See also 96 C.L.R. 35

[HIGH COURT OF AUSTRALIA.]

POULTON . . . . . APPELLANT;
PLAINTIFF,

AND

THE COMMONWEALTH AND OTHERS . RESPONDENTS.
DEFENDANTS,

H. C. OF A. 1952-1953.

1952.
SYDNEY,
July 21-24, 28-31;
Aug. 1, 5, 6;
Nov. 14.

Fullagar J.

1953.
SYDNEY,
Aug. 24-27;
Dec. 16.

Williams, Webb and Kitto JJ.

Constitutional Law (Cth.)—Wool—Acquisition by Commonwealth—Wool commission—Compensation—Appraisement—Wool grower—Wool dealer—Transaction—Basis—Sale, or share in "proceeds"—Action by wool dealer—Distribution of share—Entitlement of wool dealer—Alienation of share—Right of action for tort—Assignability to wool dealer—Federal statute and regulations—Validity—"Just terms"—The Constitution (63 & 64 *Vict. c.* 12), *s.* 51 (*xxxi.*)—*Wool Realization (Distribution of Profits) Act* 1948-1952 (*No.* 87 *of* 1948—*No.* 76 *of* 1952), *ss.* 7 (2) (3) (4), 8 (1) (3), 18, 28, 29—*National Security (Wool) Regulations* (*S.R.* 1939 *No.* 108—*S.R.* 1943 *No.* 88), *regs.* 14, 15, 30 (2).

A transaction between P., a wool dealer, and D., three brothers who were wool growers, was recorded in a document dated 4th November 1942, consisting of a printed form of invoice with handwritten additions. At the head of the document there appeared the printed words "Bought from," followed by the written words "Donlon Bros. of Bara". There followed in print the name of P. who was described as a licensed dealer in wool, hides and skins. The body of the form contained, in handwriting, particulars accounting for a stated total sum of money. At the foot of the document appeared certain printed words with provision for two signatures, and the signature of P. and then one of the D. brothers. The printed words were: "The terms and conditions upon which I have received the above wool from you are that you are not to be liable for any losses that may accrue, and that the wool will be submitted for appraisement either alone or with such other wools as I think fit. The proceeds are to be retained by me in satisfaction of the amount paid to you and for my services and expenses". On the date of the document P. received certain wool from D. and thereafter submitted it for appraisement under the *National Security (Wool) Regulations*. After appraisement P. received and retained the appraised price plus an amount for "adjustment to flat rate parity" in accordance with the wool scheme. The wool was listed as participating wool in the appraisement catalogue, and, consequently, a share of each amount to be distributed under the *Wool Realization (Distribution of Profits) Act* 1948-1952 became payable to the person who supplied that wool for appraisement.

P. brought an action in the High Court against the Commonwealth, the Australian Wool Realization Commission and D., claiming that he was entitled, by virtue of the abovementioned transaction, to all amounts payable under the Act in respect of the wool the subject matter of that transaction.

Held, by *Fullagar* J. and, on appeal, by the Full Court—

(1) The document must be construed as a whole, and, notwithstanding the words " Bought from ", the transaction evidenced by the document was not a sale of the wool by D. to P. P. therefore, never became the owner of the wool. The wool was supplied for appraisement by D. through the agency of P. and it remained the property of D. until it passed to the Commonwealth on final appraisement under the *National Security* (*Wool*) *Regulations*.

(2) The word " proceeds " in the document comprised all moneys which might at any time become payable in consequence of the supply of the wool for appraisement. P., therefore, under the terms of the document, was entitled, as between himself and D., to all moneys payable in respect of the wool under the *Wool Realization* (*Distribution of Profits*) *Act* 1948-1952.

(3) The effect, however, of ss. 8 and 29 of that Act was to deprive P. of any right which he might otherwise have had to receive any moneys payable under the Act in respect of the wool, and to entitle D. to receive and retain all such moneys.

(4) The *Wool Realization* (*Distribution of Profits*) *Act* 1948-1952, including ss. 8 and 29 thereof, is a valid exercise of the legislative power conferred upon the Parliament by s. 51 (vi.) and (xxix.) of the Constitution.

P. claimed, in the alternative, against the Commonwealth, as money had and received by the Commonwealth to his use or to the use of D., a sum equal to the total amount payable in respect of the wool under the *Wool Realization* (*Distribution of Profits*) *Act* 1948. He contended (1) that the *National Security* (*Wool*) *Regulations* were invalid on the ground that they did not give to the suppliers of wool an enforceable right to share in any profit which might ultimately be realized by the Commonwealth in respect of wool supplied, and therefore purported to provide for the acquisition of property on terms which were not just within the meaning of s. 51 (xxxi.) of the Constitution, (2) that the taking of the wool by the Commonwealth was therefore tortious, (3) that P., as owner of the wool, or alternatively as an equitable assignee from D. of the proceeds of any disposition of the wool, might waive the tort and sue for the amount received by the Commonwealth in respect of the wool, (4) that, there being no direct evidence of any amount having been received by the Commonwealth specifically in respect of that wool, the basis of the distribution under the *Wool Realization* (*Distribution of Profits*) *Act* 1948 should be adopted, and a proportion based on appraised price, of the total profit distributable under that Act, attributed to that wool.

Held by *Fullagar* J. and by the Full Court—

(1) The regulations provided just terms of acquisition and were valid.

(2) In any case, the wool was received by the Commonwealth with the consent of the true owner, D., on the terms of the regulations, and there

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was no tortious taking. *McClintock* v. *The Commonwealth* (1947) 75 C.L.R. 1, applied.

(3) Even if the regulations had been invalid, and there had been a tortious taking by the Commonwealth, D.'s right of action in tort could not be assigned at law or in equity, nor did the abovementioned document assign, or purport to assign, any such right of action to P.

Semble: In any case, P.'s claim must fail, because he had not established that the Commonwealth had received in respect of the particular wool any sum in excess of the amount actually paid by the Commonwealth to P. after appraisement.

No enforceable right was conferred upon any person who supplied wool for appraisement by reg. 30 (2) of the *National Security* (*Wool*) *Regulations*. *John Cooke & Co. Pty. Ltd.* v. *The Commonwealth* (1922) 31 C.L.R. 394; (1924) 34 C.L.R. 269, applied.

Meaning of "just terms" in s. 51 (xxxi.) of the Constitution considered.

Decision of *Fullagar* J. affirmed.

APPEAL from *Fullagar* J.

In an action brought in the High Court by way of writ of summons, of date 19th October 1949, by Malcolm Coote Poulton against the Commonwealth of Australia, the Australian Wool Realization Commission, established under the *Wool Realization Act* 1945-1950, and as subsequently amended, George Henry Donlon and William Donlon, of Bara, New South Wales, carrying on business as Donlon Bros. who were sued both personally and as executors of the will of Michael Joseph Donlon deceased, and Robert Donald Bakewell on behalf of himself and all other members of organizations affiliated with the Australian Woolgrowers' Council, the amended statement of claim was substantially as follows:—

1. At all material times the plaintiff Malcolm Coote Poulton carried on business in Mudgee, New South Wales, as a licensed dealer in wool, hides and skins under the *Wool, Hide and Skin Dealers Act* 1935 (N.S.W.) and was a member of the New South Wales Country Wool and Skin Buyers' Association (hereinafter called "the Association").

2. On 28th September 1939 the Governor-General of the Commonwealth of Australia acting with the advice of the Federal Executive Council and purporting to act under the powers conferred by the *National Security Act* 1939 and all other powers him thereunto enabling made and published Statutory Rules No. 108 of 1939 intituled the *National Security* (*Wool*) *Regulations*. These regulations were thereafter amended from time to time but such

amendments are not material to any of the issues raised herein. (The regulations are sufficiently set out in the judgments hereunder).

3. On 4th November 1942 the plaintiff as such licensed dealer in wool received from the defendants Michael Joseph Donlon, George Henry Donlon and William Donlon, of Bara, New South Wales (trading as Donlon Bros.) and who are wool growers in that State a large quantity of wool and at the time of the receipt thereof the plaintiff paid to these defendants the sum of £286 15s. 3d. and in consideration thereof and in pursuance of the agreement made between the plaintiff and those defendants the plaintiff and those defendants executed an instrument in the words following :—

" Church Street, Mudgee

Phones 276 & 48.

4 Nov. 1942

Bought from Donlon Bros.
of Bara. Time 9 a.m.

M. C. Poulton
Licensed Dealer in Wool, Hides & Skins.

---

17 Bales 2 Bags,				
Fleece	Bls	Pcs		
4439 Nett at 15¼			282	1 3
326 Lox	6		8	3 0
			290	4 3
Less Wool Tax			0	9 0
			289	15 3
Less Cartage			3	0 0
			£286	15 3

000202

The terms and conditions upon which I received the above wool from you are that you are not to be liable for any losses that may accrue, and that the wool will be submitted for appraisement either alone or with such other wools as I think fit. The proceeds are to be retained by me in satisfaction of the amount paid to you and for my services and expenses.
Signed M. C. Poulton
Signed M. Donlon
Lamson Paragon Ltd. "

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Thereafter the plaintiff duly delivered the wool to the Central Wool Committee pursuant to the provisions of the regulations and the same was duly appraised and the final appraisement thereof duly completed in the manner prescribed by the regulations.

4. The plaintiff said that by virtue of the execution of that instrument and the agreement herein contained and the payment of the moneys to those defendants the property in and all proceeds of the wool were assigned to the plaintiff by those defendants and alternatively the plaintiff said that by virtue of the matters alleged all proceeds of the wool and all rights to receive it were thereupon assigned by those defendants to the plaintiff.

5. On 4th October 1949 the plaintiff gave notice of the assignment to each of the defendant the Commonwealth of Australia and the defendant the Australian Wool Realization Commission in writing in the words and figures following:

"I act for M. C. Poulton of Church Street Mudgee, a licensed Wool Broker. On 4th November 1942 he received a quantity of wool from Messrs. Donlon Bros. of Bara, Woolgrowers, and at the time of such receipt Messrs. Donlon Bros. executed the following instrument:—

'Church Street, Mudgee
4 Nov. 1942

Phones 276 & 48
Bought from Donlon Bros.
of Bara.

Time 9 a.m.

M. C. Poulton
Licensed dealer in Wool, Hides & Skins.

---

17 Bales 2 Bags

Fleece	Bls	Pcs.			
4439 Nett at 15¼			282	1	3
326 Lox	6		8	3	0
			290	4	3
Less Wool Tax			0	9	0
			289	15	3
Less Cartage				0	0
			£286	15	3

000202

The terms and conditions upon which I have received the above wool from you are that you are not to be liable for any losses that

may accrue, and that the wool will be submitted for appraisement either alone or with such other wools as I think fit. The proceeds are to be retained by me in satisfaction of the amount paid to you and for my services and expenses.
Signed M. C. Poulton
Signed M. Donlon
Lamson Paragon Ltd. '

Following thereon my client paid to Messrs. Donlon Bros. the sum of £286/15/3.

The object and purpose of this letter is to give you notice of the above assignment from Donlon Bros. to my client and to require you to account to my client for all moneys in respect of the realization of the said wool which was thereafter delivered by my client to the Central Wool Committee—including any share in the distribution of surplus profits under the provisions of the *Wool Realization* (*Distribution of Profits*) *Act* 1948.

I shall be glad if you will kindly acknowledge this letter."

6. . . .

7. On 21st December 1948 the *Wool Realization* (*Distribution of Profits*) *Act* 1948 was passed. The wool referred to in par. 4 thereof is participating wool within the meaning of that Act.

8. The defendant, the Australian Wool Realization Commission, was established under the *Wool Realization Act* 1945-1946 and is "the Commission" within the meaning of the *Wool Realization* (*Distribution of Profits*) *Act* 1948-1952.

9. The commission has refused and still refuses, purporting to act under the provisions of the *Wool Realization* (*Distribution of Profits*) *Act* to recognize the estate, right, title and interest of the plaintiff in and to the wool and/or his right to share or participate in respect thereof in the distribution of profits under the Act and has refused and still refuses to include the plaintiff in the list of persons entitled to share in distributions under the Act in respect of the wool.

9 (a) The defendants, the Commonwealth of Australia and the Australian Wool Realization Commission, claim and assert that the plaintiff has no claim to or interest in the money payable to the defendants Donlon Brothers under or in pursuance of the *Wool Realization* (*Distribution of Profits*) *Act* 1948-1952 and no enforceable right or claim to require the defendants Donlon Brothers to pay the money or the amount thereof to the plaintiff when the same shall have been paid to the Donlon Brothers.

(b) The defendant, the Australian Wool Realization Commission, with the approval and authority of the defendant Commonwealth

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threatens and intends to pay to the defendant Donlon Brothers a sum of money being or being equal in amount to a share in the distribution under and in pursuance of the *Wool Realization (Distribution of Profits) Act* in respect of and by reason of the submission to appraisal of the wool referred to in the document set forth in par. 5 thereof and calculated according to the appraised value of the wool so that the said sum shall be retained by Donlon Brothers to the exclusion of the plaintiff and of any interest or claim of the plaintiff therein or thereto.

(c) The defendants Donlon Brothers threaten and intend to receive that sum of money from the defendant, the Australian Wool Realization Commission, and to retain the same to the exclusion of the plaintiff and of any interest or claim of the plaintiff therein or thereto and those defendants are willing to receive that sum of money in full satisfaction and discharge of any and all claims which those defendants have or may have against any other defendant in respect of the wool its appraisal or sale.

10. The Commonwealth is possessed of large and substantial sums of money being profits arising from the sale of wool received by it under and by virtue of the *National Security (Wool) Regulations* including the wool of the plaintiff referred to in par. 4 hereof.

11. The plaintiff fears that unless restrained the defendants, the Commonwealth of Australia and the Australian Wool Realization Commission, will proceed to pay to the defendants Donlon Brothers all distributions or shares under the *Wool Realization (Distribution of Profits) Act* in respect of the wool referred to in par. 4 hereof and the plaintiff will suffer thereby irreparable injury and loss.

12. The share of the plaintiff in respect of any distribution under the Act in respect of the wool exceeds the sum of One pound (£1).

13. The plaintiff claims that the *National Security (Wool) Regulations* are ultra vires the Commonwealth Parliament and are null and void, or, alternatively, that regs. 13 to 30 inclusive thereof are ultra vires the Commonwealth Parliament and are null and void.

14. The plaintiff further claims that the *Wool Realization (Distribution of Profits) Act* 1948-1952, is ultra vires the powers of the Commonwealth Parliament and is null and void.

15. (a) In or about the month of December 1942 the defendants, the Commonwealth of Australia and the Australian Wool Realization Commission, wrongfully converted to their own use certain property of the plaintiff, viz., the wool referred to in par. 3 above whereby the plaintiff lost the value of the same and the profits he otherwise could and would have made therefrom.

(b) Alternatively to sub-par. (a) above the plaintiff sues those defendants for moneys payable by the defendants to the plaintiff for moneys received by the defendants to the use of the plaintiff in respect of the sale by the defendants of the said wool of the plaintiff referred to in par. 3 above.

(c) Alternatively to sub-pars. (a) and (b) above the plaintiff in or about December 1942 sold to those defendants the wool referred to in par. 3 above at a price to be ascertained ratably from the total moneys to be received by the defendants from the United Kingdom in respect of wool sold to the United Kingdom by the Commonwealth between September 1939 and 30th June 1945, in the proportion which the wool of the plaintiff bore to the whole of the wool so sold by the Commonwealth to the United Kingdom and the said sum has become and is due to be payable by those defendants to the plaintiff and those defendants have refused to pay the same.

The plaintiff claimed :—

1. A declaration that the plaintiff was beneficially entitled as against the defendants, Donlon Brothers, to receive from the defendants, the Commonwealth of Australia and the Australian Wool Realization Commission, all moneys in respect of the proceeds of the sale of the wool referred to in par. 4 above and to share in respect thereof in all distributions to be made under the *Wool Realization (Distribution of Profits) Act* 1948-1952.

1. (a) A declaration that the defendants Donlon Brothers upon receipt of any sum of money under or in pursuance of that Act or otherwise in respect of the wool or by reason of its submission for appraisal or its sale shall be bound to pay the same to the plaintiff for his own use and benefit.

2. (a) A declaration that the plaintiff was entitled to be included in the list of persons to be prepared by the defendant, the Australian Wool Realization Commission, of the persons entitled to share in distributions under the *Wool Realization (Distribution of Profits) Act* 1948-1952 and

(b) An order directing the defendant, the Australian Wool Realization Commission, to enter the plaintiff's name upon such list in respect of the wool and to enter thereon the appraised value of the wool to which the plaintiff is entitled.

Alternatively the plaintiff claimed :—

3. (a) A declaration that the *Wool Realization (Distribution of Profits) Act* 1948-1952 was ultra vires the Commonwealth Parliament and was null and void or,

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(b) alternatively that ss. 8, 13, 17, 18, 19, 20, 27, 28 and 29 thereof were ultra vires the Commonwealth Parliament and were null and void.

The plaintiff claimed the following declarations :—

4. (a) that the *National Security* (*Wool*) *Regulations* being Statutory Rules No. 108 of 1939, were ultra vires the Commonwealth Parliament and were null and void ;

(b) that the plaintiff was entitled to recover from the Commonwealth the value of the wool referred to in par. 3 above,

(1) by regarding that value as the damages payable by the defendants, the Commonwealth and the Australian Wool Realization Commission, to the plaintiff in respect of the conversion alleged in par. 15 (a) above ; (2) alternatively to (1) above, on the plaintiff waiving the said conversion by regarding as the value the amount which those defendants in fact received in respect of the wool as moneys had and received by those defendants to the use of the plaintiff ; (3) alternatively to (1) and (2) above, by treating the Commonwealth as the purchaser from the plaintiff of the wool at its true market value, such true market value being the ratable proportion of the total moneys that the Commonwealth in fact received from the United Kingdom for the whole of the wool sold by it to the United Kingdom between September 1939 and 30th June 1945 in the proportion the wool of the plaintiff bore to the whole of that wool so sold by the Commonwealth to the United Kingdom ;

(c) an order directing the Commonwealth to pay to the plaintiff the value of that wool,

(1) by regarding that value as the damages payable by the defendants, the Commonwealth and the Australian Wool Realization Commission, to the plaintiff in respect of the conversion alleged in par. 15 (a) above ; (2) alternatively to (1) above, on the plaintiff waiving the said conversion by regarding as the value the amount which those defendants in fact received in respect of the wool as moneys had and received by those defendants to the use of the plaintiff ; (3) alternatively to (1) and (2) above, by treating the Commonwealth as the purchaser from the plaintiff of the wool at its true market value, such true market value being the ratable proportion of the total moneys that the Commonwealth in fact received from the United Kingdom for the whole of the wool sold by it to the United Kingdom between September 1939 and 30th June 1945 in the proportion the wool of the plaintiff bore to the whole of that wool so sold by the Commonwealth to the United Kingdom.

5. An injunction restraining the defendants other than Donlon Brothers from paying to those defendants Donlon Brothers any moneys under the said Act or regulations in respect of the wool referred to in par. 4 above and from entering the names of Donlon Brothers in respect of the wool on any lists under that Act as being persons entitled to share in the distributions under that Act.

6. An order providing for the costs of these proceedings.

In a statement of particulars furnished by the plaintiff on 14th February 1951, under order of *Fullagar* J. made 13th November 1950, it was stated (i) that the date and place of supply of the wool referred to in par. 3 of the particulars of claim was : " 4th November 1942, district of Bara, 22 miles from Mudgee, the broker who received the wool for appraisement being Messrs. Pitt, Son & Badgery Ltd. ; (ii) that the appraised values of the wool (18 bales, weight and markings shown) at the date of appraisement, 11th December 1942, was £316 18s. 2d. ; and (iii) that the only agreement used was ' the agreement alleged to be contained in the instrument set out in ' par. 3 ".

The nature of the defences pled on behalf of the various defendants sufficiently appears in the judgments hereunder.

G. E. Barwick Q.C., *S. Isaacs* Q.C. and *J. M. Bruxner*, for the plaintiff.

W. J. V. Windeyer Q.C., *H. A. R. Snelling* Q.C. and *R. Else-Mitchell*, for the defendant the Commonwealth of Australia.

J. B. Tait Q.C. and *K. A. Aickin*, for the defendant the Australian Wool Realization Commission.

G. Wallace Q.C. and *D. J. Benjamin*, for the defendant Robert Donald Bakewell.

Cur. adv. vult.

The following written judgment was delivered :— Nov. 14, 1952.

FULLAGAR J. The plaintiff in this action, Malcolm Coote Poulton, was at all material times a dealer in wool. The defendants in the action, as originally framed, were the Commonwealth of Australia, the Australian Wool Realization Commission (a corporation constituted under the *Wool Realization Act* 1945-1950 (Cth.)) and Michael Joseph Donlon, George Henry Donlon and William Donlon. The three lastnamed defendants were brothers who carried on a business of wool growing in partnership under the name of Donlon

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Brothers. Michael Joseph Donlon died after the commencement of the action, leaving a will in which his two brothers were named as executors. The plaintiff alleged that in November 1942 he had bought certain wool from Donlon Brothers and submitted that wool for appraisement under the *National Security (Wool) Regulations* then in force, and he claimed (to state the matter for the moment only in the most general way) that in respect of that wool he was entitled to share in the "profits" which are the subject matter of the *Wool Realization (Distribution of Profits) Act* 1948-1952. The amount directly involved in the case is small, but I was informed that it was in the nature of a "test case", and that it was expected to determine, for a very large number of similar cases in which wool was handled (to use a neutral term) by dealers, whether the share of "profit" attributable to the wool should go to the dealer or to the grower.

When the case was called on for hearing, the solicitor for George Henry Donlon and William Donlon announced that he appeared for the surviving brothers both in their personal capacity and in their capacity as executors of the will of Michael Joseph Donlon. His clients had entered an appearance but had not delivered a defence, and he informed me that they did not propose to take any part in the proceedings. Mr. *Wallace* of counsel then announced that he appeared for Robert Donald Bakewell, and asked that his client should either be added as a defendant or have leave to intervene as a representative party on behalf of himself and all other members of organizations affiliated with the Australian Wool Growers' Council. It appeared from affidavits filed that many members of those organizations had had their wool handled by dealers. Also it appeared from the pleadings that the argument for the plaintiff would involve or include an attack upon certain provisions of relevant Commonwealth legislation, the validity of which it was in the interest of the members of those organizations generally to support. Having regard to these facts and to the fact that Messrs. Donlon Brothers did not propose to take part in the proceedings, I was of opinion that, although the Commonwealth and the defendant commission were already before me and proposing to contest the plaintiff's claim, I ought to accede to Mr. *Wallace's* application. I also thought, having regard to the interest of those whom Mr. Bakewell sought to represent in maintaining the validity of the legislation attacked, that it would be preferable to join him as a defendant rather than merely permit him to intervene. Accordingly I ordered that he be joined as a defendant in the capacity proposed.

It is impossible to understand the plaintiff's claim and the arguments for and against it without an examination of the Wool Purchase Arrangement, which was made in 1939 between the Government of the Commonwealth and the Government of the United Kingdom, the steps which were taken in the Commonwealth to implement it, and the events which led up to the passing of the *Wool Realization (Distribution of Profits) Act* 1948. The story is told in outline in the judgment of the Court in *Ritchie* v. *Trustees Executors & Agency Co. Ltd.* (1) but I think that, for the purposes of the present case, I should set out the position for myself, though I will quote, where convenient, from *Ritchie's Case* (2). For what follows I have depended partly on documents and partly on the evidence of Mr. Justice *Owen* of the Supreme Court of New South Wales, who was Chairman of the Central Wool Committee in and between 1942 and 1945. It may be mentioned here that similar "Arrangements" with regard to wool were made by the United Kingdom Government with the Governments of New Zealand and South Africa respectively.

The Australian "Wool Purchase Arrangement" was made between the two Governments almost immediately after the commencement of the war in September 1939. It provided that the United Kingdom Government should purchase from the Commonwealth Government all wool produced in Australia during the period of the Arrangement, *except* wool required for the purpose of woollen manufacture in Australia. The period of the Arrangement was to be the duration of the war and one full wool year thereafter. A "wool year" is a year ending on 30th June. The price was to be 10.75 pence sterling per pound of greasy wool, which is the equivalent of 13.4375 pence Australian. This price was arrived at only after an interchange of many cables and a number of interviews in London, in the course of which the Commonwealth pressed most strongly for a higher price. It was a term of the Arrangement that the United Kingdom Government and the Commonwealth Government should divide equally any profit which might arise from the resale by the United Kingdom Government outside the United Kingdom of wool purchased by it under the Arrangement. It was also a term of the Arrangement that the acquisition of the wool and the handling of the wool to the f.o.b. point should be the responsibility of the Commonwealth Government. For these services a "handling charge" not exceeding three farthings Australian per pound of wool purchased was to be paid by the United Kingdom Government. In fact, the actual sum of three farthings per pound

(1) (1951) 84 C.L.R. 553, at pp. 569-574. (2) (1951) 84 C.L.R. 553.

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was paid for the first three wool years. It is convenient to mention here that, in the event, the Arrangement applied to the wool of six wool years, i.e., the years 1939-1940 to 1944-1945 inclusive, and the system of appraisement and acquisition which (as will be seen) was set up under it continued during the year 1945-1946. The Arrangement was modified in two respects during that period with regard to the amounts to be paid by the United Kingdom Government. In the first place, the purchase price for the year 1942-1943 and subsequent years was increased to 15.45 pence Australian per pound. In the second place, it having appeared that the actual cost of "handling" was less than three farthings per pound, it was arranged that for the year 1942-1943 and subsequent years any difference between three farthings per pound and the actual cost of handling should be credited to the United Kingdom Government.

It was necessary, of course, for the Commonwealth Government to take steps in Australia for the implementing of the Wool Purchase Arrangement, and the *National Security* (*Wool*) *Regulations* were accordingly made by the Governor-General under the *National Security Act* 1939. In fact, these regulations were made on 28th September 1939, a short time before all the details of the Arrangement had been settled between the two Governments. By these regulations a Central Wool Committee and State Wool Committees were established, the Central Wool Committee being given "all powers and authorities conducive or incidental to the purpose of the Regulations", which was "to provide for the carrying out of the Wool Purchase Arrangement". The general scheme underlying the regulations was that the Commonwealth should purchase *all* Australian wool, including what might be required for purposes of local manufacture, and should pay for all that wool a price per pound equal to the price per pound payable by the United Kingdom Government for wool sold to that Government under the Wool Purchase Arrangement. That price per pound was a flat rate. On the other hand, the wool to be purchased by the Commonwealth comprised many hundreds of classes of wool of widely differing quality and value, and to pay for all these at a flat rate was out of the question. What had to be done, therefore, was to arrive as nearly as possible at an appropriate price for each class of wool on such a basis that the average price per pound payable by the Commonwealth for all the wool would be equal to the price per pound receivable from the United Kingdom Government for wool sold by the Commonwealth to that Government. This was achieved by means of a system of "appraisement" or valuation, subject

to what was called a " table of limits " prepared by highly skilled experts. The plan is explained in *Ritchie's Case* (1) in a passage which I will quote. " The plan upon which the regulations proceeded was to substitute appraisement for auction as the mode of selling wool and otherwise to adhere as closely as possible to the procedures for the handling and disposal of wool customary in peace-time. Wool was catalogued by the wool-selling broker to whom the grower had sent it and the appraisement was conducted upon the floors of the wool-selling broker's store by three appraisers, one representing the wool-selling broker and the other two (wool buyers in peace-time) representing the Commonwealth. Every appraisement was made according to a table of limits which for each wool season or year the Central Wool Committee caused to be prepared " (2). The table of limits was constructed for each wool year by a Technical Advisory Committee. It was necessarily based on an anticipation—founded on experience and on information obtained —as to the quantity of the various types which would come forward for appraisement. And the object in view was that the *average* price per pound which would be paid by the Commonwealth for the whole of the clip of the wool year should approximate as nearly as possible to the *flat rate* per pound payable to the Commonwealth by the United Kingdom.

It has been necessary to say so much in order that the regulations may be understood. I now turn to the regulations, and I think it convenient at this stage to set out certain of them which were the subject of argument. Regulation 13 provided that every contract for the sale of wool in force at the commencement of the regulations should be void except in cases where delivery to the buyer had taken place. Regulation 14 provided that no person should sell or buy any wool except in accordance with the regulations. Regulation 15 provided that " The sale of wool shall be by appraisement under these Regulations and the property in every parcel of wool submitted for appraisement shall pass to the Commonwealth when the final appraisement thereof is completed in the manner prescribed by the instructions of the Central Wool Committee governing appraisement ". Regulation 16 provided for the preparation of tables of limits. Regulation 17 provided : " In the preparation of such a table of limits regard shall be had to the price payable by the Government of Great Britain to the Government of the Commonwealth under the arrangement between those Governments and the limits shall be so fixed as to ensure that the price per pound payable by the Government of Great Britain for

(1) (1951) 84 C.L.R. 553. (2) (1951) 84 C.L.R., at p. 570.

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the wool of any wool year will not be exceeded by the average price per pound of the total payments made pursuant to the appraisements of that wool." Regulation 19 provided that all wool should be submitted for appraisement, and that any person owning or having possession of any wool who did not submit that wool for appraisement should be guilty of an offence. It also authorized the Central Wool Committee to seize and cause to be appraised any wool not submitted for appraisement within the wool year. Regulation 23 dealt with the purchasing from the Commonwealth, with the approval of the Central Wool Committee, of wool for purposes of manufacture within Australia.

There is one other regulation which is of importance in this case. That is reg. 30, which provided: "(1) All moneys payable by the Government of Great Britain under the arrangement made by that Government with the Commonwealth for acquiring Australian Wool shall be received by the Central Wool Committee, and out of such moneys the Central Wool Committee shall defray all costs, charges and expenses of administering these Regulations, and make the payments for wool to the suppliers. (2) Any moneys which may be received by the Central Wool Committee from the Government of Great Britain under or in consequence of such arrangement over and above the purchase price payable by such Government thereunder for the wool and any surplus which may arise shall be dealt with as the Central Wool Committee shall in its absolute discretion determine". To quote again from *Ritchie's Case* (1): "It will be seen that sub-reg. (1) covers the flat-rate price payable by the United Kingdom and the amount not exceeding three farthings a pound for expenses. Sub-regulation (2) conferred upon the Central Wool Committee a discretion to determine how the half share of profits payable by the United Kingdom under the Wool Purchase Arrangement should be dealt with and profits or moneys arising otherwise, as, for instance, from wool tops or wool for manufacture for export" (2). It was not, of course, known in the beginning whether there would ever be any "profit" or "surplus". But administrative arrangements were made from the beginning by the Central Wool Committee in anticipation of there being ultimately a fund distributable under reg. 30 (2). It was determined that the suppliers of shorn wool (i.e., wool shorn from the living sheep) should share in any such fund, but that the suppliers of skin wool (i.e., wool fellmongered from the skins of dead sheep) should not. Accordingly, for the purposes of each appraisement, wool of the former class was listed in the broker's

(1) (1951) 84 C.L.R. 553.

(2) (1951) 84 C.L.R., at p. 572.

catalogue as " participating " wool, and wool of the latter class as " non-participating " wool. It will be seen later that this distinction formed the basis of the distribution ultimately provided for by the *Wool Realization (Distribution of Profits) Act* 1948-1952.

In the case of non-participating wool, payment of the full appraised price was made by the Central Wool Committee within fourteen days after appraisement, and those who had supplied such wool for appraisement received nothing more. In the case of participating wool, payment of ninety per cent (in later years ninety-five per cent) of the appraised price was made within fourteen days of appraisement. The reason for the retention of a percentage of the appraised price was that it could not be known with certainty in advance whether the total of the appraised prices of all the wool appraised in the wool year would average out at a price equal to, or greater than or less than, the flat rate payable by the United Kingdom Government. In actual fact a very remarkable degree of accuracy was attained, and in every year the total of the appraised prices averaged out at a price a little less than the flat rate. Accordingly, after the end of the wool year, when this was ascertained, the Central Committee made two further payments consisting of the retained percentage of the appraised price (called the " retention money ") and a further percentage to bring the total payment up to " flat rate parity ", i.e., approximately to the amount which would have been the appraised price if it had been possible to achieve the object of the appraisement with mathematical accuracy. Because payments were made up to flat rate parity in respect of the whole shorn clip, and because the United Kingdom Government was paying only for so much of the wool clip as was not required for purposes of manufacture in Australia, the Central Wool Committee required funds over and above what it received from the United Kingdom Government. These funds were derived from the proceeds of the sale of wool for local manufacture, from certain operations under the *National Security (Wool Tops) Regulations* and the *National Security (Price of Wool for Manufacture for Export) Regulations*, and (before the year 1942-1943) from the surplus amount not expended of the " handling charge " of three farthings per pound. All moneys received in respect of wool were received by the Central Wool Committee, and none were paid into consolidated revenue.

Wool required for purposes of local manufacture was, as has been seen, excluded from the United Kingdom Government's purchase. Wool for this purpose was purchased from the Commonwealth by local manufacturers. It amounted in the first wool

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year to about nine per cent of the total clip, but in later years the proportion rose to about fourteen per cent of the total clip. The price to the manufacturer was fixed at first at the appraised price, then at appraised price plus a percentage, and later still at prices fixed by the Prices Commissioner. On wool sold to local manufacturers the Central Wool Committee incurred a loss amounting to something over £750,000.

The wool purchased by the United Kingdom Government under the Wool Purchase Arrangement was dealt with in one or other of the following ways. Some was shipped from Australia to the United Kingdom. Some was sold by the United Kingdom Government to buyers in other countries, and shipped from Australia to those other countries. Some was held in Australia for storage or treatment on behalf of the United Kingdom Government, and some was shipped to the United States for storage there in pursuance of arrangements between the Governments of the United Kingdom and the United States. The quantity stored in Australia was very large indeed, and the Central Wool Committee erected some 400 stores averaging over an acre in extent. The wool sent to countries other than the United Kingdom was sold at prices known as "export issue prices", which were determined by the United Kingdom Government. The accounts in respect of such sales were kept in England by the United Kingdom Government, and these included a "distributable profits account". In 1945, however, after the end of the war with Germany, very large quantities of the wool purchased by the United Kingdom Government remained in store in Australia and elsewhere, and it was impossible to determine at that stage whether there would ultimately be any profits to be dealt with in accordance with the Wool Purchase Arrangement. As a result of negotiations conducted in that year, a plan was agreed upon between the Government of the United Kingdom and the Governments of the Commonwealth, South Africa and New Zealand respectively, for the winding up of the wool scheme. One of the main objects of the plan was to dispose of the large stocks of wool held by the United Kingdom Government without unduly disturbing the market and depressing the prices of the current and future wool clips. The plan was called the "Disposals Plan", and it is set out in the schedule to the *Wool Realization Act* 1945-1950 (Cth.). This Act, which received the Royal assent on 11th October 1945, came into force by proclamation on 16th November 1945, but the plan took effect as from 1st August 1945.

The Act of 1945 constituted and incorporated the Australian Wool Realization Commission, which is a defendant in this action. The personnel of the commission, like that of the Central Wool Committee, was representative of the main interests concerned in the wool industry. Upon the commission were conferred all the powers and functions of the Central Wool Committee under the *National Security* (*Wool*) *Regulations*. The assets of the Central Wool Committee were vested in the commission, and, in effect, for all material purposes, the commission was substituted for, and took the place of, the Central Wool Committee. The *National Security* (*Wool*) *Regulations* were, by s. 11 of the Act, preserved in force for the time being, but on 1st August 1946 regs. 14, 15 and 19 were repealed by Statutory Rule No. 129 of 1946, and, by virtue of s. 2 of the *National Security Act* 1946, the regulations, as a whole, ceased to have force or effect on 31st December 1946, not being preserved by the *Defence* (*Transitional Provisions*) *Act* 1946.

I do not regard the details of the plan as having vital importance in this case, but I think I should state its effect in outline so far as it affected Australia. The stock of Australian-grown wool in the ownership of the United Kingdom at 31st July 1945 was transferred to the joint ownership of the United Kingdom Government and the Commonwealth Government, and was to be held and disposed of by a "Joint Organization", which was to be incorporated as a private company in England with an Australian subsidiary. The Australian subsidiary was the Australian Wool Realization Commission, which was constituted and incorporated by the Act, and which is a defendant in this action. The United Kingdom and the Commonwealth were each to take up fifty per cent of the original capital represented by the opening stock of Australian-grown wool, which opening stock was to be taken into account at its original cost less the amount standing to the credit of the divisible profits account. Payment of the Commonwealth's share of the original capital was to be made in four annual instalments, but there was provision for such payment to be made out of Australia's share of current profits, if any. The operating costs of the Joint Organization were to be borne equally by the wool industry and the Joint Organization itself. The contribution of "the industry" was provided for by Acts of the Commonwealth Parliament entitled the *Wool* (*Contributory Charge*) *Assessment Act* 1945-1951, and the *Wool* (*Contributory Charge*) *Act* 1945, both of which received the Royal assent on the same day as the *Wool Realization Act* 1945-1950. The ultimate balance of profit *or loss*

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was to be shared or borne equally by the United Kingdom and the Commonwealth. With regard to the wool year 1945-1946 (described as the " interim period ") it was agreed that the United Kingdom should purchase the whole clip in the same way as in the six preceding years, but it was to be handled by the Joint Organization, and the Commonwealth was to reimburse to the United Kingdom one half of the cost of so much of the clip as remained unsold at the end of the wool year. In the following year (1946-1947) the normal system of selling wool by auction in Australia was resumed. Actually in that year the Joint Organization purchased a very substantial quantity of Australian wool at auction sales.

It should be noted here that s. 10 of the Act of 1945 provided that " Any reference in the National Security (Wool) Regulations to the arrangement made between the Government of Great Britain and the Government of the Commonwealth shall include and shall be deemed at all times, on and after the first day of August, One thousand nine hundred and forty-five, to have included a reference to the Disposals Plan ". It may be recalled also that the Court in *Ritchie's Case* (1) said : " The Commonwealth's share in the ultimate profit of the Joint Organization covers the divisible profit under the United Kingdom Wool Purchase Arrangement, or, in other words, the moneys which in reg. 30 (2) of the Wool Regulations were referred to, in anticipation, by the description ' any moneys which may be received by the Central Wool Committee from the Government of Great Britain under or in consequence of such arrangement over and above the purchase price payable by such Government thereunder for the wool '. The adoption of the Joint Organization Disposals Plan made the description inappropriate, at all events so far as it described the moneys as moneys received from the United Kingdom under the Wool Purchase Arrangement. Perhaps the words ' in consequence ' remain apt. But in any case substantially it is the fund contemplated by that part of reg. 30 (2) " (2).

At the time of the adoption of the Disposals Plan there was, for reasons explained by Mr. Justice *Owen* in his evidence, no reason to suppose that any profit would result from the operations of the Joint Organization. In fact, however, in the years following the year 1945-1946 the Joint Organization made large profits from Australian-grown wool. These profits were, of course, due in large measure to the phenomenal unforeseen rise in world prices for wool. The Commonwealth's actual and expectant share in the profits of the Joint Organization were the subject of the *Wool Realization (Distribution of Profits) Act* 1948-1952. The provisions of this Act

(1) (1951) 84 C.L.R. 553.

(2) (1951) 84 C.L.R., at p. 575.

dealt also with moneys received by the Commonwealth from the United Kingdom Government in pursuance of an arrangement which had been made for the sharing of profits arising from the disposal of sheepskins acquired under the *National Security (Sheepskins) Regulations*. " The profits in connection with sheepskins, a comparatively minor matter, are thus treated, as might be expected, as an accession to the wool profits " (*Ritchie's Case* (1)). The " profit fund " dealt with by the Act of 1948 is, as has been noted, properly regarded as the fund contemplated by reg. 30 (2) of the Wool Regulations. But the passing of the Act of 1948 means that Parliament is not leaving the fund " to be dealt with as the Central Wool Committee may in its absolute discretion determine ". The Wool Regulations have ceased to be in force, and Parliament is dealing by direct enactment with the distribution of the " profit fund ". The Act prescribes the persons who are to share in distributions, provides the necessary machinery for distribution, and contains certain ancillary or incidental provisions. Some of its provisions are, of course, of vital importance in the present case, and it will be convenient to state them at this stage.

The word " dealer " is defined by s. 4 as meaning, in relation to any wool, " a person, not being a broker or a person who owned the sheep from which the wool was produced, who submitted the wool for appraisement in the course of a business of dealing in wool or of acting as an agent in the submission of wool for appraisement ". Sub-section (1) of s. 7 provides that, subject to the Act, an amount equal to each declared amount of profit shall be distributed by the Australian Wool Realization Commission in accordance with the Act. Sub-section (2) provides that " There shall be payable by the Commission, out of each amount to be distributed under this Act, in relation to any participating wool, an amount which bears to the amount to be distributed the same proportion as the appraised value of that wool bears to the total of the appraised values of all participating wool ". (The expression " participating wool " has already been explained.) Sub-section (3) provides that " Subject to this Act, an amount payable under this Act in relation to any participating wool shall be payable to the person who supplied the wool for appraisement ". Sub-section (1) of s. 8 provides :—" For the purposes of this Act, wool which was submitted by a dealer for appraisement shall be deemed to have been supplied for appraisement—(*a*) where only one dealer has dealt with the wool—(i) if that dealer submitted the wool as agent for another person—by that person ; or (ii) if that dealer submitted, or purported

(1) (1951) 84 C.L.R., at p. 575.

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to submit, the wool on his own behalf—by the person from whom he obtained the wool; or (*b*) where more than one dealer has dealt with the wool—by the person for whom the first such dealer to deal with the wool acted as agent, or by the person from whom that dealer obtained the wool, as the case may be". Sub-section (2) provides that sub-s. (1) shall not apply in relation to wool which was owned by a dealer at any time before 28th September 1939. Sub-section (3) provides that, notwithstanding the terms of any contract (whether made before or after the commencement of the Act), a dealer shall not be entitled to recover from another person the whole or any part of any moneys paid to that other person under the Act. It will be seen that, in the definition of "dealer", and also in s. 7 (3), and s. 8 (2) a distinction is drawn between "supplying" wool for appraisement and "submitting" wool for appraisement. In effect, for the purposes of s. 7 (3), though subject to s. 8 (2), a "dealer" is not to be regarded as a person who "supplied" wool for appraisement. Section 28 provides: "No action or proceedings shall lie against the Commission or the Commonwealth for the recovery of any moneys claimed to be payable to any person under this Act, or of damages arising out of anything done or omitted to be done by the Commission in good faith in the performance of its functions under this Act". Section 29 provides: "Subject to this Act and the regulations, a share in a distribution under this Act, or the possibility of such a share, shall be, and be deemed at all times to have been, absolutely inalienable prior to actual receipt of the share, whether by means of, or in consequence of, sale, assignment, charge, execution or otherwise".

The plaintiff, as has been said, was at all material times a dealer in wool. In normal times, although the vast majority of the wool grown by the wool growers of Australia (some hundred thousand in number) is consigned by the grower direct to one of the big wool-selling houses, where it is sold on behalf of the growers by auction, there is a certain percentage of growers—mostly growers on a small scale—whose wool is handled by dealers. There are said to be some five hundred dealers in Australia. The practice is for the dealer to buy the wool outright from the grower. Commonly he will buy the whole clip of the particular grower at an average price per pound greasy. He then himself (perhaps after some re-grading or re-packing) consigns the wool to one of the wool-selling brokers, who sells it by auction in the ordinary way and accounts for the proceeds to him and not to the grower. The dealer's gross profit is, of course, the difference between what he has paid to the grower and what he receives from the broker. One

advantage to the small grower is said to be that he receives immediate payment, although the terms on which wool is sold by brokers, and the practice of the wool trade, ensure very prompt payment where wool is consigned by grower direct to broker. Usually, if not invariably, the dealer carries on business in a country town, and deals in other commodities in addition to wool, for example, sheepskins and rabbit skins.

The somewhat anomalous position of the dealer was one which had to be considered by the Central Wool Committee both in connection with the purchase of Australian wool by the United Kingdom Government in the war of 1914-1918, and in connection with the similar purchase in the war which commenced in 1939. In both cases the general policy of the administration was that all shorn wool should be purchased by the Commonwealth *from the grower*, and it was contemplated that the grower of any such wool should be the person who would share in an ultimate distribution of " profit " if any such distribution should take place. In the earlier war the general policy was effectuated by provisions of a more negative character, and the central provision of the *War Precautions (Wool) Regulations* was reg. 10 (1), which provided that no person should sell any wool except through or to or with the consent of the Central Wool Committee or otherwise in accordance with the regulations. In the later war more direct and positive provisions were adopted, and the *National Security (Wool) Regulations* not merely avoided all contracts for the sale of wool (except where delivery had taken place) and prohibited any future sale or purchase of wool except in accordance with the regulations, but affirmatively required all wool to be submitted for appraisement during the wool year in which it was produced. The practical result was, of course, the same in each case, and, so far as the dealer was concerned, a strict application of either set of regulations must have had the effect of simply putting him out of business so far as his business related to wool. It was not desired to produce this effect, and in the earlier war a system was adopted whereby the Central Wool Committee consented under reg. 10 of the War Precautions Regulations to certain very limited purchases of wool by dealers. In these cases the dealer became the owner of the wool, and himself, as owner, " supplied " it for appraisement.

This method of meeting the situation, however, was never regarded as satisfactory, one reason doubtless being that it represented a departure from general policy. There were probably other reasons also. Accordingly, in the later war, a system of " permits ", which appears to have had no actual legal authority or sanction,

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was instituted. In October 1939, the Central Wool Committee forwarded a circular to dealers, which was in the following terms: "Under the National Security (Wool) Regulations, Clause 14 provides: 'No person shall sell or buy or contract to sell or buy any wool except in accordance with these Regulations'. The Central Wool Committee has borne in mind the desirability of maintaining as far as possible, consistently with the Regulations, existing practices, and early in its meetings considered the position of wool dealing having regard to Clause 14. The Committee resolved to issue to Wool Dealers a permit to allow them to continue to receive wool from growers and other owners on terms and conditions which, while consistent with the Regulations, will enable dealers who obtain permits to continue the substance of their business. A condition of the permit is that the dealer will give an undertaking in the following terms:—'(1) All wool received will be submitted for appraisement in the store or stores of an approved Wool Selling Broker. (2) The dealer will keep true and correct records of all transactions, pursuant to which he received wool, sufficient to enable a proper distribution amongst the growers and other owners of such wool of all payments which may follow the appraised price of such wool. (3) The dealer will upon notice in writing from the Central Wool Committee under the hand of the Secretary produce such records to the Central Wool Committee or its Executive Member. (4) The dealer will fully and faithfully account in respect of the proceeds of such wool to the Growers or other owners from whom he receives such wool in accordance with the terms and conditions upon which he shall have obtained and received such wool from them'. There is no restriction upon dealing in sheepskins".

The plaintiff applied for a "permit", and a permit was issued to him on or about 9th November 1939. The document was headed (under the names of the Commonwealth of Australia and the Central Wool Committee) "Permit to submit Wool for Appraisement *as Agents*". It stated that the plaintiff, having given an undertaking to the Central Wool Committee to perform and observe the conditions of the permit, was thereby "permitted to receive wool from Woolgrowers and other owners and submit it for appraisement on their account". The conditions are then set out in the same terms as in the October circular. The permit was forwarded to the plaintiff with a letter, which said, *inter alia*: "This permit . . . does not override Regulation 14, which provides that no person shall sell or buy any wool . . . except in accordance with these Regulations". The reference in the circular and in the

permit to "other owners" of wool (i.e., owners of shorn wool other than growers) is explained by the fact that some wool would have been sold and delivered by growers to purchasers before the regulations came into force, and these transactions were not affected by the general avoidance of contracts for the sale of wool effected by reg. 13.

The transaction on which the plaintiff bases his claim in the present case took place on 4th November 1942. On that date he received from Donlon Brothers seventeen bales of fleece wool and some other wool, and he paid to Donlon Brothers a net sum of £286 15s. 3d. The transaction was recorded in a document (Exhibit A3) which it is necessary to set out in full. It is as follows :—

"Church Street, Mudgee.

Phones 276 & 48 4 Nov. 1942.

Bought from Donlon Bros.
of Bara. Time 9 a.m.

M. C. Poulton
Licensed Dealer in Wool, Hides & Skins

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17 Bales 2 Bags,

Fleece	Bls.	Pcs.			
4439	Nett at 15¼		282	1	3
326	Lox	6	8	3	0
			290	4	3
Less Wool Tax				9	0
			289	15	3
Less Cartage			3	0	0
			£286	15	3

The terms and conditions upon which I received the above wool from you are that you are not to be liable for any losses that may accrue, and that the wool will be submitted for appraisement either alone or with such other wools as I think fit. The proceeds are to be retained by me in satisfaction of the amount paid to you and for my services and expenses.

Signed M. C. Poulton
Signed M. J. Donlon."

It should be mentioned here that at a much later date, viz., on 4th October 1949, the plaintiff's solicitor gave notice to the Commonwealth and to the defendant commission of Exhibit A3

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by letters which set out the document in full and stated that the plaintiff had paid to Donlon Brothers the sum of £286 15s. 3d. The letter proceeded: "The object and purpose of this letter is to give you notice of the above assignment from Donlon Brothers to my client, and to require you to account to my client for all moneys in respect of the realisation of the said wool—which was thereafter delivered by my client to the Central Wool Committee—including any share in the distribution of surplus profits under the provisions of the Wool Realization (Distribution of Profits) Act". These letters were not, I think, put in evidence, but they were set out in full in the statement of claim and their sending and receipt were admitted by the Commonwealth and the commission respectively in their defences.

The plaintiff appears to have repacked some of the wool, and the bales were branded DB/Ilford. It was then consigned, together with a considerable quantity of other wool, to Messrs. Pitt, Son and Badgery, wool-selling brokers of Sydney, for appraisement. It was appraised at prices totalling £316 18s. 2d. The total of the appraised prices of this and all other wool consigned by the plaintiff and appraised at this appraisement was paid, less the five per cent retention money and less the broker's charges (which amounted to approximately £1 per bale) to the plaintiff. In due course he received also the five per cent retention money and the amount payable by way of flat rate adjustment (eleven per cent in this case). The total amount received by him in respect of Donlon Brothers' wool would thus appear to have been about £365.

It will be convenient to deal now with the question of the construction of the document of 4th November 1942. Actually two questions of construction arise. The first is whether the transaction evidenced by the document was a *sale* of Donlon Brothers' wool to the plaintiff, so that the property therein passed to the plaintiff. And the second (which is, I think, only of practical importance if the first is answered in the negative) is whether the word "proceeds" includes any share to which Donlon Brothers might become entitled in any profit arising from the Wool Purchase Arrangement between the two Governments.

With regard to the first question, counsel for the plaintiff relied, of course, strongly on the introductory words "Bought from Donlon Bros.", and maintained that those words governed the whole document. Counsel for the defendants relied upon the concluding words which immediately precede the signatures, and which I will call (for reasons which will appear) the "inset": these words, they said, must be taken to qualify, and indeed to

override, the introductory words. There are, in my opinion, a number of considerations which point conclusively to the view that the contention of the defendants' counsel is correct.

To begin with, reg. 13 prohibited, subject to the possibly very severe penalties provided by the *National Security Act*, any sale by Donlon Brothers to the plaintiff. It may very well be, indeed, as was argued, that reg. 14 would of its own force avoid any transaction between the parties which purported to be a sale. This, however, is possibly an arguable point, and the validity of reg. 14 was challenged. But no question of its validity had been raised at the time, and, in dealing with the question of construction, it is very material to observe that the existence of reg. 14 provided a strong reason why the parties should wish to avoid giving to their dealing the character of a sale. It had been made perfectly clear that the Central Wool Committee had no intention of countenancing any contravention of reg. 14 or of permitting any *sale* by growers to dealers. It is also very material to observe that the plaintiff had applied for and accepted a permit to submit wool for appraisement *as agent*.

In the next place, I think that the circumstances of the insertion of the "inset" are important. In November 1939, the New South Wales Country Wool and Skin Buyers' Association, an association of which the plaintiff was a member, had issued to its members, including the plaintiff, a circular (Exhibit A9) with which was forwarded a copy of a letter from the Central Wool Committee to the New South Wales State Wool Committee. The enclosure contained the following passage: "The procedure of Dealers will largely depend on circumstances. Probably in the case of large purchases, money will be advanced on the wool received, and the balance of the appraised price, less commission or other remuneration, will be paid to the grower when received by the dealer from his Wool-selling Broker. In the case of small lots the grower or other owner may desire to make a final settlement with the dealer when passing over the wool, and he could probably do this without actually divesting himself of the legal title to the wool in such a way as to contravene reg. 14. The Permit does not allow a dealer to submit wool for Appraisement on his own account". The circular, referring to the terms of the enclosure, contained the following paragraph: "The reference to small lots is particularly interesting, and there appears to us no reason why it should not apply to everything. It must not be overlooked, however, that the dealer's name in all cases must appear on contracts as the agent, as you still cannot buy wool outright". At a later date the association

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forwarded to its members, including the plaintiff, a clause in the terms of the " inset " with the suggestion that it should be used in the invoice or other document recording a transaction between wool grower and dealer. The plaintiff thereupon caused to be added to the printed form which he had previously used the words of the " inset ", while leaving the words " Bought from " standing. The words of the " inset " are, of course, only applicable where the commodity being received by the dealer is wool. In such a case it is a well-settled rule of construction that special words prevail over general words : cf. *Glynn* v. *Margetson & Co.* (1) (a case of written words in a printed form) and *Western Assurance Co. of Toronto* v. *Poole* (2). In the latter case the Court took the view that words in a printed form had been left standing through carelessness. In the present case the words " Bought from " were possibly left standing by the dealer not through carelessness but in the far-sighted hope of having the " best of all possible worlds ". But in such cases an ambiguity, even if—perhaps especially if—it be a studied ambiguity, must generally be resolved by preferring the special words to the general.

The text of the " inset " is, to my mind, plainly inconsistent with the view that a sale is taking place under which the property in the wool is passing to the dealer. The clause is indeed purposeless and without significance if the property is passing. If the property were passing, Donlon Brothers could not be liable for any loss which the dealer might sustain. The undertaking to submit the wool for appraisement is inserted because, and only because, it is the duty of Donlon Brothers, as owners, to submit the wool for appraisement. If the property is passing, there is no sense in providing that, if the buyer resells, he is to be entitled to the price on a resale. The idea that services are to be rendered by the dealer to Donlon Brothers in connection with the wool is inconsistent with the idea that the dealer is becoming the owner of the wool. The services contemplated are clearly any repacking that may be necessary or desirable, the transport of the wool to the place of appraisement, and the submission of the wool for appraisement.

For all the above reasons I am clearly of opinion that the plaintiff never became the owner of the wool in question or acquired any proprietary right or interest of any kind in it. The wool remained the property of Donlon Brothers up to the moment of final appraisement.

I have felt somewhat more difficulty over the second question of construction which arises on Exhibit A3. It was contended for

(1) (1893) A.C. 351, at p. 355.

(2) (1903) 1 K.B. 376, at pp. 388-389.

the defendants that the word " proceeds " did not include a share in any " wool profit " which might ultimately become distributable or be distributed, though it was conceded that they included the appraised price, and it was not, I think, seriously disputed that they included the amount paid for adjustment to flat rate parity. Strong reliance was placed on the use of the word " retained " as showing that what was referred to was something of which it could be predicted with certainty that it would be payable to the dealer in the first place. But the actual language of such a document ought not to be too closely scanned, nor ought it to be assumed that every term in it is intended in a strictly pure and accurate sense. I am of opinion that the language used really means that Donlon Brothers are making over to the plaintiff every amount which may become payable in respect of the wool after and by reason of its submission to appraisement. The whole idea of the " inset " is, in my opinion, to provide that, although no property in the wool is passing to the dealer, yet the dealer is to be entitled to all moneys which would become payable to the growers if they submitted the wool for appraisement themselves directly as owners. There is no real difficulty, I think, in regarding the word " proceeds " as covering a share in any fund that might arise under the clause relating to " profits " in the Wool Purchase Arrangement. At the hearing I excluded certain evidence tendered by Mr. *Isaacs* to show that there was a general expectation that there would be further payments over and above appraised price and adjustment to flat rate parity. It is possible that, in so doing, I took too narrow and strict a view, but in any case it does not matter, for what Mr. *Isaacs* sought to establish by direct evidence is, in my opinion, to be inferred from all the circumstances existing, and indeed might almost be treated as a notorious fact. Such an expectation is indeed implied in the very practice of cataloguing wool as participating and non-participating. Everybody would know that this classification was made in anticipation of a decision of the Central Wool Committee with regard to profits which might arise from the Wool Purchase Arrangement. Nor would the experience of the wool scheme of the war of 1914-1918 have been forgotten. In *Ritchie's Case* (1) it is said that " It is clear that from the beginning the distribution, in whole or in part, of the Australian share of any surplus arising on divisible profits account was contemplated " (2). And again " The receipt of the payments " (in respect of profits) " is an actual consequence of the submission of wool for appraisement. It is a consequence which from the beginning was contem-

(1) (1951) 84 C.L.R. 553.

(2) (1951) 84 C.L.R., at p. 577.

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plated as a contingent result of submitting the wool for appraisement " (1).

It was argued that, even if the word " proceeds " must be read as covering any share of the profit originally contemplated by the Wool Purchase Arrangement, it cannot be treated as covering any share of the profit with which the *Wool Realization (Distribution of Profits) Act* 1948 deals. The former, it was said, was a profit made by the United Kingdom Government from sales of wool to countries outside the United Kingdom, while the latter was a profit made by the Joint Organization as a result of a pooling operation. The Disposals Plan did indeed differ from the profit-sharing provision of the Wool Purchase Arrangement in a considerable number of very important respects, which were pointed out by counsel and emphasized. But, to quote again from *Ritchie's Case* (2), " The source of the distribution is in effect the fund arising under the divisible profits clause in the Arrangement ". The profit has, in the event, resulted from operations differing widely from those originally contemplated as the source of a possible profit, but the profit is none the less attributable to the original Wool Purchase Arrangement. It is very noteworthy that, when the Act of 1948 comes to deal with cases of devolution on death and of dissolution of partnership, it does so on a basis which treats amounts distributable under the Act as if they were part of the " proceeds " of wool appraised as participating wool. As was said in *Ritchie's Case* (3), there could be no closer practical analogy than that which is here adopted. In truth and in reality any amount distributable under the Act in respect of the wool received by the plaintiff from Donlon Brothers is part of the " proceeds " of that wool—*part of what resulted from the supplying of that wool for appraisement.*

This construction of Exhibit A3 having been reached, it does not seem to me to matter very much whether it would be correctly described in technical language as an equitable assignment or not. I refer in this connection to what I said in *Maslen* v. *Perpetual Executors Trustees & Agency Co. (W.A.) Ltd.* (4). Whether or not it could, after notice of it had been given to the Commonwealth and to the commission, have the effect of creating any right against the Commonwealth or the commission, it had at least this effect, that, as between Donlon Brothers and the plaintiff, the plaintiff was entitled to any share of a profit fund which might ultimately be distributed in respect of the wool which he received from Donlon Brothers.

(1) (1951) 84 C.L.R., at p. 579.
(2) (1951) 84 C.L.R., at p. 580.
(3) (1951) 84 C.L.R., at p. 580.
(4) (1950) 82 C.L.R. 101, at p. 121.

The profit fund which did come into existence, however, is dealt with by the Act of 1948. No other profit fund ever came into existence. And the Act of 1948 dealt with that profit fund in such a way as to exclude the plaintiff from any right to participate which he might have acquired from Donlon Brothers, and to deprive him of any right against Donlon Brothers in respect of any share in the fund. For s. 29, as has been seen, made any such share absolutely inalienable prior to actual receipt. And s. 8, making special provision for cases of wool submitted by dealers, in effect gave to the grower the share of the profit fund attributable to such wool, and provided that, notwithstanding the terms of any contract, the dealer should not be entitled to recover from the grower any moneys paid to the grower under the Act. When once he obtained the money, the grower could, of course, do what he liked with it. He could give it to the dealer if he wished, but the dealer could have no *right* against him.

If therefore, the provisions of the Act of 1948 are to receive their full face value, it seems clear enough that they are applicable to this case and that they are fatal to the plaintiff's claim. Counsel for the plaintiff, however, submitted an argument of considerable subtlety, involving several alternative views, whereby he endeavoured to place the plaintiff's claim on a common law basis and to exclude from consideration the Act of 1948. This argument must now be considered. To some of the alternatives presented it is (as will be seen) a complete answer that the plaintiff (as I hold) never acquired any property in the wool.

It was argued, in the first place, that the *National Security* (*Wool*) *Regulations* were invalid, because they provided for the acquisition of property from persons otherwise than on just terms and were therefore not authorized by s. 51 (xxxi.) of the Constitution. (The reasons adduced in support of this argument may be put on one side for the moment.) It was then said that the Commonwealth had wrongfully taken possession of wool owned by the plaintiff and had disposed of that wool. The plaintiff might have sued in tort, but he waived the tort, and, adopting the disposal of his wool by the Commonwealth, claimed the proceeds of that disposal as money had and received to the use of the plaintiff. The rest, it was said, was merely matter of quantification of the proceeds. There is no evidence as to how the wool was in fact disposed of. So far as the evidence goes, it might have been part of the wool sold to the United Kingdom under the Arrangement. It might have been sold to local manufacturers. If it was sold to the United Kingdom under the Arrangement, it might or might not have

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formed part of the wool taken over by the Joint Organization. I would gather from Mr. Justice *Owen's* final statement of the position that it might be theoretically possible, by investigating very many thousands of invoices, not classified according to type or catalogue or year, to obtain some information as to what became of the wool, but I would gather that the task would be so laborious as to be impracticable. It was accordingly said that a fair and reasonable way, and indeed the only practicable way, of quantifying the plaintiff's claim was to adopt the basis which was in fact adopted by the Act of 1948, and to attribute to the plaintiff's wool a proportion, based on appraised price, of the total profit made by the Commonwealth out of all the wool.

It was, I think, rightly claimed by Mr. *Barwick* that this argument, if sound, avoided the incidence of ss. 8 and 29 of the Act, because the plaintiff was not relying on any assignment with which s. 29 dealt, and because he was not claiming a share in any fund with which the Act dealt. If, it was said, the Commonwealth chose, in addition to paying the plaintiff what he claimed, to give to Donlon Brothers a share of a fund in its hands, that was the Commonwealth's business. What the plaintiff claimed would be payable out of consolidated revenue. It was, however, conceded that the basis of the whole of this argument was the plaintiff's ownership of the wool, and I have already expressed my opinion that the plaintiff never became the owner of the wool. I would add that, even if the Wool Regulations were invalid, and even if a tort was committed by the Commonwealth which the plaintiff was at liberty to waive, as to both of which questions I shall say something later, there was no justification, in my opinion, for adopting as a basis for ascertaining the amount payable to the plaintiff the basis on which Parliament enacted that the available fund should be distributed. I should have thought that the position was simply (as Mr. *Windeyer* and Mr. *Tait* contended) that the plaintiff had failed to prove that the wool was worth more or realized more than the amount of the appraised price plus flat rate parity adjustment. That amount the plaintiff has already received.

The next argument for the plaintiff was based on the view that the property in the wool in question did not pass to the plaintiff under the transaction of 4th November 1942 but remained in Donlon Brothers. It was then said that (the Wool Regulations being invalid) there was a wrongful dealing by the Commonwealth with the wool of Donlon Brothers, for which Donlon Brothers would have a right of action in tort. The plaintiff then, as " equitable assignee of the proceeds ", could waive the tort committed against

Donlon Brothers, adopt the Commonwealth's disposal of the wool and sue for the amount which the wool had realized. The plaintiff, on this view, sues as an equitable assignee of a chose in action, joining the legal owner of the chose in action as defendant. The rest was mere matter of quantification, and the necessary quantification was again achieved by reference to the "profit fund" and the provisions of the Act of 1948.

This argument seems to rest fundamentally on the view that the document signed on 4th November 1942 amounted to an equitable assignment of a potential cause of action in tort. One answer to it seems to me to be that even actual causes of action in tort are not assignable at law or in equity. Another (if another is necessary) seems to be that the document did not purport to assign any such cause of action. It authorized, and indeed required, the submission of the wool for appraisement. Whatever the document meant, it did not mean that Donlon Brothers were saying to the plaintiff: "If the Commonwealth wrongfully takes our wool and converts it to its own use, our right of action is to belong to you". The basis of the "quantification" of the plaintiff's claim is subject to the observations which I have made in connection with the first argument presented.

Each of the arguments which I have so far mentioned assumes that the *National Security* (*Wool*) *Regulations* were invalid, and assumes also that, because those regulations were invalid, the Commonwealth never, apart from an "adoption" by the true owner of the wool of an act in itself tortious, acquired any property in the wool. The next argument presented was based on the assumption that the regulations, with the exception of reg. 14 (which provided that no person should buy or sell any wool except in accordance with the regulations), were valid, and on the further assumption that the plaintiff became the owner of the wool by virtue of the transaction with Donlon Brothers. It seems to me impossible to maintain, if the regulations as a whole were valid, that reg. 14 was invalid. It is plainly incidental to the scheme of the regulations as a whole that it should be provided that wool shall not be bought or sold except in accordance with the regulations. And, with regard to the second assumption, I have given my reasons for thinking that, whether all or any of the regulations were valid or not, the plaintiff never became the owner of the wool.

The remaining arguments for the plaintiff, as I understand them, treated the regulations as wholly valid, and regarded the plaintiff as an equitable assignee of the "proceeds" of Donlon Brothers' wool. On these two assumptions, the plaintiff put his argument in two ways.

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In the first place, he construed reg. 30 (2) as giving to the Central Wool Committee only a " limited and controlled " discretion in dealing with the moneys to which it refers. That sub-regulation required, it was said, a distribution of those moneys among those who supplied wool for appraisement, though it left the basis and details and manner of the distribution to the discretion of the Central Wool Committee. (It was said indeed that it was only if this construction were given to reg. 30 (2) that the regulations as a whole could be held valid.) When the Disposals Plan was substituted for the original Arrangement between the two Governments as to profit-sharing, reg. 30 (2) continued, it was said, by virtue of ss. 10 and 11 of the *Wool Realization Act* 1945, to apply to any profit which might come to the Commonwealth from the Joint Organization, and, when that profit did come to the hands of the Commonwealth, the plaintiff had an interest in it by virtue of his equitable assignment from Donlon Brothers. Thus what he claimed in the action was to enforce his interest in that profit fund. He accepted the basis of distribution adopted by the Act of 1948 as an equitable basis, but he did not rest his claim on the Act of 1948. Because he did not rest his claim on the Act of 1948 or seek to share in a distribution *under the Act*, he was not touched, it was said, by s. 8 (3) or s. 29 of the Act.

I am quite unable to regard reg. 30 (2) as giving to anybody any right or interest. The discretion given is, in terms, " absolute ", and it is impossible to doubt that the sub-regulation was enacted in order to make it clear that the position with regard to any profits was to be the same as that which had been held to subsist under the wool scheme of the war of 1914-1918. After the end of that war the existence of a right to share in profits ultimately realized was a matter of notorious controversy and prolonged litigation : see *John Cooke & Co. Pty. Ltd.* v. *The Commonwealth* (1) and *Kreglinger & Fernau Ltd.* v. *The Commonwealth* (2). It was finally determined that no such right existed. And, in the present case, the point is precluded by *Ritchie's Case* (3), where the Court said : " It is conceivable that a court interpreting the regulations might have implied limitations upon the manner in which the discretion was exercisable, but even so no right to participate could possibly have been imputed, particularly having regard to the reasons upon which were based the decisions in *John Cooke & Co. Pty. Ltd.* v. *Commonwealth* (4) " (5).

(1) (1922) 31 C.L.R. 394 ; (1924) 34 C.L.R. 269.
(2) (1926) V.L.R. 310 ; 37 C.L.R. 393.
(3) (1951) 84 C.L.R. 553.
(4) (1922) 31 C.L.R. 394 ; (1924) 34 C.L.R. 269.
(5) (1951) 84 C.L.R., at p. 577.

I have now considered each of the arguments of the plaintiff, except one, which, because it rests on the Act of 1948, it is convenient to leave to the end. I have indicated that each, in my opinion, breaks down at one or more points, whether the *National Security* (*Wool*) *Regulations* were valid or invalid. Before referring to the one remaining argument, I think I should say that, in my opinion, the regulations were valid, and that, whether they were valid or not, there are fundamental reasons why the plaintiff cannot succeed. The position appears to me to be governed in all respects by the *Wool Realization* (*Distribution of Profits*) *Act* 1948-1952.

The attack on the regulations was based on the argument that they provided for the acquisition of property by the Commonwealth otherwise than on just terms, and, therefore, were not authorized by s. 51 (xxxi.) of the Constitution. It is to be observed at the outset that a somewhat similar argument (though I do not know that reliance was expressly placed on s. 51 (xxxi.)) was put forward in *John Cooke & Co. Pty. Ltd.* v. *The Commonwealth* (1). The argument was dealt with by Viscount *Cave* speaking for the Privy Council in the following terms : " As a last alternative it was suggested that the Commonwealth Government must be taken to have requisitioned the appellants' wool and accordingly must pay for it on requisition terms . . . In their Lordships' opinion there is no foundation for this suggestion. Regulation 10 of the Wool Regulations did indeed forbid the sale of wool except through or to or with the consent of the Central Wool Committee or otherwise in accordance with the regulations ; and this regulation no doubt made it difficult, if not impossible, for a wool-owner to dispose of his wool except to the Commonwealth Government and on the terms offered by that Government. But there was no legal compulsion on any wool-owner to bring in his wool for sale. The Commonwealth Government proceeded throughout by the method of agreement, and resort was never had to the method of requisition " (2). It has already been mentioned that the *National Security* (*Wool*) *Regulations* of 1939, unlike the *War Precautions* (*Wool*) *Regulations* of 1916, did purport to compel owners of wool to send in their wool for appraisement and provided that the property should pass to the Commonwealth on final appraisement. It may be, therefore, that the element of " *legal* compulsion ", which Lord *Cave* found lacking in the earlier case, is present in the case before me. I am prepared, without deciding the point, to assume, as I think it was really assumed throughout in argument, that there was here, in each year of the scheme, an acquisition of property within the meaning

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

(2) (1924) 34 C.L.R., at p. 282.

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of s. 51 (xxxi.). But the terms of the acquisition appear to me to have been entirely just.

When any question of "just terms" arises, it must always be important to bear in mind a passage in the judgment of *Starke* J. in *Minister of State for the Army* v. *Dalziel* (1). His Honour said: "Under the Australian Constitution the terms of acquisition are, within reason, matters for legislative judgment and discretion. It does not follow that terms are unjust merely because 'the ordinary established principles of the law of compensation for the compulsory taking of property' have been altered, limited or departed from, any more than it follows that a law is unjust merely because the provisions of the law are accompanied by some qualification or some exception which some judges think ought not to be there. The law must be so unreasonable as to terms that it cannot find jusification in the minds of reasonable men" (2). *Williams* J. in the same case said: "I agree with the contention that an Act in order to contain just terms need not necessarily comply in all respects with all the principles of the common law relating to the compulsory acquisition of property. Each Act must be judged on its merits" (3). In what follows his Honour makes it very clear that the circumstances of acquisitions will, in the nature of things, vary infinitely, and that the circumstances must vitally affect the question of what terms are just. If it is to be accepted that on the justice of the terms of an acquisition by the Commonwealth depends the validity of the acquisition, any other view than that expressed by *Starke* J. in *Dalziel's Case* (4) would turn s. 51 (xxxi.) into a stultifying restraint on power, because, in such a case as the present, no man could say with confidence *a priori* that any given terms represented ideal justice.

The observations of *Williams* J. in *Dalziel's Case* (5) are well illustrated by the present case, because the attack on the Wool Regulations is based on an altogether exceptional ground. It was said that no terms of acquisition could be regarded as just which did not give to suppliers of wool, as a matter of legal right, a share in any profit which might ultimately accrue to the Commonwealth Government under the Wool Purchase Arrangement with the United Kingdom Government.

If the matter of profits be put on one side, and apart from one argument which I will notice briefly later, it could hardly be seriously contended that the price contemplated by the regulations

(1) (1944) 68 C.L.R. 261.
(2) (1944) 68 C.L.R., at p. 291.
(3) (1944) 68 C.L.R., at p. 308.
(4) (1944) 68 C.L.R. 261.
(5) (1944) 68 C.L.R. 261.

was inadequate or unfair, or that the manner of its distribution was inequitable. With regard to the price itself, the basis on which the regulations were framed, and the basis on which they were administered from the beginning, was that the Commonwealth should pay for the whole clip of a wool year a price per pound equal to the price per pound receivable from the United Kingdom Government. With regard to the allocation of the total price among suppliers, the scheme involved a most elaborate classification of wools according to type and yield—an achievement only made possible by the fact that in a highly organized industry men of the highest skill and integrity were willing to pool for the public good their private resources of knowledge and experience. With regard to the price itself, it compared not unfavourably with the average price of preceding years. It had been arrived at after very hard bargaining with the United Kingdom Government. Nor is it possible, in considering its fairness, to overlook a number of factors in the situation which were detailed by Mr. Justice *Owen* in the course of his evidence. In the absence of an acquisition scheme there would, he said, have been chaos. Shipping difficulties and storage difficulties would have made it impossible for the ordinary course of trade in wool to be carried on. I have mentioned that the Central Wool Committee erected some 400 stores of great size, defraying the cost by means of the " handling charge " which was paid by the United Kingdom Government. Large export markets simply disappeared. The obtaining of jute for woolpacks was from the beginning an ever present problem.

These and similar considerations were pressed upon me by counsel for the defendants, and, if it were merely a question whether adequate consideration had been provided for property acquired, they would, to my mind, be unanswerable. They do not, however, really answer Mr. *Barwick's* argument, which was that the Commonwealth, having a chance of obtaining a profit and being under no risk of making a loss, did not provide just terms unless it bound itself to pass on to the suppliers any profit which came to its hands. The real answer to the argument was, I think, put when it was pointed out that the Arrangement between the two Governments did not create any legal relation between them.

It was conceded that, if the position had been that the Commonwealth Government was to receive half of any profit made by the United Kingdom Government from sales outside the United Kingdom and was also to bear half of any loss incurred, justice would not have required that it should bind itself to distribute any profit which it might receive. The contrary could hardly have been

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argued. When once this is accepted, and the purely political character of the Arrangement between the two Governments is realized, the position seems clear enough. The character of the Arrangement was exactly the same as that of the parallel Arrangement made between the two Governments in 1916. Of that Arrangement this Court in *John Cooke & Co. Pty. Ltd.* v. *The Commonwealth* (1) said : " This was an arrangement between Governments—an arrangement of a political nature . . . —not cognizable by Courts of law, creating no legal rights and duties and depending entirely for its performance upon the constitutional relationship between those Governments and their good faith towards each other " (2). In the same case in the Privy Council (3) it was referred to as " an arrangement . . . not enforceable by any Court ".

It was quite impossible to foresee the course of the war, or the exigencies of an infinite number of situations that might arise. Before or after a profit from the source contemplated by the Arrangement was made, the gravest reasons might appear for altering the terms of the Arrangement. The two Governments *must* be at liberty to take whatever course the common interest dictated. In actual fact, as things turned out, the terms of the Arrangement *were* radically altered in 1945, when the Disposals Plan was adopted, under which the Commonwealth agreed to share with the United Kingdom Government the losses as well as the profits of a scheme entirely different from that which was originally contemplated. It was rightly conceded, as I have said, that " just terms " did not require that the Commonwealth should bind itself legally to pay profits to the suppliers of wool without requiring the suppliers to bear losses. Having all these things, and doubtless others, in mind, the Commonwealth took the fairest course conceivably open to it. Having appointed a Central Wool Committee, which was representative of all wool interests and on which wool growers were represented with special strength, it provided, in effect, that any profit which might ultimately be realized under the Arrangement should be dealt with not at the will of the Executive but in such manner as that representative body might determine. It seems to me impossible to maintain that an acquisition on those terms in the existing circumstances was an acquisition otherwise than on just terms.

One other argument relating to " just terms " must be briefly noticed. It was said that terms could not be just which fixed in advance the price to be paid for the wool over an indefinite period

(1) (1922) 31 C.L.R. 394.
(2) (1922) 31 C.L.R., at p. 416.
(3) (1924) 34 C.L.R., at p. 280.

of years. Whether this proposition is sound or not, the price to be paid to growers for their wool was not, in fact, so fixed.

But, in truth, so far as the present case is concerned, it is of no consequence whether the acquisition was or was not on just terms. No wool of the plaintiff's was ever acquired. So far as Donlon Brothers were concerned, they simply authorized the submission of their wool for appraisement under the regulations. This was an entirely voluntary act on their part, and the position is that which was held by *Latham* C.J. and *McTiernan* J. to exist in *McClintock* v. *The Commonwealth* (1). Every one of the circumstances which led to the dissent of *Williams* J. in that case is most conspicuously absent in the present case. There is nothing to suggest that the submission of the wool for appraisement was anything but a purely voluntary act. In any case, Donlon Brothers could now have no cause of complaint, for the Act of 1948 gives them everything that they could possibly claim.

It remains only to mention the one remaining argument of the plaintiff, which, unlike the other arguments put for him, did rest on the Act of 1948. It was claimed that the plaintiff was either the person who supplied the wool in question for appraisement or an equitable assignee of such a person. It was then said that, in one or other of those capacities, he was entitled under s. 7 (3) of the Act to the share of profit attributable to that wool. If s. 8 or s. 29 stood in his way those sections were said to be invalid.

The plaintiff is not, in my opinion, a person who supplied wool for appraisement within the meaning of the Act. I have already drawn attention to the distinction which the Act draws between "supplying" and "submitting" wool for appraisement. He may very well be an equitable assignee of the persons who supplied the wool for appraisement within the meaning of the Act. In that capacity, however, ss. 8 and 29 do stand in his way. He contends then that those sections are invalid. One answer to his contention may very well be that ss. 8 and 29 are an essential part of the scheme of the Act as it stands, that they are not severable, and that, if they fall, the whole Act falls. But, however this may be, I am unable to entertain any doubt that the whole Act, including ss. 8 and 29, is a perfectly valid exercise of the legislative power of the Parliament. It was suggested by counsel for the defendants that the Act might be supported under various powers given by s. 51 of the Constitution, but it seems quite plain to me that it is a valid exercise of the powers conferred by s. 51 (vi.) and (xxxix.). Nothing could be clearer than that the acquisition of the wool and

(1) (1947) 75 C.L.R. 1.

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the legislation under which it was effected were war measures. It was no mere matter of assisting producers in a crisis created for them by the war, as, for example, in the case of the apple and pear acquisition. Wool was a commodity of incalculable strategic importance alike to the United Kingdom at war and to the Commonwealth at war. The connection of the measures taken with the conduct of the war is immediate and obvious, and those measures were clearly authorized by the defence power. From the beginning the possibility of a profit, and of a distribution of profit, is envisaged, and all wool is appraised as " participating " or " non-participating". When a profit arising from the sale of wool is realized, although it is not realized from the source originally contemplated, it must be within the defence power to provide by legislation for the distribution of that profit. The manner of distribution might have been left, as had been originally contemplated, to the " wisdom fairness and discretion " of the Central Wool Committee, or it might have been placed in the hands of its successor, the Wool Realization Commission. But the Parliament was perfectly at liberty to exercise its own " wisdom fairness and discretion " with or without the advice of the commission. The provisions of ss. 8 and 29 are plainly incidental to the exercise of the discretion. I can see no reason whatever for saying that the Parliament is exceeding its powers if it says: " For the purposes of this distribution we will not recognize any assignment of any expectancy of a share in profit ". Such a provision might be dictated either by considerations of policy or by considerations of convenience. Nor can I see the slightest reason for saying that the Parliament is exceeding its powers if it says: " If a grower's wool came for appraisement through a dealer, we will pay the share of profit attributable to that wool to the grower and not to the dealer ".

The plaintiff's claim is, in my opinion, without foundation, and his action must be dismisssed.

From that decision the plaintiff appealed to the Full Court of the High Court.

Sir *Garfield Barwick* Q.C. (with him *T. R. Morling*), for the appellant. The submissions to be made on behalf of the appellant may be summarized as follows. (A) Assuming the *National Security (Wool) Regulations* and the *Wool Realization (Distribution of Profits) Act* 1948-1952, to be wholly valid, such legislation does not upon its true construction preclude the appellant from maintaining an

action as an equitable assignee of the wool against the assignor-owner (Donlon Brothers), and the persons who are about to pay to that assignor-owner moneys which fall within the description of the property equitably assigned. (B) If s. 8 (3) and s. 29 of that Act, or either of them on their proper construction afford an answer or defence to the appellant's claim as an equitable assignee of the proceeds of the wool, then those sections are invalid as beyond the constitutional powers of the Commonwealth on the ground that those sections, by precluding a person who has a good title to property under State law from enforcing the title obtained by him antecedently to the passing of the said 1948 Act, go beyond the scope of the power conferred upon the Commonwealth Parliament by s. 51 (xxxix.) of the Constitution, which is the only relevant constitutional power. (C) (1) The appellant having become the owner of the wool by virtue of the transaction with Donlon Brothers, and the *National Security* (*Wool*) *Regulations* being invalid as failing to provide just terms for the acquisition of the wool, the appellant waives any tort or wrong involved in the handling of the wool by the Commonwealth or the commission and claims the proceeds of the sale of the wool by the Commonwealth as money had and received, the appellant's claim being quantified by ratably apportioning the total price received by the Commonwealth for all the wool according to the appraised values of that wool in the same way as the 1948 Act distributes the moneys payable under that Act; or, (2), the appellant being regarded only as an equitable assignee of the proceeds of the wool and the *National Security* (*Wool*) *Regulations* being invalid, the assignor, Donlon Brothers, has waived any tort and adopted the sale of the wool by the Commonwealth; the assignor is therefore entitled to sue for money had and received, the claim being quantified according to the appraised values of the wool in the same way as the 1948 Act distributes the moneys payable under that Act; the amount so payable to the assignor falls within the description of the property subject to the equitable assignment and is recoverable by the assignee—the appellant. *Fullagar* J. took the view that the word "proceeds" as used in the transaction was apt to describe and include moneys which are now to be distributed by the Commonwealth. The effect of ss. 9 and 10 of the *Wool Realization* (*Distribution of Profits*) *Act* 1948-1952, was that the discretions of the Central Wool Committee under reg. 30 became the discretions of the Australian Wool Realization Commission, and further that the moneys to come from the Joint Organization under the disposal plan were brought within that discretion by s. 10. There is to be

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found in reg. 30 (2) a discretion in the Central Wool Committee as to the disposal of the profit in excess of the flat rate price in the original arrangement. By s. 9 that discretion was put into the commission, and by s. 10 a reference to the arrangement between the Government of Great Britain and the Government of the Commonwealth in reg. 30 (2) is extended to include the Disposals Plan. Regulation 30 remains; there has not been any express repeal of that regulation as affected by the Act. The situation at the time of the passing of that Act in 1948 was that reg. 30 was extant and the commission was substituted for the committee and the money coming under the disposal plan had been brought within the discretion of reg. 30 (2). Section 8 (3) of the Act is limited to a prohibition against the recovery by a dealer of the moneys paid under the Act where the moneys sought to be recovered are expressly described in the document under which he claims as money paid under the Act. The assignment under which the appellant claims describes the property in general terms without specific reference to the moneys paid under the Act and is therefore outside the terms of sub-s. (3). Section 8 (3) refers only to the recovery of money paid and not of money payable. The prohibition does not extend to or attach at any time prior to the actual receipt of the money. As the appellant seeks to intercept the money before payment to Donlon Brothers the appellant's claim cannot in any sense be regarded as the recovery of money paid to Donlon Brothers under the Act. Enforcing a claim as equitable assignee in respect of the moneys paid under the Act is not the " recovery " of those moneys in the sense in which that word is used in s. 8 (3). That section is not apt to prohibit the appellant's claim at the moment to be equitable assignee of the proceeds, the description of the property the subject of the assignment being quite appropriate to enable one to identify this distribution as being within the assignment by name of the share under this Act, or the possibility of a share under this Act, nor is it an attempt to recover the money paid under this Act by that description, therefore the sections do not preclude the appellant. Section 29 describes an assignment of the share in a distribution under the Act or the possibility of such a share. It is not in the sense of possibility of getting something, the possibility of there being some more money to be paid over but of the distribution under the Act. And it is deemed to be inalienable prior to the actual receipt of the shares in a distribution under the Act. Section 29 was designed to operate upon transactions occurring after the passage of the Act. The share in a distribution under the 1948 Act referred to in s. 29 is not defined but is determined

by reference to the other provisions of the Act and in particular by reference to ss. 7 and 19. Until those sections have been applied there is not any share in a distribution under the Act in existence and nothing upon which s. 29 can operate. It is such a share which is rendered inalienable. The share referred to in s. 29 is not the money paid over but the entitlement to receive something in the distribution. All that is being prevented is an alienation of that right. There was not any share prior to the passing of the Act and s. 29 cannot refer to anything which took place prior to the commencement of the Act. The words "possibility of a share" are not apt to refer to transactions occurring prior to the commencement of the Act because the words refer to the possibility of a share under the 1948 Act as such. Those words are directed to the possibility of there being more than one distribution under the Act. The assignment to the appellant does not assign a share under the 1948 Act as such. There is nothing in *Maslen* v. *Perpetual Executors Trustees & Agency Co. (W.A.) Ltd.* (1) inconsistent with that view of s. 29. All that the section does is to prevent an assignment of the right which the Act gives. It is designed to prevent a dealing in the right which the Act gave prior to the actual receipt of the money. Section 29 does not apply after the actual receipt of the money constituting the share under the Act. Section 28 precludes Donlon Brothers from having a right to sue for the money so that it was not until its actual receipt by Donlon Brothers that it could be said to be "proceeds" within the meaning of the equitable assignment to the appellant. The assignment only operates after the moneys are received by Donlon Brothers and therefore s. 29 has no application. Section 29 is designed, as a matter of administration, to prevent there being any need to alter or interfere with the distribution list compiled under s. 18 of the Act between the time of its compilation and the time of the final distribution under the Act. Section 29 only renders inalienable the right which the Act gives to receive a proportion of a sum being distribution, or the possibility of such a right. Section 8 (3) applies no matter what the terms of any contract. It is not limited to claims by a dealer arising out of his dealing. Whatever the prohibition may be, it is against claims by the dealer in any capacity so long as he is a dealer. As it does not refer to moneys payable, the prohibition does not extend or does not attach at any time prior to the receipt of the money. Section 29 is an endeavour to prevent traffic in the right to receive the money as such, to prevent traffic

(1) (1950) 82 C.L.R. 101, at pp. 109, 110, 121-125, 130; (1952) A.C. 215, at pp. 227, 229, 230; 88 C.L.R. 401, at pp. 409, 411, 412.

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in the right so described. In s. 8 (3) there is an endeavour to prevent the enforcement, the recovery, of the money so described. The appellant asserts that he owns the moneys upon the receipt by the grower, and he claims the assistance of the court of equity to ensure that the grower in discharge of his trusteeship—his conscience—hands over the money to the appellant. That is not properly described as "recovery from another person the moneys paid under this Act". Section 8 (3), on its true construction, does not apply because (i) it is limited to recovery of the money by that description, and (ii) in his suit the appellant is not seeking to recover the moneys as moneys paid to the other person, he is intercepting it at an earlier stage. The appellant is entitled in equity to intercept it because the respondent, who will be a trustee, has indicated that he is not going to perform his trust. If the construction of s. 8 (3) contended for by the appellant be incorrect, then that section purports to give to the assignor a good defence in a State Court in a suit to assert an equitable assignment which is valid under State law, the defence being simply that the moneys, otherwise within the assignment, are derived from a distribution under the 1948 Act. Section 8 (3) therefore has the effect of destroying the benefit of rights which the assignor had prior to the passing of the 1948 Act. The only relevant head of Commonwealth legislative power to support the 1948 Act is s. 51 (xxxix.), the Act being incidental to the execution of reg. 30 (2) of the *National Security* (*Wool*) *Regulations*. The Act is merely an Act to provide for the distribution of moneys which had been gathered together in the carrying out of a law which was passed in the wartime days. The question of whether the money being paid over is paid over as of right or not has not touched the question of whether the interference with the rights of others is a reasonably necessary incident of the power to pass it over. Conceding that the Commonwealth may validly choose the persons to whom it will pay the moneys the subject of the 1948 Act, that it may attach to the gift conditions precedent or subsequent, and that, in granting a right to receive the moneys, it may provide that that right shall be inalienable, the Commonwealth nevertheless has no power to destroy the rights of third parties which have accrued under State law and are valid and enforceable under that law. Such a provision cannot be said to be reasonably necessary, and therefore, incidental, to the distribution of the money. There is a radical difference between protecting the right given by the Act and protecting the payment itself after it has been made. Section 8 (3) cannot be regarded as a condition of the gift or as a condition

of the right to receive the gift. That section is severable. To assert that these antecedent transactions would not have effect according to their valid tenor is, as in the case of s. 8 (3), an unwarranted interference with the rights that have been acquired under the State law. If the construction of s. 29 of the 1948 Act contended for by the appellant be not acceptable and it be construed as wide enough to prevent the appellant enforcing the equitable assignment to him by Donlon Brothers, then the section is invalid and severable. If so read the section is an attempt by the Commonwealth to alter the significance of the transaction entered into in 1942 between the appellant and Donlon Brothers, is an unwarranted interference with rights which have been acquired under State law prior to the passing of the 1948 Act, and is not reasonably incidental to the disbursement of the moneys. The transaction between the appellant and Donlon Brothers constituted a sale. The document is expressed to be a "bought note", it makes up a price which is a final and complete sum so far as Donlon Brothers is concerned, and the wool is in fact delivered and passes irrevocably out of the control of Donlon Brothers. The words in the inset are consistent with a sale and at the most show that the parties intended a sale coupled with an equitable assignment by way of further assurance in case the sale should be avoided by some legislative or other act. The use of the word "retained" does not indicate that the appellant was parting with the possibility of receiving moneys over and above the appraised prices. Even if reg. 14 of the *National Security* (*Wool*) *Regulations* rendered the parties to the transaction liable to a penalty for breach of its terms, the sale was not thereby rendered void. Contrary to the view expressed in *Ritchie* v. *Trustees Executors & Agency Co. Ltd.* (1), that sub-reg. (1) of reg. 30 of the *National Security* (*Wool*) *Regulations* related only to the flat rate price while sub-reg. (2) referred to the share of profits which might become available for distribution, the correct view is that sub-reg. (1) refers to the whole of the moneys derived from either source. The effect of reg. 30 (1) and (2) is that all the moneys will go into the commission out of which will be discharged the payment to wool growers. The real price for the wool was flat rate plus participation in profit. The acquisition of the wool was for no other purpose than to service the Arrangement between the United Kingdom and the Commonwealth Governments, under which Arrangement the Commonwealth was to receive a flat rate paid plus a share of profits and was not subject to any risk of loss or disadvantage. It is nothing to the point that the Arrangement with Great

(1) (1951) 84 C.L.R. 553.

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Britain was political and not a legally enforceable arrangement. Regulation 30 (2) itself contemplates the distribution of the moneys in fact received. The constitutional requirement that the terms of acquisition must be just could not be satisfied without giving to the dispossessed owners access as of right to such profit as might be paid to the Commonwealth under the arrangement. Just terms may require that the dispossessed owners receive more than the market value at the date of acquisition of the commodity acquired. Unless the dispossessed owners are given a right of access to such profit as might arise, the price to be paid by the Commonwealth for wool was arbitrarily fixed and was to operate over an indefinite period of time. The handing over to the Commonwealth of a commodity in obedience to a law supposed at the time to be valid and compulsive is not a voluntary act. If it were not so regarded the owners of the commodity could not sue for a price as there was not any intention to contract nor could he sue for damages for tort.

W. J. V. Windeyer Q.C. (with him *R. Else-Mitchell*), for the Commonwealth. The legal nature of the transaction between the appellant and Donlon Brothers does not vary whether the regulations are considered to be valid or invalid. The transaction was not a sale because the language was not apt for a sale but was consistent with agency. Further, there was a studious avoidance of a sale so as to preclude any contravention of reg. 14 of the *National Security* (*Wool*) *Regulations*. If the transaction was intended to be and was a sale, such sale was rendered void by reg. 14 : *Bradshaw* v. *Gilbert's* (*Australasian*) *Agency* (*Vic.*) *Pty. Ltd.* (1) ; *Bassin* v. *Standen* (2) ; *Dressy Frocks Pty. Ltd.* v. *Bock* (3) ; *Hawke* v. *Edwards* (4). The document merely assigned the proceeds of the appraisement of the wool, that is, the price which flowed from the sale by appraisement. Further it was an assignment only of the moneys which came or should come, to the appellant's hands as a result of the appraisement, that is to say, the appraised price plus the flat rate adjustment payment which under the practice which had existed in previous seasons, would be paid to the appellant as the person who submitted the wool for appraisement, albeit as agent for Donlon Brothers. The appellant was entitled to retain these moneys. The permit under which the appellant was operating as a dealer draws a distinction between the obligation to keep records to enable a distribution to be made amongst growers and the

(1) (1952) 86 C.L.R. 209.
(2) (1945) 46 S.R. (N.S.W.) 16, at p. 18 ; 62 W.N. 238, at p. 239.
(3) (1951) 51 S.R. (N.S.W.) 390, at p. 393 ; 68 W.N. 287, at p. 288.
(4) (1947) 48 S.R. (N.S.W.) 21 ; 64 W.N. 211.

obligation to account for proceeds. In *Squatting Investment Co. Ltd.* v. *Federal Commissioner of Taxation* (1) somewhat different views were taken as to whether or not these distributed moneys coming in under the 1948 Act were to be distributed as proceeds of wool at all. If that construction of " proceeds " be correct then the appellant has received everything for which he contracted and his present claim must fail. The appellant was not the owner of the wool, so that he did not buy it and cannot sue in conversion. He cannot sue on the basis of money had and received because it was not his wool. He cannot recover as against Donlon Brothers or anybody else anything done under the equitable assignment of proceeds, because he has had the proceeds. He has not the right to challenge the validity of the Act nor any of the regulations. That meaning of " proceeds " flows from a proper construction of the Arrangement. That construction is much reinforced by the views of the majority in *Squatting Investment Co. Ltd.* v. *Federal Commissioner of Taxation* (1) because of the different problem with which that case was concerned, and it is not in any way contrary to the views of the minority. If that construction of " proceeds " be not accepted by the Court then the following submissions are made. The *Wool Realization Act* 1945-1950 was a valid exercise of the defence power, the external affairs power and the trade and commerce powers. The *Wool Realization (Distribution of Profits) Act* 1948-1952 was a valid exercise of the defence power as providing for the winding-up of a war-time scheme and as being incidental to the *National Security (Wool) Regulations* and the *Wool Realization Act* 1945-1950. The policy of the 1948 Act was that the moneys to be distributed by that Act should go to the persons who supplied the wool, that is, for the most part, the wool growers. If the word " proceeds " would be sufficient to assign to the appellant the moneys payable to Donlon Brothers under the 1948 Act, s. 29 operates to render that assignment ineffective and inoperative. Section 29 means that a share in a distribution under the Act shall be absolutely inalienable, and a possibility of such a share shall be deemed at all times to have been absolutely inalienable, prior to the actual receipt of the share whether by means of or in consequence of sale, assignment, charge, execution or otherwise. That section is not restricted in its operation to circumstances which occur after the Act comes into operation but operates also upon circumstances existing before that time. An equitable assignment of possible future property must be inoperative if when the possibility materializes the property is inalienable

(1) (1953) 86 C.L.R. 570.

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(*Tailby* v. *Official Receiver* (1)). It is therefore incorrect to suggest that s. 29 takes away a pre-existing right given by an equitable assignment. *Palmer* v. *Carey* (2) makes a distinction between somewhat similar transactions. The 1948 Act makes a statutory gift and Parliament in making a gift may choose the persons to whom and the conditions upon which the gift will be made and may determine the legal qualities and attributes of the thing given. There was prior to the 1948 Act no *right* in any wool grower to share in the profits (if any) of the wool scheme because reg. 30 (2) conferred an absolute discretion on the Central Wool Committee, such discretion not being controlled in any legal sense except by the requirement that it must be exercised bona fide : *Commissioner of Taxes* v. *British Australian Wool Realization Association Ltd.* (3) ; *Commissioner of Taxes* v. *Union Trustee Co. of Australia Ltd.* (4). The right first arose in the 1948 Act but it was a right which by virtue of s. 29 was inalienable prior to the actual receipt of the money. Section 8 (3) is complementary to s. 29 as well as having some independent operation. It introduces a further restriction in the case of dealers. There is not any reason why any part of the 1948 Act should be regarded as invalid. That Act is a proper exercise of the incidental power because it is incidental, firstly, to the regulations, and secondly, to the 1945 Act. It is directed to winding up the war-time scheme and to dissolving the control in an orderly manner having regard to the conditions created by the war. It is also an Act (i) to authorize and validate an Arrangement between Australia and the United Kingdom, (ii) which has annexed to it the Disposals Plan arrived at by agreement, (iii) which is an exercise of the trade and commerce power as it provides for the ordinary marketing of current clips of wool in competition with or in conjunction with the great accumulated war stocks, and (iv) which is in that sense for the marketing primarily, mainly overseas, of Australian wool. The 1948 Act is valid because it is a statutory exercise of a discretion similar to and separating the discretion given by reg. 30 (2). It is a statutory exercise of a discretion similar to and which supersedes the action by reg. 30 (2). It is incidental to the disposition of the funds which come under the Wool Regulations. It is incidental to those regulations, but to dispose of the moneys which come in as a result of the war-time arrangement. It is not denied that the manner in which the scheme is administered does not really determine whether it be valid or invalid. It is necessary

(1) (1888) 13 App. Cas. 523, at p. 533.
(2) (1926) A.C. 703 ; 37 C.L.R. 545.
(3) (1931) A.C. 224, at p. 235.
(4) (1931) A.C. 258, at p. 263.

to have regard to what are the legal incidents as disclosed by the regulations. The *National Security* (*Wool*) *Regulations* are valid. The appellant's argument that the only purpose of the acquisition was to enable the Commonwealth to act as a mercantile agent to service the agreement with the United Kingdom Government misapprehends the position. The transaction was not a purely commercial transaction but was part of an elaborate enterprise in which the wool of the British Commonwealth countries was controlled for the purpose of the war. Considerations far different from ordinary mercantile considerations entered into the transaction and were in the minds of both Governments when the transaction was made. The acquisition was for war purposes, military, economic and diplomatic, both of Australia and the United Kingdom, and for the purpose of maintaining a stable economy in Australia during the war years. A considerable quantity of the wool was never sold to the United Kingdom but was used for local manufacture in the Commonwealth. It is amply shown in the evidence that all the wool was needed for war purposes in one form or another, either to clothe members of the armed forces or as a weapon to encourage neutrals or to deny it to the enemy or to deny it to neutrals whose neutrality seemed uncertain and who were calculated as likely to go over to the enemy. The terms of the Arrangement between the Governments were arrived at after a process of bargaining. The flat rate price paid by the United Kingdom Government was in itself a fair and just price. The increase of fifteen per cent in the flat rate price which occurred in 1942 was not attributable to wholly commercial considerations. In a transaction of this magnitude the justice of the terms is not to be judged by mere mercantile considerations or monetary equivalence. "Just terms" requires the consideration of the interests both of the expropriated owners and of the community, especially when the nation be at war (*Grace Bros. Pty. Ltd.* v. *The Commonwealth* (1); *Nelungaloo Pty. Ltd.* v. *The Commonwealth* (2)). The whole of the circumstances existing at the time must be considered with a recognition that a full and flexible operation must be given to the concept of just terms (*Bank of New South Wales* v. *The Commonwealth* (3); *Andrews* v. *Howell* (4); *Nelungaloo Pty. Ltd.* v. *The Commonwealth* (5)). "Just terms" is not synonymous with or equivalent to pecuniary compensation for various reasons, one being that in measuring pecuniary compensation,

(1) (1946) 72 C.L.R. 269, at pp. 279, 280, 285, 290, 291.
(2) (1948) 75 C.L.R. 495, at p. 571; (1952) 85 C.L.R. 545, at p. 600.
(3) (1948) 76 C.L.R. 1, at p. 349.
(4) (1941) 65 C.L.R. 255, at p. 282.
(5) (1948) 75 C.L.R., at pp. 569, 571.

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regard is had rather to what the seller should receive than to what the buyer should pay. When considering compensation in the common law sense attention is fixed on the price which the seller should receive measured by the value to him of the property acquired, this value being the market price if there be a market, or the monetary equivalent of the market price if there be no market. Cases in which the Court was concerned with regulations which used the word " compensation " and provided for the acquisition on the payment of compensation are distinguishable, because they do import to some extent the idea of pecuniary compensation, but where there is not any special use of that word and all that is said is that the acquisition as a whole is on unjust terms, one is entitled to have regard to wider matters. " Just " means what a reasonable man could regard as just, and if a fair-minded man could regard the terms as just it is immaterial that a court might prefer other terms which it thinks more just (*Minister of State for the Army* v. *Dalziel* (1); *Grace Bros. Pty. Ltd.* v. *The Commonwealth* (2); *McClintock* v. *The Commonwealth* (3); *Bank of New South Wales* v. *The Commonwealth* (4); *P. J. Magennis Pty. Ltd.* v. *The Commonwealth* (5); *Attorney-General for Canada* v. *Hallett & Carey Ltd.* (6)). The assessment of compensation may be committed to a tribunal representative of the trade which is required to act fairly (*Andrews* v. *Howell* (7); *Australian Apple & Pear Marketing Board* v. *Tonking* (8); *Johnston Fear & Kingham & The Offset Printing Co. Pty. Ltd.* v. *The Commonwealth* (9); *Nelungaloo Pty. Ltd.* v. *The Commonwealth* (10)). The acquisition in this case is not an acquisition of a single article. In this case all the wool for the duration of the war and one wool year thereafter was taken at a fair price. In considering whether the terms be just or not the totality of the terms must be regarded and it is not proper to isolate one element as the appellant does and regard the presence or absence of that element as the thing which makes the terms just or unjust. The regulations provided for the dispossessed owner to get two things, firstly, the table of limits price on appraisement brought up to flat rate parity by the flat rate adjustment moneys and, secondly, a chance of participation in any profits which might arise from the scheme. Not only was the total price paid by the Commonwealth a fair price but the distribution of that price to

(1) (1944) 68 C.L.R. 261, at p. 291.
(2) (1946) 72 C.L.R., at pp. 279, 285, 290, 291, 295.
(3) (1947) 75 C.L.R. 1, at p. 24.
(4) (1948) 76 C.L.R., at p. 300.
(5) (1949) 80 C.L.R. 382, at p. 429.
(6) (1952) A.C. 427.
(7) (1941) 65 C.L.R., at p. 270.
(8) (1942) 66 C.L.R. 77, at p. 107.
(9) (1943) 67 C.L.R. 314, at pp. 326, 327.
(10) (1948) 75 C.L.R., at p. 547.

growers was in a fair and proper manner. It is undeniable that the owners get a chance of participation in profits because a committee representative of the industry had the task of distributing profits if there were any. If a distributable amount came to hand then a distribution amongst wool growers in some form or another was what the regulations certainly contemplated and perhaps required. The distributable profit arose from the Joint Organization Disposals Plan which was a wholly new scheme. The profit did not arise from the Wool Purchase Arrangement entered into in 1939. The Commonwealth may have retained the whole of the profit because of the tremendous impact of the scheme on the economy of the Commonwealth and because of the vast organization which the Commonwealth set up to operate the scheme and keep the industry on a sound basis. The appellant cannot recover unless there was, in fact, a wrongful conversion of goods in which he had such property that he was entitled to bring an action for trover. There must have been a tort which could have been sued upon if it had not been waived. There was not any tort upon which the appellant could sue because, firstly, he was not the owner and any bailment of the wool which he had, ceased when the wool reached the broker's store; secondly, there was not any wrongful conversion because all that was done by the Commonwealth was done with his assent and with the assent of Donlon Brothers. Further, the appellant has not shown that the Commonwealth received more for Donlon Brothers' wool than it has in fact already paid (*McClintock* v. *The Commonwealth* (1); *Powell* v. *Hoyland* (2); *Brewer and Gregory* v. *Sparrow* (3); *Nelungaloo Pty. Ltd.* v. *The Commonwealth* (4)). Some of the difficulties of mixed funds, mixed quantities of chattels, were dealt with in *Brady* v. *Stapleton* (5).

J. B. Tait Q.C. (with him *K. A. Aickin*), for the Australian Wool Realization Commission. This respondent adopts the arguments presented to the Court on behalf of the Commonwealth. Section 8 (3) of the *Wool Realization* (*Distribution of Profits*) *Act* 1948-1952, is not so limited in its operation as the appellant contends. The sub-section applies wherever the dealer, in order to succeed in his claim, must prove that the moneys he claims were paid to another person under the 1948 Act. The appellant, in order to show that the moneys come within the description of the property assigned, namely, "proceeds", must show that the moneys are payable

(1) (1947) 75 C.L.R. 1.
(2) (1851) 6 Ex. 67 [155 E.R. 456].
(3) (1827) 7 B. & C. 310 [108 E.R. 739].
(4) (1948) 75 C.L.R. 495.
(5) (1952) 88 C.L.R. 322.

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under the 1948 Act. The appellant's construction limits the operation of s. 8 (3) to contracts made after the passing of the Act because until that time no one could specifically describe moneys as moneys payable under the Act. Such a construction is inconsistent with the very words of the sub-section. The suit that can be brought to recover must be one in which it is an essential part of the entitlement to recover that the money was paid under this Act, and then if that is so it is a prohibition. The main argument on the construction of s. 8 (3) is that the words in the section "recover from another person the whole or any part of moneys paid to that other person under this Act" are satisfied when the right to recover is given, i.e., proceeds of wool, and when he sues for the moneys that are paid under this Act, he has to show that they are proceeds of the wool because they are paid under this Act, and that is the only way in which he could claim these moneys. The appellant is not entitled to a declaration of entitlement to payment as the equitable assignee of Donlon Brothers unless he has an existing right to payment. The appellant cannot have a greater right than Donlon Brothers, and Donlon Brothers, by virtue of s. 28 of the 1948 Act, has not any right to any payment under the Act. Until the gift is actually made to Donlon Brothers the appellant cannot have any rights in respect of the moneys. The right of the assignor must be an existing right (*Tailby* v. *Official Receiver* (1)). The operation of s. 29 is not limited, as the appellant contends, to assignments in which the property assigned is described in terms as a share or a possibility of a share in a distribution under the 1948 Act (*Maslen* v. *Perpetual Executors Trustees & Agency Co. (W.A.) Ltd.* (2)). That section applies wherever the property alienated or any part thereof is or includes a share in a distribution under the Act. The 1948 Act is an exercise of the defence power for the winding up of a war-time scheme. The statute makes provision for the distribution of moneys to which no person had a legal right and in that sense provides for the making of personal gifts. The Act decides not only the persons who are to receive the gift but also the nature of what is given to them. Sections 8 (3) and 29 form part of the qualities or characteristics attached to the giving of the money and are a legitimate part of the scheme enacted by the Parliament for the distribution of the moneys. Those sections are inseverable from the remainder of the provisions of the Act. The particular characteristic attached in

(1) (1888) 13 App. Cas., at pp. 533, 543.

(2) (1950) 82 C.L.R. 101; (1952) A.C., at p. 230; 88 C.L.R., at p. 412.

s. 8 (3) is one which applies to dealers only. If the wide construction of the word " proceeds " contended for by the appellant be correct, then it would include the proceeds of every sale of the wool which took place after appraisement because every subsequent sale and its proceeds flow from the submission of the wool for appraisement. The moneys distributable under the 1948 Act cannot be properly described as the proceeds of the wool or of its submission for appraisement. The differences between the profits arising under the arrangement made in 1939 and the profits arising under the Disposals Plan reinforce that conclusion. The events which happened when the Joint Organization was formed, including the fact that there was an undertaking on the part of the Commonwealth Government, a liability for losses, a bringing-in of the wool that was brought in, and the various other things, make it impossible to suggest that the fund that was being distributed in 1948, so far as it was the profits from the Joint Organization, and the Disposals Plan, were proceeds in any sense as the words are used in the document. It cannot be said that any part of the surplus profits were received on account of Donlon Brothers' wool. Even if some part of these profits are regarded as having been received on account of Donlon Brothers' wool, it is very difficult to determine the precise amount so received. It cannot be said that any part of the surplus profits were received on account of the appellant's wool. The Commonwealth has already paid through appraisement a greater sum for the wool in question than could have been obtained elsewhere by the owner. There was not any wrongful conversion of the wool by the Commonwealth as the submission for appraisement was voluntary (*McClintock* v. *The Commonwealth* (1)). Further, there has not been any waiver by Donlon Brothers of any tort. The discretion vested in the Central Wool Committee by reg. 30 (2) of the *National Security* (*Wool*) *Regulations* was not an uncontrolled discretion but was a discretion which was to be exercised in conformity with the general purpose and scope of the regulations. The acquisition of the whole of the wool was not a pool for the purpose of the marketing of the wool in order to get an orderly marketing of the wool. In such a case as this where the wool is acquired under the power of the Commonwealth, there is not any principle which says that whatever the Commonwealth obtains on resale the Commonwealth is bound to pay over. The requirements of just terms may in certain circumstances be satisfied by giving to the dispossessed owners something less than common law compensation but cannot require more.

(1) (1947) 75 C.L.R. 1.

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The acquisition in *Australian Apple and Pear Marketing Board* v. *Tonking* (1) by the governmental authority was simply as a means of marketing the commodity. The Arrangement with the United Kingdom Government was a joint effort arranged between that Government and their allies as being a very essential and necessary step in the prosecution of the war. The Commonwealth was not a mere " conduit pipe ", nor was it a mere marketing scheme. Having regard to all the circumstances existing and contemplated at the time of the promulgation of the regulations, it could not be said that the terms provided for the acquisition were unjust, when by those terms each dispossessed owner received his proper proportion of the flat rate price payable by the United Kingdom Government and the ultimate disposition of any profit which might arise was left to the discretion of a body representative of the wool industry. Indeed, the requirement of just terms was fully satisfied when the suppliers of the wool received their proper share of the flat rate price.

W. J. V. Windeyer Q.C., by leave, handed to the Court copies of the statement of evidence given by his Honour Mr. Justice *Owen* before *Fullagar* J.; referred to the arrangement whereunder the price of the Wool Purchase Commission was reviewable each May. The cables show that the agreement between the Commonwealth and the United Kingdom was never reduced to writing in the sense that a commercial contract is reduced to writing. The Arrangement was not a mercantile sale in any sense. Examined as a whole it will be seen to be a political arrangement for the conduct of the war. It not being in the ordinary sense a sale it is inappropriate to apply to it the idea of an agent passing on the price he received.

G. D. Bonamy (Solicitor), on behalf of the respondents George Henry Donlon and William Donlon, in their personal capacity and as executors of the will of Michael Joseph Donlon deceased, adopted, in advance, the arguments to be addressed to the Court on behalf of the Commonwealth and having submitted to any order the Court might make, was excused from further attendance.

C. B. Lynch, for the respondent Robert Donald Bakewell, adopted, in advance, the arguments to be addressed to the Court on behalf of the Commonwealth and having submitted to any order the Court might make, was excused from further attendance.

Sir *Garfield Barwick* Q.C., in reply.

Cur. adv. vult.

(1) (1942) 66 C.L.R. 77.

In a letter dated 7th September 1953, addressed to the Registrar, Sir *Garfield Barwick* Q.C., with the knowledge of counsel for the respondents, asked that it be brought under the notice of *Williams*, *Webb* and *Kitto* JJ. that in connection with the ascertainment of the price received by the Commonwealth for the subject wool, reference might be made to *Paton* on *Bailment*, at pp. 155, 399, 401, and that as to the admixture of money reference might be made to *Sinclair* v. *Brougham* (1).

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THE COURT delivered the following written judgment :— Dec. 16.

This is an appeal from a judgment of *Fullagar* J., given on the trial of an action brought in this Court by the appellant against the Commonwealth, the Australian Wool Realization Commission, and two brothers named Donlon who were sued both personally and as the executors of the will of a third brother.

The action relates to a share payable to the Donlon brothers in a distribution under the *Wool Realization* (*Distribution of Profits*) *Act* 1948-1952 (Cth.). By that Act provision is made for the distribution of the wool disposals profit which resulted (in the main) from the operations of the Joint Organization in pursuance of the Disposals Plan devised by the Governments of the United Kingdom, Australia, South Africa and New Zealand for the disposal of wool at the end of the second World War. To trace the history of wool in the second World War, and thereby to explain how the disposals profit came into existence, would be to go over again an epic story which not only was told in its essentials in *Ritchie* v. *Trustees Executors & Agency Co. Ltd.* (2), and discussed in some of its aspects in *Squatting Investment Co. Ltd.* v. *Federal Commissioner of Taxation* (3), but has been adequately reviewed by *Fullagar* J. in his reasons for the judgment under appeal. It is against this historical background, and in the light of the statutes and regulations which belong to it, that the problems of the present case have had to be examined ; but we find no need to say more by way of preface to this statement of our reasons than that we adopt and treat as incorporated here the historical narrative and the conspectus of the relevant legislation which the judgment of *Fullagar* J. contains. We turn at once to the facts of the particular case.

On 4th November 1942, the plaintiff, a wool dealer, received certain wool from the three Donlon brothers who were wool growers, and thereafter he submitted it for appraisement under the *National Security* (*Wool*) *Regulations*. It was duly appraised, and the property

(1) (1914) A.C. 398, at pp. 438, 458-460.

(2) (1951) 84 C.L.R. 553.

(3) (1953) 86 C.L.R. 570.

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in it passed to the Commonwealth by force of reg. 15. It was listed as participating wool in the appraisement catalogue used by the appraisers for the purpose of the appraisement. Accordingly, when the *Wool Realization (Distribution of Profits) Act* came into force in 1948, a share of each amount to be distributed under that Act became payable by the defendant commission in relation to this wool, the share being an amount bearing the same proportion to the total amount to be distributed as the appraised value of the wool in question bore to the total of the appraised values of all participating wool (s. 7 (2)). This share became payable to the person who supplied the subject wool for appraisement (s. 7 (3)). For the purposes of the Act, wool submitted by a dealer for appraisement as agent for another person (where only one dealer has dealt with the wool) is deemed to have been supplied for appraisement by that other person (s. 8 (1)), and two or more persons who have jointly supplied wool for appraisement are to be treated as one person for the purpose of determining their claims in relation to that wool in any distribution under the Act (s. 7 (4)). The result is that a share in each distribution, proportionate in amount to the appraised value of the Donlon brothers' wool, is payable to them. They are accordingly shown, on the distribution list prepared and kept under s. 18, as persons who, in the opinion of the commission, are entitled to share in distributions under the Act. The plaintiff, however, seeks to establish in this action that he is entitled, with respect to each share which becomes payable to the Donlon brothers in a distribution, either to intercept the share as it becomes payable to them, or to have the share paid to him upon their receiving it, or to recover from the Commonwealth an amount equal to the share as for money had and received to his use or to the use of the Donlon brothers in whose place he claims to stand.

The foundation of the plaintiff's case, in whichever of these alternative ways it may be put, is the transaction under which the plaintiff received the Donlon brothers' wool. That transaction is recorded in a document dated 4th November 1942, consisting of a printed form of invoice with handwritten additions. At the head of the document, after the plaintiff's business address and telephone numbers and the date, there appear the printed words " Bought from ", followed by the written words " Donlon Bros. of Bara ". There follows in print the name of the plaintiff, who is described as a licensed dealer in wool, hides and skins. The body of the form contains, in handwriting, particulars accounting for a total sum of £286 15s. 3d. Then, at the foot of the document, appears what has been called during the case the inset. It consists

of certain printed words with provision for two signatures, and the signatures, first of the plaintiff, and then of M. Donlon (one of the Donlon brothers), the whole being enclosed within printed lines forming a rectangle. The printed words read as follows:— "The terms and conditions upon which I have received the above wool from you are that you are not to be liable for any losses that may accrue, and that the wool will be submitted for appraisement either alone or with such other wools as I think fit. The proceeds are to be retained by me in satisfaction of the amount paid to you and for my services and expenses".

The argument advanced for the plaintiff on the appeal consisted of several alternative contentions, depending upon different hypotheses as to the legal effect of the transaction which this document records. It is convenient to deal with that matter at once.

At the date of the document, reg. 14 of the *National Security (Wool) Regulations* was in force, forbidding any person to sell or buy or contract to sell or buy any wool except in accordance with the regulations. This prohibition formed an integral part of the legislative framework within which the appraisement system worked. It must have been well known to persons in the position of the plaintiff and the Donlons, and the inset shows that compliance with the requirements of the system was the footing upon which they were dealing with one another. A conclusion that nevertheless the parties should be taken to have intended a sale of the wool by the Donlons to the plaintiff would therefore not accord with probability. There are, it is true, two features of the document of 4th November 1942 which tend in that direction. One is that the printed words "Bought from" were left standing when the document was filled in and signed as a record of the transaction; and the other is that the particulars written into the body of the document do not differ in their nature or their form from the particulars usually appearing in a sale invoice to describe goods sold and a price payable. The first of these features cannot be allowed decisive weight, for it is apparent that the parties were utilizing, for a transaction entered into in relation to the appraisement system, a document adapted from the form appropriate to the normal pre-war business of the plaintiff as a wool dealer; and the second is quite equivocal, for, considered by itself, it is equally consistent with a sale of the wool and with a discounting of the proceeds to arise from the wool.

But the terms of the inset really leave no room for doubt that it is a discounting of the proceeds, and not a sale of the wool, that the document records. The terms and conditions set out would

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be completely otiose in the case of a sale. It is inconceivable that parties who intended a sale should trouble to make these stipulations and, having made them, to record them, describe them as " the terms and conditions upon which " the wool has been received by one from the others, and solemnly sign them. The very words in which these terms and conditions are expressed are repugnant to the notion of a sale of the wool and a consequential passing of the property therein. The choice of the word " received " to describe what has happened to the wool from the plaintiff's point of view; the exoneration of the Donlons from liability for losses; the taking by the plaintiff of authority from the Donlons to submit their wool for appraisement either alone or with other wools; his taking authority to retain the proceeds; the reference to the amounts, which appears in the body of the document as if it might be a price, as an amount paid to the Donlons, in " satisfaction " of which the proceeds should be retained by the plaintiff; the reference to services and expenses of the plaintiff (*scil.* performed and laid out on behalf of the Donlons); and the provision for the " satisfaction " of these, as well as the amount paid, out of the proceeds—all point irresistibly to the conclusion that the parties, in obedience to reg. 14, set their faces against a sale of the wool, and agreed upon a transaction which should entitle the plaintiff, not to the wool, but to the " proceeds ".

Then what does the word " proceeds " include? Prima facie, the word comprises all moneys which at any time may be paid out by the Commonwealth or its agencies in consequence of the submission of the wool for appraisement. The moneys to which the present action relates fall clearly enough within this general description. *Fullagar* J. considered, and we agree, that they are not to be excluded because of a supposition that the parties were not contemplating any moneys other than the full appraised price of the wool (including the retention money) and the flat rate adjustment. The possibility of further moneys becoming payable at some future date was notorious, and it was acknowledged, both generally and in relation to the Donlons' wool in particular, by the inclusion of that wool in the class designated in the Central Wool Committee's books as participating wool. But the agreement between the plaintiff and the Donlons was that the " proceeds " should be " retained " by the plaintiff; and it was contended that the use of the latter word provides a clear indication that the plaintiff was to be entitled to such proceeds only as might come to his hands. The adoption of this view would end the case, for, as we have mentioned already, it is the Donlons and not the

plaintiff whom the commission, in accordance with the Act, has placed on the distribution list as the persons entitled to receive payments in relation to the Donlons' wool. But the word " retained " affords too slender a foundation for this conclusion. It reflects the anticipation of the parties that all moneys which the submission for appraisement might produce would be received by the plaintiff as the agent through whom the wool was submitted, but much more would be needed to reduce the otherwise complete generality of the expression " the proceeds ". It is not to be supposed that the parties intended, by using the word " retained " in a precise and literal sense, to make the ultimate destination of moneys resulting from the appraisement of the wool vary according as the Commonwealth might choose to pay them to the plaintiff or to the Donlon brothers.

The result is that, if there is no valid statutory provision in his way, the plaintiff is entitled by virtue of the transaction of 4th November 1942 to insist, at least as against the defendants Donlon, that all moneys to be distributed under the *Wool Realization (Distribution of Profits) Act* in relation to the wool to which that transaction referred shall be paid to him. But the first obstacle in his way is that, whether the transaction operates as an equitable assignment of those moneys or not, once they are paid to the Donlons any right in the plaintiff to recover them is in terms denied by s. 8 (3) of the Act. The section provides that notwithstanding the terms of any contract (whether made before or after the commencement of the Act), a dealer shall not be entitled to recover from another person the whole or any part of any moneys paid to that other person under the Act. The Court was invited to hold that on the true construction of the sub-section what is precluded is the recovery of moneys paid under the Act in one class of case only, viz., that in which the person seeking to recover relies, for the establishment of his right, upon a contract specifically referring to those moneys as moneys paid under the Act. A claim to recover those very moneys by virtue of a title to be paid all moneys answering a description wider than that of moneys paid under the Act was said to be left untouched. This contention places upon the sub-section a limitation which is entirely arbitrary and finds no support in the language used. Of course the provision applies only when moneys paid under the Act are claimed by a dealer on the ground that their character as moneys paid under the Act entitles him to recover them ; but that may be the case, not only where the dealer relies for his title upon a transaction or instrument referring by specific description to moneys paid under the Act, but also where he relies

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upon a title to moneys of a particular genus of which moneys paid under the Act are a species. The sub-section, according to its express terms, may invalidate a right even though conferred by a contract made before the commencement of the Act; and, unless it is to be assumed that this refers only to contracts made after the intention of the Government to procure the passing of the Act had become known—a suggestion too fanciful to be entertained—this fact is in itself a sufficient refutation of the argument, for contracts made before the Act, if they do give any right to recover moneys paid under the Act, must necessarily do so by the use of a general description which embraces those moneys.

Consequently, if s. 8 (3) is valid—and for the moment its validity may be assumed—once the moneys which are the subject of the present action are paid to the Donlon brothers, the plaintiff will have no enforceable right to recover them. If the plaintiff is to obtain any order for payment, it must be an order made against the defendant commission while it still has the subject moneys in its hands; and if he is to obtain such an order he must rely upon a promise by the Donlon brothers, to be found in the transaction of 4th November 1942, to assign future property of a description which these moneys satisfy, and operating according to the principle of *Tailby* v. *Official Receiver* (1) to effect an equitable assignment of the moneys when they become identifiable as moneys covered by the description. It is quite impossible to accede to the contention that there may be a middle position, such that, if the plaintiff cannot recover the moneys either from the commission before their payment or from the Donlon brothers after their payment, yet he may obtain an injunction to restrain the Donlon brothers from receiving payment without his consent, and thus ensure that either he gets the money through the co-operation of the Donlons, or no one gets it.

But when he endeavours to put his case in the manner referred to, the plaintiff encounters the provisions of s. 29. This section provides that, subject to the Act and the regulations (a qualification which has no materiality in this case), a share in a distribution under the Act, or the possibility of such a share, shall be, and be deemed at all times to have been, absolutely inalienable prior to actual receipt of the share, whether by means of, or in consequence of, sale, assignment, charge, execution or otherwise.

Counsel for the plaintiff submitted that on its true construction this section has no application in the present case, because its operation is entirely prospective in the sense that it renders

(1) (1888) 13 App. Cas. 523.

ineffectual such alienations only as are made after the passing of the Act, or perhaps (as the reference to the possibility of a share may indicate) such only as are made after the Bill for the Act was introduced into Parliament. The purpose or policy which this submission ascribes to the section is simply to preclude, as far as possible, changes in the distribution list during the period, possibly a period of many years, over which the successive distributions may have to extend. But the language of the section is altogether against this view. Of course, the section is prospective in one sense: it precludes only future alienations and the future recognition of past sales, assignments, &c., as alienations. But what ground is there for limiting by reference to their date the sales, assignments, &c., which are not to be treated as effectual alienations? The answer which was offered commenced by asserting that the word "share" in the first two places in which it occurs in s. 29 means, not a sum of money, but a right to participate in a distribution. (It was recognized that the Act does not create any right which is enforceable by action (see s. 28); but a right is conferred to receive moneys in distributions under the Act, and it is that right to which the word "share" was said to refer.) The next step was a submission similar to that which was made in relation to s. 8 (3), namely, that the sales, assignments, &c., to which s. 29 refers are those only which specifically mention shares or possibilities of shares in distributions under the Act, and do not include those which apply to such shares or possibilities because they fall within a wider description. And the final step was to say that, since a share or possibility of a share (in the sense contended for) was unknown before the Act commenced, or at the earliest before the Bill for the Act was introduced into Parliament, s. 29 cannot be held to preclude the alienation of a share or the possibility of a share by the operation of a transaction which occurred before the happening of these events.

This argument must fail, if for no other reason, because the second step has no greater claim to acceptance than its counterpart under s. 8 (3). Alienations, not only "by means of", but also "in consequence of" any kind of transaction, are invalidated. It would be difficult to find words more clearly applying to a transaction effected either before or after the Act which, by reason of a sufficiently wide description of its subject matter, takes effect as an alienation of a share in a distribution under the Act as and when that share becomes identifiable as payable to the alienor. But the first step, too, must be declined. It overlooks the fact that the

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meaning which it attributes to the expression " a share in a distribution under this Act " not only departs from the natural meaning of the words, but also differs from the meaning which " the share " must be intended to have where it occurs in the phrase " actual receipt of the share ". In that phrase, " the share " must mean the money which becomes payable to a person in a distribution under the Act. There is no justification for denying the same meaning to " share " in each of the three places in which it occurs in the section ; and, if it is given that meaning, " the possibility of such a share " must mean the chance which the Act gives that an amount will become payable to a person in a distribution—for in point of law it is no more than a chance, however great may be the probability attaching to it. What the section means, according to the plain sense of its terms, is that no sale, assignment, charge, execution or other means of alienation, whether it occurs in the future or has occurred in the past, shall be recognized as preventing a person from receiving for his own benefit money which becomes payable to him in a distribution under the Act.

Failing, as we must hold that he does, in his arguments upon the construction of ss. 8 (3) and 29, the plaintiff falls back upon a challenge to the constitutional validity of those provisions. That the Act, broadly considered, is a valid exercise of the defence power was not questioned. Indeed it could not fairly be questioned, for the Act is plainly a law for winding up an immense enterprise which was designed to play, and in fact played, a part of major importance in the conduct of the second World War. But the particular provisions referred to were attacked on the ground that, if they have the meaning we have attributed to them, they are unsupported by the considerations which link the other provisions of the Act with constitutional power. They purport to interfere with rights which belong to the sphere of State legislative power, it was said, and to do so in a manner not in any way incidental to defence. Counsel conceded that a law of the Commonwealth resting upon the defence power might validly prescribe the persons who should participate in distributions such as have here to be considered, and might validly prescribe the conditions upon which those persons should be entitled to receive their shares. But he maintained that, if the Parliament chose to make moneys payable to a person unconditionally, it could not proceed to destroy proprietary or contractual rights of other persons which, according to State law, would arise with respect to the right to receive those moneys upon its accrual or with respect to the moneys themselves upon their payment. An individual donor, he pointed out, could

not make the subject matter of his gift inalienable by the recipient or prevent it from being caught by antecedent transactions within the terms of which it might happen to fall. The flaw in the argument is apparent. We are here concerned, not with a disposition of property taking effect under the general law, but with an exercise of legislative power; and there is no analogy whatever between the limitations which the law of property imposes upon the powers of individuals in the making of gifts and the limitations which the Constitution sets to the power of the Parliament in providing for the appropriation of moneys within its disposition. The challenge to the validity of ss. 8 (3) and 29 may be answered in a sentence by saying that, where an Act validly provides for payments to be made to individuals whom it selects, a provision debarring other persons from so asserting any rights they may have as to deprive the chosen individuals of the benefit of the moneys which the Act intends for them, either by preventing them from receiving those moneys or by preventing them from having the disposition of those moneys when received, is a provision which is plainly incidental to the main purpose of the legislation and is supported by the same head of constitutional power. Indeed, such provisions are frequently found forming integral parts of legislative schemes under which money benefits are to accrue to persons within particular descriptions. Examples in point may be found in s. 144 of the *Social Services Consolidation Act* 1947-1952 (Cth.), s. 85 of the *Defence Forces Retirement Benefits Act* 1948-1952 (Cth.), and s. 55 of the *Workers' Compensation Act* 1926-1953 (N.S.W.). Even apart from express statutory provision the law has sometimes treated inalienability as an incident of statutory payments to be inferred from their very nature: *Davis* v. *Duke of Marlborough* (1); *In re Robinson* (2); *Paquine* v. *Snary* (3) and see, generally, *Halsbury's Laws of England*, 2nd ed., vol. 4, pp. 471-475, pars. 869-873.

We come to the last of the plaintiff's alternative arguments. It was stated in a few condensed propositions, but it may be explained as involving the following steps:—(1) The *National Security* (*Wool*) *Regulations*, in so far as they provided for the acquisition of wool by the Commonwealth, were invalid *ab initio*, because they failed to provide just terms of acquisition as required by s. 51 (xxxi.) of the Constitution. (2) This is enough to justify the conclusion that, having regard to the circumstances in which the Donlons' wool was supplied for appraisement, the Commonwealth was guilty of conversion when it treated that wool as its

(1) (1818) 1 Swans. 74 [36 E.R. 303].
(2) (1884) 27 Ch. D. 160, at p. 164.
(3) (1909) 1 K.B. 688, at p. 691.

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own after appraisement. (3) It is competent for the plaintiff, whether the transaction of 4th November 1942 made him the owner of the Donlons' wool or the equitable assignee of its proceeds, to waive the tort thus committed. (4) The plaintiff does waive the tort, and thereby becomes entitled to recover from the Commonwealth in this action an amount equal to the proceeds derived by the Commonwealth by sale of the Donlons' wool, as money had and received to the use of the plaintiff (if he was the owner of the wool) or of the Donlons (if he was the equitable assignee of the proceeds). (5) He has already received the whole of this amount with the exception of that proportion of the wool disposals profit referred to in the 1948 Act which corresponds with the Donlons' wool, viz., so much thereof as bears to the total amount the same proportion as the appraised value of the Donlons' wool bore to the total of the appraised values of all participating wool—so that he is entitled now to recover an amount equal to the total of the amounts distributable under the Act in relation to the Donlons' wool.

This argument must be rejected for a variety of reasons. In the first place, the plaintiff has no other rights in relation to the Donlons' wool than those which he acquired by the transaction of 4th November 1942 ; and, as we have already held, that transaction entitled him to nothing but the proceeds to arise from the submission of the wool for appraisement, that is to say, the proceeds to arise to the Donlons from its submission for appraisement. The proceeds of the sale of the wool by the Commonwealth, however, even if the Donlons themselves could claim those proceeds as money had and received to their use, would be the proceeds, not arising to the Donlons from the submission for appraisement—that is to say, not arising to the Donlons from the compulsory sale by them to the Commonwealth—but arising to the Commonwealth from a sale by it to the United Kingdom Government or some other third party. These are simply not the proceeds to which the plaintiff's rights attach.

In the second place, if it were true that the Commonwealth were guilty of conversion of the Donlons' wool, it would be the Donlons alone who could elect to waive the tort and take the proceeds of sale. This would be so, both because there was not in fact any purported assignment to the plaintiff of the right of action for the tort, and because, according to well-established principle, the right was incapable of assignment either at law or in equity : *Dawson* v. *Great Northern & City Railway Co.* (1) ; *Defries* v. *Milne* (2).

(1) (1905) 1 K.B. 260, at pp. 270-271. (2) (1913) 1 Ch. 98.

In the third place, as *Fullagar* J. has said, "So far as Donlon Brothers were concerned, they simply authorized the submission of their wool for appraisement under the regulations. This was an entirely voluntary act on their part, and the position is that which was held by *Latham* C.J. and *McTiernan* J. to exist in *McClintock* v. *The Commonwealth* (1). Every one of the circumstances which led to the dissent of *Williams* J. in that case is most conspicuously absent in the present case. There is nothing to suggest that the submission of the wool for appraisement was anything but a purely voluntary act." We were invited to reject this line of reasoning, on the ground that it would lead to the conclusion that, wherever legislation for the acquisition of property is held invalid, the Commonwealth is under no obligation to pay for property it has received in pursuance of the purported acquisition. This conclusion, however, does not follow, for although in many circumstances no consent of the owner of the property to its acquisition could be implied, in many other circumstances a promise on the part of the Commonwealth to pay a reasonable sum could be inferred. Remembering that the very transaction which is the foundation of the plaintiff's claim in this case was an agreement between him and the Donlons for the submission of the Donlons' wool for appraisement, we find it impossible to accept the view that the Commonwealth, by receiving the wool for appraisement when it was submitted in accordance with this agreement, committed a wrong against either the Donlons or the plaintiff.

In the fourth place, even if the proceeds derived by the Commonwealth from the Donlons' wool were recoverable by the plaintiff, there is no evidence to justify the conclusion that the Donlons' wool contributed to the wool disposals profit an amount equal to the share of that profit which is payable under the Act in relation to it. Apparently the wool was not sold in Australia, but was consigned abroad. For all that appears, however, the ship in which it was consigned may have been lost on the voyage; or it may have been otherwise destroyed by enemy action; or it may have been sold for a disproportionately low price; or it may not have been sold at all, but may have been used in England for the manufacture of uniforms. The truth is that there is no possibility, at least so far as the evidence suggests, of finding what the Donlons' wool produced or whether it produced anything at all. It does not even appear that there was at any stage such an intermixture of the Donlons' wool with the wool submitted by other persons as

(1) (1947) 75 C.L.R. 1.

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to make it material to consider the law applicable in the class of cases referred to by Lord *Moulton* in *Sandeman & Sons* v. *Tyzack & Branfoot Steamship Co. Ltd.*, (1).

But in any event, the argument advanced in support of the submission that the regulations were void as not affording just terms of acquisition is completely lacking in substance. Before *Fullagar* J., a great deal of evidence, oral and documentary, was adduced to show that the price realized by the Australian Government for the wool acquired under the regulations gave the growers as favourable a return for their wool as could reasonably have been obtained, and that the manner in which the appraisement system operated to distribute the flat rate price amongst the wool growers in accordance with relative values as expertly determined on the basis of a table of limits accurately prepared by persons of great knowledge and experience, was as fair as any that could have been devised. But we do not need to review this evidence in any detail, or to add to the comments which *Fullagar* J. has made upon it; for, with the whole history of the matter laid open for examination, and with every possible ground of criticism of the regulations available to be relied upon, in the end the attack has been pressed at one point only. It commences with the statement, indeed the admission as the argument regards it, which is contained in reg. 2, that the purpose of the regulations was to provide for the carrying out of the Arrangement made between the Government of Great Britain and the Government of the Commonwealth for acquiring, in connection with the war, all wool produced in Australia, with certain exceptions. Thus, it was said, the acquisition of wool was provided for by the regulations for the sole purpose of servicing the Wool Purchase Arrangement. The ultimate objective was recognized as being the successful prosecution of the war, but the method adopted, counsel insisted, was neither more nor less than the compulsory acquisition of wool for the purpose of reselling it to the United Kingdom Government under the Arrangement, subject to the exception of so much as might be required for local manufacture. The Arrangement entitled the Australian Government to receive a flat rate price, a payment to cover handling charges, and one-half of any profit which should result to the United Kingdom Government from the sale to other countries of any of the wool not required for Britain's own needs. Thus, in relation to all the wool acquired except such of it as was needed for local manufacture, the acquisition by the Commonwealth was for

(1) (1913) A.C. 680, at pp. 694-695.

the sole purpose of getting in exchange for it, without incurring any risk of loss, a net sum consisting of the flat rate price plus the one-half share of profits resulting from disposals by the United Kingdom. For such an acquisition, it was contended, terms could not be just which failed to entitle the dispossessed owners, as of right, to have divided amongst them or applied for their benefit, if not in ratable proportion to the appraised values of their respective parcels of wool, at least in some reasonable manner, whatever moneys the Commonwealth might actually receive in respect of its half share of the United Kingdom's profit on external sales. And the final step in the argument was to point to reg. 30 (2) and adopt the statement of the effect of the regulations which appears in the Court's judgment in *Ritchie* v. *Trustees Executors & Agency Co. Ltd.* (1): "No payment to the supplier of wool, beyond, at all events, appraised value (whether appraised value *simpliciter* or adjusted to flat rate is not material) was required by the regulations; all else remained a matter of administration" (2). Thus, it was said, the suppliers of the wool were given no right to participate in the profit, and that circumstance suffices to make the terms of acquisition unjust. The mere chance of participation in consequence of an administrative decision given in exercise of a discretion does not make them just.

The argument concedes that there may be cases in which terms of acquisition are just notwithstanding that the Commonwealth intends to dispose of the property by a transaction which may yield a profit; but it maintains that this cannot be so where the proposed transaction is one in which the Commonwealth runs no risk of loss. The point that is made seems to be that in such a case the role of the Commonwealth is substantially that of a mere conduit pipe, the acquisition simply creating a detour by which the property passes from the owner to a waiting purchaser instead of passing between them by means of a direct sale as it might if the acquisition had not occurred. In a case in which the position may fairly be described in these terms, it may well be considered that there would be injustice in the Commonwealth's retaining for itself any part of the price which the owner could have obtained for himself if the acquisition had not prevented him from doing so. But the situation which we have to consider is not of this kind at all. The wool growers were not in a position to make a bargain as advantageous as that which the Commonwealth Government made. Indeed they were not in a position to market their

(1) (1951) 84 C.L.R. 553.

(2) (1951) 84 C.L.R., at p. 577.

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wool at all; for the whole apparatus by which the Australian wool clip had been disposed of in peacetime conditions had collapsed with the outbreak of war. The terms which the Commonwealth Government secured by the Wool Disposals Arrangement were such as could not have been obtained in the prevailing circumstances, except by means of inter-Government negotiations on the highest political level, dealing with the country's entire output of wool for the whole period of the war and conducted on the footing that the Commonwealth, in the exercise of its war-time powers, would establish a highly-specialized organization for the handling of the wool, invest that organization by means of legislation with adequate powers for its purposes, ensure that the whole of the wool produced in Australia during the war would come to the organization's hands, and make available to it the men it needed of the appropriate qualifications and experience, the material equipment necessary for handling and storage purposes and the like, the requisite facilities for transport to the seaboard, and the necessary amount of shipping space. It is quite absurd to suggest that in this situation the demands of justice could not be satisfied by anything short of a legal right conferred upon the wool growers to have passed on to them, not only the agreed flat rate price, but also any moneys the Commonwealth might receive from the United Kingdom Government as its half-share of any ultimate disposal profits. Whether justice required that as much should be assured to the wool growers as was in fact provided for them by the regulations may be left an open question. What we have to consider is whether, in relation to the Commonwealth's share of any profit that might arise from sales to other countries, there was any necessity to do more than the regulations did, namely, to exclude that profit from the Commonwealth's consolidated revenue and commit its application to the discretionary judgment of the Central Wool Committee, which consisted in the main of persons drawn from the wool industry. By so doing the regulations created a high degree of probability that the profit would be applied for the benefit of those engaged in the industry, in some manner regarded by the committee as appropriate to the circumstances as they should turn out to exist. Those circumstances, of course, could not be foreseen, and they admitted of so much variation that upon a practical view of the matter it was almost inevitable that there should be allowed to some responsible body the latitude of judgment with which the committee was in fact entrusted. A decision as to what was the best and fairest course to adopt would have to be made when the time came, after considering, *inter alia*, how much there was to

dispose of and what had happened to the industry in the period that had elapsed. It is quite a hopeless proposition to maintain that because reg. 30 (2) left this matter in the realm of administrative discretion the acquisition was upon terms which were not just.

In the result we are of opinion that the judgment of *Fullagar* J. was right and should be affirmed.

The appeal will be dismissed with costs.

Appeal dismissed with costs.

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J. B.