FARRINGTON v. THOMSON AND BRIDGLAND

SMITH, J. 24-6 September, 11 November, 17 December 1958

Licensing Act 1928—Licence forfeited ipso facto on conviction for third offence—"Third offence"—"Second offence"—Wrongful order to close licensed premises given by police—Action for misfeasance in public office—Entry by "authorized member of the police force"—Trespass—Exemplary damages—Licensing Act 1928 (*No.* 3717), *ss.* 177, 202—*Licensing Act* 1958 (*No.* 6293), *ss.* 170, 195.

The plaintiff was the licensee of the Athenaeum Hotel, Bendigo. On 12 March 1955 the plaintiff committed an offence under s. 177 of the *Licensing Act* 1928 (now s. 170 of the *Licensing Act* 1958) for which he was convicted on 10 May 1955. On 30 April 1955 he committed a further offence against s. 177 and on 15 June 1955 was convicted in respect of it. On 13 July 1956 he again offended against the same section and on 11 October 1956 was convicted in respect of this offence. Section 177 provides that on conviction for "a third offence" thereunder the licensee shall *ipso facto* forfeit his licence. The defendant B. was a sergeant of police stationed at Bendigo and the defendant T. was a superintendent of police and the licensing inspector for the Bendigo licensing area and the superior officer of B. On 11 October 1956 after the last-mentioned conviction, the defendant B., acting on the orders of T., entered the hotel premises and ordered the plaintiff to close the hotel and cease supplying liquor and threatened to prosecute him if he failed to do so. In consequence of this the plaintiff closed the hotel and ceased to supply liquor.

Held: (1) At the time of B.'s entry into the plaintiff's hotel and his order to the plaintiff to close the hotel, the plaintiff's licence had not been forfeited under s. 177, as the conviction of 11 October 1956 was not a third conviction. For a conviction to be a "third conviction", it is necessary for a person to have been convicted of a "second offence", and a person may not be convicted of a "second offence" until he has been convicted of a first offence; the relevant date in respect of the first offence is the date of conviction, not the date of its commission. *Christie* v. *Britnell* (1895), 21 V.L.R. 71; *Knox* v. *Bible*, [1907] V.L.R. 485; *O'Connor* v. *Bini*, [1908] V.L.R. 567, applied.

(2) If a public officer does an act which, to his knowledge, amounts to an abuse of his office, and he thereby causes damage to another person, an action in tort for misfeasance in a public office will lie against him at the suit of that person. *Whitelegg* v. *Richards* (1823), 2 B. & C. 45, at p. 52; *Henly* v. *Mayor and Burgesses of Lyme* (1828), 5 Bing. 91, at pp. 107-8; *Fitzgerald* v. *Boyle* (1861), 1 Q.S.C.R. 19; *Smith* v. *East Elloe R.D.C.*, [1956] A.C. 736, at p. 752; [1956] 1 All E.R. 855, applied. The court having found that the defendants, in giving the order to close the hotel, were intentionally purporting to exercise a power which they knew they did not possess, to give binding orders to the plaintiff, both defendants were guilty of the tort of misfeasance in a public office.

(3) Section 202 of the *Licensing Act* 1928 (now s. 195 of the *Licensing Act* 1958) does not authorize an entry by an "authorized member of the police force" upon licensed premises for the purpose of giving an order in purported exercise of a power which he knows that he does not possess. The entry of B. upon the plaintiff's hotel, being for the purpose of exercising a power which he knew that he did not possess, constituted a trespass, for which exemplary damages could be awarded. *Shrimpton* v. *Commonwealth* (1945), 69 C.L.R. 613, at pp. 620-1; [1945] A.L.R. 125; *Trobridge* v. *Hardy* (1955), 94 C.L.R. 147, at p. 154; [1956] A.L.R. 15, applied.

TRIAL OF ACTION

The plaintiff, Edward Farrington, brought an action for damages against the defendants, Robert Reginald Thomson and Harold Albert Bridgland. The plaintiff in his statement of claim alleged that on

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11 October 1956 he was the owner of and in occupation of the Athenaeum Hotel, Bendigo, and the holder of the victualler's licence under the Licensing Acts in respect of this hotel; that the defendant Bridgland was a sergeant of police stationed at Bendigo and the defendant Thomson was a superintendent of police and the licensing inspector for the licensing area of Bendigo, and the superior officer of Bridgland; and that on 11 October 1956, Bridgland, pursuant to the orders of Thomson and/or on his own initiative, entered the hotel premises and wrongfully ordered the plaintiff to close the hotel and to cease trading: The plaintiff closed the hotel and ceased trading in consequence of this order and thereafter brought an action against both defendants claiming damages for trespass and negligence in so ordering the hotel to be closed. The action was heard at Bendigo before Smith, J., and a jury of six men.

Thomson, for the plaintiff.

Frost, for the defendants.

Cur. adv. vult.

SMITH, J., delivered the following written judgment: In this case the plaintiff is claiming damages against the defendants in respect of certain action taken by them on 11 October 1956, which led to the closing of the bar and the cessation of trading in liquor, at a hotel in Bendigo known as the Athenaeum Hotel. The plaintiff's case is that the defendants, in what they did, were guilty of trespassing upon the hotel premises, and of misfeasance in a public office.

The action came on for trial in Bendigo on 24 September 1958, and the following matters alleged in the statement of claim were then agreed between the parties:—

(a) At all material times the defendant Thomson was a superintendent of police, and the licensing inspector for the licensing area of Bendigo, and the superior officer of the defendant Bridgland.
(b) The defendant Bridgland was at all material times a sergeant of police stationed at Bendigo.
(c) The defendant Thomson is liable for the acts of the defendant Bridgland done in accordance with instructions from the defendant Thomson.
(d) On 11 October 1956, the plaintiff was the owner and occupier of the said Athenaeum Hotel and was the holder of a victualler's licence for it under the Licensing Acts.
(e) On that day the defendant Bridgland, acting pursuant to orders from the defendant Thomson, entered upon the said hotel.

The matters set out in (d) above must be taken subject to this qualification, that the defendants contend, and the plaintiff denies, that the plaintiff's licence became forfeited on 11 October 1956 before Bridgland entered the hotel. The facts material to this issue are common ground and it will be convenient to rule upon the point of law that is involved before dealing further with the facts of the present case.

Section 177 of the *Licensing Act* 1928 provides that on conviction for "a third offence" thereunder the licensee shall, *ipso facto,* forfeit his licence. On 12 March 1955 the plaintiff committed an offence against s. 177 for which he was convicted on 10 May 1955 and fined £2. In the meantime, on 30 April 1955 he committed a further offence against the section, and for this he was convicted on 15 June 1955 and fined £5

Then on 13 July 1956 he again offended against the section. For this he was convicted on the morning of 11 October 1956 and fined £10, and it was in the afternoon of that day that Bridgland entered the hotel. The plaintiff, therefore, had by then been convicted for the third time under the section. But had he been convicted for "a third offence" within the meaning of the section?

It is clear, I think, that the second of the plaintiff's three convictions was not a conviction for "a second offence" within the meaning of the section: see *Christie* v. *Britnell* (1895), 21 V.L.R. 71; *Knox* v. *Bible,* [1907] V.L.R. 485; *O'Connor* v. *Bini,* [1908] V.L.R. 567; *R.* v. *South Shields Licensing Justices,* [1911] 2 K.B. 1; *Wright* v. *Carcary* (1920), 14 Q.J.P.R. 46; *R.* v. *McCaig,* [1936] 2 D.L.R. 605, at p. 607. These cases show, I consider, that in sections like s. 177, which impose increased penalties for second and subsequent offences, an offence is not ordinarily to be considered a "second offence" unless at the time when it was committed the offender had a prior conviction. They, therefore, support the view that an offence is not a "third offence" unless the offender had two prior convictions when he committed it. They do not deal, however, with the question whether that is all that is necessary to constitute a "third offence" or whether it is necessary, in addition, that one of the two prior convictions should have been for a "second offence" within the meaning of the section.

It appears to me that s. 177 does make this additional requirement. The decisions in the cases cited are derived from a rule of construction stated in Coke's Institutes vol. 2, p. 468 in language which, as I read it, makes that requirement. In commenting upon the words, "*et si tertio deliquerint*" in the Statute of Westminster the Second, Coke there says: "Though this branch . . . may seem to refer to the third offence, yet cannot he be convicted of the third before he be convicted of the second, nor of the second before he be convicted of the first; and the second offence must be committed after the first conviction, and the third after the second conviction and several judgments thereupon given: for so it is to be understood in other acts of parliament, where there be degrees of punishment inflicted, for the first, second and third offence, etc. . . . ". Moreover it appears to me that the applicability of this rule of construction to s. 177 is confirmed by the gravity of the consequences attaching to a conviction for a third offence thereunder as compared with those attaching to a conviction for a second offence. It seems difficult to suppose that the legislature intended the liability to these severe additional penalties to depend on so small a thing as, for example, whether previously to the commission of the offence for which it is sought to impose them the licensee had been convicted for serving two customers, and not merely one, upon a given occasion.

Further confirmation is provided by this consideration, that if all that is required to constitute a third offence under s. 177 is that there should have been two convictions before the commission of the offence in question, then a curious consequence would seem to follow. It would seem that a licensee who committed three offences before he had any conviction and who was then convicted for those offences could commit any number of further offences without forfeiting his licence. None of the first three convictions would rank as a second or subsequent offence and it could be put that his next conviction would be for a fourth and not a third offence and that the penalty of forfeiture attaches only to a third offence. Moreover, the context is strongly against the view that this curious result could be avoided by reading "third offence" as meaning "third or subsequent offence"

For these reasons I am of opinion that the plaintiff's licence had not in fact been forfeited when the defendant Bridgland entered the hotel on 11 October 1956, but was then in full force and effect.

At the hearing in Bendigo certain questions were submitted to the jury for determination. These questions and the jury's answers thereto were as follows:—

1. Are you satisfied that the defendant Bridgland, while in the plaintiff's hotel on 11 October 1956:—
   - (a) Informed the plaintiff that under the licensing law he was obliged to close the hotel for the sale of liquor?—Yes.
   - (b) Informed the plaintiff that this was the view of the defendant Thomson or the defendant Bridgland or both of them?—Yes.
   - (c) Ordered the plaintiff to close the hotel for the sale of liquor?—Yes.
   - (d) Purported when giving such order (if one was in fact given) to be exercising a power to give binding orders imposing on the plaintiff a duty to obey?—Yes.
   - (e) Threatened to prosecute the plaintiff if he did not close the hotel for the sale of liquor?—Yes.
   - (f) Threatened to use force to close the hotel for the sale of liquor if the plaintiff himself did not close it?—No.
   - (g) Threatened to take some action, the nature of which was not indicated, to bring about the closing of the hotel for the sale of liquor?—Yes.

2. If yes to any part or parts of Question 1—
   - (a) Are you satisfied that the defendant Bridgland, in doing all that he thus did, was acting in accordance with instructions from the defendant Thomson?—Yes.

If not then what did he do that you are not satisfied was in accordance with his instructions?
   - (b) Are you satisfied that the defendant Bridgland, by doing what he thus did, caused the plaintiff to close the hotel for the sale of liquor?—Yes.

3. Are you satisfied that the defendant Thomson failed to exercise reasonable care to ascertain whether the plaintiff's conviction of 11 October 1956 was a conviction for "a third offence" within the meaning of s. 177 of the *Licensing Act* 1928, before giving his instructions to the defendant Bridgland?—Yes.

4. Are you satisfied that the defendants were acting honestly in the belief that the plaintiff's licence had terminated?—Yes.

5. Are you satisfied that the defendants were acting honestly in intended execution of the provisions of the Licensing Acts?—No.

6. At what amount do you assess the loss and damage resulting to the plaintiff from the closing of the hotel?—£172.

7. Assuming, without deciding the question, that Bridgland was acting illegally, what amount, if any, should be added to the damages by way of exemplary damages?—£100.

The parties agreed that there were no further questions that they desired to have put to the jury, and that any further questions of fact that needed to be decided might be decided by me, consistently with the findings made by the jury. Pursuant to this agreement the jury was discharged without bringing in a general verdict, and the further hearing of the case was adjourned to Melbourne where argument was heard on 11 November 1958 and judgment was reserved.

In relation to the answers given by the jury some explanations and observations are called for.

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The jury was directed that the purpose of the various parts of question 1 was to find out its view as to the meaning of what was said and done by Bridgland, and that what had to be determined was what a reasonable man in the plaintiff's position would have understood was meant. No questions were put to the jury as to whether the meaning, as found by the answers given, was what Bridgland intended to convey or what the plaintiff understood him to mean; but in my view the proper conclusion on the evidence is that, in relation to the answers given to all the parts of question 1, other than part (f), both these further questions should be answered in the affirmative.

In relation to part (d) of question 1, the jury was given a direction aimed at bringing out the distinction between a mere statement in the imperative mood, and a purported exercise of a power to give orders creating an obligation to obey. By reason of the form which that direction took, the jury's answer to part (d) must, in my view, be taken to involve a finding that what was said and done by Bridgland would have conveyed to a reasonable man in the plaintiff's situation the meaning, "close down, because I have the power to order it, and I order it." The additional findings which I have made as to what was intended by Bridgland and what was understood by the plaintiff extend to this aspect of the answer to part (d).

The answer given to question 2 (b) appears to me to deal only with the effect of Bridgland's conduct considered as a whole. In particular it does not say whether the giving of the order in the way found by the jury was, if considered alone, a cause of the closing of the hotel. In my view, however, the proper conclusion on the evidence is that it was both a *causa sine qua non* and the immediate and decisive cause.

It will be observed that questions 4 and 5 treat the burden of proof of bona fides as resting on the defence. They were so expressed because of the form of the pleadings. The statement of claim alleged that the defendants acted wrongfully, but it did not in terms allege mala fides. At the commencement of the trial the defence was amended to add to the particulars under a plea of not guilty by statute, a reference to s. 320 of the *Licensing Act* 1928; and this was treated as involving an allegation that the defendants, in so far as they did any of the things alleged against them, were acting "in pursuance or execution or intended execution" of that Act, within the meaning of s. 320. To come within those words good faith is necessary: compare *Trobridge* v. *Hardy* (1955), 94 C.L.R. 147; [1956] A.L.R. 15; and on the pleadings, therefore, it was the defendants who raised the issue by alleging that they acted in good faith.

As the case progressed, however, the situation altered. Though the plaintiff's counsel conceded throughout that the defendants acted in good faith in asserting that the licence had been forfeited, he contended at the conclusion of the evidence that he should be allowed to rely, in support of his own case, upon the allegation that the defendants acted mala fide in another respect. This consisted, he said, in purporting to exercise and threatening to exercise, powers which they were well aware that they did not possess. What led to this contention on the part of the plaintiff was that each of the defendants gave evidence to the effect that he knew, at the material time, that there was no power to use force or to give binding orders to the plaintiff. This evidence, which was no doubt the basis of the jury's answer to question 5, was given with the object, as it appeared, of persuading the jury that the defendants neither threatened to use force nor purported to give binding orders to the plaintiff. But once it had been given the situation was that if the plaintiff could establish as he has now done, that the defendants intentionally did one of

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those things then their own evidence conceded that they knew they did not have the power they pretended to have. In these circumstances I decided that the plaintiff should be allowed to rely upon an allegation of mala fides in this respect in support of his case. Neither party suggested that there was any occasion to amend the statement of claim to cover the point and the contentions of the parties upon it were put to the jury by counsel without any such amendment having been made.

The fact that a question additional to question 5 was necessary to deal with the plaintiff's own allegation of mala fides, as distinct from his denial of bona fides, was overlooked by me, and, so far as appeared, by counsel too. In my view, however, the omission to ask it does not now cause any legal difficulty. Once the jury's findings are accepted the proper conclusion I consider, from the additional findings that I have made and the defendants' own evidence, is that in doing what is described in part (d) of question 1 the defendants were intentionally purporting to exercise a power to give binding orders to the plaintiff which they were fully aware, at the time, that they did not possess.

Upon this view of the facts s. 320 of the *Licensing Act* 1928, I consider, cannot help the defendants; but even so it is, to my mind, a question of real difficulty whether any cause of action has been established against them.

As the plaintiff cannot recover exemplary damages as assessed by the jury unless he establishes his cause of action in trespass, it will be convenient to look first at that cause of action and to consider whether Bridgland's entry on the hotel premises has been shown to have been unlawful.

Section 202 of the *Licensing Act* 1928 provides that any authorized member of the police force may demand entrance into any licensed premises at any time by day or night; and both the defendants were authorized members of the police force, within the meaning of this provision. Moreover I do not consider that the fact that, at the material time, they both believed the hotel to be no longer licensed would prevent them from relying upon the section if it were otherwise applicable to what was done by them. But in my view the facts here were such that the section was not so applicable. Bridgland entered the hotel on two occasions on 11 October, and the proper conclusion on the evidence is, I consider, that on each of the two occasions Bridgland, at the time of entry, intended to give, and Thomson intended him to give, the order to close the hotel for the sale of liquor which he did in fact give after entry. I consider further that at least on the second occasion, what Bridgland went on the premises to do was, in substance, to give this order, everything else that was done after entry being merely incidental to that. Accordingly, though the motive, or one of the motives of the defendants, may have been a laudable one of preventing what they believed to be unlawful trading, the immediate and primary purpose of the second entry, if not the first as well, was to give an order in purported exercise of powers which they knew they did not possess. In my view s. 202, notwithstanding the generality of its language, does not, upon its true construction, authorize an entry for such a purpose. It should be read, I consider, as impliedly limited by a requirement of good faith which will prevent it from operating to authorize an entry for purposes of deception or conscious abuse of power: compare *Trobridge* v. *Hardy* (1955), 94 C.L.R. 147, at p. 154; [1956] A.L.R. 15; *Shrimpton* v. *Commonwealth* (1945), 69 C.L.R. 613, at pp 620 1, [1945] A L R 125

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It could not be suggested that the entry was justified by reason of the rights conferred on the public by the common law and by statute to be received and given accommodation at an inn or on licensed premises. Bridgland was not seeking to be received as a guest nor to be provided with any accommodation.

Could it then be said that the entry was authorized by the common law as one made for the purpose of preventing the commission of offences? The limits of the right of a constable to enter premises for such a purpose are not well defined: compare *R.* v. *Smith* (1833), 6 C. & P. 136; *Mackay* v. *Abrahams,* [1916] V.L.R. 681; *Great Central Railway Co.* v. *Bates,* [1921] 3 K.B. 578; *Thomas* v. *Sawkins,* [1935] 2 K.B. 249; *Davis* v. *Lisle,* [1936] 2 K.B. 434; [1936] 2 All E.R. 213; *Dowling* v. *Higgins,* [1944] Tas. L.R. 32. But whatever the precise limits may be, it seems clear that, in the absence of an invitation or licence, express or tacit, given by the occupier, the right does not extend to a case such as the present, in which the only offences in question are summary offences and there is no suggestion of any actual or threatened breach of the peace.

We come, therefore, to the question whether Bridgland had an invitation or leave and licence from the plaintiff to make the entries.

The evidence indicates, I think, that the part of the hotel entered and traversed by Bridgland was at the material time open to the public. The plaintiff's situation in relation to this part of his hotel would seem to have been comparable with that of a shopkeeper in relation to that part of the shop which is open to the public. Such a person is, in general, regarded as extending a tacit invitation to the public to enter that part of the premises for the purpose of discussing or transacting any business which concerns him: compare *Indermaur* v. *Dames* (1866), L.R. 1 C.P. 274; *Mackay* v. *Abrahams,* [1916] V.L.R. 681; *Davis* v. *Lisle,* [1936] 2 K.B. 434. But this general principle appears to me to require some qualification. The tacit invitation cannot, I think, be taken to extend to persons entering for the purpose of committing a criminal offence, or a tort against the occupier, merely because the intended wrongful act relates to the occupier's business. It is therefore necessary, in the present case, to consider whether Bridgland's conduct in giving the order to close the hotel for the sale of liquor was so far wrongful that the fact he entered to give it placed him outside the scope of any tacit invitation which might otherwise have extended to cover the entry.

The defendant Thomson, as the licensing inspector for the licensing district of Bendigo, was the holder of a public office in which it was his duty, by virtue of s. 81 of the *Licensing Act* 1928, to carry out or cause to be carried out the provisions of the Act in the Bendigo district. As the holder of that office he had a variety of powers and duties under the Act including powers to serve orders imposing obligations upon licensees to do work to the licensed premises: compare ss. 81 (*b*), 92, 97, 110, and 138 to 142, inclusive. The defendant Bridgland, too, as a sergeant of police stationed at Bendigo and an "authorized member of the police force" within the meaning of the Act, was the holder of a public office; and as such he, too, had a number of powers and duties under the Act: compare ss. 135, 169, 171, 188, 202, 208, 214 and 217. These included powers, in certain circumstances, to make demands imposing obligations to obey.

In these circumstances the giving of the order to the plaintiff may well have amounted to the offence of oppression by a public officer which is a misdemeanour at common law: see Bacon's Abridgment, "Offices and Officers (N)", Stephen's Digest of Criminal Law 9th ed , section 142,

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Russell on Crime 10th ed. at p. 398; Archbold's Criminal Pleading, Evidence & Practice, 32nd ed. at pp. 1190 and 1244; Chaster, Public Officers at p. 697; *R.* v. *Badger* (1843), 4 Q.B. 468, at pp. 474-5; *R.* v. *Bembridge* (1783), 3 Doug. 327; *Ex parte Kearney* (1917), 17 S.R. (N.S.W.) 578, at p. 582; *R.* v. *Jones,* [1946] V.L.R. 300. But whether it did so or not I think that the proper view, on the authorities, is that what was done amounted to a tort against the plaintiff, if it caused damage to him—the tort committed being that called "misfeasance in a public office".

That an action on the case lay for such a misfeasance was established at a relatively early period. In Comyns' Digest, tit. "Action on the Case for Misfeasance (A1)", there is the statement: "an action on the case lies for misfeasance; as, if an officer misdemean himself by any falsity . . . or otherwise misbehave himself in his office". In the same work, tit. "Action on the Case for a Deceit (A6)", it is stated that such an action will be "if an officer, being entrusted by the law, act deceptive in his office". In Bacon's Abridgment, "Offices and Officers (N)", it is said that all officers, whether such by the common law or made pursuant to statute, are punishable for oppressive proceedings by an action at the suit of the party injured. Then in *Whitelegg* v. *Richards* (1823), 2 B. & C. 45, at p. 52, it is stated that an action on the case may be maintained against any officer of a court "for a falsity or misconduct in his office, whereby a party sustains a special damage". In *Henly* v. *Mayor & Burgesses of Lyme* (1828), 5 Bing. 91, at pp. 107-8, it is laid down by Best, C.J., as perfectly clear law that "if a public officer abuses his office" and by the "act of abuse in his office, any individual sustains an injury, that individual is entitled to redress in a civil action" against the public officer. It was pointed out in *Fitzgerald* v. *Boyle* (1861), 1 Q.S.C.R. 19, that this language should not be treated as applying to acts done in the exercise of judicial functions, but subject to this limitation the law as stated by Best, C.J., was there approved. See also Halsbury, 2nd ed., vol. 26, section 579; Chaster, Public Officers, at p. 631.

Some of the authorities seem to assume that in order to establish a cause of action for misfeasance in a public office it is, or may be, necessary to show that the officer acted maliciously, in the sense of having an intention to injure: compare *Acland* v. *Buller* (1848), 1 Exch. 837; 1 Rolle's Abr. p. 93; *Drewe* v. *Coulton* (1787), 1 East 563 (*n*). It appears to me, however, that this is not so and that it is sufficient to show that he acted with knowledge that what he did was an abuse of his office: see the other authorities previously cited, and see, too, *Smith* v. *East Elloe R.D.C.*, [1956] A.C. 736, at p. 752; [1956] 1 All E.R. 855. Indeed, in some cases at least, even this is unnecessary, and it is sufficient that the act was a breach of his official duty, even though it is not shown either that he realized this or that he acted maliciously: compare *Brasyer* v. *Maclean* (1875), L.R. 6 P.C. 398, at p. 406. Proof of damage is, of course, necessary in addition.

In my view, therefore, the rule should be taken to go this far at least, that if a public officer does an act which, to his knowledge, amounts to an abuse of his office, and he thereby causes damage to another person, then an action in tort for misfeasance in a public office will lie against him at the suit of that person. But even so there are two questions of difficulty which have to be determined in favour of the plaintiff here before it can be said that the giving of the order to him to cease trading amounted to the commission of this tort.

The first is whether the necessary act in abuse of office may consist of the giving of an order such as was here given. In my view it may. In 1 Rolle's Abr. p. 93, an example is given of an action on the case against a summoner of the Ecclesiastical Court who, without process, but under

colour of office, cites a person to appear before the court and thereby puts him to expense in appearing: compare also Comyns' Digest tit. "Action on the Case for a Deceit (A6)". In *Acland* v. *Buller* (1848), 1 Exch. 837 it seems to have been regarded as a sufficient act that Tithe Commissioners, under colour of office, issued a certificate as to the amount of expenses to be paid by the plaintiff, which the relevant statute did not authorize them to issue. In each case the element of intention to injure existed, or was alleged, but this, as previously stated, is not, in my opinion, essential. Compare also *Abbott* v. *Sullivan*, [1952] 1 K.B. 189; [1952] 1 All E.R. 226 per Evershed, M.R., at K.B. p. 197 and per Denning, L.J., at pp. 201-2 where there are observations favouring the view that an action may lie for damages in respect of loss resulting from a usurpation of jurisdiction by a statutory tribunal even though no act amounting to an independent tort has been committed pursuant to its decision.

The other question is whether damage resulting from a plaintiff's own act in obeying an invalid order such as was here given is to be regarded as damage caused by the act of giving the order. Upon this question, too, the passage in Rolle's Abridgment is an authority in favour of the plaintiff.

The very recent case of *Wood* v. *Blair & Helmsley Rural District Council* (1957), Adm. L.R. 243 supports the plaintiff's contention upon each of these two questions. The report cited is very brief but the case is reported at considerable length in "The Times" of 3, 4, 5 July 1957.

The plaintiff, Wood, who was a producer and retailer of farm-bottled T.T. milk, sued the council and one Dr. Blair, its medical officer of health, for damages for conspiring together to destroy his business by serving certain notices upon him in purported exercise of powers under the *Milk and Dairies Regulations* 1949. He alleged that they knew well that they had no power to serve the notices, and that the notices could not and did not apply to the circumstances of the case. He alleged further that as a result of these wrongful acts he had had to leave his farm.

The following is a summary of the facts taken, in the main, from the reasons for judgment of Parker, L.J., in the Court of Appeal. In 1949 the plaintiff rented the farm in question and brought to it a small herd of cows. On 11 February 1951 his manageress was found to be suffering from typhoid fever. On 14 February 1951 a notice purporting to be given under the regulations was served on him by the defendants, forbidding the sale of any milk from his herd for human consumption.

On 27 February 1951 they served on him a further notice forbidding him to sell any of his milk unless it had been pasteurised. The plaintiff, who was a member of the Bar, took the view from the outset that the notices were invalid but he felt constrained to obey them. For six weeks he poured the milk produced down the drain. After that period some of it was disposed of for manufacture into baby food. But his business as a retail producer of bottled milk came to a complete standstill. At the same time he was having trouble with the agricultural executive committee, which resulted eventually in the cancelling of his registration as a dairy farmer at the farm and the revoking of his T.T. licence; and he was having trouble, also, with his landlords, which resulted in their resuming possession of the farm. He left the farm on 31 October 1951 and afterwards took his herd to two other places; but in the end he gave up dairy farming altogether. In the meantime, under an arbitration award which, in the event, was a nullity he received, though from whom does not clearly appear, a sum of £275 representing the difference

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between the price he would have got for his milk between the 14 February and 31 October 1951 and the amount he in fact got for the milk sold for baby food.

At the trial of the action, Hallett, J., found that both defendants had acted from the best motives and that the cause of action for conspiracy must fail. But by an amendment a new cause of action was raised, which was described by Parker, L.J., as being "that the notices were invalid and that the plaintiff was entitled to damages for misfeasance". Hallett, J., held "that the notices complained of were invalid and that if the plaintiff could show that he had suffered damage by complying with them he had a valid cause of action against the council"; but he dismissed the claim for misfeasance upon the ground that the plaintiff had not shown that he had suffered any damage over and above the sum of £275 received under the invalid award.

The plaintiff appealed to the Court of Appeal upon the grounds first that the decision that no damage had been proved by him was wrong, and secondly that by reason of the conduct of Hallett, J., at the hearing he had not had a fair trial. In the Court of Appeal he appeared in person and in the course of argument Hodson, L.J., said to him: "You have an intelligible point of appeal, which is that you succeeded in your action by showing that the notices were bad, but you have not been given any damages. That does not depend on any intervention by the judge." Hodson, L.J., also said: "We are accepting that you have a right to damages if you can prove them;" and he then put it to counsel for the defendants, "You agree that the law, as submitted by the plaintiff and accepted by Hallett, J., is that the defendants are liable for misfeasance as a council if damage is proved?" Counsel stated that that was conceded. Later in the argument when the question was being debated whether loss consisting of injury to the plaintiff's health was too remote, Parker, L.J., said: "This is a tort and the tortfeasor must accept the injured party as he finds him."

The Court of Appeal allowed the appeal on the first of the plaintiff's two grounds. Parker, L.J., said that the plaintiff had claimed damages for loss of profit but that this claim could not be sustained because there had been nothing—apart from money—to prevent the plaintiff from going to another farm. He rejected, too, a claim for the expenses of disturbance and removal, holding that these expenses would have been incurred in any event because the landlords would have turned the plaintiff out even if the notice had not been served by the defendants. He held further that the injury to health which the plaintiff had suffered was not shown to have been caused by "the two orders of Dr. Blair."

As to one head of damage, however, the plaintiff succeeded. The reasons of Parker, L.J., upon that point are reported by "The Times" in the following terms:—"But on the next item of special damage—an amount of £99, being a milk subsidy for bottled milk—the plaintiff was entitled to succeed. After the notices had been served, the plaintiff applied to the Milk Marketing Board for the milk subsidy he would have got if he had been carrying on his normal business and selling bottled milk. Ultimately the Board sued him for the £99 which they had paid him, and he paid it back to them; but if he had not got it from the Board he would have claimed it before the arbitration tribunal in addition to the £275 awarded him, and he had every right to claim it now, and to that extent his appeal succeeded." Ormerod and Hodson, L.JJ., concurred.

In that case, as it appears to me, the present plaintiff finds support in the decision of Hallett, J., for his contention that there was here, in the giving of the order to close, a sufficient act to found a cause of action for

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misfeasance in a public office; and the remarks made *arguendo* in the Court of Appeal tend in the same direction. He also finds support in the decision of the Court of Appeal for his contention that loss resulting from his own act in obeying the invalid order here given is damage resulting from the act of giving that order.

In *O'Connor* v. *Isaacs*, [1956] 2 Q.B. 288; [1956] 1 All E.R. 513; [1956] 2 All E.R. 417, there are *dicta* by Diplock, J. and Romer, L.J., tending against the views that I have been putting, but it does not appear to me that they justify a rejection of those views.

In that case one of the questions to be decided was whether justices who had made a maintenance order, in perfect good faith but without jurisdiction, were liable to an action for damages in respect of the loss sustained by the defendant husband by making payments under the order. Diplock, J., held that such an action would not lie and this decision was upheld by the Court of Appeal.

The *dicta* of Diplock, J., extended to orders other than judicial orders, and to orders as to matters other than the payment of money. He referred to the case of a person with a limited authority who, in purported exercise of it, gives an order to another to do an act, both of them believing that the order is authorized, though it is not; and he expressed the view that if that other obeys the order then it is too broad a proposition to say that he can maintain an action in respect of the natural consequences of the order given. As an illustration of his view, Diplock, J., suggested the case of a person obeying the direction of a constable to cross the street and sustaining an injury in consequence. This illustration, however, must be understood in its context and I do not consider that it should be regarded as indicating any view as to the liability for orders given by a public officer in purported exercise of an authority which is known to him to be non-existent; or as to the liability for orders to do acts necessarily involving damage to a man's property or business, such as a health officer's order to kill cattle, or the order in the present case.

The *dicta* of Romer, L.J., related to causation. He said that the actual injury to the plaintiff in that case was the payment, and that this was made as a consequence of the order. But then he went on to say that the loss was not occasioned by the wrong of the justices, while at the same time conceding that their invalid order was one of the causes which contributed to the loss. I do not think that I understand this.

Romer, L.J., himself suggested that it might be regarded as too narrow a view; and if it means that the plaintiff could not succeed because there was no sufficient causal connexion between the order to pay and the loss due to the plaintiff's act in obeying its command, then that view appears to be inconsistent with the view of Diplock, J., and Singleton, L.J., that the action might well have been maintainable if malice had been proved.

The actual decision in that case is clearly distinguishable from the present case, since the order there made was not only made in perfect good faith but was made by justices in intended exercise of judicial functions. For reasons of policy the right to maintain actions against judicial officers has, of course, been subjected by the common law to restrictions which are not applicable in the case of executive officers: compare *Fray* v. *Blackburn* (1863), 3 B. & S. 576. The fact that a ruling as to the validity of a judicial order can almost always be obtained on appeal or on prerogative writ enables this policy to be applied without much risk of injustice; and in *O'Connor* v. *Isaacs, supra*, it was emphasized that the plaintiff there was not bound to obey the order made against him, and that he did have a remedy at law in respect of the

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order, though that remedy was by way of appeal, and not by action: compare [1956] 2 Q.B., at pp. 351, 364, 368. These passages relate, in my view, to this question of policy and not to the question of causation.

The members of the Court of Appeal and Diplock, J., all referred with approval to a passage in *Polley* v. *Fordham*, [1904] 2 K.B. 345, at p. 348 in which it was said that no such thing was ever heard of as an action for making an order against a person without jurisdiction, and that if the order is not followed by consequences against the individual it comes to nothing. It may be that in this passage the reference to consequences is meant to relate to something which would be a tort independently of the making of the order. But this passage, and the approval given to it, must, in my view, be treated as having application only to judicial orders. Moreover, even in that field Diplock, J. and Singleton, L.J., accepted the position that the law might well be otherwise where malice was proved; and Singleton, L.J. and Romer, L.J., both indicated by their references to *Beaurain* v. *Scott* (1813), 3 Camp. 388 that, in their view, if the very making of the unauthorized order causes damage which cannot be prevented by setting it aside on appeal, then no further "consequences" are necessary to give a right of action.

For the reasons I have indicated I consider that the giving of the order by Bridgland to the plaintiff in the present case constituted a tort. I consider further that Bridgland's entry on the premises for the purpose of committing that tort was not within the scope of any tacit invitation or licence that he may have had from the plaintiff, and that therefore his entry onto the premises, at least on the second occasion, was a trespass: compare Smith's Leading Cases 13th ed., at p. 139; Salmond on Torts 12th ed., at pp. 158-9; *Taylor* v. *Jackson* (1898), 78 L.T. 555; *Hillen* v. *I.C.I.* (*Alkali*) *Ltd.*, [1936] A.C. 65. It is, therefore, unnecessary to enter upon any examination of the doctrine of trespass *ab initio*, which was relied on by the plaintiff, or of the question whether what Bridgland did on the premises after entry amounted to a trespass to them.

The plaintiff, I consider, is entitled to judgment for the amounts assessed by the jury, and there will, therefore, be judgment for the plaintiff against both defendants for the sum of £272 with costs.

Judgment accordingly.

Solicitors for the plaintiff *E S Cahill & Son*, Bendigo

Solicitor for the defendants *Thomas F Mornane*, Crown Solicitor

J F F

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