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BARTON J. I am clearly of opinion that within the meaning of the *Public Service Act* 1883 the petitioner was appointed to the service after the passing of Act No. 710, and that is a fatal bar to his claim. I would add that it seems to me that the reasons given by the Supreme Court Judges are conclusive, and need no further indorsement on our part.

While it is not for this Court to make recommendations to the Crown, still it is open to me to say that this is a case of evident hardship.

I agree that the appeal will have to be dismissed.

ISAACS J. I agree with what has been said both as to the hardship and as to the law.

Appeal dismissed with costs.

Solicitors, for the appellant, *Snowball & Kaufmann.*

Solicitor, for the respondent, *Guinness*, Crown Solicitor for Victoria.

B. L.

Cons *Miller v TCN Channel Nine* (1986) 67 ALR 321

Cons *Loubie, Re* (1985) 62 ALR 139

Cons *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1

Foll *Theophanous v Herald & Weekly Times Ltd* (1994) 124 ALR 1

Foll *Theophanous v Herald & Weekly Times Ltd* (1994) 34 ALD 1

[HIGH COURT OF AUSTRALIA.]

THE KING AGAINST SMITHERS.

EX PARTE BENSON.

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SYDNEY, *April* 22, 23, 24.

Griffith C.J., Barton and Isaacs JJ.

Dec. 16, 17, 20.

Griffith C.J., Barton, Isaacs and Higgins JJ.

Constitutional law—Power of State to exclude undesirable persons—Freedom of "intercourse"—Police power—Limits of power—Discrimination between residents of different States—The Constitution (63 & 64 *Vict. c.* 12), *secs.* 92, 107, 117—*Influx of Criminals Prevention Act* 1903 (*N.S. W.*) (*No.* 6 *of* 1903), *sec.* 3.

The *Influx of Criminals Prevention Act* 1903 (N.S.W.), by sec. 3, provides that "If any person (other than a person who has been resident in New South Wales at or prior to the commencement of this Act), has before or after such commencement, been convicted in any other State . . . of an offence for which in such State he was liable to suffer death, or to be imprisoned for one year or longer; and if before the lapse of three years after the termination of any imprisonment suffered by him in respect of any

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such offence, such person comes into New South Wales, he shall be guilty of an offence against this Act."

An inhabitant of Victoria who had been convicted there of being a person having insufficient lawful means of support, which offence may, by the law of Victoria, be punished by imprisonment for twelve months, having within three years after the termination of the imprisonment suffered by him in respect of such offence come into New South Wales, was convicted there of an offence against the section above quoted.

Held, that the last mentioned conviction was bad; by *Griffith* C.J. and *Barton* J., on the ground that the power of the Parliament of a State to make laws for the exclusion of persons whom it thinks undesirable immigrants, is limited to the making of laws for the promotion of public order, safety or morals, and that the exclusion of a person convicted of such an offence as that of which the accused was convicted in Victoria was not within the power as so limited; by *Isaacs* J. and *Higgins* J., on the ground that the section of the New South Wales Act was an interference with freedom of "intercourse" between the States within the meaning of sec. 92 of the Constitution, and was therefore invalid.

ORDER *nisi* for certiorari.

John Benson, a British subject who was born in the State of Victoria, where he had resided practically all his life, was on 28th December 1910 convicted at St. Arnaud in Victoria of the offence of having insufficient lawful means of support, and was sentenced to imprisonment for twelve months. He was released from imprisonment on 11th November 1911. On or about 30th November 1911 he went to Sydney in New South Wales, with the intention of obtaining, if possible, employment in New South Wales, but intending, if unsuccessful in obtaining such employment, to return to Victoria. On 25th January 1912, at the Central Police Court, Sydney, before George Henry Smithers, Esq., S.M., he was convicted, under sec. 3 of the *Influx of Criminals Prevention Act* 1903, for that he, being a person other than a person who had been a resident of New South Wales at or prior to the commencement of that Act, was after such commencement convicted in another State of an offence for which he was liable to be imprisoned for one year or longer, and for which he was sentenced to twelve months' imprisonment, and before the lapse of three years after the termination of the imprisonment suffered by him in respect of such offence came

into New South Wales. He was ordered to be imprisoned for twelve months.

An order *nisi* for a writ of certiorari to remove into the High Court the record of the last mentioned conviction was obtained on behalf of Benson on the grounds:—

1. That the *Influx of Criminals Prevention Act* 1903 is *ultra vires* the Parliament of New South Wales, inasmuch as it is in contravention of the provisions of the *Commonwealth of Australia Constitution Act.*

2. That in view of the provisions of the said *Commonwealth of Australia Constitution Act* the aforesaid record of conviction discloses no offence.

Bavin, for the applicant, moved the order absolute. The *Influx of Criminals Prevention Act* 1903 must be read as a prohibition against persons of certain classes coming into New South Wales. An interference with the free entrance to, or exit from, a State is an interference with trade, commerce and intercourse between the States: *Prentice and Egan on the Commerce Clause of the Federal Constitution*, p. 217; *Willoughby on the Constitution of the United States*, vol. II., p. 632; *Lottery Case* (1); *Bowman* v. *Chicago and North-Western Railway Co.* (2); and is directly forbidden by sec. 92 of the Constitution. That prohibition is absolute, and there is no implied exception to it. Wherever a State passes a law which interferes with the passage of goods or persons from one State to the other, that law can only be justified by showing that the goods or persons are not really actors in inter-State trade or commerce. Even if there is an implied exception to sec. 92, it must be based on the ground of the necessities of the health and welfare of the States, that is, on the police power: *Harrison Moore's Commonwealth of Australia*, 2nd ed., p. 337; *Barbier* v. *Connolly* (3); *Fox* v. *Robbins* (4); *Willoughby on the Constitution of the United States*, vol. II., pp. 658, 661. An exercise of the police power if it incidentally affects inter-State trade and commerce is not necessarily bad, although it is if it purports to directly affect inter-State trade and

(1) 188 U.S., 321.
(2) 125 U.S., 465, at p. 483.
(3) 113 U.S., 27.
(4) 8 C.L.R., 115.

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commerce: *Railroad Co.* v. *Husen* (1). This Court must decide in each case whether an exercise of the police power by a State is reasonably necessary for the purpose to which it is directed: *Houston and Texas Central Railroad Co.* v. *Mayes* (2); *Smith* v. *Turner* (3); *Henderson* v. *Mayor of New York* (4). Sec. 3 of the New South Wales Act goes far beyond the necessities of self-preservation. The New South Wales Act is also bad because it imposes a discrimination on the ground of residence, and is therefore in conflict with sec. 117 of the Constitution: *Davies and Jones* v. *State of Western Australia* (5).

[ISAACS J. The discrimination here is based on past residence. Is that within sec. 117?]

Yes. The section covers any kind of discrimination based on residence, *e.g.*, an income tax with a discrimination as to residence during the preceding year. Under the *Rules of the High Court* 1911, Part I., Order XLVII., r. 11, the conviction should be quashed.

Armstrong, for the respondent, showed cause. This is not a case in which the Court should grant a writ of certiorari. The case is not within sec. 40 (1) of the *Judiciary Act* 1903-1910. This is not an appeal within the meaning of that Act. The Court below was not acting as a Federal Court. The original proceeding did not arise under the Constitution, or involve its interpretation: See *Miller* v. *Haweis* (6).

[ISAACS J. referred to *Norton* v. *Shelby County* (7)].

This Court can only grant prohibition to a State Court where it is going beyond its jurisdiction on a federal question. It is only discrimination on the sole ground of residence which sec. 117 of the Constitution prohibits: *Davies and Jones* v. *State of Western Australia* (8). For the same reasons it is restrictions on intercourse only which are prohibited by sec. 92 of the Constitution. A person seeking employment in New South Wales with the intention of making his residence there is a resident of New South Wales as soon as he crosses the border, and, there-

(1) 95 U.S., 465, at p. 472.
(2) 201 U.S., 321.
(3) 7 How., 283.
(4) 92 U.S., 259.
(5) 2 C.L.R., 29, at p. 39.
(6) 5 C.L.R., 89.
(7) 118 U.S., 425.
(8) 2 C.L.R., 29.

fore, the applicant was not a resident of Victoria for the purpose of sec. 117: See *Lee Fay* v. *Vincent* (1). The question to be determined under sec. 117 is: Does the State Act seek to punish a man because he is a resident in another State? Here, the State is seeking to prevent the influx of criminals. If a criminal got into the Commonwealth from outside, the Parliament of the Commonwealth would not have power to legislate as to his movements from one State to another. That power must reside somewhere, and it can only reside in the parliaments of the States. In sec. 92 of the Constitution, the words "trade, commerce, and intercourse" must be interpreted as *ejusdem generis*.

[GRIFFITH C.J. The Part of the Constitution in which sec. 92 occurs is headed "Finance and Trade." Has the influx of criminals anything to do with finance and trade?

ISAACS J. That seems to be why the word "intercourse" was introduced.

GRIFFITH C.J. Must not "intercourse" mean intercourse for the purpose of trade and commerce?

ISAACS J. If it had that meaning it would be included in the words "trade and commerce."]

The fact that part of the transaction in which a man is engaged when he passes from one State to another is "intercourse" within the meaning of sec. 92, will not prevent him from being liable to punishment. What makes him punishable is coming into New South Wales having been punished in another State. The evil which sec. 92 was intended to remedy is pointed at by the introductory words, "On the imposition of uniform duties of Customs." The same result was intended to be brought about by sec. 92 as exists in the United States by reason of the decisions on the commerce clause of the United States Constitution. See *D'Emden* v. *Pedder* (2); *Harrison Moore's Commonwealth of Australia*, 2nd ed., pp. 340, 343, 379. The mere fact that an Act of a State may incidentally interfere with free intercourse between States does not necessarily make the Act invalid. The Court has to see what is the real nature of the Act: *Attorney-General for Manitoba* v. *Manitoba Licence Holders' Association*

(1) 7 C.L.R., 389.

(2) 1 C.L.R., 91, at p. 105.

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(1); *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (2). If the Court can see that the Act cannot possibly be for the self-protection of the State, it may say that the Act is bad. If the Court considers that the Act can possibly come within the limits of the self-protection of the State, it will not consider whether the Act is wise or not. [He referred to *Grand Trunk Railway Co. of Canada* v. *Attorney-General of Canada* (3); *German Alliance Insurance Co.* v. *Hale* (4); *Harrison Moore's Commonwealth of Australia*, 2nd ed., p. 564; *Russell* v. *The Queen* (5); *Inglis Clark's Australian Constitutional Law*, 2nd ed., p. 128.]

Bavin, in reply. Where it is alleged that a conviction under a State Act is bad because the State Act is invalid on the ground that it conflicts with a provision of the Constitution, certiorari is the proper remedy: *Osborn* v. *United States Bank* (6). [He also referred to *Prentice and Egan on the Commerce Clause of the Federal Constitution*, p. 58; *State* v. *Steamship Constitution* (7); *Chy Lung* v. *Freeman* (8); *Brimmer* v. *Rebman* (9)].

Cur. adv. vult.

THE COURT subsequently directed the case to be re-argued before a Full Bench.

Bavin, for the applicant.

Holman, A.-G. for New South Wales (with him *Armstrong* and *Perry*), for the respondent.

The following additional authorities were referred to by counsel:—*Lake Shore and Michigan Southern Railway Co.* v. *Ohio* (10); *Owners of s.s. Kalibia* v. *Wilson* (11); *Paul* v.

(1) (1902) A.C., 73.
(2) (1896) A.C., 348.
(3) (1907) A.C., 65.
(4) 219 U.S., 307.
(5) 7 App. Cas., 829, at p. 838.
(6) 9 Wheat., 738, at p. 824.
(7) 42 Cal. St. R., 578.
(8) 92 U.S., 275, at p. 280.
(9) 138 U.S., 78, at p. 83.
(10) 173 U.S., 285.
(11) 11 C.L.R., 689.

Virginia (1); *Asbell* v. *Kansas* (2); *Davenport* v. *The Queen* (3); *Hodge* v. *The Queen* (4); *Schollenberger* v. *Pennsylvania* (5).

[BARTON J. referred to *Corfield* v. *Coryell* (6), cited in the *Slaughter-House Cases* (7).

ISAACS J. referred to *Compagnie Française de Navigation à Vapeur* v. *Louisiana State Board of Health* (8); *Rasmussen* v. *Idaho* (9); *Blake* v. *McClung* (10); *Cole* v. *Cunningham* (11); *City of Montreal* v. *Montreal Street Railway* (12); *Reid* v. *Colorado* (13).

HIGGINS J. referred to *Crandall* v. *State of Nevada* (14); adopted in the *Slaughter-House Cases* (15).]

Cur. adv. vult.

The following judgments were read :—

Dec. 20.

GRIFFITH C.J. The applicant in this case attacks the validity of sec. 3 of the *Influx of Criminals Prevention Act* 1903 (N.S.W.), which provides that :—

"If any person (other than a person who has been resident in New South Wales at or prior to the commencement of this Act), has before or after such commencement, been convicted in any other State—

(a) of an offence against the *Immigration Restriction Act* 1901 of the Commonwealth, by reason of his being a prohibited immigrant within the definition in section three, subsection (*e*) or (*f*) of that Act, and being found within the Commonwealth in contravention or evasion of subsection (*e*) or (*f*) of that Act; or

(b) of an offence for which in such State he was liable to suffer death, or to be imprisoned for one year or longer;

and if before the lapse of three years after the termination of any imprisonment suffered by him in respect of any such offence,

(1) 8 Wall., 168.
(2) 209 U.S., 251.
(3) 3 App. Cas., 115, at p. 128.
(4) 9 App. Cas., 117.
(5) 171 U.S., 1, at p. 12.
(6) 4 Washington's Circuit Court, 371.
(7) 16 Wall., 36, at p. 75.
(8) 186 U.S., 380, at p. 391.
(9) 181 U.S., 198.
(10) 172 U.S., 239.
(11) 133 U.S., 107, at p. 137.
(12) (1912) A.C., 333, at p. 343.
(13) 187 U.S., 137, at p. 150.
(14) 6 Wall, 35, at p. 44.
(15) 16 Wall, 36, at p. 79.

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such person comes into New South Wales, he shall be guilty of an offence against this Act."

He contends that any law providing for the exclusion of any person seeking to enter a State from another State is contrary to the provisions of sec. 92 of the Constitution, which enacts 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."

To this contention several answers were set up: (1) That the provisions of sec. 92, which is found in Chapter IV. of the Constitution relating to Finance and Trade, are enacted altogether *alio intuitu*; so that the enactment relied on is not relevant to the question; (2) That, if it is relevant, the term "free" as applied to intercourse cannot properly be applied to non-restriction of the movements of the criminal population; (3) That if the widest meaning should be given to the word "intercourse" standing alone, its operation is cut down by the provisions of sec. 107, which provides that:—

"Every power of the Parliament of a Colony which has become or becomes a State, shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth, or at the admission or establishment of the State, as the case may be." It is urged that this section continues to the States the general power of regulation of internal affairs which in the United States of America is commonly called the "police power," and which was described in the case of *Railroad Co.* v. *Husen* (1) as "a right founded in the sacred law of self-defence," and that if there is any apparent conflict between sec. 92 and sec. 107, the former must be read in such a sense as will reconcile the conflict. This, it is urged, can be done in accordance with the doctrines laid down in *Russell* v. *The Queen* (2), in which Sir *Montague Smith*, delivering the opinion of the Judicial Committee, pointed out that regard must be had to the real subject matter with which Parliament is dealing. In that case the law under consideration was the *Canada Temperance Act* 1878, which, wherever it was put in force, would have pro-

(1) 95 U.S., 465, at p. 471. (2) 7 App. Cas., 829.

hibited the sale of intoxicating liquors except under certain conditions, and the question was whether that Act was an invasion of the field of "property and civil rights" which was assigned exclusively to the provinces. He said (1):—"What Parliament is dealing with in legislation of this kind is not a matter in relation to property and its rights, but one relating to public order and safety. That is the primary matter dealt with, and though incidentally the free use of things in which men may have property is interfered with, that incidental interference does not alter the character of the law. Upon the same considerations, the Act in question cannot be regarded as legislation in relation to civil rights. In however large a sense these words are used, it could not have been intended to prevent the Parliament of Canada from declaring and enacting certain uses of property, and certain acts in relation to property, to be criminal and wrongful. Laws which make it a criminal offence for a man wilfully to set fire to his own house on the ground that such an act endangers the public safety, or to overwork his horse on the ground of cruelty to the animal, though affecting in some sense property and the right of a man to do as he pleases with his own, cannot properly be regarded as legislation in relation to property or to civil rights. Nor could a law which prohibited or restricted the sale or exposure of cattle having a contagious disease be so regarded. Laws of this nature designed for the promotion of public order, safety, or morals, and which subject those who contravene them to criminal procedure and punishment, belong to the subject of public wrongs rather than to that of civil rights." So, it is contended, in this case the Act in question belongs to the subject of the preservation of public safety, and not to that of restricting intercourse between the States.

All these questions are worthy of serious consideration, but in the view which I take of the present case, it is not necessary to express any decided opinion upon them.

The applicant also relies on sec. 117 of the Constitution, which provides that:—

"A subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination

(1) 7 App. Cas., 829, at p. 838.

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which would not be equally applicable to him if he were a subject of the Queen resident in such other State."

To this contention it is replied (1) that for the purpose of the section the residence which is made a ground of disability or discrimination must be contemporaneous with the attempt to enforce the disability or make the discrimination, and (2) that an exemption from a penalty for an act on the ground of a previous residence is not within the section. There is much weight in both arguments, but again, I do not find it necessary to decide the question.

There is, however, another point which is sufficient to dispose of the case.

The so-called "police power" of the Colonies before the establishment of the Commonwealth extended to the exclusion of any person whom the Colonial Parliament might think an undesirable immigrant. It is clear that the continuance of such a power in its full extent after the federation is inconsistent with the elementary notion of a Commonwealth. On that point I adopt the language of *Miller* J. in the case of *Crandall* v. *State of Nevada* (1). After referring to the right of federal officers to free access to, and transit through, the States for federal purposes he proceeded :—"But if the government has these rights on her own account, the citizen also has correlative rights. He has the right to come to the seat of government to assert any claim he may have upon that government, or to transact any business he may have with it; to seek its protection, to share its offices, to engage in administering its functions. He has a right to free access to its seaports, through which all the operations of foreign trade and commerce are conducted, to the sub-treasuries, the land offices, the revenue offices, and the Courts of justice in the several States, and this right is in its nature independent of the will of any State over whose soil he must pass in the exercise of it." This passage was referred to with approval by the majority of the Court in the *Slaughter-House Cases* (2). The right of the States to exclude convicts, paupers, idiots, and lunatics has, however, been assumed : *Railroad Co.* v. *Husen* (3).

(1) 6 Wall., 35, at p. 44. (2) 16 Wall., 36, at p. 79.
(3) 95 U.S., 465, at p. 471.

In my opinion, therefore, the former power of the States to exclude any persons whom they might think undesirable inhabitants is cut down to some extent by the mere fact of federation, entirely irrespective of the provisions of secs. 92 and 117.

The extent to which it is cut down, and the line of demarcation which should be held to separate a justifiable from an unjustifiable exclusion, may be hard to determine, and yet it may be possible to say on which side of it a particular case lies. The basis of the discrimination, so far as it does not depend upon positive enactment, must be the necessity of the continuance of the power, to use the words of Sir *Montague Smith* (1), to make laws "designed for the promotion of public order, safety, or morals."

In the present case, the offence committed in Victoria by reason of which the applicant was convicted on his coming into New South Wales was "being a person having insufficient lawful means of support," which offence may by the law of Victoria be punished by twelve months' imprisonment. I do not think that the exclusion of an inhabitant of another State for such a reason can be justified on any such ground of necessity as I have referred to.

I think that on this application the Court is entitled to go behind the formal words of the Statute attacked, and inquire as to the real reason of the interference with the applicant's freedom of migration from one State to another.

BARTON J. I am of the same opinion. The reasoning of the Supreme Court of the United States in the case of *Crandall* v. *State of Nevada* (2), as expressed by *Miller* J., portion of which, quoted by my learned brother, has been expressly adopted by the same Court in a later decision, is as cogent in relation to the Constitution of this Commonwealth, as it was when applied to the Constitution of the United States. The whole of that memorable judgment is instructive upon the rights of the citizens of a federation. The reasoning shows that the creation of a federal union with one government and one legislature in respect of national affairs assures to every free citizen the

(1) 7 App. Cas., 829, at p. 839. (2) 6 Wall., 35.

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right of access to the institutions, and of due participation in the activities of the nation. In my opinion the reasons for the decision are conclusive as to all parts of Australia. A great deal of that which it is usual to call the "police power," the "right of self-defence" in respect of such matters as internal order, or the safety, health and morals of the people of the State, is probably affected by this new right. It is not for us to-day to determine the extent to which that may be the case, and, indeed, it can only be determined in concrete cases as they arise. It is probable that the right of the citizen, so far as it may be described by the word "intercourse," is not carried much further by sec. 92 of the Australian Constitution than the fact of union necessarily carried it, though the express prohibition of that section against restriction no doubt makes the Australian Charter much stronger than the American in respect of trade and commerce. I must by no means be thought to say, and it is quite unnecessary to decide, either that the fact of federation or that the language of sec. 92 destroys the right of individual States to take any precautionary measure in respect of the intrusion from outside the State of persons who are or may be dangerous to its domestic order, its health, or its morals. But whatever may be the residue of power left to the State in this regard, it is clearly limited by the existence of some necessity for the defensive precaution. And this, I think, is where the answer to the application fails. Sec. 3 of the State Act of 1903, now in question, brings within its interdict any person who, subject to the exception with which the section begins, has been convicted in any other State, "(b) of an offence for which in such State he was liable . . . . to be imprisoned for one year or longer." This provision, if valid, authorizes the punishment of such a person, though the offence of which he has been convicted outside the State has been of trivial import; though it has deserved and received a punishment of only a few hours or days, and though for nearly three years he has as a free man led a blameless life, so long as, under some arbitrary classification, the offence is one for which in an extreme case an imprisonment for one year might have been allotted.

In this instance the applicant was convicted in Victoria of being

a person "having insufficient lawful means of support," and as, in Victoria, that offence may be punished by imprisonment for one year, he came within the terms of the Act of 1903 so soon as he set foot in New South Wales. If his offence had deserved and received an inconsiderable sentence, still the mere liability to imprisonment for one year would have brought him within the ban.

I repeat that I am far from deciding that the police power of the States in the case of undesirables has become non-existent. But I do think that the face of the State Act and the reasons by which its validity is supported do not indicate such a necessity as might entitle it to be held a valid exercise of the power.

I agree, therefore, that the writ must go.

ISAACS J. The lawfulness of the conviction depends upon the validity of that provision in the New South Wales Statute No. 6 of 1903, which makes it an offence for any person (with certain exceptions) to come into New South Wales within three years after the termination of his imprisonment in another State for any offence punishable with imprisonment for a year or longer.

The legality of the whole Act is challenged as conflicting both with sec. 92 and sec. 117 of the Commonwealth Constitution.

As to sec. 92, which is the only section I find it necessary to deal with, the applicant contends that the words "intercourse" is unlimited, and refers to all transit of persons, and that the words "absolutely free" are so large as not to be susceptible of reduction by exceptions.

On the other hand, it is said for the respondent that sec. 92 must be read as subject to what is called the "police power" of the State, or in other words, the right of the State to safeguard the health, morals and safety of its inhabitants.

How are we to approach the Constitution to decide the question? Lord *Loreburn* L.C., speaking for the Privy Council in *Attorney-General for Ontario* v. *Attorney-General for Canada* (1), said:— "In the interpretation of a completely self-governing Constitution founded upon a written organic instrument, such as the British North America Act, if the text is explicit the text is conclusive,

(1) (1912) A.C., 571, at p. 583.

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alike in what it directs and what it forbids. When the text is ambiguous, as, for example, when the words establishing two mutually exclusive jurisdictions are wide enough to bring a particular power within either, recourse must be had to the context and scheme of the Act. Again, if the text says nothing expressly, then it is not to be presumed that the Constitution withholds the power altogether. On the contrary, it is to be taken for granted that the power is bestowed in some quarter unless it be extraneous to the Statute itself (as, for example, a power to make laws for some part of His Majesty's dominions outside of Canada) or otherwise is clearly repugnant to its sense. For whatever belongs to self-government in Canada belongs either to the Dominion or to the provinces, within the limits of the British North America Act."

Before commenting on that passage I again quote portion of the invaluable canon of constitutional construction enunciated by Lord *Selborne*, also for the Privy Council, in *The Queen* v. *Burah* (1). His Lordship there states the duty of Courts of justice in ascertaining whether a Statute violates a written constitution, in these terms :—" The only way in which they can properly do so, is by looking to the terms of the instrument by which, affirmatively, the legislative powers were created, and by which, negatively, they are restricted. If what has been done is legislation, within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited (in which category would, of course, be included any Act of the Imperial Parliament at variance with it), it is not for any Court of justice to inquire further, or to enlarge constructively those conditions and restrictions."

I apply both those authoritative utterances in the following manner :—This falls within the first case mentioned by Lord *Loreburn*, namely, the case where the text is explicit : " trade, commerce, and intercourse . . . shall be absolutely free." All that requires to be done is to ascertain the meaning of the words in that provision. The other two cases mentioned by that learned Lord are inapplicable to this case.

(1) 3 App. Cas., 889, at pp. 904-905.

Then, assuming the meaning of the terms in sec. 92 to be known, the matter comes within Lord *Selborne's* canon. The Act impeached is made under a sufficiently ample power contained in the State Constitution, so far as that instrument is unaffected by the Commonwealth Act, and it violates no express condition or restriction in the State Constitution. But it has to meet the limitation in the Imperial Act of the Federal Constitution contained in sec. 92. If the express words of that section (or any other section) properly construed cut down the original State power, it is by so much diminished, but I am unable consistently with the canon quoted to cut it down by any indefinite estimate I may make of the general character of the Constitution, apart from the true construction of some specific provision.

We then have to inquire what is meant by "intercourse" in sec. 92. We have not to consider, and I offer no opinion, whether or not that word in its fullest acceptation is included in the first subsection of sec. 51. It is found in sec. 92 expressly enacted, and according to all accepted rules of interpretation—particularly strong in the case of a self-governing constitution—the word must have some meaning additional to the other words in the same section. What is the extent of that additional meaning? Does it include the present case?

Its natural meaning is explicit and carries it as far as the applicant contends. To limit it to commercial intercourse would make the right of personal freedom to pass a State line depend on the fact of whether the individual was engaged in trade or commerce, and if that were to be given a restricted signification, the people of the Commonwealth would have to rest their right to cross a State line, not on their personality or their common citizenship, but on the sordid fact of some inter-State business transaction. In that case, however, "intercourse" would carry no signification and might as well be omitted. But, if once it be conceded that it does carry some additional meaning, where is the line to be drawn? Is it possible to draw any line? Once admit that the word includes a personal right in an Australian as such, and independent of any commercial attributes he may possess to pass over this continent irrespective of any State border as a reason in itself for interference, then I turn in

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vain to the Constitution, to find any limitation whatever in the word.

The learned Attorney-General of New South Wales spoke of the police power being still preserved in its entirety for the preservation of the health, morals and safety of the people, and he pointed to sec. 107. But the simple answer is that the powers of State Parliaments referred to in that section cannot be larger than they have under the State Constitutions; and by sec. 106 those Constitutions are confirmed but "subject to this Constitution," and, further, sec. 107 itself while confirming the powers of State Parliaments does so with two exceptions, one of which is as to powers "withdrawn from the Parliament of a State." So that applying the first case mentioned in Lord *Loreburn's* canon, "the text being explicit is conclusive." Whatever then is found to be the fair meaning of anything *elsewhere* enacted, is by virtue of the clear enactments of secs. 106 and 107 so much qualification of the State Constitution and State parliamentary powers. I can, consequently, not find in those sections any suggestion of a line of demarcation.

The learned Attorney-General referred to some American cases in which it was held in certain circumstances by the Supreme Court of the United States, that the States might validly enact laws that were in furtherance of the police power, and did not unreasonably interfere with the federal trade and commerce power, and he suggested this as a true line of division. But the American position is made quite plain by late decisions. I referred during the argument to some of them, and read extracts, as the *Compagnie Française &c.* v. *Board of Health* (1), and *Reid* v. *Colorado* (2), and I need not repeat those passages. But the effect is this: that it has long been a judicial doctrine of the Supreme Court that has passed into a definite canon of constitutional construction that the trade and commerce power, being national, is in its nature exclusive; and that consequently the silence of Congress is equivalent to a positive declaration of freedom. But the cases show that a qualification is grafted on to that doctrine of silent prohibition, namely, that the constructive prohibition does not go so far as to forbid the States from passing

(1) 186 U.S., 380, at p. 391. (2) 187 U.S., 137.

health and quarantine laws for example, and if they do merely that, they are not in conflict with the Constitution simply because there is some incidental interference with inter-State commerce. See also *Martin* v. *West* (1). But there is no doctrine that the federal power is subject to any reservation of the State police power—an error it is absolutely necessary to guard against. If that were so, Congress would have no right to legislate so as to prevent the exercise of the State power assumed to be "reserved." But the contrary is shown in both the cases I have referred to at the places cited. And in *Keller* v. *United States* (2) the Court makes some quotations from previous cases which are exactly in line with the canons of construction laid down by the Privy Council. One is:—"Generally it may be said in respect to laws of this character that, though resting upon the police power of the State, they must yield whenever Congress, in the exercise of the powers granted to it, legislates upon the precise subject matter, for that power, like all the other reserved powers of the States, is subordinate to those in terms conferred by the Constitution upon the nation." Another is:—"Definitions of the police power must, however, be taken subject to the condition that the State cannot, in its exercise, for any purpose whatever, encroach upon the powers of the general government, or rights granted or secured by the supreme law of the land."

There is no trace of any such doctrine as that contended for by the learned Attorney-General, that whatever is granted to the Commonwealth the police power of the States is reserved out of the grant. First, I construe the express grant or prohibition and construe it by every line on the document. But there is nothing in sec. 107 to cut down anything found elsewhere: it assumes a true interpretation of this Constitution elsewhere ascertained, and then confirms *other* Constitutions subject to the true meaning of *this*, and confirms *other* parliamentary powers subject to the grants and restrictions of *this*. I, therefore, am unable to assent to the view so earnestly and clearly presented by the Attorney-General.

A minor contention for the respondent should be noticed. It was urged that the true meaning of an Act may be ascertained

(1) 222 U.S., 191, at p. 198. (2) 213 U.S., 138, at p. 146.

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by considering its purpose or object or intention, by reference to the supposed motives or aim of its framers. The Canadian cases decided by the Privy Council and cited by the learned Attorney-General have, in my opinion, little relevance. The question there was, within which of two mutually exclusive classes of powers, possibly covering the same ground, an Act made properly fell. That is Lord *Loreburn's* second case. I know of only one lawful method of ascertaining the intention and purpose of an Act, and that is by ascertaining the meaning and effect of the words actually used. The meaning of the words may depend upon the subject matter and the circumstances with reference to which they are used, and the words in one part may modify those in another, but once that meaning is ascertained the effect of the language cannot be modified by any conjectural motive or purpose behind them and independent of them. As Lord *Loreburn* said in *Attorney-General for Ontario* v. *Attorney-General for Canada* (1):—"A Court of law has nothing to do with a Canadian Act of Parliament, lawfully passed, except to give it effect according to its tenor." And he adds that considerations of public policy can never be applied to an Act of Parliament. So, in *Reid* v. *Colorado* (2), it is said:—"The purpose of a Statute, in whatever language it may be framed, must be determined by its natural and reasonable effect." And in *Berryman* v. *Whitman College* (3), *White* C.J. says:—"We must be controlled by the power which the Act manifests, not by a consideration of the mere motive which initially energized the bringing of the power into play." So construing the New South Wales Act it purports to make it an offence for any person (not specially excepted) to enter New South Wales even for inter-State trade and commerce, if he answers the given description. He may have entered upon a wholly reputable and honourable life; he may be regarded in his State as a useful and not dangerous citizen; he may be desirous of passing, say, from Brisbane to Adelaide for the transaction of ordinary honest business; and yet, by the terms of this Act, he is liable to imprisonment, not only if he wishes to do business in New South Wales,

(1) (1912) A.C., 571, at p. 583. (2) 187 U.S., 137, at p. 150.
(3) 222 U.S., 334, at p. 350.

but even if he merely passes through upon a railway, or comes to Sydney to take ship to his destination, or after his imprisonment, say, in Victoria, he may wish to rejoin his family in New South Wales, where he is permanently resident, or to exercise his vote in a federal electorate, or attend a sitting of this Court, or desire access to any federal office. Is he to be prohibited in the face of sec. 92, which stands as a definite and absolute guarantee of freedom of "intercourse," whatever that means? I do not think so. If he can be prevented for the sake of preserving the morals of the people, then I am unable to see any limitation upon the power of the State to exclude whatever persons or property they choose to declare prejudicial to their people. *Mala fides* cannot be imputed to the King and his Parliament, and no Court can imagine it. If this Court can, every Court can, for all alike are bound to administer the law. And if there be no limitation, it must be all or none. In my opinion, the guarantee of inter-State freedom of transit and access for persons and property under sec. 92 is absolute—that is, it is an absolute prohibition on the Commonwealth and States alike to regard State borders as in themselves possible barriers to intercourse between Australians.

The order, therefore, should be made absolute.

HIGGINS J. In my opinion, sec. 92 of the Constitution affords sufficient ground for the release of the prisoner; and it is unnecessary to consider the precise effect of sec. 117.

Sec. 92 provides:—"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." This section is found under Chapter IV., headed "Finance and Trade"; and, therefore, at first sight, it would seem to relate to finance and trade only. But this is only the first appearance; and if the words clearly show that the section covers more than finance and trade, effect must be given to it accordingly. To my mind, it is impossible to give any adequate meaning to the word "intercourse" added to "trade" and "commerce" unless we resort to the meaning based on its origin (*intercurrere*), the meaning which is not limited to inter-

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course of trade, the general meaning which is in modern use more common.

It is curious that the section seems to overlook the possibility that a man may walk across the border into another State, as well as be carried "by internal carriage or ocean navigation;" but these words must be merely meant to exhaust all kinds of carriage, if there be carriage. If not, they qualify the words "trade" and "commerce" as well; and a State might, then, impose a duty on, or obstruct the passage of, cattle driven over the border: a result which would be absurd. No due effect can be given to the word "intercourse" unless it be treated as including all migration or movement of persons from one State to another—of children returning for their holidays, of friends visiting friends, as well as of commercial travellers returning to their warehouse.

I base my decision on the fact that the New South Wales Statute in this case (sec. 3) is pointed directly at the act of *coming* into New South Wales—makes the coming into New South Wales an offence on the part of the ex-criminal. The questions how far the Parliament of New South Wales may deal with ex-criminals when within the borders of the State, how far that Parliament may deal with ex-criminals of other States when dealing with ex-criminals of New South Wales, how far the "internal police" powers are preserved to that Parliament in the face of this section and of the Constitution as a whole, had better be left open for decision when the facts of a case render a decision on these points absolutely necessary.

The cases which have arisen under the United States Constitution tend rather to perplex than to assist us; for there are no such words in that Constitution as in the Australian. It is our duty meekly to ascertain the meaning and application of the words used in our own Constitution, as they stand, as the words of an instrument which is complete in itself, and which has to be construed, as a will is construed, by an examination of its own language within its own four corners. But the United States decisions are useful as showing that the power "to regulate commerce with foreign nations and among the several States" has been treated as involving a power to regulate the transport

of passengers and immigration; and that, apart from this power to regulate commerce, and without any such section as sec. 92, the Supreme Court treats restraint on the movement of persons from one State to another as being inconsistent with the whole scope and system of the Federal Constitution. According to the words of *Taney* C.J. (1), approved by the Supreme Court in *Crandall* v. *State of Nevada* (2):—"We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own States." This result of the Constitution is said to be implied in the American Constitution; it is expressed in sec. 92 of our Constitution, so far as regards State boundaries; but how far this result has to be qualified by the reserved powers of the States as to matters within their own borders, is a question which caution enjoins us to leave open for future examination.

Order absolute for certiorari. Conviction to be quashed on return without further order. Security to be returned.

Solicitor, for the applicant, *C. Powers*, Crown Solicitor for the Commonwealth.

Solicitor, for the respondent, *J. V. Tillett*, Crown Solicitor for New South Wales.

B. L.

(1) 7 How., 283, at p. 492.

(2) 6 Wall., 35, at p. 49.