GD PC 6 37, 1955

In the Privy Council.

No. 31 of 1955.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA

BETWEEN

PERPETUAL TRUSTEE COMPANY (LIMITED) (*Plaintiff*) *Appellant*

AND

PACIFIC COAL COMPANY PTY. LIMITED (*Defendant*) *Respondent.*

RECORD OF PROCEEDINGS

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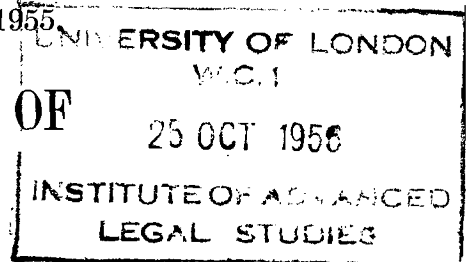
In the Privy Council.

No. 31 of 1955.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ON APPEAL FROM THE HIGH COURT OF AUSTRALIA

BETWEEN

PERPETUAL TRUSTEE COMPANY (LIMITED) *(Plaintiff) Appellant*

AND

PACIFIC COAL COMPANY PTY. LIMITED *(Defendant) Respondent.*

10

RECORD OF PROCEEDINGS

In the Supreme Court of New South Wales.

No. 1. Plaintiff's Declaration. 13th September 1951.

No. 1.

Plaintiff's Declaration.

No. 3258 of 1951.

IN THE SUPREME COURT OF NEW SOUTH WALES.

Between

PERPETUAL TRUSTEE COMPANY (LIMITED) ... ... *Plaintiff*

and

PACIFIC COAL COMPANY PTY. LIMITED ... ... *Defendant.*

20

PLAINTIFF'S DECLARATION.

PERPETUAL TRUSTEE COMPANY (LIMITED) a corporation entitled to sue and be sued in its corporate name by Keith Bevan Campbell its Attorney sues Pacific Coal Company Pty. Limited a corporation liable to be sued in its corporate name for that the plaintiff by a memorandum of lease registered under the provisions of the Real Property Act 1900 No. B324466 demised to the defendant all and singular the mines beds veins and seams of coal shale and minerals of a similar character in or under all that piece of land described in Certificate of Title Volume 3611 Folio 204 (with a certain exception) and also the whole of the land comprised 30 in Crown Grant Volume 781 Folio 173 and also part of the land comprised in Certificate of Title Volume 3058 Folio 113 under the said Act 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 thereby demised 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 a term of forty three years computed from the first day of September One thousand nine hundred and nineteen at a yearly rental of £819 payable quarterly each year provided that the defendant be permitted to win work carry away forth and out of the said mines and seams of coal shale and other minerals of a similar character such a quantity of coal shale and such other minerals as should 10 at the rate per ton hereinafter mentioned produce in any one year of the term thereby created the said sum of £819 and at a royalty per ton of all coal wrought and brought to bank from the said mines thereby demised over and above such quantity as may be worked in respect of such rent as aforesaid as follows: when the selling price per ton of round or best coal obtained from the said mines free on board at Newcastle should be less than six shillings and three pence the royalty to be five pence per ton; when the said selling price should be not less than six shillings and three pence but less than seven shillings and three pence the royalty to be six pence per ton; when the said selling price should be not less than 20 seven shillings and three pence but less than eight shillings and three pence the royalty to be seven pence per ton and so on the royalty to be increased by one penny for every increase of one shilling in the said selling price provided that such royalty as aforesaid should be reduced to a fixed and constant royalty of three pence per ton in respect of all small coal so wrought and brought to bank as aforesaid and above such quantity as may be worked in respect of the fixed rent thereinbefore provided and provided further that fractions of a shilling on such selling price as aforesaid should not be taken into account in calculating the said royalty and a royalty in respect of all shale and other minerals of similar character wrought and 20 brought to bank as in the said memorandum of lease provided and the defendant by such memorandum of lease covenanted to pay the said rent and royalty calculated as aforesaid at the times and in the manner therein appointed for payment and since the quarter ended the 31st day of December 1931 until the quarter ended March 31st 1934 of the rent and royalty payable in respect of the said period by the defendant to the plaintiff as aforesaid the sum of £880.12.7 remains due and unpaid and since the quarter ended 31st March 1939 and until the quarter ended 31st December 1950 of the rent and royalty payable in respect of the last mentioned period by the defendant to the plaintiff as aforesaid the sum 40 of £27,488.14.7 remains due and unpaid and all conditions were fulfilled and all things happened and all times elapsed necessary to entitle the plaintiff to a performance by the defendant of the said covenant on his part and to maintain this action for the breaches thereof hereinbefore alleged and yet the said defendant has not paid the said sums of £880.12.7 and £27,488.14.7 or any part thereof and the said sums remain due and unpaid to the plaintiff and the plaintiff claims twenty-eight thousand three hundred and sixty-nine pounds seven shillings and two pence (£28,369.7.2).

In the Supreme Court of New South Wales.

No. 2. Defendant's Pleas. 2nd November 1951.

No. 2.

Defendant's Pleas.

THE DEFENDANT by ROBERT HUGH MINTER its Attorney as to so much of the declaration as alleges that there is due and owing to the plaintiff by the defendant rent and royalty for the period since the quarter 31.12.31 until the quarter ending 31.3.34 and since the quarter ending 31.3.39 until the quarter ending 31.12.47 and that the defendant has not paid the same says that the defendant became entitled pursuant to the provisions of the Reduction of Rent Act 1931 and pursuant to the
10 provisions of the Landlord and Tenant Acts 1932–1947 to a reduction of 22½% of the rent and royalty payable by it in terms of the said lease and the moneys sued for in the declaration in respect of the periods above set forth is the amount by which the defendant's obligation to pay rent in terms of the said lease was reduced by the said Acts of Parliament and in respect of these sums the defendant says that its obligation to pay the same was extinguished by the said Acts.

2.—AND for a second plea the defendant says that the rent and royalty sued for in this action are moneys alleged to be due for mining rights in respect of coal mined from land not leased from the Crown but privately
20 leased by the plaintiff to the defendant in accordance with the lease in the declaration set forth and in respect of so much of the rent and royalty sued for herein as accrued due after the Eighteenth day of March One thousand nine hundred and forty-three the defendant says that on the said Eighteenth day of March One thousand nine hundred and forty-three 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 1938–1949 and by the said Prices Regulation Order the maximum amount payable for mining rights in respect
30 of coal mined from land privately leased was not to exceed in the case of properties privately leased on the thirty-first day of August One thousand nine hundred and thirty-nine the amount payable per ton by a lessee on the thirty-first day of August One thousand nine hundred and thirty-nine and the Defendant further says that on the thirty-first day of August One thousand nine hundred and thirty-nine the amount of rent and royalty payable by the defendant to the plaintiff was the amount prescribed by the lease less the reduction of 22½% affected by the Reduction of Rent Act 1931 and the defendant further says that since the eighteenth day of March One thousand nine hundred and forty-three it has paid to the
40 plaintiff rent and royalty for all coal won since the eighteenth day of March One thousand nine hundred and forty-three at the rate payable by it on the Thirty-first day of August One thousand nine hundred and thirty-nine and the moneys sued for herein since the Eighteenth day of March One thousand nine hundred and forty-three are moneys in excess

In the Supreme Court of New South Wales.

No. 2. Defendant's Pleas. 2nd November 1951—*continued.*

of the maximum amount payable by the Defendant to the Plaintiff as determined by the said Prices Regulation Order and the defendant says that the said Prices Regulation Order has continued to be in full force and effect from the eighteenth day of March One thousand nine hundred and forty-three until the commencement of this action.

3.—AND for a third plea " on equitable grounds " the defendant says that in or about the year One thousand nine hundred and thirty-two and during the currency of the term of the said lease the plaintiff with the intention that the defendant would act on the promise hereinafter alleged and with the further intention that such promise would create legal 10 obligations between the plaintiff and the defendant represented to and promised the defendant that so long as the Reduction of Rent Act 1931 and any re-enactment thereof should remain in force the provisions of the said Reduction of Rent Act should apply to the rent and royalty payable under the said lease and that the amount payable by the defendant to the plaintiff as rent and royalty in terms of the said lease should be the respective amounts fixed by the said lease less a reduction of 22½% and no more and the defendant in reliance upon the said 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 20 of its said promise and representation over the said period accepted such reduced amounts of rent and royalty in full discharge of all rent and royalty payable by the defendant over the said period and the defendant further says 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 said lease at a price lower than the price it otherwise would have sold the said 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 30 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 said lease.

No. 3. Plaintiff's Demurrer. 5th November 1952.

No. 3.

Plaintiff's Demurrer.

The plaintiff says that the first plea herein is bad in substance.

On the argument of this demurrer it will be contended that the said plea is bad on the following grounds :

That neither the provisions of the Rent Reduction Act 1931 nor the provisions of the Landlord and Tenant Act 1932-1947 applied to the subject of the lease mentioned in the declaration 40

in that the mines and mining rights leased and granted are not "premises" within the meaning of the provisions of either of the said Acts.

In the Supreme Court of New South Wales.

No. 3. Plaintiff's Demurrer. 5th November 1952—*continued.*

2.—The plaintiff further says that the second plea herein is bad in snbstance.

On the argument of this demurrer it will be contended that the said plea is bad on the following grounds :—

A. That Prices Regulation Order 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 lease mentioned in the declaration in that no mining rights under the said lease were on the date of the said order or have since the said date been supplied by the plaintiff to the defendant and that prior to the promulgation of the said Order the defendant had acquired all its mining rights under the said lease and that the said order had no effect upon its obligation to pay for the same in accordance with the provisions of the said lease.

B. That on the 31st day of August 1939 (that date on which the amount payable per ton of coal mined was by the said Order fixed as the maximum rate) the amount payable for rent and royalty by the defendant to the plaintiff was not reduced by the Act of Parliament in the said plea mentioned by $22\frac{1}{2}$%.

3.—The plaintiff further says that the third plea is bad in substance.

On the argument of this demurrer it will be contended that the plea is bad on the following grounds :

A. The claim of the plaintiff arises under an instrument having the effect of a deed and the said plea in effect alleges a variation of the said terms of the instrument otherwise than by deed.

B. The representation and promise alleged in the said plea is not supported by any allegation of valuable consideration.

C. The matter alleged in the said plea is not a ground entitling the defendant to an absolute unconditional and perpetual injunction in equity.

No. 4.

Joinder in Demurrer.

No. 4. Joinder in Demurrer. 17th December 1952.

The defendant says that the first second and third pleas filed herein are good in substance.

Dated this 17th day of December One thousand nine hundred and fifty two.

K. B. CAMPBELL,
Attorney for the Plaintiff,
60 Hunter Street,
Sydney.

In the Supreme Court of New South Wales.

No. 5. Amended Pleas. 8th October 1953.

No. 5.

Amended Pleas.

No. 3258 of 1951.

IN THE SUPREME COURT OF NEW SOUTH WALES.

8th October 1953.

1.—The defendant by Robert Hugh Minter its Attorney as to £333.17.7 parcel of the moneys claimed being the amount claimed in respect of the period since the quarter ended the 31st day of December 1931 until the 31st day of December 1932 says that the defendant became entitled pursuant to the provisions of the Reduction of Rents Act 1931 to a reduction of 22½% of the rent and royalty payable by it in terms of the lease in respect of the said period and the said £333.17.7 is the amount by which the defendant's obligation to pay rent and royalty in terms of the said lease in respect of the said period was reduced by the said Reduction of Rents Act and in respect of the said amount the defendant says that its obligation to pay the same was extinguished by the said Act. 10

2.—And for a second plea the defendant as to £9,513.10.2 other parcel of the moneys claimed being the amount claimed in respect of the period commencing on the 1st day of January 1933 and ending on the 31st day of March 1934 and the period since the quarter ended the 31st day of March 1939 until the 31st day of December 1947 says that the defendant became entitled pursuant to the provisions of the Landlord and Tenant (Amendment) Act 1932–1947 to a reduction of 22½% of the rent and royalty payable by it in terms of the lease in respect of the said periods and the said £9,513.10.2 is the amount by which the defendant's obligation to pay rent and royalty in terms of the said lease in respect of the said periods was reduced by the said Landlord and Tenant (Amendment) Act 1932–1947 and in respect of the said amount the defendant says that its obligation to pay the same was extinguished by the said Act. 20

3.—And for a third plea the defendant as to £649.14.11 other parcel of the moneys claimed being the amount claimed in respect of the period commencing the 1st day of January 1948 and ending the 30th day of June 1948 says that the said amount comprises 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 in the declaration set forth 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 1938–1949 and by the said Prices Regulation 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 30 40

amount payable per ton by a lessee on the 31st August 1939 and the defendant further says that on the 31st August 1939 the amount payable per ton by the defendant to the plaintiff within the meaning of the said Prices Regulation Order was the amount determined by the rate prescribed in the said lease calculated under the said lease in the case of certain types of coal on the selling price free on board at Newcastle of the said certain types of coal (at the dates from time to time when the same was brought and brought to bank) less the reduction of 22½% effected by the Landlord and Tenant (Amendment) Act 1932–1947 and the defendant further says that it has paid to the plaintiff for all coal won during the said period commencing the 1st day of January 1948 and ending the 30th day of June 1948 the amount per ton payable by it on the 31st August 1939 as determined by the lease in the manner aforesaid and the said amount of £649.14.11 comprises moneys in excess of the maximum amount payable during the said period by the defendant to the plaintiff as determined by the said Prices Regulation Order and the defendant says that its obligation to pay the same was extinguished by the said Prices Regulation Order and National Security (Prices) Regulations which said Order and Regulations were and remained in full force and effect during the said period.

4. And for a fourth plea the defendant as to £1,093.10.5 other parcel of the moneys claimed being the amount claimed in respect of the period commencing the 1st day of July 1948 and ending the 20th day of September 1948 says that the said amount comprises 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 in the declaration set forth and within the meaning of the 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 1938–1949 and by the said Prices Regulation 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 the 31st August 1939 and the defendant further says that on the 31st August 1939 the amount payable per ton by the defendant to the plaintiff within the meaning of the said Prices Regulation Order was the amount determined by the rate prescribed in the said Lease calculated under the said Lease in the case of certain types of coal on the selling price free on board at Newcastle of the said certain types of coal (as at the 31st August 1939) less the reduction of 22½% effected by the Landlord and Tenant (Amendment) Act 1932–1947 and the defendant further says that it has paid to the plaintiff for all coal won during the said period commencing the 1st day of July 1948 and ending the 20th day of September 1948 the amount per ton payable by it on the 31st August 1939 as determined by the said lease and calculated thereunder on the selling price as at 31st August 1939 in the manner aforesaid and the said amount of £1093.10.5 comprises

In the Supreme Court of New South Wales.

No. 5. Amended Pleas. 8th October 1953—*continued.*

moneys in excess of the maximum amount payable during the said period by the defendant to the plaintiff as determined by the said Prices Regulation Order and the defendant says that its obligation to pay the same was extinguished by the said Prices Regulation Order and National Security (Prices) Regulations which said Order and Regulations were and remained in full force and effect during the said period.

5.—And for a fifth plea the defendant as to £16,778.14.1 other parcel of the moneys claimed being the amount claimed in respect of the period commencing the 20th day of September 1948 and ending the 31st day of December 1950 says that the said amount comprises 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 in the declaration set forth and within the meaning of Prices Regulation Order hereinafter referred to and in respect of the said amount the defendant says that on the said 20th day of September 1948 the New South Wales Prices Regulation Act No. 26 of 1948 came into force and by virtue of the said Prices Regulation Act there came into force or there was continued in force in New South Wales Prices Regulation Order No. 985 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 1938–1949 and by the said Prices Regulation 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 the 31st August 1939 the amount payable per ton by a lessee on the 31st August 1939 and the defendant further says that on the 31st August 1939 the amount payable per ton by the defendant to the plaintiff within the meaning of the said Prices Regulation Order was the amount determined by the rate prescribed in the said lease calculated under the said lease in the case of certain types of coal on the selling price free on board at Newcastle of the said certain types of coal as at the 31st August 1939 less the reduction of $22\frac{1}{2}\%$ effected by the Landlord and Tenant (Amendment) Act 1932–1947 and the defendant further says that it has paid to the plaintiff for all coal won during the said period commencing the 1st day of July 1948 and ending the 20th day of September 1948 the amount per ton payable by it on the 31st August 1939 as determined by the said Lease and calculated thereunder on the selling price as at 31st August 1939 in the manner aforesaid and the said amount of £16,778.14.1 comprises moneys in excess of the maximum amount payable during the said period by the defendant to the plaintiff as determined by the said Prices Regulation Order and the defendant says that its obligation to pay the same was extinguished by the said Prices Regulation Act and the said Order which were and remained in full force and effect during the said period.

6.—And for a sixth plea on equitable grounds the defendant as to £9,847.7.9 parcel of the moneys claimed being the amount claimed in respect of the period since the quarter ended the 31st day of December 1931 until the quarter ended the 31st day of March 1934 and the period since

No. 5. Amended Pleas. 8th October 1953—*continued.*

the quarter ended the 31st day of March 1939 and until the quarter ended 31st day of December 1947 and being the amounts pleaded to in the 1st and 2nd pleas says that in or about the year One thousand nine hundred and thirty-two and during the currency of the term of the said lease the plaintiff with the intention that the defendant would act on the promise hereinafter alleged and with the further intention 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 Rent Act 1931 and any re-enactment thereof should remain in force the provisions of the said Reduction of Rent Act should apply to the rent and royalty payable under the said lease and that the amount payable by the defendant to the plaintiff as rent and royalty in terms of the said lease should be the respective amounts fixed by the said lease less a reduction of 22½% and no more and the defendant in reliance upon the said 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 the said period accepted such reduced amounts of rent and royalty in full discharge of all rent and royalty payable by the defendant over the said period and the defendant further says 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 said lease at a price lower than the price it otherwise would have sold the said 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 or would be called upon to pay for rent and royalty under the terms of the said lease.

R. H. MINTER,
Defendant's Attorney,
31 Hunter Street,
Sydney.

No. 6.

Reasons for Judgment of Street, C.J.

No. 6. Reasons for Judgment of Street, C.J. 30th November 1953.

I have had the opportunity of reading the reasons prepared by Owen, J., and agreeing as I do with his conclusions and the reasons he has given for them, I desire to say little for myself.

The matter which principally exercised my mind was the question of the proper construction of certain Federal regulations which affected the decision on the demurrer to the third, fourth and fifth amended pleas. It is clear that the relationship which existed between the parties was that

of landlord and tenant, and the payments required to be made under the lease executed in 1919 were rent in every sense of the term. It is true that the amount payable in any particular year depended upon the amount of coal mined, but this does not alter the situation and create some other relationship than that of landlord and tenant. " Rent . . . is the " recompense paid by the lessee to the lessor for the exclusive possession " of corporeal hereditaments. . . . Rent does not necessarily represent " the annual produce of the land, a royalty, notwithstanding that it is " reserved in respect of substances which are taken from the land so as to " cause its permanent diminution is a true rent." (Halsbury Laws of England, 2nd ed. vol. 20, p. 158; and see also *Coal Commission* v. *Earl Fitzwilliams Royalties Co.,* 1942 Ch. 365.) The effect of the agreement between the parties contained in the lease now in question was to require a minimum payment of £819 each year, and further additional payments if the amount of coal won from the mine and the land demised exceeded a certain figure. These payments were sums issuing out of the thing demised by virtue of the estate granted by the demise, and are properly to be regarded as rent paid for the subject matter of the lease.

The National Security Act 1939–1940, s. 5 (1), authorised the Governor-General to make regulations for securing the public safety and defence of the Commonwealth, and pursuant to the powers, thereby conferred certain regulations, entitled the National Security (Prices) Regulations, were published in Statutory Rule No. 176 of the 22nd August, 1940. Under those regulations the Governor-General was given power to appoint a Prices Commissioner, an Assistant Prices Commissioner, and certain powers were conferred upon these named officers. By Clause 22 of the National Security (Prices) Regulations the Minister was given power to declare any goods to be " declared " goods for the purposes of the regulations, and also to declare any service to be a " declared " service. Clause 23 then authorised the Commissioner, with respect to any " declared " goods, to fix and declare the maximum price at which such goods might be sold, and with respect to any declared service, to fix and declare the maximum rate at which any declared service may be supplied or carried on. By Clause 3, " service " was defined to mean :

> " (a) any service supplied or carried on by any person or body " of persons, whether incorporated or unincorporated, " engaged in a public utility undertaking or an industrial " or commercial enterprise ; and
>
> " (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. . . ."

By Order No. 985, dated 17th March, 1943, the Prices Commissioner purported to fix the maximum amount to be paid for coal royalties on the footing that these were services in the nature of rights conferred upon the person making the payment, and therefore were subject to the power of the Prices Commissioner to fix the appropriate amount to be paid.

In the Supreme Court of New South Wales.

No. 6. Reasons for Judgment of Street, C.J. 30th November 1953—*continued.*

The substantial question is whether in the present case the sums paid by the lessee to the lessor were paid for a " service " within the meaning of the National Security (Prices) Regulations. In ordinary English the amount paid under the agreement between the parties in the present case cannot aptly be described as money paid for a service. The lessor does not render a service to his lessee, and unless the definition of " service " within the regulation requires that meaning to be put upon the word, it is clear that the rents paid under the lease now in question would not be a service. It is said, however, that the word " royalty " where it occurs in the definition makes the regulations applicable to the present case and entitles the Commissioner to promulgate an order in the terms contained in Order No. 985 of March, 1943.

Not without some doubt, I have come to the conclusion that this contention cannot be supported. The Governor-General-in-Council had, by other regulations, dealt with the fixing of fair rents where the relationship of landlord and tenant existed in respect of the premises covered by the National Security (Landlord and Tenant) Regulations. In their terms these regulations do not apply to leases such as the one now under consideration. The question of the control of coal mining was also taken into consideration by the Governor-General-in-Council, and regulations entitled the National Security (Coal Control) Regulations were made in 1941. Although the widest powers were conferred upon the authorities thereby created, no provision was contained therein enabling a rent to be fixed in cases such as the present one. It would seem curious that in that event the power to fix the maximum amounts to be paid for coal mined was left to be determined by the Prices Commissioner by a strained construction of the language of the definition clause in the National Security (Prices) Regulations. Sub-Clause (b) of the definition deals with rights or privileges for which remuneration is payable. In one sense rent may be said to be paid for a right or a privilege, but it is more than that, for it issues out of the land demised by virtue of the grant of that demise. The actual amount of the rent to be paid may fall to be determined by the application of a formula in the nature of a royalty formula, but it is still rent which is paid to the lessor. The other words which are used in the definitions clause, namely, " stumpage, tribute or other levy," are not associated with the relationship of landlord and tenant. " Stumpage " is the price paid to an owner of land for the privilege of cutting standing timber, and " tribute " is the sum paid to miners or other similar workers for their work, based on the amount of ore or other minerals produced. So also a royalty may be payable without any association with a lease, and the word would be properly applicable to moneys paid where patented articles are produced and sold, or where mineral is mined under a licence. But in the present case the " royalty " is merged in and becomes part of the rent payable by the lessee to the lessor, and what the Commissioner purported to do by Order No. 985 was to fix the rent payable under a lease of land and a lease of the coal seam beneath the land. The Commissioner only had power to fix a price for a service, and had no power to fix rents. What was payable

In the Supreme Court of New South Wales.

No. 6. Reasons for Judgment of Street, C.J. 30th November 1953—*continued.*

under the agreement between the parties in this case was a rent, and in my opinion, therefore, Order No. 985 was incapable of operation upon the agreement made between the parties in 1919. It is quite inapt to say that by this lease the lessor supplied to the lessee a service in the way of mining rights. The mining rights were vested in the lessee because of the estate demised, and it was by virtue of that estate that the lessee was entitled to take coal from the lands in question. In no sense can it be said that the landlord supplied a service.

So far as concerns the first, second and sixth amended pleas, I desire to add nothing to the reasons given by Owen, J. and Herron, J., with which I agree. 10

In the result there should be judgment for the defendant on the first and second amended pleas, but without costs, and for the plaintiff on the third, fourth, fifth and sixth amended pleas.

No. 7. Reasons for Judgment of Owen, J. 30th November 1953.

No. 7.

Reasons for Judgment of Owen, J.

By memorandum of lease registered under the Real Property Act the plaintiff demised to the defendant the seams of coal in and under certain lands for a term of 43 years from 1st September, 1919. The lease reserved an annual fixed rent of £819, payable quarterly, and certain 20 royalties, the amount of which, in the case of round or best coal, was to vary with the selling price of coal f.o.b. Newcastle. The payment of the fixed rent entitled the defendant, without further payment, to win such quantity of coal in any one year as would, at the appropriate rate of royalty for that coal, produce the sum of £819 and it was for coal won in excess of that amount that the further payments were to be made.

The plaintiff's claim is for a balance of rent and royalty alleged to have accrued due between 1st January 1932 and 31st March, 1934, and between 1st April 1939 and 31st December, 1950. To the plaintiff's declaration the defendant originally pleaded three pleas, to which the plaintiff demurred. 30 During argument, however, it became apparent that the decision on the demurrers to the first and third of these pleas might go off on the point that they had been pleaded to the whole claim whereas admittedly they applied, if valid, to part only of it. Both parties were, however, anxious to obtain the opinion of the court on the real issues of law in contest between them, and accordingly it was agreed, subject only to a question of costs, that the defendant should be allowed to amend its pleas in order that those issues might be determined. This amendment has been made, with the result that we now have to consider the validity of six pleas, and with these I propose to deal in turn. 40

In the Supreme Court of New South Wales.

No. 7. Reasons for Judgment of Owen, J. 30th November 1953—*continued.*

First Plea : This is pleaded to so much of the rent and royalty as is alleged to have accrued between 1st January 1932 and 31st December 1932 the period during which the Reduction of Rents Act, No. 45 of 1931, was in force, and the question is whether the compulsory reduction in rent, for which that Act provided, applied to the payments covenanted to be paid under this lease. In my opinion, it did. The Act was one of a group of enactments passed during the depression of the early 1930's to give effect to the Premier's Plan. Leases of agricultural lands which came under the Agricultural Lessees' Relief Act 1931—this being one of the 10 group of Acts mentioned above—were excluded from its provisions. It reduced the rent reserved by or under any lease by 22½% and extinguished the obligation of the lessee to pay more than the reduced rent (s. 6). " Lease " was defined to include every letting of premises, and " premises " to include lands and buildings.

Now, the payments covenanted to be paid under this lease, whether fixed or uncertain but ascertainable, were, in my opinion, rent. A royalty such as was here reserved is a true rent. It is a profit, capable of being rendered certain, issuing out of the land demised, for which the lessor could at common law distrain. (*Daniel* v. *Gracie,* 6 Q.B. 145 ; *The Queen* v. 20 *Westbrook,* 10 Q.B. 178 ; *Llewellyn* v. *Rous,* L.R. 2 Eq. 27 ; *Edmonds* v. *Eastwood,* 2 H. & N. 811 ; *Coal Commission* v. *Earl Fitzwilliams Royalties Co.,* 1942 Ch. 365). In the declaration, the pleas and in argument no attempt has been made to distinguish between the fixed and the uncertain payments covenanted to be made, and, in my opinion, rightly so. They are inextricably tied together and both are rent. In my opinion the first plea is good.

Second Plea : This plea is pleaded to the amount of rent and royalty alleged to have accrued between 1st January, 1933 and 31st March, 1934 and between 1st April, 1939 and 31st December, 1947, and is based upon 30 Part III of the Landlord and Tenant (Amendment) Act, No. 67 of 1932. That Part came into force immediately upon the expiration of the Reduction of Rents Act 1931 and from time to time was continued until its expiry on 31st December, 1947. With some exceptions, it followed the same pattern as the Reduction of Rents Act. The definitions of " land " and " lease " were the same. Leases to which the Agricultural Lessees' Relief Act applied were excluded from its terms (s. 14 (1)). S. 15 (1) reduced by 22½% the rent reserved by any lease, and by s. 15 (2) provision was made to ensure that this reduction should not operate so as to bring about a further reduction in rents which had already been reduced under the Reduction of Rents 40 Act. It contains two sections (ss. 16 and 17) upon which the plaintiff relies as showing that the lease here in question was not within its terms. These sections deal with leases reserving an annual rent. By s. 16 a lessor or lessee under such a lease might apply within three months from the commencement of the Part to one or other of the Courts mentioned in s. 21 to have the annual rent determined, and the Court was empowered to fix a rent either above or below the original rent as reduced by the Act. S. 17 laid down a formula to be applied by the Court involving the ascertainment

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No. 7. Reasons for Judgment of Owen, J. 30th November 1953—*continued.*

of the capital value of the land demised and requiring account to be taken of matters such as repairs, maintenance, depreciation and the like. It might have been difficult but not impossible, to apply s. 17 to a lease of a coal seam, since the section appears to have been designed rather to deal with leases of land and buildings. But the difficulty, or even the impossibility, of applying s. 17 to a lease such as this does not seem to me to justify the conclusion that s. 15 had no application to the payments for which this lease called. Part III of the Landlord and Tenant (Amendment) Act of 1932 was, for present purposes, a re-enactment of the Reduction of Rents Act 1931, and in my opinion the second plea is good. 10

Third Plea : This is pleaded to so much of the claim for rent and royalty as is said to have accrued due between 1st January, 1948 and 30th June, 1948, and claims that during this period the National Security (Prices) Regulations and a Price Regulation Order No. 985 made under those Regulations governed the transaction. Although the plea is limited to the first six months of 1948, it is necessary to go back to the Regulations as they existed in 1942 and 1943. They were, of course, designed to enable control to be exercised over the price of goods and the cost of services. Such control of rents and other aspects of the relationship of landlord and tenant as was thought necessary between 1932 and 1950, either by the 20 State or by the Commonwealth, was exercised either by the State landlord and tenant legislation, of which the Act of 1932 formed part, or under the National Security (Landlord and Tenant) Regulations. If, as I think, the whole of the payments for which this lease provided were in truth rent, it is to me somewhat surprising to think that one would find provisions relating to the fixation of rents in a set of Regulations designed to deal with the price of goods and services. The general scheme of the Prices Regulations was to empower the Minister to " declare " goods and services and to empower the Prices Commissioner to fix the price of goods and services so " declared." " Service " was, by Reg. 3 of the Regulations 30 in force in 1942 and 1943, defined to mean, *inter alia,* " 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." By Declaration No. 108 of 30th November, 1942, all services, with some immaterial exceptions, supplied or carried on in Australia were " declared " ; and, on 17th May, 1943, Prices Order No. 985 was issued by the Commissioner purporting to fix " the maximum rates per " ton of coal mined at which mining rights may be supplied . . . to be—

" (a) ...
" (b) ... 40
" (c) Properties not subject to Crown Lease which were privately " leased on 31st August, 1939—the amount per ton mined " payable on 31st August, 1939."

In my opinion, a royalty which is in truth rent was not within the meaning which should be ascribed to the word " royalty " in Reg. 3, any more than was the fixed rent. I do not think it necessary to consider the

practical difficulties which could arise where the payment per ton would vary not only with variations in the price of coal but with the quantity mined in any year. The simple method might perhaps have been merely to fix the selling price of coal, a course which, for aught I know, was taken. However that may be, the purport of the plea is that the amount payable on 31st August, 1939 (the date selected by the Prices Order) was a " rent " which at that date stood at the figure to which it had been reduced by the Landlord and Tenant (Amendment) Act of 1932 and that the Prices Order operated to fix the payments to be made, from the date of that
10 Order onwards, as being those operative on 31st August, 1939. To establish the validity of the plea the defendant must show four things. First, that the State legislation operated to reduce by $22\frac{1}{2}\%$ the amount of rent and royalty payable under the lease, and for the reasons I have given in connection with the first and second pleas, I am of opinion that this is the correct view to take. Next, it must show that the payments covenanted to be made were payments for " services " within Regulation 3 as it stood in 1942. Then it must show that the " services " rendered by " supplying " rights to mine coal were within Order No. 985 ; and finally, that for the whole of the period to which the plea is pleaded the National Security
20 (Prices) Regulations were valid. The reason why it is necessary to go back to the Regulations in force in 1942 and 1943, although the plea relates to a later period, is that the only " Declaration " of goods and services is to be found in Declaration No. 108 of 30th November, 1942, and the only relevant Order is the one made on 17th May, 1943. If Reg. 3, as originally framed, did not include these " services " then the Declaration (and therefore the Order No. 985) could not affect them. The Declaration could operate only on transactions which were within the definition of " services " at the date when it was made. There could be no Declaration as a " service " of something which was not then a " service " within the
30 Regulations. In my opinion, the defendant fails to bring the payments for which this lease provided within those Regulations. The " royalty " of which Reg. 3 speaks should, in my opinion, be confined to payments such as, for example, might be made for the right to use a patent in the production of goods, or, to take another example closer to the present case, royalty payments made under a licence to extract minerals or to cut timber. Such a licence passes no estate in the land, and royalties payable under it are in no sense rent. It is, I think, in the set of laws dealing with the relationship of lessor and lessee and with the rent to be paid by the one to the other, and not to that which controlled prices, that one should look
40 to find what, if any, interference there has been with that relationship ; and it is not, I think, to the point to say that when one goes to the landlord and tenant laws it is found that it was not considered necessary to apply them to leases of coal mines. There cannot, I think, be any doubt that the fixed rent payable under this lease was not within the Prices Regulations, and for my part I cannot, any more than could the parties, distinguish between that payment and the uncertain, but ascertainable, payments. If, however, Reg. 3 did apply to these payments, then a further difficulty

arises. The Regulations, the Declaration and the Order are designed to operate on the price of goods thereafter sold and services thereafter supplied. To speak of the plaintiff supplying a service to the defendant by "supplying" mining rights is, to say the least of it, an inapt use of language, but, using this awkward phraseology, as must be done if the Regulations and Order apply to a lease such as this, the question arises as to when these rights were "supplied." I think the answer must be that they were "supplied" in 1919, when they were granted. This difficulty did not escape notice, and in 1946 Reg. 3 was amended by adding to it a new sub-paragraph providing, *inter alia*, that "a person from whom the rights or privileges "mentioned in Reg. 3 (c) have been acquired shall be deemed to be "supplying those rights or privileges at all times during which they "continue"; but that amendment does not I think assist the defendant. On the assumption, which I make for this purpose, that Reg. 3 as originally framed included payments of rent reserved by a mining lease for the "supply" of mining rights, it applied only to future "supplies" and the Declaration and Prices Order could operate only on future "supplies." If the effect of the 1946 amendment was to bring into the Regulations services which hitherto were not within them, I think that there would have had to have been a further Declaration and a further Prices Order to cover these additional "services" and no such Declaration or Order was made. I do not find it necessary to pursue this further since I am of opinion that the third plea fails because the payments reserved by this lease were not within the Prices Regulations. It is unnecessary therefore to express any opinion as to the validity of these Regulations during the period with which the plea deals or, if they ceased to be valid, to select the date of their death.

Fourth Plea: This plea is identical with the third plea, except that it relates to the period from 1st July 1948, to 20th September, 1948. I think that it is bad, for the reasons already expressed.

Fifth Plea: For the same reasons I think that this plea fails. It relates to the period between 20th September, 1948 and 31st December, 1950. It differs only from the third and fourth pleas in that it has to rely in addition upon the State Prices Regulation Act, No. 26 of 1948, which came into force on 20th September, 1948, and which continued the National Security (Prices) Regulations as a State law.

Sixth Plea: This plea is pleaded on equitable grounds and relates to the period 1st January, 1932 to 31st March 1934 and 1st April 1939, to 31st December, 1947. If the first and second pleas are good, as I think they are the sixth plea ceases to be of practical importance, but the parties are entitled to a decision on the demurrer to it. It alleges that the plaintiff made a promise, unsupported by consideration, that so long as the Reduction of Rents Act and any re-enactment thereof (referring thereby to Part III of the Landlord and Tenant (Amendment) Act of 1932) should remain in force, the rent reduction provisions of those Acts should apply to the payments covenanted to be made under the lease, that this promise was made with the intention that the defendant should act upon it, that the

defendant did act upon it, and paid to the plaintiff the amounts covenanted to be paid, less 22½% that the plaintiff accepted these reduced payments in discharge of the defendant's obligation under the lease and that the defendant in reliance on the plaintiff's promise managed and conducted its affairs upon the assumption that those reduced payments had operated to discharge its obligations to the plaintiff. The argument for the defendant is based upon what was said by Denning, J., as he then was, in *Central London Property Trust Limited* v. *High Trees House Ltd.* (1947 K.B. 130) and in *Robertson* v. *Minister of Pensions* (1949 1 K.B. 227). Reference
10 may be made also to *Combe* v. *Combe* (1951 2 K.B. 215); *Perrott & Co. Ltd.* v. *Cohen* (1951 1 K.B. 705); and *Dean* v. *Bruce* 1952 1 K.B. 11). Assuming His Lordship's views to be sound, there seems to me to be no doubt that the underlying reasons for the rule which he enunciated is to be found in the existence of the Judicature Act. But s. 95 of our Common Law procedure Act, which gives a defendant a limited right to plead an equitable defence in a common law action, allows that to be done only where, if a judgment in the common law action were obtained, the defendant could have maintained a suit in equity to restrain its execution. To that must be added the gloss that since at common law there can only be a verdict
20 and judgment for the plaintiff or for the defendant, an equitable defence can be sustained only where it would have entitled the defendant, had he gone into equity to restrain the execution of the judgment, to an absolute unconditional and perpetual injunction. As to this last point, no difficulty arises. If the defendant here could proceed as a plaintiff in equity to enforce what Denning J., and others (see Williston on Contracts, sec. 139) have called a promissory estoppel, the relief granted would be absolute, unconditional and perpetual. But I think it is clear that an estoppel, whether a promissory estoppel or a true estoppel, can never be used to found a cause of action whether in equity or at common law. In one sense
30 it is true to say that the defendant here is seeking to use this promissory estoppel as a shield and not as a sword, but it can do so here only if it could use it as a sword in proceedings in which it was a plaintiff, and this, in my opinion it could not do. For these reasons, I am of opinion that the sixth plea fails.

In the result, therefore, there should be judgment for the defendant on the demurrers to the first and second amended pleas, and for the plaintiff on the third, fourth, fifth and sixth amended pleas. As I have mentioned earlier the first and third pleas, as originally filed, were demurrable as being pleaded to the whole cause of action. Their place has now been taken by
40 the first, second and sixth amended pleas. In the circumstances, I think the just order as to costs should be that the judgment for defendant on the first and second amended pleas should be without costs, while as to the third, fourth, fifth and sixth pleas, on which the plaintiff succeeds, the ordinary rule should apply and it should have its costs.

In the Supreme Court of New South Wales.

No. 8. Reasons for Judgment of Herron, J. 30th November 1953.

No. 8.

Reasons for Judgment of Herron, J.

The plaintiff company sues upon a deed of lease, the transaction being registered under the provisions of the Real Property Act, 1900. It was a demise of the mines, beds, veins and seams of coal shale and minerals of a similar character in or under certain lands described. By the deed the plaintiff was entitled to search for, win, get, convert, carry away, sell and dispose of the said mines of coal shale or minerals demised. Rights of way over the land were granted. The term of the lease was 43 years as from 1st September, 1919. The rent was based upon a twofold computation ; 10

(a) a yearly rent of £819 payable quarterly for which the lessee was entitled to win a quantity of coal such as would produce the sum of £819 in any one year calculated at a royalty per ton of a fluctuating rate for round or best coal and at a fixed rate for small coal ;

(b) a royalty according to the rate already referred to on all coal worked over and above such quantity already referred to as the lessee was entitled to work in respect of the fixed or minimum rent. 20

The first question involved in this demurrer is whether the defendant is entitled to the benefit of certain deductions having statutory force from time to time conferred on lessees in this State.

With respect to pleas one and two the word rent means both the fixed rent and the royalty. Both parties agree that the matter should be so treated. This is a correct view. When examined for the purposes of the law relating to landlord and tenant royalty is a true rent although for other purposes, e.g., price fixing by statute or regulation, it may have to be regarded as a form of remuneration or price for coal actually won. However, if the rent comprised of a fixed or minimum sum together with 30 a fluctuating royalty based on output is capable of ascertainment by calculation so as to become certain it is regarded by the law of real property as rent. (*The Queen* v. *Ererist*, 10 Q.B. 178 ; *Daniel* v. *Gracey*, 6 Q.B. 145 at p. 152 ; *Coal Commission* v. *Earl Fitzwilliam's Royalties Co.*, 1942 1 Ch. 365–373 ; Halsbury, 2nd ed., vol. 20, 158 ; Hill and Redmond, 10th ed. 236.) The first statutory impact upon rent in this State was Act No. 45 of 1931, the Reduction of Rents Act, 1931 assented to on 7th October, 1931. By sec. 6 rent reserved by or under any lease due and payable up to 31st December, 1932 (the date fixed for the Act's expiry) was reduced by 22½ per centum unless the lessor obtained from a court of 40 petty sessions an order permitting him to receive a higher rent.

Lease was defined as including a letting of premises by deed and premises were defined so as to include lands and buildings. The only leases to which the Act did not apply were expressly specified in sec. 3. Leases

of specified agricultural land were excluded, these being expressly provided for by a separate statute. Rent payable to the Crown remained unaffected, sec. 3 (3), as was rent payable under certain other leases entered into since 7th July, 1930. Apart from these specific exceptions the Act was expressed to " apply to and in respect of every lease which is subsisting at the date " of the commencement of this Act." The Act is in broad terms and of general application and must be held to apply to the deed of lease upon which the plaintiff company's claim in this action is based. This view accords with the general trend of legislation in the early 1930's in this 10 State in economic fields. The Act was not limited to buildings as is the case of the Landlord and Tenant legislation in this State since 1948 or of the National Security (Landlord and Tenant) Regulations which preceded it. (*Turner & Ors.* v. *York Motors Pty. Ltd.*, 83 C.L.R. 55 ; *Lynch* v. *Bonnington Ltd.*, 86 C.L.R. 259.)

The purpose of the 1931 Act was to reduce, in a period of economic depression, the sums payable by tenants of leased lands and buildings and that Act was not concerned with the question of whether or not the land was built upon or not. In the recent wartime regulations and the State Acts which followed them the principal purpose was to prevent the disturbance 20 of tenants and persons deriving rights under them in their occupation of leased dwellings or business premises, buildings being the dominant notion of the legislative purpose. The expression " land and buildings " as used in sec. 2 of the 1931 Act cannot be used as a conjunctive term to indicate that only leases of buildings were intended to be included. The Acts of 1931 and 1932 applied to leased lands. A lease of land includes a lease of mines. Such transactions are well known to the law just as a conveyance of a mine is well recognised. (*Batten Pooll* v. *Kenny*, 1907, 1 Ch. 256 ; See also Re Baskerville, 1910, 2 Ch. 329.) The 1931 Act came to an end on 31st December, 1932. On 30th December, 1932 the Landlord and Tenant 30 Act No. 67 of 1932 was assented to and Part III dealing with Reduction of Rent commenced to operate as from 31st December 1932 (Sect. 2). The 1932 Act was expressed in the preamble to make further provision relating to the reduction of rents in certain cases. These cases were more limited than was the position in the 1931 Act. The 1932 Act applied only to certain leases having comparatively long terms, (sec. 14) the lease in the present case being clearly within the terms of that section. Sec. 15 (1) re-enacted in terms the important rent reduction provisions of sec. 6 of the 1931 Act and by the definition section (sec. 13) " lease " and " premises " were defined as in the earlier Act. I can see no reason for rejecting the 40 argument that this Act applied to the lease in the present case equally with the 1931 Act and for the same reasons.

It was intended to have the same result as to leases for a term of years. The Act gave the parties to leases affected by the Act a limited right to have the rent determined by a court, if the application was made on or before the end of March 1933. Mr. Smythe for the plaintiff argued that the provisions of Part III which conferred this limited right were not appropriate to the case of a lease of a coal mine. I am inclined to agree

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that this is probably the correct view. Sections 16 and 17 would appear to have no application to a lease of a coal seam. The method of calculating the annual rent by reference to the notional selling price of the fee simple of the leased land is not an apt method of valuing a coal mine. Many other features of these sections were pointed to in argument to suggest the same result, namely that secs. 16 and 17 did not apply to the lease in this case. While this is probably the case, I do not think it renders the other provisions of Part III and of sec. 15 (1) inapplicable to the present case. All that can be said is that the Act has not provided for an application to the court in the present case. But if so that does not deprive the lessee of its right to a reduction in rent and secs. 16 and 17 cannot present an insuperable obstacle to the defendant enjoying the benefit of the right conferred. The same reasoning was applied by Starke, J., to a somewhat similar argument in *Williams* v. *Metropolitan Coal Co. Ltd.* (76 C.L.R. 431 at p. 447). Part III ceased to have effect on the 31st December, 1935, but its provisions were kept alive by a series of amendments until the end of 1947. In my opinion, the defendant was entitled up to that time to the reduction in rent provided for in sec. 15 (1).

I turn now to consider certain aspects of the third, fourth and fifth pleas, which are common to each plea. In order to succeed the defendant must first show that the Prices Regulation Order 985 promulgated by the Commonwealth Prices Commissioner applied to this transaction. Two questions arise. The first is whether from the circumstances alleged in the pleadings it is correct to describe the transaction as a declared service within the meaning of the National Security (Prices) Regulations enacted pursuant to the National Security Act 1938-1949. The second question is whether the transaction can be said to be a supply of mining rights on and after 17th March, 1943, within the meaning of Order No. 985. If the transaction comes within the definition of service then it is a "declared" service for, under the powers conferred on him by para. 22 (2) of the Prices Regulations the Minister declared all services supplied or carried on in Australia, with certain exceptions with which we have no concern, to be declared services. With respect to any declared service the Commissioner was empowered by an order published in the Gazette to fix, *inter alia*, a maximum rate of general application at which such service might be supplied or carried on, para. 23 (2). Hence Order No. 985 which was promulgated under such power. The word "service" was intended to have the broadest possible application. The regulations were intended to fix prices as an aid to the national security. It was recognised that price fixation was a valid exercise by the executive of the powers delegated to it by the National Security Act 1939-1940 to make laws for the peace, order and good government of the Commonwealth conferred on the Commonwealth Parliament by the defence power sec. 51 (vi) of the Constitution. In *Victorian Chamber of Manufactures* v. *The Commonwealth* (67 C.L.R. 335), Latham, C.J. said at p. 339–40:

> "The prosecution of the war involves the withdrawal of "many men from the manufacture and distribution of goods

" and from the supply of services so that they may serve in the
" fighting forces, or work in manufacturing munitions. The
" result is a reduction in the supply of goods and services which
" they had formerly provided, with a natural tendency to increases
" in the prices of goods and in the charges for services. This
" tendency is aggravated by a great increase in the amount of
" money in circulation, that increase being due to war conditions.
" Though there is a general increase in the amount of money
" available for expenditure, that increase has been brought about,
10 " at least to a material extent, by reducing the incomes of many
" members of the community. Uncontrolled increase of prices
" produces grave economic and social effects and may result in
" a complete dislocation of the organisation of the community.
" In modern times all countries in time of war have found it
" necessary to deal with profiteering and inflation. In my opinion
" the legislature is validly exercising the defence power when
" it legislates for the purpose of protecting the people against such
" results of the war. In my opinion the Commonwealth Parliament
" may, under the defence power, validly control prices of
20 " commodities and charges for services. In particular, regs. 22
" and 23 of the Regulations are, in my opinion, valid."

Williams, J., added at p. 345 :

" As to the first point—The general control of prices at which
" goods may be sold during war is in my opinion within the ambit
" of the defence power. It is common knowledge that war
" creates a scarcity of goods for civil consumption ; and that this
" scarcity, combined with an expanding purchasing power in the
" general public due to wide employment and high wages, creates
" a competition for these goods which must cause prices to become
30 " inflated unless they are controlled. As it is impossible to
" postulate that these conditions will apply to some classes of
" goods and not to others, it is conceivable that any classes of
" goods may require to be controlled."

The fixation of prices of necessity could not be limited to sales of goods. There were many transactions which were not sales for which a price was asked and given. These transactions were described by the word " service." It was not wholly apt so to describe every sort of transaction which resulted in a price but it was a " label " which was given a very wide and expanded meaning in the definition clause. It was defined
40 as meaning—

" (a) any service supplied or carried on, *inter alia*, in an industrial
" or commercial enterprise, and

" (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 ;

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" and includes any other undertaking or service which is declared
" by the Minister, by notice in the Gazette, to be in his opinion
" essential to the life of the community."

I think the word was intended to cover every valuable consideration whatsoever, whether direct or with respect to indirect transactions, which were for actual services rendered as in (a) or for notional services as in (b). A Lease of land at a fixed rent of itself would not be a service as it is not an actual service rendered nor is it within the terms of (b). With respect to the minimum or fixed rent under the lease in this case the regulations would not apply. But the lease conferred a right beyond the mere employment 10 of the leasehold hereditaments, it conferred a right to mine and take away part of the land itself. This was a right or privilege. Beyond a certain point in quantity the right was not conferred by the fixed rent. It was a right in respect of which a separate remuneration was payable in the form of royalty. The word service was intended, in my opinion, to apply to transactions which resulted in production of goods and for which a valuable consideration was paid but which could not be classed strictly as a sale of goods. Such transactions included converting trees into standing timber hence the expression stumpage, also digging minerals or gravel, from, e.g. a quarry or river bed by a tributer and mining coal on a royalty basis. 20 So that taking a broad view of the Regulations, having regard to their purpose and to the circumstances under which they came into existence, a right which one person conferred upon another for valuable consideration to mine coal under the land of the former became a service rendered to the latter. The owner of the coal did not perform any active service but under part (b) of the definition he was not required to do so. All that the definition envisaged was the conferring of a right or privilege and a payment by way of royalty on the volume produced.

It is said that regulation 23 did not empower the Commonwealth to fix the remuneration for the coal won by the defendant in this case, as this 30 would confer on him a power to fix rents not prices for, as I have already said, the fixed rent and royalty together constituted a true rent. But this argument is, to my mind, unsound. No regulation passed under the National Security Act applied to leases of coal mines nor were the Prices Regulations concerned with the relationship of landlord and tenant as such. Their purpose was to fix a rate for mining coal where this was done on a royalty basis. In some cases the right to take away coal may be included in a fixed rent and not at so much per ton. In such case the regulations would not apply. Payment of royalty is essential to their operation. But once payment by royalty per ton of coal mined is the 40 method adopted by the parties for fixing the consideration or price, the regulations take their stand at that point and empower the Commissioner to fix the rate and disturb the parties' agreement as to quantum only. It makes no difference to the right of the Commissioner that the parties to such transaction are landlord and tenant or that, according to the law of landlord and tenant and for ascertaining their rights inter se as such, royalties are regarded as rent. The fact that the royalty is fixed by the

parties as a term of a lease whilst it is rent for one branch of the law it is nonetheless a royalty when it is sought to determine the price per ton of coal won. The definition, I think, applied to this transaction so that the Commissioner was empowered to fix the royalty payable by a lessee of a coal mine based on a rate per ton.

I turn then to Order 985. It is said that this order relates to the future supply of mining rights and does not speak as to past transactions. I agree. It operates on transactions on and from 17th March, 1943. Para. 2 is in the following terms :—

10 " I fix and declare the maximum rates per ton of coal mined " at which mining right may be supplied in respect of coal mined " from the classes of mining properties mentioned hereunder to be
" (a) Properties subject to Crown lease which were subleased " by the Crown lessee on 31st August, 1939—the amount " per ton of coal mined now payable under the Crown lease " plus the amount per ton of coal mined paid by the sub-lessee " on the 31st August, 1939 (after deducting the amount " then payable under the Crown lease).
" (b) Properties subject to Crown lease which were not sub-leased
20 " on the 31st August, 1939, but have since been sub-leased— " the amount at present payable under the Crown lease " per ton of coal mined plus one penny.
" (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.
" (d) Properties not subject to Crown lease which were not " privately leased on 31st August, 1939—threepence per " ton."

The expression " mining rights " offers no difficulty. These refer
30 simply to the right to mine coal and have no reference to miner's rights as a technical phrase in mining law. The word " supplied " offers greater difficulty. In this case the right to mine coal was granted in 1919. Was the " mining right " equally supplied then within the meaning of Order 985 ? I do not think so. The purpose of the order was to fix rates per ton for coal mined after the 17th March, 1943. Royalty is payable under the lease when and only when the coal is won. Prior to that date the grant or supply is a matter of indifference to a Prices Commissioner or to the economy of the country in wartime. It is at the point of time when the royalty becomes payable by agreement that the order takes its stand by
40 an interference with the parties' agreement and fixes the price. This. point of time is when the coal is won, before that no royalty is payable So that, in my opinion, the word " supplied " as used in the order refers to the actual exercise of a right or privilege as and when that occurs. The right is supplied if and when the service is availed of, not when merely agreed upon. The remuneration is the part of the agreement struck at by the regulations and as this is only determined at the moment the coal is

worked the regulations operate as from that moment of time. The mere fact that parties have agreed that the right is to be a continuing one cannot warrant an interpretation of a price fixing regulation or order which would have the effect of rendering the fixation of price of no effect even though the actual price was fixed by the parties by reference to a time or event which happened or occurred after the making of the order. Sub-paragraphs (a) (b) (c) and (d) of the order favour this view. I hold, therefore, that Order 985 applied to this transaction until its expiry in 1948. The National Security (Prices) Regulations were amended by the addition to paragraph (3), *inter alia,* of sub-paragraphs (2) (3) and (4). This amendment was effected 10 by statutory rules 113 of 1945 and 71 of 1946. The amendment of 1945 produced this result which I paraphrase as follows : A person who received consideration in respect of the enjoyment by the payer of a service shall be deemed to supply the service for the amount of value or rate of the consideration. As this, it seems to me, puts in another way the true construction of the original definition of service, as I have construed it, I feel bound to hold that it was merely declaratory of the true position. The framer of regulation (2) did not intend to create any new service or to travel outside the scope and intendment of the original regulation which defined service. The language of the amendment is, I think, opposed to 20 any other view and must be regarded as having been promulgated *ex abundanti cautelà* and to render more certain the somewhat general expressions that up to then had been used in what, as I have already pointed out, were possibly not the most apt to describe the transactions intended to be covered. The definition of service as declared by Regulation 3 (2) I think clearly covers the present case.

The further amendments of 1946 which added pars. (3) and (4) to Regulation 3 offer, at first sight, greater difficulty in arriving at the result. Para. 3 provided in effect that if the rights or privileges mentioned in, *inter alia,* para. (b) of the definition of service were conferred by an agreement 30 the grantor of the rights or privileges was deemed to supply them. So far, I think, this was merely stating in other language the effect, as I construed it, of the original definition of service. Obviously the remuneration referred to was the result of agreement of parties. How otherwise could it be " payable " ? The amendment further declares that leases were to be included in agreements. This again added nothing to the original definition of service. As I see the position, the mere fact that the parties who fixed the remuneration by agreement also bore the relationship of landlord and tenant did not destroy the effect of the regulations in respect of royalties payable. Indeed, I would suggest that 40 coal mining in New South Wales is usually conducted under a lease of the seams. The amendment further says that the regulation operates on past and future agreements by which the person has become entitled to the rights or privileges specified for example in (b) of the definition. This also read with the context, it seems to me, merely had the effect of emphasizing that the supply of the rights or privileges took place from time to time as and when they were enjoyed and equally as and when the

remuneration became payable. Although I concede that the matter presents difficulties I am unable to say that any new class of service was created by the new Regulation 3 (3) which did not already exist and in view of the construction of the original definition adopted by me I hold that the amendment was declaratory only. It seems to result in the present transaction, so far as it provides for royalties as the rate of remuneration for coal won, being caught clearly in the wide net of the regulations.

10 In view of the foregoing it is unnecessary for me to deal with the effect of para. (4) of the amendment. I think that as it operates only after an order or notice has been made or given it provides a new code or method of price fixation and so would operate only as from 11th April, 1946. As it does not appear to expand the definition of service but merely fixes a price by a general provision no further declaration of service would be necessary to give effect to it.

Prices Regulations based on the National Security Act ceased their operations on the day when the Prices Regulation Act, New South Wales Act No. 26 of 1948, commenced to operate, namely, 20th September, 1948 (Gazette 97 of 1948). Section 2 (1) of the State Act provided, *inter alia*,
20 that " all declarations, orders made under the Commonwealth Regulations " which are in force immediately before the commencement of this Act " shall for the purposes of this Act . . . be deemed to have been made . . . " under this Act. . . ." For the effect of this provision see *Brown* v. *Green* (84 C.L.R. 285) where the High Court considered a similar section appearing in the Landlord and Tenant (Amendment) Act 1948–1949 (N.S.W.). This decision was followed in *Bradshaw* v. *Gilberts Australasian Agency Vic. Pty. Ltd.* (86 C.L.R. 209) where the Victorian Prices Regulation Act 1938 is dealt with. As sec. 4 of the Victorian Act is substantially the same as sec. 2 of the N.S.W. Act the decision in this case is decisive of the effect of
30 sec. 2 of the N.S.W. Act. This latter Act consisted of a redraft of the provisions of the Prices Regulations. By the State Act the provisions of regulations 3, 22 and 23 were re-enacted. Regulations were passed under the Prices Regulation Act 1948. (Government Gazette No. 113 of 20th September, 1948.) These regulations continued, *inter alia* the general declaration by the Minister made under the Commonwealth Regulations No. 108 of 30th November, 1942, so far as related to rights or privileges for which remuneration is payable in the form of royalty and so on. The State Minister administering the Prices Regulation Act 1948 did not appear to view Regulation 3 (2), (3) and (4) as a form of services which needed a
40 declaration to give effect to these sub-sections. (See Declaration No. 2, 20th September, 1948. N.S.W. Rules and Regulations, Vol. 37, p. 336.) This, I think, was a correct view for the reasons I have already given. In the light of the decision which I have reached regarding the proper application of these regulations to this case I hold that the corresponding sections of the State Act govern the rights of the parties as from 20th September, 1948.

It remains to consider only the correct application of Prices Regulation

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No. 8. Reasons for Judgment of Herron, J. 30th November 1953—*continued.*

Order 985 to the facts alleged in the pleadings. The third plea alleges that its true effect was that the amount payable under the order was the amount specified in the lease payable from time to time as royalty less the reduction of 22½% effected by the Landlord and Tenant (Amendment) Act 1942-1947. As opposed to this the fourth and fifth pleas allege that the true effect of the order was to render the defendant liable only for the amount determined by the rate prescribed in the lease as royalty as at 31st August, 1939, less the reduction of 22½% effected by the Act referred to.

In my opinion the true effect of the order and of the Prices Regulation Act No. 26 of 1948 is that set out in the fourth and fifth pleas. The contention of the defendant, as disclosed by the third plea is untenable. Order 985 pegged the royalty on coal as that payable in this case on the 31st August, 1939. The order did not operate on the amount agreed to be paid as at that date but required the ascertainment of the sum actually payable between the parties on that date. In this case the sum actually payable was the amount agreed upon by the lease less the 22½%. Although no doubt this method of approach gives rise to some degree of complexity, there is no reason that I can see for refusing to give this effect to the order. It is true that the royalty agreed to be paid between the parties was reduced by reference to a statute which affected the rights of landlord and tenant and operated on amounts payable which came within the scope of the Act as rent, but nonetheless this cannot alter the plain fact with which we are here concerned, namely that the sum payable in respect of royalty was fixed by this formula, and it was upon this resulting rate, which in law was payable between the parties, that the order operated and pegged the rate thus ascertained as the maximum rate payable between the parties as from the 17th March, 1943.

As to the sixth plea. This is stated to be on equitable grounds. Sec. 95 of the Common Law Procedure Act 1899 N.S.W., provides that the defendant in any action in which if judgment were obtained he would be entitled to relief against such judgment on equitable grounds may plead the facts which entitle him to such relief by way of defence. . . . By a series of decisions, of which *Aaron* v. *Burke* (56 W.N. 51) is an example, a defence at common law or in ejectment may be raised only where the defence is one which if proved would lead a court of equity to grant an absolute unconditional and perpetual injunction against proceedings to enforce the judgment at law. (Stephen's Principles of Pleading, 7th ed., 210); (*Cowell v. Rosehill Racecourse Coy. Ltd.* (56 C.L.R. 605)). The reason for this is that at common law a verdict can only pass simply for the plaintiff or for the defendant. Complete and final justice must result. The judgment upon the verdict must settle all equities between the parties, no conditional orders can be worked out by a master or prothonotary in an action at law. So that even where a defendant can establish a right in equity, e.g., to specific performance, this will not dispose of an action at law if equity would have imposed some condition such as the payment of money or execution of a document or the like. See Sec. 98, Common Law Procedure Act 1899.

In this case the plea alleges in effect a representation or promise by the plaintiff that the plaintiff would not enforce the deed according to its terms but would, during the currency of certain legislation in this State which had the effect of granting a reduction in rent of 22½% per centum to lessees, allow the defendant the benefit of a similar reduction. It was not alleged that this representation or promise was supported by consideration or was in writing or under seal. The point for consideration at the outset is whether on these facts the defendant would be entitled in equity to obtain an absolute perpetual and unconditional injunction to restrain the plaintiff from executing a judgment in this action if one was obtained.

In my opinion the defendant would not be so entitled. It would fail for the reason that in equity it would have no cause of action upon which to found an affirmative right to such an order as the transaction alleged, if a promise, being oral was made without consideration, or if not amounting to a promise, gave rise only to an estoppel. A full discussion on this subject is found in *Cowell* v. *Rosehill Racecourse Coy. Ltd.* (56 C.L.R. 605) where Latham, C.J., at p. 620 pointed out that it is an erroneous belief that equity will always do whatever it can to bring about the specific performance of any contract according to its terms. In commercial contracts equity leaves the parties to their remedies at law. The equitable remedies of injunction and specific performance were never applied merely or generally on grounds of unconscientiousness. They would be used to protect proprietary rights, to enforce negative agreements and in special cases only to enforce affirmative agreements. As was said by Lord Cairns, L.C. in *Doherty* v. *Allman* (1878, 3 A.C. 709 at 720): "If "parties for valuable consideration, with their eyes open, contract that "a particular thing shall not be done, all that a Court of Equity has to do "is to say by way of injunction, that which the parties have already said "by way of covenant, that the thing shall not be done . . . it is the specific "performance, by the Court, of that negative bargain which the parties "have made. . . ." The Lord Chancellor at p. 720 examines the circumstances in which the equity will interfere to enforce or prevent violation of an affirmative covenant and concludes that it will not do so in all cases.

In particular a court of equity will not interfere to restrain a plaintiff from enforcing a legal right, e.g., to recover money as a debt where the equitable relief sought is based upon a representation, not amounting to an agreement for valuable consideration, that the legal right will not be enforced or will be kept in suspense or abeyance. *Birmingham and District Land Co.* v. *London and North Western Railway Co.* (40 Ch. D. 268) in which the Court of Appeal applied the judgment of Lord Cairns in *Hughes* v. *Metropolitan Railway Coy.* (2 A.C. 439 at 438.) A mere representation of future intention was held to be insufficient in the particular circumstances of the case to found an equity to restrain the representor from enforcing a legal right (*Jorden* v. *Money*; 5 H.L.C. 185) but this seems to be in conflict in principle with *Hughes* v. *Metropolitan Railway Co.*, a later decision of the House of Lords. Later decisions have distinguished *Jorden* v. *Money*

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No. 8. Reasons for Judgment of Herron, J. 30th November 1953—*continued.*

on the ground that a statement of intention may be in substance a representation of fact (*Salisbury* v. *Gilmore ;* 1942 2 K.B. 39). Denning, J. as he then was further distinguished *Jorden* v. *Money* on the ground that there the promisor did not intend to be legally bound (*Central London Property Trust* v. *High Trees House Ltd.* ; 1947 K.B. 130). In that case Denning J., formulated by certain dicta a principle of law based on a form of estoppel that a promisor is bound by a promise or representation made without consideration not to enforce a legal right where the so-called promisee has acted upon the promise where the promisor had intended that it should be. Such a party, according to Denning, J., would not be allowed in equity to go back on such a promise (p. 135). Somervell, L.J., in *Re Venning* (63 T.L.R. 394) hinted that these dicta may be too wide. Denning, L.J. when a member of the Court of Appeal, said that it is important that the principle stated by him in the *High Trees* case should not be stretched too far lest it be endangered.

In my opinion, in the *High Trees* case Denning, J. did not suggest that a promise or representation by one party made without consideration that he would not enforce a legal right even if acted upon by the other could found a cause of action in equity either for specific performance or for an injunction. Indeed, I read that case as a rejection of such a principle. Denning, L.J. in *Combe* v. *Combe* (1951 2 K.B. 215, at p. 219) said, " That " principle (as stated in *High Trees* case) does not create new causes of " action where none existed before. It only prevents a party from insisting " upon his strict legal rights when it would be unjust to allow him to enforce " them, having regard to the dealings which have taken place between the " parties." And at p. 220 he added :

> " The principle, as I understand it, is that where one party " has, by his words or conduct, made to the other a promise or " assurance which was intended to affect the legal relations " between them and to be acted on accordingly then, once the " other party has taken him at his word and acted on it, the one " who gave the promise or assurance cannot afterwards be allowed " to revert to the previous legal relations as if no such promise " or assurance had been made by him, but he must accept their " legal relations subject to the qualification which he himself " has so introduced, even though it is not supported in point of " law by any consideration but only by his word.
>
> " Seeing that the principle never stands alone as giving a cause " of action in itself, it can never do away with the necessity of " consideration when that is an essential part of the cause of " action. The doctrine of consideration is too firmly fixed to " be overthrown by a sidewind. Its ill-effects have been largely " mitigated of late, but it still remains a cardinal necessity of the " formation of contract, though not of its modification or " discharge."

In *Dean* v. *Bruce* (1952 1 K.B. 11), Denning, L.J. at p. 14, explained that the passage cited from *Combe* v. *Combe* referred only to a promissory

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No. 8. Reasons for Judgment of Herron, J. 30th November 1953—*continued.*

or equitable estoppel. The view taken of the *High Trees* case by Asquith, L.J. in *Combe* v. *Combe*, p. 225, a view which I respectfully adopt, is important. He said :

" The judge has decided that, while the husband's promise
" was unsupported by any valid consideration, yet the principle
" in *Central London Property Trust Ltd.* v. *High Trees House Ltd.*,
" entitles the wife to succeed. It is unnecessary to express any
" view as to the correctness of that decision, though I certainly
" must, not be taken to be questioning it ; and I would remark,
10 " in passing, that it seems to me a complete misconception to
" suppose that it struck at the roots of the doctrine of consideration.
" But assuming, without deciding, that it is a good law. I do not
" think, however, that it helps the plaintiff at all. What that
" case decides is that when a promise is given which (1) is intended
" to create legal relations, (2) is intended to be acted upon by the
" promisee and (3) is in fact so acted upon the promisor cannot
" bring an action against the promisee which involves the
" repudiation of his promise or is inconsistent with it. It does
" not, as I read it, decide that a promisee can sue on the promise.
20 " On the contrary, Denning, J., expressly stated the contrary."

The law in New South Wales is, I think, correctly stated by Long Innes, J. in *Greater Sydney Development Association Ltd.* v. *Rivett* (29 S.R. 356), a decision given in 1929. Even in light of the more modern decisions in England, including the *High Trees* case, the correct view is as Long Innes, J., indicated, that a promissory representation not to enforce a legal right may be relied upon as a defensive equity to an attempt by the representor to obtain equitable relief in a court of equity in respect of such legal right. In other words it may constitute a defensive equity to a claim for equitable relief. Beyond this it cannot go. It is an application of the
30 maxim " He who comes into equity must come with clean hands." I adopt the argument of Counsel in *Combe* v. *Combe*, p. 218, " the doctrine of the " *High Trees* case, it has been said, may be used as a shield and not as a " sword ; it does not decide that a promisee can sue on such a promise." To reduce the matter to its essentials and at the risk of over simplification I would say that the principle laid down by the House of Lords in *Foakes* v. *Beer* (9 A.C. 605) is still the law and that in New South Wales in a court of common law a plea of payment by a debtor of a smaller sum in satisfaction of a larger is no answer by way of discharge to an action for debt.

Whatever may be the true position in those parts of the British
40 Commonwealth that have adopted the Judicature system of fusion of the principles of law and equity the plea is no answer in this State to the declaration. The result will be that I would order judgment in demurrer for the defendant on the first, second, fourth and fifth pleas and judgment in demurrer for the plaintiff on the third and sixth pleas.

In the Supreme Court of New South Wales.

No. 9. Rule on Demurrer. 30th November 1953

No. 9.
Rule on Demurrer.

Monday the Thirtieth day of November One thousand nine hundred and fifth-three.

THE DEMURRER HEREIN coming on to be argued on the Twenty-eighth Twenty-ninth and Thirtieth days of September One thousand nine hundred and fifty three WHEREUPON AND UPON READING the Demurrer Book filed herein AND UPON HEARING what was alleged by Mr. J. W. Smyth of Queen's Counsel with whom was Mr. V. G. Wesche of Counsel on behalf of the Plaintiff and what was alleged by Mr. M. F. Hardie of Queen's Counsel 10 with whom were Mr. R. L. Taylor of Queen's Counsel and Mr. K. J. Holland of Counsel for the defendant IT WAS ORDERED that the defendant be at liberty to file and serve Amended Pleas herein AND IT WAS FURTHER ORDERED that the matter stand for judgment and the same standing in the List this day for judgment accordingly IT IS 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 AND IT IS FURTHER ORDERED that the defendant pay to the plaintiff or its attorney the plaintiff's costs relating to the Demurrers to the third, fourth, fifth and sixth 20 Amended Pleas AND IT IS FURTHER ORDERED that the defendant have fourteen days from this date to file further Pleas if so advised.

By the Court.
For the Prothonotary,
R. T. BYRNE,
Chief Clerk.

In the High Court of Australia.

No. 10. Order granting Leave to Appeal. 17th December 1953.

No. 10.
Order Granting Leave to Appeal.

Court Book No. 81 of 1953. 30

IN THE HIGH COURT OF AUSTRALIA, NEW SOUTH WALES REGISTRY.

Between

PACIFIC COAL COMPANY PTY. LIMITED ... ... *Applicant*

and

PERPETUAL TRUSTEE COMPANY (LIMITED) ... ... *Respondent.*

Before Their Honours the CHIEF JUSTICE (Sir Owen Dixon) Mr. Justice WILLIAMS and Mr. Justice WEBB.

Thursday, the Seventeenth day of December, One thousand nine hundred and fifty-three.

UPON APPLICATION made by Counsel on behalf of the above- 40 named applicant AND UPON READING the two several affidavits of Martin

James Alexander Easton both sworn on the Sixteenth day of December One thousand nine hundred and fifty-three and filed herein and the several exhibits referred to in the said affidavits AND UPON HEARING Mr. M. F. Hardie of Queen's Counsel with whom appeared Mr. K. J. Holland of Counsel for the Applicant THIS COURT DOTH ORDER that leave be granted to the Applicant to appeal against so much of the judgment and Order of the Full Court of the Supreme Court of New South Wales delivered and made on the 20th day of November 1953 as ordered that judgment be entered for the Respondent on the Demurrers of the Respondent to the third, fourth 10 and fifth Amended Pleas of the Applicant in an action No. 3258 of 1951 instituted by the said Respondent as plaintiff in the Supreme Court of New South Wales by Writ of Summons dated the Twenty-second day of August One thousand nine hundred and fifty-one against the said Applicant as defendant.

By the Court.

(Seal) F. C. LINDSAY,
District Registrar.

No. 11. Notice of Appeal. 23rd December 1953.

No. 11.

Notice of Appeal.

20 TAKE NOTICE that (by leave granted pursuant to the Order of this Honourable Court made herein on the Seventeenth day of December One thousand nine hundred and fifty-three) the Appellant herein appeals to the High Court of Australia from part only of the judgment of the Supreme Court of New South Wales upon the Respondent's demurrers to the Appellant's pleas in the matter No. 3258 of 1951 in the Supreme Court of New South Wales between the Respondent as Plaintiff and the Appellant as defendant. This Appeal is from so much of the said judgment as held that the Appellant's third fourth and fifth pleas to the Respondent's declaration were bad.

30 THE GROUNDS relied upon in support of the appeal are :

1.—The Court was in error in holding that the National Security (Prices) Regulations made and enacted pursuant to the National Security Act 1938–1949 did not apply to the Appellant's obligations to the Respondent under the lease alleged in the Respondent's declaration.

2.—The Court was in error in holding that Prices Regulation Order No. 985 made and promulgated pursuant to the said National Security (Prices) Regulations and brought into or continued in force in the State of New South Wales on and from the 20th September 1948 by the

New South Wales Prices Regulation Act No. 26 of 1948 did not apply to the Appellant's said obligations to the Respondent under the said lease alleged in the Respondent's said declaration.

3.—The Court should have held that the said National Security (Prices) Regulations and the said Prices Regulation Order No. 985 did apply to the Appellant's said obligations under the said lease.

4.—(a) The Court should have held further that the said Prices Regulation Order No. 985 applied to the Appellant's said obligations under the said lease in the manner and with the consequences set forth in the fourth and fifth pleas. 10

(b) Alternatively the Court should have held that the said Prices Regulation Order No. 985 applied to the Appellant's said obligations under the said lease in the manner and with the consequences set forth in the third plea.

AND the Appellant asks for an Order that there should be judgment for the Appellant on the Respondent's demurrer to the Appellant's fourth and fifth pleas and judgment for the Respondent on its demurrer to the Appellant's third plea and that the Appellant do have fourteen days to file and serve such further or other pleas to so much of the sums claimed in the Respondent's declaration as was pleaded to by the Appellant's third plea. 20

ALTERNATIVELY the Appellant asks for an Order that there should be judgment for the Appellant on the Respondent's demurrer to the Appellant's third plea and judgment for the Respondent on its demurrers to the Appellant's fourth and fifth pleas and that the Appellant do have fourteen days to file and serve such further or other pleas to so much of the sums claimed in the Respondent's declaration as were pleaded to by the Appellant's fourth and fifth pleas.

AND for an Order that the Respondent be ordered to pay the costs of the demurrer and of this appeal.

AND the Appellant asks for such further or other order as to this Honourable Court seems fit. 30

Dated this 23rd day of December 1953.

MINTER SIMPSON & CO.,
Solicitors for the Appellant,
31 Hunter Street,
Sydney.

NOTE: This Notice of Appeal is filed by Minter Simpson & Co. of 31 Hunter Street, Sydney, Solicitors for Pacific Coal Company Proprietary Limited the abovenamed Appellant.

No. 12.

Joint Reasons for Judgment.

SIR OWEN DIXON, C.J.
WEBB, J.
FULLAGER, J.

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.

10 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 20 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 30 fixed rent of £819 and that the prescribed royalty should be calculated on the coal won over and above that amount. 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 40 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 £880.12.7. 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 £27,488.14.7 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 22½ 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. £28,369.7.2.

The first of the pleas demurred to is based upon the Reduction of Rents Act 1931 of New South Wales and relates only to the period of one year from 31st December 1931 to 31st December 1932. The amount the plea covers is £33.17.7. forming part of the £880.12.7 claimed by the declaration in respect of the nine quarters extending from 31st December 1931 to 31st March 1934: that is to say, the 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 22½ 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 £9,513.10.2.

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 22½ per cent of "rent reserved by or under any lease," that is any lease to which the statutory provisions applied: see sec. 6 (1) of the Reduction of Rents Act 1931 (N.S.W.) and sec. 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

£649.14.11. 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 £1,093.10.5. 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 Regulations 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 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 £16,778.14.1. 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 plea 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 " the 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

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pleas suggest the possibility. The defect, 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 Price Regulations Order actually made by the Commonwealth Prices Commissioners as far back as 17th March 1943. It is identified as P.R.O. 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 10 " 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 para. (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 20 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 22½ 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 30 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 Honour's 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 40 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. Reg. 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. Reg. 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-reg. (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 authorised by para. (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. Reg. 3 defined the word " rate " to include every valuable consideration, whether direct or indirect.

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 para. (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. Reg. 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 connexion with the

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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." Reg. 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 para. (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 10 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. (3) that need consideration. Sub-reg. (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 para. (b) is the relevant one, the person from whom the rights or 20 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 30 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-regs. (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 40 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 para. (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 Sec. 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 10 National Security Act in like manner as it applies to the interpretation of regulations and for the purpose of Sec. 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 subsection was transcribed as Sec. 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 Henlein Pty. Ltd.* v. *Cody*, 1945 70 C.L.R. 100, at pp. 126–127, where the matter is discussed, the earlier words of Sec. 5 (5) are enough to submit orders themselves to the operation of the whole Acts Interpretation Act including the directions 20 contained in para. (b) of Sec. 46 and it is plain that this was the intention. That Orders made under National Security Regulations were subject to Sec. 46 (b), however the result may be reached, is established by the decision of the Court in *Fraser Henlein* v. *Cody*, 1945 70 C.L.R. 100 : 117 : 123 : 127 : 131 : 137. 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 30 leased on that date para. (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 para. (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 para. (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 para. (b) relates to rights or privileges 40 for which remuneration is payable in the form of royalty, stumpage, tribute or other levy based on volume or value of goods produced.

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 para. (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 para. (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. 10 " 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 mineowner 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.

20 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 30 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 para. (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 40 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 Henlein Pty. Ltd.* v. *Cody*, 1945 70 C.L.R. 100 : 127.

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 para. (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 Laws of England, 2nd Ed. Vol. 22 p. 602, 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 para. (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 " 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. *The Commissioner of Taxation*, 1944 69 C.L.R. 235 at p. 240 : " 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* (1883) 8 App. Cas. 767, at p. 777)—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* (1933) 17 Tax " Cas. 574), and to payments for flax cut (*Akers* v. *Commissioner of Taxes* " (N.Z.) (1926) G.L.R. (N.Z.) (259), the person paying the royalties becoming " the owner of the slag or of the flax." 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 "—69 C.L.R. at p. 244. This being the meaning and these being the characteristic applications of the word it is not 10 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.

The suggestion that, inasmuch as the control of rent was a purpose of the National Security (Landlord and Tenant) Regulations, the language 20 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 para. (b) of the definition 30 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 para. (c) of the Order to the fluctuating royalty of the present case as at 31st August 1939 and the reduction effected by the Landlord & 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 40 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

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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 22½ per cent. prescribed by the Landlord & Tenant (Amendment) Act 1932–1947. It is immaterial whether you reduce the fixed rent by the 22½ per cent. and then calculate what amount of coal at the rates ascertained from the prices f.o.b. Newcastle reduced by 22½ 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 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 22½ 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-relegation 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 Sec. 6 and Sec. 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. Sec. 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 Sec. 3 of the Act as in Reg. 3. The definition of " service " in that section contains the same para. (b) as in the definition in Reg. 3. Sub-regs. (2), (3) and (4) of Reg. 3 appear in the Act as subsecs. (2), (3) and (4) of Sec. 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 Sec. 20 (5) (a) of the Act and Sec. 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, P.R.O. No. 985, and not through a new order made in pursuance of the Act. Sec. 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. Sec. 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 Sec. 2 (1). A provision in the Landlord & Tenant (Amendment) Act 1948 (N.S.W.) Sec. 4 (1), closely resembling Sec. 2 (1) of the Prices Regulation Act 1948 (N.S.W.) has received a construction in this Court. The question in *Brown* v. *Green*, 1951 84 C.L.R. 285, was whether Sec. 4 (1) on its true construction made the constitutional validity of the Commonwealth National Security (Landlord & 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 (84 C.L.R. at pp. 289–291) it was decided that Sec. 4 (1) did not mean to make it an essential condition. The construction placed upon the subsection appears from the following passage : " When Sec. 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 but exceeded the power which the Commonwealth Regulations " purport to confer or because of some other disconformity with " Common- " wealth Regulations fell outside the " authority they purport to confer it " could not be considered to have force or effect under the Regulations."

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The same construction seems to be applicable to Sec. 2 (1) of the Prices Regulations Act 1948. It means that if P.R.O. 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 Sec. 2 (1) of the Prices Regulations 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* (supra) 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 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 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.

No. 13.
Order Allowing Appeal.

IN THE HIGH COURT OF AUSTRALIA, NEW SOUTH WALES REGISTRY.

Court Book No. 81 of 1953.

Between

PACIFIC COAL COMPANY PTY. LIMITED ... ... *Appellant*

and

PERPETUAL TRUSTEE COMPANY (LIMITED) ... ... *Respondent*

Before Their Honours the CHIEF JUSTICE (Sir Owen Dixon),
10 Mr. Justice WEBB and Mr. Justice FULLAGAR.

Friday, the Twentieth day of August, One thousand nine hundred and fifty-four.

THIS APPEAL from so much of the judgment and order of the full court of the Supreme Court of New South Wales delivered and made on the 30th day of November, 1953 as ordered that Judgment be entered for the Respondent to the 3rd, 4th and 5th pleas of the Appellant to the declaration of the Respondent in an action instituted in the said Supreme Court by the Respondent as plaintiff against the Appellant as defendant and numbered 3258 of 1951 coming on to be heard on the 12th and 13th days
20 of April, 1954 WHEREUPON AND UPON READING the Transcript Record of Proceedings filed herein AND UPON HEARING Mr. M. F. Hardie of Queen's Counsel with whom was Mr. K. J. Holland of Counsel for the Appellant and J. K. Manning of Queen's Counsel with whom was Mr. B. J. F. Wright of Counsel for the Respondent THIS COURT DID ORDER that the appeal should stand for judgment and the same standing in the list this day for judgment accordingly in the presence of Mr. D. A. Staff of Counsel for the Appellant and Mr. B. J. F. Wright of Counsel for the Respondent THIS COURT DOTH ORDER that this appeal be and the same is hereby allowed AND THIS COURT DOTH FURTHER ORDER that the Order of the
30 Supreme Court of New South Wales made on the 30th day of November 1953 appealed from be varied by discharging so much thereof as relates to the 4th and 5th pleas and to costs AND THAT in lieu thereof judgment be entered for the defendant on the demurrers to the 4th and 5th pleas AND THAT the plaintiff pay to the defendant the costs of the demurrers to the 1st, 2nd, 4th and 5th pleas AND THAT the judgment for the plaintiff on the 3rd and 6th pleas be without costs AND THIS COURT DOTH FURTHER ORDER that it be referred to the proper officer of this court to tax and certify the costs of the Appellant of and incidental to this appeal and that such costs when so taxed and certified be paid by the Respondent to the
40 Appellant or to its Solicitors Messrs. Minter Simpson & Co. of 31 Hunter Street, Sydney.

(L.S.)

By the Court.
(Sgd.) F. C. LINDSAY,
District Registrar.

In the Privy Council.

No. 14.
Order Granting Leave to Appeal to Her Majesty in Council.
7th April 1955.

No. 14.

Order Granting Leave to Appeal to Her Majesty in Council.

(L.S.) AT THE COURT OF BUCKINGHAM PALACE.

The 7th day of April, 1955.

Present

THE QUEEN'S MOST EXCELLENT MAJESTY. 10

LORD PRESIDENT. MR. HEATHCOAT AMORY.
MR. SECRETARY LENNOX-BOYD. MR. BOYD-CARPENTER.

WHEREAS there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 21st day of March 1955 in the words following, viz. :—

" WHEREAS by virtue of His late Majesty King Edward the Seventh's Order in Council of the 18th day of October 1909 there was 20 referred unto this Committee a humble Petition of the Perpetual Trustee Company Limited in the matter of an Appeal from the High Court of Australia between the Petitioner and the Pacific Coal Company Pty. Limited Respondent setting forth (amongst other matters) that the Petitioner is desirous of obtaining special leave to appeal from an Order of the High Court of Australia dated the 20th August 1954 : that on the 22nd August 1951 the Petitioner by Writ of Summons in the Supreme Court of New South Wales claimed from the Respondent the sum of £28,369 7s. 2d. being arrears of rent due under a Mining Lease dated 1st September 1919 computed on a dead rent plus royalty 30 basis the rate of royalty varying with the price of coal as and when such coal was mined the sum being made up as follows : 31st December 1931 to 31st December 1934 £880 12s. 7d. 31st March 1939 to 30th December 1950 £27,488 14s. 7d. ; that the Respondent raised six pleas not disputing that such sums were due and payable according to the terms of the said Mining Lease but contending *inter alia* as regards the fourth and fifth pleas mentioned below that the National Security (Prices) Regulations especially the Prices Regulations Order No. 985 dated the 18th March 1943 enacted pursuant to the National Security Act 1938–1949 empowered the Commonwealth Prices 40 Commissioner to control the fluctuating rent payable under such a lease : that the first and second pleas of the Respondent relate to all relevant periods up to the 31st December 1947 and involve in all the sum of £9,547 11s. 5d. ; that the third fourth and fifth pleas relate in all to the period 1st January 1948 to 31st December 1950 each plea relating only to part of such period : that the sixth plea related to the same period as please Nos. 1 and 2 and raised a further defence

In the Privy Council.

No. 14. Order Granting Leave to Appeal to Her Majesty in Council 7th April 1955—*continued.*

but from this plea no Appeal is sought: that on the 30th November 1953 the Court entered Judgment for the Respondent on the first and second pleas and for the Petitioner on the remaining four pleas: that the Respondent appealed to the High Court which Court on the 20th August 1954 made an Order allowing the Appeal on the fourth and fifth pleas: And humbly praying Your Majesty in Council will be pleased to order that the Petitioner shall have special leave to appeal from the Order of the High Court of Australia dated 20th August 1954 and for further or other relief:

10 "THE LORDS OF THE COMMITTEE in obedience to his late Majesty's said Order in Council have taken the humble Petition into consideration and having heard Counsel in support thereof and in opposition thereto Their Lordships do this day agree humbly to report to Your Majesty as their opinion that leave ought to be granted to the Petitioner to enter and prosecute its Appeal against the Order of the High Court of Australia dated the 20th day of August 1954 upon depositing in the Registry of the Privy Council the sum of £400 as security for costs:

"AND THEIR LORDSHIPS do further report to Your Majesty that 20 the proper officer of the said High Court ought to be directed to transmit to the Registrar of the Privy Council without delay an authenticated copy under seal of the Record proper to be laid before Your Majesty on the hearing of the Appeal upon payment by the Petitioner of the usual fees for the same."

HER MAJESTY having taken the said Report into consideration was pleased by and with the advice of Her Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed obeyed and carried into execution.

Whereof the Governor-General or Officer administering the Government 30 of the Commonwealth of Australia for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

W. G. AGNEW.

In the Privy Council.

No. 31 of 1955.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

BETWEEN

PERPETUAL TRUSTEE COMPANY (LIMITED) ... (*Plaintiff*) *Appellant*

AND

PACIFIC COAL COMPANY PTY. LIMITED ... (*Defendant*) *Respondent*.

RECORD OF PROCEEDINGS

GALBRAITH & BEST,
1 Essex Court,
Temple, E.C.4,
Appellant's Solicitors.

LIGHT & FULTON,
24 John Street,
Bedford Row, W.C.1,
Respondent's Solicitors.

GEO. BARBER & SON LTD., Printers, Furnival Street, Holborn, E.C.4, and Cursitor Street, Chancery Lane.
(A66493)