[HIGH COURT OF AUSTRALIA.]

BROADCASTING COMPANY OF AUSTRALIA PROPRIETARY LIMITED AND OTHERS } PLAINTIFFS;

AND

THE COMMONWEALTH . . . . DEFENDANT.

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MELBOURNE, *Oct.* 31, 1934.

Feb. 21, 1935.

Gavan Duffy C.J., Rich, Starke, Evatt and McTiernan JJ.

Regulation—Wireless telegraphy—Remuneration of licensees fixed by regulation—Accrued rights—Subsequent regulation—Reduction of fees—Retrospective operation—Validity—Interference with accrued rights—Wireless Telegraphy Act 1905-1919 (*No.* 8 *of* 1905—*No.* 4 *of* 1919), *secs.* 5, 10—*Acts Interpretation Act* 1904-1930 (*No.* 1 *of* 1904—*No.* 23 *of* 1930), *sec.* 10.

Sec. 10 of the *Wireless Telegraphy Act* 1905-1919 provides that "the Governor-General may make regulations . . . prescribing all matters which by this Act are required or permitted to be prescribed or which are necessary or convenient to be prescribed for carrying out or giving effect to this Act."

Two of the plaintiff companies were established to erect and maintain broadcasting stations for the purpose of transmitting messages by means of wireless telegraphy, and the fees to which they were entitled were fixed by regulation. Subsequently a regulation was passed on 7th August 1928 purporting to amend the earlier regulation by reducing the remuneration payable to the two companies, and by clause (2) thereof purporting to make such reduction operate retrospectively as from 1st November 1927.

Held, by *Gavan Duffy* C.J., *Rich*, *Evatt* and *McTiernan* JJ. (*Starke* J. dissenting), that clause (2) of the regulation which made the reduction operate as from a date anterior to the passing of the regulation was void.

Per Gavan Duffy C.J., *Evatt* and *McTiernan* JJ.:—(1) The regulation was inconsistent with sec. 10 of the *Acts Interpretation Act* 1904-1930 and was void; (2) The regulation was also void on the ground that it attempted to alter and set aside the accrued right to remuneration of those who had already

provided a broadcasting service. Such a regulation, operating retroactively, was not within the power granted to the Governor-General by sec. 10 of the Act.

Per Rich J.: The regulation was void in so far as it purported to authorize a further deduction from the available revenue prior to the date of its adoption, since to diminish the remuneration or revenue to which the licensees had become already entitled for services already rendered was a thing neither required nor permitted to be prescribed by the Act, nor necessary or convenient to be prescribed for carrying out or giving effect to the Act.

DEMURRER.

The Broadcasting Co. of Australia Pty. Ltd., the Associated Radio Co. of Australia Ltd., and Dominion Broadcasting Pty. Ltd. brought an action in the High Court against the Commonwealth of Australia and the Postmaster-General.

The statement of claim, as amended, was, in substance, as follows:—

1. The plaintiffs severally are companies incorporated under the provisions of the *Companies Acts* of Victoria.

2. The plaintiff Broadcasting Co. of Australia Pty. Ltd. at all times material was the proprietor of the class A high power wireless broadcasting station in the State of Victoria known as 3LO, and the holder of a broadcasting station licence of such station under the *Wireless Telegraphy Act* 1905-1919 and the *Wireless Telegraphy Regulations* thereunder.

3. The plaintiff Associated Radio Co. of Australia Ltd. at all times material was the proprietor of the other class A wireless broadcasting station in the said State known as 3AR, and the holder of a broadcasting station licence of such station under the said Act and regulations.

4. By an agreement in writing dated 30th May 1928 and made between the plaintiffs, Broadcasting Co. of Australia Pty. Ltd. and Associated Radio Co. of Australia Ltd. and the plaintiff, Dominion Broadcasting Pty. Ltd., the plaintiffs, Broadcasting Co. of Australia Pty. Ltd. and Associated Radio Co. of Australia Ltd. respectively sold and assigned to the plaintiff, Dominion Broadcasting Pty. Ltd. all licence fees and revenue received from their broadcasting operations as from 1st March 1928 and 1st January 1928 respectively.

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5. On 7th August 1928 the sums of £3,260 4s. 2d. and £2,203 18s. 2d. had become due and payable by the defendants to the plaintiffs, Broadcasting Co. of Australia Pty. Ltd. and Associated Radio Co. of Australia Ltd. respectively under reg. 62 of the regulations for their proportions—70 per cent and 30 per cent respectively of the available revenue within the meaning of the regulations obtained in the said State, and being within such meaning the balance of the fees collected by the Postmaster-General's Department under the regulations in respect of broadcast listeners' licences, dealers' licences and experimental licences after deducting from each licence the amounts respectively stated in reg. 67 (as amended) of the regulations, and the said amounts were and are held by the Department on behalf of the plaintiffs.

6. Of the sum of £3,260 4s. 2d. due and payable to the plaintiff Broadcasting Co. of Australia Pty. Ltd. £1,809 8s. 5d. was and is receivable by such plaintiff in respect of the period prior to 1st March 1928, and the sum of £1,450 15s. 9d. was and is receivable in respect of the period since 1st March 1928, and of the sum of £2,203 18s. 2d. due and payable to the plaintiff Associated Radio Co. of Australia Ltd. £649 17s. 6d. was and is receivable by such plaintiff in respect of the period prior to 1st January 1928, and the sum of £1,554 0s. 8d. was and is receivable in respect of the period since 1st January 1928.

7. By reg. 3 of regulations purporting to be made under the said Act on 7th August 1928 (Statutory Rules 1928, No. 79) it was provided as follows :—" (1) After reg. 67 of the *Wireless Telegraphy Regulations* the following regulation is inserted :—' 67A. In addition to the amount deductable from the licence-fees specified in the last preceding regulation, the Postmaster-General may deduct from the respective licence-fees an amount not exceeding fivepence for each month of the currency, after 1st November 1927, of any such licence issued before 1st January 1928. Of the amount so deducted the sum of threepence shall be utilized by the Postmaster-General in accordance with clause 8 of the agreement contained in the Schedule to the *Wireless Agreement Act* 1927, and the balance shall be utilized as the Postmaster-General thinks fit.' (2) This regulation shall be deemed to have commenced on 1st November 1927."

8. The said reg. 3 (1) is either wholly or to the extent hereinafter stated in the plaintiffs' claim invalid, and the said reg. 3 (2) is wholly invalid.

The plaintiffs claim:—1. A declaration (*a*) that reg. 3 (1) of Statutory Rules 1928 No. 79 is either wholly or in so far as it purports to apply retrospectively to the period between 1st November 1927 and the date of such regulation (7th August 1928) or deals with any liability already accrued under reg. 62 of the *Wireless Telegraphy Regulations*, and in particular in so far as it deals with the liability of £5,464 2s. 4d. due to the plaintiffs and claimed in this action in excess of and not authorized by the power to make regulations granted by sec. 10 of the said Act or any other power, and is either wholly or to the extent hereinbefore stated invalid; (*b*) that reg. 3 (2) of the said Statutory Rules is in excess of and is not authorized by the power to make regulations granted by sec. 10 or any other powers and is invalid.

2. (*a*) The plaintiff Broadcasting Co. of Australia Pty. Ltd. claims £3,260 4s. 2d. (*b*) The plaintiff Associated Radio Co. of Australia Ltd. claims £2,203 18s. 2d.

Alternatively—(*c*) The plaintiff Dominion Broadcasting Pty. Ltd. claims (1) £1,450 15s. 9d. part of the said sum of £3,260 4s. 2d.; (2) £1,554 0s. 8d. part of the said sum of £2,203 18s. 2d.

By their defence the defendants, in substance, pleaded:—

1. The defendant, the Postmaster-General, submits that in respect of the matters alleged in the statement of claim no cause of action can arise against the Postmaster-General, and this Court has no jurisdiction to entertain any claim on the part of the plaintiffs or any of them against the Postmaster-General.

The defendants, in substance, admitted pars. 1, 2, 3 and 7 of the statement of claim, and did not admit pars. 4 and 6 thereof. They denied that the sums of £3,260 4s. 2d. and £2,203 18s. 2d. or either of such sums or any sum had in law become due and payable by the defendants or either of them to the plaintiffs Broadcasting Co. of Australia Pty. Ltd. and Associated Radio Co. of Australia Ltd. respectively or to either of such plaintiffs, and that such or any amounts were held by the Postmaster-General's Department on behalf of the plaintiffs or any of them as in par. 5 of the statement

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of claim alleged, and relied, *inter alia*, on reg. 67A of the regulations referred to in par. 7 of the statement of claim. They also, by their defence, contended that neither reg. 3 (1) nor reg. 3 (2) referred to in par. 7 of the statement of claim was invalid either wholly or in part as alleged in par. 8 thereof.

The defendants demurred to the whole of the statement of claim alleging that it was bad in law and did not show any cause of action on the grounds following :—1. There is no statutory or other authority to sue the defendant the Postmaster-General. 2. By virtue of reg. 4 (4) of Statutory Rules 1924 No. 101 made under the *Wireless Telegraphy Act* 1905-1919, the licences referred to in pars. 2 and 3 of the statement of claim were issued and held subject to the provisions of any regulations from time to time made under the said Act, and (without limiting the generality of reference to such regulations) included in such regulations were and are (*a*) Reg. 62 (5) contained in Statutory Rules 1927 No. 3 and providing (*inter alia*) as follows: " 62. (5) The available revenue shall be payable quarterly on dates to be determined by the Postmaster-General and to such extent as the Postmaster-General considers justified " ; (*b*) Reg. 3 contained in Statutory Rules 1928 No. 79 providing as follows :—" 3. (1) After reg. 67 of the *Wireless Telegraphy Regulations* the following regulation is inserted :—' 67A. In addition to the amount deductable from the licence-fees specified in the last preceding regulation, the Postmaster-General may deduct from the respective licence-fees an amount not exceeding fivepence for each month of the currency, after 1st November 1927, of any such licence issued before 1st January 1928. Of the amount so deducted the sum of threepence shall be utilized by the Postmaster-General in accordance with clause 8 of the agreement contained in the Schedule to the *Wireless Agreement Act* 1927, and the balance shall be utilized as the Postmaster-General thinks fit.' (2) This regulation shall be deemed to have commenced on 1st November 1927 " ; and (*c*) Reg. 79 contained in Statutory Rules 1924 No. 101 providing as follows : " 79. The decision of the Postmaster-General with regard to the interpretation or application of any of the provisions of this Division shall be final."

And on other grounds sufficient in law to sustain this demurrer.

"Available revenue" is defined by reg. 67 (Statutory Rules No. 101 of 1924) as amended by Statutory Rules No. 123 of 1925) as follows: "For the purposes of this Division 'the available revenue' means the balance of the fees collected by the Department under these regulations in respect of broadcast listeners' licences, dealers' listening licences and experimental licences after deducting from each licence" the amounts then set out.

By consent, the demurrer was argued as though the Commonwealth was the sole party, and as though the Postmaster-General had been dismissed from the action.

Wilbur Ham K.C. and *Eager*, for the plaintiffs. Reg. 67A is not within the power given by sec. 10 of the *Wireless Telegraphy Act* which empowers the Governor-General to make regulations "which are necessary or convenient to be prescribed for carrying out or giving effect to" the Act. The effect of reg. 67A is to cancel an accrued right. That is neither necessary nor convenient for carrying out the Act. The regulation is bad in so far as it purports to take away money that is already earned (*Carbines* v. *Powell* (1)).

[EVATT J. referred to *Gibson* v. *Mitchell* (2).]

The purpose of the regulation is not to define the terms on which the plaintiffs are to do their work, but to take away from them an accrued right. The regulation is bad not merely because it is retroactive, but because it cancels debts which the Commonwealth owes. This regulation was passed in August 1928 and after that date it is probably valid, but in so far as it was retroactive it deprived the plaintiffs of money already earned by them, and which should have been paid over to them. Properly construed, sec. 10 of the *Wireless Telegraphy Act* does not give power to take away money from people who have earned it, because it neither enforces nor carries out the Act. The power of the Commonwealth to pass retrospective legislation is not challenged, nor is it contended that a subordinate body cannot pass retroactive enactments. The retrospective force of this regulation can have only the purpose of cancelling debts, and that cannot be for the purpose of carrying out or giving effect to the Act. A fiduciary relationship existed between

(1) (1925) 36 C.L.R. 88. (2) (1928) 41 C.L.R. 275.

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the parties whereby the Commonwealth was bound to pay to the plaintiffs the money it had received on their behalf. Under sec. 10 of the *Acts Interpretation Act* a " contrary intention " must appear in the Act giving power to make regulations, not a " contrary intention " as shown in the regulations. The regulation in question is dated 7th August 1928, and by sec. 10 of the *Acts Interpretation Act* it comes into force on that date and not before. The only power which the rule-making body has is to bring it into operation on a later date, and this was not done.

Latham K.C. (with him *Keating*), for the defendant. This regulation is not retrospective in any relevant sense. The plaintiff must admit that it is within the regulation-making power for the government to distribute funds received by it. The regulation shows that this right accrues under the regulations or not at all. It is not a matter of contract. There is no right which is legally enforceable at all, because it depends on the discretion of the Postmaster-General. Reg. 67A, if properly read, is not retrospective in any relevant sense. If it is retrospective, it is only a method of ascertaining a figure by reference to two existing sums. Sec. 5 of the Act provides that persons may be licensed for terms and on conditions which may be prescribed, and other sections give effect to these provisions. The regulations can say how much money is to be given, and when, and how it is to be given, and this can be done unless there is some objection to retrospective legislation. The Postmaster-General has a discretion under the regulations as to the amount he will pay. The first part of reg. 67A simply authorizes a deduction of the amount to be arrived at in a particular way. The reference to past months does not make the regulation retrospective. It only provides a method of ascertaining a sum of money. If the second part of reg. 67A is bad, the regulation is severable, and if it is invalid it is only invalid as to the retrospective part. Alternatively, there is power to make retrospective regulations under this Act (*R.* v. *Kidman* (1)). A regulation is not beyond the power to make regulations conferred by the Act merely because it is retrospective (*Duncan* v. *Theodore* (2)).

(1) (1915) 20 C.L.R. 425, at pp. 443, 451, 452, 455.
(2) (1917) 23 C.L.R. 510, at p. 543.

[EVATT J. referred to *Ex parte Walsh and Johnson* ; *In re Yates* (1).] There is no rule of construction that an Act will not be regarded as retrospective unless such intention clearly appears.

Eager, in reply. Conditions subsequent to the grant of a licence cannot be relied upon. *Marshall's Township Syndicate Ltd.* v. *Johannesburg Consolidated Investment Co.* (2) is clearly distinguishable from the present case. The whole question comes back to the extent of the power granted.

Cur. adv. vult.

Feb. 21, 1935.

The following written judgments were delivered :—

GAVAN DUFFY C.J., EVATT AND MCTIERNAN JJ. This demurrer raises the question of the validity of Regulation 3 of the Wireless Telegraphy Regulations purporting to be made under the *Wireless Telegraphy Act* 1905-1919.

The regulation bears date 7th August 1928 and is as follows :—

"(1) After regulation 67 of the Wireless Telegraphy Regulations the following regulation is inserted :—'67A. In addition to the amount deductable from the licence-fees specified in the last preceding regulation, the Postmaster-General may deduct from the respective licence-fees an amount not exceeding fivepence for each month of the currency, after 1st November 1927, of any such licence issued before 1st January 1928. Of the amount so deducted the sum of threepence shall be utilized by the Postmaster-General in accordance with clause 8 of the agreement contained in the Schedule to the *Wireless Agreement Act* 1927, and the balance shall be utilized as the Postmaster-General thinks fit.' (2) This regulation shall be deemed to have commenced on 1st November 1927."

Under the *Wireless Telegraphy Act* 1905-1919 it is provided (by sec. 5) that licences to establish, maintain and use stations for the purpose of transmitting or receiving messages by means of wireless telegraphy may be granted by the Minister "for such terms and on such conditions and on payment of such fees as are prescribed." The reference to payment of fees in this section is obviously to such payment *by* and not *to* those who are granted licences ; consequently

(1) (1925) 37 C.L.R. 36, at p. 138. (2) (1920) A.C. 420.

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the only power to make the regulation which is relevant to the present case is that contained in sec. 10 which provides: "The Governor-General may make regulations, not inconsistent with this Act, prescribing all matters which by this Act are required or permitted to be prescribed or which are necessary or convenient to be prescribed for carrying out or giving effect to this Act."

The parties are agreed that the statute conferred power to make regulations providing for the remuneration of those who, like the plaintiffs, provided from day to day and from hour to hour a broadcasting service which could be availed of by those who paid listeners' licence fees to the Commonwealth.

By sec. 10 of the *Acts Interpretation Act* 1904-1930, it is provided that where an Act confers power to make regulations, all regulations made accordingly shall, unless the contrary intention appears, (i.e., appears from the Act), take effect as from the date of notification or from a later date specified in the regulations.

In the case of the regulation here attacked, it was expressly provided in clause 2 that it should be deemed to have commenced on 1st November 1927, a date some nine months earlier than the date of the notification. In our opinion this clause is inconsistent with sec. 10 of the *Acts Interpretation Act* 1904-1930 and is void. Moreover, it is not possible to discard clause (2) of the regulation and allow clause (1) of it to have effect as from the date of *Gazette* notification. For it is clear that the executive authority regarded clause (2) as an essential part of the scheme embodied in the regulation.

This objection is, of itself, sufficient to invalidate the regulation, but its invalidity can be demonstrated upon broader grounds. For the essence of the regulation is its attempt to alter and set aside the accrued rights of those who had already provided a broadcasting service to the public, and for whose remuneration provision had already been made in the regulations. No one disputes that the mere fact that a statute of the Commonwealth Parliament operates retrospectively is insufficient to invalidate it. But, where the executive Government attempts to give to a regulation a retroactive operation, the validity of the regulation is necessarily dependent upon the precise term of the grant which the Parliament has conferred upon the Executive. In the present case the regulation-making

power of the Governor-General is limited to such matters as are necessary or convenient in relation to the purpose of "carrying out or giving effect" to the Act. It is argued that the present regulation merely "adjusts" the amount of remuneration payable to the plaintiffs. But an "adjustment" which involves so substantial an interference with an admittedly accrued right to remuneration for past services, is perhaps better described by another name. However described, its legal effect is clear; and, in our opinion, no purpose of the Act is carried out or given effect to by such a provision. It is said that clause 8 of the Wireless Agreement embodied in the Act No. 37 of 1927, and referred to in clause 1 of the regulation, should have resulted in a revision of the fees payable to the plaintiffs. But although such clause may explain the origin of the present regulation, it has no other relation to the question before us. Indeed, the reference to the *Wireless Agreement Act* rather emphasizes the fact that the serious alteration of the plaintiffs' accrued rights should have been effected by specific legislation, and not by the regulation-making power conferred by the *Wireless Telegraphy Act*.

By consent of all parties the demurrer was argued as though the defendant were the Commonwealth alone, and the Postmaster-General dismissed from the action.

The demurrer should be overruled.

RICH J. This is a demurrer by the defendants, the Commonwealth of Australia and its Postmaster-General, to the statement of claim. The plaintiffs are two broadcasting companies who held licences under the Wireless Telegraphy Regulations (Statutory Rules 1924, No. 101) made pursuant to the *Wireless Telegraphy Act* 1905-1919.

Under these regulations broadcasting station licences are divided into classes. The plaintiffs were the holders of the class A licences for the State of Victoria. The remuneration to which they were entitled was prescribed by reg. 62 which provided that:—"(1) Subject to the Postmaster-General being satisfied with the service provided by the licensee, and subject to the licensee complying with the provisions of these regulations, and subject to the provisions of this Division, a licensee of a Class A Station shall be entitled to receive the following proportion of the available revenue obtained

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in the State in which his station is located, namely :—(*a*) the existing licensee of the high power station in New South Wales or Victoria —seventy per centum of the available revenue; (*b*) the other licensee in New South Wales or Victoria—thirty per centum of the available revenue."

The first named plaintiff operated the high power station, and was therefore entitled to 70 per cent of the available revenue, and the other plaintiff was entitled to the remaining 30 per cent of the available revenue. Reg. 67 as amended defined available revenue to mean " the balance of the fees collected by the Department under these regulations in respect of broadcast listeners' licences, dealers' listening licences and experimental licences after deducting from each licence the following amounts respectively :—

Class of Licence.	Amount deducted.
(*a*) " Ordinary Broadcast Listeners' Licence	2s. 6d., if the fee be fully paid in advance or 2s. 6d. per half-yearly payment of the fee if paid in two half-yearly instalments " and
(*b*) " Special Broadcast Listeners' Licence	5s.
Temporary Broadcast Listeners' Licence	25 per centum of fee
Dealers' Listening Licence	25 per centum of fee
Experimental fee..	10s."

The statement of claim alleges that on 7th August 1928 certain sums, which it specifies, had become due and payable by the defendants to the plaintiffs respectively under these regulations. Parcel of one of these sums represented periods prior to 1st March 1928 and parcel a period since. Of the other sum parcel represented a period prior to 1st January 1928 and parcel a period since that date. In this state of affairs, on 7th August 1928, the Governor-General in Council adopted an amendment of the regulations. The amendment included the insertion after reg. 67 of a new regulation 67A. The new regulation read as follows :—" ' In addition to the amount deductable (*sic*) from the licence-fees specified in the last preceding regulation, the Postmaster-General may deduct from the

respective licence-fees an amount not exceeding fivepence for each month of the currency, after 1st November 1927, of any such licence issued before 1st January 1928. Of the amount so deducted the sum of threepence shall be utilized by the Postmaster-General in accordance with clause 8 of the agreement contained in the Schedule to the *Wireless Agreement Act* 1927, and the balance shall be utilized as the Postmaster-General thinks fit.' (2) This regulation shall be deemed to have commenced on 1st November 1927."

The plaintiffs seek a declaration that this regulation is void either wholly or in so far as it purports to apply retrospectively between the period 1st November 1927 and the date of the regulation, or to deal with any liability accrued under reg. 62. The demurrer raises the question of the validity of the regulation. In my opinion the regulation is void in so far as it purports to authorize a further deduction from the available revenue accruing prior to the date of its adoption. I place my judgment on a very simple ground. The power to make the regulation is conferred by sec. 10 of the *Wireless Telegraphy Act* 1905-1919, and enables the Governor-General to make regulations not inconsistent with the Act "prescribing all matters which by this Act are required or permitted to be prescribed or which are necessary or convenient to be prescribed for carrying out or giving effect to this Act." To diminish the remuneration or revenue to which the licensees had become already entitled for services already rendered is, in my opinion, a thing neither required nor permitted to be prescribed by the Act nor which is necessary or convenient to be prescribed for carrying out or giving effect to the Act. It is not directed towards anything which the Act is designed to effect or achieve. It is not concerned with any operation to be performed under the Act. It is concerned only with the past due debt of the Commonwealth. The retrospective operation of the regulation achieves nothing but a reduction of a matured liability of the Commonwealth. The liability may have been payable *in futuro* but none the less was owing *in præsenti*. The contention that the agreement referred to in the regulation impugned, which agreement the Commonwealth had made with the holder of wireless patents, was likely to operate in relief of the plaintiffs, and that this

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called for additional expenditure on the part of the Commonwealth, appears to me to be beside the point. For these reasons I think par. 2 of the regulation 67A is void. I have some doubt whether it is possible to sever this clause from clause 1, but in the circumstances of this case, and having regard to the view of the majority of the Court, it is unnecessary to deal with this matter. The demurrer should be overruled with costs.

STARKE J. The *Wireless Telegraphy Act* 1905-1919 enacts that the Minister for the time being administering the Act shall have the exclusive privilege of establishing, erecting, maintaining and using stations and appliances for the purpose of transmitting and receiving messages by wireless telegraphy. But sec. 5 provides that licences to establish, erect, maintain or use stations and appliances for the purpose of transmitting or receiving messages by means of wireless telegraphy may be granted by the Minister for such terms and on such conditions and on payment of such fees as are prescribed. And sec. 10 provides that the Governor-General may make regulations not inconsistent with the Act, "prescribing all matters which by this Act are required or permitted to be prescribed or which are necessary or convenient to be prescribed for carrying out or giving effect to this Act."

The legislation is in skeleton form, and delegates not only details of administration, but matters which affect the rights of the subject, to regulations made by the Governor-General in Council. The subject matter of regulation is of a technical nature, and requires constant adaptation to changing conditions. Flexibility is therefore desirable, and the delegation of power permits alterations and amendments to be made in an easy and convenient form. Under the regulations, the classes of licences that may be granted are set out, including broadcasting station licences. Every licence is subject to the provisions of any regulation from time to time made under the *Wireless Telegraphy Act* 1905-1919 so far as they are applicable to the licence, and those provisions are deemed to be incorporated in the licence. The broadcasting station licence emphasizes this provision, for it provides that the licence is subject to the provisions of the Wireless Telegraphy Regulations and such

amendments and additions thereto as are made from time to time. At the foot of the licence is the licensee's acceptance thereof "under the conditions above set out."

There are two classes of broadcasting station licences, namely, those for Class A and Class B stations respectively. A broadcasting station licence continues in force for a period of five years, and is renewable annually thereafter. The A class stations receive proportions of the available revenue, which means the balance of the fees collected by the Department under the regulations, subject to certain deductions. The available revenue is payable quarterly, on dates to be determined by the Minister and to such extent as the Minister considers justified. In Victoria there were two A class stations —the two plaintiffs the Broadcasting Co. of Australia Pty. Ltd. and the Associated Radio Co. of Australia Ltd.—which were entitled to the available revenue in accordance with the regulations in the proportions of 70 and 30 per cent respectively. These companies, in May of 1928, sold and assigned to the third plaintiff, Dominion Broadcasting Pty. Ltd., as from 1st March 1928 and 1st January 1928 respectively, all licence fees and revenues received from their broadcasting operations. In August of 1928 the Governor-General made certain regulations (1928 No. 79) under the *Wireless Telegraphy Act* 1905-1919, one of which was as follows:— "3. (1) After regulation 67 of the Wireless Telegraphy Regulations the following regulation is inserted:—'67A. In addition to the amount deductable from the licence-fees specified in the last preceding regulation, the Postmaster-General may deduct from the respective licence-fees an amount not exceeding fivepence for each month of the currency, after 1st November 1927, of any such licence issued before 1st January 1928. Of the amount so deducted the sum of threepence shall be utilized by the Postmaster-General in accordance with clause 8 of the agreement contained in the Schedule to the *Wireless Agreement Act* of 1927, and the balance shall be utilized as the Postmaster-General thinks fit.' (2) This regulation shall be deemed to have commenced on 1st November 1927."

Under the regulation of 1924 No. 101, broadcasting licensees kept the Minister indemnified against any claim for royalties in respect of equipment operated under their licences, or against any claim

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whatever arising out of the licensees' operations. But under the Wireless Agreement scheduled to the *Wireless Agreement Act* 1927 No. 37, an arrangement was made with Amalgamated Wireless (Australasia) Ltd. as to that company's patent rights. And it was said at the Bar that clause 67A of the regulation 1928 No. 79 was made to meet this change in arrangements as to patent rights. The plaintiffs in their statement of claim, however, allege that the regulation 1928 No. 79, cl. 3 (1) is in excess of and not authorized by the power to make regulations under the *Wireless Telegraphy Act* 1905-1919. The defendants have demurred to the statement of claim. The question for determination upon this demurrer is whether the regulation is or is not valid.

It is said to be wholly invalid because it does not prescribe any matter which by the Act is required or permitted to be prescribed or which is necessary or convenient to be prescribed for carrying out or giving effect to the Act. But, as I have already said, the Act is a mere skeleton, and the duty and the power of making it effective rest with the executive, and are found in the power to make regulations (Cf. *Gibson* v. *Mitchell* (1)). It is upon this power, coupled with the authority in sec. 5 to grant licences, that the plaintiffs depend for their right to receive the available revenue. But the available revenue is not the whole of the fees collected, but only a balance of fees after the prescribed deductions have been made. The provision that licensees of A class stations are to receive proportions of the available revenue is but a method of ascertaining the revenue which shall be paid over to the broadcasting stations, and, in my opinion, clearly within power. The regulation 1928 No. 79 cl. 3 (1) adds but another deduction.

But it is contended that the power to make regulations cannot affect accrued or vested rights, or apply retrospectively to a period prior to the date of such regulation. By the terms, however, of the regulation of 1924, and of the licences themselves, every licence is subject to the provisions of any regulation from time to time made under the Act, so far as they are applicable, and the provisions are incorporated in the licence. It is difficult to speak of accrued or vested rights when they are so conditioned. Nevertheless, it is said

(1) (1928) 41 C.L.R. 275.

that the regulating power cannot authorize the creation of new obligations or duties in respect of transactions or considerations already past. The question is really one of construction of the power. It is quite true that Acts ought not to be construed so as to have a retrospective operation unless their language is such as plainly to require such a construction. But the grant of the power in the present case is in the widest terms; it includes matters which are necessary or convenient to be prescribed for carrying out or giving effect to the Act. The only restriction upon the power is that regulations made pursuant to it shall not be inconsistent with the Act. The power of Parliament to legislate retrospectively cannot be denied. And there is no rule that denies the right of Parliament to delegate the power of regulating retrospectively matters necessary or convenient to be prescribed for carrying out or giving effect to the Act. The Act under consideration—being, as I have already observed, in skeleton form—confers power to regulate not only the whole detail of administration, but also the creation, definition and regulation of the rights of the subject. The power—within the ambit of the authority given—is as extensive as that of the Parliament. It enables the grant of licences on such terms and conditions and on payment of such fees as are prescribed. It is not inconsistent with any provision, express or implied, in the Act, that the power should be exercised retrospectively; a regulation is not beyond power because it is retrospective or retroactive.

It was further contended that the regulation 67A (1928 No. 79, cl. 3 (1)) is not retroactive in any relevant sense. An Act is not retroactive merely because a part of the requisites for its operation is drawn from a time antecedent to its passing, and, in my opinion, the regulation here in question is of this character. But whether it is retroactive in operation or not appears to me immaterial, for, in either view, the regulation is within power, and consequently valid.

The demurrer should be allowed.

Demurrer overruled with costs.

Solicitors for the plaintiffs, *Robert W. Best & Hooper.*

Solicitor for the defendant, *W. H. Sharwood,* Crown Solicitor for the Commonwealth.

H. D. W.