THE COMMONWEALTH CONSTITUTION: SECTION 92

—Its History in the Federal Conventions.

Few sections in the Commonwealth Constitution [1] have received so much judicial attention as section 92, [1a] which provides in effect that "trade, commerce, and intercourse among the States . . . . shall be absolutely free." The choice of the words "absolutely free" was deliberately made by the founders of the Constitution; to the critics who objected that the meaning of the words was far from clear, Mr. George Reid, then Premier of New South Wales, retorted with lofty assurance, "they have the further recommendation that no legal technicalities can be built upon them in order to restrict their operation. It is a little bit of laymen's language which comes in here very well." [2] The prophet did not live to see the mass of legal technicalities which has in fact been built on the section and on these two words in particular. [3]

For more than forty years distinguished judges have tried to give to the salient words of the section a coherent and comprehensive meaning capable of uniform and easy application to any new set of facts; but completely without success. All that is clear, from the mass of judicial decision and dictum, is that the words "absolutely free" do not mean what they appear to say. The Judicial Committee made a valiant attempt at authoritative definition in James v. The Commonwealth; [4] but even the High Court of Australia appears to be far from unanimous as to what is the definition which emerges from the reasoning of the Judicial Committee.[5] It may be assumed that past and present members of the High Court Bench are more or less familiar with the debates of the Conventions which

[1] (1900) 63 & 64 Vict., c. 12.

[1a] The full text is given at the end of this article.

[2] Convention Debates (Melbourne, 1898), II, 2367.

[3] *Commonwealth Statute Law Decisions* 1903-1918 (edited by S. G. Pirani and published by Butterworth & Co. (Australia) Ltd.) lists seven cases under sec. 92; *Cumulative Supplement No.* 23 (compiled by M. C. Tenison Woods and published by the same company) lists thirty-seven more for the period 1918-1947. The most recent instance of the nullifying effect of sec. 92 is *Bank of New South Wales v. The Commonwealth,* (1948) 2 Argus L.R. 89, where the High Court held *inter alia* (Latham, C.J., and McTiernan, J., dissenting on this point) that it renders nugatory the Commonwealth atttempt to nationalise banking.

[4] (1936) A.C. 578, particularly at 627-631; 55 C.L.R. 1, at 55-59.

[5] See incidentally Milk Board (New South Wales) v. Metropolitan Cream Pty. Ltd., (1939) 62 C.L.R. 116, and contrast Latham, C.J., at 125-127 with Starke, J., at 143.

preceded federation; the first five occupants of that Bench [6] had all taken an active part in one or more of the Conventions; but they and their successors have all been debarred—or have barred themselves—from resorting to the history of the Constitution in order to ascertain its meaning.[7] It is the object of this article to show that the exclusion of the evidence provided by the Convention Debates has resulted in a meaning and operation being given to section 92 which was never in the minds of the founders.

THE NATIONAL AUSTRALASIAN CONVENTION OF 1891.

To Sir Henry Parkes, for many years the dominant figure in New South Wales politics, must go most of the credit for inspiring renewed interest in and enthusiasm for plans for the federation of the six Australian colonies, and for bringing into existence the Convention of 1891. Then approaching the end of a long political career, he was as ever a fervent free-trader and made no secret of his hopes that the coming Commonwealth—for he was confident of its establishment—would adopt an economic policy similar to that which had brought prosperity to New South Wales. Elected as one of the senior colony's delegates to the forthcoming Convention, he held a preliminary conference with his New South Wales colleagues to whom he submitted a draft of the resolutions which in his opinion ought to be put before the Convention.[8] His first resolution, which by taking pride of place shows the importance which he attached to making Australia one "free-trade" unit, reads as follows:—

"That the trade and intercourse between the Federated Colonies, whether by means of land carriage or coastal navigation, shall be free from the payment of Customs duties, and from all restrictions whatsoever, except such regulations as may be necessary for the conduct of business."

When the Convention met at Sydney on 2nd March, 1891, there were present representatives of New South Wales, Victoria, Queensland, South Australia, and Tasmania; most of the New Zealand delegates did not arrive until 4th March, while the members from Western Australia joined the Convention on the 9th. On the opening day Sir Henry Parkes was unanimously elected President of the Convention, "at liberty to take part in our debates and . . . . free to vote." [9] On 4th March Parkes submitted a series of motions.

[6] Sir Samuel Griffith, the first Chief Justice, took a leading part in the drafting of the 1891 Bill, but was not present at the 1897-1898 Conventions, having in the meantime been appointed Chief Justice of Queensland. Of the first two puisne judges, Barton was present at all the Conventions and was leader of the 1897-1898 sessions; O'Connor took part in the latter only. The next two puisne judges to be appointed were Isaacs and Higgins (who took their seats in 1906); both had represented Victoria at the 1897-1898 Conventions.

[7] For a mild criticism of the judicial attitude generally towards the interpretation of statutes, see R. H. Graveson in 60 Juridical Review, at 97-99.

[8] Parkes, *"Fifty years in the Making of Australian History,"* II, 359.

[9] Convention Debates (1891), 3.

The first provided for the retention by the colonies of "all powers and privileges and territorial rights" except such as they might agree to surrender to the National Federal Government; the second dealt with trade and intercourse. The latter was presented in a slightly different form from that in which it had been submitted to his colleagues in Sydney, for it now read, "That the trade and intercourse between the federated colonies, whether by means of land carriage or coastal navigation, shall be absolutely free." In his autobiography [10] Parkes does not say why he made these changes but merely records the altered form. Two explanations are possible of the omission of the words, "(free) from all restrictions whatsoever, except such regulations as may be necessary for the conduct of business." It may be that on reflection Parkes considered them to be too vague; or it may be that for the sake of brevity he inserted the adverb "absolutely" before "free," regarding it as a synonym for the longer expression. The omission of the words "from the payment of Customs duties" after the word "free" does not justify the inference that Parkes was now thinking of an even wider freedom; for, speaking to his second resolution, he clearly revealed that it was the declaration of faith of a lifelong free-trader. "By my next condition," he said, "I seek to define what seems to me an absolutely necessary condition of anything like perfect federation, that is, that Australia, as Australia, shall be free—free on the borders, free everywhere—in its trade and intercourse between its own pople; that there shall be no impediment of any kind—that there shall be no barrier of any kind between one section of the Australian people and another; but, that the trade and the general communication of these people shall flow on from one end of the continent to the other, with no one to stay its progress or to call it to account; in other words, if this is carried, it must necessarily take with it the shifting of the powers of legislation on all fiscal questions from the local or provincial parliaments to the great national Parliament sought to be created. To my mind, it would be futile to talk of union if we keep up these causes of disunion. It is, indeed, quite apparent that time, and thought, and philosophy, and the knowledge of what other nations have done, have settled this question in that great country to which we must constantly look, the United States of America. The United States of America have a territory considerably larger than all Australasia—considerably larger, not immensely larger—and from one end of the United States to the other there is no custom-house office. There is absolute freedom of trade throughout the extent of the American union, and the high duties which the authors of the protectionist tariff are now levying on the outside world are entirely confined to the federal custom-houses on the sea-coast. Now, our country is fashioned by nature in a remarkable manner—in a manner which distinguishes it from all other countries in the wide world for unification of family life—if I may use that term in a national sense. We are separated from the rest of the world by many leagues of sea—from all the old countries, and from

[10] Parkes, op. cit., II, 367.

the greatest of the new countries; but we are separated from all countries by a wide expanse of sea, which leaves us with an immense territory, a fruitful territory—a territory capable of sustaining its countless millions—leaves us compact within ourselves. So that if a perfectly free people can arise anywhere, it surely may arise in this favoured land of Australia. And with the example to which I have alluded, of the free intercourse of America, and the example of the evils created by customs difficulties in the states of Europe, I do not see how any of us can hesitate in seeking to find here absolute freedom of intercourse among us."[11] The speaker's explanation of his object in moving the second resolution is capable of one interpretation only, that to him "freedom of trade" and "free-trade" were synonyms; at a later stage in his explanatory statement he reiterated his support of that particular economic dogma by saying that "if I should be honoured with a place in the federal parliament, it would be my duty, to the utmost of my powers, to seek to embody in the fiscal laws of the country the principles of what is known as free-trade."[12] His audience knew perfectly well what Parkes meant by his second resolution; when the Drafting Committee set about its task it included it, with slight changes in wording,[13] in clause 8 of Chapter IV (Finance and Trade) and made the operation of the clause dependent upon the imposition of uniform duties of customs by the federal parliament. When the clause as so drafted came before the Convention, there was no discussion of the principle incorporated therein; the report of the debate on the clause takes up eighteen lines only. It is submitted that the implied prohibition contained in the clause was directed, in the minds of all those who took part in the 1891 Convention, against the re-erection, either directly or in a disguised form, of the intercolonial tariff barriers which it was one of the objects of federation to demolish. The same Convention had already agreed to confer upon the federal parliament power to make laws with respect to "The regulation of Trade and Commerce with other Countries, and among the several States" (clause 52(1) of Chapter I) and "Customs and Excise and bounties, but so that duties of Customs and Excise and bounties shall be uniform throughout the Commonwealth, and that no tax or duty shall be imposed on any goods exported from one State to another" (clause 52(2)). It did not occur to any of the delegates that there might be an antinomy between clause 52(1) and clause 8 of Chapter IV, simply because to them clause 8 contained a guarantee of inter-state free-trade and nothing more; subject to the observance of that principle the federal parliament was to control interstate trade and commerce.

[11] Convention Debates (1891), 24-25

[12] Convention Debates (1891), 25. It may be noted that the words are always printed in hyphenated form.

[13] As drafted by the Committee and approved by the Convention, the clause read, "So soon as the Parliament of the Commonwealth has imposed uniform duties of customs, trade and intercourse throughout the Commonwealth, whether by means of internal carriage or ocean navigation, shall be absolutely free."

THE AUSTRALASIAN FEDERAL CONVENTION OF 1897-1898.

Mainly because of political changes in New South Wales [14] the 1891 Bill was not approved by the colonial legislatures; the federal movement appeared to have lost its impetus. It was not until 1895 that there was agreement to summon a second Convention, which first met at Adelaide on 22nd March, 1897. Neither Queensland nor New Zealand was represented, the former because the two houses of its legislature could not agree upon the method of selecting the colony's delegates, the latter because of waning interest; but the Convention was nevertheless described as Australasian, not Australian. Mr. C. C. Kingston, Premier of South Australia, was elected president, but was not expected to lead the Convention as Sir Henry Parkes had done when chosen to take the presidency of the 1891 Convention; the leadership went by unanimous vote to Mr. Edmund Barton of New South Wales. The latter moved certain resolutions embodying the "principal conditions" of federation which closely resembled Parkes's "principles" of 1891. Once again the legislative power over customs, excise, and bounties was to be vested exclusively in the federal parliament ("condition" III) and "the trade and intercourse between the Federated Colonies, whether by land or sea, shall become and remain absolutely free" ("condition" V). Elaborating, Barton said,[15] "The third (principal condition) contains conditions without which Federation would be impossible. The Federal Parliament should have the exclusive power to impose and collect customs duties. Clearly we could not have border duties. We should have free intercourse by sea, as well as by land, between one colony and another. We have had it argued outside this place that other forms of revenue than customs should be given up to the federation. . . . . that form of taxation, as a primary source of revenue, ought to be chosen which is least imbued with the idea of localism, and that is to be found in customs duties and the abolition of duties between States. The continuance of such duties is at variance with the federal idea." When he reached his fifth principal condition Barton did not think it necessary to say very much. "The fifth," he remarked, "is that the trade and commerce between the federated colonies, whether by land or sea, shall become and remain absolutely free. *I have dealt with that under sub-heading three, in referring to the imposition of Customs and Excise.*" [16] Could any evidence be clearer, more cogent, that in Barton's mind, as in Parkes's, the "absolute freedom" to which he referred meant freedom from customs and excise duties as between the colonies, i.e., free-trade at the borders? Barton said in express words that he was deliberately following in the footsteps of Parkes; "about these resolutions," he said, "they correspond very largely in the main with the proposals of Sir Henry Parkes at the Convention in 1891. They have been

[14] See Quick & Garran, *Annotated Constitution of the Australian Commonwealth*, 143 et seq.; John Reynolds, *Edmund Barton*, c.9.
[15] Convention Debates (Adelaide, 1897), 20-21.
[16] Author's italics.

altered only in the direction of brevity and simplicity." There was no more dissent from Barton's interpretation of this principle than there had been from Parkes's exposition six years earlier.

But Barton did not merely adopt the substance of Parkes's proposals; he closely followed the form also, and in one curious feature in particular. Both spoke, not of trade and intercourse between the federated colonies, but of *the* trade and intercourse between them. Does not the use of the definite article suggest that they had a specific object in mind? Had they not examined the existing course of trade and intercourse between the colonies and found it to be checked by tariffs which, with one or two possible exceptions, were protectionist, not revenue-raising? Did they not find bounties paid on local products so as to give their producers and manufacturers an advantage over their competitors from other colonies? Were they not convinced—and did not all their colleagues at the Conventions share this conviction—that federation would be a mere pretence if it did not put an end to these artificial obstacles to the free movement of goods and persons within Australia? In this sense intercourse as well as trade had to be free; it would be of little avail to prohibit the colonies from taxing goods if they could still hamper and harass the producers and vendors. Hence both *the* trade and *the* intercourse between the colonies must be protected, by a constitutional command, from any attempt, once the commonwealth was established, to re-impose the old fetters. This did not mean that the trade and intercourse were to be completely unrestricted, beyond the control of any legislature; for the coming commonwealth was itself to have the power to make laws for the regulation of that trade.

The Convention had to decide whether to use the 1891 Bill as the basis of its deliberations, or to start afresh; it preferred the second course, appointing a number of committees to draft particular chapters of a new Bill. But these committees could not avoid reproducing verbatim many clauses of the earlier Bill. For example, clause 52 of the 1891 Bill, setting out the legislative powers of the federal parliament, became clause 50 of the 1897 draft; but the first two sections of the latter, dealing with (a) trade and commerce and (b) customs, excise, and bounties, were in exactly the same terms as the corresponding sections in clause 52. The first section was adopted as read; there is still no suggestion of a possible inconsistency between that section and the "absolutely free" clause. The latter had now become clause 86, and was in the words used in the 1891 Bill. When it came before the Convention it did not have the quick and easy passage which had been vouchsafed to it in 1891.[17] To some extent it was discussed prematurely. Alfred Deakin of Victoria was apprehensive lest the combined effect of clauses 50(1)

[17] A careful reading of the debate leads irresistibly to the conclusion that the great majority of the delegates believed (a) that the clause contained a prohibition addressed solely to the States, and (b) that it was a prohibition of customs, excise, bounties, and the like imposts or privileges.

and 86 should be to deprive the States of all power, even within their own borders, over commodities the use or consumption of which might be deemed dangerous to public health or morals; unsuccessfully he moved an amendment to enable the States to control the import and consumption of alcohol and opium. Isaac Isaacs now began to criticise the wording of clause 86, using expressions which showed that while he was an advocate of free-trade among the States he doubted whether the clause contained the words appropriate to secure that objective. "This particular clause," he complained, "is not in the American constitution, and the words are very wide indeed. I think the words 'throughout the Commonwealth' should be 'among the States.' *We certainly want to secure inter-colonial free-trade,*[18] and to do all that is necessary to secure it, but to say that trade and intercourse throughout the Commonwealth shall be 'absolutely free' I think goes further than we intend. . . . . *This provision is really pointed at the border duties.*[19] It is intended as an indication of our adhesion to a principle that we shall not have any duties on the border to prevent the free introduction of goods, that is, that we shall have nothing that bars freedom of entry into any State of goods from any other State. . . . *What we intend to do is to prevent any State from charging importation duty on goods coming into its territory.*[20] If we use the words 'throughout the Commonwealth' I feel no shadow of doubt that these words will be construed as much larger than the well-known phrase expression (*sic*) 'among the States.' We know what we intend, but these provisions are to be subject to judicial interpretation hereafter." Then he too indulged in prophecy, and proved himself a more capable exponent of this art than Reid. "There is not the slightest doubt," he insisted, "that these words will be tested hereafter, and those who adhere to the opinion that they are not open to the interpretation I have placed upon them will have their opinions either justified or falsified by an authoritative tribunal. Personally I am thoroughly convinced that no provision will be more quickly tested in a court of law than this." [21]

Many other members of the Convention shared Isaacs's views as to the object of the clause, but not his fears as to its interpretation. O'Connor—with whom Isaacs was later to sit on the High Court Bench [22]—expressed a view which later both the High Court and the Judicial Committee were to consider only to reject. *"This clause,"* he said, *"must be read in connection with its position in the*

[18] Author's italics.
[19] Author's italics.
[20] Author's italics.
[21] Convention Debates (Adelaide, 1897), 1142-1144. After his elevation to the Bench Isaacs became one of the strongest supporters of a wide and far-reaching extension of what ultimately became sec. 92. The explanation may be psychological: He was subconsciously impelled to widen the ambit of sec. 92 because he had warned his colleagues at the Convention that this was precisely what would happen if they did not express their intentions more clearly; in other words, a dignified judicial way of saying, "I told you so."
[22] See note 6, supra.

Constitution, and its position comes immediately after the laws regarding uniformity of customs duties. When you read those clauses and you take the law relating to prohibiting the State from imposing customs duties you mean that as far as any restrictions by means of Customs duties or charges upon commerce are concerned they are absolutely free.[23] The hon. member wishes to restrict this by sustituting 'several States' for 'Commonwealth.' I do not think this is necessary as a restriction, and it would not be advisable, because there is no possible case you can put in which any misconception could arise."[24] No alteration was then made in the wording of clause 86; but when the Convention held its second session (which opened in Sydney on 2nd September, 1897), O'Connor then said that he had changed his mind. (In the meantime the number of the clause had been changed to 89 in the revised draft.) He was speaking to Deakin's second attempt to urge an amendment to section 1 of what had again become clause 52 so as to enable the States to control the use, sale, or consumption of fermented, distilled or other intoxicating liquors, the entry of which they could not prevent because of clause 89. O'Connor would have preferred to give this power to the federal legislature, but added, "The only thing that prevents the federal government from dealing with the question in this way is *the prohibition which may be implied*[25] from the clause relating generally to freedom of trade—clause 89. I have always thought that the words in that clause are very much too general. It was pointed out in Adelaide, and having thought the matter over since, I have come round to the view, that we should state our meaning there more definitely. There is nothing more dangerous in the Constitution than vague general words, the meaning of which we do not at present know ourselves. We ought to be very careful not to leave anything in the Constitution which may be seized upon by-and-by to wrest its meaning to something different from what we intended."[26] As far as the author has been able to discover, this was the first occasion on which a delegate had realised that clause 89, because of its broad terms, might be construed as a prohibition addressed to the Commonwealth as well as to the States; O'Connor's statement implies that in his opinion that was not the intention of the Convention, and there is no record of any dissent from that opinion.

This time Deakin's amendment to sec. 1 of clause 52 was approved. Cockburn of South Australia then moved a further amendment to enable the federal parliament by appropriate legislation to endeavour to prevent the transmission of vegetable or animal diseases from one State to another. Being now persuaded that clause 89 might prevent a State from taking action, he also voiced the fear that the clause might equally inhibit the Commonwealth. "There will not be such a power," he said, "because any law made

[23] Author's italics.
[24] Convention Debates (Adelaide, 1897), 1144.
[25] Author's italics.
[26] Convention Debates (Sydney, 1897), 1041.

by a State, or even by the Commonwealth parliament, which may have the effect of derogating from the freedom of trade or commerce will be absolutely null and void. A law prohibiting the passing of cattle over the border of Queensland into New South Wales will, to a great extent, interfere with freedom of trade. A law prohibiting the introduction of vines into South Australia, where we have no phylloxera, and where we mean to keep free from that scourge, would be interfering undoubtedly with freedom of commerce." [27] But Cockburn withdrew his amendment when Barton said that he intended to make clause 89 read in this way—"So soon as uniform duties of customs have been imposed, trade and intercourse throughout the Commonwealth is not to be restricted or interfered with by any taxes, charges, or imposts." [28]

However, clause 89 was not reached at the Sydney session. When it came up at the Melbourne session (which began on 20th January, 1898), Isaacs again directed his fire on it, and used in support a comment by Sir Samuel Griffith. "I venture to suggest," the latter had written, "a doubt whether the words of section 89 (which are the same as in the Draft Bill of 1891) are, in their modern sense, quite apt to express the meaning intended to be conveyed. It is, clearly, not proposed to interfere with the internal regulation of trade by means of licences, nor to prevent the imposition of reasonable rates on state railways. I apprehend that the real meaning is that the free course of trade and commerce between different parts of the commonwealth is not to be restricted or interfered with by any taxes, charges, or imposts. Would it not be better to use these or similar words?" [29] Isaacs found himself in complete accord with Griffith; "what we want to do," he said, "is to establish free-trade between the different parts of the Commonwealth, and I would press my honorable friends to consider again the words of Sir Samuel Griffith. . . . . I am perfectly willing to leave the matter to the Drafting Committee. It is important now, and it will increase in importance as time goes on. We do not know what questions may arise, and the meaning of the clause is bound to be tested almost on the first opportunity in the Federal Court. We should be in a very sorry plight if a decision were given following the American decisions which carried us much further than we anticipated, and there had to be a referendum of the states and of the people to get the clause altered. We want to get interstate freedom of trade, and I am sure that we are capable of expressing that intention. I am willing to leave it to the Drafting Committee, but, as a basis, I think Sir Samuel Griffith's words are very good." [30]

Barton agreed with Isaacs about the vagueness of the clause as then drafted, and went on to suggest that the combined effect of clause 89 and of section 1 of clause 52 might be to authorise the

[27] Convention Debates (Sydney, 1897), 1059.
[28] Convention Debates (Sydney, 1897), 1064.
[29] Convention Debates (Melbourne, 1898), I, 1014.
[30] Convention Debates (Melbourne, 1898), I, 1015.

federal parliament to control what was really intrastate, as opposed to interstate, trade. "We ought to be very chary," he said, "about adopting any provision that would interfere with any internal regulations that do not pertain to trade and commerce. The regulation of trade and commerce specified in sub-section 1 of clause 52 is with foreign countries, and among the several states. It is therefore defined in the first sub-section as interstate commerce. The question is whether we should consent to a form of words remaining in this clause which might have the effect of extending the operation of interstate commerce to matters of internal regulation within a state which might be, in one sense, inimical or in derogation of free-trade as practised in that state, but which it is not the purpose of the constitution to interfere with. Matters of internal regulation of trade, as long as they do not necessarily affect the commerce between one state and another, are entirely under the cognisance of that particular state, and it is not the purpose of any Federal Constitution to interfere with trade of that character. If we once grasp that fact, the contention of my honorable and learned friend is again strengthened. I leave the matter now to be discussed, and I am perfectly prepared to accept the general sense of the Convention. My inclination is in favour of Mr. Isaacs's view." [31] Here the emphasis lies, not so much on the danger that clause 89 might be construed so as to whittle down the power over interstate commerce conferred on the federal parliament by section 52(1), but on the risk that the substantive power might be deemed to extend beyond *interstate* commerce into the sphere of *intrastate* trade. Support for the views of Isaacs and Barton came from Quick [32] of Victoria. "What you want to secure," he said, "is free passage across the frontier. . . . . Freedom from all preferences or obstructions. The danger is that the words 'throughout the Commonwealth' would attach restrictions or disabilities to the local authorities. The words 'between the States' seem to give expression to what is intended. We should leave no room for doubt hereafter. I therefore support the suggestion made by the Attorney-General for Victoria" (Isaacs).[33] In similar vein O'Connor repeated his earlier view; "I think," he said "that *the object of this clause is clearly only to infer that there shall be no duties of customs, or charges of that character, upon the transit of goods from one state to another. I do not think it means anything more than that.* I quite agree with the criticisms of Mr. Isaacs as to the generality of the clause. I have read the valuable criticism of Sir Samuel Griffith, and it appears to me that we might very well adopt something in the nature of his suggestion as to defining the meaning of this subsection." [34]

Other speakers, while agreeing that the object of clause 89 was to guarantee interstate free-trade, did not think it was ambiguous or

[31] Convention Debates (Melbourne, 1898), I, 1016.
[32] One of the joint authors of Quick & Garran, *Annotated Constitution of the Commonwealth of Australia.*
[33] Convention Debates (Melbourne, 1898), II, 1017.
[34] ibid.

too general. Among these was Downer of South Australia, who urged the Convention not to alter the clause "because it contains *a cardinal principle of our Commonwealth of absolute free-trade within its borders.*" He, too, pointed out that the clause would have to be interpreted in its relation to other, cognate sections. "Although the clause says," he went on, "that trade and intercourse throughout the Commonwealth shall be absolutely free, you have to look through this Constitution at the other provisions, which show clearly what is the intention. This is a broad central declaration; the rest you gather from a perusal of other provisions of the Bill. I think the fears of Mr. Isaacs in the particulars he mentioned are not well founded." [35] However, another South Australian, Cockburn, now saw a possible inconsistency between clauses 89 and 52(1). "Quite apart from the question of trade between state and state," he commented, "is it not necessary that the Commonwealth itself should have some power for the restriction and regulation of trade. The words 'absolutely free' are infinite in their application, and they seem to me to take away from the Commonwealth the power to restrict and regulate trade within the confines of the Commonwealth." Here Deakin interjected that the speaker was going too far ahead; at the moment the Convention was being invited to substitute "among the States" for "throughout the Commonwealth," and members should confine their remarks to that proposal. Cockburn did not agree. "The whole clause," he replied, "is before the Committee, and it goes a good deal further than any of its advocates intend. I support the remarks of Mr. Isaacs in urging that some such limitation should be inserted, not only with the view of seeing that the clause goes no further than is desirable in the restriction of the States, but also in order that it shall not tie the hands of the Commonwealth itself, but shall allow it to impose such restrictions and regulations of trade throughout the Commonwealth as may, from time to time, in the interests of the people, be necessary." [36]

At this stage an amendment to substitute "between the States" for "throughout the Commonwealth" was carried; the Convention then proceeded to discuss, and ultimately to adopt, a second amendment which now appears in the Constitution as the second paragraph of section 92. [37] No further discussion of Griffith's suggestion took place, probably because of Barton's undertaking to amend the clause in accordance with that suggestion. When the clause was reconsidered some three weeks later it had not been revised; Isaacs at once moved to add the words "from taxation or restriction" after "absolutely free." It was at this point that Reid eulogised the existing words as "a little bit of laymen's language which comes in here

[35] Convention Debates (Melbourne, 1898), II, 1018.

[36] Convention Debates (Melbourne, 1898), II, 1020.

[37] This second paragraph has long been *functus officio*. It provided that if goods had been imported into any State before the imposition of uniform duties by the federal parliament, and were exported to another State during the two years immediately after the imposition of such duties, the goods were to be subject to federal duty (less any duty paid upon first importation).

very well." [38] The Convention was so impressed by Reid's views (or so anxious not to antagonise New South Wales, without whose participation federation could hardly be established) that it rejected Isaacs's amendment by 20 votes to 10; but Isaacs stuck doggedly to his guns. He now began to expound a number of new objections to the clause based on entirely different grounds, the discussion of which merely had the effect of virtually dividing the Convention into two opposed groups—Victoria against the rest. The gist of his argument was this: Melbourne is much nearer than Sydney to the rich southern district of New South Wales, the Riverina; with the object of encouraging Riverina primary producers to export through Melbourne instead of through the capital city of their own colony, Victoria had for some years carried Riverina produce on its railways at very low rates, lower in fact than it charged for the carriage of Victorian produce on the same lines. New South Wales tried to attract the traffic back to its railways by adopting the principle, the longer the haul the lower the rate per mile. Isaacs contended that because interstate trade was to be absolutely free, Victoria would no longer be able to offer special rates to Riverina consignors because their goods must cross a State border and immediately became part of interstate trade; he apparently gave such a wide meaning to clause 89 as to interpret "absolutely free" to mean free, not merely from duties and other restrictions, but also from special advantages or concessions. New South Wales, on the other hand, would still be able to offer to carry Riverina produce to Sydney at a rate ruinously low from the Victorian point of view because the carriage would be entirely *intrastate* and therefore unaffected by clause 89. It was obvious that most of the delegates failed to see any connection between this argument and the necessity, as to which there was no dispute, of having free-trade between the federated colonies. Isaacs, however, would not give in, and by his obstinacy in pressing what to the majority appeared to be a narrow, parochial claim on behalf of the Victorian railways, ultimately defeated his own object of having clause 89 expressed in less ambiguous terms. Barton, who at Sydney had said that he would ask the Drafting Committee to change the wording of the clause so as to make it read, "trade and intercourse throughout the Commonwealth is not to be restricted or interfered with by any taxes, charges, or imposts," was obviously so irritated by Isaacs's tortuous argument that he now opposed any alteration whatever in the clause. "I cannot see," he said, "any particular difficulty about this matter, except so far as intercolonial free-trade may be an irritating thing. I cannot apprehend the difficulty that my honorable and learned friend seems to be suffering under. The clause provides that—So soon as uniform duties of customs have been imposed, trade and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free. Do we mean that, or do we not? Do we mean that trade and intercourse is to be absolutely free, or is it to be left free sub modo? Each state is left to deal with the internal regulation of its

[38] Convention Debates (Melbourne, 1898), II, 2367.

own traffic. *A state is not interfered with except when it usurps the Commonwealth power of regulating trade and commerce between the states.*[39] What advantage does any state seek to gain beyond this? I cannot understand why, at every stage, we should be told that inter-colonial free-trade is a good thing so long as you let us do this, that, or the other. Is intercolonial free-trade a good, or is it a bad thing? Is it a bad thing unless you have as many obstacles in its way as you have fingers and toes? I have said before in this Convention that I am a protectionist, but I admit that *unless you have free-trade throughout the Commonwealth the Federation will not be worth a snap of the fingers."* [40] Here Isaacs interjected, "No one objects to that." Barton promptly took him up; "No one objects to my statement of that principle," he retorted, "but when it is laid down in so many words in the Constitution, it seems to cause a shrinking of the sensitive plant within honorable members. *I do not know why intercolonial free-trade, if it is essential to federation, should be objected to when it is provided for in the Constitution in so many words.*[41] Why should we have all these qualifications? . . . . we have made it clear that the power of the Parliament extends to the making of laws with regard to trade and commerce. We have made it clear that the Commonwealth may prohibit any discrimination or preference such as would be unfair or unreasonable to any state. We have added that fair consideration should be given to any financial outlay, and . . . . we have provided that where the traffic rates apply equally to goods from one colony to another, the fact that they are imposed for the purposes of internal development shall not make them bad.[42] . . . . If these provisions have been inserted in the Constitution for the benefit of certain gentlemen, or, at any rate, at their instance, and if they say that they want otherwise to derogate from free-trade, are we not entitled to press the argument that this would not be a Federal Constitution if we acceded to their request? I am unable to see why principles of this kind, which have been inserted in the Constitution, should be waived or whittled away, or why they should be made subject to any qualification or restriction. The words which it is proposed to insert would be no good unless they qualified the doctrine that intercolonial free-trade shall be free, and that is why I cannot understand the honorable member who proposes them." [43] Isaacs thought he was being accused of seeking to undermine the sacrosanct principle of intercolonial free-trade, and showed his annoyance in his reply. "I do not think," he complained, "I said a single word which justified the assertion that I quarrelled with the doctrine of intercolonial free-trade. Anything I said on that subject, I think must have assured

[39] Author's italics.
[40] Author's italics.
[41] Author's italics.
[42] Not all the provisions to which Barton refers survived the 1898 session.
[43] Convention Debates. (Melbourne, 1898), II, 2369-2371.

the Convention, at least those who listened to me,[44] that my opinion was directly the opposite. If it was not for the belief that we should get intercolonial free-trade we should not be here today trying to form a Constitution. I do not think there is anyone more loyal to the principle than I am"; but nothing could dissuade him that the principle of intercolonial free-trade would demand greater sacrifices from Victoria unless after federation it could still bid for and obtain the lion's share of the Riverina traffic.

Deakin, a fellow Victorian, tried to act as peacemaker. "The considerations," he remarked, "which (Mr. Isaacs) has offered resolve themselves into two, and these I venture, with all deference, to press on the leader of the Convention. In the first place, I take it that if this clause had been the product of the present Drafting Committee we should never have seen the words 'absolutely free.' From the Bill of 1891 we adopted a number of phrases which we have since seen the necessity of considerably qualifying in order to express more directly and distinctly the exact meaning we desire to convey. Our purpose is to convey our meaning, and not to accomplish more than is necessary to fulfil the purpose we have in view. These words are not known to the American Constitution, and, so far as I am aware, are unknown in any other Constitution. Consequently, their operation is largely a matter for legal speculation and inquiry. So far as they imply the removal of everything in the nature of an obstruction placed in the way of intercolonial trade by any state they have our hearty approval. The only question is whether the words in their present connexion and novel combination do not go further than the removal of obstructions, and imply the power to interfere in regard to matters which may be considered to affect absolute freedom of trade and intercourse." [45] He then endeavoured to restate Isaacs's contentions in a more lucid and acceptable form; but even he failed to shed light on the prevailing darkness. Barton appeared to speak for the great majority when he said, "I think somebody has got hold of a bogy here tonight"; but, obviously mollified by Deakin's more co-operative and genial attitude, he decided to reserve judgment. "Mr. Isaacs and Mr. Deakin," he said, "have put their position fully. I have not been able to follow them, but I will read the Hansard report of tonight's debate, and I will do everything I can to master the position which they have set out; and although I cannot promise to look at the matter through their spectacles, I will look at it with my own eyes, in the light that their speeches furnish me. If I then become not merely convinced that they are right, but even if I feel a very serious doubt whether this

[44] Is a note of exasperation to be detected here? The remark was hardly likely to commend the speaker's views to his audience and particularly to those who had in fact been inattentive. Deakin, in his *Federal Story*, implies that Isaacs frequently rubbed people up the wrong way (see particularly his character-sketch of Isaacs at pp. 67-68). It is no slur on the memory of a very distinguished judge and Australian citizen to suggest that, in the Convention, his pertinacity only helped to defeat his own praiseworthy proposals.

[45] Convention Debates (Melbourne, 1898), II, 2373.

clause will not do some injustice, I will do what I can to get the Drafting Committee to make the matter acceptable to honorable members, always reserving to myself, if I think the clause is clear, the right to make no alteration whatever." [46] With this assurance from Barton the clause was at long last passed. The clause was never re-committed; the Convention was never officially informed by Barton what decision he had reached after reading the printed report of the speeches; but evidently he decided against any substantial change. Clause 89—with the two amendments accepted by the Convention before the acrimonious argument about railway rates began—appeared as clause 92 of the final draft at the Melbourne session and as section 92 of the Constitution as ultimately adopted, in these words:—

> On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free.
>
> But notwithstanding anything in this Constitution, goods imported before the imposition of uniform duties into any State, or into any Colony which, whilst the goods remain therein, becomes a State, shall, on thence passing into another State within two years after the imposition of such duties, be liable to any duty chargeable on the importation of such goods into the Commonwealth, less any duty paid in respect of the goods on their importation.

(To be continued.)

F. R. BEASLEY.

[46] Convention Debates (Melbourne, 1898), II, 2374-2375.