[HIGH COURT OF AUSTRALIA.]

PEACOCK . . . . . APPLICANT;

AND

NEWTOWN MARRICKVILLE AND GENERAL CO-OPERATIVE BUILDING SOCIETY No. 4 LIMITED . . . . . RESPONDENT.

H. C. OF A. 1943.

SYDNEY, *May* 3, 4.

MELBOURNE, *June* 22.

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

Federal Judiciary—Judicial power—National Security (Contracts Adjustment) Regulations—Investing State Courts with Federal jurisdiction—Validity—Power to invest by regulation—Whether confined to limits of State court's jurisdiction—The Constitution (63 & 64 *Vict. c.* 12), *secs.* 51 (*vi.*), 77 (*iii.*)—*Judiciary Act* 1903-1940 (*No.* 6 *of* 1903—*No.* 50 *of* 1940), *secs.* 39 (2), 40, 41—*National Security Act* 1939-1940 (*No.* 15 *of* 1939—*No.* 44 *of* 1940), *sec.* 5 — *National Security (Contracts Adjustment) Regulations* (S.R. 1942 *No.* 65—1943 *No.* 88), *regs.* 3, 4, 4A, 5, 9, 9A, 20.

Constitutional Law—Defence—National Security (Contracts Adjustment) Regulations—Whether within power—The Constitution (63 & 64 *Vict. c.* 12), *sec.* 51 (*vi.*)—*National Security (Contracts Adjustment) Regulations* (*S.R.* 1942 *No.* 65—1943 *No.* 88).

The *National Security (Contracts Adjustment) Regulations* are invalid as the powers which they purport to confer upon State courts are judicial in their nature and the *National Security Act* 1939-1940* does not authorize the making of regulations investing State courts with Federal jurisdiction. *Per Latham* C.J., *Starke* and *McTiernan* JJ.: Parliament can authorize the making of regulations for investing State courts with Federal jurisdiction. *Per Latham* C.J. and *McTiernan* J.: In investing a State court with Federal jurisdiction Parliament is not confined to the limits of that court's jurisdiction under State law.

Le Mesurier v. *Connor*, (1929) 42 C.L.R. 481, considered. *Moses* v. *Parker*; *Ex parte Moses*, (1896) A.C. 245, distinguished.

Per Latham C.J., *Rich*, *McTiernan* and *Williams* JJ.: The *National Security (Contracts Adjustment) Regulations* can be supported under the defence power.

* Amended since the judgment in this case: see *National Security Act* 1943 (No. 38 of 1943).

H. C. OF A. 1943.

PEACOCK v. NEWTOWN MARRICKVILLE AND GENERAL CO-OPERATIVE BUILDING SOCIETY NO. 4 LTD.

CAUSE removed to the High Court under sec. 40 of the *Judiciary Act* 1903-1940.

An application under the *National Security* (*Contracts Adjustment*) *Regulations* was made to the District Court of the Metropolitan District holden at Sydney by Clifford Edwin Peacock that interest payable under a memorandum of mortgage given by him to Newtown Marrickville and General Co-operative Building Society No. 4 Ltd., the respondent to the application, be reduced for such period and subject to such conditions as the Court thought fit.

In an affidavit the applicant stated that the mortgage secured the payment by him of the sum of one thousand pounds (£1,000) and that interest thereunder was assessed at the rate of five and one-half pounds per cent per annum. He enlisted for active service on 11th May 1942 and received pay and allowances appropriate to the rank of private. On 5th August 1942 he was promoted to the rank of sergeant, whereupon his army pay was increased to £4 0s. 6d. per week, out of which he made an allotment to his wife. His military pay was his sole source of income. Prior to his enlistment he carried on the occupation of a builder, his income from all sources then being not less than £12 per week. Owing to the diminution in his income he could not afford to reside in the premises the subject of the mortgage, and he let the same furnished at the rent of £3 10s. per week.

The application came on for hearing before a judge of the District Court on 4th March 1943 and, after being part heard, was stood over generally to enable the applicant to submit to the Court further evidence in support of his application.

The further evidence not having been submitted the respondent society, in April 1943, contending that the *National Security* (*Contracts Adjustment*) *Regulations* were beyond the constitutional powers of the Commonwealth, obtained from the High Court an order under sec. 40 of the *Judiciary Act* 1903-1940 removing the application into the High Court on the ground that it involved the interpretation of the Constitution.

The Commonwealth was granted leave to intervene.

The relevant statutory provisions and regulations are sufficiently set forth in the judgments hereunder.

Mason K.C. (with him *Holmes*), for the respondent society. The power conferred by sec. 51 (vi.) of the Constitution to make laws with respect to the defence of the Commonwealth and of the several States and the control of the forces to execute and maintain the laws of the Commonwealth does not enable the Parliament to

empower the Governor-General to authorize State Courts to exercise jurisdiction, as is purported to have been done by sec. 5 of the *National Security Act* 1939-1940, or, alternatively, by the *National Security* (*Contracts Adjustment*) *Regulations*. The Governor-General was not enabled by the defence power to make those Regulations. The subject matter of the Regulations is a domestic matter for the States and is not related to the prosecution of the war. The defence power is subject to the limitations of the Constitution. The power conferred upon the Commonwealth Parliament by sec. 77 (iii.) of the Constitution to make laws investing any court of a State with Federal jurisdiction does not empower the Governor-General to authorize State courts to exercise jurisdiction, as sec. 5 of the *National Security Act*, or, alternatively, the *National Security* (*Contracts Adjustment*) *Regulations* purport to do. The defence power does not override sec. 77 (iii.). Economic financial disturbance as a result of the war is not the proper subject for Federal legislation under the defence power. Reg. 4 does not come within the defence power merely because the tribunal has to be satisfied with the inequitableness or hardship affecting one of the parties. The fact that one of the parties thereto has been adversely affected financially does not show that the contract or mortgage has become or is likely to become impossible or inequitable or unduly onerous. In order to come within the defence power the subject matter must in some way be directly related to the war effort (*Victoria* v. *The Commonwealth* (1)). The adjustment of a contract or mortgage between civilians cannot be regarded as part and parcel of the war effort and does not come within the defence power.

LATHAM C.J. The Court does not propose to call upon other counsel in relation to the objection that these Regulations cannot be supported under the defence power.

Mason K.C. The Governor-General is not enabled by the powers conferred by sec. 51 (vi.) and sec. 77 (iii.) of the Constitution to :—(*a*) invest the inferior courts of a State with jurisdiction to adjudicate with respect to any subject matter other than a subject matter over which those courts have judicial powers under the laws for the time being of the State, e.g., investing jurisdiction with respect to equitable matters upon State courts not empowered by State law to deal therewith ; or (*b*) regulate the procedure and vary the limits of jurisdiction with respect to amount and locality of the inferior courts of a State, e.g., in New South Wales, a District Court or a

(1) (1942) 66 C.L.R. 488.

H. C. OF A. 1943.

PEACOCK v. NEWTOWN MARRICKVILLE AND GENERAL CO-OPERATIVE BUILDING SOCIETY NO. 4 LTD.

Small Debts Court; or (*c*) prescribe that State courts shall perform administrative duties. The Regulations purport to confer a jurisdiction not limited in any way such as the limitation suggested by sec. 39 (2) of the *Judiciary Act*. It is not a failure to define a court as in *Le Mesurier* v. *Connor* (1), but the definition of the court by regulations rather than by an Act of Parliament. To adjudicate and pronounce judgment upon the question whether in all the circumstances a certain contract, agreement or mortgage is inequitable or unduly onerous is a judicial function. It is not possible by regulation to exercise the power conferred by sec. 77 (iii.). Even if it be possible so to do, there has not been a correct exercise of the power, because the State courts must be taken as found (*Federated Sawmill, Timberyard and General Woodworkers' Employees' Association* (*Adelaide Branch*) v. *Alexander* (2); *Le Mesurier* v. *Connor* (3)). Whenever jurisdiction is given to State courts the validity of the legislation depends upon sec. 77 (iii.), and not upon anything implied in sec. 51 (*Le Mesurier* v. *Connor* (4)). The inferior courts of New South Wales have not been taken as found. In addition to subject matter, the Regulations vary the limits of the jurisdiction of those courts with respect to amount and locality. In giving them an extended jurisdiction and prescribing a special procedure the whole structure of those courts has been altered. An analysis of the position seems to lead to the conclusion that the tribunals set up by or under the Regulations are not courts, but are Federal administrative bodies. What, however, was contemplated was judicial bodies and not purely administrative bodies. The Regulations are acts of the executive similar to the proclamation under consideration in *Le Mesurier* v. *Connor* (1). The investing of State courts with Federal jurisdiction under sec. 77 (iii.) must be done by an Act of the Commonwealth Parliament and not otherwise. There is no such Act which authorizes the matters contained in the *National Security* (*Contracts Adjustment*) *Regulations*. The *National Security Act* is silent on the point. The power to make regulations conferred upon the Governor-General by sec. 5 of that Act does not enable him to authorize State courts to exercise jurisdiction, as the *National Security* (*Contracts Adjustment*) *Regulations* purport to do.

Watt K.C. (with him *Isaacs*), for the applicant. Assuming that the various matters contained in the Regulations are matters of judicial power, the question now before the Court is distinguishable

(1) (1929) 42 C.L.R. 481.
(2) (1912) 15 C.L.R. 308.
(3) (1929) 42 C.L.R., at p. 498.
(4) (1929) 42 C.L.R., at pp. 495, 496, 499, 500.

from the matter dealt with in *Le Mesurier* v. *Connor* (1), e.g., in these Regulations there is a precise definition of the courts, and there is also a precise definition of the conferred or invested jurisdiction. The intention as shown by the Constitution is that the legislative power of the Commonwealth shall be used and the vesting of the judicial power shall come into operation as the occasion therefor arises. The power given by sec. 77 (iii.) is a plenary power to make laws investing a State court with Federal jurisdiction. Parliament has an unfettered discretion as to the mode in which it exercises that plenary power. One of the recognized and ordinary methods of law making is by subsidiary legislation such as regulations (*Hodge* v. *The Queen* (2); *R.* v. *Burah* (3); *Powell* v. *Appollo Candle Co. Ltd.* (4); *Le Mesurier* v. *Connor* (5)). The power so given is the power to "make laws investing", and not expressly and *simpliciter* "to invest." A regulation made and promulgated by the executive, which is an integral part of Parliament, in order to effectuate the investiture of a State court with Federal jurisdiction, has the force of a law, and is a law of Parliament. The later expositions with regard to the discretionary powers of Parliament and Parliament's powers of delegation contained in *Victorian Stevedoring and General Contracting Co. Pty. Ltd. and Meakes* v. *Dignan* (6) and *Wishart* v. *Fraser* (7) cast doubts upon the correctness of the majority judgment in *Le Mesurier* v. *Connor* (1). The Regulations are not an exercise of judicial power, but are administrative provisions made for the purpose of carrying out the desire of the Executive to deal with the matters mentioned in sec. 5 of the *National Security Act*. They are provisions in respect of matters prescribed or necessary or convenient to be prescribed for the more effectual prosecution of the war. The Regulations may be separate and apart altogether from sec. 77 (iii.). They contain powers to inquire, to deal with matters *inter partes*, and in one case to make an order, but there is an entire absence of any provision for enforcement. Under the defence power, at least, the Commonwealth Parliament can impose any non-judicial functions upon a State court (*Victorian Stevedoring and General Contracting Co. Pty. Ltd.* v. *Dignan* (8); *Shell Co. of Australia Ltd.* v. *Federal Commissioner of Taxation* (9)). A convincing distinction within the meaning of the last-mentioned case (10) is that a State court exercising State jurisdiction is a court, but a State court exercising

(1) (1929) 42 C.L.R. 481.
(2) (1883) 9 App. Cas. 117.
(3) (1878) 3 App. Cas. 889.
(4) (1885) 10 App. Cas. 282.
(5) (1929) 42 C.L.R., at pp. 499, 500.
(6) (1931) 46 C.L.R. 73.
(7) (1941) 64 C.L.R. 470.
(8) (1931) 46 C.L.R., at p. 99.
(9) (1930) 44 C.L.R. 530, at pp. 535, 536, 540, 543; (1931) A.C. 275, at pp. 288, 289, 293, 296.
(10) (1930) 44 C.L.R., at p. 543; (1931) A.C., at p. 296.

H. C. OF A. 1943.

PEACOCK v. NEWTOWN MARRICKVILLE AND GENERAL CO-OPERATIVE BUILDING SOCIETY NO. 4 LTD.

special powers under these Regulations is not necessarily a court for the purpose of that exercise. The officials of State courts are not necessarily called upon to perform Commonwealth duties and functions as such officials, but are so called upon as citizens of the Commonwealth competent for the particular purpose. For the purpose of these Regulations, and as shown more particularly by reg. 9, the State courts are not courts " in the strict sense of exercising judicial power," but are " tribunals with many of the trappings of a court " (*Shell Co. of Australia Ltd.* v. *Federal Commissioner of Taxation* (1) ; *Moses* v. *Parker* ; *Ex parte Moses* (2)). The Regulations do not have the effect of altering the structure of the State courts. The State limitations remain unaffected.

Weston K.C. (with him *Sugerman*), for the Commonwealth (intervening). The distinction between *Le Mesurier* v. *Connor* (3) and this case is that in that case there was legislation, but which courts were invested were ascertainable only by reference to the executive act, whereas in this case there is a regulation which identifies the courts and vests the jurisdiction. Those Regulations are legislation, therefore all the requirements of *Le Mesurier* v. *Connor* (3) are satisfied. There is nothing in the majority judgment in that case which opposes the view that when the Commonwealth Parliament invests a court with Federal jurisdiction it can alter that court's procedure and enlarge its jurisdiction *qua* area. The Regulations do not in any way affect the structure or organization of any court. All that is required for the purpose of exercising the power under sec. 77 (iii.) is (*a*) that the matter is one within sec. 75 or sec. 76, and (*b*) the existence of a court of a State. Those requirements having been satisfied, Parliament may invest that court with the whole Federal jurisdiction under those sections. Parliament can take a State court and organization and invest it with jurisdiction without regard to the required subject matter or persons. No distinction can be drawn between one sort of limitation and any other (*Lorenzo* v. *Carey* (4) ; *Adams* v. *Chas. S. Watson Pty. Ltd.* (5)). The making by an invested State court of an order under the Regulations is not a judicial act, and therefore Federal jurisdiction, in the sense of judicial judgment, is not conferred, or, in other words, there is not any investiture of Federal jurisdiction under sec. 77 (iii.). It is not a judicial act because the court acting under the Regulations does not apply law to facts in order

(1) (1930) 44 C.L.R., at p. 543; (1931) A.C., at p. 296.
(2) (1896) A.C. 245.
(3) (1929) 42 C.L.R. 481.
(4) (1921) 29 C.L.R. 243, at p. 252.
(5) (1938) 60 C.L.R. 545, at pp. 553-555.

to ascertain and declare existing rights, duties or obligations; the order made by the court is not conclusive; the order does not create remedial rights but only varies or alters antecedent rights; the order is not enforceable by the court; the provisions of reg. 9 read in the light of *Moses* v. *Parker*; *Ex parte Moses* (1), render it non-judicial. If Parliament passed an Act providing that a court of law might set aside a contract which is too hard in its terms, that is not a judicial power, it is a rule of law. Non-judicial functions do not become judicial merely because they are discharged by a judge (*Waterside Workers' Federation of Australia* v. *J. W. Alexander Ltd.* (2); *Shell Co. of Australia Ltd.* v. *Federal Commissioner of Taxation* (3)). The ordinary incidence of the judicial power is that the court merely applies existing law to existing facts; declares what are termed the damages or remedial rights of the parties; translates the antecedent rights; and makes a judgment or order and, ordinarily, can itself enforce that order. There is nothing to prevent the Commonwealth Parliament from choosing a State instrumentality, e.g. a State court or a judge thereof, for the discharge of a Commonwealth non-judicial function. The power can be given to a State judge as if he were a private citizen and if it interferes with the conduct of his ordinary duties *Amalgamated Society of Engineers* v. *Adelaide Steamship Co. Ltd.* (4) provides a complete answer. The vesting of this jurisdiction aids defence. The matter was discussed at some length in *R.* v. *Federal Court of Bankruptcy*; *Ex parte Lowenstein* (5). In time of war it is definitely within the defence power to choose the persons regarded as the most proper and competent persons to perform that duty to the Commonwealth as distinct from the States. The duty imposed upon a State officer in relation to defence is a duty imposed in one sense upon a citizen of the Commonwealth. It is doubted whether *Silk Bros Pty. Ltd.* v. *State Electricity Commission of Victoria* (6) decides this precise point or is applicable. The Court should adopt a liberal view when construing sec. 5 of the *National Security Act* (*Victorian Stevedoring and General Contracting Co. Pty. Ltd. and Meakes* v. *Dignan* (7); *Ex parte Walsh* (8); *Reference re Regulations re Chemicals* (9)). By sec. 5 of that Act Parliament, in effect, authorized the Governor-General to exercise the whole of its legislative power which conduced to defence. Sec. 77 (iii.) may be necessary in times

(1) (1896) A.C. 245.
(2) (1918) 25 C.L.R. 434.
(3) (1930) 44 C.L.R., at p. 543; (1931) A.C., at p. 296.
(4) (1920) 28 C.L.R. 129.
(5) (1938) 59 C.L.R. 556, at pp. 565-567, 576, 577.
(6) *Ante*, p. 1.
(7) (1931) 46 C.L.R., at p. 99.
(8) (1942) 42 S.R. (N.S.W.) 125; 59 W.N. 115.
(9) (1943) 1 D.L.R. 248, at pp. 255, 271.

H. C. OF A. 1943.

PEACOCK v. NEWTOWN MARRICKVILLE AND GENERAL CO-OPERATIVE BUILDING SOCIETY NO. 4 LTD.

of peace for the purpose of investing State courts but in times of war this can be done under the sole authority of sec. 51 (vi.). Under the defence power Parliament can provide means for re-forming contracts and it is at liberty to determine who shall re-form them. Reg. 4A is not restricted to an obligation to pay interest. In any event the transaction comes within reg. 4.

Mason K.C., in reply. The courts mentioned in the Regulations are courts in the strict sense. Except that they are not bound by the ordinary rules of evidence, they have all the attributes of courts. The Constitution does not confer a power to call upon State courts to do something of an administrative nature. The conferring of judicial power upon State courts must be done by an Act of the Commonwealth Parliament.

Cur. adv. vult.

June 22.

The following written judgments were delivered :—

LATHAM C.J. These proceedings were initiated as an application in a District Court in New South Wales for reduction of interest payable under a mortgage of land by C. E. Peacock to the Newtown Marrickville and General Co-operative Building Society No. 4 Ltd. The application was made under the *National Security* (*Contracts Adjustment*) *Regulations*, Statutory Rules 1942 No. 65 as subsequently amended. The building society contended that the Regulations were beyond the constitutional power of the Commonwealth and, upon application to the Full Court of this Court, an order was made that, as it appeared that the application was a cause involving the interpretation of the Constitution of the Commonwealth, it should be removed into the High Court:—*Judiciary Act* 1903-1940, sec. 40.

Reg. 4 of the *Contracts Adjustment Regulations* is as follows :—

"4. Where a tribunal is satisfied, on application by any person, that, by reason of circumstances attributable to the war or the operation of any regulation made under the *National Security Act* 1939 or under that Act as subsequently amended, the performance, or further performance, of a contract or agreement to which that person is a party, in accordance with the terms thereof, has become or is likely to become impossible or, so far as the applicant is concerned, has become or is likely to become inequitable or unduly onerous, the tribunal may make an order cancelling the contract or agreement or may make such order as it thinks just varying the terms of the contract or agreement, or may provide for the repayment, in whole or in part, of any amount paid in pursuance of the contract or agreement."

Statutory Rules 1942 No. 470 extended the application of the Regulations to leases and mortgages. Statutory Rules 1942 No. 258 added to the powers mentioned in reg. 4 a power to suspend the operation of a contract in the circumstances mentioned in the regulation. The same statutory rule added reg. 9A, which directed tribunals acting under the Regulations to take into consideration various matters, including the question whether the trading or business activities of the parties had been affected by reason of circumstances attributable to the war or the operation of any regulation made under the *National Security Act* 1939 ; where a contract was in respect of the provision of a service or the use of any article, the extent, if any, to which the benefit of the service or the use of the article had been affected by such circumstances ; and also whether the making or refusal of an order was likely to result in hardship to the respondent or the applicant, as the case might be. This regulation also contains special provisions with respect to persons engaged in farming or grazing operations where the performance of a contract made by them had become unduly onerous by reason of difficulty in obtaining materials or equipment, or shortage of labour and other matters, and it also requires tribunals to consider whether it is in the interests of the defence of the Commonwealth that the application should be granted.

Reg. 20 of Statutory Rules 1942 No. 65 provides for the saving of rights under the ordinary law in the following terms :—

" 20. The right to take proceedings under regulation 4 or 5 of these Regulations in respect of any contract or agreement shall be in addition to any right or remedy which, apart from these Regulations, may be exercised on the ground that the performance, or further performance of the contract or agreement has become or is likely to become impossible or has become or is likely to become unduly onerous."

Other provisions of the Regulations are ancillary to the principal provision contained in reg. 4.

The Regulations alter the substantive law of contract in relation to the obligations of parties under contracts. They make additions to the law relating to discharge of contract, whether by reason of failure of performance, impossibility, or frustration. They make it possible to recover moneys paid under contracts in cases where under the ordinary law such moneys could not be recovered unless there were a failure of consideration. The remedies of cancellation, (in effect) of suspension of the operation of a contract, and of recovery of money paid, were available in certain cases before the Regulations were made. The scope of these remedies is extended by the Regulations. They also provide for variation of the terms of a contract

H. C. OF A. 1943.

PEACOCK v NEWTOWN MARRICKVILLE AND GENERAL CO-OPERATIVE BUILDING SOCIETY No. 4 LTD.

Latham C.J.

and, in reg. 5, for an order reviving a rescinded contract. These are new remedies. They make it possible to adjust the rights of the parties in cases falling within their terms otherwise than by the application of the rough and ready law of frustration, which may do great injustice to one party and can only by accident result in justice to both parties.

The applicability of these new substantive and remedial provisions is made dependent upon circumstances attributable to the war or the operation of National Security Regulations bringing about the result that the performance or further performance of a contract in accordance with its terms has become, or is likely to become, impossible or, so far as the applicant is concerned, inequitable or unduly onerous. There is a direct relation between these provisions and the disturbance of human affairs and, in particular, of business conditions, which present day war necessarily involves in many cases. In my opinion it is clear that such Regulations may be made under the defence power of the Commonwealth.

It is further objected, however, that the Regulations purport to confer Federal jurisdiction upon State courts and that this cannot be done by regulation, but must be done, if at all, by statute. It is also objected that, even if such jurisdiction can be conferred by regulation, it can be conferred only upon an existing State court taken as it is with its powers as defined by State law, and that the Regulations alter the powers of the State courts by changing their jurisdiction in respect of persons, locality and amount or value of the matter involved in a proceeding. Alternatively, it is said that, if the powers conferred upon State courts are not judicial but administrative in character, there is no constitutional power in the Commonwealth Parliament to enact such legislation. These objections raise several questions for consideration.

1. Reg. 4 is introduced by the words: "Where a tribunal is satisfied"—as to certain matters. Reg. 3, as amended by Statutory Rules 1942 No. 258, defines "tribunal" for the purposes of the Regulations. "Tribunal" in relation to any application means:—(*a*) where the matter at issue does not exceed in value £500 and the respondent resides or carries on business in a particular State or Territory or Norfolk Island—certain specified courts of the general character of Courts of Petty Sessions; (*b*) where the matter at issue exceeds in value £500, but does not exceed in value £2,000—a District Court, County Court, or Local Court of full jurisdiction in the State or Territory in which the respondent resides or carries on business, with special provisions where there is no such court and for New Guinea, Tasmania, Jervis Bay and Norfolk Island; (*c*)

where the matter at issue exceeds in value £2,000—the Supreme Court of the State or Territory in which the respondent resides or carries on business, with special provisions for Jervis Bay and Norfolk Island.

The tribunals specified are all courts specifically described by appropriate names, e.g., a court of limited civil jurisdiction constituted by a police, stipendiary or special magistrate, or a District Court, County Court or Local Court of full jurisdiction, or the Supreme Court of a State, &c. Thus the powers created by reg. 4 are plainly conferred upon courts as such and not upon persons who are designated or described by reference to judicial powers which they are entitled to exercise.

2. The next question is whether the powers conferred are judicial. It is contended for the respondent society that under reg. 4 tribunals are authorized to alter rights and not merely to declare and to give effect to pre-existing rights. In my opinion, this fact does not show that the powers conferred by the regulation are not judicial powers. In some cases the powers are analogous to those exercised by a court when it declares that a contract is discharged by impossibility, breach, or frustration. The circumstances which control the exercise of the powers created by the Regulations are similar in their effect, as between the parties, to facts which affect the discretion of a court of equity when it declines to order specific performance of a contract on the ground that it is unconscientious or oppressive. Contracts may be varied by a court under Money Lenders Acts, Rent Restriction Acts and Moratorium Acts in the States of Australia and in Great Britain. Under these Acts courts exercise their powers in order to prevent performance of contracts becoming inequitable or unduly onerous. An outstanding example of a case where a court exercising judicial power is not limited to the declaration or enforcement of existing rights, but where it makes orders altering the rights of the parties, is to be found in the exercise of jurisdiction in matrimonial causes in relation to nullity of marriage, judicial separation, and divorce. In my opinion the objection that, for the reason stated, the powers conferred upon the courts by reg. 4 are not judicial in character cannot be supported.

3. A further objection is based upon reg. 9, which is in the following terms :—" 9. In exercising its powers under these Regulations, a tribunal shall act according to equity, good conscience and the substantial merits of the case, without regard to technicalities or legal forms, and shall not be bound by any rules of evidence, but may inform its mind on any matter in such manner as it thinks just."

H. C. OF A. 1943.

PEACOCK v. NEWTOWN MARRICKVILLE AND GENERAL CO-OPERATIVE BUILDING SOCIETY NO. 4 LTD.

Latham C.J.

It is contended, upon the authority of *Moses* v. *Parker*; *Ex parte Moses* (1), that a court operating under such a direction is not exercising judicial power. In *Moses* v. *Parker*; *Ex parte Moses* (1) the question arose with respect to the Supreme Court of Tasmania, upon which was imposed a duty of deciding certain disputes with respect to claims to land vested in the Crown. The relevant statute provided that the court should be guided by equity and good conscience only, and by the best evidence procurable, even if not required or admissible in ordinary cases, nor should the said court, or clerk of the court, be bound by strict rules of law or equity or by any legal forms whatever. In the opinion of the Privy Council the effect of this section was that the court was "expressly exonerated from all rules of law and equity." It was accordingly held that the Supreme Court was not acting as a court, and that, on that ground, no appeal could be allowed to the Privy Council.

In the present case the tribunals specified in the Regulations are, it is true, directed to act according to equity, good conscience and the substantial merits of the case. I should regret to be bound to hold that such a direction disqualified a tribunal from being a court. There is, however, no authority which supports such a proposition. Technicalities and legal forms and rules of evidence may be varied indefinitely without depriving a tribunal of a judicial character. If, however, it had been provided in the Regulations that the tribunals were to be exonerated from all rules of law and equity, the case would, I agree, be different. The Regulations, however, do not so provide. In *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Brisbane Tramways Co. Ltd.* (*Tramways Case*) [*No.* 1] (2), *Isaacs* J., referring to *Moses* v. *Parker* (1), draws a distinction between provisions relating to procedure and provisions excluding the application of rules of law "as was the case in *Moses* v. *Parker*; *Ex parte Moses* (1), a circumstance that seems to me to have been the real point of the judgment of the Privy Council"—See also *Waterside Workers' Federation of Australia* v. *Gilchrist, Watt & Sanderson Ltd.* (3), per *Starke* J., and *British Imperial Oil Co. Ltd.* v. *Federal Commissioner of Taxation* (4), per *Isaacs* J. It may be added that Courts of Petty Sessions in New South Wales, when acting under the *Small Debts Recovery Act* 1912-1933, are required to hear and determine cases "according to equity and good conscience" (sec. 7).

For these reasons I am of opinion that the objection that the powers conferred upon the Court are not judicial powers must fail.

(1) (1896) A.C. 245.
(2) (1914) 18 C.L.R. 54, at p. 72.
(3) (1924) 34 C.L.R. 482, at p. 554.
(4) (1925) 35 C.L.R. 422, at p. 438.

4. It was argued on behalf of the Commonwealth, which obtained leave to intervene, that the powers conferred on the courts were administrative and not judicial. Administrative or ministerial powers may be conferred upon State courts by the Commonwealth Parliament as auxiliary to the performance of judicial functions in the exercise of Federal jurisdiction invested in such courts (*Bond* v. *George A. Bond & Co. Ltd. and Bond's Industries Ltd.* (1)). But it has not yet been decided that in the case of State courts other than judicial functions and functions incidental to judicial functions can be conferred upon them by the Commonwealth so as to place those courts under a duty to exercise such powers. Upon the view which I take (that the powers are judicial), it is not necessary to decide this question in the present case.

5. The power to invest State courts with Federal jurisdiction is contained in sec. 77 (iii.) of the Constitution, by which it is provided that with respect to any of the matters mentioned in secs. 75 and 76 the Parliament may make laws—"(iii.) investing any court of a State with federal jurisdiction." This is a power to give new, additional, jurisdiction to State courts. The Parliament may select such State courts as it pleases. It may give them much or little new jurisdiction. It may make the jurisdiction as wide or as narrow as it pleases with respect to persons, localities or amounts involved; or, as in the *Judiciary Act* 1903-1940, sec. 39, it may allow the State law to operate in respect of such matters. But the State court must be taken as it exists. The constitution or structure of the court cannot be changed by the Federal Parliament. In *Federated Sawmill, Timberyard, and General Woodworkers' Employees' Association* (*Adelaide Branch*) v. *Alexander* (2), it was held that where a Commonwealth statute conferred Federal jurisdiction upon a State court, the State court must be taken as it is found: See also *Le Mesurier* v. *Connor* (3), and *Adams* v. *Chas. S. Watson Pty. Ltd.* (4). The Commonwealth Parliament cannot, by virtue of sec. 77 (iii.) of the Constitution, under the guise of conferring jurisdiction upon a State court, in effect create a new Federal court, possibly without observing the conditions imposed upon such creation by sec. 72 of the Constitution: see *Waterside Workers' Federation of Australia* v. *J. W. Alexander Ltd.* (5).

The Regulations in my opinion do not infringe these principles. The various State courts which are described as tribunals in the Regulations are taken as found, with their constitution as determined

(1) (1930) 44 C.L.R. 11.
(2) (1912) 15 C.L.R. 308.
(3) (1929) 42 C.L.R. 481.
(4) (1938) 60 C.L.R. 545.
(5) (1918) 25 C.L.R. 434.

H. C. OF A. 1943.

PEACOCK v. NEWTOWN MARRICKVILLE AND GENERAL CO-OPERATIVE BUILDING SOCIETY NO. 4 LTD.

Latham C.J.

by State law and, indeed, with their jurisdiction (except in relation to the new Federal subject matter) as determined by State law, except in respect of amount involved. It was argued for the respondent that, to take an example, the word " tribunal " includes, where the matter at issue exceeds in value £500, but does not exceed in value £2,000, a District Court in the State or territory in which the respondent resides or carries on business. The *District Courts Act* 1912-1936 (N.S.W.) provides in sec. 7 that the jurisdiction of the courts depends upon the defendant residing or carrying on business within a particular district, or upon the fact that the debt sued for was contracted, or the liability for damages arose, within a particular district. Every judge of a District Court is constituted a judge of every District Court, but he can exercise his jurisdiction only in the courts of the district appointed in that behalf by the Governor (sec. 15). Sec. 41 provides that the common law jurisdiction of the District Court extends to cases in which the property sought to be recovered does not exceed £400 in value, or the amount claimed does not exceed £400.

It was urged that the Regulations conferred jurisdiction upon the courts irrespective of the place of residence of the defendant or the place where the cause of action arose, that they enabled the judges to act outside their districts, and that they increased the amount or value in relation to which the jurisdiction of the court was determined. In my opinion these objections would not be relevant, even if they were all well founded. But (except in respect of amount) I am of opinion that they are not well founded. The reference in the definition of " tribunal " to the place where the respondent resides or carries on business does not displace the provisions of State law defining the jurisdiction of the court to which reference has been made. Those provisions remain in operation. Accordingly, sec. 7 of the *District Courts Act* still applies to District Courts in New South Wales when applications are made under the Regulations, the respondent to an application being in the position of a defendant. In my opinion, the Regulations do not affect to alter the jurisdiction of the District Court in relation either to persons or locality. The Regulations do determine jurisdiction by reference to amount in the words " where the matter at issue exceeds in value five hundred pounds, but does not exceed in value two thousand pounds." It is objected that this provision extends the jurisdiction of a District Court beyond the limit of law fixed by sec. 41 of the Act, under which the court is constituted. In my opinion it is within the competence of the Federal Parliament to do this. It is unnecessary to rely upon the fact that upon a

reference from the Supreme Court made under sec. 139 or sec. 140 of the *District Courts Act* a District Court may deal with cases in which more than £400 is involved. The Federal Parliament may, in conferring jurisdiction in respect of Federal subject matter, extend or limit the jurisdiction of a State court in respect of persons, locality, amount or otherwise, as it may think proper. I have taken the District Court of New South Wales as an example. Similar considerations apply to all the other courts included in the definition of "tribunal."

The objection that the Regulations alter the constitution of State courts is not well founded.

6. A further objection, based upon *Le Mesurier* v. *Connor* (1), was that, though the Commonwealth Parliament itself might invest State courts with Federal jurisdiction under sec. 77 (iii.) of the Constitution, it could not authorize this to be done by means of a regulation. For this objection the respondent relied upon *Le Mesurier* v. *Connor* (1). In that case *Knox* C.J., *Rich* and *Dixon* JJ., constituting the majority of the Court, expressed an opinion that it was beyond the power of the Federal Parliament, acting under sec. 77 (iii.), to authorize the Governor-General to invest State courts with Federal jurisdiction by means of a proclamation made under the authority of a Federal statute. This opinion was expressly stated not to be a ground of the decision of the majority (2). But even if the opinion were adopted, it would not be relevant in the present case where the investing of jurisdiction is sought to be accomplished, not by an executive act such as a proclamation, but by a regulation which is legislative in character: See the report (2):— "No-one suggests that the Governor-General, in making [such] a proclamation . . . , is legislating." The decisions of this Court in *Baxter* v. *Ah Way* (3), *Roche* v. *Kronheimer* (4), *Victorian Stevedoring and General Contracting Co. Pty. Ltd. and Meakes* v. *Dignan* (5) and *Radio Corporation Pty. Ltd.* v. *The Commonwealth* (6), make it impossible to argue that the Regulations now in question are not legislation. Accordingly the opinion expressed in *Le Mesurier* v. *Connor* (1) is not decisive of the question in the present case.

7. There is, however, a further objection to the Regulations, also based upon the character of the power conferred upon the Federal Parliament by sec. 77 (iii.) of the Constitution. Even if it be admitted for the purpose of argument that Federal jurisdiction may be conferred upon a State court by means of a regulation made

(1) (1929) 42 C.L.R. 481.
(2) (1929) 42 C.L.R., at p. 499.
(3) (1909) 8 C.L.R. 626.
(4) (1921) 29 C.L.R. 329
(5) (1931) 46 C.L.R. 73.
(6) (1938) 59 C.L.R. 170.

H. C. OF A. 1943.

PEACOCK v. NEWTOWN MARRICKVILLE AND GENERAL CO-OPERATIVE BUILDING SOCIETY NO. 4 LTD.

Latham C.J.

under a Federal statute, it is still necessary to see that the Federal statute authorizes the making of such a regulation. In the present case the relevant statute is the *National Security Act*. This Act empowers the Governor-General to make regulations for matters set out in sec. 5 and other sections of the Act. These regulations relate to matters affecting the public safety and the defence of the Commonwealth and the effectual prosecution of any war in which His Majesty is or may be engaged. There is no provision in the Act which in express terms authorizes the making of regulations for the purpose of conferring Federal jurisdiction upon a State court. The question is whether the general terms to which I have referred, which are all connected with the subject of defence, are sufficiently wide to create a power to make regulations conferring Federal jurisdiction upon State courts.

The judicature chapter of the Constitution, chapter III., secs. 71-80, contains various provisions referring to State courts in relation to the exercise of Federal jurisdiction: see secs. 71, 72, 77 (with the contained reference to secs. 75 and 76) and 79. In *Le Mesurier* v. *Connor* (1) it was held that the specific character of these provisions was such as to exclude any contention that the provisions relating to legislative power contained in sec. 51 and other sections authorized legislation giving Federal jurisdiction to State courts. I quote the following passage from the reasons for judgment of *Knox* C.J., *Rich* and *Dixon* JJ. in that case:—"But the provisions of sec. 77 and sec. 79, which explicitly give legislative power to the Commonwealth in respect of State courts, make it plain that the general powers of the Parliament to legislate with respect to the subjects confided to it, like the similar powers of Congress, must not be interpreted as authorizing legislation giving jurisdiction to State Courts" (2).

As at present advised I see no reason to doubt that the Commonwealth Parliament could effectively authorize the making of regulations under which Federal jurisdiction could be conferred upon State courts. It would only be necessary for Parliament to express such an intention clearly. But in the general words of the *National Security Act* there is no reference to the investing of State courts with Federal jurisdiction. Upon the principle stated in *Le Mesurier* v. *Connor* (2), which I have quoted, it would not be a proper construction of the Act to regard it as authorizing the making of regulations for this purpose. If Parliament desires that the specific legislative power conferred in the judicature chapter with respect to this subject should be exercised by the method of subordinate

(1) (1929) 42 C.L.R. 481.

(2) (1929) 42 C.L.R., at p. 496.

legislation, it will be easy for Parliament so to declare. In my opinion, however, the *National Security Act* as at present framed does not authorize regulations of this character.

The *Judiciary Act* 1903-1940, sec. 39, contains a general provision which gives State courts jurisdiction in matters arising under laws made by the Commonwealth Parliament. In the Regulations now under consideration the specific provision as to " tribunals " excludes the application of the general provision of the *Judiciary Act*. The result, in my opinion, is that no courts are validly authorized to exercise the powers created by the Regulations. The operation of the Regulations in all cases depends upon the making of orders by the courts specified as " tribunals." The consequence is that, jurisdiction not having been validly conferred upon these courts, all the Regulations are invalid. The result is that the District Court had no jurisdiction to deal with this application, that this Court should now so hold, and that the application should be dismissed for want of jurisdiction. Where a matter is dismissed for want of jurisdiction, the Court has power to award costs (*Judiciary Act* 1903-1940, sec. 26). Upon the application to remove the cause into this Court the building society undertook to pay the costs of the applicant Peacock in the High Court, and an order should be made in accordance with the undertaking.

A further question which was argued relates to the application to building society mortgages of reg. 4A, which was inserted in the principal Regulations by Statutory Rules 1943 No. 4, reg. 2. But in view of the decision of the Court that the Regulations are invalid, this question does not arise.

RICH J. This case was removed into this Court on the allegation that it involved the interpretation of the Constitution. The subject matter of the case is concerned with the application of the *National Security* (*Contracts Adjustment*) *Regulations* to a certain mortgage executed by the applicant, who had applied to the Metropolitan District Court of New South Wales for the reduction of the interest payable under the mortgage. One of the questions for our consideration to which I shall briefly refer is whether the Regulations in question come within the ambit of the defence power. I am clearly of opinion that they fall within that power, and in this connection I venture to refer to what I said in *South Australia* v. *The Commonwealth* (1) :—" It is notoriously essential, for the effective prosecution of such a war as is now being waged, a war in which the continued existence of the Commonwealth and its constituent States is at stake,

(1) (1942) 65 C.L.R. 373, at p. 437.

H. C. OF A. 1943.

PEACOCK v. NEWTOWN MARRICKVILLE AND GENERAL CO-OPERATIVE BUILDING SOCIETY NO. 4 LTD.

Rich J.

that the whole resources of the nation, whether of men or of things, should be marshalled and concentrated upon war effort. If the Commonwealth is to wage war effectively, it must command the sinews of war."

But the vital question in this case is whether the Regulations, in so far as they confer on the tribunals therein mentioned judicial power to hear and determine proceedings under the Regulations, are justified in law. The answer to this question depends upon the source of the power to invest State courts with Federal jurisdiction. I adhere to what was said in *Le Mesurier* v. *Connor* (1): "Sec. 77 of the Commonwealth Constitution expressly confers upon the Parliament power to make laws investing the courts of the States with Federal jurisdiction. But the provisions of sec. 77 and sec. 79, which explicitly give legislative power to the Commonwealth in respect of State courts, make it plain that the general powers of the Parliament to legislate with respect to the subjects confided to it, like the similar powers of Congress, must not be interpreted as authorizing legislation giving jurisdiction to State courts. It is no less certain that these general powers cannot be interpreted as authorizing legislation dealing with the organization of State courts. The power conferred by sec. 77 (iii.) is expressed in terms which confine it to making laws investing State courts with Federal jurisdiction. Like all other grants of legislative power this carries with it whatever is necessary to give effect to the power itself."

It now remains to be determined whether the *National Security Act* 1939-1940 is an Act of the Federal Parliament which does invest State courts with Federal jurisdiction. An examination of the Act shows that Parliament has conferred very wide powers upon the executive, but it does not expressly or by implication purport to confer any jurisdiction upon State courts and does not authorize the making of regulations for that purpose.

The opinion I have expressed relieves me from the necessity of passing upon other questions raised in this application which are, in my opinion, unnecessary for the determination of this case. Included in these questions is the question what the result would be where an Act did empower the executive to confer such jurisdiction by regulation.

The application should be dismissed.

STARKE J. An application was made by Clifford Edwin Peacock to the District Court of the Metropolitan District at Sydney pursuant to the *National Security* (*Contracts Adjustment*) *Regulations* 1942-1943 for an order that interest payable under a memorandum of

(1) (1929) 42 C.L.R., at p. 496.

mortgage given by the applicant to the Newtown Marrickville and General Co-operative Building Society be reduced for such period and subject to such conditions as the Court thought fit. The applicant alleged that he was a person engaged on war service within the meaning of the *National Security* (*War Service Moratorium*) *Regulations* and had by reason of such service suffered a diminution of his income. The application was removed into this Court pursuant to the *Judiciary Act* 1903-1940, sec. 40, on the ground that it involved the interpretation of the Constitution.

The *National Security* (*Contracts Adjustment*) *Regulations* provide that where a tribunal is satisfied, on application by any person, that, by reason of circumstances attributable to the war or the operation of any regulation made under the *National Security Act* 1939 or under that Act as subsequently amended, the performance, or further performance, of a contract or agreement to which that person is a party, in accordance with the terms thereof, has become or is likely to become impossible or, so far as the applicant is concerned, has become or is likely to become inequitable or unduly onerous, the tribunal may make an order cancelling or suspending the operation of the contract or agreement or may make such order as it thinks just varying the terms of the contract or agreement or may provide for the repayment, in whole or in part, of any amount paid in pursuance of the contract or agreement (*National Security* (*Contracts Adjustment*) *Regulations*, Statutory Rules 1942 No. 65 ; 1942 No. 258).

Again: " Where a party to a mortgage applies to a tribunal for relief under these Regulations, and it appears to the tribunal that, by reason of the applicant being engaged, or being deemed to be engaged, on war service within the meaning of the *National Security* (*War Service Moratorium*) *Regulations*, he has suffered a diminution of his income, that diminution shall be *prima facie* evidence that the performance or further performance of the obligations of the applicant under the mortgage with respect to the payment of interest has become inequitable and unduly onerous, and the tribunal shall consider any such diminution of income and any benefit or income derived by the applicant from the property subject to the mortgage and thereupon may make an order suspending or reducing, for such period, to such amount, and subject to such conditions, as it thinks fit, the interest payable under the mortgage " (Statutory Rules 1943 No. 4, reg. 2, inserting reg. 4A).

A tribunal in relation to any application means where the matter at issue does not exceed in value £500 and the respondent resides or carries on business (1) in a State (other than the State of Tasmania)— a court of limited civil jurisdiction constituted by a police, stipendiary or special magistrate in the State in which the respondent

H. C. OF A. 1943.

PEACOCK v. NEWTOWN MARRICKVILLE AND GENERAL CO-OPERATIVE BUILDING SOCIETY NO. 4 LTD.

Starke J.

resides or carries on business; (2) in the State of Tasmania—a Court of Requests. Where the matter at issue exceeds in value £500 and does not exceed £2,000 and where it exceeds £2,000, tribunals being various courts of the States or the Territories are also specified in the Regulations (Statutory Rules 1942 No. 258).

These Regulations were challenged on the ground that the constitutional power of the Commonwealth to make laws with respect to the naval and military defence of the Commonwealth was transcended, and also on the ground that the Regulations exceeded the powers conferred upon the Governor-General by the *National Security Act* 1939-1940, sec. 5. It was contended that the subject matter of the Regulations was beyond power, that the Parliament alone was authorized to invest State courts with Federal jurisdiction, that the *National Security Act* 1939-1940 conferred no power upon the Governor-General to invest State courts with Federal jurisdiction. The subject matter of the Regulations provided, it was said, for "fair contracts" and was in the same category as "fair rent" provisions which had the sanction of this Court in *Silk Brothers Pty. Ltd.* v. *State Electricity Commission of Victoria* (1). But it is unnecessary to express any concluded opinion upon this branch of the argument, for the case can be disposed of on another ground.

The contention that the Parliament alone was authorized to invest State courts with Federal jurisdiction was based upon an opinion, but not a decision, of *Knox* C.J., *Rich* and *Dixon* JJ., expressed in *Le Mesurier* v. *Connor* (2). The Constitution provides in sec. 77 that, with respect to certain matters mentioned in secs. 75, 76, the Parliament may make laws investing any court of a State with Federal jurisdiction. "We think," said the learned judges, "that the natural meaning of the words of sec. 77 requires that the law made by the Parliament should not only define the jurisdiction to be invested but identify the State court in which jurisdiction is thereby invested. The power is to make laws 'investing,' not, as in sec. 51, 'with respect to,' a subject matter" (3).

The same reasoning would, I should think, apply to secs. 76, 78, 96, 102, 105A and 122, and indeed it is somewhat difficult to follow the distinction as regards sec. 51. But I have never been able to subscribe to this opinion and think it plainly contrary to the principle enunciated in *Roche* v. *Kronheimer* (4) and *Victorian Stevedoring and General Contracting Co. Pty. Ltd. and Meakes* v. *Dignan* (5), that the Parliament has plenary authority to make laws

(1) *Ante*, p. 1.
(2) (1929) 42 C.L.R., at pp. 499, 500.
(3) (1929) 42 C.L.R., at p. 500.
(4) (1921) 29 C.L.R. 329.
(5) (1931) 46 C.L.R. 73.

upon subject matters within its constitutional powers "using any agent, any agency, any machinery that in its wisdom it thinks fit" (*Baxter* v. *Ah Way* (1)).

The contention, however, that the *National Security Act* 1939-1940 confers no power upon the Governor-General to invest State courts with Federal jurisdiction is well founded. It might have conferred such authority, but as a matter of construction it has not done so. The reasoning upon which the contention was based is fully stated by *Knox* C.J., *Rich* and *Dixon* JJ., in *Le Mesurier's Case* (2):— "Sec. 77 of the Commonwealth Constitution expressly confers upon the Parliament power to make laws investing the courts of the States with Federal jurisdiction. But the provisions of sec. 77 and sec. 79, which explicitly give legislative power to the Commonwealth in respect of State courts, make it plain that the general powers of the Parliament to legislate with respect to the subjects confided to it, . . . must not be interpreted as authorizing legislation giving jurisdiction to State courts. It is no less certain that these general powers cannot be interpreted as authorizing legislation dealing with the organization of State courts. The power conferred by sec. 77 (iii.) is expressed in terms which confine it to making laws investing State courts with Federal jurisdiction. Like all other grants of legislative power this carries with it whatever is necessary to give effect to the power itself."

The *National Security Act* 1939-1940 in sec. 5 provides that the Governor-General may make regulations for securing the public safety and the defence of the Commonwealth and in particular for various enumerated matters and for prescribing all matters which by the 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. Despite these extensive powers the investing of State courts with Federal jurisdiction is not mentioned. The Parliament itself could not so invest State courts without resort to the provisions of sec. 77 (iii.). And the *National Security Act* 1939-1940 cannot, in the absence of some specific provision, be interpreted as authorizing regulations giving jurisdiction to State courts.

It was said for the Commonwealth, intervening, that the Regulations did not confer Federal jurisdiction upon the State courts, but only administrative jurisdiction. But the provisions do confer Federal jurisdiction, because they authorize State courts to determine whether the applicant is entitled to relief in case the performance or further performance of a contract to which the applicant

(1) (1909) 8 C.L.R., at p. 646.

(2) (1929) 42 C.L.R., at p. 496.

H. C. OF A. 1943.

PEACOCK v. NEWTOWN MARRICKVILLE AND GENERAL CO-OPERATIVE BUILDING SOCIETY No. 4 LTD.

Starke J.

is a party by reason of circumstances attributable to the war or the *National Security Act* for the time being has become or is likely to become inequitable or unduly onerous. And because they authorize State courts to give relief in cases in which the party to a mortgage has suffered a diminution of his income by reason of the applicant being engaged or being deemed to be engaged on war service within the meaning of the *National Security* (*War Service Moratorium*) *Regulations*.

Substantially the Regulations confer new rights upon particular persons to have their contracts cancelled, suspended or re-formed in specified cases. The enforcement of such rights is an exercise of judicial power: See *Shell Co. of Australia Ltd.* v. *Federal Commissioner of Taxation* (1). Reference was made to reg. 9 (Statutory Rules 1942 No. 65) in support of the argument that administrative jurisdiction only is conferred upon the State courts, and to the decision of the Judicial Committee in *Moses* v. *Parker*; *Ex parte Moses* (2). Reg. 9 provides that: "In exercising its powers under these Regulations, a tribunal shall act according to equity, good conscience and the substantial merits of the case, without regard to technicalities or legal forms, and shall not be bound by any rules of evidence, but may inform its mind on any matter in such manner as it thinks just." But the regulation does not exclude "rules of law," and should be read as a procedure section, as was pointed out by *Isaacs* J. in *The Tramways Case* [*No.* 1] (3). Even if the powers conferred upon the State courts were administrative or executive powers, still I should doubt whether the Parliament or the Governor-General under the powers conferred upon him by the *National Security Act* 1939-1940 has any authority unless some provision can be found in the Constitution to impose administrative functions upon State organizations, tribunals or officers as such, whatever their authority be with respect to citizens as individuals. And perhaps I should add that it appears to me that the powers granted in the form contained in reg. 4 (Statutory Rules 1942 No. 65) and 4A (Statutory Rules 1943 No. 4, reg. 2) can only be exercised through the judicial power of the Commonwealth vested in the High Court or Federal courts or duly invested courts of the States.

Three sections of the *Judiciary Act* 1903-1940 should be noticed. One is sec. 39 (2), which invests with Federal jurisdiction the several courts of the States within the limits of their several jurisdictions. But that section is inapplicable to this case, for the *Contracts Adjustment Regulations* constitute or set up or purport to constitute and

(1) (1931) A.C., at pp. 295-298; 44 C.L.R., at pp. 542-545.

(2) (1896) A.C. 245.

(3) (1914) 18 C.L.R., at p. 72.

set up without any lawful authority special tribunals for the purposes of those Regulations and preclude the application of the provisions of sec. 39 (2) of the *Judiciary Act*. The other two are secs. 40 and 41. The former (sec. 40) provides that any cause or part of a cause arising under the Constitution or involving its interpretation which is at any time pending in any court of a State may be removed into the High Court, and the latter (sec. 41) provides that, when a cause or part of a cause is removed into the High Court under the provisions of the *Judiciary Act*, the High Court shall proceed therein as if the cause had been originally commenced in that Court and as if the same proceedings had been taken in the cause in the High Court as had been taken therein in the Court of the State prior to its removal, but so that all subsequent proceedings shall be according to the course and practice of the High Court.

In my opinion these sections do not invest the High Court with jurisdiction in cases in which the cause is brought before a tribunal set up without any lawful authority.

The result is that the order removing this cause into the High Court should be rescinded, which is another way of saying that the application on the part of Clifford Edwin Peacock cannot be granted.

McTiernan J. I agree with the reasons and the conclusions of His Honour the Chief Justice.

Williams J. This matter has come before this Court in the following manner. C. E. Peacock, a member of the A.I.F., hereinafter called the applicant, applied to the Metropolitan District Court of New South Wales under the provisions of the *National Security (Contracts Adjustment) Regulations* for an order that the interest payable under memorandum of mortgage No. C992649 by which he mortgaged certain land to the respondent to the application should be reduced for such period and subject to such conditions as the Court thought fit. The respondent to the application, Newtown Marrickville and General Co-operative Building Society No. 4 Ltd., hereinafter called the respondent, then applied to this Court for an order to remove the application into this Court under sec. 40 of the *Judiciary Act* 1903-1940, on the ground that the application was a cause involving the interpretation of the Constitution of the Commonwealth. This Court ordered that the cause should be so removed, subject to an agreement being made between the parties as to the amount to which the payments made by the applicant and alleged to be made by way of interest should be reduced. The Commonwealth of Australia was given leave to intervene.

H. C. OF A. 1943.

PEACOCK v. NEWTOWN MARRICKVILLE AND GENERAL CO-OPERATIVE BUILDING SOCIETY NO. 4 LTD.

Williams J.

The *National Security (Contracts Adjustment) Regulations* are contained in Statutory Rules 1942 Nos. 65, 98, 162, 258, 470 and 481, and 1943 Nos. 4 and 88.

Before this Court counsel for the respondent raised two main contentions: (1) that the subject matter of the Regulations is beyond the defence power of the Commonwealth, and (2) that if the subject matter is within power, the Regulations purport to invest State courts with Federal jurisdiction, but such jurisdiction can only be conferred under sec. 77 (iii.) of the Constitution by an Act of the Commonwealth Parliament. In the event of both these contentions failing, counsel for the respondent also contended that the memorandum of mortgage did not provide for the payment of interest within the meaning of reg. 4A of the *Contracts Adjustment Regulations*, inserted by Statutory Rules 1943 No. 4, reg. 2.

As to the first contention.—The Regulations purport to have been made under the powers to legislate conferred upon the Governor-General (which means the Governor-General acting with the advice of the Federal Executive Council) by the *National Security Act* 1939-1940. This Act, sec. 5, authorizes the Governor-General to make regulations for securing the public safety and defence of the Commonwealth and for prescribing all matters which are necessary or convenient for the prosecution of the war. The purpose of the Act is therefore to delegate to the executive while the Commonwealth is engaged in war and for six months thereafter (sec. 19) the power to make laws for the peace, order and good government of the Commonwealth conferred upon the Commonwealth Parliament by the Constitution, sec. 51 (vi.). But as the Commonwealth Parliament could not confer upon its delegate ampler powers of legislation than are conferred upon Parliament, it follows that if the Parliament could not validly pass an Act in the same terms as the *Contracts Adjustment Regulations*, the Regulations cannot be valid.

In order to determine whether legislation is within the defence power I adhere to the test laid down by *Isaacs* J. in *Farey* v. *Burvett* (1), a test which is supported *mutatis mutandis* in my opinion by the decision of the Privy Council in *In re Board of Commerce Act*, 1919, *and Combines and Fair Prices Act*, 1919, (2) and in *Fort Frances Pulp and Power Co. Ltd.* v. *Manitoba Free Press Co. Ltd.* (3) and by *Greer* J., as he then was, in *Hudson's Bay Co.* v. *Maclay* (4) when, in dealing with the question whether regulations made under the Imperial *Defence of the Realm Act* were valid, he said:—"If a regulation is such that it cannot, on the face of it,

(1) (1916) 21 C.L.R. 433, at p. 455.
(2) (1922) 1 A.C. 191, at p. 200.
(3) (1923) A.C. 695, at p. 706.
(4) (1920) 36 T.L.R. 469, at p. 476.

conceivably aid in securing the safety of the public and the defence of the realm, it is not, in my opinion, within the legislative powers which are conferred during the war on His Majesty in Council." Whether the test is expressed in the form of " conceivably capable " or " reasonably capable " (*Chester* v. *Bateson* (1)) or simply " capable " (*South Australia* v. *The Commonwealth* (2)) appears to me to be immaterial. But in view of the established principle that where the purpose of a regulation in time of war is to ensure public safety, it is right to interpret emergency legislation so as to promote rather than to defeat its efficiency for the defence of the realm, the proper test before holding that a regulation is beyond the defence power is, in my opinion, that most favourable to its validity, namely, whether it is conceivably capable even incidentally of aiding defence. It is now recognized by several decisions of this Court that in a total war such as the present the defence of Australia involves not only the mobilization of the military and naval forces and their maintenance but also involves the necessity to mobilize the whole resources of the nation and to take such steps as are necessary to meet the impact of total war upon the national economy.

The position of parties to contracts, leases and mortgages can be gravely affected by war and by measures introduced by Parliament to meet the emergencies which war creates; so that, unless some means are provided by statute for the adjustment of contractual obligations entered into under normal conditions to meet the abnormal conditions created by war, the general economic organization of the nation may be dislocated. Moratorium legislation to meet such crises was common in all countries during the last war.

The main subject matter of the *Contracts Adjustment Regulations* is contained in regs. 4 and 5 as amended. Reg. 4 provides that where a tribunal is satisfied that, by reason of circumstances attributable to the war or the operation of any regulation made under the *National Security Act*, the performance, or further performance, of contracts, which include leases and mortgages, to which an applicant is a party, in accordance with the terms thereof, has become or is likely to become impossible or, so far as an applicant is concerned, has become or is likely to become inequitable or unduly onerous, the tribunal may make an order cancelling the contract or suspending its operation or may make such order as it thinks just varying its terms, or may provide for the repayment, in whole or in part, of any amount paid in pursuance of the contract. Reg. 5 provides that where any party to a contract has rescinded the same by reason of the default of the other party thereto in the performance of any

(1) (1920) 1 K.B. 829, at p. 833. (2) (1942) 65 C.L.R., at p. 407.

H. C. OF A. 1943.

PEACOCK v. NEWTOWN MARRICKVILLE AND GENERAL CO-OPERATIVE BUILDING SOCIETY NO. 4 LTD.

Williams J.

term or provision thereof and a tribunal is satisfied, on application by that other party, that the default was due to circumstances attributable to the war or the operation of any regulation made under the *National Security Act*, the tribunal may make an order reviving the contract.

The *Contracts Adjustment Regulations* provide, therefore, for statutory modifications of the substantive contractual rights of parties of a more extensive nature than those provided by moratorium legislation, and are intended to meet disturbances in business relations of a more acute nature than have hitherto occurred, due to the unexampled magnitude and proximity of the present conflagration, and the unprecedented measures which have been taken to cope with it. The modifications only attach where the performance of existing contractual obligations is affected by reason of circumstances attributable to the war or the operation of regulations made under the *National Security Act*. It is curious that Commonwealth Acts are not also expressly mentioned as well as National Security Regulations, because the operation of Acts such as the *Defence Act* could affect the ability of many persons to perform their contracts to a greater extent than any National Security Regulations could do. But it is obvious that the operation of such Acts is intended to be included under the preceding general words. The modifications are in addition to the rights that arise at common law upon the frustration of the performance of contracts (reg. 20), which do not extend to leases and mortgages. As it is conceivable that ameliorative legislation of this nature can aid at least incidentally in the effectuation of the defence of the Commonwealth in its widest sense, it is, in my opinion, a subject matter with respect to which the Commonwealth Parliament can legislate under the Constitution, sec. 51 (vi.), and is therefore a matter within the powers of legislation conferred upon the executive by the *National Security Act*. Indeed, counsel for the applicant and the Commonwealth were not called upon on this contention.

As to the second contention.—In *Silk Bros. Pty. Ltd.* v. *State Electricity Commission* (1) the Chief Justice said that in *Le Mesurier* v. *Connor* (2) three Justices of this Court expressed the opinion that only an Act of the Commonwealth Parliament can invest State courts with Federal jurisdiction under sec. 77 (iii.) of the Constitution, so that such investment cannot be effected by a proclamation made under or in pursuance of such an Act. The correctness of this opinion was challenged by counsel for the applicant and the Commonwealth, but it is unnecessary in the present case to express

(1) *Ante*, at p. 12.

(2) (1929) 42 C.L.R., at pp. 499, 500.

a conclusion whether it is right or wrong. But it must not be supposed that if the question was *res integra* I would come to an opposite conclusion, or that, even if I did so, since the question is no longer *res integra*, I would consider that this opinion should now be reconsidered. Possibly the opinion should be limited by the statement (1): "No-one suggests that the Governor-General, in making such a proclamation as sec. 18 (1) (*b*)" (of the *Bankruptcy Act* 1924-1928) "contemplates, is legislating," so that the proclamation failed because it was an administrative and not a legislative act of the executive. If the opinion can be limited in this way, it would not apply to legislation by regulation. But such distinction would be a fine one. Sec. 18 (1) (*b*) clearly authorized the executive to confer Federal bankruptcy jurisdiction on State courts by proclamation. I assume that the Commonwealth Parliament, where it can delegate power to legislate, can also prescribe the manner and form in which that legislative power shall be exercised, whether by proclamation, regulation or otherwise, so that if a proclamation would only be valid if it was an exercise of legislative power the maxim *omnia praesumuntur rite esse acta* would apply and it would be presumed an exercise of legislative power. It is also difficult to reconcile such a limitation with the statement: "We think the natural meaning of the words of sec. 77 requires that the law made by the Parliament should not only define the jurisdiction to be invested but identify the State court in which the jurisdiction is thereby invested. The power is to make laws 'investing,' not as, in sec. 51 'with respect' to, a subject matter" (2).

If the Commonwealth Parliament can delegate to the executive the power to invest State courts with Federal jurisdiction, it must equally be able to delegate to the executive the power to create new Federal courts. But regulations have by no means the same sure foundation as Acts; they are subject to disallowance by either House of Parliament in accordance with the provisions of sec. 48 of the *Acts Interpretation Act* 1901-1941. In the case of the investment of State courts with Federal jurisdiction such a disallowance might be comparatively innocuous, but it would have a disastrous effect upon a Federal court, to which the judges must be appointed for life, which had been created in the meantime. The point need never arise if the Commonwealth Parliament chooses to exercise its legislative powers under the judicature chapter by Act of Parliament instead of through a delegate. Any conclusion would be *obiter dictum* because, assuming that the Commonwealth Parliament can delegate to the executive the power to legislate under sec.

(1) (1929) 42 C.L.R., at p. 499. (2) (1929) 42 C.L.R., at p. 500.

H. C. OF A. 1943.

PEACOCK v. NEWTOWN MARRICKVILLE AND GENERAL CO-OPERATIVE BUILDING SOCIETY NO. 4 LTD.

Williams J.

77 (iii.) of the Constitution, it is at least essential that there should be an Act of Parliament bestowing this power upon the executive.

The *National Security Act* in several of its sections refers to proceedings in the courts, but it nowhere purports expressly to invest or to authorize the executive to invest any courts with any jurisdiction which they would not derive from the Constitution or from some other Act of the Commonwealth Parliament in relation to any legal proceedings arising under the Act or regulations made under the Act. The utmost operation of the Act is limited to not longer than six months after His Majesty ceases to be engaged in war, so that it would not be an appropriate Act for the purpose of creating a new Federal court. It is, therefore, not an appropriate Act impliedly to authorize the executive to exercise the whole of the legislative powers conferred upon Parliament by the judicature chapter. It would be difficult, therefore, to imply an intention to authorize the executive partially to exercise these legislative powers to the extent required to confer Federal jurisdiction on State courts. At the date of the passing of the Act, State courts had already been invested with a wide Federal jurisdiction by the *Judiciary Act* 1903-1940, sec. 39 (2). Under sec. 18 of the *National Security Act* a regulation made under the Act has effect notwithstanding anything inconsistent therewith contained in any enactment other than the Act, so that if the Commonwealth Parliament intended that the legislative powers conferred by the judicature chapter should be exercised by regulation it must have intended that the executive could by regulation repeal existing Commonwealth Acts exercising these legislative powers, as, for instance, the *Judiciary Act*. The conclusion is that the *National Security Act* does not authorize the executive to exercise any of the legislative powers of the Commonwealth Parliament contained in the judicature chapter of the Constitution.

It follows, therefore, that in so far as the *Contracts Adjustment Regulations* purport to invest the tribunals specified in reg. 3 as amended by Statutory Rules 1942 Nos. 258 and 481 with Federal judicial power they must be invalid.

In order to escape from this difficulty counsel for the applicant and for the Commonwealth contended that administrative and not judicial powers are conferred upon the tribunals. I am unable to accept this contention.

The meaning of judicial power has been discussed in several cases in this Court, including the recent decisions of *R.* v. *Federal Court of Bankruptcy*; *Ex parte Lowenstein* (1), *Australian Apple and*

(1) (1938) 59 C.L.R., at pp. 575, 576.

Pear Marketing Board v. *Tonking* (1), and *Silk Bros. Pty. Ltd.* v. *State Electricity Commission of Victoria* (2), and by the Privy Council in *Shell Co. of Australia Ltd.* v. *Federal Commissioner of Taxation* (3). From these discussions it is clear that many tribunals invested with quasi-judicial functions need not be exercising the judicial power of the Commonwealth in its strict sense. Each case must be judged on its own circumstances.

In the present case there is the following concatenation of circumstances; (1) A tribunal is required to discharge what is plainly a judicial act, that is to say, "an act done by competent authority, upon consideration of facts and circumstances, and imposing liability or affecting the rights of others" (*Tonking's Case* (4)). To the authorities cited in that case there may now be added *R.* v. *City of Westminster Assessment Committee*; *Ex parte Grosvenor House (Park Lane) Ltd.* (5). (2) This requirement is imposed upon a tribunal as a designated court. (3) In order to adjust the rights of the parties a tribunal must consider the effect upon the contract, lease or mortgage of the circumstances attributable to the war or the operation of regulations made under the *National Security Act*. It must therefore construe the contract, lease or mortgage in order to determine the extent to which its performance has been affected by circumstances attributable to the war, or whether it was rescinded for default in its performance due to such circumstances. Where it is alleged that performance has been affected by the operation of any regulation made under the *National Security Act*, a tribunal must essay the task, often attended with considerable difficulty, of determining the legal effect of the regulation. In the present case a question of law arises whether the memorandum of mortgage is one which provides for payment of interest within the meaning of reg. 4A. A tribunal is therefore required to decide questions of law as well as of fact. A tribunal is authorized to make orders for the repayment in whole or in part of any amount paid in pursuance of a contract. Such an order would presumably be enforceable by execution in the same manner as any other order of the court. A tribunal can order the payment of costs, and such costs would presumably be taxed and recovered in the same manner as any other costs ordered to be paid by the court. All these circumstances taken in conjunction lead to the conclusion that the tribunals specified in the Regulations are intended to exercise the judicial functions imposed upon them as courts.

(1) (1942) 66 C.L.R. 77, at pp. 83-85, 103, 104.
(2) *Ante*, p. 1.
(3) (1931) A.C. 275; 44 C.L.R. 530.
(4) (1942) 66 C.L.R., at p. 83.
(5) (1941) 1 K.B. 53, at p. 62.

H. C. OF A. 1943.

PEACOCK v. NEWTOWN MARRICKVILLE AND GENERAL CO-OPERATIVE BUILDING SOCIETY NO. 4 LTD.

Williams J.

Counsel for the applicant and the Commonwealth relied upon the nature of the powers conferred by regs. 4 and 5 and upon the provisions of reg. 9 as indicating that, although the powers given by the Regulations are entrusted to courts, the courts are required to act administratively and not judicially.

Reliance was placed upon the statement in the judgment of *Griffith* C.J. in *Huddart Parker & Co. Pty. Ltd.* v. *Moorehead* (1), cited with approval by the Privy Council in *Shell Co. of Australia Ltd.* v. *Federal Commissioner of Taxation* (2), that the exercise of judicial power does not begin until some tribunal which has power to give a binding and authoritative decision whether subject to appeal or not is called upon to take action. It was said that this statement related to the declaration and enforcement of existing rights and that the essence of judicial power is to declare and enforce such rights. But existing rights include rights and obligations compulsorily added by legislation to legal relationships. A right to vary an existing obligation is an existing enforceable right which can become the subject matter of a controversy relating to property just as much as any other right relating to property. Parties can provide by contract for the suspension, variation or destruction of existing rights upon the occurrence of particular circumstances, or such a right of suspension, variation or destruction can be compulsorily imposed upon parties by legislation.

Legislatures have freely exercised this right. Many examples can be culled from the legislation of New South Wales, and similar legislative provisions occur elsewhere. To take a few examples:— (1) The *Conveyancing Act* 1919-1942, sec. 89, empowers the court to modify or extinguish easements and restrictive covenants in the circumstances therein mentioned. (2) The same Act, sec. 129, empowers the court to relieve against the forfeiture of leases. (3) The *Trustee Act* 1925-1942, sec. 81, empowers the court to sanction administrative dealings with a trust estate not authorized by the trust instrument. (4) The *Testator's Family Maintenance and Guardianship of Infants Act* 1916-1938, sec. 3, empowers the court to alter the provisions of a testator's will. (5) The *Money-lenders and Infants Loans Act* 1941, sec. 30, empowers the court to re-open transactions of moneylenders. (6) The *Hire-Purchase Agreements Act* 1941, sec. 9, contains similar provisions. (7) The *Matrimonial Causes Act* 1899, sec. 56, empowers the court to vary marriage settlements. The court in enforcing these rights is determining controversial questions of fact and the legal results that should flow from these

(1) (1908) 8 C.L.R. 330, at p. 357.
(2) (1931) A.C., at pp. 295, 296; 44 C.L.R., at pp. 542, 543.

facts, however great its discretion, in exactly the same manner as it determines facts and their application to legal rights and obligations that are fixed and definite. The *Companies Act* 1936, sec. 208, enables the court to wind up a company in certain specific circumstances and also where the court is of opinion that it is just and equitable to do so. It would be strange if the court was exercising judicial power in determining whether an order should be made upon proof of specific circumstances, but was not doing so when it had to determine whether it was just and equitable to make an order.

Reg. 9 provides that in exercising its powers under the Regulations a tribunal shall act according to equity, good conscience and the substantial merits of the case, without regard to technicalities or legal forms, and shall not be bound by any rules of evidence, but may inform its mind on any matter in such manner as it thinks just. Counsel relied upon the decision of the Privy Council in *Moses* v. *Parker*; *Ex parte Moses* (1). In *Canadian Pacific Railway Co.* v. *Toronto Corporation and Grand Trunk Railway of Canada* (2) the Privy Council, referring to this decision, said :—" It was there held that as the tribunal from which it was desired to appeal was expressly exonerated from all rules of law or practice, and certain affairs were placed in the hands of the judges as the persons from whom the best opinions might be obtained, and not as a court administering justice between the litigants, such functions do not attract the prerogative of the Crown to grant appeals."

The provisions of reg. 9, which are the same as the *Commonwealth Conciliation and Arbitration Act* 1904-1934, sec. 25, correspond to sec. 53 of the Commonwealth *Income Tax Assessment Act* 1922-1923. Their legal effect is discussed by *Isaacs* J. in *British Imperial Oil Co. Ltd.* v. *Federal Commissioner of Taxation* (3). They were not sufficient to induce this Court in that case to hold that the Board of Review, having regard to the other provisions of the Act, was an administrative tribunal. On the contrary it was held that the powers with which the Act purported to invest the Board were invalid because they were an exercise of the judicial power of the Commonwealth. Similar provisions are to be found in other Acts where it is intended that judicial power shall be exercised by a court: see *Small Debts Recovery Act* 1912-1933 (N.S.W.), sec. 7 (1). Reg. 9 only appears expressly to authorize a tribunal to act in a manner in which it would be forced by circumstances to act in any event. A tribunal has to be judicially satisfied that the performance of a contract has been affected by circumstances attributable to the

(1) (1896) A.C. 245.
(2) (1911) A.C. 461, at p. 471.
(3) (1925) 35 C.L.R., at pp. 439, 440.

H. C. OF A. 1943.

PEACOCK v. NEWTOWN MARRICKVILLE AND GENERAL CO-OPERATIVE BUILDING SOCIETY NO. 4 LTD.

Williams J.

war or the operation of a regulation made under the *National Security Act*. Some of these circumstances are enumerated in reg. 9A. Once a tribunal has been satisfied on this point, it has a wide discretion as to the surgical operation it will inflict upon the contract; even artificial resuscitation is allowed; and it could scarcely be directed to exercise this discretion more precisely than according to equity and good conscience and the substantial merits of the case.

In determining the facts a tribunal is not bound by rigid adherence to the ordinary rules of evidence, but may inform its mind on any matter in any manner it thinks just. It has a discretion as to the evidence it will receive and on which it will act. If a tribunal were bound by the strict rules of evidence it would often be impossible, or at least extremely difficult, to ascertain the relevant facts. Supposing the circumstances attributable to the war relied upon were active hostilities in some foreign country, these hostilities could only be proved strictly by the evidence of some combatant who would *ex hypothesi* not be available, but no real detriment could occur to either party to the application if the tribunal informed itself on this point from official communiques published in the newspapers. Supposing an employer desired to prove that deliveries under a contract had been delayed because a number of his employees had been called up. This could often only be proved strictly by calling the employees or the persons who called them up, but the employer himself could give quite reliable information on the point. Numerous other instances could be cited where strict formal evidence might not be available or readily procurable but satisfactory information could be obtained which it would be safe for a tribunal to accept.

There is, in my opinion, no substance in either of these points. As the whole operation of the *Contracts Adjustment Regulations* is dependent upon the valid investment of the tribunals by which the rights conferred by regs. 4, 4A and 5 can be enforced, the result is that the whole of the Regulations must be held to be invalid, and it becomes unnecessary to consider the other matters that were argued.

I will mention in conclusion that during the argument in *Silk Bros. Pty. Ltd.* v. *State Electricity Commission* (1) I pointed out for the consideration of the Commonwealth the possible flaw in the *National Security Act* which has now proved to be fatal, and which must have repercussions upon other regulations made under the Act. So that in case fresh regulations on the same subject matter may rise like the phœnix from the present ashes it might not perhaps be out of place to call attention to the possible separate invalidity of regs.

(1) *Ante*, p. 1.

5 and 6 or parts thereof having regard to the provisions of the *Acts Interpretation Act* 1901-1937, sec. 48 (2).

The application should be dismissed.

Application dismissed for want of jurisdiction. Respondent society to pay applicant's costs in the High Court. Applicant to pay society's costs in the District Court.

Solicitors for the applicant, *Barkell & Peacock.*

Solicitors for the respondent, *Murphy & Moloney.*

Solicitor for the Commonwealth (intervening), *H. F. E. Whitlam,* Crown Solicitor for the Commonwealth.

J. B.