REPORTS OF CASES

DETERMINED IN THE

HIGH COURT OF AUSTRALIA

[HIGH COURT OF AUSTRALIA.]

McCLINTOCK . . . . . APPELLANT;
PLAINTIFF,

AND

THE COMMONWEALTH . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

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SYDNEY, *Aug.* 6-8; 11.

MELBOURNE, *Oct.* 23.

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

Constitutional Law (Cth.)—National security—Pineapples—Disposal by grower—Direction thereto by committee nominated by Federal department—Acquisition—"Just terms"—Price fixed by another committee—Grower not heard re fixation—Delivery of pineapples by grower pursuant to direction—Voluntary or compulsory—Mistake of law or fact—Exaction colore officii—Orders—Validity—Compensation—Trover—Conversion—Damages—The Constitution (63 & 64 *Vict. c.* 12), *s.* 51 (xxxi.)—*Sugar Agreement Act* 1940 (*No.* 21 *of* 1940)—*National Security (General) Regulations* (*S.R.* 1939 *No.* 87—1945 *No.* 123), *regs.* 57, 59, 60D, 60G—*National Security (Food Control) Regulations* (*S.R.* 1943 *No.* 165—1945 *No.* 47), *regs.* 9, 12—*National Security (Prices) Regulations* (*S.R.* 1940 *No.* 176—1945 *No.* 113)—*Prices Regulation Order No.* 1512—*Control of Pineapples Orders Nos.* 1, 2—*Control of Canned Pineapples and Pineapple Juice Order*—*Distribution of Food Order No.* 2.

Growers of pineapples were directed by orders, and directions made thereunder, made under reg. 59 of the *National Security (General) Regulations* to deliver a prescribed percentage of their pineapples to a specified representative committee as agent for a department of the Commonwealth. Payment for pineapples so delivered was received by the growers from the committee at rates fixed from time to time by another representative committee after due inquiries but in the absence of the growers. The pineapples so delivered were

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forwarded by the first-named committee to canners who processed and canned them and paid that committee therefor. Later these orders were revoked and another order was made under reg. 9 of the *National Security* (*Food Control*) *Regulations* which contained provisions substantially similar to those in the revoked orders, the prescribed rate of payment being higher. During the currency of this order the higher rate was fixed as the maximum price for pineapples by an order made under the *National Security* (*Prices*) *Regulations*. The Commonwealth obtained from the canners supplies of canned pineapples and pineapple juice for troops in battle areas, and paid the canners for such supplies. A grower who, without protest, delivered pineapples to the first-named committee in conformity with the orders in the belief that the orders were valid and binding upon him claimed (i) declarations that the orders, and directions thereunder, made under the General Regulations were invalid in that being laws of acquisition of property they did not provide just terms for such acquisition; (ii) damages for the wrongful conversion of the pineapples delivered by him under those orders and directions; and (iii) compensation for the pineapples delivered in pursuance of the order, and directions made thereunder, made under the Food Control Regulations as for goods requisitioned. The Supreme Court of Queensland dismissed the action on the ground that, although the orders and directions made under the General Regulations were laws of acquisition and were invalid because they did not provide just terms, the plaintiff delivered the whole of his pineapples voluntarily and therefore was not entitled either to compensation or damages.

Held, by *Latham* C.J., *Starke* and *McTiernan* JJ. (*Rich* and *Williams* JJ. dissenting), that the appeal should be dismissed.

By *Latham* C.J. and *McTiernan* J. on the grounds that (1) if the orders under the General Regulations (*a*) were valid, the appellant had been paid in accordance with their terms and no wrong had been done to him, or (*b*) were invalid, he voluntarily, without any compulsion, delivered pineapples in pursuance of the orders believing that he was compelled to do so, and received payment for them. By so doing he had acted under a mistake of law and accordingly was bound by his action; (2) as regards the order under the Food Control Regulations, even assuming in the appellant's favour that the pineapples were requisitioned by the Commonwealth, the appellant had accepted an amount of money paid on behalf of the Commonwealth in full satisfaction of his claim. Accordingly there had been no "absence of agreement" on the amount of compensation which alone would have entitled the appellant to bring an action for compensation pursuant to reg. 12 of those regulations.

By *Starke* J. on the grounds (1) that the Control of Pineapples Orders Nos. 1 and 2 were valid in that, although they were laws for the acquisition of property within the meaning of s. 51 (xxxi.) of the Constitution, they did provide for "just terms" e.g. terms that a reasonable man could not regard as being unjust; (2) that prices orders authorized by the *National Security* (*Prices*) *Regulations* fixed the maximum amount which was payable to the appellant in respect of certain pineapples delivered to a cannery under a Distribution

of Food Order made pursuant to the *National Security* (*Food Control*) *Regulations* and the appellant had received that price.

Per Rich, Starke and *Williams* JJ. Section 51 (xxxi.) of the Constitution is not limited to the acquisition of property by the Commonwealth but extends to the acquisition of property for any purpose in respect of which the Commonwealth Parliament has power to make laws.

Decision of the Supreme Court of Queensland (*Macrossan*, C.J.) by majority, affirmed.

APPEAL from the Supreme Court of Queensland.

In an action commenced in the Supreme Court of Queensland against the Commonwealth of Australia, William Arthur McClintock claimed declarations that the following orders were invalid :—

(1) (*a*) An order made on 11th September 1942 by the Director of Contracts and delegate for the Minister of State for Supply and Development and purporting to have been made in pursuance of regulation 59 of the *National Security* (*General*) *Regulations*. This order was cited as the Control of Pineapples Order.

(*b*) An order made on 25th September 1942 by the Controller of Defence Foodstuffs and delegate of the said Minister and purporting to have been made in pursuance of the said regulations and cited as the Control of Pineapples and Pineapple Juice Order.

The plaintiff alleged that each of these orders was a law in respect of the acquisition of property, namely, pineapples, by the Commonwealth of Australia and that neither of them provided just terms for such acquisition.

(2) An order made on 21st January 1943 by the Minister of State for Supply and Shipping and purporting to be made in pursuance of regulation 59 of the *National Security* (*General*) *Regulations* and cited as the Control of Pineapples Order No. 2. (This order revoked the Control of Pineapples Order.)

The plaintiff alleged that this order was a law in respect of the acquisition of property, namely, pineapples, by the Commonwealth of Australia and that it did not provide just terms for such acquisition.

(3) An order made on 5th October 1943 by the Controller-General of Food and purporting to have been made under the *National Security* (*Food Control*) *Regulations* and cited as the Distribution of Food Order.

The plaintiff alleged that par. 6 of this order was invalid insofar as it purported to provide that every person who was immediately before the commencement of the said paragraph under an obligation to comply with a direction given under the Control of Pineapples Order No. 2 should continue to comply with the direction according to its tenor.

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The plaintiff also claimed (1) damages for the wrongful conversion by the Commonwealth of the plaintiff's pineapples while the defendant was acting or purporting to act under the said Control of Pineapples Order, the Control of Pineapples and Pineapple Juice Order and the Control of Pineapples Order No. 2; (2) compensation from the defendant for the plaintiff's pineapples requisitioned by the defendant in pursuance of an order issued on 10th February 1944 by the Acting Deputy Director for Queensland of Service Foodstuffs under the *National Security* (*Food Control*) *Regulations*.

The effect of these orders and directions, the provisions of which, so far as material, are set out in the judgments hereunder, compelled the plaintiff and other growers of pineapples to offer a certain proportion of their crop to the Committee of Direction of Fruit Marketing (hereinafter referred to as the C.O.D.) at the nearest railhead to be delivered to canneries so that the canneries would receive sufficient pineapples to enable them to provide a quantity of canned pineapples, pineapple juice and fruit salad which the Commonwealth required in order to supply the needs of the armed forces.

In pursuance of directions given under each of these orders the plaintiff delivered to the C.O.D. certain quantities of pineapples as specified in directions from time to time given to him and received in respect of the pineapples certain sums of money as provided in the said orders.

The defendant denied each and every allegation in the statement of claim contained.

Macrossan C.J., before whom the action was tried, gave judgment in favour of the defendant. The reasons for his Honour's judgment are, so far as material for the purposes of this report, as follows:—

The C.O.D. " was at all material times the duly authorized agent of the Deputy Controller of Foodstuffs for the purposes of the Control of Pineapples Order. I hold that the " C.O.D. " was also at all material times the agent of the defendant, the Commonwealth of Australia, to accept delivery of all pineapples delivered to the " C.O.D. " in pursuance of the direction " referred to in par. 4 of the statement of claim. " In the belief that the Control of Pineapples Order and the said direction were binding upon him, the plaintiff delivered to the " C.O.D. " in the period 11th September 1942 to the 31st December 1942 307 cases of pineapples containing 9 tons 1,102 lbs. of pineapples. This quantity was 79 cases in excess of twenty-five per cent of the plaintiff's whole crop for the period 1st July to 31st December 1942. . . . The plaintiff's said pineapples were delivered by the " C.O.D. " to canners of pineapples in Queensland, and when

processed and canned, were delivered by the canners to the defendant, or to some person or body at the direction of the defendant, and in fulfilment of an order placed by, or contract made with, the defendant, or its agent. . . . This Committee (the Fruit Industry Sugar Concession Committee) purporting to act under the said Control of Pineapples Order fixed the price to be paid to the plaintiff and other growers under the said Order for pineapples delivered in pursuance of the direction " referred to in par. 4 of the statement of claim " at £9 11s. 8d. per ton free on rail, less any freight in excess of 6d. per case. Neither the plaintiff nor any other pineapple grower was heard, or had any opportunity of being heard, by the said Fruit Industry Sugar Concession Committee before the abovementioned price was fixed. . . . I find that the " C.O.D. " was at all material times duly authorized by the Controller of Defence Foodstuffs to act on his behalf for the purposes of the said Control of Pineapples Order No. 2 and that it was at all material times the agent of the defendant to accept delivery of all pineapples delivered to it by the plaintiff in pursuance of the directions contained in " the circular letters dated 21st January 1943 and 23rd March 1943 respectively and referred to in par. 13 of the statement of claim. " During the period 23rd January 1943 to the 1st October 1943 inclusive, the plaintiff delivered to the " C.O.D. " 540 cases of pineapples containing 16 tons, 2,129 lbs. of pineapples. The plaintiff made these deliveries in the belief that the Control of Pineapples Order No. 2 and the directions contained in " the said circular letters referred to in par. 13 of the statement of claim " were valid and binding on him and in purported obedience to the said directions. Of these 540 cases of pineapples so delivered, the plaintiff delivered 251 cases during the period 5th February to the 25th March 1943 inclusive. There was in fact no direction which required, or purported to require, the plaintiff to deliver pineapples to the " C.O.D. " or to canneries during this period.

The plaintiff explained his making these deliveries by stating that he expected that a fresh direction would be given to him covering this period, similar to the direction " referred to in par. 4 of the statement of claim " which, although given on the 11th September 1942 purported to apply to the whole of the plaintiff's crop of pineapples for the period 1st July 1942 to the 31st December 1942.

I accept the bona fides of this explanation of the plaintiff, but it is clear that he could have no claim against the defendant in respect of the 251 cases of pineapples in question, as was admitted by his counsel at the hearing.

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The Fruit Industry Sugar Concession Committee purporting to act under the Control of Pineapples Order No. 2 fixed the price to be paid to the plaintiff and all other growers under the said Order for the pineapples delivered in pursuance of the directions " referred to in par. 13 of the statement of claim " at £10 11s. 8d. per ton free on rail, less any freight in excess of 6d. per case.

Neither the plaintiff nor any other grower was heard, or had any other opportunity of being heard by the said Committee, before the said price was fixed by it. . . . In intended obedience to the . . . direction " referred to in pars. 22 and 23 of the statement of claim " the plaintiff delivered to the " C.O.D. " 8 cases of pineapples from the 9th October to the 23rd October 1943 inclusive. . . . In intended obedience to (the) direction " referred to in par. 27 of the statement of claim " the plaintiff delivered to the " C.O.D. " 172 cases of pineapples, containing 5 tons 631 lbs. of pineapples. The Fruit Industry Sugar Concession Committee purported to fix the prices to be paid to the plaintiff and other growers for pineapples delivered to the " C.O.D. " under the said direction of the said W. Ireland at £12 per ton of pineapples free on rail, less any freight in excess of 6d. per case. Neither the plaintiff nor any person on his behalf had any opportunity of being heard by the said Fruit Industry Sugar Concession Committee before the said price was fixed by the Committee. . . . The evidence established that at all times from the 21st August 1942 to the 11th August 1944 the price obtainable for pineapples on the fresh fruit market was in excess of the price fixed by the Fruit Industry Sugar Concession Committee with the exception of a short period from the 2nd March to the 11th March 1943 inclusive. . . .

I think therefore that if the plaintiff had sold on the fresh fruit market his fruit which was diverted to the canneries . . . he would have obtained therefor the price at which pineapples were being sold on the fresh fruit markets at the relevant times . . . with the exception of the pineapples referred to in par. 33 of the statement of claim weighing 1,061 lbs. which were rejected or only taken at a diminished price by the factories on account of defects in quality. (The market values of the pineapples were as shown in the plaintiff's claims). . . .

In my opinion the Control of Pineapples Order, together with the Control of Pineapples and Pineapple Juice Order, constituted a law in respect of the acquisition of property, namely pineapples, by the Commonwealth of Australia.

I think the two orders constituted a legislative scheme for the acquisition by the Commonwealth of the pineapples of the plaintiff

and other growers for the benefit of the Commonwealth. Under the scheme the growers were required to deliver their pineapples to the " C.O.D. " as the agent of the Commonwealth to be sent to canning factories to be canned. The canned fruit so produced was entirely at the disposal of the Commonwealth.

I think, therefore, that the 'true nature and character' of the orders, their 'pith and substance' is that they are laws for the acquisition of property. . . .

In my opinion the Control of Pineapples Order and the Control of Pineapples and Pineapple Juice Order did not provide just terms for the acquisition of the plaintiff's property by the Commonwealth.

The Control of Pineapples Order provides that the plaintiff and other growers were to be paid for their pineapples the subject of the order, a price to be fixed by the Fruit Industry Sugar Concession Committee without any opportunity being afforded to the grower to be heard by that Committee. . . . As the Control of Pineapples Order is, in my opinion, a law in respect of the acquisition of property, and it does not provide just terms for such acquisition, it is not authorized by the powers conferred on subordinate law-making authorities by the *National Security Act* and is therefore wholly invalid. . . .

But I am unable to see that the plaintiff has any remedy either by way of damages for the conversion of his pineapples delivered by him in intended obedience to the Control of Pineapples Order, or for compensation for the acquisition by the defendant of the pineapples.

The plaintiff delivered his pineapples in conformity with the Order in the belief that the Order was valid and binding on him. In doing so he acted under a mistake of law. He made no protest against delivering his pineapples in conformity with the Order. He did not at any time act under any physical compulsion of the defendant to deliver his pineapples. He delivered his pineapples voluntarily.

In this state of the facts I am unable to see that he has any claim in court on the basis that the defendant wrongfully converted his pineapples.

I think . . . that the alternative claim for compensation also fails. For the same reasons I am of opinion that the Control of Pineapples Order No. 2 read in conjunction with the Control of Pineapples and Pineapple Juice Order was a law in respect of the acquisition of property, namely pineapples, by the Commonwealth of Australia, which does not provide just terms for such acquisition, and is therefore invalid.

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If I am correct in my conclusion as to the invalidity of Control of Pineapples Order No. 2, it would follow that immediately before the commencement of par. 6 of the Distribution of Food Order no person was under an obligation to comply with a direction given under the Control of Pineapples Order No. 2. The effect of this is not that the Distribution of Food Order is invalid, but *quoad* pineapple growers there were no persons in relation to whom it could operate.

As to the 172 cases of pineapples delivered by the plaintiff in purported obedience to the direction " referred to in par. 27 of the statement of claim " these pineapples were not acquired by the Commonwealth, but the direction required the plaintiff and other growers to transfer their pineapples to pineapple canners.

In a case recently decided . . . *Latham* C.J. reserved consideration of the question whether the requirement of just terms applied to Federal laws with respect to the acquisition of property by any person as well as to the acquisition of property by the Commonwealth.

If the requirement of just terms applies to such a legislative scheme of the Commonwealth then, for the reasons I have already given in relation to the Control of Pineapples Order and the Control of Pineapples Order No. 2, the direction would be invalid because it does not provide just terms for the acquisition of the plaintiff's pineapples.

I am unable to see any other ground upon which this direction could be successfully attacked.

I think that the plaintiff's claim for substantive relief in relation to these pineapples fails equally with his claim in respect of his other pineapples, and for the same reason.

In the circumstances consequently the plaintiff is not entitled to any declaratory judgment. The rule enabling the court to make a declaratory decree, Order 4 Rule 11, ought not to be applied where a declaration is merely asked for as a foundation for substantive relief which fails.

In the result, therefore, the plaintiff's claim fails."

From that decision the plaintiff appealed to the High Court.

Relevant statutory provisions and regulations are sufficiently set forth, and further facts appear, in the judgments hereunder.

Barwick K.C. (with him *O'Hagan*), for the appellant. In respect of the claim for compensation the orders provided no basis for payment, though the regulations themselves converted the claim into one for compensation. So that, there being no order or regulation prescribing the *quantum*; that was an open question to be decided on general principles of compensation. Certain of the

directions were invalid but, having proved a valid order and a requisition, there should have been an award in favour of the appellant for at least the compensation. If, on its proper construction, the Control of Pineapples Order did authorize the acquisition of pineapples for the Commonwealth, then it is a law with respect to acquisition. If, on the other hand, on its proper construction, it did not authorize the Deputy Controller to direct the pineapples to the Commonwealth, then the result would be the same because he would be acting in the colour of his office requiring the growers under purported performance of the order to deliver to the Commonwealth pineapples whereas he had no power to do so. In those circumstances the Deputy Controller's dealing with the growers was a conversion. The order contemplates some subsidiary direction by the Deputy Controller. That, with the circular issued on 11th September 1942 and the instructions contained in the circular with regard to the factory pineapples winter crop 1942 constitute a substantial direction under the order. Alternatively, the two circulars constitute an approval to the growers disposing, on their own initiative, of two-thirds of their crop subject to a condition that the growers should deliver the other one-third of their crop to the Commonwealth. The provision for just terms applies to any acquisition in law and for any of the purposes of the Commonwealth, including defence, so, if in pursuance of the defence power property is acquired, it must be on the basis of just terms. Under the order and direction the appellant supplied three hundred and seven cases of pineapples, being seventy-nine cases in excess of 25 per cent of the appellant's crop for the season. There is a finding that all the fruit delivered was received by the Commonwealth. The direct or indirect payment for the fruit by the owners of the canneries, or by the C.O.D., was only an intermediate step. The real source of the money so paid was the Commonwealth, which made certain that it would get, and it did get, all the canned fruit. The various circulars issued from time to time each contained a direction or directions to growers in respect of the disposal of their fruit. Although the definition of "prescribed food" in the Distribution of Food Order includes pineapples and canned apricots, peaches and pears it does not include canned pineapples. That fact aids the suggestion that what was done under the order amounted to a requisition. That order directs the continued compliance with directions previously given. Those directions imposed obligations which were good and valid. Thus here was a requisition made under the Food Control Regulations and therefore the appellant is entitled to compensation. The diversion of the appellant's pineapples to factories under the Control of Pineapples Order No. 2 involved a conversion.

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In holding that the appellant, by delivering his pineapples in conformity with these orders and directions in the belief that they were valid and binding upon him, did so voluntarily, under a mistake of law and having made no protest, the judge must really have meant that the appellant, when he delivered his pineapples, was making a contract voluntarily in the sense that he had an *animus contrahendi*. That is an impossible analysis in this situation : if a Commonwealth official under the colour of his office insists that a grower hand over his pineapples to the official and the grower believes that the official has power to enforce the demand, it would be impossible to say that the grower had an *animus contrahendi*. The real analysis would be that the grower was agreeing to some terms which the official asserted were the only terms which the law permitted. The orders were bad. There is conversion because the official under colour of his office demanded the handing over of the pineapples. The Commonwealth is liable for the torts of its servants. The Commonwealth may authorize an official to commit a tort and it would not be any less an authorization because the statute contained an authority which offended placitum xxxi. of s. 51 of the Constitution : see *Johnston Fear & Kingham and The Offset Printing Co. Pty. Ltd.* v. *The Commonwealth* (1) and *Lake* v. *Simmons* (2). The pineapples were taken against the will of the owner. He had no will but to hand them over under the compulsion of the demand.

[STARKE J. referred to *James* v. *Cowan* (3)].

The fact that the officials alleged that they had Commonwealth lawful authority bringing about an act done by the appellant makes the act of the appellant a non-voluntary act and gives the appellant a right to damages (*Steele* v. *Williams* (4) ; *Payne* v. *The Queen* (5)). The principle that an exaction or demand under colour of office deprives the act of a voluntary character applies equally, irrespective of whether it be in respect of money or of goods (*Marshal Shipping Co.* v. *Board of Trade* (6)). In *Brocklebank Ltd.* v. *The King* (7), as in *Marshal's Case* (8), the question turned on whether or not the Crown was liable, and so far as the demanding of money was concerned the absence of a protest was not allowed to make any difference. The right of recovery back of money extorted *colore officii* was discussed in *Sargood Bros.* v. *The Commonwealth* (9). Even if money is paid voluntarily it can be recovered back in an action for money

(1) (1943) 67 C.L.R. 314.
(2) (1927) A.C. 487.
(3) (1930) 43 C.L.R. 386 ; (1932) A.C. 542 ; 47 C.L.R. 386.
(4) (1853) 8 Ex. 625, at pp. 629-631 [155 E.R. 1502, at pp. 1504, 1505].
(5) (1901) 26 V.L.R. 705, at p. 718.
(6) (1923) 2 K.B. 343, at p. 350.
(7) (1925) 1 K.B. 52.
(8) (1923) 2 K.B. 343.
(9) (1910) 11 C.L.R. 258, at pp. 276-278, 301-304.

if, as in this case, the parties were not on equal terms (*Morgan* v. *Palmer* (1)).

Mason K.C. and *Bennett* K.C. (with them *Fahey*) for the respondent.

Mason K.C. The real question for consideration is: What is the effect of the orders made from time to time? The judge below has found that they were orders acquiring property on behalf of the Commonwealth. That finding appears to be based primarily on a consideration that the C.O.D. was in some way an agent of the Commonwealth for the purpose of acquiring property on behalf of the Commonwealth in the pineapples. The background of the whole matter is that long before any of these orders were made the C.O.D. was a State organization operating in Queensland under a State statute. It is a growers' body and is a body with very wide powers. Under the orders the C.O.D. was adopted as a "conduit pipe" for the purpose of transferring the pineapples. The pleadings and the facts show that each grower was directed that a certain percentage of his crop should be handled by the C.O.D. and that that body would forward them to the canneries. The important point is that the canneries paid the grower for the pineapples through the C.O.D. and at a certain price which was specified in the order. In the directions it was made perfectly clear that the direction was to deliver the pineapples to the C.O.D. for delivery to the canneries but that they were at the grower's risk until they reached the canning factory and that the C.O.D. was the agent of the grower for the purpose of taking them to the canneries. The suggestion that upon the delivery of the pineapples to the C.O.D. they became the property of the Commonwealth is quite inconsistent with the fact that contemporaneously there was an order to the canneries that they must not part with any of their canned pineapples except under some contract made with the Commonwealth: see the Control of Pineapples and Pineapple Juice Order. The order is an order regulating the distribution, sale, purchase and use of pineapples and also controlling the price at which they should be sold within the meaning of reg. 59 of the *National Security* (*General*) *Regulations*. That regulation was a valid exercise of the defence power (*Stenhouse* v. *Coleman* (2)). There was no acquisition by the Commonwealth within the meaning of placitum xxxi., but an acquisition incidental to a purpose for which the Commonwealth has power to legislate. It was a proper exercise of the defence power and was a law under that power for the distri-

(1) (1824) 2 B. & C. 729, at pp. 734, 735 [107 E.R. 554, at p. 556].

(2) (1944) 69 C.L.R. 457.

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bution of certain goods. It was not a law with regard to the acquisition of property. It has never been held that a law, made under the defence power, which is essentially a law with regard to defence and which incidentally might expropriate somebody of certain property, is a law under placitum xxxi. which provides for the acquisition of property on just terms. If, however, it were a law with regard to property then compliance would have to be made with the placitum, and it must be on just terms, e.g. the Prices Regulations are not a law with respect to the acquisition of property (*Ex parte Callinan*; *Re Russell* (1)). Of necessity the defence power includes a power to acquire property as, for example, foodstuffs urgently required in time of war for the armed forces. The matter of the requisitioning of property other than land is dealt with in reg. 57 of the *National Security* (*General*) *Regulations*. This is not an acquisition, pure and simple, as in *Johnston Fear & Kingham and The Offset Printing Co. Pty. Ltd.* v. *The Commonwealth* (2), but is simply a control of the pineapples of the growers and a direction as distinct from an acquisition. The acquisition referred to in placitum xxxi. means an acquisition by the Commonwealth or for purposes for which the Commonwealth can legislate and it does not mean or refer to an acquisition by some person other than the Commonwealth (*Real Estate Institute of New South Wales* v. *Blair* (3)). The question of just terms does not arise because there was not an acquisition. The test in each case is: Is the law a law with respect to the acquisition of property? or: Is it a law under the defence power applying generally and nothing to do with acquisition of property or with a law relating to the acquisition of property? Just terms apply only in the event of an affirmative answer being returned to the test as first expressed. The position in this case is similar to the position that arose in *Morrisdale Coal Co.* v. *United States* (4). On the question of whether there was an acquisition see *John Cooke & Co. Pty. Ltd.* v. *The Commonwealth* (5). The power relates only to acquisition by the Commonwealth. The question of whether the appellant had a right of action cannot depend on whether he knew the state of the law. His intention was to pass the property irrespective of whether the orders or directions were good or bad. The mere making of an alleged law is not a cause of action. Although the judge below found that the pineapples were acquired by the Commonwealth it is competent for this Court to deal with that matter. The

(1) (1945) 45 S.R. (N.S.W.) 358, at pp. 362, 363.
(2) (1943) 67 C.L.R. 314.
(3) (1946) 73 C.L.R. 213, at pp. 223, 224, 235, 236.
(4) (1922) 259 U.S. 188 [66 Law Ed. 892].
(5) (1924) 34 C.L.R. 269, particularly at pp. 272, 282.

Control of Pineapples and Pineapple Juice Order as an isolated document, comes within the decision in *John Cooke & Co. Pty. Ltd.* v. *The Commonwealth* (1). The Control of Pineapples Order No. 2 is an indication to growers that whatever they sent along according to specification would be accepted and would be paid for; but it does not contain an order on any canner that he shall accept. The only embargo in the Distribution of Food Order appears in par. 3 and is entirely covered by *Cooke's Case* (1). It is not a requisition. The only effect of that order is that it requires growers to obtain an approval before selling or disposing, in any way, of their pineapples. On the facts of this case under this order the appellant's pineapples were delivered to canners and the canners paid for them. Paragraph 6 of that order does not keep in force any of the directions given under the revoked Control of Pineapples Order No. 2. Under the revoked order the appellant was required to deliver a certain proportion to the C.O.D. whereas under this order he must not move, deliver or do anything with respect to his pineapples without the approval of a person who is different from the person mentioned in the revoked order. The words "subject to any direction given under the *National Security* (*Food Control*) *Regulations*" in the said par. 6 mean "subject to the provisions" of those regulations. A direction to do a thing must be regarded as an approval. The only power was to approve on terms and conditions. The direction in this order impliedly involved an approval of those terms and conditions and, at that stage, the matter comes within *Cooke's Case* (1), and there is no question of acquisition. The word "acquisition" as used in placitum xxxi. means the acquisition, by or on behalf of the Commonwealth, of property on just terms from any State or person. It means an acquisition by the Commonwealth and not by any person (*Quick & Garran, Annotated Constitution of the Australian Commonwealth* (1901) pp. 640, 641). Section 51 (xxxi.) contemplates a vesting not necessarily of the fee simple but of some right in the nature of property by reason of action taken by the Commonwealth Parliament for purposes with respect to which the Commonwealth Parliament has power to legislate. The ordinary natural meaning is that it is an acquisition from somebody by a person who has power to acquire. In this case the Commonwealth Parliament has the necessary power. The first factor to be established is that the law is a law with respect to a purpose. It would not be incidental to the power that under such a law there could be established a body completely independent from the Commonwealth. That would not be subject to a law made properly in pursuance of placitum xxxi. It cannot be

(1) (1924) 34 C.L.R. 269.

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conceived that the power to make laws vested in the Commonwealth Parliament could be incidental to a compulsory power of acquisition given to such an independent body. Except, perhaps, under the defence power in time of war it would be impossible for the Commonwealth Parliament to enact a law authorizing any constituted body compulsorily to acquire property. Therefore the question of just terms cannot arise. The placitum was not intended so much to create an independent power as it was to make certain that the right of eminent domain existed. Its proper construction is the power to exercise the right of eminent domain and it should not be construed as conferring a power compulsorily to acquire property from any person or persons. The acquisition of State railways under placitum xxxiii. was dealt with in *Australian Railways Union* v. *Victorian Railways Commissioners* (1). Each order should be considered separately. In no case was there any acquisition by the Commonwealth.

Bennett K.C. On the assumption only that these are laws of acquisition, it is submitted that the appellant has in fact not proved an acquisition of his pineapples by the Commonwealth. Dealing with the Distribution of Food Order there was no power whatever to direct any diversion or delivery of pineapples to the canneries or to anyone at all; it was merely an approval. The word "move" in par. 3 (1) of that order should be read in the sense indicated in *Andrews* v. *Howell* (2), the word should not be construed literally. It means moving for the purpose of transport and disposal and not the mere ordinary physical movement. The position under the Distribution of Food Order is that the pineapples are "tied." Although the document issued 10th February 1944 was in the form, perhaps, of a direction, it should be read as an approval subject to conditions set out as directions. There was no power to direct, there was only power to impose terms and conditions in relation to an approval. Therefore if a grower sought an approval, or acted under a general approval, the decision in *Cooke's Case* (3) applies. On the chain of evidence the appellant has failed to prove any acquisition in fact by the Commonwealth. The method of fixing the price was a fair method. The Fruit Industry Sugar Concession Committee is an expert body. The just terms must be just not only to the owner of the property but also to the public and others who have to pay for the property. This action is entirely novel and the only case that approaches it in any way is *Australian Apple and Pear Marketing Board* v. *Tonking* (4) although the facts in that case were

(1) (1930) 44 C.L.R. 319, at p. 349.
(2) (1941) 65 C.L.R. 255.
(3) (1924) 34 C.L.R. 269.
(4) (1942) 66 C.L.R. 77.

somewhat different (1). If these provisions are bad it is a pure case of mistake of law and does not come within the scope of the cases on exaction under colour of office. A person's consent is not necessarily bad because it was induced by mistake of law (*Marshall* v. *Collett* (2); *Kitchen* v. *Hawkins* (3)). The cases cited on behalf of the appellant on the point of exaction under colour of office are on a very limited footing, which would not apply here even in the case of money, and do not apply at all in the case of goods. All those cases were cases where a person, an official, in his office had made a demand for a certain fee or payment to perform a service which he would have to perform in any case without any payment of money. That limited footing was expressly recognized and referred to in *Whiteley (Ltd.)* v. *The King* (4) wherein it was held that the moneys there involved having been paid under a mistake, not of fact but of law, could not be recovered back either on the ground that they were paid under duress or compulsion, or on the ground that they were paid in discharge of a demand unlawfully made under colour of an office.

[LATHAM C.J. referred to *Werrin* v. *The Commonwealth* (5).]

The question whether a person was *volens* or *nolens* is one of fact and not of law (*Key* v. *Commissioner of Railways (N.S.W.)* (6)). When payment or delivery is made under a pure mistake of law it is voluntary. Even if there were a tort, by the appellant receiving payment, there has been accord and satisfaction. The payment so received was a complete and final payment of any claim the appellant might have. This is so even if the payment was received from someone else (*Hirachand Punamchand* v. *Temple* (7)). Where an amount is appropriated to a certain purpose, is paid on that basis, and is received without protest, then the person who so receives it cannot repudiate that basis at a later stage (*Croft* v. *Lumley* (8)). This case is also covered by the following cases in respect of accord and satisfaction (*Foakes* v. *Beer* (9) and *Bidder* v. *Bridges* (10)). Although it cannot be denied that there was no hearing consignment by consignment before the Fruit Industry Sugar Concession Committee the evidence shows (i) that the "trade" has always accepted the prices fixed by this Committee as the price for the purpose of selling as between growers and canners; (ii) that the Committee was a body which was open to hear any representations made to it; (iii) that one of the witnesses acted before the Committee

(1) (1942) 66 C.L.R., at pp. 80, 102.
(2) (1835) 1 Y. & C. Ex. 232, at p. 238 [160 E.R. 94, at p. 97].
(3) (1866) 2 C.P. 22, at pp. 29, 30.
(4) (1909) 26 T.L.R. 19; 101 L.T. 741.
(5) (1938) 59 C.L.R. 150.
(6) (1941) 64 C.L.R. 619, at p. 627.
(7) (1911) 2 K.B. 330.
(8) (1855) 5 E. & B. 648, at p. 680 [119 E.R. 622, at pp. 634, 635].
(9) (1884) 9 App. Cas. 605, at p. 619.
(10) (1887) 37 Ch.D. 406, at pp. 412, 416, 419, 420.

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as a spokesman on behalf of the growers; and (iv) that the C.O.D. had another spokesman before the Committee and by whom representations had been made.

Barwick K.C., in reply. Dealing with the period covered by the Distribution of Food Order, the claim does not set up that this is a law with respect to the acquisition of property. Paragraph 6 of the Distribution of Food Order fulfils all the requirements of a requisition (*Australasian United Steam Navigation Co. Ltd.* v. *Shipping Control Board* (1)). To obtain the use of things is a requisition, therefore, if the Commonwealth obtains the use of things under these regulations, it cannot avoid retaining the property. The pleadings do not dispute that the various orders and directions were duly authorized. The property passed to the Commonwealth the moment the direction was complied with. The canneries were bound to deal with the pineapples in accordance with the wishes of the Commonwealth and therefore every pineapple taken by the canneries became Commonwealth property. It is quite fallacious to assert that the legislative power for a law with regard to acquisition comes from any provision other than placitum xxxi. merely because acquisition is incidental to some other activity, because, of necessity, in most cases a legislative provision for acquisition will be incidental: see *Johnston Fear & Kingham and The Offset Printing Co. Pty. Ltd.* v. *The Commonwealth* (2)). These are laws of acquisition none the less because they are incidental to some valid scheme under the defence measures, and they derive their legislative power from placitum xxxi. and not otherwise. It is not necessary to show that they do effect an acquisition; it is sufficient if they authorize it. Although they are laws with respect to acquisition of property they do not provide just terms as of right. It was nothing to the point that the Fruit Industry Sugar Concession Committee was an experienced body. Under just terms the growers were entitled to the market price of their pineapples. The Committee had no statutory or other authority to represent the growers. The words "by the Commonwealth" do not appear in the placitum. The real limitation is for the purposes of the Commonwealth. To suggest that the appellant accepted the C.O.D. as his agent would be unreal. The only person to whom delivery could be directed was the nominated person. "Conversion" is defined and discussed in *Clerk & Lindsell* on *Torts*, 9th ed. (1937), pp. 314, 315, and *Pollock* on *Torts*, 13th ed. (1929), p. 372. The C.O.D. was not exercising a State function because the State function was always to receive on a voluntary basis and to act on a voluntary

(1) (1945) 71 C.L.R. 508, at p. 521. (2) (1943) 67 C.L.R. 314.

basis at the behest of the grower. In this matter the C.O.D. is a Federal agent. As the price of approval the appellant was unlawfully required to deliver a percentage of his pineapples to a nominated person. The decision in *Grainger* v. *Hill* (1) affords some support to the appellant's case: see also *Marshal Shipping Co.* v. *Board of Trade* (2); *Smith* v. *William Charlick Ltd.* (3) and *Hooper* v. *Exeter Corporation* (4). In *Morrisdale Coal Co.* v. *United States* (5) there was no intervening act of the United States. That case is a good illustration of merely making an order or regulation which someone obeys under a mistaken idea as to its validity. The whole point in this case, however, is a physical interference with the appellant's pineapples on the part of the C.O.D.

Cur. adv. vult.

Oct. 23.

The following written judgments were delivered:—

LATHAM C.J. This is an appeal from a judgment for the defendant Commonwealth in an action in which the plaintiff, William Arthur McClintock, claimed declarations that three orders made in 1942 and 1943, relating to the control and disposition of pineapples or pineapples and pineapple juice made under the *National Security* (*General*) *Regulations*, reg. 59, and certain directions given under those orders, were invalid. The plaintiff also claimed damages for wrongful conversion of his pineapples, which, he alleged, were delivered under those orders to the agents of the defendant, the Commonwealth of Australia, in pursuance of directions given under the said orders. In October 1943 these orders were replaced by an order made under the *National Security* (*Food Control*) *Regulations* entitled Distribution of Food Order. These regulations (reg. 12) provided that where any goods were requisitioned in pursuance of an order under the regulations the goods should become the absolute property of the Commonwealth freed from all mortgages, charges &c., and that the rights and interests of every person in the goods should be converted into a claim for compensation. Regulation 12 (2) provides that the amount of compensation in respect of goods requisitioned under such an order "shall be such as is agreed upon between the persons concerned and the Commonwealth, or, in the absence of agreement, as is determined in an action for compensation against the Commonwealth." In respect of pineapples delivered in pursuance of the Distribution of Food Order the plaintiff claims compensation under the order as for goods requisitioned. Thus

(1) (1838) 4 Bing. N.C. 212, at pp. 216, 219 [132 E.R. 769, at pp. 771, 772].
(2) (1923) 2 K.B., at p. 350.
(3) (1924) 34 C.L.R. 38, at pp. 50, 51.
(4) (1887) 56 L.J. Q.B. 457.
(5) (1922) 259 U.S. 188 [66 Law. Ed. 892].

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for pineapples delivered under the Control of Pineapples Orders the plaintiff claims damages for conversion, contending that the orders were invalid because they were orders for the acquisition of property and did not provide for just terms upon such acquisition (Commonwealth Constitution, s. 51 (xxxi.)). For pineapples delivered under the Distribution of Food Order the claim is for compensation in accordance with the Food Control Regulations.

The learned trial judge held that the orders made under reg. 59 of the *National Security* (*General*) *Regulations* were invalid because they provided for the acquisition by the Commonwealth of pineapples and did not provide just terms for such acquisition. The learned judge found that the plaintiff delivered pineapples to an agent of the Commonwealth in the belief that he was bound by the orders to do so, that he was not in truth so bound because the orders were invalid for the reason stated, that the plaintiff acted under a mistake of law and not under a mistake of fact, but that he voluntarily transferred his pineapples to the Commonwealth, and therefore had no claim for damages.

The earlier orders were made under the provisions of reg. 59 of the *National Security* (*General*) *Regulations* and the last order was made under the provisions of the *National Security* (*Food Control*) *Regulations*. A circular which was communicated to the plaintiff, together with a copy of the first order, stated that the payment to be made on behalf of growers who delivered their pineapples would be £9 11s. 8d. per ton. In the case of pineapples delivered in pursuance of directions given under the second order, a price of £10 11s. 8d. per ton was fixed. Later the price paid was £12 per ton. The plaintiff was paid for his pineapples at the rates mentioned.

It is not necessary, in my opinion, to examine in detail the terms of the orders and directions to which reference has been made. If the earlier orders were valid the position is that the plaintiff has been paid in accordance with their terms and no wrong has been done to him. If, on the other hand, the orders were, as held by the learned judge, invalid because they did not provide for the payment to the plaintiff of the true value of his pineapples, then the position is as found by the learned judge—that he voluntarily, without any compulsion, delivered pineapples in pursuance of the orders, believing that he was bound to do so. Later, after he had delivered the pineapples and been paid for them, the plaintiff changed his mind—at least to the extent of determining to challenge the validity of the orders in the hope that they would be held to be invalid, and he took these proceedings. We do not know whether he now believes the orders to be valid or to be invalid, but the present state of his

mind cannot be relevant to the decision upon his claim. The finding of the learned trial judge is that at the times of delivery and payment he believed that the orders were valid, and this finding has not been challenged. This belief was not induced by any fraud or pressure, but by the existence of the regulations and orders.

It is argued, however, that a delivery of goods under a belief that such delivery is required by law is not truly a voluntary delivery. But the fact is that the plaintiff himself took the pineapples to the persons appointed to receive them under the order. His reason for doing so was that he believed that the orders and directions were valid and that he was accordingly bound to do what he did. But the existence of this reason explains why he was willing to deliver his pineapples and does not show that he did not act voluntarily. The Commonwealth does not incur any liability because Parliament or some subordinate Federal legislative authority makes an invalid statute or regulation. Neither does the giving of directions in the course of the administration of such a statute or regulation create any right of action against the Commonwealth unless there is some infringement of a right of a plaintiff: See *Riverina Transport Pty. Ltd.* v. *Victoria* (1). If, as in *James* v. *Cowan* (2); and *James* v. *The Commonwealth* (3), there had been a seizure of the plaintiff's fruit against his will, so that there was prima facie an actionable trespass, and if the only defence was that the seizure complained of was authorized by a statute or regulation which was held to be invalid, there would have been a liability in tort. But in the present case nothing was done to which the plaintiff did not consent. There was no mistake of fact. The plaintiff acted in the belief that the orders made under the *National Security Regulations* were binding upon him. Having so acted, he cannot now ground a cause of action upon an allegation that his goods were taken from him and dealt with against his will. For these reasons the plaintiff's claim fails in respect of the pineapples delivered in pursuance of the orders made under the *National Security* (*General*) *Regulations*.

As to the order made under the *Food Control Regulations*, the position is different. There were no provisions in the order or in any directions given under the order fixing the prices for pineapples delivered in pursuance of the order. The plaintiff was entitled to compensation under reg. 12 (which has already been quoted) if his goods were requisitioned in pursuance of the order. It has been argued for the Commonwealth that the pineapples were not "requisitioned" under the order. I assume in favour of the plaintiff that

(1) (1937) 57 C.L.R. 327, at pp. 341, 342.

(2) (1930) 43 C.L.R. 386; (1932) A.C. 542; 47 C.L.R. 386.

(3) (1939) 62 C.L.R. 339.

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the pineapples were so requisitioned. Upon this assumption, the plaintiff had a claim for compensation. The regulations provide that in the event of failure to agree upon compensation, but only in that event, the plaintiff shall have a right of action for compensation. But in this case the plaintiff agreed with the Commonwealth upon the amount of compensation payable. He accepted as in full satisfaction of his claim an amount of money paid on behalf of the Commonwealth. He therefore has no right of action for compensation under the regulations.

Many questions were raised during the argument upon the appeal, e.g. questions as to whether the Committee of Direction of Fruit Marketing constituted under the Queensland *Fruit Marketing Organisation Acts* 1923 to 1941 was an agent of the Commonwealth in receiving and dealing with pineapples, as to whether the Commonwealth or certain Queensland canneries acquired the property in the pineapples, as to the time at which it could be suggested that the alleged conversion occurred, and various other questions. In my opinion, however, the case can be determined upon the basis of the reasons which I have above stated without examining these matters.

In my opinion the appeal should be dismissed.

RICH J. I have had the advantage of reading the judgment of my brother *Williams* and am in substantial agreement with it.

I agree with the order proposed by him.

STARKE J. Appeal from a judgment of the Supreme Court of Queensland dismissing, in substance, an action brought by the appellant against the Commonwealth.

In the action the appellant claimed that several orders relating to the control of pineapples, which are hereinafter referred to as Orders numbered 1 and 2 and an order relating to canned pineapples and pineapple juices which is hereinafter referred to as Order No. 1A, were invalid because they did not provide just terms of acquisition and also that an Order for the Distribution of Food was invalid in so far as it provided that every person who was under an obligation to comply with a direction given under, *inter alia*, the Control of Pineapples Order No. 2 should continue to comply with the direction according to its tenor. And the appellant also claimed damages for wrongful conversion of his pineapples or compensation for their acquisition.

Regulation 59 of the *National Security* (*General*) *Regulations* is, so far as material, in the following terms: A Minister, so far as appears to him to be necessary in the interests of the defence of the

Commonwealth or the efficient prosecution of the war, or for maintaining supplies and services essential to the life of the community, may by Order provide :—

(*a*) for regulating, restricting or prohibiting the . . . distribution, sale, purchase, use or consumption of essential articles, and in particular, for controlling the prices at which the articles may be sold ;

(*e*) for any incidental and supplementary matters for which that Minister thinks it expedient for the purposes of the Order to provide. "Essential articles" means appearing to a Minister to be essential for the defence of the Commonwealth or the efficient prosecution of the war or to be essential for the life of the community.

The validity of this regulation was established in *Stenhouse* v. *Coleman* (1) (cf. *Wertheim* v. *The Commonwealth* (2)). It was authorized by the *National Security Act* 1939, s. 5 and was within the defence power of the Commonwealth.

On its face the regulation does not appear to deal with the acquisition of property but with regulating, restricting or prohibiting the distribution, sale and purchase of articles and the control of prices thereof.

The Deputy Controller of Foodstuffs in Queensland, who was an officer of the Federal Department of Supply and Development, stated in a circular memorandum that in view of the extensive requirements of canned pineapples &c. for the troops in the battle area, and the light crop, the Department deemed it necessary to institute a form of control of the pineapple crop throughout Queensland in order to assure a reasonable flow of pineapples into the canneries.

Control of Pineapples Order No. 1, dated 11th September 1942, was the result.

That order requires a grower to pick such proportion of his pineapple crop as might be directed by the Deputy Controller of Foodstuffs for the State of Queensland or any person or body authorized by him for the purposes of the order, and, deliver the same as might be directed by him. The price to be paid for pineapples delivered under the order was the price or prices determined from time to time by the Fruit Industry Sugar Concession Committee. The last-named Committee was a body constituted under the Sugar Agreement (See clause 7) scheduled to the Federal *Sugar Agreement Act* 1940, No. 21. The Deputy Controller notified all concerned that the Committee of Fruit Direction constituted under

(1) (1944) 69 C.L.R. 457. (2) (1945) 69 C.L.R. 601.

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the Queensland *Fruit Marketing Organisation Act* 1923, was a body authorized by the Deputy Controller for the purposes of the Order.

And another circular memorandum was issued by the Deputy Controller to those concerned containing instructions and directions. Various directions were given as to condition, grades, sizes, colour, and cases and method of consignment. Pineapples for canneries, it was stated, would be received by the Committee of Fruit Direction for distribution to factories and would be accepted only through the Committee's loaders. The basis of acceptance, it was stated, would be a weight basis at factory and that the Committee received on behalf of grower for forwarding to factories, but the place of delivery and acceptance would be at the factory.

The price it was stated would be £9 11s. 8d., grower's station.

Under these circumstances the appellant delivered to the Committee of Fruit Direction loaders a number of cases of pineapples and was paid the price £9 11s. 8d. set forth in the memorandum, already mentioned, which had been fixed by the Fruit Industry Sugar Concession Committee. The Committee of Fruit Direction paid the growers directly on the basis of weight at the factories or through the local Fruit Growers Associations and the Committee were reimbursed by the factories, frequently described as canneries, but often the growers were paid before the Committee received any moneys from the factories. But the Commonwealth did not supply the Committee of Fruit Direction with funds, though it obtained such supplies as it needed of canned pineapples and so forth from the canners. Indeed the Control Order relating to canned pineapples and pineapple juices dated 25th September 1942 (Order No. 1A) prohibited canners, except with the consent of the Deputy Controller, from selling, delivering, distributing, conserving or otherwise disposing of any canned pineapples and so forth other than in fulfilment of an order placed by or contract made with the Commonwealth or any person or body in authority on behalf of the Commonwealth. No doubt in this manner canners obtained funds whereby they were able to provide moneys for the payment of growers. But the Commonwealth had no contractual or other relation with the growers. So far as the Commonwealth was concerned its officers, the Committee of Fruit Direction and its officers and the Fruit Industry Sugar Concession Committee were officers or bodies administering the provisions of the Orders numbered 1 and 1A. The Commonwealth did not acquire from the appellant any of his pineapples pursuant to Order No. 1. It obtained its supplies of canned pineapples and juices from the canners and paid them accordingly. The appellant's claim for compensation against the Commonwealth

for the acquisition of his pineapples based upon Order No. 1 therefore fails. But the appellant claims that if the Commonwealth did not acquire or purport to acquire any of his pineapples pursuant to Order No. 1 still it was guilty of trover or conversion thereof. It was said that the *National Security Act*, under which reg. 59, Order No. 1 and the directions already mentioned were made or given, operated as a law for the acquisition of property within the meaning of the Constitution s. 51 (xxxi.) but did not provide just terms as required by the Constitution inasmuch as neither the appellant nor any other grower was heard or had any opportunity of being heard by the Fruit Industry Sugar Concession Committee before the price of pineapples was fixed. Consequently it was contended that the provisions of Order No. 1 and also the Control Order No. 1A were invalid. And it was claimed that the Commonwealth through its officers and administrative bodies took possession of the appellant's pineapples and transferred that possession without any lawful authority to the canners.

The argument involves several matters of law.

1. That the constitutional power to make laws for the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws is not confined to laws for the acquisition of property by the Commonwealth alone as it contended. The only limitations upon the constitutional power are "just terms" and a "purpose in respect of which the Parliament has power to make laws." And there is no reason for further limiting the power. Authorities, independent of the Commonwealth, may be set up for various purposes under the constitutional powers of the Commonwealth and endowed with authority to acquire property. There is no constitutional provision denying this power to the Commonwealth.

2. That the *National Security Act*, under which reg. 59, Order No. 1 and Order No. 1A operate, is a law with respect to the acquisition of property. The appellant suggests that the Control Order No. 1A is part of the scheme of acquisition. But this order does not affect any property or right of the appellant and only those whose rights are infringed and not strangers are entitled to challenge the validity of legislation, regulations or orders made pursuant thereto. So far as it is claimed that this order is invalid the appellant is an incompetent party (cf. *Victorian Chamber of Manufactures* v. *The Commonwealth* (*Prices Regulations*) (1) and *Victorian Chamber of Manufactures* v. *The Commonwealth* (*Women's Employment Regulations*) (2)).

(1) (1943) 67 C.L.R. 335, at p. 343. (2) (1943) 67 C.L.R. 347, at p. 382.

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The effect of Order No. 1 and the directions given under it is to require the grower to pick and deliver his pineapples as directed and fixes the price which is to be paid therefor. It certainly regulates the distribution and sale of the pineapples and controls the prices at which they may be sold. In operation it compels a grower to deliver his pineapples to canners at a fixed price. Such a transaction is a forced sale and results in the acquisition of property by some canner. And, therefore, the legislation, regulation and order must be founded on the constitutional power to make laws with respect to the acquisition of property (*Johnston Fear & Kingham & The Offset Printing Co. Pty. Ltd.* v. *The Commonwealth* (1)). I have had some doubt whether reg. 59 authorizes Order No. 1. The regulation however is in wide terms and has been given wide scope in *Stenhouse* v. *Coleman* (2) and its validity is not challenged in these proceedings.

The regulation it will be observed purports to have been made under the *National Security Act* 1939 which attracts the defence power but does not exclude the constitutional power to make laws for the acquisition of property on just terms &c.

3. That the legislation does not provide just terms for the acquisition of growers' pineapples.

It is now recognized, I think, in this Court, that it is " a legislative function to provide the terms and the Constitution does not mean to deprive the legislature of all discretion " in the matter (3). The Court should not hold legislation invalid on the ground that the terms provided are unjust unless they are such that a reasonable man could not regard the terms of the acquisition as being just (*Grace Brothers Pty. Ltd.* v. *The Commonwealth* (4)).

The regulation in this case remits the fixation of price to the Fruit Industry Sugar Concession Committee. That is a body set up under the Sugar Agreement, scheduled, as already mentioned, in the *Sugar Agreement Act* 1940.

The Sugar Agreement provided, so far as material to this case, that the Queensland Government should, under its statutory powers in that behalf, acquire all raw sugar manufactured from sugar cane grown in Queensland during several seasons and also should purchase all raw sugar manufactured from sugar cane grown in New South Wales during the same seasons. And it also provided that the Queensland Governemnt should, during an agreed period, make sugar and other sugar products, the product of the raw sugar manufactured during the several seasons, available for sale and

(1) (1943) 67 C.L.R. 314, at pp. 318, 325.
(2) (1944) 69 C.L.R. 457.
(3) (1946) 72 C.L.R. 269, at p. 291.
(4) (1946) 72 C.L.R., at pp. 279, 280, 285, 291.

delivery in the several States at prices not exceeding the prices specified in the agreement in respect of each grade of sugar and each sugar product.

But it was considered that concessions should be made to the "manufactured fruits industry." Consequently, it was provided that the Queensland Government, on behalf of the Sugar Cane Industry, should during the agreed period assist the "manufactured fruits industry" by creating a fund payable to the Fruit Industry Sugar Concession Committee which should be responsible for the due application of the fund in the manner specified in the agreement. The Committee was authorized in such manner and subject to such conditions as it thought fit, to pay to the manufacturers who pay for Australian fresh fruit purchased and used in fruit products manufactured in Australia during the agreed period not less than such prices as the Committee declares to be reasonable a specified rebate per ton in respect of the Australian cane sugar used by them during the agreed period. By the terms of the agreement this Committee was appointed by the Minister of State for Trade and Customs and was composed of a representative of each of the following :—

The Commonwealth Government ;

The Queensland Sugar Board ;

The growers of canning fruits ;

The growers of non-canning fruits ;

The co-operative and State manufacturers of fruit products ; and

The proprietary manufacturers of fruit products.

The representatives of the Commonwealth Government and the Queensland Sugar Board were the Chairman and Deputy Chairman respectively and each of the other representatives were to be nominated in manner approved by the Minister. Four members of the Committee constituted a quorum and in the event of voting being equal the Chairman of the meeting had a casting vote.

This Committee is a representative body and one of its functions was to determine, before any rebate was payable, whether purchasers of fresh fruits who used them in the manufacture of fruit products in Australia paid for them not less than a price declared by the Committee to be reasonable. Pineapples were one of the fruits used by manufacturers for the purpose of canning or extracting pineapple juice. And it was for the Committee to consider and determine whether manufacturers paid for them not less than a price declared by the Committee to be reasonable. The function of this Committee was such that it doubtless obtained accurate information of the pineapple crop and of market conditions and requirements. And why might not the Commonwealth remit to this representative body

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the determination of a fair or just price for the pineapples delivered as directed pursuant to the regulation and order? It was not the primary function of the Committee but there is no reason why the Commonwealth should not avail itself of the knowledge and experience of a representative and skilled body for the purpose of determining "just terms" of acquisition for the purposes of its order.

In my judgment that is not a provision that a reasonable man would regard as unjust. True the particular grower is not heard, but it would be quite impracticable for every grower who delivered pineapples pursuant to the scheme of the order to be heard or to be given an opportunity of being heard and, indeed, quite unnecessary. The legislative provisions for the delivery of pineapples and the price to be paid for them do, I think, provide "just terms" within the meaning of the Constitution. If the Committee fixed the price of pineapples pursuant to the regulations and order, then the appellant has either been paid what is provided or if he has not been so paid then he should apply to the Committee to determine the price which should be paid to growers in his position. But I gather that the Committee determined the relevant price which has been paid to the appellant. And it is to be observed that the price was payable in cash and not deferred or discharged by paper promises.

4. Trover and conversion.

The claim that the Commonwealth converted to its own use the appellant's pineapples or in other words wrongfully deprived the appellant of the use and possession of his pineapples thus falls to the ground.

But I desire to reserve the question whether the Commonwealth would be liable for the conversion of the appellant's pineapples even if Order No. 1 was invalid because just terms of acquisition had not been provided. No doubt the Commonwealth is responsible for the tortious acts of its officers and servants in the course of their service unless the officer is executing some independent duty cast upon him by law (See *Judiciary Act*, 1903-1946, s. 56; *Baume* v. *The Commonwealth* (1); *Field* v. *Nott* (2)).

The tortious act here relied upon is the transport and delivery of the appellant's pineapples to factories by the Committee of Fruit Direction and its loaders. It will be remembered that this Committee was constituted under the Queensland law but was authorized by a Federal officer, the Deputy Controller of Foodstuffs, for the purposes of Order No. 1 and as the agency through which pineapples were directed to the factories. The appellant delivered his pineapples to the Committee because of the existence of Order

(1) (1906) 4 C.L.R. 97. (2) (1939) 62 C.L.R. 660.

No. 1 and not because of any pressure or duress on the part of the Committee. And it was expressly stated in the directions to growers that their pineapples were received on behalf of the growers for forwarding to the factories which would be the place of delivery. The Committee also acted because of the existence of Order No. 1, the validity of which it assumed, and of what may be regarded as the mandate of the appellant. "Any asportation of a chattel for the use of the defendant, or a third person, amounts to a conversion; for this simple reason, that it is an act inconsistent with the general right of dominion which the owner of the chattel has in it, who is entitled to the use of it at all times and in all places" (*Fouldes* v. *Willoughby* (1); *Hollins* v. *Fowler* (2); *Hiort* v. *Bott* (3)). But the Committee and its loaders never for a moment interfered with the appellant's dominion over his pineapples but on the contrary recognized his title throughout. It delivered the appellant's pineapples to factories as the order and the direction thereunder provided and as the appellant contemplated. But I express no concluded opinion upon the question, whether the acts of the Committee of Fruit Direction and its loaders, in the circumstances of this case, would constitute a conversion on the part of the Commonwealth of the pineapples of the appellant, if the Order No. 1 were invalid.

Order No. 2, dated 21st January 1943, next falls for consideration. It revoked Order No. 1.

It provided that, except with the consent of the Controller of Defence Foodstuffs or his deputy or any person authorized in writing by him to act on his behalf for the purposes of the order, a grower should not distribute, sell, supply, deliver, remove, use, consume or otherwise dispose of pineapples. And also that the Controller might give directions in writing to any grower that all or such proportion as the Controller specified of pineapples of that grower should be picked and/or packed by such grower in such manner and within such period as was specified in the direction and/or sold and/or delivered by such grower to such person and within such period as was specified in the direction. A grower, it was provided, should comply with any direction given to him by the Controller and should not pick or pack, sell or deliver pineapples contrary to any direction given to him by the Controller. It was also provided that the person to whom a grower delivered pineapples pursuant to any direction should not reject any pineapples delivered to him without the consent of the Controller and should pay the grower therefor such price or prices as should be determined from time to time by the Fruit Industry Sugar Concession Committee.

(1) (1841) 8 M. & W. 540, at p. 548 [151 E.R. 1153, at p. 1156].
(2) (1874) L.R. 7 H.L. 757.
(3) (1874) L.R. 9 Ex. 86.

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The Committee of Fruit Direction was again authorized by the Controller of Foodstuffs to carry out this order. Directions were given to the appellant of the proportion of his crop of pineapples that should be delivered to the Committee of Fruit Direction. And the appellant, accordingly, delivered to the Committee pineapples belonging to him which were forwarded by the Committee to the factories. The Fruit Industry Sugar Concession Committee, purporting to act under Order No. 2, fixed the price to be paid to all growers at £10 11s. 8d. per ton. The appellant was paid in the manner already mentioned. And the Commonwealth obtained its supplies from the factories and paid for them accordingly.

The appellant claims that Order No. 2 is invalid because it does not provide just terms for the acquisition of his pineapples and damages for conversion of his pineapples or compensation.

Order No. 2, though it differs in form from Order No. 1, raises precisely the same questions as have already been dealt with. And in my judgment and for the same reasons, Order No. 2 is not beyond power nor is it invalid on the ground that it does not provide "just terms" for the acquisition of the appellant's pineapples.

The Distribution of Food Order, dated 5th October 1943, which is No. 2 but which for convenience I shall refer to as Order No. 3 still remains for consideration. It was made under the *National Security* (*Food Control*) *Regulations* which confer upon the Minister power, *inter alia*, to control, regulate and direct the growing, production, manufacture, processing, distribution, disposal, use and consumption of food, foodstuffs &c. and provides that the Controller-General of Foodstuffs should, subject to any direction of the Minister, have and might exercise all the powers conferred on the Minister by the regulations. The Minister on the 5th October 1943 revoked the Control of Pineapples Order No. 2 already dealt with. The Controller on the same day made the Distribution of Food Order, which I refer to as Order No. 3. Clause 6 of this Order directed that, subject to any direction given under the *National Security* (*Food Control*) *Regulations*, every person who was immediately before the commencement of the paragraph under an obligation to comply with any of the Orders specified in the last preceding paragraph (Order No. 2 was one of these orders) should continue to comply with the direction according to its tenor. So far as the appellant delivered pineapples pursuant to this clause his rights are the same as in respect of pineapples delivered pursuant to Order No. 2. And for the reasons already given his claim based upon this clause fails. But Order No. 3 also provided that a grower or manufacturer should not, except with the approval of an authorized officer and in

accordance with the terms and conditions of the approval move, transport, distribute, sell, dispose of, use or consume (otherwise than for his own domestic purposes) any prescribed food in his possession or custody or under his control whether on his own account or on behalf of any other person. Prescribed food included pineapples of every type and variety suitable for canning. Under this provision growers were informed that the Committee of Fruit Direction was appointed by the Commonwealth authorities for carrying out its instruction. Growers were directed that they must load for factories a specified proportion of their crop. And instructions and specifications were also issued to growers of pineapples diverted to canneries or factories pursuant to the order. Cannery pineapples it was stated would be received by the Committee of Fruit Direction for distribution to factories on certain conditions. The basis of acceptance was :—(*a*) Pineapples would be accepted on a weight basis at factory the growers accepting factory weight ; (*b*) the Committee of Fruit Direction receives from the growers for forwarding on growers' behalf to factory but the place of delivery and acceptance was at the factory.

No price for the pineapples was fixed nor was any method of ascertaining the price prescribed. The appellant delivered pineapples to the Committee of Fruit Direction under this order and was paid in the usual way and save as to about 2,000 lbs was paid £12 per ton free on rail. This price was in fact fixed by the Fruit Industry Sugar Concession Committee. But in May 1944 a Prices Regulation Order fixed and declared the maximum price at which pineapples might be sold for processing to be £12 per ton free on rail. This order was made pursuant to the *National Security* (*Prices*) *Regulations* which have the support of decisions in this Court (*Victorian Chamber of Manufactures* v. *The Commonwealth* (1) ; *Fraser Henleins Pty. Ltd.* v. *Cody* (2)).

The Order No. 3 made under the *National Security* (*Food Control*) *Regulations* is within the powers conferred by those regulations. It is called Distribution of Food Order. Doubtless the order was administered by Commonwealth officers and pineapples were diverted to factories pursuant to its provisions. But the Commonwealth did not in fact acquire any of the appellant's pineapples under this order and the directions given pursuant to it, nor did it operate as an acquisition by the Commonwealth of any of his pineapples. And it is doubtful, I think, whether the order and directions under it operated as a forced sale to the factories. It was rather a diversion order. There was no obligation on the canners to accept the

(1) (1943) 67 C.L.R. 335. (2) (1945) 70 C.L.R. 100.

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goods and no price was prescribed. If the canners accepted the pineapples they would come under an obligation to pay a reasonable price therefor. But the Prices Orders authorized by the *National Security* (*Prices*) *Regulations* fixed a maximum price which was paid by the canners to the appellant. The appellant was lawfully required, by force of Order No. 3 and directions thereunder, to deliver his pineapples to factories, and did so, receiving the maximum price fixed by the Prices Order, £12 per ton, which was an adoption, I presume, of the price fixed by the Fruit Industry Sugar Concession Committee.

Under these circumstances the appellant's claim against the Commonwealth for compensation for pineapples delivered pursuant to Order No. 3 also falls to the ground. It is not alleged that the Commonwealth wrongfully deprived the appellant of his pineapples delivered pursuant to Order No. 3. The claim in respect of these pineapples is for compensation.

The result is that this appeal fails and the judgment of the Supreme Court of Queensland in favour of the Commonwealth should be affirmed.

McTIERNAN J. In my opinion the appeal should be dismissed. I agree with the judgment and reasons of his Honour the Chief Justice of this Court.

WILLIAMS J. This is an appeal from a judgment of the Supreme Court of Queensland dismissing an action brought by the appellant, who is a grower of pineapples in the district of Woombye in the State of Queensland, as plaintiff against the respondent as defendant, claiming damages and compensation for certain pineapples which he forwarded to the Committee of Direction of Fruit Marketing at the nearest railhead to be delivered to various Queensland canneries between September 1942 and August 1944. These pineapples were forwarded to this committee pursuant to directions given to the plaintiff in accordance with the provisions of two orders made under the authority of reg. 59 of the *National Security* (*General*) *Regulations*, known as the Control of Pineapples Order and the Control of Pineapples Order No. 2, and a subsequent order made under the authority of reg. 9 of the *National Security* (*Food Control*) *Regulations*, known as the Distribution of Food Order No. 2.

It appears that prior to the war the growers of pineapples in Queensland sold as much of their fruit as they could in the markets, principally inter-State markets, and sold the balance to the canneries. For both purposes the growers delivered their fruit at the nearest railhead to the above-mentioned committee (referred to in the

evidence as the C.O.D.), which is a body corporate representative of the growers constituted under the *Fruit Marketing Organisation Acts* 1923 to 1941, (Q.) and this committee then forwarded their fruit by special trains to the markets or the canneries.

A price was fixed as the minimum price f.o.r. which would be paid for the fruit sold to the canneries by another committee known as the Fruit Industry Sugar Concession Committee, constituted under the Sugar Agreement 1941-1946, the terms of which appear in the schedule to the Commonwealth *Sugar Agreement Act* 1940. Clause 7 (*b*) of this agreement provides that this committee shall . . . pay to manufacturers who pay for Australian fresh fruit purchased and used in fruit products manufactured in the Commonwealth of Australia during the agreed period not less than such prices as the Committee agrees to be reasonable a rebate of £2 4s. per ton in respect of the Australian refined sugar cane used by them during the agreed period in such fruit products.

The Control of Pineapples Order came into force on 11th September 1942. It provided *inter alia* that: (clause 3) a grower should from time to time pick such proportion of pineapples then being grown by him as should be directed by the Deputy Controller of Foodstuffs and should deliver the same to such persons or body as the Deputy Controller directed; and that (clause 4) the price to be paid to the grower for pineapples delivered under the order should be such price or prices as should be determined from time to time by the Fruit Industry Sugar Concession Committee. A copy of this order was posted to each grower accompanied by a circular and a specification relating to the quality and method of delivery of the pineapples to be delivered under the order. The circular, after stating that growers were aware that the Department of Supply and Development required pineapple juice, canned pineapples, and fruit salad for the troops in the battle areas, explained that it had become necessary to institute a form of control of the total pineapple crop throughout Queensland in order to assure a reasonable flow of pineapples into the canneries, and that the agency through which the pineapples would be directed to the canneries would be the C.O.D., the body which was responsible for the distribution of the fruit and vegetable requirements of the fighting services throughout Queensland. The circular also stated that until further notice growers' crops were released to the extent of two thirds of each week's pickings, and that at any time a grower might make application to the Deputy Controller for the total release of his crop, but that such application could be approved only on the grower establishing that he had despatched to the canneries twenty-five per cent of his crop

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for the period 1st July 1942 to 31st December 1942. The specification provided that the C.O.D. would receive the pineapples from the growers for forwarding on their behalf to the factory, but that the place of delivery and acceptance was at the factory. The specification also provided that fruit arriving at the factory not conforming to the standard laid down would, at the discretion of the C.O.D. after inspection by C.O.D. inspectors, be either (*a*) dumped, or (*b*) given to the social services, or (*c*) fruit rejected for undersize or other reasons might, when factories were accepting "smalls," be handled by factories and the proceeds credited to the freight and handling reserve. The specification also provided that the price would be £9 11s. 8d. f.o.r., £9 1s. 8d. per ton to be paid to the grower and the grower to be credited with 10s. per ton cannery purchase levy, and that freight in excess of 6d. per case as with previous crops would be debited against the growers.

The Control of Pineapples Order No. 2 came into force on 21st January 1943. It revoked the Control of Pineapples Order. It provided, *inter alia*, that (clause 4) except with the consent of the controller, a grower should not distribute, sell, supply, deliver, remove, use, consume or otherwise dispose of pineapples; (clause 5) the Controller might give directions in writing to any grower that all or such proportion as he specified of pineapples of that grower should be picked or packed by such grower as specified in the direction and sold or delivered by such grower to the person specified in the direction; (clause 6) a grower should not pick or pack, sell or deliver pineapples contrary to any direction given him by the controller; (clause 7) the person to whom a grower delivered pineapples in pursuance of any direction should pay the grower therefor such prices as should be determined from time to time by the Fruit Industry Sugar Concession Committee. A copy of this order, as in the case of the previous order, was posted to each grower accompanied by a circular and specification. The circular stated that the Department of Supply and Shipping had arranged that the C.O.D. should act as its instrument of distribution, that a copy of a letter which had been prepared by the C.O.D. at the direction of the Department was enclosed, and that the directions therein were to be observed in all particulars. One direction was that growers were to load for factory one half of their pineapples available for marketing. The specification also provided that the C.O.D. would receive the fruit from growers and forward it to the factory on their behalf, but the place of delivery and acceptance was at the factory, and that fruit arriving at the factory not conforming to the standards laid down would, at the discretion of the C.O.D. after inspection by

C.O.D. inspectors, be either (*a*) dumped or (*b*) given to the social services. This specification stated that an application had been made to the Fruit Industry Sugar Concession Committee for an increase of £1 per ton on the price which was paid for the 1942 winter crop, but that this application had not yet been approved. This increase was granted and the plaintiff received the increased price for the pineapples he delivered under the Control of Pineapples Order No. 2.

The Control of Pineapples Order No. 2 was revoked by an order made under reg. 59 of the *National Security* (*General*) *Regulations* on 5th October 1943. On the same day the Distribution of Food Order No. 2 was made under reg. 9 of the *National Security* (*Food Control*) *Regulations* and posted to the growers. This order provided *inter alia*, that—(clause 3) a grower should not, except with the approval of an authorized officer and in accordance with the terms and conditions of the approval, move, transport, distribute, sell, dispose of, use or consume (otherwise than for his own domestic purposes), any prescribed food in his possession or custody or under his control whether on his own account or on account of any other person; (clause 6) that subject to any direction given under the Food Control Regulations, every person who was, immediately before the commencement of this paragraph, under an obligation to comply with a direction given under the Control of Pineapples Order No. 2 should continue to comply with the direction according to its tenor. Clause 6 therefore had the effect of resuscitating the direction which had expired with the revocation of the Control of Pineapples Order No. 2 that growers were to load for factories one half of their crop.

On 10th February 1944, directions were given under the Distribution of Food Order No. 2 to operate from 12th February 1944 to 12th February 1945, and posted to growers accompanied by a circular and specification. The circular stated, that taking into consideration the very large service demands, the Department of Commerce and Agriculture had decided to proceed with a diversion scheme to factories under Food Control Order No. 2 on the basis that the C.O.D. had again been appointed the agent of the department for carrying out its instructions and the diversion would be on the basis of fifty per cent of the crop. This specification, like the previous specifications, provided that the C.O.D. would forward the pineapples to the factory as agents of the growers, but that the place of delivery and acceptance was at the factory and that fruit arriving at the factory, not conforming to the standards laid down would, at the discretion of the C.O.D. after inspection by the C.O.D. inspectors, be either (*a*) dumped or (*b*) given to the social services.

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The Distribution of Food Order No. 2 did not provide for any price to be paid for the pineapples, but a price of £12 per ton f.o.r., less any freight in excess of 6d. per case, was in fact fixed by the Fruit Industry Sugar Concession Committee, and the plaintiff was paid this price until 9th May 1944, when the same price was fixed by Prices Regulations Order No. 1512 made under the *National Security* (*Prices*) *Regulations* as the price at which pineapples might be sold for processing, and the plaintiff was paid this price for the pineapples he delivered after that date.

It will be seen that the three orders and directions given thereunder operated to compel the plaintiff and other growers of pineapples to forward a certain proportion of their crop to the loaders of the C.O.D. at the nearest railhead to be delivered to the canneries, so that the canneries would receive sufficient pineapples to enable them to provide the quantity of canned pineapples, pineapple juice, and fruit salad which the Commonwealth required to supply the needs of the armed forces.

The first two orders were made under the authority of reg. 59 of the *National Security* (*General*) *Regulations*. This regulation, so far as material, provided that a Minister might by order provide for regulating restricting or prohibiting the movement distribution sale purchase use or consumption of essential articles. These regulations also contained reg. 57 which authorized a Minister by order to requisition or provide for the requisitioning of any property other than land. The third order was made under the authority of reg. 9 of the *National Security* (*Food Control*) *Regulations*. This regulation conferred on the Minister of State for Commerce and Agriculture a general power to control regulate and direct the growing, distribution, and disposal of food, and without limiting the generality of the foregoing: (*a*) to require that any food should be grown processed distributed or disposed of; (*e*) to determine . . . the manner in which and the terms and conditions upon which food, should be grown . . . processed, distributed or disposed of and; (i) to requisition or provide for the requisitioning of any food. Where a Minister made an order for the requisitioning of property under reg. 57 of the *National Security* (*General*) *Regulations*, reg. 60D provided for the payment of compensation, and reg. 60G gave the person dispossessed an ultimate right to have the compensation determined by a court. In a similar manner reg. 12 of the Food Control Regulations provided that where any goods were requisitioned in pursuance of an order under the regulations, the goods should, by force of, and in accordance with, the provisions of the order, become the absolute property of the Commonwealth, and that the rights and interests

of every person in the goods should thereupon become converted into claims for compensation, the amount of which should be agreed upon between the persons concerned and the Commonwealth, or in the absence of agreement determined in an action for compensation against the Commonwealth.

In *The Meandros* (1) the President, after pointing out that requisition is not a term of art, said that it is " a process by which the State takes the use or the possession of, or the property in, chattels, and sometimes in land. But it is infinitely various. If, for instance, a stack of hay is requisitioned, it is requisitioned to be consumed." The first two orders and the directions given pursuant thereto did not purport to requisition the pineapples on behalf of the Commonwealth but to compel the growers to deliver a certain proportion of their pineapples to the canneries and to compel the canneries to pay the growers certain prices for these pineapples. The Commonwealth then purported to control the output of the canneries so that the Commonwealth would have the prior right to acquire so much of the output as was required for the armed forces and to determine to whom the balance of the output should be sold. The evidence does not disclose the prices which the Commonwealth paid to the canneries for the output which they acquired, but it is obvious that these prices must have been sufficient to enable the canneries to pay the C.O.D. its handling charges, to pay the growers the prices fixed first by the Fruit Industry Sugar Concession Committee and subsequently by the Prices Commissioner, and presumably to make a profit. Nor did the Commonwealth purport to requisition the pineapples under the third order. But it was contended that at least it had requisitioned the pineapples under this order because reg. 12 of the Food Control Regulations provided that where any goods were requisitioned in pursuance of an order under these regulations the goods should, by force of, and in accordance with, the provisions of the order, become the absolute property of the Commonwealth. But the words " in accordance with the provisions of the order " indicate to my mind that to become the absolute property of the Commonwealth within the meaning of reg. 12, the order would have to provide that the goods were to be requisitioned by or on behalf of the Commonwealth.

The material provisions of reg. 59 of the *National Security* (*General*) *Regulations* and reg. 9 of the *National Security* (*Food Control*) *Regulations* conferred upon Ministers very wide sub-delegated legislative powers which, if used to control regulate and direct the production distribution sale purchase and use of food in a general manner, would

(1) (1925) P. 61, at pp. 65, 66.

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not have resulted in the compulsory acquisition of the food by the Commonwealth or any other body or person. But an order compelling particular persons to deliver specific food to the Commonwealth or to some other body or person would, in my opinion, be legislation providing for the compulsory acquisition of that food by the Commonwealth or other body or person within the meaning of s. 51, pl. (xxxi.) of the Constitution. Accordingly the pineapples in the present case were acquired compulsorily either by the Commonwealth or the canneries.

It is perhaps unnecessary finally to decide whether the acquisition was by the Commonwealth or the canneries, because s. 51, pl. (xxxi.) of the Constitution is not limited to the acquisition of property by the Commonwealth but extends to the acquisition of property for any purpose in respect of which the Commonwealth Parliament has power to make laws. The placitum requires that whenever the Parliament exercises such a legislative power, and the legislation provides for the acquisition of property from any State or person, the legislation must provide just terms for the acquisition, otherwise the acquisition is unlawful. The three orders under discussion were delegated legislation under the defence power. The canneries had no power to compel the growers to deliver their pineapples to the canneries. But the Commonwealth Parliament or its authorized delegate could legislate to give the canneries compulsory powers to acquire fruit required to be canned in order to supply the needs of the armed forces. This was a purpose (that is of defence) in respect of which the Commonwealth Parliament had power to make laws, and it was necessary that the legislation should provide just terms for the acquisition whether the pineapples were compulsorily acquired by the Commonwealth or by the canneries.

But I agree with the learned Chief Justice of Queensland that the Orders were in pith and substance legislation for the acquisition of the plaintiff's property in the pineapples by the Commonwealth. The effect of the orders if valid would have been to transfer the property to the Commonwealth when they were delivered by the growers to the loaders of the C.O.D. The growers then lost the possession and all control of the disposition of their pineapples, (even those which were not accepted at the factory). They could not prevent the pineapples being delivered to the canneries. They could not control the manner and date of delivery.

The specifications provided that the C.O.D. would forward the pineapples to the canneries on behalf of the growers, and that acceptance and delivery would take place at the factory. But the C.O.D. was not the agent of the growers once the pineapples had

been received by their loaders. An agent is a person who is authorized by his principal to act on his behalf, and who is usually entitled to receive some remuneration from his principal for his services. The C.O.D. was not authorized by the growers to act on their behalf and was not entitled to receive any remuneration from them. The price payable to the plaintiff was a price f.o.r. and the C.O.D. had to recover its handling charges from the factories. The C.O.D. paid the growers for their pineapples, and was in general reimbursed by the factories, but in one instance in August or September 1943, when the directions given to the growers resulted in the factories being over supplied, and the surplus pineapples had to be dumped, it was the Commonwealth which reimbursed the C.O.D. for the payments which they had made to the growers for these pineapples, amounting apparently to £1,200.

If the C.O.D. had been the agent of the growers, the growers would have been entitled to give the C.O.D. instructions with regard to the pineapples, but the C.O.D. received its instructions from the Commonwealth. The C.O.D. was in fact, as the circular stated, the agent of the Commonwealth, and it was as such agent that they received the pineapples from the growers and delivered them to the canneries. In these circumstances the provision that the place of delivery and acceptance was at the factory could only operate to confine the rights of the growers to be paid for their fruit to those pineapples which on arrival at the factory were found to conform to the standards laid down. In form the canneries purported to acquire the pineapples from the grower, and to supply the manufactured products to the Commonwealth, but in substance and reality the C.O.D. acquired possession of the pineapples on behalf of the Commonwealth, and delivered them to the canneries as the property of the Commonwealth, and the Commonwealth arranged for the canneries to manufacture the pineapples, which it provided, into canned goods to be subsequently disposed of in accordance with its directions.

I also agree with his Honour that the first two orders did not provide just terms within the meaning of pl. (xxxi.). They provided that the price to be paid to the growers should be such price as should be determined by the Fruit Industry Sugar Concession Committee. The function of this Committee was to determine what would be a reasonable minimum price for the canneries to pay for pineapples voluntarily sold by the growers to the canneries so that the canneries would qualify for a rebate upon refined sugar which they used in the manufacture of the pineapples into fruit products. The price which it fixed for this purpose would not necessarily be a price which would be just compensation for the compulsory acquisition of the growers' fruit.

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A person who is compulsorily deprived of his property is entitled to receive by way of compensation the equivalent in money for its value to him. The value of pineapples grown for sale to the grower is their value for sale when they are ripe. Where there is an ordinary market, the best evidence of the value of such a commodity at the date of acquisition is the price which it would have brought if sold in the market on that date (*Vyricherla Narayana Gajapatiraju* v. *Revenue Divisional Officer, Vizagapatam* (1)). If there is no such market then the value must be determined by estimating the price which would be agreed upon if the grower as a reasonably willing vendor entered into friendly negotiations with a reasonably willing purchaser on the date of acquisition. Recent authorities on this subject are cited in *Abrahams* v. *Federal Commissioner of Taxation* (2). To these may be added *Municipal Council of Colombo* v. *Kuna Mana Navanna Suna Pana Letchiman Chettiar* (3); *Short* v. *Treasury Commissioners* (4). In the present case there were markets in the various States in which the growers could have sold their pineapples during the relevant period, and there is ample evidence of the prices for which the plaintiff could have sold his pineapples in these markets. But the Fruit Industry Sugar Concession Committee was not directed to assess just compensation for the compulsory acquisition of the growers' fruit. It was not concerned with the market value of their fruit. Its function was not to assess compensation, but to fix a price for a different purpose altogether, and price and compensation do not necessarily mean the same thing: *Johnson Fear & Kingham & The Offset Printing Co. Pty. Ltd.* v. *The Commonwealth* (5). Further, as *Starke* J. said in *Bear* v. *Official Receiver* (6): "It is contrary to fundamental principles of justice that the subject should be affected in his person or his estate without being heard." The assessment of compensation affects rights of property and is a judicial function to which these principles apply: *R.* v. *Hendon R. D. C.*; *Ex parte Chorley* (7); *Australian Apple & Pear Marketing Board* v. *Tonking* (8); *Johnson Fear & Kingham* v. *The Commonwealth* (9). The Committee was therefore bound to give the growers an opportunity of being heard either by oral or written representation before it fixed the price. Similar objections apply to the growers being bound to accept the price fixed by Prices Regulation Order No. 1512 as just compensation.

(1) (1939) A.C. 302, at p. 312.
(2) (1944) 70 C.L.R. 23, at p. 31.
(3) (1947) A.C. 188.
(4) (1947) 2 All E.R. 298.
(5) (1943) 67 C.L.R. 314, at pp. 333, 334.
(6) (1941) 65 C.L.R. 307, at p. 314.
(7) (1933) 2 K.B. 696, at p. 704.
(8) (1942) 66 C.L.R. 77.
(9) (1943) 67 C.L.R. 314.

For these reasons I am of opinion that none of the plaintiff's pineapples delivered under the first two orders were lawfully acquired by the Commonwealth. I am also of opinion that the pineapples delivered under the third order were not requisitioned within the meaning of reg. 12 of the Food Control Regulations so as to give the plaintiff an action for compensation against the Commonwealth, and that none of these pineapples were lawfully acquired by the Commonwealth.

The crucial question is therefore whether the Commonwealth is liable in tort for the wrongful conversion of the plaintiff's goods. On this question the learned Chief Justice of Queensland said :— "The plaintiff delivered his pineapples in conformity with the Orders in the belief that the Orders were valid and binding on him. In doing so he acted under a mistake of law. He made no protest against delivering his pineapples in conformity with the Orders. He did not at any time act under any physical compulsion of the defendant to deliver his pineapples. He delivered his pineapples voluntarily. In this state of the facts I am unable to see that he has any claim in tort on the basis that the defendant wrongfully converted his pineapples."

I agree with his Honour that the plaintiff did not deliver the pineapples to the C.O.D. under duress in the strict sense, that is, under physical compulsion. But I cannot agree that the plaintiff necessarily delivered his pineapples to the C.O.D. voluntarily because he believed that the orders were valid and binding on him. It is clear that the plaintiff would have preferred to sell as many of his pineapples as he could in the markets, and only sell the balance to the canneries. There is evidence that the plaintiff was objecting to the orders and questioning their validity. But if he refused to deliver his pineapples and the orders were valid, he became liable to be prosecuted summarily or on indictment under s. 10 of the *National Security Act* and upon conviction to be fined or imprisoned or both. There is also evidence that the Commonwealth was enforcing the orders by directing the railways not to carry, and agents in the markets not to sell, the pineapples of growers who were not delivering their proper proportion of pineapples to the canneries. The plaintiff was therefore forced by the Commonwealth into the position that the Commonwealth had ordered him not to dispose at all of a highly perishable commodity without its authority, and as a condition of authorizing him to sell any of the commodity in the markets had required him to forward a certain proportion of the commodity to the C.O.D. for delivery to the canneries. Further the Commonwealth was in a position to enforce compliance with this condition

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by the control which it was able to exercise over the C.O.D., the canneries, the railways, and the selling agents in the markets. The whole purpose of the orders was to compel the growers to deliver the proper proportion of their pineapples to the canneries. They were not requested to deliver them voluntarily. It is therefore difficult for the Commonwealth to assert that what it intended should be an act of compulsion was complied with voluntarily. As *Abbott* C.J. said in *Morgan* v. *Palmer* (1) in a passage cited with approval by *Scrutton* L.J. in *Brocklebank Ltd.* v. *The King* (2): "If one party has a power of saying to the other, 'That which you require shall not be done except upon the conditions which I choose to impose,' no person can contend that they stand upon anything like an equal footing." In such circumstances, as *Avory* J. said in the court below in *Brocklebank Ltd.* v. *The King* (3), "compulsion is apparent from the circumstances of the case."

I agree with his Honour that if the plaintiff had delivered his pineapples to the C.O.D. under protest he would have been in a stronger position, but there is no magic in a protest for, as *Buckley* L.J. pointed out in *Maskell* v. *Horner* (4), a protest simply means that "a further factor is added which goes to show that the payment (in this case delivery) was not voluntary." In *Furphy* v. *Nixon* (5) this Court held that a payment by a purchaser in excess of the money legally due and payable under a contract for the purchase of land under an unjustifiable threat by the vendor that he would rescind the contract was an involuntary payment, although the vendor had previously refused to accept a payment made under protest. In *Brocklebank's Case* (6) on appeal *Bankes* L.J. said: "The payment" (here delivery) "is best described, I think, as one of those which are made grudgingly and of necessity, but without open protest, because protest is felt to be useless." I think that the evidence establishes that the plaintiff delivered his pineapples to the C.O.D. under the pressure of an illegal demand made under the colour of a valid law, and that Mr. *Barwick* is entitled to rely on principles analogous to those stated in *Maskell* v. *Horner* (7). Lord *Reading* C.J. said (8) that:—"If a person with knowledge of the facts pays money, which he is not in law bound to pay, and in circumstances implying that he is paying it voluntarily to close the transaction, he cannot recover it. . . . If a person pays money, which he is not bound to pay, under the compulsion of urgent and pressing necessity or of seizure, actual or threatened, of

(1) (1824) 2 B. & C. 729, at p. 735 [107 E.R. 554, at p. 556].
(2) (1925) 1 K.B. 52, at p. 67.
(3) (1924) 1 K.B. 647, at p. 653.
(4) (1915) 3 K.B. 106, at p. 124.
(5) (1925) 37 C.L.R. 161.
(6) (1925) 1 K.B., at p. 62.
(7) (1915) 3 K.B. 106.
(8) (1915) 3 K.B., at p. 118.

his goods he can recover it as money had and received. . . . The payment is made for the purpose of averting a threatened evil and is made not with the intention of giving up a right but under immediate necessity and with the intention of preserving the right to dispute the legality of the demand."

There is no evidence that I can discover that the plaintiff delivered the pineapples to the C.O.D. or accepted the prices fixed by the Fruit Industry Sugar Concession Committee voluntarily, or that he intended to close the transaction or give up his right to dispute the legality of the demands or his right to damages if the demands were unlawful. In *Grainger* v. *Hill* (1) *Tindal* C.J. said that "taking the property of another without his consent, by an abuse of the process of the law, must be deemed a wrongful taking." In *Caxton Publishing Co.* v. *Sutherland Publishing Co.* (2) Lord *Porter* said: "Conversion consists in an act intentionally done inconsistent with the owner's right, though the doer may not know or intend to challenge the property or possession of the true owner."

Therefore the dealing with the plaintiff's pineapples by the C.O.D. and the canneries on behalf of the Commonwealth, since it was done without the consent of the plaintiff and without legal justification, was a conversion of the plaintiff's property in the goods.

It is not disputed that if the taking was tortious the amount of damages to which the plaintiff is entitled is the difference between what he has been paid and the fair market value of his pineapples. The plaintiff delivered more pineapples than demanded under the Orders, but he cannot claim damages for the excess.

His Honour has found that the difference in question for the pineapples delivered pursuant to these demands is three hundred and twenty-four pounds four shillings and five pence.

In my opinion the appeal should be allowed, the judgment below set aside and judgment entered for the plaintiff for the sum of three hundred and twenty-four pounds four shillings and five pence. The defendant should pay the costs of the plaintiff of the action and of this appeal.

Appeal dismissed with costs except additional costs incurred by appellant by reason of the transfer of the hearing of the appeal to Sydney, which additional costs as between solicitor and client are to be paid by the respondent to the appellant. Costs to be set off.

J. B.

(1) (1838) 4 Bing. (N.C.) 212, at p. 221 [132 E.R. 769, at p. 773].

(2) (1939) A.C. 178, at p. 202.