

*Delivered 23rd January, 1959.*

This claim first came before me in July 1957 on a demurrer pleaded at the instance of the Administration then the sole defendant. There had been insufficient compliance with the demurrer rules and with the concurrence of counsel I proceeded to treat the matter as a pleading summons and held that several paragraphs of the Statement of Claim could not stand. The Plaintiff elected to discontinue the action and take time to consider his position with a view to commencing a fresh action.

The present action was commenced on 8th November 1957 and again the Administration was the sole defendant. The claims made were similar in substance to those in the earlier action but the Statement of Claim had been revised to avoid the objections previously encountered. Again the Defendant demurred but, under the rules, also traversed the facts relied upon by the Plaintiff. The demurrer came before me in April 1958. I held that the claim based on a cause of action in tort could not stand but that the contract relied on by the plaintiff, if proved, was not unsupported by consideration. I gave leave to amend the Statement of Claim.

Upon the hearing of these demurrer proceedings I gained the impression that it would have been more appropriate to hear the evidence first and this impression was confirmed on the trial of the action.

The Statement of Claim was amended and the amended Defence was delivered just before the trial. The amendments raised for the first time the plea that the officers who entered into the relevant transaction with the Plaintiff had no authority to contract on behalf of the Administration. This not unnaturally took Mr. Jones who appeared for the Plaintiff by surprise, but since he had travelled from Rabaul and had brought his client and witnesses from far afield for the trial he preferred to proceed with the hearing. He somewhat hastily applied to join the three officers concerned as co-defendants upon a claim for breach of warranty of authority and hoped for the best. Arrangements were made for immediate representation of these three officers so that the trial could proceed, and I made an order abridging times. A defence was delivered on behalf of the three new defendants and a reply was subsequently delivered during the trial.

In their defence the three added defendants pleaded that the transaction was not supported by consideration but that if it constituted a binding transaction then the three officers who made it were duly authorized to do so and the contract was binding on the Administration. A curious result of the joinder of defendants was that although the Administration was bound by my earlier determination that the contract was not lacking in consideration, the other defendants were not, and so Mr. McLoughlin for these defendants took over this point as his main argument, and abandoned the question of authority raised in paragraph 6 of his defence. He went so far as to say that his clients knew that they could not make a contract and that it would be cause for very serious criticism of them as senior and responsible officers if they had made the error of purporting to make a contract binding on the Administration.

Of course counsel is free to put any argument on behalf of his client that he may think fit, and it is his responsibility to shape his course. Moreover officers may for reasons of expedience prefer to rely on some proposition which may damage their case, but in my view there is no justification for any suggestion that merely because an officer makes some arrangement which imposes obligations to take reasonable care upon the Administration, the officers have necessarily failed in their duty. There are matters of great substance to be considered before arriving at any such conclusion and such a suggestion is unjust.

I think it is convenient to deal first with two points which can be disposed of shortly. First, I have heard nothing which leads me to the conclusion that the question of consideration which I decided on the demurrer proceedings was wrongly decided and I therefore adopt the same conclusion on this point. Second, the evidence makes it clear that the three officers who were joined as defendants, at all times acted as members of the Public Service, gave no express personal undertaking or warranty, and were at all times understood by the Plaintiff as acting in their official capacity only. Under these circumstances they can be under no personal liability to the Plaintiff either on express or implied contract or warranty. Dun v McDonald 1897. 1 Q.B. 555 is sufficient to dispose of the claim against the three officers.

I now proceed to examine the first main question: It is clear that a transaction resembling a contract was entered into. The question is what was that transaction.

Since intention is going to be important it is necessary to consider the history of the whole matter on both sides. Both sides had had their difficulties and by the time the transaction of 7th June 1954 was entered into a good deal had happened which might indicate the intention of the parties.

During the hearing Mr. Dwyer was asked (without objection) whether he intended to enter into a legally binding contract, and he answered in the negative without any specific reasons which would assist me. I think it would be plainly wrong to attach weight to this evidence on a disputed issue. I must consider what inference is proper from what the parties said and did at the time, and consider what each party might have taken to be the intention of the other at that time.

Mr. Leahy had been a well-known mining pioneer in the Territory of New Guinea for many years. After many years prospecting and mining he settled down to pastoral pursuits. His disposition is forceful in some respects and his early experience and his temperament have produced a forthright approach to business coupled with a marked tendency to express himself plainly and in strong terms. He caused a good deal of resentment amongst Administration officers at various times as the correspondence shows, but on the whole maintained a cordial relationship with them.

Although the Plaintiff is given to overstatement to some extent I am satisfied that his experiences prior to 1954 justified his expressed attitude, if not some of his remarks.

In 1947 he commenced importing cattle from New South Wales. His land at Zenag was tick-free and the

Administration insisted, very properly, that all his cattle be imported from tick free areas, although this added much to the cost of the cattle. In 1948 Mrs. Booth, another well-known pioneer of the goldfields in New Guinea, asked the Plaintiff's permission to send some of her cattle to Zenag for service. Mr. Leahy apparently knew that her cattle were tick infested and since he was about to leave for Sydney for a holiday, discussed the matter with Mr. Grainger, an officer of the Department of Agriculture, Stock and Fisheries in Port Moresby, and asked him to tell Mrs. Booth that she must not send her cattle to Zenag. The Plaintiff's evidence was not entirely in agreement with the correspondence on this point but it remains uncontradicted in substance. What I think most probably occurred is that although Mr. Leahy did not purport to have a great knowledge of cattle, he knew very well from his experience when importing cattle that the Administration viewed ticks very seriously, and he knew the risks involved in bringing Mrs. Booth's cattle on to his property. I think however that Mr. Leahy found it hard to refuse what was probably a confident request of Mrs. Booth, in view of their long association, and especially since there was no alternative readily open to Mrs. Booth. I think that the Plaintiff gave a somewhat reluctant consent and then tried to get Mr. Grainger to veto the proposal.

The Plaintiff said in cross-examination that the expected telegram was never sent and this assertion which had previously been made in the correspondence was never contradicted. Whilst Mr. Leahy was in Sydney Mrs. Booth's cattle were sent to his property with the result that it became infested with cattle ticks, which persisted until after the matters in dispute had occurred. No claim was made in the action in respect of the invasion of ticks, but the Plaintiff's attitude since then has been that the Administration brought them there and should get rid of them. At the same time I think that the Plaintiff realized that he had allowed himself to get into a false position over the whole matter and was prepared to be co-operative with the Administration. At this time the Administration did not have adequate equipment or trained officers to eradicate the ticks but provided free of charge to the Plaintiff supplies of tickicides and hand operated spray equipment to enable him to spray his own cattle. The Administration also gave the Plaintiff some instruction in proper treatment methods. In the circumstances Mr. Leahy preferred to conduct his own campaign for the eradication of ticks assisted by the Administration to the extent which I have indicated.

The campaign was conducted by Mr. Leahy and his employees from 1948-1954 but without success. During this period he managed to keep the tick population down to a low level so that generally his cattle were never heavily infested but he never managed to eradicate them completely. The many causes for this failure may be tabulated as follows:

- (1) Mr. Leahy was not an expert cattle man nor did he have the patience or thoroughness necessary to make a success of the operation.
- (2) Considerable numbers of his cattle were Herefords which bore comparatively long coats of dense woolly hair affording ticks effective protection from the spray and making their presence in small numbers difficult to notice.

- (3) The hand operated spray equipment was inadequate for the purpose. Instructions indicated that about two and one half gallons of spray per beast were required to ensure adequate drenching of the hide and this requirement must have made it a very tedious task.
- (4) Mr. Leahy's property was as yet in an undeveloped state. It was rough country affording plenty of cover for cattle and without a properly organized system it was virtually impossible to ensure complete musterings for spraying.
- (5) Mr. Leahy's property lacked facilities for efficient yarding and handling of his cattle.
- (6) In the early stages Mr. Leahy was beginning to build up his herd of cattle but was unable to import them in unlimited numbers and had to spend the substantial part of his time growing and dealing in cash crops in order to produce income.

For some time Mr. Leahy did the spraying himself but found that his health was being adversely affected by the considerable quantities of tickicide spray which he inhaled in the process. Thereafter he passed over this task to his employees who apparently did not relish it any more than he did. At a later stage the Administration provided a power operated spray, that is, a pump driven by a small engine to provide the pressure to drive the fluid through a hose fitted with a director and nozzles so that the jet of spray could be directed on to the animals by hand whilst they were held in a crush pen. This equipment operated at a high pressure and promised much better results especially on the long-haired Hereford cattle but the campaign was still only partly successful.

On the 9th November 1953 the Plaintiff wrote to the Director of the Department of Agriculture, Stock and Fisheries (Exhibit A 1) and in his letter the Plaintiff complains of the heavy cost to him in terms of European and native labour of the spray treatment which he regarded as incapable of getting rid of the ticks. He refers to a previous offer of the Department and asks it to send one of its men along to look at the situation, devise effective means of dealing with the ticks and relieve the Plaintiff of the task. In its reply dated 20th November 1953 (Exhibit A 2) the Department expresses its regret that it has no stock inspector available to supervise the spraying but expresses the expectation that one would be available early in the new year. Reference is made by the Department to the desirability of using a dip instead of the spray technique. One paragraph in the letter states "We will do everything in our power to undertake the cleansing of your stock as quickly as possible, and if this is not successful we will do all we can to undertake the supervision of the eradication in the near future". The reference to "cleansing" relates to the removal of tick from individual cattle so that they might be certified by the Department as fit to be moved to clean land at Baiune where the Plaintiff wished to take some of his cattle.

On the 1st December 1953 Plaintiff wrote again to the Department (Exhibit A 3) to the effect that he could find a man willing to supervise the spraying of the stock according to the Department's instructions and suggested that the cost of this supervision and of labour, transport and other

expenses should be borne by the Department. The Plaintiff expressed himself as strongly in favour of the use of a dip instead of the spray apparatus. In its reply dated 22nd December 1953 (Exhibit A 4) the Department declines to employ a supervisor as suggested by the Plaintiff. The two reasons given are first "That there are various administrative circumstances which mitigate (sic) against our being able to do this" which may be freely translated as "We cannot be responsible for a part time employee who is not working under our effective supervision and is not employed according to departmental regulations" and second "That the supervision requires certain technical skills." The Department outlines all that it has done and is prepared to continue to do for the Plaintiff, expresses regret that it cannot do more at the moment and repeats its assurance that "An officer of this Department will be made available to supervise the eradication of tick on your property as soon as one becomes available." This letter and, I think in particular the reference to what the Department was doing for Mr. Leahy brought forth some characteristic retorts from Mr. Leahy which he expressed in a letter of the 11th January 1954 (Exhibit A 5). I think that this letter accurately sets out Mr. Leahy's attitude at that time. As a result of Mr. Leahy's forthright statements and possibly as a result of some alleviation in the staff shortage of the Department the decision was taken to send Mr. McLaren as stock inspector to the Mōrobo District where his activities were to be confined to Wau and Zenag. This decision is communicated to Mr. Leahy in the Department's letter of the 18th March 1954 (Exhibit A 6). It should be noted in passing that Wau was the area from which Mrs. Booth's cattle had come and which was known to have been infested with cattle ticks for many years. In his letter of 4th April 1954 (Exhibit A 7) Mr. Leahy accepts the Department's decision and regards this as the fulfillment of a promise made by the Department some years before. He looks forward to "handing over to Mr. McLaren in the near future". On the 8th May the Department writes again (Exhibit A 8) referring to a slight delay in Mr. McLaren's plans.

Mr. McLaren commenced his duties some time in May 1954 and took charge of the spraying operations on the plaintiff's property. For this purpose he was using the plaintiff's labour to handle the spray equipment and perform incidental duties around the cattle yards and he also had the assistance of the Plaintiff's European dairyman and native stockmen for the purpose of mustering. By this stage Mr. Leahy had obtained from the Department nearly all that he had asked for or demanded but there still remained the vital question of the cost of labour which would be involved if the departmental requirements for a thorough campaign against ticks were to be fully observed. Accordingly Mr. Leahy came down to Port Moresby and interviewed the Director of the Department of Agriculture, Stock and Fisheries, Mr. R.E.P. Dwyer, who was one of the Defendants joined in the action. Mr. Dwyer had known the Plaintiff for very many years. They had quite a cordial discussion but since Mr. Leahy's requirements fell within the particular sphere of Mr. Marley, Chief officer of the Division of Animal Husbandry, Mr. Marley was invited to join the conference and the main discussion so far as material to this case took place between Mr. Marley and the Plaintiff. Mr. Dwyer does not retain a detailed recollection of what was discussed and there is some difference in recollection between Mr. Marley and the Plaintiff. However there is much common ground as to the more important parts of what was said. To summarize the conversation briefly it amounted to this -

that the Plaintiff having outlined the financial burden imposed on him by the Department's requirements asked the Department to take over the cost of the labour involved. He pointed out that he had carried this burden himself for a long time without achieving successful results and he stated that he had no confidence in the Department's programme. He asked for the introduction of a dip and the modification of the tick campaign so that the cattle would only need to be handled at longer intervals than weekly as the Department's eradication plan required. Mr. Leahy expressed the view that dipping at longer intervals would serve to control the tick population to keep it below a dangerous level; would save a very substantial amount of expense in mustering and handling the cattle and would avoid the necessity for frequent yarding of cattle for long periods of time when they should be grazing, thus leading to loss of condition since the pastures were already severely overstocked and feed was scarce. The Department would not agree to these alternative proposals. The main reasons were:-

- (1) Sprays were preferred to dipping because of the very high cost of charging a dip with suitable tickicides and of keeping the dip at the required strength.
- (2) The fact that the tickicides selected for use could not be relied upon to remain effective after being kept in solution for long periods of time.
- (3) The use of arsenic which was the only solution which could be relied upon to keep indefinitely in an open dip, was prohibited for this purpose for health reasons.
- (4) The control of ticks in cattle was entirely the responsibility of the cattle owner and the Department would not assist Mr. Leahy or anybody else to control ticks. The Department's policy was to achieve the complete eradication of ticks in the Territory and it was only when eradication was to be undertaken that the Department would offer any assistance. If the owner elected merely to control the tick population the Department would prohibit the movement of his cattle as a means of preventing the spread of ticks. In these circumstances individual beasts could only be moved when the Department was satisfied after inspection that all the ticks had been completely eliminated from them.

It became apparent to Mr. Leahy that the control of ticks on his property would not achieve his purpose because it would make it practically impossible for him to move his cattle to the Baiune area where he was anxious to establish his beef cattle herd and put an end to the severe overstocking of his Zenag property. In these circumstances and faced with the prospect of meeting the entire cost of any different programme that he might prefer to carry out he fell in with the Department's views and agreed that they should carry out a complete tick eradication programme under the supervision of their own qualified officer. He also agreed to supply six native labourers to the Administration at a charge of 6/- per day to work under the direction of the Department's officer and agreed that he would undertake the responsibility for mustering all his stock and having them available for spraying at the time indicated by the Department. For mustering purposes the Plaintiff was to provide his own native labour and European supervision. Mr. Leahy emphasized that he would have nothing to do with the campaign itself and according to Mr. Marley who was called as a witness the

Plaintiff said "Once you people start paying this native labour I'll hand the whole lot over to you, I am more than sick and tired of it". Mr. Marley said that he replied "We are not to be responsible for your cattle and it is quite clearly your responsibility for the handling and mustering of them". When Mr. Leahy said that he did not want any more to do with tick eradication and would hand it all over to the Administration Mr. Marley said in substance that the Administration would not be responsible for the cattle generally - for their wellbeing and handling. He did not however say that the Administration would not be responsible for the spraying of the cattle or for the proper conduct of the tick eradication campaign.

Mr. Marley's evidence is the only detailed evidence of the conversation relied upon by the Administration. His evidence would support the conclusion that the substance of the transaction agreed upon was that the Administration should take over the responsibility for payment of native labourers who were to work under the direction and control of a qualified officer of the Department and that the Plaintiff's responsibilities were limited to mustering the cattle and having them available when required for spraying.

"Since the Department had already agreed to provide a qualified officer who would undertake the supervision of the spraying and had already implemented this by sending Mr. McLaren to carry out those duties it appears to me that there is hardly any real difference between the two versions which I have had of the conversations.

Considering the position of the Plaintiff it is clear that he was assuming some liabilities and responsibilities and agreed to depart from his own proposals to the extent of co-operating with the Administration to carry out its campaign. I think that it is clear that the Plaintiff expected the Department to honour its promises and to see that the campaign was carried out properly. He was prepared to leave the entire conduct of the campaign to the Department and in fact he was insisting that they should take complete charge of it. I think that the proper conclusion is that Mr. Leahy was entering into a transaction which as between individuals would amount to a contract and which was intended to impose obligations of a legal character on both parties. There remains of course the question whether in relation to this transaction the Administration should be considered as being upon a different footing from that of an ordinary individual.

Looking at the history and background of the transaction from the point of view of the Administration to ascertain what may be a fair inference as to its intentions in the matter we find that at the time when the transaction was entered into it was the stated policy of the Administration "to undertake the eradication of ticks in the Territory". Mr. Marley had told the Plaintiff that this was the policy of the Administration and this was relied upon as the justification for the Department refusing to contribute towards any scheme designed merely to control ticks. That it was the policy of the Administration to undertake the elimination of ticks is beyond question having regard to the statements contained in the Memorandum dated 8th June 1954 from the Director of the Department of Agriculture, Stock and Fisheries to the Government Secretary. This Memorandum is Exhibit F. The relevant passage of this memorandum recites this policy in the following terms:- "His Honour the Administrator has approved that the Administration should be responsible for tick eradication in the Territory.

Dr. Legg has several times pointed out that satisfactory results in tick eradication will not be achieved until such time as stock inspectors are used for the eradication."

This report was shown to His Honour the Administrator by the Government Secretary and the proposals in it received the Administrator's approval.

At the time when the discussion took place between the Plaintiff and the officers of the Department of Agriculture, Stock and Fisheries, the Department had been established in the Territory but its powers had not become the subject of special legislation.

The Animal Diseases and Control Ordinance was passed in 1952 and assented to on 24th January 1953 but was not brought into force until 11th November 1954. This Ordinance gave statutory power to the Stock Inspectors to compel persons in the Territory to submit to various actions and decisions of the Department's officers, to comply with various orders and directions in relation to cattle and to submit the cattle to prescribed treatments at the owner's expense without imposing on the Department or its officers any express obligation for damages unless occasioned maliciously and without reasonable or probable cause. This Ordinance was designed to be the instrument for implementation of Administration policy but until it was brought into force the Department had to be content with exercising a more or less advisory function in relation to cattle diseases and of course so long as the officers of the Department kept the confidence of the cattle owners their advice was eagerly sought and the co-operation of the cattle owners was assured.

In the absence of such statutory powers of compulsion the Department was substantially in the traditional role of the Crown at Common Law. The courts had for many years evolved principles for the protection of citizens against arbitrary acts of interference with private property subject to this, that if the Crown could prove that the individual was using his property in such a way as to endanger the public interest or the rights of citizens in general in the area the Crown could seek an injunction or other appropriate remedy to protect the public interest. The Crown could not enter upon private land for the purpose of interfering in the conduct or management of the landowner's business. In more modern times and especially during and since World War 1, it has been the practice for Parliament to confer upon Governments express statutory power to regulate and control many kinds of business activities and to interfere with established rights of property and to impose liabilities on persons in the interests of the public and especially with regard to matters of defence, health, etc. It is entirely the responsibility of Parliament to decide to what extent the public interest justifies conferring these express statutory powers which have the effect of depriving the individual citizen of much of the protection of the law which would otherwise be his. It is therefore in my view quite erroneous for the Administration in the light of subsequent experience, gained during the period when it had statutory powers which enabled it to carry out its policy without entering into any contractual obligations towards the citizen in question, to suggest that the Director of the Department of Agriculture, Stock and Fisheries must be taken to have intended at a time when there were no such statutory powers, to avoid the creation of any kind of contractual rights or obligations. Indeed at the time in question such an intention would have defeated



the purpose which the Administration then had in mind. The Director of the Department of course could have stipulated that the Department and the Administration were to be under no kind of legal obligations but if this had been done the Plaintiff himself would have been in a similar position and since he was already thoroughly dissatisfied with the tick eradication campaign he could have withdrawn from it at any time at will.

The transaction was clearly one which would affect rights of property at least to the extent of creating a licence in favour of the Administration to go upon the land and to treat the cattle. Such a licence if given by virtue of a transaction for which there is valuable consideration constitutes a contract. I think that the officers of the Department clearly intended that the Plaintiff should be bound to carry out the transaction to the end and expected him to honour his obligations. The transaction was in my view intended to have legal consequences of the kind which I have indicated and I therefore conclude that if it were an arrangement made between individuals it would constitute a valid contract.

I think that the terms of the contract may be summarized as follows:

- (1) The Administration through its qualified officers was to carry out a thorough tick eradication campaign involving the thorough spraying of all the cattle on the Plaintiff's property once a week under the direct supervision of the stock inspector until all the ticks on the property had been entirely eliminated. It was expected that this result would be achieved in not more than eighteen months.
- (2) The Administration was to provide the spray equipment tickicide and pay for the labour employed in administering the spray and in incidental duties in the cattle yard.
- (3) The Plaintiff was to provide the necessary labour for mustering and was to see that all cattle were mustered regularly every week according to details agreed upon and was to provide water at the cattle yards for mixing with the tickicides.
- (4) The Plaintiff was to construct fences and pens as might be required from time to time by the stock inspector.
- (5) The Plaintiff was to have available at the property for the use of the stock inspector six native labourers whose services would be made available to the stock inspector whenever required by him at the rate of 6/- per hour.
- (6) The Administration was to provide whatever transport the stock inspector might require.

I think that the obligation of the Administration in relation to the eradication of ticks was not an absolute obligation but was one to exercise reasonable care at a proper level of skill and competence towards the elimination of the ticks.

Before concluding that the transaction entered into in this case was a contract it is necessary to consider whether the Administration was in any way in a different position from ordinary individuals who might have entered

into a similar contract. Mr. McLoughlin who represented the three individual defendants but who bore the main weight of the argument for the Administration on this point pressed very strongly the view that even if the transaction bore the usual characteristics of a contract it should be held to amount to no more than an administrative arrangement "not intended to impose on the Administration any kind of legal responsibility". This argument seemed to me to be strongly coloured by what I regard as the false assumption that a public servant must never involve his Government in any kind of responsibilities.

I think that the aspect of this argument which carries most weight in favour of the Administration was the point that it would be unreasonable to infer that the Administration intended to bind itself to carry out a long-range tick eradication campaign to such an extent that it would be legally compelled to deny the services of its stock inspector to some other member of the public who might have greater need for them than the Plaintiff at any future time. At first sight this argument carries a good deal of conviction but I think that the answer to it is that it would be more unreasonable to infer that the Administration contemplated that either party would be free to abandon the campaign and allow the Plaintiff's cattle again to become badly infested with ticks after both parties had gone to much trouble and expense to carry on the campaign for a considerable period.

Both Mr. O'Connell for the Administration and Mr. McLoughlin cited Booker v Palmer 1942 2 All E.R. 674 at p.677; Balfour v Balfour 1919 2 K.B. 571 at p. 578; and Australian Woollen Mills v The Commonwealth 92 C.L.R. 424 at pp. 455 and 465 and 93 C.L.R. 546. I think that each of the cases referred to was decided upon facts which were materially different from those of the present case.

Of course the special position of the Administration is of vital importance in considering the questions of fact involved, but this argument advanced on the hearing appeared to suggest that there was some principle of the law of contract which placed the Administration in a different position from that of the individual. Having examined the authorities cited I am unable to accede to any such view.

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Booker v Palmer 1942, 2 All E.R. 674 is a decision on a very special set of facts in which motives of charity and generosity in time of ~~material~~ distress had an important bearing upon the inferences to be drawn by the Court as to whether the parties intended to enter into a legally enforceable transaction. These considerations are wholly inapplicable to the present case. The principle involved in Booker v Palmer is clearly enough indicated in the Editorial Note at the commencement of the report. The last sentence of this note is "At the same time it will be appreciated that the decision in such a case is for the most part one of fact and will in each case depend upon the particular facts of the case."

Much the same consideration disposes of Balfour v Balfour 1919 2 K.B. 571 in which a convenient domestic arrangement between husband and wife was held not to be a transaction intended to involve legal consequences principally because it appeared that the parties intended to meet no more than the situation of the present, and ought not to be taken to have agreed that their bargain should apply regardless of what consequences might ensue.

The case of Australian Woollen Mills v The Commonwealth 92 C.L.R. 424 is in a different category. At first sight the passages referred to in argument seem to lend some support to the view that the Court should not regard statements issued by the Government in implementation of Government policy as being intended to create contractual obligations. However in the judgment of the Court in that case it was pointed out with a good deal of emphasis that the case could not be understood without the closest attention to the detailed circumstances which existed. Having studied the facts in detail it seems to me that in that case even if it had been assumed that there was a binding contract it would have been extremely difficult for the Plaintiff to have established what were the terms of that contract. The transactions involved many unilateral variations on the part of the Commonwealth of what was understood to be its stated policy and it is evident that the Commonwealth from time to time did as it thought fit in relation to the subsidies. The High Court rejected the view that a contract was intended and held in fact that the transaction involved no more than a statement by the Commonwealth of its intention to make certain payments in certain specified events to people who fell within a particular class. There was no consideration referable to the payment although as a matter of political administration the Commonwealth regarded the scheme as beneficial to the economy of the nation as a whole. I think that the decision in that case might well have been different if the Commonwealth had proposed a scheme whereby in return for the subsidies the manufacturers of woollen goods were to surrender the control of their factories to the officers of the Commonwealth for the purpose of manufacturing some particular class of goods which the Commonwealth desired for some reason to have manufactured. I think if such had been the facts of that case they would have been much closer to the facts in the case now before me. Accordingly I reject the view that the Administration is in any different position from that of ordinary individuals who might have entered into the same transaction and hold that the transaction entered into in this case constituted a contract involving on both sides legal obligations.

The next question for consideration is raised by the plea of the Administration that the officers who entered into the transaction had no authority to do so. Such an objection was not raised in the course of the long correspondence between the parties nor was it raised in the course of the legal proceedings until the eve of the trial when paragraph 9 appeared for the first time in the amended defence delivered by the Administration. This is not very fertile ground in which to raise such a delicate plant as a denial of authority. Nevertheless the question having been raised must be examined. It is established by the evidence that the transaction in question was the result of correspondence passing between the Plaintiff and the Director of the Department of Agriculture, Stock and Fisheries and the conference which took place between these gentlemen on the 7th June 1954. At the material part of the conference Mr. Marley the Head of the Division of Animal Husbandry was also present and he too concurred with what was done. The bargain reached involved the expenditure of public money for native labour and the Plaintiff was told that for reasons peculiar to the Administration it would be necessary to obtain the sanction of the Administrator before such an obligation could be undertaken. If it had been merely a question of spending some sum of money forthwith there would apparently not have been the Department's practice to refer the matter to the Administrator. The reason for referring the matter to the

Administrator was that the proposal involved the payment of money over some period of time in the future and for this reason the question of payment for native labour assumed for departmental purposes an importance which tended to overshadow the importance of the transaction as a whole. However when the Government Secretary was approached on this matter he was given a fairly comprehensive report (Exhibit F) which discloses fairly enough the substance of the transaction and indicates that it is intended to implement the policy already approved by the Administrator that the Administration should be responsible for tick eradication in the Territory. The evidence shows that the Administrator read this report and gave the essential approval to the expenditure of money which was involved in the transaction. It is not necessary for the Plaintiff to establish that this memorandum would satisfy in all respects the Statute of Frauds or that it was sufficient to give notice to the Administrator of every detail of the agreement arrived at. It is a doctrine of general application that where the internal management of an organization requires some particular means of authorisation it may be assumed in the absence of any indication to the contrary that these internal requirements have been fully met. I think that I must assume that the officers of the Administration made to the Administrator whatever reports on the transaction might have been required by him to inform him of the true nature of the transaction. Indeed I think that the report itself gives a clear enough indication of the substantial nature of the transaction for this purpose. The facts of this case are very close to Bardolph v N.S.W. 52 C.L.R. 455.

In giving his account of the interview which he himself had with the Administrator after the main conference with the officers of the Department of Agriculture, Stock and Fisheries the Plaintiff at first stated merely that he had made a satisfactory arrangement with the Department. At a later stage in the trial when the significance of this question of authority had become apparent the matter was put to the Plaintiff again and he elaborated somewhat in a way which would tend to show that the Administrator was told rather more of the substance of the arrangement. I do not think that I can accept the view that the Plaintiff did personally convey to the Administrator any more than that he had made arrangements with the Department for the eradication of ticks which were to the satisfaction of both parties.

The present case is different from Dixon (Administration) v Huggins which I decided in September last year. In that case I held that the Administration was entitled to recover upon a claim in contract or quasi-contract fees for services rendered to members of the public by the Department of Health. I took the view that the power of the Administrator under the Administration Contracts Ordinance was not a power that could be delegated to officers of the Administration because the Ordinance required that in each case the Administrator himself should apply his mind to the question of whether the proposed contract was in the public interests. This ordinance was subsequently amended to enable delegation to take place but the amendment does not affect the case at present before me. I held that the power to make contracts which was exercised in Huggins case did not reach the officers of the Health Department by process of delegation from the Administrator but that there was an implied authority to be derived from the scheme set out in the Health Ordinance. The same consideration is not applicable to Mr. Leahy since there was at the time in question no corresponding legislation setting out the functions of the Department of Agriculture,

Stock and Fisheries therefore as far as I can see the only way in which Mr. Leahy can show authority to make his contract is to establish that the Administrator himself gave his assent or that the power to contract conferred on the Administrator under the Administration Contracts Ordinance does not abolish a wider power in the Administrator to enter into contracts and to delegate that power to be derived from the provisions of the Papua and New Guinea Act of 1949-1954. I did not find it necessary to decide in Huggins case whether such a power existed or whether it could be delegated and I do not think that it is necessary to decide the point in the present case. I think that the facts of this case are very close to those in Bardolph v New South Wales 52 C.L.R. 455 and I think that since the Administrator himself expressly assented to the transaction submitted to him there is no need to determine the limits of his power to delegate. Apart from the question of express authorization by the Administrator I think that there are facts from which authority should be inferred. The Plaintiff relies upon ratification and I think the correspondence tends to show that over a long period of time the Administration adopted the view that what had been done by the Department was done on behalf of the Administration in the implementation of the Administration's policy.

The next substantial question for consideration is whether there was a breach of the contract on the part of the Administration. I think that on the evidence there is no doubt that there was a substantial breach. In fact for a period of almost a year the stock inspectors employed by the Administration to carry out the tick eradication campaign neglected their duties to such an extent that the degree of tick infestation rose to levels never experienced before in the Plaintiff's herd. This neglect does not apply to all the officers of the Department of Agriculture, Stock and Fisheries. Some of the inspectors and veterinary officers who visited the property on odd occasions carried out their work so efficiently that temporarily at least substantial improvement was noticeable in the condition of the cattle and the Plaintiff himself in spite of his highly critical frame of mind was more than satisfied with their work. These officers however only visited the property on a few occasions. The substantial conduct of the campaign was left to the care of two officers each of whom was responsible for these duties for periods of some months and each of whom failed dismally in his task. The first of these was described by the Plaintiff as a dipsomaniac and as a man who was incompetent and unreliable; Mr. Leahy gave one or two instances of callous ill-treatment of cattle by this inspector which would indicate a disregard for the well-being of the animals and described him as being constantly under the influence of drink. These assertions of the Plaintiff were not substantially challenged by the Defendants and it may well be that because the officer is now deceased and unable to answer these charges the Administration is at a disadvantage on the question. Mr. Dwyer was specifically asked whether the inspector was a dipsomaniac and, showing a proper reluctance to speak ill of the dead, Mr. Dwyer contented himself with saying that there was no compulsion to drink and that the inspector had had severe wartime experiences and was a "sick man". "He drank a fair issue" but Mr. Dwyer could not say what was the cause of his illness. The Plaintiff said that on the occasion of a visit by Mr. Dwyer to the property he complained in very strong terms about this stock inspector and asked that he be removed from his property. Mr. Dwyer's recollection of the details is not good but he does recall that the

Plaintiff did make a complaint on that occasion about the stock inspector, in fact he said that both parties complained to him. I think that there is no doubt on the evidence that this stock inspector's work was characterized by inefficiency, frequent failures to appear on the property to carry out his duties and such an addiction to drink that he was unfit to be placed in charge of such a campaign.

The other stock inspector who was in charge of the eradication for a substantial period was a very young man who like his predecessor was stationed at the Mumeng Hotel a few miles from the Zenag property to which he travelled to perform his duties on three days in each week. I do not know under what pressures this young man was labouring during the first few months of his posting to Mumeng but it is plain from the evidence that he found the ready availability of drink too much for his powers of resistance. As the Christmas season approached he became more and more addicted to drink, more inclined to do his work badly and to leave his work unfinished. On many occasions he did not appear at all or appeared in such a condition that he was unfit to carry out his duties. Early in 1955 he had to undergo a minor eye operation for a corneal ulcer but the evidence failed to justify his rather prolonged absence from work. Later between March and May he was absent from his duties for a continuous period of six weeks during which no spraying was carried out at all.

I do not want to be unduly critical of this officer's performance since in May as a result of the plaintiff's outspoken criticisms Mr. Marley was sent to the property and put the whole campaign on a proper footing for the first time. Thereafter the stock inspector carried out his duties in an exemplary fashion and the campaign ultimately succeeded as a result of his application to duty. The inspector was called as a witness in these proceedings and on his own record had to submit to a cross-examination which few witnesses have to endure. He faced a series of most searching questions and answered them with complete candour and on his performance in the witness box I would hope that the sorry chapter in his career to which I have referred and which was due to causes unknown to me is now forever closed. However the evidence established upon the cross-examination of this witness shows all too clearly the extent to which the Department's officer failed to observe any reasonable standard of care in the supervision of the tick eradication.

Some attempts were made by the Defendants to show that all the fault was not on one side and that the Plaintiff himself was guilty of breaches of obligations on his part. The pleaded allegations that the Plaintiff was at fault because he failed to keep his sprayed cattle on tick-free pastures cannot be sustained on the expert evidence and is without foundation, having regard to the fact that his entire property was tick infested and overstocked, and he was not allowed to move his cattle to Baiune.

The Plaintiff has given a satisfactory account of his performance of his bargain and I am left with the impression that his evidence was substantially unshaken in cross-examination. There may have been some incidental delays and on a few occasions the stock inspector may have been kept waiting for short periods for water or for check counting of mustered stock. However these are merely trivial incidents and on both sides there were occasional

delays which in the circumstances were only to be expected. On many occasions the cattle were mustered but the inspector failed to arrive and on some occasions he arrived without any message having been received to indicate what his movements would be. In these circumstances a good deal of hostility developed between the Plaintiff's dairyman who was in charge of the mustering and the stock inspector with the result that they were hardly on speaking terms. It was a matter of substantial detriment to the cattle to be kept yarded in a small enclosure on days when the stock inspector failed to arrive and on some occasions when he arrived unexpectedly the dairyman did not have the cattle yarded but usually had them close at hand so that they could be got in without much delay. I think that there is no justification for any finding that the Plaintiff failed to carry out his part of the bargain.

The Defendants also endeavoured to show that the breaches if they existed were due to matters beyond the control of the Administration and gave instances of adverse weather and break-down of machinery in support of this. However it appears from the evidence that it was seldom that the weather interfered with spraying for any substantial part of the day and the overall effect of the weather on the campaign must have been insignificant. I think that the Defendants can derive no comfort from break-down of machinery, because the machinery was to be provided by the Administration and it would be part of the duty of the Administration to see that whatever spare parts and replacements might be needed were available. After the period of six weeks previously referred to during which no spraying took place it appears that some spray equipment had deteriorated to such a stage that it was unworkable. Various spare parts had to be obtained and apparently the inspector had to send requisitions for the required parts through his Department which involved delay. In spite of this mechanical trouble it appears that one set of spray equipment could easily have been made serviceable and the Plaintiff had a qualified mechanic on his property who was always available to the stock inspector for that purpose. Later when Mr. Marley, the chief of the Division of Animal Husbandry, was sent to the property to straighten the matter out means were speedily found for replacing the defective equipment. I think that it is clear from the evidence that the failure of the campaign up to the middle of 1955 was not due to any shortcoming on the part of the Plaintiff or his employees but was due to the neglect of the two stock inspectors.

The next issue for determination is whether the breaches of the agreement gave rise to any loss or damage on the part of the Plaintiff. There are two aspects of this question. The first may be disposed of shortly. I think that it is well established on the evidence that the Plaintiff's cattle deteriorated in condition as a result of the increased infestation of ticks and that the Plaintiff was hampered in the establishment of his beef herd at the Baiune property because he could not get permission to move his cattle on to clean pastures until the tick eradication campaign had succeeded to such an extent that batches of cattle could be pronounced "clean". The result was that he had to keep his entire herd of 400 odd cattle on his property consisting of five hundred acres of rough country which led to severe overstocking of his pastures. The evidence does not enable me to assess this loss with any precision and I think that the Plaintiff is entitled to nominal damages under this heading which I would fix at the sum of £100. There was a

time when the Plaintiff's loss stood at a much higher value, but the parties continued to treat the contract as subsisting. By the end of the period of treatment the cattle had time to recover condition and the incidental losses which may have been realized during the period are not established by the evidence.

The other question involved in this issue has appeared to me to be much more difficult.

In May 1955 during the period of six weeks neglect by the stock inspector the Plaintiff had made urgent representations to the Administrator. On the 3rd April 1955 the Plaintiff wrote to the Government Secretary a long letter (Exhibit A 9) in which he sets out the substance of his complaints. The matter was referred to the Administrator who requested the Plaintiff to come to Port Moresby for discussions. The Plaintiff came to Port Moresby on the 21st April and decisions were arrived at designed to place the whole question of tick eradication on a proper and efficient footing. It was also agreed that a dip should be installed but in the course of further discussions with his advisers the Administrator decided against the installation of a dip and subject to this departure the Administrator's letter of the 30th April 1955 (Exhibit A 11) sets out the arrangements made. Mr. Marley is mentioned in this letter and it is clear that he received specific instructions to go to the property and put things right. He went to the property on the 2nd May 1955 and his report thereon dated 10th May 1955 is Exhibit A 16. Having heard Mr. Marley's evidence I think that his report sets out a compromise view of what he found when he arrived at the property. He said that there were faults on both sides and it is noticeable from the notations endorsed on letters from the Departmental file which became exhibits in the proceedings that the officers spent a good deal of their energy trying to demonstrate to their own satisfaction that it was the Plaintiff who was really at fault in relation to a wide range of matters. I think that the Department would be wise to keep comments of this kind off their original papers because once one realises the background of the dispute many of these comments lose whatever force they might otherwise have and show a determination in their authors to convince themselves that they are right rather than an application to the task before them.

Mr. Marley's report was not received by the Plaintiff until some time after Mr. Marley's visit and in his letter of the 17th June 1955 (Exhibit A 17) the Plaintiff refutes some of the passages of Mr. Marley's report and shows at least by his reference to paragraph 13 of that report that he means to carry out the arrangement as agreed and not to interfere in any way in the campaign, to avoid lending colour to any suggestion that failure might be attributed to some fault on his part. I prefer Mr. Leahy's version of what occurred in May and whether or not Mr. Marley used the precise expressions attributed to him in his references to the stock inspector I am satisfied that the Plaintiff's account is substantially accurate and that it was as a result of some very forthright remarks and explicit instructions given by Mr. Marley that the stock inspector was prevailed upon thereafter to carry out his duties properly.

After the campaign had been put into operation under the directions of Mr. Marley the tick population declined fairly rapidly and within a month the infestation of cattle



was light. However during the month of June several beasts died and towards the end of June the number of deaths appeared significant. On the 20th June 1955 (Exhibit A 20) the Plaintiff radioed to the Department in Port Moresby asking for veterinary assistance. Thereafter a series of telegrams were sent (Exhibits A 21 to A 25) indicating that the Plaintiff was alarmed at the increasing number of deaths in his herd and showing that at first he held the view that they were due to the presence of poisonous feed in his stock pastures, and that later the tentative diagnosis of red-water fever, commonly known as "tick fever", was put forward and finally confirmed by the Department on the 14th July. This confirmation of the diagnosis was made as a result of laboratory tests of blood samples taken from cattle by veterinary officers of the Department. From June to October the deaths continued to take a heavy toll of the Plaintiff's cattle until remedial treatment administered by the veterinary officers checked the deaths and the successful conduct of the tick eradication campaign removed the risk of further infection of animals.

The essence of this issue is whether the outbreak of red-water fever was caused by the ticks which ought to have been eliminated from the herd long before May 1955 but which in fact at that time were infesting the cattle more heavily than ever before. In support of his contention that the red-water fever was due to the heavy infestation of ticks the Plaintiff relied upon the evidence of Mr. Maunder, a veterinary specialist from Queensland. Mr. Maunder is a veterinary surgeon, a graduate of the Sydney University in veterinary science and has served in the Queensland Department of Agriculture and Stock for seventeen years. He became Chief Inspector of Stock and Director of Veterinary Services and had between one hundred and one hundred and ten stock inspectors under his control. One of his most important functions in the course of his departmental duties was in relation to the eradication and control of ticks. In 1951 Mr. Maunder left the department and went into private practice and has worked since that time as veterinary consultant with a group of cattle stations one of which comprises 70,000 head of cattle. He is undoubtedly an expert with outstanding experience of tick eradication and control. I will have to deal with Mr. Maunder's evidence in greater detail in a moment but I should pause to remark that it is quite obvious that Mr. Maunder relies very heavily upon actual observations in the field and field experience in arriving at any conclusion. Moreover in identifying diseases of cattle he regards the case history of the herd and information as to local conditions as of paramount importance. The conclusions which would be supported by Mr. Maunder's evidence give rise to the difficulty that they cannot be fully accounted for by theoretical knowledge or reasoning and several pertinent questions must if his approach to the problem is adopted, therefore be left unanswered. His approach receives some general support from the evidence of Mr. Anderson who was called on behalf of the Administration and who qualified some of his views by saying that in dealing with live organisms one cannot predict future courses of events with any degree of certainty from purely theoretical considerations.

In contrast with the case on this issue presented by the Plaintiff the Administration relied on the evidence of experts which would tend to support the opposite conclusion for theoretical reasons. One of the most exacting tasks which I have been called upon to perform in this case has been to decide whether the evidence based on practical observation and experience affords me more or less guidance towards the

solution of this issue than the considerations based on theory. I must bear in mind always that the onus is upon the Plaintiff to establish that the disease which caused the death of his cattle was due to the ticks. If I cannot find that this was so upon the balance of probabilities the Plaintiff must fail in this part of his claim.

During the course of the trial I asked a few questions to try to ascertain just how far theory on the subject could go in affording a conclusive answer to the various questions which emerge and my general impression was that the theoretical understanding of the problem at least in the Territory leaves many vital questions unanswered, and that greater weight ought to be placed upon the actual observations in the field of qualified and experienced men. That this is also the position in relation to the disease in Queensland is indicated by the methods practised there by Mr. Maunder.

Some matters relating to the incidence of red-water fever were not in dispute. It appears that the disease is due to an organism which follows a regular life cycle part of which takes place within the body of some animal of the bovine family, and the remainder within the body of the parasitic ticks habitually infesting several types of animals including cattle. At birth and for some short time thereafter calves have a natural immunity to this organism but after this preliminary immunity has passed off, cattle which are infested with ticks bearing the disease (referred to as "pathogenic" ticks) may have the red-water fever organism introduced into their blood streams where the organisms tend to migrate towards certain organs, notably the spleen, establishing colonies and causing substantial destructive changes in the substance of those organs. The organisms multiply within the bodies of the infected cattle commonly causing such a break-down of the organic tissues that the urine of the animals becomes noticeably stained with blood giving the disease its common name of red-water fever. The disease in its acute stages gives rise to symptoms of fever and is very commonly fatal.

In areas where pathogenic ticks are common young calves soon after birth are invariably infected with the disease before their natural immunity disappears and as a result of repeated infections the animals tend to develop a resistance to the disease which is termed by the experts "a pre-munity". This is not strictly a true immunity but rather a developed resistance due to previous contact with the disease itself. Provided that the individual animal is frequently reinfected with the disease it will usually retain this form of resistance throughout its life but if over any considerable period there are no pathogenic ticks present and the animal is not reinfected its resistance to the disease is readily lost. Thereafter such an animal may reach the same condition as an animal which has never been exposed to the disease. Such animals are extraordinarily susceptible to the disease and if they encounter pathogenic ticks the usual result is a violent outbreak of the disease usually with fatal results.

Cattle suffering from the disease have considerable quantities of the disease organisms in their bodies and in their blood stream but apparently the distribution of the organisms is by no means uniform. There appears to be a tendency for the organisms to be destroyed in the blood stream and sometimes they do not reach the extremities of the circulatory system referred to by the experts as "the peripheral

blood stream" although at the same time they may be present in large quantities in the blood which is passing through the major blood vessels. It also appears that the organisms invade the blood stream from the source of their development in waves but I was unable to find out from the experts whether this was due to the production of new generations of organisms occurring at regular intervals and seeking outlet from the host animal to the ticks or whether it was a sporadic appearance of numbers of organisms due to causes which could not be established. At all events it appears that those organisms which are destined to leave the body of the animal to complete their life cycle within the bodies of ticks do so by migrating into the peripheral blood stream from which they are ingested by ticks which have in the meantime fastened themselves on to the cattle. After a period of a fortnight or so the ticks, which by this time have become greatly enlarged and heavily engorged with blood, fall to the ground where they lay eggs. These eggs contain the red-water fever organism and upon hatching and going through two separate juvenile stages emerge as mature ticks capable of fastening themselves on to other animals. The ticks lie in wait in some convenient place in the grass and fasten themselves on to the cattle usually when they are at rest. After the ticks have commenced to draw blood from the animal the disease organisms within the ticks' bodies become established within the salivary glands of the ticks from which they gain access to the blood stream of the host animal.

To summarize very briefly the effect of Mr. Maunder's experience - it appears that in country where pathogenic ticks are prevalent there is generally no great problem arising from red-water fever because the cattle maintain their resistance to the disease and the deaths from the disease are quite infrequent. However the ticks during their two juvenile stages of development have the capacity to hibernate and during long periods of adverse weather conditions, for example during periods of drought, the ticks remain dormant on the ground for periods of time long enough to cause the cattle to lose their resistance to the disease. Under some conditions an enormous number of dormant ticks may accumulate on the ground. When such climatic conditions come to an end and are succeeded by rain and spells of mild weather the ticks emerge from their dormant state and attack the cattle in very large numbers. As a result of their reduced resistance and the very large number of ticks which attack the cattle at one time there is invariably a very severe outbreak of the disease with a very high incidence of mortality. Similar severe outbreaks of the disease occur in marginal country, i.e. country where for some periods the tick population is high or the population of pathogenic ticks is substantial and at other periods owing to factors such as movement of cattle and varying weather conditions the tick population may either disappear or be substantially reduced for long periods of time. If "clean" or non-resistant cattle from disease free areas encounter the disease a very severe outbreak of the disease may be expected to manifest itself.

Based upon these practical observations a system of reasonably effective tick control has been evolved in Queensland and elsewhere and the main elements of this system are that tick populations should be kept at a low level to prevent any sudden build-up due to climatic or other factors and that at the end of any periods of dormancy the cattle should be actually infected with the disease by injection of pathogenic blood samples under controlled conditions which enable the cattle to be treated with the appropriate drugs

throughout the course of the disease. This course of treatment renews the animal's resistance and avoids the high death rate which would occur amongst cattle becoming infected with the disease haphazardly by ticks outside the immediate control of trained personnel.

Mr. Maunder said that the outbreak of disease could be confidently predicted when certain conditions were observed in the field. The essential condition was that there should be a sudden build-up of the tick population infesting the cattle and that this was invariably followed by an outbreak of the disease after an interval of approximately four weeks and that the severity of the outbreak would depend entirely upon the resistance of the animals in question. He is convinced from observation that one or two pathogenic ticks are extremely unlikely to be able to infect an animal with the disease and that diseased cattle are invariably infested with substantial numbers of ticks. He thinks that the very small number of organisms that would be released by a single tick would most probably fail to survive in the blood stream for long enough to establish the disease.

Mr. Maunder was given details of what occurred at the Plaintiff's property and described those events as "a classic example" of what he had encountered throughout his experience in Queensland. During the six weeks period when no spraying took place and the very substantial "build up" of ticks occurred the tick population was so heavy that the beasts were rubbing themselves and crushing the blood engorged ticks to such an extent that "screw flies" were attacking the animals and the ticks and the wounds caused by them were becoming infested with maggots. The screw fly is a particularly vicious form of fly in the Territory, the maggots of which having gained access to the flesh of an animal will burrow into and devour living tissues. Mr. Maunder said that this state of affairs established beyond any question that the tick population had reached such a proportion that the pathogenic ticks must have become very numerous, and that the outbreak of red-water fever which subsequently occurred coincided precisely with his experience.

The experts called by the Administration sought to demonstrate by reference to quite inconclusive tests that there had never been any red-water fever either at Zenag or at Wau from where the ticks came, and they put forward the view that since all of the Plaintiff's cattle came from disease free areas of New South Wales there must of necessity have been a severe outbreak of red-water fever as soon as these cattle came into contact with the disease. Since this did not occur in 1948 or at any other time up to 1955 during which the cattle were exposed to substantial quantities of ticks it must follow that the ticks on the property were not pathogenic and that the disease must have been introduced from some other source. On a basis of theoretical reasoning and on some significant circumstantial evidence I was invited to come to the conclusion that the Plaintiff himself or somebody on his behalf purposely introduced the disease amongst his own cattle in order to develop resistance to the disease and to create a situation which could be used to support his request to the Administration that he be allowed to import further stock from tick infested areas of Queensland. It is not essential to the defence that I should confirmatively reach such a conclusion, it would be sufficient to defeat the Plaintiff's claim if it appeared that the disease was introduced from some unknown source provided always that it did not appear that the disease was disseminated throughout the herd by the ticks which the stock inspectors ought by now to have

eliminated. Nevertheless the opinion which was formed by the officers of the Department that Mr. Leahy or somebody on his behalf inoculated his cattle is based on circumstantial evidence which calls for close examination. Perhaps the most significant thing is that on the 14th May 1955 the Plaintiff wrote to the Department a letter which is Exhibit A 18 in which he showed a substantial financial interest in being allowed to import cattle from Queensland. He also showed a clear understanding of the considerations involved and particularly of the fact that it would be very dangerous to import Queensland cattle on to his tick infested property unless his disease free cattle already there could first be given effective resistance to the disease. He therefore asks that his own cattle be inoculated to develop their resistance and, referring to the failure to rid the property of ticks, reveals that he greatly fears an outbreak of red-water fever, a subject which had not been recently canvassed in correspondence with the Administration. He pointedly asks whether in the event of an outbreak of red-water fever the Department had ample stocks of veterinary medicines to treat a major outbreak. The Department in its letter in reply dated 27th May (Exhibit A 19) refused to accede to this request for inoculation pointing to several disadvantages and dangers involved in such a plan but made it clear that the Department had ample stocks of medicines for the treatment of red-water fever in the event of an outbreak in the herd. The Department did not and presumably could not forbid inoculation but strongly advised against it. Assuming that the letter of the 27th May reached the Plaintiff at about the end of May, and allowing for an incubation period of seven to fourteen days which is applicable in cases of inoculation, it would be possible for the Plaintiff by inoculating his cattle to produce the outbreak which occurred in June.

Another circumstance of some significance is that the Plaintiff himself had stocks of the appropriate medicines for treatment of red-water fever and it was his own dairy manager who first diagnosed the disease. When this diagnosis was tentatively accepted by the veterinary officers of the Department the Plaintiff himself supplied the appropriate drugs which they used until confirmation of the diagnosis and further stocks of the appropriate drugs arrived from Port Moresby.

Another circumstance relied upon by the Defendants was that the strain of red-water fever which was found to be present in the cattle was most unusual in that it consisted of a pure strain of the species Argentina whilst invariably throughout Queensland where Mrs. Booth's cattle originally came from the disease was caused by a mixed strain of the species Argentina and Bigemina. There is relationship between these two species and the latter in some respects is a dominating species with a tendency to exclude the former from the peripheral blood stream. In consequence it was argued that if through any natural causes a single strain were found in any infected beast that strain must be of the species Bigemina rather than Argentina. There are specially cultivated pure strains as well as mixed strains of both of these species available in Queensland to cattle owners so that considerable variation of technique in inoculation is available. The usual procedure when inoculating with the pure strain is to inoculate with Bigemina first and when a resistance is developed to this strain subsequently inoculate with Argentina thus ensuring the development of resistance to both strains and securing the advantage that the second infection tends to be less severe. It was argued that such an unusual pure strain

of the species Argentina could only have been obtained for the purposes of inoculation from specially qualified and equipped persons able to produce it and that it was contrary to nature for such an infection to be derived from ticks. It was also argued that by the end of May the tick population had been substantially reduced so that the danger of infection from ticks indicated in Mr. Maunder's evidence had already passed and that the outbreak occurred a month too late to be satisfactorily explained upon the hypothesis put forward by Mr. Maunder. The date of the outbreak was however consistent with the first inoculation taking place shortly after the Plaintiff received the letter of the 27th May. It was further argued that all the early deaths occurred amongst the portion of the Plaintiff's herd known as "the bullocks and dry heifers". Although these were mainly Herefords they were not the most heavily tick infested portion of the herd. The heaviest infestation had occurred amongst the breeding Hereford cattle which were normally dispastured on the ranges some distance away from the other cattle. All these points and several other matters of comment such as the severity of the outbreak of the disease when it occurred were vigorously put forward by Mr. McLoughlin as establishing the irresistible inference that Mr. Leahy himself had inoculated the herd.

It would not be difficult to suppose that a person of Mr. Leahy's temperament would be prepared if he thought fit to go against the advice of the Department and follow the advice of his own experts in a matter such as inoculation if this were all that was involved, but in this case the accusation against Mr. Leahy involves a high degree of moral turpitude because in his subsequent letters and especially his letter of the 8th July 1955 (Exhibit 3) and also in the present proceedings the Plaintiff puts forward a claim for substantial compensation which would be obviously untenable if he himself had introduced the disease contrary to the Department's advice. The making of such a claim would amount to the plainest fraud. The matter was put to Mr. Leahy in cross-examination and he answered the matter with a direct denial in a manner which I thought entirely worthy of belief. The Plaintiff's employee, the dairyman Howard, also denied that he had had anything to do with it and although I would not place the same reliance upon his evidence if it stood alone, I think that in the circumstances it is to say the least extremely unlikely that he would have taken any such course without the Plaintiff's knowledge. Bearing in mind many serious shortcomings in the circumstantial evidence relied upon by the Defendants on this point I find that Mr. Leahy was not directly or indirectly a party to the inoculation of his own cattle.

The circumstantial evidence on this point which was so effectively marshalled in Mr. McLoughlin's argument cannot stand up to careful examination. It appears from the notes on the correspondence filed and particularly those enclosed on the Plaintiff's letter of the 30th July 1955 (Exhibit 3) that some officer of the Department had by that date already made up his mind that Mr. Leahy had some undisclosed information as to where the outbreak of disease had come from. Mr. Marley apparently made up his mind at quite an early stage that Mr. Leahy had been responsible for the inoculation and this impression was to his mind confirmed by the fact that the Plaintiff had supplies of the required drugs for treatment in stock. If Mr. Marley's view were accurate the Plaintiff could only have obtained a supply of infected blood from a few sources in Queensland which might have been easily tracked down by a little detective work if it were intended that such

a suggestion were to be seriously put. No enquiries were made in this direction. Infected blood has only a very brief "shelf life" and must be administered within thirty six hours after being taken from a diseased animal. Having regard to the Plaintiff's geographical situation it would be extremely difficult for him to administer any such supplies in time. If on the other hand he was thought to have obtained his samples from somewhere within the Territory there are very few herds where red-water fever or ticks are known to occur and owing to the peculiar strain of the disease which was involved the Department might well have been able to make tests from the few herds of cattle in the Territory which would enable it to base its conclusion on more reliable facts. The significance of the fact that the Plaintiff had the appropriate medicines in his possession is greatly diminished by the fact that he was not cross-examined as to the circumstances, and mere possession of the medicines cannot signify much unless there is some material on which to base the inference that he obtained them for this particular purpose and at the particular time when he contemplated making use of them. I have noticed that in the Schedule of correspondence which the Plaintiff attached to his letter of the 30th July 1955 (Exhibit 3) there is a reference to a request having been made by the Plaintiff to John Hughes (whoever he may be) on the 16th August 1948 for "tick fever dope as protection against red water fever". There is endorsed on this Schedule at this point a note "piroparv supplied fortnightly spraying fixed". It appears that piroparv was in fact one of the drugs prescribed for treatment of red-water fever and actually used when the outbreak occurred. The letter of the 16th August 1948 was not produced at the hearing and I am left in the situation that it would be unjust without further investigation on this point to draw any inference adverse to the Plaintiff from the mere fact that he had these drugs in his possession seven years after this letter was written. I think that Mr. McLoughlin's argument on the subject also derives too much support from material set out in the Plaintiff's letter of the 14th May 1955 which on closer examination appears to me to be equivocal. The financial arrangements with the Plaintiff's bank which are referred to in this letter involved the importation of two to three hundred head of cattle and since the admitted cost of imported cattle to the Territory was approximately £100 it is clear that the transaction would involve the Plaintiff in liabilities of up to £20,000 to £30,000. Since the Bank was to provide accommodation for this transaction it is only natural to assume that considerable discussion had taken place between the Plaintiff and his Bank as to the economics of importing more costly cattle from New South Wales as compared with much cheaper cattle from areas of Queensland one thousand miles closer to the Territory and within reach of the Territory by smaller coastal ships. It is also natural to suppose that the Plaintiff (and perhaps the Bank Manager also) would have supplemented his own limited knowledge of the subject by seeking the advice of experts in Queensland on questions affecting the very substantial transaction he proposed to undertake and looking at the questions asked in the letter of the 14th May 1955 I would suppose that they were the outcome of a very thorough examination by the Plaintiff of the various alternatives open to him and their implications. The cross-examination of the Plaintiff did not carry the investigation on this subject to a stage at which I would feel justified in drawing any adverse inference.

As for the rest of the argument it seems to be largely based on the assumption that the inoculation of the

cattle by the pure strain of the Argentina species of red-water fever organism could only come about by unnatural means and not by means of ticks. Mr. Maunder stated that the incubation period in case of inoculation by blood samples is from seven to fourteen days and sometimes longer and that when caused by pathogenic ticks is usually two to three weeks but that it may be up to six weeks. When the blood samples taken from the Plaintiff's herd were examined the culture of Argentina organisms manifested itself fourteen days after the samples were injected into a splenectomized calf. Only one test was made and this period of incubation was taken as a sufficient indication that it was a pure strain. If the Bigemina species had been present it would have been expected to manifest itself at the expiration of seven days. It seems to me that such a single experiment is wholly untrustworthy when serious imputations against the Plaintiff's character are involved.

The experts called on behalf of the Defendant were not able to inform me by what means laboratory workers were able to produce a pure strain of the organisms. No doubt they are capable of becoming extinct when exposed to conditions which do not favour their continued existence but the experts could not tell me what these conditions might be or how they might be employed in the laboratory to produce a pure strain. Different species of related organisms occur in different parts of the world and no field research work has been undertaken in the Territory which would support any positive assertion as to whether any such diseases occur here. It is thought that only members of the bovine family can constitute suitable hosts for the purpose of completing the life cycle of the organisms but it is not known positively whether pathogenic ticks can be transported from place to place by any other animals or birds. Many animals become hosts to these ticks but do not transmit the disease. It is not known for certain whether the organisms are capable of producing two generations of pathogenic ticks without the co-operation of a susceptible host although it is assumed that this is not the case. It is known that wild deer in the Territory carry ticks and are susceptible to red-water fever but the presence or absence of deer in the vicinity of Zenag is not established.

It was argued on behalf of the Plaintiff that the proper inference is that Mrs. Booth's cattle which were imported before the war in a tick infested condition from Queensland carried the red-water fever organism into the Territory where it has survived ever since. During the war in consequence of the Japanese invasion this herd of cattle was allowed to run wild in the bush and on her return to the Territory Mrs. Booth was fortunate to recover them. It was suggested that the red-water fever organism could not survive a long period in the bush when the cattle had no fixed place of abode but this argument is surely contrary to ordinary experience of the habits of cattle which tend to frequent for substantial periods favoured camping and feeding places. Moreover it is plain that the ticks survived their war-time experiences and there is no reason to suppose that the disease did not do the same. However whatever unknown factors may be capable of producing in a laboratory a pure strain of the red-water fever organism might well be capable of producing the same result in an isolated herd over a period of years. Some unknown factor may have caused one species of the mixed strain, assuming that in the first place it was a mixed strain, to become extinct with the result that the pure strain survived and was carried on to the Plaintiff's property with the ticks which accompanied Mrs. Booth's cattle. The



theoretical evidence offers me very little substantial information as to what would be the effect on disease free cattle of such a pure strain. I asked but could not be told whether these organisms occurred in different stages of virulence so that on some occasions or under some conditions the disease might break out in acute or epidemic form whereas on other occasions or under different circumstances a mildly chronic form of the disease might occur. I instanced experience of this kind with other diseases but the experts were unable to supply any information. They could not tell me whether long exposure to tropical conditions in the bush might weaken the surviving strain as well as extinguishing the other. The whole question of the behaviour of the ticks especially in regard to dormancy under the climatic conditions subsisting in the Territory has not been investigated and is apparently matter for conjecture. It is supposed as a matter of inference that there would be no occasion for prolonged periods of dormancy in the mild climate at Zenag but this again is conjecture. The evidence shows that from time to time the Plaintiff suffered losses of cattle from various causes. Some of them met violent deaths but others died from causes which were not precisely ascertained. Most of these deaths were attributed to snake bite since this is death adder country, or to poisonous weeds. If in 1948 the introduction of pathogenic ticks bearing a considerably weakened strain of pure Argentina organisms is assumed to have occurred when the Plaintiff had four mature cattle and four calves it seems to me to be not improbable that this small herd developed resistance to the disease. As the Plaintiff's herd was augmented fresh batches of disease free cattle would on this hypothesis have been exposed to infection at a period during which the Plaintiff was keeping the tick population down to a low level by frequent spraying. Division of the herd into different groups grazing in different areas would introduce further factors which ought to be taken into account. It may be that occasional deaths from red-water fever were attributed to snake bite or to poison weeds and that the individual cattle exposed to infection from a small population of ticks gradually built up a resistance to the disease without suffering such a violent outbreak as to draw attention to the fact that the disease existed. It may be that the first heavy infestation with ticks which occurred in the latter half of 1954 was insufficient to produce any noticeable result and it may be that in June 1955 the infestation of ticks reached such a degree or the disease organisms reached such a state of virulence that the disease broke out for the first time perhaps amongst a section of the herd of cattle which had not developed sufficient resistance, in such a violent attack as to attract special notice. I do not say that these things actually occurred but I think that the theoretical evidence offered by the Defendants is by no means sufficient to exclude possibilities of this kind. I therefore reach the conclusion that Mr. Maunder's evidence based on more practical considerations of observation and experience in the field affords a more reliable basis for attributing the outbreak of fever to what he described as a sudden build up of ticks at a time approximately four to six weeks before the outbreak was first noticed.

Mr. Maunder's views do not enable me to say where the disease came from but it does in my opinion lead to the conclusion that it was spread through the herd by the ticks and that in the present state of technical knowledge so far as it was revealed to me during the trial it must always be assumed that such a heavy infestation of ticks will carry with it the risk of an outbreak of red-water fever. I

therefore attribute the death of such cattle as died from red-water fever to the Defendant's breach of contract.

The next question for consideration is the quantum of damages involved. Here again the onus is on the Plaintiff to establish that the cattle claimed for did in fact die of red-water fever.

After the diagnosis was confirmed by the officers of the Department of Agriculture, Stock and Fisheries the cause of death was ascertained and records were kept by Departmental officers. Prior to the diagnosis of the disease other cattle of the Plaintiff had died and consistently with the hypothesis upon which his case is based he seeks to go back over a period of some months and to attribute to the disease earlier deaths of cattle which had died from causes not positively identified at the time. This part of the claim is largely based on Mr. Howard's recollection of symptoms present in the cattle corresponding to those which were subsequently identified as being caused by red-water fever. Further Mr. Howard purported to have had some previous experience of red-water fever but this was limited as far as I can see to one post-mortem examination conducted some years before. In view of the importance which Mr. Maunder attaches to the case history of the herd in identifying diseases of this kind and in distinguishing red-water fever and other diseases, I think that it would be dangerous for me to apply the case history of this herd in retrospect on the material before me. At the time when these earlier deaths occurred it was thought that they were due to poisonous weeds or snake bite on all the evidence available at the time, and I think that if there were no symptoms present at the time which led to any other conclusion it would be wholly unsafe for me to assume that the deaths were caused by red-water fever. I cannot say whether they were or were not.

In the result I think that the Plaintiff has a just claim for the capital value of the cattle that can be fairly regarded as having died of red-water fever.

The Plaintiff goes on to claim in addition various items for loss of natural increase which he would have enjoyed from these cattle had they survived and also of milk production from such of them as were included in the Plaintiff's dairy herd. This claim was at first made for a period of three years after the loss of the cattle in question and was based on the fact which is conceded that it would have taken some time even if the Plaintiff had had the money to replace the cattle which he lost. In the course of argument it appeared that the period of three years was not appropriate and the claim was left in the position that something up to two years loss of animal increase and milk production was claimed. In giving judgment upon the demurrer proceedings I said that it appeared to me upon the face of the claim that the Plaintiff was claiming his damages twice over. I did not form any conclusion on the point at that stage but I found it difficult to appreciate how the Plaintiff could at once claim the capital value of the animals lost and in addition the income which he would have expected to derive from the same animals if they had survived for some period thereafter. If such a claim could be allowed the loss of income could go on forever when natural increase is taken into account. This last consideration of course does not apply in the case of bullocks.

I appreciate that in some claims, for example in relation to damaged motor vehicles allowance is made for loss of earning power during the necessary period of repairs but this is merely a convenient way to arrive at a fair assessment of the diminution to the value of the vehicle occasioned by the damage, and the claim could not exceed the value of the vehicle as it stood at the date of the accident. The purpose of an award of damages in cases of contract is to place the Plaintiff as nearly as may be practicable in the same position as if the contract had been properly performed. This involves giving him the cash value of any cattle lost and he must then proceed upon the footing that he may invest that cash as he sees fit to earn its own profits. If he delays in bringing an action for compensation the period of delay can't be taken as increasing the amount of his loss unless there is a continuing cause of action. I think that the correct approach to this problem is to have regard to the question of loss of profits only in this indirect way, that in the Territory there was in fact no ready market where cattle might be bought and sold and that therefore any hypothetical vendor or purchaser in the Territory would take into account in determining his price the trouble expense and delay involved in importing fresh cattle from Australia. Thus a dairy cow in full milk production in the Territory would be worth more than the net cost of importing a similar cow from Australia, having regard to the need for establishing it in the Territory and waiting until it came into production.

The Plaintiff said that the Administration refused to sell him cattle from its own herds to replace those which he had lost and that he did not try to buy them elsewhere knowing that other graziers were building up their herds and would only be prepared to dispose of any of their cattle at a "fancy price". He conceded that he would have been prepared to sell any of his own cattle at any time if the price offered had been high enough but said that it would have to be a very "fancy" price. In fixing his claim at £100 Mr. Leahy based his figures on the cost of importing dairy and other cows and upon the total cash proceeds which he would receive from the sale of a fully grown bullock's carcass. These figures appeared to me to be somewhat high but they were not challenged and I take it that they relate particularly to conditions which prevailed in the Territory at the time in question. Since that time importation of cattle has been subsidised by the Administration and the production of cattle in the Territory has enabled the Administration to sell them at substantially lower prices by public auction. I think that I must fix the value for the cattle which died by assessing what would have been a fair value to the Plaintiff in the situation in which he was at the time when their deaths occurred, arriving at my estimate with due regard for what it would cost the Plaintiff or anybody else in a similar position to replace the cattle in terms of time and money. Since the Plaintiff was selling his best bullocks in prime condition for a total cash return of £90-£120 and since there is no possibility of natural increase or other incidental profits I think that £90 per head is all that I can allow as an average value for the bullocks and steers lost. It must be borne in mind that all of these cattle would not be in fully matured or prime condition at the time of their death and that considerable time and trouble would need to be expended before the full benefit of the slaughtering and sale of the beasts could be realised. I think a higher value should be set upon cows because their value is not limited to

meat production and they were being used by the Plaintiff either for breeding or in the production of milk for sale in his dairying business. As a result of his loss he was unable to fulfill all the available demand for dairy products but there is nothing to indicate that he suffered any capital loss of goodwill as a result. Accepting the evidence which was not challenged that it cost something like £100 per head to import his dairy cattle from New South Wales I think that the hypothetical vendor of a similar beast in the Territory at that time would expect a somewhat higher price and I think that £130 would be reasonable in the case of dairy and beef breeding cows. In the absence of further details as to age and condition of the animals I think that a fair overall average price to allow for heifers would be £75 and in the case of the aged bull £50. I think that the cattle which I should regard as having died as a result of red-water fever are those which died after the 1st June. Taking for this purpose Mr. Howard's list (excluding two calves which died from other causes) the result is that forty head of cattle are to be allowed for and their values assessed as follows:-

25 steers and bullocks at £90 per head	....	£2250
11 Illawarra shorthorn cows at £130 per head	..	£1430
3 heifers at £75 per head	....	£ 225
1 aged bull at £50	....	£ 50
		<hr/>
		£3955

I think that the damages claimed by the Plaintiff have been stretched too far and are unreasonable. I think that the expenditure of £4,000 in mid-1955 on the importation of cattle from New South Wales would have enabled him to replace the forty head of stock lost without much delay and still leave him a considerable sum of money in hand.

I have previously indicated that the Plaintiff is entitled to £100 damages for loss of condition of his stock and I therefore conclude that he is entitled to damages amounting in all to £4,055.

C. J.