[HIGH COURT OF AUSTRALIA.]

THE MINISTER OF STATE FOR THE ARMY — APPELLANT;
RESPONDENT,

AND

PARBURY HENTY AND COMPANY PROPRIETARY LIMITED — RESPONDENT.
CLAIMANT,

THE MINISTER OF STATE FOR THE ARMY — APPELLANT;
RESPONDENT,

AND

CARRIER AIR CONDITIONING LIMITED — RESPONDENT.
CLAIMANT,

BRICKWORKS LIMITED — APPELLANT;
CLAIMANT,

AND

THE MINISTER OF STATE FOR THE ARMY — RESPONDENT.
RESPONDENT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *May* 4, 7.

Latham C.J., Starke, Dixon and McTiernan JJ.

May 8, 10, 11; *Aug.* 10.

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

National Security—Acquisition of property—Compensation—Principles of assessment—The Constitution (63 & 64 *Vict. c.* 12), *s.* 51 (*xxxi.*)—*National Security* (*General*) *Regulations* (*S.R.* 1939 *No.* 87—1942 *No.* 402), *regs.* 54, 60F, 60G.

Federal Jurisdiction—Acquisition of property by Commonwealth—Compensation—Determination by Commonwealth Compensation Board—Appeal to single judge of State Supreme Court—Appeal to Full Court of State Supreme Court—Jurisdiction—The Constitution (63 & 64 *Vict. c.* 12), *ss.* 75-77—*Judiciary Act* 1903-1940 (*No.* 6 *of* 1903—*No.* 50 *of* 1940), *ss.* 39 (2) (*a*), 79—*National Security Act* 1939-1943 (*No.* 15 *of* 1939—*No.* 38 *of* 1943), *ss.* 5 (1) (*ac*), 18—*Supreme Court Procedure Act* 1900 (*N.S.W.*) (*No.* 49 *of* 1900), *ss.* 3, 5—*Administration of Justice Act* 1924 (*N.S.W.*) (*No.* 42 *of* 1924), *s.* 11—*National Security* (*General*) *Regulations* (*S.R.* 1939 *No.* 87—1942 *No.* 402), *reg.* 60G.

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A person dispossessed by reason of anything done in pursuance of reg. 54 of the *National Security* (*General*) *Regulations* is entitled to the value to him of the thing taken, and is not limited to the actual pecuniary loss suffered by him.

So *held* by *Latham* C.J., *Rich*, *Starke*, *Dixon*, *McTiernan* and *Williams* JJ.

An appeal lies to the Full Court of the Supreme Court of New South Wales from a determination made on a review of compensation under reg. 60G (5) of the *National Security* (*General*) *Regulations* by a judge of the Supreme Court of New South Wales sitting as the Court but without a jury; such appeal is not prevented by s. 39 (2) (*a*) of the *Judiciary Act* 1903-1940.

So *held* by *Latham* C.J., *Rich*, *Starke*, *Dixon*, *McTiernan* and *Williams* JJ.

By *Latham* C.J., *McTiernan* and *Williams* JJ. on the ground that s. 39 (2) (*a*) does not apply to a review of compensation by the Supreme Court of a State under reg. 60G of the Regulations. The jurisdiction of the Supreme Court is conferred by the Regulations and not by the *Judiciary Act*, and under the Regulations an appeal lies from the decision of a single judge of the Supreme Court to the Full Court of that Court. By *Latham* C.J. and *McTiernan* J. on the further ground that even if the jurisdiction of the State Supreme Court was held to be conferred by s. 39 of the *Judiciary Act*, s. 39 (2) (*a*) of that Act does not prevent an appeal in cases of Federal jurisdiction from a Supreme Court of a State constituted by a single judge to the Full Court of the State Supreme Court.

By *Rich*, *Starke* and *Dixon* JJ., on the ground that s. 39 (2) (*a*) of the *Judiciary Act* does not prevent an appeal in cases of Federal jurisdiction from a Supreme Court of a State constituted by a single judge to the Full Court of the State Supreme Court. *Per Starke* and *Dixon* JJ.: Proceedings under reg. 60G of the *National Security* (*General*) *Regulations* are subject to the provisions of s. 39 (2) (*a*) of the *Judiciary Act*.

Decisions of the Supreme Court of New South Wales in:—

(*a*) *Parbury Henty & Co. Pty. Ltd.* v. *Minister of State for the Army*, (1944) 45 S.R. (N.S.W.) 275; 62 W.N. 76, affirmed.

(*b*) *Carrier Air Conditioning Ltd.* v. *Minister of State for the Army*, (1944) 45 S.R. (N.S.W.) 215; 62 W.N. 102, affirmed.

(*c*) *Brickworks Ltd.* v. *Minister of State for the Army*, (1944) 45 S.R. (N.S.W.) 223; 62 W.N. 73, reversed.

APPEALS from the Supreme Court of New South Wales.

Appeals were brought to the High Court from three judgments of the Full Court of the Supreme Court of New South Wales, in the cases of *Parbury Henty & Co. Pty. Ltd.* v. *Minister of State for the Army* (1) and *Carrier Air Conditioning Ltd.* v. *Minister of State for the Army* (2), allowing, and in the case of *Brickworks Ltd.* v. *Minister of State for the Army* (3), dismissing, appeals from decisions of *Roper* J. upon

(1) (1944) 45 S.R. (N.S.W.) 275; 62 W.N. 76. (2) (1944) 45 S.R. (N.S.W.) 215; 62 W.N. 102.
(3) (1944) 45 S.R. (N.S.W.) 223; 62 W.N. 73.

reviews of assessments of compensation made by a Compensation Board under reg. 60F of the *National Security (General) Regulations*.

The Minister of State for the Army took possession, under reg. 54 of the *National Security (General) Regulations*, of premises belonging to the said three companies respectively. The parties were unable to agree upon amounts of compensation, and the claims for compensation were referred to a Compensation Board. Applications were made to the Supreme Court of New South Wales for a review of the assessments made by the Compensation Board. The Supreme Court is a court of competent jurisdiction within the meaning of reg. 60G of the Regulations.

Facts relevant to the respective claims are as follows :—

Minister of State for the Army v. *Parbury Henty & Co. Pty. Ltd.*— The company carried on the business of an indent agent at premises in Grace Building situate at Number 77 York Street, Sydney, and held by the company under a lease, which was due to expire on 31st May 1943, at an annual rental of £1,047 10s. Possession of these premises was taken on 28th August 1942 under reg. 54 by the Minister of State for the Army, who assumed, on behalf of the company, all the obligations of the lessee under the terms of the lease as to rent or otherwise.

In order to preserve its business, the company, without delay, acquired other premises at Lawson House, Sydney, at an annual rental of £494, and further accommodation as a packing- and store-room for an additional annual rental of £52. A lease of these premises was taken for two years and eleven months and, as the premises were not suitably fitted, the money in question in the review was expended so as to fit them.

The Compensation Board fixed the compensation payable at £1,137 6s. 3d. under five heads, namely : fixtures and fittings, £734 17s. 2d. ; cartage, £161 1s. 7d. ; electric installations, £72 14s. 6d. ; telephone system installation, £52 16s. ; and extra labour and sundries, £108 17s.

Of the sum of £734 17s. 2d. fixed in respect of fixtures and fittings, £270 13s. 1d. represented the cost of dismantling and removing fixtures from the premises of which possession was taken, and installing them in new premises which the company had acquired. It was not contested that this amount was properly allowable. The balance allowed under that heading, however, namely £464 4s. 1d., was allowed as the cost of purchasing and installing new fixtures and fittings in the new premises, with a set-off of £100, which was agreed to be the residual value which the new fixtures and fittings would have when the Minister gave up possession of the old premises or

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when the lease of the new premises expired, whichever was the appropriate date. The allowance of this sum of £464 4s. 1d. was contested.

There was also a contest as to the item of electrical installations, this item representing the cost and expense of purchasing and installing electrical equipment in the new premises, less the residual value of those fixtures and fittings. It was not contested that the expenditure was reasonable for the purpose of adapting the new premises to the carrying on of the company's business. It was claimed, however, that, when the Minister took over the obligations of the company under its lease of premises in Grace Building, and paid the expenses of removal of the company's goods and fixtures and fittings from that building, the whole of the loss or damage suffered by the company because of the dispossession had been met. It was not established that the company's business had suffered by the change, and in fact the company showed a saving in rent of £501 10s. a year.

Roper J. held that the company had not shown any loss or damage arising out of the acquiring or fitting up of the new premises, and that its loss and damage was restricted to the money value of the premises which it had lost and the expense incurred by it in removing from those premises. He fixed the compensation at £637 18s. 8d., being: for fixtures and fittings, £270 13s. 1d.; for cartage, £168 1s. 7d.; for telephone system installation, £52 16s.; for extra labour and sundries, £108 17s.; and for electrical installation conceded to be payable by the Minister, £37 11s.

Upon an appeal to the Full Court of the Supreme Court, the decision of *Roper* J. was, by a majority, set aside and the order of the Compensation Board was restored: *Parbury Henty & Co. Pty. Ltd.* v. *Minister of State for the Army* (1).

From the decision of the Full Court, the Minister appealed to the High Court.

Minister of State for the Army v. *Carrier Air Conditioning Ltd.*— Prior to 5th May 1942, Carrier Air Conditioning Ltd. carried on business in premises owned by it and situate at 36 Bourke Street, Woolloomooloo. On that date, under reg. 54 of the *National Security (General) Regulations*, the Minister of State for the Army took possession of part of the premises, namely, in area, 60,000 square feet. As a result of the action by the Minister, the area available to the company was so reduced as to necessitate the company's re-organizing its business activities. This was done by housing part

(1) (1944) 45 S.R. (N.S.W.) 275; 62 W.N. 76.

of its technical staff in temporary premises; in re-arranging the restricted space available in the premises at 36 Bourke Street; and leasing premises in Yorkshire House, Spring Street, Sydney, at a rental of £275 per annum, for the accommodation of part of the administrative staff.

Upon a claim referred to it under reg. 60E (5), a Compensation Board, under reg. 60F, assessed compensation as follows:—(*a*) a periodical payment at the rate of £942 5s. per annum as from 5th May 1942, by way of rental allowance for the occupied premises; (*b*) a sum of £618 17s. 1d., by way of removal and other expenses incurred; (c) a further periodical payment of £104 2s. 6d. per annum as from 5th May 1942, for direct telephone line and for travelling expenses; and (*d*) a further periodical payment of £87 11s. 2d. per annum, payable monthly, as from 5th May 1942, in respect of air conditioning and electrical installation at 36 Bourke Street.

Roper J. said that, apart from £296 11s. 5d. removal expenses, the company had reasonably and properly incurred expenses amounting to £672 10s. 3d. in altering its premises at Bourke Street, and in furnishing and refitting its new premises at Spring Street. The rent of the Spring Street premises was £275 per annum, and the carrying on of its business in the two premises involved the company in additional annual expenses amounting to £104 2s. 6d. per annum. The payment by the Minister to the company of the sum of £942 5s. as rent for the premises of which possession was taken gave the company a surplus over the rent and additional continuing business expenses at Spring Street of £563 2s. 6d. per annum. As the loss of possession had already endured for more than two years, the capital expenditure of £672 10s. 3d. had already been more than fully recouped to the company by the difference between the annual rent to which it was entitled in respect of the premises lost, and the rent of the new premises and additional continuing expenses in respect of carrying on its business in two separate buildings instead of in one entire one. The Judge held that the company had suffered no loss or damage in excess of the agreed rental value of the premises taken and its removal expenses and fixed the amount of compensation at: (*a*) a periodical payment of £942 5s. per annum payable monthly as from 5th May 1942, and (*b*) a sum of £296 11s. 5d. for removal expenses.

Upon an appeal by the company, the Full Court of the Supreme Court of New South Wales, by a majority, held that the Minister's claim to be entitled to set-off against the rental value of the premises of which possession had been taken under reg. 54 the difference between that value and the rent paid by the company for its new

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premises could not be supported, and that the award of the Compensation Board should be restored: *Carrier Air Conditioning Ltd.* v. *Minister of State for the Army* (1).

From that decision, the Minister appealed to the High Court.

Brickworks Ltd. v. *The Minister of State for the Army.*—Brickworks Ltd. owned an area of about fourteen acres at Alexandria, known as City Brickworks. It contained four kilns and a brick pit. On 25th May 1942, the Minister of State for the Army took possession of this area pursuant to reg. 54 of the *National Security (General) Regulations* and remained in occupation until April 1943. When the Minister took possession, the yard was not being used by the company for the purpose of making bricks, and was being looked after by a caretaker who lived in a cottage on the premises and, as occasion required, serviced the machinery and prevented the brick pit from flooding.

A claim by the company for compensation was referred under reg. 60E (5) to a Compensation Board. Before the Compensation Board, the following questions and answers were put to and obtained from the secretary of the company:—

"Q. All you have done with regard to that is to preserve the asset, isn't it? A. Well, under the regulations, or I should say the agreement of which the City is a part, there is a necessity to keep the place in order, so that it may work again when required.

Q. If it is called upon? A. Yes.

Q. The position is that there was no anticipation of it being called upon from the time the military went in until April of this year? It was not anticipated that they would be called upon? A. No.

Q. That was the position? A. Yes.

Q. It was not anticipated that the company would call upon that brickyard to produce bricks during the time the military were in occupation whether they had been there or not? A. It was not anticipated, from knowledge in my possession.

Q. As events have turned out you can say now it would not have been called upon whether the military went in or not, that is so, isn't it? A. Yes.

Q. You said the yards had to be in a condition to produce bricks on notice. What amount of notice? A. At the most sixty days' notice.

Q. How much? A. Sixty days' notice.

Q. But in some cases less? A. Yes, in some cases less. One month is the least and sixty days the most."

(1) (1944) 45 S.R. (N.S.W.) 215; 62 W.N. 102.

It was proved that, as the result of an appeal by the company against an allegedly excessive valuation, the brickyard was in 1942 assessed by the Valuer-General as having an unimproved value of £11,462; an improved value of £16,500; and an annual value of £990.

The Compensation Board awarded a sum of £221 12s. 1d. to the company in respect of the Minister's possession from May 1942 to April 1943, being the amount payable for municipal and water rates apportioned over the period of occupation by the Minister. Both the company and the Minister appealed against this assessment, the company contending that the Compensation Board had not allowed enough, and the Minister contending that it should not have allowed anything. An estate agent called on behalf of the Minister gave evidence that "the rental value of the premises, apart from the brickworks, would be nil—that is apart from letting it as brickworks. As an ordinary letting proposition the value is nil."

Roper J. held that the company had failed to show any loss or damage suffered by it because of the occupation of its land, and he fixed the amount of compensation at nil.

An appeal by the company to the Full Court of the Supreme Court of New South Wales was, by a majority, dismissed: *Brickworks Ltd.* v. *Minister of State for the Army* (1).

From that decision the company appealed to the High Court.

Upon the appeal by Brickworks Ltd. coming on for hearing, a jurisdictional point common to each of the three appeals was raised by counsel for the Minister of State for the Army after argument by counsel for the appellant had proceeded on the merits. The Court, consisting of *Latham* C.J., *Starke*, *Dixon* and *McTiernan* JJ., reserved this point and further argument thereon was adjourned and was later continued before the same justices, with *Rich* and *Williams* JJ., in conjunction with the hearing of the other two appeals.

Further facts and relevant statutory provisions and regulations appear in the judgments hereunder.

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Barwick K.C. (with him *Hooke*) for the appellant Brickworks Ltd. "Loss or damage" within the meaning of reg. 60D of the *National Security* (*General*) *Regulations* does not mean loss or damage in fact for the period of the Minister's occupation. The loss suffered by the appellant was the loss of its right to possession of the whole property and is a loss within the meaning of reg. 60D. That right to possession should be valued as such. Prima facie the value of a right to possession of property is its rental value, due regard being had to restrictions on the legal right to let. There is no evidence of any such

(1) (1944) 45 S.R. (N.S.W.) 223; 62 W.N. 73.

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restrictions. It is nothing to the point that the appellant did not propose to exercise its right in any particular way. The appellant has not only been deprived of the use of its land but also of the right to use it. The order under reg. 54 operates in effect as a restriction on the title. It carries with it a right in the Minister to override restrictions as to user which may have been created by the appellant. Regulation 54 and its effect on the title of an owner were considered in *Minister of State for the Army* v. *Dalziel* (1). Under reg. 54, the Minister may enter into possession and rightfully remain in possession and exclude the owner from possession. The question is: What is the rental value of the property on the basis that there is an indefinite taking for an indefinite term? The evidence does not show that its right to possession was valueless to the appellant, nor does it show, as suggested in the courts below, that the property was suitable only for brickworks. The non-user of the land at the time of the taking is not itself relevant to the determination of compensation. *Syme* v. *The Commonwealth* (2) was not directed to the question now before the Court: it called attention to the use of the word "personally." The short submission is: the appellant suffered loss the day that the order for possession, or the possession, was given or taken; what the appellant lost was the right to possession or the right to use it. That right has a value. It is valued as at the date when it was lost by the appellant, and a periodic sum is fixed representing its value. Prima facie, the value is the fair rental of the land taking into consideration any legal bar to the letting or to the use of the land by the appellant. There is no such legal bar.

Teece K.C. and *Webb* K.C. (with them *C. M. Collins*), for the respondent, the Minister of State for the Army.

Teece K.C. The Full Court of the Supreme Court had no jurisdiction to entertain the appeal from the Supreme Court constituted by *Roper* J. His Honour's decision was a decision of the Supreme Court within the meaning of s. 39 (2) of the *Judiciary Act* 1903-1940 (*The Commonwealth* v. *Kreglinger & Fernau Ltd.* (3); *Cook* v. *Downie* (4)). This point was neither raised nor argued in the court below.

LATHAM C.J. Mr. *Teece* we do not think a Court of four Justices should determine the question which you have raised. Accordingly we propose to reserve this point and ask you to argue the remainder

(1) (1944) 68 C.L.R. 261, at pp. 285, 290, 301.
(2) (1942) 66 C.L.R. 413.
(3) (1926) V.L.R. 310; (1926) 37 C.L.R. 393.
(4) (1945) V.L.R. 95.

of the case. You might consider whether in all the circumstances you desire to press it.

Teece K.C. The same point is to be raised in two appeals coming on for hearing before this Court. On the merits, it is submitted that the decision of *Roper* J. and the decision of the majority of the Full Court were correct. The issue before all the courts was what was the amount of the loss or damage suffered by the appellant, not what was the proper assessment of the value of the property acquired by the Minister for compensation for use and occupation (*Minister of State for the Army* v. *Dalziel* (1); *Syme* v. *The Commonwealth* (2)). If the appellant had been absolutely free to deal with the land as it pleased, the measure of compensation might well have been the fair rental value of the land. Legal restrictions on the title and an agreement or understanding with other brickmaking companies prevented the appellant from dealing freely with its land. In certain circumstances, although certain land has potentialities, its potential value is nil (*Odlum* v. *City of Vancouver* (3)).

[LATHAM C.J. referred to *Spencer* v. *The Commonwealth* (4).]

In assessing the amount of compensation where there has been a lapse of time, the court or assessor may ascertain the quantum of damage in fact suffered by the claimant by having regard to *ex post facto* matters (*Bwllfa and Merthyr Dare Steam Collieries* (1891) v. *Pontypridd Waterworks Co.* (5); *Williamson* v. *John I. Thornycroft & Co. Ltd.* (6)). The evidence shows not only that the appellant did not use the land but also that, during the occupation by the Minister, the use of the land was not and would not have been required under the arrangement with the other brick manufacturers. A right to possession may not be of any value, and the value of land to the owner may be nil (*Stebbing* v. *Metropolitan Board of Works* (7), *MacDermott* v. *Corrie* (8)). On the facts of this case, it appears that during the relevant time the occupation of the land was of no value or of negligible value to the appellant. The restrictions are relevant, though they do not affect the title but rather the use of the land by the appellant (*A and B Taxis Ltd.* v. *Secretary of State for Air* (9)). In that case, it was held that "direct loss and damage" included consequential loss and damage. In principle, it does not matter whether the restrictions on the use are voluntarily imposed and observed or whether they are fixed by statute or by some

(1) (1944) 68 C.L.R., at p. 272.
(2) (1942) 66 C.L.R., at pp. 421, 424.
(3) (1915) 85 L.J. P.C. 95, at p. 96.
(4) (1907) 5 C.L.R. 418.
(5) (1903) A.C. 426, at pp. 428, 430.
(6) (1940) 2 K.B. 658, at p. 659.
(7) (1870) L.R. 6 Q.B. 37, at pp. 39, 43, 45.
(8) (1913) 17 C.L.R. 223, at p. 246.
(9) (1922) 2 K.B. 328.

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reservation in the Crown grant, so long as in fact there is a restriction on use which the owner or occupant observes and intends to observe.

Webb K.C. On the question of damage, the rule and principle shown in *British Westinghouse Electric & Manufacturing Co. Ltd.* v. *Underground Electric Railways Co. of London Ltd.* (1) are applicable. *Roper* J. had before him all the facts which he could take into consideration.

(Adjourned.)

Teece K.C. (with him *Webb* K.C. and *C. M. Collins*), for the Minister of State for the Army. Where the fact is brought to the notice of a final court of appeal that some lower court to which an appeal was brought in the matter had exceeded its jurisdiction, no matter how the fact was brought under the notice of the final court, and although not raised by any of the parties, it is the duty of the final court to take the point. It is the duty of the final court, upon becoming cognizant of it, no matter from what source the information was forthcoming, to take the point in order to protect the prerogative of the Crown (*Benson* v. *Northern Ireland Road Transport Board* (2); *Westminster Bank Ltd.* v. *Edwards* (3)). The Minister did not invite the judgments of the Full Court, he was the respondent in the appeals to that Court. A duty is cast upon counsel to bring the matter under the notice of the final court (*Glebe Sugar Refining Co. Ltd.* v. *Greenock Port and Harbour Trustees* (4)). In the circumstances, it was not necessary that the point should be taken in the Minister's notice of appeal. In any event, it is a pure point of law, not apparent on the evidence, therefore the Minister should be given leave to raise it (*Adams* v. *Chas. S. Watson Pty. Ltd.* (5)).

LATHAM C.J. The members of the Court, with the exception of my brother *Starke*, think that, though it was not mentioned in the notice of appeal, you are entitled to take this point and that it is proper for the Court to allow the point to be argued.

Teece K.C. The judgment of *Roper* J. was a judgment of the Supreme Court of New South Wales within the meaning of s. 39 (2) of the *Judiciary Act*. His Honour so sitting as the Supreme Court was a court of competent jurisdiction within the meaning of reg. 60G (8) of the *National Security* (*General*) *Regulations*. Where in any

(1) (1912) A.C. 673, at pp. 688 et seq.
(2) (1942) A.C. 520, at p. 528.
(3) (1942) A.C. 529, at pp. 533, 536.
(4) (1921) 2 A.C. 66.
(5) (1938) 60 C.L.R. 545.

statute there is a provision giving jurisdiction to a specified court to hear and determine a matter, then, unless there is in the statute some context or some inconsistent provision, the jurisdiction of the court can be exercised by a single judge (*Smeeton* v. *Collier* (1); *In re Mackenzie* (2); *Ex parte Thurecht* (3); *Re Estate of Grace* (4); *Parkin* v. *James* (5)). The records, including the orders as drawn up and settled, show that the proceedings were proceedings in the Supreme Court before *Roper* J. sitting as and for the Supreme Court. The *Supreme Court Procedure Act* 1900 (N.S.W.), either as originally enacted or as amended by the *Administration of Justice Act* 1924 (N.S.W.) following upon criticisms by *Isaacs* A.C.J. in *Hazeldell Ltd.* v. *The Commonwealth* (6), has no relevance to these proceedings. Where a judge sits without a jury pursuant to the *Supreme Court Procedure Act*, it is in respect of an action brought in the Supreme Court. This Court should be very slow to interpret sub-reg. 7 of reg. 60G as either wholly or partly repealing the *Judiciary Act*. The *Supreme Court Procedure Act* does not apply to this matter. This was a special jurisdiction to hear an appeal from a subordinate tribunal conferred upon the Supreme Court by the Constitution in which the law is laid down, therefore *Smeeton* v. *Collier* (7) does not apply. Section 39 (2) deprives the Full Court of the Supreme Court of jurisdiction in this matter (*Kreglinger & Fernau Ltd.* v. *The Commonwealth* (8), *Cook* v. *Downie* (9)). Even though the Court was exercising a double jurisdiction (*Lorenzo* v. *Carey* (10)), it was exercising a Federal jurisdiction and therefore it was exercising a jurisdiction directly governed by the provisions of the *Judiciary Act*. Where the jurisdiction is expressly conferred on the Court by a Federal statute, it is Federal jurisdiction. In *The Commonwealth* v. *Limerick Steamship Co. Ltd.* (11) it was pointed out that, by virtue of s. 39 (2) of the *Judiciary Act*, there was no appeal from the Supreme Court to the Privy Council because the Supreme Court was exercising Federal jurisdiction. Under the *National Security (General) Regulations*, a claim for compensation against the Commonwealth will not lie in the Supreme Court (*Schweppes Ltd.* v. *The Commonwealth* (12)). The Regulations gave jurisdiction to the Supreme Court to hear appeals from the Compensation Board. Those appeals could be

(1) (1847) 1 Ex. 457, at p. 463 [154 E.R. 194, at p. 197].
(2) (1890) 11 L.R. (N.S.W.) 277.
(3) (1925) 42 W.N. (N.S.W.) 65.
(4) (1942) 43 S.R. (N.S.W.) 139; 60 W.N. 74.
(5) (1905) 2 C.L.R. 315.
(6) (1924) 34 C.L.R. 442, at pp. 447-451.
(7) (1847) 1 Ex. 457 [154 E.R. 194].
(8) (1926) V.L.R., at pp. 314, 323.
(9) (1945) V.L.R. 95.
(10) (1921) 29 C.L.R. 243.
(11) (1924) 35 C.L.R. 69.
(12) (1944) 45 S.R. (N.S.W.) 35; 62 W.N. 35.

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heard either by a single judge of the Supreme Court or by a Full Court of the Supreme Court. If such an appeal is heard by a single judge, his judgment is a judgment of the Supreme Court, and then s. 39 (2) of the *Judiciary Act* operates to deprive the Full Court of the Supreme Court of jurisdiction to hear an appeal from that judgment of a single judge. In any case in which the Commonwealth is a party, the Supreme Court is invested with Federal jurisdiction by the *Judiciary Act* (*The Commonwealth* v. *Limerick Steamship Co. Ltd.* (1)).

Barwick K.C. (with him *Hooke*) for the appellant Brickworks Ltd. and the respondent Parbury Henty & Co. Pty. Ltd. The jurisdiction of *Roper* J. was derived from the *National Security (General) Regulations*. Jurisdiction is given by those Regulations to the Supreme Court because the Supreme Court is a court within reg. 60G (8). Upon a trial of issues before a jury presided over by a judge in actions in the Supreme Court between subject and subject, a judgment is entered up which does not become the decision of the court. The *Common Law Procedure Act* (N.S.W.) provides for the entry of what is termed a judgment, or an incipitur of judgment. That judgment is not a judgment of the court, nor is it a judgment or order of the court from which, under the Constitution, an appeal lies to this Court (*Musgrove* v. *McDonald* (2)). When reg. 60G invested the Supreme Court with jurisdiction to review the assessment, it did not invest a judge and jury with jurisdiction, it invested the Court, with all its machinery, in relation to this particular matter, because it is the whole court that is the competent authority. The judgment of the Court is reached only by using all the machinery of the Court in one or other form. In relation to reg. 60G, in New South Wales it is only the judgment of the Full Court that is a decision of the Full Court. There is no equitable jurisdiction as between subject and subject for the recovery of a debt, it is entirely Commonwealth jurisdiction. The Regulations contemplate that the jurisdiction which will be exercised will be that which is ordinarily exercised in relation to practice, powers and procedure in civil actions. In the Supreme Court, there are three methods of determining recovery of a debt as between subject and subject, namely by trial (i) at nisi prius with a jury; (ii) by a judge without a jury; and (iii) under the *Commercial Causes Act* 1903 (N.S.W.). In each of these methods, the judge sits merely to try issues of fact, not to give decisions of the court. Section 5 of the *Supreme Court Procedure Act* (N.S.W.) shows that the function of a judge when he decides the issues is merely the equivalent of a jury and that his decision will have no

(1) (1924) 35 C.L.R., at p. 118. (2) (1905) 3 C.L.R. 132.

greater effect *per se* than that of a jury. There is no decision within the meaning of s. 39 (2) of the *Judiciary Act* other than the decision of the Full Court of the Supreme Court. The word " judgment " as used in the State legislation does not refer to a decision of the court but to a judgment entered up on a jury's finding. The legislation puts what more accurately should be described as a finding of a judge in something like the same position as a verdict of a jury. The competent court under reg. 60G (8) is the Supreme Court in its totality. *Roper* J. was empowered to enter judgment only if there was not an appeal. Regulations 60D, 60G and 60K create a new right to compensation and that right is justiciable only in accordance with the Regulations (*Schweppes Ltd.* v. *The Commonwealth* (1)). The investiture of the jurisdiction in the Supreme Court to hear a review under the Regulations is made by the Regulations and not by s. 39 (2) of the *Judiciary Act*. This course is permissible under s. 5 (1) (*ac*) of the *National Security Act* 1939-1943. Section 18 of that Act gives the Regulations effect where they are inconsistent with existing law. The words in s. 39 (2) of the *Judiciary Act* do not mean that, wherever and by whatever means State courts become invested with Federal jurisdiction, such investiture shall be upon the conditions of that sub-section unless there is something to the contrary in the context. The Regulations are special investing provisions and exclude the special provisions of the *Judiciary Act*. Consistent with all the decisions in respect of s. 39 (2), conditions of the jurisdiction conferred by the Regulations can be imposed which are different from s. 39 (2). An additional circumstance is that reg. 60G (8) excludes the original jurisdiction of the High Court. Also, the District Court of New South Wales, which has no jurisdiction in an action against the Commonwealth, does not get jurisdiction under reg. 60G (8). The District Court would not have jurisdiction under s. 39 (2) by reason of the limitation contained in s. 56 of the *Judiciary Act*. At common law the entry of a judgment on a verdict is ministerial (*Parkin* v. *James* (2)), and the Privy Council has regarded the ministerial judgment entered up on the verdict as not being appealable to it (*Nathoobhoy Ramdass* v. *Mooljee Madowdass* (3), *Tronson* v. *Dent* (4)). Section 39 (2) does not take a verdict in the Supreme Court, or a judgment founded upon it, out of the operation of the procedure of the State (*The Commonwealth* v. *Brisbane Milling Co. Ltd.* (5)). Section 5 (1) of the *Supreme Court Procedure Act* makes the judge's finding no better than a verdict.

(1) (1944) 45 S.R. (N.S.W.) 35; 62 W.N. 35.
(2) (1905) 2 C.L.R., at p. 339.
(3) (1840) 3 Moo. P.C. 87 [13 E.R. 40].
(4) (1853) 8 Moo. P.C. 419 [14 E.R. 159].
(5) (1916) 21 C.L.R. 559, at pp. 568, 569, 580.

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By virtue of s. 5 (2), the direction of a judgment to be entered is the equivalent of signing and the signing is ministerial assimilating completely a judgment directed to be entered by a judge under the *Supreme Court Procedure Act* to a judgment signed under verdict. The observations in *Brisbane Shipwrights' Provident Union* v. *Heggie* (1) have no application to this case, because, by the time a judge came to make the award, he would have determined the facts and directed himself, and any objection to his award would be an objection either to his finding, as being for want of evidence, or an objection to himself in point of law: See *Fieman* v. *Balas* (2), *McDonnell & East Ltd.* v. *McGregor* (3) and *Hazeldell Ltd.* v. *The Commonwealth* (4). The appeal from the decision of *Roper* J. to the Full Court of the Supreme Court was, by reason of s. 5 (12) of the *Supreme Court Procedure Act*, in the nature of a motion for a new trial, it was not an appeal *in stricto sensu*. Alternatively, it was a motion for judgment under the *Supreme Court Procedure Act*. Under s. 5 (7)-(10), an appeal is a complete re-hearing. Briefly, the Regulations invested the Supreme Court. The Supreme Court, when it hears an action under its procedure, has a verdict and a judgment on a verdict; it has a new trial motion so that when giving to the Supreme Court this jurisdiction with the powers, practice and procedure of that court, the Regulations gave to the Supreme Court the power to entertain what is called an appeal but what is in reality a motion for a new trial or for a judgment on the findings as challenged. Therefore what took place before the Full Court was within the regulation, within its contemplation, and was competent to the Court. This result would follow without the presence in sub-reg. 7 of the word "appeals." The finding of *Roper* J. was not a decision of the Full Court within the meaning of s. 39 (2) (*a*). The decision to enter judgment on that finding—assuming *Roper* J. to have so directed—was not a decision of the Court in respect of which an appeal would lie to the Privy Council. An appeal will not lie to the Privy Council from a judgment entered upon a verdict. On its true construction, s. 39 (2) (*a*) is limited to decisions of the Full Court after its own internal machinery is exhausted (*Kreglinger & Fernau Ltd.* v. *The Commonwealth* (5)). If the foregoing submissions are not acceptable to the Court, then Brickworks Ltd. request, that it be granted special leave to appeal to this Court.

Hooke, for the respondent Carrier Air Conditioning Ltd. The argument addressed to the Court by Mr. *Barwick* K.C. is adopted on behalf of this respondent.

(1) (1906) 3 C.L.R. 686, at p. 694.
(2) (1930) 47 C.L.R. 107.
(3) (1936) 56 C.L.R. 50, at p. 54.
(4) (1924) 34 C.L.R., at pp. 447, 448.
(5) (1926) V.L.R., at pp. 328, 329.

Teece K.C., in reply on this point. The provisions of s. 5 of the *Supreme Court Procedure Act* 1900, as amended by the *Administration of Justice Act* 1924, show that the intention was that the judgment of a judge sitting at common law without a jury should be of the same effect as the judgment of a judge sitting in probate, or in equity, or in divorce, from all of which jurisdictions appeals have been and are brought to this Court and to the Privy Council. The Regulations do not initiate a new right. The right to compensation is a right given by the Constitution ; the Regulations merely set out the procedure by which that right is enforced. The question whether under reg. 60G the High Court is or is not given jurisdiction is not relevant to the matter before the Court. The investiture of jurisdiction in the Supreme Court is made by the *Judiciary Act*, which provides that in the classes of cases in which the Constitution confers original jurisdiction on the High Court such jurisdiction shall be invested in this Supreme Court of the State subject to certain restrictions. The Regulations merely indicate the procedure by which the Supreme Court is approached. The decision of *Roper* J. was in no way a judgment entered as of course on the verdict of a jury ; it was a deliberate exercise by the judge of his judicial functions on the findings that he himself had made on the issue of facts submitted to him. When he made the deliberate entry of judgment, he exercised the jurisdiction of the Court in so doing. Reference to the precise terms of s. 5, and particularly sub-s. 7, of the *Supreme Court Procedure Act*, shows that the appeals made from the decisions of *Roper* J. were not in fact motions for new trials. The words " the powers . . . of the court in civil actions or appeals " do not mean the powers of some other superior court to entertain an appeal from that court. The word " appeals " in sub-s. 7 means that a party dissatisfied with the decision of the Compensation Board may appeal to a single judge or to the Full Court. The Court has to protect the prerogative of the Crown. At this point argument in the appeal by Brickworks Ltd. is concluded.

LATHAM C.J. The Court reserves its decision in relation to that appeal.

Teece K.C. In ascertaining what loss a dispossessed person has suffered, loss and gain must be balanced. If, as a result of the dispossession, a gain has been made by the dispossessed person then that gain must be taken into account in determining what was his total loss (*British Westinghouse Electric and Manufacturing Co. Ltd.* v. *Underground Electric Railways Co. of London Ltd.* (1)). Each of the

(1) (1912) A.C., at pp. 683-692.

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companies concerned carried on its business without any inconvenience and has not suffered any loss of goodwill. The principle in assessing the amount payable for loss or damage suffered by a dispossessed person is exactly the same as the principle applied by the Court in assessing compensation for damages for breach of contract. In either case, the wronged or dispossessed person should receive a sum of money sufficient to put him in a position as nearly similar as possible to the position he was in before he was wronged or dispossessed (*Spencer* v. *The Commonwealth* (1)). The amount of loss or damage which has been suffered is a matter of fact.

[DIXON J. referred to *Selected Essays on Constitutional Law*, pp. 946, et seq.]

A dispossessed person must act reasonably in mitigating his loss or damage. Any pecuniary advantage derived by the dispossessed person as a result of being dispossessed should, as between him and the person by whom he has been dispossessed, be brought into account in balancing loss and gain (*A and B Taxis Ltd.* v. *Secretary of State for Air* (2); *Horn* v. *Sunderland Corporation* (3)). A test is: What amount would a person about to be dispossessed be prepared to offer to the requisitioning authority to be allowed to remain undisturbed? The guiding principle is the amount of the actual loss suffered by the dispossessed person.

Barwick K.C. The loss is the deprivation of possession, the quantification of that loss is the value of possession to the dispossessed parties. There is no evidence that no loss was suffered by the dispossessed parties in their businesses carried on in the new premises. The trading profit in the new location is irrelevant, and, even if relevant, it does not show that it was the same as before, or unaffected by, the change of location. The value to the dispossessed parties includes, even if regard be had to the principle of reinstatement referred to in *Cripps* on *Compensation*, 8th ed. (1938), at pp. 906, 908, 910, the cost of setting them up in new premises. *Horn* v. *Sunderland Corporation* (4) is not in conflict with, but, on the contrary, supports these contentions. Principles applicable in breach of contract cases are not applicable to this type of case.

Hooke. The sum of £942 5s. is not merely rent. That sum was determined upon by taking four per cent of the capital value, and adding thereto the proper proportion of rates, insurance, depreciation of part of the building, of the air-conditioning plant and other items. That method does not produce a result of more rent. The fact is

(1) (1907) 5 C.L.R. 418, at p. 435.
(2) (1922) 2 K.B., at pp. 336-339, 343.
(3) (1941) 2 K.B. 26, at pp. 48, 49.
(4) (1941) 2 K.B. 26.

that the sum of £942 5s. per annum, which is admitted to be the market value and not the value to the owner, is cut down by the sum of £672, which indicates that the set-off proposed by the Minister cannot be effective in the circumstances of this respondent's case. The only sum of money to which any set-off could be applied is the market value of the property taken. The loss or damage flowing from the taking possession is the market value of the land together with the cost of removal and the cost of re-establishing the dispossessed person in some other location. All that the sum of £942 5s. purports to be is the market value and to determine what is the value to the owner there must be added the expense it incurred as a result of being deprived of possession. That will not in any way allow of any set-off. If the constitutional point succeeds, this respondent requests that special leave be granted to appeal to this Court from the decision of *Roper* J.

Teece K.C., in reply. Regulation 60D, under which the compensation is claimed, is an " omnibus " regulation which applies to compensation for all manner of loss or damage, not only compulsory acquisition of property, either temporarily or permanently acquired, but also compensation for damage done to property without taking possession of it. There must be applied principles of assessing loss or damage which are applicable to every form of interference with rights dealt with by the Regulations. Therefore it is necessary to ascertain as a matter of fact what sum of money is requisite to put the claimant in the position in which he would have been had his proprietary rights not been interfered with. The loss or damage actually suffered by the dispossessed parties has been satisfied by the decisions of *Roper* J. In the absence of a claim therefor, the judge was entitled to draw the inference that there was no loss of profits. Even if the Minister loses on the merits but succeeds on the jurisdictional point, he should be allowed his costs (*Benson* v. *Northern Ireland Road Transport Board* (1); *Adams* v. *Chas. S. Watson Pty. Ltd.* (2)).

Cur. adv. vult.

Aug. 10.

The following written judgments were delivered :—

LATHAM C.J. *The Minister of State for the Army* v. *Parbury Henty & Co. Pty. Ltd.—The Minister of State for the Army* v. *Carrier Air Conditioning Ltd.*—These are appeals from two judgments of the Full Court of the Supreme Court of New South Wales (*Jordan* C.J. and *Halse Rogers* J., *Davidson* J. dissenting) allowing appeals from

(1) (1942) A.C. 520. (2) (1938) 60 C.L.R. 545.

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decisions of *Roper* J. upon reviews of assessments of compensation which had been made by a Compensation Board under the *National Security (General) Regulations*. The Minister of State for the Army took possession of premises belonging to the respondents. The parties were unable to agree upon amounts of compensation, and the claims for compensation were referred to a Compensation Board under reg. 60E. The Minister was dissatisfied with the assessments made by the Compensation Board, and applied to the Supreme Court of New South Wales for a review of the assessments. The Supreme Court is a court of competent jurisdiction within the meaning of reg. 60G as being a court which would have jurisdiction to hear and determine the application if it were an action between subject and subject for the recovery of a debt equal to the compensation claimed in the original claim to the Minister.

In each case, the appellant, the Minister of State for the Army, relies upon the contention that the judgment of *Roper* J. was a " decision of the Supreme Court of a State " within the meaning of s. 39 (2) (*a*) of the *Judiciary Act* 1903-1940, and that therefore it was final and conclusive, except so far as an appeal might be brought to the High Court. If this be so, the Full Court had no jurisdiction to entertain the appeal from *Roper* J. If this contention is sound, the judgment of the Full Court should be set aside as having been made without jurisdiction, and the decision of *Roper* J. should be restored.

The objection which is raised assumes that, in the present cases, the State Supreme Court obtained jurisdiction by virtue of s. 39 (2) (*a*) and not otherwise. Section 39 (2) (*a*) provides that the several courts of the States, within the limits of their jurisdiction, shall be invested with Federal jurisdiction in all matters in which the High Court has original jurisdiction or in which original jurisdiction can be conferred upon it, subject to four conditions, one of which is that, in the case of a decision of the Supreme Court of a State, that decision shall be final and conclusive except so far as an appeal may be brought to the High Court. The first question which arises is whether s. 39 applies to the present cases or whether jurisdiction is invested in the Supreme Court in these cases, not by s. 39, but by the Regulations.

Section 39 of the *Judiciary Act* is a general provision with respect to the exercise of Federal jurisdiction by State courts. Prima facie, it applies to all exercise of such jurisdiction. But other provisions may be of such a character as to show that Parliament did not intend s. 39 to apply to certain cases. For examples, see *Seaegg* v. *The King* (1), *Peacock* v. *Newtown Marrickville and General Co-operative Building Society No. 4 Ltd.* (2), and cf. *Silk Bros. Pty. Ltd.* v.

(1) (1932) 48 C.L.R. 251.

(2) (1943) 67 C.L.R. 25.

State Electricity Commission of Victoria (1). I proceed to consider whether the provisions of the Regulations show that it was intended that they should give to certain State courts jurisdiction which, apart from the Regulations, those courts would not have possessed, or otherwise to establish special conditions for the exercise of that jurisdiction which exclude the application of the general provisions of s. 39 of the *Judiciary Act*.

In the first place, I call attention to the fact that s. 39 relates to all State courts " within the limits of their several jurisdictions ", while the Regulations limit the exercise of jurisdiction thereunder to certain State courts. The power to review an assessment of a Compensation Board is given only to " a court of competent jurisdiction." Regulation 60G (8) provides :—" For the purposes of this regulation, ' court of competent jurisdiction ' means a court of the Commonwealth, or of a State or Territory of the Commonwealth (other than a court presided over by a Justice of the Peace, Magistrate or District Officer), which would have jurisdiction to hear and determine the application if it were an action between subject and subject for the recovery of a debt equal to the compensation claimed in the original claim to the Minister." Thus certain courts which would be eligible to exercise jurisdiction under s. 39 are not eligible to act under reg. 60G. The courts excluded by the regulation are courts of a State presided over by a justice of the peace or a magistrate. Further, the regulation permits both a court of the Commonwealth and a court of a Territory to act. Section 39 does not invest jurisdiction in such courts. Further, if a proceeding for a review of an assessment of compensation is regarded as a claim against the Commonwealth, a District or County Court would have jurisdiction under the Regulations up to a limit of a certain amount—e.g., £400 in New South Wales, £500 in Victoria. But such courts would, it is submitted, have no jurisdiction under the *Judiciary Act*—see s. 56, which limits jurisdiction in the case of a claim against the Commonwealth to the High Court or a Supreme Court. These provisions show that the courts which are to be empowered to act judicially under the Regulations are not the same courts as those to which s. 39 applies.

If the Regulations are not construed as investing jurisdiction in the selected courts of competent jurisdiction to which they refer then it follows that the Regulations fail to operate in relation at least to some of those courts.

There is, in my opinion, no reason for holding that the Regulations do not both purport to invest and in fact succeed in investing the

(1) (1943) 67 C.L.R. 1.

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courts mentioned with Federal jurisdiction. In order to show this, I state the provisions of the relevant regulations.

Regulation 60G provides that, if either the Minister or a claimant is dissatisfied with the assessment of a Compensation Board, he may, within one month after the receipt of the notice of assessment of a Board (or, in a particular case, within fourteen days thereafter), apply to a court of competent jurisdiction for a review of the assessment. Regulation 60G then prescribes the procedure to be followed when an application for a review of an assessment is made to a court. Sub-regulation 2 provides that the application for review shall be made in writing to the registrar or other proper officer of the court, and shall be accompanied by a true copy of the application for endorsement and service. Sub-regulation 3 requires the registrar or other officer upon receipt of the application to appoint a time for hearing and to endorse on the copy of the application the place and time of hearing and to return it to the applicant. Sub-regulation 4 provides that the applicant shall, not less than fourteen days before the day fixed for the hearing, serve on the other party the endorsed copy of the application, such service to be made in accordance with the practice of the court relating to service of writs or summonses. Sub-regulation 5 provides that, upon the day fixed, the court may, on proof of due service, or upon the appearance of the respondent, proceed to hear the application and to determine whether any compensation is payable, and, if so, the compensation which it thinks just. The sub-regulation empowers a court to make an order for payment of the compensation so determined. Sub-regulation 6 confers a power to award costs. Sub-regulation 7 is as follows :—

> "In any matter not provided for in these Regulations the powers, practice and procedure of the court shall be as nearly as may be in accordance with the powers, practice and procedure of the court in civil actions or appeals."

These provisions apply to a review of an assessment made by a Compensation Board. Unless these or similar provisions existed, no court would have any jurisdiction to review any such assessment. The assessment would stand, for what it was worth according to law, and no court would have power to reconsider it. Perhaps an action could be brought to enforce the rights created by the assessment, but the terms of the assessment could not be altered by any court. The jurisdiction to review an assessment is created by these Regulations, and not otherwise. Even if, independently of the procedure provided in reg. 60G, an action could be brought against the Minister or the Commonwealth for compensation, such an action would not take

the form of a review of an assessment made by the Compensation Board. It would be an independent original proceeding. Thus the source of the jurisdiction of the court is to be found in the Regulations.

Further, the Regulations provide a procedure of their own for the initiation and conduct of proceedings in the Supreme Court which is different from that which applies to other proceedings in that court. The first step is not the issue of a writ or summons, but the presentation of an " application " to a registrar or other court officer followed by the service of a copy of the application endorsed by the registrar or other officer in the manner prescribed. A method of service of the copy upon the respondent is prescribed. There is an express provision that the court may then proceed to hear the application and to make an order therein.

Thus the Regulations provide a special procedure in relation to particular matters and provide that, subject to those special provisions, the powers, practice and procedure of the court in civil actions or appeals shall be observed. The reference to appeals shows that it is contemplated that there may be an appeal within the " court of competent jurisdiction " from a determination of compensation in that court. A distinction is drawn between the powers, practice and procedure of the court in civil actions and the powers, &c., of the court in appeals. The reference to civil actions is apt to apply to the hearing by a single judge of the application for review. That is a proceeding in the original jurisdiction of the court and is not an appeal from the decision of the Compensation Board. The court deals with the matter by taking evidence and making such order as it thinks just. It is in all respects an exercise of original jurisdiction to which the procedure in civil actions is readily and conveniently applicable. Accordingly, the reference to appeals should be regarded as providing, in the case of the Supreme Court, the practice and procedure for an appeal from the decision of a single judge to the Full Court.

If, for these various reasons, the jurisdiction of the Supreme Court in these cases is conferred by the Regulations and not by the *Judiciary Act*, the provision in s. 39 (2) (*a*) of that Act that the decision of the Supreme Court shall be final and conclusive (except so far as an appeal may be brought to the High Court) has no application to them. The ordinary procedure of the Supreme Court in relation to appeals applies. Thus, when a single judge of the Supreme Court acts in pursuance of reg. 60G, there is not only nothing to prevent an appeal to the State Full Court but the regulation specifically provides that the powers, practice and procedure of the

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Supreme Court in relation to appeals are to be exerciseable and applicable.

Upon these grounds, I am of opinion that the objection of the appellant that no appeal lay to the Full Court cannot be sustained.

But it was argued for the appellant that the jurisdiction of the Supreme Court in these cases depended upon the general provision conferring Federal jurisdiction upon the Supreme Court which is contained in s. 39 of the *Judiciary Act*. I have stated my reasons for my opinion that in these cases jurisdiction was actually conferred by the Regulations. But, even if the jurisdiction were held to be conferred by s. 39 of the *Judiciary Act*, the contention of the appellant that an appeal to the State Full Court was excluded should not, in my opinion, be accepted.

The Commonwealth Constitution, s. 75, provides that the High Court shall have original jurisdiction in five matters therein specified. Section 76 provides that the Parliament may make laws conferring original jurisdiction on the High Court in four matters specified in that section. Section 77 provides that, with respect to any of the matters mentioned in the last two sections (that is, the nine matters mentioned in ss. 75 and 76), the Parliament may make laws "(ii.) Defining the extent to which the jurisdiction of any federal court shall be exclusive of that which belongs to or is invested in the courts of the States: (iii.) Investing any court of a State with federal jurisdiction."

In Part VI. of the *Judiciary Act*, the Commonwealth Parliament has made certain jurisdiction of the High Court exclusive and has invested State courts with certain Federal jurisdiction.

By s. 38, the jurisdiction of the High Court is made exclusive of the jurisdiction of State courts in five matters, all of which are included within, but which do not exhaust, the matters mentioned in s. 75 of the Constitution. By s. 38A, the jurisdiction of the High Court is made exclusive of the jurisdiction of the Supreme Courts of the States in matters (other than trials of indictable offences) involving any question, however arising, as to the limits *inter se* of the constitutional powers of the Commonwealth and those of any State or States, or of the constitutional powers of any two or more States.

Section 39 (1) is in the following terms:—

> "The jurisdiction of the High Court, so far as it is not exclusive of the jurisdiction of any Court of a State by virtue of either of the last two preceding sections, shall be exclusive of the jurisdiction of the several Courts of the States, except as provided in this section."

This provision purports to deal only with the actual jurisdiction of the High Court.

The original jurisdiction of the High Court is to be ascertained by considering, first, s. 75 of the Constitution, which directly confers original jurisdiction in five classes of matters upon the High Court, secondly, s. 76, which authorizes Parliament to make laws conferring original jurisdiction on the High Court in four classes of matters, and thirdly, any legislation passed under the power conferred by s. 76. This power has been exercised in the *Judiciary Act*, s. 30, which provides that, in addition to the matters in which original jurisdiction is conferred on the High Court by the Constitution (that is, by s. 75 of the Constitution), the High Court shall have original jurisdiction in two matters therein specified. Other statutes, e.g. patents, trade marks, copyright, and taxation statutes, also confer original jurisdiction upon the High Court.

The words of s. 39 (1), "the jurisdiction of the High Court", in their natural sense refer to the jurisdiction which the High Court actually has, that is, its actual jurisdiction, as distinct from what might be called its potential jurisdiction, that is, jurisdiction which might be conferred upon it, but which has not in fact been conferred upon it. The effect of s. 39 (1), therefore, is to make the actual jurisdiction of the High Court completely exclusive of the jurisdiction of any court of a State except as provided in s. 39. The exclusion of the State courts effected by ss. 38 and 38A is complete. In other matters, the exclusion is an exclusion subject to the exceptions provided in s. 39.

Section 39 (2) proceeds to exercise the power conferred upon the Parliament by s. 77 (iii.). (It is unnecessary for the purposes of this case to refer to pars. (*b*), (*c*) and (*d*) of the section.) Section 39 (2) (*a*) is in the following terms :—

> "The several Courts of the States shall within the limits of their several jurisdictions, whether such limits are as to locality, subject-matter, or otherwise, be invested with federal jurisdiction, in all matters in which the High Court has original jurisdiction or in which original jurisdiction can be conferred upon it, except as provided in the last two preceding sections, and subject to the following conditions and restrictions :—
>
> (*a*) Every decision of the Supreme Court of a State, or any other Court of a State from which at the establishment of the Commonwealth an appeal lay to the Queen in Council, shall be final and conclusive except so far as an appeal may be brought to the High Court."

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This provision purports to invest the several courts of the States, within the limits of their several jurisdictions, with Federal jurisdiction in two classes of matters, namely, first, matters in which the High Court has original jurisdiction, and secondly, matters in which original jurisdiction can be conferred upon it. It has sometimes been supposed that the first class refers only to the matters mentioned in s. 75 of the Constitution, as to which the Constitution provides that the High Court has original jurisdiction, and that the second class refers to the matters mentioned in s. 76 of the Constitution which are matters in which original jurisdiction can be conferred upon it. In truth, however, the High Court actually has original jurisdiction, by virtue of the *Judiciary Act* and other statutes, not only in the matters mentioned in s. 75 of the Constitution, but also in the matters mentioned in s. 30 of the *Judiciary Act*, namely, " (*a*) in all matters arising under the Constitution or involving its interpretation ; and (*c*) in trials of indictable offences against the laws of the Commonwealth ", and in the matters in respect of which jurisdiction has been conferred under other laws made by the Commonwealth Parliament, e.g., the *Patents Act*, &c. These are matters mentioned in s. 76 of the Constitution, and, in my opinion, they are also matters which fall within the first class of matters mentioned in s. 39 (2), namely matters in which the High Court in fact has original jurisdiction.

The jurisdiction conferred upon the several courts of the States by s. 39 (2) is conferred subject to certain conditions and restrictions, the first of which is that every decision of the Supreme Court of a State or certain other courts shall be final and conclusive, except in so far as an appeal may be brought to the High Court.

Section 39 has been the subject of much controversy. In *Webb* v. *Outrim* (1), it was held by the Privy Council that the section was invalid. In *Baxter* v. *Commissioners of Taxation* (*N.S.W.*) (2), the High Court refused, for reasons there stated, to regard this decision as binding upon it, and s. 39 (2) (*a*) of the *Judiciary Act* was held to be effective, at least to invest State courts with Federal jurisdiction with a right of appeal to the High Court, even if the section were invalid in so far as it attempted to take away what was described as the prerogative right of appeal to the Privy Council (as distinct from appeal by special leave only).

In *Lorenzo* v. *Carey* (3), it was held by five Justices (the Court expressing no opinion as to the provisions in sub-s. 2 (*a*)) that s. 39 was a valid exercise of the powers conferred upon the Parliament of

(1) (1907) A.C. 81.
(2) (1907) 4 C.L.R. 1087.
(3) (1921) 29 C.L.R. 243.

the Commonwealth, so that an appeal would lie to the High Court from a decision of an inferior court of a State under the provisions of s. 39 (2) (*b*). In this case, it was said that a State court might exercise (apparently at will—but see *Troy* v. *Wrigglesworth* (1))—either Federal or State jurisdiction in the same matter. This possibility arose from the fact that jurisdiction already " belonged to " State courts before the *Judiciary Act* in certain of the matters in which s. 39 (2) purported to invest them with Federal jurisdiction. I venture to suggest that this aspect of the subject of Federal jurisdiction may require further consideration. I refer to what *Dixon* J. said in *Ffrost* v. *Stevenson* (2), adding that when one law permits an appeal and another law prohibits an appeal in the same proceeding, there is a stronger case for holding that the laws are inconsistent (e.g., under s. 109 of the Constitution) than when each of two laws permits different appeals in a proceeding.

In *The Commonwealth* v. *Limerick Steamship Co. Ltd.* (3), it was held by a majority of the Court that s. 39 (2) (*a*) was valid, so as to exclude an appeal as of right to the Privy Council from a decision of the Supreme Court exercising Federal jurisdiction, and to give to the High Court jurisdiction to entertain an appeal from such a decision. The decision in *Webb* v. *Outrim* (4) was interpreted as relating only to cases of pure State jurisdiction, and not to cases of Federal jurisdiction : See per *Isaacs* and *Rich* JJ. (5) and per *Starke* J. (6).

In this state of the authorities, the case of *Kreglinger & Fernau Ltd.* v. *The Commonwealth* (7) came before the Supreme Court of Victoria. The action was an action brought against the Commonwealth, and was therefore a matter in respect of which the High Court had original jurisdiction under the Constitution, s. 75 (iii.). An appeal was brought from a single judge of the Supreme Court to the Full Court of the Supreme Court. It was held by a majority of that Court that the decision of the single judge was a decision of the Supreme Court within the meaning of s. 39 (2) (*a*) of the *Judiciary Act*, and that if that section were valid the decision of the single judge was final and conclusive, except so far as an appeal was brought to the High Court. The majority, however, was of opinion that the Privy Council had decided in *Webb* v. *Outrim* (4) that s. 39 was invalid, at least in relation to the appeal to the Privy Council, that that decision should be followed, and that no operation of severance could be performed so as to preserve the section in relation to other matters

(1) (1919) 26 C.L.R. 305, at p. 310.
(2) (1937) 58 C.L.R. 428, at p. 573.
(3) (1924) 35 C.L.R. 69.
(4) (1907) A.C. 81.
(5) (1924) 35 C.L.R., at pp. 94, 95.
(6) (1924) 35 C.L.R., at p. 118.
(7) (1926) V.L.R. 310.

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than the appeal to the Privy Council. The consequence was that s. 39 was held to be wholly invalid, with the result that the provision in s. 39 (2) (*a*) that the decision of the Supreme Court was final and conclusive, except in so far as an appeal might lie to the High Court, was invalid. Accordingly the Full Court (*Irvine* C.J., *Mann* J., *Macfarlan* J. dissenting) held that, s. 39 being invalid, there was nothing to prevent the Full Court from entertaining the appeal from the single judge, and judgment was accordingly given in that appeal.

An appeal was brought to the High Court in *The Commonwealth* v. *Kreglinger & Fernau Ltd.* (1). The High Court did not decide the question whether the decision of the single judge was a decision of the Supreme Court within the meaning of s. 39 (2) (*a*) so as to prevent an appeal to any other court than the High Court, but determined the case on the ground that on the hearing of the appeal from the single judge to the Full Court of the Supreme Court a question arose as to the limits *inter se* of the constitutional powers of the Commonwealth and a State within the meaning of s. 74 of the Constitution and ss. 38A and 40A of the *Judiciary Act*. Therefore, under s. 40A, the case was removed to the High Court. It was held that on this ground the Full Court had no jurisdiction to entertain the appeal from the single judge, or to make a subsequent order granting leave to appeal to the Privy Council. In this case, it was held by three Justices that s. 39 (2) (*a*) was valid so as to prevent any appeal to the Privy Council in any matter of Federal jurisdiction to which the section applied. Mr. Justice *Higgins*, who dissented from the judgment of the Court, said that, if s. 39 (2) (*a*) were valid, "then appeals from a single Judge to the Full Court, and also appeals from the Supreme Court to the Privy Council, were effectively prohibited" (2). The other members of the Court abstained from expressing an opinion upon this matter (3).

It was held by this Court that the Full Court of the Supreme Court of Victoria had no jurisdiction to give a decision in *Kreglinger & Fernau Ltd.* v. *The Commonwealth* (4), and therefore that decision cannot be regarded as a decision which is or was an authority for the proposition that the *Judiciary Act*, s. 39 (2) (*a*), prevents an appeal in cases of Federal jurisdiction from the decision of a single judge of the Supreme Court to the Full Court of that Court. In *Cook* v. *Downie* (5) the Full Court of the Supreme Court of Victoria has, however, adopted the reasoning of the majority of the Full Court in *Kreglinger &*

(1) (1926) 37 C.L.R. 393.
(2) (1926) 37 C.L.R., at p. 425.
(3) (1926) 37 C.L.R., at pp. 400, 401, 423, 431.
(4) (1926) V.L.R. 310.
(5) (1945) V.L.R. 95.

Fernau Ltd. v. *The Commonwealth* (1) and has formally decided that the effect of s. 39 (2) (*a*) is to prevent an appeal lying to the State Full Court from a judgment of a single judge of that Court when exercising Federal jurisdiction. The contentions raised in these appeals bring this question before this Court for decision.

In the first place, it is argued that the decision of *Roper* J. was a decision given in the exercise of Federal jurisdiction conferred by s. 39 (2) for two reasons: first, because the proceeding was in substance a claim against a person, namely a Minister, who was sued on behalf of the Commonwealth (see Constitution, s. 75 (iii.)), and secondly because the claim arose under a law made by the Commonwealth Parliament, namely, the *National Security Act* and the regulations thereunder: See Constitution, s. 76 (ii.). I have already given reasons for my opinion that the special provisions of the Regulations, applying only to the review of assessments, supersede the general provisions of s. 39 (2) in respect of specification of courts as well as in respect of conditions precedent to jurisdiction (viz. a prior assessment by a Compensation Board) and of procedure. But, in order to deal with the whole of the appellant's argument, I assume in his favour that s. 39 is applicable to these cases.

The order made by *Roper* J. was, in my opinion, an order of the Supreme Court. The order was made by virtue of the provisions of the *Supreme Court Procedure Act* 1900 (N.S.W.), s. 3. Section 3 provides that "in any action by consent of both parties the whole or any one or more of the issues of fact in question may be tried, or the amount of any damages or compensation may be assessed by a judge without a jury." This section was applied in the present cases and *Roper* J. assessed the compensation without a jury. Section 5 provides that, subject to the provisions of the section, the verdict or finding of any judge sitting without a jury under the Act shall be of the like force and effect in all respects as the verdict or finding of a jury. It was argued for the respondents that the verdict or finding of a judge sitting in pursuance of the Act amounted to no more than the verdict or finding of a jury, and that therefore it was not a decision of the Supreme Court itself: Cf. *Parkin* v. *James* (2); *Musgrove* v. *McDonald* (3); *The Commonwealth* v. *Brisbane Milling Co. Ltd.* (4); *Wilson* v. *Hood* (5).

When s. 5 of the *Supreme Court Procedure Act* 1900 was first passed it consisted simply of the following provision: "The verdict or finding of any Judge sitting without a jury on the trial or assessment of

(1) (1926) V.L.R. 310.
(2) (1905) 2 C.L.R. 315, at p. 339.
(3) (1905) 3 C.L.R. 132.
(4) (1916) 21 C.L.R. 559.
(5) (1864) 3. H. & C. 148 [159 E.R. 484].

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any issue of fact or amount of damages or compensation pursuant to this Act shall be of the like force and effect in all respects as the verdict or finding of a jury." The section was not introduced by the words " Subject to the provisions of this section " and sub-ss. 2 to 13 were not contained in the Act as originally passed. In *Hazeldell Ltd.* v. *The Commonwealth* (1), decided in August 1924, Mr. Justice *Isaacs* considered s. 5 as it then appeared, in its original form, and pointed out that a trial judge sitting under the Act of 1900 could only give a verdict, and not a judgment of the court. His Honour criticized the effect and operation of the Act in this respect in very pointed language. Soon afterwards, s. 5 was amended by the Parliament of New South Wales by the *Administration of Justice Act* 1924. This Act added sub-ss. 2 to 13 to s. 5. In my opinion, the object of the amendment was to remove the basis of the criticism of *Isaacs* J., and the amendments, I think, have effectively achieved this object. Sub-section 2 provides that nothing in the section shall authorize judgment to be signed on the verdict or finding, but that " judgment may be directed to be entered as provided in this section, and the entry shall have the like force and effect in all respects as the signing of judgment." Sub-section 3 provides that the court may direct judgment to be entered for any or either party, and for that purpose the court may be held and its jurisdiction may be exercised by the judge, and either at or after the trial. This provision, in my opinion, brings about the result that when an order is made by a trial judge sitting in pursuance of the Act the order made is a judgment of the court. Sub-section 5 provides that any judgment directed by the judge to be entered under the provisions of the section shall, unless there is an appeal as provided in the section against the judgment, have the same force and effect in all respects as the judgment of the court ; and sub-s. 6 provides that any party may appeal to the court against any judgment so directed by the judge to be entered. This last provision clearly differentiates an order made by a judge sitting under the Act from a verdict of a jury. Sub-section 7 provides that the appeal shall be by way of rehearing. Sub-section 9 provides that " the Court may on the appeal give any judgment and make any order which ought to have been given or made in the first instance." These provisions appear to me to be quite inconsistent with the view that the decision of a single judge sitting under the Act has and has only the same operation and effect as the verdict of a jury. If that were the case, the provisions to which I have just referred could not be applied. It would be impossible upon that view for a Full Court ever to allow an appeal in such a case because the only question

(1) (1924) 34 C.L.R. 442.

which would be open could be whether the order made was right "on the verdict"—and the order and the verdict would be the same thing. In my opinion, the effect of all these provisions is to make an order of a single judge sitting under the Act a judgment of the Supreme Court. The orders in these cases recite that it was ordered that the matters should stand for judgment and proceed "and the same standing in the list for judgment accordingly . . . it is ordered that the following compensation be awarded to the claimant namely" &c.

I therefore deal with these cases upon the basis that the orders made by *Roper* J., which in terms are orders of the Supreme Court, are decisions of the Supreme Court.

The next question is whether s. 39 (2) (*a*) operates to make these decisions final and conclusive, except so far as an appeal may be brought to the High Court.

In *Parkin* v. *James* (1) it was decided that an order made by a judge of the Supreme Court of the State of Victoria sitting as a judge of first instance was a judgment of the Supreme Court, so that an appeal lay direct to the High Court from that judgment by virtue of the Constitution, s. 73, and the *Judiciary Act*, s. 35. "The term 'judgment' in the Constitution and in the *Judiciary Act*, . . . includes orders" (2). It is therefore submitted for the appellant in the present cases that *Parkin* v. *James* (1) concludes this particular argument in his favour.

It is true that in *Parkin* v. *James* (1) it was held that a decision of a Supreme Court judge sitting as a judge of first instance was a judgment of the Supreme Court. (Of course, it was not decided in that case that a judgment of the Full Court of the Supreme Court was not also a decision of the Supreme Court.)

In *Kreglinger & Fernau Ltd.* v. *The Commonwealth* (3), *Macfarlan* J. (dissenting) expressed the opinion that the provision of s. 39 that a decision of the Supreme Court was final and conclusive, except so far as an appeal might be brought to the High Court, operated only to restrict appeal to a court other than the Supreme Court, and that it did not operate to prevent an "internal" appeal to the Full Court of a State. I agree with the learned judge that the decision in *Parkin* v. *James* (1) is not inconsistent with this view because *Parkin* v. *James* (1) only decided affirmatively that an appeal would lie from an order of a Supreme Court judge of first instance to the High Court, because such an order was a "judgment of the Supreme Court" from which an appeal lay to the High Court under s. 73 of the

(1) (1905) 2 C.L.R. 315.
(2) (1905) 2 C.L.R., at p. 342.
(3) (1926) V.L.R. 310.

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Constitution and s. 35 of the *Judiciary Act*. The decision in *Parkin* v. *James* (1) is not a decision as to the meaning of any provision in s. 39 of the *Judiciary Act*.

The object of s. 39 (2) (*a*) was to exclude appeals from the Supreme Court to any court other than the High Court in certain cases. This object can be, and is, achieved by allowing what may be described as the machinery of the Supreme Court to operate fully in order to reach that which is the final decision of that court. An interlocutory order may be made by the Supreme Court in a matter to which s. 39 (2) (*a*) applies. Such an order would be a decision of the Supreme Court. But it could hardly be contended that s. 39 (2) (*a*) made that order a final order subject only to appeal to the High Court, so that no further proceedings in the matter could take place in the Supreme Court, either before or after appeal to the High Court. Section 39 permits the Supreme Court to do all that is necessary to reach a decision of that court and thus allows interlocutory proceedings and appeals within that court, but subject to the provision that there shall be no appeal from that court to any other court except the High Court.

Where a judge of the Supreme Court sitting as a judge of first instance makes an order and there is no appeal to the Full Court of the Supreme Court against that order, then that order is the decision of the Supreme Court, and, if the matter is one to which s. 39 applies, there can be no appeal from that decision of the Supreme Court, except to the High Court. But if there is an appeal from the decision of the judge of first instance to the Full Court of the Supreme Court, his order no longer represents the " decision of the Supreme Court." That decision is then to be found in the order made by the Full Court. Section 39 then operates to prevent any appeal (except to the High Court) from the order of the Full Court, which has become the only decision of the Supreme Court. These considerations are sufficient in themselves, in my opinion, to justify the conclusion that s. 39 does not prevent an appeal from a decision of a single judge of the Supreme Court to the State Full Court in matters of Federal jurisdiction.

The Constitution, s. 79, provides that the Federal jurisdiction of any court may be exercised by such number of judges as the Parliament prescribes. Thus the Parliament might have provided that Federal jurisdiction should be exercised in a Supreme Court only by a single judge or only by a Full Court consisting of a specified number of judges. But this legislative power has not been exercised in relation to the Supreme Courts. In my opinion, both the single

(1) (1905) 2 C.L.R. 315.

judges and the Full Courts of the Supreme Courts of the States have been invested with Federal jurisdiction by s. 39 and the Commonwealth Parliament has left that jurisdiction to be exercised in accordance with the ordinary *cursus curiae*, which has been left unchanged : Cf. *Dale's Case* (1) : " If a new jurisdiction is given to an existing Court—that is to say, a jurisdiction to deal with some new matters in a different mode and with a different procedure—if that jurisdiction be so given to a well-known court, with well-known modes of procedure, with well-known modes of enforcing its orders, it must, unless the contrary be expressed or plainly implied, be given to that court to be exercised according to its general inherent powers of dealing with the matters which are within its cognizance."

The *Judiciary Act*, s. 79, provides that " the laws of each State, including the laws relating to procedure, evidence, and the competency of witnesses, shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all Courts exercising federal jurisdiction in that State in all cases to which they are applicable." Thus, when a Supreme Court exercises Federal jurisdiction by virtue of s. 39, the laws of the State of Victoria relating to procedure are binding upon it. An appeal *within the Supreme Court* is a matter of procedure within that court. An appeal from that court to another court is not a matter of procedure in that court. In *Poyser* v. *Minors* (2) *Lush* L.J. said that the term " practice " denoted the mode of proceeding to enforce a right as distinguished from the law which gives or defines the right, and that he took " practice " and " procedure," as applied to that subject, to be convertible terms. " Practice " in the common or ordinary sense of the word denotes " the rules that make or guide the *cursus curiae*, and regulate the proceedings in a cause within the walls or limits of the Court itself "—*Attorney-General* v. *Sillem* (3) per Lord *Westbury*. In that case, it was held that, under a power given to the Barons of the Exchequer to make rules and orders as to " process, practice and mode of pleading " in a court, any rules might be made by the Barons " for the guidance of their own proceedings " which did not require legislative sanction. A provision conferring a right of appeal within a court in a proceeding brought to enforce a substantive right is not a law creating a substantive right, but relates only to the method of establishing or enforcing that right. Such a provision is, in my opinion, a law relating to the procedure of that court.

(1) (1881) 6 Q.B.D. 376, at pp. 450-451.
(2) (1881) 7 Q.B.D. 329, at p. 334.
(3) (1864) 10 H.L.C. 704, at p. 723 [11 E.R. 1200, at p. 1209].

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The right of appeal from a decision of a single judge sitting in pursuance of the *Supreme Court Procedure Act* 1900 is given by s. 5 (6) of that Act. The Act is entitled, and is in fact, a procedure Act. Accordingly, by virtue of the *Judiciary Act*, s. 79, this provision, giving a right of appeal within the Supreme Court to the Full Court, is made applicable in these cases.

For all these reasons, I am of opinion that the contention of the appellant founded upon s. 39 must fail.

I proceed now to deal with the merits of the appeals.

In *Minister of State for the Army* v. *Parbury Henty & Co. Pty. Ltd.*, the evidence shows that the respondent company was occupying premises for which it paid a rent of £1,047 10s. Possession of those premises was taken under reg. 54 of the *National Security (General) Regulations* on 28th August 1942. In order to continue its business, the company took other premises. Expense was incurred (which otherwise would have been unnecessary and useless) in dismantling fittings at the premises of which the company was dispossessed, in removal expenses, and in installing new fixtures and fittings in the new premises. All matters in controversy have been settled except in relation to a sum of £464 4s. 1d., the net cost of purchasing and installing new fixtures and fittings in the new premises, i.e. the total cost less £100 agreed as the residual value of the fixtures and fittings when the Minister ultimately gives up possession of the old premises or when the lease of the new premises expires.

The rent of the new premises, including a store, amounted altogether to £546 a year. Thus the company made a saving in rent of £501 10s. a year. It was contended for the Minister that, though compensation was payable in respect of the rental value of the premises taken over, of the cost of vacating those premises and of removal to the new premises, and of purchasing and installing new fixtures, the last item (£464) should be regarded as discharged by setting off against it the saving in rent (£501 10s.). This argument was rejected by the Compensation Board which made the assessment under the Regulations which was brought before the Supreme Court for review. *Roper* J. took a different view, basing his decision upon the proposition that the company had not shown any loss or damage arising out of acquiring or fitting up the new premises and holding that its loss and damage was "restricted to the money value of the premises which it has lost and to the expense incurred by it in removing from those premises." He allowed the saving in rent (£501 10s.) to be set off against the amount of £464 which he would otherwise have held to be recoverable as compensation.

Upon appeal to the Full Court, by a majority, the decision of *Roper* J. was set aside and the order of the Compensation Board was restored (*Parbury Henty & Co. Pty. Ltd.* v. *Minister of State for the Army* (1)).

It has been argued for the appellant that reg. 60D provides for compensation only to a person who "has suffered or suffers loss or damage" by reason of anything done in pursuance of certain regulations (including reg. 54, under which possession was taken in the present case) and that therefore the measure of such compensation is the loss and damage actually suffered and not necessarily the value of the property plus damages allowed in compensation cases as being part of (or affecting) such value. This is the view which I expressed in *Syme* v. *The Commonwealth* (2) and in *Minister of State for the Army* v. *Dalziel* (3), where I based my decision upon the opinion that the compulsory taking by the Commonwealth of interests in land was dealt with by the *Lands Acquisition Act* 1906-1936 and not by the *National Security Act* 1939 (see s. 5 (1) (*b*)) and that taking of possession under reg. 54 did not involve taking an interest in land. In *Dalziel's Case* (3) I said of reg. 60D in the latter case: "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" (4). This view did not commend itself to my colleagues and it was decided that taking of possession of land under reg. 54 did involve acquisition of an interest in land. Accordingly, when possession of land is taken under reg. 54, the duty of a Compensation Board or a court under reg. 60G is not to assess loss or damage suffered as a result of the action of the Minister, but to assess just compensation for the interest taken—into which assessment consideration of certain loss and damage may enter as affecting the amount properly payable as compensation, but not as in itself constituting the measure of such compensation.

Compensation is to be paid for what is taken. Thus the value of the land taken must be paid. This rule is applied in England under the *Lands Clauses Consolidation Act* 1845—see e.g. *Stebbing* v. *Metropolitan Board of Works* (5) as cited in *MacDermott* v. *Corrie* (6)—and also in Australia: *Spencer* v. *The Commonwealth* (7). In some special cases, e.g. hospitals, schools, churches, for which there is ordinarily no market, the cost of reinstatement may be adopted as the measure of value—though probably the property taken would

(1) (1944) 45 S.R. (N.S.W.) 275; 62 W.N. 76.
(2) (1942) 66 C.L.R. 420, at p. 421.
(3) (1944) 68 C.L.R. 261.
(4) (1944) 68 C.L.R., at p. 272.
(5) (1870) L.R. 6 Q.B. 37.
(6) (1913) 17 C.L.R. 223, at p. 239.
(7) (1907) 5 C.L.R. 418.

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not bring in the market any sum approaching the cost of reinstatement. But the general rule applied is that the value is the amount which would be paid by a willing buyer to a not unwilling but not anxious-to-sell vendor (*Spencer's Case* (1)). But "value" in cases of compulsory acquisition has proved to be a word of very elastic meaning. It is not necessarily the "mere saleable value"—*Spencer's Case* (2). It may include compensation for loss of business or goodwill—costs of removal—value of fixtures if taken, or loss if not taken (Halsbury's *Laws of England*, 2nd ed., vol. 6, p. 43)—but these items are, theoretically, considered only as factors or elements affecting what is called the value to the owner: See e.g. *Inland Revenue Commissioners* v. *Glasgow and South-Western Railway Co.* (3). In that case, land was compulsorily taken and compensation for the land was assessed under three heads—value of land £28,586, value of buildings thereon £14,572, and compensation for loss of business £9,499. The land was conveyed to the acquiring railway company and a question arose as to what was, under the *Stamp Act* 1870 (Imp.), the "consideration for the sale" of the premises. It was held that the £9,499 awarded as compensation for loss of business was part of such consideration. The House of Lords did not suggest that there should not be payment for loss of business, but held (4) that what had to be ascertained was "the value of the land," though such value could be calculated under the three heads mentioned. The £9,499 represented part of the "value of the land."

The contention for the Minister is that there should be a set-off of the saving in rent against one item only of compensation, namely against the net cost of installing fixtures &c. in the new building.

It was strenuously contended that the only set-off claimed is against those particular expenses and, for a reason which I was not able completely to follow, not against either the removal expenses or the admitted rental value of the premises taken. If it is relevant at all to enquire whether the total effect of the dispossession is a loss or a gain to the dispossessed person, I am unable to see why any gain alleged to have accrued from the dispossession should not be set off against a single sum representing the "value" of the premises taken.

I agree with *Halse Rogers* J. that, as his Honour said in the Full Court, the argument for the Minister was based on the assumption that the company got as much value in the premises for which it was paying a much reduced rental as it got for the £1,047 10s. which it was paying for the premises which were taken from it. There is no

(1) (1907) 5 C.L.R. 418.
(2) (1907) 5 C.L.R., at p. 435.
(3) (1887) 12 App. Cas. 315.
(4) (1887) 12 App. Cas., at p. 321.

evidence which will support that view. No doubt it is stated that the company was able to carry on its business without loss in the new premises, but that seems to me to be an entirely irrelevant matter. The fact that the company saves money by being content, or being forced to be content, with cheaper premises is a matter which has no relation whatever to the market value of the interest of which it has been dispossessed, nor does it affect the fact that the company found it reasonably necessary to incur expenditure which otherwise would have been unnecessary and useless. I agree with *Jordan* C.J. that there is no principle according to which the Commonwealth is entitled to claim the benefit of such a saving.

The contention for the Commonwealth really seeks to take an account of the trading of a dispossessed person and to enquire whether he has been benefited by being forced to carry on his business upon a reduced scale or in a more humble style. But the manner in which he carries on after dispossession has, in my opinion, no bearing upon the value of the property taken or upon the damage directly consequent upon such taking. I am therefore of opinion that this appeal should be dismissed.

In the case of *The Minister of State for the Army* v. *Carrier Air Conditioning Ltd.*, the position was that part of the premises of the company was taken, other premises were acquired, and there was a net saving in rent of £667 5s. per annum. In my opinion, for the reasons which I have given in relation to the case of *Parbury Henty & Co. Ltd.*, this appeal also should be dismissed.

Brickworks Ltd. v. *The Minister of State for the Army.*—This is an appeal from a judgment of the Full Court of the Supreme Court of New South Wales affirming a decision of *Roper* J. given upon a review of compensation awarded by a Compensation Board acting under reg. 60G of the *National Security* (*General*) *Regulations*.

The respondent contended that, by reason of the *Judiciary Act* 1903-1940, s. 39 (2) (*a*), the Full Court of the Supreme Court had no jurisdiction to entertain the appeal from *Roper* J. because that section provided that an appeal from such a decision (given in the exercise of Federal jurisdiction) should lie only to the High Court. If this contention were well-founded, the judgment of the Full Court should be set aside as made without jurisdiction, with the result that the decision of *Roper* J. (which was in favour of the respondent) would be restored. I have dealt with this contention in the case of *The Minister of State for the Army* v. *Parbury Henty & Co. Pty. Ltd.*, and, for the reasons there stated, I am of opinion that it should be rejected.

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On 25th May 1942, the Minister of State for the Army exercised the power conferred upon him by reg. 54 of the *National Security (General) Regulations* and took possession of fourteen acres of land owned by the appellant company. The land was used by the Army for the storage of ammunition until 2nd April 1943. The land had been used for brickmaking, and there were a brickworks and a clay pit upon it. At the time when possession was taken, the land was not in use and it was found by the learned judge that, if the Army had not taken possession, the land would not have been used by the company during the period for which the Army was in possession. It was not suggested that the land was useless. The land and buildings &c. thereon could be used for the purpose of making bricks, and the land was actually used by the Army for storage purposes. It was agreed between the parties that the rental value of the land was £990 per annum.

But the company was said to be a party to an agreement with some other companies under which it was bound to keep the land available for resumption of brickmaking upon a maximum of sixty days' notice. It is contended that this agreement made the land valueless to the company and that therefore no compensation was payable by the Minister. The Compensation Board accepted this contention but allowed £221 12s. 1d. as compensation, representing municipal and water rates which became payable during the period of occupation by the Minister. The contention was also accepted by *Roper* J. and by the majority of the Full Court (*Davidson* and *Halse Rogers* JJ., *Jordan* C.J. dissenting) (1).

It was held by *Roper* J. that there had been " no loss or damage suffered in this case because if the Army had not been in possession the claimant could not have derived anything from the land." He therefore fixed the compensation at nil. *Davidson* J. did not base his decision upon the ground that the title to the land restricted its user, but said that " in substance there is no difference, as the appellant by its own agreements had obviously restricted its right to use the land in the only manner in which revenue might be derived from it beyond what presumably the company was already receiving for keeping the premises idle " (2). He held that the only compensation recoverable under the Regulations must be represented by " loss or damage and that is a loss or damage suffered by the claimant personally " (3), and he referred to *Syme* v. *The Commonwealth* (4). *Halse Rogers* J. took the same view, saying that no financial loss

(1) (1944) 45 S.R. (N.S.W.) 223; 62 W.N. 73.
(2) (1944) 45 S.R. (N.S.W.), at p. 227; 62 W.N., at p. 74.
(3) (1944) 45 S.R. (N.S.W.), at p. 228; 62 W.N., at p. 74.
(4) (1942) 66 C.L.R. 413.

or damage had been suffered because of the dispossession, and that therefore the claim for compensation was left without support.

In my opinion, the decision in *Minister of State for the Army* v. *Dalziel* (1) involves a rejection of the proposition that when the owner of land is dispossessed under reg. 54 he is entitled only to compensation for loss or damage proved to have been suffered by him. That case decided that such dispossession involves the taking of an interest in land, and that, in the absence of any effective provisions to the contrary, compensation is to be paid for the interest so taken in accordance with the ordinary principles of the law of compensation applicable to the compulsory taking of land. I refer to what I have said with respect to this matter in the case of *Minister of State for the Army* v. *Parbury Henty & Co. Pty. Ltd.*

In this case, no claim is made in respect of damages directly consequent upon the taking, and therefore the only question, in my opinion, is—What is the value of the interest taken ?

It is established that the value of land which is compulsorily taken is to be estimated at the value to the owner. It is immaterial that the owner is not using the land at the time (*Spencer* v. *The Commonwealth* (2)—where the land taken consisted of unused sand hummocks overlooking the Indian Ocean, but substantial compensation was allowed ; *Teesdale Smith* v. *Minister for Home and Territories* (3) ; *A. and B. Taxis Ltd.* v. *Secretary of State for Air* (4)). Thus the facts that in this case the company was not using the land when it was taken, and would not have used it during the period of dispossession, do not produce the result that the compensation is nil.

If there is a legal restriction upon the use of land which affects its value to the owner, that is a matter which may properly be taken into account in estimating that value : See *Corrie* v. *MacDermott* (5) ; *Stephen* v. *Federal Commissioner of Taxation* (6). But, on the view which I take of the facts in this case, there is no need to examine these cases or to make another attempt to reconcile *Stebbing* v. *Metropolitan Board of Works* (7) with *Hilcoat* v. *The Archbishops of Canterbury and York* (8).

The burden of a covenant does not run with the land at law, except as between landlord and tenant (*Spencer's Case* (9) : *Halsbury's Laws of England*, 2nd ed., vol. 29, pp. 442-444) and only in equity in the case of negative covenants of which the assignee has notice under the

(1) (1944) 68 C.L.R. 261.
(2) (1907) 5 C.L.R., at p. 432.
(3) (1920) 28 C.L.R. 513, at pp. 518-519.
(4) (1922) 2 K.B. 328, at p. 338.
(5) (1914) A.C. 1056.
(6) (1930) 45 C.L.R. 122.
(7) (1870) L.R. 6 Q.B. 37
(8) (1850) 10 C.B. 327 [138 E.R. 132].
(9) (1583) 5 Co. Rep. 16a [77 E.R. 72].

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equitable doctrine of *Tulk* v. *Moxhay* (1) (*Haywood* v. *Brunswick Permanent Benefit Building Society* (2)). But the agreement suggested in this case is not a merely negative agreement. It is a positive agreement to keep the land available and fit for brickmaking upon certain notice. Therefore, even if such an agreement were fully proved as a binding covenant, it would not constitute a blot upon the title of the company.

But the evidence of such an agreement is very unsatisfactory indeed. It consists only of the following questions and answers :—

"Mr. *Webb* : Q. All you have done with regard to that is to preserve the asset, isn't it ? A. Well, under the regulations, or should I say the agreement of which the City " (that is, the City Brickworks) "is a part, there is a necessity to keep the place in order, so that it may work again when required.

Q. If it is called upon ? A. Yes.

. . .

Mr. *Barwick* : Q. You told my friend the yards had to be in a condition to produce bricks on notice. What amount of notice ? A. At the most sixty days' notice.

The Chairman : Q. How much ? A. Sixty days' notice.

Mr. *Barwick* : Q. But in some cases less ? A. Yes, in some cases less. One month is the least and sixty days the most."

This evidence does not show that the business arrangement to which reference was made was a binding contract. It is consistent with the arrangement being terminable at will. It certainly cannot be suggested that there is any evidence to show that the arrangement could not have been terminated by agreement between the parties to it, whoever they were. The suggested agreement is not shown to have been under seal, and there is no evidence of any consideration for the promise of the company to keep the brickyard available. The whole matter is left very much in the air.

But there is no evidence of any agreement of any kind which constitutes a blot upon the title of the company. Even if it were held that the agreement suggested were fully proved as a binding contract, it would be only a personal contract and a breach would sound only in damages. Such an agreement would not prevent the company from dealing with the land. In my opinion, there is no ground for the conclusion that the company was not fully able, both at law and in equity, to deal with the full title to the land.

The Compensation Board directed the Minister to pay a sum of £221 12s. 1d. for compensation representing municipal and water rates in respect of the land during the period of dispossession. This

(1) (1848) 2 Ph. 774 [41 E.R. 1143]. (2) (1881) 8 Q.B.D. 403.

award cannot be supported upon any ground. If the measure of compensation is loss or damage suffered (as was held in the Supreme Court) this sum cannot be allowed as such loss or damage, because it would have been payable by the company whether or not the Minister entered into possession, and the company, not using the land, was no worse off in relation to this liability by reason of the Commonwealth taking possession. If, on the other hand, the company should be paid as compensation the value of the land for the period of dispossession (as in my opinion is the case) then there is no reason for adding to that value the amount of any tax paid by the owner in respect of the land. It was indeed not contended for the appellant that the award of the Board for the amount of rates could be supported.

In my opinion, the appeal should be allowed and it should be ordered that there be paid to the appellant compensation at the rate of £990 per annum for the period from 25th May 1941 to 2nd April 1943.

RICH J.—*The Minister of State for the Army* v. *Parbury Henty & Co. Pty. Ltd.*—*The Minister of State for the Army* v. *Carrier Air Conditioning Ltd.*—These are two appeals, which have been heard together, from judgments from the Supreme Court of New South Wales involving the same principles of law and their application to analogous sets of facts, in each of which that Court, sitting *in banco*, allowed an appeal from a single Judge of the Court exercising a special Federal jurisdiction conferred upon the Court by reg. 60G of the *National Security* (*General*) *Regulations*.

As I agree with both the judgments appealed from and also with the reasons given for them, no useful purpose would be served by my canvassing again the merits of the two cases. A great deal of the argument before us was, however, addressed to a point not raised below, namely whether the Supreme Court *in banco* should have entertained the appeals, it being now contended that an appeal does not lie from the Supreme Court of New South Wales constituted by a single judge to the Supreme Court sitting *in banco* when that Court is exercising Federal jurisdiction. I shall, therefore, state my reasons for holding that it does.

It has long been decided that the Commonwealth Parliament has no power to restrict the right of appeal to the Privy Council from judgments of the Supreme Court of a State exercising State jurisdiction (*Webb* v. *Outrim* (1)); but that it can, when investing a State Supreme Court with Federal jurisdiction by virtue of s. 77 (iii.)

(1) (1907) A.C. 81.

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of the Constitution, attach such conditions to the jurisdiction as it thinks fit, including the condition that there shall be no appeal from any decision given by it in the exercise of the jurisdiction to any court other than the High Court (*The Commonwealth* v. *Limerick Steamship Co.* (1); *The Commonwealth* v. *Kreglinger & Fernau Ltd.* (2)).

By s. 39 (2) of the *Judiciary Act* 1903-1940, the Commonwealth Parliament, in conferring Federal jurisdiction on the several Courts of the States, imposed conditions and restrictions including a provision that every decision of the Supreme Court of a State shall be final and conclusive except so far as an appeal may be brought to the High Court. "Now there is only one Supreme Court, though there are several Judges. Sometimes two or more Judges sit together as the Court, in many cases one Judge exercises the jurisdiction of the Court, but in every case the judgment of the Judge or Judges is in law the judgment of the Supreme Court" (*Saunders* v. *Borthistle* (3)). The law of a State may enable a single judge of the Supreme Court to give a judgment which operates as the judgment of the Court unless and until it is displaced by a judgment of the Supreme Court *in banc*, and it may also give what is, in effect, an appeal from Caesar unto Caesar, by providing for an appeal to the Court *in banc* from a judgment of the Court given by a single judge. In such a case, a decision by a single judge is only provisionally a decision of the Supreme Court. It becomes one definitely if no appeal is brought to the Court *in banc*; but, if there is such an appeal, it is the decision of the judges sitting *in banc* which becomes the decision of the Court. In either case, an appeal lies to the High Court from the decision, which is none the less a decision of the Supreme Court whether it has been allowed to rest as given by a single judge or has proceeded, by reason of an appeal, to the stage of a decision given by the Court *in banc* (*Parkin* v. *James* (4)). When a decision is given in the exercise of Federal jurisdiction, s. 39 (2) (*a*) of the *Judiciary Act* prevents an appeal from any decision of the Supreme Court to any tribunal *dehors* that Court other than the High Court. But I can see nothing in either the language or the framework of the section which prevents a litigant, who is desirous of obtaining a decision from the Supreme Court exercising Federal jurisdiction, from proceeding within that Court to obtain it by first getting a decision of a single judge, as the initial stage of the process, and then going on, if he finds it necessary, to get a decision of judges sitting *in banc* as the final stage of the process. No doubt, no appeal lies to any outside

(1) (1924) 35 C.L.R. 69.
(2) (1926) 37 C.L.R. 393.
(3) (1904) 1 C.L.R. 379, at p. 387.
(4) (1905) 2 C.L.R., at pp. 338, 339.

court other than the High Court at either stage ; but there is nothing to prevent a litigant from taking every step necessary to obtain from the Supreme Court the most authoritative decision which it is able to give, nothing to compel him to stop short at one stage in the process of obtaining such a decision. What s. 39 (2) (*a*) does is to prevent a person who has obtained a decision of the Supreme Court exercising Federal jurisdiction—whether he has been content to rest with the decision of a single judge or has preferred to obtain a decision from judges sitting *in banc*—from instituting, or being subjected to, an appeal to any outside court other than the High Court.

It is well settled that " when the Federal Parliament confers a new jurisdiction upon an existing State Court it takes the Court as it finds it, with all its limitations as to jurisdiction, unless otherwise expressly declared " (*Federated Sawmill, Timberyard and General Woodworkers' Employees' Association (Adelaide Branch)* v. *Alexander* (1) ; *Peacock* v. *Newtown Marrickville and General Co-operative Building Society No.* 4 *Ltd.* (2)). I find no indication of intention in s. 39 (2) (*a*) to interfere with the procedure of State Supreme Courts by preventing appeals within the Courts themselves and there is certainly nothing in the language of reg. 60G of the *National Security (General) Regulations* which expresses such an intention. " When a question is stated to be referred to an established Court without more, it, in my opinion, imports that the ordinary incidents of the procedure of that Court are to attach, and also that any general right of appeal from its decisions likewise attaches " (*National Telephone Co. Ltd.* v. *His Majesty's Postmaster-General* (3)).

The appeals should be dismissed with costs.

Brickworks Ltd. v. *The Minister of State for the Army.*—In this matter I was concerned only with the question whether the Full Court of the Supreme Court of New South Wales had jurisdiction to entertain the appeal from *Roper* J.

The reasons for the affirmative answer I gave in the *Minister of State for the Army* v. *Parbury Henty & Co. Ltd.*, and the *Minister of State for the Army* v. *Carrier Air Conditioning Ltd.*, apply to the instant case.

STARKE J.—*The Minister of State for the Army* v. *Parbury Henty & Co. Pty. Ltd.*—*The Minister of State for the Army* v. *Carrier Air Conditioning Ltd.*—These are appeals from judgments of the Supreme Court which set aside orders of *Roper* J. and restored determinations

(1) (1912) 15 C.L.R. 308, at p. 313.
(2) (1943) 67 C.L.R., at p. 37.
(3) (1913) A.C. 546, at pp. 552, 553, 562.

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of a Compensation Board appointed under the *National Security (General) Regulations*.

An owner or occupier of premises taken under reg. 54 of these Regulations is entitled to compensation for the loss or damage suffered by him, which, on the construction of the regulation adopted in this Court, is compensation for the value of the thing taken from him, including the costs of removal and alteration of premises since those are losses consequent on the taking of his premises or elements in the value of the premises. The value must however be ascertained in accordance with any rules of assessment lawfully set up by the legislation authorizing the taking of the premises.

In the case of Parbury Henty & Co. Pty. Ltd., the company had been carrying on a business in the premises taken, and in order to get other accommodation it obtained a lease of other premises. To establish itself there, the company incurred expenses in dismantling and removing fixtures and fittings from the old premises and installing them in the new premises and also in buying and installing other fittings.

The rent of the new premises in which the company established itself was considerably less than the rent paid for the premises taken by the Minister, and the Minister claimed that there should be set off against the cost of establishing the company's business in the new premises the saving of rent which it was able to effect by the removal. But, if the company is entitled to the value of the thing taken from it, including the costs of removal and alteration as an element of that value, the claim of the Minister is untenable. It is based on the fallacy that the compensation payable under the Regulations is the actual pecuniary loss or damage sustained by the person whose premises have been taken and not the value of those premises to him. *Horn* v. *Sunderland Corporation* (1) is inapplicable to the facts of this case, for the company is not obtaining a value for its premises on a basis other than its value as used by it.

In the case of Carrier Air Conditioning Ltd., the Minister took possession of portion of the company's premises, and it became necessary for the company to make alterations in its premises and find other accommodation for some of its office staff. In so doing, the company incurred expenses. But the company effected a considerable saving in rent in the acquisition of the new accommodation for its staff, which the Minister claims should be set off against the cost of removal and alteration. The claim is untenable for the reasons already expressed in the case of Parbury Henty & Co. Pty. Ltd.

(1) (1941) 2 K.B. 26.

An objection, however, has been taken by the Minister to the judgment of the Supreme Court sitting on appeal from *Roper* J. on the ground that it had no jurisdiction to hear the appeal. But the Minister appealed to the Supreme Court and invited its judgment, and he never mentioned the objection there nor in his notice of appeal to this Court, but sprang it on this Court when the appeal in the Brickworks Case and these appeals were first called for hearing. And the Minister persists in his objection, which was taken, so it was said, for the protection of the royal prerogative and the orderly administration of justice. However, this Court promptly granted special leave to the respondents to appeal from the primary judge in case of need. In these circumstances, the objection should, I think, have been summarily rejected. But this Court allowed it to be argued : Cf. *Upper Agbrigg Assessment Committee* v. *Bent's Brewery Co. Ltd.* (1). The objection, based upon s. 39 of the *Judiciary Act*, is by no means new, and is supported by the decision of the Supreme Court of Victoria in *Kreglinger & Fernau Ltd.* v. *The Commonwealth* (2) and by the more recent decision of the same Court in *Cook* v. *Downie* (3), and to some extent by the decision of this Court in *Parkin* v. *James* (4).

The point is that the order appealed to the Supreme Court was an order made in the exercise of exclusive Federal jurisdiction from which there was no appeal except to the High Court. The argument in support of this view is so fully stated in *Bardsley's Case* (2) by *Irvine* C.J. and by *Mann* J. that I shall not repeat it. The provisions of s. 39 (2) invest the State Courts with Federal jurisdiction in all matters in which the High Court has original jurisdiction or in which original jurisdiction can be conferred upon it, except as provided by ss. 38 and 38A, subject to the following conditions and restrictions :— "(*a*) Every decision of the Supreme Court of a State, or any other Court of a State from which at the establishment of the Commonwealth an appeal lay to the Queen in Council, shall be final and conclusive except so far as an appeal may be brought to the High Court." But this section has a history, which may be followed in these cases : *Webb* v. *Outrim* (5) ; *Baxter's Case* (6) ; *Flint* v. *Webb* (7) ; *Lorenzo* v. *Carey* (8) ; *The Commonwealth* v. *Limerick Steamship Co. Ltd.* (9) ; *The Commonwealth* v. *Kreglinger & Fernau Ltd.* (10). It is unnecessary for me to traverse again these various cases. It is enough to say that the purpose of the section was to exclude

(1) (1945) 1 K.B. 196, at p. 200.
(2) (1926) V.L.R. 310.
(3) (1945) V.L.R. 95.
(4) (1905) 2 C.L.R. 315.
(5) (1907) A.C. 81.
(6) (1907) 4 C.L.R. 1087.
(7) (1907) 4 C.L.R. 1178.
(8) (1921) 29 C.L.R. 243.
(9) (1924) 35 C.L.R. 69.
(10) (1926) 37 C.L.R. 393.

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appeal as of right to the Privy Council from every decision of the Supreme Court of a State or any other court of a State from which at the establishment of the Commonwealth an appeal lay to the Queen in Council. And, despite the opinion of the Judicial Committee in *Webb* v. *Outrim* (1), the decisions in this Court are to the effect that this purpose was achieved in cases in which the Supreme Courts and the other courts exercise Federal jurisdiction. And jurisdiction is conferred upon the High Court to entertain appeals from every such decision. The section, however, struck at appeals as of right to the Privy Council and not at appeals within the Supreme Courts themselves, that is, from decisions or orders of a single judge whether sitting in court or chambers to the Court *in banc* or as we now say to the Full Court. Every reason of convenience and of common sense is against the exclusion of what I may call these internal appeals. But it is said that the words of s. 39 (2) (*a*) :—" Every decision of the Supreme Court of a State " and the decision of this Court in *Parkin* v. *James* (2) are decisive of the matter and necessarily exclude these internal appeals in Federal jurisdiction. But I do not take that view. The Supreme Court of a State " in all its branches and including its machinery for internal appeals " is regarded as " one whole " and the words of s. 39 (2) (*a*) mean " the Supreme Court's decision when exercising Federal jurisdiction shall in every case be final and conclusive in the sense that no appeal shall lie from its decision to any Court outside the Supreme Court except so far as an appeal may be brought to the High Court " (3). That was the view of *Macfarlan* J. in *Kreglinger & Fernau Ltd.* v. *The Commonwealth* (4) and with it I agree.

Parkin v. *James* (2), it must be remembered, was not concerned with s. 39 (2) (*a*) of the *Judiciary Act* but with s. 73 of the Constitution, which is not coloured in quite the same way as the former section. And I would add, though it is unnecessary for my decision, that proceedings under reg. 60G of the *National Security* (*General*) *Regulations* are subject to the provisions of s. 39 (2) (*a*). Any other view would destroy the efficacy of that section and confuse more than ever the law relating to appeals.

The Minister's objection to the jurisdiction fails, and these appeals should be dismissed.

Brickworks Ltd. v. *The Minister of State for the Army.*—Appeal from a decision of the Supreme Court of New South Wales affirming by a majority the decision of the judge of first instance that no

(1) (1907) A.C. 81.
(2) (1905) 2 C.L.R. 315.
(3) (1926) V.L.R., at p. 329.
(4) (1926) V.L.R. 310.

compensation was payable to the appellant for loss and damage suffered by it by reason of the Minister taking possession of certain brickworks in its possession pursuant to the power contained in reg. 54 of the *National Security (General) Regulations*.

Under the *Valuation of Land Act* 1916 (N.S.W.), the improved value of the land was estimated at £16,500 and the annual value at £990. The Minister took possession in May 1942 and remained in possession until April 1943. Nothing the Chief Justice said in the court below turns on the figures, for the Minister agreed that if the appellant were entitled to a substantial sum then it was entitled to compensation at the rate of £990 per annum, which was the annual value set on the land by the Valuer-General. The amount seems excessive, but I suppose the facts were fully considered by the responsible authorities. But it was contended that the appellant had not suffered any actual loss or damage because it had arranged with the owners of brickworks in the Metropolitan area not to produce bricks from the particular yard but to keep it in readiness to produce on sixty days' notice. Apart from the rental value of the premises as brickworks, evidence was led that the premises had no letting value. The arrangement on the evidence was very loose and did not affect the title to the premises. It might be revoked by the parties if any advantage accrued to either party thereby or it might be renounced or broken with the ordinary consequences. All of which indicates that the potential value of the premises was by no means lost by reason of the arrangement. But the loss or damage which a party suffers by reason of anything done in pursuance of reg. 54 is the value to him of the thing taken, and not, as was said in the court below, the actual pecuniary loss or damage suffered by the owner or possessor. *Syme* v. *The Commonwealth* (1), upon which the Minister relied, is not inconsistent with this view. " The compensation " as I expressed it " is payable in respect of that person's personal loss or damage " (2) or the value to him of the thing taken from him.

The Minister objected that no appeal lay to the Supreme Court from the judge of first instance. But he did not take this objection before the Supreme Court nor in his notice of appeal, and sprang it at the last moment in this Court, whereupon special leave was given to the appellant to appeal from the order of the judge of first instance in case of need. In these circumstances, the objection should, I think, have been summarily rejected. But, in any case, the objection fails for reasons which I have given in the cases of Parbury Henty & Co. Pty. Ltd. and Carrier Air Conditioning Ltd.

The appeal should be allowed.

(1) (1942) 66 C.L.R. 413.

(2) (1942) 66 C.L.R., at p. 424.

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DIXON J.—In these three appeals the question is raised whether an appeal lies to the Full Court of the Supreme Court from a determination made under reg. 60G (5) of the *National Security (General) Regulations* by a judge of the Supreme Court sitting as the court but without a jury.

The question depends upon the operation of s. 39 (2) (*a*) of the *Judiciary Act*. Section 39 (2) invests the courts of the States with Federal jurisdiction in all matters (amongst others) in which the High Court has original jurisdiction, subject to conditions and restrictions, one of which is expressed in par. *a* of the sub-section. That paragraph provides that every decision of the Supreme Court of a State shall be final and conclusive except so far as an appeal may be brought to the High Court.

In view of the decisions in this Court, the validity of the provision is assumed and the question is whether s. 39 (2) applies to a proceeding in the Supreme Court under reg. 60G and, if so, whether, within the meaning of par. *a*, the determination of the single judge was a decision of the Supreme Court, final and conclusive in the sense that even within the Supreme Court it could not be appealed against.

In my opinion, s. 39 (2) does apply to a proceeding in the Supreme Court under reg. 60G. Section 75 (iii.) of the Constitution confers original jurisdiction upon the High Court in all matters in which the Commonwealth, or a person suing or sued on behalf of the Commonwealth, is a party. Section 78 provides that the Parliament may make laws conferring rights to proceed against the Commonwealth or a State in respect of matters within the limits of the judicial power. A claim against the Commonwealth for compensation for property taken or loss or damage suffered is a matter in which jurisdiction is given to the High Court by s. 75 (iii.), though it does not follow that, without the exercise by the Parliament of the power derived from s. 78 to confer rights to proceed, the claimant could maintain a suit or other proceeding against the Commonwealth, or anyone on behalf of the Commonwealth. But the jurisdiction of the Court and the existence of an actionable right, or the liability to suit or process, in a given case are two different things.

The operation of s. 39 (2), so far as material, is to invest the Supreme Court of the State with the same jurisdiction as the High Court. There is, therefore, no distinction between the jurisdictions of the High Court and of the Supreme Court in matters in which the Commonwealth is a party. Regulation 60G confers upon the claimant for compensation a right to proceed against the Commonwealth or the appropriate Minister of State on behalf of the

Commonwealth, prescribes a procedure, and indicates the courts in which proceedings may be instituted. The Federal jurisdiction of the Supreme Court extended to such matters and, even if in the case of courts of limited jurisdiction the Regulations could be considered as investing them with jurisdiction, it could not have that operation in the case of a court already invested with Federal jurisdiction over the matter. This view accords with the policy of the legislature in enacting s. 39 and with the evident intention of its general language. The provision was meant to cover the whole field of Federal jurisdiction so that the conditions embodied in the four paragraphs of sub-s. 2 should govern its exercise whether the cause of action, the procedure and the liability to suit arose under existing or future legislation. To that end it invested State courts with the full content of the original jurisdiction falling within the judicial power of the Commonwealth and, as it has been held, some of the appellate jurisdiction. The limits of jurisdiction of any court so invested found their source in State law and, I presume, any change made by the State in those limits would, under the terms of s. 39 (2), *ipso facto* make an identical change in its Federal jurisdiction. An acknowledged purpose was to exclude appeals as of right to the Privy Council, and it was intended to exclude them over the whole field of Federal jurisdiction. That jurisdiction was, therefore, conferred in its entirety, leaving it to future legislation to bring into being new subject matters and deal with procedure and liability to suit. The contrary view would mean that to proceedings under a great number of provisions of Federal law, of which ss. 245 and 246 of the *Customs Act* may serve as an example, the conditions of s. 39 would not apply.

For the reasons I have given, I am of opinion that, whatever its meaning, s. 39 (2) (*a*) governs proceedings in the Supreme Court pursuant to reg. 60G.

The question then is whether the paragraph means, in matters of Federal jurisdiction, to exclude proceedings by way of appeal within the Supreme Court, that is appeals from one branch of the Supreme Court to another. In saying that this is the question, I assume, although the contrary was contended, that the determination of the single judge is to be considered the judicial act of the Supreme Court.

Different views have been taken upon the question whether the words of the paragraph affect appeals within the Supreme Court, or, on the contrary, operate only to prevent an appeal from the court to some other judicial authority, as for instance the Privy Council:

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See *The Commonwealth* v. *Kreglinger & Fernau Ltd.* (1); *Cook* v. *Downie* (2). The decision in *Parkin* v. *James* (3) that the order of a single judge of the Supreme Court exercising the jurisdiction of the court fell within the words of s. 73 " judgments, decrees, orders, and sentences . . . of the Supreme Court " &c. appears at first sight to require a like interpretation of the words in s. 39 (2) (*a*) " every decision of the Supreme Court " &c. But the purpose of the former provision is to give an appeal from whatever amounts to a judgment &c. of the Supreme Court, while that of the latter is to prevent an appeal being taken from the Supreme Court. It is, therefore, open to question whether the finality meant by the paragraph excludes review by the Supreme Court itself of what, while standing, constitutes a decision of the court. The manner in which the provision is expressed creates a difficulty but its purpose is evident and indeed notorious. If an appeal from a single judge to the Full Court is excluded, it is an accidental and unintended result of the words used. On the whole, I am not prepared to dissent from the view that the paragraph operates to restrict appeals from the Supreme Court and not appeals in or to the Supreme Court.

I, therefore, agree that in the three cases the Full Court of the Supreme Court had jurisdiction to hear and determine the appeals from *Roper* J.

I proceed to deal with the merits of the respective appeals.

Brickworks Ltd. v. *Minister of State for the Army.* The arrangement under which the company refrained from the making of bricks on the land taken was not very distinctly proved, but I take it that no negative covenant had been given affecting the land in the sense that it would bind persons taking under the company, not being bona fide purchasers for value without notice. Whatever it amounted to, it is not shown to be more than a contract imposing a personal obligation on the company. In this view, it could not affect the value of the land, or of the right to occupy it.

The decision of the Court in *Minister of State for the Army* v. *Dalziel* (4) establishes that the taking under reg. 54 of the *National Security* (*General*) *Regulations* of the exclusive possession of land for an indefinite period amounts to an acquisition of property and, notwithstanding the observations in *Syme* v. *The Commonwealth* (5) relied upon by the Minister, I accept the decision as meaning that the owner who has been dispossessed is to be compensated in the character of an owner for his loss of property or deprivation of proprietary

(1) (1926) V.L.R., at pp. 315, 323, 324, 329; (1926) 37 C.L.R., at p. 425.
(2) (1945) V.L.R. 95.
(3) (1905) 2 C.L.R. 315.
(4) (1944) 68 C.L.R. 261.
(5) (1942) 66 C.L.R. 413.

rights and not simply recompensed or reimbursed for whatever financial prejudice he may have personally suffered in the particular circumstances in which he happened to stand as an individual. Upon this view, I agree in the contention of the company that, in fixing compensation, you do not go behind the value of the occupancy (including of course any special advantages it may have had to the owner and any special detriment his disturbance in it may involve) and proceed to ascertain how far he would in fact have used the occupancy, possessing that value, for his own pecuniary profit or benefit.

I think, therefore, that the company is entitled to the full value of the right to occupy the premises considered as property and that its appeal succeeds.

I am, however, by no means satisfied that the figure accepted by the parties does no more than reflect that value. But, as it has been agreed upon, it is not our concern.

I think that the appeal should be allowed.

Minister of State for the Army v. *Parbury Henty & Co. Pty. Ltd.*— It is not denied that the compensation payable to an occupier dispossessed under statutory powers of premises he holds as a tenant at a full rental includes the costs he reasonably incurs in removing his furniture and goods including tenants' fixtures and the expenses in setting up in new premises for the purposes of carrying on his business. Nor is it denied that the expenses may include the net cost of installing fixtures, both those removed and, where reasonably necessary, newly acquired fittings. The residual value which would remain to him must of course be taken into account.

But, on the assumption that the change of premises necessitated by the compulsory taking of those he occupied resulted in a saving of rent, it is contended that the saving must also be taken into account. As the principle is that the dispossessed occupier must be compensated for his loss and the measure of his loss adopted is the net cost of placing himself in the same position, it appears to me that, as an essential part of the groundwork of the contention, the fact must appear that the new premises, for which the lower rent is paid, are completely equivalent, for the purposes of the dispossessed person, to those he has had to vacate. This must mean that because they were unsuitable for his needs, or because the rent was excessive, his old premises cost him more than they were worth to him, or else that he pays for the new premises less than their annual value.

In the present case, the company dispossessed is not shown to have acquired for the lower rent premises which for all its purposes were of

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equal value with the old. I think that the burden of showing this must be upon the Minister. There is no presumption that, because the rental of the new premises was lower, the company really gained an advantage. The old premises were those which it chose as suitable for its business and the new were obtained as a substitute only because of the necessity of finding another place of business. The natural inference is that in each case it paid what the premises were worth and that the additional advantages of the old premises from a business point of view were worth paying for.

I think, therefore, that the appeal should be dismissed.

The Minister of State for the Army v. *Carrier Air Conditioning Ltd.*—I regard this case as indistinguishable in substance from that of Parbury Henty & Co. Pty. Ltd.

The company, however, were owners of the premises from part of which they were dispossessed, not tenants paying a rent. But they were awarded an annual sum in respect of the period of dispossession and that was compared with the rent of the new premises, just as in the case of Parbury Henty & Co. Pty. Ltd. the rent of the old premises was compared with that of the new. The saving, consisting of the excess of the annual value for the period of occupation over the rent of the new premises, was then treated as destroying *pro tanto* the prima facie right of the claimants to the expenses of establishing themselves in the new premises. But here again there was no proof or other reason to conclude that the difference in pecuniary value of the two premises did not reflect a difference in business advantage, eligibility or desirability. Indeed, during the argument before *Roper* J., counsel said that it was not conceded that the premises were equally commodious and efficient from a business point of view, though cross-examination had indicated that there was no loss of profit in carrying on in that way.

In my opinion, the appeal should be dismissed.

McTIERNAN J.—*The Minister of State for the Army* v. *Parbury Henty & Co. Pty. Ltd.*—*The Minister of State for the Army* v. *Carrier Air Conditioning Ltd.*—In my opinion, these appeals should be dismissed. I agree with the reasons for judgment of his Honour the Chief Justice.

Brickworks Ltd. v. *The Minister of State for the Army.*—In my opinion, the appeal should be allowed, and the order proposed by the Chief Justice made.

WILLIAMS J.—*The Minister of State for the Army* v. *Parbury Henty & Co. Pty. Ltd.*—*The Minister of State for the Army* v. *Carrier Air Conditioning Ltd.*—As these two appeals have been heard together and raise the same question of principle, although they differ in their facts, they can be conveniently disposed of in the same judgment. Each company was dispossessed of premises, which it was occupying for the purposes of its business, under the authority conferred upon the Minister by reg. 54 of the *National Security (General) Regulations* and had to make new arrangements to carry on that business elsewhere. Each company was dissatisfied with the amount of compensation awarded by the Central Hirings Committee, and applied to have the loss and damage which it had suffered, and for which it was entitled to be compensated under reg. 60D, assessed by a Compensation Board. The Minister, being dissatisfied with the amounts awarded by the Board, applied to the Supreme Court of New South Wales to have the assessments reviewed. The reviews came on for hearing before *Roper* J., who reduced the amounts awarded by the Board, whereupon the companies appealed to the Full Court of New South Wales, no objection being taken by the Minister to the competence of the appeals, and in each case the Full Court restored the award of the Board. The Minister then appealed to this Court against the orders of the Supreme Court, no ground being taken in the notice of appeal that the Full Court was incompetent to entertain the appeals from *Roper* J. When the appeals came on for hearing in this Court, counsel for the Minister raised the point for the first time that the Full Court was incompetent and submitted that he was entitled to have the appeals allowed with costs and the orders of the Full Court set aside with costs. He relied on two recent decisions of the House of Lords, *Benson* v. *Northern Ireland Road Transport Board* (1) and *Westminster Bank Ltd.* v. *Edwards* (2). If the effect of upholding the point would be to restore the orders of *Roper* J. so as to make them unappealable, the point would have considerable practical importance, but since, in the circumstances, it would be proper to grant the companies special leave to appeal, it becomes somewhat academic. But the decisions cited would appear to constrain the Court to consider it, although, if it succeeded, the question of the proper order for costs would require consideration.

The point is founded on the supposition that jurisdiction to entertain the reviews was conferred upon *Roper* J. by s. 39 (2) of the *Judiciary Act* 1903-1940. But his Honour was not, in my opinion, invested with jurisdiction under that section, but under reg. 60G. Although that regulation gives the claimant or the Commonwealth

(1) (1942) A.C. 520. (2) (1942) A.C. 529.

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a right to what the Regulations call a review of the award of the Board by a court, the review is in law an original proceeding in which the onus is on the claimant to prove his loss or damage, although it is the Commonwealth which has applied, and the proceedings before the Board, except so far as the evidence is tendered by consent and on the subject of costs, are irrelevant. The curial proceedings are, therefore, in their essence a matter in which the claimant is the plaintiff and the Minister is a person who is being sued on behalf of the Commonwealth. This is sufficient to give this Court original jurisdiction under s. 75 of the Constitution. It was submitted that in consequence the courts of the States became invested with jurisdiction under s. 39 (2). But s. 75 operates irrespective of and even against the intention of the Commonwealth Parliament, whereas the *Judiciary Act* is an Act of that Parliament, so that Parliament can provide expressly or by implication that State courts shall be invested with Federal jurisdiction, not under that Act, but under some other Act. Where a right of action is given against the Commonwealth, it is usual for the legislation to specify the courts in which that right can be litigated: Cf. the *Judiciary Act* 1903-1940, s. 56, and the *Lands Acquisition Act* 1906-1936, s. 37.

Regulation 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 forms one of a series of regulations providing compensation for the loss or damage suffered by the persons mentioned in reg. 60D by reason of anything done under the regulations therein mentioned. Compensation had to be provided whenever there was an acquisition of property within the meaning of s. 51 (xxxi.) of the Constitution, otherwise the acquisition would have been unlawful. But the Constitution does not itself confer a right to compensation. That right must be created by legislation, as it is in the present case by the Regulations.

Under reg. 60G, the claim must first be considered by a Compensation Board, which is an administrative body, as a condition precedent to any right of action arising in a court. If there is an application for a review, the court must 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. In any matter not provided for in the Regulations, the powers, practice and procedure of the court are to be as nearly as may be in accordance with the powers, practice and procedure of the court in civil actions or appeals.

Section 79 of the *Judiciary Act* is not incorporated in the Regulations, and is therefore not relied on.

" A court of competent jurisdiction " is defined as meaning a court of the Commonwealth, or of a State or Territory of the Commonwealth (other than a court presided over by a justice of the peace, magistrate or district officer), which would have jurisdiction to hear and determine the application if it were an action between subject and subject for the recovery of a debt equal to the compensation claimed in the original claim to the Minister.

The Regulations create a new right and a complete procedure for its recovery. In *Doe d. Murray* v. *Bridges* (1) Lord *Tenterden* said: " Where an Act creates an obligation, and enforces the performance in a specified manner, we take it to be a general rule that performance cannot be enforced in any other manner " (2). It is a right, to apply Lord *Halsbury's* words in *Pasmore* v. *Oswaldtwistle Urban District Council* (3), where Lord *Tenterden* is cited, which is created by the Regulations and by them alone. In *Josephson* v. *Walker* (4) *Isaacs* J. said: " Prima facie, where the same statute creates a new right and specifies the remedy, that remedy is exclusive . . . but on examination of the legislation, the legislative intention may be found to be different . . . If the fair reading of the statute leads to the view that Parliament intended to create the right absolutely and independently of any specific form of remedy, the respondent's action is well brought. If . . . the proper construction is that the right and the remedy are inseparable, that they are combined and essential parts of a new scheme of public policy, then the action is wrongly conceived " (5).

Section 5 (1) (*ac*) of the *National Security Act* 1939-1943 provides that the Governor-General may make regulations for investing any court of a State with Federal jurisdiction with respect to any matter arising under the regulations. This provision was introduced and made retrospective by s. 4 of the Act of 1943, which enacts that all regulations in force at the time which were expressed to invest any court of a State with Federal jurisdiction shall be as valid and effectual as if that Act had been in operation when they were made. Thus the *National Security Act* expresses a clear intent that the investment of State courts with Federal jurisdiction in any matter arising under the regulations shall be effected by the regulations themselves. If reg. 60G is inconsistent with s. 39 (2) of the *Judiciary Act*, the regulation must prevail over the section (*National Security*

(1) (1831) 1 B. & Ad. 847 [109 E.R. 1001].
(2) (1831) 1 B. & Ad., at p. 859 [109 E.R., at p. 1006].
(3) (1898) A.C. 387, at p. 394.
(4) (1914) 18 C.L.R. 691.
(5) (1914) 18 C.L.R., at pp. 701, 702.

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Act 1939-1943, s. 18). It is at least partly inconsistent because it excludes from competent courts those presided over by a justice of the peace, magistrate or district officer. But there is in truth no inconsistency because the regulation provides for the special investment of defined courts. The *Judiciary Act* is a general Act, and the maxim *generalia specialibus non derogant* applies.

It was contended that the words " or appeals " do not refer to a right of appeal but to original applications to the court, as for instance an application under s. 124 of the *Stamp Duties Act* (N.S.W.), which are often referred to as appeals. But it is unnecessary to determine this contention because, assuming it to be sound, the powers, practice and procedure of the court in civil actions, when constituted by a judge without a jury under the *Supreme Court Procedure Act*, include an appeal to the Full Court, the effectiveness of a judgment which a single judge can enter under s. 5 sub-s. 3 being made by sub-s. 5 subject to an appeal to that Court. For these reasons, I am of opinion that the Supreme Court was empowered by reg. 60G to entertain the appeals. It is therefore unnecessary to determine whether the majority of the Victorian Supreme Court were right in holding in *Kreglinger & Fernau Ltd.* v. *The Commonwealth* (1) that a decision where, as in the present case, a single judge is sitting as the Supreme Court, means the decision of that judge, so as to preclude an appeal from him to the Full Court of the State.

I shall now proceed to consider the appeals on their merits. The facts of each case have already been set out at length by the Compensation Board, *Roper* J. and the Full Court. They can be briefly summarized as follows :—Parbury Henty & Co. Ltd. were lessees of certain premises known as the Grace Building under a lease at a rental of £1,047 for a term expiring on 31st May 1943. On 28th August 1942, the Minister entered into possession of the whole of these premises under the authority conferred upon him by reg. 54. The company had to look for accommodation elsewhere to carry on its business, and obtained a lease of other premises for two years and eleven months at an annual rental of £454 and of a room at an annual rental of £45. It incurred expenses in dismantling and removing certain fixtures from the old to the new premises and installing them there, and in buying and installing certain new fixtures which, after allowing for residual values, totalled £1,137. The Board allowed this amount as compensation. No question arose as to the company's liability for rent and for its obligations under the lease because the Minister gave an indemnity.

(1) (1926) V.L.R. 310.

Carrier Air Conditioning Ltd. owns a certain building in Bourke Street, the whole of which it was occupying for the purposes of its business. On 5th May 1942, the Minister, under the authority of the same regulation, entered into possession of the front portion of this building, which made it necessary for the company to provide other accommodation for its office staff. For this purpose, certain alterations and improvements were made to the remaining portion of the building, and other premises were acquired some distance away at a rental of £275 per annum. The Board awarded as compensation £942 as the fair annual rental value of the front portion of the company's premises. It also allowed a sum of £618 in respect of the expenses incurred by the company in making the alterations to its own premises and removing into and fitting up the new premises, and two annual sums of £104 and £87, the first being for a direct telephone line from the old to the new premises, and the second for further air conditioning of the old premises and certain electrical installations rendered necessary by the move.

The appellant does not dispute that the amount of £1,167 allowed to Parbury Henty & Co. Pty. Ltd. or the amounts allowed to Carrier Air Conditioning Ltd. are fair and reasonable allowances for the expenses which they incurred, and, in my opinion, directly incurred, as a result of the dispossessions. But *Roper* J. held that the Minister was entitled to set off against the expenses incurred by the companies in fitting up the substituted premises, in the case of Parbury Henty & Co. Ltd. the saving in rent by moving into the new premises; and in the case of Carrier Air Conditioning Ltd. the difference between the rent which the Minister was paying to the company for the premises taken over and the rent paid by the company for the new premises. He accordingly reduced the compensation awarded by the Board in each case by a substantial amount. On appeal the Supreme Court by a majority, *Jordan* C.J. and *Halse Rogers* J., *Davidson* J. dissenting, held that the Minister was not entitled to these set-offs and restored the awards of the board.

The question of principle arising on the merits is whether the Minister is entitled to these set-offs. *Roper* J. considered that the companies were bound to mitigate any loss or damage which they suffered from being dispossessed. Since they were able to carry their business as profitably in the substituted premises as in the old, and thereby derived the benefit already mentioned from being forced to make the new arrangements, this benefit should be set off against the detriment which they suffered from being dispossessed.

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The established principle upon which compensation should be assessed is to ascertain the value of the property taken to the person dispossessed (*Horn* v. *Sunderland Corporation* (1)), and for this purpose to estimate what sum a reasonably willing vendor could have expected a reasonably willing purchaser to pay, if he had been willing to sell his proprietary interest with all its existing advantages and future possibilities on the date of dispossession. In the present case, each company was occupying the premises of which it was dispossessed for the purposes of its business. In the case of Parbury Henty & Co. Pty. Ltd., it is not disputed that it was paying the full rental value of the premises at Grace Building, so that as lessee it was fully compensated by the Minister's indemnity. But the premises had the additional existing value of being so situated and equipped that it was an advantage to the company to occupy them and carry on its business there. In the case of Carrier Air Conditioning Ltd., the Minister carved a temporary slice in the nature of a lease out of its proprietary interest in the Bourke Street property for which compensation would be payable in the nature of rent. These premises also had the additional value that they were so situated and equipped that it was an advantage to the company to occupy them and carry on its business there. The right to compensation arises at the moment of acquisition, just as the proprietary right of the owner of property upon a voluntary sale is converted into a right to receive the purchase money when the contract is made. The amount of compensation, being a matter of assessment, can, like damages, be calculated in the light of any subsequent facts to the extent to which they throw light upon the items of value which can properly be taken into account in the calculation, having regard to the circumstances existing at the date of acquisition (*Australian Apple and Pear Marketing Board* v. *Tonking* (2); *McCathie* v. *Federal Commissioner of Taxation* (3)). In the present case it would have been reasonable for the companies, as willing sellers of the proprietary interests acquired by the Minister, to have claimed, not only for the value of the proprietary interests so acquired, but also for what can be compendiously called the expenses of removal into premises at least as commodious and congenial, taking a broad view of the matter, as those of which they were dispossessed. If, instead of moving into such premises, the company moved into less commodious premises, it would be the Minister and not the company which would benefit, if the claim which could reasonably be made for the expenses of removal was thereby reduced. If

(1) (1941) 2 K.B. 26.
(2) (1942) 66 C.L.R. 77, at p. 108.
(3) (1944) 69 C.L.R. 1, at pp. 16, 17.

the company had moved into more commodious premises, even at the same rent as that of the premises of which it had been dispossessed, it might well be that the amount claimed for the expenses of removal would be unreasonable, and would have to be reduced to what would have been a proper allowance if the company had been satisfied with equally commodious premises. But if Parbury Henty & Co. Ltd. had been approached by the Minister on 28th August 1942 to make a contract for sale of their leasehold interest in Grace Building, they could not reasonably have been expected to have calculated their expenses of removal as other than the expenses of moving into equally commodious premises. And if Carrier Air Conditioning Ltd. had been approached by the Minister on 5th May 1942 to grant a lease of the front of the Bourke Street premises, it would have been entitled to make the same calculation. A prudent purchaser must have expected that he would have to provide a sum to meet these expenses as a part of the purchase money sooner than fail to obtain the premises (*Pastoral Finance Association Ltd.* v. *The Minister* (1)). In other words, in the circumstances, the companies as reasonably willing vendors would have been entitled to demand a price which would enable them to reinstate themselves in equally suitable premises. But when the companies chose to move into less commodious premises, and there was no evidence that their business had suffered by the move, they could not reasonably claim more than the expenses which they had actually incurred.

Another method of calculating the compensation which leads in this instance to the same result is to ascertain what sum is required to reinstate the person dispossessed in equally convenient buildings on an equally convenient site (*Geita Sebea* v. *Territory of Papua* (2)). As pointed out in the passages in *Cripps on Compensation*, 7th ed. (1931), p. 170 and *Halsbury's Laws of England*, 2nd ed., vol. 6, p. 45 there cited, this method has usually been applied to the acquisition of buildings used for non-commercial purposes, but it was applied in *A and B Taxis Ltd.* v. *Secretary of State for Air* (3) so as to enable that company, when it was dispossessed of its premises in Dublin by the Government for an indefinite period, to receive, as " the direct loss or damage incurred or sustained by reason of interference with their property or business " within the meaning of the Imperial *Indemnity Act* 1920, the expenses to which it was put in buying other premises, fitting them for use as a garage and transferring to them all the appliances of its business, less the proceeds of sale of the substituted premises which were sold when the original premises

(1) (1914) A.C. 1083, at p. 1088.
(2) (1941) 67 C.L.R. 544, at p. 550.
(3) (1922) 2 K.B. 328.

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were returned by the Government, the purchase of the premises being in the circumstances of the case a reasonable act " as being the necessary and only way of effectively substituting premises for those which had been taken " (1). These proceeds of sale represented the residual value to the company of the property acquired for the purposes of reinstatement and correspond with the residual sums deducted by the Board.

But I am unable to agree with *Roper* J. that any other deductions should be made. The doctrine of the mitigation of damages applies when a person suffers damage from a breach of contract or tort and the damage or some part of it is mitigated by a subsequent transaction which arises out of transactions naturally attributable to the consequences of the breach, and must not be of an independent character (per Viscount *Haldane* L.C. in *Williams Bros.* v. *Ed. T. Agius Ltd.* (2)). The underlying principle in awarding damages in contract or tort is *restitutio in integrum*. In *James Patrick & Co.* v. *Minister for the Navy* (*s.s. Corrimal Case*) (3), there is a reference to the danger of applying this principle to a claim for compensation. There is a similar danger in attempting to apply the doctrine of mitigation of damages to such a claim except to the extent that a vendor must be taken to be willing to accept a sum which will reasonably compensate him for the value of the premises for the purposes of his business, so that when he is dispossessed he can only claim such a sum as will be reasonably sufficient to reinstate him elsewhere. I am, of course, dealing with the case where such a reinstatement is possible, and where it is reasonable under all the circumstances for him to continue in business elsewhere. If he obtained leasehold premises at a rent which was below the market value, and if, when the Minister gave up possession, he moved back into the old premises, it would appear from the *A and B Taxis Case* (4) that the saleable value of the lease at that date could be set off against the expenses of the two moves. But I am unable to see how a person dispossessed who moves into less commodious premises at a smaller rent than that payable for the previous premises gains any advantage which can be set off against the expenses of removal. The result of the transaction is simply that he is content with something less than full reinstatement.

For these reasons, I would dismiss both appeals with costs.

Brickworks Ltd. v. *The Minister of State for the Army.*—I only sat on this appeal so far as it related to the objection that the Full Court

(1) (1922) 2 K.B., at p. 343.
(2) (1914) A.C. 510, at p. 520.
(3) (1944) A.L.R. 254 (reported in part).
(4) (1922) 2 K.B. 328.

of the Supreme Court of New South Wales had no jurisdiction to entertain the appeal from *Roper* J.

For the reasons given in *Minister of State for the Army* v. *Parbury Henty & Co. Pty. Ltd.* and *Minister of State for the Army* v. *Carrier Air Conditioning Ltd.*, I am of opinion that this objection fails.

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Brickworks Ltd. v. *The Minister of State for the Army.*—*Appeal allowed with costs. Order of Supreme Court set aside. Order that the respondent pay to the appellant the sum of* £846 *and costs of proceedings in the Supreme Court.*

Solicitor for the Minister of State for the Army, *H. F. E. Whitlam*, Crown Solicitor for the Commonwealth.

Solicitors for the appellant Brickworks Ltd. and the respondent Carrier Air Conditioning Ltd., *Minter, Simpson & Co.*

Solicitors for the respondent Parbury Henty & Co. Pty. Ltd., *J. Stuart Thom & Co.*

J. B.