[HIGH COURT OF AUSTRALIA.]

THE MINISTER OF STATE FOR THE ARMY APPELLANT; RESPONDENT,

AND

DALZIEL . . . . . RESPONDENT. CLAIMANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, 1943, *Dec.* 2. 3.

MELBOURNE, 1944, *Mar.* 10.

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

Constitutional Law—National security—Acquisition of property—Exclusive possession taken for indefinite period—"Just terms"—Regulation empowering orders fixing basis of compensation — Taking of possession assumed by regulation not to be acquisition—Order thereunder precluding compensation for loss of profits or occupation—Validity—Severability—The Constitution (63 & 64 *Vict. c.* 12), *s.* 51 (*xxxi.*)—*National Security Act* 1939-1943 (*No.* 15 *of* 1939—*No.* 38 *of* 1943), *s.* 5—*National Security* (*General*) *Regulations* (*S.R.* 1939 *No.* 87—1943 *No.* 99), *regs.* 54, 60G (5), 60H—*Basis of Compensation Order—Acts Interpretation Act* 1901-1941 (*No.* 2 *of* 1901—*No.* 7 *of* 1941), *s.* 46 (*b*).

The taking under reg. 54 of the *National Security* (*General*) *Regulations* by the Commonwealth for an indefinite period of the exclusive possession of property constitutes an acquisition of property within the meaning of s. 51 (xxxi.) of the Constitution.

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

Reg. 60H of the *National Security* (*General*) *Regulations* does not provide just terms within the meaning of s. 51 (xxxi.) of the Constitution in respect of such a taking of possession by the Commonwealth, in that it proceeds on the footing that the taking is not an acquisition and purports to empower the Minister to make an order providing a basis of compensation not constituting just terms. Therefore reg. 60H and the Basis of Compensation Order made thereunder (which precludes compensation for loss of profits or occupation in cases of such taking of possession) are invalid.

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

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Held, further, by *Rich*, *McTiernan* and *Williams* JJ., that such a taking of possession by the Commonwealth is not, by reason of the invalidity of reg. 60H, unlawful; that regulation is severable from others of the *National Security* (*General*) *Regulations*, and in particular reg. 60G (5) thereof, whereunder a claimant may be awarded compensation on a basis conforming with the constitutional standard of just terms.

Decision of the Supreme Court of New South Wales (*Roper* J.) affirmed.

APPEAL from the Supreme Court of New South Wales.

On 12th May 1942, Arthur Dalziel was the occupier, as a weekly tenant and at a rental of £8 per week, of certain vacant land owned by the Bank of New South Wales and situate at the corner of Wynyard Street and York Street Sydney. For about thirteen years he had conducted on the land a car-parking station.

On the date mentioned above the Quartermaster-General for the Commonwealth took possession of the land by virtue of reg. 54 of the *National Security* (*General*) *Regulations* and pursuant to a notice in writing dated 5th May 1942. The notice directed the Quartermaster, United States Armed Forces in Australia, to occupy the land and authorized him to do in relation to the land anything which any person having an unencumbered interest in the fee simple in the land would be entitled to do by virtue of that interest and provided that, while the land remained in possession of the Commonwealth, no person should exercise any right of way over the land or any other right relating thereto, whether by way of an interest in land or otherwise.

It was not disputed that, during the twelve months immediately preceding the date the Commonwealth entered into possession, Dalziel made a net profit of about £15 per week from the business conducted by him on the land.

Correspondence ensued between his solicitors and the Deputy Assistant Director of Hirings, whereupon, in accordance with reg. 60D of the *National Security* (*General*) *Regulations*, Dalziel, on 19th August 1942, lodged a formal claim for compensation "at the rate of £23 a week from date of taking over by the military authorities to date of evacuation by them of the premises." He also claimed the sum of £10 in respect of expenditure incurred by him for the purpose of moving his goods and making the premises available to the military authorities.

On 19th November 1942, Dalziel was informed in writing by the Assistant Director of Hirings that the Central Hirings Committee had determined that compensation should be paid to Dalziel at the rate of £34 13s. 4d. per month, for the period from 16th May 1942 to 26th November 1942, both dates inclusive, but that no other

compensation should be paid to him. This was confirmed on 1st February 1943 by a notice to Dalziel pursuant to the *National Security* (*Hirings Administration*) *Regulations*. During the period referred to Dalziel had continued to pay the amount of £8 per week, that is, £34 13s. 4d. per month, to the Bank of New South Wales by way of rent to preserve his tenancy, and the Commonwealth had not been paying the bank anything for the use of the land.

Upon Dalziel refusing to accept compensation as assessed by the Central Hirings Committee his claim was forwarded to a Compensation Board in accordance with reg. 60E.

The Compensation Board, on 21st August 1943, found that Dalziel was entitled to compensation, but that the basis set out in the Basis of Compensation Order made under reg. 60H did not provide just terms.

In addition to the moneys already paid to Dalziel and by him paid over to the bank as rent, the Board assessed compensation at the sum of £197, comprising thirteen weeks at £8 per week in lieu of reasonable notice to quit, £104; goodwill, £91; and for removal of fixtures, £2. The Board held that proviso iv to the Basis of Compensation Order did not in any way limit the operation of proviso iii, which remained of full effect. For that reason the Board did not make any allowance for loss of profits. It fixed the amount of £197 as full compensation and refused to allow any additional amount for future or other rental.

The Basis of Compensation Order, made by the Minister of State for the Army on 23rd March 1942 in pursuance of reg. 60H, prescribed by substantive clauses *a* to *g* inclusive the basis of compensation for loss or damage suffered by an owner of land by reason of the taking possession of land. These substantive clauses were followed by provisoes i, ii, iii and iv which, so far as material, provided :— "(iii) in assessing compensation, loss of occupation or profits shall not be taken into account; and (iv) in any case in which, owing to exceptional circumstances, the payment of compensation on the basis set out above would not provide just terms to the owner of the land, the compensation may include such additional amount as is just."

By an amendment of the order published in the Commonwealth *Gazette* on 1st January 1943, a definition of "owner" was inserted in the order in the following terms :—"'owner' includes a lessee and a tenant for any term or at will and any person who has any estate, right or interest in or to the land," and a new proviso was inserted as follows :—"(iii*a*) the total amount of compensation payable (other than compensation in accordance with sub-paragraph (*g*) of

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this paragraph) shall not exceed the amount which would, but for any increase in rental value attributable to the war, be the fair market rental of the land at the date when possession was taken."

Dalziel applied to the Supreme Court of New South Wales in accordance with reg. 60G for a review of the assessment made by the Compensation Board, on the ground that he was entitled to more compensation than the amount awarded by the Board. A similar application was made by the Minister of State for the Army, on the ground that Dalziel was not entitled to any compensation in addition to that offered by the Central Hirings Committee.

Upon preliminary points of law *Roper* J. held that the right to the possession of the land conferred upon the Commonwealth by reg. 54 of the *National Security* (*General*) *Regulations* was an acquisition of property within the meaning of s. 51 (xxxi.) of the Constitution, so that the Commonwealth could only take possession of the land under the regulation on just terms, that reg. 60H did not provide just terms and therefore it was ultra vires, and that the compensation payable should therefore be determined without regard to the Basis of Compensation Order made by the Minister on 23rd March 1942, as amended, and under the ordinary established principles of the law of compensation for the compulsory taking of property.

From this decision the Minister appealed, by special leave, to the High Court.

Further facts and relevant statutory provisions and regulations are set forth in the judgments hereunder.

Fullagar K.C. (with him *Webb*), for the appellant. The language of s. 51 (xxxi.) of the Constitution stands out in very marked contrast to that of the Fifth Amendment of the Constitution of the United States of America and a reasonable inference would be that the framers of the Commonwealth Constitution deliberately avoided the language used in the Fifth Amendment. That Amendment is expressed in a negative form and gives expressly what is commonly known as a constitutional guarantee (*Andrews* v. *Howell* (1)). It contains both the " due process " clause and the " taking for public use " clause. The words used are " without just compensation " and not " on just terms " as in s. 51 (xxxi.). It is no answer to an objection based on s. 51 (xxxi.) to say that the exercise of the power in question is referable to another head of power (*Johnston Fear & Kingham and The Offset Printing Co. Pty. Ltd.* v. *The Commonwealth* (2)), but the scope of the limiting words in s. 51 (xxxi.) is different from the scope of the Fifth Amendment. The words " taking of

(1) (1941) 65 C.L.R. 255, at p. 268. (2) (1943) 67 C.L.R. 314, at p. 318.

property " as used in the Fifth Amendment are wider in their scope than the words " acquisition of property " in s. 51 (xxxi.). The real purpose of s. 51 (xxxi.), and the reason why it was expressed in an affirmative form and put into the list of powers, was to make quite certain that there should not be any doubt that the Commonwealth—which is not a sovereign State in the sense in which Great Britain is a sovereign State—should have the power of eminent domain and should be able to acquire property. The expression " acquisition of property " in s. 51 (xxxi.), and also in reg. 60H, of the *National Security* (*General*) *Regulations* means the acquisition of some legal or equitable estate or interest in property and does not include mere temporary possession or occupation. The word " acquire " means to " get as one's own." The use of the word " acquisition " was dealt with in *Attorney-General* v. *De Keyser's Royal Hotel Ltd.* (1), *Central Control Board* (*Liquor Traffic*) v. *Cannon Brewery Co.* (*Ltd.*) (2), and *John Robinson & Co. Ltd.* v. *The King* (3).

[McTIERNAN J. referred to *Ffrost* v. *Stevenson* (4).]

The respondent's weekly tenancy was not acquired. The Commonwealth merely entered into possession of the land; therefore the respondent, being a tenant, and thus an " owner " as defined therein, is, under the Regulations, entitled to compensation in respect of his liability for rent.

[WILLIAMS J. referred to *Matthey* v. *Curling* (5).]

As there has not been any acquisition in this case it is not necessary to consider whether there are just terms provided by the Regulations and the order. The Regulations are not affected at all by s. 51 (xxxi.). Assuming, however, that a taking of possession is an acquisition of property within the meaning of s. 51 (xxxi.), it is submitted that the expression " on just terms " has not the same meaning as " on payment of just compensation," and it does not necessarily import the common law doctrines as to the measure of compensation where there has been a resumption of land under statute. There must be a measure of discretion in Parliament as to what are just terms. What are just terms must depend on all the circumstances of the particular case, e.g., under the defence power or under marketing or pooling legislation as in *Andrews* v. *Howell* (6) and *Australian Apple and Pear Marketing Board* v. *Tonking* (7). If Parliament lays down general terms of acquisition

(1) (1920) A.C. 508, at pp. 527, 528, 552-558, 561, 569, 572, 579.
(2) (1919) 35 T.L.R. 552, at p. 554; (1919) A.C. 744.
(3) (1921) 3 K.B. 183; 37 T.L.R. 698, at p. 700.
(4) (1937) 58 C.L.R. 528, at pp. 554, 555, 588, 589, 615.
(5) (1922) 2 A.C. 180.
(6) (1941) 65 C.L.R. 255.
(7) (1942) 66 C.L.R. 77.

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which are found not to do ideal justice in a particular case there is not, for that reason alone, an acquisition on unjust terms. A taking and a payment of compensation to be assessed by an administrative body is in itself a taking not on unjust terms. It is not essential that the assessment of compensation should in the first place be made by a court of law ; it could be made by a tribunal appointed for that purpose. The assessment of compensation is a judicial function, but, on the other hand, it is not an exercise of the judicial power of the Commonwealth in the relevant sense. A mandamus to hear and determine according to s. 51 (xxxi.) would lie under s. 75 of the Constitution to a tribunal so appointed. Except for the mandamus the tribunal could be completely free of anything. " On just terms " is not necessarily on payment of full compensation according to the rules laid down in *Spencer* v. *The Commonwealth* (1). There may be a taking on terms which exclude that case and which will still be a taking on just terms, e.g., in pooling cases. The expression " just terms " does not mean that payment must be made for loss of occupation or profits or for disturbance or interference with a business. Reg. 60D must be read as giving compensation for loss or damage subject to reg. 60H and any order made thereunder. The word " occupation " means vocation, calling, profession or the like. Alternatively, the expression " loss of occupation or profits " should be read as one phrase and taken as mere consequential loss or loss of benefits accruing from the occupation as distinct from the taking of possession itself. Terms do not become unjust merely because they exclude loss of business or loss of profits (*Joslin Manufacturing Co.* v. *City of Providence* (2) ; *Mitchell* v. *United States* (3) ; *United States* : *Ex rel. Tennessee Valley Authority* v. *Powelson* (4)). On any view the Basis of Compensation Order is valid because of proviso iv to clause 1, which provides for just terms in exceptional circumstances. " Exceptional circumstances " are circumstances which are not fairly covered by the preceding provisions.

McKillop, for the respondent. The Commonwealth did in fact take an interest in land from the respondent. If it did not so take an interest in land, it took some other sort of property (*Cowell* v. *Rosehill Racecourse Co. Ltd.* (5)). The physical possession of the land has been taken. Although the entering into possession by the

(1) (1907) 5 C.L.R. 418.
(2) (1922) 262 U.S. 668, at p. 675 [67 Law. Ed. 1167, at p. 1174].
(3) (1925) 267 U.S. 341, at p. 344 [67 Law. Ed. 644, at p. 647].
(4) (1943) 319 U.S. 266 [87 Law. Ed. 1390].
(5) (1937) 56 C.L.R. 605.

Commonwealth has not put an end to the tenancy (*Matthey* v. *Curling* (1)), it has put an end to the use the respondent could have made of the land. The Commonwealth has carved out of the respondent's estate whatever rights it has under reg. 54, that is, every right which the owner in fee has in the land together with every right which any other person might have by way of an easement. Within the ambit of the defence power the Commonwealth is a freeholder. The test of what estate a person has in land is to consider what he can do with it. Acquisition of land or of an estate in land is only a matter of terms, and the Court looks to the actual powers the Commonwealth has under reg. 54. The Commonwealth has acquired all the rights which the respondent had in the land, namely, the right of possession, the right of user, the right of subleasing, and the right of granting a licence. The matter before the Court in *John Robinson & Co. Ltd.* v. *The King* (2) did not involve a distinction between acquiring property and taking possession of property in any sense which concerned the beneficial interest in it. In *Attorney-General* v. *De Keyser's Royal Hotel Ltd.* (3) the members of the Judicial Committee dealt indifferently with the terms " taking possession " and " acquisition " as though they were interchangeable terms. The distinction they made, if at all, was to refer to " temporary possession " as against " permanent acquisition." " For the duration of the war " is an indefinite period ; therefore it is not a temporary period. The right to just terms is given by the Constitution ; therefore by no artifices or devices can the Commonwealth Parliament provide for any terms that cannot be proved just (*Australian Apple and Pear Marketing Board* v. *Tonking* (4)). For " just terms " the respondent, being entitled to an estate or interest in possession, should get the full equivalent, according to ordinary standards, of the property taken (*Clissold* v. *Perry* (5)). The Regulations, excluding therefrom reg. 60H and any order made under that regulation, do seem to satisfy that test. A fair construction of reg. 60H (2) is that it is in juxtaposition to the distinction made in s. 5 (1) (*b*) (i) and (ii) of the *National Security Act* 1939-1943. It was intended to cover within the terms of those sub-sections any property, whether it be real property or personal estate, or whatever the interest was that was taken. There is not any reason to suppose that Parliament was not following out a definite scheme. Reg. 60H is ultra vires because of par. 3 thereof. The obligation is upon the Commonwealth of placing the rights of subjects on a clear basis. A claimant must have the right of recourse to an independent tribunal

(1) (1922) 2 A.C. 180.
(2) (1921) 3 K.B. 183 ; 37 T.L.R. 698.
(3) (1920) A.C. 508.
(4) (1942) 66 C.L.R., at p. 106.
(5) (1904) 1 C.L.R. 363 ; (1906) 4 C.L.R. 374 ; (1907) A.C. 73.

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free from the coercion or direction of Parliament (*Johnston Fear & Kingham & The Offset Printing Co. Pty. Ltd.* v. *The Commonwealth* (1)). Under the Constitution the Commonwealth can never become the judge in its own cause, whether it be by a tribunal or by legislation. If the Regulations were valid in every other respect they fail by reason of their ambiguity; having regard to s. 5 (1) (*b*) (i) and (ii) of the *National Security Act* and also to sub-regs. 1, 2 and 3 of reg. 60H, they do not show what is meant by the word "property." The Court is not able with any certainty to define its meaning as used. The Basis of Compensation Order itself is ambiguous. In a case where the Central Hirings Committee proposes to "otherwise determine" within the meaning of clause 1 of that order, that Committee is not bound to hear evidence or to hear anybody in the matter. If proviso iv to clause 1 is subject to any other proviso it does not carry the question of just terms any further; if, however, it purports to empower the Committee to award an amount which in exceptional circumstances seems proper then it nullifies prior provisions. The order is silent as to what constitutes "exceptional circumstances." The reasonable interpretation of the order is that Parliament has sought to go outside the Constitution. The order has not, nor have amendments thereto, retrospective operation. The amendments have effect, if at all, only as from the date thereof. This Court is not bound by the decisions in *Buckman* v. *Button* (2) and *Director of Public Prosecutions* v. *Lamb* (3): see the *Law Quarterly Review*, vol. 59, p. 199, and *Craies* on *Statute Law*, 4th ed. (1936), p. 335. Unless a statute clearly indicates an intention to interfere with vested rights it should be construed as not so interfering, or, alternatively, as interfering as little as possible therewith (*Australian Coal and Shale Employees Federation* v. *Aberfield Coal Mining Co. Ltd.* (4)). In so far as the order as amended purports to fix an amount of compensation as at a date subsequent to the date on which the respondent's claim crystallized it must be bad, because "just terms" must be terms considered as at the date when the claim crystallized, that is, the date of the entering into possession. For that reason also the amendments, at least, are ultra vires.

Fullagar K.C., in reply. Compensation under the Regulations to persons in possession or not in possession, of land was dealt with in *Syme* v. *The Commonwealth* (5). If the terms, generally speaking, are just, then the acquisition is on just terms.

(1) (1943) 67 C.L.R., at pp. 326, 327.
(2) (1943) 1 K.B. 405.
(3) (1941) 2 K.B. 89.
(4) (1942) 66 C.L.R. 161, at p. 178.
(5) (1942) 66 C.L.R. 413, at pp. 420, 422-424.

[LATHAM C.J. referred to *The Commonwealth* v. *New South Wales* (1) on the interest therein taken when the Commonwealth acquires land.]

The word " acquisition " in reg. 60H bears the same meaning as it does in s. 51 (xxxi.) of the Constitution. The only things that in strictness can be acquired under the Regulations are chattels. It was intended to leave the whole matter at large and to provide that if any acts or takings amount to an acquisition then the basis of compensation shall be on just terms. The acquisition of property means the acquisition of some legal or equitable estate in property, that is, a taking of ownership as distinct from a taking of possession or control. An order made under reg. 60H is an order within the meaning of s. 5 (3) of the *National Security Act* 1939-1943. The words " unless the Central Hirings Committee otherwise determines " in clause 1 of the order do not enable that Committee to cut down an award of compensation: they only empower the Committee to increase the amount awarded.

Cur. adv. vult.

1944, Mar. 10.

The following written judgments were delivered:—

LATHAM C.J. The *National Security* (*General*) *Regulations* were made under the *National Security Act* 1939-1943, s. 5. Reg. 54 relates to the taking of possession of land by the Commonwealth, and other regulations provide for the ascertainment and payment of compensation for loss or damage suffered by reason of things done in pursuance of the Regulations. The Supreme Court of New South Wales (*Roper* J.) has held that taking possession of land in pursuance of reg. 54 amounts to an " acquisition of property " within the meaning of these words where they appear in s. 51 (xxxi.) of the Constitution, whereby the Commonwealth Parliament is empowered to make laws with respect to " 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 has been held that laws enacted under this power must, in order to be valid, provide for just terms (*Johnston Fear & Kingham & The Offset Printing Co. Pty. Ltd.* v. *The Commonwealth* (2)).

Reg. 60H authorizes the Minister administering the Regulations to make orders providing the basis on which compensation is to be awarded in any class of case. The Minister has made an order in pursuance of this authority. *Roper* J. was of opinion that the order did not provide just terms because it contained a provision that " in assessing compensation loss of occupation or profits shall not be taken into account." It was held therefore that the order was

(1) (1923) 33 C.L.R. 1.

(2) (1943) 67 C.L.R. 314.

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invalid and it was declared that the compensation payable to the claimant, Arthur Dalziel (the respondent upon this appeal) "shall be determined without regard to the basis of the compensation order made under reg. 60H of the *National Security* (*General*) *Regulations* and shall be determined under the ordinary established principles of the law of compensation for the compulsory taking of property." This decision was given in an application to the Supreme Court for review of the amount of compensation fixed by a Compensation Board acting under the Regulations. Special leave to appeal from the order was granted by this Court.

The only question which the Court is called upon to decide at this stage of the proceedings is whether the decision of the learned judge that the Minister's order is invalid is right. If it were held that the order was invalid it would then be necessary to decide whether the Minister of the Army, in taking possession of the land of the respondent, was a trespasser, or whether he lawfully took possession but was bound to pay compensation according to some other (and what) standard relating to compensation for property taken. As at present advised I would not be prepared to hold as of course that, if the *regulations* authorizing the taking were invalid because no provision was made for just terms, the Commonwealth authority was entitled to remain in possession upon paying compensation. Taking possession of land belonging to another person may be authorized by the royal prerogative or under a valid statute (or regulation), but I know of no principle of law which would allow a person (whether that person be a Minister or any other person) who without authority took possession of land belonging to another person to remain in occupation upon paying "compensation." The act of taking possession, if *in invitum*, would prima facie be a trespass and the trespasser would be liable as such. But this question does not arise in these proceedings.

The respondent Dalziel conducted a parking station for motor cars on vacant land in the business quarter of the City of Sydney. The land is owned by the Bank of New South Wales and it is obviously very valuable. Dalziel paid a rent of £8 a week under a weekly tenancy. He made a net profit out of his business of about £15 a week. The Minister for the Army required possession of the land for defence purposes and, after notice given in pursuance of the Regulations, took possession of the land. After consideration of the question by the Hirings Committee, the Minister made an offer of compensation which was not accepted and the matter went before a Compensation Board appointed in pursuance of the Regulations. The Compensation Board assessed compensation and both parties applied to the Supreme Court for review of the assessment. Upon

an application for directions, *Roper* J. made an interlocutory order in the terms already stated.

At the outset it is important to observe that the Commonwealth has not acquired the fee simple in the land, which remains in the Bank of New South Wales, nor has it acquired the weekly tenancy from Dalziel. The Minister has acted under the Regulations and can exercise the rights for which the Regulations provide.

Reg. 54 contains the following provisions :—

" 54.—(1) If it appears to the Minister of State for the Army to be necessary or expedient so to do in the interests of the public safety, the defence of the Commonwealth or the efficient prosecution of the war or for maintaining supplies and services essential to the life of the community, he may, on behalf of the Commonwealth, take possession of any land, and may give such directions as appear to him to be necessary or expedient in connexion with the taking of possession of the land.

(2) While any land is in the possession of the Commonwealth in pursuance of a direction given under this regulation, the land may, notwithstanding any restriction imposed on the use thereof (whether by law or otherwise), be used by, or under the authority of, that Minister for such purpose, and in such manner, as he thinks expedient in the interests of the public safety or the defence of the Commonwealth, or for maintaining supplies and services essential to the life of the community ; and that Minister, so far as appears to him to be necessary or expedient in connexion with the taking of possession or use of the land in pursuance of this sub-regulation—

(*a*) may do, or authorize persons so using the land to do, in relation to the land, anything which any person having an unencumbered interest in fee simple in the land would be entitled to do by virtue of that interest ; and

(*b*) . . . "

Under this regulation the Minister may, on behalf of the Commonwealth, take possession of any land for defence purposes and if he does so the land may be used for defence purposes as fully as if he, the Minister, had an unencumbered interest in fee simple in the land. The validity of this regulation has not been challenged. It is indeed obvious that the defence of the country may make it necessary or expedient for the defence authorities to take possession of and to use land.

The Regulations and the *National Security Act* itself (as will be seen later) are based upon the assumption that there is a distinction between taking possession of land for a temporary purpose, even though for an indefinite period, and the acquisition of an interest

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in land. The terms of reg. 55AA plainly show that this is a distinction which the Regulations assume to be real—an assumption which is denied by the order now under appeal. Reg. 55AA is introduced by the words : " Where any of the powers conferred by or under regulation 53, 54 or 55 of these Regulations has been exercised in relation to any land, and the land is later compulsorily acquired in pursuance of any law of the Commonwealth " &c. These words show that the Regulations assume that possession of the land can be taken under reg. 54 and that the land may be used in pursuance of such a regulation without any compulsory acquisition of the land by the Commonwealth.

Other regulations, such as 53, 55, 55A, 56, 59A and 59D, confer rights on Commonwealth authorities to enter upon land and do things on the land for defence purposes, together with incidental provisions. Reg. 57 relates to the requisitioning of property other than land.

Reg. 60D is the regulation which defines the right to compensation. It is as follows :—

" 60D.—(1) Any person who has suffered or suffers loss or damage by reason of anything done in pursuance of any of the following regulations and sub-regulations, namely, regulations 53, 54, 55, 56, sub-regulations (1.) and (2.) of regulation 57, regulation 58 and sub-regulation (4.) of regulation 59 of these Regulations, or in pursuance of any order made under any of those regulations or sub-regulations in relation to—

(*a*) any property in which he has, or has had, any legal interest, or in respect of which he has, or has had, any legal right ;

(*b*) any undertaking in which he has or has had any legal interest ; or

(*c*) any contract to which he is or has been a party,

shall, if the compensation, or the method of fixing the compensation, in respect of the loss or damage is not prescribed by any regulations other than these Regulations, be paid such compensation as is determined by agreement or, in the absence of agreement, may, within one month after the commencement of this regulation, or, if the thing is done after the commencement of this regulation, within two months after the doing of the thing on which the claim is based, or, in either case, within such further time as the Minister allows, make a claim in writing to the Minister for compensation : . . . "

The regulation deals with compensation for loss or damage, and does not purport to provide for the assessment and payment of the value of property acquired. In order to entitle a person to claim

compensation, that loss or damage must have relation to some property in which the person has or has had a legal interest or in respect of which he has or has had a legal right or an undertaking in which he has or has had an interest or a contract to which he is or has been a party.

Other provisions of reg. 60D relate to procedure in making claims. Reg. 60E allows the Minister to make an offer of compensation which may be accepted by the claimant. If the claimant does not accept the offer, he may request the Minister to refer the claim to a Compensation Board. Reg. 60F provides for the assessment of compensation by the Board, and reg. 60G provides for an appeal by a party if dissatisfied to a court of competent jurisdiction "for a review of the assessment." The function of the court upon a review is defined in reg. 60G (5) in the following words:—"the court may . . . proceed to hear the application, and to determine whether any compensation is payable and, if so, the compensation which it thinks just, and may make an order for payment of the compensation so determined." The application referred to in this provision is the application for review referred to in preceding sub-regulations. The duty of the court is to hear the application and to determine whether any compensation is payable and, if so, to assess the amount of compensation. Under this provision the function of the court is, in my opinion, not limited merely to determining whether there was evidence to support the decision of the Compensation Board. The court must determine for itself whether any compensation at all is payable and, if so, the amount of compensation which is just.

Reg. 60H is as follows:—

"60H.—(1.) The Minister may, by order, make provision regarding the basis on which compensation is to be awarded in any class of case.

(2.) Any such order relating to the acquisition of property shall provide just terms to the person from whom the property is acquired.

(3.) Notwithstanding anything contained in these Regulations, where a Minister has, whether before or after the commencement of this regulation, by order made any provisions regarding the basis on which compensation is to be awarded in any class of case, every Compensation Board and court shall be bound, in the assessment of compensation in any case of that class, to observe those provisions."

Sub-regs. 1 and 2 again emphasize the assumption made by the Regulations as a whole, namely, that there is a distinction between acquisition of property and other acts which may be done by virtue of the Regulations, including taking possession and user of land which may cause loss or damage to persons interested in property. Sub-reg. 2 recognizes that the Constitution requires that laws under

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which property is acquired must provide for just terms. Sub-reg. 1, limited as it is by sub-reg. 2 in relation to, but only in relation to, "acquisition of property," assumes that in cases other than the acquisition of property it is for Parliament, by or under direct statutory enactment or regulation, to provide as it may think proper for the payment of compensation.

Sub-reg. 3 requires every Compensation Board and court to observe the provisions of a Minister's order in assessing compensation. If such an order relates to the acquisition of property and does not provide for just terms to the person from whom the property is acquired, the order is not authorized by sub-reg. 2 and can be disregarded as invalid. If, on the other hand, the order does not relate to the acquisition of property, then it is authorized by sub-reg. 1, and it is for the Minister, if he exercises his power of making an order as to the basis of compensation, to provide such terms of compensation as he thinks proper, irrespective of the opinion of a court as to whether such terms are just or not.

In pursuance of reg. 60H the Minister made an order dated 23rd March 1942, which has been subsequently amended in certain particulars. That order relates only to loss or damage suffered by the owner of land, and "owner" is defined in clause 2 of the order to include a lessee and a tenant for any term or at will and any person who has any estate, right or interest in or to the land. Clause 1 of the order provides that where the amount of compensation payable in respect of the loss or damage suffered by the owner of any land by reason of the taking possession of the land in pursuance of reg. 54 is not settled by agreement, the basis of compensation shall be as set out in the order.

The order provides that "the basis of compensation shall not, unless the Central Hirings Committee otherwise determines, exceed the aggregate" of certain sums "provided that . . . (iii) in assessing compensation, loss of occupation or profits shall not be taken into account". This provision appears as a proviso. *Roper* J. has interpreted it as a substantive provision and has given it full effect according to its terms, and not merely as a limitation upon the preceding provisions of the regulation. As a general rule a proviso should not be interpreted as if it were a substantive provision independent of the provisions to which it is a proviso. Speaking generally, a proviso is a provision which is "dependent on the main enactment" and not an "independent enacting clause": Cf. *R.* v. *Dibdin* (1). But though a provision framed as a proviso ought to be drafted and generally should be construed only as such,

(1) (1910) P. 57, at p. 125.

a consideration of both the main and the subsidiary provisions of an enactment may show that the proviso contains matter which is really " in substance a fresh enactment, adding to and not merely qualifying that which goes before " (*Rhondda Urban District Council* v. *Taff Vale Railway Co.* (1)). In the present case it is difficult to give effect to the proviso as to loss of occupation and profits merely as a proviso and I think the learned judge was right in treating it as an independent substantive enactment.

His Honour said that " in a proper case loss of occupation or profits must be taken into account for the assessment of compensation on just terms for the resumption or taking of possession of land (See *Pastoral Finance Association Ltd.* v. *The Minister* (2))." Accordingly it was held that the order did not provide for just terms for the taking of possession of land, and as his Honour was of opinion that taking possession of land amounted to an acquisition of property within the terms of the Constitution, the order was held to be invalid.

It has already been shown that the Regulations proceed upon the basis that the taking possession of land under the Regulations does not amount to the acquisition of land. The *National Security Act* is based upon the same assumption. Section 5 of that Act provides that " the Governor-General may make regulations for securing the public safety and the defence of the Commonwealth and the Territories of the Commonwealth, and in particular . . . (*b*) for authorizing—(i) the taking of possession or control, on behalf of the Commonwealth, of any property or undertaking ; or (ii) the acquisition, on behalf of the Commonwealth, of any property other than land." (See the same provisions in the *Emergency Powers (Defence) Act* 1939 (2 & 3 Geo. VI. c. 62, s. 1 (2) (*b*) (i) and (ii)) and see also the *Compensation (Defence) Act* 1939 (2 & 3 Geo. VI. c. 75), s. 1.) The distinction between (i) and (ii) is the distinction between taking of possession of property and the acquisition of property. It will be observed that s. 5 does not contemplate the making of regulations thereunder in relation to the acquisition of land by the Commonwealth. There is reason for excluding this subject from the scope of the Regulations, because the Commonwealth *Lands Acquisition Act* 1906-1936 contains full provisions dealing with the acquisition of land. If, however, taking possession of land under such a regulation as No. 54 involves the acquisition of property in land, both the *National Security Act* and the Regulations have been based upon a false assumption, and the Commonwealth Parliament cannot give itself power by legislating upon such a basis. If the Parliament makes a law which is truly a law for the acquisition of property, it

(1) (1909) A.C. 253, at p. 258. (2) (1914) A.C. 1083.

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cannot evade constitutional requirements by describing that which is acquired as not being property.

In the present case the question arises as to the acquisition of land. The Commonwealth cannot be said to have acquired land unless it has become the owner of land or of some interest in land. If the Commonwealth becomes only a possessor but does not become an owner of land, then, though the Commonwealth may have rights in respect to land, which land may be called property, the Commonwealth has not in such a case acquired property.

It has often been explained by writers upon jurisprudence that the term "property" is ambiguous. As applied to land it may mean the land itself in relation to which rights of ownership exist, or it may refer to the rights of ownership which exist in relation to the land. See *Williams, Real Property*, Introductory Chapter—in the 23rd ed. (1920), at pp. 3, 4; *Salmond, Jurisprudence*, 9th ed. (1937), p. 342. In the former sense a man may say that his property consists of land. In the latter sense a man's property would consist not of land, but of rights in respect of land which were rights of ownership. I can see no reason why, so far as land is concerned, "property" in s. 51 (xxxi.) of the Constitution should not be interpreted so as to include land itself and also proprietary rights in respect of land. The provision in the Constitution is plainly intended for the protection of the subject, and should be liberally interpreted.

English law, in the interests of peace, has always protected a person who is actually in possession of land. Indeed, a person in possession, though wrongfully in possession, was for some centuries protected even against the true owner. It was held that such a person had a tortious fee simple which he could alienate and devise, while the disseised true owner had only a right of entry or, in some cases, something even lower—a mere right of action: See *Holdsworth, Historical Introduction to the Land Law*, (1927), p. 127; *History of English Law*, vol. II., 3rd ed. (1922), pp. 582 et seq. This, however, is no longer the law (8 & 9 Vict. c. 106, s. 4, and, in New South Wales, *Conveyancing Act* 1919-1943, s. 22; *Holdsworth, Historical Introduction*, (1927), pp. 185 et seq.; *Challis, Real Property*, 2nd ed. (1892), pp. 127, 371). The technicality of the remedies available to the true owner of land after he had been dispossessed led to the use of possessory remedies by indirect methods and by legal fictions for the purpose of enforcing the rights of a disseised owner (*Holdsworth, Historical Introduction*, (1927), pp. 137, 138, 170 et seq.). Possession has long been, and still is, prima facie evidence of title, and it is a substantive root of title.

But possession and ownership of land, though closely connected, are not identical. An owner has the right to maintain or recover

possession of the land against all others (*Williams, Real Property*, first sentence in Part V.). A person who is possessor but not owner does not as such have such a right against the owner. The right of a possessor to be protected against wrongdoers no longer avails against the true owner as if he were a wrongdoer. When the true owner is out of possession of land, and a trespasser is in possession, there are not two owners of the land, but only one owner, though the trespasser may now, by the operation of statutes of limitation, become an owner. When it is said that a person in possession of land, even though wrongfully, has a sort of title to the land, this proposition does not and cannot mean that he has become the owner of the land by virtue of his trespass. It means that if a stranger interferes with his possession he will be protected against the stranger, and that he can transmit to another person this right to protection. But, if all the facts are known, including the identity of the true owner, the possession of a trespasser will not avail against the latter, and the distinction between possession and ownership becomes clear: See *Holdsworth, Historical Introduction*, (1927), pp. 185-187.

In English law no subject can own lands allodially—he can own only an estate in land. Possession is prima facie evidence of an estate in fee simple in the possessor. In one case the possessor may be the owner in fee simple in fact. In another case evidence may show that the person in possession is a tenant for years. If no evidence of tenancy had been given, the fact of possession would have been prima facie evidence of a fee simple in the possessor; but, as soon as it is shown that he is a tenant, then he is treated as that which he really is, namely, the owner of a term, and not as the owner of a presumed fee simple. The question of title is determined upon the whole evidence, and, where evidence displaces a prima facie presumption based upon possession, that presumption no longer has any operation or effect.

Accordingly, in my opinion, the facts that the right to possession is the most valuable attribute of ownership, that possession is prima facie evidence of ownership, and that possession may develop into ownership, do not justify any identification of possession with ownership, but, on the contrary, emphasize the distinction between the two ideas. The fact that the Commonwealth is in possession of land as a result of action under the Regulations does not show that the Commonwealth has become the owner of the land or of any estate in the land. If nothing more were known of the facts than that the Commonwealth was in possession, then, in such an imperfect state of evidence, the presumption would be that the Commonwealth

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was owner in fee simple. But when possession has been taken of land under the Regulations it is plain that the Commonwealth is not the owner of an estate in fee simple. There is no room for a presumption of ownership based upon possession. The Commonwealth has precisely the rights which the Regulations confer upon it and no more. The only question which arises in the present case is whether those rights, the existence and reality of which are undisputed and not a matter of inference or presumption, are proprietary rights, so that it can be said that the Commonwealth has acquired property.

The rights of the Commonwealth are to take and remain in possession of the land and to use it for purposes of defence. In such use, but only for the purposes of such use, the Commonwealth has the rights of an owner in fee simple. The Commonwealth can, at will, give up possession at any time. The rights of the Commonwealth, by reason of the terms of the *National Security Act*, s. 19, cannot last for longer than the war and six months afterwards. In my opinion the Commonwealth is unable to alienate these rights so as to entitle any other person to enjoy them. The right is limited to a right to the Commonwealth to use the land for defence purposes, and such a right cannot be transferred to any other person. The mode of such use may be as determined by the Commonwealth, but any use must be by or on behalf of the Commonwealth. The right may be said to be personal to the Commonwealth.

The only question is, as I have already said, whether these rights are proprietary rights. That which can be owned in respect of land is, as already stated, an estate. The Minister has not an estate in fee simple or any lesser freehold estate, nor, in my opinion, has he a chattel interest. The Bank of New South Wales is still the owner of the land and Dalziel is still the tenant under a weekly tenancy. No other tenancy has been created and there has been no assignment of Dalziel's tenancy. The Commonwealth is, in my opinion, in the position of a licensee with rights as stated in the Regulations. The Regulations permit the Commonwealth to do upon the land things which would otherwise be unlawful (*Thomas* v. *Sorrell* (1)). " A . . . licence properly passeth no interest, nor alters or transfers property in any thing, but makes an action lawful, which without it had been unlawful,"—and cf. *Cowell* v. *Rosehill Racecourse Co. Ltd.* (2). In *Daly* v. *Edwardes* (3), the Court of Appeal considered a document which described itself as an underlease and the parties to it as

(1) (1673) Vaughan 330 [124 E.R. 1098].
(2) (1937) 56 C.L.R. 605.
(3) (1900) 83 L.T. 548 (affirmed *sub nom. Edwardes* v. *Barrington* (1901) 85 L.T. 650.

lessor and lessee. The lease granted to the lessee "the free and exclusive licence and right to the use of" certain refreshment rooms, &c., in a theatre. It was held that even if the lessee could exclude the lessor from those rooms the real substance of the agreement was not the granting of any interest in land, that no interest in land was granted, and that the "lessee" had only an exclusive licence to use the premises for the purpose of providing refreshments (1). The document was "really a grant of a privilege and licence merely masquerading as a lease" (2). See also *Frank Warr & Co. Ltd.* v. *London County Council* (3), where it was held that under a similar agreement (which used the words "grant" and "let" but not the words "lease," "lessor" or "lessee") no interest in land was created which could be the subject of compensation under the *Lands Clauses Consolidation Act* 1845 (Imp.). In *Clore* v. *Theatrical Properties Ltd. and Westley & Co. Ltd.* (4) a similar agreement used the words "doth hereby demise and grant to the lessee the free and exclusive use" of parts of a theatre. It was held that no interest in land was created. In *Commissioner of Stamp Duties (N.S.W.)* v. *Yeend* (5) it was held that an agreement under which a person had the sole right to use premises for the purpose of providing refreshments did not vest any "property" in that person within the meaning of a definition of property which included any estate or interest in any property real or personal. These are cases of contracts creating personal rights to use land for particular purposes, in one case with and in others without a right to exclude the "grantor." In the present case the rights of the Commonwealth to use land for purposes of defence are created, not by contract, but by action taken by the Commonwealth under the Regulations. But the rights so created are, in my opinion, of the same character as those which were created in the cases cited—they are inalienable personal rights and the Commonwealth is not a grantee of property but a licensee. Such personal rights are not proprietary rights.

Upon these grounds of what may be called general reasoning, I reach the conclusion that the taking of possession of land under the Regulations does not amount to the acquisition of an interest in land so as to bring about an acquisition of property within the meaning of s. 51 (xxxi.) of the Constitution.

The opinion that there is a real difference between, on the one hand, taking possession of land for a temporary purpose under these

(1) (1900) 83 L.T., at p. 550.
(2) (1900) 83 L.T., at p. 551.
(3) (1904) 1 K.B. 713.
(4) (1936) 3 All E.R. 483.
(5) (1929) 43 C.L.R. 235.

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particular Regulations, and, on the other hand, the acquisition of land, may be supported by reference to similar statutes and decisions of the courts thereon. English statutes relating to this matter are conveniently mentioned in *Attorney-General* v. *De Keyser's Royal Hotel Ltd.* (1). Lord *Dunedin* refers to the right under the prerogative " to take for use of the moment in a time of emergency " (2), and discusses whether certain statutes, beginning with 7 Anne c. 26, related to permanent acquisition in times of peace, as well as of war, or to another subject matter, namely, the temporary use of land during war (3). His Lordship refers to provision made in statutes for " a temporary taking, and for payment; or, in other words, for getting by statute, with the concomitant obligation of payment, that very possession which, according to the view expressed above, it was the function of the prerogative to provide free of charge, leaving it to statute to provide for a permanent acquisition." So also in 38 Geo. III. c. 27 there is provision for treating with the owner of land " for the possession or use thereof, during such time as the exigence of the service shall require." Reference is made to the Act 44 Geo. III. c. 95, which provided for " temporary taking for such time as the exigence of the public service shall require " (4). The latter phrase appears also in the *Defence Act* 1842, 5 & 6 Vict. c. 94, s. 16. Lord *Moulton* clearly distinguishes between acquisition of property and taking of possession of property when he says that he is satisfied that the *Defence Act* 1842 enables the Crown to acquire " either the property or the possession or use of it as it may need " (5). Lord *Sumner* says that the *Defence Act* " enables the Crown to take lands under the Act in peace or in war, in absolute ownership and in perpetuity or for temporary occupation only " (6). Lord *Parmoor* recognizes the same distinction, referring " to an entry upon, or to taking temporary possession of, or to the temporary occupation and use of the land " (7). Lord *Parmoor* sets out and analyses the various statutes which enable the Crown to take possession of land during such time as the exigencies of public service may require (8). The statutes examined in this decision of the House of Lords thus recognize the distinction between acquisition of land and the temporary taking of possession of land, and the speeches of their Lordships show that this distinction is fully recognized as a real distinction.

In regulations made under the *Defence of the Realm Consolidation Act* 1914, 5 Geo. V. c. 8, the same distinction was recognized: See

(1) (1920) A.C. 508.
(2) (1920) A.C., at p. 526.
(3) (1920) A.C., at p. 527.
(4) (1920) A.C., at p. 528.
(5) (1920) A.C., at p. 551.
(6) (1920) A.C., at p. 560.
(7) (1920) A.C., at pp. 568, 569.
(8) (1920) A.C., at pp. 576 et seq.

In re a Petition of Right (1), and see per *Warrington* L.J. (2), the distinction between " taking and using land " under the prerogative and " taking of land by way of purchase or lease ".

In *Whitehall Court Ltd.* v. *Ettlinger* (3) the Earl of *Reading* C.J., referring to the taking of possession of a flat for defence purposes, said : " There is nothing in the notice which was served upon the tenant to show that the Government required more than the occupation of the premises for an undefined period." The interest of the tenant remained unaffected by such occupation. A right so to occupy is, in my opinion, the right which is given when possession is taken of land under reg. 54 of the Regulations. Subject to the limitation contained in s. 19 of the *National Security Act*, the occupation to which the Commonwealth becomes entitled is occupation for an indefinite period, as the exigence of defence may require.

So also in the case of *Matthey* v. *Curling* (4) Lord *Atkinson*, referring to the *Defence Act* 1842 (Imp.), emphasized the distinction between " the compensation to be paid either for the absolute purchase of the property desired to be acquired or for the ' possession *or use* ' thereof as the case may be." Lord *Atkinson* said, referring to the appellant, of whose land possession has been taken : " The lease under which the appellant held these premises was not in any degree, or to any extent invalidated. His title to the hereditament demised was not in any way weakened " (5). Also his Lordship distinguished between the loss of use and enjoyment of premises and the deprivation of right and title to premises (5).

In the case of *John Robinson & Co. Ltd.* v. *The King* (6) *Bankes* L.J., speaking of regulations made under the *Defence of the Realm Act* (Imp.), to which reference has already been made, said : " Reg. 2B deals with two quite separate matters, (*a*) taking of possession of goods by the authority, (*b*) the acquisition by the authority of goods, possession of which has been so taken. . . . It is obvious that under this regulation the taking possession of goods need not necessarily be followed by any acquisition of them." On the other hand, as *Bankes* L.J. points out, there may be both taking possession of goods and an acquisition of property in goods. Reg. 55AA, to which reference has already been made, shows that the Regulations assume that in the case of land also possession may be taken under the Regulations without any acquisition of property, but that property in the land may subsequently be compulsorily acquired.

(1) (1915) 3 K.B. 649, at p. 667.
(2) (1915) 3 K.B. at p. 668.
(3) (1920) 1 K.B. 680, at p. 685.
(4) (1922) 2 A.C. 180, at pp. 231, 232.
(5) (1922) 2 A.C., at p. 232.
(6) (1921) 3 K.B. 183, at p. 195.

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The *Defence* (*General*) *Regulations* 1939 made under the *Emergency Powers* (*Defence*) *Act* 1939 (Imp.) contain reg. 51, which is similar to the Commonwealth regulation No. 54. It authorizes a competent authority to take possession of land for defence purposes. In *Swift* v. *Macbean* (1), *Birkett* J., referring to a taking of possession under this regulation, spoke of the question of compensation being negotiated "on the footing of requisition and not acquisition" and, referring to furniture, says: "Requisition of furniture does not amount to acquisition" (2).

The authorities to which I have referred show, in my opinion, that the taking of possession of land under such an authority as that conferred by reg. 54 is different in legal significance from any acquisition of an interest in the land. In the present case the Commonwealth has not acquired any interest of any kind in the land. It has not acquired any interest either from the owner of the fee simple or from the tenant. The possession of the Commonwealth may, I think, properly be described as that of a licensee whose rights are defined by the Regulations.

For the reasons stated, I am of opinion that reg. 54, dealing with the taking of possession of land, is not a regulation with respect to the acquisition of property and that therefore there is no constitutional requirement that an order made in pursuance of the Regulations and prescribing the basis of compensation in such a case should contain provisions which, in the opinion of a court, constitute just terms for the taking. The matter is left to the discretion of Parliament. In my opinion, reg. 60H is valid, and the Minister's order made under reg. 60H is not invalid as infringing any constitutional requirement.

If I had been of opinion that the taking of possession of land under the Regulations involved an acquisition of property, I would not have been prepared to hold that the Minister's order did not provide for just terms. The Minister's order includes a proviso in the following terms:—"(iv) in any case in which, owing to exceptional circumstances, the payment of compensation on the basis set out above would not provide just terms to the owner of the land, the compensation may include such additional amount as is just." This provision I would interpret as conveying a direction to assessing authorities to provide just compensation in every case. The view of the Minister, as expressed in the order, is that the basis of compensation set out in the order is just in ordinary circumstances. Any circumstances which would make it unjust in a particular case are, from the point of view of the order, exceptional. In many cases the application of the terms of the order would bring about a just

(1) (1942) 1 K.B. 375, at p. 379. (2) (1942) 1 K.B., at p. 381.

result. Thus, for example, if a dispossessed person were carrying on a business on his land, but could readily obtain other suitable land without disturbance of his business, justice would not require that he should receive compensation for loss of profits. But if his business was disturbed or destroyed as a result of the Commonwealth taking possession, the proviso quoted would allow that fact to be taken into account in the assessment of compensation. I regard proviso iv as an overriding provision which gives a wide discretion to assessing authorities and enables them to give just compensation to owners of land in all cases.

By an amendment of the order published in the Commonwealth *Gazette* on 1st January 1943 a definition of " owner " was inserted in the order in the following terms :—"' owner ' includes a lessee and a tenant for any term or at will and any person who has any estate, right or interest in or to the land." Dalziel is an owner within the meaning of this definition. The Minister for the Army took possession of the land on 12th May 1942. But in my opinion it is not important to determine whether or not the amendment of the order which introduced the definition of " owner " applies to Dalziel because he is a person who, within the meaning of reg. 60D, is a person who has a legal interest in property of which possession has been taken under reg. 54. Other amendments, however, may be of importance. In my opinion, for reasons which I have stated in the case of *Minister of State for the Army* v. *Pacific Hotel Pty. Ltd.**, which was heard immediately before the present case, I am of opinion that the Court is bound to apply the provisions of the order as they exist at the time when the matter comes before the Court.

The order of the Supreme Court should, in my opinion, be varied by striking out the part thereof referring to the method of determining compensation and by inserting in lieu thereof a declaration that the compensation payable should be determined upon the basis of the order made under reg. 60H as amended prior to the determination of the matter by the Court. The majority of the Court is of opinion that the order of the Supreme Court should be affirmed. The appeal is therefore dismissed with costs.

RICH J. The question which arises for determination in the present case turns upon the operation, according to its proper construction, of s. 51, placitum xxxi., of the Constitution. The facts are simple and not in dispute. Certain vacant land in the City of Sydney is owned, so far as land is susceptible of private ownership,

* [*See* note, p. 310, *post.*—Ed. C.L.R.]

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by a bank. It was let by the bank to one Dalziel upon a weekly tenancy at a rental of £8 per week. Dalziel carried on upon it the business of a parking station for motor cars, out of which he made a net profit of about £15 a week. The Minister for the Army, purporting to act under reg. 54 of the *National Security (General) Regulations*, took possession of this land for defence purposes. He made an offer to Dalziel of compensation which was not accepted. The matter was then submitted to a Compensation Board appointed in pursuance of the Regulations, which assessed compensation in accordance with an order of the Minister which provides that in assessing compensation loss of occupation or profits shall not be taken into account. Both parties then appealed to the Supreme Court of New South Wales, which held that the taking of possession amounted to an acquisition of property from Dalziel, and that the terms of compensation provided for by the Regulations were not just, because they prevented compensation being paid in any case in respect of loss of occupation or profits, and justice required that in assessing the compensation payable to Dalziel his loss in this respect should be taken into account. It was ordered, therefore, that his compensation should be determined without regard to the basis of the compensation order made under reg. 60H and should be determined under the ordinary established principles of the law of compensation for the compulsory taking of property. This is an appeal by the Minister from that order.

The placitum which is in question is concerned with the legislative power of the Commonwealth Parliament. One of the characteristic features of a fully sovereign power is its legal right to deal as it thinks fit with anything and everything within its territory. This includes what is described in the United States as eminent domain (*dominium eminens*), the right to take to itself any property within its territory, or any interest therein, on such terms and for such purposes as it thinks proper, eminent domain being thus the proprietary aspect of sovereignty. The Commonwealth of Australia is not, however, a fully sovereign power. Its legislature possesses only such powers as have been expressly conferred upon it, or as are implied in powers which have been expressly conferred. The subject of eminent domain is dealt with by the placitum now in question (s. 51 (xxxi.)), which is in the following terms:—"The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to—the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws." What we are concerned with is not a private document

creating rights *inter partes*, but a Constitution containing a provision of a fundamental character designed to protect citizens from being deprived of their property by the Sovereign State except upon just terms. The meaning of property in such a connection must be determined upon general principles of jurisprudence, not by the artificial refinements of any particular legal system or by reference to *Sheppard's Touchstone*. The language used is perfectly general. It says the acquisition of property. It is not restricted to acquisition by particular methods or of particular types of interests, or to particular types of property. It extends to any acquisition of any interest in any property. It authorizes such acquisition, but it expressly imposes two conditions on every such acquisition. It must be upon just terms, and it must be for a purpose in respect of which the Parliament has power to make laws. In the case now before us, the Minister has, *in adversum*, assumed possession of land of which Dalziel was weekly tenant. With all respect to the argument which has been addressed to us to the contrary, I am quite unable to understand how this can be said not to be an acquisition of property from Dalziel within the meaning of the placitum. Property, in relation to land, is a bundle of rights exercisable with respect to the land. The tenant of an unencumbered estate in fee simple in possession has the largest possible bundle. But there is nothing in the placitum to suggest that the legislature was intended to be at liberty to free itself from the restrictive provisions of the placitum by taking care to seize something short of the whole bundle owned by the person whom it was expropriating. *Possession vaut titre* in more senses than one. Not only is a right to possession a right of property, but where the object of proprietary rights is a tangible thing it is the most characteristic and essential of those rights. " So feeble and precarious was property without possession, or rather without possessory remedies, in the eyes of medieval lawyers, that Possession largely usurped not only the substance but the name of Property; and when distinction became necessary in modern times, the clumsy term ' special property ' was employed to denote the rights of a possessor not being owner " (*Pollock & Wright, Possession in the Common Law*, (1888), p. 5). " Possession confers more than a personal right to be protected against wrongdoers: it confers a qualified right to possess, a right in the nature of property which is valid against everyone who cannot show a prior and better right." " Possession is a root of title " (*ibid.*, p. 22). " The rule that Possession is a root of Title is not only an actual but a necessary part of our system " (*ibid.*, p. 93). " The standing proof that English law regards, and has always regarded, Possession as a substantive root of

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title, is the standing usage of English lawyers and landowners " (*ibid.*, p. 94). A vendor of land cannot require a purchaser to accept his title unless he can give vacant possession at the time for completion (*Cook* v. *Taylor* (1)); and a lessee incurs no liability under his covenant to pay rent if the lessor cannot give him vacant possession (*Neale* v. *Mackenzie* (2); *Hughes* v. *Mockbell* (3))—see also, as to the interest and title of a person in possession of land, *Perry* v. *Clissold* (4).

It would, in my opinion, be wholly inconsistent with the language of the placitum to hold that, whilst preventing the legislature from authorizing the acquisition of a citizen's full title except upon just terms, it leaves it open to the legislature to seize possession and enjoy the full fruits of possession, indefinitely, on any terms it chooses, or upon no terms at all. In the case now before us, the Minister has seized and taken away from Dalziel everything that made his weekly tenancy worth having, and has left him with the empty husk of tenancy. In such circumstances, he may well say :—

> " You take my house, when you do take the prop
> That doth sustain my house ; you take my life,
> When you do take the means whereby I live."

I am not impressed by the argument sought to be based upon the fact that in the expropriation legislation of fully sovereign legislatures a distinction is sometimes drawn between the permanent appropriation of property and the temporary assumption of the possession of adjacent property for use whilst works are being erected on the property which has been permanently appropriated. It was pointed out that in such legislation the two types of appropriation are differently dealt with, and that different language has been used to describe them by learned judges who have had occasion to refer to them. This is no doubt so. And it is to be found not only in the legislation of the Imperial Parliament, but also in the legislation of the Parliaments of the States of the Commonwealth, which, although not fully sovereign, are, in respect of their right of eminent domain, subject to no such restrictions as were imposed by the framers of the Constitution on the Federal legislature. But, with all respect, I fail to see how the practice of such legislatures, or the language used by judges in referring to their legislation, throws any light upon the construction or operation of placitum xxxi., occurring, as it does, in a Constitution which confers powers which are both limited and conditional. I venture to repeat what I said in *Australian Apple*

(1) (1942) Ch. 349.
(2) (1836) 1 M. & W. 747 [150 E.R. 635].
(3) (1909) 9 S.R. (N.S.W.) 343 ; 26 W.N. 72.
(4) (1907) A.C. 73, at p. 79 ; 4 C.L.R. 374, at p. 377.

and Pear Marketing Board v. *Tonking* (1): "It is by the Constitution itself that the acquisition is required to be on just terms, and, since Parliament is bound by the Constitution, by no artifice or device can it withdraw from the determination by a court of justice the question whether any terms which it has provided are just, that is, terms which secure adequate compensation to those who have been expropriated. . . . This is not to say that a tribunal which is technically a court must necessarily be provided for the assessment of compensation. That is a question which does not arise in the case before us, and I prefer not to pass upon it until it does." If the argument which has been addressed to us on behalf of the Minister were allowed to prevail, the Commonwealth Parliament could authorize the Executive to take possession of not only all or any of the private property of citizens but also the property of the States and keep it indefinitely without paying a farthing of compensation to any one. To accede to this argument would be in effect to strike placitum xxxi. out of the Constitution.

It has been suggested, although the point has not been taken in the grounds of appeal, that if the respondent is correct in his contention he may be seeking the wrong remedy. The true position may be that unless the Minister can assume and maintain possession of the land on his own terms he would prefer to be regarded as a wrongdoer and a trespasser rather than submit to just terms, and that the respondent's proper remedy may be an action in tort for unliquidated damages. A somewhat similar suggestion was made to the Privy Council in relation to a party to litigation in the case of *Corea* v. *Appuhamy* (2), and in my opinion the present suggestion deserves a similar fate. In some cases, the language used may be such as to make this the correct method of approach, e.g., *Johnston Fear & Kingham & The Offset Printing Co. Pty. Ltd.* v. *The Commonwealth* (3); but, as at present advised, I do not think that it is so in the present case. Reg. 60D provides that any person who suffers loss or damage by reason of anything done in pursuance of reg. 54 (the regulation which authorizes the taking possession of land) in relation to property in which he had any legal interest or right, may, if compensation is not otherwise provided for, make a claim to the Minister for compensation. Reg. 60F provides for the assessment of compensation by a Compensation Board in case of difference, and reg. 60G for an appeal from the Board to a court of competent jurisdiction. Reg. 60H empowers the Minister by order to make provision for the basis of compensation,

(1) (1942) 66 C.L.R. 77, at pp. 106, 107.

(2) (1912) A.C. 230, at pp. 235, 236.

(3) (1943) 67 C.L.R. 314.

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subject to the condition that any order relating to the acquisition of property shall provide just terms, and provides also that any such provision of the Minister shall bind every Compensation Board and court. It was in reliance upon reg. 60H that the Minister made the order which directs that in assessing compensation for loss or damage suffered through the taking possession of land, loss of occupation or profits shall not be taken into account. There is nothing in all this to suggest that it was intended that assumptions of possession were to be dependent for their legal validity upon every jot and tittle not only of every regulation but of every order made thereunder turning out to be maintainable. On the contrary, the scheme of the Regulations is that the Minister may take possession of whatever he considers necessary, and that the appropriate compensation shall be paid. In these circumstances, I think that the proper course is that which was taken by the House of Lords in *Netherseal Colliery Co. Ltd.* v. *Bourne* (1), that is, to treat the transaction as generally valid and to give full effect to it, rejecting only the invalid condition which was sought to be attached to it: Cf. *Lake View and Star Ltd.* v. *Cominelli* (2); *Kearney* v. *Whitehaven Colliery Co.* (3); *Vita Food Products Inc.* v. *Unus Shipping Co. Ltd.* (4).

This is in accordance with s. 46 (*b*) of the *Acts Interpretation Act* 1901-1941, which provides that where an Act confers power to make, grant or issue any instrument (including rules, regulations or by-laws) then any instrument so made, granted or issued shall be read and construed subject to the Act under which it was made, and so as not to exceed the power of that authority to the intent that where any such instrument would, but for this section, have been construed as being in excess of the power conferred upon that authority, it shall nevertheless be a valid instrument to the extent to which it is not in excess of that power. It has already been pointed out by this Court that the effect of such a provision is that such instruments, found partially invalid, must be treated as distributable or divisible, unless it appears affirmatively that it was not part of the intention of their authors that so much as might have been validly provided should become operative without what is bad (*R.* v. *Poole*; *Ex parte Henry* [*No.* 2] (5)).

It is not in strictness necessary, in order to decide the matter now before us, to do more than determine whether the third proviso to clause 1 of the Minister's Order of 23rd March 1942, treated as invalid, is, upon the principles indicated, severable from the general

(1) (1889) 14 App. Cas. 228.
(2) (1937) A.C. 653, at p. 664.
(3) (1893) 1 Q.B. 700.
(4) (1939) A.C. 277, at p. 293.
(5) (1939) 61 C.L.R. 634, at pp. 651, 652.

scheme of which it forms a part, and I think that it is so severable. But I think it desirable that our decision should rest upon a broader basis than this. It is evident that the draftsman of reg. 60H proceeded upon an erroneous supposition, apparently shared by the framers of s. 5 (1) (*b*) of the *National Security Act* 1939, that the appropriation by the Commonwealth to itself, for an indefinite period, of the exclusive possession of property did not constitute an acquisition of property within the meaning of s. 51 (xxxi.) of the Constitution, and that the Executive Government could therefore exercise an arbitrary discretion as to the compensation, if any, to be paid to persons deprived of the proprietary right of beneficial possession. Not only is reg. 60H designed to give effect to this erroneous idea, but it appears to be intended to confer upon the Minister an arbitrary discretion even when the Minister dispossesses a citizen not only of some, but of all, his rights of property in a particular subject-matter. The regulation is, in my opinion, wholly void, and the order of 23rd March 1942 is therefore also wholly bad.

For the reasons which I have stated, I am of opinion that the appeal should be dismissed with costs.

STARKE J. The first question on this appeal is whether the taking possession of land pursuant to reg. 54 of the *National Security (General) Regulations* is an acquisition of property within the meaning of the Constitution, s. 51 (xxxi.). That section confers upon the Commonwealth 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 the decisions of this Court construe this power as a limitation upon the legislative power of the Commonwealth to acquire property except upon the terms mentioned (*Andrews* v. *Howell* (1) ; *Australian Apple & Pear Marketing Board* v. *Tonking* (2) ; *Johnston Fear & Kingham & The Offset Printing Co. Pty. Ltd.* v. *The Commonwealth* (3)).

Reg. 54 authorizes the taking possession of any land, but the period cannot, by reason of the provisions in the *National Security Act* 1939-1943, s. 19, in any event be longer than six months after His Majesty ceases to be engaged in war. The regulation may be compared with reg. 53, which authorizes the doing of work on any land, and with reg. 55, which authorizes the use of land. And it may also be compared with reg. 55AA, which marks the distinction between the taking possession of land for temporary purposes, the doing of

(1) (1941) 65 C.L.R. 255.
(2) (1942) 66 C.L.R. 77.
(3) (1943) 67 C.L.R. 314.

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work on and using land, and the compulsory acquisition of land pursuant to a law of the Commonwealth.

The power of the Commonwealth to make laws with respect to the acquisition of property is an extensive power, but the Court must construe it according to the plain and ordinary signification of English words. Property, it has been said, is *nomen generalissimum* and extends to every species of valuable right and interest including real and personal property, incorporeal hereditaments such as rents and services, rights of way, rights of profit or use in land of another, and choses in action. And to acquire any such right is rightly described as an "acquisition of property." On the other hand a mere personal licence such as is not assignable would not be rightly described as property: Cf. *Leake, Uses and Profits of Land*, pp. 196-199. There is no doubt, I think, that taking possession of land pursuant to reg. 54 confers a definite legal right upon the Commonwealth in the nature of property (Cf. *Pollock and Wright, Possession in the Common Law* (1888), pp. 22, 23), but I should not think that the right acquired pursuant to reg. 54 is assignable.

Now is this right of the Commonwealth an acquisition of property within the meaning of the Constitution? It is said in the *Imperial Dictionary* that to gain a mere temporary possession of property is not expressed by the word acquire, but by such words as gain, obtain, procure, as to obtain (not acquire) a book on loan. But the construction of the Constitution cannot be based on such refinements. However, the ownership of the land the possession of which is taken under reg. 54 is not transferred to the Commonwealth nor is any estate therein, but a temporary possession. The right conferred upon the Commonwealth may be classified, I think, under the denomination of *jura in re aliena*, and so a right of property, the subject of acquisition. Nothing is gained by comparing the right given by reg. 54 to the Commonwealth with various estates or interests in land of limited duration or with rights over the land of another recognized by the law, for it is a right created by a statutory regulation and dependent upon that regulation for its operation and its effect. And the operation and effect of the regulation gives the Commonwealth the right to possession of the land of another for a period, limited only as already mentioned, and to do in relation to the land anything which any person having an unencumbered interest in fee simple in the land would be entitled to do by virtue of that interest: See reg. 54 (2) (*a*).

The Commonwealth, however, cannot so exercise its legislative power of acquisition unless the terms are just. It does not follow that an acquisition under the regulation is ineffective because no

terms are provided, for in such case the Commonwealth would, nevertheless, I think, be liable to pay such compensation as was reasonable and just: See *Attorney-General* v. *De Keyser's Royal Hotel Ltd.* (1); *Johnston Fear & Kingham & The Offset Printing Co. Pty. Ltd.* v. *The Commonwealth* (2). The constitutional power given to the Commonwealth by s. 51 (xxxi.) is a legislative power and not, as in the Fifth Amendment of the Constitution of the United States of America, a provision that private property shall not be taken for public use without just compensation. Under the Australian Constitution the terms of acquisition are, within reason, matters for legislative judgment and discretion. It does not follow that terms are unjust merely because "the ordinary established principles of the law of compensation for the compulsory taking of property" have been altered, limited or departed from, any more than it follows that a law is unjust merely because the provisions of the law are accompanied by some qualification or some exception which some judges think ought not to be there. The law must be so unreasonable as to terms that it cannot find justification in the minds of reasonable men.

And this brings me to the compensation provisions, regs. 60B to 60M of the Regulations, and what is called the "Basis of Compensation Order" made under reg. 60H. The Regulations provide (reg. 60D) that any person who suffers loss or damage by reason of anything done in pursuance of (*inter alia*) reg. 54 in relation to any property in which he has, or has had, any legal interest, or in respect of which he has, or has had, any legal right shall be paid such compensation as is determined in the manner provided by the Regulations. The compensation may be determined by agreement, or, in the absence of agreement, a claim may be made to the Minister, who (reg. 60E) may make an offer, and, if not accepted, the claim may be referred to a Compensation Board, and (reg. 60G), if either the Minister or claimant is dissatisfied with the assessment of the Board, then either party may apply to a court of competent jurisdiction to review the assessment. The amount of compensation may be in the form of a lump sum or a periodical payment or both. And reg. 60H provides that the Minister may by order make provision regarding the basis on which compensation is to be awarded in any class of case, but any order relating to the acquisition of property shall provide just terms to the person from whom the property is acquired. And clause 3 provides that, notwithstanding anything contained in the Regulations, where a Minister has by order made any provisions regarding the basis on which compensation is to be awarded in any class of

(1) (1920) A.C. 508.

(2) (1943) 67 C.L.R., at p. 327.

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case, every Compensation Board and court shall be bound, in the assessment of compensation in any case of that class, to observe these provisions. Reg. 60H is not, in my opinion, obnoxious to the provisions of the Constitution, for it expressly provides that any order regarding the basis of compensation relating to the acquisition of property shall provide just terms. In my opinion clause 3, providing that assessment tribunals shall observe the basis of compensation order in any class of case in which the Minister has made provision regarding it, does not override the express provision relating to the acquisition of property nor permit the Minister to disregard it. If the Minister does not observe the prescription as to just terms, that would invalidate his order, but not the regulation itself.

The Basis of Compensation Order, it was also held, was bad in several respects, but the judgment below is based upon the invalidity of the provision that loss of occupation or profits shall not be taken into account in assessing compensation. An owner under the Basis of Compensation Order includes any person who has or has had any estate, right or interest in or to land. The Basis of Compensation Order does not provide a measure of compensation, but fixes the upper limits of compensation in two respects. It shall not exceed the aggregate of certain sums specified in the Order, nor shall it exceed the amount which would, but for any increase in rental value attributable to the war, be the fair market rental of the land at the date when possession was taken. But it also provides that in assessing compensation loss of occupation or profits shall not be taken into account. An owner, however, cannot claim compensation or damages for losses to his business or for its destruction consequent on the taking of his property: See *Mitchell* v. *United States* (1). And the Judicial Committee pointed out in *Pastoral Finance Association Ltd.* v. *The Minister* (2) that suitability of land for the purposes of special business affected the value of the land to the owner and furnished material for estimating what was the real value of the land to him, but that it was a serious fault to say that he was entitled to receive compensation for business profits or savings which he expected to make from the use of the land.

In assessing compensation for taking property compulsorily the settled rules of law, I think, preclude any allowance for consequential damages for loss of occupation or profits, and the regulation appears to me merely a re-assertion of that rule. And this is the more apparent when it is observed that in assessing compensation a sum equal to four per cent per annum, for the period during which

(1) (1925) 267 U.S. 341 [69 Law. Ed. 644]. (2) (1914) A.C. 1083.

possession is retained, of the capital value of the land at the time of taking possession may be taken into account in ascertaining the limit prescribed by the regulation. The special suitability of land for the purposes of special business would be a relevant consideration in ascertaining its capital value. And, further, it must be observed that the regulation provides that the basis of compensation shall not exceed an aggregate amount " unless the Central Hirings Committee otherwise determines ", and that in any case in which owing to exceptional circumstances the payment of compensation on the basis set out in the regulation would not provide just terms to the owner of the land the compensation may include such additional amount as is just. In my opinion there is nothing unreasonable or unjust in these circumstances in the prescription that in assessing compensation loss of occupation or profits shall not be taken into account.

It was suggested in the Supreme Court that the regulations and Basis of Compensation Order were invalid for other reasons, which were not specified and which counsel on the argument before this Court did not elaborate. But I suppose that the provision allowing only a sum equal to four per cent per annum of the capital value of the land to be taken into account in assessing compensation is one to which exception is taken. I see nothing unreasonable in it : the interest allowed by the Commonwealth on its own public securities is now less than four per cent. Again, the direction that no account shall be taken of any appreciation of values due to war is also, I suppose, a provision to which exception is taken. But that kind of provision has been common in Compensation Acts for many years and there is nothing unreasonable or unjust about it. Beyond these provisions I have not noticed any that call for special mention. The Basis of Compensation Order attempts to bring about some uniformity in the assessment of compensation and its provisions should be considered as a whole and not singly and detached from the scheme of the Order.

In my opinion this appeal should be allowed.

McTIERNAN J. The main question to be decided is whether the compensatory terms upon which the *National Security (General) Regulations* provide that possession is to be taken of land under the authority of reg. 54 are valid. The purpose for which this regulation was made is plainly within s. 51 (vi.) of the Constitution. But because of the contention which the respondent makes as to the nature of the action which is authorized by reg. 54, the foregoing question cannot be decided by reference solely to s. 51 (vi.). For if the taking of the possession of land under the authority of reg. 54 is in

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its nature an acquisition of property, the power of the Governor-General in Council to make the regulation depends finally on s. 51 (xxxi.); and the validity of the provisions made regarding compensation for loss or damage suffered in consequence of the operation of reg. 54, would depend on their conformity with the standard of just terms with which s. 51 (xxxi.) hedges the legislative power it vests in the Parliament to make laws with respect to the acquisition of property by the Commonwealth. This approach to the decision of the case is necessitated by the statements on the limitations of the legislative power with respect to the acquisition of property which appear in the cases of *Andrews* v. *Howell* (1) and *Australian Apple & Pear Marketing Board* v. *Tonking* (2), and by the reasons upon which the majority relied in *Johnston Fear & Kingham & The Offset Printing Co. Pty. Ltd.* v. *The Commonwealth* (3). This body of authority establishes that the Commonwealth Parliament has no power, either in peace or in war-time, to legislate on the subject of "the acquisition of property" (situate within any State) except the power conferred by s. 51 (xxxi.). The specific and explicit limitation on the power with which this placitum vests the Parliament would be frustrated by an interpretation of the Constitution which attributed to it any concurrent implied power to legislate which was not subject to the same limitations. To avoid this result it is necessary to adopt the interpretation that the only power with which the Constitution vests the Parliament to legislate on the subject of the acquisition of property is the express and limited power in s. 51 (xxxi.). Hence there is no legislative power either inherent or implied in s. 51 (vi.) or added to it by s. 51 (xxxix.) to provide for the acquisition of property even as a means for carrying on the war. The Australian Constitution differs in this respect from the United States Constitution: this does not explicitly confer power on the legislature to make laws appropriating property for public use: but it exists as an inherent or implied power (*Kohl* v. *United States* (4); *The Mississippi and Rum River Boom Co.* v. *Patterson* (5); *United States* v. *Gettysburg Electric Railway Co.* (6); *Chicago, Burlington & Quincy Railroad Co.* v. *City of Chicago* (7)). The Fifth Amendment provides safeguards on the exercise of this power. The final part of this Amendment says that property shall not be taken without just compensation. This expresses a rule of

(1) (1941) 65 C.L.R. 255.
(2) (1942) 66 C.L.R. 77.
(3) (1943) 67 C.L.R. 314.
(4) (1875) 91 U.S. 367 [23 Law. Ed. 449].
(5) (1878) 98 U.S. 403 [25 Law. Ed. 206.
(6) (1895) 160 U.S. 668 [40 Law. Ed. 576].
(7) (1896) 166 U.S. 226 [41 Law. Ed. 979].

political ethics akin to that which is recognized by the limitations in s. 51 (xxxi.). But whereas this placitum is a power, the Fifth Amendment is a restraint on power. These differences between the Australian Constitution and the United States Constitution would suggest a need for caution in the application of the American decisions regarding the power of eminent domain and the safeguards upon its exercise.

The primary question, therefore, is whether the executive action, which is authorized by reg. 54, is in its nature an acquisition of property. If it is of this nature, the terms upon which the Regulations provide that it is to be taken must be just terms according to the intendment of s. 51 (xxxi.).

Reg. 54 empowers the Commonwealth to take possession of land and, while the land is in its possession, to use it, or authorize it to be used, for the purposes which are specified.

The word "property" in s. 51 (xxxi.) is a general term. It means any tangible or intangible thing which the law protects under the name of property. The acquisition of the possession of land is an instance of the acquisition of property. In my opinion the Parliament exercised the power vested in it by s. 51 (xxxi.) in authorizing the Governor-General in Council to make reg. 54.

It is necessary, therefore, to consider whether the terms upon which the Regulations provide that possession is to be taken of land in respect of which an order is made under reg. 54 satisfy the condition of the power that the acquisition must be made upon just terms.

Reg. 60H provides, firstly, that the Minister may, by order, make provision regarding the basis on which compensation is to be awarded in any class of case. The taking of possession of land under reg. 54 is one of these cases. Reg. 60H, secondly, provides that "any such order relating to the acquisition of property shall provide just terms to the person from whom the property is acquired." This regulation lastly provides that every Compensation Board and the court are to be bound by the provisions which the Minister may make under the terms of this power.

If the expression "the acquisition of property" is used in the same sense in this regulation as it is used in s. 51 (xxxi.), there could be no doubt that this regulation is within that power. But s. 5 of the *National Security Act* 1939-1943 draws a distinction between "the taking of the possession of property" and the "acquisition of property." This distinction does not govern the meaning of the expression "acquisition of property" in s. 51 (xxxi.). It is made only for the purpose of the *National Security Act* 1939-1943. Section 5 of this Act confers power to make regulations for authorizing the taking possession of any property and the

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acquisition of any property other than land. The direction in reg. 60H to provide just terms is to be construed as applying only to such acquisitions of property as are authorized by the Regulations; but as these do not include any acquisition of land, the direction could not have been intended to apply to an acquisition of land made pursuant to the Regulations. It seems to me that reg. 60H is governed by the assumption that the taking of the possession of land is not an acquisition of property within the meaning of s. 51 (xxxi.); and that it is within the authority which the regulation intends to confer on the Minister in the case of a taking of possession of land pursuant to reg. 54, to make an order regarding the basis of compensation which does not conform with the constitutional standard of just terms.

Reg. 60H therefore exceeds the constitutional power of the Commonwealth. There is no lawful foundation for any order regarding the basis of compensation for loss or damage by reason of the taking of the possession of land under the power contained in reg. 54. These orders fall with the power under which they were made and have no legal effect.

It is unnecessary to examine the provisions of any such order to determine whether it would, if lawfully authorized, provide just terms. If that inquiry were undertaken it would be useful to consider the case of *Backus* v. *Fort Street Union Depot Co.* (1).

But the invalidity of reg. 60H does not, in my opinion, affect the validity of the other regulations. It is not essential for the operation of the scheme of compensation provided in the Regulations that the Minister should exercise the discretionary power which reg. 60H purports to confer on him. The existence of an order under reg. 60H is not a condition which is necessary for the operation of the scheme.

The conclusion which follows is that the basis on which compensation should be assessed by the court in this case is that contained in reg. 60G (5), the court proceeding without reference to the provisions of any order which the Minister made under reg. 60H. Reg. 60G (5) provides that the court may determine whether any compensation is payable upon a claim and, if so, the compensation which it thinks just and may make an order for payment of the compensation so determined. This basis of compensation clearly conforms with the constitutional standard of just terms. It is within the discretion which reg. 60G (5) confers on the court to determine under the ordinary established principles of the law of compensation for the compulsory taking of property the compensation which is payable to the claimant.

(1) (1897) 169 U.S. 557, at pp. 571 et seq. [42 Law. Ed. 853, at pp. 860 et seq.]

Roper J., from whose decision this appeal is brought, decided that the court should determine the compensation under these principles and without reference to the basis of compensation which the Minister laid down pursuant to reg. 60H. In my opinion the decision is correct and the appeal should be dismissed.

WILLIAMS J. This appeal comes before this Court under the following circumstances :—

For thirteen years prior to 12th May 1942 the respondent Dalziel had been a weekly tenant of the Bank of New South Wales of a block of vacant land situated at the corner of Wynyard and York Streets, Sydney, at a rental of £8 per week upon which he had carried on a car-parking station.

On 12th May 1942 the Commonwealth, acting under the powers conferred upon it by reg. 54 of the *National Security* (*General*) *Regulations*, entered into possession of the land.

Possession was taken pursuant to a notice in writing dated 5th May 1942. The notice authorized the Quartermaster, United States Armed Forces in Australia, to occupy the land, and authorized him to do in relation to the land anything which any person having an unencumbered interest in the fee simple in the land would be entitled to do by virtue of that interest and provided that, while the land remained in possession of the Commonwealth, no person should exercise any right of way over the land or any other right relating thereto, whether by virtue of an interest in land or otherwise. It is common ground that the respondent at the date of dispossession was making a clear profit of £15 per week out of the business.

The respondent duly made a claim in accordance with reg. 60D of the *National Security* (*General*) *Regulations* for the loss or damage which he had suffered by reason of the Commonwealth taking possession of the land. On 1st February 1943 the Central Hirings Committee determined that compensation at the rate of £34 13s. 4d. per month for the period 16th May 1942 to 26th November 1942 should be paid to the respondent. During this period the respondent had continued to pay the amount of £8 per week (or £34 13s. 4d. per month) to the Bank of New South Wales by way of rent to preserve his tenancy, and the Commonwealth had not been paying the bank anything for the use of the land, so that the Central Hirings Committee only offered the respondent the equivalent of the rent which he had paid to the bank and refused to offer him anything in respect of the loss of a lucrative business.

The respondent refused to accept this amount and his claim was then forwarded to a Compensation Board in accordance with reg.

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60F, which assessed compensation at £197 in addition to the amount awarded by the Central Hirings Committee.

Cross-applications were then made to the Supreme Court of New South Wales in accordance with reg. 60G for a review of the assessment by the Compensation Board, the respondent claiming that he was entitled to more compensation than the amount awarded by the Compensation Board, and the Minister contending that the respondent was not entitled to any compensation in addition to that offered by the Central Hirings Committee.

The cross-applications came on for hearing before *Roper* J. upon certain preliminary points of law, who held that the right to the possession of the land conferred upon the Commonwealth by reg. 54 was an acquisition of property within the meaning of s. 51 (xxxi.) of the Constitution, so that the Commonwealth could only take possession of land under the regulation on just terms; that reg. 60H did not provide just terms so that it was ultra vires the Constitution; and that the compensation payable should therefore be determined without regard to the Basis of Compensation Order, hereinafter referred to, made under reg. 60H (1), and under the ordinary established principles of the law of compensation for the compulsory taking of property.

From this decision of *Roper* J. this Court gave special leave to appeal.

At the hearing of the appeal the main contention raised by Mr. *Fullagar* was that the acquisition of property in s. 51, placitum xxxi., of the Constitution refers to the acquisition of some legal or equitable estate or interest in land, and does not include the temporary but indefinite possession of land taken by the Commonwealth under statutory authority for some purpose (in this case defence), authorized by s. 51 of the Constitution.

As between British subjects, the expression the acquisition of property in land does no doubt refer to the acquisition of some estate or interest in land, but this is because English law does not recognize absolute ownership of land unless in the hands of the Crown. At common law the Crown is the supreme owner or lord paramount of every parcel of land in the realm and all land is holden of some lord or other and either immediately or mediately of the King. The word "estate" is therefore especially used to denote the extent of the interest that the subject has in his land, and an estate in fee simple, which is the greatest interest in land which a subject may have, is wellnigh equivalent to absolute property. See *Williams and Eastwood* on *Real Property*, (1933), pp. 5, 6:—"To have a good title to land is to have the essential part of ownership, namely, the

right to maintain or recover possession of the land as against all others. In English law all title to land is founded on possession. Thus a person, who is in possession of land, although wrongfully, has a title to the land, which is good against all except those who can show a better title; that is, can prove that they or their predecessors had earlier possession, of which they were wrongfully deprived. For possession of land is prima facie evidence of a seisin *in fee*; and he who sues for the recovery of land of which another is in possession must recover on the strength of his own title, and cannot found his claim on the weakness of the possessor's title" (*Williams and Eastwood*, (1933), at p. 448).

So a possessory title is a devisable title and the heir of the devisee can maintain an ejectment against a person who has entered on the land and cannot show title or possession in any one prior to the testator (*Asher* v. *Whitlock* (1)); and upon a resumption a person who has a possessory title good at the date of resumption against everyone but the rightful owner can claim compensation (*Perry* v. *Clissold* (2)). In *Leach* v. *Jay* (3), *James* L.J. quoted with approval a passage from Mr. *Joshua Williams*' book on seisin:—"If a person wrongfully gets possession of the land of another he becomes wrongfully entitled to an estate in fee simple, and to no less estate in that land; thus, if a squatter wrongfully encloses a bit of waste land and builds a hut on it and lives there, he acquires an estate in fee simple by his own wrong in the land which he has enclosed. He is seised, and the owner of the waste is disseised."

It is plain, therefore, that the wrongful entry into possession of land is an acquisition of an interest in the land, and it must necessarily follow, in my opinion, that possession under a statutory title which gives the Commonwealth for an indefinite period, which may last during the war and for six months thereafter, an exclusive right to possess the land against the whole world, including the persons rightfully entitled to the possession of the land at common law, must be, *a fortiori*, an acquisition of an interest in the land.

At common law interests in land in possession are either estates of freehold or chattel real (that is, leasehold) interests.

The nearest analogy to such a statutory right *in rem* at common law would appear to be a tenancy at will. Such a tenancy creates a chattel interest in the land. But such a tenancy must be at the will of either party (*Spencer* v. *Harrison* (4)), whereas under the regulation the period of possession is at the sole will of the Commonwealth.

(1) (1865) L.R. 1 Q.B. 1.
(2) (1907) A.C. 73.
(3) (1878) 9 Ch. D. 42, at p. 44.
(4) (1879) 5 C.P.D. 97, at p. 104

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Such a statutory right *in rem* does not, in my opinion, bear the slightest analogy to the rights created by a licence. A licence does not create any estate or interest in the land but creates merely personal rights between the parties to a contract. Such personal rights are binding solely upon the parties to the contract and do not run with the land (*King* v. *David Allen & Sons, Billposting Ltd.* (1); *Walton Harvey Ltd.* v. *Walker & Homfrays Ltd.* (2); *Cowell* v. *Rosehill Racecourse Co. Ltd.* (3)).

In many instances agreements which have been couched in language appropriate to leases have been held on their true construction to be mere licences: See the authorities collected in *Clore* v. *Theatrical Properties Ltd.* (4). The position was succinctly stated by Lord *Davey* when delivering the judgment of the Privy Council in *Glenwood Lumber Co. Ltd.* v. *Phillips* (5):—"It is not, however, a question of words but of substance. If the effect of the instrument is to give the holder an exclusive right of occupation of the land, though subject to certain reservations or to a restriction of the purposes for which it may be used, it is in law a demise of the land itself." So, too, Lord *Coleridge*, when referring to an agreement which was held to be a licence, said in *Wells* v. *Kingston-upon-Hull* (6): "The contract did not relate to the possession or enjoyment of the land or any right over it, but only to the use of it under very stringent regulations, the defendants retaining themselves complete possession of and all rights over it."

If anyone could grant a licence for the Commonwealth to enter into possession of land for the purposes of defence it would be a person having some estate or interest in the land (whether of a freehold or of a chattel nature) entitling him to grant such a right. But if the grant conferred upon the Commonwealth the exclusive right to possession of the land it would be a demise.

But no such grant is required. The Commonwealth enters into possession of the land, not at the invitation of any such person, but *in invitos* all persons by virtue of a statutory right which overrides any rights to possession vested in any of them: See *Minister of Health* v. *Bellotti* (7).

Reg. 54 provides, so far as material, that: (2) While any land is in the possession of the Commonwealth the land may, notwithstanding any restriction imposed on the use thereof (whether by law or otherwise), be used by, or under the authority of, the Minister of State for the Army for such purpose, and in such manner, as he

(1) (1916) 2 A.C. 54.
(2) (1931) 1 Ch. 274.
(3) (1937) 56 C.L.R. 605.
(4) (1936) 3 All E.R. 483.
(5) (1904) A.C. 405, at p. 408.
(6) (1875) L.R. 10 C.P. 402, at p. 409.
(7) (1944) 1 All E.R. 238, at pp. 240, 241.

thinks expedient in the interests of the public safety or the defence of the Commonwealth, or for maintaining supplies and services essential to the life of the community; and that Minister, so far as appears to him to be necessary or expedient in connection with the taking of possession or use of the land in pursuance of this sub-regulation—(*a*) may do, or authorize persons so using the land to do, in relation to the land, anything which any person having an unencumbered interest in fee simple in the land would be entitled to do by virtue of that interest; and (*b*) may by order provide for prohibiting or restricting the exercise of rights of way over the land, and of other rights relating thereto which are enjoyed by any person whether by virtue of an interest in land or otherwise.

The regulation therefore confers upon the Commonwealth for the purposes of defence the express right to do in relation to the land anything which any person having an unencumbered interest in fee simple in the land would be entitled to do by virtue of that interest; and also confers upon the Commonwealth rights against the owners of incorporeal hereditaments not exercisable by any person having any estate or interest in the land at common law, namely, rights to prohibit or restrict the exercise of rights of way over the land and of other rights relating thereto which are enjoyed by third parties whether by virtue of an interest in land or otherwise. The notice under which possession was taken in the present case exercised all these rights.

It is true that the entry into possession by the Commonwealth does not determine any estate or interest in the land, so that in the present case the Bank of New South Wales continues to be the owner of the land in fee simple and the respondent continues to be a tenant of the Bank of New South Wales from week to week, but the rights of the bank and of the respondent only continue to exist subject to the statutory right of the Commonwealth to take possession of the land and to use it for the purpose authorized by the regulation. Under the regulation, therefore, the Commonwealth acquires by compulsion a right for an indefinite period to the possession and use of land previously vested in some person (in the present case the respondent) by virtue of some estate or interest in the land which that person owns at common law. That person has therefore been divested of the right to possess the land so long as the Commonwealth continues in possession. Moreover, whilst the Commonwealth continues in possession any person becoming entitled to the possession of the land, such as the owner of the fee simple upon the determination of a lease, the owner in fee simple of a reversion which falls into possession, or a mortgagee becoming entitled to

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and desiring to exercise his right to enter into possession of the land is also divested of that right. All rights to possession existing or coming into existence at common law are therefore acquired by the Commonwealth by compulsion at the expense of the person entitled or becoming entitled to such rights.

The position is the same but even clearer in the case of a chattel. A contractual right to the possession of a chattel does not create a proprietary right (*Broad* v. *Parish* (1)). But a statutory power to take possession of a chattel does create a proprietary right *in rem* at the expense of all such persons (*France Fenwick & Co. Ltd.* v. *The King* (2) ; *Lane* v. *Minister of War Transport* (3)).

In *Matthey* v. *Curling* (4) the House of Lords held that where the military authorities entered into possession of land under powers conferred by the *Defence of the Realm Regulations* similar to those conferred by reg. 54 the lessee was not evicted by title paramount and continued to be liable upon the covenants in the lease. Lord *Buckmaster*, in whose opinion Lord *Sumner* and Lord *Wrenbury* concurred, said :—" Eviction by title paramount means an eviction due to the fact that the lessor had no title to grant the term, and the paramount title is the title paramount to the lessor which destroys the effect of the grant, and with it the corresponding liability for payment of rent " (5).

In the present case the Bank of New South Wales as the unencumbered owner of the land in fee simple had a good title to grant the lease, so that the respondent was not evicted by title paramount and remains liable to pay the rent whilst the weekly tenancy continues.

The decision of the House of Lords in *Matthey* v. *Curling* (4) has established that the doctrine of frustration does not apply to leases, so that covenants by a lessee which are absolute in terms are not discharged where the lessee is deprived of the benefits conferred upon him by the lease, as, for instance, where the property is destroyed by fire or flood or occupied by the King's enemies (*Matthey* v. *Curling* (6)), or demolished as a dangerous structure (*Popular Catering Association Ltd.* v. *Romagnoli* (7)), or where as in the present case he is dispossessed under some statute passed subsequently to the lease. As *Birkett* J. said in *Swift* v. *Macbean* (8), in a judgment which has recently been approved by the Court of Appeal in *Leightons Investment Trust Ltd.* v. *Cricklewood Property and Investment Trust*

(1) (1941) 64 C.L.R. 588, at p. 609.
(2) (1927) 1 K.B. 458, at p. 467.
(3) (1942) Ch. 354.
(4) (1922) 2 A.C. 180.
(5) (1922) 2 A.C., at p. 227.
(6) (1922) 2 A.C., at p. 233.
(7) (1937) 1 All E.R. 167.
(8) (1942) 1 K.B. 375, at p. 379.

Ltd. (1) :—" In English law the fact that a lessee had been deprived of the possession of the premises is no excuse for non-payment of rent in the absence of express exception, and the contractual position between the landlord and tenant is in the main unaffected."

But *Matthey* v. *Curling* (2) is not a decision that under a statute similar to reg. 54 an estate or interest in property is not compulsorily acquired at the expense of the lessee because the lease is not discharged by the compulsory entry. In this decision, and in the earlier decision in *Attorney-General* v. *De Keyser's Royal Hotel Ltd.* (3) the House of Lords was dealing with the right to compensation under the English statutes providing for the compulsory taking of land in England for the purposes of defence, and in particular with s. 19 of the *Defence Act* 1842 (Imp.). Section 16 of that Act authorized the Crown to enter into lands, buildings or other hereditaments or easements required for the defence of the realm and to treat and agree with the owners of such land, &c., or with any person or persons interested therein for the absolute purchase thereof or for the possession or use thereof during such time as the exigence of the public service should require. Section 19 empowered the bodies or persons authorized to acquire the lands, &c., either absolutely or for a temporary purpose to offer a sum of money as a consideration for the absolute purchase of the lands, &c., or such annual rent or sum for the hire thereof either for a time certain or for such period as the exigence of the public service might require ; and, if an agreement could not be made, to cause a jury to be summoned to find the compensation to be paid either for the absolute purchase of such lands or for the possession or use thereof. The permanent and temporary acquisition of property were therefore dealt with in the statute in the same way. Both transactions were treated as concerning property which was being acquired from the owners or any other person or persons interested therein and in both cases the statute provided for a purchase or a hiring (which is plainly an acquisition of property) by agreement ; or, in default of agreement, for what was equivalent to a purchase or a hiring, namely, a compulsory acquisition of the fee simple or of the temporary possession of the land at a compensation which was intended to be the equivalent of the purchase money or rent. So, in the *Case of De Keyser's Royal Hotel* (4), Lord *Atkinson*, in referring to that Act, said :—" Whether the land or its use were presumed to be acquired by voluntary purchase under its sixteenth section, or compulsorily under its

(1) (1943) 1 K.B. 493, at p. 496.
(2) (1922) 2 A.C. 180.
(3) (1920) A.C. 508.
(4) (1920) A.C., at p. 541.

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nineteenth section, the owner in each case was to be paid or compensated *for what he parted with.*" (The italics are mine.) In that case the taking was, as in the present case, a temporary one, but Lord *Moulton* said :—" The duty of paying compensation cannot be regarded as a restriction. It is a consequence of the taking, but in no way restricts it, and, therefore, *as the acquisition is made under the Defence Act* 1842 the suppliants are entitled to the compensation provided by that Act " (1). (The italics are again mine.)

The close analogy between the compulsory acquisition of a lease of land and the compulsory taking of possession of land for some statutory purpose is made clear by the speech of Lord *Buckmaster* in *Matthey* v. *Curling* (2). His Lordship referred to the following words of Lord *Hatherley* in *Harding* v. *Metropolitan Railway Co.* (3) :—" As to the abstract principle, I have no doubt that a company purchasing a leasehold interest as this company has done, is bound to take an assignment and bound to enter into an engagement to indemnify the vendor against the covenants of his lease. It would be a grievous injustice to take property by force from a man who is unwilling to dispose of it, and to leave him subject to a substantial rent of £600 a year, and to the other covenants and conditions of his lease." His Lordship went on to say : " That statement has never been questioned, has formed the foundation of procedure from that date, and to my mind is an accurate statement of the true position in such circumstances ; but if it be accepted, the appellant's defence is taken away, for it establishes the proposition that the lessee remains liable on his covenants in the lease, notwithstanding that he has been deprived of the term by the exercise of legal powers."

The following important passage then occurs in his Lordship's speech :—" In the present instance it is true that there was no assignment, nor do I think that the War Office intended to acquire the leasehold interest. They entered into possession by virtue of the authority conferred by the *Defence Act* of 1842, which empowered them to take, and compelled them to pay compensation as therein provided : *Attorney-General* v. *De Keyser's Royal Hotel Ltd.* (4). The preliminary conditions and restrictions imposed by this Act were removed by the statute of 1914, and the regulations made thereunder, *but though this prevented the necessity for formal vesting by assignment or otherwise in the Crown, it left untouched the liability to make the compensation. It is, therefore, closely analogous to—though it is not identical with—the compulsory acquisition by a railway company,* and there is no principle upon which it is possible to hold

(1) (1920) A.C., at p. 551.
(2) (1922) 2 A.C., at p. 229.
(3) (1872) 7 Ch. App. 154, at p. 159.
(4) (1920) A.C. 508.

that the lessee remains liable to the lessor in the one case and not in the other" (1). (The italics are again mine.)

The resemblance between the periodical payments which are appropriate compensation for the taking of the compulsory temporary possession of land to rent has received statutory recognition in the legislation referred to in *Mellows* (*H.M. Inspector of Taxes*) v. *Buxton Palace Hotel Co. Ltd.* (2).

The principal purpose of a lessee in entering into a lease is to obtain the exclusive possession of the demised property so that he may use and enjoy it for those purposes for which the property is suited and which are not forbidden by the lease. This exclusive possession is, therefore, of the very essence of the proprietary interest conferred upon a lessee by a lessor. By entering into possession under reg. 54, the Commonwealth divests the lessee of this exclusive possession and acquires it for itself. The lessee is placed in an analogous position to that in which he is placed where he assigns the lease or sublets. He is still liable to the lessor on the covenants in the lease, but he has parted with the possession which has been acquired from him by the assignee or sub-lessee. The only distinction is that in the case of an assignment or sub-lease the possession has been parted with and acquired voluntarily, while in the case of reg. 54 it has been parted with and acquired by compulsion. In *Attorney-General* v. *De Keyser's Royal Hotel Ltd.* (3), Lord *Atkinson* speaks of the Crown going into possession of the land by virtue of a legislative title or by force of a paramount power. His Lordship's words are equally applicable to the Commonwealth Parliament legislating for the acquisition of the possession of land under the Constitution, because the power conferred by placitum xxxi. is a plenary power which enables the Commonwealth to acquire property in land in the amplest connotation of the term (per *Isaacs* J. in *The Commonwealth* v. *New South Wales* (4)).

For these reasons I agree with *Roper* J. that reg. 54 provides for the acquisition of property in land within the meaning of s. 51 (xxxi.) of the Constitution so that such an acquisition can only be lawful if the legislation which provides for the acquisition also provides for just compensation to the person dispossessed.

The *National Security Act*, s. 5 (1), provides that, subject to the section, the Governor-General may make regulations for securing the public safety and the defence of the Commonwealth and in particular (*b*) for authorizing (i) the taking of possession or control, on behalf of the Commonwealth, of any property or undertaking;

(1) (1922) 2 A.C., at pp. 229, 230.
(2) (1943) 170 L.T. 46.
(3) (1920) A.C., at p. 534.
(4) (1923) 33 C.L.R. 1, at p. 37.

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or (ii) the acquisition, on behalf of the Commonwealth, of any property other than land. The Parliament, therefore, in enacting the section, intended to distinguish between the taking of temporary possession or control of land and the acquisition of some permanent estate or interest in land, but this distinction cannot affect the proper construction to be placed on placitum xxxi., or enable the Executive lawfully to legislate under s. 5 (1) (*b*) (i) to take possession of land except upon just terms. Placitum xxxi. does not give a person who is dispossessed of his property a constitutional right to sue the Commonwealth for compensation, but it does require that all laws made by the Commonwealth for the acquisition of property shall contain just terms, so that if they do not contain such terms they are unconstitutional and the taking of the property is unlawful and a tort (*Attorney-General* v. *De Keyser's Royal Hotel Ltd.* (1); *Johnston Fear & Kingham & The Offset Printing Co. Pty. Ltd.* v. *The Commonwealth* (2)).

The provisions for compensation are contained in regs. 60D to 60M of the *National Security* (*General*) *Regulations*. Reg. 60D provides, so far as material, that any person who has suffered or suffers loss or damage pursuant to anything done in pursuance of, *inter alia*, reg. 54, in relation to any property in which he has any legal interest shall be paid such compensation as is determined by agreement, or, in the absence of agreement, may make a claim in writing to the Minister for compensation. The Regulations then proceed to prescribe that the Minister through a hirings committee shall assess the compensation, but that if the applicant is dissatisfied he may apply to a Compensation Board; while reg. 60G provides that if either the Minister or the claimant is dissatisfied with the assessment of a Compensation Board he may apply to a court of competent jurisdiction for a review of the assessment. It was under the provisions of reg. 60G that the cross-claims already mentioned came before *Roper* J.

The respondent did not suggest before *Roper* J. or before this Court that the Regulations other than reg. 60H do not provide just terms. The contest between the parties arises with respect to reg. 60H and to the Basis of Compensation Order, as amended by the Minister, made under sub-reg. 1 of that regulation. Reg. 60H is in the following terms:—

(1) The Minister may, by order, make provision regarding the basis on which compensation is to be awarded in any class of case.

(2) Any such order relating to the acquisition of property shall provide just terms to the person from whom the property is acquired.

(1) (1920) A.C., at pp. 555, 556. (2) (1943) 67 C.L.R. 314.

(3) Notwithstanding anything contained in these Regulations, where a Minister has, whether before or after the commencement of this regulation, by order made any provisions regarding the basis on which compensation is to be awarded in any class of case, every Compensation Board and court shall be bound, in the assessment of compensation in any case of that class, to observe these provisions.

The words " acquisition of property ", in my opinion, are used in sub-reg. 2 of reg. 60H in the same sense as they are used in s. 5 (1) (*b*) of the *National Security Act*—see the *Acts Interpretation Act* 1901-1941, s. 46 (*a*)—and are intended to refer to what the Act in effect defines as an acquisition of property, and not to the taking possession and control of land, which the Act in effect defines not to be such an acquisition. The Basis of Compensation Order, fixing the basis of compensation for loss or damage suffered by an owner of land by reason of the taking possession of land, made by the Minister on 23rd March 1942 in pursuance of reg. 60H, and subsequently amended on 30th June 1942, 18th December 1942 and 23rd December 1942, provided, so far as material, that where the Commonwealth entered into possession of land under reg. 54 the loss or damage suffered by an owner should not, unless the Central Hirings Committee otherwise determined, exceed the aggregate of a sum equal to four per cent per annum, for the period during which possession was retained, of the capital value of the land at the time of taking possession, plus sums equal to the rates, taxes and insurances payable by the owner in respect of the land during this period, plus a reasonable amount to cover depreciation of any depreciating or wasting asset, plus a sum equal to the cost of making good any damage to the land as a result of the occupation thereof by the Commonwealth.

The original order contained, *inter alia*, the two following provisoes: —(iii.) In assessing compensation, loss of occupation or profits shall not be taken into account. (iv.) In any case in which, owing to exceptional circumstances, the payment of compensation on the basis set out above would not provide just terms to the owner of the land, the compensation may include such additional amount as is just. After the date that the Commonwealth entered into possession of the land, but before the claim for compensation came before the Compensation Board, the order was amended to provide, *inter alia*, (2) that owner includes a tenant and (iii*a*) that the total amount of compensation payable shall not exceed the amount which would, but for any increase in rental value attributable to the war, be the fair market rental of the land at the date when possession was taken.

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During the argument many contentions were raised with respect to whether the order contained just terms within the meaning of placitum xxxi. I agree with the contention that an Act in order to contain just terms need not necessarily comply in all respects with all the principles of the common law relating to the compulsory acquisition of property. Each Act must be judged on its merits. As the matter was discussed I will add that, as at present advised, I do not think that there is anything in the placitum which prevents a statute providing for the compulsory pooling of property where such a method of disposing of property is for the benefit of a large body of growers of perishable products, so long as the statute provides for the division of the proceeds amongst the growers upon an equitable basis. At the same time it appears to me that the determination of what is adequate compensation must vary so greatly in different circumstances that it would be extremely difficult to provide a detailed legislative scheme that would be just in all cases to which it was intended to apply (*Australian Apple and Pear Marketing Board* v. *Tonking* (1)). Moreover, as it is evident that questions of law will generally arise in the assessment and apportionment of compensation, it appears to me that if the amount of compensation is to be fixed by arbitration the statute should contain machinery for questions of law being determined by a court by providing, as in the Regulations discussed in *Johnston Fear & Kingham & The Offset Printing Co. Pty. Ltd.* v. *The Commonwealth* (2), that the arbitration should be conducted under the arbitration laws of the States, or by providing for cases upon questions of law to be stated for the opinion of a court: See the Imperial *Acquisition of Land (Assessment of Compensation) Act* 1919, s. 6, and the Imperial *Compensation (Defence) Act* 1939, s. 7.

The present Regulations do not relate to pooling, but to the assessment of separate claims for compensation in respect of separate parcels of land, and it is clear to my mind that the Basis of Compensation Order would not work justly in many cases. Where an owner was in possession of the land at the date the Commonwealth entered into possession, the land was unencumbered, and the land had no special advantages for the carrying on of some particular business, a rental fixed on the basis of four per cent of the capital value of the land plus the amounts required to pay rates, taxes and insurance might provide just terms in most cases, and proviso iv would provide for exceptional cases where this return would be inadequate. But it is difficult to see how a return of four per cent could be just where market values in the vicinity were based on some higher percentage.

(1) (1942) 66 C.L.R., at pp. 84, 85. (2) (1943) 67 C.L.R. 314.

In particular, by the amendment of the order made on 18th December 1942 the claims of a dispossessed tenant are to be assessed on the same basis. But if a tenant was paying rent assessed say on an eight per cent basis it could not be just for the Commonwealth to compensate him on a four per cent basis. In addition I agree with *Roper* J. that terms cannot be just which provide that in assessing compensation loss of occupation or profits shall not be taken into account. It was suggested during the hearing that the word " occupation " in the proviso meant personal occupation. But, in my opinion, it has the same meaning as in par. *d*, namely, occupation of the land. Since proviso iii specifically directs that loss of occupation or profits is not to be taken into account, such loss cannot be regarded as one of the exceptional circumstances included in proviso iv, but, as *Roper* J. said : " In a proper case loss of occupation or profits must be taken into account for the assessment of compensation on just terms on the resumption or taking of possession of land : See *Pastoral Finance Association Ltd.* v. *The Minister* (1)."

For these reasons I am of opinion that the Basis of Compensation Order does not contain just terms within the meaning of the Constitution, so that, if it should be regarded as legislation made by the Minister under the provisions of the *National Security Act*, s. 5 (3), it is invalid. On the other hand, if it should be regarded as of an executive character, it also fails because it was made by the Minister under the powers conferred upon him by reg. 60H. That regulation authorizes the Minister by order to make provision regarding the basis on which compensation is to be awarded in any class of case, but it is only where the order relates to the acquisition of property as that expression is used in the *National Security Act* that the Minister is required to provide for just terms in the order. He can, therefore, make an order in the case of the Commonwealth taking possession of land, that does not provide for just terms, and sub-reg. 3 provides that all Compensation Boards and courts are to observe the provisions of the order ; so that he is authorized to make unconstitutional orders and such a regulation must be invalid (*R.* v. *Barger* (2) ; *Vardon* v. *The Commonwealth* (3)). As sub-reg. 1 is invalid the order, which depends upon its validity, must also be invalid. Reg. 60H (3), which provides that the basis of compensation fixed by the Minister shall be observed by all Compensation Boards and courts, must also be invalid.

If the result of the invalidity of sub-regs. 1 and 3 of reg. 60H had been to deprive the respondent of any right to compensation,

(1) (1914) A.C. 1083. (2) (1908) 6 C.L.R. 41.
(3) (1943) 67 C.L.R. 434, at p. 452.

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the entry by the Commonwealth would have been unlawful and the respondent's proper course would have been to sue the Commonwealth for damages for tort, but, as I have said, the validity of regs. 60D to 60G inclusive has not been challenged, and these regulations give the respondent the right to claim compensation for the loss or damage which he has suffered by the Commonwealth entering into possession. In particular, reg. 60G (5) empowers the court to determine whether any compensation is payable, and, if so, the compensation which it thinks just. This provision, which confers upon a court complete power to award adequate compensation, is severable from and independent of reg. 60H. It is clear that reg. 60G was intended to be operative whether the Minister made any orders under reg. 60H or not so that, applying the *Acts Interpretation Act*, s. 46 (*b*), the effect of which has been discussed by this Court in several cases, including the recent case of *Pidoto* v. *Victoria* (1), the validity of reg. 60G is not affected by the invalidity of reg. 60H.

For these reasons I am of opinion that *Roper* J. reached a right conclusion and that the appeal should be dismissed.

Appeal dismissed with costs.

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

Solicitors for the respondent, *K. D. Manion & Co.*

J. B.

[*Minister of State for the Army* v. *Pacific Hotel Pty. Ltd.*:—In view of the decision in *Minister of State for the Army* v. *Dalziel* (*supra*) no report of this case is necessary as the majority's decision was consequential upon the decision that reg. 60H and the Basis of Compensation Order are invalid.

The following passage from the judgment of LATHAM C.J. contains the statement of his Honour's reasons referred to by his Honour at p. 283 *ante*:—

"In the present case much attention was directed to the question whether an addition made to the order by an amendment made on 23rd December 1942 and published in the Commonwealth *Gazette* on 1st January 1943 was binding upon the Compensation Board when it heard the company's claim, or upon the Court when it dealt with the application for review of the assessment of compensation by the Board. When possession was taken by the Minister on 1st August 1942, the order did not include among the provisoes par. iii*a*. That proviso is as follows:—" (iii*a*) the total amount of compensation payable (other than compensation in accordance

(1) *Ante*, p. 87.

with sub-paragraph (*g*) of this paragraph) shall not exceed the amount which would, but for any increase in rental value attributable to the war, be the fair market rental of the land at the date when possession was taken ".

The Board gave its decision on 4th March 1943, and the Court gave its decision upon the review at a later date. It was held in the Supreme Court that the proviso quoted was not applicable to the assessment of compensation in a case where possession had been taken before the new clause iii*a* had been inserted in the order. Reference was made to *In re Athlumney* (1), where it was said :— " No rule of construction is more firmly established than this— that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matter of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only " (2). His Honour took the view that the company had a right vested in it under the Regulations and the order as they stood at the time when the Minister gave notice of intention to take possession, or at the time when he entered into possession. Prima facie that right continued unless altered by subsequent legislation expressed in clear words, and his Honour failed to find any such clear words in the Regulations or order.

Reg. 60H (3) is in the following terms :—" (3) Notwithstanding anything contained in these Regulations, where a Minister has, whether before or after the commencement of this regulation, by order made any provisions regarding the basis on which compensation is to be awarded in any class of case, every Compensation Board and court shall be bound, in the assessment of compensation in any case of that class, to observe those provisions."

This provision gives a direction to Compensation Boards and courts to be observed by them when they are acting under the authority of the Regulations. In my opinion, effect can be given to this provision only if Boards and courts observe any provisions made in an order which is in operation at the time when the Board or court makes a decision as to the assessment of compensation. The rule referred to in *In re Athlumney* (3) is a rule of construction and cannot be applied where the words of a law are clear to the contrary effect. In my opinion reg. 60H (3) is clear to the contrary effect.

But, further, in order to ascertain what right the company had before the order was amended by the insertion of proviso iii*a*, it is necessary to examine the terms of the order as it stood in July-August 1942, when the Minister gave notice under the Regulations that he intended to take possession and took possession. At that time the right of the company depended upon clause 1 of the order, which was then expressed in the following terms :—" Where the amount of compensation payable in respect of the loss or damage suffered by the owner of any land by reason of the taking possession of the land in pursuance of regulation 54 of the *National Security*

(1) (1898) 2 Q.B. 547. (2) (1898) 2 Q.B., at pp. 551, 552.
(3) (1898) 2 Q.B. 547.

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(*General*) *Regulations* is not settled by agreement, the basis of compensation shall, until otherwise ordered, be the aggregate of the following sums :— " and certain heads of compensation were then set out. It should be noticed that the right to compensation is to be as stated in the order " until otherwise ordered." Some effect should, if possible, be given to these words " until otherwise ordered." No effect is given to them if they are regarded as referring only to the possibility of altering, by future amendment of the order, provisions relating to compensation to be paid in cases where rights had arisen only after such amendment. It was obvious that amending orders might be made from time to time. Such orders might or might not apply to pending claims. They would certainly apply to future claims. The words " unless otherwise ordered " where they appear in clause 1 have no significance if they are regarded as merely intimating that in relation to future claims the law may be altered. Effect can be given to them only if they are regarded as a statement that the right originally conferred upon any person by clause 1 is a right which itself may be altered in relation to that person by an order made in other terms than those which appear in clause 1 as it originally stood. Thus the right which was vested in the company was a right which was granted by the Regulations subject to the possibility of alteration thereof before it had become effective and the matter had been closed by the assessment and payment of compensation. For these reasons I am of opinion that the Board and the Court should have applied the proviso which imposes a limit upon the total amount of compensation payable by reference to the fair market rental of the land at the date when possession was taken."

ED. C.L.R.]