[HIGH COURT OF AUSTRALIA.]

HUME . . . . . APPELLANT;
DEFENDANT,

AND

HIGGINS . . . . . RESPONDENT.
COMPLAINANT,

ON REMOVAL FROM THE SUPREME COURT OF TASMANIA.

H. C. OF A. 1949.

MELBOURNE, *Feb.* 22, 23; *March* 18.

Latham C.J., Rich, Dixon, Williams and Webb JJ.

Constitutional Law (Cth.)—Defence—National security—Economic organization—Regulations—Restriction of sales of land—Cessation of hostilities—Operation of regulations—Statute penalizing breach of regulations—Operation of statute after lapse of regulations—The Constitution (63 & 64 *Vict. c.* 12), *s.* 51 (*vi.*), (*xxxix.*)—*Defence* (*Transitional Provisions*) *Act* 1946-1948 (*No.* 77 *of* 1946—*No.* 88 *of* 1948), *ss.* 6, 15—*National Security* (*Economic Organization*) *Regulations, regs.* 6, 21 (*S.R.* 1942 *No.* 76—*S.R.* 1948 *No.* 121).

The power of the Commonwealth Parliament to legislate with respect to defence had not—because of the cessation of hostilities—so contracted by the end of 1946 that it did not support s. 6 of the *Defence* (*Transitional Provisions*) *Act* 1946 to the extent to which it purported to keep in force regs. 6 and 21 of the *National Security* (*Economic Organization*) *Regulations*; and the regulations themselves still had a sufficient relation to defence in May 1947. Notwithstanding that the regulations ceased to operate in 1948, s. 15 of the 1946 Act—being kept in force by reason of amendments to s. 6 made by the Acts of 1947 and 1948—validly operates to make punishable an offence against the Act committed by a contravention of reg. 21 while it was still in force.

Dawson v. *The Commonwealth*, (1946) 73 C.L.R. 157, referred to.

CAUSE removed from the Supreme Court of Tasmania under *Judiciary Act* 1903-1948, s. 40A.

In a court of petty sessions of Tasmania, Ronald John Grant Hume was charged, on the complaint of Donald Hubert Higgins, that he "contravened regulation 21 (*b*) of the *National Security*

(*Economic Organization*) *Regulations* (in force by virtue of the *Defence* (*Transitional Provisions*) *Act* 1946), in that at Hobart in Tasmania on or about the first day of May 1947 he made an arrangement for the purpose of avoiding the operation of Part III. of those regulations in that he made an oral arrangement with one Eric William Stone who was acting for and on behalf of himself and Emma Jane Stone, Norman Raymond Stone, Stanley George Stone and Mary Eliza Stone (who are hereinafter referred to as 'the purchasers') that the purchasers should purchase from him the said Ronald John Grant Hume land . . . at Ulverstone in Tasmania . . . without the consent of the Treasurer in that he agreed with the said Eric William Stone that the price thereof should be £16,000; that of that sum £11,600 should be expressed and was expressed in a written contract of sale and £4,400 should be paid and was paid to the said Ronald John Grant Hume in cash; that the written contract for £11,600 should be presented to the Treasurer as expressing the true purchase price and that the payment of £4,400 in cash should be concealed from the Treasurer in the expectation and hope that the Treasurer in ignorance of the payment of the sum of £4,400 would consent to the purchase at the sum of £11,600 or some other figure approximating thereto contrary to the form of the Act in such case made and provided." The complaint was heard on 22nd December 1947 and 20th and 21st May 1948. On 22nd May 1948 the magistrate who constituted the court convicted Hume and sentenced him to six-months' imprisonment.

Hume appealed to the Supreme Court of Tasmania. The appeal, which, under s. 152 of the *Justices Procedure Act* 1919-1947 (Tas.), was by way of rehearing, came before *Morris* C.J. on 25th August 1948. The parties agreed that the magistrate's notes of the evidence given before him should be the evidence on which the appeal was to be decided. Counsel for the appellant formally submitted that the regulation alleged to have been contravened was invalid, but, in view of the decision in *Dawson* v. *The Commonwealth* (1), offered no argument on this point.

Morris C.J. confirmed the conviction and sentence and ordered that the appeal be dismissed.

Notwithstanding this order, the parties treated the cause as having been removed to the High Court, under s. 40A of the *Judiciary Act* 1903-1948, by reason of the objection to the validity of the regulation. The cause, coming before *Latham* C.J. as on such removal, was referred to the Full Court. The appellant also gave

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

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formal notice of motion for special leave to appeal from the order of *Morris* C.J., but the motion was adjourned *sine die*.

Sholl K.C. (with him *J. G. Norris*), for the appellant. The constitutional point was clearly taken, though not argued, before *Morris* C.J. The matter before him was a full rehearing (*Justices Procedure Act* 1919 (Tas.), s. 152), and the position is the same in this Court. The whole cause was removed to this Court under s. 40A of the *Judiciary Act*. Accordingly, what is now before the Court is an appeal by way of rehearing from the petty sessions. This Court has the same powers as the Supreme Court. The matter of the validity of the regulations and the other matters which were before the magistrate are all before this Court. The parties agreed that the magistrate's notes of evidence should be the evidence on which the appeal should be decided, and that material is now before the Court. The fact that *Morris* C.J. purported to determine the appeal is no obstacle to the High Court dealing with the appeal now. The Court can clear the record of the Supreme Court, if necessary, by means of the application for special leave, which now stands adjourned *sine die*. [He referred to *Commonwealth* v. *Kreglinger & Fernau Ltd. and Bardsley* (1); *O'Neill* v. *O'Connell* (2).] Regulation 21 of the *Economic Organization Regulations* was not supported by the defence power at any relevant time, and the effect of the contraction of the power in invalidating the regulation prevented and/or prevents a conviction thereunder. Regulation 21 was not so supported in May 1947 (the date of the alleged offence). *Dawson* v. *The Commonwealth* (3) is not really a binding precedent, in view of the equal division of opinion (*Tasmania* v. *Victoria* (4), per *Rich* and *Dixon* JJ.); but even accepting *Dawson* v. *The Commonwealth* (3) as deciding the validity of Part III. of the regulations in April 1946 (the date of the transactions there considered), or perhaps October 1946 (the date of the decision), and even accepting it as deciding inferentially the validity of reg. 21 (in Part VI.), nevertheless it is no authority for May 1947. [He referred to *Walker* v. *Oldham* (5).] At all events, reg. 21 was not so supported by October 1947 (the date of the complaint); or December 1947-May 1948 (hearing); or May 1948 (conviction); or (what is now submitted to be irrelevant) August 1948 (hearing by and order of *Morris* C.J.). The appellant need only show that it is not so supported now; and clearly it is not, since the subject matter has

(1) (1926) 37 C.L.R. 393, at pp. 402, 423, 430.
(2) (1946) 72 C.L.R. 101.
(3) (1946) 73 C.L.R. 157.
(4) (1935) 52 C.L.R. 157, at pp. 173 and 183.
(5) (1948) 1 A.L.R. 129.

since 20th September 1948 been handed back to the States. [He referred to *Crouch* v. *The Commonwealth* (1).] Regulation 21 would be mere machinery in aid of a Treasurer's discretion not tied by regulations to considerations of defence. Notwithstanding the preamble to the *Defence (Transitional Provisions) Act* 1946 and to the similar 1948 Act, and notwithstanding reg. 6 (10A) of the *Economic Organization Regulations*, added by Statutory Rules 1946 No. 192, and the policy there stated, the Commonwealth has itself conceded the irrelevance now of the policy to the defence power. The fact that Statutory Rules 1948 No. 121 and declarations thereunder may have purported to leave the regulations in operation as to sales *before* 20th September 1948 cannot extend the defence power indefinitely as to them; e.g., it cannot be that a pending application for consent by the Federal Treasurer to a sale made on 19th September 1948 could now be validly entertained and rejected by him. Alternatively, reg. 21 depends on reg. 6. Regulation 6 covers a much wider field than sales, and it extended to any land in Australia till 20th September 1948. Though reg. 6 (10A) restricted the discretion to the considerations of economic policy there expressed, the power was still too wide. There was no longer any need to divert money to war purposes. It was simply a general anti-inflationary measure, having no relation to defence, and none really to "transition." There was no shortage of land due to the war. No easing or solution of any shortage was effected by the regulations. Apart from statutory saving, repeal prevents prosecution or conviction in respect of an offence committed before repeal; apart from transactions past and closed, a repealed statute is to be regarded as never having existed (*Hale, Pleas of the Crown*, 2nd ed. (1778), vol. 1, p. 291; *Craies, Statute Law*, 4th ed. (1936), pp. 295, 296; *R.* v. *M'Kenzie* (2)). This applies to subordinate legislation (*Victorian Stevedoring and General Contracting Co. Pty. Ltd. and Meakes* v. *Dignan* (3), per *Dixon* J.). Nothing in s. 8 or s. 50 of the *Acts Interpretation Act* 1901-1948 (cf. *Craies, Statute Law*, p. 296), or in s. 19 of the *Defence (Transitional Provisions) Act* 1946-1948 can affect the matter, because those provisions deal only with repeal proper. If it is necessary so to contend (which is denied), s. 15 of the *Defence (Transitional Provisions) Act*, in so far as it relates to proceedings in relation to reg. 21, had or has also ceased to be supported by the defence power by one or other of the alternative dates already mentioned. If, notwithstanding the above

(1) (1948) 77 C.L.R. 339.
(2) (1820) Russ. & R. 429 [168 E.R. 881].
(3) (1931) 46 C.L.R. 73, at p. 106.

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submissions, the Court affirms the conviction, the penalty should be varied; it was unduly severe.

Tait K.C. (with him *Ellis Cox*), for the respondent. The regulations in question were kept alive for the year 1947 by the *Defence (Transitional Provisions) Act* 1946, and by s. 15 of the Act it was made an offence against the Act to contravene any of the regulations so kept in force. There was nothing in the 1946 Act putting any limitation on the time during which s. 15 should have operation. The operation of the Act of 1946 in keeping the regulations in force was extended by the Act of 1947 to the year 1948 simply by amendment of the date in s. 6. There was no alteration or re-enactment of s. 15; that is to say, there was no renewal from year to year of s. 15. It is now, and has been since its commencement, continuously in operation. The charge here is really of an offence against the 1946 Act: Regulation 21 did not create an offence or impose a penalty; it merely prohibited without stating the consequences. One must look to s. 15 for the offence. The real question, therefore, is whether s. 15 is still in force. The law to-day, it is submitted, is that there may be a prosecution now for what was an offence in 1947. The position is nothing like that of the repeal of a penal provision in a statute. *Dignan's Case* (1), therefore, is not in point here. It was a case where regulations which included penal provisions had been disallowed. The penal provisions failed, of necessity, with the rest of the regulations. Here there is no revocation or cessation or determination of s. 15. It is within the power of the Commonwealth Parliament to impose penalties for contravention of its laws (that is, validly enacted laws) and to make such a contravention punishable for an unlimited time —to enable prosecution a long time, it may be, after the enactment contravened has itself ceased to operate. Accordingly, s. 15 is supported to-day by the defence power and/or the incidental power, and it applies here unless the regulations in question had ceased to have the support of the defence power at the time of the offence alleged. No valid reason has been advanced by the appellant for the view that the regulations had ceased to have a sufficient relation to defence in May 1947 or at any time until they ceased to operate. Whatever authority *Dawson's Case* (2), as a case of equally divided opinion, may have had, there is certainly no authority in it for the view that the regulations were not within power after the amendment effected by Statutory Rules 1946 No. 192. *Crouch* v. *The Commonwealth* (3) is the first case in which effect has been given

(1) (1931) 46 C.L.R. 73: see p. 106.
(2) (1946) 73 C.L.R. 157.
(3) (1948) 77 C.L.R. 339.

to the principle of the contraction of the defence power. The order there in question had to be considered on the footing of an enactment made at the time when the *Defence* (*Transitional Provisions*) *Act* purported to save it—it had to be regarded as divorced from the former regulations (which were not saved) under which it was originally made.

Sholl K.C., in reply, referred to *Wicks* v. *Director of Public Prosecutions* (1); *Bennett* v. *Tatton* (2); *R.* v. *Ellis*; *Ex parte Amalgamated Engineering Union* (3); *Maxwell* on the *Interpretation of Statutes*, 9th ed. (1946), p. 404; *Craies*, *Statute Law*, 4th ed, (1936), pp. 347, 348; *Halsbury's Laws of England*, 2nd ed., vol. 31, pp. 512, 513.

Cur. adv. vult.

The following written judgments were delivered :—

March 18.

LATHAM C.J. The appellant Ronald John Grant Hume was on 22nd May 1948 convicted by a magistrate of an offence against reg. 21 (*b*) of the *Economic Organization Regulations* which were originally made under the *National Security Act* 1939-1940. Regulation 21 provides that a person shall not enter into any transaction or make any contract or arrangement for the purpose of or which has the effect of in any way, whether directly or indirectly, defeating, evading or avoiding or preventing the operation of, *inter alia*, Part III. of the Regulations. Part III. of the Regulations contains reg. 6, which provides that, except as provided by Part III., a person shall not, without the consent in writing of the Treasurer, purchase any land. It was proved that Hume made an arrangement with one Stone to sell a hotel for £16,000, but that of this sum £4,400 was to be paid in cash, and that a written contract for sale at the price of £11,600 should be executed by the parties and produced for the consent of the Treasurer. It is not disputed that this arrangement was an infringement of reg. 21 if that regulation was in force at the relevant time.

Hume appealed to the Supreme Court and at the hearing contended, *inter alia*, that the regulation was invalid because it could not be supported under s. 51 (vi.) of the Commonwealth Constitution —the defence power. It is agreed between the parties that by reason of this contention there arose a question as to the limits *inter se* of the constitutional powers of the Commonwealth and the

(1) (1947) A.C. 362.
(2) (1918) 118 L.T 788; 88 L.J.K.B. 313.
(3) (1921) 125 L.T. 397.

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States. Accordingly, under the *Judiciary Act* 1903-1948, s. 40A, it was the duty of the Supreme Court to proceed no further in the cause, and the cause was without any order removed to the High Court. Under the *Judiciary Act*, s. 41, it is the duty of the High Court to proceed in the cause as if it originally commenced in the High Court and the same proceedings had been taken in the cause in the High Court as had been taken in the court of the State prior to its removal. Under s. 152 (3) of the Tasmanian *Justices Procedure Act* 1919-1947 the appeal to the Supreme Court is by way of rehearing. Accordingly, the proceeding in this Court is an appeal by way of rehearing. The Court must therefore apply the law as it exists at the present time: *Victorian Stevedoring and General Contracting Co. Pty. Ltd. and Meakes* v. *Dignan* (1). A person cannot be convicted under a law which has been repealed or which has expired unless there is some statutory provision preserving liability: see the cases cited in *Halsbury's Laws of England*, 2nd ed., vol. 31, p. 512, which establish the proposition in the text: "After the expiration of a statute, in the absence of provision to the contrary, no proceedings can be taken on it, and proceedings already commenced *ipso facto* determine." Where a statute or a regulation is repealed the *Acts Interpretation Act* 1901-1948, ss. 8 and 50, preserve liabilities incurred before the repeal. These provisions, however, do not apply to the present case. It is contended, not that the relevant statute or regulation has been repealed, but that they have ceased to be in operation by reason of the contraction of the defence power after the cessation of active hostilities.

The *National Security Act* 1939-1943 as amended by Act No. 15 of 1946, s. 2, provided in s. 19 that all regulations made under the Act should cease to have effect at midnight on 31st December 1946. The *Defence (Transitional Provisions) Act* 1946, however, provided that certain regulations, including the *Economic Organization Regulations*, should be in force until 31st December 1947. By subsequent legislation this date was altered to 31st December 1948 and then to 31st December 1949 in respect of regulations which still included the *Economic Organization Regulations*. In my opinion, however, the statutes subsequent to the 1946 Act are not relevant to the decision of this case.

Section 15 of the *Defence (Transitional Provisions) Act* 1946 provides that a contravention of a regulation which is in force by virtue of the Act shall be an offence against the Act. This section has not been repealed or amended.

(1) (1931) 46 C.L.R. 73.

Accordingly, the position is that the relevant statute, namely the *Defence (Transitional Provisions) Act* 1946, provides for penalties in the event of infringement of the *Economic Organization Regulations*. That Act extended the operation of the regulations to 31st December 1947. The transaction which constituted an offence under the regulation, if it was in operation, occurred on 1st May 1947. Thus s. 15 applies to the offence alleged and authorizes a conviction if the statute, in so far as it continued the operation of the *Economic Organization Regulations* during 1947, is still in operation.

It was contended for the appellant that the regulations were no longer in operation because they could not be supported under the defence power. It was argued in the first place that this Court must apply the law as it exists at the time of the rehearing in this Court. That is no doubt the case. It was argued that the law relied upon for the prosecution had disappeared because, by an amendment made on 15th September 1948 a new regulation 25 was added authorizing the Treasurer by a declaration published in the *Gazette* to declare that from and including a date specified in the declaration sales of land should, in the State or Territory specified in the declaration, cease to be controlled under the regulations. Regulation 25 (2) provides that where such a declaration has been made in relation to a State, Part III. and certain other parts of the regulations shall not have effect in respect of transactions entered into in that State on or after the date specified in the declaration. A declaration was made by the Treasurer on 20th September 1948 that from and including 20th September 1948 sales of land should in the State of Tasmania cease to be controlled under the regulations. This declaration plainly refers only to future sales and does not alter the law in respect of past transactions. It does not limit or prevent the application of reg. 21 to such transactions if that regulation is otherwise valid in such application. Accordingly, if reg. 21 was in operation on 1st May 1947 the appellant can now rightly be convicted of an offence against s. 15 of the *Defence (Transitional Provisions) Act* 1946, which is still in operation.

But it is argued that the Act of 1946 could not validly continue the *Economic Organization Regulations* in operation during 1947 because the defence power, owing to the cessation of active hostilities in 1945 and the progress made towards the re-establishment of more normal conditions, could not, when the 1946 Act was passed, or during 1947, any longer support the regulations as defence provisions. The relevant provisions of the regulations were considered

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in *Shrimpton* v. *The Commonwealth* (1) and *Dawson* v. *The Commonwealth* (2). The decision in the latter case was given in October 1946. In that case I gave my reasons for the view that the continued application of these regulations at that time was within the authority vested in the Commonwealth Parliament under the defence power—Constitution, s. 51 (vi.). The question which arises is whether the defence power authorized the 1946 Act, which extended the operation of the regulations for another year to the end of 1947. In my opinion, regard being had to the existing circumstances and the uncertainty of the immediate future, the regulations could properly be continued in operation as a measure of adjustment required by the direct and immediate effects of the war upon the reasonably anticipated economic condition of the community during the year 1947. Accordingly, I am of opinion that the appellant may now rightly be convicted of an offence against reg. 21 committed on 1st May 1947 by reason of the continued operation of s. 15 of the *Defence (Transitional Provisions) Act* 1946.

The Court is asked to reconsider the sentence. The maximum penalty for an offence tried summarily is a fine of one hundred pounds or imprisonment for six months: see *Defence (Transitional Provisions) Act* 1946, s. 15. The magistrate inflicted the maximum penalty, imprisonment for six months. If the offence had been prosecuted upon indictment a term of imprisonment not exceeding two years might have been inflicted. In my opinion the offence was deliberate, a very substantial sum of money was involved, and imprisonment for six months is not an excessive penalty.

Accordingly I am of opinion that the appeal from the magistrate should be dismissed.

The Supreme Court in fact made an order dismissing the appeal. As the case was removed into the High Court under the *Judiciary Act* 1903-1948, s. 40A, the Supreme Court should not have made any order. In *Commonwealth* v. *Kreglinger & Fernau Ltd. and Bardsley* (3) it was held that an order of the Supreme Court made in a case which was automatically removed to the High Court under s. 40A was an order made in a case which was not before the court and was null and void. It is, however, undesirable that an order which can have no force or effect should remain upon the record. This Court, though it reaches the same conclusion as the Supreme Court, cannot properly affirm the order of the Supreme Court. The whole cause, however, is here, and, that being so, in

(1) (1945) 69 C.L.R. 613.
(2) (1946) 73 C.L.R. 157.
(3) (1926) 37 C.L.R. 393, at pp. 402, 423 and 430.

my opinion this Court has power to deal with any order in fact made in the cause which in the opinion of this Court was wrongly made. I am therefore of opinion that, notwithstanding the doubts expressed by *Higgins* J. in the last-mentioned case (1), this Court may properly, in dismissing the appeal from the magistrate, also discharge the order of the Supreme Court.

RICH J. In this case the appellant lodged an appeal to the Supreme Court of Tasmania from a conviction on 22nd May 1948 by a magistrate of an offence against reg. 21 (*b*) of the *National Security* (*Economic Organization*) *Regulations*. The particulars of the offence are already in statement and if this regulation was in force on the date mentioned there is no dispute that an offence was committed. The crucial question ultimately raised before the Supreme Court, though at a late stage, was that the regulation could no longer be supported under s. 51 (vi.) of the Constitution. Thereupon a question arose as to the limits *inter se* of the constitutional powers of the Commonwealth and those of the State of Tasmania and the cause was removed to this Court under s. 40A of the *Judiciary Act*. It is by no means clear that the question of validity was raised timously but the counsel for the Commonwealth took no objection on this score, but on the contrary conceded that the question came within ss. 38A and 40A of the *Judiciary Act*. The result was to deprive the Supreme Court of jurisdiction and to remove the cause to this Court. I assume that consistently with s. 41 of that Act we may hear it in the same manner as the Supreme Court would have done acting under the *Justices Procedure Act* 1919-1947 (Tas.). However it was agreed that the evidence upon which we should proceed should be that used before the Chief Justice of the Supreme Court of Tasmania.

In the consideration of this case I begin by accepting the decision of *Dawson* v. *The Commonwealth* (2), as sufficiently establishing the validity of the *Economic Organization Regulations* as at the date with which that decision is concerned. The amendment of reg. 6 by the insertion of sub-reg. (10A), which has been made since the decision removed the most formidable objection to the validity of Part III. The defendant in the present case is prosecuted for an offence under s. 15 of the *Defence* (*Transitional Provisions*) *Act* 1946. The offence so created is that of contravening or failing to comply with a provision of a regulation in force by virtue of the Act. Part III. of the *Economic Organization Regulations* is included in the regulations mentioned in the first schedule to the Act. Section

(1) (1926) 37 C.L.R., at p. 424. (2) (1946) 73 C.L.R. 157.

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6 (1) provides that subject to the Act such regulations shall be in force until midnight of 31st December 1947 and no longer. The *Defence (Transitional Provisions) Act* 1947, the material part of which came into force on 11th December 1947, altered that date to 31st December 1948. It is important to notice that s. 15 of the *Defence (Transitional Provisions) Act* 1946 is expressed to operate indefinitely. It is the regulations only which are liable to go out of operation when the specified date is reached. Of course when a regulation goes out of operation it is no longer possible to contravene it. But so far as the statute is concerned past contraventions which under s. 15 of the Act amounted to offences remain punishable under a law still in force, namely, s. 15. The alleged offence in the present case took place on 1st May 1947. According to the Act of 1946 the regulations were in force in May 1947. Is there any constitutional reason why in declaring that the regulation shall be in force during the year 1947 the Act of 1946 exceeded the legislative power of the Commonwealth ? The answer to this question depends on the operation of the defence power as enabling the legislature to take appropriate measures for the liquidation or winding up of the legislative organization which during hostilities was lawfully established. Once hostilities have finally ceased and the enemy has been overcome, it is no longer competent for the Parliament to legislate on the footing that it is taking measures for the defence of the Commonwealth against the particular aggression. In other words the conclusion of hostilities and the subjection of the enemy mean that the content or application of the defence power contracts. But it also means that another aspect of the defence power comes into view. It must be incidental to a power of the peculiar character of the defence power to take legislative measures for the purpose of placing the country once again upon a peace footing. The proper resumption by a country of a footing of peace after it has been fully organized for war is something which from a practical point of view cannot be done by a sudden destruction of the entire social structure or edifice erected for war. It requires something more than the immediate abrogation of the laws made for or in connection with the prosecution of the war. This is shown by the decisions of the Court in *Sloan* v. *Pollard* (1), as well as in *Miller* v. *The Commonwealth* (2) and *Real Estate Institute of New South Wales* v. *Blair* (3).

The question to my mind is whether as on 14th December 1946 it remained reasonably incidental to the defence power under the

(1) (1947) 75 C.L.R. 445.
(2) (1946) 73 C.L.R. 187.
(3) (1946) 73 C.L.R. 213.

necessary process of winding up the organization of the country for the purposes of war to prolong the operation of Part III. of the *Economic Organization Regulations* for the ensuing year. This depends on matters of degree and involves an appreciation by the Court of the situation as it stood at the end of 1946. Speaking for myself, I should have preferred to have laid before me some material facts and information supporting the view that at that date it was reasonably necessary to retain the regulations pending full readjustment. In the end the relevant provisions of the regulations went out of force on 20th September 1948 pursuant to a declaration of the Treasurer; that is of course assuming that the regulations were capable of so long continuing. Doing the best I can by taking into consideration public general matters subject to judicial notice, I find myself unable to say that it was not reasonably incidental to the exercise of the defence power to keep Part III. of the regulations on foot and that it was not competent to legislate in December 1946 to continue their operation for another year as an appropriate period. Prima facie this means that the regulations were in force in May 1947. Nothing occurred between December 1946 and May 1947 which could possibly form a foundation for a contention that the content of the defence power had in the interval so diminished that the regulations could no longer be supported. I think it is quite unnecessary to pursue the question whether, after May 1947 and before September 1948, when the Executive's declaration was made terminating the operation of the regulations, the content of the defence power suffered a reduction which would involve a lapse of the regulations. For, once there was a contravention of the regulations while they were operative, s. 15 made the contravention an offence. Any subsequent cesser of the regulations could not mean that the liability for the offence came to an end. If the liability had been created only by the regulations, the doctrine explained in *Victorian Stevedoring and General Contracting Co. Pty. Ltd. and Meakes* v. *Dignan* (1) might have had this consequence. For it is probably true that the *Acts Interpretation Act* does not displace the operation of this doctrine when the cesser is the result of a contraction of constitutional power. But the liability for the offence rests upon s. 15 and s. 15 continues in force. I can see no constitutional objection to the legislature enacting a provision which continues indefinitely the liability for an offence that has been validly created, a provision which continues the liability as long as it is unpunished. The fact that a law making particular acts an offence must have a temporary operation appears

(1) (1931) 46 C.L.R. 73

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to me to have no bearing upon the power of the legislature to keep alive the liability to punishment of a man who offends against the temporary law while it is in force. It is almost inherent in any legal system that a liability to punishment should continue to exist until the offence is expiated. Anything else would mean that evasion and concealment would be encouraged by the hope that the temporary law would lapse.

For these reasons I am of opinion that the appeal against the conviction must fail. I was impressed by Mr. *Sholl's* reasons in favour of the reduction of the sentence of six months imposed by the magistrate. No doubt to send the defendant to gaol is a severe punishment to him but on full consideration I think that it would be going outside the proper exercise of this Court's functions to interfere with the sentence which the magistrate, in the exercise of his discretion, has thought fit to impose.

The appeal from the magistrate's decision should be dismissed.

DIXON J. This is a cause that was pending in the Supreme Court of Tasmania. It is conceded by the parties that while it was so pending a question arose as to the limits *inter se* of the constitutional power of the Commonwealth with respect to defence and the constitutional powers of the State of Tasmania or of the States generally. According to s. 40A of the *Judiciary Act* 1903-1948 upon the question so arising it became the duty of the Supreme Court to proceed no further in the cause, and by virtue of the *Judiciary Act* and without any order of this Court the cause was removed into this Court.

The cause, which thus fell within the statutory provision for removal is an appeal to the Supreme Court under s. 152 of the Tasmanian *Justices Procedure Act* 1919-1947 from a conviction before a police magistrate. The conviction was for an offence against Federal law.

The appeal to the Supreme Court from a summary conviction which s. 152 of the *Justices Procedure Act* gives is a new hearing upon evidence to be adduced in that court. The Supreme Court in hearing such an appeal must proceed by finding the facts as they are known to exist at the time when it hears the appeal and by applying the law as it exists at that date to the circumstances so found. It does not take the facts as appearing from the evidence before the magistrate and the applicable law as it stood at the time of the conviction. If in the meantime the law has undergone any change or amendment by which the decision of the case would be altered that must be applied by the Supreme Court and not the

law as it stood at the date of the decision of the magistrate: cf. *Victorian Stevedoring and General Contracting Co. Pty. Ltd. and Meakes* v. *Dignan* (1).

The Federal offence of which the defendant was convicted was that of contravening Part III. and reg. 21 of the *National Security (Economic Organization) Regulations*. Part III. contains the provisions prohibiting dealings in land without the consent of the Treasurer. Regulation 21 prevents evasion. The control of dealings in Tasmania as well as other States under those provisions was removed on 20th September 1948. That was done under reg. 25, which was added to the *Economic Organization Regulations* by S.R. 1948 No. 121.

The defendant takes his stand upon the nature of the appeal to the Supreme Court and the necessity of applying the law as it exists at the time such an appeal is heard and determined. He says that the law for the contravention of which he was convicted has gone out of force since the date of his offence, which was 1st May 1947. He invokes the principle of the common law that once a law creating an offence or other liability has gone out of force, then except as to matters past and closed, it is just as if the law had never existed. The law having gone out of force, offences committed while it was in operation are no longer punishable by conviction, and other liabilities accruing or accrued under it are no longer enforceable by suit: cf. *Victorian Stevedoring and General Contracting Co. Pty. Ltd. and Meakes* v. *Dignan* (2). When a Federal Act of Parliament is repealed s. 8 of the *Acts Interpretation Act* 1901-1948 prevents the operation of the common law principle and, on the contrary, keeps alive any criminal responsibility or civil liability that has already been incurred under the Act; and s. 50 has the same effect when a regulation made under a Federal Act of Parliament is repealed. But the defendant maintains that these provisions are confined to the case of repeal and have no application when a provision goes out of force for some other reason. This is no doubt true.

For the assertion that Part III. of the *Economic Organization Regulations* has gone out of force the defendant does not rest simply on the declaration under reg. 25 that after 20th September 1948 sales of land in Tasmania should cease to be controlled and upon the consequent termination by reg. 25 of the effect of Part III. upon transactions thereafter entered into in that State. It is not surprising that the defendant should not be

(1) (1931) 46 C.L.R. 73, at pp. 87, 106-110, 113.

(2) (1931) 46 C.L.R., at pp. 87, 104-106.

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content to rest simply on such a declaration and such a termination of the operation of Part III. with respect to subsequent transactions. For these things fall short of putting Part III. entirely out of force. He says, however, that Part III. lost its force as law at an earlier time, because of the insufficiency of the defence power to continue it in operation. His contention is that as the date receded when the active hostilities ceased which alone justified the adoption of Part III. of the *Economic Organization Regulations*, it became less and less possible to sustain the continued operation of the Part as something which the defence power warranted. The argument on his behalf assumed without conceding that the law contained in Part III., adopted as it was at the height of the conflict, might at that time have been a valid exercise of the defence power as a measure directed to the prosecution of the war. Indeed it would not have been useful to argue the contrary at length in view of *Dawson* v. *The Commonwealth* (1) and the subsequent amendment of reg. 6 by the insertion of sub-reg. 10A, although the actual decision of the Court in *Dawson's Case* (1) was the result of an equal division of opinion: cf. *Tasmania* v. *Victoria* (2). But beginning with an assumption in favour of the initial validity of the provisions of Part III., the argument for the defendant proceeded to deny the possibility of the defence power sufficing to sustain these provisions at the present time. The power to make laws for the naval and military defence of the Commonwealth, so it was claimed, could no longer operate to keep in force a legislative measure such as Part III. once the exigency or state of affairs had passed which had given the measure a relevance to defence. The defendant did not find it necessary to specify an event or a time or a stage in the process by which the organization of the country for armed conflict is exchanged for one more appropriate to the pursuits of peace and identify that as the point at which the provisions of Part III. went out of force. It was enough for him to claim that by the present time at all events no one could suppose that the defence power could keep alive Part III. But not unnaturally he sought to show that the demise of Part III. had taken place early and not recently, indeed early enough to be out of force before the date laid in the complaint as that of the contravention by him of the regulations.

There underlies the foregoing the tacit assumption that a law validly adopted in the exercise of the legislative power of the Commonwealth with respect to defence may by a change of events

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

(2) (1935) 52 C.L.R. 157, at pp. 173, 183-185.

lose its constitutional efficacy, quite independently of the intention of the legislature, whether expressed or implied. This appears to me to be a theory which merits a great deal of examination before it is accepted. It depends of course on the peculiar character of the defence power, which, because it authorizes such legislative measures as are found necessary in the conduct of a war, must have an application which varies with the occasion for its exercise. But before dealing with the theory which the argument assumes, it is necessary to point out a fallacy in the reasoning, as I have stated it, the correction of which means a different application of the principles invoked on the part of the defendant and one even more difficult and dubious. The necessity of the correction was acknowledged during the hearing of the appeal, although its importance was not conceded. The point is that the offence is not created by the regulations the supposed cesser of which is made the pivot of the argument. The offence is created by s. 15 of the *Defence (Transitional Provisions) Act* 1946. That section provides that any person who contravenes or fails to comply with any provision of any regulation in force by virtue of the *Defence (Transitional Provisions) Act* shall be guilty of an offence against the Act. The *National Security (Economic Organization) Regulations* owe whatever force they possess or possessed to that Act and so come within the meaning of the words " regulation in force by virtue of the . . . Act." They stand in the schedule to which s. 6 of the Act refers. Section 6, as it was enacted in the *Defence (Transitional Provisions) Act* 1946 (No. 77 of 1946), which was assented to on 14th December 1946 and came into operation on 1st January 1947, provided that regulations in that schedule should, subject to the Act, be in force until 31st December 1947. By Act No. 78 of 1947 this date was extended to 31st December 1948 and by Act No. 88 of 1948 to 31st December 1949. The regulations which s. 6 has thus undertaken to keep alive and which have been liable to termination at these successively appointed dates create no offence. They express prohibitions and commands. The law which makes disobedience of these prohibitions or commands an offence is s. 15 and the operation of that section is not limited to any specified date but is indefinite in its duration. The intention of the statute is that s. 15 shall remain in force until it is repealed by some subsequent enactment. Thus if while a scheduled regulation is in force it is contravened, the contravention is an offence against s. 15 which will remain punishable under s. 15 so long as s. 15 is unrepealed and has the force of law, notwithstanding that in the meantime the regulation has gone out of operation either

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because the time limited by s. 6 has expired or for any other reason. This I think is clearly the meaning and intended effect of the section. Section 15 has not been repealed, and even if it were repealed s. 8 of the *Acts Interpretation Act* would remain to be reckoned with.

It is therefore necessary for the defendant, before he can succeed, to do more than make good his proposition that Part III. of the regulations has by now lost its force through failure of the power from which it derived its legal efficacy. He must show one of two things. He must establish that it is beyond the constitutional power of the Parliament over defence and matters incidental thereto to enact and keep alive such a provision as s. 15, creating, as it does, for the contravention of what must be a temporary law a criminal liability, to which a person contravening the temporary law while it is in force must remain exposed indefinitely; that is to say a provision under which the liability will endure until the offender is prosecuted to conviction or acquittal or obtains a pardon or dies. Alternatively the defendant must establish that Part III. and reg. 21 of the *Economic Organization Regulations* was not in valid operation at the time of the contravention charged against him, namely on 1st May 1947. For the defendant an attempt was made to support both these propositions, in the hope no doubt that one or other might find acceptance.

The first proposition has no foundation in the Constitution. Given a state of affairs that justifies a statutory provision as an exercise of the defence power, to provide for the punishment of offences committed against the provision while it is in operation is incidental to the legislative power or to its exercise. The question how long a substantive statutory provision justified in this manner under the defence power can validly continue as a law prescribing conduct and regulating transactions is entirely different from the question whether in order to ensure obedience what may be called an adjective provision may create a penal liability from which lapse of time will not relieve an offender, one which will endure until he suffers the penalty notwithstanding that in the meantime the exigency has passed which called forth the temporary substantive measure he has contravened and notwithstanding that its further operation has been terminated. The latter question depends altogether upon what is considered incidental to the legislative power or its exercise. Speaking generally, in the interest of the enforcement of law serious offences remain punishable indefinitely. That is the general policy of the law. The policy was impaired in some degree by the common law rule treating a repealed statute as

if it had never been passed; and no doubt for that reason among others it was reversed by such provisions as s. 8 of the *Acts Interpretation Act*. It is unsafe to make sweeping statements about the application of constitutional power; moreover what may be done under an incidental power is determined by reference to the thing to which it is incidental. But I venture to think that a case has not been imagined in which the power of the Commonwealth Parliament to make a violation of Federal law punishable would not enable the enactment of a law under which an offender would remain exposed to prosecution indefinitely. The objection that s. 15 is invalid because it is such a law must fail.

The second of the two propositions one or other of which is essential to the defendant's success is that before 1st May 1947 Part III. and reg. 21 of the *Economic Organization Regulations* had ceased to have a valid operation. It was at this point that reliance appeared finally to be placed upon the notion that if the conditions ceased to exist which would justify a particular measure as a valid exercise of the legislative power with respect to defence the measure without more would go out of force. The principles of English law do not, I think, supply a parallel to the lapse or exhaustion of an enactment because of a change of events and to us there seems something anomalous in the notion of a law going automatically out of operation, not according to some limitation expressed upon its operation or duration or implied therein, but simply because, owing to changing facts, the power from which it derives its legal efficacy will no longer support the provisions it contains. But in the United States the same difficulty does not appear to have been felt. *Holmes* J. said quite simply that a law depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change, even though valid when passed: *Chastleton Corporation* v. *Sinclair* (1). Citing this case *Stone* J., as he then was, said in *United States of America* v. *Carolene Products Co.* (2) that the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist. References to some of the American cases on the subject are given in *Australian Textiles Pty. Ltd.* v. *The Commonwealth* (3), and in them other cases are cited. The special nature of the defence power is the source here of the difficulty. The power of course authorizes

(1) (1923) 264 U.S. 543, at p. 547 [68 Law. Ed. 841, at p. 843].
(2) (1937) 304 U.S. 144, at p. 153 [82 Law. Ed. 1234, at p. 1242].
(3) (1945) 71 C.L.R. 161, at pp. 180, 181.

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measures taken in peace time lest future wars may arise. It also enables the legislature after hostilities have closed to dispose of the matters which grow out of the existence of a warlike organization of the community established in the course of prosecuting a war. But during a war it empowers the legislature to do or confer authority to do whatever appears necessary or expedient for the successful resistance and the defeat of the enemy. What that will involve in fact must depend upon the nature of the war, the identity of the enemy, the dimensions of the conflict and on many other considerations, some of them geographical. The meaning of s. 51 (vi.) is fixed but its practical application must vary, for it includes a power to do what is commensurate with the actual and apprehended exigencies of war. I have said before, and it is obvious enough, that one difficulty to which this elastic application of the defence power gives rise is that regulations the necessity or justification for which would be conceded during the emergency which called them forth may continue unrevoked when the emergency may have passed and conditions may have assumed a normal appearance: *Stenhouse* v. *Coleman* (1); cf. *Andrews* v. *Howell* (2).

Probably the difficulty should be met by a free application of the principles of statutory interpretation to the regulation or other enactment which was adopted in the exercise of the defence power. These principles enable the court to imply in a statutory provision obviously addressed to a particular state of facts a restriction upon its operation confining it to those facts. When the conditions to which it was directed have passed the statutory provision will then be spent. But the course which in the actual event the legislature has pursued in dealing with *National Security Regulations* appears to me to make it unlikely that this form will be assumed by the problem of the validity of any of the regulations. For by the *Defence (Transitional Provisions) Acts*, No. 77 of 1946, No. 78 of 1947 and No. 88 of 1948, a discriminatory judgment has been expressed at the end of each year by the legislature as to the regulations that should be kept alive for a further term. On each occasion for the surviving regulations a further term of one more year has been fixed subject to a power in the Governor-General in Council to bring the operation of any regulations to an end in the meantime. This is the method the Parliament has adopted of disposing of or winding up the legislative controls and arrangements established in the course of the prosecution of the war. It is a process which depends in the main upon that aspect of the defence power which concerns the transition from war to peace. In that aspect the power

(1) (1944) 69 C.L.R. 457, at p. 472. (2) (1940) 65 C.L.R. 255, at p. 278.

to make laws for defence does make it possible for the legislature to decide that some of the governmental organization, some of the social and economic controls, established in order to place the country on a war footing shall be continued for a reasonable interval of time, if they cannot at once be abruptly ended or removed without risk of untoward consequences to the community. To do so may be incidental to the disestablishment of the organization of the country for war and that in turn is incidental to the power to make laws with respect to defence. See *Dawson's Case* (1). The Parliament having directed its attention three or four times since the conclusion of hostilities to the question what regulations should be continued in this way and for what period, it is plain that when the possibility is denied of a given regulation retaining its force as law at some particular date, the first problem for the court must be whether it was constitutionally competent for the legislature to determine that for the year in which the date occurs the regulation should remain in force unless in the meantime the Governor-General in Council saw fit to terminate its operation.

That is a problem of the validity at the time it was passed of a specific enactment, namely, the enactment that the regulation should remain in operation for the ensuing year unless earlier repealed by the Executive. The validity of such an enactment must depend upon the answer to the question whether in all the existing circumstances it was fairly incidental to the defence power so to provide.

If the question is answered in the affirmative it nevertheless remains, I suppose, logically or theoretically possible under the defendant's argument that during the year and before the critical date the regulation had lost its force because, as the defendant would say, the defence power had in the meantime contracted and the regulation could no longer be supported under that power. But the theoretical possibility has no practical reality, especially when, as in the present case, the interval is only between 14th December 1946 and 1st May 1947. However that may be, in face of the express declaration of the legislature that the regulations should remain in force for the ensuing year, it seems impossible, by any process of interpretation, however free, to imply an intention to limit the operation of the regulations and impose a further condition of their remaining in force during the year, namely, that it should depend on the continuance of a state of facts supposedly connecting the regulations with the defence power. The true question must be whether as on 14th December 1946 it was within

(1) (1946) 73 C.L.R. 157, at pp. 183, 184.

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the constitutional power of the Parliament to provide that, unless sooner repealed by the Executive, Part III. and reg. 21 of the *Economic Organization Regulations* should be in force throughout the year 1947.

My answer is a definite affirmative. The provisions of Part III. form a part of the controls considered appropriate to restrain the inflationary consequences of the financial and economic conditions to which the prosecution of the war gave rise. Doubtless it is true that a distinction exists between matters incidental to the transition from war to peace to which the defence power extends, and things which, while attributable to the war as a cause, form but part of the conditions we must continue to face as part of the social and economic life of the community. Further, it may be true that while the inflationary tendencies which Part III. is said to play a part in restraining were set up by what had to be done in the course of the war, other factors have contributed to them. But conceding so much, it appears to me that at the end of 1946 it was necessarily a question for the Parliament what measures might and ought to be taken with reference to the existing controls, of which this forms but one, adopted as restraints upon rising prices and values. It was a question that might involve relaxation of control with whatever consequences might follow, or a transfer to the States of responsibility in the matter or the acquisition of further powers or perhaps other courses of action.

The conditions prevailing at the time must be taken into account, though upon this aspect we are left to such matters as are within judicial notice. In *United States of America* v. *Carolene Products* (1) *Stone* J. said that where the existence of a rational basis for legislation whose constitutionality is attacked depends upon facts beyond the sphere of judicial notice such facts may properly be made the subject of judicial inquiry: the report (2) is annotated with a discussion of the use of extrinsic evidence where the constitutional basis of legislation rests on events or circumstances. But in Australia few attempts have been made to lay before the court information as to facts or events with a view of showing that a sufficient legal foundation for legislation does or does not exist, and no such attempt was made in the present case. However, looking back to the conditions of December 1946 which we can judicially notice it appears to me that the situation was such as to provide quite a sufficient basis for the determination which the Parliament embodied in so much of s. 6 of the *Defence (Transitional*

(1) (1937) 304 U.S. 144, at p. 153 [82 Law. Ed. 1234, at p. 1242].

(2) (1937) 304 U.S., at p. 155 [82 Law. Ed., at p. 1244].

Provisions) *Act* 1946 and the first schedule as provided that Part III. and reg. 21 of the *Economic Organization Regulations* should subject to the Act be in force until 31st December 1947.

For the foregoing reasons I am of opinion that the defendant's contentions that no penal liability under the Act and regulations could now constitutionally rest upon him and his contention that none was ever incurred must fail.

On the footing that by reason of the operation of s. 40A of the *Judiciary Act* in relation to s. 152 of the Tasmanian *Justices Procedure Act* 1919 we are to consider afresh what punishment should be imposed upon the defendant, we were asked to quash the sentence of six months' imprisonment inflicted by the magistrate and substitute a fine. In the case of a summary proceeding for an offence against s. 15 of the *Defence* (*Transitional Provisions*) *Act* six months' imprisonment is the maximum sentence. Although I can understand a very unfavourable view being taken of the defendant's offence, there is a severity in the maximum sentence which, in all the circumstances of the case, would have led me to review it. But the majority of the Court think that we ought not to interfere with the magistrate's discretion and as that is so I shall say no more about the matter.

The Supreme Court made an order dismissing the appeal from the magistrate. Probably this would not have occurred had the constitutional question been raised in due time and distinctly. Presumably the Supreme Court would then have held its hand. I would grant the application for special leave to appeal from that order, set it aside and substitute an order of this Court which, after reciting that the cause was removed under s. 40A, dismissed the appeal from the magistrate.

WILLIAMS J. The origin of these proceedings was the prosecution of the appellant summarily before a magistrate in Tasmania under s. 15 of the *Defence* (*Transitional Provisions*) *Act* 1946 for an offence under reg. 21 of the *Economic Organization Regulations*. On 22nd May 1948 the magistrate convicted the appellant and sentenced him to six months' imprisonment. It was proved that on or about 1st May 1947 the appellant had agreed to sell certain land in Tasmania on which is erected the Grand Hotel to a purchaser for £16,000, that of that sum £11,600 was stated to be the consideration in a written contract of sale, that the balance £4,400 was paid to the appellant in cash, that the written contract was presented to the Treasurer as expressing the true purchase price, and that the payment of £4,400 in cash was concealed from the Treasurer in the

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expectation and hope that the Treasurer, in ignorance of the payment of the sum of £4,400, would consent to the purchase at the sum of £11,600. On 21st May 1948 the appellant appealed to the Supreme Court of Tasmania, the appeal being by way of rehearing under s. 152 (3) of the *Justices Procedure Act* 1919-1947 (Tas.). It was agreed by the appellant and the respondent that on that appeal a question arose as to the limits *inter se* of the constitutional powers of the Commonwealth and the States and that the appeal was removed into the original jurisdiction of this Court by force of s. 40A of the *Judiciary Act* 1903-1948. It was also agreed that the evidence given before the magistrate should be regarded as evidence tendered in this Court. It was not contended that the evidence did not disclose an offence under reg. 21, but it was contended that, as the appeal is a rehearing, the conviction could not stand unless the appellant could be convicted for the alleged offence under the law in force at the date of the rehearing. I accept this contention but, in my opinion, the appellant could be convicted under that law.

The *Economic Organization Regulations* were originally made under the *National Security Act* 1939-1940 in April 1942. The *National Security Act* 1939-1943, as amended by the *National Security Act* 1946, provided that the Act and all regulations made thereunder should cease to have effect at midnight on 31st December 1946. But the *Economic Organization Regulations* and other regulations made under the *National Security Act* were continued in force by the *Defence (Transitional Provisions) Act* 1946 from midnight on 31st December 1946 until midnight on 31st December 1947. On 1st May 1947, therefore, the *Economic Organization Regulations* were in force by virtue of the *Defence (Transitional Provisions) Act* 1946. The appellant was prosecuted under s. 15 of this Act. Sub-section (1) of s. 15 provides that any person who contravenes, or fails to comply with, any provision of any regulation in force by virtue of this Act, shall be guilty of an offence against this Act. Section 15 is not like ss. 6 and 7 of this Act, a temporary section. It is a section which will continue to operate until repealed so long as it can be supported as a valid exercise of the defence power, that is supported by s. 51 placitum vi. of the Constitution.

The validity of the *Economic Organization Regulations*, so far as they relate to the sale of land, when they existed as regulations made under the *National Security Act*, was considered by this Court in *Shrimpton* v. *The Commonwealth* (1) and *Dawson* v. *The Commonwealth* (2). In the latter case the Court was evenly divided and it was contended that for this reason the case has not the same authority as a case in which there is a majority. We were therefore

(1) (1945) 69 C.L.R. 613. (2) (1946) 73 C.L.R. 157.

invited to reconsider the correctness of the decision and to hold that the views of the three dissentients were correct. But it is not necessary, in my opinion, to consider this contention because the regulations were subsequently amended on 19th December 1946 by Statutory Rules 1946 No. 192 which inserted after reg. 6 (10) a new sub-reg. (10A), providing that, notwithstanding anything contained in this regulation, the Treasurer shall not refuse to grant his consent under sub-reg. (1) of this regulation, or make the granting of his consent subject to any condition, except for the purpose of giving effect to a policy of (*a*) preventing or limiting increases in prices of land; (*b*) preventing or limiting increases in rates of interest; or (*c*) restricting the borrowing of money for use in investment in land. As I said during the argument, if the regulations had originally contained this new sub-regulation, I would have had no difficulty in upholding their validity as an exercise of the defence power in its economic facet of guarding against inflation.

I am of opinion that it follows from the views expressed by the members of this Court in *Dawson's Case* (1) and in *Miller* v. *The Commonwealth* (2) of the extent of the defence power in the period of transition from hostilities to peace that the Commonwealth Parliament had power to keep these regulations as amended in force during the year 1947. My own views of the power of the Commonwealth Parliament to retain in force and amend regulations made during hostilities in this period are stated in *Miller's Case* (3) and *Jenkins* v. *The Commonwealth* (4), and I shall not repeat them. The danger of inflation in this period could be at least as great as the danger during hostilities. Legislation to control prices and restrict borrowings to meet this danger, of which the regulations as amended are an example, is legislation which falls within the defence power during hostilities and would continue to do so for a reasonable period thereafter so long as the necessities of life, particularly food, clothing and shelter, are still in short supply as a result of the cessation in the manufacture and production of civilian goods and the building of houses during hostilities. The Executive must be accorded a wide latitude of discretion in determining when that period has come to an end. The recent case of *Crouch* v. *The Commonwealth* (5) was relied on by the appellant. The Control of New Motor Cars Order there impeached was held to be beyond the defence power in the transition period because no connection appeared between the order and the remission of the community from hostilities to peace. But it can be gathered from

(1) (1946) 73 C.L.R. 157.
(2) (1946) 73 C.L.R. 187.
(3) (1946) 73 C.L.R., at pp. 211, 212.
(4) (1947) 74 C.L.R. 400, at p. 405.
(5) (1948) 77 C.L.R. 339.

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the *Economic Organization Regulations* as amended by reg. 6 (10A) that they are intended, so far as they relate to land, to deal with an economic disturbance occasioned originally by hostilities and still existing in the transmission period. *Crouch's Case* (1) is therefore distinguishable.

I can see no reason why reg. 6 (10A) should not have been added to the *Economic Organization Regulations* on 19th December 1946 so as to make them from that date an effective exercise of the defence power assuming that prior to that amendment, as the dissentients thought in *Dawson's Case* (2), the discretion of the Treasurer was so wide that no sufficient nexus existed between the regulations and the defence power. In this connection I repeat the statement in *Jenkins' Case* (3): "It is just as likely that some defect may be found in the regulations during this period" that is the period of transition "as during the period of hostilities, so that to ensure that the regulations shall be effective the defence power must be wide enough to authorize amendments to be made in either period in order to carry into effect the purpose for which the regulations were made." Further I see no reason to doubt the power of the Commonwealth Parliament to continue the *Economic Organization Regulations* in force at least during the year 1948 as it did by the *Defence (Transitional Provisions) Act* 1947 and therefore up to 20th September 1948, when by declarations made under Statutory Rules 1948 No. 121 the Treasurer of the Commonwealth declared that thereafter sales of land in the various States, including Tasmania, should cease to be controlled under the *Economic Organization Regulations*. But for the purposes of the present appeal it is only necessary to hold, as I do hold, that the *Economic Organization Regulations*, in their amended form, so far as they relate to the sale of land, were validly re-enacted by the *Defence (Transitional Provisions) Act* 1946 and were in force under that Act during the year 1947.

Regulation 21 of the *Economic Organization Regulations* was therefore a valid law of the Commonwealth on 1st May 1947 and the appellant on that date committed an offence against the *Defence (Transitional Provisions) Act* 1946 within the meaning of s. 15 of this Act. If s. 15 is still in force the magistrate was accordingly entitled to convict the appellant and sentence him to imprisonment for six months and the appellant could still be convicted of the offence at this date. Section 15 has not been repealed and must therefore be still in force unless the defence power is no longer wide enough to support it. But I have no doubt that it is within

(1) (1948) 77 C.L.R. 339.
(2) (1946) 73 C.L.R. 157.
(3) (1947) 74 C.L.R., at p. 405.

the power of the Commonwealth Parliament under the incidental power, s. 51, placitum xxxix. of the Constitution, to provide for the prosecution at a subsequent time of a person who commits an offence against a law of the Commonwealth, even if the law is no longer in force at the date of the prosecution, whether it has ceased to exist by repeal or lapse because the constitutional power under which it was made is no longer wide enough to support it.

There remains for consideration the appeal against the sentence of imprisonment for six months. Several circumstances were advanced by Mr. *Sholl* in mitigation of the offence, but I am not prepared to overrule the magistrate's exercise of his discretion. The offence was a serious one and the appellant was perhaps fortunate that the magistrate did not see fit to exercise his powers under s. 15 (6) of the *Defence (Transitional Provisions) Act* 1946 and order the forfeiture of the £4,400 paid to the appellant. The appellant has been allowed to retain this sum, and in all the circumstances the sentence cannot be said to be unreasonably severe.

For these reasons I would dismiss the appeal.

WEBB J. In my opinion the appeal should be dismissed.

It is not necessary for me to decide the question upon which this Court was equally divided in *Dawson* v. *The Commonwealth* (1), because, in my opinion, the amendment of reg. 6 by the addition of clause 10A (*a*), which was made after the decision in *Dawson's Case* (1) and before the appellant made his arrangement with Stone in May 1947, removed any objection to reg. 6 that might otherwise have been successfully grounded on reg. 9 (2).

But the appellant submits that in any event the defence power had so far contracted by May 1947 as to leave regs. 6 and 21 without any support and inoperative, and the appellant's arrangement with Stone legally unprohibited.

The Commonwealth may not continue indefinitely to exercise under the defence power what ordinarily are State powers in order to cope with a situation that arises out of the war, but which does not arise out of any measures taken by the Commonwealth during the war in exercise of the defence power. The power of the Commonwealth is to legislate for naval and military defence. Economic measures to mobilise Australia's resources for war are within the power (*Farey* v. *Burvett* (2)), but not measures to meet any changes whatever that result from the war, independently of measures taken under the defence power during the war.

In my opinion the economic organization effected by regulations under the *National Security Act* to enable the war to be successfully

(1) (1946) 73 C.L.R. 157. (2) (1916) 21 C.L.R. 433.

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conducted did not immediately and completely cease to be supported by the defence power when Japan surrendered on 2nd September 1945 and actual hostilities ceased, but continued, or could be continued, under the defence power to the extent and for the period necessary to avoid serious dislocations and losses that otherwise might reasonably have been expected to result.

This economic organization effected by the regulations under the *National Security Act* and continued in operation by the *Defence (Transitional Provisions) Act*, and more particularly the regulations controlling sales of land, brought about a state of things which could not have been suddenly terminated without causing serious dislocation and losses. To avoid this it was necessary that some of the regulations, including reg. 6, should remain in force for periods varying according to the nature of the regulations. I am unable to hold that the period necessary as regards control of sales of land had expired when the appellant made his arrangement with Stone in May 1947. The state of things that warranted the control of land sales during the war was continuing when the arrangement was made. That arrangement was then a breach of reg. 21 (*b*) and this breach was made a punishable offence not by the regulations but by s. 15 of the *Defence (Transitional Provisions) Act*. Section 15 has continued in force, and so too the liability it created, although the sale of land without the Treasurer's consent is no longer prohibited in any of the States.

The defence power should, I think, be held to continue to enable the enforcement of a liability for a breach of the regulations. The States' powers are not usurped by the Commonwealth in the retention of a power to enforce the liability for a breach of valid Commonwealth regulations.

As to the punishment imposed, I do not think that this should be mitigated. In the absence of any forfeiture order I am unable to hold that the sentence of six-months' imprisonment is excessive, although it is the maximum term prescribed by the statute.

Order of Supreme Court set aside. Appeal from Court of Petty Sessions dismissed.

Solicitors for the appellant: *Crisp, Edwards & Wilson*, Ulverstone (Tas.), by *Page, Seager, Doyle, Crisp & Wright*, Hobart, and *Rylah & Rylah*, Melbourne.

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E. F. H.