SHIELD OF THE CROWN REVISITED

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The expression 'shield of the Crown' was devised by Lord Cranworth in 1865[1] to describe the situation where a public authority is accorded the special privileges which the courts accorded to the Monarch, at a time when the Monarch in a direct and personal sense carried on the central government of the country. The most important of these privileges were: immunity from the operation of statutes (subject to exceptions); immunity from taxation (which for the most part in England today, and in all cases outside it, is a form of immunity from statutes); immunity from suit in the courts save with the Monarch's consent; special advantages in litigation (whether as plaintiff or, pursuant to consent, as defendant) such as immunity from discovery and interrogatories, advantages in style and order of pleading and immunity from execution of judgments. With the 'constitutionalization' of the monarchy in the seventeenth and eighteenth centuries, it began to be apparent that these advantages enured less for the benefit of the Monarch than of 'the public government of the country'—to use another of Lord Cranworth's phrases—and there was accordingly a strong tendency to substitute 'any public authority' for 'the Crown' in the relevant rules. This tendency was ended by the decisions of the House of Lords in the *Mersey Docks* cases (1865, 1866),[2] which finally established that the Crown's privileges are confined to the Crown in a direct and personal sense, and to those authorities of the central government which have a close connection with the Crown.

The survival of government privilege in this limited sphere was defended by Higgins J. in 1923[3] as 'a recognition of the principle that

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[1] *Mersey Docks and Harbour Trustees v. Cameron* (1864) 11 H.L.C. 443, 508. Many other phrases have been used and criticized, and the question of phraseology has become a subject for mild judicial jokes. Thus in *Territorial and Auxiliary Forces Assn. v. Nichols* [1949] 1 K.B. 35, 45, Scott L.J. inquired whether the Association was 'a sufficiently intimate "emanation" from the Crown to attract the contagion of the Crown's immunity.' In *Smith v. Canadian Broadcasting Corporation* [1953] 1 D.L.R. 500, 512, Judson J. referred to criticism of the expression 'emanation', (which Day J. first used in *Gilbert v. Corporation of Trinity House* (1886) 17 Q.B.D. 795, 801), by the Privy Council in the *Niagara Parks Commission* case [1941] A.C. 328; Judson J. said: 'The language of the law and not the language of spiritualism should be used to describe these public corporations'. Actually the Privy Council's criticism was misconceived; Day J. was using the language, not of spiritualism, but of history. Some such phrase must be used to give a general description of the problem, but none must be regarded as containing its solution.

[2] *Mersey Docks and Harbour Trustees v. Cameron* (1864) 11 H.L.C. 443; *Mersey Docks and Harbour Trustees v. Gibbs* (1866) L.R. 1 H.L. 93.

[3] *Repatriation Commission v. Kirkland* (1923) 32 C.L.R. 1, 11.

all private interests are subordinate to the public needs'. But that principle, if sound, would require the extension of the privileges to all public authorities – the very doctrine rejected in the *Mersey Docks* cases. And in any event, it is political cant. Whether 'public' interests should be treated as superior to, equal with or inferior to 'private' interests is a question susceptible of infinite difference of opinion, and capable of solution, if at all, only from case to case. The courts should not assume that government interest and public interest are the same thing. Government interest may be a form of private interest, or used to serve a private interest. Thus in the very case in which Higgins J. made his above-quoted observation, the question was whether goods supplied to a returned soldier by the Repatriation Commission on hire-purchase should be exempt from distress for rent; the public interest was minimal, and any general immunity from execution of government-financed purchases in the hands of a citizen would be an instrument of fraud. Similarly in the *Hungarian Administrator* case [4] the holding that the Administrator did not have to pay income tax benefited solely the lucky alien owner of the assets which the Administrator had converted and invested. But even when clear and substantial public interests are involved, it cannot be assumed that these should always prevail; there is no objective moral standard justifying so sweeping a conclusion. The claim of the tax collector may well be considered inferior to the claim of a bankrupt's deserted wife or children to maintenance; the claim of the civil service department to keep its policy secret may well be considered inferior to the claim of the private litigant that he should be given full discovery of relevant documents. Often the issue is not between 'public' and 'private' interests, but between different public interests, as in the *Grain Elevators Board* case;[5] the rules then operate to give the central government advantages over decentralized government agencies, and this again may or may not be consonant with some intelligible policy. The jealously guarded immunity of central government agencies from legal liability to municipal rates rarely has any good reason, and in a federation such as Australia this is so whether the central agency is State or Commonwealth. As general doctrines, therefore, these Crown immunities, when applied to the circumstances of modern government, are one and all objectionable and should be abolished. The courts should be authorized to act on an assumption of formal equality between legal entities, whether governmental or not, and the legislatures should specify in particular cases the special advantages thought essential to a particular authority; in such a system, the politicians would probably be found not nearly so willing to maintain

[4] *Bank voor Handel en Scheepvaart N.V. v. Administrator of Hungarian Property* [1954] A.C. 584.
[5] *Grain Elevators Board v. Shire of Dunmunkle* (1946) 73 C.L.R. 70.

governmental privileges as they are at present, when the problem usually arises not as one of granting privileges, but of taking them away.

Of course, Crown privileges have been abridged in many details. The most notable abridgment has related to immunity from suit; Australia led the way in this matter, although it was left to the State of Victoria to take the final step among the Australian States by abolishing Crown immunity from suit in tort by the Crown Proceedings Act 1955. This Act is also interesting because it contains some attempt at dealing with the problem now under discussion. Section 4 (3) provides that no action shall lie against the Crown in respect of the contracts or torts of 'any public statutory corporation'. For the particular purpose of liability to suit, the result is to substitute a reasonably well defined – though broad – category, namely, 'public statutory corporations', for the less well defined category, 'bodies not under the shield of the Crown'. The provision has not been interpreted, and perhaps never will be, since a wise plaintiff will make preliminary inquiry as to whether in a doubtful case the relevant public authority and the Crown Law Office can agree as to the preferable formal defendant.[6] It should be noted that the Act has no impact on the question whether a public statutory corporation has or lacks other Crown privileges such as immunity from taxation, and does not deal with unincorporated authorities.

Lacking any root and branch abolition of Crown privileges, we are still for various purposes plagued with the problem, which was first 'visited', other than judicially, by Sir William Harrison Moore in 1907[7] and by him stated in these terms: 'Who and what are covered by the shield of the Crown?'[8]

There was a long gap between Moore's pioneer inquiry and the next considerable paper, and this also was by an Australian scholar – J. M. Jelbart, in 1931.[9] Moreover, it was whilst in Australia that W. Friedmann paid special attention to the topic.[10] No doubt this special Australian interest is due to the large number of Australian cases – probably greater in total than those of the United Kingdom, although the latter encountered the problem earlier and has supplied

[6] The Commonwealth Crown Law authorities will normally decline to take advantage of any possible mistake in the naming of a defendant in similar circumstances; they take the view that since the Commonwealth and its instrumentalities are equally liable to suit, the only important matter is to ensure that the substantive grounds of liability are properly established. But in any event with both Commonwealth and States, if a plaintiff makes a reasonable effort at clearing up any doubt about governmental parties, and the government agencies concerned lack the common sense to co-operate, the joinder of both the public authority and the Crown as defendants is unlikely to be punished with costs.

[7] (1907) 23 *Law Quarterly Review* 12. The title, 'Liability for Acts of Public Servants', is misleading; the article deals mainly with shield of the Crown.

[8] *Ibid.*, 16.

[9] (1931) 5 *Australian Law Journal*, 216.

[10] (1948) 22 *Australian Law Journal*, 7; (1950) 24 *Australian Law Journal*, 275.

the foundation decisions. From 1950 to 1956 there were at least fourteen reported Australian decisions involving the problem; during the same period, there were not so many in the United Kingdom, Canada and New Zealand taken together. No doubt, too, the plenitude of Australian cases has been due to the long tradition of collectivist policy, and the diverse forms in which it has been expressed.[11] But that neither decisions nor juristic writings have produced clear and settled doctrine, in Australia or elsewhere, is suggested by the strong dissents in recent cases. Thus in the *Hungarian Administrator* case (1954), the House of Lords divided three against two, and reversed the opinion of three Lords Justices in the Court of Appeal, who had in turn reversed Devlin J. In *Wynyard Investments v. Commissioner for Railways* (1956),[12] the High Court divided three against two, the majority in this case agreeing with the Supreme Court of New South Wales. These dissents moreover, were not on the facts, nor even on the evaluation of the facts for the purpose of the doctrine, but squarely on the doctrine. The uncertainty is unfortunate, because this is an area of law where certainty and predictability are more important than flexibility. What, then, is the doctrine?

1. We can eliminate two end cases. If the function in question is performed literally by the Monarch, or by a personal representative of the Monarch – a Governor-General or Governor – in his capacity as such, then *cadit quaestio*. At the other end, the *Mersey Docks* cases suggested, and *Coomber v. Justices of Berks*[13] confirmed, that the immunity extends to a number of functions of government, by whomsoever carried out. With such functions, the question of *organizational* relation to the central government is irrelevant. In *Coomber's* case, Lord Watson listed the administration of justice, the maintenance of order and the repression of crime as *among* the 'primary and inalienable functions of a constitutional Government'[14] to which this doctrine applies, and no doubt at least defence must be added. The student of social history will be reluctant to regard any function of government as 'primary and inalienable', but he can accept without cavil the amendment of Latham C.J. to 'traditional'[15] at least for our society; whatever argument on political principle and difference in political practice there may have been over the functions of government in the past four centuries, justice, police and defence have come to be regarded as 'properly' governmental. It is also very desirable that for the present purpose, the functions so dignified should be as restricted as possible.[16]

[11] The present writer gives an account of this in W. Friedmann, *The Public Corporation* (1954), 4 ff.

[12] [1956] Argus L. R. 49. [13] (1883) 9 App. Cas. 61. [14] *Ibid.*, 74.

[15] *Grain Elevators Board v. Shire of Dunmunkle* (1946) 73 C.L.R. 70, 75.

[16] It has been suggested that taxation is also 'primary'. But no decision requires its inclusion, and it would be unfortunate if common law privilege attached to municipal

2. The problem, then, relates to the functions of government which are not 'traditional' under (1), and which are not literally carried on by and for the benefit of the Monarch or his gubernatorial representatives. Within this area, judicial *dicta* have varied from broad conceptions corresponding to the understandings of politicians and civil servants, to attempts at using established legal concepts of a reasonably precise character. In the High Court of Australia, Justices are sometimes found asking whether an instrumentality is a 'department of the government'[17] (meaning the central government): this assumes that a 'department' is a self-evident category. Another approach, suggested in early Australian cases and some more recent New Zealand ones, is to assume that incorporation of an authority with liability to suit is *prima facie* sufficient to confer separate legal personality for all purposes and to exclude Crown privilege;[18] unfortunately, this view is inconsistent with decisions of high authority, and it is doubtful whether incorporation is even *prima facie* evidence of independence from the Crown.[19] In the *Mersey Docks* cases, stress was laid on another aspect of function: is the authority in question merely a 'substitute for private enterprise'? This may be good enough to provide an assumption in doubtful cases, but it cannot be regarded as a main doctrine, since as Latham C.J. has said, 'any activity may become a function of government if parliament so determines'.[20] In the *Mersey Docks* cases, the House of Lords did not have to lay down any comprehensive rule, but *dicta* suggested that only 'servants of the Crown', or even 'direct and immediate servants of the Crown'[21] could qualify for the immunity, and it is a pity that this narrowing rule has not been established, and maintained in a literal fashion. Moore considered that the decisions required an extension of the shield 'beyond the case of servants or agents in any sense in which

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rates—and rate collectors. It is not unknown, even today, for private persons to be given power of making compulsory exactions. Perhaps judicial philosophy would be satisfied with the view that taxation is a means, not an end, of government.

[17] *Sydney Harbour Trust Commissioners v. Wailes* (1908) 5 C.L.R. 879, 885, 888; *Repatriation Commission v. Kirkland* (1923) 32 C.L.R. 1, 7; *Rural Bank of New South Wales v. Shire of Bland* (1947) 74 C.L.R. 408, 417; *Rural Bank of New South Wales v. Hayes* (1951) 84 C.L.R. 140, 146.

[18] *Sweeney v. Board of Land and Works* (1878) 4 V.L.R. (L) 440; *Shire of Arapiles v. Board of Land and Works* (1904) 1 C.L.R. 679; *Christchurch City v. Canterbury Education Board* [1934] N.Z.L.R., s. 22; *Smith and Smith Ltd. v. State Advances Corporation* [1939] N.Z.L.R. 588. And see Friedmann, (1948) 22 *Australian Law Journal* 7, 10.

[19] *Bainbridge v. P.M.G.* [1906] 1 K.B. 178; *A. Goninan & Co. Ltd. v. South Australian Harbours Board* [1931] S.A.S.R. 128, 130. And see J. A. G. Griffith in (1952) 9 *University of Toronto Law Journal*, 169.

[20] In the *Uniform Tax Case* (1942) 65 C.L.R. 373, 423, quoted with approval in *Wynyard Investments v. Commissioner for Railways* [1956] Argus L.R. 49, 55.

[21] (1864) 11 H.L.C. 443, 464, 501-502, 712. In the *Hungarian Administrator* case, the House agreed in rejecting the argument that 'direct and immediate' meant senior or high-ranking officials, though it is not impossible that Lord Westbury L.C. (who used the phrase) had this in mind. See especially [1954] A.C. 584, 613-614.

these terms would ordinarily be used in private law',[22] but probably the extended sense he had in mind was that dealt with in (1) above; certainly, the test he proposed for other cases is almost undistinguishable from the classical test of servanthood – 'whether the central government exercises such a general direction and control over the body in relation to its functions as to deprive it of any will of its own, and to make it the mere instrument of the collective will of the state'.[23] But he immediately cites *Sanitary Commissioners v. Orfila* (1890)[24] as an example, and there the Commissioners, although subject to a great deal of policy control and working under regulations were not in the position of the common law servant of the Crown. The next important case, *Fox v. Government of Newfoundland* (1898)[25] approached the matter from the other direction and emphasized the degree of independent discretion which the body in question possessed; it also introduced the phrase 'mere agent'. Even if Moore overstated the amount of 'servitude' needed to bring an authority 'under the shield', he assessed even the few cases at that date correctly in stating 'the question of immunity depends in substance on control'.[26] J. M. Jelbart, with more cases to draw on, expressed the matter as depending on a 'relationship of agency', and analysed the 'departmental' test as depending on ministerial control.[27] Agency is a broader concept than service. Fullagar J. observed in *Commonwealth v. Bogle*[28] that there is no reality in the idea of an incorporated public authority being a fellow servant of the Crown with the 'individual servants' employed, but the difficulty disappears if the corporation is thought of as an agent; an agent may employ servants to carry on the agency, and those servants are not fellow servants of *their* principal. In the *Wynyard Investments* case, Kitto J. observes[29] that in the case of a corporate authority, it is not sufficient to establish that there is 'in some vague sense an approximation of the corporation to a Government department'. But the agency concept, though covering a wide syndrome, is somewhat more precise than this. Devlin J. was undoubtedly right when in the *Hungarian Administrator* case he asserted that few responsible public officials were servants;[30] this, however, does not prevent them from being agents.

3. The tests for 'agency' relate to three main factors: policy control, financial control and control over the appointment and dismissal

[22] (1907) 23 *Law Quarterly Review* 12, 18. [23] *Ibid.*, 24. [24] (1890) 15 App. Cas. 400.
[25] [1898] A.C. 667. [26] (1907) 23 *Law Quarterly Review*, 12, 24.
[27] (1931) 5 *Australian Law Journal*, 216, 217.
[28] [1953] Argus L.R. 229, 243. [29] [1956] Argus L.R. 49, 59.
[30] [1953] 1 Q.B. 248. Of course many officials are servants in a strict sense, but the question nearly always arises at the level of an official who is an agent with some discretion; hence Lord Reid's criticism of Devlin J. [1954] A.C. 584, 616 was misconceived. To call a minister a 'servant' of the Crown is clearly a peculiar use of the term. If one adopts Lord Justice Denning's heretical notion of 'service', then the distinction between service and agency disappears; see [1953] 1 Q.B. 248, 295.

of staff.[31] Other matters sometimes mentioned are the history and nature of the function, discussed under (d) *(infra)*, and matters of report or certification (such as auditing of accounts); the latter, if relevant at all, are so only if there is ambiguity in the control factors proper.[32] Both Jelbart and Friedmann criticize the 'agency' test, Jelbart for its indeterminate elements and Friedmann for its inappropriateness to the administrative organization of the welfare state.[33] But it is firmly established,[34] and indeed unless Crown privilege is either abolished or confined to Crown servants in a narrow sense, some consideration of the organizational relationship between authority and central government is unavoidable; perhaps 'agency' is not an entirely appropriate word, but in this as in so many branches of administrative law we have no option but to use the private law concept offering the closest analogy. To the discussions by Jelbart and Friedmann we add the following notes:

(a) There is no doubt that an authority may be 'under the shield' in respect of some of its functions and not in respect of others.[35] Jelbart appeared to think that the 'agency' concept prevented this, but in that he erred; nothing in the concept of agency prevents an authority from being an agent for one purpose but not for another. Some difficulties, not so far illustrated by the cases, may lurk in such situations, since staff, premises and equipment may be used indifferently for all purposes, and questions may arise concerning the organization as a whole – for example, liability to municipal rates. No doubt the possibilities of apportionment would be exhausted, but in an extreme case it might become necessary to decide the predominant character of the authority.

(b) It is also certain that an authority may have some Crown immunities but lack others.[36] Jelbart appeared to think that this required arguing, but one has only to consider the situation of the Crown itself, which has now for the most part been deprived of its immunity from suit and its special advantages in litigation, and may be subject to some statutes while immune from others. A corollary is that the possession or the lack of a particular

[31] *Skinner v. Commissioner for Railways* (1937) 37 S.R. (N.S.W.) 261, 269.

[32] See the discussion by Jelbart (1931) 5 *Australian Law Journal*, 216, 218.

[33] (1931) 5 *Australian Law Journal*, 216, 220; (1948) 22 *Australian Law Journal*, 7, 11 ff.

[34] For *dicta* since Friedmann wrote, see the *Bank Nationalization Case* (1948) 76 C.L.R. 1, 226, 273, 322; *Tamlin v. Hannaford* [1950] 1 K.B. 18, 22; *Hungarian Administrator* case [1954] A.C. 584, 613-614, 616, 627, 633-634; *Wynyard Investments* case [1956] Argus L.R. 49, 50. The test is also accepted in Canada: *Halifax v. Halifax Harbour Commissioners* [1935] 1 D.L.R. 657; *University of Toronto* case [1950] 2 D.L.R. 732. But in the New Zealand cases, quoted *supra*, n. 18, the agency test was ignored.

[35] *Victorian Railways Commissioners v. Herbert* [1949] V.L.R. 211; *Rural Bank of New South Wales v. Hayes* (1951) 84 C.L.R. 140.

[36] This should be distinguished from (a).

immunity should not be regarded as in itself relevant to the possession or lack of another immunity; the question is whether the *ground* for the presence or absence in one case is relevant to the case in question.

(c) The actual degree of autonomy possessed by an authority is not relevant: the question is how much it can 'assert and insist on by reason of the terms of [its] appointments'.[37] This is very important in relation to the many Australian authorities which were once autonomous, which still enjoy a great deal of *de facto* autonomy, but which pursuant to Labour Party policy have been put under ministerial control.[38]

(d) In decisions and the literature, the history and function of the authority are often mentioned as if relevant to the question of agency. Friedmann criticizes this.[39] Logically, neither history nor function are immediately relevant to the question 'how much control does the Crown or Minister exercise'. If the statutory provisions on control are ambiguous, the general principles of interpretation allow history to be used in order to resolve the ambiguity. Function raises more difficult problems. The *Mersey Docks* cases justify a rule that 'commercial' function should be presumed autonomous. On the other hand, in the *Hungarian Administrator* case, Lord Reid suggested that function is relevant only in the case of the 'traditional' functions dealt with in (1) above.[40] It is certainly misleading to proceed as if collectivist enterprises are ever 'mere' substitutes for private enterprise; government intervention is usually undertaken to achieve further, if not different, purposes from those pursued by private enterprise. But this paper is written on the general assumption that the best rules are those which can be squared with existing decisions and will minimize the operation of Crown privilege. That being so, it is suggested that, *pace* Lord Reid, if the 'control factors' are ambiguous, the courts are entitled to presume and should presume against Crown agency in the case of authorities not performing the traditional functions. The opinion written by Denning L.J. for the Court of Appeal in *Tamlin v. Hannaford*[41] strongly supports that view.

4. *Dicta* in the second *Mersey Docks* case[42] support a view since revived from time to time[43] that the question depends on the con-

[37] *Hungarian Administrator* case [1954] A.C. 584, 617, *per* Lord Reid.
[38] See Friedmann, *The Public Corporation* (1954) 18-20.
[39] (1948) 22 *Australian Law Journal*, 7, 12 ff; see also *per* Latham C.J., *supra* n. 20.
[40] [1954] A.C. 584, 615.
[41] [1950] 1 K.B. 18. Mr J. A. G. Griffith ((1949) 12 *Modern Law Review*, 496) trenchantly, and justifiably, criticizes the form of the opinion, but his criticisms do not touch this question of presumption.
[42] (1864) 11 H.L.C. 686, 703, *per* Blackburn J.
[43] *E.g. Victorian Railways Commissioners v. Herbert* [1949] V.L.R. 211.

struction of relevant statutes – those governing the authority in question, and those from whose operation immunity is sought. Of course the question can be put as one of construction, and of course statutes could give a complete answer without recourse to any general doctrine; it would, indeed, save much private and public time and money if the politicians and the civil servants would permit the parliamentary draftsmen to deal with each case by clear and explicit language. If privilege is desired, there is the Queensland form: 'For all purposes of this Act the Commission shall have and may exercise all the powers privileges, rights and remedies of the Crown'.[44] If avoidance of privilege is required, there is the New South Wales form: 'the Board shall not be deemed to represent the Crown for any purpose whatsoever'.[45] In between, the various possible privileges can readily be listed, and granted or denied as required. But in most of the cases, the problem arises because the legislation in question does not explicitly deal with it; the legislation is then a most important part of the material for solving the problem, but by definition some doctrine not contained in the legislation is also required.

5. Similar to the tendency mentioned in (4), is the recent tendency to emphasize the particular kind of immunity claimed, and the particular activity in respect of which it is claimed.[46] But even when a peculiarly worded statutory immunity is in issue, as in the *Grain Elevators Board* case,[47] reasoning is found almost impossible without reference to the general 'agency' concept. The argument keeps coming back to the question – 'who and what is the Crown?'

6. Until the *Hungarian Administrator* case attention had been concentrated on the question of organizational relationship to the central government; if central government control were present, then it was assumed that benefit to the Crown from the conduct of the activity and from the grant of the immunity would follow. But the peculiar facts of the *Hungarian Administrator* case drew attention to benefit for the Crown as a possible independent element. The Administrator had held property of aliens during the war, on trusts which could finally be determined only after conclusion of the peace treaties; until then, it was possible that some or all of the property would eventually go to the owner, or to the Crown, or to the Crown's subjects (under reparation arrangements). The property actually went to the owner. The question was whether the Administrator had

[44] Considered in *Sundell v. Queensland Housing Commission* (No. 5) [1955] St. R. Qd. 162; *cf. Housing Commission v. Imperial Paint Manufacturers Pty. Ltd.* 73 W.N. (N.S.W.) 396, which shows how very explicit such provisions need to be.

[45] Marketing of Primary Products Act 1927, s. 7 (4).

[46] *Victorian Railways Commissioners v. Herbert* [1949] V.L.R. 211, 213-214, quoted with approval by Kitto J. in the *Wynyard Investments* case [1956] Argus L.R. 49, 58.

[47] (1946) 73 C.L.R. 70. Only Dixon J. decided the case on a basis wholly independent of the agency test.

properly paid income tax on proceeds of the property while its ultimate destination was still doubtful. To hold that the Administrator had improperly paid income tax was clearly for the benefit not of the Crown but of the private owner, and the Court of Appeal was prepared to dispose of the matter on that basis of rough common sense.[48] But however clear it may have been in the particular case, as a general rule it would not be at all easy to decide whether a particular immunity would operate to bring a specific 'benefit' to 'the Crown'. The 'Crown' here means the central government.[49] It is quite delusory to talk as if any identifiable person or even group of persons constitutes the 'Crown'. The money in question would not go to the Monarch, but to the Treasury for the general purposes of government. If property is used for the purpose of a particular instrumentality – a railway commission, a savings bank, *etc.* – we cannot answer the question whether a Crown interest is involved *independently* of the question whether the authority is an agency of the central government; in every case where the property is not literally held for the Crown (or for one of the 'traditional purposes'), the agency is the very thing which establishes a 'Crown interest'. Next, it may often be embarrassing for a court to decide whether the immunity claimed will provide an actual benefit or not; is it in the interests of the 'Crown' that its agents be at liberty to drive at any speed they please, thereby endangering the Crown's subjects or (if that is irrelevant) other Crown servants?[50]

It is suggested, therefore, that particular benefit to the 'Crown' in the actual case cannot be the test. It is the character of the activity and the possible tendency of the immunity that matter. So in the *Hungarian Administrator* case, the House of Lords considered the possible interest of the Crown at the time when the tax was paid. The majority said, and the dissentients denied, that the existence of a possible, partial, interest in the Crown at that time was sufficient, and it is the only case in which such a question has arisen.[51] Perhaps that type of problem is better approached from the opposite direction. All agree that if a Crown agent is performing a service purely for a private person, Crown immunities should not operate to benefit that

[48] [1953] 1 Q.B. 248, 283 ff.

[49] This is clearly recognized in the dissenting opinion of Kitto J. in the *Wynyard Investments* case, [1956] Argus L.R. 49, 59. But His Honour then begs the question by proceeding as if the Commissioner for Railways were self-evidently *not* 'the Crown', although he was 'subject to the control and direction of the Minister', and as if one had to find some *other* 'Crown' entity for whose benefit the property was held. Perhaps, at bottom, the dissent of Kitto J. rests on the admirable heresy that no incorporated body should be identified with the Crown.

[50] *Cf. Cooper v. Hawkins* [1904] 2 K.B. 164, and note the analogous difficulty of deciding what is a 'preference' under s. 99 of the Commonwealth Constitution, as in *Elliott v. Commonwealth* (1935) 54 C.L.R. 657.

[51] The dissentients thought the function must be exclusively for the benefit of the Crown.

person; thus a Public Trustee working within a departmental setting will be liable to income tax on the income accruing to a deceased estate under his management. But will he be liable to pay municipal rates in respect of the property in which he conducts his office? Surely the carrying on of a trustee business has become a 'Crown' activity, merely because it is under the general control of a Minister, and if an immunity is claimed, the court must presume that the 'Crown' will in fact benefit. Surely in the *Hungarian Administrator* case, even if the legislation had from the first established that under no circumstances was the money to go to the Treasury, the Administrator could have claimed immunity from municipal rates in respect of an office building he exclusively occupied. He might even have made a good case for immunity from the Landlord and Tenant Acts in respect of house properties under his administration, on the ground that the tendency to simplify management by a Crown agent, in respect of a function which the Crown wished to carry on as an incident of wartime administration, rather than the ultimate advantage to the recipient, should be the test. In the *Wynyard Investments* case, Kitto J. dissenting, said,[52] in reference to the *Hungarian Administrator* case: 'there was unanimity . . . that the decision must depend upon an ascertainment of the effect which the taxing of the income would have upon interests or purposes of the Sovereign. The nature of the relation between the official himself and the Crown – whether he was a servant, or an agent or occupied some other position – was considered only in the course and for the purpose of determining that crucial matter'. It is suggested with respect that actually the House of Lords treated the two considerations – relationship of the official to the Crown and effect on the Crown's interests – as independent factors, each of which was equally important and each of which required to be established. It is further suggested that the 'Crown interest' issue can arise separately only in the rare cases where the function can be said to be performed for the benefit of private persons, or of a public authority clearly not 'under the shield'. In most cases, the authority is self-regarding as to purpose, or is legally so treated. The Railways Commissioners carry on the railways in one sense for the benefit of the public, but the only legally relevant consideration is whether they do so under the substantial control of a minister, and if they do, then running railways has become an activity of the central government and a 'Crown interest'.

7. In *Bogle's* case Fullagar J., delivering the main majority opinion, said[53] (dealing with a company formed by the Commonwealth to run migrant hostels): 'the rights asserted by the Company in these proceedings are simply *not* rights of the Commonwealth'. (The rights in

[52] [1956] Argus L.R. 49, 57.

[53] [1953] Argus L.R. 229, 245.

question were claims for board and lodging in excess of those prescribed by legislation of the State in which the relevant hostel was situated.) Similarly, in the *Hungarian Administrator* case, Denning L.J. said of the Administrator:[54] 'Although the Board of Trade have a large measure of control over him, his activities as custodian are his own activities'. And in the *Wynyard Investments* case, Kitto J. said of the Commissioner:[55] 'his exercise of the right of possession which his legal title gives him can never be, in law, an exercise by the Crown by its servant or agent . . . there is nothing in the Act which makes the possession of the land the Minister's as distinguished from the Commissioner's'. The reasoning thus adumbrated appears to provide a convenient escape from Crown immunity, by concentrating on the purely juristic quality of the possession, ownership, contractual relation or whatever interest is being asserted, and requiring that this interest be legally vested in the Crown or be held on trust for the Crown, or declared by statute to be a Crown interest; on this view the degree of control which the central government exercises over the *administration* of the interest is irrelevant. If such a view could be adopted, the result would be very similar to that long advocated by Friedmann and myself – namely that incorporation of an authority should be sufficient to remove it for all purposes from 'under the shield'. But it is difficult to reconcile this approach with the main line of decided cases, in which both incorporation and legal title have been treated as irrelevant and all the emphasis placed on the administrative control of the central government. The inconsistency can be seen by considering the passage in the Privy Council's opinion in *Sheedy's* case[56] on which Kitto J. relied in his above-quoted remarks. Lord Haldane did not say 'there is nothing in the statute which makes the acts of administration his' [*i.e.* the minister's] 'as distinct from theirs' [*i.e.* the Meat Board's] in reference to any question of title or of precise legal interest. He went on to explain that the Board's acts were 'theirs' because the Board had a high degree of independent discretion in exercising their functions – as he said, 'without consulting the direct representatives of the Crown'. In the *Wynyard* case, on the contrary, the Commissioners were in all respects under the control of 'the direct representative of the Crown'. We come back to the difficulty considered in (6) above. A 'Crown' interest cannot be other than an interest of the central government. Putting it another way, the statutory system of control has just the same legal effect as if the interest were held on trust for the Crown.

8. So far therefore as the majority opinion in *Bogle's* case rests on the doctrine mentioned in (7), it would appear inconsistent with the

[54] [1953] 1 Q.B. 248, 296. [55] [1956] Argus L.R. 49, 62.
[56] *Metropolitan Meat Industry Board v. Sheedy* [1927] A.C. 899.

main line of authority, which was accurately expounded and applied by the dissenting Justices (McTiernan and Williams JJ.). However, the case raises another issue which is also mentioned by Fullagar J.[57] and was the main ground of the decision of Webb J. This is that, outside the sphere of ordinary common law service, 'Crown agency' requires to be established by statute. The hostel company there in question had been incorporated under the ordinary Companies Act of Victoria, which of course gave the Commonwealth no statutory control of its affairs. Commonwealth control was very extensive, but it was established by the terms of the incorporation and by agreements between the company and the Department of Immigration – that is, by obligations arising wholly in the sphere of private law and mainly in the law of contracts. On the general principle of restricting Crown immunity, this gives a satisfactory basis for limiting the scope of Crown agency. It also provides a satisfactory ground for overruling *Roberts v. Ahern*,[58] in which the High Court extended Crown privilege to an independent contractor carrying out a job for the Post Office; in *Bogle's* case, Fullagar J. attempted to distinguish that case as a wrong application of the doctrine of immunity of instrumentalities in a federation,[59] but actually Griffith C.J. in *Roberts v. Ahern* expressly avoided deciding the federal immunity issue (which was argued) and put the decision squarely on 'shield of the Crown', as if the relation had been between a Victorian department and a Victorian statute. It is clearly undesirable that Crown immunities should extend to private contractors.

9. In several Australian cases[60] and in a Canadian paper,[61] attention is paid to the analogies provided by 'federal immunities' decisions. As a matter of forensic technique, this is probably unavoidable, since the federal immunity cases provide extensive discussions of what are 'essential functions of government' and what are 'government instrumentalities'. However, the history and purpose of the two doctrines is quite different, and the relevant categories, while having some common features, have different operational values and different marginal contents. The 'essential function of government' under (1) above is a residual category, left in existence only because the House of Lords was unable, when making the new start in the *Mersey Docks* cases, to get rid of one line of older authority; if immunity doctrines have any life at all, they require a measurement of 'essential function' by reference to contemporary governmental reality. The immunities doctrine, whatever its scope, includes bodies not 'under the shield'.

[57] [1953] Argus L.R. 229, 245. [58] (1904) 1 C.L.R. 406.
[59] [1953] Argus L.R. 229, 245-246. He cites other High Court opinions containing the same erroneous view of *Roberts v. Ahern*.
[60] *E.g.*, *Victorian Railways Commissioners v. Greelish* [1947] V.L.R. 425.
[61] W. Sellar, 'Government Corporations', (1946) 24 *Canadian Bar Review*, 393.

The 'shield' doctrine takes no account of discrimination or 'special burdens'. Hence it would be desirable if the courts treated the immunity cases as having no relevance to the 'shield' cases and *vice versa*.