[HIGH COURT OF AUSTRALIA.]

DAWSON . . . . . PLAINTIFF;

AND

THE COMMONWEALTH AND ANOTHER . DEFENDANTS.

H. C. OF A. 1946.

SYDNEY, *Aug.* 12, 13.

MELBOURNE, *Oct.* 22.

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

Constitutional Law (Cth.)—Defence—National security—Economic organization—Regulations—Validity—Purchase of land—Consent of Treasurer—"Absolute discretion" of Treasurer—"Ceases to be engaged in war"—Cessation of hostilities—Continuance in force of war-time legislation and regulations thereunder—The Constitution (63 & 64 *Vict. c.* 12), *s.* 51 (*vi*)—*Acts Interpretation Act* 1901-1941 (*No.* 2 *of* 1901—*No.* 7 *of* 1941), *s.* 46 (*b*)—*National Security Act* 1939-1943 (*No.* 15 *of* 1939—*No.* 38 *of* 1943), *s.* 19—*National Security Act* 1946 (*No.* 15 *of* 1946), *s.* 2—*National Security* (*Economic Organization*) *Regulations* (*S.R.* 1942 *No.* 76—1945 *No.* 189), *regs.* 6, 9 (2).

Part III. of the *National Security* (*Economic Organization*) *Regulations* provides, *inter alia*, that a person shall not, without the consent in writing of the Treasurer, purchase any land (reg. 6 (1)) and that, where application is made to the Treasurer for his consent, he "may, in his absolute discretion, grant the consent, either unconditionally or subject to such conditions as he thinks fit, or refuse to grant the consent" (reg. 9 (2)).

A person who had agreed on 26th April 1946 to purchase certain land for the sum of £200 applied to the delegate to the Treasurer for his consent to the transaction. The delegate to the Treasurer, on 3rd May 1946, refused to give his consent to the proposed transaction but informed the applicant that consent would be given if the selling price of the land did not exceed £150. In a statement of claim in an action brought against the Commonwealth and the Treasurer for the Commonwealth the applicant alleged, *inter alia*, that on or before 2nd September 1945 all the enemy governments with which His Majesty had been engaged in war unconditionally surrendered and hostilities ceased with all enemy nations; and that prior to 26th April 1946 the *National Security*

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Act 1939-1943 and the regulations thereunder had ceased to be in force and were not continued in force by the *National Security Act* 1946. He claimed declarations accordingly, and also that the regulations were not authorized by the Constitution and were void and of no effect. The defendants demurred.

Held, by *Latham* C.J., *Dixon* and *McTiernan* JJ. *pro* (*Rich*, *Starke* and *Williams* JJ. *contra*), that the demurrer should be allowed and judgment given for the defendants.

Held, by *Latham* C.J., *Dixon* and *McTiernan* JJ. (*Rich*, *Starke* and *Williams* JJ. dissenting), that the regulations in Part III. of the *National Security* (*Economic Organization*) *Regulations* were valid when made; by virtue of s. 19 of the *National Security Act* 1939-1943 they continued in force notwithstanding the surrender of enemy nations; they were still valid as legislation under the defence power; and they would come to an end on 31st December 1946 as regulations under the Act by reason of the provisions of s. 19 as inserted by s. 2 of the *National Security Act* 1946.

Held, by *Rich*, *Starke* and *Williams* JJ., that the "absolute discretion" conferred upon the Treasurer by reg. 9 (2) of the *National Security* (*Economic Organization*) *Regulations* was not authorized by the defence power.

Held, by *Latham* C.J., *Starke* and *McTiernan* JJ., that His Majesty did not "cease to be engaged in war" within the meaning of s. 19 of the *National Security Act* 1939-1943 upon the cessation of active hostilities.

Held, by *Latham* C.J., *Dixon* and *McTiernan* JJ., that the defence power includes not only a power to prepare for war and to prosecute war, but also a power to wind-up after a war and to restore a condition of peace as gradually as the particular circumstances may require.

Held, by *Rich* J., that the scope of the defence power becomes very wide in time of war, and does not shrink to its normal peace-time dimensions immediately on cessation of hostilities, although (by *Starke* J.) the increasing change after the cessation of hostilities in the circumstances which called for war-time legislation affords less justification for the continuance of that legislation than when it was passed even if then valid.

Per Latham C.J. and *McTiernan* J.: (1) If it can reasonably be considered that there is a real connection between the subject matter of certain legislation and defence the Court should hold that the legislation is authorized by the power to make laws with respect to defence; and (2) The scope of possible legislation under the defence power varies from time to time in accordance with the circumstances of the time, and the mere fact that a state of war continues does not in itself authorize the continuance of laws which may have been validly operative when made, but which cannot be regarded as having any relation to defence at a later time when their validity is challenged.

The application of s. 46 (*b*) of the *Acts Interpretation Act* 1901-1941 to the provisions of reg. 9 (2) of the *National Security* (*Economic Oganization*) *Regulations*, considered.

DEMURRER.

In an action brought in the High Court by Burton Barclay Dawson against the Commonwealth of Australia and the Treasurer of the Commonwealth the statement of claim was substantially as follows :—

1. On or about 19th February 1942 the Governor-General of the Commonwealth purported to make certain regulations under the provisions of the *National Security Act* 1939-1940 called the *National Security* (*Economic Organization*) *Regulations* and subsequently purported to make regulations amending the same.

2. By these Regulations it was provided that the said Regulations (other than Part V. thereof) should be administered by the Treasurer of the Commonwealth who is a defendant herein.

3. On 26th April 1946 Avalon Beach Estates Ltd. (In liq.) was the owner of an estate in fee simple of Lot No. 38 on Deposited Plan No. 16393 being part of the land comprised in Certificate of Title registered Volume 3467 Folio 211.

4. Avalon Beach Estates Ltd. (In liq.) has at all material times been a company duly incorporated and entitled to enter into the agreement hereinafter mentioned.

5. By an agreement in writing dated 26th April 1946 the plaintiff agreed to buy and Avalon Beach Estates Ltd. (In liq.) agreed to sell the said land for Two hundred pounds payable as to Thirty pounds thereof upon the signing of the contract and as to the balance in cash upon the signing of the transfer.

6. On 26th April 1946 the liquidator of Avalon Beach Estates Ltd. (In liq.) with the authority of the plaintiff wrote a letter to the Delegate of the Treasurer in the words and figures, so far as material, following :—

> " Avalon Beach Estates Ltd. (In Liq.)
> Sale of Lot 38—Burton Barclay Dawson.
>
> I enclose herewith, Application by the Purchaser, Original Contract, Vendor's Declaration and Valuer General's Valuations in respect of Lot 38 sold to Mr. Burton Barclay Dawson.
>
> Advice of your approval in due course, will oblige."

7. With that letter there was forwarded an application for consent to purchase the land the subject of the agreement on the terms of the agreement and a statement by the vendor with respect to certain particulars in connection with the land and also the original agreement between the plaintiff and Avalon Beach Estates Ltd. (In liq.). So far as material the application for consent to purchase the land and the statement by the vendor were as follows :—

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APPLICATION FOR CONSENT TO PURCHASE LAND.

4. (*a*) Explain why you wish to buy this land and the use to which you will apply it.

I desire to build a home on the subject land when conditions permit.

(*b*) If the land is to be used for agricultural or pastoral purposes, etc. :—

(i) Do you intend to work it yourself as your main occupation ?

(ii) What experience have you had as a primary producer ?

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5. (*a*) Is there a house on the property ? No.

(*b*) Do you intend to reside in it immediately after purchase ?

(*c*) Is the house vacant now ?

(*d*) If the house is not vacant and you intend to live in it immediately, the following information *must* be supplied :—

(i) Name of occupant.

(ii) Terms and conditions of present tenancy or occupancy.

(iii) Can immediate vacant possession be obtained ? Yes.

(If the answer is " Yes," a written undertaking from the tenant to vacate must be attached.)

(iv) The reason why you wish to leave your present address.

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6. Total Purchase Price	£200	0 0
Amounts included in Purchase Price for :—		
(*a*) Furniture	£	
(*b*) Live Stock	£	
(*c*) Plant	£	
(*d*) Fixtures and Fittings	£	
Purchase Price for land and improvements only	£200	0 0

Note : A separate valuation of items (*a*), (*b*), (*c*) and (*d*) must be provided.

7. Has any contract or transaction dependent on or in any way contingent upon the approval of this transaction been entered into ? If so, give particulars. No.

Note : Regulation 21 (*b*) of the *National Security* (*Economic Organization*) *Regulations* reads as follows :—

" A person shall not enter into any transaction, or make any contract or arrangement, whether orally or in writing, for the purpose of, or which has the effect of, in any way, whether directly or indirectly, defeating, evading or avoiding, or preventing the operation of Part III. or Part IV. of these Regulations in any respect."

8. (*a*) Do you and your wife (or husband) own any other property ? Yes.

(You must answer " yes " or " no.")

(*b*) If so, state date of purchase, location, use to which property is put, value and purchase price of each property owned by you and your wife (or husband).

The only property which I and my wife own is the property in which we are living at No. 51 Undercliff Street, Neutral Bay.

Note : If necessary, attach a list thereof to this application.

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9. Will the whole of the purchase price be paid in cash immediately without recourse to borrowing ? Yes. If not, how much of the purchase price will be provided by :—

(*a*) a new mortgage ?

(*b*) taking over an existing mortgage ?

(*c*) bank overdraft ?

(*d*) balance remaining under Contract of Sale ?

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10. If it is desired to arrange a mortgage in connexion with the purchase or to continue an existing mortgage, the following particulars should be supplied :—

(*a*) Amount of mortgage.

(*b*) Name of mortgagee.

(*c*) Rate of interest.

(*d*) Period of mortgage and date of maturity.

(*e*) Terms of repayment.

Note : If the application in its present form is approved, consent will be endorsed on the mortgage on presentation to the Delegate of the Treasurer.

DECLARATION BY APPLICANT.

I, Burton Barclay Dawson, of 51 Undercliff Street, Neutral Bay, in the State of New South Wales being desirous of purchasing the land referred to in this form declare that the foregoing statements are true and correct in every particular.

Form 5.

National Security (Economic Organisation) Regulations.

Sale of Land other than Land which has been used for Twelve Months for Agricultural, Pastoral and like purposes.

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STATEMENT BY VENDOR.

4. State if Freehold or Leasehold. Freehold.

Note.—Full details of all Leases and Tenancies affecting the Property and income and outgoings to be given below.

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5. State fully your reasons for wanting to sell this Land.

Realisation of assets, Company in liquidation.

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6. Sale Price and terms. (If Furniture or Plant included in Sale Price, state value thereof.) Was the sale made at auction or by private treaty ?

£200 Cash sold by private treaty.

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7. When was the property last sold ? Not previously sold in subdivision.

Vendor's name.....Date of Sale.....Price.....

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8. Give details of any official valuation of the property.

	Valuer-General	Municipality or Shire	Federal Land Tax	State Land Tax
Date of Valuation	16/7/45			
Improved Value	£150			
Unimproved Value				

Valuer-General's valuation dated 8/8/42 covers Lots 37 and 38 jointly and is for £300 I.C.V.

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9. Are you aware of any other valuation having been made of the property since 10th February, 1942, for probate or any other purpose ? if so, give details.

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10. State amounts on which War Damage Contributions and Fire Insurance Premiums are paid.

Description of Building	Fire Insurance Valuation	War Damage Valuation

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11. Leases and Tenancies. (Give details of all Leases and Tenancies affecting the Property, including term and commencing date, rental, and particulars of any Lessee's and Tenant's obligations.)

Details of Income and Outgoings.

Income.		Outgoings.	
Identification number of each Flat, Office, etc. (Include any Vacancies.)	Actual Rental 10/2/1942.		£
		Municipal Rates	
		Water & Sewerage Rates	
		Federal Land Tax	
		State Land Tax	
		Insurances	
		War Damage Contribution	
		Repairs	
		Lift Maintenance	
		Wages—Cleaners, etc.	
		Electricity & Gas	
		Agent's Commission	
		Other Outgoings	
		Total Outgoings	£
		Summary.	£
		Annual Income—	
		Occupied Space	
		Vacant Space	
		Total Income	
		Annual Outgoings	
Total Income	£	Net Annual Rent	£

8. On or about 3rd May 1946 the Delegate of the Treasurer refused to consent to the agreement and wrote a letter in the words and figures, so far as material, following to the liquidator of Avalon Beach Estates Ltd. (In liq.) :—

"National Security (Economic Organization) Regulations

Re : Dawson from Avalon Beach Est. Ltd.

I refer to your letter of 26th April, relative to the above-mentioned subject.

Consent to this transaction will be granted provided the selling price does not exceed £150. On receipt of a new amended contract showing the price of £150, the necessary consent will be endorsed thereon."

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9. On or about 6th May 1945 the respective sovereign Governments of all countries with which His Majesty was engaged in war other than Japan unconditionally surrendered.

10. On or about 2nd September 1945 the Sovereign Government of Japan with whom His Majesty had also been engaged in war formally and unconditionally surrendered.

11. On 2nd September 1945 hostilities ceased with all enemy nations.

12. Prior to 26th April 1946 the *National Security Act* 1939-1943 and all regulations and orders made thereunder had ceased to be in force and the *National Security Act* 1946 if and so far as it is relevant and any regulations thereunder did not come into operation until 16th May 1946.

13. The plaintiff fears and the defendants threaten that if the plaintiff proceeds with the transaction evidenced by the agreement in writing the defendants will enforce against him the provisions of the *National Security Act* 1939-1946 and of the regulations made and purported to be made thereunder.

The plaintiff claimed :—

1. A declaration that Part III. of the *National Security* (*Economic Organization*) *Regulations* so far as they related to the sale or purchase of land were never authorized by the Constitution and were void and of no effect.
2. A declaration that prior to 26th April 1946 Part III. of the *National Security* (*Economic Organization*) *Regulations* so far as they related to the sale or purchase of land and all orders made thereunder ceased to be in operation.
3. A declaration that the *National Security Act* 1939-1946 and any order or regulation thereunder and any Act of the Parliament in so far as they purport to restrict the sale or purchase of land are now inoperative and are not authorized by the Constitution.
4. A declaration that in any event Part III. of the *National Security* (*Economic Organization*) *Regulations*, so far as it purports to restrict the sale or purchase of land is now inoperative and is not authorized by the Constitution.

The defendants demurred to the statement of claim.

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

Maughan K.C. and *Barwick* K.C. (with them *McLelland*), for the plaintiff.

Maughan K.C. The *National Security* (*Economic Organization*) *Regulations*, even in time of war, were too wide and were *ultra vires*. From the report of that case it would appear that certain matters touching upon this aspect were not brought before the notice of the Court in *Shrimpton* v. *The Commonwealth* (1). Under the Regulations as framed the Treasurer, or a delegate for the Treasurer, can refuse an application *simpliciter* without giving any reason therefor and the applicant has no means of ascertaining the grounds for rejection of his application; therefore the Regulations are invalid. Any code which enables the Treasurer to refuse consent without giving reasons would be too wide in peace-time. The power of consent conferred by reg. 9 (2) is far too wide. Under that power the Treasurer may impose any condition whatsoever which may occur to him and is not confined to conditions which should be set forth in the Regulations. No condition can arise out of the obligation under reg. 6 (4) to furnish particulars, or out of any of the other sub-regulations of reg. 6. The word "condition" in reg. 9 (2) is used in such a way that it must apply to matters outside the Regulations. There is nothing in the Regulations by which they could be de-limited; they are quite unlimited. The Regulations do not contain an "objects" clause, as in, for example, the *National Security* (*Dried Fruits Acquisition*) *Regulations* and the *National Security* (*Egg Industry*) *Regulations*: See *Australian Textiles Pty. Ltd.* v. *The Commonwealth* (2); *R.* v. *University of Sydney*; *Ex parte Drummond* (3). A code without any object stated gives rise to a very strong presumption that the executive government intended that the general words used should be given a general meaning because particular objects were not specified. Part III. of the *National Security* (*Economic Organization*) *Regulations* is now void. Placitum (vi.) of s. 51 of the Constitution, unlike other placita, has an area or an ambit which is variable. The extent to which it authorizes the Parliament to make laws varies according to the circumstances of the Commonwealth at the crucial moment when the law is challenged. For that purpose consideration must be given to three different periods during which the defence power widens and wanes, namely, (i) the period of perfect peace, when there is no threat of war; (ii) the transitional period from perfect peace to war and from war to perfect peace; and (iii) the period of actual hostilities: See *Farey* v. *Burvett* (4); *Victorian Chamber of Manufactures* v. *The Commonwealth* (*Industrial Lighting Regulations*) (5); *R.* v. *University of Sydney*; *Ex parte Drummond* (3). The position during the transitional period between the

(1) (1945) 69 C.L.R. 613.
(2) (1945) 71 C.L.R. 161.
(3) (1943) 67 C.L.R. 95.
(4) (1916) 21 C.L.R. 433.
(5) (1943) 67 C.L.R. 413.

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cessation of hostilities and the re-attainment of perfect peace is shown in *Australian Textiles Pty. Ltd.* v. *The Commonwealth* (1) and *Australian Woollen Mills Ltd.* v. *The Commonwealth* (2). The Court must find at the moment when the statute or regulation is challenged whether the circumstances at that time justified the continued operation of the statute or regulation, and, if it be a newly made statute or regulation, the making of it. The mere fact that a statute was enacted in war-time does not necessarily make it good in the period of peace on the cessation of hostilities. In this case the Court does not start with the basic fact that the country is at war, but is limited to the facts stated in the statement of claim and any facts of which the Court may take judicial notice. Those facts show that all the enemies of His Majesty the King surrendered unconditionally and hostilities ceased a year ago. Hostilities having ceased in 1945 the onus is upon those who support the making of the Regulations in 1946 to show that the making of the Regulations was justified by circumstances then existing. The Regulations must be commensurate with the exigency or danger (*Australian Textiles Pty. Ltd.* v. *The Commonwealth* (3)). The defendant Commonwealth should have put before the Court the nature of the exigency or danger. Regulation 6 (1), from its very contents, was invalid when made. It goes much further than sales; it covers every kind of transaction. It is not a price-fixing clause. It is a scheme to regulate and control all transactions in real estate, not only prices, purchases and sales, but in every respect. Land transactions are prohibited in the absence of the Treasurer's consent, irrespective of whereabouts in the Commonwealth the land is situate, remote or otherwise. The words " otherwise acquire any land " in reg. 6 (1) (*e*) are too wide and would include, for example, land demised by will to members of the testator's family. The code is not a price-fixing code; it is a code to regulate the buying and selling of real estate in this community. The whole of Part III. of the *Economic Organization Regulations* should be declared invalid. If a regulation is invalid under the defence power or under the *National Security Act* 1939-1943, the *National Security Act* 1946 does not validate it. Further, if a regulation made under the *National Security Act* 1939-1943 ceases to be operative owing to a change in circumstances it remains inoperative notwithstanding the provisions of the *National Security Act* 1946. Section 19 of the *National Security Act* 1939, as amended by the *National Security Act* 1940, s. 9, provided that the Act should not, in any event, operate " longer than six months after

(1) (1945) 71 C.L.R., at pp. 178, 179.
(2) (1944) 69 C.L.R. 476, at p. 500.
(3) (1945) 71 C.L.R., at p. 178.

His Majesty ceases to be engaged in war". The words "engaged in war" indicate something active. They refer to hostilities; not to a "paper" state of war. It is problematical as to whether peace treaties will be concluded. The legislature used the words "engaged in war" in the sense of "engaged in hostilities." The words as so used have no technical meaning but were used colloquially in lieu of the words "state of war" ordinarily used: See *Hall* on *International Law*, 3rd ed. (1890), pp. 557, 558, 564; 8th ed. (1924), p. 672, and *Halleck* on *International Law*, 4th ed. (1908), vol. II., p. 351. A "state of war" is more a matter of legal relationship than of actual hostilities as contemplated in a state of being engaged in war. His Majesty ceased to be engaged in war in September 1945 when active hostilities ceased; therefore the *National Security Act* 1939-1943 and the regulations made thereunder expired and ceased to have effect in March 1946, that being six months after the cessation of hostilities. The *National Security Act* 1946 does not purport to be a ratifying or validating Act. In so far as it has any effect its effect dates from 16th May 1946, so that at the time the application was made for the Treasurer's consent there was no Act in existence relating to the transaction.

Barwick K.C. If the code referring to so much of Part III. of the Regulations as related to land dealings on its proper construction would have authorized, say, four things which were each appropriate to the circumstances either in February 1942 or to the condition of the country down to the cessation of hostilities, and if, on a proper construction, it now appeared that one or more of these things would be inappropriate to the condition of the country after the cessation of hostilities then the code will have ceased to operate at least on the date when hostilities ceased. The decision in *Shrimpton* v. *The Commonwealth* (1) does not turn upon the meaning of the code as it then stood. It is submitted that the full extent of that decision is that it being a code for dealing with land, authorities like *Sharp* v. *Wakefield* (2) and *Swan Hill Corporation* v. *Bradbury* (3) could be used to control the discretion of the Treasurer in respect to land transactions and when, on the face of things, he went beyond those transactions and purported to deal with investment activities the Court was then able to control him and conditions he imposed could be treated as void by the Court because he had gone beyond the power he had, being the power to deal with land transactions. Upon the cessation of hostilities a radical change came over the

(1) (1945) 69 C.L.R. 613.
(2) (1891) A.C. 173.
(3) (1937) 56 C.L.R. 746.

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face of the country. In addition to a change in the objective conditions of the country it had an effect upon the matters as to which the Court may take judicial notice, that is as to the origin and nature of the various problems, and whether those problems be war-created or otherwise. For example, it would be most inappropriate that the Treasurer now should be entitled to refuse to consent to the transfer of land because of the identity of the purchaser, or because of the identity of the land concerned. Even assuming, but not admitting, that the construction of reg. 9 (2) could be approached on the basis that it was made in pursuance of the defence power, on its face the words " absolute discretion " would exceed the defence power. Therefore, under the compelling necessity of s. 46 (*b*) of the *Acts Interpretation Act* 1901-1941, it would be good only to the extent it would be good under the defence power. It follows that the discretion must be a limited discretion and it would follow further that if that construction be correct then the regulation must have ceased to have operation at this time because matters that that construction would cover would be inappropriate now. The matter is one of construction. There is no normal standard by means of which there could be found a means of reading down or construing down. The answer to the suggestion that the words " absolute discretion " can be read down is to be found in *Pidoto* v. *Victoria* (1). In construing the Regulations the Court must not in effect re-legislate. A construction cannot be cast into a form of words. Assuming the correctness of the view spoken of in *Shrimpton's Case* (2), still the Regulations are bad. It is submitted that the correct view is that it is impossible to construe down or read down the words " absolute discretion " in the code. The Regulations do not provide a measure or guide for the construing or reading down of those words, and it is not sufficient to say that they were passed pursuant to a limited power and therefore ought to be read in terms, as far as possible, of the limited power. The phrase " absolute discretion " as used in reg. 9 (2) is one which cannot be severed. Under these Regulations there is no warrant for reading down or construing down because there is no objects clause and it is not discoverable from the code what it really was that the code was designed to do. The Regulations must be examined as at the moment they are challenged to ascertain whether they continue in operation and there must be found a specific nexus with the defence power, the word " specific " being used in the sense in which it was used in *Victorian Chamber of Manufactures* v. *The Commonwealth* (*Industrial Lighting Regulations*) (3). After the cessation of hostilities

(1) (1943) 68 C.L.R. 87.
(2) (1945) 69 C.L.R. 613.
(3) (1943) 67 C.L.R., at p. 418.

great care must be taken in ascertaining whether or not the specific nexus exists. Regulations dealing with land transactions, as distinct from price-fixing, have no specific nexus with the defence power. Assuming, alternative to the meaning of the words "engaged in war" already addressed to the Court, that those words and the words "state of war," as used in the *National Security Act* 1939, s. 19 are synonymous in meaning and that they refer to some period of time, it is submitted that His Majesty ceased to be engaged in war in that technical sense on 2nd September 1945. The Act having ceased to operate at the expiration of six months from that date the Regulations made thereunder also ceased to operate. The *National Security Act* 1946, which was enacted after the expiration of the six months, did not purport to re-create or re-enact those Regulations. Even if the phrase "engaged in war" be regarded as synonymous with the phrase "state of war" the cessation of hostilities in this case, on the facts within judicial knowledge, amounts to a termination of the state of war. The duration of the Act is part and parcel of its validity. Whatever construction may be put upon the words "ceases to be engaged in war," the war did come to an end by the cessation of hostilities because that was the intention of the parties when they ceased hostilities: See *Jerger* v. *Pearce* (1). There was no armistice. The same effects follow from the Potsdam Declaration and the surrender as if a peace treaty had been made, so that on the cessation of active hostilities there was a state of peace. The Potsdam Declaration and the surrender of the Japanese would be facts within judicial knowledge. The idea of the cessation of hostilities was to terminate the war. Where the Court has within its judicial knowledge material from which it can determine the point at issue it has no need to inquire, and, indeed, should not inquire from the executive, but if the Court has no material then it would be proper to seek a certificate from the executive by which the Court should be bound (*Kawasaki Kisen Kabushiki Kaisha of Kobe* v. *Bantham Steamship Co. Ltd.* (2)).

Mason K.C. (with him *Louat*), for the defendants. The decision of the Court in *Shrimpton* v. *The Commonwealth* (3) was that upon the proper construction of Part III. of the *National Security* (*Economic Organization*) *Regulations*, as promulgated in 1942, when the war was at its height, and as the defence power then stood, the Treasurer could then require as a condition of his consent that the purchase money involved should not be borrowed. That being so, *a fortiori*

(1) (1920) 28 C.L.R. 588, at pp. 593, 594.
(2) (1939) 2 K.B. 544.
(3) (1945) 69 C.L.R. 613.

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the Treasurer had power in this case to prevent the sale of the subject land at what he considered to be an excessive price. It is clear on the facts that the only objection taken to the transaction was that the price was excessive. Upon a proper interpretation of the Regulations the Treasurer, in determining whether or not he should give his consent, must consider certain matters and is confined to the consideration of those matters (*Shrimpton* v. *The Commonwealth* (1)). The control exercised under these Regulations is a control to regulate the prices and the dealing in real estate; to control the price of land and to ensure that land is not sold at inflated values. The Regulations bring about the result that the only value to be regarded is the value in February 1942. Price-fixing in relation to land—a very essential commodity—was clearly within the defence power as at 1942. The practical question for determination by the Court is, taking the matter step by step: Did the Treasurer in 1942, by virtue of these Regulations, have control over prices? It was decided in *Shrimpton* v. *The Commonwealth* (2) that upon the true construction of the Regulations the Treasurer's discretion is unexaminable so long as it falls within the ambit of the defence power as at 1942. This case does not raise the question as to the right of the Treasurer to make the inquiries set out in the form of application. The Regulations were designed to control the investment of money in land and served to divert finance from non-war objects to war objects, e.g. war loans. They evidenced a war purpose to control the use of money in war-time, whether it was for the purchase of land or anything else. The *National Security Act* and Regulations should be construed as at 1942 in order to ascertain their proper construction. It may be held that if the defence power becomes contracted that power ceases to operate on one head of the Regulations by reason of the power having contracted. In other words, it does not alter the construction of the Regulations as originally promulgated in 1942 but the defence power is spent say as to the control of land with regard to an aerodrome. It is admitted, on the authorities, that the defence power is ambulatory, shifting, contracts and may possibly expand, and that at the present time there has been contraction. The question for determination is whether the price-fixing power, *qua* land, by reason of the contracting of the defence power, has ceased to operate. It may be that the proper approach to the matter is: Does the defence of the Commonwealth at a particular time reasonably require a certain control or type of control, or in other words construing the Regulations in accordance with the defence power, can it be reasonably said that the control over the

(1) (1945) 69 C.L.R., at pp. 619-621. (2) (1945) 69 C.L.R. 613.

price of land to-day (1946) is reasonably necessary for the defence of the Commonwealth. The *National Security Act* 1946 was passed on the footing that the expression " ceases to be engaged in war " was the same thing as a " state of peace " being brought into existence. Either there is a state of war or a state of peace. The words " six months after His Majesty ceases to be engaged in war " were regarded by Parliament as meaning a state of peace being brought into existence. These matters were discussed in *Janson* v. *Driefontein Consolidated Mines Ltd.* (1); *Kawasaki Kisen Kabushiki Kaisha of Kobe* v. *Bantham Steamship Co. Ltd.* (2); *Rattray* v. *Holden* (3) and *O'Neill* v. *O'Connell* (4). It is idle to suggest that the Act of 1946 accomplished nothing, and, alternatively, it is submitted that it is implicit, by the provision in s. 19 and in the Regulations that the Regulations shall cease to be operative, that they were to continue in force until 31st December 1946.

Barwick K.C., in reply. The Regulations are not merely a price-fixing code. Regulation 6 (1) and other regulations disclose a code to regulate land-dealing, not only as to prices but also as to other aspects unconnected with prices. At no time has any particular decision of the Court been based on the footing of duration. Without any amendment of the law the Parliament cannot impose any meaning on the Court, so the Court is not concerned with what Parliament thought was the meaning of the *National Security Act* 1939-1943. The statements in the Act of 1946 as to the meaning or effect of the Act of 1939-1943 are irrelevant. The Court takes judicial notice of peace and war. If, in its opinion, it has sufficient material to determine the matter then neither the opinion of the executive nor of the Parliament is of any importance or relevancy because the determination is the function of the Court. If, however, the Court has insufficient material it should not receive evidence on the point but should apply to the executive for a certificate and then the Court becomes conclusively bound by the statement of the executive.

Cur. adv. vult.

Oct. 22.

The following written judgments were delivered :—

LATHAM C.J. The plaintiff Burton Barclay Dawson agreed to buy a block of land for £200. He applied to the delegate of the Treasurer of the Commonwealth for approval of the purchase under reg. 6 of the *National Security (Economic Organization) Regulations*. The delegate of the Treasurer refused to give his consent to the

(1) (1902) A.C. 484.
(2) (1939) 2 K.B. 544.
(3) (1920) 36 T.L.R. 798.
(4) (1946) 72 C.L.R. 101.

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proposed transaction but informed the applicant that consent would be given if the selling price of the land did not exceed £150. The plaintiff contends that the Regulations are and always have been invalid as not authorized by the *National Security Act* 1939-1943 or by the Commonwealth Constitution.

The application for consent to purchase the land was made in accordance with forms which are not prescribed by any regulation but which apparently it is the practice of the delegate of the Treasurer to use. In my opinion there is no justification in the Regulations for requiring much of the information which the parties to a transaction are required to give, but the question of the validity of the Regulations cannot depend upon the practice adopted by officers in dealing with vendors and purchasers.

In the statement of claim in the action the plaintiff alleges the surrender of all of the Governments with which His Majesty was engaged in war, the final surrender being that of Japan on 2nd September 1945, on which day hostilities ceased with all enemy nations. The *National Security Act* 1939-1943, s. 19, provided :— "This Act shall continue in operation until a date to be fixed by Proclamation, and no longer, but in any event not longer than six months after His Majesty ceases to be engaged in war." It is contended that His Majesty ceased to be engaged in war on 2nd September 1945 and that the operation of the Act therefore expired on 2nd March 1946. The *National Security Act* 1946 repealed s. 19 of the former Act and substituted a new provision in the following terms :—"This Act, and all regulations made thereunder, and all orders, rules and by-laws made in pursuance of any such regulation, shall cease to have effect at midnight on the thirty-first day of December, One thousand nine hundred and forty-six."

The plaintiff contends that, even if the Act of 1946 upon its true construction purports to allow the Regulations to continue in force till 31st December 1946, the Regulations have now become invalid or inoperative by reason of the changed position in relation to the war. The defendant has demurred to the statement of claim.

The first contention for the plaintiff was that the defence power did not at any time authorize legislation of the character contained in Part III. of the *Economic Organization Regulations* relating to the transfer of property. These Regulations were considered by the Court in *Shrimpton* v. *The Commonwealth* (1). The objections now made to the Regulations on behalf of the plaintiff are the same as those which were raised and dealt with in that case. It was there contended that the Regulations, and particularly reg. 9 (2), gave

(1) (1945) 69 C.L.R. 613.

the Treasurer a discretion which was not limited in any way. Regulation 6 provides that, subject to exceptions, a person shall not, without the consent in writing of the Treasurer, purchase any land or enter into other specified transactions with respect to land. Regulation 9 (2) provides that the Treasurer may in his absolute discretion grant consent either unconditionally or subject to such conditions as he thinks fit or refuse to grant consent. The attack made upon the Regulations in *Shrimpton's Case* (1) was based particularly upon this provision and the judgments in the case deal in detail with that objection. In *Shrimpton's Case* (2) I gave reasons for my opinion that the Regulations were validly made under the *National Security Act* 1939-1943 and it is not necessary to repeat them.

In view of some of the arguments used upon the hearing, I desire to add that it is not the duty or a function of the Court itself to consider whether in its opinion such Regulations are "necessary" for defence purposes. Questions of legislative policy are determined by the legislature, not by the Courts. If it can reasonably be considered that there is a real connection between the subject matter of the legislation and defence, the Court should hold that the legislation is authorized by the power to make laws with respect to defence. The control of the use of money for the purchase of land, or of stocks and shares, or of goods or for other purposes, is a control of finance and trade which, as *Griffith* C.J. said in *Farey* v. *Burvett* (3), "may be the most potent weapon of all" in conducting a war. It is not for the Court to inquire into "the degree of its necessity": a determination of that question belongs to the legislative and not to the judicial sphere (4).

It is contended, however, that the *National Security Act* 1939-1943 expired on 2nd March 1946 because then six months had elapsed since 2nd September 1945, when His Majesty ceased to be engaged in active hostilities, all enemy powers having surrendered. The question is whether His Majesty then ceased "to be engaged in war." It was argued that the words "engaged in war" meant actually engaged in fighting, and that therefore the continuance of the Act depended upon the date to which fighting continued. It seems to be clear that this proposition cannot be supported in its literal sense. Fighting might cease for a week or a month, but no-one could doubt that a war was still in existence if the hostile forces were still opposing each other, ready and waiting to fight. Accordingly, the criterion cannot be the actual happening or non-happening on any given day of war-like operations.

(1) (1945) 69 C.L.R. 613.
(2) (1945) 69 C.L.R., at pp. 619-623.
(3) (1916) 21 C.L.R. 433, at p. 441.
(4) (1916) 21 C.L.R., at p. 443.

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But it is said that the complete surrender of all enemy forces brings war to an end and that therefore His Majesty was not engaged in war after 2nd September 1945. It has not been suggested that in relation to this matter there are any other categories than those of war and peace. There is no intermediate state which is neither war nor peace. An alien is either an alien friend or an alien enemy. Did German and Japanese subjects become alien friends overnight on 2nd September 1945 ?

It is a matter of common knowledge that at the present time representatives of the allied nations are engaged in conference for the purpose of endeavouring to determine terms upon which peaceful relations may be resumed with former enemy States. No decisions have been made as to the character of the terms which will be proposed for agreement, or forcibly imposed independently of agreement. Allied forces are in occupation of enemy countries by virtue of conquest, and are exercising authority which rests entirely upon military power. Such a condition of affairs cannot, in my opinion, be described as a state of peace. In some of the conquered countries it can hardly be said that a government exists with which relations can be maintained. In my opinion the present state of affairs in relation to the enemy countries, except Thailand, with which a treaty of peace has been concluded, is a state of war. What is being done in those countries can only be justified by reason of the continuance of war. If there were a state of peace there could be no justification whatever for the occupation of enemy countries and the exercise by the allied nations of powers in those countries which are not derived from any municipal law of those countries or from any agreement with a government of those countries. It is simply a fact that the military forces of the allied nations are exercising war powers and no other powers.

In my opinion His Majesty did not cease to be engaged in war at the moment when Japan surrendered in Tokyo Bay, and His Majesty is still engaged in war. Therefore the *National Security Act* 1939-1943 did not come to an end on 2nd March 1946, and it has not been brought to an end by any subsequent legislation.

The *National Security Act* 1946 repeals s. 19 of the Act of 1939-1943 and provides that that Act and all regulations &c. made under it shall cease to have effect at midnight on 31st December 1946. Other provisions of the Act of 1939-1943 are not amended or repealed and the terms of the new s. 19 assume that regulations made under the Act will (unless themselves repealed) continue in force until the date mentioned.

The long title of the Act is " An Act to provide for the termination of the *National Security Act* 1939-1943." It commenced on 16th May 1946. It is contended for the plaintiff that the *National Security Act* 1939-1943 had already terminated on 2nd September 1945. If this is truly the case, then the 1946 Act proceeded upon a wrong assumption and is simply ineffectual to produce any legal result. So far as this argument depends upon the terms of s. 19 of the 1939-1943 Act, I have already dealt with it. I add to the considerations which I have already mentioned the fact that the 1946 Act, after reciting s. 19 of the 1939-1943 Act, further recites : —" . . . whereas a state of war still exists between His Majesty and Germany, Italy, Japan and other countries : And whereas some considerable time must elapse before a state of peace comes into existence with each of the countries with which a state of war still exists, and it is desirable that the *National Security Act* 1939-1943 should be terminated before a state of peace with all of those countries has come into existence : " I agree that recitals in a statute are not conclusive evidence of facts recited ; they are prima-facie evidence—see cases cited in *Craies* on *Statute Law*, 4th ed. (1936), at pp. 41 et seq. Thus, though the recitals in the 1946 Act do not conclusively establish that a state of war still exists, they do recognize and support as a matter of evidence the other facts constituting the relationship between the Allied Nations and enemy powers to which reference has already been made.

But the plaintiff has a further argument, depending upon the nature of the constitutional power to make laws with respect to defence. It is contended, and in my opinion rightly, that the scope of possible legislation under the defence power varies from time to time in accordance with the circumstances of the time, and that the mere fact that a state of war continues does not in itself authorize the continuance of laws which may have been validly operative when made, but which cannot be regarded as having any relation to defence at a later time when their validity is challenged. To take an example—the introduction of blackout regulations, however justifiable in the past, could not be supported now as valid legislation. But this principle does not mean that the Federal defence power in relation to a particular matter ceases *instanter* with the disappearance of the conditions which justified the original exercise of the power. I give another example :—Let it be supposed that, under the defence power, at a time when there was, in the opinion of the Commonwealth Government, a danger of bombing attacks, regulations had been made authorizing a Commonwealth authority to erect air-raid shelters in public streets. Such regulations

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would be valid. Circumstances change, and there is obviously no longer any danger of such attacks. The structures in the streets do not then immediately become unlawful obstructions under State law, in relation to which the Commonwealth has no power. Federal statutes or regulations could, in my opinion, validly be made for the orderly demolition or removal of the structures. Similar considerations apply in the case of other defence measures. The defence power does not cease instantaneously to be available as a source of legislative authority with the termination of active hostilities (cf. *Jerger* v. *Pearce* (1)) or even with the end of the war (*Roche* v. *Kronheimer* (2)). The power is not cut off as with a guillotine. The defence power includes not only a power to prepare for war and to prosecute war, but also a power to wind up after a war and to restore conditions of peace—gradually if that is thought wise, and not necessarily immediately by the crude process of immediate abandonment of all Federal control. The fact that certain conditions have been created by the exercise of the defence power is itself a fact which is relevant to the validity of a continued or further exercise of that power. After the 1914-1918 war the *Commercial Activities Act* 1919 provided for the continuance in force of various regulations in relation to subjects which derived their existence from the exercise of defence powers during the war which had ended. I see no reason to doubt the validity of that Act.

In this case the *Economic Organization Regulations*, if valid when made (as in my opinion they were) do not cease to be operative when the actual war conditions with which they were designed to deal have ceased to exist. The fact that the Regulations have been in operation itself creates an economic condition which may reasonably be thought to require their continued operation for some further period in order to bring about a gradual return to what might be called more normal conditions, instead of exposing the community to the consequences of a sudden and abrupt creation of what might be a legislative vacuum. Whether such a policy is wise or not is not a matter for the Court to decide. But I am of opinion that the defence power includes a power to make laws which can continue in operation for a period not precisely coterminous with the defence emergency to meet which they were enacted, and that this period should not be held to have expired until, as I said in *Australian Textiles Pty. Ltd.* v. *The Commonwealth* (3), a stage has been reached when "it would be beyond reason to allege that the continuance of a particular war control, not within Commonwealth powers in time of peace, was necessary for defence purposes."

(1) (1920) 28 C.L.R. 588.
(2) (1921) 29 C.L.R. 329.
(3) (1945) 71 C.L.R. 161, at p. 170.

In my opinion, the challenged Regulations were valid when made: by virtue of s. 19 of the *National Security Act* 1939-1943 they continued in force notwithstanding the surrender of enemy powers: they are still valid as legislation under the defence powers: and they will come to an end at midnight on 31st December 1946 as regulations under the Act by reason of the provisions of the *National Security Act* 1946.

In my opinion, the demurrer should be allowed and judgment should be given for the defendants.

The Court is equally divided in opinion and accordingly the opinion of the Chief Justice prevails (*Judiciary Act* 1903-1946, s. 23 (2) (*b*)). The result is that the demurrer is allowed and judgment is given in the action for the defendants.

RICH J. The present demurrer illustrates the difficulties inherent in any Federal form of government when the country which has adopted it becomes involved in a war which necessitates the direction of its whole resources to defence. It cannot hope to survive unless it submits itself for the time being to what is in effect a dictatorship with power to do anything which can contribute to its defence. It follows that the scope of the defence power of the Commonwealth becomes very wide in time of war, and does not shrink to its normal peace-time dimensions immediately on the cessation of hostilities. The question now before us is whether certain Commonwealth *Economic Organization Regulations*, providing that a person shall not, without the consent in writing of the Commonwealth Treasurer which he may in his absolute discretion grant or refuse, purchase any land, are a valid exercise of the defence power. I have already in the case of *Shrimpton* v. *The Commonwealth* (1), expressed my reasons for holding that they are not, and nothing that has occurred since, and none of the arguments which have been addressed to us in the present case, lead me to alter that opinion. For the reasons mentioned, which it is unnecessary for me to repeat, the demurrer should be disallowed.

STARKE J.—Demurrer to a statement of claim which claimed a declaration that Part III. of the *National Security* (*Economic Organization*) *Regulations* so far as they restrict the sale or purchase of land were not authorized by the Constitution and in substance that the Regulations are no longer in operation because of the provisions in s. 19 of the *National Security Act* 1939-1943, under which the Regulations were made, that the Act "should continue

(1) (1945) 69 C.L.R. 613.

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in operation until a date to be fixed by Proclamation, and no longer, but in any event not longer than six months after His Majesty ceases to be engaged in war." Since the commencement of the action the *National Security Act* 1946 has been passed, which provides that the *National Security Act* and all regulations made thereunder and all orders made in pursuance thereof shall cease to have effect at midnight on 31st December 1946.

Doubtless, some regulation of the sale and purchase of land is a necessary war measure, to prevent the inflation of land values and a consequent rise in the costs of production, and a legitimate exercise of the defence power. The question in this case is whether the provisions contained in Part III. of the Regulations restricting the sale or purchase of land are within the constitutional power of the Commonwealth.

The Regulations provide that, subject to certain exceptions, no person shall, " without the consent in writing of the Treasurer—(*a*) purchase any land ; (*b*) take an option for the purchase of any land ; (*c*) take any lease of land ; (*d*) take a transfer or assignment of any lease of land ; or (*e*) otherwise acquire any land " (reg. 6 (1)). And the Regulations further provide that " the Treasurer may, in his absolute discretion, grant the consent, either unconditionally or subject to such conditions as he thinks fit, or refuse to grant the consent " (reg. 9 (2)).

The golden rule of interpretation is that the grammatical and ordinary sense of words should be adhered to unless that would lead to some absurdity or some repugnance or inconsistency with the rest of the instrument being interpreted. But that rule does not enable any power or authority to be exercised mala fide or arbitrarily or capriciously. And further, if there be two possible interpretations of a statute or regulation, one of which would render the statute or regulation bad, that interpretation should be adopted which will save the Act or regulation, *ut res magis valeat quam pereat.* And the *Acts Interpretation Act* 1901-1941, ss. 15A and 46 also provide a statutory rule of interpretation to the effect that where an Act or regulation is in excess of power it shall nevertheless be a valid enactment to the extent to which it is not in excess of power. Sometimes this process of interpretation is described as " writing down the statute or regulation " but the phrase is meaningless. The Court cannot rewrite an Act or regulation and give it an effect altogether different from that sought by the measure viewed as a whole (*Pidoto* v. *Victoria* (1) ; *Australian Railways Union* v. *Victorian Railways Commissioners* (2)).

(1) (1943) 68 C.L.R., at p. 118.

(2) (1930) 44 C.L.R. 319, at pp. 385-387.

In the present case the words of the Regulations are perfectly plain : there are not two possible interpretations nor are they capable of severance. In the prescribed cases the consent of the Treasurer must be obtained and he has an absolute discretion to grant or refuse that consent unconditionally or subject to such conditions as he thinks fit.

Australia has an area of some two million square miles, much of it mere desert, and a coastline of some twelve thousand miles. Yet, subject to some unimportant exceptions, no land in Australia can be purchased or acquired without the consent of the Treasurer and then only upon such conditions as he thinks fit. The power is almost unlimited, for the exceptions are comparatively unimportant, and everything is left to the Treasurer without any rule to guide him or to protect the public. So long as the Treasurer does not act dishonestly or arbitrarily or capriciously his discretion is absolute and without control although unrelated to the defence of the Commonwealth. The Court cannot, as I have said, rewrite the Regulations so as to bring them within power. It cannot by any legitimate process of interpretation convert the absolute discretion given to the Treasurer by the Regulations into some conditional or more limited discretion.

In my opinion, the power to make laws with respect to defence does not authorize a regulation granting authority so large and so vague as that contained in the present regulation. But I do not deny that a regulation more carefully framed might well be within constitutional power.

The authority granted by the Regulations is obviously capable of great abuse and *Shrimpton's Case* (1) and the questionnaire scheduled to the statement of claim make it plain that the authority has been used in a manner that cannot be supported. Abuse of an authority does not, of course, affect the validity of a regulation but the possibility of abuse owing to the generality and vagueness of the Regulations cannot be ignored when its effect and operation with respect to defence is under consideration.

Stenhouse v. *Coleman* (2) was referred to but that case is based upon the regulations there in question. The Minister there was not at large in the same measure as is the Treasurer in the present case and to some extent the question now involved is one of degree.

The demurrer also raises the question whether the Regulations have ceased to operate because of the cessation of hostilities in September 1945.

The *National Security Act* 1939-1943 provides that the Act, as already stated, shall continue in operation no longer than six months

(1) (1945) 69 C.L.R. 613. (2) (1944) 69 C.L.R. 457.

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after His Majesty ceases to be engaged in war. But a cessation of hostilities does not establish that His Majesty has ceased to be engaged in war. "The regular modes of termination of war are treaties of peace or subjugation; but cases have occurred in which simple cessation of all acts of war on the part of both belligerents has actually and informally brought the war to an end" though the termination of war in this manner is inconvenient and to be avoided (*Oppenheim* on *International Law*, 5th ed. (1935), vol. 2, p. 468). In the present case enemy country is occupied and a state of peace has not been proclaimed or declared. A state of war still exists and enemy nationals are still enemy subjects. It will be remembered, however, that the *National Security Act* 1946, provides that the *National Security Act* and all regulations made thereunder and all orders made in pursuance thereof shall cease to have effect at midnight on 31st December 1946.

But, though a state of war still exists, the cessation of hostilities for nearly a year materially alters the circumstances which called forth the Regulations and affords now less justification than when passed for the continued exercise of the exceptional powers conferred by the Regulations even if they were valid. That is not to say that the Parliament may not make other provisions under the defence power for regulating the purchase and acquisition of land because of consequences or conditions arising out of the war. But that is another question which does not arise upon this demurrer which, in my opinion, should be overruled.

DIXON J. The foundation of the plaintiff's claim for relief is the fact that the Treasurer has withheld his consent under the *National Security* (*Economic Organization*) *Regulations* to the proposed purchase by the plaintiff of a piece of land. In strictness, therefore, it is only so much of those Regulations as forbids the purchase of land without consent and defines the extent of the Treasurer's discretion that the plaintiff can directly call in question in these proceedings, that is to say, reg. 6 (1) (*a*) and, in its application to reg. 6 (1) (*a*), reg. 9 (2). But, though in a question of validity they may not be inseparable, the provisions contained in regs. 6, 6A, 10B, and, in their application to land, in regs. 8, 9 and 10 are so interconnected that they have naturally been drawn into the field of controversy. The efficacy of the provisions to prohibit the transaction in which the plaintiff desires to engage is denied on the ground that the material regulations never were valid and, on the further ground that, if at their inception they were valid, they can no longer lawfully operate. The contention is that at the

time the regulations were made they went beyond the legislative power with respect to defence, and that, in any case, the cessation of hostilities meant that they could have no effect now, or at the date of the proposed transaction. Two reasons were given why they could no longer have any effect. The first was that on 2nd March 1946, that is to say six months after the Japanese surrender, the *National Security Act* 1939-1943 came to an end and with it all regulations thereunder, because s. 19, as it then stood, provided that the Act should continue in operation until a date to be fixed by proclamation and no longer, but, in any event, not longer than six months after His Majesty ceased to be engaged in war and because at the end of hostilities His Majesty did cease to be engaged in war.

As to the amendment of s. 19 by the *National Security Act* 1946, it was said that this neither purported to, nor could, revive the operation of the Regulations ; it could not do so because the necessity had passed by which alone they could be justified, the necessity of bracing the community for a tremendous conflict with a powerful enemy.

In my opinion when the material regulations were adopted they were valid. By the material regulations I mean reg. 6 (1) (*a*) and reg. 9 (2) read in the light of the other provisions of Part III. In their earlier forms the provisions relating to dealings in land contained in the *Economic Organization Regulations* were somewhat less drastic than in the form in which we dealt with them in *Shrimpton's Case* (1) and that is the form in which they now stand, except for the insertion of reg. 6A. In *Shrimpton's Case* (1) I stated my understanding of their purpose and effect and said that I was by no means prepared to say that the control they established over land dealings went beyond the defence power (2). I shall not repeat what I then said.

The renewed attack made in the present case upon the validity of the provisions when adopted was supported on the ground that the discretion given to the Treasurer is unlimited, or, at least, so wide that its exercise may go beyond the defence power and yet cannot be controlled. I do not know that it will add much to what I said on this score in *Shrimpton's Case* (1), but it is, perhaps, desirable that I should mention some of the considerations which have weighed with me against this argument. The expression in reg. 9 (2) " in his absolute discretion " was doubtless intended to protect every exercise of the discretion from attack. The word " absolute " here appears to mean " free from outside interference or restraint." But no discretion could be conferred wider than the purposes of the

(1) (1945) 69 C.L.R. 613. (2) (1945) 69 C.L.R., at pp. 628-630.

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National Security Act or of the defence power and any attempt to make a purported exercise of discretion judicially unexaminable must to that extent fail. If reg. 9 (2) contains such an attempt, I regard it as a case completely within the application of the direction given by s. 46 (*b*) of the *Acts Interpretation Act* 1901-1941. Regulation 9 (2) must, therefore, be read and construed subject to the *National Security Act* and so as not to exceed the power of the Governor-General in Council to the intent that it shall be valid to the extent that it is not in excess of that power. So far, therefore, as ordinary judicial remedies extend, an exercise of the discretion may be examined, if it is impugned on the ground that it was directed to purposes foreign to those of the Act or that of the defence power. In the case of the present regulations that, I think, amounts to saying foreign to the purposes I ascribed to them in *Shrimpton's Case* (1).

It is complained that ordinary judicial remedies might be defeated if the Treasurer or his delegate were to adopt measures to conceal the grounds upon which his consent is withheld. The answer is that that is a complaint against the inadequacy of judicial process to uphold the law. It does not go to the intrinsic validity of the supposed acts of the Treasurer or his delegate. No doubt it is an argument against the constitutional validity of all Federal regulation which takes the form of prohibiting an act unless the consent is obtained of an administrator in whom is confided a discretion. But it is now much too late to adopt that rigid test.

The purposes of the Regulations are to be collected from their contents and the circumstances in which they were made, but the view I took of them seemed to be accepted, namely that they meant to restrain dealings in land to those considered justified by the use of the land or the needs or situation of the parties or one of them and thus to prevent speculation, the movement of land values, the withdrawal of capital from investments expressed in money and the substitution of land as a security and generally the diversion into land of funds available for investment in government securities and, as a secondary purpose, to reduce the volume of land dealings so that the energies of fewer people would be absorbed in them. Substantially I should think that to go beyond these purposes would go beyond power; but it was pointed out that a refusal of consent to an alien of enemy affiliations or to a dealing in land connected by situation with some defence project or military post or the like might, before the end of hostilities, have been justifiable under both the constitutional power and the statutory power.

(1) (1945) 69 C.L.R., at pp. 628, 629, 630.

That may be so and, though I doubt whether the Regulations had such matters in view, I am content to include them in the list of what initially were legitimate grounds for refusing consent to a dealing in land. It is then said that such matters, as well as many of the economic considerations which during the war formed proper grounds for refusing to relax the prohibition, necessarily ceased to be relevant to the defence power as time advanced and the period of hostilities receded into the past. It was denied that the economic purpose of checking inflation fell any longer within the application of the defence power. The denial was based on a distinction drawn between, on the one hand, matters incidental to concluding a war and to establishing the community upon a footing appropriate to peace and, on the other hand, social and economic problems which, though attributable to there having been a war or to circumstances arising in or from the war, yet form part of the conditions which continue in peace to govern the life of the community and have no further or other nexus with defence. The prevention of monetary inflation was placed in the latter category. Thus there could not now, according to the argument, be any justification under the defence power for regulating land transactions or alternatively for including among the grounds for their regulation, many of the matters upon which, as I think, the present Regulations depend. Consequently the validity of the provisions complained of by the plaintiff was denied on the ground that they were, so to speak, constitutionally spent.

The argument overlooks, I think, the consideration that while, in the conditions which follow the end of actual hostilities, the defence power might not authorize a given measure, were it then to be adopted for the first time, yet the change of circumstances consisting in the surrender of the enemy and the passing of the military purposes with a view to which the country had been organized, does not mean that the measures by which it has been so organized must suffer an immediate constitutional collapse, unless new or continuing exigencies growing out of the war would justify them as fresh exercises of the defence power. To place a country on a footing to take an adequate part in such a war as that through which we have passed requires a co-ordinated and systematic series of measures which must reshape the economy of the country. It is impossible to suppose that the defence power will suffice to authorize the retention of such a legislative fabric so constructed throughout a long and indefinite period of peace. But it is apparent that the change back from a war economy to an economy appropriate to peace is a task calling for further measures of a legislative nature and the defence power, in

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my opinion, is not insufficient to authorize laws for that purpose. The power must, by consequence, also extend to sustaining for some reasonable interval of time the laws and regulations in force at the end of hostilities so as to enable the legislature to proceed with the task. The whole edifice does not collapse at once simply because the necessities which call it into being have passed. Further, among the things that are incidental to the power must be the fixing by the legislature itself of some reasonable time during which the regulations adopted for war are to continue in force, while the steps are taken that are considered necessary for the remission of the community to an order proper to peace. In substance I think that this is what the Parliament has done by the *National Security Act* 1946. It is true that both the preamble and the operative provisions of that Act appear to imply an assumption that unless positively terminated by a new statute the *National Security Act* 1939-1943 and the regulations thereunder would all remain in force until six months after " a state of peace comes into existence " or a proclamation is made. But I do not think that such an assumption is necessarily against the view that the Act of 1946 intends to maintain the legislative provisions until the date fixed. For it supports the conclusion that the legislature so intended.

The new s. 19, introduced into the Act of 1939-1943, provides that the Act and all regulations made thereunder and all orders, rules and by-laws made in pursuance of any such regulation shall cease to have effect at midnight on 31st December 1946. This appears to mean that, so far as the legislature has authority to enact it, the Act, regulations, rules and by-laws shall not lapse by operation of law at an earlier date or be considered to have so lapsed. I think that it is now immaterial what the former words meant, viz., the words " six months after His Majesty ceases to be engaged in war." But I am not prepared to say that His Majesty ceased to be engaged in war on 2nd September 1945. I cannot accede to the contention that the relevant provisions of the *Economic Organization Regulations* are such that constitutionally they must have already lapsed by reason of the alteration of circumstances resulting from the cessation of hostilities and, accordingly I think that they are maintained in force for the present.

For these reasons, I think that the demurrer should be allowed and the suit dismissed with costs.

McTIERNAN J. In my opinion the demurrer should be allowed. My reasons for allowing it are the same as those of the Chief Justice. I think that it is unnecessary to add anything to his Honour's judgment.

WILLIAMS J. Several points were raised during the argument of the demurrer with which I find it unnecessary to deal. It is sufficient to say that having listened carefully to Mr. *Mason*, I see no reason to alter the opinion expressed in *Shrimpton* v. *The Commonwealth* (1), that Part III. of the *National Security* (*Economic Organization*) *Regulations*, so far as it relates to the purchase of land was beyond the ambit of the defence power at the date when the Regulations were made. Regulations 6 and 9 provide in the clearest language that with certain exceptions no land shall be purchased without the consent of the Treasurer and that the Treasurer has an absolute discretion to grant or refuse his consent either unconditionally or subject to such conditions as he thinks fit. Accordingly he may require an applicant for his consent to furnish him with such particulars of the transaction as he requires: reg. 6 (4). He may also require an applicant to furnish him with a valuation by an independent approved valuer: reg. 6 (6).

The purpose of the Regulations on their plain, literal, and grammatical construction was to invest the Treasurer with a plenary administrative discretion. The only limitations on the exercise of such a discretion are that it must be authorized by the legislation and be exercised bona fide (*Liversidge* v. *Anderson* (2); *Point of Ayr Collieries Ltd.* v. *Lloyd-George* (3)). An unreasonable exercise is not a sufficient objection to its validity (*Minister of Agriculture and Fisheries* v. *Price* (4); *Horton* v. *Owen* (5); *Carltona Ltd.* v. *Commissioners of Works* (6)).

The scope of the power is so wide that the Treasurer could withhold his consent because he considered it inadvisable to allow any or certain land to be sold or to be sold at any particular time or in any particular locality, or because he thought that the vendor had not a sufficient reason for selling, or the purchaser for buying the land, or the purchaser already had sufficient land, or for any other reason that had relation to the sale of land generally or of the particular parcel. I adhere to the statement in *Shrimpton's Case* (7): "The effect of the regulation is . . . to confer upon the Treasurer power to inquire into every particular of the transaction, and, if he does not approve of any particular, or of the transaction as a whole, to refuse his consent absolutely or to make his consent subject to some condition."

The Regulations could therefore only have been valid when made if it was within the scope of the defence power in April 1942 for the Commonwealth to take complete control of, and even to prohibit,

(1) (1945) 69 C.L.R. 613.
(2) (1942) A.C. 206.
(3) (1943) 2 All E.R. 546.
(4) (1941) 2 K.B. 116.
(5) (1943) K.B. 111.
(6) (1943) 2 All E.R. 560.
(7) (1945) 69 C.L.R., at pp. 634, 635.

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the sale of land anywhere in the Commonwealth. They go far beyond matters such as control of the price at which land may be sold and the extent to which money may be borrowed to finance its purchase, which could have a specific connection with the prosecution of the war. They extend to matters which in no way relate to its prosecution except " in so far as all matters affecting the well-being of the community have such a relation, and that is a general and not a specific relation " : *Victorian Chamber of Manufactures* v. *The Commonwealth* (*Industrial Lighting Regulations*) (1), per *Latham* C.J.

We were urged however to construe the Regulations as if they contained a recital that their object was to secure the defence of the Commonwealth and the prosecution of the war, and that they were to be construed and administered accordingly. But the Regulations do not contain such a recital. If they did, it could not qualify or limit operative provisions couched in such clear and unambiguous terms. We were also urged to apply s. 46 (*b*) of the *Acts Interpretation Act* 1901-1941. This section requires the Court so to construe a regulation, which is in excess of power, that its operation is not in excess of power. But the section can only be invoked where such a construction is open on the fair, commonsense meaning of the language. Absolute discretion can only mean one thing rough hew it as you may.

The particulars of each transaction, which the form of application for the Treasurer's consent requires, illustrate the extent of the discretion. They fill two pages for the vendor and two for the purchaser. For the purchaser they include such questions as, " Explain why you wish to buy this land and the use to which you will apply it, the reason why you wish to leave your present address, and whether you (or your husband or wife) own any other property " ; and for the vendor ; " Give full reasons for wanting to sell the land." All these questions appear to be well within the range of inquisitiveness contemplated by the words " such particulars of the proposed transaction as the Treasurer requires."

In my opinion, the demurrer should be overruled.

I would give judgment for the plaintiff and make the first declaration in the statement of claim.

Demurrer allowed with costs. Judgment for defendants with costs.

Solicitors for the plaintiff, *E. H. Tebbutt & Sons.*

Solicitor for the defendants, *G. A. Watson,* Acting Crown Solicitor for the Commonwealth.

J. B.

(1) (1943) 67 C.L.R., at p. 418.