[HIGH COURT OF AUSTRALIA.]

JOSEPH . . . . . APPELLANT;
PLAINTIFF,

AND

THE COLONIAL TREASURER OF NEW SOUTH WALES . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1918.

MELBOURNE, *May* 22, 23, 24; *June* 10.

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

War—Royal prerogative—Defence of the Realm—Authority to exercise prerogative in Australia—Wrongful act of State Government—Interference with contracts—Wheat pool scheme—Justification—The Constitution (63 & 64 *Vict.* c. 12), *secs.* 51 (VI.), 52 (II.), 69, 70, 106, 107, 114.

Held, by *Isaacs*, *Powers* and *Rich* JJ., that the royal prerogative as to war so far as the Commonwealth or any State thereof is concerned can only be exercised by the Governor-General acting by the ordinary constitutional methods, and cannot be exercised by the Government of a State; that the necessity of the occasion for its exercise must be judged by the Commonwealth Government; that neither the exercise of the power nor the discretion to judge of the necessity can be delegated to the Government of a State; and that evidence of the existence of a national emergency calling for the exercise of the power, without which the power cannot be exercised, must be given by an officer of the Commonwealth having authority to express the opinion of the Commonwealth Government.

By *Higgins* J.: If and so far as the royal prerogative as to war is exercisable by Australian authority, it must be exercised by the Governor-General and the Ministers of the Commonwealth.

Semble, *per Higgins* J.: Where an act otherwise unlawful is attempted to be justified as an exercise of the royal prerogative it must appear that the act was intended to be done in exercise of that power.

In an action claiming damages from the Government of New South Wales for injuries sustained by the plaintiff by reason of certain acts of the Government of New South Wales, the acts complained of were sought to be justified as having been done by the State Government in the exercise of the royal prerogative as to war. At the trial the jury found, in answer to a specific question, that a certain scheme, in pursuance of which it was alleged that the acts complained of were done, was not carried out by the Government with the object of benefiting the nation as a whole in time of war, and they found a verdict for the plaintiff. The Full Court of the Supreme Court, on a motion to set aside the verdict, held that the evidence established that the acts complained of were done by the Commonwealth Government acting through the State Government in pursuance of the scheme and in exercise of the royal prerogative as to war, and therefore were justified. On appeal to the High Court,

Held, by *Isaacs*, *Higgins*, *Gavan Duffy*, *Powers* and *Rich* JJ., that the verdict should stand, there being evidence to support the special finding of the jury and the evidence not establishing that the acts complained of were justified as an exercise of the royal prerogative as to war.

Decision of the Supreme Court of New South Wales: *Joseph* v. *Colonial Treasurer*, 17 S.R. (N.S.W.), 624, reversed.

APPEAL from the Supreme Court of New South Wales.

An action was brought in the Supreme Court by Henry Joseph against the Colonial Treasurer of New South Wales, as nominal defendant on behalf of the Government of that State, seeking to recover damages for injuries alleged to have been sustained by reason of certain acts of the Government, which were alleged to have been done maliciously and without reasonable or probable excuse and with intent to injure and for the purpose of injuring the plaintiff in his calling as a broker, shipping agent and merchant. The various acts complained of were substantially as follows: procuring the purchasers under certain contracts for the purchase and sale of wheat, in respect of which the plaintiff was entitled to commission payable on delivery, to break their contracts; procuring the Chief Commissioner for Railways of New South Wales in contravention of the *Government Railways Act* 1912 to refuse to carry, or to deliver when carried, wheat either purchased and sold by the plaintiff or which was the subject matter of contracts of sale in respect of which the plaintiff was entitled to commission on delivery; procuring the Chief Commissioner for Railways of New South Wales in contravention of the *Government Railways Act* 1912, the *Commonwealth of Australia*

H. C. OF A. 1918.

JOSEPH v. COLONIAL TREASURER (N.S.W.)

Constitution Act and the *Inter-State Commission Act* 1912 to refuse to carry wheat the subject of contracts of sale and of shipment to other States in respect of which the plaintiff was entitled to commission on delivery or on shipment respectively; procuring certain shipping companies in contravention of the *Commonwealth of Australia Constitution Act* to refuse to carry wheat the subject of contracts of sale and of shipment to other States in respect of which the plaintiff was entitled to commission on delivery or shipment respectively; and procuring De Lauret & Co. Ltd. to break certain contracts made by them with the plaintiff as agent for the sale of wheat and certain other contracts made by that company for the sale of wheat to the plaintiff.

The only material defence was "not guilty"; and at the trial the defendant denied malice, and alleged that the acts were done by the Government of New South Wales in exercise of the royal prerogative as to war and in pursuance of a scheme called the "wheat pool scheme." That scheme, shortly, was that the Commonwealth should take control of the export of all wheat from Australia and that each State should take control of the wheat grown within its boundaries.

At the trial before *Harvey* J. and a jury, the jury were asked the following questions, and returned the following answers to them :—

Question.—Was the pool scheme of the Government carried out by the Government with the object of benefiting the nation as a whole in time of war ?

Answer.—No. The jury are of opinion that the scheme as carried out was more in the interests of the farmers than the nation as a whole in time of war.

Question.—Were the actions of the Government officials which interfered with the plaintiff's dealing with wheat taken *bonâ fide* in furtherance of the wheat pool scheme ?

Answer.—No, on the evidence before the Court.

The jury found also a verdict for the plaintiff for £1,321 3s. 5d. The learned trial Judge reserved the question whether a verdict should be directed for the defendant.

The defendant moved before the Full Court for a new trial or *venire de novo*, or to enter a nonsuit or a verdict for the defendant, or for judgment *non obstante veredicto*, or to stay proceedings or to

reduce the damages. The Full Court ordered that the verdict entered for the plaintiff should be set aside and a verdict entered for the defendant: *Joseph* v. *Colonial Treasurer* (1).

From that decision the plaintiff now appealed to the High Court. Other facts are stated in the judgments hereunder.

The Appellant in person. Authority to exercise the royal prerogative is vested not in the Government of a State but in the Commonwealth Government. The prerogative must be exercised through the recognized officers of the Crown; in the case of the prerogative as to war, through the officers of the Defence Department. The exercise of the prerogative cannot be delegated by a person to whom it has been delegated, and therefore cannot be delegated by the Commonwealth Government to a State Government. There is no evidence of any such delegation. There is no proper evidence that the acts complained of were done for the public safety and defence of the Realm. The acts complained of were not in their nature such as could be done under the prerogative. In order to justify the acts as an exercise of the prerogative, they should have originated by constitutional methods, that is, by an order in council, an executive minute or a proclamation. On the evidence the verdict should stand. [He referred to *Moore's Commonwealth of Australia*, 2nd ed., pp. 163, 441, 443; *Keith's Responsible Government in the Dominions*, vol. II., pp. 656, 664; *Musgrave* v. *Pulido* (2); *Halsbury's Laws of England*, vol. I., p. 149; vol. VI., pp. 382, 386; vol. VII., p. 68; *Anson's Law and Custom of the Constitution*, vol. II., pp. 38, 50, 150, 195, 202, 206, 209; *Inglis Clark's Australian Constitutional Law*, 2nd ed., pp. 45, 260; *Ridge's Constitutional History*, 2nd ed., p. 208; *Baty and Morgan on War, its Conduct and Legal Results*, p. 138; *Hight and Bamford's Constitutional History and Law of New Zealand*, p. 94; *Phipson on Evidence*, 5th ed., p. 75; *In re a Petition of Right* (3); *The Zamora* (4); *Pankhurst* v. *Kiernan* (5); *Chitty on the Prerogative*, p. 50; *Dicey's Law of the Constitution*, 7th ed., pp. 24, 25, 321; *Evidence Act* 1905, sec. 5.]

Blacket K.C. and *Armstrong*, for the respondent. If in the opinion

(1) 17 S.R. (N.S.W.), 624.
(2) 5 App. Cas., 102.
(3) (1915) 3 K.B., 649.
(4) (1916) 2 A.C., 77, at p. 106.
(5) 24 C.L.R., 120.

H. C. OF A. 1918.

JOSEPH v. COLONIAL TREASURER (N.S.W.)

of the State Government it was necessary and advisable in the interests of the nation in time of war to do the acts complained of, that is a good defence to the action; for in that case the authority to do the acts would be vested in the State Government. But in this case there were the request of the Imperial Government and the direction of the Commonwealth Government to support what was done. The purpose of the wheat pool scheme was to secure to the farmers in the wheat-growing States a high price and thereby to induce them to put in an increased area of wheat. If the State Government, acting on the request of the Imperial Government and with the sanction and approval of the Commonwealth Government, believed that the method it took was the best method of carrying out the scheme, the acts done by it were not malicious and were not acts for which it is responsible. The evidence shows that the action of the State Government was under the direction and with the approval of the Commonwealth Government carrying out the war power. The State Government was acting as agent of the Commonwealth. The authority of the Commonwealth covered whatever was necessary to be done for the success of the scheme, and it was necessary that the State Government should have practically a monopoly of the wheat. That authority permitted the State Government to use such methods to carry out the object as, although not stated, must have been in the contemplation of the parties. In order to establish the existence of the emergency which justified the exercise of the prerogative it is not necessary to call the highest authority to give the evidence. There was no one more competent to give the evidence than the Minister of Agriculture. The emergency existing, the State was itself exercising the prerogative. No direct authorization is required, and if the emergency exists any person acting upon it is protected by the prerogative (*Phillips* v. *Eyre* (1); *In re a Petition of Right* (2)). So that even if the Commonwealth Government did not authorize the means by which the scheme was carried out in New South Wales, it permitted the State Government to undertake the whole work of providing the wheat which the Commonwealth was supplying, and the State Government had the right to exercise the prerogative

(1) L.R. 6 Q.B., 1, at p. 15.

(2) (1915) 3 K.B., at p. 665.

in carrying out that work. Under the Constitution the Governor-General in Council might act for the national defence through any agent he chose, and therefore he might act through the Government of New South Wales in respect of wheat grown in New South Wales. The royal prerogative as to war is above the Constitution, and might be exercised notwithstanding the Constitution. The person who has to decide whether an emergency has arisen which justifies the exercise of the prerogative is the person who does or directs the act complained of. The emergency having arisen, the Commonwealth Government and the State Government had in contemplation the employment of all the powers which could be exercised including the prerogative power. If the State Government did act under the prerogative, there is no evidence that it did any acts other than acts in defence of the scheme, and therefore the evidence does not support either finding of the jury. The respondent is entitled to stand in the same position as that in which he stood when, at the close of the case, the Judge was asked to direct a verdict for the defendant. The Judge should have so directed, because there was no evidence of any act done otherwise than under the prerogative. The plea of not guilty is the proper plea to raise the question of an exercise of the royal prerogative (*Bullen & Leake's Precedents of Pleading*, 3rd ed., p. 411; *Buron* v. *Denman* (1); *Dicas* v. *Lord Brougham* (2)). A declaration that the defendant caused others to break their contracts with the plaintiff would not be sufficient, and malice had to be alleged (*Halsbury's Laws of England*, vol. XXVII., pp. 648 *et seqq.*). If justification for the acts complained of existed, whether it was or was not then known to exist does not matter (*Bullen & Leake's Precedents of Pleading*, 3rd ed., p. 650).

Cur. adv. vult.

June 10.

The following judgments were read :—

ISAACS, POWERS AND RICH JJ. This is an action of tort brought in the Supreme Court of New South Wales under the consolidated Act the *Claims against the Government and Crown Suits Act*, No. 27 of 1912, by the appellant against the respondent as the nominal defendant representing the Crown in right of the State. Sec.

(1) 2 Ex., 167. (2) 6 C. & P., 249.

H. C. OF A. 1918.

JOSEPH v. COLONIAL TREASURER (N.S.W.)

Isaacs J. Powers J. Rich J.

4 of the Act provides that "every such case shall be commenced in the same way, and the proceedings and rights of parties therein shall as nearly as possible be the same . . . as in an ordinary case between subject and subject."

The declaration contains six counts. As to two of these the plaintiff has failed. The remaining counts allege that the defendant "maliciously without reasonable or lawful excuse and with intent and for the purpose of injuring the plaintiff in his calling" did various enumerated acts for which he claims damages as being tortious acts causing pecuniary loss. Broadly speaking, the acts complained of were that the State Government procured and forced purchasers of wheat to break certain contracts in which the appellant was interested, and also procured and forced the Chief Commissioner for Railways of the State and five shipping companies to refuse to carry or deliver wheat.

The only plea now material is the first, which is simply "not guilty." The system of common law pleading in New South Wales is, for the purposes of this appeal, identical with that in force in England immediately prior to the *Judicature Act* 1873. We do not treat this appeal as turning on any rules or forms of pleading or any technicalities whatever, and therefore do not address ourselves to a point raised on behalf of the respondents that *Buron* v. *Denman* (1) is an authority for permitting any justification to be proved under the plea of "not guilty." We simply refer to *Feather* v. *The Queen* (2), and to the provision contained in the New South Wales Act No. 27 of 1912 and already quoted. We deal with this case on broad lines of law and procedure and of the evidence read by the light of the way in which the issues were presented to the primary tribunal.

At the trial, which took place before *Harvey* J. and a jury, the defendant did not deny that the State Government had in fact done the acts complained of in the counts now under consideration, nor did it deny that the appellant had sustained pecuniary loss, nor that he had a lawful cause of action against the Government, in respect of those Acts, but for one ground of defence only. It, however, denied "malice" both in the sense of personal ill will to him, and in

(1) 2 Ex., 167.

(2) 6 B. & S., 257, at p. 296.

the sense of not carrying out the wheat pool scheme with the object of benefiting the nation. It also set up, as its one substantive ground of defence, that the acts complained of were done by it, the State Government, in the exercise by it of the royal war prerogative, which it claimed was vested in it quite apart from and independently of the Federal Government.

No contention of law was made, and no issue of fact was presented or suggested, that the acts were the acts of the State Government merely as the agent or representative of the Federal Government, or that those acts were in any way referable to the Federal Government as principal or that the exercise of the prerogative was by the Federal Government, the State Government being a mere hand to carry out that exercise. The most searching examination of the charge of *Harvey* J. to the jury, and the arguments of counsel noted by his Honor, disclose no trace of any issue involving the Federal Government as principal in relation to the acts complained of. On the contrary it appears from the transcript that learned counsel for the respondent said, the "Commonwealth has no exclusive power in defence"—indicating that the position was accepted on both sides that, not only were the acts complained of those of the State Government only, but that that Government had by virtue of its own inherent powers rightfully exercised a discretion under the royal war prerogative to do the acts for which the plaintiff sued, and that those acts were therefore lawfully done.

In this view the learned Judge, in order to have all contested questions of fact decided by the jury, ruled formally against the contention, reserving the question of law so raised, and his Honor formulated two special questions, which on all hands, apart from the *bona fides* of one claim and the quantum of damages, were treated as the only questions of fact in the case. The two special questions were: (1) "Was the pool scheme of the Government carried out by the Government with the object of benefiting the nation as a whole in time of war?" and (2) "Were the actions of the Government officials which interfered with the plaintiff's dealing with wheat taken *bonâ fide* in furtherance of the wheat pool scheme?" The answers given were:—(1) "No. The jury are of opinion that the scheme as carried out was more in the interests of the farmers

H. C. OF A. 1918.

JOSEPH v. COLONIAL TREASURER (N.S.W.)

Isaacs J. Powers J. Rich J.

than the nation as a whole in time of war"; and (2) "No, on the evidence before the Court."

The first question assumes the scheme to be that of the State Government, and assumes its terms were not exceeded, but inquires only as to the *object* which the Government had in view when carrying it out. The second question has a different scope and purpose. It was directed to the plaintiff's contention that the *acts complained of* were not *bonâ fide* in furtherance of the scheme, but were outside its provisions, and the result not of a desire to advance the scheme but of *animus* against the plaintiff for trying to defeat the scheme. Having given the answers, the jury, following the learned Judge's direction, gave a general verdict for the plaintiff, and assessed damages at £1,321 3s. 5d.

On motion to the Full Court, the verdict for the plaintiff was set aside and a verdict entered for the defendant. *Pring* J., who presided, recounted the facts, and said: "If the case rested on the facts which I have stated, there could of course be no doubt as to the plaintiff's right to recover at least the sum of £821 3s. 5d., for the action of the State Government would have been altogether illegal and without justification." This position was not contested by the defendant before us. Learned counsel for the respondent was more than once specifically asked as to the *primâ facie* liability of the respondent, and the explicit answer was given that in time of peace the acts complained of would of themselves constitute good cause of action by the appellant against the respondent, and that the respondent sets up no other answer than justification on the ground of the prerogative. Nor was any question of damages suggested. This, which is entirely in line with the defendant's attitude at the trial and in the Full Court of the State, relieves us from considering any question of *primâ facie* liability for the acts complained of. We proceed to consider the only questions raised here as well as elsewhere, namely, whether the special findings are sustainable and whether there has been established justification under the prerogative.

In the Full Court, as appears by the judgment of *Pring* J., the appellant, in addition to relying on the argument of sinister motive, contended—as he did before us—that "as the Federal Government

is by the *Constitution Act* charged with matters of defence, the State Government had no right or authority to intervene." In dealing with those two questions, decisive force was given by the Supreme Court to the circumstance that the Prime Minister of the Commonwealth had approved of the scheme.

The material facts are, that the Imperial Government had expressed its desire that steps should be taken to increase the production of wheat, and that whatever wheat was available for export should go to the British Government through the Federal Government. The outcome of that request is stated very succinctly by Mr. Grahame, the Minister for Agriculture in New South Wales, in these words:—"In 1915 I was Minister for Agriculture for the State, and I hold that office still. In September the Prime Minister called a conference of the wheat-producing States. He asked for a Minister to be in attendance at a conference in Melbourne, from the four wheat-producing States, and the Government of New South Wales appointed me to attend that conference with the other three Ministers and the Prime Minister. At that conference the Prime Minister made the position very clear that the only freight from then on would be entirely under the control of the Federal Parliament, that the Federal authority was the only shipping authority in the Commonwealth. He made certain suggestions that the States should agree to share in that freight, that is, the four States, in connection with wheat and wool and other products; metal and wool the Commonwealth would deal with as a Commonwealth; but in wheat he wanted the co-operation of the four States in a scheme to handle the whole of the wheat crop. We agreed to that, and then discussed the position of financing the farmer and securing the whole of the wheat crop for the British Government. . . . We then agreed to a certain proposal that was submitted to that conference, that in the interest of the nation the Governments of each State should take control of the entire crop of Australia. That scheme, which I cannot tell you the reasons for, was that the Governments of Australia should take over control of the whole of the wheat crop of Australia, that is, the four wheat-producing States. . . . That scheme, with certain information conveyed to me from the Prime Minister, I brought back to the New South Wales Cabinet, and they agreed

H. C. OF A. 1918.

JOSEPH v. COLONIAL TREASURER (N.S.W.)

Isaacs J. Powers J. Rich J.

to the scheme; I think it was some time in October. The scheme was similarly agreed to by the other three wheat-growing States and the Commonwealth. . . . The scheme having been agreed upon and settled, the Ministers deputed me to act in respect of it. I have had control of the wheat pool from the very first conference. . . . The meeting of the Ministers that I referred to was a meeting at which the Prime Minister was present. . . . The purposes for which this scheme was initiated and carried out were in the interests of the people as a whole, absolutely in the interests of the nation. There were no other reasons. Of course under other conditions it would not have been necessary; it was the war conditions which made it necessary to form the pool. . . . He" (the Prime Minister) "wanted to control it in one way, and we said this is the way to control it; it was a matter of method. He wanted to keep certain wheat interests under control, and we objected to it. It was a matter of method, not of principle. I said" (reading from *Hansard*): "'We then adjourned and discussed the position further, and we went back to the Prime Minister, and said, as Ministers of the different States, . . . these are the proposals that we intend to adopt.' That was a direction to him that we were going to adopt them, and we were in a majority. I also said: 'He then said, "Well, if you have agreed on that, I am prepared to lend the assistance of the Commonwealth to your scheme": ' that is correct." Mr. Grahame was asked: "Why did you not pass an Act of Parliament taking the wheat over and handling it?" He replied: "I cannot answer that question. It was a Cabinet decision. I regarded at this time that it was necessary to create a monopoly in the Government over the wheat. My Government thought so."

The scheme itself, as shown by the evidence of the witnesses, by the extracts from speeches in Parliament made by Mr. Grahame, and by the terms of the official pamphlet, issued by the New South Wales Government, was a purely voluntary scheme. It offered great advantages to farmers, but these advantages were made great because the scheme as adopted by the conference, and approved by the Prime Minister of the Commonwealth, contained no element of compulsion and no suggestion of interference with contracts against the will of any contracting party. The acts complained of in the

action and for which the damages were awarded were, however, acts of compulsion and interference with contracts. They were not comprised within the terms of the scheme, and were resorted to in order, if possible, to drive the appellant into the scheme, or into inactivity. The scheme, it was thought, would have failed unless the appellant and others in his position were interfered with, and in that sense the interference was to protect the scheme. Nevertheless, it was altogether extraneous to the scheme itself, and was no part—even incidental—of the method assented to by the Prime Minister. True it is that the Customs Department refused to permit export except on a permit of the Wheat Board; but that does not cover the acts complained of. The Supreme Court held that the Prime Minister's adhesion to the scheme as promulgated had the effect of establishing that the scheme was carried out with the object of benefiting the nation at large. We agree that it is an important fact, but not a conclusive fact. We cannot suppose the question was meant to test the *bona fides* of the Crown, or that the jury's answer was meant to deny it. The legality of the Crown's action may be tested by reference to power as existing and intended to be exercised, but its honesty cannot be impugned in the King's Courts.

The real purport of the question and answer, as we understand them, is that the New South Wales Government, in carrying out its own wheat pool scheme was doing so not primarily for the purpose of national defence but for the local political purpose of benefiting the farmers of the State and thereby strengthening its own political position, the national object being left to the Commonwealth, and, that falling in with the State Government's object, the scheme was adopted and carried out. In other words, the answer means that the State Government never intended to exercise the war prerogative, but to exercise its own local powers, which the central Government would assist in *its* desire to advance the cause of the national defence. In that sense we are unable to say there is not evidence upon which the jury as reasonable men could not find as they did. The pamphlet of the Government, the oral evidence and the extracts from *Hansard* are such as to leave it open to a jury to form the conclusion they arrived at. In our opinion the finding should stand. But, as will be seen hereafter, it does not affect the

H. C. OF A. 1918.

JOSEPH v. COLONIAL TREASURER (N.S.W.)

Isaacs J. Powers J. Rich J.

result, because it only means that the State Government did not purport to exercise a power it did not in law possess.

We also think that the evidence is insufficient to sustain the answer to the second question. The legality of the acts complained of must be determined apart from the allegation of so called "malice." If enough remains without that allegation to constitute an unwarranted interference with the appellant's rights, he should succeed (*Nocton* v. *Ashburton* (1)), otherwise not : the respondent does not dispute this.

But the Supreme Court held further that the Prime Minister's adhesion to the scheme at once brought the case within the ambit of the war prerogative, and that the evidence of Mr. Grahame and Mr. Harris satisfied the evidentiary requirements as to the necessity of the occasion. As to this we are, with much respect, constrained to differ. It is not very clear what precise legal effect the Supreme Court attached to the Prime Minister's participation, whether or not they regarded it as constituting the Commonwealth the principal in the scheme itself. If they did, there are several difficulties in the way of accepting that conclusion. First of all, it would be a complete departure from the accepted position at the trial, where the State Government and not the Federal Government was treated as the only principal, and where the evidence was not directed to any issue on that point. Next, unless the evidence was so overwhelming as to the Federal Government being the principal that no jury could reasonably or without failing in their judicial duty find otherwise (see *Jones* v. *Spencer* (2)), it was at least an issue of fact for the jury and not for the Full Court. But, so far from the evidence being conclusively in favour of that position, it appears to us to be rather the very opposite, and to establish beyond controversy that the State Government alone was the principal as to the wheat scheme. If mere adhesion to that scheme constituted the adhering party a principal, then every State Government was a principal in regard to the scheme in every other State, and also in regard to the Commonwealth's own part in shipping the wheat abroad.

The true position, as we view the matter, was that the Imperial

(1) (1914) A.C., 932.

(2) 77 L.T., 536.

Government did not, so far as is indicated, intend the Commonwealth or States to overstep their respective powers; that the Commonwealth and States arranged to contribute severally their efforts, each operating in its own domain, within its own jurisdiction, and exercising its own powers lawfully for the common object. This was manifestly the case with respect to Victoria and Western Australia, which proceeded to pass fresh legislation to enable those States to effectuate the proposal within their respective territories. The fact that New South Wales did not act similarly is unexplained, even when explanation was sought during the evidence from Ministers. Possibly it was thought originally that as the scheme was purely voluntary no legislation was necessary. Possibly also, when the scheme appeared insufficient and compulsion was determined on, an open request to Parliament for compulsive powers might have been considered contradictory and impracticable, and the Commonwealth regulation under the *War Precautions Act* forbidding actions against the State without the consent of the Federal Attorney-General was apparently considered a sufficient safeguard. Be this, however, as it may, there is no more reason for the New South Wales Government thinking the State schemes rested on the Commonwealth war power, than for either the Victorian or the Western Australian Government thinking so.

There is still another reason, and perhaps the most decisive, why the Commonwealth should not in any event be regarded as the principal in relation to the acts complained of; and that is that those acts were entirely outside the scheme assented to. Test the question by supposing the Commonwealth to be sued instead of the State. How could its liability for those acts be maintained in face of the evidence in this case? The only alternative view is that the State when asked by the Prime Minister to aid him was thereby invested with the power of exercising the war prerogative, and therefore of lawfully doing what is complained of.

We assume, but without affirming, that the war prerogative—that is, *the common law* (for this case does not arise under any legislative provision)—extends at all to acts of the nature here under consideration. If it were necessary, we should require to consider the question much further. But even upon that assumption, by

H. C. OF A. 1918.

JOSEPH v. COLONIAL TREASURER (N.S.W.)

Isaacs J. Powers J. Rich J.

what right can the State exercise it? If the Commonwealth were the principal it could, on the assumption made, exercise it by the proper representative of His Majesty in Australia, the Governor-General, acting by the ordinary constitutional methods. But the authorities quoted in the judgments under appeal, and notably the case of *The Zamora* (1), show conclusively that the necessity of the occasion must be judged of by those who are entrusted with the public defence—in other words, so far as Australian authority is concerned, by the Commonwealth Government.

In the allocation and distribution of powers effected by the Constitution of the Commonwealth the defence power is exclusively assigned to the Commonwealth. It is a matter of common knowledge that the necessity of a single authority for the defence of Australia was one of the urgent, perhaps the most urgent, of all the needs for the establishment of the Commonwealth. That power now rests in the one hand so far as Australian authority extends. A brief reference to the relevant sections of the Constitution makes this manifest.

By sec. 51 (VI.) the Parliament has power to make laws with respect to "The naval and military defence of the *Commonwealth and of the several States*, and the control of the forces to execute and maintain the laws of the Commonwealth." Sec. 52 (II.) makes exclusive the Commonwealth power of legislation with respect to "Matters relating to any department of the public service the control of which is by this Constitution transferred to the Executive Government of the Commonwealth." By sec. 69 "Naval and military defence" is named as one of the departments to be "transferred"; and it has been transferred. So far, then, the legislative power is exclusive. Then, by sec. 70, the executive power is also made exclusive, because there are "transferred" from the Government of the State to the Government of the Commonwealth "all powers and functions" relating to the transferred departments. Secs. 106 and 107, dealing with State Constitutions and Parliaments, declare that these are to be limited accordingly. Sec. 114 forbids the State, without Commonwealth consent, raising or maintaining any naval or military force; and sec. 119 declares the obligation of the Commonwealth

(1) (1916) 2 A.C., 77.

to protect every State against invasion and, on request, against domestic violence.

We therefore hold that under our organic law the State has not the power or function of exercising the royal war prerogative, and that it could not be conferred upon the State by any such circumstance as the Prime Minister's adhesion to, or concurrence in, the concerted scheme referred to in this case. The Commonwealth Government may, of course, enlist the aid of any State Government as it could enlist the aid of any individual in carrying out its powers, but it cannot retransfer to the State the executive discretion and responsibility which the Constitution has taken from the several States, possibly diverging in their views, and reposed in the Federal Executive alone as representing, with unity of purpose, the whole people of the Commonwealth.

There is yet another defect in the respondent's case. In the *Zamora* judgment Lord *Parker* said (1): "Those who are responsible for the national security must be the sole judges of what the national security requires." For want of the necessary evidence the Crown failed in that case, although it had itself authorized the step taken. The necessary fact to be established to the satisfaction of the Court is the national emergency calling for the particular act sought to be justified. That fact must be established by evidence, and the evidence must be given by "the proper officer of the Crown" (*The Zamora Case* (2)), and he must satisfy the Court that the matter complained of is justified by the national emergency (3).

It does not follow that even where the Commonwealth Government directly does an act *primâ facie* tortious it is justifiable. The necessity of the occasion must still be proved. It is not true in such a case that "*Stet pro lege voluntas.*" Where those to whose discretion the Constitution entrusts the care of the national safety state their opinion to the Court—not necessarily in person, but by a "proper officer"—the Court accepts that opinion as controlling, and does so from the very nature of the situation. But the Supreme Court appear to have dispensed with this. They have accepted Mr. Grahame's statement, not that those acts were necessary, but

(1) (1916) 2 A.C., at p. 107. (2) (1916) 2 A.C., at p. 106.
(3) (1916) 2 A.C., at p. 108.

H. C. OF A. 1918.

JOSEPH v. COLONIAL TREASURER (N.S.W.)

Isaacs J. Powers J. Rich J.

that the "pool" was necessary, and that the Prime Minister adhered to the scheme, as satisfying the requirement of the law, that the further and extraneous acts complained of were proved to be a matter of national urgency and were so considered by the Federal Government. In our opinion, that would not have been sufficient if the Federal Government itself had been the defendant, and still less can it be so in the present case. As to Mr. Grahame and Mr. Harris, even if they had sworn to the national necessity of the very acts complained of, which they have not done, it must be remembered that those gentlemen are not entrusted by the Constitution with any responsibility or function in relation to the power of national defence. They are not by their official position in the situation of having the required knowledge of the facts to know how far a given step is so urgent as to call for the disregard of private rights, and they have not been shown to be authorized to represent the opinion of the Commonwealth Government on the subject, even if that were sufficient to answer the appellant in the circumstances.

Mr. *Blacket* further contended that apart altogether from governmental power arising from the State Government's virtual agency on behalf of the Commonwealth Government, the State Government could on another ground exercise the war prerogative. He said that the State Government must at least have the power of every individual subject of the Crown, and that every subject was not only entitled, but bound, to do all he could to assist in the defeat of the enemy; and, finally, that the acts complained of were only such assistance. Besides leading to a state of helpless anarchy, such a doctrine confuses the King's prerogative with the subject's duty. *Chitty on the Prerogative*, at p. 4, quotes *Blackstone* as to the meaning of "prerogative," and the quotation includes the following passage: "It can only be applied to those rights and capacities which the King enjoys alone, in contradistinction to others; and not to those which he enjoys in common with any of his subjects; for if once any one prerogative of the Crown could be held in common with the subject, it would cease to be prerogative any longer."

For these reasons we think that the judgment appealed from cannot be sustained. The appeal must be allowed, the verdict

entered by the Supreme Court set aside and the general verdict of the jury restored.

We desire to add that we have not overlooked the provisions of sec. 40A of the *Judiciary Act*, passed under the power vested in the Commonwealth Parliament by the second sub-section of sec. 77 of the Constitution. That section has made the jurisdiction of this Court entirely exclusive of that of the State Courts with respect to questions as to the limits *inter se* of the constitutional powers of the Commonwealth and of the States. The argument before *Harvey* J., as already stated, was that the State possessed the power of exercising the royal war prerogative and that the "Commonwealth has no exclusive power in defence."

The question of how far the Supreme Court should have dealt with the case having regard to the principle laid down in *Jones* v. *Commonwealth Court of Conciliation and Arbitration* (1), has not been raised at any stage. We treat this appeal as properly in this Court; it is here now, and we have jurisdiction to determine all the questions involved. Our anxiety has not been lessened in view of the special responsibility the Constitution places upon us in matters of this nature.

HIGGINS J. In view of the possibility that other actions may be brought, it cannot be made too clear that this case is being decided on certain assumptions. For instance, we have not to consider whether the declaration discloses a cause of action. Counsel for the defendant admit that in time of peace the matters alleged would constitute a good cause of action and cannot be justified except through the doctrine of the prerogative.

It has not been argued by the plaintiff that the point as to the prerogative could not be raised by the defendant under the plea of "not guilty." The point was brought out in evidence and in argument at the trial, and without objection; but it appears that at that stage the prerogative relied on was some prerogative power exercisable by the State Government. This is the explanation of the form of the first question put by the learned Judge to the jury, at the instance of counsel for the defendant: "Was the pool

(1) (1917) A.C., 528; 24 C.L.R., 396.

H. C. OF A. 1918.

JOSEPH v. COLONIAL TREASURER (N.S.W.)

Higgins J.

scheme of the Government carried out by the Government with the object of benefiting the nation as a whole in time of war?" The Government referred to is the Government of New South Wales, represented here by the Colonial Treasurer. The Full Court of New South Wales, however, evidently saw the difficulty of treating the prerogative as to war as being exercisable by any Government that has not the powers as to war and defence; and, in setting aside the verdict for the plaintiff, the Full Court treated the acts done by the New South Wales Government as having been done "in concert with the Commonwealth Government." In my opinion, the verdict should not have been set aside on this new aspect of the facts, as the plaintiff had had no opportunity of meeting it by evidence. For aught that appears, he might have adduced evidence to show that the Federal Ministers did not intend to use the war prerogative, or did not know that the State Government was carrying out its scheme of the wheat pool by acts unlawful but for the prerogative.

I am also of opinion that even on the evidence put in on the trial, the scheme of the wheat pool, as distinguished from the scheme for carriage of the wheat overseas, was not the scheme of the Federal Government at all. It could not become by ratification the act of the Federal Government, as the State Government did not at the time purport to act as agent for the Federal Government, but on its own authority and behalf (*Wilson* v. *Tumman* (1)). It was the scheme of the State Government. It was devised, according to the Minister for Agriculture, four months before he met the Prime Minister in conference; and its developments, so far as they were illegal under the ordinary law—the refusal of trucks, and the procuring of breaches of contract—did not begin until after the conference with the Prime Minister, and (so far as appears) were never disclosed to him.

Further, even if the Federal Government did approve of the illegal incidents (illegal under the ordinary law), there is no sufficient ground for finding that they were necessary or urgently required for defence of the Commonwealth and of the several States. There was no finding of the jury to such an effect; and the Full Court could not legitimately make such a finding unless there was no

(1) 6 Man. & G., 236, at pp. 242-243.

other conclusion to which any jury could reasonably come. By virtue of the reservation at the trial, the defendant was entitled to show that there was no case to go to the jury; but there was certainly evidence on which the jury could find, and did find, that the scheme was not carried out even "with the object of benefiting the nation as a whole in time of war." I need not refer to more than the evidence furnished by the Government's own pamphlet, which said:—"It" (the scheme) "has been formulated by the Ministers, considered, amended, debated, and finally adopted, so far as the Ministers are concerned, from one standpoint only—the interest of the farmer. All other interests have been made subsidiary to that of the producer."

It is true that to secure to the farmers high prices for wheat may be the best means of inducing them to put their lands under tillage; but the point is that it was for the jury to consider whether the object of the pool was to benefit the nation as a whole in time of war, or for other objects.

Further, even if the wheat pool scheme could be treated as valid under the prerogative, the jury have found, on the second issue, that all the actions of the Government officials which interfered with the plaintiff's dealings in wheat were not taken *bonâ fide* in furtherance of the wheat pool scheme. If my judgment had to rest on this finding, I should feel doubt. The two arguments in favour of the finding, as stated and condemned by *Pring* J., are certainly unsatisfactory. But I am not convinced that there was no evidence to support the finding.

The considerations which I have stated are, to my mind, conclusive, but I do not want to be treated as committing myself, as a matter of law, to the assumption that the peculiar and exceptional doctrine of the prerogative is applicable to circumstances such as have appeared in this case. I certainly agree with the view that, if and so far as the royal prerogative as to war is exercisable by Australian authority, it has to be exercised, not by the State Ministers, but by the Governor-General and his Federal Ministers (Constitution, secs. 51 (VI.), 52, 61, 68-70, 106-109, 114, 119). As Lord *Parker* says (*The Zamora* (1)), "Those who are responsible for the national

(1) (1916) 2 A.C., at p. 107.

H. C. OF A. 1918.

JOSEPH v. COLONIAL TREASURER (N.S.W.)

Higgins J.

security must be the sole judges of what the national security requires." But it is not to be taken for granted that the fact of the existence of war and of such circumstances of exigency as have been here proved would justify the acts done in connection with the wheat pool scheme, so far as they were illegal under the ordinary law. The matter has not been argued, and I wish to leave it open. *Primâ facie*, illegal acts are not rendered justifiable by the plea of the King's command or of State necessity (*Entick* v. *Carrington* (1)), although there is certainly greater latitude allowed in war. Moreover, even if the recognized agent of the King for purposes of war has power in such circumstances to transcend the ordinary law, I should think that he must intend to transcend it, must intend to exercise the special prerogative power, must address himself to the prerogative power. A mere statement to the effect, "Bring me your wheat to the port, and I shall ship it," would not seem to be sufficient to justify any illegal act in the bringing; as the bringing of the wheat to the port is *primâ facie* to be done by methods permitted by the ordinary law. According to *Sugden on Powers*, 8th ed., p. 289, "a donee of a power may execute it without referring to it, or taking the slightest notice of it, *provided that the intention to execute it appear.*" I referred to this point in the recent case of *Pankhurst* v. *Kiernan* (2) in connection with legislation enacted by the Federal Parliament for the protection of private property in time of war. If the principle is right, it would seem to be *à fortiori* applicable to the present case. Here the Prime Minister does not say, no Federal officer or other agent of the King who could be treated as a medium for the exercise of the prerogative as to war has said, in evidence or otherwise, that he sanctioned by virtue of the prerogative the acts done by the State Government in pursuance of the wheat pool scheme, or that he regarded them as essential or urgently required for defence, or even for the necessities of the Imperial Government and the allies. I do not make any dogmatic pronouncement on the subject as it has not been argued; but I want to leave it open, so far as I am personally concerned.

I concur in the view that the appeal should be allowed.

(1) 19 St. Tri., 1030, at p. 1063.

(2) 24 C.L.R., at p. 135.

GAVAN DUFFY J. In this case defendant's counsel formally admitted that the acts complained of if done in time of peace would have afforded the plaintiff a cause of action whatever might have been the motive or intention of those responsible for them, and he justified them solely as acts done by virtue of the King's prerogative in time of war. The defendant's case was put in two ways. First it was said that the acts complained of were the acts of the New South Wales Executive acting for and on behalf of the Commonwealth Government, and next that they were acts of the New South Wales Government as the immediate agent of the King. I do not think that the first position is now open to the defendant, because his pleading does not raise the question specifically and at the trial before *Harvey* J. he so conducted his case as to suggest to the plaintiff that it was not necessary for him to call evidence on that issue. In order to support the second position it must be shown that the circumstances justified the use of the King's prerogative and that the New South Wales Executive was the King's agent for that purpose. In my opinion, the defendant has not shown that the acts complained of were such as in the circumstances might be done by virtue of the prerogative and it is therefore unnecessary to consider the further question, but my silence on that point must not be taken as suggesting that I think the New South Wales Executive acted as the King's agent in the transaction. I concur in thinking that the acts complained of were not part of the wheat pool scheme, and I adopt the words used in the judgment read by my brother *Isaacs* to describe their nature (1) :—" They were not comprised within the terms of the scheme, and were resorted to in order, if possible, to drive the appellant into the scheme, or into inactivity. The scheme, it was thought, would have failed unless the appellant and others in his position were interfered with, and in that sense the interference was to protect the scheme. Nevertheless, it was altogether extraneous to the scheme itself, and was no part—even incidental—of the method assented to by the Prime Minister."

The evidence in support of the defence that the acts complained of were justified by the prerogative was summarized by the learned

(1) *Ante*, p. 43.

H. C. OF A. 1918.

JOSEPH v. COLONIAL TREASURER (N.S.W.)

Gavan Duffy J.

Judge at the trial in the questions he submitted to the jury, apparently with the approval of the parties. Using his language we may express it thus :—The pool scheme of the Government was carried out by the Government with the object of benefiting the nation as a whole in time of war. The actions of the Government officials which interfered with the plaintiff dealing with wheat (which were the acts complained of) were taken *bonâ fide* in furtherance of the wheat pool scheme.

The jury found that the wheat pool scheme was not carried out by the Government with the object of benefiting the nation as a whole in time of war, and that the actions of the Government officials which interfered with the plaintiff's dealing with wheat were not taken *bonâ fide* in furtherance of the wheat pool scheme. The first of these findings is, in my opinion, justified by the evidence, and disposes of the case as the parties fought it before the trial Judge. I think it must be taken that the questions were left to the jury for the purpose of determining the issues of fact which the parties considered material, and on the understanding that if the jury found a negative answer to either of the questions and the finding was supported by evidence, the plaintiff should have a verdict. If this is not so, the position stands thus : the jury have returned a general verdict for the plaintiff, after what must be taken to be a proper direction from the Judge, subject only to the objection taken at the trial that there was no case to go to them ; and if the evidence discloses a case for the jury this Court must accept their verdict. It is admitted that the plaintiff made a *primâ facie* case, and, in my opinion, proof that the acts complained of were done *bonâ fide* in furtherance of the wheat pool scheme and that the wheat pool scheme itself was carried out by the Government with the object of benefiting the nation as a whole in time of war would supply no answer to that case. The prerogative affords no justification for an act otherwise illegal merely because such act is, in the opinion of the Sovereign or his agents, beneficial to the nation as a whole in time of war. It may perhaps be that the acts complained of are such as might be done by virtue of the prerogative if they were necessary for the public safety and the defence of the realm, and the opinion of those who are responsible for the national security, if

offered on oath to the Court, would be conclusive on the question of the existence of necessity, but in this case we have no evidence on the subject from them or from any other person. The defence of justification under the King's prerogative in time of war therefore fails. No argument was addressed to us on the quantum of damages. The verdict must stand, and the appeal should be allowed.

Appeal allowed with costs. Motion to Full Court of Supreme Court dismissed with costs and verdict for the plaintiff for £1,321 3*s.* 5*d. restored.*

Solicitors for the appellant, *E. Prichard Bassett & Co.*, Sydney.

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

B. L.

[HIGH COURT OF AUSTRALIA.]

HARRIS . . . . . APPELLANT;
DEFENDANT,

AND

BYERLEY . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

Contract—Construction—Agreement for services—Payment by commission on profits—Auditor's or accountant's certificate as to profits—Arbitration clause—Interdict Act 1867 (*Qd.*) (31 *Vict. No.* 11).

A written contract by which B. agreed to manage H.'s businesses provided that payment for such services was to be by a fixed salary and a commission on all net profits in excess of a certain sum, and that "for the purpose of computing the amount of the said commission and for all other purposes" the balance-sheet or profit and loss account of the businesses prepared and certified by H.'s auditor or accountant was to be conclusive and binding