[PRIVY COUNCIL.]

WELDEN . . . . . APPELLANT;
PLAINTIFF,

AND

SMITH . . . . . RESPONDENT.
NOMINAL DEFENDANT,

ON APPEAL FROM THE HIGH COURT.

PRIVY COUNCIL.* 1924. Jan. 22.

Negligence—Wheat pool scheme—Statutory authority—Contractual relation—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—Words of indemnity—Wheat Harvest (1915-1916) *Act* 1915 (*S.A.*) (*No.* 1229), *secs.* 3, 4, 5, *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 appellant, who had delivered his 1916-17 wheat to the Government of South Australia for sale on his behalf pursuant to the *Wheat Harvest* (1915-1916) *Act* 1915 (S.A.), as amended by the *Wheat Harvest* (1915-1916) *Act Amendment Act* 1916 (S.A.), and had signed an agreement in the form set out in the Schedule to the Act of 1915, instituted proceedings against the Government by a petition 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 appellant was entitled to compensation in respect of the negligence alleged. There was no allegation that the appellant's own wheat was damaged, or that

* Present—Viscount Cave L.C., Viscount Haldane, Lord Sumner, Lord Wrenbury and Sir Charles Darling.

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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, that each owner who delivered his wheat to the Government for sale and signed the agreement thereby entered into a contractual relation with the Government, under which he acquired an interest in all the wheat which was to be sold with his and became entitled to have all the wheat handled with reasonable care and prudence, and therefore that the appellant's petition disclosed a cause of action.

Decision of the High Court : *Smith* v. *Welden*, (1922) 30 C.L.R. 585, reversed.

APPEAL from the High Court.

This was an appeal by Elijah Weldon to the Privy Council from the decision of the High Court : *Smith* v. *Welden* (1).

The judgment of their Lordships, which was delivered by Viscount CAVE L.C., was as follows :—

This appeal from the High Court of Australia raises, as a point of law, the question whether the Government of South Australia can be made liable for loss caused by the negligence of its servants and agents in the execution of the duties of the Government under the Wheat Harvest Acts of 1915-1916 of South Australia.

By sec. 4 of the *Wheat Harvest* (1915-1916) *Act* 1915 it was provided that every owner of wheat who desired to do so might deliver his wheat to the Government for sale on his behalf, and should sign an agreement in the form set out in the Schedule. By sec. 5 of the same Act it was provided that all wheat delivered to the Government for sale by the Government on account of the owners might be sold at such time and place as the Minister of Agriculture might decide and at the best price obtainable at the time, and that the price to be received by the owners of wheat delivered to the Government for sale should be ascertained by a method which was described in the following terms :—" 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

(1) (1922) 30 C.L.R. 585.

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." Shortly stated, the effect of this formula was that the net proceeds of all wheat sold by the Government under the Act were to be divided among the wheat-owners concerned in proportion to the amount of wheat delivered by them respectively for sale; but, in order that an owner contributing wheat of fair average quality should not suffer by having his wheat pooled with inferior wheat, a "dockage" or deduction was to be made in respect of any inferior wheat. No express provision for fixing this dockage was contained in the Act; but apparently it was fixed by the Government agents on principles which were well understood, and, after being added for the purpose of computation to the proceeds so as to permit of the price realized for wheat of fair average quality being ascertained, it was deducted from the share of the owner of the inferior wheat. The result of the proceeding was that, subject to this provision for the protection of the contributors of good wheat, each owner received for his wheat a price contingent on the aggregate price obtained for the whole.

The Schedule to the Act contained a form of agreement 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. The Government of South Australia may proclaim a date not earlier than fourteen days from the date of proclamation from which accrual of interest on this certificate shall cease." The "final settlement" here referred to was obviously to be made in accordance with the provisions of sec. 5 of the Act, which was thus incorporated in the agreement.

The Act empowered the Minister to appoint companies, firms, or

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individuals to act as agents for and on behalf of the Government in receiving, stacking, storing, protecting, and delivering the wheat.

By the *Wheat Harvest* (1915-1916) *Act Amendment Act* 1916, the Act of 1915 was extended to the harvest of 1916-1917 ; and it was provided that all contracts entered into with the Government by any owner of wheat should be deemed to provide that the Government, in handling and selling wheat to the best advantage, might handle and sell 1915-1916 wheat in conjunction with 1916-17 wheat, and that for the purpose of ascertaining the price to be received by the wheat-owners, the returns for both harvests should be aggregated as therein mentioned.

The appellant, an owner of wheat, delivered to the Government of South Australia his harvest for 1916-1917, and signed an agreement in the form scheduled to the Act of 1915. The appellant has received, on account of the price payable to him for his wheat, a sum of 2s. 6d. per bushel, but the balance payable to him has not yet been settled.

On 29th April 1921 the appellant, under Act No. 6 of 1853 (which regulates pecuniary claims against the Government of South Australia), presented to the Governor of South Australia a petition whereby, after alleging that, pursuant to the *Wheat Harvest Acts* 1915 and 1916, a large number of owners of 1916-17 wheat had delivered their wheat to the Government of South Australia for sale on their behalf and had signed agreements in the scheduled form, and that the petitioner was one of such owners, he alleged as follows :—" (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." And the petitioner, 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) were entitled to receive the price prescribed by the said Acts of 1916-17 wheat delivered to the Government for sale, claimed a declaration that he and the said other persons were entitled to compensation for the negligence, carelessness, damage and loss above mentioned; and claimed to have such compensation ascertained by proper accounts and inquiries.

Pursuant to the provisions of the Act the respondent was appointed a nominal defendant in the proceedings; and by an order dated 21st June 1921 it was ordered that the petition be treated as a writ of summons in an action and as a statement of claim in such action, and that a defence be filed, and that in other respects the *Supreme Court Act* 1878 and the rules thereunder be applicable to the proceedings. The nominal defendant, on 27th July 1921, delivered a defence which contained the following plea:—"(1) The nominal defendant will object in point of law that the petition of the plaintiff is bad and insufficient on the grounds following, that is to say:—(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 hath 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."

By an order dated 2nd August 1921 it was ordered that the points of law raised by the nominal defendant in the above paragraph of his defence be set down for hearing, and disposed of before the trial of the action.

On the hearing of the above points of law by the Full Court of the Supreme Court of South Australia, that Court upheld the first objection of the nominal defendant on the ground that a petition on behalf of a plaintiff and other persons was not contemplated by

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Act No. 6 of 1853; but the Court held that this objection was not fatal to the petitioner's case, and that the petition was good in so far as it prayed for relief on behalf of the petitioner himself. Having regard to the course taken by the case on the appeal to the High Court of Australia, the latter Court did not find it necessary to deal with this point; and on the appeal before their Lordships it was not argued that the decision was incorrect in this respect. Upon this point, therefore, the decision of the Supreme Court of South Australia stands, and it need not be again mentioned.

Upon the second point of law raised by the nominal defendant, the Supreme Court decided against him and overruled his objection; but on appeal to the High Court of Australia that Court reversed the decision of the Supreme Court, mainly on the ground (stated by *Knox* C.J. and *Gavan Duffy* and *Starke* JJ.) that, if the agreement in the scheduled form gave to each owner of wheat the right to insist that his own wheat should be carefully kept until it was sold, no similar right with regard to all other wheat was expressed or implied either in the agreement or in the statute. *Higgins* J. expressed the opinion that, having regard to the exceptional character of the statute, designed to meet the exceptional circumstances of the War, it was not to be inferred that the Government took any responsibility for the safe-keeping of any of the wheat, and added that he was strongly inclined to the opinion that under the Acts of 1915 and 1916 the only holders of the wheat were to be agents appointed by the Government, and not the Government itself; but in this reasoning the other Judges did not concur. The High Court declared that the petition of the present appellant disclosed no cause of action, and it is against this decision that the present appeal is brought.

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. Under sec. 4 of the Act of 1915 any owner of wheat who desired to deliver his wheat to the Government for sale on his behalf was to sign an agreement in

the scheduled form, and that agreement recited and embodied an undertaking by the Government to receive and market the wheat on the owner's behalf. By the terms of the agreement the Government was authorized to handle and sell the wheat in conjunction with other wheat in such manner as it might consider to be to the best advantage; and provision was made for periodical settlements, which were obviously to be settlements in respect of the prices to be ascertained in accordance with sec. 5 of the Act. There was, then, an agreement by the Government with each owner to receive, handle and market that owner's wheat on his behalf and to pay him for such wheat the price prescribed by the statute, which was to depend upon the aggregate price obtained for all the wheat handled and sold. As in handling and marketing the wheat some storage was necessarily involved, the Government was authorized to appoint agents for receiving, stacking, storing and protecting the wheat; but it was not compelled to take that course, and any agents so appointed would be the agents of the Government.

Now, was the Government, in the performance of its duties under this agreement, free from any obligation to take ordinary and reasonable care? In their Lordships' opinion, it was not. It is true that neither the agreement nor the statute expressly mentions such an obligation, nor was it to be expected that any such express mention should be made. A person who undertakes to perform an act as the mandatary of another, whether as bailee, agent or otherwise, and whether for reward or gratuitously, is bound, without express words, to act in a reasonable and prudent manner having regard to the circumstances of the case. It matters not whether his obligation is regarded as a common law obligation the breach of which gives rise to an action of tort, or as an implied condition of his contract; in either case, the obligation arises without express words unless it is excluded by the terms of the contract. And if this is the case in an ordinary contract of bailment or agency, their Lordships see no reason why the same rule should not extend to the present case. 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 wheat received, must be regarded as the mandatary of all the owners and bound by the ordinary

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obligation of reasonable care ; and their Lordships see no reason why this obligation should not extend to the handling and marketing (including the storage) of all the wheat dealt with by the Government, so as to be enforceable by each owner interested in the total sales. Each owner who delivered his wheat to the Government for sale and signed the agreement thereby acquired an interest in all the wheat which was to be sold with his, and became entitled to have that wheat handled with reasonable care and prudence.

It was suggested that, as the powers of the Government were imposed upon it by statute, the above considerations do not apply; but in their Lordships' view that circumstance cannot be held to relieve the Government from all obligation of using ordinary care. "It is an implied condition," said Lord *Watson* in *Sanitary Commissioners of Gibraltar* v. *Orfila* (1), "of statutory powers that, when exercised at all, they shall be executed with due care"; and the same doctrine applies generally to cases where a public authority undertakes to deal with the property of the subject (see *Brabant & Co.* v. *King* (2)). The cases in which it has been held that statutory duties will not readily be extended by implication (such as *Sharpness New Docks &c. Co.* v. *Attorney-General* (3)) have no application to a case where the duty plainly exists and the only question is as to its careful exercise. It was not disputed that, having regard to the decision in *Farnell* v. *Bowman* (4), a claim founded on tort as well as a claim for breach of contract could properly be brought against the Government under Act No. 6 of 1853.

It was argued that, in view of the state of war existing at the time when the Acts were passed, of the lack of storage room in Australia at that time, and of the difficulty of obtaining tonnage for the export of wheat, it would be unreasonable to hold the Government of South Australia liable for insufficient or improper storage; but in their Lordships' opinion this argument rests on a misunderstanding of the case alleged by the plaintiff. It is not sought to make the Government of South Australia responsible for not storing and protecting the wheat, but for negligence and want of proper care in respect of such storage and protection ; and if at the trial of the action it should

(1) (1890) 15 App. Cas. 400, at p. 411.
(2) (1895) A.C. 632.
(3) (1915) A.C. 654.
(4) (1887) 12 App. Cas. 643.

appear that, owing to the circumstances, it was impossible for the Government, its agents and servants, acting reasonably, to provide necessary storage, the action would fail. All such defences will, of course, be open to the respondent.

It was further argued that any implication of a duty to exercise reasonable care is excluded in the present case by the provision in the scheduled agreement whereby the owner agrees to " abide by and accept the conditions and actions of the Government unreservedly so far as the said wheat is concerned " ; but these words, which refer to conditions and actions in marketing the owner's wheat, are not apt to exempt the Government from responsibility for negligence in storing the aggregate wheat received. Words of indemnity, to be effective, must be clear ; and the words quoted, properly construed, are words of authority and not of exoneration.

As to the suggestion of *Higgins* J. that the responsibility, if any, for careful storage is upon the agents of the Government, and not upon the Government itself, their Lordships are unable to accept it. The Government had power to appoint agents ; but its powers were not confined (as in *Fowles* v. *Eastern and Australian Steamship Co.* (1)) to the selection of such agents. The agents, when appointed, acted on behalf of the Government ; and there is no reason why the Government should not, according to the ordinary rule, be liable for their default.

For these reasons their Lordships are unable to agree with the view taken by the High Court of Australia that, upon the assumption (which for the present purpose must be made) that the Government of South Australia, its servants or agents, have been guilty of negligence or want of reasonable care in connection with the handling and selling of the owners' wheat, the owners are wholly without a remedy. They are of opinion that in point of law the Government may be made liable for negligence and want of reasonable and proper care, if proved ; and they will humbly advise His Majesty that the order of the High Court of Australia be reversed and the order of the Full Court of South Australia restored, with costs here and below.

(1) (1916) 2 A.C. 556.