REPORTS OF CASES

DETERMINED IN THE

HIGH COURT OF AUSTRALIA

[HIGH COURT OF AUSTRALIA.]

SILK BROS. PROPRIETARY LIMITED . . PLAINTIFF;

AND

STATE ELECTRICITY COMMISSION OF VICTORIA . . . . . } DEFENDANT.

ON REMOVAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1943.

MELBOURNE, *March* 15-17.

SYDNEY, *April* 8.

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

Federal Judiciary—Judicial power—Landlord and tenant—Applications for recovery of possession—Fair Rents Boards—Whether Federal courts—Tenure of members—Whether investing of State courts with Federal jurisdiction—Boards consisting of State magistrates—The Constitution (63 & 64 *Vict. c.* 12), *secs.* 71, 72—*National Security* (*Landlord and Tenant*) *Regulations* (*S.R.* 1941 *No.* 275—1943 *No.* 12), *regs.* 15, 16—*National Security* (*Fair Rents*) *Regulations* (*S.R.* 1941 *Nos.* 62 *and* 71), *reg.* 7.

Constitutional Law—Defence—National security—Landlord and Tenant Regulations—Severability—Validity—The Constitution (63 & 64 *Vict. c.* 12), *sec.* 51 (*vi.*)—*National Security* (*Landlord and Tenant*) *Regulations* (*S.R.* 1941 *No.* 275—1943 *No.* 12).

Regs. 15* and 16† of the *National Security* (*Landlord and Tenant*) *Regulations*, purporting to vest in Fair Rents Boards power to determine applications by landlords for the recovery of premises and providing for the enforcement of the Board's orders, are invalid inasmuch as their effect would be to confer

* Statutory Rules 1941 No. 275, reg. 15, as amended by Statutory Rules 1941 No. 286, reg. 2; 1941 No. 321; 1942 No. 112, reg. 2; 1942 No. 456, reg. 5; and 1943 No. 12, reg. 7.

† Statutory Rules 1941 No. 275, reg. 16, as amended by Statutory Rules 1941 No. 286, reg. 3

H. C. OF A. 1943. SILK BROS. PTY. LTD. v. STATE ELECTRICITY COMMISSION OF VICTORIA.

judicial power contrary to secs. 71 and 72 of the Constitution. The Boards are not Federal courts because their members have not the tenure required by the Constitution. The conferring of powers upon Boards to consist of a police, stipendiary or special magistrate, with or without other persons, is not an investing with Federal jurisdiction of the State courts in which the members of the Boards, or some of them, may exercise judicial functions under State law.

The other provisions of the *National Security* (*Landlord and Tenant*) *Regulations* are severable from regs. 15 and 16 and not affected by their invalidity, and, *semble*, are within the defence power of the Commonwealth.

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

At the times material to this report Silk Bros. Pty. Ltd., fruit merchant (hereinafter called the plaintiff), was in possession of certain premises at City Road, South Melbourne, which it used as a store. It had been the tenant of these premises prior to July 1942. In or about that month, the liquidator of James Moore & Sons Pty. Ltd., the then owner of the premises, agreed with the plaintiff to let the premises to it at a monthly rental of £13, on condition that, if the premises should be sold and the plaintiff then be given notice to vacate, it would do so. On 23rd September 1942 the liquidator sold the premises to a Miss Meehan, and on the next day he informed the plaintiff of the sale and that the plaintiff was required to vacate the premises on 23rd October 1942. The plaintiff, nevertheless, remained in possession after that date. On 3rd December 1942 the State Electricity Commission of Victoria, pursuant to sec. 44 of the *State Electricity Commission Act* 1928 (Vict.), acquired the premises from Miss Meehan by agreement; on 10th February 1943 it informed the plaintiff that it required vacant possession, and threatened that it would issue a warrant to take possession in accordance with the *Lands Compensation Act* 1928 (Vict.) (which, with necessary modifications, was to be read as incorporated in the *State Electricity Commission Act*). On 17th February 1943 the plaintiff commenced an action against the Commission in the Supreme Court of Victoria, claiming an injunction restraining the defendant, its servants and agents from—"(i) taking or continuing any proceedings to terminate the tenancy of the plaintiff in the premises . . . or to recover possession of the . . . premises, or to eject the plaintiff therefrom except proceedings authorized by or under regulation 15 of *National Security* (*Landlord and Tenant*) *Regulations*; (ii) issuing its . . . warrant to the Sheriff to recover possession of the . . . premises and/or to eject the plaintiff its servants or agents therefrom; (iii) interfering in any way with the peaceable enjoyment

by the plaintiff its servants or agents of the . . . premises." By a summons which was served with the writ the plaintiff sought an interlocutory injunction in the same terms. The summons came before *Martin* J., who, when the question of the validity of the *National Security* (*Landlord and Tenant*) *Regulations* was raised, declined to proceed further in the matter, being of opinion that a question within sec. 40A of the *Judiciary Act* 1903-1940 had arisen. The cause was removed to the High Court and came before *Latham* C.J., who, to obviate the necessity of hearing argument as to whether a question within sec. 40A of the *Judiciary Act* had arisen, made an order under sec. 40 of that Act removing the cause into the High Court; he also referred it to the Full Court of the High Court. The order of *Latham* C.J. recited that the parties had agreed to treat the hearing of the summons as the trial of the action; it also recited undertakings by the plaintiff and the defendant which appear in the judgment of *Latham* C.J. hereunder.

The Full Court was informed, on the hearing of the cause, that a transfer under the *Transfer of Land Act* 1928 (Vict.) of the premises from Miss Meehan to the Commission had been executed and the purchase money under the agreement had been paid but the transfer had not yet been registered.

The effect of the relevant regulations is sufficiently stated in the judgments hereunder.

P. D. Phillips, for the plaintiff. The defendant cannot recover possession of the premises from the plaintiff unless it is able to do so under reg. 15 of the *National Security* (*Landlord and Tenant*) *Regulations*. Those Regulations are not beyond the defence power, and they do not confer judicial power in contravention of the Constitution. As to the defence power.—The fixing of rents in time of war, as a measure contributing to defence, is as justifiable as the fixing of the price of goods; and a scheme for fixing rents would be futile if no provision was made to prevent the landlord from ejecting the tenant. As to the judicial power.—The method by which Fair Rents Boards were constituted in Victoria has resulted in the conferring of the powers under reg. 15 of the *Landlord and Tenant Regulations* upon Courts of Petty Sessions as State courts exercising Federal jurisdiction. The Victorian Fair Rents Boards were originally constituted by the Governor in Council of that State in accordance with the *National Security* (*Fair Rents*) *Regulations* by an Order in Council of 9th October 1939, constituting " a Fair Rents Board at each place in the State of Victoria at which a court of petty sessions has been or may hereafter be appointed to be holden under the " *Justices Acts*

H. C. OF A. 1943.

SILK BROS. PTY. LTD. v. STATE ELECTRICITY COMMISSION OF VICTORIA.

(Vict.) and appointing "any Police Magistrate for the time being assigned to adjudicate at any such Court of Petty Sessions to constitute the Fair Rents Board at the place at which the said court of petty sessions is appointed to be holden as aforesaid." The Metropolitan Fair Rents Board was constituted by the Governor in Council on 8th April 1941, as "consisting of such Police Magistrate as is assigned for the purpose for the time being . . . at the City Court, Russell Street, Melbourne"; by Order in Council of 8th April 1941 a named police magistrate was appointed to be the Metropolitan Board, and by a further Order of 10th February 1942 another named police magistrate was appointed "to be also" the Metropolitan Board. The Victorian Boards continued in existence (*Landlord and Tenant Regulations*, reg. 3, and order of the Minister thereunder dated 25th March 1942). The terms in which these Boards were constituted show that a police magistrate constituting a Court of Petty Sessions (*Justices Act* 1928 (Vict.), sec. 63) was intended to be the Board. Accordingly, a Fair Rents Board in Victoria is a State court exercising Federal jurisdiction, and there is no contravention of the Constitution as regards judicial power. *Le Mesurier* v. *Connor* (1) is not a decision to the contrary; expressions of opinion in the judgments that a statute is necessary for the conferring of Federal jurisdiction were *obiter*, and were incorrect. Sec. 5 of the *National Security Act* 1939-1940 is wide enough to authorize Regulations conferring judicial power. If regs. 15 and 16 of the *Landlord and Tenant Regulations* are invalid, the remainder of those Regulations must fail; they are merely a rent-fixing scheme which, as has already been submitted in relation to the defence power, cannot operate effectively in the absence of some such provision as reg. 15. The plaintiff can then have recourse to the *Fair Rents Regulations*, particularly reg. 17, which prevents the defendant from ejecting the plaintiff. Those Regulations are still in force notwithstanding that they are expressed to be repealed by reg. 1 of the amending *Landlord and Tenant Regulations*, Statutory Rules 1943 No. 12. If the principal *Landlord and Tenant Regulations* are wholly invalid, Statutory Rules 1943 No. 12 is also wholly void, and the purported repeal is ineffectual. Further, if the principal *Landlord and Tenant Regulations* are invalid in whole or in such an essential part as reg. 15, reg. 1 of Statutory Rules 1943 No. 12 should not be read as anything more than a conditional repeal of the *Fair Rents Regulations*; the fact that the repealing provision appears in amending *Landlord and Tenant Regulations* shows that

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

it is conditioned upon the continuance of the *Landlord and Tenant Regulations* in full operation. The premises in question are " prescribed premises " within reg. 4 of the *Fair Rents Regulations* ; they are a " shop " within the meaning of that regulation (*Pope* v. *Whalley* (1) ; *Haynes* v. *Ford* (2)). It is sufficient for this purpose that the premises are used by the plaintiff for storing goods for sale ; a shop must consist of a place for storing the goods as well as a place for selling them.

Ham K.C. (with him *Dean*), for the defendant. Reg. 15 of the *Landlord and Tenant Regulations* is invalid in that it purports to confer judicial power. A Fair Rents Board is not a Federal court, and it is not a State court invested with Federal jurisdiction. If the Regulations purport to create a Federal court, they are invalid because they do not give life tenure to members of a Board (*Shell Co. of Australia Ltd.* v. *Federal Commissioner of Taxation* (3)) ; and the same case in the High Court, *sub nom. British Imperial Oil Co. Ltd.* v. *Federal Commissioner of Taxation* (4) ; *New South Wales* v. *The Commonwealth* (5) ; *Waterside Workers' Federation of Australia* v. *J. W. Alexander Ltd.* (6)). A Fair Rents Board in Victoria is not a Court of Petty Sessions ; it is constituted by a police magistrate, but there is nothing in the Orders of the Governor in Council of Victoria to indicate that the police magistrate sits as a Court of Petty Sessions. As to the Metropolitan Board in particular, the appointment is merely of a named police magistrate, and not of a court (*Ex parte Thompson* ; *In re Ryan* (7) ; *Medical Board of Victoria* v. *Meyer* (8)). Reg. 15 (2) is, therefore, invalid, and reg. 15 (1) is not severable from it. In any event, it requires a statute to invest a State court with Federal jurisdiction ; it cannot be done by regulations (*Le Mesurier* v. *Connor* (9)). The *Landlord and Tenant Regulations* (particularly reg. 15) are beyond the defence power. They are not limited either to persons doing work in connection with the war or to places in which there is a shortage of houses, but apply indiscriminately throughout the country ; and they have no real relation to defence (*Victoria* v. *The Commonwealth* (10)). Even if the rent-fixing provisions are supported by the defence

(1) (1865) 6 B. & S. 303, at p. 313 [122 E.R. 1208, at p. 1211].
(2) (1911) 2 Ch. 237.
(3) (1931) A.C. 275, at pp. 295, 296 ; 44 C.L.R. 530, at pp. 542, 543.
(4) (1926) 38 C.L.R. 153, at pp. 175, 176.
(5) (1915) 20 C.L.R. 54, at pp. 62, 89.
(6) (1918) 25 C.L.R. 434, at p. 453.
(7) (1940) 41 S.R. (N.S.W.) 10, at p. 14.
(8) (1937) 58 C.L.R. 62, at pp. 70, 71.
(9) (1929) 42 C.L.R. 481.
(10) (1942) 66 C.L.R. 488, *per Latham* C.J., at pp. 505, 508, 509 ; *per Starke* J., at pp. 514, 515.

H. C. OF A. 1943.

SILK BROS. PTY. LTD. v. STATE ELECTRICITY COMMISSION OF VICTORIA.

power, the provisions relating to ejectment cannot be supported. The plaintiff cannot rely on the *Fair Rents Regulations*, which were superseded by the *Landlord and Tenant Regulations*, or, if they had any subsequent force, were repealed before this action was commenced. Even if they remained in force, the *Fair Rents Regulations* would not apply to the present case. There was no relationship of lessor and lessee between the plaintiff and the defendant, and the premises in question were not "prescribed premises" within the meaning of the Regulations; they were not a "shop" (*Stroud's Judicial Dictionary*, *s.v.* "shop"), nor were they a dwelling-house or factory. The defendant has ample authority under its Act to acquire the premises and to take the steps it proposes to recover possession from the plaintiff.

Fullagar K.C. (with him *Adams*), for the Commonwealth (intervening). Reg. 15 of the *Landlord and Tenant Regulations* does purport to confer judicial power, and is invalid unless the Regulations and Orders in Council invest State courts with Federal jurisdiction. Courts of Petty Sessions in Victoria are so invested; the assignment of police magistrates, who do, or may, constitute Courts of Petty Sessions, is sufficient to bring this about (*Medical Board of Victoria* v. *Meyer* (1); *National Telephone Co. Ltd.* v. *Postmaster-General* (2)). *Le Mesurier* v. *Connor* (3) is not an authority to the contrary; it is inconsistent with *Baxter* v. *Ah Way* (4) and *Victorian Stevedoring and General Contracting Co. Pty. Ltd. and Meakes* v. *Dignan* (5). If the Regulations authorize the appointment of non-judicial as well as judicial bodies, they should be read down so as to authorize only valid appointments. If reg. 15 is invalid, reg. 16 also fails, but the other regulations are severable. Otherwise, the *Fair Rents Regulations* remain in force. Their repeal must have been based on the assumption that the *Landlord and Tenant Regulations* would operate in their stead, and therefore should be regarded as conditional merely. Reg. 17 of the *Fair Rents Regulations* does not confer judicial power and is valid.

P. D. Phillips, in reply, referred to *Wynes, Legislative and Executive Powers in Australia*, (1936), p. 47.

Cur. adv. vult.

(1) (1937) 58 C.L.R., at pp. 71, 72, 80, 81.
(2) (1913) A.C. 546, at pp. 559, 560, 562.
(3) (1929) 42 C.L.R. 481.
(4) (1909) 8 C.L.R. 626.
(5) (1932) 46 C.L.R. 73.

The following written judgments were delivered :—

LATHAM C.J. The plaintiff company, Silk Bros. Pty. Ltd., sued the defendant, the State Electricity Commission of Victoria, in the Supreme Court of Victoria, seeking an injunction against the defendant taking or continuing any proceedings to terminate the tenancy of the plaintiff in certain premises, or to recover possession of the premises, or to eject the plaintiff therefrom "except proceedings authorized by or under reg. 15 of *National Security* (*Landlord and Tenant*) *Regulations*."

The plaintiff applied in the Supreme Court for an interlocutory injunction. The defendant contended that reg. 15 was invalid. *Martin* J. was of opinion that this contention raised a question as to the limits *inter se* of the constitutional powers of the Commonwealth and of a State, and under sec. 40A of the *Judiciary Act* 1903-1940 declined to proceed further in the matter, and the case accordingly was removed under that section to the High Court. In order to obviate the necessity of hearing argument as to whether the action did raise a question of the limits *inter se* of constitutional powers, when the matter came before me I made an order under sec. 40 of the *Judiciary Act* removing the action into the High Court. The cause arose under the Constitution and involved its interpretation, and accordingly I followed the procedure adopted by *Starke* J. in *James* v. *Cowan* (1). The application for the injunction has been referred to the Full Court, and the parties have agreed to treat the application as the trial of the action.

In the statement of claim the plaintiff alleges that the defendant is the owner of the premises in question. It is therefore unnecessary to examine the steps by which it became owner under the *State Electricity Commission Act* 1928 (Vict.) and the *Lands Compensation Act* 1928 (Vict.). The evidence shows that the agreement for tenancy upon which the plaintiff relies contained a condition that, if the premises should be sold and the plaintiff were then given notice to vacate, it would do so. The premises were sold, and notice was given that vacant possession was required on 23rd October 1942, and the plaintiff was required to vacate the premises. The defendant made no agreement for tenancy with the plaintiff and has accepted no rent from the plaintiff. Thus, under the ordinary law of landlord and tenant, the defendant would be entitled to obtain an order for recovery of possession in proceedings in the Supreme Court.

The only question which arises upon the case as it now stands is whether reg. 15 of the *National Security* (*Landlord and Tenant*) *Regulations* prevents the defendant from taking steps to eject the

(1) (1932) 43 C.L.R. 386, at p. 388.

H. C. OF A. 1943.

SILK BROS. PTY. LTD. v. STATE ELECTRICITY COMMISSION OF VICTORIA.

Latham C.J.

plaintiff, whether such steps be taken under the ordinary law of landlord and tenant, or under special powers under the *Lands Compensation Act* which enable the Commission to take possession of land acquired by it under the Act. Although the only regulation mentioned in the documents in the case is reg. 15 of the *Landlord and Tenant Regulations*, the plaintiff has relied in argument also upon the *National Security* (*Fair Rents*) *Regulations* as affording protection to the plaintiff, if for some reason the *Landlord and Tenant Regulations* are not applicable in its favour.

The *National Security* (*Landlord and Tenant*) *Regulations* were made as Statutory Rules 1941 No. 275 and have been amended from time to time. They contain provisions for the constitution of Fair Rents Boards and provide that the Boards may fix a fair rent for the premises to which the Regulations apply. The provisions relating to the determination of a fair rent are substantially the same as those which were contained in the *National Security* (*Fair Rents*) *Regulations*—Statutory Rules 1941 No. 62, as since amended. In addition, however, to the provisions for fixing fair rents, the *Landlord and Tenant Regulations* add in regs. 15 and 16 provisions placing restrictions upon the right of a landlord to evict a tenant.

Reg. 15 (1) of the *Landlord and Tenant Regulations* is as follows :— "Subject to this regulation, the lessor of any prescribed premises shall not give any notice or take or continue any proceeding to terminate the tenancy or to recover possession of the premises or for the ejectment of the tenant therefrom." The premises in question are prescribed premises within the meaning of the *Landlord and Tenant Regulations*: See definition in reg. 4 thereof.

Reg. 15 (2) provides that, subject to succeeding sub-regulations, an application may be made by a lessor to a Fair Rents Board for an order for the recovery by him of any prescribed premises, or for the ejectment of the tenant therefrom, if the lessor, before taking such proceedings, has given to the lessee notice to quit for a specified period and that period of notice has expired. The notice to quit can be given only upon one or more of the grounds which are set out in sub-pars. *a* to *h*. The lessor has not given the notice required by this provision, and there is no evidence that any of the specified grounds exist in the present case. Accordingly, as reg. 15 is in terms applicable to the present case, the defendant has no right, if the regulation is valid, to take any proceedings to terminate the tenancy.

The effect of reg. 15 is to prevent any action for recovery of possession of land in the courts which normally deal with such matters and to confine the power to make an order for recovery of possession

to Fair Rents Boards. Power to make an order in favour of a landlord against a tenant for the recovery of the possession of leased land is plainly a judicial power according to any definition of judicial power which can be suggested. In *Shell Co. of Australia Ltd.* v. *Federal Commissioner of Taxation* (1), the Privy Council adopted as one of the best definitions of judicial power that given by *Griffith* C.J. in *Huddart, Parker & Co. Pty. Ltd.* v. *Moorehead* (2) :—" I am of opinion that the words ' judicial power ' as used in sec. 71 of the Constitution mean the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this 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." The power which reg. 15 purports to confer on a Fair Rents Board is a power to decide a controversy between landlord and tenant relating to property. The Fair Rents Board is expressly given power to make a binding and authoritative decision: see reg. 15 (9), which provides that a Fair Rents Board shall have all the powers possessed by courts of summary jurisdiction and that its decision shall not be subject to appeal. Reg. 16 expressly provides that any order made by a Board under these Regulations for the recovery of premises, or for the ejectment of a tenant, may be enforced in the same manner as if the order had been made by a court which, but for the Regulations, would have had jurisdiction to make the order. Thus the Regulations purport to invest Fair Rents Boards with judicial power.

Sec. 71 of the Constitution provides that the judicial power of the Commonwealth shall be vested in the High Court, and in such other Federal courts as the Parliament creates, and in such other courts as it invests with Federal jurisdiction. *Griffith* C.J. said in *New South Wales* v. *The Commonwealth* (3) : " There cannot be a third class of courts which are neither Federal courts nor State courts invested with Federal jurisdiction." Accordingly, in order that a Fair Rents Board should be able to discharge the functions committed to it, it must be either a Federal court created by the Commonwealth Parliament by or in pursuance of the Regulations, or a State court invested by or in pursuance of the Regulations with Federal jurisdiction.

A Federal court, in order to be validly constituted under the Constitution, must satisfy the provisions of the Constitution with

(1) (1931) A.C., at p. 295; 44 C.L.R., at p. 542.
(2) (1908) 8 C.L.R. 330, at p. 357.
(3) (1915) 20 C.L.R. 54, at p. 62.

H. C. OF A. 1943.

SILK BROS. PTY. LTD. v. STATE ELECTRICITY COMMISSION OF VICTORIA.

Latham C.J.

respect to the tenure of the members of the court. In *Waterside Workers' Federation of Australia* v. *J. W. Alexander Ltd.* (1) it was held that sec. 72 of the Constitution required that every member of any court created by the Parliament of the Commonwealth should, subject to the power of removal contained in the section, be appointed for life: See also per *Knox* C.J. in *British Imperial Oil Co. Ltd.* v. *Federal Commissioner of Taxation* (2). Accordingly, a Fair Rents Board cannot be a Federal court, so as to be capable of exercising judicial power in that capacity, unless the members of the Board are appointed for life. I refer hereafter in some detail to the provisions relating to the constitution of Fair Rents Boards. It is sufficient here to say that it cannot be suggested that the members of Fair Rents Boards have been appointed for life, or that the regulations relating to them either contemplate or permit appointments for life in accordance with the terms of sec. 72 of the Constitution.

A Fair Rents Board can therefore exercise the powers conferred upon it by regs. 15 and 16 of the *Landlord and Tenant Regulations* only if it is a State court which has been invested with the Federal jurisdiction referred to in those Regulations.

It is contended for the company that Fair Rents Boards are State courts to which Federal jurisdiction has been given by the Regulations. Reg. 3 (4) of the *Landlord and Tenant Regulations* provides that, where the Minister is satisfied in respect of any State that the law in force in that State does not sufficiently carry out the objects of the Regulations, the Minister may, by order in the Gazette, declare that the provisions of the Regulations which are not otherwise in force in the State shall apply in that State. Reg. 3 (5) provides that where the Minister makes any such order in respect of a State in which, at the publication of the order, a Fair Rents Board is constituted under the *National Security* (*Fair Rents*) *Regulations*, every Fair Rents Board constituted under those Regulations shall continue in existence as if constituted under the *Landlord and Tenant Regulations*, but that it may be abolished in accordance with the *Landlord and Tenant Regulations*. (Reg. 7 of the *Landlord and Tenant Regulations* provides that the Minister may abolish any Fair Rents Board. This provision in itself is sufficient to show that the members of a Fair Rents Board do not hold office under the terms of sec. 72 of the Constitution, which require life tenure, subject only to removal on an address from both Houses of the Parliament. But, if the Fair Rents Boards are State courts, then they may be invested with judicial power, though it is hard to see how in such a case a Federal Minister could " abolish " them.)

(1) (1918) 25 C.L.R. 434. (2) (1925) 35 C.L.R. 422, at pp. 432, 433.

In order to determine whether the Fair Rents Boards are State courts, it is necessary to consider the effect of the provisions relating to the continuance under the *Landlord and Tenant Regulations* of the existence of Fair Rents Boards constituted under the *Fair Rents Regulations*.

The Minister, on 25th March 1942, made an order under reg. 3 (4) declaring that the provisions of the *Landlord and Tenant Regulations* which are not otherwise in force in the State of Victoria should apply in that State. The consequence of this order was that Fair Rents Boards constituted under the *Fair Rents Regulations* continued to exist in Victoria for the purpose of the *Landlord and Tenant Regulations*: See reg. 3 (5) already quoted. It is necessary, therefore, to refer to the *Fair Rents Regulations* in order to ascertain what is the constitution of Fair Rents Boards under the *Landlord and Tenant Regulations*. Reg. 7 (1) of the *Fair Rents Regulations* provides that the Governor in Council of a State may, for the purposes of the Regulations, constitute Fair Rents Boards in the State at such places as he thinks fit. Par. 3 of this regulation provides that each Fair Rents Board in a State shall consist of a police, stipendiary or special magistrate, and, if the Governor in Council thinks fit, two other persons. Par. 4 provides that the member or members of a Fair Rents Board in a State shall be appointed by the Governor in Council of that State, and shall hold office during his pleasure.

It is argued that these provisions bring about the result that, as a police magistrate may in Victoria constitute a Court of Petty Sessions (*Justices Act* 1928, sec. 63), Courts of Petty Sessions in Victoria are appointed as Fair Rents Boards and that, as they are State courts, they may properly be invested with the judicial power with which the *Landlord and Tenant Regulations* seek to invest them. I find myself unable to accept this contention. The Regulations provide for the creation of the Boards, to consist of a police, stipendiary or special magistrate, with or without other persons. They do not provide for the addition of new (Federal) powers to those already possessed by State courts. The Fair Rents Boards consist of persons qualified in the manner set forth in the Regulations, and not of courts in which those persons (or some of them) might exercise judicial functions under State law. A Court of Petty Sessions in Victoria may be constituted by a police magistrate or by two or more justices of the peace: See *Justices Act* 1928, sec. 63. But par. 3 of reg. 7 provides that the Governor may constitute a Fair Rents Board consisting of a police magistrate and, if he thinks fit, two other persons. It is not provided that these other persons must be justices of the peace, and accordingly it is obvious that a Fair

H. C. OF A. 1943.

SILK BROS. PTY. LTD. v. STATE ELECTRICITY COMMISSION OF VICTORIA.

Latham C.J.

Rents Board could be constituted under the Regulations which could not possibly be a Court of Petty Sessions. It may, however, be observed that even if two justices (not being police magistrates) were appointed in a particular case, their jurisdiction is limited in respect of bailiwicks (*Justices Act*, sec. 12), and they could not be members of a Court of Petty Sessions acting elsewhere than in their bailiwicks.

Appointments of Fair Rents Boards were made by the Governor in Council in pursuance of the *Fair Rents Regulations*. On 9th October 1939 the Governor in Council constituted Fair Rents Boards by a proclamation containing the following declaration:—"I do hereby constitute a Fair Rents Board at each place in the State of Victoria at which a Court of Petty Sessions has been or may hereafter be appointed to be holden under the provisions of the *Justices Acts* of the State of Victoria and do hereby appoint any Police Magistrate for the time being assigned to adjudicate at any such Court of Petty Sessions to constitute the Fair Rents Board at the place at which the said Court of Petty Sessions is appointed to be holden as aforesaid." In respect of the metropolitan district specified police magistrates were appointed to be Fair Rents Boards.

These appointments were, in my opinion, clearly appointments of persons possessing the qualifications of police magistrates to be Fair Rents Boards at particular places at which Courts of Petty Sessions were holden. They were not, and did not purport to be, the assignment to any Courts of Petty Sessions of the functions of Fair Rents Boards.

I am therefore of opinion that the Regulations did not invest in State courts, or authorize the investment in State courts of, any Federal jurisdiction. This conclusion makes it unnecessary for me to consider arguments for the defendant based upon *Le Mesurier* v. *Connor* (1), where three Justices expressed the opinion that only a Federal statute could invest State courts with Federal jurisdiction under sec. 77 (iii.) of the Constitution, and that such investing with jurisdiction could not be effected by a proclamation made under or in pursuance of a statute.

If Fair Rents Boards are neither duly constituted Federal courts, nor State courts invested with Federal jurisdiction, it follows that they cannot exercise judicial power by virtue of Federal legislation. Reg. 15 (2) of the *Landlord and Tenant Regulations* purports to give judicial power to Fair Rents Boards. Reg. 15 (2) is therefore invalid.

(1) (1929) 42 C.L.R. 481, at pp. 499, 500.

The plaintiff, however, relies upon reg. 15 (1), which is simply prohibitory in character. It provides that, subject to the regulation, the lessor of premises shall not give any notice, or take or continue any proceeding to terminate the tenancy, &c. It is urged that, even if reg. 15 (2) is invalid, reg. 15 (1) may be valid. This argument, however, cannot be maintained. Reg. 15 (1) is introduced by the words "Subject to this regulation." It is, therefore, plainly dependent for its operation upon the operation of the following provisions. As those provisions are invalid, it is clear that sub-reg. 1 cannot operate, as it is shown by its own terms that it was never intended to operate independently of the rest of the regulation. It is, therefore, unnecessary to examine various tests of severability that have been suggested, or to consider the provisions of sec. 46 (*b*) of the *Acts Interpretation Act* 1901-1941. Sub-reg. 1 is plainly not severable from the rest of the regulation, and it must fail with the rest of the regulation. Therefore the whole of reg. 15 is invalid and, accordingly, the plaintiff fails so far as it relies upon that regulation.

It does not follow, however, that the whole of the *Landlord and Tenant Regulations* are invalid. The regulations other than regs. 15 and 16 refer to the fixing of fair rents, and to other matters which are quite distinct from those dealt with in regs. 15 and 16. It is argued that the provisions for fixing a fair rent (rent-pegging regulations) are inseverable from regs. 15 and 16, which give stability of tenure to occupants of houses and other premises. (The object of this argument, advanced for the plaintiff, is to show that, if reg. 15 is invalid, the whole statutory rule of which it forms part is invalid, so that the whole of a later statutory rule—No. 12 of 1943— which amends the *Landlord and Tenant Regulations*—is invalid for all purposes.) The bearing of this argument will become clear only when it becomes necessary to examine the effect of Statutory Rules 1943 No. 12 in relation to the *Fair Rents Regulations*, which that statutory rule purports to repeal. In my opinion there is no foundation for the argument that the invalidity of regs. 15 and 16 infects the whole of the *Landlord and Tenant Regulations*. The provisions for fixing fair rents are complete in themselves. They constitute a complete scheme for dealing with that subject. They are independent, in terms and in operation, of the provisions relating to recovery of possession and ejectment, and there is no reason why they should be held to be dependent upon the latter provisions. I am therefore of opinion that the invalidity of regs. 15 and 16 does not affect the validity of the rest of the *Landlord and Tenant Regulations*.

The plaintiff, however, contends that, even if the *Landlord and Tenant Regulations*, or regs. 15 and 16 thereof, are invalid, the *Fair*

H. C. OF A. 1943.

SILK BROS. PTY. LTD. v. STATE ELECTRICITY COMMISSION OF VICTORIA.

Latham C.J.

Rents Regulations are still in existence and that he is protected from ejectment by reg. 17 of those Regulations.

The *Fair Rents Regulations* contain provisions for the fixing of fair rents by Fair Rents Boards. These provisions are to a large extent identical with the provisions relating to the same subject matter contained in the later *Landlord and Tenant Regulations*. The fair rent, which alone is recoverable from a tenant by a landlord (see reg. 16), is either the rent as determined by a Board or, where no rent has been so determined, a rent not exceeding the rent payable in respect of the premises at 31st December 1940 (reg. 6). Reg. 17 (1) provides that, where the rent of any prescribed premises is fixed by virtue of reg. 6, or by determination, then, so long as the lessee duly pays the rent and otherwise performs the terms and conditions of his lease, the lessor shall not, without the consent of a Fair Rents Board, demand any increased rent, or give any notice or take any proceeding to terminate the tenancy. The rent in the case of the premises in question is fixed by virtue of reg. 6. The defendant Commission is seeking to obtain possession of the premises occupied by the plaintiff company, and it has not obtained the consent of a Fair Rents Board to take any proceeding to terminate the tenancy. The plaintiff contends that, in the absence of such consent, the defendant cannot take any proceeding to recover possession of the premises and that upon this ground the injunction sought should be granted.

It is contended for the defendant that for several reasons the plaintiff cannot rely upon reg. 17 as constituting an obstacle in the way of the defendant recovering possession of the premises. In the first place it is said that there is no relation of lessor and lessee between the parties. It is contended that the Regulations apply only to the case of a lessor who has granted a lease to a lessee and a lessee who has accepted a lease from a lessor, and not to a case where premises subject to a lease are sold, so that there is a new owner of the reversion. "Lessor" and "lessee" include a mesne lessor and a mesne lessee (reg. 4). But, upon the view which I take of other matters in the case, it is not necessary to reach any decision upon the effect of this definition in the present case.

In the next place it is pointed out that the *Fair Rents Regulations* apply only in the case of "prescribed premises," and that the definition in those Regulations is more narrow than that contained in the *Landlord and Tenant Regulations*. Reg. 4 defines "prescribed premises" as meaning a dwelling-house, shop or factory. The premises in question are not any dwelling-house or a factory. The defendant contends that they are not a shop.

"Shop" is defined by reg. 4 as meaning any premises leased wholly or in part for the purposes of a shop and including (*a*) any part of any such premises separately leased; (*b*) any land or appurtenances leased with any such premises or part thereof. The only evidence which the Court has with respect to the purposes for which the premises are used is contained in an affidavit filed on behalf of the plaintiff, in which it is stated that the plaintiff uses the premises as a storehouse for fruit and vegetables in connection with its business as wholesale produce merchants. The plaintiff applied for leave to adduce further evidence for the purpose of showing that the premises are a shop, and not merely a storehouse, but the majority of the Court were of opinion that, in view of the stage at which this application was made, further evidence should not be admitted. I am inclined towards the view that the evidence before the Court does not establish that the premises are a shop; but I am not prepared to decide the case against the plaintiff upon this point when possible evidence has not been received and when the case can be decided upon other grounds. I therefore proceed to deal with other matters upon which the defendant relies.

I have referred to the *Fair Rents Regulations* as if they were still in force. Statutory Rules 1943 No. 12, however, which was headed "Amendments of the *National Security* (*Landlord and Tenant*) *Regulations*," contained in reg. 1 the following provision:—"The *National Security* (*Fair Rents*) *Regulations* (being Statutory Rules 1941, No. 62, as amended by Statutory Rules 1941, No. 71) are repealed." If this regulation is effective according to its terms, it is plain that the *Fair Rents Regulations* no longer exist, and therefore that the plaintiff cannot rely upon them for any purpose in relation to any date after 13th January 1943, when Statutory Rules 1943 No. 12 came into operation. The writ in the action was issued on 17th February 1943.

The plaintiff endeavours to meet the difficulty created by the apparent repeal of the *Fair Rents Regulations* in two ways. In the first place, it is said that the regulation appears only as part of the *Landlord and Tenant Regulations*, and reference is made to the heading of the Regulations, which shows that they are intended to constitute an amendment of the *Landlord and Tenant Regulations*. It is then argued that, if the *Landlord and Tenant Regulations* are completely invalid, Statutory Rules 1943 No. 12, which amends those Regulations in certain particulars, is also invalid. In my opinion there are two answers to this contention. In the first place, I have already expressed my opinion that the *Landlord and Tenant Regulations* are not completely invalid, and there is no reason why

H. C. OF A. 1943. SILK BROS. PTY. LTD. v. STATE ELECTRICITY COMMISSION OF VICTORIA. Latham C.J.

the amendments made by Statutory Rules 1943 No. 12 in relation to regs. 3, 4, 5, 9 and 13, should not be completely effective, even if the amendment made by the only other regulation in the statutory rule (namely, reg. 7, amending reg. 15 of the *Landlord and Tenant Regulations*) should fail, together with reg. 15. In the next place, there is no reason why the operation of reg. 1 repealing the *Fair Rents Regulations* should be limited by the heading which describes the statutory rule as consisting of amendments of the *Landlord and Tenant Regulations*. The headings in a statute or in Regulations can be taken into consideration in determining the meaning of a provision where that provision is ambiguous, and may sometimes be of service in determining the scope of a provision (see *In re Commercial Bank of Australia Ltd.* (1)). "But where the enacting words are clear and unambiguous, the title, or headings, must give way, and full effect must be given to the enactment" (*Bennett* v. *Minister for Public Works* (*N.S.W.*) (2), per *Isaacs* J.). In this case the words of reg. 1, repealing the *Fair Rents Regulations*, are clear and unambiguous.

The second argument on this point on behalf of the plaintiff is that the repeal of the *Fair Rents Regulations* should be regarded as having been made only for the purpose of allowing the *Landlord and Tenant Regulations* to operate uncomplicated by the provisions of the *Fair Rents Regulations* dealing with substantially the same subject matter, that is to say, with the fixing of fair rents. It is urged that the repeal of the *Fair Rents Regulations* was only a conditional repeal, the condition being that the *Landlord and Tenant Regulations* should be in full operation. If this condition is not satisfied by reason of the invalidity of the *Landlord and Tenant Regulations*, or of a substantial part thereof, the repeal should be held to be not effective.

Upon the view which I take of the validity of the *Landlord and Tenant Regulations*, there is no room for the application of an argument of this character because, in my opinion, the provisions of the *Landlord and Tenant Regulations* dealing with the fixing of fair rents are valid and are in full operation.

Apart, however, from this consideration, I find myself unable to accept the argument submitted for the plaintiff upon this point. Probably it was believed by the draftsman that the whole of the *Landlord and Tenant Regulations* were valid, but the repeal of the *Fair Rents Regulations* is not made dependent upon the continuance in operation of the *Landlord and Tenant Regulations*. The words of repeal are quite unequivocal, and a court must give effect to them

(1) (1893) 19 V.L.R. 333, at p. 375. (2) (1908) 7 C.L.R. 372, at p. 383.

even though an expectation as to the condition of the law after such repeal may be disappointed in whole or in part. Grave difficulties would arise if a court were to attach an unexpressed condition to the operation of words of repeal so unambiguous as those in the present case. The door would be open to speculations of all kinds as to some probable, but unexpressed, intent of the legislating authority, and great uncertainty would arise as to the effect of repealing provisions. In my opinion the *Fair Rents Regulations* were effectively repealed as from 13th January 1943.

Accordingly, neither the *Landlord and Tenant Regulations* (which in my opinion are invalid in the material provision) nor the *Fair Rents Regulations* (which in my opinion have been repealed) constitute any obstacle in the way of the defendant exercising either the ordinary rights of a landlord against a tenant, or any special rights which it may have under the *State Electricity Commission Act* 1928 and the *Lands Compensation Act* 1928. (If the Commission acts under the latter Act, it must pay compensation assessed in the manner provided in sec. 60 of the Act.)

On these grounds, in my opinion, the action should be dismissed.

What I have said is sufficient to dispose of the case, but it should be mentioned that the defendant attacked all the regulations as invalid on the ground that they could not be supported under any Federal legislative power. The regulations depend upon the defence power (Constitution, sec. 51 (vi.)). It was argued that the regulations cannot be justified thereunder because they cannot assist the defence of the Commonwealth—because they have no real relation to, or no real connection with, defence. It is not necessary in the view which I have taken to decide this question, but I wish to say that, as at present advised, I see no reason for questioning the validity of any of these regulations under the defence power. In the case of *Farey* v. *Burvett* (1), it was held that the price of food could be fixed under the defence power. Similar considerations apply to the price of shelter—whether the shelter be used for living accommodation or for working accommodation. I see no reason why the price of shelter cannot similarly be fixed, and why provisions directed to securing persons in continued possession of premises of which they are in occupation should not be equally valid.

The parties have agreed to treat the application for an interlocutory injunction as the trial of the action. The action should be dismissed with costs, including costs in the Supreme Court. An undertaking was given by the defendant not to disturb the plaintiff's possession until the hearing, and at the hearing this undertaking was extended

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

H. C. OF A. 1943.

SILK BROS PTY. LTD. v. STATE ELECTRICITY COMMISSION OF VICTORIA.

Latham C.J.

to the date of judgment in the case. The plaintiff gave an undertaking when the matter was before me to abide by any order which the Court may make as to damages in case the Court should be of opinion that the defendant should have sustained any by reason of the defendant's undertaking which the plaintiff ought to pay. If the parties do not agree upon this matter, it should be referred to the Registrar to fix the damages, and judgment should be given for the defendant for the amount of damages fixed. I suggest that the action might be referred back to myself for the purpose of dealing with any question of costs in relation to the fixing of damages which may arise.

RICH J. I have had the advantage of reading the judgment of the Chief Justice and concur in it.

STARKE J. This was a summons treated as the trial of an action which was removed into this Court either by force of the provisions of sec. 40A of the *Judiciary Act* or by force of an order of this Court pursuant to sec. 40 of the Act for an injunction restraining the defendant from taking or continuing any proceedings to terminate the tenancy of the plaintiff in certain premises or to recover possession thereof or to eject the plaintiff therefrom except under reg. 15 of the *National Security* (*Landlord and Tenant*) *Regulations* and also an injunction restraining the defendant from issuing its warrant to the Sheriff to recover possession of the said premises or to eject the plaintiff therefrom and from interfering in any way with the peaceable enjoyment by the plaintiff of the said premises and other ancillary relief.

It appears from the affidavits filed on the summons that the plaintiff was in possession of certain premises at South Melbourne. These premises had been let to it in July 1942 by the liquidator of James Moore & Sons Pty. Ltd. at a rental of thirteen pounds per month on condition that, if the premises were sold and the plaintiff then be given notice to vacate, it would do so. The premises were sold to Dorothea Cecelia Meehan, and the plaintiff was informed of this fact on 24th September 1942 and told that vacant possession was required on 23rd October 1942 and that it was required to vacate them on that date. On 3rd December 1942 the defendant acquired the premises by agreement from D. C. Meehan pursuant to its powers under its Act—the *State Electricity Commission Act* 1928—and subsequently on 21st December 1942 also gave a notice to treat pursuant to the Act.

It was not disputed that the purchase money under the agreement had been paid and a transfer of the premises to the defendant executed which had not at the time of the argument before this Court been registered under the *Transfer of Land Act* 1928. On the 10th February 1943 the defendant required the plaintiff to vacate the premises before 18th February 1943 and notified the plaintiff that failing compliance with this requirement the defendant would issue its warrant to the Sheriff to take possession pursuant to the provisions of the *Lands Compensation Act* 1928.

The plaintiff did not contend that its possession of the premises could be maintained apart from the provisions of the *National Security* (*Landlord and Tenant*) *Regulations* and *National Security* (*Fair Rents*) *Regulations*.

The argument occupied considerable time and traversed much ground, but the case can be dealt with without undue prolixity.

On 8th April 1941 the Governor in Council of the State of Victoria pursuant to the provisions of the *National Security* (*Fair Rents*) *Regulations* (reg. 9) abolished every Fair Rents Board at any place within certain municipal districts and constituted a Fair Rents Board (reg. 7) to be known as the Metropolitan Fair Rents Board (consisting of such police magistrate as was assigned for the purpose for the time being by the Attorney-General) at the City Court, Russell Street, Melbourne, to exercise the powers conferred by the *Fair Rents Regulations*. And on 8th April 1941 the Governor in Council of the State of Victoria appointed Raymond Henry Beers, Police Magistrate, to be the Fair Rents Board constituted under the before-mentioned Order in Council. Another magistrate was later appointed by the Governor in Council of the State of Victoria to be also the Fair Rents Board constituted under the same Order in Council. The *Landlord and Tenant Regulations* provided that the powers and functions of Fair Rents Boards under these Regulations might be exercised in any State in which a Fair Rents Board was constituted under the *Fair Rents Regulations* by a Fair Rents Board so constituted (See reg. 3 (2) and (3)). The powers and functions of Fair Rents Boards under the *Landlord and Tenant Regulations* are to determine a fair rent of any prescribed premises, that is, any premises, with certain exceptions, and the rent determined is the rent payable by the lessee notwithstanding any term or covenant in any lease of the premises to the contrary (See regs. 9 and 13).

Reg. 15 then provides, so far as material :—" (1) Subject to this regulation, the lessor of any prescribed premises shall not give any notice or take or continue any proceeding to terminate the tenancy

H. C. OF A. 1943.

SILK BROS. PTY. LTD. v. STATE ELECTRICITY COMMISSION OF VICTORIA.

Starke J.

or to recover possession of the premises or for the ejectment of the tenant therefrom : (2) Subject to the succeeding sub-regulations . . . an application may be made by a lessor to a Fair Rents Board for an order for the recovery by him of any prescribed premises . . . or for the ejectment of the tenant therefrom if the lessor, before taking such proceedings, has given to the lessee notice to quit for a period not less than a period calculated by allowing seven days for each completed period of six months of occupation and adding thereto seven days, and that period of notice has expired, upon one or more of " certain grounds which have no relevance to this case " but upon no other ground."

But the defendant contends that the *Landlord and Tenant Regulations* are invalid or, if valid, do not cover the present case :—

(*a*) Because the Regulations transcend the power of the Parliament of the Commonwealth to make laws with respect to 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 (Constitution, sec. 51 (vi.)).

The argument was that the Regulations apply throughout the length and breadth of Australia without any regard to the varying conditions in that area and are in substance a regulation for the social control of the relation of landlord and tenant with respect to rent, having no connection with the defence of the Commonwealth. But the argument cannot be sustained in the face of such decisions as *Farey* v. *Burvett* (1) and *Andrews* v. *Howell* (2), which are based on the necessity or propriety of stabilising or controlling the prices of commodities and of services on the home front and providing food for the people of the Empire and its armed forces in time of war. That is a legitimate exercise of the defence power, at least in time of war. But the Chief Justice has observed that the most complete recognition of the power and responsibility of Parliament and of the Government in relation to defence does not involve the conclusion that the defence power is without any limits whatever (*Victoria* v. *The Commonwealth* (3))—See also *Andrews* v. *Howell* (4). And it is for the courts of law to determine when those limits have been passed.

The court must consider the legislation in its entirety and in relation, I apprehend, to the common and public knowledge of the time. *Farey* v. *Burvett* (1) and *Andrews* v. *Howell* (2) attach, I think, but little importance to such knowledge. The matters to

(1) (1916) 21 C.L.R. 433.
(2) (1942) 65 C.L.R. 255.
(3) (1942) 66 C.L.R., at pp. 514, 515.
(4) (1942) 65 C.L.R., at pp. 271, 272.

which I refer may be found in the former case in the judgment of *Higgins* J. (1), and in the latter case in my own judgment (2), and now may be added the fact that the operation of the acquisition scheme in the latter case has involved considerable loss and for the present, at all events, has ceased to operate in four States. The fair-rents scheme is not, I think, open to any like criticism, and it is far too late in this Court to challenge the *Landlord and Tenant Regulations* for the reasons assigned in argument at the Bar.

(*b*) Because the *Landlord and Tenant Regulations*, particularly reg. 15, purport to invest the Fair Rents Board known as the Metropolitan Fair Rents Board and other Boards operating pursuant to that regulation with judicial power in violation of the provisions of the Constitution.

It is an established doctrine of this Court that the judicial power of the Commonwealth can only be vested in the High Court or in such other Federal courts as Parliament creates and in such other Courts as it invests with Federal jurisdiction. And also that it is incompetent to appoint Justices of the High Court or of the other courts created by Parliament under sec. 71 of the Constitution with other than a life tenure of office (*Waterside Workers' Federation of Australia* v. *J. W. Alexander Ltd.* (3); *British Imperial Oil Co. Ltd.* v. *Federal Commissioner of Taxation* (4); *Shell Co. of Australia Ltd.* v. *Federal Commissioner of Taxation* (5)).

The provisions of reg. 15 vest in the Boards therein mentioned the power to decide controversies between landlords and tenants relating to the right to possession of premises and to order the issue of orders for recovery thereof or ejectment of the tenant therefrom. But this is a typical instance of judicial power, and the members of the Board are not appointed for life, but during pleasure only (See *Fair Rents Regulations*, reg. 7 (4)).

The plaintiff countered this argument by another, namely, that the jurisdiction conferred upon the Fair Rents Board known as the Metropolitan Fair Rents Board under reg. 15 was Federal jurisdiction invested in a court of the State of Victoria pursuant to sec. 77 (iii.) of the Constitution. This argument cannot be sustained. The Board consists of a police magistrate of the State of Victoria assigned for the purpose, but the jurisdiction is not in terms conferred upon any court of summary jurisdiction but upon a tribunal consisting of an individual answering to the description of a police

(1) (1916) 21 C.L.R., at p. 459.
(2) (1942) 65 C.L.R., at pp. 272, 273.
(3) (1918) 25 C.L.R. 434.
(4) (1925) 35 C.L.R. 422; (1926) 38 C.L.R. 153.
(5) (1931) A.C. 275; 44 C.L.R. 530.

H. C. OF A. 1943.

SILK BROS. PTY. LTD. v. STATE ELECTRICITY COMMISSION OF VICTORIA.

Starke J.

magistrate assigned for the purpose of exercising the powers conferred upon that tribunal. The provisions of the *Fair Rents Regulations*, regs. 7 (1) and (3), under which the Metropolitan Board was constituted support this view, and so do the *Landlord and Tenant Regulations*, reg. 3 (3) (*a*) and (*b*). The amended *Landlord and Tenant Regulations*, 1943 No. 12, have no application to this case, for a ministerial order was made on 25th March 1942 declaring that the provisions of the *National Security* (*Landlord and Tenant*) *Regulations* which were not otherwise in force in the State of Victoria should apply in that State. Reg. 15 and also reg. 16 connected with it are therefore invalid.

The plaintiff then contended that, if regs. 15 and 16 of the *Landlord and Tenant Regulations* were invalid, then the whole of those Regulations were void, which entitled him to fall back on the *Fair Rents Regulations*, particularly upon reg. 17, which provided that a lessor should not without the consent of a Fair Rents Board demand any increased rent or give any notice or take any proceeding to terminate the tenancy.

But there are several answers to this argument. One, that the *Landlord and Tenant Regulations* are not wholly void. The invalidity of regs. 15 and 16 still leaves a body of separate and independent provisions relating to the determination of fair rents, e.g., regs. 11 and 12, 13 and 14, which are consistent, workable and effective notwithstanding the invalidity mentioned: See *Deputy Federal Commissioner of Taxation* (*N.S.W.*) v. *W. R. Moran Pty. Ltd.* (1), and the provisions of the *Acts Interpretation Act* 1901-1941, secs. 15A and 46. And they supersede the *Fair Rents Regulations*.

Another, that the *Fair Rents Regulations* were repealed by Statutory Rules 1943 No. 12. This repeal was said to be dependent upon the validity of the *Landlord and Tenant Regulations*, but I can find no support for this argument in the terms of the repealing Regulations or otherwise.

Further, the plaintiff's premises were exempt from the operation of reg. 17, for it was not proved to be a factory or shop within the meaning of reg. 17 (3) (*e*). It was said that the *Fair Rents Regulations*, particularly reg. 17, operated in any event until 13th January 1943, when they were repealed (Statutory Rules 1943 No. 12), but that is quite immaterial if the plaintiff's premises were not a shop.

An argument was also made that the defendant was not entitled to issue a warrant to the Sheriff under the provisions of the *Lands Compensation Act* 1928. But the facts proved in this case authorize the exercise of the powers given by sec. 50 of that Act.

(1) (1939) 61 C.L.R. 735, at pp. 772, 773.

The defendant, I should add, also contended that it was not a lessor within the meaning of reg. 15 of the *Landlord and Tenant Regulations*, but it is unnecessary and, I think, undesirable, in the view I take, to discuss this contention, which involves in this case some technical considerations concerning the relation of the defendant to the plaintiff.

The result is that the action should be dismissed.

McTIERNAN J. I agree with the reasons and conclusion of his Honour the Chief Justice.

WILLIAMS J. I have read and substantially concur in the judgment of my brother *Starke*, and I have little to add.

But I prefer not to decide upon the present evidence whether the premises at South Melbourne were being used by the plaintiff as a shop, as it is in my opinion unnecessary to express any opinion on this point.

The *National Security* (*Fair Rents*) *Regulations* were repealed at the latest on 13th January 1943 by the express repeal contained in Statutory Rules 1943 No. 12. Reg. 15 of the *National Security* (*Landlord and Tenant*) *Regulations*, which attempted to invest the Fair Rents Board with judicial power in violation of the Constitution was invalid *ab initio*, and reg. 16 fell with it, so that the plaintiff, after 13th January 1943 had no security of tenure other than that conferred upon him by the law of Victoria. It is unnecessary to decide what rights the plaintiff had to continue in possession of the premises under that law after that date, because it had at most a tenancy that came within the provisions of sec. 60 of the *Lands Compensation Act* 1928 (Vict.). This section applies, in my opinion, to the acquisition of land under the Act whether by agreement or notice to treat. The defendant was entitled therefore at the date of the commencement of the action on 17th February 1943 to eject the plaintiff from the premises in accordance with sec. 50 of the Act, and the plaintiff's only remedy, if any, is a claim for compensation under sec. 60 of the Act.

The action should be dismissed.

Action dismissed with costs, including costs in the Supreme Court. Let an inquiry be made if so required by defendant and at its risk as to costs, whether the defendant has sustained any and what damages by reason of defendant's undertakings not to disturb the plaintiff's possession, and which the plaintiff ought to pay according to its undertakings given herein, and in case it shall

H. C. OF A. 1943. SILK BROS. PTY. LTD. v. STATE ELECTRICITY COMMISSION OF VICTORIA.

appear that any damage has been sustained, let the plaintiff pay to the defendant within one month of the registrar's certificate, to be made pursuant to this order, the amount which shall be certified for such damages. Reserve for the consideration of the Chief Justice the costs of such inquiry and remit cause accordingly.

Solicitors for the plaintiff, *Herman & Coltman.*

Solicitors for the defendant, *Norval H. Dooley & Breen.*

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

E. F. H.