[HIGH COURT OF AUSTRALIA.]

AUSTRALIAN WOOLLEN MILLS PROPRIETARY LIMITED . . . . } PLAINTIFF;

AGAINST

THE COMMONWEALTH . . . . DEFENDANT.

H. C. OF A. 1953-1954.

SYDNEY, 1953, *Aug.* 31, *Sept.* 1-4; 1954, *May* 4.

Dixon C.J., Williams, Webb, Fullagar and Kitto JJ.

Contract—Wool—Subsidization—Auction—Purchase for purpose of manufacture—Subsidy by Commonwealth—Promise—Intention—Contractual obligation—Creation—Subsidies paid and subsequently withdrawn—Payment of moneys by purchaser to Commonwealth—Claim therefor—"Moneys had and received" by Commonwealth for use of purchaser—"Bounties"—"Production or export of goods"—The Constitution (63 & 64 *Vict. c.* 12), *ss.* 51 (*iii.*), (*vi.*), 81.

In the case of contracts which are commonly said to be constituted by the acceptance of an offer of a promise for an act, it is necessary, in order that such a contract may be established, that it should be made to appear that the statement or announcement which is relied on as a promise was really offered as consideration for the doing of the act, and that the act was really done in consideration of a potential promise inherent in the statement or announcement.

Carlill v. *Carbolic Smoke Ball Co.* (1893) 1 Q.B. 256, applied. *Shadwell* v. *Shadwell* (1860) 9 C.B. (N.S.) 159 [142 E.R. 62] and *Combe* v. *Combe* (1951) 2 K.B. 215, discussed.

The appraisement system set up in war-time under the *National Security* (*Wool*) *Regulations*, and described in *Ritchie* v. *Trustees Executors & Agency Co. Ltd.* (1951) 84 C.L.R. 553 and *Squatting Investment Co. Ltd.* v. *Federal Commissioner of Taxation* (1953) 86 C.L.R. 570, came to an end on 30th June 1946, after which the normal practice of selling wool by auction in Australia was resumed. In June 1946 it was announced that the Commonwealth Government had decided that a "subsidy" would be paid to manufacturers on wool purchased and used for local manufacture after 30th June 1946. The plaintiff company, which was a manufacturer, purchased large quantities of wool for local manufacture in the wool years 1946-1947 and 1947-1948, and received large sums by way of subsidy. Early in June 1948 it was announced that subsidies would not be paid on wool purchased after 30th

June 1948, and that "adjustments" would be made on a specified basis as at the date of the "Christmas close-down" of factories in December 1948. As at that date the company claimed that there had been an underpayment of subsidy to it. The Commonwealth claimed that there had been an overpayment to it to the extent of £67,282. After demands for this sum had been made, the company paid £67,282 to the Commonwealth. The payment was not made under protest, but it was accompanied by a "counter-claim" for £92,002. Later the company commenced an action against the Commonwealth, in which it claimed (1) that a contract by the Commonwealth to pay a subsidy was constituted from time to time by an "offer" by the Commonwealth to pay a subsidy and the "acceptance" of that offer by the purchase of wool, and that under that contract the sum of £108,871 was owing to it, and (2) that the sum of £67,282 was recoverable by it as money had and received to its use.

Held, on the facts, (1) that there was not on the part of the Commonwealth anything in the nature of a request or invitation to purchase wool, or anything which suggested that the payment of subsidy was put forward in order to induce any manufacturer to purchase wool, and that there was no contract to pay subsidy:

(2) that the plaintiff, on the demand of the Commonwealth, paid the said sum of £67,282, voluntarily and with full knowledge of all the material facts, and there was no foundation for a claim for that sum as money had and received or on any other basis.

Quaere, whether the subsidies in question, not being made payable "on the production or export of goods" were "bounties" within the meaning of s. 51 (iii.) of the Constitution for which revenues or moneys may "be appropriated for the purposes of the Commonwealth" under s. 81 of the Constitution though probably they would be justified under the power to legislate conferred by s. 51 (vi.) of the Constitution.

ACTION.

In an action brought in the High Court by the Australian Woollen Mills Pty. Ltd. against the Commonwealth of Australia the amended statement of claim was substantially as follows:—

1. The plaintiff the Australian Woollen Mills Pty. Ltd. is a company duly incorporated in accordance with the provisions of the *Companies Act* as amended in force in the State of New South Wales and is entitled to sue in that name.

2. The plaintiff company has for many years and at all material times carried on the business of a manufacturer of piece goods woollen or containing wool including the manufacture of those goods for consumption in the Commonwealth of Australia and of buying and selling wool fibres woollen materials and piece goods and fabrics of all kinds in connection with and incidental to its said business of a manufacturer.

H. C. OF A. 1953-1954.

AUSTRALIAN WOOLLEN MILLS PTY. LTD. v. THE COMMONWEALTH.

3. At or prior to the commencement of the wool season 1946-1947 the defendant promised the plaintiff that in consideration that the plaintiff would during that season purchase wool at auction and otherwise than at auction for domestic consumption in Australia the defendant would pay to the plaintiff a subsidy calculated as the difference between the then basic price of wool for domestic consumption and the average market price of wool for each auction series at which those wools were purchased by the plaintiff and in those cases where those wools were purchased by the plaintiff otherwise than at auction the amount of that subsidy would be the difference between the said basic cost and the actual price paid by the plaintiff for the said wool, where the price paid by it for such wool was below the said average auction market level and where the price paid by it as aforesaid was equal to or greater than that average auction market level then the amount of the subsidy would be the difference between the basic cost and the average auction market level and that the amount of the subsidy would be as determined by the Australian Wool Realization Commission which had been charged by the defendant with the calculation and payment of the subsidy on its behalf.

4. During the wool season 1946-1947 the plaintiff in pursuance of the said agreement from time to time made purchases of wool at different auction series and otherwise than at auction as aforesaid for domestic consumption as aforesaid and thereupon the Australian Wool Realization Commission duly calculated and determined as aforesaid the amount of the subsidy in respect of each of those purchases and the Australian Wool Realization Commission as agent of the defendant paid to the plaintiff subsidies so calculated in respect of the wool purchases, except for the sum of £6,364 11s. 10d. which sum remains due and unpaid.

4a. At or prior to the commencement of the wool season 1947-1948 the defendant promised the plaintiff that in consideration that the plaintiff would during the season purchase wool at auction and otherwise than at auction for domestic consumption in Australia the defendant would pay to the plaintiff a subsidy calculated as the difference between the then basic price of wool for domestic consumption and average market price of wool for each auction series at which those wools were purchased by the plaintiff and in those cases where those wools were purchased by the plaintiff otherwise than at auction the amount of the said subsidy would be the difference between the basic cost and the actual price paid by the plaintiff for those wools and where the price paid by it for such wool was below the average auction market level and where the

price paid by it as aforesaid was equal to or greater than the average auction market level than the amount of the subsidy would be the difference between the basic cost and the said average auction market level and that the amount of the subsidy would be as determined by the Australian Wool Realization Commission which had been charged by the defendant with the calculation and payment of the subsidy on its behalf.

5. During the wool season 1947-1948 the plaintiff in pursuance of the lastly mentioned agreement from time to time made purchases of wool at different auction series and otherwise than at auction as aforesaid for domestic consumption as aforesaid and thereupon the Australian Wool Realization Commission duly calculated and determined as aforesaid the amount of the subsidy in respect of each of the said purchases and the Australian Wool Realization Commission paid certain of those amounts of subsidy so calculated save and except for the sum of £167,667 16s. 5d. which still remains due and unpaid.

6. And the plaintiff also sues the defendant for money payable by the defendant to the plaintiff for moneys had and received by the defendant for the use of the plaintiff particulars whereof are as follows :—

(a) Moneys exacted by the defendant and paid by the plaintiff under protest without admissions to the defendant in respect of subsidies paid and subsequently withdrawn by the defendant on subsidized wools purchased as aforesaid in the 1946-1947 wool season which is the same sum mentioned in pars. 4 and 7 (a) hereof— £6,364 11s. 10d.

(b) Moneys exacted by the defendant and paid by the plaintiff under protest without prejudice to its rights and without admissions to the defendant in respect of subsidies paid and subsequently withdrawn by the defendant on subsidized wools purchased as aforesaid in the 1947-1948 wool season which is the sum of £167,667 16s. 5d. being the sum claimed in par. 7 (b) hereof.

(c) Moneys exacted by the defendant and paid by the plaintiff under protest and without prejudice to its rights and without admissions to the defendant in respect of the deferred purchase price of wools purchased by the plaintiff from the Central Wool Committee as agent for the defendant ex appraisement during the wool season 1942-1943 ; 1943-1944 ; and 1945-1946 amounting in all to the sum of £2,121 0s. 7d., being the same sum as that claimed in par. 7 (c) hereof.

7. And the plaintiff also sues the defendant for moneys payable by the defendant to the plaintiff in respect of subsidies due from

H. C. OF A. 1953-1954.

AUSTRALIAN WOOLLEN MILLS PTY. LTD. v. THE COMMONWEALTH.

the defendant to the plaintiff and for moneys found to be due on accounts stated between them particulars whereof are as follows :—

(a) Moneys exacted by the defendant and paid by the plaintiff under protest without prejudice to its rights and without admissions to the defendant in respect of subsidies paid and subsequently withdrawn by the defendant on subsidized wools purchased as aforesaid in the 1946-1947 wool season, which is the same sum as that mentioned in pars. 4 and 6 (a) hereof . . . £6,364 11s. 10d.

(b) Moneys exacted by the defendant and paid by the plaintiff under protest without prejudice to its rights and without admissions to the defendant in respect of subsidies paid and subsequently withdrawn by the defendant on subsidized wools purchased as aforesaid in the 1947-1948 wool season which is the sum of £167,667 16s. 5d. being the sum mentioned in par. 6 (b) hereof . . . £167,667 16s. 5d.

(c) Moneys exacted by the defendant and paid by the plaintiff under protest without prejudice to its rights and without admissions to the defendant in respect of the deferred purchase price of wools purchased by the plaintiff from the Central Wool Committee as agent for the defendant ex appraisement during the wool seasons 1942-1943 ; 1943-1944 ; amounting in all to the sum of £2,121 0s. 7d. and being the same sum as that claimed in par. 6 (c) hereof . . . £2,121 0s. 7d.

The plaintiff claimed the sum of £176,153 8s. 10d. costs, and such other relief as the circumstances of the case required.

In its amended statement of defence the defendant admitted the allegations in pars. 1 and 2 of the statement of claim, and denied each and every allegation in pars. 3 and 4 (a). In cl. 3 of the amended statement of defence the defendant said that the Australian Wool Realization Commission during the year 1946 invited certain Australian woollen manufacturers, including the plaintiff, to make application for the payment of a subsidy which it informed those manufacturers, including the plaintiff, the defendant intended to pay to Australian manufacturers in respect of wool purchased by them for Australian domestic consumption, and stated that the amount of such subsidy would be calculated by the commission in accordance with certain principles and would be paid in certain circumstances and upon certain conditions from time to time made known to the plaintiff ; cl. 4—Save that it admitted that during the wool season 1946-1947 the plaintiff from time to time made purchases of wool at different auction series and otherwise than at auction for domestic consumption, and that the said commission calculated and determined amounts of subsidy in respect of each

of those purchases, and that the defendant paid certain of those amounts of subsidy, and that of such amounts so calculated and determined it had not paid the sum of £6,364 11s. 10d., it denied each and every allegation in cl. 4; cl. 6—In August 1947 the commission on behalf of the defendant informed the Australian woollen manufacturers, including the plaintiff, that the defendant intended to continue the existing scheme for payment of a subsidy to Australian manufacturers in respect of wool purchased by them for Australian domestic consumption until further notice. Subsequently the defendant decided to discontinue the scheme as from 31st July 1948, and the commission on behalf of the defendant notified those manufacturers, including the plaintiff, of such decision; cl. 7—Save that it admitted that during the wool season 1947-1948 the plaintiff from time to time made purchases of wool at different auction series and otherwise than at auction for home consumption, it denied each and every allegation in par. 5; cl. 8—Save that it admitted that on 9th May 1949, the plaintiff paid to it the sum of £67,282 4s. 9d. in respect of subsidies paid by the defendant to the plaintiff, the defendant denied each and every allegation in par. 6 and in particular it denied that the said sum or any other sum was exacted by it from the plaintiff and that that sum of £67,282 4s. 9d. or the sums referred to in par. 6 or any other sums were paid to it by the plaintiff under protest or without prejudice to the plaintiff's rights or without admissions; cl. 9—In answer to par. 7, the defendant denied that the moneys referred to in par. 7 or any moneys were payable by the defendant to the plaintiff in respect of subsidies due from the defendant to the plaintiff or for money due on accounts stated or at all and, further, referred to and repeated the last preceding clause; cl. 10—The defendant said the said sum of £67,282 4s. 9d. was voluntarily repaid by the plaintiff to the defendant pursuant to certain terms and conditions upon which subsidy had been paid to and received by the plaintiff. The defendant said the substance of those terms and conditions as varied from time to time was that if the defendant on 22nd December 1948 held stocks of wool on which subsidy had been paid or which were otherwise eligible for subsidy other than wool which was being used in work in progress on 22nd December 1948 to an amount not exceeding ten weeks' normal production, the defendant would not pay to the plaintiff any unpaid subsidy on wool comprising those stocks and the plaintiff would repay to the defendant any subsidy actually paid on the wool constituting such stocks.

H. C. OF A. 1953-1954.

AUSTRALIAN WOOLLEN MILLS PTY. LTD. v. THE COMMONWEALTH.

The plaintiff joined issue on cll. 2, 5, 8-10 of the amended statement of defence, and also on cll. 3, 4 and 7 thereof so far as they denied any material allegation in pars. 3 and 4 respectively of the amended statement of claim. The plaintiff accepted so much of cl. 6 of the amended statement of defence as admitted that the defendant purported without the assent of the plaintiff to terminate any arrangement between them as to payment of subsidy for or in respect of the wool season 1947-1948, and otherwise joined issue on that clause.

The parties made the following mutual admissions for the purposes of this action :—

1. The sale of wool by appraisement under the *National Security (Wool) Regulations* ceased on 31st July 1946. Thereafter wool was sold by auction and private sale according to the system prevailing before the war of 1939-1945.

2. Private sales of wool recommenced immediately after 31st July 1946. Auction sales recommenced with the Sydney auction series beginning on 2nd September 1946.

3. The 1946-1947 wool-selling season began with the Sydney auction series beginning on 2nd September 1946 and ended with the Melbourne auction series which finished on 2nd July 1947. The 1947-1948 wool-selling season began with the Sydney auction sales beginning on 1st September 1947 and ended with the Geelong auction series which finished on 1st July 1948.

4. The Australian Wool Realization Commission and the Commonwealth Prices Commissioner were the agents of the Government of the Commonwealth in dealings with the plaintiff relating in any way to the subsidy on wool.

5. The plaintiff was at all material times a member of an association known as Associated Woollen and Worsted Textile Manufacturers of Australia. The correspondence sent to or received from that association was sent to or received from that association acting on behalf of the plaintiff (among other persons). The correspondence purporting to be sent to or received from the Central Wool Committee, the Australian Wool Realization Commission, the Commonwealth Prices Commissioner, Messrs. Biggin & Ayrton, the plaintiff and its solicitors and the Crown Solicitor for the Commonwealth of Australia were so sent or received.

6. If as a result of the communications and dealings between the parties and/or their agents a contract was made which would be enforceable subject only to the provision of funds by Parliament, the defendant does not dispute liability on the ground that such statutory provision was not made (if that be the fact).

7. The manufacturers' prices of goods manufactured by the plaintiff for consumption within Australia were at all material times up to 20th September 1948 fixed by the Commonwealth Prices Commissioner. After 20th September 1948 the manufacturers' prices of those goods were fixed by the prices commissioners in the various States of the Commonwealth.

Upon the action coming on for hearing oral and documentary evidence was tendered and then, at the request of counsel for both parties, *Kitto* J., pursuant to s. 18 of the *Judiciary Act* 1903-1950 directed that the case be argued before the Full Court of the High Court at Sydney.

Further facts appear in the judgment hereunder.

Sir *Garfield Barwick* Q.C. (with him *J. D. Holmes* Q.C. and *J. Leaver*), for the plaintiff. Moneys paid by the plaintiff to the defendant were paid under threat of litigation and under a mistake of fact, or, alternatively, under protest. The mistake of fact is a mistake as to the obligation, one party asserting that there is an obligation that this sum should be paid, and the other party yielding to that statement and paying. That sum is recoverable as money paid under a mistake of fact. The conditions on which the plaintiff purchased wool in the wool years 1942-1943; 1943-1944; and 1945-1946, included the condition that the deferred part of the price was payable only in the event of export. The evidence shows that the two hundred and one bales were purchased by the plaintiff in those wool years. The plaintiff was quite entitled to have in stock this appraised wool which happened to be a remanet of those earlier purchases by the plaintiff. In the process of blending and the like the blender does not worry whether it is subsidized, his object is to obtain suitable wool. The Commonwealth desired to achieve on the one hand support for the auction, and free auctions, and, on the other hand, to maintain the local price structure and the "C" series index and a basic wage that was as stable as could be contrived. The records of the conference between the Commission and the wool manufacturers in evidence, show that there was abundant evidence from the practical point of view that unless there was a subsidy it was impossible to achieve what the Commonwealth Government desired to achieve. Many of the letters and other documents disclose a realization that where a person has already bought on the terms of the offer already made it is a closed transaction subject to the conditions of the offer. The Commission wrongly regarded the stocks of wool as possibly evidencing a breach of the conditions on which the subsidy was paid because the plaintiff had purchased

H. C. OF A. 1953-1954.

AUSTRALIAN WOOLLEN MILLS PTY. LTD. v. THE COMMONWEALTH.

beyond its requirements, that is it was stock-piling, that being the antithesis of the limitation which was placed upon the plaintiff's buying. The offer in respect of that wool was an offer to pay subsidy on wool purchased for local manufacture, the wool to be used in local manufacture as distinct from being sold as a commodity or being used for manufacture for export. There was not any condition that the wool must be used in that manufacture in any particular period; and there was not any term that it had to be used during the 1946-1947 wool season. From the nature of things such a condition would have been impractical. There was an additional term introduced in 1947-1948 that the Commission would pay part of it in cash immediately and the balance after investigation. No financial advantage accrued to the plaintiff by reason of the using by it of the newly bought wool instead of the old subsidized wool, the price being fixed exactly the same as it had been. The position is as to the appraisement wool, there was not any obligation whatever to make any further payment in respect of it than so much of the percentage on the appraised price as was originally not paid at the time of purchase. All else was payable on the one event of export. That point of time had not arrived in 1948. If it had subsequently arrived then either the manufacturer or the exporter would have been liable to pay that sum, and that situation was fully covered by the *Export of Wool Regulations* and the specific condition of purchase from the Central Wool Committee. As to the appraised wool there was not any obligation to pay any sum beyond what in fact the plaintiff had paid. As to the 1946-1947 season's wool, and this touches the item £6,364 11s. 10d., there was a contract binding the Commonwealth to pay to the plaintiff that sum of money in respect of the purchases during that season. The plaintiff's right to that money was complete upon the purchase of the wool, provided the plaintiff met the conditions nominated by the Commonwealth and operative at the time of such purchase and in respect of that wool. The same applies to the 1947-1948 season; there was a contract binding on the Commonwealth to pay to the plaintiff the amounts of subsidy, that obligation being similarly complete on the purchase being made subject to the conditions appropriate to each particular purchase. So far as the recovery of the item £67,282 4s. 9d. is concerned that is money which is recoverable because it was paid on a mutual mistake of the respective obligations of the two parties, or, at any rate, upon the mistake by the plaintiff as to its obligations to the other party, the Commonwealth, in respect of the demands made by the Commonwealth. The language used

by the government agents should be given the same promissory significance as it would have if in the mouth of a private individual because there was not any need for any statutory authority to make such a contract as is asserted by the plaintiff.

[DIXON C.J. referred to *John Cooke & Co. Pty. Ltd.* v. *The Commonwealth* (1).]

In point of law there was not any need for any statutory authority. It was because in *The Commonwealth* v. *Colonial Combing, Spinning & Weaving Co. Ltd.* (2) the particular contract amounted to taxation that there was need for statutory parliamentary sanction: see also *Australian Railways Union* v. *Victorian Railways Commissioners* (3). It not being necessary that there be statutory authority there is not any reason why in relation to Commonwealth administration the same view should not be taken as was taken of State administration in *New South Wales* v. *Bardolph* (4). The power to enter into contracts is unquestionable (*Kidman* v. *The Commonwealth* (5)). If there was not any need for any statutory authority and if what was being done was in the ordinary course of administration of an affair of government then it is a big advance upon the suggestion that when one finds promissory language used to commercial men to induce a commercial transaction of commercial benefit to the Government then the words should be treated as meaning what they say. It is not to the point to suggest that these particular officers did not realize they were making contracts. The rule is that if there is a mistake as to the obligation resulting in a payment from one to the other which in point of law was not payable that money is recoverable (*Weld-Blundell* v. *Synott* (6)). Money "exacted" is money taken without legal warrant. Reduced to simple form: there was a promise for an act; the plaintiff did the act and became absolutely entitled; thereafter one or both parties, acting on the view that the plaintiff was not absolutely entitled, contrary to the true position, demanded a sum of money and the plaintiff paid it over. The plaintiff was experiencing an increasing turnover. There was not any suggestion that the plaintiff had in fact been buying for stockpiling. The plaintiff met all the variations and bought in conformity with the changed offer from time to time. Nothing in the plaintiff's claim turns upon breach or failure to measure up to any of those changed offers. The plaintiff in June 1948 had a right: (i) to retain the appraised wool without paying any more; (ii) to

(1) (1924) 34 C.L.R. 269, at p. 281.
(2) (1922) 31 C.L.R. 421, at pp. 437-440.
(3) (1930) 44 C.L.R. 319, at p. 353.
(4) (1934) 52 C.L.R. 455, at pp. 463, 474, 496, 502, 507, 508.
(5) (1925) 37 C.L.R. 233, at p. 240.
(6) (1940) 2 K.B. 107, at p. 111.

H. C. OF A. 1953-1954.

AUSTRALIAN WOOLLEN MILLS PTY. LTD. v. THE COMMONWEALTH.

retain the whole subsidy as at 1946-1947; and (iii) to be paid £108,871 which together with the money required to be paid back constitutes the present claim.

W. J. V. Windeyer Q.C. (with him *G. H. Lush* and *B. B. Riley*), for the defendant. The subsidy scheme is outside the realm of contract (*Balfour* v. *Balfour* (1)). It was a transaction of Government. The relations between the plaintiff and the defendant were not on the basis of contract. The general proposition that statements made as between private individuals to create a contractural liability if they be made in circumstances such as occurred in this case between the Government and subjects, is disputed. Even if the matter be within the realm of contract there never was a concluded contract. The documents show that the Commonwealth claimed to vary, and, without any objection from the plaintiff, did vary from time to time the conditions of the scheme according to circumstances and considerations and conditions decided by itself. There never was such an offer, an acceptance and such use of promissory language as would, between private individuals, be requisite to constitute a unilateral contract. If any contract does emerge at all it is not a contract by the Crown to pay subsidy, but a contract by the recipient of subsidy that in consideration thereof he would (i) deal with the subsidized wool in the manner stipulated, and (ii) repay subsidy if he should be required to do so by the Commonwealth in accordance with the Commonwealth's administration of the scheme. The money was paid to the Commonwealth by the plaintiff voluntarily, without protest, without mistake, it being repayable in accordance with the conditions of the scheme. Particular words which may in themselves be words of obligation and which may be found in the documents do not necessarily disclose or indicate an enforceable legal obligation.

[DIXON C.J. referred to *R.* v. *Clarke* (2).]

The nearest analogy to that is the statement in *Shadwell* v. *Shadwell* (3). "Reliance" on either the continuance of the bounty or some adjustment of the general system of price control is not sufficient because, for example, soldiers and civil servants rely upon the undertaking of the Crown, and are justified in relying upon it, but it does not mean that if there be what they consider to be a failure to perform the conditions that the matter can be litigated: see *The Commonwealth* v. *Welsh* (4).

[FULLAGAR J. referred to *Bertrand* v. *The King* (5).]

(1) (1919) 2 K.B. 571, at p. 579.
(2) (1927) 40 C.L.R. 227.
(3) (1860) 9 C.B. (N.S.) 159 [142 E.R. 62].
(4) (1947) 74 C.L.R. 245.
(5) (1949) V.L.R. 49.

An illustration of the general idea of a matter which is outside the realm of contract is to be found in *John Cooke & Co. Pty. Ltd.* v. *The Commonwealth* (1), cf. on appeal (2). The plaintiff over-simplifies the situation when it asserts that the Commonwealth was desirous that manufacturers should buy wool and made this offer in order that there should not be any disturbance of the " C " series index. The Commonwealth was interested in ensuring that the general economy continued in the sense that the employees of the textile trade were kept at work, that all the inter-related aspects of Australian manufacture were maintained. In that sense it had always subsidized, in one form or another, the local manufacturer, e.g. by tariffs, import restrictions, subsidies directly or indirectly. The fact that there is a rational reliance upon the Crown carrying its expressed intention into effect does not mean that there is a legal right and that the element of reliance cannot be treated as being the thing which carries what otherwise would not be enforceable into the field of enforceability (*Nixon* v. *Attorney-General* (3); *Gibson* v. *East India Co.* (4); *Reg.* v. *Secretary of State for War* (5)). This subsidy scheme was not a matter of contract at all. Where one party has a right to perform or not to perform or to dictate for the future or to vary in the future the terms of an apparent agreement, there is not any contract: *Salmond & Williams* on *Contracts*, 2nd ed. (1945) 194; *Loftus* v. *Roberts* (6); *Roberts* v. *Smith* (7); *Taylor* v. *Brewer* (8). It is not proposed to canvass *Churchward* v. *The Queen* (9) or *New South Wales* v. *Bardolph* (10) or similar cases. There was not any express statutory basis for this subsidy scheme.

[DIXON C.J. referred to *Balfour* v. *Balfour* (11).]

That case, although in an entirely different field, indicates that there can be an agreement with all the language of a concluded agreement which may yet not be enforceable or justiciable as a contract: cf. *Gibson* v. *East India Co.* (4).

The topic of unilateral contracts in general as operating between individuals was discussed by Professor *Goodhart* in *Law Quarterly Review*, vol. 67, p. 456; vol. 69, p. 106, and by Mr. *Smith* in *Law Quarterly Review*, vol. 69, p. 99. There must be something in the nature of a request or inducement to the person to whom the offer is made to perform the act which is going to

(1) (1922) 31 C.L.R., at pp. 402, 405.
(2) (1924) 34 C.L.R., at p. 281.
(3) (1931) A.C. 184, at p. 191.
(4) (1839) 5 Bing. (N.C.) 262 [132 E.R. 1105].
(5) (1891) 2 Q.B. 326, at p. 336.
(6) (1902) 18 T.L.R. 532.
(7) (1859) 4 H. & N. 315 [157 E.R. 861].
(8) (1813) 1 M. & S. 290 [105 E.R. 108].
(9) (1865) L.R. 1 Q.B. 173.
(10) (1935) 52 C.L.R. 455.
(11) (1919) 2 K.B. 571.

H. C. OF A. 1953-1954.

AUSTRALIAN WOOLLEN MILLS PTY. LTD. v. THE COMMONWEALTH.

qualify him for the reward. There is a distinction between complying with the conditions which enable a person to get a bounty or gift from providing the consideration which entitles him to payment as a matter of contract. In this case the language is not the language of offer; it is the language purely of Government decision. Money which is recoverable in a count for money had and received on the basis of an exaction is not really recoverable on the basis of mistake and vice versa. It is understood that an exaction is money claimed *colore officii*, money which an authority gets by asserting its superior powers. That is not appropriate to this case where the plaintiff was not poor, and in the ordinary sense it was not an exaction (*Werrin* v. *The Commonwealth* (1); *Sawyer and Vincent* v. *Window Brace Ltd.* (2); *Smith* v. *William Charlick Ltd.* (3); *Steele* v. *Williams* (4); *Maskell* v. *Horner* (5); *Sargood Bros.* v. *The Commonwealth* (6)). The law as to recovery of money paid under mistake is discussed in *Halsbury's Laws of England*, 2nd ed., vol. 23, at pp. 162-169; see *Chitty* on *Contracts*, 20th ed. (1947-1953 (sup.)), p. 104; *Kelly* v. *Solari* (7) and *Rogers* v. *Ingham* (8). There is nothing in this case comparable to *Weld-Blundell* v. *Synott* (9) where there was an admitted mistake at one point in the calculation. The defendant was entitled, according to the subsidy scheme operating, to have the money repaid to it. In any event it was paid voluntarily. The plaintiff's claim for £67,230 on the basis of mistake does not come within the authorities. From one point of view *Foley* v. *Classique Coaches Ltd.* (10) does not assist very much in connection with a contract that would truly be regarded as a contract in the form in which it was put on behalf of the plaintiff. *R.* v. *Clarke* (11) was a case of an offer of a reward by the Crown and differed in that sense from *Williams* v. *Carwardine* (12) which was a transaction between parties. It was referred to in *White* v. *White* (13), *Langmead* v. *Thyer Rubber Co. Ltd.* (14) and *Reid* v. *Zoanetti* (15). On the matter of contract and unilateral contract the distinction was recognized in *Carlill* v. *Carbolic Smokeball Co.* (16) that the fulfilment of a condition for a bounty or gift was not the same thing as the performance of a consideration. The substance of the matter is a

(1) (1938) 59 C.L.R. 150.
(2) (1943) K.B. 32.
(3) (1924) 34 C.L.R. 38.
(4) (1853) 8 Ex. 625 [155 E.R. 1502].
(5) (1915) 3 K.B. 106, at p. 109.
(6) (1910) 11 C.L.R. 258, at pp. 276, 303, 304.
(7) (1841) 9 M. & W. 54, at p. 58 [152 E.R. 24, at p. 26].
(8) (1876) 3 Ch. D. 351, at p. 355.
(9) (1940) 2 K.B. 107.
(10) (1934) 2 K.B. 1, at p. 12.
(11) (1927) 40 C.L.R. 227.
(12) (1833) 4 B. & Ad. 621 [110 E.R. 590].
(13) (1950) 50 S.A.S.R. 186, at p. 193.
(14) (1947) 47 S.A.S.R. 29, at pp. 31, 32, 48.
(15) (1943) 43 S.A.S.R. 92, at p. 99.
(16) (1893) 1 Q.B. 256, at pp. 264, 271.

person was entitled to the benefit of the subsidy if he fulfilled the conditions. It is a subsidy given to persons who buy wool rather than a payment to persons in consideration of them buying wool. The Crown does make promises which are not enforceable at law. The question of whether language is promissory cannot be the only test. That an arrangement may be wholly promissory and made with great solemnity does not make it a contract. Acting upon reliance upon an announcement of a governmental intention cannot make a contract however precise the statement of intention and however greatly it was relied upon: see *Gibson* v. *East India Co.* (1) and *Wakely* v. *Lackey* (2). There was not any contract; the matter was outside the realm of contract. The scheme was administered according to the principles and conditions notified. It was a plan to pay subsidy on wool in aid of and in conjunction with a price-stabilization plan and it was to be paid only on wool which went into production.

Sir *Garfield Barwick* Q.C., in reply. As to whether or not there is a contract the defendant fails to distinguish between the appreciation which a person may have of the legal consequences of what he does, and an *animus contrahendi*. There was a promise by or on behalf of the defendant to pay subsidy. This is not a case where one party reserves an option to perform or not to perform in which case there is, of course, no binding obligation: see *Williston* on *Contracts*, (rev'd. ed. 1936), vol. 1, p. 123, par. 43. There is not in the letters anything approaching an option not to perform or to perform at the sole wish of the Crown. Cases such as *Roberts* v. *Smith* (3) and *Taylor* v. *Brewer* (4) and the passage in *Salmond & Williams* on *Contracts*, 2nd ed. (1945), 194, are not applicable. On the question of mistake see *Daniell* v. *Sinclair* (5); *Cooper* v. *Phibbs* (6) and *Re Bayley-Worthington and Cohen's Contract* (7).

[KITTO J. referred to *Rogers* v. *Ingham* (8).]

Other cases are *Midland Great Western Railway of Ireland* v. *Johnson* (9) and *Stanley Bros. Ltd.* v. *Nuneaton Corporation* (10).

Cur. adv. vult.

(1) (1839) 5 Bing. (N.C.) 262 [132 E.R. 1105].
(2) (1880) 1 N.S.W.L.R. 274.
(3) (1859) 4 H. & N. 315 [157 E.R. 861].
(4) (1813) 1 M. & S. 290 [105 E.R. 108].
(5) (1881) 6 App. Cas. 181, at p. 190.
(6) (1867) L.R. 2 H.L. 149.
(7) (1909) 1 Ch. 648, at p. 665.
(8) (1876) 3 Ch. D. 351.
(9) (1858) 6 H.L.C. 798 [10 E.R. 1509].
(10) (1913) 77 J.P. 349.

H. C. OF A. 1953-1954.

AUSTRALIAN WOOLLEN MILLS PTY. LTD. v. THE COMMONWEALTH.

May 5.

THE COURT delivered the following written judgment:—

This is an action which came on for hearing before *Kitto* J. who, after receiving some oral evidence and a considerable mass of documentary evidence, directed the case to be argued before the Full Court. In the end two questions of a familiar character seem to emerge for decision, but it is necessary to examine the facts with some care.

The plaintiff company has for many years carried on a large business of manufacturing worsted cloth. In the course of its business it purchased, during the war years and up to the end of 1948, large quantities of raw wool, both greasy and scoured, for the purpose of manufacture into cloth. Its claim against the Commonwealth in the action is for a total sum of £176,153. This amount is split up in various ways in the statement of claim, and, as to some of the sums involved, various causes of action are alleged, and the amount alleged to be payable has been calculated in various ways. In the last analysis, however, it would appear that the company's claim can only be framed as a claim for two distinct sums, which together make up the total of £176,153. The first is a sum of £108,871. The company alleges a contract, or rather a series of contracts, between itself and the Commonwealth, under which the Commonwealth bound itself to pay to it a sum, described as a subsidy, in respect of wool bought by it at auction for the purpose of manufacture. The sum of £108,871 is, it says, payable to it under this contract or these contracts. The second sum claimed is a sum of £67,282. This is a sum which was in fact paid by the company itself to the Commonwealth in response to a demand made by the Commonwealth in circumstances which will have to be considered. This sum is claimed as money had and received by the Commonwealth to the use of the company.

The wool in respect of which the larger sum is claimed was all purchased by the company in April, May and June 1948. The sum of £67,282 was paid by the company to the Commonwealth in May 1949. The case cannot, however, be understood without going back over some years and looking at the circumstances under which trade in wool was carried on in Australia during and shortly after the war of 1939-1945.

The Wool Purchase Arrangement between the United Kingdom Government and the Commonwealth Government, whereby the former acquired from the latter the entire Australian wool clips for the duration of the war and one year thereafter, has very recently been fully examined and discussed by this Court in *Ritchie*

v. *Trustees Executors & Agency Co. Ltd.* (1) and in *Squatting Investment Co. Ltd.* v. *Federal Commissioner of Taxation* (2). The steps taken by the Commonwealth to implement that Arrangement within Australia have also been considered in some detail in those cases. The point to be noted for present purposes is that the sale by the Commonwealth Government to the United Kingdom Government expressly excluded " wool required for purposes of local manufacture " (i.e. manufacture in Australia). On the other hand, the Commonwealth under the *National Security* (*Wool*) *Regulations* (which came into force on 28th September 1939) acquired the whole of the wool produced in Australia in each of the war years. For their supplies of wool, therefore, in those years local manufacturers had to look to the Commonwealth, which owned all the wool. This really meant that they had to look to the Central Wool Committee, which was constituted under those regulations. Regulation 23 dealt with wool for local manufacture. It provided that any person desirous of obtaining wool for the purpose of manufacture within Australia might apply to the Central Wool Committee for authority to purchase wool, and that the Central Wool Committee might authorize a purchase of wool subject to such conditions as it might think fit to impose. A person so authorized was entitled within a reasonable time after appraisement to examine wool appraised and, subject to any conditions imposed upon his authorization, to purchase wool at the " appraised price ". The provision as to price was twice amended. As from 2nd May 1940 the words " such prices as are from time to time determined by the Central Wool Committee " were substituted for the words " appraised price ", and after 13th November 1942 the price to be paid was the price " fixed by the Central Wool Committee in accordance with any determination notified to it by the Commonwealth Prices Commissioner ". The matter was also dealt with by the *National Security* (*Price of Wool for Manufacture for Export*) *Regulations*, which came into force on 17th February 1941. Regulation 7 provided that the Central Wool Committee might, either as a condition of authorizing the purchase of wool under reg. 23 of the Wool Regulations, or by resolution or by direction or in any other manner it might think expedient, provide for postponing the payment of any part of the price payable for the purchase of wool under that regulation and for treating it as a deferred or contingent liability, which the Central Wool Committee might remit upon proof to its satisfaction that the wool had been used in the manufacture of goods for consumption within Australia and which

(1) (1951) 84 C.L.R. 553. (2) (1953) 86 C.L.R. 570.

H. C. OF A. 1953-1954.

AUSTRALIAN WOOLLEN MILLS PTY. LTD. v. THE COMMONWEALTH.

Dixon C.J. Williams J. Webb J. Fullagar J. Kitto J.

otherwise it might call up and enforce. A new reg. 7A was added as from 17th September 1941. It required a manufacturer, where there was a deferred or contingent liability under reg. 7, to include in any contract for the sale of wool by the manufacturer a provision which would have the effect of imposing an obligation on the purchaser to pay the amount of the contingent or deferred liability.

In 1945, when the war with Germany came to an end, a plan was agreed upon between the Governments of the United Kingdom and the Commonwealth for the winding-up of the wool scheme, which was to take effect as from 1st August 1945. The Disposals Plan, as it was called, is scheduled to the *Wool Realization Act* 1945, and this also has been examined and explained in the two recent cases in this Court to which reference has been made. The only point that need be noted here is that, in accordance with the Plan, the method of appraisement and acquisition by the Commonwealth was continued during the wool year ended 30th June 1946, but in the following year the normal Australian practice, under which wool is sold at auction by wool-selling brokers on behalf of producers, was reinstituted.

During the appraisement years the plaintiff company, in pursuance of the regulations mentioned above, applied for and was granted a number of authorizations to purchase appraised wool. Three purchases, totalling 201 bales, made under these authorizations become ultimately material in this case. These are a purchase of three bales of the wool year 1942-1943, a purchase of 48 bales of the wool year 1943-1944 and a purchase of 150 bales of the wool year 1945-1946. The conditions of the authorizations to purchase imposed by the Central Wool Committee varied in detail from time to time. But those granted for the season 1941-1942 and for all subsequent seasons contained material provisions which were identical in substance. The authorization granted to the plaintiff company on 2nd August 1945 may be taken as an example. This contained the following conditions:—"For all wool purchased under this Authorization the said The Australian Woollen Mills Pty. Ltd. shall be liable to pay the Central Wool Committee a price consisting of an amount representing the basic price fixed by the Central Wool Committee increased by $27\frac{1}{2}\%$ of the appraised price. The basic price fixed by the Central Wool Committee for shorn wool for the Season 1945-1946 is appraised price plus 10%. The basic price fixed by the Central Wool Committee for skin wool for the season 1945-1946 is the appraised price plus 5%. The amount representing the basic price shall be paid together with delivery charges within fourteen days after purchase of the wool.

Payment of the remaining part of the price shall be deferred, but shall be made if and when demanded by the Central Wool Committee, which may remit such part upon proof to its satisfaction that the wool has been used in the manufacture of goods distributed for consumption within Australia." One would imagine that the intention, or at least the primary intention, behind both the regulations and the authorizations was that the percentage addition to the basic price should be exacted only if wool bought did not actually reach local consumption but was exported either in its raw state or in the form of a manufactured product. It would seem, however, that, legally speaking, the deferred or " contingent " part of the price was exigible at the discretion of the Central Wool Committee.

It should be mentioned at this stage that, although the word " subsidy " was not commonly used in connection with purchases of wool by manufacturers during the appraisement period, the Commonwealth was in effect paying a subsidy during this period. For, as appears from par. 12 of the case stated in the *Squatting Investment Case* (1) the prices at which the Central Wool Committee on behalf of the Commonwealth sold wool to manufacturers were (except in the 1941-1942 season) less than the prices which the Commonwealth paid to growers in respect of its acquisition of that wool under the regulations. Existing alongside, and bearing always on, the local administration of the wool scheme, was the strict and elaborate system of price control set up under the *National Security (Prices) Regulations*. Under this system maximum selling prices were fixed for the products of local manufacture. The price charged by the Central Wool Committee for raw wool enabled prices of manufactured woollen goods to the ultimate consumer to be kept down to a level which the Prices Commissioner regarded as satisfactory, while the wool producer whose wool went to local manufacturers was placed on the same footing as the producer whose wool was sold to the United Kingdom Government. In effect, therefore, the Commonwealth was, during the appraisement period, granting a subsidy on wool used in local manufacture. It was paying it to the producer of the raw material and not to the manufacturer, but the manufacturer benefited in just the same way as if it had been paid to him direct.

It has been necessary to mention all these matters because the 201 bales of wool bought ex appraisement, and mentioned above, were still held in stock by the plaintiff company at the end of 1948, and in respect of those bales a sum of £2,121 entered into the

(1) (1953) 86 C.L.R., at pp. 575, 576.

H. C. OF A. 1953-1954.

AUSTRALIAN WOOLLEN MILLS PTY. LTD. v. THE COMMONWEALTH.

Dixon C.J. Williams J. Webb J. Fullagar J. Kitto J.

calculation of the sum of £67,282 which, as has been said, was demanded by the Commonwealth and paid by the company in 1949, and which the company now seeks to recover. The major part of the plaintiff's claim, however, has relation to wool purchased by it during a later period, when the Commonwealth in fact paid subsidies direct to local manufacturers in respect of wool purchased by them. It will be convenient to state the facts in a general way as briefly as possible, before turning to the actual documents on which the success or failure of the claim ultimately depends.

It has been seen that under the Disposals Plan the system of acquisition of wool on appraisement was to come to an end on 30th June 1946. After that date the normal system of sale by brokers at auction was to recommence. As the date approached, certain problems presented themselves. At the auctions local manufacturers would have to compete with overseas buyers, and it was impossible consistently with the auction system to control the price of raw wool to local buyers. At the same time it was a firm point of Government policy that the war-time system of local price control in respect of commodities generally, including products of woollen manufacture, should be continued for an indefinite period. It was the co-existence of these two factors that created the main problem. There had been, since the beginning of the war, a controlled market for wool and a controlled market for manufactured woollen goods. If this could have been succeeded by a free market for both, there would have been simply a restoration of the pre-war position. But, as it was, there was to be a free market in wool and a controlled market in manufactured woollen goods. The problem itself was essentially one for the Prices Commissioner rather than the Australian Wool Realization Commission, which had by this time, under the *Wool Realization Act* 1945, succeeded the Central Wool Committee. But the Commission, in view of its functions under the Disposals Plan, was vitally concerned with what was to be done, and it was natural that it should play, as it did, a very large part both in the negotiations leading up to the scheme which was in fact adopted and in the administration of that schene.

In March 1946 a conference was held which was attended by representatives of the commission, of the Prices Commissioner, and of woollen manufacturers. What took place at this conference could have no legal effect, but it has some explanatory value, and two points which were made clear at the meeting should be mentioned. It was made clear, firstly, not only that price control was likely to continue for some considerable time, but that the Prices Commissioner proposed to continue, for the time being at any rate,

the policy of fixing prices on a basis in which cost of raw materials to the manufacturer figured as a factor. On the other hand, he did not propose for the present to allow any substantial rise in the price of the finished product. It was made clear, secondly, that the Government realized that, on the resumption of auction sales, the price of raw wool was almost certain to rise, and that it had come to the conclusion that the only practical solution was that it should grant a bounty or subsidy to the manufacturer. There were, however, two things against which the Commonwealth desired to guard, though only one of these seems to have been actually stressed at the conference. The second was perhaps too obvious to need stressing. In the first place, the difference between the new price and the old price—and this was the basis of the subsidy—might be unduly enhanced by extravagant bidding in a market in which demand for a particular type of wool exceeded supply. In the second place, a particular manufacturer might ultimately place himself in what would have been regarded as an unduly favourable position by building up large stocks of subsidized wool—what is nowadays called " stock-piling ". The obtaining of an advantage in this way would depend, of course, on a number of factors, including rising prices of raw wool. But by this time, although the contrary had been anticipated when the Disposals Plan was adopted, the general expectation was that wool prices would continue to rise for some time. Mr. *Windeyer* expressed the position succinctly when he said that the Commonwealth was concerned throughout to prevent two things—undue bidding and undue buying. In the last resort the Prices Commissioner was in control of the situation, but it seems to have been at no material time envisaged that the current basis of price regulation should be fundamentally altered.

It was a suggestion of the late Mr. N. W. Yeo that was ultimately adopted as a solution of the problem, and what was proposed was announced in a circular of 20th June 1946 addressed by the Prices Commissioner to manufacturers, and in letters of 7th August and 20th August 1946 and 20th August 1946 from the Commission to manufacturers. It was announced that the Commonwealth Government had decided that a subsidy would be paid to maintain the price of wool purchased for domestic use by Australian manufacturers when auctions recommenced after 30th June 1946. The subsidy would be calculated as the difference between the present basic price of wool for domestic consumption and the average market price for each auction series. The amount of subsidy payable was to be as determined by the Australian Wool Realization

H. C. OF A. 1953-1954.

AUSTRALIAN WOOLLEN MILLS PTY. LTD. v. THE COMMONWEALTH.

Dixon C.J. Williams J. Webb J. Fullagar J. Kitto J.

Commission. The basic price of wool for domestic consumption was the price determined under reg. 23 of the Wool Regulations as amended. The words " auction series " had reference to a long-standing practice under which auctions are held from time to time at different wool-selling centres—Sydney, Melbourne, Geelong and other cities. A " series " is constituted by one sale by each wool-selling broker who has wool for sale at the particular time in the particular centre. The basic price was fixed at first at appraisement price plus ten per cent in the case of shorn wool and five per cent in the case of skin wool. The " appraisement price " was the 1945-1946 appraisement price, and it was ascertainable by the commission by reference to the table of limits for that wool year.

It was not anticipated at the outset that it would be necessary (apart from exceptional cases) for manufacturers to make application to the commission for subsidy. The commission would have reports of sales at auction series from the brokers, and would be able to compute the subsidy appropriate to each purchase at auction by a manufacturer. The commission, however, decided at an early stage that it would require manufacturers to forward details of all wool on which subsidy was claimed, and after 20th March 1947 it required this to be done on a printed form, in which the manufacturer " declared ", *inter alia*, " as a condition of receiving subsidy " on the wool comprised in the claim—" (c) that if all or any of the wool is not for any reason used for manufacture of goods eligible for subsidy, the subsidy paid will be refunded to the Australian Wool Realization Commission as agent for the Commonwealth, and (d) that the above information is a true and correct statement of wool for manufacture of subsidized goods within the Commonwealth purchased by the said manufacturer ". It is important to note these references to " *goods* eligible for subsidy " and " subsidised *goods* ". (The italics are, of course, ours). There are other such references in the material before the Court. The subsidy is regarded as a subsidy on manufactured goods. It is granted because the Commonwealth has fixed maximum prices to the consumer for those goods. Goods would not naturally be regarded as " eligible for subsidy " unless their price to the consumer was so fixed, and, if wool is used otherwise than in the manufacture of goods eligible for subsidy, any subsidy which may have been paid must be refunded.

The plaintiff company from time to time made claims for subsidy, tendering in each case the required declaration. These were checked with brokers' invoices forwarded by the broker to the commission, and on the information so obtained and on the

1945-1946 table of limits the commission computed the amount of subsidy. The cheque forwarded in payment was accompanied in every case by a statement which showed the weight in pounds of each lot purchased, the series average price as computed by the commission, the basic cost per pound, the rate of subsidy per pound, the total amount of subsidy in respect of each lot, and the total amount covered by the cheque. The statement contained at the foot the following clause: "Payment of this amount is made to you by the Australian Wool Realization Commission as agent for the Government of the Commonwealth of Australia in accordance with the principles of the Prices Stabilisation Plan, and the Government retains the right to review and, if necessary, vary the amount of subsidy so paid".

On 21st April 1947 manufacturers were informed by the commission by letter that the Prices Commissioner had "ruled" that subsidization of wool purchased by a manufacturer during the 1946-1947 season was proposed only on the quantity of wool necessary for him to carry on his normal manufacturing activities to 30th June 1947 and for any period thereafter during which he was unable to obtain supplies of wool from the market. The letter concluded: "If any manufacturer is found to have purchased wool in excess of these requirements, payment of subsidy on such excess will be withheld by the Commission". It may be mentioned here that the stocks held by the plaintiff company at 30th June 1947 were closely investigated by the Prices Commissioner, who appears to have required the company to reduce its stocks, and it was not until 10th November 1947 that the commissioner declared himself satisfied that stocks had been reduced in accordance with his instructions, and a cheque for £3,870 was forwarded to the company representing the balance of subsidy claimed on purchases made in the 1946-1947 season.

On 27th August 1947 the commission wrote to manufacturers, saying that it had been directed by the Prices Commissioner to inform them that the existing subsidization scheme was to continue until further notice, subject to certain amendments, which were stated. The letter concluded:—"The Commission has also been directed to inform all manufacturers purchasing wool that subsidy will be paid only on purchases of wool for current manufacturing requirements, and that payment may be withheld in instances where purchases are in excess of current reasonable requirements for manufacture".

During the two wool years 1946-1947 and 1947-1948 the plaintiff company purchased large quantities of wool both at auction and

H. C. OF A. 1953-1954.

AUSTRALIAN WOOLLEN MILLS PTY. LTD. v. THE COMMONWEALTH.

Dixon C.J. Williams J. Webb J. Fullagar J. Kitto J.

privately, and large sums were paid to it by way of subsidy. The position as at 30th June 1948 was that, while a subsidy had been paid to it in respect of wool purchased up to April 1948, purchases had been made in April, May and June 1948 in respect of which subsidy had been claimed but had not been paid. The amount of subsidy so claimed and unpaid was subsequently computed by the Commission as £108,871, and this is one of the two sums claimed by the company in the action.

Early in June 1948 it was announced in the press that the Commonwealth Government intended to discontinue the subsidy system as from 30th June 1948. The announcement seems to have been made with some suddenness, but it may well be that it had been expected for some time. The decision to discontinue paying subsidies was a more or less necessary incident or corollary of a decision that the Commonwealth should, after September 1948, vacate the field of price control in favour of the States. This decision in its turn was doubtless occasioned by a growing doubt as to the constitutional validity of Commonwealth legislation controlling prices: this Court had already had occasion to observe that the defence power, greatly enlarged in practical application in war-time, had begun to contract. The subsidy scheme had been an incident of Commonwealth price control, and, when the Commonwealth ceased to control prices, it would naturally cease to pay subsidies. It was, however, not a simple matter of declaring that subsidy would not be paid after a specified date. The Government was concerned about a number of matters incidental to the cessation of the payment of subsidies. It was concerned, in the first place, to see that the transition from Commonwealth control with subsidies to State control without subsidies should be made in such a way that manufacturers should enter the new period so far as possible on equal terms. One thing which this conception was regarded as involving was the transfer of wool by manufacturers with comparatively large stocks to manufacturers with comparatively small stocks, and towards the end of 1948 the plaintiff company, at the instance of the Commission, sold 200 bales of wool to another manufacturer. In the ultimate computation of stocks, which was later made, this wool was, of course, excluded. But the Government was concerned with much more than that. It was concerned to ensure that wool, on which subsidy had been paid by the Commonwealth, should not be used—or at any rate should not be used after a certain date—in the manufacture of goods which would not be subject to Commonwealth price control. This concern would be the more pressing because it must have been anticipated that

the State Prices Commissioners would allow an increase in the prices of manufactured woollen goods; the States would be precluded by s. 90 of the Constitution from granting subsidies, even if they were willing and able to do so. The situation obviously necessitated some sort of compromise by way of solution. It was in fact met, as will be seen, by a decision that the subsidy scheme should be finalized on the basis that each manufacturer would have in stock at 30th June 1948 so much subsidized wool as would suffice for his manufacturing requirements for five and one-half months from that date. The period of five and a half months would end at the "Christmas close-down" of the factories about the middle of December.

By a letter of 18th June 1948 the Commission suggested to manufacturers that a conference should be held at an early date to discuss matters in connection with the cessation of the subsidy scheme. In the course of this letter the Commission said that the decision to discontinue subsidies on wool "is, of course, subject to the ruling previously given that subsidy will only be considered in respect of such wools as are required to tide a manufacturer over until he is able to obtain wool from the market in the 1948-1949 wool season". The letter suggests that the agenda for the conference should include the subject of "what would constitute reasonable stocks of subsidized wool in the hands of manufacturers at 30th June 1948 (i.e. four, five or six months' stocks based on 1947-1948 consumption)". The suggested conference was held on 24th June, but no conclusion could be reached in the absence of information as to stocks then held by individual manufacturers. Information as to stock held, on which subsidy had been paid or was being claimed, and as to the number of months over which that stock would last, was sought by the commission by telegram, to which the plaintiff company replied on 28th June, stating the "anticipated stock in lbs. weight greasy basis as at close of 1947-1948 season on which subsidy has been paid or is being claimed" as 1,960,000 lbs., and the "number of months that the estimated stock would last at current average rate of consumption" as "about six months over all". The weight given, on an average of 280 lbs. to the bale, would be the equivalent of 7,000 bales. In correspondence which followed reference is made to the question of the stage at which wool which has been taken from bales for the purpose of manufacture should be considered as having so far entered on the process of manufacture as no longer to be properly regarded as raw material. The various stages are described in the evidence, but nothing in the case appears to turn on this.

H. C. OF A. 1953-1954.

AUSTRALIAN WOOLLEN MILLS PTY. LTD. v. THE COMMONWEALTH.

Dixon C.J. Williams J. Webb J. Fullagar J. Kitto J.

After discussion by correspondence with representatives of manufacturers, from which it appeared that agreement was not likely to be reached, the Commission decided to recommend to the Commonwealth Government that it "lay down a basis of equalisation". The decision of the Government was announced by the Commission in a letter of 30th August 1948 in which it said—"After discussions with representatives of your association the Government has decided that manufacturers, where possible, should be allowed sufficient stocks of subsidized wool to last them over all for $5\frac{1}{2}$ months from the 30th June 1948". The purpose of the letter was said to be "to outline administrative procedure relating to the equalisation of subsidized wool stocks in accordance with the decision of the Commonwealth Government". After dealing with the transfer of wool from mills with excess stocks to mills with deficient stocks (a matter which has already been mentioned) the letter proceeded: "The Commonwealth Prices Commissioner has now declared that goods manufactured from wool stocks in excess of $5\frac{1}{2}$ months' normal requirements from 30th June 1948 are ineligible for wool subsidy. Therefore, in accordance with sub-paragraph (c) of the conditions under which subsidy has been claimed on wool . . . the subsidy on wool stocks in excess of this period will be either withheld in cases where payment has not yet been made or must be refunded to the Commission as agent for the Commonwealth Government if payment of subsidy has already been made". Again it is *manufactured goods* that are regarded as "eligible for subsidy". The sub-par. (c) which is referred to in this passage, and which has already been cited, declared that it was a condition of receiving subsidy on wool "that if all or any of the wool is not for any reason used for manufacture of goods eligible for subsidy the subsidy paid will be refunded to the Australian Wool Realization Commission as agent for the Commonwealth".

On 14th September 1948 the Commission wrote to the company a letter in which, after referring to what had been said in the letter of 30th August, it said: "From an analysis of your statutory declaration of 7th July 1948 in respect of stocks of raw material at 30th June 1948 and movements of raw wool in the preceding twelve months, it would appear that, after taking into consideration all unpaid claims for subsidy, your company was holding the equivalent of 273,564 lbs. of greasy wool in excess of $5\frac{1}{2}$ months' requirements at that date. Scoured wool has been converted to a greasy basis on an estimated yield of 69%". The Commission's calculation was made in the following manner. The "excess stocks" of subsidized wool are first computed by deducting from the stock held

at 30th June 1948, as returned by the company, the five and one-half months' requirements, which are calculated on the basis of the actual " usage " by the company in the year ended 30th June 1948. The quantity so ascertained is 838,457 lbs. The calculation then, so to speak, credits the company with the quantity of wool purchased on which subsidy has been claimed but not paid, which is stated as 564,893 lbs. The difference between these two figures is 273,564 lbs. and the letter concludes : " quantity over-subsidized on which a refund of subsidy will be required—273,564 lbs.". The basis of this calculation and of later calculations set out in later letters seems to be this. The Commission is reviewing the whole period of two years during which the subsidy system has been in operation and is saying : " We are discontinuing subsidies after 30th June 1948. The total amount of subsidy, to which we are going to treat you, the manufacturer, as entitled in respect of your purchases during the last two years, is such as will leave you at 30th June 1948 with $5\frac{1}{2}$ months' requirements of subsidized wool in stock. We will pay your outstanding claims for subsidy to an extent which will give you at 30th June 1948 $5\frac{1}{2}$ months' requirements in the shape of subsidized stock. But, if payments of subsidy already made have been of such a total amount as to leave you at that date with more than your $5\frac{1}{2}$ months' requirements of subsidised wool, then you must repay to us the equivalent of the excess ".

On 21st September the company replied to the Commission's letter of 14th September. In this letter the company clearly accepted the " basis of equalization " on which the Commission's calculations had been made, but it made two points. In the first place, it said that its current production of manufactured goods was in fact considerably larger than it had been in 1947-1948 and it suggested that its five and one-half months' requirements should be calculated on its actual usage of wool in the eleven weeks of that period which had by now elapsed. In the second place, it called attention to the fact that its outstanding claims for subsidy included a quantity of scoured wool, and that for the purpose of calculating subsidy this scoured wool ought to have been converted to a greasy basis. The Commission in a letter of 23rd September said that it was agreeable to calculating the five and one-half months' requirements of the company on the basis of actual usage between 1st July and the Christmas close-down of the company's factory. It also accepted the position that the scoured wool included in the company's outstanding claim ought to be converted to a greasy basis. The result (on the assumption that the company's increased

H. C. OF A. 1953-1954.

AUSTRALIAN WOOLLEN MILLS PTY. LTD. v. THE COMMONWEALTH.

Dixon C.J. Williams J. Webb J. Fullagar J. Kitto J.

production was maintained) may be stated as being that the company, instead of being over-subsidized to the extent of 273,564 lbs., was under-subsidized to the extent of 299,080 lbs.

It may be observed at this stage that it was clearly possible either that a manufacturer's stocks on hand at Christmas 1948 might include wool purchased before 1st July 1946 (which would almost certainly be appraisement wool), or that " usage " during the five and one-half months after 30th June 1948 might include wool purchased after that date. It follows that it was possible that wool on hand at the Christmas close-down in 1948 might include either appraisement wool or directly subsidized wool or both. (It has already been pointed out that appraisement wool had in effect been " subsidized ", though not by direct payment to the manufacturer). It is not difficult to infer from the minutes of the conference of 24th June that each of these possibilities was realized by the Prices Commissioner and by the Commission, and that what was contemplated throughout was that each manufacturer should at the end of the five and one-half months be in the position of having turned his stocks of subsidized wool into manufactured goods. Mr. Walsh, a representative of the Commission at the conference of 24th June, said : " The conditions under which this subsidy on wool is being made available are, in the words of the Prime Minister, that it should be used in the manufacture of goods under controlled prices ". " Controlled prices " meant, of course, " prices controlled by the Commonwealth ". To this Mr. Stanley, a representative of top-makers, replied : " That is only natural ". The Commonwealth was about to vacate the field of price control, and, if subsidized wool were retained thereafter, it could be used in the manufacture of goods the sale of which might not be subject to price control at all and in any case would not be subject to price control by the Commonwealth. It would thus seem that the period of five and one-half months was fixed as a more or less arbitrary period for which sufficient subsidized stocks would be allowed, and at the end of which subsidized stocks were expected to have been turned into manufactured goods.

On 15th December 1948 the Commission addressed to manufacturers a letter which indicated that stocks of subsidized wool on hand at the end of 1948 would be taken into account in the final adjustment and that for this purpose appraisement wool was to be treated as subsidized wool. This letter, after referring to previous announcements as providing an " interim basis for finalisation ", announced that the Prices Commissioner had now authorized the basis on which final adjustments under the wool subsidy scheme

would be effected. Regard was to be had to stocks held by manufacturers " in subsidized form " at the Christmas 1948 close-down. " Subsidized form " was said to mean that subsidy had been claimed or paid on the wool or the wool content of manufactured or semi-manufactured goods in stock, or that the wool or the wool content was appraisement wool on which part of the purchase price was deferred and contingently payable under the *National Security (Price of Wool for Manufacture for Export) Regulations*. The letter contained the following passage: " On receipt of these returns, which should be rendered not later than 7th January, 1949, the Commission will take the following action :—' (a) *Original bale stocks and greasy wool not in original bales* (*Annexures A & B*). After appraisement of greasy wool not in original bales, a calculation will be made of the amount of subsidy paid or payable on such types of wool according to the following scale :—(i) *Wool Purchased in the* 1947-48 *Season* :—The average subsidy computed on individual types over the whole of the 1947-48 Season auction sales. This is the difference between the basic cost and the average price for the Season on such type. (ii) *Wool Purchased in the* 1946-47 *Season* : The subsidy actually paid on the wool. (iii) *Wool Purchased by manufacturers ex appraisement* :—The subsidy which would have been payable on the same types of wool in the first half of the 1946-47 Season, or the deferred portion of the purchase price whichever is the higher ' ". The letter proceeded: " The manufacturer will be presented with statements showing the nett cost of the wool after subsidy has been adjusted; for the purposes of costing for State Price Control, and the amount of subsidy calculated on this basis on the wool. The amount so calculated will be either offset against amounts of subsidy outstanding on account of the manufacturer or are to be refunded by the manufacturer ". Returns were requested of wool held at the Christmas 1948 close-down " which has been the subject of a claim for subsidy or which is wool appraised during the seasons 1939-1940 to 1945-1946 ", and forms to be used for the purpose of making these returns were enclosed. The mention of " State Price Control " is, of course, a reference to the fact that the control of prices is now a subject of State legislation and not of Commonwealth legislation. It was actually in September 1948 that Commonwealth control of prices ceased and State control took its place.

The required returns were duly made by the plaintiff company on 12th January 1949. These returns showed that the company had on hand at the Christmas close-down in 1948 the 201 bales of appraisement wool which have been mentioned above, and also

H. C. OF A. 1953-1954.

AUSTRALIAN WOOLLEN MILLS PTY. LTD. v. THE COMMONWEALTH.

Dixon C.J. Williams J. Webb J. Fullagar J. Kitto J.

a very considerable quantity of wool (some in the original bales and some broached from the original bales) purchased during the years 1946-1947 and 1947-1948. On the other hand, it had in fact used in manufacture a considerable number of bales of wool purchased by it after 30th June 1948. The returns were accompanied by a letter explaining this latter fact. To this letter the Commission replied on 24th January 1949 by a letter in the course of which it said: "I am to advise you that the Commission is required to ensure that all greasy wool held at the Christmas 1948 closedown is freed from subsidy, and that therefore no allowance can be made for quantities of unsubsidized 1948/49 Season wool used in manufacture prior to that date. It is pointed out that the basis laid down of 5½ months normal requirements *presupposed the use of such wool in the time stipulated* and if for any reason the wool was not used, subsidy must be adjusted thereon. Relief in regard to this aspect is a matter for discussion between you and the Prices Authorities".

This letter was followed by a letter of 25th February 1949 in which the Commission calculated that the sum of £67,282 was owing by the plaintiff company to the Commonwealth. The calculation was made in the same way as a previous calculation to which reference has been made. In effect the Commission debited the company with certain amounts in respect of the stocks of appraisement wool and wool purchased during 1946-1947 and 1947-1948 and held in stock at the Christmas close-down. The total amount attributable to all this wool was the sum of £176,153. The Commission then credited the company with the amount of subsidy which had been claimed and computed on the wool purchased between April and June 1948, but which had not been paid. The total sum calculated in respect of this wool amounted to £108,871. The Commission demanded payment to it of the difference between these two sums, i.e., the sum of £67,282. The amounts which appeared in the calculation in respect of the 201 bales of appraisement wool and the wool purchased in 1946-1947 and 1947-1948 were apparently calculated in the ways which had been indicated in the passage quoted above from the commission's letter of 15th December 1948. The Commission begins by calculating on the respective bases set out in that letter the total amount of "subsidy" appropriate to all the wool held in stock at Christmas 1948 which was either appraisement wool or wool which had been purchased during the two subsidy years. If the whole of that amount had been paid to the company, the company would have been required to repay the whole of that amount. But, because a part of that amount

has not been paid to the company, the sum regarded as repayable must be reduced by the sum so unpaid. It may be added that it does not appear to be possible to attribute any particular wool to this sum of £67,282. That sum simply represents the difference between the two amounts which are arrived at in the manner indicated.

Demands for the payment of the sum of £67,282 were repeated, and on 13th April 1949, the Commission stated that, unless prompt payment were made, it would " refer the matter to the Crown Law Authorities ". On 14th April, the company wrote stating that it was engaged in preparing details of a counter-claim which would be forwarded to the Commission when completed. On 9th May 1949, the company forwarded to the Commission's office in Sydney its cheque for the sum of £67,282 with a letter which was headed " Finalisation of Wool Subsidy Scheme ", and which said :— " We refer to previous correspondence between this company and your Melbourne office with reference to the above finalisation, and now enclose our cheque for £67,282 4s. 9d., being the amount claimed by the Commission as refundable ". On the same day, however, the company addressed a letter to the Commission at its Melbourne office in which it stated that it was forwarding to the Sydney office of the Commission its cheque for £67,282 4s. 9d., but that it would " continue to press " a " counterclaim ". The counter-claim is in substance a claim to be paid subsidy in respect of 2,115 bales of wool, which was purchased after 30th June 1948 and which had been actually used in manufacture before the Christmas close-down " in preference to subsidized wool on hand ". On this basis it claimed a sum of £92,002 10s. 0d., i.e. at the rate of £43 10s. 0d. per bale, a figure based not on the actual prices paid for the 2,115 bales but on the average of the " subsidies " calculated by the commission in its letter of 25th February. The counterclaim was forwarded by the Commission to the Prices Commissioner, who rejected it, saying that " there is no authority to subsidise wool purchased after 31st July 1948 ". No claim is now made on the basis of this " counterclaim ", but the company seeks to recover the sum of £67,282 paid by it to the commission on 9th May 1949.

Consideration of the plaintiff company's claims could not have been undertaken without an examination of the somewhat complicated facts and events outlined above. But the two questions which now seem to emerge do not seem to us to present any very serious difficulty. These questions are (1) whether the Commonwealth bound itself by contract to pay to the plaintiff company the sums claimed by way of subsidy in respect of the wool purchased

H. C. OF A. 1953-1954.

AUSTRALIAN WOOLLEN MILLS PTY. LTD. v. THE COMMONWEALTH.

Dixon C.J. Williams J. Webb J. Fullagar J. Kitto J.

in April, May and June 1948, and (2) whether an action for money had and received will lie in respect of the sum of £67,282, which was paid by the company to the Commonwealth on 9th May 1949.

It is obvious that on the threshold of the first question lie two constitutional questions, the one general and the other particular, and, although it is not necessary to determine either, both should certainly be mentioned. The general question arises from the fact that the contract alleged is a contract with the Crown, and it may be framed in general terms thus :—in the absence of antecedent statutory authority, could a valid contract of the nature alleged in this case be made, binding the Crown to pay public moneys to the plaintiff ? (There is, of course, the subsidiary question whether either the Prices Commissioner or the Australian Wool Realization Commission was in a position to bind the Commonwealth by such a contract as is alleged). The particular question arises from the fact that the powers of the Parliament and Government of the Commonwealth are limited by the Constitution, and it is whether the expenditure of moneys of the Commonwealth in the payment of " subsidies " was authorized by the Constitution.

What we have called the " particular " question was not raised by the pleadings or argued. Section 81 of the Constitution authorizes the appropriation of the revenues and moneys of the Commonwealth for the purposes of the Commonwealth. The payment of " subsidies " would appear to be a payment of " bounties " within the meaning of the Constitution, but s. 51 (iii.) authorizes only the making of laws with respect to bounties " on the production or export of goods ", and the subsidies in question were not made payable on the production or export of goods—unless indeed we regard the subsidy (as the Prices Commissioner seems to have regarded it) as a subsidy " on " goods manufactured, a view which, in the last analysis, would be fatal to the plaintiff. The justification, however, for the appropriation of moneys for paying subsidies would probably, if challenged, be sought in the defence power, which is conferred by s. 51 (vi.). It would be said that such payments were an incident of the exercise of the power to control prices, which has ever since *Farey* v. *Burvett* (1) been regarded as included in the defence power in time of war and for a limited time thereafter. No defence of lack of power having been raised, the matter need not be pursued further.

With regard to what we have called the " general " question and its " subsidiary " question, there is clearly much to be said for the view that both questions should be answered against the

(1) (1916) 21 C.L.R. 433.

plaintiff. The case bears no resemblance to *New South Wales* v. *Bardolph* (1), in which an officer of the Premier's Department, with the authority of the Premier, signed a contract in the ordinary course of the carrying on of an activity of a more or less commercial character under governmental control. The position, however, is the subject of two " admissions " in writing made by the Commonwealth in these proceedings. These are (1) that " the Australian Wool Realization Commission and the Commonwealth Prices Commissioner were the agents of the Government of the Commonwealth in dealings with the plaintiff relating in any way to the subsidy on wool ", and (2) that " if, as a result of the communications and dealings between the parties and/or their agents a contract was made which would be enforceable subject only to the provision of funds by Parliament, the defendant does not dispute liability on the ground that such statutory provision was not made (if that be the fact) ". With regard to the first of these admissions, we take it as meaning neither more nor less than that the commissioner and the Commission had the authority of the Executive Government of the Commonwealth to write and do the things that were written and done by them respectively in and about the matter of the payment of subsidies to the plaintiff. The second admission does not appear in terms to mean very much, because *any* contract by the Crown to pay money would, of necessity, be subject to the provision of funds by Act of Parliament, and it is well settled that judgment may be given against the Crown on a contract although that judgment cannot be enforced in the absence of such a statutory provision: see *Bardolph's Case* (1). The admission, however, was probably intended to go further, and it was, we think, treated as going further. The intention seems to have been that the Crown would not rely on the absence of statutory authority if otherwise the proper inference from the facts would be that a contract binding the Crown was made. At the same time, Mr. *Windeyer* very properly insisted that he was entitled to rely on the absence of statutory authority as an element tending against the inference that a contract binding the Crown was intended by anybody. The fact that one of the parties to the dealings in question was the Crown is, of course, a relevant, and indeed a fundamental, consideration. The whole case may be said to illustrate the difficulties which ensue if one puts aside a vital element in an entire legal problem and seeks to obtain the decision of a court on an artificial basis. However, we have endeavoured to give effect to what the advisers of the Crown seem to have intended.

(1) (1934) 52 C.L.R. 455.

H. C. OF A. 1953-1954.

AUSTRALIAN WOOLLEN MILLS PTY. LTD. v. THE COMMONWEALTH.

Dixon C.J. Williams J. Webb J. Fullagar J. Kitto J.

The contracts alleged by the plaintiff are pleaded in pars. 3 and 4a of the statement of claim. Paragraph 3 alleges that "At or prior to the commencement of the wool season 1946-1947 the defendant promised the plaintiff that in consideration that the plaintiff would during that season purchase wool at auction and otherwise than at auction for domestic consumption in Australia the defendant would pay to the plaintiff a subsidy". The alleged mode of determining the amount of the subsidy is then set out, but this may be put on one side for the moment. Paragraph 4a contains an identical allegation in respect of the wool season 1947-1948. In each case there follows an allegation that the plaintiff made purchases of wool from time to time "in pursuance of the said agreement". The contract put forward by the plaintiff is thus seen to be of that type which is commonly said to be constituted by an offer of a promise for an act, the offer being accepted by the doing of the act. Such contracts are sometimes described as "unilateral" contracts, but the term is open to criticism on the ground that it is unscientific and misleading. There must of necessity be two parties to a contractual obligation. The position in such cases is simply that the consideration on the part of the offeree is completely executed by the doing of the very thing which constitutes acceptance of the offer. A well-known example in which a contract was held to have been made is to be found in *Carlill* v. *Carbolic Smokeball Co.* (1), which has been recently referred to as "that immortal case on unilateral contract" (*J. C. Smith, Law Quarterly Review*, vol. 69, p. 107). Other well-known examples are the cases in which a reward is offered for the giving of information or for the finding and returning of lost property (e.g. *Williams* v. *Carwardine* (2) and *England* v. *Davidson* (3)), and the cases in which there is forbearance by a creditor in return for the debtor's promise to give security (e.g. *Alliance Bank (Ltd.)* v. *Broom* (4)).

In cases of this class it is necessary, in order that a contract may be established, that it should be made to appear that the statement or announcement which is relied on as a promise was really offered as consideration for the doing of the act, and that the act was really done in consideration of a potential promise inherent in the statement or announcement. Between the statement or announcement, which is put forward as an offer capable of acceptance by the doing of an act, and the act which is put forward as the executed consideration for the alleged promise, there must subsist, so to speak,

(1) (1893) 1 Q.B. 256.
(2) (1833) 4 B. & Ad. 621 [110 E.R. 590].
(3) (1840) 11 Ad. & E. 856 [113 E.R. 640].
(4) (1864) 2 Dr. & Sm. 289 [62 E.R. 631].

the relation of a *quid pro quo*. One simple example will suffice to illustrate this. A, in Sydney, says to B in Melbourne: "I will pay you £1,000 on your arrival in Sydney". The next day B goes to Sydney. If these facts alone are proved, it is perfectly clear that no contract binding A to pay £1,000 to B is established. For all that appears there may be no relation whatever between A.'s statement and B's act. It is quite consistent with the facts proved that B intended to go to Sydney anyhow, and that A is merely announcing that, if and when B arrives in Sydney, he will make a gift to him. The necessary relation is not shown to exist between the announcement and the act. Proof of further facts, however, might suffice to establish a contract. For example, it might be proved that A, on the day before the £1,000 was mentioned, had told B that it was a matter of vital importance to him (A) that B should come to Sydney forthwith, and that B objected that to go to Sydney at the moment might involve him in financial loss. These further facts throw a different light on the statement on which B relies as an offer accepted by his going to Sydney. They are not necessarily conclusive but it is now possible to infer (a) that the statement that £1,000 would be paid to B on arrival in Sydney was intended as an offer of a promise, (b) that the promise was offered as the consideration for the doing of an act by B, and (c) that the doing of the act was at once the acceptance of an offer and the providing of an executed consideration for a promise. The necessary connection or relation between the announcement and the act is provided if the inference is drawn that A has requested B to go to Sydney.

The position has been stated above in terms of the technical doctrine of consideration, and this is, in our opinion, the correct way of stating it. But it may be referred to a principle which is fundamental to any conception of contract. It is of the essence of contract, regarded as a class of obligations, that there is a voluntary assumption of a legally enforceable duty. In such cases as the present, therefore, in order that a contract may be created by offer and acceptance, it is necessary that what is alleged to be an offer should have been intended to give rise, on the doing of the act, to an obligation. The intention must, of course, be judged in the light of the principle laid down in *Freeman* v. *Cooke* (1), but, in the absence of such an intention, actual or imputed, the alleged "offer" cannot lead to a contract: there is, indeed, in such a case no true "offer".

(1) (1848) 2 Ex. 654, at p. 663 [154 E.R. 652, at p. 656].

H. C. OF A. 1953-1954.

AUSTRALIAN WOOLLEN MILLS PTY. LTD. v. THE COMMONWEALTH.

Dixon C.J. Williams J. Webb J. Fullagar J. Kitto J.

A test which has not seldom been applied in such cases in order to determine whether a contract has been made or not is to ask whether there has been a request by the alleged promisor that the promisee shall do the act on which the latter relies. Such a request may, of course, be expressed or implied. In an interesting article in the *Law Quarterly Review*, (vol. 69, p. 99) to which Mr. *Windeyer* referred us and which has already been incidentally mentioned, Mr. *J. C. Smith* maintains that the presence of a request, express or implied, is an essential element in every true offer. Sir *A. Goodhart* (*Law Quarterly Review*, vol. 67, p. 456 and *Law Quarterly Review*, vol. 69, p. 106) contests this general proposition, maintaining in effect that the essential thing, in a case such as the present, is that the "offeror" should *state* a *price* which the "offeree" must pay if he wishes to purchase a promise. This way of putting the position does not seem to differ materially from the way in which we have put it above. At the same time, it can hardly be denied that the presence or absence of an implied request to do the act may often provide a useful test for determining whether there has been a true offer and a true acceptance such as to bring a contract into existence: (cf. *Salmond & Williams* on *Contracts*, 2nd ed. (1945), pp. 104, 105). We are really applying the same test if we ask whether the "offer" was made in order to induce the doing of the act. It seems to have been thought at one time that it was necessary for a plaintiff, in any action at law in which he relied on an executed consideration, to allege in his declaration a request by the defendant that he should do the act which is relied on as providing the consideration. See however, *Victors* v. *Davies* (1) where *Parke* B. cites at length a note by Serjeant *Manning* to the case of *Fisher* v. *Pyne* (2), and distinguishes between the action for money lent and the action for money paid. These cases are referred to by *Bowen* L.J. in *Carlill's Case* (3). Serjeant *Manning* refers to the possibility that the act which is said to provide the consideration may be a mere "gratuitous kindness". The position will, of course, be the same if the act, while not accurately described as a "gratuitous kindness", is not shown to have been done in return for, and in consideration of, the alleged promise.

The presence or absence of an implied request that the act be done has been regarded as material in a number of cases. In *Carlill's Case* (4) itself it is regarded as material by both *Bowen* L.J. and *A. L. Smith* L.J. *Bowen* L.J. says: "A further argument for

(1) (1844) 12 M. & W. 758, at pp. 759, 760 [152 E.R. 1405, at pp. 1405, 1406].

(2) (1840) 1 Man. & G. 265, at pp. 265-267 [133 E.R. 334].

(3) (1893) 1 Q.B., at p. 271.

(4) (1893) 1 Q.B. 256.

the defendants was that this was a *nudum pactum* . . . that there was no consideration at all; in fact, that there was no request, express or implied, to use the smoke ball" (1). His Lordship then refers to *Victors* v. *Davies* (2) and *Fisher* v. *Pyne* (3), and proceeds :—"The short answer, to abstain from academical discussion, is, it seems to me, that there *is* here a request to use involved in the offer" (4). *A. L. Smith* L.J. says :—"Now, is there not a request there? It comes to this: 'In consideration of your buying my smoke ball, and then using it as I prescribe, I promise that if you catch the influenza within a certain time I will pay you £100'" (5). Several other illustrative cases are cited in Mr. *Smith's* article. It will suffice here to mention two cases, the one nearly a hundred years old and the other very recent. The correctness of the actual decision in *Shadwell* v. *Shadwell* (6) is likely to be forever debated. *Erle* C.J. and *Keating* J. took, in the light of all the circumstances, one view of the letter on which the plaintiff relied: *Byles* J. took another view. But the approach of all the learned judges to the problem of fact was exactly the same. *Erle* C.J. and *Keating* J. said :—"First, do these facts shew a loss sustained by the plaintiff at his uncle's request? . . . If the promise was made *in order to induce* the parties to marry, the promise so made would be in legal effect a request to marry. Secondly, do these facts shew a benefit derived from the plaintiff to the uncle, at his request? . . . If the promise of the annuity was intended as an inducement to the marriage . . . this is the consideration averred in the declaration" (7). *Byles* J. said :—"The inquiry therefore narrows itself to this question,—Does the letter itself disclose any consideration for the promise? the consideration relied on by the plaintiff's counsel being the subsequent marriage of the plaintiff" (8). Then, after discussing the contents of the letter he says :—"The question, therefore, is still further narrowed to this point,—Was the marriage at the testator's request? *Express* request there was none. Can any request be implied?" (9) His Lordship concludes that no such request can be implied, and that the marriage could not be said "to have taken place *at* the testator's request or, in other words, in consequence of that request" (9). The very recent case is *Combe* v. *Combe* (10).

(1) (1893) 1 Q.B., at pp. 270, 271.
(2) (1844) 12 M. & W. 758 [152 E.R. 1405].
(3) (1840) 1 M. & G. 265 [133 E.R. 334].
(4) (1893) 1 Q.B., at p. 271.
(5) (1893) 1 Q.B., at p. 273.
(6) (1860) 9 C.B. (N.S.) 159 [142 E.R. 62].
(7) (1860) 9 C.B. (N.S.), at pp. 173, 174 [142 E.R., at p. 68].
(8) (1860) 9 C.B. (N.S.), at p. 175 [142 E.R., at p. 69].
(9) (1860) 9 C.B. (N.S.), at p. 177 [142 E.R., at p. 69].
(10) (1951) 2 K.B. 215.

H. C. OF A. 1953-1954.

AUSTRALIAN WOOLLEN MILLS PTY. LTD. v. THE COMMONWEALTH.

Dixon C.J. Williams J. Webb J. Fullagar J. Kitto J.

This is one of the "forbearance" cases. *Denning* L.J. said:—"Unilateral promises of this kind have long been enforced, so long as the act or forbearance is done on the faith of the promise and at the request of the promisor, express or implied. The act done is then in itself sufficient consideration for the promise, even though it arises *ex post facto*" (1). And *Asquith* L.J. (as he then was) said:—"I do not think an actual forbearance, as opposed to an agreement to forbear to approach the court, is a good consideration unless it proceeds from a request, express or implied, on the part of the promisor. If not moved by such a request, the forbearance is *not in respect of* the promise" (2).

Coming to the present case, it is impossible, in our opinion, to hold that any contract was constituted at any stage binding the Commonwealth to pay a subsidy to the plaintiff, or to any manufacturer, in consideration of a purchase of wool for local manufacture.

The position may be considered first as at the outset, and with reference to the original official announcement—the general announcement of 20th June 1946, and the particular announcements to the plaintiff company of 6th and 20th August 1946. It is to be observed, in the first place, that these announcements come not from a party having a commercial interest in the subject matter but from instrumentalities of a Government, which has been dealing for years, and is still dealing, with a problem created by a great war. That problem is the maintenance of a price structure, and in particular its maintenance in relation to manufactured woollen goods. That is no new problem. It has been dealt with in the past by what was in substance and effect payment of a subsidy. For, as has been seen, the Commonwealth during the appraisement period had paid to growers more than it charged to manufacturers for wool sold to them. The price to the manufacturer was after November 1942 fixed by the Prices Commissioner, and the difference between what the Commonwealth paid and what it received was the equivalent of a subsidy paid by the Commonwealth. It could make no practical difference to the manufacturer whether the Commonwealth's money was paid to him or was paid to the grower. In either case he benefited—in the one case by a reduction in the price he had to pay, and in the other by a reimbursement of part of the price he paid. It is impossible to suggest that the Government ever contracted with manufacturers to sell them appraisement wool at less than cost. The Government simply acquired wool and sold it to manufacturers at a price lower than it paid for it. The problem has not changed in character since June

(1) (1951) 2 K.B., at p. 221.

(2) (1951) 2 K.B., at pp. 226, 227.

1946. The object to be attained is still to keep down the price of woollen goods to the consumer. And it is to be solved in the same way —that is to say, by a subvention. The only difference is that, because the Government will no longer be acquiring and selling wool, the old method is impracticable, and the subvention is to be paid direct to the manufacturer. No reason is suggested why the Government, which has not hitherto entered into any contract, should now propose to bind itself by contract. Again, the position is not that of a person proposing to expend moneys of his own. It is public moneys that are involved. Questions of general constitutional law have, as has been mentioned, been excluded from consideration, but, if there was an intention on the part of the Government to assume a legal obligation, one would certainly have expected statutory authority to be sought: the case, as has been pointed out is entirely unlike *Bardolph's Case* (1). And one would *not* have expected the vital announcement to be made by persons who, in the ordinary course of things, could have no power to commit the Crown to the expenditure of a single penny.

The question at issue depends on an examination of documents, and not—except as a last resort—on probabilities. But the documents did not come into existence in a vacuum, and it is a relevant consideration that the announcements on which the plaintiff relies did not emanate from someone who had something to sell or from a rich and generous uncle.

When one comes to the documents, it is not, in our opinion, possible to construe them as containing a standing offer, a standing offer capable of acceptance by the purchase of wool. It is impossible to find anywhere anything in the nature of a request or invitation to purchase wool, or anything which suggests that the payment of subsidy was put forward in order to induce any manufacturer to purchase wool, or which suggests that the payment of subsidy and the purchase of wool were regarded as related in such a way that the one was a consideration for the other. Whichever of the possibly legitimate tests is applied, the answer is the same. If we ask (what we think is the real and ultimate question) whether there is a promise offered in consideration of the doing of an act, as a price which is to be paid for the doing of an act, we cannot find such a promise. No relation of *quid pro quo* between a promise and an act can be inferred. If we ask whether there is an implied request or invitation to purchase wool, we cannot say that there is. If we ask whether the announcement that a subsidy would be paid was made in order to induce purchases of wool, no such intention can be inferred.

(1) (1934) 52 C.L.R. 455.

H. C. OF A. 1953-1954.

AUSTRALIAN WOOLLEN MILLS PTY. LTD. v. THE COMMONWEALTH.

Dixon C.J. Williams J. Webb J. Fullagar J. Kitto J.

It is, of course, legitimate, if not necessary, to look at all the documents in which the intention to pay a subsidy is stated or referred to. But, if an offer of a promise for an act cannot be found in three initial documents, it cannot, in our opinion, be found at all. Those three documents are the letter of 20th June 1946 from the Prices Commissioner to the Manufacturers' Association and the Council of Wool-selling Brokers (which enclosed a press statement of the Minister for Trade and Customs), the letter of 7th August 1946 addressed by the Commission to manufacturers, including the plaintiff, and the further letter of 20th August 1946 from the Commission to manufacturers, including the plaintiff. The first letter refers to recent discussions " relating to the subsidization of raw wool purchased by Australian manufacturers for domestic consumption under auction conditions ". It proceeds :—" The Commonwealth Government has decided that subsidy will be paid to maintain the price of wool purchased for domestic use by Australian manufacturers after the 30th June 1946 ". This is, in form and in substance, a mere announcement of a decision on a matter of policy—of an intention which has been formed by the Government. The letter proceeds :—" The Subsidy will be calculated as the difference between the present basic price of wool for domestic consumption and the average market price for each auction series. Manufacturers will be required to carry any excess cost by purchasing above average market level, but under certain specified conditions, will be allowed the benefit of keen buying at lower than average market level. The amount of subsidy payable will be as determined by the Australian Wool Realization Commission. The administration of the scheme will be vested in the Australian Wool Realization Commission and complete details of procedure will be made available to your members as soon as possible."

All this is perfectly consistent with a mere announcement of policy, and the references to possible benefits of keen buying and to the determination of amount by the Commission tend against any inference that an obligation is being assumed. The enclosed extract from the press says that the Minister " announced to-day that subsidy would be paid to maintain existing prices of wool to Australian manufacturers for utilization in goods for domestic consumption when auction sales recommence after 30th June 1946 ". The " aim of the proposal " was stated to be " to place Australian manufacturers as nearly as possible in the same position as if they were buying in a competitive market prior to the war ". The statement added that " as an inducement to efficient buying manufacturers will obtain benefits from purchases made below average

market level", but these "benefits" are not defined, and never were defined. The letters of 7th and 20th August deal with the procedure to be followed in and about the claiming and payment of the proposed subsidy. There is nothing in any of these documents to support the view that the Commonwealth Government intended to assume a liability on any purchase of wool by any manufacturer. When it is decided to continue the payment of subsidies into the second wool year, all that is said is (in a letter dated 27th August 1947):—"The Commission has been directed by the Commonwealth Prices Commissioner to inform manufacturers that the existing scheme for the subsidisation of raw wool purchased for consumption within the Commonwealth is to continue until further notice". The "terms and conditions of payment", which differ somewhat from those previously laid down, are then stated.

It is impossible, in our opinion, to infer from these documents anything more than an announcement of intention, which is not capable of leading to a contract. But the matter does not rest there. In the correspondence which took place during the subsidy period there is material which not merely suggests that it is impossible to formulate with precision the terms of any contract, but indicates that the payment of subsidies was regarded as entirely a matter of discretion.

In a letter to the plaintiff of 20th August 1946 the commission says that "all sales will . . . be subject to close scrutiny", and proceeds:—"The Commission will take into account instances where Australian manufacturers bid against each other or against overseas competition in a manner which might be deemed unreasonable having regard to the state of the market, and may be forced to take action to protect the funds of the Commonwealth, where it has adequate reason to believe that the bids on certain types constituted a departure from normal competitive bidding on a pre-war basis". On 20th February 1948 the commission, in a letter to the plaintiff company, drew attention to this statement, and asserted that the company had, by its method of bidding and the extent of its purchases at a particular sale at Geelong, prevented other buyers from operating. The letter proceeded:—"Under the circumstances the Commission is not prepared to assess the average market level on these transactions, and the question of payment of subsidy on these claims ceases to come within the delegation given to the Commission by the Prices Commissioner. Your claims for payment of subsidy on purchases of extra Super Warp Wools in Geelong series No. 4 have therefore been referred to the Commonwealth Prices Branch, Canberra, for consideration in accordance

H. C. OF A. 1953-1954.

AUSTRALIAN WOOLLEN MILLS PTY. LTD. v. THE COMMONWEALTH.

Dixon C.J. Williams J. Webb J. Fullagar J. Kitto J.

with the principles of the Prices Stabilization Plan. It is requested that you address further correspondence on this matter to that authority. Payment on certain other claims has also been deferred, pending an investigation on your premises into the quantity and nature of your holdings of raw wool stocks". In response to this letter no suggestion is made by the company that it has any legal right. It denies the Commission's allegations, protests against what it apparently regards as harsh treatment, and withdraws its claim for subsidy.

Again, the Minister's original statement, as has already been mentioned, said that manufacturers would obtain benefits from purchases made below average market level. These benefits were never defined. This cannot be fitted into any picture of the making of a contract. Again, with every cheque forwarded in payment of subsidy went a statement which said that the payment was "made in accordance with the principles of the Prices Stabilization Plan", and that "the Government retains the right to review, and, if necessary, vary, the amount of subsidy so paid", i.e. the amount forwarded with the statement. Whether this was sufficient of itself to confer on the Crown a right to demand repayment of the whole or any part of the "amount so paid" need not be debated. But it cannot be reconciled with the conception that the Crown has promised to pay a subsidy of definite amount in consideration of a purchase of wool by the manufacturer.

Another incident which throws light on the position arose out of a re-sale by the plaintiff company in September 1946 of 970 bales of wool which had been purchased by it in the appraisement years. On 24th February 1947 the Commission writes to the company, saying that the Prices Commissioner, having investigated this re-sale, has estimated that the company derived from it a profit of £8,181, and "has directed" that this amount be deducted from subsidy in respect of purchases of wool at auction in the 1946-1947 season. The making of this deduction may have been, and probably was, regarded by the Prices Commissioner as justified by the principles of his Prices Stabilization Plan, but it was not authorized by the terms of any contract alleged by the plaintiff company, and there is no reference, in any of the communications which define the conditions of subsidization, to any right to make any such deduction. Yet the company does not question the right to make this deduction. All it does is to contend that its actual profit was less than £8,181, with the result that a figure of £6,770 is ultimately (many months later) accepted, and the Commission forwards its cheque for the difference, £1,411.

Again, on 21st April 1947 (when nearly ten months of the wool year have passed) the Commission writes to say that the Prices Commissioner "has ruled" that subsidy on wool purchased in 1946-1947 is to be paid only on "the quantity of wool necessary for the manufacturer to carry on his normal manufacturing activities to the 30th June 1947, and for such period after that date during which he is unable to obtain supplies of wool from the market." The letter concludes:—"If any manufacturer is found to have purchased wool in excess of these requirements, payment of subsidy on such excess will be withheld by the Commission". It is obvious that this may involve a refusal of subsidy on wool already purchased. No suggestion is made that the Crown is bound to pay subsidy on such wool. Instead, the company supplies particulars of its stocks over a number of years, the Prices Commissioner is ultimately satisfied, and a final payment of subsidy to the amount of £3,870 in respect of wool purchased in 1946-1947 is sent to the company, though not until 10th November 1947.

Finally, the attitude and conduct of the company at the very end, when the Commission demands repayment of the sum of £67,282, are all of a piece with what has gone before. There is no suggestion that this sum, or any part of it, has been paid in discharge of a legal obligation. Instead, the sum claimed is paid in full, and a "counterclaim" is put forward which cannot have been regarded as having any legal foundation but which may have been regarded as representing a "fair thing". On the whole case the conclusion is unavoidable that the Commonwealth authorities never for a moment intended to make an offer capable of leading to a contract binding the Crown, and that nobody ever supposed for a moment that they did so intend. A wide discretion in a variety of matters was clearly regarded by the authorities as residing in them, and was, in effect, acknowledged as residing in them. It is not only that substantial indications of the making of a contract or contracts are lacking. There are substantial indications to the contrary. There was an expectation, and there is nothing really in the case to suggest that every reasonable expectation was not satisfied. In the well-known words of Lord *Buckmaster* in *Considine* v. *McInerney* (1) "the expectation, though it might be relied on with full certainty, was none the less not a legal right, and no claim for it could be enforced by any legal proceedings" (2).

If we had been of opinion that a contract was established, we should have had to go on to consider whether it was not an implied

(1) (1916) 2 A.C. 162.

(2) (1916) 2 A.C. 162, at p. 170.

H. C. OF A. 1953-1954.

AUSTRALIAN WOOLLEN MILLS PTY. LTD. v. THE COMMONWEALTH.

Dixon C.J. Williams J. Webb J. Fullagar J. Kitto J.

term of that contract that subsidized wool should be used in manufacture during the period of price control by the Commonwealth—a period which in fact ended in September 1948, but is to be taken to have been extended, by way of concession, to the "Christmas close-down". We think that this was undoubtedly the intention of the authorities, and that there is a great deal to be said for the view that such a term must be taken to be implied if any contract is to be found. Being satisfied, however, that no contract was ever made, we prefer to dispose of the case on that ground.

With regard to the £67,282, it is possible that, if the company had refused to repay it, the Commonwealth would have failed in an action to recover that sum. But the company, on the demand of the Commonwealth, paid it voluntarily and with full knowledge of all the material facts. There is no foundation whatever for a claim for this sum as money had and received or on any other basis.

The payment was accompanied by a "counterclaim", but it can hardly have been imagined that the counter-claim was legally tenable. The voluntary making of the payment is, we think, very significant. The most reasonable explanation of it is that the company had throughout understood very well indeed the basis on which the Commonwealth authorities had entertained and paid claims for subsidies.

The action having been referred to this Court by *Kitto* J. there should be judgment for the defendant with costs.

Judgment for the defendant with costs.

Solicitors for the plaintiff, *Arthur Muddle & Stephenson.*

Solicitor for the defendant, *D. D. Bell*, Crown Solicitor for the Commonwealth.

J. B.