

[HIGH COURT OF AUSTRALIA.]

OCKERBY AND COMPANY LIMITED . . . APPELLANTS;
PLAINTIFFS,

AND

MURDOCK RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF
WESTERN AUSTRALIA.

H. C. OF A. *Contract—Construction—Sale of goods—Specific goods—Retrospective Statute—
1916. Seizure under Statute—Non-delivery excused—Grain and Foodstuff Act 1914
SYDNEY, (W.A.) (No. 5 of 1915), secs. 11, 12, 19—Industries Assistance Act 1915 (W.A.)
Nov. 27. (No. 27 of 1915), sec. 23.*

Griffith C.J.,
Barton, Isaacs,
Gavan Duffy
and Rich JJ.

By sec. 11 of the *Grain and Foodstuff Act 1914* (W.A.) the Grain and Foodstuff Board is empowered "to acquire all or any quantity of any grain and foodstuff now or hereafter within the State, except grain or foodstuff hereafter imported into the State." By sec. 12 it is provided that one of the methods of such acquisition shall be by notice of intention to acquire, and that upon the giving of such notice the grain or foodstuff which is the subject of the notice shall vest absolutely in the Board. By sec. 19 it is provided that "In case any grain or foodstuff is, at the time when it is acquired by the Board, in the custody of any person who under any contract is bound to deliver it, or any grain or foodstuff in lieu thereof, to or in accordance with the order of any other person, the obligation so to deliver shall be discharged upon the taking of such grain or foodstuff by or on behalf of the Board or the delivery thereof to the Board."

By sec. 23 of the *Industries Assistance Act 1915* (W.A.), which came into operation on 2nd March 1915, it is provided that "(1) Every farmer who, before the commencement of this Act, may have contracted for the sale of wheat for future delivery, shall, unless the contrary intention is proved, be deemed to have contracted for the sale of wheat the proceeds of his own crops.

The defendant, a farmer, in August 1914 entered into a contract to sell to the plaintiffs 250 bags of fair average quality wheat to be delivered in January and February 1915. The Grain and Foodstuff Board, under the powers conferred by the *Grain and Foodstuff Act* 1914, in February 1915 by notice acquired the whole of the defendant's wheat. In an action brought by the plaintiffs it was sought to recover from the defendant damages for breach of the contract by non-delivery. The Full Court of the Supreme Court of Western Australia held that by virtue of sec. 23 (1) of the *Industries Assistance Act* 1915 the contract was one for the sale of wheat the proceeds of the defendant's own crop, and that by reason of the acquisition by the Board of all the defendant's wheat he was excused from performance of the contract.

H. C. OF A.
1916.

OCKERBY &
Co. LTD.
v.
MURDOCK.

Special leave to appeal to the High Court was refused.

APPLICATION for special leave to appeal.

An action was, before 30th April 1915, brought in the Supreme Court of Western Australia by Ockerby & Co. Ltd. against James Francis Murdock, a farmer, to recover £117 19s. 5d. damages for breach of a contract made on 1st August 1914 for the sale by the defendant to the plaintiffs of 250 bags of fair average quality wheat to be delivered in January and February 1915. The breach alleged was that the defendant had not delivered any wheat. By his defence the defendant alleged that the contract was for the sale and delivery of wheat the proceeds of his own crop, and was therefore subject to an implied condition that the proceeds of his own crop should be of such and sufficient quantity and quality to enable him to perform the contract; that the Grain and Foodstuff Board under the powers and authorities conferred by the *Grain and Foodstuff Act* 1914 seized and took possession of the whole of the proceeds of the defendant's crop, and that by reason of the action of such Board the contract was rendered impossible of performance by the defendant; and, alternatively, that if the defendant was bound to deliver any wheat other than wheat the proceeds of his own crop, he was bound to deliver Western Australian grown wheat and no other, and that the performance of the contract was rendered impossible before breach thereof by reason of the action of the Grain and Foodstuff Board, which, acting under the powers and authorities conferred by the *Grain and Foodstuff Act* 1914, acquired in or about the months of January and February 1915 all Western Australian grown wheat within the State.

H. C. OF A.
1916.

OCKERBY &
CO. LTD.
v.
MURDOCK.

The action was heard by *Rooth J.*, who held that under the circumstances the contract was one for the sale of wheat the proceeds of the defendant's own crop, and that by reason of the seizure on 11th February 1915 by the Grain and Foodstuff Board of all the defendant's wheat he was excused from performance of the contract. From that decision the plaintiffs appealed to the Full Court, which dismissed the appeal, the majority of the Court holding that by virtue of sec. 23 (1) of the *Industries Assistance Act* 1915 the contract was one for the sale of wheat the proceeds of the defendant's own crop, and that by reason of the seizure by the Board of all the defendant's wheat he was excused from performance of the contract.

The plaintiffs now applied to the High Court for special leave to appeal from that decision.

It was stated that the action was a test action, and that there were sixty or more actions of a similar nature pending in the Supreme Court, involving an amount of over £5,000.

Knox K.C. (with him *Bonney*), in support of the application. Sec. 23 (1) of the *Industries Assistance Act* 1915 does not apply to contracts which have been broken before the Act came into operation, and its provisions are only a foundation for proceedings before a magistrate. Sec. 19 of the *Grain and Foodstuff Act* 1914, which says that the taking of grain by the Grain and Foodstuff Board shall discharge the obligation to deliver it under a contract, only applies to a contract for the sale of specific goods.

GRIFFITH C.J. The majority of the Court are of opinion that special leave to appeal should be refused.

Special leave to appeal refused.

Solicitor for the appellants, *G. F. Boulton*, Perth, by *John Williamson & Sons*.

B. L.