[HIGH COURT OF AUSTRALIA.]

FAREY . . . . . APPELLANT;
DEFENDANT,

AND

BURVETT . . . . . RESPONDENT.
INFORMANT,

ON APPEAL FROM A COURT OF PETTY SESSIONS OF VICTORIA.

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MELBOURNE, *May* 31; *June* 1, 2, 8.

Griffith C.J., Barton, Isaacs, Higgins, Gavan Duffy, Powers and Rich JJ.

Constitutional Law—Parliament of Commonwealth—Legislative powers—Defence—Existence of war—Power to fix price of bread—The Constitution (63 & 64 *Vict. c.* 12), *secs.* 51 (VI.), (XXXIX.), 61, 68, 119—*War Precautions Act* 1914-1916 (*No.* 10 *of* 1914—*No.* 3 *of* 1916), *sec.* 4—*War Precautions* (*Prices Adjustment*) *Regulations* 1916 (*Statutory Rules* 1916, *No.* 40 *and No.* 53).

Held, by *Griffith* C.J. and *Barton*, *Isaacs*, *Higgins* and *Powers* JJ. (*Gavan Duffy* and *Rich* JJ. dissenting), that the legislative powers of the Commonwealth Parliament conferred by sec. 51 (VI.) and (XXXIX.) of the Constitution include a power during the present state of war to fix within limits of locality the highest price which during the continuance of the War may be charged for bread.

APPEAL from a Court of Petty Sessions of Victoria.

At the Court of Petty Sessions at Melbourne before a Police Magistrate on 12th May 1916 an information was heard whereby Alfred Stephen Burvett, an Inspector in the Department of the Commonwealth Treasury at Melbourne, charged that W. A. Farey on 20th April 1916 "did contrary to the *War Precautions* (*Prices Adjustment*) *Regulations* 1916, made in pursuance of the *War Precautions Act* 1914-1915 of the Commonwealth of Australia in a

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proclaimed area, namely, in Area (*c*) specified in the Schedule to the said Regulations, sell four pounds of bread, namely, two two-pound loaves of bread, at the price of seven pence, such price being greater than the maximum price fixed by the *Prices Adjustment Order, No.* 1, under the said Regulations for the sale of bread in the said area." The defendant was convicted and fined.

From that decision the defendant now appealed to the High Court by way of order to review.

The material facts appear in the judgments hereunder.

Sir William Irvine K.C. and *Starke*, for the appellant. The fixing of the price of bread may be treated as an act done in pursuance of the powers contained in secs. 51 (VI.) and (XXXIX.) of the Constitution and the duty imposed upon the Commonwealth by sec. 119 of the Constitution. It is almost impossible to lay down the limit of the legislative power as to defence contained in sec. 51 (VI.), but in no case, and certainly not in existing circumstances, does that power or the incidental power in sec. 51 (XXXIX.) include a power to fix the maximum price at which one person may sell bread to another. Under certain circumstances what is known as the law of necessity arises, which overrides all constitutional limitations, and whether those circumstances exist or not is a matter of fact for this Court to decide. When the necessity arises the acts of those exercising the power are not justiciable by the Courts. It is an inherent power of a sovereign State to protect itself, but the Commonwealth must protect itself according to the limitations which the Constitution has set out unless the limitations are set aside by the necessities of the case. The existence of war does not of itself supersede the express limitations of the Constitution. The only difference which the existence of war makes is that it brings into prominence the exercise of the defence power, but that power remains the same whether there be peace or war. If in time of war it is within the power of the Parliament to fix the prices of commodities because Parliament thinks that to do so is necessary for the defence of the Commonwealth, it is also within the power of Parliament in time of peace to fix prices if it thinks that in view of possible future war it is necessary for the defence of the

Commonwealth to do so. The existence of war cannot affect the question whether the Parliament has or has not the right to take steps for strengthening the people, or removing local unrest, in order thereby to enable the defence of the Commonwealth to be more efficiently carried out. The defence power must be directed to the prosecution of war, either by preparing for war in the future or by carrying on a war when it exists. But, although the defence power remains the same in peace and in war, a great number of conditions come into existence in time of war which do not exist in time of peace, so that Parliament may do many things in time of war which it could not do in time of peace. But whatever the defence power may include which directly tends towards a successful prosecution of an existing war, it does not include all the powers the exercise of which may promote among citizens conduct which is conducive to what is called national efficiency. The defence power does not include the powers that arise under the law of necessity, which abrogates the existing civil rights of citizens. Where a certain state of facts arises the military power pushes aside the civil power. The acts done under the power are unlawful, but are not justiciable. The question, then, is whether in a particular locality the necessity exists; and that question is one of fact for the Courts to decide: *Ex parte Marais* (1); *Ex parte Milligan* (2); *Law Quarterly Review*, vol. XVIII., p. 158.

[HIGGINS J. referred to *Law Quarterly Review*, vol. XVIII., p. 143.]

Putting aside the authority arising from necessity, whatever power sec. 51 (VI.) includes is included in time of peace as well as in time of war. The condition of its exercise is not the existence of war. It cannot be said to exist during a serious war and not to exist during a minor war. It is a general power applicable at all times to particular matters which are the subjects of war.

[GRIFFITH C.J. Does not the power include the power which all sovereign nations have to defend themselves by all means?]

No. That power does not arise from the Constitution but is outside it. See *Mitchell* v. *Harmony* (3).

(1) (1902) A.C., 109.
(2) 4 Wall., 2, at p. 122.
(3) 13 How., 115.

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[HIGGINS J. referred to *Legal Tender Case* (*Juillard v. Greenman*) (1).]

Under the power conferred by sec. 51 (VI.), for the purpose of directly or indirectly carrying out operations which can be deemed to be warlike preparations the Commonwealth has the right to take everything it wants, and, if necessary, without paying for it. But the power does not include a right to regulate the whole conduct of the people, except so far as to make the defence efficient.

[ISAACS J. referred to *In re a Petition of Right* (2).]

The power conferred by sec. 51 (VI.) must be capable of logical definition as to the conditions under which it is exercisable. Either it is granted independently of any condition of fact, or it is granted subject to some condition of fact. If it is granted independently of any condition of fact, in which the existence of war of any kind is included, then it exists at all times. If it is granted subject to some condition of fact, then this Court has to decide whether that condition of fact exists. If the power is independent of any question of fact, then the Parliament may at any time pass laws regulating the prices of commodities. If it depends on the existence of a certain state of facts, there is an issue of fact to be determined by this Court. In determining that issue, the Court will take judicial cognizance of some facts, and will take the assurance of the responsible Minister as to others. The question to be determined which is relevant to this particular case is whether a state of facts exists which in England would authorize the military authorities to supersede the civil rights—that is, whether the conditions are such that the military authorities may reasonably exercise the power to regulate the price of bread. The defence power in sec. 51 (VI.) should be confined to such acts as are directed towards the naval or military defence of the Commonwealth. It does not extend to acts which are merely indirectly conducive to the naval or military defence of the Commonwealth in the sense that they tend to produce a condition of things, physical or otherwise, which may aid naval or military defence. To give it the latter meaning would destroy all constitutional limitations in time of peace as well as in time of war. The defence power is not an absolutely plenary power

(1) 110 U.S., 421.

(2) (1915) 3 K.B., 649.

such as that of the Parliament of Great Britain, but it is subject to the balances and checks of the Constitution. The power permits legislation as to three classes of matters: (1) the preparation for naval and military defence, which includes the raising and training of naval and military forces, &c.; (2) the conduct of naval and military operations; and (3) the effective prosecution of naval and military operations, which would cover legislation as to trading with the enemy and restricting the movements of aliens within the Commonwealth. But the power does not authorize the Parliament to legislate as to any economic or industrial conditions which might be brought about by a war in which Great Britain was concerned. The power to prohibit the States from borrowing during the War would be very conducive to success in the War, but it cannot be suggested that such a power is included in the defence power On their face the Order in Council and the Regulation in question are not conducive to any defensive or offensive operation. The reason why the prohibition of borrowing by the States is not within the defence power is the doctrine of the implied prohibitions in the Constitution. The doctrine of the implied reservations to the States equally applies to the present case. If in time of war the reservation of powers to the States could be denied, so could the prohibition against interference with State instrumentalities. [Counsel also referred to *Willoughby on the Constitution*, vol. II., p. 1244; *Baty and Morgan's War, its Conduct and Legal Results*, pp. 111-113; *Lefroy's Canada's Federal System*, p. 240; *Forsyth's Cases and Opinions on Constitutional Law*, p. 559.]

Mann (with him *Latham*), for the respondent. The defence power in sec. 51 (VI.) includes, amongst other powers, the power to conserve and develop to the utmost all the resources of the Commonwealth so far as they can be directed towards success in war. The word "defence" there certainly includes the power in time of war, by blockade or other suitable measures, to distress the enemy and diminish his resources, and among other suitable measures are those dealing with trading with the enemy in the widest sense of that term. All that class of legislation is obviously directed to attacking the enemy in his resources. There is a correlative power to do

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what is necessary to conserve the resources of the Commonwealth. Included in that power two matters stand out prominently, namely, controlling the financial resources and controlling the direction of trade, the effect of which is direct and immediate both upon the enemy and upon the protection of the Commonwealth. Under sec. 51 (XXXIX.) there is power to legislate in aid of the executive power of the Commonwealth. One of the executive powers is to wage war, and war is being waged; therefore the Commonwealth may legislate to aid in waging the War. The export of the large surplus of wheat is very desirable, both to supply the allied forces and to enable the Commonwealth to carry out its financial operations. It is well known that for that purpose the Government has practically taken over the entire control of the wheat produced in the last harvest. The Government might properly guard against discontent arising from that burden being taken over by preventing the probable rise in the price of bread. The provision for fixing the price of bread should not be looked at by itself, but should be considered in connection with the other war legislation.

Sir William Irvine K.C., in reply.

GRIFFITH C.J. The majority of the Court are of opinion that the appeal should be dismissed with costs. The reasons will be given later.

June 8. The following judgments were read :—

GRIFFITH C.J. The legislative act of which the validity is impeached in this appeal is the *War Precautions Act* No. 10 of 1914 as amended by the Act No. 3 of 1916, so far as it purports to authorize the making of certain Regulations and Orders by the Governor-General. That Act, which is to continue in operation during the present state of war and no longer, purports to authorize the Governor-General to make Regulations for securing the public safety and the defence of the Commonwealth, and by Order published in the *Gazette* to make provision for any matters which appear necessary or expedient with a view to the same objects.

The Act No. 3 of 1916, which is retrospective in its effect, purports to authorize the Governor-General to make, in particular, such Regulations as he thinks desirable for the more effectual prosecution of the War, or the more effectual defence of the Commonwealth or of the realm, "prescribing and regulating" (*inter alia*) "the conditions (including times, places, and prices) of the disposal or use of any property goods articles or things of any kind."

By a Regulation of 24th March 1916 certain areas, comprising the area within a radius of ten miles from the General Post Offices at Sydney and Melbourne, within seven miles of the General Post Office at Brisbane, within six miles of the General Post Office at Adelaide, within four miles of the General Post Office at Perth, and within three and a half miles from the General Post Office at Hobart, together with certain other populous districts in the Commonwealth were declared to be "proclaimed areas," and the Governor-General was authorized on the recommendation of a Board to be constituted under the Regulations to determine the maximum prices which might be charged for flour and bread in any proclaimed area. By a Regulation of 12th April the Governor-General was empowered to fix the prices without the recommendation of the Board. The "proclaimed areas" in fact include almost all the populous parts of Australia.

By an Order of 10th April 1916 the Governor-General determined the maximum prices which might be charged for flour and bread in the proclaimed areas. The appellant was convicted of selling bread in a proclaimed area at a greater price than that so determined.

All this legislative action purports to have been taken in execution of the power conferred by pl. VI. of sec. 51 of the Constitution, by which the Parliament is authorized to make laws with respect to "the naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth." The question is whether it is warranted by that power.

The general principle to be applied in determining whether an attempted exercise of a power is valid has been more than once enunciated by this Court. In *Jumbunna Coal Mine, No Liability*

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v. *Victorian Coal Miners' Association* (1), *Barton* J. quoted the well known passage from the judgment of *Marshall* C.J. in the celebrated case of *M'Culloch* v. *Maryland* (2) :—"We admit, as all must admit, that the powers of the Government are limited, and that its limits are not to be transcended. But we think the sound construction of the Constitution must allow to the national Legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional."

The first question, then, is what is the nature and extent of the power conferred by pl. VI. It is contended by the appellant that the word "defence," as there used, must bear a single and uniform meaning at all times, in the sense that an act which is not authorized to be done in time of peace cannot be authorized in time of war, and that any wider meaning of the word is excluded by the context. No one disputes that an attempt by the Commonwealth Parliament to fix the price of food in time of peace would be a trespass on the reserved powers of the States. It is contended that it is therefore equally a trespass in time of war.

As to the suggested limitation by the context, the words "naval" and "military" are not words of limitation, but rather of extension, showing that the subject matter includes all kinds of warlike operations. The concluding words cannot have any restrictive effect, unless they are read as an exhaustive definition of all that may be done, which is an impossible construction. In my opinion the word "defence" of itself includes all acts of such a kind as may be done in the United Kingdom, either under the authority of Parliament or under the Royal Prerogative, for the purpose of the defence of the realm, except so far as they are prohibited by other provisions of the Constitution.

This, then, is the subject matter with respect to which power

(1) 6 C.L.R., 309, at p. 344. (2) 4 Wheat., 316, at p. 421.

to legislate is given. It includes preparation for war in time of peace, and any such action in time of war as may conduce to the successful prosecution of the war and defeat of the enemy. This is the constant and invariable meaning of the term. It is obvious, however, that the question whether a particular legislative act is within it may fall to be determined upon very different considerations in time of war and time of peace.

It is hardly necessary to say that the best security of Australia lies in the success of the British arms. Certainly any measure which may have the effect of tending to secure an adequate food supply to Great Britain during the War, and so increasing, or preventing the diminution of, the resources of that part of the Empire would be a measure tending also to the more efficient defence of the Commonwealth as a part of it.

I agree generally with Mr. *Mann's* argument that the power to legislate with respect to defence extends to any law which may tend to the conservation or development of the resources of the Commonwealth so far as they can be directed to success in war, or may tend to distress the enemy or diminish his resources, as, for instance, by the prohibition of trading with him or with persons associated with him. But this definition is not exhaustive. The control of finance or trade may be the most potent weapon of all. One test, however, must always be applied, namely: Can the measure in question conduce to the efficiency of the forces of the Empire, or is the connection of cause and effect between the measure and the desired efficiency so remote that the one cannot reasonably be regarded as affecting the other?

History as well as common sense tells us how infinitely various the means may be of securing efficiency in war. Sumptuary laws have always been common war measures. No one would dispute that the regulation of the supply and price of food in a beleaguered city would be a proper, and might be a necessary, war measure. The legislative act now in question is in substance a sumptuary law.

The power to make laws with respect to defence is, of course, a paramount power, and if it comes into conflict with any reserved State rights the latter must give way.

It has often been pointed out by this Court, following decisions

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of the Judicial Committee in Canadian cases, that in a federal Constitution the ambits of Federal and State powers may often really or apparently overlap, and that in such cases it is the duty of the Court to inquire whether the subject matter of the law in debate falls substantially within the one or the other ambit.

It is true that up to the present time no case has decided that in answering that inquiry regard may be had to extrinsic temporary circumstances of which the Court takes judicial notice. But, in my judgment, the principle is the same in all cases. The inquiry in every case is whether the Act impeached is or may be substantially an exercise of a power conferred on the Parliament. In making the inquiry the Court cannot shut its eyes to the fact that what could not rationally be regarded as a measure of defence in time of peace may be obviously a measure of defence in time of war. I content myself with two illustrations. I take first the case of a Commonwealth law enacting that any person plying for hire with a boat or launch in any harbour or river in the Commonwealth shall obtain a licence from a Commonwealth officer. Such a law, if passed in time of profound peace, could not possibly be regarded as a law substantially dealing with defence. An identical law passed in time of war, and limited in its operation to the duration of the war, might obviously be a necessary war precaution. The second instance I will give is that of what was once regarded as a very heinous offence, and called "forestalling." A law passed by the Commonwealth Parliament in time of profound peace prohibiting the accumulating of food stuffs could not be regarded as substantially an exercise of the defence power. In time of war the same act might well be made a capital offence.

Applying this well established doctrine, the question is whether the Act and Regulation the validity of which is now called in question can be regarded as substantially laws relating to defence, in other words, whether the provisions of the Regulation *can* conduce to the more effectual prosecution of the War. It is not necessary for the Court to point out the particular way in which they can have that effect. But the Court may, I think, take judicial notice of the fact that the past season's harvest was most abundant, and that vast quantities of wheat, far exceeding the possible consumption of the

Commonwealth, are awaiting export, while owing to the operations of war the supply of freight is deficient. It is obvious that for economical as well as other reasons the export of the surplus to the United Kingdom or the allied nations may be highly desirable for the more efficient prosecution of the War. It seems to follow that any law which may tend, with or without the aid of other measures, to encourage such export may be conducive to the more efficient conduct of the War.

It is then contended that the necessity and desirability of making the law are questions of fact to be adjudged by the Court. In answer to that argument I refer to another well known passage in the judgment of *Marshall* C.J. in *M'Culloch* v. *Maryland* (1), also quoted by my brother *Barton* in the *Jumbunna Case* (2) :—" Where the law is not prohibited, and is really calculated to effect any of the objects entrusted to the Government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground."

So far as the attack is made upon the Act as distinct from the Regulation the Court is invited to assume the function of determining whether the facts were at the time when the Act was passed such as to warrant the Parliament in exercising the defence power by passing it. Whether it was or was not authorized to do so must, so far as the authority depends upon facts, depend upon the facts as they appeared to it, of which we have not, and cannot have, any knowledge. In my opinion there is no principle, and there is certainly no precedent, which would justify a Court in entering upon such an inquiry, if upon any state of facts the exercise of the legislative power in the particular way adopted could be warranted. If it appeared on the face of the Act that it could not be substantially an exercise of the defence power different questions would arise. I am not prepared to say that it may not have some, and some important, influence upon the successful conduct of the War.

If the attack is transferred, as it must be, to the Regulation, that is, if it is treated as a denial of the desirability of making it at the time when it was made, the question, though not formally

(1) 4 Wheat., 316, at p. 423. (2) 6 C.L.R., 309, at p. 345.

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the same, is the same in substance. The Act expressly designates the Governor-General as the person to determine that question of fact. How can this Court say that it will assume the function of revising his opinion? In this aspect of the case *Lloyd* v. *Wallach* (1), decided by this Court last year, is exactly in point, and is conclusive.

For these reasons I am of opinion that, since the existence of a state of war might under some circumstances create an exigency justifying the exercise of the power to legislate with respect to defence in the way in which it has been exercised by the Parliament and by the Governor-General, it is not competent for any Court to entertain the question whether the circumstances were in fact of such a character.

In my judgment, therefore, the Act and the Regulation are valid.

BARTON J. In the first instance I wish to apply to the Constitution of the Commonwealth the following words of *Gray* J. delivering the opinion of the Supreme Court of the United States in the great *Legal Tender Case* (*Juillard* v. *Greenman*) (2) :—" A Constitution, establishing a frame of government, declaring fundamental principles, and creating a national sovereignty, and intended to endure for ages and to be adapted to the various crises of human affairs, is not to be interpreted with the strictness of a private contract. The Constitution of the United States, by apt words of designation or general description, marks the outlines of the powers granted to the national Legislature ; but it does not undertake, with the precision and detail of a code of laws, to enumerate the subdivisions of those powers, or to specify all the means by which they may be carried into execution."

The United States Constitution, after granting Legislative power to Congress including authority to declare and conduct a war, gives this further power :—" To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof."

The last-mentioned provision was expounded by *Marshall* C.J.,

(1) 20 C.L.R., 299.

(2) 110 U.S., 421, at p. 439.

in *United States* v. *Fisher* (1), as follows :—"In construing this clause it would be incorrect, and would produce endless difficulties, if the opinion should be maintained that no law was authorized which was not indispensably necessary to give effect to a specified power. Where various systems might be adopted for that purpose, it might be said with respect to each, that it was not necessary, because the end might be obtained by other means. Congress must possess the choice of means, and must be empowered to use any means which are in fact conducive to the exercise of a power granted by the Constitution."

The Australian Constitution, by sec. 51, empowers the Parliament, subject to the Constitution, "to make laws for the peace, order, and good government of the Commonwealth, with respect to" (*inter alia*) "(VI.) The naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth"; "(XXXIX.) Matters incidental to the execution of any power vested by this Constitution in the Parliament . . . or in the Government of the Commonwealth . . . or in any department or officer of the Commonwealth."

The power in sub-sec. VI. would be sufficient to include matters incidental to the exercise of that power without sub-sec. XXXIX., but that section puts it at least beyond doubt. If the power in the United States Constitution "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers" bears the sense attributed to it by *Marshall* C.J.—and that is settled law of the United States—it appears to me that sub-sec. VI., probably without, but more certainly with, the aid of sub-sec. XXXIX., gives the Parliament of Australia at least as wide a choice of means in the exercise of the power so far as they are conducive to such an exercise. The word "incidental" gives at least as ample scope as the expression "necessary and proper," and the Australian power is not complicated with any difficulty arising from necessity in fact (see *Jumbunna Coal Mine, No Liability* v. *Victorian Coal Miners' Association* (2)). The end being once found to be legitimate, that is, authorized by the Constitution, then whether

(1) 2 Cranch, 358.

(2) 6 C.L.R., 309, at p. 344.

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it is " wise and expedient " to resort to the means proposed is, to adapt the words of *Gray* J., " the political question to be determined by Parliament when the question of exigency arises, and not a judicial question, to be afterwards passed upon by the Courts." Quoting again from the judgment of *Marshall* C.J. in *M'Culloch* v. *Maryland* (1) :—" To undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground."

The *War Precautions Act* (No. 10 of 1914) as amended by No. 3 of 1916, which is retrospective both as to the Act and as to any regulations under it (sec. 3), provides in sec. 4 (1A), *inter alia* :— " The Governor-General may make such Regulations as he thinks desirable for the more effectual prosecution of the War, or the more effectual defence of the Commonwealth or of the realm, prescribing and regulating— . . . (*b*) the conditions (including times, places, and prices) of the disposal or use of any property goods articles or things of any kind."

It is under that section that the Commonwealth justifies Regulations No. 40 of 1916, par. 9 of which empowers the Governor-General, on the recommendation of the Board, to determine the maximum prices which may be charged for flour and bread sold in any proclaimed area ; and under that paragraph the Governor-General, with the advice of the Federal Executive Council and on the recommendation of the Board, made *Prices Adjustment Order, No.* 1, which came into force on the 12th April last. It is to apply to the proclaimed area (*c*) in the Schedule to Regulations No. 40. Concurrently, a similar Order was applied to each of the other proclaimed areas. These included in each case the area within a specified number of miles from the principal post office in one of the large cities in the Commonwealth : Sydney, Newcastle, Melbourne, Adelaide, Brisbane, Perth, Hobart and Launceston.

To determine whether the appellant was rightly convicted of a sale of bread at a higher price than the maximum allowed by the Order, it is necessary first to determine the validity or otherwise, in relation to the defence power, of the 4th section of the *War Precautions Act* as lately amended retrospectively, and also the

(1) 4 Wheat., 316, at p. 423.

validity of the Regulation and the Order quoted, which, if sec. 4 is valid, are admitted to be within its authority.

First, then, as to the ambit of sec. 51, sub-sec. VI., of the Constitution. We cannot, of course, say that any Statute or provision is within it until we know how wide it is.

The armies of Australia are now engaged in her defence in several fields of the world. For the safety of Australia is notoriously involved in the success of the Empire in the present war. It is a common error to suppose that the defence of a country is limited to the protection of its shores when invasion is actually made or attempted. There is much more hope for the country which, at need, sends its armies or its ships, or both, abroad, to engage, to overcome if possible, or to cripple the enemy in whatever field he may be found. One is safer from a burglar if he can grapple with him at the gate without waiting until he has entered the house, and one's belongings are by this means infinitely safer. Success in a distant field is therefore often the surest means of saving one's own country from invasion.

Next, attack may be, and often is, the best defence. This needs no proof. Now, these principles do not apply to the operations of troops and warships alone. In these days the strategy of war is not so limited. It applies to war by many other methods devised to assist in the subjection of the enemy. The enemy uses every resource of his nation against us, and if we of the Empire leave any of our resources unused against him, that is by the abstention, culpable or chivalrous, of people or Parliament, and not through the want of such resources or of the right to use them. Almost any resource of a nation can now be made an assistant to its success in war, whether the resource be mental or material and whether in its application it be political, financial, economic, industrial, or of any other kind. Parliament may be limited only by its own wisdom or its own discrimination in the choice of the resources it will employ, or the means by which it will employ them. The Parliament of one belligerent may think its country most wisely defended while refraining from methods which appeal to another as weapons to be used or avoided purely according to their effectiveness. But in any case, if the enemy can be injured by curtailing his food supply,

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or our countrymen or Allies can be best helped by supplying part of the food they need, the enforcement or encouragement of the one or the other, or both, is capable of giving substantial aid towards success in war. To aid in supplying the food-needs of any part of the Empire outside Australia or of Australia herself may greatly assist that Empire's defence, especially, but not only, when that supply may be used for the feeding of armies of which at this moment Australia forms an active part. To employ that resource may be one of the many methods of contributing to success. For the wars of to-day are wars of country against country and not only of army and navy against army and navy; the war in the fighting line is only part of the hostilities. And these hostilities, so far as we are concerned, must be carried on by the authorities constitutionally charged with defence. It is not to the purpose to say that they involve the exercise of powers which are the proper province of Governments which have no direct concern with that duty. If they are admittedly so in time of peace it does not follow that they are so, or exclusively so, in time of war.

It is argued that the defence power has the same meaning at all times whether in peace or in war. I doubt that, but it may not be necessary to determine it, for the true question is whether many things that cannot aid defence in peace, and when no enemy is in view, are not urgently necessary when an enemy has arisen who must be defeated if the nation, or family of nations, is to live.

If the object of this Order and the Regulation on which it depends, and, indeed, of the portion of sec. 4 in dispute, is of either of two kinds, namely, the augmentation of the food supplies at the disposal of the Mother Country, or of any of our Allies, or, on the other hand, the augmentation of the food supplies at the disposal of our Government and people; either object is, in my opinion, a legitimate means of defence in time of war; and whether these means, or either of them, be necessary must be a question for our Parliament, or the authority validly delegated by it for the purpose, to determine. What is necessary in the control and disposal of this country's resources, in food as well as in arms, ships, and men, is a matter that can only be known by those who, as Government and Parliament, have the best knowledge of the facts relating to the strategy

of the War and the conditions under which the people can be victorious. Such facts are not lightly disclosed beyond the eyes and ears of those who alone can determine the degree of necessity or fitness. For us to determine it would be, to repeat a phrase already quoted, "to tread on legislative ground."

I have endeavoured to show how widely sec. 51, sub-sec. VI., extends in its ambit, but it is very difficult, even if it is possible, to express its ambit, as it exists in this time of war, by any proposition intended to define it. Many matters may, not because of enthusiasm, or excitement, but by compelling reason, be seen to come within it at a critical time, which at a time less critical were not realized as embraced in its scope as aids to defence. It may be only in a great emergency that it is demonstrated that they must be utilized to render defence successful. For instance, a great battle is fought on our land, or in our waters, or thousands of miles away. Suppose the result to be indecisive or even adverse. Subjects which before that battle seemed only indirectly or remotely connected with defence as the means of winning the war may after the battle be seen quite clearly to be within it. It may be, as Sir *William Irvine* urged, that the power does not change. If that is so it is because of the perspective of affairs: because the power looks narrower in peace, when it is not in the foreground of our view than it does as a means of present war when war brings us into close contact with it—when its exercise becomes the most vital of our activities. It may be that the power does not become enlarged in war, but that when seen closely we know how large it is in relation to existing war. Then at least we are able to envisage the reach of its long arm. If the thing be capable, during war, of aiding our arms by land or sea, here or elsewhere, we are to say so, but we say no more. It may be wholly beside the mark in peace, and, if it be so, we are to say so upon due occasion. But the necessity is not for us, when facts of which we take judicial notice establish that the thing is capable of aiding directly the execution of the power. If it is thus capable, then the question of the necessity, or the wisdom or expediency, of invoking such aid, is for Parliament or its duly delegated authority.

It has been urged that this exercise of power is a usurpation of

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State activities. The individual States cannot always use such activities as this efficiently for the purposes of war, because they, like ourselves, cannot gauge the necessity. They cannot know all the facts which dictate or forbid action in time of war, and they cannot individually deal with the case of the whole Commonwealth. The *War Precautions Act* is limited to the duration of the War, and the Regulations and Orders that owe their life to it cannot exist when it expires. If an activity belongs solely to a State in time of peace it does not follow that it is not a means of defence for Commonwealth hands in time of war.

Apart from that, if this action is only incidental to the defence of the country against an actual state of war, it is, of course, incidental to this power; and the Commonwealth may, incidentally to the legislative exercise of a power, make ancillary provision on a subject as to which substantive legislation on its part would be unconstitutional and invalid. As an instance see the *Jumbunna Case* (1).

I cannot but think that as a mere war precaution, though in no other way or guise, and not in time of peace, this legislation and the derivative Regulations and Orders are, as far as they are impeached, authorized by the Constitution.

ISAACS J. The contention, and the only contention, on behalf of the appellant, is that even in time of war, whatever be the national exigency, it is wholly incompetent to the Commonwealth Parliament to make any provision with respect to the sale of the necessaries of life, except so far as relates directly to the armed forces or some actual military operation. The needs of the civil population, it is said, are altogether outside the limits of Commonwealth protection, because within the meaning of the Australian Constitution no scheme of national defence can possibly comprehend them. Monopoly, according to the argument gravely presented, may lay the community under private contribution, may sap their energies or unconscionably reduce their means of living, with the most direct consequences of impeding the nation in its struggle for existence, and yet the national Government, charged by the Constitution

(1) 6 C.L.R., 309.

with the duty of universal defence, is by the same instrument forbidden to remove the impediment. The remedy suggested for such an evil is in the State powers. But though the States may, in directions not contravening express prohibitions, most advantageously act by means of their own constitutional powers in aid of the common object, yet this possibility does not ensure a remedy at all, and certainly does not ensure a remedy on broad national lines, with unity of purpose and action, even if the requisite knowledge were always possessed by the State authorities to enable them to appreciate the necessities of the entire situation.

It is manifest that to make defence adequate and successful full power must be within the grasp of one hand. And the question is whether the constitutional limitations as between Commonwealth and States are such that the Commonwealth has full power. Day by day we are reminded how potent a weapon both of attack and defence is the control of a nation's food supply. It is one of the most notorious facts of this war that the economic pressure brought about by the stoppage more or less successful of the enemy's food supplies reacts with direct influence upon his military operations. Time after time the further fact is proclaimed that men without munitions are helpless; but without an adequate supply of the prime necessities of life there can be no munitions; and yet we are solemnly told that the food supply is too indirectly connected with defence to come even incidentally within its ambit, unless there is virtually a state of siege. I must confess my inability to accept the suggestion, and must candidly say that, from the moment the view was presented, I have not been able to entertain the slightest doubt upon the subject.

The matter seems to me to rest upon the plainest possible foundation. The Constitution, as I view it, is not so impotent a document as to fail at the very moment when the whole existence of the nation it is designed to serve is imperilled. Let us first consider its bare words. By sec. 51, sub-sec. VI., the Imperial Parliament has committed to the hands of the general Government of Australia the power of legislating with respect to the naval and military defence of the Commonwealth, and it has added these words of great significance, "and of the several States." Not only has this

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legislative power been placed in the hands of the Commonwealth Parliament, but its effective exertion has been made exclusive, because by sec. 114, the States themselves are forbidden, unless they have the consent of the Commonwealth Parliament, to raise or maintain any naval or military force; by sec. 119 the Commonwealth is commanded to protect every State against invasion. Besides the legislative power, there is the executive authority of the Commonwealth. By sec. 61 of the Constitution that is vested in the Sovereign and (subject to sec. 2) is exercisable by the Governor-General as the royal representative, and, says sec. 61, this executive power extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth. These provisions carry with them the royal war prerogative, and all that the common law of England includes in that prerogative so far as it is applicable to Australia. The creation of a state of war and the establishment of peace necessarily reside in the Sovereign himself as the head of the Empire, but apart from that, the prerogative powers of the Crown are exercisable locally. The full extent of the prerogative it is not necessary now to define, but it is certainly great in relation to the national emergency which calls for its exercise, as may be seen by reference to *Chitty on the Prerogatives of the Crown* (pp. 49 and 50). The only importance of it now is the fact that it is included in the Commonwealth powers and indicates the completeness of authority vested. Superadded to all this, sub-sec. xxxix. of sec. 51 enables the Parliament to legislate as to all matters incidental to the execution of the legislative powers of the Parliament itself, and of the executive power of the Crown. So that by the very words of the Constitution there is vested, in the most ample and absolute terms, in the Commonwealth the full power and duty of taking every measure of defence which the circumstances may require as they present themselves to the proper organs of Government, to protect this Continent from foreign aggression, for maintaining its freedom—always under the British Crown—and in short for preserving its very existence as a unit of the Imperial family of nations.

It is said that the measure of the power is the same in peace

and in war, and, as such a Regulation as the one now under consideration would be invalid in times of peace, so it must be unlawful in the present circumstances. I have no hesitation in rejecting such an argument. It fails to grasp the all-essential fact that is comprehended in the power of defence. The Constitution, it is true, provides for a distribution of powers, but, in doing so, contemplates in general the normal orderly peaceful progress of the nation, working out its own destiny, free from hostile aggression. Its continued existence and development for all time and in all circumstances, as a free self-governing community under the British Crown, is a postulate of the Constitution. Primarily it contemplates conditions of amity with the world at large. But the interruption of its normally peaceful condition is foreseen and provided for both by the express terms quoted and by the common law, which as a part of our heritage so far as it is not altered by competent authority stands behind the written fabric of our Constitution to aid and assist us in understanding and applying it. The defence power may be exerted in times of peace ; but so far only by way of preparation. Actual defence, and all that it connotes, comes only when we are at war. War creates its own necessities, proportioned to the circumstances, and not measurable in advance of the occasion ; and defence is only complete when it meets those necessities, whatever they may prove to be. While peace prevails, the normal facts of national life take their respective places in the general alignment, and are subject to the normal action of constitutional powers. Precedence as to their regulation is governed by recognized usage or expressed enactment, but always with reference to normal conditions.

A war imperilling our very existence, involving not the internal development of progress, but the array of the whole community in mortal combat with the common enemy, is a fact of such transcendent and dominating character as to take precedence of every other fact of life. It is the *ultima ratio* of the nation. The defence power then has gone beyond the stage of preparation ; and passing into action becomes the pivot of the Constitution, because it is the bulwark of the State. Its limits then are bounded only by the requirements of self-preservation. It is complete in itself, and

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there can be no implied reservation of any State power to abridge the express grant of a power to the Commonwealth. Even if there be a concurrent power in the State, it is necessarily subordinate. If it were possible to give special legal prominence to this principle among Commonwealth powers, that must of necessity be accorded to the defence power. All other powers and authorities—Commonwealth and State—are necessarily dependent upon its effective exercise. For of what avail is the State right to regulate the internal sale of commodities if the State itself disappears? Or of what value is the Commonwealth right to regulate inter-State and foreign trade if the Commonwealth is shattered? The best protection all the rights and powers so jealously, and in ordinary times so justifiably, defended can have, so far as Australia is concerned, is the very Commonwealth power that is now sought to be limited. The Constitution cannot be so construed as to contemplate its own destruction or, what amounts to the same thing, to cripple by checks and balances the ultimate power which is created for the undeniable purpose of preserving at all hazards and by all available means the inviolability of the Commonwealth and of the several States. Let me advert as an instance to a section which has been referred to in argument and which admirably tests the situation, because it is so inherently clear. Sec. 92 in the most positive terms places beyond Commonwealth and State control alike the freedom of all inter-State commerce and intercourse. But though in ordinary times of peace this cannot be infringed, could it be asserted for a moment that it limits the war power? Can every citizen demand the right of passage from State to State, though military necessity is openly opposed to it? Is it the function of this Court to declare the supremacy of that provision, literally construed, over the organic power of defence? But if not, is it not because the new element of war destroys the ordinary perspective of national life, and gives by the very nature of the circumstances a paramount authority to the defence power, without which the 92nd clause would be a senseless inscription on the instrument of government? The essential fact is that Australians are belligerents as well as citizens, and for the moment their character as belligerents is pre-eminent and must receive the first consideration.

As I read the Constitution, the Commonwealth, when charged with the duty of defending Commonwealth and States, is armed as a self-governing portion of the British Dominion with a legislative power to do in relation to national defence all that Parliament, as the legislative organ of the nation, may deem advisable to enact, in relation to the defence of Australia as a component part of the Empire, a power which is commensurate with the peril it is designed to encounter, or as that peril may appear to the Parliament itself; and, if need be, it is a power to command, control, organize and regulate, for the purpose of guarding against that peril, the whole resources of the continent, living and inert, and the activities of every inhabitant of the territory. The problem of national defence is not confined to operations on the battlefield or the deck of a man-of-war; its factors enter into every phase of life, and embrace the co-operation of every individual with all that he possesses—his property, his energy, his life itself; and, in this supreme crisis, we can no more sever the requirements and efforts of the civil population, whose liberties and possessions are at stake, from the movements of our soldiers and sailors, who are defending them, than we can cut away the roots of a living tree and bid it still live and bear fruit, deprived of the sustenance it needs.

I do not hold that the Legislature is at liberty wantonly and with manifest caprice to enter upon the domain ordinarily reserved to the States. In a certain sense and to a certain extent the position is examinable by a Court. If there were no war, and no sign of war, the position would be entirely different. But when we see before us a mighty and unexampled struggle in which we as a people, as an indivisible people, are not spectators but actors, when we, as a judicial tribunal, can see beyond controversy that co-ordinated effort in every department of our life may be needed to ensure success and maintain our freedom, the Court has then reached the limit of its jurisdiction. If the measure questioned may conceivably in such circumstances even incidentally aid the effectuation of the power of defence, the Court must hold its hand and leave the rest to the judgment and wisdom and discretion of the Parliament and the Executive it controls—for they alone have the information, the knowledge and the experience and also, by the Constitution,

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the authority to judge of the situation and lead the nation to the desired end. Certain facts are before the Court by admission; others are notorious. I do not enter into the circumstances further than to perform my duty as I have stated it. As to the desirability or wisdom of the Regulation complained of, it is not my province to speak; but as a matter of law I have no hesitation in holding that such a Regulation is one which, as a defence Regulation, is within the competency of the Legislature in the condition of affairs that now exist.

I therefore agree that the appeal should be dismissed.

[*Note.*—Since this judgment was delivered I have observed the recent case of *The Zamora* (1). Lord *Parker* for the Privy Council said (2):—"Those who are responsible for the national security must be the sole judges of what the national security requires. It would be obviously undesirable that such matters should be made the subject of evidence in a Court of law or otherwise discussed in public."—*I.A.I.*]

HIGGINS J. I am of opinion that the objections taken to the Act No. 3 of 1916 must fail. This Act purports by sec. 2 (sec. 4 of the *War Precautions Act* 1914-1916) to enable the Governor-General to "make such Regulations as he thinks desirable for the more effectual prosecution of the War, or of the more effectual defence of the Commonwealth or of the realm, prescribing" (*inter alia*) "the conditions (including times, places, and prices) of the disposal or use of any property goods articles or things of any kind." On 10th April 1916 the maximum price of bread was fixed by Regulation of the Governor-General, for the Melbourne district; on 20th April a sale of bread was made contrary to the Regulations; and by sec. 3 of the Act No. 3 of 1916, passed on 30th May 1916, the Regulation was validated retrospectively. The question is, can an Act, or a Regulation under an Act, fixing the maximum price of bread, be treated as authorized by sec. 51 (VI.) and (XXXIX.) of the Constitution? The Parliament of the Commonwealth is empowered by sec. 51 to make laws for the peace, order, and good government of

(1) 32 T.L.R., 436.

(2) 32 T.L.R., at p. 445.

the Commonwealth with respect to "(VI.) The naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth." By sec. 51 (XXXIX.) Parliament can make laws with respect to matters incidental to the execution of any power vested by the Constitution in the Parliament or in the Government of the Commonwealth. By sec. 61 the executive power of the Commonwealth is exerciseable by the Governor-General as the Queen's representative; by sec. 68 the command in chief of the naval and military forces is vested in the Governor-General as the Queen's representative; and by sec. 119 the Commonwealth shall protect every State against invasion and, on the application of the Executive Government of the State, against domestic violence. The *War Precautions Act* 1914, of which this Act No. 3 of 1916 is an amendment, is to last only for the term of the War (sec. 2); but it is urged that a law fixing the maximum price of bread between one citizen and another is not a law with respect to the naval and military defence of the Commonwealth, or to matters incidental to the execution of any power of Parliament or of the Government. If there were a state of siege, it might be a defence measure; but how can it be a defence measure in the present happy security of Australia?

Now, I have taken the view which I have sometimes expressed in this Court (see *Baxter* v. *Commissioners of Taxation* (*N.S.W.*) (1)), that in the famous decision of *M'Culloch* v. *Maryland* (2) *Marshall* C.J. pushed the doctrine of implied powers and implied prohibitions beyond legitimate bounds. But the present is not a case of implication; it is a question as to the interpretation of an express power. What is the ambit of the power, not merely to make laws for the control of the forces, but to make laws (not *for*, but) "with respect to" naval and military defence, and to matters incidental to that power and the powers of the Government? All the subjects for legislation in sec. 51 are on the same logical level: there is no hierarchy in the powers, with the power as to defence on the top. But, from the nature of defence, the necessity for supreme national effort to preserve national existence, the power

(1) 4 C.L.R., 1087, at pp. 1165 *et seq.* (2) 4 Wheat., 316.

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to legislate as to defence, although it shows itself on the same level as the other powers, has a deeper tap-root, far greater height of growth, wider branches, and overshadows all the other powers. Defence—naval and military defence—is primarily a matter of force, actual or potential; the whole force of the nation may be required; and for the purpose of bringing the whole force of the nation to bear the policy of the States may have to be temporarily superseded, the law made under the Federal Constitution prevailing (sec. 109). The temporary suspension of the policy of a State may possibly help to prevent the total and permanent paralysis of the State's policy and functions, and of the State itself, under foreign invasion and domination. In Great Britain there is no limit to the legislative powers, and therefore there is no line of demarcation between Acts for defence and Acts for other purposes. But if the British Acts had to be classified, and if in view of the importance of bunker coal for the warships, and of munitions for the army and the navy, an Act be passed to make strikes penal in South Wales for the period of the War, and to forbid absences from work in Glasgow ironworks during the same period (*Cf. Munitions of War Act* 1915, and amendment 5 & 6 Geo. V., c. 99), might not such Acts be fairly classed under Acts for defence purposes? The Parliament of Australia has, so far as regards the subjects committed to it by sec. 51 of the Constitution, power as plenary and as ample as the Parliament of the United Kingdom (*Hodge* v. *The Queen* (1)). The fact that such Acts as I have mentioned are also industrial laws does not prevent them from being also Acts with respect to the naval and military defence of the Empire.

But, it may be urged, Acts to secure the supply of bunker coal or munitions may be defence Acts: but the Act here in question is an Act to fix the price of bread; and how is such an Act a defence Act? If, however, Acts for industrial regulation may be defence Acts, Acts such as have been actually passed in Germany to regulate the prices of food in war time, in order to prevent extreme privation and riots, and the dissipation of the national force in controlling internal turbulence when all the force is required to meet the enemy, may also be defence Acts—Acts "with respect to" naval and military

(1) 9 App. Cas., 117, at p. 132.

defence. So may sumptuary Acts, or Acts forbidding or limiting the sale or use of alcohol, or the purchase of foreign goods. We have no evidence before us of the facts which, in the opinion of Parliament, rendered the present Act expedient for the purpose of the War, and for the term of the War; but there may have been such facts. I am not entitled to use as facts in this case matters which I have learnt *aliunde*; but I may refer to the following personal experiences as hypothetical illustrations of the possible. I was in Sicily in February of last year when Italy was still neutral. There were bread riots, bakers' shops were looted; and the outlook was serious. Wheat was scarce, and bread was rising in price. At that very time, as now appears, the Government was engaged in critical negotiations with Austria; and nothing would have suited Austria better than that Italy should be so distracted by internal revolts as to be unable to undertake external operations. The Government of Italy took measures to allay the excitement as to bread, and thereby became free to apply itself to preparations for external war. These measures were quite as important for the naval and military defence of the country as measures for the raising, maintaining and using the army. Then, early this year, the waterside workers in Melbourne took it into their heads to refuse to handle wheat for export, saying that the export of wheat would raise the price of bread. Our Government was then engaged in a great scheme for the exporting the wheat of an abundant harvest to feed the people of Great Britain and our Allies. As President of the Court of Conciliation, I managed to get the waterside workers to see their mistake, and to leave the whole subject to be handled by the Government and Parliament; and these Regulations and the impugned Act are, to all appearances, the response of Parliament. Whether the Act will be effective or ineffective, useful or hurtful, it is not for this Court to decide; it is enough that Parliament, for purposes of the War, wants to export the Australian wheat, and probably wants to do so without inflicting privations on the working classes; and the fixing of the price of bread seems to be an expedient adopted. To secure peace and contentment and orderly industry among the people, from whom all our national force comes, may be as valuable a war measure as the equipment of an army division. To consolidate

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our own forces may be a necessary step towards disintegrating the forces of the enemy I need hardly refer to the beneficial influence of large exports on money exchanges, and on the prices which we pay for foreign commodities, and on the rates which we pay for our war loans. Soldiers and sailors and munitions cannot be supplied or maintained except from the country's resources; and there are no resources more valuable than a contented population having its necessary wants satisfied, and freed from all temptations to riot or sedition.

Here, Parliament has declared, on the face of the Act, that it is for "the more effectual defence of the Commonwealth." It is not for this Court to decide that the Act does aid defence, or how it aids defence; it is enough that it is capable of being an Act to aid defence, enough that the statement of Parliament is not necessarily untrue. Appellant's counsel urge that it is for this Court to decide whether the military necessities now existing are sufficient to justify the Act—or, as finally stated, whether this Act is capable of being a defensive Act in the circumstances of the country. In my opinion, this is not our function. As *Marshall* C.J. said in *M'Culloch* v. *Maryland* (1): "The degree of necessity for any congressional enactment or the relative degree of its appropriateness, if it have any appropriateness, is for consideration in Congress, not here." As was said in *Knox* v. *Lee* (2): "The judiciary should pre ume, until the contrary is clearly shown, that there has been no transgression of power by Congress." As *Holmes* J. said in *Missouri &c. Railway Co.* v. *May* (3): "It must be remembered that Legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the Courts." As was said by the Court in the *Legal Tender Case* (*Juillard* v. *Greenman*) (4): "The question whether at any particular time, in war or in peace, the exigency is such, by reason of unusual and pressing demands on the resources of the Government, or of the inadequacy of the supply of gold and silver coin to furnish the currency needed for the uses of the Government and of the people, that it is, as matter of fact, wise and expedient to resort to this means, is a political question, to be

(1) 4 Wheat., 316.
(2) 12 Wall., 457, at p. 531.
(3) 194 U.S., 267, at p. 270.
(4) 110 U.S., 421, at p. 450.

determined by Congress when the question of exigency arises, and not a judicial question, to be afterwards passed upon by the Courts." We have not in this Court the evidence, we have not even the means of compelling the Ministers to state the information on which they or Parliament acted. If we attempted the function of determining whether the circumstances of the country and the military necessities are such as to justify this Act, we should be trespassing on the legislative power.

I assume—as the appellant's counsel assumes—that the Regulation fixing the prices ceases to be operative at the termination of the War, when the Act ceases to be operative. Moreover, it has not been argued that the addition in the Act of the words "or of the realm" to the words "the more effectual defence of the Commonwealth" renders the Act invalid.

GAVAN DUFFY and RICH JJ. The appellant was fined for breach of a Regulation prescribing the price at which bread should be sold in Melbourne and its suburbs. The Regulation is admitted to be within the authority conferred by sec. 4 of the *War Precautions Act* 1914-1915 as amended by sec. 2 of the *War Precautions Act* 1916, and the question for our determination is whether that section in its amended form is within the competence of the Commonwealth Parliament to enact. So far as it is relevant it is as follows:—"(1A) The Governor-General may make such Regulations as he thinks desirable for the more effectual prosecution of the War or the more effectual defence of the Commonwealth or of the realm, prescribing and regulating . . . (*b*) the conditions (including times, places, and prices) of the disposal or use of any property goods articles or things of any kind." It will be observed that the section authorizes the Governor in Council to make Regulations for the "more effectual prosecution of the War or the more effectual defence of the Commonwealth or of the realm." No authority was cited to us for this legislation, nor are we aware of any, except the provisions of sec. 51 (VI.) and (XXXIX.), and the section if, and so far as, it authorizes the making of Regulations otherwise than with respect to the defence of the Commonwealth is in our opinion invalid.

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There remains the question whether it is valid as an authority to make Regulations with respect to the defence of the Commonwealth. Sec. 51 (VI.) of the Constitution is as follows :—" The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to . . . (VI) The naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth." For the respondent it was boldly contended that this sub-section enables the Parliament of the Commonwealth from time to time to make such laws as it chooses, provided they are, in its opinion, conducive to the defence of the Commonwealth. We cannot accept this proposition. The provisions of the Constitution must have a fixed and accurate meaning which cannot vary according to the pressure of circumstances. The legislative power of Parliament under the sub-section must be constant, though the circumstances which call for an exercise of the power, and hence the extent to which the power can be applied, may change from day to day. Parliament, in time of peace, can legislate as fully and effectually as it can in time of war, but in both cases the legislation must be such as, having regard to the time and circumstances to which it is applied, may properly be termed legislation for the military or naval defence of the Commonwealth or of the States. Whatever was the meaning of be attributed to the sub-section when it became law, is its meaning now, and will remain its meaning until the Constitution is altered by competent authority. Meanwhile Parliament cannot itself determine the limits of its jurisdiction ; that is the province of this Court exercising its function as expounder of the Constitution. In the alternative a less arrogant claim is made by the respondent. He says that at least Parliament has a discretion to enact any law which on a proper construction of the sub-section comes within its terms, however harsh or arbitrary the law may be, and however unwisely or unnecessarily the discretion may appear to have been exercised. We accept this proposition ; for we admit that this Court has no right to consider the expediency of the use of any instrument, if the use of that instrument is committed

to Parliament by the Constitution. It accordingly becomes necessary to consider whether on the proper construction of sec. 51 (VI.) of the Constitution it can be invoked as an authority for the enactment of sub-sec. 1A (*b*) of sec. 4 of the *War Precautions Act* 1914-1916. Let us first look at the sub-section and examine its scope and effect. It purports to assume control over the conduct of citizens with respect to their property, and so, not only to interfere with their existing proprietary rights, but to override and invalidate any existing or attempted inconsistent legislation by the State authorities. Under its provisions not only might trade and commerce be brought to a standstill but the whole social fabric might be destroyed. The only condition is that the Governor-General must think the proposed Regulation to be desirable "for the more effectual prosecution of the War, or the more effectual defence of the Commonwealth or of the realm." If he do so think, the regulation is congeable, though it does not deal with the raising, maintenance or use of any naval or military forces, or with the training or equipment of such forces, or with the supply of any naval or military material, or with any matter immediately ancillary to any of these things, or incidental to the execution of any power exercised in respect of them within the meaning of sec. 51 (XXXIX.) of the Constitution. The conviction of the appellant affords an admirable illustration of what may happen under a temperate exercise of the powers conferred on the Governor-General. His offence is that, in a city conducting its domestic affairs as in the times of the most profound peace, he has demanded and obtained for the bread which it is his business to sell a price which he is permitted by the laws of the State to demand and which no federal authority can preclude him from demanding, unless the Commonwealth Parliament can do so on the plea that in so precluding him it is making laws "with respect to the naval and military defence of the Commonwealth." In the first place, it seems to us that the power conferred on the Governor-General is not a power to make Regulations for the defence of the Commonwealth, but a power to make such Regulations as he thinks desirable with that object in view, which is of course a much wider power, and one that would vest in the Governor-General the discretion which we have already

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denied to the Parliament of the Commonwealth, and which we must for a like reason deny to him. It will be said that, whatever may be the grammatical construction of the language employed, the real intention of the Legislature was to authorize only such Regulations as were in fact directed to the more effectual defence of the Commonwealth and to confer power on the Governor-General only within that limit and the limit of the language of sub-sec. (*b*). We have already examined the scope and effect of that sub-section; let us see what sanction for its octopus grip is to be found in the Constitution. The enumerated powers entrusted by the States to the Commonwealth are stated in language adopted after prolonged and meticulous discussion. The powers distributed and reserved were intended to enable the individual States and the federation of States to move, each in its own orbit, in a complete and permanent harmony. Where it seemed possible that the powers, whether distributed or reserved, might be too liberally construed, the desired limitations were expressly stated as in sec. 114. Where it was feared that they might be construed too narrowly, the powers intended to be vested were expressed in detail as in sec. 51 (XXXII.), which adds to the powers of naval and military defence the power of controlling railways with respect to transport for the naval and military purposes of the Commonwealth. As was said by Viscount *Haldane* L.C. in delivering the judgment of the Privy Council in *Attorney-General for Australia* v. *Colonial Sugar Refining Co.* (1): "About the fundamental principle of that Constitution there can be no doubt. It is federal in the strict sense of the term . . . . In a loose sense the word 'federal' may be used . . . to describe any arrangement under which self-contained States agree to delegate their powers to a common Government with a view to entirely new Constitutions even of the States themselves. But the natural and literal interpretation of the word confines its application to cases in which these States, while agreeing on a measure of delegation, yet in the main continue to preserve their original Constitutions. . . . In fashioning the Constitution of the Commonwealth of Australia the principle established by the United States was adopted in preference to that chosen by

(1) (1914) A.C., 237, at p. 252; 17 C.L.R., 644, at p. 651.

Canada. It is a matter of historical knowledge that in Australia the work of fashioning the future Constitution was one which occupied years of preparation through the medium of conventions and conferences in which the most distinguished statesmen of Australia took part. Alternative systems were discussed and weighed against each other with minute care. The Act of 1900 must accordingly be regarded as an instrument which was fashioned with great deliberation, and if there is at points obscurity in its language, this may be taken to be due not to any uncertainty as to the adoption of the stricter form of federal principle, but to that difficulty in obtaining ready agreement about phrases which attends the drafting of legislative measures by large assemblages."

In these circumstances what meaning should be attributed to the words "the naval and military defence of the Commonwealth and of the several States" in sec. 51 (VI.) of the Constitution? We venture to think that they extend to the raising, training and equipment of naval and military forces, to the maintenance, control and use of such forces, to the supply of arms, ammunitions and other things necessary for naval and military operations, to all matters strictly ancillary to these purposes, and to nothing more. This, in our opinion, is their natural meaning and to extend it would be to paralyze the States during war time as completely as if there had been no reserve powers, and to subject them at all times to an irritating and embarrassing usurpation of their ordinary functions. The defence of the States would be the defence which King Stork extended to the frogs who invoked his assistance.

It is said for the respondent that the word "defence" of itself includes all such things as may be done either under the authority of the Parliament of Great Britain or under the Royal Prerogative for the purposes of the defence of the realm, and that the epithets "military" and "naval" do not limit the meaning of the word "defence" The inference, of course, is that as the Parliament of Great Britain might enact that no food should be cooked and that no person should wear any clothes in England during the period of the War, or that an infant should be blown from the mouth of a cannon every day during the same period, the Parliament of the Commonwealth might make similar enactments for Australia. In

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our opinion the epithets "military" and "naval" do limit the meaning of the word "defence," but assuming that they do not the fault of the argument lies in a misapprehension of the powers and practice of the Imperial Parliament. If it is meant to suggest that that Parliament has power to legislate only in specific departments as our own Parliament has, and that it could make these enactments only because it has power to legislate for the purposes of the defence of the realm, it is, of course, a misstatement of the facts. The British Parliament has power to legislate in any manner about anything, it can make any enactment and label it with any name it chooses however inappropriate to the real tenor of the enactment, while the validity of every enactment of the Commonwealth Parliament must be established by referring it to some particular department of legislation.

Then it is said for the respondent that the words must have at least as large a meaning as would ordinarily be given in England to the words "the public safety and defence of the realm," the phrase commonly used in connection with the Royal Perogative exercised in war time and for war purposes, and actually employed in the King's Proclamations after the outbreak of the present war. In our opinion the Prerogative would not justify Regulations such as those authorized by the *War Precautions Act* 1914-1916, but we were told that under Acts purporting to be for the defence of the realm power has been conferred to make Regulations as extensive as those authorized by sec. 4 of the *War Precautions Act* 1914-1916. We do not think that is an accurate statement, but let us assume it to be so and consider whether the suggested inference as to the meaning of the phrase "military and naval defence of the Commonwealth" is a proper one. The words "the public safety and the defence of the realm" are very different from the words "the naval and military defence of the Commonwealth": the one phrase clearly suggests defence by means of naval and military operations, while the other is as broad and general as could be devised for the purpose of embracing all means for securing the safety of the community. Let us, however, assume that the phrases are similar in meaning, and what follows? The British Parliament, as we have said, can label its enactments as it

chooses without affecting their validity. In the year 1914 it passed the Act 4 & 5 Geo. V. c. 29, and by that Act declared that His Majesty in Council had power during the continuance of the present war to issue Regulations as to the powers and duties of the Admiralty and Army Council, &c., for securing the public safety and the defence of the realm, and might by such Regulations authorize the trial, by Courts Martial, of certain persons in like manner as if such persons were subject to military law. So far the Regulations were clearly within the narrowest meaning of the phrase "for securing the public safety and the defence of the realm." Subsequently it was thought desirable, from time to time, to enact that His Majesty had power to make Regulations not so cognate to naval and military defence as were those under the original Act. This was done, as one would expect, by amending the original Act, and in the end the Act as amended authorized Regulations which in some cases seemed as far apart from naval and military defence as are those authorized by the amended sec. 4 of the *War Precautions Act* 1914-1916. All the powers to make Regulations, which Parliament intended to deal with, were thus gathered together in one enactment as a matter of convenience. The powers to make the various Regulations and the Regulations themselves would have been valid if the powers had been inserted in a Customs Act or a Merchant Shipping Act or in an Act devoted, so far as its main principles were concerned, to any other object, or if they had been inserted separately in various Acts dealing with various subjects. This being so, we cannot accept the legislation referred to as in any way helping us to a definition of the expression "military and naval defence of the Commonwealth."

Finally, we were pressed not to withhold from the Commonwealth a power so conducive to the effective conduct of a war in which we are engaged, as we firmly believe, on the side of honour and righteousness. Such an appeal is ill made to Judges who are sworn to administer the law without fear, favour or affection, and whose fundamental duty is to interpret the law as they understand it, not to strain it this way or that at the bidding of expediency. But in our opinion the respondent has wholly failed to show that the power to fix the price of bread in Melbourne and its suburbs at the

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present time is in any sense conducive to the defence of the Commonwealth, or has any relation whatever to the progress of the War. If we are wrong, and such a power be necessary now, or if it becomes necessary in the future, it can be exercised by the State or delegated by the State to the Commonwealth. It is a gross and pernicious error to suppose that in the conduct of the present war the interests of the States and the Commonwealth are diverse, they are identical, and the people of Australia will no doubt be as willing to protect and forward those interests through their State Legislatures as through the Commonwealth Parliament.

In our opinion the order should be made absolute.

POWERS J. I have had the advantage of reading and considering the judgment delivered by my brother *Isaacs*, and I agree, and for the reasons stated by him, that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for the appellant, *Derham, Robertson & Derham.*

Solicitor for the respondent, *Gordon H. Castle*, Crown Solicitor for the Commonwealth.

B. L.