TORTIOUS LIABILITY FOR ACTS PERFORMED UNDER AN UNCONSTITUTIONAL STATUTE[1]

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Introduction

Problems in constitutional law can never be satisfactorily solved by the invocation of a cliché. Most of these problems arise from the difficulties associated with applying the general provisions of an instrument of government to infinitely various fact situations. Others involve the cleaning up operation that must take place after a statute has been declared unconstitutional. The cliché, however, is a stereotype block which blindly prints the same answer irrespective of factual settings. Its use is nevertheless a popular legal technique because it provides, ready-made, an answer which appears to be so obvious that it carried within itself its own justification. It is attractive to many because it obviates the need for detailed rational analysis.

This paper will be concerned to examine the use that has been made of one particular constitutional cliché by the courts of Australia and the United States in dealing with the problem of the tortious liability for acts performed under the authority of an unconstitutional statute. This problem is shared by the two countries because it is an inevitable consequence of the fact that they both have federal constitutions which limit the legislative competence of both the central and the state governments. A comparative study may therefore be of some value. The cliché involved was stated in its classic form by Field J. in an opinion which he wrote for the Supreme Court of the United States in *Norton v. Shelby County* as follows:

> An unconstitutional act is not a law; it confers no right; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed.[2]

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1 The leading treatments of this topic all date from the late nineteen twenties. See: Field, 'The Effect of an Unconstitutional Statute in the Law of Public Officers' (1928) 77 *University of Pennsylvania Law Review* 155; Rapacz, 'Protection of Officers who act under Unconstitutional Statutes' (1927) 11 *Minnesota Law Review* 585; Crocker, *The Tort Liability of Public Officers who Act Under Unconstitutional Statutes*. The Field article is reprinted in his book, *The Effect of An Unconstitutional Statute* (1935). Earlier treatments can be found in Mechum, *Public Officers* (1889) §§ 624-662 and Throop, *Public Officers* (1892) Ch. 29. See also *infra* n. 7.

2 (1885) 118 U.S. 425. The operation of this cliché in the sphere of unconstitutional taxing statutes has been examined elsewhere by the present writer. See: Pannam, 'The Recovery of Unconstitutional Taxes in Australia and the United States' (1964) 42 *Texas Law Review* 777.

It will be argued that a mechanistic application of this doctrine to determine the tortious quality of acts performed under an unconstitutional statute is a crude and harsh solution to what is a basic, and extremely complex, question of constitutional law.

A second, though related theme will also be developed. This concerns the validity of the view that public law (or constitutional) problems can be satisfactorily solved by the use of private law concepts. Professor A. V. Dicey certainly believed that not only could such problems be resolved in this way but that it was of the essence of the 'Rule of Law' that they should be so resolved. Summing up the English common law rules on this question he said:

> . . . in short, the principles of private law have with us been by the action of the courts and Parliament so extended so as to determine the position of the Crown and of its servants;[3]

It is intended, in the context of the subject matter of this paper, to challenge that assumption and to put forward the view that very often private law concepts make little sense in the constitutional sphere. The argument will be put forward that a new body of public law rules needs to be developed which will pay increased attention to the peculiar problems which arise when the constitutional competence of a legislative body is in issue.

The Problem Stated

There are many cases in which an interference with the person or property of another can only be justified by reference to the terms of some statutory authorization. If this authorization was absent then the interference would give rise to a liability in tort, but because it is present, there can be no legal complaint. In the modern world with the extension of the regulatory powers of government into every nook and cranny of human affairs this defence of statutory authority has become quite common. Statutory provisions abound which give powers of entry, seizure, detention, confiscation, destruction, and so on. They are part of the price we pay for an efficient and effective governmental system.

The legal principle involved can be stated with reasonable sim-

[3] *The Law of the Constitution* (9th ed. 1939) 203. He also wrote: 'With us every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen. The Reports abound with cases in which officials have been brought before the courts, and made, in their personal capacity, liable to punishment, or to the payment of damages, for acts done in their official character but in excess of their lawful authority.' *Ibid.* 193. And again: 'Any official who exceeds the authority given him by the law incurs the common law responsibility for his wrongful act . . .' *Ibid.* 389.

plicity: if an act is authorized by a statute it gives rise to no tortious liability. The real difficulty involved with this proposition is of course to discover how far the statutory authorization extends. That question has generated a lot of litigation and even more academic discussion.[4] The problem that concerns us here, however, is a separate, though related one. It does not concern the extent of a statutory authorization because it only arises when there is no question but that the acts are within the authority conferred. The problem involves the legal consequence of a judicial declaration that the statutory authorization is unconstitutional. It can be illustrated by the facts of two cases decided in 1955, one by the Supreme Court of Idaho, and the other by the High Court of Australia.

In the Idaho case, the owner of a Labrador dog sued a game conservation officer alleging that he had intentionally shot and wounded the dog.[5] The defence was that the dog was running at large in territory inhabited by deer and that under the provisions of section 36-1407 of the Idaho Code the defendant was authorized to kill it without incurring any civil liability.[6] In reply, the plaintiff attacked the constitutionality of section 36-1407 on the ground that it amounted to a destruction of property without due process of law. The Supreme Court of Idaho upheld this argument on the ground that the statute contemplated the killing of a dog even if it was not actually tracking, chasing, molesting or worrying deer. Such a provision was arbitrary and unreasonable and hence was a denial of the due process requirement of both the 14th Amendment to the United States Constitution and Article 1, Section 13 of the Idaho Constitution. The question thus raised was whether the game conservation officer was liable even though at the time he shot the dog he relied, in good faith, on the terms of a statute which ostensibly empowered him to shoot it, and to exempt him from any civil liability. At the time he pulled the trigger no court had ever decided that the statute was unconstitutional. The Supreme Court of Idaho held that the officer was liable because 'an unconstitutional act is not a law and . . .

[4] See generally: 2 Harper and James, *The Law of Torts* (1956) 1632-1646; 3 Davis, *Administrative Law Treatise* (1956) 506-544; Fleming, *The Law of Torts* (3rd ed. 1965) 102-6; Gellhorn and Byse, *Administrative Law: Cases and Comments* (1954) 344-355; Jennings, 'Tort Liability of Administrative Officers' (1937) 21 *Minnesota Law Review* 263.

[5] *Smith v. Costello* (1955) 77 Idaho 205; 290 P.2d 742. A companion case *Nissen v. Costello* was dealt with by the Court at the same time. That case had the same facts except that there a Cocker Spaniel was shot and killed by the defendant.

[6] The statute provided, *inter alia*, '. . . any dog running at large in territory inhabited by deer, is hereby declared to be a public nuisance and may be killed at such time by any game conservation officer or other person entrusted with the enforcement of the game laws, without criminal or civil liability'.

thus affords no protection'[7] to anyone who relied on it to justify actions which *prima facie* give rise to tortious liability.

In the Australian case, the owner of a 'refrigerated pantechnicon'[8] brought an action against an officer of the New South Wales Department of Transport and Highways claiming damages arising out of an alleged trespass to chattels.[9] The admitted facts were that the defendant had seized and detained the truck, which was carrying a load of twelve tons of margarine from Sydney to Melbourne, because the plaintiff had not obtained a licence or permit in respect of the vehicle, or of its journey, as was required by the State Transport (Co-ordination) Act 1931-1952 (N.S.W.). One of the defences open to the defendant, and which was dealt with by the High Court of Australia, was that his acts could be justified under section 42 of the Act.[10] That section provided that an authorized officer could seize any motor vehicle in respect of which he suspected that an offence was being committed against the Act and to 'detain the same pending investigation and legal proceedings'. At the time the defendant seized the truck and its contents, not only was there no reason for him to doubt the constitutionality of this section, but there was a long line of High Court decisions which upheld its validity.[11] Some two years after the seizure, however, and almost a year before the decision in this case, the Privy Council reversed the doctrine which had been accepted by the High Court and held that section 92 of the Constitution operated to prevent the valid operation of the Act with regard to vehicles engaged in interstate commerce.[12]

The High Court held, following the Privy Council decision, that section 42 of the Act was unconstitutional in its application to vehicles engaged in interstate commerce. As a result of this holding the question was squarely presented as to whether the unconstitutionality of the defendant's statutory justification of the trespass rendered

7 *Smith v. Costello* 77 Idaho 205, 208; 290 P.2d 742, 744. This decision prompted several case notes and comments in the law reviews and these constitute the only material written in any detail on this topic since the nineteen twenties. See: Note, (1956) 2 *Howard Law Journal* 299; Comment, (1957) *University of Florida Law Review* 226; Note, (1956) 10 *Arkansas Law Review* 508; Note, (1957) 42 *Iowa Law Review* 460; Comment (1956) 10 *South Western Law Journal* 214.

8 *i.e.* a large refrigerated motor vehicle.

9 *Deacon v. Grimshaw* (1955) 93 C.L.R. 83. This case is reported together with two other cases *Antill Ranger & Co. Pty. Ltd. v. Commissioner for Motor Transport* and *Edmund T. Lennon Pty. Ltd. v. State of New South Wales*. These other cases raise very different questions and it is unfortunate that the High Court bundled the three of them together. The relevant pages dealing with *Deacon's Case* are 85-87, 104-109.

10 This defence was not pleaded by the defendant. The pleadings in the action were badly drawn and were rightly criticized by Fullager J. *Ibid.* 105-106. The other defence, which was pleaded, is dealt with *infra*.

11 The cases are collected in Wynes, *Legislative, Executive & Judicial Powers in Australia* (3rd ed. 1962) 356 ff.

12 Section 92 of the Australian Constitution provides *inter alia*, '. . . trade, commerce and intercourse among the States . . . shall be absolutely free'.

him liable in damages. It should be noticed that the defence here is even stronger than in the Idaho case. There the statute had never been called in question before a court and the defendant was relying upon its ostensible validity. Here the statute had been upheld in its application to vehicles engaged in interstate trade by several earlier decisions of the High Court. Nevertheless the defendant was held liable in damages for his trespass. Fullagar J., who delivered the main judgment in the case,[13] curtly dispatched the defence as follows:

> Section 46(2) purported to provide prospectively a statutory defence to an action for trespass and detention of chattels. The defence fails because the trespass and detention infringe the freedom of inter-State commerce, which s.92 preserves.[14]

These two cases indicate the general nature of the problem. In both of them, acts which would otherwise have been tortious were committed under the apparent authority of an ostensibly valid statute. In both of them the officer had no reason to suspect, at the time he acted, that the statutes were unconstitutional. Indeed it took the *ex post facto* decision in each of the cases to decide that very question. And yet the Supreme Court of Idaho and the High Court of Australia held the officers personally liable in damages. On the face of it these seem to be very harsh decisions. However, before discussing the merit of the legal principles they reflect it is essential to examine the law on this topic as it has developed in the United States and in Australia in some detail to ascertain whether the two cases accurately state the generally accepted rule.

One last preliminary comment: the two cases set out above concerned the liability of officers employed by a governmental authority. In the first the defendant was a game conservation officer. In the second he was an officer employed by a transport and highway authority. The normal case in which this problem is presented will of course involve such persons. That is because the general pattern followed by most legislative bodies is to vest a statutory authorization to interfere with the person or property of another only in an officer employed by, or associated with, some governmental authority. However, there is no reason why this question cannot arise in the context of a tort action between two private citizens. The cases are rare, but some exist. For example, the Supreme Court of Missouri in *Manson v. Wabash Railroad Co.*[15] recently had before it the question whether

[13] And with whose judgment Dixon C.J., McTiernan, Kitto and Williams JJ. agreed.

[14] *Deacon v. Grimshaw* (1955) 93 C.L.R. 83, 108 'It is because, and only because s. 92 destroys an otherwise perfectly good statutory defence that the common law right subsists so that effect must be given to it in the courts'. *Ibid.*

[15] (1960) 338 S.W. 2d 54. The Court held that his reliance upon the statute gave him a defence to an action for false arrest and false imprisonment.

a watchman employed by a railroad company could justify his arrest of two infant trespassers on the basis of a statute which he had relied upon, but which the court later declared unconstitutional. Whether or not the same rules ought to apply to private persons as apply to government officers will be examined later on in this paper.

The Rule in the United States

The two classic texts on the law relating to public officers published at the end of the nineteenth century, *Throop* and *Mechum,* stated the American rule with magisterial certainty:

> It must be borne in mind that an unconstitutional law is, in legal effect, no law at all, and the ministerial officer cannot, therefore, justify his action under it, even though he acted in good faith upon the presumed validity of the law which had not yet been declared to be unconstitutional.[16]
>
> An officer, exercising ministerial power, cannot justify under an unconstitutional statute, although he acted in good faith, and before the statute had been declared unconstitutional.[17]

At the time these propositions were stated there was certainly no dearth of authority in the reports to support them. In *Barling v. West,* for example, a police officer arrested several persons for violating an ordinance which prohibited the sale without licence at temporary stands or tables of 'any lemonade, ice cream, cakes, pies, cheeses, nuts, fruits . . .'.[18] An action was brought against the officer claiming damages and he justified his arrest by relying on the statute. The Supreme Court of Wisconsin held that the ordinance was unconstitutional and hence afforded no defence to the officer. Cole J. dealt with the argument that the officer had, in good faith, relied on the ostensible validity of the ordinance in one sentence:

> The ordinance must therefore be declared void, and consequently would afford no justification for the acts of the defendant.[19]

16 Mechum, *The Law of Public Offices and Officers* (1889) 662. The contributor to the *American and British Encyclopedia of Law* was not as certain as Throop or Mechum. He stated the law thus: 'According to the weight of authority it seems that an officer is not protected by an invalid statute; but there are decisions to the contrary.' *Ibid.* Vol. 23, pp. 369-370.

17 Throop, *Public Officers* (1892) § 730. It will be noticed that both of these formulations relate to ministerial officers. This phrase is used to describe the type of function performed by this particular class of public officer, or public employee, and to distinguish that function from those of a discretionary nature. The magic of the distinction in American law is that it seems to be reasonably well settled that officers, or employees, are not liable for damage caused by their unintentional fault in the exercise of discretionary powers. With regard to ministerial functions, however, the officer or employee is liable. It is very difficult to draw clear distinctions between the two functions. Perhaps it will suffice here to say that discretionary functions savour of the judicial, legislative and executive function whereas ministerial functions are administrative. See generally: 3 Davis, *Administrative Law Treatise* (1958) Ch. 26; Mechum *op. cit.* Ch. 5; the authorities cited *supra* n. 4.

18 (1871) 29 Wisc. 307. 19 *Ibid.* 309.

The Supreme Court of Maine gave a somewhat longer explanation of the same holding in 1880.[20] Before the court was an action for trespass and false imprisonment against the Warden of the State jail. The action was brought by a prisoner who had been kept in the jail for sixty-eight days beyond the term of imprisonment for which he was sentenced. The Warden's defence was that he had kept the prisoner under the authority of a statute which added the days that a prisoner spent in solitary confinement to the length of his term. This was designed as an added punishment for misbehaviour in jail. The court held that the statute was a deprivation of liberty without due process of law, and then dealt with the effect of this upon the Warden's liability as follows:

> A point is raised for the defence, that the warden should be protected, because the statute had not been declared unconstitutional when he acted under it. We do not comprehend the logic of a statute having effect as if constitutional, when not so; a law for one man and not another. It must be either valid or invalid from the beginning or from the date of the constitutional provision. Judge Cooley says (*Constitutional Limitations* p. 188), "when a statute is adjudged unconstitutional, it is as if it had never existed." Such is the better opinion of the authorities and such has been the view of the question in the practise in this State. An unconstitutional law is not a law. It is null and void. The warden is only liable to the perils that more or less follow official stations. He had no warrant of court that could protect him. He is thus liable for the actual, not punitive damages for the injury suffered.[21]

The second-last sentence in this passage implies that a warrant of a court might protect an officer even if the statutory foundation for the court's jurisdiction was unconstitutional. There were cases in the reports, however, that even denied a defence in those circumstances. In the old Massachusetts decision of *Fisher v. McGirr* Shaw C.J. held an officer personally liable in trespass in respect of a search and seizure of liquor made pursuant to a warrant issued by a magistrate.[22] The statute under which the magistrate issued the warrant was held to be unconstitutional and he reasoned that therefore the warrant could not protect the officer as there was no jurisdiction to issue it. He recognized the strength of the defendant's argument that he should have been able to rely on the validity of a warrant complete and regular on its face, but rejected it in the following language:

20 *Gross v. Rice* (1880) 71 Maine 241.

21 *Ibid.* 252. The difficulty that the Supreme Court of Maine had in this case in comprehending the 'logic of a statute having effect as if constitutional, when not so' was shared by the Supreme Court of Tennessee. In *Lynn v. Polk* (1882) 8 Lea (Tenn.) 121, 131 Turnley J., writing for the court, said: 'I am compelled to confess my utter incompetency to comprehend the reasoning upon which it has been holden that unconstitutional enactments may be or must be treated as the authority of the State. To my mind it is the climax of absurdity.'

22 (1854) 61 Am. Dec. 381.

> This is certainly an important consideration; inasmuch as it is for the interest of the community that subordinate and administrative officers should, as far as possible, be protected in the full and fearless discharge of their duties, leaving all responsibility for errors in judgment and irregularities of process to rest upon others. But this principle must have some limit; it would be dangerous and injurious to the common rights of citizens, if one man, under the mere colour or semblance of legal process, could justify the arrest and imprisonment of the person, or the seizure and removal of property of another, without any responsibility.[23]

There were similar decisions by the Supreme Courts of Minnesota,[24] Kentucky[25] and Wisconsin.[26] Even the Maine court accepted this result eight years after the decision referred to above.[27]

Two courts even went so far as to hold that justices of peace and magistrates who constituted inferior courts were personally liable if they assumed jurisdiction and issued any form of process under the authority of a statute which was later held to be unconstitutional. In the great Kentucky case of *Ely v. Thompson,* decided in 1820, an action alleging trespass, assault, battery and false imprisonment was brought by a 'free person of colour' against a justice of the peace and a constable.[28] The justice had issued a warrant directing that the plaintiff be taken into custody and have thirty lashes of the whip administered to him, and this warrant had been executed by the constable. This was the justice's sentence after a white man had proved that the plaintiff had lifted his hand in opposition to him. The Act of the Kentucky legislature which authorized this sentence provided that:

> If any negro or mullatto, or Indian, bond or free, shall at any time lift his or her hand in opposition to any person not being a negro, mullatto or Indian (he or she) . . . shall for each offence receive 30 lashes on his or her back.

23 *Ibid.* 403.

24 *Merrit v. City of St Paul* (1866) 11 Minn. 223. 'It is not to be denied that there may be occasional hardship in upholding such responsibility, but to do otherwise would be to allow ignorance of the law . . . to excuse a trespass.' *Ibid.* 232.

25 *Ely v. Thompson* (1820) 3 A.K. Marsh (Ky.) 83, 1 Ky. 981.

26 *Campbell v. Sherman* (1874) 35 Wisc. 103. 'How can it be expected, it is asked, that a mere ministerial officer could decide such a question and thus find out that his process was void for want of jurisdiction in the court which issued it? The maxim *ignorantia juris non excusat,* in its application to human affairs, frequently operates harshly; and yet it is manifest that if ignorance of the law were a ground of exemption, the administration of justice would be arrested and society could not exist . . . It may devolve upon the officer a vast responsibility in some cases, to say that he must notice at his peril that an act of the legislature attempting to confer jurisdiction upon the courts is unconstitutional. But if the officer does not wish to assume all the hazard . . . he must require a bond of indemnity from the party for whom he is acting.' *Ibid.* 110.

27 *Warren v. Kelley* (1888) 15 Atl. 49.

28 3 A. K. Marsh (Ky.) 70, 1 Ky. 981.

In a moving judgment, Judge Mills held the statute unconstitutional.[29] He then held both the justice and the constable liable, as the only defence open to them was the validity of the statute under which the justice assumed jurisdiction, and the constable executed the warrant. He said that the Constitution was:

> An instrument that every officer is bound to know and preserve, at his peril, whether his office be judicial or ministerial; and he cannot justify an act against its provisions, even with the authority of the legislature to aid him, however much that may mitigate his case.[30]

The Supreme Court of Massachusetts similarly held a magistrate liable for issuing a *mittimus* under a statute that was later declared to be unconstitutional.[31]

All of the cases that have been referred to up to this point have been decisions of the State courts. However, the rule was just as strict in the Federal courts. A sentence from the opinion of Marshall C.J. for the Supreme Court of the United States in *Osborn v. Bank of the United States* will show the attitude of that Court, which was not departed from for the rest of the century. He thought the proper answer was too clear to warrant much discussion. His one sentence squashed the contrary argument thus:

> The counsel for the appellants are too intelligent, and have too much self respect, to pretend, that a void act can afford any protection to officers who execute it.[32]

However, it is interesting to note that, although there are dozens of cases in the Reports of the United States Supreme Court where relief in the nature of ejectment, specific restitution, mandamus and injunction have been given against federal and state officers, there does not appear to be one where damages were either claimed or awarded.[33] The language used in the opinions written by various members of the Supreme Court leave little doubt, though, that such officers would be liable in damages.[34] The question that caused the Supreme Court real

29 A judgment which should take its place in any anthology of American judicial opinions. He held that free coloured people were secure from 'the heated vengeance of the organs of government'. *Ibid.* 75, 985. 30 *Ibid.* 75,985.

31 *Kelly v. Beamis* (1855) 4 Gray (Mass.) 83 Am. Dec. 50.

32 (1824) 9 Wheat. 738, 868.

33 The cases are collected in a useful note entitled: 'Liability of Public Officers Acting Under Unconstitutional Statutes—The Federal Rule' (1935) 22 *Virginia Law Review* 316. There is also an elaborate catalogue of cases in an appendix to the dissenting judgment of Frankfurter J. in *Larson v. Domestic and Foreign Corp.* (1948) 337 U.S. 683, 712-716. See also: Jaffe, 'Suits Against Governments and Officers: Sovereign Immunity' (1963) 77 *Harvard Law Review* 1; 'Suits Against Governments and Officers: Damage Actions' (1963) 77 *Harvard Law Review* 209; Davis, *Administrative Law Treatise* (1958) §§ 27.03-27.04.

34 *Board of Liquidation v. McComb* (1875) 92 U.S. 531, 541 *per* Bradley J.; *Cunningham v. Macon & Brunswick Railroad Co.* (1883) 109 U.S. 446, 452 *per* Miller J.; *Poindexter v. Greenhow* (1884) 114 U.S. 270, 288-291 *per* Matthews J.; *Re Tyler* (1893) 149 U.S. 164, 190 *per* Fuller C.J.

difficulty in these cases was to determine whether the action which, in form, was brought against a governmental officer was in substance an action against the United States or a State. If it was the latter, then it would fail because of the sovereign immunity of both governments concerned.[35] In 1893 Fuller C.J. summarized the effect of all the earlier Supreme Court decisions in the following language:

> Where a suit is brought against defendants who claim to act as officers of the state and, under colour of an unconstitutional statute, commit acts of wrong and injury to the property of the plaintiff, to recover money or property in their hands unlawfully taken by them in behalf of the state; or, for compensation for damages; or in a proper case, for an injunction to prevent such wrong and injury; or, for a mandamus in a like case to enforce the performance of plain legal duty, purely ministerial, such suit is not, within the meaning of the amendment an action against the State.[36]

The rules stated in these federal and state cases, however, did not pass without some challenge. This was especially so with regard to the decisions referred to above holding judges of inferior courts, and the officers who executed their process, liable in damages if the statute upon which the judge assumed jurisdiction was later held to be unconstitutional. In *Henke v. McCord* the Supreme Court of Iowa refused to hold a justice of the peace, and the officer who executed his warrant, liable in such circumstances.[37] It was pointed out that the justice of the peace had jurisdiction to decide upon the validity of the statute and should not be penalized for making an erroneous decision on that question. The officer had merely executed a warrant that was regular on its face and it would be unfair to hold him responsible. This result was also reached in Texas,[38] Arkansas[39] and Michigan,[40] and by the end of the century was probably recognized as stating the general principle of the American law on this subject.[41]

Outside of this particular problem concerning judges of inferior courts, and the officers who execute their process, the rule in nine-

35 An immunity in the case of the United States created by judicial decision and in the case of the States created by the 11th Amendment.

36 *Re Tyler* (1893) 149 U.S. 164, 190.

37 (1880) 7 N.W. 623. Day J., who wrote the opinion of the Court, said that *Kelly v. Beamis supra* n. 31 was 'the only case which we have found which goes to this extreme length of finding liability'. *Ibid.* 385, 626. However, as pointed out in the text, the Supreme Court of Kentucky had reached the same result as *Kelly v. Beamis*. See *Ely v. Thompson, supra* n. 28.

38 *Sessum v. Botts* (1870) 34 Texas 335.

39 *Trammell v. Town of Russellville* (1879) 36 Am. Rep. 1.

40 *Ortman v. Greenman* (1856) 4 Mich. 291; *Brooks v. Mangan* (1891) 49 N.W. 633.

41 Mechum *op. cit.* §§ 630-632. It certainly seems to be the modern view. See: Davis, *Administrative Law Treatise* (1958) § 26.01; the authorities cited *supra* n. 4; Annotation, 'Civil Liability of Judicial Officers for False Imprisonment', (1921) 13 A.L.R. 1344, 1363 as supplemented in (1928) 55 A.L.R. 282 and 173 A.L.R. 802; *Bohri v. Barnett* (1906) 144 Fed. 389 (C.C.A. 7th).

teenth century America was that stated by *Throop* and *Mechum*. To be sure there were some murmurings of discontent, especially in New York,[42] Texas[43] and Ohio,[44] but the rule appeared to be well settled that an unconstitutional statute afforded no defence to a government officer or employee who relied on it to justify actions which would otherwise be tortious.

There have been several decisions since the turn of the century which accept the authority of this rule.[45] Indeed, as late as 1928, the compiler of an annotation in the American Law Reports was still able to say that:

> In the majority of jurisdictions it is held that reliance on a statute which subsequently is declared unconstitutional does not protect one from civil responsibility for an act in reliance thereon, which would otherwise subject him to liability.[46]

Since then, however, the trend of judicial decision has been the other way. Indeed, it is no longer accurate to say that the majority of jurisdictions support the old rule. Recent investigation by the present writer has shown that, of the twenty-one states which have decisions

[42] In *Dexter v. Alfred* (1892), 19 N.Y.S. 770 the intermediate appeals court of New York, the Supreme Court, held that reliance on orders given to the defendant by the Commissioner of Highways pursuant to an unconstitutional statute justified a trespass. The court founded its decision on the fact that 'it was no part of the duty of the commissioner of highways to decide whether the law in question was or was not constitutional. His duty was to execute the law as he found it'. *Ibid.*, 771. See also *Clark v. Miller* (1874) 54 N.Y. 528. There it was held that an administrative officer was liable in damages for refusing to carry out a statutory duty on the ground that it was unconstitutional.

[43] In *Sessum v. Botts* (1870) 34 Texas 335 a question arose as to whether a clerk of a district court was entitled to refuse to issue execution pursuant to a judgment relying on a statute (later held unconstitutional) which directed him to refuse. The Supreme Court of Texas held that he was entitled to refuse. Ogden J. said: 'It is . . . advisable for every good citizen to obey whatever may be promulgated by the law-making power as law, until the same shall have been passed upon by the courts of the country in a legitimate and proper manner . . . he should be protected in that obedience . . . It is the duty of a ministerial officer to execute and not to pass judgment upon the law.' *Ibid.* 349.

[44] In two Ohio lower court cases, *Herzberg v. Willey* (1885) 9 Ohio Dec. 426 and *Hornberger v. Case* (1885) 9 Ohio Dec. 434, the validity of the statute involved had been upheld by the State Supreme Court and then it later overruled itself. The acts in question were committed in between the two Supreme Court decisions. In the first case Phillips J. said: 'Is a faithful officer to be made liable for an official act required of him by the combined legislative and judicial power of the state? Certainly not!' *Ibid.* 334. In the second Price J. said: 'It would be shocking to every sense of right and justice to hold that these officers must now suffer personally for doing the very thing they were compelled to do officially, as was decided by the sovereign judicial authority of the State.' *Ibid.* 437.

[45] The cases the present writer has been able to discover are *Norwood v. Goldsmith* (1910) 53 So. 84; *Saratoga State Water Works Corp. v. Pratt* (1920) 125 N.E. 834 (which states a contrary view to the New York cases cited *supra* note 41); *Dennison Manufacturing Co. v. State ex rel. Wright* (1923) 120 S.E. 120; *State ex rel. Test v. Steinwedal* (1932) 180 N.E. 864; *Smith v. Costello* (1955) 290 P. 2d 742.

[46] Annotation 'Unconstitutional Statute or Veto as Protection Against Civil or Criminal Responsibility for Act or Omission in Reliance Thereon.' 53 A.L.R. 268.

on the question, ten support the rule and eleven reject it.[47] The federal courts still follow the old rule in relation to federal officers, but it is again worth comment that there is still not one case where damages have been awarded against an administrative officer who has relied on an unconstitutional statute.[48]

The major reason given for refusing to follow the old rule is the injustice of holding an administrative officer personally liable in damages when he acts under the terms of an apparently valid statute. It can hardly be said that he has acted unreasonably in that it would be impossible for him to grapple with complex questions of constitutional law, which often bewilder judges of the highest courts in the land. Furthermore, it is pointed out that public administration would fall into a state of vast confusion if every officer were forced to decide for himself the constitutionality of the statutes he is called upon to implement. Such a situation would lead to timidity, laxness, and failure to act when courageous and independent enforcement of the laws should be expected and encouraged. Thus the old rule has been variously described as 'intolerable',[49] 'stupid'[50] and a 'serious reflection upon justice'.[51] The Supreme Court of Utah stated its objections as follows:

> The evils of such a holding, however, [are] apparent, since it is by no means easy for a trained lawyer to tell whether or not a law is unconstitutional. The judges of the Supreme Courts of the various states and of the United States are frequently divided in their opinion on the question of whether a law should or not be held unconstitutional. To make the sheriff and his deputies, who are not supposed to be lawyers, act at their peril . . . would certainly work a great injustice to these officers and would tend to work against public policy for the reason that the officers would always be hesitant in carrying out the directions of the statutes and the orders of the courts.[52]

As pointed out above, many of the recent cases which have repudiated the old rule have laid great stress on the criticism that it inevitably leads to over-cautious law enforcement. For example, in *Manson v. Wabash Railroad Co.*, Westhues J. said that he thought

47 *For:* Arkansas, Georgia, Idaho, Indiana, Kentucky, Maine, Massachusetts, Minnesota, New York and Wisconsin. *Against:* Arizona, Illinois, Iowa, Kentucky, Michigan, Mississippi, Ohio, Tennessee, Texas, Utah and Washington. All of the cases are cited *infra passim.*

48 *Supra* n. 33. The limitation to federal officers is compelled by *Erie Railroad Co. v. Tompkins* (1938) 304 U.S. 64. As far as state officers are concerned, the federal courts would, in most cases, apply the law of the state in which they are sitting.

49 *Bricker v. Sims* (1953) 259 S.W. 2d 661. See also *Roberts v. Roane County* (1929) 23 S.W. 2d 239.

50 *McCray v. City of Louisville* (1960) 332 S.W. 2d 837, 842.

51 *Village of Dolton v. Harms* (1945) 63 N.E. 2d 715.

52 *Allen v. Holbrook* (1942) 135 P. 2d 242. The Utah court had earlier held that when a court had upheld the constitutionality of a statute, and then later reversed itself, an officer was protected if he relied on the statute in the intervening period. *State ex rel. University of Utah v. Candland* (1909) 104 P. 285.

the rule tended 'to lead to a breakdown of local law enforcement'.[53] Similarly, Neil C.J. in *Bricker v. Sims* stated that it would be outrageous if administrative officers could refuse 'to enforce the law as written in the absence of any proper adjudication of unconstitutionality'.[54] Most judges, however, have been content to base their rejection of the rule on the simple proposition that the doctrine declaring an unconstitutional statute to be an utter nullity is not to be applied to work hardship, and impose liability, on a person who has, in good faith, relied upon a statute before it has been declared unconstitutional.[55] The only explanation usually given is that any other rule would be inequitable and oppressive.

The only conclusion which emerges from this examination of the American cases is that the law is in a state of flux. In the nineteenth century the rule was clear. An authority conferred by an unconstitutional statute did not justify what otherwise would be a tort. During the last fifty or sixty years, however, an increasing number of courts have rejected that rule until today there is no clear majority view. What is clear though is that the modern trend has been dramatically away from the old rule. Underlying that trend is an attitude that was recently expressed by the Supreme Court of Arizona as follows:

> However desirable the total nullity doctrine of *Norton v. Shelby County* may be from the standpoint of symmetrical jurisprudence it does not conform to reality. For a statute, until legislatively or judicially excised, is an operative fact which cannot be ignored. This court presumes every legislative act constitutional and indulges in every intendment in favour of its validity . . . No penalty should be visited upon the citizenry for doing likewise.[56]

The Rule in Australia

The Australian courts have solved this problem by a simple application of a fundamental principle of the English common law. The principle is that an individual can only justify acts, which would otherwise constitute a tort, by pointing to some lawful authority to commit those acts conferred on him by the common law, or by statute.[57] An unconstitutional statute, it is pointed out, cannot confer a lawful authority on anybody to do anything and hence, if it is the only justification relied on, the actor is not shielded from liability.

53 (1960) 338 S.W. 2d 54. 54 (1953) 259 S.W. 2d 661.

55 *Wichita County v. Robinson* (1955) 276 S.W. 2d 509; *Golden v. Thomson* (1943) 11 So. 2d 906; *Wedts v. Berry* (1913) 157 S.W. 1115; *Birdsall v. Smith* (1909) 122 N.W. 626; *Shafford v. Brown* (1908) 95 P. 270; *Goodwin v. Guild* (1900) 29 S.W. 721. 56 *Austin v. Camnbell* (1962) 370 P. 2d 769.

57 See authorities cited *infra* notes 59, 60 and 61. Sir John Salmond wrote: 'It is a fundamental principle of our law that the Crown or its servants must be prepared to justify before the ordinary courts the legality of any act which interferes with the person or property of the subject. The justification must be found in some distinct rule of common law or statute . . .' *The Law of Torts* (1924 6th ed.) 71.

As the English common law knew nothing of the phenomenon of an unconstitutional statute,[58] the authorities which exemplify the proposition stated above are mainly concerned with the liability of Crown servants for acts they seek to justify under some authority given to them in the name of the Crown. In the classic case of *Entick v. Carrington,* for example, the defendant sought to justify his breaking into the plaintiff's house, conducting a search there for more than four hours, and finally taking away certain charts and pamphlets by pleading that he had acted under a warrant given to him by the Earl of Halifax, who was one of His Majesty's Secretaries of State.[59] The warrant purported to authorize the defendant to search the premises to ascertain whether the plaintiff was concerned with an allegedly seditious newspaper. In his classic judgment, the Lord Chief Justice, Lord Camden, held that a Secretary of State did not have any power to issue such a warrant and that therefore the officer executing the warrant had no legal justification for his actions, and was liable for them. He stated the principles as follows:

> If he [the officer] admits the facts he is bound to show by way of justification, that some positive law has empowered or excused him. The justification is submitted to the judges, who are to look into the books and see if such a justification can be maintained by the test of the statute law, or by the principles of the common law. If no such excuse can be found or produced . . . the plaintiff must have judgment.[60]

More than 150 years later Viscount Finlay echoed the same principles in the House of Lords in the following language:

> It is the settled law of this country . . . that if a wrongful act has been committed against the person or the property of any person the wrongdoer cannot set up a defence that the act was done by the command of the Crown. The Crown can do no wrong, and the Sovereign cannot be sued in tort, but the person who did the act is liable in damages, as any private person would be.[61]

58 That is if Coke's famous dictum in *Dr. Bonham's Case* (1610) 8 Co. Rep. 113b is put aside: 'In many cases the common law will control acts of Parliament and . . . adjudge them to be utterly void.' *Ibid.* 118a.

59 (1765) 19 St. Trials. 1030. Of this case Professor Heuston has written: 'If one case had to be chosen to illustrate more than any other the fundamental principles of English constitutional law, it would be this one. It is, the one case to be taken to a desert island.' *Essays in Constitutional Law* (1961) 33. Bradley J. has described the case as 'one of the permanent monuments of the British Constitution.' *Boyd v. U.S.* (18) 116 U.S. 626, 631.

60 *Ibid.* 1066. See also: *Wilkes v. Halifax* (1769) 19 State Trials 1406; *Leach* v. *Money* (1765) 19 St. Tr. 1001. For a good exposition of this rule see: Broom, *Constitutional Law Viewed in Relation To Common Law* (1866) 524-623.

61 *Johnstone v. Pedlar* [1921] 2 A.C. 262. Other statements of the principle are to be found in *Raleigh v. Goshen* [1898] 1 Ch. 73, where Romer J. said: 'It appears to me that if any person commits a tresspass . . . he cannot escape liability for the offence, he cannot prevent himself being sued, merely because he acted in obedience to the order of the executive Government, or of any officer of State . . .' *Ibid.* 77. See also *Henly v. Mayor of Lime* (1828) 5 Bing. 91, 107, 130 E.R. 995, 1000, *per* Best C.J.: *Cobbet v. Sir George Gray* (1849) 4 Ex. 729, 154 E.R. 1409; *Mostyn v. Fabrigas* (1774) 1 Cowp. 161, 175, 98 E.R. 1021, 1030, *per* Lord Mansfield C.J.

The injustice of holding an administrative officer personally liable in damages in these cases did not influence the English Judges to modify the harsh results of this principle. Indeed, their attitude was quite the contrary. As Sir John Holt said in *Ashby v. White*: 'If publick officers will infringe mens' rights, they ought to pay greater damages than other men, to deter and hinder other officers from the like offences'.[62] Unless the officer could bring himself four-square within the limits of the legal authority conferred upon him then he could expect no sympathy from the courts.[63]

The High Court of Australia has used these principles of the English common law to deal with the problem of the personal liability of an officer who tries to justify his otherwise tortious conduct under a statute which is later held to be unconstitutional.[64] The same approach has been taken by the Privy Council.[65] If the alleged statutory justification turns out to be unconstitutional, then both Courts hold that it provides no shield against the personal liability of the officer. This result follows because the accepted doctrine is that an unconstitutional statute is completely void. As Dr Wynes sums up the doctrine, such a statute 'is a complete nullity; no right can be acquired no duties imposed, under its provisions—*Defectus potestatis nulletas nullitatum;* it is void *ab initio*'.[66]

Most of the cases in which the High Court has discussed this problem have involved the operation of section 92 of the Australian Con-

62 (1703) 2 Lord Raymond 938, 956, 92 E.R. 126, 137. Lord Mansfield in *Mostyn v. Fabrigas* (1774) 1 Cowp 161, 98 E.R. 1021 was splenetic at the suggestion that the Governor of Minorca could defend an action brought against him for battery, assault and false imprisonment on such a basis. He thought that: '. . . to lay down in an English Court of Justice such a monstrous proposition, as that a governor acting by virtue of letters patent under the Great Seal, is accountable only to God, and his own conscience; that he is absolutely despotic, and can spoil, plunder, and affect His Majesty's subjects, both in their liberty and property, with impunity, is a doctrine that cannot be maintained.' *Ibid.* 175, 1029.

63 The courts very rarely gave any but literal readings of the provisions of a statute which did not make an officer's position any easier. An example of a strict construction against an officer is *Warne v. Varley* (1795) 6 Term Rep. 443, 101 E.R. 639. A statute authorized the seizure of undried leather and the officer mistakenly, but in good faith, seized what was later declared to be dried leather. He was held liable for trespass. However, the statute (2 Jac. 1 c.22, 1604) would have easily been susceptible to an interpretation which would have authorized the seizure of suspicious leather, as it set up a board before whom the officer was to take all seized leather to establish whether it was dried or undried.

64 *Riverina Transport Pty. Ltd. v. Victoria* (1937) 57 C.L.R. 327; *McClintock v. The Commonwealth* (1947) 75 C.L.R. 1, 19 *per* Latham C.J.; *Bank of New South Wales v. The Commonwealth* (1948) 76 C.L.R. 1, 230-231 *per* Latham C.J., 388 *per* Dixon J.; *Williams v. Metropolitan & Export Abattoirs* (1953) 89 C.L.R. 66, 77 *per* Kitto J.; *Deacon v. Grimshaw* (1955) 93 C.L.R. 83, 104-109 *per* Fullagar J.

65 In *James v. Cowan* (1930) 43 C.L.R. 386, Lord Atkin, who gave the advice for the Judicial Committee, said: 'It is beyond dispute that unless the seizures can be justified under the Act they were legal wrongs for which the plaintiff had a remedy.' *Ibid.* 393. The Act was held unconstitutional and judgment was entered for the plaintiff.

66 *Legislative, Executive and Judicial Powers of Australia* (3rd Ed. 1962) 39.

stitution.[67] That section, as presently interpreted, strikes down any federal or state legislation which operates to deny the freedom which it guarantees to interstate trade and commerce.[68] The approach of the High Court may be illustrated by the following passage from the judgment of Sir John Latham, then Chief Justice, in the *Bank Nationalization Case*:

> If a plaintiff complains of an act done by a defendant, he must show some infringement of a right which he, the plaintiff possesses. He may show an interference with his goods which is prima facie a trespass because unauthorized by him. The defendant may contend that what he did was authorized by a statute. But if the statute is invalid because it purports to authorize acts which interfere with the freedom of inter-State trade and commerce, then the defence fails, the plaintiff succeeds and obtains damages for breach of this common law right . . .[69]

Although Sir John Latham was a veritable champion of the view that an unconstitutional statute is void *ab initio*, whilst he was on the High Court Bench his approach to the problem in the above passage appears to be the well-settled doctrine of the court.[70] It was recently affirmed by Fullagar J. in a judgment with which six other judges, including the then Chief Justice Sir Owen Dixon, agreed and which the Privy Council expressly approved on appeal.[71]

67 Other cases have involved section 51 (xxxi) which limits the Commonwealth's power of acquisition in that it provides such acquisitions must be 'on just terms'. If the acquisition is unconstitutional, then it is a tort because the only defence fails. *Infra* n. 89.

68 Section 92 provides, *inter alia*, '. . . trade, commerce and intercourse among the States . . . shall be absolutely free'. The earlier interpretation was that it only fettered the powers of the States. See generally: Wynes *op. cit.* 290-320.

69 *Bank of New South Wales v. The Commonwealth (1948)* 76 C.L.R. 1, 230-231. See his remarks in *McClintock v. The Commonwealth* (1947) 75 C.L.R. 1, 19 where he said: '. . . if the only defence was that the seizure complained of was authorized by a statute or regulation which was held to be invalid, there would have been a liability in Tort . . .'. He also made the same point in *Riverina Transport Pty. Ltd. v. Victoria* (1937) 57 C.L.R. 327, 342: 'If what has been done in real or pretended reliance upon the statute is a breach of duty or an interference with a right for which the law provides a remedy, then the person doing the act is liable in ordinary legal proceedings . . . If his act is authorized by the words of the statute upon which he relies, but that statute is invalid because it offends against sec. 92 of the Constitution, or for any other reason, then the defence fails. The plaintiff then recovers damages, not for any breach of the Constitution, but for the common law wrong of trespass. No interference with a right can be justified by an invalid statute, and the invalid statute being out of the way, the common law applies.'

70 *Supra* n. 69. In *South Australia v. The Commonwealth* (1942) 65 C.L.R. 373, 408 he said: 'A pretended law made in excess of power is not and never has been a law at all. Anybody in the country is entitled to disregard it. Naturally he will feel safer if he has a decision of a court in his favour—but such a decision is not an element which produces invalidity in a law. The law is not valid until a court pronounces against it—and thereafter invalid. If it is beyond power it is invalid *ab initio*.'

71 *Deacon v. Grimshaw* (1955) 93 C.L.R. 83. Fullagar J. pointed out that: 'It is because, and only because, sec. 92 destroys an otherwise perfectly good statutory defence that the common law right subsists so that effect must be given to it in the courts . . .' *Ibid.* 108. Although *Deacon's Case* was not itself appealed, its companion case *Commissioner for Motor Transport v. Antill Ranger & Co. Pty. Ltd.* [1956]

Three questions have been dealt with by the High Court that find no counterparts in the United States. They have arisen because the Commonwealth and State governments in Australia are liable in tort.[72] The first is whether the Commonwealth is vicariously liable for a tort committed by one of its employees, or agents, or some other person or body authorized by it, in the execution of the provisions of an unconstitutional statute. In *James v. The Commonwealth,* it was argued on behalf of the Commonwealth that because such persons obtain no valid legal authority to act on its behalf the Commonwealth is not vicariously liable for their torts.[73] The torts in that case were committed by officers attached to the Dried Fruits Boards of various States who were authorized by the Commonwealth to seize certain fruit belonging to the plaintiff pursuant to a statute, and regulations made under it, which were later held unconstitutional. Five specific seizures had been made. Dixon J., as he then was, held that the legal invalidity of the authorization did not alter the vicarious liability of the Commonwealth for the torts committed under it. After pointing out that, at common law, the maxim *rex non potest peccare* excluded the maxim *respondeat superior,* he went on:

> But it is important to see that, once there is found a *de facto* authority from the Crown in right of the Commonwealth within the scope of which an alleged tort is committed, the doctrine of *ultra vires* is not used to produce the same immunity as formerly arose from the incompetence of an officer at common law to bind the Crown by his tortious acts. In the present case . . . I think that, throughout, the State Boards acted with the full allowance of the Commonwealth Department of Commerce or of Marketing, and subject to its general direction. In the case of the five specific seizures I think that it should be inferred that an actual *de-facto* authority to make them was sufficiently communicated by the Commonwealth department to the State Boards.[74]

Since *James v. The Commonwealth,* it seems well settled that the Commonwealth cannot avoid vicarious liability for acts committed under an unconstitutional statute if a *de facto* authorization has been given by such a statute.[75] Of course there are cases where the Commonwealth will not be liable on other grounds, but the fact that a

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A.C. 527 was appealed to the Privy Council. In giving their Advice the Judicial Committee, however, expressly approved Fullagar J.'s judgment. *Ibid.* 538. It should also be noted that the approach described by Latham C.J. was that used by Dixon J. in his classic judgment in *James v. The Commonwealth* (1939) 62 C.L.R. 339, 362.

[72] See generally: Wynes *op. cit.* 595-600; Brett, *Cases on Constitutional and Administrative Law* (1962) 110-126. [73] (1939) 62 C.L.R. 339. [74] *Ibid.* 359-360.

[75] Sir Owen Dixon's judgment in *James Case* has been twice expressly approved by the Privy Council in *Commissioner for Motor Transport v. Antill Ranger & Co. Pty. Ltd.* [1956] A.C. 526, 537, and in the *Bank Nationalization Case* [1950] A.C. 235, 304-305. It has also been consistently cited with approval by the High Court, *e.g.,* all the cases cited *supra* note 64.

tort was committed under an unconstitutional statute is not enough, of itself, to produce that result.[76]

The second question that has arisen in Australia is whether the Commonwealth can itself be sued, even though no tort known to the common law has been committed, in respect of any damage caused to an individual by the mere fact that it has enacted and administered an unconstitutional statute or authorized the making of such a regulation. This question was also dealt with by Dixon J. in *James v. The Commonwealth*.[77] The plaintiff's claim in that case did not only relate to the five specific seizures of fruit, which are dealt with above, but also included a claim in respect of the general loss to his trade or business caused by the continual effect of the Commonwealth Dried Fruit Act 1928, and the regulations made under it. One of the effects of the legislation on the plaintiff's business was that it interfered with his right to send his dried fruit to be sold inter-state. Carriers were subjected to penalties under the Act if they accepted dried fruit to be carried inter-state from a person who did not hold a licence. The plaintiff held no such licence. It was decided by the Privy Council in 1936 that this legislation and its licensing provisions were unconstitutional.[78] Dixon J. was prepared to hold that the active administration of the Dried Fruits Act 1928 by the Commonwealth, apart altogether from the specific seizures of his fruit, had caused damage to the plaintiff.[79] He then considered whether the actions of the Commonwealth in administering the unconstitutional Act constituted any tort known to the common law. In an exhaustive judgment, he examined the various torts relating to interference with a trade or business and inducing a breach of contract, but came to the conclusion that no tort had been committed.[80] Two important, and closely

[76] One of the most significant, and unjust, exceptions to the vicarious liability of the Commonwealth is the doctrine of *Enever v. The King* (1906) 3 C.L.R. 969. As described by Dixon J., as he then was, in *Little v. The Commonwealth* (1947) 75 C.L.R. 94, 114 it is as follows: 'any public officer whom the law charges with a discretion and responsibility in the execution of an independent legal duty is alone responsible for tortious acts which he may commit in the course of his office and that for such acts the government or body which he serves or which appointed him incurs no vicarious liability.' Even though a Commonwealth officer commits a tort under an unconstitutional statute, the Commonwealth will not be vicariously liable, therefore, if the statute imposed an independent duty of this type. The doctrine is discussed *infra*.

[77] *Supra* n. 73.

[78] *James v. The Commonwealth* [1936] A.C. 578, (1936) 55 C.L.R. 1.

[79] (1939) 62 C.L.R. 339, 354.

[80] *Ibid.* 362-376. His Honour's discussion of the torts of inducing a breach of contract and intentionally inflicting harm on another's business are interesting because in both cases he holds them inapplicable due to the existence of the unconstitutional Act and regulations. He held that the existence of the Act and regulations justified any inducement by the Commonwealth to the carriers to break their contracts with James. *Ibid.* 373. He also held that it could not be said that an act was done with an intent to cause injury when its purpose was simply to see that a person conformed to an apparently valid statute and regulations. *Ibid.* 366. See also *Williams v. Metropolitan & Export Abattoirs* (1953) 89 C.L.R. 66, 77 *per* Williams J.

related, arguments which had been advanced by counsel for the plaintiff were rejected by Dixon J. One was that, even though no tort previously known to the common law had been committed by the Commonwealth, nevertheless it was liable for any damage caused by the enactment and implementation of an unconstitutional statute. The other was that section 92 itself, being in the form of a constitutional guarantee of freedom, operated to confer a private right on the plaintiff to recover damages incurred as a result of its violation by the legislature in passing a statute which it invalidated.[81]

The first argument was answered by Dixon J. in the following passage from his judgment.

> I am quite unable to believe that an attempted enactment of the legislative organ of government can form any part of a wrongful act for which the Executive Government is liable under Part IX of the Judiciary Act.[82] The existence of an invalid statute may be regarded as a fact preliminary to and explanatory of the commission by the Executive of a tort, but it cannot, in my opinion, enter into the actual grounds of legal responsibility in tort.[83]

As Dixon J. does not explain the reasons behind his inability to believe the proposition put forward, his judgment is of little assistance on this point.[84] The principle he states does, however, appear to be accepted as settled by the High Court.[85] The only explanation of it that has ever been volunteered was given by Latham C.J. in his judgment in *Arthur Yates & Co. Pty. Ltd. v. The Vegetable Seeds Committee* where he said:

> The enactment of a law cannot in itself give any cause of action to a person who is injured by the operation of the law. All members of the community are subject to the risk of a law being made, altered, or repealed to their detriment, and they have no remedy for any injury consequentially suffered unless the law provides for some form of compensation. This is obviously the case when the law is valid. If a pretended law is invalid, it is still the case that there is no remedy in repect of the mere making of the supposed law (*James v. The Commonwealth*).[86]

The persuasiveness of this argument will be examined later.[87]

81 This second argument is narrower than the first, as it only applies to constitutional guarantees. It would not apply to a statute which merely went beyond the limits of an affirmative Commonwealth power. In American terms, the question would be put in terms of the guarantees in the Bill of Rights.

82 Part IX of the Judiciary Act contains the general provisions which, in one view, make the Commonwealth liable in tort. They are perfectly general. See the authorities cited *supra* n. 72.

83 *Ibid.* 372.

84 He makes a similar assertion on pp. 369-370 in the context of unconstitutional regulations. The only reason he gives for his terseness is: 'In a case involving so many other questions I shall forbear from entering into a discussion of the grounds for this statement.' *Ibid.* 370.

85 See the authorities cited in notes 64, 69, 71 and 75.

86 (1945) 72 C.L.R. 37, 64.

87 *Infra.*

Dixon J. was not prepared to accept the plaintiff's other argument either. He held that section 92 does not deal with the rights of individuals even though it is cast in the form of an affirmative guarantee of freedom for interstate trade and commerce. Instead it is 'a negative in universal terms denying power, authority and competence, denying them to governments'.[88] The proper sphere of the section's operation is that:

> It gives to all an immunity from the exercise of government power. But to find whether a governmental act be wrongful the general law must be applied. Section 92 will do no more than nullify an alleged justification. The plaintiff cannot, therefore, recover damages under sec. 92 independently of any tort by the Commonwealth.[89]

This interpretation of section 92 has become the settled doctrine of the High Court and has been affirmed on several occasions by the Privy Council.[90]

The third question mentioned above with which the High Court has had occasion to deal also concerns section 92. It can be stated as follows: Can the Commonwealth or a State legislature retroactively extinguish by statute a tortious liability which arises in respect of acts done under a statute rendered unconstitutional by section 92? Could, for example, the Commonwealth have retroactively extinguished its liability in respect of the five specific seizures of fruit in *James v. The Commonwealth*? The question arose for decision in *Deacon v. Grimshaw*.[91] In that case, the facts and background to which have already been given,[92] the New South Wales legislature purported to extinguish the liability of its officer in respect of his seizure of a truck.[93]

[88] (1939) 62 C.L.R. 339, 362.

[89] *Ibid.* 362. This interpretation is the same as that given to the constitutional guarantee in section 51 (xxxi) which provides that the Commonwealth has only power to acquire property 'on just terms'. The High Court has often pointed out that section 51 (xxxi) does not give a constitutional right to sue the Commonwealth for compensation. It invalidates an unconstitutional taking of property and thus renders the Commonwealth liable in tort. See: *Minister for the Army v. Dalziel* (1944) 68 C.L.R. 261, 306 *per* Williams J.; *Marine Board of Launceston v. Minister for the Navy* (1945) 70 C.L.R. 518, 523 *per* Latham C.J.

[90] *McClintock v. The Commonwealth* (1947) 75 C.L.R. 1, 19 *per* Latham C.J.; *The Bank of New South Wales v. The Commonwealth* (High Court) (1948) 76 C.L.R. 1, 230-231 *per* Latham C.J., 388 *per* Dixon J., (Privy Council) [1950] A.C. 235, 304-5; *Antill Ranger & Co. Pty. Ltd. v. Commissioner for Motor Transport* (High Court) (1955) 93 C.L.R. 83, (Privy Council) [1956] A.C. 526, 538. See also: *Riverina Transport Pty. Ltd. v. Victoria* (1937) 57 C.L.R. 527; Wynes *op cit.* 383-384, 595. The Privy Council have approved the following remarks of Fullagar J. in *Deacon v. Grimshaw* (1955) 93 C.L.R. 83, 108: 'It is quite true . . . that s. 92 does not itself provide his cause of action: what he primarily asserts is not a constitutional or a statutory right but a common law right. But the successful assertion of the right depends on s. 92. It is because, and only because, s. 92 destroys an otherwise perfectly good statutory defence that the common law right subsists . . .' [1956] A.C. 526, 535.

[91] (1955) 93 C.L.R. 83.

[92] *Supra.*

[93] Section 3(b) State Transport Co-Ordination (Barring of Claims and Remedies) Act 1954. The sub-section purported to bar all claims arising out of any act done by an authorized officer acting pursuant to the statute which the Privy Council later held unconstitutional.

At the time the officer was acting pursuant to a statute which had been held valid by the High Court, but which was held unconstitutional in later litigation by the Privy Council.[94] In a judgment concurred in by the other six members of the High Court, and expressly approved by the Privy Council, Fullagar J. held that the purported extinguishment was itself unconstitutional.[95] He said:

> It says simply that the plaintiff's cause of action, which subsists and is effective because of the operation of s.92, is no longer to subsist or be effective. This is to contradict s.92. Section 3(b) [the extinguishment-provision] attempts, in effect, to do exactly the same thing as s.47(2) [the original power in the unconstitutional statute] attempted to do. Section 47(2) purported to provide prospectively a statutory defence to an action for trespass and detention of chattels. The defence fails because the trespass and detention infringe the freedom of inter-State commerce, which s.92 preserves. Section 3(b) purports to substitute *ex post facto* another statutory defence. This other defence must fail for the same reason. No State statute can justify either prospectively or *ex post facto* an act which is at once a wrong at common law and an invasion of an immunity given by the Constitution.[96]

A question arises as to whether this reasoning can apply to situations where a statute is held unconstitutional for exceeding the limits of an affirmative power conferred on the Commonwealth rather than for a violation of a constitutional immunity or prohibition such as that in section 92, or those in sections 51 (xxxi), 90, 99, 100, 114, 116, or 117? The joint judgment in *Antill Ranger & Co. Pty. Ltd. v. The Commonwealth* was careful to point out that there was no due process clause in the Australian Constitution, and as a result there was a critical difference between exceeding an affirmative power and violating a prohibition or a limitation upon power.[97] It was implied that, whereas a retroactive extinction of tortious liability would contradict a constitutional immunity or a prohibition, and hence be unconstitutional, such an extinction in the case where an affirmative power has been exceeded might be perfectly constitutional. However, the point did not arise for decision in this case and the High Court

94 *Supra* p. 116.

95 The case was not appealed to the Privy Council but its companion case was. It was in the companion case that the Privy Council approved this judgment. *Commissioner of Road Transport v. Antill Ranger & Co. Pty. Ltd.* [1956] A.C. 527, 535.

96 (1955) 93 C.L.R. 83, 108. In *Antill Ranger & Co. Pty. Ltd. v. Commissioner for Motor Transport* (1955) 93 C.L.R. 83, the joint judgment of Dixon C.J., McTiernan, Williams, Webb, Kitto and Taylor JJ. contains the following passage: 'Can the State by its functionaries stop him without legal justification and immediately afterward confirm the Act, give it a legal justification and deny him all remedy? It seems implicit in the declaration of freedom of inter-State trade that the protection shall endure, that is to say, that if a governmental interference could not possess the justification of the anterior authority of the law because it invaded the freedom guaranteed, then it could not, as such, be given a complete *ex post facto* justification.' *Ibid.* 101.

97 *Op. cit.* 99-100.

has yet to clarify its attitude on this question.[98] It is likely that the principle which the court will apply is that the retroactive extinction of a tortious liability can only be justified if it can be characterized as a law with respect to any specific legislative power vested in the Commonwealth. If it cannot be so characterized then it will be unconstitutional.[99]

The question as to whether a judge of an inferior court is liable for any damage suffered as a result of orders made pursuant to an apparent jurisdiction, conferred upon him by what is in fact an unconstitutional statute, has not been raised in the Australian courts. There is no difficulty, however, in stating the applicable legal principles. They are well settled. A judge of an inferior court incurs no liability for any action he takes whilst acting within the jurisdiction which has been conferred upon him. If, on the other hand, he acts either without jurisdiction, or in excess of jurisdiction, he is personally liable for any damage directly caused by his actions. Furthermore, the burden of proof lies upon the judge of an inferior court to show that he was acting within his jurisdiction.[1] The critical question, then, is whether a judge, who assumes jurisdiction under an unconstitutional statute, has merely made a mistake as to its validity whilst acting within his jurisdiction or whether he is acting without any jurisdiction at all. This is a very difficult question.[2] It is of course clear that a judge of a superior court in Australia would incur no personal liability in such a case.[3]

Although it is far from clear what answer the Australian Courts would give to this question, it would be difficult to square a holding of no liability with the mechanistic void *ab initio* doctrine they have applied in the general field of the liability of other public officers. If the judge of an inferior court has to demonstrate the existence of his jurisdiction, in the same way that a public officer has to justify his

98 The High Court has held in *Nelungaloo Pty. Ltd. v. The Commonwealth* (1947) 75 C.L.R. 495 that the Commonwealth can retroactively validate a regulation which was *ultra vires* because it exceeded the limits of a delegated authority. As validated, however, the regulation was within the constitutional competence of the Commonwealth. The case does not cover the situation where a statute or regulation is outside the constitutional competence of the Commonwealth and there is an attempt to extinguish a tortious liability that has arisen under it.

99 *Werrin v. The Commonwealth* (1938) 59 C.L.R. 150 contains some remarks which would support this approach. See *per* Starke J. at 163, *per* Dixon J. at 165-168.

1 See generally on this question: *Winfield on Tort* (7th ed. Jolowicz 1963) 65-69; *Salmond on Torts* (13th ed. Heuston 1961) 711-716; *Clerk and Lindsell on Torts* (12th ed. 1961) §§ 1781-1797.

2 The distinction stated in the text has been described as 'easier to state in general terms than to define with accuracy or apply with precision'. Salmond *op. cit.* 714.

3 A judge of a superior court is presumed to have jurisdiction and the burden of proof is on the person contending that it does not exist. However it seems that a judge of a superior court always has jurisdiction to determine his own jurisdiction and so an error, or mistaken assumption, as to the constitutionality of a statute would be an error within his jurisdiction.

authority to commit a tort, then an unconstitutional statute should afford neither the justification nor the jurisdiction which are necessary to defeat liability.

An officer who carries out the orders, decrees or warrants of either a superior or an inferior court is not personally liable for any defect in the authority under which he acts.[4] He would not be affected by the fact that a court assumed jurisdiction under an unconstitutional statute.

An Analysis of the Problem

On the surface, the issue which divides the American Courts seems clearly defined. It centres around the legal effect that is to be given to an unconstitutional statute. The supporters of the view that such a statute can afford no defence to a person who acts under it merely assert that an unconstitutional statute is void *ab initio*. It is therefore a complete legal nullity which must be subtracted from the facts of the case. The result of this technique is that the facts then show no legal justification for the act in question and liability follows automatically. Sometimes the principle that ignorance of the law is no excuse is employed to meet the argument that it would be almost impossible for an adminstrative officer to determine complex questions of constitutional law for himself.

The supporters of the contrary view argue that to deny an unconstitutional statute any effect is to turn a Nelsonian eye to the realities of the situation. The statute after all had not been declared unconstitutional at the relevant time and its existence provided the very reason for the action taken. Indeed, he may even be under a duty to enforce the statute until some court declares it to be unconstitutional. It would be unreasonable, therefore, to insist that an administrative official determine the constitutionality of every statute he is called upon to enforce, and unjust to make him personally liable in damages for coming to an incorrect conclusion. Furthermore, to hold the official personally liable is undesirable from the point of view of a sensible system of public administration. It would lead to timidity and laxness in the enforcement of the laws because of the official's concern for his personal finances.

At this level it would be interesting to examine, and evaluate, the

[4] Of course the officer must show that he strictly complied with its terms. The common law authorities are collected in 30 Halsbury's *Laws of England* (3rd ed. 1959) paragraphs 1348-1349. There are also statutory provisions in the Australian States based on the English Constables Protection Act 1750 A.C. (24 Geo. 2 c. 44). For example section 26 of the Police Regulation Act 1899-1960 (N.S.W.) provides that a member of the police force can defend an action against him by merely producing the order under which he acted. See also: Police Act 1937-1961 (Queensland) section 69; Police Regulation Act 1958 (Victoria) section 124. As the police are responsible for the execution of the orders of these courts, these statutory provisions are quite important.

reasons that have been advanced on both sides of the argument. However, there is already a significant body of literature where this has been done, and it would be pointless to reproduce it here, although it will be necessary to examine some of this later on.[5] The argument on the surface seems a very one-sided one, and all the commentators are agreed that the personal liability of the officer cannot be justified. All of the courts who embrace that doctrine are condemned for being hypnotized by empty juristic formulae as to the effect of an unconstitutional statute.[6] If these were the real issues, then there would be little on this subject to merit very detailed attention. It would be exhausted by a demonstration of the doctrinal shallowness of the void *ab initio* theory and the injustice and unreasonableness of imposing a personal liability on the administrative official. The problem, unfortunately, is not so simple.

Rules of law and legal concepts have no disembodied ideal existence of their own. They operate and find their meaning in particular contexts. Sometimes this means that they are incomprehensible when divorced from those contexts. More often it means that they cannot be properly understood, or their function appreciated, unless the background against which they operate is taken into consideration. This is certainly true of the void *ab initio* doctrine in constitutional law in general, and in the area of the tort liability of persons acting under unconstitutional statutes in particular. The doctrine has often been stated by judges in the United States and in Australia in terms which suggest that it is the inevitable consequence of adopting a basic constitutional instrument which delineates and controls the powers of federal and state legislatures.[7] It has become hallowed by constant judicial and text-book repetition.[8] In examining its operation in this

[5] See the articles cited *supra* n. 1, n. 7. The only point that I would add to the arguments advanced in those articles concerns the operation of the principle that ignorance of the law constitutes no defence. It is interesting that the supporters of the void *ab initio* doctrine use this principle to deny a defence to the defendant in a *tort* action, yet it seems that most courts in the United States have allowed it to operate as a defence in a *criminal* case. See Annotation 'Mistaken Belief as to Constitutionality or Unconstitutionality of Statute as affecting Criminal Responsibility' (1929) 61 A.L.R. 1153. If the officer is sued in tort he is liable, but if he is prosecuted criminally then he has committed no crime! This is a curious distinction that the supporters of the void *ab initio* doctrine are forced to draw. Whether it can be justified is another question dealt with in the text *infra*.

[6] *Ibid.*

[7] The origins of the doctrine are traced by the present writer in 'The Recovery of Unconstitutional Taxes in Australia and in the United States' (1964) 42 *Texas Law Review* 777, 799-804.

[8] The following examples are taken from the Supreme Court decisions: 'An unconstitutional law will be treated by the courts as null and void.' *Board of Liquidation v. McComb* (1875) 92 U.S. 531, 541; 'An unconstitutional act is not a law, and can neither confer a right or immunity nor operate to supersede any existing valid law.' *Chicago, Indiana & Louisville Railway Co. v. Hackett* (1912) 228 U.S. 559, 566; 'The statutes were as though they did not exist.' *Poulos v. New Hampshire* (1952) 345 U.S. 395, 414. Text books: Burdick, *The Law of the American Constitution* (1922) § 49; Willis, *The Constitutional Law of the United States* (1936) 89-91; Willoughby, *The Constitutional Law of the United States* (2nd ed. 1929) § 8; Cooley, *Consti-*

area of the law, however, it is vital to understand that the doctrine depends upon more realistic considerations than some *a priori* ideas about constitutional government.[9]

Both the United States government and the governments of the various States originally enjoyed, and to a great extent still enjoy, a sovereign immunity from suit. The doctrine known to the American colonies that the King can do no wrong lived on in the American Republic.[10] This meant that no tort action could be instituted against either the federal or a state government in respect of any acts performed by their officers while acting under the authority of a statute which was later declared unconstitutional. If the officer was allowed to defend himself by relying upon the ostensible validity of the statute, then a person who suffered damage as a result of the implementation of an unconstitutional statute would be without remedy. This result did not appeal to the nineteenth century American judges. Nor, indeed, as we have seen, had it appealed to the English judges.[11] To be sure they did not have to deal with the problems of unconstitutional statutes, but they did have to deal with other situations where an apparently valid authority was later held to be illegal.[12] The King might not be able to do any wrong, but the question was whether his servants could; and as to this the English judges had no doubts.

This is the background to these rules which the judges do not often discuss in their judgments. In the English decisions you find a principle tersely stated that a person can only justify acts which are tortious by the production of a valid legal authority to commit those acts. The courts are the ultimate arbiters of the legality of any such alleged authority. In the American decisions this principle is accepted, and the gloss added to it that an unconstitutional statute provides no lawful justification for tortious acts even though it had not been declared unconstitutional at the time they were committed. It is void *ab initio*. It is as if it never was. It is a nothing. Therefore it cannot

tutional Limitations (7th ed. 1903) 259-260. For a collection of the many hundreds of statements to this effect made in the American state courts see: 11 *Am. Jur.* § 148 'Constitutional Law' (1937).

9 Generally, in constitutional law the doctrine fulfilled the very realistic purpose of playing down the creative role played by the judges in a system of judicial review of the constitutionality of legislation. The invalid statute was void from the very moment it was enacted and all a court did was to make a formal declaration to that effect.

10 See generally: Borchard, 'Government Liability in Tort' (1924-25) 34 *Yale Law Journal* 1, 129, 229; 'Government Responsibility in Tort' (1926-37) 36 *Yale Law Journal* 1, 757, 1039; 'Theories of Government Responsibility in Tort' (1928) 28 *Columbia Law Review* 734; Schumate, 'Tort Claims against State Governments' (1942) *Law and Contemporary Problems* 242; Gellhorn and Schenk, 'Tort Actions against the Federal Government' (1946) 41 *Columbia Law Review* 722; Fleming James Jr. 'Tort Liability of Governmental Units and their Officers' (1955) 22 *University of Chicago Law Review* 610; Leflar and Kantrowitz, 'Tort Liability of the States' (1954) 29 *New York University Law Review* 1363.

11 *Supra* p. 126.

12 *e.g.* A purported exercise of an asserted prerogative by the Crown.

operate to give the person acting under it a defence. In this way a constitutional cliché is born. Its setting makes it an eminently sensible doctrine, but it is formulated without reference to the setting that alone gives it sense. It is stated in general terms, and this leads to the danger that it will be used in other situations where it will make no sense at all. As a solution to the personal liability in tort of an administrative officer where the government which employs him is immune from suit, the void *ab initio* doctrine is comprehensible enough. As a general principle of constitutional law it is very suspicious indeed.

The judges have rarely made it clear that the general principles they have laid down to deal with these problems are to be understood in the context of a government which insists upon its sovereign immunity from claims in tort. One of the rare expressions is to be found in the following remarks of Dr. Lushington when he was giving the advice of the Privy Council in *Rogers v. Rajendro Dutt:*

> The civil irresponsibility of the Supreme Power for tortuous [*sic*] acts could not be maintained with any show of justice, if its agents were not personally responsible for them; in such cases the Government is morally bound to indemnify its agent, and it is hard on such agent when this obligation is not satisfied; but the right to compensation in the party injured is paramount to this consideration.[13]

This sentiment is at the root both of the traditional common law rule and the gloss added to it with the void *ab initio* doctrine by the nineteenth century American judges.

In Australia this foundation for the void *ab initio* doctrine is absent. The Commonwealth Government has been liable in tort since its very earliest days, and at the present all of the State governments have given up their sovereign immunity. In this different context one would expect that new rules would have been fashioned. There is no longer any need to hold the officer personally liable for the tort. He could be given a defence on the basis that he was entitled to rely upon the ostensible validity of a statute that had not been declared unconstitutional. The government, however, would have the officer's acts treated as its own and be held liable for whatever tortious damage they caused. It is true that this would have meant the development of public law rules different from the normal principles of vicarious liability in that acts of the servant, rather than torts of the servant, would be imputed to the employer.[14] Yet such a step would seem to be justified by the reasonableness of the result. The officer who has

[13] (1860) 13 Mod. P.C. 209, 236, 15 E.R. 78, 89.

[14] In *Darling Island Stevedoring Co. Ltd. v. Long* (1957) 97 C.L.R. 36, the High Court discussed this distinction at some length. It held that where a statute imposed an obligation specifically on an employee, the employer is not vicariously liable for any breach of it by the employee.

merely carried out his instructions would not be personally liable whilst the government who gave him the instructions would.

Instead the Australian courts have accepted the void *ab initio* doctrine, and refused to allow the officer a defence. They then impute his tort to the government which they hold vicariously liable for it. Such an approach in the present submission involves two fundamental fallacies. First, it is a classic example of the danger involved in a constitutional cliché. Here a doctrine which made good sense in the context of a government which refused to waive its sovereign immunity is transferred to a very different context where its application is of doubtful merit. The transfer takes place without any consideration of this change of context. Second it assumes that rules, such as those relating to vicarious liability, which work well enough in the area of private law, can be automatically used to solve public law problems. These arguments will be amplified separately.

As has been pointed out the sense of the void *ab initio* doctrine in the American courts was that it enabled the injured plaintiff to recover from the officer who actually committed the acts of which he complained. If a remedy was denied against the officer then the plaintiff would go uncompensated, because the government was immune from suit. The American judges of the nineteenth century decided that the citizen should be compensated and employed the void *ab initio* doctrine to achieve that result. They realized the severity of this rule as far as the officer was concerned, but were nevertheless prepared to hold him liable. The thought, no doubt, was that he could obtain reimbursement from his employer. During the last fifty years or so, this has been reinforced by the fact that the officer could insure himself against these risks. But at any rate if one of two innocent parties were to suffer—the officer or the citizen—then it was decided it should be the officer. The void *ab initio* doctrine was the legal expression of that conclusion of social policy.

To apply that doctrine in a situation where the government has expressly waived its sovereign immunity and declared its liability in tort is to ignore the doctrine's *raison d'etre* in this area of the law. It is to be hypnotized by a formula which was designed to solve a different problem. Everybody realized the harshness and severity of the personal liability rule, even the judges who applied it with such stringency.[15] It was only adopted because it was thought to be the lesser of two evils—either the innocent citizen or the innocent officer had to suffer. In a situation where the government has assumed responsibility for its torts there is no reason for holding the officer liable. He has acted reasonably in reliance on an ostensibly valid

15 *e.g. supra.* All the commentators have taken this view and all the American courts which have rejected the old rule have used it as the basis of their reasoning.

authority and should be protected. There is no justification for applying the void *ab initio* doctrine so as to make him personally liable.

It may be argued that the reason why the void *ab initio* doctrine has been retained in this area by the Australian courts is to ensure that the government will be liable, rather than from either a desire to penalize the officer, or a blind transcription of an inappropriate doctrine. This leads to the second of the points made above. The essence of this argument would be that the government will only be liable on accepted principles of vicarious liability if its officer is liable. In other words, tortious liability in this area has got to be a double-barrelled affair. The fallacy of this argument is its assumption that private law concepts are always appropriate to, or are capable of rationally solving, public law problems.

Of course it must be pointed out at once that this assumption represents the traditional common law view. It is a view that Professor A. V. Dicey even regarded as part of the Rule of Law.[16] Nevertheless, in the present submission, it is a view which has frozen the development of a system of public law and which is productive of a host of legal fictions. This is being realized even in England. Recently, for example, Professor J. D. B. Mitchell made the following observation in the pages of the Law Quarterly Review:

> It may be that today many of our difficulties spring if not from this virtue which Dicey claimed, at least from the related failure to distinguish between constitutional and other cases. The apparent absence of a system of public law (although such a system must exist in fact) creates confusion and difficulty.[17]

If this is so in England, then the problem is certainly more acute in Australia and the United States where the courts have to grapple with the problems of federal constitutional law. The traditional view, however, is very strong. It was carefully preserved in both

[16] The relevant extracts from his book *The Law of the Constitution* are set out at the beginning of this paper. A possible interpretation of Dicey's remarks is that he was referring to private law in the sense of the law administered in the ordinary courts as opposed to administrative law applied by a special set of courts as was the case in France which was his polemical target. If this interpretation is accepted, it does not vary from the view taken in the text.

[17] (1963) 79 *Law Quarterly Review* 487. The same point was made by Professor Robson in 1932: 'The English legal system has, in fact, shown the most remarkable incapacity to expand in accordance with the needs of the modern state. The liability of the individual official . . . on which so much praise has been bestowed by English writers, is essentially a relic of past centuries when government was in the hands of a few known, prominent, independent and substantial persons called Public Officers, who were in no way responsible to ministers or elected legislatures.' 'Report of the Committee on Ministers' Powers' (1932) 3 *Political Quarterly* 346, 357. At the time this was written the Crown in England was still immune from suit. Professor Robson went on: 'The exclusive liability of the individual officer is a doctrine typical of a highly individual common law. It is of decreasing value today, and is small recompense for an irresponsible State.' *Ibid.* 358.

the English and Australian statutes which abolished the immunity of the Crown in tort. Section 23 (1)(b) of the Victorian Crown Proceedings Act 1958, for example, provides as follows:

> the Crown shall be liable for the torts of any servant or agent of the Crown or independent contractor employed by the Crown as nearly as possible in the same manner as a subject is liable for the torts of his servant or agent or of an independent contractor employed by him.[18]

Several criticisms can be made of the traditional view without going beyond the limits of the subject matter of this paper. To begin with, when normal principles of vicarious liability come into contact with doctrines like the one which treats unconstitutional statutes as utter nullities, some curious results eventuate. If, for example, the individual officer is personally liable because the statute under which he has acted is as if it never was, then how is the officer linked to the government which employs him? If the statute is void *ab initio* then the officer had no authority to act on behalf of the government which employs him at all. How then do the rules of vicarious liability operate? The answer is that the Australian courts have recognized the unconstitutional statute as giving the officer a *de facto* authority to act on behalf of the government so as to render it vicariously liable for his torts.[19] An unconstitutional statute is therefore not a complete nullity to be entirely subtracted from the facts of the case. It can be peeked at to establish a link between the officer and the government, but it must be completely ignored when evaluating the officer's personal liability. Would it not be more sensible to allow its factual existence provide the reason for not holding the officer personally liable?

The second criticism concerns the operation of the doctrine of vicarious liability in the context of a government and an officer employed by it to administer its statutes. Although the private law rule is that you impute the torts of the servant to his employer and not his acts, there is a need for a different rule in this area.[20] The mere fact that a rule is adopted which protects the officer

18 The English Crown Proceedings Act 1947 (10 & 11 Geo. 6 c. 44) provides that the Crown will not be liable unless the act or commission in question 'would apart from the provisions of this Act have given rise to a cause of action in tort against that servant or agent or against his estate'. This provision is completely dependent on the traditional common law rule. At least the Victorian Act contains a glimmer of hope in the phrase 'as nearly as possible'. The U.S. Federal Tort Claims Act provides that: 'The United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances.' The Courts have, however, recognized some of the peculiarities associated with the fact that it is a government which is being sued. See *Feres v. U.S.* (1950) 340 U.S. 135.

19 *Supra* p. 139.

20 There have been some recent decisions in England and in Australia in the private law sphere where this reformulation has been suggested. See generally: *Darling Island Stevedoring Co. Ltd. v. Long* (1957) 97 C.L.R. 36; Fleming, *The Law of Torts* (2nd ed. 1961) 322-325.

from personal liability should not mean that the government escapes liability for acts he commits under an unconstitutional statute. This can be achieved by imputing the acts to the government which employs him and not allowing it to defend itself by pleading the unconstitutional statute. The most serious objection to such a rule is some supposed merit in the notion that private law rules should be used to decide private law problems. Here is a situation where, it is suggested, the different needs of a system of public law compels a rejection of that notion.

There are other operations of the principles of vicarious liability in this area which point to the same result. For example, there is the curious doctrine of *Enever v. The King* which has become embedded in the Australian law.[21] This doctrine operates to free the government from any vicarious liability in respect of torts committed by its employees when they are acting under an authority directly imposed upon them either by statute or the common law, as designated persons, which requires them to make an independent judgment, or to exercise some independent discretion.[22] Now whatever sense this doctrine makes in the context of a private employer, it is submitted that it makes very little sense indeed when the government is the employer. After all, it is the government itself that enacts the statute, or allows the common law to stand, which imposes the duty which is in question. And it is the government who, by appointing an officer, puts him in a position to exercise those duties.[23] If the statute imposing the duty in question

[21] (1906) 3 C.L.R. 969. I say embedded as the case has been cited and followed and applied by the High Court on numerous occasions. See: *Baume v. The Commonwealth* (1906) 4 C.L.R. 97; *Fowles v. The Eastern and Australian Steamship Co. Ltd.* (1913) 17 C.L.R. 149; *Zachariassen v. The Commonwealth* (1917) 24 C.L.R. 166; *Field v. Nott* (1939) 62 C.L.R. 660; *Attorney General for New South Wales v. Perpetual Trustee Co. Ltd.* (1952) 85 C.L.R. 237 (High Court), (1955) 92 C.L.R. 113 (Privy Council). The rule has been abolished by statute in England. *Infra* n. 58.

[22] The doctrine derives from the judgment of Erle C.J. in *Tobin v. The Queen* (1864) 16 C.B. (N.S.) 310, 143 E.R. 1148. In that case the owners of the 'Mary and Isabel' bought a Petition of Right against the Crown in respect of the seizure and destruction of their ship by Captain Sholto Douglas of Her Majesty's ship 'Espoir'. Captain Douglas was acting under the provisions of 5 Geo. 4, c. 113 section 4 which provided that all vessels engaged in the slave trade could be seized. One of the three reasons for dismissing the action given by Erle C.J. was that Captain Douglas was acting pursuant to a duty imposed upon him by Parliament and not pursuant to the orders of the Queen. Whatever merit the distinction between the Queen and Parliament had in nineteenth century England, it has very little in twentieth century Australia. The Crown, *i.e.* the executive arm of Government, carries on the administration of the country but is completely responsible to the Parliament.

[23] According to Professor Fleming the doctrine is 'incompatible with notions of modern democratic government'. *The Law of Torts* (2nd ed. 1961) 331. For other criticisms see: Sawer, 'Crown Liability in Torts' (1951) *Res Judicatae* 14; Street, *Government Liability* (1953) 34; Friedman and Benjafield, *Principles of Australian Constitutional Law* (2nd ed. 1962) 108. The rule has been abolished by statute in England. *Infra* n. 58.

is unconstitutional, then the government should be liable for any torts committed by an officer acting under it.

Another area where private law rules have demonstrated their incapacity to effectively solve public law problems is the recovery of taxes paid under unconstitutional taxing statutes. This subject has been dealt with elsewhere at some length by the present writer.[24]

Finally, there may be situations where no tort has been committed in the private law sense, yet there is a need to hold the government liable in damages. Take the facts of *McClintock v. The Commonwealth* as an example.[25] In that case pineapple growers were required to deliver a specified percentage of their crop to a body nominated by the Commonwealth government pursuant to orders and regulations made under the war-time National Security Act. The plaintiff voluntarily delivered them pursuant to the orders made under the regulations, which turned out to be unconstitutional. His action claiming damages for conversion of the pineapples failed on the grounds that he had voluntarily handed the pineapples over to the Commonwealth, albeit under a mistaken belief in the validity of the orders,[26] a perfectly good private law defence.[27] The High Court gave a similar decision in regard to the delivery of wool pursuant to the National Security (Wool) Regulations in *Poulton v. The Commonwealth*.[28]

In both these cases there is a strong argument for holding the Commonwealth liable in damages even though no tort in a private law sense has been committed. The Commonwealth's unconstitutional activity had caused damage to citizens who mistakenly believed that it had valid authority to direct the disposal of their wool and pineapples. They submitted, and when they later contested the constitutional power of the Commonwealth to act in the way it had, they were unable to recover because of that submission. However, submitting to a *de facto* exercise of govern-

24 'The Recovery of Unconstitutional Taxes in Australia and the United States' (1964) 42 *Texas Law Review*.

25 (1947) 75 C.L.R. 1.

26 Latham C.J. and McTiernan J. decided the case on this ground affirming the decision of the trial judge. 'There was no mistake of fact. The plaintiff acted on the belief that the orders made under the National Security Regulations were binding upon him. Having acted so, he cannot now ground a cause of action upon an allegation that his goods were taken from him and dealt with against his will', *per* Latham C.J. *Ibid.* 19.

27 Williams and Rich JJ. dissented on the ground that the delivery of the pineapples was involuntary, again a perfectly good private law point. There are some passages in Williams J.'s judgment which go somewhat further *e.g.* 'I think that the evidence establishes that the plaintiff delivered his pineapples to the [Commonwealth] under the pressure of an illegal demand made under the colour of a valid law.' *Ibid.* 40. This comes close to a recognition that the fact that the defendant was a government which modified the private law rules!

28 (1953) 89 C.L.R. 540, 577, *per* Fullagar J., 603 *per* Williams, Webb and Kitto JJ.

mental power involves very different considerations from consenting to the demands of a private person. The government has a wide range of compulsory powers at hand, which are absent in the normal private law situation.[29] As Professors Friedman and Benjafield have recently written:

> The attempt in the field of tort to . . . force government liability into the mould of private law leads inevitably to harsh and capricious results, for the private law was, by its very nature, designed to deal with fundamentally different problems.[30]

The particular problems created by the phenomenon of unconstitutional statutes in governmental tort liability are only an illustration of the general argument that public law should be treated as something more than an 'appendix' to private law.[31]

Up to this point we have been concerned to examine the background of the traditional English common law rule relating to the personal liability of administrative officials and the use of the void *ab initio* doctrine to achieve the same result in the United States in situations involving unconstitutional statutes. The link between them was the immunity of the Crown and the sovereign immunity of the federal and state governments of the United States. There has also been a criticism of the use made by the Australian High Court of these rules in the context of a legal system in which the government has waived its sovereign immunity. Some evaluation must now be made of the tendency by state courts in the United States to reject the void *ab initio* doctrine and to give the administrative official a complete defence, even though the government is not liable to be sued in tort. As has been pointed out earlier, this tendency has gained in strength since the turn of the century.[32]

The judges, and the academic commentators,[33] who have rejected the personal liability rule have done so for a variety of reasons. There are those who have claimed that the rule was based on a glib maxim which incorrectly stated the effect of an unconstitutional statute. They pointed out that the way to formulate the

[29] Pannam, 'The Recovery of Unconstitutional Taxes in Australia and the United States' (1964) 42 *Texas Law Review* 777, 789-798. The only judicial recognition of this difference in Australia is contained in the following remark by Dixon C.J. in *Mason v. New South Wales* (1959) 102 C.L.R. 108, a case on the recovery of unconstitutional taxes. 'For myself I entertain some doubt whether the law to be applied in the present case is the law relating to the recovery by one subject from another of moneys paid by the former in consequence of a demand by the latter lacking lawful justification.' *Ibid.* 116.

[30] *Principles of Australian Administrative Law* (2d ed. 1962) 108.

[31] The phrase is Professor Friedman's: 'There may be public law duties which find no parallel in the private law of tort. This under-lines again the need for the common law to develop a public law, of tort as well as of contract, not as a mere appendix to private law.' *Law in a Changing Society* (1959) 387.

[32] *Supra* p. 125.

[33] They have unanimously condemned the personal liability rule. *Supra* n. 15.

question is who should bear the loss—the officer who enforces the statute or the citizen whose rights have been infringed? The old rule according to Professor Crocker, for example, merely 'dismissed the matter with recitations of maxims and formulae'.[34] Now it is true that the nineteenth century authorities rarely spelt out the policy judgment embodied in the void *ab initio* doctrine as applied to this problem. But, as pointed out above, it was nevertheless a judgment that the citizen should be allowed to recover against the officer when the government which employed him was immune from suit. It might be argued that it was an incorrect judgment, but that is a different question. The point here is that, although the courts stated their conclusions in the form of a constitutional cliché, they were not unconscious of the policy factors that led them to those conclusions.[35]

Before leaving this point, it should be noticed that the advocates of this view, and the advocates of some of the other views that are dealt with hereunder, draw support from many cases decided after *Norton v. Shelby County* which contain statements criticizing the void *ab initio*, or utter nullity, theory as to the effect of an unconstitutional statute. For example, there is the famous passage in the opinion of Hughes C.J. for the Supreme Court in *Chicot County Drainage District v. Baxter State Bank* where he says:

> The actual existence of a statute, prior to such determination, is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration. The effect of the subsequent ruling as to invalidity may have to be considered in various aspects,—with respect to particular relations, individual and corporate, and particular conduct, private and official. Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and of its previous application, demand examination. These questions are the most difficult of those which have engaged the attention of the courts, state and federal, and it is manifest from numerous decisions that an all-inclusive statement of a principle of absolute retroactive invalidity cannot be justified.[36]

There are other similar passages to be found in Supreme Court and State court judgments.[37]

[34] 'The Tort Liability of Officers Who Act Under Unconstitutional Statutes' (1929) 2 *Southern Californian Law Review* 236, 240. He collects the authorities which take this view. [35] *Infra.* [36] (1940) 308 U.S. 371, 374.

[37] *e.g.* 'Even unconstitutional statutes may not be treated as though they had never been written. They are not void for all purposes and as to all persons', *per* Stone J. in *Frost v. Corporation Commission* (1928) 278 U.S. 515, 552. 'Even where a statute is unconstitutional and hence declared void as of the beginning, this Court has held that its existence before it has been so declared is not to be ignored', *per* Jackson J. in *N.L.R.B. v. Rockaway News Supply Co.* (1953) 345 U.S. 71, 77. 'For

This passage is a classic statement of the distinctions, and differences, which are critical to keep in mind if sensible answers are to be given to questions involving unconstitutional statutes. They are the very things that a constitutional cliché ignores. It ignores differences because it can only give one answer. But, although Hughes C.J. rightly castigates the void *ab initio* doctrine as a universal solvent, his remarks do not really bear on the point at issue here. That point is whether the void *ab initio* doctrine, in that it imposes a personal tortious liability on an administrative official for acts performed under an unconstitutional statute in a situation where the government is immune from suit, achieves a satisfactory result. Hughes C.J. was dealing with the problem whether the doctrine of *res judicata* protected a federal district court decree in a bond readjustment proceeding from collateral attack when the statutory foundation for the court's jurisdiction was later held to be unconstitutional. He held that it did, and that the void *ab initio* doctrine was not to be applied to reach a different result. The question here is whether the void *ab initio* doctrine is to be applied. The exposure of its lack of merit as a universal solvent, and the castigation of the dangers involved in the use of constitutional clichés in general, and this one in particular, are not strictly relevant to that question. That of course is just another risk adherent in the use of a constitutional cliché—they are despised even in situations where they make good sense!

The reason most frequently given by the courts who refuse to impose personal liability on an administrative officer is that such a rule is unjust. It is argued that the officer has not acted unreasonably in relying upon the ostensible validity of the statute, as he lacks the professional knowledge of the law which would enable him to consider questions of constitutionality. He is only employed to do a job, and if he performs it with all due care why, it is asked, should his personal resources be jeopardized by the accident that a statute turns out to be unconstitutional? Fears are also expressed that a rule of personal liability will frighten the best men away from these jobs.[38]

This is the heart of the problem. There are two innocent and faultless people—the officer and the citizen—and one of them must bear the loss. The question is: 'Which one?' Professor Gellhorn

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many purposes an unconstitutional statute may influence judicial judgment, where, for example, under color of it private or public action has been taken. An unconstitutional statute is not merely blank paper. The solemn act of the legislature is a fact to be reckoned with,' *per* Collins J. in *Allison v. Corker* (1902) N.J.L. 596, 599, 52 Atl. 362, 363.

[38] These arguments are developed, and the cases collected, in the materials cited *supra* n. 1, n. 7.

has claimed that it is 'anomalous' to impose a duty upon officers to execute laws and then hold them personally liable for having performed their duty.[39] However, it is very difficult to see why it is any more 'anomalous' than to deny a citizen compensation for injuries suffered as a result of unconstitutional interference with his person or property. The injustice argument is easy to overstate as far as the officer is concerned. After all, he can insure himself against these risks by taking out an indemnity bond, which is freely available.[40] The existence of this insurance is never mentioned by those who advocate allowing an officer a defence in this situation.[41] Then again there is the possibility that the government will indemnify its employee against the loss he suffers as a result of his personal liability. These points seem to the present writer to rob the injustice argument of most of its merit. As far as the argument that the officer is not guilty of any carelessness or fault is concerned, a sufficient answer is that there are many areas of the law of torts where there is liability without fault. The only question is whether the imposition of liabilty without fault can be justified as being in the public interest.

In the present submission, it is far more desirable that the citizen be compensated rather than that both the government and its officers escape liability. If, and this has never been proved, this rule works a hardship on public officers, then their remedy is to persuade their employers to indemnify them, or to insure themselves, or to find some other job. The latter is not a flippant suggestion as, if enough people refuse to accept public employment, the government will be forced to indemnify its employees or make other adequate arrangements to protect them.

Another argument closely allied to this one is that the personal liability rule leads to laxness in public administration. If an officer is required to satisfy himself of the constitutionality of the legislation he is called upon to enforce, then this is an impediment to efficient government. He will be timid when forcefulness is needed. As Professor Davis puts it: 'If an officer resolves all doubt in favour of his own pocket book, the public interest in effective law enforcement is sure to suffer.[42] This argument, too, is easily overstated. The personal liability rule does not require an officer to satisfy himself of the constitutionality of a statute before he

39 *Administrative Law: Cases and Comments* (2d ed. 1947) 308.

40 In 1952 the Surety Association of America put out a little booklet entitled *Is the Public Official Personally Liable?* which was, and is, sent to most people when they are appointed to public office in the United States. It paints a black picture of the personal liability of an official and tells how an indemnity bond can be obtained.

41 It is not mentioned by any of the authorities cited *infra* n. 1 and n. 7 or by any of the judgments read by the present writer.

42 3 *Administrative Law Treatise* (1956) 522.

enforces it. The rule merely states that he cannot defend a tort action by proving that he relied on an ostensibly valid statute, if in fact it was unconstitutional. That is why there is no necessary contradiction, as some commentators have claimed,[43] between the personal liability rule and the rule in some states that a public officer cannot defend *mandamus* proceedings by alleging the unconstitutionality of the statute which imposes a duty upon him.[44]

If there is laxness and timidity in the enforcement of the laws as a result of the personal liability rule, the cure for it is for the government to take this fear, if it exists, out of the mind of its employees by indemnifying them against loss. At any rate, no proof has ever been produced to demonstrate that, if an officer is insured against this risk, he is nevertheless irresolute in the execution of his duties. The answer is indemnification or insurance, not freedom from liability.

The judicial choice then is limited to either of two innocent and faultless parties. Neither is a completely satisfactory result because the government, which has directed the enforcement of the unconstitutional statute, refuses to accept responsibility. In that situation, the present submission is that the personal liability rule offers the most reasonable solution. It seems far better that the citizen be compensated than that he be made to suffer a loss inflicted upon him by unconstitutional governmental action. The fact that the government is immune from suit does not seem to be a proper reason for denying him recovery against its officer. Indeed it seems to be the most potent reason for holding the officer liable.

A Suggested Solution

The starting point for any effective solution to this problem must be the acceptance of responsibility by the government for damage caused by acts committed by its officers in the execution, or administration, of an ostensibly valid statute, which is later held to be unconstitutional. This step has already been taken in Australia, where both the Federal and State governments have abolished the Crown's immunity in tort. In America, however, there has been no such general waiver of sovereign immunity. The United States government enacted a Tort Claims Act in 1946 which, in

[43] *e.g.* Crocker *op. cit.* pp. 249-250; Rapacz *op. cit.* 597-599.

[44] This used to be the majority view. See: Annotation: 'Unconstitutionality of Statute as Defence to Mandamus Proceedings' (1924) 30 A.L.R. 378. However some of the later cases hold the other way. See: Suppl. Annot. (1940) 129 A.L.R. 941. See also: Note, 'Public Officers Right to Question the Constitutionality of Statute in Mandamus Proceedings' (1928-29) 42 *Harvard Law Review* 1071; Collier, 'Unconstitutionality of a Statute as Defence to Mandamus against a Public Officer' (1911) 72 *Central Law Journal* 301; Gellhorn and Byse, *Administrative Law—Cases and Comments* (1954) 399.

part, accepted a limited responsibility in tort, but very few states have followed even this example.[45]

Perhaps the most remarkable thing about the Tort Claims Act is that it expressly *excludes* the liability of the United States government in respect of acts committed under unconstitutional statues.[46] As has already been pointed out the strongly entrenched rule in the Federal courts is that a federal officer is personally liable for such acts. Under the Tort Claims Act the curious situation is reached that a rule which developed because of the doctrine of sovereign immunity is given an independent existence at the very time that doctrine is abolished in other areas of governmental tort liablity. It is submitted that the personal liability rule developed in the shadow of, and drew its meaning from, the sovereign immunity doctrine and that when that doctrine is relaxed, the government should assume responsibility for the officer's actions.

Whereas the United States Government has waived its sovereign immunity in some areas, but refused to accept responsibility for acts under unconstitutional statutes, California has both retained its immunity and abolished the right of personal action against the officer by statute.[47] This statute is open to the same criticisms that were made above in connection with the judicial abolition of the personal immunity rule.

As long as the federal and state governments in America refuse to accept ultimate responsibility for these acts, the law will be in an unsatisfactory state. The judicial choice will be between two blameless persons and the real culprit, the government which passed the unconstitutional act and directed its enforcement, will escape liability. Thus, in the present submission, the first step in solving this problem must consist of a governmental assumption

[45] New York has probably gone the furthest of all the States in assuming responsibility for its torts. For a detailed survey of the various State legislation see: Leflar and Kantorowicz, 'Tort Liability of the States' (1954) 29 *New York University Law Review* 1363-1415. 'The principal fact to be noted from the study is that few states have very fully broken away from the immunity rule.' *Ibid.* 1363. The Federal Tort Claims Act 1945 (60 Stat. 812, 842) is limited because it contains many exceptions to the basic provision that liability attaches 'under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred'. 28 U.S.C. § 1346(b). The exceptions are set out in §§ 2671-2680.

[46] 28 U.S.C.A. § 2680 (a) provides that there will be no liability in respect of, *inter alia*, 'Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid . . .'

[47] 'A State, county, district or municipal officer, agent or employee . . . acting in good faith and without malice under the apparent authority of any law of this State . . . which law subsequently is judicially declared to be unconstitutional . . . shall not be held civilly liable in any action in which he would not have been liable if such law had not been declared unconstitutional.' Cal. Stats. 1933 c. 248, Government Code § 1955.

of responsibility in respect of acts performed under unconstitutional statutes.[48]

The question arises as to whether the personal liability of the officer makes any sense in a situation where the government has assumed its proper responsibility in this matter. In both England and Australia the abolition of the Crown's immunity in tort has taken place without any alteration in the personal liability rule. The result is that either the government or its employees may be sued at the option of the plaintiff. Of course if the officer, or employee, was actually directed to do the act which is the subject of complaint, then he may be legally entitled to an indemnity against the government. Furthermore, the government might voluntarily undertake to meet any damages awarded against the officer. The question, however, is whether it is proper to allow the officer to be sued personally at all. It is not enough to say that if he is, then, by some legal or extra-legal procedures, he can shift the burden of the verdict to the government. What policy, it may be asked, is served by retaining this personal liability rule? In some areas, such as negligence, there might be strong policy factors working in favour of retaining the rule. The possibility that an employee can be a defendant in judicial proceedings may operate to make him more careful and thus reduce the damage caused by his work. Similarly, where a policeman acts in an improper way in the execution of his duties, for example by assault, fraud or malicious arrest, an award of damages against him personally has punitive and deterrent value. But these are different situations than the one that concerns us here. In acting under an unconstitutional statute the officer is not negligent. Indeed, the torts he commits will be intentional ones such as trespass, conversion and false imprisonment. He has not abused his authority in any way. He has merely done that which he is ostensibly authorized to do. In this particular situation there do not appear to be any policy factors favouring the personal liability rule. Its justification completely disappears when the government accepts responsibility for these acts.

The present submission is that any statutory attempt to deal with this problem ought to embody the principle that an officer incurs no personal liability when he can show that he *bona fide* acted in reliance on the ostensible authority of an unconstitutional statute. It is important to notice that this formulation would not cover two situations in which there is good sense in holding an officer personally liable. The case of *Sumner v. Beeler* illustrates the first situation.[49] There the plaintiff was suing for wrongful arrest and false imprisonment arising out of his arrest by the defendant under the provisions of an

[48] This has been advocated by all of the writers on this subject cited *supra* n. 1, n. 7.

[49] (1875) 19 Am. Rep. 718.

Indiana statute. Unknown to the defendant, the Supreme Court of Indiana had held this statute unconstitutional more than a year before the arrest in question.[50] The court held that ignorance of the law was no defence and awarded damages against the defendant.[51] This is a proper result, as it would be wrong to allow a person to raise such a defence *after* the statute had been declared unconstitutional. The reason why the officer has a defence *before* the declaration of invalidity is that it would be unjust to fix him with liability with reference to something he could not have known. After the declaration he does not have a defence because he ought to have known. Any other result would mean that unconstitutional statutes would have effect after they have been invalidated, whereas even the strictest champions of the view that they should have some effect have limited their arguments to the period before the declaration of invalidity.

The second situation can be illustrated by *Miller v. Stinnett*.[52] That, too, was a case where the plaintiff was suing for wrongful arrest and false imprisonment. The plaintiff was an itinerant vendor of tailored clothing who measured prospective customers and forwarded the orders interstate to be filled and sent directly to the customer. He was required by statute to have a licence to sell clothes in New Mexico. Before the statute was held invalid, as applied to him, on the ground that he was engaged in interstate commerce, he was arrested by the defendant for not having a licence. However, it was proved as a fact that the defendant did not rely in good faith on the ostensible validity of the statute as he had good reason to know that it was invalid as applied to the plaintiff. In short, the defendant had intentionally harassed the plaintiff by arresting him. The court held the defendant personally liable. Again it is suggested that this was the correct result as the reason for protecting the officer is good faith reliance on the ostensible validity of a Statute.[53] With these two limitations expressed in the formulation of the exemption, there would seem to be no objection to abolishing the personal liability rule. Any difficulty that this might create with the private law principles of vicarious liability could be solved by including a provision in the

50 *State v. Young* (1874) 47 Ind. 150.

51 *Sumner v. Beeler* is often treated as a leading case which supports the personal liability rule in the context of a statute not held to be unconstitutional at the time of the acts complained of. This is an incorrect reading of the case. See *e.g.*: Rapacz *op. cit.* 588.

52 (1958) 257 F. 2d. 910.

53 The defendant in this case would even be liable in French law, which has gone a long way in freeing administrative officials from personal liability. A distinction is drawn between *faits personnels* (personal fault) and *faits de service* (service connected fault). The official is only liable for the former and the government for the latter. A service connected fault is a wrongful act committed in the exercise of an administrative function, whereas a personal fault is an act which is not relevant to that function but is personal to the officer. *Miller v. Stinnett* in France would be a *faits personnel*. See: Sieghart, *Government by Decree* (1950) 233-244; Schwartz, *French Administrative Law and The Common Law World* (1954) Ch. 9.

necessary statute making it clear that the acts of the officer are nevertheless to be imputed to the government. The fact that he has committed no tort does not mean that the government escapes liability. This need to substitute a different provision for the normal private law principles of vicarious liability leads to a consideration of three other related points.

First, is the government to be held liable merely because it enacts an unconstitutional statute that causes a citizen some damage? As has been pointed out earlier in this paper, the High Court has answered this question in the negative.[54] The reasons for this answer have never been satisfactorily explained. In the leading case on the subject the present Chief Justice, Sir Owen Dixon, merely asserts that it is so.[55] Perhaps the reason lies deep in the very nature of a federal constitution. An instrument of government can have no fixed and frozen meaning in the sense that a legislature always knows when it is exceeding the limits of a power conferred on it, or violating some constitutional guarantee, or prohibition. If that were the case, then every unconstitutional statute would clearly be a wrongful act for which there ought to be a remedy if it causes harm. Often there is doubt about the meaning or interpretation of a constitutional provision, and the only way to resolve the problem is by passing a statute and then testing it in the Courts. For example, let us assume that the Commonwealth Parliament doubts whether it has power to enact a free medicine scheme, but wants as a matter of government policy to do so. It enacts the legislation with the intention that it is to be immediately challenged before the High Court. However, in the meantime, chemists suffer a loss of business because people are not buying the quantities of medicine they normally would in anticipation of that which they will get free. The legislation is then held unconstitutional by the High Court. Should the chemists be able to sue? The present submission is that they should not. Otherwise the freedom of legislative experimentation would be restricted and this would be undesirable as a matter of public policy. In this sense Sir John Latham was right when he said: 'All members of the community are subject to the risk of a law being made, altered, or repealed to their detriment . . .'.[56]

The second point is closely related to the first. It involves the question as to whether governmental liability for action taken under an unconstitutional statute only arises when a tort known to the common law has been committed. For the reasons already given, it is suggested that there is room here for a different answer to the one

54 *Supra* p. 131.
55 *James v. The Commonwealth* (1939) 62 C.L.R. 339, 369-370, 372.
56 *Arthur Yates & Co. Pty. Ltd. v. The Vegetable Seeds Committee* (1945) 72 C.L.R. 37, 64.

which has been given by the High Court, which is that governmental tort liability is irrevocably tied to private law concepts.[57] This does not contradict the point made above. That concerned the question whether the mere fact that a government has enacted an unconstitutional statute is enough to found liability for any harm caused as a result. It was suggested that more was needed than the mere fact that a statute has been enacted. The question, then, is how much more. The answer given by the High Court is that liability will be incurred when the enforcement of the statute results in action which constitutes a private law tort. The present suggestion is that this is too narrow a view. It fails to take account of the fact that this is a public law problem where one of the parties is a government which by its very nature is completely different from the ordinary citizen. A person may submit to a governmental direction from fear, inertia, or good citizenship, whereas the same direction from another private person or company would be stoutly resisted. It would be impossible to foresee all the circumstances in which this public law of torts would have its operation. Indeed, it would be unwise to try and do so. These problems should be resolved as they arise in the facts of each particular case.[58] All that is necessary is that any statutory solution of the problems presented by this area of the law include a direction to the courts that the private law rules of tort are not necessarily the only rules to be used to determine governmental liability. This would leave it to judicial discretion to evolve a public law of torts.

The third point concerns the liability of the government in cases where the statute in question has first been upheld by, for example, either the High Court or the Supreme Court of the United States, and then the earlier decision is over-ruled and the statute is held unconstitutional. It is here that the fundamental fallacy of the void *ab initio* doctrine is most clearly revealed. If the result of holding the statute unconstitutional in the later litigation is to retroactively subject the government to liability in respect of all acts committed in reliance on it, within the applicable limitaton period, then a tremendous financial burden will be imposed on the government. The only reason

[57] *Supra* p. 140.

[58] It may be, for example, that the plaintiffs in *McClintock v. The Commonwealth* (1947) 75 C.L.R. 1 and *Poulton v. The Commonwealth* (1953) 89 C.L.R. 540 would recover on this analysis. See *supra*. One situation where it is clear that a public law of torts would lead to a rejection of a well-established principle of vicarious liability is the outrageous doctrine of *Enever v. The King* (1906) 3 C.L.R. 969. See *supra*. It is not without interest to note that this doctrine was abolished in England in 1947 by s. 2(3) of the Crown Proceedings Act which provided: 'Whether any functions are conferred or imposed upon an officer of the Crown as such either by any rule of the common law or by statute, and that officer commits a tort while performing or purporting to perform those functions, the liabilities of the Crown in respect of the tort shall be as such as there would have been if those functions had been conferred or imposed solely by virtue of instructions lawfully given by the Crown.'

for imposing this burden will be to vindicate the transparent fiction that law is something immutable and unchanging. On this view, the earlier decision was never the law and could not operate to give any validity, or effect, to a statute which was unconstitutional the very moment it was enacted.

The void *ab initio* doctrine, in that it preaches complete retroactive invalidity in this situation, ignores the creative nature of the process of judicial review in a federal system. It ignores the fact that the law can change and that there is no contradiction between saying that a law was held valid in 1910 and then invalidated in 1960. These criticisms of the void *ab initio* doctrine are developed elsewhere by the present writer and will not be reproduced here.[59] The effect of them is, however, to suggest that when a government enforces or administers a statute, which has been held valid by a final court of appeal, it ought not be held liable for its actions merely because the court over-rules itself at a later stage and holds the statute unconstitutional.[60] This does not mean that either Mr. James[61] or Mr Grimshaw[62] who, as plaintiffs, were both responsible for having the earlier decisions over-ruled, should not have recovered. If the benefit of the new rule were not bestowed upon the person who successfully challenges the old, then there would be no incentive for the challenge.[63] What it does mean is that because a Mr. James or a Mr Grimshaw is successful there is no automatic accrual of rights of action against the government to all persons who have been suffered damage as a result of official action under the statute.

It has been pointed out earlier in this paper that a judge of an inferior court in Australia would probably be personally liable for any damage he causes by assuming jurisdiction under an unconstitutional statute.[64] The rule in the United States, on the other hand, seems to

59 Pannam, 'Recovery of Unconstitutional Taxes in Australia and the United States' (1964) 42 *Texas Law Review* 777, 798-804.

60 A difficult question arises over what is meant in the text by 'a final court of appeal'. In Australia, for example, the Privy Council is the final court of appeal for many questions arising under the Constitution, whereas the High Court is in others. See: Constitution, section 74. In the opinion of the present writer, the Full High Court should be regarded as a final court of appeal in all cases for this purpose both because of the importance of the court, and because the fact that appeals to the Privy Council are not frequent. In the United States the State Supreme Courts, or Courts of Appeal, are the final appellant courts in problems arising under the state Constitutions, and of course, the Supreme Court in matters arising under the federal Constitution.

61 *James v. The Commonwealth* (1939) 62 C.L.R. 339. See *supra*

62 *Deacon v. Grimshaw* (1955) 93 C.L.R. 83. See *supra.*

63 The benefit of the new rule has been conferred on plaintiffs who successfully challenged the long established immunities of school districts, charities and local government bodies in Illinois and Michigan even though the Supreme Courts of those States accepted a prospective overruling technique. See: *Molitor v. Kanelan Community District* (1959) 115 N.E. 2d 841; *Parker v. Port Huron Hospital* (1960) 105 N.W. 2d 1; *Williams v. City of Detroit* (1961) 111 N.W. 2d 1.

64 *Supra* pp. 134-135.

be that he would not be liable.[65] There is some difficulty in stating these propositions with any confidence because there are no decisions on the point in Australia, and there are some older cases in the United States which hold judges liable. The important questions, however, irrespective of what the present rules in the two countries may be, are whether judges should be held personally liable in these circumstances, and if not, whether the government nevertheless should be responsible for the damage caused by the judges' actions.

In regard to the first question, all of the arguments based on unfairness and unreasonableness referred to above in connection with the liability of adminstrative officials can be repeated here. Indeed, the arguments are even stronger because the judge may have actually considered the question of constitutionality and decided that the statute in question was valid.[66] It is unreal to think that an administrative official ever considers these questions, as he has no professional expertise to enable him to do so. Then there is the argument that, as judges, they ought to be able to carry out their duties free from any fear of personal liability if an ostensibly valid statutory jurisdiction conferred on them turns out to lack constitutional foundation. These considerations would seem to lead to the inevitable conclusion that judges of inferior courts should not be personally liable in these circumstances. It should be noted, however, that this conclusion draws no nourishment from the argument, used above in connection with administrative officials, that they were only liable because the government was immune, and therefore, when the government waived its immunity, the foundation for the personal liability rule disappeared. The personal liability of judges of inferior courts when they acted in excess of, or without any jurisdiction, was based on very different considerations than the doctrine of sovereign immunity.[67] The rule, in areas outside the one that concerns us here, can exist side by side with a system of complete governmental responsibility in tort without any contradiction.[68]

As to whether the government should be liable for the damage caused by its unconstitutional conferment of jurisdiction on an in-

[65] *Supra* p. 120.

[66] If this is the fact, then to subject a judge to a risk of personal liability would be no more than a penalty for coming to an incorrect conclusion on matters of the greatest legal complexity.

[67] Historically the grant of a jurisdiction was a valuable privilege, and it was in the interest of the Crown to keep the grantees of the privilege strictly within its limits. The common law courts were also very jealous of grants of jurisdiction to other courts, and forced them to observe their limited jurisdiction by evoking these rules to penalize the judges and the prerogative writs of *certiorari* and *prohibition* to control their proceedings. See generally: Winfield, *Present Law of Abuse of Legal Procedure* (1921) Ch. vii.

[68] The rule imposes a personal penalty on a judge who exceeds his jurisdiction because he does exceed that jurisdiction. The Government certainly does not want judges of limited jurisdiction to exceed it.

ferior court, the present submission is that it should be liable.[69] The harm caused is the same as if the statute conferred a power on an administrative official rather than jurisdiction on an inferior court. A judge of such a court is in no better position than an administrative officer to determine complex constitutional questions. If the rule were to be otherwise, then a government could avoid responsibility for the actions of its administrative officers under unconstitutional statutes by interposing between the statutory power and its exercise the necessity for obtaining an *ex parte* order from a justice of the peace. Mr. Grimshaw, then, if he had first obtained a warrant from a justice of the peace to seize Mr. Deacon's refrigerated 'pantechnicon' and its load of margarine, would not have subjected the New South Wales government to liability. Unless the jurisdiction is conferred on a superior court where the constitutional question can be easily raised and satsfactorily disposed of, the government ought to meet the damages caused by its unconstitutional exercise of power.

The proper rules to be applied to the case of a ministerial officer who executes the process of an inferior court when it has assumed jurisdiction under an unconstitutional statute follow automatically from the arguments advanced already. They should not be personally liable,[70] and the government should bear responsibility for any acts they perform while duly executing the process of an inferior court. It is submitted that a statute drafted along these lines would dispel the confusions and resolve the problems which have long bedevilled this area of the law.

One last point remains. What rule ought to be applied when this question of tortious liability for acts performed under an unconstitutional statute arises, not between a government and its officers or employees on the one hand and the citizen on the other, but between two private citizens? Here there is little doubt as to the proper answer. A citizen ought to be able to rely upon the ostensible validity of a statute when regulating and planning his actions.[71] He acts without negligence, and the imposition of a rule of strict liability, under which he relied on a statute only at his own risk, is difficult to justify. It would lack any sound judgment of policy, such as was at the root of the personal liability of officers where the government was immune, and would be contrary to the whole trend towards negligence as the

69 The view in the text is contrary to the express provisions inserted in the English and Australian statutes which abolished the immunity of the Crown in tort. They provide that the Crown is not to be liable in respect of an act or omission done by any person while discharging any judicial responsibility. See *e.g.* Crown Proceedings Act 1947 (England) section 2(2); Crown Proceedings Act 1958 (Victoria) section 23(2).

70 And are not now in Australia and in many parts of the United States. See *supra.*

71 This view is contrary to *Manson* v. *Wabash Railroad Co.* (1960) 338 S.W. 2d 54. *Supra.*

basis of tort liability. Insofar as it is supported by the void *ab initio* doctrine, this provides yet another of the dangers involved in the use of constitutional clichés—this time in the field of private law. Perhaps we can conclude with the following comment in this connection made by Gummere C.J. of the New Jersey Court of Errors and Appeals in 1907:

> The vice of the doctrine of *Norton v. Shelby County,* as it seems to me, is that it fails to recognize the right of the citizen, which is to accept the law as it is written, and not to be required to determine its validity. The latter is no more the function of the citizen than is the making of the law . . .[72]

The suggestions made above may be summarized as follows:

1. A government should accept responsibility for acts committed by its officers or employees in the enforcement, or adminstration, of an ostensibly valid statute which is later declared unconstitutional.
2. An officer or employee should not incur personal liability in respect of acts he commits in *bona fide* reliance on an ostensibly valid statute.
3. A government should not be held liable for damage resulting from the mere fact that it enacts an unconstitutional statute.
4. A government should be liable for damage caused in the enforcement, or execution, of an unconstitutional statute in some cases where no tort in the private law sense has been committed. The courts should be given a discretion to develop a public law of torts.
5. A government should not be liable for damage caused in the enforcement, or execution, of a statute which has been upheld by a final court of appeal if that court subsequently over-rules itself, and holds the statute unconstitutional. This rule should not be applied to the successful plaintiff in the later case.
6. A government should be liable for damage caused as a result of an unconstitutional conferment of jurisdiction on an inferior court. The judges of such courts and the officers that execute their process should not be personally liable for any such damage.

72 *Lang v. Bayonne* (1907) 68 Atl. 90, 92.