[HIGH COURT OF AUSTRALIA.]

POLITES . . . . . PLAINTIFF;

AND

THE COMMONWEALTH AND ANOTHER . DEFENDANTS.

KANDILIOTES . . . . . PLAINTIFF;

AND

THE COMMONWEALTH AND ANOTHER . DEFENDANTS.

H. C. OF A. 1945.

MELBOURNE, *March* 8, 9; *April* 10.

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

Constitutional Law—Construction of statutes to prevent conflict with rules of international law—Act authorizing conscription of persons for defence purposes—Whether Regulations conscripting allied nationals authorized thereby—National Security Act 1939-1943 (*No.* 15 *of* 1939—*No.* 38 *of* 1943), *ss.* 5, 13A—*National Security* (*Aliens Service*) *Regulations* (*S.R.* 1942 *No.* 39, *reg.* 7; *S.R.* 1942 *No.* 39—1943 *No.* 108, *Part II.*).

Section 13A of the *National Security Act* 1939-1943 provides:—"Notwithstanding anything contained in this Act, the Governor-General may make such regulations making provision for requiring persons to place themselves, their services and their property 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 of the Commonwealth, or the efficient prosecution of any war in which His Majesty is or may be engaged."

Held that, notwithstanding any rule of international law that aliens cannot be compelled to serve in the military forces of a foreign State in which they happen to be, s. 13A should be construed as authorizing the Governor-General to make regulations under which the service of any persons in Australia, including aliens, may be compelled for defence purposes.

Held, therefore, that reg. 7 of the *National Security* (*Aliens Service*) *Regulations* (Statutory Rules 1942 No. 39), and Part II. of the *National Security* (*Aliens Service*) *Regulations* (which was enacted in substitution for reg. 7 by Statutory Rules 1943 No. 108 and was in substantially the same terms), which provided for the compulsory enrolment of aliens in the armed forces organized by the Commonwealth to wage war against its external enemies, were valid.

Existence and scope of the rule of international law that aliens may not be compelled to serve in the defence forces of a foreign State in which they happen to be, and the effect of the rule on the construction of statutes, considered.

DEMURRERS.

Speros Polites brought an action in the High Court against the Commonwealth and Francis Michael Forde, the Minister of State administering the Department of the Army in the Commonwealth and administering the *National Security* (*Aliens Service*) *Regulations*. The statement of claim endorsed on the writ was substantially as follows :—

1. The plaintiff is a national of the Kingdom of Greece and is twenty-nine years of age, and was born within the territory of the aforementioned Kingdom and is not a British subject.

2. The defendant Francis Michael Forde is the Minister of State administering the Department of the Army in the Commonwealth of Australia and administering the *National Security* (*Aliens Service*) *Regulations*.

3. In or about the month of August 1942, purporting to act in pursuance of the *National Security* (*Aliens Service*) *Regulations* and more particularly Part II. thereof, the Commonwealth of Australia through its servants or agents caused to be served upon the plaintiff a notice requiring the plaintiff to serve in the military forces of the said Commonwealth.

4. On and after the service of the notice referred to in par. 3 above, the Commonwealth of Australia has deemed and deems the plaintiff to be enlisted in its Citizen Military Forces and through its servants and agents demands obedience by the plaintiff to the orders of military officers claiming authority over the plaintiff as a person subordinate to such officers as a member of the Citizen Military Forces and demands of the plaintiff the performance of military functions in pursuance of the orders abovementioned.

5. The plaintiff contends that the *National Security* (*Aliens Service*) *Regulations* Part II. are invalid because the making thereof is not authorized by the *National Security Act* 1939-1943 nor by any other Act of the Parliament of the Commonwealth of Australia and are void and of no effect.

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6. By reason of the matters set out in par. 5 above the plaintiff contends that he is not enlisted in the Citizen Military Forces and should not be deemed to be so enlisted and is not according to the law under any duty to obey orders given him by the military officers referred to in par. 4 above and is not under any legal duty to perform the military functions referred to in par. 4 above.

7. The plaintiff fears that if he refuses to obey the orders of the military officers referred to in par. 4 above and/or to perform the military functions therein referred to he will be subjected to punishment for supposed breaches of the *Defence Act* 1903-1941 and the regulations made thereunder.

The plaintiff claimed:—

(1) A declaration that he was not and was not to be deemed to be enlisted in the Citizen Military Forces of the Commonwealth of Australia and was not a member thereof.

(2) A declaration that the *National Security* (*Aliens Service*) *Regulations* Part II. are not authorized by (*a*) the *National Security Act* 1939-1943; (*b*) any other Act of the Parliament of the Commonwealth, and are void and of no effect.

Subsequently, Speros Polites delivered an amended statement of claim in which references to reg. 7 of Statutory Rules 1942 No. 39 were substituted for references to the *National Security* (*Aliens Service*) *Regulations* and Part II. thereof in pars. 3 and 5 and in the second prayer for relief and in which there were consequential alterations of a verbal nature.

Orpheus Kandiliotes, who was 25 years of age, brought an action in the High Court against the Commonwealth and Francis Michael Forde, the Minister of State administering the Department of the Army in the Commonwealth and administering the *National Security* (*Aliens Service*) *Regulations* in which the statement of claim endorsed on the writ was substantially the same as the statement of claim endorsed on the writ in the action of Polites as above set out, except that in par. 3 the month of August 1943 was substituted for the month of August 1942.

In each action, the defendants demurred to the statement of claim on the ground that the making of the relevant regulations was authorized by the *National Security Act* 1939-1943 and that the said regulations were valid and of full effect.

Both demurrers were argued together, the demurrer in the case of Polites' action being argued as a demurrer to the amended statement of claim.

The relevant statutory provisions and regulations are sufficiently set forth in the judgments hereunder.

P. D. Phillips (with him *T. M. Smith*), for the plaintiffs. Legislation of the Commonwealth Parliament should be read, if possible, so as not to involve the breach of a recognized rule of public international law. More particularly, a statute authorizing the making of a subordinate rule having the force of law should not be deemed to authorize the making of a rule involving a breach of a rule of public international law (*Maxwell on the Interpretation of Statutes*, 8th ed. (1937), p. 130; *Bloxam* v. *Favre* (1); *Craies* on *Statute Law*, 4th ed. (1936), pp. 386, 393; *Oppenheim, International Law*, 5th ed. (1937), vol. I., p. 40; *Jumbunna Coal Mine, No Liability* v. *Victorian Coal Miners' Association* (2), per *O'Connor* J.; *Niboyet* v. *Niboyet* (3); *In re Ralston*; *Perpetual Executors and Trustees Association* v. *Ralston* (4); "*Le Louis*" (5), per Sir *William Scott*; *R.* v. *Keyn* (6); *The* "*Annapolis*" (7), per Dr. *Lushington*; *Colquhoun* v. *Brooks* (8); *Mortensen* v. *Peters* (9); *Murray* v. *Charming Betsy* (10), per *Marshall* C.J.; *Potter, Relative Authority of International Law and National Law in the United States*, (1925) 19 Am. J. I.L. 315). Section 13A of the *National Security Act* must be subject to implied limitations not to be derived from the mere literal construction of the words thereof. Some limitation has to be placed on "persons" in the section. It is not conceivable that the legislature meant all persons everywhere, so that the subject matter of the legislation is not such as to justify an application of its literal meaning. It is not like *Mortensen* v. *Peters* (9), because, on any view, limitations have to be read into s. 13A. These limitations come from accepted rules of comity and international law. The rules of international law may be established by reference to the accepted text writers, the diplomatic practice and policy of the British Crown, and to right, reason and equity. It is a recognized rule of public international law, accepted by the British Crown, that the laws of one sovereign State may not impose the duties of military service in time of war upon the nationals of other States, except with the consent of those other states (*Oppenheim, International Law*, 5th ed. (1937), vol. I., pp. 237, 540; *Walker, Manual of Public International Law* (1895), p. 46; *Holland, Lectures on International Law* (1933), p. 149; *Halleck's International Law*, 3rd ed. (1893), vol. I., p. 558; *Pitt Cobbett, Cases on International Law*, 5th ed. (1931), vol. I., p. 202).

(1) (1883) 8 P.D. 101, at p. 107.
(2) (1908) 6 C.L.R. 309, at p. 363.
(3) (1878) 4 P.D. 1.
(4) (1906) V.L.R. 689.
(5) (1817) 2 Dods. 210, at p. 239 [165 E.R. 1464, at p. 1473].
(6) (1876) L.R. 2 Ex. D. 63.
(7) (1861) Lush. 295, at p. 306 [167 E.R. 128, at p. 134].
(8) (1888) 21 Q.B.D. 52.
(9) (1906) 14 S.L.T. 227.
(10) (1804) 2 Cranch. 64 [2 Law. Ed. 208].

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[STARKE J. referred to *The Lotus* (1).]

The general doctrine appears to be subject to a limited exception in the case of aliens who have lived in the country in question and taken the benefits of citizenship by voting, &c. (*Pitt Cobbett, Cases on International Law*, 5th ed. (1931), vol. I., p. 203) but the extent of any such gloss is not material, since the Commonwealth Parliament has purported to make a rule embracing all aliens without differentiation. The most modern and specific statement of the international doctrine is to be found in the *Projects of the International Commission of Jurists on the Codification of International Law* ((1929) 23 Am. J.I.L. Supplement, p. 234). During the last war, the United States of America conscripted aliens, and, in the correspondence consequent upon diplomatic protests, admitted that this was a breach of international law, even when restricted to aliens who had applied for, but not obtained, naturalization : this is fully set forth in the *Lansing Papers* (*Papers Relating to the Sovereign Relations of the United States*).

Until the *Army Act* 1881 (Imp.), aliens could not be enrolled in the British Army, and during the last war the British Government avoided general conscription of aliens and would not take steps against allied nationals except by treaty arrangements such as those made with France, Italy, Russia (*Parliamentary Papers*, 1917 and 1918, vol. 38, pp. 368, 445, 738), Greece and the United States (*Parliamentary Papers* 1918, vol. 26, pp. 655, 931). In the present war, the British Government has followed a similar course. The *National Service* (*Armed Forces*) *Act* 1939, s. 1, applied conscription to British subjects only, as did the *Allied Forces Act* 1940. The *Allied Powers* (*War Service*) *Act* 1942 gave allied nationals the option of joining their own or the British forces, but this remained ineffective until diplomatic agreement was reached and an Order in Council was made in 1943 (*Halsbury's Laws of England*, Supplement, (1944), p. 1200). [He referred also to *McKenzie, Legal Status of Aliens in Pacific Countries* (1937), pp. 209, 305, 354.] Conscription of British subjects by the Confederate States during the American civil war is dealt with in *Parliamentary Papers* (1864), vol. 20, pp. 368, 391, 393. The operation of the English Bankruptcy Acts has been limited by reference to the rules of international law : *Ex parte Blain* ; *Re Sawers* (2) ; *Cooke* v. *Charles A. Vogeler Co.* (3) ; *In re a Debtor* (4). The regulations cannot be supported by s. 5 of the *National Security Act*, since sub-s. 7 contains a prohibition against compulsory naval, military or air-force service. Section 13A is in general

(1) (1927) P.C.I.J., Series A., No. 10.
(2) (1879) 12 Ch. D. 522.
(3) (1901) A.C. 102.
(4) (1936) Ch. 622.

terms—it cannot mean what it says literally, and the Court is bound to apply some limitation to it. It must be confined to persons in Australia and British subjects outside Australia—that is the widest meaning "persons" can have on well-recognized rules. The real significance of the international rule is greatest in time of war. Existence of an emergency does not create an exception from the rule; in any event, the second set of regulations is more comprehensive, though the emergency had lessened considerably. The fact that the regulations are restricted to allied nationals makes no difference: firstly, because the international rule recognizes no such qualification; secondly, because British practice is to the contrary; thirdly, because intolerable difficulties would result, such as conscription of a Russian national to fight against Japan when Russia and Japan are not at war.

Dean K.C. (with him *Adam*), for the defendants. The general rule of construction is that an Act of Parliament, expressed in general terms, is presumed, unless the contrary appears either expressly or impliedly, not to infringe any rule of international law (*Maxwell* on *Interpretation of Statutes*, 3rd ed. (1896), p. 200, approved by *O'Connor* J. in *Jumbunna Coal Mine, No Liability* v. *Victorian Coal Miners' Association* (1)). But this rule is subject to qualifications. Firstly, the rule of international law must be shown to command general acceptance (*Craies* on *Statute Law*, 4th ed. (1936), p. 393; *Halsbury's Laws of England*, 2nd ed., vol. 31, p. 509). Secondly, the rule must be capable of precise and clear statement. Thirdly, the character of the Act sought to be restricted must be considered (*Mortensen* v. *Peters* (2))—an Act relating to defence in a total war should not be readily restricted. Fourthly, the rule must be one which can clearly be held to be applicable under modern conditions. Many of the passages cited for the plaintiffs have been based on events of past wars of very different character from the present war. Fifthly, the Act on which the rule is to set a limitation must be such that the limitation or implication can be readily drawn from it. By s. 13A of the *National Security Act*, the Executive was given new power to conscript persons, including aliens, as events made such conscription necessary for the defence of Australia. Section 13A is concerned merely with the distribution of power, and no violation of international law can occur until that power is exercised. If the rule of international law recognizes exceptions and the Act goes beyond those exceptions, then the whole Act is not bad, but it is good in so far as it does not exceed the exceptions, and it is necessary

(1) (1908) 6 C.L.R. 309, at p. 363. (2) (1906) 14 S.L.T. 227.

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to examine the scope of the exceptions to see whether the present case falls within or without the power when so restricted. The practice which may be discovered from an examination of the attitudes of particular nations is not conclusive. Aliens may be compelled to help maintain social order, within the limits of police action, and to defend the country against an external enemy when the existence of social order or of the population is threatened, when, in other words, a State or part of it is threatened by an invasion of savages or uncivilized nations (*Hall, Treatise on International Law*, 8th ed. (1924), pp. 260, 261). This would apply to the defence of Australia when the regulations were made, and is sufficient to allow regulations requiring compulsory military service of aliens of all kinds. It is very doubtful whether any accepted practice has so far been established which can be recognized as the rule of international law (*Halleck's International Law*, 3rd ed. (1893), vol. I., pp. 558, 559 ; *Wheaton's International Law*, 6th ed. (1929), vol. I., p. 208). The rule is the privilege of the State rather than of the individual, and where a State adopts neutrality its subjects should not be required to depart from their loyalty to that State. This basis disappears in the case of an allied national, and, though England made treaty arrangements with allied powers during the last war, it has never been said that the rule extends to others than subjects of neutral States. The rule is uncertain and vague in its operation as to the persons from whom service may be exacted, as to the distinction between allied and neutral nationals, as to the kind of service which may be exacted, and as to its exceptions. This uncertainty and vagueness is so great that the rule cannot justify the reading into s. 13A of any effective limitation relevant to this case. The rule further admits limitations within which, on any view, the present case falls. Section 5 (1) (*e*) of the *National Security Act* gives power to make regulations for requiring or authorizing action to be taken by or with respect to aliens, and for prohibiting aliens from doing any act or thing, but this (together with the other provisions of sub-s. 1) is limited with respect to compulsory military service by sub-s. 7. Section 13A was designed to remove the restriction contained in s. 5 (7). Parliament has thus considered the question of aliens, and s. 13A is in wide terms in order that all persons within Australia and all property of persons within Australia may be used for defence. The nature of the legislation is such that there is no room for any implied restriction. Section 13A merely confers a power on the Executive and the exercise of that power may not be a breach of international law—aliens may be employed in munitions, road-making, records, supply corps, &c., and in all

manner of things which are not directly connected with fighting. It must be shown that the regulations require service against which the rule of international law is directed. The regulations are directed to allied nationals only, to whom the international rule does not apply.

P. D. Phillips, in reply. The rule that a statute is to be construed as far as possible so as not to contravene international law is not displaced by the nature of the *National Security Act*. Firstly, the delegation by s. 13A is a general one, referring to all citizens as well as aliens. Secondly, if power to conscript aliens is included, it will cover also ambassadors, and neutrals. The fact that the recipient of the power is the Executive is no reason to rebut the prima facie construction. Thirdly, the rule of international law is a rule directed at law-making power or competence of the State in its international aspect. The rule is one creating rights, and is not a rule for the breach of which the remedy is mere diplomatic complaint. The English practice during the present war agrees with the arguments for the plaintiffs. The preponderance of authority shows that the rule is a precise rule of international law, and the fact that there may be exceptions to it does not render it vague and uncertain. The rule is expressed in universal form, and applies to all aliens, whether allied or not; the attitude of the United States of America in the last war shows that that State did not contend that the rule did not extend to allied nationals. The basis of the rule is not to be found in the requirements of neutral conduct: the obligation of military service is correlative with the general allegiance; an alien has not the full privileges of citizenship, and, in turn, may not have imposed upon him the ultimate obligations of service for the protection of the State.

Cur. adv. vult.

April 10.

The following written judgments were delivered:—

LATHAM C.J. These demurrers raise the question of the validity of reg. 7 of the *National Security* (*Aliens Service*) *Regulations* as appearing in Statutory Rules 1942 No. 39, and of Part II. of the *National Security* (*Aliens Service*) *Regulations* as enacted in substitution for that regulation by Statutory Rules 1943 No. 108.

The plaintiff Speros Polites is a national of the Kingdom of Greece, and is 29 years of age. A notice was served upon him in pursuance of the first-mentioned regulation requiring him to serve in the military forces of the Commonwealth. The plaintiff in the second action, Orpheus Kandiliotes, is also a Greek national, and is 25 years of

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age. He was required to serve with the military forces of the Commonwealth by a notice given to him in pursuance of reg. 6 contained in Part II. of the later Regulations mentioned. The two sets of regulations are substantially identical. They purport to authorize an area officer to serve a notice requiring any male allied national, with certain exceptions which are not material to the present cases, to serve in the military forces of the Commonwealth. When a notice under the Regulations has been served, the allied national becomes subject to the *Defence Act* and any regulations in force thereunder—under the earlier regulation " as if " (he) " were " (a) " British subject," and under the later regulation " to the same extent as if he were serving under Part IV. of " the *Defence Act*.

" Allied national " is defined in both sets of regulations as meaning " a national of any country which is or may be allied or associated with His Majesty in any war in which His Majesty is or may be engaged."

Under the provisions of these Regulations, the service of a notice by an area officer imposes an obligation of military service upon certain aliens. It is argued for the plaintiffs, first, that there is a general rule of construction of statutes according to which, unless the contrary intention is clear, it is to be presumed that they do not violate any recognized rule of international law; secondly, that there is a well-established rule of international law that aliens cannot be compelled to serve in the military forces of a foreign State in which they happen to be; thirdly, that the Regulations are made under a provision in the *National Security Act* 1939 as amended, namely s. 13A, which refers to persons generally; that these general words must be limited in some way, as otherwise they would apply to all persons in the world, and that one proper limitation is to be found in the recognition and application of the rule of international law to which reference has been made. By this course of reasoning, it is sought to establish the propositions that the Regulations are a clear breach of an established rule of international law, and that s. 13A of the *National Security Act* should be construed as not intended to authorize such a violation of established principle.

The first proposition for which the plaintiffs contend is well established by many authorities. Perhaps it is most conveniently stated in *Bloxam* v. *Favre* (1), where Sir *James Hannen* approved the statement in *Maxwell* on *Interpretation of Statutes*, 8th ed. (1937), p. 130, that " every statute is to be so interpreted and applied, as far as its language admits, as not to be inconsistent with the comity of nations or with the established rules of international law." See

(1) (1883) 8 P.D. 101, at p. 107.

also *Craies* on *Statute Law*, 4th ed. (1936), p. 379, and *Oppenheim*, *International Law*, 5th ed. (1937), vol. I., p. 37.

But all the authorities in English law also recognize that courts are bound by the statute law of their country, even if that law should violate a rule of international law: See, e.g., *Croft* v. *Dunphy* (1) where, after reference to the well-known authorities of *R.* v. *Burah* (2) and *Hodge* v. *The Queen* (3), establishing that Dominion Parliaments have, within the limits of their powers, authority as plenary and as ample as that of the Imperial Parliament, it is said that "legislation of the Imperial Parliament, even in contravention of generally acknowledged principles of international law, is binding upon and must be enforced by the Courts of this country, for in these Courts the legislation of the Imperial Parliament cannot be challenged as ultra vires," that is, as ultra vires by reason of being inconsistent with international law.

It was not really argued, and it could not, I think, successfully be contended, that the powers conferred on the Commonwealth Parliament itself by the Constitution, s. 51 (vi.), relating to naval and military defence, and s. 51 (xix.), "naturalization and aliens," were limited in any other manner than by the description of the subject matter. The Commonwealth Parliament can legislate on these matters in breach of international law, taking the risk of international complications. This is recognized as being the position in Great Britain—cf. *Craies* on *Statute Law*, 4th ed. (1936), p. 393: "Each State can, at its own international risks, reject the opinions of other States as to international law." The position is the same in the United States of America: See *United States* v. *Ferreira* (4); *Botiller* v. *Dominguez* (5); *Hijo* v. *United States* (6). And see *Willoughby on the Constitution of the United States*, 2nd ed. (1929), vol. 2, pp. 1316 et seq.. It must be held that legislation otherwise within the power of the Commonwealth Parliament does not become invalid because it conflicts with a rule of international law, though every effort should be made to construe Commonwealth statutes so as to avoid breaches of international law and of international comity. The question, therefore, is not a question of the power of the Commonwealth Parliament to legislate in breach of international law, but is a question whether in fact it has done so.

The next step in the plaintiffs' argument depends upon the establishment of the proposition that there is a rule of international law

(1) (1933) A.C. 156, at pp. 163, 164.
(2) (1878) 3 App. Cas. 889.
(3) (1883) 9 App. Cas. 117.
(4) (1851) 54 U.S. 40 [14 Law. Ed. 42.]
(5) (1889) 130 U.S. 238 [32 Law. Ed. 926].
(6) (1904) 194 U.S. 315 [48 Law. Ed. 994].

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which prevents a State from imposing an obligation of military service upon aliens resident within its territory. In order to establish this proposition, Mr. *Phillips* referred to the writings of jurists, to diplomatic practice, and, in particular, to the practice and the policy adopted by Great Britain. He clearly showed that there was a rule which prevented the imposition upon resident aliens of an obligation to serve in the armed forces of the country in which they resided, unless the State to which they belonged consented to waive this ordinarily recognized exemption. (No such consent is alleged in the present cases.) This rule, however, does not prevent compulsory service in a local police force, or, apparently, compulsory service for the purpose of maintaining public order or repelling a sudden invasion. Authority for these propositions is to be found in *Oppenheim, International Law*, 5th ed. (1937), vol. I., pp. 541, 542; *Walker's Manual of Public International Law* (1895), p. 47; *Pitt Cobbett's Cases on International Law*, 5th ed. (1937), vol. I., p. 203; *Hall, Treatise on International Law*, 8th ed. (1924), pp. 259, 260, where the distinction is drawn between the use of military forces for ordinary national or political objects and police action to preserve social order or to protect the population against an invasion by savages.

The proposition was also supported by reference to discussions which took place during the American civil war between Great Britain and the Confederate States: See *Davis, Elements of International Law*, 3rd ed. (1908,)pp. 154, 155, and *Hall, Treatise on International Law*, 8th ed. (1924), pp. 259, 260.

The Regulations which are challenged enforce ordinary military service without regard to any of the exceptions which have been suggested. The rule as to such military service is plain, even though there is some difference of opinion as to the extent of the right (internationally considered) to require aliens to perform police duties. The Regulations provide for compulsory service of aliens in Australian armed forces and place the aliens in the same position as British subjects in Australia. They must be held to be contrary to an established rule of international law.

The next question which arises is whether the *National Security Act* authorizes the making of regulations of this character. This is a question of the intention of Parliament, to be ascertained from the terms of the relevant legislation. The *National Security Act*, in its original form, contained in s. 5 provisions authorizing the making of regulations, *inter alia*, "(*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." Section 5, sub-s. 2, provided: "Any provision of any regulation made under this section with respect

to aliens may relate either to aliens in general or to any class or description of aliens." It was therefore clear that the Parliament contemplated the making of regulations thereunder which might be of a far-reaching kind—requiring or authorizing any action to be taken by or with respect to aliens. Thus regulations with respect to aliens were clearly within the contemplation of Parliament when the Act was passed.

Section 5 (7), however, provided that nothing in the section should authorize the imposition of any form of compulsory naval, military or air-force service, or any form of industrial conscription, or the extension of any existing obligation to render compulsory naval, military or air-force service. This provision imposed a limitation upon all the powers conferred by the section, including the power for making regulations requiring action to be taken by aliens under par. (*e*) of sub-s. 1. When the provisions in sub-s. 1 are examined, it is seen that the specific powers which are particularized, so far as they relate to persons as distinct from property, refer in par. (*c*) to alien enemies, in par. (*e*) to aliens, and in par. (*f*) to naturalized persons. The only other provision specifically relating to persons is par. (*g*), which authorizes the making of regulations requiring any person to disclose information in his possession as to any prescribed matter. A regulation made under par. (*g*) could not raise any question of compulsory naval, military or air-force service—to which sub-s. 7 applies. Thus sub-s. 7, referring specifically as it does to action in respect of persons, should be regarded as applying to action which might be required in respect of persons under regulations made under the preceding part of the section, and, therefore, to alien persons who are specifically referred to in the earlier part of the section.

The *Defence Act* at all relevant times has included the following provisions:—"46. (1) The Governor-General may, in time of war, by proclamation, call out the Citizen Forces or any part thereof for war service," and s. 59, "All male inhabitants of Australia (excepting those who are exempt from service in the Defence Force) who have resided therein for six months and are British subjects and are between the ages of eighteen and sixty years shall, in time of war, be liable to serve in the Citizen Forces." The obligation in respect of naval, military or air-force training was limited by s. 125 to British subjects. The position, therefore, was that the *Defence Act* did not apply to aliens, and that, while s. 5 of the *National Security Act* gave large powers to make regulations with respect to aliens, sub-s. 7 of that section prevented the imposition upon them of any form of compulsory naval, military or air-force service.

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By Act No. 44 of 1940, however, s. 13A was added to the *National Security Act* 1939. Section 13A is as follows:—"13A. Notwithstanding anything contained in this Act, the Governor-General may make such regulations making provision for requiring persons to place themselves, their services and their property 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 of the Commonwealth, or the efficient prosecution of any war in which His Majesty is or may be engaged: Provided that nothing in this section shall authorize the imposition of any form of compulsory service beyond the limits of Australia."

This was a general provision extending the regulation-making power conferred on the Governor-General by the Act "notwithstanding anything contained in this Act," and therefore notwithstanding s. 5 (7). Section 5 (7) prevented the making of regulations under the Act for military or industrial conscription. Section 13A expressly permitted the making of such regulations, in spite of the provision contained in s. 5 (7). It has already been said that s. 5 (7) operated to prevent aliens being conscripted. Section 13A removed this restriction and prima facie permitted aliens to be conscripted.

In this state of the law, the regulations which are now challenged were made. They make specific provision for the imposition in the case of certain aliens of compulsory military service.

Subsequently, the *Defence (Citizen Military Forces) Act* 1943 was passed. This Act defined "the South-Western Pacific Zone" and contained the following provision in s. 4:—"Notwithstanding anything contained in the *Defence Act* 1903-1941 or in the *National Security Act* 1939-1940, any member of the Citizen Military Forces may be required to serve in such area contained in the South-Western Pacific Zone as is specified by proclamation, and the power to make regulations in pursuance of those Acts, or either of them, shall extend to the making of regulations in relation to any such member so required to serve in that area, and to the service of the member in that area."

Under this provision, any member of the Citizen Military Forces might be required to serve in the South-Western Pacific Zone. At the time when this Act was passed, the *National Security (Aliens Service) Regulations*, Statutory Rules 1942 No. 39, were in operation, and those regulations provided that, when a notice was served by an area officer, the alien upon whom it was served should be deemed to be enlisted in the Citizen Military Forces. Thus, when this Act was passed in 1943, Parliament must be presumed to have been aware that its own legislation (by way of regulations made under the *National*

Security Act) provided that certain aliens were members of the Citizen Military Forces. Prima facie, therefore, the 1943 Act applied to those aliens so that they might be required to serve in the South-Western Pacific area. Further, s. 4 of that Act specifically provides that the power to make regulations in pursuance of the *Defence Act* or the *National Security Act* shall extend to the making of regulations in relation to any such member so required to serve in the area and to the service of the member in the area. This provision extends what may be called the conscription power contained in s. 13A. It should, in my opinion, be construed as intended to apply to all the persons who were at that time legislatively treated as being subject to that power.

I agree that s. 13A must be limited in its operation : for example, it does not refer to all persons everywhere in the world, or to all property everywhere in the world. But, for the reasons which I have stated, in my opinion the Commonwealth Parliament by s. 13A of the *National Security Act* intended to authorize the Governor-General to make regulations under which the service of any person in Australia, including aliens, may be compelled for defence purposes. It is not for a court to express an opinion upon the political propriety of this action. It is for the Government of the Commonwealth to consider its political significance, taking into account the obvious risk of the Commonwealth having no ground of objection if Australians who happen to be in foreign countries are conscripted for military service there. Parliament has, in my opinion, placed upon the Executive the responsibility of making agreements with other countries which will remove international difficulties or of accepting the risk of such difficulties being created.

In my opinion, the regulations are valid and the demurrers should be allowed. As the decision upon the demurrers disposes of all the issues in the actions, there should be judgment in the actions for the defendants.

RICH J. The demurrers in these cases raise the question whether the plaintiffs are required to serve in the military forces of the Commonwealth. The regulations which call for construction are reg. 7 of the *National Security* (*Aliens Service*) *Regulations*, Statutory Rules 1942 No. 39, and reg. 6 of the amended *National Security* (*Aliens Service*) *Regulations*, Statutory Rules 1943 No. 108. These regulations depend for their validity on s. 13A of the *National Security Act* 1939-1943. The contention put forward is that, although this section, which qualifies the restriction contained in s. 5 (7) (*a*), is expressed in terms wide enough to compel the service

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required on the part of the plaintiffs, it should be construed so as not to involve a breach of a recognized rule of international law and an " international wrong " on the part of the Commonwealth Government. There is, it is said, a presumption against construing a statute so as to contravene a rule of international law. In these days, I would remark in passing that it would be difficult to find all the States agreeing on questions of international law. But, assuming that there is an ascertained and settled rule that a country may not compel resident aliens to serve and fight in its armies in a war in which it is engaged, I am unable to construe s. 13A as subject to any such rule. The purpose of the section is to vest in the Executive unqualified power to require " persons to place themselves, their services and their property at the disposal of the Commonwealth " in order to secure " the public safety, the defence of the Commonwealth and the Territories of the Commonwealth, or the efficient prosecution of any war in which His Majesty is or may be engaged." Nor can I construe the legislative powers of the Commonwealth as anything but as plenary and ample within their ambit " as the Imperial Parliament in the plenitude of its power possessed and could bestow " (*Hodge* v. *The Queen* (1)).

For these reasons, I am of opinion that the regulations in question are valid and that the demurrers should be allowed.

STARKE J. The plaintiffs in these actions, resident, according to the respective writs of summons, in Australia, are nationals of the Kingdom of Greece who have been called upon to enlist and serve in the military forces of the Commonwealth. Polites was called to enlist and serve under the provisions of the *National Security* (*Aliens Service*) *Regulations* 1942 No. 39 and Kandiliotes under the provisions of Part II. of the *National Security* (*Aliens Service*) *Regulations* inserted by Statutory Rules 1943 No. 108. Each plaintiff, by his statement of claim, seeks a declaration that the regulation under which he was called to enlist and serve in the military forces of the Commonwealth is unauthorized by the *National Security Act* 1939-1943 or any other Act of the Parliament and also a declaration that he is not a member of, nor liable to serve in, the military forces of the Commonwealth.

The Commonwealth has demurred to each statement of claim.

The *National Security Act* 1939-1943 empowers the Governor-General to make regulations for securing the public safety and the defence of the Commonwealth and in particular for requiring or authorizing any action to be taken by or with respect to aliens, and

(1) (1883) 9 App. Cas. 117, at p. 132.

for prohibiting aliens from doing any act or thing. The challenged regulations purport to have been made under this power.

The validity of this Act has been sustained in this Court on many occasions, and need not be further discussed. And it was properly conceded in argument that the plaintiffs fall within the terms of the relevant regulations if they are valid. It is not explicitly alleged what services the plaintiffs have been called upon to perform, but it is said truly enough that the call is wide enough to cover performance of military functions, perhaps in line of battle. And it is contended that the regulations are invalid because they authorize allied nationals, that is, nationals of any country allied or associated with His Majesty the King in any war in which His Majesty is or may be engaged (subject to some exceptions immaterial for the purpose of this case), who have attained the age of 18 years but have not attained the age of 60 years to be called for service in the military forces of the Commonwealth contrary to the principles or rules of international law.

International law or the law of nations is a law for the intercourse of States with one another and not a law for individuals: See *Oppenheim, International Law*, 4th ed. (1928), vol. 1, *Peace*, s. 1, p. 5. The law of nations, as I understand it, concedes that all persons or things within the territory of a State fall under its territorial supremacy and are subject to its jurisdiction, legislative, administrative and judicial: See *Oppenheim*, 4th ed. (1928), vol. 1, *Peace*, s. 144, p. 280. And the Commonwealth is in much the same position as a sovereign State in relation to the powers conferred upon it by the Constitution. Its authority is as plenary and as ample within the limits prescribed by the Constitution as the Imperial Parliament in the plenitude of its power possessed or could bestow (*Hodge* v. *The Queen* (1)). No doubt sovereign States have, and have often exercised, the right of protecting their nationals abroad against oppression, discrimination and so forth. But that is a very different proposition to that advanced in the present case, namely, that the legislative power of the Commonwealth is subject to and that all its legislation, whether by the Parliament itself or by any subordinate authority, is limited by or must be construed so as not to contravene the rules of the law of nations. So to limit the constitutional power of sovereign States or their subordinate authorities denies the supremacy of those States within their own territory, which is contrary to the principles of the law of nations itself. And to refuse to give words in legislation their grammatical and ordinary signification because of some practice or rule of the law of nations

(1) (1883) 9 App. Cas. 117, at p. 132.

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is contrary, as I think, to settled principles of construction. Cases of ambiguity I leave on one side, for there is no ambiguity in the meaning of the present regulations.

It is desirable, however, to consider the law, practice or rule of nations upon which reliance is placed. *Hall, Treatise on International Law*, 7th ed. (1917), s. 61, p. 219, states that it is in accordance with general principle to say, as is in effect said by M. *Bluntschli*, that:—

"1. It is not permissible to enrol aliens, except with their own consent, in a force to be used for ordinary national or political objects.

2. Aliens may be compelled to help to maintain social order, provided that the action required of them does not overstep the limits of police, as distinguished from political action.

3. They may be compelled to defend the country against an external enemy when the existence of social order or of the population itself is threatened, when, in other words, a state or part of it is threatened by an invasion of savages or uncivilized nations."

During the Civil War in America, the British Government, however, instructed its ambassador that there was no rule or principle of international law which prohibits the government of any country from requiring aliens resident within its territories to serve in the militia or police of the country or to contribute to the support of such establishments (*Hall, Treatise on International Law*, 7th ed. (1917), at p. 218). The practice or rule of civilized nations is thus rather vague and undefined. And to limit constitutional powers by the rule suggested would be subversive of the sovereignty of the State itself. And to construe the legislation of sovereign States or their subordinate legislative authorities by reference to such a rule would often be in direct contradiction of the legislation itself and in any case beyond the ordinary functions of courts of law. The truth is that the so-called law is a practice or rule which every State enjoys as of right for the protection of its subjects abroad (See *Oppenheim, International Law*, 4th ed. (1928), vol. 1, *Peace*. s. 320, p. 558) and it is a right which is exercised through diplomatic action. To treat the rule as a restriction upon the legislative capacity of sovereign States or as an overriding principle governing the construction of legislative acts ignores the fundamental principle of government that a State is sovereign within its territory and it is moreover, so vague and indefinite that courts of law would find it difficult, if not impossible, of application. But this is not to say that the plaintiffs have no remedy: they may represent their cases to the Commonwealth, which would not, I should think, send them

into the battle line, or in case of need apply for protection through the representatives of their national government.

The demurrer should be allowed in each case.

DIXON J. It is a rule of construction that, unless a contrary intention appear, general words occurring in a statute are to be read subject to the established rules of international law and not as intended to apply to persons or subjects which, according to those rules, a national law of the kind in question ought not to include.

In reliance upon this rule, the plaintiffs contend that s. 13A of the *National Security Act* should be read as if the power to make regulations thereby conferred were subject to the qualification that they should be consistent with the settled rules of public international law.

On this footing, the second plaintiff maintains that s. 13A would not authorize Part II. of the *National Security* (*Aliens Service*) *Regulations* because that Part assumes to impose upon male allied aliens the same liability to serve in the Citizen Military Forces as falls upon a British subject. A consequence of the liability to serve so imposed is that, by virtue of s. 4 of the *Defence* (*Citizen Military Forces*) *Act* 1943, the alien, in common with British subjects, is required to serve against the enemy anywhere he may be sent within the South-Western Pacific Zone. This, it is said, is contrary to the recognized international rule which restricts the right of a country to compel aliens within its borders to bear arms to the purpose of maintaining internal order or defending the community against savage or uncivilized assailants threatening its existence. The rule does not, speaking generally, allow one civilized nation at war with another member of the society of nations to compel the nationals of a third country, without its consent, to fight in that war. The rule is formulated by *Hall, Treatise on International Law*, 8th ed. (1924), s. 61, pp. 260, 261, in a manner based upon *Bluntschli* and accepted by *Westlake, International Law*, 2nd ed. (1910), Part I., *Peace*, p. 218.

In my opinion, s. 13A of the *National Security Act* should not be read subject to the restriction contended for. It is not a provision directly prescribing what the individual must do. It is concerned with the power of the Executive. Its purpose is to clothe the Executive with the most ample and complete authority to require by regulations persons to place themselves and their property at the disposal of the Government for securing the public safety, the defence of the Commonwealth and the efficient prosecution of the war. It was based on the United Kingdom *Emergency Powers* (*Defence*) *Act* 1940 passed on 22nd May 1940 in a then unexampled

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emergency. The Commonwealth enactment was passed on 21st June 1940, immediately after the fall of France. Country after country had been occupied by Germany. There was general confusion as to the governments in exile of these countries and as to the position of their nationals outside the territories occupied. The British Commonwealth was confronted with a danger that could only be met by the use of every available resource and by an unparalleled effort. No one could foresee what course the war would take next and the legislation was the consequence of a series of rapid changes in the allied fortunes. The relations with other nationals and aliens who were within, or might afterwards come to, the Commonwealth were peculiarly the care of the Executive Government. In confiding to the Executive so large a portion of the legislative power over defence in such circumstances, the Parliament might well trust it to exercise the authority bestowed in accordance with what was right internationally. The conditions obtaining in the international world were extraordinary and the responsibility for dealing with them rested upon the Executive.

Having regard to the circumstances and to the subject matter, it would, I think, be artificial and unreal to restrict the mere grant of power contained in s. 13A by an implication founded upon the presumption to which the rule of construction gives effect.

The contention that s. 51 (vi.) of the Constitution should be read as subject to the same implication, in my opinion, ought not to be countenanced. The purpose of Part V. of Chapter I. of the Constitution is to confer upon an autonomous government plenary legislative power over the assigned subjects. Within the matters placed under its authority, the power of the Parliament was intended to be supreme and to construe it down by reference to the presumption is to apply to the establishment of legislative power a rule for the construction of legislation passed in its exercise. It is nothing to the point that the Constitution derives its force from an Imperial enactment. It is none the less a constitution.

In my opinion, Part II. (reg. 6) of the *National Security* (*Aliens Service*) *Regulations* is valid and so is the corresponding previous regulation.

For the foregoing reasons, I think that the demurrers should be allowed.

McTIERNAN J. I agree that the demurrers in each case should be allowed.

Section 13A did, in my opinion, upon its true construction authorize the Governor-General to make reg. 7 of the *National Security*

(*Aliens Service*) *Regulations* (Statutory Rules 1942 No. 39) and Part II. of the *National Security* (*Aliens Service*) *Regulations* (Statutory Rules 1943 No. 108).

These regulations provide for the compulsory enrolment of aliens in the armed forces organized by the Commonwealth to wage war against its external enemies. This enrolment of aliens is not permissible by the rules of international law, as propounded in works of high authority, governing the responsibilities of aliens for the defence of the State in which they are resident: See *Hall, Treatise on International Law*, 8th ed. (1924), p. 260.

There is a presumption that the legislature does not intend to violate by a statute any established rule of international law. But the presumption does not govern the construction of a statute if its language shows that it was not the intention of the legislature that the statute should be in harmony with international law: See *Maxwell* on *Interpretation of Statutes*, 7th ed. (1929), pp. 127, 131. I think that the presumption does not apply here. The general term "persons", used in s. 13A, plainly includes at least aliens within the jurisdiction of the Commonwealth, besides persons other than aliens. In this context, the word "persons" does not reasonably admit of being narrowed in construction to mean only persons other than aliens.

It was also argued that, upon this construction of s. 13A, the section is beyond the legislative powers of the Commonwealth. I cannot agree with this argument. Subject to the Constitution, the legislative powers under s. 51 (vi.) to make a law answering the description of a law with respect to "defence" is plenary. The power is not subject to the rules of international law governing the responsibilities of aliens for the defence of the State in whose territory they are resident (*Farey* v. *Burvett* (1); *Amalgamated Society of Engineers* v. *Adelaide Steamship Co. Ltd.* (*Engineers' Case*) (2); *Hodge* v. *The Queen* (3)).

WILLIAMS J. These two demurrers, which were argued together, raise the important question whether the plaintiffs, who are Greek nationals resident in Australia, are liable for compulsory military service in the Citizen Military Forces of the Commonwealth as if they were British subjects. The only distinction between the two actions is that, in one case, the plaintiff was required to enlist and serve in these forces under reg. 7 of the *National Security* (*Aliens Service*) *Regulations* comprised in Statutory Rules 1942 No. 39,

(1) (1916) 21 C.L.R. 433, at pp. 440, 452.
(2) (1920) 28 C.L.R. 153.
(3) (1883) 9 App. Cas. 117.

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gazetted on 3rd February 1942, while the other plaintiff was required to serve in these forces under reg. 6 of the amended *National Security (Aliens Service) Regulations* comprised in Statutory Rules 1943 No. 108, gazetted on 3rd May 1943. These regulations clearly empower the area officers concerned to compel Greek nationals to serve in the military forces, so that the real question is whether they are valid.

It is admitted that s. 13A of the *National Security Act* 1939-1943 is the only source of authority. This section is in the following terms :—" Notwithstanding anything contained in this Act, the Governor-General may make such regulations making provision for requiring persons to place themselves, their services and their property 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 of the Commonwealth, or the efficient prosecution of any war in which His Majesty is or may be engaged : Provided that nothing in this section shall authorize the imposition of any form of compulsory service beyond the limits of Australia."

It is conceded that, read literally, the section, which contains the most general words, is wide enough for the purpose. But it is submitted that there is an accepted rule of public international conduct, evidenced by international treaties and conventions, authoritative textbooks and practice, having the general hallmarks of assent and reciprocity (per Lord *Macmillan* in *Compania Naviera Vascongado* v. *S.S.* " *Cristina* " (1)) that any nation, when at war, will not compel the nationals of another State who are within its jurisdiction to enlist and serve in its armed forces. As at present advised, it appears to me that the treaties and conventions, authoritative textbooks and practice to which we were referred by Mr. *Phillips* are sufficient to establish the rule of conduct in question.

The rule is, I think, correctly stated in article 5 of Project 111 of the *International Commission of Jurists*, relating to the status of aliens published in the *American Journal of International Law*, vol. 23 Supplement, (1929), p. 234 : " Foreigners can not be obliged to perform military service, but those foreigners who are domiciled, unless they prefer to leave the country, may be compelled, under the same conditions as nationals, to perform police, fire-protection, or militia duty for the protection of the place of their domicile against natural catastrophes or dangers not resulting from war."

It is clear that such a rule, when it has been established to the satisfaction of the courts, is recognized and acted upon as part of English municipal law so far as it is not inconsistent with rules

(1) (1938) A.C. 485, at p. 497.

enacted by statutes or finally declared by the courts (*Chung Chi Cheung* v. *The King* (1)).

As a corollary, there is a rule of construction that, in the interpretation of statutes, the courts will presume, so far as the language admits, that Parliament did not intend that they should operate in derogation of such a rule, and will limit the scope of general words so as to give effect to the presumption (*Bloxam* v. *Favre* (2) (affirmed *Bloxam* v. *Favre* (3)); *Colquhoun* v. *Brooks* (4); *R.* v. *30th Battalion Middlesex Regiment*; *Ex parte Freyberger* (5); *Mortensen* v. *Peters* (6); *Barcelo* v. *Electrolytic Zinc Co. of Australasia Ltd.* (7)).

The crucial question in the present case is, therefore, whether, in the light of the circumstances in which s. 13A was enacted and of the scope and purpose of the *National Security Act* to be gathered from its provisions as a whole, the language of the section is such that the general words can be construed in this limited manner, or whether it does not sufficiently appear that Parliament intended to confer upon the Executive complete authority to exercise the defence power for the purposes and subject only to the express limitations stated in the Act. It was faintly contended that, in construing the defence power itself, it must be assumed that the Imperial Parliament has not conferred on the Commonwealth Parliament power to legislate contrary to the principles of international law, a point which was mentioned but not determined by the Privy Council in *Croft* v. *Dunphy* (8). But it is beyond doubt that the Imperial Parliament can, if it thinks fit, legislate in violation of such principles, and since this power, like the other constitutional powers, is not a delegated power but a power which, as the Privy Council has pointed out on the same page, is as plenary and ample, subject to the limitation that the legislation must be legislation for the peace, order and good government of the Commonwealth with respect to the naval and military defence of the Commonwealth, as the Imperial Parliament in the plenitude of its powers possessed and could bestow, it cannot, in my opinion, be limited in its operation any more than the power of the Imperial Parliament by any such presumption. The *National Security Act*, as originally enacted, in addition to the general authority conferred upon the Executive by s. 5 to make regulations for securing the public safety and defence of the Commonwealth and for prescribing all matters necessary or convenient for the more effectual prosecution of the war, contained

(1) (1939) A.C. 160, at p. 168.
(2) (1883) 8 P.D. 101, at p. 107.
(3) (1884) 9 P.D. 130.
(4) (1888) 21 Q.B.D. 52, at pp. 57, 58.
(5) (1917) 2 K.B. 129, at p. 132.
(6) (1906) 14 S.L.T. 227.
(7) (1932) 48 C.L.R. 391, at pp. 423, 424.
(8) (1933) A.C. 156, at p. 164.

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in s. 5, sub-ss. 1 (*e*) and 2, particular powers for the Executive to make regulations requiring or authorizing any action to be taken by or with respect to aliens, but the section also contained, in sub-s. 7, an express limitation that nothing in the section should authorize the imposition of any form of compulsory naval, military or air-force service, or any form of industrial conscription, or the extension of any existing obligation to render compulsory naval, military or air-force service. At that stage, therefore, it would appear to have been the intention of Parliament that any extension of any obligation that then existed to serve compulsorily in any of the armed forces of the Commonwealth should be authorized by Act of Parliament. In the case of the Citizen Military Forces, such an obligation was then confined by s. 59 of the *Defence Act* 1903-1939 to British subjects between the ages of 18 and 60 years.

Section 13A was inserted in the *National Security Act* when the danger to the British Empire, including Australia, had been gravely intensified by the collapse of France, and is the same in substance as the amendment made on 22nd May 1940 to the Imperial *Emergency Powers (Defence) Act* 1939 by the Imperial *Emergency Powers (Defence) Act* 1940: *Reid* v. *Sinderberry* (1). The circumstances which rendered necessary the passing of s. 13A were therefore such that the intention must be imputed to Parliament, I think, to confer upon the Executive the most complete powers it could bestow to enable it to meet and overcome the acute dangers then threatening Australia. The section contains a proviso that nothing in the section shall authorize the imposition of any form of compulsory service beyond the limits of Australia. This proviso, which has the effect of repealing s. 5 (7) (*a*) to the extent to which the two enactments are inconsistent, affords a clear indication that Parliament intended that the Executive should have power to impose by regulation all forms of compulsory service in Australia, including extensions of compulsory service in the armed forces instead of such extensions being provided for by amendments of the *Defence Act*, the *Naval Defence Act* and the *Air Force Act*.

In several previous judgments, I have expressed the view that the effect of the *National Security Act* is to delegate to the Executive, subject, of course, to the limitations imposed by the Act, a power to legislate for the defence of Australia as wide in its ambit as the defence power. The constitutional power clearly enables the Commonwealth Parliament to legislate for the purposes of defence with respect to any person or thing within its territory. The same power as the Parliament possessed to legislate with respect to the

(1) (1944) 68 C.L.R. 504, at p. 518.

persons, services and property of aliens for the purposes mentioned in s. 13A was, in my opinion, delegated to the Executive by the *National Security Act*. I agree, therefore, with Mr. *Dean* that the Commonwealth Parliament has authorized the Executive to decide, as a matter of policy, whether it will compel aliens to serve in its armed forces, and that the *Aliens Service Regulations* which have been impeached are authorized by s. 13A of the *National Security Act*. At the same time, I cannot refrain from saying that I cannot agree with him that there is any distinction drawn by the rule between allied nationals and other aliens, so that the regulations are, in my opinion, a departure from established British practice and a breach of the comity of nations.

For these reasons, I would allow the demurrers.

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Solicitors for the plaintiffs, *Maurice Blackburn & Co.*

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

D. G. B.