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SECTION 92 — A PROBLEM PIECE

*LORD WRIGHT OF DURLEY**

I feel great diffidence in approaching questions arising under s. 92 of the Australian Constitution.[1] The Constitution was the creation of the Australian people and its meaning and its application are matters for Australia and the Australian Courts. Of that fact I have always felt conscious even when in my judicial duty I was sitting on the Board, as I did in the case of *James* v. *The Commonwealth*[2], where the Privy Council made a serious attempt to solve some of the problems of the section. I have no second thoughts about the judgment then given except on one very vital point, that is, the exact scope of s. 92. The Board held that it was a *laisser passer* clause, not a *laisser faire* clause. They ought, as I now think, to have gone further and held that s. 92 was a fiscal clause (for reasons which I will develop later in this article), and that its operation was there limited to fiscal matters. When I look back it seems to me now as a private person, and not even an Australian, that on that view it was wrong to invalidate an Act of the Commonwealth Parliament which was not fiscal in character but appertained to the State powers or fell within the governmental powers vested in the Federal Government under s. 51 (i)[3] of the Constitution. All these could be affected by s. 92 if the case fell within the range of fiscal matters, with which alone, as I think now, s. 92 dealt.

I wish this article to be purely exploratory, even though, from long judicial habit, I may sometimes appear to be a little dogmatic and to allow my present personal views to obtrude. What I want to do is to state the question for the consideration of Australians, who, in any case (on the purely legal side), have

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[1] Commonwealth of Australia Constitution Act, 1900 (Eng.), 63 & 64 Vict., c. 12, s. 92, provides that "Trade, commerce and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free".

[2] (1936) A.C. 578, (1936) 55 C.L.R. 1 (P.C.).

[3] I.e., the power to make laws with respect to "trade and commerce with other countries, and among the States".

available the vital and realistic help of the Australian Bench, Bar, and Law Schools, all very learned and experienced.

Section 92, it seems to me, is not merely declaratory, it is imperative and categorical: trade, commerce and intercourse among the States shall under the Constitution be "*absolutely free*". It is vain to seek here for qualifications; these are ruled out by the word "absolutely": read in their context, moreover, the words of the section carry with them the limitation to fiscal matters *ejusdem generis* with customs duties. The section comes under Chapter IV, which relates to Finance and Trade, and is controlled by the opening words. It is said that Sir George Reid, the New South Wales Premier, praised the section as "a little bit of layman's language".

It has certainly given the courts, the Government draftsmen and people generally an immense deal of trouble for slender, if any, advantage to the general weal. But I have asked myself whether that was not the fault of the lawyers (including, in 1935, myself) and not of the language itself. Oliver Wendell Holmes, Jr., once said that a constitution may mean what it actually says. Fiscal burdens may take many forms besides uniform duties of customs, as was seen in the early years of the Constitution's life in *Fox* v. *Robbins*.[4] If the limitation to fiscal burdens was clear, as I think it was, in the words of the section, the draftsmen were quite justified in avoiding further definition. The Fathers of the Constitution could not foresee the confusions and misunderstandings that gradually emerged.

But, it will be said, why did not the Privy Council in 1936 put the matter right? I am not speaking now from memory; I do not remember details of events of so many years ago.

The Judicial Committee of the Privy Council, if I may say so (as, indeed, I am in private duty bound to say—I gave fifteen years of my judicial life to service largely in that tribunal), it seems clear to me on perusing once more the report of the case, was over-impressed by the general idea, largely prevalent in Australia at that time (partly under the influence of *McArthur's Case*[5]), that s. 92 was an overriding section applicable to the whole range of legislative and governmental activity of every kind. The section had been constantly and almost as a matter of course used to invalidate governmental acts of almost every kind far removed from fiscal matters. Only four years before 1936 the Privy Council had declared a Marketing Control Act[6] and Regulations void as infringing the freedom guaranteed for all time by s. 92. Though the Privy Council is not bound by its own decisions, it would have been a strong measure to reverse so recent a decision. Anyhow it did not, it seems, realise either the error, or the importance of its consequences. An interpretation of the Constitution is not like a decision on a question of criminal law, though it necessarily involves a ruling of law. An erroneous interpretation can and must be put right for the future as soon as the error is made clear. You cannot change the Constitution simply on the maxim *communis error facit jus*. The general good must prevail over precedent, once the error is ascertained, though, if the constitutional court is not clear, there may be invoked the decision of the people in the way prescribed by the Constituent Act. The people are thus the ultimate authority. But, as I shall point out, errors of interpretation of the words of the Constitution can be put right by the courts. It is their duty to do so. To change the Constitution (i.e., the words) is one thing, to change and correct the interpretation is quite another.

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[4] (1908-09) 8 C.L.R. 115.
[5] *W. & A. McArthur* v. *State of Queensland* (1920) 28 C.L.R. 530.
[6] Dried Fruits Act, 1928-1935 (S. Aust.), No. 11, 1928—No. 5, 1935.

The difficulties and obscurities of s. 92, as currently construed, are notorious. The Privy Council in 1950 in the *Banking Case*[7] in the course of what has been called their authoritative *obiter dictum* (because they had disclaimed jurisdiction) complained that all through the cases on s. 92 the problem has been to define the qualification of the section. Surely the answer is that the section not only in its true meaning but also in its express terms is unqualified—it is "absolute". The Board said, later on, that it is no longer arguable that freedom from customs or other monetary charges alone is secured by the section. Here again the point has almost gone by default. Surely the question should be turned round and it should be asked what words or context there are to justify so unfortunate and obscure a reading of the section. What the true meaning is may be illustrated by *Fox* v. *Robbins*[8] which, in regard to the Privy Council in 1936, explains inferentially the draftsmanship and the fiscal purpose of the section. I shall, a little later, develop this essential matter more fully.

What I am urging now is the need for a realistic reconsideration of s. 92; that perhaps Sir George Reid's satisfaction may have been justified. I ought, however, as I pass on, to point out that the distinction between regulation and prohibition finds no place in s. 92. The grant of power (which, in the basic matter, is to be found as regards the Commonwealth in the grant of power to legislate with respect to trade, commerce, etc. in s. 51 (i)[9] is also a grant of plenary legislative power, which (Australia being a sovereign State) would naturally include both what is called regulation and what is called prohibition. It is to this plenary power that s. 92 applies (whenever it does apply) as an exception to the plenary grant. The distinction between regulation and prohibition finds no place in the language or scheme of the Constitution. Similar reasoning *mutatis mutandis* would be true of State power.

As the cases show, the attempt to give a practical and realistic significance to s. 92 according to the conventional interpretation cruelly taxed the efforts of Australian judges. I have not attempted either an eirenicon or an anthology of these decisions. Let me, however, here quote a few general words of that great judge and *statesman*, Sir Owen Dixon[10], on whom, with the help of the Judges of his Court, the responsibility of construing the Constitution rests. He comments on the failure of attempts to formulate principles for giving effect to s. 92, and says that if we proceed by applying on each occasion the general sense conveyed by the words of the Constitution we can reach a conclusion more effectively than by abstract reasoning. But surely all this difficulty follows from not taking the words in their obvious sense. No doubt to do so will mean a great and concerted effort on the part of the judges. But it may come in time.

I want to conclude these introductory, and in a sense apologetic, words by repeating that all I here write is aimed simply to urge a complete reconsideration of s. 92, in its present form; especially since the suggestion made at the conclusion of the judgment in *James* v. *The Commonwealth*[11] that the words of s. 92 should be amended by a referendum has proved, then and subsequently, quite abortive. But the alternative of a constitution more in accordance with the original language and purpose remains. I hope my Australian friends will consider this course; meanwhile I must apologise for what may seem an officious and gratuitous trespass.

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[7] *Commonwealth* v. *Bank of New South Wales* (1950) A.C. 235, (1949) 79 C.L.R. 497 (P.C.).

[8] (1908-09) 8 C.L.R. 115.

[9] Commonwealth of Australia Constitution Act, 1900 (Eng.), 63 & 64 Vict., c. 12.

[10] Now Chief Justice of the High Court of Australia.

[11] (1936) A.C. at 633.

In 1936 I was first initiated into the mysteries and complexities of s. 92. The Judicial Committee of the Privy Council in *James* v. *The Commonwealth*[12], in discussing that section made some preliminary observations.

> It is true that a constitution must not be construed in any narrow and pedantic sense. The words used are necessarily general, and their full import and true meaning can often only be appreciated when considered, as the years go on, in relation to the vicissitudes of fact which from time to time emerge. It is not that the meaning of the words changes, but the changing circumstances illustrate and illuminate the full import of that meaning. It has been said that "in interpreting a constituent or organic statute such as the Act (i.e., the British North America Act), that construction most beneficial to the widest possible amplitude of its powers must be adopted": *British Coal Corporation* v. *The King*.[13] But that principle may not be helpful where the section is, as s. 92 may seem to be, a constitutional guarantee of rights, analogous to the guarantee of religious freedom in s. 116, or of equal right of all residents in all States in s. 117. The true test must, as always, be the actual language used.

The Members of the Board expressed some dissatisfaction with the course which they felt bound to take.

> The result is that in their Lordships' judgment the Commonwealth should be held to have failed in its attempt by the method adopted under the Act in question to control prices and establish a marketing system, even though the Commonwealth Government is satisfied that such a policy is in the best interests of the Australian people. Such a result cannot fail to cause regrets. But these inconveniences are liable to flow from a written Constitution.[14]

I may say at once that I am going to suggest in this article that the Privy Council did not give full effect to one important limitation which I am now going to emphasize, and if it is said that I was a party to the judgment which is being criticized, I may add that in that particular issue I have changed my mind to the limited but important extent which I shall now indicate. In now taking the attitude that I do, I may quote a few words of a very great American judge, Mr. Justice Story, from the case of *United States* v. *Gooding*.[15] His words were, "My own error, however, can furnish no ground for its being adopted by this Court"—he meant, of course, his previous error. Even Lord Eldon could reverse his own previous decision.

James v. *The Commonwealth*[16] was decided thirty-six years after the Constitution had been enacted. Four years before, in 1932, there was the case of *James* v. *Cowan*[17], but between the formulation of the Constitution in 1900 and 1936 there had been a great many cases decided in which the High Court had to pronounce upon s. 92. There is one more case in which the Privy Council was invoked on that section; that is the case of *The Commonwealth* v. *Bank of New South Wales*[18] decided in 1949. I shall have to refer in some detail a little later to these three cases, and I shall do so when I have concluded some preliminary observations.

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[12] *Supra* at 614.
[13] (1953) A.C. 500 (P.C.).
[14] (1936) A.C. at 633.
[15] 12 Wheaton 460, 478.
[16] (1936) A.C. 578, (1936) 55 C.L.R. 1.
[17] (1932) A.C. 542, 47 C.L.R. 386 (P.C.).
[18] (1950) A.C. 235, (1949) 79 C.L.R. 497.

The High Court of Australia is the constitutional court for the construction of the Constitution, and in effect now (especially after what was said in the *Banking Case*[19] to which I have just referred) the final court of appeal in cases on the Constitution. It has been said often that a constitution means what the judges say it means, subject only to the possibility of amendment; but it seems now clear that recourse to amendment is seldom, indeed very rarely, available if there is a difficulty in construing the Constitution. In *James* v. *The Commonwealth*[20] I think it is clear that the Privy Council were looking towards a possible amendment in order to meet their failure to reconcile the Constitution with what appeared to be the necessities of the national life. But an important point must be noticed; namely, that though the words which expressed the choice of the people of Australia at the *date* of the Constitution cannot be altered, the interpretation of those words given afterwards by the judges can be altered by a subsequent and revised interpretation given by later courts. The extent to which this may go has been very strikingly illustrated in the United States, and for that I may quote some expressions from American writers. The crucial incident is what has been called the *volte-face* on the part of the Supreme Court in and about 1935 which involved a complete change of view on the effect of certain constitutional guarantees in the United States Constitution. Without referring to them in detail, I may describe them as the "Due Process Clause" and the "Contract Clause". For a considerable number of years the Supreme Court had, mostly by a majority, adopted a very restrictive view of these clauses. The contrast was between a less progressive view of their effect and a wider view more consistent with the ideas of social welfare which were establishing themselves in America. The contrast is often described as a contrast between the *laissez-faire* and the contrary theory. For about ten years before 1936, Mr. Justice O. W. Holmes, supported by Mr. Justice Brandeis and later by Mr. Justice Cardozo and Mr. Justice Stone, had been fighting for the more liberal construction in dissenting judgments. But eventually, under the stress of strong popular feeling and of the influence of a very powerful President, the wider view and the view of social welfare prevailed over the *laissez-faire* attitude, and by a majority of five to four the new ideas received effect.[21]

It is well known that a wide latitude of construction is permissible in dealing with the words of a constitution; as Marshall C.J. once said to his judges, "It is a Constitution we are construing"[22], and he went on to point out that it was meant to continue for centuries and to be adjusted from time to time to meet the necessities of the nation. Flexibility in that sense was more important than rigidity; hence we find that the doctrine of *stare decisis* is not the watchword, though obviously a Court will not depart from an earlier decision save for good reasons. Let me quote a passage from Professor Corwin:

> Some other cases admit of more summary mention. In *Electric Bond and Share Company* v. *S.E.C.*[23], in which the right of the Commission to inquire into the practices of holding companies was sustained, Marshall's definition of "commerce" as *intercourse* was illustrated. In *Mulford* v. *Nat Smith*[24] the power of Congress to "regulate" commerce to the extent of pro-

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19 (1950) A.C. 235, (1949) 79 C.L.R. 497.
20 (1936) A.C. 578, (1936) 55 C.L.R. 1.
21 I should have liked to develop this at greater length, but it is immpossible here. Those interested should see the works by Professor E. S. Corwin, *Constitutional Revolution, Ltd.* (1941) and by H. J. Agar, *The United States* (1950).
22 4 Wheaton 316, 415.
23 (1938) 303 U.S. 419.
24 (1939) 307 U.S. 38.

hibiting it was asserted in broad terms. In the *Parrish Case*[25] the long-standing judicial taboo on minimum wage legislation was revoked. In the *Nebbia Case*[26], mentioned earlier, the ancient formula "business affected with a public interest" lost most of its effectiveness as a limitation on governmental power. In *Graves* v. *New York*[27] the principle of constitutional tax exemption was given the *coup de grace* so far at least as income taxation is concerned. And since these lectures were delivered the Wages and Hours Act of 1939 has been upheld in a decision explicitly over-ruling *Hammer* v. *Dagenhart*.[28]

The heart, nevertheless, of the Constitutional Revolution which was brought about by the New Deal is comprised in the cases found in 301 U.S. — cases which were decided, be it noted, prior to any change in the Membership of the Court. The outstanding results of these cases for constitutional law are those which bear on the federal relationship and on the interpretation of the "due process" clause. As to the former, these cases assert that national power is to be defined without regard to the possibility of its coming into conflict with the accustomed powers of the States; that the States possess no exclusively reserved powers which independently limit national power; that national power, while limited by the words of grant of the Constitution, may be exercised to promote on a national scale the same wide range of purposes as the indefinite powers of the State may be exercised to promote on a local scale; and finally that national and State powers may be employed to promote co-operatively the same general purposes without attaint to the Federal System.

Then, as to the "due process" clause, the word "property" therein does not forbid the use by government of public funds for the *immediate* benefit of private persons in the realization of an ulterior public end; while the term "liberty" in the clause includes "fundamental rights", like that of labor to organize and bargain collectively, which can often be more effectively asserted by means of legislation than by judicial review. The clause is, therefore, broad enough to lend positive constitutional sanction to projects of social reform—it is not solely a constitutional barrier.[29]

I have rather dwelt on this aspect because of some submissions which I shall later make. I should like, however, to note that the Australian Constitution, apart from s. 92, has stood fire remarkably. It resisted the temptation to insert a number of guaranteed rights. What it inserted were very few: for instance, in addition to s. 92 there are to be noted s. 116, which deals with religious freedom, and perhaps s. 115, which prohibits the States from coining money. But the principle broadly has been, as one may judge from the instrument, to leave the law of personal liberty to the ordinary common law of the land. We get a position, therefore, very analogous to that of Great Britain. Britain has not, and cannot, have any guaranteed rights. Lord Samuel, that well-known veteran Liberal statesman, has recently, as I see in the press, congratulated the country on not having a written constitution; and such experience as I have had of these constitutions is that they may create more difficulties than they solve, though they are of course necessary in every case where federation has been secured by uniting a number of separate states or provinces who often insist on having particular rights guaranteed. But little of that was experienced in framing the

[25] *West Coast Hotel Co.* v. *Parrish* (1937) 300 U.S. 379.
[26] *Nebbia* v. *N.Y.* (1934) 291 U.S. 502.
[27] (1939) 306 U.S. 466.
[28] (1918) 247 U.S. 251—overruled by *United States* v. *Danby* (1941) 312 U.S. 100.
[29] Corwin, *op. cit.* at 78.

Australian Constitution. That, I think, is an important matter in construing s. 92, because many of the difficulties disappear when it is seen that, according to the general policy of the Australian statesmen who framed the Constitution, the ordinary law of the land was still the dominant and underlying force. From that standpoint s. 92 can be construed as relating only to a very specific and limited subject matter which only impinges on the ordinary law of the country where that follows inevitably from the words themselves. There is no need, I think, to give an extended meaning to s. 92 (which is both absolute and peremptory), because its impact on the general law of the land is so limited and it is to be read accordingly.

Before I leave the question of construction I might add a very few general observations by some famous judges. I have already referred to Marshall's famous words in *McCulloch* v. *Maryland*[30]: "This provision is made in a Constitution intended to endure for ages to come, and consequently to be adapted to the various crises of human affairs." It is obvious that that necessarily implies such changes in construction as the exigencies require. Mr. Justice Holmes stated the principle in words of living force:

> . . . when we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago.[31]

Let me remind my readers of some other words of that great judge:

> . . . the provisions of the Constitution are not mathematical formulae having their essence in their form; they are organic living institutions transplanted from English soil. Their significance is vital, not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth.[32]

I could multiply such quotations, but I will be content simply to mention that in Canada also a constitutional revolution, perhaps not so momentous or extensive, has been taking place involving a new and different construction by the judges of particular passages in the Constitution.[33] It is interesting to see how other nations than Australia have their constitutional problems, and to see how they may be led to deal with them according to the special requirements of the time.

I wish to add one more general observation, and that is that in dealing with constitutions as the years or the centures go on, judgments accumulate and, even more than judgments, long discussions by learned publicists or lawyers, and there has always been a tendency, perhaps particularly noticed in the United States, for the text of the Constitution to be lost and ignored in the great multiplicity of exposition, the *copia verborum* which accumulates. As Professor Corwin says:

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[30] 4 Wheaton 316, 415.
[31] *Missouri* v. *Holland* (1920) 252 U.S. 416, 423.
[32] *Gompers* v. *United States* (1914) 233 U.S., 604, 610.
[33] An illuminating discussion of this development is contained in *Note*, "Nationhood and the Constitution" (1951) 29 *Can. Bar Rev.*

> . . . I am told that Professor Powell of Harvard carefully warns his class in Constitutional Law each year against reading the Constitution, holding that to do so would be apt to "confuse their minds". Certain it is that of the 6,000-odd words of the constitutional document, at least 39 out of every 40 are totally irrelevent to the vast majority, as well as to the most important, of the problems which the Court handles each term in the field of constitutional interpretation. Or, to put the same thought a little differently, about 150 words serve to articulate the bulk of our constitutional law, as I defined it a moment ago, with the constitutional document. That these facts, too, spell freedom for the Court in its work of constitutional interpretation I shall now proceed to show.[34]

On the previous page, in contrast to this statement, he has quoted the language of Mr. Justice Roberts as speaking for the Supreme Court of the United States:

> There should be no misunderstanding as to the function of this court in such a case. It is sometimes said that the court assumes a power to overrule or control the action of the people's representatives. This is a misconception. The Constitution is the supreme law of the land ordained and established by the people. All legislation must conform to the principles it lays down. When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate the judicial branch of the Government has only one duty—to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. All the court does, or can do, is to announce its considered judgment upon the question. The only power it has, if such it may be called, is the power of judgment. This court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitution; and, having done that, its duty ends.[35]

In that context, I may again refer to Mr. Justice Brandeis' view that the Supreme Court in its revisory capacity of the Constitution was not a super-legislature. However, it is impossible not to feel that the work of construing a statute, and in particular an organic statute like a constitution, tends to introduce new elements or factors.

It is impossible to avoid a certain creation of law in the work of judicial construction. Australia, I understand, goes even further than English law in rejecting as guides to construction evidence of preliminary discussions between the authorities who are framing the instrument; a certain amount of extraneous evidence must always be admissible, and the English rule is, I think, quite clear. It is sometimes stated too narrowly, but a comparatively recent statement is to be found in the judgment in the House of Lords in *Assam Railways* v. *The Commissioners of Inland Revenue*.[36] It is clear from that case that a most important feature in construction is to ascertain the state of the law at the time of an enactment, and also in particular the evil or defect which the Act was intended to remedy. As long ago as Heydon's case[37] a somewhat analogous principle was laid down. In dealing with s. 92 we have the strongest possible evidence what the evil contemplated and sought to be avoided by s. 92 was. It was often said

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[34] Corwin, *op. cit.* at 13.
[35] *Id.* at 12, citing 297 U.S. 62.
[36] (1935) A.C. 445.
[37] (1584) 3 *Co. Rep.* 7a.

that the intention was to abolish the evils of "the barbarism of borderism"—that is to say, to abolish as far as possible all the merely territorial distinctions between the separate States. It is true that the independence of the separate States was a matter of primary importance and interest in the Australian Commonwealth. They were large and important Governments, and their identity was in no sense merged in that of the Commonwealth. The residual powers remained vested in the States, and the States had concurrent powers of legislation with a very few exceptions, with the Commonwealth, though a Commonwealth Act would overrule a State Act on the same subject matter. But the evils of interstate tariffs were very fully realised, and it was out of that that s. 92 clearly originated. Hence the true view, which is so fully and so often expressed, that the whole gist of s. 92 was fiscal protection, is forcibly stated by Professor Sawer:

> This section has caused more differences of judicial opinion and greater conflict between decisions than any other provision of the Constitution. There has never been any doubt as to the primary intention of the Founders. They wished to do away between States with the border tariffs the abolition of which was one of the main reasons for federating at all, and they wished to embody this objective in a specific provision, instead of leaving it to implication as in the U.S. Constitution. There is also no doubt that the Founders anticipated the possibility of 'indirect' fiscal protection by methods other than border tariffs and differential excises[38] and accordingly desired their guarantee of fiscal free trade between the States to be stated with some generality and to be capable of some flexibility of application. Unfortunately they started with a rhetorical declaration penned by Sir Henry Parkes, the Father of Federation, and originally intended, not as a specific section for the Constitution, but as a declaration of policy to guide the draftsmen; having embodied Sir Henry's emotive language in their first draft of 1891, they tinkered with details of its phraseology, but kept putting off the more precise formulation of their intentions, until a last desperate attempt by the lawyers to secure more precision was talked out in the dying hours of the 1898 Melbourne Convention. It was typical of the situation that Sir George Reid, the New South Wales Premier famous for the equivocations on both federation and free trade, should have praised the section as 'a little bit of layman's language.' He was probably the last person to give it any praise.[39]

But there can be no question that the sole purpose of s. 92 was originally fiscal. I should like also to quote other passages, for instance one in the language of a brilliant judge, now retired, Mr. Justice Rich, which is set out at length by Professor Sawer; but I must be content with a brief quotation:

> The rhetorical affirmation of s. 92 that trade, commerce and intercourse between the States shall be absolutely free, has a terseness and elevation of style which doubtless befits the expression of a sentiment so inspiring. But inspiring sentiments are often vague and grandiloquence is sometimes obscure. If this declaration of liberty had not stopped short at the high-sounding words "absolutely free", the pith and force of its diction might have been sadly diminished. But even if it was impossible to define precisely what it was from which inter-State trade was to be free, either because a commonplace definition forms such a pedestrian conclusion or because it needs an exactness of conception seldom achieved where Constitutions are

[38] As an illustration of this I may refer to *Fox* v. *Robbins* (1908-09) 8 C.L.R. 115.
[39] G. Sawer in G. W. Paton (ed.), *The Commonwealth of Australia* (1952) 38, at 71.

> projected, yet obmutescense was both unnecessary and unsafe. Some hint at least might have been dropped, some distant allusion made, from which the nature of the immunity intended could afterwards have been deduced by those whose lot it is to explain the elliptical and expound the unexpressed.[40]

I must now turn to the section which has given so much trouble, but I want to avoid the pitfalls which may await the expositor who takes a few words by themselves and ignores the setting in which they come. Section 92 appears in a chapter of the Constitution, Chapter 4, which deals with finance and trade. Insofar as it operates it is an exception from or limitation of these powers. There was never any inconsistency between s. 51 (i) and s. 92. It has no contact with the general law of persons. Section 88 provides for the imposition of uniform duties of customs within two years after the establishment of the Commonwealth. Section 89 contains an interim provision for credits or payments between the Commonwealth and State in regard to the customs duties. Section 90 deals with customs, excise and bounties, and vests the power over them in the Parliament. That section goes on to say, "On the imposition of uniform duties of customs all laws of the several States imposing duties of customs or of excise, or offering bounties on the production or export of goods, shall cease to have effect. . . . " Section 91 states some exceptions about bounties; then comes s. 92, which I must set out in full:

> 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.
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> 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.

Sections 93, 94 and 95 deal with incidental provisions to regulate, as between the Commonwealth and the States, various matters arising in regard to customs and excise.

It is clear that all these sections are dealing with fiscal charges. The general powers over legislation relating to trade and commerce are to be found in a separate section, s. 51, which deals with the distribution of powers. It begins, "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." I may also quote s. 51 *pl.* (xiii), which deals with banking other than State banking, or State banking beyond the limits of the State concerned, the incorporation of banks and the terms of paper money. The three exclusive powers of the Commonwealth are found in s. 52 but do not affect what we are discussing. Section 51 (i) has obviously to be read with s. 92. Section 92 is on its face an exception wherever it applies, so that s. 51 should be read as limited by s. 92 as part of the Constitution. But s. 51 is the dominant section, which creates the power. There was for some time a doubt whether s. 92 applied to the Commonwealth as well as to the States. It was originally treated as being confined to the States in the well-

[40] G. Sawer, *op. cit.* at 71, citing *James* v. *Cowan* (1930) 43 C.L.R. 386, at 422.

known case of *McArthur* v. *Queensland*[41], but the Privy Council in 1936, in *James* v. *The Commonwealth*[42], after long debate and argument, held that it applied to the Commonwealth as well as to the States. That case also reaffirmed what I think was originally fully understood, that what s. 92 was dealing with was what I may call transit charges or impositions. Their precise form might vary. The section itself is very curiously worded, as Mr. Justice Rich pointed out: it says 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.

It seems to me that it is a simple matter of construction that this clause is a limited *laissez-passer* clause, not a *laissez-faire* clause. It contains no guarantee against Government intervention in the ordinary general sense, but it does deal with the passage and repassage of trade and commerce across the border, and when it says that that is to be absolutely free it does, according to the ordinary rules of construction, as I understand it, refer back to the opening words of s. 92, "on the imposition of uniform duties of customs". In future trade is to be free of them. The freedom which it then goes on to postulate is governed as to its extent and effect by the opening words which qualify the whole section. Otherwise the clause would have no meaning at all, because 'free' is a word of such general import and is in itself so indifferentiated that unless it could be treated as qualified in some specific way it would really have no effect at all. The judges cannot fill up an absolute blank. They may, with the help of inference from other parts of the instrument or from surrounding circumstances, read the words, where apparently undifferentiated, as qualified in some particular way, but unless they do so a mere gap cannot be filled up by the judges: that would be not construction but re-writing. It is futile to seek for a qualification of what is to be absolute, i.e. unqualified.

Here, as I think, reading the section as a whole, giving full effect to the opening words and also to its general purpose and quality, everything points to the definition which I have suggested. In other words, the view which has been expressed that s. 92 deals with fiscal matters alone gives sense and efficacy to s. 92. That the clause is dealing with trade or intercourse in motion is clear from its language. It is "trade, commerce and intercourse among the States": that is partially defined by the reference to internal carriage and ocean navigation, which does not limit the scope of trade and intercourse, but shows that it is trade, commerce and intercourse in movement. It specifies two forms of locomotion, but the judges have extended that meaning by reference to conditions which are now part of modern life, such as aviation. But what the clause deals with is trade, as it were, in transit: among the States that is, to and fro, across the State borders, in the words of s. 105. That view was decisively affirmed by the Privy Council in *James* v. *The Commonwealth*[43], which applied the idea of trade in motion which was already accepted before the decision in the Privy Council. The language of the head note in the case on this point is: "By free is meant freedom as at the State frontier or barrier, the crucial point in inter-State trade, or freedom in respect of goods passing into or out of the State, and in every case it is a question of fact whether there is an interference with this freedom of passage." But where I now think that bald statement requires supplement or correction is to add that the freedom meant is fiscal freedom, and the importance, as we now realise, of that definition is that s. 92 has been employed to nullify a great deal of important

41 *W. & A. McArthur* v. *State of Queensland* (1920) 28 C.L.R. 530.
42 (1936) A.C. 578.
43 *Ibid.*

legislation in Australia, because such legislation was regarded as infringing freedom as at the State border, not merely or only by fiscal impositions like a tariff, but by burdens and restrictions and laws of a general character, such as could be imposed under s. 51. This distinction, I think, makes the construction of the section of very great importance.

I shall simply note in passing that freedom as at the border may be interfered with by impositions operating at an earlier stage in the movement of the trade, commerce or intercourse which is being considered. The essential feature is the actual imposition; and whether it is exacted at the border or before passing the border outwards or after passing the border inwards—if I may use these expressions—is not material. Again I emphasise the difference between fiscal imposition and non-fiscal regulation, the latter being regulation which may indeed involve a burden or charge, but which has reference to general policy other than merely fiscal policy—which is regulative of trade not in the interests of revenue but in the interests of policy in controlling and regulating trade. If we take *James* v. *Cowan*[44] and *James* v. *The Commonwealth*[45], two of the cases in the Privy Council, we find that there is no mention of fiscal purposes at all. What is being dealt with is regulation or restriction, or indeed it may be prevention, in the course of the general policy of the authority concerned. This may seem a narrow distinction, but it is obviously vital, and, as I have tried to show, it is the only explanation or true construction of the language used in s. 92, read in its context and read as a whole, which can be accepted. It is curious, when one looks at the cases, to see how overlooked or disregarded that vital distinction has been. Indeed, it ought to have been obvious by reason of the whole scope and purpose of those sections which surround s. 92. It is clear from them that the whole idea of s. 92 was to establish for all time, or at least as long as the Constitution remained in the form in which it was, an internal free trade, which was felt in 1900, and earlier, to be a vital need, and to secure it for the future by a stringent, over-riding and unqualified sanction entrenched with all the force of constitutional sanctions. As it was so limited it did not, outside its exact effect, impinge on the general operations of the common law. Trade, commerce and intercourse were subject to all the rules of the common law. They were part of the political, social and legal system of the whole Commonwealth, and, that being so, it is easy to explain what has constantly been said in the subsequent discussions, that s. 92 presupposes an organised State and an organised law. So, of course, it does, and that is indicated by defining precisely the whole scope of the section as seen against the background of the whole exercise of power vested in the Commonwealth in terms by s. 51. The result of that view is that many of the difficulties which have attended the efforts to fit in s. 92 on an entirely different view of its effect—that is to say, on a view that it extends beyond fiscal matters and into the general law—fall to the ground.

What I do think, however, is clear from my study of the very numerous and very difficult cases which have been argued as applying s. 92 is that this section has been very detrimental to the idea of freedom under the rule of law, which seems to me to be the basic impulse of the Constitution as a whole. That is because in my view s. 92, which is intended to be permanent and to be an entrenched guarantee, is so limited that it cannot affect the general law, except on the narrow topic of fiscal affairs. Its scope is exhausted when it has excluded any operation of a fiscal character; it does not extend to operations which are not of a fiscal

[44] (1932) A.C. 542.
[45] (1936) A.C. 578.

character. It does not create in general effect the open door. The idea of s. 92 as a power in the air brooding and ready in the name of freedom to crush and destroy social and industrial or political experiments in Australian life ought, I think, to be exploded. In truth, as I said, s. 92 is both pedestrian and humble, though very essential from the point of view of the founders of the Constitution who wished to establish internal inter-State free trade in fiscal matters for all time.

Section 92, therefore, had no ambitious or energising quality. It was purely protective. It was with something of that in mind that in *James* v. *The Commonwealth*[46] the Privy Council on the construction which it adopted indicated its dissatisfaction with the conclusion at which it was arriving. I have already quoted the passage in question. Then again the word "absolutely" which is used in s. 92 cannot be treated as a mere word of emphasis. It means exactly what it says, and, as Chief Justice Stone in the Supreme Court of the United States once stated, "The Constitution may mean what it says"; and "absolutely" cannot receive any true effect consistent with any ordinary principle of construction unless it indicates that the freedom, whatever it is which is being established, has no limitations or qualifications at all, and that can only be said of a specific and definable restriction of a fiscal character which, as we know, is exactly what the framers of the Constitution had in mind. An absolute freedom from all law which might affect trade, commerce and intercourse in general is impossible.

When I come to the cases which have been considered, and which I have done my best to understand, I am confronted with what I regard as a not uncommon result of an attempt to give working and practical effect to some general provision which has either been imperfectly expressed or for some reason has been misunderstood. I find it difficult to enter into any detailed criticism of these cases, though they are dealing with the question with great learning and practical insight, but they do so with what I regard as a mistaken view of the Constitution, and it is very difficult for me to criticise discussions which appear to me to proceed on a misconception.

I have been very interested to see exactly how the misconception arose.[47] In *James* v. *The Commonwealth*[48] the Attorney-General, Mr. Menzies, in giving a list of six possible meanings of s. 92, gave as the sixth, the last but not necessarily the least, "(vi)—Free from pecuniary imposts—that is the narrowest meaning of s. 92"[49]. Sir Stafford Cripps, arguing on the other side, very shortly said,

> With regard to the Attorney-General's sixth proposition, if s. 92 be taken as limited to customs imposts it can at most be applicable to a non-discriminatory border duty imposed by the Commonwealth. That is the only thing that can apply to it, but that on the face of it is obviously not the intention of this declaratory section. The words 'absolutely free' cannot be limited to freedom from customs duties or financial imposts resulting from customs laws.[50]

The Privy Council dealt with that issue very shortly, and rejected it. As I now realise, much fuller exegesis was desirable.

There is a discussion in the judgment of the Privy Council which empha-

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[46] *Ibid.*

[47] In any case "*non nostrum est, tantas discernere lites*". I shall certainly not attempt either an anthology or an eirenicon.

[48] (1936) A.C. 578.

[49] *Id.* at 597.

[50] *Id.* at 603.

sizes the extraordinary vagueness of the word "free".

> 'Free' in itself is vague and indeterminate. It must take its colour from the context. Compare, for instance, its use in free speech, free love, free dinner and free trade. Free speech does not mean free speech; it means speech hedged in by all the laws against defamation, blasphemy, sedition and so forth; it means freedom governed by law, as was pointed out in *McArthur's Case*.[51] Free love, on the contrary, means licence or libertinage, though, even so, there are limitations based on public decency and so forth. Free dinner generally means free of expense, and sometimes a meal open to any one who comes, subject, however, to his condition or behaviour not being objectionable. Free trade means, in ordinary parlance, freedom from tariffs.[52]

And I may quote a few more words:

> 'Free' in s. 92 cannot be limited to freedom in the last mentioned sense. There may at first sight appear to be some plausibility in that idea, because of the starting-point in time specified in the section, because of the sections which surround s. 92, and because the proviso to s. 92 relates to customs duties. But it is clear that much more is included in the term; customs duties and other like matters constitute a merely pecuniary burden; there may be different and perhaps more drastic ways of interfering with freedom, as by restriction or partial or complete prohibition of passing into or out of the State.[53]

That is true enough. The question is how much the actual words include. The Privy Council rejects the test of absence of discrimination being a test. What the Privy Council in *James* v. *The Commonwealth*[54] did not seem to consider—it may be, and indeed it appears, that the point was not specifically brought to their notice—was the difference between, on the one hand, fiscal regulation and control, and regulations, on the other hand, of a different type aimed at purposes which are foreign to the idea of fiscal control. I do not repeat the arguments with which I attempted to repel the idea that s. 92 has a wider than fiscal scope. That distinction was not present to the mind of the High Court in the famous case of *McArthur* v. *Queensland*[55] in which s. 92 was discussed. The Court in that case, in the judgment delivered by Knox C.J., Isaacs and Starke JJ., dealt with this matter. The gist of their view was, I think, expressed as follows:

> The critical words are 'absolutely free' without any immediate verbal limitation. Whatever limitation exists must arise from the nature of the subject matter, and the context. . . . The context is said to indicate the phrase 'from pecuniary imposts only.' How? Because it is said that in s. 90 reference is made to 'duties of customs and of excise.' But one answer is that as s. 92 is intended at all events to include a prohibition to the States, that section was not needed to prevent the imposition of State customs and excise duties because s. 90 had already made them impossible. What other 'pecuniary impost' would be possible was asked during the course of the argument, but the only instance suggested was that workers engaged in moving goods at the border might be required to have a licence.[56]

This was before it had been held that s. 92 applied to the Commonwealth.

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[51] *W. & A. McArthur* v. *State of Queensland* (1920) 28 C.L.R. 530.
[52] *James* v. *The Commonwealth* (1936) A.C. at 627.
[53] *Ibid.*
[54] (1936) A.C. 578.
[55] (1920) 28 C.L.R. 530.
[56] *Id.* at 554.

And then the Court goes on to its conclusion that the words of s. 92 must have their meaning of absolute freedom from every sort of impediment or control by the States with respect to trade, commerce and intercourse between them, considered as trade, commerce and intercourse. What the Court had, I think, ignored were the other words and the context of s. 92 which, as I have said, indicate quite clearly that the whole section is governed by the opening words relating to customs duties and also by the surrounding context and the known intention and purpose of the whole section. In a constitution, customs duties might well be construed as typifying fiscal charges on the *ejusdem generis* rule. It was, in fact, as I have already said, a *laissez-passer* clause, not a *laissez-faire* clause. But apart from these passages, and perhaps one or two echoes or repetitions of them, that point has gone almost by default ever since, and the Courts have, one after the other, proceeded to act on the view that s. 92 was directed against every sort of control, interference or restriction whether in interstate passage or not. In *James* v. *The Commonwealth*[57] there was some further discussion which I ought to refer to, and various difficulties were pointed out. The Court stated and examined a view of freedom which is to be found stated in *McArthur's Case*[58], namely that such freedom is to be regarded as distributive. The words, the judges say, have never been confined to the mere act of transportation of merchandise over the frontier. "That the words include that act is, of course, a truism. But that they go far beyond is a fact quite as undoubted." That statement, however, was criticised by the Privy Council in *James* v. *The Commonwealth*[59]:

> Then there is the conception enunciated in *McArthur's Case*[60] that 'free' means free from every sort of impediment or control by any organ of Government, legislature or executive to which s. 92 is addressed with respect to trade, commerce or intercourse, considered as trade, commerce and intercourse. The scope of this view has already been indicated. It involves a conception of inter-State trade, commerce and intercourse commencing at whatever stage in the State of origin the operation can be said to begin, and continuing until the moment in the other State when the operation of inter-State trade can be said to end: the freedom is postulated as attaching to every step in the sequence of events from first to last. Now it is true that for purposes of s. 51 (i) the legislative powers of the Commonwealth may attach to the whole series of operations which constitute the trade in question, once it has fallen into the category of inter-State trade; hence the various Acts to some of which reference has been made here. But when it is sought to apply this to s. 92, difficulties at once arise. It seems in practice only to have been so applied in *McArthur's Case*[61], and it is doubtful if it was so applied even there, but it has been rejected in *Roughley's Case*[62] and in *Vizzard's Case*[63] and the other transport cases. But even in *McArthur's Case*[64] it was recognised that such freedom was qualified; the analogue of freedom of speech was there taken, but it has already been explained what limitations that involves. Nor is help to be derived from speaking of freedom of trade as trade: as well speak of freedom of

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57 (1936) A.C. 578.
58 (1920) 28 C.L.R. at 547.
59 (1936) A.C. 578.
60 (1920) 28 C.L.R. 530.
61 *Ibid.*
62 *Roughley* v. *State of New South Wales* (1928) 42 C.L.R. 162.
63 *The King* v. *Vizzard ex p. Hill* (1933) 50 C.L.R. 30.
64 (1920) 28 C.L.R. 530.

> speech as speech. Every step in the series of operations which constitute the particular transation is an act of trade; and control under the State law of any of these steps must be an interference with its freedom as trade. If the transaction is one of sale, it is governed at every stage, from making the contract, until delivery — by the relevant Sale of Goods Act. If it is a bill of exchange, similarly the Bills of Exchange Act applies. If it involves sea, railway or motor carriage, relevant Acts operate on it; it is subject to executive or legislative measures of State or Commonwealth dealing with wharves or warehouses or transport workers. It must be so subject. Otherwise the absurd result would follow that the inter-State operation of trade would be immune from the laws of either State, of the State of origin equally with the other State. There would thus be in every State a class of dealings and acts entirely immune from the general law of the State, though only distinguishable from other like dealings and acts by the fact that they are parts of an inter-State transaction.[65]

It is clear that the view of the majority of the High Court to which I have referred on the issue whether the Commonwealth as well as the States were bound by s. 92 has been decided by the Privy Council in *James* v. *The Commonwealth*[66] adversely to *McArthur's Casez*[67], and that view has now been accepted, and I am suggesting that equally the view expressed in *McArthur's Case*[68] extending the meaning of s. 92 so as to apply to other fiscal impositions cannot be supported. It was certainly rejected in its full possible scope and all its implications by the Privy Council[69], and what the Privy Council said there is well worth considering because of its conclusion that burdens and hindrances which the Board thought might take diverse forms and appear under various disguises could be carried beyond fiscal burdens. The Privy Council proceeded to express the view that the freedom in question could properly go beyond the analogy of fiscal imposts. That, of course, is the distinction which I am suggesting is erroneous. It is true that their Lordships say that in every case it must be a question of fact whether there is an interference with this freedom of passage.[70] That is perfectly true, but a question of fact can only be decided whenever it goes beyond a question of mere observation and experience by reference to some positive standard by which the fact is to be ascertained; and it is just that standard which I am now concerned to specify. The conclusion of the Privy Council is this: "As a matter of actual language, freedom in s. 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."[71] That, so far as it goes, would not be contrary to my present submission, but still it falls short of emphasizing or giving effect to the distinction which I have just been expounding, which was not appreciated by their Lordships.

James v. *The Commonwealth*[72] was of course primarily concerned with the question whether s. 92 bound the Commonwealth, and as that was the dominant question it had very considerable influence on the course which the argument and the judgment eventually took. It followed within four years of the earlier case in the Privy Council on s. 92, *James* v. *Cowan*[73],undoubtedly a very important case in this connection. It was important both generally and particularly because

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[65] *James* v. *The Commonwealth* (1936) A.C. at 628-29.
[66] (1936) A.C. 578. [67] (1920) 28 C.L.R. 530.
[68] *Ibid.*
[69] See *James* v. *The Commonwealth* (1936) A.C. at 630.
[70] *Id.* at 631. [71] *Ibid.* [72] (1936) A.C. 578.
[73] (1932) A.C. 542.

it was precisely followed by the Privy Council at the essential point that I am dealing with; but neither in *James* v. *Cowan*[74] nor in *James* v. *The Commonwealth*[75] was the distinction between fiscal burdens and other burdens in transit considered.

The whole matter in *James* v. *Cowan*[76] can be very shortly dealt with. The real question debated in *James* v. *Cowan*[77] was as to the validity of an Act of the State of South Australia, and Orders under it, for the compulsory sale and acquisition of dried fruit with the object of forcing the surplus of dried fruit off the Australian market. It was held that the Orders were invalid as being in breach of s. 92, because the direct object was an interference with the freedom of inter-State trade contrary to s. 92 of the Commonwealth Constitution. The point, therefore, though in a sense complicated, was for the present purpose quite limited. The restrictions there were clearly, as I think, not within the scope of s. 92 because, in the words of s. 92, they were not duties of customs, or indeed anything like duties of customs, which, as I think, is all that the section dealt with. The purpose was clearly general, and fell within the powers of s. 51 (i) to legislate for the peace, order and good government of the Commonwealth, particularly under placitum (i), "trade and commerce with other countries and among the States."

Lord Atkin, in delivering the judgment on behalf of the Privy Council, which I quote in full to emphasise how far the courts have got beyond the idea of *laisser passer*, said:

> If the real object of arming the Minister with the power of acquisition is to enable him to place restrictions on inter-State commerce, as opposed to a real object of taking preventive measures against famine or disease and the like, the legislation is as invalid as if the legislature itself had imposed the commercial restrictions. The Constitution is not to be mocked by substituting executive for legislative interference with freedom. But, in the present case, the Courts are not faced with the problem of construing an Act of the legislature which contains no reference to s. 92. In this case the powers given to the Minister are expressly conditioned as subject to the section. Section 28 appears to mean that the Minister may acquire compulsorily so that he does not interfere with the absolute freedom of trade among the States and acquires for the purposes of the Act. Thus the only question in this case appears to be whether the Minister did exercise his powers so as to restrict the absolute freedom of inter-State trade. It may be conceded that, even with powers granted in this form, if the Minister exercised them for a primary object which was not directed to trade or commerce, but to such matters as defence against the enemy, prevention of famine, disease and the like, he would not be open to attack because incidentally inter-State trade was affected. But, in the present case, it appears to their Lordships, as it did to Isaacs J., that the statement of the objects of the Minister and the Board, as expressed in the finding of Starke J. set out above, makes it plain that the direct object of the exercise of the powers was to interfere with inter-State trade. "To force the surplus fruit off the Australian market" appears necessarily to involve two decisions: first, the fixing of a limited amount for Australian consumption (a necessary element in the conception of a 'surplus'); secondly, the prevention of the sale of the balance of the output in Australia. In the result, therefore, one returns to the precise situation created

[74] *Ibid.*
[75] (1936) A.C. 578.
[76] (1932) A.C. 542.
[77] *Ibid.*

> by s. 20 with its determination of where and in what quantities the fruit is to be marketed. Section 20 and the determinations are invalid, and for precisely the same reasons it appears to their Lordships inevitable that the exercise of the powers of the Minister, crediting him with the precise object and intention found by the High Court, were also invalid.[78]

The Privy Council here took it for granted that s. 92 had a scope beyond fiscal matters, and on that basis, on their reading of s. 92, invalidated the acquisition.

The unsuccessful plaintiff thereupon brought a similar action claiming similar relief on similar facts against the Commonwealth. The Commonwealth took out a summons to dismiss the claim as an abuse of the processes of the Court in that the substantial questions had already been litigated between the parties and decided against the appellant. The substantial question was then whether s. 92 of the Constitution bound the Commonwealth, and if so whether the Dried Fruits Act and regulations contravened it. I have already discussed at some length that action, and I have explained that in the result it was held that s. 92 bound the Commonwealth, and, that being so, it was held that the Act and regulations were invalid under s. 92. That case was also important on a side issue as showing that the mere fact that a compulsory acquisition of the goods had intervened did not prevent the interference with the absolute freedom of trade among the States within the meaning of s. 92, if its purpose was as a step to force the surplus fruit off the Australian market. It is clear that in neither case did the Privy Council consider the distinction between fiscal and general law in this context, as I have already observed.

The third decision which I am going to refer to by the Privy Council is one of great importance and some difficulty. It is *The Commonwealth* v. *Bank of New South Wales*.[79] The question there was whether s. 46 of the Banking Act, 1946, infringed s. 92. It was treated as a separate matter arising as a particular issue in a very complicated banking Act. Section 46 was specially extracted and treated as severable from the rest to raise the issue under s. 92. In effect this section may be sufficiently summarised as providing that the bank in question should not carry on banking business in Australia from and after a date specified in a particular notice given to that bank under the Act. The bank was one of a number of what were called private banks which did inter-State business in Australia, and the admitted purpose of the Act was to nationalise all these private banks, and, as the Act said, it forbade them to carry on banking business from and after the particular date. There were many questions agitated at great length. One was whether the business of banking such as the business of the private bank and others in question could be described as a business within the terms of s. 92 of the Constitution which provides that trade, commerce and intercourse among the States shall be absolutely free. On that point it was held that the banking business in question fell within the ambit of s. 92, and s. 46 of the Banking Act which prohibited the carrying on in Australia of the business of banking by private banks was held invalid.

It was obviously very difficult to deal with so complicated a question as the relation of s. 46 of the Banking Act to s. 92 of the Constitution on a mere abstract discussion of the terms of s. 46, which was only one section in a very complicated scheme for nationalising the private banks—that is to say, for putting an end to their activities and leaving the Commonwealth and the specified

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[78] Lord Atkin in *James* v. *Cowan* (1932) A.C. at 558.
[79] (1950) A.C. 235.

State banks unaffected so that practically they could acquire without competitors the business of the private banks. The question thus was whether nationalisation of a trading concern like a bank was permissible under s. 92. It was held that the section was invalid, and the Court proceeded without any detailed examination of the precise position of the particular banking businesses, and limited their purview to very general considerations. I will not refer at length to the arguments, but I want to make a short extract from the reported arguments of counsel for the States of Queensland and New South Wales, which had been given leave to intervene because of the great importance to them of the particular action. I must first premise that banking across State borders, as that of the private banks in question, had been held to come within the description 'trade, commerce and intercourse among the States'. That again repeats the matter which has always bulked so large in my mind during these cases, namely the great risk of curtailing any important matters of inter-State trade, the normal and legitimate activities of States and the Commonwealth in the matters which are indicated in the passage I have just quoted. No one would doubt in modern times the extreme importance for the peace, order and good government and welfare of a nation of these methods of regulating and controlling trade, and it would be most disastrous if a great nation like Australia, with its long and enormous development and future before it and with the prospect of expanding industries and commerce, was disabled by s. 92 from these specific fields of legislation. In the end the Privy Council held that the banks were entitled to succeed, on the principles, as it said, laid down by the Privy Council in *James* v. *Cowan*[80] and *James* v. *The Commonwealth*[81] which I have already cited. The Privy Council in the *Banking Case*[82], referring to *James* v. *Cowan*[83], quoted two sections of the South Australian Act, each of which authorised an interference with the free disposal by the grower of his products, s. 20 by empowering the Dried Fruits Board, which was established under the Act, in its absolute discretion to determine where and in what quantities the output of dried fruits produced in any year should be marketed, and s. 28 (which was expressed to be subject to s. 92 of the Constitution) by empowering the Minister to purchase by agreement, or acquire compulsorily, any dried fruits in South Australia grown and dried in Australia subject to certain exceptions. *James* v. *The Commonwealth*[84] was also cited as being a similar case, but in this case an Act of the Commonwealth was under attack, and, the point at issue being whether the Commonwealth as well as the State was bound by s. 92, the Privy Council added that on the interpretation they accepted of "freedom" in s. 92, the Acts and the Regulations either prohibit entirely, if there is no licence, or if a licence is granted, partially prohibit inter-State trade; and then they added that this conclusion followed from *James* v. *The Commonwealth*[85] if the appropriate facts were found,

> . . . because it (the Act) authorized 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, it was invalid. And for the same reason the Commonwealth Act fell. The necessary implications of these decisions are important. First may be mentioned an argument strenuously maintained on this appeal that s. 92 of the Constitution does not

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80 (1932) A.C. 542.
81 (1936) A.C. 578.
82 (1950) A.C. 235.
83 (1932) A.C. 542.
84 (1936) A.C. 578.
85 *Ibid.*

> guarantee the freedom of individuals. Yet James was an individual and James vindicated his freedom in hard-won fights. Clearly there is here a misconception. It is true, as has been said more than once in the High Court, that s. 92 does not create any new juristic rights, but it does give the citizen of State or Commonwealth, as the case may be, the right to ignore, and, if necessary, to call on the judicial power to help him to resist, legislative or executive action which offends against the section. And this is just what James successfully did.[86]

No one would, I think, controvert this. I have quoted this passage because it does quite succinctly dispose of a matter which was often controverted in the cases: what rights were given to an individual if he suffered from an infringement of s. 92; and the Privy Council said quite clearly that what James successfully did was a good illustration of the position of an individual. In the next passage, which I shall quote in full, the Privy Council expressed its dissent from an argument, sometimes advanced, that it was the passage from State to State of dried fruit in general, and not of particular dried fruit, property of an individual, that was impeded; that is to say the test of total volume was substituted for the test of the effect on particular individuals. The actual conclusion of the Privy Council, in its own words, is thus stated:

> The bearing of those decisions *James* v. *Cowan*[87] and *James* v. *The Commonwealth*[88] with their implications on the present appeal is manifest. Let it be admitted, let it, indeed, be emphatically asserted, that the impact of s. 92 on any legislative or executive action must depend on the facts of the case. Yet it would be a strange anomaly if a grower of fruit could successfully challenge an unqualified power to interfere with his liberty to dispose of his produce at his will by an inter-State or intra-State transaction, but a banker could be prohibited altogether from carrying on his business both inter-State and intra-State and against the prohibition would invoke s. 92 in vain. In their Lordships' opinion there is no justification for such an anomaly. On the contrary, the considerations which led the Board to the conclusion that s. 20 of the South Australian Dried Fruits Act, 1924, offended against s. 92 of the Constitution lead them to a similar conclusion in regard to s. 46 of the Banking Act, 1947. It is no answer that under the compulsion of s. 11 of the Act the Commonwealth Bank will provide the banking facilities that the community may require, nor, if anyone dared so to prophesy, that the volume of banking would be the same. Nor is it relevant that the prohibition affects the intra-State transactions of a private bank as well as its inter-State transactions: so also in *James' Case*[89] there was no discrimination: his fruit, for whatever market destined, was liable to be the subject of a "determination".[90]

I quote this passage in full to emphasise how remote these questions are from s. 92 if construed as I have suggested.

The Privy Council went on to discuss the meaning of a phrase which was used in some of the cases where it was said that the impugned restriction or interference was a direct restriction, the object of which was directed against or aimed at the trade of the particular complainant. Returning to the particular case, the Privy Council said the test is clear: "does the Act, not remotely or incidentally . . . but directly, restrict the inter-State business of banking? Beyond

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[86] *Commonwealth* v. *Bank of New South Wales* (1950) A.C. at 305.
[87] (1932) A.C. 542.
[88] (1936) A.C. 578.
[89] *James* v. *The Commonwealth* (1936) A.C. 578.
[90] (1950) A.C. te 306.

doubt it does, since it authorizes in terms the total prohibition of private banking. If so, then in the only sense in which those words can be appropriately used in this case, it is an Act which is aimed or directed at, and the purpose object and intention of which is to restrict, inter-State trade, commerce and intercourse."[91]

I should like to comment that though, in *James* v. *The Commonwealth*,[92] such phrases as "freedom at the frontier" were used, all that they meant (as I understand that case) was that restriction might in a picturesque way be treated as operating at the State barrier. But the essence of the matter was that the restriction was something which operated to restrict the inter-State trade by some imposition, like a duty of customs, which, however collected, was an imposition in respect of the passage of goods into or out of the State in the course of trade, i.e. was fiscal in character. That was laid down in *James* v. *The Commonwealth*[93], which the Privy Council in 1950 cannot have intended to overrule. The Privy Council, as it seems to me, may perhaps in substance have based their condemnation of the nationalizing claim on the view that the restrictions involved were prohibitory and something more than regulatory. Their Lordships gave in substance no effect to the word "absolutely", because they took it that the word must receive some qualification, and they quoted, in support of what they said was common ground in that case, that the conception of freedom of trade, commerce and intercourse in a community regulated by law presupposes some degree of restriction on the individual. They quoted from *Duncan* v. *State of Queensland*[94] a passage: "But the word 'free' does not mean *extra legem* any more than freedom means anarchy. We boast of being an absolutely free people, but that does not mean that we are not subject to law." The Privy Council went on to say:

> . . . and through all the subsequent cases in which s. 92 has been discussed, the problem has been to define the qualification of that which in the Constitution is left unqualified. In this labyrinth there is no golden thread. But it seems that two general propositions may be accepted: (1) that regulation of trade, commerce and intercourse among the States is compatible with its absolute freedom, and (2) that s. 92 is violated only when a legislative or executive act operates to restrict such trade, commerce and intercourse directly and immediately as distinct from creating some indirect or consequential impediment which may fairly be regarded as remote. In the application of these general propositions, in determining whether an enactment is regulatory or something more, or whether a restriction is direct or only remote or incidental, there cannot fail to be differences of opinion. 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.[95]

But may not the truth be that "absolutely" means what it says? So that it is fallacious to search for a non-existent qualification. The problem may be insoluble because it does not exist. The Privy Council here seem to have abandoned, if they ever entertained, the project of applying any definite criterion as to what was legitimate or not, beyond the very general distinction between restrictions which were regulatory and prohibitory.

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[91] *Id.* at 303.
[92] (1936) A.C. 578.
[93] *Ibid.* at 308.
[94] (1916) 22 C.L.R. 556, 573.
[95] (1950) A.C. at 310.

The judgment thus seems to give no criterion to determine whether a restriction is or is not invalid, except that of the distinction between regulatory and prohibitory; on that distinction, which is said to depend on a question of fact, it was held by the Privy Council that the section was invalid. It had, of course, said that the interference must be direct, and that its real object must be such interference. The judgment, however, goes on to a passage which I find it very difficult to understand or to fit in with the general concept. It has been characterised as "extraordinary".

> Yet about this, as about every other proposition in this field, a reservation must be made. For their Lordships do not intend 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. 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 economic 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 monopolized remained absolutely free.[96]

Their Lordships' final conclusion is that it was a direct and immediate result of the Banking Act to restrict the freedom of trade, commerce and intercourse among the States, and it is also said that whether that is so or not, was a question of fact and degree.

That passage seems to me to raise a very considerable number of difficulties. As I have already said, before you can discuss the question of fact or degree you have to know what test you are going to apply. Whether or not that phrase "the question of fact or degree" is used, there must be some standard or criterion, and I cannot find that the Privy Council has given or suggested any working criterion which would assist the court in deciding in any case of doubt or difficulty whether there has been a breach of s. 92 according to the construction which is given to it by the Privy Council, or, I may say, by the general or conventional interpretation. On the construction which I have ventured to propound of s. 92 the crucial question would be whether there was a restriction in the nature of uniform duties and customs (i.e. a fiscal burden). That idea, no doubt, may be widely and liberally understood, but the criterion can never, in my view, be departed from, that is, of an imposition somewhat similar or *ejusdem generis* with such duties. But even on the view of *James* v. *The Commonwealth*[97] there is the idea of trade in passage among the States. But where you have a scheme like the nationalisation of the banks there is no analogy at all. The whole proceeding belongs to a completely different category which, as I have said, may well fall within s. 51 as dealing with either banking, or with trade and commerce among the States, but which cannot have any affinity whatever with customs duties or border restrictions. It is certainly not fiscal in any sense. It may be classed as an act of good government within the general powers of good government decided upon by the Parliament exercising its regular legislative authority, and equally in appropriate cases by the executive exercising its proper authority. As an act of general government, it depends on political and administrative considerations. It depends on reasons of policy and the general administration of the nation, and according to the construction which I have ventured to propound,

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[96] *Id.* at 311.
[97] (1936) A.C. 578.

s. 92 is quite irrelevant and may be disregarded entirely for this purpose. The distinction between regulation and prevention, if it exist at all, could only be relevant as arising on the grant of power under s. 51 (i).

I do, however, find it difficult to see how the Privy Council, having decided in an earlier part of its judgment that it is debarred from having any judicial authority on this dispute by reason of the prohibition under s. 74, can proceed judicially to decide the questions of law and fact which it then purports to decide. I agree that their Lordships very fairly explain and recognise the difficulty of their position. They cleared off the very material point in a few words after they quoted s. 92. What they said is very significant:

> Forty years of controversy on these words have left one thing at least clear. It is no longer arguable that freedom from customs or other monetary charges alone is secured by the section. On that the contending parties, while differing on almost every other point, are agreed. The questions remaining are, what is included, and in particular, is the business of banking included, in the expression trade, commerce and intercourse? What is the freedom guaranteed by the section, and is it infringed by the Act?[98]

This reasoning, from precedent, I suppose, would be conclusive in anything but constitutional law. Their Lordships had, however, said that they thought it right to state their views. It is no doubt of great value to the Commonwealth to have the view of so eminent a body of judges as the Privy Council on this very difficult question, but for all that it cannot be said, I think, that the pronouncements[99] to the end carry with them the weight of a judicial decision. They have been described, not inaptly, as "an authoritative *obiter dictum*".

I have already said, and I think it convenient now to repeat at the end, that I am not pretending that the interpretation I have ventured to put forward on s. 92 is law in Australia, because, whatever differences there may be in detail between the various interpretations which have been put forward, this particular vital question has always been decided in one way and almost as a matter too clear for argument. At the same time a constitution is meant to operate for a great many years, or even centuries, and in the course of these years or centuries great changes not only in the circumstances of the nation may take place, but fresh views of construction, perhaps largely influenced by practical exigencies, may be raised and debated, and the fact that for many years a particular solution has been either expressly or tacitly rejected is not conclusive against its being accepted at some future time when the matter has been fully agitated. The contention I raised as to the interpretation of s. 92 has not been dead, as I have shown; it was very strongly raised by two of the largest States of the Commonwealth in the *Banking Case*[100], and it was also discussed by the Privy Council in *James* v. *The Commonwealth*.[101] I will just again repeat some words of Professor Sawer which I think give a fair statement of the position on s. 92:

> There is also no doubt that the Founders anticipated the possibility of 'indirect' fiscal protection by methods other than border tariffs and differential excises, and accordingly desired their guarantee of fiscal free trade between the States to be stated with some generality and to be capable of some flexibility of application. But all the same the governing idea is that of fiscal control.[102]

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98 (1950) A.C. at 299.
99 See (1950) A.C. at 299.
100 *Commonwealth* v. *Bank of New South Wales* (1950) A.C. 235.
101 (1936) A.C. 578.
102 G. Sawer, *op. cit.* at 71.

The whole of that quotation, and indeed the whole of that very valuable article of Professor Sawer, ought to be carefully considered.

I must, however, revert to the concluding part of the decision of the Privy Council in 1949, and that is the important reservation which I have already quoted: it is so important that I repeat it:

> Yet about this, as about every other proposition in this field, a reservation must be made. For their Lordships do not intend to lay it down that in no circumstances could the exclusion of competition so as to create a monopoly either in a State or a Commonwealth agency or in some other body be justified. 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 economic 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 monopolized remained absolutely free.[103]

These are words of some difficulty and complexity, and certainly put a very serious problem to any court which has to decide whether a particular case of nationalization does or does not come within the constitutional powers of Parliament. The Privy Council struck down as unconstitutional the scheme which culminates in s. 46 of the *Banking Act*. If the Privy Council were laying down a general principle that all schemes of nationalization were unconstitutional because they infringed s. 92, or alternatively because they went beyond the scope of the powers of Parliament under s. 51, or because of some definite criterion capable of precise statement, the position would be less complicated than it is in view of these words which I have just quoted, which seem to show that there is no definite criterion on which the validity of a scheme of monopoly or nationalization can be upheld. It will of course be asked why in these circumstances was the banking nationalization scheme held to be invalid? There must have been in the minds of the Privy Council some basic feature which rendered it obnoxious to the constitutional powers of the Parliament. The Parliament had passed a measure in due course of their parliamentary duties, and unless and until it was invalidated by the competent tribunal, it was a law of the land. So far as I can judge the reasoning of the Privy Council, the law was struck down because it went beyond regulation and went into prohibition. The reference to the words of Sir John Latham which the Board quoted with approval seem to me to be conclusive that this is so, and that would seem to involve two rulings. One is that a system of prevention or prohibition, as contrasted with a system of regulation, is a violation of s. 92, and, secondly, that the scheme in question was a system of prevention or prohibition and therefore violated s. 92. The former of these questions does involve the construction of the Constitution but it is a question of power under the grant in s. 51 (i), and is a question of law for the court. Whether the conclusion depends on the express words of the Constitution or on something implied in the Constitution, either view would involve a question of construction and a question of law. The concluding words of the paragraph I have been quoting seem to contradict the conclusion that this is a true question of law, because the Privy Council goes on to say that in certain circumstances prohibition with a view to State monopoly may be the only practical and reasonable manner of regulation, and that inter-State trade, commerce and intercourse

[103] (1950) A.C. at 311.

thus prohibited and thus monopolized remained absolutely free. That seems to exclude prohibition as contrasted with regulation as the test, and to treat regulation of trade though amounting to prohibition as not interfering with absolute freedom guaranteed by s. 92, or outside the power granted in s. 51 (i). The language of the judgment, and possibly the concept underlying it, has a somewhat paradoxical flavour; but apart from that and so far as s. 92 is in question I must ask that this language should be placed alongside the simple and categorical terms of s. 92; these are very difficult, and indeed impossible, to fit in with the proposition laid down by the Privy Council.

Constitutional law necessarily involves some definite principles which are capable of some general application, otherwise there would be no law at all but decisions would be left entirely to practical discretion in the circumstances of the case; in other words there would be strictly no case of applying law at all, because the application would depend not on some governing legal principle, but simply on the facts of the case. That certainly would involve an absence of guidance and a very difficult choice of fundamental issues to a court. It has also, I think, been recognised that a revisory tribunal dealing with the Constitution is not generally qualified to decide the matter on the basis of what is or seems to it to be reasonable. The crucial question in these cases is one of power, not of reasonableness, and the question is whether the decision is within the constitutional powers of the parliament, and not whether it is reasonable, because that must involve questions of political or administrative character. Quite apart from the denial of guidance to a court in these difficult problems, I have grave doubts whether the propositions laid down would be workable or could be accepted. I may add that the distinction which is suggested between what is regulatory and what is prohibitory is extremely difficult to define or apply, so that it is a principle which leaves it uncertain what is the true view of the position and is quite unsatisfactory. The distinction between prohibition and regulation is also difficult, but if it is accepted as being the true distinction in law, as it seems to be in Australia at present, then it may serve as a workable rule; but there again I find it difficult to bring it within any view of s. 92.

I put aside the heretical view which I have been propounding, and I simply look at it from the point of what has been accepted, I think, in the High Court, especially by the Chief Justice and in the last decision of the Privy Council. But then I must ask whether any support for such a view can be derived from s. 92. There is no hint of any such distinction in that section. The section obviously, as I have said, is dealing with duties of customs, and no doubt duties of customs must be expanded to include any fiscal measures; but, putting that aside, whatever is involved must fulfil the words "absolutely free". It must be free from any qualification or any restraint, and there does not seem to be any logical ground for saying that whereas a regulatory measure may not conflict with the description "absolutely free", a prohibitory measure would. The distinction may become extremely narrow in certain cases, and be regarded as a question of fact and degree, but the real point is whether any such defective logic can be reconciled with the declaration of absolute freedom. I may repeat what I have already pointed out: absolute freedom may be demanded in regard to customs duties or other fiscal impositions because their impact is so extremely limited and so very occasional, and because they can be precisely defined and because it was clearly intended to put, once and for all, an end to such things. I have found it difficult to fit in the idea of absolute freedom with the words of the Privy Council applying the idea of absolute freedom to a prohibition with a view to State monopoly, even though it was the only practical and reasonable manner of

regulation. To say that inter-State trade, commerce and intercourse thus prohibited and thus monopolized remains absolutely free seems to me to be a contradiction in terms. I hesitate to make these criticisms of the very important and valuable observations of the Privy Council, which I only venture to do because it had already disclaimed any jurisdiction and almost seemed to invite comments.

To revert to the distinction between prohibition and regulation, I should add that according to usual rules of construction a power to regulate would generally include a power to prohibit or prevent. This certainly has been the view in the United States, as appears from the short quotation I made from Professor Corwin's essays in an earlier part of this article.[104] Therefore, if the words of s. 92 had been merely to "regulate", I should have been disposed to think even then that this included prohibition or prevention. At the moment the relevant power depends on the words and scope of s. 51 (i), and that placitum explicitly gives Parliament power to make laws for the peace, order and good government of the Commonwealth with respect to trade and commerce, etc. No wider grant of power in the particular matter can be given. There is plenary power to make laws for the good government of the Commonwealth, and that in itself would be a plenary unqualified power involving the whole range of legislative function in the particular matter, subject only to the Constitution and for this purpose subject only to s. 92 as an exception. If neither s. 92 nor any other exception applies, then the power is plenary, and that I think is the true position.

The word "intercourse" in s. 92 has led to some questionings in the United States. It does not appear in the words of the United States Constitution, but it is used in close connection in exegesis at times with the "trade and commerce" clause, and has generally been, I think, understood not as introducing any independent head but as ancillary or incidental to the main grant of power. In s. 92 it may be thought that it has a wider range, but on that view it seems to me it must be bound up with the more important words "trade and commerce", and therefore like them, and like the clause in general, subject to the limitations which I have recognised to exist under s. 92 generally; and therefore if there is not any fiscal question involved there is nothing to bring in s. 92 and therefore the ordinary law applies.[105]

I have not thought it desirable in this essay to canvass systematically the various decisions which have been given under s. 92.[106] The Privy Council in 1936 did make a tentative examination of a number of cases on s. 92 up to the date of their judgment. I am not at all sure that that was a wise course to take, because what the Board said has been treated from time to time as forming precedents for the construction of s. 92 in other cases. I do not think, reading the judgment in *James* v. *The Commonwealth*[107], that that was a satisfactory way of dealing with the matter. What the Privy Council were seeking to do was

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[104] Corwin, *op. cit.* at 7, quoted *supra* pp. 149-150.

[105] In the light of the main thesis of this article that s. 92 is directed solely to fiscal burdens and that there is room for a judicial return to this original scope, it seems unnecessary to canvass the correctness of particular interpretations of "intercourse", e.g., in *Gratwick* v. *Johnson* (1945) 70 C.L.R. 1, despite my temptation to stress Sir John Latham's most interesting discussion of "the Transport Cases", and Sir Owen Dixon's penetrating comment (at 19) upon the judicial history of s. 92 that "What has been clear has not been accepted and what has been accepted has yet to be made clear".

[106] Recent cases such as *Wilcox Mofflin Limited* v. *State of New South Wales* (1951-52) 85 C.L.R. 488, (1952) Argus L.R. 281, seek valiantly to apply the test laid down by the Privy Council in the *Banking Case*. The more recent case of *Wragg* v. *State of New South Wales* (June 1953) (High Court) may involve important particular adjustments of the principles hitherto deemed to be established by *MacArthur's Case* (*supra* n. 6). But these holdings still assume the wider, more than fiscal view of the prohibition in s. 92, and since my present purpose is to plead for the reexamination of that assumption, a detailed discussion of them seems out of place, and might even confuse the main issue.

[107] (1936) A.C. 578.

simply to illustrate the questions and particular difficulties which had arisen in the past, and not really to act as a sort of Court of Appeal on these judgments; and I have therefore avoided commenting, as I have already said, on the various cases decided since *James* v. *The Commonwealth*[108], though I have made an exception, for convenience of exposition, and as an aid to exegesis in the case of the three judgments in the Privy Council. I have not, however, failed to bear in mind throughout that the decision of the High Court on these constitutional questions is final unless an appeal is brought. As such appeals have always been very rare, I think it is fair to regard the difficult and onerous questions which arise under s. 92 as now, for practical purposes, subject to the final decision of the High Court. This is no doubt a great responsibility for the High Court, but when we look back upon the work that they have done in the past in grappling with all the problems under the Commonwealth of Australia Constitution Act, and in particular under s. 92, the judges may take a legitimate pride in their achievements.

The result, however, of my heretical suggestion for the construction of s. 92, if it were accepted in practice, would be to introduce in certain aspects for the High Court a new approach to questions under s. 92, and that approach might involve some considerable difference in results. Whether that situation will ever arise in Australia depends on what happens in the future. It would perhaps not involve so revolutionary a change as that which appears to have taken place in the United States and in Canada. Circumstances, however, in these two nations may never reproduce themselves in Australia. In the United States there was a great wave of popular feeling in favour of the New Deal and against the precedents which had been established for construing the relevant parts of the Constitution. Something of the same may be said of Canada. I do not feel, however, competent to express any views about all that. As to Australia, I do not form any prognostication for the future. Those who live longest will see most, and I am not at all saying that the questions under s. 92 are as important or basic as those which arose on the Constitution of the United States or of Canada, or that new views may equally be felt to be desirable or necessary. There have been a great many complicated arguments and decisions on s. 92, and a great wealth of learning and wisdom and statesmanship has been expended; and, as we have seen, some desirable aspects of governmental power may have to some extent been thwarted or complicated and great complexity of law introduced. I cannot help thinking that if my heresies were adopted or alternatively if the Constitution were amended there would be an end to some at least of the complexities which could be dispensed with and which might otherwise, even in a small degree, hamper the triumphant progress of a great nation in its development and advance. How that may be, eventually depends on the people of Australia.

The Australian Constitution is little more than half a century old. Yet the changes in every aspect of the national life in that period are great and even revolutionary.[109] I am not sure that Australia would need any such drastic constitutional revision as Professor Corwin has suggested for the United States. I am here concerned only to propose the elimination or the revision by the people of s. 92, or at least a changed construction of it by the Judges. Whether either of the courses mentioned is likely to ensue, I do not know. People better able to judge seem to think it is not at present likely. Meanwhile the High Court and its Judges, steeped in all the learning about the Constitution, and intimately

[108] *Ibid.*

[109] In the sense applied by Professor Corwin to the United States position. See *supra*.

familiar with Australian ways of life and ideas, have the function and responsibility of construing and applying its terms. I am sure they will not fall below their great mission. I have attempted only to submit for consideration (somewhat officiously even then) a limited solution for a limited problem.

GENERAL EDITOR'S NOTE: *The important theses in his Lordship's article did not require a detailed canvassing of recent decisions and literature. For our readers' convenience, however, a summary list is subjoined.*

A Summary of Decisions and Literature on Section 92 of the Commonwealth Constitution since the Banking Case.

I. *High Court of Australia.*

A. *McCarter* v. *Brodie* (1950) 80 C.L.R. 432.

The Transport Regulation Acts 1933-1947 (Vic.), which provide that a commercial goods vehicle shall not be operated on a public highway unless duly licensed, are valid and do not infringe s. 92. *Riverina Transport Pty. Ltd.* v. *Victoria* (1937) 57 C.L.R. 327 followed and *R.* v. *Vizzard; ex parte Hill* (1933) 50 C.L.R. 30 applied. So held by Latham, C.J., McTiernan, Williams and Webb, JJ.; Dixon and Fullagar, JJ. dissenting. (Leave to appeal to the Privy Council was refused, see 80 C.L.R. v.)

B. *Graham* v. *Paterson* (1950) 81 C.L.R. 1.

(1) The Profiteering Prevention Act of 1948 (Q'land) validly provides for the fixation of prices of goods the subject of intra-state sales. (2) The fact that goods sold by retail in one State may be taken into another State for consumption is not an interstate transaction within s. 92. So held by Latham, C.J., McTiernan, Williams, Webb and Fullagar, JJ.

C. *Fergusson* v. *Stevenson* (1951) 84 C.L.R. 421.

(1) The Fauna Protection Act, 1948 (N.S.W.), making it an offence to be in the possession of skins of certain native animals, is valid, but must be read subject to s. 92, so as not to apply to interstate transactions. (2) Possession of skins of protected animals brought from Queensland for shipment abroad is part of interstate trade protected by s. 92 and does not come within the Fauna Protection Act, 1948, s. 19. So held by Dixon, Williams, Webb, Fullagar and Kitto, JJ.

D. *Cam & Sons Pty. Ltd.* v. *The Chief Secretary of N.S.W.* (1951) 84 C.L.R. 442.

The Fisheries and Oyster Farms Act, 1935-1949 (N.S.W.), requiring the sale of fish through a market is valid, but must be read subject to s. 92 so as not to apply to interstate transactions in fish. So held by Dixon, Williams, Webb, Fullagar and Kitto, JJ.

E. *Carter* v. *The Potato Marketing Board* (1951) 84 C.L.R. 460.

(1) The Primary Producers Organization and Marketing Acts, 1926-1946 (Q'land), are valid, but must be read subject to s. 92, (2) The Acts as so read can have a severable and distributive construction which will confine them to transactions not protected by s. 92. (3) Section 92 does not protect acts which may or may not lead to interstate trade and which at best can only be preparatory to transactions which may or may not be of an interstate character. *Peanut Board* v. *Rockhampton Harbour Board* (1933) 48 C.L.R. 266 distinguished. So held by Dixon, McTiernan, Williams, Webb, Fullagar and Kitto, JJ.

F. *The Queen* v. *Wilkinson; Ex parte Brazell, Garlick and Coy.* (1951) 85 C.L.R. 467.

The sale and delivery of goods in New South Wales to an agent for an interstate buyer for transport to the buyer in the other State is a transaction in the course of trade and commerce between the States. So held by Dixon, McTiernan, Williams, Webb, Fullagar and Kitto, JJ.

G. *Wilcox Mofflin Ltd.* v. *New South Wales* (1951) 85 C.L.R. 488.

(1) The Hide and Leather Industries Act, 1948-49 (N.S.W.), which is part of a Commonwealth - State scheme for the acquisition and distribution of hides, is valid insofar as it requires all hides to be appraised and provides for the compulsory acquisition of all hides not the subject of interstate trade. So held by Dixon, McTiernan, Fullagar and Kitto, JJ.; Williams and Webb, JJ. dissenting. (2) The Act is invalid insofar as it prohibits the sale of hides which have not been appraised. So held by Dixon, McTiernan, Williams, Fullagar and Webb, JJ.

E. *Hospital Provident Fund Pty. Ltd.* v. *Victoria* (1953) A.L.R. 258; 26 *A.L.J.* 677.

(1) The Benefit Associations Act 1951 (Vic.), which requires all associations providing sickness, hospital, medical and other benefits to be registered and comply with certain requirements, failing which they shall be wound up, is valid and does not infringe s. 92.

(2) The Act effectively applies to associations despite the fact that they carry on business in more than one State, employ agents who travel interstate and send moneys to and receive moneys from members and insured persons in other States. So held by Dixon, C.J., McTiernan, Webb, Fullagar, Kitto and Taylor, JJ.; Williams, J. dissenting.

F. *Hughes & Vale Pty. Ltd.* v. *New South Wales* (1953) A.L.R. 323; 27 *A.L.J.* 62.

The State Transport (Co-ordination) Act, 1931-1951 (N.S.W.), which provides that no person shall carry goods for hire by a public motor vehicle unless the vehicle is licensed, is valid. *McCarter* v. *Brodie* (1950) C.L.R. 432, followed. So held by Dixon, C.J., McTiernan, Williams and Webb, JJ.; Fullagar, Kitto and Taylor, JJ. dissenting. (Leave to appeal was granted by the Privy Council, but the appeal has not yet been heard.)

G. *Wragg* v. *New South Wales* (1953) A.L.R. 583; 27 *A.L.J.* 259.

The Prices Regulation Act, 1948 (N.S.W.), and Orders thereunder fixing the price at which potatoes may be sold in New South Wales by traders (including primary wholesalers who have imported such potatoes from other States) are valid and do not infringe s. 92. So held by Dixon, C.J., McTiernan, Williams, Webb, Fullagar, Kitto and Taylor, JJ.

II. *State Supreme Courts.*

The Supreme Courts of New South Wales and Victoria also dealt with s. 92 in the following cases:

A. *Ex parte Mason; Re Hager* (1951) 51 S.R. (N.S.W.) 363, in which, following *Roughley* v. *New South Wales* (1928) 42 C.L.R. 162, it was held that a regulation under the Farm Produce Agents Act, 1926 (N.S.W.), was valid.

B. *Egg and Pulp Marketing Board* v. *Robins* (1953) A.L.R. 44, in which it was held that the Marketing of Primary Products Act, 1935 (Vic.), did not operate to vest in the Board eggs sold by a Victorian producer to a trader in New South Wales.

III. *Literature.*

Ross Anderson, "The Main Frustrations of the Economic Functions of Government Caused by Section 92 and Possible Escapes Therefrom" (1953) 26 *A.L.J.* 518, 566.

K. H. Bailey, "Fifty Years of the Australian Constitution" (1951) 25 *A.L.J.* 328-331.

F. R. Beasley, "The Commonwealth Constitution: Section 92" (1948-1950) *Univ. West. Aust. L. Rev.* 97, 293, 433.

H. S. Nicholas, *The Australian Constitution* (2 ed. 1952) c. xxi, 250-284.

P. D. Phillips, Q.C., in R. Else-Mitchell ed., *Essays on the Australian Constitution* (1952) c. ix, 238-259.

G. Sawer, "The Case of Bank Nationalization" (1950) 32 *J. Comp. Leg. & Int. L.* 17.

G. Sawer, in G. W. Paton ed., *The Commonwealth of Australia* (1952) c. ii, 69-76.

G. Sawer, "The Record of Judicial Review", *Federalism, An Australian Jubilee Study* (1952) 228-231.

J. Stone, "A Government of Laws and Yet of Men: Being a survey of Half a Century of the Australian Commerce Power", (1950) 25 *N.Y. Univ. L. Q. Rev.* 451-512 repr. (1948-1950) 1 *Univ. West. Aust. L. Rev.* 445.

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CORRIGENDA

TO J. G. LATHAM, "CHANGING THE CONSTITUTION", *supra* p. 14.

At p. 19, beginning 4th full para., omit the first sentence and substitute, "Amendments falling within this provision could not be made without the consent of each State affected".

P. 23, last line, for "offend", read "not offend".

P. 29, last line, for "manufactured goods", read "manufacture of goods".

P. 36, second full para., sentence beginning, "it was held . . . was invalid". This whole sentence should be omitted.

The *corrigenda* of substance involved were made by Sir John before publication, but unfortunately too late for incorporation.—*Ed.*