H. C. OF A. 1952.

GEORGE v. FEDERAL COMMISSIONER OF TAXATION.

Dixon C.J. McTiernan J. Williams J. Webb J. Fullagar J.

purposes of the statute. To infer from the presence of s. 10 (2) in the statute that the wide words of s. 12 (1) are to be read as excluding a power or function if according to the express terms of a provision of the statute it requires, or depends upon an exercise of discretion or judgment would be to defeat the administration of the Act. There may be matters depending upon the opinion, belief or state of mind of the commissioner and second commissioner which because of their character do not fairly fall within the description " power or function " in s. 12 (1). But it seems obvious that these words were intended to bear their wide natural meaning unrestricted by any inference from s. 10 (2) of the kind suggested by the rule of interpretation, *expressio unius est exclusio alterius*. Of this rule *Wills* J. in a judgment upheld in the House of Lords (*Colquhoun* v. *Brooks* (1) ) said :—" I may observe that the method of construction summarised in the maxim ' Expressio unius exclusio alterius ' is one that certainly requires to be watched. Perhaps few so-called rules of interpretation have been more frequently misapplied and stretched beyond their due limits. The failure to make the ' expressio ' complete very often arises from accident, very often from the fact that it never struck the draftsman that the thing supposed to be excluded needed specific mention of any kind ; and the application of this and every other technical rule of construction varies so much under differing circumstances, and is open to so many qualifications and exceptions, that it is rarely that such rules help one to arrive at what is meant."

In the present case we are concerned with the function of assessing taxpayers. It has already been pointed out that s. 166 and s. 167 are not independent, but together give the directions which the assessing officer must pursue. The discretion or judgment involved in s. 167 forms a practically inseparable part of that function. It seems to be clearly within the contemplation of s. 12 (1) that such a discretion or judgment should be included in the delegation of the duty of assessing taxpayers. Any other view would make it impossible to carry on the work of the Department of Taxation. But in any case the question whether the right officer has applied his mind to the question whether the taxpayer's returns are satisfactory within s. 167 (*b*) is not a question left open by s. 177. As already has been said, ss. 166 and 167 are together concerned with the process of ascertaining the taxpayer's taxable income and the consequent tax. The clear policy of s. 177 is to distinguish between the procedure or mechanism by which the taxable income and tax is ascertained or assessed on

(1) (1887) 19 Q.B.D. 400, at p. 406 ; 14 App. Cas. 493.

the one hand and on the other hand the substantive liability of the taxpayer. The former involves the due making of the assessment. The production of the notice of assessment is conclusive evidence of the due making of the assessment. It would, for example, be absurd to suppose that in an action brought by the commissioner under s. 209 to recover unpaid tax due upon such an assessment as those now under appeal, evidence must be given for the plaintiff that the right officer was not satisfied under s. 167 (*b*) and formed a judgment as to the amount of the income to be taxed. Yet that is the consequence of the argument. To avoid this consequence, amounting as it does to a *reductio ad absurdum* of the argument, it was suggested that under s. 177 (1) the amount of the assessment was conclusive, although fulfilment of what the argument treated as conditions precedent to the power given by s. 167 to make the assessment were not covered by the words " due making ". But this would mean that *ex hypothesi* the power to assess the tax was not well exercised. Accordingly the assessment would be bad and there would be nothing to be treated as good. Since tax is only due after it is " assessed " (see, for example, s. 204) a bad assessment would not do, however conclusive as to the amount of the tax a notice of assessment might be. Obviously the " due making of the assessment " was intended to cover all procedural steps, other than those if any going to substantive liability and so contributing to the excessiveness of the assessment, the thing which is put in contest by an appeal.

The decision of *Kitto* J. refusing an order for particulars and dismissing the summonses was right.

The appeals should be dismissed with costs.

FULLAGAR J. I am a party to the judgment which has just been delivered. I wish, however, to add for myself that, in my opinion, apart altogether from any question of burden of proof, the application for " particulars " was rightly rejected by *Kitto* J. It was not really an application for particulars at all. The subject matter of the demand for information was rather subject matter for interrogatories, and I can see no warrant for ordering interrogatories to be answered in a case of this type, even if I am to assume that the Court has power to make such an order, which I doubt. It is common practice, in the Court lists and in the Law Reports to entitle a taxation appeal as if it were a proceeding between a named taxpayer and the Commissioner of Taxation. But the Commissioner is only nominally a " party " to the proceedings. The proceedings are really proceedings between Crown and subject.

H. C. OF A. 1952. GEORGE v. FEDERAL COMMISSIONER OF TAXATION.

A similar position exists under the *Patents Act* 1952 and the *Trade Marks Act* 1905-1948. The substance of the position in taxation cases is not affected by the fact that the Commissioner is given *eo nomine* a right of appeal from decisions of the Board of Review. The Commissioner is an officer who, in the performance of his statutory functions, does acts which prima facie create an obligation as between the Crown and a particular subject, and the statute provides means whereby the subject may test before a court or a board the question whether the Commissioner has acted according to law. In proceedings before court or board the Commissioner's acts are called in question, but he is in no real sense a party. This does not mean that he is not, in many respects, subject to orders of the court, but it does mean that certain orders which are quite appropriate as between parties to an action are quite inappropriate as between an appellant taxpayer and the Commissioner.

*Appeals dismissed with costs.*

Solicitors for the appellant, *Garland, Seaborn & Abbott.*

Solicitor for the respondent, *D. D. Bell*, Crown Solicitor for the Commonwealth.

J. B.

[HIGH COURT OF AUSTRALIA.]

BRADSHAW . . . . . APPELLANT;
DEFENDANT,

AND

GILBERT'S (AUSTRALASIAN) AGENCY (VIC.) PROPRIETARY LIMITED . . . RESPONDENT.
PLAINTIFF.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1952.

MELBOURNE, *Oct.* 13, 14; *Nov.* 3.

Dixon C.J., McTiernan and Taylor JJ.

*Price Control—Sale of goods—State statute—Continuance in operation of orders made under Commonwealth Prices Regulations—Validity—Applicability to sale of goods destined for export—Consistency with Commonwealth regulations relating to exports and foreign exchange—Validity of transactions in contravention of a statute—Prices Regulation Act* 1948 (*Vict.*) (*No.* 5310), *ss.* 4 (1), 8 (2), 9 (1) (*a*), 25—*Banking* (*Foreign Exchange Control*) *Regulations* (*S.R.* 1946, *No.* 191—*S.R.* 1952, *No.* 80)—*Customs* (*Prohibited Exports*) *Regulations* (*S.R.* 1935, *No.* 2—*S.R.* 1951, *No.* 122).

Section 4 (1) of the *Prices Regulation Act* 1948 (Vict.) provides: "All declarations . . . made published or given under the corresponding previous Commonwealth Regulations which are in force at the commencement of this Act shall, for the purposes of this Act, and except so far as they are inconsistent with this Act, be deemed to have been made published or given under this Act and subject to this Act, until repealed amended or revoked under this Act shall be deemed to have force and effect accordingly as if made published or given under this Act."

*Held* by *Dixon* C.J. and *Taylor* J. that s. 4 (1) validly operated on orders which had a Commonwealth-wide operation under the regulations, the effect of s. 4 (1) being to give the orders operation so far as they applied to Victoria.

Section 25 (1) (*a*) of the Act provided that no person should sell or offer for sale any declared goods at a greater price or rate than the maximum price or rate fixed in relation thereto. Section 25 (2) provided that, in addition to any other penalty which might be imposed for a contravention of s. 25 (1), the court might order the defendant to refund to the purchaser

H. C. OF A. 1952.

BRADSHAW v. GILBERT'S (AUSTRALASIAN) AGENCY (VIC.) PTY. LTD.

of the goods the difference between the maximum price or rate so fixed and the price or rate at which the goods were sold.

*Held* by *Dixon* C.J. and *Taylor* J. (*McTiernan* J. dissenting) that s. 25 (1) applied to transactions in respect of goods where the selling was part of or for purposes of or in the course of foreign trade.

*Held* further by *Dixon* C.J. and *Taylor* J. that the *Prices Regulation Act* 1948 was not repugnant to any of the provisions of the *Banking* (*Foreign Exchange Control*) *Regulations* made under the *Banking Act* 1945 or of the *Customs* (*Prohibited Exports*) *Regulations* made under the *Customs Act* 1901-1951; and that a sale or contract of sale in breach of s. 25 (1) of the *Prices Regulations Act* 1948 was void.

Observations of *Jordan* C.J. in *Bassin* v. *Standen*, (1945) 46 S.R. (N.S.W.) 16; 62 W.N. 238, referred to.

Decision of the Supreme Court of Victoria (*Barry* J.) reversed.

APPEAL from the Supreme Court of Victoria.

On 7th January 1949 Gilbert's (Australasian) Agency (Vic.) Pty. Ltd. agreed to sell to Norman Wilfred Bradshaw 127 tons of battery scrap lead, with export licence at the price of £98 per ton f.o.b. Melbourne. The parties contemplated that the lead would be exported, and the dealings took place on that footing. At this time battery scrap lead was a declared commodity within s. 9 of the *Prices Regulation Act* 1948 (Vict.) and the price at which it could be sold in Victoria did not exceed £22 per ton. Subsequently the purchaser refused to go on with the contract, assigning as his reason, that it was illegal. Ultimately the vendor sold the lead to another purchaser at a price which was less by £1,861 6s. 6d. than the price which the appellant had agreed to pay, and brought an action to recover the sum of £1,861 6s. 6d. as damages for breach of the said contract.

This action was heard by *Barry* J., who found that at the date of the making of the contract the scrap lead was intended for export and had been appropriated to that purpose, application having been made for the necessary licences on 23rd December 1948, and that the parties contemplated that the lead would be exported. His Honour held that the *Prices Regulation Act* 1948 did not, on its true construction, embrace a contract with respect to goods that are genuinely intended for, and appropriated to, export, and accordingly, after rejecting part of the plaintiff's proof of damage, gave judgment for the plaintiff for £1,607 6s. 6d. with costs.

Against this judgment the defendant appealed to the High Court of Australia.

*M. V. McInerney*, for the appellant. The power of the Victorian Parliament to legislate is to make laws " in and for Victoria ". See *The Constitution Act* (18 & 19 Vict. c. 55), Schedule (1), s. 1. A Victorian law as to prices is valid if it is capable of being a law " in and for Victoria ". Legislation which is directed to regulation of the price of goods which are in Victoria and which are sold in Victoria for export, either to other States of the Commonwealth of Australia or to countries outside Australia, has a sufficient nexus with the welfare of the Victorian community to be a valid exercise of the powers of the Victorian Parliament. In the present case the parties and the goods were in Victoria, and all parts of the transaction took place in Victoria. The decision in *Forster* v. *Forster* (1) is not applicable here, since no question of conflict with the principles of international law arises. *Hall* v. *McMurtrie & Co. Pty. Ltd.* (2) is likewise not applicable because in that case the object of the Act did not require it to apply to shoes for export from Victoria, since the selling of poor quality shoes on the Sydney market did not touch the Victorian public. But in the present case the price of goods for export does affect the Victorian public. The *Banking* (*Foreign Exchange Control*) *Regulations* are legislation on a different subject matter and do not purport to control the contract, but merely control the seller as to the mode of collection of payment. This was not a contract for the sale of goods for export. Export requires that a ship should have cleared the port of shipment and it does not begin until some person is contractually bound to some other person to send goods outside the port of shipment to or to the disposition of that other contracting party. The mere fact that a contract is f.o.b. does not require the buyer to export, or even to take delivery on board. If the *Prices Regulation Act* 1948 (Vict.) applies to this contract then clearly the price was in excess of the permitted price, and it follows that the contract is illegal, and the action on the contract must fail.

*C. I. Menhennitt* (with him *B. L. Murray*), for the respondent. The contract was for the export of goods from Victoria. By the *Banking* (*Foreign Exchange Control*) *Regulations* a licence was required for the export of the goods, and by the *Customs* (*Prohibited Exports*) *Regulations* the approval of the Department of Supply and Shipping. Once the approval was obtained the goods fell into the category of goods for export. The *Prices Regulation Act* 1948 (Vict.), does not on its true construction apply to a sale of goods for export. It was intended to regulate internal prices in Victoria and to protect

(1) (1907) V.L.R. 159.

(2) (1919) V.L.R. 296.

H. C. OF A. 1952. BRADSHAW v. GILBERT'S (AUSTRALASIAN) AGENCY (VIC.) PTY. LTD.

the Victorian consumer. See ss. 2, 8 (4), 9 (2) (*b*). The fact that export prices do have an effect on the internal price level is not significant when regard is had to the fact that there was in operation a system of export control operated by the Commonwealth. The test is not merely whether the contract is made in Victoria but, whether in addition, the goods are to be consumed in Victoria. Once the goods fall into the overseas market they go outside the range of the Act.

[TAYLOR J. Could not the commissioner fix a special price for export goods under s. 9 (2) (*a*) of the Act? That would explain why reg. 25 of the *National Security* (*Prices*) *Regulations* was not included in the Act.]

The reason why reg. 25 is not included is that Parliament acted on the basis that sales for export would not be covered by the Act. *Hall* v. *McMurtrie & Co. Pty. Ltd.* (1) is in point here.

[DIXON C.J. If the Court adopted the "intended for export" test what objective fact could be taken by the Court? ]

I concede the difficulty of determining that.

[DIXON C.J. The highest you put it was that it was commercially certain that these goods would be exported.]

It ought to be implied as a term of the contract that the goods were to be exported. The court should have regard to the fact that the Banking Regulations operated so as to ensure that the purchase price was brought into the country. The Act is inconsistent with Commonwealth law. The policy of Commonwealth laws is to obtain as high a price as possible from the overseas consumer. Although Commonwealth legislation does not cover the same field yet this Act collides directly with it.

*Colvin* v. *Bradley Bros. Pty. Ltd.* (2) shows that it does not matter that the laws are on different subjects. See per *Latham* C.J. (3). The Commonwealth regulations were not valid at the date of proclamation of the Act. Accordingly the *Prices Regulation Act* 1948 while purporting to adopt declarations &c. given under those regulations did not in fact do so. [He referred to *Johnson* v. *James Yates Pty. Ltd.* (4).]

[TAYLOR J. referred to *Brown* v. *Green* (5).]

The Commonwealth regulations dealt with sales within the Commonwealth. On the ordinary principles applicable there is no warrant for giving it any more limited operation. See *Bank*

(1) (1919) V.L.R. 296.
(2) (1943) 68 C.L.R. 151.
(3) (1943) 68 C.L.R., at pp. 157, 158.
(4) (1950) 24 A.L.J. 237.
(5) (1951) 84 C.L.R. 285.

*of New South Wales* v. *The Commonwealth*, per *Dixon* J. (1); *R.* v. *The Commonwealth Court of Conciliation and Arbitration* (*Boot-makers' Case*), per *Isaacs* J. (2); *Victorian Chamber of Manufactures* v. *The Commonwealth* (3). No satisfactory test can be devised to limit the operation of the declarations &c. which are taken over under the *Prices Regulation Act* 1948 to Victoria. It is not competent for the Victorian Parliament to pass legislation having an extra-territorial effect. See *McLeod* v. *Attorney-General for N.S.W.* (4) and *Mynott* v. *Barnard* (5). Even if the contract is in contravention of the *Prices Regulation Act* 1948, then it is not invalidated thereby. Section 25 (2) of the Act recognizes that the transaction is valid and therefore gives rights to the innocent party which he would not have apart from it. [He referred to *Bassin* v. *Standen* (6).]

[DIXON C.J. One view of the matter is that the real principle is that the court must refuse to entertain an action founded on an illegal cause of action.]

There would be far-reaching consequences to many transactions if the contract were held illegal.

*M. V. McInerney*, in reply.

*Cur. adv. vult.*

The following written judgments were delivered:—

Nov. 3.

DIXON C.J. AND TAYLOR J. This is an appeal from the judgment of the Supreme Court of Victoria in an action in which the plaintiff, the respondent on the appeal, sued the appellant to recover damages for the wrongful repudiation of a contract whereby the respondent agreed to sell and the appellant agreed to purchase 127 tons of scrap battery lead at the price of £98 per ton f.o.b. Melbourne. On the trial it was not disputed by the appellant that such a contract had been made or that he had refused to accept or pay for the subject goods but the contention was raised that the contract constituted a breach of s. 25 (1) of the *Prices Regulation Act* 1948 (Vict.) and that, therefore, the action was not maintainable. The learned trial judge rejected this contention and in the result entered judgment for the respondent for £1,607 6s. 6d. This amount is less by £2 per ton than the difference between the contract price and the amount which the respondent was able to obtain upon a sale

(1) (1948) 76 C.L.R. 1, at pp. 369 et seq.
(2) (1910) 11 C.L.R. 1, at p. 54.
(3) (1943) 67 C.L.R. 413, at pp. 418, 424, 428.
(4) (1891) A.C. 455.
(5) (1939) 62 C.L.R. 68.
(6) (1945) 46 S.R. (N.S.W.) 16; 62 W.N. 238.

H. C. OF A. 1952.

BRADSHAW v. GILBERT'S (AUSTRALASIAN) AGENCY (VIC.) PTY. LTD.

Dixon C.J. Taylor J.

after repudiation. But, in view of the opinion which we have formed of the matter, it is unnecessary to discuss the matters which led the learned judge to assess damages in this somewhat smaller amount.

The first relevant step in the fixation of a maximum selling price for scrap battery lead was taken under the *National Security* (*Prices*) *Regulations*. In the exercise of the powers conferred upon him by those regulations the Commonwealth Prices Commissioner purported on 2nd February 1948 to fix and declare the maximum price at which scrap battery lead might be sold at £22 per ton. But prices for the sale of goods in the State of Victoria ceased to be controlled under those regulations on 20th September 1948, and, on that date, the *Prices Regulation Act* of that State came into operation. The contract sued upon was made after this date and before any specific fixation under that Act of a maximum selling price for scrap battery lead. General provision had, however, been made by s. 4 (1) of the Act and, subsequently, by the first prices regulation order made thereunder, for keeping in operation in Victoria formerly existing prices regulation orders made under the Commonwealth regulations, but the respondent argued on this appeal that these general provisions were not appropriate to effect their apparent purpose.

Section 4 (1) of the Act is in the following terms : " All declarations orders requirements determinations delegations authorities notices notifications applications and consents made published or given under the corresponding previous Commonwealth Regulations which are in force at the commencement of this Act shall, for the purposes of this Act and except so far as they are inconsistent with this Act be deemed to have been made published or given under this Act and, subject to this Act, until repealed amended or revoked under this Act shall be deemed to have force and effect accordingly as if made published or given under this Act ; and any reference in any such declaration order requirement determination delegation authority notice notification application or consent to any provision of the corresponding previous Commonwealth Regulations shall accordingly with such adaptations as are necessary be construed as a reference to the corresponding provision of this Act." Two questions in relation to the operation of this sub-section arose on the appeal. The first proposition was that it did not accomplish the adoption of any prices regulation orders made under the corresponding previous Commonwealth regulations since, in view of the extent of the contraction of the Commonwealth legislative power with respect to defence at the relevant time, neither the regulations

nor any orders thereunder could be said to be " in force ". The second proposition was concerned with the form of the relevant Commonwealth prices regulation order and it was argued firstly, that it was not competent to the Parliament of the State of Victoria to provide that orders having a Commonwealth-wide operation should " be deemed to have been made published or given under " the Act, and " deemed to have force and effect accordingly as if made published or given under " the Act and, secondly, that assuming, in accordance with the provisions of s. 4 (1), that the Commonwealth order was made under s. 9 (1) (*a*) of the Victorian Act, it could not be valid because it was an order fixing the maximum price of scrap battery lead for the whole of the Commonwealth, a thing which s. 9 (1) (*a*) does not contemplate. The order, it is said, cannot be read down because it intended a uniform price throughout the Commonwealth and it is therefore incapable of being confined within the limits of s. 9 (1) (*a*).

The first point, which is substantially the same as that which arose in *Brown* v. *Green* (1), is conclusively determined against the respondent by the decision of the majority of the Court in that case, and we have nothing to add to the views then expressed.

The first aspect of the second point raises questions which did not arise in that case but, upon consideration, we do not think that the respondent's contentions on this aspect of the matter are sound. We see no reason why a prices regulation order which is not, in express terms, given a Commonwealth-wide operation should not " be deemed to have been made published or given under the Act ". Nor, do we see any reason why it should not " be deemed to have force and effect accordingly as if made published or given under the Act ". In our view, s. 4 (1) merely takes the previous Commonwealth orders in the form in which it finds them and gives to them, according to their tenor, such force and effect as if they had been made under the Act. Accordingly, we are of the opinion that at all material times there was, by reason of the operation of s. 4 (1) a lawfully fixed maximum selling price for the commodity in which the parties dealt, and it is, therefore, unnecessary to consider the somewhat doubtful questions which arise with respect to the validity of the relevant portion of the first general prices regulation order made under the Act.

The answer to the remaining aspect arising under s. 4 (1) is rather indicated by what we have already said. Section 4 (1) contains, by implication, a modification relevant to the application of Commonwealth-wide federal orders best expressed by some such words as " in so far as they apply to Victoria ".

(1) (1951) 84 C.L.R. 285.

H. C. OF A. 1952. BRADSHAW v. GILBERT'S (AUSTRALASIAN) AGENCY (VIC.) PTY. LTD. Dixon C.J. Taylor J.

The contract between the parties is evidenced by two letters of 7th and 8th January 1949. In the first of these, the appellant confirmed his acceptance of the offer of 127 tons of lead battery plates at £98 per ton f.o.b. Melbourne, and in the second, the respondent acknowledged receipt of the appellant's letter and advised that, although it had a licence (i.e. an export licence), for the particular parcel of 127 tons, it would be " to both our interests to have it shipped with as little delay as possible, owing to the embargo introduced by the Federal Government this day ". Within a matter of a few days, it became evident to the appellant that the overseas market for this commodity was deteriorating and thereupon he intimated to the respondent that as the transaction was illegal it could not " proceed further ".

In these circumstances, three questions arose before the learned trial judge :—(1) Whether the *Prices Regulation Act* on its true construction applies to the sale of goods which are destined for export ; (2) If so, whether any relevant portion of the Act is inconsistent with the *Banking* (*Foreign Exchange Control*) *Regulations* made under the *Banking Act* 1945 (Cth.) or with the *Customs* (*Prohibited Exports*) *Regulations* made under the *Customs Act* 1901-1951 ; and (3) Whether the effect of the *Prices Regulation Act* 1948 operates to avoid transactions of sale made in breach of its provisions.

The argument on the first of these questions was, in the main, based upon general considerations of policy. It was contended that it was apparent that the object of the Act was to safeguard consumers in Victoria and that the court should reject any construction which, proceeding beyond this point, would give to the representatives in Victoria of overseas purchasers the benefit of what was intended to be a home consumption price. It was sought to strengthen this argument by reference to the purposes served by the *Banking* (*Foreign Exchange Control*) *Regulations* and the *Customs* (*Prohibited Exports*) *Regulations*, and our attention was drawn to reg. 25 of the *National Security* (*Prices*) *Regulations* which expressly authorised the Commonwealth Prices Commissioner, on application by an exporter of declared goods, to approve of the sale of such goods for export at a price exceeding the maximum price fixed in pursuance of the regulations. These considerations found favour with the learned trial judge, who said : " The primary purpose of the *Prices Regulation Act* was the protection of the people of Victoria from excessive prices, and its main concern was the fixing of prices of goods for use or consumption within Victoria. It is true that the adequacy of the supply of a commodity ordinarily

would have an effect upon the price of that commodity, but the Victorian Parliament has not, for reasons that need no ingenuity to surmise, legislated specifically in respect of the retention of commodities within Victoria. As has been pointed out, there was in existence at the time when the Act was passed effective Commonwealth control over exports, resting upon Commonwealth laws, the validity of which has not been impugned, and the Act omitted the provision of the prototypal *National Security* (*Prices*) *Regulations* that enabled the prices of exports to be fixed by the price-fixing authority. These considerations lead me to the conclusion that the Act should be construed as not embracing within its ambit a contract with respect to goods that were genuinely intended for, and appropriated to, export, and in respect of which the necessary licences and permits were obtained from the relevant Commonwealth authorities ". There could be no doubt upon the evidence that the scrap battery lead in question in this case was intended for export and, finding that this was so, the learned judge went on to express the view that the transaction was thus outside the ambit of the Prices Regulations and that the contention that it was " unenforceable for illegality created by the provisions of that Act must be rejected ".

We regret that we are unable to share this view. Although couched in general terms the relevant provisions of the Act are too clear to be restrained by general considerations of this nature, and, indeed, we should feel, at the very least, a great difficulty in finding any basis upon which the Act could be construed so as to limit its operation in the manner indicated by his Honour. It seems to us quite clear that the only limit to the operation of s. 25 is that it must be taken to deal with sales or offers for sale in *Victoria*; but it must be taken to apply to all sales in Victoria of declared goods in respect of which a maximum price is fixed. Section 8 (2) which provides that the Governor-in-Council may, by notice in the Government *Gazette*, declare any goods to be declared goods for the purposes of Part II. of the Act, clearly extends to all existing or future goods in Victoria (cf. *Victorian Chamber of Manufactures* v. *The Commonwealth* (1)) and the power of the commissioner under s. 9 equally clearly extends to all declared goods. That the *National Security* (*Prices*) *Regulations*, the relevant provisions of which were in identical terms, applied to sales within the Commonwealth of goods intended for export is emphasised by the terms of

(1) (1943) 67 C.L.R. 335.

H. C. OF A. 1952.

BRADSHAW v. GILBERT'S (AUSTRALASIAN) AGENCY (VIC.) PTY. LTD.

Dixon C.J. Taylor J.

reg. 25 itself, and we are unable to see that the omission of such a provision from the Victorian Act can in any way assist the respondent. The reason for its omission may well have been that the word "export" was thought to be an inappropriate term in State legislation of this nature. But the omission of such a provision does not tend to support a more limited construction of the sections to which we have referred. We should add that, whilst we appreciate to the full the reasonableness of the general argument which was addressed to the court on this question it is clear that it is concerned with matters which might well have been thought by the Legislature to be appropriate for the special consideration of the commissioner. There is no doubt that in the exercise of his general powers the commissioner might refrain from fixing maximum prices for goods destined for export, or fix special prices for such goods, or deal with them in some other appropriate way. But we do not think that the considerations which have been advanced can operate to effect a limitation of the powers conferred upon him by the Act in clear and unambiguous language

With respect to the second question, we think it is sufficient to say that an examination of the regulations in question fails to establish any ground for the suggestion that any relevant section of the *Prices Regulation Act* is repugnant to any of their provisions. No doubt, transactions of sale immediately antecedent to export, or sales in Victoria of goods for export, might well be discouraged by the promulgation of fixed prices applying to goods intended for export. But this does not arise from any conflict of legislative provisions, and we are unable to see in the terms of the regulations any support for the respondent's contention.

In support of the argument on the third question, we were referred to the observations of *Jordan* C.J. in *Bassin* v. *Standen* (1). After referring to the general rule that if a particular class of sale is prohibited by statute a purported sale in breach of the prohibition is void, his Honour referred to sub-reg. (1A) of reg. 29 of the *National Security* (*Prices*) *Regulations* which, in terms, corresponds to s. 25 (2) of the *Prices Regulation Act*. Sub-section (1) expressly provides that no person shall sell any declared goods at a greater price than the maximum price fixed in relation thereto whilst sub-s. (2) provides that, in addition to any other penalty that may be imposed for a contravention of sub-s. (1), the court may order the defendant to refund to the purchaser of the goods the difference between the maximum price so fixed and the price

(1) (1945) 46 S.R. (N.S.W.) 16; 62 W.N. 238.

at which the goods were sold. *Jordan* C.J. in referring to reg. 29 (1A) said that: "It may be that this should be regarded as sufficiently indicating an intention that a breach of the regulation shall not avoid the sale, but shall merely subject the vendor to a penalty and to the risk of being ordered to refund to the purchaser the unlawful excess or some part of it" (1). His Honour's observations were, of course, not intended as the expression of a concluded opinion on this point and, indeed, he expressly made this clear. That his Honour correctly stated the prima-facie rule, is quite clear from decisions such as *In re Mahmoud and Ispahani* (2), *Anderson Ltd.* v. *Daniel* (3), and *Montreal Trust Co.* v. *Canadian National Railway* (4). The prohibition imposed by s. 25 is in express terms and the purpose of the prohibition is quite clear, and we have no doubt that, apart from any special problem which may arise because of the terms of sub-s. (2), a sale or contract of sale made in breach of s. 25 must be regarded as void and as being incapable of giving rise to an action for damages in the present form. Further, we are satisfied that sub-s. (2) does not affect this conclusion. It does not seem to us that its provisions operate to displace the presumption that transactions in breach of sub-s. (1) should be treated as void. On the contrary, it seems to have been intended, merely, as an additional penalty upon a seller and as a means of reimbursing an innocent purchaser in appropriate circumstances. The very terms of the sub-section itself indicates that it was an obligation which might be imposed upon a vendor as an additional penalty, and they afford a means of relief to a purchaser which would not be available either upon the view that a sale, in contravention of the section is quite valid or upon the view that it is illegal and void. Consequently, it cannot be assumed, from the presence of the sub-section, that it was not intended that sales in contravention of the sub-section should be treated as valid and subsisting. But whatever the effect of the section with respect to completed sales of goods, it is beyond doubt that the terms of the section preclude a party to an agreement for the sale of declared goods at a price in excess of the maximum price from seeking in a court of law to enforce his contract, or to recover damages for a breach thereof.

Accordingly, we are of the opinion that the appeal should be allowed, the judgment for the plaintiff set aside and judgment entered for the defendant in the action.

(1) (1945) 46 S.R. (N.S.W.), at p. 19; 62 W.N., at p. 239.
(2) (1921) 2 K.B. 716.
(3) (1924) 1 K.B. 138.
(4) (1939) A.C. 613.