[HIGH COURT OF AUSTRALIA.]

ADELAIDE COMPANY OF JEHOVAH'S WITNESSES INCORPORATED . . . } PLAINTIFF;

AND

THE COMMONWEALTH . . . . . DEFENDANT.

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MELBOURNE, *March* 10-12; *June* 14.

Latham C.J., Rich, Starke, McTiernan and Williams JJ.

*Constitutional Law—Free exercise of religion—Defence—Subversive associations—Dissolution—Disposition of property—Judicial power—The Constitution* (63 & 64 *Vict. c.* 12), *ss.* 51 (*vi.*), 71, 116—*National Security Act* 1939-1940 (*No.* 15 *of* 1939—*No.* 44 *of* 1940), *s.* 5—*National Security* (*Subversive Associations*) *Regulations* (*S.R.* 1940 *No.* 109—1941 *No.* 322).

*Held*, by the whole Court, that s. 116 of the Constitution does not prevent the Commonwealth Parliament from making laws prohibiting the advocacy of doctrines or principles which, though advocated in pursuance of religious convictions, are prejudicial to the prosecution of a war in which the Commonwealth is engaged. Section 116 is not infringed by the *National Security* (*Subversive Associations*) *Regulations* or by their application to the association known as Jehovah's Witnesses. Limits of the constitutional guarantee established by s. 116 considered.

*Held*, further:—

(1) by *Latham* C.J. and *McTiernan* J., that regs. 3 and 4 of the *National Security* (*Subversive Associations*) *Regulations* are within, but reg. 6A thereof is beyond, the powers conferred by s. 51 (vi.) of the Constitution and the *National Security Act* respectively;

(2) by *Rich* and *Williams* JJ., that regs. 3 to 6B both inclusive of the *National Security* (*Subversive Associations*) *Regulations* are beyond the said powers;

(3) by *Starke* J., that the *National Security* (*Subversive Associations*) *Regulations* are beyond the powers conferred by the *National Security Act*.

*Per Latham* C.J., *Starke* and *McTiernan* JJ. (*Williams* J. *contra*): The *National Security* (*Subversive Associations*) *Regulations* do not confer judicial power contrary to s. 71 of the Constitution.

CASE STATED.

In an action in the High Court by the Adelaide Society of Jehovah's Witnesses Incorporated against the Commonwealth, *Starke* J. stated for the Full Court a case which was substantially as follows :—

1. Adelaide Company of Jehovah's Witnesses Incorporated is an association incorporated under and pursuant to provisions of the *Associations Incorporation Act* 1929-1935 (S.A.) (No. 1912 of 1929—No. 2246 of 1935).

2. The rules and regulations of the association filed in the office of the Registrar of Companies pursuant to the Act vested the management of the plaintiff in four trustees and empowered them to purchase, hold, sell, lease, transfer or mortgage land or buildings or property.

3. The association so incorporated was in exclusive occupation of certain land and buildings known as Kingdom Hall situate in Sturt Street Adelaide in the State of South Australia.

4. The hall was used as a meeting place for an association of persons known as Jehovah's Witnesses.

5. The association held meetings of a religious character in the hall whereat hymns were sung, prayers offered and discourses delivered upon the doctrines, beliefs and teachings of Jehovah's Witnesses.

6. The association so incorporated had no register of members. It comprised an indefinite number of persons, some 200 to 250 persons, who attended meetings at the hall and professed the beliefs of Jehovah's Witnesses.

7. Jehovah's Witnesses are an association of persons loosely organized throughout Australia and elsewhere who regard the literal interpretation of the Bible as fundamental to proper religious beliefs.

8. Jehovah's Witnesses believe that God, Jehovah, is the supreme ruler of the universe. Satan or Lucifer was originally part of God's organization and the perfect man was placed under him. He rebelled against God and set up his own organization in challenge to God and through that organization has ruled the world. He rules and controls the world through material agencies such as organized political, religious, and financial bodies. Christ, they believe, came to earth to redeem all men who would devote themselves entirely to serving God's will and purpose and He will come to earth again (His second coming has already begun) and will overthrow all the powers of evil.

9. These beliefs lead Jehovah's Witnesses to proclaim and teach publicly both orally and by means of printed books and pamphlets that the British Empire and also other organized political bodies

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are organs of Satan, unrighteously governed and identifiable with the Beast in the thirteenth chapter of the Book of Revelation. Also that Jehovah's Witnesses are Christians entirely devoted to the Kingdom of God, which is "The Theocracy," that they have no part in the political affairs of the world and must not interfere in the least manner with war between nations. They must be entirely neutral and not interfere with the drafting of men of nations that go to war. And also that wherever there is a conflict between the laws of Almighty God and the laws of man the Christian must always obey God's law in preference to man's law. All laws of men, however, in harmony with God's law the Christian obeys. God's law is expounded and taught by Jehovah's Witnesses. Accordingly they refuse to take an oath of allegiance to the King or other constituted human authority, though they do not object to take an oath in a court of law to speak the truth nor do they refuse the protection of the King's Courts or other constituted human authority.

10. On 17th January 1941 the Governor-General, acting with the advice of the Federal Executive Council pursuant to the authority conferred upon him by the *National Security* (*Subversive Associations*) *Regulations*, declared certain bodies including the Adelaide Company of Jehovah's Witnesses Incorporated and the organization or association of persons known as Jehovah's Witnesses prejudicial to the defence of the Commonwealth and the efficient prosecution of the war.

11. On 17th January 1941 a Minister of State, namely, the Attorney-General of the Commonwealth, pursuant to the authority conferred upon him by the Regulations, directed an officer of the Commonwealth to take possession of, control and occupy, certain premises including the premises mentioned in par. 3 hereof and known as Kingdom Hall.

12. Accordingly, on or about 17th January 1941 an officer of the Commonwealth entered and took possession of Kingdom Hall and has ever since excluded therefrom the Adelaide Company of Jehovah's Witnesses Incorporated and all persons professing the beliefs of Jehovah's Witnesses.

13. On 4th September 1941 the Adelaide Company of Jehovah's Witnesses Incorporated issued a writ out of this Court against the Commonwealth and delivered a statement of claim claiming an injunction to restrain the Commonwealth and its servants and agents from continuing or repeating the trespass before mentioned, damages for the said trespass and other relief.

14. The Adelaide Company of Jehovah's Witnesses Incorporated and the association of persons known as Jehovah's Witnesses are

not engaged in any seditious enterprise nor in the printing or publishing of any seditious words within the meaning of the *Crimes Act* 1914-1932.

15. The incorporated association and the association of persons known as Jehovah's Witnesses proclaim and teach matters prejudicial to the defence of the Commonwealth and the efficient prosecution of the war, namely, the matters set forth in par. 9 of this case, but otherwise their doctrines or beliefs are but primitive religious beliefs.

16. The incorporated association contends that the *National Security* (*Subversive Associations*) *Regulations*, and the said Order in Council, and the said direction of the Attorney-General are unauthorized by the Constitution and the *National Security Act* 1939-1940, contravene the provisions of s. 116 of the Constitution, and impinge upon the judicial power of the Commonwealth. They also contend that the *National Security* (*Subversive Associations*) *Regulations* do not upon their proper construction include religious associations such as the said incorporated association or the association of persons known as Jehovah's Witnesses.

Upon the case above stated I reserve for the consideration of the Full Court the following questions of law :—

1. Is the Adelaide Company of Jehovah's Witnesses Incorporated a party competent to maintain that the *National Security* (*Subversive Associations*) *Regulations*, the said Order in Council, and the said Direction of the Attorney-General above mentioned contravene the provisions of s. 116 of the Constitution ?
2. Do the *National Security* (*Subversive Associations*) *Regulations* or any and which of those regulations contravene the provisions of s. 116 of the Constitution ?
3. Do the said Order in Council and the said direction of the Attorney-General above mentioned, or any and what part thereof so far as they affect the said incorporated association or the association of persons known as Jehovah's Witnesses, contravene the provisions of s. 116 of the Constitution ?
4. Are the *National Security* (*Subversive Associations*) *Regulations* or any and which of those regulations, beyond the powers or authorities conferred by :—
   (*a*) The Constitution.
   (*b*) The *National Security Act* 1939-1940 ?
5. Is the said Order in Council or the said direction of the Attorney-General or any and what part thereof so far as either affects the said incorporated association or the

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association of persons known as Jehovah's Witnesses, beyond the powers and authorities conferred by :—

(*a*) The Constitution.

(*b*) The *National Security Act* 1939-1940.

(*c*) The *National Security* (*Subversive Associations*) *Regulations* ?

6. Do the said *National Security* (*Subversive Associations*) *Regulations*, upon their proper construction, extend to the said incorporated association or the association of persons known as Jehovah's Witnesses ?

The provisions of the relevant regulations sufficiently appear in the judgments hereunder.

*Fullagar* K.C. and *H. G. Alderman* (with them Dr. *Louat*), for the plaintiff.

*Fullagar* K.C. The *Subversive Associations Regulations* are wholly invalid because they contravene s. 116 of the Constitution. They permit the dissolution of religious bodies and the prohibition of meetings for purely religious purposes and the propagation of purely religious doctrines. The plaintiff is an entity competent to question the validity of the Regulations under s. 116, as it is a duly incorporated body. [Counsel referred to *Santa Clara County* v. *Southern Pacific Railroad Co.* (1) ; *Kentucky Finance Corporation* v. *Paramount Auto Exchange Corporation* (2) ; *Reynolds* v. *United States* (3) ; *Davis* v. *Beason* (4) ; *Willoughby* on *The Constitution of the United States*, vol. 2, p. 1185.] The word " religion " in s. 116 of the Constitution must be given a limited meaning : it does not include anything which the common sense of the community does not regard as religious. The views in par. 9 of the case stated which are subversive are not religious within the meaning of s. 116, even though Jehovah's Witnesses regard them as religious. [Counsel referred to *Myer* v. *Nebraska* (5) ; *Stromberg* v. *California* (6) ; *Hamilton* v. *University of California* (7) ; *De Jonge* v. *Oregon* (8) ; *Herndon* v. *Lowry* (9) ;

(1) (1886) 118 U.S. 394 [30 Law. Ed. 118].

(2) (1922) 262 U.S. 544 [67 Law. Ed. 1112].

(3) (1878) 98 U.S. 145, at pp. 165, 166 [25 Law. Ed. 244, at p. 250].

(4) (1890) 133 U.S. 333, at pp. 342, 343, 348 [33 Law. Ed. 637, at pp. 639, 640, 642].

(5) (1922) 262 U.S. 390, at pp. 399, 400 [67 Law. Ed. 1042, at p. 1045].

(6) (1931) 283 U.S. 359, at pp. 367-369 [75 Law. Ed. 1117, at pp. 1122, 1123].

(7) (1934) 293 U.S. 245, at p. 262 [79 Law. Ed. 343, at p. 352].

(8) (1937) 299 U.S. 353, at pp. 362-365 [81 Law. Ed. 278, at pp. 282-284].

(9) (1937) 301 U.S. 242, at pp. 258, 259 [81 Law. Ed. 1066, at p. 1075].

*Hague* v. *Committee for Industrial Organization* (1); *Schneider* v. *State* (*Town of Irvington*) (2); *Cantwell* v. *Connecticut* (3); *Minersville School District* v. *Gobitis* (4); *Lovell* v. *Griffin* (5); *Jones* v. *Opelika* (6).] A further ground upon which the Regulations are invalid is that they confer judicial power on the Governor-General in contravention of s. 71 of the Constitution (*Waterside Workers' Federation of Australia* v. *J. W. Alexander Ltd.* (7); *British Imperial Oil Co. Ltd.* v. *Federal Commissioner of Taxation* (8); *Shell Co. of Australia Ltd.* v. *Federal Commissioner of Taxation* (9); *Groenvelt* v. *Burwell* (10); *Wong Wing* v. *United States* (11)). It is for the legislative power to say from what facts consequences shall follow; it is for the judicial power to say whether the facts exist or not. Under the Regulations here in question, power to determine facts is conferred in a way not authorized by s. 71 of the Constitution.

*H. G. Alderman.* The question of the construction of the *Associations Incorporation Act* (S.A.) is one as to which great difficulty has been felt in South Australia, and it seems open to question whether the "incorporation" of the plaintiff under that Act gives it the status of a corporation in the technical legal sense. In any event, the Regulations should be construed as not applying to a body such as the plaintiff; absurd results would follow if the Regulations are read as applying to religious bodies, and no reasonable construction could be given to the Regulations which would not involve a contravention of s. 116 of the Constitution.

*Weston* K.C. (with him *A. R. Taylor*), for the defendant. The Regulations are justified by the defence power and the *National Security Act*, even if they do involve an interference with the exercise (in a literal sense) of religion. It is conceded on behalf of the plaintiff that s. 116 must be "read down": it cannot be given its full literal sense (*Davis* v. *Beason* (12)). Otherwise the Constitution would be unworkable, and the defence power, in particular, would be

(1) (1939) 307 U.S. 496, at pp. 515, 516 [83 Law. Ed. 1423, at pp. 1436, 1437].
(2) (1939) 308 U.S. 147, at pp. 161, 164 [84 Law. Ed. 155, at pp. 164, 166].
(3) (1940) 310 U.S. 296, at pp. 303, 304 [84 Law. Ed. 1213, at pp. 1217, 1218].
(4) (1940) 310 U.S. 586, at p. 602 [84 Law. Ed. 1375, at p. 1383].
(5) (1938) 303 U.S. 444 [82 Law. Ed. 949].
(6) (1942) 316 U.S. 584 [86 Law. Ed. 1698].
(7) (1918) 25 C.L.R. 434, at pp. 443, 444.
(8) (1926) 38 C.L.R. 153.
(9) (1930) 44 C.L.R. 530; (1931) A.C. 275.
(10) (1700) 1 Ld. Raym. 454, at p. 467 [91 E.R. 1202, at p. 1211].
(11) (1896) 163 U.S. 228 [41 Law. Ed. 140].
(12) (1890) 133 U.S., at p. 343 [33 Law. Ed., at p. 640].

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greatly restricted. [Counsel referred to *Hamilton* v. *University of California* (1); *Minersville School District* v. *Gobitis* (2); *Jones* v. *Opelika* (3); *Krygger* v. *Williams* (4).] The Regulations do not confer any judicial power; the mere fact that penal consequences or loss of property may result from the exercise of power under the Regulations does not mean that judicial power is conferred.

[LATHAM C.J. referred to *R.* v. *Federal Court of Bankruptcy*; *Ex parte Lowenstein* (5).]

*Fullagar* K.C., in reply, referred to *R.* v. *Halliday* (6).

*Cur. adv. vult.*

June 14.

The following written judgments were delivered :—

LATHAM C.J. 1. This proceeding raises important questions with reference to the nature and extent of the protection which is given to religion under the Constitution of the Commonwealth. Section 116 of the Constitution is as follows :—" The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth."

It is plain that by this provision it is intended to place some restriction upon the power of the Commonwealth to enact legislation which favours any religion, or which interferes with any religion. The principal questions which arise in the case are :—Does s. 116 prevent the Commonwealth Parliament from legislating to restrain the activities of a body, the existence of which is, in the opinion of the Governor-General, prejudicial to the defence of the Commonwealth or the efficient prosecution of the war, if that body is a religious organization ? Is the answer to this question affected by the fact that the subversive activities of such a body are founded upon the religious views of its members ? Can such a body be suppressed ?

2. In the first place, it is important to observe that s. 116 is an express prohibition of any law which falls within its terms. The section deals with laws which in some manner relate to religion. The Constitution, however, contains no provision which confers upon the Commonwealth Parliament any power to make laws with respect

(1) (1934) 293 U.S. 245, at p. 263 [79 Law. Ed. 343, at p. 353].
(2) (1940) 310 U.S., at pp. 594, 596, 602 [84 Law. Ed., at pp. 1379, 1380, 1383].
(3) (1942) 316 U.S. 584 [86 Law. Ed. 1691].
(4) (1912) 15 C.L.R. 366, at pp. 369, 372.
(5) (1938) 59 C.L.R. 556.
(6) (1917) A.C. 260.

to the subject of religion. Section 116 therefore cannot be regarded as prescribing the content of laws made with respect to religion upon the basis that the Commonwealth Parliament has some power of legislating with respect to religion. Section 116 is a general prohibition applying to all laws, under whatever power those laws may be made. It is an overriding provision. It does not compete with other provisions of the Constitution so that the Court should seek to reconcile it with other provisions. It prevails over and limits all provisions which give power to make laws.

Accordingly no law can escape the application of s. 116 simply because it is a law which can be justified under ss. 51 or 52, or under some other legislative power. All the legislative powers of the Commonwealth are subject to the condition which s. 116 imposes.

3. Section 116 applies in express terms to "any religion," "any religious observance," the free exercise of "any religion" and any "religious test." Thus the section applies in relation to all religions, and not merely in relation to some one particular religion.

It would be difficult, if not impossible, to devise a definition of religion which would satisfy the adherents of all the many and various religions which exist, or have existed, in the world. There are those who regard religion as consisting principally in a system of beliefs or statement of doctrine. So viewed religion may be either true or false. Others are more inclined to regard religion as prescribing a code of conduct. So viewed a religion may be good or bad. There are others who pay greater attention to religion as involving some prescribed form of ritual or religious observance. Many religious conflicts have been concerned with matters of ritual and observance. Section 116 must be regarded as operating in relation to all these aspects of religion, irrespective of varying opinions in the community as to the truth of particular religious doctrines, as to the goodness of conduct prescribed by a particular religion, or as to the propriety of any particular religious observance. What is religion to one is superstition to another. Some religions are regarded as morally evil by adherents of other creeds. At all times there are many who agree with the reflective comment of the Roman poet—"*Tantum religio potuit suadere malorum.*"

The prohibition in s. 116 operates not only to protect the freedom of religion, but also to protect the right of a man to have no religion. No Federal law can impose any religious observance. Defaults in the performance of religious duties are not to be corrected by Federal law—*Deorum injuriae Diis curae.* Section 116 proclaims not only the principle of toleration of all religions, but also the principle of toleration of absence of religion.

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4. It was suggested in argument that no system of beliefs or code of conduct or form of ritual could be protected under the section unless the general opinion of the present day regarded the belief or conduct or ritual as being really religious. It is true that in determining what is religious and what is not religious the current application of the word "religion" must necessarily be taken into account, but it should not be forgotten that such a provision as s. 116 is not required for the protection of the religion of a majority. The religion of the majority of the people can look after itself. Section 116 is required to protect the religion (or absence of religion) of minorities, and, in particular, of unpopular minorities.

5. It is sometimes suggested in discussions on the subject of freedom of religion that, though the civil government should not interfere with religious *opinions*, it nevertheless may deal as it pleases with any *acts* which are done in pursuance of religious belief without infringing the principle of freedom of religion. It appears to me to be difficult to maintain this distinction as relevant to the interpretation of s. 116. The section refers in express terms to the *exercise* of religion, and therefore it is intended to protect from the operation of any Commonwealth laws acts which are done in the exercise of religion. Thus the section goes far beyond protecting liberty of opinion. It protects also acts done in pursuance of religious belief as part of religion.

6. The scope of religion has varied very greatly during human history. Probably most Europeans would regard religion as necessarily involving some ideas or doctrines affecting the relation of man to a Supreme Being. But Buddhism, one of the great religions of the world, is considered by many authorities to involve no conception of a God. For example, Professor *Gilbert Murray* says: "We must always remember that one of the chief religions of the world, Buddhism, has risen to great moral and intellectual heights without using the conception of God at all; in his stead it has Dharma, the Eternal Law."—*Five Stages of Greek Religion*, ch. 1. On the other hand, almost any matter may become an element in religious belief or religious conduct. The wearing of particular clothes, the eating or the non-eating of meat or other foods, the observance of ceremonies, not only in religious worship, but in the everyday life of the individual—all of these may become part of religion. Once upon a time all the operations of agriculture were controlled by religious precepts. Indeed, it is not an exaggeration to say that each person chooses the content of his own religion. It is not for a court, upon some *a priori* basis, to disqualify certain beliefs as incapable of being religious in character.

Thus in the early history of mankind it was almost impossible to distinguish between government and religion (*Encyclopedia Britannica*, 14th ed., vol. 19, p. 105). A clear distinction between ruler and priest developed only at a relatively late stage in human development. Those who believe in a theocracy refuse to draw the distinction between government and religion which is implicit in s. 116. The beliefs of the Anabaptists were similar to those of Jehovah's Witnesses, which the Court, as it will be seen, has to consider in the present case. The Anabaptists refused to take oaths, they refused to appear before civil law courts, they refused to bear arms or to make any resistance to wrongdoers. The civil governments of the world were regarded by them as pertaining to anti-Christ. Accordingly they would take no public office, and would render only passive obedience to governments. Many of the early Christians held similar beliefs. It cannot be said that beliefs upon such matters founded upon Biblical authority (as understood by those who held them) are not religious in character. Such beliefs are concerned with the relation between man and the God whom he worships, although they are also concerned with the relation between man and the civil government under which he lives. They are political in character, but they are none the less religious on that account.

It is perhaps not out of place to mention at the present time that there are large numbers of people in Japan who believe that the Shinto religion, the Way of the Gods, affords a path to universal peace and prosperity under the guidance of the people of Japan. The worship of the Emperor as divine is represented to the Japanese people as the way of escape to happiness for the whole world.

At all periods of human history there have been religions which have involved practices which have been regarded by large numbers of people as essentially evil and wicked. Many religions involve the idea of sacrifice, and the practice of sacrifice has assumed the form of human sacrifice or animal sacrifice as appears in the Old Testament, and in many other sacred writings and traditions. So also religions have differed in their treatment of polygamy. Polygamy was not reproved in the Old Testament; it has been part of the Mormon religion; it is still an element in the religion of millions of Mohammedans, Hindus, and other races in Asia. The criminal religions in India are well known. The Thugs of India regarded it as a religious duty to rob and to kill. The practice of suttee, involving the immolation of the widow upon the funeral pyre of her husband, was for centuries a part of the Hindu religion.

These examples are sufficient to show that religious belief and practice cannot be absolutely separated either from politics or from

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ethics. An inconsistency between religious and political duty has often appeared in history. The early Christians refused to take part in the worship of the Emperor as divine, just as Christian converts in Korea refuse to take part in Shinto ceremonial. In each case the State view is that the ceremony which has been made obligatory is merely political in character—a form of "saluting the flag"—but the other view of the question is that it is something which requires a true believer to abjure part of his cherished faith.

Section 116, however, is based upon the principle that religion should, for political purposes, be regarded as irrelevant. It assumes that citizens of all religions can be good citizens, and that accordingly there is no justification in the interests of the community for prohibiting the free exercise of any religion.

7. The examples which have been given illustrate the difficulty of the problem with which a court is confronted when it is asked to determine whether or not a particular law infringes the constitutional provision by prohibiting "the free exercise of . . . religion." Can any person, by describing (and honestly describing) his beliefs and practices as religious exempt himself from obedience to the law? Does s. 116 protect any religious belief or any religious practice, irrespective of the political or social effect of that belief or practice?

It has already been shown that beliefs entertained by a religious body as religious beliefs may be inconsistent with the maintenance of civil government. The complete protection of all religious beliefs might result in the disappearance of organized society, because some religious beliefs, as already indicated, regard the existence of organized society as essentially evil.

8. Section 116 does not merely protect the exercise of religion, it protects the free exercise of religion. The word "free" is vague and ambiguous, as is shown by the many decisions in this Court and in the Privy Council upon the meaning of the word "free" in another place when it appears in the Constitution—in s. 92, which provides for free trade, commerce and intercourse between the States. When a slogan is incorporated in a constitution, and the interpretation of the slogan is entrusted to a court, difficulties will inevitably arise.

The word "free" is used in many senses, and the meaning of the word varies almost indefinitely with the context. A man is said to be free when he is not a slave, but he is also said to be free when he is not imprisoned, and is not subject to any other form of physical restraint. In another sense a man is only truly free when he has freedom of thought and expression, as well as of physical movement. But in all these cases an obligation to obey the laws which apply

generally to the community is not regarded as inconsistent with freedom.

Freedom of speech is a highly valued element in our society. But freedom of speech does not mean that an individual is at liberty to create a panic in a theatre by raising a false alarm of fire, as was pointed out in the United States of America in the case of *Schenck* v. *United States* (1). In *James* v. *The Commonwealth* (2), the Privy Council dealt with the meaning of the words " absolutely free " in s. 92 of the Constitution. It was there said : " ' Free ' in itself is vague and indeterminate. It must take its colour from the context. Compare, for instance, its use in free speech, free love, free dinner and free trade. Free speech does not mean free speech ; it means speech hedged in by all the laws against defamation, blasphemy, sedition and so forth ; it means freedom governed by law, as was pointed out in *McArthur's Case* (3). Free love, on the contrary, means licence or libertinage, though, even so, there are limitations based on public decency and so forth. Free dinner generally means free of expense, and sometimes a meal open to anyone who comes, subject, however, to his condition or behaviour not being objectionable. Free trade means, in ordinary parlance, freedom from tariffs " (4). Thus there is no dictionary meaning of the word " free " which can be applied in all cases.

In the Constitution of the United States there is a provision which is very similar to that contained in s. 116 of our Constitution. The first amendment of the Constitution of the United States provides that Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. In the United States the problems created by this provision have been solved in large measure by holding that the provision for the protection of religion is not an absolute, to be interpreted and applied independently of other provisions of the Constitution. The Supreme Court said in *Jones* v. *Opelika* (5), with reference to the constitutional guarantees of freedom of speech, freedom of press and freedom of religion : " They are not absolutes to be exercised independently of other cherished privileges, protected by the same organic instrument." It was held that these privileges must be reconciled with the right of a State to employ the sovereign power to ensure orderly living " without which constitutional guarantees of civil liberties would be a mockery." A practical illustration of the application of this doctrine of accommodation is to be found in the case of *Cox*

(1) (1919) 249 U.S. 47, at p. 52 [63 Law. Ed. 470, at p. 473].
(2) (1936) A.C. 578 ; 55 C.L.R. 1.
(3) (1920) 28 C.L.R. 530.
(4) (1936) A.C., at p. 627 ; 55 C.L.R., at p. 56.
(5) (1942) 316 U.S. 584, at p. 593 [86 Law. Ed. 1691, at p. 1699].

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v. *New Hampshire* (1). It was said :—" One would not be justified in ignoring the familiar red traffic light because he thought it his religious duty to disobey the municipal command or sought by that means to direct public attention to an announcement of his opinions."

The result has been that the Supreme Court of the United States has refused to regard the provisions relating to freedom of religion, freedom of assembly and freedom of speech as involving the invalidity of all laws which in any degree interfere with such freedom. For example, the right of assembly is a right to peaceable assembly, and not a right to organize or promote riots (*De Jonge* v. *Oregon* (2)). So also in *Stromberg* v. *California* (3) it was held that the liberty of the person which is protected under the due process clause of the American Constitution, while it embraces the right of free speech, does not protect seditious speech : see the report (4). In *Schneider* v. *State* (*Town of Irvington*) (5) it was held that, while the municipal authorities may control the streets in order to keep peace and order therein, they may not exercise their powers so as to interfere with a peaceable and non-obstructive distribution of literature in the streets : See also *Cantwell* v. *Connecticut* (6). In this case the power to regulate the conduct of citizens in the public streets was recognized, but it was said with reference to religious freedom and liberty of speech and of the press that " in every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom." This statement frankly recognizes that the general protection given by the Constitution to the freedom in question leaves it to the court to determine whether a particular measure which in fact limits complete freedom involves an " undue " infringement of that freedom. It is upon this principle that many cases have been decided in the American Courts. *Willis*, in his work on the *American Constitution*, states the effect of the constitutional guarantee by saying (p. 502) that its real purpose is to prevent religious persecution, but the cases show that " the Constitution does not protect religious liberty in the broad sense." It does not protect unsocial actions (p. 504).

9. The cases to which I have just referred are recent cases. But before the Constitution of the Commonwealth was adopted in 1900 decisions of the Supreme Court of the United States had dealt with the subject of the constitutional protection of religious freedom.

(1) (1941) 312 U.S. 569, at p. 574 [85 Law. Ed. 1049, at p. 1053].
(2) (1937) 299 U.S. 353, at pp. 363 et seq. [81 Law. Ed. 278, at pp. 283 et seq.].
(3) (1931) 283 U.S. 359 [75 Law. Ed. 1117].
(4) (1931) 283 U.S., at p. 368 [75 Law. Ed., at p. 1122].
(5) (1939) 308 U.S. 147 [84 Law. Ed. 155].
(6) (1940) 310 U.S. 296, at p. 303 [84 Law. Ed. 1213, at p. 1218].

These cases quite clearly determined that such protection was not absolute and that it did not involve a dispensation from obedience to a general law of the land which was not directed against religion.

In *Reynolds* v. *United States* (1) a Mormon who had a religious belief in polygamy, and who had more than one wife, was indicted for polygamy. It was held that his religious belief could not be accepted as a justification for the commission of an overt act which was made criminal by the law of the land. *Waite* C.J., who announced the unanimous decision of the Court upon the relevant question, referred to the history of legislation in favour of or directed against particular religions, and to the fact that polygamy had generally been a crime among the northern and western nations of Europe. He said:—"Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? Or if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice? So here, as a law of the organization of society under the exclusive dominion of the United States, it is provided that plural marriages shall not be allowed. Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances" (2). Upon this reasoning the Court refused to set aside a conviction for bigamy.

There are obvious difficulties in the principle laid down in the case cited. When the suggestion that religious beliefs should be superior to the law of the land is rejected as a matter of course, it may well be asked whether the very object of the constitutional protection of religious freedom is not to prevent the law of the land from interfering with either the holding of religious beliefs, or bona fide conduct in pursuance of such beliefs. But practical considerations persuaded the court to give a practical interpretation to the constitutional provision and to abstain from giving it a meaning which was inconsistent with practical necessities.

In the year 1890 the case of *Davis* v. *Beason* (3) was decided by the Supreme Court of the United States of America. This case

(1) (1878) 98 U.S. 145 [25 Law. Ed. 244].
(2) (1878) 98 U.S., at p. 166 [25 Law. Ed., at p. 250].
(3) (1890) 133 U.S. 333, at pp. 342, 343 [33 Law. Ed. 637, at p. 640].

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also dealt with the polygamous beliefs and practices of the Mormon religion. Here it was contended that a statute disfranchising citizens and disqualifying them from holding office if they belonged to a Church which taught bigamy or polygamy as a doctrine of the Church was unconstitutional and void as prohibiting the free exercise of religion. Mr. Justice *Field*, after expressing strong views upon the subject of polygamy, said that it was never intended or supposed that the first amendment, which protected the free exercise of religion, "could be invoked as a protection against legislation for the punishment of acts inimical to the peace, good order and morals of society. With man's relations to his Maker and the obligations he may think they impose, and the manner in which an expression shall be made by him of his belief on those subjects, no interference can be permitted, provided always the laws of society, designed to secure its peace and prosperity, and the morals of its people, are not interfered with. However free the exercise of religion may be, it must be subordinate to the criminal laws of the country, passed with reference to actions regarded by general consent as properly the subjects of punitive legislation."

This decision appears to make room for any kind of law thought proper by the legislature on grounds of peace and prosperity and the morals of the people, that is, in practice, upon any grounds at all, notwithstanding the constitutional protection of religion. The decision goes very far when it is said: "Crime is not the less odious because sanctioned by what any particular sect may designate as religion" (1). This method of approaching the question appears to me to treat the constitutional provision as if it were subject to the proviso which is to be found in, for example, the Constitution of New York of 1777, which is quoted in the report of *Davis* v. *Beason* (2). That Constitution provided as follows:—"The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed, within this State, to all mankind: *Provided*, That the liberty of conscience, hereby granted, shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State." The opinion which in effect adds such a proviso to the absolute words of the Constitution may be good practical common-sense, but it appears to me to be difficult to justify it upon any basis of legal interpretation.

But the cases which I have cited do show that in 1900 it had been thoroughly established in the United States that the provision

(1) (1890) 133 U.S., at p. 345 [33 Law. Ed., at p. 641].

(2) (1890) 133 U.S., at p. 348 [33 Law. Ed., at p. 642].

preventing the making of any law prohibiting the free exercise of religion was not understood to mean that the criminal law dealing with the conduct of citizens generally was to be subject to exceptions in favour of persons who believed and practised a religion which was inconsistent with the provisions of the law. The result of this approach to the problem has been the development of the principle which has been applied in the later cases, to which I have already referred, according to which it is left to the court to determine whether the freedom of religion has been *unduly* infringed by some particular legislative provision. This view makes it possible to accord a real measure of practical protection to religion without involving the community in anarchy.

10. There is, therefore, full legal justification for adopting in Australia an interpretation of s. 116 which had, before the enactment of the Commonwealth Constitution, already been given to similar words in the United States. This interpretation leaves it to the court to determine whether a particular law is an undue infringement of religious freedom. It is possible, however, in my opinion, to decide the present case upon a narrower principle which escapes the criticisms to which that interpretation may be open.

John Stuart Mill in his *Essay on Liberty* critically examines the idea of liberty, and his discussion of the subject is widely accepted as a weighty exposition of principle. The author had to make the distinction which is often made in words between liberty and licence, but which it is sometimes very difficult to apply in practice. He recognized that liberty did not mean the licence of individuals to do just what they pleased, because such liberty would mean the absence of law and of order, and ultimately the destruction of liberty. He expressed his opinion as to the limits of liberty when he said : " The sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection " (*Essay on Liberty*, sch. 1, p. 6—1871 ed.). It may be going too far to say that self-protection is " the sole end " which justifies any governmental action. But I think it must be conceded that the protection of any form of liberty as a social right within a society necessarily involves the continued existence of that society as a society. Otherwise the protection of liberty would be meaningless and ineffective. It is consistent with the maintenance of religious liberty for the State to restrain actions and courses of conduct which are inconsistent with the maintenance of civil government or prejudicial to the continued existence of the community. The Constitution protects religion within a community organized under a Constitution, so that the continuance of such protection

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necessarily assumes the continuance of the community so organized. This view makes it possible to reconcile religious freedom with ordered government. It does not mean that the mere fact that the Commonwealth Parliament passes a law in the belief that it will promote the peace, order and good government of Australia precludes any consideration by a court of the question whether or not such a law infringes religious freedom. The final determination of that question by Parliament would remove all reality from the constitutional guarantee. That guarantee is intended to limit the sphere of action of the legislature. The interpretation and application of the guarantee cannot, under our Constitution, be left to Parliament. If the guarantee is to have any real significance it must be left to the courts of justice to determine its meaning and to give effect to it by declaring the invalidity of laws which infringe it and by declining to enforce them. The courts will therefore have the responsibility of determining whether a particular law can fairly be regarded as a law to protect the existence of the community, or whether, on the other hand, it is a law "for prohibiting the free exercise of any religion." The word "for" shows that the purpose of the legislation in question may properly be taken into account in determining whether or not it is a law of the prohibited character.

11. The Commonwealth Parliament has power to make laws "for the peace, order, and good government of the Commonwealth 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" (Constitution, s. 51 (vi.)). "The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth" (s. 61).

In pursuance of the powers so conferred, the Commonwealth can defend the people, not only against external aggression, but also against internal attack, and in doing so can prevent aid being given to external enemies by internal agencies. No organized State can continue to exist without a law directed against treason. There are, however, subversive activities which fall short of treason (according to the legal definition of that term) but which may be equally fatal to the safety of the people. These activities, whether by way of espionage, or of what is now called fifth column work, may assume various forms. Examples are to be found in obstruction to recruiting, certainly in war-time, and, in my opinion, also in time of peace. Such obstruction may be both punished and prevented. So also

propaganda tending to induce members of the armed forces to refuse duty may not only be subjected to control, but may be suppressed. In *Hamilton* v. *University of California* (1), it was said: "Government, federal and state, each in its own sphere owes a duty to the people within its jurisdiction to preserve itself in adequate strength to maintain peace and order and to assure the just enforcement of law. And every citizen owes the reciprocal duty, according to his capacity, to support and defend government against all enemies (*Selective Draft Law Cases* (*Arver* v. *United States*) (2), *Minor* v. *Happersett* (3)). *United States* v. *Schwimmer* (4) involved a petition for naturalization by one opposed to bearing arms in defence of country. Holding the applicant not entitled to citizenship we said: 'That it is the duty of citizens by force of arms to defend our government against all enemies whenever necessity arises is a fundamental principle of the Constitution . . . Whatever tends to lessen the willingness of citizens to discharge their duty to bear arms in the country's defense detracts from the strength and safety of the Government' (5)". So also in this Court it was held in *Krygger* v. *Williams* (6) that a person who is forbidden by the doctrines of his religion to bear arms is not thereby exempted or excused from undergoing the military training and rendering the personal service required by the *Defence Act* 1903-1910; and that the provisions of the Act imposing obligations on all male inhabitants of the Commonwealth in respect to military training do not prohibit the free exercise of any religion, and, therefore, are not an infringement of s. 116 of the Constitution.

12. It is a well-established doctrine of constitutional law that it is for Parliament to choose the means by which its powers are to be carried into execution. In the absence of a relevant constitutional prohibition it is not a proper function of a court to limit the method of exercising a legislative power. *Marshall* C.J. said in a famous statement in *M'Culloch* v. *Maryland* (7):—"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

(1) (1934) 293 U.S. 245, at pp. 262, 263 [79 Law. Ed. 343, at p. 353].
(2) (1918) 245 U.S. 366, at p. 378 [62 Law. Ed. 349, at p. 353].
(3) (1875) 89 U.S. 162, at p. 166 [22 Law. Ed. 627].
(4) (1929) 279 U.S. 644 [73 Law. Ed. 889].
(5) (1929) 279 U.S., at p. 650 [73 Law. Ed., at pp. 891, 892].
(6) (1912) 15 C.L.R. 366.
(7) (1891) 17 U.S. 316, at p. 421 [4 Law. Ed. 579, at p. 605].

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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." This general proposition can in itself solve no particular constitutional problem, but it does effectively state the constitutional principle. Parliament, for example, may legislate, not only for the purpose of punishing wrongful acts which have been committed, but also for the purpose of preventing the commission of such acts.

13. In the present case the validity of certain regulations made under the *National Security Act* 1939-1940 is challenged. The Act provides in s. 5 that the Governor-General may make regulations for securing the public safety and the defence of the Commonwealth and the territories of the Commonwealth and for prescribing all matters which are necessary or convenient to be prescribed for the more effectual prosecution of any war in which His Majesty is, or may be, engaged. The *National Security* (*Subversive Associations*) *Regulations*, Statutory Rules 1940 No. 109, as amended, were made under this power. It is contended that these Regulations, or some of them, are not authorized by the *National Security Act* and, alternatively, that if they are so authorized, then the Act itself exceeds the powers of the Commonwealth Parliament under the defence power.

I propose to take the regulations in turn and to state the objections which are made to them. In the first place, I direct particular attention to the fact that the Regulations are concerned with the continued existence of certain bodies or associations. The Regulations do penalize certain actions, but the object of the Regulations, as is shown by the terms of the principal regulation, reg. 3, is to put an end to the existence of bodies the continued existence of which is regarded as being subversive of the war effort. Reg. 3 is as follows :—" Any body corporate or unincorporate, the existence of which the Governor-General, by order published in the *Gazette*, declares to be in his opinion, prejudicial to the defence of the Commonwealth or the efficient prosecution of the war, is hereby declared to be unlawful." It was not contended in argument that reg. 3, taken merely by itself, is invalid. The mere proclamation that in the opinion of the Governor-General the existence of a body is prejudicial to the defence of the Commonwealth, &c., creates no offence and imposes no duty upon any person. The terms of the

regulation, however, become important by reason of other regulations which attach legal consequences to the order of the Governor-General. For example, under reg. 4 a body declared under reg. 3 is dissolved, and under other regulations the property of the body may be seized. These consequences depend in the beginning upon an order made by the Governor-General under reg. 3.

It is objected that when reg. 3 is read, as it must be, in conjunction with such other regulations as those which I have mentioned, the result is that legal consequences are made to depend, not upon the fact that the existence of a body is prejudicial to the defence of the Commonwealth or the efficient prosecution of the war, but upon the declaration of the opinion of the Governor-General to that effect. It probably would not be argued that the Commonwealth could not legislate, at least to some extent, against bodies the existence of which was in fact prejudicial in the manner stated. But it is said that regulations which make these consequences depend upon the opinion of the Governor-General are invalid.

In my opinion it is too late to raise this argument. In the case of *Lloyd* v. *Wallach* (1) this Court considered a regulation which provided that where the Minister for Defence had reason to believe that any naturalized person was disaffected or disloyal, he might, by warrant under his hand, order him to be detained in military custody in such place as he thought fit during the continuance of a state of war. It was held that upon proof of the fact that the Minister believed that a naturalized person was disaffected or disloyal, detention of a person could be justified under a warrant issued in pursuance of the regulation and that the regulation, so construed, was valid. It was held by each of seven Justices that the existence in the mind of the Minister of the belief specified in the regulation was a sufficient foundation for action under the regulation: see the report (2). See *R.* v. *Halliday* (3), where the House of Lords, after considering the arguments against opinion as a basis for action restricting the liberty of a British subject and taking into account the risk of abuse inherent in regulations of this character, upheld such a regulation. These decisions were considered and applied in the case of *Ex parte Walsh* (4), where the validity of a National Security regulation was challenged. The regulation was in the following terms:—"The Minister may, if satisfied with respect to any particular person, that with a view to prevent that person acting in any manner prejudicial to the public safety or the defence of the Commonwealth it is necessary so to do make an order . . .

(1) (1915) 20 C.L.R. 299.
(2) (1915) 20 C.L.R., at pp. 304, 309, 313, 314.
(3) (1917) A.C. 260.
(4) (1942) 48 A.L.R. 359.

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directing that he be detained in such place and under such conditions as the Minister from time to time determines and any person shall while detained in pursuance of an order made under this sub-regulation be deemed to be in legal custody."

The Court rejected the argument that the opinion of the Minister could not form a valid basis for detention under the regulation, holding that the case was governed by *Lloyd* v. *Wallach* (1). See also *Liversidge* v. *Anderson* (2).

The cases cited relate to the liberty of the subject, which has always been a matter of the very highest concern to the law. If a basis in opinion is sufficient to authorize the most grave interference with personal liberty by indefinite imprisonment, namely, imprisonment during the duration of a war, it can hardly be said that such a basis is insufficient to authorize interference with property. The rights of property, however important they may be, have never been held in the courts to be as sacred as the right of personal liberty. In my opinion, therefore, the objection taken to the validity of reg. 3 as a basis for the operation of the other regulations must be held to fail.

14. Reg. 4 is as follows :—" Any body in respect of which a declaration is made in pursuance of the last preceding regulation shall, by force of that declaration, be dissolved." It is contended on several grounds that this regulation is invalid.

The first objection, as I understand it, is that, though the Commonwealth Parliament may legislate for the purpose of punishing particular acts which are prejudicial to the defence of the Commonwealth or the efficient prosecution of the war, it is beyond the power of the Commonwealth to provide for the dissolution of what may be called subversive associations, that is, bodies the existence of which is prejudicial to the defence of the Commonwealth or the efficient prosecution of the war. I admit that I have some difficulty in appreciating this objection. One obvious way of dealing with associations which aim at the destruction of the community is to disband and suppress them if they come into existence. Another means of dealing with them is to seek to prevent their formation by attaching consequences to their activities which are calculated to deter persons from forming them, or from becoming members of them. In my opinion it is within the legislative power to provide in effect :—" Associations of a particular subversive kind are not to be allowed to exist. If they do exist they shall be dissolved." As I have already said, the choice of the means of exercising its powers is essentially a matter for Parliament, and not for the courts.

(1) (1915) 20 C.L.R. 299.

(2) (1942) A.C. 206.

Reg. 4 adopts means for the discouragement of such associations which the legislative authority regards as useful and effective. It is for Parliament, and not for the courts, to determine whether the use of a particular means of discouragement is necessary or wise. In my opinion the power of the Commonwealth to protect the community against what are now called fifth-column activities, that is, internal activities directed towards the destruction of the people of the Commonwealth, is not so weak as to be limited to legislation for the punishment of offences after they have been committed. Parliament may, in my opinion, under the defence power, seek to prevent such offences happening by preventing the creation of subversive associations or ordering their dissolution.

An argument was submitted to the Court to the effect that, while Parliament can punish particular offences, it is going too far to dissolve an unlawful association. I find myself unable to appreciate the basis of this argument. It is not for a court to say that a particular law is too severe. A court may do so in America in extreme cases because there is there a constitutional provision prohibiting what are called "cruel and unusual" punishments. There is no such provision in our Constitution. But even if there were such a provision, the dissolution of an association which was treasonable in character is only a mild and natural precaution in the interests of the people. Such a law is directed towards the prevention of actions which may involve the destruction of the whole community, and if Parliament thinks it proper to destroy the association rather than to run the risk of the community being destroyed, it is not for a court to seek to interpose any veto. The Regulations depend upon the possibility that the *existence* of some associations may be prejudicial to the defence of the Commonwealth or the efficient prosecution of the war. If there are such associations it is, in my opinion, within the defence power and within the powers conferred by the *National Security Act* to take steps to suppress them and to terminate their existence.

A separate objection to reg. 4 is based upon the suggestion that the dissolution of an association or a company lasts forever, whereas the *National Security Act* (see s. 19) can continue in operation only until a date to be fixed by proclamation but, in any event, not longer than six months after His Majesty ceases to be engaged in war. It is suggested that as a body dissolved during the war continues to be dissolved after the war, the Act would in this matter operate after the war. I do not agree that this would be the case. A provision which gives a limited operation to an Act of Parliament does not mean that nothing having a permanent effect can be done

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under the Act or that there must be a kind of *restitutio in integrum* after the period of operation has expired. It could not (I should think) be suggested, if a statute gave power to demolish houses, but was limited in operation to a period of five years, that it would be unlawful to pull down any houses under the Act because the houses would remain pulled down after the period of five years had elapsed. Precisely similar considerations appear to me to apply to the argument that reg. 4 is inconsistent with s. 19 of the *National Security Act*.

The final argument against the validity of reg. 4 is that the dissolution of a corporate body such as a company is an exercise of judicial power, that under the Commonwealth Constitution such a power must be exercised by a court, and that under these Regulations dissolution is brought about by the order of the Governor-General and the direct operation of reg. 4 without any curial proceedings.

No authority was quoted for the proposition that the dissolution of a company is a judicial act. It was said in a general way that the dissolution of a company affected the rights of the company. It is true that dissolution terminates the rights of a company, but it is a common provision in Companies Acts to provide for the dissolution of a company, not only by a court, but also by the direction of an official: See, for example, the English *Companies Act* 1929, s. 295, by which it is provided that, after certain notices have been given by the Registrar of Companies, a company may be struck off the register, with the result that the company is dissolved—See the New South Wales *Companies Act* 1936, s. 323, and the Victorian *Companies Acts* 1938-1940, s. 230. Thus it is well recognized that a registered company may be dissolved without any judicial proceedings.

The "dissolution" of an unincorporated body appears to me to present no legal difficulty whatever. It is merely a legislative direction that the body shall not be allowed to continue to exist. The body is not a legal persona, and the "dissolution" can be made effective only by some other provisions dealing with the conduct of the natural persons who constitute the association. There are some provisions of that character in the Regulations which will be considered in due course.

For these reasons I am of opinion that it has not been shown that reg. 4 is not authorized by the defence power of the Commonwealth (Constitution, s. 51 (vi.)). For the same reasons it is, in my opinion, not beyond the powers conferred by the *National Security Act*, s. 5. I can think of few measures more necessary for the purpose of securing the public safety and the defence of the Commonwealth

than measures directed, not only towards the punishment of internal enemies, but also towards the prevention of the association of internal enemies in subversive bodies. Accordingly, in my opinion, the regulation is justified by the initial words of s. 5 of the *National Security Act*, as well as by the final words of sub-s. 1 of that section, which authorizes the Governor-General to make regulations for the more effectual prosecution of the war.

15. Reg. 5 provides that a Minister may require persons to answer questions, furnish information and allow the inspection of documents relating to the affairs of an unlawful body. This regulation is directly authorized by s. 5 (1) (*g*) of the *National Security Act*, and it was not argued that it was invalid as being beyond the defence power unless it should be held that the Regulations as a whole were invalid.

16. Reg. 5A provides that a body corporate which has been declared to be an unlawful body if registered as a company under the law of a State or a territory may be wound up by a court of that State or territory which has jurisdiction to wind up companies. If reg. 4 is valid there can be no objection to this provision empowering courts to control the orderly liquidation of a company.

17. The first three paragraphs of reg. 6 are as follows :—

"6.—(1) Any person having in his possession or custody any property which immediately prior to the dissolution of a body which has been declared to be unlawful belonged to, or was used by or on behalf of, or in the interests of, that body or was held by trustees for and on behalf of that body, shall on demand deliver that property to a person thereto authorized by a Minister.

(2) The acknowledgment in writing by the person so authorized of the receipt of any such property shall be a sufficient discharge to the person delivering the property to him.

(3) A person having in his possession or custody any such property shall not suffer or permit or be a party to any dealing with such property."

These regulations purport only to authorize and to require the delivery of certain property to a person authorized by a Minister. The terms of the regulations show that they do not apply to real property, but only to things capable of transfer of possession by physical delivery. They do not profess to alter the ownership of property, and, standing by themselves, would give no power to detain property. If delivery of any property were made in pursuance of the regulations, there is nothing in them which would prevent the owner from immediately recovering his property. They are therefore of no utility in themselves. Their importance and

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significance depends upon reg. 6B, which authorizes the forfeiture of property taken possession of or delivered to a person in pursuance of the Regulations. In my opinion these regulations are necessarily connected with reg. 6B in the sense that they would be quite useless and futile apart from reg. 6B and are intended to operate only as a foundation for the application of reg. 6B. In my opinion they stand or fall with reg. 6B.

Reg. 6 (4) provides that any member of a Police Force not below the rank of sergeant may, by notice in writing served on any person (e.g., a bank, see reg. 2 (2) ), declare that any persons specified in the notice are, with respect to any account specified, trustees for a declared body. Such a declaration, the regulation provides, shall, as between the persons specified (e.g., the persons in whose name a bank account stands) and the person on whom the notice is served (e.g., a bank) be conclusive evidence that those persons are trustees of the declared body with respect to any moneys standing to the credit of the account.

At first sight there may be some difficulty in seeing how such a provision is related to defence. But it should be realized that subversive bodies, more especially in time of war, work in secret. In particular they will endeavour to have their property in the hands or in the names of agents or trustees who will have no apparent connection with the unlawful body. The real bank account of a spy organization will not be in the name of the organization, but in the name of some person or association which will present an innocent facade to the public. Reg. 6 (4) does not purport to provide, e.g. that money in a bank to the credit of AB shall, upon the declaration of a police officer, be conclusively deemed to be held in trust for an unlawful body. It provides only that as between the bank and AB it shall be so deemed. The effect of the regulation is to shift the area of controversy as to whether or not AB is a trustee for the unlawful body. It merely protects the bank against any claim by AB, leaving it to be determined by the courts in the ordinary way whether AB is in fact a trustee for the unlawful body. Reg. 6 (1) applies only to property which in fact belonged to or was used by, &c., an unlawful body and to property which was in fact held by trustees for that body. (Property includes money and funds and anything capable of being the subject of ownership (reg. 2).) Thus reg. 6 (4) does not enable any Commonwealth authority arbitrarily to determine that moneys held by one person for another are in fact held for some unlawful body. It only simplifies procedure for determining the beneficial ownership of the moneys. When the

meaning of the regulation is thus understood there is, in my opinion, no ground for objection to its validity.

18. Reg. 6A is as follows :—" Any house, premises or place or part thereof which was occupied by a body immediately prior to its having been declared to be unlawful may, if a Minister by order so directs, be occupied in accordance with the provisions of the order so long as there is in the house, premises or place or part thereof any property which a Minister is satisfied belonged to, or was used by or on behalf of, or in the interests of, the body, and which was therein immediately prior to the body having been declared to be unlawful." This regulation relates to real property. It does not, nor does any other regulation, purport to affect the ownership of real property. It purports to authorize the occupation of certain real property on behalf of the Commonwealth for a particular period.

As at present advised, I can see no objection to the validity of a regulation providing for the occupation by Commonwealth authorities of premises occupied by an unlawful body for the purpose of preventing the use of such premises by that body. But under the regulation the premises may be occupied so long as there is in the premises any property which a Minister is satisfied belonged to or was used by or on behalf of, or in the interests of the body, if that property was in the premises immediately prior to the body being declared to be unlawful. As long as a table or chair belonging to an unlawful body remained in a building, the occupation of the building would be lawful under the regulation. The regulation, therefore, does not depend for its operation upon any connection between the premises and the continued use or continued risk of use of the premises by the unlawful body. The regulation, for example, is very different from what are known in Victoria as the quarantine provisions relating to gaming houses under the *Police Offences Act*: See *Police Offences Act* 1928, ss. 133-142. In other words, the occupation authorized by the regulation has no relation to actual or probable unlawful user of the premises. Accordingly in my opinion reg. 6A is not authorized by the defence power of the Commonwealth.

19. Reg. 6B provides that all property taken possession of, or delivered to a person thereunto authorized by a person in pursuance of the regulation shall be forfeited to the King for the use of the King and shall, by force of the regulation, be condemned. Further provisions of the regulation entitle a Commonwealth authority to destroy or deal with such property as the Attorney-General directs. The property is divided into three classes :—

(*a*) property which the Attorney-General or an authorized person is satisfied belonged to a declared body—such

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property may be destroyed or otherwise dealt with as the Attorney-General directs;

(*b*) property which the Attorney-General or an authorized person is satisfied did not belong to such a body, and which consists of books, &c., which he is satisfied were used or intended to be used in connection with the activities of the body, or which, in his opinion, advocate unlawful doctrines—such books, &c., may be destroyed or otherwise dealt with as the Attorney-General directs;

(*c*) the remainder of the property may be returned to the owners or otherwise dealt with as the Attorney-General directs.

This regulation applies only to property taken possession of or delivered in pursuance of the Regulations, that is, to property referred to in reg. 6. It applies, therefore, only to property which (see reg. 6) actually belonged to, or was used by or on behalf of, or in the interests of, the declared body, or was held by trustees for it. As already stated, the ownership, &c., of property under reg. 6 must be determined in the ordinary way by a court. The question arising under reg. 6B is whether such property may be forfeited to the King.

The objection taken to this regulation is that the forfeiture of property bringing about an extinction of proprietary rights involves an exercise of judicial power, so that under the Constitution of the Commonwealth it can be effected only by a court exercising the judicial power of the Commonwealth (Constitution, s. 71). This objection is, in my opinion, completely met by the clear decision of five Justices of this Court in the case of *Roche* v. *Kronheimer* (1), where a similar objection was raised against regulations made for the purpose of carrying into effect the Versailles Peace Treaty. In the joint judgment of *Knox* C.J., *Gavan Duffy*, *Rich* and *Starke* JJ. (2), it was stated: "We see no reason why property should not be vested or divested by a legislative enactment or by an executive act done under the authority of the legislature as well as by a judicial act." *Higgins* J., in a separate judgment, stated that he concurred in the opinion that the challenged regulation, which provided for the confiscation of property by a ministerial act, was not invalid as involving an exercise of the judicial power of the Commonwealth by other than Commonwealth courts. He said:—"I can hardly understand how the point is arguable; for the vesting is not the result of a judicial finding as to rights—it is in defiance of admitted rights. To give the property of A to B is not a judicial proceeding" (3). In my opinion this case is decisive

(1) (1921) 29 C.L.R. 329.
(2) (1921) 29 C.L.R., at p. 337.
(3) (1921) 29 C.L.R., at p. 340.

against the objection raised. If the property described in the regulation can be forfeited to the King, there can be no objection to it being dealt with by any Commonwealth authority in the manner prescribed by the regulation.

Reg. 6B (3) is a provision purporting to validate seizures made before the commencement of the regulation. The validity of this provision was not argued and I express no opinion upon it.

20. The other regulations the validity of which was discussed in argument all relate to some form of advocacy of "unlawful doctrines." Reg. 7 prohibits the printing and the publication of matter advocating any unlawful doctrines. Reg. 8 prohibits meetings for the purpose of advocating unlawful doctrines. Reg. 9 prohibits appeals for funds for the furtherance of unlawful doctrines. Reg. 11 enables a Minister to prohibit the holding of meetings at which a Minister is satisfied it is likely that unlawful doctrines will be advocated.

Unlawful doctrines is defined in the following manner in reg. 2 :— "'unlawful doctrines' includes any doctrines or principles which were advocated by a body which has been declared to be unlawful, and any doctrines or principles whatsoever which are prejudicial to the defence of the Commonwealth or the efficient prosecution of the war."

This provision may be divided into two parts. It relates to :—

(*a*) any doctrines or principles which were advocated by a body declared under reg. 3 ;

(*b*) any doctrines or principles whatsoever which are prejudicial to the defence of the Commonwealth or the efficient prosecution of the war.

It was suggested that the definition should be read as if there were a comma after the word "whatsoever", so that the final relative clause would apply first to doctrines or principles advocated by a declared body, and secondly to any doctrines or principles whatsoever. This interpretation, however, gives no effect to the first part of the definition, which is limited to doctrines or principles advocated by an unlawful body, because such doctrines would necessarily be included within the second part, namely, "any doctrines or principles whatsoever." Therefore, in my opinion, this interpretation must be rejected.

There can, in my opinion, be no doubt that under the defence power the Commonwealth Parliament may legislate to prevent propaganda of any kind prejudicial to the defence of the Commonwealth or the efficient prosecution of the war. Regulations for that purpose are authorized by the *National Security Act*, s. 5.

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But the definition of "unlawful doctrines" includes within that term any doctrine or principle which was advocated by a declared body. Thus, if a declared body advocated observance of the Ten Commandments, or annual elections to the Commonwealth Parliament, or improvements in the education system, all these matters would fall within the definition of unlawful doctrines. It is, in my opinion, clear that the defence power does not authorize the Commonwealth Parliament to prohibit the advocacy of such doctrines or principles simply because it happens that they have been advocated by a declared body. In my opinion the regulations, so far as they depend upon this part of the definition of unlawful doctrines, should be held to be invalid. The result is that, to this extent at least, the regulations last mentioned are invalid.

The question arises whether these regulations are completely invalid, or whether they are saved in part by the application of the *Acts Interpretation Act* 1901-1941, s. 46 (*b*). This section provides that regulations shall be read and construed subject to the Act under which they are made, and so as not to exceed the power of the authority by which they are made to the intent that where a regulation would, but for the section, have been construed as being in excess of the power conferred, it shall nevertheless be a valid regulation to the extent to which it is not in excess of that power. Section 46 (*b*) is a direction by the legislature that regulations shall be held to apply so far as they can validly be applied. In the present case all the regulations in question will be valid if the first part of the definition, as set out in (*a*) above, is rejected. The policy and operation of the regulations in cases falling under (*b*), the valid and effective part of the definition, are not in any way affected by the rejection of (*a*), the part to which effect cannot validly be given. The regulations should, therefore, be held to be valid in so far as, but only in so far as, they apply in the case of unlawful doctrines comprehended within the second part of the definition. Thus regs. 7, 8, 9 and 11 (and also 6B (1) (*b*) ) should be read and applied as if the first part of the definition of unlawful doctrines were struck out.

Neither the complete nor the partial invalidity of these regulations as to publications, meetings, &c., can, in my opinion, affect the validity of other regulations. They are completely severable from all the other regulations. The operation of the other regulations would not be in any manner either extended or limited by the invalidity of regs. 7, 8, 9 or 11.

21. This case has been stated by *Starke* J. in an action brought by the Adelaide Company of Jehovah's Witnesses Incorporated against the Commonwealth of Australia. The plaintiff claims an

injunction to restrain the Commonwealth, its servants and agents, from continuing to trespass upon the company's property, and it also claims damages for trespass. The alleged trespass consisted in acts done by servants of the Commonwealth in pursuance of the *National Security* (*Subversive Associations*) *Regulations*.

The company is incorporated under the *Associations Incorporation Act* 1929-1935 of South Australia. It has rules and regulations which make no reference to religion, but which provide for management by trustees and for control over belongings and property to be exercised by the Australian representative of the Australian Watch-tower Bible and Tract Society of New South Wales. (This Society has been declared an unlawful body under reg. 3.) The plaintiff association was in exclusive occupation of land and buildings known as Kingdom Hall in Adelaide. The hall was used as a meeting place for persons who designate themselves Jehovah's Witnesses. Services of a religious character were held in the hall, at which discourses were delivered upon the doctrines, beliefs and teachings of Jehovah's Witnesses.

On 17th January 1941 the Governor-General declared by an Order in Council that the existence of the plaintiff company and of the organization or association of persons known as Jehovah's Witnesses was prejudicial to the defence of the Commonwealth and the efficient prosecution of the war. On the same day the Attorney-General of the Commonwealth gave a direction to an officer of the Commonwealth to take possession of and occupy Kingdom Hall. An officer of the Commonwealth entered into possession of Kingdom Hall in accordance with the authority given, and this entry and subsequent occupation constitute the trespass alleged.

The case states the following facts :—

"7. Jehovah's Witnesses are an association of persons loosely organized throughout Australia and elsewhere who regard the literal interpretation of the Bible as fundamental to proper religious beliefs.

8. Jehovah's Witnesses believe that God, Jehovah, is the supreme ruler of the universe. Satan or Lucifer was originally part of God's organization and the perfect man was placed under him. He rebelled against God and set up his own organization in challenge to God and through that organization has ruled the world. He rules and controls the world through material agencies such as organized political, religious, and financial bodies. Christ, they believe, came to earth to redeem all men who would devote themselves entirely to serving God's will and purpose and He will come to earth again (His second coming has already begun) and will overthrow all the powers of evil.

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9. These beliefs lead Jehovah's Witnesses to proclaim and teach publicly both orally and by means of printed books and pamphlets that the British Empire and also other organized political bodies are organs of Satan, unrighteously governed and identifiable with the Beast in the 13th chapter of the Book of Revelation.

Also that Jehovah's Witnesses are Christians entirely devoted to the Kingdom of God which is 'The Theocracy,' that they have no part in the political affairs of the world and must not interfere in the least manner with war between nations. They must be entirely neutral and not interfere with the drafting of men of nations that go to war.

And also that wherever there is a conflict between the laws of Almighty God and the laws of man the Christian must always obey God's law in preference to man's law. All laws of men, however, in harmony with God's law the Christian obeys. God's law is expounded and taught by Jehovah's Witnesses.

Accordingly they refuse to take an oath of allegiance to the King or other constituted human authority though they do not object to take an oath in a court of law to speak the truth nor do they refuse the protection of the King's courts or other constituted human authority."

It is also stated in par. 15 of the case :—

" 15. The said incorporated association and the association of persons known as Jehovah's Witnesses proclaim and teach matters prejudicial to the defence of the Commonwealth and the efficient prosecution of the war namely the matters set forth in par. 9 of this case, but otherwise their doctrines or beliefs are but primitive religious beliefs."

It needs no argument to show that the doctrine that the Commonwealth is an organ of Satan is prejudicial to any defence of the Commonwealth against any enemy. There was, in this case, full justification for the action of the Governor-General in deciding that the existence of the plaintiff association was prejudicial to the defence of the Commonwealth and the efficient prosecution of the war. But, as I have already said, the Regulations leave the determination of the question to the Governor-General, and not to a court.

22. The contention for the plaintiff has been that, as Jehovah's Witnesses are a body of persons associated for religious purposes, they are completely exempt from the operation of the Regulations in the form in which the Regulations are actually drawn. The first principal argument is that the Commonwealth may legislate to punish subversive acts, but not to terminate the existence of any subversive bodies, whether those bodies are religious or not. The

next principal argument is that in the case of a religious body the body has further the express protection of s. 116 of the Constitution.

I have given my reasons for the opinion that it is within the power of the Commonwealth to terminate the existence of subversive bodies, and for the further opinion that the exercise of this power in the case of a religious organization does not infringe s. 116.

The questions asked in the case and the answers which, in my opinion, should be given to them are as follows :—

*Question* 1 : Is the Adelaide Company of Jehovah's Witnesses Incorporated a party competent to maintain that the *National Security* (*Subversive Associations*) *Regulations*, the said Order in Council, and the said Direction of the Attorney-General above mentioned contravene the provisions of s. 116 of the Constitution ?

It is obvious that a company cannot exercise a religion. In the United States of America it has been decided that only natural persons, and not artificial persons, such as corporations, have the privileges and immunities of free speech and of assembly under the Constitution : See *Hague* v. *Committee for Industrial Organization* (1).

To the objection that the plaintiff company is not entitled to the protection of s. 116 of the Commonwealth Constitution the answer has been made and, in my opinion, effectively made, that in this case the defendant justifies under certain Regulations what would otherwise have been a trespass ; the plaintiff contends that those Regulations are invalid because they have been made in breach of s. 116 of the Constitution. If they are invalid for this or any other reason the defendant should not be allowed to rely upon them. I can see no answer to this argument.

But, for reasons which I have already stated, the declaration of the Governor-General was effective to bring the Regulations into operation in the case of the plaintiff. Accordingly, under reg. 4 the plaintiff company has been dissolved. It is therefore no longer a competent plaintiff. For this reason, but only for this reason, in my opinion question 1 should be answered : No.

*Question* 2 : Do the *National Security* (*Subversive Associations*) *Regulations* or any and which of these regulations contravene the provisions of s. 116 of the Constitution ?

*Answer* : No.

*Question* 3 : Do the said Order in Council and the said direction of the Attorney-General above mentioned or any and what part thereof so far as they affect the said incorporated association or the association of persons known as Jehovah's Witnesses, contravene the provisions of s. 116 of the Constitution ?

*Answer* : No.

(1) (1939) 307 U.S. 496, at p. 514 [83 Law. Ed. 1423, at p. 1436].

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*Question* 4 : Are the *National Security* (*Subversive Associations*) *Regulations* or any and which of those regulations, beyond the powers or authorities conferred by :—

(*a*) The Constitution.

(*b*) The *National Security Act* 1939-1940 ?

*Answer* : I have stated my opinion as to the validity of most of the regulations, but I cannot see that it is necessary to answer this question as to all of them. The only regulations which are directly in question in the present case are regs. 3, 4 and 6A. In my opinion this question is sufficiently answered by declaring that regs. 3 and 4 are not, but reg. 6A is, beyond the powers or authorities mentioned in the question.

*Question* 5 : Is the said Order in Council or the said direction of the Attorney-General or any and what part thereof so far as either affects the said incorporated association or the association of persons known as Jehovah's Witnesses, beyond the powers and authorities conferred by :—

(*a*) The Constitution.

(*b*) The *National Security Act* 1939-1940.

(*c*) The *National Security* (*Subversive Associations*) *Regulations* ?

*Answer* : As to the Order in Council, as to (*a*), (*b*) and (*c*) : No. As to the direction of the Attorney-General—as to (*a*), (*b*) and (*c*) : Yes.

*Question* 6 : Do the said *National Security* (*Subversive Associations*) *Regulations*, upon their proper construction, extend to the said incorporated association or the association of persons known as Jehovah's Witnesses ?

*Answer* : As to both associations : Yes.

RICH J. In this matter the facts appear in the case stated. The main arguments addressed to us by counsel for the plaintiff company were that the *National Security* (*Subversive Associations*) *Regulations* contravened s. 116 of the Constitution and that the Regulations are outside the defence power. As to the first argument I think that the Court should be very careful in applying s. 116 of the Constitution to legislation impugned under its provisions. In one sense the provision is very wide and in another narrow. It is wide in the area of religious faith which it seeks to protect, but it may be said to be narrow in its description of the kinds of laws which it disallows as impinging upon the freedom of faith. It is, I think, a mistake for the Court to lay down general or abstract propositions as to the effect of s. 116. It is typically a provision the interpretation of which should be developed by specific decisions applicable to the

particular facts of the given cases. In the present case we have been furnished by my brother *Starke*, from whom the case stated comes, with a precise account of the beliefs professed by the individuals who form the incorporated company—the plaintiff in this action. It is to the facts so stated that we must apply s. 116. We must take the Regulations, assume that in other respects they are valid, and see whether the operation of those Regulations on those facts would contravene any of the prohibitions contained in s. 116. The only part of those prohibitions which appear to me to be relevant is that which expressly prevents the Commonwealth from making a law prohibiting the free exercise of any religion. The rest of the provisions of the section seems to be irrelevant. As to the relevant part of the prohibitions I cannot believe that the suppression of the plaintiff corporation prohibits the free exercise of any part of the religious faith ascribed by the case stated to the individual corporators. Sir *William Holdsworth*, *History of the Law*, vol. VIII., pp. 402-420, has traced the development of the law towards religious toleration, and it may be said that religious liberty and religious equality are now complete (*Maitland*, *Constitutional History of England*, p. 520). This, however, does not afford an unlimited licence to propagate or disseminate subversive doctrines. In this connection I would adapt some passages from the speech of Lord *Sumner* in *Bowman* v. *Secular Society Ltd.* (1): "The words, as well as the acts, which tend to endanger society differ from time to time in proportion as society is stable or insecure in fact, or is believed by its reasonable members to be open to assault. The question whether a given opinion is a danger to society is a question of the times and is a question of fact. Society has the right to protect itself by process of law from the dangers of the moment, whatever that right may be. The attitude of the law both civil and criminal towards all religions depends fundamentally on the safety of the State."

Any regulations, therefore, which empower the Government to prevent persons or bodies from disseminating subversive principles or doctrines or those prejudicial to the defence of the Commonwealth or the efficient prosecution of the war do not infringe s. 116. The peace, good government and order of the Commonwealth may be protected at the same time as the freedom of religion is safeguarded. Freedom of religion is not absolute. It is subject to powers and restrictions of government essential to the preservation of the community. Freedom of religion may not be invoked to cloak and dissemble subversive opinions or practices and operations

(1) (1917) A.C. 406, at pp. 466, 467.

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dangerous to the common weal. Any competition between governmental powers and liberty under the Constitution can be reconciled and made compatible. They co-exist without invasion of their respective spheres of action. Accordingly I consider the Regulations in question do not infringe the section.

I am not, however, satisfied that the *National Security* (*Subversive Associations*) *Regulations* are within the defence power of the Federal Parliament. They are so widely expressed and the material parts are so difficult to restrain by interpretation or by any attempt at separation that I am disposed to agree with the view on this point of my brother *Williams*, whose judgment I have had the privilege of reading.

I answer the questions submitted as follows :—

1. Yes.
2. No.
4. Yes with regard to regs. 3 to 6B inclusive.
5. Yes.

I find it unnecessary to answer questions 3 and 6.

STARKE J. Case stated pursuant to the *Judiciary Act* 1903-1940 in an action of trespass based upon the entry of Commonwealth officers into certain premises known as " Kingdom Hall " belonging to or in the possession of the plaintiff company and its exclusion therefrom. The Commonwealth justified under the *National Security Act* 1939-1940, the *National Security* (*Subversive Associations*) *Regulations*, and an Order in Council and direction of the Attorney-General made thereunder.

The plaintiff company contends that the *National Security* (*Subversive Associations*) *Regulations* and the Order in Council and the direction of the Attorney-General are unauthorized by the Constitution and the *National Security Act* 1939-1940, contravene the provisions of s. 116 of the Constitution invalidating any law for prohibiting the free exercise of religion, and impinge upon the judicial power of the Commonwealth. They also contend that the *National Security* (*Subversive Associations*) *Regulations* do not extend upon their proper interpretation to the plaintiff.

1. The validity of the *National Security Act* 1939-1940, s. 5, was not disputed and could not be disputed in this Court in view of its decisions (*Wishart* v. *Fraser* (1) ; *Roche* v. *Kronheimer* (2) ; *Victorian Stevedoring & General Contracting Co. Pty. Ltd. and Meakes* v. *Dignan* (3) ). A multitude of regulations have been made by the Governor-General in Council under the powers conferred upon him by the

(1) (1941) 64 C.L.R. 470.
(2) (1921) 29 C.L.R. 329.
(3) (1931) 46 C.L.R. 73.

*National Security Act*, and in the main their validity has been supported (*Farey* v. *Burvett* (1); *Andrews* v. *Howell* (2); *Victoria* v. *The Commonwealth* (3); *Silk Bros. Pty. Ltd.* v. *State Electricity Commission of Victoria* (4)).

2. The *National Security Act* 1939-1940 authorizes the Governor-General in Council (*Acts Interpretation Act* 1901-1941, s. 17, "Governor-General") to make regulations for securing the public safety and defence of the Commonwealth. The regulations authorized "are . . . of the widest possible character and may affect not only the liberty but also the property of all subjects." Extraordinary powers "are given . . . because the emergency is extraordinary," but they "are limited to the period of the emergency" (*Liversidge* v. *Anderson* (5); *Reference re Regulations re Chemicals* (6)). If the power is abused or misused, the only remedy is by political action, and not by appeal to the courts of law (*R.* v. *Halliday* (7); *Victorian Stevedoring & General Contracting Co. Pty. Ltd. and Meakes* v. *Dignan* (8)). Still the Governor-General is a subordinate authority, and can no more transcend the powers contained in the Constitution than can the Parliament itself. Consequently the regulations must be "with respect to" defence: they must in substance relate to defence or, to use the words of the Chief Justice, have a "real connection with defence" (*Victoria* v. *The Commonwealth* (9)). No general test applicable to all cases can be laid down. The true character, object and effect of the legislation or regulation can only, as has been said, be ascertained from an examination of the legislation or the regulation in its entirety. Moreover, the Governor-General cannot exceed the powers conferred upon him by the *National Security Act* 1939-1940 itself, which, as already noticed, are limited to regulations for securing the public safety and defence of the Commonwealth. And this, I think, may be asserted, that no regulation made by a subordinate authority, whether that authority be the Governor-General in Council or other public authority, can be within power if arbitrary or capricious. In other words, if the regulation involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the court might well say: "Parliament never intended to give authority to make such rules." A regulation of that character would not be a law or a regulation "with respect to defence" or for securing the public

(1) (1916) 21 C.L.R. 433.
(2) (1941) 65 C.L.R. 255.
(3) (1943) 66 C.L.R. 488.
(4) *Ante*, p. 1.
(5) (1942) A.C. 206, at pp. 212, 261.
(6) (1943) 1 D.L.R. 248.
(7) (1917) A.C. 260, at p. 270.
(8) (1931) 46 C.L.R. 73, at p. 84.
(9) (1943) 66 C.L.R. 488.

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safety or defence of the Commonwealth (*Slattery* v. *Naylor* (1); *Widgee Shire Council* v. *Bonney* (2); *Kruse* v. *Johnson* (3); *R.* v. *Broad* (4); *R.* v. *Halliday* (5); *Reference re Regulations re Chemicals* (6)). It would be more than an abuse or misuse of power: it would be beyond power.

The courts must not, of course, forget that those who are responsible for the national security must be the best judges of what the national security requires, but still in Australia neither the Parliament nor the Governor-General in Council can transcend the Constitution, nor can the Governor-General transcend the powers conferred upon him by the *National Security Act* 1939-1940. Thus, to suggest an extravagant illustration, a regulation under the *National Security Act* that any person who the Governor-General declares has acted, in his opinion, in a manner prejudicial to the defence of the Commonwealth or the efficient prosecution of the war shall be executed, could not be supported as a regulation with respect to defence or the safety and defence of the Commonwealth, because of its arbitrary and capricious nature. It would not do to say that it was merely an abuse of power and that the remedy was political, for the regulation would be beyond power: it would not be a regulation with respect to defence or the safety and defence of the Commonwealth.

This brings me to an examination of the *Subversive Associations Regulations*. It should be noted that the *National Security Act* 1939-1940 continues in operation "not longer than six months after His Majesty ceases to be engaged in war", and regulations made thereunder must also then cease to operate. The Regulations provide that any body, corporate or unincorporate, the existence of which the Governor-General declares to be in his opinion prejudicial to the defence of the Commonwealth or the efficient prosecution of the war "is hereby declared to be unlawful." Standing alone, this provision is not open to attack (*Lloyd* v. *Wallach* (7); *Ex parte Walsh* (8); *R.* v. *Halliday* (9); *Liversidge* v. *Anderson* (10)). But it is not the declaration so much as the consequences of the declaration that have been attacked. Any body in respect of which a declaration is made is, by force of the declaration, dissolved. A regulation providing for the precautionary detention of individuals has been upheld under provisions such as in the *National Security Act* (See cases, *supra*). And, so I apprehend, could regulations controlling

(1) (1888) 13 App. Cas. 446, at p. 452.
(2) (1907) 4 C.L.R. 977, at p. 983.
(3) (1898) 2 Q.B. 91, at p. 99.
(4) (1915) A.C. 1110, at p. 1122.
(5) (1917) A.C. 260, at p. 272.
(6) (1943) 1 D.L.R. 248, at p. 256.
(7) (1915) 20 C.L.R. 299.
(8) (1942) A.L.R. 359.
(9) (1917) A.C. 260.
(10) (1942) A.C. 206.

the activities or operations of any body mentioned in the *Subversive Associations Regulations*, as was done in the case of enemy subjects by the *Trading with the Enemy Act*, No. 14 of 1939, s. 13. But here are regulations of a temporary character which dissolve the body and wind it up. Further still, any person, including a bank, having in his possession or custody any property which immediately prior to the dissolution of the body belonged to, or was used by or on behalf of, or in the interests of, that body or was held by trustees for and on behalf of that body, shall on demand deliver that property to a person authorized by the Minister. And any person not below the rank of sergeant may by notice in writing served on any person declare that any persons specified in the notice are, with respect to any account so specified, trustees for any such body, and that declaration is conclusive evidence that those persons are trustees of the body with respect to any moneys standing to the credit of the account. And any property taken possession of or delivered to a person authorized by the Minister is forfeited to the King for the use of the Commonwealth. It is not a precautionary detention of property but a forfeiture of property to the Crown, though no offence is created. The matter is entirely one for the discretion of the Executive, regardless apparently, except by the grace of the Executive, of obligations to creditors or others or even the interests of persons in property used by or in the interests of a declared body. Any house, premises, or place or part thereof occupied by a body prior to its declaration may, if the Minister so orders, be occupied so long as there is in the house, premises or place or part thereof any property which the Minister is satisfied belonged to, or was used by or on behalf of, or in the interests of, the body.

A regulation might be legitimate, if merely precautionary, but the operation of the Regulations under consideration is to forfeit property to the Crown even though the property be not that of the declared body but only used on behalf of or in its interests. Further still, a person shall not publish or broadcast any unlawful doctrines or hold or convene any meeting or with any other person assemble in any place for the purpose of advocating any unlawful doctrines. And unlawful doctrines include any doctrines or principles which were advocated by a declared body and also any doctrines or principles whatsoever which are prejudicial to the defence of the Commonwealth or the efficient prosecution of the war. So the doctrines of a declared body, whether they be religious, political, economic or social, innocent or injurious, are all prohibited, whether they be or be not prejudicial to the defence of the Commonwealth or the efficient prosecution of the war.

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In themselves the Regulations are arbitrary, capricious and oppressive. Bodies corporate and unincorporate are put out of existence and divested of their rights and their property on the mere declaration of the Executive Government. The operative clauses of the Regulations, such as the provision relating to bank credits, forfeitures and unlawful doctrines have little, if any, real connection with the defence of the Commonwealth or the efficient prosecution of the war. Accordingly, in my judgment, the Regulations are beyond the power conferred upon the Governor-General in Council by the *National Security Act* 1939-1940, and, even if enacted by the Parliament itself, they would, I venture to think, transcend the powers conferred upon the Parliament by the Constitution.

It was suggested, however, that the Regulations are not wholly bad but are severable: See *Acts Interpretation Act* 1901-1941, ss. 15A, 46 (*b*). But these Regulations are so bound up with invalid provisions that they cannot be severed. Notwithstanding the presumption in favour of divisibility which arises from the legislative declaration, the court cannot rewrite a regulation and give it an effect altogether different from that sought by the regulations viewed as a whole: See *Railroad Retirement Board* v. *Alton Railroad Co.* (1); *Australian Railways Union* v. *Victorian Railways Commissioners* (2).

3. The Constitution, in s. 116, enacts: "The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth."

It was contended that the *Subversive Associations Regulations* contravened this provision and were therefore void. In the view I take this case can be resolved without reference to the constitutional provision. But, as the matter was argued at some length, a few observations upon the subject are perhaps desirable. The Commonwealth is prohibited from making any law for the establishment of any religion or prohibiting the free exercise thereof. The Parliament is given no express power to legislate with respect to religion, but it has many other legislative powers. And those other powers cannot be exercised in contravention of the provision for religious liberty or freedom protected and guaranteed by the Constitution. But liberty and freedom in an organized community are relative and not absolute terms.

The present Chief Justice of the Supreme Court of the United States observed in his dissenting judgment in the case of *Minersville*

(1) (1935) 295 U.S. 330, at p. 362 [79 Law. Ed. 1468, at p. 1482].
(2) (1930) 44 C.L.R. 319, at p. 386.

*School District* v. *Gobitis* (1): "Concededly the constitutional guarantees of personal liberty are not always absolutes. Government has a right to survive and powers conferred upon it are not necessarily set at naught by the express prohibitions of the Bill of Rights. It may make war and raise armies. To that end it may compel citizens to give military service, . . . and subject them to military training despite their religious objections. . . . It may suppress religious practices dangerous to morals, and presumably those also which are inimical to public safety, health and good order."

The liberty and freedom predicated in s. 116 of the Constitution is liberty and freedom in a community organized under the Constitution. The constitutional provision does not protect unsocial actions or actions subversive of the community itself. Consequently the liberty and freedom of religion guaranteed and protected by the Constitution is subject to limitations which it is the function and the duty of the courts of law to expound. And those limitations are such as are reasonably necessary for the protection of the community and in the interests of social order. Therefore there is no difficulty in affirming that laws or regulations may be lawfully made by the Commonwealth controlling the activities of religious bodies that are seditious, subversive or prejudicial to the defence of the Commonwealth or the efficient prosecution of the war.

The critical question is whether the particular law, as in this case, is reasonably necessary for the protection of the community and in the interests of social order. In my opinion the present Regulations, if they had been within power, would not have transcended those limits. The Constitution of the United States of America contains a provision substantially the same as that contained in s. 116 of the Constitution. But I shall not go through the American cases which may be found at large in *Willoughby* on the *Constitution of the United States*, 2nd ed., ch. 65, p. 1185, and in *Willis* on *Constitutional Law*, chs. XVII., XVIII., at pp. 477-513, and in the late cases of *Minersville School District* v. *Gobitis* (2), already mentioned, *Jones* v. *Opelika* (3) [and since this judgment was delivered *West Virginia Board of Education* v. *Burvette* (4)], where the main American decisions may be found; see also *James* v. *The Commonwealth* (5).

4. The contention that the *Subversive Associations Regulations* impinge upon the judicial power of the Commonwealth is untenable.

(1) (1940) 310 U.S. 586, at pp. 602, 603 [84 Law. Ed. 1375, at p. 1383].
(2) (1940) 310 U.S. 586 [84 Law. Ed. 1375].
(3) (1942) 316 U.S. 584 [86 Law. Ed. 1691].
(4) (1942) 87 Law. Ed. (Advance Opinions) 1171.
(5) (1936) A.C. 578, at p. 593.

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Indeed, a remarkable feature of the Regulations is the number of consequences that follow the declaration that a body is unlawful without any resort to the judicial power: See, for instance, regs. 4, 6A, 6B. But that does not impinge upon the judicial power, though it may seriously affect the liberty of the subject and his property. *Roche* v. *Kronheimer* (1) decisively negatives the contention so far as this Court is concerned.

The questions stated should be answered as follows:—

1. Yes.
2. No.
3. No.
4. (*a*) Unnecessary to answer.
   (*b*) Yes.
5. (*a*) Unnecessary to answer.
   (*b*) Yes.
   (*c*) Unnecessary to answer.
6. Yes.

McTIERNAN J. Question 1.—In my opinion the answer should be: No. I agree with the reasons of the Chief Justice for answering this question in the negative.

Question 2.—In my opinion the answer should be: No. The reasons are that it is plain that none of the Regulations is in terms "a law for prohibiting the free exercise of any religion"; and it does not appear that the real object of the Regulations is to arm the Executive with power to prohibit or restrict the exercise of any religion or that there is any attempt "to mock" the constitutional guarantee of religious freedom: See *James* v. *Cowan* (2).

Question 3.—In my opinion the answer should be: No. The question turns upon the interpretation of the provisions of s. 116, which prohibit interference by the Commonwealth with the free exercise of any religion. The section creates a restriction both on legislative and executive power.

The word religion extends to faith and worship, to the teaching and propagation of religion, and to the practices and observances of religion.

Section 116 imposes a restriction on all the legislative powers of Parliament. An Act passed by Parliament may be a law with respect to any of the subjects of power enumerated in s. 51 or with respect to any other subject of legislative power, but if it answers to the description of "a law for prohibiting the free exercise of any

(1) (1921) 29 C.L.R. 329.

(2) (1932) A.C. 542, at p. 558.

religion" within the meaning of s. 116 it violates the Constitution and is void.

The terms of the Order in Council show that there is a conflict between the existence of the bodies mentioned in the Order and the security of the Commonwealth against the enemy. In these circumstances which is to prevail? It would be contrary to well-settled principles for the court to question in war-time the opinion of the Executive which is declared by the Order in Council. The Executive is in a better position than the court during war to form an opinion whether the existence of the bodies mentioned in the order is prejudicial to the defence of the Commonwealth and the prosecution of the war. By dissolving these bodies it is true that the Commonwealth has directly interfered with the teaching of the principles and with the practices described in the case stated and, if the guarantee of the free exercise of religion is absolute, it violated the guarantee. Does the Constitution deprive the Executive in war-time of the power to secure the safety of the Commonwealth against invasion by suppressing a body whose existence is prejudicial to the defence of the Commonwealth and the efficient prosecution of the war? The provisions of s. 116 that the Commonwealth shall not make any law for prohibiting the free exercise of any religion must obviously be limited in their legal effect by necessity and accommodated, at least, to the powers with which the Constitution arms the Commonwealth to defend itself against invasion. In my opinion s. 116 does not according to its true interpretation extend to the executive action which has been taken to suppress the plaintiff. I agree with the reasons which the Chief Justice has given for denying that the words of s. 116, on which the plaintiff relies, create an absolute guarantee of the free exercise of any religion.

Questions 4, 5 and 6.—I agree with the answers and reasons of the Chief Justice.

Regarding question 4, I shall add that by s. 5 of the *National Security Act*, Parliament delegated to the Executive its own legislative power in the field limited by that section. Regs. 3 and 4 are within that field and within the defence power of the Commonwealth.

The possible abuse of the power conferred on the Executive is not an argument against the existence of the power: See *McCray* v. *United States* (1); *Twining* v. *New Jersey* (2); *Hamilton* v. *Kentucky Distilleries and Warehouse Co.* (3).

(1) (1904) 195 U.S. 27 [49 Law. Ed. 78].
(2) (1908) 211 U.S. 78 [53 Law. Ed. 97].
(3) (1919) 251 U.S. 146 [64 Law. Ed. 194].

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WILLIAMS J. The questions asked in the case stated relate mainly to the constitutional validity of the *National Security* (*Subversive Associations*) *Regulations*, under which the defendant, the Commonwealth of Australia, seeks to justify what would otherwise be certain trespasses committed against the plaintiff.

The plaintiff is a body incorporated under the provisions of the *Associations Incorporation Act* 1929-1935 (S.A.). It was in exclusive occupation of certain lands and buildings known as Kingdom Hall, situated in Sturt Street, Adelaide, in the State of South Australia. The hall was used as a meeting place for an association of persons known as Jehovah's Witnesses. The association held meetings of a religious character in the hall whereat hymns were sung, prayers offered and discourses delivered upon the doctrines, beliefs and teachings of Jehovah's Witnesses.

By an Order in Council made on 17th January 1941 the Governor-General, after reciting reg. 3 of these Regulations, acting with the advice of the Federal Executive Council, declared that in his opinion the existence, *inter alia*, of the organization or organizations known as Jehovah's Witnesses or the Witnesses of Jehovah was prejudicial to the defence of the Commonwealth and the efficient prosecution of the war. By a direction of the Attorney-General made on the same date, after reciting reg. 6A of these Regulations, the declaration made by the Governor-General, and also reciting that immediately prior to the date of this declaration the premises in Sturt Street, Adelaide, were occupied by the organization or organizations known as Jehovah's Witnesses or the Witnesses of Jehovah, and that the Attorney-General was satisfied that there was on these premises property which belonged to or was used by or on behalf of or in the interests of this subversive association and which was therein immediately prior to the subversive association having been declared to be unlawful directed that :—The Inspector, Commonwealth Investigation Branch in South Australia, should take possession of, control and occupy Kingdom Hall, that no person should, except with the consent of the inspector, be in or enter or leave the hall, and that no property whatsoever should, except with the consent of the inspector, be brought into or removed from the hall.

The Association of Jehovah's Witnesses is a religious sect professing primitive Christian beliefs, one of these being that the nations of the earth including the British Commonwealth of Nations are under the control of Satan, and that it will be necessary for Jesus Christ (whose second coming on earth has already begun) through His true followers to overthrow all these satanic governments in order to establish His kingdom on earth. Because the Government of the Commonwealth is a satanic government, the witnesses object to

take the oath of allegiance or to assist in the defence of the Commonwealth in time of war. They do not engage in any overt hostile acts; their attitude to the war is one of strict neutrality; but it is apparent that an attitude of non-co-operation in the prosecution of the war and a propagation of a belief that no benefit will flow from defeating the enemy must have an eroding effect on the national war effort.

On these facts my brother *Starke* has found that the plaintiff and the association of persons known as Jehovah's Witnesses proclaim and teach matters prejudicial to the defence of the Commonwealth and the efficient prosecution of the war, but that otherwise their doctrines or beliefs are primitive religious beliefs.

The plaintiff's cause of action is that it was in exclusive occupation of the hall and that the defendant, the Commonwealth of Australia, unlawfully trespassed upon and dispossessed it. The defence of the Commonwealth is that it acted lawfully under the powers conferred upon it by the *National Security* (*Subversive Associations*) *Regulations*.

The plaintiff contends that: (1) these Regulations are invalid in all cases or at least as against the plaintiff, because they contravene s. 116 of the Constitution; (2) that the Regulations are invalid because they are beyond the ambit of the defence power; and (3) that certain of the Regulations are invalid because they attempt to confer judicial power upon persons not eligible to exercise such power under s. 71 of the Constitution.

As to the first contention. Just as the meaning and scope of the powers conferred upon the Parliament of the Commonwealth by the Constitution, however absolute their terms, must be ascertained, as in any other document, in the context of the whole of the Constitution, so the meaning and scope of s. 116 must be determined, not as an isolated enactment, but as one of a number of sections intended to provide in their inter-relation a practical instrument of government, within the framework of which laws can be passed for organizing the citizens of the Commonwealth in national affairs into a civilized community, not only enjoying religious tolerance, but also possessing adequate laws relating to those subjects upon which the Constitution recognizes that the Commonwealth Parliament should be empowered to legislate in order to regulate its internal and external affairs. The determination of the meaning of an ordinary English phrase or word in a statute is a question of fact, the problem being to ascertain what the phrase or word meant in its ordinary popular acceptation at the date the statute was passed. At the date of the Constitution it would not have been considered in a popular sense to have been an interference with the

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free exercise of religion for the legislation of the States to have included laws (as in fact it did) making polygamy or murder a crime, although it was still a tenet of some religious beliefs to practice polygamy or human sacrifice. Such laws would be classified as ordinary secular laws relating to the worldly organization of the community, even if their indirect effect might be to prevent some religious sects indulging in practices which in the ordinary popular acceptation would be regarded as crimes and as having no connection with any observance which an enlightened British community would consider to be an exercise of religion. The right to the free exercise of religion conferred by the Constitution postulates a continuous right to such freedom in a Commonwealth which will survive the ordeal of war. When, therefore, the safety of the nation is in jeopardy, so that the right to such free exercise can only survive if the enemy is defeated, laws which become necessary to preserve its existence would not be laws for prohibiting the free exercise of religion. There are many conceivable circumstances in war-time in which it might be necessary for the military authorities to take physical possession even of churches and other buildings where religion is practised, and a law enabling the military authorities to do so would not be a law prohibiting the free exercise of religion. It is impossible, in my opinion, to impute to the framers of the Constitution an intention that the phrase " the free exercise of religion " should confer an absolute right to propagate a belief that the system of government created by the Constitution was of a satanic nature, the functioning of which, in spheres which the common sense of the community generally would regard as entirely secular, was not to be judged on its merits or demerits as worldly legislation, but to be condemned in every instance as an emanation of Satan. The easy toleration of a British community often permits bodies with such beliefs to flourish in its midst in times of peace, although it is the usual practice of such bodies to accept the benefits but refuse to shoulder the responsibilities incidental to citizenship in such a community. But the activities of such bodies can be subversive of good government even in peace-time, and in war-time can become a serious menace. If the Regulations only conferred such powers as were reasonably required to prevent bodies disseminating principles and doctrines prejudicial to the defence of the Commonwealth during the war, they could not be impeached under s. 116, even if they interfered incidentally with activities that some persons in the community considered to be the free exercise of religion, because in its popular sense such principles and doctrines would not be considered to be religion, but subversive

activities carried on under the cloak of religion. The attack on the Regulations as an infringement of s. 116 therefore fails.

As to the second contention. A state of war, however prolonged the duration of a conflict such as the present war may be, does not continue indefinitely. Because war promotes abnormal conditions, abnormal means are required to cope with them, and this justifies the Parliament of the Commonwealth under the defence power enacting many laws in times of war which would be beyond its scope in times of peace. As my brother *Dixon* said in *Andrews* v. *Howell* (1), in discussing the defence power :—" In dealing with that constitutional power, it must be remembered that, though its meaning does not change, yet unlike some other powers its application depends upon facts, and as those facts change so may its actual operation as a power enabling the legislature to make a particular law. In the same way the operation of wide general powers conferred upon the Executive by the Parliament in the exercise of the power conferred by s. 51 (vi.) is affected by changing facts. The existence and character of hostilities, or a threat of hostilities, against the Commonwealth are facts which will determine the extent of the operation of the power. Whether it will suffice to authorize a given measure will depend upon the nature and dimensions of the conflict that calls it forth, upon the actual and apprehended dangers, exigencies and course of the war, and upon the matters that are incident thereto."

A state of war, therefore, justifies legislation by the Commonwealth Parliament, in the exercise of the defence power, which makes many inroads on personal freedom, and which places many restrictions on the use of property of an abnormal and temporary nature which would not be legitimate in times of peace. A law that called up the whole of the civil population between the ages of eighteen and sixty for continuous military service during the whole of these years in times of peace would be so fantastic that it could not be said to be a real exercise of the defence power. The substance and purpose of such a law would be to organize the Commonwealth as a military state and not to take the necessary steps to prepare for war ; but it would be a valid exercise of the power to call up all or any citizens between these ages for continuous military service for the indefinite period of the war.

So bodies corporate and unincorporate and individuals may profess ideas or carry on activities which in times of peace may be harmless, but which in time of war may interfere with the successful defence of the Commonwealth.

(1) (1941) 65 C.L.R. 255, at p. 278.

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It is recognized that the internment of such persons on mere suspicion without trial for some period not exceeding that of the war upon the opinion of a Minister that their liberty is prejudicial to the safety of the realm is a valid exercise of a plenary administrative discretion. The justification for what would be in times of peace an unwarranted interference with the liberty of the subject is that in many instances it would be against the public interest for the Minister to have to disclose to a court the confidential information upon which he acted (*Liversidge* v. *Anderson* (1); *R.* v. *Secretary of State for Home Affairs*; *Ex parte Budd* (2)). It is the exercise of an administrative discretion to interfere with the freedom of individuals by conscripting them for service in the armed forces of the Commonwealth, or by compelling them to labour in some particular locality at some particular form of work connected with the prosecution of the war. It is also an interference with the freedom of individuals in a somewhat different but no more extreme form necessitated by the same emergency to compel them to undergo internment. Such an interference was described by Lord *MacMillan* in *Liversidge's Case* (3) to be, in comparison with conscription, a relatively mild precaution.

The right of the Commonwealth Parliament to require Australian citizens to serve in the armed forces or engage in some form of work connected with the prosecution of the war is, of course, absolutely clear; and, for the reasons already given, it is equally clear, as this Court has decided, that the right to intern other citizens of the character mentioned must also exist (*Ex parte Walsh* (4)). But an Act which said that if, in the opinion of a Minister, the existence of any body of individuals was considered to be prejudicial to the defence of the Commonwealth during the war, these individuals were forthwith to be cremated and all their property confiscated to the Crown, would be such a complete destruction of the personal and proprietary rights of individuals for an offence of such an indefinite nature that it would go far beyond anything that could conceivably be required for the purposes of meeting the abnormal conditions created by the war.

The same principles must apply *mutatis mutandis* to property. Nearly all rights of property arise under the common law or statutes of the States. Most corporations are incorporated under State laws, and the rights of the corporators and creditors, including their rights to have the corporation dissolved, and their rights upon dissolution, depend upon these laws. It is the duty of the Commonwealth under s. 119 of the Constitution to protect every State against invasion.

(1) (1942) A.C. 206.
(2) (1942) 2 K.B. 14, at pp. 19-21.
(3) (1942) A.C., at p. 257.
(4) (1942) A.L.R. 359.

This duty must be fulfilled in order to preserve the Constitutions of the States and the rights of citizens and corporations under the laws of the States. For the purposes of defence the Commonwealth can in times of war pass legislation affecting the rights of the States and of their citizens and corporations under State laws to a greater extent than it can in times of peace (*South Australia* v. *The Commonwealth* (1) ). But the extent to which it can entrench upon these rights is limited by the reasonable necessities of defence during the period of the war. If it is necessary for the Commonwealth to acquire such property, it can do so subject to s. 51 (xxxi.) of the Constitution. But the mere fact that the corporation or individual or body of individuals is carrying on some activity, which in the opinion of Parliament or of some Minister is prejudicial to the defence of the Commonwealth, cannot, in my opinion, conceivably require that the Commonwealth should enact that the property of such corporation or individual or body should be forfeited to the Crown, and the rights of all corporators and creditors in that property under State laws completely destroyed.

Under the *Subversive Associations Regulations*, 3 to 8 inclusive, if the Governor-General, by Order published in the *Gazette*, declares that the existence of any body corporate or unincorporate is prejudicial to the defence of the Commonwealth or the prosecution of the war, that body becomes an unlawful body and is dissolved by force of the declaration (regs. 3 and 4). Any doctrines or principles which were advocated by that body become unlawful and any printing or publishing of such doctrines or principles becomes unlawful; and no person shall hold or convene any meeting or with any other person assemble in any place for the purpose of advocating such doctrines (regs. 7 and 8). Any Minister can order any person to deliver any property of the body which was held by or on behalf of or in the interests of the body to a person thereto authorized by a Minister; any member of the Police Force of the Commonwealth or a State or Territory of the Commonwealth, if not below the rank of sergeant, may by notice in writing declare that any persons specified in the notice are, with respect to any bank account so specified, trustees for the body, and that declaration shall, as between the persons so specified or any of them and the person on whom the notice is served, be conclusive evidence that those persons are trustees of the body with respect to any moneys standing to the credit of the account (reg. 6). Any property taken possession of, or delivered to a person thereto authorized by a Minister, in pursuance of the Regulations becomes forfeited to the King for the use of the Commonwealth and is condemned by force of the regulation; such of the

(1) (1942) 65 C.L.R. 373, at p. 468.

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property as the Attorney-General or an authorized person is satisfied belonged to a body which has been declared to be unlawful may be destroyed or otherwise dealt with as the Attorney-General directs; such of the property as the Attorney-General or an authorized person is satisfied did not belong to such a body and as consists of books, documents or papers which the Attorney-General or an authorized person is satisfied were used or intended to be used in connection with the activities of such a body, or which, in the opinion of the Attorney-General or an authorized person, advocate unlawful doctrines, may be destroyed or otherwise dealt with as the Attorney-General directs; and the remainder of the property may be returned to the owners thereof or otherwise dealt with as the Attorney-General directs (reg. 6B).

This brief analysis of the contents of these regulations is sufficient to show that the purpose of the enacting authority was, by the mere force of an order made under reg. 3, instantly to dissolve the body and to place the disposal of the whole of its assets and certain assets of third parties in the absolute discretion of the Attorney-General, to vest in police officers and the Attorney-General judicial powers not subject to appeal of determining the ownership of property, and to place a complete veto upon the dissemination of any doctrines or principles whatever advocated by a body which has been declared to be unlawful. The definition of "unlawful doctrines" includes any doctrines or principles which were advocated by a body which has been declared to be unlawful, and any doctrines or principles whatsoever which are prejudicial to the defence of the Commonwealth or the efficient prosecution of the war. Mr. *Weston* submitted that on its true construction this definition should be read so that the words, "which are prejudicial to the defence of the Commonwealth or the efficient prosecution of the war", govern the whole of the preceding words of the definition. On this construction the first branch of the definition would read: "any doctrines or principles which were advocated by a body which has been declared to be unlawful which are prejudicial to the defence of the Commonwealth or the efficient prosecution of the war." It would be included in the second branch of the definition and so would be tautologous. But the definition appears to me to include two distinct classifications of unlawful doctrines, the one a more definite class consisting of those doctrines which were advocated by a body which has been declared to be unlawful, and the other a more indefinite class consisting of any doctrines which are prejudicial to the defence of the Commonwealth or the prosecution of the war whether advocated by an unlawful body or not. Regs. 7 and 8 would operate whether

a body has been declared unlawful or not. But a prosecution for a breach of these regulations would have to aver that the doctrine was unlawful because it was prejudicial to the defence of the Commonwealth or the prosecution of the war, where it could not be averred that it had been advocated by some body which had been declared to be unlawful; whereas, if a body had been declared to be unlawful, it would only be necessary to aver that the doctrine had been advocated by that body. If there was any intention apparent in the context of the Regulations as a whole that any limitation was to be placed on the wide meaning of many of the expressions which they contain, it might be permissible to construe the definition in this narrow way, even at the risk of doing some violence to its language, in order to avoid a capricious and absurd result; but, far from indicating any intention to narrow the meaning of such expressions, the context indicates an intention to give the Regulations the widest possible operation, without any real regard being had to what the possible repercussions of such an operation might be. The definition is therefore wide enough to include perfectly innocent principles and doctrines advocated by a body which has been declared to be unlawful. As the religion of Jehovah's Witnesses is a Christian religion, the declaration that the association is an unlawful body has the effect of making the advocacy of the principles and doctrines of the Christian religion unlawful and every church service held by believers in the birth of Christ an unlawful assembly. Apart from s. 116 such a law could not possibly be justified by the exigencies and course of the war. But it is also prohibited by s. 116.

Mr. *Weston*, after pointing out that the whole of the action taken by the Commonwealth against the plaintiff fell within the ambit of regs. 3 and 6A, also contended that these regulations were severable, so that they could be valid even if the remainder of the regulations or some of them were unconstitutional. Reg. 6A provides that any house, premises or place or part thereof which was occupied by a body immediately prior to its having been declared to be unlawful may, if a Minister by order so directs, be occupied in accordance with the provisions of the order so long as there is in the house, premises or place or part thereof any property which a Minister is satisfied belonged to, or was used by or on behalf of, or in the interests of, the body, and which was therein immediately prior to the body having been declared to be unlawful. The right to occupy a house, premises or other place given by the regulation is wide enough to authorize an occupation of any premises, whether owned by the unlawful body or not, so long as there is on the premises any property which a Minister was satisfied belonged to or was used by or in connection

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with the body. As a purely temporary occupation pending dissolution of the body, the regulation might be justified as an administrative act, but it would be impossible, in my opinion, applying the tests of severability referred to by my brother *Dixon* in *R.* v. *Poole*; *Ex parte Henry* [*No.* 2] (1), to sever regs. 3 and 6A in this way, as the effect would be to confer an indefinite right of occupation and this would give these regulations a completely different operation from that which they would have as part of the Regulations as a whole.

As to the validity of regs. 3 to 8 considered as a whole. There can be no doubt, in my opinion, that the Commonwealth is justified under the defence power in times of war in taking possession of and controlling during the war the property of organizations whose activities are prejudicial to the defence of the Commonwealth or the prosecution of the war, in confiscating any literature which is being used to promote subversive doctrines, and in preventing such bodies from holding meetings; but the vice of these regulations is that the consequences to a body, to those interested in the property of a body as shareholders and creditors, and to third persons which flow from the declarations are so drastic and permanent in their nature that they exceed anything which could conceivably be required in order to aid, even incidentally, in the defence of the Commonwealth. Even if a narrow construction could be placed on the definition of "unlawful doctrines," in which event regs. 7 and 8 might be valid, regs. 3 to 6B would still be objectionable. The Governor-General could form an opinion that the existence of a body was prejudicial to the defence of the Commonwealth or to the efficient prosecution of the war on an almost indefinite number of wholly undefined grounds. To quote the words of Lord *Wright* in *Liversidge's Case* (2): "There is no hard and fast issue of fact, such as there is in the trial of a specific charge on indictment." It could be an offence for a corporation to occupy too many buildings or to employ too many employees. The corporation is not told what the prejudicial conduct consists of or given an opportunity of rectifying it. The declaration can result in the forfeiture of the whole of the property of the corporation to the Crown in destruction of the rights of every person interested in the property, including even creditors who have bona fide dealt with the body in the ordinary course of business, and in a complete overriding of State laws not only relating to events in which the corporation can be dissolved but to the right of the creditors and the shareholders upon a dissolution. None of these creditors may have been aware of any conduct of the corporation which could

(1) (1939) 61 C.L.R. 634, at pp. 651-653. (2) (1942) A.C., at p. 270.

be prejudicial to the conduct of the war. If the shareholders were aware of any such conduct, the rights of a minority who might have done all they could to oppose it would be forfeited in the same way as the rights of the majority who approved of or condoned it. Such a holocaust of proprietary rights could not, in my opinion, conceivably be required, even incidentally, for the purposes of defence.

Reg. 5A provides that: (1) where a body corporate which has been declared to be unlawful is registered as a company under the law of any State or Territory a court of that State or Territory which has jurisdiction to wind up companies shall, subject to this regulation, have the same powers, and the provisions of the law of that State or Territory relating to companies shall apply, as if a winding-up petition had been duly presented to the court by the company and the court had made an order for winding up the company; provided that it shall not be necessary for the court to make an order that the company be dissolved; (2) the Attorney-General may by an order appoint a person to be a liquidator of the company, and such liquidator shall be the sole liquidator of the company and shall have all the powers of a liquidator or official liquidator appointed by the court. But the powers of the court under this regulation would be subject to the right of the Commonwealth to take possession of any property, whether belonging in law to the unlawful body or not under the other regulations, and thereby cause it to be forfeited to the King. The powers of the court would be confined, therefore, to distributing such of the assets of the body as were not taken possession of by a person authorized by a Minister and thereby forfeited to the King.

For these reasons I am of opinion that regs. 3 to 8 are an invalid exercise of the defence power. I express no opinion as to the validity of the remaining regulations.

It is therefore unnecessary to discuss at any length the extent to which the Regulations are invalid because they transgress the judicial power of the Commonwealth. This power can only be exercised by this Court, some other Federal court created by the Commonwealth Parliament, or some court of a State duly invested with Federal jurisdiction (The Constitution, ss. 71 and 77). The meaning of judicial power has been discussed by this Court in many cases, including the recent decisions of *R.* v. *Federal Court of Bankruptcy*; *Ex parte Lowenstein* (1), *Australian Apple and Pear Marketing Board* v. *Tonking* (2), and *Silk Bros. Pty. Ltd.* v. *State Electricity Commission of Victoria* (3). It is as clear to my mind "as burning

(1) (1938) 59 C.L.R. 556, at pp. 575, 576.

(2) (1942) 66 C.L.R. 77, at pp. 83-85, 103, 104.

(3) *Ante*, p. 1.

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daylight" that the determination by police officers or the Attorney-General of the controversies which could arise under regs. 6 (4) and 6B (1) and (2) as to whether property belonged to an unlawful body or to innocent third parties would be an exercise of judicial power, so that these sub-regulations would be invalid on this ground. Reg. 6B (3) is also invalid because it is made to operate retrospectively in breach of the provisions of the *Acts Interpretation Act* 1901-1941, s. 48 (2) (*a*).

In my opinion the questions should be answered as follows:—

1. Yes.
2. No.
3. Does not arise.
4. (*a*) and (*b*) Yes at least as to regs. 3 to 6B inclusive.
5. (*a*) Yes. (*b*) Yes. (*c*) Yes.
6. Does not arise.

*Questions in case answered as follows*:—

1. *Yes.*
2. *No.*
3. *No.*
4. *As to* (*a*) *as to reg.* 6A—*Yes.*
   *as to regs.* 3 *to* 6 *and* 6B—*No answer.*
   *As to* (*b*) *Yes, as to regs.* 3 *to* 6B.
5. *As to* (*a*) *No answer.*
   *As to* (*b*) *in respect of the order and the direction—Yes.*
   *As to* (*c*) *in respect of the order—No answer; in respect of the direction—Yes.*
6. *Yes as to both associations.*

*Case remitted to Starke* J. *Costs of case to be costs in the action.*

Solicitors for the plaintiff, *R. J. M. Newton*, Sydney, by *Pearce & Webster.*

Solicitor for the defendant, *H. F. E. Whitlam*, Crown Solicitor for the Commonwealth.

E. F. H.