

fingers was unexpected, or could not have been anticipated or fore-  
seen by the defendant or his servants (*In re Polemis and Furness,  
Withy & Co.* (1) ).

The judgments of the Courts below must, therefore, be reversed,  
and judgment entered for the plaintiff.

*Appeal allowed. Judgment of Supreme Court  
reversed. Judgment of District Court for  
defendant set aside. Judgment for plain-  
tiff for £200 with costs in the District Court  
and Supreme Court and in the High Court.*

Solicitors for the appellant, *J. B. Price & Daly.*  
Solicitor for the respondent, *H. J. H. Henchman*, Acting Crown  
Solicitor for Queensland.

J. L. W.

(1) (1921) 3 K.B., 560.

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[HIGH COURT OF AUSTRALIA.]

SMITH . . . . . APPELLANT ;  
NOMINAL DEFENDANT,

AND

WELDEN . . . . . RESPONDENT.  
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF  
SOUTH AUSTRALIA.

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MELBOURNE,  
May 29-31 ;  
June 1.  
ADELAIDE,  
Aug. 17, 21.

*Negligence—Wheat pool scheme—Statutory authority—Wheat delivered to Government  
for sale—Damage to wheat through negligence of Government—Duty towards owner  
of wheat to take care of all wheat in pool—Wheat Harvest (1915-1916) Act 1915* Knox C.J.,  
Higgins,  
Gavan Duffy  
and Starke JJ.

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(S.A.) (No. 1229), secs. 3, 4, 5, 6, 8, *Schedule\**—*Wheat Harvest (1915-1916) Act Amendment Act 1916 (S.A.) (No. 1251), secs. 3, 6—Wheat Harvest (1915-1916) Act Further Amendment Act 1919 (S.A.) (No. 1368), sec. 3.\**

The respondent, who had delivered his 1916-17 wheat to the Government for sale on his behalf pursuant to the Act and had signed an agreement in the form set out in the Schedule, instituted proceedings against the Government by a petition purporting to be on behalf of himself and all other persons entitled to the redress claimed, alleging that a large number of other owners of wheat as well as himself had delivered their wheat to the Government for sale on their behalf, and that the Government by its agents and servants negligently and without reasonable or proper care or protection kept, and carelessly and negligently omitted to keep, large quantities of the wheat so delivered to it, whereby large quantities of the wheat were damaged and the aggregate of the returns for wheat sold was less than it otherwise would have been. The claim was substantially that the respondent and the other owners of wheat were entitled to compensation in respect of the negligence alleged. There was no allegation that the respondent's own wheat was damaged, or that his wheat was intermixed by the Government with that of other owners so as to be unidentifiable and that the mixed wheat was damaged.

*Held*, by the whole Court, that no cause of action was disclosed :

By *Knox C.J., Gavan Duffy and Starke JJ.*, on the ground that no duty towards an owner of wheat who delivered it to the Government for sale to take care of all the wheat delivered to it for sale was imposed upon the Government ;

By *Higgins J.*, on the ground that no duty to keep safely wheat delivered to it for sale was imposed upon the Government by the Act as to 1916-17 wheat, either expressly or by necessary implication.

*Per Starke J.* : A duty was imposed upon the Government towards each owner who delivered wheat for sale to take such care of his wheat as a prudent owner would exercise in relation to his own wheat.

Decision of the Supreme Court of South Australia, reversed.

\* The *Wheat Harvest (1915-1916) Act 1915 (S.A.)* is entitled "An Act to enable the Government to enter into contracts relating to the marketing of wheat and to enable the Government to compulsorily acquire wheat in South Australia;" &c. Sec. 3 provided as follows:—"(1) The Minister for and on behalf of the Government may enter into contracts with such companies, firms, or individuals as he may think fit, under which contracts such companies, firms, and individuals shall act as agents for and on behalf of the Government in receiving, stacking, storing, protecting, and/or delivering such wheat as the owners thereof may desire to deliver to the Government for sale by the Government on account of such owners. (2) The terms and conditions of such contracts must be

mutually agreed between the parties thereto." Sec. 4 provides that "Every owner of wheat who desires so to do may deliver his wheat to the Government for sale on his behalf and shall sign an agreement in the form set out in the Schedule hereto." Sec. 5 provides that "(1) All wheat delivered to the Government for sale by the Government on account of the owners may be sold at such time or times and at such place or places as the Minister may decide and at the best price obtainable at the time. (2) The price to be received by the owners of wheat delivered to the Government for sale shall be ascertained in the following manner:—From the aggregate of the returns for wheat sold by the Government plus the total dockages shall be deducted all expenses and expenditure



APPEAL from the Supreme Court of South Australia.

A petition by Elijah Welden to the Governor of South Australia, under Ordinance No. 6 of 1853, was substantially as follows:—

1. Pursuant to the *Wheat Harvest Acts* 1915 and 1916, a large number of owners of wheat delivered their wheat, known as 1916-17 wheat, and referred to in the *Wheat Harvest Acts* by that term, to the Government of the State of South Australia for sale on their behalf, respectively, and respectively signed agreements in the form set out in the Schedule to the *Wheat Harvest (1915-1916) Act* 1915.

2. Your petitioner was one of such owners of 1916-17 wheat, and your petitioner delivered his 1916-17 wheat to the said Government and signed an agreement as aforesaid. Your petitioner delivered his 1916-17 wheat, the quantities whereof are respectively mentioned in the following schedule on the dates respectively mentioned in the same schedule. [A schedule was then set out specifying the quantities of wheat delivered, the dates on which they were delivered and the numbers of the certificates for the several quantities.]

3. On delivery to the said Government of each parcel of the wheat mentioned in par. 1 hereof, the said Government by its several agents delivered to each owner who delivered the wheat a certain certificate for payment of 2s. 6d. per bushel as for “first advance” on the wheat delivered, and also a certain certificate, entitled “Government certificate for supplementary advances on wheat

incurred in or about the marketing of the wheat and certified by the Minister as being approved by him. The amount arrived at after making such deductions shall be divided by the number of bushels of wheat received for sale. The result will show the f.o.b. price of f.a.q. wheat, and settlements will be made on that basis. The decision of the Minister as to the amount to be so deducted for expenses and expenditure shall be final and bind all parties.” The form in the Schedule to the Act was, so far as is material, as follows: “In consideration of the Government of South Australia undertaking to receive and market on my behalf wheat delivered by me, I hereby agree to abide by and accept the conditions and actions of the said Government unreservedly so far as the said

wheat is concerned, and hereby authorize the said Government to handle and sell the said wheat in conjunction with other wheat in such manner as the said Government may consider to be to the best advantage, with periodical settlements as circumstances may permit, and agree to accept final settlement at such time as the said Government is able to close accounts” &c. The *Wheat Harvest (1915-1916) Act Further Amendment Act* 1919 (S.A.), by sec. 3, repealed sec. 3 of the Act of 1915, and substituted the following new section therefor: “3. The Minister, for and on behalf of the Government, may (a) receive, stack, store, and protect such wheat as the owners thereof may desire to deliver to the Government for sale by the Government on account of such owners,” &c.

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1916-17 harvest," being in substance and effect a certificate of the delivering owner's rights to receive payment of his share of the proceeds of 1916-17 wheat over the 2s. 6d. per bushel. The numbers of the last-mentioned certificates respectively for the wheat referred to in par. 2 hereof are set forth in the said schedule in par. 2 hereof.

4. The said Government received the wheat delivered to it as aforesaid, and upon and in consideration of such delivery undertook to market the same on behalf of the owners who delivered the same.

5. The said Government in the years 1916, 1917 and 1918, by its agents and servants kept large quantities of the wheat delivered to it, as stated in par. 1 hereof, negligently and without reasonable or proper care or protection and carelessly and negligently omitted to keep or protect large quantities of the said wheat.

6. By reason of the negligence and carelessness of the said Government, its servants and agents, large quantities of the said wheat were damaged by mice and by exposure to and effects of the weather, and large quantities thereof were destroyed by mice and by exposure to and effects of the weather, and by reason thereof the said Government has not marketed or sold and cannot market or sell a large portion of the said wheat delivered to it, and has marketed and sold large quantities of the said wheat delivered to it at prices far below the prices which would or could and should have been received therefor if the same had not been damaged through the negligence and carelessness of the Government and its servants and agents.

7. The aggregate of the returns for 1916-17 wheat actually sold by the Government has exceeded the said sum of 2s. 6d. per bushel and expenses and expenditure incurred in or about the marketing of the wheat; but in consequence of the facts stated in pars. 5 and 6 hereof the aggregate of the returns for 1916-17 wheat sold and (if any remains in existence unsold) to be sold by the Government is and will be much less in amount than the same would be if there had not been the negligence, carelessness, improper conduct, damage and loss stated in pars. 5 and 6 hereof, and that to the great loss and detriment of the owners who delivered 1916-17 wheat to the Government.

8. On or about 15th March 1921 your petitioner by his solicitors by letter to the Honourable the Chief Secretary of South Australia



asked for an intimation that the Government admitted your petitioner's claim for compensation, and that the Government would furnish all information in its control which might be necessary to determine the amount of such compensation. On 2nd April 1921 the said Chief Secretary, as the Minister controlling the Wheat Scheme, replied by letter of the Under Secretary to your petitioner's solicitors that the Government could not recognize any right upon the part of your petitioner to compensation.

9. Your petitioner respectfully submits, on behalf of himself and all other persons who (being owners who delivered 1916-17 wheat to the Government or executors, administrators or assigns of such owners) are entitled to receive the price prescribed by the said Acts of 1916-1917 wheat delivered to the Government for sale (all hereinafter referred to as "the said other persons"), that he on behalf of himself and the said other persons are entitled to

- (1) A declaration that he and the said other persons are entitled to compensation to be paid by the said Government for the negligence, carelessness, improper conduct, damage and loss stated in pars. 5 and 6 above;
- (2) A declaration that the said Government is bound to make good to your petitioner and the said other persons the amount by which the aggregate of the returns for 1916-17 wheat sold and to be sold by the Government is and shall be less than it would have been if there had not been any of the said negligence, carelessness, improper conduct, damage or loss;
- (3) A decree that the Government do and shall make settlements for 1916-17 wheat under the *Wheat Harvest Acts* 1915 to 1919 by paying to your petitioner and the said other persons the same sums as would be payable and paid to them by the Government if the said aggregate of the returns were not in fact less than it would be if there had not been any of the negligence, carelessness, improper conduct, damage and loss aforesaid;
- (4) Payment by the Government of compensation for the negligence, carelessness, improper conduct, damage and loss aforesaid;

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- (5) Account of and inquiries for determining (a) the amount of compensation to which each of them, your petitioner and the said other persons, is entitled ; (b) the amount by which the said aggregate of the returns of 1916-17 wheat sold and to be sold by the Government is or will be less than it would be if there had not been the negligence, carelessness, improper conduct, damage and loss aforesaid ;
- (6) Such further or other relief as the nature of the case may require.

Pursuant to the ordinance George John Smith was appointed a nominal defendant and the petition was referred to the Supreme Court for trial. The nominal defendant by his defence raised two objections in point of law, which were as follows:—(1) That the petition is not authorized by the Ordinance No. 6 of 1853 in that the same is in respect of, or includes, matters of dispute or difference which the Court has no jurisdiction or authority to entertain or to determine. (2) That the petition discloses no cause of action ; nor any sufficient or lawful obligation, nor any obligation, on the part of the Crown towards the petitioner ; nor any legal or equitable right of the petitioner against the Crown cognizable by the Court or enforceable therein.

The points of law having been referred to the Full Court for hearing and determination, that Court made an order declaring that the petitioner was entitled to maintain in his own behalf the petition, and that the objections in point of law, except to the petitioner's suing on behalf of persons other than himself, were not valid and should be overruled, and ordering that the petitioner's costs of and incidental to the hearing and the order should be his costs in the cause in any event. The reasons for the judgment were those given for the judgment in respect of the same objections to a similar petition by Mark Bloch.

From the decision of the Full Court the nominal defendant now, by special leave, appealed to the High Court, he having as a term of the special leave undertaken to pay the petitioner's costs of the appeal in any event.

During the argument a cross-appeal was taken by the petitioner raising the question whether the petitioner was entitled to institute



the proceedings in a representative capacity ; but, as the question was not dealt with in the judgments hereunder, the arguments upon it are not reported.

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*Cleland* K.C. and *Napier* K.C. (with them *McLachlan*), for the appellant. The petition discloses no cause of action. The Government is not liable for the negligent acts or omissions alleged in the petition, because (1) what was done by the Government under the *Wheat Harvest Acts* was undertaken for the defence of the Empire and was political and governmental, and therefore had none of the characteristics or obligations of trading or business dealings between individuals (*Salaman v. Secretary of State in Council of India* (1) ) ; (2) in carrying out the terms of those Acts the Government was intended to be beyond the control of the Courts of law except in so far as the Acts expressly imposed legal obligations in favour of owners of wheat ; (3) the Acts do not expressly impose upon the Government the duty of care, nor do they give to owners of wheat the right to sue in respect of want of care ; (4) no such duty and no such right should be implied or inferred from the terms of the Acts ; (5) so far as concerns wheat voluntarily delivered to the Government for sale, the terms of the agreement in the Schedule to the *Wheat Harvest (1915-1916) Act* 1915 exonerate the Government ; (6) so far as wheat compulsorily acquired by the Government is concerned, it is acquired upon the same conditions as apply to wheat voluntarily delivered and the amount of compensation is to be ascertained in the same way. [Counsel referred to *R. v. Williams* (2).]

[*STARKE* J. referred to *Fowles v. Eastern and Australian Steamship Co.* (3).]

The actions of the Government which by the agreement in the Schedule the owner of wheat agrees to abide by and accept must be acts which otherwise would be wrongful. For the petitioner to succeed he must show a special private interest (*Wool Slipping and Scouring Co. v. Central Wool Committee* (4) ). The relationship between the Government and an owner of wheat is not contractual but statutory. Certain statutory rights are given to the owner and certain statutory obligations are imposed on the Government—

(1) (1906) 1 K.B., 613, at p. 640.

(2) (1884) 9 App. Cas., 418.

(3) (1916) 2 A.C., 556.

(4) (1920) 28 C.L.R., 51, at p. 60.



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*e.g.*, a duty to sell the wheat at the best price. But those duties are towards the public and not towards the individual owners of wheat. The statute having stated the rights of the owners of wheat and the obligations of the Government, no other rights or obligations will be implied (*Sharpness New Docks and Gloucester and Birmingham Navigation Co. v. Attorney-General* (1) ). If any obligations binding upon the Government are to be implied they are limited to obligations which would arise from a similar contract between individuals, but in that case the relationship should not be assimilated to that of bailment or agency but to that of shareholders in a corporate enterprise, in which the corporation would only be liable to the extent of the corporate funds (*Mersey Docks and Harbour Board Trustees v. Gibbs* (2) ). In that view the losses should be borne by the funds of the pool and not by the consolidated revenue. The obligation of the Government would also be limited to the appointing of proper persons to carry out the scheme, and would not include responsibility for the negligent acts of properly chosen servants.

[KNOX C.J. referred to *Hillyer v. St. Bartholomew's Hospital* (3).

[STARKE J. referred to *Galsworthy v. Selby Dam Drainage Commissioners* (4).]

The duty being to provide suitable servants in carrying out the scheme, there is no allegation of negligence in that respect. If any obligation of care is to be implied it should be limited to an obligation to each owner in respect of his own wheat. [Counsel also referred to *The Moorcock* (5); *Devonald v. Rosser & Co.* (6); *In re Railway and Electric Appliances Co.* (7); *Evans v. Liverpool Corporation* (8); *Clegg, Parkinson & Co. v. Earby Gas Co.* (9); *Reigate v. Union Manufacturing Co. (Ramsbottom) Ltd.* (10); *Dare v. Bognor Urban District Council* (11).]

[STARKE J. referred to *Smith v. Martin and Kingston-upon-Hull Corporation* (12).]

*Piper K.C.* and *Latham K.C.* (with them *Ham* and *Norman*), for

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| (1) (1915) A.C., 654, at p. 669.       | (7) (1888) 38 Ch. D., 597, at p. 608. |
| (2) (1866) L.R. 1 H.L., 93, at p. 107. | (8) (1906) 1 K.B., 160, at p. 166.    |
| (3) (1909) 2 K.B., 820.                | (9) (1896) 1 Q.B., 592, at p. 594.    |
| (4) (1892) 1 Q.B., 348.                | (10) (1918) 1 K.B., 592, at p. 605.   |
| (5) (1889) 14 P.D., 64, at p. 68.      | (11) (1912) 76 J.P., 425.             |
| (6) (1906) 2 K.B., 728, at p. 745.     | (12) (1911) 2 K.B., 775.              |



the respondent. Reading the *Wheat Harvest (1915-1916) Act 1915* and the Schedule together, when an owner of wheat delivers it to the Government and signs the agreement in the Schedule, he has a contract with the Government and his rights depend on that contract, and by virtue of the Act the Government is bound by that contract. That the relation created is contractual is shown by the title to the Act of 1915, "An Act to enable the Government to enter into contracts relating to the marketing of wheat," by the use in sec. 4 of the phrase "shall sign an agreement," and by the language of the Schedule, which is that of contract; and is borne out by sec. 6 of the Act of 1916, which recognizes that contracts have been entered into. If the relation is contractual, it involves a promise by the Government to market all wheat received by the Government for sale or acquired by the Government, and to divide the proceeds of such marketing in the specified manner. From such a promise must be implied, as it would be between individuals, a promise to take some care of all the wheat (*Hart v. MacDonald* (1)). Whatever the degree of care may be, the allegation of negligence in the petition is sufficient (*Bullen and Leake's Precedents of Pleading*, 6th ed., p. 334). There would be a duty of care towards each particular owner in respect of his wheat, and under sec. 5, which expresses some of the terms of the contract, there is a duty to each owner to account for a certain quantity of f.a.q. wheat at the best price obtainable. If the Government cannot so account, it can excuse itself; but the onus is on the Government to prove that the loss of any wheat did not occur through its negligence. The duty of care arises from the mere possession by the Government of the wheat (*Makower, McBeath & Co. v. Dalgety & Co.* (2); *Newman v. Bourne and Hollingsworth* (3); *Bullen v. Swan Electric Engraving Co.* (4)). Since the authority to the Government is to sell each owner's wheat in conjunction with other wheat, the performance of the obligation to any one owner depends on the handling of all the wheat, and the implied obligation of the Government is to take care of all the wheat. The degree of care is at least the same as that which a reasonable person would exercise in relation to his own property. Unless it is

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(1) (1910) 10 C.L.R., 417.

(2) (1921) V.L.R., 365; 43 A.L.T., 38.

(3) (1915) 31 T.L.R., 209.

(4) (1907) 23 T.L.R., 258.



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to be inferred that the Government, having wheat in its possession, must take care, the transaction would be ineffectual (*Oriental Steamship Co. v. Tylor* (1)). The promise by the owner of wheat set out in the Schedule—"I hereby agree to abide by and accept the conditions and actions of the . . . Government"—is not an exoneration of the Government from liability for negligence, but binds the owner to abide by what the Government does in relation to third parties under the authority to market the wheat. The words are not apt to express an exoneration from a breach of duty, and have no reference to omissions on the part of the Government. The promise is confined to the wheat of the particular owner. If the words are ambiguous, they should be construed most favourably for the owner and not for the Government, for whose benefit the expression was framed (*Taylor v. Liverpool and Great Western Steam Co.* (2); *Price & Co. v. Union Lighterage Co.* (3); *Nelson Line (Liverpool) Ltd. v. James Nelson & Sons Ltd.* (4)). [Counsel also referred to *Joseph v. Colonial Treasurer (N.S.W.)* (5).]

*Cleland K.C.*, in reply, referred to *R. v. New Queensland Copper Co.* (6); *Coggs v. Bernard* (7); *Wilson v. Mayor and Corporation of Halifax* (8); *Poulsum v. Thirst* (9); *Ferrier v. Wilson* (10); *Mersey Docks and Harbour Board Trustees v. Gibbs* (11).

*Cur. adv. vult.*

Aug. 21.

The following written judgments were delivered :—

KNOX C.J. AND GAVAN DUFFY J. In this case the plaintiff's claim is put in various ways, but in essence it depends on the proposition that the Government is bound to every owner of wheat not only to exercise care in keeping the wheat delivered to it by such owner under the provisions of Act No. 1229, but also to exercise care in keeping all the wheat delivered to it by other owners under the provisions of that Act. In our opinion this proposition cannot be sustained.

(1) (1893) 2 Q.B., 518, at p. 527.

(2) (1874) L.R. 9 Q.B., 546.

(3) (1904) 1 K.B., 412.

(4) (1908) A.C., 16.

(5) (1918) 25 C.L.R., 32.

(6) (1917) 23 C.L.R., 495, at p. 501.

(7) (1703) 2 Ld. Raym., 909.

(8) (1868) L.R. 3 Ex., 114, at p. 119.

(9) (1867) L.R. 2 C.P., 449, at p. 451.

(10) (1906) 4 C.L.R., 785.

(11) (1866) L.R. 1 H.L., at p. 118.



Sec. 4 of Act No. 1229 is as follows: "Every owner of wheat who desires so to do may deliver his wheat to the Government for sale on his behalf and shall sign an agreement in the form set out in the Schedule hereto." This section authorizes an owner of wheat to deliver it to the Government for sale on his behalf. It imposes on the Government an obligation to receive the wheat for that purpose when offered, and on the owner the obligation to sign an agreement in the form set out in the Schedule to the Act. That agreement recognizes the obligation of the Government to receive and market wheat delivered to it by an owner, and in consideration of such obligation imposes on the owner certain obligations to the Government with respect to that wheat. It imposes no obligation on either party with respect to the price to be obtained for such wheat, except the obligation to make and accept such periodical settlements as circumstances may permit, and a final settlement at such time as the Government is able to close accounts. It has no reference to wheat other than that delivered by the owner who signs the agreement. Under the provisions of sec. 5 (1) all wheat delivered to the Government for sale may be sold at such times and at such place or places as the Minister may decide and at the best price obtainable at the time. Sec. 5 (2) prescribes the method of ascertaining the price to be paid to every owner for his wheat. It runs as follows:—"The price to be received by the owners of wheat delivered to the Government for sale shall be ascertained in the following manner:—From the aggregate of the returns for wheat sold by the Government plus the total dockages shall be deducted all expenses and expenditure incurred in or about the marketing of the wheat and certified by the Minister as being approved by him. The amount arrived at after making such deductions shall be divided by the number of bushels of wheat received for sale. The result will show the f.o.b. price of f.a.q. wheat, and settlements will be made on that basis. The decision of the Minister as to the amount to be so deducted for expenses and expenditure shall be final and bind all parties." Sec. 6 authorizes the Government to acquire wheat on behalf of His Majesty; and sec. 8 provides that the wheat so acquired shall be sold and disposed of, and compensation paid to the person from whom it is acquired, as if it had been voluntarily delivered under sec. 4.

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It was urged for the plaintiff that the obligation to pay the price to be received by the owner of wheat was imposed by the agreement in the form contained in the Schedule signed by him, and that that agreement therefore imposed on the Government an implied obligation to do everything which was reasonably necessary in order to insure to the owner the best price for his wheat. As that price depended on the aggregate amount received for the total quantity of wheat sold for all owners, including His Majesty, and as that aggregate amount depended on the condition of every portion of the wheat sold, it was said that each owner could insist on the whole of the wheat being kept without negligence and could obtain damages from the Government in so far as any want of care in keeping any part of it had affected its condition, and so the price ultimately to be obtained by him under the provisions of sec. 5 (2).

The answer to this argument is that the obligation to pay the prices prescribed by sec. 5 to the owner signing the agreement is not imposed by the agreement but by the section itself, and in order to succeed in this action the plaintiff must show that the Act itself, expressly or impliedly, entitles him to enforce against the Crown a careful performance not only of the functions committed by sec. 5 but also of the duties incidental to the right of possession and control vested in it in order that it may perform such functions. In our opinion he has no such right.

The scheme of the Act is this :—All wheat delivered under the provisions of sec. 4 may be sold with any other wheat delivered under the provisions of that section or acquired for His Majesty under the provisions of sec. 6, and all moneys resulting from the sale of any portion of the wheat so delivered or acquired shall be pooled for the purpose of giving to each owner, not the price actually obtained for his wheat, but a price based on the average price obtained for all wheat sold. Such rights and obligations as are intended to be given to or imposed upon the owner of wheat in addition to those expressly prescribed by the statute must be found expressed or implied in the agreement which he is compelled to sign; and an inspection of this agreement, as we have already seen, shows that none of the rights and obligations so given or imposed refers to any wheat other than that delivered by himself. The agreement



might have expressly prescribed rights and obligations with respect to wheat other than that which is the subject matter of the agreement; but it does not do so. We see no reason to imply into the statute any such right as is claimed for the plaintiff. If the agreement gives to every owner of wheat the right to insist that his own wheat shall be carefully kept until it is sold, it is unnecessary to read into the statute a similar right with respect to all other wheat whether delivered or acquired. On the other hand, if it gives him no such right with respect to his own wheat, it is absurd to suggest that he has the larger right by virtue of the statute.

For these reasons we are of opinion that the plaintiff has no cause of action against the defendant in this case, and in the circumstances it becomes unnecessary to pass an opinion on any other question raised before us.

HIGGINS J. The position which arises for our consideration has been so fully stated in the judgment of the Chief Justice of South Australia that there is no need for me to restate it. Of the two points of law raised in the defence and submitted to the Supreme Court of that State, I propose to deal with the second only: "That the petition discloses no cause of action; nor any sufficient or lawful obligation, nor any obligation, on the part of the Crown towards the petitioner; nor any legal or equitable right of the petitioner against the Crown cognizable by the Court or enforceable therein."

I cannot but think that the arguments have approached this question from the wrong angle. The problem is not to ascertain whether there is a bailment or not as known to the law, or under which category of the bailments enumerated by Lord *Holt* in *Coggs v. Bernard* (1) the relations created by the *Wheat Harvest* (1915-1916) Act 1915 with its amendments can be brought, or what are the consequences of voluntary bailment at common law: the problem is, first and last, and throughout, what does the Act mean—what relations does the Act create, what duties does it impose. The Legislature of South Australia has plenary powers of legislation subject to the Federal Constitution; and if it chooses to add to

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Lord *Holt's* list of bailments, or to alter the rights under bailments, or to create some new relations, or alter old rights as known to the common law, it can do so. It is not restricted by the cases on bailments.

It is also to be borne in mind that under sec. 4 of the Principal Act the Government of South Australia is not a voluntary bailee. In my opinion, *Poole J.* was justified in saying that "there was a right given by the Act to the owner to deliver his wheat to the Government, and consequently a correlative duty on the Government to receive it." *Primâ facie*, therefore, the duties which would be implied at common law as duties of a bailee who voluntarily undertakes to keep another's property would not be implied. Does the Act impose on the Government, expressly or by necessary implication, any duty; and, if so, what is it?

But although the Act imposes the duty of receiving the wheat voluntarily delivered, for sale on behalf of the owner, and this duty might not involve a contractual relation, sec. 4 creates such a relation. The owner has to sign "an agreement" in a certain form, rigid and unalterable. The form is set out in the Schedule. The Legislature has in fact expressly prescribed that there is to be an agreement which is to be signed by the owner; and, unless the duty of safe-keeping be found in that agreement, it does not exist as a contractual duty at all. There is no meaning in the requirement that an agreement shall be signed containing certain stipulations, unless these are the only stipulations. I recognize, of course, that there may be stipulations not express, but arising by necessary implication from the words used. I recognize also that possibly the Act may impose a duty outside the agreement; but I cannot find any duty imposed on the Government by the Act, either expressly or by necessary implication, to keep safely. Such a duty would ordinarily appear from the agreement; but everything in the agreement tends rather in favour of Government irresponsibility. From the provision in sec. 4 entitling the owner to deliver his wheat to the Government for sale, it might be a necessary inference (but for sec. 3 and the significant words of the agreement) that the Government is under an obligation to hold it until sale; but it is not a necessary inference that this implied duty to hold implies legal responsibility for its



safety. The only duty that I find imposed on the Government by sec. 5 (1) of the Act is to sell at the best price when it sells at all. So far as material, for my purpose, the words of the agreement are these: "In consideration of the Government of South Australia undertaking to *receive* and *market* on my behalf wheat delivered by me, I hereby agree to abide by and accept the conditions and actions of the said Government unreservedly so far as the said wheat is concerned, and hereby authorize the said Government to handle and sell the said wheat in conjunction with other wheat in such manner as the said Government may consider to be to the best advantage," &c. That is to say, the owner agrees to the conditions and actions of the Government unreservedly, and empowers it to handle and sell his wheat in conjunction with other wheat as the Government may think to be to the best advantage. The agreement is unskillfully drawn; and there may be legitimate doubt as to the precise meaning of the words "conditions . . . of the said Government." I rather think that the word "conditions" has the same sense as in sec. 12 (1) of the Act. The Governor may make regulations for carrying out the Act, and in particular for "(d) prescribing the conditions subject to which wheat acquired may be sold or disposed of"; and, in the agreement, the phrase may well involve that the owner agrees to abide by and accept the conditions subject to which his wheat may be received and sold. But there is no justification, in my opinion, for implying on the part of the Government a promise safely and securely to hold. Such a promise was alleged in the declaration in *Coggs v. Bernard* (1), and had to be admitted for the purpose of the argument in that case; and the contention was that there was no consideration for that promise such as would create an obligation enforceable under English law to keep safely. The Court held that the confidence induced by undertaking any service for another is a sufficient legal consideration to create a duty in the performance of the service; but neither the promise nor the voluntary undertaking on the part of the Government has been established here.

This Act is on its face a very exceptional Act, designed to meet the very exceptional circumstances of the War. The character of

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the second party to the contract—the Government—explains provisions which would otherwise be very extraordinary. The Government's duty and the Government's interest both combined to make it reasonable to suppose that the Government would do its best for the wheatgrowers; and if the Government failed to do its best for the State's wheatgrowers, it would have to answer to Parliament and to the electors. Under sec. 6 the Minister was empowered to acquire wheat compulsorily on behalf of the Crown; under sec. 8 the wheat so acquired was to be sold and disposed of in the same manner and subject to the same conditions in every respect as if the wheat had been delivered to the Government under sec. 4; the compensation to be paid for any wheat so acquired had to be ascertained and paid in the manner and at the time in which the owner had delivered the wheat under sec. 4; and the Government stood to get nothing for its trouble. Under all the circumstances, how can it be a necessary inference that the Government took any responsibility for the safe-keeping of the owners' wheat? It is, at the least, as reasonable an inference that the owners of the wheat would, in their helplessness, consent to trust the Government, and take the risk of negligence on its part, or rather on the part of its agents. The owners of the wheat would probably feel that the pooling of the wheat for export and marketing under the ægis of the Government, and in conjunction with wheat acquired and owned by the Government, was better for him than no export or marketing at all.

But there are considerations which appear to me actually to negative the inference that the Government was even to hold the wheat for the owner. It would appear that under the Principal Act, as it originally stood, all the work of "receiving, stacking, storing, protecting, and/or delivering" wheat was to be done by "agents" under contract (sec. 3); and the terms and conditions of the contracts with the "agents" were to be a matter for mutual agreement of the Minister and the "agents." The title of the Act describes it, first of all, as "An Act to enable the Government to enter into contracts relating to the marketing of wheat"; and this power to enter into such *contracts (with agents)* is the first power conferred (sec. 3). Under sec. 3 of the amending Act of 1919 the Minister was



given—apparently for the first time—power to receive, stack, store and protect such wheat as the owners thereof might desire to deliver to the Government for sale on account of the owners; but the words are future in effect, and do not apply to 1916-17 wheat, the subject of these proceedings. Under these contracts between the Government and the agents, conditions might be framed as to care to be taken by the “agents”; but any such conditions would be matter of contract between the Government and the agents, not between the Government and the owner. They would not impose any liability on the Government towards the owners. The only liability that the original Act seems to impose on the Government is, as to wheat voluntarily delivered for sale, to sell—if sale were possible—all the pooled wheat at the best price; and to divide the proceeds, less expenses, &c., among the owners in proportion to the number of bushels delivered by the owners respectively; and, under the scheduled form of agreement, there were to be periodical settlements as circumstances may permit. Under sec. 3 of the amending Act 1916, wheat stored by the owner thereof to the satisfaction of the Minister in a barn or other place approved by the Minister was to be deemed to have been delivered to the Government; and if the Government, by implication, is to be legally responsible for the safe-keeping of all wheat delivered, it would be legally responsible for such wheat stored by the owner himself; and even for its own wheat acquired under the compulsory powers. Having regard to the fact that in the scheduled agreement there is an undertaking on the part of the Government to “receive and market” the wheat, but no undertaking to “hold” or “keep” it, and to the fact that in sec. 3 of the Principal Act the only stacking, storing and protecting of wheat contemplated is stacking, storing and protecting by the “agents,” and to the fact that nowhere in the Act is there any reference to the Government holding the wheat, and to the fact that until the Act of 1919 (sec. 3) there was no power conferred on the Government itself to stack, store and protect the wheat, I am strongly inclined to the opinion that until the Act of 1919 came into operation the only holders of the wheat were to be the “agents”—not the Government. The wheat was to be delivered to the Government (sec. 4); but it was to be held by the

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1922. imposed by the contract with them. But whether this opinion is  
SMITH correct or not, I think that ground 2 of par. 1 of the defence has  
v. been sustained. The Government has made no promise and is not  
WELDEN. put by the Act under any duty to take care of the wheat delivered  
Higgins J. to it by any owner. There is no such promise or duty express or  
implied. I say nothing as to the point that, even if there is a binding  
agreement on the part of the Government with the owner to take  
care of his wheat, there is no agreement with him to take care of  
the wheat in the pool delivered by others; or as to the point that  
the petitioner cannot say that any of the wheat destroyed by mice  
or by weather was his wheat.

STARKE J. The facts alleged in the petition in this case do not,  
in my opinion, disclose any cause of action against the Government  
of the State of South Australia. The liability of the Government  
must be determined upon a true interpretation of the *Wheat Harvest  
Acts* 1915 to 1916, coupled with the agreement entered into pursuant  
to sec. 4 of the Act of 1915. The facts alleged by the petitioner  
are that he and other owners of wheat delivered it to the Government  
pursuant to the Acts, and that the Government kept large quantities  
of the wheat negligently and without reasonable or proper care or  
protection whereby it was damaged by mice or exposure to the  
weather. But it must be observed that the petitioner does not  
allege that his wheat was so damaged; or that his wheat was inter-  
mixed by the Government with the wheat of other owners so as to  
be unidentifiable, and that the mixed mass was damaged. On the  
contrary, the case alleged and argued by the learned counsel for the  
petitioner was that a quantity of the wheat delivered to the Govern-  
ment pursuant to the Acts was damaged by reason of the Govern-  
ment's negligence whereby “the aggregate of the returns for wheat  
sold by the Government” was diminished. In effect, therefore,  
the duty alleged by the petitioner on the part of the Government  
towards him was to take proper care of all wheat delivered to it  
pursuant to the Acts, so that the aggregate return for wheat sold  
by the Government might not be diminished. Now, let me turn to  
the Acts.



The 4th section of the 1915 Act coupled with the Schedule contains the terms on which each owner delivers his wheat to the Government. The learned counsel for the Government contended that the words in the agreement set forth in the Schedule to the Act, "I hereby agree to abide by and accept the conditions and actions of the said Government unreservedly so far as the said wheat is concerned," exonerated the Government from all responsibility in respect of the wheat of each owner who signed an agreement. But I am unable to take this view of the agreement. Words of exoneration from liability should be clear and precise, and the words used in the agreement are words of authority rather than of exoneration. No doubt, if the Government were exonerated from all responsibility in respect of each owner who delivered wheat to it, then it would be difficult to infer the duty suggested by the petitioner. But, even if the Government is not expressly exonerated from all liability, still the question remains what, if any, duty is imposed upon it by reason of the agreement and the Act, or flows from the relation established by them. The agreement itself only purports to give authority in respect of the owner's own wheat; the words are "wheat delivered by me," "the said wheat," "to sell the said wheat in conjunction with other wheat." And sec. 5 of the Act does no more than fix the sum which each owner is to receive in respect of wheat delivered by him to the Government. It is true that neither the agreement nor the Act expressly defines the duty of the Government as to the safe-keeping of wheat delivered to it, but the law may, nevertheless, attach a duty as an incident to the relationship established by virtue of that agreement and the Act. A bailee, by reason of the bailment, is bound to his bailor to take care of goods placed in his hands. And a Government empowered by statute to carry on a business would be liable to its customers for negligence in the conduct of that business (*Brabant & Co. v. King* (1); *Fowles v. Eastern and Australian Steamship Co.* (2)). In my opinion, similar duties arise in the present case, and include a duty, on the part of the Government towards each owner who delivers wheat to it for sale, to take such care of that wheat as a prudent owner would exercise in relation to his own wheat. This

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(1) (1895) A.C., 632.

(2) (1916) 2 A.C., at p. 563.



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duty arises, in my opinion, as an incident to the relationship established between the Government and the owner by reason of the agreement and the Act.

In its final form, however, the argument for the petitioner was that the performance of the obligation to each owner of wheat involved handling all the wheat delivered to the Government, and paying the price fixed by sec. 5 of the Act. Consequently it was said that the necessary implication of the agreement and the Act was to impose a duty upon the Government, in respect of each owner who delivered wheat to it, to exercise care as to all wheat delivered (or acquired), and that the degree of care required was at least the same as that which a prudent man would exercise in relation to his own wheat. But implications, in the case of agreements, are only made to give effect to the intention of the parties—to give such business effect and efficacy to the transaction as the parties must have intended (*The Moorcock* (1) ). The transaction in the present case cannot be put on any higher footing than that of an agreement reinforced by the provisions of the Act, and requiring such implications to be made as are necessary to give it business force and efficacy. But if a duty arises from the agreement and the Act in respect of the wheat delivered by an owner to the Government, then the further or more extended duty contended for by the petitioner is not necessary to give business force and efficacy to the transaction. Such further duty, therefore, cannot have been, or ought not to be presumed to have been, within either the contemplation of the parties or the intention of the Act.

It is unnecessary to discuss the measure of damages in respect of the breach of the duty which, in my opinion, rests upon the Government in respect of wheat delivered to it by an owner, but it may well be that the measure is not the value of that owner's wheat which has been destroyed, but the claimant's proportion of the amount by which the aggregate return of the wheat sold by the Government has been diminished. Further, it is unnecessary to discuss the position which arises if the Government has so intermixed the wheat of different owners that the wheat of each separate owner is unidentifiable, but, as at present advised, I am inclined to

(1) (1889) 14 P.D., 64.



the view that in this case also the duty of the Government towards an owner in respect of the wheat delivered by him to it might be enforced by appropriate allegations in proper proceedings (*Smurthwaite v. Hannay* (1); *Spence v. Union Marine Insurance Co.* (2)).

Some suggestion was made in the course of the argument that the provisions of sec. 3 and of secs. 6, 7 and 8 of the Act No. 1229 negative any duty on the part of the Government towards owners who delivered wheat to it. But sec. 3 is permissive: it does not purport either to deprive the Government of the power to itself handle wheat committed to its care, or to render unlawful or *ultra vires* any action of the Government in that direction. And secs. 6, 7 and 8 have little bearing on the question. These sections give an owner a claim for compensation in respect of wheat acquired from him, and prescribe how that compensation is to be determined. If loss occurs owing to the negligence of the Government in the care of that wheat, the same inquiry will arise as in the present case—namely, what is the duty of the Government as to wheat acquired from each owner. It is unnecessary to formulate this duty here; but I will add that it seems unlikely that an owner's right to compensation for wheat acquired by the Government from him can be diminished by reason of the negligence of the Government in its care and protection. Further, sec. 3 of the Act No. 1251 was relied on. But though it might be impossible for an owner to allege any breach by the Government of its duty as to storage in cases falling within the section, still I am quite unable to follow its bearing upon the duty of the Government in wholly different circumstances.

*Appeal allowed. Order appealed from discharged.*

*Declare that the petition discloses no cause of action. Appellant to pay costs of appeal. Respondent to pay costs of reference to Supreme Court. Set-off of costs.*

Solicitors for the appellant, *Baker, Glynn, McEwin & Napier*, Adelaide, by *Whiting & Aitken*.

Solicitors for the respondent, *Wadey, Norman & Waterhouse*, Adelaide, by *Malleson, Stewart, Stawell & Nankivell*.

B. L.

(1) (1894) A.C., 494, at pp. 505, 507.

(2) (1868) L.R. 3 C.P., 427.

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