

[HIGH COURT OF AUSTRALIA.]

CROUCH . . . . . PLAINTIFF ;

AND

THE COMMONWEALTH AND ANOTHER . DEFENDANTS.

*Constitutional Law (Cth.)—Defence—National security—Control of disposition of motor cars—Order made pursuant to regulations during hostilities—Necessity of permit—Unlimited discretion of prescribed transport authority—Cessation of hostilities—Discontinuance of regulations—Statutory continuance in force of order—Validity of statute and order—Alleged offences—Prosecution of motor car dealer—Action by dealer—Demurrer—Sufficiency of dealer’s interest—Declaratory order—Discretion of Court—The Constitution (63 & 64 Vict. c. 12), ss. 51 (vi.), 75 (iii.), 76 (i.)—Defence (Transitional Provisions) Act 1946 (No. 77 of 1946), ss. 6 (1), 7 (1)—National Security (Land Transport) Regulations (S.R. 1944 No. 49—1944 No. 168), reg. 4—Control of New Motor Cars Order No. 15—High Court Rules, Order IV.*

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SYDNEY,  
Nov. 25,  
Dec. 14.  
Latham C.J.,  
Rich, Starke,  
Dixon and  
Williams JJ.

The Control of New Motor Cars Order made in 1943 under the *National Security (Land Transport) Regulations*, and continued in force by the *Defence (Transitional Provisions) Act 1946*, provided that a person should not, without a permit, dispose of or acquire a motor car which had not, prior to the original date of the order, been registered under Australian law relating to the registration of motor vehicles. A prescribed transport authority might in its discretion issue or refuse to issue a permit. In a statement of claim against the Commonwealth for a declaration that the *Defence (Transitional Provisions) Act 1946* was invalid to the extent to which it purported to enact the order and that the order itself was invalid, the plaintiff alleged, *inter alia*, that his business of selling new motor cars was hampered by the necessity of obtaining permits under the order and that he had been served with two summonses alleging offences arising under the order. The defendant demurred on the grounds that the facts alleged did not show any cause of action, that the allegation that the plaintiff had been served with summonses was not sufficient to sustain the action and that the Act and the order were valid.

*Held* that the demurrer should be overruled.



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(1) Although valid when made in 1943, the order, particularly having regard to the unlimited discretion of the transport authorities, could not at the date of the *Defence (Transitional Provisions) Act 1946* and thereafter be supported under the defence power.

(2) The allegation that the plaintiff's business was hampered by the necessity of obtaining permits established a sufficient interest on his part to sustain his action.

*Per Latham C.J. and Williams J. (Starke and Dixon JJ. contra),* that the allegation that the plaintiff had been served with the summonses established sufficient interest on his part to sustain the action.

## DEMURRER.

In an action brought in the High Court by Cecil Stanley Crouch against the Commonwealth of Australia and the Attorney-General for the Commonwealth, the statement of claim was substantially as follows :—

1. The plaintiff carried on the business of a car dealer at 197 Castlereagh Street, Sydney, New South Wales. In the course of his business as a car-dealer the plaintiff bought second-hand motor vehicles of all types and makes for the purposes of sale and sold the same. He also as such car-dealer sold and distributed new motor cars made by four well-known motor-car manufacturing companies. Except as above stated he did not sell or distribute or otherwise deal in any new motor cars.

2. Purporting to act under powers conferred by the *National Security Act 1939-1946* the Governor-General by Statutory Rules 1944, No. 49 as amended by Statutory Rules 1944, No. 168 made the *National Security (Land Transport) Regulations*.

3. Paragraph 7 of those regulations provides :—(1) The Minister shall have power and authority to control, regulate and direct the transport of goods and passengers by rail or road within the Commonwealth. (2) The power and authority so conferred shall extend to the control, regulation and direction of . . . (e) The disposal and acquisition of any vehicle or any other goods connected with, or used for the purpose of land transport. (3) Without limiting the generality of the preceding provisions of this regulation the Minister shall have power and authority . . . (k) To control and regulate the disposition and acquisition of new and used motor vehicles and the installation and repair of gas-producer units therefor.

4. Paragraph (8), sub-par. (1) of the regulations provides :—The Minister shall have power to make such orders, give such directions, enter into such contracts on behalf of the Commonwealth



and do all such things as he thinks fit, for the purposes of these regulations.

5. Purporting to exercise the powers conferred by the regulations the Director-General of Land Transport, on 4th June 1943, made the Control of New Motor Cars Order and that order was notified in the Commonwealth *Gazette* on 8th June 1943.\*

6. The Control of New Motor Cars Order, as amended up to and including 13th January 1947, provided, so far as relevant, as follows :—

*Definitions.*

2. In this Order, unless the contrary intention appears—  
 “acquire” includes purchase, rent, hire, borrow and receive, and  
 “acquisition” has a corresponding meaning; “Motor Car” includes any motor vehicle, other than a commercial motor vehicle within the meaning of the Control of New Commercial Motor Vehicles Order, and every chassis designed to form part of such a vehicle; “dispose” includes sell, lease, hire, give and deliver; “new motor car” means a motor car which has not, prior to the date of this Order, been registered under the law of any State or Territory of the Commonwealth relating to the registration of motor vehicles; “owner”, in relation to a motor car, includes:  
 (a) every person in whose name the motor car is registered under the law of any State or Territory of the Commonwealth relating to the registration of motor vehicles; and (b) every person who is the owner, joint owner, or part owner of the motor car, and any person who has the use of the motor car under a hiring or hire purchase agreement, but does not include an unpaid vendor of such vehicle under a hire purchase agreement; “permit” means permit under this Order; “prescribed transport authority” means a person or body of persons authorized in writing by the Minister to act under this Order.

*No disposal or acquisition without a permit.*

3. A person shall not dispose of or acquire a new motor car unless the person acquiring the new motor car is the holder of a permit authorizing the acquisition.

*Permits.*

5. (1) A prescribed transport authority may, in its discretion, issue a permit or may refuse to issue a permit.

\* EDITOR'S NOTE.—This order was made under the authority of the *National Security (Land Transport) Regulations*, S.R. 1942 No. 149, as amended by S.R. 1943 Nos. 27 and 28. These regulations were repealed by S.R. 1944 No. 49 which provided (reg. 3 (2)) that all orders made under the repealed regulations should continue in force.

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(2) A permit shall be subject to such terms or conditions as the prescribed transport authority issuing the permit determines.

(3) A prescribed transport authority may at any time vary, revoke, or suspend a permit or may vary any term or condition thereof.

(4) A person to whom a permit is issued shall comply with its terms and conditions, including those terms and conditions as varied under the last preceding sub-paragraph.

*Vehicle to be operated according to permit.*

6. The owner and the driver of a motor car to which a permit relates shall not use the motor car, or cause or permit the motor car to be used, otherwise than in accordance with the terms and conditions of the permit, including those terms and conditions as varied under sub-par. (3) of the last preceding paragraph.

*Registrations and Transfers of Registrations.*

7. Notwithstanding anything in the law of any State or Territory of the Commonwealth :—(a) a new motor car shall not be registered unless and until a permit authorizing the acquisition of the motor car by the applicant for registration is surrendered to the registration authority. (b) the registration of a motor car in respect of which a permit is issued to any person shall not be transferred to any other person unless and until a permit authorizing the acquisition of the motor car by that other person is surrendered to the registration authority.

The statement of claim then proceeded :—

7. The Control of New Motor Cars Order is set out in the Second Schedule of the *Defence (Transitional Provisions) Act 1946*.

8. The plaintiff had been served with two summonses under Divisions 1 and 2 of the *Justices Act 1902* wherein it was alleged firstly that on or about 28th April 1947 at Sydney he was guilty of an offence against the *Defence (Transitional Provisions) Act 1946* in that contrary to par. 3 of the Control of New Motor Cars Order made in pursuance of the *National Security (Land Transport) Regulations* made in pursuance of the *National Security Act 1939-1946* and in force by virtue of the *Defence (Transitional Provisions) Act 1946* he not being the holder of a permit authorizing the acquisition did acquire a new motor car to wit 1946 Chevrolet Sedan Motor Car Engine No. R118091 from one Reginald Hall Clarke contrary to the Act in such case made and provided, and secondly that on or about 28th April 1947 at Sydney he was guilty of an offence against the said *Defence (Transitional Provisions) Act 1946* in that he did dispose of a new motor car to wit 1946 Chevrolet Sedan



Motor Car Engine No. R118091 to one Thomas Richard Pracey who was not the holder of a permit authorizing the said acquisition contrary to the Act in such case made and provided.

The plaintiff claimed (a) a declaration that the *Defence (Transitional Provisions) Act* 1946, to the extent to which it purported to enact the Control of New Motor Cars Order as referred to in the first column of the second schedule to the Act, was ultra vires the Parliament of the Commonwealth and void, and (b) a declaration that the Control of New Motor Cars Order referred to in the first column of the second schedule to the *Defence (Transitional Provisions) Act* 1946 was ultra vires the Constitution of the Commonwealth and void.

The defendants demurred to the whole of the statement of claim upon the following grounds: (1) that the facts alleged therein did not show any cause of action to which effect could be given by the Court as against the defendant or either of them; (2) that the *Defence (Transitional Provisions) Act* 1946 in so far as it purported to enact the Control of New Motor Cars Order had at all material times been in full force and effect and within the constitutional power of the Commonwealth; (3) that the Control of New Motor Cars Order had at all material times been in full force and effect within the constitutional power of the Commonwealth; (4) that the allegation that the plaintiff had been served with summonses under the Control of New Motor Cars Order was insufficient to sustain the action on the part of the plaintiff; and (5) that the *National Security (Land Transport) Regulations* and the Control of New Motor Cars Order as amended were insufficiently and incorrectly set forth in the statement of claim.

Upon the demurrer coming on for hearing, counsel for the plaintiff, at the instance of the Court, began.

*Spender K.C.* (with him *J. A. Lee*), for the plaintiff. The *Defence (Transitional Provisions) Act* 1946 in so far as it purports to enact the Control of New Motor Cars Order is beyond the powers of the Commonwealth, alternatively that order, which is specified in the second schedule to the Act, is itself invalid. For the purposes of this demurrer the crucial period is the year commencing 1st January 1947. The order was made under the *National Security (Land Transport) Regulations* in June 1943, but those regulations have not been specified in the schedules to the Act. The object of those regulations was to secure the control by the Commonwealth of rail and road transport for the defence of the Commonwealth and the effectual prosecution of the war. The order is beyond the

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defence power of the Commonwealth. Section 7 of the *Defence (Transitional Provisions) Act* 1946 had no authority to give validity to the order. In any event, even if a more limited order were within the power the order now under consideration is too wide in its scope. The definitions are important. The order extends to all transactions which fall within the meaning of the word "acquired." That word is given a special and very extensive meaning. Also, according to the definition of "new car," control is not exercisable in respect of motor cars which were already registered at the date of the order in June 1943. The question is: Even if it had any validity before, had it on 28th April 1947, the date of the alleged offences, any continued validity under the Act. The practice of this Court clearly permits this action to be brought for declarations of right. The allegation in par. 1 of the statement of claim and also the allegation in par. 8 that the plaintiff had been served with summonses are respectively sufficient to bring the matter within the statement in *Toowoomba Foundry Pty. Ltd. v. The Commonwealth* (1). The summonses themselves give a sufficient interest (*Colonial Sugar Refining Co. Ltd. v. Attorney-General for the Commonwealth* (2)). The business carried on by the plaintiff is interfered with by reason of the order. On both those grounds the plaintiff has sufficient interest to obtain a declaratory order from this Court. The order gives absolute discretion to the prescribed authority to grant, subject to conditions, a permit for the acquisition (in the wide sense in which "acquisition" is defined in the order) of any vehicle which was not registered in June 1943. The question immediately arises whether as at 28th April 1947, or at any time during 1947, it could be said that that could be brought within the defence power contained in s. 51 (vi.) of the Constitution. Hostilities had then ceased and conditions were becoming more normal. The Court is entitled to inform its mind of facts which are notorious. In view of the existence of the *Import Licensing Regulations*, made under the *Customs Act*, which prevented any goods from being imported into the Commonwealth except subject to licence, and the *National Security (Prices) Regulations* under which the price was fixed of any motor car sold irrespective of whether it had been registered before or after June 1943, and of the *Banking Act* 1945, it cannot be said that the order was directed to the control of any inflationary tendency. The order has nothing to do with the armed forces, or with the rehabilitation of service personnel; it does not relate to the carrying out of any obligation or arrangement entered into during the war and for the purposes of defence; it

(1) (1945) 71 C.L.R. 545, at p. 570.

(2) (1912) 15 C.L.R. 182, at p. 190.



does not involve the necessary completion of any process begun before the cessation of hostilities; and there is no exigency or danger relating to defence which calls for its exercise. The order simply deals with something in short supply in the Commonwealth, a matter which, *prima facie*, falls within the powers of the States. The control of petrol, in so far as that might be said to be within the defence power, is dealt with by a separate control and it affects all cars registered before or after June 1943. The order is too widely expressed to be read down and it cannot be said to be within the defence power of the Commonwealth (*Shrimpton v. The Commonwealth* (1); *Dawson v. The Commonwealth* (2)). The order is not connected with the prosecution or winding up of the war and it is not incidental to anything that happened during the war. The words "a prescribed authority may, in its discretion, issue a permit" in the order are very similar to the words considered by the Court in *Shrimpton v. The Commonwealth* (1) and *Dawson v. The Commonwealth* (2). There is no nexus between the order and the defence power. It has been exhausted and it has no validity at all.

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*Holmes K.C.* (with him *Snelling*), for the defendants. The relief asked for in the statement of claim is a declaration; it is no other form of relief. In considering the question of a declaration the Court will consider the law as it is now. The order should be looked at as legislation enacted by the *Defence (Transitional Provisions) Act* 1946, under which Act it was regarded as a "temporary" provision: see ss. 6 (1), 7. In determining the validity of that order and its nexus with the defence power, regard should not be had to the *National Security (Land Transport) Regulations* under which it was reasonably enacted, but to the statute which incorporated it by reference. Regard, therefore, should be had to the preamble of the *Defence (Transitional Provisions) Act* 1946 for the purpose of determining the intention of the legislature in incorporating the order. The recitals of the *Defence (Transitional Provisions) Act* 1947 should carry equal weight with the Court as the recitals of the Act of 1946. It is notorious that at the cessation of hostilities there was an obvious shortage of motor vehicles of all types; not only commercial vehicles but also motor cars within the meaning of the order. That shortage was directly attributable to effects or factors concerned with hostilities. With the cessation of hostilities the production of motor vehicles had largely to recommence. Production and distribution take time and it was not unreasonable to

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

(2) (1946) 73 C.L.R. 157.



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control distribution until the needs of industry &c. were met. The loss of production and distribution during the war years resulted in a huge accumulated deficit so far as industry &c. were concerned, not only in the Commonwealth but throughout the world. The order has been amended during the present year so as to relax control of some vehicles. This is a circumstance which the Court will take into consideration. Having regard to the circumstance that hostilities caused the shortage of vehicles in industry &c. the Court will not hold that the continuation of control under the order is not reasonable as (a) all machines, including motor cars, are in short supply, (b) while motor cars are in short supply control should be exercised with a view to rehabilitating industry &c. and rehabilitating in business and professions ex-service personnel and persons who had been displaced from their ordinary employment during the war and thus facilitate a return to peace-time conditions, (c) the control has been partially relaxed, (d) the legislature has twice continued the control for short periods, and (e) the Act will cease to operate as from 31st December 1948. The order, as enacted in 1946 and 1947, was valid as dealing with the shortage of vehicles so caused. The control is not exercised in respect of the distribution of motor cars *simpliciter* but is exercised in such a way as to ensure a gradual and orderly return to peace-time conditions, that is, in effect, that rehabilitation shall take precedence over mere pleasure. The principle which should be applied is shown in *Fort Frances Pulp & Power Co. Ltd. v. Manitoba Free Press Co. Ltd.* (1) and *Co-operative Committee on Japanese Canadians v. Attorney-General for Canada* (2). There is nothing in the statement of claim which suggests that what would have been a proper control immediately upon the cessation of hostilities is no longer such. The onus is upon the plaintiff who seeks a declaration of invalidity to show that the necessity for the order no longer exists. The discretion of the Minister or other prescribed authority exercising the power under par. 5 of the order is not an arbitrary discretion, the exercise of that discretion is limited by the provisions of the Act and particularly the preamble thereto. The exercise of a discretionary power was considered in *Reid v. Sinderberry* (3) and *Pidoto v. Victoria* (4). An instance of a wide administrative discretion in dealing with the distribution of a commodity subsequent to the cessation of hostilities is shown in *Sloan v. Pollard* (5). The regulations referred to in the first schedule to the Act of 1946, and

(1) (1923) A.C. 695, at p. 706.

(2) (1947) A.C. 87, at pp. 101, 102, 108.

(3) (1944) 68 C.L.R. 504, at pp. 510, 514, 516.

(4) (1943) 68 C.L.R. 87.

(5) (1947) 75 C.L.R. 445.



the orders referred to in the second schedule to that Act, all relate, substantially, to war-time shortages. The facts that (a) there was and is a shortage of motor cars, (b) that motor cars are not produced in the Commonwealth, (c) the needs of the producing countries as well as the needs of the Commonwealth and other countries have to be satisfied after the cessation of hostilities, and (d) during the war years motor cars were not produced in normal quantities and were distributed in a way different from that which obtained in normal times, are notorious and may be taken into consideration by the Court. The discretion given to the prescribed authority does not invalidate the order. It is not alleged in the statement of claim that the business of the plaintiff could not be carried on, or that it would be interfered with, because of the requirements of the order.

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*Sponder K.C.*, in reply. Paragraph 1 of the statement of claim sufficiently shows that the order places a very serious limitation upon the plaintiff's right to carry on his business in respect of vehicles purchased after the date of the order. The purpose of the order now is quite different from the purpose of the order when it was originally made in June 1943. The order was originally made for war purposes, those war purposes have disappeared and the conditions connected with the war have disappeared. The Commonwealth, if it desires to establish a nexus between the defence power and a matter which is *prima facie* a matter for State legislation, should be in the position of alleging it (see *Sloan v. Pollard* (1)). All the facts are within the knowledge of the Commonwealth. It would place an impossible and intolerable burden on the subject if he had to allege and establish, by way of a negative, that it had no relation in fact. The respondent has not shown any nexus between the order and the defence power (*Victorian Chamber of Manufactures v. The Commonwealth* (2)). A different subject matter was dealt with in *Reid v. Sinderberry* (3); therefore that case is distinguishable. In *Sloan v. Pollard* (4) the nexus between the order and the defence power was established.

*Cur. adv. vult.*

The following written judgments were delivered:—

LATHAM C.J. This is a demurrer to a statement of claim by which a declaration is sought that the *Defence (Transitional Provisions) Act 1946* is invalid to the extent to which it purports to enact the Control of New Motor Cars Order as referred to in the

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(1) (1947) 75 C.L.R., at p. 467.

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

(3) (1944) 68 C.L.R. 504.

(4) (1947) 75 C.L.R. 445.



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first column of the second schedule to the Act, together with a declaration that the said order is invalid. The argument is that the order can be justified, if at all, only under the defence power of the Commonwealth Parliament (*Constitution*, s. 51 (vi.)) and that it cannot be so justified. The order, the terms of which are set out in the statement of claim, was made on 4th June 1943 under powers conferred by the *National Security (Land Transport) Regulations*—Statutory Rules, 1942 No. 149 and was continued in force by Statutory Rules 1944 No. 49, reg. 3. The order defined “acquire” as including purchase, rent, hire, borrow and receive, and gave a corresponding meaning to “acquisition.” New motor cars were defined to mean motor cars (other than new commercial motor vehicles, which were dealt with in another order) which had not prior to the date of the order been registered under any State or Commonwealth law relating to registration of motor vehicles. Clause 3 of the order was in the following terms : “A person shall not dispose of or acquire a new motor car unless the person acquiring the new motor car is the holder of a permit authorizing the acquisition.” Clause 5 provided that a prescribed transport authority might in its discretion issue a permit or refuse to issue a permit. Other provisions required persons to whom a permit was issued to comply with the terms and conditions of the permit.

The statement of claim alleged that the plaintiff had been served with two summonses charging offences against the *Defence (Transitional Provisions) Act* 1946 in that, in breach of the order, he, not being the holder of a permit authorizing the acquisition, acquired a new motor car and disposed of another new motor car to a person who did not hold a permit for acquisition.

The defendants demurred to the statement of claim on the grounds that the facts alleged did not show any cause of action, that the allegation that the plaintiff had been served with summonses under the order was insufficient to sustain the action, and that the Act of 1946 and the order were valid.

The Court has a discretion to determine whether a declaration as to the rights of a plaintiff shall be made without giving consequential relief : see cases cited in *Halsbury's Laws of England*, 2nd ed., vol. 19, pp. 215, 216. As a general rule the Court would not make a declaration so as, in effect (though not in form), to intercept proceedings in a criminal court by passing upon the validity of a statute or regulation with an offence against which an accused person was charged. If the accused relied upon the invalidity of an enactment he could raise his contention as a defence in the criminal proceedings. In determining whether the Court should



exercise its discretion to make a declaratory order in the present case all the circumstances of the case should be considered. Among these circumstances is the fact that, whether or not the validity of the Commonwealth legislation was upheld in the magistrate's court, there would probably be an appeal to this Court in order to obtain a decision on the question. There are, in such a case as the present, real considerations of convenience in having the question of the validity of the legislation determined at the outset in proceedings in the High Court. This course was taken in *Colonial Sugar Refining Co. Ltd. v. Attorney-General for the Commonwealth* (1). In that case the discretionary jurisdiction of the Court to make a declaration of right was exercised because prosecutions were pending against a person for breach of a statute which he contended was invalid. In my opinion that case shows that the plaintiff has sufficient interest to sustain his action.

It was also argued for the plaintiff that the allegation that the plaintiff was carrying on a business in the course of which he bought and sold new motor cars, and that the order the validity of which he challenged required permits to be obtained before he could so deal in motor cars, was a sufficient allegation of interference with the business of the plaintiff to show that he had an interest which would support his action. In my opinion this argument also is sound—the requirement that permits should be obtained in the case of each car by every person who acquires a motor car is a real impediment in the way of conducting a business of buying and selling motor cars.

This is a proceeding by way of demurrer. It is the duty of the Court to determine whether the allegations made in the statement of claim are sufficient in law to entitle the plaintiff to the relief sought. Those allegations are taken to be true for the purpose of arguing the demurrer. If the defendants rely for the purpose of defence upon other facts than those alleged in the statement of claim they must plead those facts in a defence—unless they are facts of which the Court takes judicial notice without evidence, such as notorious facts: see *Halsbury's Laws of England*, 2nd ed., vol. 13, p. 622. The question therefore is whether the facts alleged in the statement of claim, together with facts, if any, of which the Court can take judicial notice without proof, are sufficient in law to support the plaintiff's claim.

The order controls the disposition of certain motor cars, namely motor cars (not being new commercial motor cars as defined in

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(1) (1912) 15 C.L.R. 182: see per *Griffith C.J.*, at pp. 189-192.



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another order) which were not registered before 4th June 1943. By amendments to the order certain low-powered motor cars have been excluded. The order, as already stated, was made under Statutory Rules 1942 No. 149. The *Defence (Transitional Provisions) Act* 1946, s. 7, kept the order in force, but did not keep in force the *Land Transport Regulations* under which that order was originally made and continued in force. Those regulations expired on 31st December 1946. The *Land Transport Regulations* 1944, reg. 4, contained a statement of the objects of the regulations in the following terms :—“ The objects of these Regulations are to secure, in the interests of the defence of the Commonwealth and the effectual prosecution of the war, the control by the Commonwealth of rail and road transport and for that purpose to provide that rail facilities, equipment and rolling stock and road services and vehicles shall be subject to control, regulation and direction, and these Regulations shall be administered and construed accordingly.” There was a similar provision in Statutory Rules 1942 No. 49, reg. 5. The order has now been divorced from these provisions, which are no longer in operation. Since 1st January 1947 (the date upon which the 1946 Act came into operation) the order has existed simply as an order controlling the disposition of certain motor cars, with no such specific reference to matters of defence. (The 1947 Act is introduced by a preamble stating that a state of war still exists, that the gradual and orderly return to conditions of peace is not yet completed and that certain *regulations* should, for the peace, order and good government of the Commonwealth, continue to operate during the time of transition. There is no reference in that Act to the necessity of maintaining *orders* in operation apart from regulations.)

The order contains no provision which determines the number of cars which will be available for disposition by sale or otherwise. It does not limit either the importation or the production of cars. It is concerned only with the distribution of existing cars among people who want them: it does not prescribe any order of priority and purports to give a complete discretion to officers to give the right to individual persons to acquire motor cars.

Prima facie this subject is a matter falling within State legislative power. There is no head of federal power which authorizes general Commonwealth control of the acquisition and disposition of chattels by members of the public except in the case of a valid exercise of the defence power. The Commonwealth Parliament may control many matters for defence purposes. It is plain enough that the Commonwealth in relation to defence requirements may



control transport within the Commonwealth by motor cars or otherwise, and that for this purpose it may acquire motor cars and dispose of them and regulate the disposition and use of them by other persons.

For these reasons the order was validly made in 1943. But the validity of legislation may depend upon the continuance of a particular state of facts. "A statute valid when enacted may cease to have validity, owing to a change of circumstances": *Hamilton v. Kentucky Distilleries & Warehouse Co.* (1). A law depending upon the existence of a certain state of facts to uphold it may cease to operate if the facts change, even though valid when passed (*Chastleton Corporation v. Sinclair* (2)). There may be such a change of circumstances that "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" (see *Australian Textiles Pty. Ltd. v. The Commonwealth* (3)). It is easier to state this general principle than to apply it in a satisfactory manner to particular cases.

The order now challenged was valid when made because clause 5 of the regulations associated it with the subject of defence, and the existing conditions, namely the actual existence and prosecution of a war, established a clear connection between the order and considerations of defence. In the case of some war controls the nature of the subject matter to which they related might be such as to require a gradual process of resumption of more normal conditions. But even if such a consideration is relevant in the case of the control of disposition of motor cars, it is difficult to suggest any reason for retaining federal control by reason of circumstances connected with the subject of defence as late as April 1947. It is notorious that there was a shortage of cars after the war and doubtless that shortage has continued—i.e. in the sense that there are persons who want to buy motor cars and they cannot get them. But, if it can be assumed that the shortage is due to the war and if this fact is said to be sufficient to support the order, an effective answer to such an argument is to be found in the facts that the order does nothing to relieve any such shortage and that it makes no provision for allocation of available cars upon any principle which is related to considerations of defence.

The writ in this action was issued in June 1948. The offences referred to in the statement of claim are alleged to have been

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(1) (1919) 251 U.S. 146, at p. 162  
[64 Law. Ed. 194, at p. 202].

(2) (1924) 264 U.S. 543 [68 Law. Ed.  
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(3) (1945) 71 C.L.R. 161, at p. 170.



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committed in April 1947. There were no notorious facts in April 1947 or in June 1948 of which the Court can take judicial notice which can be relied upon to show that this particular order then had any association with the subject matter of defence. There is no allegation in any pleading before the Court of any facts showing such an association. The subject matter to which the order applies can readily be regulated by the State Parliaments if it is desired to have a system of regulation applying to the subject. Accordingly I am of opinion that, as *prima facie* the matter belongs to the States, and no circumstances appear which justified the continued application of the order in April 1947 or in June 1948, the demurrer should be overruled. The defendants should have liberty to plead a defence if they so desire within fourteen days—Rules of High Court, Order XXIV., Rule 10. The defendants pay the costs occasioned by the demurrer—Order XXIV., Rule 9.

RICH J. In this case the plaintiff in his statement of claim asks for a declaration that the provision in the *Defence (Transitional Provisions) Act* 1946 (No. 77 of 1946), ss. 6 (1), 7 (1) and second schedule, which purports to continue the operation of the Control of New Motor Cars Order until the end of December 1947, is *ultra vires*.

The demurrer to the statement of claim raises two questions, namely lack of interest in the plaintiff to maintain the action and validity of the order in question. The allegations in the statement of claim state that the plaintiff is carrying on the business of buying and selling cars in which, if the order is valid, he is obliged to obtain permits to buy cars and is restricted to selling cars to those purchasers only who have permits. These facts admitted by the demurrer are, in my opinion, sufficient to maintain the action. The second question raises the question of the scope of the defence power. In time of war it becomes very wide and does not shrink to its normal peace-time dimensions immediately on the cessation of hostilities (*Dawson v. The Commonwealth* (1)). It becomes necessary, therefore, in this case to consider whether the prolongation of this order has any nexus with defence. It is attempted to support it on the ground that it is incidental to the winding up process of the war. But after the cessation of hostilities care must be taken to ascertain whether or not any real nexus exists. The things which may be lawfully done by the Commonwealth legislature, or by authorities to which it may delegate its functions, by virtue of the defence power, must be really, and not fancifully, colourably,



or ostensibly referable to defence of the Commonwealth (*The Real Estate Institute of New South Wales v. Blair* (1) ). An examination of the order shows that the discretion given to the transport authorities is general in its nature, no grounds for its exercise are mentioned : it is entirely arbitrary and unlimited. Thus it is capable of being exercised beyond the scope of the defence power.

I would, therefore, overrule the demurrer.

STARKE J. Demurrer to a statement of claim claiming a declaration that the *Defence (Transitional Provisions) Act* 1946, to the extent to which it purports to enact the Control of New Motor Cars Order, is ultra vires and void and also a declaration that the Control of New Motor Cars Order is ultra vires and void.

Two matters were argued :—one that the statement of claim does not allege sufficient interest in the plaintiff to sustain the action and the claims made : the other that the Act, so far as it purports to enact the order, and the order itself, afford no real and substantial basis for the conclusion that they relate to the constitutional power to make laws with respect to the naval and military defence of the Commonwealth and the several States.

The courts do not allow the validity of an Act or regulations or orders made pursuant to it to be attacked by strangers or parties whose rights are not affected and who have therefore no interest in defeating the Act or order.

An allegation in this case is that summonses have been issued against the plaintiff charging contraventions of the Act and the order.

Penalties are prescribed for such contraventions (see *Defence (Transitional Provisions) Act*, s. 15), though the statement of claim does not specifically so allege. Prosecutions, however, of this nature are matters of public and not of individual concern. No right of an individual is infringed by such proceedings. Consequently this allegation cannot sustain the plaintiff's action and claims.

But there is another allegation in the statement of claim that the plaintiff carries on business in New South Wales and, in the course of his business as a car-dealer, sells and distributes new motor cars, and then is set out the Control of New Motor Cars Order, providing that a person shall not dispose of or acquire a new motor car unless the person acquiring the new motor car is the holder of a permit authorizing the acquisition.

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(1) (1946) 73 C.L.R. 213, at p. 224.



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And the order provides that the prescribed authority may in its discretion issue or refuse to issue a permit.

The right of the plaintiff to institute and maintain this action is badly pleaded, but it is enough if that interest can reasonably be deduced from the facts stated.

The allegations in the statement of claim do, I think, establish interest in the plaintiff sufficient to maintain this action. It appears from the order that the plaintiff cannot acquire new motor cars without a permit, and that he cannot dispose of them unless his purchaser has a permit.

And it may reasonably be concluded that this requirement of a permit may hinder or interfere with the plaintiff in carrying on his business.

But I hope that this statement of claim will be a warning rather than a precedent for pleaders.

The other argument that the Act, so far as relevant to the order, and the order itself, cannot be supported under the defence power, and are therefore void, remains for consideration.

An order for the Control of New Motor Cars was made in 1943 under *Land Transport Regulations* made pursuant to the *National Security Act*.

But the Act No. 15 of 1946 provided that the Act and all regulations made thereunder and all orders made in pursuance of any such regulation should cease to have effect at midnight on 31st December 1946. But then came the *Defence (Transitional Provisions) Act* No. 77 of 1946, which provided that certain orders (which included the Control of New Motor Cars Order) should remain in force until midnight on 31st December 1947, extended by an amending Act No. 78 of 1947 to midnight on 31st December 1948.

These Acts recite that a state of war still exists and that legislative provision is required in order to bring about a gradual and orderly return to conditions of peace, that those conditions have not yet been completed and that it is necessary for these purposes to make provision during the transitional period for the carrying on of various orders.

War doubtless still exists between His Majesty, Germany, Japan and other countries, for peace has not yet been made, but hostilities ceased more than two years ago.

The order does not cover commercial motor vehicles within the meaning of the Control of New Commercial Vehicles Order, nor motor vehicles not exceeding twelve horse-power by an amendment of the order made on 17th September 1948, but otherwise it covers all motor cars which have not been registered under the law of any



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And the order provides that a person shall not dispose of or acquire a new motor car unless the person acquiring the new motor car is the holder of a permit authorizing the acquisition. The transport authority set up under the order may in its discretion issue or refuse to issue a permit subject to such terms and conditions as the authority determines.

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It was said that the object of the order was to regulate the distribution of motor cars which were in short supply. No such object is apparent on the face of the order. But the discretion of the transport authority is unlimited and everything is left to that authority without any rule to guide it or to protect the public. So long as the authority does not act dishonestly or capriciously its discretion is absolute and without control, although unrelated to the defence of the Commonwealth.

In my opinion such an order cannot be supported under the defence power of the Commonwealth, and I adhere to the opinion I expressed in *Dawson v. The Commonwealth* (1) and *Miller v. The Commonwealth* (2).

The demurrer should be overruled.

DIXON J. This is a demurrer to a statement of claim in which the relief sought consists in declarations of right. The plaintiff, who says that he is a car-dealer, complains that the Control of New Motor Cars Order, the operation of which the *Defence (Transitional Provisions) Act* 1946 purports to continue throughout 1947, could have no valid application in that year. He seeks to have it declared that the provision continuing the operation of the order is ultra vires.

In my opinion it was beyond the powers of the Commonwealth Parliament to enact, as it did, that the Control of New Motor Cars Order should be in force until 31st December 1947. It so enacted on 14th December 1946 by ss. 6 (1), 7 (1) and the second schedule of the abovementioned Act, which is No. 77 of 1946. The order in question was made pursuant to the *National Security (Land Transport) Regulations* by the Director-General of Land Transport on 4th June 1943. Those regulations contained a statement of purpose connecting them with the prosecution of the war and an order made thereunder would prima facie be understood as also directed to that purpose. The order is expressed to authorize a prescribed transport

(1) (1946) 73 C.L.R. 157.

(2) (1946) 73 C.L.R. 187.



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authority in its discretion to issue a permit under the order or to refuse such a permit and to prohibit persons from disposing of or acquiring new motor cars unless the person acquiring the new motor car holds a permit authorizing the acquisition. The expression "new motor car" is not used in opposition to secondhand motor cars but is defined to mean a motor car which was not registered before the date of the order, viz. 4th June 1943. It will be seen that on the face of the order an unfettered discretion is given to withhold or grant a permit. During the war the statement of purpose in the regulation might have governed the order and limited the ambit of the discretion. But that statement of purpose is inappropriate to the post-war period. The regulations were not kept alive. The order, apart from and independently of the regulations, which of course ceased to be law, was listed in the second schedule of Act No. 77 of 1946. Of orders specified in that schedule s. 7 (1) enacted that, as in force immediately prior to the commencement of the Act, they should, subject to the Act, be in force until the prescribed date, that is 31st December 1947.

There is no legislative power of the Commonwealth Parliament enabling it to keep the order in force, unless it be the defence power. That power, it is true, was not exhausted when hostilities ended. Under it the Parliament was able to enact measures directed to disestablishing the organization set up for the prosecution of the war and re-establishing in the pursuits and purposes of peace people who and things which had been diverted therefrom to those of war. There is, of course, in addition much else that is incidental to the conclusion of a war. But it is one thing to treat the defence power as extending to matters which are incidental so to speak to winding up the war. It is an entirely different thing to assert authority over things connected with the war only as a matter of causation or history. Many of the lasting conditions of difficulty and inconvenience, not to say hardship, by which men and communities will for a long time be affected will be traceable as a matter of causation to the war. But it does not follow that it will be within the legislative power of the Commonwealth with respect to defence to attempt to provide a remedy for such conditions by legislation.

The validity of the order in the present case is supported on the part of the Commonwealth on the ground that the diversion during the war of then existing cars to military and governmental uses and the suspension or restriction of the supply of new cars at that time deprived productive industry and business of motor vehicles and



that it is incidental to the winding up of the war and the restoration of the instruments of production and distribution to see that as cars change hands and new cars come forward, the true needs of productive industry, of business and of those serving the community are preferred. This ground might call for serious consideration if it were not for the combined effect of two factors. The first is that on the face of the order there is nothing to require the transport authorities to attend to any of the foregoing matters in exercising their discretion to give or withhold a permit, nothing even to indicate that they are expected to advert to them. There is no priority list set out and no reference to the need of one. There is no direction to take the volume of supply into account and compare it with specific classes of demand for cars or to direct the judgment of the authorities to particular needs of the community or of industry or the like. As to time it is obvious that as the date of the cessation of hostilities recedes the more difficult it becomes to find in the defence power a justification for measures which otherwise fall within the exclusive province of the States. It consequently becomes increasingly necessary, before the Court decides such a law to be within the defence power, that the law shall disclose on its face the real connection which it has with the defence power and that it shall not be capable of administration in a way that is not relevant to that power. That consideration forms the second factor. A mere inspection of the present order is enough to show that it cannot fulfil these conditions.

It is for these reasons that I think that the attempt in December 1946 to keep the order alive is nugatory and void.

The demurrer of the Commonwealth raised a point of pleading. The plaintiff alleged in his statement of claim that prosecutions are pending against him for failing to observe the order. That is no ground for making a declaration of invalidity. It tends to show the contrary. For a prosecution is a proceeding in a court of law where the validity of the order can be impugned and decided. But he also alleges that he is carrying on business as a car-dealer and in the course of doing so buys and sells cars. That means that he is or was under the necessity of obtaining permits to buy cars and to deal only with purchasers who have such permits, that is if the order were valid. That may give him enough interest to maintain the suit, but I doubt if it touches any period prior to the writ. However, it is at best a matter for amendment and in any case once any interest appears it is enough on general demurrer.

I think that the demurrer should be overruled.

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WILLIAMS J. This is the hearing of a demurrer to a statement of claim in which the plaintiff claims a declaration that the *Defence (Transitional Provisions) Act* 1946 to the extent to which it purports to enact the Control of New Cars Order referred to in the first column of the second schedule to the Act is ultra vires the Parliament of the Commonwealth and is void. The *Defence (Transitional Provisions) Act* 1946 came into operation on 1st January 1947. Section 6 of the Act defines "prescribed time" to mean midnight on 31st December 1947. The time was extended by the *Defence (Transitional Provisions) Act* 1947 to midnight on 31st December 1948. Section 7 of the principal Act provides, so far as material, that the orders specified in the first column of the second schedule, as in force immediately prior to the commencement of the Act, shall, subject to this Act, be in force until the prescribed time and no longer. The grounds of the demurrer may be summarized that (1) the *Defence (Transitional Provisions) Act* so far as it purports to enact the Control of New Motor Cars Order is valid and (2) the facts alleged in the statement of claim, and in particular the allegation that the plaintiff is being prosecuted, are insufficient to give the plaintiff a cause of action in this Court against the defendants. I shall deal in the first instance with the second ground.

The statement of claim alleges that the plaintiff carries on the business of a car-dealer in Sydney and in the course of his business buys secondhand motor vehicles of all types and makes for the purposes of sale and sells the same. It also alleges that the plaintiff sells and distributes certain makes of new motor cars. These allegations, which must be taken to be admitted for the purposes of the demurrer, prove that the plaintiff is carrying on a business of buying and selling cars and that in the case of most cars, if the order be valid, he can lawfully only purchase the car if he has a permit to buy it and he can only lawfully sell the car to a purchaser who has a permit to buy it. He is therefore subject to a form of governmental control in the carrying on of his business from which he would be free if the order were invalid, and this, in my opinion, gives the plaintiff a sufficient interest to claim a declaration of right. Order IV. of the rules of this Court provides that an action shall not be open to objection on the ground that a merely declaratory judgment or order is sought thereby; and the Court may make binding declarations of right in an action properly brought, whether any consequential relief is or could be claimed therein or not. Apart from the addition of the words "in an action properly brought", which appear to me to mean in an action in which this Court has jurisdiction, the order is in the same terms as the English Order XXV., Rule 5.



Under the English rule the jurisdiction extends to give a general power to make a declaration whether there is a cause of action or not at the instance of a party interested in the subject matter of the declaration (*Guaranty Trust Co. of New York v. Hannay & Co.* (1); *Simmonds v. Newport Abercarn Black Vein Steam Coal Co. Ltd.* (2)). In *Dyson v. Attorney-General* (3) *Farwell* L.J. pointed out the convenience in the public interest of "providing a speedy and easy access to the Courts for any of His Majesty's subjects who have any real cause of complaint against the exercise of statutory powers by Government departments and Government officials." This case and *Burghes v. Attorney-General* (4) indicate the particular benefits that flow from making declaratory decrees where such departments and officials are not acting in accordance with their statutory powers. In *Smeeton v. Attorney-General* (5) *Peterson* J. said, "In each case the Commissioners called attention to the statutory penalties which would be incurred by anyone who neglected to comply with their requirements; and in each case the only way of testing the legality of the Commissioners' requirement was by an action for a declaration or by defending proceedings for the enforcement of the penalties." As the Chief Justice said in *Toowoomba Foundry Pty. Ltd. v. The Commonwealth* (6), "It is now, I think, too late to contend that a person who is, or in the immediate future probably will be, affected in his person or property by Commonwealth legislation alleged to be unconstitutional has not a cause of action in this Court for a declaration that the legislation is invalid."

The statement of claim also alleges that the plaintiff has been served with two summonses alleging that on 28th April 1947 he was guilty of two offences under the Act, the one being that he acquired a new motor car without being the holder of a permit authorizing the acquisition and the other that he disposed of a new motor car to a purchaser who was not the holder of a permit. This allegation, in my opinion, also gives the plaintiff a sufficient interest to claim a declaration of right. The question does not arise at this stage whether the Court would or would not grant an injunction to restrain the prosecution if it thought that the order was invalid. Nor does the question now arise whether the Court would, in the exercise of its discretion, make a declaration and not leave the plaintiff to plead the invalidity of the order as a defence to the prosecution. The action is one in which the Commonwealth is

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(1) (1915) 2 K.B. 536.

(4) (1912) 1 Ch. 173.

(2) (1921) 1 K.B. 616, at pp. 627, 630, 631.

(5) (1920) 1 Ch. 85, at p. 96.

(3) (1911) 1 K.B. 410, at p. 423.

(6) (1945) 71 C.L.R. 545, at p. 570.



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being sued as a party so that this Court has original jurisdiction under s. 75 (iii.) of the Constitution. It also has original jurisdiction under s. 76 (i.) of the Constitution and s. 30 (a) of the *Judiciary Act* 1903-1947 because the action involves the interpretation of the Constitution. The Court always has a discretion whether or not to make a declaration of right. But the ground of demurrer is that the plaintiff has not alleged a sufficient interest to give the Court jurisdiction to entertain the action, and in my opinion this ground fails.

I shall therefore proceed to consider the constitutional validity of the order. It first appeared in June 1943 as an order made under the *National Security (Land Transport) Regulations*, Statutory Rules 1942 No. 149. These regulations were repealed and replaced by regulations with the same title, Statutory Rules 1944 No. 49. Regulation 4 of the latter regulations provided that—"The objects of these Regulations are to secure, in the interests of the defence of the Commonwealth and the effectual prosecution of the war, the control by the Commonwealth of rail and road transport and for that purpose to provide that rail facilities, equipment and rolling stock and road services and vehicles shall be subject to control, regulation and direction, and these Regulations shall be administered and construed accordingly." The *Land Transport Regulations* were not continued in force by the *Defence (Transitional Provisions) Act* when the *National Security Act* expired on 31st December 1946. The exercise of the administrative powers conferred by the order are not therefore subject to any particular legislative declaration of its objects. The order is no longer an order made under regulations but an order which by virtue of s. 7 of the *Defence (Transitional Provisions) Act* has the force of a statute. The only applicable declaration of legislative intent is contained in the preamble of the Act that it is necessary for the peace, order and good government of the Commonwealth to make certain provisions to operate during a time of transition from war conditions to conditions of peace. Active fighting had ceased in September 1945 but the judgments of this Court in *Dawson v. The Commonwealth* (1) and *Miller v. The Commonwealth* (2) establish that, in the words of Dixon J. in the former case, the defence power must "extend to sustaining for some reasonable interval of time the laws and regulations in force at the end of hostilities . . . while the steps are taken that are considered necessary for the remission of the community to an order

(1) (1946) 73 C.L.R. 157.

(2) (1946) 73 C.L.R. 187.



proper to peace" (1). I adhere to the views which I expressed in *Miller v. The Commonwealth* (2); *Jenkins v. The Commonwealth* (3) and *Sloan v. Pollard* (4).

If some connection appeared between the order and the remission of the community from hostilities to peace, I would be slow to uphold that it was beyond the defence power. But it deals with an ordinary article of commerce having no obvious connection with defence, and it cannot be gathered from its terms that it is intended to meet any particular economic or other disturbance occasioned originally by hostilities. It is, I think, as Mr. *Holmes* contended, a notorious fact of which the Court can take judicial notice that motor cars have not yet been produced for sale in this country but have to be imported, and that there was upon the conclusion of hostilities and for some time afterwards and may still be an excess of the demand far over the supply of the commodity. I can see that in such circumstances the economic disturbance occasioned by the war might be sufficient to enable the Commonwealth Parliament under the defence power to provide that priority in the purchase of cars should be given to certain classes of purchasers who have more urgent need of cars than other members of the public for the purpose of restoring the community to conditions of peace and to effect that purpose by a system of permits.

But the order does not contain any prescribed order of priority and does not give any directions to the officials who are to administer it requiring them to issue permits so as to give such a priority. The order has been recently amended so as to exclude motor vehicles not exceeding twelve horse-power. But at the date of the writ on 8th June 1948 it applied to all cars which had not prior to the date of the order, which appears to mean prior to June 1943, been registered under the law of any State or Territory of the Commonwealth relating to the registration of motor vehicles. It therefore applies not only to new cars but also to cars first registered after that date which have become second-hand cars. It provides that a person shall not dispose of or acquire a car unless the person acquiring the car is the holder of a permit authorizing the acquisition. It provides that the issuing authority may in its discretion issue a permit or refuse to issue a permit, or issue a permit subject to such terms and conditions as the issuing authority determines, and may at any time vary, revoke or suspend a permit or vary any term or condition thereof. It is the legislation, in this case the order, and

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(1) (1946) 73 C.L.R., at p. 184.

(2) (1946) 73 C.L.R., at pp. 211, 212.

(3) (1947) 74 C.L.R. 400, at p. 405.

(4) (1947) 75 C.L.R. 445, at pp. 477, 478.



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not the executive acts done under it which must be authorized by the defence power. The only limitation on the discretion of a prescribed authority to issue or refuse to issue a permit for the disposal and acquisition of cars subject to the order is that the manner in which the discretion is exercised must be authorized by the order and the exercise must be bona fide. An unreasonable exercise is not a sufficient objection to its validity, see the cases cited in *Dawson v. The Commonwealth* (1). Officials administering the order could therefore issue permits to such members of the public as they thought fit, and without any relation to any scheme of issue designed to overcome any economic disturbance occasioned originally by hostilities. Legislation conferring an uncontrolled administrative discretion over the disposal of an ordinary article of trade and commerce just because it is temporarily in short supply exceeds, to my mind, the limits of the defence power in the transition period.

It was said that the order was in a similar form to the Cream (Disposal and Use) Order which was held to be valid in *Sloan v. Pollard* (2). The effect of that order was to prohibit the use of cream except for the purpose of the manufacture of butter or cheese without the consent of the Controller-General of Food or a permit. This purpose was held to be within the defence power. The Controller-General of Food had a discretion to authorize the use of cream for other purposes. But the Court was not concerned with the validity of this discretion or of the grant of permits. It was only concerned with the validity of the governing provision that a person should not without the consent of the Controller-General or a permit use any cream except for manufacture into butter or cheese.

For these reasons I would overrule the demurrer.

*Demurrer overruled. Liberty to defendants  
to deliver a defence within fourteen days.*

Solicitor for the plaintiff, *F. C. Sinclair*.

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

J. B.

(1) (1946) 73 C.L.R., at p. 185.

(2) (1947) 75 C.L.R. 445.