FREEDOM OF INTERSTATE TRADE

BUCK v. *BAVONE*

In *Buck* v. *Bavone*,[1] the High Court dealt with yet another case[2] in which persons engaged in a trade having some interstate element have claimed protection under s. 92 of the Constitution from the operation of particular legislation.

The judgments of a majority[3] of the Court followed fairly orthodox lines, and it is not the purpose of this casenote to examine those judgments in any detail.

The real interest of the case lies in the dissenting judgment of Murphy, J., who availed himself of the opportunity afforded by the subject matter of the case to expound his view of the true meaning of s. 92. His interpretation of that section, though not an original interpretation, is nevertheless a radical one: it is that s. 92 "clearly concerns freedom from customs duties or similar taxes [only]".[4] Unaided by a scintilla of judicial authority, and without regard to the doctrine of *stare decisis,* Murphy, J. purports to upset the whole of s. 92 law, and at a stroke, to rewrite and simplify it largely on the basis of logical inference from the terms of the Constitution alone.

The purpose of this casenote is to analyse Murphy, J.'s dissenting judgment against a background of the present law on s. 92, and the doctrine of *stare decisis.*

1. The facts

Buck v. *Bavone* concerned a South Australian potato grower, who had contracted to sell and deliver a quantity of potatoes to a New South Wales buyer. He was prosecuted under s. 18(1) of the Potato Marketing Act, 1948-1973 (S.A.), which provided that "[a] person shall not . . sell potatoes grown by him unless he is registered by the [Potato] Board as a grower". The grower was not registered, although under s. 18(2) of the Act he should have been "entitled to registration as a grower"

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[1] (1976) 50 A.L.J.R. 648.
[2] A long line of cases dates from *Fox* v. *Robbins* (1908) 8 C.L.R. 115.
[3] Barwick, C.J., Gibbs, Stephen, Mason and Jacobs, JJ.
[4] (1976) 50 A.L.J.R. 648 at 657.

by supplying certain information to the Board and satisfying them as to certain facts.

Section 12(1) of the same Act provided that "the Board may . . . require all or any of the persons who are registered . . . to pay . . . contributions towards . . . carrying out the power and duties of the Board under this Act".

The defendant claimed *inter alia* that both the requirement of registration under s. 18, and the fact that registration exposed a grower to a levy under s. 12 were impermissible burdens on interstate trade, and contrary to s. 92 of the Constitution.

The case came by way of appeal to the High Court.

2. The judgments

A majority of the Court, that is to say, Barwick, C.J., Gibbs, Stephen, Mason and Jacobs, JJ., took a conventional view of the law, which they treated as reasonably well settled.

Gibbs, Stephen, Mason and Jacobs, JJ. held that the requirement of registration under s. 18 was regulatory only, and did not therefore constitute a burden on interstate trade contrary to s. 92 of the Constitution. They also took the view that s. 12 of the Act was independent of s. 18, and that to the extent to which s. 12 was invalid, it would not apply to a grower engaged in interstate trade.

Stephen, Mason and Jacobs, JJ. thought that in any case, the mere fact that the Board might strike a levy in the nature of a burden on interstate trade would not itself invalidate s. 12, and *a fortiori* in the instant case where there was nothing to suggest that the defendant would ever have been called upon to pay a levy at all.

Barwick, C.J. dissented on the facts. He thought that s. 18 of the Potato Marketing Act was itself an infringement of s. 92 of the Consituation, on the rather curious ground that the section was to be read "as forbidding an interstate sale by a grower who is not registered but who, if registered, will be exposed to the possibility of a levy of uncertain and, perhaps, unlimited amount".[5]

Murphy, J. held that the Act did not contravene s. 92 as it did not impose fiscal charges, and that even if there were a latent possibility of such imposition, there was no actual or threatened imposition.

3. The present law

Section 92 of the Constitution provides:

> 92. 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,

[5] (1976) 50 A.L.J.R. 648 at 650.

> become 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.

In the interpretation of s. 92, judicial attention has usually been centred upon the words "trade, commerce, and intercourse among the States . . . shall be absolutely free". The effect of the expression "absolutely free" has, however, been a matter of some controversy.

At one time it was thought that the words were very far reaching. In *W. & A. McArthur Ltd.* v. *State of Queensland* it was claimed that "[t]he words 'absolutely free' in sec. 92 . . . must . . . have their natural 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".[6]

But in *James* v. *The Commonwealth*[7] the Privy Council recognised that a strict application of the *McArthur* principle would create "in every State a class of dealings . . . entirely immune from the general law of the State, though only distinguishable from other like dealings . . . by the fact that they are parts of an inter-State transaction".[8] Accordingly they proposed an alternative test for "absolute freedom":

> The true criterion seems to be that what is meant is freedom at the frontier or, to use the words of s. 112 [of the Constitution], in respect of "goods passing into or out of the State".[9]

By way of illustration of the diverse means by which interstate trade might be burdened or hindered "at the frontier", the Privy Council cited "compulsory acquisition of goods . . . if in truth the expropriation is directed wholly or partially against inter-State trade in the goods, that is, against selling them out of the State", and "placing a special burden on the goods in the State to which they have come, simply because they have come from [another] State".[10]

In *James' Case* itself, the Privy Council considered a (Commonwealth) Act and regulations which *inter alia* prohibited an owner from carrying dried fruits from one State to another unless he held an appropriate licence: the licence being issued subject to a condition that the owner should export a prescribed percentage of the dried fruits from Australia. They held that the Act and regulations were invalid as contravening s. 92.

But whatever the scope of the "freedom" afforded by s. 92 to interstate trade, this much is clear beyond doubt: that "freedom" is

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[6] (1920) 28 C.L.R. 530 *per* Knox, C.J., Isaacs and Starke, JJ. at 554, Rich, J. concurring at 569.
[7] (1936) 55 C.L.R. 1.
[8] *Id.* at 58.
[9] *Ibid.*
[10] *Id.* at 59.

not limited to freedom from tariffs and customs duties. This was quite settled by the Privy Council in *James' Case*:

> Free trade means in ordinary parlance freedom from tariffs. Free in s. 92 cannot be limited to freedom in the last-mentioned sense. . . . [I]t 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.[11]

In *The Commonwealth* v. *Bank of New South Wales* the Privy Council observed:

> Forty years of controversy upon these words [in s. 92] 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.[12]

Until appeals to the Privy Council on Constitutional matters were abolished in 1968,[13] the Privy Council continued to act upon the assumption that the decision in *James' Case* was correct,[14] and the High Court has continued so to act.[15]

4. The circumstances under which the High Court should review a previous decision

(a) *A previous decision of the High Court.*

In *The Tramways Case (No. 1)*, Griffith, C.J. observed:

> [I]t is impossible to maintain as an abstract proposition that the Court is either legally or technically bound by previous decisions. Indeed, it may in a proper case be its duty to disregard them. But the rule should be applied with great caution, and only when the previous decision is manifestly wrong. . . . Otherwise there would be grave danger of a want of continuity in the interpretation of the law.[16]

The principles upon which the Court should act in deciding whether to review a previous decision have been considered in a number of cases. For example, in *State of Victoria* v. *The Commonwealth,* the exceptional course of declining to follow a previous decision was only taken upon the ground, *inter alia* that the decision was "isolated, . . . receiving no support from prior decisions and . . . forming no part of . . . a stream of authority . . . [or] a *catena* of cases".[17]

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[11] *Id.* at 56.

[12] (1949) 79 C.L.R. 497 at 629.

[13] By the Privy Council (Limitation of Appeals) Act 1968 (Com.), s. 3(1)(b)(i).

[14] See for example *Hughes and Vale Pty. Ltd.* v. *State of New South Wales* (1954) 93 C.L.R. 1; *Freightlines and Construction Holding Ltd.* v. *State of New South Wales* (1967) 116 C.L.R. 1.

[15] See for example *S.O.S. (Mowbray) Pty. Ltd.* v. *Mead* (1972) 124 C.L.R. 529 *per* Menzies, J. at 560, 573, and Gibbs, J. at 602; *North Eastern Dairy Co. Ltd.* v. *Dairy Industry Authority (New South Wales)* (1975) 50 A.L.J.R. 121 *per* Barwick, C.J. at 126, 127, 129, McTiernan, J. at 131, and Stephen, J. at 135.

[16] (1914) 18 C.L.R. 54 at 58.

[17] (1957) 99 C.L.R. 575 *per* Dixon, C.J. at 615-16, Kitto, J. concurring at 658.

Again, in *Amalgamated Society of Engineers* v. *Adelaide Steamship Co. Ltd.*, the majority of the Court overruled several earlier decisions on the ground *inter alia*, that they disclosed "a conflict both with the text of the Constitution and with distinct and clear declarations of law by the Privy Council".[18]

It is clear that "changes in the personnel of the bench . . . can . . . never of themselves furnish a reason for review".[19] In *James* v. *The Commonwealth*, Rich, J., considering a previous pronouncement of the Court that s. 92 did not bind the Commonwealth, declared:

> When the Court has adopted an interpretation [of a section of the Constitution] and declared, it is highly undesirable that the Court should depart from it. . . . In my opinion we should hold, quite independently of our individual opinions, that the Commonwealth is not bound by s. 92.[20]

There is one isolated *dictum* which suggests that the High Court might be less reluctant to overrule a previous decision in a Constitutional case. In *Perpetual Executors and Trustees Association of Australia Ltd.* v. *Federal Commissioner of Taxation*, the Court remarked:

> [I]t may be that considerations are present in constitutional cases, where Parliament is not in a position to change the law, which do not arise in other cases.[21]

But the statement is not definitive. In any case, it purports to assume for the High Court a legislative role, a role which the Court has otherwise consistently disclaimed.[22]

(b) *A previous decision of the Privy Council.*

There are many statements to be found in the cases to the effect that the High Court is bound, if by nothing else, at least by decisions of the Privy Council.[23] Thus in *Cooper* v. *Southern Portland Cement Ltd.*, Barwick, C.J. said:

> [T]his Court is bound by the actual decision of a case by the Privy Council and by the principles by which that decision is essentially supported, that is to say, by the basic reasons for its decision.[24]

(c) *The effect of the Privy Council (Limitation of Appeals) Act* 1968.

In *James* v. *The Commonwealth*, one of the reasons given by Rich, J. for declining to review an earlier decision of the High Court was that

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[18] (1920) 28 C.L.R. 129 *per* Knox, C.J., Isaacs, Rich and Starke, JJ. at 142.

[19] *Perpetual Executors and Trustees Association of Australia Ltd.* v. *Federal Commissioner of Taxation* (1949) 77 C.L.R. 493 *per curiam* at 496.

[20] (1935) 52 C.L.R. 570 at 586. See also *per* Dixon, J. at 593.

[21] (1949) 77 C.L.R. 493 at 496.

[22] See for example *Bank of New South Wales* v. *The Commonwealth* (1948) 76 C.L.R. 1 *per* Rich and Williams, JJ. at 252; *Federated Engine Drivers' and Firemen's Association of Australasia* v. *Colonial Sugar Refining Co. Ltd.* (1916) 22 C.L.R. 103 *per* Powers, J. at 123; *R.* v. *Barger* (1908) 6 C.L.R. 41 *per curiam* at 64.

[23] See for example *Brown* v. *Holloway* (1909) 10 C.L.R. 89 *per* O'Connor, J. at 102; *Davison* v. *Vickery's Motors Ltd. (In Liquidation)* (1925) 37 C.L.R. 1 *per* Isaacs, J. at 7.

[24] (1972) 128 C.L.R. 427 at 438.

"[t]he plaintiff . . . can . . . carry the matter to the Privy Council".[25]

On 1st September 1968, the Privy Council (Limitation of Appeals) Act 1968 (Com.) came into operation. Under s. 3(1)(b)(i), special leave of appeal to Her Majesty in Council from a decision of the High Court may no longer be sought where the decision of the High Court involved the application or interpretation of the Constitution.

Thus the consideration that an appeal may be taken to the Privy Council is no longer a factor to be taken into account by the High Court when considering whether a previous decision ought to be followed.

Furthermore, it was always the case that no appeal lay directly from a State Supreme Court to the Privy Council on a Constitutional matter,[26] so that the High Court is now the final court of appeal on Constitutional issues. The question therefore arises whether the Court may now be in a position to review an earlier decision of the Privy Council. This possibility was expressly recognized in *R.* v. *Joske* by Barwick, C.J. and Mason, J.,[27] although they pronounced no decided view on the matter.

Shortly before judgment was delivered in *Buck* v. *Bavone,* the problem was again considered by Barwick, C.J. in *Favelle Mort Ltd.* v. *Murray.* He said:

> The question is whether the reasons of the Privy Council should now continue to be regarded as binding precedents to the point that this Court will continue to follow and apply them as of obligation, even when the Court is firmly convinced that the reasons were erroneous. If the answer to the question is negative, there would still remain the question whether or not the Court would continue to accept them under the doctrine of *stare decisis.* I am of opinion that the first of these is a question of judicial policy upon which the Court as a whole should pronounce.[28]

The issue is therefore still unresolved.

It is however worthwhile to observe that it is still theoretically possible for the Privy Council to decide a Constitutional question which arises in proceedings before the Privy Council itself, in an appeal from a State Supreme Court on an otherwise purely State matter.[29] In one sense therefore, the Privy Council remains the highest Court which can pronounce upon a Constitutional issue.

5. The judgment of Murphy, J.

Murphy, J.'s thesis can be simply stated. It is that the command in

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[25] (1935) 52 C.L.R. 570 at 586. See also *per* Starke, J. at 589, Dixon, J. at 590-91 and Evatt and McTiernan, JJ. at 594, 603.

[26] Judiciary Act 1903 (Com.), ss. 30(a), 39(2).

[27] (1974) 130 C.L.R. 87 at 90, 102.

[28] (1976) 50 A.L.J.R. 509 at 514.

[29] P. H. Lane, *The Australian Federal System with United States Analogues* (1972), p. 412.

s. 92 "clearly concerns freedom from customs duties or similar taxes [only]".[30]

In his judgment, Murphy, J. pays no regard to the principles which have been laid down in the cases, either as to the true interpretation of s. 92 itself, or as to the matters to which a High Court Justice should look in taking the exceptional course of refusing to follow previous decisions of the High Court and of the Privy Council.

He does however attempt to substantiate his interpretation on a number of separate grounds.

(a) *Section 92 is generally taken out of context and abbreviated, eliminating the references to duties of customs and facilitating its misinterpretation.*[31]

The contention that "free" in s. 92 should be given the meaning of " 'free from pecuniary impositions or burdens' . . . having regard to the rest of s. 92 and to the subject matter of the other sections among which s. 92 is found" was placed squarely before the High Court in *Duncan* v. *State of Queensland,*[32] and rejected by five out of seven members of the Court.[33] The context in which s. 92 is found was expressly considered by Griffith, C.J.;[34] and by Barton, J., who observed of the section itself:

> [I]ts inclusion of [fiscal matters] is sufficient justification for the place it occupies [in Chapter IV of the Constitution].[35]

In *James* v. *The Commonwealth* the Privy Council considered s. 92 in full[36] and in context,[37] but rejected the idea that "free" in that section should be limited to "freedom from tariffs". They said:

> 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.[38]

It seems fair to suggest, with respect, that there is no substance in Murphy, J.'s first contention.

(b) *Section 92 does not guarantee economic anarchy. It is not a* laissez-

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[30] (1976) 50 A.L.J.R. 648 at 657.
[31] *Ibid.*
[32] (1916) 22 C.L.R. 556, by Ryan (Attorney-General for Queensland) and Mitchell, K.C., for the State of Queensland, at 567-68.
[33] (1916) 22 C.L.R. 556 by Griffith, C.J. at 572-73; Barton, J. at 589; Isaacs, J. at 618; Higgins, J. at 630; and Powers, J. at 644.
[34] (1916) 22 C.L.R. 556 at 570-72.
[35] *Id.* at 589.
[36] (1936) 55 C.L.R. 1 at 37.
[37] *Id.* at 41-42.
[38] *Id.* at 56.

faire *provision freeing trade, commerce and intercourse among the States from regulation.*[39]

No one would dissent from this observation by Murphy, J. In *Duncan* v. *State of Queensland* Griffith, C.J. said:

> [T]he word "free" [in s. 92] does not mean *extra legem,* any more than freedom means anarchy. We boast of being an absolutely free people, but that does not mean we are not subject to law.[40]

Again, in *James* v. *The Commonwealth,* the Privy Council observed that "liberty . . . is not equivalent to anarchy or license [*sic*]".[41] By way of illustration they said:

> Every step in the series of operations which constitute [a] particular transaction is an act of trade; and control under the State law of any of these steps must be an interference with its freedom of trade. If the transaction is one of sale, it is governed . . . by the relevant Sale of Goods Act. . . . 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 wharfs or warehouses or transport workers. It must be so subject.[42]

In *The Commonwealth* v. *Bank of New South Wales,* the Privy Council said:

> [R]egulation of trade commerce and intercourse . . . is compatible with its absolute freedom.[43]

Murphy, J.'s observation is certainly correct. Yet it represents a refusal to acknowledge the distinction between a *laissez-faire* clause and a *laissez-passer*[44] clause, a distinction with which most of the cases both before and after *James' Case* have been essentially concerned.[45]

(c) *The judicial approach of injecting into s.* 92 *the philosophy of* laissez-faire *has caused a substantial and serious inroad into the spheres of State and Federal legislatures. . . . The doctrine of* stare decisis *should not be applied to continue the effect of reasoning which has made the State and Federal Parliaments almost impotent in fields of social and economic importance.*[46]

Here we find, perhaps, the true rationale of Murphy, J.'s thesis. It is however, with respect, hardly conventional *legal* reasoning.

In *Gratwick* v. *Johnson,* Latham, C.J. observed:

> The maxim *salus populi suprema lex* . . . is a wise political observation — not a legal criterion of constitutional validity.[47]

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[39] (1976) 50 A.L.J.R. 648 at 657.
[40] (1916) 22 C.L.R. 556 at 573.
[41] (1936) 55 C.L.R. 1 at 48.
[42] *Id.* at 57.
[43] (1949) 79 C.L.R. 497 at 639.
[44] Adopting, with modification, the words of Lord Wright in "Section 92 — A Problem Piece" (1954) 1 *Syd. L.R.* 145 at 155.
[45] Murphy, J. does however subsequently acknowledge "the doctrine of permissible regulatory laws" (1976) 50 A.L.J.R. 648 at 658.
[46] (1976) 50 A.L.J.R. 648 at 657, 658-59.
[47] (1945) 70 C.L.R. 1 at 11.

In *James* v. *The Commonwealth* the Privy Council, in striking down particular legislation and regulations as contravening s. 92, recognized that the legislation was in furtherance of a policy which the Commonwealth Government was satisfied was "in the best interests of the Australian People", and expressed their regret. But at the same time they observed:

> [T]hese inconveniences are liable to flow from a written Constitution. Their Lordships cannot arrive at any conclusion save that they could not give effect to [the Commonwealth's] contention consistently with any construction of the Constitution which is in accord with sound principles of interpretation. To give that effect would amount to rewriting, not to construing, the Constitution. That is not their Lordships' function.[48]

(d) *In this area, the Court has adopted a legislative role. It acts as an additional House but its role is necessarily negative. It can veto but not initiate.*[49]

In "Section 92 — A Problem Piece" Lord Wright observed that "[i]t is impossible to avoid a certain creation of law in the work of judicial construction".[50] And in a sense it is true to say that the Court adopts a legislative role.

Nevertheless the doctrine of judicial review is well established. In *Australian Communist Party* v. *The Commonwealth,* Fullagar, J. said:

> [T]here are those . . . who disapprove of the doctrine of *Marbury* v. *Madison* (1803) 1 Cr. 137, and who do not see why the courts, rather than the legislature itself, should have the function of finally deciding whether an Act of a legislature in a Federal system is or is not within power. But in our system, the principle of *Marbury* v. *Madison* is accepted as axiomatic.[51]

The claim by Murphy, J., which is in terms restricted to the Court's role in construing and applying s. 92, might equally be made in respect of *any* section of the Constitution. Such a broad claim lends no support to his construction of s. 92.

(e) *Lord Wright (who delivered the judgment of the Privy Council in* James *v.* The Commonwealth *made a dramatic recantation. In "Section* 92 *— A Problem Piece", he wrote: " . . . that s.* 92 *deals with fiscal matters alone gives sense and efficacy to s.* 92".[52]

It is indeed the case that in "Section 92 — A Problem Piece",[53] Lord Wright admitted a misreading of s. 92 in *James* v. *The Commonwealth,* and claimed that the operation of that section is limited to fiscal matters.

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[48] (1936) 55 C.L.R. 1 at 61.
[49] (1976) 50 A.L.J.R. 648 at 657.
[50] (1954) 1 *Syd. L.R.* 145 at 152.
[51] (1951) 83 C.L.R. 1 at 262.
[52] (1976) 50 A.L.J.R. 648 at 657.
[53] (1954) 1 *Syd. L.R.* 145.

But in that article, Lord Wright made no claim to be speaking in any other capacity than as "a private person".[54]

Furthermore, he admitted that his revised interpretation does not represent the law:

> 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.[55]

Lord Wright's new opinion is certainly entitled to respect. But it can hardly carry the same weight as the considered opinion of the Judicial Committee[56] in *James* v. *The Commonwealth.*

(f) *Professor Colin Howard observed that [the prevailing interpretation of s.* 92] *approaches the antithesis of what the section was originally intended to do. . . . Professor Geoffrey Sawer said: "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".*[57]

It is not at all clear that the sole intention of the Founders of the Commonwealth was to do away with border tariffs. Certainly Sir Samuel Griffith, himself one of the Founders, does not appear to have thought so. As Griffith, C.J. in *Duncan* v. *State of Queensland,* he said:

> It is an important historical fact that one of the supposed great disadvantages of the pre-federation distribution of governmental powers in what is now the Commonwealth of Australia was the interference, both potential and actual, with freedom of intercourse among the States. This interference was mainly effected by means of customs duties imposed upon goods passing from one Colony into another. . . . But the power of interference was neither in theory nor in practice limited to duties of customs. It might be exercised by absolute prohibition of the entry of specified goods or persons or by imposing restrictive conditions upon either, and had in fact been so exercised.[58]

The Australasian Federal Convention Debates of 1891 and 1897-98 are equivocal as to what the majority of the delegates thought s. 92 meant, or was intended to mean. If anything, however, the evidence goes against the view that they intended to restrict its operation to border tariffs. When the proposed s. 92 was being discussed for the last time towards the end of the Melbourne Convention of 1898, Sir Isaac Isaacs, then Mr. I. A. Isaacs, moved that "[s. 92] be amended by the addition, after

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[54] *Id.* at 145.
[55] *Id.* at 167.
[56] Consisting of Viscount Hailsham, Lord Russell of Killowen, Lord Wright, Sir George Lowndes and Sir Sidney Rowlatt.
[57] (1976) 50 A.L.J.R. 648 at 657.
[58] (1916) 22 C.L.R. 556 at 571.

'free' . . . of the words 'from taxation or restriction' ".[59] He said:

> [A]t present, [s. 92] is open to the very serious objection that, while it says "absolutely free", it does not say free of what. . . . I do not suppose there will be any objection to the principle I am advocating, but it is certainly dangerous to leave that clause as it now stands, because it is not only free from taxation or restriction, which it is our intention to confine it to, I take leave to say, but it operates in various ways — free from licences of all sorts, and free from various considerations. I do not think I need enlarge on the matter. I apprehend there will be no objection to putting in these words, unless other and better words can be found.[60]

Yet Isaacs' motion to amend s. 92 was lost by 10 votes to 20, and in the event, the section was adopted into the Constitution in its present form by the Imperial Parliament.

If the historical facts were unequivocal as to "the evil or defect which the Act of Parliament now under construction was intended to remedy",[61] then it might be legitimate to refer to those facts in interpreting s. 92.[62]

But even then we should bear in mind that the Constitution is "an instrument of government meant to endure . . . [and] to be capable of flexible application to changing circumstances".[63]

Thus in *James* v. *The Commonwealth,* the Privy Council said:

> [No] decisive help here [can] be derived from evidence of extraneous facts existing at the date of the Act of 1900; such evidence may in some cases help to throw light on the intention of the framers of the statute, though that intention can in truth be ascertained only from the language used. But new and unanticipated conditions of fact arise. It may be that in 1900 the framers of the Constitution were thinking of border tariffs and restrictions in the ordinary sense and desired to exclude difficulties of that nature, and to establish what was and still is called "free trade", and to abolish the barrier of the State boundaries so as to make Australia one single country. Thus they presumably did not anticipate those commercial and industrial difficulties which have in recent years led to marketing schemes and price control, or traffic regulations such as those for the co-ordination of rail and road services, to say nothing of new inventions, such as aviation or wireless. The problems, however, of the Constitution can only be solved as they emerge by

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[59] Official Record of the Debates of the Australasian Federal Convention, Third Session, Melbourne 1898, vol. 2 at 2365.

[60] *Ibid.*

[61] *Eastman Photographic Materials Co. Ltd.* v. *Comptroller-General of Patents, Designs and Trade Marks* [1898] A.C. 571 *per* Lord Halsbury at 575.

[62] *Id. per* Lord Halsbury at 576. See also *Heydon's Case* (1584) 3 Co. Rep. 7a; 76 E.R. 637.

[63] *Australian National Airways Pty. Ltd.* v. *The Commonwealth* (1945) 71 C.L.R. 29 *per Dixon,* J. at 81.

giving effect to the language used.[64]

With respect, Murphy, J. can derive little support for his interpretation of s. 92 from dogmatic statements by others as to the historical purpose of that section.

(g) *Latham, C.J. said*: *"A new approach is required to s.* 92, *and no approach has been made towards reconsideration of that provision".*[65]

If Latham, C.J.'s words are read in their original context, it is clear that he was not advocating reconsideration of s. 92 by the High Court, but by Federal Parliament itself. For he said:

> The Constitution, I suggest, might be reconsidered with advantage. One of the difficulties of improving the Constitution is that a proposal is always made by one political party, and is sometimes objected to just because it has been made by that party. I suggest that it is not too much to hope for that some reconsideration of the Constitution may be conducted on a non-party basis. Among the matters which I suggest might engage the attention of those who have the knowledge, capacity, and interest to consider these problems [is] . . . s. 92.[66]

There is nothing here to assist Murphy, J.

6. Murphy, J.'s analysis of the command in s. 92

(a) *Meaning of "Trade and Commerce . . . Among the States".*

Murphy, J. says:

> " . . . Among the States" has been treated as simply meaning "interstate". The phrase should not be given a narrow meaning. It is obviously comprehensive. "Trade and Commerce . . . Among the States" extends into areas of intra-State commerce. The supposed line detween interstate and intra-State . . . does not exist.[67]

Murphy, J. does not indicate how "obviously comprehensive" the phrase "Among the States" may be. Perhaps he is merely extending the protection of s. 92 to Acts inseverably connected with interstate trade itself, in which case he is (as to this point) doing nothing more than stating the present law.[68] Yet he comes perilously close to suggesting that the words are nugatory.

It is a well-known rule of construction that "effect is to be given, if possible, to every word the legislature has used".[69] In the present context, there can be no ground for disregarding "[t]he distinction which is drawn between inter-State trade and the domestic trade of a State for the purpose of . . . s. 51(i) [of the Constitution] . . . [a] distinction

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[64] (1936) 55 C.L.R. 1 at 44.
[65] (1976) 50 A.L.J.R. 648 at 657.
[66] 85 C.L.R. i at viii-ix.
[67] (1976) 50 A.L.J.R. 648 at 657.
[68] See for example *Fergusson* v. *Stevenson* (1951) 84 C.L.R. 421; *R.* v. *Wilkinson* (1952) 85 C.L.R. 467.
[69] *City of Melbourne* v. *Attorney-General for Victoria* (1905) 3 C.L.R. 467 *per* Griffith, C.J. at 474.

which s. 92 makes as clearly as does s. 51(i)".[70]

(b) *Meaning of "absolutely free".*

Murphy, J. says:

> The inclusion of this phrase means that s. 92 contains a command subject to no exceptions . . . [A] doctrine has arisen by which the words "absolutely free" have been converted to "relatively free", that is, "subject to permissible regulation" on the grounds such as health and safety. Such a meaning cannot be given to "absolutely free".[71]

This claim is made in the face of countless statements in the cases to the contrary. For example, in *James* v. *The Commonwealth,* the Privy Council said:

> [T]he mere generality of the word[s] ["absolutely free"] must compel limitation in [their] interpretation.[72]

In *Hughes and Vale Pty. Ltd.* v. *State of New South Wales (No. 2)*, Kitto, J., who took a most uncompromising view of the freedom afforded by the section, yet observed:

> The freedom is . . . not an exemption from the obligation of laws which insist upon standards of competence, of conduct or of equipment, or which gives or provides for general or particular directions as to the manner of participation in a form of inter-state trade, commerce, or intercourse.[73]

In *McCarter* v. *Brodie,* Latham, C.J. said:

> It is not material to ask whether [a] law can be described as a law upon crime or bankruptcy or health. . . . If the law does in fact interfere with the freedom protected by s. 92 it must be invalid.[74]

But putting aside these broad statements of principle, what is the alternative interpretation which Murphy, J. proposes? He says:

> [Section 92] frees absolutely trade, commerce and intercourse among the States from customs duties or similar taxes, direct or indirect. . . . Absolute freedom can be applied to fiscal charges without difficulty, but it would produce chaos if applied to laws generally on interstate trade, commerce and intercourse.[75]

It is, with respect, not at all clear that "absolute freedom" can be applied to fiscal charges "without difficulty". Would differential railway rates, for example, be caught by s. 92? Would licence fees be caught?

It is indeed the case, as Murphy, J. points out, that s. 92 has proved a somewhat troublesome section. The Privy Council recognized this in *The Commonwealth* v. *Bank of New South Wales*:

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[70] *Wragg* v. *State of New South Wales* (1953) 88 C.L.R. 353 *per* Dixon, J. at 385-86.

[71] (1976) 50 A.L.J.R. 648 at 658.

[72] (1936) 55 C.L.R. 1 at 56.

[73] (1955) 93 C.L.R. 127 at 218.

[74] (1950) 80 C.L.R. 432 at 455.

[75] (1976) 50 A.L.J.R. 648 at 658.

> [T]he conception of freedom of trade, commerce and intercourse in a community regulated by law presupposes some degree of restriction upon the individual. . . . And through all the . . . 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.[76]

Yet they saw no reason to sweep aside the "great wealth of learning and wisdom and statesmanship [which] has been expended"[77] on s. 92. On the contrary, they said:

> The problem to be solved will often be not so much legal as political, social and economic. Yet it must be solved by a court of law.[78]

Murphy, J., on the other hand, says:

> Under the doctrine of permissible "'regulatory laws", laws on interstate trade and commerce may be regarded as regulatory and therefore permissible, if they conform to certain tests. The tests are so obscure that . . . they can generally be shown to agree with any outcome.[79]

He makes no analysis or examination of these "tests", but is content with saying:

> Cases which have declared marketing and other State laws (not imposing fiscal burdens) invalid for contravention of s. 92 were wrongly decided.[80]

Murphy, J. does make one specific criticism of the present view of s. 92. He says:

> Section 92 has been described as guaranteeing freedom to the individual (*James* v. *The Commonwealth*). . . . Departure from the fiscal interpretation of s. 92 leads to difficulties when a corporation claims exemption from the laws of the legislature which created it.[81]

Section 92 was not described as guaranteeing "freedom to the individual" in *James* v. *The Commonwealth* itself. However, in *The Commonwealth* v. *Bank of New South Wales,* the Privy Council rejected an argument that "section 92 does not guarantee the freedom of individuals". They said:

> James was an individual and James vindicated his freedom in hard-won fights. . . . [Sec. 92] does give the citizen . . . the right to ignore, and if necessary, to call upon 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.[82]

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[76] (1949) 79 C.L.R. 497 at 639.
[77] Lord Wright, "Section 92 — A Problem Piece" (1954) 1 *Syd. L.R.* 145 at 171.
[78] (1949) 79 C.L.R. 497 at 639.
[79] (1976) 50 A.L.J.R. 648 at 658.
[80] *Ibid.*
[81] *Ibid.*
[82] (1949) 79 C.L.R. 497 at 635.

But the Privy Council were not there distinguishing the freedom afforded by s. 92 to individuals from that afforded to corporations. They were distinguishing the freedom of individuals to trade from "freedom from prohibition or restriction in relation to the goods passing into or out of a State".[83]

Murphy, J. does not indicate the nature of the difficulties which a corporation might face in claiming exemption from the laws of the legislature which created it. In the present context, however, a corporation claiming freedom to carry on interstate trade contrary to the law of the State which created it need not claim exemption from the laws of that State, but rather protection under a provision of an Imperial Act, namely s. 9(92) of the Commonwealth of Australia Constitution Act 1900.[84]

But in any case, whatever may be the difficulties to which Murphy, J. refers, those difficulties can hardly be overcome simply by restricting the operation of s. 92 to fiscal matters.

(c) *Meaning of "intercourse".*

Here Murphy, J. merely suggests that " 'intercourse' in s. 92 is not restricted to commercial intercourse". In the notion of "intercourse" he includes "passage of persons".[85]

Murphy, J.'s fiscal interpretation of s. 92 limits the freedom afforded to "passage of persons" by that section to mere freedom from tolls.

The High Court in *Gratwick* v. *Johnson*[86] did not think that the operation of s. 92 was so limited. They held that an order made pursuant to regulations under the National Security Act 1939 (Cth.), which provided that no person should travel by rail without a permit from one State to another, was a direct interference with the freedom of intercourse among the States conferred by s. 92.

Murphy, J. overcomes this difficulty by disapproving *Gratwick* v. *Johnson*. He says:

> The right of persons to move freely across . . . State borders is a fundamental right arising from the union of the people in an indissoluble Commonwealth. This right is so fundamental that it is not likely it would be hidden away in s. 92 . . . in a clause dealing with uniform duties of customs. . . . I think that freedom to move across State borders arise from this fundamental implication of the Constitution and not, as held in *Gratwick* v. *Johnson* . . . from s. 92.[87]

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[83] (1949) 79 C.L.R. 497 *per* H.V. Evatt, K.C. (Attorney-General for the Commonwealth) *et al.*, for the Commonwealth, at 526.

[84] And, in New South Wales, if more is wanted, under s. 5 of the New South Wales Constitution Act, 1902, which stipulates that "[t]he Legislature shall, subject to the provisions of the Commonwealth of Australia Constitution Act, have power to make laws for the peace, welfare and good government of New South Wales".

[85] (1976) 50 A.L.J.R. 648 at 658.

[86] (1945) 70 C.L.R. 1, Latham, C.J., Rich, Starke, Dixon and McTiernan, JJ. delivering separate judgments.

[87] (1976) 50 A.L.J.R. 648 at 658.

One can only suggest, with respect, that so fundamental a right is far more likely to be "hidden away in s. 92" than "aris[ing] from [a] fundamental implication of the Constitution".

7. Murphy, J.'s view of the relationship between s. 92 and the commerce power, s. 51(i)

Murphy, J.'s interpretation of s. 92 allows the States to regulate interstate trade and commerce "by marketing acts or otherwise".[88]

The Parliament of the Commonwealth also has "full power to legislate for interstate trade and commerce . . . [and] to regulate the national economy by appropriate exercise of its powers under s. 51(i)".

Now in *James* v. *The Commonwealth,* the Privy Council examined the extent of the power conferred on the Commonwealth Parliament by s. 51(i), to legislate with respect to trade and commerce among the States. They said:

> [I]t 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. . . . But when it is sought to apply this to s. 92, difficulties at once arise. . . . [F]reedom in s. 92 must be somehow limited, and the only limitation which . . . can . . . be applied is freedom . . . at the State barrier. This construction . . . makes s. 51(i) consistent with s. 92, so far as concerns the Commonwealth, which in their Lordships' judgment . . . is bound by s. 92 equally with the States. . . . The argument . . . that s. 92 does not bind the Commonwealth is that s. 92 if it applied to the Commonwealth would nullify or practically nullify s. 51(i). . . . Their Lordships . . . reject that theory. . . . [T]hough trade and commerce mean the same thing in s. 92 as in s. 51(i), they do not cover the same area, because s. 92 is limited to a narrower context by the word "free".[89]

The Commonwealth Parliament accepted the limitation prescribed in *James' Case* upon their legislative power under s. 51(i). Subsequently, they enacted the Constitution Alteration (Marketing) Act 1936, in which they sought by Constitutional means to overcome the effect of the decision in that case. The Act envisaged the insertion into the Constitution, after s. 92, of the following section:

> 92A. The provisions of the last preceding section shall not apply to laws with respect to marketing made by or under the authority of the Parliament in the exercise of any powers vested in the Parliament by this Constitution.

The proposed law was submitted to the electors in the following year, but was not approved by the majorities of electors required by s. 128 of the Constitution.

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[88] *Ibid.*
[89] (1936) 55 C.L.R. 1 at 57-60.

All this says nothing, of course, as to the correctness of the decision in *James' Case* itself. But it must be weighed against the concern shown by Murphy, J. for the difficulties experienced by "State and Federal Parliaments . . . in fields of social and economic importance".[90]

Murphy, J. concludes his analysis by demonstrating the operation of the new powers which he proposes to confer upon the Commonwealth Parliament, in relation to those which he incidentally confers upon the Parliaments of the States. He says:

> The [Commonwealth] Parliament has ample power to regulate the national economy by appropriate exercise of its powers under s. 51(i). . . . If a State marketing law hinders interstate trade, then it is in the discretion of the Parliament of the Commonwealth to legislate so that (by the operation of s. 109) the offending provisions of State law become invalid.[91]

8. Conclusion

It is appropriate to recall the words of Latham, C.J. in *Gratwick* v. *Johnson*:

> The maxim *salus populi suprema lex* . . . is a wise political observation — not a legal criterion of constitutional validity.[92]

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[90] (1976) 50 A.L.J.R. 648 at 658-59.
[91] *Id.* at 658.
[92] (1945) 70 C.L.R. 1 at 11.