[HIGH COURT OF AUSTRALIA.]

THE STATE OF NEW SOUTH WALES . . APPELLANT;
DEFENDANT,

AND

BARDOLPH . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM EVATT J.

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SYDNEY, *Dec.* 4, 8, 1933; *Feb.* 12, 13, *April* 4, 1934.

Evatt J.

SYDNEY, *Aug.* 10, 13, *Nov.* 30, 1934.

Gavan Duffy C.J., Rich, Starke, Dixon and McTiernan JJ.

Constitutional Law—Crown contract—Industrial undertaking—Validity of contract—Necessity for express parliamentary authority—Executive power—Power to contract—Payment—Parliamentary appropriation—Special Deposits (Industrial Undertakings) Act 1912-1930 (*N.S.W.*) (*No.* 22 *of* 1912—*No.* 40 *of* 1930), *sec.* 3*—*The Constitution* (63 & 64 *Vict. c.* 12), *sec.* 75 (IV.)—*Judiciary Act* 1903-1933 (*No.* 6 *of* 1903—*No.* 65 *of* 1933), *secs.* 64-66.*

The Tourist Bureau of New South Wales is a department of the Public Service of that State under the control of the Chief Secretary, who is the responsible Minister. It is an industrial undertaking within the meaning of the *Special*

* The *Special Deposits (Industrial Undertakings) Act* 1912-1930 (N.S.W.) provides:—By sec. 2: "The Colonial Treasurer shall cause special deposit accounts to be opened in the Treasury to which shall be paid all moneys received from all sources in the course of the management of . . . any . . . industrial undertaking that the Governor may specify by notification in the *Gazette*." By sec. 3 (1): "There shall be paid out of any such account any expenditure of or in relation to the industrial undertaking to which it relates, including charges for management, maintenance, working expenses, and interest on capital at the current rate for loan money payable by the Government." The *Judiciary Act* 1903-1933 provides:—By sec. 64: "In any suit to which . . . a State is a party, the rights of parties shall as nearly as possible be the same, and judgment may be given and costs awarded on either side, as in a suit between subject and subject." By sec. 65: "No execution or attachment, or process in the nature thereof, shall be issued against the property or revenues of . . . a State in any such suit; but when any judgment is given against . . . a State, the Registrar shall give to the party in whose favour the judgment is given a certificate in the form of the Schedule to this Act, or to a like effect." By sec. 66: "On receipt of the certificate of a judgment against . . . a State the Treasurer of the . . . State . . . shall satisfy the judgment out of moneys legally available."

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Deposits (Industrial Undertakings) Act 1912-1930. An incident of its work is continual advertising. It is the duty of an officer of the Premier's department to arrange for advertisements relating to the various Government departments. On the authority of the Premier "as a matter of Government policy," this officer entered into a contract with the plaintiff, a resident of South Australia, for the weekly insertion in a newspaper owned by the latter, of advertisements relating to the Tourist Bureau. The contract, which was for a period which affected more than one financial year, was not expressly authorized by the Legislature, nor was it sanctioned or approved by any Order in Council or Executive minute. In the Supply Acts and Appropriation Acts for the financial years affected provision was made under the heading "Government advertising" for the expenditure of sums much larger in amount than the amount involved in the contract. Shortly after the making of the contract a change of Government took place and the new Administration refused to use or pay for any further advertising space in the newspaper. Notwithstanding this the plaintiff continued to insert the advertisements, and, at the end of the period named in the contract, brought an action in the High Court under sec. 58 of the *Judiciary Act* 1903-1933 against the State of New South Wales for the recovery of the total unpaid amount of the agreed advertising rates. *Evatt* J. held (*a*) that the contract was validly entered into by responsible Ministers of the Crown and was not inchoate or suspended pending the time when moneys had been made available by Parliament to carry out the contract, (*b*) that it was enforceable against the State of New South Wales subject to the Parliament's making moneys available to the Executive to discharge liabilities under the contract, and (*c*) that, upon an examination of the statutes passed by Parliament, it appeared that Parliament had already made available sufficient moneys to discharge all liabilities under the contract either (i) by virtue of the *Audit Act* (N.S.W.), various Supply Acts and an Appropriation Act or (ii) under sec. 3 of the *Special Deposits (Industrial Undertakings) Act*.

Held, on appeal to the Full Court, that the contract was a contract of the Crown and, subject to the provision by Parliament of sufficient moneys for its performance, was binding on the Crown: Although the contract must be regarded as containing an implied condition that payments under it by the Crown should be made only out of moneys lawfully available for the purpose under parliamentary appropriation, that condition did not go to the validity of the contract, and under the *Judiciary Act* the contract might be sued on whether or not sufficient moneys had been so appropriated.

Decision of *Evatt* J. affirmed.

Per Evatt J.:—(1) The provision in sec. 45 of the *Constitution Act* (N.S.W.) making the Consolidated Revenue Fund subject to be appropriated "to such specific purposes as may be prescribed by any Act in that behalf" is a flexible part of the Constitution and subsequent Supply and Appropriation Acts must be given effect to according to their tenor despite their generality in appropriating portions of the Consolidated Revenue Fund. *McCawley* v. *The King*,

(1920) A.C. 691; 28 C.L.R. 106, considered. (2) In order to satisfy the rule that liabilities under a Crown contract may be discharged by the Executive only out of moneys granted by Parliament for the purpose, it is not necessary that a detailed or specific reference to the particular contract should be discoverable in the Act of Parliament, or that Parliament's attention should have been directed to the particular payment to the particular contractor. And it is not necessary that there should be an Appropriation Act specifying the supplies granted by Parliament. The dissolution or prorogation of Parliament without an Appropriation Act does not of itself nullify any prior grants of money by Parliament to the Crown in the form of Supply Acts which, in their modern form, are also "Appropriation" Acts so far as they operate and extend. (3) It is a sufficient compliance with the constitutional rule in *Churchward* v. *The Queen*, (1865) L.R. 1 Q.B. 173, if the payments necessary to discharge the Crown's liability may be referred to a parliamentary grant covering the class of service to which the contract relates and there is a fund established from which payments may lawfully be made to the contractor by the Executive. (4) The absence of a sufficient parliamentary grant to make payments under the contract does not invalidate a contract made by the Crown in the State of New South Wales. In that State the executive authority of the King is not limited by reference to subject matter and the Crown has a general authority and capacity to enter into contracts. (5) Sec. 3 of the *Special Deposits (Industrial Undertakings) Act* operates as a continuing and permanent appropriation of the receipts of an undertaking to the purposes of meeting its working expenses, including any necessary advertising expenses.

Churchward v. *The Queen*, (1865) L.R. 1 Q.B. 173, *R.* v. *Fisher*, (1903) A.C. 158; (1901) 26 V.L.R. 781, *Commercial Cable Co.* v. *Government of New Foundland*, (1916) 2 A.C. 610, *Auckland Harbour Board* v. *The King*, (1924) A.C. 318, and *The Commonwealth* v. *Colonial Ammunition Co.*, (1924) 34 C.L.R. 198, considered.

APPEAL from *Evatt* J.

An action was brought in the High Court by Kenneth Edward Bardolph, a resident of Adelaide, South Australia, against the State of New South Wales in which he claimed the sum of £1,114 10s. as money due to him by the defendant under a contract, and an extension thereof, entered into between them in respect to the insertion each week from 27th May 1932 to 31st March 1933 of certain advertisements in the *Labor Weekly*, a newspaper owned by the plaintiff and circulating in New South Wales. The advertisements related to the Government Tourist Bureau. The defendant pleaded (*a*) that the contract and the agreement for the extension thereof had not been authorized or ratified by the Parliament of

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the State of New South Wales and were made without any authority in law, and consequently they were not binding on the defendant; (*b*) that, alternatively, by reason of the facts shown in (*a*) and also by reason of the fact that the contract and the agreement for the extension thereof purported to impose an obligation to pay moneys out of the revenue of the defendant State, the defendant was not liable to make any payment in respect thereto; (*c*) that if the agreement which purported to extend the contract was a valid agreement it was validly cancelled by the defendant on 17th May 1932, and the defendant had not utilized the advertising space as alleged in accordance with the terms of any agreement binding on the defendant. The action came on for hearing before *Evatt* J.

Further material facts appear in the judgments hereunder.

Watt K.C. (with him *Evatt* and *Thomas*), for the plaintiff.

Flannery K.C. and *Jordan* K.C. (with them *Nicholas*), for the defendant.

Cur. adv. vult.

April 4, 1934.

EVATT J. delivered the following written judgment:—

In this action the plaintiff claims that there is owing to him from the State of New South Wales the sum of £1,114 10s. in respect of advertisements inserted by the plaintiff in a newspaper called the *Labor Weekly*. The newspaper circulated in New South Wales. Its owner, the plaintiff, was at all material times a resident of South Australia.

The case comes before this Court under sec. 75 (IV.) of the Constitution, which vests original jurisdiction in this Court in all "matters between States, or between residents of different States or between a State and a resident of another State." (See also *Judiciary Act* 1903-1933, secs. 58, 64.)

The actual decision of the Full Court of this Court in *The Commonwealth* v. *New South Wales* (1), is that sec. 75 (III.) of the

(1) (1923) 32 C.L.R. 200.

Constitution enables an action for tort to be brought by the Commonwealth against a State without the consent of that State. But the reasoning of the Court extends equally to sec. 75 (IV.). Thus *Knox* C.J. said (1) :—

> "This power is conferred by the Constitution itself on this Court to take cognizance of this matter. Any legislation by Parliament directed to conferring this power would, therefore, be as superfluous as legislation by Parliament to restrict the limits of the jurisdiction would be ineffective".

And *Isaacs*, *Rich* and *Starke* JJ. said (2) :—

> "The cause of action, as a tort in its inherent nature, would as between subject and subject be justiciable in a competent Court. It therefore falls within the meaning of the word 'matters' in sec. 75 of the Commonwealth Constitution."

And they added later (3) :—

> "Obviously the matter was one to be dealt with by the Constitution, which created mutual rights and obligations between Commonwealth and States and foresaw the necessity of some tribunal, not the judicial organ of any one State exclusively, to determine or finally determine possible disputes between Commonwealth and States, and between different States, and between States and residents of other States. As to these the Constitution at once enacted sec. 75 as a self-executing provision in the terms mentioned. The words 'in all matters' are the widest that can be used to signify the subject matter of the Court's jurisdiction in the specified cases. 'Matters' read with the context and in relation to 'judicial power' are limited by the inherent sense of matters which a Court of law can properly determine, that is, by some legal standard."

Isaacs, *Rich* and *Starke* JJ. also pointed out that the word, i.e., "matters," must

> "include all claims for infringements of legal rights of every kind—all claims referable to a legal standard of right. The word would, without question, include a claim for breach of contract" (4).

The case therefore establishes that in the present action against the State of New South Wales by the plaintiff, a resident in another State, the question for the Court to determine is whether a breach of contract has been proved. (See *Daly* v. *Victoria* (5) ; *Judiciary Act*, secs. 58 and 64.)

At this stage two points should be mentioned. I assume in favour of the defendant State that it is not, by sec. 75 (IV.), or by secs. 58 and 64 of the *Judiciary Act*, placed in precisely the same

(1) (1923) 32 C.L.R., at pp. 206, 207.
(2) (1923) 32 C.L.R., at p. 207.
(3) (1923) 32 C.L.R., at pp. 211, 212.
(4) (1923) 32 C.L.R., at p. 213.
(5) (1920) 28 C.L.R. 395.

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position as a subject who is sued for breach of contract, so that it is entitled to invoke any constitutional immunity from liability other than the general liability for breach of contract implied by the Constitution or imposed by the *Judiciary Act*. This assumption may find support in sec. 106 of the Constitution and in the opinions expressed in the case of *Australian Railways Union* v. *Victorian Railways Commissioners* (1).

I also assume in favour of the defendant State that the governing law to be applied in ascertaining and measuring the obligation of the contract is that of the State of New South Wales. It may be—I express no opinion on the point—that the express stipulation in the first contract is sufficient to ensure such a reference to the law of South Australia as will exclude the application of that part of the constitutional law of New South Wales which is invoked by the defendant. On the other hand, much is to be said in favour of the view that the constitutional doctrine in question applies whether or not the governing law of the contract is that of South Australia. At any rate, I assume in favour of the defendant that the doctrine is applicable.

The first advertising agreement which the plaintiff made with the defendant is embodied in a document dated 1st April, 1931. It provided for 5,000 inches of advertising space to be inserted in his newspaper between 2nd April, 1931, and April, 1932. The total moneys payable thereunder were to amount to £1,000. But the full 5,000 inches was not used during such period of twelve months, only 3,900 inches of advertisement being inserted. Payments to the plaintiff for the space used were made regularly by the government officers, including those whose duty it was to see that the payments were authorized by Parliament. When the first contract period was about to end the plaintiff interviewed Mr. Harpur, who was Superintendent of Advertising and had the management of all the Crown's advertising. The plaintiff pointed out that 1,100 inches had not been inserted during the year. He suggested an arrangement under which (*a*) 3,900 inches would be inserted over the next ensuing twelve months, and (*b*) the 1,100 inches available

(1) (1930) 44 C.L.R. 319.

under the previous contract would be used at the rate of 45 inches per weekly insertion over a period commencing at once and ending about the end of October, 1932.

The plaintiff's proposal was accepted and the arrangement as to the 3,900 inches was embodied in a written document signed by Mr. Harpur as Editor of Publications and Superintendent of Advertising. It requested the *Labor Weekly* to have advertisements "re Government Tourist Bureau or other matter" inserted in its columns between 1st April, 1932, and 11th April, 1933, the minimum space per week to be 75 inches and the rate being 5s. 6d.

The full arrangement of April, 1932, was put into effect; advertisements were inserted and payment made regularly until 17th May, 1932, when the Under Secretary of the Premier's Department informed the plaintiff that he was directed by the Premier to inform him "that it is not intended to utilize any further space in your paper for Government advertising." Upon inquiry at the Premier's office the plaintiff was informed that this unilateral termination of the running agreements was taken upon the direct responsibility of the new Ministers of the Crown, who replaced the previous administration which had held office under Mr. Lang as Premier. The plaintiff refused to accept the breach. It may here be noted that the bona fides of the agreement with the plaintiff has not been impugned in any way in these proceedings.

Refusing to accept the breach, the plaintiff treated the agreements as still on foot and duly inserted advertisements throughout the agreed period in accordance with the standing copy which had been supplied to him by the Government Tourist Bureau through Mr. Harpur, the instruction having been that the last copy was to stand until the Government desired fresh copy to be inserted. To the manner or form of the advertisements no objection was raised by the Government either whilst they were being inserted or during the present hearing, where the State took its stand upon legal considerations of a technical character. That the Government was quite aware of the form of the advertisements inserted by the plaintiff appears from a letter dated 1st November, 1932, from the Under Secretary of the Premier's Department to a body called the Sane

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Democracy League, which seems to have complained that Government advertisements were being inserted in a Labour newspaper. The same knowledge on the part of the Government is shown by the letter dated 1st June, 1932.

The first question which arises is whether the plaintiff has shown that the agreement entered into in April, 1932, was authorized by the then Ministers of the Crown, that is, whether Mr. Harpur had sufficient authority on behalf of the Crown to enter into the transaction in question. In my opinion, this question admits of only one answer. The insertion of advertisements for Government trading concerns such as the Tourist Bureau, and also for ordinary administration purposes, was essential to the proper functioning of the Executive Government of the State of New South Wales. This is shown by the long-continued practice of Parliament's voting moneys for advertising services and by the setting up of an officer like Mr. Harpur to act as a permanent official for dealing exclusively with all Government advertising. Not only was the insertion of Tourist Bureau advertisements within the ordinary scope of administration; in the present case it is abundantly clear that the responsible Ministers required that the transactions should be entered into and did so "as a matter of Government policy." The actual directions to Mr. Harpur proceeded from the secretary of the Premier, Mr. Lang, one of whose Cabinet colleagues was Mr. Gosling, the Chief Secretary, to whose responsibility in the first instance the industrial undertaking known as the Tourist Bureau was committed. No objection was raised to the admissibility in evidence of conversations between the permanent Under Secretary, Mr. Hay, and the Premier, the Premier's private secretary and Mr. Harpur; and these conversations prove a direct chain of authority from the first Minister of the Crown as representing the Cabinet to Mr. Harpur, who made the final and formal arrangements with the plaintiff. There was no statutory or other authority which required such transactions to be documented or evidenced by Order in Council or in any other special manner.

The suggested defence that the contract was not authorized by the Government completely fails. It is only right to add that,

although raised in the pleadings, this defence was not seriously pressed at the hearing.

The main, indeed the only real defence relied upon by the State of New South Wales, was that Parliament did not make public moneys available for the express purpose of paying the plaintiff for his advertising services. The defence is, of course, quite unmeritorious, and its success might tend to establish a dangerous precedent in the future. But it raises an interesting question of law, the examination of which shows that the repudiation of subsisting agreements by a new administration can seldom be ventured upon with success.

The facts in relation to the relevant grants of public money by Parliament are somewhat complicated. The two financial years to be considered are 1931-1932 and 1932-1933 for, as I have already explained, the agreements sued on by the plaintiff, although made in April, 1932, stipulated for the performance of advertising services not only during the then current financial year, but the succeeding financial year also. I now deal with the financial year 1931-1932. The *Supply Act* (*No.* 5) (No. 46 of 1931) was assented to on 6th October, 1931. It recited a resolution of the Assembly to grant to the Crown a sum mentioned in the statute and then proceeded, in the ordinary form, to make good the grant by authorizing the issue and application out of the Consolidated Revenue Fund of the specified sum " to be expended at the rates which are shown on the estimates for the financial year ending thirtieth day of June, One thousand nine hundred and thirty-two, as laid upon the table of the House, to defray the expenses of the various departments and services of the State during the months of October and November or following month of the financial year ending thirtieth day of June, One thousand nine hundred and thirty-two, subject to the rate of any reduction that may hereafter be made in the expenditure of the year 1931-1932."

It will be observed that this temporary *Supply Act* referred to the estimates as laid upon the table of the House. Those estimates are in evidence. At page 35, one of the enumerated " functions of the Department " of the Premier is No. 7, " Government Advertising and issue of Government Publications," and No. 8, " Publicity for

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all Departments." At page 41 the annual estimate for "Governmental Advertising" is £6,600.

The next *Supply Act* was Act No. 58 of 1931. In form it followed the *Supply Act* already mentioned. It authorized expenditure for December, January and February at the rate shown on the estimates referred to above. This *Supply Act* was followed by one passed on 7th March, 1932 (Act No. 1 of 1932). By this Act authority was given to issue moneys from the Consolidated Revenue Fund to make good supplies voted for the months of March and April, 1932. Act No. 8 of 1932 followed the same form as the three previous temporary *Supply Acts*, and authorized expenditure in respect of the month of May, 1932. These four Acts were based upon the current estimates for 1931-1932.

Finally, Act No. 11 of 1932 authorized the application of certain sums out of the Consolidated Revenue Fund to make good grants in respect of the month of June, 1932. In this case, however, the money was authorized to be expended at the rates shown in the estimates for the previous financial year, that is, 1930-1931, which had been embodied in the usual *Appropriation Act*. The appropriation for the year 1930-1931 for the Government Advertising (Premier's Department service) was £9,900.

The ordinary Appropriation Act was not passed in respect of the year 1931-1932. I do not suggest that either administration was at fault in the matter, but, in any event, responsibility must be borne both by the Lang and Stevens administrations, the former holding office for about ten months of the financial year, and the latter for about two months.

It will be observed that the five *Supply Acts* for 1931-1932 granted supplies for the Government services for only nine months of the financial year. In respect of the first three months, sec. 33 of the *Audit Act* provides that if, before the close of any financial year, no Act is passed granting and appropriating moneys out of the Consolidated Revenue Fund to meet the requirements for the next succeeding financial year, the Treasurer may pay moneys in order to meet current and accruing requirements, subject to certain conditions. Under these conditions the authority of the Treasurer

ceases upon the passing of the *Appropriation Act* for the next succeeding financial year, and does not, in any event, extend beyond the first three months of that year. Further, when the *Appropriation Act* is passed, all payments are to be treated as made out of the supply granted by the *Appropriation Act* under the respective divisions and heads of services. Further, the authorized rates of payment are to be based upon the *Appropriation Act* of the immediately preceding financial year "in respect of all salaries . . . contracts, supplies, services . . . and other recurrent charges."

Sec. 33 (1) (*d*) also provides that, when the estimates of expenditure for the year are presented to Parliament and the rate of expenditure in such estimates is in any case lower for any service than that authorized by the previous *Appropriation Act*, the payments under the authority of sec. 33 shall not exceed the lower rates.

It appears that the estimates for the year 1931-1932 were laid before the Assembly on 27th August 1931. The event mentioned in sec. 33 (1) (*d*) having happened, the result in respect of Government advertising was to limit the authority to make advertising payments to the rate of £6,600 per year, instead of £9,900 per year, which was the appropriation in respect of 1930-1931. It would appear doubtful whether sec. 33 (1) (*d*) operates in respect of that portion of the months of July, August and September which have elapsed before the estimates are presented to Parliament. I shall assume that there is a retroactive operation so that, in respect of the Government advertising service for the whole financial year 1931-1932, eleven months out of the twelve should be treated upon the basis of an annual vote of £6,600 per annum, in accordance with the current estimates, only the last month, June, 1932, being treated upon the basis of an annual vote of £9,900. The net result is that the total supply which Parliament made available during the year for Government advertising can be reckoned as amounting to eleven-twelfths of £6,600, plus one-twelfth of £9,900, that is, £6,875 in all.

It appears from the statement prepared by Mr. Kelly, Chief Accountant at the Treasury, that if payment had been made to the

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plaintiff in respect of the advertisements inserted before the end of the financial year, 30th June, 1932, but not paid for, the total expenditure for the service would only have amounted to £4,595 18s., a figure considerably lower than the assumed minimum supply voted by Parliament, that is, £6,875. At the same time it may be noted that upon the hypothesis mentioned, the statement erroneously treats the total supply available in respect of 1931-1932 as £7,700, for such figure does not apply the condition mentioned in sec. 33 (1) (*d*) of the *Audit Act* and discussed above.

Before referring to what took place in the financial year 1932-1933, it is convenient to consider the legal position as it existed on and in respect of 30th June, 1932. It was argued for the State that it was a condition of the contracts with the plaintiff that all payments of money thereunder should be authorized by Act of Parliament, and it was said that no person can successfully sue the State of New South Wales in the absence of a precise or specific Parliamentary allocation of public moneys for the purpose of making payments under the contracts. It was further contended that, even in an Appropriation Act, the constitutional condition of such contracts is not fulfilled unless it can be shown that Parliament's intention was directed to the particular payment to the particular contractor.

Certainly, the New South Wales *Constitution Act* does contemplate that subject to the payments to be made in pursuance of the *Constitution Act* itself, the Consolidated Revenue Fund should be subject to be appropriated to such " specific purposes " as may be prescribed by any Act in that behalf (sec. 45). But this section is necessarily subject to the terms of any subsequent Act passed by Parliament, this part of the Constitution of New South Wales being of a flexible character. For the principle of *McCawley* v. *The King* (1) is that, in dealing with public moneys or indeed any other subject not governed by a special method of law-making, Parliament is not bound to adhere to the letter or spirit of sec. 45, but is, on the contrary, empowered to make any provision it thinks fit, whether consistent or not with sec. 45.

(1) (1920) A.C. 691 ; 28 C.L.R. 106.

Whilst the validity of the various *Supply Acts* for 1931-1932 have not, and cannot, be impugned, the question still remains whether their terms are sufficient to enable the plaintiff to satisfy the constitutional doctrine invoked by the defendant to defeat his present claim.

In the well-known case of *Churchward* v. *The Queen* (1), *Shee* J., in a passage often cited, adopted the principle that, in the case of a contract by a subject with the Crown, there should be implied a condition that the providing of funds by Parliament is a condition precedent to the Crown's liability to pay moneys which would otherwise be payable under the contract. In that case the actual promise was to pay a sum "out of the moneys to be provided by Parliament" (see *Churchward* v. *The Queen* (2)); so that the judgment of *Shee* J. went beyond the actual point necessary to determine the case. *Churchward's Case* (3) was decided upon demurrer, the third plea alleging that "no moneys were ever provided by Parliament for the payment to the suppliant for, *or out of which the suppliant could be paid* for the performance of the said contract, for any part of the said period subsequent to the 20th June, 1863, or for the payment to the suppliant for, and in respect of, or *out of which the suppliant could be paid or compensated for*, in respect of any damages sustained by the suppliant by reason of any of the breaches of the said contract committed subsequent to the said 20th of June, 1863" (4). (I italicize certain words.)

Further, the *Appropriation Acts* referred to in that case expressly provided that Churchward's claim was to be excluded from the large sum of money (£950,000) thereby voted for the general purposes of providing and maintaining the Post Office Packet Service.

The judgment of *Shee* J. has always been accepted as determining the general constitutional principle. But it should be added that *Cockburn* C.J. said (5):

> "I agree that, if there had been no question as to the fund being supplied by Parliament, if the condition to pay had been absolute, or if there had been a fund applicable to the purpose, and this difficulty did not stand in the petitioner's way, and he had been throughout ready and willing to perform this

(1) (1865) L.R. 1 Q.B. 173, at pp. 209, 210; 122 E.R. 1391.
(2) (1865) L.R. 1 Q.B., at p. 174.
(3) (1865) L.R. 1 Q.B. 173; 122 E.R. 1391.
(4) (1865) L.R. 1 Q.B. at p. 183.
(5) (1865) L.R. 1 Q.B., at p. 201.

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> contract, and had been prevented and hindered from rendering these services by the default of the Lords of the Admiralty, then he would have been in a position to enforce his right to remuneration."

It appears clear that the first part of this passage has not been acted upon by the Courts in the cases subsequently determined, and that, even where the contract to pay is in terms "absolute" and the contract fails to state that the fund has to be "supplied by Parliament," the Crown is still entitled to rely upon the implied condition mentioned by *Shee* J.

The second part of *Cockburn's* C.J. statement, that, if there is a fund "applicable to the purpose" of meeting claims under the contract, the contractor may enforce his right to remuneration, has never, so far as I know, been questioned. Moreover, its correctness was assumed by the terms of the Crown's third plea in *Churchward's Case* (1) which denies that moneys were ever provided by Parliament "out of which the suppliant could be paid for the performance of the said contract."

Mr. *Flannery*, for the Crown, relied upon *Commonwealth* v. *Colonial Ammunition Co.* (2). In that case (3) *Isaacs* and *Rich* JJ. discussed the general object of parliamentary supply and appropriation under the system of responsible government. But it is clear that the discussion was entered upon in order to show that the mere inclusion in an Appropriation Act of a general reference to some Government service cannot be relied upon in order to work a legalization or validation of every contract which related to such service, but which has been rendered invalid by the non-observance of the conditions of a prior statute. In the *Colonial Ammunition Case* (2) the contract should, in accordance with sec. 63 of the *Defence Act*, have been authorized either mediately or immediately by Order in Council (4). There being no Order in Council, reliance was placed upon certain Appropriation Acts. But *Isaacs* and *Rich* JJ. rejected the argument, stating (3):—

> "The object of Parliament in such a case is financial, not regulative. In doing that, it is not concerned with general legislation, and is acting wholly *alio intuitu* (see *May's Parliamentary Practice*, 10th ed., p. 562). It thereby neither betters nor worsens transactions in which the Executive engages within

(1) (1865) L.R. 1 Q.B. 173; 122 E.R. 1391.
(2) (1924) 34 C.L.R. 198.
(3) (1924) 34 C.L.R., at pp. 222, 225.
(4) (1924) 34 C.L.R., at p. 220.

its constitutional domain, except so far as the declared willingness of Parliament that public moneys should be applied and that specified funds should be appropriated for such a purpose is a necessary legal condition of the transaction. It does not annihilate all other legal conditions."

From this it appears that the learned Judges considered that the somewhat general appropriation there relied upon was sufficient to satisfy one "necessary legal condition of the transaction," though not all other legal conditions. The condition which was satisfied is, of course, the condition referred to by *Shee* J. in *Churchward's Case* (1), and here invoked by the defendant.

That this is a correct view of the *Colonial Ammunition Case* (2) is shown by the judgment of *Isaacs* J. in *The Commonwealth* v. *Colonial Combing, Spinning and Weaving Co.* (*Wooltops Case*) (3), where it is stated that Parliament may sanction the expenditure of public money payable under contracts with the Crown "either by direct legislation or by appropriation of funds."

I quite agree that neither the reference in the *Colonial Ammunition Case* (2) nor the passage mentioned in the *Wooltops Case* (3) is directed to determining the question, what degree of authorization or reference in an Act is to be deemed sufficient to comply with the constitutional condition mentioned by *Shee* J. in *Churchward's Case* (1). But at the very least the cases do not qualify in any way the observation of *Cockburn* C.J. (4), to which I have referred.

In *Commercial Cable Co.* v. *Government of Newfoundland* (5) Viscount *Haldane* said:

> "For all grants of public money, either direct or by way of prospective remission of duties imposed by statute, must be in the discretion of the Legislature, and where the system is that of responsible government, there is no contract unless that discretion can be taken to have been exercised in some sufficient fashion."

This general principle adopts the main principle of *Churchward* v. *The Queen* (1), though expressing it somewhat differently. However, the statement affords no guidance as to what will, under any particular circumstances, constitute a "sufficient" expression of the exercise of the Legislature's discretion to grant or withhold public moneys.

(1) (1865) L.R. 1 Q.B. 173; 122 E.R. 1391.
(2) (1924) 34 C.L.R. 198.
(3) (1922) 31 C.L.R. 421, at p. 451.
(4) (1865) L.R. 1 Q.B., at p. 201.
(5) (1916) 2 A.C. 610, at p. 617.

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In *Auckland Harbour Board* v. *The King* (1) the facts were somewhat analogous to those in the *Colonial Ammunition Case* (2). A New Zealand statute had provided that the sum in respect of which the Auckland Harbour Board petitioned against the Government of New Zealand was payable to the Board by the Government, but only subject to a condition described in the statute. This condition was not, in fact, satisfied, and the Board then sought to rely upon a subsequent *Appropriation Act*, in which Parliament granted public moneys in general terms for railway purposes. This was said to be capable of dispensing with the non-fulfilment of the condition of liability expressly laid down in the prior statute. But it was held by the Privy Council that it had no such operation. *Chapman* J. said (3), when the case was before the New Zealand Supreme Court :—

> "As to the effect of the parliamentary appropriation—a question on which we have not had the advantage of hearing argument—I cannot conceive that this covers or was intended by Parliament to cover the mistake that has been made. There is a general vote for opened lines in the North Island, but that refers to lawful expenditure. A specific mention of this sum would, of course, have ended all controversy, but here there is nothing to show that Parliament expressed its will with reference to what was otherwise an unauthorized payment."

Hosking J. said (4) : "It appears to me to be clear that, although moneys are appropriated by Parliament in anticipation for particular purposes, no part of them can be disbursed by the officers of the Crown until that part has become payable according to the law governing its payment."

These opinions of *Chapman* and *Hosking* JJ. seem to have met with the approval of the Privy Council (5).

The opinion expressed by *Chapman* J. was that a specific mention of the sum in dispute "would, of course, have ended all controversy," but, as the grant was general, it could not be regarded as an authorization of expenditure otherwise unlawful because it did not sufficiently appear that the condition of the earlier statute had been waived by Parliament.

(1) (1924) A.C. 318.
(2) (1924) 34 C.L.R. 198.
(3) (1919) N.Z.L.R. 419, at pp. 434, 435.
(4) (1919) N.Z.L.R., at p. 443.
(5) (1924) A.C., at p. 327.

It is abundantly clear, I think, that the *Auckland Harbour Board Case* (1) does not justify the theory that, where there is nothing unlawful in a contract entered into by the Crown, and that contract is authorized by responsible Ministers, and made by them in the ordinary course of administering the affairs of Government, a detailed reference to the particular contract must be found in the statutory grant in order to satisfy the constitutional condition laid down in *Churchward's Case* (2).

Incidentally it should be noted that the *Auckland Harbour Board Case* (1) shows that payments made from the Consolidated Revenue Fund in the absence of a " sufficient " parliamentary authority may be recovered back by the Government if they can be traced. In these circumstances, it would be an extraordinary if not disastrous doctrine if the law is, as the Crown contends, that not a single contract made by the Crown with a subject is enforceable against the Crown, and every payment made thereunder is recoverable back from the subject, unless a clear reference to payments under the particular contract is contained in an Act of Parliament. This doctrine would reduce almost to a nullity the responsibility of Ministers for the ordinary course of governmental administration, and would compel Parliament to devote all its time and attention to administrative, as distinct from legislative, duties. The position may be illustrated.

It has been the practice of the Government to enter into advertising contracts, the performance of which extends or may extend into more than one financial year, apart altogether from the innumerable contracts for single insertion advertisements in newspapers and periodicals. For instance, on 1st June, 1932, the Government entered into a contract with the proprietor of the *Sydney Morning Herald*, and accepted a heavy liability for advertisements covering the month of June in the financial year 1931-1932, and eleven months during the following financial year. Payments were made to the proprietor from time to time in accordance with the contract. But no reference whatever was made to this particular contract in any Act of Parliament. If the argument for the State is right, this money is recoverable back from the proprietor, although the

(1) (1924) A.C. 318.

(2) (1865) L.R. 1 Q.B. 173.

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contract has been fully performed on the part of the newspaper. Contracts of a like character were admitted in evidence in order to show the practice of the Government in relation to the Government advertising business of the State and in order to measure the precise surplus or deficiency in the Parliamentary grants for advertising. But the contracts also show that it has never been the practice for Parliament itself to consider with particularity that large number of contracts, payments under all of which are made in reliance upon the general Parliamentary grant for Government advertising.

Further illustrations suggest themselves. During the course of argument I mentioned the expenditure on books in the library attached to the Attorney-General's Department. This expenditure has been covered only by a general vote for the library. It would be preposterous if Parliament should have to address its attention to each contract for the purchase of books for this library and determine, with fitting solemnity, what firm or company should supply each book or each parcel of books.

Again, as was stated in evidence, the Crown enters into many transactions under which it becomes lessee of premises. Rent thus becomes payable by the Crown weekly, monthly or yearly. But it has never been the practice that leases should be submitted to Parliament for approval, or that the individual lessors should be mentioned by name or other description in some portion of the Supply or Appropriation Act.

From convincing illustration, one may turn to the discussion of learned writers. Thus *Durell* in his work on *Parliamentary Grants* says :—

> " It is not its (i.e. Parliament's) duty to decide upon matters of administration itself, but to take care that the persons who have to decide them are the proper persons, and are honestly and intelligently chosen. ' Deliberation, and not despatch, is the duty of the House of Commons.' Again, ' when a popular body knows what it is fit for and what it is unfit for, it will more and more understand that it is not its business to administer, but that it is its business to see that the administration is done by proper persons, and to keep them to their duties.' The working of constitutional government necessitates the delegation of certain powers to every department. If such powers are exercised with the knowledge of Parliament and subject to its control, they can be more advantageously discharged by the responsible Minister or his department, which has the special or local knowledge, than by direct parliamentary action " (p. 20).

Durell adds, with reference to the "course of expenditure": "The control of Parliament over the course of expenditure is limited to its control over the Executive; and so long as the Government possesses the confidence of the House, no active exercise of control would take place except in case of suspected illegality" (p. 21).

Maitland, in his *Constitutional History of England* (1908), pp. 445, 446, says:—

> "But statute does not say to the queen, 'You shall spend so much on your embassies, so much on your navy.' Rather its language is: 'Here is money for this purpose and for that; spend it if you please; we trust the discretion of your advisers; the account of the expenditure will be presented to us and votes of censure may follow.' This, however, applies only to expenditure within the limits laid down by the Act; here are two and a quarter millions for war-like stores, £100,000 for the royal parks, one hundred guineas for expenses connected with the observation of the transit of Venus; if more is drawn out for any of these purposes, some one will have committed a crime, indeed in all probability several persons will have conspired to commit a crime."

It may be added that one of the grants which *Maitland* (at p. 385) describes as appropriated "with great minuteness" includes "£2,902,900 for the payment of seamen and marines, £964,400 for their victuals and clothing, £11,477 for the maintenance of the British Museum and the Natural History Museum, £2,100,000 for public education, £1,000 as a gratuity for the widow of a certain distinguished public servant."

Later (at p. 445), he describes an appropriation as "pretty minute" which includes £1,639,300 "for the expense of dockyards and naval yards at home and abroad," and £50,000 "for Her Majesty's foreign and other secret service."

Durell fully discusses the legal position, and concludes:—

> "If, as is the case, Parliament grants to the Crown a certain sum for a certain service in a given year, without any more definite appropriation in the terms of the grant, it is legally competent to the Executive to expend that sum *at discretion* in the year upon that service. That is to say, since the parliamentary enactment deals with the vote only, the Government is not legally bound to adhere to the details submitted to Parliament, provided the expenditure is restricted to 'the four corners of the vote.' Morally, however, the Government must adhere to those details as far as is consistent with the interests of the public service, since its good faith is pledged by the details given to Parliament, and the Comptroller and Auditor-General would correctly bring divergencies to notice. This being so, it follows that if Parliament wishes to definitely prohibit the use of a vote for a service which would be covered by

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the terms of the resolution granting the vote, even though no mention is made of it in the details of the estimates, the resolution must contain a special proviso to that effect. By this means only can Parliament ensure that a particular service is not carried out, for then there would be no funds which could legally be applied to it. In the absence of such a proviso there would be no technical incorrectness in charging the expenditure against the vote, even though the service were for a purpose for which Parliament had not wished to provide. This point is admitted by the Treasury, which points out that, even if the amount of a vote is reduced in supply, there is no guarantee that expenditure will not take place upon the object in respect of which such reduction is made" (pp. 296, 297).

A case in which the views of *Maitland* and *Durell*, though not referred to, seem to be applied to their full extent, is the decision of the Full Court of New South Wales in *Commonwealth of Australia* v. *Kidman* (1). In that case it was held that a contract between the Commonwealth of Australia and the then respondent had been recognized as valid by certain Appropriation Acts of the Commonwealth Parliament. These Acts authorized the payment of moneys in respect to "Commonwealth Shipbuilding" and the "construction of ships." The Court held that as payments under the contract were made, *or could be presumed to have been made*, under the Appropriation Acts in question, it was impossible for the Court to treat the contract as being invalid.

Without necessarily following *Durell* to the full extent of his argument, I am satisfied that, in the absence of some controlling statutory provision, contracts are enforceable against the Crown if (*a*) the contract is entered into in the ordinary or necessary course of Government administration, (*b*) it is authorized by the responsible Ministers of the Crown, and (*c*) the payments which the contractor is seeking to recover are covered by or referable to a parliamentary grant for the class of service to which the contract relates. In my opinion, moreover, the failure of the plaintiff to prove (*c*) does not affect the validity of the contract in the sense that the Crown is regarded as stripped of its authority or capacity to enter into the contract. Under a constitution like that of New South Wales where the legislative and executive authority is not limited by reference to subject matter, the general capacity of the Crown to enter into a contract should be regarded from the same point of

(1) (1923) 23 S.R. (N.S.W.) 590.

view as the capacity of the King would be by the Courts of common law. No doubt the King had special powers, privileges, immunities and prerogatives. But he never seems to have been regarded as being less powerful to enter into contracts than one of his subjects. The enforcement of such contracts is to be distinguished from their inherent validity.

It appears that no Appropriation Act *eo nomine* was enacted for the year 1931-1932. We have seen that the responsibility for this omission lies upon the two governments which held office during that financial year. It was suggested that the absence of an Appropriation Act is fatal to the plaintiff's claim.

In my opinion, the English practice of Parliament's covering expenditure early in the financial year by passing Consolidated Fund Acts and subsequently appropriating the same amounts retrospectively in the *Appropriation Act*, has caused some misconception as to the precise legal situation in New South Wales. As to the English practice, *Durell* says :—

> "All grants in supply are strictly appropriated to the service of the financial year in which provision is made, and no issues can be made from the consolidated fund on account of unspent grants in one year for use, even temporarily, in the following year. Unless, therefore, the services are to be brought to a standstill, it is absolutely essential that provision for carrying them on should be made before 1st April. The Treasury, moreover, has no power to authorize issues out of the consolidated fund except under statute. It is therefore necessary to pass before 1st April, a Consolidated Fund Bill which empowers the Treasury to issue out of the consolidated fund, for the service of the departments for whose use the grants are voted, such sums as they require, in anticipation of the statutory sanction to be conferred by the *Appropriation Act*. Similar Bills may also be required between 1st April and the date on which the *Appropriation Act* is passed, if the supply made available by the first one becomes exhausted" (pp. 29, 30).

And he adds :—

> "When all the estimates of the year have been voted, the Appropriation Bill is brought in. The passing of this gives final and full legal sanction to the votes on account which have previously been passed, by appropriating them to their respective services. The issues out of the consolidated fund are legalized by the passing of Consolidated Fund Bills, but these bills give no legal effect to the votes as such. If a prorogation or a dissolution takes place before the *Appropriation Act* is passed, all the grants made are nullified and would require to be re-voted in the next session before a legal appropriation could ensue. It is therefore necessary that before a dissolution takes place, all grants on account should be legalized by an Appropriation Act" (p. 35).

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Why should a dissolution or a prorogation nullify a grant on account? *Hearn* in *The Government of England* (1886), p. 370, points out that these grants on account are "towards making good the services voted in the present session" And he adds that

> "the word 'vote' is a term of art and implies that the resolution thereby announced ends with the current session. Hence if, as has sometimes happened, the session terminates without an Appropriation Act, there remains nothing upon which the *Ways and Means Act* can operate. They are not repealed, and payments already made under them are valid, but as they are limited to 'services voted in that session,' and as these votes no longer exist, the grants become inoperative, and must be re-voted when Parliament has again assembled" (p. 370).

For this proposition of law, *Hearn* relies in the main upon the case of *Alcock* v. *Fergie* (1), where the Supreme Court of Victoria held that an Act of Parliament, No. 322, ceased to have any operation at the end of the session during which it was passed; so that a contract subsequently made by the Executive Government of Victoria could not be treated as referable to the moneys granted in the Act in question. It was said (2):—

> "But to render any part of the consolidated revenue legally available for and applicable to the payment of the amount of this judgment, Parliament must have voted and actually appropriated the money for the purpose; and this must have been effected either by a general, or a special, Appropriation Act; or the moneys comprised in what is known as a Supply Bill must have been applied to the particular purpose during the operation of the measure. It is admitted that no general Appropriation Act has passed, and that the session terminated before the contract was made. The operation of the Supply Bill therefore lapsed."

Turning to the form of the so-called Supply Bill, No. 322, it provided that "there shall and may be issued out of the consolidated revenue and applied from time to time to such services as shall then have been voted by the Legislative Assembly of Victoria in this present session of Parliament, any sums of money not exceeding £300,000" (3).

This was a very curious form of wording, and it was quite capable of being regarded as meaning that unless, at the time of payment out of the consolidated revenue, there was existing a resolution of the Assembly covering or referring to the services, no payment should

(1) (1867) 4 W.W. & a'B. (L.) 285.
(2) (1867) 4 W.W. & a'B. (L.), at p. 316.
(3) (1867) 4 W.W. & a'B. (L.), at pp. 306, 307.

be made. And, as *Hearn* points out or implies, a mere resolution of one House of Parliament ceases to have any living force or effect after a prorogation or dissolution. In striking contrast to the Victorian Act No. 322, which was dealt with in *Alcock* v. *Fergie* (4), is the Victorian Act No. 327, sec. 2 of that Act providing: "There shall and may be issued out of the consolidated revenue and applied for or towards making good the supply granted to Her Majesty for the service of the year one thousand eight hundred and sixty-eight the sum of one million pounds."

This latter provision is more in keeping with the form of the English Consolidated Fund Acts, for, although it makes a reference to the grant of supply to the Crown, it makes no reference, either expressly or impliedly, to the existence of Assembly resolutions at the time of payment out of revenue for the services of the Crown.

The English practice is referred to by *Durell* in the passage already cited. The form of the Consolidated Fund Acts is that the Treasurer may issue out of the consolidated fund and apply towards making good the supply granted to the Crown for the services of the year, a certain sum of money. Later when the *Appropriation Act* is passed (that is in England), it always contains a section appropriating, as from the date of their original passing, the sums granted in the Consolidated Fund Acts towards the services and purposes expressed for the first time in the Schedule to the *Appropriation Act*.

It is quite clear that *Durell's* reference at page 35, quoted above, that grants contained in the Consolidated Fund Acts are nullified upon prorogation or dissolution, whilst certainly emphasizing the usual constitutional practice, contains a legal opinion of very doubtful import. The authority quoted by *Durell* is *May*, who says (13th ed. (1924), p. 499):—

> "The grants on account caused by a dissolution should be legalized by an Appropriation Act, passed before Parliament is dissolved, appropriating in detail all the supply voted in the expiring session in the manner used at the close of an ordinary session; and the amount of supply left unvoted is dealt with by the succeeding Parliament. The prorogation or dissolution of Parliament without an Appropriation Act is a constitutional irregularity, as thereby all the grants of the Commons are nullified, and the sums must be voted again in the next session, before a legal appropriation can be effected. This course

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was followed on the two occasions when Parliament was dissolved, no Appropriation Act having been passed. On the occasion of the dissolution of 1820, the Commons did not pass a Bill to effect the due appropriation of certain temporary supplies; a course which drew from the Lords a remonstrance, which that House recorded on its journal."

It is also true, as *May* noted, that the Commons in 1784 resolved that persons who acted on supply grants not covered by an Appropriation Act would be guilty of a high crime and misdemeanour, but this resolution of the House of Commons was only intended, as most historians agree, to deter Pitt from securing from George III. a dissolution of Parliament. In spite of the threat, Pitt acted on supply grants, and Parliament was dissolved without an Appropriation Act. The statement in *Alcock* v. *Fergie* (1) attributed to counsel, of whom Hearn himself was one, that Pitt, trusting to obtain a majority in the new House of Commons, looked to an indemnity from the future Parliament, and duly obtained it, is quite incorrect. The contrary is not only asserted, but commented upon by the standard authorities. For instance, *Tomline* says: "Nor was any Bill of indemnity passed, or even called for, by those who had in the old Parliament declared that it would be necessary in case of a dissolution" (*Memoirs of the Life of the Rt. Hon. William Pitt* (1822), vol. I., p. 507). And *Stanhope* emphasizes the same fact, and comments:—"Thus worthless was the resolution which the late House of Commons had carried on this subject. So completely had all the threats antecedent to the dissolution fallen to the ground" (*Life of the Rt. Hon. William Pitt* (1861), vol. I., p. 224).

It may also be noted that the Acts under which Pitt acted were two, one granting to the Crown certain excise duties, and the other a land tax (24 Geo. III., sess. 1, cc. 1 and 4). These Acts bear little resemblance to the modern Consolidated Fund Acts, which are concerned not at all with authorizing the imposition of taxation, but only with the provision of a key to enable the Executive to unlock the Treasury so as to meet the exigencies of the public service. It is, of course, true that by 24 Geo. III., sess. 2, c. 44, the moneys arising from the excise duties and land tax were duly appropriated. But no inference can or should be drawn that any illegality would

(1) (1867) 4 W.W. & a'B. (L.), at p. 296.

have been committed merely by reason of the absence of an Appropriation Act. *May's* note on the subject seems to have been affected, to some extent at least, by the original Whig tradition that the danger to be guarded against was actually misappropriation by the Crown of moneys intended to be allocated to a specific purpose.

In truth, the modern Supply Acts, such as those passed in New South Wales during the financial year 1931-1932, are not merely Supply Acts but also Appropriation Acts so far as they operate and extend. The constitutional practice is that such Acts are subsequently embodied in one Appropriation Act which deals with the whole financial year. In this sense the *Appropriation Act* replaces them, and they cease to govern the situation. But it must be taken that the New South Wales Parliament deliberately chose to dispense with an Appropriation Act in respect of the year 1931-1932, and to rest content with the Supply Acts which, with the *Audit Act*, covered the full twelve months' supply. The possibility of variation or replacement by an Appropriation Act never having eventuated, one is necessarily referred back to the Supply Acts and the *Audit Act* themselves. In such circumstances all that a Court of law can do is to attend to their terms and give them full force and effect. Doing this, the result is a distinct authorization to the Executive to pay moneys from the Consolidated Revenue Fund (the only fund now in question) upon the basis of the estimates referred to in the Acts, the fund being made available in order to defray the expenses of the Crown in the various departments and services during the months specified in the Acts. It is not possible to treat the *Supply Act* and the *Audit Act* as ceasing to operate because prorogation or dissolution took place in May, 1932, and no Appropriation Act in the usual form has ever been passed. Of course the authorization to pay extends only to the various months of the year 1931-1932, and ceased to have effect on 30th June, 1932. But this is also the case when the *Appropriation Act* is passed in the usual way.

The actual point of *Alcock* v. *Fergie* (1) concerned the effective recovering of moneys payable originally under a contract entered into after the session had closed, and said to be irrecoverable in any

(1) (1867) 4 W.W. & a'B. (L.) 285.

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event because, at the time of suit, no moneys were legally available for the purpose of payment. An important part of the reasoning in *Alcock* v. *Fergie* (1) was subsequently rejected by *Madden* C.J., in his illuminating judgment in *Fisher* v. *The Queen* (2). *Madden* C.J. said, referring to the earlier judgment of *Stawell* C.J. :—

> "But his Honor says that 'a specific appropriation must be of a specific sum for a specific definite object which Parliament can estimate, and in consideration of which it is prepared to forego its privilege of an annual appropriation after full discussion.' But is this so ? Parliament has equal authority to make special appropriations, which may be definite or indefinite in amount as it pleases. If it can arrive safely at a specific amount, and yet a special appropriation is desirable to protect the public interest by preventing delay in payments, and by making them certain, there is nothing *ultra vires* or even unwise in providing that when moneys of a definite kind, not at present ascertainable, can be and shall be ascertained later, the consolidated revenue shall be specially appropriated to meet them. Of course Parliament would not commit the ascertainment of such payments to any but highly responsible persons, whose judgment could be in any case final."

The judgment of *Madden* C.J. on this point seems to bear the general approval of the Privy Council in *R.* v. *Fisher* (3). In my opinion, it is absolutely correct. Appropriation of public funds by Act of Parliament may take many and varied forms, so long as no overriding constitutional provision exists to control the method of appropriation. Two illustrations may be given.

In the year 1878 the law officers of the Crown in England advised that the moneys necessary to defray the costs, charges and expenses incident to the collection, management and receipt of the public revenue of Victoria were already appropriated by sec. 45 of the Constitution Statute, 18 & 19 Vict. c. 55, so that there was no necessity for any further grant or appropriation of the moneys by the Parliament of Victoria (*Todd, Parliamentary Government in the British Colonies* (1894), pp. 219, 734).

A further illustration is given by *Anson*, who says :—

> "In times of emergency, such as war actual or threatened, recourse may be had to a vote of credit. In such a case the Crown asks for a grant of money in general terms, it being impossible at the moment to furnish (as in an ordinary estimate) a detailed statement of the manner in which it will be spent; and Parliament, by acceding to the request, in effect places the money at the disposal of the Executive to be spent at the discretion of the latter on any object within the terms of the vote" (5th ed. (1922), vol. I., p. 289).

(1) (1867) 4 W.W. & a'B. (L.) 285.
(2) (1901) 26 V.L.R. 781, at p. 800.
(3) (1903) A.C. 158, at p. 167.

Hearn, who was closely associated with the Victorian Upper House, did not fail to suggest that a Legislative Council may have a legitimate grievance against the representative Assembly in cases where the ordinary constitutional practice of passing an Appropriation Act is departed from by the Crown's advisers and the Assembly to which they are responsible. But such irregularity cannot affect the strict legal position.

In the present case, the position as it existed on 30th June, 1932, was that (*a*) the Crown had made contracts with the plaintiff, and (*b*) moneys had been made legally available by the Supply Acts, including that of June, 1932. It is admitted that the advertising service vote, if otherwise sufficient to satisfy the rule in *Churchward's Case* (1), covered the service called for by the contracts with the plaintiff. On 30th June, therefore, there was (*a*) an existing contract, (*b*) a sufficient compliance with the rule in *Churchward's Case* (1), (*c*) a proved performance by the plaintiff of the contract on his part, (*d*) proved non-payment for this service for five weeks at £29 12s. 6d. per week, that is, £148 2s. 6d. in all.

It cannot be too strongly emphasized at all points of this case that the plaintiff's contracts were not with the Ministers individually or collectively, but with the Crown. As Viscount *Cave* said in *Attorney-General* v. *Great Southern and Western Railway Co. of Ireland* (2) :—

> "My Lords, the liability to pay the costs of replacement undertaken by the agreements of March, 1917, and September, 1918, was of course a liability of the British Crown, which on maturity would fall to be discharged out of moneys to be provided for that purpose by the Parliament of the United Kingdom. The nature and incidence of a debt so incurred has been authoritatively described in such cases as *Churchward* v. *The Queen* (1), and is not open to question. This being so, the transfer by the Act of 1919 and the Order of 1920 of the powers and liabilities of the Board of Trade in relation to railways to the Minister of Transport is of little importance in this case. The contingent liability to pay for replacing the rails remained after that transfer a liability of the Crown, the only change being in the Minister entrusted with the duty of advising the Crown upon the matter."

The Crown is represented in New South Wales by the Governor, who is always in office, and is the supreme head of the Executive Government. The honour of the Crown demands that, subject to

(1) (1865) L.R. 1 Q.B. 173.

(2) (1925) A.C. 754, at pp. 763, 764.

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Parliament's having made one or more funds available, all contracts for the Crown's departments and services should be honoured. The position on 30th June, 1932, having been examined, what was the position existing on 1st July, 1932, the first day of the financial year 1932-1933 ? In my opinion, it was plainly this, that the plaintiff's contract with the Crown was still on foot. The plaintiff did not accept the implied offer to rescind contained in the letter of cancellation or repudiation forwarded to him during the month of May. The condition that payments thereunder depended upon moneys being made legally available by Parliament still subsisted, but the contract was not inchoate or suspended but existing. (See the argument before the Privy Council in *Kidman* v. *The Commonwealth* (1).) (See also per *Higgins* J. in *Kidman* v. *The Commonwealth* (2).)

The only question, therefore, is whether in respect to the year 1932-1933 also the condition of *Churchward's Case* (3) was satisfied. Two points arise. The first is whether sufficient moneys had been made available for the provision of advertising services to enable the officers of the Crown to pay the plaintiff from that source. The second is whether the Court should draw the inference that, because a particular Ministry desired to avoid paying the plaintiff in respect of his services, the Court should infer that the moneys if legally " available " otherwise, were at least not " available " to pay him.

Dealing with the first question, Mr. Kelly prepared a statement which, in respect of the year 1932-1933, assumed that £94 18s. 8d. came to hand week by week for the Government's advertising services. Upon this basis the account runs into debit as early as 1st September, 1932. But there are two reasons why this statement cannot be acted upon for the purpose of the present case. For one thing, it includes in its expenditure moneys paid in relation to the Crown's trading concerns which were not treated as part of the advertising grant to the Department of the Premier. Payments to provide advertising for the purpose of such trading concerns were made by the Premier's Department in the first instance, though subsequent recoupment was obtained from the funds of the appro-

(1) (1926) A.L.R. 1, at p. 2. (2) (1925) 37 C.L.R. 233, at p. 248.
(3) (1865) L.R. 1 Q.B. 173.

priate trading concern. Therefore, although the statement shows the vote in debit on 1st September, 1932, this is a nominal debit, and a true debit would have been reached only about April of the year 1933.

Moreover, it is not accurate to assume a weekly incoming of a proportion of the yearly appropriation for advertising. It appears from the estimates for the financial year 1932-1933 that, for the service of advertising, the sum of £4,950 was voted by Parliament. This vote was included in a very much more general vote contained in the *Appropriation Act*. We find that, upon the passing of the *Appropriation Act* on 8th November, 1932, the sum of £4,950 was then made available by Parliament for the purposes of the service of advertising. Upon that date (8th November) the plaintiff had become entitled to be paid about £700 in all under his two contracts, having completed one contract on or about 28th October, 1932. The other contract was not completed until 31st March, 1933, when the total liability of the State to him in accordance with the contract amounted to £1,114 10s. So far as the financial year 1932-1933 was concerned, about £550 was the total liability incurred by the Crown to the plaintiff on 8th November, when the *Appropriation Act* became law. On 31st March, 1933, the total sum of £1,114 10s. now sued for, was owing to the plaintiff, but £148 2s. 6d. has to be deducted to obtain the sum referable to 1932-1933, the total sum covering, as we have seen, services rendered in the previous financial year.

In order to secure a judgment declaring the Crown's liability, a person who has a subsisting contract with the Crown satisfies the constitutional doctrine laid down in *Churchward's Case* (1) in respect of payments accruing during the financial year when he completes the performance of his contract if, at the time of such completion, there exists in respect of such financial year sufficient moneys in the vote for the relevant service to enable the payments in question to be lawfully made. I also think that the plaintiff is entitled to say that the constitutional doctrine was satisfied in respect of all payments falling due between 1st July, 1932, and the date of his completing his contract if, at the date of

(1) (1865) L.R. 1 Q.B. 173.

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the passing of the *Appropriation Act* (8th November, 1932), enough moneys to pay him in full could have been lawfully paid or set aside to pay him from moneys then remaining from the parliamentary grant in respect of advertising. From a close consideration of the figures and evidence, I draw the inferences of fact that (*a*) on 8th November, 1932, sufficient moneys were available to pay him what was then owing to him in respect of services rendered in the year 1932-1933, and (*b*) sufficient moneys from the same grant were also available to pay him in full on 31st March, when he finally completed the performance of his contracts.

In such a case as this I do not think any question of "priority" really arises. And I do not agree for a moment that the plaintiff should be deemed bound to wait for payment until the end of the financial year, until the Government completes payment under all advertising contracts whether or not such contracts were entered into after the time when the plaintiff made his contracts, or after the time when he performed all his services under the contracts, or after the passing of the *Appropriation Act* in November, 1932. I am rather inclined to think that the proper date to which the plaintiff is entitled to be referred, is, not the actual time when the *Appropriation Act* was passed in November, 1932, but 1st July, 1932, the commencement of the financial year. If that be so, an immediate call upon the vote of £4,950 for 1933 could have been made in order to make payments to the plaintiff and those others (including the *Sydney Morning Herald* proprietor) who had contracts with the Crown extending from the previous financial year into the financial year beginning on 1st July, 1932. And the vote of £4,950, was, I also find, amply sufficient to make payments under all other contracts current on 1st July, 1932, as well as the plaintiff's two contracts.

The second point made by Mr. *Flannery* remains to be considered. What inference is to be drawn from the fact that in 1932 the Crown's advisers stated their intention not to pay the plaintiff? It should be inferred, so it is said, that, in the sum of £4,950 which the Crown asked for and received, by way of grant from Parliament for advertising services, there could hardly have been included the very amounts which the Ministers intended to avoid paying to the plaintiff.

This argument might be very formidable if the matter rested upon mere inference, ignoring the separate and distinct position of the Crown and its Ministers for the time being. It seems to me that a Court of justice is not entitled to find from a mere expression of intention of the Ministers to repudiate a contract with a subject, that intention being expressed to the subject and not to Parliament, that the Crown may successfully argue as follows :—" Our Ministers desired to repudiate. They said nothing to Parliament about the matter. But be pleased to infer (1) that Parliament supported our Ministers' desire to repudiate, and (2) that upon the statutory grant of money for advertising services a special exception should be engrafted excluding payments under the contract repudiated by Ministers."

The true test is, I think, whether the Ministers could have retraced their steps (say) in December, 1932, or March, 1933, and paid the plaintiff. In my opinion, they, or other Ministers, could lawfully have paid the plaintiff, assuming, as is conceded throughout, that there is nothing in the class of services contemplated by the Premier's Department advertising vote which would exclude the services called for by the contracts with the plaintiff.

The above reasoning shows that the plaintiff is entitled to succeed in the argument based on *Churchward's Case* (1). And the same conclusion may be reached in a much more direct method. By the *Special Deposits* (*Industrial Undertakings*) *Act* 1912, provision was made by the New South Wales Parliament for the constitution of special deposit accounts in the Treasury and for the receipt and payment of moneys relating to certain industrial undertakings of the Government, such as the State Brick Works and Metal Quarries. The Act applied to any other industrial undertaking which the Governor specified by notification in the *Gazette*. In the case of the Tourist Bureau of New South Wales, which is an important trading concern, this power was exercised by the Governor, and it is admitted that its exercise was valid, so that the Tourist Bureau is to be regarded as an industrial undertaking for the purpose of the statute in question.

(1) (1865) L.R. 1 Q.B. 173.

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The scheme of 1912 was to enable the concerns in question to acquire such a degree of autonomy as would enable their business to be carried on to the best advantage and without the necessity of annual parliamentary appropriation or grant of moneys in order to defray the running expenses of the business. It was contemplated that the receipts of such undertaking from all sources would be paid into the special account at the Treasury. From this account, sec. 3 provides that "there shall be paid . . . any expenditure of or in relation to the industrial undertaking to which it relates, including charges for management, maintenance, working expenses and interest on capital." Subsequent amendments to the Act were all designed to the same end, power, for instance, being given in 1916 by Act No. 77 for the Minister to carry trading balances to reserve account.

It is clear from secs. 5, 6, and 7 of the Act of 1912 that the control and direction of the industrial undertaking was committed to the responsible Minister of the Crown. In relation to the Tourist Bureau, the responsible Minister was the Chief Secretary of New South Wales, which office was, in April, 1932, filled by Mr. Gosling of the Lang Ministry. I have already pointed out that it was from Mr. Lang himself that the authority proceeded to Mr. Harpur to enter into the contracts with the plaintiff. This was done, as Mr. Hay, the Under Secretary explained in evidence, as a matter of Government policy, and to this policy Mr. Gosling was as much a party, and accepted as much responsibility, as the Premier himself. Of course, as is well known, the *Special Deposits (Industrial Undertakings) Act* does not exclude the constitutional practice of collective Ministerial responsibility for the control of the undertakings. On the contrary, it requires it, and ensures it by making it perfectly clear that the responsibility for its control rests with the appropriate Minister of the Crown.

This position was quite well understood in New South Wales. For instance, the permanent officer who was managing the Tourist Bureau at the relevant dates, after stating that he furnished the copy for advertising in the plaintiff's newspaper, said :—

> "Q. What is your procedure with regard to advertisements for your Bureau ? A. We ask the Superintendent of Advertising in the Premier's Department to arrange any contracts that we desire.

Q. What about payment? A. The payment comes from the Tourist Bureau Working Account, Special Deposit Account.

Q. In the first instance? A. No, we recoup the Premier's Department for original payments.

Q. Does it rest with the Premier's Department whether your advertisement will be published or not? A. Yes. The Premier's Department could, by Ministerial direction, restrict me from advertising any further.

Q. That is what you take to be your position? A. Yes.

His Honor: Q. The Tourist Bureau is not an independent body? A. It is in a measure. It is a State industrial undertaking, but it is always subject to Ministerial direction.

Mr. *Watt*: Q. I think you work under the Chief Secretary's Department, but your advertising is done by the Premier's Department? A. Yes, by Ministerial minute we submit our advertising requirements to the Premier's Department."

From this it appears clearly that the responsibility of the Chief Secretary as the "responsible" Minister of the Crown was, in accordance with the doctrine of collective ministerial responsibility, shared with the Premier and the other members of the Cabinet.

No doubt, in respect of ordinary routine administration, directions would not be given by the Cabinet either to the permanent officer managing the industrial concern or to any other public servant such as Mr. Harpur, whose duty it became to assist the concern in certain parts of its administration. But, even then, ministerial and executive responsibility could never be surrendered by the Ministry, all the assets and receipts of the undertaking being assets and receipts of the Crown, all its liabilities and expenses being the liabilities and expenses of the Crown, and the executive Government being always responsible to Parliament for the whole course of administration of the undertaking.

In the case of the contracts with the plaintiff, however, for reasons with which we need not be concerned, the executive Government, including the Premier and Chief Secretary, authorized and required advertising contracts to be made with the plaintiff, it being intended both by the plaintiff and the Tourist Bureau that advertisements should appear in the newspaper throughout the agreed period.

This being so, the Ministry, including the Chief Secretary, duly authorized the expenditure of money "in relation to the industrial undertaking," and sec. 3 of the Act of 1912 commands that such

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expenditure shall be paid out of the special account opened in the Treasury, the account being kept so that the receipts of the undertaking shall always be available as a separate fund for the purpose of meeting all expenditure by or in relation to the undertaking. The statute deliberately avoids the necessity either for the receipts being paid into the Consolidated Revenue Fund, or an annual grant of moneys by Parliament out of the Consolidated Revenue Fund to meet working expenses. Sec. 3 may be said to operate as a continuing and permanent appropriation for the purposes therein specified.

Mr. *Flannery* urged that it was not competent for one Minister of the Crown, e.g., the Attorney-General, to give a direction that contracts in relation to an industrial undertaking shall be given to a contractor against the will or without the knowledge of the Minister of the Crown in charge of the undertaking. If such a thing occurred, either the Attorney-General or the responsible Minister would soon cease to be a member of the Cabinet, for the position of the Premier would become intolerable. But what happened in the present case was not analogous to the suggested illustration. For it is clear, I find, that Mr. Lang as Premier acted not against the will or without the knowledge of the Chief Secretary, but with his full knowledge and approval.

One other circumstance should now be mentioned. The manager of the Tourist Bureau was informed by Mr. Harpur that, as between the Bureau and the Premier's Department, the payments called for by one or more of the plaintiff's contracts would be met out of the Premier's Department grant for advertising. The question of the validity of such an inter-departmental arrangement does not directly arise in these proceedings, but I am bound to say that the general scheme of the 1912 Act is that the working expenses of the industrial undertakings shall come out of the fund constituted by their own receipts, and shall not be borne by votes for the services of the ordinary departments of the Executive Government. There is, of course, no obstacle in the way of Parliament's granting moneys to assist a particular industrial undertaking. This may be done by means of the usual Appropriation Act, but, if so, the vote should indicate not merely e.g., that it relates to " Advertising," or " Fuel,"

or "Furniture," but that it grants money to a specified industrial undertaking for the provision of any such service.

In the present case this procedure was never followed, so that it would not have been permissible for the Premier's Department, relying merely upon its general advertising vote, to pay into the funds of the Tourist Bureau an equivalent of such moneys as should or might have been paid to the plaintiff from the account of the Bureau.

Of course, the point may be pressed still further, though no such argument was advanced before me; for it may be said that, by reason, not only of the 1912 statute, but also of the meaning of the phrase itself, the Premier's Department vote for "governmental advertising" must be regarded as a vote in relation to "governmental" or "non-trading" departments, as distinct from the industrial and trading concerns specified in or pursuant to the 1912 statute, or otherwise carried on by the Crown. And, although the parties have conducted their case upon the assumption that "governmental" should not be so construed, an assumption which is in accordance with the practice adopted in relation to the plaintiff's contracts, much may be said in favour of the restricted meaning of "governmental" advertising. And I do not overlook the fact that the adoption of this view would tell strongly against the view I have expressed earlier, based upon the hypothesis that the Premier's Department vote for advertising is of itself sufficient to satisfy the rule in *Churchward's Case* (1).

In the circumstances, whatever difficulties were attached to the scheme of inter-departmental recoupment in respect of moneys payable to the plaintiff, I am quite satisfied that the plaintiff should succeed, even if he fails to show a sufficient and relevant grant of moneys either in the *Supply Act* and the *Audit Act*, or in the *Appropriation Act* of 1932.

His contracts were made, not with the Premier's Department, not with the Tourist Bureau, but with the Crown alone. As Lord *Dunedin* said in *Attorney-General* v. *Great Southern and Western Railway Co. of Ireland* (2):—

> "The learned Judges of the Court of Appeal found difficulty in thinking that there was a departmental liability. I cannot say such difficulty affects me.

(1) (1865) L.R. 1 Q.B. 173.

(2) (1925) A.C., at p. 775.

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I do not know what a departmental liability is, except a liability on behalf of the Government and which is only enforceable as the noble Viscount has said. A Government department never binds itself personally, i.e., in the persons of the officers who compose it."

Lord *Phillimore* said (1), in the same case :

" As to the distinction sought to be drawn between the liability of the Crown and the liability of a department, I agree with the noble and learned Lord, Lord *Dunedin*, that there is no such thing as a departmental liability as distinct from the liability or quasi-liability of the Crown."

Did the officer who made the contracts have authority ? The answer is that he had specific and definite authority to do so from the Government ; that is, the Premier and Ministers, including the responsible Minister, the Chief Secretary. Further, the contracts were made in relation to the Tourist Bureau and in accordance with previous directions, the promised service of advertising was fully rendered by the plaintiff for the benefit of the Tourist Bureau.

Having regard to the statute of 1912, dealing with industrial undertakings, the plaintiff shows that the rule in *Churchward's Case* (2) is satisfied, because sec. 3 of the statute operates as a continuing appropriation of all receipts from the Tourist Bureau to working expenses, including, of course, advertising.

The plaintiff cannot be affected by any inter-departmental arrangement for recouping. The evidence shows that he did not even know that such an arrangement was proposed or agreed to. He has proved a binding agreement with the Crown, acting through the Ministry of the day, a breach of such agreement, and a compliance with the constitutional rule that payments under the contract should bear the authority of the Parliament of New South Wales.

I therefore hold that the plaintiff succeeds. I make a declaration that the plaintiff is entitled to be paid the sum of £1,114 10s., which is the undisputed amount of liability in this action. The defendant must pay the costs of the action.

From this decision the defendant appealed to the Full Court.

Flannery K.C. (with him *Nicholas*), for the appellant. The contracts involve the expenditure of public revenue. Consequently they are void because the making thereof was not, prior thereto,

(1) (1925) A.C., at p. 781. (2) (1865) L.R. 1 Q.B. 173.

authorized by an Act of Parliament. There is not any specific provision or authorization in any Appropriation Act in respect of the money claimed; therefore the respondent is not entitled to sue for its recovery (*Young* v. *Williams* (1); *The Commonwealth* v. *Colonial Combing, Spinning and Weaving Co.* (2)). Parliamentary authorization of the contracts is rendered more important by reason of the fact that more than one financial year is affected. No Executive is entitled to tie the hands of any succeeding Executive. The contracts were not made by the Executive Council nor by the responsible Minister; therefore it can be neither said nor inferred that they were made in pursuance of "Government policy." As the Tourist Bureau was not carried on under the direction of the Premier, the provisions of sec. 5 of the *Special Deposits (Industrial Undertakings) Act* 1912 prevent the application to this matter of the provisions of sec. 3 of that Act. Contracts which bind the revenue of the State from year to year must be specifically authorized by statute.

[DIXON J. referred to *Food Controller* v. *Cork* (3).]

The provision of money generally in an Appropriation Act authorizes the expenditure of that money by the Executive, but it does not confer any rights upon a contractor to the Government, nor does it authorize a particular contract. Specific reference thereto is necessary for the authorization of a particular contract.

[STARKE J. referred to *Australian Railways Union* v. *Victorian Railways Commissioners* (4).]

Appropriation is not effected by an antecedent Act which, although it distinctly authorizes, does not in terms appropriate. *Churchward* v. *The Queen* (5) lays down the law which has been followed consistently. Contractors to the Crown contract unconditionally, that is, the contract depends upon authority given either prior or subsequently to the making of the contract.

[STARKE J. referred to *Alcock* v. *Fergie* (6).]

A contract entered into between members of the Executive and a contractor, to be effective, must be supported by parliamentary authority (*Commercial Cable Co.* v. *Government of Newfoundland* (7);

(1) (1916) 21 C.L.R. 145.
(2) (1922) 31 C.L.R. 421.
(3) (1923) A.C. 647.
(4) (1930) 44 C.L.R. 319.
(5) (1865) L.R. 1 Q.B. 173.
(6) (1867) 4 W.W. & a'B. (L.) 285.
(7) (1916) 2 A.C. 610.

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The Commonwealth v. *Colonial Ammunition Co.* (1); *Attorney-General* v. *Great Southern and Western Railway Co. of Ireland* (2); *Rayner* v. *The King* (3)). The matter was discussed in a note to *Dominion Building Corporation Ltd.* v. *The King* (4).

Weston K.C. (with him *Evatt* and *Thomas*), for the respondent. The evidence shows that the Executive as a matter of Government policy decided to have advertisements of the nature now under consideration published: From this the inference can be drawn that the responsible Minister knew and approved of the Premier's action in the matter. This is important having regard to the provisions of secs. 3 and 5 of the *Special Deposits* (*Industrial Undertakings*) *Act* 1912. The Executive Council is not bound to function as a whole in respect of every executive act. Individual members are competent to deal with certain matters. The respondent is entitled to hold the judgment, partly because moneys were appropriated and available, and partly under the *Judiciary Act*. The modern doctrine, whether correct or otherwise, based upon *Churchward* v. *The Queen* (5) does not affect the matter because here there was a sufficient appropriation of funds by the Legislature for purposes covered by the contract. *Commercial Cable Co.* v. *Government of Newfoundland* (6) does not touch at all the problem involved here, nor do *Mackay* v. *Attorney-General for British Columbia* (7), *Auckland Harbour Board* v. *The King* (8) and *Attorney-General* v. *Great Southern and Western Railway Co. of Ireland* (2) assist the Court, because the questions dealt with in those cases differ from the problems now before the Court. The decision in *Rayner* v. *The King* (3) turns upon the construction of certain New Zealand statutes. *Young* v. *Williams* (9) was merely a decision that the head of a department was not a Minister of the Crown and that he had not, at common law or by statute, power to bind the Crown by a contract of the nature there involved. *Kidman* v. *The Commonwealth* (10) was dealt with by the Court on the merits. In the passages in the

(1) (1924) 34 C.L.R. 198.
(2) (1925) A.C. 754.
(3) (1930) N.Z.L.R. 441.
(4) (1927) 2 D.L.R. 510, at pp. 513-528.
(5) (1865) L.R. 1 Q.B. 173.
(6) (1916) 2 A.C. 610.
(7) (1922) 1 A.C. 457.
(8) (1924) A.C. 318.
(9) (1916) 21 C.L.R. 145.
(10) (1925) 37 C.L.R. 233.

judgment of *Isaacs* J. in the *Wool Tops Case* (1) referred to on behalf of the appellant, his Honor dealt only with the problem of enforceability or original invalidity. The Executive has a common law power to contract (*O'Keefe* v. *Williams* (2)). The only limitation imposed upon that power is that it is exercisable only in respect of contracts necessary and expedient for the performance of the functions of the Executive (*Wool Tops Case* (3)). The power of the Executive to enter into a contract is absolute so far as it is not fettered by the express statute. The contract now before the Court is well within the power which resides in the Executive. If the view contended for by the appellant be correct the absurd position would arise that statutory authority would be required by the Executive before it could enter into a contract in respect of even the most insignificant item in everyday use. In any event, sufficient authority for the contract and the payment of the amount claimed is to be found in the *Special Deposits* (*Industrial Undertakings*) *Act* 1912. Authority to pay out of a particular fund does not exclude the respondent's right to be paid out of any fund. Where Parliamentary recognition is given to an industrial undertaking there is a power in the Crown of necessity to enter into contracts in connection with that undertaking.

Flannery K.C., in reply. The effect of the *Wool Tops Case* (3) and *Kidman* v. *The Commonwealth* (4) is (*a*) that the Executive must have some authority for its contractual power, and (*b*) that a claimant must be able to establish an appropriation. [He also referred to *Maitland, Constitutional History of England* (1908), p. 461.]

Cur. adv. vult.

Nov. 30, 1934.

The following written judgments were delivered :—

GAVAN DUFFY C.J. In my opinion the appeal should be dismissed with costs. I agree in the reasons of *Dixon* J.

(1) (1922) 31 C.L.R., at pp. 450, 451.
(2) (1907) 5 C.L.R. 217; (1910) A.C. 186.
(3) (1922) 31 C.L.R. 421.
(4) (1925) 37 C.L.R. 233.

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RICH J. This is an appeal by the State of New South Wales from a decision of *Evatt* J. given in an action brought in the original jurisdiction of this Court by a resident of South Australia. The plaintiff is the proprietor of a newspaper called *Labor Weekly*. He sues to recover moneys payable under a contract for advertising. In 1931 the plaintiff obtained from the Government of New South Wales a contract for a given amount of space in his newspaper for the purpose of advertisements of the Government Tourist Bureau. The period of this contract was twelve months. At the end of this period of twelve months the full amount of space had not been used. The plaintiff apparently desired a contract for a further period of twelve months and he also wished to arrange for the use of the balance of the space available under the previous contract during the succeeding twelve months. The Tourist Bureau of New South Wales is an ordinary sub-department carrying on a recognized governmental activity. It is an industrial undertaking under the *Special Deposits* (*Industrial Undertakings*) *Act* 1912, New South Wales. Naturally the work it does involves a great deal of advertising. But many other departments of Government find it necessary in these days to make use of the advertising columns of the press and other means of publicity. To deal with all such matters it seems to have been found desirable to appoint a central officer through whom all advertisements may be arranged. He is given the title of "Editor of Publications and Superintendent of Advertising." His office is under the Premier, who in New South Wales administers a separate department of Government known as the Premier's Department. The Tourist Bureau is under the Chief Secretary. The plaintiff interviewed the Superintendent of Advertising for the purpose of arranging his further contract. That officer received instructions from the permanent head of the Premier's Department to treat any directions he might receive through the Premier's private secretary as commands of the Premier. Through the Premier's private secretary he had been told that it was a matter of Government policy to advertise in the plaintiff's journal and he accordingly made a contract reserving space for twelve months from 1st April 1932. As I understand the facts found by *Evatt* J. and disclosed by the evidence, the actual contract which he made

had the personal authority of the Premier authenticated by the instructions of the Premier's private secretary. Not many weeks after the making of the contract a change of Government took place. The new Government informed the plaintiff that no further advertisements would be inserted in his paper. The plaintiff refused to treat this as the termination of his contract, which he held open by continuing the advertisements with which he had been supplied. At the end of twelve months he sued for the total sum of the advertising rates specified in his contract. The defence of the Government did not depend upon the form in which he sued nor upon any attack upon the bona fides of the transaction either on his part or on that of the former administration. It consisted of a denial of the Crown's liability upon such a contract in the absence of any statutory power or authority to make it and any statutory adoption or ratification and any specific appropriation of funds to meet the expenditure involved. At the trial before *Evatt* J. no independent contention seems to have been advanced that the evidence did not establish that the Premier gave his personal assent to the contract, or, that if it did, his legal authority was insufficient to make it a transaction of the Crown's. But upon this appeal these points were also discussed, subject, however, to the protestations of the plaintiff's counsel that they were not open. Open or not, they ought, in my opinion, to fail. A proper officer of the Premier's department receives from his permanent head, whom he is bound to obey, instructions to carry into effect such orders as he receives from the Premier's secretary as on the Premier's behalf. When he acts on an order so given through what is thus established to be a regular channel of communication it must be assumed until the contrary is shown that he acted with the Premier's actual authority. In the next place, the Premier's position is such that a transaction otherwise within the competence of the Crown which he carries through and which is not disowned by his administration, particularly when it pertains to his own department, must be treated as the transaction of the Crown. The conduct of Government business would otherwise be impossible.

The question whether the transaction was within the competence of the Crown cannot be answered simply by considering the statutory

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authority for it. Apart from the question whether parliamentary appropriation of moneys is a prerequisite of the Crown's liability to pay under a contract made by it, the Crown has a power independent of statute to make such contracts for the public service as are incidental to the ordinary and well-recognized functions of Government. When the administration of particular functions of Government is regulated by statute and the regulation expressly or impliedly touches the power of contracting, all statutory conditions must be observed and the power no doubt is no wider than the statute contemplates. But that is not the present case. The Tourist Bureau is recognized under statute as a function of Government and for many years in New South Wales it has been recognized, both in Parliament and out, as part of the established service of the Crown. The *Special Deposits (Industrial Undertakings) Act* is in no way concerned with the administration of the department. It relates to accounting and the segregation of funds. In my opinion it was an ordinary incident of this particular function of Government to make a contract for advertising. It is another question whether the contract can take effect against the Crown without an appropriation of funds to answer it. *Evatt* J. made a close examination of the relevant heads of the Supply and Appropriation Acts and came to the conclusion that sufficient money had been voted during the period of the contract for the purpose with which the contract dealt to answer the liability sued upon, and in this conclusion I agree. But the Crown contends that this is not enough to give validity to the contract. The appropriation is specific in purpose and not general, and such expenditure as would in fact satisfy the contract is within that purpose. But of course expenditure upon this particular contract as a specific obligation was not referred to in any of the items or heads. Accordingly it is contended on behalf of the Crown that there is no sufficient parliamentary appropriation of funds. In my opinion this contention is founded upon a misunderstanding of the principle invoked. Such a misunderstanding arises from too literal an application of some of the expressions used in judicial pronouncements which state with much force the necessity of parliamentary control of public moneys. The occasion for such pronouncements could not arise in the days when the Crown was exposed to no statutory liability to suit for

money claims. The procedural difficulties which attend the common law petition of right made that remedy inconvenient to the subject. As Sir *William Holdsworth* points out (*History of English Law*, vol. IX., p. 39) one reason for the revival of that remedy in the nineteenth century lay in the manifold activities of the modern State which necessitated some remedy against the Crown for breach of contract. The *Petitions of Right Act* 1860 then made it a more generally available remedy. But under the better procedure no apprehension could be felt that a judgment would give the suppliant any greater right to obtain without the consent of Parliament a payment from the Crown than he had before. The *Petitions of Right Act* 1860 in remodelling the remedy observed the principle of parliamentary control. Under sec. 14 of that Act the judgment cannot be executed by process and the Commissioners are required to pay only out of the moneys legally applicable for the purpose. Dominion and Colonial legislation giving remedies against the Crown takes various forms and in some jurisdictions the judgment authorized imposes an absolute liability to pay. But we are concerned only with the effect of the *Judiciary Act* 1903-1933, Part IX. This provision does not impose an absolute liability. The only judgment to which the Crown is liable is one which requires the Treasurer of the Commonwealth or State, upon it being certified to him, to satisfy it out of moneys legally available (secs. 64, 65). The object of such a provision is to enable the subject to establish his claim that he is a person who would be entitled to a contractual right to payment out of moneys available for that purpose. It leaves completely in the hands of Parliament the question whether moneys shall be made available for the purpose. But it recognizes that, in a jurisdiction over matters between a State and a resident of another State, between two States, between State and Commonwealth and between Commonwealth and subject it is necessary to enable the Court to pronounce upon all legal questions arising in contract or in tort up to the point at which the authority of Parliament to grant or withhold funds emerges. The establishment of the subject's right in other respects must logically come before, not after, the consideration by Parliament of the question whether he should be paid if his situation be one to be specially dealt with by Parliament. My brother *Dixon* has dealt

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with the difficulties created by judicial utterances on this matter and I do not desire to repeat a discussion of the course of authority. But I think these difficulties have largely disappeared as the result of the three most recent formulations of the doctrine. The statement of Viscount *Haldane* in *Attorney-General* v. *Great Southern and Western Railway Co. of Ireland* (1) makes it clear that he regarded absence of appropriation as no answer to a petition of right because he speaks of paying the judgment out of the funds thereafter voted by Parliament for the purpose. His Lordship's statement during the argument of *Kidman* v. *The Commonwealth* (2) explicitly denies that failure to appropriate made a contract of the Crown null and *ultra vires*, and clearly stated that the doctrine meant that the presumption was that the contract bound only funds appropriated to answer the liability under the contract. Finally, *Isaacs* C.J. in *Australian Railways Union* v. *Victorian Railways Commissioners* (3) explains that it is no more than a condition implied in the contract that before payment is made Parliament must appropriate the necessary money, but that a contract otherwise within the authority of Government is binding subject to that condition. The *Judiciary Act* is designed to give effect to the condition.

I think the judgment of *Evatt* J. is right and the appeal should be dismissed.

STARKE J. The State of New South Wales has an advertising branch, which forms part of the Department of the Premier, an office recognized by the Constitution of New South Wales. (See *Constitution Act* 1902-1930 (N.S.W.), and Schedule. Incorporated Acts, vol. VIII., p. 33.) It has also a Government Tourist Bureau, which is an industrial undertaking subject to the provisions of the *Special Deposits* (*Industrial Undertakings*) *Act* 1912, No. 22. The Bureau forms part of the Department of the Chief Secretary. In 1931 Mr. Lang, the then Premier of New South Wales, gave instructions, through his private secretary, to the Superintendent of Advertising, that an advertising contract should be given to the proprietors of the *Labor Weekly*, " as a matter of Government policy." Bardolph,

(1) (1925) A.C. 754, at p. 771.
(2) (1926) A.L.R., at p. 2.
(3) (1930) 44 C.L.R., at p. 353.

the respondent, was the proprietor of this newspaper. The Superintendent of Advertising was an officer in the service of the Crown in New South Wales, properly appointed, as is admitted. In April 1931, the Superintendent of Advertising, pursuant to this instruction, entered into an advertising contract with the proprietors of the *Labor Weekly*. It was in the following form:—"The *Labor Weekly*. The circulation embraces the whole of the Trade Union Movement. Head Office: 11 Franklin Street, Adelaide. Sydney Office: Labor Council, Trades Hall, Goulburn Street, Sydney. Official Organ of the Labor Council of New South Wales, and the Australasian Council of Trade Unions, with which is associated the *South Australian Worker*, the official organ of the United Trades and Labor Council, the Port Adelaide District Trades and Labor Council and the Australasian Council of Trade Unions. Advertising contract entered into this first day of April 1931, between Premier's Department of New South Wales of the one part, and the proprietors of the *Labor Weekly* of the other part. Whereas it is hereby agreed by the said Premier's Department of New South Wales to utilise advertising space in the *Labor Weekly* on the following terms and conditions: Period of this contract 12 months. Total number inches contracted 5,000. Contract to commence from 2nd April 1931. All advertising space in this contract to be used by April 1932. Number of issues over above period, fifty-two. Minimum space to be used each issue, 75 inches. Price per single column inch 4s. Setting charges, nil. Total amount £1,000 (One thousand pounds). Page and position, best available. This contract is deemed to have been made in Adelaide. Casual displacement or omission of advertisements shall not invalidate this contract. All advertisements are accepted subject to the approval of the management of the *Labor Weekly*, who reserve the right to omit an advertisement at any time, whether part of a serial or not. Such action shall not invalidate this contract. All accounts to be paid monthly. Signed for and on behalf of the proprietors of the *Labor Weekly*—per K. E. Bardolph. Signed for and on behalf of the said Premier's Department of New South Wales—per E. F. H. Harpur, Superintendent of Advertising." There is no Order in Council or Executive minute sanctioning or approving any such contract. Save that 1,100 inches of space were

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not used, the contract was carried out, and payments were regularly made by the Government. In April of 1932, the then Premier, through his private secretary, again intervened and gave oral instructions that another contract should be given to the proprietors of the *Labor Weekly*. Again, however, there is no Order in Council or Executive minute sanctioning or approving such a contract. The Superintendent of Advertising, pursuant to those instructions, entered into another contract with the respondent. It was as follows:—"Advertising Bureau, Premier's Department, Sydney, 12th April, 1932. Government Advertising. To the Proprietor of *Labor Weekly*. Be good enough to have advertisements *re* Government Tourist Bureau or other matter, 3,900 inches, to be taken over period from 1st April 1932, and ending 11th April 1933. Minimum space to be used per week 75 inches. Total amount at 5s. 6d. per inch, one thousand and seventy-two pounds 10s. (£1,072 10s.). E. F. H. Harpur, Editor of Publications and Superintendent of Advertising, (Sgd.) E. F. H. Harpur." The Superintendent also agreed orally that the 1,100 inches of space unused under the prior contract should be used at the rate of 45 inches per week, and at the price fixed by the former contract. Advertisements were inserted in the *Labor Weekly* pursuant to this agreement, and payments were made in respect of those published before the 20th May. The Lang Government fell about the middle of May 1932, and on 17th May 1932 the new Government—the Stevens Government as it is called—refused to utilize any further space in the *Labor Weekly* for Government advertising. The notice given to the respondent was as follows:—"New South Wales. Premier's Department, Sydney, 17th May, 1932. The Manager, *Labor Weekly*, Box 3681, S.8. G.P.O. Dear Sir,—I am directed by the Premier to inform you that it is not intended to utilize any further space in your paper for Government advertising. Please be good enough to note that the instructions which I have received will preclude the payment of any accounts rendered for advertising appearing in the *Labor Weekly* after the current week's issue. Yours faithfully, C. H. Hay, Under Secretary." The respondent went on publishing advertisements, despite this notice, and his claim is for £1,114 10s. in respect of such publication. No

objection has been made to the form in which he has made his claim or the amount claimed, if he is otherwise entitled to succeed.

Under these contracts, the activities of the Tourist Bureau were the subject of advertisements in the *Labor Weekly*. But, as I understand the facts, the funds under the control of the Tourist Bureau, whether in special deposit under the Act already mentioned or otherwise, were not called upon to meet the cost of these advertisements, but it was thrown upon a general vote for governmental advertising allocated in the Premier's Department.

"The departments of Government enter necessarily into many and various relations with the King's subjects, and the officers of these departments, through whom these relations are established, represent the Executive—that is, the Crown" (*Anson, Law and Custom of the Constitution*, 3rd ed. (1908), "The Crown," vol. II., Part II., p. 298). It is well established that an officer of the Crown is not personally liable under contracts made by him for and on behalf of the Crown (*Gidley* v. *Lord Palmerston* (1); *Palmer* v. *Hutchinson* (2); *Dunn* v. *Macdonald* (3)). On the other hand, it must be conceded, in English law, that whenever a valid contract has been made between the Crown and a subject, a petition of right will lie for damages resulting from a breach of that contract by the Crown (*Windsor and Annapolis Railway Co.* v. *The Queen and The Western Counties Railway Co.* (4), and *Robertson, Civil Proceedings by and against the Crown* (1908), pp. 337 *et seq.*). But it is argued that no contract with the Crown can possess legal validity unless Parliament has authorized it, either directly or under the provisions of a statute (*Churchward* v. *The Queen* (5); *Commercial Cable Co.* v. *Government of Newfoundland* (6); *Mackay* v. *Attorney-General for British Columbia* (7); *Auckland Harbour Board* v. *The King* (8); *Attorney-General* v. *Great Southern and Western Railway Co. of Ireland* (9); *The Commonwealth* v. *Colonial Combing, Spinning and Weaving Co.* (10); *The Commonwealth* v. *Colonial Ammunition Co.* (11)). It is doubtless true, in modern times, that no money

(1) (1822) 3 Brod. & B. 275; 129 E.R. 1290.
(2) (1881) 6 App. Cas. 619.
(3) (1897) 1 Q.B. 555.
(4) (1886) 11 App. Cas. 607, at p. 613.
(5) (1865) L.R. 1 Q.B. 173.
(6) (1916) 2 A.C. 610.
(7) (1922) 1 A.C. 457.
(8) (1924) A.C. 318.
(9) (1925) A.C. 754.
(10) (1922) 31 C.L.R., at p. 451.
(11) (1924) 34 C.L.R., at p. 219.

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can be withdrawn from the public funds without a distinct authorization of Parliament itself. The Crown is dependent upon the supply granted to it by Parliament, and there is an express or implied term in its contracts that payment shall be made out of moneys so provided. But the existence of the contract is not conditional upon Parliamentary authority, or upon provision of funds by Parliament for the performance of the contract. The view that it is so conditional is entirely contrary to English practice, and to a long line of cases, collected in *Robertson, Civil Proceedings by and against the Crown* (1908), p. 337. (See *R.* v. *Doutre* (1); *Rayner* v. *The King* (2).) Moreover, it is in opposition to the statement of the Judicial Committee in *R.* v. *Fisher* (3). Constitutional practice, as in the *Commercial Cable Case* (4), or statutory provisions, as in *Churchward's Case* (5) or *Mackay's Case* (6), may prescribe conditions precedent to the making of contracts with the Crown, and so far as these conditions exist they must be observed. But otherwise contracts made on behalf of the Crown by its officers or servants in the established course of their authority and duty are Crown contracts, and as such bind the Crown. The nature and extent of the authority may be defined by constitutional practice or express instructions, or inferred from the nature of the office or the duties entrusted to the particular officer or servant. It is not every contract made or purporting to have been made by an officer or servant of the Crown on its behalf that will bind the Crown, but only such as are within the authority delegated to that officer or servant. The authority is a matter which ultimately falls for determination in the Courts of law (see *Musgrave* v. *Pulido* (7)). The fact that a Premier, or a responsible Minister of the Crown, has entered into a contract on the part of the Crown, or has directed a subordinate official so to do by no means established the necessary authority : such a rule, while it might not destroy Parliamentary control over the amount and manner of expenditure of public money, would seriously weaken that control. In each case, the character of the transaction, and also constitutional practice, must be considered. The question of authority, in the case of contracts providing

(1) (1884) 9 App. Cas. 745.
(2) (1930) N.Z.L.R. 441.
(3) (1903) A.C., at p. 167.
(4) (1916) 2 A.C. 610.
(5) (1865) L.R. 1 Q.B. 173.
(6) (1922) 1 A.C. 457.
(7) (1879) 5 App. Cas. 102.

for the carrying on of the ordinary activities or functions of government, presents, as a rule, but little difficulty; other contracts, however, must be considered each in relation to its own facts.

The contract in question in this appeal has one sinister and dangerous aspect: it was directed as a matter of Government policy, and was one which, apparently, the permanent officers of the Premier's Department would not have made without special instructions. It has not been alleged, however, that the contract is contrary to public policy: though that would not be conclusive if illegality were in fact established (*Scott* v. *Brown, Doering, McNab & Co.* (1)). The question then is simply whether a contract made by the Superintendent of Advertising on behalf of the Crown binds it.

An advertising branch in the Premier's Department had been established in New South Wales as one of the ordinary activities and functions of its Government. A superintendent in charge of the branch was appointed, and it was in the ordinary course of his duty to prepare and make contracts for Government advertising. In the present case, he received special instructions from the head of the Government to make the contract sued upon. A contract made in these circumstances is a Government contract, and in my opinion binds the Crown. The idea "that there is . . . no remedy against the Crown" for breach of such a contract is "in substance erroneous" (see *Dicey, Law of the Constitution*, 8th ed. (1915), p. 586). In England, the remedy is by petition of right. In the State of New South Wales, a remedy is provided by the *Claims against the Government and Crown Suits Act* 1912, No. 27; in the State of Victoria by the *Crown Remedies and Liability Act* 1928. And the Constitution provides that in all matters between a State and a resident of another State this Court shall have original jurisdiction (Constitution, sec. 75 (IV.); *The Commonwealth* v. *New South Wales* (2)).

Evidence was adduced in the Court below of the provision made by Parliament for governmental advertising during the period of the contracts in question here. But, in the view I take, it was irrelevant, and, so far as I follow it, the amount provided by Parliament was never sufficient to provide for all the obligations entered into on

(1) (1892) 2 Q.B. 724.

(2) (1923) 32 C.L.R. 200.

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behalf of the Crown as they fell due. Further, I accede to the view put forward by *Isaacs* and *Rich* JJ. in the *Colonial Ammunition Case* (1) as to Appropriation Acts.

The appeal should for the reasons above stated be dismissed.

DIXON J. The Government Tourist Bureau in New South Wales conducts an "industrial undertaking" within the meaning of the *Special Deposits (Industrial Undertakings) Act* 1912-1930. It has a special account at the Treasury into which its receipts are paid and from which its expenditure is defrayed. The Bureau, which is managed by an officer called a director, is a department of the Public Service under the control of the Chief Secretary, who is the responsible Minister. An incident of its work is continual advertising. Many other departments of Government in New South Wales have occasion to advertise. To deal with Government advertisements and publications concerning the various departments, an office has been established in the Premier's Department. The officer is called the "Editor of Publications and Superintendent of Advertising," shortened to "Superintendent of Advertising." It is his duty to authenticate orders and contracts for all government advertising. In the case of advertisements of the Tourist Bureau, he usually consults with the manager. The cost of such advertisements would in the ordinary course be met in the first instance out of moneys available to the Premier's department, but would in the end be debited to a Tourist Bureau special deposit account.

In the action out of which this appeal arises, the plaintiff sues upon a contract made by the Superintendent of Advertising for the insertion of advertisements of the Tourist Bureau in a newspaper called the *Labor Weekly*, of which the plaintiff is proprietor. By the contract the Government took a large amount of space weekly at specified rates for the period of a year from the beginning of April 1932. A year earlier a similar contract had been made, but much of the space provided for had not been used, and by the new contract, which was partly oral and partly written, the Government engaged for a further amount of space, and arranged to use, at a given quantity a week, that remaining from the previous year.

(1) (1924) 34 C.L.R., at pp. 220-225.

Each contract was made by the Superintendent of Advertising under instruction from the Premier's private secretary. Orders had been given by the permanent head of the Premier's department that instructions from the private secretary should be treated as coming from the Premier. The use of the newspaper for such advertisements was, it is said, a matter of Government policy. For this reason, perhaps, the Director of the Tourist Bureau was informed that the cost of the advertisement would not be debited against the Bureau, a statement which, no doubt, meant that it would be met out of the amount annually appropriated to the Premier's department for expenditure under the head "Government Advertising." Shortly after the making of the contract sued upon, a change of Government took place and the new administration refused to use or pay for any further advertising space in the *Labor Weekly*. The plaintiff, notwithstanding this refusal, held the advertising space at the disposal of the Government and actually filled it by repeating advertisements already supplied. At the end of the year he sued the State of New South Wales for the total unpaid amount of the agreed advertising rates. The point is not made that he should have claimed, not the liquidated amount, but unliquidated damages. Nor is it denied that *de facto* a contract was made under the authority of the Premier as a responsible Minister of the Crown. Moreover, the honesty of the transaction is not impugned. No case is made that the contract, although entered into ostensibly for the purposes of the Tourist Bureau, was actually designed to benefit the plaintiff, so that, to his knowledge, it did not rest upon a bona fide exercise of authority on the part of the Crown's servants. The contention upon which the defence to the action depends is that, for two reasons, the facts I have stated are not enough to impose upon the Crown in right of New South Wales a contractual liability which is actionable. The first reason given is that at common law no authority resided in any of the servants of the Crown who made and authorized the agreement, and none was reposed by statute, to make on behalf of the Crown a contract of the nature of that put in suit. The second reason given is that no contract for the payment of money can expose the Crown to legal proceedings unless and until

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moneys to answer the payment have been appropriated by Parliament or the contract has been sanctioned by legislative enactment, and that neither of these conditions has been satisfied.

These grounds depend upon considerations of general application and are in no way concerned with the merits of the particular contract. They depend only upon the subject matter of the contract, its terms, the position of the officer who actually made it, and his instructions from the Premier, apart from principles of law and statutory provisions including, perhaps, those of Appropriation Acts. Although I have stated the grounds for it separately, the contention that the contract is not an enforceable obligation of the State of New South Wales does not treat them altogether as independent, because, even if otherwise an authority to make the contract would exist in the servants of the Crown, it is maintained that the authority must remain insufficient to impose an obligation unless there be some parliamentary financial provision covering the Crown's liability under it, or a distinct statutory antecedent power to make the contract or a subsequent recognition of it. But, in my opinion, the contention for the Crown is ill-founded, and, in giving my reasons for that opinion, I find it necessary to distinguish between the two reasons upon which it appears to me to depend.

The action upon the contract has not been brought in the Courts of the State but under sec. 58 of the *Judiciary Act* 1903-1933 in the original jurisdiction conferred by sec. 75 (iv.) of the Constitution upon this Court in matters between a State and a resident of another State. The plaintiff resides in South Australia. Under these provisions the Crown in right of the State is liable to be sued in contract and in tort. But although judgment may be given in the suit as if between subject and subject, no execution may issue thereon against the State, but a certificate of the judgment issues upon receipt of which " the Treasurer . . . of the State . . . shall satisfy the judgment out of moneys legally available " (secs. 64, 65 and 66 of the *Judiciary Act*). These provisions serve to measure the liability to which the Crown may be adjudged. It is not absolute but to pay out of moneys made available under the law of the State. They " recognize the principle that the liabilities

of the Crown in right of the States are subject to parliamentary appropriation of funds" (*New South Wales* v. *The Commonwealth* [*No.* 1] (1)). The question therefore strictly is whether the State has incurred a liability to this judicial remedy.

In considering whether the Crown was affected with responsibility for the agreement made on its behalf by the Superintendent of Advertising, that is, whether, independently of parliamentary provision of funds, it became the contract of the Crown, it is a matter of primary importance that the subject matter of the contract, notwithstanding its commercial character, concerned a recognized and regular activity of Government in New South Wales. Not only has the conduct of a Tourist Bureau been long practised by the Executive. It has been recognized by Parliament in the appropriation of funds, and it has been proclaimed under statute as an industrial undertaking. Again, it is a matter of no small importance that the contract was made by an officer appointed for the regular discharge of duties which included the making of contracts in reference to advertisements of the Tourist Bureau. His independent authority would probably be enough to support the contract, but the intervention of the Premier, in my opinion, puts beyond question the authority of the contract as a transaction of the Crown. In New South Wales the Premier is a Minister of the Crown known to the law. The Premiership itself is an office mentioned in the *Constitution Act* (cf. secs. 27 and 29 and Second Schedule). In his capacity of Premier he administers a department. It appears that, in the division of work among various departments, the making of advertising contracts fell to an officer of his department, who, therefore, must act under his control and direction. But independently of this consideration, as head of the administration, he must be assumed to speak with the authority of the Government. It is not a tenable position that, because he did not act through the Chief Secretary as the Minister administering the Tourist Bureau, his instructions cannot in law amount to an authorization on behalf of the Crown. Nor is it possible to treat the communication to the Director of the Tourist Bureau, that the expenditure would not be debited to his account, as taking the contract out of the course of the authority

(1) (1932) 46 C.L.R. 155, at p. 177.

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residing in the Premier and his officer, the Superintendent of Advertising. The bona fides of the transaction not being in question, this can amount to no more than a proposal communicated by one servant of the Crown to another as to the fund which should provide for the burden, a matter which could not concern the plaintiff. No statutory power to make a contract in the ordinary course of administering a recognized part of the government of the State appears to me to be necessary in order that, if made by the appropriate servant of the Crown, it should become the contract of the Crown, and, subject to the provision of funds to answer it, binding upon the Crown. (See, per *Blackburn* J., *Thomas* v. *The Queen* (1), and, per *Rowlatt* J., *Rederiaktiebolaget Amphitrite* v. *The King* (2).) I think that the contract sued upon is a contract of the Crown.

It remains to deal with the contention that the contract is unenforceable because no sufficient appropriation of moneys has been made by Parliament to answer the contract. "The general doctrine is that all obligations to pay money undertaken by the Crown are subject to the implied condition that the funds necessary to satisfy the obligation shall be appropriated by Parliament" (*New South Wales* v. *The Commonwealth* [*No.* 1] (3)). But, in my opinion, that general doctrine does not mean that no contract exposes the Crown to a liability to suit under the provisions of secs. 58 to 66 of the *Judiciary Act* unless and until an appropriation of funds to answer the contract has been made by the Parliament concerned, or unless some statutory authorization or recognition of the contract can be found. The very object of such provisions is to enable the subject to establish against the Crown, which except by statute cannot be sued without its own consent, a contractual or delictual liability subject to the condition which is preserved by the nature of the judgment that moneys shall be legally available to satisfy the claim so established. The effect and operation of such enactments was early described by the Supreme Court of Victoria. "In many instances money has been so appropriated as to be applicable to the satisfaction of judgments against the Crown. In all cases the Act presents a simple and comparatively economical machinery for

(1) (1874) L.R. 10 Q.B. 31, at p. 33. (2) (1921) 3 K.B. 500, at p. 503.
(3) (1932) 46 C.L.R., at p. 176.

obtaining the decision of the Supreme Court of the country (which decision may be reviewed by the highest Court of appeal) on the questions whether a valid contract has been made between the suppliant and the Crown, and what damages should be awarded for the breach of such a contract. It is left to Parliament, if no money is applicable to the liquidation of those damages, to determine whether the judgment obtained on that decision should be satisfied or not" (*Alcock* v. *Fergie* (1)). In this manner the principle that Parliament shall control the expenditure of public moneys is preserved, but the subject is given a means of establishing the existence and validity of his claim against the Executive Government. (See *Rayner* v. *The King* (2)). The principles of responsible government impose upon the administration a responsibility to Parliament, or rather to the House which deals with finance, for what the Administration has done. It is a function of the Executive, not of Parliament, to make contracts on behalf of the Crown. The Crown's advisers are answerable politically to Parliament for their acts in making contracts. Parliament is considered to retain the power of enforcing the responsibility of the Administration by means of its control over the expenditure of public moneys. But the principles of responsible government do not disable the Executive from acting without the prior approval of Parliament, nor from contracting for the expenditure of moneys conditionally upon appropriation by Parliament and doing so before funds to answer the expenditure have actually been made legally available. Some confusion has been occasioned by the terms in which the conditional nature of the contracts of the Crown from time to time has been described, terms chosen rather for the sake of emphasis than of technical accuracy. But, in my opinion, the manner in which the doctrine was enunciated by *Isaacs* C.J., when he last had occasion to state it, gives a correct as well as a clear exposition of it. In *Australian Railways Union* v. *Victorian Railways Commissioners* (3), he said: "It is true that every contract with any responsible Government of His Majesty, whether it be one of a mercantile character or one of service, is subject to the condition that before payment is made out of the

(1) (1867) 4 W.W. & a'B. (L.) 285, at pp. 320, 321.

(2) (1930) N.Z.L.R. at pp. 457-459.

(3) (1930) 44 C.L.R., at p. 353.

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Public Consolidated Fund Parliament must appropriate the necessary sum. But subject to that condition, unless some competent statute properly construed makes the appropriation a condition precedent, a contract by the Government otherwise within its authority is binding." Notwithstanding expressions capable of a contrary interpretation which have occasionally been used, the prior provision of funds by Parliament is not a condition preliminary to the obligation of the contract. If it were so, performance on the part of the subject could not be exacted nor could he, if he did perform, establish a disputed claim to an amount of money under his contract until actual disbursement of the money in dispute was authorized by Parliament. It is true that in many cases the existence of a fund out of which it is lawful to pay for such purposes as the contract may be supposed to serve might suffice as an authority for the expenditure of money to satisfy the contract, but in many others, where the contract was of an exceptional nature, some specific appropriation would appear to be demanded. It would defeat the very object of such provisions as those contained in the *Judiciary Act*, if, before the Courts could pass upon the validity in other respects of the subject's claim against the Crown, it were necessary that Parliament should vote the moneys to satisfy it. Certainly no justification whatever for such a requirement can be found in the case of liability to suit for tort. It would be strange if liability to suit upon contract was dependent upon the antecedent fulfilment of the condition that moneys have been made available to satisfy the claim.

No case has been found before the *Petitions of Right Act* 1860 in which the existence has been asserted of an implied condition in contracts with the Crown that funds should be appropriated to answer the expenditure involved. But, in *Macbeath* v. *Haldimand* (1) Lord *Mansfield* did say that those who advance money for the public service trust to the faith of Parliament and that, if there were a recovery against the Crown by a suppliant by petition of right, application must be made to Parliament. The doctrine first finds expression in *Churchward* v. *The Queen* (2), in the judgment of *Shee* J.

(1) (1786) 1 T.R. 172, at pp 176, 177 ; 99 E.R. 1036, at pp. 1038, 1039.
(2) (1865) L.R. 1 Q.B. 173 ; 14 L.T. 57 ; 30 J.P. 213 ; 2 Maritime Law Rep. (Crockford) 303 ; 6 B. & S. 807 ; 122 E.R. 1391.

The contract there sued upon contained an express condition making it subject to parliamentary provision of funds which *Shee* J. described as a condition precedent, and, as a result of a public controversy about it, Parliament had specially excluded the transaction from the purposes to which funds were lawfully applicable. (Cf. *Todd's Parliamentary Government in England* (1867), vol. I., pp. 497-503.) The observations of *Shee* J. (1) were *obiter*, but they have been accepted as a statement of the rule of law that, in contracts for the payment of public moneys, it is implied that the liability of the Crown is conditional upon appropriation of funds. In *R.* v. *Fisher* (2), in answer to a claim by a servant of the Crown for the balance of salary erroneously withheld although due to him under the Public Service Acts, the defence was raised on behalf of the Crown, that in the annual Appropriation Acts the full salary had not been provided, and *Churchward's Case* (3) was relied upon. In the course of an elaborate judgment, in which he denied the validity of this contention on more than one ground, *Madden* C.J. expressed the opinion that the Victorian *Crown Remedies and Liability Act* ought not to receive the construction placed upon it in *Alcock* v. *Fergie* (4), according to which a judgment against the Crown could be satisfied, like a judgment under the Federal Act, only out of moneys otherwise made legally available for the purpose, but should be construed as itself amounting to a special appropriation of moneys to answer such judgments. But he proceeded to say that, whatever the provision meant, " the proceedings provided by it are to occur after judgment, and the Crown's argument now is that the non-provision of the money in the *Appropriation Act* is an answer to the maintenance of the action, so that, in such cases, judgment could never be reached at all " (5). In dealing with the point that, as the Appropriation Act only provided the amount of salary already paid to the suppliant, nothing further could be recovered against the Crown, Sir *Ford North*, who delivered the judgment of the Privy Council, said : " This was very fully and exhaustively dealt with by the Chief Justice ; and his reasoning on this point was not challenged at their Lordships' bar.

(1) (1865) L.R. 1 Q.B., at pp. 209, 210.
(2) (1901) 26 V.L.R. 781 ; (1903) A.C. 158, at p. 167.
(3) (1865) L.R. 1 Q.B. 173.
(4) (1867) 4 W.W. & a'B. (L.) 285.
(5) (1901) 26 V.L.R., at p. 798.

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But in any case their Lordships would not enter upon the consideration of that question, as they are satisfied that, the respondent having finally established the validity of his claim against the Crown for the sum for which he has recovered judgment, the provision necessary to satisfy that obligation will be readily and promptly made" (1). (Cf., per *Higgins* J., *Williamson* v. *The Commonwealth* (2).) For some time afterwards the absence of appropriation does not appear to have been seriously relied on by the Crown as an answer to a claim *ex contractu*. But, in *Commercial Cable Co.* v. *Government of Newfoundland* (3), an observation upon the subject was made by Viscount *Haldane* in delivering the judgment of the Privy Council, and, perhaps, as a result, the defence has of late been raised not infrequently both by and against the Crown. In that case the contract upon which the Crown was sued was held to be invalid because it had not been approved by the House of Assembly of Newfoundland pursuant to a rule of that House, made under the authority of statute, requiring that in all contracts extending over a period of years and creating a public charge, actual or prospective, entered into by the Government, there should be inserted the condition that the contract should not be binding until it had been approved by resolution of the House. A new administration had repudiated the agreement and had sought no approval for it. Viscount *Haldane* in concluding the judgment remarked (3):—"What view the Legislature might have taken had it been properly submitted is a topic into which no Court of law can enter, and no damages can be recovered for breach of any implied promise so to submit it. For all grants of public money, either direct or by way of prospective remission of duties imposed by statute, must be in the discretion of the Legislature, and where the system is that of responsible government, there is no contract unless that discretion can be taken to have been exercised in some sufficient fashion." In *Rayner* v. *The King* (4), *Adams* J., speaking for the New Zealand Court of Appeal, pointed out that the words "there is no contract" meant "no contract to pay." But I think it is certain that His Lordship did not mean that no contract of the Crown was actionable under

(1) (1903) A.C., at p. 167.
(2) (1907) 5 C.L.R. 174, at p. 183; 14 A.L.R. 1, at p. 4.
(3) (1916) 2 A.C. 610, at p. 617.
(4) (1930) N.Z.L.R., at p. 458.

the Crown Remedies legislation of the Dominions and Colonies unless and until money was appropriated to answer it, and this indeed his subsequent utterances make clear. This is true also of the expressions used by Viscount *Haldane* in *Mackay* v. *Attorney-General for British Columbia* (1), where he speaks of the "legal validity" of the contract although he founds this proposition on *Churchward's Case* (2). The decision of the Board simply was that a contract of a description which the Legislature had empowered the Lieutenant-Governor to make could not be supported unless made by him in such a manner as to comply with the statute. But in the *Wool Tops Case* (3), where the Court gave judgment against the Crown's claim upon a contract made by it with a subject, *Isaacs* J., as he then was, on the strength of these observations actually took, as an additional reason for concurring, the ground that the contract involved payment of money by the Crown and was therefore wholly void, so that it was unenforceable at the suit of the Crown as well as of the subject. The doctrine was again considered by *Isaacs* and *Rich* JJ. in *Commonwealth* v. *Colonial Ammunition Co.* (4), but in that case for the contract to be valid an Order in Council was required under sec. 63 of the *Defence Act* 1903-1918, and all their Honors decided was that the provision by Parliament of funds for the service involved by the contract did not cure such a defect. In *Kidman* v. *The Commonwealth* (5) a contractor with the Crown, who incurred a liability which passed into an arbitration award, failed, on various grounds which do not call for particular examination, in a defence based upon the supposed invalidity of the contract because no funds appeared to have been voted to meet the expenditure involved. *Higgins* J. (6), however, simply stated the doctrine to be that "even if a contract is binding on the Commonwealth there is no way of getting payment from the Commonwealth unless under an appropriation by Parliament." In the meantime, the House of Lords had decided *Attorney-General* v. *Great Southern and Western Railway Co. of Ireland* (7). In the course of his opinion in that case, Viscount *Haldane* (8), after saying that he assumed that a contract had been established which still subsisted, proceeded:—"But what is the nature of

(1) (1922) 1 A.C., at p. 461.
(2) (1865) L.R. 1 Q.B. 173.
(3) (1922) 31 C.L.R. 421.
(4) (1924) 34 C.L.R., at p. 220.
(5) (1925) 37 C.L.R. 233.
(6) (1925) 37 C.L.R., at p. 247.
(7) (1925) A.C. 754.
(8) (1925) A.C., at pp. 771, 772.

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the remedy on this footing made available against the Crown? The Court of Appeal appear to me to have proceeded on the footing that the remedy in case of its breach was analogous to that on the ordinary contract of a private individual. Surely sec. 14 of the *Petition of Right Act* contains a warning that this is not to be assumed. Under that Act no personal judgment against the Sovereign can be rendered. All that the Act provides is, in a public matter, that the Treasury may be required to pay what has been found due out of any moneys in their hands legally applicable thereto, or which may be thereafter voted by Parliament for that purpose. This is not a provision which is to be expected otherwise than in the restricted form in which it is made." Then, after illustrating this statement by the *Commercial Cable Co.'s Case* (1), *Auckland Harbour Board* v. *The King* (2) and *Churchward's Case* (3), he continued (4):—"My Lords, I am of opinion that the judgments in these three cases illustrate a principle which is definitely recorded in our text books of constitutional law. However clear it may be that before the Revolution Settlement the Crown could be taken to contract personally, it is equally clear that since that Settlement its ordinary contracts only mean that it will pay out of funds which Parliament may or may not supply." This passage makes it clear, in my opinion, that Viscount *Haldane* regarded the provision of funds by Parliament simply as a contractual condition and as a condition which must be fulfilled before actual payment by the Crown, but not as a matter going to the formation, legality, or validity of the contract, and not as a condition precedent to suit, at any rate, under enactments which authorize a judgment giving no right to the subject except to payment out of moneys made legally available by Parliament. This is clearly shown by the second alternative in the statement of the terms of sec. 14 of the *Petition of Right Act* in the sentence, "All that the Act provides is, in a public matter, that the Treasury may be required to pay what has been found due out of any moneys in their hands legally applicable thereto, *or which may be thereafter voted by Parliament for that purpose*" (5). This alternative necessarily implies that judgment against the Crown may be given on a petition of

(1) (1916) 2 A.C. 610.
(2) (1924) A.C. 318.
(3) (1865) L.R. 1 Q.B. 173.
(4) (1925) A.C., at p. 773.
(5) (1925) A.C., at p. 772.

right to enforce a contract notwithstanding that up till that time moneys have not been appropriated or provided by Parliament out of which the liability may be lawfully discharged. Indeed the judgments of all the noble Lords proceed upon the tacit assumption that, unless the liability had been transferred to the Irish Treasury, the petitioners may succeed notwithstanding that the British Parliament had made no money provision for it. Subsequently, in the same matter as was dealt with by this Court in *Kidman's Case* (1), the subject applied to the Privy Council for special leave to appeal from a decision of the Supreme Court of New South Wales (2) giving liberty to enforce the award. In the course of the argument, which is reported (3), upon the *Commercial Cable Co.'s Case* (4) being referred to, Viscount *Haldane* said (5): "In that case we distinctly laid it down (in a judgment which I think I delivered) that the Governor-General, as representing the Crown, could enter into contracts as much as he liked, and even, if he made the words clear, to bind himself personally. But he was presumed only to bind the funds which might or might not be appropriated by Parliament to answer the contract, and if they were not, that did not make the contract null and *ultra vires*; it made it not enforceable because there was no *res* against which to enforce it. The Lord Chancellor" (Lord *Cave*). "Like *Churchward* v. *The King* (6)? Viscount *Haldane*. Yes, but the contract stood just as was said in *Churchward* v. *The King* (6)." His Lordship also said:—"We have had all these things dealt with quite recently in an Irish case in the House of Lords (*Attorney-General* v. *Great Southern and Western Railway Co. of Ireland* (7)). How can you say that, under the Federal Act, this was null? Just look at the section which gives the executive power: 'The executive power of the Commonwealth is vested in the King and is exercisable by the Governor-General as the King's representative.' That goes beyond the Constitution of Canada, and it enables him, the Prime Minister of the Commonwealth, to enter into contracts; whether they are enforceable depends upon whether there was an appropriation to answer them, but that is another thing."

(1) (1925) 37 C.L.R. 233.
(2) (1923) 23 S.R. (N.S.W.) 590.
(3) (1926) A.L.R. at pp. 1-3.
(4) (1916) 2 A.C. 610.
(5) (1926) A.L.R., at p. 2.
(6) (1865) L.R. 1 Q.B. 173.
(7) (1925) A.C. 754.

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Finally, in *Rayner* v. *The King* (1), after referring to Viscount *Haldane's* statement in *Attorney-General* v. *Great Southern and Western Railway Co. of Ireland* (2), *Adams* J. said :—"But, as we have said, the right to proceed under the *Crown Suits Act* is not affected. To hold otherwise would be to stultify the Act, since by the very fact of making a special appropriation Parliament has acknowledged the liability and authorized its payment by the proper authorities in terms of the *Public Revenues Act*. If the right to petition were given only to persons in whose favour a special appropriation had been made the main object of that part of the Act would be defeated." The legislation of New Zealand contained in the *Public Revenues Act* is not reproduced in New South Wales, but this statement illustrates how the condition implied in Crown contracts has been understood to operate and the meaning which is to be attributed to the cases I have discussed.

In my opinion, it is not an answer to a suit against a State under the *Judiciary Act* upon a contract, that the moneys necessary to answer the liability have not up to the time of the suit been provided by Parliament. This does not mean that, if Parliament has by an expression of its will in a form which the Court is bound to notice, refused to provide funds for the purposes of the contract, it remains actionable under the *Judiciary Act*. That question does not arise in the present case. Indeed a ground upon which the judgment of *Evatt* J. is based is that moneys were provided by Parliament out of which the liability to the plaintiff might lawfully be discharged. I do not in any way disagree with this view, but, as I have formed a definite opinion that the contention of the Crown misconceives the doctrine upon which it is founded, I have thought it desirable to place my judgment upon the grounds I have given.

In my opinion the judgment of *Evatt* J. is right and should be affirmed.

McTIERNAN J. The executive functions which are exercised by the Government of New South Wales include the provision of accommodation and other facilities for tourists. These services are managed by the Government Tourist Bureau, which, having the

(1) (1930) N.Z.L.R., at pp. 458, 459. (2) (1925) A.C., at p. 773.

character of an industrial undertaking, was proclaimed as such by the Governor in Council for the purpose of the *Special Deposits (Industrial Undertakings) Act* 1912-1930. It is a trading or business enterprise and any profits derived from carrying it on are liable to income tax (*Special Deposits (Industrial Undertakings) Amendment Act* 1930, sec. 2). The undertaking was at all material times administered by the Chief Secretary, who is a Minister of the Crown, and a member of the Cabinet. The contract sued upon was made on the instructions of the Premier communicated directly by him through his private secretary to the Editor of Publications and Superintendent of Advertising, who is an officer of the Premier's Department, and has the duty of attending to Government advertising. There can be no doubt that the Premier entered into the alleged agreement through this officer as his instrument. Moreover, the evidence shows that the alleged contract whereby the respondent undertook to publish " advertisements " re the Government Tourist Bureau and other matters in his newspaper was a matter of Government policy. The advertisements which were published pursuant to the arrangement, and for which the respondent claims payment, related to the Government Tourist Bureau. This undertaking is not incorporated by statute nor is there any legislative definition of its powers and duties. But it is made apparent that the Government Tourist Bureau is in fact an industrial undertaking of the Government. The carrying on of this enterprise is within the executive capacity of the Crown acting through the medium of its advisers. The making of a contract for advertising the services managed by this undertaking is within the scope of this function of the Crown. The contract now in suit is within the prerogative powers exercised by the Crown in carrying on the undertaking, and if the Premier was the competent ministerial authority or constitutional agent to bind the Crown it will become necessary to consider what is the effect on the contract of the Executive's dependence on Parliament to supply the funds to meet the financial obligation which the Executive assumed to undertake.

Constitutional rules would prevent the Governor as head of the Government from making the contract without ministerial advice. The contract might have been formally signed and approved by the

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Governor on ministerial advice after its terms had been determined by Cabinet or a responsible Minister. If the Premier had authority to make the contract, the absence of this formal execution of the contract by the Governor in Council would not prevent it binding the Crown. The agreement was of a commercial character and the making of it was incidental to the carrying on of one of the Crown's industrial undertakings (cf. *South of Ireland Colliery Co.* v. *Waddle* (1)). In my opinion the Premier was a competent ministerial authority and a constitutional agent to make this agreement for the Crown (cf. *Attorney-General* v. *Lindegren* (2)). In *Rederiaktiebolaget Amphitrite* v. *The King* (3), *Rowlatt* J. said: "No doubt the Government can bind itself through its officers by a commercial contract, and if it does so it must perform it like anybody else or pay damages for the breach." *Bankes* L.J. said in *Public Works Commissioners* v. *Pontypridd Masonic Hall Co.* (4): "Two cases have been referred to, *Graham* v. *Public Works Commissioners* (5) and *Roper* v. *Public Works Commissioners* (6), both of which make it clear that if a body, whether incorporated or not, is in fact acting in any particular matter as agents of the Crown, they are to be treated in law as such." In his judgment in *Mackenzie-Kennedy* v. *Air Council* (7), the same learned Lord Justice approved of the observations of *Day* and *Wills* JJ. in *Gilbert* v. *Corporation of Trinity House* (8), as to the authority of Ministers of State. These observations correctly define the relationship between responsible Ministers in New South Wales to the Crown in right of that State. "All the great officers of State are, if I may say so, emanations from the Crown. They are delegations by the Crown of its own authority to particular individuals" (per *Day* J. (9)). "I am clear that at common law there is no instance of any person or body having two distinct capacities—in one of which there is no liability to be sued because the person or body is the direct representative of the Crown, and in the other there is a liability to be sued because the capacity is that of a private corporation or

(1) (1868) L.R. 3 C.P. 463; (1869) L.R. 4 C.P. 617.
(2) (1819) 6 Price 287, at p. 308; 146 E.R. 811, at p. 818.
(3) (1921) 3 K.B. 500, at p. 503.
(4) (1920) 2 K.B. 233, at pp. 234, 235.
(5) (1901) 2 K.B. 781.
(6) (1915) 1 K.B. 45.
(7) (1927) 2 K.B. 517, at pp. 522, 523.
(8) (1886) 17 Q.B.D. 795.
(9) (1886) 17 Q.B.D., at p. 801.

person" (per *Wills* J. (1)). The Premier acted in his official and representative capacity and no action on the contract would lie against him in that capacity (*Gidley* v. *Lord Palmerston* (2); *Hosier Bros* v. *Earl of Derby* (3); *Attorney-General* v. *Great Southern and Western Railway Co. of Ireland* (4), per Lord *Dunedin*). Such an action could not be maintained because the Crown would be the real entity pursued (*Graham* v. *Public Works Commissioners* (5), per *Phillimore* J.; cf. *Dixon* v. *Farrer* (6); *Bainbridge* v. *Postmaster-General* (7)). The Government Tourist Bureau was, in the assignment of departments to Ministers, placed under the control of the Chief Secretary, who is a responsible Minister and a member of the Cabinet. But, in my opinion, the Premier nevertheless had authority to make the contract now in question. The responsibility for the administration of the Government Tourist Bureau was not confined to the Chief Secretary by statute. The Premier did not, in my opinion, make any unlawful assumption of the authority of the Chief Secretary as the medium through which the Crown administered this undertaking. It was competent for the Cabinet to check, if necessary, or determine the policy to be pursued by the Chief Secretary with respect to his department. It is to be taken that as a matter of Government policy the making of this contract had the collective assent of ministers; it is not suggested that the Chief Secretary dissented. Moreover there was no legal disqualification of any Minister acting for and representing the Crown in the making of this contract. The administration of the Tourist Bureau by the Chief Secretary was a matter of ministerial arrangement and not of legal necessity. "Except in so far as statute gives powers to one or other of the five secretaries of State, each is capable of performing any one of the functions of the various departments which I have briefly described. The secretaries are in this respect like the Judges of the High Court of Justice, each individually possess and may exercise the powers of any one of the others, but as its special business is assigned to each of the divisions of the High Court, so is a special department of government assigned

(1) (1886) 17 Q.B.D., at p. 803.
(2) (1822) 3 Brad. & B. 275; 7 Moore C.P. 91; 129 E.R. 1290.
(3) (1918) 2 K.B. 671.
(4) (1925) A.C. 754, at p. 775.
(5) (1901) 2 K.B. 781, at p. 790.
(6) (1886) 18 Q.B.D. 43, at p. 51.
(7) (1906) 1 K.B. 178.

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to each of the members of the secretariat. Each and all are primarily the means by which the royal pleasure is communicated; the work of each department is the work of the Crown, acting on the advice of responsible ministers, and for such action and advice each of these ministers must answer to Parliament" (*Anson, Law and Custom of the Constitution*, 3rd ed. (1907), vol. II., The Crown, Part I., p. 168).

Secs. 36, 37 and 38 of the *Constitution Act* 1902 of New South Wales do not lead to the result that the agreement was devoid of legal effect because it was made by the Premier and not by the Chief Secretary. These sections are in the following terms:—Sec. 36: "The Governor may authorise any Executive Councillor to exercise the powers and perform the official duties and be responsible for the obligations appertaining or annexed to any other Executive Councillor in respect to the administration of any department of the Public Service, whether such powers, duties, or obligations were created by virtue of the terms (express or implied) of any Act or are sanctioned by official or other custom: Provided that no such authority shall be granted under this section in respect of the powers, duties, and obligations by law annexed or incident to the office of the Attorney-General." Sec. 37: "Every such authority shall be in such terms and subject to such conditions as the Governor thinks fit and shall be duly recorded by the officer in charge of the records of the Executive Council." Sec. 38: "Subject to the proviso of section thirty-six, any official document, minute, instrument, or paper, of what kind soever, which, according to official custom or to the requirements of any Act, requires or appears to require the signature of any particular Executive Councillor, shall, in the absence or disability of such Executive Councillor, be valid and effectual to all intents and purposes if signed by any other Executive Councillor." These sections provide for overcoming the rigidity of restrictions on ministerial authority resulting from statute or custom. The administration of the Government Tourist Bureau was not annexed to the office of the Executive Councillor discharging the duties of Chief Secretary, by statute, or so far as appears, by official or other custom. We were informed that it was upon its creation part of the responsibility of the Attorney-General and Minister of Justice.

Furthermore, it was the collective will of the Ministers that the costs of the advertisements that were ordered by the Premier to be inserted "re Government Tourist Bureau or other matters" was to be borne by the Premier's Department. The making of the agreement was not, therefore, in fact an intrusion into the responsibilities of the Chief Secretary but the performance of an administrative act incidental to the lawful exercise by the Government of one of its functions which, although assigned to the Chief Secretary, was within the collective responsibility of the Cabinet. I agree with *Evatt* J. that the Premier had authority to bind the Crown by this agreement, assuming that the constitutional rules which make the Executive dependent on Parliament for supply do not operate to prevent any liability from attaching.

Viscount *Haldane* in his judgment in *Attorney-General* v. *Great Southern and Western Railway Co. of Ireland* (1), after referring to *Commercial Cable Co.* v. *Government of Newfoundland* (2), *Auckland Harbour Board* v. *The King* (3) and *Churchward* v. *The Queen* (4), said:—"I am of opinion that the judgments in these three cases illustrate a principle which is definitely recorded in our text books of constitutional law. However clear it may be that before the Revolution Settlement the Crown could be taken to contract personally, it is equally clear that since that Settlement its ordinary contracts only mean that it will pay out of funds which Parliament may or may not supply."

In the first of these cases, *Commercial Cable Co.* v. *Government of Newfoundland* (5), the dependence of the Executive on Parliament to provide funds to meet its obligations was secured by the adoption in the Constitution of an express rule whereby distinct parliamentary approval of the terms of a contract such as that there in suit, was demanded. If this rule were not obeyed no liability *ex contractu* attached. The judgment, which was delivered by Viscount *Haldane*, concluded with this statement:—"What view the Legislature might have taken had it been properly submitted is a topic into which no Court of law can enter, and no damages can be recovered for breach of any implied promise so to submit it. For all grants

(1) (1925) A.C., at p. 773.
(2) (1916) 2 A.C. 610.
(3) (1924) A.C. 318.
(4) (1865) L.R. 1 Q.B. 173.
(5) (1916) 2 A.C. 610.

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of public money, either direct or by way of prospective remission of duties imposed by statute, must be in the discretion of the Legislature, and where the system is that of responsible government, there is no contract unless that discretion can be taken to have been exercised in some sufficient fashion" (1).

In *Auckland Harbour Board* v. *The King* (2), the second of the cases referred to by Viscount *Haldane*, as illustrating the effect on the Government's contractual promises of its dependence on Parliament for money to honour them, his Lordship speaking for the Judicial Committee, concluded with this characteristic statement:—"For it has been a principle of the British Constitution now for more than two centuries, a principle which their Lordships understand to have been inherited in the Constitution of New Zealand with the same stringency, that no money can be taken out of the consolidated fund into which the revenues of the State have been paid, excepting under a distinct authorization from Parliament itself. The days are long gone by in which the Crown, or its servants, apart from Parliament, could give such an authorization or ratify an improper payment. Any payment out of the consolidated fund made without Parliamentary authority is simply illegal and *ultra vires*, and may be recovered by the Government if it can, as here, be traced" (3). The agreement under which the Government paid public moneys to the appellants was invalid, as appears from the judgment, for the following reasons:—"It was said, and it appears to have been the fact, that the Controller and Auditor-General subsequently passed the sum handed over as having been payable out of public moneys appropriated in general terms for railway services by the New Zealand Parliament in 1914. But this is not a sufficient answer to the contention that the payment was not authorized. Sec. 7 of the Act of 1912 provides that the sum which was agreed on at £7,500 was to be payable to the appellants only on a condition—namely, on the granting of the lease, which was to be the consideration. The provision which Parliament thus made was to be in itself a sufficient appropriation, but only operative if the condition was actually satisfied. Their Lordships have not been referred to any appropriation

(1) (1916) 2 A.C. 610, at p. 617.
(2) (1924) A.C. 318.
(3) (1924) A.C., at pp. 326, 327.

or other Act which altered these terms. If, as must therefore be taken to be the case, it remained operative, the authority given by Parliament is merely the conditional appropriation provided in sec. 7, for a condition which was not fulfilled. The payment was accordingly an illegal one, which no merely executive ratification, even with the concurrence of the Controller and Auditor-General, could divest of its illegal character" (1).

While these two judgments illustrate, as Viscount *Haldane* says, that principle of parliamentary control on the expenditure of public funds, the judgments do not assert, as I understand them, that the Crown or its constitutional agent, in exercising its lawful executive functions, is incapable of imposing on the Crown any obligation *ex contractu* to pay money unless Parliament has provided money specifically for the contract or approves of its terms; otherwise the judgments could not have become the basis of the observations in *Attorney-General* v. *Great Southern and Western Railway Co. of Ireland* (2), in which the learned Lord described the restricted nature of the liability imposed on the Crown by a contract involving pecuniary liabilities for which no parliamentary appropriation has been made. His Lordship's observations were as follows:—"In the present case Parliament transferred the duty of producing the fund out of which the liability in question, when it accrued, should be met to the Irish Parliament. It thereby declared its intention not itself to provide the money required out of its own consolidated fund. It does not matter whether the liability was in terms transferred to the Irish Government. By its very character it would cease when it became operative to be a liability of the British Consolidated Fund and become one of the Irish Legislature Central Fund, if they chose to so provide. I think that this appeal ought, therefore, to succeed. It is important that we should lay down clearly the restricted nature of the liability in modern times of the Crown under its contracts. It seems to me that what I believe to be the true character of this liability makes beside the point the bulk of the reasoning in the judgments under appeal in this case. For the true view of any liability there was I take to be that it was a liability

(1) (1924) A.C., at p. 326.

(2) (1925) A.C., at pp. 773, 774.

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in rem which ceased to be operative when the *res* was transferred" (1). Indeed the assumption on which the judgment proceeds is that there was a contractual bond between the Crown and the respondent. The problem was to ascertain the nature of the liability arising under it. The assumption made was expressed thus:— "My Lords, the case of the respondents is that the Board of Trade and the Ministry of Transport under authority from the Crown established a contract between the Crown itself and the respondents which still subsists, the creation of the Irish Government notwithstanding. I will assume for the purposes of my observations that this was so. But what is the nature of the remedy on this footing made available against the Crown?" (2).

There is no rule of the constitution of New South Wales similar to that which regulated the making of the contract in *Commercial Cable Co.* v. *Government of Newfoundland* (3), whereby the present contract is rendered devoid of any legal effect because its terms were not distinctly approved by Parliament; nor does it appear that the Parliament of New South Wales at any material time gave such a particular authority for the payment of public moneys for a specified consideration that it would, as in the case of *Auckland Harbour Board* v. *The King* (4), be inconsistent with such expression of the legislative will with respect to the disbursement of public moneys for the Government, to promise that public moneys would be paid to the respondent for the publication of the advertisements stipulated in the contracts now in suit.

Churchward v. *The Queen* (5) is the last of the judgments referred to by Viscount *Haldane* as illustrating the principles which he proceeded to state in *Attorney-General* v. *Great Southern and Western Railway Co. of Ireland* (6). It may be observed that the same authority was also approved by the Judicial Committee in *Mackay* v. *Attorney-General for British Columbia* (7) in which the judgment was also delivered by Lord *Haldane*. It contains this statement:—"The character of any constitution which follows, as that of British Columbia does, the type of responsible government in the British Empire, requires

(1) (1925) A.C., at pp. 733, 774.
(2) (1925) A.C., at p. 771.
(3) (1916) 2 A.C. 610.
(4) (1924) A.C. 318.
(5) (1865) L.R. 1 Q.B. 173.
(6) (1925) A.C., at p. 773.
(7) (1922) 1 A.C. 457.

that the Sovereign or his representative should act on the advice of Ministers responsible to the Parliament, that is to say, should not act individually, but constitutionally. A contract which involves the provision of funds by Parliament requires, if it is to possess legal validity, that Parliament should have authorized it, either directly, or under the provisions of a statute. It follows that in the present case, no such contract would have been made, unless sec. 3 authorized it. If authority be wanted for this proposition it will be found in *Churchward* v. *The Queen* (1), and in the decision of this Board in *Commercial Cable Co.* v. *Government of Newfoundland* (2). The vital preliminary question is, therefore, one of fact; was an order or resolution passed by the Lieutenant-Governor in Council authorizing the contract?" (3). In that case no contractual obligation resulted from the acts of the Executive because of the statutory restrictions which fenced its power of contracting. The reference to *Churchward* v. *The Queen* (1) in this judgment must be taken to be to the pronouncement of *Shee* J., for *Cockburn* C.J. in giving judgment made statements of a different import. He said:—"I am very far, indeed, from saying, if by express terms, the Lords of the Admiralty had engaged, whether Parliament found the funds or not, to employ Mr. Churchward to perform all these services, that then, whatever might be the inconvenience that might arise, such a contract would not have been binding; and I am very far from saying that in such a case a petition of right would not lie, where a public officer or the head of a department makes such a contract on the part of the Crown, and then afterwards breaks it. We are not called upon to decide that in the present case, and I should be sorry to think that we should be driven to come to an opposite conclusion" (4). He also said:—"I agree that, if there had been no question as to the fund being supplied by Parliament, if the condition to pay had been absolute, or if there had been a fund applicable to the purpose, and this difficulty did not stand in the petitioner's way, and he had been throughout ready and willing to perform this contract, and had been prevented and hindered from rendering these services by the default of the Lords of the Admiralty,

(1) (1865) L.R. 1 Q.B. 173.
(2) (1916) 2 A.C. 610.
(3) (1922) A.C. at p. 461.
(4) (1865) L.R. 1 Q.B., at pp. 200-201.

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then he would have been in a position to enforce his right to remuneration. But then his petition and his ground of complaint must have assumed a wholly different shape. He must then have alleged a performance, or a readiness to perform on his part, and a right to receive remuneration" (1). It will be seen that *Cockburn* C.J. was not troubled by the consideration to which he adverted, that Parliament may refuse to provide funds to enable the Government to pay, but *Isaacs* C.J., (then *Isaacs* J.) in his judgment in *The Commonwealth* v. *Colonial Combing, Spinning and Weaving Co.* (2) regarded that consideration of great importance. He said:—"There emerges from this the general understanding that Parliament is not to be fettered in its discretion as to public expenditure by anything the Executive may do. Parliamentary discretion would be severely fettered if the Executive could make a compact binding the Crown in law to pay away portion of the public funds and leaving to Parliament the alternative of assenting to the payment or disavowing a public obligation. That would be seriously weakening the control by Parliament over the public Treasury." In that case, the question, now material to be mentioned, reserved for the consideration of the Full Court, was as follows:—"Was it within the legal power of the Commonwealth Executive Government apart from any Act of the Parliament or regulation thereunder to make or ratify at the times the same were respectively made or ratified any and which of the following agreements" (3). The agreements were then mentioned. *Knox* C.J. and *Gavan Duffy* J., as he then was, said:—"In our opinion the answer to this question depends on the meaning of sec. 61 of the Constitution, which is as follows: '61. The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth'" (4). They reached the following conclusion:—"It is clear that none of these agreements is made in maintenance of the Constitution, and in our opinion it is equally clear that none is made in execution of the Constitution, because none of them is prescribed

(1) (1865) L.R. 1 Q.B., at p. 201.
(2) (1922) 31 C.L.R. 421, at p. 450.
(3) (1922) 31 C.L.R., at p. 430.
(4) (1922) 31 C.L.R., at p. 431.

or even authorized by the Constitution itself, and execution of the Constitution means the doing of something immediately prescribed or authorized by the Constitution without the intervention of Federal legislation. It is true that sec. 64 of the Constitution directs that the sovereign through his Ministers shall administer such departments of State as the Governor-General in Council may establish, and they would probably be authorized to make such contracts on behalf of the Commonwealth as might from time to time be necessary in the course of such administration; but it is not pretended that the contract now in question comes within that category" (1). This statement condemns the agreements because it was beyond the powers of the Executive Government as defined by the express terms of the Constitution of the Commonwealth to enter into them. But *Isaacs* J. condemned the arguments also on the ground that the Executive Government exceeded the limitations imposed upon it by constitutional practice. He said:—"In other words, the constitutional practice that the Crown's discretion to make contracts involving the expenditure of public money would not be entrusted to Ministers unless Parliament had sanctioned it, either by direct legislation or by appropriation of funds, had, like many other general customs of the country, acquired such consistency and notoriety that, stating it in legal terms, everyone must be deemed to have notice of it, and consequently no Court can regard any contract as valid which violates that practice. It is that same rule of law which is restated in *Mackay's Case* (2)" (3).

The contract in the present case depends upon the authority of the Crown to do what is necessary for or incidental to the conduct and management of an undertaking which it lawfully carried on with the advice of its Ministers. The contract is not rendered wholly invalid because of the operation of any express parliamentary or legislative restriction on the authority of the Government to make it or to spend revenue on the objects specified by the contract. But, although there is no such restriction, the Crown is subject to a constitutional incapacity to resort to the revenue without legislative authority to discharge the liabilities which it assumed to incur.

(1) (1922) 31 C.L.R., at p. 432. (2) (1922) 1 A.C. 457.
(3) (1922) 31 C.L.R., at p. 451.

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The effect on the contract of that incapacity is stated by *Shee* J. in *Churchward* v. *The Queen* (1), the third case referred to by Viscount *Haldane* as illustrating the constitutional principle which determines what conditions are to be implied in the obligation resulting from the Crown's " ordinary contracts." The Lords Commissioners of the Admiralty, on behalf of the Crown, had engaged to pay the suppliant in that case, a subsidy of £18,000 per annum out of funds to be provided by Parliament for that purpose in consideration that he would provide and maintain certain services including steam vessels whereby the mail could be conveyed. The suppliant claimed redress for the breach of an implied covenant on the part of the Crown to employ him to carry the mails. The covenant which he sought to imply would not have had as one of its terms, that the liability was to be satisfied out of funds to be provided by Parliament. Indeed that was one of the reasons given for deciding that the covenant in the terms alleged by the suppliant should not be implied. The pronouncement of *Shee* J., which was approved by the Judicial Committee in *Mackay* v. *Attorney-General for British Columbia* (2), and by the House of Lords in *Attorney-General* v. *Great Southern and Western Railway Co. of Ireland* (3), is in these terms :—" I should have thought that the condition which clogs this covenant, though not expressed, must, on account of the notorious inability of the Crown to contract unconditionally for such money payments in consideration of such services, have been implied in favour of the Crown . . . The condition of parliamentary provision is usually notified to Government contractors, for services of a continuing character, by covenants like the one before us. When not so notified, the occurrence of the alleged inconvenience—such are known to be the justice and honour of Parliament—is too improbable to induce any of the Queen's subject to forego when the opportunity offers the advantages of a good Government contract. It was beyond the power of the commissioners, as the suppliant must have known, to contract on behalf of the Crown, on any terms but those by which the covenant is restricted and fenced. I am of opinion that the providing of funds by Parliament is a condition precedent

(1) (1865) L.R. 1 Q.B. 173. (2) (1922) 1 A.C. 457.
(3) (1925) A.C. 754.

to it attaching. The most important department of the public service, however negligently or inefficiently conducted, would be above control of Parliament were it otherwise " (*Churchward* v. *The Queen* (1)). Before making this pronouncement *Shee* J. stated the considerations which guided him in formulating this conception of the obligation arising from a contractual promise of the Crown, whether the promise is unconditional, or conditional upon Parliament providing the money out of which it may be discharged. He said : " As a matter of ordinary law, between subject and subject, a covenant so guarded would be held to be binding on the covenantor only in the event of his being supplied with funds from the source which the contract had indicated. The cases cited by the Attorney-General, *Gurney* v. *Rawlins* (2), *Dawson* v. *Wrench* (3) and *Hallett* v. *Dowdall* (4), are on this point." This conception is clearly suggested by Baron *Parke's* observations in *Gurney* v. *Rawlins* (5), " The defendants undertake by an instrument under seal that this sum of money shall be paid, if the funds prove adequate ; therefore it is equivalent to a covenant to pay if J.S. go to Rome." It appears therefore that the exigency of binding constitutional practice fashions the promise of the Crown into a promise to pay out of moneys lawfully available under parliamentary appropriation for the discharge of the promise. The contract under which the respondent claims to be paid is one of the " ordinary contracts " of the Crown—the conception introduced by Viscount *Haldane* in the passage which has been quoted in his judgment in *Attorney-General* v. *Great Southern and Western Railway Co. of Ireland* (6), and, as such, means that the Crown would pay out of funds " which Parliament may or may not provide." In *Australian Railways Union* v. *Victorian Railways Commissioners* (7) *Isaacs* C.J. said :—" It is true that every contract with any responsible Government of His Majesty, whether it be one of a mercantile character or one of service, is subject to the condition that before payment is made out of the Public Consolidated Fund Parliament must appropriate the necessary sum. But subject to that condition,

(1) (1865) L.R. 1 Q.B., at pp. 209, 210.
(2) (1836) 2 M. & W. 87 ; 150 E.R. 680.
(3) (1849) 3 Ex. 359 ; 154 E.R. 883.
(4) (1852) 18 Q.B. 2 ; 118 E.R. 1.
(5) (1836) 2 M. & W., at p. 90 ; 150 E.R., at p. 682.
(6) (1925) A.C. 754.
(7) (1930) 44 C.L.R. 319, at p. 353.

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unless some competent statute properly construed makes the appropriation a condition precedent, a contract by the Government otherwise within its authority is binding." Without appropriation, therefore, there may be a contract, but, unless there is an appropriation, the Crown's liability to pay does not attach. In *New South Wales* v. *The Commonwealth* (1), *Rich* and *Dixon* JJ. said:—"But under the Constitution of each of the States the pecuniary obligations of the States cannot be answered out of the consolidated revenue except under parliamentary appropriation. The general doctrine is that all obligations to pay money undertaken by the Crown are subject to the implied condition that the funds necessary to satisfy the obligation shall be appropriated by Parliament."

Evatt J. found that in the two relevant financial years funds were available under parliamentary appropriation out of which the Government was at liberty to pay the respondent for the publication of the advertisements at the stipulated rates. I agree with that finding. To prove the fulfilment of the condition precedent to the Crown's liability *ex contractu* to pay these moneys to the respondent, it is not necessary to show that the Appropriation Acts contain a specific provision of funds to meet this particular contract. The Appropriation Acts passed by Parliament placed money at the disposal of the Government for "Government Advertising." There was, as *Evatt* J. found, sufficient money available to the Government when the contract was entered into, to answer the pecuniary obligations of the Crown under it for the remainder of that financial year, and the amount appropriated by Parliament for that service in the next financial year was sufficient to discharge all liabilities in respect of it for that year. There was no restriction against the application of such money to this contract. In *The Commonwealth* v. *Colonial Ammunition Co.* (2) *Isaacs* and *Rich* JJ. said: "The object of supply and appropriation is simply to furnish the Crown with authority and opportunity to obtain the money it desires for the government of the country." No attack is made on the good faith of Ministers in entering into the contract. The condition implied in the obligation which the contract imposed on

(1) (1932) 46 C.L.R. 155, at pp. 175, 176.
(2) (1924) 34 C.L.R. 198, at p. 222.

the Crown was, in my opinion, satisfied by a sufficient appropriation of moneys by Parliament, whereby moneys were supplied to the Government out of which it could, consistently with parliamentary control over expenditure, discharge that obligation. The respondent is therefore entitled to judgment for the amount claimed. Sec. 65 of the *Judiciary Act* provides: "No execution or attachment, or process in the nature thereof, shall be issued against the property or revenues of the Commonwealth or a State in any such suit; but when any judgment is given against the Commonwealth or a State, the Registrar shall give to the party in whose favour the judgment is given a certificate in the form of the Schedule to this Act, or to a like effect." Sec. 66 of the same Act says: "On receipt of the certificate of a judgment against the Commonwealth or a State the Treasurer of the Commonwealth or of the State as the case may be shall satisfy the judgment out of moneys legally available." The form of certificate of judgment is, so far as material, as follows:—"I hereby certify that A.B. . . . did on the . . . day of . . . obtain a judgment of the High Court in his favour, and that by such judgment the sum of £ was awarded to him." The remedy thereby given a successful plaintiff does not purport to override the right of the Parliament of the State to control the disbursement of the revenue; and, if there is no money available under parliamentary appropriation to pay the judgment, its satisfaction must await the pleasure of the Parliament. "It never has been contended, and I do not suggest that it ever could be properly contended, that anyone but the State Parliament could appropriate the King's State revenue" (*Australian Railways Union* v. *Victorian Railways Commissioners* (1), *per Isaacs* C.J.).

The arrangement which was made between the Premier's Department and the Government Tourist Bureau for the payment of moneys due under the contract out of the funds provided by Parliament for the services of the Premier's Department, answering to the description "Government Advertising," was a matter of internal arrangement between Ministers. But sec. 3 of the *Special Deposits (Industrial Undertakings) Act* 1912-1930, provides:—"There shall be paid out of any such account any expenditure of or in relation to

(1) (1930) 44 C.L.R., at p. 352.

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the industrial undertaking to which it relates, including charges for management, maintenance, working expenses, and interest on capital at the current rate for loan money payable by the Government." Thus, in so far as the contract was for advertising the services of the Tourist Bureau, the moneys payable thereunder were lawfully payable as an expense of the undertaking out of the special account established under sec. 3 of the above-named Act, whereby the moneys in the account were appropriated and lawfully applicable to pay for such advertising. Ostensibly the contract was not one for which Parliament " may or may not provide funds " but one for which moneys were appropriated by statute. I agree with *Evatt* J. in the conclusion that this statute avoided the necessity of the receipts of the Government Tourist Bureau being paid into consolidated revenue or of an annual grant by Parliament out of the consolidated revenue to meet working expenses, and that sec. 3 operates as a continuing appropriation for the purposes therein specified.

In my opinion the judgment of *Evatt* J. should be affirmed and the appeal dismissed.

Appeal dismissed with costs.

Solicitor for the appellant, *J. E. Clark*, Crown Solicitor for New South Wales.

Solicitor for the respondent, *Abram Landa*.

J. B.