HIGH COURT OF AUSTRALIA

Commonwealth of Australia

Vs.

Colonial Ammunition Company Limited

(Knox C.J., Isaacs, Gavan Duffy, Rich and Starke JJ.)

21 March 1924

Knox C.J.,

Gavan Duffy and Starke JJ.

The judgment of the Court below cannot, in our opinion, be supported. In the statement of claim it is alleged that the Commonwealth agreed to take over all the obligations of the Company—the plaintiff—arising or to arise under or out of its contracts of service with A. J. Cartwright and others. The truth of this allegation depends upon the construction of three letters, and upon inferences to be drawn from the subsequent conduct of the parties.

On 17th December 1920 the Secretary of Defence wrote to the Company a letter which, so far as material, is as follows:—"The principal heads of agreement, as understood by this Department to have been agreed to by representatives of both parties, are set out hereunder:— ... Clause 8: The Company to use its best endeavours to secure, and the Commonwealth to engage, the services of the skilled staff at present employed by the Company, but no obligation to be on the Commonwealth to employ or retain in employment any person considered by the Minister unnecessary, unfit, or incompetent. Clause 9: All persons employed by the Commonwealth to be subject to the regulations for Government factories." The Company replied on the same day in terms which, so far as material, are as follows:—"Referring to your letter herein of even date, ... this Company confirms the heads of agreement arrived at as therein contained and is prepared to execute the agreement in due course. ... Regarding clause 8 of the heads of agreement, we have to inform you that the following members of the staff are under engagement to this Company for the following terms:" (among others, an agreement with A. J. Cartwright as assistant manager for ten years from January 1920 was mentioned). "These," the letter concludes, "are all the service agreements entered into by the Company, and it is understood that the Department will take over the Company's obligations thereunder." On 20th December the Secretary for Defence acknowledged the receipt of the Company's letter "confirming" its "acquiescence in the heads of agreement," and stated that the Crown Solicitor would be asked to prepare the draft agreement with the least possible delay. And he added: "In regard to the concluding portion of your letter under notice I shall be glad if you will ... furnish, for the information of the Department, copies of the agreements standing between the Company and the members of the staff referred to therein."

We were pressed with an argument that Cartwright and the other members of the staff mentioned in the service agreements were not members of the "skilled staff" referred to in clause 8 of the heads of agreement, which—as we understood the argument—would include only skilled operatives. But the plaintiff Company has not established any facts in support of this interpretation, and it cannot rely

on the argument unless it shows that the phrase bears the suggested meaning. In the absence of any such evidence, we feel no doubt that the persons mentioned in the service agreements were in point of fact part of the "skilled staff" of the Company and, indeed, the specially skilled men of that staff. Consequently, in our opinion, they fell within the stipulations contained in clause 8 of the heads of agreement.

The question, therefore, is whether the statement by the Company in its letter of 17th December that "it is understood that the Department will take over the Company's obligations" under the service agreements was an additional stipulation to those contained in the heads of settlement, and, if so, whether the Commonwealth assented to it. The Company was bound, if it proposed a radical alteration of the heads of agreement, to state that alteration clearly and precisely and in such manner that the Commonwealth ought reasonably to have understood that either a new proposal was being put forward, or else a variation suggested of the stipulation contained in clause 8. The Company did not, in our opinion, do so. Its letter is quite consistent, to our minds, with the performance of the provisions of clause 8. The material sentence commences: "Regarding clause 8 of the heads of agreement." That does not suggest any modification of the clause. Then it gives the names of persons who, so far as we can see, were members of the skilled staff which the Commonwealth was to engage under clause 8, if their services could be secured. The Company is relying here, we think, upon the provisions of clause 8 that the Commonwealth shall engage these men. Next comes the contested sentence. But this, to our minds, simply means that, in the case of the men engaged pursuant to clause 8, the Company understands that the Commonwealth will pay the salaries and observe the conditions prescribed by the agreements. It does not suggest a departure from clause 8, or anything in derogation of its provisions, but rather a reliance upon its terms.

The subsequent conduct of the parties adds nothing to the material letters, for it clearly refers to the agreement made between them, whatever that agreement was.

There are other difficulties in the Company's way in this case, but we prefer to rest our opinion upon the short and simple ground already stated.

Isaacs and Rich JJ.

The respondent Company sued the appellant, the Commonwealth, claiming a declaration and an order. The declaration sought is that a binding contract exists between the respondent and the appellant whereby the Company in 1921 leased its works to the Commonwealth as a going concern for seven years at least, on certain terms including one set out in par. 4 of the statement of claim, which is the pivot of the relief sought. That term is alleged to be "that the defendant should take over all the obligations of the plaintiff arising or to arise under or out of its contracts of service with" certain named "members of its staff," including A. J. Cartwright. The order sought is that the Commonwealth do carry out the terms of the agreement and do indemnify the Company in respect of any action that may be taken by A. J. Cartwright against the Company for breach of his contract of service with the Company.

The foundation of the claim for the order, consists of the allegations (1) that by an indenture dated 15th December 1915 the Company was under an obligation to continue to retain and employ Cartwright for ten years from 1st January 1920 at the salary and on terms set forth in the indenture, and (2) that the Commonwealth has not carried out the Company's obligation to give Cartwright employment but has dismissed Cartwright and refused to employ him further or pay him.

The alleged cause of action as set forth in the statement of claim is a very unusual one. According to the pleading, the plaintiff being under the obligation to employ Cartwright, the Commonwealth having taken over that obligation was itself bound to employ him and to retain him—of course, as the Commonwealth's own servant. The breach alleged is that, though the Commonwealth did perform its obligation by employing Cartwright as its own servant, it broke the obligation by dismissing him. There is no allegation explaining how Cartwright remained bound by two apparently inconsistent contracts—one to serve the Company and another to serve the Commonwealth; or how, if the Commonwealth did "take over" the obligation of the Company, with what must have been the assent of Cartwright when he accepted service under the Crown, the cause of action (if any) is not by novation in Cartwright instead of the Company.

It certainly requires a considerable amount of ingenuity and imagination to deal with the position upon the pleadings, as they stand, consistently with ordinary principles of legal liability. However, this has been successfully accomplished, so it is claimed, by using the simple word "indemnity." In our opinion that word has no proper application to the facts of this case when they are examined.

But before entering into the reasons for our judgment it is proper to refer to what took place during the argument. The Court, after hearing Sir *Edward Mitchell* for the appellant and after hearing all that Mr. *Dixon* had to urge as to the inclusion in the agreement of the term averred in par. 4 of the statement of claim, obtained from the learned counsel for the Commonwealth some assurances as to the Crown's attitude in relation to the agreement apart from the disputed term, and also some intimation from the learned counsel for the Company as to his view of the pleadings and the effect of a determination adverse to his client respecting par. 4 of the claim. Counsel for the Crown announced that, apart from that term, there was no intention to dispute the existence or validity of the agreement, but that, if it were necessary now or on any appeal, in order only to contest the alleged term in par. 4, all possible defences would be raised. Counsel for the Company stated that if the averment in that paragraph failed he could not succeed. The Court announced its opinion that the term was not included. Mr. *Dixon* then frankly intimated the intention of his client to move the Privy Council, and that he would for that purpose regard all questions of law as being open to him. This candour was very proper and commendable, but, in our view, it lays upon us in the circumstances a duty both to the parties concerned and to the Judicial Committee to assist, so far as we are able, in the elucidation of some very important questions of public as well as private import. These questions have not merely been raised by the parties, but have also been the subject of actual decision by the learned Chief Justice of Victoria, from whom this appeal comes: and they may possibly be found necessary to be considered by the Privy Council. We have been greatly concerned with the mass of material to which, if clearness is to be the first consideration, it is necessary to refer. We think it better on the whole to heed the warning "Brevis esse laboro, obscurus fio," and so make our meaning plain.

The whole position will be best understood by indicating at the outset the relative situation of the parties leading to the bargain between them. The Company was in possession of an ammunition factory erected partly on land belonging to the Commonwealth and leased by it to the Company. There was current a contract made on 23rd July 1919 by which the Company was to manufacture and supply to the Commonwealth small arms ammunition up to 30th June 1922. Owing to local causes there was a stoppage of the factory in 1920, and various business complications arose. These and some of the suggestions for coping with them need not be detailed, but reference may be made to the enclosure in the Company's letter to the Secretary for Defence dated 27th November 1920. It is sufficient to say that negotiations were entered upon at least as early as 10th November 1920 as to giving the Government effective control of the factory in return for the payment of £25,000 or

thereabouts annually, and as to the Government taking over the Company's staff, the arrangement to continue until the termination of the supply contract, that is, 30th June 1922. The negotiations continued, and heads of agreements were drawn up on the basis mentioned in November 1920. The negotiations then expanded until the four letters, Exhibits J, K, L and M, were written, which the Company relies on as definitely constituting the contract. The ultimate problem is twofold:—As a matter of legal construction did the Commonwealth in that correspondence undertake absolutely and without qualification to relieve the Company of all its existing contractual obligations under the indentures mentioned, as stated in par. 4 of the statement of claim? If such an undertaking is to be gathered from the correspondence, is it a binding obligation on the Commonwealth?

1. *Concluded Agreement*.—The Commonwealth contends *in limine* that there never was a concluded agreement in fact at all. This is based on the various statements in the letters as to the preparation and execution of a formal agreement. When the various letters in evidence prior to 14th December are looked at, and even down to the conference of 8th December, it will be seen that at one time the intention was clear that before the matter was to be regarded as a concluded bargain there should be a formal agreement executed. But on 8th December a conference took place, and circumstances altered. Prior to that conference the proposed arrangement, as previously mentioned, was to lease the Company's premises, &c., only until the termination of the supply contract on 30th June 1922. The Company desired the lease to go back to 1st July 1920; the Government declined that as impracticable, and proposed to begin on 1st January 1921 and end on 30th June 1922, and stated its willingness to make special arrangements as from 1st July 1920 to 31st December 1920. The proposal to begin on 1st January 1921 so as to end the supply contract on that date is of great importance in this regard. The Company agreed to the alteration of the commencement date, but other matters were in debate. When on 8th December the conference took place, it appears that some points were mutually assented to and others left in disagreement. It appears that the parties had agreed provisionally to the lease being for seven years from 30th June 1920, with six months' notice thereafter; even then the matter was, as we think, intended to be conditional and subject to execution of the agreement. But again intervened an interview on 13th December, and then it was that terms were agreed to, which still, as we think, stand. There was written a letter (Ex. J) dated 14th December, from the Company to the Commonwealth, assenting to the alterations in the previous memorandum; and on the 17th the Commissioner (by Ex. K) replied, setting out *in extenso*, the terms as amended. By clause 2 the lease was to be for seven years from 1st January 1921, with subsequent six months' notice. By clause 7 it was provided: "On 1st January 1921 the Company to relinquish and the Commonwealth to assume control and management of works and employees." By clause 6 it was provided (*inter alia*):—"On taking possession of the factory, the Commonwealth to pay a deposit of £25,000 on account of stock taken over. Stock to be taken, cost price to be determined, and the balance of purchase-money paid to the Company on or before 31st January 1921"; so that stock might be taken *after* going into possession. The covering letter contains two statements of importance. First, it announces the Minister's approval, and next it refers to clauses enumerated as "the principal heads of agreement," and refers to a word "fire" as reinserted. Ex. L from the Company on the same day "confirms the heads of agreement arrived at"; and there were no others. No doubt the formal agreement would express the enumerated heads in more precise terms, but there was nothing substantial left untouched. The Company's letter Ex. L is highly important, first, for the determination of this particular question. Having regard to the agreement to put the Government into possession on 1st January 1921, only a fortnight ahead, to the fact that no express reference at all was made to the formal agreement in Ex. K and to the proved improbability known to both parties of the formal agreement being prepared in the meantime—the seasonal holidays intervening—some expressions now found for the first time in Ex. L and also in Ex. M are

extremely important. In Ex. L the Company states that it is "prepared to execute the agreement in due course." "In due course" points to nothing immediate. Again, it says: "Kindly submit the draft at your early convenience for perusal." Then it says: "As regards the taking over by the Department of the works at Footscray, there is no reason why the stock-taking cannot be proceeded with immediately." That is to say, an operation which is not stipulated to take place until after possession is transferred, and which in fact did not take place until after possession was transferred, may, it is suggested, be by arrangement proceeded with beforehand. In Ex. M on 20th December the Department says: "The Crown Solicitor will be asked to prepare the draft agreement with the least possible delay." That is much more consistent with an intention to take possession on 1st January 1921 in any event than to make it conditional on the execution of the formal contract. The letter then proceeds: "Arrangements are now being made with a view to stock-taking being carried out by representatives of this Department during the week." In other words, the Department is making preparations to perform an act referable only to a completed bargain, and necessary only to determine the *balance* of purchase-money payable after the deposit has been paid on taking possession. The prima facie intention deducible from these letters is confirmed by subsequent communications, notwithstanding the draft agreement was only forwarded by the Crown Solicitor to the Company on 2nd June 1921. And it would be strange that possession should be taken on 1st January 1921 as agreed, but conditional only on an agreement to be executed after that date for possession on that date.

We do not think there can be any doubt that there was a concluded agreement between the Defence Department with the authority of the Minister (see, as to his approval, Ex. K—17th December 1920) and the Company. The law on the subject is authoritatively stated in *Harichand Mancharam v. Govind Luxman Gokhale*[1]. Mr. *Ameer Ali*, speaking for Lords *Atkinson*, *Sumner* and *Carson* and himself, says:—"Whether an agreement is a completed bargain or merely a provisional arrangement depends on the intention of the parties as deducible from the language used by the parties on the occasion when the negotiations take a concrete shape. As observed by the Lord Chancellor (Lord Cranworth) in Ridgway v. Wharton2(1856-57) 6 H.L.C. 238, at pp. 263-264., the fact of a subsequent agreement being prepared may be evidence that the previous negotiations did not amount to an agreement, but the mere fact that persons wish to have a formal agreement drawn up does not establish the proposition that they cannot be bound by a previous agreement. In Von Hatzfeldt-Wildenburg v. Alexander3(1912) 1 Ch. 284. Parker J. laid down that where the acceptance by the plaintiff was subject to a condition that the plaintiff's solicitors should approve the title to and covenants contained in the lease, the title from the freeholder and the form of contract, the negotiations did not form a binding agreement between the parties. The facts of that case were wholly different from the present, but the judgment marks the difference between a completed and binding agreement and one subject to a condition."

The intention, we gather from the relevant documents read by the light of the relevant circumstances, is that the agreement for a formal recording of the bargain was not to be a condition of, but was to be an addition to, the mutual assent of the parties to the substantive terms arranged, which were to go into operation on the date fixed, irrespective of whether the formal record was made or not.

But this is all subject to the inquiry whether in law it can be said that by the departmental action it was the Commonwealth Government, that is, the Crown, that entered into that bargain.

2. *Indemnity Clause*.—The next, an equally vital question so far as the respondent's claim is concerned, is whether there was included, among the terms in fact agreed to, a stipulation which is

couched in the following actual words: "It is understood that the Department will take over the Company's obligations thereunder"—that is, under the service agreements enumerated in Ex. L (17th December 1920), and interpreted by the respondent as set out in par. 4 of the statement of claim. We have already stated some of the difficulties in the way of reconciling the alleged obligation contained in par. 4 and the acts alleged as breaches with principles imposing liability for those acts on the Commonwealth towards the Company. No tripartite agreement is suggested. But the liability has been briefly described as "indemnity." And we must ask what that involves. It means that the Commonwealth undertook, unconditionally and under all circumstances, that the Company might henceforth disregard its service agreements, notwithstanding those agreements remained intact obliging the Company to employ the men and the men to serve the Company. And it means that, for that disregard of its engagements by the Company, the Commonwealth would, as between the Commonwealth and the Company, bear the brunt of whatever just claims the employees might make for the Company's breach of obligation, leaving it to the Commonwealth to choose whether it will save itself by engaging the employees (if they were willing) and thus annulling or reducing loss, or whether it will bear the loss in full by not employing them. But if the employees refused to engage with the Commonwealth, the Commonwealth would still be liable to indemnify the Company. That was the argument pressed upon us. That, however, would connote — as we think and as the learned Chief Justice of Victoria, who agreed with that view, holds—that clause 8 of the heads of agreement, being largely inconsistent with the stipulation, must to the extent of inconsistency be excised from the bargain. An ingenious argument was addressed to us to avoid this result, and we shall refer to this later. It was held that the Commonwealth was bound by a simple obligation of indemnity. It is not unimportant to notice that that view involves this result: that, although under the agreed terms the lease might expire in seven years or perhaps seven years and a half, that is, until at latest July 1928, the indemnity obligation in the case of A. J. Cartwright would continue until 31st December 1929, when the Commonwealth had no factory work on which to employ him. It also involves the result that a person (O'Shea)—who was not yet an employee and who was only just arranged for to commence on 16th April 1921, after the Company was to cease business, and whose contract was even not executed until 13th January 1921, about a fortnight after the Commonwealth took possession—was also to be the subject of indemnification by the Commonwealth. These results are not legally inconsistent with such a stipulation as is alleged, but are very important as elements in considering what the parties as reasonable business operators would understand by the critical passage in Ex. L.

The conclusion arrived at by the learned primary Judge was founded on materials which leave quite clear the function and duty of an appellate Court to form its own opinion (*Mersey Docks and Harbour Board v. Procter*[4]). We are unable to arrive at the same opinion as the learned Chief Justice. We think the position tolerably plain. The Company, when agreeing to lease its factory, found itself bound to certain of its employees for several years, and as a business expedient included in its bargain with the Commonwealth an arrangement by which the Commonwealth might possibly be able to obtain, and if so would probably engage, the services of the Company's skilled staff. Such an arrangement might obviously be mutually advantageous. But the Department, knowing, as everyone must know, that always, and certainly in such operations, the Government must be free to protect public interests by careful selection of employees, took care to add the cautionary saving proviso in clause 8, "but no obligation to be on the Commonwealth to employ or retain in employment any person considered by the Minister unnecessary, unfit, or incompetent." It would have been an astonishing thing if the Defence Department had, without direct authority of a statute, assumed to bind itself to employ any persons in its ammunition factory for several years, whatever their future fitness or even loyalty might be. Indeed, such a bargain unauthorized by statute would

not, in our opinion, have been lawful. But on the facts two points stand out, in our opinion, clear: (1) the only method by which the Commonwealth undertook to do anything that would relieve the Company was by engaging the services of the skilled staff, that is, by employing them as Commonwealth servants, and (2) even that method was expressly made subject to the high necessary public consideration of not taking or keeping anyone found unnecessary, unfit, or incompetent. There is not a syllable to indicate that the terms definitely agreed to on 13th December and referred to specifically in both Ex. J (the Company's letter) and Ex. K (the departmental letter) were ever altered or qualified. On the contrary, Ex. L referring to Ex. K itself expressly "confirms the heads of agreement as therein contained" and states that the Company "is prepared to execute the agreement in due course." That, so far, includes clause 8 in its entirety. After referring to projected acts in carrying out the agreement on those terms, the letter proceeds to say: "Regarding clause 8 of the heads of agreement, we have to inform you that the following members of the staff are under engagement to this Company for the following terms." Then follow names and dates, and nothing more as to obligations. So far again, clause 8 is reaffirmed, and the information is given as to facts relevant to that clause. Finally, says the Company: "These are all the service agreements entered into by the Company," followed by the words "and it is understood that the Department will take over the Company's obligations thereunder." "It is understood"—by whom? Obviously not by the Commonwealth so far, unless the true construction of clause 8 so requires it. The Commonwealth Department, seeing the acknowledgment of the accuracy of the heads of agreement as tabulated, seeing the express reference to clause 8 and to service agreements in connection with it, and knowing that the Commonwealth was promising to engage the employees subject to the expressed qualifications, might well think—to put it very mildly—and clearly did think, judging by the answer (Ex. M), that there was nothing new stipulated by the Company. It would be a wholly unexpected and a very subtle mode of creating a vast and unmeasured change in the stipulations already agreed on after so much discussion; and we think no one in the position of the Secretary for Defence, to whom Ex. L was addressed and who replied to it, could be anticipated to discern the sudden and tremendous and destructive legal significance now attributed to these words. We think the meaning which the recipient might reasonably be anticipated to place on it would be that the Commonwealth was expected to do all that clause 8 enabled it to do to relieve the Company, without in any way surrendering the protective qualification which had appeared in the clause from its earliest formulation (25th November) to its latest tabulation (17th December). The words "it is understood" point clearly to the understanding of the Company, and the sentence is left incomplete in expression probably because explicit reference to the qualification was considered unnecessary.

The departmental reply, after specific recognition of the heads of agreement as they stood, asked for copies of the agreements of service "for the information of the Department." Clearly this was no assent to any such stipulation as suggested. On the contrary, before anything could be said, "information" was requested. It is suggested that "information" was for the purpose of carrying out the stipulation; but up to that time no such stipulation existed. The information was not furnished until 14th January 1921, and in the meantime possession had been given and taken in accordance with the mutual intention of the parties based on considerations entirely free from any such new stipulation, and when the Government was, except as to dates, in perfect darkness as to the obligations the Company was under to the employees in question. We are of opinion that par. 4 of the statement of claim is not sustained. We think the interpretation is not doubtful, but would add that if it were doubtful the principle laid down in *English and Foreign Credit Co. v. Arduin*[5] would have very close application. It is a general principle founded on fairness, and has been applied in various situations (*Ireland v. Livingston*[6]). Also, in *United Insurance Co. v. Cotton* —a decision in July 1885 by the Privy Council, composed of Lord *Watson*, Sir *Barnes Peacock*, Sir

Robert Collier, Sir *Richard Couch* and Sir *Arthur Hobhouse*, and reported only, as far as can be discovered, in the *South Australian Law Reports*[7] — where, respecting certain instructions to an agent, their Lordships intimate their opinion as to their meaning, and then proceed to say[8]:—"Of course a more limited construction may be put upon it. Their Lordships merely desire to indicate that the wider construction is one which might, in their estimation, be reasonably put upon it by the person to whom it was addressed." Again, it is said[9], with great appositeness here: "It is a well recognized canon of construction, that general words may have a very limited meaning impressed upon them when they occur apparently as a rider upon the subject matter of the letter." (See also *Falck v. Williams*[10].)

The argument of Mr. *Dixon*, to which we referred, was that clause 1, and not clause 8, was the crucial clause as to these employees. He said that as by clause 1 the Commonwealth agreed to take over the factory as a "going concern," that connoted taking over all contractual obligations—manufacturing contracts and employment contracts. He further said that clause 8 dealt only with the "skilled staff," and these gentlemen were not the "skilled staff." As to the argument based on the words "going concern," we think it impossible to hold that the purchase of a business as a "going concern" *ipso facto* involves the purchaser's indemnifying the vendor against all current contractual obligations in relation to the business. A purchaser might thus easily and unsuspectingly acquire a *damnosa hereditas*. Besides, the very terms of this bargain impliedly repel the contention as to service contracts. Clause 10 of the heads of agreement incorporates in the lease by reference a clause similar to clause 38 of the agreement of 23rd July 1919. That clause 38 provides for the possible sale of part of the Company's business to the Commonwealth "as a going concern," but goes on expressly to provide for "the benefit of all subsisting contracts," &c., saying nothing about employees' contracts.

What we have said would be sufficient to dispose of the case, but, as we are in the circumstances dealing with defences as well as the claim, we proceed to consider whether, even if the respondent should succeed in establishing the existence of the stipulation relied on, as between it and the Department it is legally enforceable. The answer depends on the effect of two classes of Commonwealth legislation, the *Defence Act 1903-1918* and three Appropriation Acts in 1921 and 1922.

3. *Defence Act*.—Sec. 63 is the controlling enactment. By that section it is provided:—"(1) The Governor-General may ... (d) Establish and maintain arms and ammunition factories; ... (db) Authorize the employment of persons in a civil capacity ... in any factory established in pursuance of this Act; ... and (f) Subject to the provisions of this Act do all matters and things deemed by him to be necessary or desirable for the efficient defence and protection of the Commonwealth or of any State. (2) Persons employed in a civil capacity in pursuance of this section ... shall be engaged for such periods and shall be subject to such conditions as are prescribed." By sec. 4 "prescribed" means prescribed by "this Act"; but, as the expression "this Act" is also defined to include all regulations made under "this Act," it follows that persons employed in a civil capacity are subject to such conditions as are prescribed either by the Act directly or by the Regulations. Further, by sec. 124 (regulations) it is enacted in sub-sec. 2 that "all regulations shall be notified in the Gazette and shall thereupon have the force of law."

Regulations were made; but, after anxious consideration of them, we find them in such a state of confusion and partial inconsistency that we base nothing upon them. Three classes of persons employed in Government factories are defined. They are (1) "officers" who are to be appointed by the Governor-General; (2) foremen, who, by reg. 1, are any persons who are appointed by the

Minister, and, by reg. 86, are persons appointed to the grade of foremen and appointed, not by the Minister, but by the Board; and (3) employees simply, who are engaged by the manager. As Cartwright, in the present case, was not appointed by the Governor-General and it is not clear by whom otherwise he was appointed, his status, so far as the regulations are concerned, is too vague for us to build any opinion upon.

Dealing with the Act itself, we are clearly of opinion that, before any administrative act can be justified under sec. 63, there must be an Order in Council authorizing it mediately or immediately. The term the "Governor-General" is defined in sec. 4 of the *Defence Act* and sec. 17 of the *Acts Interpretation Act 1901* as an expression that "means" the Governor-General acting with the advice of the Executive Council. The Executive Council is the Federal Executive Council referred to in secs. 62 and 63 of the *Constitution* (see *Acts Interpretation Act 1901*, sec. 17). It is impossible to maintain the position contended for by learned counsel for the respondent that, when a Minister acts in authorizing a contract, it must be deemed to be by the authority of the Governor-General in Council when that is denied by the Commonwealth, and more particularly when, as here, the existence of an Order in Council is positively disproved. The special powers created by Parliament by sec. 63 cannot be exercised by a Minister on his own responsibility or on any authority short of the order of the Governor-General in Council. The establishment of this factory and the employment of persons in a civil capacity in this factory, therefore, cannot be justified as a legal exercise of ministerial authority, and the agreement made in fact by the departmental officers and sanctioned by the Minister cannot be regarded, so far as the *Defence Act* is concerned, as warranted by law or as binding on the Crown. There is no other parliamentary prior authority suggested. For the reasons given at length in the *Wool Tops Case*[11], to which we refer without repeating them, we hold that no authority short of parliamentary authority could sustain the bargain.

The agreement, if supportable in law at all, must find the necessary foundation, as the learned Chief Justice of Victoria has found, in the Appropriation Acts of the Commonwealth. This we now proceed to examine.

4. *Appropriation Acts*.—Three Acts were relied on by Mr. *Dixon*: the first, No. 11 of 1921, passed 26th November 1921; the second, No. 8 of 1922, passed 9th September 1922, and the third, No. 42 of 1922, passed 18th October 1922. The first is an Appropriation Act relating to works and buildings. It is a special Appropriation Act—that is, it is not an Act which appropriates moneys for the ordinary annual services of the Government within the meaning of sec. 54 of the *Constitution*. Under the Part relating to the Department of Defence, and in Division No. 8, subdivision No. 1, there appears an item: "8. Small Arms Ammunition Factory—amount to be paid to the credit of Trust Fund—Small Arms Ammunition Account—to recoup advances made therefrom to Trust Fund—Small Arms Ammunition Factory Account £250,000." The second is a similar Act, but, though in Division No. 10, subdivision No. 1, it repeats the words of the item referred to; it makes no further appropriation. For the information of Parliament it is shown that, of the previously voted sum of £250,000, the sum of £214,289 has been expended. The third Act is an Appropriation Act for the ordinary annual services of the Government within the meaning of sec. 54 of the *Constitution*. In Division No. 93, subdivision No. 2, there is item 5, as follows: "For maintenance of the Small Arms Ammunition Factory on a nucleus basis including wages, stores, services, and rent £79,499," with a footnote stating "To be paid to credit of Trust Fund, Small Arms Ammunition Factory Account."

The last-mentioned Act was not open to amendment by the Senate, but only to request by that House (sec. 53 of the *Constitution*). The others were open to amendment subject to the restrictive

provisions of sec. 53. The learned Chief Justice of Victoria rejected the contention of Mr. *Ham* that the appropriation item in the last Act was only an appropriation for rent for the financial year for which the appropriation was made, and did not involve a validation of the contract under which the rent was payable. His Honor said:—"I think this argument cannot be maintained. If Parliament is to be in the position of a principal on whose behalf but without whose authority a contract has been entered into, I think the intention of Parliament to ratify must be inferred from the same kind of acts or words as would suffice for that purpose in the case of an individual principal." He accordingly held that either or both of the two Acts No. 11 of 1921 and No. 42 of 1922 sufficed to constitute a ratification by Parliament of the contract making it binding on the Commonwealth. On the argument before us Mr. *Dixon* declined to place the matter on the ground of ratification, and stated that he did not regard Parliament as a principal. He was right in this. If Parliament is the principal in relation to the contract, what is the position of the Crown? Government contracts are made by or for the Crown by its appropriate agents and in the appropriate manner. Parliament is not the Commonwealth. It does not represent the Commonwealth in the making of contracts. It is the legislative not the executive organ of the Commonwealth. It authorizes executive action, prescribes its limitations and consequences, or ratifies in a legislative sense, and, in short, makes the *law* of the contract, but it is not a party to a *contract* itself. With great respect, the word "ratify" has been used in an inapplicable sense. Where a person ratifies a bargain, it is assumed that the bargain was professedly made for him as principal, and that the law permitted such a bargain when it was in fact made. Where Parliament ratifies a bargain, it is necessarily assumed *ex natura rerum* that the bargain was not professedly made for the Parliament as principal, and it is also assumed that the law did not permit such a bargain when it was in fact made. The only way in which Parliament could be said to have ratified the contract—that is, to have made the contract binding on the Commonwealth—is by having expressly or impliedly validated it. It has not done so expressly. Has it done so by implication? Is the legislative process of granting supply to the Crown and of appropriating public moneys to meet that supply a validation of every bargain, of every act, tort, or even crime—as it might happen to be at the time—involved in the detailed estimates for which the money is voted? We think not. From the inherent nature of the parliamentary process of supply and appropriation such a conclusion cannot be drawn. This is emphasized when we see how, with adaptations, this time-honoured process has been embodied in the written Constitution of the Commonwealth.

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. The Committee of Supply inquires as to policy and expediency and as to extravagance It secures publicity and locates responsibility (see the able monograph of *Willoughby and Lindsay on Financial Administration of Great Britain*, at pp. 129 *et seqq.*). It is not examining the transactions involved with a view to determining whether statutory conditions will be or have been observed. Still less is it concerning itself with the advisability of validating illegalities. And when supply has been agreed to by the Committee and the report is approved by the House, and it then becomes a question of ways and means, in order that the supply may be provided for, it is equally foreign to the purpose of the Committee, and afterwards of the House, to inquire or decide whether every step involved in the proposed expenditure is legal or illegal. If the legal result were that all illegalities are swept away, that all Acts to the contrary are *pro hac vice* repealed or suspended or amended, then, by force of the constitutional practice in England (as to which see the despatch of 17th August 1878 from the Secretary of State set out in *Keith's Responsible Government in the Dominions*, 2nd ed., vol. 2, p. 613), and by force of the same practice, and to some extent of the statute law, in the Dominions, which places the controlling power of the public purse in the hands of one of the Chambers, the other Chamber would find itself practically coerced into what would be frequently violent and

radical alterations of standing law. Acts of Parliament laying down rigid conditions for contracts for the taking of property, for the making of regulations, for the general protection of the subject, and for the performance of executive acts generally, could be overridden by the simple expedient of a harmless-looking vote on account. If Parliament in authorizing a payment were supposed to see or know the contents of every relevant document, the circumstances of its execution, whether on the side of the Crown or the subject, and to inform itself of every fact and phase relative to the payment it is asked to sanction, it would be deemed to undertake a novel and, we venture to assert, an impossible task. If, merely because it passed a vote on a royal message asking for supply for the public service, there were the further presumption that all invalidities were swept away and all arrangements were converted into binding contracts, there would arise, in our opinion, an inevitable state of surprise and confusion and injustice. If such a course operates to declare the sovereign will of Parliament as to the validity of a transaction, it necessarily operates either way. It may operate against the Government to-day, and against the individual to-morrow. If it were the Government insisting on the binding nature of the bargain and the individual citizen contesting it, could it be maintained that the mere authority to pay £1 on account of rent was a parliamentary legalization precluding any defence, and requiring every Court to disregard all breaches of law?

Whether the matter be regarded from the aspect of ratification as "principal," which we deem to be impossible, or of ratification in the sense of validation *ex post facto*, we hold that the well-established nature and function of the parliamentary grant of supply and appropriation of funds to meet the grant, and that only, is merely as between the Crown and the people as taxpayers. The constitutional aspect of the proceeding is clearly expounded in Colonel *Durell's* work on *Parliamentary Grants*, at pp. 3 *et seqq*. The essence of the matter, so far as this case is concerned, is contained in a few lines, which we quote from p. 3. It is there stated:—"The prohibition of raising taxes without parliamentary authority would be nugatory if the proceeds even of legal taxes could be expended at the will of the Sovereign. The right, therefore, of appropriation was a logical consequence of the right of levying supplies. The chain of historical evidence undeniably proves that a previous and stringent appropriation, often minute and specific, has formed an essential part of the British Constitution." The specific reference to the item of the Small Arms Ammunition Factory was obviously, according to the recognized constitutional practice, to assign and stringently limit the moneys to the named purpose. This was done as in performance of Parliament's duty to provide money for the supplies it had granted and in exercise of its right to restrict the expenditure to the particular purpose. 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 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.

The statutory contentions of the respondent failing, we are of opinion that, *quacunque via*, the appeal must succeed.

Appeal allowed. Judgment appealed from rescinded. Judgment for defendant with costs. Respondent to pay costs of appeal.

Solicitor for the appellant, Gordon H. Castle, Crown Solicitor for the Commonwealth.

Solicitors for the respondent, Lynch, McDonald & Elliott.

[1] (1922) L.R. 50 Ind. App. 25, at pp., 30-31.

[2] [1857] EngR 713; (1856-57) 6 H.L.C. 238, at pp. 263-264.

[3] (1912) 1 Ch. 284.

[4] (1923) A.C. 253, at pp. 258-259.

[5] (1870-71) L.R. 5 H.L. 64, and particularly at p. 75 (per Lord Hatherley L.C.), p. 79 (per Lord Westbury) and pp. 80-81 (per Lord Colonsay).

[6] (1871-72) L.R. 5 H.L. 395, at p. 416.

[7] (1885) 19 S.A.L.R. 124.

[8] (1885) 19 S.A.L.R., at p. 127.

[9] (1885) 19 S.A.L.R., at p. 129.

[10] (1900) A.C. 176.

[11] (1922) 31 C.L.R., at pp. 445-451.

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