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[ISAACS J. That would be an exercise of original, and not appellate, jurisdiction.]

The word "pretext" does not involve proof of falsity. The words "for the purpose or on the pretext" should be read as meaning for the real or ostensible purpose. There is no reason for discriminating between the genuineness and falsity of the purpose. If "pretext" means a falsely pretended purpose, there was evidence upon which the Magistrate could find that the real purpose of those who met was not to make known their grievances, but was to create a disturbance and gain notoriety.

BARTON J. I wish the remarks I am about to make as to the appeal of Adela Constantia Mary Pankhurst to apply to all three cases. They stand on the same footing. By reg. 27 of the *War Precautions (Supplementary) Regulations* 1916, which was made on 14th August 1917, it is provided, so far as is material, that "(1) It shall not be lawful for any number of persons exceeding twenty to meet in the open air in any part of the proclaimed place for any unlawful purpose or for the purpose or on the pretext of making known their grievances or of discussing public affairs or of considering or of presenting or preparing any petition memorial complaint remonstrance declaration or other address to His Majesty or to the Governor-General or to both Houses or either House of the Parliament of the Commonwealth." In the view that I take of this case the amendment which has been allowed in the second ground of the order *nisi* does not come into question. The real point which we are about to decide is whether there was evidence which should have satisfied the Magistrate, or upon which the Magistrate might properly have been satisfied, that the appellant was one of twenty or more persons who had assembled "on the pretext of making known their grievances." That depends on the meaning to be attached to the word "pretext"; and that again is to be determined largely upon the context of the regulation. I can imagine a case where the word "pretext" would mean the real or ostensible purpose. That might be where the context called for such a meaning; but here the word is by the context clearly distinguished from other words in the regulation. For we have, first, these words "for any

unlawful purpose." That clearly means for any unlawful object, being the real object. Then follow the words "or for the purpose or on the pretext" &c. The word "purpose" is there used again, and *primâ facie* it is used in the same sense as before, that is to say, as meaning the real purpose. Then come immediately the words "or on the pretext," and it appears plain to me that as a matter of construction the collocation in which the word "pretext" is used shows that it is used in contradistinction to the word "purpose." In that case the words "for the purpose or on the pretext" indicate that the persons who have assembled have done so either for the real purpose of making known their grievances or on the pretext, and not really with the purpose, of making known their grievances. We are bound, if we can, to find separate meanings for the words "purpose" and "pretext," and we cannot say that the word "pretext" has the meaning of the word "purpose." Being of that opinion, what is the next inference? When persons have assembled on the "pretext" of making known their grievances, and not for the real purpose of making them known, there is a sham. There is, in such a use of the two terms, a concealment, or a screen, connoted by the word "pretext" which is not connoted by the direct and frank word "purpose." Reading the regulation in that way, as I think we must, the question is what evidence there is here that the purpose for which the persons were assembled was not the true purpose; in other words, that they were assembled on a mere pretext. The evidence is as follows:—The informant, who is a constable, said that "Shortly after three o'clock the three accused, with several other women, came into the Treasury Gardens" (which is within the proclaimed place). "There were between five thousand and six thousand people present, and the defendant Adela Constantia Mary Pankhurst got up on a seat and addressed the people assembled, and told them all to follow her to Parliament House in defiance of the police and to break in if necessary, and see what Billy Hughes was going to do to get cheaper food for the starving people. The crowd surged round the seat and the said Adela Constantia Mary Pankhurst was pushed off it, and then Alice Suter got up on the seat and commenced to address the people assembled, and she in turn was pushed off the seat, and also Jennie

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Baines was pushed off the seat, and then Adela Constantia Mary Pankhurst and Alice Suter and Jennie Baines went towards the steps of Parliament House arm-in-arm, and followed by the crowd of people." Then the arrests were made. Does that evidence show that the people, however wrong their object, were there holding forth a sham as the reason of their meeting when their real purpose was a different one ? I do not think that, whatever may be the fact, the evidence shows that. This Court, it must be remembered, is here not for the purpose of expressing its opinion upon the propriety or impropriety of the conduct of the appellants, but to determine the meaning of the regulation, and whether the Magistrate was justified in finding that the charge with which the appellants have been confronted had been proved. I do not think that anyone hearing the evidence which I have just read would say that there is anything in it upon which the ordinary reasonable mind could conclude that the persons at the meeting were there, not with the object of finding out from the authorities what steps were to be taken to provide cheaper food, but for an ulterior purpose which the cry for cheaper food was merely used to disguise. They are not shown to have been putting forward a sham, and this Court is concerned only with the matter of proof. It seems to me that if we were to hold that the object of these persons was falsely stated, that they had some ulterior object such as to break the law or gain notoriety, we should come to a conclusion unsupported by the evidence. We cannot do that. I am, therefore, of opinion that in the regulation " pretext " has a different meaning from " purpose," that the latter word refers to the real object and the former to the professed and not to the genuine object, or to something done under a screen. If it had been alleged in the information that these persons were assembled " for the purpose " of making known their grievances, it is possible that upon this evidence they might have been properly convicted. That, however, does not concern the present case.

For these reasons the convictions must be quashed.

This Court, in the case of Acts of the Federal Parliament or of subordinate legislation passed by the authority of that Parliament, does not inquire into their validity unless it becomes necessary

to do so, and as this case, on its very threshold, is decided upon the evidence we leave the ordinary presumption of validity to remain.

ISAACS J. I concur.

HIGGINS J. I agree, but I should like it to be clearly understood that we say nothing as to the validity or invalidity of the Act or the Regulations.

GAVAN DUFFY J. I concur.

POWERS J. I concur.

RICH J. I concur.

Appeals allowed. Conviction in each case quashed.

Solicitors for the appellants, *Loughrey & Douglas.*

Solicitor for the respondent, *Gordon H. Castle*, Crown Solicitor for the Commonwealth.

B. L.

[HIGH COURT OF AUSTRALIA.]

DUNCAN AND ANOTHER . . . . APPELLANTS;
PLAINTIFFS,

AND

THEODORE AND OTHERS . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

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BRISBANE, *Aug.* 6-10, 15.

Barton, Isaacs, Gavan Duffy, Powers and Rich JJ.

Trespass—Sugar Acquisition Act—Compulsory acquisition of cattle by Government—Seizure under invalid Proclamations—Proclamation of extension of Act—Proclamation of acquisition—Coextensiveness of Proclamations—Execution of Act and Proclamations—Statutory protection—Liability for damages—Bona fides of Proclamations—Sugar Acquisition Act 1915 (*Qd.*) (6 *Geo. V. No.* 2), *secs.* 2, 7, 10, 13—*Meat Supply for Imperial Uses Act* 1914 (*Qd.*) (5 *Geo. V. No.* 2).

A Proclamation dated 30th June 1915, not issued under the authority of any antecedent law, but a copy of which was set forth in the Schedule to the *Sugar Acquisition Act of* 1915 (Qd.), assented to on the 4th of the succeeding August, was ratified by that Act. The Proclamation declared that all raw sugar, the product of the 1915 crop of sugar-cane, whether then in existence in any mill, &c., or thereafter in that year to be manufactured, in Queensland, was to be kept for the disposal of the Government of Queensland, and that the property of the owners should be divested from them and vested in the Government and changed into a right to receive payment of the value.

By sec. 10 of that Act it is provided that "The operation of this Act may at any time and from time to time be extended by the Governor in Council, by Proclamation published in the *Gazette*, so as to authorize the acquisition by His Majesty of raw sugar to be manufactured in any future year, or of any foodstuffs, commodities, goods, chattels, live-stock, or things whatsoever (in this Act referred to as commodities) in such Proclamation mentioned. Thereupon any such commodity may be acquired by a Proclamation containing

provisions similar to those of the Proclamation set forth in the Schedule to this Act, with such modifications as may be deemed necessary, and this Act shall extend and apply to the commodity mentioned in such Proclamation to the same extent and in the same manner as if such commodity were expressly mentioned in this Act."

Held, by *Barton*, *Gavan Duffy* and *Rich* JJ. (*Isaacs* and *Powers* JJ. dissenting), that where the Proclamation extending the operation of the Act under sec. 10 (the Proclamation of extension) authorizes the acquisition of the whole of the commodity mentioned in such Proclamation, the further Proclamation required by the section (the Proclamation of acquisition) must not restrict the acquisition to a specified portion of the commodity.

By sec. 13 it is provided that "(1) The Governor in Council may from time to time make and publish in the *Gazette* all such Proclamations as he thinks fit for giving full effect to this Act," &c.; and "(2) Every Proclamation made under this Act shall be read as one with this Act and construed as being of equal validity," &c.

Held, by *Barton*, *Gavan Duffy* and *Rich* JJ., that sec. 13 does not apply so as to validate an acquisition where the Proclamation of acquisition purporting to be made under sec. 10 is invalid by reason of non-compliance with that section.

By sec. 7 it is provided that "No action . . . shall lie . . . against His Majesty or the Treasurer, or any officer or person acting in the execution of the Proclamation hereby ratified . . . , or any other Proclamation made under this Act, or of this Act, for or in respect of any damage . . . alleged to be sustained by reason of the making of the said or any such Proclamation or the passing of this Act, or of the operation thereof, or of anything done or purporting to be done thereunder, save only for or in respect of the value . . . of any raw sugar (or other commodity) acquired by His Majesty."

Held, by *Barton*, *Gavan Duffy* and *Rich* JJ., that the protection afforded by sec. 7 is not available in the case of acts done in the execution of a Proclamation which is not valid under sec. 10.

By a Proclamation dated 12th November 1915 the operation of the *Sugar Acquisition Act of* 1915 was extended by the Governor in Council of the State of Queensland "so as to authorize the acquisition by His Majesty of cattle now or hereafter to come within the said State," and by a further Proclamation, dated 1st June 1916, it was declared that "all the cattle now on or about Mooraberrie Station" belonging to the appellants were the property of and vested in the Government of Queensland. In pursuance of these Proclamations the Treasurer of Queensland instructed a police constable to take, and he took, possession of the appellants' cattle on the station. Thereupon the appellants took proceedings against the respondents (the Crown, the Treasurer and the constable), in which they claimed damages for trespass.

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Held, by *Barton*, *Gavan Duffy* and *Rich* JJ. (*Isaacs* and *Powers* JJ. dissenting), (1) that the Proclamations gave no authority for the seizure of the cattle, as the subject matter of the two Proclamations was not coextensive; (2) that the acts of the respondents were not within the protection afforded by sec. 7 of the *Sugar Acquisition Act*, as the respondents were not acting in the execution of any Proclamation made under the Act (*i.e.*, authorized by the Act), nor were they acting under the Act, which of itself did not authorize such acts; (3) that the respondents were jointly liable in damages for trespass.

Per Isaacs and *Powers* JJ.: *Mala fides* is not imputable with respect to the issuing of a royal Proclamation, which is the act of the King by himself or his representatives.

The provisions of the *Meat Supply for Imperial Uses Act of* 1914 (Qd.) considered.

Decision of the Supreme Court of Queensland: *Duncan* v. *Theodore*; *Duncan* v. *Beal*, (1917) S.R. (Qd.), 250, reversed.

APPEAL from the Supreme Court of Queensland.

The appellants, Laura Duncan and Fitzroy Clarence Trotman, were the owners of a cattle run called "Mooraberrie," situated in South-West Queensland, on which they had 1,700 cattle, including 600 fat bullocks. The usual and best market for their cattle was in South Australia; but this market was lost to them when the Government of Queensland, acting under the *Meat Supply for Imperial Uses Act of* 1914 (Qd.), prohibited the removal of fat cattle over the borders of Queensland except with the permission of the Chief Secretary, and permission to remove 600 fat cattle to South Australia, for which they applied in May 1916, was refused to them. On the 23rd of that month they brought an action in the High Court claiming (*inter alia*) an injunction against the Government of Queensland and a declaration that the *Meat Supply for Imperial Uses Act* was invalid. Notice of motion for an injunction in the terms of the indorsement of the writ in that action, which was to be made to the High Court on 2nd June 1916, was served on the defendants therein on 1st June, on which date the Governor in Council, having previously, by Proclamation of 12th November 1915, extended the *Sugar Acquisition Act of* 1915 "so as to authorize the acquisition by His Majesty of cattle now or hereafter to come within the State of Queensland," issued a further Proclamation, dated 1st June 1916. The second Proclamation recited that "by reason of the continued existence of the present war, and the expected shortage

in the supply of live-stock, it has become necessary to take such action as appears to be most conducive towards safe-guarding the interests of the public," and that by the Proclamation of 12th November 1915 the operation of the *Sugar Acquisition Act* had been extended as above mentioned; and then proceeded to declare that "all the cattle on or about Mooraberrie Station to the number of about 1,700, including 600 fat bullocks" (describing the 600 fat cattle already referred to), "are and have become and shall remain and be held for the purposes of and shall be kept for the disposal of His Majesty's Government of the State of Queensland . . . and all the title and property of the existing owners thereof . . . are and shall be divested from such owners, and are and shall be vested in His Majesty's said Government absolutely freed from any mortgage, charge, lien, or other encumbrance thereon whatsoever, and all the title and property of such owners are and shall be changed into a right to receive payment of the value thereof in the manner and to the extent to be hereafter determined and declared by a further Proclamation or Proclamations, and all such owners . . . shall . . . give immediate and peaceable possession to the Treasurer of Queensland, or to any person authorized by him to demand and take delivery and possession of the same," &c. On 3rd June 1916 the respondent Edward Granville Theodore, as Treasurer of Queensland, and acting under the assumed authority of these Proclamations, sent a telegram to N. Balfour, a police constable of that State, authorizing him to demand and take delivery and possession of the cattle. Balfour and another constable, in pursuance of these instructions, arrived at Mooraberrie on 13th June and remained there in charge of the cattle, as the property of the Queensland Government, until 27th July. It was alleged by the appellants that owing to the respondents' conduct in not looking after the cattle during this period a number of them were lost, and the value of others was depreciated by being mixed with a mob of another breed. (Respondents afterwards paid the appellants under a separate agreement for the 600 head of fat cattle.)

On these facts the appellants issued two writs in the Supreme Court of Queensland—one against the above-named Edward Granville Theodore and N. Balfour, and the other against George Lansley

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Beal, a nominal defendant under the *Claims against Government Act of* 1866 (Qd.). These actions were subsequently consolidated. In their statement of claim the plaintiffs claimed against each of the defendants damages for trespass, and a declaration that the Proclamations of 12th November 1915 and 1st June 1916 purporting to be made under the *Sugar Acquisition Act* are *ultra vires*, unlawful and invalid, and that the said Proclamations were not lawfully made or issued under or in pursuance of any power or authority conferred by that Act or for the purpose of giving effect to its provisions. For their defence the defendants mainly relied on the validity of the two Proclamations, and on the provisions of sec. 7 of the *Sugar Acquisition Act*.

At the trial before *Cooper* C.J. and a jury, the latter found in favour of the plaintiffs, and awarded them £2,900 damages. On the question of *bona fides* the jury found that the Proclamation of 1st June was not issued and the acts complained of were not done by the defendants or any of them in good faith with the object of safe-guarding the interest of the public and/or in order that the cattle mentioned in the claim should be and become and remain and be held for the purposes and kept for disposal as set out in par. 1 of the Schedule to the *Sugar Acquisition Act*, and that the said Proclamation was issued and the said acts were done by the defendants with an indirect object and/or for some ulterior purpose. Judgment was entered for the plaintiffs against the defendants for £2,900 and costs.

On appeal by the defendants therefrom this judgment was reversed by the Full Court of the Supreme Court of Queensland (*Real*, *Chubb* and *Shand* JJ., *Lukin* J. dissenting) : *Duncan* v. *Theodore* ; *Duncan* v. *Beal* (1).

From the decision of the Full Court the plaintiffs now appealed to the High Court.

Feez K.C. and *Douglas*, for the appellants. Before sec. 7 of the *Sugar Acquisition Act of* 1915 can give the protection claimed by the respondents, the Proclamations under which the cattle were seized must be valid. The Proclamations were invalid, and so there was

(1) (1917) S.R. (Qd.), 250.

ab initio no authority for the acts of the respondents, which, therefore, do not come within the protection of sec. 7. In construing sec. 7 the whole of the contents of the Act must be regarded. If, notwithstanding that it ignores sec. 10, the Crown can apply sec. 7, then sec. 10 is nullified (*Hazelton* v. *Potter* (1)).

[ISAACS J., as to the words "purporting to be done" dragging in illegal matters, referred to *Meyers* v. *Casey* (2); *Hughes* v. *Buckland* (3); *Spooner* v. *Juddow* (4).]

Any illegal thing purporting to be done under a Proclamation is not protected by the section if the Proclamation is itself invalid; and it was under the Proclamations the respondents purported to act. The Proclamation of 1st June 1916 is invalid. The *Sugar Acquisition Act* was primarily passed to validate the Proclamation of 30th June 1915 acquiring the whole of the 1915 sugar crop, and to provide for the extension of the operation of the Act by Proclamation to other commodities mentioned therein. Under sec. 10 it was not competent to acquire by Proclamation only a portion of the commodity mentioned in the Act. The scheduled Proclamation must be followed, and the whole of a commodity must be taken.

[ISAACS J. referred to the *Acts Shortening Act of* 1867, sec. 18.]

[BARTON J. There may be an alternative view: that sec. 10 authorizes the extension of the Act by means of two Proclamations, the subject matter of each of which must be identical, but need not embrace the whole of a given commodity.]

The word "thereupon" in sec. 10 suggests that the second Proclamation is to be issued immediately after the first. The words of sec. 13 cannot be construed as giving Proclamations validity whatever they may contain, and whether they clash with the provisions of sec. 10 or not. Sec. 13 is merely a machinery section (*Young* v. *Tockassie* (5); *The Commonwealth* v. *Progress Advertising &c. Co. Proprietary Ltd.* (6); *Sprigg* v. *Sigcau* (7)).

The validity of the Proclamation of 12th November 1915 depends on the construction of the *Meat Supply for Imperial Uses Act of*

(1) 5 C.L.R., 445.
(2) 17 C.L.R., 90, at p. 112.
(3) 15 M. & W., 346.
(4) 6 Moo. P.C.C., 257.
(5) 2 C.L.R., 470.
(6) 10 C.L.R., 457.
(7) (1897) A.C., 238.

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1914 and the *Sugar Acquisition Act of* 1915 read together, as both Acts refer, in part, to the same subject matter. The former Act was in force when the latter was passed and at the time the cause of action arose. Portion of the cattle (*i.e.*, the 600 fat bullocks), being already dedicated to the Imperial Government under sec. 6 of the Meat Act, could not be the subject of a Proclamation under the Sugar Act, and the Sugar Act can and ought to be read so as not to interfere with sec. 6 of the Meat Act. The two Acts can be read together and a reasonable construction given to both. (See *Duncan* v. *State of Queensland* (1).) The cattle were by the Meat Act put *extra commercium*, and could not, therefore, be a commodity.

The appellants are entitled to damages against the respondents (*Broom's Constitutional Law*, 2nd ed., pp. 525, 552-554 (note); *Owners of the Mediana* v. *Owners &c. of the Comet* (2); *Mayne on Damages*, 8th ed., p. 693; *R.* v. *Governor of Brixton Prison*; *Ex parte Sarno* (3); *R.* v. *Halliday* (4)).

[ISAACS J. referred to *Willoughby Municipal Council* v. *Halstead* (5); *Pendlebury* v. *Colonial Mutual Life Assurance Co. Ltd.* (6).]

[After consultation the parties agreed that the damages (if any) should be reduced from £2,900 to £2,000.]

Ryan A.-G. for Qd., *Stumm* K.C. and *Macrossan*, for the respondents. Sec. 7 of the *Sugar Acquisition Act* was obviously meant to give protection for illegal acts (*Spooner* v. *Juddow* (7); *Hazelton* v. *Potter* (8)). If the Proclamation of 1st June 1916 is valid, then any act done under it is protected by sec. 7 as being done "under this Act"; if it is invalid, then any act done under its assumed authority is protected also as "purporting to be done under the Act" (*Selmes* v. *Judge* (9)).

The first Proclamation gives the authority to acquire, and is a declaration of intention to acquire. The words "with such modifications" in sec. 10 and also the other sections of the Act support and compel the conclusion that the second Proclamation may be

(1) 22 C.L.R., 556.
(2) (1900) A.C., 113.
(3) (1916) 2 K.B., 742, at pp. 749, 752.
(4) (1917) A.C., 260, at p. 307.
(5) 22 C.L.R., 352.
(6) 13 C.L.R., 676.
(7) 6 Moo. P.C.C., 257.
(8) 5 C.L.R., 445.
(9) L.R. 6 Q.B., 724.

issued at any time after the first, and that no obligation is imposed to take the whole of the commodity mentioned in the first.

[ISAACS J. referred to *Powell* v. *Apollo Candle Co.* (1); *Institute of Patents Agents* v. *Lockwood* (2); *Queensland Acts Shortening Act of* 1867, secs. 18, 20; *In re Andrew* (3).]

The word "thereupon" in sec. 10 means that the second Proclamation may be issued after, and at any time after, power has been taken by the first Proclamation to acquire a given commodity, and the words "any such commodity" do not require the second Proclamation to be coextensive with the first.

The construction of the Proclamation of 12th November 1915 must depend on the reading of the *Sugar Acquisition Act* alone, as sec. 2 of that Act provided that it should override all previous Acts, and, therefore, the Meat Act. Nothing has been done under the Meat Act to create a title in the Crown; consequently, the cattle can come lawfully under the provisions of the *Sugar Acquisition Act*. Even if this were not so, the definition of "stock" in the Meat Act refers only to "cattle," &c., "the meat whereof is intended for export or may be made available for export." This definition, though it might include the 600 fat bullocks, certainly does not include the remainder of the cattle.

Cur. adv. vult.

Aug. 15.

The following judgments were read:—

BARTON J. The plaintiffs are trustees of the will of William Duncan, deceased, and the plaintiff Laura Duncan is a beneficiary under that will. They are the owners of a station called "Mooraberrie" and certain cattle thereon. The defendant Beal is the person appointed nominal defendant by the Governor in Council in the matter of a petition of the plaintiffs under the *Claims against Government Act of* 1866. The defendant the Honorable E. G. Theodore is Treasurer of Queensland, and the defendant Balfour is a police constable of this State. The three are joined as defendants upon the consolidation of two separate actions by the same plaintiffs.

(1) 10 App. Cas., 282. (2) (1894) A.C., 347.
(3) 1 Ch. D., 358.

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The defendant Theodore, on 3rd June 1916, sent to the defendant Balfour, who was stationed at a place a considerable distance from Mooraberrie, a telegram informing him that a Proclamation had been issued acquiring all cattle on or about Mooraberrie Station the property of the plaintiffs or of either of them, to the number of about 1,700 cattle, including 600 fat bullocks. In this telegram the defendant Theodore, who signed himself Treasurer of Queensland, authorized Balfour to demand and take delivery and possession of the 1,700 cattle on his, Theodore's, behalf, concluding his telegram with the words "act with promptitude accordingly." Constable Balfour, together with another constable named Blandford, in obedience to the telegram and to police instructions, entered on the plaintiffs' station on 13th June, seized the cattle in question, stayed there a considerable time, and caused the plaintiffs certain damage, which, in the event of the entry and of the seizure and possession proving in the opinion of this Court to have been unauthorized by law, and in the event of the action of the defendants or of any of them being without protection under a provision to be mentioned presently, has now been assessed by the parties at £2,000.

The action is not only against the Crown but against the defendants Theodore and Balfour as officers of the Government and personally.

The constables remained in possession from 13th June to 27th July, when they withdrew from the station, and from possession as to about 1,100 head of the cattle, retaining possession of about 600 head, for which the defendants afterwards paid the plaintiffs in pursuance of a separate agreement.

In addition to their claim for damages the plaintiffs claimed a declaration that two Proclamations, purporting to have been made under the *Sugar Acquisition Act of* 1915 on 12th November 1915 and 1st June 1916, were and are invalid, and gave no authority for the acts complained of. If the plaintiffs are right, there was a trespass causing damage, unless the defendants are protected in their conduct by sec. 7 of the *Sugar Acquisition Act*. The defendants, if liable at all, are jointly liable; as *Shand* J. put it in the Supreme Court, the Crown is in that case liable because the trespass was committed by agents of the Crown in the course of their employment as such,