1971 *Present :* Weeramantry, J., and Thamotheram, J.

F. G. ROWLANDS, Appellant, *and* THE ATTORNEY-GENERAL, Respondent

S. C. 104/1966 (F)—D. C. Colombo, 53737/M

Contract—Delusion under which a party is labouring—Whether the other party owes a duty in law to correct it—Estoppel and promissory estoppel—Scope of the doctrines—Failure to reply to a business letter—Effect—Whether estoppel arises from silence or inaction—Novation—Requirement of a pre-existing obligation—Contracts seeking to impose liability upon the Crown—Pre-requisites for their validity and enforceability—Undertakings given to a party by the Minister of Finance to pay a sum of money and not to plead prescription—Invalidity—Ceylon (Constitution) Order in Council (Cap. 379), ss. 46 (4), 67—Assignment of Ministers' Functions (Consequential Provisions) Act (Cap. 385)—Gazette Notifications thereunder—Token vote—Large sums cannot be drawn on basis of such vote—Agency—Suit against Crown as principal—Doctrine that agent need have only ostensible authority does not apply—Prescription—Accrual of cause of action—Subsequent reference of dispute to arbitration—Failure of arbitration proceedings—Whether it has any effect on the running of time.

Plaintiff sued the Crown for the recovery of a sum of Rs. 2,407,872 as damages resulting from a breach of an alleged contract. His case was presented in appeal on the basis of three main contentions : (*a*) that there was a *promise* on the part of Government to purchase certain stocks of scrap iron from the plaintiff for utilisation in a proposed steel factory ; (*b*) that there was later a novation of this obligation in terms of which the Government undertook and promised to pay a certain sum of money *in discharge of the obligation it had already incurred ;* (*c*) that there was an undertaking by the Crown to *waive the plea of prescription* which it might otherwise have been entitled to take and this constituted an obligation binding on the Crown which disentitled it to raise the plea of prescription.

The evidence, documentary and oral, showed that the plaintiff had much reason to expect that the scrap iron would be purchased from him by the Ministry of Industries on behalf of the Government, but it was not sufficient to establish a legally binding promise. Although the plaintiff wrote several letters to the Ministry stating that he was holding his stocks of scrap iron for the Government, the Ministry did not definitely repudiate the suggestion but informed him in reply that no final decision upon the establishment of a steel factory had yet been reached by the Government. It was contended that the failure to disabuse the plaintiff's mind of his belief that the Government would purchase his stocks constituted an estoppel precluding the Crown from denying the existence of a contract.

In regard to the second and third submissions, the appellant sought to prove novation by leading evidence that the Minister of Finance had undertaken, on behalf of the Government, to pay a sum of one million rupees in discharge of the promise that had already been made by the Government and that there was an agreement by the Minister not to plead prescription. It was also argued that the claim was not, in fact, prescribed mainly because the reference, at one stage, to arbitration of the dispute had the effect of interrupting the running of prescription after the cause of action had already accrued.

It was the contention of the Crown that the Minister of Finance, though he was a Minister of State, was not the proper authority for making contracts of a nature such as would bind the Crown and that, accordingly, both the alleged novation to pay a sum of million rupees and the alleged contract to waive the plea of prescription were invalid for want of authority.

Held, (i) that the failure on the part of Government to disabuse the plaintiff's mind of the belief which he entertained, at any rate at one stage, that the Government was proposing to buy his scrap iron could not build a cause of action upon estoppel. No principle is better established in regard to the law of estoppel than that estoppel operates as a shield and not as a sword. Even the doctrine of promissory estoppel could not form the basis of an affirmative cause of action.

(ii) that failure to reply to a business letter does not prove the truth of the contents of the letter although it may almost amount to an admission. No estoppel would appear to arise from silence or inaction unless there is a legal, as opposed to a moral, duty on the part of the recipient of the letter to reply. From the letters produced in the present case it was impossible to spell out anything in the nature of a promise legally binding on the Government.

(iii) that it is essential to novation that there should be a pre-existing obligation for which a new obligation is substituted. There was no such prior obligation in the present case. Neither in regard to quantum nor in regard to time of payment nor in regard to the making of the promise itself was there that degree of certainty which is the minimum requisite for the creation of an obligation which is binding in law.

(iv) that one of the clearest statements relating to the enforceability of contracts against the Crown was that by Evatt J. of the High Court of Australia in *New South Wales v. Bardolph* (1934) 52 C. L. R. 455 at 474–5. This statement which summarised the law on this matter in terms accepted thereafter even in England as one of the most authoritative expositions of the subject was as follows:—" ... in the absence of some controlling provision, contracts are enforceable against the Crown if (*a*) the contract is entered into in the ordinary or necessary course of Government administration, (*b*) it is authorised by the responsible Ministers of the Crown, and (*c*) the payments which the contractor is seeking to recover are covered by or referable to a parliamentary grant for the class of service to which the contract relates". However Evatt J. went on to state regarding class (c), " In my opinion, however, the failure of the plaintiff to prove (*c*) does not affect the validity of the contract in the sense that the Crown is regarded as stripped of its authority or capacity to enter into a contract ... The enforcement of such contracts is to be distinguished from their inherent validity ".

In the contract alleged in the present case the three requisites set out by Evatt J. were absent. Firstly, the alleged contract was not one that was entered into in the "*ordinary or necessary course of Government administration* ". Secondly, the undertakings given by the Minister of Finance could not be justified by the provisions of Article 46 (4) of the Ceylon (Constitution) Order in Council read with the Assignment of Ministers' Functions (Consequential Provisions) Act No. 29 of 1953 and the relevant Gazette Notifications. The requirement of authorisation by the responsible Ministers of the Crown was not complied with, for the responsible Ministers in relation to a contract involving substantial expenditure would appear to be the Cabinet as a whole and not a single Minister acting on his own responsibility. Thirdly, Parliamentary control of finance is one of the important principles laid down in Article 67 of the Ceylon (Constitution) Order in Council. No Minister of the Crown has authority in his own right to commit the public revenue to a sum not covered or contemplated by an existing vote in the estimates approved by Parliament. There was never a vote by Parliament for the purchase of steel scrap, although there was a token vote in earlier years providing a sum of Rs. 100 as " running expenses " for a steel factory which had not yet been established. This token vote had apparently lapsed by the time the alleged promise was given in 1958. Even under the authority of a valid token vote, the Minister could not commit the public revenue to the expenditure of a large sum of money. However, in regard to a Government contract involving the payment of money by the Crown, the lack of necessary funds would appear to point to unenforceability rather than invalidity of the contract.

Accordingly, not one of the three tests formulated by Evatt J. in *New South Wales v. Bardolph* (supra) was satisfied in the present case. The lack of the first two requirements would in any event make the contract invalid while the lack of the third would make it unenforceable against the Crown.

(v) that, even if a Minister is authorised, by the allocation of functions among the Ministers, to purchase certain stores or equipment or to waive prescription, the implementation of the decision of the Minister belongs to the administrative officials concerned. While policy decisions fall within the purview of the Minister, financial accountability falls upon his officials.

(vi) that it could not be contended that even if the Minister of Finance did not have actual authority to bind the Crown he had ostensible authority to do so, inasmuch as he apparently held himself out to the plaintiff as having such authority. In the field of agency, in so far as it concerns contracts seeking to impose liability upon the Crown, the common law doctrine that the agent need have only ostensible authority does not apply, and his authority must be actual.

(vii) that the Crown was not in law precluded from taking the plea of prescription. Although the Minister of Finance genuinely believed, and assured the plaintiff, that the plea of prescription would not be taken by the Attorney-General, the Attorney-General had at no stage unequivocally agreed to waive prescription.

(viii) that, admittedly, the cause of action had arisen before 10th July 1958 by reason of the final refusal by Government of the plaintiff's claim. This admission by the plaintiff was made in the notice of action sent by him on 10th July 1958 in terms of section 461 of the Civil Procedure Code. The fact that, after the final refusal, the plaintiff made further attempts at making appeals to the authorities, resulting in drawing certain replies to his letters, could not take away from the finality of the refusal. Nor could the subsequent willingness of Government (although this later proved futile) to determine the dispute by arbitration, with a view to an equitable settlement, delay the commencement of prescription until the arbitration arrangements broke down. " The running of time, once commenced, is not interrupted by the preparations for arbitration or by the pendency of a reference. The cause of action has already accrued and indeed it is that which constitutes the subject matter of the proposed reference."

APPEAL from a judgment of the District Court, Colombo.

L. A. T. Williams, for the plaintiff-appellant.

Mervyn Fernando, Senior Crown Counsel, with *N. Sinnetamby*, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

June 16, 1971. WEERAMANTRY, J.—

The plaintiff-appellant has been the victim of a most unfortunate combination of circumstances, and through no fault on his part has suffered tremendous loss. This action is an attempt to seek relief against the Crown but for whose actions in one form or another this loss would not have been sustained.

The cause of this unfortunate state of affairs has been a lack of definiteness and co-ordination in Government policy. This has resulted not only in loss to the plaintiff as an individual but also in grave loss to the country, for the nett result of this sorry episode is that several thousands of tons of scrap iron worth millions of rupees in foreign currency have been left stacked away till rust and the elements have rendered them valueless to both the plaintiff and the State.

It would appear that after the termination of hostilities in 1945 the War Department sold its stocks of vehicles in Ceylon and the plaintiff was the purchaser of a lot of approximately 4,000 War Department vehicles. These vehicles were purchased for their scrap value and when converted to scrap iron amounted to 24,000 tons in weight.

At the time of the plaintiff's purchase, scrap iron was an exportable material and it was in the expectation of being able to export it that the plaintiff made this purchase on which he expended a sum of Rs. 100,.000 In the same expectation the plaintiff had engaged a staff of about 300 persons and incurred considerable expenditure in order to reduce to an exportable condition the vehicles which he had so purchased.

It happened that shortly after the plaintiff's purchase a plan was adopted by the Government for the commencement of a steel factory in Ceylon, using initially all steel and iron scrap available within the country, and that with a view to conserving stocks already in the Island, a ban was introduced on the exportation of ferrous scrap.

The plaintiff's purchase was on 5th July 1946. A partial ban was introduced by P1 on 23rd January 1947, that is, in respect of all scrap iron acquired after that date, and by 1948 the ban became complete. The plaintiff was able to export only 3,000 tons out of the scrap which he had, before the total ban was introduced.

It will be seen that the introduction of the ban on export was an unforeseen circumstance which completely thwarted the plaintiff's original intention and which left him with a commodity in his hands which was now neither exportable nor, in view of its vastness in quantity, saleable to private buyers within the Island. The plaintiff was of course not the only person thus left with this unsaleable commodity in his hands, but the stocks held by him, according to the evidence, far exceeded in magnitude anything held by any other person in the country.

The only direction in which there lay any possibility of relief against total loss was the acquisition by Government of stocks held by traders and this was indeed the only equitable action which the Government could have taken in this matter.

Concern over the individual losses sustained as well as over the loss thereby caused to the country was reflected in the proceedings of Parliament, for we read in Hansard of 16th August 1951, marked P43, that Dr. Kaleel, M.P. had spoken of the investment of large sums of money by various persons in purchasing scrap from the American and British Military authorities by public auction in the hope of exporting it to other countries. The sudden embargo on the export of iron left these persons with iron on their hands which they could neither export nor sell, and he observed that whether the party responsible was the Minister of Industries or the Minister of Commerce or the whole Cabinet, it was really an abuse of power in their hands. *On that occasion the Hon. G. G. Ponnambalam, Minister of Industries, stated that he accepted completely all responsibility for the embargo that had been placed on the* export of scrap iron and observed that he had no mind whatsoever to change that attitude. He further observed that he accepted the suggestion that Government must buy if the export of the scrap was banned.

Again, P44, Hansard *of* 31st *January* 1952, shows that Dr. Kaleel, M.P. had asked the Minister of Commerce and Trade how long the embargo on the export of scrap iron had been in operation and whether he was aware that the stocks in the possession of holders were deteriorating in value through rust and other causes.

We learn from Hansard of 26th February 1952, P45, that the new factory had been sanctioned and that it would be a complete iron and steel factory and not a mere steel rolling factory. The Minister further indicated in Parliament that purchases of scrap would be made as soon as the site of the factory had been decided on. The Minister also categorically stated in Parliament that the Government proposed to buy the scrap and that as soon as storage space became available in which to put it, the actual purchase of further quantities would be undertaken.

It will be seen *from* this *statement* of *policy* that Government had made two decisions, namely that the factory was to be commenced and that the stocks of scrap in the Island would be purchased by Government, the only delay being delay till such time as the site was selected.

It will be seen also that it was the expectation of all parties that the contemplated factory would soon be established.

By way of background to the establishment of the factory it is useful to note also that during the war years a steel rolling factory had in fact functioned in the railway yard with great success and that its output had been 30,000 tons of steel a year. It was considered expedient instead of improving this factory which functioned on outmoded machinery to start an altogether new factory and it was not as though a steel factory in the country was an altogether new venture.

The next stage in the history of this unfortunate episode was that the International Bank of Reconstruction and Development sent a mission to the Island at the request of the Government of Ceylon and this mission by its Report (P47) of September 1952 condemned the whole scheme, observing that the Government was proceeding prematurely on this project and strongly recommending that before going further the Government should seek a complete technical and economic evaluation from the larger and experienced commercial steel companies. The mission stated that it was its considered opinion that the project would imperil more urgent development and should be long deferred.

On 26th September 1952 a question was asked in Parliament (vide P48) as to whether it was correct to assume that a decision had been reached to abandon the idea of the iron and steel project and the acting Minister of Industries and Fisheries answered that no decision had as yet been made, thus indicating that at least at that stage the project had not been abandoned. At any rate therefore till September 1952 it would be correct to assume that all parties proceeded upon the basis that the plan for the factory was still part of Government policy. Holders of stocks were therefore entitled until that date to assume that the announced intention of Government to purchase the stocks in their hands, which they were unable to export by reason of the embargoes, remained unchanged.

By 1953 however the project stood definitely abandoned, and the embargo was eventually lifted by P180 of 10th August 1953. Thereupon holders of stocks for the first time found themselves free to export.

It is the plaintiff's position that by this date the stocks in his hands had greatly dwindled in value by reason of rust and decay and furthermore that he was still unable to export his scrap because it had been purchased by the Government and negotiations were afoot between himself and the Government in this connection. It will be noticed that a period of more than six years had elapsed since the introduction of the partial ban in 1947.

I must pause here for a moment to examine the plight in which the plaintiff was placed in consequence of the sudden ban on exports. Mr. Arndt, the plaintiff's Superintendent of Exports of scrap iron, who had entered the plaintiff's service shortly after the ban was imposed, has given us some idea of this expenditure in his evidence, and so also have the plaintiff and another employee, Mr. Rabot.

The evidence of these witnesses, regarding whose credit worthiness not the slightest imputation has been made, shows that at the time of the ban, the condition of the metal was very good and that there had been no deterioration of the material in 1948. The plaintiff took steps to protect his material by putting up a cadjan screen on the perimeter on the sea side and screens in front of each stack on the sea face and by spraying them with burnt oil and slush. This was done every year at considerable cost.

At the Hendala yard there were also security measures involving the employment of about 40 watchers as the area covered was extensive—about 40 acres in extent—and each watcher was paid bewteen Rs. 130 and Rs. 150 per month apart from overtime at double this rate. Documents in evidence such as P165, P166, P167, P168 support these positions.

In addition there were other expenses such as a canteen for cooking meals, a mess cook, a stand-by-vehicle for security purposes, a driver and a cleaner. Similar arrangements were made for the depots at Trincomalee and Kirillapone. On a conservative basis these security measures cost Rs. 12,500 a month.

All this was in addition to the very large staff engaged by the plaintiff to reduce his stocks to scrap by dismantling the vehicles and cutting up the heavier members, where their size rendered stacking impossible or inconvenient. The expenses involved in these operations will be referred to again at a later point in this judgment.

Mr. Arndt has stated further that when he left the plaintiff's services in 1951 there was not much deterioration in the heavy materials stacked.

The Crown has made the comment that the plaintiff had ample opportunity prior to the total ban to export the stocks he had in hand and thereby minimise damages. The facts however do not support this submission and the plaintiff's failure to export this stock prior to the total ban has been adequately explained by him.

The export of a large stock of scrap iron needs negotiation with buyers abroad in the first instance, compliance with export regulations and the procuring of freight. It is not a simple matter of merely chartering a ship and sending off all the iron, as was suggested by the Crown. The plaintiff had been to India and made arrangements for the export of scrap iron to India and towards the end of 1947 when motor scrap exports were permitted (vide the Controller's letter P20 of 22nd February 1947) a representative of the Department of Industries made a selection of certain scrap and wanted it put aside saying that the other scrap, that is the motor scrap, could be exported. According to P162, 935 tons were exported from Trincomalee in 1947. More scrap could have been shipped but there were other difficulties with the Industries Department about passing the scrap, particularly after the imposition of the partial ban. P1 of 23rd January 1947 banned exports of iron and steel scrap with the exception of iron and steel scrap already acquired for the purpose of export by persons holding the stocks. The view of the Director of Industries was that a firm commitment to export motor scrap, as evidenced by a foreign written contract to export, was required if a permit was to be granted. The plaintiff had no such contract as he was exporting to himself as consignee in India, having, as he was at that time entitled to do, arranged for purchase from himself at that end. Consequently, the plaintiff was not allowed to ship scrap iron in the absence of such a written contract for export entered into prior to 23rd January 1947.

The letter of the Director of Commerce and Industries P20 of 22nd February 1947 also confirms that he required to be satisfied that the purchases were made prior to prohibition if export was to be permitted and that he was prepared to allow the shipment of motor scrap *only* if informed that such lot was ready for shipment. P21 of 29th February 1948 shows that the Management of the steel rolling factory had inspected and passed 300 tons of scrap consisting of dismantled and broken up motor vehicles.

For these and other reasons, shipping could not be continued without a break. Moreover the availability of shipping between Ceylon and the Indian ports in question was seasonal.

A breakdown of the quantities exported and of the dates of shipment, which has been produced marked P162, suffices to show how laborious was the process of export. Even to send so small a quantity as 4,000 tons, a large number of shipments had to be made on various dates. With all the formalities involved, the operation was time-consuming and I doubt very much that it was within the ability even of persons with larger resources than the plaintiff to accomplish what it is suggested he should have done.

The case of the plaintiff has been presented in appeal on the basis of three main contentions :

(a) that there was a *promise* on the part of Government to buy the stocks of iron that were in his hands for utilisation in the proposed factory.

(b) that there was later a novation of this obligation in terms of which Government undertook and promised to pay a sum of Rupees one million in *discharge of the obligation it had already incurred.*

(c) that there was an undertaking by the Crown to *waive the plea of prescription* which it might otherwise have been entitled to take and this constituted an obligation binding on the Crown which disentitled it to raise the plea of prescription in these proceedings.

I shall consider these contentions in that order.

Turning now to the first of them, it is necessary that the documentary evidence relied on be examined against the background, already referred to, of a firm intention on the part of the Government to commence such a factory which was to make use of all stocks of scrap iron available in this country.

It is stressed on behalf of the plaintiff that not only was the purchase of his scrap the declared intention of the Government but also that a promise by Government to take over his stock was an eminently reasonable one and indeed the only equitable course open to Government in the circumstances. The scrap was so large in quantity that the embargo placed on its export rendered it incapable of disposal in the hands of the plaintiff, and the only purpose to which it could have been put was sale to the Government for utilisation as raw material for the mill.

Against that background the plaintiff relies on both oral and documentary evidence as leading inevitably to the inference that there had been a firm promise by the Government to purchase this scrap. On this basis the plaintiff's claim against the Government is a sum of Rs. 2,407,872.

The basic documents relied on by the plaintiff in support of this position are P37 and P38. Before referring to these documents it is necessary however to refer to the prior correspondence in outline.

There is in evidence a series of documents indicating that the idea of a steel factory was never remote and was in the contemplation of both parties at any rate up to the end of 1952. It is not necessary to detail these documents at this stage, suffice it to mention that documents such as P17, P24, P24B, P43, P44, P46, P48, P49, P54, P55, P55b, P143, P147 all confirm this position.

It would also appear that the intention of Government to purchase these stocks was not a mere unimplemented intention but that in furtherance thereof many active steps were taken. Valuers and other experts visited the plaintiff's yard from time to time for the purpose of estimating their value, and the scrap was stacked in accordance with Government requirements.

This meant that the plaintiff had to break up his original stacks and restack in accordance with Government requirements. Mr. Perera from the Steel Factory used to visit the yard very often and in obedience to his directions about 12,000 tons were restacked. About 40 to 50 stacks of light scrap were involved as the other stacks were of heavy material such as chequered plates. After Mr. Perera's selection there were about 130 stacks of heavy material and about 50 or 60 stacks of loose scrap. The stacking took two to three months.

Again, Professor Durrer, to whom reference will be made later, visited the Hendala yard and inspected the various stacks of scrap.

Another circumstance relied on by the plaintiff as evidentiary of a decision by Government to take over his stocks is based upon the history of the requisitioning and de-requisitioning of the land at Hendala which the plaintiff used as one of his yards. This land was de-requisitioned by the Army on 9th December 1950 but possession was retained by the Competent Authority, the Government Agent, from 9th December 1950 in terms of Act 33 of 1950. This would appear from the documents P52 and P133, and it is the plaintiff's contention that this land was retained for the express purpose of facilitating the storage of scrap.

This continuance of control over the land was not in pursuance of any desire to that effect on the part of the plaintiff and is stated by the plaintiff to be attributable to the desire of Government itself to have undisturbed storage of the scrap at Hendala, which incidentally, was in close proximity to Enderamulla, the site then proposed for the Factory. Moreover, whilst the plaintiff was in occupation at Hendala, rent for the land was paid by Government.

I do not think however that this circumstance merits the importance attached to it by the appellant, for it is at best ambiguous and indicates that Government was still interested in this scrap. There is no specific evidence of the precise purpose for which the Government Agent retained possession. This evidence is hardly sufficient material from which to draw the inference that Government had purchased or agreed to purchase the scrap.

I must refer now to the correspondence immediately antecedent to the letters P37 and P38.

In his letter P34 of 18th August 1949 addressed to the Permanent Secretary to the Ministry of Industries, the plaintiff has stressed that much expenditure is being incurred in holding the scrap "*for you*" and that as the plaintiff would have to introduce various internal changes regarding staff and administration, he would appreciate an indication within a few days if possible when arrangements for taking over this scrap would be complete. This letter was pursuant to earlier letters such as P127 of 25th May 1949, P31 of 7th May 1949, P30 of 6th April 1949 all stressing the hardships the plaintiff was experiencing by prolonged holding of the stock, and urging an early take-over.

The Ministry replied by P35 of 24th August 1949 and this is certainly in terms which could have been clearer if the Ministry was repudiating the suggestion that the plaintiff was holding his stocks for the Government. It does however inform the plaintiff that it is not possible to state with any exactitude when it would be possible to start negotiations for the purchase of steel scrap. The same letter also informs the plaintiff that no final decision upon the establishment of an iron and steel factory had yet been reached.

The plaintiff's reply to P35 was P36 of 27th August wherein he presses the Government once more for a decision on the matter contained in P34 as being extremely urgent. The same letter repeats that steps involving considerable expenditure and loss had been taken on the Government's previous correspondence.

P83 of 19th September 1949 written in reply to P36 again fails to disabuse the plaintiff's mind of the belief entertained by him and merely adopts the very unhelpful attitude that the Permanent Secretary is unable to give the plaintiff any assistance in the difficulty which he was experiencing.

The writer must be taken to have been well aware of the steps taken by the plaintiff to keep his stocks in a condition of readiness for Government acquisition, of the visits of Mr. M. E. Perera to the plaintiff's site and of the considerable expense incurred by the plaintiff in breaking up his stacks and restacking on the instructions of Mr. Perera. It would be not inappropriate to indicate here that the attitude of the Government department concerned, towards a private citizen who had taken steps in reliance on certain indications given by Government of an intention to purchase, and had incurred great expenditure in connection therewith, left much to be desired. The latter was certainly entitled to expect a more understanding and helpful consideration of the simple request he was making. If the position of the Government was that the plaintiff's letters proceeded upon a totally incorrect assumption, while it may not have been the strict legal duty of the department concerned to repudiate this assumption, one would nevertheless expect such a repudiation in all fairness to a party placed in the plaintiff's unfortunate circumstances and acting in a matter of this magnitude.

A perusal of the correspondence leaves one with the unfortunate impression that there was a lack of appreciation of the plaintiff's genuine difficulties and a want of sympathy for the plight in which a citizen found himself not through any fault on his part, but in consequence of changing official policies.

It is indeed a saving grace that even at a late stage some government officials handling the plaintiff's file were struck by the unsatisfactory treatment he had received at their hands, for we have the document P185 by the Ministry of Industries to the Controller of Finance on 2nd June 1959. This document indicates that there was no doubt that the existence of a valid legal contract had not been proved, but it recognises however, that the loss incurred by Mr. Rowlands was attributable even in some measure to acts of omission or commission on the part of the Government. This document states further that the writer, the Deputy Secretary to the Treasury, was inclined to the view that it would not be inappropriate to consider whether under these circumstances the Government was not morally obliged to compensate Mr. Rowlands for any loss he may have incurred. Furthermore it is significant that there is express recognition in this letter of the failure on the part of Government to disabuse

Mr. Rowlands' mind of the belief which he appeared to have entertained, at any rate at one stage, that the Government was proposing to buy his scrap.

Passing now to P37 and P38, P37 was a letter written by him to the Director of Industries on 16th March 1950, which purports to record the result of two interviews had with the Director. This letter records, in numbered paragraphs, the matters which according to the plaintiff were decided at the first interview. These decisions were that varieties of ferrous scrap were required by Government for the proposed factory; that as export of ferrous scrap was accordingly prohibited the plaintiff was keeping his stocks at the disposal of Government for the proposed steel factory; that the Director had agreed to recommend to his Minister for consideration that the plaintiff's stocks of scrap should be taken over and should be paid for at the price then being paid for scrap purchased from other Government departments; that in the event of Government deciding to pay a higher price for privately owned scrap, it would consider the possibility of paying the plaintiff the nett difference in price; and that the plaintiff was to interview the Director on the 8th when a final decision regarding these matters would be communicated to him.

Regarding the second interview, the letter recounts decisions that no acquisition of private stocks would be permitted until the same had been thoroughly inspected by Professor Durrer, that the Professor would definitely inspect the plaintiff's stocks on his arrival and that a decision regarding place of delivery and price would be communicated to the plaintiff when the scrap was so inspected.

The letter recites also that between the dates of the two interviews, plaintiff's counsel had had several discussions with the Minister and were informed that his stocks would be purchased when representations in that behalf were made through the Director.

The plaintiff attaches the utmost importance to the letter P38 of 23rd March 1950, the Director's reply to P37. This letter denies specifically that the Director was to recommend to the Minister that the plaintiff's stocks were to be taken over and paid for at the current price and that a final decision would be communicated at the second interview. In the plaintiff's submission what is significant however is that there are no other specific denials in P38 although the plaintiff had specifically stated in one of the numbered paragraphs of his letter as a decision arrived at during the first interview, that the plaintiff would keep his stocks at the disposal of Government for the proposed steel factory. The reply went on to state that a report on the plaintiff's case had been made to the Permanent Secretary, in which report it had been recommended that Professor Durrer should inspect the plaintiff's stocks. Professor Durrer not being at that time in Ceylon, the Director hoped it would be possible to have him carry out his inspection at a very early date. In short the latter did not disabuse the plaintiff's mind of the belief clearly entertained by him at that stage that he was keeping his stocks at the disposal of Government for the proposed factory.

The question then is whether the failure of the defendant so to disabuse the mind of the appellant can amount to evidence of a binding contract or can itself constitute a contract binding upon the Crown.

The learned Judge has quite rightly held that the documentary evidence is quite insufficient to establish any contract binding on the Crown. Even if it had been understood at the conference that the plaintiff was to hold his stocks at the disposal of the Crown, this fact would amount to no more than an indication of readiness on the part of the parties to negotiate with each other and of a serious intention to do so, but by no means does it conclusively point to the existence of a concluded contract. Nowhere do any of the documents reveal any promise by Government or any intimation by Government of a firm intention to buy the plaintiff's scrap in a manner which can be considered binding upon the Crown. Indications of a willingness to negotiate at some point of time in the future there undoubtedly are and declarations by Government of its intention to purchase, there undoubtedly had been. The former are insufficient however to constitute either an offer to the plaintiff or an acceptance of any offer on his part. The latter have not been communicated to the plaintiff by any officer of Government authorised to do so, and remain at best unilateral and general declarations not intended to be offers and not therefore capable of acceptance unless they came in a more specific form to the plaintiff.

Had there been some principle of law upon which the plaintiff may possibly have been granted relief in the unfortunate situation in which he found himself, this court would have been ready to examine the applicability of that principle to the facts of this case with much sympathy for the plaintiff. It would seem however that no such principle can be invoked.

I shall first examine the plaintiff's contention that Government's failure to disabuse the plaintiff's mind of his belief referred to earlier, constitutes an estoppel precluding the Crown from denying the existence of a contract to buy his stocks.

Now, even if the facts referred to suffice to raise an estoppel, no principle is better established in regard to the law of estoppel than that estoppel operates as a shield and not as a sword. " Its sole office " according to Spencer Bower [1] " is either to place an obstacle in the way of a case which might otherwise succeed or to remove an impediment out of the way of a case which might otherwise fail. It has no other function. Emphatically, it is not a cause of action in itself, nor does it create one, though the application of this, as of any other rule of evidence in the course of litigation, may result in a total or partial establishment, or

[1] *Estoppel by Representation, 1st ed. p. 11.*

disestablishment, of the case made by one or other of the parties ". Switching the metaphor from the military to the naval, Spencer Bower observes [1] " To use the language of naval warfare, estoppel must always be either a mine-layer or a mine-sweeper : it can never be a capital unit. ".

The plaintiff cannot therefore seek to build a cause of action upon this estoppel he alleges.

It is true that the doctrine of promissory estoppel, which indeed does not fall into the category of estoppel properly so-called, has recently extended far beyond the limits of estoppel the range of cases where relief may be granted on the basis of promises or representations made by one party to the other. In particular, whereas estoppel relates to representations of existing fact, promissory estoppel may cover a case of representations concerning the future, and to that extent is called in aid by the plaintiff in regard to the alleged representation that the Government intended to buy his stocks.[2] However the fact still remains that even promissory estoppel, though by no means an estoppel properly so-called, operates to defeat a claim instituted by the promisor in disregard of such promise but not as the basis of an affirmative cause of action. Although the limits of this new doctrine are not clear, it would appear that it cannot be used to create a new cause of action where none existed before.[3] In the words of Buckley J.[4] " The doctrine may afford a defence against the enforcement of otherwise enforceable rights : it cannot create a cause of action ; " and as shown by the learned editor of the second edition of Spencer Bower [5] a close analysis of all the authorities leads to this same result.

Again, reliance is placed by the plaintiff upon the principle that failure to reply to a letter or contradict material averments therein, is to be construed as an admission of the correctness of such averments. The decision generally cited on this principle is that in *Colombo Electric Tramways Co. v. Pereira.*[6] As I had occasion to point out in *Wickremasinghe v. Devasagayam* [7] that decision does not go the length of saying that failure to reply to a business letter proves the truth of the contents of the letter but only that it almost amounts to an admission.

Colombo Electric Tramways v. Pereira proceeds upon the basis of certain obiter dicta expressed by the judges in *Wiedeman v. Walpole.*[8] These dicta must not be taken to mean that in business communications every failure to contradict assertions amounts to an admission of their truth,

[1] *at p. 12.*
[2] *See Lyle-Mellor v. Lewis & Co. (Westminster) (1956) 1 W.L.R 29.*
[3] *Halsbury, 3rd ed. vol. 15 p. 175; Combe v. Combe (1951) 2 K.B. 215; C.A; Pararajasekeram v. Vijayaratnam (1968) 74 C.L.W. 45.*
[4] *Beesly v. Hallwood Estates Ltd. (1960) 2 All E.R. 314 at 324.*
[5] *Turner's ed. pp. 316-7.*
[6] *(1923) 25 N. L. R. 193.*
[7] *(1970) 74 N. L. R. 80.*
[8] *(1891) 2 Q.B. 534.*

but as Kay L.J. observed therein, it depends upon a view in each case of all the particular circumstances under which the letter in question was written. In an appropriate case failure to reply may be strong evidence of an admission. There may at the most be a strong inference resulting from the failure to deny the fact, that at the conference it was understood that the plaintiff would, *pending negotiations*, hold his stocks at the disposal of the Crown, but there is no scope for any inference from P38 that the Crown was admitting that it had contracted to buy the plaintiff's stocks.

Another ground on which the plaintiff's claim has been based is the principle of estoppel arising from silence or inaction. Assuming that inducement and alteration of position to the detriment of the representee have been established, still no estoppel would appear to arise unless there is a legal, as opposed to a moral duty, on the part of the recipient of the letter, to reply. In the words of Spencer Bower [1] " On the other hand, it is firmly established that reticence and passivity in relation to matters which give rise to no legal duty to speak or act, whether censurable *in foro conscientiae* or not, is not a representation of anything, and accordingly creates no estoppel any more than it is actionable ; and the courts have on the whole steadily repelled the invitations, again and again addressed to them, to pronounce that silence and inaction, in the absence of such duty, is other than justifiable in law, or subjects the party to any liability or disability whatsoever "

There are indeed extreme instances where the courts have relaxed this rule and have been prepared to hold that a duty exists in law to correct a delusion under which a party is labouring. In my view the present case is not one of this nature. It may perhaps be said that there was a moral duty upon the Crown to state its position on the question whether it expected the plaintiff to hold his stocks for the Government. This is far from saying that the failure to disabuse the plaintiff's mind of this belief imposes a *legal* obligation upon the Crown to purchase the plaintiff's stocks. Moreover it is not difficult to visualise numerous situations in which a person may hold his stocks at the disposal of another in the expectation that the latter would purchase, without a firm commitment by the latter to do so.

As the learned District Judge has observed, a ban on the export of scrap iron does not by itself mean that Government was undertaking to take over the stocks which were in the possession of the plaintiff and other persons. Such a result could not be reached in the absence of a definite agreement in that behalf. No doubt, in the special circumstances of the case, there was nothing else the plaintiff could have done with his stocks but hope that Government would acquire them, but neither the inability of the plaintiff to dispose of his stocks in any other way nor the announcement by Government of an intention to purchase stocks can impose contractual liability upon the Crown.

[1] *Estoppel by Representation, 1st ed. p. 67.*

In the result then, however much one sympathises with the plaintiff, and whichever way one views the series of letters put in evidence, and in particular the letters P37 and P38, it is impossible to spell out from them anything of the nature of a promise binding on the Government.

It has been strenuously submitted by counsel for the plaintiff that the plaintiff has at no point been proved to have made false allegations and that there has been no disbelief of the plaintiff on any matter by the learned Trial Judge. There has likewise been no suggestion under cross-examination that he wrote false letters. While this is perfectly true, the fact remains that the plaintiff has apparently very honestly been under the impression that Government would purchase his stocks and has held his stocks in this belief, but he has been under the wrong but honest impression that there was a legally binding promise by Government whereas that was never the case. It may be pertinent to observe that the plaintiff is one who appears to have advised himself on the law, made his own drafts, conducted his own case and made submissions on legal questions himself. While in doing this he has acquitted himself with credit, it may well be that through his lay view of the legal questions involved he honestly but wrongly convinced himself that the Crown was under a binding legal obligation to acquire his stock of scrap.

These observations suffice to dispose of the plaintiff's first contention, that there was a promise on the part of the Government to purchase his stocks.

I pass now to his second contention, namely that the Government undertook and promised to pay a sum of one million rupees in discharge of the obligation it had already incurred. The argument of novation thus advanced involves also certain subsidiary questions among which are the authority of the Minister of Finance to make such a promise on behalf of the Government, and the necessity in any event for the availability of funds to back such a promise if made. These subsidiary matters are pertinent also to the third question argued before us, namely the alleged agreement by the Crown not to plead prescription.

The evidence on which the plaintiff relies in support of his second basis of argument, is briefly as follows.

Mr. Alagiyawanna, a witness for the plaintiff, has stated that the plaintiff had asked him for his help as he had to receive a large sum of money from the Government. The witness, who knew the Prime Minister, undertook to speak to the latter and obtain whatever help was necessary for the plaintiff. He delivered a letter from the plaintiff to the Prime Minister who asked him to interview the Minister of Trade. The witness accordingly interviewed the Minister of Trade, who asked him to attend a second interview. At the second interview the Permanent Secretary was also present and so was the plaintiff. It was there suggested that the plaintiff should see the Prime Minister. The Prime Minister granted an interview to the plaintiff and asked him to see Mr. Stanley de Zoysa, the Minister of Finance. The plaintiff told him that he knew Mr. Stanley de Zoysa and it was not necessary for him to be given an introduction to Mr. Stanley de Zoysa. On a later occasion the witness had met Mr. Stanley de Zoysa who had told him that he would consider the matter.

It was in these circumstances that Mr. Stanley de Zoysa came to deal with the plaintiff's file, although he had earlier been unwilling to deal with it in view of his prior personal acquaintance with the plaintiff and his knowledge of this particular matter.

Mr. de Zoysa, who gave evidence, remembered two stages in regard to this matter. The first was when he asked his officials to go into this matter and arrive at a conclusion one way or the other as soon as possible. The second was when, in consequence of delay in complying with his earlier instructions, he felt that some kind of direction or control at Ministerial level was necessary, and instructed his Parliamentary Secretary to deal with the plaintiff's claim. On his instructions his Parliamentary Secretary dealt with it, and he remembers having been told by him that he had practically concluded investigations. The witness thought that the matter was reaching finality. The result did not concern him one way or the other but he wanted the plaintiff's claim decided expeditiously and fairly.

At one stage the witness directed that if the two parties, namely, the plaintiff and the Government together with the Attorney-General, could not arrive at any conclusion, the claim should be referred to arbitration. He took this step as a matter of principle and Government policy. It was in this context that he gave the plaintiff the letter P63 of 29th August 1958, to which reference will be made later, which stated that Government should not and would not take the plea of prescription.

According to Mr. de Zoysa, he had suggested arbitration in the event of the matter not being satisfactorily concluded between the parties. However, according to the information he had, there was nothing to be arbitrated on, for his impression was that the question had been adjusted to the satisfaction of the parties at that stage and he believed the figure agreed upon had been mentioned to him. This figure was about a million rupees.

That a figure approximating a million rupees had indeed been discussed would appear also from a letter of May 1960 (P85 of 30th May 1960) which the plaintiff sent to the Treasury. This document shows that the plaintiff at any rate genuinely believed that Government was willing to pay him a sum approximating this amount. This document is a draft of the terms of arbitration, as suggested by the plaintiff, wherein it is recited that " the Government was willing, in equity, to pay the party of the first part about 1/3rd of the said claim as reasonable compensation." The plaintiff's claim at that stage being a sum of about two and a half million rupees, a third of this sum would be in excess of Rs. 800,000.

Mr. de Zoysa had stated in his evidence that the fact that the plaintiff was a personal friend of his has not affected his judgment in this matter and in fairness to Mr. de Zoysa I should state that there is nothing in the evidence to indicate otherwise. Quite evidently he felt convinced that the plaintiff had an equitable claim and he was anxious to do justice to the plaintiff as far as he could.

The plaintiff thus asserts that at the stage of negotiations had with Mr. de Zoysa, the pre-existing obligation of the Government towards him became the subject of a novation by which there was substituted for that indeterminate obligation, a new obligation to pay him a sum in the region of Rs. 1,000,000.

Now it is essential to novation in the first place that there should be a pre-existing obligation for which the new obligation is substituted. As already indicated such prior obligation is entirely absent in the present case.

Furthermore the evidence that there was a firm promise to pay a sum of one million rupees is altogether lacking in that definiteness which is necessary to establish such a claim. Neither in regard to quantum nor in regard to time of payment nor in regard to the making of the promise itself is there that degree of certainty which is the minimum requisite for the creation of an obligation which is binding in law.

Yet another objection is that in any event Mr. de Zoysa lacked the requisite authority for this purpose. This objection is pertinent also to the third submission of the appellant, namely that there was an agreement to waive prescription, for this too is said to be a contract entered into between the plaintiff and Mr. de Zoysa on behalf of the Crown. The ensuing discussion thus relates to both the second and the third of the appellant's submissions.

Now it is the contention of the Crown that Mr. de Zoysa though a Minister of State, was not the proper authority for making contracts of a nature such as would bind the Crown. It is thus argued that both the alleged contract to pay a sum approximating a million rupees and the alleged contract to waive the plea of prescription are invalid for want of authority. The Crown contends further that a person seeking to bind the Crown by a promise made on its behalf is under the burden of proving that the person making the contract had the necessary authority to do so.

The plaintiff's contention on the other hand is that for the purpose of making these contracts, the Minister is and represents the Government of Ceylon and that the allocation of functions and powers among the Ministers of the Crown as contained in the relevant Gazette Notifications, amounts to a specific delegation to the Minister of Finance of all the power to settle this case.

One of the clearest statements relating to the enforceability of contracts against the Crown is that by Evatt J. of the High Court of Australia in *New South Wales v. Bardolph*[1]. This statement which summarised the law on this matter in terms accepted thereafter even in England as one of the most authoritative expositions of the subject, states : " . . . in the absence of some controlling provision, contracts are enforceable against the Crown if (*a*) the contract is entered into in the ordinary or necessary course of Government administration, (*b*) it is authorised by the responsible Ministers of the Crown, and (*c*) the payments which the contractor is seeking to recover are covered by or referable to a parliamentary grant for the class of service to which the contract relates. " However, Evatt J. further went on to state regarding class (*c*), " In my opinion, moreover, the failure of the plaintiff to prove (*c*) does not affect the validity of the contract in the sense that the Crown is regarded as stripped of its authority or capacity to enter into a contract . . . The enforcement of such contracts is to be distinguished from their inherent validity. "

This statement makes it clear in the first place that there are two separate questions—enforceability and validity—that need consideration in regard to these contracts.

With a view to determining questions of enforceability and validity, the most convenient approach would be to view the problem before us in the light of the three requisites set out by Evatt J.

In regard to the first of these, it seems clear enough the present case is not one where the alleged contract was entered into in the " ordinary or necessary course of Government administration ". The type of contract entered into in *New South Wales v. Bardolph* may be cited as an illustration of such a contract. The contract under examination in that case was one for the insertion of government advertisements in the respondent's newspaper. Evatt J. observed[2] that " The insertion of advertisements for Government trading concerns such as the Tourist Bureau, and also for ordinary administration purposes, was essential to the proper functioning of the Government of the State of New South Wales. " The contract we are here concerned with is of a category altogether impossible to bring within the ambit of such phraseology.

The second requirement, that it should be authorised by the responsible Ministers of the Crown calls for a consideration of Mr. Stanley de Zoysa's authority as Minister of Finance to authorise contracts of this nature.

Article 46 (4) of the Ceylon Constitution (Order-in-Council) provides that each Minister other than the Prime Minister shall be charged with the administration of such subjects and functions as may be assigned to him by the Prime Minister. The Assignment of Ministers' Functions

[1] *(1934) 52 C. L. R. 455 at 474–5.*   [2] *Ibid, p. 462.*

(Consequential Provisions Act) No. 29 of 1953 provides that the Prime Minister may by Order published in the Gazette make such incidental, consequential and supplemental provisions as may be necessary or expedient for giving full effect to any assignment of subjects and functions.

In this case, Gazette Notifications made by virtue of this provision have been produced, indicating the functions of the Ministry of Finance. According to these documents, P153 and P154, the previous assignments made by the Prime Minister have been cancelled and the Minister of Finance is assigned, inter alia, the following subjects : Control of and sanctions for expenditure, including refunds from revenues, irregularities, losses, write offs, waivers and surcharges ; purchase of stores and equipment, *including* procedure relating to requisitions, indents, tenders and contracts ; and *ex gratia* payments to private parties.

The appellant submits that this assignment of functions is sufficient to cover a decision by the Minister to pay a sum of Rs. 1,000,000 in settlement of a contract as well as a decision to waive prescription of a contract.

It seems clear that contracts of this nature do not fall within the subjects so assigned to the Minister of Finance. This is not a matter of " control of expenditure " nor is it a sanction of expenditure incurred or to be incurred by some other authority. These are the controlling words governing the next items from " refunds " to " surcharges ", including the word " waivers ". The next category is purchase of stores and equipment. This is not a case of purchase of stores or equipment, and since these words govern the other categories from " requisitions " to " contracts " there is again no applicability of any of these items to the present case. As regards " *ex gratia* compensation to private parties " it is patently clear as will presently be seen, that at the very minimum a promise by a Cabinet Minister to make an *ex gratia* payment of the order of a million rupees requires the approval of Parliament or at the very least of the Cabinet.

Furthermore the lack of seriousness of the promise made can be gathered from the conduct of the Minister himself. He has taken no steps to seek Cabinet approval or to go before the House and obtain its approval to this large and unusual item of expenditure.

It is to be noted also that this particular transaction does not fall within the day to day administration of the departments working under the Minister but is one of a nature so unusual that quite apart from the magnitude of the payment involved, it is clear that the Minister was under a duty to seek Cabinet authority. Moreover the proposed payment involved a question of principle, namely whether Government was accepting liability to compensate those who could not dispose of their stocks owing to the embargo on exports. The financial implications of such a decision were in no way limited to the immediate case of the plaintiff.

The principle of seeking Parliamentary approval for important decisions and for those involving large sums of expenditure seems well established. As will be seen presently the expenditure involved did not come within the estimates approved by Parliament. This was thus a new kind of expenditure which Parliament had not contemplated.

Jennings while examining the powers of the Treasury over Finance has noted that " Proposals which involve substantial increases in expenditure, immediately or contingently, are obviously of such an order of magnitude that they require Cabinet sanction[1] ". He notes also that " The Treasury would not be prepared to allow an old sub-head to be exceeded or a new sub-head to be opened if they thought the expenditure in question either from its amount or from its nature was such that Parliament ought to have cognizance of it before it was spent. "[2] In the present case these tests of amount and nature point very strongly to the need for Parliamentary cognizance of the proposed expenditure. The sum was large enough and the circumstances in which the Treasury was allegedly being committed to pay this sum not legally due, were so altogether unusual, that one can have little hesitation in concluding that Parliamentary authorisation was required.

On this point the evidence of Mr. de Zoysa is specifically to the effect that he had not consulted the Cabinet about this matter. He expressed the view that this was a claim against Government and would be a matter for the Minister of Finance in consultation with the other departments concerned.

All this would show then that the requirement of authorisation by the responsible Ministers of the Crown, the second requirement stipulated by Evatt J. is not present in regard to the contract alleged by the plaintiff, for the responsible Ministers of the Crown in relation to a contract of this nature would appear to be the Cabinet as a whole and not a single Minister acting on his own responsibility.

The third of the heads specified by Evatt J. now calls for more detailed consideration.

Parliamentary control of finance is one of the important principles of our Constitution and has been a tenet of English constitutional law at any rate since the Revolution of 1688. No Minister of the Crown has authority in his own right to commit the public revenue to a sum not covered or contemplated by an existing vote.

Article 67 of the Ceylon Constitution (Order-in-Council) provides that no sum shall be withdrawn from the consolidated fund except under the authority of a warrant under the hand of the Minister of Finance,

[1] *Cabinet Government, 3rd ed. p. 152.*

[2] *Ibid p. 167 citing the Epitome of the Reports from Select Committees of Public Accounts.*

and sub-section (2) goes on to provide that no such warrant shall be issued unless the sum has, by resolution of the House of Representatives or by any law, been granted for a specific public service for the financial year during which the withdrawal is to take place or is otherwise lawfully charged on the consolidated fund. The decision, therefore, as to whether a sum not provided for in the estimates is to be withdrawn from the consolidated fund for payment of such a claim, is not a decision which the Minister of Finance could make on his own initiative, but requires the consent of the House of Representatives. In this case the proposed settlement or waiver related to sums of money running to several lakhs of rupees, and it can scarcely be contended that any Minister of the Crown can by reason of his own decision on the matter, charge the public funds with an expenditure of this magnitude which has not been authorised by Parliament.

The estimates of the Government of Ceylon for some years have been produced in evidence. The earlier estimates for 1947–48 (P151) and for 1948–49 (P152) show only a nominal sum of Rs. 100 as a token vote for the running expenses of a steel rolling factory, and a sum of Rs. 50,000 for the establishment of a steel factory. So also do P150 for 1949-50, P147 for 1950-51, P148 for 1951–52 and P149 for 1952–53. P143 for 1958–59 shows an estimated expenditure up to September 30, 1959, of Rs. 1,600,000 on account of preliminary expenditure and contribution to initial capital of the corporation for the steel rolling project. The provision for the year 1959–60 (P144) shows an estimated expenditure up to September 30, 1959 of Rs. 1,600,000. So also the estimates for 1960-61 (P145) and for 1962–63 (P146) show provisions for expenditure under similar heads. Nowhere has there been a vote by Parliament for the purchase of steel scrap.

When the token vote in earlier years provided a sum of Rs. 100 as "running expenses" for a steel factory, which had not yet been constructed, it would be a straining of language to say that the acquisition of millions of rupees worth of raw materials in contemplation of the future commencement of the factory, comes within that head. Moreover, by the time the alleged promise was given in the year 1958, this token vote had apparently lapsed. It is indeed true that under the authority of a token vote there had been a practice with regard to advance accounts to spend large sums of money[1]. Such a practice however, if it existed was an illegal one even from the Treasury point of view, as is borne out by the evidence of the writer of the work just referred to, who, giving evidence as a Treasury expert before the Public Accounts Committee on August 18, 1961, stated that the practice of exceeding the advance account limits was illegal and that the Attorney-General had advised that a two thirds majority of Parliament was necessary to legalise such a practice.[2]

[1] *Vide C. Balasingham, Parliamentary Control of Finance, p. 39.*

[2] *Vide Balasingham, ibid, Appendix I, p. 56.*

Again the provision of such sums as Rs. 1,600,000 could not cover the purchase of raw materials for the factory, but was for preliminary expenditure for the factory and a contribution towards the initial capital of the Corporation. The general principle seems to be clear that although details of expenditure may not be specified in a vote, and to that extent the Executive may spend such sum at discretion, still such expenditure must be restricted to "the four corners of the vote"[1]. Consequently if in this case the Minister promised on behalf of the Crown to pay such a sum or to waive prescription regarding such a claim, it was illegal for the Minister to commit the public revenue to this expenditure, even if there had been a token vote during the relevant period.

It has been submitted as a further argument against the validity of such a contract that it would appear to be a settled principle that a government contract involving the payment of money by the Crown requires an express appropriation by Parliament of funds for the purposes of the contract. At one time there was ample authority in support of such a proposition, for it was carried by all the text books, with a variety of reasons adduced in support. Thus Professor Wade[2] and Halsbury[3] based the principle on the implied condition that the obligation is dependent on the supply of funds by Parliament; Keir and Lawson, on the incapacity of the Crown to contract without Parliamentary approval[4] and Berriedale Keith, on reasons of public policy[5]. There is authority to the same effect in Anson[6].

Despite this apparently unanimous view which prevailed some years ago, it would appear that in recent times considerable doubt has been cast on it[7]. The principle, thought to be based on the decision of Shee J. in *Churchward v. R.*[8], was seriously doubted by the High Court of Australia in *New South Wales v. Bardolph*[9] already referred to. The more recent text writers seem agreed in doubting the principle. Thus Garner[10] considers it "doubtful whether such an artificial principle would be accepted by the courts today unless a term to that effect could be read into the contract in the particular case" and Mitchell[11] is to the same effect. The third edition of Halsbury likewise departs from the view expressed in the second edition and states that: "The considered opinion of a powerful court" in *New South Wales v. Bardolph* should prevail

[1] *Durrell, Parliamentary Grants, cols. 297–7.*
[2] *Appendix to Dicey; The Law of the Constitution, 9th ed., p. 528.*
[3] *2nd ed. Vol. VI, p. 488.*
[4] *Cases in Constitutional Law, 3rd ed., p. 220.*
[5] *The Constitutional Law of the British Dominions, p. 387.*
[6] *Law and Customs of the Constitution, 4th ed., Vol. 11, part II, p. 184.*
[7] *Mitchell, The Contracts of Public Authorities, pp. 71-2.*
[8] *(1865) L. R. 1 Q. B. 173 at 209.*
[9] *(1934) 52 Com. L. R. 455.*
[10] *Administrative Law, pp. 218–9.*
[11] *The Contracts of Public Authorities.*

against the contrary view[1]. Street likewise[2] states that it is plain that *Churchward's case* appears to have been misunderstood and that "the other authorities alleged to 'confirm the decision' in *Churchward v. R.* are equally flimsy props for the statements of law expressed in the text books." [3]

Viscount Haldane in *Commonwealth of Australia v. Kidman*, when considering an application for leave to appeal to the Privy Council observed[4] that the Governor-General contracting on behalf of the Crown "was presumed only to bind the funds which might or might not be appropriated by Parliament to answer the contract, and if they were not, that did not make the contract null and ultra vires; it made it not enforceable because there was no *res* against which to enforce it."

These considerations suffice to show that the lack of necessary funds does not make the contract invalid as the Crown has suggested, but, as indicated in *New South Wales v. Bardolph*, that the question of enforceability is another matter, and that the lack of funds, as in this case, would appear to point to unenforceability rather than invalidity.

Not one of the three tests formulated by Evatt J., we see then, is satisfied in the present case. The lack of the first two requirements would in any event make the contract invalid while the lack of the third would make it unenforceable.

For all these reasons I conclude that the contract on which the plaintiff relies is invalid and that even if there had been a valid contract, it would be unenforceable against the Crown.

It is pertinent also to make a few further observations relating to the manner in which this alleged contract was entered into. The allocation of functions among the Ministers means ordinarily that the Minister is the authority vested with the right to control the matters so entrusted to him and therefore to make policy decisions regarding them. The decision once made, ordinarily falls for its physical implementation within the province of officials, whose duty it is to implement the decisions of the Minister. If for example it is decided to purchase certain stores or equipment one would be surprised indeed if the purchases were made by the Minister himself. Likewise it is not ordinarily to be expected that a Minister himself, beyond sanctioning a contract with a private citizen, would enter into it himself, for there are the proper officials for performing this function. The Parliamentary system functions in fact on the principle that, the policy decisions once taken, their implementation belongs to the administrative officials concerned.

[1] *3rd ed., Vol. 7, p. 252 note q.*

[2] *Op. cit p. 91.*

[3] *At p. 87.*

[4] *(1926) 32 A. L. R. 1 at 2–3.*

When a Minister makes a decision to waive prescription or to pay a sum of money, that decision would, if the Minister has authority in that regard, be a decision of the Government, pursuant to which a contract would be made in the usual way between the Crown and the citizen. This contract would ordinarily be entered into by officials carrying out the directives of the Minister. The informal communication of that decision by the Minister to the citizen concerned is however far different from the making of a binding contract between the Crown and the citizen. Far less can the Crown be considered bound when the Minister's decision is of the altogether unusual nature we meet with in this case. It is well recognised that although there are no legal restrictions on the contents of Government contracts, the Government generally contracts only on the basis of certain fixed standard terms and conditions [1]. When therefore a contract of such an altogether unusual nature is alleged and sued upon, the plaintiff would need specially satisfactory proof that the contract has been entered into in such a way as to bind the Crown.

The usual indicia of this, namely a contract formally entered into through officers of the Crown specially or generally authorised for that purpose, are altogether lacking in the present case.

In this case, had such a contract been made by the appropriate official or officials, Mr. de Zoysa as Minister of Finance was apparently quite clearly prepared to authorise it. One would however, expect such contract to be made in the usual way in the first instance, before it attracts validity either prospectively or retrospectively, from the Minister's authorisation, and we have none such here.

If the conduct of the Minister in this case could be relied upon as constituting a contract binding on the Crown, there would indeed be the gravest danger of the Government being sought to be held contractually liable on the basis of informal discussions had with and assurances given by Ministers.

It is pertinent also to observe that while policy decisions fall within the purview of the Minister, financial accountability falls upon his officials. A Head of Department is an accounting officer and the Permanent Secretary the chief accounting officer of a Ministry. When the Auditor-General examines accounts and reports to the Public Accounts Committee, it is the accounting officer who is called upon to explain the expenditure before the Public Accounts Committee. If there is an irregularity in expenditure in that a sum not voted by Parliament is expended, it is the accounting officer who is liable to a surcharge and the fact that the Minister has ordered the expenditure without Parliamentary sanction is no answer to the irregularity. Even if the Minister had ordered payment of this sum without authority, it follows that an accounting officer who paid out such sum did so at his peril.

[1] *Street, Governmental Liability, p. 99.*

It has been urged, again, that even if Mr. de Zoysa did not have actual authority to bind the Crown he had ostensible authority to do so, inasmuch as he apparently held himself out to the plaintiff as having such authority.

Now in the field of agency, in so far as it concerns contracts seeking to impose liability upon the Crown, the common law doctrine that the agent need have only ostensible authority does not apply, and his authority must be actual. There is clear authority to this effect in American law [1] but there would appear to be a dearth of authority in English law [2]. In our law however there is now clear authority to this effect.

I should refer first to the decision of the Privy Council in *Attorney-General v. A. D. Silva* [3]. Dealing with a contention on behalf of the plaintiff that the Principal Collector of Customs had represented to the public that certain goods were saleable, their Lordships observed that in advertising the goods for sale, the Principal Collector of Customs no doubt represented to the public that the goods were saleable, but the question was whether this act of the Principal Collector could be said to be an act of the Crown. It was argued that by reason of the fact that the Principal Collector had been appointed to his office under the Customs Ordinance and was the proper officer to administer it, he must be regarded as having had ostensible authority on behalf of the Crown to represent to the public that goods advertised for sale under the Customs Ordinance were in fact saleable under that Ordinance. If so, although the goods were in fact not saleable under the Ordinance it was submitted that the contract was binding on the Crown. Their Lordships did not regard the Principal Collector as having any such authority. In terms equally applicable to the case we are considering, their Lordships observed that no public officer unless he possesses some special power, can hold out on behalf of the Crown that he or some other public officer has the right to enter into a contract on behalf of the Crown when in fact no such right exists. In so far as it is sought to contend that the Minister concerned had held out that he had authority to enter into this contract on behalf of the Crown, the same considerations apply.

Referring to the hardships that might be caused to the citizen by such a rule, their Lordships further observed in *Attorney-General v. A. D. Silva* that the subject derives benefits sometimes directly and sometimes indirectly from property vested in the Crown, and that its proper protection was necessary in the interest of the subject even though it may cause hardship to an individual. The same consideration applies to the protection of the public funds.

[1] *Whiteside v. U. S. (1876) 93 U. S. 247 at 256.*
[2] *Street, Governmental Liability, p. 84.*
[3] *(1953) 54 N. L. R. 529 at 536.*

Wijayasooriya v. Attorney-General [1], another decision of Their Lordships, stresses that if a subject wrongly assumes that the person he is dealing with has a wider authority than in fact he had, he acts at his peril. Applying even this principle, one sees that no member of the public could reasonably believe that a Minister of the Crown has unlimited authority to contract on behalf of the Crown. He may have wide authority, but his contracting powers are limited and his contractual power is not co-equal with that of the Government. Knowing that his contracting powers are limited, a member of the public, if he were relying on an act of such party, should have ascertained whether or not that act was authorised. If the act was not authorised, then it could not be held to be such as would bind the Crown or give rise to any estoppel.

For all these reasons then, the plaintiff fails to establish any valid or enforceable contract against the Crown as urged on his behalf in the second main contention urged before this court.

I proceed now to examine the plaintiff's third proposition, that there was an agreement by the Crown not to plead prescription and that for this reason it is now not open to the Crown to take up this plea in its answer.

The basic submission on this matter is that the Minister of Finance on the 29th of August 1958 gave a firm undertaking to the plaintiff amounting to a serious and deliberate promise which is binding in law not to plead prescription. The plaintiff's case is that in so doing the Minister of Finance acted for and on behalf of the Government of Ceylon and with the consent and concurrence of the Attorney-General. This representation, according to the plaintiff, was acted upon by him to his detriment, and on this basis it is pleaded alternatively that the defendant is estopped from now asserting prescription.

Agreements not to plead prescription are not contrary to public policy and would be binding both under English and Roman-Dutch law. Under the former system consideration would be necessary [2] and under Roman-Dutch law such an agreement would be valid and binding if seriously and deliberately made.

However in this case the real difficulty arises not in connection with the legal efficacy of such an agreement, but in connection with the authority of the Minister of Finance, Mr. Stanley de Zoysa, to enter into such an agreement on behalf of the Crown. The Crown submits that he did not have such authority and has urged, further, that whatever the powers of the Minister, still the authority in whom the ultimate decision rested was the Attorney-General, who represents the Crown in litigation. A consideration of these legal questions necessitates a preliminary examination of the somewhat extraordinary evidence placed before

[1] *(1950) 51 N. L. R. 361.*

[2] *Chitty, Contracts, 22nd ed. S. 1521; Franks, Limitation, pp. 19-20.*

court in this connection. The parties being at variance in their interpretation of this evidence, it is necessary to refer to it in some detail.

The main item of evidence in support of the plaintiff's case regarding a waiver of prescription is the document P2, a letter of 29th August, 1958, to the plaintiff by Mr. Stanley de Zoysa, the Minister of Finance, reading in these terms : " This is to confirm the information I conveyed to you at our interview this afternoon. I have discussed with the Attorney-General the question of prescription as regards your claim. The Attorney-General agrees that, in view of the Government's delay in disposing of this matter, Government should not, and will not, if the question arises, raise the question of prescription in this regard."

The circumstances in which this letter was obtained have been described both by the plaintiff and Mr. de Zoysa. The plaintiff stated that in view of the discussions which he had had with the Minister of Finance and the indication that he was prepared to initiate steps towards the settlement of the claims out of court, he, the plaintiff, had been advised to take precautions safeguarding his position, lest prescription should run against him. For that reason and purely as a precaution, he had mentioned the question of prescription to the Minister. As a result of his representations to the Minister, the Minister spoke to the Attorney-General over the telephone in his presence and the letter P2 was given to him. This letter, typed then and there by the Minister's confidential secretary, was handed to the plaintiff by the Minister, who left the Island the next day on official business.

The plaintiff also states that throughout 1958 and 1959, at all the discussions he had at the Treasury, the Ministry of Finance and the Ministry of Industries, the question of prescription was never raised, and that in view of the Minister's indication that he would have the claim reported on by his Parliamentary Secretary, the plaintiff felt that there was no need for precipitate action.

Mr. de Zoysa ceased to be Minister of Finance in April 1960, and the plaintiff contends that thereafter the helpful attitude of Treasury officials towards him was markedly changed. He was perturbed to discover that the file copy of P2 was missing and that the Treasury would not take up a definite position as to whether they were denying this document completely or whether they were suggesting that it was fictitiously dated and given after Mr. de Zoysa ceased to be Minister. In any event, the Treasury would not commit itself to a decision regarding this letter. The Treasury officials kept putting him off from interviews and he was able to get no information and make no headway in regard to his claim.

In view of this intransigent attitude regarding his claim, he wrote a letter on 5th April, 1960, to the Deputy Secretary to the Treasury stating, with reference to the Finance Minister's letter of 29.8.58 that, " undoubtedly, the Minister had in mind that the Honourable Attorney-General would honour his own pledge in this matter but as I have no such confirmation, as it would be preferable to have in my hands, I request you to please take such steps as you deem necessary to secure for me the confirmation of the Attorney-General."

The same letter refers to the circumstance that no file copy of the letter of 29.8.58 could apparently be traced in the Treasury files or in the Ministry files, and observes that this was the second occasion when vital documents had been found missing from the relevant files since February, 1959.

Referring to a conference with the Deputy Secretary on 4th April 1960, the plaintiff indicated that the original of the letter of 29.8.58 had been produced at the conference on that date together with its original envelope. This was a precaution apparently taken by the plaintiff lest a denial of this letter should emanate from official sources. All that the plaintiff received in reply to this letter P76 was a curt communication P78 sent on behalf of the Controller of Finance acknowledging receipt of the letter together with the enclosure. Thereafter, the plaintiff wrote P79 on 29th April 1960 in order to remove any doubts that might exist regarding the authenticity of the letter of 29th August 1958 in view of its absence from the files. He requested the Secretary to the Treasury to ask the Attorney-General to state whether or not he admitted the telephone conversation to which Mr. de Zoysa alluded in that letter, and to inform him with the least possible delay what exactly was the Government's position on the question of prescription.

For the purpose of record, the letter repeated that Mr. de Zoysa had stated "No self-respecting government nor its Attorney-General would defend itself behind a plea of prescription in a case like this". The letter also requested that Mr. de Zoysa's confirmation or denial of this and other facts be sought and that the writer should be informed in the event of a denial by Mr. de Zoysa of such a position.

On the 23rd of May, the plaintiff had an interview with the Secretary to the Treasury and by his letter P82 on 25th May, he placed on record his version of that interview. In P82 the plaintiff repeats that he had no reason whatsoever to doubt the bona fides of Mr. Stanley de Zoysa's conversation with the Attorney-General and that "naturally I should have preferred to have such confirmation with me, but the lack of one hardly matters in the absence of a denial". Neither P79 nor P82 was denied by the recipients or challenged in regard to the accuracy of its contents.

Mr. Stanley de Zoysa himself stated in evidence that the plaintiff complained of delay in the settlement of his claim and on the eve of Mr. de Zoysa's leaving Ceylon for a conference, the question of delay was brought to his notice.

Mr. de Zoysa went on to say that the plaintiff requested a letter as a safeguard, and when shown P2, acknowledged that it was his letter given to the plaintiff in these circumstances. He also stated that he had informed Mr. Rowlands that the question of prescription should not worry him as the plea of prescription would never be taken.

The plaintiff also called his Proctor Mr. Modder, who stated that at the time he was advising the plaintiff there was no question of prescription as the claims were not prescribed, but he advised the plaintiff not to lose sight of the fact that his claims might become prescribed and that it would be wise to take some precautions. He also stated that the plaintiff showed him a letter of Mr. Stanley de Zoysa undertaking not to take any plea of prescription in regard to the matters pending between the plaintiff and the Crown.

Upon all this material, there can be no doubt whatsoever about the authenticity of the letter P2, and despite the reluctance of the Treasury to admit these facts it is clear that the document was one given by Mr. Stanley de Zoysa while he held office as Minister of Finance.

What, then, follows from the letter P2 ?

The first question is whether the document proves that the Attorney-General had agreed that the plea should be waived.

Now, it would appear that Mr. de Zoysa did truly believe at the time he gave the letter P2, that the plea of prescription would not be taken and that the Attorney-General had concurred in this view. It has not been suggested to Mr. de Zoysa that he misled or intended to mislead the plaintiff. It is clear therefore that whatever he recorded in the document P2 was genuinely believed by him to be the position at the time he wrote it.

We now come to a conflict between the plaintiff and the Crown regarding the conversation between the Minister and the Attorney-General.

Mr. de Zoysa has stated that, feeling that it would be unconscionable and immoral if the plaintiff were put into a situation of having to go to court and be time barred by reason of delays of officials, he telephoned the Attorney-General and informed him that it was his (Mr. de Zoysa's) view that if the plaintiff had to go to court, it would be immoral for the Government to take the plea of prescription. The Attorney-General replied that he should be free to take any legal plea that might be available to him, but Mr. de Zoysa's view was that any Government should not behave in that way. He therefore told the Attorney-General that he did not wish him to take the plea and that those were his instructions, adding that the latter was only the lawyer and the Government was the litigant. The conversation appears according to Mr. de Zoysa to have ended on the note of an abrupt comment by Mr. de Zoysa to the Attorney-General that he had better carry out his instructions.

Mr. de Zoysa did not make a minute of the conversation on the Treasury file. He himself did not put the minute on a more official basis, expecting that the Attorney-General would make a minute of the conversation, nor did he confirm the conversation in writing or give any instructions to the Attorney-General in writing. He gave verbal instructions and he thought it was " up to the Attorney-General " to make a minute stating that the Minister had given him oral instructions.

At the argument before us, there were by consent marked in evidence two minutes of the Attorney-General relating to this telephone conversation. These do not purport to be a full record of the conversation with the Minister but are apparently minutes by the Attorney-General for the guidance of his subordinate officers. One of these, X2 of 9.9.58, states that no plea of prescription is to be taken in this case without the specific approval of the Attorney-General. It is not, it is to be observed, a minute to the effect that the plea of prescription is not be taken at all. The other minute, X1 of 2.5.60, was made when Treasury officials saw the Attorney-General in connection with the plaintiff's claim. When informed by these officials that the Minister had written to the plaintiff stating that he had agreed to waive the plea of prescription, the Attorney-General informed them that he had informed the Minister that such a plea would not be taken without the former's express approval, but the Attorney-General made it quite plain that he had not stated that he would not take the plea. The question whether the plea should or should not be taken had not yet been decided by the Attorney-General.

We have also the letter P132 by the Crown Proctor to the plaintiff which specifically states the position of the Attorney-General, namely, that although Mr. de Zoysa did discuss the matter with him over the telephone, the Attorney-General at no time undertook or agreed that he or his successors in office would not take the plea of prescription.

All this makes it perfectly plain that the Attorney-General himself had at no stage unequivocally agreed to waive prescription, although Mr. de Zoysa appears to have had this impression of their conversation.

One can only conclude that the Minister misunderstood the Attorney-General. The Minister appears to have been genuinely under the impression that the Attorney-General had agreed that prescription was not to be taken, whereas what in fact the Attorney-General said and intended was that prescription would not be taken without express reference to him. I proceed then, upon this basis.

I do not agree with the submission that inasmuch as a clear decision had been taken by the Minister that prescription was not to be pleaded and that decision had been communicated to the Attorney-General and also to the plaintiff, the Crown is now precluded from taking up this plea. As has been shown already, the Minister did not have authority to bind the Crown by contract not to take the plea. The plea was therefore one which remained open to the Crown and it was left to the Attorney-General as legal adviser and representative of the Crown to decide whether or not to take the plea. He was certainly not precluded from doing so as he had not in any way agreed to waive the plea.

It seems perfectly clear then that the good intentions of Mr. de Zoysa were insufficient, however specifically they might have been expressed, to bind the Crown in such a manner as to prevent it from taking this plea. Had Mr. de Zoysa been the contracting party, I think his letter P2 would amount to an expression of intention sufficiently serious and deliberate to amount to a waiver of the plea. In the present case however, it is not Mr. de Zoysa but the Government of Ceylon which is the party to the contract, and an expression on the part of Mr. de Zoysa that it would be immoral to take such a plea and his clearly genuine intention that the plea should not be taken, would not suffice to bind the Crown.

Having thus reached the conclusion that the Crown was not in law precluded from taking the plea of prescription, we must now proceed to examine whether the plaintiff's cause of action was in fact prescribed.

The plaintiff came into court on 28th August 1961.

According to the plaintiff the final refusal of the Crown to accept his claim is contained in the letter P87 of 20th May 1961 written to the plaintiff by the Controller of Finance. This letter states that government had examined his claims, that no sums of money were due to him and that government therefore considered that there was no purpose in referring the matter to arbitration.

This letter is relied upon as the final refusal, so as to show that the plaintiff's claim is not prescribed in any event.

It is significant however that the plaintiff has served on the Crown two notices of action under section 461 of the Civil Procedure Code, which have been marked P60 of 10th July 1958 and D1 of 10th July 1961. In the first of these he states that as the Minister of Industries had not taken delivery of his ferrous scrap and had not paid him the value of the same, he had suffered loss and damage in a sum of Rs. 2,349,697.

The second notice, a more detailed one, recites two causes of action and refers to a repudiation by the Crown in or about May 1961, of an agreement made in June/August 1959 to determine all disputes by voluntary arbitration.

It will be seen that the first of these notices is more than three years anterior to the institution of action. What had happend thereafter is that a protracted correspondence and negotiation ensued in an attempt by the plaintiff to have a reconsideration of the decision which the plaintiff had himself considered to be sufficiently final to warrant his taking action upon it.

It seems clear that in the mind of the plaintiff himself there had been a final refusal of his claim by the time he wrote his first notice P60 of 10th July 1958. Indeed he sent a copy of this notice to the Minister of Finance along with the notice itself. The accompanying letter P59 of 10th July 1958 also serves to indicate the plaintiff's belief that there had been a final refusal of his claim and even at that stage he took the opportunity to urge upon the Minister that his claim should not be legally contested but honourably settled. This and further attempts by the plaintiff at making appeals to the authorities no doubt resulted in ensuing correspondence, but this did not take away from the finality of the refusal that had already been made earlier—a refusal which the plaintiff too understood as being sufficiently definitive to require him to seek his legal remedy. This latter correspondence cannot now be relied upon as making out a fresh refusal and creating a fresh cause of action. After a final refusal one may otherwise be able to keep adressing appeals to the persons concerned, some of which may draw replies, and then rely upon these replies in order to delay the commencement of the prescriptive period. I do not think such a course is permissible.

It is thus evident that the plaintiff's cause of action had arisen before *10th July 1958* when he sent his first notice P60 under section 461 of the Civil Procedure Code.

It is pertinent also to note that the notice P133 issued on 1st May 1953 by the Government Agent to the owner of the land whereon the metal was stacked, indicated that by that date Government was no longer interested in the scrap. Indeed the World Bank Report had been issued in September 1952 (P47) and any ambiguity as to the date of the final decision of the Government not to proceed with the steel factory project is removed when one sees that P142, the Gazette Notification lifting the export ban, was in September 1953. A period of nearly five years of negotiation ensued before the plaintiff made up his mind that with the final refusal of Government to purchase his scrap, the time had come for him to go to court.

It should also be noted that although a series of letters are relied upon by the plaintiff in order to establish the contract he alleges, these letters do not form the contract in question, but in association with the oral evidence, are relied upon to prove the contract alleged. The contract alleged is thus an unwritten contract, and the plaintiff's cause of action would in any event be prescribed three years from the date of breach. At the latest this would be three years from 10th July 1958 when according to the plaintiff's own understanding of the matter, his cause of action had accrued.

For these reasons I hold that the plaintiff's claim is prescribed.

The plaintiff has made the alternative submission that there had been a promise by the Government to refer the matter to arbitration and that his cause of action arose only upon its failure to implement that promise.

I must for this purpose deal with another series of letters leading up to this matter. This correspondence indicates how the question of arbitration came to be mooted, at a point of time subsequent to the accrual of the plaintiff's cause of action. It also shows that the plaintiff, having received a firm refusal, was attempting, as no doubt a person placed in his circumstances would have, to obtain a sympathetic consideration of his case on an equitable, rather than a legal basis.

By P67 of 17.1.59 addressed by the plaintiff to the Junior Minister of Finance (which letter was after the plaintiff's first notice dated 10th July 1958, under section 461 of the Civil Procedure Code) the plaintiff wrote that at an interview he had had with the Treasury officials, he was required to adduce evidence of the agreement by which he alleged that the Government undertook to purchase his scrap iron. He states that he had already dealt with this matter fully and suggests that a conference on this question would be redundant and should be dispensed with, and requests the recipient to dispose of this matter before the end of the month. P68 followed within a month, on 14th February 1959, and was written to the Permanent Secretary to the Ministry of Industries. This referred to the interviews had with the latter on 3rd February and the promise by the latter to communicate with the plaintiff within ten days. This communication was not received and hence the plaintiff addressed this letter to the official in question stating inter alia, " If the Government has now, as it appears to me, accepted in principle the payment of compensation in this matter, may I respectfully urge you, Sir, in view of the delay in disposing of this matter, that the Government *in equity* may consider the interim payment of say, 25 per cent of the value of my claim as an earnest of its position pending further consideration, if need be, of the full quantum of compensation that will be eventually paid."

There was no response to this communication, but the plaintiff on the following day wrote a letter to the Minister of Finance referring to his communication to the Permanent Secretary to the Ministry of Industries on 14th February. In this letter the plaintiff states : " May I respectfully request your attention, Sir, to the penultimate paragraph of that letter in which I have taken the liberty to urge that an interim payment at this stage might be a gesture worthy of the Government's sympathetic consideration in view of the immense hardship this matter has caused over the past years." A formal letter P70 was received in reply acknowledging receipt and stating in stereotyped fashion " that the matter is receiving attention ". Eight months later on 7th October 1959, P71 was received from the Deputy Secretary to the Treasury, this time in somewhat more hopeful language, saying that the matter was " under active consideration " by the respective Departments in consultation with the Attorney-General. It said the plaintiff would be informed as soon as the arbitration proceedings are to commence.

Steps were thereafter apparently taken towards preparing the matter for arbitration and on 18th November, letter P72 by the Deputy Secretary to the Treasury *states that the terms of reference to arbitration in respect of these and the plaintiff's other claims were in preparation.*

The plaintiff had an interview with Mr. V. M. Peiris of the Treasury on 6th January and by his letter P73 of 7th January confirmed the results of this interview. It shows, inter alia, that the terms of reference to arbitration had not as yet been settled by the Attorney-General to whom these matters had been referred in August, and considers the question whether submissions should not be made to the Attorney-General in connection with this delay.

The plaintiff nominated as his lawyer for drafting the terms of reference to arbitration, Mr. S. P. Amerasingham, Advocate and Mr. Amerasingham duly addressed the Solicitor-General by letter P75 on 25th January 1960 seeking an early interview in order to draft the terms of reference. Apparently the plaintiff's lawyer himself became exasperated at the delays of the Government in finalising this matter and the plaintiff's letter P76 of 5th April 1960 addressed to the Deputy Secretary to the Treasury states that the plaintiff's lawyer had asked to be excused from wasting his time further in this matter "as he complains he has never felt so frustrated as he is in this instance."

There was still delay in deciding the final terms of arbitration, and the plaintiff by letter P77 of 14th April 1960 informed the Deputy Secretary to the Treasury that he had retained Mr. G. E. Chitty, Q.C., in addition to Mr. Amerasingham to represent him at the discussion with the Attorney-General with a view to decide upon the final terms of reference.

From all this the plaintiff derived little satisfaction, receiving the usual type of stereotyped letter P78 of 16th April 1960 from the Controller of Finance formally acknowledging receipt of the letter of 5th April. The plaintiff apparently in exasperation on 29th April 1960 wrote letter P79 to the Secretary to the Treasury requesting an early intimation regarding the Government's position on the question of prescription. The letter goes on to state that Mr. Amerasingham had informed the plaintiff at the end of January that the draft terms of reference to arbitration were well advanced up to a stage when only about two hours of work remained to be done. It was now ten months since the matter was first referred to arbitration and the plaintiff quite justifiably and understandably protested that it was not reasonable that he should be indefinitely delayed in the final disposal of these matters.

By P80 of 7th May 1960 the plaintiff states that he had been told that the Treasury had tentatively nominated an arbitrator and sought to know his name so as to enable the plaintiff to communicate the name of his arbitrator to the Crown.

The plaintiff in fact on 30th May 1960 sent to the Treasury his draft P85 of the agreement to refer the matter to arbitration.

On 20th May 1961 by P87 the plaintiff was informed by the Controller of Finance that his claims had been examined and that there was no purpose in referring the matter to arbitration.

Had this been the position, one does not realise why the officials concerned had been subjecting the plaintiff to the tantalising procedure of holding before him a very real prospect of arbitration on the faith of which he retained lawyers including Queen's Counsel, in order to discuss the terms, drafted documents, and in so many other ways prepared himself for these mutually contemplated proceedings.

This brief recapitulation will suffice to show that the plaintiff was seeking an equitable adjustment of the matter after receiving a *final* repudiation of his legal claim. To the extent that the Crown contemplated arbitration proceedings with a view to an equitable adjustment, the action of the Crown was commendable, but thereafter the indecision which has characterised all its actions in this matter came into play again, and having actively encouraged in the plaintiff's mind the expectation that there would be an arbitration, the Crown *has* belied his expectations once more.

When the letter P87 written by the Controller of Finance is read against the background of P185 of June 2, 1959, the minute of the Deputy Secretary to the Treasury to the same official, it becomes difficult to understand how the writer of P87 believed he could so easily dispose of the matter. I refer to paragraphs 11 and 12 of that minute. Paragraph 11 states that although there is no doubt that the existence of a valid legal contract has not been proved, nevertheless, the writer is inclined to the view that it would not be inappropriate to consider whether the Government is in any way morally obliged to compensate Mr. Rowlands for any loss that he may have incurred in the particular circumstances of this case, as a result of any acts of omission or commission on the part of the Government. " At least this must be in justice granted ", states the minute, " that the Government did not absolutely disabuse Mr. Rowlands' mind of the belief which Mr. Rowlands appears to have entertained, at least at one stage, that the Government was going to buy his scrap—vide his letter of 18th August, 1949. "

Paragraph 12 of that minute states that if it is correct that there is some kind of moral obligation, then the question that would necessarily arise would be the quantum of compensation to be paid to Mr. Rowlands. As regards this, if it was the intention of Government to pursue this aspect of the matter, the writer suggests that the papers may be referred back to him after a further report in consultation with the Chief Valuer.

It is somewhat disconcerting to find that a Government official to whom such a minute had been addressed should find himself able so lightly to dismiss the plaintiff's appeal in the summary terms of the letter P87.

We thus see firstly that the legal claim had long been repudiated when this correspondence started, and secondly that the willingness of Government (although this later proved futile) to consider the question further as a matter of equity, could not delay the commencement of prescription.

Furthermore, in any event, the mere circumstance that parties agree to refer a matter to arbitration and that the arbitration agreement thereafter falls through, does not mean that the commencement of limitation is delayed until the arbitration arrangements break down. The running of time, once commenced, is not interrupted by the preparations for arbitration or by the pendency of a reference. The cause of action has already accrued and indeed it is that which constitutes the subject matter of the proposed reference.

The general principle in English law would appear to be that the period of limitation runs from the date on which the "cause of arbitration" accrued [1]. Adapting this to our law where there is no specific statutory provision dealing with the matter, the period of limitation would run from the date when the cause of action accrued. In England indeed section 27(5) of the Limitation Act provides that where an arbitration proves abortive for certain specified reasons, the court may order that the time lost be excluded in computing the period of limitation for that dispute. We have however in Ceylon no special statutory provision interfering with the normal principles of prescription in this regard.

Consequently although at a stage subsequent to the accrual of the plaintiff's cause of action, arbitration proceedings were mooted and indeed taken up to a certain point, the moment when they eventually proved abortive is not the moment when time begins to run. The fact that arbitration proceedings were contemplated does not therefore help the plaintiff in attempting to take his case out of the operation of the Statute.

I am for these reasons compelled to arrive at the conclusion that the plaintiff's claim on all the alternative bases set forth, must fail.

In view of these findings it does not become necessary to examine in detail the way in which the plaintiff has made up his claim.

Since however the suggestion has been made that the claim is fanciful and not substantiated by facts and figures and since in any event the opinion of this Court may prove useful on the quantum of damages, it is necessary to make a few observations in regard to the computation of the plaintiff's claim.

Briefly the plaintiff's case is that he bought 4,161 vehicles of which 2,489 were at Hendala (vide P6), 818 were at Trincomalee (vide P7) and 854 were at Kirillapone (vide P8). After purchase however, the actual

[1] *Russell on Arbitration, 16th ed. p. 6.*

count revealed 4,814 vehicles, of which 3,100 were at Hendala, 900 at Kirillapone and 804 at Trincomalee. Rabot the personal assistant to the plaintiff states that the first thing he did for the plaintiff was to prepare an inventory of the vehicles in these three depots.

It may be that the discrepancy was due as Sansoni, one of the Managers of the military vehicle break down Depot has said, to vehicles being brought in even after the plaintiff's purchase, although they have not been included in the advice note at the time of taking over.

The plaintiff too has in evidence stated that there were more vehicles in each of the depots than were referred to in the advice note P6, P7 and P8 and that in addition there were also large quantities of loose scrap inside the vehicles.

There is no reason to doubt this evidence of the plaintiff and therefore the total of 4,814 vehicles found in the depots upon a physical count may safely be acted upon.

The quantity of scrap iron available to the plaintiff from this lot of vehicles has been worked out upon what the plaintiff states is a conservative estimate of 4 tons, as being the average tare weight of a vehicle.

On this basis we get approximately 19,000 tons of scrap. To this the plaintiff has added five thousand tons as estimated tonnage to cover loose scrap, having regard to the proportion of loose scrap as compared with the quantity of metal in the vehicles. These figures make up a total of 24,000 tons of scrap. From this the plaintiff has subtracted the sum of four thousand tons as representing material other than ferrous scrap, thus arriving at the figure of 20,000 tons as the opening stock.

Having regard to the scrupulous honesty of the plaintiff as displayed throughout these proceedings and to the fact that his books though available have not been in any way challenged by the Crown, I consider the estimate of 20,000 tons to be a satisfactory basis on which the calculations may be made.

The reduction of these stocks to the form of scrap entailed heavy and expensive work. The plaintiff has stated that the heavy sections of these Army vehicles had to be cut into pieces and this involved the use of oxygen flames. The vehicles had to be dismantled and the parts had to be stacked. The items were so heavy that a large labour force was required. The work involved in transporting the scrap between the depot and the wharfs at Colombo and Trincomalee, required heavy motor transport.

Maintenance was likewise very expensive and has already been discussed.

The plaintiff had also to find the nearest and best available market in India for the sale of ferrous scrap. For these purposes it became necessary for him to undertake several trips to India where he concluded all the essentials for the wholesale disposal of the 20,000 tons of scrap iron which he had in Ceylon. To assist him in these negotiations his assistant Mr. Rabot as well had to fly to India.

It is thus clear that very heavy expenditure was incurred by the plaintiff in connection with this entire matter.

We have it from P162 that 3,606 tons were shipped to India and from P172 that 5,567 tons were sold in Ceylon making a total of 9,172 tons disposed of. Subtracting this from the opening stock of 20,000 tons one is left with a balance stock of somewhat over 10,000 tons.

According to P3A the plaintiff makes a further deduction of over 1,000 tons on account of non-ferrous scrap and motor parts, leaving according to P3A a stock of 8,906 tons undisposed of in his hands.

The average sale price in India was Rs. 287 per ton and the average sale price in Ceylon was Rs. 126. This yields an average sale price of Rs. 207 per ton and on this basis according to P3A if the plaintiff had sold his 8,906 tons he would have realised Rs. 1,843,542. P3A adds on to this the various items of expenditure incurred in connection with 8,906 tons. The sum of Rs. 492,299 which is the principal amount so added appears not unreasonable having regard to the very heavy expenditure which the plaintiff was obliged to incur as already outlined. The other items added are of a comparatively trifling nature and the plaintiff has also reduced from his claim the sum of Rs. 10,000 which he eventually realised upon the sale of his scrap.

Having regard to the plaintiff's evidence and to the availability of his books in court, it can scarcely be said that the sum of Rs. 492,000 incurred for looking after this scrap during a period of three years is excessive. Even if some deduction is to be made on that account, that deduction would be comparatively trifling against the proved value of nearly two million rupees as the sale price of the scrap.

On the basis of this computation the plaintiff assesses his claim at Rs. 2,357,872.

For these reasons I do not think it can fairly be said that this claim is exorbitant or exaggerated as was suggested.

Had the plaintiff succeeded therefore in establishing the causes of action upon which he sued, I do not think that it could fairly be urged against him that the quantum of damages claimed is in any way excessive.

It should also be observed that the plaintiff through his accountant Rajadurai placed before court the result of his inspection of the books of account. Documents P170 to P174 along with the oral testimony of Rajadurai who audited the account books showed the manner of calculation of the figures on which the plaintiff was relying. These figures according to Rajadurai were based upon the plaintiff's books of account which were available in court and had the defendant desired to question the accuracy of Rajadurai's figures or his manner of computation he would no doubt have had the opportunity of doing so. It is not denied by the Crown that the books were available in court. Inasmuch as P170 to P174 appeared to be a summary of the books, I consider that the comment is not available at this stage that the books were not produced. Section 65 (7) of the Evidence Ordinance provides that secondary evidence may be given of the contents of a document when the originals consist of numerous accounts or of documents which cannot conveniently be examined in court and the fact to be proved is the general result of the whole collection. When Mr. Rajadurai's summaries P170 to P174 were sought to be produced and were produced without objection, the Crown could not thereafter take up the position that prejudice had been caused to it by reason of the non-production of the books of account.

The next question is the question of mitigation of damages. I have already referred in another context to the evidence of the many precautions the plaintiff took, as for example greasing the scrap and fencing it all round, so as to prevent corrosion, and to the maintenance expenses which exceeded Rs. 12,000 per month.

I do not think it could fairly be urged that added precautions were necessary on his part. It must be remembered that the scrap was of such extensive proportions that it could not possibly be housed or roofed over. It had necessarily to be left in the open, and scrap iron left in the open for a period of years must necessarily rust and decay. We have the evidence of the plaintiff that although there was a market price of hundreds of rupees per ton which he could have obtained when the iron was in good condition, the best he could do with his stock finally was to sell off the entire lot for a sum of Rs. 10,000.

Another factor to be considered here is the condition report P157 dated 18th May 1953, which shows the value of the lots on which this scrap was stacked. We see from this that at any rate by 1953 this scrap had badly deteriorated, for the report observes that there were large quantities spread over about 75 per cent of the land, estimated at 6,000 tons of useless scrap iron " heavily corroded and in a bad state of deterioration ". The major deterioration of the stocks had already occurred before the breach of contract alleged by the plaintiff and efforts at reducing damages at any stage subsequent to 1953 would not have averted any substantial loss. There is therefore little merit in the submission that the plaintiff could have minimised his loss by selling even at that stage.

I consider that having regard to the steps taken by the plaintiff to protect the property, it cannot be held against the plaintiff that there was any failure on his part to minimise damages.

I have already commented upon the great hardship caused to the plaintiff through no fault of his own but in consequence of changing official policy. I have also referred to the altogether unsatisfactory manner in which the Treasury handled the plaintiff's claim. The learned trial judge has been so struck by these matters that he has observed that " the Government's omission to disabuse the plaintiff's mind with regard to his belief that the Government would buy his scrap iron may give rise to a moral obligation on its part to pay the plaintiff compensation in respect of the acts done by him in the circumstances set out in his evidence. " So also, in regard to the Crown's plea of prescription, he has observed that the delay of the plaintiff to institute this action was due to the negotiations which he was carrying on with the Government. It is true the plaintiff is not entitled in law to avoid the operation of prescription on this basis, but we know as a fact that till a very late stage the plaintiff was actively led to expect a settlement by arbitration. The learned District Judge has consequently expressed strong doubts regarding the propriety of the plea of prescription, " especially in the circumstances of this case, where the delay has been due to negotiations being carried on between the plaintiff and the Government. "

I find myself in agreement with the views expressed by the learned trial judge and am of the view that the circumstances of the case, although they can ground no legal claim, may well have given rise to a moral obligation on the part of the government to reduce the amount of the plaintiff's loss.

I would give expression to these views by awarding the successful defendant no costs either here or in the Court below.

The plaintiff-appellant's appeal is dismissed.

THAMOTHERAM, J.—I agree.

Appeal dismissed.