18 of the Wrongs Act 1958 (Vic.) provides 'there shall not be taken into account [in diminution of damages] any sum paid or payable on the death of the deceased under any contract of assurance or insurance . . . ', and the question was whether the pension came within that description.

Counsel for the plaintiff merely relied on the decision of Sholl J. in *Tinka v. Lenan*[44] in which it was held that a pension under a superannuation scheme fell within the section, but Windeyer J. decided not to follow that decision. Sholl J. had followed, with some doubts, the decision in *Butler v. McLachlan*[45] but he was not aware that that decision had been overruled by the Full Supreme Court of South Australia in *Public Trustee v. Wilson.*[46] For that reason Wanstall J., of the Supreme Court of Queensland, in *Cockburn v. Brock*[47] refused to follow *Tinka v. Lenan.*[48] Thus the prevailing judicial opinion in Australia did not favour the decision in *Tinka v. Lenan,*[49] and it was not surprising that Windeyer J. refused to follow it. He referred to contrary English decisions and decided that the pension was not a sum 'payable under a contract of assurance or insurance '.[50]

J. A. CRAWFORD

HAZELTINE RESEARCH INC. v. ZENITH RADIO CORPORATION[1]

Constitutional Law—Evidence—Production of Documents—Crown Privilege —Power of the court to inspect documents.

A question of privileged Crown documents arose before the Supreme Court of the Australian Capital Territory in somewhat unusual circumstances. A dispute concerning restrictive trade practices in the United States led to an examination before the Registrar of the A.C.T. Supreme Court under the provisions of the Imperial Foreign Tribunals Evidence Act.[2] Under this Act, a Judge may on application order the examination upon oath of a witness and the production of documents where the Judge is satisfied that a foreign court desires to obtain the testimony of that witness. In the present case the Assistant Secretary of the Imports Branch of the Department of Trade and Industry was subpoenaed to

[44] [1956] V.L.R. 580.
[45] [1936] S.A.S.R. 152.
[46] [1955] S.A.S.R. 117.
[47] [1959] Qd.R. 254.
[48] [1956] V.L.R. 580.
[49] *Ibid.*
[50] The cases are reviewed by Hocker, ' Lord Campbell's Act—A Comment ' (1961-1964), 4 *University of Queensland Law Journal*, 451.

[1] Unreported. Supreme Court of Australian Capital Territory; Smithers J.
[2] 19 & 20 Vic. C.113.

produce certain documents which were in his custody in his official capacity. On behalf of the Assistant Secretary, Counsel objected to the production of the documents; an affidavit by the Minister acting for the Minister for Trade and Industry supporting the objection was tendered to the Registrar. By consent of the parties the question of the validity of the objection was referred to Smithers J. in the Supreme Court of the Australian Capital Territory for a determination under Order 39 Rule 13 of the Supreme Court Rules. The Deputy Crown Solicitor sought leave to represent the Crown and the subpoenaed witness ; this application was refused, but he was allowed to appear as *amicus curiae* to advise the Court on the significance of the affidavit and to present submissions on the law pertaining to Crown privilege.

The plaintiff contended that in the Territory the Privy Council decision in *Robinson v. The State of South Australia*[3] should be followed in preference to the decision of the House of Lords in *Duncan v. Cammell Laird & Co. Ltd.*[4] It was submitted that the Court should order the production of the documents for examination rather than rely solely on the Minister's affidavit, as the N.S.W. Supreme Court had done by strict application of *Duncan v. Cammell Laird* in *Nash v. Commissioner of Railways.*[5]

The Deputy Crown Solicitor emphasised that he did not wish to rely on the conclusiveness of the affidavit on the basis of *Duncan v. Cammell Laird*, and he drew the Court's attention to the decisions of the Court of Appeal that recently criticised the *Cammell Laird* case, *In re Grovenor Hotel, London*[6] and *Merricks v. Nott-Bower.*[7] In particular he referred to the judgment of Lord Denning in the latter case[8] where his Lordship held that a mere certificate in itself was not sufficient to found a claim to withhold the production of documents; rather, the certificate should set out the nature of the privilege claimed and describe the document so that the judge could clearly see, on reading the certificate, that the Crown would not be expected to produce the documents.

The affidavit of the Minister in the present case stated that the Minister acting for the Minister for Trade and Industry had personally examined the relevant documents and formed the conclusion that their production would be contrary to public policy as being injurious to the public interest. The affidavit disclosed that the documents in question were applications for import licences by a named company which were endorsed as to whether they were approved or not and stated that the approval or otherwise for licences to import goods concerned policy decisions at a high level.

It was submitted that the affidavit was sufficiently detailed to support a claim for privilege under the tests set out in *In re Grovenor Hotel* and

[3] [1931] A.C. 704.
[4] [1942] A.C. 624.
[5] [1963] S.R. (N.S.W.) 357.
[6] [1964] 1 Ch. 464.
[7] [1965] 1 Q.B. 57.
[8] *Ibid.* 68-70.

Merricks v. Nott-Bower and that *Robinson's* case together with *In re Grovenor Hotel* and *Merricks v. Nott-Bower* decided that although the ultimate authority is in the Court, the Court will not lightly pass over the certificate of the Minister. The applicability of *Robinson's* case to federal law has been established by the decision of Kriewaldt J. in *Christie v. Ford.*[9]

Bruce v. Waldron[10] was cited by the Deputy Crown Solicitor as supporting the ratio of *Robinson's* case on which he placed reliance in supporting the claim for Crown privilege, namely that the Court will not lightly pass over the certificate of the Minister.

His Honour in his judgment referred to only two of the cases cited in argument and he reached a different conclusion as to their application to the application sought to be placed on them by the Deputy Crown Solicitor. His Honour said:

> I consider that for the reasons set forth in *Bruce v. Waldron* I should act upon the principle enunciated in *Robinson v. State of South Australia* (No. 2) that notwithstanding any objection taken before a court to the production of a document as being against public interest the court in the performance of its duty to protect that interest has always had in reserve the power to inquire into the nature of the document for which protection is sought and to require some indication of the nature of the injury to the State which would follow its production.

With regard to the affidavit presented, His Honour made the following comments and decision:

> The affidavit states that the approval or otherwise for licences to import goods concerns policy decisions at a high level. There is nothing to suggest that the class of goods or the government decision affecting them has or had any security significance whatsoever. The mere fact that the relevant policy decision was made at a high level does not seem to me to touch the issue . . . In my opinion therefore, notwithstanding the respect due to the Minister's opinion, his statement that he formed the conclusion set out above cannot be regarded as sufficient to sustain the objection to production and I therefore overrule the same.

As the fate of the import applications had been communicated to the applicant for the licences, Smithers J. thought it difficult to conceive that there was any aspect of public interest relevant to the claim by the Crown to withhold production of the documents as evidence in litigation. No doubt in an endeavour to prevent any further such claims His Honour commented on Crown privilege generally whilst referring specifically to the case under review:

> There is therefore a strong possibility that the objection may have had its genesis in a misconception of the considerations relevant to this class of objection. Attention may therefore be drawn to the

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[9] [1957] 2 F.L.R. 202.

[10] [1963] V.R. 3.

> following. A high degree of public interest is involved in the effective administration of justice. That a party should be denied relief or should suffer punishment or judgment for lack of evidence when that evidence is in existence is certainly contrary to the public interest. In some cases this might be the result of sustaining the privilege claimed. Such an eventuality could be tolerated only in those special cases where there is a competing public interest involved of even more compelling importance and where production of the document would materially prejudice that interest. No doubt, documents properly immune from production are usually in the custody of a government department but the mere fact that documents are in government custody and not normally made available to the public cannot support immunity. Where therefore it is sought to support immunity by reference to an opinion the nature of the documents in question and the nature of the public injury which is feared should always appear.

The decision of Smithers J. in this case has clearly established the existence and application of the reserve power of the Court in the A.C.T. to safeguard the public interest from prejudice arising from the suppression of a document, where an objection has been taken by a Minister to the document's production. As the Australian Capital Territory is the seat of Commonwealth Government and the source of most Commonwealth ministerial decisions the clear unambiguous decision of Smithers upholding the principles of *Robinson's* case is to be welcomed.

B. MORRIS

INVASION OF PRIVACY : AUSTRALIA'S FIRST TELEPHONE TAPPING PROSECUTIONS

The Supreme Court of the Australian Capital Territory has recently completed the hearing of the first prosecutions under section 5[1] of the Telephonic Communication (Interception) Act 1960 (Cth). The first

[1] Section 5, insofar as is relevant for the purposes of this note provides as follows —' 5.—(1.) A person shall not—(a) intercept ; (b) authorize, suffer or permit another person to intercept ; or (c) do any act or thing that will enable him or another person to intercept, a communication passing over the telephone system. Penalty : Five hundred pounds or imprisonment for two years. A person shall not divulge or communicate to another person, or make use of or record, any information obtained by intercepting a communication passing over the telephone system . . . Penalty : Five hundred pounds or imprisonment for two years.'

Section 3 of the Act contains the following relevant definitions—" ' communication ' includes conversation, message and signal, and any part of a conversation, message or signal ; ' the Department ' means the Postmaster-General's Department ; ' the telephone system ' means the telephone system controlled by the Department." Section 4 of the Act provides, inter alia—' 4.—(1.) For the purposes of this Act, but subject to the next succeeding sub-section, interception of a communication passing over the telephone system consists of listening to or recording, by any means, such a communication in its passage over the telephone system without the knowledge of the person making the communication. (2.) Where a person lawfully on premises to which a telephone service is provided, by means of a telephone instrument or other device that is part of that service—(a) listens to or records a communication passing over a telephone line that is part of that service, being a communication that is being