

## CONSTITUTIONAL PROBLEM IN MALARIA

*National Mosquito Board v. Who* \*

The constitution of Malaria, which is the fundamental law of that state, and that is about as fundamental as you can get, contains the following article: "No person shall be deprived of property save in accordance with law." Last year the Parliament of Malaria passed an Act providing: "Any person may be deprived of property, whether in accordance with law or not." That Act was passed by the ordinary procedure for enacting legislation, which involves counting heads (some of which are attached to bodies) in narrow passage-ways in accordance with a revered custom said to have been brought to Malaria by Simon bin Montfort. In other words, that Act was not passed by the special procedure for amending the constitution.

In a forthcoming volume of the All-Malarial Law Reporter there will appear the very interesting decision of *National Mosquito Board v. Who*. The defendant, Who, was possessed of various devices for inoculation, medication and so on, on his premises in Uttar Horrah, a village near one of Malaria's most attractive beaches. The tourist trade is very important to Malaria's foreign currency reserves, such as they are. Many people come to the area of Uttar Horrah to swim, eat, drink and get sunburned. The sea snakes are an important feature, but they are insignificant compared with the mosquitoes. Their presence is vital to the net profits, the repellent people and other undertakers. The National Mosquito Board, established as a charity to preserve Malaria's greatest friend (not always dumb), feared that Who might immunise visitors or, worse, mosquitoes, to the National Disease. Accordingly, employees of the Board entered Who's premises, seized his devices and caused them to be destroyed.

The action was brought by the Board to recover the cost of that operation under another provision of the constitution which provides that, when property is compulsorily acquired, adequate compensation must be paid. The defendant argued, first, that such compensation ought to be paid to, not by, the person whose property had been compulsorily acquired. Secondly, if that argument failed, that his property had not been compulsorily acquired because the theft by the Board or its employees had vested no title in them and it was still the defendant's property at the time of its destruction. Finally, the defendant appealed to the dirty feet doctrine ("He who comes to

court with dirty feet shall leave them outside") by alleging that the plaintiffs had infringed his constitutional rights by depriving him of property not in accordance with law. As will be seen from the appended judgment, the first two defences were quickly disposed of, but the third led to the creation of some fine Malarial jurisprudence.

Culex J.: "On the first defence I find for the plaintiffs. It is expensive to acquire property and its upkeep is a continuing respon-

\* This hypothetical case is inspired by *Selangor Pilot Association (1946) v. Government of Malaysia* [1977] 1 M.L.J. 133 (P.C.). For a discussion of the case see, Singh, "The Rights of Manufacturers in Malaysia under the Industrial Co-ordination Act 1975" in this issue, *post*, p. 197.

sibility. I can take judicial notice of that because I have got a lot myself. So clearly the acquirer needs compensation.

"There is no merit in the second defence. The Board clearly acquired the goods when they destroyed them, if not earlier, when they stole them (as we used to call it).

"Now I come to the main point of the case: did the Board have dirty feet? I am prepared to assume for the purposes of argument that a board can have feet.

"The defendant has caused me a great deal of inconvenience by referring me to a provision of our constitution, but fortunately there are no reported cases in which it has been considered: "No person shall be deprived of property save in accordance with law." He maintains that breaking and entering and stealing and destruction of his property is not in accordance with law and might even amount to a crime or tort. The Board, however, drew attention to the Finance Act 1976, section 12: "Any person may be deprived of property, whether in accordance with law or not." I do not think I am doing injustice to counsel's complicated argument if I summarise it so as to make it slightly more complicated than he was able to: (1) the Board deprived the defendant of his property; (2) that was not done in accordance with law; (3) it was therefore authorised by section 12; (4) section 12 is a law; (5) therefore Who was deprived in accordance with law; (6) therefore the deprivation was constitutional.

"The defendant carried inconsiderateness to the point of drawing attention to an apparent inconsistency between (2) and (5), above. Clever counsel for the Board was able to deal with that by answering that he would then put the central core of the argument backwards: (5) Who was deprived in accordance with law; because (4) section 12 is a law; which (3) authorises deprivation of property not in accordance with law; so that (2) by not being in accordance with law the deprivation was in accordance with law.

"The defendant asserted that (2), there, did not make sense, and should have come second anyway. Further, he argued that if the deprivation was in accordance with law it was ultra vires that part of section 12 which authorises deprivation not in accordance with law, and that (as the plaintiffs had not argued that it was otherwise in accordance with law) it was therefore not in accordance with law.

"In my opinion there is a presumption of constitutionality which has not been displaced and the Board's feet, if any, are clean.

"I further find that, if I had been required to do so, I would have found that Board's feet are a fiction."

There will probably be an appeal from Culex J.'s decision. As the result will be of tremendous import for the Malarial way of life, it is to be hoped that it will fail or succeed. However, since the appeal lies to the Judicial Committee of His Malarial Majesty's Privy Council, that is not too likely.

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