

[HIGH COURT OF AUSTRALIA.]

JOHNSTON FEAR & KINGHAM & THE
OFFSET PRINTING COMPANY PRO-
PRIETARY LIMITED

} PLAINTIFF ;

AND

THE COMMONWEALTH

DEFENDANT.

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MELBOURNE,

June 24, 25.

Constitutional Law—Acquisition of property—Defence—National security—“ Just terms ” — Judicial power — The Constitution (63 & 64 Vict. c. 12), ss. 51 (vi.), (xxxi.), 71—National Security Act 1939-1940 (No. 15 of 1939—No. 44 of 1940), s. 5—National Security (Supply of Goods) Regulations (S.R. 1939 No. 129 — 1942 No. 164).

SYDNEY,

Aug. 11.

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

The National Security (Supply of Goods) Regulations are invalid.

So held, by Latham C.J., Rich, Starke and Williams JJ., on the ground that they provide for the acquisition of property by the Commonwealth otherwise than “ on just terms ” as required by s. 51 (xxxi.) of the Constitution, which is the source of the Commonwealth’s power to legislate for the acquisition of property for defence purposes ; by McTiernan J., on the ground that they are not authorized by the National Security Act 1939-1940, which, in so far as it confers power to make regulations for the acquisition of property, should be interpreted as conferring power to make regulations providing for the acquisition of property upon the terms that just compensation is paid.

Per Starke J. : The Regulations do not impinge upon the judicial power of the Commonwealth.

DEMURRER.

In an action in the High Court against the Commonwealth, the plaintiff company alleged in its statement of claim :—(By pars. 1-5) On and prior to 27th July 1942 the plaintiff was the owner and in possession of one “ Crabtree ” three-colour offset press ; on that day the defendant by notice in writing ordered the plaintiff to supply and deliver the press to the defendant ; the notice purported to be given under the *National Security (Supply of Goods) Regulations* ; on or about 21st August 1942 the defendant by its servants or agents

removed the press from the premises of the plaintiff and converted the same to its own use whereby the plaintiff suffered damage particulars whereof were: Value of the press, £10,432, loss of profit until plaintiff was able to replace the press, £9,900. (By par. 6) Upon their proper construction the Regulations did not authorize the giving of the notice or the taking or acquisition of the press. Alternatively (by par. 7), if the Regulations authorized the giving of the notice and the taking or acquisition of the press, they or reg. 5 thereof was or were beyond the powers conferred by the Constitution and void. The plaintiff claimed damages for conversion, £20,332; and, alternatively, (amongst other relief) declarations that the Regulations or reg. 5 thereof was or were *ultra vires* and void and that the plaintiff was entitled to receive compensation upon just terms for the acquisition of the press.

The defendant demurred to the statement of claim, and the demurrer now came on for hearing.

It was agreed that counsel for the plaintiff should begin.

Dr. Coppel, for the plaintiff. The Regulations are invalid because they exceed the power of the Commonwealth under s. 51 (xxxi.) of the Constitution to acquire property "on just terms" (*Andrews v. Howell* (1); *Australian Apple and Pear Marketing Board v. Tonking* (2)). The Regulations provide only for a "price" to be paid for the goods acquired; that is, for the goods as goods, regardless of any loss which the owner may suffer, over and above the "price" or intrinsic value, through being deprived of the goods. The taking of goods which form part of a plant as distinct from stock-in-trade of necessity creates a loss which is not compensated for by merely paying the market value—the mere "price." The power under s. 51 (vi.) of the Constitution to legislate in relation to defence does not override the requirement of "just terms" by s. 51 (xxxi.). The provision in reg. 5 for arbitration does not take the matter any further: the arbitrator cannot award anything more than the price of the goods taken, and the provisions as to arbitration do not provide any just basis (or any basis at all) for the recompense of the the owner of the goods. Moreover, these provisions introduce the laws of the States relating to arbitration. In some, at least, of the States these laws confer certain powers on State courts. Thus, the Regulations purport to confer Federal jurisdiction on State courts and are not authorized by the *National Security Act* (*Peacock v. Newtown Marrickville and General Co-operative Building Society No. 4 Ltd.* (3)). Further, the assessment of compensation is a judicial function which cannot be conferred on an arbitrator.

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(1) (1941) 65 C.L.R. 255.

(2) (1942) 66 C.L.R. 77.

(3) *Ante*, p. 25.

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Fullagar K.C. (with him *P. D. Phillips*), for the defendant. The assessment or quantification of compensation may, consistently with s. 51 (xxxi.), be left to any impartial tribunal (*Cooley on Constitutional Limitations*, 8th ed., vol. 2, p. 1207; *United States v. Jones* (1); *Bauman v. Ross* (2))—cf. *Monongahela Navigation Co. v. United States* (3) and *Seaboard Air Line Railway Co. v. United States* (4). Reg. 5, in conferring power to determine the amount to be paid for goods, does not violate s. 51 (xxxi.) (*Tonking's Case* (5)). As to arbitration, there is no invalid conferring of jurisdiction on State courts. *Peacock's Case* (6) does not apply here, because in the present case the jurisdiction of State courts is to be found in s. 39 of the *Judiciary Act*. Any question arising in an arbitration pursuant to reg. 5 is a question arising under a law made by the Commonwealth, and accordingly State courts within the limits of their jurisdiction as to subject matter, &c., have jurisdiction to deal with it. The jurisdiction of a State court resulting from reg. 5 (6) is therefore Federal jurisdiction under s. 39. The invalidity of the proviso to reg. 5 (1) is not disputed, but the proviso is severable: What remains makes a complete piece of legislation: See *Wynes, Legislative and Executive Powers in Australia*, (1936), pp. 46-48, 50. Then, reg. 5 (2) requires that the price must be fair and reasonable; this would entitle the plaintiff to receive the value to it of the machine taken, and that is all to which the plaintiff is entitled (*Owners of Liesbosch Dredger v. Owners of S.S. Edison* (7)). [He referred also to *Minister of State for Home Affairs v. Rostron* (8); *In re Smith and Minister for Home and Territories* (9).]

Dr. Coppel, in reply. "Price" is not the equivalent of "value." This is clearly not the meaning in the proviso to reg. 5 (1), and the word "price" must have the same meaning throughout the Regulations.

Cur. adv. vult.

Aug. 11.

The following written judgments were delivered:—

LATHAM C.J. Demurrer to a statement of claim.

The statement of claim alleges that the plaintiff was the owner and in possession of a "Crabtree" three-colour offset press with auto feeder and electric equipment and that on 27th July 1942 the

- (1) (1883) 109 U.S. 513, at p. 519 [27 Law. Ed. 1014, at p. 1017].
- (2) (1897) 167 U.S. 548, at p. 593 [42 Law. Ed. 270, at p. 289].
- (3) (1893) 148 U.S. 312 [37 Law. Ed. 463].
- (4) (1923) 261 U.S. 299, at p. 304 [67 Law. Ed. 664, at p. 669].

- (5) (1942) 66 C.L.R. 77: see per *Rich J.* at p. 107.
- (6) *Ante*, p. 25.
- (7) (1933) A.C. 449, at p. 464.
- (8) (1914) 18 C.L.R. 634.
- (9) (1920) 28 C.L.R. 513, at pp. 522, 523.

defendant, by notice in writing, ordered the plaintiff to supply and deliver the press to the defendant. It is further alleged that the notice purported to be given under the *National Security (Supply of Goods) Regulations*—Statutory Rules 1939 No. 129 as amended. It is alleged that the defendant, by its servants or agents, removed the press and converted the same to its own use, whereby the plaintiff suffered damage—the value of the said press £10,432 and loss of profit until plaintiff was able to replace the press £9,900, a total of £20,332. The statement of claim further alleges that the *Supply of Goods Regulations* did not authorize the giving of the notice and that the Regulations, if they authorize the giving of the notice and the taking of the press, are void as being beyond the powers conferred by the Constitution of the Commonwealth. The defendant demurs upon the ground that the giving of the notice was duly authorized by the Regulations, that the taking of the press was also duly authorized, and that the Regulations are valid.

The contention that the Regulations are invalid was based entirely upon the terms of s. 51 (xxxi.) of the Constitution. This provision authorizes the Parliament to make laws with respect to: “(xxxi.) The acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws.” It was contended for the defendant, and denied for the plaintiff, that the *Supply of Goods Regulations* provide just terms for the acquisition of property. The Regulations purport to authorize a Minister to acquire goods for defence purposes.

It was not argued in the present case that the Commonwealth Parliament has any power to legislate for the acquisition of property except under s. 51 (xxxi.). Legislation under the provision must, in order to be valid, be legislation which provides for just terms. If par. xxxi. had not appeared in s. 51, there is little doubt that other paragraphs of s. 51 would have been interpreted so as to authorize the Parliament to make laws for the acquisition of property in relation to the subject matters of those paragraphs. For example, under the power to legislate with respect to lighthouses and bankruptcy, there is no doubt that the Parliament would have been entitled to legislate for the purpose of acquiring land for the erection of lighthouses and bankruptcy courts. The paragraphs of s. 51 should not, in my opinion, in general be read as limiting each other in any way. But there are special characteristics of par. xxxi. which raise special questions with respect to the power to legislate for the acquisition of property. Par. xxxi. gives express power to legislate for the acquisition of property “for any purpose in respect of which the Parliament has power to make laws.” This phrase is

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used in a general descriptive sense and, in its setting, may fairly be interpreted as referring to all other matters with respect to which the Parliament has power to make laws and, therefore, as including the thirty-eight subjects referred to in the other paragraphs of s. 51, as well as other subjects mentioned in other sections of the Constitution. Thus the phrase, "purpose in respect of which the Parliament has power to make laws," incorporates by reference all the other subject matters of the legislative power of the Commonwealth. (Perhaps the power to make laws for the government of territories (Constitution, s. 122) should be excepted from this statement (cf. *R. v. Bernasconi* (1)), but it is not now necessary to express an opinion upon that question.) In relation, for example, to defence, par. xxxi. means that the Parliament may legislate for the acquisition of property on just terms for the purpose of the naval and military defence of the Commonwealth and of the several States and the control of the forces to execute and maintain the laws of the Commonwealth. When par. xxxi. is thus construed in relation to a particular purpose it must, I think, be regarded as limiting the legislative power with respect to the acquisition of property for that purpose. In other words, the terms of par. xxxi. are such that, for example, the power to legislate with respect to defence cannot be interpreted as including a power to make laws for the acquisition of property upon any terms which commend themselves to Parliament, whether they are just or not. In relation to defence, as in relation to all other legislative purposes, an express and specific power to make laws is given by par. xxxi. and that power is limited by the inclusion of the words "on just terms." Accordingly, I am of opinion that the only power of the Commonwealth Parliament to legislate with respect to the acquisition of property for defence purposes is that conferred by s. 51 (xxx.).

In the present case the only questions which arise are questions of legislative power. No question of executive power independent of any Commonwealth statute is raised by this demurrer. It may be that the prerogative of the Crown authorizes the seizure and use of property in the course of war-like operations without any compensation to the owner. The Commonwealth Constitution does not contain any such provision as that which is to be found in the fifth amendment of the American Constitution—"Nor shall private property be taken for public use without just compensation." This is an absolute prohibition of any taking of private property for public use without just compensation, whether or not a statute purports to authorize such a taking. The Commonwealth Constitution

contains no such provision. The only reference to the subject is contained in a positive grant of legislative power. The limitation upon the legislative power of the Commonwealth Parliament does not necessarily involve any corresponding limitation with respect to the executive power of the Commonwealth. This matter, however, has not been argued, and no decision upon it is required for the determination of the present case. The point raised by the demurrer is a point as to the validity of legislation, and not as to the legality of executive action sought to be justified independently of any legislation.

The case, therefore, may properly be dealt with upon the footing that the defendant justifies the seizure of the press only under the *Supply of Goods Regulations*, and supports those Regulations only as being legislation for the acquisition of property on just terms for a purpose in respect of which the Parliament has power to make laws. The only power relied upon was the power to make laws with respect to defence. The acquisition of property for the purposes of defence is plainly a proper subject matter of Commonwealth legislation. The only question, therefore, is whether the Regulations provide for such acquisition upon just terms.

The Regulations are to be found in Statutory Rules 1939 No. 129, with subsequent amendments, more particularly amendments contained in Statutory Rules 1942 No. 164. Reg. 2 as amended defines "the Minister" as the Minister of State for Supply and Development, or the Minister of State for Munitions: See Statutory Rules 1941 No. 214. Reg. 3 provides that the Minister may, by notice, declare any articles or commodities which he considers are urgently required in connection with the defence of the Commonwealth or the successful prosecution of the present war to be goods for the purposes of the Regulations.

Reg. 4 as amended by Statutory Rules 1941 No. 93 and 1942 No. 164 provides as follows:—

"(1) The Minister may by order in writing require any person who deals in or has control of any goods to supply and deliver to the Commonwealth at such place as is specified in the order such goods as are so specified, and within such period as is so specified.

(1A) The Minister may, by order in writing, require any person who manufactures or produces goods, or who, in the opinion of the Minister, is capable of manufacturing or producing goods, to manufacture or produce and to deliver to the Commonwealth at such place as is specified in the order, such goods as are so specified, and within such period as is so specified."

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Par. 1 of reg. 4 deals with persons who deal in or have control of goods, and with the supply or delivery of goods by such persons. Par. 1A deals with persons who manufacture or produce goods, or who, in the opinion of the Minister, can manufacture or produce goods. Under par. 1 the Minister may require goods to be supplied and delivered, and under par. 1A he may require them to be manufactured or produced and delivered. Under par. 1B the Minister may, subject to specified conditions, require a person to manufacture, produce, or supply and deliver goods to persons who manufacture or produce goods for supply to the Commonwealth.

Reg. 5 (1) as enacted by Statutory Rules 1942 No. 164 is as follows :—

“(1) The price or remuneration to be paid by the Commonwealth or by the person to whom goods are delivered in pursuance of an order issued under sub-regulation (1B.) of the last preceding regulation, as the case may be, for the supply and delivery of any goods in respect of which an order has been issued in pursuance of that regulation shall be such as is agreed between the person executing the order and the Commonwealth or person to whom the goods have been delivered in pursuance of an order under that sub-regulation, as the case may be, or, in default of agreement, such as is determined by arbitration in accordance with the succeeding provisions of this regulation :

Provided that the price or remuneration so agreed upon or determined shall not in any case exceed the maximum price (if any) fixed in respect of the goods by the Commonwealth Prices Commissioner in pursuance of the *National Security (Prices) Regulations*.”

Reg. 5 (2) provides that “if a dispute arises between the Commonwealth . . . and the person executing the order as to the price or remuneration which is fair and reasonable, having regard to all relevant circumstances, the dispute may be referred for determination to an arbitrator mutually selected, or, failing such selection, appointed by the Governor-General.” Reg. 5 (3) provides that the arbitrator selected or appointed in pursuance of the regulation may “upon receiving a submission to arbitration of the dispute, duly executed by the parties, hear the dispute and make his determination in relation thereto.” Further provisions relate to the giving of evidence in the course of the arbitration, the production of books, &c., and to costs. Par. 6 of the regulation provides that the arbitration proceedings shall be conducted according to the laws relating to arbitration in force in the State or part of the Commonwealth in which the arbitration takes place, and that the provisions of those laws shall apply in relation to the arbitration as if it were an arbitration within the meaning of those laws.

The objections to the validity of the Regulations are in substance that they do not provide just terms for the acquisition of property, and attention was called to the following matters :—

(1) In the case of the supply of goods the Regulations provide only for a price to be paid for goods, not for compensation for loss caused by the taking of goods.

(2) The Regulations impose a maximum limit upon such price, namely the maximum price (if any) fixed in respect of the goods by the Commonwealth Prices Commissioner under the *Prices Regulations*. There is no provision for hearing any person concerned before the Commissioner fixes such a price.

(3) No provision is made for any general tribunal, a court or other tribunal, to determine prices in default of agreement, but an arbitrator is to be appointed in each separate case, and in default of agreement between the parties the arbitrator is to be appointed by one of the parties, namely, by the Commonwealth, acting by the Governor-General.

(4) There can be no arbitration unless both parties execute a submission to arbitration, and if the parties fail to agree upon the terms of a submission there is no means of bringing about any arbitration under the Regulations so as to obtain any “price” thereunder.

(5) The arbitration would take place between the Commonwealth and “the person executing the order”: see reg. 5 (2). Such a person might be any person who happened to have control of goods at the time when the Commonwealth acquired them (reg. 4 (1)), for example, a bailee, such as a person who had hired a motor-truck, and who was in control of it. There is no provision to secure representation of the owner upon any arbitration; there is no provision even for notice of any arbitration to be given to him; and there is no provision for the payment to him of any part of any “price” awarded.

(6) Reg. 5 (6) introduces the laws of the States with respect to arbitration. The Arbitration Acts of the States give certain jurisdiction to State courts. Therefore the regulation purports to confer Federal jurisdiction on State courts and the *National Security Act* does not authorize the making of such a regulation (*Peacock v. Newtown Marrickville and General Co-operative Building Society No. 4 Ltd.* (1)). Since the hearing of argument upon the demurrer the *National Security Act* has been amended by the *National Security Act* 1943, so as to authorize the making of regulations under the Act investing State courts with Federal jurisdiction, and the amendment is made retrospective. In the view which I take, however, it is not necessary to deal with any question arising with respect to reg. 5 (6).

(1) *Ante*, p. 25.

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The Regulations entitle a person who executes an order of the Minister given under reg. 4 to a price or remuneration to be determined by agreement or by arbitration. The word "price" I understand as referring to the price of goods supplied and delivered, and the word "remuneration" as referring to reward for services in the production or manufacture of goods.

The word "price" appears in the body of par. 1 of reg. 5 and also in the proviso contained in that paragraph. The word must have the same meaning in each case. By reason of the proviso the price must not in any case exceed the maximum price, if any, fixed by the Commonwealth Prices Commissioner. It is evident that such price is fixed, as the regulation states, "in respect of goods," and that such a price cannot take into account any circumstances which may make it just in a particular case that a person whose goods are compulsorily taken from him should receive as compensation something more than the fixed price of the goods. It was conceded for the Commonwealth that the Commonwealth had no legislative power to fix a limit to compensation in this manner, because it was inconsistent with the idea of just terms that a maximum compensation for goods taken should be fixed without any regard to the circumstances of a particular case, and without giving the owner of the goods an opportunity of being heard: Cf. *Chicago &c. Railway Co. v. Minnesota* (1), quoted in *Baltimore and Ohio Railroad Co. v. United States* (2). But the concession that the proviso is invalid does not affect the interpretation of the word "price" where it appears in the Regulations. The reference to "price" in the proviso shows that the price referred to in the Regulations is a price in the ordinary sense, that is, merely the money value of goods, no account being taken of any special loss suffered by an owner as the result of a compulsory taking of his goods.

Where goods are acquired from a person who deals in those goods, the price of the goods taken would, as a general rule, be fair compensation to him. The price of goods depends upon the characteristics of the goods and the state of the market for them, if any. The just compensation to be paid to a person for compulsory taking of goods depends upon these circumstances, but also possibly upon particular circumstances which may vary in different cases. The Prices Commissioner in fixing a price obviously does not and cannot take such circumstances into consideration. In the case of goods (such as a machine) which a person uses in his business, such a price might fall below fair compensation if the machine could not

(1) (1890) 134 U.S. 418 [33 Law. Ed. 970].

(2) (1936) 298 U.S. 349, at p. 364 [80 Law. Ed. 1209, at p. 1221].

be replaced without long delay. In such a case the payment to the dispossessed owner only of the price at which such a machine could, after some lengthy period, be bought, would not give him compensation on just terms, even if, by a generous interpretation of the word "price," interest was added to the sum paid: See *Rickets v. Metropolitan Railway Co.* (1) and *Jubb v. Hull Dock Co.* (2).

"Just terms" involve full and adequate compensation for the compulsory taking. There are cases in which the payment of a "price" for goods (as the term price must be interpreted in these Regulations) does not provide a just measure of compensation. The Regulations provide only for a price to be paid in all cases, and, therefore, do not satisfy the constitutional requirement of just terms.

Upon this ground alone, and without the necessity of considering other arguments which were submitted, I am of opinion that the Regulations are invalid.

In my opinion the demurrer should be overruled.

RICH J. The question involved in this demurrer is whether the *National Security (Supply of Goods) Regulations*, Statutory Rules 1939 No. 129 as amended by Statutory Rules 1941 No. 214, 1941 No. 93 and 1942 No. 164, are valid. The relevant regulations for consideration in this case are 2, 3, 4, and 5. I refrain from setting them out as they are already in statement.

The facts which give rise to the controversy are that the plaintiff company, which at the date of the notice given was the owner and in possession of a "Crabtree" three-colour offset press with auto feeder and electrical equipment, was ordered by the defendant to supply and deliver these goods to the defendant. On a subsequent date the defendant by its servants or agents removed the press from the plaintiff's premises. The defendant attempts to justify this expropriation for a purpose—viz. defence—in respect of which Parliament has power to make laws.

Do these Regulations provide just terms within the meaning of s. 51 (xxxi.) of the Constitution? There are, in my opinion, at least two grounds which demonstrate that such a provision is not made. In the first place "price" in reg. 5 is used in its ordinary sense as contrasted with compensation, and, as the statement of claim alleges that the plaintiff has suffered damage by the acquisition, it may well be that the press in question is the keystone of the plant, with the result that the substratum of the business is gone. In such a case, I think, the price, which must not in any case exceed the maximum

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(1) (1865) 34 L.J. Q.B. 257, at p. 261.

(2) (1846) 9 Q.B. 443, at p. 455 [115 E.R. 1342, at p. 1347].

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price, if any, fixed by the Commonwealth Prices Commissioner (reg. 5 (1) proviso) would not be such full or adequate compensation as the condition of "just terms" demands. In the next place, reg. 4 (1) does not concern itself expressly with the real owner or with other persons who may have an interest in the goods, as the only person mentioned in this regulation is "any person who deals in or has control of any goods" and the word "control" is wide enough to include many types of possession which are not commensurate with full ownership. Moreover, reg. 5 purports to empower the Commonwealth or the person to whom the goods may be ordered to be delivered to agree as to the price to be paid or in default of agreement to submit this question to arbitration. In the latter case, failing mutual selection, the arbitrator may be appointed by the Governor-General, i.e., by one only of the parties to the dispute. Thus there is a total disregard of the rights or claims of the owner or other persons interested, together with the right to exclude such persons from an opportunity of having their claims heard and determined. These conditions appear to me to be more characteristic of an appropriator than of a statutory expropriator, and amount to a failure to observe one of the cardinal principles of justice.

For these reasons I consider that the demurrer should be overruled.

STARKE J. The statement of claim in this action claims damages against the Commonwealth for conversion of a colour offset press, and, anticipating that the Commonwealth would justify its action under the *National Security (Supply of Goods) Regulations*, the plaintiff challenges the validity of those Regulations. And the Commonwealth has demurred.

It is not good pleading to anticipate the defence (*Hall v. Eve* (1)), but pleading nowadays seems a forgotten art.

The *National Security (Supply of Goods) Regulations* were made under the *National Security Act 1939-1940*, which (*inter alia*) authorizes the Governor-General to make regulations for authorizing the acquisition of any property other than land. But this authority depends, I think, upon the provision in the Constitution conferring upon the Parliament power to make laws with respect to the acquisition of property upon just terms from any State or person for any purpose in respect of which the Parliament has power to make laws and not upon the defence power: Cf. *Ex parte Walsh and Johnson*; *In re Yates* (2); *Moore v. Attorney-General for The Irish Free State* (3).

(1) (1876) 4 Ch. D. 341, at p. 345. (2) (1925) 37 C.L.R. 36, at pp. 134, 135.
(3) (1935) A.C. 484, at p. 498.

There are no implied constitutional prohibitions, but in interpreting the Constitution there are some implications such as would arise in the ordinary process of construction: See *Le Mesurier v. Connor* (1), per Isaacs J. Thus, "s. 77 of the . . . Constitution expressly confers upon the Parliament power to make laws investing the courts of the States with Federal jurisdiction. But the provisions of s. 77 and s. 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": See *Le Mesurier v. Connor* (2); *Peacock v. Newtown Marrickville and General Co-operative Building Society No. 4 Ltd.* (3).

So the express power to make laws for the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws makes it plain that the general powers of the Parliament, e.g., the defence power, to legislate with respect to the subjects confided to it must not be interpreted as authorizing legislation for the acquisition of property. It is in this sense that my observations in *Andrews v. Howell* (4) should be understood. Actual war operations and military necessity require further consideration, and so does the requisitioning of property for war purposes (*Saltpetre Case* (5); *Attorney-General v. De Keyser's Royal Hotel Ltd.* (6); *France Fenwick & Co. v. The King* (7)).

The *National Security (Supply of Goods) Regulations* (Statutory Rules 1939 No. 129 as amended) must now be considered. By these Regulations the Minister may require any person who has control of any goods declared to be urgently required in connection with the defence of the Commonwealth or the successful prosecution of the war to supply and deliver to the Commonwealth such goods as are specified. The price or remuneration to be paid by the Commonwealth shall be such as is agreed between the party executing the order and the Commonwealth or, in default of agreement, such as is determined by arbitration in accordance with the provisions of the Regulations. If a dispute arises between the Commonwealth and the person executing the order as to the price or remuneration which is fair and reasonable having regard to all relevant circumstances, the dispute may be referred for determination to an arbitrator

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(1) (1929) 42 C.L.R. 481, at p. 512.

(2) (1929) 42 C.L.R. 481, at p. 496.

(3) *Ante*, p. 25.

(4) (1941) 65 C.L.R. 255, at p. 268.

(5) (1606) 12 Co. Rep. 12 [77 E.R. 1294].

(6) (1920) A.C. 508.

(7) (1927) 1 K.B. 458.

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mutually selected, who may upon receiving a submission to arbitration of the dispute executed by the parties hear the dispute and make his determination in relation thereto. Failing such selection the dispute may be referred to an arbitrator appointed by the Governor-General. But the price or remuneration shall not in any case exceed the maximum price (if any) fixed in respect of the goods by the Commonwealth Prices Commissioner in pursuance of the *National Security (Prices) Regulations*.

The Regulations were attacked on various grounds.

1. Property can only be acquired pursuant to the powers conferred by the Constitution "on just terms". But that involves, it was said, the exercise of the judicial power of the Commonwealth, or in any case an impartial tribunal and the usual rights and privileges which attend judicial investigation.

The former proposition rests upon the division of the government into three departments, legislative, executive and judicial—but a strict division is impossible, and we find more and more, as a matter of practical government, a mingling of functions. This is true also in the United States of America, where the doctrine has been most considered and applied: See *Willis on Constitutional Law*, pp. 165 et seq.; *Holmes J.* in his dissenting opinion in *Springer v. Phillipine Islands* (1); *Robson, Justice and Administrative Law*, pp. 5 et seq.; *Port, Administrative Law*, pp. 257 et seq.; *Victorian Stevedoring & General Contracting Co. Pty. Ltd. and Meakes v. Dignan* (2). Indeed, it has long been recognized in the United States that the ascertainment of the value of property acquired is not exclusively the function of the judicial power. "The proceeding for the ascertainment of the value of property and consequent compensation to be made, is merely an inquisition to establish a particular fact as a preliminary to the actual taking; and it may be prosecuted before commissioners or special boards or the courts, with or without the intervention of a jury, as the legislative power may designate" (*United States v. Jones* (3); *Bauman v. Ross* (4)).

Such a tribunal should act fairly and in a just and judicial manner, but that does not involve any exercise of the judicial power of the Commonwealth. Again, the tribunal should not be merely the representative of one party, but, subject to this, the nature and the character of the tribunal is necessarily a mere matter of legislative discretion.

(1) (1928) 277 U.S. 189, at pp. 209-212 [72 Law. Ed. 845, at pp. 852-854].

(2) (1931) 46 C.L.R. 73.

(3) (1883) 109 U.S. 513, at p. 519 [27 Law. Ed. 1015, at p. 1017].

(4) (1897) 167 U.S. 548, at p. 593 [42 Law. Ed. 270, at p. 289].

In my opinion the Regulations which have been challenged do not impinge upon the judicial power of the Commonwealth, and the tribunal set up is within the legislative discretion. An arbitrator is not partial because of his appointment by the Governor-General in Council: it cannot be contemplated that the Executive Government would appoint a person with formed or pronounced views. It is no part of the Court's duty to approach regulations with a desire to destroy them, especially if a provision, the subject of attack, be one of ordinary prudence and fairness.

2. The Regulations provide that the Minister may require any person who has control of any declared goods to supply and deliver them to the Commonwealth. It is contended that the Regulations do not provide for the case of an owner who has not control of declared goods. But in this case the plaintiff was a juristic person in control of declared goods which was the owner thereof. Its interest is, so far, fully and sufficiently protected, and the Regulations are not bad because they do not provide for all possible cases. And it does not follow that an owner whose case is not provided for by the Regulations would have no redress against the Commonwealth. If the acquisition were effective under the Regulations although just terms were not provided for such an owner, the Commonwealth, I apprehend, would nevertheless be liable to pay compensation (*Attorney-General v. De Keyser's Royal Hotel Ltd.* (1)), and, if it were not effective as to his interest therein, then for damages as for trespass or conversion.

3. The argument that the Regulations do not provide "just terms" is well founded. They prescribe that the price or remuneration agreed upon or determined shall not in any case exceed the maximum price (if any) fixed in respect of the goods by the Commonwealth Prices Commissioner in pursuance of the *National Security (Prices) Regulations*. This enables the Commonwealth to fix the price of goods. But it cannot do so either directly by legislation or indirectly through its Prices Commissioner, for this in substance would make it the judge of its own cause and permit it to determine for itself the price that should be paid for the goods. Apart from this objection the regulation would not, I should have thought, have been objectionable. Price is the sum of money or its equivalent at which a thing is valued, and the Regulations require that it should be fair and reasonable having regard to all relevant circumstances. Under Acts relating to the compulsory acquisition of land the owner's interest in the land must be valued. Compensation is allowed for special adaptability of the land acquired and to some extent for loss of goodwill where a man's business premises are taken and also for

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loss of profits: See *Browne, Law of Compensation*, 2nd ed. (1903), p. 101. But I must take leave to doubt whether there must be reflected in the sum payable to an owner of goods acquired under the Regulations compensation for the loss of a business or of profits from a business. "Just terms" must be related to the value of the goods taken and not to consequential loss of business or of profits therefrom: Cf. *Mitchell v. United States* (1); *United States v. Powelson* (2).

4. Lastly, it was argued that the provisions of reg. 5 were invalid. That regulation prescribes (*inter alia*) that the provisions of State laws shall apply in relation to the arbitration as if it were an arbitration within the meaning of those laws. It was contended that the Governor-General had no power to invest State tribunals with any such authority: See *Peacock v. Newtown Marrickville and General Co-operative Building Society No. 4 Ltd.* (3). But an amending Act has been passed, the *National Security Act 1943*, to meet the decision in *Peacock's Case* (3), and this branch of the argument should stand over and be considered, if need arises, together with the provisions of the *Acts Interpretation Act 1901-1941*.

The demurrer should be disallowed.

MCTIERNAN J. The question to be decided is whether the *National Security (Supply of Goods) Regulations* lawfully authorized the Commonwealth to acquire the plaintiff's press and accessories described in the statement of claim.

The plaintiff contends that the Regulations did not authorize the Commonwealth to acquire the property for two reasons. First, the Regulations on their proper construction do not authorize the acquisition of this property. Second, the Regulations, or reg. 5, are or is beyond the powers conferred by the Constitution of the Commonwealth.

The facts alleged by the statement of claim do not indicate that the press, or any of its accessories, are not articles or commodities within the ordinary meaning of those words as used in the Regulations. The suggestion was made by the plaintiff's counsel in argument that the press and its accessories constituted a trade fixture. But there were no facts then appearing from the pleadings which would justify the inference that the press and its accessories are property of this nature. It is not necessary to consider whether the Regulations would authorize the acquisition of a trade fixture *in situ*.

(1) (1925) 267 U.S. 341 [69 Law. Ed. 644]. (2) (1943) 87 Law. Ed. (U.S.) (Advance Opinions) 976, at pp. 985, 986.

(3) *Ante*, p. 25.

The second question is the principal one raised by the demurrer. The Regulations are an exercise of power conferred on the Governor-General by the *National Security Act* 1939-1940. This Act plainly confers power on the Governor-General to make regulations authorizing the acquisition by the Commonwealth of property. The question that arises is whether the power extends to making reg. 5, which provides that a "price" to be determined by agreement or arbitration is to be paid for any article or commodity acquired, and with the proviso that the price to be paid must not exceed the maximum price, if any, fixed by the Commonwealth Prices Commissioner. "It is an established rule that a statute will not be read as authorizing the taking of a subject's goods without payment unless an intention to do so be clearly expressed: See *Attorney-General v. Horner* (1); *London & North Western Railway Co. v. Evans* (2); *R. v. Abbott* (3); *Commissioner of Public Works (Cape Colony) v. Logan* (4). This rule must apply no less to partial than to total confiscation, and it must apply *a fortiori* to the construction of a statute delegating legislating powers" (*Newcastle Breweries (Ltd.) v. The King* (5)). In *Attorney-General v. De Keyser's Royal Hotel Ltd.* (6), Lord Atkinson said:—"Neither the public safety nor the defence of the realm requires that the Crown should be relieved of a legal liability to pay for the property it takes from one of its subjects. The recognized rule for the construction of statutes is that, unless the words of the statute clearly so demand, a statute is not to be construed so as to take away the property of a subject without compensation." See also (7).

The powers conferred on the Governor-General by s. 5 of the *National Security Act* 1939-1940 include the power to make regulations for securing the public safety and the defence of the Commonwealth and its territories, and, in particular, for authorizing the acquisition on behalf of the Commonwealth of any property other than land. The *National Security Act* does not explicitly delegate any power to make regulations (even if it were within the powers of Parliament to pass such an Act) under which the subject might be deprived of his property without compensation—that is, just compensation. The Act, in so far as it confers power to make regulations for the acquisition of property, should be interpreted as conferring power to make regulations providing for the acquisition of property

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(1) (1884) 14 Q.B.D. 245, at p. 256;
1 T.L.R. 28.

(2) (1893) 1 Ch. 16, at p. 28; 9
T.L.R. 50.

(3) (1897) 2 I.R. 362, at p. 405.

(4) (1903) A.C. 355, at p. 363; 19
T.L.R. 545.

(5) (1920) 36 T.L.R. 276, at p. 281.

(6) (1920) A.C., at p. 542.

(7) (1920) A.C., at pp. 529, 559, 560,
569, 579.

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upon the terms that just compensation is paid. Reg. 5 limits the compensation to the price of the goods which are compulsorily acquired. Even if the Commonwealth Prices Commissioner has not fixed a maximum price for goods of the same description, the price would obviously not in all cases be just compensation, that is to say, a fair recompense to the owner for the goods. Price is narrower than compensation. The scope of the Regulations extends beyond goods that are produced for sale at a price. In the case of articles outside that category, the bare price would not be just compensation for compulsory acquisition. In my opinion reg. 5 is beyond the powers which the *National Security Act* confers on the Governor-General and is void for that reason. The intention of the Regulations is to authorize the Commonwealth to take articles and commodities declared to be goods for the purposes of the Regulations upon the payment of the "price" of the goods, and no more. It follows that, not reg. 5 only, but the whole of the Regulations, are invalid.

The determination of the question whether the Regulations are invalid does not therefore involve any discussion of the powers conferred on Parliament by the Constitution: for, upon the proper construction of the provisions of the *National Security Act* 1939-1940, the Regulations are not within the powers conferred on the Governor-General by that Act. As the Regulations are not in my opinion justified by those powers, it is unnecessary to express an opinion on the relation of placitum xxxi. of s. 51 of the Constitution to placitum vi. of this section. Placitum xxxi. is a grant of legislative power. It contains no express restriction on any other legislative power. In *Andrews v. Howell* (1), however, *Dixon J.* assumed, without deciding, that s. 51 (xxx.) affected the construction of other particular legislative powers.

In my opinion the Regulations are invalid and the demurrer should be overruled.

WILLIAMS J. The *National Security (Supply of Goods) Regulations*, Statutory Rules 1939 No. 129 made under the provisions of the *National Security Act* 1939, came into force on 31st October 1939. They have been subsequently amended by Statutory Rules 1941 Nos. 93 and 214 and 1942 No. 164 made under the provisions of this Act as amended in 1940.

Purporting to act under the provisions of these Regulations, as amended, the defendant, the Commonwealth of Australia, on 27th July 1942, ordered the plaintiff to supply and deliver to it one "Crabtree" three-colour offset press with auto feeder and electrical

equipment. On 21st August 1942 the defendant removed this press from the plaintiff's premises. If the Regulations are invalid then the taking of the press was unlawful and the plaintiff has a right of action against the Commonwealth in tort. If the Regulations are valid then the taking was lawful and the plaintiff has a right to recover "the price" in accordance with the Regulations.

The constitutional validity of the Regulations is attacked on the ground that they do not provide just terms for the acquisition of goods within the meaning of s. 51 (xxxi.) of the Constitution. This placitum enables the Commonwealth Parliament to make laws for the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws. The Regulations are a delegated legislative exercise of the powers of the Parliament to make laws for the naval and military defence of the Commonwealth under the Constitution, s. 51 (vi.). This is a purpose in respect of which the Parliament has power to make laws, but where the Parliament provides in such laws for the acquisition of property from a State or person placitum xxxi. requires that they must contain just terms. The meaning of placitum xxxi. was discussed by this Court in *Andrews v. Howell* (1) and *Australian Apple and Pear Marketing Board v. Tonking* (2).

The relevant regulations are 4 (1) and 5 which, as amended, provide (so far as is material) as follows:—

4. (1) The Minister may by order in writing require any person who deals in or has control of any goods to supply and deliver to the Commonwealth at such place as is specified in the order such goods as are so specified, and within such period as is so specified.

5. (1) The price to be paid by the Commonwealth for the supply and delivery of any goods in respect of which an order has been issued in pursuance of reg. 4 shall be such as is agreed between the person executing the order and the Commonwealth, or, in default of agreement, such as is determined by arbitration in accordance with the succeeding provisions of this regulation:

Provided that the price so agreed upon or determined shall not in any case exceed the maximum price (if any) fixed in respect of the goods by the Commonwealth Prices Commissioner in pursuance of the *National Security (Prices) Regulations*; and

(2) If a dispute arises between the Commonwealth and the person executing the order as to the price which is fair and reasonable, having regard to all relevant circumstances, the dispute may be referred for determination to an arbitrator mutually selected, or failing such selection, appointed by the Governor-General.

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(3) The arbitrator selected or appointed in pursuance of this regulation may, upon receiving a submission to arbitration of the dispute, duly executed by the parties, hear the dispute and make his determination in relation thereto.

(4) The parties to the dispute, by themselves, or, in the case of a company, association, or body of persons, by their principal officers, shall, if required by the arbitrator, submit to be examined by the arbitrator on oath in respect of any matter in relation to the dispute, and shall produce before the arbitrator all books, papers, accounts, writings and documents which may be required or called for, and do all other things which, during the hearing of the dispute, the arbitrator may lawfully require.

(5) The costs of the arbitration shall be in the discretion of the arbitrator who may by his determination direct to and by whom, and in what manner, those costs or any part thereof shall be paid and may, if he thinks proper, tax or settle the amount of costs to be so paid or any part thereof.

(6) Subject to this regulation, the arbitration proceedings shall be conducted according to the laws relating to arbitration in force in the State or part of the Commonwealth in which the arbitration takes place, and the provisions of those laws shall apply in relation to the arbitration as if it were an arbitration within the meaning of those laws.

Reg. 4 (1) refers to the person who deals in or has control of any goods. He is the person who is ordered to supply and deliver the goods to the Commonwealth. In the present case the plaintiff was the owner and in possession of the press, but a person who deals in or has control of goods need not necessarily be a person having the sole or even any proprietary interest in the goods. Reg. 5 (1) refers to an agreement as to the price of goods acquired being made between the person executing the order and the Commonwealth. If this person and the Minister are unable to agree as to the price then it is to be determined by arbitration. The arbitration is between this person and the Minister. When the price has been agreed upon or settled by arbitration it is payable to him. The Regulations therefore provide that the price shall be fixed by the Commonwealth by agreement or arbitration with and payment made to a person who may have only a partial or even no proprietary interest in the goods.

It is a fundamental principle of law that claimants should have a fair opportunity of putting their case before their claims are determined (*Australian Apple and Pear Marketing Board v. Tonking* (1)),

so that all persons having a proprietary interest in the goods should have an opportunity of being heard before the price is fixed by agreement or arbitration. It might be difficult in many instances to ascertain who these persons are, but the Regulations could at least provide that the person executing the order should notify their names and addresses to the Commonwealth by statutory declaration to the best of his knowledge, and that notice by post should be given to these persons at these addresses of any appointments made to agree upon a price, or, in default of agreement, to appoint an arbitrator to settle the submission and to proceed upon the arbitration. Compensation for property acquired for the purposes of defence in England is provided by the *Imperial Compensation (Defence) Act 1939*. Section 9 of this Act provides that the tribunals constituted to assess compensation shall have power (a) to make, with the concurrence of the Lord Chancellor, rules prescribing the procedure for notifying, presenting and hearing claims and all matters incidental thereto. The Regulations do not even contain a provision that the person to whom the purchase money is payable shall hold it on account of all persons interested in the goods or for the apportionment of the proceeds in the event of a dispute: See the *Imperial Licensing Act 1904*, s. 2, sub-s. 2, referred to in the footnote *In re Bladon*; *Dando v. Porter* (1), cited by this Court in *Syme v. The Commonwealth* (2). See also s. 113, sub-s. 4, of the *Imperial Army Act* (as amended), referred to in *Roadways Transport Development Ltd. v. Attorney-General* (3), and the *Imperial Compensation (Defence) Act 1939*, ss. 13 and 14. Regulations which make no attempt to ensure that all persons interested in the goods shall be heard as to the price or that the purchase money shall be properly apportioned between them do not comply with placitum xxxi.

In order to be just the Regulations must provide a full measure of compensation. It was contended that the word "price" in the context "price . . . which is fair and reasonable, having regard to all relevant circumstances" means compensation. In the absence of the proviso inserted by Statutory Rules 1942 No. 164, which limits the maximum compensation to the price, if any, fixed in respect of the goods by the Commonwealth Prices Commissioner, this meaning might be open; but the question whether the word "price" meant "compensation" was once the subject of litigation which reached the House of Lords in *Stockton and Middlesbrough Water Board v. Kirkleatham Local Board* (4). In the Court of Appeal

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(1) (1912) 1 Ch. 45, at p. 46.

(2) (1943) 66 C.L.R. 413.

(3) (1942) Ch. 208.

(4) (1893) A.C. 444.

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Bowen L.J. said: "The legislature unquestionably has said that what the sellers are to receive is price as distinct from compensation" (1). Terms to be just should be clear and not obscure; so that where compensation is meant, the word compensation should be used. Since the addition of the proviso it is plain that the Regulations mean price and not compensation. This proviso appears to have been adopted from the proviso to the *Imperial Compensation (Defence) Act*, s. 6 (2). But the Imperial Parliament can acquire property for public purposes on any terms it thinks fit. The fixed price would be an important element to be taken into account in assessing compensation. Where the market value of the goods would provide adequate compensation it might be conclusive; but where, as in the present case, the acquisition has interfered with the carrying on of a business the owner would have to be compensated for loss due to this disturbance of business. The principles upon which compensation should be assessed are discussed in *Tonking's Case* (2). In this respect also the Regulations do not contain just terms.

It was also contended that the Regulations were invalid on other grounds. One ground, based on the decision of this Court in *Peacock v. Newtown Marrickville and General Co-operative Building Society No. 4 Ltd.* (3), that the investment of State Courts by reg. 5 (6) with Federal jurisdiction under s. 77 (iii.) of the Constitution was ineffective, may have disappeared with the passing, since the date of the argument, of the *National Security Act* 1943. But, since the Regulations are invalid for the reasons already given, it is unnecessary to deal with any other grounds.

The demurrer should be overruled.

Demurrer overruled.

Solicitors for the plaintiff, *Oswald Burt & Co.*

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

E. F. H.

(1) (1893) 1 Q.B. 375, at p. 385.

(2) (1942) 66 C.L.R. 77.

(3) *Ante*, p. 25.