[HIGH COURT OF AUSTRALIA.]

PACIFIC COAL COMPANY PROPRIETARY LIMITED . . . . . } APPELLANT;
DEFENDANT,

AND

PERPETUAL TRUSTEE COMPANY (LIMITED) . . . . . } RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *April* 12, 13; *Aug.* 20.

Dixon C.J., Webb and Fullagar JJ.

Landlord and Tenant—Rent-control—Coal-mine—Lease—Rent and royalty—Rate—Amount payable—Calculation—Prices Regulation Order—Applicability—Pleadings—Demurrers—National Security Act 1939-1946, s. 5 (5)—*National Security (Prices) Regulations—Prices Regulation Order No.* 985—*Reduction of Rents Act* 1931 (*N.S.W.*)—*Landlord and Tenant (Amendment) Act* 1932-1947 (*N.S.W.*), *s.* 15 (1)—*Prices Regulation Act* 1948 (*N.S.W.*), *s.* 2 (1).

By a lease made in 1919 the respondent leased to the appellant a coal mine for a term commencing on 1st September 1919 and ending on 1st September 1962 at a fixed yearly rent of £819, payable quarterly, plus a royalty per ton which varied with the grade of coal mined. To the reservation of the fixed rent of £819 there was a proviso to the effect that the lessee should be at liberty to win coal to a quantity the royalty on which would be equal to that fixed rent, and that the royalty should be calculated only on coal won over and above that quantity. In an action in the Supreme Court of New South Wales the respondent claimed a balance of rent and royalty alleged to have accrued due in certain periods between 1st January 1932 and 31st December 1950. The appellant pleaded that the rent and royalty had, by various statutory enactments, been reduced by twenty-two and one-half per cent and that it had paid rent and royalty in full at the reduced rate. In respect of periods between 1st January 1932 and 31st December 1947 it relied on the *Reduction of Rents Act* 1931 (N.S.W.) and the *Landlord and Tenant (Amendment) Act* 1932-1947 (N.S.W.). On demurrer the pleas in respect of these periods were upheld by the Supreme Court, which decided that the royalties payable under the lease were "rent" within the meaning of the statutes. There was no appeal by the respondent against this decision.

In respect of later periods the appellant relied on Prices Regulation Order No. 985, which was made on 18th March 1943 by the Prices Commissioner in pursuance of the powers conferred upon him by the *National Security* (*Prices*) *Regulations* made under the *National Security Act* 1939-1940 (Cth.). This Order had effect under the *National Security Act* and regulations up to 20th September 1948. On and after that date it had effect under s. 2 (1) of the *Prices Regulation Act* 1948 (N.S.W.): see *Brown* v. *Green* (1951) 84 C.L.R. 285. Regulation 23 (2) of the *National Security* (*Prices*) *Regulations* authorized the commissioner by order to fix and declare the maximum rate at which any declared service might be supplied or carried on, and reg. 23 (2A) authorized him to fix " different maximum rates according to differences in the quality, description or volume of the service supplied or carried on ". By the Order the commissioner fixed and declared the maximum rates per ton of coal mined at which mining rights might be supplied in respect of coal mined from properties not subject to Crown lease, which were privately leased on 31st August 1939, at the amount per ton of coal mined payable on 31st August 1939. The Supreme Court allowed demurrers to the pleas in respect of these periods.

Held, reversing the decision of the Supreme Court—

1. That Prices Regulation Order No. 985 was a valid exercise of the power conferred on the commissioner by reg. 23 (2) and 23 (2A) of the *National Security* (*Prices*) *Regulations*. The word " volume " in reg. 23 (2A) should be read as including quantity.

2. That the Order applied to the rent and royalties payable under the lease, notwithstanding that the lease had been made before the coming into operation of the Order.

3. That the " amount per ton of coal mined payable on 31st August 1939 " was the amount reserved by the lease less the statutory deduction of twenty-two and one-half per cent under the *Landlord and Tenant* (*Amendment*) *Act*.

Meaning of the word " royalty " discussed.

Decision of the Supreme Court of New South Wales (Full Court) in part reversed.

APPEAL from the Supreme Court of New South Wales.

In an action brought by it in the Supreme Court of New South Wales the Perpetual Trustee Co. (Ltd.), by its declaration, alleged that by a memorandum of lease registered under the provisions of the *Real Property Act* 1900 (N.S.W.) it demised to the defendant, Pacific Coal Co. Pty. Ltd., the mines, beds, veins and seams of coal, shale and minerals of a similar character in or under certain lands described with full liberty to the defendant to search for, win, get, convert, carry away, sell and dispose of the said mines of coal, shale or minerals of a similar character together with free way leave and right and liberty of passage and other rights enabling the defendant to load and carry away the said coal, shale and other minerals for

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a term of forty-three years computed from 1st September 1919 at an annual fixed rent of £819, payable quarterly, and certain royalties, the amount of which, in the case of round or best coal, was to vary with the selling price of coal free on board at Newcastle, the lowest being fivepence per ton, and in the case of small coal was to be a fixed and constant royalty of threepence per ton. The plaintiff claimed a balance of rent and royalty alleged to have accrued due between 1st January 1932 and 31st March 1934 in the sum of £880 12s. 7d., and between 1st April 1939 and 31st December 1950 in the sum of £27,488 14s. 7d., the total amount of £28,369 7s. 2d. remaining due and unpaid.

The defendant pleaded (1) as to so much of the declaration as alleged that the defendant had not paid rent and royalty for the various periods up to the quarter ended 31st December 1947, that the defendant became entitled pursuant to the provisions of the *Reduction of Rents Act* 1931 and to the provisions of the *Landlord and Tenant* (*Amendment*) *Act* 1932-1947 to a reduction of twenty-two and one-half per cent of the rent and royalty payable by it in terms of the lease and the moneys sued for in the declaration in respect of the said periods was the amount by which the defendant's obligation to pay rent in terms of the lease was reduced by those Acts and that the defendant's obligation to pay those moneys was extinguished by those Acts;

(2) that the rent and royalty sued for were moneys alleged to be due for mining rights in respect of coal mined from land not leased from the Crown but privately leased by the plaintiff to the defendant in accordance with the said lease and in respect of so much of the rent and royalty sued for as accrued due after 18th March 1943 the defendant said that on that day there came into force Prices Regulation Order No. 985 made and promulgated by the Commonwealth Prices Commissioner in pursuance of powers vested in him by the *Prices Control Regulations* made and enacted pursuant to the *National Security Act* 1939-1940 and by that Order the maximum amount payable for mining rights in respect of coal mined from land privately leased was not to exceed in respect of properties privately leased on 31st August 1939 the amount payable per ton by a lessee on that day, and that on that day, 31st August 1939, the amount of rent and royalty payable by the defendant to the plaintiff was the amount prescribed by the lease less the reduction of twenty-two and one-half per cent effected by the *Reduction of Rents Act* 1931, and the defendant further said that since 18th March 1943 it had paid to the plaintiff rent and royalty for all coal won since 18th March 1943, at the rate payable by it on 31st August

1939, and the moneys sued for since 18th March 1943, were moneys in excess of the maximum payable by the defendant to the plaintiff as determined by the said Prices Regulation Order which had continued to be in full force and effect from 18th March 1943 until the commencement of this action; and

(3) for a third plea "on equitable grounds" the defendant said that in or about 1932 and during the currency of the term of the lease the plaintiff with the intention that the defendant would act on such promise and that such promise would create legal obligations between the plaintiff and the defendant represented to and promised the defendant that so long as the *Reduction of Rents Act* 1931, and any re-enactment thereof, should remain in force the provisions of that Act should apply to the rent and royalty payable under the lease and that the amount payable by the defendant to the plaintiff as rent and royalty in terms of the lease should be the respective amounts fixed by the lease less a reduction of twenty-two and one-half per cent and no more and the defendant in reliance upon that promise and representation and not otherwise duly paid to the plaintiff such reduced amounts of rent and royalty for many years and the plaintiff in pursuance of its said promise and representation over that period accepted such reduced amounts of rent and royalty in full discharge of all rent and royalty payable by the defendant over that period, and the defendant further said that in reliance upon the plaintiff's said promise and representation it carried on business for many years and made disbursements of moneys, declared dividends, prepared and adopted profit and loss accounts and balance sheets and sold the coal won by it under the lease at a price lower than the price at which it would otherwise have sold that coal and incurred financial obligations, on the basis that the amount of rent and royalty paid by it over that period computed as shown above was the only amount of rent and royalty which it was liable to pay or would be called upon to pay for rent and royalty under the terms of the lease.

The plaintiff demurred to those pleas; to the first plea, on the grounds that neither the provisions of the *Reduction of Rents Act* 1931 nor the provisions of the *Landlord and Tenant (Amendment) Act* 1932-1947 applied to the subject of the said lease in that the mines and mining rights leased and granted were not "premises" within the meaning of the provisions of either of those Acts; to the second plea, on the grounds (A) that Prices Regulation Order No. 985 did not and could not fix and declare maximum rates per ton of coal mined at which mining rights may be supplied under the said lease in that no mining rights under that lease were on the date

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of the Order or had since that date been supplied by the plaintiff to the defendant and that prior to the promulgation of that Order the defendant had acquired all its mining rights under the lease and that the Order had no effect upon its obligation to pay for them in accordance with the provisions of the lease ; and (B) that on 31st August 1939—the date on which the amount payable per ton of coal mined was by the Order fixed as the maximum rate—the amount payable for rent and royalty by the defendant to the plaintiff was not reduced by the said Act by twenty-two and one-half per cent ; and to the third plea, on the grounds (a) that the claim of the plaintiff arose under an instrument having the effect of a deed and the plea in effect alleged a variation of the terms of the instrument otherwise than by deed ; (b) that the representation and promise alleged in the plea was not supported by any allegation of valuable consideration ; and (c) that the matter alleged in the plea was not a ground entitling the defendant to an absolute unconditional and perpetual injunction in equity.

During the hearing of the demurrers before the Full Court of the Supreme Court of New South Wales the defendant, by consent, amended its pleas in order that the opinion of the court on the real issues of law in contest between the parties might be obtained.

The amended pleas were substantially as follows :—

1. as to £333 17s. 7d.—being the amount claimed in respect of the period since the quarter ended 31st December 1931 until 31st December 1932, the defendant said that it became entitled pursuant to the provisions of the *Reduction of Rents Act* 1931 to a reduction of twenty-two and one-half per cent of the rent and royalty payable by it in terms of the lease in respect of the said period and the said £333 17s. 7d. was the amount by which the defendant's obligation to pay rent and royalty in such terms in respect of that period was reduced by that Act and the defendant said that its obligation to pay that amount was extinguished by that Act ;

2. as to £9,513 10s. 2d.—being the amount claimed in respect of the period commenced on 1st January 1933 and ended on 31st March 1934 and of the period since the quarter ended 31st March 1939 until 31st December 1947, the defendant said that it became entitled pursuant to the provisions of the *Landlord and Tenant (Amendment) Act* 1932-1947 to a reduction of twenty-two and one-half per cent of the rent and royalty payable by it in terms of the lease in respect of those periods and the said £9,513 10s. 2d. was the amount by which the defendant's obligation to pay rent and royalty in such terms in respect of those periods was reduced by that Act

and the defendant said that its obligation to pay that amount was extinguished by that Act;

3. as to £649 14s. 11d.—being the amount claimed in respect of the period commenced on 1st January 1948 and ended 30th June 1948, the defendant said that that amount comprised moneys alleged to be due for mining rights in respect of coal mined from land not leased from the Crown but privately leased by the plaintiff to the defendant in accordance with the lease set forth in the declaration and within the meaning of Prices Regulation Order No. 985 dated 18th March 1943 made and promulgated by the Commonwealth Prices Commissioner in pursuance of powers vested in him by the *National Security* (*Prices*) *Regulations* made and enacted pursuant to the *National Security Act* 1939-1940 and by that Order the maximum rate per ton of coal mined payable for mining rights in respect of coal mined from land privately leased was not to exceed in the case of properties privately leased on 31st August 1939 the amount payable per ton by a lessee on 31st August 1939, and the defendant further said that on 31st August 1939 the amount payable per ton by the defendant to the plaintiff within the meaning of the Order was the amount determined by the rate prescribed in the lease calculated under the lease in the case of certain types of coal on the selling price free on board at Newcastle of the said types of coal at the dates from time to time when it was wrought and brought to bank less the reduction of twenty-two and one-half per cent effected by the *Landlord and Tenant* (*Amendment*) *Act* 1932-1947, and the defendant further said that it had paid to the plaintiff for all coal won during the said period the amount per ton payable by the defendant on 31st August 1939 as determined by the lease in the manner aforesaid and the said amount of £649 14s. 11d. comprised moneys in excess of the maximum amount payable during that period by the defendant to the plaintiff as determined by the said Order, and the defendant said that its obligation to pay that amount was extinguished by the Order and the *National Security* (*Prices*) *Regulations* which Order and Regulations were and remained in full force and effect during that period;

4. as to £1,093 10s. 5d.—being the amount claimed in respect of the period commenced 1st July 1948 and ended 20th September 1948, the defendant said that that amount comprised moneys alleged to be due for mining rights in respect of coal mined from land not leased from the Crown but privately leased by the plaintiff to the defendant in accordance with the lease set forth in the declaration and within the meaning of the said Prices Regulation Order No. 985 so made and promulgated and by that Order the maximum

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rate per ton of coal mined payable for mining rights in respect of coal mined from land privately leased was not to exceed in the case of properties privately leased on 31st August 1939 the amount payable per ton by a lessee on 31st August 1939, and the defendant further said that on 31st August 1939 the amount payable per ton by the defendant to the plaintiff within the meaning of that Order was the amount determined by the rate prescribed in the lease calculated thereunder in the case of certain types of coal on the selling price free on board at Newcastle of those types of coal as at 31st August 1939 less the reduction of twenty-two and one-half per cent effected by the *Landlord and Tenant (Amendment) Act* 1932-1947, and the defendant further said that it had paid to the plaintiff for all coal won during the said period the amount per ton payable by it on 31st August 1939 as determined by the lease and calculated thereunder on the selling price as at 31st August 1939 in the manner aforesaid and the amount of £1,093 10s. 5d. comprised moneys in excess of the maximum amount payable during that period by the defendant to the plaintiff as determined by the said Order, and the defendant said that its obligation to pay that amount was extinguished by that Order and *National Security (Prices) Regulations* which Order and Regulations were and remained in full force and effect during the said period;

5. as to £16,778 14s. 1d.—being the amount claimed in respect of the period commenced 20th September 1948 and ended 31st December 1950, the defendant said that that amount comprised moneys alleged to be due for mining rights in respect of coal mined from land not leased from the Crown but privately leased by the plaintiff to the defendant in accordance with the lease set forth in the declaration and within the meaning of the said Prices Regulation Order No. 985, and in respect of that amount the defendant said that on 20th September 1948 the New South Wales *Prices Regulation Act* 1948, No. 26, came into force and by virtue of that Act there came into force or there was continued in force in New South Wales Prices Regulation Order No. 985 made and promulgated as set out in other pleas, and that by that Order the maximum rate per ton of coal mined payable for mining rights in respect of coal mined from land privately leased was not to exceed in the case of properties privately leased on 31st August 1939 the amount payable per ton by a lessee on 31st August 1939, and that on that day the amount payable per ton by the defendant to the plaintiff within the meaning of that Order was the amount determined by the rate prescribed in the lease calculated under the lease in the case of certain types of coal on the selling price free on board at Newcastle of those types

of coal as at 31st August 1939 less the reduction of twenty-two and one-half per cent effected by the *Landlord and Tenant (Amendment) Act* 1932-1947, and the defendant further said that it had paid to the plaintiff for all coal won during the said period commenced 1st July 1948 and ended 20th September 1948 the amount per ton payable by it on 31st August 1939 as so determined and calculated and that the amount of £16,788 14s. 1d. comprised moneys in excess of the maximum amount payable during that period by the defendant to the plaintiff as determined by the said Order and the defendant said that its obligation to pay that amount was extinguished by the said *Prices Regulation Act* and the Order which were and remained in full force and effect during the said period ;

6. as to £9,847 7s. 9d.—being the amount claimed in respect of the period since the quarter ended 31st December 1931 until the quarter ended 31st March 1934 and the period since the quarter ended 31st March 1939 until the quarter ended 31st December 1947 and being the amounts pleaded to in the first and second pleas, the defendant for a plea on equitable grounds said that in or about 1932 and during the currency of the term of the lease the plaintiff with the intention that the defendant would act on such promise and that such promise would create legal obligations between the plaintiff and the defendant represented to and promised the defendant that so long as the *Reduction of Rents Act* 1931 and any re-enactment thereof should remain in force the provisions of that Act should apply to the rent and royalty payable under the lease and that the amount payable by the defendant to the plaintiff as rent and royalty in terms of the lease should be the respective amounts fixed by the lease less a reduction of twenty-two and one-half per cent and no more and the defendant in reliance upon that promise and representation and not otherwise duly paid to the plaintiff such reduced amounts of rent and royalty for many years and the plaintiff in pursuance of its promise and representation over that period accepted such reduced amounts of rent and royalty in full discharge of all rent and royalty payable by the defendant over that period and the defendant further said that in reliance upon the plaintiff's said promise and representation it carried on business for many years and made disbursements of moneys, declared dividends, prepared and adopted profit and loss accounts and balance sheets and sold the coal won by it under the lease at a price lower than the price it otherwise would have sold the coal and incurred financial obligations on the basis that the amount of rent and royalty paid by it over the said period computed as aforesaid was the only amount of rent and royalty which it was liable to pay

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or would be called upon to pay for rent and royalty under the terms of the lease.

The plaintiff demurred to the pleas.

The Full Court of the Supreme Court of New South Wales, (*Street* C.J. and *Owen* J., *Herron* J. dissenting as to the fourth and fifth amended pleas), ordered that judgment be entered for the defendant on the demurrers to the first and second amended pleas but without costs, and for the plaintiff on the demurrers to the third, fourth, fifth and sixth amended pleas.

From that decision, so far as it related to the third, fourth and fifth amended pleas, the defendant, by leave, appealed to the High Court.

The provisions of the relevant statutes, *National Security* (*Prices*) *Regulations* and Prices Regulation Order No. 985 are sufficiently stated in the judgment hereunder.

M. F. Hardie Q.C. and *K. J. Holland*, for the appellant.

J. K. Manning Q.C. and *B. J. F. Wright*, for the respondent.

Cur. adv. vult.

Aug. 20.

THE COURT delivered the following written judgment :—

This is an appeal by the defendant from a judgment of the Supreme Court of New South Wales allowing a demurrer by the plaintiff to certain amended pleas. The appeal concerns three amended pleas with respect to which judgment in demurrer was given for the plaintiff.

It appears from the pleadings that the defendant is a lessee and the plaintiff a lessor of a coal mine. The action is brought by the plaintiff to recover the balance of rent and royalty said to be due by the defendant under the lease. The lease which is registered under the *Real Property Act* contains a demise of the coal mine for a term extending from 1st September 1919 to 1st September 1962. It is a demise of the mine's beds, veins and seams of coal, shale and minerals of a similar character in and under the land described with full liberty to the lessee, stated shortly, to win remove and dispose of such coal, shale and minerals. The lease also conferred upon the lessee certain incidental rights to effectuate the purpose. The demise is expressed to be at a fixed yearly rent of £819 payable quarterly and at a royalty. The amount of the royalty is to be arrived at by calculation. It is to be calculated at different amounts for round or best coal and for small coal. For the former a graduated

scale is prescribed beginning at 5d. a ton of coal and rising by 1d. a ton in correspondence with a graduated scale of specified increases in the f.o.b. price of the coal at the port of Newcastle. For small coal a fixed royalty is provided of 3d. per ton. To the reservation of the fixed rent of £819 there is a proviso, in effect, that the lessee should be at liberty to win coal to a quantity the prescribed royalty upon which would equal the fixed rent of £819 and that the prescribed royalty should be calculated on the coal won over and above that quantity. It is described as a royalty per ton of all coal wrought and brought to bank from the mines demised over and above such quantity as may be worked in respect of such rent as aforesaid.

The action is brought to recover the unpaid balance of the amounts of rent and royalty calculated according to these provisions which the plaintiff claims the defendant was bound to pay.

The declaration, which so far as appears contains only one count, relates to two periods of time. The first period consists of the nine quarters beginning from 31st December 1931 and ending on 31st March 1934. The declaration alleges that rent and royalty payable in respect of that period remains due and unpaid amounting to £880 12s. 7d. The second period mentioned in the declaration begins five years later. It is the ten years and nine months extending from 31st March 1939 to 31st December 1950. It is alleged that rent and royalty payable in respect of that period, amounting to £27,488 14s. 7d., remains due and unpaid.

From the pleas, as it is convenient to call the amended pleas, it appears that the defendant deducted from the rent and royalty calculated according to the above-mentioned provisions of the lease twenty-two and one-half per cent thereof. The deductions were made in purported pursuance of certain provisions in various statutory instruments upon which the defendant relied in answer to the claim in the declaration. The pleas filed by the defendant in reliance upon the statutory instruments were five in number. At different periods different statutory instruments were in force and this accounts for the number of pleas. Each plea covers only a parcel of the moneys claimed but when the sums respectively mentioned in the five pleas are added together they will be found to amount to the sum sued for, viz. £28,369 7s. 2d.

The first of the pleas demurred to is based upon the *Reduction of Rents Act* 1931 (N.S.W.) and relates only to the period of one year from 31st December 1931 to 31st December 1932. The amount the plea covers is £333 17s. 7d., forming part of the £880 12s. 7d. claimed by the declaration in respect of the nine quarters extending from 31st December 1931 to 31st March 1934; that is to say, the

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first period to which the claim relates. The second plea deals with the remainder of that period and also with eight years and nine months of the second period, namely from 31st March 1939 to 31st December 1947. The plea sets up a statutory right to deduct twenty-two and one-half per cent of the rent and royalty payable according to the terms of the lease during these intervals of time. The claim of the defendant to make the deduction is based upon the *Landlord and Tenant (Amendment) Act* 1932-1947 of New South Wales. This second plea covers a total amount in respect of the two periods to which it relates of £9,513 10s. 2d.

The plaintiff demurred to the first two pleas and to the third, fourth and fifth pleas, but the Supreme Court overruled the demurrer to the first and second pleas. The respective statutes on which these two pleas were based contained specific provisions for a reduction by twenty-two and one-half per cent of " rent reserved by or under any lease " ; that is, any lease to which the statutory provisions applied : see s. 6 (1) of the *Reduction of Rents Act* 1931 (N.S.W.) and s. 15 (1) of the *Landlord and Tenant (Amendment) Act* 1932-1947 (N.S.W.). The two pleas were held by the Supreme Court (*Street* C.J., *Owen* and *Herron* JJ.) to be good because the royalty reserved by the lease was, as their Honours decided, as much a rent as was the fixed yearly sum of £819, which was expressly described as a rent. The two New South Wales statutes therefore successively applied to reduce the total amount of rent and royalty for the periods covered by these two pleas. The plaintiff has not appealed from the judgment entered by the Supreme Court for the defendant upon the demurrer to the two pleas. To the defendant's appeal, in other words, there is no cross-appeal. The defendant's appeal is confined to the three pleas which deal with later periods and with these pleas alone are we now directly concerned. They are the third, fourth and fifth. The third relates only to the short period of six months from 1st January to 30th June 1948 and covers a sum of £649 14s. 11d. It is based upon the *National Security (Prices) Regulations* and a Prices Regulation Order made in purported pursuance thereof. The fourth plea is also based upon those regulations and that order. It relates to the remainder of the period of their operation after 30th June 1948, namely the period from 1st July to 20th September 1948 and covers a sum of £1,093 10s. 5d. It was upon 20th September 1948 that prices for the sale of goods and rates for the supply of services ceased in New South Wales to be controlled by the Commonwealth *National Security (Prices) Regulations* and that the operation of the *Prices Regulation Act* 1948 of New South Wales commenced. (See declaration of the Minister

for Trade and Customs made under reg. 3B of the regulations on 17th September 1948 in the Commonwealth Government *Gazette* of that date, and proclamation of the Governor of New South Wales in the New South Wales *Gazette* of 20th August 1948.)

The fourth plea differs from the third in the manner in which it alleges that, under the Prices Regulation Order in its application to the royalty prescribed by the lease, the maximum rate was to be ascertained. Presumably the difference in the pleas reflects a real difference in the methods actually employed during the two periods of arriving at the amount of the reduced royalty to be paid by the lessee, the defendant.

The fifth plea relates to the period from 20th September 1948 to 31st December 1950 and covers a sum of £16,778 14s. 1d. It depends upon the New South Wales *Prices Regulation Act* 1948 and upon the same Commonwealth Prices Regulation Order so far as that Act continued it and gave it force after 20th September 1948. The fifth plea alleges the method adopted for arriving at the amount of the reduced royalty to be paid by the defendant in the same form as does the fourth plea and in this respect does not follow the third plea.

In the Supreme Court *Street* C.J. and *Owen* J. adopted the view that the statutory provisions upon which the defendant relied for the third, fourth and fifth pleas were inapplicable and on that ground held all three pleas bad. *Herron* J. was of the contrary view that the provisions did apply and dissented, but his Honour was of opinion that the method of arriving at the maximum rate of royalty set up by the third plea was erroneous and for that reason that particular plea was bad.

The defendant appellant appears to concede by his notice of appeal that both methods cannot be right and in the first instance asks this Court to hold the fourth and fifth pleas good as did *Herron* J. and alternatively asks the Court to hold the third plea good. Probably there is another defect in the third plea besides what *Herron* J. considered the statement of an erroneous formula for that prescribed for calculating the maximum royalty payable and perhaps it should be here noticed. The defect occurs in the statement of the amount per ton which the defendant actually did pay. It is described as "the amount per ton payable by the defendant on 31st August 1939 as determined by the lease in manner aforesaid". This can scarcely be what is intended. Perhaps some words have fallen out after the word "lease". The corresponding allegations in the other pleas suggest the possibility. The defect,

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however, if it be one, would doubtless have been remedied by amendment, had the plea otherwise been considered good.

All three pleas ultimately depend upon the operation of a Prices Regulation Order actually made by the Commonwealth Prices Commissioner as far back as 17th March 1943. It is identified as Prices Regulation Order No. 985 and is to be found in the Commonwealth *Gazette* of 18th March 1943. The material part is as follows: "I (the Commissioner) fix and declare the maximum rates per ton of coal mined at which mining rights may be supplied in respect of coal mined from the classes of mining properties mentioned hereunder to be . . . (*c*) Properties not subject to Crown lease which were privately leased on 31st August 1939—the amount per ton of coal mined payable on 31st August 1939." The allegations in the pleas show that the coal mine the subject of the lease sued upon is of the class specified in par. (*c*), viz. a property not subject to Crown lease which was privately leased on 31st August 1939, that is to say it was in lease on that day. The defendant's case is simply that the Order possessed the force of law during the time covered by the three pleas, first by virtue of the *National Security* (*Prices*) *Regulations* and then by virtue of the *Prices Regulation Act* 1948 (N.S.W.), and that the expression in the Order "the amount per ton of coal mined payable on 31st August" applies to this case so as to establish as a maximum the rates of royalty which would result as on 31st August 1939 from making the reduction of twenty-two and one-half per cent required by the *Landlord and Tenant* (*Amendment*) *Act* 1932-1947 (N.S.W.) from the royalty ascertained in accordance with the provisions of the lease. The answers given to this case of the defendant by the majority of the Supreme Court come down in the end to two propositions. The first is that the Order never did apply to a rent expressed as a royalty which this is: such a thing was outside the scope both of the Prices Regulations and the Order. The second is that even were it otherwise the Order relates to "rates . . . at which mining rights may be supplied" and if mining rights could be said to be "supplied" at all in this case the "supply" was by virtue of the lease made long before, namely in 1919, and therefore outside the operation of the Order, which could only be prospective. Certain amendments of the regulations made after the date of the Order could not, so their Honours held, affect the result both because the amendments were prospective only in their operation and also because the old declaration by the Minister would not, in their Honours' opinion, suffice and a new declaration became necessary to bring "mining rights" within the definition of "declared services" if by the amendments

they were brought within the scope of the regulations and no such declaration was made.

It is evident that the legal foundation upon which the three pleas of the defendant have been constructed needs close examination. The jargon of the Order in speaking of supplying mining rights is of course to be explained by the commissioner's reliance upon that part of the Prices Regulations which authorized him to fix and declare the maximum rate at which any declared service may be supplied or carried on : reg. 23 (2). But by definitions and the introduction of conclusive presumptions into the regulations so many unnatural meanings have been given to words that the incongruous verbiage of the Order can afford little ground for presuming the Order to be outside the operation of the regulation whence the more essential of its terms come.

It is necessary to begin with the Prices Regulations in the form in which they stood at the date the Order was made, viz. 17th March 1943. Regulation 23 (2) (*a*) enabled the commissioner with respect to any declared service to fix and declare the maximum rate at which any declared service may be supplied. The word " service " and the words " declared service " were defined by reg. 3. " Service " was defined to mean among other things—" (*b*) any rights or privileges for which remuneration is payable in the form of royalty, stumpage, tribute or other levy based on volume or value of goods produced ". The expression " declared service " was defined to mean any service declared by the Minister by notice in the *Gazette* to be a declared service for the purpose of the regulations. Regulation 22 (2) provided that the Minister might by notice in the *Gazette* declare any service to be a declared service. In fact on 30th November 1942 the Minister had declared all services carried on in Australia, with certain exceptions not here material, to be declared services. (The regulations had not been altered between 30th November 1942 and the making of the order on 17th March 1943.) Sub-regulation (2A) of reg. 23 made particular provisions amplifying the commissioner's power to fix and declare rates for services, " but without limiting the generality of the last preceding sub-regulation " *scil.* sub-reg. (2). Among other things the commissioner was authorized by par. (*g*) of sub-reg. (2A) to fix and declare maximum rates relative to such standards as he thought proper or relative to the rates charged by individual suppliers on any date specified by the commissioner. Regulation 3 defined the word " rate " to include every valuable consideration, whether direct or indirect.

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In considering the efficacy of the Order and its operation under the foregoing regulations it is desirable to begin by disregarding the particular circumstances of this case and inquiring into the abstract validity of the material part of the Order as an exercise of the power given by reg. 23. Now it seems to be clear enough that par. (*b*) of the definition of the word " service ", operating as it does upon and therefore through the expression " declared service ", extends the application of reg. 23 (2) beyond its natural meaning and must, so to speak, be read into it. Regulation 23 (2) (*a*) thus should be understood as if expressed to authorize a fixing and declaring of the maximum rate at which any declared service including any rights or privileges for which remuneration is payable in the form of royalty etc. may be supplied or carried on. The incongruity of the word " supply " with rights or privileges for which a royalty is payable is obvious. But another word inappropriately chosen is " remuneration " to describe a royalty. These words evidently were intended to receive a flexible meaning in accordance with the context and the subject matter. It seems almost undeniable that they cover royalties payable in connection with the exercise of rights or privileges granted after the making of an order fixing or declaring the maximum royalty payable therefor. Do they cover royalties payable in connection with the exercise of rights or privileges granted before the making of an order fixing or declaring the maximum royalty, and before the making of the regulations ? There is much to support the view that they do. The regulations were dealing with " goods and services ", a collocation familiar in economics, and they were assigning to the latter category the providing of rights and privileges to be exercised for the production of goods at a royalty etc. The word " supply " in relation to the category if it were not artificially extended would be equivalent to " perform " and, if it is to be moulded to fit the extension of the category, the analogous meaning is to maintain the enjoyment of the right rather than to grant it once for all. The subject is " price fixing " as a war measure and it is obvious that what must be controlled are the rates that affect the cost of production and go into the price of the goods. It is the royalty charged *de die in diem* that matters, not the grant of the right and the initial fixing of a royalty. It is to be noticed that royalties on the value of goods produced were included. That doubtless was because a rise in value would mean a rise in the royalty. And that would be so irrespective of the term for which the right or privilege was granted. But, as will appear, the question whether the " supply " of " rights and privileges " is complete within the meaning of the regulation upon

the making of the original grant or, on the contrary, the regulation means to extend to the continued support of the right or the maintenance of the enjoyment of the right, is one that must be decided in the light of amendments of the regulation subsequently made. Until these are examined it is better to suspend consideration of the question. Its importance arises not only from the facts of the present case, but also from the provisions of the Order. For the Order is hardly capable of a construction which confines its intended operation to royalties reserved by leases (or licences) granted after the making of the Order. At the same time the intended operation of the Order includes future leases. It is convenient to pass to the amendments which affect the question. By reg. 1 (1) of S.R. 1945 No. 113, which came into force on 23rd July 1945, the following provision was added to reg. 3 (the definition clause) as sub-reg. (2)— "A person who receives (otherwise than as agent) any valuable consideration from any other person in respect of the enjoyment by that other person of a service shall, for all purposes of these regulations, be deemed to supply that service to that other person for the amount or value, or at the rate, as the case may be, of that valuable consideration." Regulation 1 (2) provided at the same time that any declaration by the Minister of any services in force at the commencement of the regulation (viz. S.R. 1945 No. 113) should have effect as if the regulation had been in operation at the time of the publication in the *Gazette* of the notice of the declaration.

In face of this last sub-regulation the point can have no validity that, without a new declaration including them within the conception of " declared service ", " rights or privileges " of the description provided for by par. (*b*) of the definition of " service " could not by sub-reg. (2) be brought within the application of the Order, if such rights or privileges had been created by an instrument made before the Order or made before the promulgation of S.R. 1945 No. 113.

In the following year a further amendment of reg. 3 was made that is material to the question whether the " supply " of the " mining rights " could and should be considered as taking place after the date of the Order and as continuing as they were exercised or as made once for all when the lease was granted. But that amendment included no express provision that the declaration of the Minister should have effect as if the new provision had been in force at the time the declaration was made. The amendment was made by S.R. 1946 No. 71 and came into operation on 11th April 1946. Two new sub-regulations were added to reg. 3, viz. sub-regs. (3) and (4). At this point it is only the provisions of sub-reg.

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(3) that need consideration. Sub-regulation (3) provided that where any agreement (including any lease) had been entered into, whether before or after the commencement of the sub-regulation, under which a person has become entitled to rights or privileges specified in certain paragraphs of the definition of " service " of which par. (*b*) is the relevant one, the person from whom the rights or privileges have been acquired shall, for all purposes of the Prices Regulations, be deemed to be supplying those rights or privileges at all times during which the rights or privileges continue, at the rate of the remuneration charged therefor from time to time. If this regulation applies its evident result is to place a person who, like the plaintiff, granted rights or privileges, before the making of an order treating them as services, in the situation of one supplying services from day to day as the rights and privileges were exercised. The fact that the Minister made no new declaration under reg. 22 (2) can be no obstacle to the application of the additional sub-regulation, sub-reg. (3) of reg. 3. The existing declaration covered all services, with certain exceptions not relevant; the sub-regulation did not add a new " service " of a kind not contemplated by this general, indeed almost universal, declaration; it simply provided that certain persons should be deemed to be performing those services. If they did not already fall within the class affected it brought them within but it did not add a new category of " services " to which the Minister's declaration did not extend.

Sub-regulations (2) and (3) of reg. 3 are therefore sufficient to meet the objection, if it be a valid objection, that the Order could not operate upon rights for which remuneration was payable in the form of royalty, if the rights were created before the Order was made, because within the meaning of reg. 23 (2) (*a*) the rights were " supplied " once for all at the date they were granted; the sub-regulations are sufficient to do so subject to one possibility. That possibility is that the Order was totally void from its inception. The fact has already been noticed that the Order exhibits clearly an intention to govern the rates of royalty for the " supply " of mining rights granted in the past, although it also shows an intention to govern rates in respect of mining rights granted subsequently. On the assumption that when the Order was made the grant constituted the " supplying ", the former intention would exceed the power conferred on the commissioner by the combined operation of reg. 23 (2) (*a*) and par. (*b*) of the definition of " service " in reg. 3. Would this result in the total invalidity of the Order ? The answer must be that it would not because the intended application of the Order is distributable and the presumption is that it is severable.

The presumption arises from the operation upon the Order of the *Acts Interpretation Act* 1901-1950 pursuant to s. 5 (5) of the *National Security Act* 1939-1946 which provided that the *Acts Interpretation Act* shall apply to the interpretation of any orders (among other instruments) made in pursuance of regulations made under the *National Security Act* in like manner as it applies to the interpretation of regulations and for the purpose of s. 46 of the former Act those orders shall be deemed to be Acts. The word "Acts", where last occurring, no doubt was a mistake for "regulations". When the sub-section was transcribed as s. 14 (3) of the *Defence (Transitional Provisions) Act* 1946-1952 the word "Acts" was replaced in that provision by the word "regulations". But as was pointed out in *Fraser Henleins Pty. Ltd.* v. *Cody*; *Crowther* v. *Cody* (1) where the matter is discussed, the earlier words of s. 5 (5) are enough to submit orders themselves to the operation of the whole *Acts Interpretation Act* including the directions contained in par. (*b*) of s. 46 and it is plain that this was the intention. That Orders made under *National Security Regulations* were subject to s. 46 (*b*), however the result may be reached, is established by the decision of the Court in *Fraser Henleins Pty. Ltd.* v. *Cody* (2). Given a valid operation at least upon the "supply" of mining rights granted after the date of the Order, there is no reason why sub-regs. (2) and (3) of reg. 3 should not bring within its scope mining rights exercised pursuant to grants made before the date of the Order. It may be suggested that in fixing as maximum rates the amount per ton of coal mined payable on 31st August 1939 in the case of properties privately leased on that date par. (*c*) of the Order does not sufficiently prescribe a rate as an exercise of the power given by reg. 23 (2). But notwithstanding some departures from the language of par. (*g*) of reg. 23 (2A) the Order seems to be justified in this respect by that paragraph.

There is one other point concerning the sufficiency of par. (*b*) of the definition of "service" to support the Order. It is a point appearing on the surface of the Order, but, somewhat strangely, it does not seem to have been canvassed until it was mentioned in this Court. The Order fixes a rate per ton of coal mined. A ton is a measure of weight not a measure of volume or of value. Yet par. (*b*) relates to rights or privileges for which remuneration is payable in the form of royalty, stumpage, tribute or other levy based on volume or value of goods produced.

(1) (1945) 70 C.L.R. 100, at pp. 126, 127.

(2) (1945) 70 C.L.R., at pp. 117, 123, 127, 131, 137.

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The prima facie meaning of volume in relation to quantity is size, bulk, dimension. If the ordinary meaning of the word is placed upon it where it occurs in par. (*b*) the Order cannot be said to fix a rate for rights or privileges for which remuneration is payable in the form of royalty based on volume of goods produced within the meaning of the paragraph. The order of the words in par. (*b*) is such that it is logically possible to construe the words " based on volume or value of goods produced " as qualifying only the word " levy " and as not applying to the word " royalty ". If that construction were adopted, the difficulty would disappear. But unfortunately it does not seem to represent the real meaning of the clause. It is not probable that it was concerned with royalties nor with stumpage nor with tribute except as it affected the production of goods. A playwright's royalty on dramatic performances is an example that would probably be thought to be outside the real meaning of the paragraph. " Stumpage " is said, by the *Oxford Dictionary*, which ascribes an American origin to the word, to mean the price of standing timber or the standing timber itself considered with reference to its quantity or marketable value. " Tribute " is a mining term and when used to describe the " remuneration " for a " right or privilege " must refer to a percentage or portion of the minerals won by a miner or person working a mine or of the proceeds of such minerals paid to the mine-owner for the right to work the mine or part of it. The context points to the view that the concluding words are attached to all four words " royalty stumpage tribute and levy " and not to the final word " levy " alone.

There are few words, however, that are incapable of some extension beyond their primary meaning and incorrect as is the use of " volume " to signify quantity whatever be the terms in which it is measured, the subject matter and the context may make it right so to understand it.

Here the subject is the control of the amount of the compensatory payments charged in respect of rights and privileges the exercise of which contributes to the production of goods. It is part of the machinery of control to keep down in time of war the price of commodities and to check inflation. The context includes a reference to tributing in mining and neither the precious metals nor minerals are ordinarily measured by bulk or size. The alternative standard to volume is value and the alternatives suggest an attempt to cover remuneration calculated by the amount of goods produced or the value of goods produced. There are instances of volume used to mean quantity in a very general sense to be found in the

Oxford Dictionary. On the whole it seems right to read the word in par. (*b*) as meaning " quantity ".

From these questions it is necessary now to pass to one which may be regarded more correctly as relating to the application of the Order than to its validity. It is whether the Order can and does apply to royalties which in point of law form part of the rent reserved upon a lease. The question depends on the construction of the Prices Regulations, not of the Order, but it is more correct to treat it as relating to the application of the Order because the Order is not confined in its intended operation to royalties reserved as rent. It extends to royalties payable under a lease but not reserved as rent and, one would suppose, to royalties payable under a licence to work a coal mine. If the regulations do not enable the commissioner to fix and declare rates at which there may be " supplied " rights or privileges arising under a lease, the remuneration being payable in the form of a royalty reserved as rent, then the consequence would be that the Order must be construed as having no application to such a royalty or to such rights : *Fraser Henleins Pty. Ltd.* v. *Cody* (1).

In the Supreme Court the decision of the majority of the judges was based on the view that such rights and such a royalty were outside the scope of the regulations and were not covered by par. (*b*) of the definition of " service " in reg. 3.

In considering this question it is to be borne in mind that here and in England it has long been a practice in coal mining leases to reserve both a fixed minimum rent and royalties varying with the quantity of the coal worked. The fixed or dead rent ensures a minimum return to the lessor and encourages the lessee to work the mine : cf. *Halsbury's Laws of England*, 2nd ed., vol. 22, pp. 602, 603, where the nature of the practice is mentioned and amplified in the following passage : "A royalty, in the sense in which the word is used in connection with mining leases, is a payment to the lessor proportionate to the amount of the demised mineral worked within a certain period. Usually the royalties are made to merge in the fixed rent by means of a provision that the lessee may, without any additional payment, work, in each period for which a payment of fixed rent is made, so much of the minerals as would, at the royalties reserved, produce a sum equal to the fixed rent." The lease declared upon is of this description. The words " goods produced " in par. (*b*) of the definition of " service " are of the widest possible application. It would indeed be surprising if they did not include fuel and basic natural products. " Royalty "

(1) (1945) 70 C.L.R., at p. 127.

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stands unqualified in its generality. It is a word of various known applications. The common applications of the word are described by *Latham* C.J. in *McCauley* v. *Federal Commissioner of Taxation* (1): "The word 'royalty' is most commonly used in connection with agreements for the use of patents or copyrights and in relation to minerals. In the case of patents a royalty is usually a fixed sum paid in respect of each article manufactured under a licence to manufacture a patented article. Similarly the publisher of a work may agree to pay the author royalties in respect of each copy of the work sold . . . In the case of mineral leases, a rent is reserved by the lease and frequently royalties are also made payable, being sums calculated in relation to 'the quantity of minerals gotten' (*Attorney-General of Ontario* v. *Mercer* (2))—in such a case the royalties represent 'that part of the reddendum which is variable.' . . . Use of the term 'royalty' is not, however, limited to patents, copyrights and minerals. The term has been used to describe payments for removing furnace slag from land (*Shingler* v. *P. Williams & Sons* (3)), and to payments for flax cut (*Akers* v. *Commissioner of Taxes* (*N.Z.*) (4)), the person paying the royalties becoming the owner of the slag or of the flax" (5). In his dissenting judgment *Rich* J. defined the word thus: "In its primary sense, royalty denotes one of the beneficial rights of the Crown, such as the right to *bona vacantia*, escheats, treasure trove, and so forth. In its secondary sense . . . it denotes a consideration paid for permission to exercise a beneficial privilege, usually made payable as and when the privilege is exercised, and measured by the quantum of the benefit from time to time received from the exercise, for example, by the quantity of minerals won by the exercise of mining rights, or the number of articles manufactured under a licence to use a patent or a secret process" (6). This being the meaning and these being the characteristic applications of the word it is not easy to suppose that royalties on the production of coal and other minerals were outside the intendment of the paragraph. Once that is granted the next step seems almost inevitable, namely that it covers such royalties whether their character is rent or not. For in the first place the character of rent usually attaches to such royalties. In the second place whether it does so or not is irrelevant to the purpose of the regulations, namely to control charges which would affect the price or cost of commodities and to check some of the factors or incidents of monetary inflation.

(1) (1944) 69 C.L.R. 235.
(2) (1883) 8 App. Cas. 767, at p. 777.
(3) (1933) 17 Tax. Cas. 574.
(4) (1926) G.L.R. (N.Z.) 259.
(5) (1944) 69 C.L.R., at p. 240.
(6) (1944) 69 C.L.R., at pp. 243, 244.

The suggestion that, inasmuch as the control of rent was a purpose of the *National Security* (*Landlord and Tenant*) *Regulations*, the language of the Prices Regulations ought not to be understood as covering royalties having the character of rent does not sufficiently take into account the different purposes of the two sets of regulations. The *Landlord and Tenant Regulations* concerned the right to occupy premises and the compensation payable by the tenant therefor. Royalty on the production of coal and minerals may have the character of rent but its relevancy to war control is not to the occupation of premises or the compensation payable therefor but to the production of goods and the costs which go into the price of the goods. That was the concern of the Prices Regulations. There is accordingly no sound ground for placing upon par. (*b*) of the definition of " service " or upon reg. 23 (2) a restrictive interpretation which would exclude royalties on the production of coal or minerals forming part of the rent reserved on a mining lease.

It is necessary, however, to turn to a difficulty that has been felt in the application of par. (*c*) of the Order to the fluctuating royalty of the present case as at 31st August 1939 and the reduction effected by the *Landlord and Tenant* (*Amendment*) *Act* 1932-1947. It is asked what, on the provisions of the lease as stated in the declaration modified by this statute, was the amount per ton of coal mined payable on 31st August 1939. It seems certain enough that the Order is referring to the rates actually payable on that day in respect of coal mined from the particular property on the assumption that there was such coal in respect of which rates would be payable. By " actually " is meant that, on the assumption required, you look at what would really be legally payable and so take into account statutory reductions of rates contracted for. As the contract in the present case, the lease, describes the royalty as a royalty per ton of all coal wrought and brought to grass, the fulfilment of that condition is assumed as on 31st August 1939 and the prices f.o.b. Newcastle as at that day are taken as the basis of computation.

The royalty is charged on the amount of coal over and above the quantity the royalty on which will satisfy the fixed rent but subject to the reduction of twenty-two and one-half per cent prescribed by the *Landlord and Tenant* (*Amendment*) *Act* 1932-1947. It is immaterial whether you reduce the fixed rent by the twenty-two and one-half per cent and then calculate what amount of coal at the rates ascertained from the prices f.o.b. Newcastle reduced by twenty-two and one-half per cent would satisfy the reduced rent or you make the calculation of the tonnage which is sufficient at the unreduced prices to satisfy the unreduced rent. The result is

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the same and in any case it is not a matter that affects the rate. But the fixed rent is not a royalty and is not a rate per ton of coal mined within the Order and it therefore seems to be unaffected by the Order.

The method of calculation put forward by the third plea cannot be supported because it takes the reduction of twenty-two and one-half per cent in force on 31st August 1939 as applicable to the formula and treats the Order as doing no more than, so to speak, continuing the reduction as part of the formula and as leaving the formula otherwise to apply to the prices f.o.b. Newcastle as they existed from time to time when the coal actually charged for was wrought and brought to bank. The third plea cannot therefore be supported.

As to the fourth plea, it is only necessary to add that sub-reg. (4) of reg. 3, a sub-regulation added by S.R. 1946 No. 71, varies the contract by the substitution of the lower rate fixed under the regulations, that is by the Order.

For the foregoing reasons the fourth plea is good and sufficient. It should perhaps be stated before passing from the pleas framed under the regulations that it was under s. 6 and s. 8 of the *Defence (Transitional Provisions) Act* 1946-1947 the Regulations and Order were continued in force.

The sufficiency of the fifth plea depends upon the provisions of the New South Wales *Prices Regulation Act* 1948 but so closely do those provisions follow the Commonwealth *National Security (Prices) Regulations* that the views that have already been expressed almost decide the question. Section 19 (2) of the Act corresponds with reg. 22 (2) and empowers the minister to declare any service to be a declared service. The same definition of " declared service " is to be found in s. 3 of the Act as in reg. 3. The definition of " service " in that section contains the same par. (*b*) as in the definition in reg. 3. Sub-regulations (2), (3) and (4) of reg. 3 appear in the Act as sub-ss. (2), (3) and (4) of s. 3. The power to fix and declare the maximum rate at which any declared service may be supplied or carried on conferred by reg. 23 (2) (a) is reproduced in s. 20 (5) (a) of the Act and s. 20 (6) (g) reproduces the amplification of it that formed reg. 23 (2A) (g) enabling the commissioner to fix maximum rates relative to such standards as he thinks proper or relative to the rates charged by individual suppliers on any date specified.

The operation of these provisions of the Act upon the present case is by means of the same order, Prices Regulation Order No. 985, and not through a new order made in pursuance of the Act. Section 2

(1) provides for the continuance, among other things, of all declarations and orders made or published under the Commonwealth *National Security* (*Prices*) *Regulations* as in force immediately before the commencement of the Act under the *Defence* (*Transitional Provisions*) *Act* 1946-1947. Section 2 (1) enacts that orders and declarations of that description which are in force in the State of New South Wales immediately before the commencement of the Act (viz. 20th September 1948) should, for the purposes of the Act, and except so far as they are inconsistent with the Act, be deemed to have been made or published under the Act and, subject to the Act, until repealed, amended or revoked under the Act, should be deemed to have force and effect accordingly as if made or published under the Act.

It will be seen that the validity of the Order as one to which the Commonwealth regulations gave force may appear to amount to a condition of the application of s. 2 (1). A provision in the *Landlord and Tenant* (*Amendment*) *Act* 1948 (N.S.W.), s. 4 (1), closely resembling s. 2 (1) of the *Prices Regulation Act* 1948 (N.S.W.), has received a construction in this Court. The question in *Brown* v. *Green* (1) was whether s. 4 (1) on its true construction made the constitutional validity of the Commonwealth *National Security* (*Landlord and Tenant*) *Regulations* an essential condition of the operation of the provision to take over the determinations made under the Commonwealth regulations. For reasons set out in the report (2) it was decided that s. 4 (1) did not mean to make it an essential condition. The construction placed upon the sub-section appears from the following passage: "When s. 4 (1) speaks of the determinations made before the commencement of the Act under the Commonwealth Regulations it assumes that the Commonwealth Regulations have the operation described and does not imply that it shall be a condition of the operation of s. 4 (1) that the operation of the Regulations shall be constitutionally valid. The words which follow 'and having force or effect in this State immediately before such commencement' are necessary in order to ensure that a determination which was made but had since been rescinded or varied or the operation of which had expired shall not be included in the description. They are words which are attached to the word 'determinations' and refer to the force or effect of the determinations on the footing or assumption that the Commonwealth Regulations are operative. They do not import the necessity that the Commonwealth Regulations themselves possess a valid constitutional force or effect. If a determination was made in point of fact

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

(2) (1951) 84 C.L.R., at pp. 289-291.

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but exceeded the power which the Commonwealth Regulations purport to confer or because of some other disconformity with the Commonwealth Regulations fell outside the authority they purport to confer it could not be considered to have force or effect under the Regulations " (1).

The same construction seems to be applicable to s. 2 (1) of the *Prices Regulations Act* 1948. It means that if Prices Regulation Order No. 985 exceeded the power or were outside the authority which the Prices Regulations purported to confer, the Order would not be taken up and continued in force by s. 2 (1) of the *Prices Regulation Act* 1948.

The continued constitutional validity of the regulations was not impugned in this Court but, material as it might be for the purpose of the fourth plea, it is not, under the decision of *Brown* v. *Green* (2) important for the fifth plea. It follows that the same questions concerning the validity of the Order as were considered in discussing the sufficiency of the third and fourth plea arise alike under the fifth plea. It is necessary, however, to do no more than note that the conclusion already stated with respect to these questions and the reasons therefor are as material to the fifth plea as to the fourth. The same observation is, of course, true of questions concerning the application of the Order, as an instrument receiving its continued force from the Act, to the facts of this case as they appear from the pleadings.

It is perhaps desirable to note too that the declaration of the Commonwealth Minister dated 30th November 1942 was, by the Minister of the State of New South Wales administering the *Prices Regulations Act* 1948, made the subject of what may be called an express declaration confirmatory of its operation so far as it related to services consisting in rights or privileges for which remuneration is payable in the form of royalty, stumpage, tribute or other levy based on volume or value of goods produced : Declaration No. 2 (N.S.W.), 20th September 1948. Possibly this affords an independent reason for saying that as to the fifth plea there can be no question of the sufficiency of the declaration of services as declared services to cover such rights and privileges.

The fifth plea should be held to be good and sufficient.

Another observation may perhaps be added. It may seem at first sight a strange result that, for the purposes of the first and second pleas, the moneys payable are rent, whereas, for the purposes of the later pleas, they are a price for services. There is, however, no appeal from the decision of the Supreme Court on the first and

(1) (1951) 84 C.L.R., at pp. 291, 292. (2) (1951) 84 C.L.R. 285.

second pleas, and in any case it is all a matter of artificial statutory definition.

The result of the foregoing is that the appeal should be allowed, the order of the Supreme Court should be varied by discharging so much thereof as relates to the fourth and fifth pleas and to costs and in lieu thereof ordering that judgment be entered for the defendant on the demurrers to the fourth and fifth pleas and that the plaintiff pay to the defendant the costs of the demurrers to the first, second, fourth and fifth pleas and that the judgment for the plaintiff on the third and sixth pleas be without costs. The respondent should pay the costs of the appeal.

Appeal allowed. Order of the Supreme Court varied by discharging so much thereof as relates to the fourth and fifth pleas and to costs. In lieu thereof order that judgment be entered for the defendant on the demurrers to the fourth and fifth pleas and that the plaintiff pay to the defendant the costs of the demurrers to the first, second, fourth and fifth pleas and that the judgment for the plaintiff on the third and sixth pleas be without costs. Order that the respondent pay the costs of the appeal.

Solicitors for the appellant, *Minter, Simpson & Co.*
Solicitors for the respondent, *Frank A. Davenport & Mant.*

J. B.