

[HIGH COURT OF AUSTRALIA.]

MILLER PLAINTIFF ;

AND

THE COMMONWEALTH AND OTHERS . DEFENDANTS.

Constitutional Law (Cth.)—Defence—National security—Economic organization—Regulations—Validity—Company—Shares, stock and debentures—Sale, purchase or transfer—Consent of Treasurer—“ Absolute discretion ” of Treasurer—Cessation of hostilities—Continuance in force of war-time legislation and regulations thereunder—The Constitution (63 & 64 Vict. c. 12), s. 51 (vi.)—National Security Act 1939-1946 (No. 15 of 1939—No. 15 of 1946), s. 19—National Security (Economic Organization) Regulations (S.R. 1942 No. 76—1945 No. 189), regs. 7, 9 (2).

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Regulation 7 (7) of the *National Security (Economic Organization) Regulations* provides that “ the Treasurer may, after consultation with the Committee of the Associated Stock Exchanges of Australia, by order, determine the maximum and minimum prices at which any shares, stock or debentures of a company may be sold.”

Held, by the whole Court, that this sub-regulation, when made, was within the defence power (s. 51 (vi.) of the Constitution) as having a direct relation to the organization of the community for the prosecution of a modern war, and that it was still within that power even after the termination of hostilities.

Held also, by *Latham C.J., Rich, Dixon and McTiernan JJ.*, that the other sub-regulations of reg. 7 were also valid ; by *Williams J.*, that only sub-reg. (6), (7) and (8) were valid.

Held, by *Latham C.J., Starke, Dixon, McTiernan and Williams JJ.*, that the termination of active hostilities on 2nd September 1945 did not, under s. 19 of the *National Security Act 1939-1943*, bring about the expiry of that Act six months later.

Dawson v. The Commonwealth, *ante*, p. 157, referred to.

DEMURRER.

An action was brought in the High Court by Clarence Hamilton King Miller against the Commonwealth of Australia, the Treasurer

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for the Commonwealth and the Attorney-General for the Commonwealth. The statement of claim, as amended, was substantially as follows :—

1. The plaintiff is and has since May 1928 been a stock and share broker carrying on business at Sydney in the State of New South Wales and is and has since that month been a member of the Sydney Stock Exchange.

2. In the course of his business the plaintiff buys and sells shares, stock and debentures for members of the public on a commission basis and in addition the plaintiff buys and sells shares, stock and debentures on his own account with a view to making a profit therefrom.

3. Purporting to act under and pursuant to the provisions of Part III. of the *National Security (Economic Organization) Regulations* the Treasurer for the Commonwealth has from time to time issued orders fixing the maximum prices at which the various classes of shares, stock and debentures listed on the Sydney Stock Exchange may be sold. The said orders have not nor has any of them been laid before each House of the Parliament within fifteen sitting days of that House after the making thereof nor at any other time.

4. The orders referred to in the preceding paragraph hereof have not been revoked and the defendants claim that the same are in full force and effect and preclude any person from buying or selling on his own account or as broker or otherwise such shares, stock or debentures at a price in excess of that specified therein and preclude any company from registering any transfer of shares, stock or debentures in which the expressed consideration is greater than that specified in those orders.

5. The maximum prices specified in those orders are in all cases substantially below the true value of such shares, stock and debentures with the result that holders of such shares, stock and debentures have not since the making of those orders been prepared and are not prepared to sell the same at the said prices and it has become impossible for the plaintiff to carry on his business of stock and share broker or to engage in the buying and selling of shares, stock and debentures on his own account.

6. By reason of the matters hereinbefore set forth and the effect upon the business of the plaintiff of the provisions of Part III. of the said Regulations relating to the sale, purchase or transfer of shares, stock and debentures the plaintiff has suffered and will continue to suffer serious loss and damage.

7A. His Majesty was engaged in war with Germany as from 3rd September 1939, with Italy as from 12th June 1940, with Finland,

Hungary and Rumania as from 8th December 1941, with Japan as from 8th December 1941, with Bulgaria as from 6th January 1942, and with Thailand as from 2nd March 1942.

7B. On or about 6th May 1945 His Majesty accepted the unconditional surrender of Germany by a military instrument of surrender.

7C. On or about 2nd September 1945, the sovereign government of Japan formally and unconditionally surrendered to His Majesty.

7D. Of the other countries with which His Majesty had been engaged in war as abovementioned Italy surrendered on 3rd September 1943, Rumania on 12th September 1944, Finland on 12th September 1944 and Hungary and Bulgaria had surrendered before 6th May 1945.

7E. Thailand surrendered in September 1945 and a Treaty of Peace was concluded with Thailand on or about 1st January 1946.

7F. The defendants claim and have threatened and intend to act on the footing that the provisions of Part III. of the Regulations in so far as they relate to the sale, purchase or transfer of shares, stock and debentures are still in full force and effect and that the maximum price at which the same may be bought or sold are those set forth in the orders hereinbefore referred to.

The plaintiff claimed *inter alia* :—

1. A declaration that the provisions of Part III. of the *National Security (Economic Organization) Regulations* in so far as they relate to the sale, purchase or transfer of shares, stock and debentures are void and of no effect as being—

(a) beyond the powers conferred upon the Commonwealth by the *Constitution Act* 1900 ;

(b) in excess of the powers conferred by the *National Security Act* 1939, as amended.

2. A declaration that orders purporting to have been made by the Treasurer under and pursuant to the said Regulations and fixing the maximum prices at which shares, stock and debentures listed on the Sydney Stock Exchange may be sold were void and of no effect on the grounds set out in 1. hereof, or, in the alternative, as being—

(a) beyond the powers conferred by these Regulations ;

(b) orders of a legislative character which have not been laid before each House of Parliament as prescribed by s. 4 of the *National Security Act* 1939 (as amended) and s. 48 (1) (c) of the *Acts Interpretation Act* 1901-1941.

3. In the alternative a declaration that the said Regulations and the said orders ceased to have any legislative or other force or effect as from 2nd March 1946.

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The defendants demurred to the whole of the amended statement of claim and said that it was bad in law because—(i) it disclosed no cause of action; (ii) it disclosed no ground for the relief sought; and (iii) Part III. of the *National Security (Economic Organization) Regulations* made under the *National Security Act 1939-1943* in so far as they related to the sale, purchase or transfer of shares, stock and debentures and the orders made thereunder referred to in the amended statement of claim were valid laws of the Commonwealth.

At the hearing of the demurrer the plaintiff abandoned his claim to a declaration that the orders purporting to have been made by the Treasurer were void and of no effect so far as that claim was based upon the alternative ground that those orders were of a legislative character which had not been laid before each House of Parliament as prescribed.

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

Kitto K.C. (with him *Hardie* and *J. D. Evans*), for the plaintiff. The arguments addressed to the Court on behalf of the plaintiff in *Dawson v. The Commonwealth* (1) are adopted on behalf of this plaintiff. Regulations 7 to 10 inclusive of the *National Security (Economic Organization) Regulations* are not within the defence power, and, therefore, are invalid. Those regulations do not create a price-fixing code, nor do they deal with inflation, and they have no connection with war. They have the effect of creating an official control over the whole sphere of dealings in shares, stock and debentures, and are not designed to achieve any purpose related to defence. Although the exceptions in sub-reg. (2) and (8) of reg. 7 appear extensive, most of the ground remains covered by the general prohibition and little opportunity is left to deal in shares, stock and debentures. The prohibition is irrespective of price and has nothing to do with an attempt to avoid inflation. Even sales at low price are prohibited. Under reg. 7 (7) both maximum and minimum prices may be determined. As part of the scheme the only consequence which flows from sub-reg. (5) and (6) of reg. 7 is to make dealings more difficult. The consent of the Treasurer is not related to any inquiries. There is no indication in those regulations, as in the regulations relating to the sale of land, of any matters which the Treasurer must or should consider when dealing with an application for his consent (*Shrimpton v. The Commonwealth* (2)). The discretion given to the Treasurer by reg. 9 (2) is not merely a discretion but is an “absolute” discretion without any

(1) *Ante*, at p. 157.

(2) (1945) 69 C.L.R. 613, at p. 620.

qualification whatsoever. Regulation 9 (2) is intentionally absolute in its terms and anything under reg. 7 not within the stated exceptions comes within the absolute discretion in reg. 9 (2). That discretion is an absolute arbitrary official control unexaminable by the Court. There is nothing in the Regulations, so far as they relate to shares, stock and debentures, to suggest that the circumstances of intending purchasers should be inquired into, or which manifests any desire to avoid inflation, except, perhaps, remotely, if they stood alone, sub-regs. (7) and (8) of reg. 7; nor do they show a desire to or cause a diversion of money from shares, stock and debentures to war loans or other government securities; therefore the observations in *Shrimpton v. The Commonwealth* (1) cannot be applied to these regulations. Shares give the holder an interest in profits and assets, both of which are controlled. The essential difference between shares on the one hand and commodities and land on the other hand is price-fixing. The controlling of the price of shares has no effect upon the cost of living. The Regulations show no regard to the necessities of the war situation. Even if sub-regs. (5) and (6) of reg. 7 were severable and valid to deal with speculation, the other Regulations go further and set up a scheme that has no real or specific relation to the war. These regulations did not at any time have any relation to the war. But assuming that there was a relation to the defence power, the question which now arises is whether the area of the defence power has now contracted. This matter was fully debated in *Dawson's Case* (2). In short the defence power has now sufficiently diminished to call for a decision that the regulations can no longer be justified. Speculation and inflation are not now related to defence; they are matters of social legislation for the States. These proceedings come before the Court by way of demurrer. The defendants have not alleged any facts to show that these regulations were necessary for defence. Economic and social re-adjustment do not come within the scope of the defence power. A line must be drawn between the defence power and legislation for economic and social re-organization. It is not sufficient to continue the regulations in force in order to deal with exigencies of peace. It does not follow that because economic and social situations had to be dealt with during the war under the defence power there is still power to so deal with them after the war. The test is the same as for new legislation. The regulations ceased to have effect in March 1946 and therefore the operation thereof was not and could not be extended by the *National Security Act* 1946 which commenced in May 1946. Alternatively, any extension of the regulations by the Act of 1946 was ineffective.

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(1) (1945) 69 C.L.R., at p. 628.

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Mason K.C. (with him *Holmes*), for the defendants. The correct approach to the problem before the Court is to consider the position when the Regulations were brought into force; to consider whether it was proper then to prevent gambling and speculating in shares, stock and debentures on the Stock Exchange. The Regulations deal with the following positions:—(i) price-fixing—under reg. 7 (7); (ii) the necessity for the Treasurer's consent in three events only, namely, (a) if shares, stock or debentures not held by the vendor for the specified period; (b) where a person proposes to lend or borrow the purchase price; and (c) where the proposed sale would result in the purchaser holding shares or stock representing more than twenty-five per cent of the issued capital of the company concerned: reg. 7 (2), (6). The necessity for obtaining the Treasurer's consent to the sale of shares, stock or debentures not held for the specified period was designed to prevent speculation and "day to day" gambling. Such speculation and gambling would cause tremendous repercussions on the economic position of the Commonwealth. The need to avoid those repercussions in 1942 was a sufficient nexus between the prohibition and the defence power. An examination of the Regulations as a whole leads to the irresistible conclusion that their scope and intentment was an economic plan. The Regulations are reasonably capable of being construed as a valid exercise of the defence power (*Shrimpton v. The Commonwealth* (1)). Although the discretion exercisable by the Treasurer is expressed in reg. 9 (2) to be an "absolute discretion" it is "not arbitrary and unlimited and must be exercised bona fide" and "for the purposes of the regulations" (*Shrimpton v. The Commonwealth* (2)). Section 46 (b) of the *Acts Interpretation Act* 1901-1941 operates to keep the scope of the discretion within the power. The price-fixing provisions in sub-regs. (7) and (8) of reg. 7 are entirely severable. The "pegging" of prices was intended to prevent either booms or slumps on the Stock Exchange, a nerve centre of the financial system of the Commonwealth. That being the object in 1942, it was a proper exercise of the defence power. The test between an investor and a speculator was the period during which the shares, stock or debentures were held. The question then arises: Is it necessary now, at the time of these proceedings, that an order should be made under reg. 7 (7)? Is such a requirement unreasonable? Regard cannot be had only to shares, stock or debentures; consideration must be given also to land, goods and other commodities. All form part of the economic plan. It is admitted that price-fixing in respect

(1) (1945) 69 C.L.R., at p. 619.

(2) (1945) 69 C.L.R., at pp. 619, 629, 630.

of commodities is still within the defence power. That must mean that the war has created an unnatural or unusual economic structure, that is to say, a shortage of commodities and a surplusage of money, conditions which may easily and readily lead to inflation with its attendant harmful or disastrous effects upon the Commonwealth. Price-fixing is designed to prevent inflation, and the inflationary condition is a direct result of the war. There thus being a power now to deal with the price of commodities, so also is there power to deal similarly with shares, stock and debentures. In the circumstances it is not unreasonable, in order to prevent speculation in shares, stock or debentures and to prevent an artificial value being given thereto, that the consent of the Treasurer should be necessary where it is proposed to borrow or lend money for the purchase of shares, stock or debentures. Borrowing is clearly related to price. The continued operation of the Regulations was not unreasonable (*Australian Textiles Pty. Ltd. v. The Commonwealth* (1)). The only complaint discoverable in the statement of claim is in respect of the fixing of a maximum price, that is, price-fixing. Even assuming that the *National Security Act* did not contain s. 19 and that Treaties of Peace had been signed, it could not be said that upon the termination of the war the whole of the control structure built up by the Act and the regulations collapsed and ceased to operate. There must be a "tapering-off" period otherwise complete chaos would result. The time has not been reached when it would be unreasonable to assert that the control and stabilization of prices are unnecessary for the defence of the Commonwealth. The true position is that Treaties of Peace have not yet been signed and units of the Commonwealth Defence Forces are still on service overseas. Further, by the *National Security Act* 1946, Parliament enacted that the regulations should cease to operate at midnight on 31st December 1946.

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Kitto K.C., in reply. There is an essential difference between shares, stock and debentures on the one hand and land and commodities on the other hand. The price of shares, stock or debentures has no bearing upon, and is not a factor in the increase of, the cost of living. Reference to the possibility of chaos in the event of the Regulations ceasing to have effect cannot be regarded as an argument on the question of validity. The test is: Would there be any effect on the defence of the Commonwealth if the Regulations were repealed or held to be invalid?

Cur. adv. vult.

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The following written judgments were delivered :—

LATHAM C.J. This is a demurrer to a statement of claim in which the plaintiff, who is a stock and share broker carrying on business at Sydney, claims that the provisions of Part III. of the *National Security (Economic Organization) Regulations*, in so far as they relate to the sale, purchase or transfer of shares, stock and debentures, are void as being beyond the powers conferred by the Commonwealth Constitution and in excess of the powers conferred by the *National Security Act 1939-1946*. The plaintiff also claims a declaration that orders made by the Treasurer fixing maximum prices of shares, stock and debentures listed on the Sydney Exchange are void as being beyond the powers conferred by the Regulations. No argument was presented with respect to this particular claim. The plaintiff also claims in the alternative that the declarations in the order ceased to have any effect as from 2nd March 1946.

In the statement of claim it is alleged that the plaintiff carries on business as a stock and share broker and himself buys and sells shares, stock and debentures, and that the Treasurer, purporting to act under the Regulations, has from time to time issued orders fixing maximum prices of shares, stock and debentures listed on the Sydney Exchange. The statement of claim further alleges that all enemy powers in the recent war have surrendered, the last surrender being made by the Government of Japan on 2nd September 1945. A treaty of peace was made with Thailand on or about 1st January 1946. The *National Security Act 1939-1943*, s. 19, 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. The contention of the plaintiff is that His Majesty ceased to be engaged in war on 2nd September 1945, when the last surrender of an enemy power took place, with the result that the Act expired on 2nd March 1946. The defendants have demurred to the statement of claim.

The *National Security (Economic Organization) Regulations* in Part III. deal with the prohibition of transfer of certain property, in Part IIIA with the prohibition of transfer of residential businesses, in Part IV. with interest rates and in Part V. with industrial provisions. The plaintiff attacks the provisions in Part III. which relate to the sale, purchase or transfer of shares, stock and debentures of companies. The plaintiff's claim is made only in relation to reg. 7 (7), which deals with the fixing of maximum and minimum prices for shares &c. But it is contended on his behalf that others of the regulations are invalid and that reg. 7 (7) is inseverable from

them and falls with them. It is necessary, therefore, to consider the provisions of these other regulations.

Regulation 7 (1) provides that, except as provided by Part III., "a person shall not, without the consent in writing of the Treasurer— (a) sell any shares, stock or debentures of a company; (b) grant an option for the purchase of any such shares, stock or debentures; or (c) otherwise dispose of any such shares, stock or debentures, except by way of gift, by will or in the exercise of a power of appointment under a will." Paragraph (2) of this regulation provides for certain exceptions, including in (b) the sale by any person of any debentures of which he has been the beneficial owner for not less than six months, and in (d) the sale by any person of any shares or stock officially listed by any Stock Exchange where the shares or stock have been registered in the name of that person for not less than five months and the sale is made through a member of any such Stock Exchange. Paragraph (e) provides another exception in the case of the sale of shares or stock not so listed, including the case where the shares or stock have been registered in the name of the seller for not less than five months. This paragraph is subject to a provision that nothing in the paragraph shall authorize the sale of any shares or stock where, as the result of the sale, the purchaser will have acquired, since 15th June 1944, the beneficial ownership of shares or stock, or of any class of shares or stock exceeding in nominal value one-quarter of the nominal value of the shares or stock issued by the company or of that class of shares or stock so issued, as the case may be.

These provisions thus require the consent in writing of the Treasurer to the sale of any stock, shares or debentures which have not been held by the vendor for a period of five months in the case of shares and stock, and six months in the case of debentures. The effect of the provisions, therefore, is to prevent without the Treasurer's consent any sales of stock which have not been held for the periods mentioned, and therefore to prevent or limit speculative dealings in securities, and to control investment, and particularly changes of investment.

Regulation 7 (5) provides that "A person who sells any shares, stock or debentures of a company shall tender a transfer thereof to the buyer within twenty-one days after the date of the sale, or within such further time as the Treasurer allows, and the buyer shall forthwith after the tender make payment therefor in full." This is a provision directed to secure prompt cash settlements.

Regulation 7 (6) provides that "A person shall not, without the consent in writing of the Treasurer, borrow or lend any money for

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the purpose of enabling the borrower to pay for any shares, stock or debentures of a company purchased, or to be purchased, by him." This regulation, in preventing the borrowing of money for the purpose of purchasing shares &c., is also directed against speculation in shares and trading in margins. I agree with the argument for the plaintiff that these regulations are intended to control investment in some degree as well as speculation. They are particularly directed to securing that purchases of shares are made rather for purposes of investment than for purposes of speculation. These regulations may, in my opinion, reasonably be considered to have an effect in bringing about and maintaining a condition of stability in the prices of shares, stock and debentures of companies so as to diminish tendencies towards booms and slumps upon the stock market. Different views may be entertained by persons with varying interests as to the necessity or desirability of such controls, but that is not a matter for a court to consider.

Regulation 7 (7) provides that "The Treasurer may, after consultation with the Committee of the Associated Stock Exchanges of Australia, by order, determine the maximum and minimum prices at which any shares, stock or debentures of a company may be sold." This is the provision which the plaintiff attacks. It is a price-fixing regulation. It has nothing to do with obtaining the consent of the Treasurer to any transaction, or with the period during which shares &c. have been held, or with the borrowing of money to pay for shares. It operates in complete independence of all these other provisions. It is not dependent in any way upon them, and they are not dependent in any way upon it. In my opinion it is clearly severable from the other provisions of the Regulations.

The fixing of maximum and minimum prices for shares is, in my opinion, an economic control of the same character as the fixing of the prices of goods and charges for services and the fixing of prices of land. The former provisions were upheld in *Victorian Chamber of Manufactures v. The Commonwealth (Prices Regulations Case)* (1). The latter provisions (as to land) were considered by the Court in *Shrimpton v. The Commonwealth* (2) and are again under consideration in *Dawson v. The Commonwealth* (3).

It is unnecessary to repeat what has been said in the cases mentioned with respect to the effect of the control of the price of anything which is bought and sold in relation to the prevention of inflation, the maintenance of financial, commercial and industrial stability and the avoidance of economic disturbance and insecurity. All the

(1) (1943) 67 C.L.R. 335.

(2) (1945) 69 C.L.R. 613.

(3) *Ante*, at p. 157.

considerations which support the constitutional validity under the defence power of the fixing of prices of goods and services apply, in my opinion, to the fixing of the prices of stock, shares and debentures. It has been argued that, as the real value of shares &c. depends upon the value of the assets of the companies in which the shares are held, the fixing of the prices of goods, land, &c., makes it unnecessary to fix the prices of shares. In *Wertheim v. The Commonwealth* (1) a similar argument was presented. It was contended that it was unnecessary to fix the price of a product because it was sufficient to fix the prices of the ingredients of the product. But it is a matter of common knowledge that the price of bread is not controlled entirely by the price of flour. Some may think that the price of shares should depend entirely upon the value of the assets of companies. But it is notorious that this is not the case and it is obvious that it never will be the case as long as purchasers of shares take into account (as they always will) the probabilities of future profits in determining what they will pay for shares. The price of stocks and shares often varies most extravagantly quite out of relation to the value of the assets owned by the companies in which the shares are held. Nearly every stock market crisis provides an apposite illustration, and the effect of crises upon the stock market in disturbing the financial, industrial and commercial stability of a community is too well known to require explanation in detail.

The economic organization of a community is necessary in order to prosecute successfully a modern war which is of global dimensions. The fixing of the prices of stock, shares and debentures of companies is, in my opinion, a part of such economic organization which may reasonably be considered to have a direct relation to the organization of the community for purposes of war, and it falls, therefore, within the defence power.

In this view it is unnecessary to consider the other provisions of the Regulations, which require the consent of the Treasurer to sales &c. of stock, shares and debentures, but I see no reason to doubt their validity. They are directed against speculation and are intended to control investment to some extent, and therefore are directly associated with the maintenance of the financial stability of the community which war conditions not only disturb, but might, in the absence of some form of control, completely destroy. The control of the use of credit and currency for the purpose of dealings upon a stock exchange or in securities of the character which are commonly there bought and sold, is, in my opinion, a matter which

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may reasonably be considered to have a direct relation to the organization of the resources of the community for purposes of defence. In my opinion these Regulations are valid.

It was stated at the Bar that no such provisions had been enacted in Great Britain or America. The Court is not informed whether any other steps were taken in these countries in order to control speculation and investment. But what other countries choose to do cannot provide any criterion to govern this Court in determining the extent of the powers of the Parliament of Australia. The consideration of what other countries have chosen to do is, in my opinion, completely irrelevant to the determination of the matters before the Court in this case.

The contention on the part of the plaintiff that the *National Security Act* expired on 2nd March 1946 was raised in the case of *Dawson v. The Commonwealth* (1) where I have given reasons, which I do not now repeat, for my opinion that the fact that active hostilities with enemy powers ceased on 2nd September 1945 did not bring about the result that the Act expired six months after that date.

In my opinion, the demurrer should be allowed.

RICH J. This demurrer provides another illustration of the difficulties to which I have alluded in *Dawson's Case* (1). The problem of the scope of the defence power of the Commonwealth involves questions with which a Court of Justice is, in many cases and in many respects, ill-qualified to deal, and it should therefore be slow to hold Commonwealth legislation or action to be beyond that power, unless it is reasonably plain that it is. In many cases the line may be hard to draw, and if the matter challenged is *in dubio* it should, I think, be resolved in favour of validity. The present case differs in essential respects from *Dawson's Case* (1). Stock, shares and debentures notoriously lend themselves for use as counters in forms of gambling which might upset the nation's economy with disastrous results in time of war or during the nation's recovery from the immediate effects of war. Notwithstanding this, I have grave doubts as to the validity of the regulation which has been challenged, namely, reg. 7 of the *National Security (Economic Organization) Regulations*, apart from sub-reggs. (6), (7) and (8) dealing specifically with price control; but, on the whole, I am not prepared to say, having regard to the nature of the commodity dealt with, that the regulation as a whole has not been, and for the present is not still, on the hither side of the line. I think, therefore, that the demurrer should be allowed.

(1) *Ante*, at p. 157.

STARKE J. Demurrer to a statement of claim which claims a declaration that the provisions of Part III. of the *National Security (Economic Organization) Regulations* so far as they relate to sale, purchase or transfer of shares, stock or debentures are not authorized by the Constitution or the *National Security Act* 1939-1946 and also a declaration that orders made by the Treasurer pursuant to the regulations fixing the maximum prices at which shares, stock and debentures listed on the Sydney Stock Exchange might be sold are not authorized by the Constitution or the *National Security Act* or the Regulations. And in the alternative a declaration that the Regulations and orders ceased to have any legislative or other force or effect as from 2nd March 1946. The orders made by the Treasurer were also attacked on the ground that they were of a legislative character and had not been laid before Parliament as prescribed by the *National Security Act* and the *Acts Interpretation Act* 1901-1941 but this ground of attack was abandoned on the argument before this Court.

It cannot be denied, I think, that some regulation of the sale of shares, stock and debentures of a company is a necessary war measure and a legitimate exercise of the defence power as is also an authority to determine the maximum and minimum prices at which any shares, stock or debentures of a company may be sold. The purpose of such regulations and orders is to prevent the inflation of share values and restrain speculative investments or gambling on the Stock Exchange. But I should not think that such regulations or orders have any effect upon the costs of production as have inflated land values.

The question in the present case is whether the provisions of Part III. of the Regulations, so far as they relate to the sale of shares, stock and debentures and the determination of the maximum and minimum prices at which any shares, stock or debentures of a company may be sold, are within the constitutional power of the Commonwealth.

The Regulations, by reg. 7 (1), prescribe :—" Except as provided by this Part, a person shall not, without the consent in writing of the Treasurer—(1) (a) sell any shares, stock or debentures of a company ; (b) grant an option for the purchase of any such shares, stock or debentures ; or (c) otherwise dispose of any such shares, stock or debentures, except by way of gift, by will or in the exercise of a power of appointment under a will."

But there are some important exceptions such as sales by the representatives of deceased persons, or by a trustee in bankruptcy or by a mortgagee or sub-mortgagee in the exercise of a power of

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sale, or sales by a person of debentures of which such person has been the beneficial owner for not less than six months and of shares which have been registered in the name of the seller for not less than five months (see generally reg. 7 (2)).

The Treasurer, however, upon application for his consent, may in his absolute discretion grant or refuse the consent conditionally or subject to such conditions as he thinks fit (see reg. 9 (2)).

Regulation 7 (7) provides that " the Treasurer may, after consultation with the Committee of the Associated Stock Exchanges of Australia, by order, determine the maximum and minimum prices at which any shares, stock or debentures of a company may be sold " and reg. 7 (8) provides that " where the Treasurer makes any such order, a person shall not buy or sell any shares, stock or debentures of a company to which the order relates at a price above the maximum price or below the minimum price fixed in respect thereof."

The regulation of the prices of commodities and of stock and shares are, I think, traditional war measures. The regulation so far as it relates to prices and any order made pursuant to it is within constitutional power. It affords a real and substantial basis for the conclusion that it relates to the defence and safety of the Commonwealth.

But with that regulation is another which prescribes, with the exceptions already alluded to, that no sale shall be made of any shares, stock or debentures of a company without the consent of the Treasurer who may in his absolute discretion grant or refuse it unconditionally or subject to such conditions as he thinks fit. Everything, as I said in *Dawson's Case* (1), is left to the Treasurer without any rule to guide him or to protect the public and unless it can be established that the Treasurer acted dishonestly or arbitrarily or capriciously his discretion is absolute and without control although unrelated to the defence of the Commonwealth.

In my opinion, an authority granted in such large and vague terms cannot be justified under the defence power for the reasons which I stated in *Dawson's Case* (1) and shall not repeat. It has not been found necessary, so it was stated at the Bar, in England, Canada or in New Zealand.

The demurrer also raises the question whether the Regulations and orders ceased to have any force or effect after 2nd March 1946, that is six months, I take it, from the cessation of hostilities. That question must be determined adversely to the plaintiff in this action. But I have dealt with the question sufficiently in *Dawson's Case* (1) to which I refer.

The demurrer goes to the whole cause of action and should accordingly be overruled.

(1) *Ante*, at p. 157.

DIXON J. This demurrer was argued shortly after the demurrer in *Dawson's Case* (1) and many of the contentions advanced in the latter case were adopted. With respect to the grounds common to both cases for impeaching the validity of provisions of Part III. of the *National Security (Economic Organization) Regulations*, it will, I think, be enough for me to refer to the reasons I have given in *Dawson's Case* (1) for allowing that demurrer and dismissing the suit.

In this case, however, the subject of the regulations attacked is not land and for that and other reasons distinctions are taken between the two cases. The provisions here in question are those imposing a control on dealings in shares, stock and debentures of companies. The main provisions which do this are contained in reg. 7. But regs. 8 and 9 apply to transactions in those securities as well as to dealings in land. Regulations 10A and 10B contain further provisions ancillary to the control of shares, stock and debentures of companies, but they are "policing" in character and consequential upon the main provisions and so call for no independent consideration.

The plaintiff is a member of the Sydney Stock Exchange carrying on business as a stock and share broker. He also sells stock, shares and debentures on his own account. He seeks declarations of right declaring that the regulations imposing control are invalid, or, alternatively, have ceased to operate.

The first general purpose of reg. 7 is to prevent the sale or disposal of shares, stock or debentures of a company unless either the consent of the Treasurer is obtained or the seller is acting in one of certain representative capacities or is exercising a power of sale under a mortgage or the seller has been the beneficial owner of the securities, if they be debentures, for at least six months, and, if they be shares or stock, for at least five months, provided also in the latter case that, if the shares or stock are not listed upon the Stock Exchanges, the sale does not mean that the buyer will have recently acquired shares or stock in the company amounting in nominal value to more than a quarter of the company's issued shares or stock.

The second general purpose is to enable the Treasurer, after consulting the Committee of the Associated Stock Exchanges, to fix maximum and minimum prices for the sale of shares, stock and debentures of a company.

The third general purpose is to control the lending and borrowing of money for the purchase of shares, stock and debentures of a company.

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The main cause of complaint by the plaintiff, as disclosed in his statement of claim, is that orders have been made, and still subsist, fixing the maximum prices at which various classes of shares, stock and debentures listed on the Sydney Stock Exchange may be sold and that, because of the low values so fixed, no one is prepared to sell them with the consequence that, according to the plaintiff, he cannot carry on his business. There is, however, a complaint in very general terms of the effect of the provisions of Part III., not confined to the price-fixing provision, and a prayer that the provisions of the Part relating to shares, stock and debentures be declared void and of no effect.

In support of the statement of claim it is pointed out that the provisions in question amount to much more than an assumption of control over prices of marketable securities. They give, subject to the specific exceptions, a very wide and general control over all dealings in shares, stock and debentures. The control is exercised by a discretion the scope and purpose of which are not indicated. It is said that the exception in favour of those filling certain representative capacities is unimportant and that the exception in favour of those holding securities for five or six months show that one object at least of the provisions is quite remote from the control of values and the prevention of inflation, an inference confirmed by the proviso against acquiring more than a quarter of the share capital of unlisted companies.

It is denied that the purposes above described can ever have had any sufficient bearing on the prosecution of the war or the defence of the Commonwealth.

I am unable to accept these contentions. In my opinion, at the time when these regulations were adopted, a rigid control of dealings in marketable securities might reasonably have been considered essential to the financial and economic organization of the country to sustain its part in the war. It is not for us to pronounce upon matters of finance and economics. When the connection between a challenged provision and the defence power is financial or economic in character, our province is to say whether the Executive Government in which the responsibility is reposed of adopting by regulation measures required for the prosecution of the war, might reasonably consider that the conduct of the war would be likely to suffer if the challenged provisions were not made.

I do not see how we can say that it might not reasonably be considered that, in the financial or economic exigencies of the war, it was necessary to avoid the inflation or deflation of marketable securities and to control transactions, dealings, or operations which

might lead to booms and slumps, or which might form a factor in absorbing funds otherwise available for government loans or other purposes. Measures calculated to provide floor and ceiling prices, to prevent operations upon margins and speculative dealings, and to limit sales to the realization of genuine investments, might all be thought necessary or desirable in order to secure stability.

On a question of *ultra vires*, when the end is found to be relevant to the power and the means not inappropriate to achieve it, the inquiry stops. Whether less than was done might have been enough, whether more drastic provisions were made than the occasion demanded, whether the financial and economic conceptions inspiring the measure were theoretically sound, these are questions that are not in point. They are matters going to the manner of the exercise of the power, not to its ambit or extent. But, in reference to the attack upon the limitation of sales not requiring consent to cases where the seller has been owner of the securities for five or six months, it may be permissible to recall the remark of Lord *Keynes* :—" The spectacle of modern investment markets has sometimes moved me towards the conclusion that to make the purchase of an investment permanent and indissoluble, like marriage, except by reason of death or other grave cause, might be a useful remedy for our contemporary evils " (*The General Theory of Employment, Interest and Money*, 1st ed. (1936), p. 160).

I think that, when made, reg. 7 was a valid exercise of power. For the reasons I have given in *Dawson's Case* (1), I think that its operation has not lapsed through changed circumstances, and that the *National Security Act* 1946 operates to support its validity until 31st December 1946.

In my opinion, 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. This demurrer raises the question of the validity of the regulations in Part III. of the *National Security (Economic Organization) Regulations* relating to the sale of shares, stock and debentures. In *Inland Revenue Commissioners v. Crossman* (2) Lord *Russell of Killowen* said : " A share in a limited company is a property the nature of which has been accurately expounded by *Farwell J.*

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(1) *Ante*, at p. 157.

(2) (1937) A.C. 26, at p. 66.

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in *Borland's Trustee v. Steel* (1). It is the interest of a person in the Company, that interest being composed of rights and obligations which are defined by the *Companies Act* and by the memorandum and articles of association of the company. A sale of a share is a sale of the interest so defined, and the subject matter of the sale is effectively vested in the purchaser by the entry of his name in the register of members." In *English and Scottish Mercantile Investment Co. Ltd. v. Brunton* (2), Bowen L.J. said: "It seems that there are three usual forms of debentures. . . . The first is a simple acknowledgment under seal, of the debt; the second, an instrument acknowledging the debt, and charging the property of the company with repayment; and the third, an instrument acknowledging the debt, charging the property of the company with repayment, and further restricting the company from giving any prior charge. In the first class of these forms there is, of course, nothing to charge the property of the company at all. Of late years, however, companies have included in their debentures something which imports a charge upon their property. That is the second form, and it has become a very common form of debenture."

Regulation 7 (1) provides that:—"Except as provided by this Part, a person shall not, without the consent in writing of the Treasurer—(a) sell any shares, stock or debentures of a company; (b) grant an option for the purchase of any such shares, stock or debentures; or (c) otherwise dispose of any such shares, stock or debentures, except by way of gift, by will or in the exercise of a power of appointment under a will."

Regulation 7 (2) excepts certain sales from the operation of these provisions. Of these exceptions I need only mention (b) the sale by any person of any debentures of which that person has been the beneficial owner for not less than six months, (d) the sale by any person of any shares or stock officially listed by any Stock Exchange, where the shares or stock have been registered in the name of that person for not less than five months and the sale is made through a member of such Stock Exchange, (e) the sale of any shares or stock not so listed (ii) where the shares or stock have been registered in the name of the seller for not less than five months.

Regulation 7 also contains the following paragraphs:—

"(6) A person shall not, without the consent in writing of the Treasurer, borrow or lend any money for the purpose of enabling the borrower to pay for any shares, stock or debentures of a company purchased, or to be purchased, by him.

(1) (1901) 1 Ch. 279.

(2) (1892) 2 Q.B. 700, at pp. 712, 713.

(7) The Treasurer may, after consultation with the Committee of the Associated Stock Exchanges of Australia, by order, determine the maximum and minimum prices at which any shares, stock or debentures of a company may be sold.

(8) Where the Treasurer makes any such order, a person shall not buy or sell any shares, stock or debentures of a company to which the order relates at a price above the maximum price or below the minimum price fixed in respect thereof."

Regulation 9 (2) provides that, where application is made for the consent of the Treasurer, 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.

The exceptions contained in reg. 7 (2) make the regulations prohibiting the sale of shares, stock and debentures without the consent of the Treasurer more flexible than the regulations prohibiting the purchase of land without such consent, because they permit the free sale of debentures which have been owned for six months and shares which have been registered in the name of the seller for not less than five months. But reg. 7 still prohibits, without the consent of the Treasurer, the granting of any option except by will whenever exercisable for the purchase of shares, stock or debentures, and other transactions in shares, stock or debentures such as their distribution *in specie* amongst the shareholders upon a winding-up under a power contained in the articles of association.

It was submitted that the purpose of the regulations was threefold. 1. To prevent speculation but allow genuine investment in shares, stock and debentures of a company. It was for this purpose that sellers were required to hold debentures for six months or shares for five months before they could be sold without the consent of the Treasurer. A person who for any bona-fide reason required to sell his shares or debentures within these periods could apply to the Treasurer for his consent. 2. To prevent money being borrowed without the consent of the Treasurer to enable the borrower to purchase shares or debentures of a company. 3. To control the maximum and minimum prices at which shares and debentures of a company might be sold.

As to 1 : It was submitted that the public should not be allowed to speculate in shares and debentures in war-time. No doubt there is a marked expansion of the purchasing power in the civilian population in war-time due to full employment and high wages accompanied by a marked diminution in the production of goods for civilian purposes so that the avenues of expenditure are limited, and this causes competition particularly for the necessities of life

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such as food, clothing and shelter, which has the effect of inflating prices and creating false values. It is because of this danger that legislation to control prices and values falls within the defence power in war-time.

Regulation 7 (7) authorizes the Treasurer to fix both maximum and minimum prices between which all sales must be made. There is nothing that I can see which can place land or shares or debentures of a company in the peculiar position in relation to the prosecution of the war that, while all other forms of property can be freely dealt with at controlled prices, land and shares and debentures can only be disposed of even at controlled prices subject to the consent of the Treasurer. There are, as I ventured to say in *Shrimpton's Case* (1), many uses to which land can be put irrespective of its ownership which assist in the prosecution of the war, but shares and debentures can in themselves serve no such useful purpose. A company may be carrying on a business capable of aiding the prosecution of the war. Considerable control can then be exercised over the carrying on of its business. But generally speaking the conduct of such a business would not be affected by the shareholders or debenture holders having a right to sell their shares or debentures, and in any event the regulations do not seek to control the sale of shares and debentures on this ground.

Shares may be divided into two broad classes; preference and ordinary. The most usual form of preference share is one carrying a fixed preferential cumulative dividend and a preferential right to be repaid the amount paid on the shares upon a winding up. An ordinary debenture is simply an interest-bearing debt generally secured on the assets of the company. Preference shares and debentures alike provide a fixed income, the distinction being that on preference shares the income is payable out of, and is therefore dependent upon, profits, whereas the interest on the debentures is charged upon the assets. But shares and debentures of all kinds are intangible property. They are property in which money may be invested just as money may be invested in loans to individuals or governments or public bodies. I can conceive of no reason from the point of view of defence why the sale of land or shares or debentures in which money is invested should be made subject to the control of the Treasurer while at the same time there is a free market for the sale of private debts and government and other public stock. If the purpose was indirectly to drive persons to invest their money in war loans, that was no reason at all because the seller of land or shares or debentures would be just as likely to be willing to do this

(1) (1945) 69 C.L.R., at p. 636.

as the buyer, and Parliament has ample power under s. 51 (iv) of the Constitution to obtain, by compulsory loans if necessary, the moneys required to finance the war without seeking to invade ordinary rights of disposing of property enjoyed under State laws.

We are here concerned not with the organization or maintenance or supply of the armed forces in the field but with the organization of the civil community for the purposes of total war. Assuming that the control of prices at which shares and debentures in a company can be sold is within the ambit of the defence power in war-time, there is, in my opinion, no conceivable connection between the prohibition, either total or partial, of the free sale of these assets at fixed prices and the prosecution of the war. If this can be called speculation, and speculation is an evil, it is an evil of a social nature which exists both in peace and war. Ordinary civil rights can only be affected under the defence power so far as an interference with those rights is capable of aiding defence. The present regulations have nothing to do with organizing the supply of the material needs of the civil community. They are on the very fringe of the defence power.

I have already referred in several previous judgments to the considerations which appear to me to be material in deciding whether any particular legislation is within power (*Victorian Chamber of Manufactures v. The Commonwealth (Women's Employment Regulations Case)* (1); *Victoria v. Foster* (2); *Australian Woollen Mills Ltd. v. The Commonwealth* (3)). However comprehensive the defence power may be in time of war it must still be exercised subject to the Constitution. It cannot be extended to cover what a paternal Government may consider to be a social evil irrespective of any sufficient connection between that social evil and the prosecution of the war. I have already expressed the opinion in *Victoria v. Foster* (4) that Commonwealth legislation is not necessarily valid under the defence power if it relates to a problem created by the war because the war creates all sorts of problems, the solution of which has nothing to do with defence. If speculation in shares and debentures is an evil, it is not one which has any specific relation to the prosecution of the war, except as the Chief Justice has said, "in so far as all matters have such a relation, and that is a general and not a specific relation."

Regulation 7 (1) could only be valid if complete and absolute control of the disposition of shares and debentures in a company, and

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(1) (1943) 67 C.L.R. 347, at pp. 400-403. (3) (1944) 69 C.L.R. 476, at pp. 498, 499.
(2) (1944) 68 C.L.R. 485, at pp. 500-502. (4) (1944) 68 C.L.R., at p. 500.

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indeed of all property, comes within the defence power in war-time, the question of the extent of that control being entirely one of political expediency. But the defence power, however great the emergency, is not, in my opinion, as wide as that.

For these reasons I am of opinion that reg. 7 (1) was not a valid exercise of the defence power at the time it was made.

The exceptions contained in reg. 7 (2) are qualifications upon the operation of reg. 7 (1), and cannot be construed as substantive enactments. As reg. 7 (1) is void they can have no separate operation. If they could they would also be beyond power for the same reasons. The incidental provisions contained in reg. 7 (3), (3A), (4) and (5) must fail with reg. 7 (1).

As to 2 and 3: I think that it is clear that reg. 7 (6) which guards against secondary inflation was within the defence power at the time it was made. It is not so clear that the control of prices at which shares and debentures could be sold was within power.

Mr. *Kitto* contended that, although the price of land can, that of shares and debentures cannot, affect the price of commodities, so that the price of shares and debentures cannot have any effect upon the cost of living. But money is the sinews of war; the Stock Exchange is, as Mr. *Mason* said, a financial nerve centre; and violent fluctuations in the prices of any property including shares and debentures may have a detrimental effect upon the economic organization of the nation. Regulation 7 (7) forms part of regulations designed to peg everything: wages, services, prices and values, as at April 1942. It authorizes the Treasurer to fix maximum and minimum prices. Unlike commodities there is no decrease in the quantity of shares and debentures in wartime. If there is a scarcity it is because there is an increase in the number of buyers and a decrease in the number of sellers. A superabundance of cash in the hands of the purchasing public might produce an artificially high price for ordinary shares, but it would not be likely to have any more effect upon the rise in the price of fixed cumulative preference shares or debentures than it would upon government loans. Presumably higher prices for shares and debentures would tend to lower interest rates, and this would assist the flotation of Commonwealth loans at low rates of interest, whereas a fall in such prices would tend to raise interest rates and prejudicially affect such flotations. Accordingly it may be that the power to fix minimum prices has more relevance to the prosecution of the war than the power to fix maximum prices. But the Executive must be given a wide latitude of discretion. The regulations were made at a time of extreme crisis. There is, I think, a conceivable connection with the defence power and the power to

fix maximum and minimum prices as part of a comprehensive scheme for stabilizing prices and values at a critical period of the war. As Lord Macmillan said in *Schering Ltd. v. Stockholms Enskilda Bank Aktiebolag* (1): "Modern warfare" is of an "increasingly pervasive character."

For these reasons I am of opinion that regs. 7 (6), (7) and (8) were within the defence power at the time they were made.

The regulations were made under the authority conferred upon the Executive by the *National Security Act* 1939-1946 to exercise the defence power of the Commonwealth for the purposes mentioned in the Act. These purposes were the securing of public safety and the defence of the Commonwealth and its Territories. Section 19 of the Act provided that the Act should continue in operation until a date to be proclaimed and no longer, but in any event not longer than six months after His Majesty ceased to be engaged in war. The last enemy, Japan, surrendered unconditionally on 2nd September 1945. Apart from the *National Security Act* 1946, a serious question would arise as to the meaning of the words in s. 19 "ceases to be engaged in war." The same words occur in s. 18 of the *Black Marketing Act* 1942.

The *National Security Act* 1939 was intituled "an Act to make provision for the safety and defence of the Commonwealth and its Territories during the present state of war." The present state of war was defined to mean "the state of war existing between His Majesty and Germany . . . commencing on 3rd September 1939 . . . and terminating on the date of the issue of a proclamation that the war between His Majesty the King and Germany had ceased." Section 19 originally provided that the Act should "continue in operation during the present state of war and for a period of six months thereafter and no longer."

Apart from any definition the words "a state of war" have acquired a definite legal meaning. They are used in contradistinction to a state of peace and assume that a nation must either be at war or at peace (*Janson v. Driefontein Consolidated Mines Ltd.* (2); *Hirsch v. Somervell* (3) and cases there cited).

By the *National Security Act* 1940, which came into force on 21st June 1940 after France had fallen and Italy had entered the war, the title of the principal Act was amended by omitting the words "the present state of war" and inserting in their stead "any war in which His Majesty is or may be engaged," and consequential amendments were made throughout the Act. Section 19 was repealed and replaced by the present section.

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(1) (1946) A.C. 219, at p. 254.

(3) (1946) 2 All E.R. 27.

(2) (1902) A.C. 484, at p. 497.

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The word "war" is an ambiguous word: *Ruffy-Arnell and Baumann Aviation Co. Ltd. v. The King* (1); *Kawasaki Kisen Kabushiki Kaisha of Kobe v. Bantham Steamship Co. Ltd.* (2). Its true meaning must be ascertained in the context of the Act in which it appears. The purposes for which the right to exercise the defence power was delegated to the Executive, namely, securing the public safety and defence of the Commonwealth, coupled with the extraordinary interference with ordinary civil rights authorized by some of the specific powers, somewhat indicate a meaning of active war, or in other words, hostilities.

But these purposes and most of these powers were contained in the Act of 1939. A considerable period of time would inevitably elapse after the cessation of hostilities during which it would be necessary or convenient that regulations made while hostilities were in progress should continue in operation. If it was intended that the Act should expire six months after the termination of hostilities, it is unlikely that provision would have been made for its termination at an earlier date by proclamation. The intention seems to have been that the Act should be terminated by a proclamation, but that a safeguard should be provided by prescribing a period of termination if no proclamation was made. The alteration in language between the Act of 1939 and that of 1940 seems to have been intended to meet the situation of a spreading conflagration in which the number of foes had already grown from one to two and other foes were in the offing and not to give a different meaning to war from that which it bore in the original Act and thereby shorten its life.

Section 2 of the *National Security Act* 1946 repeals s. 19 and inserts in its stead a new section which reads:—"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."

If, contrary to my opinion, the words "engaged in war" have a meaning equivalent to engaged in hostilities, the principal Act would have expired on 2nd March 1946. The question would then arise whether the new Act has a retrospective operation. In *Lauri v. Renad* (3) *Lindley* L.J. said: "It is a fundamental rule of English law that no statute shall be construed so as to have a retrospective operation unless its language is such as plainly to require such a construction; and the same rule involves another and subordinate

(1) (1922) 1 K.B. 599, at p. 610.

(2) (1939) 2 K.B. 544.

(3) (1892) 3 Ch. 402, at p. 421.

rule to the effect that a statute is not to be construed so as to have a greater retrospective operation than its language renders necessary."

Applying these rules of construction I think that it does sufficiently appear from the language of the new section that Parliament did plainly intend that the principal Act and all regulations made thereunder, and all orders, rules and by-laws made in pursuance of such regulations (apart from regulations, orders, rules and by-laws expressly repealed) should continue in force until 31st December 1946, and that the section should, if necessary, be given a retrospective operation.

But the plaintiff contended that the defence power had contracted to such an extent by the date of the issue of the writ on 21st June 1946, that the power was no longer wide enough to support the regulations. It is only necessary for me to consider this contention in relation to reg. 7 (6), (7) and (8). These paragraphs are severable from the rest of the regulations under the provisions of s. 46 (b) of the *Acts Interpretation Act* 1901-1941. I agree with the contention that the scope of the defence power is conditioned by events, and, just as it expands in times of crisis, so it contracts as the crisis passes. There are four main stages: peace, hostilities, and the transition from peace to hostilities and from hostilities to peace. We are here concerned with the extent of the power during the transition from hostilities to peace. "Out of this nettle danger, we have plucked this flower safety." Some remarks on the extent of the power at this stage appear in *Australian Textiles Pty. Ltd. v. The Commonwealth* (1) and *Australian Woollen Mills Ltd. v. The Commonwealth* (2).

No legislation enacted under the defence power during a period of expansion could continue in force when the power had contracted to such an extent that it was no longer wide enough to support the legislation. Otherwise legislation passed at the height of the war could be made perpetual. But after the conclusion of hostilities the power must continue to be wide enough to enable the Executive under existing or fresh legislation to cope with the transition to peace. As Viscount *Haldane* said, when delivering the judgment of the Privy Council in *Fort Frances Pulp and Power Co. Ltd. v. Manitoba Free Press Co. Ltd.* (3), the Executive "must be . . . left with considerable freedom to judge" what legislation is still required in this period. He pointed out (4) that the effect of the economic and other disturbance occasioned originally by the war may continue for some time after it is terminated, and the question of the extent to

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(1) (1945) 71 C.L.R., at pp. 177-181.

(3) (1923) A.C. 695, at p. 705.

(2) (1944) 69 C.L.R., at pp. 499, 500.

(4) (1923) A.C., at p. 706.

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which provision for circumstances such as these may have to be maintained is one on which a Court of law is loath to enter. For the reasons already given the legislation under discussion, unlike legislation to control the prices of commodities which will continue to be scarce for some time after the conclusion of hostilities, is not legislation which is likely to remain within the ambit of the defence power for any considerable period. But Parliament has now decided that the *National Security Act* and all regulations made thereunder shall expire at the end of the year, and this is not a period which in my opinion can be said to be so unreasonable as to be outside the wide latitude of discretion which must be accorded to the Executive even in relation to the control of prices of shares and debentures.

For these reasons, I would overrule the demurrer, give judgment for the plaintiff, and declare that, except for pars. 6, 7, and 8, reg. 7 of the *National Security (Economic Organization) Regulations* is void.

*Demurrer allowed with costs. Judgment for
defendants with costs.*

Solicitor for the plaintiff, *T. J. Purcell*.

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

J. B.