A GOVERNMENT OF LAWS AND YET OF MEN

— being a survey of half a century of the Australian Commerce Power.*

I. SOME FEATURES OF CONSTITUTIONAL FORM AND GROWTH IN AUSTRALIA.

Neither the adoption[1] nor (with some fluctuation) the subsequent interpretation of the Commonwealth of Australia Constitution Act 1900 has been free of American influence.[2] Some parallels with the American constitutional system are obvious enough. Both systems are "rigid," based upon written provisions. In both systems the drafting history is well known or capable of being known. Both allot specific powers to the federal government, leaving the residue to the States. Both entail dubious reliance on the separation of judicial from other powers.[3] Both systems, by allotting power over defence and over commerce beyond the limits of a State to the

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1 For some account of the historical background so far as here relevant, see pp. 469-474, *infra*.

2 *Amalgamated Society of Engineers v. Adelaide Steamship Company,* (1920) 28 C.L.R. 129, is generally regarded as a point up to which American influence on interpretation was strong, and after which it was eclipsed. That case ended temporarily the tendency to import the doctrine of the immunity of State instrumentalities. That doctrine, however, has recently had a spectacular revival: see *Melbourne Corporation v. Commonwealth,* (1947) 74 C.L.R. 31. It was also referred to inconclusively in the *Bank Nationalization Case,* (1948) 76 C.L.R. 1.

3 The Australian Constitution, however, does not involve the general doctrine of the separation of powers as known in the United States. Australian problems in this regard have arisen mainly from the requirement in sec. 72 of the Constitution that Judges shall have life tenure. In *Waterside Workers' Federation of Australia v. Alexander,* (1918) 25 C.L.R. 434, it was held that the Commonwealth Arbitration Court as then organised was not a "Court", since the President of the Court had no life tenure as prescribed by sec. 72 of the Commonwealth Constitution. The result of this finding was that the Arbitration Court's functions were held not to be judicial, and therefore its awards, though valid, could not be enforced by it. Tenure on the Arbitration Court was subsequently placed on a life basis.

federal authority, have required difficult determinations as to the scope of these concepts.[4] In both systems, these particular determinations have acquired crucial importance in our present century, marked as it is as regards defence, by the expanding techniques of total war,[5] and as regards commerce, by the intractable complexity of economic relations. And in both systems, these and other judicial determinations of governmental power are raised to the level of momentous statecraft by the difficulty of constitutional amendment, which experience in both countries has shown to reach almost the point of political impossibility.[6]

Comparison need not here be taken beyond the purpose of this paper; and, within the same limits there are, of course, major differences to be noted. Two of these, perhaps, are outstanding. On the side of political structure, Australia models herself on the traditional British principle of the Executive responsibility to the Legislature, whilst in the United States, the fuller separation of powers leaves the Executive in theory (and largely in practice) independent of Congress. On the legal side, apart from the limited provisions forbidding the establishment of religion in sec. 116, and for equal treatment in each State of the citizens of all States in sec. 117, the Australian Constitution provides no express Bill of Rights corresponding to those in the American Federal and State Constitutions.[7]

[4] For the relevant provisions so far as the commerce power is concerned, see p. 470, *infra*.

[5] For a brief note covering summarily World War II authorities on the defence power, see H. W. Arndt, *The Extent of the Defence Power in the Post-War Period: A Case Study of the Problem of Judicial Review,* in (1949) 8 Public Administration (Sydney), 87-97.

[6] Under sec. 128 of the Commonwealth Constitution, any proposed alteration of the Constitution must normally be passed by both Houses of the Commonwealth Parliament, and then submitted to a popular referendum. At the referendum, the proposal to be carried must be approved not only by an over-all majority of the electors, but also by a majority of the electors in a majority of the States. Up to the time of writing, twenty-three different proposals for constitutional amendment have been presented to popular referendum, and only four of these have been carried, of which latter only two (the Financial Agreement and State Debts Referendum of 1928 (as to which see *infra*), and the Social Services Referendum of 1946) can be regarded as being of substantial importance.

[7] There should also perhaps be included here a reference to the limitation, in sec. 51 (xxxi) of the Constitution, of the Commonwealth's power of acquisition of property, to acquisition on "just terms"—"The acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws."

All six judges of the High Court sitting in the *Bank Nationalization Case,* (1948) 76 C.L.R. 1 (cited note 2, *supra*), were agreed that the Commonwealth Act there in question violated the limitation in sec. 51 (xxxi) as to "just terms", the unanimity of the judges on this one point being most striking in view of their substantially conflicting views upon the other major points raised, which are the main subject of this paper.

It has been held that even legislation under the defence power is subject to the provisions of sec. 51 (xxxi), so that in acquiring property even for

This latter difference may, however, be made too much of. Insofar as the Federal Government in Australia is a government of limited powers, many of the rights sanctified in the American Bills of Rights enter into constitutional determination by the judges; they represent received ideals which colour the judicial approach. A good illustration will be seen later in this paper in the judicial reading into the provisions of sec. 92 of the Constitution, that commerce between the States shall be free, of the ideal that restriction or destruction of the liberty of contract of inter-State traders must be justified as a proper governmental regulation.

The overriding difference between the Australian and American Constitutions resides, however, not in their provisions, but in the comparative youth of the Australian Constitution, as against the American, which is the oldest of "going" written constitutions. This difference in constitutional maturity is accentuated by the industrial and demographic immaturity of the Australian economy. From this key difference flow many others.

For instance, despite our assumption in Australia that we already have a mass of judicial decisions on the Constitution, in fact, as compared with the American, our Constitution is still comparatively unexplored. This not only arises from differences in constitutional and economic maturity, but from the absence in Australia of an explicit Bill of Rights. For, though the absence of a bill of fundamental rights does not prevent judicial importation of fundamental rights into the Constitution, it does affect the tendency of individuals and of corporations to vindicate their rights by constitutional attack—the turnover, as it were, of constitutional business.[8]

what the Court admits to be the pivot of the Constitution, namely, defence purposes, the Commonwealth must pay just terms (*Johnston Fear & Kingham & The Offset Printing Company v. Commonwealth,* (1943) 67 C.L.R. 314). See also possibly sec. 75 (v) vesting in the High Court original jurisdiction in all matters in which mandamus, prohibition, or injunction is sought against an officer of the Commonwealth.

[8] Turnover of such business is, of course, also affected by the available procedures of challenge.

The High Court declined comparatively early to entertain proceedings by way of a request for advisory opinions, analogous to those entertained under the Canadian Federal system, the High Court attitude in this regard stemming from the very limited separation of powers under the Commonwealth Constitution and the view that the essential function of the judiciary was the decision of matters *inter partes,* and not the consideration of legal questions *in abstracto* (*In re Judiciary and Navigation Acts,* (1921) 29 C.L.R. 257). Some breaking down of the rigidity of this view has followed on the increasing recourse since *Dyson's Case* (*Dyson v. Attorney-General,* [1911] 1 K.B. 410) to the equity jurisdiction for the protection of public interest by way of declaratory judgment against the Crown as represented by the Attorney-General, and by way of a suit for injunction in which the Attorney-General, as guardian of the public interest, is plaintiff. The test

Furthermore, and part consequentially, the Australian High Court has not as yet been subjected to the ordeal undergone by the United States Supreme Court, of adjusting lines of decision set in nineteenth-century social and economic contexts, to the radically different contexts of the twentieth mid-century. In the absence of this ordeal, it may not be disrespectful to observe that the Court lacks also the accompanying experience. Australian lawyers can, of course, point to vacillations and even inconsistencies, and even internal contradictions of the High Court decisions, for instance, under the defence power.[9] But there have been few such open and spectacular reversals of lines of decision expressing social and economic values, such as that of the Supreme Court of the United States in *West Coast Hotels Company v. Parrish*[10] when it reversed *Adkins v. Children's Hospital.*[11]

The High Court, indeed, is sternly tenacious of the view that it ought to follow its own decisions.[12] In this regard, without doubt, its attitude is influenced, not only by its comparatively limited span of experience, but also by the example of the House of Lords. Tenacity does not prevent this attitude being something of a curiosity. For, in the first place, the largely formal nature of the *London*

of what is the public interest is rather obscure, though it has been indicated by Starke, J., in *Ramsay v. Aberfoyle Manufacturing Co. (Australia) Pty. Ltd.*, (1935) 54 C.L.R. 230, at 249, that the Attorney-General might properly be interested in such functions as the maintenance of safety, sanitary or food regulations, the despoiling of public recreation grounds, or the infringement of by-laws.

The declaratory judgment has had striking use in recent Australian constitutional cases, notably in the *Potato Case (Tasmania v. Victoria,* (1935) 52 C.L.R. 157) where one State sued another, and in the *Pharmaceutical Benefits Case (Attorney-General for Victoria v. Commonwealth),* (1946) 71 C.L.R. 237, where the Attorney-General for Victoria intervened at the relation of a number of individual doctors, the Attorney-General being in fact the mouthpiece of the medical profession in its opposition to the Act in question. In the *Pharmaceutical Benefits Case* the declaratory judgment was granted to restrain the Commonwealth from giving effect to the Act, even before it was proclaimed. In the *Bank Nationalization Case,* injunctions were granted restraining the Commonwealth Government and its officers, although no action had in fact been taken to give effect to the Act in question.

[9] See generally the able study by G. W. Paton and G. Sawer, *Ratio Decidendi and Obiter Dictum in Appellate Courts,* (1947) 63 L.Q.R. 461.

[10] (1937) 300 U.S. 379; 81 Law. Ed. 703. Perhaps the nearest Australian parallel, though the economic content is there more latent, is the Court's double *volte face,* on the doctrine of implied immunity of State instrumentalities first in the *Engineers' Case (Amalgamated Society of Engineers v. Adelaide Steamship Company,* (1920) 28 C.L.R. 129) and then in the *Local Government Banking Case (Melbourne Corporation v. Commonwealth,* (1947) 74 C.L.R. 31). And see note 2, supra.

[11] (1922) 261 U.S. 525; 67 Law. Ed. 785.

[12] The High Court, though not in a technical sense bound by its previous decisions, will only review a previous decision when it regards that decision as *manifestly* wrong (*R. v. Commonwealth Court of Conciliation and Arbitration, Ex parte Brisbane Tramways Co. Ltd.,* (1914) 18 C.L.R. 54).

Tramways Case[13] rule, in the light of the techniques of distinguishing cases, is a juristic commonplace.[14] In the second place, the function of the High Court as the normal final resort of appeal[15] in vital questions under a rigid constitution, difficult of amendment, is obviously different *toto coelo* from that of the House of Lords as the final resort under a flexible constitution where the legislative power is unlimited. In the third place, the Privy Council is the only resort of appeal from the High Court on matters that are appealable, and the Privy Council, which has more experience of interpreting written constitutions than the High Court of Australia, does not regard itself as bound by its own decisions. Both on formal and on substantial grounds, therefore, it is curious that the High Court should spurn the example of the Privy Council, and follow that of the House of Lords.

Certain other features of this judicial mental pattern would strike American lawyers by comparison with the United States Supreme Court. One is the persistent refusal of the High Court to permit reference to the legislative *travaux preparatoires,* even in constitutional questions.[16] This again is an unquestioning extension of English judicial attitudes to constitutional functions which English courts do not have. Another is the continued dominance of a conception of the judicial function, which, if it is not of the slot-machine variety, is nearer to it than to the heresies that are now orthodox to most American lawyers and judges on the appellate

[13] *London Street Tramways Company, Limited v. London County Council,* [1898] A.C. 375, holding the House to be bound by its own decisions.

[14] See C. K. Allen, *Law in the Making* (1st edn., 1927), 164 et seq. See generally on the relation of this to the judicial process, J. Stone, *The Province and Function of Law,* Chapter 7, *passim.*

[15] Under sec. 74 of the Commonwealth Constitution, no appeal lies to the Privy Council from the High Court upon any question, however arising, as to the limits *inter se* of the constitutional powers of the Commonwealth and of the States, without the leave of the High Court first being obtained. The restrictive operation of sec. 74 of the Constitution upon appeals to the Privy Council is still further accentuated by the decision in *Baxter v. Commissioner of Taxes,* (1907) 4 C.L.R. 1087, that the High Court (and not the Privy Council) is the sole arbiter of what constitutes an *inter se* question for purposes of sec. 74. Note that absence of requisite leave to appeal to the Privy Council was an important ground of the Privy Council's decision against the Commonwealth in the *Bank Nationalization Case* (see note 125, *infra*).

[16] This refusal is all the more striking because the first High Court Bench was quite prepared to allow reference to draft Constitution bills that had been submitted to Federal Conventions in 1891, 1897, and 1898, in order to clear up the interpretation, *inter alia,* of the second paragraph of sec. 92 (*Tasmania v. Commonwealth,* (1903-1904) 1 C.L.R. 329). Griffith, C.J., justified this reference "as a matter of history of legislation," but was careful to add that the expressions of opinion of members of the Convention should not be referred to (*ibid.,* at 333). It is interesting to note that all three members of the original High Court Bench appointed in 1903, Griffith,

level. Very few Justices of the Supreme Court of the United States, since the Brandeis brief was named, would be prepared even to argue that the Court's task, for instance in enforcing the Fifth and Fourteenth Amendments, was a mere matter of application of the constitutional provisions, free of the social knowledge and value judgments of the tribunal. Rather, if a stranger's comment be permitted, the present members of the Supreme Court have gone too far towards reducing many constitutional provisions to mere pegs upon which to hang social knowledge and value judgments.

The High Court of Australia, by contrast, still clings to the more modest view of its constitutional function, namely that they are not concerned with "politics," or "economics" or "sociological inquiry," or value judgments, but with the provisions only of the constitutional instrument under application. As Latham, C.J., observed in *South Australia v. Commonwealth,*[17] the famous *Uniform Tax Case,* which more than any other revolutionised the political and economic structure of Australian federation:

> "Thus the controversy before the Court is a legal controversy, not a political controversy. It is not for this or any court to

C.J., Barton and O'Connor, JJ. (and indeed also Isaacs, J., who was appointed to the High Court shortly afterwards), had active political backgrounds, and all had played leading roles at the Convention of 1897-1898, which immediately preceded Federation. In a sense then, their position was often not very far removed from that of mediaeval English judges who have been recorded to observe that counsel argued in vain on interpretation since the judge himself had assisted at the drafting. In this regard, note especially *ibid.,* at 351, the judgment of Barton, J. ("the father of Australian Federalism", and the first Prime Minister of the Australian Commonwealth).

It is accepted in Australia, however, that where legislation forms or may form part of a scheme, then all relevant legislation forms part of the circumstances which a Court may consider (*W.R. Moran Pty. Ltd. v. Deputy Commissioner of Taxation,* [1940] A.C. 838 (Privy Council), where a number of Commonwealth and State Taxing and other Acts, representing a comprehensive scheme of assistance to the wheat industry, were considered together by the Court. The Privy Council was also prepared to examine the record of the conference at Canberra between the Commonwealth Prime Minister and the six State Premiers, which agreed upon the scheme (see Viscount Maugham's judgment on behalf of the Privy Council at 848). See also *South Australia v. Commonwealth,* (1942) 65 C.L.R. 373 (*Uniform Tax Case*), where Latham C.J., after noting that the preambulatory statement of objects might, in a doubtful case, turn the scale, but that such a declaration by a Parliament of limited powers cannot be regarded as conclusive, agreed with the other members of the Court that evidence of speeches made in Parliament or of the report of a committee on which legislation is based, adduced to show the purpose or intention of Parliament or the existence of a "scheme" of legislation, is irrelevant to the determination of the validity of legislation, and therefore inadmissible (see especially per Latham, C.J., *ibid.,* at 409-410).

17 (1942) 65 C.L.R. 373, at 409. The illustrations which the Chief Justice gave of his observation were less open to attack than the unqualified proposition itself.

prescribe policy or to seek to give effect to any views or opinions upon policy. We have nothing to do with the wisdom or expediency of legislation. Such questions are for Parliament and the people."

II. THE FULL IMMUNITY FROM DOUBT OF THE JUDICIAL MIND.[17a]

The will to believe in the full immunity of the judicial mind from all extra-legal problems and especially problems of evaluation has its most spectacular results in constitutional matters. And it is to some of these results that the present paper is directed. The will so to believe characterises the members of the Court generally, even, be it said, those more interested in American institutions. Sir Owen Dixon's interests in American law were no doubt enhanced during his important wartime mission to Washington, when he made contacts fruitful for both countries with the American Bench and Bar. But his views on this matter, as expressed shortly before his departure, do not appear to have materially altered in the *Bank Nationalization Case*[18] in 1948.

This learned judge's position in *Waghorn v. Waghorn*[19] in 1941 is worth a preliminary glance before we approach the main constitutional issue to which this paper is directed. For, by the very triviality of the private law point there at issue, it exhibits in marked degree the sincerity with which the ablest judges may abnegate the very creative activity which their decision presupposes. In momentous constitutional questions, where decision will affect the lives and fortunes of all citizens, along with the political and economic future of the Commonwealth, the nature of judicial unawareness is similar, but its exposure is too often hindered by the warmth with which critics divide on the merits of the matter.

In *Waghorn v. Waghorn,* the short question was whether the appellant, whose spouse had (unknown to her) given her good ground for ceasing to cohabit, could nevertheless be guilty of "deserting" him. The matter was complicated by a certain conflict of tendency between the earlier Australian High Court decisions on this point,[20] and the view of the English Court of Appeal.[21]

[17a] The title of this section is taken from Sir Frank Gavan Duffy's delightful verses (under the pseudonym of *"Vie Manquee"*) in "A Dream of Fair Judges" (reprinted in (1945-46) 19 A.L.J. 43).

[18] *Bank of New South Wales v. Commonwealth,* (1948) 76 C.L.R. 1.

[19] (1941) 65 C.L.R. 289.

[20] Notably *Crown Solicitor v. Gilbert,* (1937) 59 C.L.R. 322.

[21] *Herod v. Herod,* [1939] P. 11, approved by the Court of Appeal in *Earnshaw v. Earnshaw,* [1939] 2 All E.R. 698.

Dixon, J., purported to decide the matter on the meaning of "desert" as "an ordinary English verb about the meaning of which there should be no mystery, even in the law." "Desert" self-evidently involved "a breach of obligation whether legal or moral," which would not exist if ground had been given, whether or not the wife now charged with desertion was aware of the marital offence. This reasoning, said the learned judge, "attempts to follow legal principles and, as the fashion once was, to put out of consideration social or sociological conceptions or preconceptions."[22]

It might be of little import that a professor of jurisprudence is insensitive to this self-evident meaning of the word "desert"; the meaning might even be self-evident, though Sir Boyd Merriman, P., of the English Court of Appeal and other judges declined to see it. But such facts should give pause. If the learned judge had no doubts, it may have been precisely because social or sociological conceptions or preconceptions resolved them.

But the latent conceptions and preconceptions on this point paled into insignificance when the learned judge turned to the question whether the High Court ought to follow its own decisions when they conflicted with those of the English Court of Appeal.

> "If this court," he said, "is convinced that a particular view of the law has been taken in England from which there is unlikely to be any departure, wisdom is on the side of the court's applying that view to Australian conditions, notwithstanding that the court has already decided the question in the opposite sense. The fact that we still believe in the correctness of our own decision, as I do in the present case, is not in itself an adequate ground for refusing to follow this course. . . . The common law is administered in many jurisdictions, and unless each of them guards against needless divergences of decision, its uniform development is imperilled."[23]

Why did Dixon, J., assume that uniformity with English decisions is so vital as to justify overriding the Court's own decision, which the Court still believes to be the correct decision? Ought we not rather to say that English decisions, of necessity rendered by reference to English conditions, have no claim to application to Australian conditions until similarity of these conditions[24] is shown?

The question becomes the more intriguing as the learned judge informs[25] us that divergences from English authority are tolerable

[22] *Waghorn v. Waghorn,* (1941) 65 C.L.R. 289, at 295, 296
[23] *Ibid.,* at 297.
[24] On this point see the courageous article by R. W. Parsons, *English Precedents in Australian Courts,* 211, *supra.*
[25] *Waghorn v. Waghorn,* (1941) 65 C.L.R. 289, at 297.

on minor matters of application of a principle, but that on the major principles themselves, uniformity is vital. For it might reasonably be thought that the position was just the reverse; that in developing a system of law for Australian conditions, it would be precisely the major matters of principle whose applicability to Australian conditions should be carefully scrutinised by the local court.

The answer to our question can scarcely be merely in the convenience of uniformity to the Australian legal profession as affording the maximum utility to English textbooks, digests and reports. Other things being equal, this is, of course, desirable: but this itself would be a "social" or "sociological" consideration, which Dixon, J., thinks that judges ought to eschew. Only it would be a rather warped and emasculated resort to such considerations.[26]

III. HISTORICAL BACKGROUND OF SECTION 92.

> "In fashioning the Constitution of the Commonwealth of Australia," declared Lord Haldane, "the principle established by the United States was adopted in preference to that chosen by Canada. It is a matter of historical knowledge that in Australia the work of fashioning the future Constitution was one which occupied years of preparation through the medium of conventions and conferences in which the most distinguished statesmen of Australia took part. Alternative systems were discussed and weighed against each other with minute care. The Act of 1900 must accordingly be regarded as an instrument which was fashioned with great deliberation, and if there is at points obscurity in its language, this may be taken to be due not to any uncertainty as to the adoption of the stricter form

[26] A rather fanciful alternative basis for this assumption might be by way of gloss upon 9 Geo. IV., c. 83. It would proceed as if to assume that common law is immemorial and immutable, and that the common law of the Australian Commonwealth, of the Australian States and of England has continued to be identical since 1828, except to the extent that it may have been altered by statute. Such a view was all but formulated by Griffith, C.J., in *R. v. Kidman,* (1915) 20 C.L.R. 425, at 435-436: "It is clear law that in the case of British Colonies acquired by settlement the colonists carry their law with them so far as it is applicable to the altered conditions. In the case of the eastern Colonies of Australia this general rule was supplemented by the Act of 9 Geo. IV., c. 83. . . . In so far as any part of this law was afterwards repealed in any Colony it, no doubt, ceased to have effect in that Colony, but in all other respects it continued as before. When in 1901 the Australian Commonwealth was formed . . . the current which had been temporarily diverted into six parallel streams coalesced."

For a recent High Court consideration of its attitude towards House of Lords cases see *Piro v. W. Foster,* (1943) 68 C.L.R. 313; *Waghorn v. Waghorn,* (1941) 65 C.L.R. 289, is the latest consideration of its attitude to the Court of Appeal. And see generally R. W. Parsons, *op. cit.,* note 24, *supra.*

of federal principle, but to that difficulty in obtaining ready agreement about phrases which attends the drafting of legislative measures by large assemblages."[27]

The early recommendations of the Committee of the Constitutional Convention in 1891 had contained only two clauses relating to trade and commerce, both of them based on the model of the United States Constitution. One clause forbade preference to the ports of one State over those of another, the other empowered the Federal Parliament to annul State laws derogating from freedom of inter-State trade; the former being based on the United States Constitution, Article 1, section 9, clause 6, the latter being a generalisation from the judicial interpretation of the federal power over inter-State commerce in the United States. And in the final outcome, the first placitum of sec. 51 confers power on the Commonwealth Parliament with respect to "trade and commerce with other countries and among the States," this being on its face indistinguishable from the power of the American Congress "to regulate commerce with foreign countries, and among the several States."

Sec. 92, on the other hand, has quite a different origin, and has no American counterpart. It provides as follows:

> 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 of customs 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.

An able contemporary observer of the long years of pre-Constitution debate, has written on this section:

> "A section which has already been given four interpretations[27a] . . . not one of which, it may be added, is justified by the language; which shows our High Court undeservedly in a light which is inconsistent and regrettable, which robs the States of much of their promised autonomy and tends to wholly prevent certain lines of economic development, such a section may well

[27] *Attorney-General for the Commonwealth v. Colonial Sugar Refining Co. Ltd.*, [1914] A.C. 237, 254.

[27a] See pp. 474-478, *infra*.

go. If it ever had a reasonable purpose that purpose ceased with the referendum of 1899. Since then it has merely cumbered the earth and the law books."[28]

Sec. 92, according to Holman and other authorities,[29] was devised to win the support of New South Wales for federation. In 1891, New South Wales was the richest and second most populous of the States; she was the only free-trade State, and she feared the spread of protectionism under federation. First introduced in 1891, sec. 92,[30] as the constitutional debate proceeded, had become even more essential by 1897, when at the Adelaide Convention of that year, Queensland stood aloof, and New South Wales still wavered. But the necessity for sec. 92, argued Holman, was "not as part of the working machinery when the new government was set up, but as an aid to pass the difficult ordeal of the Referendum in New South Wales."[31] In his view, the substance of the free-trade principle as it affected government was already contained in sec. 90, giving exclusive power of imposing customs duties to the Federal Parliament, and sec. 92 was only retained to allay "the ignorant fears of certain Free Traders."[32]

It was this local and transient objective which injected sec. 92 (a provision without precedent in the United States Constitution) into a general system of federal control of inter-State commerce, modelled in other respects on the American. The two most powerful legal minds at the Convention, Isaac Isaacs and Sir Samuel Griffith, both expressed the view, at the later stages of drafting, that the section meant merely that inter-State trade was not to be "restricted or interfered with by taxes, charges or imposts."[33] And there is the

[28] W. A. Holman, *Section 92—Should it be Retained?*, in (1933-34) 7 A.L.J. 140, at 145. See also for Holman's views his *Three Lectures on the Australian Constitution*, (1928) 55 et seq. on sec. 92, 33-60 on constitutional interpretation generally. W. A. Holman, K.C., had a distinguished career both in politics and the law, being the founder in the last decade of the 19th century of the Australian Labour Party, and Premier of New South Wales 1913-1920. See H. V. Evatt, *Australian Labour Leader* (a biography of Holman).

[29] See F. R. Beasley, *The Commonwealth Constitution: Section 92, Its History in the Federal Conventions*, 97, 273. 433 *supra*; Sir Robert Garran, *The Coming Commonwealth*, 142; Barton, J., (who was outstanding in the constitutional debates) in *Fox v. Robbins*, (1909) 8 C.L.R. 115.

[30] Which was then numbered 86.

[31] W. A. Holman, *op. cit.* (note 28, *supra*), at 141.

[32] *Ibid.*

[33] W. A. Holman, *op. cit.* (note 28, *supra*), at 142-143, quoting a memo. of Sir Samuel Griffith at p.2365 of the Debates of the Melbourne Session of the Constitutional Convention.

Sir Samuel Griffith was first Chief Justice of the High Court of Australia, holding office 1903-1919. He had been Premier and later Chief Justice of the State of Queensland, and had been present at some of the sessions of the Constitutional Conventions of 1888, 1891, and 1893, which preceded Federation. Sir Isaac Isaacs was a Justice of the High Court of Australia, 1906-1930, Chief Justice of the High Court, 1930-1931, Governor-General of Australia, 1931-1935. He represented the State of Victoria at the Federal Convention of 1897-1898.

strongest historical confirmation of this in the relation of the first and second paragraphs of sec. 92 quoted earlier in this section. In that context, the words "absolutely free" receive their full quantitative ambit as "absolutely free" from customs and like imposts. A similar result, by historical approach, is seen in the judgments of the first High Court bench in *Tasmania v. Commonwealth*,[34] when the second paragraph of sec. 92 was considered in company with secs. 89 and 93, sections which made similar provision of a transitory nature, in relation to customs and excise duties.

Later examination of the documents by Professor F. R. Beasley[35] confirms the general inferences drawn by Mr. Holman. And Professor Beasley is also concerned to stress that insofar as the legal import of sec. 92 was considered at all, sec. 92 was not regarded as applicable to the Commonwealth, since the Commonwealth's exclusive power to impose customs duties under sec. 90, and the requirement of sec. 88 that these customs duties be uniform, removed any danger to free trade from Commonwealth action.[36]

As against the restrictive view drawn from the Convention debates by Holman, Beasley and others, there has to be placed the unshakeable fact that sec. 92 in its present form was finally and with deliberation left in the Constitution. The consequential half-

[34] (1903) 1 C.L.R. 329.

[35] F. R. Beasley, *op. cit.*, note 29 *supra*.

[36] While at the Melbourne and Sydney sessions of 1897-1898, a few members thought that sec. 92 might be interpreted as binding the Commonwealth, the prohibition on the Commonwealth they envisaged was merely a prohibition against the setting up of a uniform tariff wall between all the States. The only other restriction envisaged on the Commonwealth in this regard was separately embodied in sec. 99, prohibiting preference by the Commonwealth of one State over another by any law or regulation of trade, commerce or revenue.

> "It was never present", concludes Professor Beasley, "to the minds of members that there was the slightest risk that sec. 92 might be deemed (a) to whittle down the power conferred on the Commonwealth by sec. 51 (i), (b) to apply to all the other powers conferred on the Commonwealth if they were related, however distantly, to trade and commerce among the States, or (c) to have the effect of creating a legislative no-man's land, which neither Commonwealth nor States could enter" (*op. cit.*, note 29, supra).

Cf. Owen Dixon, K.C. (as he then was), in evidence in 1927 before the Royal Commission on the Constitution (Minutes of Evidence (1929) 777-778), that probably *the real purpose for which section 92 was enacted* would be fulfilled if it ran, "the States shall not by any discriminatory law or executive act impair the freedom of trade, commerce and intercourse among the States and the territories of the Commonwealth." This would make it clear "that the restriction did not apply to the Commonwealth, and that it did apply to the States, but that the restriction did not prevent the States by uniform laws in relation to commerce generally regulating intra-State and inter-State commerce alike. Such a regulation so far as it included transactions of inter-State commerce would necessarily be subject entirely to the will of the Federal Legislature which could intervene and displace it under section 51 (i) of the Constitution by making an inconsistent law."

century of tangled interpretation was well foreshadowed by the outstanding Australian constitutional lawyer, Harrison Moore,[37] soon after the adoption of the Constitution:—

> "By a clause which binds both the Commonwealth Parliament and the States, (the constitution) provides that trade, commerce, and intercourse shall be 'absolutely free.' But if inter-State commerce is to be absolutely free from all interference or regulation, what becomes of the power confided to the Commonwealth Parliament to make laws with respect to trade and commerce among the States? It may be that section 92 expresses as to the States the doctrine of non-interference with inter-State commerce, which has been declared in the United States to arise by necessary implication as to matters of a national character. If so, it must apply unequally to State and Commonwealth; and the latter, while it may be restrained by it from taxation, prohibition, and perhaps from all regulation, *the essential and unequivocal nature of which is to impede commerce,*[38] may for the rest operate freely upon the matter. And, of course, it is hardly a correct assumption that every regulation of commerce, even by the State, is an intrusion upon freedom of commerce, a truth which is recognised in the sufferance of the States to deal with those matters of inter-State commerce which admit of local regulation—'aids to commerce,' as they have been called."

The relation of the historian's view of the intention of the draftsmen to the view later taken by the judges is largely conditioned by the refusal of British Courts to admit reference to legislative history and *travaux preparatoires* in aid of interpretation, an attitude contrasting starkly with that of the Supreme Court of the United States. No one would place Lord Wright among the least progressive representatives of the British judicial tradition. But it is to Lord Wright that we owe one of the clearest expositions of this attitude towards the history of the drafting. Speaking in *James v. Commonwealth*[39] of this very sec. 92 of the Australian Constitution, his Lordship observed:

> "Nor can any decisive help here be derived from evidence of extraneous facts existing at the date of the Act of 1900; such evidence may in some cases help to throw light on the intention of the framers of the statute, though that intention can in truth be ascertained only from the language used. But new and unanticipated conditions of fact arise. It may be that in 1900 the framers of the Constitution were thinking of border tariffs and restrictions in the ordinary sense, and desired to exclude difficulties of that nature, and to establish what was and still is called 'free trade,' and to abolish the barrier of the State

[37] W. Harrison Moore, *The Commonwealth of Australia* (1902), 204.
[38] Author's italics.
[39] [1936] A.C. 578, at 614-5.

boundaries so as to make Australia one single country. Thus they presumably did not anticipate those commercial and industrial difficulties which have in recent years led to marketing schemes and price control, or traffic regulations such as those for the co-ordination of rail and road services, to say nothing of new inventions, such as aviation or wireless. The problems, however, of the Constitution can only be solved as they emerge by giving effect to the language used."

The curious implication of this argument is to be noted. It amounts to saying that even if the framers only intended by sec. 92 to prohibit border tariffs, etc., in the ordinary sense, i.e., to guarantee "free trade," and though they never for a moment contemplated the possibility of its prohibiting marketing schemes such as the present, nevertheless it was the duty of the court to apply the language used in the unintended sense, now for the first time made relevant by changing economic techniques. All this is made the more striking by Lord Wright's admission[40] that the narrower historical meaning is favoured not only by the timing, but by the placing of sec. 92 among the neighbouring sections, and because the proviso in the second paragraph of sec. 92 relates to customs duties. He adds, as if it explained the matter, that "it is clear that much more is included in the term," giving no other reason than that there may be other modes than customs duties, etc., of interfering with freedom.

IV. INTERPRETATIONS OF "ABSOLUTELY FREE" BEFORE THE BANK NATIONALIZATION CASE.

It is unnecessary for our purposes to canvass in detail the decisions of the High Court and the Privy Council in the subsequent two generations which, in Holman's words, present a "long and agonising struggle . . to get back to the language, a struggle primarily between the demands of statesmanship and the judicial conscience, still clinging to the non-existing letter of the law."[41]

Professor K. H. Bailey[42] in 1933 detected four main views of the meaning of "absolutely free," around which the debate up to that time had centred.

The first of these, the narrowest view, limiting the meaning of freedom in Sir Samuel Griffith's words to freedom "from taxes, charges or imposts,"[43] was rejected by the court almost immediately,[44] and has never been rehabilitated.[45] This view, while indicated

[40] *Ibid.*, at 628.
[41] W. A. Holman, *op. cit.*, at 143.
[42] K. H. Bailey, *Interstate Free Trade: The Meaning of "Absolutely Free"*, (1933) 7 A.L.J. 103.
[43] *Fox v. Robbins*, (1909) 8 C.L.R. 115.
[44] It was rejected, interestingly enough, on the main ground that this, in view of sec. 90, would make sec. 92 redundant. Mr. Holman's point was, of course, that it was *legally* redundant, its import being merely political.
[45] Rich, J., in *James v. Cowan*, (1929-30) 43 C.L.R. 386, at 423.

by the historical context, would have required a reading down of the words "absolutely free," so as to limit the kind of burdens at which they struck, though preserving their quantitative reference within that range. This would have been a simpler, and no more drastic, reading down than those later tolerated, but it was perhaps not to be expected from a court which denied itself access to legislative *travaux preparatoires.*[46] The rejection of the historical limitation confronted the court immediately with even graver difficulties, since it could not, either, give the words "absolutely free" their full literal extension. The judges were driven to an enterprise, which half a century has by no means lightened, of "explaining the elliptical and expounding the unexpressed."[47]

Chronologically the next meaning favoured was this, that "absolutely free" meant free of any restriction imposed "by virtue of its inter-State character."[48] This meaning would strike down only laws which discriminated between inter-State and intra-State trade in the burdens imposed. This second view, on the whole, prevailed until 1920, when the dissenting view taken by Isaacs, J., during the earlier period[49] came to command a majority in the court. This was that "absolutely free" meant that "the acts and transactions of which inter-State trade and commerce consist must be left *absolutely free,*"[50] so that even a restraint imposed equally and without discrimination on intra-State and inter-State trade was obnoxious. This view was first established in *W. & A. McArthur Ltd. v. Queensland,*[51] which struck down a Queensland statute fixing maximum prices of certain commodities; so also in *Commonwealth v. South Australia*[52] with regard to a State tax on all sales of petrol. Its effect was to expand the scope of the prohibition in sec. 92, including therein any encroachments on the freedom of contract and choice of vocation of individuals engaged in inter-State commerce. But its effect was simultaneously to read the prohibition as applicable only to the States; for the judges thought[53] that if so wide a prohibition were directed at the Commonwealth, its effect would flatly contradict the grant to the Commonwealth Parliament in sec. 51 (i) of the power to legislate "with respect to trade and commerce . . . among the States." *W. & A. McArthur v. Queensland* was overruled on

[46] Thus Isaacs, J., who knew as much as anyone of the narrow import of sec. 92 in the minds of the draftsmen, later led the movement to extend its legal meaning.

[47] Rich, J., in *James v. Cowan,* (1920-30) 43 C.L.R. 386, at 422.

[48] *Ibid.,* at 423, quoted by K. H. Bailey, *op. cit.,* at 104. The *locus classicus* is in Sir Samuel Griffith's judgment in *Duncan v. Queensland,* (1916) 22 C.L.R. 556, at 574.

[49] See his dissent in *Duncan v. Queensland.*

[50] K. H. Bailey, *op. cit.,* at 104.

[51] (1920) 28 C.L.R. 530.

[52] (1926) 38 C.L.R. 408.

[53] See especially the joint judgment of Knox, C.J., Isaacs and Starke, JJ., (1920) 28 C.L.R. 530, at 556-558.

this point in *James v. Commonwealth*,[54] which will be considered shortly.

This third meaning also made acute the problem of defining what were "acts of inter-State trade," since if *all* aspects of an inter-State trader's activities were immune from State law, State regulation, of which everyone recognised the validity and indeed the necessity, for example, of traffic, health, working conditions, minimum wages, bankruptcy, and the like, would be forbidden. And this presented particular difficulties, when the regulation which everyone recognised as necessary was directed at the very movement across State boundaries which distinguishes inter-State from intra-State trade. It is not surprising, therefore, that the Court in 1928 in *Ex parte Nelson (No. 1)*[55] divided equally as to the constitutionality of a statute prohibiting the importation into New South Wales of stock from a Queensland district riddled with infectious disease in stock.

The confusion in the cases of the next twenty years arises mainly from the difficulty of isolating "acts of inter-State trade" for the purpose of applying this third meaning, and it is in a vain effort to render this problem more precise that such tests as that of the "real" or "true" nature of the impugned legislation, "the pith and substance," the "direct" or "incidental" operation of legislation upon inter-State trade have been proposed.[56] The statute in *Ex parte Nelson (No. 1)*, for instance, was rendered tolerable to sec. 92 by the finding that its true nature was that of a quarantine law, and that its effect on the act of inter-State commerce was innocuously incidental.[57] And this tortuous approach later won the support of a clear majority of the Court.[58] The effect, as Professor Bailey pointed out, was to return by a circular route to something very like the second view, departing from the third view even while purporting to apply it.

As a rather problematical summation of the cases between *McArthur's Case*[59] in 1920, and 1933, Professor Bailey suggests that "absolutely free" had come (in the fourth place) to mean "absolutely free from State laws with respect to inter-State trade and commerce." Here the essence of the search has shifted from the nature of the act which is regulated (act of inter-State trade), via the aspect of the act which is regulated, to the assumed target at which the legislative arrow is shot, and this be it remembered was

[54] [1936] A.C. 578.
[55] (1928) 42 C.L.R. 209.
[56] See K. H. Bailey, *op. cit.*, and see pp. 496-501, *infra*.
[57] Knox C.J., Gavan Duffy and Starke, JJ., whose view as including that of the Chief Justice prevailed. The opposite view of Isaacs, Higgins, and Powers, JJ., held the statute bad as squarely within *W. & A. McArthur Ltd. v. Queensland*.
[58] See for example, *Willard v. Rawson*, (1933) 48 C.L.R. 316, where in various forms it was adopted by all the judges, except Dixon, J.
[59] *W. & A. McArthur Ltd. v. Queensland*, (1920) 28 C.L.R. 530.

the main gist of the second test mentioned above. "The State," as Professor Bailey says, can under this test "tax transactions of inter-State trade, it can even forbid inter-State importation, so long as it does so in the exercise of some power other than the trade and commerce power."[60]

In its nature, any summation of a body of conflicting judicial rationalisations as profuse as that of the High Court of Australia on this issue must be oversimplification. In particular, it misses the curious tangle of reasoning surrounding the question of the claims of individuals as such to enjoy, and to demand legal support in the enjoyment of, the "absolute freedom" conferred by sec. 92. Mr. R. G. Menzies as Attorney-General in *James v. Commonwealth*[61] phrased it thus—Whether sec. 92 protected freedom of trade, commerce and intercourse as a whole only, and not distributively? And the point is crystallised in the argument made by the Commonwealth in the *Bank Nationalization Case*[62] that sec. 92 would not be infringed if the total volume of banking business were not decreased, even though the private banks and all other individuals were deprived of their freedom of contract and vocation in this regard.

In this form the issue is a clear one. But some confusion has arisen between this question and another question, which is quite a different one. This is the question whether, independently of any cause of action which would have existed if legislation invalid under sec. 92 had never been passed, sec. 92 itself gives to an individual injured by the operation of such invalid legislation a cause of action on the analogy of a private action for damages arising in certain cases from breach of a statutory duty. This question came squarely before Dixon, J., in *James v. Commonwealth,*[63] in an action for damages for loss of trade and the like due to the refusal of others to deal with the plaintiff by reason of his non-compliance with a statute subsequently held to be invalid under sec. 92. Dixon, J., in a judgment not seriously questioned since that time, held that no such cause of action arose from sec. 92.

This latter question does not concern the scope of the prohibition in sec. 92, but only what remedies lie in respect of legislation admittedly within the prohibition. On the other hand, the question posed by Mr. Menzies is precisely a question of the scope of the constitutional commandment.

In the cases, the question formulated by Mr. Menzies arose for solution in relation to certain early holdings, especially the *Wheat*

[60] On the frequent difficulties of the High Court and the Privy Council in understanding each other's reasoning on this matter, see K. H. Bailey, *op. cit.*, at 109-111. These mutual misunderstandings reach a high point in the High Court decision in the *Bank Nationalization Case*. See *infra, passim.*

[61] [1936] A.C. 578.

[62] (1948) 76 C.L.R. 1.

[63] (1939) 62 C.L.R. 339, esp. at 361-362.

Case,[64] which upheld the compulsory purchase outright of goods by a State even where, in the normal course, the goods would subsequently have flowed into the stream of inter-State trade, and even though some lesser interference with the power of disposition of the goods in inter-State commerce would have been invalid. The theory was that sec. 92 guaranteed the inter-State mobility of the goods, and that for this purpose it was not material who was the owner, so that a mere compulsory transfer of ownership to the State did not violate sec. 92.

It was in opposition to this view that Isaacs, J., in *James v. Cowan,*[65] described the right protected by sec. 92 as a personal right attaching to the individual and not merely attaching to the goods. Sec. 92 did not merely protect the inter-State mobility of goods as goods; it also protected the freedom of anyone who owned them at a given time to move them in inter-State commerce.

The point made by Isaacs, J., was therefore immediately directed to removing the limitation on the scope of sec. 92 imposed by the *Wheat Case*. But the broader distinction later made by Mr. Menzies was implicit in the debate. In essence, the controversy emerged, and still had to be considered in the *Bank Nationalization Case,*[66] whether the scope of the prohibition in sec. 92 included within its protection the right of all persons to have their individual freedom of activity in inter-State commerce unrestricted by State and Commonwealth legislation. Whether, in short, the guarantee in sec. 92 incorporates a guarantee of freedom of contract and choice of vocation to all individuals operating in inter-State trade.[67]

V. THE COMMONWEALTH AS SUBJECT TO SECTION 92.

It was not until *James v. Commonwealth*[68] in 1936 that it was squarely held that sec. 92 bound the Commonwealth as well as the State Governments. The main issue in this case was the consistency with sec. 92 of the Commonwealth Dried Fruits Act 1928-1935 (No. 11 of 1928—No. 5 of 1935) and of the Dried Fruits (Interstate Trade) Regulations 1934 made thereunder, which wholly prohibited inter-State trade in dried fruits without a licence, and (even with a licence) partially prohibited such trade by limiting the amount of dried fruits that could be sold within the Commonwealth to a quota of each trader's production. These Commonwealth measures were an attempt to make good the failure of the South Australian legislation to the same effect to pass the test of sec. 92. All these efforts were directed to preventing the domestic price of dried fruits from

[64] *New South Wales v. Commonwealth,* (1915) 20 C.L.R. 54.
[65] (1930) 43 C.L.R. 386, at 418.
[66] (1948) 76 C.L.R. 1.
[67] The development of this doctrine as to the guarantee of individual rights is further examined below.
[68] [1936] A.C.578.

falling to the level of the world price, which at that time was very low. The High Court, consisting of Rich, Starke, Dixon, Evatt, and McTiernan, JJ., upheld [69] the legislation on the ground that *W. & A. McArthur Ltd. v. Queensland*[70] bound them to hold that the Commonwealth was not bound by sec. 92.[71]

A main argument of the Commonwealth was that, if applied to the Commonwealth, sec. 92 would contradict sec. 51 (i). Mr. Menzies, of counsel for the Commonwealth, stressed[72] the repugnancy of the two sections if the words "absolutely free" involved "an absolute absolute, and not a qualified absolute," that the phrases in both sections were (apart from the words "and intercourse") identical. In view of the fact that sec. 92 was binding on the States, the question before the Privy Council involved (he urged) the entire inter-State trade and commerce power, and if that power were destroyed by sec. 92, then "quite clearly there is a gap in governmental power in Australia now which did not exist before Federation."

Lord Wright, giving the opinion of the Board, rejected this position on two grounds. The first is a singular comment on the pretension of the courts that they have been concerned not with historical contexts or social policy, but with the literal words of the Constitution. The word "absolutely," he said, in "absolutely free" was merely "popular" or "rhetorical." Trade, he said, was either free or not free; the word "absolutely" added nothing and could be ignored. But, from the standpoint of literal interpretation, the matter is even stranger. For his rejection of the Commonwealth argument required him to say that trade and commerce could be "free" under sec. 92, even though (as the cases undoubtedly showed) they were subject to many and varied regulatory statutes either of the States or the Commonwealth. In this way, he could show that sec. 92, if applied to the Commonwealth, would not wholly cancel out the Commonwealth's power over inter-State commerce under sec. 51 (i).

It is, however, but a partial truth to say, as Lord Wright said, that the word "absolutely" can be ignored. The net result of the supposed literal interpretation has done far more than this. It has substituted for the words "absolutely free" not the word "free," but the words "free up to a point to be determined from time to time (in particular cases) by the judges."

There is thus presented the extraordinary spectacle of a course of decision which, while declining to give the expression "absolutely free" the meaning which on all the evidence it seemed to have in the minds of the draftsmen, namely, "free of customs and like taxes at

[69] (1935) 52 C.L.R. 570.
[70] (1920) 28 C.L.R. 530.
[71] Dixon, Evatt, and McTiernan, JJ., indicated that, apart from *McArthur's Case,* they would have taken a contrary view.
[72] [1936] A.C. 578, at 597.

the frontier," is yet prepared, not indeed to ignore words deliberately inserted, but to read them in a sense that is at least a partial contradiction of what is expressed.

Lord Wright's second ground for denying repugnancy between section 51 (i) and the application of sec. 92 to the Commonwealth was more convincing. Since the Commonwealth's power over inter-State trade under sec. 51 (i) was not in any way exclusive, each State, he said, also had the power to regulate inter-State trade. Insofar as the Commonwealth sought to escape from sec. 92 by a supposed repugnancy with sec. 51 (i), the same argument would have been available to each State as a means of escape from sec. 92. The only difference between the Commonwealth and State positions in the matter was (he thought) that the former's power over inter-State commerce was express, and the latters' implied.

So to hold was of course to turn back deliberately over the ground covered by *W. & A. McArthur Ltd. v. Queensland.*[73] The High Court in that case, having widened the boundaries of the prohibition in sec. 92, felt constrained by its apparent repugnancy, as thus extended, to the federal power over inter-State trade and commerce granted by sec. 51 (i) to hold that sec. 92 did not bind the Commonwealth. Lord Wright narrowed the boundaries of the prohibition in sec. 92, since he disapproved of the holding in *McArthur's Case* that a price-fixing statute applying uniformly without discriminatory intention to both inter-State and intra-State trade was obnoxious to it.[74] Having thus narrowed the prohibition, he found a way out of the alleged repugnancy between sec. 92 and sec. 51 (i), since it left *some* power to the Commonwealth over inter-State commerce, even after the field prohibited by sec. 92 had been taken away.[75]

Lord Wright did not find it necessary to define the exact degree of narrowing thus undergone by the prohibition of sec. 92. It was sufficient to found his view of the non-repugnancy of sec. 92 and sec. 51 (i) that the power to regulate under the latter was *in some respects* wider than the prohibition in sec. 92. But it would appear from the earlier authorities which he selected to buttress his view, that the power of the Commonwealth, despite sec. 92, to interfere with the freedom of contract and free choice of vocation of individuals would be saved by his interpretation. He relied heavily on *Roughley v. New South Wales,*[76] holding consistent with sec. 92 a law making it an offence to act as farm produce agent unless licensed by the State, etc. (Isaacs, J., had there vigorously dissented on the ground that the agency relation thus interfered with was a

[73] (1920) 28 C.L.R. 530.
[74] [1936] A.C. 578, at 619-620.
[75] At the same time, Lord Wright was careful to assert his view (at 628) that the presence or absence of discrimination between inter-State and intra-State trade was not a decisive criterion of what regulation sec. 92 permitted.
[76] (1928-30) 42 C.L.R. 162.

part and often an essential part of inter-State trade.) He relied too on *The King v. Vizzard,*[77] holding that the New South Wales Transport Act of 1931, prohibiting the operation of public motor vehicles in New South Wales unless licensed, was not a violation of sec. 92. Evatt, J., had there said that:[78]

> "Sec. 92 does not guarantee that, in each and every part of a transaction which includes the inter-State carriage of commodities, the owner of the commodities, together with his servant and agent and each and every independent contractor co-operating in the delivery and marketing of the commodities and each of his servants and agents, possesses, until delivery and marketing are completed, a right to ignore State transport and marketing regulations, and to choose how, when and where each of them will transport and market the commodities."[79]

Lord Wright apparently approved of this reasoning, for he went on to say that, if correct, then "in principle it applies *mutatis mutandis* to the Commonwealth's powers under sec. 51 (i), and shows that sec. 51 (i) has a wider range than that covered by sec. 92"—the conclusion to which he himself had come.

What view Lord Wright expressed of the scope of permissible regulation under sec. 92 was to be a matter of surprisingly wide disagreement in later cases. He had rejected the wide interpretation of "freedom" in *McArthur's Case* on the ground that such wide freedom was incompatible with the regulation which the judges in that very case recognised to be permissible, e.g., that every sale of goods is subjected to the relevant Sale of Goods Act, every bill of exchange to the Bills of Exchange Act,[80] etc. He had agreed with Evatt, J., that sec. 92 does not entitle those engaged in inter-State commerce "to ignore State transport and marketing regulations."[81] He had reconciled with sec. 92 the exclusion of everyone but the federal postal service from the business of carrying letters for reward by the Post and Telegraph Act 1901-1923,[82] and the resulting restraint on freedom of intercourse, by two arguments, one of them with respect irrelevant and question-begging, the other tantalisingly evasive. The one was that this exclusion of private carriage of letters was "a limitation notoriously existing in ordinary usage in all modern civilised communities," and did not impede freedom of correspondence, but merely "canalised" it.[83] The other was that

[77] (1933-34) 50 C.L.R. 30.

[78] *Ibid.,* at 94. Quoted by Lord Wright in *James v. Commonwealth,* (1936) A.C. 578, at 621-622.

[79] Cf. the other Transport Cases, cited in note 164 *infra,* on all of which, and on the recent case of *McCarter v. Brodie,* [1950] Argus L.R. 385, see *infra.*

[80] [1936] A.C. 578, at 628-9.

[81] See quotation from judgment of Evatt, J., *supra.*

[82] [1936] A.C. 578, at 625.

[83] Cf. his attempted explanation of the consistency with sec. 92 of the Wireless Telegraphy Act 1905, the Secret Commissions Act 1905, the Commerce (Trade Descriptions) Act 1905-1933, and the Australian Industries Preservation Act 1906-1930, in [1936] A.C. 578, at 626 et seq.

such exclusion did not violate sec. 92 "if freedom is understood in a certain sense."[84]

What then, in his view, was that "certain sense"? Lord Wright framed it thus: " . . . what is meant is freedom as at the frontier or, to use the words of sec. 112, in respect of 'goods passing into or out of the State.' "[85] He admitted that this needed explanation, and his explanation was to build a generalization upon the narrow criterion of freedom from customs duties which, though historically well-based, all the judges, including Lord Wright himself, had formerly rejected out of hand. The principle, he said, was that the people of Australia were to be free to trade with each other, and to pass to and fro among the States, without any burden, hindrance or restriction based merely on the fact that they were not members of the same State.

> "As a matter of actual language," he observed,[86] "freedom in sec. 92 must be somehow limited, and the only limitation which emerges from the context, and which can logically and realistically be applied, is freedom at what is the crucial point in inter-State trade, that is at the State barrier."

And yet, one must immediately ask, "if freedom in sec. 92 must be somehow limited," why not have limited it in some way easier to understand and apply, as well as more consistent with the intention of the draftsmen, by directing it essentially at customs and similar imposts, rather than by the fantastic play on words which has characterised the decisions? For few things can be clearer than that the test here proposed by Lord Wright was not found capable of realistic and consistent application in later cases, and that both the liberal and restrictive exponents of sec. 92 found equal comfort in his judgment.[87] The apparent certainty of his reference to the State barrier proved quite illusory, an outcome foreshadowed by his own insistence that a restraint may violate freedom at State barriers, even though it operates before the goods leave the State of origin, or after they arrive in the other State.

Lord Wright was indeed himself sufficiently aware of this uncertainty to admit that it must in every case be a question of fact whether there is an interference with this freedom of passage. And in the light of this admission,[88] his claim that his test was consistent with all the decisions except *McArthur's Case* was both an understatement and an overstatement. It may even be consistent with *McArthur's Case,* but only for the reason that a test which makes every case turn on its own facts will obviously allow each case to turn on its own facts.

[84] *Ibid.,* at 625.
[85] *Ibid.,* at 630.
[86] *Ibid.,* at 631.
[87] See pp. 496, 504-505, *infra.*
[88] To which the Privy Council was again compelled in the *Bank Nationalization Case.*

VI. THE BANKING CASE OF 1948-49: IMMEDIATE BACKGROUND.

The Commonwealth v. Bank of New South Wales,[89] better known as the *Bank Nationalization Case,* or more briefly as the *Banking Case,* was a suit by the Bank of New South Wales and other privately owned banks in Australia, challenging the validity of the Commonwealth Banking Act of 1947, a measure long advocated in the programme of the Australian Labour Party, then in power. The objects of this Act as set out in section 3 were as follows:—

> "(a) the expansion of the banking business of the Commonwealth Bank as a publicly-owned bank conducted in the interests of the people of Australia and not for private profit;
>
> (b) the taking over by the Commonwealth Bank of the banking business in Australia of private banks and the acquisition on just terms of property used in that business;
>
> (c) the prohibition of the carrying on of banking business in Australia by private banks."[90]

The legislative power of the Commonwealth in relation to these objects was to be derived, if it existed, from section 51 of the constitution, which in part is as follows:

> The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:—
>
> (i) Trade and commerce with other countries and among the States;
>
> (xiii) Banking, other than State banking; also State banking extending beyond the limits of the State concerned, the incorporation of banks, and the issue of paper money;
>
> (xx) Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth."[91]

The Banking Act 1947 did not purport to extend to State (Government) banking (excluded from federal power by placitum xiii), but was solely directed at private banks of which there were fourteen

[89] [1950] A.C. 235, [1949] 2 All E.R. 755; in the High Court *sub nom. Bank of New South Wales v. Commonwealth,* (1948) 76 C.L.R. 1, [1948] Argus L.R. 89.
[90] [1950] A.C. 235, at 288; [1949] 2 All E.R. 755, at 757.
[91] *Ibid.*

in number, and those of overseas incorporation.[92] As to these banks, it gave power to the Commonwealth Bank compulsorily to acquire the shares, and to take over their businesses, subject to compensation to be agreed, or in default to be determined by a tribunal other than the High Court. In addition, the Banking Act of 1947 prohibited in sec. 46 the carrying on of banking business by private banks in the following terms:

(1) Notwithstanding anything contained in any other law, or in any charter or other instrument, a private bank shall not, after the commencement of this Act, carry on banking business in Australia except as required by this section.

(2) Each private bank shall, subject to this section, carry on banking business in Australia and shall not, except on grounds which are appropriate in the normal and proper conduct of banking business, cease to provide any facility or service provided by it in the course of its banking business on the fifteenth day of August, One thousand nine hundred and forty-seven.

(3) The last preceding sub-section shall not apply to a private bank if its business in Australia has been taken over by another private bank or after that business has been taken over by the Commonwealth Bank.

(4) The Treasurer may, by notice published in the *Gazette* and given in writing to a private bank, require that private bank to cease, upon a date specified in the notice, carrying on banking business in Australia.

(5) The date specified in a notice under the last preceding sub-section shall be not more than two months after the date upon which the notice is published in the *Gazette*.

(6) The Treasurer may, from time to time, by notice published in the *Gazette* and given in writing to the private bank

[92] Its immediate politico-legal background was the Banking Act of 1945, whereby the Commonwealth had sought to prohibit private banks from receiving the deposits of and performing banking functions generally for the local government authorities throughout Australia, thus diverting this considerable business to either the State banks or its own banking instrument, the Commonwealth Bank. In *Melbourne Corporation v. Commonwealth,* (1947) 74 C.L.R. 31, the High Court struck down this earlier Act as unconstitutional on the principal ground that the Statute violated the implied immunities of State instrumentalities, an American doctrine followed by the High Court until *The Amalgamated Society of Engineers v. Adelaide Steamship Company,* (1920) 28 C.L.R. 129. Thus was revived after nearly thirty years a doctrine supposed to have ended its Australian career.

There is a widespread belief that it was the defeat of the Banking Act 1945 which, politically speaking, pressed the Labour Government to the more extreme Act of 1947. And certainly, there is some evidence that the private banks and the State Governments would have preferred to see the earlier Act affirmed.

concerned, amend a notice under sub-section (4) of this section (including such a notice as previously amended under this sub-section) by substituting a later date for the date specified in that notice (or in that notice as so amended).

(7) That later date may be a date either before or after the expiration of the period of two months referred to in sub-section (5) of this section.

(8) Upon and after the date specified in a notice under sub-section (4) of this section (or, if that notice has been amended under sub-section (6) of this section, upon and after the date specified in that notice as so amended), the private bank to which that notice was given shall not carry on banking business in Australia.

Penalty: Ten thousand pounds for each day on which the contravention occurs.

VII. THE BANK NATIONALIZATION CASE IN THE HIGH COURT.

"It must at the outset be admitted," Lord Wright has observed,[93] "that though the judgments in the High Court on sec. 92 present a great, and perhaps embarrassing, wealth of experience, learning and ratiocination, the decisions, and the various reasons which they embody, are not always easy to reconcile, and present considerable differences of judicial opinion." He thought that this was not surprising in view of the extreme difficulty and high importance of the question. But it is well to add at the outset that these are not the only reasons.

There have been few better illustrations, indeed, of the frequent difficulty and even impossibility of determining the exact significance of decisions of the High Court for the legal issues at stake than that provided by the High Court judgments in the *Bank Nationalization Case*. This difficulty is accentuated by the inveterate custom of most of the justices to concur as well as dissent individually. And in the instant case it produced situations in which a majority of the justices seemed to support a principle which the decision of the case negated.[94]

So far as the constitutionality of the Act as a whole was concerned, four out of six judges were clear that it could not stand, only Latham, C.J., and McTiernan, J., being willing to hold its key provisions to be valid.[95] But as to some of the main grounds of

[93] In *James v. Commonwealth,* [1936] A.C. 578, at 609-10.

[94] See discussion of related problems in the High Court by G. W. Paton and G. Sawer, *op. cit.,* note 9, *supra.*

[95] (1948) 76 C.L.R. 1, at 149 et seq. All six judges held that the just compensation requirement of sec. 51 (xxxi) was violated (see note 7, *supra*).

invalidity relied on by one or other of the majority justices, a majority of the justices took the opposite view.

Thus, on the scope of the Commonwealth's "banking" power, a main ground taken by Rich and Williams, JJ., for striking down the statute was that the concept of "banking" caught by placitum xiii should be restricted to the old mercantile law contractual activity, that is, the regulation of banker-customer relations, and hence that that power did not extend to the *destruction* of private banking. Yet, this narrow view, which helped to contribute two votes to the majority decision of four striking down the Act, was explicitly rejected by a majority of four members of the Court, Latham, C.J., Starke, Dixon, and McTiernan, JJ.

The same two judges who contributed to the majority holding of unconstitutionality, because of an interpretation of "banking" which the majority rejected, were again in a similar position on the question whether the Act was obnoxious to the provisions of the 1927 Financial Agreement between the Commonwealth and the States, and to sec. 105A of the Constitution. They held the Act unconstitutional by implying, from the above instruments, a right of each State to have available the loan facilities *inter alia* of the private banks, and therefore a right to demand that the private banks should not be destroyed.[96] But the four other members of the Court making up, on this point, a majority, rejected this last implication, on which nevertheless the majority decision was in part based.

On the question of the consistency of the Banking Act 1947, especially sec. 46,[97] to which the balance of this paper will be mainly devoted, with the requirement of sec. 92 that "trade, commerce and intercourse among the States shall be absolutely free," the majority holding against the Act was indeed also supported by a majority of the *rationes* offered—though still a somewhat hazardous one. Rich, Starke, Dixon, and Williams, JJ., would appear to have taken the view that "banking" being a part of trade, commerce and intercourse, and a bank carrying on banking in more than one State being engaged in "trade, commerce and intercourse among the States," a law which prohibits individual persons or corporations[98] from carrying on banking is contrary to sec. 92 insofar as the person or corporation affected is in fact engaged in inter-State banking.

Two of these, however, Starke and Dixon, JJ., shared the view of the dissenting minority[99] that the compulsory acquisition of the

[96] The Financial Agreement of 1927, between the Commonwealth and the States, set up a Loan Council (representing Commonwealth and State Governments) to control borrowing by the State Governments, in return for certain undertakings by the Commonwealth as to State debts and State grants. The Agreement was submitted to and approved by a popular referendum in 1928, and was embodied in a new sec. 105A of the Commonwealth Constitution.

[97] See p. 484 *supra,* for text.

[98] *Semble,* not necessarily all individuals or corporations.

[99] Latham, C.J., and McTiernan, J.

private banks as going concerns was in itself within the Commonwealth's power of acquisition under sec. 51 (xxxi), and were not very definite whether such bare acquisition, if unaccompanied by express prohibition of private banking, would infringe sec. 92. Yet, if such bare acquisition were innocuous, nationalization of banks could, as a practical matter, be carried out by successive acts of bare acquisition, whenever any private banks were able to re-establish themselves. And the opinion on this point of these two justices, who concurred in striking down the Act, would, if joined to the two dissenting judges, provide a ground whereby nationalization could lawfully be brought about by the use of the power of acquisition.

Again, Dixon, J., though he was clear that the prohibition of private banking in sec. 46 violated sec. 92, was quick to add that "no doubt sec. 92 leaves open the regulation of trade and commerce, at all events until regulation is pressed to the point of impairing true freedom of inter-State commerce. The freedom of inter-State trade . . . commerce and intercourse which sec. 92 assures supposes an ordered society where the mutual relations of man and man and man and Government are regulated by law."[100] He did not desire to cast any doubt upon the validity of laws "regulating" banking "in the interests of security, reliability, efficiency, uniformity of practice, and so on."[101]

He admitted that no logical distinction between such licit and illicit regulation was available, and he thought this absence explained the divergent conclusions on sec. 92 in particular cases. But Starke, J.,[102] who was with Dixon, J., in the majority holding on this point, took pains to disagree with the reasoning of Dixon J., while at the same time he too agreed that "the absolute freedom" of sec. 92 was "not an unrestricted privilege to engage in business or to conduct it as one pleases," that legislation would only be obnoxious to sec. 92 if "its real object, true character and real effect —its pith and substance—in the particular instance" was found to be restrictive of freedom.[103] When he came to apply his view of sec. 92, he proceeded by three stages whose relation to his earlier argument is by no means clear. Banking was a part of trade, commerce and intercourse. The Act "prohibits all such business on the part of the banks, domestic, inter-State and foreign."[104] The Act, he said, prohibits the whole of the business irrespective of "such matters as defence . . . prevention of famine, disease and the like."[105] (This might well be questioned, even if the list were kept *eiusdem*

100 (1948) 76 C.L.R. 1, at 389.
101 *Ibid.*
102 *Ibid.*, at 296.
103 On the divergence of reasoning between Starke and Dixon, JJ., despite their being often in a dissenting minority together, see note 169, *infra.*
104 *Ibid.*, at 324.
105 Quoted by Starke, J., *ibid.*, from *James v. Cowan* at 559.

generis.) Then, as if to clinch the matter, he quoted his own opinion in *Australian National Airways v. The Commonwealth*[106]:

> "The object of sec. 92 is to maintain freedom of inter-State competition—the open not the closed door—absolute freedom of inter-State trade and commerce."

Since, he concluded, the Act "closes that door and excludes the banks from the business of inter-State banking in Australia," it violated sec. 92. It will be observed that Starke, J., gave no consideration (other than a mere confident denial) to the question whether the objectives of the Act would be included in the class of objectives, such as defence, which he admits to justify restriction. His eloquent phrase, "the open and not the closed door," which provides the verbal climax of decision, is merely an empty restatement of the problem of sec. 92 and gives none but emotional aid to its solution.

The other two judges who concurred in the majority holding on sec. 92 seem at first sight to take a position close to that of Starke, J. They too stress the absence of justification of famine, disease and the like, and devote to the objectives of this Bill only the observation that "there is no suggestion that the private banks are carrying on business in a way that is a menace to the common welfare."[107] But whatever inarticulate criterion Starke, J., had in mind, which compelled him to say that the *Transport Cases*[108] were wrongly decided as to the nature of the permissible restraint under sec. 92,[109] must have been rather different from that which led Rich and Williams, JJ., to regard them as correctly decided.

Rich and Williams, JJ., were prepared to state their general position on sec. 92 in these words. The section, they said, "does not invalidate legislation regulating the operations of inter-State trade . . . (It) invalidates legislation which deprives individuals of their freedom to trade in more States than one."[110]

The essential difficulty is ignored by this formulation. For unfortunately it is the fact that the statutes which have perplexed the court have usually done so precisely because in regulating the operations of inter-State trade they "deprived individuals of their freedom to trade in more States than one." To assert that the former is constitutionally good and the latter bad is to overlook the most difficult question at issue—namely, when is a law *that does both* good, and when is such a law bad? In terms the writer has discussed elsewhere[111] the distinction may be meaningless, and is certainly

[106] (1945) 71 C.L.R. 29, at 78.
[107] *Bank Nationalization Case,* (1948) 76 C.L.R. 1, per Rich and Williams, JJ., at 293.
[108] Enumerated and cited in note 164, *infra.* See later for a further treatment of the judicial divisions in these cases.
[109] *Bank Nationalization Case,* (1948) 76 C.L.R. 1, at 311.
[110] *Ibid.,* at 295.
[111] J. Stone, *op. cit.,* at 171-4, 185 et seq.

indeterminate, and a decision which purports to apply it must have at least latent reference to other grounds.

This very consideration lies behind the debate in the High Court on the question whether sec. 92 confers rights on individuals. The historical aspect of this question has already been touched upon. Analytically, assuming that the limits of the prohibition under sec. 92 are known, the effect of that prohibition would be, within those limits, to inhibit governmental action, and to guarantee the freedom of inter-State trade, etc., as well as to justify any action of individuals which, but for the prohibition of sec. 92, would be contrary to State or federal statutes, and thus assure the freedom of persons. These three effects are really only aspects of the single proposition that a statute violating the constitutional prohibition is void. The scope of the prohibition is not affected by the aspect from which the prohibition is observed. Once the scope of the prohibition in sec. 92 is granted as known, a statute could not simultaneously conform to it when viewed as a legislative inhibition, and violate it when viewed as a guarantee of the freedom of persons. "Acts," as Lord Wright observed in this connection,[112] "imply persons to perform them or create them," and therefore no criterion of "freedom" under sec. 92 can be based merely on a supposed distinction between the freedom of activities, and the freedom of persons, which sec. 92 protects. It is an illusory distinction.[113]

Yet the judges seem to have assumed the contrary. Latham, C.J., was concerned to show[114] that "Section 92 is directed to laws made by the Commonwealth or States, and not to actions of individuals." If this means that its net does not catch the conduct of individuals, that is well, but irrelevant.[115] But Latham, C.J., proceeds to say that though the section "operates to protect individuals," it still "does not give a cause of action to individuals."[116] Yet he admits in the very same paragraph that one effect of sec. 92 is to allow individuals to obtain damages, in respect of "common law rights," which but for its unconstitutionality the statute would have taken away. And if this is accepted, the question whether a breach of sec. 92 creates a cause of action seems to be quite without interest for this case,[117] despite the Chief Justice's implicit assumption that it in some way favoured the arguments of the Commonwealth.

112 In *James v. Commonwealth,* [1936] A.C. 578, at 630.

113 Or what I have called elsewhere a category of meaningless reference. see J. Stone, *op. cit.,* at 171.

114 *Bank Nationalization Case,* (1948) 76 C.L.R. 1., at 230.

115 And perhaps questionable as an interpretation of sec. 92.

116 *Bank Nationalization Case,* (1948) 76 C.L.R. 1, at 231, citing *James v. Commonwealth,* (1939) 62 C.L.R. 339, at 362, and *Riverina Transport Pty. Ltd. v. Victoria,* (1937) 57 C.L.R. 327, at 341-42, for this.

117 Though, of course, *aliter* in a case like *James v. Commonwealth,* (1939) 62 C.L.R. 339, where the question was what remedies are available against violation of sec. 92 *within its admitted scope.*

Contrarily, Rich and Williams, JJ., admitted[118] that the doctrine that sec. 92 confers a personal right on individuals was an essential basis for their view that the prohibition of private banking was a direct (and obnoxious) rather than an incidental (and permissible) prohibition of inter-State business. With respect, it is difficult to see why such an admission was necessary, or indeed what it can mean. They themselves had in the previous paragraph[119] stated the matter thus:

> "Section 92 invalidates the infringing legislation and gives to the person or corporation aggrieved the right to treat the legislation as null and void and to sue for a declaration to this effect. It also gives such person or corporation the right to treat any other person or corporation as a wrongdoer whose conduct would only be justified if the legislation were valid."

When such words as "right" are given a consistent meaning, this analysis is identical with that of Latham, C.J. Yet the latter based upon it the view unfavourable to the private banks that since sec. 92 conferred no rights on individuals, their exclusion from the banking field was not obnoxious as a direct restraint on inter-State trade; while, on the other hand, Rich and Williams, JJ., based upon it the view, favourable to the private banks, that sec. 92 did confer on individuals "a personal right . . . to engage in trade and commerce among the States," and that consequently the Banking Act violated sec. 92 as a direct and not merely incidental burden on inter-State trade.

The truth of the matter is that concealed behind the apparently empty question whether the prohibition in sec. 92 confers rights on individuals or not, lies the question, *"What* rights does it confer?", and that question can only be answered by asking, "What is the precise scope of the prohibition in sec. 92?" What is really in issue is whether that prohibition includes within itself a prohibition against depriving *individuals* of the liberty to engage in inter-State trade. Or, to state the matter in terms of American constitutional doctrine, does sec. 92 lay down for Australian inter-State trade the kind of prohibition against legislative interference with liberty of contract and freedom of vocation which, for more than half a century after the *Slaughterhouse Cases*[120] and *Munn v. Illinois,*[121] the Supreme Court of the United States drew out of the Fifth and Fourteenth Amendments?[122]

This is almost explicit in the purported paraphrase by Rich and Williams, JJ., of what they thought to be involved in the debate whether sec. 92 confers rights on individuals:—[123]

> "The defendants contended that S. 92 is not concerned with the right of an owner of goods to sell them out of the State,

[118] *Bank Nationalization Case,* (1948) 76 C.L.R. 1, at 291.
[119] *Ibid.,* at 290.
[120] (1873) 16 Wall. (U.S.) 36; 21 Law. Ed. 395.
[121] (1876) 94 U.S. 142; 24 Law. Ed. 77.
[122] For further development of this point see pp. 493-495, 512-515, *infra.*
[123] *Bank Nationalization Case,* (1948) 76 C.L.R. 1, at 291.

and therefore is not concerned with the ownership of such goods prior to, at the time of, or subsequent to the passage of goods across the State boundaries. Accordingly, the Commonwealth and State Parliaments legislating within their constitutional powers can select the individuals who are to engage in inter-State trade. But they must not place any hindrance, burden or restriction on the free passage of the goods of such individuals across State boundaries."

They admitted that *New South Wales v. Commonwealth* (the *Wheat Case*)[124] cited by the Commonwealth here did seem to support it, and were at pains to cast doubt on the correctness of that decision in this regard.

If this be the gist, then the problem could be stated equally well in either of two forms. Does the prohibition of sec. 92 extend to interference with liberty of contract and vocation of individuals engaged in inter-State commerce, as well as to the physical movement of goods, vehicles, vessels and persons across State frontiers, etc., or only to the latter? Or alternatively, do the rights protected by sec. 92 include freedom of contract and vocation, as well as those involved in the physical movement of goods, vehicles, vessels and persons, etc., or only the latter? Either way of stating the gist will do; but in no meaningful sense, and only with the certainty of great confusion, can that gist be stated in terms of the question whether sec. 92 *merely* prohibits restraints on inter-State trade, commerce or intercourse, or *also* confers rights on individuals.

VIII. THE PRIVY COUNCIL AND POLITICAL, SOCIAL AND ECONOMIC ASSESSMENTS UNDER SECTION 92.

In the Commonwealth's appeal to the Privy Council against the decision of the High Court, the issue with which this paper is concerned[125] resolves itself into the question whether sec. 46 of the Banking Act 1947, "prohibiting the carrying on of banking business by private banks," was unconstitutional.

The main vices urged were two. First, that sec. 46 exceeded the powers of the Commonwealth above quoted[126] of legislating for the peace, order and good government of the Commonwealth with

124 (1915) 20 C.L.R. 54. *The Wheat Case* involved an emergency measure of the First World War.

125 Strictly speaking, the Privy Council disposed of the appeal on a procedural point, disallowing it on the ground that the leave of the High Court required by sec. 74 of the Constitution for appeals on questions of the the powers of the States and of the Commonwealth *inter se* had not been obtained. The Privy Council proceeded to deal with the merits of the substantial questions here considered of whether sec. 46 of the Act was within the "banking" power of sec. 51 of the Constitution, and if it was whether it violated the prohibition of sec. 92. The major importance of the case is on these latter topics.

126 At p. 483, *supra.*

respect to "banking"; second, that it violated sec. 92 of the Constitution.[127] Sec. 92 provides, as has been seen, that "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." The historical context showed that the intentions of the draftsmen were directed primarily, if not exclusively, to the removal of obstacles to inter-State commerce in the nature of customs and taxes set up by the respective States against each other. A half-century of judicial interpretation had, however, left far behind any such modest intentions.

In the first place, as the Privy Council observed in the *Bank Nationalization Case*,[128] one thing at least was clear after long judicial controversy, namely that the prohibition implied from sec. 92 was not to be limited to a prohibition merely of customs or other monetary charges. Furthermore, again after many doubts, it had been judicially determined that the prohibition in sec. 92 extended not only against action by the States (as might have been thought from the historical context) but also against action by the Commonwealth itself.[129] The Commonwealth power to legislate with respect to trade and commerce under sec. 51 (i) was thus counterbalanced to an extent not clearly determined by the injunction in sec. 92 that "trade, commerce, and intercourse shall be absolutely free."

In this state of the authorities, the presentation of the Commonwealth's case faced some difficulty in the Privy Council, as it had done in the High Court. For, insofar as it might base its position on the power to legislate with respect to inter-State and foreign trade and commerce under sec. 51 (i), it was open to attack under sec. 92 as impairing the "absolute freedom of trade, commerce, and intercourse," leaving for argument on this head only the question whether the degree of impairment was such as to violate "absolute freedom" as that term had been interpreted by the Courts.

A main effort of the Commonwealth, therefore, was to find sources for its legislative power independently altogether of its power to legislate with respect to inter-State and foreign commerce. There were two such possible sources, of which the principal[130] was

127 Other grounds were the alleged inconsistency of sec. 46 with the maintenance of the constitutional integrity of the States, and with sec. 105A of the Constitution relating to State-Commonwealth financial agreements insofar as they presupposed the continuance of the availability of private bank facilities to the States, and the question of severability. This last question has special interest in view of the unprecedentedly wide severability clause (sec. 6), by which Parliament had sought to salvage in advance as much as possible of the Banking Act 1947. The effort was vain.

128 *Commonwealth of Australia v. Bank of New South Wales* (P.C.), [1950] A.C. 236; [1949] 2 All E.R. 755.

129 See pp. 478-482, *supra*.

130 The other, which received rather short shrift, was sec. 51 (xx) giving power with respect to "foreign corporations and trading or financial corporations formed within the limits of the Commonwealth."

placitum xiii of sec. 51, giving power "with respect to . . . banking other than State banking; also State banking extending beyond the limits of the State concerned, the incorporation of banks and the issue of paper money." Insofar as the Commonwealth might be able to rely on this, it would have to take the position that banking was *not* "trade, commerce and intercourse between the States."

Two questions, therefore, arose on sec. 46:—

(1) Was federal legislation on "banking" to be regarded as outside the prohibition of sec. 92, by reason of the fact that it was not a part of the "trade, commerce and intercourse" protected by that section?

(2) Assuming the negative, that is the federal legislation on "banking" might be within the prohibition of sec. 92 by reason of the fact that it was a part of the "trade, commerce, and intercourse" protected by the section, was the exclusion of all private banking by sec. 46 a violation of that prohibition?

On the first of these questions, the Chief Justice and McTiernan, J., in the High Court had held that banking, despite its role in inter-State commerce, was not itself "trade, commerce, and intercourse" among the States within sec. 92, and this was of course a main argument for the Commonwealth on both levels. The majority of the High Court having held to the contrary, however, this was a main issue before the Privy Council. This question the Privy Council resolved into the following subsidiary questions which it stated thus:

(1) Is the business of banking included among those activities described as trade, commerce, and intercourse in sec. 92?

(2) If not, is a prohibition of private banking, involving the denial of a choice of banking facilities to those engaged in trade and commerce among the States, a restriction upon the freedom of that trade and commerce which is guaranteed by sec. 92?[131]

In short, their Lordships opened up the question whether, even granted that banking is not in itself "trade, commerce, and intercourse," the fact that private banking is actually and at present a facility enjoyed by those engaged in trade, commerce and intercourse among the States, converted the mere prohibition of banking into an indirect restraint on trade, commerce, and intercourse within sec. 92. Having opened up this second sub-question, their Lordships did not proceed further with it, since they answered the first sub-question in the affirmative.

In doing so, they had to overcome the argument that the words "trade, commerce, and intercourse" within sec. 92, being qualified by the clause, "whether by means of internal carriage or ocean

[131] [1950] A.C. 235, at 302; [1949] 2 All E.R. 755, at 765.

navigation," indicated that the trade, commerce, and intercourse contemplated by the section were such as were carried on by these means of physical movement, and that banking was, on its face, of a different nature. Banking, even inter-State banking, for example, could in theory at any rate be wholly carried on by radio and telephonic communication involving no physical transportation whatsoever, but only book entries within each State.

On the second main question, whether, assuming that banking was "trade, commerce, and intercourse" within sec. 92, the provisions of sec. 46 of the Banking Act 1947 involved a kind and degree of restraint violating the "absolute freedom" of sec. 92 of the Constitution, the Privy Council found itself confronted by certain earlier decisions of its own, and of the High Court, widely believed to have been unfavourable to the contentions of the Commonwealth, in particular, *James v. South Australia*[132] in the High Court, and *James v. Cowan*[133] in the Privy Council. In *James v. South Australia* the appellant, who was a grower and producer of dried fruits with a business extending beyond the State, challenged the validity of sec. 20 of the South Australian Dried Fruits Act 1924, which empowered the Dried Fruits Board established under the Act to determine where and in what quantities the output of dried fruits in any year should be marketed. It was held unanimously by the High Court that sec. 20, insofar as it limited the quantities of fruits that might be marketed within the Commonwealth, was obnoxious to sec. 92 of the Constitution. No appeal was brought from this decision, the South Australian Minister instead using sec. 28 to purchase by agreement or acquire compulsorily any dried fruits in South Australia grown and dried in Australia. Sec. 28 was in its terms expressed to be subject to sec. 92 of the Constitution. In *James v. Cowan,* James challenged this further action of the Minister under sec. 28. The High Court struck down sec. 28 and the appeal to the Privy Council was dismissed. In the *Bank Nationalization Case,*[134] the Privy Council treated its earlier holding in *James v. Cowan* as an explicit affirmation of the decision of the High Court in *James v. South Australia,* this inference being drawn from certain incidental words of Lord Atkin.[135]

James v. Commonwealth[136] arose out of still a third attempt at governmental control of the marketing of Australian dried fruits. The relevant South Australian provisions having been held invalid, a Commonwealth statute imposing similar restraints was passed and challenged by James. The only substantially new question involved

[132] (1927) 40 C.L.R. 1.
[133] [1932] A.C. 542.
[134] *Commonwealth of Australia v. Bank of New South Wales* (P.C.), [1950] A.C. 235; [1949] 2 All E.R. 755.
[135] In *James v. Cowan,* [1932] A.C. 542, 559.
[136] [1936] A.C. 578.

was whether the Commonwealth as well as the States was bound by sec. 92, the Privy Council holding, as we have seen,[137] that it was.

The Privy Council, in reviewing these earlier cases on the nature and degree of the restraints obnoxious to sec. 92, took their gist to be that the statutory provisions there involved "authorised a determination at the will of the Board, the effect of which would be to interfere with the freedom of the grower to dispose of his products to a buyer in another State."[138] It rejected the Commonwealth argument that sec. 92 does not guarantee the freedom of the individual since, they said, the litigant who vindicated his rights in the *James Cases* was an individual, and any individual has the right to ignore, and "if necessary to call upon the judicial power to help him to resist," legislative and executive action which offends against the Constitution. This, as we have submitted above, begs the question of substance as to the scope of sec. 92. Analytically speaking, sec. 92 protects individual rights within whatever limits are set to its prohibition. But the question here raised by the Commonwealth (as it had previously been raised by Mr. Menzies in *James v. Commonwealth*)[139] was the question of substance, whether the restraints prohibited by sec. 92 include restraints on individual freedom of contract and choice of vocation as well as on the general mobility of the objects of trade and commerce, and the physical movement of persons.

Dr. Evatt's argument for the Commonwealth, that the test of an obnoxious restriction under sec. 92 was whether the net effect was to produce an overall decrease in the volume of inter-State trade, is really a corollary of the position that the section does not guarantee the freedom of individuals. So long as the total volume of inter-State trade was not decreased, the section would be satisfied; and the mere fact that some individual trader's liberty of inter-State trading was restricted or even his property involved in such trade compulsorily acquired, would not be obnoxious to sec. 92.

The Privy Council's misunderstanding of the issue as to whether sec. 92 protects the freedom of individuals extended to its treatment of the corollary. They thought the *James Cases* to be *contra* for the very irrelevant reason that James, an individual, had been allowed a remedy for rights violated by statutory restraints which were within the prohibited area of sec. 92. They thought also that the total volume argument was unreal and unpractical since the effect of interference on total volume was said to be incalculable, involving speculation as to what would have happened but for the legislative interference. It is difficult to see why a tribunal, on whose decision there may rest the whole economic destiny of a nation, should not receive and act upon expert testimony on the question whether a restraint would tend to increase or decrease the total volume. The

[137] See pp. 478-482, *supra*.
[138] [1950] A.C. 235, at 305; [1949] 2 All E.R. 755, at 768.
[139] See p. 478, *supra*.

economists may disagree, and may be wrong when they disagree. And the tribunal may come to a wrong decision. That, however, is an inevitable responsibility of statesmanship, whether on the bench or in Parliament."[140]

The Privy Council therefore found it impossible to distinguish what it took to be the *ratio decidendi* of all three *James Cases* from the instant case. It is on this point that perhaps the main divergences of legal opinion concerning the Banking decision would turn. For, as the Privy Council observed, the Commonwealth in the instant case took as one of its main grounds that the High Court decision on sec. 46 was inconsistent with the Privy Council decisions in *James v. Cowan*[141] and *James v. Commonwealth*.[142] The Commonwealth's argument rested on certain language in the earlier cases[143] suggesting that the test of obnoxious interference with commerce was whether the interference was "directed at inter-State commerce as such," thus attaching importance to the objects with which the interference is entered upon. So, in *James v. Commonwealth*[144] also, Lord Wright used similar language, stressing the "real object" of the Act, what it was aimed at or directed against. The Commonwealth argued in the instant case that the Banking Act would not be obnoxious to sec. 92 unless its object or intention were to interfere with inter-State trade. The Privy Council rejected this argument on the ground that granted relevance of "the real object," etc., of the interference, this "real object" was to be gathered only from what the legislature has seen fit to enact.[145]

The Privy Council also rejected the Commonwealth's reliance on the language of Lord Wright in *James v. Commonwealth*,[146] insofar as its terms seemed to restrict the scope of sec. 92 to freedom of physical movement across frontiers. They did so not merely on the ground that physical movement was not decisive, but also on the ground that, on Lord Wright's own view in the same case, inter-

[140] A third ground taken for rejection of the total volume argument turns on the use of the term "intercourse" in sec. 92, and need not delay us in the text. The Privy Council thought that while freedom in relation to trade and commerce might make sense in terms of the total volume argument, "intercourse", which is placed on the same level by sec. 92, could not be given meaning in terms of that test. The writer confesses that he is unable to follow the Privy Council's reasoning on this matter. "Intercourse", insofar as it is not repetitious of "trade" and "commerce", would normally refer to the physical motion and locomotion of persons across the frontier, and possibly of letters and messages across the frontier. In this sense, it would be susceptible of quantitative estimate of total movements, just as would be the total volume of trade and commerce.

[141] [1932] A.C. 542.

[142] [1936] A.C. 578.

[143] See p. 478, *supra*.

[144] [1936] A.C. 578.

[145] Citing Lord Watson in *Salomon v. Salomon & Co.*, [1897] A.C. 22, at 38, and adopted by Isaacs, J., in *James v. Cowan*, (1930) 43 C.L.R. 386, at 409.

[146] [1936] A.C. 578, at 630.

ference even before and after the frontier might still be obnoxious to sec. 92.[147]

Finally, their Lordships rejected the Commonwealth's argument that Lord Wright in *James v. Commonwealth*[148] had approved the High Court decision in *The King v. Vizzard*[149] and the other *Transport Cases* as applicable also to the Commonwealth's powers, and that, on this basis, the present High Court decision could not stand. The Privy Council questioned the degree of Lord Wright's earlier approval of the judgment of Evatt, J., in *Vizzard's Case,*[150] and further questioned whether, in any case, there was any inconsistency with the present High Court judgment in view of the wide difference of subject-matter and manner of restriction in the two cases.

At this point, the Privy Council in the *Bank Nationalization Case* directed its mind to certain distinctions on which earlier cases had relied, and in particular, to the distinction (1) between obnoxious restrictions affecting trade, commerce, etc., *directly,* and innocent ones affecting them only remotely or indirectly; (2) between regulation obnoxious to sec. 92 and regulation which is proper and valid. Up to this point, it may be noted, the Privy Council had proceeded confidently, as if the matter was to be decided purely on legal principles, without any regard (if we may adopt the words of Dixon, J.) to "social or sociological conceptions or preconceptions."[151] At the present crucial point in the argument, however, its judgment moved boldly into the social and sociological field, though without much apparent awareness of the change in judicial responsibilities thereby involved.

The four propositions, indeed, of this final section form almost a perfect illustration of the reluctance of judges to face the implications of their creative function, the innocence of the judicial right hand of the doings of the left, or, in Holmes' old phrase, of the continued reign of the inarticulate major premiss.

The Privy Council's first proposition amounted to this, that the term "absolutely free" in sec. 92 did not mean absolutely free, but only relatively free. They correctly admitted that ever since *Duncan v. Queensland*[152] the problem of all the cases had been to define the qualification of that which in the Constitution is left unqualified. Pausing at this point, it is to be observed how subtly the learned Lords, like Lord Wright before them,[153] understated the matter. For the truth, after all, is not that the word "free" is left unqualified in sec. 92, but that it is qualified by the most unqualified term which the draftsmen could devise. Those who regard the judicial task in

147 See p. 481, *supra.*
148 [1936] A.C. 578, at 622.
149 (1933) 50 C.L.R. 30.
150 See pp. 481-482, *supra,* and pp. 501 et seq., *infra.*
151 See p. 468, *supra.*
152 (1916) 22 C.L.R. 556, at 572.
153 See pp. 478-479, *supra.*

the constitutional sphere as merely to decide according to pre-existing legal propositions (among whom the writer is not to be counted) might well conclude that a pretended application of legal principles which has transformed the meaning of the word "absolutely" into "relatively" was a flagrant judicial usurpation.

In its attempt to rationalise this position, the Privy Council admitted that no "golden thread" ran through the labyrinth. But, they asserted, there were acceptable guides. First, *regulation* of trade, etc., is compatible with its "absolute freedom." Yet, with respect, this is no more a guide through the labyrinth than mere assertion of the existence of God is a proof of that existence. Emphatic denial of the patent contradiction does not prove that it does not exist. Second, they said, restrictions which were "remote" as distinct from "direct" did not interfere with "absolute freedom."

At this juncture, the judgment is illuminated by these words, offering momentarily hope for ascent to a more promising level of discourse:—

> "The problem to be solved will often be not so much legal as political, social, or economic, yet it must be solved by a court of law. For where the dispute is, as here, not only between Commonwealth and citizen but between Commonwealth and intervening States, on the one hand, and citizens and States, on the other, it is only the court that can decide the issue. It is vain to invoke the voice of Parliament."[154]

(This proposition as to the necessity for reference to political, social and economic considerations in many cases under sec. 92 we may term the *First Proposition.*)

But hopes are forthwith dashed. For, having thus recognised the "political, social, or economic" as distinct from "legal" nature of this inquiry, that its function was essentially of the order of policy-making normally assigned to a Parliament, the Privy Council proceeded to determine the case as if no such inquiry and policy-making were involved. Quite contrarily, they proceeded to decide the matter on what appears to be a merely verbal basis. Simple prohibition, they said, approving certain words of Latham, C.J., is not regulation. And the exclusion of competition by Australian National Airways with Trans-Australia Airways (the government airline) on the one hand,[155] and, in the instant case, of competition by private banks with the Commonwealth Bank, was a prohibition, not a regulation. This case, they said, was stronger than the *Airways Case,* in that competition was here excluded in intra-State as well as in inter-State activity, while the legislation in the *Airways Case* limited its pretensions to inter-State trade. (This finding of un-

[154] [1950] A.C. 235, at 310; [1949] 2 All E.R. 755, at 772.
[155] *Australian National Airways Pty. Ltd. v. Commonwealth,* (1946) 71 C.L.R. 29, at 61.

constitutionality on the basis of the "prohibition-regulation" dichotomy may be termed the *Second Proposition.*)

This decision, that sec. 46 of the Banking Act violated sec. 92 of the Constitution because it involved a prohibition and not a regulation of banking, was reached, be it noted, without giving any grounds based on political, social, or economic inquiries. And this, despite their admission a few paragraphs earlier that the problem before them involved the kind of political, social, and economic inquiry normally associated with legislative activity.

This coyness, which excluded from judgment those very considerations expressly acknowledged to be essential to judgment, presented an almost ludicrous aspect as the Privy Council elaborated its position on sec. 92. Having already decided that sec. 46 must be struck down on the mere basis that "prohibition" was not "regulation," their Lordships then proceeded to say that they did not intend thereby "to lay it down that in no circumstances could the exclusion of competition so as to create a monopoly, either in a State or Commonwealth agency, or in some other body, be justified."[156] In other words, having already decided the case on the unqualified "prohibition-regulation" dichotomy, and on the clear if unstated assumption that the dichotomy was a perfect one, their Lordships proceeded to say that the dichotomy required qualification, and was not perfect, an admission which we may here term the *Third Proposition.* This said, it was to be expected that their Lordships would, at this point, have returned to the ground they had already covered, to inquire whether sec. 46 of the Banking Act, though a prohibition, might still not fall innocently within the qualification.

For this purpose, it would of course have been essential for the learned Lords to define the scope of the qualification which, on their view, the "prohibition-regulation" dichotomy must suffer. What definition they offered was as follows:—

> "Every case must be judged on its own facts and in its own setting of time and circumstance, and it may be that in regard to some activities and at some stage of social development it might be maintained that prohibition with a view to State monopoly was the only practical and reasonable manner of regulation and that inter-State 'trade, commerce and intercourse' thus prohibited and thus monopolised remain absolutely free."[157]

[156] [1950] A.C. 235, at 311; [1949] 2 All E.R. 755, at 772.

[157] *Ibid.* Cf. Latham, C.J., in *McCarter v. Brodie,* [1950] Argus L.R. 385, at 400-401: "It has, however, been objected that a power to regulate . . . does not include a power to exclude any person from operations in trade and commerce. But it is obvious that any regulation which imposes conditions upon activities of individuals must exclude from those activities persons who are not prepared, or who are not able for any reason, to satisfy those conditions. In other words, all regulation involves some degree of prohibition. . ."

In their Lordships' view, therefore, the test for ascertaining whether, in a particular case, "prohibition with a view to State monopoly" was consistent with sec. 92, involved at the least a review of relevant economic factors in their relation to the "stage of social development" in the particular community at the particular time. (This we may term the *Fourth Proposition,* made by their Lordships.)

Here again, therefore, the Privy Council's own reasoning required it to have resort to social and economic considerations, with special reference here to the stage of social development of the Commonwealth of Australia when the Banking Act was passed in 1947. It may be, of course, that had their Lordships made such an examination they would have come to the same conclusion as they had already reached without it. The present article is not concerned with the correctness of the holding that the Banking Act 1947 was unconstitutional, but rather with the nature of judicial techniques in such cases. From this angle there could rarely have been a clearer and more fascinating example of the hiatus between what the court did, and what it simultaneously admitted it ought to have been doing.[158]

For, having by its *First Proposition* declared the need for reference to political, social and economic considerations in applying sec. 92, the court proceeded in its *Second Proposition* to strike down sec. 46 of the Banking Act without any material reference to such considerations on the basis of a verbal distinction between "prohibition" and "regulation." And then, having already struck down sec. 46 on this basis, the Privy Council added in its *Third Proposition* that this distinction was not decisive, and must be qualified, in terms of its *Fourth Proposition,* according to the stage of development, including social and economic development, of the Australian community. And having said this, their Lordships nevertheless still found it unnecessary to consider whether sec. 46 fell within the qualification to the "prohibition-regulation" distinction, or for this purpose to examine the stage of Australian development. In short, they determined that sec. 46 was void without considering those very questions which according to their judgment were prerequired for that determination.

As if to re-emphasise the inadequacy of its own technique, the Privy Council pointed out that other criteria in the decisions for distinguishing between regulation innocent and obnoxious to sec. 92 were also inadequate. Referring to the Commonwealth's argument that some prohibitions must be permissible, otherwise lunatics,

[158] It is of course possible that the Privy Council did base its conclusions on an assessment of relevant political, social and economic factors, but thought it unnecessary or unwise to state what facts were relevant, and what its assessment was. This would involve problems of judicial technique in the constitutional field additional to those of the unconsciously held "inarticulate premiss."

infants, bankrupts, could not be restrained from inter-State trade, and diseased or noxious objects could not be restrained from crossing State frontiers, their Lordships admitted that there again "a question of fact and degree is involved." They endorsed the views of Gavan Duffy, C.J., and Evatt and McTiernan, JJ., in the *Potato Case*[159] that it was "neither necessary nor desirable to mark out the precise degree to which a State may lawfully protect its citizens against the introduction of disease."

Having admitted therefore that the "direct-remote" criterion required the same kind of broad legislative approach as the "prohibition-regulation" criterion, they were content to reassert that "the distinction is a real one," and had no doubt on which side of the boundary the instant case fell, though they hastened to add that they would not attempt to define the boundary. Concerning this, as well as the "pith and substance" test, the Privy Council observed charitably that it illustrated "the way in which the human mind tries, and vainly tries, to give to a particular subject-matter a higher degree of definition than it will admit."[160]

In the writer's respectful view, their Lordships' own criterion, based on the distinction between "prohibition" and "regulation," merits at least equal charity. All these three tests, in truth, are but examples of what the writer has termed elsewhere "categories of indeterminate reference."[161] As such they are not in themselves capable of basing decisions without preliminary inquiry into the social, economic and political facts of the particular case. This their Lordships themselves had perceived, and they admitted even the tremendous range of the relevant facts in constitutional questions of the nature before them. The intense jurisprudential interest which their decision holds arises from their conduct, after having made this verbal admission, in completely ignoring it during the process of judgment.

That their Lordships had admitted this in so many words represents a landmark in the interpretation of the Australian Constitution. That they had, however, apart from this verbal admission, ignored their own insight, showed that the landmark marked a point still very little beyond the beginning of the road.

IX. THE RELUCTANT JUDGES: THE HIGH COURT AFTER THE BANK NATIONALIZATION CASE.

The confidence of the Australian judicial tradition that political, social and economic considerations can and should be excluded from judgment, must obviously be shaken by the Privy Council's square assertion that these may be precisely the critical considerations under sec. 92. It may be of interest, therefore, to conclude this

159 *Tasmania v. Victoria*, (1935) 52 C.L.R. 157, at 168-9.
160 [1950] A.C. 235, at 313; [1949] 2 All E.R. 755, at 773.
161 J. Stone, *The Province and Function of Law*, at 185 et seq.

paper with some account of the High Court's review of its own course of decision in the light of the Privy Council's judgment in the *Bank Nationalization Case.*

In *McCarter v. Brodie,*[162] a Victorian statute[163] prohibiting under criminal penalty the operation of commercial goods vehicles on Victorian public highways without a licence, was challenged. The licensing board's discretion to refuse or to attach conditions to the licence was absolute subject only to review by the Governor-in-Council. The defendants had been convicted for carrying, without a licence, cargoes of beer from South Australia to New South Wales, by a route traversing north-west Victoria for a short distance of seventy miles, and they now sought to show that the Act violated sec. 92 of the Constitution.

Prior to the Privy Council's judgment in the *Bank Nationalization Case,* this would have raised few problems for the High Court. On its facts *McCarter's Case* would have been but the latest of a long series of decisions so well known as to have earned the compendious title of the *Transport Cases,*[164] all of them involving State laws prohibiting both intra-State and inter-State transport without a licence, and all of them upheld by a steady majority as a proper exercise of the States' regulatory power consistent with sec. 92.

The majority reasoning in the *Transport Cases* has been regarded as best formulated in the judgment of Evatt, J., in *Vizzard's Case*:—[165]

> ". . . a State does not infringe sec. 92 if, having no concern, interest or object in restricting or prohibiting trade between States, or commerce between States, or intercourse between States, it chooses to organize, regulate and co-ordinate those facilities or services which are provided and conducted within the State as instruments essential to all trade, commerce, and intercourse."

Evatt, J., had also, in a passage often regarded as approved by the Privy Council,[166] stated that sec. 92 did not guarantee to those

[162] [1950] Argus L.R. 385; 24 A.L.J. 172.

[163] Transport Regulation Act 1933.

[164] Before *James v. Commonwealth—Willard v. Rawson,* (1933) 48 C.L.R. 316; *The King v. Vizzard,* (1934) 50 C.L.R. 30; *O. Gilpin Ltd. v. Commissioner for Transport,* (1935) 52 C.L.R. 189; *Bessell v. Dayman,* (1935) 52 C.L.R. 215; *Duncan v. Vizzard,* (1935) 53 C.L.R. 493. After *James v. Commonwealth — Riverina Transport Pty. Ltd. v. Victoria,* (1937) 57 C.L.R. 327. Dixon, J., dissented in all six cases; Starke, J., did not sit in the last case but dissented in all the rest except the first.

[165] (1934) 50 C.L.R. 30, at 82.

[166] [1936] A.C. 578, at 621-22. A fuller quotation with the Privy Council's observations thereon will be found on pp. 481-482, *supra.* Starke, J., however, in *Gratwick v. Johnson,* (1945) 70 C.L.R. 1, at 17-19, and in the *Bank Nationalization Case,* (1948) 76 C.L.R. 1, at 311, has denied that the Privy Council's remarks in question constituted approval of the *Transport Cases.*

engaged, whether as owners or servants or agents, in inter-State transactions and transport "the right to ignore State transport and marketing regulations, and to choose how, when and where each of them will transport and market the commodities."

The more consistent minority view of the *Transport Cases* is that of Dixon, J.[167] In *Gilpin's Case*[168] he formulated the test in this way, that, given a matter falling within sec. 92 and some restriction thereon, such restriction must be invalid unless the restriction or burden is imposed in virtue of or in reference to none of the essential qualities which are connoted by the description "trade, commerce, and intercourse among the States." Dixon, J., regarded this test as displacing the "pith and substance" test, though it is worth observing that Starke, J., who also dissented, based his condemnation of the *Transport Cases* precisely on the "pith and substance" test, and on the "directness" of the burden on inter-State commerce.[169]

Prior, therefore, to the Privy Council's decision in the *Bank Nationalization Case,* the High Court judges were aligned on the correctness of the earlier decisions in the *Transport Cases* in this way, Dixon, J., held them wrongly decided on the test of the qualities in virtue of which the restriction is imposed. Starke, J., held them wrongly decided on the pith and substance and direct-remote test. Rich, J., who had been among the majorities in the *Transport Cases,* and Williams, J.,[170] had apparently no afterthoughts.[171] Latham, C.J. (McTiernan, J., agreeing) on the other hand, in also accepting the *Transport Cases* as rightly decided, regarded their correctness as crucial to the determination whether the statutory exclusion of one or all of the plaintiff banks from the banking business violated sec. 92. For he regarded the *Transport Cases* as

167 Starke, J., dissented along with Dixon, J., in all except the first, the *Willard Case,* which Starke, J., was later concerned to explain as involving on the special facts an Act whose "pith and substance" was mere traffic regulation. See his opinion in the *Bank Nationalization Case,* quoted in note 169, *infra.*

168 (1935) 52 C.L.R. 189, at 204.

169 "The *Transport Cases*", said Starke, J., in the *Bank Nationalization Case,* (1948) 76 C.L.R. 1, at 311, "including *Willard v. Rawson* are applications of this generalization which was", he thought, "the prevailing view of this Court, that the legislation must be scrutinised in its entirety and its real object, true character and real effect—its pith and substance—in the particular instance under discussion must be determined" (at 310). But he thought they were erroneous applications. And in further unconscious testimony to the unreality of the distinctions which he found it worthwhile to dispute with his fellow dissentient, he went on to re-state it in still another form, of directness or remoteness of the burden on inter-State commerce: "The *Transport Cases*", he said (at 311), "were not mere traffic regulations . . . but a burden imposed directly and immediately upon the transport or movement of passengers and goods, whether engaged in domestic, inter-State or other trade and commerce."

170 Who was not appointed until 1940, after the *Transport Cases.*

171 They did not find it necessary to consider them in relation to sec. 92 in the *Bank Nationalization Case.*

precisely cases where such exclusion had been upheld as regards transport, and did not see how the majority of the Court could both regard them as correct, and yet regard similar exclusion from banking as violative of sec. 92.[172]

The Privy Council in the *Bank Nationalization Case* having slipped out of Chief Justice Latham's cleft stick by condemning the exclusion from banking, while not committing itself as to the *Transport Cases,*[173] the problem came quickly back to the High Court in *McCarter v. Brodie* for a decision on the status of the *Transport Cases.*

It was held by a majority (Latham, C.J., McTiernan, Williams, and Webb, JJ.) with Dixon and Fullagar, JJ., dissenting, that the Victorian Act, though operating directly on persons engaged in inter-State trade, commerce and intercourse, was regulatory only, and a valid exercise of legislative power consistent with sec. 92. The majority regarded *The King v. Vizzard*[174] and the *Transport Cases* generally as correctly decided and consistent with *James v. Commonwealth.*[175] The minority (Dixon and Fullagar, JJ.) on the other hand, thought that *The King v. Vizzard* was quite irreconcilable with *James v. Commonwealth,* and that in the present case, the prohibition contained in the Act, being a prohibition subject to an absolute discretion to exempt from the prohibition, as equivalent to a simple prohibition. Though possibly regulatory of the general volume of trade, it was not regulatory of the trade of an individual, but was prohibitive, and therefore bad.

This summary, however, gives little inkling of the strange state in which the course of High Court decision found itself in the *McCarter Case.*

All four majority judges adopted the Privy Council's statement in the *Bank Nationalization Case* that sec. 92 does not forbid regulation of inter-State trade and commerce, but only "direct" and "immediate" as distinct from "indirect" and "consequential" impediments.[176] Two of the majority, McTiernan[177] and Webb,[178] JJ., followed their Lordships in observing that the "direct-remote" as well as the "prohibition-regulation" tests often involved "not so much legal as political, social, or economic" inquiries. And they followed their Lordships in ignoring the observation so far as the instant

[172] *Bank Nationalization Case,* (1948) 76 C.L.R. 1, at 238-9.
[173] See p. 497, *supra.*
[174] (1934) 50 C.L.R. 30.
[175] [1936] A.C. 578.
[176] See pp. 497 et seq., *supra.*
[177] [1950] Argus L.R. 385, at 407.
[178] *Ibid.,* at 412, 413.
[179] McTiernan, J., did precede his holding with the words that "having regard to the nature of the subject-matter and the economic problem which (the Act) was passed to solve". But this was both preamble and peroration with no social, economic or political impediment or inquiry between.

decision was concerned.[179] None of the other judges, majority or minority, showed any awareness at all that the Privy Council had enjoined a technique of interpretation of sec. 92 at odds with their own earlier attitudes. It was as if, out of sheer respect for their Lordships' *legal* authority, the eye and ear were to be averted from their Lordships' unseemly invocation of extra-legal considerations.

We have seen that the Privy Council, through Lord Wright in *James v. Commonwealth*[180] and Lord Porter in the *Bank Nationalization Case,* has virtually admitted that, in the final resort, cases on sec. 92 will each usually turn on its own facts.[181] What the Privy Council clarified was not any legally fixed line between licit and illicit regulation or prohibition under sec. 92, but the unfortunate truth that, for most cases at any rate, no such legally fixed line exists in advance of the particular judicial determination. The High Court judgments in *McCarter v. Brodie* dramatically confirm this.

All the judges, of course, accepted the obligation to follow the Privy Council, which had so recently spoken. Their Lordships had said, in slipping from Chief Justice Latham's cleft stick, that not all of the reasoning of Evatt, J., in *Vizzard's Case* had been approved by the Privy Council,[182] that the decisions in *James v. Cowan* and *Vizzard's Case* could be reconciled, but that all that Evatt, J., and Isaacs, J., had said in those respective cases could not be reconciled.

In view of the calculated ambiguity of this evasion, and of the fact that the Privy Council's actual holding proceeded on meaningless or indeterminate *formulae,* infused with political, social and economic assessments, the need for which was asserted but the content of which remained quite unexpressed,[183] the High Court's obligation to "follow" the Privy Council promised much interest.

Fulfilment of the promise began in the four-way division of opinion in *McCarter v. Brodie* as to whether the *Transport Cases* were still law. McTiernan, J., rested on the pre-*Bank Nationalization Case* assumption that the Privy Council had given the stamp of its authority to the judgment of Evatt, J., in *Vizzard's Case* as a final endorsement of the *Transport Cases.*[184] Williams[185] and Webb,[186] JJ., thought that while what had fallen from their Lordships in the *Bank Nationalization Case* had weakened the authority of the *Transport Cases,* it had not overruled them, and that they still stood sufficiently to uphold the instant statute. On the other hand, Fullagar, J.,[187] and Dixon, J.[188] (who on this point adopted

180 [1936] A.C. 598.
181 See pp. 497 et seq., *supra.*
182 See pp. 481-482, *supra.*
183 See p. 498, *supra.*
184 [1950] Argus L.R. 385, at 406.
185 *Ibid.,* at 410.
186 *Ibid.,* at 413.
187 *Ibid.,* at 420.
188 *Ibid.,* at 404.

the former's opinion), thought that the *Bank Nationalization* decision involved a "very clear and explicit denial of the whole basis of *The King v. Vizzard*" and that the latter case, and with it the *Transport Cases,* were "irreconcilable with the law as propounded in the Banking Case."[189]

Latham, C.J., in contrast with all his brethren, while regarding the *Bank Nationalization* judgment as a further approval of the judgment of Evatt, J., in *Vizzard's Case,* was prepared to limit its authority to the specific question of the regulation of transport. He was disposed, therefore, while recognising some inconsistency between the respective reasonings, to reconcile the two by limiting the force of the latter to "transport" and (*semble*) of the former to banking.[190] Insofar, as it were, as the Privy Council had in *James v. Commonwealth* approved Evatt's judgment in *Vizzard's Case,* they had done so only as applicable to "State regulation of transport." Insofar as the same body in the *Bank Nationalization Case* had seemed to disapprove of the *Transport Cases,* it had merely declared them inapplicable to "banking." Accordingly, he concluded,

> "I regard the reference made to *Vizzard's Case* in the *Banking Case* as amounting to a warning that general statements made with reference to a particular subject-matter ought not to be extended so as to be applied to another subject-matter irrespective of distinctions between those matters and without reference to the particular form of legislation in each case. In other words, a decision under S. 92 with respect to transport ought not to be applied in relation to banking without regard to the limitations mentioned."[191]

This approach, it is to be observed, constitutes a radical breakaway from the search for a single legal formula adequate for all cases under sec. 92. It is also perhaps an important step in the direction of the Privy Council's reduction of sec. 92 to a question of fact in each case.

CONCLUSIONS.

1. The present fragment of Australian experience of constitutional interpretation shows, in marked degree, the qualities of surprise which are the sign of a living and changing system. The written constitution in Australia in its first half-century has been no more proof against the pressures of economic and social change than other long-lived constitutions.

2. These dynamic pressures which have subjected the federal commerce power in Australia to the hazards of sec. 92 are reflected in the growth of competing rationalisations as exuberant and

189 *Ibid.,* at 421.
190 *Ibid.,* at 394.
191 *Ibid.*

bewildering as anything in American constitutional doctrine, unless indeed it be the public utilities doctrines of *Smyth v. Ames*[192] and its successors.

3. It is clear that the Australian draftsmen had in mind the model of Article 1, section 8, clause 3 of the United States Constitution, when they provided in sec. 51 of the Australian Constitution that Parliament should have power to make laws with respect to "(i) trade and commerce with other countries, and among the States." Apart from the reference in the American provision to the Indian tribes, no serious difference can be detected between the apparent scope of federal legislative power in relation to inter-State and foreign commerce in Australia and that of the United States Congress. Both of them, moreover, are subject to the limitations and guarantees in other parts of the respective Constitutions.

4. As to these overriding limitations and guarantees, however, the two documents on their face would appear to be wholly divergent. The United States Constitution has its generous Bill of Rights, its protection against the impairment of the obligations of contract, against deprivation of life, liberty or property without due process of law, and the rest; guarantees effective for the most part against both the American State and Federal Governments. The Australian Constitution, apart from secs. 116-117 on religious disestablishment and liberty and equality of citizens, contains no comparable Bill of Rights, though it does contain sec. 92, which historically was directed to guaranteeing "free trade" on the fiscal level.

5. It might have been expected from the preceding considerations that the federal commerce power in the United States would have been hemmed in by guaranteed liberties of the individual to a far greater extent than in Australia.

   In fact, this has not been as much the case as would have been expected. Indeed, in substantial degree, the position has been quite the reverse.

   The trend of American constitutional interpretation in the last half-century, so far as the commerce power is concerned, can be stated broadly in terms of a double federal encroachment, first, upon the activities earlier regarded as the province of the States, and second, upon the free economic activity of individuals, especially on their freedom of contract and free choice of vocation. It would not be too inaccurate to say that the federal commerce power in the United States has been a main channel through which governmental interventionism has invaded practically all spheres of national economic activity, these invaded spheres becoming constantly wider as the com-

[192] (1896) 169 U.S. 466; 42 Law. Ed. 819.

plexity of modern economic relations entangles inter-State and foreign commerce. It is true that this expanding federal invasion of the field of *laissez-faire* was held in for a time by reference to other provisions of the Constitution, to which admittedly the commerce clause is subject, notably the due process clause and the prohibition of the impairment of the obligation of contract. Nevertheless, in the long run, the commerce clause has served not only as a basis of consolidation of federal power as against State power, but also as a basis for the construction of an efficient system of governmental regulation of the operation of the great public utilities, and of individual freedom of contract and vocation in fields of public interest.

In Australia, constitutional development has definitely followed the American on the first head. There has been, here also, a steadily increasing invasion by the federal parliament of the field of economic control throughout the States, though this has proceeded at least as much under the defence power in sec. 51 (vi) as under the power over inter-State and foreign commerce.[193] But on the second head, despite the absence of a Bill of Rights, interpretation has reached a position in which the commerce power, as well of the Commonwealth as of the States, has been severely hemmed in by guaranteed individual rights of freedom of contract and disposition and free choice of vocation.

6. This remarkable situation has arisen from the growth of sec. 92 of the Australian Constitution, under judicial cultivation, to a stature which the draftsmen could scarcely have conceived.

Contemporary accounts were quite clear that the admonition in sec. 92 that inter-State commerce should remain "absolutely free," was envisaged as a mere safeguard against the continuance or revival of customs barriers and the like between the several States. It was, in brief, a guarantee of "free trade" in the sense of the free trade-protection politics of the day. And since other provisions of the Constitution forbade the Commonwealth in any case to discriminate between States or parts of States, inhibition of the Commonwealth by sec. 92 seemed pointless.

Had judicial interpretation of sec. 92 followed the historical context, the scope of the Australian commerce power would have been nearer to the American than it is. That context was, however, rejected almost *ab initio* as a guide to interpretation.

The judges based themselves mainly on the fact that the phrase "trade, commerce, and intercourse shall be absolutely free" had, in its ordinary literal sense, a wider import than the

[193] For Holman's summary of the encroachments on the sphere of the States up to 1928 see his *Three Lectures on the Australian Constitution,* (1928) 57 et seq.

"free trade" doctrine, and that it was beyond the judicial province to read them down to the actual intention of the draftsmen.

7. This professed moderation, however, only forced the judges into stronghandedness of a far more serious kind. By their refusal to limit the clause by reference to the "free trade" doctrine of the framers, the judges were led to do far less justified violence to the word "absolutely" in "absolutely free." They either read the word "absolutely" wholly out of the section, or, what is worse, they read it to mean "relatively." So reading it, they were induced to indulge in a whole series of *tours de force* by way of attempts to distinguish between degrees of infringement of "absolute" freedom that were permissible under sec. 92, and those that were not.

8. Because, moreover, of the wide varieties of trade regulation exercised by the States, the abolition of which was quite beyond contemplation, the line of distinction proved difficult. The judges sought to ease this difficulty by the observation that the prohibition in sec. 92 did not forbid such regulation as was essential in an ordered community. In Lord Wright's words:—

> "Whatever 'free' in 'absolutely free' means, it cannot mean free from legislation, because both the States and the Commonwealth have power to legislate on trade and commerce. 'Free,' it is submitted, is a political conception, it is the conception of an orderly and ordered freedom, and not the conception of a chaotic licence which would result from allowing every individual to do exactly as he wished. No impediment or hindrance is to be put upon trade among the States, it is not that its regulation is thereupon to cease."[194]

Under cover of this postulate, that an "ordered" community was presupposed by sec. 92, the judges were able to save such State legislation restricting freedom of inter-State trade as appeared to them for the time being to be necessary and desirable.

The postulate of an "ordered" community is not to be found expressed in the Australian Constitution any more than "the police power" is to be found expressed in the American Constitution. Both are devices for evading constitutional restraints at points where they would impede what the judges regard as essential governmental regulation. The Australian device has not gone without judicial challenge. "It is certainly difficult," said Lord Wright, "to read into the express words of sec. 92 an implied limitation based on public policy," and he reserved the question whether the maxim *salus populi est*

[194] *James v. Commonwealth*, [1936] A.C. 578, at 593.

suprema lex could override sec. 92.[195] Yet nothing could be clearer than the nature of this implied limitation, or than the fact that Lord Wright himself had helped to entrench it.

9. The pressure for making the regulation of inter-State commerce legally possible was greatly intensified when, fully thirty-six years after federation, it was first held that sec. 92 guaranteed

[195] See *ibid.*, at 624-5, his discussions of *Ex parte Nelson (No. 1)*, (1928) 42 C.L.R. 209 (upholding a statute forbidding entry of cattle into New South Wales from an infectious cattle area of Queensland; three judges dissenting) in relation to *Tasmania v. Victoria,* (1935) 52 C.L.R. 157.

The tyranny of names over thought is great. In the case of *McCarter v. Brodie,* [1950] Argus L.R. 385, 24 A.L.J. 172, just decided, Latham, C.J., re-asserted the implied right of a State to regulate "creatures or things or courses of action . . . calculated to injure its citizens", and "to determine for that purpose what is so calculated." On the same page, he is concerned to say that the American doctrine "of the police power of the States, which permits some degree of local regulation of inter-State trade and commerce . . . finds many difficulties in its application and has never been part of the law of Australia." Of such stuff clearly is comparative public law *not* made!

Such a blindness to the *functional* identity of the American doctrine of "the police power" and the Australian doctrine that sec. 92 presupposes an "ordered and orderly" community, was more understandable in 1928 before the latter doctrine established itself. Higgins, J., in *Roughley v. New South Wales,* (1928) 42 C.L.R. 162, thought he disposed of the dissents of Holmes, Brandeis and Stone, JJ., in *Di Santo v. Pennsylvania,* (1927) 273 U.S. 34, 71 Law Ed. 524, by the observation that "in Australia we have to apply a specific provision of the Constitution (sec. 92)". In that very year, the High Court in *Ex parte Nelson,* (1928) 42 C.L.R. 209, sustained (on an equal division) a New South Wales statute as consistent with sec. 92, forbidding the importation of stock from a disease-ridden Queensland district despite sec. 92.

Owen Dixon, K.C. (as he then was), testifying in December 1927 before the Royal Commission on the Constitution of the Commonwealth (Minutes of Evidence, (1929) 791), showed an awareness, which he did not consistently retain on the Bench, when he said that whether the Australian Constitution was to have a police power doctrine depended "on what the judiciary would do in the future." His awareness did not even then extend to a realisation that the Australian doctrine, if it developed, would be open to the same criticism that he made of the American police power, that being "a doctrine . . . invented to get rid of the logical results of literal interpretation, and it is so flexible and so dangerous that most English lawyers find it repugnant to them."

For other Australian discussions of the police power see *Fox v. Robbins,* (1908-09) 8 C.L.R. 115, and *R. v. Smithers,* (1912) 16 C.L.R. 99. And see another comparative reference in which Fullagar, J., after indicating that on consideration of the American cases he found it necessary to refer only to High Court and Privy Council decisions, added that "The American decisions suggest strongly to my mind that, if Congress were to enact a law in the terms of sec. 92 of the Constitution, a State Act such as the Victorian Transport Regulation Act would have no chance of surviving a challenge in the Supreme Court" (*McCarter v. Brodie,* [1950] Argus L.R. 385, at 425). Such pronouncements go far to justify the tendency of the High Court, since the *Engineers' Case* (note 2, *supra*), to discourage the use of American authorities. But they go even further to prove the importance to both countries of raising the study of comparative constitutional law to a rather different level.

the "absolute freedom" of inter-State commerce against the Commonwealth itself as well as against the States. Since that holding threatened to remove important economic problems beyond the regulatory power of any government, Commonwealth or State, it was accompanied by a tendency to reduce the overall scope of the prohibition of sec. 92.

10. This, however, was but one among many tangled threads in the course of decision under sec. 92. Behind this tangle and the embarrassingly rich pattern of tests of licit regulation, there brooded vaguely certain issues with which the American constitutional lawyer is quite familiar.

Oversimplified, it might be said that while "absolutely free" was being read down *quantitatively* to permit regulation which the Court deemed necessary in an "ordered society," the word "free" in that phrase was being given a *qualitative* expansion, enlarging its ambit beyond the sphere of customs and other trade impediments so as to protect individual freedom of contract and choice of vocation.

The American reader will recall how the Fifth and Fourteenth Amendments were for half a century and more after the Civil War interpreted by the United States Supreme Court as protecting individual freedom of contract and free choice of vocation from the reach of governmental interference, whether under the commerce clause or otherwise. This interpretation set a serious brake on important social legislation from the 1880's right down to the changes in the Court under the New Deal,[196] whether under the commerce clause or otherwise. So, under the Australian Constitution, the "freedom" of trade, commerce and intercourse guaranteed under sec. 92 is coming to be interpreted to include tacitly within itself a guarantee of individual freedom of contract and choice of vocation of persons operating within the field of inter-State commerce.

Certain points in the timing of these developments are interesting. At the present day, especially since the *Airways*[197] and *Bank Nationalization Cases*,[198] the course of Australian decision appears to be moving more definitely towards a defence of freedom of contract and free choice of vocation under the banner of sec. 92, with a corresponding inhibition of federal control of national economic activity under sec. 51 (i). Equally definitely, the American course of decision has tended, since the late 'thirties, to unloose the shackles imposed upon the federal power of regulation of inter-State and foreign commerce by

[196] See for a brief account, J. Stone, *op. cit.*, at 250 et seq., and the literature there cited.

[197] (1945) 71 C.L.R. 29.

[198] *Supra, passim.*

the individual liberties (notably of contract and vocation) formerly implied from the Fifth and Fourteenth Amendments.

This difference in timing, however, may conceal a deeper similarity. The great flowering of the liberty of contract doctrine in America coincided with the building of the great railroads, the expansion of Northern industry generally after the Civil War, and, in particular, the growth of the corporative form in industry. Three-quarters of a century have now passed. But in the life cycle of her economy Australia is only just beginning to feel the full expansive pressure resulting from industrialization under a private enterprise economy. While there had been a substantial amount of industrialization from the beginning of Federation and considerable steel production even before, the Second World War undoubtedly marked a new scale of industrial activity, just as did the railroad development and growth of corporate industrial enterprise after the American Civil War.

11. Despite this unquestionable influence of economic and social change upon judicial interpretation, the judges of the High Court have felt it necessary to protest constantly the irrelevance for their deliberations of any but "legal" considerations. This attitude is persisted in even today. So that even in the *Bank Nationalization Case,*[199] Dixon, J., was able to dispose of the Commonwealth argument that the purpose of sec. 92 was to prevent impairment of the total volume or flow of inter-State commerce, by observing that it "raised an irrelevant consideration," and was "moreover, a consideration of an economic and not a legal character." Both the majority and minority opinions concentrated all their learned and lengthy elaboration on the verbal labyrinth of their own earlier decisions, and succeeded only in lengthening the labyrinthine paths. Questions which the Privy Council in this very case later declared could only be decided by reference to social and economic considerations, and to the stage of the Australian people's social development, were passed upon at both levels without any serious attention to these matters.

12. In view of the preceding conclusions, the complexities of the High Court's 1950 review of the *Transport Cases* in *McCarter v. Brodie*[200] are not to be attributed to merely confused or even erroneous thinking. The *Transport Cases,* sociologically speaking, represent a phase of High Court decision before the issues of individual freedom of contract and vocation under sec. 92 emerged with even their present degree of clarity. The obvious feeling in the High Court in 1950, none the less strong because it did not in that case prevail, and not limited to the dissents

[199] For certain qualifications, see J. Stone, *The Myths of Planning and Laissez-faire,* (1949) 18 George Washington Law Review 1, at 16 et seq.
[200] [1950] Argus L.R. 385.

of Dixon and Fullagar, JJ., that they should now be overruled is a natural effect of the emergence of those issues.

This aspect almost becomes explicit in the dissenting judgments, which carried over from the *Bank Nationalization Case* the debate whether sec. 92 guarantees the rights of individuals, within which rather ambiguous notion, as we have seen above, the freedom of contract and vocation issue is encysted. Fullagar, J. (then the newest appointee to the High Court Bench), as well as his brother dissentient Dixon, J., came near to stating their basic quarrel with the *Transport Cases* in these very terms. "S. 92," said Fullagar, J.,[201] "protects the trade, commerce and intercourse of the famous Mr. James and every other individual," and therefore a challenged statute is "to be examined from the point of view of every individual engaged in trade, commerce and intercourse." And the *Transport Cases* were bad law because they failed to do this. Dixon, J., made the same proposition in converse form. It was a main reason for his conviction that the *Transport Cases* were erroneous that

> "the inter-State commercial activities of the individual and his right to engage in them were ignored. Inter-State commerce as a whole was considered and the adverse effect upon the total flow was treated as the test or, at all events, a test."[202]

And Williams, J., of the majority, while not prepared to overrule the *Transport Cases,* was prepared to accept the view that the Privy Council had made it plain that "the freedom of trade and commerce and intercourse protected by sec. 92 is the freedom of the individual to engage in trade and commerce and pass freely between the States."[203]

That the *Transport Cases* were not in fact overruled is, it is believed, due to the High Court's entrenched tradition to seek the meaning of sec. 92 in some authoritatively formulated legal propositions. The writer believes that this entrenched traditional technique came, in *McCarter v. Brodie,* into head-on conflict with the judicial ideal of free enterprise of more recent growth.[204] Such a conflict would go far to explain both the reluctance of the reaffirmation of the *Transport Cases,* as well as the signs of restiveness and retreat even among the three of the four majority judges in face of this re-affirmation.

For, while the decision in *McCarter v. Brodie* can be formally described as a four-to-two decision in favour of the

201 *Ibid.,* at 423.
202 *Ibid.,* at 403.
203 *Ibid.,* at 408, 410.
204 For Dixon, J., himself, paradoxically enough, this presented no problem, since he had consistently dissented in all the *Transport Cases,* and his dissents had, in his view, now been authoritatively converted into law by the Privy Council.

survival of the *Transport Cases,* this only conceals the real ferment which is at work beneath. McTiernan, J., alone seemed to have no doubts. Dixon and Fullagar, JJ., dissenting, not only denied that the Privy Council had approved of them, but asserted squarely that the decision in the *Bank Nationalization Case* had negatived and virtually overruled the only consideration on which the *Transport Cases* could rest. Both Williams and Webb, JJ., concurring, in holding themselves still bound by the *Transport Cases,* recognised that the *Bank Nationalization* decision had weakened their authority to some undefined extent. And most interesting of all, Latham, C.J., who before the Privy Council *Bank Nationalization* decision had asserted that the statutes in that case and in the *Transport Cases* must on this issue stand or fall together,[205] was prepared, after the Privy Council decision, to limit the authority of the *Transport Cases* to cases of regulation of transport, and by implication to limit the authority of other decisions on sec. 92 (including presumably the *Bank Nationalization Case* itself) to the particular subject-matter with which they dealt.

When, therefore, it is remembered that the *Transport Cases* themselves represent but one of many strands in the judicial tangle which enmeshes sec. 92, the way ahead seems grim indeed for those who still pursue the meaning of sec. 92 as a matter of law, free, as Dixon, J., might say, from "social and sociological conceptions and preconceptions." For those, however, who take seriously the Privy Council's discovery that the problems of sec. 92 are often determinable only on political, social and economic grounds, rather than by the manipulation of judicially wrought *formulae,* the signs of a deeper issue are plain to see behind the mutual conflict and reciprocating chaos of judicial rationalisations. This issue concerns the extent to which judicial views concerning the proper bounds of legislative encroachment on individual freedom of contract and vocation are to be embodied in the constitutional inhibition of sec. 92. It may be that some of the judicial *dramatis personae* are not conscious of such issues, or at any rate of their pervasiveness. Old as the issue is in American constitutional law, its age is not great in specific relation to sec. 92 of the Australian Constitution. The close of the first half-century of the Australian Constitution leaves it raised, but still far from even a provisional answer.

13. In the final resort, the Privy Council has in the two now leading cases reduced the question of conformity of particular legislation to sec. 92 to the level of a question of fact in each case. Admittedly successive generations cannot expect to foresee the application of a Constitution half a century old to new problems as they arise. But the situation under sec. 92 is not merely the

[205] See pp. 503-504, *supra.*

result of an ageing organic law. It is also a function of judicial unwillingness to accept the realities of the tasks which willy-nilly they must shoulder, and indeed have shouldered. A game of poker is not a game of chess, and it cannot be converted into a game of chess by mere gravity of countenance or even by thinking about chess while playing poker. To do these things is merely to spoil the game of poker. And in the judicial version of this situation the players are risking not their own stakes but the entire future of their societies.

14. Having by devious routes converted the word "absolutely" in sec. 92 into "relatively"; having given "free" a content going far beyond what the historical context would bear even by projecting the minds of the draftsmen forward to contemporary problems, and having recognised that the effect of this was to render the Commonwealth as well as the State Governments impotent to take economic measures such as marketing schemes which the Court, and even the vast majority of producers and consumers, regarded as essential, Lord Wright in *James v. Commonwealth*[206] stood back and lamented his own handiwork:

> "Such a result," he said, "cannot fail to cause regrets. But these inconveniences are liable to flow from a written Constitution. Their Lordships . . . could not give effect to the respondent's contention consistently with any construction of the Constitution which is in accordance with sound principles of interpretation. To give that effect would amount to re-writing, not to construing, the Constitution."

Pausing at this point, one may respectfully wonder whether the judges had not in any case done precisely that; with this reservation, however, that their re-writing is rather illegible. Lord Wright, however, assumed otherwise, no doubt regarding the vast body of quasi-theological dogma and doctrine surrounding sec. 92 as implicit in the original brief text. He continued that such re-writing

> "is not their Lordships' function. The Constitution, including sec. 92, embodied the will of the people of Australia, and can only be altered by the will of the people of Australia expressed according to the provisions of sec. 128."

So, alas, does a people's will move into spheres where their mind may not follow.

JULIUS STONE.

[206] [1936] A.C. 578, at 633.