[HIGH COURT OF AUSTRALIA.]

THE COMMONWEALTH AND OTHERS . . APPELLANTS;
DEFENDANTS,

AND

GRUNSEIT . . . . . RESPONDENT.
PLAINTIFF,

H. C. OF A. 1943.

SYDNEY, *Feb.* 1, 2, 4, 11.

Williams J.

SYDNEY, *April* 19, 20; *May* 6.

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

National Security—Aliens service—Liability to serve—"Refugee alien . . . who has not . . . been accepted for service" in defence force—Offer to serve not dealt with—Employment in protected undertaking—Direction by Minister—Whether legislative or executive in character—National Security Act 1939-1940 (*No.* 15 *of* 1939—*No.* 44 *of* 1940), *secs.* 5 (1), (3), (4), 13A—*Acts Interpretation Act* 1901-1941 (*No.* 2 *of* 1901—*No.* 7 *of* 1941), *sec.* 46—*National Security* (*Aliens Service*) *Regulations* (*S.R.* 1942 *No.* 39—1942 *No.* 103), *regs.* 4, 8 (1), (1A)—*National Security* (*Man Power*) *Regulations* (S.R. 1942 *No.* 34—1942 *No.* 355), *reg.* 14.

Pursuant to reg. 8 of the *National Security* (*Aliens Service*) *Regulations* the Minister for the Army directed that every male refugee alien of certain descriptions should perform such service in Australia as was directed by the Minister for the Interior, not being service in the armed forces, but being service which the alien was, in the opinion of the Minister for the Interior, capable of performing.

Held, by the whole Court, that the direction was of an executive, and not a legislative, character and, therefore, did not come within the operation of sec. 5 (4) of the *National Security Act* 1939-1940.

A male refugee alien within fourteen days after he first became liable to register under the *National Security* (*Aliens Service*) *Regulations* volunteered for service in the military forces of the Commonwealth. While his offer to serve remained undisposed of by acceptance or rejection, and while he was employed in a protected undertaking within the meaning of the *National Security* (*Man Power*) *Regulations*, he was directed to perform service under reg. 8 of the *National Security* (*Aliens Service*) *Regulations*.

Held, by *Latham* C.J., *Starke* and *McTiernan* JJ. (*Rich* J. dissenting):—

(1) that, within the meaning of reg. 8 (1) (*a*) of the *National Security* (*Aliens Service*) *Regulations*, he was a male refugee alien "who has not, within fourteen

days after he first became liable to register, volunteered and been accepted for service in any part of the Naval Military or Air Forces of the Commonwealth";

(2) that reg. 14 (2) of the *National Security* (*Man Power*) *Regulations* did not operate to prevent his being directed to perform service under reg. 8 of the *National Security* (*Aliens Service*) *Regulations*.

Decision of *Williams* J. reversed.

APPEAL from *Williams* J.

In a writ of summons directed to the Commonwealth of Australia, Edward Granville Theodore (the Director-General of Allied Works) and William Stewart Howard (Deputy Director of Personnel, Allied Works Council) the plaintiff, an infant, by his next friend, Heinrich Grunseit, claimed declarations:—(1) that the *National Security* (*Aliens Service*) *Regulations* were void and of no effect; (2) alternatively, that so much of sub-reg. 3 of reg. 8 of those Regulations as required moneys payable in respect of service of aliens under those Regulations to be paid to the Commonwealth and the whole of sub-regs. 4, 5 and 6 of reg. 8, were void and of no effect; (3) that a direction made on 7th March 1942, published in the Commonwealth *Gazette* on that date, and purporting to be issued under the *National Security* (*Aliens Service*) *Regulations*, was void and of no effect; (4) that a direction made on 17th August 1942, published in the Commonwealth *Gazette* dated 2nd December 1942, and purporting to be issued under the aforesaid Regulations was void and of no effect; (5) that the defendants or either of them, their agents, officers or servants, were not entitled to call upon the plaintiff to do labour or service as required by certain directions given to the plaintiff; and (6) that the defendants or either of them, their agents, officers or servants, should be restrained from compelling, or instructing, or causing the plaintiff to do the said labour or service.

In an affidavit filed in support of the notice of motion for an interlocutory injunction referred to below, the plaintiff stated that he was a former Rumanian subject who was forced to emigrate from Rumania on 17th December 1938 on account of threatened racial persecution and that he was and continued to be opposed to the regime which forced him to emigrate. He had been classified as a refugee alien under the *National Security* (*Aliens Service*) *Regulations*. At the date of the affidavit, namely 6th January 1943, he was twenty years of age and was a student attending the Sydney Technical College in the diploma course for mechanical engineering. He was employed as a junior draftsman by the firm of F. Muller Pty. Ltd., Camperdown. The said firm had been declared a protected undertaking under the *National Security Regulations* and was fully engaged on defence

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projects. The plaintiff himself was directly engaged on that work. On 3rd February 1942 he first became liable to register for national service within the meaning of the *National Security* (*Aliens Service*) *Regulations* and on 9th February 1942 he duly volunteered for military service in accordance with the provisions of reg. 6 of those Regulations. He was medically examined on 25th February 1942 and was found fit, but, some time later, owing to the nature of his employment, he was temporarily exempted from service as being in a reserved occupation. Nevertheless he had always been anxious to serve in the army if possible. On 4th January 1943 he had received an " Employment Advice " from the defendant Howard, as Deputy Director of Personnel, Allied Works Council, directing him to report at Central Railway Station, Sydney, at 6.45 o'clock p.m. the next day to proceed by rail to the Northern Territory, the employing authority being shown as the Department of the Interior. The plaintiff claimed that this action taken by Howard and other officers of the Allied Works Council was illegal and that such action was contrary to the national interests and was inconsistent with the best considerations of national defence.

On 17th August 1942, in pursuance of reg. 8 of the *National Security* (*Aliens Service*) *Regulations*, the Minister for the Army had directed that " every male refugee alien, and every male enemy alien other than a refugee alien who (*a*) is of, or above, the age of eighteen years, and under the age of sixty years; and (*b*) has not, within fourteen days after he first became liable to register, volunteered and been accepted for service in some part of the Naval, Military or Air Forces of the Commonwealth, shall perform such service in Australia as is directed by the Minister of State for the Interior, not being service in the Armed Forces, but being service which the alien is, in the opinion of the Minister of State for the Interior, capable of performing." This direction was notified in the Commonwealth *Gazette* on 2nd December 1942, and by it was rescinded a direction made on 7th March 1942 by the Minister for the Army. Neither of these directions was laid before either House of Parliament.

On 14th December 1942 the defendant Theodore, acting under a delegation from the Minister for the Interior, had directed that certain persons named in the direction including the plaintiff, perform certain service, declared that he was of the opinion that the plaintiff was capable of performing such service, and authorized the defendant Howard to issue instructions to the plaintiff as to, *inter alia*, the times and places at which such service was to be performed.

Further affidavits read on the hearing of the motion referred to below showed that F. Muller Pty. Ltd. was declared a protected undertaking on 19th February 1942; that the plaintiff was at all material times employed by that firm; that permission had not been given by the Director-General of Man Power or any person authorized by him for the plaintiff to change his employment or to be appointed to or enlisted in the Defence Force of Australia; that on 7th March 1942 the man-power officer stationed at the drill hall of the military area in which the plaintiff resided marked the plaintiff's papers "reserved occupation"; that on 17th December 1942 the man-power officer indorsed on the form on which the plaintiff was enrolled with the aliens section of the Allied Works Council, the letters "N.E.", which meant that he was not exempt from service under the *National Security* (*Aliens Service*) *Regulations* and permission was given by that officer for the plaintiff's employment to be changed from his then present employment to employment under the said Regulations; and that on 30th January 1943, according to the area officer, the file of papers relating to the plaintiff showed that he had not been accepted for service by the military authorities and that he was reserved by the man-power authorities.

The plaintiff did not comply with the direction contained in the "Employment Advice" of 4th January 1943, as he had been advised that it was invalid.

A notice of motion taken out on behalf of the plaintiff for an interlocutory injunction to restrain the defendants from compelling him to do the work directed to be done by the employment advice was heard by *Williams* J. The parties agreed that the hearing of the motion should be treated as the trial of the action.

Further facts and the provisions of the relevant regulations are stated in the judgments hereunder.

Weston K.C. (with him *Starke*), for the plaintiff.

Maughan K.C. (with him Dr. *Louat*), for the defendants.

Cur. adv. vult.

Feb. 11.

WILLIAMS J. delivered the following written judgment:—The plaintiff is an alien who has been resident in Australia since early in the year 1939. At the beginning of the year 1942 he was nineteen years of age. He was then working (as he still is) as a junior draftsman for a firm of sheet metal workers.

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The *National Security* (*Man Power*) *Regulations* came into force on 31st January 1942. They provide (reg. 2) that industrial or commercial enterprises essential to the defence of the Commonwealth may be declared protected undertakings; and, with respect to such undertakings, (reg. 14) that an employer cannot terminate the employment of an employee or an employee change his employment or be appointed to or enlist in the defence forces without the permission in writing of the Director-General of Man Power; and (reg. 16) that a person aggrieved by a decision of the Director-General may appeal to a Local Appeal Board and that the Director-General shall take such action as is necessary to give effect to the decision of the Board. The business in which the plaintiff is employed was declared to be a protected undertaking on 19th February 1942.

The *National Security* (*Aliens Service*) *Regulations* came into force on 3rd February 1942. They apply, *inter alia*, to "allied nationals," "enemy aliens" and "refugee aliens." Allied nationals are nationals of any country which is or may be associated with His Majesty in any war in which His Majesty is or may be engaged. Enemy aliens are persons who, not being British subjects, possess a nationality of a State at war with His Majesty. Refugee aliens (of whom the plaintiff is one) are aliens who have no nationality, or whose nationality is uncertain, or who are enemy aliens in respect of whom the Minister of State for the Army is satisfied that the alien was forced to emigrate from enemy territory on account of actual or threatened religious, racial or political persecution, and that he is opposed to the regime which forced him to emigrate. The provisions of regs. 4 and 5 require every male alien resident in Australia of or above the age of eighteen years to register for national service within seven days from the day when he first became liable to register by completing an approved application form and delivering or posting it to the area officer of the area in which he is then residing.

Regs. 6, 7 and 8 (1) (*a*), (*b*) are in the following terms:—

"6. Any alien who, at any time within fourteen days from the date when he first becomes liable to register, volunteers for service in the naval, military or air forces of the Commonwealth shall forthwith deliver or post to the Area Officer to whom his application was delivered or posted a notification in writing stating—

(*a*) the date upon which he volunteered,

(*b*) the service for which he volunteered, and

(*c*) the place at which he volunteered.

7. (1) An Area Officer may, by notice in a form approved by the Military Board, require any male allied national under the age of sixty years who has not, within fourteen days after he first became

liable to register, volunteered and been accepted for service in any part of the naval, military or air forces of the Commonwealth, to enlist and serve in the Citizen Military Forces.

(2) Any allied national to whom a notice is sent in pursuance of the last preceding sub-regulation shall, within the time specified in that notice, enlist and serve as directed, but shall not be required to take and subscribe an oath or affirmation of enlistment in accordance with the form set forth in the Third Schedule to the *Defence Act* 1903-1941.

(3) Subject to the provisions of these Regulations, the provisions of the *Defence Act* 1903-1941 and any regulations made under that Act shall apply to aliens enlisted in the Citizen Military Forces in pursuance of these Regulations as if they were British subjects.

8. (1) The Minister of State for the Army may direct that—

(*a*) Any male refugee alien under the age of sixty years who has not, within fourteen days after he first became liable to register, volunteered and been accepted for service in any part of the naval military or air forces of the Commonwealth; and

(*b*) Any male enemy alien other than a refugee alien;

shall perform such service in Australia as is directed by the Minister of State for Labour and National Service, or the Minister of State for the Interior, not being service in the armed forces, but being service which the alien is, in the opinion of the Minister issuing the direction, capable of performing."

Pursuant to the Regulations the plaintiff, within the fourteen days allowed by reg. 6, duly volunteered for service in the military forces of the Commonwealth. On 25th February 1942 he was medically examined at the drill hall in his area and found to be fit for military service.

On 26th February 1942 the *National Security* (*Allied Works*) *Regulations* came into force.

On 7th March 1942 the man-power officer for the plaintiff's area (the business of the firm having by then been declared to be a protected undertaking) marked the plaintiff's papers " reserved occupation." The plaintiff has since continued to work for the firm which has continued to be a protected undertaking, and his offer of service in the military forces has neither been accepted nor refused by the military authorities.

On 7th March 1942 the Minister of State for the Army gave and published in the Government *Gazette* the following direction :—" In pursuance of regulation 8 of the *National Security* (*Aliens Service*) *Regulations*, I, Francis Michael Forde, Minister of State for the Army,

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do hereby direct that every male refugee alien, and every male enemy alien other than a refugee alien who—(*a*) is of or above the age of eighteen years and under the age of sixty years; and (*b*) has not, within fourteen days after he first became liable to register, volunteered for service in some part of the Naval, Military or Air Forces of the Commonwealth; and (*c*) is included in Class I., Class II., Class III., Class IV. or Class V. referred to in sec. 60 of the *Defence Act* 1903-1941, shall perform such service in Australia as is directed by the Minister of State for the Interior."

On 7th March 1942 the Minister of State for the Interior in pursuance of sec. 17 of the *National Security Act* 1939-1940, by notice in the Commonwealth *Gazette*, delegated his powers under reg. 8 of the *Aliens Service Regulations* to the officer performing the duties of the office of Director-General of the Allied Works Council. This officer was and still is the defendant, E. G. Theodore.

On 17th August the Minister of State for the Army gave the following direction :—" In pursuance of regulation 8 of the *National Security* (*Aliens Service*) *Regulations*, I, Francis Michael Forde, Minister of State for the Army, do hereby direct that every male refugee alien, and every male enemy alien other than a refugee alien who—(*a*) is of, or above, the age of eighteen years, and under the age of sixty years; and (*b*) has not, within fourteen days after he first became liable to register, volunteered and been accepted for service in some part of the Naval, Military or Air Forces of the Commonwealth, shall perform such service in Australia as is directed by the Minister of State for the Interior, not being service in the Armed Forces, but being service which the alien is, in the opinion of the Minister of State for the Interior, capable of performing. The direction made by me pursuant to the abovementioned regulation on the 7th March 1942, is hereby rescinded."

This direction was not published in the Government *Gazette* until 2nd December 1942. There is no evidence whether it was intended to be operative prior to 2nd December, but the point is immaterial, because no action was taken under it against the plaintiff until after this date.

On 14th December 1942 the defendant Theodore as Director-General of Allied Works acting under the above delegation directed that certain persons named in the direction, including therein the plaintiff, should perform the service of fitter and all work pertaining thereto, declared that he was of the opinion that the plaintiff was capable of performing such service, and authorized the defendant W. S. Howard, the Deputy Director of Personnel, Allied Works Council, to issue instructions to the plaintiff as to the times and places

at which such service was to be performed and any other matters incidental to the performance of such service. On 4th January 1943 Howard instructed the plaintiff to perform the work of a fitter in the Northern Territory in the employment of the Department of the Interior, and to leave Sydney for that destination on the following night. Prior to this direction a man-power officer, Colonel Spurge, who was acting for the Deputy Director-General of Man Power for New South Wales as a man-power officer at the Allied Works Council, had, on 17th December, marked the plaintiff's papers at the Allied Works Council "N.E." (not exempt).

The plaintiff did not comply with the direction to proceed to the Northern Territory, as he had been advised that it was invalid. On 6th January 1943 he issued a writ out of this Court against the defendants, claiming that it might be declared that (1) the *Aliens Service Regulations* are void and of no effect; (2) alternatively that so much of sub-reg. 3 of reg. 8 of these Regulations as require moneys payable in respect of service of aliens under the Regulations to be paid to the Commonwealth and the whole of sub-regs. 4, 5 and 6 of the same regulation are void and of no effect; (3) that the direction of 7th March 1942 is void and of no effect; (4) that the direction of 17th August is void and of no effect; (5) that the defendants, or either of them, their agents, officers or servants are not entitled to call upon the plaintiff to do labour or service as required by the directions given to the plaintiff; and (6) that the defendants or either of them, their agents, officers or servants be restrained from compelling or instructing or causing the plaintiff to do such labour or service.

On 7th January the plaintiff filed a notice of motion for an interlocutory injunction to restrain the defendants from compelling him to do the work directed to be done by the notice of 4th January. The writ, notice of motion and evidence also refer to an earlier direction to the plaintiff dated 21st December 1942 to proceed to the Northern Territory to do the same work on 28th December, but it is common ground that this notice lapsed, so that I need not consider it.

During the hearing of the notice of motion the parties agreed that the hearing should be taken to be the trial of the action.

Mr. *Weston* for the plaintiff has contended (1) that the direction of 17th August 1942 is invalid, and (2) that even if it is valid the plaintiff is not an alien who comes within its scope.

The two main objections made by Mr. *Weston* to the validity of the direction were (1) that it was avoided because it was an order of a legislative character within the meaning of sec. 5 (4) of the *National Security Act* 1939-1940, and was not laid before each

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House of Parliament in accordance with the provisions of sec. 48 (1) (*c*) of the *Acts Interpretation Act* 1901-1941. The evidence shows that the direction was never laid before either House. I am of the opinion that sec. 13A of the *National Security Act* must be read in conjunction with sec. 5 of that Act, and as an enlargement of the power to make regulations conferred upon the Governor-General by the latter section, so that all orders, rules or by-laws made under any regulations made by the Governor-General must comply with sec. 5 (4). I shall assume, without finally deciding, that the direction of 17th August is an order within the meaning of this sub-section. On this assumption, I am of opinion that it is an order of an executive and not of a legislative character. I agree with Mr. *Weston* that, as the same distinction has not been drawn in Australia as in the United States of America between legislative, executive and judicial powers, care must be taken before applying in Australia the decisions of the courts of the United States of America as to the distinction between acts of a legislative and of an executive character. But sec. 5 (4) of the *National Security Act* requires that a distinction shall be drawn; and, in arriving at a conclusion, I can see no reason why I should not adopt the test referred to by the Supreme Court of the United States of America in *J. W. Hampton, Jr. & Co.* v. *United States* (1): "The true distinction, therefore, is, between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made"—cited by my brother *Dixon* in *Victorian Stevedoring and General Contracting Co. Pty. Ltd. and Meakes* v. *Dignan* (2). The direction of 17th August was made pursuant to the provisions of reg. 8 of the *Aliens Service Regulations*. That regulation defines the classes of aliens who are subject to any direction which the Minister of State for the Army may give, and the work which they can be required to do. It prescribes both the legal obligation and the class of persons who are subjected to it. The Minister has a mere discretion to direct the time and the manner in which these aliens shall be compelled to perform the obligation. He can only administer an existing law by directing persons who are subject to that law to do acts which they are liable to perform under that law. In giving a direction he is merely carrying an existing law into execution. Such a direction is, in my opinion, of an executive character, and need not be laid before the Houses of Parliament. (2) That reg. 8 is too wide, because it requires

(1) (1928) 276 U.S. 394, at p. 407 [72 Law. Ed. 624, at p. 629].
(2) (1931) 46 C.L.R. 73, at p. 93.

refugee and enemy aliens to do any service which, in the opinion of the Minister issuing the direction, the alien is capable of performing. This authority is wide enough in terms to enable the Minister to require an alien to perform many services having no connection with the defence of the Commonwealth. But the only services which an alien could be ordered to perform by a regulation made under the *National Security Act*, secs. 5 and 13A, would be services which could conceivably aid, at least incidentally, in such defence. The evidence shows that the work which the plaintiff has been called upon to do is work of this nature. It is, therefore, work which he could be required to do by a regulation made under the authority of the Act. The present regulation can only be valid if the *Acts Interpretation Act* 1901-1941, sec. 46 (*b*), can be applied so as to confine its operation to services which can conceivably aid even incidentally in the effectuation of the defence of the Commonwealth. In *R.* v. *Poole*; *Ex parte Henry* [*No.* 2] (1) (in a passage to which he subsequently referred in *Andrews* v. *Howell* (2)) my brother *Dixon* pointed out that two types of case present themselves under sec. 46 (*b*). The present is an illustration of the second type of case to which he refers, the regulation being one which, if its operation is limited to services connected with the war, would be valid. It is clear, I think, that the Governor-General intended that the regulation should be valid to the full extent to which it was not in excess of the power conferred upon him to make regulations by the Act, so that to confine the operation of the regulation to this extent would be a partial application of an intended law and not the application of a different law to that intended by the regulation. That it is proper to use sec. 46 (*b*) so as to limit the operation of the regulation in this way is established, I think, not only by the statements of my brother *Dixon* to which I have referred, but by those of my brother *Rich* in *Huddart Parker Ltd.* v. *The Commonwealth* (3), my brother *Starke* in *New South Wales* v. *The Commonwealth* [*No.* 3] (4) and my brother *McTiernan* (5), in relation to sec. 15A of the same Act, and by the use of sec. 46 (*b*), the sub-section for this purpose, made by the Chief Justice (with whose judgment my brother *McTiernan* agreed) and by myself in *Australian Coal and Shale Employees Federation* v. *Aberfield Coal Mining Co. Ltd* (6). Both these objections therefore fail.

Mr. *Weston* raised two further objections, one to the validity of reg. 8 and the other to the validity of the direction of 17th August

(1) (1939) 61 C.L.R. 634, at pp. 651, 652.
(2) (1941) 65 C.L.R. 255, at p. 281.
(3) (1931) 44 C.L.R. 492, at p. 500.
(4) (1932) 46 C.L.R. 246, at p. 270.
(5) (1932) 46 C.L.R., at p. 272.
(6) (1942) 66 C.L.R. 161, at pp. 175, 176, 196.

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1942, to which I shall shortly refer. With respect to the regulation he objected that the effect of sub-regs. 3, 4, 5 and 6 is to impose a tax on the earnings of the alien. But, even if this is so, and these sub-regulations could be invalidated on this ground (as to which I express no opinion) their invalidity would not affect the validity of sub-reg. 1. The plaintiff is not suing the Commonwealth for any remuneration in this action. He has not done any work for the Commonwealth or earned any remuneration. This objection would only arise if the Commonwealth retained some part of his remuneration and he complained that such a retention was invalid. Mr. *Weston* also objected that the direction of 17th August could not be validly given unless the provision which it contains repealing the direction of 7th March was valid. He submitted that if the *Aliens Service Regulations* were made solely under sec. 13A and not under sec. 5 of the Act, the direction of 7th March could not be subsequently rescinded, because sec. 13A does not contain a provision similar to that contained in sec. 5 (6). There is no substance in this objection. The Regulations were made under the powers conferred upon the Governor-General by sec. 5 as enlarged by sec. 13A, so that sec. 5 (6) is available; even if it were not, the *Acts Interpretation Act* 1901-1941, sec. 46 (*a*), would convert the direction of 7th March into an Act for the purposes of sec. 33 (3); so that, even if the direction of 7th March could not be revoked, the direction of 17th August would be cumulative upon it.

I shall proceed therefore to discuss the plaintiff's rights upon the basis that sub-reg. 8 (1) (*a*) and (*b*) of the *Aliens Service Regulations* is a valid sub-regulation and that the direction of 17th August 1942 is a valid direction. Prior to the *Aliens Service Regulations* coming into force there was nothing to prevent aliens volunteering for service in the naval, military or air forces of the Commonwealth, but compulsory enlistment in these forces was confined by the *Defence Act* 1903-1941 to British subjects. Reg. 6 gives to all aliens a period of fourteen days after they first become liable to register within which to volunteer for service in the naval, military or air forces of the Commonwealth. If an alien volunteers, he has to give the information specified in the regulation to the area officer of the district in which he resides. Reg. 7 refers to male allied nationals between the ages of eighteen and sixty. It authorizes an area officer, by notice in a form approved by the Military Board, to require such an alien, who has not, within fourteen days after he first became liable to register, volunteered and been accepted for service in any part of the naval, military or air forces of the Commonwealth, to enlist and serve in the Citizen Military Forces. By reg. 8 the Minister

of State for the Army may direct any male refugee alien between the ages of eighteen and sixty years, who has not, within fourteen days after he first becomes liable to register, volunteered and been accepted for service in any part of such forces, to perform the non-combatant services in Australia therein specified.

The words in regs. 7 and 8 " who has not, within fourteen days after he first became liable to register, volunteered and been accepted for service in any part of the Naval, Military or Air Forces of the Commonwealth " must be construed in the context of the Regulations as a whole, and in particular in that of regs. 6, 7 and 8. It is clear that in time of war the highest offer an alien can make to the country in which he resides, and to which he owes a temporary allegiance, is to volunteer to risk his life in its armed forces. Reg. 6 gives to all aliens a period of fourteen days to volunteer to do this after they first become liable to register, although it appears from reg. 8 (1) (*b*) that it was not contemplated that enemy aliens would do so ; or, if they did so, that this be accepted. In the case of aliens who, like the plaintiff, were between the ages of eighteen and sixty years on 3rd February 1942, the period would commence on that date. In the case of aliens who attained the age of eighteen years after 3rd February 1942, the period would commence on their eighteenth birthday. There are three possible constructions of the words which I have placed in inverted commas : (1) that the alien must volunteer and be accepted within the period of fourteen days ; (2) that the alien must volunteer within the fourteen days and be subsequently accepted before his services are impressed under regs. 7 or 8 ; and (3) that the alien must volunteer within the fourteen days and if he does so his services can only be impressed if he is not subsequently accepted for the arm of the defence force for which he has volunteered. As some interval of time must elapse between the dates when the alien volunteers and his application is accepted, it is only reasonable to conclude that the period of fourteen days referred to in the Regulations must refer to the volunteering, so that the first construction should be rejected. The expression should, in my opinion, be construed : " has not volunteered within fourteen days and if he has volunteered has not been accepted for service," so that male allied nationals and male refugee aliens who have volunteered within this period only become liable to the provisions of regs. 7 and 8 if they have not been accepted for the branch of the defence force for which they have volunteered. The proper choice between the second or third constructions depends upon the meaning to be placed upon the words " has not been accepted." The words are not used in a technical but in a colloquial

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sense: cf. *R.* v. *Slatter* (1). The ascertainment of the meaning of ordinary English words in a statute is a question of fact (*Federal Commissioner of Taxation* v. *Broken Hill South Ltd.* (2)). According to the *Oxford English Dictionary* and to *Webster's International Dictionary* "not" is the ordinary adverb of negation used to express negation, prohibition, denial or refusal, and non-acceptance means neglect or refusal to accept. It can be placed first for the sake of emphasis. It can be used to imply an affirmative term. In ordinary parlance it would not be correct, in my opinion, to say that a person who has volunteered for active service in the armed forces "has not been accepted" where the proper authority has not decided either to accept or refuse his services. The emphasis placed in the non-acceptance of the offer imports, to my mind, a positive act of refusal. Regs. 7 and 8 do not provide for what is to happen if the offer of an allied national or refugee alien to serve in a branch of the defence force, say the navy or air force, is accepted after a direction has been given under regs. 7 or 8. The Regulations are intended to have, and a direction given under them is capable of having, a prospective operation in the case of aliens attaining the age of eighteen years after 3rd February 1942. So that, if the second construction is correct, then such an alien would be caught by the direction of 17th August although he volunteered within the fourteen days, unless he could also induce the naval, military or air force authority to accept him within this period, because at the end of the fourteen days he would immediately become a person whose services had not been accepted. It is difficult to believe that it would have been intended that a third party should be able to circumvent the acceptance of such an offer. Both the second and third constructions being open, it appears to me that the third construction is more reasonable and more likely to give effect to the intentions of the Governor-General. The onus is on the Commonwealth to show that the alien has not volunteered within the fourteen days, and that, if he did so, he has not been accepted by the defence authorities. In my opinion, therefore, if a male allied national or a refugee alien has volunteered for active service within the fourteen days, he will only become liable to have his services impressed under regs. 7 or 8 if his offer is refused. The same construction must be placed upon the direction of 17th August 1942. It follows that on 4th January it was illegal for the defendants to attempt to impress the services of the plaintiff under its provisions.

(1) (1840) 11 A. & E. 505 [113 E.R. 507]; 9 L.J. Q.B. 115.

(2) (1941) 65 C.L.R. 150, at pp. 155, 160.

The *Man Power Regulations* apply to all persons in protected undertakings, while the *Aliens Service Regulations* can apply to all aliens over the age of sixteen years, but national service is only required from allied and refugee aliens who are between the ages of eighteen and sixty years. The *Aliens Service Regulations* do not expressly repeal the *Man Power Regulations* so far as the latter refer to aliens, and repeal by implication, which is the consequence of inconsistent legislation, is never favoured (*Halsbury's Laws of England*, 2nd ed., vol. 31, p. 561). The Governor-General could hardly have intended to make the *Aliens Service Regulations* an exclusive code for aliens so that after 3rd February 1942 aliens who continued to be employed in protected undertakings could be dismissed by their employers or could themselves change their employment or enlist in the defence force without the consent of the Director-General of Man Power It, therefore, would appear to be that the two sets of Regulations should be construed together, although, where there is a plain repugnancy between them and they come into collision, the provisions of the *Aliens Service Regulations* must be taken to have repealed by implication the provisions of the *Man Power Regulations* to the extent of the repugnancy. No definition is given of the meaning of the expression " accepted for service " in regs. 7 and 8 of the *Aliens Service Regulations*. But its requirements would, in my opinion, be satisfied where an alien, who had volunteered for service, had been medically examined and had then been informed by the proper authority that his services would be accepted for the branch of the defence forces for which he had volunteered, although he was also informed that he would not be called up until a future date. He would not become enlisted in the defence forces within the meaning of reg. 14 (4) of the *Man Power Regulations* and reg. 7 of the *Aliens Service Regulations* until he had been called up for actual service in the defence forces, and had, in the former instance, taken the oath required by the *Defence Act*. There is, therefore, nothing inconsistent between the right of an alien to volunteer for active service under reg. 6 of the *Aliens Service Regulations* and the prohibition against an alien employed in a protected undertaking being enlisted in the defence forces contained in reg. 14 of the *Man Power Regulations*. If his offer to enlist was accepted but the Director-General of Man Power refused permission for him to do so, he could appeal to the Board under reg. 16. It would be strange if the Governor-General intended that a refugee alien employed in a protected undertaking could be compulsorily removed from that employment into services under reg. 8, and even stranger if it was intended that an allied

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national employed in a protected undertaking who was not allowed to enlist voluntarily without the permission of the Director-General of Man Power could be compulsorily enlisted without his permission under reg. 7. There is nothing, to my mind, plainly repugnant to the provisions of the *Aliens Service Regulations* that an alien employed in a protected undertaking, while he remains so employed, should continue to be entitled to the rights and subject to the liabilities given to and imposed upon him by the *Man Power Regulations*; so that, whether an alien has volunteered under reg. 6 of the *Aliens Service Regulations* or not, his services, whilst he continues to be employed in a protected undertaking, cannot be impressed under the *Aliens Service Regulations*. The evidence establishes that on 17th December 1942 Colonel Spurge was authorized to act on behalf of Mr. Bellemore as the man-power officer at the Allied Works Council; but it is unnecessary to decide whether Colonel Spurge could grant an exemption required under the *Man Power Regulations*, or, as Mr. *Weston* contended, only Mr. Bellemore could do so, because assuming that the act of Colonel Spurge was in law the act of Mr. Bellemore, there is no provision in the *Man Power Regulations* (as they existed, on and prior to 4th January 1943), authorizing the Director-General of Man Power to agree to an employee in a protected undertaking being conscripted in this way.

The plaintiff is therefore entitled to a declaration as claimed in par. 5 of the writ. The defendants must pay the plaintiff's costs of action, including the costs of the motion for an interlocutory injunction.

From this decision the defendants appealed to the Full Court.

Maughan K.C. (with him Dr. *Louat*), for the appellants. Although the *Man Power Regulations* and the *Aliens Service Regulations* are two different codes they are absolutely consistent. There is not any conflict whatever between them so far as refugee aliens are concerned. Those aliens are completely controlled by the *Aliens Service Regulations*. The respondent is a "refugee alien" within the meaning of the definition of that expression as appearing in reg. 2 of the *Aliens Service Regulations*, and he comes within the operation of reg. 8 of those Regulations. It is not sufficient that within fourteen days after he first became liable to register the respondent volunteered for service in the armed forces. In order to satisfy the requirements of reg. 8 (1) (*a*) he must also have been accepted for such service within that period. The respondent has not in fact been so accepted. The *Man Power Regulations*, either

by reg. 14 thereof or generally, do not operate to prevent the competent authority from issuing under reg. 8 of the *Aliens Service Regulations* a direction to the respondent to perform service other than in the armed forces.

Weston K.C. (with him *Starke*), for the respondent. The offer to serve in the armed forces made by the respondent while he was in a reserved occupation was neither accepted nor rejected. Doubtless, the reason why his offer was not actually accepted was that for the time being he was in a reserved occupation. The word "employment" in reg. 14 (2) of the *Man Power Regulations* is not equivalent to occupation or vocation. That sub-regulation was designed to control the changing by persons employed in a protected undertaking from one employer to another. It is not a case of change of occupation *simpliciter*. Reg. 14 (2), and also reg. 9 (3), of the *Allied Works Regulations* prohibit the taking of a respondent from a protected undertaking for the purpose of serving either for the Allied Works Council or in the Civil Constructional Corps. Reg. 6 of the *Aliens Service Regulations* shows that the period of fourteen days specified in reg. 8 is for the act of volunteering only; it is not necessary that acceptance should take place within that period. The matter of making an offer to serve in the armed forces is within the control of the person concerned, but the acceptance of that offer is a matter entirely beyond his control. Effect should be given to reg. 14 of the *Man Power Regulations* as a special provision as against reg. 8 of the *Aliens Service Regulations*, which is a general provision. The order dated 17th August 1942 and purporting to have been made by the Minister for the Army under reg. 8 of the *Aliens Service Regulations* is legislative and not executive in character. Therefore it should have been brought before each House of Parliament: See *National Security Act* 1939-1940, sec. 5 (4), and *Acts Interpretation Act* 1901-1941, secs. 48, 49.

Maughan K.C., in reply. Reg. 14 (2) of the *Man Power Regulations* does not apply to the appellants. Within the meaning of sec. 5 (4) of the *National Security Act* 1939-1940, reg. 8 of the *Aliens Service Regulations* is an order, rule or by-law of a legislative character. It was brought before each House of Parliament. All the acts the Minister for the Army, or his delegate, has done under reg. 8 are executive acts (*J. W. Hampton, Jr. & Co.* v. *United States* (1)). The direction made on 17th August 1942 by the Minister for the Army is

(1) (1928) 276 U.S., at p. 407 [72 Law. Ed., at p. 629].

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not an order, rule or by-law within the meaning of any statutory provision that requires it to be brought before each House of Parliament, and, therefore, is valid. The respondent has not shown (*a*) that he volunteered and was accepted within the period of fourteen days, or (*b*) that he volunteered within that period and was accepted at any time. There is not by implication in the *Man Power Regulations*, either in reg. 14 (2) or generally, any prohibition against the Minister under the *Aliens Service Regulations* calling up an employee in a protected undertaking. Such an implication should not be read into the Regulations merely because (*a*) it would be reasonable, or (*b*) it is a fair inference that it was intended, or (*c*) it is strange there is not an express prohibition thereto (*Crawford* v. *Spooner* (1)).

Cur. adv. vult.

May 6.

The following written judgments were delivered :—

LATHAM C.J. The respondent, Eric Grunseit, who is twenty years of age and is a refugee alien within the meaning of the *National Security* (*Aliens Service*) *Regulations* (Statutory Rules 1942 No. 39 as amended), instituted proceedings in the High Court against the Commonwealth of Australia, E. G. Theodore, the Director-General of Allied Works, and W. S. Howard, Deputy Director of Personnel, Allied Works Council, for declarations that the said Regulations were invalid and that a direction given on 17th August 1942 purporting to be issued under the Regulations was void. He also claimed an injunction restraining the defendants from calling upon him to do labour or services required by a certain direction given to him. The Court (*Williams* J.) made the last-mentioned declaration, and the defendants now appeal to the Full Court.

I propose to begin the consideration of this matter by referring to the last-mentioned direction and tracing the proceedings back for the purpose of discovering the authority for each step taken.

On 4th January 1943 the defendant W. S. Howard gave an " Employment Advice " to the plaintiff stating that he was enrolled in the aliens' section to perform service under the *National Security* (*Aliens Service*) *Regulations*. Travelling instructions were as follows :—

Employing authority .. .. Department of the Interior.
Place of work .. .. .. Northern Territory.

and directions were given as to method of transport and place and time of departure. This is the direction which (it has been held) the plaintiff was entitled to disobey.

(1) (1846) 6 Moo. P.C. 1 [13 E.R. 582].

The defendant W. S. Howard received authority to issue the direction in question by a document dated 14th December 1942. This was signed by the defendant E. G. Theodore, described as Director-General of Allied Works and Delegate of the Minister of State for the Interior. It was a direction which recited reg. 8 of the *Aliens Service Regulations* and a direction made by the Minister for the Army in pursuance of that regulation dated 17th August 1942. The direction also recited an instrument of delegation whereby the Minister for the Interior delegated to the defendant E. G. Theodore powers and functions conferred upon him by sub-regs. 1 and 1A of the said reg. 8. This delegation was authorized by the *National Security Act* 1939-1940, sec. 17.

The direction signed by the defendant E. G. Theodore declared that he was of opinion that certain aliens (including the plaintiff) whose names were set out in a schedule were capable of performing specified services, and directed that the aliens should perform the service therein specified "under the instructions of the Department of the Interior and its employees." The direction authorized the defendant Howard to issue instructions to the aliens as to the times and places at which service was to be performed. Accordingly, the defendant W. S. Howard was duly authorized by the defendant E. G. Theodore to issue the direction of 4th January 1943.

The authority of the defendant E. G. Theodore depended upon a delegation by the Minister for the Interior, who derived his authority in this matter from the direction given by the Minister for the Army on 17th August 1942. The *Aliens Service Regulations* are administered by the Department of the Army. That direction stated that in pursuance of reg. 8 of the *Aliens Service Regulations* the Minister for the Army directed "that every male refugee alien, and every male enemy alien other than a refugee alien who—(*a*) is of, or above, the age of eighteen years, and under the age of sixty years; and (*b*) has not, within fourteen days after he first became liable to register, volunteered and been accepted for service in some part of the Naval, Military or Air Forces of the Commonwealth, shall perform such service in Australia as is directed by the Minister of State for the Interior, not being service in the Armed Forces, but being service which the alien is, in the opinion of the Minister of State for the Interior, capable of performing."

The plaintiff is a male refugee alien above the age of eighteen years and under the age of sixty years. One question which arises is as to whether he is such an alien who "has not, within fourteen days after he first became liable to register, volunteered and been

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accepted for service in some part of the Naval, Military or Air Forces of the Commonwealth."

The direction of 17th August 1942 given by the Minister for the Army was given in exercise of a power conferred by reg. 8 of the *Aliens Service Regulations*. The relevant provisions of reg. 8 are as follows :—

"8—(1) The Minister of State for the Army may direct that—

(*a*) Any male refugee alien under the age of sixty years who has not, within fourteen days after he first became liable to register, volunteered and been accepted for service in any part of the Naval Military or Air Forces of the Commonwealth ; and

(*b*) Any male enemy alien other than a refugee alien ;

shall perform such service in Australia as is directed by the Minister of State for Labour and National Service, or the Minister of State for the Interior, not being service in the armed forces, but being service which the alien is, in the opinion of the Minister issuing the direction, capable of performing.

(1A) The Minister of State for Labour and National Service or the Minister of State for the Interior may, in any direction under the last preceding sub-regulation, authorize any person or persons to issue instructions to the alien or aliens to which the direction applies as to the times and places at which the service is to be performed and any other matters incidental to the performance of the service."

The *National Security Act*, sec. 5 (1) (*e*), provides that the Governor-General may make regulations for requiring or authorizing any action to be taken by or with respect to aliens, and sec. 13A of the Act enables the Governor-General to make such regulations for requiring persons to place themselves and their services at the disposal of the Commonwealth as appear to him to be necessary or expedient for securing the public safety, the defence of the Commonwealth and the territories thereof, or the efficient prosecution of any war in which His Majesty may be engaged.

It will be seen that reg. 8 may, if a sufficiently wide direction is given by the Minister for the Army, become applicable to all male refugee aliens under the age of sixty years. The direction given by the Minister for the Army was limited, however, to such aliens over the age of eighteen years. Further, the regulation provided that the Minister for the Army might direct that the aliens should perform such service as was directed by the Minister for Labour and National Service *or* the Minister for the Interior. The direction given by the Minister for the Army was a direction that such aliens should perform such service as should be directed by the Minister

for the Interior. It is contended that the direction so given by the Minister for the Army was not authorized by reg. 8.

The plaintiff, who was of Rumanian nationality, is a fitter. He is employed by a firm, F. Muller Pty. Ltd., which was declared a protected undertaking under the *National Security* (*Man Power*) *Regulations* (Statutory Rules 1942 No. 34 as amended). These Regulations are administered by the Department of Labour and National Service. Reg. 14 contains the following provisions:—

"14. (1) An employer carrying on a protected undertaking shall not, except with the permission in writing of the Director-General or of a person authorized by him—

(*a*) terminate the employment in the undertaking of any person employed therein;

(*b*) without terminating his employment, cause or permit any such person to give his services in some other undertaking (except, in case of emergency, for a period not exceeding fourteen days); or

(*c*) except in pursuance of an award, order or determination of an industrial tribunal, or of an industrial agreement, alter any customs or usages observed in the undertaking.

(2) A person employed in a protected undertaking shall not, except with the permission in writing of the Director-General or of a person authorized by him, change his employment. . . .

(4) No person employed in a protected undertaking shall be appointed to or enlisted in the Defence Force without the permission in writing of the Director-General."

Reg. 4 of the *Aliens Service Regulations* provides that every male alien of or above the age of eighteen years, not being an alien who is exempt from the provisions of the Regulations, who, on or after the date of the commencement of the Regulations, is resident in Australia, shall register himself for national service in accordance with the provisions of the Regulations. The aliens who are exempt from the *Aliens Service Regulations* are specified in reg. 3. The exempt aliens are members of the defence forces, diplomatic and consular representatives and staff, and certain other persons. The plaintiff is not exempt within any of these provisions. He was therefore bound to register for national service. The contention made on his behalf in these proceedings is that, though he was bound to register for national service, he could not be compelled to render any national service under the *Aliens Service Regulations* because he was employed in a protected undertaking: see the *Man Power* reg. 14 quoted above.

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The plaintiff registered for national service under reg. 4 of the *Aliens Service Regulations*. Within fourteen days after registration he volunteered for service in the army. His offer to serve was neither accepted nor rejected. One of the questions which arises is whether upon this state of facts he is a male refugee alien who " has not, within fourteen days after he first became liable to register, volunteered and been accepted for service " in the army. If he was not such a person, he could not be required to perform service by a direction given under reg. 8 of the *Aliens Service Regulations*.

In the argument upon the appeal the validity of the *Aliens Service Regulations* was not challenged and no decision upon that question is required. As at present advised I can see no reason why the Regulations should not be held to be valid with respect to any work whatever which an alien is directed to do in pursuance of the Regulations, that is, subject only to the limitation that the conditions prescribed by the Regulations are observed. The work which the plaintiff in this case was required to do was in the Alice Springs district and was " to service motor trucks and machinery used in the construction and maintenance of roads which work has been classed as high priority in work of a non-combatant nature and considered extremely important for strategic purposes in the defence of the Commonwealth " (affidavit of D. C. Gardyne). There can be no doubt as to the connection of this work with the defence of the Commonwealth.

The principal argument for the plaintiff has been that reg. 14 (2) of the *Man Power Regulations* has the effect of preventing the application of the *Aliens Service Regulations* to any alien who is employed in a protected undertaking.

Reg. 14 (1) prevents an *employer* carrying on a protected undertaking from terminating the employment in the undertaking of any person employed therein, and reg. 14 (2) prevents *a person employed* in such an undertaking from changing his employment, except in either case with the permission in writing of the Director-General of Man Power or of a person authorized by him. I agree with the argument submitted for the appellants that the terms of reg. 14 (2) are clear and that it operates only to prevent an employee in a protected undertaking from himself changing his employment. It places a limitation only upon action by the employee and has no relation to action by any other person. Reg. 14 cannot apply to a compulsory change of employment brought about independently of any action by employer or employee.

The appellants disclaim any reliance upon evidence which possibly showed that the man-power authorities, by marking the papers of

the plaintiff " non-exempt," had given authority to him to change his employment. Agreeing as I do with the contention that reg. 14 (2) does not apply to any change of employment other than a change of employment sought to be brought about by the employee himself, I do not find it necessary to deal with this secondary argument.

A further argument for the plaintiff is based upon Statutory Rules 1942 No. 170, which is an amendment of the *National Security* (*Allied Works*) *Regulations*, which are administered by the Department for the Interior. This statutory rule (reg. 2) adds a new regulation, No. 9, to the *National Security* (*Allied Works*) *Regulations*. The new regulation authorizes the establishment of a Civil Constructional Corps consisting of persons who volunteer and are accepted for service in the Corps and persons who are directed to serve in the Corps. The regulation authorizes the Director-General of Allied Works to direct any person to whom the regulation applies to serve in the Corps, and requires him to serve in accordance with the direction. The regulation applies to a man of the age of eighteen years and upwards, but under sixty years, with certain exceptions. The first exception is : " (*a*) men employed in protected industries or protected undertakings within the meaning of the *National Security* (*Man Power*) *Regulations*." It is suggested that this exception has some relevance in the present case.

The regulation applies only, however, to work in what is called a Civil Constructional Corps. It can be brought into operation in the case of a particular person by the Director-General of Allied Works independently of any authority from or action by either the Minister for the Interior or the Minister for the Army. National service under the *Aliens Service Regulations* is quite distinct from service in the Civil Constructional Corps under the *Allied Works Regulations*, though Mr. E. G. Theodore has powers and responsibilities, but in different capacities, under each set of regulations. The plaintiff has not been directed to serve in the Civil Constructional Corps, and no attempt has been made to apply the *Allied Works Regulations* in his case. The exception in this statutory rule is therefore of no significance in the present case.

The plaintiff contends that he cannot be called up in pursuance of any action taken under reg. 8 of the *Aliens Service Regulations* because, though he is a male refugee alien under the age of sixty years, he is not a person " who has not, within fourteen days after he first became liable to register, volunteered and been accepted for service in any part of the Naval, Military or Air Forces of the Commonwealth " : see reg. 8 (1) (*a*). He is a male refugee alien and he

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did volunteer for service with the army within fourteen days after he first became liable to register. He contends that he is not a person who has not been accepted for service in pursuance of his offer to serve. It is argued for him (and the argument was accepted by my brother *Williams*) that it could not be said that a person had not been accepted for service within the meaning of the regulation unless and until his offer to serve had been refused. In support of this argument it was urged that if "not accepted" were interpreted as meaning "refused," the regulation was much more definite and much more capable of satisfactory administration than if the words "not accepted" were held to be applicable in every case where there had been neither positive acceptance nor definite refusal of an offer of service.

In my opinion it is difficult to justify this interpretation of the language used. If a person has been accepted for service he falls into the class of accepted persons. If in fact he has not been accepted for service, either because he has been refused, or because his offer has not been dealt with, he must fall into the class of persons who have not been accepted for service. There is no middle term between "accepted" and "not accepted." To interpret "not accepted" as equivalent to "refused" is to identify a contradictory with a contrary. The natural meaning of words cannot be displaced by reference to difficulties in administration. But I do not see any difficulties from a practical point of view. Until the army accepts the volunteer in question, he is available for work under the *Aliens Service Regulations*. If the army requires his services, then, as the Department of the Army administers the *Aliens Service Regulations*, there can be no difficulty in terminating his employment under those Regulations and calling him up for service with the army. If he had volunteered for the navy or the air force and had not been accepted, but subsequently either of those services required him, it would depend upon a decision of the army authorities under the *Aliens Service Regulations* as to whether he should be allowed to serve with the navy or air force or not. This is quite a proper administrative result, because it is the Minister for the Army who, if an alien is not interned under the *Aliens Control Regulations* (reg. 20), may determine whether he should be required to work under the *Aliens Service Regulations* (reg. 8 thereof), or should (if a male *allied* national) be *required* to serve in the Army (*Aliens Service Regulations*, reg. 7), or, if not dealt with under any of these provisions, be allowed, if eligible, to serve in the naval, military or air forces if accepted for such service.

It may be observed that reg. 14 (4) of the *Man Power Regulations* provides that no person employed in a protected undertaking shall be appointed to, or enlisted in, the defence forces without the permission in writing of the Director-General of Man Power. No such permission has been given in the present case (affidavit of C.J. Bellemore) and, accordingly, it would have been impossible for the army to accept the plaintiff's offer to serve, so that he could, by enlisting, have become a member of the military forces.

A question which arises under reg. 8 (1) (*a*) is whether, in order to exclude the possible application of the regulation, both the volunteering and the acceptance for service must be within fourteen days after the alien first became liable to register. Upon the view which I take (that the plaintiff has not been accepted for service at any time) it is not necessary to decide this question. It would, I venture to suggest, be desirable to clarify the meaning of this regulation and reg. 7 (which uses the same words) by an amendment.

Two questions have been raised with respect to the direction given by the Minister for the Army on 17th August. In the first place, it is argued for the plaintiff that the direction is not authorized under reg. 8 for the reason that it does not identify any aliens, but refers only to a class of aliens. In my opinion there would have been more force in this objection if the regulation had been in the form that the Minister for the Army may direct an alien to serve. In that case there would have been much to be said for the contention that it was necessary for the Minister for the Army to give a direction to each and every alien upon whom it was desired to impose any duty in pursuance of the regulation. The words of the regulation, however, are: "The Minister of State for the Army may direct that" any male refugee alien, &c., shall perform such service as is directed by the Minister for Labour and National Service, or the Minister for the Interior, &c. These words, in my opinion, are not such as to require the Minister for the Army to give a direction to, or in respect of, specified aliens. The Minister has directed that aliens falling within, but not exhausting, the classes mentioned in par. 1 (*a*) and (*b*) of the regulation shall perform service covered by the regulation and it is, in my opinion, within the power of the Minister to give such a direction.

The second question is whether the direction given by the Minister for the Army on 17th August 1942 is an order, rule, or by-law "of a legislative and not an executive character" within the meaning of the *National Security Act* 1939-1940, sec. 5 (4). Sec. 5 (1) of the Act provides for the making of certain regulations. Sec. 5 (3) provides that the regulations may provide for empowering persons

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or classes of persons to make orders, rules or by-laws for any of the purposes for which regulations are authorized by the Act to be made. Sec. 5 (4) provides that certain provisions of sec. 48 of the *Acts Interpretation Act* 1901-1937 shall apply to "orders, rules and by-laws, which are of a legislative and not an executive character, in like manner as they apply to regulations." These provisions include sub-secs. 1 (*c*) and 3 of sec. 48 of the *Acts Interpretation Act*, which provide that regulations shall be laid before each House of the Parliament within a specified time and that if they are not so laid before each House, they shall be void and of no effect. The direction given by the Minister for the Army on 17th August 1942 was not laid before either House of Parliament. It is contended for the plaintiff that the direction was an order made under a regulation, that it is of a legislative character, and that, therefore, not having been laid before each House of the Parliament, it is void and of no effect. In the view which I take of the character of the direction it is unnecessary to decide whether sec. 5 (4) applies in the case of orders made under regulations which can be made only under sec. 13A of the Act.

The provisions of sec. 5 (4) of the *National Security Act* are based upon the proposition that it is possible to distinguish between orders, rules, and by-laws which are of a legislative character and orders, rules and by-laws which are of an executive character. It is not always easy to draw this distinction. Rules and by-laws by their very nature appear to partake of a legislative character, but it is plain that sec. 5 (4) contemplates that they may be executive rather than legislative in character. In the case of orders, some orders would plainly be executive, as, for example, where in pursuance of a power created by legislation a particular person was ordered by another person to do a particular thing. The general distinction between legislation and the execution of legislation is that legislation determines the content of a law as a rule of conduct or a declaration as to power, right or duty, whereas executive authority applies the law in particular cases. Attention has been given in the United States of America to this distinction for the purpose of applying the doctrine which is there accepted of the separation of legislative, executive, and judicial power. My brother *Williams* referred to the case of *J. W. Hampton Jr. & Co.* v. *United States* (1), where it was said: "The true distinction, therefore, is, between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law."—See also

(1) (1928) 276 U.S., at p. 407 [72 Law. Ed., at p. 629].

Panama Refining Co. v. *Ryan* (1) and *Opp Cotton Mills Inc.* v. *Administrator of Wage and Hour Division of Department of Labour* (2).

In the present case, in my opinion, the direction of the Minister for the Army applies the general rule which is laid down by reg. 8 to particular cases which are described by reference to common characteristics. The law is not altered by the direction of the Minister; it is neither extended nor limited. The direction makes the law applicable in certain cases, the content of the law not being changed. The case might be more open to argument if the order of the Minister created a new rule of conduct depending upon circumstances or considerations which were not stated or indicated in the regulation. I agree with the decision of *Williams* J. that the order of the Minister for the Army in this case was of an executive, not of a legislative character, and that it was therefore not necessary to lay it before Parliament.

The result, in my opinion, is that all the objections of the plaintiff fail, and that therefore the appeal should be allowed and the action dismissed.

RICH J. The facts in this case are more fully set out in the judgment of my brother *Williams*, but I propose to state such of them as are necessary for my judgment. It appears that the plaintiff is a refugee alien employed in a "protected undertaking" which is fully engaged in munitions and other defence work. The plaintiff is himself employed in this work. He duly volunteered for military service and was found fit. At a later date E. G. Sherring, the man-power officer for the plaintiff's area, marked the plaintiff's papers "reserved occupation" by reason of the fact that his employer's business had been declared a "protected undertaking." The plaintiff has not received any notice that he has been accepted or rejected for service in any branch of the naval, military or air forces of the Commonwealth. However, on 4th January 1943 the plaintiff received an "Employment Advice" that he was enrolled in the aliens' section to perform service under the *National Security* (*Aliens Service*) *Regulations*. This "Advice" purports to be issued from the Allied Works Council and is signed by the defendant W. S. Howard, "Deputy Director of Personnel". The purported authority to issue this "Advice" is contained in a direction given on 14th December 1942 by E. G. Theodore, "Director-General of Allied Works and Delegate of the Minister of State for the Interior". Mr. Theodore's authority derives from a delegation by the Minister

(1) (1935) 293 U.S. 388, at pp. 426, 429, 430 [79 Law. Ed. 446, at pp. 462, 463, 464].

(2) (1941) 312 U.S. 126, at p. 145 [85 Law. Ed. 624, at p. 636].

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for the Interior, who in his turn derives his authority from the Minister of State for the Army. The source from which these streams of authority issue is the *National Security Act* 1939-1940, sec. 13A. Thereunder the *National Security* (*Aliens Service*) *Regulations* (administered by the Department of the Army) were made. The relevant regulation is reg. 8, which is, in so far as is material, as follows :—

"8. (1) The Minister of State for the Army may direct that—

(*a*) Any male refugee alien under the age of sixty years who has not, within fourteen days after he first became liable to register, volunteered and been accepted for service in any part of the Naval Military or Air Forces of the Commonwealth ; and

(*b*) Any male enemy alien other than a refugee alien ;

shall perform such service in Australia as is directed by the Minister of State for Labour and National Service, or the Minister of State for the Interior, not being service in the armed forces, but being service which the alien is, in the opinion of the Minister issuing the direction, capable of performing.

(1A) The Minister of State for Labour and National Service or the Minister of State for the Interior may, in any direction under the last preceding sub-regulation, authorize any person or persons to issue instructions to the alien or aliens to which the direction applies as to the times and places at which the service is to be performed and any other matters incidental to the performance of the service."

At the date of these Regulations there was in existence another body of regulations—the *National Security* (*Man Power*) *Regulations* (administered by the Department of Labour and National Service). The relevant provision of these Regulations is to be found in reg. 14 in the following terms :—

"14. (1) An employer carrying on a protected undertaking shall not, except with the permission in writing of the Director-General or of a person authorized by him—

(*a*) terminate the employment in the undertaking of any person employed therein ;

(*b*) without terminating his employment, cause or permit any such person to give his services in some other undertaking (except, in case of emergency, for a period not exceeding fourteen days) ; or

(*c*) except in pursuance of an award, order or determination of an industrial tribunal, or of an industrial agreement, alter any customs or usages observed in the undertaking.

(2) A person employed in a protected undertaking shall not, except with the permission in writing of the Director-General or of a person authorized by him, change his employment."

Pursuant to the former set of regulations a direction was given by the Minister for the Army in these terms :—

" *National Security* (*Aliens Service*) *Regulations.*

In pursuance of regulation 8 of the *National Security* (*Aliens Service*) *Regulations*, I, Francis Michael Forde, Minister of State for the Army, do hereby direct that every male refugee alien, and every male enemy alien other than a refugee alien who (*a*) is of, or above, the age of eighteen years, and under the age of sixty years ; and (*b*) has not, within fourteen days after he first became liable to register, volunteered and been accepted for service in some part of the Naval, Military or Air Forces of the Commonwealth, shall perform such service in Australia as is directed by the Minister of State for the Interior, not being service in the Armed Forces, but being service which the alien is, in the opinion of the Minister of State for the Interior, capable of performing.

The direction made by me pursuant to the above-mentioned regulation on the 7th March, 1942, is hereby rescinded.

Dated this seventeenth day of August, 1942."

Subsequently, on 14th December 1942, E. G. Theodore as Director-General of Allied Works and Delegate of the Minister for the Interior directed that the plaintiff, among other aliens, should perform the service of fitter and all work pertaining thereto under the instructions of the Department of the Interior and its employees, and he authorized W. S. Howard to issue the instructions incidental to the performance of such service. At a later date the necessary instructions issued under the hand of W. S. Howard from the Department of the Interior, Allied Works Council. The streams of authority already mentioned can scarcely be called clear and undiluted, but further currents add to the troubled waters. It appears that Mr. C. J. Bellemore—Deputy Director-General of Man Power in New South Wales—is the officer to whom the Director-General of Man Power pursuant to reg. 8 (3) of the *National Security* (*Man Power*) *Regulations* delegated the power of giving permission in writing to a person employed in a protected undertaking to be appointed to or enlisted in the defence force. No such permission was given by Mr. Bellemore to the plaintiff. Notwithstanding this, Colonel Spurge, a man-power officer, and as such authorized by the Director-General of Man Power to give permission for persons employed in a " protected undertaking " for their employment to be changed to

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that with the Allied Works Council, purports to have given permission for the plaintiff's employment in the protected undertaking to be changed to employment with the Allied Works Council. This employment, it will be noticed, is limited to a change of employment (reg. 14 (2), *Man Power Regulations*), whereas Mr. Bellemore's authority purports to enable him to permit a person employed in a protected undertaking to be appointed to or enlisted in the defence force. Moreover, Colonel Spurge purports to permit the change in question to be made to employment with the Allied Works Council. There is no direct evidence as to how or where the Allied Works Council operates, or of what its employment consists. In these circumstances the plaintiff applied to this Court and my brother *Williams* made a declaration that the defendants were not entitled to call upon the plaintiff to do the labour or service specified in the direction by the defendant E. G. Theodore dated 14th December last, or to do the acts and things specified in the "Employment Advices" given by the defendant W. S. Howard on 21st December last and 4th January last. From this order the plaintiff has appealed. In support of the judgment under appeal Mr. *Weston* stoutly contended that the direction of 17th August 1942 is invalid because, being an order of a legislative character within the meaning of sec. 5 (4) of the *National Security Act* 1939-1940, it was not laid before each House of Parliament pursuant to sec. 48 (1) (*c*) of the *Acts Interpretation Act* 1901-1937. I do not propose to express any opinion on this contention, which is far-reaching in its character, because my brother *Williams*' judgment, for the reasons given by him and supported by Mr. *Weston*, is in my opinion correct. I pass then to state my reasons for my opinion.

1. Prior to 3rd February 1942, when the *Aliens Service Regulations* came into force, aliens were not required to render national service, although they could volunteer to do so. Every judge is presumed to know that the policy of the Commonwealth has been to encourage its inhabitants to volunteer to enlist in the armed forces. Indeed, the navy, Australian Imperial Force, and air force have always been recruited by voluntary enlistment and compulsion in the army has been limited until recently to the defence of Australia and its mandated territories. The *Aliens Service Regulations* recognize this policy of encouraging voluntary enlistment, because they provide for aliens volunteering for service in the navy, army or air force within fourteen days after they first become liable to register. The Regulations relate to two classes of aliens :—(1) those who volunteer, and (2) those who do not volunteer. The question which arises as to whether an alien's services have not been accepted can only arise

with respect to aliens in class 1. Aliens in class 2 have not offered any service capable of not being accepted. The expression, "an alien who has not volunteered and been accepted for service," is elliptical. If an alien has not volunteered no question can arise as to acceptance, so that the expression must be expanded into "an alien who has not volunteered, and, if he has volunteered, has not been accepted for service." The crucial question, therefore, is what is meant when it is said that an offer to serve in a branch of the armed forces has not been accepted. To accept is to take something which is offered, so that not to accept is not to take something which is offered. If the phrase had been expressed in a present or a future tense so as to read "an alien who does not volunteer and (if he does) is not accepted," or "an alien who shall not volunteer and if he shall volunteer, shall not be accepted," it would be clear that non-acceptance meant refusal. I am unable to see why it should be given a different construction because the past tense has been chosen. But the context strengthens this conclusion. The Regulations profoundly affect life and liberty. Surely they must intend that the opportunity given to volunteer should be effective and not illusory? But in order that it should be effective in any substantial practical sense it is essential to construe the regulation to mean that if an alien volunteers within the fourteen days he is exempt from compulsion until that offer has been disposed of. Suppose he volunteers for the navy or air force. The offer can only be accepted by the navy or air force. In order to dispose of the offer, the navy or air force would require the alien to undergo medical and other examinations such as aptitude tests. He must, therefore, be ready to attend at the recruiting depot when called upon to do so. But if he could be compelled in the meantime to enlist and serve in the Citizen Military Forces or to do work allotted to him by the Minister for Labour and National Service or the Minister for the Interior anywhere in Australia, he would in both a legal and practical sense in the first instance, and in at least a practical sense in the second instance, be unable to bring such an offer to fruition by attending the call-up and thereby obtaining the same opportunity as other volunteers of being accepted for voluntary service in the navy or air force. It is necessary, therefore, in order to implement the right to volunteer, that the words in question should be construed to mean that the offer has been refused. The words in reg. 8 (1) (*a*), "within fourteen days," relate to the word "volunteered," and not to the words "been accepted."

The time within which an alien volunteers is a matter within his own control, but the time within which he may be accepted is

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beyond his control. He is not, therefore, subject to a direction under reg. 8 if he has so volunteered and while his offer is under consideration. During that period it is inapt to say that he has not been accepted. Regs. 6, 7 and 8 were intended to give a refugee alien a real option to serve in the armed forces rather than to be conscripted under reg. 8 for other service. The fact that the plaintiff was in a protected undertaking would not prevent his offer to serve in the army being accepted. If it was accepted he could then apply for permission to enlist under reg. 14 (4) of the *Man Power Regulations*. Enlistment is not necessary to the acceptance of an offer to serve. It is only the result of the acceptance of that offer. Reg. 14 (4) does not prevent an offer to volunteer being accepted.

If the Regulations are construed to mean that although an alien volunteers within fourteen days he can still be compelled at any time prior to his voluntary services being accepted, the result follows that regulations which appear to encourage voluntary recruiting place impediments in the way of the volunteer, because his offer can be circumvented by the intervention of compulsion in the period between the making of the offer and its consideration by the branch of the service to which it is made. The offers of a number of aliens, therefore, who volunteered on the same day might have a different result in the case where some of the offers had been expeditiously dealt with so as to anticipate a compulsory order while others had not. They would all have offered to serve when other aliens had done nothing, but they would all be just as liable to compulsion as the other aliens at any moment of time prior to the acceptance of their offer. It means that compulsory orders could have been made operative on 18th February 1942 with respect to all aliens, including those who had immediately volunteered within the fourteen days. The defendants' contention would involve that immediately upon the expiration of the fourteen days great numbers of aliens would be subject so to be conscripted, although it would have been in practice impossible for the military authorities by that time to have considered whether they would accept them, and that, taking the events which actually happened, it would be mere waste of paper for aliens reaching the age of eighteen years after the order of 17th August 1942 became operative to attempt to volunteer. It is not a question of which construction makes the regulations simpler to administer. It is a question whether what appears to be a choice given to aliens to become volunteers is in a practical sense real or a sham. The construction contended for by the appellant offends against every canon of ordinary fairness and common decency and leads to such a strange, capricious, and artificial result that it ought

not to be adopted unless the words are incapable of any other meaning.

2. *National Security* (*Man Power*) *Regulations*, reg. 14 (2), does not deal merely with leaving employment or changing a man's employment. In order to be effective under this regulation permission must be given to the employee to change from one employer to another. And even if Colonel Spurge were properly authorized to give permission under this regulation, he did not give permission to the plaintiff to go to any particular employer, but at most gave permission for him to perform service under the *National Security* (*Aliens Service*) *Regulations*, no employer being specified or contemplated. Moreover, Colonel Spurge's authority, if effective, was only to give permission for persons to change their employment to employment with the Allied Works Council. But the plaintiff's employment was either with the Department of the Interior or with the Allied Works Council. And if it was the former, Colonel Spurge had no power to sanction it. If the employment was the latter, it was prohibited by Statutory Rules 1942 No. 170, reg. 9 (3) (*a*). In any event it was Mr. Bellemore who purported to give any authority to Colonel Spurge, and he is not shown to have had power to give this authority.

3. It was contended that reg. 14 of the *Man Power Regulations* has no operation where an employee is called up compulsorily. These Regulations preceded the *Aliens Service Regulations*, and presumably aliens working in protected undertakings immediately became subject to them. Reg. 14 (4) therefore prevented aliens being enlisted in the defence force without the permission in writing of the Director-General. This sub-regulation is wide enough to cover voluntary or compulsory enlistment. It would therefore prevent an alien enlisting voluntarily or being compulsorily enlisted under reg. 7 of the *Aliens Service Regulations*. Compulsory enlistment in the defence force was the only form of compulsion that existed at the date of the *Man Power Regulations*, and aliens are protected against this. An additional form of compulsion for civil work was added by reg. 8 of the *Aliens Service Regulations*. Aliens in protected undertakings are not specifically protected against this form of compulsion by reg. 14, but reg. 14 (1) and (2) is by plain and necessary implication intended to be a complete code for the civil employment of any person employed in protected undertakings. It was also contended that the only aliens who are exempt from the *Aliens Service Regulations* are those exempted by reg. 3, which does not include aliens working in protected undertakings. Reg. 3 completely exempts certain aliens from the operation of the Regulations, but

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that is no reason why complete or partial exemption should not be conferred on some aliens by some other regulations. Here it is not contended that the plaintiff was not liable to register, but that does not mean that while he was employed in special civil work in a protected undertaking he was not exempt from being called up for other general civil work. No light is thrown on the problem by Statutory Rules 1942 No. 170. All that rule shows is that its author, wandering in a maze of overlapping regulations and wondering what they all meant, thought it advisable specifically to exempt men (including aliens) employed in protected undertakings from being called up for work in the Civil Constructional Corps. It does not affect the question whether the *Aliens Service Regulations* have repealed the protected undertakings regulations and, if so, to what extent. The applicant's contention would appear to be that the *Aliens Service Regulations* did not repeal the protected undertakings regulations so as to permit the plaintiff to enlist (as the evidence shows he desired to do), but that they did repeal for the purposes of reg. 8 what is plainly and clearly involved in reg. 14, namely, that men employed in protected undertakings cannot have their existing employment disturbed except in the manner therein mentioned. It is a highly capricious construction to be placed upon the interaction of the *Aliens Service Regulations* and the protected undertakings regulations to say that they can coincide so as to prevent an alien enlisting voluntarily or under compulsion without consent, but do not coincide so as to prevent an employer in a protected undertaking "*essential to the defence of the Commonwealth*" being deprived of the services of an employee in a key job, so that the employee can be sent under compulsion into military service or to pick and shovel work in the Northern Territory by some military or civil authority beyond the control of the Director-General of Man Power, when that employee's services are considered to be so valuable in the protected undertaking that he cannot be allowed to volunteer to enlist without the authority of the Director-General of Man Power. Reg. 14 is a special regulation. It deals with a specific matter from which reg. 8 of the *Aliens Service Regulations* does not derogate. Whereas the *Aliens Service Regulations* deal with aliens generally and have not the effect of enabling employees to be taken from the protected undertakings mentioned in reg. 14 of the *Man Power Regulations* to perform the general work which persons may be ordered to do under the *Aliens Service Regulations*, it is clear law that where there is no express repeal it is the duty of the Court to reconcile the provisions of statutes relating to the same subject matter as far as possible. In the present case there is no difficulty in so doing; and indeed reason,

convenience, and common sense require that they should be reconciled, so as to place an alien in a protected undertaking in the same position as any other employee, not only with respect to liabilities, but also with respect to rights.

For these reasons I think that the appeal should be dismissed.

STARKE J. Appeal from a judgment given by my brother *Dudley Williams* declaring in substance that the appellants were not entitled to call upon the respondent, a refugee alien and an infant, some twenty years of age, to perform a service directed by the Director-General of Allied Works pursuant to the provisions of the *National Security* (*Aliens Service*) *Regulations*.

The controversy arises out of confused regulations under the *National Security Act* 1939-1940 relating to man power, allied works and aliens service. My brother spent the better part of three days hearing the cause, and his judgment might well have been accepted. If its effect were inconvenient or contrary to the public interest, then an amendment of the Regulations might easily have been promulgated making it clear that the powers conferred by the *Aliens Service Regulations* were not limited by any of the provisions of the *Man Power* or *Allied Works Regulations*. Instead, we have an appeal costly both to the Commonwealth and to the father of the respondent, the next friend of the infant, for a legal interpretation of these confused regulations, which are of a temporary character. The appeal is now before us and extended over two more days and must be dealt with, but I propose to dispose of it as shortly as possible.

Under the *National Security* (*Man Power*) *Regulations* (Statutory Rules 1942 No. 34 as amended) the Minister of State for Labour and National Service may declare any industry to be a protected industry. A person employed in a protected industry cannot be appointed to or enlisted in the defence force without the permission in writing of the Director-General of Man Power : nor without the like permission may his employment be terminated or changed. Further, another regulation excepts men employed in protected industries under the *Man Power Regulations* from service in the Civil Constructional Corps established by the Director-General of Allied Works : See *National Security* (*Allied Works*) *Regulations*, Statutory Rules 1942 No. 88, and 1942 No. 170, reg. 9 (3) (*a*).

The respondent was employed as a junior draftsman by a company which carried on the business of sheet-metal workers and was engaged in the fulfilment of contracts relating to the war for the Minister of Munitions, for the De Haviland Aircraft Corporation, and for the American Army. The business carried on by the company was a

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protected undertaking or industry within the meaning of the *Man Power Regulations*.

The *Aliens Service Regulations*, 1942 No. 39 as amended, were passed shortly after the *Man Power Regulations*. These Regulations required every male alien of or above the age of eighteen years (not being an alien exempt from the provisions of the Regulations) resident in Australia to register for national service. And by reg. 8 of these Regulations it is provided :—" (1) The Minister of State for the Army may direct that—(*a*) Any male refugee alien under the age of sixty years who has not, within fourteen days after he first became liable to register " (that is, under reg. 4), " volunteered and been accepted for service in any part of the Naval Military or Air Forces of the Commonwealth . . . shall perform such service in Australia as is directed by the Minister of State for Labour and National Service, or the Minister of State for the Interior, not being service in the armed forces, but being service which the alien is, in the opinion of the Minister issuing the direction, capable of performing."

The respondent registered under these Regulations. He volunteered for military service within fourteen days of the time prescribed by the Regulations in the case of persons liable to register under the Regulations. But his " mobilization attestation form " was marked " reserved " : " protected industry " : and later " protected undertaking," and his registration form (duplicate) under the *National Security* (*Aliens Service*) *Regulations* was also marked " reserved." He was, however, called for service, not being service in the armed forces, under the *Aliens Service Regulations*. It was contended that the respondent was not properly called for service under the *Aliens Service Regulations*, for he had volunteered for armed service within due time and must be deemed to have been accepted for that service because non-acceptance imported some positive act of refusal. And, though the proper authority had not expressly accepted those services, still it had not by any positive or other act refused those services.

This construction of the Regulations cannot, I think, be sustained. Acceptance in its plain and ordinary signification simply imports the taking or receiving of what is offered. If an authority does not take or avail itself of the service offered, then those services are not accepted, whether there be or be not a positive refusal.

In the present case the respondent volunteered for service in the armed forces within the fourteen days prescribed, but he was not accepted, for the proper authority did not take or avail itself of his services. The regulation does not confer rights but conditions power. The conditions of the exercise of the power, in the case of

a male refugee alien, are that he be under the age of sixty years, has not volunteered within the prescribed time, and has not been accepted for service. But, if his services in the armed forces have not been accepted, then the regulation is explicit that he may be called for service, other than in the armed forces, whether the time for volunteering has or has not elapsed. However, the prescribed time had in fact elapsed before the respondent was called for service.

Another contention was that the *Man Power Regulations* dealing with protected industries were not affected by the *Aliens Service Regulations*, which, as already stated, are later in date than the *Man Power Regulations*. "Where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered, or derogated from merely by force of such general words, without any indication of a particular intention to do so" (*Seward* v. *Vera Cruz* (1)). But I do not think it necessary in the present case to consider whether there is any inconsistency between the Regulations, or whether the "protected industry" Regulations would be described as special and the *Aliens Service Regulations* as general legislation or *vice versa*, for I have reached the conclusion, perhaps with some reluctance, having regard to the facts of this case, that the *Aliens Service Regulations* indicate a particular intention to include all male refugee aliens under the age of sixty years who are not exempted from the provisions of the Regulations by reg. 3 thereof.

Finally, it was contended that a direction given on 17th August 1942 by the Minister of State for the Army pursuant to reg. 8 of the *Aliens Service Regulations* was invalid because it was of a legislative and not an executive character and had not been laid before each House of Parliament in accordance with the provisions of sec. 48 (1) (*c*) of the *Acts Interpretation Act* 1901-1937 : See *National Security Act* 1939-1940, sec. 5 (3) and (4). The direction is to the effect that every male refugee alien of certain descriptions shall perform such service in Australia as is directed by the Minister of State for the Interior, not being service in the armed forces, but being service which the alien is, in the opinion of the Minister of State for the Interior, capable of performing. This direction is not of a legislative character, for it prescribes in itself no rule of conduct for the subject but simply executes the power given by reg. 8 of the *Aliens Service Regulations*.

This appeal should consequently be allowed.

(1) (1884) 10 App. Cas. 59, at p. 68.

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McTIERNAN J. I agree with the judgment and reasons of the Chief Justice. I shall only add that in my opinion reg. 8 (1) (*a*) applies to any refugee alien under the age of sixty years, not exempted by the provisions of the Regulations, who did not, within fourteen days after he first became liable to register, become a member of the forces by the method of volunteering and acceptance for service in the forces. In my opinion this view is required by the ordinary grammatical meaning of the phrase "has not within fourteen days after he first became liable to register, volunteered and been accepted for service" in the forces. The regulation would need to be redrafted if it were considered advisable to confine the limitation of time to the act of volunteering.

Appeal allowed. Judgment set aside. Action dismissed. No order as to costs.

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

Solicitors for the respondent, *Uther & Uther.*

J. B.