

[HIGH COURT OF AUSTRALIA.]

GENERAL STEEL INDUSTRIES INC. . . . PLAINTIFF ;

AND

COMMISSIONER FOR RAILWAYS (N.S.W.) }
 AND OTHERS } DEFENDANTS.

Practice—Summary power to terminate action—Principles applicable—Inherent jurisdiction—Jurisdiction under rule of court—High Court Rules, O. 26, r. 18. H. C. OF A.
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 {
Patents—Invention—Use for services of Commonwealth or State—“ Authority of the State ”—Commissioner for Railways—Construction of carriages for use in State railway system—“ Services of the State ”—Written authority to use invention—When contract itself sufficient authority—Patents Act 1952-1960 (Cth), ss. 125, 132.* SYDNEY,
 July 23 ;
 Aug. 6 ;
 Nov. 9.

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The jurisdiction to terminate an action summarily for want of a cause of action in the plaintiff is to be sparingly employed, whether a Court is exercising its inherent power or power conferred by statutory rules, and ought not to be used save where the lack of the cause of action is clearly demonstrated. Yet the jurisdiction should not be reserved for those cases where argument is unnecessary to evoke the futility of the plaintiff's claim. Argument, even of an extensive kind, may be necessary to demonstrate that the case of the plaintiff is so clearly untenable that it cannot possibly succeed.

In an action for infringement of a patent brought in the High Court it appeared that the defendant Commissioner for Railways of New South Wales had entered into contracts with the other defendants which required that the one should manufacture certain railway vehicle central bearing structures in infringement of the plaintiff's letters patent and that the other should assemble those structures so made in order that completed railway carriages containing the infringing structures might be used in the railway system of the State. Each defendant claimed the protection of ss. 125 and 132 of the *Patents Act 1952-1960* (Cth) in answer to the action.

Held : (1) That the Commissioner for Railways is an authority of the State within s. 132 of the Act.

(2) That the use of the invention by the Commissioner was a use by him for the services of the State within s. 125 (1).

(3) That accordingly the Commissioner was within the protection afforded by ss. 125 and 132 of the Act.

* See p. 131.

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(4) That, as the plaintiff claimed that their agreements with the Commissioner required the other defendants to use the plaintiff's invention, and, as it was proper to conclude that those agreements were in writing, the other defendants were also protected by ss. 125 and 132.

(5) That, the plaintiff's lack of a cause of action being demonstrably clear, it was proper to exercise summarily the jurisdiction under O. 26, r. 18, of the *High Court Rules* to dismiss the action.

The circumstances in which a contractor with an authority of the State may require written authority to make use of an invention, considered.

Pyrene Co. Ltd. v. Webb Lamp Co. Ltd. (1920), 37 R.P.C. 57, at p. 65, and *Aktiengesellschaft für Autogene Aluminium Schweissung v. London Aluminium Co. Ltd.* [No. 2] (1923), 40 R.P.C. 107, at pp. 116, 117, referred to.

SUMMONSES.

General Steel Industries Incorporated brought an action in the High Court of Australia against the Commissioner for Railways for the State of New South Wales, A. E. Goodwin Limited and Tulloch Limited to restrain the defendants and each of them from infringing letters patent granted to the plaintiff under the *Patents Act 1952-1960* (Cth) in respect of an invention entitled "Railway Vehicle Body and Truck Central Bearing".

After delivery of the statement of claim the defendants by summons sought to set aside the writ and statement of claim in the action, or alternatively, to stay further proceedings thereon upon the ground that the plaintiff had no viable cause of action against them or any of them. Reliance was placed by the defendants upon the provisions of ss. 125 and 132 of the *Patents Act*.

The relevant facts and statutory provisions are set out in the judgment of *Barwick C.J.*, before whom the summonses came for hearing.

J. D. Holmes Q.C. and *A. H. S. Conlon*, for the defendant Commissioner for Railways.

W. P. Deane and *P. R. Capelin*, for the defendant A. E. Goodwin Ltd.

R. J. A. Franki Q.C. and *R. J. Ellicott*, for the defendant Tulloch Ltd.

N. H. Bowen Q.C. and *C. J. Bannon*, for the plaintiff.

Cur. adv. vult.

BARWICK C.J. delivered the following written judgment:—

General Steel Industries Incorporated commenced this action against the Commissioner for Railways, A. E. Goodwin Ltd. and Tulloch Ltd., seeking injunctions to restrain the infringement by the defendants or any of them of letters patent granted to the plaintiff under the *Patents Act* 1952-1960 (Cth) in respect of an invention entitled "Railway Vehicle Body and Truck Central Bearing".

The plaintiff, by its statement of claim, identifies the Commissioner for Railways as being the Commissioner for Railways under the *Transport (Division of Functions) Act*, 1932 (N.S.W.) as amended, and asserts that the Commissioner, without the leave or licence of the plaintiff, "has been . . . contracting to have manufactured . . . railway vehicle central bearing structures . . . made . . . and manufactured in infringement of the letters patent of the plaintiff and of the claims in the complete specification thereof".

The plaintiff further asserts that the defendant A. E. Goodwin Ltd., "without the leave or licence of the plaintiff, has been making and manufacturing railway vehicle central bearing structures made and manufactured in infringement of the letters patent and of the claims of the complete specification", and that the defendant Tulloch Ltd., "without the leave or licence of the plaintiff, has been . . . assembling . . . railway vehicle central bearing structures made and manufactured in infringement of the letters patent" and of the said claims.

The plaintiff then proceeds to assert that the acts of the defendant A. E. Goodwin Ltd. and of the defendant Tulloch Ltd., of which it complains, "have been done pursuant to agreements between each of them and the Commissioner for Railways respectively, pursuant to which complete railway carriages have been made and assembled for use by the said Commissioner for Railways".

The defendants, by the three separate summonses now heard by me, seek to set aside the writ and the statement of claim in this action, or alternatively, to stay further proceedings thereon upon the grounds that the plaintiff neither has nor discloses a reasonable, or for that matter any, cause of action against the defendants or any of them. For this purpose the defendants each calls in aid the inherent jurisdiction of the Court to prevent the abuse of its process, the provisions of Order 26, r. 18, and those of Order 63, r. 2, of the Rules of this Court.

Each defendant in support of its application founds itself upon Pt XIV, and particularly on the terms of ss. 125 and 132, of the

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H. C. OF A. *Patents Act* 1952-1960. The defendants A. E. Goodwin Ltd. and
 1964. Tulloch Ltd., in addition, in their applications rely upon authorities
 { in writing given to each of them by the defendant Commissioner
 GENERAL on 16th July 1964 purporting to authorize each of them to make,
 STEEL use and vend any invention in respect of which letters patent have
 INDUSTRIES on 16th July 1964 purporting to authorize each of them to make,
 INC. use and vend any invention in respect of which letters patent have
 v. been granted under the *Patents Act* 1952-1960. The authorities
 COMMIS- are identical except as to the name of the contractor, and each
 SIONER are identical except as to the name of the contractor, and each
 FOR was proved by affidavit. They were not only given after the
 RAILWAYS commencement of the action, as appears from the date, but each
 (N.S.W.). is in general terms and reads as follows :
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“THE COMMISSIONER FOR RAILWAYS a body corporate created under or by virtue of the *Government Railways Act*, 1912, as amended, the *Ministry of Transport Act*, 1932 and the *Transport (Division of Functions) Act*, 1932, as amended being an Authority of the State of New South Wales for the purpose of owning maintaining and operating *inter alia* the railways and rolling stock constructed and acquired by or on behalf of Her Majesty in the said State and for that purpose empowered to contract for any matters or things whatsoever necessary for enabling him to carry into effect the purposes of the *Government Railways Act*, 1912 as amended HEREBY pursuant to s. 125 (1) of the *Patents Act* 1952 of the Commonwealth of Australia AUTHORIZES A. E. GOODWIN LIMITED a Company duly incorporated and carrying on business in the State of New South Wales aforesaid (hereinafter called the Contractor) and any of its Subcontractors IN RELATION to the supply by the Contractor to the Commissioner of any article to be used by the Commissioner in or in relation to the exercise of his powers and the operation of the said railways TO MAKE USE EXERCISE OR VEND any invention to which the provisions of the said s. 125 (1) relate AND TO USE any model plan document or information relating to any such invention which may be required for that purpose.

DATED this Sixteenth day of July, 1964.”

At the outset the plaintiff submits that whatever conclusion I might reach upon the legal questions involved, I ought not to deal summarily with the action but should allow it to proceed, leaving the defendants to raise their points in opposition to the plaintiff's claim in proceedings on demurrer or by points of law taken on the pleadings and dealt with under Order 26, r. 16, or perhaps by special case under Order 35.

The plaintiff rightly points out that the jurisdiction summarily

to terminate an action is to be sparingly employed and is not to be used except in a clear case where the Court is satisfied that it has the requisite material and the necessary assistance from the parties to reach a definite and certain conclusion. I have examined the case law on the subject, to some of which I was referred in argument and to which I append a list of references. There is no need for me to discuss in any detail the various decisions, some of which were given in cases in which the inherent jurisdiction of a court was invoked and others in cases in which counterpart rules to Order 26, r. 18, were the suggested source of authority to deal summarily with the claim in question. It is sufficient for me to say that these cases uniformly adhere to the view that the plaintiff ought not to be denied access to the customary tribunal which deals with actions of the kind he brings, unless his lack of a cause of action—if that be the ground on which the court is invited, as in this case, to exercise its powers of summary dismissal—is clearly demonstrated. The test to be applied has been variously expressed; “so obviously untenable that it cannot possibly succeed”; “manifestly groundless”; “so manifestly faulty that it does not admit of argument”; “discloses a case which the Court is satisfied cannot succeed”; “under no possibility can there be a good cause of action”; “be manifest that to allow them” (the pleadings) “to stand would involve useless expense”.

At times the test has been put as high as saying that the case must be so plain and obvious that the court can say at once that the statement of claim, even if proved, cannot succeed; or “so manifest on the view of the pleadings, merely reading through them, that it is a case that does not admit of reasonable argument”; “so to speak apparent at a glance”.

As I have said, some of these expressions occur in cases in which the inherent jurisdiction was invoked and others in cases founded on statutory rules of court but although the material available to the court in either type of case may be different the need for exceptional caution in exercising the power whether it be inherent or under statutory rules is the same. *Dixon J.* (as he then was) sums up a number of authorities in *Dey v. Victorian Railways Commissioners* (1) where he says (2): “A case must be very clear indeed to justify the summary intervention of the court to prevent a plaintiff submitting his case for determination in the appointed manner by the court with or without a jury. The fact that a

(1) (1949) 78 C.L.R. 62.

(2) (1949) 78 C.L.R., at p. 91.

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transaction is intricate may not disentitle the court to examine a cause of action alleged to grow out of it for the purpose of seeing whether the proceeding amounts to an abuse of process or is vexatious. But once it appears that there is a real question to be determined whether of fact or law and that the rights of the parties depend upon it, then it is not competent for the court to dismiss the action as frivolous and vexatious and an abuse of process." Although I can agree with *Latham C.J.* in the same case when he said that the defendant should be saved from the vexation of the continuance of useless and futile proceedings (1), in my opinion great care must be exercised to ensure that under the guise of achieving expeditious finality a plaintiff is not improperly deprived of his opportunity for the trial of his case by the appointed tribunal. On the other hand, I do not think that the exercise of the jurisdiction should be reserved for those cases where argument is unnecessary to evoke the futility of the plaintiff's claim. Argument, perhaps even of an extensive kind, may be necessary to demonstrate that the case of the plaintiff is so clearly untenable that it cannot possibly succeed.

In the present applications the defendants seek an exercise of the inherent jurisdiction of the Court to stay actions which are frivolous and vexatious and an abuse of process. For this purpose the defendants rely on affidavits whereof the only material outcome is my knowledge of the existence and particulars of the authorities from the Commissioner to the other defendants to which I have already referred.

The defendants also seek orders under Order 26, r. 18. For this purpose the information before the Court is confined to the statement of claim. The defendants finally seek an order under Order 63, r. 2, for which purpose the abovementioned evidentiary material may be used.

I propose to deal in the first place with the applications for orders under Order 26, r. 18.

The defendant Commissioner says that he is an authority of the State of New South Wales within the meaning of ss. 125 and 132 of the *Patents Act* 1952-1960, and that therefore no action for infringement of a patent granted under that Act can be brought against him in connexion with the use of the invention in the construction of railway carriages or the constituent parts for assembly into railway carriages to be run in the railway system of the State, such a use being in his submission a use for the service of the State.

(1) (1949) 78 C.L.R., at p. 84.

Section 125 contains the following relevant provisions: “(1) At any time after an application for a patent has been lodged at the Patent Office or a patent has been granted, the Commonwealth or a State, or a person authorized in writing by the Commonwealth or a State, may make, use, exercise or vend the invention for the services of the Commonwealth or State.” . . . “(3) Authority may be given under sub-section (1) of this section either before or after a patent for the invention has been granted, and either before or after the acts in respect of which the authority is given have been done, and may be given to a person notwithstanding that he is authorized directly or indirectly by the applicant or patentee to make, use, exercise or vend the invention.” . . . “(5) Subject to sub-section (2) of this section, where a patented invention is made, used, exercised or vended under sub-section (1) of this section, the terms for the making, use, exercise or vending of the invention are such terms as are, whether before or after the making, use, exercise or vending of the invention, agreed upon between the Commonwealth or the State and the patentee or, in default of agreement, as are fixed by the High Court.” . . . “(7) An agreement or licence (whether made or given before or after the commencement of this Act) fixing the terms upon which a person other than the Commonwealth or a State may make, use, exercise or vend an invention is inoperative with respect to the making, using, exercising or vending of the invention, after the commencement of this Act, under sub-section (1) of this section, unless the agreement has been approved by the Attorney-General of the Commonwealth or of the State.” . . . “(8) No action for infringement lies in respect of the making, use, exercise or vending of a patented invention under sub-section (1) of this section.”

Section 132 provides: “In this Part” (which begins with s. 125) “references to the Commonwealth include references to an authority of the Commonwealth and references to a State include references to an authority of the State.”

The question in relation to the defendant Commissioner, therefore, is whether it is as clear as the authorities to which I have referred require it to be if there is to be a summary dismissal of the plaintiff’s action against him, that the Commissioner is an authority of the State for the purposes of Pt XIV of the *Patents Act* and that his use of the invention, of which the plaintiff complains, is a use for the service of the State.

Section 3 of the *Transport (Division of Functions) Act, 1932-1956* creates a Ministry of Transport under the Minister for

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Transport and provides that it shall be divided into departments which include the Department of Railways, to be administered by the Commissioner for Railways. By s. 4 the Commissioner is made a body corporate and for the purposes of any Act is to be deemed a statutory body representing the Crown. He is not to be removed from office except on the resolution of each House of the State Parliament: s. 11. The property of the railway system is vested in him: s. 11, *Government Railways Act*, 1912-1957; s. 9, *Ministry of Transport Act*, 1932-1950; and s. 4 *Transport (Division of Functions) Act*, 1932-1956. He collects and receives the revenues of the railway system on behalf of the Crown and pays them into the Government Railways Fund established in the State Treasury (see ss. 14, 41B and 41C of *Government Railways Act*), a fund which is subject to the *Audit Act*, 1902 and which shares certain financial benefits and burdens of the State as if it had continued to form part of the Consolidated Revenue Fund. All moneys appropriated for the maintenance or management of the railways and vested by the *Government Railways Act* in him are to be expended under his control and management: s. 13, *Government Railways Act*. In s. 4 of the *Government Railways Act* the Commissioners—to whose position the defendant Commissioner has succeeded—were nominated as the “authority” to carry out the *Government Railways Act*.

The result of these provisions is that the Commissioner is in charge of a sub-department of government under the direct control and direction of a Minister of the Crown. That sub-department is to manage and control the railway system of the State, a function historically connected with government in New South Wales. He collects its revenues for the State and pays them into a Treasury fund; and he has the control and management of moneys appropriated by Parliament for the running of the railway system.

There is no direct judicial precedent for deciding that the Commissioner is an “authority” of the State for such purposes as those of s. 125 of the *Patents Act*. It has been decided that the Commissioner for Railways is so far identified with the Crown as not to be bound by Fair Rents legislation (see *Wynyard Investments Pty. Ltd. v. Commissioner for Railways (N.S.W.)* (1)) and that in certain other respects he is entitled to the privilege or protection which the law accords the Crown; see *Skinner v. Commissioner for Railways* (2). But, to my mind, these authorities

(1) (1955) 93 C.L.R. 376.

(2) (1937) 37 S.R. (N.S.W.) 261; 54 W.N. 108.

are not decisive of the present question which is whether in the Commonwealth statute dealing with patents for inventions the expression "an authority of the State" embraces the Commissioner for Railways. That he has some of the immunities of the Crown and is not bound by some statutes may be elements for consideration but cannot be conclusive. Perhaps the judicial decision most relevant to answering this question is *Electricity Trust of South Australia v. Linterns Ltd.* (1) where Ligertwood J. held that the Electricity Trust of South Australia was an "instrumentality" of the Crown within the meaning and operation of the *Landlord and Tenant (Control of Rents) Act, 1942-1949* of South Australia. His Honour rightly perceived the inadequacy for this purpose of merely deciding that the Electricity Trust was entitled to the immunities of the Crown. He adopted the view that an "instrumentality" is that which serves or is employed for some purpose or end, a means, an agency. He applied this view in the following passage: "The Trust, in my opinion, exactly fits this conception. By virtue of s. 15 of the *Electricity Trust of South Australia Act*, the Crown is the owner of the undertaking for the supply of electricity and the mining of coal in South Australia. The Trust serves the purposes of the Crown in managing the undertaking and in making electricity and coal available for the public. It exercises its functions on behalf of the Crown and is the means or agency for managing the Crown asset. It is not the servant or agent of the Crown because it has independent powers and is not subject to the control of the Governor in Council or any Minister of State. Nevertheless, it is an instrumentality or agency of the Crown, because it serves the purpose of the Crown in managing Crown assets in the interests of the public." (2) But his Honour's conclusion that the Electricity Trust was an instrumentality of the Crown turned of course on the statute his Honour was construing and the nature of the functions performed by and the relationship of the statutory body to the Crown and to its revenues. The concept of an "instrumentality" accepted by his Honour in that case is not identical with the concept of an authority of the State for present purposes though the two concepts may have some common elements and be closely allied. Thus, though the considerations which weighed with his Honour in that case have their relevance here, they are not decisive.

The evident purpose of s. 125, having regard to sub-s. (7), is to ensure that the Governments of the Commonwealth and of the

(1) [1950] S.A.S.R. 133.

(2) [1950] S.A.S.R., at pp. 139, 140.

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States have the invention available to them for the benefit of the services of the respective Governments at once, rather than at the end of the term of the letters patent. Under s. 132 the *Patents Act* recognizes that in Australia those services are managed or performed, not exclusively by departments of government, but as well by "authorities" of the Commonwealth or State. Cf. *Patents Act*, 1949 (U.K.), s. 46. Sub-section (8) of s. 125, in providing that no action for infringement shall be brought for what would otherwise be an infringement of the letters patent, emphasizes the clear intention of sub-s. (1) and with sub-s. (7) provides a means of securing the untrammelled use of the invention by the Governments and the authorities of the Commonwealth and of the States. On the other hand, sub-ss. (5) and (6) ensure that proper compensation shall be paid to the owner of the letters patent for the acts of a Government or an authority of Commonwealth or State which makes use of the invention.

The railway system of the State is, in my opinion, undoubtedly a service of the State and the use of the invention in the construction of railway carriages to be used by the Commissioner in that railway system is a use for a service of the State or for the services of the State within the meaning of the expression in the *Patents Act* 1952, whichever may be the proper way to read the final words of s. 125 (1). One could scarcely imagine that sections such as ss. 125 and 132, with their evident practical purpose, did not extend to include within the expression the use of the services of the Commonwealth or State, the use of an invention for the purposes of one of the Government railway systems in Australia.

In the case of the Commissioner, therefore, there are present not merely the circumstances to which I have already called attention, but the asset of the State which is under his control and management, subject to Ministerial direction, is itself for relevant purposes a service of the State.

All these factors combine, in my opinion, to require the answer that the Commissioner is an authority of the State within the meaning of ss. 125 and 132 of the *Patents Act*. I am also of opinion that the use by the Commissioner—if his contracting with the other defendants in the circumstances amounts to a use of the invention by him, as indeed the plaintiff claims—is a use for the services or for a service of the State, within the meaning of those sections. These conclusions are, in my opinion, of that clear and definite nature which is requisite if an order based on them is to be made denying the plaintiff a right further to proceed with its claim against the Commissioner.

It follows that I am fully convinced to the requisite degree that the Commissioner's acts in relation to the invention for which the plaintiff holds letters patent and of which the plaintiff complains are covered by s. 125 aided by s. 132, and that the plaintiff's action for infringement is precluded by s. 125 (8). Accordingly, I hold that the plaintiff's statement of claim does not disclose a cause of action against the defendant Commissioner and that its action against the defendant Commissioner ought not to be allowed to proceed.

I should mention that during the hearing of the summonses the question was raised whether the plaintiff's action could be converted into a claim for compensation under sub-s. (5) of s. 125 but it seemed clear that this course was not open.

I turn now to the position of the contractors to the Commissioner who are co-defendants in these applications. Again I deal first with submissions based on Order 26, r. 18. Confining myself to the plaintiff's statement of claim, which in case of ambiguity must be read, to use the pleader's convenient phrase, against him, I observe that the plaintiff, in pars. 10, 13 and 14 of the statement of claim, which I have abstracted in the opening portion of these reasons, says that the agreements made between the Commissioner and the other defendants call for and require the use of the plaintiff's invention. These paragraphs allege that the Commissioner has contracted with each of the other defendants to manufacture the invention and use it as part of complete railway carriages for use by the Commissioner on the railway system of the State. I do not think these paragraphs merely say that the agreement with the Commissioner requires the doing of acts which happen because of the manner in which the other defendants have chosen to perform them to infringe the letters patent. I read them as saying that the agreement stipulates the use of a coupling which necessarily infringes the letters patent, whether knowingly or inadvertently being immaterial.

No doubt in the case of a contract with an authority of a State for manufacture or for supply of an article, it may be that the contractual terms leave the contractor with such a choice as to his method and design of manufacture that he is free to perform the contract without infringing an invention, or it may be that, as I think it is here, the contractual terms require the very act which amounts to an infringement of some patentee's letters patent. In the former case it would seem that the contractor needs some written authority to make use of the invention. In the latter case the contract itself being in writing is a sufficient

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authority. *Pyrene Co. Ltd. v. Webb Lamp Company Ltd.* (1); *Aktiengesellschaft für Autogene Aluminium Schweissung v. London Aluminium Co. Ltd.* [No. 2] (2).

In the absence of written authority, where the contract itself is insufficient as such an authority, express or implied, the contractors may be held to infringe the patent, whereas the act of the Commissioner in contracting for the infringement or otherwise using the invention does not itself amount to an infringement: see *Dixon v. London Small Arms Co.* (3). But the present is not a situation such as gave rise to that case and this for two reasons; first, these are contracts for manufacture and not for sale or supply, and the contracts do require the infringement. In *Dixon v. London Small Arms Co.* (3) the contract was for the sale by the manufacturer to the Crown of rifles which undoubtedly by their specification would infringe the letters patent. *Cockburn C.J.* did reserve the question whether the Crown might not employ the manufacturer, in which case he believed there would be a totally different situation from what the Court was there considering, see (4). But *Cockburn C.J.* and *Lush J.* thought the transaction there was one of sale and not for manufacture.

By contrast, in this case, as I have mentioned, according to the plaintiff's allegations in the statement of claim, the agreements themselves require the other defendants to manufacture and in such manufacture to do that which amounts to a use of the invention. I conclude that the plaintiff's claim is that the other defendants were authorized by the Commissioner, whom I find to be an authority of the State, to use the invention, i.e. to make a railway vehicle body and truck central bearing of a design which in fact incorporates the plaintiff's invention.

The remaining question is whether the agreements between the Commissioner and those defendants respectively were in writing; for s. 125 calls for an authority in writing. The agreements are not expressly said by the statement of claim to be in writing. Can I infer from the statement of claim that the agreements between the defendant Commissioner and the other defendants were in writing and do so with the requisite certainty to warrant my dealing summarily with the action against the second and third defendants? This has given me some pause because of the degree to which the absence of a cause of action must be demonstrated if an action is to be halted at the very threshold.

(1) (1920) 37 R.P.C. 57, at p. 65.

(2) (1923) 40 R.P.C. 107, at pp. 116,

117.

(3) (1875) L.R. 10 Q.B. 130.

(4) (1875) L.R. 10 Q.B., at p. 133.

It is, of course, highly unlikely, apart from statutory provisions, that agreements dealing with so complicated a matter as the manufacture of railway carriages should be made by parol. However, s. 22 of the *Government Railways Act*, 1912, in empowering the Commissioners to contract for any authorized work or any other matter or thing necessary for enabling them to carry the purposes of the Act into full effect, required the Commissioners to contract in writing specifying, *inter alia*, the work to be done and the materials to be furnished. The manufacture of such items as railway carriages and their components clearly falls within this section. It seems to me, therefore, that although the statement of claim does not say that the defendant Commissioner *duly* contracted with the other defendants, and although it may not be that in every situation one can presume regularity for purposes such as those on which I am presently engaged, the combination of the statutory requirement and the high degree of improbability that agreements such as those referred to in the statement of claim should be made by parol enables me to conclude with the necessary certainty that the agreements by the Commissioner with the other defendants were each in writing. I do so conclude. I am therefore satisfied with the requisite certainty that the plaintiff's statement of claim does not disclose a cause of action against either of those defendants.

Having reached this conclusion, it is unnecessary for me to consider whether or not, had I not been of this opinion, I should have concluded that the statement of claim, together with the evidentiary material in the affidavits, was sufficient to warrant my taking action under the inherent jurisdiction of the Court. Consequently I express no opinion on the adequacy of the written authorities as proved by the affidavits or upon the consequences, if any, of their having been given after the date of the commencement of the action.

Order 26, r. 18, authorizes me to strike out a pleading which does not disclose a reasonable cause of action. I am satisfied that the plaintiff's statement of claim does not do so. It seeks to restrain an infringement of the plaintiff's letters patent in stated circumstances which preclude the plaintiff having such a cause of action against any of the defendants. Accordingly, I strike out the whole of the plaintiff's statement of claim.

Rule 18 further authorizes me, if I consider it just so to do, to stay or to dismiss the plaintiff's action. This is not a case in which the plaintiff by amendment of the pleading could improve its position. I have been mindful throughout my consideration

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of this matter of the principles to which I have called attention and which govern the exercise of the power summarily to terminate an action. I have reached the firm conclusion that consistently with those principles I ought to intervene by order under this rule to prevent further proceedings in the action, as, in my opinion, to use one of the expressions which I have quoted, the plaintiff's claim is "manifestly groundless" and that to allow it to proceed "would involve useless expense". In my opinion the proper course is to dismiss the plaintiff's action, which I now do.

My order is that I strike out the whole of the plaintiff's statement of claim and dismiss the plaintiff's action with costs. The plaintiff's remedy, if any, for the acts it complains of is for compensation under sub-s. (5) of s. 125.

In each summons strike out the whole of the plaintiff's statement of claim and dismiss the plaintiff's action with costs.

APPENDIX OF CASES

- Metropolitan Bank v. Pooley* (1885) 10 App. Cas. 210.
Republic of Peru v. Peruvian Guano Co. (1887) 36 Ch.D. 489, at p. 496.
Wall v. Bank of Victoria Ltd. (1890) 16 V.L.R. 2.
Lawrance v. Norreys (1890) 15 App. Cas. 210, at p. 219.
Attorney-General of Duchy of Lancaster v. London and North Western Railway Co. [1892] 3 Ch. 274.
Kellaway v. Bury (1892) 66 L.T. 599.
Healey v. Bank of New South Wales (1893) 24 V.L.R. 405.
Hubbuck & Sons v. Wilkinson, Heywood & Clark [1899] 1 Q.B. 86.
Goodson v. Grierson [1908] 1 K.B. 761.
Burton v. President and Councillors of Shire of Bairnsdale (1908) 7 C.L.R. 76, at p. 92.
Dyson v. Attorney-General [1911] 1 K.B. 410.
Mayor & Councillors of City of London v. Horner (1914) 111 L.T. 512.
Wright v. Prescott Urban District Council (1917) 115 L.T. 772.
Agar v. J. C. Williamson Ltd. (1920) 42 A.L.T. 98.
Dey v. Victorian Railways Commissioners (1949) 73 C.L.R. 62.
Kemsley v. Foot [1951] 2 K.B. 34.

Solicitors for the plaintiff, *Minter, Simpson & Co.*

Solicitor for the defendant Commissioner for Railways, *R. J. McKay*, Crown Solicitor for the State of New South Wales.

Solicitors for the defendant *A. E. Goodwin Ltd., Murphy & Moloney.*

Solicitors for the defendant *Tulloch Ltd., Allen, Allen & Hemsley.*

R. A. H.