[HIGH COURT OF AUSTRALIA.]

BIRD . . . . . APPELLANT;
INFORMANT,

AND

JOHN SHARP AND SONS PROPRIETARY LIMITED . . . . . } RESPONDENT.
DEFENDANT,

ON APPEAL FROM A COURT OF PETTY SESSIONS OF VICTORIA.

H. C. OF A. 1942.

MELBOURNE, *Oct.* 6, 28.

Latham C.J., Rich, Starke, McTiernan and Williams JJ.

*National Security—Prices Regulations—Order fixing price of goods—Operation—Repeal of regulations under which Order made—Substitution of new regulations—Saving clause as to orders made under repealed regulations—Authority for Order in new regulations—Amendment of regulation authorizing Order by omission of portion thereof and insertion of identical and additional provisions—National Security Act* 1939-1940 (*No.* 15 *of* 1939—*No.* 44 *of* 1940)—*National Security* (*Prices*) *Regulations* (*S.R.* 1939 *No.* 110)—*National Security* (*Prices*) *Regulations* (*S.R.* 1940 *No.* 176—*S.R.* 1941 *No.* 54), *regs.* 2, 2A, 22, 23—*National Security* (*Prices*) *Regulations* (*S.R.* 1941 *No.* 54), *reg.* 2—*Prices Regulation Order No.* 100.

The Commonwealth Prices Commissioner, acting under powers conferred upon him by the *National Security* (*Prices*) *Regulations*, Statutory Rules 1939 No. 110, made Prices Regulation Order No. 100 fixing the maximum prices at which declared goods might be sold. Statutory Rules 1939 No. 110 was repealed and replaced by the *National Security* (*Prices*) *Regulations*, Statutory Rules 1940 No. 176, reg. 2A (2) whereof provided: "All . . . orders . . . made . . . under the repealed Regulations, which are in force at the commencement of these Regulations, shall, except so far as they are inconsistent with these Regulations, be deemed to have been made . . . under these Regulations." The provision of the new Regulations empowering the Commissioner to make orders of the nature of Prices Regulation Order No. 100 was reg. 23 (1), and by reg. 23 (5) it was provided: "Every order which has been, or is, made under sub-regulation (1) of this regulation . . . shall apply in relation to all goods which are declared, whether before or after

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the making of the order, to be declared goods and in respect of which the declaration is in force." Statutory Rules 1941 No. 54 provided that reg. 23 of Statutory Rules 1940 No. 176 should be amended by omitting sub-reg. 1 and inserting in its stead new sub-regulations; the newly inserted sub-regulations conferred upon the Commissioner powers identical with those conferred by the omitted sub-regulation as well as certain further powers.

Informations for selling declared goods at prices higher than those fixed by Prices Regulation Order No. 100 were dismissed by the magistrate on the ground that Statutory Rules 1941 No. 54 repealed reg. 23 (1) of Statutory Rules 1940 No. 176 under which Prices Regulation Order No. 100 was to be deemed to have been made so that Prices Regulation Order No. 100 ceased to have effect before the sales alleged in the information were made. On appeal by way of order to review :—

*Held* that Prices Regulation Order No. 100 continued in force after, and notwithstanding, the amendments made by Statutory Rules 1941 No. 54 in reg. 23 of Statutory Rules 1940 No. 176.

APPEALS, by way of orders nisi to review, from a Court of Petty Sessions of Victoria.

John Sharp & Sons Pty. Ltd. was prosecuted summarily in the Court of Petty Sessions holden at Melbourne, Victoria, upon three informations laid by Henry Scorer Bird alleging that the company had sold certain imported timber on 27th March, 23rd April and 1st May 1941 at greater prices than those fixed by regulations made under the provisions of the *National Security Act* 1939-1940 shortly entitled the *National Security* (*Prices*) *Regulations*.

By the *National Security* (*Prices*) *Regulations*, Statutory Rules 1939 No. 110, provision was made for the appointment of a Commonwealth Prices Commissioner and Deputy Prices Commissioners in each State and in each Territory being part of the Commonwealth. Reg. 17 authorized the Minister by notice in the *Gazette* to declare any goods to be declared goods for the purposes of the Regulations. Reg. 18 provided that the Commissioner might from time to time, in his absolute discretion, by order published in the *Gazette*, fix and declare the maximum price at which any declared goods might be sold. By Declaration No. 3, made on 6th October 1939, the Minister declared certain goods, including timber dressed and undressed including shooks, to be declared goods for the purposes of the Regulations. On 20th February 1940 the Commonwealth Prices Commissioner "in pursuance of the powers conferred upon me by the *National Security* (*Prices*) *Regulations*," made Prices Regulation Order No. 100, fixing and declaring the maximum price at which goods declared by the Minister by notice in the *Gazette* to be declared goods for the purposes of the Regulations might be sold in Australia.

On 22nd August 1940, by the *National Security* (*Prices*) *Regulations*, Statutory Rules 1940 No. 176, Statutory Rules 1939 No. 110, as amended, were repealed, and a fresh set of Regulations was enacted. Reg. 2A (2) of the new Regulations provided: "All declarations, orders, determinations, delegations, authorities and notifications made, published or given under the repealed Regulations, which are in force at the commencement of these Regulations, shall, except so far as they are inconsistent with these Regulations, be deemed to have been made, published or given under these Regulations, and any reference in any such declaration, order, delegation, authority or notification to any regulation repealed by these Regulations shall be construed as a reference to the corresponding provision of these Regulations." Reg. 22 gave power to the Minister, by notice in the *Gazette*, to declare goods and services. Sub-reg. 1 of reg. 23 provided as follows: "The Commissioner may with respect to any declared goods, from time to time, in his absolute discretion, by order published in the *Gazette*—(*a*) fix and declare—(i) the maximum price at which any such goods may be sold generally or in any part of Australia or in any proclaimed area; (ii) different maximum prices according to differences in quality or description or in the quantity sold, or in respect of different forms, modes, conditions, terms, or localities of trade, commerce, sale or supply; (iii) different maximum prices for different parts of Australia, or in different proclaimed areas; (iv) maximum prices on a sliding scale; (v) maximum prices on a condition or conditions; (vi) maximum prices for cash, delivery or otherwise, and in any such case inclusive or exclusive of the cost of packing or delivery; (vii) maximum prices on landed or other cost, together with a percentage thereon or a specified amount, or both; and (viii) maximum prices according to or upon any principle or condition specified by the Commissioner; and (*b*) in fixing and declaring any maximum price, do so relatively to such standards of measurement, weight, capacity, or otherwise howsoever as he thinks proper, or relatively to prices charged by individual traders on any date specified by the Commissioner, with such variations (if any) as in the special circumstances of the case the Commissioner thinks fit, or so that such price shall vary in accordance with a standard, or time, or other circumstance, or shall vary with profits or wages, or with such costs as are determined by the Commissioner." Sub-reg. 2 gave power to the Commissioner to determine the maximum rates for services. Sub-reg. 5 provided as follows: "Every order which has been, or is, made under sub-regulation (1) of this Regulation (not being an order in respect of specific goods) shall apply in relation to all goods which are declared, whether before or

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after the making of the order, to be declared goods and in respect of which the declaration is in force."

Statutory Rules 1940 No. 176 were amended on 12th March 1941 by Statutory Rules 1941 No. 54. Reg. 1 of the amending Regulations amended reg. 22 of the *National Security* (*Prices*) *Regulations* by inserting at the end of sub-reg. 3 the words " or in respect of any person or body or association of persons." Reg. 2 of the amending Regulations provided as follows :—" Regulation 23 of the *National Security* (*Prices*) *Regulations* is amended by omitting sub-regulations (1) and (2) and inserting in their stead the following sub-regulations : —' (1) The Commissioner may, with respect to any declared goods, from time to time, in his absolute discretion, by order published in the *Gazette*—(*a*) fix and declare the maximum price at which any such goods may be sold generally or in any part of Australia or in any proclaimed area ; or (*b*) declare that the maximum price at which any such goods may be sold by any person or body or association of persons shall be such price as is fixed by notice by the Commissioner in writing to that person or body or association of persons. (1A) In particular, but without limiting the generality of the last preceding sub-regulation, the Commissioner, in the exercise of his powers under that sub-regulation, may fix and declare—(*a*) different maximum prices according to differences in quality or description or in the quantity sold, or in respect of different forms, modes, conditions, terms, or localities of trade, commerce, sale or supply ; (*b*) different maximum prices for different parts of Australia, or in different proclaimed areas ; (*c*) maximum prices on a sliding scale ; (*d*) maximum prices on a condition or conditions ; (*e*) maximum prices for cash, delivery or otherwise, and in any such case inclusive or exclusive of the cost of packing or delivery ; (*f*) maximum prices on landed or other cost, together with a percentage thereon or a specified amount, or both ; (*g*) maximum prices according to or upon any principle or condition specified by the Commissioner ; and (*h*) maximum prices relative to such standards of measurement, weight, capacity, or otherwise howsoever as he thinks proper, or relative to prices charged by individual traders on any date specified by the Commissioner, with such variations (if any) as in the special circumstances of the case the Commissioner thinks fit, or so that such prices shall vary in accordance with a standard, or time, or other circumstance, or shall vary with profits or wages, or with such costs as are determined by the Commissioner. (2) . . .' "

On the hearing of the charges against the company counsel for the prosecution tendered in evidence the *Gazette* containing Prices Regulation Order No. 100. It was objected to on the ground that

it could not support informations for offences alleged to have been committed since the making of Statutory Rules 1941 No. 54. The magistrate accepted this contention, rejected the evidence, and dismissed the informations.

The prosecution applied to the High Court for orders to review this decision and on 17th July 1942 *Starke* J. made orders nisi to show cause returnable before the Full Court.

*Barry* K.C. (with him *Doyle*), for the appellant. Reg. 2A (2) of Statutory Rules 1940 No. 176 saved orders made under the regulations of Statutory Rules 1939 No. 110, which it repealed. Statutory Rules 1941 No. 54 did not repeal reg. 23 (1) of Statutory Rules 1940 No. 176. It is permissible to look at the heading of Statutory Rules 1941 No. 54, which is "Amendments." Sec. 13 of the *Acts Interpretation Act* 1901-1941 provides that headings of Parts of an Act shall be deemed part of the Act, and sec. 46 provides that where an authority has conferred upon it power to make regulations then, unless a contrary intention appears, the *Acts Interpretation Act* shall apply to such regulations as if they were an Act. The sub-regulations inserted by reg. 2 of Statutory Rules 1941 No. 54 were (so far as sub-reg. 1 is concerned) identical with the provisions omitted by that regulation. It is a principle of construction that where an enactment is repealed and the repealing legislation re-enacts the repealed provisions with additions, the new enactment is retrospective so far as it is a re-enactment (*Ex parte Todd*; *In re Ashcroft* (1), per Lord *Esher* M.R. and per *Lopes* L.J.; *Baddeley* v. *Denton* (2)).

Dr. *Coppel*, for the respondent. The continuance of Prices Regulation Order No. 100 depended on the continuance of the regulation authorizing it. Reg. 2 of Statutory Rules 1941 No. 54 repealed reg. 23 (1) of Statutory Rules 1940 No. 176, under which Order No. 100 was deemed to have been made. Order No. 100 therefore ceased to operate before the commission of the offences alleged, and could not support the informations in respect of them (*Craven* v. *City of Richmond* (3); *Craies* on *Statute Law*, 3rd ed. (1923), p. 291). There was no saving clause in Statutory Rules 1941 No. 54 similar to that in Statutory Rules 1940 No. 176. The contemporaneous enactment of reg. 23 (1) (*a*) did not preserve Order No. 100, made under provisions for which these were substituted (*Martin* v. *Trigg* (4)). *Baddeley* v. *Denton* (2) is not an authority on interpretation. The respondent could not at the date of the alleged offences be guilty of

(1) (1887) 19 Q.B.D. 186, at pp. 195, 199.
(2) (1850) 1 L.M. & P. 172.
(3) (1930) V.L.R. 153.
(4) (1931) V.L.R. 62.

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infringing Order No. 100, which had ceased to exist. The magistrate was right in refusing to admit proof of that Order.

*Barry* K.C., in reply.

*Cur. adv. vult.*

Oct. 28.

The following written judgments were delivered :—

LATHAM C.J These are appeals by way of orders to review from dismissals of three charges of selling goods (namely timber) at a greater price than the maximum price fixed under the *National Security* (*Prices*) *Regulations*. Reg. 29 of Statutory Rules 1940 No. 176 creates the offence. The relevant prices were alleged to have been fixed by an Order, No. 100, made by the Commissioner of Prices on 20th February 1940. That order was made under Statutory Rules 1939 No. 110. That statutory rule was repealed by Statutory Rules 1940 No. 176. But reg. 2A (2) of the latter rule was a saving clause providing (as to orders) that all orders made under the repealed Regulations which were "in force at the commencement of these Regulations, shall, except so far as they are inconsistent with these Regulations, be deemed to have been made . . . under these Regulations." Reg. 23 (1) of Statutory Rules 1940 No. 176 conferred power upon the Commissioner to fix prices of declared goods. Timber had been duly declared by the Minister to be declared goods. Therefore Order 100, deemed to have been made under the Regulations, is justified by reg. 23, and, as it is not inconsistent with the Regulations, was preserved in operation. Thus Order 100 remained in force after Statutory Rules 1940 No. 176 was made.

Statutory Rules 1941 No. 54 was made on 12th March 1941. Reg. 2 thereof provided : "Regulation 23 of the *National Security* (*Prices*) *Regulations* is amended by omitting sub-regulations (1) and (2) and inserting in their stead the following sub-regulations :— (1) The Commissioner may, with respect to any declared goods, from time to time, in his absolute discretion, by order published in the *Gazette*—(*a*) fix and declare the maximum price at which any such goods may be sold generally or in any part of Australia or in any proclaimed area. . . ." To this point the regulation is identical in terms with reg. 23 of Statutory Rules 1940 No. 176. Statutory Rules 1941 No. 54 then proceeds to add new provisions and to re-arrange old provisions. This statutory rule contained no saving clause.

The earliest of the offences was charged as having been committed on 27th March 1941, i.e., after the making of Statutory Rules 1941 No. 54.

The general principle as to the effect of a repealing statute is that a repealed Act must, in the absence of saving clauses and except as to closed transactions, be regarded as if it had never existed (*Surtees* v. *Ellison*; *Hewson* v. *Heard* (1)). Thus, when a by-law has been made under a statute, the repeal of the statute repeals the by-law, unless there is a saving clause (*Watson* v. *Winch* (2)). If reg. 23 (1) of Statutory Rules 1940 No. 176 was repealed by Statutory Rules 1941 No. 54, then Order 100, which after the repeal of Statutory Rules 1939 No. 110 depended for its existence upon reg. 23 (1), was also repealed. The magistrate accepted this view and excluded Order 100 from evidence.

What is the meaning of the provision that orders &c. shall be deemed to have been made under "these Regulations"? The meaning cannot be that every order &c. shall be deemed to have been made under each of the regulations. It would be nonsense to provide that orders should be deemed to have been made under a regulation which had nothing to do with the making of orders. The provision makes sense only if it is interpreted to mean that orders already made (i.e., before the coming into effect of Statutory Rules 1940 No. 176) under the repealed Regulations shall be deemed to have been made under the regulation contained in Statutory Rules 1940 No. 176 which authorizes the making of orders—i.e., under reg. 23 (1). If reg. 2A (2) had provided that, notwithstanding the repeal of prior statutory rules, orders made under those rules should remain in force, it could not have been argued that the repeal of reg. 23 (1) terminated their existence. But reg. 2A (2) does not provide that orders made under repealed rules shall remain in force. The provision that except so far as inconsistent with Statutory Rules 1940 No. 176 orders shall "be deemed to have been made" under that statutory rule has a quite different effect. It means that the orders are in future to depend for their authority upon the order-making power contained in Statutory Rules 1940 No. 176 and not upon any other power. If they are orders of a character which is authorized by that power they will be as effective as if they had actually been made under that power; but, if they are inconsistent with any of the regulations, they will not be deemed to have been made under Statutory Rules 1940 No. 176. Having no foundation in Statutory Rules 1940 No. 176, and the earlier foundation in any prior statutory rule having disappeared by reason of the repeal of prior statutory rules, orders inconsistent with Statutory Rules 1940 No. 176 will necessarily be abrogated. This interpretation of reg. 2A (2) is in accordance with the decision of the Full Court of the

(1) (1829) 9 B. & C. 750 [109 E.R. 278]. (2) (1916) 1 K.B. 688.

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Supreme Court of Victoria in *Craven* v. *City of Richmond* (1). In that case the Court had to consider the effect of a provision that by-laws " in force " under a repealed Act should be " deemed to be made " under the repealing Act. It was held that the effect of such a provision was to make the validity of such by-laws dependent upon the by-law-making provisions of the latter Act, so that a by-law which could not be made under that Act was invalid. The result would have been different if the later Act had provided that such by-laws should " remain in force." In the present case there is the same distinction in language as in *Craven* v. *City of Richmond* (1). The provision is that orders &c. " which are *in force* at the commencement of these Regulations " shall, except so far as they are inconsistent with the regulations " be *deemed to have been made* . . . under these Regulations." Thus the effect of reg. 2A (2) is to make " these Regulations," viz. Statutory Rules 1940 No. 176, reg. 23 (1), the source of authority for orders &c. made under repealed regulations. Thus if reg. 23 (1) has been repealed with no saving clause, the orders which were kept in existence by reg. 2A (2) have been abrogated.

Statutory Rules 1941 No. 54 provided that reg. 23 (1) should be omitted from Statutory Rules 1940 No. 176. The statutory rule contained no saving clause. Accordingly, unless the application of the general principle to which reference has been made can be excluded, Order 100 ceased to have any force or effect when Statutory Rules 1941 No. 54 was made.

The appellant contends that reg. 2A (2) of Statutory Rules 1940 No. 176 has the effect of continuing earlier orders &c. in operation, if they are not inconsistent with any of the regulations contained in the statutory rule, notwithstanding the omission (by Statutory Rules 1941 No. 54) from Statutory Rules 1940 No. 176 of the only regulation (viz. reg. 23) under which they can possibly be deemed to have been made. This argument can be put in either of two ways. First, it is said that reg. 2A (2) of Statutory Rules 1940 No. 176 means that prior orders are to remain in force unless inconsistent with some provision of that statutory rule. I have already stated the reasons which appear to me to create difficulties in the way of accepting this interpretation of reg. 2A (2). Secondly, it is contended that, though Statutory Rules 1941 No. 54 omitted reg. 23 (1) from Statutory Rules 1940 No. 176, it immediately inserted a provision which contained everything that was contained in the omitted regulation, so that the law remained the same throughout. The reply to this argument is that the repeal and re-enactment of a

(1) (1930) V.L.R. 153.

provision—whether immediately or after an interval of time—is not the same thing in law as the uninterrupted continuance of a provision. If, for example, a statute were to omit a provision from a Justices Act and to insert in a Police Offences Act a provision identical in terms with the omitted provision, it would be clear that, though in one sense the law had remained unchanged, in another sense the law would certainly have been altered. The Justices Act would have been changed; the Police Offences Act would have been changed; and the provision in the Police Offences Act would be a new provision which had become part of the law only when it was enacted. Is the position different when the re-enacted provision, with or without additions, is, after omission, again inserted in the original statute, or, in this case, in the original statutory rule? It is true that it becomes part of the original statute or rule, but, in the absence of a genuine retrospective clause, only as from the date of the coming into operation of the enactment which omitted and re-inserted the particular provision. From that date, the new provision has effect. After Statutory Rules 1941 No. 54 was made, orders could be made under reg. 2 of that rule which, as from that date, inserted new reg. 23 (1) in Statutory Rules 1940 No. 176. From that date no orders could be made under the repealed reg. 23 (1) of Statutory Rules 1940 No. 176 because it had ceased to exist, and, in the absence of a saving clause, no orders which depended upon it could continue to have effect. The new regulation was not inserted in Statutory Rules 1940 No. 176 as from the making of Statutory Rules 1940 No. 176, but only as from the making of Statutory Rules 1941 No. 54. Order 100 cannot be supported under the new reg. 23 (1), because it was made before the new regulation was in existence. In my opinion the arguments submitted for the appellant upon these points do not establish the proposition that Order 100 was in force at the time when the offences charged were alleged to have been committed.

There is, however, another provision contained in reg. 23 of Statutory Rules 1940 No. 176 which does produce the effect for which the appellant contends. Sub-reg. 5 of that regulation is as follows: "Every order which has been, or is, made under sub-regulation (1) of this regulation (not being an order in respect of specific goods) shall apply in relation to all goods which are declared, whether before or after the making of the order, to be declared goods and in respect of which the declaration is in force." This provision has been contained unchanged in Statutory Rules 1940 No. 176 at all times. Before the original sub-reg. 1 was omitted by Statutory Rules 1941 No. 54 it applied to all orders in fact made

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under that sub-regulation. But it had a further application. When Statutory Rules 1940 No. 176 first came into operation there obviously were no such orders in fact, because orders could not in fact have been made under a sub-regulation which had not come into existence. But reg. 2A (2) of Statutory Rules 1940 No. 176 provided that orders made under repealed regulations should be deemed " to have been made . . . under these Regulations "—i.e., as already explained, under the original sub-reg. 23 (1), which was the only regulation which authorized the making of orders. Thus Order 100, in fact made under a repealed regulation, is deemed to " have been made " under sub-reg. 23 (1) as it originally existed. Sub-reg. 23 (5) therefore comes into operation in relation to Order 100, with the result that that Order applies in relation to the goods in question, namely timber, because timber has been declared to be declared goods and a declaration in respect of timber remains in force by virtue of reg. 2A (2).

Sub-reg. 23 (5) is, I think, a saving clause different in character from reg. 2A (2). The provision that orders shall be deemed to have been made under a regulation does not (for reasons which I have stated) keep orders in existence after the repeal of the regulation. As I have said, in my opinion reg. 2A (2) would have kept them in force, notwithstanding such repeal, if it had provided that they should remain in force. Sub-reg. 23 (5), however, provides that orders which have been made under the regulation shall " apply " to declared goods provided only that the declaration is in force. Except upon the view which I have expressed, I am unable to give meaning to the words " every order which *has been* . . . made " or to the word " apply " used with respect to such orders. Accordingly, in my opinion, Order 100 is still in operation, and it should have been admitted in evidence. This conclusion renders it unnecessary to consider other arguments which were submitted on behalf of the appellant.

The orders nisi should be made absolute with costs and the cases should be remitted to the police magistrate.

RICH J. These appeals by way of orders to review involve questions affecting the construction and operation of certain regulations made under the *National Security Act* 1939-1940. On 20th February 1940 the Prices Commissioner made an order fixing the maximum selling price of timber. The Order, No. 100, was made pursuant to Statutory Rules 1939 No. 110, the *National Security* (*Prices*) *Regulations*. These regulations were repealed on 22nd August 1940 by *National Security* (*Prices*) *Regulations*, 1940 No. 176, which by reg.

2A (2) saved the life of Order 100 by providing that, *inter alia*: "all . . . orders . . . made . . . under the repealed Regulations, which are in force at the commencement of these Regulations, shall, except so far as they are inconsistent with these Regulations, be deemed to have been made . . . under these Regulations." As there was no inconsistency in the Order with these Regulations it remained in force. So far this was, I think, common ground in the argument before us. But at a later date—12th March 1941—Statutory Rules 1940 No. 176 were amended by Statutory Rules 1941 No. 54. And it was suggested that the effect of the amendment is to destroy the basis—Statutory Rules 1940 No. 176—on which Order No. 100 rests. But the new regulations do not purport to repeal the old regulations, much less the orders made under them. Such of the new rules as are relevant are amendments or additions only and do not purport to wipe out of existence the old regulations and the orders made under them. In drafting statutes or rules the word "deemed" is used to provide an artificial definition which for example in the present case treats an order made under an earlier regulation as having been made under a later regulation. This artificial "deeming" depends for its existence and validity on the condition that the order is not inconsistent with the rules in the later regulations. In the present case that condition is fulfilled and the order in question was not repealed: Cf. *International Hotel Ltd.* v. *McNally* (1).

In my opinion the orders to review should be made absolute.

STARKE J. The respondent was charged upon three informations that it did, contrary to the *National Security* (*Prices*) *Regulations*, sell declared goods at a price being a greater price than the maximum price fixed in relation thereto under the said Regulations for the sale of those goods. The informations were based upon the *National Security Act* 1939-1940, sec. 10, and reg. 29 of the *National Security* (*Prices*) *Regulations* (No. 176 of 1940).

In February 1940 a Prices Order No. 100 was made pursuant to the provision of the *National Security* (*Prices*) *Regulations* (No. 110 of 1939) which fixed and declared the maximum prices at which goods declared under the Regulations might be sold. But the Regulations No. 110 of 1939 were repealed in August 1940 by the *National Security* (*Prices*) *Regulations* (No. 176 of 1940). But these latter Regulations provided:—"All declarations, orders . . . made, published or given under the repealed Regulations, which are in force at the commencement of these Regulations, shall, except

(1) (1940) 64 C.L.R. 24, at p. 28.

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so far as they are inconsistent with these Regulations, be deemed to have been made, published or given under these Regulations, and any reference in any such declaration, order . . . to any regulation repealed by these Regulations shall be construed as a reference to the corresponding provision of these Regulations": See reg. 2A (2).

It is conceded that Prices Order No. 100 was preserved by this regulation. But only because the latter Regulations (No. 176 of 1940) had a foundation upon which the Order could rest, namely, the authority given by reg. 23 (1) to the Commonwealth Prices Commissioner to fix and declare by order the maximum price at which any declared goods might be sold: See *Craven* v. *City of Richmond* (1).

In March of 1941 reg. 23 was amended by Regulations (No. 54 of 1941) omitting the relevant sub-reg. 1 and inserting in its stead a sub-regulation, which, so far as material to the present case, is in identical words as follows: "The Commissioner may, with respect to any declared goods, from time to time, in his absolute discretion, by order published in the *Gazette*—(*a*) fix and declare the maximum price at which any such goods may be sold generally or in any part of Australia or in any proclaimed area."

Accordingly, there was no moment of time at which the authority to fix and declare the maximum price at which any declared goods might be sold was not contained in the *National Security* (*Prices*) *Regulations* (No. 176 of 1940). So if we must seek a foundation for the Prices Order No. 100 in the *National Security* (*Prices*) *Regulations* (No. 176 of 1940) in such a regulation as that contained in reg. 23 (1), then that foundation is there and has never been absent. Consistently, therefore, with the decision in *Craven's Case* (1) the Prices Order No. 100 in this case did not cease to have validity because of the omission of reg. 23 (1), for an identical provision was inserted in its stead at the same moment of time.

Apart from this view, I should think that reg. 2A (2) of the *National Security* (*Prices*) *Regulations* (No. 176 of 1940), before set out, is a substantive source of authority for Prices Order No. 100. It declares that the orders made in force at the commencement of these Regulations shall be deemed to have been made under them except so far as they are inconsistent therewith. The test of invalidity is inconsistency with the Regulations No. 176 of 1940, which clearly never existed in the present case. In *Craven's Case* (1), the words making inconsistency the test of invalidity were not

(1) (1930) V.L.R. 153.

present. *Craven's Case* (1) may perhaps be thus distinguished, but further consideration of it, on my part, is unnecessary.

An ingenious argument has been presented to the Court, but that is all that can be said in its favour. It fails and the order to review should be made absolute in respect of each of the three informations, which should be remitted to the magistrate to be dealt with according to law.

McTIERNAN J. The appellant laid three informations against the respondent, each of which charged that the respondent contravened reg. 29 of the *National Security* (*Prices*) *Regulations*, in one case on 27th March 1941, and in the other cases on 23rd April 1941 and 1st May 1941, by selling "declared goods" at a price greater than the maximum price fixed in relation to the goods under the Regulations. The three informations were heard together and dismissed. The informations were laid under the Regulations contained in the Statutory Rules 1940 No. 176 as amended by Statutory Rules 1940 Nos. 219 and 294 and Statutory Rules 1941 No. 54. The informations were dismissed on the ground that upon the making of Statutory Rules 1941 No. 54 the Order of the Commonwealth Prices Commissioner fixing the maximum price of the goods mentioned in the informations ceased to have any operation. The Order was made pursuant to the *National Security* (*Prices*) *Regulations* which were in force when the Statutory Rules 1940 No. 176 was made. These Rules repealed all the Regulations which were then in force. Reg. 2A (2) saved all the declarations of goods and orders fixing prices made under the repealed Regulations. It said that all such declarations and orders as were in force at the commencement of "these Regulations" shall except so far as they are inconsistent with them be deemed to have been made under "these Regulations." Reg. 22 of Statutory Rules 1940 No. 176 gives power to the Minister to declare goods and services, and reg. 23 gives power to the Commissioner to fix and declare the maximum price for declared goods and services. Statutory Rules 1941 No. 54 were made on 12th March 1941. Reg. 1 amended reg. 22 by inserting at the end of sub-reg. 3 the words "or in respect of any person or body or association of persons." This amendment enlarged the power of the Minister under reg. 22. Reg. 2 of Statutory Rules 1941 No. 54 begins with this provision: "Regulation 23 of the *National Security* (*Prices*) *Regulations* is amended by omitting sub-regulations (1) and (2) and inserting in their stead the following sub-regulations." Sub-reg. 1 gives power to the Commissioner to

(1) (1930) V.L.R. 153.

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fix and declare maximum prices of declared goods, and sub-reg. 2 gave similar powers to him with respect to declared services. The sub-regulations which are inserted by reg. 2 instead of sub-regs. 1 and 2 give the Commissioner powers similar to those which he had under the repealed sub-regulations to fix and declare the maximum price of declared goods and services and additional powers corresponding to those given to the Minister by reg. 1 with respect to goods or services sold or supplied by any person or body or association of persons.

The ground upon which it is contended that the order of the Commissioner fixing the maximum price of the declared goods mentioned in each information ceased to operate before the date of any of the alleged offences is that reg. 2 of the Statutory Rules 1941 No. 54 repealed sub-regs. 1 and 2 of reg. 23 of Statutory Rules 1940 No. 176. Reliance is placed on the principle that an Act which repeals another Act, in the absence of provisions to the contrary, obliterates it completely and the repealed Act must be considered as a law that never existed except as to matters and transactions which were past and closed: See *Kay* v. *Goodwin* (1); *Maxwell, Interpretation of Statutes*, 3rd ed. (1896), p. 585. The Commissioner's Order depended, so it is contended, for its efficacy on sub-regs. 1 and 2 of reg. 23 of Statutory Rules 1940 No. 176, and as no provision saving the orders depending on them was inserted in Statutory Rules 1941 No. 54, the Order was obliterated by the repeal of the sub-regulations.

The question to be decided at the outset is whether reg. 2 of Statutory Rules 1941 No. 54 is a repealing provision. Like reg. 1 of these Statutory Rules it professes to be an amending provision. The question turns upon the construction of Statutory Rules 1941 No. 54. The operative words of reg. 2 are "is amended." It is not to be presumed from the words of reg. 1 that as regards declarations made by the Minister it was intended that there should be a *tabula rasa*. The words of that regulation show that it was intended merely to make an amendment of the existing Regulations and thereby to enlarge the Minister's powers. The intention of reg. 2 is clearly to amend the existing Regulations in order to make a corresponding addition to the powers of the Commissioner. The sub-regulations which are inserted continue the powers which the Commissioner had under the omitted sub-regulations and adopt without any material variation the language of the sub-regulations which they replace. While continuing the powers which the Commissioner had under the omitted sub-regulations they arm him

(1) (1830) 6 Bing. 576 [130 E.R. 1403].

with the new power which is the counterpart of the new power with which reg. 1 armed the Minister. In my opinion the contention that reg. 2 operates as a repealing provision is incorrect. In my opinion it is, like reg. 1, an amending provision, and it was not necessary to make any provision saving the orders of the Commissioner which depended for their efficacy on the amended Regulations. In the view which I have taken it is unnecessary to decide whether the order is saved by any provision in the *Acts Interpretation Act* or by recourse to the principles which were applied in *In re Player*; *Ex parte Harvey* [*No.* 1] (1). There *Matthew* J., with whose opinion *Cave* and *Wills* JJ. concurred, said of a section that was substituted for and was identical with a section in an earlier Act: —" It has been over and over again successfully contended that the later Act in such a case is to be read with the earlier; and not to do so, in fact, would result in there being a period when neither Act applied. It is plain, therefore, that the later Act is in substitution for the earlier, and, except in so far as it varies the former, is retrospective. The language of the Act also clearly shows that the new section takes up the old, as it were, and includes all settlements " (2). This case was followed by *Esher* M.R. and *Lopes* L.J. in *Ex parte Todd*; *In re Ashcroft* (3).

In my opinion the appeal should be allowed and the matters be remitted to the Court of Petty Sessions.

WILLIAMS J. The respondent company to this appeal was prosecuted summarily in the Court of Petty Sessions holden at Melbourne upon three informations each dated 26th May 1942 alleging that it had sold certain imported timber on 27th March, 23rd April and 1st May 1941 at greater prices than those fixed by regulations made under the provisions of the *National Security Act* 1939-1940 shortly entitled the *National Security* (*Prices*) *Regulations*.

When the informations came on to be heard before the magistrate on 18th June 1942, the prosecution sought to tender Prices Order No. 100 hereinafter mentioned in order to establish the maximum prices at which the respondent could lawfully have sold the timber, but the magistrate rejected the tender on the ground that the Order had ceased to be operative on 12th March 1941. He held, therefore, that there were no maximum prices fixed by the Regulations at the date of the alleged overcharges and dismissed the informations.

The question for determination on this appeal is whether the magistrate was right in rejecting the tender of the Prices Order.

(1) (1885) 54 L.J. Q.B. 553. (2) (1885) 54 L.J. Q.B., at p. 554.
(3) (1887) 19 Q.B.D. 186.

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The first of these sets of Regulations, contained in Statutory Rules 1939 No. 110, were made on 28th September 1939. They provided for the appointment of a Commonwealth Prices Commissioner and Deputy Prices Commissioners in each State and in each Territory being part of the Commonwealth. Reg. 17 authorized the Minister by notice in the *Gazette* to declare any goods to be declared goods for the purposes of the Regulations. Reg. 18 provided that the Commissioner might from time to time, in his absolute discretion, by order published in the *Gazette*, fix and declare the maximum price at which any declared goods might be sold. By Declaration No. 3 made on 6th October 1939 the Minister declared certain goods, including timber dressed or undressed including shooks, to be declared goods for the purposes of the Regulations. On 20th February 1940 the Commonwealth Prices Commissioner, "in pursuance of the powers conferred upon me by the *National Security* (*Prices*) *Regulations*" made Prices Regulation Order No. 100, fixing and declaring the maximum price at which goods declared by the Minister by notice in the *Gazette* to be declared goods for the purposes of the Regulations might be sold in Australia.

At the dates of the Declaration and Order, the Regulations contained in Statutory Rules 1939 No. 110, amended in certain immaterial respects, were still in force, and they remained in force until 22nd August 1940, when a fresh set of *National Security* (*Prices*) *Regulations* comprised in Statutory Rules 1940 No. 176 were enacted in their stead. Reg. 2 of these Regulations repealed Statutory Rules 1939 No. 110 as amended by Statutory Rules 1939 Nos. 114, 119, 127, 152 and 166, and 1940 Nos. 12, 33 and 112. The new Regulations contained similar provisions for the appointment of a Commonwealth Prices Commissioner and Deputy Commissioners to those contained in the repealed Regulations. Reg. 2A provided that:—"All declarations, orders, . . . made, published . . . under the repealed Regulations, which are in force at the commencement of these Regulations, shall, except so far as they are inconsistent with these Regulations, be deemed to have been made . . . under these Regulations, and any reference in any such . . . order . . . to any regulation repealed by these Regulations shall be construed as a reference to the corresponding provision of these Regulations." Reg. 22 provided that: (1) The Minister might by notice in the *Gazette*, declare any goods to be declared goods for the purposes of these Regulations; (2) The Minister might, by notice in the *Gazette*, declare any service to be a declared service for the purpose of these Regulations; (3) Any declaration by the Minister in pursuance of this regulation might be made generally or

in respect of any part of Australia or any proclaimed area ; (4) Any such notice might, by notice in the *Gazette*, be amended, varied or revoked by the Minister. Reg. 23 empowered the Commissioner to fix maximum prices for goods or services declared by the Minister to be declared goods or services for the purposes of the Regulations. Reg. 23 (1) (*a*) (i) provided that the Commissioner might, with respect to any declared goods, from time to time, in his absolute discretion, by order published in the *Gazette*, fix and declare the maximum price at which any such goods might be sold generally or in any part of Australia or in any proclaimed area ; 23 (3), that the Commissioner might at any time by order published in the *Gazette* amend, vary or revoke any order made in pursuance of this regulation ; 23 (4), that every order made under this regulation should take effect *upon the date specified in the order* or, if no date is so specified, upon the date of publication of the *Gazette* containing it ; 23 (5), that *every order which has been*, or is, made under sub-reg. 1 of this regulation (not being an order in respect of specific goods) should apply in relation to all goods which are declared, whether *before* or after the making of the order, to be declared goods and in respect of which the declaration is in force. (The italics are mine.) As there is nothing in Declaration No. 3 and Prices Order No. 100 inconsistent with the powers of the Minister and Commissioner to declare goods and fix maximum prices for such goods under regs. 22 and 23, the Declaration and Order, by virtue of reg. 2A, must be deemed to have been made by the Minister and Commissioner under these Regulations, and to be subject, in the case of the Declaration, to the powers of the Minister under reg. 22 ; and, in the case of the Order, to the powers of the Commissioner under reg. 23 (*Craven* v. *City of Richmond* (1) ).

Statutory Rules 1940 No. 176 (after having been amended by Statutory Rules 1940 Nos. 219 and 294 in certain immaterial respects) were further amended on 12th March 1941 by Statutory Rules 1941 No. 54, which provided that reg. 22 should be amended by inserting at the end of sub-reg. 3 the words " or in respect of any person or body or association of persons " and that reg. 23 should be amended by omitting sub-regs. 1 and 2 and inserting in their stead four sub-regulations, which included in 23 (1) (*a*) exactly the same provision as that previously included in 23 (1) (*a*) (i). The omitted sub-regulations had conferred a general power upon the Commissioner, by order published in the *Gazette*, to fix maximum prices for the sale of goods or the supply of services generally or in any part of Australia or in any proclaimed area, and had then proceeded to

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enumerate particular methods by which such prices could be fixed. All that the new sub-regulations did was to add a further general power enabling the Commissioner by such an order to declare that the maximum prices for the sale of goods or the supply of services by any person or body or association of persons should be such as was fixed by notice in writing to that person or body or association of persons, and to preface the introduction of the particular methods by a statement that they were not to limit the generality of the Commissioner's powers. The four new sub-regulations were, therefore, in the main, an enlargement of the powers contained in the old sub-regs. 1 and 2 of reg. 23 to correspond with the enlarged powers of the Minister under the amendment made to reg. 22. Sub-regs. 3, 4 and 5 of reg. 23 remained unaltered.

The general principle is plain that when a statute or part of a statute is repealed it must be considered, except as to transactions past and closed, as if it had never existed (*Surtees* v. *Ellison* (1); *In re Mexican and South American Co.* (2)). In *Watson* v. *Winch* (3) it was held that, where by-laws have been made under powers conferred by a section of an Act, the repeal of the section abrogates the by-laws unless they are preserved by the repealing Act by means of a saving clause or otherwise. But this must not be taken to be a rule of law applicable in every case. Parliament may not intend that the repeal of the section should also operate as an implied repeal of the by-laws made under it. As a general rule the repeal of the section would no doubt have this effect. But a different result would follow where, from other sections which were not repealed, it was manifest that all that Parliament intended to do was to revoke the power to make further by-laws, leaving the existing by-laws in force, subject to their liability to be amended, varied or revoked under powers conferred by other sections contained in the Act at the time of the repeal or introduced into it by amendment at that time. In a case where an Act such as the *National Security Act* consists of a few widely drawn sections broadly defining the purposes for which it was passed, but the details, upon which its practical operation depend, are intended to be embodied in by-laws to be made by some official or body under powers conferred for that purpose by a section of the Act, it would be an incongruous result if the repeal of this section, whilst the rest of the Act remained unrepealed, should necessarily have such an effect. If the Act merely gave an express power to make by-laws, leaving the power to amend or

(1) (1829) 9 B. & C. 750 [109 E.R. 278].
(2) (1859) 4 DeG. & J. 544, at p. 557 [45 E.R. 211, at p. 216].
(3) (1916) 1 K.B. 688.

revoke them to be annexed to the power by a general provision such as that contained in the *Acts Interpretation Act* 1901-1941, sec. 33 (3), (see also the *National Security Act*, sec. 5 (6) ) so that the repeal of the section would repeal the power to amend or revoke the existing by-laws, it would in most instances be clear that the repeal of the section was intended to abrogate the existing by-laws and not to leave them in an immutable condition. But where the repeal of the power to make the by-laws does not involve the destruction of the power to amend or revoke them, the intention of the legislature would be more equivocal and more open to solution from other circumstances. In the present case the Minister's existing powers under reg. 22 were not revoked but were amended and enlarged by the addition of the words already mentioned. It would have been possible for a corresponding amendment and enlargement of the Commissioner's powers under reg. 23 to have been made by enacting that the necessary words should be added, but, as the amendments to this regulation were more comprehensive than those made to reg. 22, the more convenient machinery was adopted of omitting the sub-regulations. In law this amounted to a repeal of the sub-regulations and their contemporaneous re-enactment in the amended form. But, as it is clear that the declarations made by the Minister under reg. 22 were not revoked by the amendment of that regulation, it would be unlikely that it was intended to revoke the orders made by the Commissioner under reg. 23 for the very purpose of implementing them. The new provisions are called amendments. The retention of the words which I have italicized in reg. 23 (4) and (5) indicates that existing declarations and orders were intended to continue in force. Prices Order No. 100 contains a definition clause defining " Regulations " to mean " the *National Security* (*Prices*) *Regulations* " and to include " any amendments thereof," so that the Order is intended to operate under the Regulations as amended from time to time. Its provisions are entirely consistent with the exercise of the powers still vested in the Minister and the Commissioner after 12th March 1941.

In my opinion, the Order was not revoked and the appeal should be allowed.

*Orders absolute with costs. Case remitted to magistrate.*

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

Solicitors for the respondent, *Pavey, Wilson & Cohen.*

B. B. M.