[HIGH COURT OF AUSTRALIA.]

SMITH . . . . . APPELLANT;
NOMINAL DEFENDANT,

AND

WILLIAM CHARLICK LIMITED . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

H. C. OF A. 1923-1924.

ADELAIDE, *Sept.* 27, 28, 1923; *May* 22, 1924.

Knox C.J., Isaacs, Higgins, Rich and Starke JJ.

Money Had and Received—Voluntary payment—Money paid under threats—Wheat harvest scheme of South Australia—Sale of wheat by Wheat Harvest Board—Demand for further payment—Payment under threat to sell no more wheat to purchaser—Action against Government—Wheat Harvest (1915-1916) *Act* 1915 (*S.A.*) (*No.* 1229), *secs.* 4, 5, 8, *Schedule—Wheat Harvest* (1915-1916) *Act Further Amendment Act* 1917 (*S.A.*) (*No.* 1291), *sec.* 5.

Sec. 5 (1) of the *Wheat Harvest* (1915-1916) *Act* 1915 (S.A.) provides that "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."

Held, by *Knox* C.J., *Isaacs*, *Rich* and *Starke* JJ. (*Higgins* J. dissenting), that neither that sub-section nor any other provision of the *Wheat Harvest Acts* 1915 to 1917 imposes on the Government any duty towards persons desiring to buy wheat of which a refusal by the Government to sell wheat to a particular individual is a breach.

Held, also, by the whole Court, that, where one person demands from another money which, as the former knows, the latter is not bound to pay, the fact that payment is made only to avert from the latter some great evil which will, as both parties know, immediately follow if the demand is not complied with, does not make the payment involuntary so as to entitle the latter to recover it.

Hills v. *Street*, (1828) 2 Moo. & P. 96; *Kendal* v. *Wood*, (1871) L.R. 6 Ex. 243, and *Melbourne Tramway and Omnibus Co.* v. *Melbourne City Corporation*, (1903) 28 V.L.R. 647; 24 A.L.T. 161, distinguished.

The plaintiff, a miller, bought from the Wheat Harvest Board, which was constituted by Regulations made under the *Wheat Harvest Acts* 1915-1919 (S.A.), certain parcels of wheat at certain prices per bushel. After the wheat had been delivered and paid for, the Board demanded from the plaintiff, in respect of the wheat sold, payment of a further sum per bushel in addition to the contract price, intimating that unless the sum demanded were paid the Board would not supply the plaintiff with any more wheat. The Board was not, and did not claim to be, legally entitled to make such demand. The plaintiff, who was unable to purchase any wheat except through the Board and who, if the Board had not supplied it, would have been unable to continue to carry on business as a miller, with full knowledge of all the material facts paid, under protest, part of the sum demanded. The plaintiff then brought an action against the Government of South Australia to recover the sum so paid.

Held, by *Knox* C.J., *Isaacs*, *Rich* and *Starke* JJ. (*Higgins* J. dissenting), that the payment was voluntary and without the abuse of any duty which the Board owed to the plaintiff, and, therefore, that the plaintiff was not entitled to recover it.

Sinclair v. *Brougham*, (1914) A.C. 398, applied.

Attorney-General v. *Wilts United Dairies Ltd.*, (1922) 91 L.J. K.B. 897; 127 L.T. 822; 38 T.L.R. 781, and *T. & J. Brocklebank Ltd.* v. *The King*, (1924) 40 T.L.R. 237, distinguished.

Decision of the Supreme Court of South Australia (*Poole* J.): *William Charlick Ltd.* v. *Smith*, (1922) S.A.S.R. 551, reversed.

APPEAL from the Supreme Court of South Australia.

A petition by William Charlick Ltd. to the Governor of South Australia under Ordinance No. 6 of 1853 was substantially as follows:—

1. Your petitioner carries on at Mile End South in the said State, under the style or name of City Flour Mills, the business of millers.

2. Pursuant to the *Wheat Harvest Acts* 1915-1916, the Government of the State of South Australia, by its servants and agents, entered into contracts in writing with your petitioner dealing with the purchase by your petitioner of wheat from the said Government, that is to say:—

(a) On 25th September 1919 the said Government, by contract in writing, agreed to sell and your petitioner agreed to buy 4,000

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bags of f.a.q. milling wheat at the price of 5s. per bushel, upon the terms and conditions more particularly set out in the said contract.

(b) On 29th September 1919 the said Government, by contract in writing, agreed to sell and your petitioner agreed to buy 4,000 bags of f.a.q. milling wheat at the price of 5s. per bushel upon the terms and conditions more particularly set out in the said contract, and

(c) On 19th January 1920 the said Government, by contract in writing, agreed to sell and your petitioner agreed to buy 4,000 bags of f.a.q. milling wheat at the price of 6s. 6d. per bushel, upon the terms and conditions more particularly set out in the said contract.

3. All of the said wheat, the subject matter of the said contracts, was duly delivered to your petitioner, who duly paid to the said Government for such wheat so delivered the prices or purchase-money set out and stipulated for in the said contracts.

4. On or about 4th February 1920 the said Government notified your petitioner, by letter dated 4th February 1920, that the Government proposed and intended to debit your petitioner's account and to charge against your petitioner in lieu of the prices agreed upon by your petitioner and the said Government the price or sum of 7s. 8d. per bushel for wheat supplied to your petitioner on and after 1st February 1920, inclusive, by the said Government under contracts with your petitioner, and thereupon your petitioner, on 10th February 1920, informed the said Government that your petitioner would not agree to pay and would not pay any increased price on such wheat.

5. On or about 27th March 1920 the said Government informed your petitioner that, unless the said Government received payment of the difference between the said contract prices and the said sum of 7s. 8d. per bushel on wheat then held in stock by your petitioner, the said Government would not enter into any further business with your petitioner. The said difference amounted to £3,523 17s. 9d., and is hereinafter referred to as "the said surcharge."

6. On or about 14th April 1920 the said Government demanded

payment of the full amount of the said surcharge upon the said wheat.

7. In consequence of the premises, your petitioner on or about 16th April 1920 paid to the said Government, under protest and reserving all the rights of your petitioner, the sum of £1,952 7s. 8d. on account of the demand made and in consequence of the attitude adopted by the said Government.

8. The said Government on 20th April 1920 thereupon further notified your petitioner that the said Government would do no further business with your petitioner unless your petitioner undertook and agreed to withdraw the said protest, which your petitioner refused to do.

9. As your petitioner was unable to obtain or purchase either wheat or flour elsewhere, and as on 9th and 13th December 1920 the said Government notified your petitioner that unless your petitioner paid the sum of £1,952 7s. 8d. due by your petitioner to the said Government on other accounts, but which your petitioner claimed to set off against the said amount paid under protest by your petitioner on 16th April 1920, as hereinbefore set out in par. 7 of this petition, the Government would have no further transactions with your petitioner, your petitioner paid to the said Government the sum of £1,952 7s. 8d.

10. Your petitioner respectfully submits that upon the true construction of the said contract the demands made by the said Government were unjustified and unconscionable, and that upon the true construction of the said Acts of Parliament the said Government was not justified in refusing to sell wheat or flour to your petitioner unless and until your petitioner paid the said demands.

11. Your petitioner respectfully submits that he is entitled to

(1) Repayment of the said sum of £1,952 7s. 8d. referred to in par. 7, with interest thereon at the rate of 7 per cent per annum from 16th April 1920;

(2) A declaration that the said Government is not entitled to be paid the said surcharge or sum of £3,523 17s. 9d., or any part thereof, or to retain the said sum of £1,952 7s. 8d. so paid as aforesaid or to debit your petitioner with £1,571 10s. 1d., the balance of the said surcharge;

(3) Accounts and inquiries for determining the compensation

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or damage to which your petitioner is entitled by reason of the premises and payment of the compensation and damage so found upon such accounts and inquiries.

George John Smith (the nominal defendant) by his defence objected in point of law that the petition was bad and insufficient on the ground that it disclosed no cause of action, nor any sufficient obligation on the part of the Crown towards the plaintiff. He also (amongst other things) admitted the allegations in pars. 1 and 2 of the petition, but said that the contracts and acts referred to in the petition were made and done pursuant to the *Wheat Harvest Acts* 1915-1919 (as from time to time in force) and the Regulations thereunder by the Wheat Harvest Board acting in that behalf under the Minister to whom the administration of the Acts was entrusted, and in exercise of the power, authority and discretion conferred by the said Acts and Regulations.

The action was heard by *Poole* J.

At the hearing the following admissions of facts were made by the defendant :—

1. That at all times material the plaintiff carried on the business of a miller, under the style of " City Flour Mills."

2. That all the wheat the subject matter of the contracts respectively dated 25th September 1919, 29th September 1919 and 19th January 1920, and made between the plaintiff and the Wheat Harvest Board, was delivered to the plaintiff; that the whole of the wheat the subject matter of the said contract dated 25th September 1919 was delivered prior to and paid for on 13th November 1919; that the whole of the wheat the subject matter of the said contract dated 29th September 1919 was delivered prior to 31st December 1919 and had been paid for by 5th February 1920; and that the whole of the wheat the subject matter of the said contract dated 19th January 1920 was delivered prior to 30th January 1920 and had been paid for by 16th February 1920.

3. That the plaintiff, in pursuance of the said contracts, paid to the Wheat Harvest Board the price referred to therein.

4. That the Wheat Harvest Board on several occasions about 27th March 1920 informed the plaintiff that unless it paid the

surcharges referred to in the petition the Wheat Harvest Board would do no further business with the plaintiff and would not supply it with any further wheat.

9. That at all material times the plaintiff was unable to purchase any wheat except from the Wheat Harvest Board.

10. That if the Wheat Harvest Board had not supplied the plaintiff with any wheat the plaintiff would have been unable to continue to carry on its business as millers.

The learned Judge made an order directing that judgment should be entered for the plaintiff for the sum of £1,952 7s. 8d., and declaring that the Government of South Australia was not entitled to recover from the plaintiff the sum of £1,571 10s. 1d. mentioned in the petition: *William Charlick Ltd.* v. *Smith* (1).

From that decision the nominal defendant now appealed to the High Court.

The appeal was argued before the appeal to the Privy Council from the decision of the High Court in *Smith* v. *Welden* (2) was determined.

Napier K.C. (with him *F. Villeneuve Smith* K.C. and *Vaughan*), for the appellant. Where one person demands money from another which the other is not bound to pay and knows that he is not bound to pay, payment in compliance with the demand is not involuntary if it is made only to avert some great evil which will, as both parties know, immediately follow if the demand is not complied with. The contrary proposition is not supported by the three cases relied on by *Poole* J., namely, *Hills* v. *Street* (3), *Kendal* v. *Wood* (4) and *Melbourne Tramway and Omnibus Co.* v. *Melbourne City Corporation* (5). *Hills* v. *Street* was a case of payment under duress, and duress means pressure involving either a threat of unauthorized interference with or restraint of the person, the property or the rights of the party called on to pay, or a claim under colour of office or public law (see *Steele* v. *Williams* (6); *Sargood Brothers* v. *Commonwealth* (7)).

(1) (1922) S.A.S.R. 551.
(2) (1922) 30 C.L.R. 585.
(3) (1828) 2 Moo. & P. 96.
(4) (1871) L.R. 6 Ex. 243.
(5) (1903) 28 V.L.R. 647; 24 A.L.T. 161.
(6) (1853) 8 Ex. 625.
(7) (1910) 11 C.L.R. 258, at pp. 276, 301.

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[HIGGINS J. referred to *Close* v. *Phipps* (1).]

There was no duress in the present case. *Melbourne Tramway and Omnibus Co.* v. *Melbourne City Corporation* (2) was also a case of duress.

[KNOX C.J. referred to *King* v. *Henderson* (3).

[STARKE J. referred to *Dowling* v. *Colonial Mutual Life Assurance Society Ltd.* (4).]

Kendal v. *Wood* (5) was a case of payment under a mistake of fact.

Owen Dixon K.C. (with him *Finlayson* and *T. E. Cleland*), for the respondent. The Wheat Harvest Board was not in the position of an ordinary trader dealing with his own wheat, but was in a position of a Department of the Government administering a scheme for the benefit of the community and having very full discretionary powers but not a power to exact a sum of money from a purchaser of wheat which was not the price of the wheat. Under sec. 5 (1) of the *Wheat Harvest* (1915-1916) *Act* 1915 a public duty was imposed on the Government to sell wheat to the person who offered the best price. By sec. 5 of the Act of 1917 (No. 1291) a monopoly of the sale of wheat was given to the Government. The effect of the *Wheat Harvest Acts* 1915-1919 was that the Crown through the Board was given a monopoly in dealing in wheat for the benefit of the whole community, and the Board was bound to administer the scheme for the purpose of realizing the wheat for the benefit of the community. The Board stood in the position of the Government administering a statute conferring powers upon it for the benefit of the community, and in particular for the purpose of selling wheat at the best price obtainable. The payment made by the respondent was made under coercion consisting of a threat to exclude him from the persons with whom the Board would deal. The object of the compulsion was not within the purview of the legislation and the position is the same as in the case of money obtained by a Government official under the colour of office and the money is recoverable (see *Attorney-General* v. *Wilts United Dairies Ltd.* (6)).

[HIGGINS J. referred to *Mortlock* v. *Buller* (7).]

(1) (1844) 7 Man. & Gr. 586.
(2) (1903) 28 V.L.R. 647 ; 24 A.L.T. 161.
(3) (1898) A.C. 720.
(4) (1915) 20 C.L.R. 509.
(5) (1871) L.R. 6 Ex. 243.
(6) (1922) 127 L.T. 822.
(7) (1804) 10 Ves. 292

This is not a case of an instrument creating a trust with particular beneficiaries who have private rights, but is a case of an instrument creating a monopoly which must be exercised for the benefit of the community. [Counsel referred to *Commonwealth* v. *Colonial Combing, Spinning and Weaving Co.* (1).] Under the circumstances the respondent had no election other than either to pay the money, which he did not owe, or to suffer great damage. The form of action to recover that money is an action for money had and received, and the question is, was the payment voluntary ? There is no case which establishes that a payment cannot be involuntary unless a legal right of the person who is called upon to pay is being infringed (see *Maskell* v. *Horner* (2)). If there is such a degree of damage to be encountered by the person called upon to pay if he does not pay and he gets nothing in exchange for his payment that he was not lawfully entitled to without it, the payment is involuntary (see *Atkinson* v. *Denby* (3)). The intention to confer a permanent title upon the person to whom the payment is made is voidable in the same way as a contract becomes voidable, namely, where the situation is such that one person cannot give a true consent but is forced by circumstances to consent (see *Kaufman* v. *Gerson* (4) ; *Société des Hôtels Réunis* v. *Hawker* (5)).

Napier K.C., in reply. The Board had the same powers as the growers of wheat would have had if they had voluntarily combined together. Whatever duty the Crown owed under the original Act remained the same when the monopoly was conferred upon it. That duty was owed to the owners of the wheat, who alone could complain of any breach of it. The direction to sell at the best price is an instruction to the Government for the benefit of the owners. [He referred to *Randall* v. *Northcote Corporation* (6) ; *R.* v. *Shann* (7) ; *Commonwealth* v. *Colonial Combing, Spinning and Weaving Co.* (8).]

Cur adv. vult.

(1) (1922) 31 C.L.R. 421, at pp. 443, 460.
(2) (1915) 3 K.B. 106, at pp. 109, 123.
(3) (1862) 7 H. & N. 934.
(4) (1904) 1 K.B. 591, at p. 596.
(5) (1913) 29 T.L.R. 578.
(6) (1910) 11 C.L.R. 100, at p. 115.
(7) (1910) 2 K.B. 418, at p. 435.
(8) (1922) 31 C.L.R., at pp. 465, 470.

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The following written judgments were delivered :—

KNOX C.J. The respondent sued to recover a sum of £1,952 7s. 8d. paid by it to the Wheat Harvest Board, on 16th April 1920, as money received by the Board to the use of the respondent. The circumstances in which the money was paid may be briefly stated as follows :—Throughout the year 1920 the Board had, subject to the control of the Minister, the management of the affairs of the South Australian Wheat Harvest Scheme, and by force of the provisions of the Wheat Harvest Acts had a monopoly of the right to sell wheat in South Australia. Before 30th January 1920 the Board had entered into contracts with the respondent for the sale of certain quantities of wheat, some at 5s. and some at 6s. 6d. per bushel, and portion of the wheat covered by these contracts was still undelivered on 1st February 1920. On 31st January 1920 the Board gave notice to the respondent that the price of wheat for local consumption had been increased to 7s. 8d. per bushel as from midnight on 31st January, and requiring it to supply a statement of stocks of flour as at 31st January. On 2nd February the Board gave notice to the respondent that it had cancelled the balance undelivered in respect of all contracts unfulfilled at that date. On 4th February 1920 two letters were written by the Board to the respondent. By one the demand for particulars of stocks of flour held on 31st January was repeated; the other contained the following passage :—" We have to advise you that we will debit your account on the basis of 7s. 8d. for all wheat supplied for local consumption from 1st instant inclusive. This will relate to wheat the subject of existing contracts as well as any other because you will be in a position to recover the difference." On 18th March 1920 the respondent supplied particulars of stocks of flour and wheat held by it on 31st January. On 27th March 1920 the Board wrote to the respondent a letter in the following words, namely :—" Promptly on the occasion of the last increase in the price of wheat, and in other letters since, we have intimated to you that seeing the restriction was removed from the price of flour for local consumption, and that you have been empowered to charge on the price based on 7s. 8d. per bushel for f.a.q. wheat, we should expect you to pay into the pool the difference on account

of flour unsold and wheat held, at the date of the rise, and in respect of wheat contracts unfulfilled against which the flour similarly had not been sold. It was only with difficulty that we secured from you statements showing quantities of flour and wheat involved, and under great pressure. In accounts for wheat delivered since the rise, you have been debited on 7s. 8d. per bushel basis. We have not received payment, however, on that basis. We therefore regret the necessity to intimate that unless we receive your cheque covering the debits on the wheat, and also on the flour, calculated at 48 bushels to the ton, and at the amount per bushel, being the difference between the price paid for the wheat and 7s. 8d. per bushel basis, by noon on Monday next, 29th March 1920, we shall be compelled to decline to enter into further business with you either for local or oversea purposes." On 9th April a deputation from the Mill Owners' Association waited on the Board with reference to the surcharge, the Managing Director of the respondent being present at the interview as a member of the deputation. At this interview the Manager of the Board said that the Board did not contend that it had a legal right but considered it had a moral right to insist on payment of the surcharge. On 16th April 1920 the respondent paid under protest £1,952 7s. 8d. on account of the surcharge, which amounted in all to £3,523 17s. 9d. The balance, £1,571 10s. 1d., remains unpaid. As to this last mentioned sum the respondent claimed in the proceedings a declaration that it was not payable. On the trial of the action judgment was entered for the respondent for £1,952 7s. 8d., and a declaration was made that the Government of South Australia was not entitled to recover from the respondent the above-mentioned sum of £1,571 10s. 1d.

Mr. *Dixon*, for the respondent, rested his argument mainly on the position of the Wheat Harvest Board, which was, he said, in the position of a Department of Government dealing with the administration of the wheat pool and entrusted with large, but not unlimited, discretionary powers to be used for the benefit of the whole community.

The first matter for consideration is the position of the Wheat Harvest Board. This Board had, subject to the control of the Minister, full discretionary powers of management of what is described

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in the Regulations as the Wheat Harvest Scheme, and, subject to the control of the Minister, was in effect the representative of the Government for the purpose of carrying into effect the provisions of the Wheat Harvest Acts. The position of the Government under those Acts in relation to the suppliers of wheat has been considered by the Judicial Committee in the recent case of *Welden* v. *Smith* (1). In delivering the opinion of the Board in that case the Lord Chancellor said (2):—"Before forming a conclusion as to the obligations of the Government of South Australia in respect of the storage of wheat, it is desirable to consider what was the relation of that Government to the wheat-owners. Was the Government only exercising administrative powers conferred upon it by statute, or was there a contractual relation between the Government and the owners? In their Lordships' opinion the latter is the true view. . . . The Government, having undertaken to receive, handle and market the wheat of all the owners concerned and to pay them a price dependent on the due handling and sale of all the wheat received, must be regarded as the mandatary of all the owners and bound by the ordinary obligation of reasonable care."

These observations appear to me to dispose of the contention that the Wheat Harvest Board, in conducting or negotiating sales of wheat supplied to the Government under the Acts, should be treated as a Department of Government, and not as a private person dealing with his own property. As I read the decision, it establishes that the position which the Government—or its representative the Wheat Harvest Board—occupied as mandatary or agent of the suppliers in connection with sales of the wheat supplied under the Acts was no different from that of any individual employed in the same capacity. In this view of the position of the Government, and having regard to the fact that the suppliers of wheat to the Government, and not the Crown, would receive the benefit of the payment said to have been wrongly exacted, I think it is clear that the decisions in *Attorney-General* v. *Wilts United Dairies Ltd.* (3) and *T. & J. Brocklebank Ltd.* v. *The King* (4) have no application.

But *Poole* J. did not rest his decision on the supposed position

(1) *Ante*, 29.
(2) *Ante*, at pp. 34-36.
(3) (1922) 38 T.L.R. 781.
(4) (1924) 40 T.L.R. 237.

of the Wheat Harvest Board as a Department of Government. He held, in my opinion rightly, that neither the Government nor the Minister nor the Board owed any duty to the respondent to enter into any contract with it for the sale of wheat, and, so holding, stated the question for decision and the facts on which it was to be determined as follows (1):—" The real question is whether the petitioner is entitled to recover the £1,952 7s. 8d. paid under protest on 16th April 1920. Was the money on these facts money had and received by the Board to the use of the petitioner? It is plain that on 16th April 1920 the whole of the wheat covered by the contracts had been delivered and paid for. It is admitted by the formal admission put in at the trial that the petitioner was at all material times unable to purchase any wheat except from the Board, and that if the Board had not supplied the plaintiff with any wheat the plaintiff would have been unable to continue to carry on its business of a miller. It is clear that under the contracts no further money was due than that which had been paid, and that the Government could not have recovered one penny of the surcharge in an action or other legal proceeding. It is clear also that it did not represent that it had any legal right to the surcharge. On the contrary, it disclaimed any legal right to it. It is clear also that when the petitioner paid it he knew that the Board was not asserting the claim as a legal claim. Further, no property to which the petitioner had any right was withheld from him nor any performance of any legal duty delayed, for the petitioner had no right to compel the Board to deal with it."

After examining in detail a great number of cases, the learned Judge expressed the opinion (2) that the decisions in *Hills* v. *Street* (3) and *Kendal* v. *Wood* (4) warranted the proposition that " where a person demands from another money which he is not bound to pay, and which the party demanding knows he is not bound to pay, payment in compliance with the demand may be 'involuntary,' and will be so if he pays only to avert some great evil which will, as both parties know, immediately follow if the demand is not complied with." And he regarded the decision in *Hills* v. *Street*

(1) (1922) S.A.S.R., at p. 559.
(2) (1922) S.A.S.R., at p. 570.
(3) (1828) 2 Moo. & P. 96.
(4) (1871) L.R. 6 Ex. 243.

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as an authority for the proposition that the threatened exercise of right by the party receiving the money may amount to compulsion so as to prevent the payment from being voluntary when the necessities of the party paying are so great that he must choose between payment and inordinate loss. I am unable to agree in this view. In *Hills* v. *Street* (1) the money sued for was paid for the purpose of preventing a sale of the plaintiff's goods. As *Best* C.J. said (2):—"The payments . . . were forced from the plaintiff, under an apprehension that his goods would be sold. It is impossible to say that payments made under such circumstances can be considered as voluntary payments." It is true that in that case the defendant had a legal right to have the plaintiff's goods sold, but only for the amount of the rent and reasonable expenses attending the distress. The plaintiff protested against the amount demanded by the defendant in respect of expenses, but the defendant said the law allowed them and he would have them. In effect, the defendant, having a right to have the plaintiff's goods sold in order to satisfy (*inter alia*) a sum of £3 15s. in respect of certain charges, threatened to make use of his legal power of sale in order to extort from the plaintiff payment of a further sum of £5 10s. to which he was not entitled but which he insisted he had a legal right to recover in respect of those charges. In my opinion the decision in *Hills* v. *Street* was an application of the rule that the count for money received will lie for money paid by the plaintiff in discharge of a demand illegally made under colour of an office; as excessive fees paid to a broker under a distress. It is so treated in *Bullen and Leake*, 3rd ed., p. 50—a passage cited with approval by *Walton* J. in *William Whiteley Ltd.* v. *The King* (3). In *Kendal* v. *Wood* (4) the acceptances were given under a mistake of fact. The plaintiff became aware of the true state of facts before the bill became due and paid it with knowledge of the facts but under protest. The decision proceeded on the footing that the plaintiff was at all events partially liable on the bill, and that if, as appeared to be the case, the bill had been discounted by a third party the plaintiff would have no defence to an action upon it. It

(1) (1828) 2 Moo. & P. 96.
(2) (1828) 2 Moo. & P., at p. 103.
(3) (1910) 101 L.T. 741, at p. 745.
(4) (1871) L.R. 6 Ex. 243.

is clear that *Blackburn* J. concurred in the view that the plaintiff would have had no defence to an action on the bill, and the observation made by him on which *Poole* J. relies was not necessary to the decision.

In the present case there was no mistake of fact, no threat of unauthorized interference with the person or the property or any legal right of the respondent, and no demand made under colour of office. The payment was made with full knowledge of all material facts. The respondent knew that the Board was not, and did not claim to be, legally entitled to demand the money. It was paid, not in order to have that done which the Board was legally bound to do, but in order to induce the Board to do that which it was under no legal obligation to do. In *Sinclair* v. *Brougham* (1) Lord *Sumner* said: "The action for money had and received cannot now be extended beyond the principles illustrated in the decided cases."

In my opinion none of the cases relied on by the respondent extends far enough to support the claim made in this case, and the appeal should be allowed.

ISAACS J. Judgment in this case has been held over pending the Privy Council decision in *Welden* v. *Smith* (2). That decision is now to hand. As it does not, so far as I can see, affect what I had written immediately after the argument, I read my judgment unaltered.

The material facts may be condensed. The Wheat Harvest Board sold wheat to the respondent at 5s. and 6s. 6d. a bushel. After certain of this wheat was delivered and paid for and all contractual relations between the parties with respect to it had ceased, the Wheat Harvest Board, finding that the respondent still had in its possession some of the wheat, either as grain or as flour, demanded in respect of the wheat, under the name of a "surcharge," a further sum of money. That further sum represented the extra amount that would have been payable for the wheat (or flour) still in existence if the wheat were purchased at the date of demand, namely, 7s. 8d. per bushel. The demand was made, admittedly, not by reason of any legal obligation, but on the ground that, as

(1) (1914) A.C. 398, at p. 453. (2) *Ante*, 29.

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the controlled price of flour was increased in correspondence with the higher price of wheat, the wheat-growers were morally entitled to the advanced price, inasmuch as the wheat had been originally sold for weekly requirements only, and the actual retention of wheat or flour proved overstatement of requirements at the time. The demand was accompanied with a statement by the Board that unless the amount demanded was paid in two days "we shall be compelled to decline to enter into any further business with you, either for local or oversea purposes."

At a vainly protesting deputation from the mill-owners to the Board, the Board consented to accept payment as requested under protest. On 16th April 1920 the respondent paid to the Board "under protest" £1,952 7s. 8d. on account of the surcharge, and on the 20th of the month declined to limit its right of action in respect of the matter. The payment was simply in pursuance of the demand and threat, and not in fulfilment of any new contract. There was no new contract, and no consideration was given for the payment. But there is no doubt the Board honestly believed, not only in the moral justice of its demand, but also that it had the legal right to refuse to deal any longer with the respondent unless he acceded to the demand. The real question, as *Poole* J. says, is whether the respondent is entitled to recover the £1,952 7s. 8d. paid under protest on 16th April 1920. The argument has proceeded on two distinct grounds—the common law, and the wheat harvest legislation.

1. *The Common Law.*—The learned Judge held in favour of the respondent on common law grounds applying between private citizens. His Honor, after distinguishing many other cases cited, as not supporting the respondent's claim, ultimately founds his judgment on three, namely, *Hills* v. *Street* (1), *Kendal* v. *Wood* (2) and *Melbourne Tramway and Omnibus Co.* v. *Melbourne City Corporation* (3). From these, and particularly the two first mentioned cases, a proposition is deduced in these terms (4): "Where a person demands from another money which he is not bound to pay, and which the party demanding knows he is not bound to pay, . . . payment in compliance with the demand may be 'involuntary,'

(1) (1828) 2 Moo. & P. 96.
(2) (1871) L.R. 6 Ex. 243.
(3) (1903) 28 V.L.R. 647; 24 A.L.T. 161.
(4) (1922) S.A.S.R., at p. 570.

and *will be so* if he pays only to avert some great evil which will, as both parties know, immediately follow if the demand is not complied with." The whole force of the proposition is in the words " will be so " and the following words. It is interpreted by the decision to cover a case where a party pays what is demanded on grounds not morally reprehensible, and merely as a condition of the other party's present willingness to deal with him in the future, no present contract or obligation whatever being made or entered into. The " great evil " to be averted would in terms include the refusal of a bank to increase the limit of a customer's credit or of a wholesale merchant to supply a retailer—the result being financial ruin, and the demand being for a sum of which, however just the demand might be or might be thought to be, strict law, as is recognized, would not compel the payment. As the learned Judge demonstrated, no case other than the three mentioned would support so wide a proposition. In my opinion those cases do not authorize it.

Hills v. *Street* (1) may be simply stated. A landlord distrained on his tenant's goods, having the power to sell after the bailiff had been in possession five days. In order to secure extension of time the tenant, who disputed the amount of rent claimed, specially agreed to pay " the charges " for levying the distress and " the expenses " of keeping the man in possession. After some extended time the defendant demanded (*inter alia*) £8 5s. for certain charges which, as found by the jury, exceeded the proper charges by £5 10s. The tenant objected to the amount demanded, and the defendant's bailiff insisted on the amount demanded. The tenant accordingly paid in order to avoid a removal and sale of the goods. The tenant was held entitled to recover the £5 10s. as an involuntary payment. The point of the case is that the defendant, having at the request of the plaintiff remained in possession the whole time on the express condition that the defendant would pay " the charges," was entitled to receive the reasonable and proper charges, and *those only*, as a condition of not removing and selling the plaintiff's goods of which he had possession. The plaintiff being compelled to take the course of paying what was demanded in full (for, as held, he had no other remedy) in order to save his goods, the payment *quoad* the excess

(1) (1828) 2 Moo. & P. 96.

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was unlawfully demanded, and could be recovered. In the *résumé* of that case in *arguendo*, in *Atlee* v. *Backhouse* (1), by counsel, including the then Attorney-General (Sir *John Campbell*) and the then Solicitor-General (Sir *Robert Rolfe*), the agreement was referred to, and it is put that what the Court held was " that excessive charges, extorted under colour of that agreement, might be recovered back."

Kendal v. *Wood* (2) rests on a simple foundation. Kendal had been in partnership with Woolnough, who had handed £1,000 of the partnership money to Wood to discharge a private debt. Wood knew, or had reason to know, the £1,000 was partnership funds, but erroneously thought Woolnough had authority to apply it to payment of his debt. Woolnough becoming bankrupt, Kendal had to pay to Wood whatever partnership debts were owing. Wood honestly, but erroneously, demanded of Kendal £5,758 as the amount of partnership debt, and thereby caused him to give in cash and bills £5,758 in settlement, the true amount being £1,000 less, a fact of which Kendal was ignorant. Among the bills, and the last to fall due, was one for £2,000 drawn by Kendal's father with defendants' concurrence, and accepted by Kendal. Shortly before it became due (3) the defendants informed the plaintiff that they wished to discount the bill, and thereupon Kendal, who had discovered the mistake, paid into the Bank, the day before the bill became due, £2,000 to retire it. He did so, believing himself bound to pay the bill, and intimated to the defendants that he did so simply on account of his father's name being attached and, protesting his non-indebtedness, intimated his intention to claim back the £1,000. The Court considered that any man might well have believed he was bound to pay the £2,000 bill, of which in any case £1,000 was owing (see per *Cockburn* C.J. (4) and per *Blackburn* J. (5)); one Judge (*Mellor* J.) thinking he was legally bound to pay it. *Blackburn* J. (6), in a passage quoted by *Poole* J., speaks of " those circumstances " and of " compulsion and pressure." " Those circumstances " are imperfectly stated unless they include the fact that it was the defendants' own conduct that had placed the plaintiff in an embarrassing position, and led him to believe he was bound to retire the bill. The

(1) (1838) 3 M. & W. 633, at p. 639.
(2) (1871) L.R. 6 Ex. 243.
(3) (1870) 39 L.J. Ex. 167, at p. 169.
(4) (1871) L.R. 6 Ex., at p. 249.
(5) (1871) L.R. 6 Ex., at p. 251.
(6) (1871) L.R. 6 Ex., at p. 250.

defendants had in the first instance claimed the full amount as the true debt without acquainting him with the facts touching the £1,000, and next, when the bill approached maturity, they intimated that they wanted to discount it. As was held, a man placed in that position might well believe himself legally compelled to do what the plaintiff did, and that a failure to meet the bill might cause, at least to his father, irreparable loss of credit. It was, therefore, not really open to the defendants to say the plaintiff's payment was purely "voluntary." The "compulsion and pressure" referred to by *Blackburn* J. was obviously created by the defendants themselves. That decision therefore falls short of authorizing the proposition enumerated in this case.

As to the Victorian case (1), the passage cited from the judgment of *Madden* C.J. certainly favours that proposition. But that passage stands alone. *Williams* J. is careful to indicate on what he bases the general statement he adopted from earlier cases. He refers *en bloc* to par. 5 of the special case as setting out the facts. That paragraph shows that the root of the whole matter was the judgment procured by the defendant, then under appeal to the Privy Council, declaring the legal obligation of the plaintiff to obtain licences, and of course pay fees, an obligation which the case in hand declared non-existent. That judgment was the source of the compulsion or embarrassment of the plaintiff, which was consequently attributable to the defendant. *Hodges* J. narrates the circumstances, and includes that initial fact. His generalization also has to be read with the special facts on which he bases it. *Holroyd* J. rests on equity—since disposed of by *Sinclair* v. *Brougham* (2). *à Beckett* J. simply says "I concur," but with what preceding judgment he does not say. *Hood* J. dissents. In the result the only favouring passage is that of Madden C.J. But, in justice to the memory of the Chief Justice and of *Holroyd* J., it must be remembered that they spoke eleven years before *Sinclair* v. *Brougham*. In each of the three cases mentioned the "compulsion and pressure" originated from the defendant.

Not only, therefore, is the propcsition without positive support

(1) (1903) 28 V.L.R. 647; 24 A.L.T. 161. (2) (1914) A.C. 398.

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from precedent, but it is opposed to a very ancient principle. In *Rolle's Abridgment* (p. 688) it is stated that duress by a stranger by procurement of the party who is to have the benefit is good cause of avoidance. It is clear that duress created by persons or circumstances unconnected with a party to a contract is no cause for impeaching the bargain with him.

Refusal to relieve from business difficulties is not the creation of those difficulties. It is not the same thing as wielding the whip or the rod. The proposition is contrary to Lord Mansfield's opinion in *Moses* v. *Macferlan* (1), where he said of the action for money had and received: "It does not lie for money paid by the plaintiff, which is claimed of him as payable in point of honour and honesty, although it could not have been recovered from him by any course of law."

It is conceded that the only ground on which the promise to repay could be implied is "compulsion." The payment is said by the respondent not to have been "voluntary" but "forced" from it within the contemplation of the law. Leaving aside, for the present, the question whether in law the payment was "forced" from the respondent by some undue advantage taken of its situation having regard to the Wheat Harvest legislation, the point is whether the Board's insistence was what is regarded as "compulsion" from the simple standpoint of common law. "Compulsion" in relation to a payment of which refund is sought, and whether it is also variously called "coercion," "extortion," "exaction," or "force," includes every species of duress or conduct analogous to duress, actual or threatened, exerted by or on behalf of the payee and applied to the person or the property or any right of the person who pays or, in some cases, of a person related to or in affinity with him. Such compulsion is a legal wrong, and the law provides a remedy by raising a fictional promise to repay. Apart from any additional feature presented by the relevant legislation, it is plain that a mere abstention from selling goods to a man except on condition of his making a stated payment cannot, in the absence of some special relation, answer the description of "compulsion," however serious his situation arising from other circumstances may be (see *Pollock on Contracts*, 9th ed.,

(1) (1760) 2 Burr. 1005, at p. 1012.

pp. 477-478). The claim for repayment of a sum which has been paid on demand can only be successfully made where, as Lord *Haldane* L.C. said in *Sinclair* v. *Brougham* (1), "the law could consistently impute to the defendant at least the fiction of a promise" though, as Lord *Sumner* said in the same case (2), "it is hard to reduce to one common formula the conditions under which the law will imply a promise to repay money received to the plaintiff's use." At all events it is not sufficient that it is merely "unconscientious for the defendant to retain it" (3), or that "it would be the right and fair thing that it should be refunded to the payer" (4).

The respondent must therefore fail so far as its claim rests on common law rights.

2. *The Wheat Harvest Act.*—What is there in the Act to alter the position and give the respondent a better right to recover back the money it has paid? It is essential to remember the test; and so I phrase the problem thus: "What is there in the Act which, when applied to the circumstances, leads to the legal inference of a promise by the appellant to repay the money by reason of compulsion applied to the respondent in respect of some new statutory right created in its favour, or by reason of undue advantage taken of it in view of any statutory provision in its interest?"

For the respondent it is said that, though the Act creates extremely large powers, for the most part discretionary, in the Government, there is one strict limitation, that is to say, they are powers of sale only. And it is contended that the demand for a surcharge, being a demand for a share of profits made upon wheat already sold, delivered and paid for, has no proper relation to a sale of wheat, and is consequently *ultra vires* of the Government. It is further said that the discretion, large as it is within the scope of the scheme marked out by the Legislature, is bestowed for the general benefit of the community; that the duty of the Government in selling the wheat is a general duty to the whole community; and that its discretion cannot be fettered by a determination in advance to exclude any possible buyer from the

(1) (1914) A.C., at p. 417.
(2) (1914) A.C., at p. 454.
(3) (1914) A.C., at p. 455.
(4) (1914) A.C., at p. 456.

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field of consideration. The threat to exclude the respondent was therefore illegal, and the respondent has a right to complain. Next it is contended that, as there is an obligation to get the best price obtainable at the time of the sale, on this ground too the threatened exclusion was illegal, with the same right in the respondent as before. For the appellant the contention was that the Act placed the Government in the same position as to the disposal of the wheat as a private owner, and all it was required to do was to transform the wheat into money to the best advantage of the owners, and therefore it could require any consideration as a condition of dealing with any person.

I am not able to accept the construction placed upon the Act by either party. I find myself unable intelligibly to state my reasons for the conclusions at which I arrive without a general expression of my understanding of the enactment.

Act No. 1229 (the principal Act) was passed during the War, and arose out of the circumstances caused by the War. Australian wheat-growers experienced great difficulty in disposing of their wheat to advantage, and Great Britian needed wheat. Every Act of Parliament is passed for the welfare of the community, and public Acts certainly for the general good. But not every public Act confers or extends private rights; and whether a particular enactment does so must be judged of by reference to its provisions. Act No. 1229 deals with two subjects distinct in themselves, though by processes very similar in operation. The subjects are (1) the marketing of wheat, and (2) the compulsory acquisition of wheat by the Government from the owners and its subsequent sale and distribution by the Government. The second subject is outside the borders of this case, and as to it I need say no more than that by sec 8 (1) it is provided that the wheat acquired shall be sold and disposed of in the same manner and subject to the same conditions in every respect as if it had come under the first subject, namely, wheat to be sold by the Government for the owners of the wheat.

It is quite unnecessary for me to do more than state the effect of the legislation in broad outline sufficient to indicate why I do not think the Act creates any new right in the respondent or gives the respondent any right of action even if the demand were *ultra vires*

or illegal. Indeed, I ought by way of preface to say that, as this proceeding is against the Government—that is the Crown—under Ordinance No. 6 of 1853, and as Smith, the nominal defendant, represents the Crown only, judgment should be entered for the appellant even if the demand were *ultra vires* or illegal, for " there is no receipt of " the money " in the sense which is necessary to raise the implication of a promise to repay." See per Lord *Sumner* in *Sinclair* v. *Brougham* (1). That case is a clear authority that, where officers even of a bank act *ultra vires* of the bank's powers, money received by them is not legally received by the bank, even though physically in the bank's coffers. *A fortiori* must this be so, if, as contended, the law not merely gives no authority to the Government to receive (*ultra vires*), but impliedly forbids it (illegality). Being a question of authority, illegality destroys all possibility of it. Had this action been brought against the members of the Board, the next position alone would have arisen. But as it is, I am unable at the threshold to see any escape from the decision in *Sinclair* v. *Brougham*. The cases of *Attorney-General* v. *Wilts United Dairies Ltd.* (2) and *Commonwealth* v. *Colonial Combing, Spinning and Weaving Co.* (*Wooltops Case*) (3) were relied on to support the respondent's claim on the assumption of *ultra vires* or illegality. Those cases depended on constitutional principles concerning the power of the Crown to recover money that has been agreed to be paid and has not been paid. They have no reference to the recovery back of moneys paid after demand.

I pass now to the second position, the Government's duty under the Act. Reading sec. 4 of the Act, and its appendage the agreement in the Schedule, I find an open public invitation to the wheat-owners (not merely growers but *owners*) in South Australia to hand over their wheat to the Government for sale on the notified terms. Acceptance of the invitation was in point of law perfectly optional, although under the second branch of the Act power existed to attain the same end where the invitation was ignored. And later, by Act No. 1291 in 1917, the practical inducement to accept the invitation was strengthened by the prohibition of intra-State sales

(1) (1914) A.C., at p. 453. (2) (1922) 91 L.J. K.B. 897.
(3) (1922) 31 C.L.R. 421.

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and purchases of wheat except to or from the Minister or a person authorized by him, a provision which rendered less necessary the exercise of the acquisition power. But once the agreement as scheduled was made, it was a statutory contract, for, not only is it called an " agreement " in sec. 4 of Act No. 1229, but it is called a " contract " in Acts Nos. 1251, 1291, 1353 and 1368. The effect of the " contract " was to surrender to the Government whatever power of disposition of the wheat the owner possessed, and to surrender it irrevocably. Although the owner nominally remained the owner until the wheat was sold, his rights in respect of the wheat were entirely changed. He could not deal with it in any way, he could not revoke his agreement, for the Act gave no power to do so. Indeed sec. 4 conferred express power on the Government to sell, which no act of the parties could affect. What the Act substituted for the ordinary right of ownership were the statutory rights which the owner was given under the " contract " and the direct provisions of the Act (see *Sinclair* v. *Brougham* (1)). It is not really necessary for me to enter into the nature of those statutory rights; and, therefore, in view of the fact that *Smith* v. *Welden* (2) is now under appeal to the Privy Council, I say no more than is absolutely essential to the present case. Certain things, however, are explicit on the face of the Act. One is that the invitation to every wheat-owner was to agree to the Government selling his wheat " in conjunction with other wheat " as it thought fit (see the agreement). Another was that the price the owner was to receive was arrived at by dividing the total net returns for " wheat sold by the Government " by " *the number of bushels of wheat received for sale* "—that is, wheat under the first branch. " Settlement " will be made on that basis (sec. 5 (2)). So that the " other wheat " in the agreement unquestionably brings into account the wheat of the owners making similar agreements. And the total mass of the wheat of each season dealt with by the Acts is called a " pool " (see sec. 7 of Act No. 1291, sec. 9 of Act No. 1353 and sec. 10 of Act No. 1368). Every owner so agreeing therefore knew he was embarking in a scheme in which other wheat-owners were or would probably be interested, certainly so far as the

(1) (1914) A.C., at pp. 458-459. (2) (1922) 30 C.L.R. 585.

operation of sec. 5 of the principal Act (No. 1229) was concerned. In point of connection of parties interested and the adjustments of rights, some degree of resemblance exists between this scheme and that dealt with in *Clarke* v. *Dunraven—The Satanita* (1), and the situation as to one phase of *Sinclair* v. *Brougham* (2).

With respect to the precise relation in which the Crown may stand towards owners of wheat by reason of the direct provisions of the legislation or with respect to its precise duties by reason of the relative positions of the parties either severally or collectively and the circumstances that have supervened (*Dominion of Canada* v. *City of Levis* (3)), I am not concerned to inquire. But the authorities I have referred to convince me of this : that the relation of the Crown and its relevant legal duties do not so far extend as to include legal responsibility to a person in the situation of the respondent merely because it is a possible buyer of wheat which has been delivered to the Government to sell ; and *a fortiori* I should say this is so as to the Government's own wheat acquired compulsorily under the other branch of the enactment. I agree with the respondent's contention that the powers conferred on the Government referable to the first branch of the Act, however extensive within their ambit, are limited to the sale of wheat and to acts preparatory to and consequential on such sale. But I do not agree that the discretion of the Crown within that ambit is limited as suggested, namely, by an incapacity to declare that a given person shall be excluded from prospective buyers. Business reasons may impel any merchant for his own advantage to resolve once for all that he will have no future dealings with an individual ; and, if that individual had in the merchant's opinion treated him injuriously or shabbily, it would not be unnatural to eliminate the individual as an undesirable customer. Business reasons are not to be ignored in this scheme. Unless some provision to the contrary, express or implicit, is found, I do not see any reason why the Government, acting for all the owners, could not take the same course, and yet not fail in its duty. The agreement provides, it will be observed, that the Government is to handle and sell " the said wheat . . . in such manner as the

(1) (1897) A.C. 59. (2) (1914) A.C., at pp. 458-459.
(3) (1919) A.C. 505, at p. 513.

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said Government may *consider* to be to the best advantage." It is obvious that the Government may *reasonably* (I do not say honestly, because nothing dishonest can be imputed to the Crown) consider that a person who holds back for some considerable time part of his purchases is or may be acting prejudicially to the scheme. Indeed, if the Government came to such a conclusion, it would be, as I think, a failure on its part to conserve the interests of the owners, if it did not act upon its opinion, because it is not the price of a particular sale that has to be regarded so much as the ultimate amount to be obtained on division of the pool returns.

It is said that, as sec. 5 prescribes " the best price obtainable at the time," the elimination of a customer in advance is impliedly forbidden. But, if so, all elimination is forbidden for any reason whatever, provided only the best price is obtainable for a particular sale. If elimination of an individual is unlawful, then certainly the elimination of a whole market would be a thousand times worse. But the Act makes it clear that the Government is not bound to roam the world over in search of the longest golden fleece. Having regard to the nature of the Act, and the time and circumstances of its passing, the power of selecting " place or places " was not limited to South Australia. It must have extended to every State in Australia and to Great Britain. If so wide a choice is open, if some outside markets can be either excluded or included or made exclusive —and necessarily in advance, because it would be quite unreasonable to assume that there must be a choice of " place " for every specific sale—why is the elimination in advance of a possible buyer illegal? Remembering that the terms of the agreement enable the Government to judge of " the best advantage " (and as to this see sec. 7 of Act No. 1291), it is clear that the " best advantage " on the whole is not controllable by a single sale, and, if not, a commercial " policy " is permissible. If that be so, how can the elimination of an individual who in the opinion of the Government has acted and might in the future act inimically to the interests of the wheat-owners immediately concerned—that is, his elimination until he has repaired what is thought to be an unfair injury—be an unlawful act, or in the contemplation of the statute an act of oppression, giving rise to an implication of a promise to restore to him the reparation he makes?

In my opinion, the Act creates no such position. Even if it did, whatever legal duty exists on the part of the Government is towards the wheat-owners, and, if a departure can be shown, there may or may not be a legal remedy at their instance as the persons directly interested in the due fulfilment of the statutory provisions regulating their rights or in whatever duties the law may recognize arising from the circumstances. Apart from that, any mal-administration, if such there should ever be, must be left to the constitutional over-sight of Parliament in its superintendence of the execution of its laws. I by no means express any opinion whether the attitude of the Board towards the respondent was justified or not—that is not my province. But I have no hesitation in saying that, if the Board, representing the Government and acting for the benefit of the wheat-owners, thought it for the best interests and advantage of their principals to insist on the payment the subject of this action as a condition of further business relations with the respondent, then, however unwarranted by law that demand may have been, there was on the facts before us no breach of legal duty to the wheat-owners and no legal wrong to the respondent, and no statutory provision in the respondent's favour which guarded against the Board's action as any undue advantage taken of this situation.

In the result, neither in the common law nor in the statute, nor in both combined, can any legal principle or provision be found to sustain the claim made by the respondent.

The appeal should therefore be allowed, and judgment entered for the appellant.

HIGGINS J. The position, briefly put, omitting dates, is that the South Australian Wheat Harvest Board, having made contracts with the plaintiff company to sell to it wheat at 5s. and 6s. 6d. per bushel, and having delivered the wheat and received payment, required the company to pay an additional sum representing the difference between the contract price and 7s. 8d. per bushel for such wheat as was delivered after 30th January 1920. The *Wheat Harvest Act* 1917, sec. 5, forbade the sale of wheat by any one other than the Board; and the Board told the company that it would sell to the company no more wheat unless the additional sum were paid. The company

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carries on the business of milling, and, the wheat being essential for the business, the company paid the additional sum under protest. The Board made no pretence of any legal right to the payment, but relied on its (assumed) power to sell to whom it pleased. It is not disputed that the payment was made under the pressure of the Board's threat, unwillingly. The company claims the return of such of the additional sum as it has paid.

Now, pressure may be legitimate or illegitimate. A type of the legitimate is found when a property owner refuses to sell his property, worth in the market £1,000, for less than £10,000. No one would say that if the purchaser contract to give the £10,000 owing to his urgent need, he could afterwards recover the difference of £9,000. The owner has a right to refuse to sell the property unless he get his price. A type of the illegitimate pressure is when a highwayman presents his pistol with the option "Your money or your life." The essential difference of the two cases seems to be that the property owner has a right to refuse to sell and the highwayman has no right to take the life. The threat in the one case is justified; in the other case it is not.

In the present case, the learned Judge of first instance has given judgment for the plaintiff for the sum paid. His ground as stated is that according to reported cases "compulsion may exist, although the party receiving the money is not breaking any duty owed to the party paying, and . . . the compulsion which prevents the payment from being voluntary may be the threatened exercise of right by the party receiving the money, when the necessities of the party paying are so great that he must choose between payment and inordinate loss." For my part, I quite accept the view that compulsion may exist when the party receiving is not breaking any duty to the party paying; but the fact that the compulsion exists does not necessarily show that the party paying can recover the money—e.g., in the case put of the property owner. I accept also the view that the payment is not usually voluntary when the party paying pays under the threatened exercise of right by the party receiving which puts the party paying in the dilemma between submitting and incurring inordinate loss. But, as in the instance of the property owner, it does not follow that the payment can be

recovered. The question in each case of payment under compulsion is, was the compulsion justifiable or not—was the party receiving entitled to use, or threaten to use, the whip ?

I cannot think that the three cases on which the judgment was based justify the doctrine which I understand to be propounded, that a claim for money had and received for the use of the plaintiff should be successful in every case in which a person "demands from another money which he is not bound to pay, and which the party demanding knows he is not bound to pay," provided always that the payment is made "only to avert some great evil which will, as both parties know, immediately follow if the demand is not complied with." Such a proposition is far too wide. If a property owner refuse to sell to an adjoining owner, except on extortionate terms, a strip of land one foot wide, which is necessary for the adjoining owner to acquire if he is not to be excluded from the public road, such a claim would be rejected. In each case the proper issue would seem to be, had the party receiving the money the right to take advantage of his neighbour's necessity or not. In the case of *Hills* v. *Street* (1) the amount paid to prevent the sale of the goods included moneys which were justly payable, and moneys which were not justly payable ; and it was only the moneys which were not justly payable that the plaintiff recovered. The defendant had no right to use the inducement of threatened sale in respect of these latter moneys. In the case of *Kendal* v. *Wood* (2) the defendant had no right to demand £1,000 of the £5,000 bill which the plaintiff met in order to avoid dishonour—it had been included by mistake. The use of the whip to the extent of £1,000 was not justified. In the case of *Melbourne Tramway and Omnibus Co.* v. *Melbourne City Corporation* (3) the payment was made under a threat that proceedings would be at once taken to recover the licence fees for the tramcars as vehicles for hire, proceedings which would throw the whole tramway system into confusion unless the tramway company paid at once the amount demanded. But in that very case the Full Bench of Victoria held that the licence fees were not in law payable ; so that the threat was not based on any legal right.

(1) (1828) 2 Moo. & P. 96.
(2) (1871) L.R. 6 Ex. 243.
(3) (1903) 28 V.L.R. 647 ; 24 A.L.T. 161.

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But the case does not end here. The decision of *Poole* J. may be right although we do not accept his reasons. The question still remains had the Wheat Board any right to refuse to sell any wheat in the future to the plaintiff company unless the company paid more than the contract price. Was the use of the whip justifiable? Was the pressure legitimate or illegitimate? In my opinion, the pressure was clearly illegitimate. The Wheat Board had no right or power to refuse to sell to the company in the future, whatever the circumstances should be, or to insist upon payment of the additional price as a condition of making future sales. What it has done is in excess of its powers, and even in fraud of its powers. The Board is, at best, a statutory creation, created by the Governor-in-Council under the *Wheat Harvest Acts* 1915 *to* 1918; and it has no power except those conferred by or under the Act No. 1229 and the subsequent Acts. What the Board does outside those powers is simply nugatory. The Board has certainly no power greater than that conferred by Act No. 1229, sec. 5, on the Government (see Regulations of 26th February 1919, referred to by consent though not put in evidence); and according to sec. 5: "(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." Under this section, therefore, the Minister may decide as to times and places of selling, but, if the Government sell, it must sell "at the best price obtainable at the time." By its prospective threat not to sell at all to the company, the Board, in effect, says it will disobey the Act even if the company should offer the best price. Moreover, if the Board has power to sell, it is a power to exercise discretion as to specific transactions—not a power to exclude a certain buyer for ever or indefinitely. I mentioned in the case of *Commonwealth* v. *Colonial Combing, Spinning & Weaving Co.* (1) some of the authorities on this subject. The discretion given must be exercised when the occasion arises, according to the facts existing at the time (*Weller* v. *Ker* (2); *Chambers* v. *Smith* (3); *Moore* v.

(1) (1922) 31 C.L.R., at p. 469. (2) (1866) L.R. 1 H.L., Sc., 11.
(3) (1878) 3 App. Cas. 795, at p. 816.

Clench (1); *Commercial Cable Co.* v. *Government of Newfoundland* (2)). Nor is it competent for the Board to stipulate for money payment, for itself or for the Government, in addition to the price, as a condition of the exercise of the power to sell (see cases cited in *Commonwealth* v. *Colonial Combing, Spinning & Weaving Co.* (3), and in particular *Vatcher* v. *Paull* (4)). As Lord *Parker of Waddington* there said, fraud on a power "merely means that the power has been exercised for a purpose, or with an intention, beyond the scope of or not justified by the instrument creating the power." The principles laid down in *Attorney-General* v. *Wilts United Dairies Ltd.* (5) seem also to be applicable. The power to effect any particular sale at any particular time or place must be exercised on the merits of the transaction, as they appear to the Board at the time, and must not be controlled or affected by any such bargain or inhibition as the Board has attempted to impose in this case. In short, all the powers of the Board are subject to the provisions of the Wheat Harvest Acts; and these Acts do not confer on the Government or on the Board any power to exclude any particular person (or company) from all dealings for wheat. Under these circumstances, my opinion is that the pressure which procured this payment was illegitimate, and that the money paid must be treated as money had and received by the Government for the use of the plaintiff company; and that the judgment for repayment should be affirmed.

It is urged, indeed, that the provision that any sale must be for "the best price obtainable at the time" is a provision designed for the benefit of the producers who deliver or sell wheat to the Government. I may assume that it is for the sole benefit of these producers; but what follows? The question is not who might claim as plaintiffs for loss through breach of trust, &c., but as to the power of the Board to do what it has done. If it had no power to do what it has done, the stipulation for payment of a sum not due under the contract is of no valid effect, and is a fraud on the power; and the money must be returned as having been obtained by illegitimate pressure on the company. It is unfortunate that neither in the Court below nor in this Court was attention called to

(1) (1875) 1 Ch. D. 447, at p. 453.
(2) (1916) 2 A.C. 610, at p. 615.
(3) (1922) 31 C.L.R., at pp. 470-471.
(4) (1915) A.C. 372, at p. 378.
(5) (1922) 127 L.T. 822.

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the ordinary doctrines as to excess of powers or fraud on the part of the donee (see *Farwell on Powers*, 3rd ed., pp. 324, 457); but that fact does not prevent us from deciding that the plaintiff company is, on the facts and circumstances, entitled to recover the money under the count for money had and received.

In my opinion, the appeal should be dismissed.

RICH J. I agree that the appeal should be allowed.

In deciding that the respondent was entitled to receive the sum of £1,952 7s. 8d., *Poole* J. interpreted the *Wheat Harvest Act* in two respects. He held that the Act did not impose any duty on the Government, the Minister or the Wheat Harvest Board to sell any wheat to any person. He said (1): "No person or entity owed to the petitioner any duty to enter into any contract with it for the sale of wheat." He also held that there was no right in the Board under the Act or otherwise, to demand from the petitioner the sum in question, but his Honor proceeded to hold (2) that on common law principles there was in the circumstances an "involuntary" payment made on the demand of the Board and complied with by the petitioner in order to avert a "great evil," namely, the Board's refusal to deal with the petitioner. His Honor made a very careful examination of numerous cases that were brought to his attention. He put aside all, except three, as falling short of supporting the respondent's arguments. But he held that those three cases authorized him to go the necessary length of giving judgment in respondent's favour by affirming the principle he has stated.

I have considered those cases, and I do not think, especially when that principle is tested by *Sinclair* v. *Brougham* (3), that they can be relied on to establish such a principle. In my opinion, once it is conceded, as I agree it must be conceded, that there was no obligation on the Board or any other representative of the Government to enter into business relations with the respondent, there was nothing in the facts which made the respondent's payment "involuntary" in the legal sense. It was strenuously argued on the appeal, on behalf of the respondent, that there was an implied statutory duty on the Board not to exclude the respondent from the circle of prospective buyers. I do not think there was any such absolute

(1) (1922) S.A.S.R., at p. 555. (2) (1922) S.A.S.R., at p. 570.
(3) (1914) A.C. 398.

duty. A very large discretion was necessarily given to the Board. But, whatever duty there was, it was not one for the breach of which the respondent could complain. And the respondent is not entitled to rely upon any suggested breach of duty to the wheat-owners or to the Crown as a ground of its own claim.

A further difficulty lies in the respondent's way. It has chosen to sue the Crown and not the Board, and the appellant represents the Crown and not the Board. Even if the respondent's main position were correct, *Sinclair* v. *Brougham* (1) would seem to show that the petition must fail.

STARKE J. The relation of the Government of South Australia to wheat-owners under the *Wheat Harvest Acts* of South Australia was authoritatively declared by the Judicial Committee in *Welden* v. *Smith* (2) upon an appeal from this Court (see *Smith* v. *Welden* (3)). In the opinion of their Lordships, there is a contractual relation between the Government and the owners: the Government undertook to receive, handle and market the wheat of all the owners concerned and to pay them a price dependent on the due handling and sale of all the wheat received, and must be regarded as the mandatary of all the owners, and bound by the ordinary obligations of reasonable care.

But it was argued, in this case, that the Government was not in the position of an ordinary trader, but was administering the scheme of the *Wheat Harvest Acts* for the benefit of the community. It followed, according to the argument, that buyers of wheat had rights conferred upon them by force of the Act, and that duties were imposed upon the Government to sell to them in pursuance of the Acts. No such conclusion can be drawn from any express provision contained in the Acts, and the duties of the Government towards wheat-owners and the discretionary nature of its power under the Act make it clear, in my opinion, that the buyers of wheat cannot compel any action on the part of the Government or complain of any supposed breach of the provisions of sec. 5 of the Acts. We have been referred, in connection with the main argument, to *Attorney-General* v. *Wilts United Dairies Ltd.* (4), *Wool Tops Case* (5) and

(1) (1914) A.C. 398.
(2) *Ante*, 29.
(3) (1922) 30 C.L.R. 585.
(4) (1922) 91 L.J. K.B. 897.
(5) (1922) 31 C.L.R. 421.

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Brocklebank's Case (1). But the principle of these cases deals with unlawful exactions upon the subject for the use of the Crown, and not with demands made by the Crown as a mandatary of the subject.

Next it was argued that the retention of the sum of £1,952 by the Wheat Harvest Board was unconscientious, and so could be recovered from the Crown upon principles applicable to actions for money had and received. The Wheat Harvest Board had been constituted by regulations, and, subject to the control of the responsible Minister of State, was given the business and entire management of the affairs of the South Australian Wheat Harvest Scheme. I do not stay to inquire whether moneys obtained by the Wheat Board from buyers in circumstances which might attract the application of the principles of the action for money had and received against the Board or its members could be applied against the Crown, which never received, or had in its possession, the moneys now in question, because, in my opinion, the principles involved in the action for money had and received do not support the claim in this case. In *Sinclair* v. *Brougham* (2) Lord *Sumner* pointed out that money is not recoverable in all cases where it is unconscientious for the defendant to retain it. All that can be said in the present case is that the buyers chose to pay a further sum for wheat already sold to them rather than to be shut out from further trade with the mandatary of the owners of wheat. The money was, no doubt, paid unwillingly, and the payment was dictated by the trade interests of the petitioner. But it was, nevertheless, paid voluntarily, in the legal sense, and with full knowledge of the facts and without any unlawful compulsion, extortion, undue influence, or the abuse of any duty which the Wheat Board owed to the petitioner.

Consequently, in my opinion, the petition fails, and ought to be dismissed.

Appeal allowed. Judgment appealed from discharged. Action dismissed with costs, including costs of appeal.

Solicitors for the appellant, *Baker, Glynn, McEwin & Napier.*

Solicitors for the respondent, *Cleland, Holland & Teesdale Smith.*

B. L.

(1) (1924) 40 T.L.R. 237.

(2) (1914) A.C., at p. 455.