[HIGH COURT OF AUSTRALIA.]

GONZWA . . . . . PLAINTIFF;

AND

THE COMMONWEALTH AND OTHERS . . DEFENDANTS.

Constitutional Law—Defence—National security—Regulations—Validity—Aliens—Medical practitioners—Unregistered and unlicensed—Prohibited from practice—The Constitution (63 & 64 *Vict. c.* 12), *s.* 51 (*vi.*), (*xix.*)—*National Security Act* 1939-1943 (*No.* 15 *of* 1939—*No.* 38 *of* 1943), *s.* 5—*National Security* (*Alien Doctors*) *Regulations* (*S.R.* 1942 *Nos.* 52, 362), *regs.* 1-15, 16 (1).

Held, by *Latham* C.J., *Rich*, *McTiernan* and *Williams* JJ., that regs. 1 to 15 inclusive of the *National Security* (*Alien Doctors*) *Regulations*, and, by *Rich*, *McTiernan* and *Williams* JJ. (*Latham* C.J. and *Starke* J. dissenting), also reg. 16 (1) of those Regulations, are within the defence power of the Commonwealth.

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SYDNEY, *April* 14, 17; *May* 11.

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

DEMURRER.

In an action brought in the High Court by Jacob Gonzwa against the Commonwealth of Australia and J. H. L. Cumpston, C.M.G., Sir Robert B. Wade and J. Newman Morris, C.M.G., being the members of the Commonwealth Alien Doctors Board, the statement of claim was substantially as follows :—

Gonzwa resides at The Wintergarden, 57 Darlinghurst Road, Sydney, New South Wales, and practises medicine at that place. He was born on 1st February 1893 at Czenstochowa which, at that date, was part of the Russian Empire, but which, after the Treaty of Versailles, became part of Poland. In 1913 Gonzwa became enrolled as a medical student at the Russian University at Warsaw and during that and the following years he attended medical courses at various European Universities until late in 1914, when Warsaw was occupied by Germany and Gonzwa was ordered by the then German Government to pursue his studies at the University of Cracow, which was then part of Austria. He attended the medical courses at the University of Cracow and other Austrian Universities and in 1921 graduated from the University of Cracow as a doctor of

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medicine. In 1921 Gonzwa was appointed the Government Doctor of the District of Skalat in Poland. As such, he was in charge of all matters concerning public health, the examination of recruits for the army, the examination of civil servants, the carrying out of post-mortem examinations on behalf of the government, and other duties as Government Medical Officer. He was also in charge of the gynaecological department of the State Hospital for Skalat. From 1923 until 1937 Gonzwa practised as a medical practitioner at Lvov in Poland and was also on the staff of the State Hospital at Lvov as assistant doctor in the department of obstetrics and gynaecology and internal female diseases and surgery.

Gonzwa arrived and commenced to reside in New South Wales on 10th March 1938 and has resided in New South Wales since that date and carried on his practice as a medical practitioner. He has not been registered under the *Medical Practitioners Act* in force in New South Wales from time to time since that date.

On 11th November 1943, Gonzwa was questioned and his premises were searched by two Commonwealth peace officers in the employ of the Commonwealth of Australia. At the end of the interview he made a written statement as follows :—" I openly admit practising medicine at suite 9 on the third floor at 57 Darlinghurst Road, King's Cross. I do not keep records of persons treated by me, other than entries in diaries. I issue receipts for fees paid to me by the persons I treat. I display a brass plate at the entrance to 57 Darlinghurst Road for the purpose of advertising that I am willing to practise medicine and treat persons with illnesses. During October one of my patients . . . paid me fifteen guineas for treatment I gave her during about September this year." The two Commonwealth peace officers removed papers and other documents from Gonzwa's premises. He has made numerous requests for the return of the documents and for an inventory of the same and the Commonwealth has refused the requests.

The defendants J. H. L. Cumpston C.M.G., Sir Robert B. Wade and J. Newman Morris C.M.G. are the members of the Commonwealth Alien Doctors Board appointed under the *National Security* (*Alien Doctors*) *Regulations* being Statutory Rules 1942 No. 52 as amended by Statutory Rules 1942 No. 362.

Gonzwa has not complied with the Regulations and the defendants and each of them threatened and intended to enforce or endeavour to enforce the provisions of those Regulations against Gonzwa. He alleged that compliance with the Regulations would occasion serious loss or damage to him and that he would be seriously inconvenienced in the carrying on of his practice as a medical practitioner by reason of the requirements of the Regulations.

He therefore claimed, *inter alia*, (1) that it might be declared that reg. 16 (1) of the *National Security* (*Alien Doctors*) *Regulations* is invalid and ultra vires the Governor-General under the *National Security Act* 1939-1943 and/or the *Commonwealth of Australia Constitution Act*, and (2) that the defendants and each of them might be restrained from enforcing or endeavouring to enforce any proceedings whatsoever based upon those Regulations.

The defendants demurred to the statement of claim.

The relevant provisions of the *National Security Act* 1939-1943 and of the *National Security* (*Alien Doctors*) *Regulations* are sufficiently set forth in the judgments hereunder.

Holmes, for the plaintiff. Regs. 1 to 15 inclusive of the *Alien Doctors Regulations* amount merely to an invitation to persons who possess medical qualifications and who are not registered or who are not able to be registered under State law to procure a permit entitling them to practise medicine for the duration of the war. The Governor-General cannot make it an offence to practise medicine in time of war whether the qualified persons are registered or not, or whether they have a licence or not under Commonwealth legislation. The Regulations as a whole deal with a matter of public health, not a matter of defence or a matter of aliens. The Regulations, which do not in any way provide how persons who have obtained a licence are to exercise the privilege, are too wide. They do not provide either specifically or generally that the persons so qualified and licensed would be entitled to practise medicine in respect of the personnel of the armed forces or munition factories or other defence projects. Although provision can be made under the defence power to overcome a shortage of medical practitioners necessary for the proper prosecution of the war, it is not a proper exercise of that power to provide for the general health of the community as a whole (*Victorian Chamber of Manufactures* v. *The Commonwealth* (*Industrial Lighting Regulations*) (1); *R.* v. *University of Sydney*; *Ex parte Drummond* (2)). The providing of medical practitioners and other amenities for the general health of the community is equally necessary in time of peace and in time of war. If reg. 14 is valid, then the medical profession as such could be validly nationalized by a regulation resting entirely on the defence power. There is nothing on the face of the Regulations which connect them with defence. So far as the Court knows there is not any shortage of medical practitioners. The introductory words of s. 5 of the *National Security Act* 1939-1943 show that any regulation with

(1) (1943) 67 C.L.R. 413. (2) (1943) 67 C.L.R. 95.

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respect to aliens made under sub-s. 1 (*e*) of that section must relate to some aspect of defence. Clauses *a* to *j* inclusive of s. 5 (1) are parenthetical and in their construction should be related with the introductory words of s. 5 (*Lloyd* v. *Wallach* (1)). The interposition of those clauses is merely an indication of the particular matters included within the power without limiting the generality of the power. The Court can construe the section as a section relying entirely upon the defence power and not one to be justified by the power with respect to aliens (*Ferrando* v. *Pearce* (2)). The *National Security Act* does not purport to authorize the making of Regulations with respect to the subject matter of aliens, but only for securing the public safety and the defence of the Commonwealth, and particularly under that heading aliens. Even though regs. 1 to 15 inclusive might in a sense be justified, reg. 16 is not justified, because it is related to something quite apart from defence ; it does not provide for the utilizing of the services of anyone. It is purely prohibitory and assumes the power to regulate the medical profession generally. Reg. 16 is in no way related to any defence activity. It does not compel a person to practise medicine, it simply creates an offence.

Treatt K.C. and *Louat*, for the defendants, in support of the demurrer.

Treatt K.C. The Regulations generally are, in substance, with respect to the public safety and the defence of the Commonwealth. It is true that regs. 1 to 15 inclusive have reference to a wider class than reg. 16, but that difference emphasizes that reg. 16 has relation to the defence of the Commonwealth. Regs. 1 to 15 inclusive have reference to persons other than aliens. They are designed to secure for the Commonwealth in time of war the services of people, for the most part aliens, who have qualified overseas, to take the place of subjects who have been called up. On the other hand, reg. 16 is designed to assure that aliens, people in a special category, shall not during the currency of the Regulations exercise a calling which, from its very nature, would enable them to do things inimical to the Commonwealth. It is recognized that in times of peace the control of aliens is essential to the well-being of the State ; in time of war it is even more necessary that aliens should be controlled (*Chae Chan Ping* v. *United States* (3)).

[STARKE J. referred to *Musgrove* v. *Chun Teeong Toy* (4).]

(1) (1915) 20 C.L.R. 299, at pp. 302, 303.
(2) (1918) 25 C.L.R. 241, at pp. 253, 258.
(3) (1889) 130 U.S. 581, at p. 603 [32 Law. Ed. 1068, at p. 1074.]
(4) (1891) A.C. 272.

It is not dangerous for some qualified aliens to practise medicine, provided they are controlled by regulations. Although control, doubtless, could be effected by the States, the States have not sought to exercise it. In view of the shortage of medical practitioners it therefore devolves upon the Commonwealth, being charged with the matter of preserving the health of the community, to take the necessary measures. Regs. 1 to 15 inclusive are devised to fill a gap created by the war which must be filled in the interests of the army and the community. That being so, those Regulations have a direct relation to safety and the defence of the Commonwealth. They constitute a reasonable measure to deal with a war-created difficulty. *Victorian Chamber of Manufactures* v. *The Commonwealth* (*Industrial Lighting Regulations*) (1) is distinguishable because it appeared from the face of the *Industrial Lighting Regulations* that they were designed to regulate lighting in all establishments whether they were engaged on defence projects or otherwise. The position of medical practitioners under the *Alien Doctors Regulations* is very different. Once it is conceded that during the war there will be inevitably a shortage of medical practitioners, then Regulations designed to secure the services of qualified persons are an exercise of the defence power. The special relationship between medical practitioners and patients enables the former, if so disposed, to exercise an influence and to do things inimical to the Commonwealth. Having regard to the potential danger to the Commonwealth in time of war of some aliens and the possibility of defence information being imparted to them by patients, it is right, as provided by reg. 16 (1), that in a proper case an alien, although qualified, should be prohibited from practising.

Louat. Reg. 16 is justifiable under the defence power on the further ground that it is part of a complete scheme for utilizing in aid of the war effort the services of aliens in the Commonwealth. This scheme is comparable with the scheme under the *Man Power Regulations*. It is within the defence power to confer a discretionary power upon the authorities of determining in what capacity an alien, amongst others, should render service for the defence of the Commonwealth, and whether the employment of some aliens in certain capacities or services might be inimical to the safety of the Commonwealth, and, therefore, that they should be precluded from engaging in those capacities or services. That discretionary power ensures that the maximum and best use is made of every person.

(1) (1943) 67 C.L.R. 413.

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Holmes, in reply. There is not any evidence that qualified persons not registered under a State Act, are able to be, and are being, registered under the Regulations, thereby adding to the number of qualified medical practitioners available for service and reducing the deficiency caused by the demands of war. Reg. 16 does not utilize the services of any person. There is nothing in the Regulations which adds in any way to the availability of the plaintiff's medical services. The Regulations do not make available more persons to practise medicine than was the position before the Regulations were promulgated. The field of licensed medical practitioners created by regs. 1 to 15 inclusive is cut down by reg. 16 because it prohibits from practising any alien other than a registered medical practitioner or a person licensed under the Regulations. There is nothing in the Regulations to suggest that reg. 16 is in any way concerned with security measures. Reg. 16 applies to friendly aliens and neutral aliens. On the other hand it does not apply to naturalized British subjects of enemy origin, so any question with respect to security is speculative.

Cur. adv. vult.

May 11.

The following written judgments were delivered :—

LATHAM C.J. Demurrer to a statement of claim. The plaintiff is a medical practitioner who graduated in the year 1921 at the University of Cracow in Poland. He practised his profession in Europe until the year 1937. He arrived in New South Wales in March 1938 and has been carrying on practice as a medical practitioner in Sydney, though he has not been registered under the *Medical Practitioners Act* 1938-1939 (N.S.W.). It is not contended that in so doing he infringes any law of New South Wales. There are variations in the laws of the States with respect to qualifications for medical practice and prohibition of practice by unqualified persons.

The *National Security* (*Alien Doctors*) *Regulations* (Statutory Rules 1942 No. 52 as amended by Statutory Rules 1942 No. 362) contain a provision in reg. 16 that an alien other than a registered medical practitioner (that is, (reg. 3) a person registered as such under the law of a State or Territory), or a person licensed under the Regulations, shall not, *inter alia*, give or perform, for fee or reward, any medical or surgical service, attendance, operation or advice, or hold himself out as practising medicine or surgery. The plaintiff admittedly is practising medicine and holding himself out as practising medicine, though he does not hold himself out as being a

registered medical practitioner. Proceedings under the Regulations have been threatened by Commonwealth authorities and the plaintiff accordingly brought this action asking for a declaration that reg. 16 (1) of the *Alien Doctors Regulations* is invalid. The defendants have demurred and the demurrer now comes for argument before the Court.

The *Alien Doctors Regulations* were made under the *National Security Act*, s. 5. That section provides that "the Governor-General may make regulations for securing the public safety and the defence of the Commonwealth and the Territories of the Commonwealth, and in particular" for various matters, including "(*c*) for prescribing any action to be taken by or with respect to alien enemies, or persons having enemy associations or connexions, with reference to the possession or ownership of their property, the conduct or non-conduct of their trade or business, and their civil rights or obligations; . . . (*e*) for requiring or authorizing any action to be taken by or with respect to aliens, and for prohibiting aliens from doing any act or thing; . . . and for prescribing all matters which, by this Act, are required or permitted to be prescribed, or which are necessary or convenient to be prescribed, for the more effectual prosecution of any war in which His Majesty is or may be engaged." Section 5 (2) provides that any provision of any regulation made under the section with respect to aliens may relate either to aliens in general or to any class or description of aliens. The *Alien Doctors Regulations* apply to other persons than enemy aliens. They contain no provision which is limited to enemy aliens. Par. *c* of s. 5 (1) of the Act is not relevant to the question of the validity of these Regulations.

In my opinion the powers conferred by s. 5 are limited to requirements for securing the public safety and defence of the Commonwealth and the Territories thereof, and for prescribing the matters which are mentioned in the concluding words of the section which has already been quoted. For example, one of the particular matters in relation to which regulations may be made under the Act is "(*g*) for requiring any person to disclose any information in his possession as to any prescribed matter." In my opinion regulations are authorized under the Act in relation to this subject only if they fall within the general words of the section as regulations for securing the public safety and the defence of the Commonwealth, or as affecting the more effectual prosecution of the war. The provision quoted would not authorize the making of regulations requiring the disclosure of information which was irrelevant to any matter of defence. In other words, the *National Security Act* is an Act which

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relates throughout to defence. Thus, although the Commonwealth Parliament has power under s. 51 (xix.) of the Constitution to make laws with respect to aliens, the *National Security Act* is not an exercise of that power in such a way as to entitle the Governor-General to make regulations with respect to aliens, irrespective of any considerations of defence. I therefore approach the question of the validity of the *Alien Doctors Regulations* upon the basis that, although they are regulations falling within s. 5 (1) (*e*) of the *National Security Act*, as being regulations prohibiting aliens from doing an act or thing, they must also be regulations which can be supported under the general words of the section with reference to defence which I have quoted. The fact that reg. 16 (1) prohibits aliens from doing the act of practising medicine is not sufficient to establish the validity of that regulation.

The Regulations are entitled *National Security* (*Alien Doctors*) *Regulations*. They provide for the establishment of a "Commonwealth Alien Doctors Board," which is authorized under reg. 10 to grant or refuse to grant licences to applicants to practise medicine in all branches of medical science or in specified branches of medical science. Reg. 5 provides for an Examining Medical Committee which reports to the Board under reg. 9 as to the qualifications of applicants for licences.

Reg. 7 (1) is as follows :—"Any person who is, by the law of any country outside Australia, qualified to practise medicine in that country, may apply in accordance with the approved form to the Chairman of the Board for a licence under these Regulations."

These are the only persons who are entitled to make application for licences and are the only persons to whom licences under the regulations may be granted. It will be observed that reg. 7 contains no reference whatever to aliens. It applies to all persons who, by the law of any country outside Australia, are entitled to practise medicine in that country. Thus the Regulations apply to all such persons, whether they are British subjects, including Australian citizens, or allied aliens, or neutral aliens, or enemy aliens.

Reg. 13 provides that, notwithstanding anything in the law in force in any State, any person licensed under the Regulations shall be entitled to practise medicine in any such State, subject to the limitations, conditions or qualifications specified in his licence. Thus the effect of the Regulations is to enable a Commonwealth authority to grant a licence to practise medicine in a State, notwithstanding that, by the law of the State, the person licensed would not be entitled so to practise.

Reg. 14 provides that licensed persons shall, if so required by the Minister, practise medicine in any place, and under such conditions as the Minister may direct.

In my opinion all these regulations are valid. The Court is entitled to take judicial notice of the notorious fact that Australia has large armed forces which make a heavy demand upon the medical services of qualified persons. The result of this demand is to bring about a deficiency in the medical services which are available for civilians by reducing the number of medical practitioners available for civilians. The necessity of continuing some reasonable provision for civilians tends in turn to limit the number of medical practitioners available for the armed forces. This problem with respect to the provision of medical services has been directly created by the war.

State laws provide for the qualification of medical practitioners and impose conditions upon persons practising or holding themselves out as practising medicine. The State laws have not been made in order to meet defence requirements, and they have no relation to defence requirements. The Commonwealth Parliament, which has power and responsibility in relation to defence, may, in my opinion, make provision in war-time to secure medical practitioners for the armed forces and for the civilian population, which is being deprived of medical service by the enlistment of doctors or the calling up of doctors for the forces.

In my opinion these considerations are sufficient to support the validity of regs. 1 to 15.

In my opinion reg. 16 is of an entirely different character. Reg. 16 (1) is in the following terms :—

"16. (1) An alien, other than a registered medical practitioner or a person licensed under these Regulations, shall not—

(*a*) give or perform, for fee or reward, any medical or surgical service, attendance, operation or advice ;

(*b*) advertise or hold himself out, directly or indirectly by any name, word, letter, title or designation, whether expressed in words, or by letters, or partly in one and partly in the other (either alone or in conjunction with any other word or words) or by any other means whatsoever as being entitled, or qualified, able or willing to practise medicine or surgery, in any one or more or all of its branches, or to give or perform any medical or surgical service, attendance, operation or advice."

This regulation is limited to aliens. The other regulations, as I have pointed out, are not limited to aliens. The regulation

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prohibits any alien practising unless licensed under the Regulations or registered under State law. It is purely negative in character. It does not permit or authorize or compel any person to act as a medical practitioner. It does nothing to increase the number of persons available for utilization in any form of war service. It has no relation to the training of persons for medical work or to the utilization of limited facilities for such training—which latter circumstances I thought might be relevant to the assumption by the Commonwealth of some control over entrance into Universities : See *R.* v. *University of Sydney* ; *Ex parte Drummond* (1). Reg. 16 is passed upon the assumption that in time of war the Commonwealth Parliament can completely control the practice of medicine independently of any connection with purposes of defence. An increase in the number of persons entitled to practise medicine may, as I have already said, obviously assist defence, with the result that regs. 1 to 15 are valid ; but the disqualification of any person from practising who would otherwise be able to practise without breach of the law (which is the only effect of reg. 16 (1)) is not related to any considerations of defence and, in my opinion, has not that real relation to defence which is necessary to support it as a regulation under the *National Security Act*.

In my opinion, therefore, the demurrer should be disallowed.

RICH J. The demurrer in this case raises the question of the validity of reg. 16 (1) of the *National Security* (*Alien Doctors*) *Regulations*. The facts alleged in his statement of claim show that the plaintiff is within the class affected by the sub-regulation. His counsel, while assuming that regs. 1 to 15 of the above-mentioned Regulations were valid, contended that reg. 16 (1) was foreign to the scheme formulated by regs. 1 to 15 and outside the defence power. I consider that regs. 1 to 16 form a comprehensive plan for making medical services effective during the war campaign. The enlistment or calling up of medical practitioners for war service has drained the States of the normal supply of those duly registered and has obliged the authorities to seek the services of aliens who can establish their qualifications and prove to the satisfaction of a competent body that they are fit to practise in towns and districts, where owing to the demands made by war requirements, either there are no registered doctors available or those who are available are being sadly overworked. It is obviously inexpedient that aliens should carry on practice as medical practitioners without control by a system of registration which is not only calculated to prove

(1) (1943) 67 C.L.R. 95.

their fitness but also enables the governing body to avail itself of their services where they are most needed. The health of the armed forces and the conservation of the health and lives of great numbers of the civilian population who are engaged upon war work are alike necessary for the efficient prosecution of the war. The nexus between the scheme the subject of the Regulations and the defence power is, I think, fully established.

In my opinion the demurrer should be upheld.

STARKE J. Demurrer to a statement of claim which claims (*inter alia*) a declaration that reg. 16 (1) of the *National Security* (*Alien Doctors*) *Regulations* 1942 No. 52, as amended by Statutory Rules 1942 No. 362, is invalid and ultra vires the powers of the Governor-General under the *National Security Act* 1939-1943 and the Commonwealth Constitution.

The Regulations contain provisions for licensing persons to practise medicine who are by the law of any country outside Australia qualified to practise medicine in that country and entitling them to do so notwithstanding any law in force in any State, subject to the limitations, conditions or qualifications specified in the licence. And reg. 16 (1) provides that any alien other than a registered medical practitioner or a person licensed under the Regulations shall not (*a*) give or perform for fee or reward any medical or surgical service, or (*b*) advertise or hold himself out as entitled or qualified able or willing to practise medicine or surgery or to give or perform any medical or surgical service.

The Regulations are another intrusion upon the constitutional powers of the States and their validity depends upon the powers conferred upon the Governor-General under the *National Security Act* 1939-1943 which is based upon the legislative power of the Commonwealth to make laws with respect to the naval and military defence of the Commonwealth. The constitutional power of the Commonwealth to make laws with respect to aliens cannot be relied upon in support of the Regulations, for they are made in pursuance of the power conferred upon the Governor-General by the *National Security Act* 1939-1943 to make Regulations for securing the public safety and the defence of the Commonwealth. It is unnecessary, I think, and indeed beyond the scope of the pleadings to express any opinion upon the validity of the licensing system set up by the Regulations. The critical question is whether reg. 16 (1) is a valid exercise of power. The prohibition contained in reg. 16 (1) protects the public, it is said, from the exploitation of unlicensed or unqualified practitioners. Such a provision finds its place, no doubt, in a licensing

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Starke J.

system set up by a legislative body with plenary powers. But the relevant Commonwealth power is limited to the naval and military defence of the Commonwealth. And I agree with the Chief Justice that reg. 16 (1) has nothing to do with the defence of the Commonwealth. It makes no medical services available to the Commonwealth for the purposes of defence or any other purpose. In substance and in operation the regulation controls the practice of medicine by aliens. A law or regulation of that nature is not authorized by the defence power or by the *National Security Act* 1939-1943. Such a law relates to a matter which is not withdrawn from the States and remains within their constitutional powers. *R.* v. *University of Sydney*; *Ex parte Drummond* (1) is, I should have thought, a decisive authority in this Court in favour of this view, but when it is said that any regulation is valid if it "can conceivably be capable even incidentally of aiding defence" strange results must follow. The suggestion that reg. 16 (1) encourages aliens qualified to practise medicine by the law of a country outside Australia to come forward and place their services at the disposal of Australia is but an amusing application of this proposition.

The demurrer should be overruled.

McTIERNAN J. In this action the plaintiff alleges facts showing that he is an alien, a graduate of the University of Cracow, and that he practised medicine and surgery in Poland; the plaintiff also alleges that from 10th March 1938 he has resided in New South Wales and since that date he has carried on the practice of a medical practitioner at Sydney, but that he has not been registered under the *Medical Practitioners Act* 1938-1939 (N.S.W.).

The plaintiff claims a declaration that reg. 16 (1) of the *National Security* (*Alien Doctors*) *Regulations*, which he alleges the defendants threaten to enforce against him, is ultra vires and void. The question for decision, which is raised by demurrer, is whether this sub-regulation is beyond the powers of the Commonwealth or of the Governor-General.

It was argued on behalf of the plaintiff that, even if regs. 1 to 15 could be supported as embodying a scheme which lies within the defence power and hence within s. 5 of the *National Security Act* 1939-1943, yet reg. 16 (1) is extraneous to the scheme and cannot be supported by the defence power. It was further argued that it could not be supported as an exercise of the powers conferred by s. 5 (1) (*c*) and (*e*) of the above-mentioned Act, and s. 51 (xix.) of the Constitution, as the words of s. 5 describing the purposes for which the power to

(1) (1943) 67 C.L.R. 95.

make regulations is conferred, are, upon their true construction, confined to purposes within the defence power. In my opinion the scheme embodied in regs. 1 to 15 may be supported under the defence power and reg. 16 (1) as a measure forming part of that scheme or incidental to it.

The scheme is one which is appropriate for remedying, at least to a substantial degree, the interference which is produced by the war and its exigencies in the ordinary medical services available to the citizens, especially to those who are outside the military, naval and air services and their establishments. It is I think a matter of common knowledge that the war creates new and abnormal demands on the services of the doctors who are registered under the laws of the States and creates the need for more doctors than are necessary to satisfy normal peace-time requirements. For this reason there is a real and plain connection between regs. 1 to 15 and the defence of the Commonwealth and the prosecution of the war: Cf. *Andrews* v. *Howell* (1); *Silk Bros. Pty. Ltd.* v. *State Electricity Commission of Victoria* (2); *Peacock* v. *Newtown Marrickville and General Co-operative Building Society No. 4 Ltd.* (3). I refer also to the observations of *Latham* C.J. in *R.* v. *University of Sydney*; *Ex parte Drummond* (4). In the *Industrial Lighting Regulations Case* (5) I said: "It is not apparent to me that the Regulations could produce any condition which would be likely to assist, or could remove any condition that would be likely to impair, the war effort or the organization of the country for defence." I should say that the contrary of these observations is true of the scheme embodied in the present Regulations.

It is not the case that in every State it would be unlawful for a person who is not registered as a medical practitioner to do the acts mentioned in reg. 16 (1) (*b*). This sub-regulation would operate as a sanction compelling aliens who are engaged in such acts to apply to be licensed; and it is connected with and would, I think, aid the effectuation of this scheme to supplement, for the period of the Regulations, the ranks of registered medical practitioners with aliens of proved qualifications and fitness. Further, aliens whose qualifications or fitness failed to pass the test would be deprived of the opportunity, which is created by the shortage of doctors, of exploiting the needs of the public; and to repress that abuse is a matter which is part of and clearly incidental to this licensing scheme. It is not destructive of the validity of the scheme that this sanction operates only against aliens.

(1) (1941) 65 C.L.R. 255, at pp. 278, 279, 286, 287.
(2) (1943) 67 C.L.R. 1, at p. 17.
(3) (1943) 67 C.L.R. 25, at pp. 34, 49.
(4) (1943) 67 C.L.R., at pp. 102, 103.
(5) (1943) 67 C.L.R., at p. 423.

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McTiernan J.

These considerations are, in my opinion, sufficient to support reg. 16 (1) as an integral part of a plan the object of which is to remedy conditions which might detrimentally affect the prosecution of the war and the defence of the Commonwealth.

It was argued on behalf of the defendants that reg. 16 (1) could be supported independently of the preceding regulations as a measure of security. The argument was that the relationship between an alien medical man and his patients would give him special opportunities to engage in activities detrimental to the nation's war effort, and for that reason no alien should be allowed to establish such a relationship unless he satisfactorily passed all the tests as to fitness incidental to the procedure which is prescribed for licensing him to practise. I do not deny that reg. 16 (1) may be supported by these considerations: but I do not think it is necessary to pass on them. It is also unnecessary to decide whether the provisions of s. 5 (1) (*c*) and (*e*) of the *National Security Act* 1939-1943 confer upon the Governor-General power to make regulations outside the scope of the defence power.

In my opinion this sub-regulation is within the defence power and for that reason is a valid exercise of the power conferred upon the Governor-General by the above-mentioned Act.

I should allow the demurrer.

WILLIAMS J. The question that arises for decision on this demurrer is whether reg. 16 (1) of the *National Security* (*Alien Doctors*) *Regulations* is a valid exercise by the Executive of the power conferred upon it by the *National Security Act* to legislate within the ambit of s. 51 (vi.) of the Constitution for the naval and military defence of the Commonwealth. The regulation is in the following terms:—

"An alien, other than a registered medical practitioner or a person licensed under these Regulations, shall not—

(*a*) give or perform, for fee or reward, any medical or surgical service, attendance, operation or advice;

(*b*) advertise or hold himself out, directly or indirectly by any name, word, letter, title or designation, whether expressed in words, or by letters, or partly in one and partly in the other (either alone or in conjunction with any other word or words) or by any other means whatsoever as being entitled, or qualified, able or willing to practise medicine or surgery, in any one or more or all of its branches, or to give or perform any medical or surgical service, attendance, operation or advice."

In order to determine the validity of this regulation it is necessary to examine the scope and purpose of the Regulations as a whole.

The Regulations set up a Commonwealth Alien Doctors Board, consisting of the Commonwealth Director-General of Health as chairman and two other members appointed by the Minister of State for Health, and also an examining medical committee in each of the States of New South Wales, Victoria, Queensland and South Australia, consisting of the professor of medical jurisprudence as chairman and the professors of medicine, surgery and obstetrics in the universities in each State.

Reg. 7 provides that any person who is, by the law of any country outside Australia, qualified to practise medicine in that country may apply to the Board for a licence.

The Regulations then provide for an applicant to be examined by a committee which reports to the Board whether in its opinion the applicant has a knowledge of the English language adequate for the conduct of medical practice, possesses the requisite knowledge and skill for the efficient practise of medicine, surgery and obstetrics according to the standards in force at any Australian university, and possesses the requisite knowledge and skill for the efficient practice as a specialist of one of the special branches of medical science. After consideration of this report the Board may grant or refuse to grant a licence to the applicant. The licence, if granted, may be one to practise medicine in all branches or in one or more branches of medical science and may be unlimited as to place or area or limited as to any institution, service or area within the Commonwealth.

Reg. 13 provides that notwithstanding anything in the law in force in any State, any person licensed under the Regulations shall be entitled to practise medicine in any such State subject to the limitations, conditions or qualifications specified in his licence. Reg. 15 provides that every licence shall lapse and be no longer valid on the day on which the *National Security Act* ceases to be in force.

The circumstances surrounding the making of the Regulations, to be gathered from facts that are common knowledge and from the contents of the Regulations, are that the war has created a temporary shortage in Australia of qualified medical practitioners; that there are in Australia medical practitioners claiming to be qualified to practise according to the standards of other countries but *not qualified* under the laws of the States; that it can aid the prosecution of the war to make use of the services of these practitioners during the war provided that their professional qualifications and knowledge of English are sufficient and their general character satisfactory for the purpose; that it is equally capable of assisting the war effort whether their services are utilized in some direction directly connected with the prosecution of the war

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or indirectly by administering to civilians, thereby releasing other medical practitioners for active service; and that to be of use their services should be made available quickly in any State where they are required, but the attitude towards allowing such persons to practise and as to the conditions under which they should be allowed to do so if at all differs in the various States.

In the light of these circumstances it sufficiently appears, I think, that regs. 1 to 15 are a valid exercise of the defence power. They are not, as contended, an attempt by the Commonwealth to invade the domain of State law and to legislate on a subject of public health as in the *Industrial Lighting Regulations Case* (1), or of education as in the *Universities Commission Regulations Case* (2), in respects which have no sufficient connection with the prosecution of the war. Their purpose is to make use of the skill and energy of the persons mentioned in reg. 7 for the limited period of the war in a direction clearly capable of aiding its prosecution.

The challenged reg. 16 (1) (*a*) and (*b*) is corollary and incidental to regs. 1 to 15. Its object is to prevent aliens who are not registered medical practitioners under the laws of a State or Territory from practising or holding themselves out as duly qualified medical practitioners unless they are licensed to do so under the Regulations. The regulation might well have been made applicable to all persons referred to in reg. 7, but, if it would have been valid in this form, it would not be invalid because it only applies to those members of the class who are aliens and who desire to practise for fee or reward or to hold themselves out as duly qualified medical practitioners. Unless it was made mandatory to obtain a licence there would be no sanction to compel any of the persons referred to in reg. 7 to apply to have their professional and other qualifications inquired into. But, if their services are to be utilized, it is certainly desirable, if not essential, that steps should be taken to ensure that they have the necessary professional and other qualifications already mentioned, and, having regard to the confidential relationship which exists between a medical practitioner and his patient, it would certainly not be wise in the interests of public safety to allow them without inquiry to perform work in which they are likely to acquire information that could be of use to the enemy.

For these reasons I would allow the demurrer.

Demurrer allowed.

Solicitor for the plaintiff, *Simon Burns.*

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

J. B.

(1) (1943) 67 C.L.R. 413.

(2) (1943) 67 C.L.R. 95.