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vary the decree absolute by striking out that part of it would not now be successful. That being so, there was no reason for the learned Judge to refuse to enforce the order. For these reasons I am of opinion that the appeal fails.

BARTON J. and O'CONNOR J. concurred.

Appeal dismissed.

Solicitor, for the appellant, *P. K. White.*
Solicitor, for the respondent, *H. T. Morgan.*

C. E. W.

[HIGH COURT OF AUSTRALIA.]

THE SYDNEY HARBOUR TRUST COMMISSIONERS . . . . . DEFENDANTS, } APPELLANTS;

AND

JOHN PATRICK RYAN . . . . PLAINTIFF, RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Nov.* 23, 24, 27; *Dec.* 4.

Griffith C.J., Barton and O'Connor JJ.

Master and servant—Action against Sydney Harbour Trust Commissioners—Persons employed at daily or weekly wages—Creation of statutory corporation for public purpose—Department of the Government—Meaning of "employer"—Statute binding Crown—Action against the Crown—Sydney Harbour Trust Act 1900 (*N.S.W.*) (1901, *No.* 1), *sec.* 17—*Employers' Liability Act* 1897 (*N.S.W.*) (*No.* 28), *sec.* 4—*Claims against the Government and Crown Suits Act* 1897 (*N.S.W.*) (*No.* 30).

The Sydney Harbour Trust Commissioners, constituted under the *Sydney Harbour Trust Act* 1900, are the employers of persons engaged by them at

daily or weekly wages, within the meaning of sec. 4 of the *Employers' Liability Act* 1897.

The provisions of the *Employers' Liability Act* 1897 apply to workmen employed by the New South Wales Government.

Decision of the Supreme Court: *In re Ryan*, 11 S.R. (N.S.W.), 33, affirmed.

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APPEAL from the Supreme Court.

The respondent, who had been employed by the appellants as a pantryman, brought an action against the appellants alleging that, while working in connection with the erection of a building, he was injured by the negligence of appellants' foreman and by reason of the defective material used in the construction of the stays of the building, and he claimed compensation for his injuries under the *Employers' Liability Act* 1897. On summons he obtained leave from the Full Court, to which the summons had been referred, under sec. 6 of that Act to proceed with the action notwithstanding that notice had not been given to the appellants in accordance with that Act: *In re Ryan* (1).

From that decision the appellants now by leave appealed to the High Court on the grounds that the Supreme Court was in error in holding that the Sydney Harbour Trust Commissioners are not the Crown, and are "employers," within the meaning of the said Act, and that the Court should have held that the Crown is not bound by the said Act.

Canaway K.C., and *Ackerman*, for the appellants. The appellants, who are the Commissioners appointed under the *Sydney Harbour Trust Act* 1900, are not the respondent's employers. The appellants are a body corporate with powers which are strictly limited by the provisions of the Act. Sec. 17 provides for the appointment of officers and servants by the Governor on the nomination of the Commissioners. The persons so appointed are the servants of the Crown, and are not employés of the Commissioners: *Bainbridge* v. *Postmaster-General* (2). The Commissioners are merely a Department of the Government: *Sydney Harbour Trust Commissioners* v. *Wailes* (3). The provisions of the *Public Service Act* 1895 do not apply to the officers and

(1) 11 S.R. (N.S.W.), 33.
(2) (1906) 1 K.B., 178.
(3) 5 C.L.R., 879.

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servants appointed, but their salaries are charged to the Consolidated Revenue. All sums collected by the Commissioners or on their behalf are paid into the Treasury: sec. 75. By sec. 3 of the *Employers' Liability Act* 1897 an "employer" includes a body of persons, whether corporate or unincorporate, and a corporation sole. The provisions of the Act are made applicable to the Railway Commissioners by the express provisions of the *Railway Act* 1901 (No. 6). There is no such provision in the *Sydney Harbour Trust Act*. The proviso to sec. 17 of that Act, that all appointments at daily or weekly wages shall lie in the sole power of the Commissioners, does not put the persons so appointed in a different category from the officers and servants dealt with in the earlier part of the section: *Mullins* v. *Treasurer of Surrey* (1). When appointed they equally become the servants of the Crown. In every large business some power of appointing subordinates is delegated to the heads of departments, but the persons they appoint are the servants of the employer. In this case the employer is the Crown, whatever may be the method of appointment. The statutory powers of control given to the Commissioners would have been unnecessary if they were intended to be employers.

Assuming that the employés of the Commissioners are the servants of the Crown, the *Employers' Liability Act* 1897 does not bind the Crown: *Ex parte Wiberg* (2). The Crown is not bound by a Statute unless it appears on the face of the Statute that it was intended that the Crown should be bound by it. There is nothing on the face of the Act to show that it was intended to bind the Crown: *Roberts* v. *Ahern* (3); *Cooper* v. *Hawkins* (4); *Ryder* v. *The King* (5); *Dawburn on Employers' Liability and Workmen's Compensation*, 4th ed., p. 61.

[GRIFFITH C.J.—At common law an action of tort cannot be brought against the Crown. Under the *Claims against the Government and Crown Suits Act* 1897 the Crown can be sued for the torts of its servants, and the rights of the parties are substantially the same as in an action of the same kind between subject and subject: *Farnell* v. *Bowman* (6).]

(1) 5 Q.B.D., 170.
(2) 23 W.N. (N.S.W.), 47.
(3) 1 C.L.R., 406.
(4) (1904) 2 K.B., 164.
(5) 9 Can. Ex. Rep., 330.
(6) 12 App. Cas., 643.

The *Employers' Liability Act* merely does away with the defence of common employment in actions brought against persons who are employers under that Act. If that Act applied to the Crown, under sec. 4 (iv.) it would be competent for a jury to say that by-laws made by the Crown were improper. There is nothing to indicate that the Crown was in the contemplation of the legislature when the Act was passed. In the *Workmen's Compensation Act* 1910 the legislature has expressly extended the provisions of the Act to the Crown. If the legislature had intended that the *Employers' Liability Act* should apply to the Crown they would have said so.

Rolin, for the respondent. The object of the legislature in passing the *Sydney Harbour Trust Act* was to appoint a corporate body for the purpose of managing and controlling the affairs of the Port, against whom actions could be brought in the same way as against private individuals engaged in similar operations: *Mersey Docks Trustees* v. *Gibbs* (1); *Arapiles Shire* v. *Board of Land and Works* (2). Under sec. 17 persons engaged at daily or weekly wages are the servants of the Commissioners. The main question for determination is does the *Employers' Liability Act* bind the Crown, and it is submitted that it does. The *Claims against the Government and Crown Suits Act* is a general statutory provision that, for the future, the right of action as between the subject and the Crown shall be the same as between subject and subject: *Farnell* v. *Bowman* (3); *Enever* v. *The King* (4). The effect of that Act was that every right subsequently given to a suitor in an action between subject and subject applied also in an action between a subject and the Crown. The general law being that the Crown is liable to be sued in an action of tort by reason of the *Claims against the Government and Crown Suits Act*, it is for the Crown to show that they are not included in the definition of "employer" under the *Employers' Liability Act*. The effect is that the right of action against a private individual and against the Crown are the same. The *Workmen's Compensation Act* 1910 provides for

(1) L.R. 1 H.L., 93.
(2) 1 C.L.R., 679.
(3) 12 App. Cas., 643.
(4) 3 C.L.R., 969.

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an entirely new cause of action not previously recognized by the law. The action under that Act is not an action of tort in the ordinary sense of the word. It was therefore necessary expressly to provide that it should bind the Crown.

Canaway K.C., in reply.

[Reference was also made to *Ruegg on Employers' Liability and Workmen's Compensation*, 8th ed., p. 70; *Beven on Negligence*, 3rd ed., 725; *Craies on Statutes*, 4th ed., 352; *East London Harbour Board* v. *Caledonia Landing, Shipping and Salvage Co. Ltd.* (1).]

Cur. adv. vult.

The following judgments were read:—

December 4.

GRIFFITH C.J. This is, in form, an appeal from an order of the Supreme Court giving leave to the respondent to proceed with an action against the appellants under the *Employers' Liability Act* 1897 for compensation for injuries sustained by him while in their employ notwithstanding failure to give notice of action within the time limited by that Act. The only question discussed before the Supreme Court, and now sought to be raised by the appeal, was whether such an action can be brought against the appellants. The point is put in two ways; (1) that the relation of employer and workman does not exist between the appellants and workmen employed under them; and (2) that the Crown, and the appellants as representing the Crown, are not bound by the provisions of the *Employers' Liability Act*. If the second point is determined in favour of the respondent, the appellants do not desire to take advantage of the first, which is, however, one of considerable importance.

The answer to it must depend upon the provisions of the Statute, the *Sydney Harbour Trust Act* 1900, by which the appellants are constituted.

The system of creating corporations for the purpose of carrying on operations of a public character is now familiar. The case of *Mersey Docks Trustees* v. *Gibbs* (2) affords a leading instance. The Statutes appointing Railway Commissioners, by whom the

(1) (1908) A.C., 271. (2) L.R. 1 H.L., 93.

Government railways are managed in all the Australian States, afford another familiar instance. One of the objects of such a creation is, in many cases, as pointed out by this Court in the case of *Arapiles Shire* v. *Board of Land and Works* (1), to enable rights and liabilities to be enforced against the Crown in the same way as against individuals engaged in similar enterprises.

By the appellants' Act they are constituted (sec. 5) a body corporate with power to take and hold lands and other property for the purposes of the Act. The bed and shores of Port Jackson and all lands vested in the Crown within the boundaries of the Port, and certain lands resumed, purchased or reclaimed by the Crown in connection with or used for wharfage purposes, together with all lighthouses, lightships, lights, beacons, wharves, engines, dredges, tugs, shipping appliances and certain other property of the Crown are vested in them (sec. 27). It is their duty, *inter alia*, to dredge the Port and keep it fit for navigation, and to keep all public wharves and quays in proper condition (sec. 32). The exclusive control of the port and shipping, and of lighthouses, lightships, buoys, beacons, wharves, docks, piers, jetties, ferries (with one exception), landing-stages, slips and platforms is vested in them (sec. 33). They are authorized to take private lands by resumption or purchase (sec. 37 *et seq.*), and may construct wharves and other structures for the use or convenience of shipping, and do any necessary works for improving and maintaining the condition of the Port (secs. 46, 47). They have, in fact, all such powers as might be expected from the name under which they are incorporated. Sec. 96 makes provision for the service of legal process upon them.

It is obvious that for the discharge of such duties the Commissioners must employ a large number of officers and workmen. Sec. 17 (1) accordingly provides that a secretary and staff of clerks and such other officers and servants as may be considered necessary shall be appointed. But the appointment is to be made by the Governor (*i.e.* the Governor in Council) on the nomination of the Commissioners, and the persons appointed are not to be removed except on their recommendation. When appointed, they

(1) 1 C.L.R., 679.

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are to be subject to the "sole control and governance of the Commissioners." The provisions of the Public Service Acts do not apply to persons so appointed. The sub-section concludes with these words "Provided that all appointments at daily or weekly wages shall lie in the sole power of the Commissioners."

These provisions are analogous in many respects to those of sec. 37 of the *Constitution Act*, which provided that the appointment to all public offices under the Government should be vested in the Governor in Council, with the exception of appointments of officers liable to retire from office on political grounds, which should be vested in the Governor alone, with a provision that the enactment should not extend to minor appointments which by any Act or by order of the Governor in Council were vested in heads of Departments or other officers or persons.

Salaries payable under the Act, and the cost and expense of carrying out its provisions, are to be paid out of moneys voted by Parliament (sec. 45), and all moneys received by the Commissioners are to be paid into the Treasury (sec. 75). Their financial transactions are liable to examination by the Auditor-General (sec. 76). It results from all these provisions that the Sydney Harbour Trust may be regarded, in one sense, as a Department of the Government of New South Wales. But, in another sense, I think that the Commissioners are an independent corporation created for the purposes indicated in the *Arapiles Case* (1).

I think, therefore, that, whatever may be the position of those officers of the Commissioners who, though appointed by the Governor in Council, are subject to the sole control and governance of the Commissioners, the Commissioners are, in point of law as well as in fact, the employers of persons who are in their service at daily or weekly wages. It is admitted that the respondent is such a person.

The substantive enactment of the *Employers' Liability Act* is that in certain cases a workman shall have the same remedies against his employer for compensation for personal injury caused by a fellow-servant as if he had not been engaged in the service of the employer (sec. 4). The term "workman" means a person belonging to one of certain enumerated classes of persons "who

(1) 1 C.L.R., 679.

has entered into or works under a contract with an employer." For the reasons already given I think that the appellants are the employers of the respondent within this definition.

I think, therefore, that the appellants are liable to be sued in this action unless they are protected on the second ground set up.

It is, perhaps, not quite clear that the Commissioners could rely on that point, if my opinion on the first point is correct (see *Cooper* v. *Hawkins* (1)). But I will assume that they could, and will proceed to consider whether the Crown is, as it is said, "bound" by the *Employers' Liability Act.*

The doctrine that the Crown is not bound by a Statute unless specially named or included by necessary implication has been sometimes misunderstood and extended beyond the purposes for which it was laid down. I accept the proposition laid down in *Hardcastle on Statutes* (1st ed.), p. 180 (*Craies*, p. 361): It "does *not* mean that the King, looked upon as a mere individual, may not be in certain cases precluded by Statutes, which do not specially name him 'of such inferior rights as belong indifferently to the King or to a subject, such as the title to an advowson or a landed estate'; what it does mean is that the King cannot in any case whatever be stripped by a Statute, which does not specially name him, of any part of his ancient prerogative, or of those rights which are incommunicable and are appropriated to him as essential to his regal capacity."

It was said by Lord *Coke* in the *Magdalen College Case* (2) that there are three kinds of Statutes which always bind the King without naming him. The second class mentioned comprises Statutes for the suppression of wrong. The King "is the fountain of justice and common right, and the King being God's lieutenant cannot do a wrong: *solum Rex hoc non potest facere, quod non potest injuste agere.* . . . And although a right was remediless, yet the Act which provides a necessary and profitable remedy for the preservation of it, and to suppress wrong, shall bind the King." Accordingly, *Plowden* (*Comm.* 236*b*) says that the *Statute of Merton*, Chapter 5, which enacts that usuries shall not run against any being within age, prevents the King from a usurious doubling of rent against an infant upon default in pay-

(1) (1904) 2 K.B., 164. (2) 11 Rep., 66*b* at p. 72*a*.

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ment, "for although the Statute is general yet the King is bound by it because it is made for the remedy of infants and for the public good."

In *Farnell* v. *Bowman* (1) it was held that an action for a wrong will lie against the Government of New South Wales in any case in which an action would lie against a subject *in consimili casu*. In the opinion of the Judicial Committee it is said (2):—"It must be borne in mind that the local Governments in the Colonies, as pioneers of improvements, are frequently obliged to embark in undertakings which in other countries are left to private enterprise, such, for instance, as the construction of railways, canals, and other works for the construction of which it is necessary to employ many inferior officers and workmen. If, therefore, the maxim that 'the King can do no wrong' were applied to Colonial Governments in the way now contended for by the appellants, it would work much greater hardship than it does in England.

"It appears from the recital in Act 20 Vict. No. 15, that one of the reasons which induced the legislature to pass that Act was that the ordinary remedy by petition of right was of limited operation, and insufficient to meet all cases of disputes and differences which had arisen or might arise between the subjects of Her Majesty the Queen and Her Majesty's local Government in the Colony. It could not, therefore, have been intended to limit the operation of the Act to cases in which the subject had a remedy by petition of right. The very object of the Act was to give a remedy in cases to which a petition of right did not extend. Why, then, should it be supposed that the legislature intended to exclude cases of tort? Justice requires that the subject should have relief against the Colonial Governments for torts as well as in cases of breach of contract or the detention of property wrongfully seized into the hands of the Crown. And when it is found that the Act uses words sufficient to embrace new remedies, it is hard to see why full effect should be denied to them."

Applying the principle thus laid down, I am of opinion that, when the Government of New South Wales engages, either in

(1) 12 App. Cas., 643.

(2) 12 App. Cas., 643, at p. 649.

its own name or through the agency of a corporation created for the purpose, in enterprises which in former times were only carried on by individuals, it is subject to the same liabilities, and is governed by the same laws, to and by which individuals are subject and governed under the same circumstances. In my opinion, therefore, the benefits of the *Employers' Liability Act* extend to workmen employed by the Crown in New South Wales, whether directly or through corporate agents such as the appellants.

The case of *Bainbridge* v. *Postmaster-General* (1) proceeded on the ground that the relationship of master and servant did not exist between the Postmaster-General, although he was a corporation sole for certain purposes, and the subordinate officers of his Department. I have already given my reasons for thinking that it does exist between the appellants and the persons employed by them at daily or weekly wages. That case, therefore, has no application to the present.

I think, therefore, that the appeal fails.

BARTON J. The defendants resisted a summons in the Supreme Court taken out by the plaintiff, now respondent, for leave to proceed, notwithstanding the absence of due notice, in an action against them. The plaintiff seeks to recover, under the *Employers' Liability Act* 1897, compensation for an injury sustained by him while in their employment as a workman for wages paid by them. The summons was referred from Chambers to the Full Court. The Commissioners' resistance was on the sole ground that it would be futile to grant it, first, because, having regard to the construction of the *Sydney Harbour Trust Act*, the plaintiff was not their employé, but the servant of the Crown, who should have been sued through a nominal defendant, and next, because the Crown is not bound by and cannot be sued under the *Employers' Liability Act*, and the Commissioners, as a Department of Government representing the Crown, are entitled to the same immunity. The Full Court overruled both of these objections, and granted the leave sought; the defendants now appeal to this Court.

(1) (1906) 1 K.B., 178.

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On the first point, I think the respondent must be held to be an employé of the appellants. Many provisions of the *Sydney Harbour Trust Act* have already been examined. I will only refer to two or three. The Act abounds with provisions empowering and requiring the Commissioners to execute and maintain extensive works, and to manage and improve the port and harbour of Sydney. All works constructed and carried out under the Act are to be constructed and carried out by the Commissioners (sec. 44). These powers and duties necessitate for their execution not only the making of many contracts, large and small (see sec. 48), but the assistance of a full staff of officers and the employment of numerous workmen. By sec. 17 the secretary, the clerical staff, and the engineers, surveyors, inspectors, accountants, collectors, clerks, rangers, &c., necessary for administration are to be appointed by the Governor on the nomination of the Commissioners, and are not to be removed except on their recommendation, and all of those persons are to be "subject to the sole control and governance" of that body. Thus the Executive cannot of its own volition make any of these appointments, nor can it remove any of the appointees at all unless the Commissioners set it in motion, nor is the Executive or any Minister authorized to interfere at all in the control or discipline of the staff. But as to workmen such as the respondent the Commissioners have even greater power, for the same section concludes with a proviso that "all appointments at daily or weekly wages shall lie in the sole power of the Commissioners." So that neither the Executive nor a Minister can appoint or dismiss a person such as the respondent.

Counsel for the appellant referred to the *Federated Engine-Drivers and Firemen's Association of Australia* v. *Broken Hill Proprietary Co. Ltd.* (1). The matter now under discussion does not touch the question whether the Harbour Trust in its relation to external authorities is such an instrumentality of the State Government as to be immune from taxation or other interference at the hands of the Federal power. The present, a very different inquiry, affects only the relations *inter se* of the Trust and those who earn wages by working for it. The Trust may very well

(1) 12 C.L.R., 398.

be, indeed it is, a branch of the Government performing functions committed to it by Statute, which otherwise the Government would either have had to leave to private enterprise, or would have had to perform through one or more of its ordinary administrative Departments. Still questions of its relations to those who do part of its work are like questions of the extent of its powers in this respect, that the answers to them depend on the construction of the Statute creating it. Whether as a matter of convenience workmen are constituted its servants or whether they contract with the Crown through it as a mere agent, is a question of such construction. In general, the subordinate employés in a Government Department are not the servants of the head of the Department. "Being all equally the servants of the Crown, they" (the head and the subordinates) "are not servants of each other." See *Bainbridge* v. *Postmaster-General* (1). But, looking at the terms of the proviso to sec. 17 and comparing it with the earlier part of that section, and considering the provisions mentioned by the Chief Justice as well as those to which I have already referred; having regard also to the necessity that arises from the nature and plan of the Act that employés at a weekly or daily wage should be under the complete and continuous control and direction of the Commissioners and their officers, I think the terms of the proviso were intended to ensure, whether the official staff were made servants of the Commissioners or not, that these workmen, to be appointed or removed by the Commissioners, and whose wages are undoubtedly to be fixed and paid by them, should be their servants. Such a workman, if his wages remained unpaid, could sue the Commissioners to recover them; and probably that body would have against him such remedies as an ordinary employer possesses for a breach of contractual duty. Sec. 6 may be mentioned as expressly indicating that the corporation created by sec. 5 shall be suable and entitled to sue.

The appellants did not wish to press the first point if they failed as to the second; but whatever our decision might be as to the latter, I have thought it desirable, because of the general importance of the matter, to express an opinion as to the former.

(1) (1906) 1 K.B., 178, at p. 187.

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On the first point then, I think that on the true construction of the *Sydney Harbour Trust Act* the relation between the appellants and the respondent was that of employer and employé, and, in view of the definitions of "employer" and "workman" in the *Employers' Liability Act*, sec. 3, I see no reason why the appellants should not be held to be the employers of the respondent within the meaning of that Act unless the appellants substantiate their second objection.

If the appellants are the employers of the respondent, and the Crown is not, there is some doubt whether the second point, that the *Employers' Liability Act* does not bind the Crown, can avail them. But as in the view I take the second point does not protect them, I will state my opinion.

The classes of Statutes by which the Crown is bound, though not expressly named, are described in *Comyns's Digest*, tit. "Parliament," p. 8, and *Bacon's Abridgement*, tit. "Prerogative," E. (5). Though Statutes are *primâ facie* inferred to be "made for subjects and not for the Crown" (*per Alderson* B., for the Court of Exchequer, *Attorney-General* v. *Donaldson* (1)), yet, if the intention of the Statute be to provide for "the public good," or the advancement of religion and justice," or "to give a remedy against a wrong," or "to prevent fraud," or "tortious usurpation," it is said that the King is bound, and examples are given in the two Digests above quoted. Probably the true distinction is drawn in the passage quoted from *Craies on Statutes* by the Chief Justice. The effect of the *Claims against the Government and Crown Suits Act* in New South Wales is that "a complete remedy is given to any person having or deeming himself to have any just claim or demand whatever against the Government" if such claim or demand would be legally enforceable as between subject and subject: *Farnell* v. *Bowman* (2). "The very object of the Act," said the Judicial Committee, "was to give a remedy in cases to which a petition of right did not extend. Why, then, should it be supposed that the legislature intended to exclude cases of tort? . . . The 3rd section" (of the Act of 1876) "expressly says that, in every case, not the proceedings only but the rights, shall be the same, and that judgment shall follow as in an ordinary case

(1) 10 M. & W., 117, at p. 124. (2) 12 App. Cas., 643, at pp. 648 50.

between subject and subject." Whatever doubt there may be—and I hinted at such a doubt in the case of *Enever* v. *The King* (1)—"how far, if at all, it was intended" by such Acts "to give the subject rights of action which in the result would interfere seriously with the ordinary administrative work of the Government as apart from undertakings," which, "in other countries" to use the words of the Judicial Committee in the case just cited (2), "are left to private enterprise," no such doubt can I think exist in the case of such an undertaking as that controlled by the appellants. An action for negligence would clearly lie against the Crown, then, at the suit of a workman employed on Government harbour works, in the absence of the negligence of a fellow servant. The *Employers' Liability Act*, in general terms, does away with that defence. Does its abolition extend to prevent its success when raised by the Crown? There does not seem to be any reason to doubt that such was the intention of the legislature. The *Employers' Liability Act* was passed "to give a remedy against a wrong" by preventing an employer sued for negligent injury to his workman from sheltering himself behind the fact that the actual want of care was that of another employé engaged in carrying out the same undertaking for the employer. It is reasonable to suppose that the legislature, or the draftsman whose work the legislature endorsed, bore in mind when framing that Act both its own Statute as to claims against the Government and the case of *Farnell* v. *Bowman* (3), which is so thoroughly well known. If they had intended to exempt the Crown from the liability consequent upon the extension they were giving to the remedies of workmen, they could and most probably would have said so.

I am of opinion, therefore, that the Act is to be read as binding the Crown; that the appellants fail on the second point as well as the first; and that the judgment of the Supreme Court is right.

O'CONNOR J. On the argument before this Court two questions were raised for determination. The first was whether the Crown, that is to say, the Government, is bound by the *Employers'*

(1) 3 C.L.R., 969, at p. 988. (2) 12 App. Cas., 643, at p. 649.
(3) 12 App. Cas., 643.

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Liability Act, and for the purpose of that question it is assumed that the party defendant may be a nominal defendant appointed under the *Claims Against the Government and Crown Suits Act* 1897 or may be the Harbour Trust Commissioners. The second question is whether the Harbour Trust Commissioners can be regarded in the circumstances of the present case as employers of the plaintiff within the meaning of the *Employers' Liability Act* 1897.

As to the first question it is impossible to uphold the contention of the appellants in face of the Privy Council's decision in *Farnell* v. *Bowman* (1). The Statute under consideration in that case, 39 Vict. No. 38, is in language substantially identical with the *Claims Against the Government and Crown Suits Act* now in force. *Sir Barnes Peacock*, in delivering the judgment of the Board, makes it plain that the effect of the Statute which he was then construing was to render the Government liable for a tort in any case in which a subject would under similar circumstances be liable. In other words it placed the Government in the same position as an ordinary citizen with respect to civil liability for wrongs. If, therefore, it can be shewn that the plaintiff was employed within the meaning of the *Employers' Liability Act* by the party defendant, whether the contract of employment was made by some officer on behalf of the Government or by the Harbour Trust Commissioners on its behalf, the plaintiff will have the same right of action as if his employer had been an ordinary citizen. Now as to the second question. Assuming that the Government, whether acting by its officers or through the Harbour Trust Commissioners, is liable to its employés under the *Employers' Liability Act*, has the relation of employer and employé been created in this case between the plaintiff and the Harbour Trust Commissioners?

By sec. 17 of the *Sydney Harbour Trust Act* 1900 all officers and servants necessary for the due administration of the Act are to be appointed by the Government on the nomination of the Commissioners but shall not be removed except on the recommendation of the Commissioners. It is provided that all appointments at daily or weekly wages (the plaintiff's appointment was one of

(1) 12 App. Cas., 643.

these) shall lie in the sole power of the Commissioners. There was a further provision that all persons appointed were to be under the sole control and governance of the Commissioners. It was contended that it was apparent on these provisions that no contractual relation of employment between the Harbour Trust Commissioners and the plaintiff could exist. Whatever argument might be raised as to the position of employés nominated by the Commissioners and appointed by the Government, it is clear that in this case the plaintiff was in fact appointed by the Commissioners, he was solely under their control and guidance, and, if it became necessary to dismiss him, the dismissal would lie entirely in the Commissioners' hands. It is contended that, notwithstanding all this, the Harbour Trust Commissioners do not stand in any contractual relationship with the employés of the Harbour Trust—that in this respect there is no difference between the employés at daily and weekly wages and the other employés engaged in the work of the Trust. The Harbour Trust itself, it is contended, is merely an employé of the Government, and, therefore, merely a fellow employé under Government of all persons engaged in the work of the Trust. If that were the position, then, in accordance with the principle laid down in many cases, the Commissioners could not be under any contractual relationship with their fellow employés, and could not, therefore, be their employers within the meaning of the *Employers' Liability Act.* But, in face of the express provisions of the Act and its whole scheme and purport, it is impossible, in my opinion, to contend successfully that the principle laid down in those cases is applicable to a corporation charged with the duties, and having the status, of the Harbour Trust Commissioners under the Act. I entirely agree with the observations of my brother the Chief Justice on the sections to which he has referred. The object and effect of the legislation may be summarized in a few words. Its object is to hand over the control of, and responsibility for, the management of this great Department of the public service to a body with an independent corporate existence, enabled to hold property, to make contracts, to control employés, with an independent responsibility to the thousands of persons to whom it owes duties in the carrying out of its statutory functions, and with the rights,

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also, of independent responsible action in the assertion of its powers, in the carrying on the work of the Trust, and in the protection of the property which the Statute has vested in it. Although its revenues become part of the Consolidated Revenue Fund and its expenditure is defrayed entirely by parliamentary grants, it is set up by the Statute as the agent of the Government, but with an independent responsibility which impliedly constitutes it an agent, empowered to sue, and liable to be sued, in its corporate name in respect of all causes of actions arising out of the discharge of its duties. This implication, in my opinion, necessarily arises from the whole scheme of the Act, and its clearly expressed objects. I agree, therefore, that the learned Judges of the Supreme Court came to a right conclusion, and that the appeal must be dismissed.

Appeal dismissed.

Solicitor, for appellants, *J. V. Tillett*, Crown Solicitor for New South Wales.

Solicitors, for respondent, *Sly & Russell.*

C. E. W.

HIGH COURT OF AUSTRALIA.]

HASELL . . . . . APPELLANT;
PLAINTIFF,

AND

BAGOT, SHAKES & LEWIS, LTD. AND OTHERS . . . . . } RESPONDENTS.
DEFENDANTS.

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ADELAIDE, *Nov.* 6, 7.

SYDNEY, *Nov.* 24.

Griffith C.J., Barton and O'Connor JJ.

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

Contract — Breach — Purchase of goods — Measure of damages — Non-delivery — Quantity to be delivered — Purchase of other goods by purchaser — No market in place of delivery — Reasonable conduct of purchaser.