**Chapter Eleven**

***The Engineers' Case : Seventy Five Years On***

**John Nethercote**



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1995 marks the twentieth anniversary of the demise, in extraordinary circumstances, of the Labor Government led by Gough Whitlam, and the seventy-fifth anniversary of the High Court's decision in Amalgamated Society of Engineers v Adelaide Steamship Co., generally known as the Engineers' Case. It is the latter anniversary which occasions the preparation of this paper, but the coincidence of these anniversaries is fortuitous and of the greatest interest in the way in which Australians think about the governance of their nation.

One factor which contributed so much to the political vicissitudes of the Labor Government, 1972-75, was its inability to accept that the Senate, the second house of the Commonwealth Parliament, whose members are "directly chosen by the people" of each State "voting, until the Parliament otherwise provides, as one electorate", is, subject to some effectively minor exceptions, a fully equal part of the Parliament.

Not only is it not a House of Lords, but the Parliament Act 1911, whereby the powers of the House of Lords over money bills were virtually eliminated and its powers otherwise significantly circumscribed, is irrelevant to Australia's situation.

The Parliament Act, as the Preamble states so unambiguously, was an interim measure pending substitution "for the House of Lords as it at present exists a Second Chamber constituted on a popular instead of a hereditary basis". Australia's Commonwealth Parliament was equipped, from its origins, with just such a second chamber. The premises upon which the Parliament Act 1911 was based do not exist in Australia, and never have.

Australia is a federal nation, and for this among other reasons it is wrong to try to examine its structures and methods of government through a British prism. Britain is a unitary state, and while its institutions of government will always hold a fair measure of interest for Australians, they should not be seen as constituting a governing model. Other considerations apart, Australia now has sufficient experience of government to make its own judgments and arrangements according to its own experience, requirements and preferences.

Unhappily much (but not all) literature on Australian government is heavily influenced by British concepts. This is the case with much that has been written about 1975 : for example, Sawer, Federation Under Strain (1977); Winterton, Parliament, the Executive and the Governor-General (1983); and Coper, Encounters with the Australian Constitution (1986); but not Odgers, Australian Senate Practice, 5th ed (1977); Reid & Forrest, Australia's Commonwealth Parliament (1989); or Brian Galligan, A Federal Republic (1995).

Interpretation of the Engineers' Case is likewise affected by what may be regarded as the British approach to Australian government.

The decision itself is the occasion of much applause because it provided judicial sanction for greater centralisation of Australian government which was implicit in the financial provisions of

the Constitution (as we know from a much-quoted statement by Alfred Deakin) and the national sentiment fostered by Australia's engagement in the Great War. Essentially the High Court shifted from a federalist perspective, in which it interpreted the provisions of the Constitution so as to maintain the viability and autonomy of both the Commonwealth government and the State governments, to a centralist perspective, in which, unless there were express provisions to the contrary, the powers of the Commonwealth were to be interpreted in a full and plenary way, leaving any residue to the States.

The objective was achieved by returning the Constitution to British methods of statutory interpretation, by treating it as an ordinary statute of the Imperial Parliament, without any recognition of its provenance in the inter-colonial conventions and negotiations of the 1890s and the fact that it was legitimised, not by the parliamentary proceedings at Westminster, but by the various referenda which preceded them.

The Griffith Court The inaugural High Court was composed of three justices who had been major figures in development of the Commonwealth Constitution. It may be said of Sir Samuel Griffith, Chief Justice, and his brother Justices, Sir Edmund Barton and Sir Richard O'Connor, that they were not simply present at the creation but were, indeed, creators.

For them the Constitution was in the nature of an agreement among sovereign powers. The States were not subordinate to the Commonwealth, nor the Commonwealth to a State, when each was acting within its area of authority, except that in the case of concurrent legislative powers Commonwealth law prevailed over State law if the laws were inconsistent (Constitution, section 109).1

The Court's approach essentially had two arms, based on implications from the Constitution as a whole rather than expressly stated.

The first was the reciprocal immunity of instrumentalities doctrine. Under this doctrine, the Court held that "the Commonwealth could neither subject the States to Commonwealth law, nor could the States subject the Commonwealth to State law".2 It was this doctrine which was especially at issue in Engineers for it concerned application of Commonwealth law to employees of a State trading concern.

The second was the doctrine of implied prohibitions or reserved State powers. As first stated (in Peterswald v Bartley (1904)), it asserted, in Sir Zelman Cowen's words, that "in general Commonwealth power should be narrowly construed; that the scheme of the Constitution, in leaving the general residue of powers with the States, implied that that residue was very large, that it embraced the `private or internal affairs of the States'..."3 In a series of cases which came before the High Court in its first decade and a half it sought to give effect to these ideas. Thus it found that a Commonwealth official was not bound by a State requirement to affix a two penny duty stamp to a receipt for his salary (D'Emden v Pedder (1904)); and, in Deakin v Webb (1904), that Commonwealth officials were not liable to pay State tax on salaries. On the other hand, in the so-called Steel Rails Case (1908), the Court held that the New South Wales State Railway was liable to pay customs duty on imports.

Griffith was especially scathing of suggestions that the Constitution should be construed, as he put it in 1907, "merely by the aid of a dictionary, as by an astral intelligence, and is a mere decree of the Imperial Parliament without reference to history ...." That view, he considered, was "negatived by the preamble to the Act itself."4 In reaching their judgments the members of the early Court continued to be guided by American practice, especially McCulloch v Maryland (1819) and Texas v White (1868).5

The Court, however, was under challenge from an early stage from the Judicial Committee of the Privy Council. In Webb v Outtrim (1906) which went directly from the Supreme Court of Victoria, the Judicial Committee held that a State government could tax Commonwealth officials and criticised D'Emden (the High Court had refused leave to appeal against its decision in that case). (The Judiciary Act was subsequently amended to render it more difficult for such cases as Webb v Outtrim to go to the Judicial Committee.) In Baxter v Commissioner (1907) and Flint (1907) the High Court reasserted its views on this matter and prevented further Privy Council consideration.

A more serious challenge came, however, from within. In 1905, two additional Justices were appointed, Sir Isaac Isaacs and HB Higgins. Both were more centralist than the foundation Justices and, although present during creation of the federation, they were late arrivals. They did not accept the federalist doctrines of the founders, and steadily adopted approaches which were strongly critical of the doctrines of implied immunities and implied prohibitions. Isaacs labelled these approaches as "contrary to reason" (in R v Barger (1908)), whilst Higgins' approach was that "[w]e must find what the Commonwealth powers are before we can say what the State powers are. The Federal parliament has certain specific gifts; the States have the residue" (R v Barger (1908)).6 Doctrinal differences were aggravated by personal incompatibilities. Griffith and Isaacs never developed much rapport.

Dr Evatt wrote of their "exceedingly fierce" clashes.7 And in 1913, when Griffith was abroad, Barton complained to him about "how little decency there is about these two men [Isaacs and Higgins] - All the same, I think they hate each other, although they conspire".8 Barton especially complained of Isaacs: "It is plain to me, and I think to others, that Isaacs is building his hopes on your remaining in England and is trying to make such a big splash that he will make himself manifest as the right CJ....

His judgments are swelling to bigger proportions than ever - in fact they are very weighty - in respect of paper: and he has assumed an oracular air in court that is quite laughable."9 The inaugural Court was dissolving. In 1912 O'Connor died. In the same year, the Court was expanded to its present number of seven. The old firm of Griffith and Barton were in a clear minority and their ascendancy was certainly waning before Griffith retired in 1919 and Barton died in January, 1920, disappointed that he had been passed over for the Chief Justiceship in favour of Knox, a Sydney silk.

(It is suggested that Griffith was partly responsible for this decision; so anxious was he that Isaacs not succeed to the Chief Justiceship that he urged an appointment from outside the Court.

Barton himself wrote that Griffith's "dominant desire was to requite in deadly fashion the man [Isaacs] who had injured him, and that to make this certain he did not care if he killed the man [Barton] who had helped him".10 Throughout its history it has always been the case that the ranking Justice has been elevated when an appointment of Chief Justice has been made from the existing membership of the Court - Isaacs in 1930; Duffy in 1931; Dixon in 1952; Gibbs in 1981; Mason in 1987; and Brennan in 1995. In 1919 Griffith was not to know that this would be the case.)

The end was signalled in what is known as the Municipalities Case of 1919. It was the last case on which Griffith sat, and he and Barton were in a minority of five to two.

Griffith in his judgment drew upon American authorities ("historical expositions of the unwritten law" brought by the thirteen colonies from the Mother Country and "entitled to very great weight"), and concluded that where municipal bodies discharged State functions they were "entitled to the same immunity from Commonwealth interference as the State itself would be in

the discharge of similar functions".11 Barton took the opportunity to say that it would be "a waste of time" to attack the Railway Servants Case (which decided that railway employees did not come within the Commonwealth industrial power), but it was a warning which only had a short life.12 The Engineers' Case What was signalled in Municipalities in 1919 came to pass in 1920.

The opportunity arose in an industrial case which involved, inter alia, a small number of workers employed in an enterprise in the portfolio of the Western Australian Minister for Trading Concerns. The case was referred to the High Court by Higgins in his capacity as President of the Conciliation and Arbitration Court.

The majority decision in the case was read by Isaacs on behalf of the Chief Justice, Rich, Starke and himself. Higgins prepared his own, clearer judgment. Duffy dissented and Powers was absent. The essence of the majority judgment is contained in this abridgment of Geoffrey Sawer's summary:

1. The Constitution should be regarded primarily as a British statute, to be interpreted by reference to its explicit terms; where there are express powers and express prohibitions or restrictions on power relevant to an issue, these are prima facie conclusive.
2. Decisions of the Supreme Court of the United States are a weak authority. The Constitution of the Commonwealth embodies responsible government; and executive government is carried on in the name of the Crown which is one and indivisible.
3. It is for Parliament rather than courts to devise restrictions not expressed in the Constitution in order to prevent abuse or oppressive use of powers given by the Constitution; such questions are for the Parliaments and electors.
4. Restrictions on Commonwealth power cannot be implied from the allocation of residuary powers to the States.
5. The Constitution binds the Crown, and this means in right of the States as well as the Commonwealth.
6. There are no relevant express provisions in the Constitution restricting application of the industrial arbitration power; the Conciliation and Arbitration Act is expressly applicable to government employees.
7. Federal officials are liable for State taxes except in specified circumstances (for example, inconsistency of State tax with some Commonwealth law).
8. In no case can powers be restricted by implications from a general theory of federalism.13

The case has always been famous, for its sway in interpretation of the Constitution has been pervasive. A quirky illustration of its significance can be found from an account of Sir John Kerr's first day at the Sydney University Law School in 1932. According to Richard Hall, Sir John Peden, Dean of the Faculty, "welcomed them with a harangue which nearly fifty years later sticks in the memory of those who heard it".

The volume of the Commonwealth Law Reports containing the Engineers decision had been stolen. Peden told the students that the offender if found would be expelled and hounded from the profession of law.14 Hall's biography of Kerr is a dark story, but its citation in this context is peculiarly appropriate because what strikes a lay reader of the majority judgment in Engineers is its vituperative language.

There cannot be any doubt that Isaacs dipped his pen in vitriol before drafting the judgment. It came within a month of Griffith's death: there would not have been any irony (as there was with Mark Antony at Caesar's funeral) had Isaacs told his listeners that he had come to bury Griffith, not to praise him.

Referring to the antecedent judgments of the Court, Isaacs said: "The more the decisions are examined, and compared with each other and with the Constitution itself, the more evident it becomes that no clear principle can account for them. They are sometimes at variance with the natural meaning of the text of the Constitution; some are irreconcilable with others, and some are individually rested on reasons not founded on the words of the Constitution or on any recognised principle of the common law underlying the expressed terms of the Constitution, but on implication drawn from what is called the principle of `necessity', that being itself referrable to no more definite standard than the personal opinion of the Judge who declares it.

The attempt to deduce any consistent rule from them has not only failed, but has disclosed an increasing entanglement and uncertainty, and a conflict both with the text of the Constitution and with distinct and clear declarations of law by the Privy Council." 15 Isaacs at this juncture heads off on a long homily about: ". . the chief and special duty of this Court faithfully to expound and give effect to [the Constitution] according to its own terms, finding the intention from the words of the compact, and upholding it through it precisely as framed."16 In this context, it might be wrong to suggest that lsaacs implies that hitherto the Court had strayed from this "chief and special duty", but it would not be surprising to find that some readers have drawn such an inference.

Later in the judgment Isaacs, to use a colloquialism, names names, in particular Sir Samuel Griffith, in Attorney-General for Queensland v Attorney-General for the Commonwealth (1915). Griffith's judgment in that case he finds to be : "... an interpretation of the Constitution depending on an implication which is formed on a vague, individual conception of the spirit of the compact, which is not the result of interpreting any specific language to be quoted, nor referable to any recognized principle of the common law of the Constitution ....

This method of interpretation cannot, we think, provide any secure foundation for Commonwealth or State action, and must inevitably lead - and in fact has already led - to divergencies and inconsistencies more and more pronounced as the decisions accumulate." 17 It briefly suited Isaacs to cite some American judgments, including some by Marshall, to support his argument. 18 But within a paragraph he declared: "But we conceive that American authorities, however illustrious the tribunals may be, are not a secure basis on which to build fundamentally with respect to our Constitution." 19

American authorities are not appropriate because Australia's system of government is markedly different from that of the United States, for two reasons - the common sovereignty of all parts of the British Empire and the principle of responsible government. Isaacs quoted Lord Haldane's view that the Australian Constitution resembled that of the United States only "in its most superficial features".20 There is no explicit reference to federalism and whether it might form a basis for utilising American jurisprudence in interpreting the Constitution.

The Engineers decision has had a mixed reception. Geoffrey Sawer states: "The joint judgment is one of the worst written and organized in Australian judicial history. Isaacs was given to rhetoric and repetition, and here he gave these habits full rein." 21 Sawer also writes: "Dixon J. disliked Engineers; its literary style set his teeth on edge, and he never mentioned it without a touch of asperity. As early as A.R.U. (1930), he `restated' the case in a manner which gave as part of its decision a rule preventing the Commonwealth from discriminating against the State and its agencies, although that subject is nowhere mentioned in Engineers.

He also said that Engineers did not enable the Commonwealth to deal with States and their agencies as if they were subjects, nor provide as against States the full range of remedies and sanctions which are available against subjects. ... he said that there would still be problems of

Commonwealth-State relations which could not be solved without recourse to `principles of the Constitution which are not immediately discoverable in its words'....
He also said: `I am not prepared to accept all the obiter dicta in the Engineers Case as having achieved the impossible task of anticipating every future difficulty in the working of our Federal constitutional scheme.'" 22 Leslie Zines writes in like vein: "The joint judgment is in large part very loosely reasoned and badly organised. It is written with more fervour than clarity."23 And in a telling observation he states: "Much of the reasoning is difficult to understand; for example, the reasons given for not following United States decisions. It is true that Australia differed from the United States in having responsible government and the monarchy, but how was the difference relevant to the problem?.... Australia, while differing in those respects, resembled quite strongly the United States in the division of legislative powers and the manner in which that was done, namely by conferring express and enumerated powers on the federal government and leaving the remainder to the States." 24
Zines likewise puzzles about the significance of the reference to responsible government in the decision.25
An immediate consequence of Engineers was a dramatic shift in the Commonwealth industrial jurisdiction. In 1920, 670,000 unionists worked under State awards; only 100,000 worked under Commonwealth awards. By 1924 the comparable figures were 225,000 under State awards; 550,000 under Commonwealth awards. Although some unions moved back and forth between jurisdictions, it is clear that the Commonwealth had made substantial inroads into State authority in industrial relations. 26 The broader consequence was a High Court jurisprudence which had returned to the fold of English law in the name of nationhood.
Important and invaluable as English law has been for Australian life and liberty, its value in constitutional matters is less self-evident.
England is a unitary state with strong predilections in favour of the Crown. In constitutional matters Australia is a federal nation and a robust practitioner of federal democracy. The Court's influence hereafter was strongly weighted in favour of the central government.
Under Griffith, the Constitution-maker, the starting point was the States. After Engineers, the starting point was the Commonwealth.27 Judicially speaking, and notwithstanding occasional gallant exceptions, the Constitution has been moulded to meet the convenience of the Commonwealth, with the States and their instrumentalities subject to Commonwealth law.
But according to Sir Owen Dixon the immediate effect of the decision was ambiguous. On one occasion he wrote: "The substance of the decision has been hardly impugned, but its result was to reduce still further the power of the State and its importance in the eyes of the community. At the same time the authority of the Court suffered. A tendency grew among the States to look to the Judicial Committee of the Privy Council.
Moreover, the legal profession for a time appeared to feel that a more stable development of our constitutional law might come from that body. It was a vain hope." 28 The uncompromising character of the decision had the effect of delegitimising references to American law in the evolution of our federation. As R.T.E. Latham wrote in 1937: "It cut off Australian constitutional law from American precedents, a copious source of thoroughly relevant learning, in favour of crabbed English rules of statutory interpretation, which are one of the sorriest features of English law, and are ... particularly unsuited to the interpretation of a rigid Constitution." 29
For ordinary citizens of the Commonwealth, a general knowledge of the significance of Engineers is leavened by its association with many leading political personalities, of whom Sir Robert Menzies is not the least. The Court included two later Chief Justices, Isaacs (1930- 31)

and Duffy (1931-35), the sole dissenter. Duffy's successor, Sir John Latham, was at the bar table representing Victoria. In the fifteen years between the case and his elevation to the Chief Justiceship, Latham had a career in Commonwealth politics as, variously, Attorney- General, Minister for External Affairs and Leader of the Opposition.

Another at the bar table was Dr H.V. Evatt, destined for a later career which embraced the New South Wales Legislative Assembly, the High Court of Australia, the Commonwealth House of Representatives (Attorney-General and Minister for External Affairs, 1941-49; Leader of the Opposition, 1951-60) and the Chief Justiceship of New South Wales.

But it was upon Menzies that the light on this occasion shone so brightly. He described his situation as follows: "I was the sole counsel for the successful party. I was very young, twenty-five years old, and a success meant a great deal to me. In fact, I got married on the strength of it." 39

A late starter in the case, he did not, from the perspective of the centralist advocates on the bench, miss a cue. Counsel for the Amalgamated Society of Engineers, Menzies endeavoured to secure victory for his clients by arguing that the functions involved were trading, not governmental, and thus not affected by Griffith's federalist legacies. Starke, one of the plainer speaking Justices, complained that Menzies' argument was "a lot of nonsense!". Menzies agreed, "in what [he] later realized to be an inspired moment".

The relatively new Chief Justice, Knox, wanted to know why he was putting an argument he admitted was "nonsense". As Menzies recollected: "`Because', said the young Menzies (the old Menzies would not have dared to do this) `I am compelled by the earlier decisions of this Court. If your Honours will permit me to question all or any of these earlier decisions, I will undertake to advance a sensible argument'. I waited for the heavens to fall. Instead, the Chief Justice said: `The Court will retire for a few minutes?', and when they came back he said, `This case will be adjourned ..... Each government will be notified so that it may apply to intervene. Counsel will be at liberty to challenge any earlier decision of this Court!'" 31

(It is typical that Manning Clark treats the case only vaguely, his main interest, certainly in terms of length, is to use the opportunity to take a gibe at Menzies' first major success.32)

In his recent address on Engineers the present Chief Justice, Sir Gerard Brennan, on the basis of research in the records of the High Court, states that while Menzies lit the fuse, and Justices Isaacs and Rich had prepared the charge in the 1919 Municipalities Case, it was the argument of counsel for the Commonwealth, Leverrier, KC, which "seems to have had the greatest impact on the putative author of the majority judgment".33

This proposition is very plausible, for he would have been briefed by another of the founders of the federation, Sir Robert Garran, Solicitor-General for the Commonwealth since 1916 and Secretary to the Attorney-General's Department since its inception. Garran it was who, in Prosper the Commonwealth, wrote about Engineers under the sub-heading of "Revolutionary" Year 1920.34 The essential meaning of the case for Garran was "Back to the Constitution".35 "This seemed on the first view to be a complete revolution in the principles of interpretation".36

One strand of the Engineers decision stressed literal reading of the Constitution in contrast to one based on implied doctrines. Garran did not altogether agree: he considered that implications were still valid so long as they were necessary implications. He would no doubt have regarded the references in the majority judgment to "responsible government" to be a necessary implication of section 64, which provides that ministers should be Members of Parliament.37 And it is quite clear, as several recent decisions of the High Court show, that implications are now playing a

considerable role in interpretation of the Constitution, though tests of the necessity of the implications do not seem to a lay observer to be especially strict.

Isaacs' biographer, Sir Zelman Cowen, reports that Isaacs "also insisted that in interpreting the constitution it was necessary to take account of changing circumstances, and in particular that the Court should acknowledge the needs of the nation".38 This is an approach which appears to have considerable currency in the Court, not least by use of the external affairs power.

To conclude as I began. There may have been a case for settling the 1920 matter on terms favourable to the engineers; this could have been achieved by characterising the function as trading rather than governmental. There may also have been a case for placing a greater stress on the actual words of the Constitution in its interpretation. But what needs more searching examination is the wisdom of discarding the federal basis of the Constitution and adopting interpretative approaches derived from the legal system of a unitary state.

In 1975, by contrast, political matters in dispute between the Government and the Opposition were settled by insisting on the bicameral structure of the Parliament and resisting philosophies seeking to impose British concepts on what is an institution in all respects federal, elective, democratic and Australian.

The sub-heading for this paper is that Australians should be as familiar with the Federalist Papers as with Bagehot (although I have been told that university students in politics today are unlikely to know about either Bagehot or the Federalist Papers). To study Australian government mainly using only British government as a point of international reference is quite misleading, as it is to concentrate upon the internal structure of the Commonwealth without addressing the daily workings of the federation.

The deeper point beyond the epigram is naturally that the origins of the federation and its early years warrant much closer study and appreciation. They were genuinely creative years in Australia and the leading figures, especially Griffith, were notable for the breadth of their learning.

For some, Engineers represents a move in judicial interpretation from a federal to a national approach. My review of the case is that it also marks a narrowing of the judicial perspective after a more exacting and enterprising style displayed by the Court when it was in the hands of the three foundation judges, a retreat from the complexities and diversities of federalism towards the relative simplicities and rigidities of a unitary state.

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Endnotes : 1. This paragraph is based on Leslie Zines, The High Court and the Constitution, 2nd ed., Butterworths, 1987, 1.

2. Michael Coper, Encounters with the Australian Constitution, CCH, 1986, 188.

3. Zelman Cowen, Isaac Isaacs, Oxford University Press, 1967, 154.

4. Roger B. Joyce, Samuel Walker Griffith, University of ueensland Press, 1984, 269.

5. Brief summaries of these cases may be found in Kermit L. Hall (ed.), The Oxford Companion to the Supreme Court of the United States, New York, 1992, 536-8 and 869 respectively.

6. Cited in Zines, op.cit., 7.

7. Quoted in Joyce, op.cit., 296.

8. Quoted in Coper, op.cit., 147.

9. Ibid.

10. See Roger B. Joyce, op.cit., 357.

11. Ibid., 337.

12. Quoted in John Rickard, HB Higgins, Allen & Unwin, 1984, 277.

13. Geoffrey Sawer, Australian Federalism in the Courts, Melbourne University Press, 1967, 130-1.
14. Richard Hall, The Real Sir John Kerr, Angus & Robertson, 1978, 20.
15. Amalgamated Society of Engineers v Adelaide Steamship Company, 28 CLR (1920-21), 141-2.
16. Ibid., 142.
17. Ibid.
18. Ibid., 145.
19. Ibid., 146.
20. Ibid., 147.
21. Geoffrey Sawer, op.cit., 130.
22. Ibid., 133.
23. Zines, op.cit., 10.
24. Ibid.
25. Ibid., 10-11.
26. Stuart Macintyre, The Oxford History of Australia, Vol 4, 1901-1942, The Succeeding Age, Melbourne, 1986, 235.
27. Zines, op.cit., 13.
28. Quoted by Sir Gerard Brennan, Three Cheers for Engineers, Canberra, 31 August, 1995, typescript, 8.
29. Quoted in Peter Hanks, Australian Constitutional Law - Materials and Commentary, 4th ed., Butterworths, 19,394.
30. Sir Robert Menzies, Central Power in the Australian Commonwealth, Cassell, 1967, 37-9.
31. Ibid., 38-9.
32. C.M.H. Clark, A History of Australia, vol. VI, Melbourne University Press, 1987, 153.
33. Sir Gerard Brennan, op.cit., 7.
34. Sir Robert Garran, Prosper the Commonwealth, Angus & Robertson, 1958, 180.
35. Ibid., 181.
36. Ibid., 182.
37. Ibid., 181.
38. Zelman Cowen, op.cit., 150.