[HIGH COURT OF AUSTRALIA.]

ANDREWS . . . . . APPELLANT;
DEFENDANT,

AND

HOWELL . . . . . RESPONDENT.
INFORMANT,

ON APPEAL FROM A COURT OF PETTY SESSIONS OF VICTORIA.

H. C. OF A. 1941.

MELBOURNE, *May* 13, 14, 15; *July* 3.

Rich A.C.J., Starke, Dixon and McTiernan JJ.

Constitutional Law—Defence—National Security Act—Regulation-making power—National Security (Apple and Pear Acquisition) Regulations—Freedom of inter-State trade and commerce—Acquisition of property on just terms—The Constitution (63 & 64 *Vict. c.* 12), *secs.* 51 (vi.), (xxxi.), (xxxix.), 92—*National Security Act* 1939-1940 (*No.* 15 *of* 1939—*No.* 44 *of* 1940), *sec.* 5 (1)*—*National Security (Apple and Pear Acquisition) Regulations* (*S.R.* 1939 *No.* 148—1940 *No.* 295) —*Acts Interpretation Act* 1901-1937 (*No.* 2 *of* 1901—*No.* 10 *of* 1937), *secs.* 15A, 46.

The *National Security* (*Apple and Pear Acquisition*) *Regulations* are a valid exercise of the power to make regulations conferred by sec. 5 (1) of the *National Security Act* 1939-1940 and are within the ambit of the defence power of the Commonwealth.

So *held* by *Rich* A.C.J., *Dixon* and *McTiernan* JJ. (*Starke* J. dissenting).

Held, further, by the whole court, (*a*) that the regulations do not contravene sec. 92 of the Constitution; and (*b*) that, in relation to sec. 51 (xxxi.) of the Constitution, they do not provide for the acquisition of property otherwise than on just terms.

* Sec. 5 (1) of the *National Security Act* 1939-1940 provides as follows:—"Subject to this section the Governor-General may make regulations for securing the public safety and the defence of the Commonwealth and the Territories of the Commonwealth, and in particular . . . (*b*) for authorizing . . . (ii.) the acquisition on behalf of the Commonwealth of any property other than land . . . and for prescribing all matters which, by this Act, are required or permitted to be prescribed, or which are necessary or convenient to be prescribed, for the more effectual prosecution of any war in which His Majesty is or may be engaged or for carrying out or giving effect to this Act."

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APPEAL, by way of order nisi to review, from a Court of Petty Sessions of Victoria.

On 25th January 1941 Geoffrey Basil Andrews in the Victoria Market, Melbourne, drove a truck loaded with twenty-seven cases of apples which had been acquired by the Commonwealth. On 13th March 1941, at the Court of Petty Sessions, Melbourne, he was charged by David Thomas Howell, an officer of the Apple and Pear Board, "with contravening a provision of the *National Security* (*Apple and Pear Acquisition*) *Regulations* in that he did move twenty-seven cases of apples acquired by the Commonwealth which were held in his possession." In the information the informant averred "that on the said day the said apples had been acquired by and were the property of the Commonwealth." Andrews was convicted and fined three pounds, in default distress.

The regulations under which Andrews was convicted were the *National Security* (*Apple and Pear Acquisition*) *Regulations*, Statutory Rules 1939 No. 48, as amended by Statutory Rules 1940 Nos. 13, 38, 60, 276, 283, and 295, made under sec. 5 (1) of the *National Security Act* 1939-1940. The object of these regulations, as stated in reg. 2, is "to minimize the disorganization in the marketing of apples and pears likely to result from the impracticability of exporting sufficient quantities of apples and pears because of the effects upon shipping of the present war." A marketing board is set up for the purpose of disposing of apples and pears grown in the Commonwealth by orchardists, subject to an exception of small areas not principally used for growing apples or pears. By reg. 12 the Minister of Commerce is empowered to make provision, by an order published in the *Gazette*, for the acquisition by the Commonwealth of any apples or pears described in the order. Pursuant to this regulation the Minister of Commerce on 24th December 1940 made an order for acquisition, to become operative on 1st January 1941, whereby it was ordered that all apples and pears grown by a registered grower or a grower within the meaning of the regulations and harvested on or after 1st July 1940 and before 1st July 1941, (*a*) if harvested on or before 1st January 1941, were thereby acquired by the Commonwealth, and (*b*) if harvested after that date, should upon being harvested be acquired by the Commonwealth. Reg. 15 provides: "Except as provided in these regulations, and with the consent of the board, no person shall (*a*) part with the possession of or move any apples or pears acquired by the Commonwealth which are in his possession; (*b*) take into his possession any apples or pears which are the property of the Commonwealth; or (*c*) purport to sell or offer for sale or purport to buy or offer to buy any apples or pears which are the property of

the Commonwealth." Provision is made in the regulations for compensation to growers. The regulations are set out in greater detail in the judgments hereunder.

Andrews appealed to the High Court, by order nisi to review the conviction, upon the following grounds:—(*a*) That sec. 5 of the *National Security Act* 1939-1940 has no operation to authorize the *National Security* (*Apple and Pear Acquisition*) *Regulations* and in particular reg. 15 of Statutory Rules 1939 No. 148 as amended by Statutory Rules 1940 No. 276. (*b*) That the said regulations were and are —(i.) contrary to sec. 51 (xxxi.) of the Constitution; and/or (ii.) contrary to sec. 92 of the Constitution; and/or (iii.) otherwise beyond the powers given by the *National Security Act* 1939-1940, and therefore void. (*c*) That the proclamation relied on by the prosecution was and is—(i.) contrary to sec. 51 (xxxi.) of the Constitution; and/or (ii.) contrary to sec. 92 of the Constitution; and/or (iii.) otherwise beyond the powers given by the *National Security Act* 1939-1940, and therefore void.

Sholl, for the appellant. 1. The *National Security Act* 1939-1940, and particularly sec. 5 thereof, does not in terms authorize the *National Security* (*Apple and Pear Acquisition*) *Regulations* or the proclamations of 24th December 1940. [He referred to Statutory Rules 1939 No. 148; 1940 Nos. 13, 38, 60, 276, 283, 295, and *National Security Act* 1939-1940, sec. 5.] 2. In any event, the provisions in the Act do not authorize reg. 15 (*a*) of the regulations, and, in particular, the prohibition thereby imposed against moving fruit. 3. If in terms the Act, particularly sec. 5, did purport to authorize the regulations, and in particular reg. 15, then to that extent they would be beyond the powers conferred by the Constitution, in that such authorization would be outside the defence or any other power; accordingly, sec. 15A of the *Acts Interpretation Act* 1901-1937 would require the Act and sec. 5 to be read down to exclude such authority. The limits and scope of the defence power of the Commonwealth are set out by *Griffith* C.J. and *Barton* J. in *Farey* v. *Burvett* (1), and by *Lush* J. in *Minister of Munitions* v. *Mackrill* (2)—See also *Keir and Lawson, Cases in Constitutional Law*, (1928), Notes on Martial Law, pp. 368 et seq. The scheme set up by the regulations is not a scheme which aims at the shipping problem. The scheme is in the interests of people who cannot get the best returns for their fruit. The defence power must be read subject to the rest of the Constitution. The test laid down in *Farey* v. *Burvett* (3) shows that the scheme

(1) (1916) 21 C.L.R. 433, at pp. 438, 444.
(2) (1920) 3 K.B. 513.
(3) (1916) 21 C.L.R. 433.

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must be capable of helping the war effort. The power refers to martial law and military necessity. The scheme must be reasonably connected with defence. The cure of an inconvenience resulting from the war cannot conduce to its more efficient prosecution. The States could do this under their general powers without having to rely on the defence power of the Commonwealth. Sec. 5 of the *National Security Act* 1939-1940 must be read down to the proper content of the defence power in the Constitution. The scheme is an attempt to create a monopolistic power of sale in order to restrict local sales and keep up the price. The word " move " should bear its ordinary lexical meaning, and in interpreting the word the court should not be concerned with its purpose or intent (*McNeill* v. *Whitton* (1); *Murphy* v. *Stokes* (2); *R.* v. *McNicol* (3)). It is any form of physical interference. This provision is so wide and unreasonable that it cannot be justified as incidental to the powers set out in sec. 5 (1) of the *National Security Act* 1939-1940. The effect of the word " move " as used in reg. 15 (*a*) is that a person cannot even pick the apples off the tree. That physical interference would be a movement of the fruit; the only alternative would be to allow them to rot on the trees. 4. The regulations and/or the proclamation necessarily operate and are intended to operate so as to restrict all trade, including inter-State trade, in apples and pears; accordingly, they contravene sec. 92 of the Constitution. The scheme effectuated by the regulations is inseverable in its operation on inter-State trade, and so the regulations are entirely bad. The defence power cannot beg the operation of sec. 92 (*Peanut Board* v. *Rockhampton Harbour Board* (4); *James* v. *The Commonwealth* (5); *Duncan* v. *State of Queensland* (6); *James* v. *Cowan* (7); Constitution, secs. 51, 92). The inter-State trader is entitled to a declaration, as the statutory provisions are inseverable (*Acts Interpretation Act* 1901-1937, secs. 15A, 46; *Australian Railways Union* v. *Victorian Railways Commissioners* (8); *Macleod, The High Court on the Interpretation of Statutes*, (1924), pp. 204 et seq.; *Melbourne Harbour Trust Commissioners* v. *Colonial Sugar Refining Co. Ltd.* (9); *Fox* v. *Robbins* (10)). Sec. 51 (i) of the Constitution could not validate the scheme (*R.* v. *Burgess*; *Ex parte Henry* (11)). These provisions are

(1) (1915) 20 C.L.R. 573.
(2) (1903) 5 W.A.L.R. 162.
(3) (1916) V.L.R. 350, at pp. 354, 355.
(4) (1933) 48 C.L.R. 266, at pp. 274-276, 281-285, 286-287, 308.
(5) (1936) A.C. 578, at pp. 623, 625-628, 631, 632; 55 C.L.R. 1, at pp. 51, 54-56, 59, 60.
(6) (1916) 22 C.L.R. 556.
(7) (1932) A.C. 542; 47 C.L.R. 386.
(8) (1930) 44 C.L.R. 319, at pp. 382-386.
(9) (1926) V.L.R. 140, at pp. 150, 151.
(10) (1909) 8 C.L.R. 115, at p. 130.
(11) (1936) 55 C.L.R. 608.

inseverable (*Vacuum Oil Co. Pty. Ltd.* v. *Queensland* (1); *Owners of S.S. Kalibia* v. *Wilson* (2)). 6. The regulations and/or the proclamation purport to provide for the acquisition of fruit, but they provide for acquisition on terms which are not just; these terms are not severable, for there is no scheme without them. Accordingly, the provisions contravene sec. 51 (xxxi.) of the Constitution and are entirely bad. 7. In the alternative, the regulations and/or the proclamation purport to provide for acquisition on terms which are not just. If those terms are severable and are rejected, there is then no valid exercise of the powers under sec. 51 (xxxi.) of the Constitution. There is no other power of acquisition conferred by the Constitution, since sec. 51 (xxxi.) is either the only grant of such power, with its own limitations therein contained, or is a restriction on acquisition upon the other powers. In either event the regulations and/or proclamation are bad (*Moore, Commonwealth of Australia*, 2nd ed. (1910), p. 487; *Quick and Garran, Constitution of Australian Commonwealth*, (1901), p. 641). *Kerr, The Law of the Australian Constitution*, (1925), p. 199, states the law incorrectly, as the case of *Chicago Burlington & Quiney Railroad* v. *Chicago* (3), upon which he relies, is distinguishable (*Australian Railways Union Case* (4)). [He referred to *United States* v. *Great Falls Mfg. Co.* (5).] Because the grower is entitled to such compensation as the Minister determines on the advice of the board, such procedure does not constitute "just terms" within sec. 51 (xxxi.) of the Constitution. The provisions, on the contrary, involve unjust terms. They leave the person whose fruit has been acquired without any right to compensation till the board gives a notice requiring delivery, or other instructions, which the board may not do. Again, the discretion to give compensation is left to the Minister, that is, the Executive. Furthermore, no measure of compensation is set out in the regulations, and the Minister may give very little to the growers.

Ham K.C. and *T. W. Smith*, for the respondent.

Ham K.C. Regulations passed under the *National Security Act* 1939-1940 are passed for the safety and defence of the Commonwealth, and regulations concerning foodstuffs cannot depend on the relative values of the particular foodstuffs. It is only a matter of degree between bread and apples. [He referred to the *Apple and Pear Organization Act* 1938.] The *quantum* of importance of the matter in

(1) (1934) 51 C.L.R. 108; (1935) 51 C.L.R. 677.
(2) (1910) 11 C.L.R. 689, at pp. 696-698.
(3) (1896) 166 U.S. 226; 41 Law. Ed. 979.
(4) (1930) 44 C.L.R., at pp. 384, 385.
(5) (1884) 112 U.S. 645; 28 Law. Ed. 846.

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issue cannot be the test of whether the regulations are covered by the defence power. If *Farey* v. *Burvett* (1) is good law, then it cannot be said that it applies only to bread. [He referred to the *Apple and Pear Appropriation Act* 1940.]

[STARKE J. Do not these regulations create a scheme to make the position of a small section of the community secure at the expense of the whole community ?]

No, it is most essential to the welfare of our troops that they have good food, and apples are a part of their diet. If the orchards are to be kept going to supply the troops, then the orchardists must have the means to do so. Under the defence power you can prop up any industry of the magnitude and importance of this ; it is a matter for those responsible for the defence of the realm. Similar considerations apply to wheat, barley, rice, or any other important commodity. It is an incomplete statement of *Farey* v. *Burvett* (2) to say it is a price-fixing case. The object of these regulations is food supply for the troops and the people at home. *Pankhurst* v. *Kiernan* (3) lays down that the prevention of destruction of property comes within the defence power. Without these regulations, the destruction of the orchards would follow, as orchardists could not afford to spray them or properly look after them. The method of regulation here is altogether different from the market organization in the *Peanut Case* (4).

[DIXON J. When the Government for war purposes does something which affects a large class of persons can it restore the position of that class under its defence power ?]

Yes, the problem is what can and should be done to prevent a deleterious effect on account of defence works. If the regulations could conceivably be for the beneficial prosecution of the war, the court accepts the word of those responsible for them. The court should take judicial notice of the present effects of the war on shipping and the probable consequences to an industry like the present. There is a recommendation by a competent tribunal to decide what is a fair thing. No other just method is practicable. Compensation means that the grower should get the value of his fruit. In fact, he gets more than a fair equivalent. In the case of a glut when the grower could not sell, he still gets a fair price for his fruit. Delivery of the fruit is unnecessary. The provisions in regs. 14 and 17 show that the grower is getting "just terms." The statutory provisions, to be valid, need not set out the procedure

(1) (1916) 21 C.L.R. 433.
(2) (1916) 21 C.L.R., at pp. 441, 448, 451, 455.
(3) (1917) 24 C.L.R. 120.
(4) (1933) 48 C.L.R., at pp. 274, 281.

by which "just terms" are to be obtained. There are two kinds of acquisition envisaged in the Constitution: (*a*) of the railways, which is by agreement between the States and Commonwealth, and (*b*) of property on "just terms." Compensation implies adequacy of payment. The whole scheme created more than a mere payment of compensation; over the whole industry a bounty is paid. The board is appointed by the Governor-General in Council, but so is the judiciary. Under the King's prerogative in time of war he may take anything without paying for it. That is an incidental to the power of defence, and the Commonwealth does not have to rely on placitum xxxi. of sec. 51 of the Constitution. Whatever was decided in the *Peanut Case* (1), it has now been delimited and distinguished in later cases (*James* v. *Cowan* (2)). The regulations are not directed against inter-State trade; it has nothing to do with stopping trade between States (*Vacuum Oil Co. Pty. Ltd.* v. *Queensland* (3); *Milk Board (N.S.W.)* v. *Metropolitan Cream Pty. Ltd.* (4)). The effect of these cases is that where the legislation is not aimed at trade passing the border of the States, sec. 92 of the Constitution does not apply. The American cases on "just terms" are not directly in point in Australia, but they seem to be in favour of the scheme set up under the regulations. So long as there is proper compensation, it is unnecessary for the parties to agree on the terms thereof (*Kerr* on *The Law of the Australian Constitution*, (1925), p. 199; *Wynes, Legislative and Executive Powers in Australia*, (1936), p. 248). The scheme is not just to give adequate compensation, but to give more than the market value. In order to test the legislation one must construe the legislation to ascertain its purpose; in carrying out that purpose it may incidentally affect inter-State trade without restricting it (*James* v. *The Commonwealth* (5)). Nobody would say that this legislation was aimed at inter-State trade. Every State grows apples, and it does not appear that there is any great inter-State trade in them (*Hartley* v. *Walsh* (6)).

[STARKE J. If it is directed against all trade, is it not directed against inter-State trade?]

No, you must look at the purpose of the enactment. *Vacuum Oil Company's Case* (3) and the *Milk Board Case* (4) should be accepted as the proper limitation on the general language used in the *Peanut Case* (1).

(1) (1933) 48 C.L.R. 266.
(2) (1932) A.C. 542; 47 C.L.R. 386.
(3) (1934) 51 C.L.R. 108.
(4) (1939) 62 C.L.R. 116, at p. 127.
(5) (1936) A.C., at p. 623; 55 C.L.R., at p. 51.
(6) (1937) 57 C.L.R. 372.

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T. W. Smith. Reg. 12 is not a preamble. It is the fundamental basis of compensation: that is made clear by reg. 14A. Title and right to compensation move together. Acquisition gives right to compensation. Reg. 17 is wide enough to provide compensation for every grower whose goods are acquired. Sec. 5 of the *National Security Act* 1939-1940 makes general provision for acquisition of property, and nothing is said about "just terms" as set out in the Constitution. Defence power extends to those things that will conduce to the winning of the war. [He referred to regs. 21, 14A, 14B.] There are special reasons for a drastic deterrent to "moving" fruits, as distinct from parting with possession. The prohibition is necessary to protect Commonwealth property.

Sholl, in reply. This is an isolated effort to benefit one particular class. To suggest that the regulations are required in order that the troops are to be fed is incorrect. That interpretation is not open in these regulations. Economic necessity is not within the defence power. The regulations are inseverable, and must affect inter-State trade (*Vacuum Oil Company Case* (1)). Does reg. 12 give a general right to compensation? The board wants the right to compensation limited by reg. 17. There is nothing to bind the grower to give notice.

Cur. adv. vult.

July 3. The following written judgments were delivered:—

RICH A.C.J. Appeal, by order nisi to review, from a summary conviction under the *National Security Act* 1939-1940.

The appellant was convicted under the *National Security* (*Apple and Pear Acquisition*) *Regulations* of an offence consisting in moving twenty-seven cases of apples acquired by the Commonwealth, which were held in his possession. He is an orchardist who grows apples somewhere near Melbourne, and he was shown to have taken twenty-seven cases of apples from his orchard to a Melbourne market. There is no dispute about the facts, but he says that it is beyond the power of the Commonwealth to make it an offence to move apples and pears from one place to another. The regulations in question were made under sec. 5 (1) of the *National Security Act* 1939, and their purpose is to establish a means of disposing of apples and pears within Australia as a remedy for the disorganization in marketing apples and pears caused by the want of shipping for the purpose in war-time.

(1) (1934) 51 C.L.R., at pp. 685, 686.

Mr. *Sholl*, in a clear and careful argument, made four points against the validity of the regulations, any one of which, if right, would be enough to destroy the relevant provision.

1. The first point was that the entire plan was foreign to the defence power (sec. 51 (vi.)). After *Farey* v. *Burvett* (1) and the decisions during the last war which followed that case, I should have thought the argument was a hopeless one. I shall do no more than quote from the judgment of *Isaacs* J., as he then was, two passages describing the application of the power to the circumstances of the last war in language even more apposite to those of this war. "A war, imperilling our very existence, involving not the internal development of progress, but the array of the whole community in mortal combat with the common enemy, is a fact of such transcendant and dominating character as to take precedence of every other fact of life. It is the *ultima ratio* of the nation. The defence power then has gone beyond the stage of preparation; and passing into action becomes the pivot of the Constitution, because it is the bulwark of the State. Its limits then are bounded only by the requirements of self-preservation" (2).

The other passage is as follows:—"But when we see before us a mighty and unexampled struggle, in which we as a people, as an indivisible people, are not spectators but actors, when we, as a judicial tribunal, can see beyond controversy that co-ordinated effort in every department of our life may be needed to ensure success and maintain our freedom, the court has then reached the limit of its jurisdiction. If the measure questioned may conceivably in such circumstances even incidentally aid the effectuation of the power of defence, the court must hold its hand and leave the rest to the judgment and wisdom and discretion of the Parliament and the Executive it controls—for they alone have the information, the knowledge and the experience, and also, by the Constitution, the authority to judge of the situation and lead the nation to the desired end" (3).

I cannot see how in a totalitarian war a court could say that an organization to deal with a not unimportant primary industry is outside the scope of the power.

2. The learned counsel maintained that the plan as a marketing scheme violated sec. 92 of the Constitution.

The facts of this case contain no inter-State element, and I do not think that we are called upon to go over the whole field of possibilities to see if somewhere or other the regulations impair the

(1) (1916) 21 C.L.R. 433. (2) (1916) 21 C.L.R., at p. 453.
(3) (1916) 21 C.L.R., at pp. 455, 456.

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freedom of inter-State trade in respect of some description of transaction which we must imagine. I think that it is quite enough to say that such decisions as *Milk Board (N.S.W.)* v. *Metropolitan Cream Pty. Ltd.* (1) have upheld provisions which are *a fortiori* to the present.

3. It was then said that the scheme embodied in the regulations transcended the limitations of sec. 51 (xxxi.) of the Constitution, and attempted to acquire property in apples and pears on terms that were not just. The argument has its foundation, in my opinion, in the halting and obscure drafting of the provisions which deal with compensation to the growers. Looking behind the faulty expression of the plan, it is plain enough that the growers receive just compensation; probably at the expense of the consolidated revenue as distinguished from the proceeds of apples and pears alone.

I think that upon a proper understanding of the regulations, they sufficiently confer upon the grower an absolute right to a compensation determined in a fair manner by a specified administrative body. I am therefore of opinion that there is a sufficient compliance with the terms of sec. 51 (xxxi.) of the Constitution.

4. Lastly it was contended that it was an unnecessary and extravagant use of the power to prohibit the custodian of apples and pears from moving them and that this particular provision was unreasonably wide.

I do not think that the regulations should be construed with complete literalness. The movement prohibited is transport from one store or locality to another. In my opinion this objection fails.

For these reasons I think the order nisi should be discharged and the appeal dismissed with costs.

STARKE J. The appellant was charged before a police magistrate in the Court of Petty Sessions at Melbourne for "that he did move twenty-seven cases of apples acquired by the Commonwealth which were held in his possession," contrary to the *National Security Act* 1939-1940 and the *National Security (Apple and Pear Acquisition) Regulations* 1939 No. 148, reg. 15, as amended by Statutory Rules 1940 No. 38 and Statutory Rules 1940 No. 276.

So far as material, the regulation provides: "Except as provided by these regulations or with the consent of the board, no person shall part with the possession of or move any apples or pears acquired by the Commonwealth which are held in his possession." The appellant was convicted and now appeals to this court by means of an order to review (Appellate Rules, sec. IV). He contends that

(1) (1939) 62 C.L.R., at p. 130.

the regulations and an order made pursuant to those regulations are beyond the powers given by the *National Security Act* 1939-1940, or are contrary to the provisions of sec. 92 of the Constitution.

The *National Security Act* provides that "the Governor-General may make regulations for securing the public safety and the defence of the Commonwealth and the Territories of the Commonwealth, and in particular" (*inter alia*) "(*b*) for authorizing . . . (ii.) the acquisition, on behalf of the Commonwealth, of any property other than land . . . and for prescribing all matters which, by this Act, are required or permitted to be prescribed, or which are necessary or convenient to be prescribed, for the more effectual prosecution of any war in which His Majesty is or may be engaged or for carrying out or giving effect to this Act." Under this Act the *National Security* (*Apple and Pear Acquisition*) *Regulations* in question in this case purport to have been made. "The purpose of these regulations is to minimize the disorganization in the marketing of apples and pears likely to result from the impracticability of exporting sufficient quantities of apples and pears because of the effects upon shipping of the present war and these Regulations shall be administered accordingly" (Statutory Rules 1939 No. 148, clause 2). An Australian Apple and Pear Marketing Board is set up which is a body corporate and consists of a chairman, deputy chairman, an executive member, and six other members representing respectively each of the six States, appointed by the Minister. A committee is also appointed by the Minister for each State (Statutory Rules 1939 No. 148 and 1940 No. 276). Any person who grows any apples or pears may, and every grower is required to, register as a grower. And "'grower' means the owner, lessee, or occupier of an orchard of which not less than one acre is wholly or principally used for the growing of apples or pears or of apples and pears." "The Minister may, from time to time, by order published in the *Gazette*, make provision for the acquisition by the Commonwealth of any apples and pears described in the order, whether by reference to any contingency or otherwise, and those apples and pears shall by force of and in accordance with the provisions of the order become the absolute property of the Commonwealth, freed from all mortgages, charges, liens, pledges, interests, and trusts affecting those apples and pears, and the rights and interests of every person in those apples and pears (including any rights or interests arising in respect of any moneys advanced in respect of those apples and pears) are hereby converted into claims for compensation" (Statutory Rules 1939 No. 148, 1940 No. 295). "Any person having in his possession,

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control or disposal any apples or pears acquired by the Commonwealth shall, on receipt of a notice in writing from the board . . . requiring him to deliver or consign those apples or pears to an agent, packing shed, cool store or any other person or place specified in the notice, deliver or consign, as the case may be, those apples or pears to the agent, packing shed, cool store or other person or place within the time and in the manner specified in the notice" (1940 No. 276). "Upon delivery or consignment of any apples or pears in accordance with" the preceding provision, "or upon any apples or pears being disposed of or dealt with in accordance with instructions from the board, every person having any right or interest in those apples or pears may forward to the board a claim for compensation . . . and shall be entitled to be paid such amount of compensation as the Minister, on the recommendation of the board, determines. It shall not be necessary for the Minister to make a determination . . . until, in his opinion, a sufficient quantity of any apples or pears acquired by the Commonwealth has been disposed of to enable the board to make a just recommendation" (Statutory Rules 1939 No. 148). The board may, on behalf of the Commonwealth and subject to the direction of the Minister, sell or dispose of any apples or pears acquired or purchased by the Commonwealth, manage and control the handling, storage, protection, and shipment of any apples or pears acquired by the Commonwealth. The State committees have such powers as the regulations confer, or as the board thinks fit, but exercise all those powers subject to any direction which the board may give. The board is required to open a bank account into which it shall pay all moneys received by it in respect of apples and pears and also all moneys appropriated by Parliament or borrowed by the Minister for the use of the board on behalf of the Commonwealth. Out of the moneys standing to the credit of this account the board shall defray expenses and make all payments in respect of compensation and any other payments authorized by the regulations (Statutory Rules 1939 No. 148).

On 24th December 1940 the Minister made an order, which came into operation on 1st January 1941, as follows:—"3. (1.) All apples and pears grown by a person who is a registered grower or a grower within the meaning of the *National Security* (*Apple and Pear Acquisition*) *Regulations* and harvested on or after the 1st day of July 1940 and before the 1st day of July 1941—(*a*) if harvested on or before the date on which this order came into operation—are hereby acquired by the Commonwealth; and (*b*) if harvested after that date—shall, upon being harvested, be acquired by the Commonwealth. (2.) Nothing in the last preceding sub-paragraph shall apply to apples and

pears which, having been harvested before the 1st day of January 1941, (*a*) are sold by retail before the 7th day of January 1941; or (*b*) are on the 5th day of January 1941, held in any retail fruit shop, fruit stall, or fruit barrow for sale by retail. (3.) All apples or pears grown by any such person in respect of which notice is given to him, either personally or by post, by or on behalf of the Australian Apple and Pear Marketing Board that the apples or pears are suitable for harvesting, shall, on the giving of such notice, be acquired by the Commonwealth. (4.) All apples and pears which are brought into Australia on or after the 1st day of January 1941 shall, on being brought into Australia, be acquired by the Commonwealth. 4. This order shall not apply to pears of the variety known as Williams Bon Chretien . . . which are intended to be used for canning, dehydration, juice production or other similar manufacturing or processing purpose and are subsequently so used."

The regulation (reg. 15) under which the charge in this case was laid is above set out. This regulation, it was argued, is in excess of power, because it prohibits any change in place or position of apples or pears acquired by the Commonwealth, no matter how innocent or trivial the movement may be. This is not accurate, for the prohibition is directed against acts not sanctioned by the regulations, e.g., regs. 14 (Statutory Rule 1940 No. 276) and 21 (1939 No. 148), or not consented to by the board. In any case the power conferred upon the Governor-General includes prescribing all matters which are necessary or convenient for carrying out or giving effect to this Act. The regulation is against unauthorized movement of apples and pears acquired by the Commonwealth and for the purpose of protecting its property, rights and interests. It is a regulation convenient for that purpose and indeed almost necessary. Some extravagant cases were suggested which, it was said, would fall within the prohibition. But it must not be assumed that every unauthorized movement of apples and pears acquired by the Commonwealth contravenes the regulation. It is a question of mixed law and fact, in the determination of which common sense will often afford as good a guide as minute legal analysis: See *Customs Act* 1901-1935, sec. 33; *Symons* v. *Schiffmann* (1); *McNeill* v. *Whitton* (2); *Wilson* v. *Chambers & Co. Pty. Ltd.* (3). In the present case, there is no doubt that the appellant did move the apples acquired by the Commonwealth; he was taking them to market or to a cool store without any authority.

(1) (1915) 20 C.L.R. 277.
(2) (1915) 20 C.L.R. 573.
(3) (1926) 38 C.L.R. 131, at pp. 148, 149.

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It was also contended that the regulations provide for the acquisition of apples and pears on terms that are not just. The argument is based, I apprehend, upon the American doctrine that the mere existence of a state of war does not suspend or change the operation of the guarantees and limitations of the American Constitution upon the power of Congress. Thus the 5th amendment of the Constitution guarantees that no person shall be deprived of life, liberty, or property without due process of law, and that no private property shall be taken for public use without just compensation (*Hamilton* v. *Kentucky Distilleries & Warehouse Co.* (1) ; *United States* v. *Cohen Grocery Co.* (2)) unless, perhaps, an actual war emergency or military necessity so requires : Cf. *Ruppert* v. *Caffey* (3), *in arguendo* ; *Willis, Constitutional Law*, (1936), pp. 445, 446 ; *Willoughby* on *The Constitution*, 2nd ed. (1929), vol. 3, sec. 1033, pp. 1568-1570. Constitutional guarantees such as are contained in the 5th amendment have no counterpart in the Australian Constitution. But it is provided by sec. 51 (xxxi.) of the Australian Constitution that the Parliament shall, subject to the Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to " the acquisition of property on just terms from . . . any person for any purpose in respect of which the Parliament has power to make laws." One of those powers, sec. 51 (vi.), is with respect to the naval and military defence of the Commonwealth and the several States. According to *Isaacs* J. in *Farey* v. *Burvett* (4), war " gives by the very nature of the circumstances a paramount authority to the defence power." There is nothing in the Constitution, I think, that warrants that statement. " There is no hierarchy in the powers, with the power as to defence on the top " (*Farey* v. *Burvett* (5), per *Higgins* J.). Each power contained in sec. 51 is an independent and separate power, and its content must be found in the words in which it is expressed, subject nevertheless to the ordinary rules of interpretation. An express power to acquire property on just terms for any purpose in respect of which Parliament has power to make laws indicates a legislative intent that property shall not be acquired by the Commonwealth for any purpose in respect of which it has power to make laws unless on those terms. Actual war operations and military necessity may require further consideration, but, putting that aside, the provisions of the Constitution, in my opinion, preclude the Commonwealth from acquiring any property from any person otherwise than on just terms.

(1) (1919) 251 U.S. 146, at p. 156 ; 64 Law. Ed. 194, at p. 199.
(2) (1920) 255 U.S. 81, at p. 88 ; 65 Law. Ed. 516, at p. 520.
(3) (1919) 251 U.S. 264, at p. 267 ; 64 Law. Ed. 262.
(4) (1916) 21 C.L.R., at p. 454.
(5) (1916) 21 C.L.R., at p. 457.

Compensation has been provided in the present case, but the question is whether the terms are just. The rights and interests of every person in apples or pears acquired by the Commonwealth are converted into claims for compensation. Standing alone, that provision conforms to the requirements of the Constitution, for the right to compensation is conferred, and compensation would be recoverable, by due process of law. But it was argued that regs. 14 (1940 No. 276) and 17 (1939 No. 148) prescribe conditions upon which the right to compensation depends, or regulate the procedure for its ascertainment and determination in a manner that is not just. Thus it was said that under reg. 14 the right to compensation depends upon the board giving notice in writing requiring the apples or pears to be consigned. But that does not condition either the right to compensation nor the procedure for its recovery. The regulation certainly empowers the board to require delivery or consignment of the apples or pears acquired, but neither the acquisition nor the compensation depends upon the notice.

Then reg. 17 was attacked upon several grounds. "Just terms" required, it was argued, "an impartial tribunal and the usual rights and privileges which attend judicial investigations" (*Cooley's Constitutional Limitations*, 8th ed. (1927), vol. II., p. 1207). But the regulation, it is said, makes the right to compensation depend upon delivery or consignment in accordance with reg. 14, or instructions from the board, and remits the ascertainment of the amount of compensation to the discretion of the Minister upon the recommendation of the board and does not even require him to make any determination of the amount until, in his opinion, a sufficient quantity of apples or pears were disposed of to enable the board to make a just recommendation. The argument is based upon the proposition that the regulation gives the right to compensation but prescribes the method of enforcing it, which must be followed. Reg. 17, however, is permissive in terms. It provides that every person having any right or interest in the apples or pears may forward a claim. Furthermore, the regulation does not provide for cases in which apples or pears were acquired, but which the board had not required to be delivered or consigned, or given any instruction for their disposal. According to counsel for the appellant, the board refused to pay any compensation in such cases, and the apples or pears rotted on the trees or on the ground, but counsel who appeared in the board's interest denied this assertion and contended that the right to compensation, given by reg. 14, was absolute, and pointed out that practical effect had been given to this view by an appropriation of £750,000 by the Parliament (1940 No. 73) for the purpose of repaying to the

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Commonwealth Bank moneys advanced for the purposes of the *Apple and Pear Acquisition Regulations*.

The question, however, turns upon the construction of the regulation. In my opinion, the right to compensation given by reg. 12 is absolute, and the provisions of regs. 14 and 17 do not condition that right nor provide an exclusive method of enforcing it. They provide a summary method for determining compensation but, I think, only a method alternative to the ordinary process of the courts of law. Assume, however, that the regulations provide the only method of enforcing the right to compensation, still, in my opinion, they do not contravene the provisions of sec. 51 (xxxi.) of the Constitution. It should be observed that the power conferred by the *National Security Act* 1939-1940, sec. 5 (1) (*b*), is general in its terms, "the acquisition on behalf of the Commonwealth of any property other than land," but it must be read and construed subject to the Constitution (*Acts Interpretation Act* 1901-1937, sec. 15A). It was not suggested that compensation must be assessed by some judicial tribunal: but, as already indicated, that "just terms" involved an impartial tribunal and an opportunity of being heard. But this proposition is founded upon principles deduced by the Supreme Court of the United States from the "due process" clause of the American Constitution—See *Willis, Constitutional Law*, (1936), ch. XXIII.—which has no counterpart in the Australian Constitution. It has been held, however, that the Parliament under the Australian Constitution can entrust judicial power to no other tribunal than a court (*Waterside Workers' Federation of Australia* v. *J. W. Alexander Ltd.* (1); *New South Wales* v. *Commonwealth* (2): see per *Isaacs* J. (3)). Still, functions resembling judicial functions may lawfully be conferred upon tribunals other than a court, such as the assessment of tax (*Federal Commissioner of Taxation* v. *Munro* (4); *Shell Co. of Australia Ltd.* v. *Federal Commissioner of Taxation* (5)) or, as in the present case, the assessment of the amount of compensation to which persons are entitled by reason of the provisions of reg. 12. No-one has any right to a given mode of procedure. It is for the legislature or the regulation-making authority to prescribe the tribunal, the procedure, and the manner in which the compensation shall be ascertained and assessed. In this view, it is beyond the function of the courts to consider whether the Minister is or is not an impartial tribunal, or whether the procedure devised by the legislative authority gives

(1) (1918) 25 C.L.R. 434.
(2) (1915) 20 C.L.R. 54.
(3) (1915) 20 C.L.R., at pp. 89, 90.
(4) (1926) 38 C.L.R. 153, at pp. 175 et seq.
(5) (1931) A.C. 275; 44 C.L.R. 530.

the persons whose apples and pears have been acquired a fair opportunity of being heard. If it were the function of the court to consider the matter, I should think that the Minister was a rather partial tribunal, that is, partial towards the persons whose apples and pears have been acquired. The Minister is surrounded by a board and State committees representative of the persons whose property is acquired, and who are entitled to be paid such amount of compensation as the Minister, on the recommendation of the board, determines. Indeed, the whole scheme of the regulations is designed to give the persons whose property is acquired more than they could ever hope for in any available market or in any court of law, and even contemplates the use of moneys appropriated by Parliament for that purpose (reg. 24), and for which in 1940 a sum of no less than £750,000 was actually appropriated. One may admire the ingenuity of counsel in propounding reasons for the conclusion that the regulations empower the Commonwealth to acquire apples and pears on terms that are not just, but taxpayers may, I am afraid, think that the tribunal need not have been quite so favourable, nor the terms so likely to be more than just.

Further, it was argued that the regulations and the order made under them are beyond the powers conferred by the *National Security Act* 1939-1940, because the regulations are not for securing the public safety and the defence of the Commonwealth or its territories. The validity of the Act itself was not attacked (*Wishart* v. *Fraser* (1)). I agree that the particular provision in sec. 5 (1) authorizing regulations for the acquisition on behalf of the Commonwealth of any property other than land is, as a matter of construction, related to the main purpose of the Act, securing the public safety and defence of the Commonwealth and its Territories. Otherwise it would transcend the constitutional power of Parliament with respect to the naval and military defence of the Commonwealth and of the several States (Constitution, sec. 51 (vi.)).

The authority conferred upon the Governor-General is doubtless very extensive. It extends to all regulations necessary to the prosecution of war : it is not limited to operations in the field. It is not for this court to determine whether the regulations secure or aid in securing the public safety and defence of the Commonwealth and its Territories ; it is sufficient if the regulations are capable of securing or aiding, or tend to secure or aid, the defence of the Commonwealth and the States (*Farey* v. *Burvett* (2)). The regulations must not transcend the constitutional power of the Commonwealth

(1) (1941) 64 C.L.R. 470.
(2) (1916) 21 C.L.R., at pp. 441, 447, 448, 460.

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or any limitations imposed upon that power by the Constitution itself. But within these limits the duty is laid upon the courts to examine the regulations and determine whether they are within power. And it is perhaps as well to remember that the content of the defence power never alters, though the circumstances calling for its exercise may alter in time of war, and to those new circumstances the defence power extends.

Now it is said that the regulations on their face are not connected with the defence of the Commonwealth or the prosecution of the war, but merely establish a marketing scheme designed for the economic protection of a limited class of the community, who are affected by conditions arising out of the war. It is common knowledge that the consumption of apples and pears in Australia is not sufficient to absorb the output. In 1936 and 1937, bounties were paid on their export (1936 Nos. 4 and 46, 1937 No. 36). In 1938, Acts were passed relating to the marketing of apples and pears, the main purpose of which was to control the export of apples and pears and contracts relating to shipments and the insurance thereof (1938 Nos. 58 and 59). And further in 1938, Acts were passed for the purpose of assisting in the production and marketing in Australia of apples and pears (1938 Nos. 61, 62 and 63). But the outbreak of war in 1939 affected the shipping position and led to disorganization in the marketing of apples and pears. It did so with respect to other primary products, such as meat, butter, wine, citrus fruits, and other commodities. The legislative provisions for marketing of apples and pears already noticed became ineffective, and this led to the regulations which are challenged. It is an idle pretence, however, to say that the object of the regulations was to maintain food supplies for the troops or the civil population of Australia or the Empire or to regulate the prices of the commodities in aid of the civil population, which was the basis of the decision in *Farey* v. *Burvett* (1), or that the regulations are capable of achieving any such object. The shipping position prevents transport of the commodities to the troops, as clause 2 of the regulation makes plain, and the local consumption of the commodities is not, as already mentioned, sufficient to absorb the output of apples and pears in Australia.

It is suggested, however, that the regulations are directed to the support of the economic front, and therefore, I suppose, part of an agricultural policy. The effect of the regulations is to give a limited class in the community a remunerative price for their apples and pears, merely because war has interfered with the marketing of their

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

commodities. The regulations have no relation whatever to the economic front of the community, but prop up, at the expense of the community, a limited class of the community who are affected by the war. Indeed, the economic front of the community as a whole is more likely to be weakened than strengthened by the regulation if the appropriation of such a large sum as £750,000 is necessary for the purpose of the regulation. Almost every citizen is injuriously affected by the war, and the argument we have heard leads apparently to the conclusion that in time of war the Commonwealth has complete power to legislate in respect of the social and economic condition of Australia. But I cannot agree. After all, the government of Australia is a dual system based upon a separation of powers, and the States have ample power and authority to relieve their populations affected by war conditions. Wide as is the power of the Commonwealth in relation to defence, still it does not, in my opinion, enable the Commonwealth to seize control of the marketing of commodities of all or any who are in need or in distress because of the war, and pay them remunerative prices for their commodities, obtained from their disposal, aided by grants from Parliament. That is not the defence of the Commonwealth, but largely bounty on the part of the Commonwealth to favoured members of the community from funds provided by means of taxation and otherwise.

It is not necessary, in this view, to consider whether the regulation and order made under it contravene the provision made by sec. 92 of the Constitution, but as the matter has been argued I shall express my opinion upon the subject. "Trade, commerce, and intercourse among the States . . . shall be absolutely free." That provision in sec. 92 of the Constitution binds the Parliaments of the Commonwealth and the States alike (*James* v. *The Commonwealth* (1)). It may be regarded as a constitutional guarantee or a limitation upon the power of the Parliaments. It limits the defence power of the Commonwealth, as well as its trade and commerce power. But the extent of the limitation, and its practical operation, despite the many cases expounding the meaning of the section, still remain obscure. All that is certain is that the effectiveness of the section as a constitutional guarantee has been much reduced by judicial decisions and reasonings. Legislation which is attacked upon the ground that it contravenes the section must, I gather, be scrutinized in its entirety and its object gathered from its language and its effect

(1) (1936) A.C. 578; 55 C.L.R. 1.

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(*James* v. *Cowan* (1); *W. R. Moran Pty. Ltd.* v. *Deputy Federal Commissioner of Taxation for New South Wales* (2); *Peanut Board* v. *Rockhampton Harbour Board* (3)). According to *Isaacs* J. in *James* v. *Cowan* (4), the right of inter-State trade protected by sec. 92 from interference and regulation is a personal right attaching to the individual and not attaching to the goods. It is true enough that the regulation and the order acquiring apples and pears prevent the exercise of that right. But they do so without any reference to inter-State trade expressly "either as a criterion of authority or as a description or attribute of the property to be acquired" (*James* v. *Cowan* (5)). The purpose or object of the regulations as stated in reg. 2 is to minimize the disorganization in the marketing of apples and pears because of the effects upon shipping of the present war. The expropriation of the apples and pears is not directed wholly or partially against inter-State trade, that is, selling them out of any State, but to the better disposal of the commodities in local as well as other markets, if possible. Such legislation, it appears, is not obnoxious to sec. 92. *The Wheat Case* (6), *James* v. *Cowan* (7), and *James* v. *The Commonwealth* (8) support this view, and the case is not governed by the decision in *Peanut Board* v. *Rockhampton Harbour Board* (9). I do not profess to understand the decision of this court in *Hartley* v. *Walsh* (10) or in *Milk Board (N.S.W.)* v. *Metropolitan Cream Pty. Ltd.* (11), but the general reasoning of the majority of the court in each case supports the view that the *Apple and Pear Acquisition Regulations* are not obnoxious to the provisions of sec. 92.

In my opinion, the appeal should be allowed.

DIXON J. This is an appeal under sec. 39 (2) (*b*) of the *Judiciary Act* 1903-1940 from a conviction by a Court of Petty Sessions exercising Federal jurisdiction.

The appellant was convicted upon a charge that on or about 26th January 1941, at Melbourne he did, contrary to the *National Security Act* 1939-1940, contravene a provision of the *National Security* (*Apple and Pear Acquisition*) *Regulations* in that he did move twenty-seven cases of apples acquired by the Commonwealth which were held in his possession. The information by which the charge was laid went on to aver that on or about the said day the

(1) (1932) A.C., at p. 558.
(2) (1940) A.C. 838, at p. 849.
(3) (1933) 48 C.L.R., at p. 283.
(4) (1930) 43 C.L.R. 386, at p. 418.
(5) (1930) 43 C.L.R., at p. 415.
(6) (1915) 20 C.L.R. 54.
(7) (1932) A.C. 542; 47 C.L.R. 386.
(8) (1936) A.C. 578; 55 C.L.R. 1.
(9) (1933) 48 C.L.R. 266.
(10) (1937) 57 C.L.R. 372.
(11) (1939) 62 C.L.R. 116.

said apples had been acquired by and were the property of the Commonwealth. The regulations under which he was convicted consisted of the *National Security* (*Apple and Pear Acquisition*) *Regulations* made on 13th November 1939: Statutory Rules 1939 No. 148, as amended by Statutory Rules 1940 Nos. 13, 38, 60, 276, 283 and 295. After the date laid as that upon which the offence was committed, the regulations were further amended by Statutory Rules 1941 No. 79, but those amendments do not apply to the appeal.

The appeal is based upon the ground that the regulations, or so much of them as create the offence of which the appellant was convicted, are beyond the powers which the *National Security Act* 1939-1940 purports to confer, or could confer, upon the Governor-General in Council.

The *National Security* (*Apple and Pear Acquisition*) *Regulations* were made as under sec. 5 (1) of the *National Security Act*. The validity of the regulations depends upon the general words contained in that sub-section, which are as follows: "The Governor-General may make regulations for securing the public safety and the defence of the Commonwealth and the Territories of the Commonwealth . . . and for prescribing all matters which . . . are necessary or convenient to be prescribed for the more effectual prosecution of any war in which His Majesty is or may be engaged or for carrying out or giving effect to this Act." Par. *b* of sec. 5 (1) contains a particular power which may be material, viz., a power to make regulations for authorizing the acquisition on the part of the Commonwealth of any property other than land in Australia.

The object of the *Apple and Pear Acquisition Regulations* is expressly stated in reg. 2, which is as follows: "The purpose of these regulations is to minimize the disorganization in the marketing of apples and pears likely to result from the impracticability of exporting sufficient quantities of apples and pears because of the effects upon shipping of the present war and these regulations shall be administered accordingly."

I understand this to mean that the very large export trade in apples and pears carried on by means of ships with refrigerated space was found impracticable, because the prosecution of the war made it necessary or expedient to use the refrigerated space for the importation into Great Britain of other foodstuffs, and that the plan contained in the regulations was adopted by the government as a substitute, in order to reduce the difficulty in marketing apples and pears which the decision to use refrigerated shipping space for other foodstuffs would involve. The regulations were made before ships had been lost through enemy action to any serious extent.

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The plan appearing from the regulations as amended is to set up a marketing board for the purpose of disposing of apples and pears grown in the Commonwealth by orchardists, subject to an exception of small areas not principally used for growing apples or pears. Occupiers of orchards growing those fruits are required to register with the board. They must make a return of fruit grown, and after 1st March 1940 no person may sell apples or pears except those grown by a registered grower.

The Minister of Commerce is empowered to make provision, by an order published in the *Gazette*, for the acquisition by the Commonwealth of any apples or pears described in the order, whether by reference to any contingency or otherwise; and thereupon those apples and pears, by force and in accordance with the provisions of the order, are to become the actual property of the Commonwealth free from all mortgages, charges, &c., and the rights and interests of every person therein are, by the regulation, "converted into claims for compensation" (reg. 12). This power has been exercised by an order which provides that all apples and pears harvested during the year beginning on 1st July 1940 shall, upon being harvested, be acquired by the Commonwealth, subject to certain exceptions and qualifications not material to this appeal. The regulations require that persons having apples or pears acquired by the Commonwealth in their possession, control or disposal on the date of the acquisition shall, within fourteen days, furnish a return giving particulars of the fruit (reg. 13). On receipt of a notice from the board such a person must deliver or consign the apples or pears to an agent, packing shed, cool store, or any other person or place specified in the notice (reg. 14).

Reg. 15 is the provision under which the appellant was convicted. As amended it is in the following terms:—"Except as provided by these regulations, or with the consent of the board, no person shall (*a*) part with the possession of or move any apples or pears acquired by the Commonwealth which are held in his possession; (*b*) take into his possession any apples or pears which are the property of the Commonwealth; or (*c*) purport to sell or offer for sale, or purport to buy or offer to buy any apples or pears which are the property of the Commonwealth." The board is armed with extensive powers, which include the sale or disposal of apples or pears acquired or purchased by the Commonwealth; the management and control of all matters connected with the handling, storage, protection, treatment, transfer or shipment of apples or pears acquired by the Commonwealth; inspection of apples or pears and orchards,

and the encouragement and extension of the use of apples for canning, drying, manufacturing and processing.

A specific provision is made with respect to the payment of compensation for apples and pears acquired by the Commonwealth; but its effect may be more conveniently considered in dealing with one of the contentions advanced by the appellant, namely, that the acquisition is not upon just terms within the meaning of sec. 51 (xxxi.) of the Constitution. The appellant maintains that the regulations are void upon grounds which may be stated as follows :—

First, he says the whole plan falls outside the power conferred upon the Governor-General to make regulations for securing the public safety and the defence of the Commonwealth and for prescribing matters which are necessary or convenient for the more effectual prosecution of the war, and falls outside the legislative power of the Commonwealth with respect to naval and military defence (sec. 51 (vi.)).

Secondly, he says that the plan involves an interference with the freedom of inter-State trade and commerce which sec. 92 of the Constitution will not allow, and that the plan forms an inseverable whole, so that, in common with the rest of the regulations, the provision for the acquisition of apples and pears, and the provision, under which the appellant was convicted, prohibiting the movement of any apples or pears acquired by the Commonwealth by any person holding them in his possession, are void.

Thirdly, he says that the particular regulation governing the acquisition of apples and pears and providing for compensation to be made for apples and pears acquired by the Commonwealth does not comply with the condition expressed in sec. 51 (xxxi.) of the Constitution : that is to say, it does not amount to a law for the acquisition of property on just terms.

Fourthly, he says that, independently of the foregoing objections, the amendment, which specifically provides that a person having possession of apples or pears acquired by the Commonwealth shall not move any of them, is so wide and unreasonable that it cannot be justified as incidental to the power to make regulations to secure the public safety and the defence of the Commonwealth or for the more effectual prosecution of the war.

I shall deal with these objections to the validity of the regulations in order.

1. In my opinion sec. 5 of the *National Security Act* fully justifies regulations for the purpose of carrying out a plan of the general nature which is set out in detail in the regulations, and I think that

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such a plan clearly falls within the legislative power in respect of the naval and military defence of the Commonwealth.

In dealing with that constitutional power, it must be remembered that, though its meaning does not change, yet unlike some other powers its application depends upon facts, and as those facts change so may its actual operation as a power enabling the legislature to make a particular law. In the same way the operation of wide general powers conferred upon the Executive by the Parliament in the exercise of the power conferred by sec. 51 (vi.) is affected by changing facts. The existence and character of hostilities, or a threat of hostilities, against the Commonwealth are facts which will determine the extent of the operation of the power. Whether it will suffice to authorize a given measure will depend upon the nature and dimensions of the conflict that calls it forth, upon the actual and apprehended dangers, exigencies and course of the war, and upon the matters that are incident thereto. The statement of the purpose of the *Apple and Pear Acquisition Regulations* shows clearly enough the set of facts to which they were directed. The industry of growing apples and pears depended in part upon oversea markets for these fruits. For the better conduct of the war it became necessary to decide whether the shipping space capable of carrying apples and pears to Europe should not be used for other purposes. It may be assumed that such a decision would not be made independently of the Commonwealth. It is plain that in determining how shipping space should be used for the purposes of any war in which a country is engaged, the government of that country must weigh the consequences of the course proposed, and in arriving at a decision must consider what alternatives are open for alleviating the consequences of a diversion of shipping.

I am clearly of opinion that the powers conferred upon the Parliament by sec. 51 (vi.) of the Constitution extend to adopting legislative measures to carry into effect plans for removing or reducing the evils which otherwise would follow from shutting out goods from ships when it is found necessary to decide whether ships should go on carrying those goods or should be used for purposes which appear to be more important for the better prosecution of the war.

In the same way, I think that the powers conferred on the Governor-General in Council by sec. 5 (1) authorize him to adopt regulations for like purposes. The general plan embodied in the regulations might be supported under the defence power in other ways, as, for instance, if it has been adopted as a remedy for the condition of affairs produced by the actual sinking of ships, or to avert or lessen, in industry or production, some disturbance calculated to

impair the efficiency of the Commonwealth's warlike preparations. It is enough, however, to consider the object stated by the regulations as that upon which they were based. In the circumstances of the present war it would, I think, be strange if such a purpose were held to fall outside the defence power. Indeed, the course of the war has made it clear enough that it is impossible to treat the internal condition of a combatant country as a thing which can have at best only an indirect bearing upon the prosecution of the war.

2. The contention that sec. 92 invalidates the regulations as a whole necessarily depends upon the view that if they cannot operate according to their tenor on all commercial dealings in apples and pears they must fail entirely. For, upon the facts of the present case, no inter-State transaction took place or was in contemplation. The appellant, who is described as of a place that is in the vicinity of Melbourne, was shown to have taken a load of apples by motor truck to the Victoria market, Melbourne, and thus to have " moved " them. The suggestion, however, is that if, notwithstanding the regulations, sec. 92 enables the growers of apples and pears, after harvesting them, to sell and deliver them across the boundary of the State in which they are grown into another State by an inter-State transaction, then the whole plan must collapse as an indivisible scheme. Accordingly, the appellant's counsel examined the question whether sec. 92 of the Constitution did not confer a freedom upon the growers of apples and pears to sell them by an inter-State transaction, notwithstanding the intended operation of the regulations.

I am disposed to think that the decision of this court in *Milk Board (N.S.W.)* v. *Metropolitan Cream Pty. Ltd.* (1) is inconsistent with counsel's contention, that is, upon the assumption that the sale of milk in that case was an inter-State transaction, as appears to have been held. I have on more than one occasion expressed my individual views upon the meaning and application of sec. 92, but those views are not in accordance with the later decisions of this court.

In *Riverina Transport Pty. Ltd.* v. *Victoria* (2) I referred to the undesirability of my attempting to explain the meaning and effect of decisions in the correctness of which I have been unable to believe, and I hesitate to place my judgment in this case on the ground that it is governed by *Milk Board (N.S.W.)* v. *Metropolitan Cream Pty. Ltd.* (1), although I am inclined to that opinion. My hesitation is not lessened by the circumstance that I find that the Chief Justice (3) relied in that case upon *Crothers* v. *Sheil* (4) as decisive of the

(1) (1939) 62 C.L.R. 116.
(2) (1937) 57 C.L.R. 327, at pp. 362, 363.
(3) (1939) 62 C.L.R., at p. 134.
(4) (1933) 49 C.L.R. 399.

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question before him. In that view I cannot concur. *Crothers* v. *Sheil* (1) was decided, as I understood it, on the ground that even if it were found that the *Milk Act* did interfere with an actual transaction of inter-State commerce contrary to sec. 92, nevertheless that could not matter, because the transaction before the court was intra-State, and not inter-State. *Rich* J., in whose judgment I concurred, expressed the point in these words: "It is sufficient to say that even if an actual transaction of inter-State commerce is found to be impeded by the *Milk Act* so that the freedom of inter-State trade is impaired sec. 92 will prevail over the *Milk Act*, but it is clear that, merely because it cannot be foretold that such a state of things is impossible, the whole of the relevant provisions of the *Milk Act* do not collapse (2)."

As I understand it, the decision in *Crothers* v. *Sheil* (1) conceded, for the purposes of argument, that an inter-State transaction, if one arose, would be protected by sec. 92 from the operation of the *Milk Act*. To me it appears that, so far from deciding that the *Milk Act* could not involve an attempted interference with inter-State trade in milk, if any such trade arose, it conceded the contrary.

In the case now before us I think the same course may be followed as I had thought was followed in *Crothers* v. *Sheil* (1). I think that it is possible to assume, as a hypothesis, that there may be transactions in apples and pears of an inter-State character which might be protected from the operation of important parts of the *National Security* (*Apple and Pear Acquisition*) *Regulations*, and nevertheless to decide that the present appellant cannot take advantage of that assumption, because the transaction in which he engaged is not so protected and is within the operation of the regulations. In other words, I do not think that it follows from the fact that the operation of some or even all of the regulations on an actual transaction of inter-State trade might be prevented by sec. 92 that the regulations as a whole are invalid.

Sec. 46 (*b*) of the *Acts Interpretation Act* 1901-1937 provides that regulations shall be read and construed subject to the Act under which they are made to the intent that where the regulations would, but for that section, have been construed as being in excess of the power conferred on the authority making them, they shall nevertheless be valid to the extent to which they are not in excess of that power.

In *R.* v. *Poole*; *Ex parte Henry* (3) I stated what, according to my views, is the effect of such a provision, and I referred to the

(1) (1933) 49 C.L.R. 399.
(2) (1933) 49 C.L.R., at p. 409.
(3) (1938) 61 C.L.R. 634, at pp. 651, 652.

American cases which discussed analogous provisions. It is sufficient for present purposes to say that it throws a burden upon those attacking an entire regulation, part of which is bad, of establishing that if the regulation were confined within the limits of the power the result would be, not a partial application of the law, but a different plan or provision, or of establishing that an intention is to be found in the regulation that unless it receives its full intended operation it shall not operate at all. In the case of these regulations I think that the mere fact that some pears or apples escaped from their operation during the time the fruit was the subject of inter-State dealing could not be regarded as going to the root of the plan set up by the Commonwealth. The burden cannot be discharged unless it appears by reasonable inference that it was the intention of the regulations that they should operate in their entirety over all apples and pears in the course of all transactions and at all times as an indispensable condition of the regulations operating on apples and pears in the course of any transaction at any time.

For instance, if I had not the guidance of the more recent decisions upon sec. 92, I myself should take the view that reg. 11 could not validly operate on a sale of apples and pears in one State for delivery into another State. Reg. 11 provides that no person after a specified date shall sell or offer for sale any apples or pears other than apples and pears which have been grown by a registered grower. My reason for saying that I should have thought that such a provision could not operate on an inter-State sale is that it selects as the criterion of its operation an essential attribute of inter-State commerce, namely, sale: See the cases of *O. Gilpin Ltd.* v. *Commissioner for Road Transport and Tramways (N.S.W.)* (1) and *R.* v. *Martin*; *Ex parte Wawn* (2). But I should not have thought that, because reg. 12 could not validly operate upon an inter-State sale of fruit, it followed that the regulations generally or even that regulation was entirely void.

For these reasons I think that sec. 92 does not afford the appellant grounds for impeaching the regulations.

3. Sec. 51 (xxxi.) of the Constitution provides that the Parliament shall have power to make laws with respect to the acquisition of property on just terms from any State or person for any purpose with respect to which the Parliament has power to make laws.

This provision contemplated, no doubt, the acquisition of real or personal property which the Commonwealth proposed to use for purposes of the Executive Government in the course of executing laws made by the Parliament under its legislative powers. There

(1) (1935) 52 C.L.R. 189, at pp. 203-207.
(2) (1939) 62 C.L.R. 457, at p. 461.

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is some difficulty in applying it in such a case as the present, where the acquisition is for the purpose of immediate disposal in the course of a plan for the more effectual sale and distribution of a marketable commodity in which the Commonwealth Executive is not interested and which it does not desire to use for any governmental purpose. Indeed, it may be possible to maintain that the provision has no application to such a case. But as I am of opinion that it does not operate to invalidate the regulations now in question, it is unnecessary to pursue this matter.

The source of sec. 51 (xxxi.) is to be found in the fifth amendment of the Constitution of the United States, which qualifies the power of the United States to expropriate property by requiring that it should be done on payment of fair compensation.

I assume, without deciding, that sec. 51 (xxxi.) operates as an express provision excluding the implication which otherwise would be made in construing particular legislative powers, the implication that, where it was incidental or conducive to the exercise of a particular legislative power, the Parliament might authorize the compulsory acquisition of property.

I further assume that if it appears to the court that a law conferring a power to acquire property compulsorily does so on terms which are not just it would be invalid. But while I make these assumptions I think it is necessary to qualify the last of them by saying that the court would not arrive at the conclusion that terms were unjust except after an examination of the facts upon which the law operated, of the circumstances affecting the subject matter, and of the considerations which appear to have actuated the legislature. Further, if it appeared from the terms of the enactment that the legislature had considered that a particular form or measure of compensation was just, the court would give great weight to the conclusion of the legislature. The difficulty of the present case lies in interpreting the regulations which, on this point, are expressed in a compendious, not to say inadequate, manner.

Reg. 12 converts all interests in the fruit acquired into claims for compensation. If it stopped there, "compensation" would doubtless be construed as meaning a full recompense to be recovered in and assessed by a court of law, and there could be no doubt of the justice of such a provision. But the regulations do not stop there. Reg. 17 contains a specific provision as to the occasion when compensation should be paid, and the authority by whom the measure shall be determined. It provides, in effect, that upon delivery or consignment of any apples or pears in accordance with a notice in writing from the board requiring a grower to deliver or consign

apples or pears to an agent, packing shed, cool store or other person or place specified in the notice, or upon any apples or pears being disposed of or dealt with in accordance with instructions from the board, every person having any right or interest in those apples and pears may forward a claim for compensation and shall be entitled to be paid such compensation as the Minister, on the recommendation of the board, determines.

It is said that this provision involves unjust terms, (1) because it leaves the person whose fruit has been acquired without any right to compensation unless and until the board gives him a notice requiring delivery or instructions to dispose of or deal with the fruit in some other way, a thing which the board may refrain indefinitely from doing; (2) because it entrusts to the Minister, that is, to the Executive Government, the fixing of the compensation as his discretion dictates; and (3) because it indicates no measure of compensation, which therefore may be found illusory when fixed.

Properly construed, I do not think that the regulations bear such a meaning. They should be interpreted in accordance with their professed purpose, and the direction which reg. 2 conveys should be kept in mind: that direction is that the regulations shall be administered according to the purpose stated. Where reg. 12 converts all interests into claims for compensation it necessarily implies that the claim for compensation shall be paid by the Commonwealth, although no doubt in the manner afterwards stated.

Reg. 17 (1) ought not, in these circumstances, to be taken as conferring upon the board a discretion to withhold indefinitely any notice or direction to the grower. It should be construed as authorizing the board to choose between the alternatives it states, but as requiring the board to adopt within a reasonable time one or other of these alternatives, namely to notify the grower to deliver or consign fruit to a specified person or place or to give him directions as to how he shall dispose of or deal with it. The duty to do one or other of these things within a reasonable time might, I think, be enforced by a prerogative writ of mandamus, at all events once the Minister has fixed compensation. It follows that the board is not in a position indefinitely to withhold the notification or direction upon the giving of which the claim for compensation becomes payable. It is true that the amount of compensation is to be determined by the Minister, and it is true that the Minister represents the Government, which may be treated as the body acquiring the fruit. But the Minister must determine "on the recommendation of the board."

I do not think that these brief words should be construed as enabling the Minister to determine what he thinks fit after receiving

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the recommendation of the board, without adopting it. He may adopt or refuse to adopt a recommendation of the board, but if he determines compensation it must be in pursuance of the recommendation which the board finally makes.

The board, under the regulations as amended, is a body consisting of a chairman, deputy chairman and executive member, and six members representing the respective States, appointed by the Minister of Commerce.

But although the board is not independent of the Government of the Commonwealth, it does not form part of the ordinary service of the Executive Government subject in all things to the direction of the Minister. It is a separate body and the determination must, I think, be made in the exercise of an independent discretion.

The regulations are defective in the expression of a measure of compensation, but that measure is indicated, although somewhat indistinctly, by reg. 17 (2) construed in combination with the general purpose stated in reg. 2. Reg. 17 (2) says that it shall not be necessary for the Minister to make a determination until in his opinion a sufficient quantity of any apples or pears acquired by the Commonwealth has been disposed of to enable the board to make a just recommendation. This is an indication that the compensation is to be the result of the marketing of the apples and pears and the receipt of the proceeds for distribution, after proper deductions, among the growers.

Reg. 17 (3) enables the Minister to make an advance to growers whose fruit has been acquired by the Commonwealth and delivered to or at the direction of the board.

Reg. 17 (4), and now, by Statutory Rules 1941 No. 79, reg. 17 (3A), enable the Commonwealth to recover an advance in excess of the amount of compensation.

By an appropriation Act, No. 73 of 1940, it appears that £750,000 were appropriated by the Australian Apple and Pear Marketing Board, and no doubt some of this money was used in making advances.

Having regard to the foregoing considerations I am not prepared to say that it appears on the face of the regulations that the terms of the acquisition are unjust.

4. The offence charged against the appellant consists in moving apples and pears which have been acquired by the Commonwealth and were in his possession. Until it was amended by Statutory Rules 1940 No. 276, reg. 15 (*a*) was confined to prohibiting a person holding possession of apples or pears so acquired from parting with possession of them. But by that amendment the words " or move " were inserted in reg. 15 (*a*). The apparent object of the amendment

was to prevent the grower whose fruit had been acquired but remained in his possession from taking the fruit from one locality to another, notwithstanding that it still remained in his possession. But unfortunately the literal meaning of the word "move" is much more extensive than that of the word "remove." Under the order of the Minister, the fruit is acquired by the Commonwealth as soon as it is harvested. It remains in the custody of the grower until he receives a notification or direction from the board. Literally construed, the amendment would prevent him moving a case of fruit from one part of his store to another; it would prevent the owner of a cool store to which the fruit had, at the instance of the board, been delivered, from moving any of the cases even a few feet. If this were the real meaning of the word in the regulations, I should doubt whether the provision was authorized by sec. 5 (1) of the *National Security Act*. It would be such an extravagant and unreasonable restriction of the freedom of action of the persons in whose possession the apples and pears were left as custodians that I should doubt whether it could be considered to be incidental to the main purpose of the regulations, still less to the purpose of sec. 5 (1) of the *National Security Act*. But on the whole I think that upon a fair understanding of the purpose of the amendment, and perhaps with the aid of sec. 46 (*b*) of the *Acts Interpretation Act* 1901-1937, the court is justified in restricting the meaning of the word "move." I think it should be restricted to movement from the premises where the fruit is when harvested, or where it is placed by the person who afterwards receives it into his possession under the authority of the board, as the case may be.

So construed I think the provision is valid.

I am therefore of the opinion that all the objections to the validity of the regulations fail. Accordingly I think the appeal should be dismissed with costs.

McTIERNAN J. The appellant was convicted of an offence against the *National Security Act* 1939-1940, sec. 10 (1) of which makes it an offence against that Act to contravene any provisions of any regulations made in pursuance of the Act. The appellant contravened a provision of the *National Security* (*Apple and Pear Acquisition*) *Regulations* forbidding any person from moving, except as thereby permitted, any apples or pears acquired by the Commonwealth which are held in his possession. This prohibition is to be found in reg. 15 (*a*) of Statutory Rules 1939 No. 148, as amended by reg. 9 of Statutory Rules 1940 No. 276. The order convicting the appellant was made by a Court of Petty Sessions at Melbourne,

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and the appeal is brought under sec. 39 (2) (*b*) of the *Judiciary Act* 1903-1940 and in the manner prescribed by rule 1 of sec. IV. of the Appeal Rules of this court.

The grounds of the appeal are that the *National Security* (*Apple and Pear Acquisition*) *Regulations* are invalid, and that reg. 15 (*a*) as amended is *ultra vires* even if the rest of the regulations be valid.

At the date of the alleged offence the regulations in force were, besides those contained in Statutory Rules 1939 No. 146 and 1940 No. 276, the *National Security* (*Apple and Pear Acquisition*) *Regulations*, to be found in Statutory Rules 1940 Nos. 13, 38, 60, 283 and 295. The regulations were made by the Governor-General with the advice of the Federal Executive Council. In making the regulations contained in Statutory Rules 1939 No. 148 the Governor-General purported to exercise the powers conferred on him by the *National Security Act* 1939. The other statutory rules were similarly made under that Act, or as amended by the *National Security Act* 1940. The powers which the Governor-General purported to exercise include that of making regulations for securing the public safety and defence of the Commonwealth and its Territories, and for prescribing all matters which are necessary or convenient to be prescribed for the more effectual prosecution of the war. By sec. 5 of the amending Act the war means any war in which His Majesty is or may be engaged. The Governor-General declared in reg. 2 of Statutory Rules 1939 No. 148 what was the purpose of the regulations. It is declared in these terms : " The purpose of these regulations is to minimize the disorganization in the marketing of apples and pears likely to result from the impracticability of exporting sufficient quantities of apples and pears because of the effects upon shipping of the present war and these regulations shall be administered accordingly." The facts stated in this regulation are not challenged, nor is there any denial of the existence of the emergency which they profess to meet. But it is contended that because of the purpose for which the regulations are declared to have been made they are not reasonably capable of being described as regulations for securing public safety and defence, and are therefore in excess both of the powers conferred on the Governor-General by the *National Security Act* and of the defence power of the Commonwealth. The disorganization which the regulations aim at minimizing is a plain and direct consequence of the war. It is the result of the diversion of ships upon which the export trade in apples and pears depends to war purposes and of the loss of shipping by enemy action. The disorganization caused by the war in the important industry of producing fruit for export and home consumption impairs the economic integrity of the country. It cannot be doubted that measures

taken to repair such damage or to strengthen the nation's economy to enable it to withstand the impact of war directly contribute to the power of its defensive arms. The nature and extent of the defence power of the Commonwealth are explained and illustrated by the following cases: *Farey* v. *Burvett* (1); *Welsbach Light Co. of Australasia Ltd.* v. *Commonwealth of Australia* (2); *Pankhurst* v. *Kiernan* (3); *Ferrando* v. *Pearce* (4); *Sickerdick* v. *Ashton* (5); *Burkard* v. *Oakley* (6). The emergencies to which war gives rise will justify the Commonwealth in making laws with respect to defence which may not be justified in time of peace. The scope of such emergencies cannot be predetermined. But the defence power adjusts itself to meet whatever emergencies war produces and especially to any such emergency as might affect the country's power to defend itself: Cf. *Fort Frances Pulp and Power Co.* v. *Manitoba Free Press Co.* (7). In my opinion the regulations are not *ultra vires* the Governor-General or the Commonwealth.

Another objection to the regulations is that they violate sec. 92 of the Commonwealth Constitution.

The apples which the appellant was charged with moving in contravention of reg. 15 (*a*) were not the subject of any transaction of inter-State trade. But it is contended that as it is essential to the purpose of the regulations that there should be no independent inter-State sales of apples and pears their operation cannot be limited to intra-State sales and the whole scheme embodied in the regulations must therefore collapse under the constitutional prohibition. It is startling to contemplate that measures taken by the Commonwealth which can be justified only on the hypothesis that they are necessary for or conduce to the defence of the Commonwealth would be invalid if they should interfere with freedom of trade and commerce among the States. In *Farey* v. *Burvett* (8) *Isaacs* J., as he then was, denied that sec. 92 could override any measures taken by the Commonwealth in time of war under the defence power for securing the public safety and the defence of the country. His Honour based that conclusion on the nature and extent of the power. But it may now be said that because of the meaning which recent decisions have placed upon sec. 92 there could seldom, if ever, be any opposition between that section and a law which is directed to securing the safety and defence of the Commonwealth but operates adversely to the freedom of inter-State trade and commerce although not directed against it. I refer especially to the observations of the Privy Council reported in *James* v. *Cowan* (9) and in *James* v.

(1) (1916) 21 C.L.R. 433.
(2) (1916) 22 C.L.R. 268.
(3) (1917) 24 C.L.R. 120.
(4) (1918) 25 C.L.R. 241.
(5) (1918) 25 C.L.R. 506.
(6) (1918) 25 C.L.R. 422.
(7) (1923) A.C. 695, at pp. 703-705.
(8) (1916) 21 C.L.R., at p. 453.
(9) (1932) A.C., at pp. 558, 559; 47 C.L.R., at pp. 396, 397.

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The Commonwealth (1), and to the observations of *Latham* C.J. in *Milk Board (N.S.W.)* v. *Metropolitan Cream Pty. Ltd.* (2). Remembering that the declared purpose—the real purpose—of the present regulations is one of defence, the *ratio decidendi* of the last-mentioned case makes the appellant's objection founded on sec. 92 untenable.

The appellant also attacks the regulations on the ground that they fail to provide for the acquisition of the fruit on just terms. This objection assumes that the power of the Commonwealth to acquire the fruit for the purpose of the scheme embodied in the regulations is derived solely from sec. 51 (xxxi.) of the Constitution. It is not now necessary to decide whether this is a correct assumption. In my opinion the regulations do provide for compensation on just terms. It is obvious, of course, that they are not confiscatory. I am in agreement with the reasons which my brother *Dixon* has given for saying that upon the true construction of the regulations they do safeguard the right of any person whose fruit is expropriated to a fair assessment of his claim for compensation.

The last objection is that reg. 15 (*a*) extends to the prohibition of making any change, however minute the distance, in the position of any fruit, and for that reason is in excess of any purpose which could reasonably be related to the purpose of defence. Before amendment, reg. 15 (*a*) forbade any person to part with the possession of any apples or pears held in his possession. That prohibition remains, and to it is added the prohibition that no person shall move such fruit. The regulation postulates that fruit which is acquired by the Commonwealth is held by a person in his possession at some place. The intention of the amendment is to prevent him from moving it to another place, but not necessarily from one spot within that place to another spot within the same place. The amendment prohibits a moving the result of which could be described by saying that whereas the fruit was held at one place it is now to be found at a different place. Upon that construction of the regulation I think it was a provision which was necessary to the scheme embodied in the regulations. In my opinion this particular objection which is made to reg. 15 (*a*) also fails.

I agree, therefore, that the appeal be dismissed with costs.

Appeal dismissed with costs. Order nisi discharged.

Solicitors for the appellant, *Malleson, Stewart, Stawell & Nankivell.*

Solicitor for the respondent, *H. F. E. Whitlam*, Crown Solicitor for the Commonwealth.

O. J. G.

(1) (1936) A.C., at pp. 630, 631; 55 C.L.R., at pp. 58, 59.
(2) (1939) 62 C.L.R., at pp. 130-135.