REPORTS OF CASES

DETERMINED IN THE

HIGH COURT OF AUSTRALIA

1936.

[PRIVY COUNCIL.]

JAMES . . . . . APPELLANT;
PLAINTIFF,

AND

THE COMMONWEALTH . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE HIGH COURT.

PRIVY COUNCIL*
1936.
May 4, 5, 7, 8, 11, 12, 14, 18, 19; *July* 17.

Constitutional Law (Cth.)—Freedom of inter-State trade and commerce—Commonwealth legislation—Interference with freedom of inter-State trade—Commonwealth bound by sec. 92 of the Constitution—Dried Fruits Act 1928-1935 (*No.* 11 *of* 1928—*No.* 5 *of* 1935)—*The Constitution* (62 & 63 *Vict. c.* 12), *sec.* 92.

The Commonwealth is bound by sec. 92 of the Constitution.

The *Dried Fruits Act* 1928-1935 and the regulations made thereunder are *ultra vires* the Commonwealth Parliament as contravening sec. 92 of the Constitution.

Decision of the High Court: *James* v. *The Commonwealth*, (1935) 52 C.L.R. 570 (following *W. & A. McArthur Ltd.* v. *Queensland*, (1920) 28 C.L.R. 530) reversed.

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* Present—The Lord Chancellor (Viscount Hailsham), Lord Russell of Killowen, The Master of the Rolls (Lord Wright), Sir George Lowndes, Sir Sidney Rowlatt.

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APPEAL from the High Court to the Privy Council.

This was an appeal by special leave from the decision of the High Court of Australia in *James* v. *The Commonwealth* (1). Frederick Alexander James a fruit merchant carrying on business in South Australia commenced an action in the High Court against the Commonwealth of Australia. By his statement of claim the plaintiff alleged that, purporting to act in pursuance of the Commonwealth *Dried Fruits Act* 1928-1935 and the regulations and determinations made thereunder, the defendant Commonwealth (1) had caused to be seized the plaintiff's consignments of dried fruit in the course of delivery to purchasers in New South Wales and (2) had notified shipping companies and other carriers that, if they carried dried fruits tendered for carriage by any person not holding a licence under the Commonwealth *Dried Fruits Act* 1928-1935, they would incur penalties. The plaintiff further alleged that, by determinations made under the Act, the holder of an owner's licence was required to export from Australia a fixed percentage of each class of dried fruits produced by him. The plaintiff also alleged that the defendant Commonwealth was wrongfully insisting upon his taking out a licence as a condition of his being allowed to sell his dried fruits in other States of the Commonwealth, and was wrongfully preventing him from fulfilling his inter-State contracts. The statement of claim claimed a declaration that the *Dried Fruits Act* and the regulations made thereunder were *ultra vires* as contravening sec. 92 of the Constitution, together with an injunction, and damages.

The defendant Commonwealth demurred to the statement of claim and the demurrer came before the Full Court (*Rich*, *Starke*, *Dixon*, *Evatt* and *McTiernan* JJ.) for hearing. In support of the demurrer the Commonwealth relied upon the decisions in *W. & A. McArthur Ltd.* v. *Queensland* (2) and *James* v. *The Commonwealth* (3), as establishing that the Commonwealth was not bound by sec. 92 of the Constitution.

The High Court allowed the demurrer. In agreeing with the order proposed *Dixon* J. said (4) that while he recognized the strength of the considerations which led to the previous decision of the Court

(1) (1935) 52 C.L.R. 570.
(2) (1920) 28 C.L.R. 530
(3) (1928) 41 C.L.R. 442.
(4) (1935) 52 C.L.R., at p. 592.

in *W. & A. McArthur Ltd.* v. *Queensland* (1) to the effect that the Commonwealth was not bound by sec. 92, he had never felt satisfied that they sufficed to raise a necessary implication limiting the application of sec. 92 to the States. *Evatt* and *McTiernan* JJ. in a joint judgment (2), said that they were definitely of opinion that sec. 92 laid down a general rule of economic freedom and necessarily bound all authorities within the Commonwealth, including the Commonwealth itself. Their Honours added that although they were of opinion that the Commonwealth had no legal authority to maintain its prohibitions of the inter-State marketing of dried fruits, the ruling in *McArthur's Case* (1) to the contrary should be followed until the Privy Council finally dealt with the matter.

On 4th December 1935 the Privy Council gave special leave to the plaintiff to appeal. The State of New South Wales, Queensland and Victoria obtained leave to intervene in support of the contentions of the Commonwealth. The States of Tasmania and Western Australia obtained leave to intervene in support of the contentions of the appellant.

Wilfrid Barton and *Kevin Ward* (of the South Australian Bar), for the appellant.

Wilfrid Barton. This is an appeal from a decision upon demurrer of the High Court of Australia, and it involves the determination of two points. The first is whether sec. 92 of the Commonwealth Constitution, which enacts that after the imposition of uniform duties, trade, commerce and intercourse between the States shall be absolutely free, means what on the face of it it would appear to say, or means that trade, commerce and intercourse shall be free only so far as State legislation is concerned and not free at all so far as Commonwealth legislation is concerned. The second point is whether the system of limiting and restraining inter-State trade imposed by the dried fruits legislation of the Commonwealth of Australia is an infringement upon the freedom of trade guaranteed by sec. 92. The High Court unanimously determined the second point in favour of the present appellant, but following the opinions expressed in a case decided in 1920 viz. *McArthur's Case* (1), they allowed the demurrer not because they or a majority of them were of opinion

(1) (1920) 28 C.L.R. 530. (2) (1935) 52 C.L.R., at pp. 602-3.

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that sec. 92 did not bind the Commonwealth—the majority thought it did—but because they thought they should follow the opinions expressed in the earlier case. The Australian Constitution was discussed by the Privy Council in *Attorney-General for the Commonwealth of Australia* v. *Colonial Sugar Refining Co. Ltd.* (1). The material sections of the Constitution are secs. 51 (I.), (II.), (III.) and (XXXIX.), 52, 88, 90, 92, 107. Sec. 20 of the *South Australian Dried Fruits Act* 1924 was held to be *ultra vires* (*James* v. *South Australia* (2); *James* v. *Cowan* (3)). The Commonwealth then enacted the *Dried Fruits Act* 1928. Regulations were passed under that Act. The Act and regulations required the owner of dried fruit to obtain a licence to dispose of the fruit. The effect of that legislation was that no man may send any dried fruit from one State of Australia to another unless he exports, destroys or feeds to stock that percentage of his total crop which is named in the determination of the Dried Fruits Board. The balance, amounting to 10 per cent or 12½ per cent, is all that may be marketed inter-State; the object of the legislation being to keep up prices for the benefit of the growers. The whole object of the legislation is that the State Dried Fruits Boards, consisting of officials and representatives of the growers, should have and exercise the power to decide exactly what quantity of dried fruit should be marketed in Australia. Therefore you have the producing States effectively exercising the power of deciding what amount of dried fruits shall be marketed in Australia. One effect of the Act is that the person who desires to sell one case of fruit inter-State must limit his sales in the whole of Australia, and, therefore, the second and inevitable effect of this legislation is that the Commonwealth is preventing the native of, e.g., South Australia, quite apart from whether the State allows him to or not, from marketing nine-tenths of his output in his own State. The result on the individual grower—and in this case the appellant is the individual grower—is that he is limited to marketing 10 per cent of his goods if he desired to trade inter-State. The percentage applies if he sells one case inter-State. Then all the rest of his fruit beyond the permitted percentage is sterilized in his hands and must

(1) (1914) A.C. 237, at pp. 253, 254. (2) (1927) 40 C.L.R. 1.
(3) (1932) A.C. 542; 37 C.L.R. 386.

be fed to the pigs or destroyed; it must not be sold in Australia. Even if the *Dried Fruits Act* is valid the regulations thereunder prescribing a quota are invalid. Although up to 1920 members of the High Court had expressed from time to time the view that sec. 92 operated to restrict Commonwealth and State legislature power alike, upon a review of the interpretation of the section which in that year the Court undertook in *McArthur's Case* (1), the majority of the members of the Court adopted the view that Commonwealth legislative power was not affected by the provision of the section. Since that decision there has been no enthusiasm displayed by the members of the Court for the view that sec. 92 does not bind the Commonwealth. Until the present case, however, the question has not been presented to the Court for definitive judicial decision. In *James* v. *The Commonwealth* (2) the High Court followed the opinion expressed in *McArthur's Case* (1), but the decision of the question was not necessary to the determination of that case. In *R.* v. *Vizzard*; *Ex parte Hill* (3) the Commonwealth intervened with the object of securing an interpretation narrowing the freedom from State interference and argued that the Commonwealth must be held bound on the terms of the provision notwithstanding *McArthur's Case* (1).

It is not proposed to invite your Lordship to decide what under every circumstance the meaning of sec. 92 may be because it is apprehended that the decision should be confined to the concrete case before the Board. When you are construing a statute you must observe what was the mischief or object to be provided for. That is especially the case in construing a Federal statute which is its nature inevitably a compromise between the advantages of disunion and the disadvantages of disunion. All the Judges of the High Court have called attention to the historical importance of the attainment of freedom of inter-State trade. They have pointed out that it is really impossible to construe sec. 92 without taking into consideration the circumstances existing at the time of the federation which have variously been described as a state on inter-colonial trade war (*Cockburn, Australian Federation*, (1901), p. 40.

(1) (1920) 28 C.L.R. 530. (2) (1928) 41 C.L.R. 442.
(3) (1933) 50 C.L.R. 30.

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The existence of the bitterness brought about by tariffs had been forseen in 1842 by official despatches. The position as it developed was that you had in all of these colonies tariff wars which were not only barriers in the way of duty but prohibitions of import and export. Besides that there were other difficulties which centred on the border. One way to judge of the position is to regard the actual legislation passed by the Australian colonies and existing at or prior to the time of federation. There was intense competition for railway traffic which is reflected in the railways sections of the Australian Constitution. All the railways were State owned and these railways thought that the traffic within their State borders was their traffic and ought legitimately to come over their lands. As a result you find the *Queensland Railway and Traffic Act of* 1893. The border became a source of trouble again with regard to immigration and you get at a comparatively late date an Act for the restriction of Chinese immigration which was passed as a result of a meeting of all the Australian Governments. There was also a New South Wales statute which dealt with prohibited immigration. The last two statutes are quite independent of the question whether the person affected was a naturalized citizen of one of the other colonies or not. In *Duncan* v. *State of Queensland* (1) the historical importance of freedom of intercourse amongst the States was referred to. One of the points directly taken in the respondent's case in *James* v. *Cowan* (2), was that sec. 92 was confined to border duties. Every Judge of the High Court in the present case held that if sec. 92 applied to the Commonwealth then by virtue of *James* v. *Cowan* (2) the dried fruits legislation and regulations were *ultra vires* sec. 92. *W. & A. McArthur Ltd.* v. *Queensland* (3) is the judgment which is really under appeal. There all counsel argued that sec. 92 did bind the Commonwealth and they based their arguments entirely on the assumption that sec. 92 did bind the Commonwealth and no argument was in that case directed to the Court to show that the Commonwealth was exempt. The question whether the Commonwealth was bound by sec. 92 did not actually arise in *W. & A. McArthur Ltd.* v. *Queensland* (3).

(1) (1916) 22 C.L.R. 556, at p. 571. (2) (1932) A.C. 542; 47 C.L.R. 386.
(3) (1920) 28 C.L.R. 530.

Both the Commonwealth and all States can regulate abuses in inter-State trade and to hold that they cannot would be putting an interpretation upon "Freedom of Trade" which would be straining the words to a limit utterly impossible. Any general provision to restrict commodities would be invalid but that does not infringe the right of the State to enforce for the benefit of its subjects laws relating to public health even if the subject of that law happens to be incidental in the course of inter-State trade. It is necessary to consider whether the primary purpose of the statute is trade and commerce or such matters as defence against the enemy, prevention of famine, disease and the like, and it will be a question of deciding in each case whether the law relates to trade and commerce or to the prevention of famine, disease and the like (*James* v. *Cowan* (1)). The State is justified in prohibiting the import of infected cattle from another State, even if the cattle are actually travelling in the course of inter-State trade (*Ex parte Nelson* [*No.* 1] (2)). There it was held that the statute was not legislation to prevent or impair the freedom of trade but was legislation to protect the health of its own flocks and its own herds. A law which is directed at health, famine or defence is not directed to trade or commerce (*James* v. *Cowan* (1)). The High Court in *James* v. *Cowan* (1) did not distinguish between expropriation to control inter-State trade and absolute expropriation simpliciter. Sec. 92 is to be considered not in any way as dividing powers as between State and Commonwealth but, as it was described in more than one case in the High Court, as a charter to the citizen and an inviolable fact of the constitution. The Commonwealth was a union of people not of States. Sec. 92 is one of a group of sections which deal with the rights of citizens and these sections protect the political rights, the financial rights, and trade rights, the individual liberty and religion, and equal rights, wherever he may be, of the individual citizen. Secs. 7-24 of the Constitution deal with the election of members of Parliament. They enact that both Houses shall be composed of members directly chosen by the people. Sec. 74 is a guarantee of the independence of the judiciary. Sec. 80 provides for trial by jury. Sec. 88 for uniform customs. Sec. 92 for freedom

(1) (1932) A.C. 542; 47 C.L.R. 386. (2) (1928) 42 C.L.R. 209.

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of trade, commerce and intercourse. The word "intercourse" is very significant because in the ordinary acceptation of words the States do not have intercourse but individuals do, and it is the intercourse of individuals that is there protected. This has its corollary in sec. 117 as regards intercourse. The right to religious liberty is provided by sec. 116 and provision for the alteration of the statute is made by sec. 128. All these provisions are safeguards inserted in the Constitution for the protection of the citizen. They were inserted not in the form of limitations upon legislative power but were inserted in the form of absolute declarations of right. Wherever you get one of these general declarations the Constitution departs from the method of saying that the State or the Commonwealth may or may not do this and uses instead absolute words of the widest import. This form of words is used because these things are absolute in the Constitution and because it is the idea of this Federal Constitution that trade, commerce and intercourse between those people who become citizens of the new Commonwealth, not because of their citizenship of the State but independently and in their own right as people, should be protected. It is not a question of acquiring rights as by and through membership of a State but of acquiring rights directly from the Constitution. The whole Constitution has at its root the idea of citizenship extending over the whole area of the Commonwealth and of the freedom of a man's right to travel and to take his goods anywhere in the Commonwealth. Every power given to the Commonwealth is subject to the Constitution and is therefore subject to any legislative limitations contained in the Constitution. Secs. 51 and 52 are expressed to be subject to the Constitution. Sec. 52 confers exclusive powers and these powers are conferred subject to the Constitution. Therefore if you find a subsequent and absolute limitation the power is subject to the limitation and must be construed as subject and it is the absolute declaration of the Constitution that should prevail rather than the power given subject to the limitation of that declaration. Sec. 92 follows directly after the vesting in the Commonwealth of the exclusive powers as to customs and excise and Customs Acts have always been the vehicle for prohibition of entry. Therefore, if you find a prohibition of interference with the freedom of trade following

immediately on the grant of the trade and commerce power and immediately on the customs powers granted to the Commonwealth, as customs are the most ordinary and best known vehicles for interfering with the freedom of trade, the inference is that that is one of the things prohibited by sec. 92. Its own words are an interference with inter-State trade by way of imposition of customs duties. If so it must apply to the Commonwealth which alone has the power of imposing duties of customs. It is almost impossible to think of any interpretation of sec. 92 which would not necessarily include duties on customs. If sec. 92 did not apply to the Commonwealth the Commonwealth would have power to re-erect State customs barriers so long as they were uniform barriers. It was also upon the borders that the railways warfare centred and it was upon the borders that the provisions as to the restricting of entry turned. Sec. 92 means that trade and commerce are to be conducted as if the borders were not there.

The Act of Union provides for freedom of trade and intercourse between Scotland and England, but nobody ever suggested that all those laws with regard to health and the like which are commonplaces of our daily life are or have been any infringement of the Act of Union. The expression " freedom of trade " is very important. That connotes freedom from taxation. Sec. 92 is primarily addressed to the authority having power to impose the usual burdens. If it applies to the States only it is difficult to see why it was only applied on the imposition of uniform duties. The section applies only after the State dominion has ceased. It is only when the Commonwealth comes into power and when the external barrier is erected that you can possibly have freedom of trade, and it is legislation with reference to the erection of the external barrier by the Commonwealth. Sec. 92 imposes a limit both upon legislative and executive authority. Sec. 117, it is admitted, applies to the Commonwealth, and that section is phrased in exactly the same way as a positive enactment of right rather than as a limitation of legislative power. The scheme of the Act is as declared by sec. 52 that where the State or the Commonwealth is to be excluded the Act says so. See secs. 90, 99, 115. The word " intercourse," which refers in its primary meaning to the intercourse of individuals, is especially important, because freedom

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of intercourse and freedom to come and go are the merest and veriest instances of citizenship of the Commonwealth, and the provision from the protection of intercourse, general in its scope, is strong evidence that the Commonwealth was meant to be included in this prohibition. The words " ocean navigation " are also of importance. Prior to the Constitution no State had any power to make any law with regard to ocean navigation (*Macleod* v. *Attorney-General for New South Wales* (1)). Sec. 5 gave a limited power of legislation over ocean navigation, but was a power which no State had possessed. The reference in the section to ocean navigation can only refer to Commonwealth power and cannot refer to any State power. The proviso in the section is of very great importance. The proviso equalizes taxation. This is a special provision for a payment under the Commonwealth in respect of a border duty and it is a limitation on the generality of sec. 92. Obviously the collection of a border duty by the Commonwealth in any shape or form would be contrary to sec. 92 if and only if sec. 92 applied to and bound the Commonwealth, otherwise the Commonwealth would have the fullest power to impose an equalizing duty of this sort. The proviso is utterly unnecessary if the Commonwealth is not bound by sec. 92 because the Commonwealth if not bound by sec. 92 would have the fullest power of imposing import or border duties for the purpose of equalizing taxation. A similar inference is to be drawn from secs. 93 (I.), 95 and 112. There is no provision in sec. 51 (I.) against discrimination. Sec. 112 is important because it recognizes that the State inspection laws may be valid as to inter-State trade and commerce. The section recognizes inspection laws of a State and recognizes the inherent power of the State to legislate as to trade and commerce because its border inspection law is especially and intrinsically a law as to inter-State trade and commerce.

As to the arguments raised on behalf of the respondents, they are based entirely upon *McArthur's Case* (2). They may be summarized under two heads, first, that there is a line of thought running through the cluster of sections in which sec. 92 stands, which shows that the States are excluded and that the Commonwealth is given exclusive power with regard to inter-State trade and commerce;

(1) (1891) A.C. 455.

(2) (1920) 28 C.L.R. 530.

secondly, that sec. 92 excludes all power to legislate as to inter-State trade and commerce, and that therefore the Commonwealth, which is granted such a power in sec. 51 (I.) is not bound by sec. 92. The effect of the first of these contentions would be to make sec. 51 (I.) an exclusive power of the Commonwealth. The States are expressly prohibited from doing certain acts under secs. 114 and 115.

The suggestion that the whole subject of inter-State trade and commerce is vested in the Commonwealth is an express contradiction to sec. 107. The power to legislate in respect of trade and commerce among States is vested both in the Commonwealth and in the States. As to the second ground of the respondents that sec. 92 practically destroys the power given by sec. 51 (I.). The word "practically" implies that the power is not destroyed, there is consequently no total exclusion. Sec. 92 prevails over sec. 51 (I.) if there is inconsistency (*Kutner* v. *Phillips* (1); *Forbes* v. *Git* (2); *Furnivall* v. *Coombes* (3); *Williams* v. *Hathaway* (4)). The powers conferred upon the Commonwealth by sec. 51 (I.) are not co-extensive with those denied by sec. 92. The power of sec. 51 (I.) is much greater than the power denied by sec. 92, so there can be no ground for applying the theory of total exclusion. The fact that the Commonwealth has enacted legislation on the assumption that it is not bound by sec. 92 is not material in construing that section.

In *Fox* v. *Robbins* (5), a State Act discriminating against wine produced in another State was held to be bad. *R.* v. *Smithers*; *Ex parte Benson* (6) concerned the validity of the *Influx of Criminals Prevention Act* 1903 of New South Wales, which provided for the exclusion from the State of any person who had been convicted in any other State of an offence for which the punishment was death or imprisonment for a year or longer. In that case a conviction under that Act was held to be bad in the case of an inhabitant of Victoria who had been convicted there as a person having insufficient lawful means of support. In *New South Wales* v. *The Commonwealth* (7), there were two points: One was as to the validity of the *Inter-State Commission Act*; the other was as to the validity of the *Wheat*

(1) (1891) 2 Q.B. 267, at pp. 271, 272.
(2) (1922) 1 A.C. 256, at p. 259.
(3) (1843) 12 L.J. C.P. 265.
(4) (1877) 6 Ch. D. 544.
(5) (1909) 8 C.L.R. 115.
(6) (1912) 16 C.L.R. 99.
(7) (1915) 20 C.L.R. 54.

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Acquisition Act of New South Wales. That Act was a war-time Act and provided that the Governor might by notification declare that any wheat therein described or referred to was acquired by His Majesty and should become the absolute property of His Majesty and the rights of the former owner should be converted into a claim for compensation. The High Court held that the *Wheat Acquisition Act* did not violate the provisions in sec. 92: *Foggitt Jones & Co. Ltd.* v. *New South Wales* (1) dealt with the *Meat Supply for Imperial Uses Act* 1915 of New South Wales. This Act provided that all stock and meat in New South Wales should be kept for the disposal of His Majesty's Imperial Government in aid of the supplies for His Majesty's armies in the present war. The High Court held that so far as the Act purported to authorize the Government of New South Wales to prevent the export of stock by the owners thereof from that State to another State it was an interference with inter-State trade and commerce and was invalid as infringing sec. 92. *Duncan* v. *Queensland* (2) related to the *Meat Supply for Imperial Uses Act* 1914 of Queensland. In effect this case overruled *Foggitt Jones & Co. Ltd.* v. *New South Wales* (1). *Foggitt Jones & Co. Ltd.* v. *New South Wales* (1) was restored later by *W. & A. McArthur Ltd.* v. *Queensland* (3). In *Duncan* v. *Queensland* (4) the Commonwealth for the first time contended that the Commonwealth was not bound by sec. 92. The interpretations of sec. 92 which are given in the course of these cases are all important in this case because unless there is a total exclusion between sec. 51 and sec. 92 you must apply the principle of construction which reconciles the opposition and gives effect to both sections; that is the guiding principle of construction in this case. These decisions show that there is a large scope for State legislation. They are to that extent not only material but very valuable because they do destroy the whole root of the exclusion. The next case is *James* v. *The Commonwealth* (5). This case concerns the present Commonwealth legislation. Mr. James sought a declaration on the grounds that this legislation was invalid. In the High Court as soon as the

(1) (1916) 21 C.L.R. 357.
(2) (1916) 22 C.L.R. 556.
(3) (1920) 28 C.L.R. 530.
(4) (1916) 22 C.L.R., at pp. 562, 563, 564.
(5) (1928) 41 C.L.R. 442.

invalidity of the legislation under sec. 92 was mentioned the Chief Justice who was sitting with the Court of three other Judges at once intimated that they could hear no argument upon it, and the Court refused to hear any argument as to whether sec. 92 bound the Commonwealth (1). The Judges, under those circumstances, merely recognized previous judgments, and they do transform *W. & A. McArthur Ltd.* v. *Queensland* (2) into a definite decision. The Court held that all the regulations were invalid and the plaintiffs succeeded on that ground, i.e., that the regulations were bad though the legislation was good. *The Commonwealth and Commonwealth Oil Refineries Ltd.* v. *South Australia* (3) is also in point. *Roughley* v. *New South Wales* ; *Ex parte Beavis* (4), related to the *Farm Produce Agents Act* 1926 of New South Wales, which provided for the regulation of agents and provided that they could only receive such remuneration and fees as were from time to time prescribed. *Roughley's Case* (4) dealt with agents who were only concerned in inter-State trade, and *Beavis's Case* (4) dealt with those who had a mixed business dealing with both. The *Farm Produce Agents Act* was held to be valid and not obnoxious to sec. 92. This case makes such an inroad into that exclusive provision and into the definition of freedom which form the basis of the majority of the judgments in *W. & A. McArthur Ltd.* v. *Queensland* (2) that it is inconsistent with that case. *Ex parte Nelson* [*No.* 1] (5) turned on the quarantine provisions of the *Stock Act* of New South Wales. It was held that the *Stock Act* did not violate provisions of sec. 92.

An application for a certificate to appeal to the Privy Council from the decision in *Ex parte Nelson* [*No.* 1] (5) was refused in *Ex parte Nelson* [*No.* 2] (6). *Peanut Board* v. *Rockhampton Harbour Board* (7) was decided after *James* v. *Cowan* (8), and the latter case was largely relied upon in arriving at the decision. *Huddart Parker Ltd.* v. *The Commonwealth* (9) is also in point. *The Peanut Board Case* (7) decided that sec. 9 of the *Primary Producers' Organization and Marketing Act* 1926-1930 of Queensland, which enabled the Board

(1) (1928) 41 C.L.R., at p. 458.
(2) (1920) 28 C.L.R. 530.
(3) (1926) 38 C.L.R. 408, at p. 433.
(4) (1928) 42 C.L.R. 162.
(5) (1928) 42 C.L.R. 209.
(6) (1929) 42 C.L.R. 258.
(7) (1933) 48 C.L.R. 266.
(8) (1932) A.C. 542 ; 47 C.L.R. 386.
(9) (1931) 44 C.L.R. 492, at p. 522.

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to acquire all of the commodity in Queensland for the purpose of marketing was invalid on the ground that acquisition for such a purpose contravened sec. 92. *Willard* v. *Rawson* (1) is one of a group of transport cases which arose out of State laws imposing the necessity of licences on vehicles from other States engaged in inter-State traffic. In *R.* v. *Vizzard*; *Ex parte Hill* (2), the Commonwealth intervened to argue that sec. 92 did bind the Commonwealth. This seems the best answer to the contentions put up in the present case about the dreadful results which will follow if the Commonwealth were held to be bound by sec. 92. The States of New South Wales and Victoria intervened and argued that the Commonwealth was bound. The case arose under the *State Transport (Co-ordination) Act* 1931 of New South Wales which provided that every vehicle operating as a public vehicle should be licensed. The Act was held to be valid.

In *O. Gilpin Ltd.* v. *Commissioner of Road Transport and Tramways (N.S.W.)* (3) *Dixon* J. really first enunciates the decision to which he comes in the present case and in practically the same words. Except for *James* v. *The Commonwealth* (4) where the Court refused to hear any argument as there was not a Full Bench sitting the present case is the first case in which Commonwealth legislation has been the subject matter of decision. In *Tasmania* v. *Victoria* (5) relating to the *Vegetation and Vine Diseases Act* of Victoria the Court held that the legislation did infringe sec. 92 and distinguished *Nelson's Case* (6). It is impossible to reconcile the later decisions of the High Court with the full exclusive theory of *McArthur's Case* (7) and these later decisions destroy the basis upon which the decision in *McArthur's Case* (7) was founded, namely, that sec. 51 (1) and sec. 92 were absolutely contradictory. The contention that the appellant's view would maim the powers of the Commonwealth is irrelevant. It did not do so for the first nineteen years of its existence. Sec. 92 establishes as a definite principle of the Constitution an economic system of inter-State free trade which allows the individual and his goods to pass from State to State with

(1) (1933) 48 C.L.R. 316.
(2) (1933) 50 C.L.R. 30.
(3) (1935) 52 C.L.R. 189, at p. 212.
(4) (1928) 41 C.L.R. 442.
(5) (1935) 52 C.L.R. 157.
(6) (1928) 42 C.L.R. 209.
(7) (1920) 28 C.L.R. 530.

the same freedom as between adjacent counties in England. Secondly, sec. 92 is not concerned with the division of powers between the State and the Commonwealth. Thirdly, there is no good reason for restricting the operation of sec. 92 to States alone, and from its position, subject matter and phraseology that section includes the Commonwealth in its operation. Fourthly, upon any proper construction sec. 92 does not destroy the powers given by sec. 51 (I.), and sec. 51 (I.) must be construed subject to sec. 92. The power to legislate as to trade and commerce is not made an exclusive power of the Commonwealth by the Constitution. Lastly, the *Dried Fruits Acts* and regulations are identical in effect with the legislation found to offend against sec. 92 in *James* v. *Cowan* (1) and are therefore equally invalid.

Kevin Ward. Prior to *W. & A. McArthur Ltd.* v. *Queensland* (2) it had never been held by any Justice of the High Court that sec. 92 operated so as to prevent all State legislation with respect to trade and commerce and the tenor of the decisions can be summarized in this way, that it was still possible for States notwithstanding sec. 92 to regulate inter-State trade, that is, to regulate persons and goods who or which are engaged in inter-State trade provided that they did not in any way impede the free flow of goods and persons from one State to another. There is a distinction to be drawn between restricting or prohibiting inter-State trade and merely regulating it. The only case in which this question has directly arisen for definitive decision by the High Court is *James* v. *The Commonwealth* (3), and there the matter was not decided. First, as regards sec. 92, although the words are perfectly general and do not indicate one authority or the other there are indications in the section itself which point very strongly towards the fact that the Commonwealth is bound. One is " ocean navigation," another is the use of the words " absolutely free." Chapter IV. of the Constitution in which sec. 92 occurs deals with finance and trade and deals with it in a general way. Sec. 92 gives the Commonwealth exclusive power over customs, excise and bounties which were the principal instruments which could be used to destroy free trade

(1) (1932) A.C. 542 ; 47 C.L.R. 386. (2) (1920) 28 C.L.R. 530.
(3) (1928) 41 C.L.R. 442.

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and establish a system of protection, the States having surrendered to the Commonwealth the very instrument with which free trade is usually impaired received almost at once this guarantee which is contained in sec. 92. There are some strong affirmative arguments supporting the appellant's view but there is no affirmative argument supporting the respondent's view based on the words of the section itself which properly interpreted does not supply any such affirmative argument. *W. & A. McArthur Ltd.* v. *State of Queensland* (1) was wrongly decided. The Commonwealth has passed numerous Acts such as the *Australian Industries Preservation Act*, the *Secret Commissions Act*, and the *Sea Carriage of Goods Act*, against abuses of trade which on any fair interpretation of sec. 92 would not hinder trade but facilitate, preserve and foster it. These Acts have never been challenged and show that there is a field of legislation under sec. 51 (I.) which does not infringe sec. 92, thus the suggestion of conflict between secs. 51 and 92 completely vanishes. The State legislation has been held valid in cases since *W. & A. McArthur Ltd.* v. *Queensland* (1), namely, *Roughley* v. *New South Wales; Ex parte Beavis* (2); *Nelson's Case* (3); *Willard* v. *Rawson* (4); *Vizzard's Case* (5); *Gilpin's Case* (6); *Duncan and Green Star Trading Co. Pty. Ltd.* v. *Vizzard* (7). Four of them are transport cases. They were all cases of legislation with respect to some aspect or other of inter-State trade and were passed by the State. If the State could make those laws with respect to trade then the Commonwealth could do so under sec. 51 (I.). They would still not be invalid and the supposed repugnancy between sec. 51 and sec. 92 completely vanishes. None of those decisions could possibly stand if the full reasoning in *McArthur's Case* (1) is accepted. It was only by holding that the section forbade all State legislation that the High Court said that on that construction if applied to the Commonwealth there would be an incompatability between the two sections. If that reasoning is correct it is impossible to sustain the validity of any of those seven cases. Although *McArthur's Case* (1) has never been expressly overruled the reasoning has not been followed in its full integrity

(1) (1920) 28 C.L.R. 530.
(2) (1928) 42 C.L.R. 162.
(3) (1928) 42 C.L.R. 209.
(4) (1933) 48 C.L.R. 316.
(5) (1933) 50 C.L.R. 30.
(6) (1935) 52 C.L.R. 189.
(7) (1935) 53 C.L.R. 493.

by any Justice of the High Court other than by *Isaacs* C.J. The result of the cases since *McArthur's Case* (1) is that sec. 92 does not exclude all legislation by States in respect to trade, commerce and intercourse even though it is inter-State and therefore by parity of reasoning it would not exclude all Commonwealth legislation under sec. 51 (I.) were it held to apply to the Commonwealth.

Sir *Stafford Cripps* K.C. (with him *Paul Springman*), for the States of Tasmania and Western Australia intervening. Tasmania and Western Australia are primarily concerned with the question of the interpretation of sec. 92 rather than with the particular legislation which is challenged in this case. Under sec. 92 the Commonwealth has no power to intervene in inter-State trade and commerce in such a way as to diminish its flow. *McArthur's Case* (1) depends upon two propositions being closely linked, that is to say, that the reason why the Court in that case came to the conclusion that the Commonwealth must be excluded from the operation of sec. 92 was because of the interpretation which the Judges put upon that section as regards the States, that is to say, they feel constrained because of the very wide interpretation they placed upon the words "absolutely free" to find some way out by which some authority in Australia would be able to regulate inter-State trade and to preserve it from complete anarchy. Having the dilemma as it appeared to them of either interpreting sec. 92 more narrowly as it has been interpreted in the cases that have been decided since, or on the other hand excluding the Commonwealth from the operation of sec. 92 they chose the latter course and thereby were enabled to get out of what appeared to them to be the dilemma. One may assume that if the Commonwealth falls within the section the principles which have already been applied as regards the States would apply to the Commonwealth. The criteria applied in *James* v. *Cowan* (2) would imply that the section also covers the Commonwealth. The principles for the construction of such a statute as the Australian Constitution was stated in *The Queen* v. *Burah* (3). There is nothing in the implied negative power which is in sec. 92

(1) (1920) 28 C.L.R. 530.
(2) (1932) A.C. 542; 47 C.L.R. 386.
(3) (1878) 3 App. Cas. 889, at pp. 904, 905.

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which in any way attempts to show a distinction between State and Commonwealth. The words of the Constitution alone must be considered and references to the general scheme or line of thought in the mind of the framers of the Constitution are irrelevant. One cannot so easily imply things in construing other written documents. The right criterion of interpretation was laid down in *Amalgamated Society of Engineers* v. *Adelaide Steamship Co.* (*The Engineers Case*) (1). Other cases are *Attorney-General of Ontario* v. *Attorney-General of Canada* (2); *Attorney-General for the Commonwealth of Australia* v. *Colonial Sugar Refining Co. Ltd.* (3); *John Deere Plow Co. Ltd.* v. *Wharton* (4); *Equitable Life Assurance Society of the United States* v. *Reed* (5); *British Coal Corporation* v. *The King* (6). There are four propositions. First, the antecedent circumstances leading to the Constitution Act are material for the general interpretation of the Act but not to cut down or enlarge any specific terms of the Act. Secondly, if the words of the Act are clear and unambiguous in declaring some fundamental principle of the Constitution it is for the Courts to find the exact extent of the operation of the principle but not to alter its content by implication. The declaratory section in a constitutional Act very often does declare a principle and it is for the Courts to find exactly what are the limits of the operation but not to alter the principle itself. Thirdly, where specific and not general powers are given to a Federal Government, it is for those alleging that any specific act falls within those powers to substantiate this allegation. Lastly, it is not for the Courts to fill up gaps in the powers of a Federal Government and its Constitution even if they appear to exist. Such gaps must be filled, if at all, by an amendment of the Constitution. Sec. 51 is expressed to be "subject to this Constitution," and the powers in that section are not exclusive. *Citizens Insurance Co. of Canada* v. *Parsons* (7) dealt with the distribution of legislative powers. Had sec. 92 been intended to apply to State Legislatures alone it would have said so in express terms. It is impossible to base any argument on the question of

(1) (1920) 28 C.L.R. 129.
(2) (1912) A.C. 571, at p. 583.
(3) (1914) A.C. 237, at p. 252.
(4) (1915) A.C. 330.
(5) (1914) A.C. 587.
(6) (1935) A.C. 500, at p. 517.
(7) (1881) 7 App. Cas. 96, at p. 111.

convenience or necessity, as this is a political, not a legal, criterion. The fact that legislation has been passed on the assumption that sec. 92 does not bind the Commonwealth is irrelevant. Limitations of Federal legislative power are dealt with in *Quick and Garran, Annotated Constitution of the Australian Commonwealth* (1901), at pp. 510, 517, 945. There is no qualification in sec. 92 as there is in sec. 51, i.e., " subject to this Constitution." " Absolutely free " means that no impediment or hindrance is to be put upon trade among the States. Legislation which is for the prevention of disease has nothing to do with commerce at all. The method of interpreting a constitution is illustrated in *Russell* v. *The Queen* (1) and *Attorney-General for Ontario* v. *Reciprocal Insurers* (2). In considering whether the Parliament is infringing in the forbidden territory one has to consider not merely the form of the legislation, what it is purporting to do or pretend to do by the legislation, but one has to consider the substance of the legislation, whether, in fact, whatever is found it does go into a territory from which it is prohibited from entering. Therefore, the first consideration in the present case under sec. 92, is whether the law with which one is dealing is a law which deals with trade and commerce as such, and having decided that it is such a law, then one has got to consider, does it restrict or prohibit the freedom of trade and commerce between the States ? It may regulate it or control it, or assist it, or help it, but if it does prohibit trade and commerce, then it is outside the powers of the Commonwealth Government. If the Act does not deal with trade and commerce as such, but is an Act relating to another matter such as health, it must be ascertained whether it prohibits or restricts more than is necessarily incidental to the main subject matter with which the law deals. There are thus two matters to be decided ; first, what is the subject matter of the statute ? Into what category of legislative power does it fall ? And, secondly, whether the actual restrictions imposed by the statute, although nominally within a category which is not trade and commerce, are in reality outside the subject matter of that category, safety, disease or health, or whatever it may be, and are restrictions upon trade and commerce within the States.

(1) (1882) 7 App. Cas. 829, at pp., 834, 835, 838. (2) (1924) A.C. 328, at p. 341.

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R. G. Menzies K.C., Attorney-General for the Commonwealth (with him *Gavin T. Simonds* K.C., and The Hon. *H. L. Parker*), for the Commonwealth.

R. G. Menzies K.C., (with him The Hon. *H. L. Parker*), for the State of Victoria, intervening.

R. G. Menzies K.C. Though the immediate question which here falls for decision is the validity of the Commonwealth *Dried Fruits Act*, what falls for determination really is the whole power of the Commonwealth to pass legislation in relation to inter-State trade and commerce, and by so doing to render possible schemes of marketing control in the whole Commonwealth. If the Commonwealth cannot control inter-State trade and commerce to the extent illustrated by the Act immediately in question then it is clear that the States cannot control it. It will therefore be clear that nobody can control it. If neither the Commonwealth nor the States can control that element the control of marketing in Australia is impossible. The result would be that the totality of legislative power in Australia will prove to be less than the totality of power in other civilized countries.

The legislation which touches the dried fruits industry in Australia is before your Lordships, and there is very similar legislation in relation to dairy products. There is very similar legislation which has already been passed by the Commonwealth and by one or two States in relation to wheat. The scheme of control adopted is similar in each case. The general characteristic of that scheme is that instead of paying a low price to the grower of the primary commodity in Australia as the inevitable and unavoidable result of the depression in the world, these schemes set out to rectify that to some extent by providing for the Australian grower a better average price for his commodity by providing for him inside Australia, and, in relation to his Australian sales, a higher price than the world is then paying. The basis of the scheme is to give a higher local price as an offset to an unusually low world price—the price that he would normally get on the export of his commodity. If that is to be done it becomes necessary to adopt some scheme whereby the quantity of the commodity in question retained in Australia for sale will not be sufficiently great to break down the special Australian price.

Prior to the decision in *James* v. *Cowan* (1), the scheme adopted was for the States to expropriate the commodity from the hands of the owner. The High Court in holding that State legislation to be valid, merely followed the doctrine in the *Wheat Case* (2). The doctrine in that case was that you do not limit inter-State trade and commerce or intercourse by merely changing the ownership of the commodity. The view in the minds of the majority of the High Court was simply that what has occurred here is that South Australia has become the owner of this dried fruit and it may do with it what it chooses. All that has happened is that the ownership has changed. From the date of the decision of the Privy Council in *James* v. *Cowan* (1), it became clear that you could not effectuate these schemes of control by using the expropriation power. Another means of control was then sought. The means adopted was for the Commonwealth to control inter-State business on the basis that the Commonwealth was not bound by sec. 92, following the doctrine of *McArthur's Case* (3), and by exercising that control the Commonwealth could complement legislation passed by the States. Putting that in another way, you cannot possibly control Australian trade as such without recognizing that it falls into two groups, the precise limits of which it may be difficult to determine—intra-State and inter-State trade. Both must be controlled if you are to control Australian trade. Intra-State trade may be controlled by the States and not by the Commonwealth, and upon the Commonwealth's power to control inter-State trade therefore rests its ability to put between the various stones, so to speak, set up by the States, the cement that will constitute a building. The Commonwealth provides the means of associating one State's scheme with another, and under the doctrine of *McArthur's Case* (3), it has been found possible and desirable—and what is desirable for any country depends entirely on current political views at the moment—to have systems of control operated in that sense jointly by the Commonwealth and by the States. These facts are material circumstances in the task of interpretation. When *Vizzard's Case* (4) was argued the full effect of *James* v. *Cowan* (1) had not been appreciated. If you have two interpretations of

(1) (1932) A.C. 542; 47 C.L.R. 386.
(2) (1915) 20 C.L.R. 54.
(3) (1920) 28 C.L.R. 530.
(4) (1933) 50 C.L.R. 30.

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the Constitution reasonably available on the language of the document, one of which would lead to the result that there is a gap in the legislative powers of the States and the Commonwealth and one which would lead to the continued existence after Federation of powers which undoubtedly existed before it, then the second of those interpretations should be the one to be adopted. When you interpret a constitution you are not able to leave out of sight certain characteristics about constitutions which do not exist about ordinary statutes. The constitution cannot be amended with the ease of an ordinary statute. It is, moreover, an organic law or frame of Government (*British Coal Corporation* v. *The King* (1)). Apart from sec. 52, sec. 51 of the Constitution is the only section which confers powers in this Constitution. Secs. 106 and 107 do not confer powers on the States. All that secs. 106 and 107 do is to make it clear that the residue of power is left with the States.

The Commonwealth may exercise the powers conferred by sec. 51 without reference to what any State is doing. The State, on the other hand, does not have an unqualified resort to the area marked out by sec. 51. It is true that in relation to most of these powers it is nominally of concurrent authority, but because of sec. 109 that area to which the State has access is constantly subject to reduction by reason of the exercise of the Commonwealth powers and to the extent that the Commonwealth effectively occupies the field prescribed by sec. 51, so the States are effectively expelled from it by reason of the operation of sec. 109. The interpretation of the word "inconsistency" in sec. 109 given by *Clyde Engineering Co. Ltd.* v. *Cowburn* (2) illustrates the view about the progressive retirement of the State from the legislative field as the Commonwealth occupies it. Since that case you can no longer have competitive demands in the same field, and the effect is to emphasize more and more the residuary character of the State's legislative power. The real business of the Constitution was to found a new organism which was the Commonwealth, and to deal with its powers which were to be national powers by way of special grant and not by way of residue. The powers of the States are in that sense residual powers, and you cannot completely deal with them until the business of interpreting

(1) (1935) A.C., at pp. 518, 519.

(2) (1926) 37 C.L.R. 466.

the scope of the grant to the Commonwealth has been completed. In *Amalgamated Society of Engineers* v. *Adelaide Steamship Co. Ltd.* (*The Engineers Case*) (1), the High Court swept away the doctrines of immunity of instrumentalities and of implied prohibitions, and said that in interpreting the Constitution the documents alone should be regarded, and that the powers conferred thereby were to be given the most ample interpretation. It is not essential to show a complete opposition between secs. 92 and 51 (I.). On the face of the Constitution itself the trade and commerce power is the first, not only in place, but among the first in national importance. *McArthur's Case* (2) is not to be regarded as a mere case in which the Court applied the rules of repugnancy or of implied repeal, but is to be regarded as a case in which the Court, being presented with that choice, followed the course of interpretation which would avoid anomalous results. If sec. 51 (I.) relates merely, as it would in one interpretation of sec. 92, to machinery, and those matters which are ancillary to trade and commerce but which do not directly affect trade and commerce, secs. 98 and 100 would have no point. Sec. 101 recognizes the great importance of the laws to be passed by the Commonwealth under its trade and commerce power. If the words "absolutely free" in sec. 92 are to be given their full meaning there would be substantially a repugnancy between secs. 51 (I.) and 92. The sections 51 (I.) and 92 are similar, and the words should therefore be given the same meaning. The extent of the subject-matter in secs. 51 (I.) and 92 must be the same. The fullest interpretation must be given to the powers conferred on the Commonwealth under sec. 51 (I.) (*Amalgamated Society of Engineers* v. *Adelaide Steamship Co. Ltd.* (*The Engineers Case*) (1)). If sec. 92 is to be subtracted from sec. 51 (I.) it is equally to be subtracted from the whole of sec. 51. The following are the possible interpretations of the word "free" in sec. 92:—(1) Free of all law of every description. (2) Free of any restrictions imposed upon it, i.e., trade and commerce by reason of its inter-State character, i.e., free of any discriminating trade law. (3) Free as trade and commerce of all interference whether specially directed to it or not. (4) Free of all laws, the pith

(1) (1920) 28 C.L.R. 129. (2) (1920) 28 C.L.R. 530.

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and substance of which is a regulation of inter-State trade and commerce. (5) Freedom attaches to trade and commerce regarded as a whole and not distributively. Individuals are not guaranteed freedom in relation to their trade and commerce so long as trade and commerce, as a whole, are not impaired. (6) Free from pecuniary imposts. The first meaning has been universally rejected and cannot be supported. The second was first put forward by *Griffith* C.J. in *Duncan* v. *Queensland* (1). It was also referred to in *McArthur's Case* (2), and in *James* v. *Cowan* (3). The third proposition was the view of *McArthur's Case* (4) and the view of *Dixon* J. in *Willard* v. *Rawson* (5) and *O. Gilpin Ltd.* v. *Commissioner for Road Transport and Tramways (N.S.W.)* (6). The essential inferences from the view of *Dixon* J. are two:—First, that the test of burden or interference is a purely objective one; you must simply say "Is there in fact a burden placed upon something which forms part of trade, commerce and intercourse?"—not: "Was it intended to impose a burden?" or "Did the Act describe itself as an Act relating to that particular subject matter?", but "Was the burden imposed?" Secondly: "Was it imposed not merely upon trade and commerce as a whole but was it imposed upon individuals in relation to these acts of trade and commerce?" In both these respects *Dixon* J. was correct. To adopt any other view is to alter sec. 92 and not to interpret it. Sec. 92 was concerned not with freedom of trade as an abstraction but with freedom of trade as something in which the individual as such had a concern and in which he was protected. The fourth, the pith and substance test, is one based upon the *Attorney-General for Ontario* v. *Reciprocal Insurers* (7). This view is completely erroneous. It is founded upon a method of interpretation which is thoroughly applicable to the Canadian Constitution but which finds no resting point at all in the Australian Constitution (*Russell* v. *The Queen* (8)). Though correct in its relation to the Canadian Constitution, this view is quite inappropriate to the interpretation of the Australian Constitution. Under the *British North America Act* it is necessary to determine into what category the

(1) (1916) 22 C.L.R., at p. 574.
(2) (1920) 28 C.L.R., at pp. 568, 569.
(3) (1932) A.C. 542; 43 C.L.R. 386.
(4) (1920) 28 C.L.R. 530.
(5) (1933) 48 C.L.R., at p. 330.
(6) (1935) 52 C.L.R., at p. 204.
(7) (1924) A.C. 328.
(8) (1882) 7 App. Cas. 829, at p. 836.

particular enactment falls. In Australia this is not necessary. In Australia it is never necessary to enquire " Under what head of State power could this law be passed ? " The pith and substance rule was the basis of the decision in *Nelson's Case* (1). No distinction can logically be drawn between protection against disease and protection against famine on the one hand and on the other hand protection against glut and protection against some other form of economic diseases or something which may be equally disastrous. *Nelson's Case* (2) and *McArthur's Case* (3) are inconsistent. *Nelson's Case* (2), though distinguished, is in reality over-ruled by *Tasmania* v. *Victoria* (4). The pith and substance test was also applied in *Willard* v. *Rawson* (5).

As to the fifth test, that freedom attaches to trade and commerce regarded as a whole and not distributively—individuals not being guaranteed freedom in relation to the trade and commerce so long as trade and commerce as a whole are not impaired. This view is dealt with in *Vizzard's Case* (6). This test is not very easy to explain. What *Evatt* J. means in that case is that absolute freedom is the perquisite of trade and commerce as a whole under sec. 92, and is not ascribed to individuals in relation to that trade. The first difficulty this view produces is that of determining whether the effect of the legislation in question will be to diminish or control the volume of inter-State trade. If the test is whether the act has a tendency to interfere with inter-State trade then the answer to the question must depend upon an economic survey of the problem in order to determine whether the tendencies in the act are of a kind calculated to facilitate inter-State trade or calculated to retard it. These last two tests lead to complete confusion and cannot possibly afford a working guide to those whose task it is to interpret the Constitution. As to the fifth test, you cannot leave trade and commerce unimpaired or even not fenced off if you in fact impose prohibitions or terms upon individuals in relation to it. The sixth test has been uniformly rejected. The whole setting of sec. 92 is one which relates to customs and excise. Sec. 92, read with the surrounding sections, suggests a very strong inference that it is dealing with

(1) (1928) 42 C.L.R., at p. 218.
(2) (1928) 42 C.L.R. 209.
(3) (1920) 28 C.L.R. 530.
(4) (1935) 52 C.L.R. 157.
(5) (1933) 48 C.L.R., at p. 335.
(6) (1933) 50 C.L.R., at p. 77.

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freedom from border duties. *James* v. *Cowan* (1) is against this view, and the High Court has rejected it. This however is a view to which very great weight should be attached on the interpretation of the Constitution itself. Another virtue in the argument based on the sixth test is that this view alone gives the fullest scope for Commonwealth legislation under sec. 51 because it imposes the narrowest possible limitation on that action. If the whole matter were free of authority I would contend that the sixth was the correct test. The amount of State control which is left since *James* v. *Cowan* (1) to inter-State trade is nil. If the sixth test is not the correct one the third test should be applied, and if the sixth test is rejected it becomes more and more difficult to escape from the *McArthur* test. *James* v. *Cowan* (1) should not be regarded as binding here. The Privy Council has power to reverse its own decisions. See the cases quoted in *Australian Agricultural Co.* v. *Federated Engine-Drivers and Firemens' Association of Australasia* (2). Technically it is not bound by its own decisions. It is not possible to find a completely rational and consistent support of tests four and five on the language of sec. 92. If sec. 92 applied only to border duties it would not matter very much whether the Commonwealth were bound or not. The States are not prohibited from imposing border duties except by sec. 92, and therefore, if you assume that sec. 92 at least covers border duties it is not deprived of meaning because it still was needed in order to deal with the State. Altogether, apart from sec. 92, the Commonwealth could not impose border duties, and therefore sec. 92 was not needed as a prohibition to the Commonwealth in relation to border duties. The customs power of the Commonwealth is to be found in sec. 51 (I.) and 51 (II.). Sec. 51 (I.) is expressly limited by sec. 99. *Fox* v. *Robbins* (3) related to a differential licence. It was there said that to impose a duty on wines coming from other States while allowing the sale of locally produced wines without duty was discrimination. If that is discrimination if done by a State, it is equally discrimination if done by the Commonwealth, because the test of discrimination is the test of the result which is achieved. Sec. 99 prevents the Commonwealth

(1) (1932) A.C. 542; 47 C.L.R. 386. (2) (1913) 17 C.L.R. 261, at p. 275.
(3) (1909) 8 C.L.R. 115, at p. 123.

from re-imposing border duties (*Duncan's Case* (1)). The *Secret Commissions Act*, which was passed under the power contained in sec. 51 (I.), would, on several of the possible interpretations of " free " contended for in this case, be hit by the test of discrimination because the legislation discriminates by being confined to inter-State trade. It regulates inter-State trade as such. It would be hit by the motive test or the category test above referred to because it is expressly made under the trade and commerce power, and professes to be an Act relating to trade and commerce and to nothing else. It would not be hit by the test suggested by *Evatt* J. because presumably you could support the view that it leaves the total volume of trade unimpaired. The criticisms of that test need not be repeated. The *Australian Industries Preservation Act*, sec. 4, is a provision which seeks to prevent people from carrying on business in a certain way in order to achieve what Parliament, at the time, regarded as a desirable social end, viz., the repression of monopolies. This is clearly a law which imposes a burden on the operation of those individuals in relation to their inter-State trade, so it satisfies the third test. It is clearly a discriminating law because it deals in inter-State trade and cannot deal with anything else, so it satisfies the second test. It is a law which comes within the category of trade and commerce laws. The only test by which it can escape from the net of sec. 92 is by applying the fifth test, because it is said that while it restricts the individual it in some mysterious way preserves or even threatens to extend the volume of inter-State trade. The *Seamen's Compensation Act* was enacted under the trade and commerce power, and is essentially a discriminating law. It imposes a burden on the person who is engaged in that form of maritime inter-State trade and commerce and it therefore imposes a burden upon him in relation to the inter-State commerce that he is carrying on. These acts discriminate necessarily between inter-State and intra-State trade by dealing only with the one. In dealing with those things they satisfy the tests except the test which says that the effect on the individual does not matter so long as you are able at any given time to perceive that the total effect on industry was satisfactory. Similar observations apply to the *Sea Carriage of Goods Act*.

(1) (1916) 22 C.L.R., at p. 572.

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On the sixth point of interpretation the proposition that sec. 92 is confined to pecuniary burdens is dealt with in *Duncan* v. *State of Queensland* (1); *McArthur's Case* (2); *Vizzard's Case* (3). Sec. 92 comes into force when uniform duties of customs are imposed. This would give the Commonwealth extensive powers under sec. 51 (I.) and also under the other provision of sec. 51 until uniform duties are imposed after which date these powers would be diminished or destroyed. If sec. 92 binds the Commonwealth sec. 51 (I.) will be almost, if not quite, destroyed. Everything in the Constitution points to a clear intention that sec. 51 (I.) should be a real national power just like the other powers in sec. 51 and that nothing points to the whittling away of the power except one thing and that is that sec. 92 happens to be expressed in language of generality. There is nothing in the Constitution which gives any colour to the view that the American doctrine of police powers applies to it. *R.* v. *Smithers*; *Ex parte Benson* (4) depended on the doctrine of implied prohibition which was cleared away in the *Engineer's Case* (5). Since that case you look to the language of the Constitution in order to determine the boundaries of power and you are not to impute to the Constitution in some unspoken way the adoption of a doctrine like police power. The question of the State police powers is dealt with in *Nelson's Case* (6). Sec. 112 recognizes the inspection laws of a State. If sec. 51 (I.) is subject to sec. 92 and if the latter section binds the Commonwealth the Commonwealth could not deal with the movement of diseased cattle. Except for the narrow interpretation of sec. 92 above suggested the decision in *Tasmania* v. *Victoria* (7) is right. You impair the freedom of inter-State trade when you say people are not to engage in it in any particular commodity. Even for necessary reasons of health the State cannot now limit the right of entry of animals, people or vegetables even if diseased. The Commonwealth is bound to deal with that sort of problem and it is just as well that it should because as between one State and another matters of health may tend to be mixed up with questions of competition between the growers and with other matters so as to render

(1) (1916) 22 C.L.R., at pp. 570, 571, 572, 587-589, 617, 639.
(2) (1920) 28 C.L.R., at pp. 553, 554, 561, 562, 566.
(3) (1933) 50 C.L.R., at pp. 54, 97.
(4) (1912) 16 C.L.R., at pp. 114, 115.
(5) (1920) 28 C.L.R. 129.
(6) (1928) 42 C.L.R., at p. 240.
(7) (1935) 52 C.L.R. 157.

the judgment of any particular State against another on that matter undesirable. The Commonwealth representing all is able to take a detached view. There may be inspection laws of a State effective for various purposes though there may be no power of execution thereunder. Inspection laws are not confined to inspection at the borders although sec. 112 is looking at the operation of the law at the border and that is the only thing which need be looked at in a Constitution of this kind. Even if sec. 112 does permit a State to exclude goods the Commonwealth may also have power to prevent the movement of diseased cattle or unhealthy goods from one State to another. As to the meaning of the word " intercourse " in sec. 92, *McArthur's Case* (1) was correctly decided. The immediate result of the adoption of the *McArthur* test would be adverse to some State legislation as it now stands but it will still leave this position that to the extent to which the States were excluded the Commonwealth would have legislative power and consequently by concerted State and Commonwealth action each of those problems could be completely dealt with. Intercourse in sec. 92 may mean in the first place no more than commercial intercourse, i.e. it may be read *ejusdem generis* with trade and commerce (*R.* v. *Smithers* (2); *Roughley's Case* (3)). If the judgment in *Nelson's Case* (4) is right free does not mean free but means something less than free. If sec. 92 does not apply to the Commonwealth this will not make the powers in sec. 51 (I.) exclusive. The Constitution may declare a power to be exclusive in more than one way as in secs. 90, 114, 115. When it is desired to impose some special disability on the Commonwealth it is done in express terms. The method of construing the Constitution adopted by counsel for the State of Tasmania may be perfectly applicable in construing the Constitution where you have mutual exclusiveness of Federal and State powers as in Canada because wherever you get mutual exclusiveness the inclusion of an Act in one category or another becomes obviously important; but in the case of the Commonwealth where powers are for the most part concurrent and are in any event put in categories only on one side, the other side being a residue such principles are much too

(1) (1920) 28 C.L.R. 530.
(2) (1912) 16 C.L.R., at p. 113.
(3) (1928) 42 C.L.R., at p. 179.
(4) (1928) 42 C.L.R., at p. 240.

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narrow. Where Colonies with plenary powers of self government come together and create a new organization and affect to divide their powers then under these circumstances when you find in the written Constitution that has been evolved in language that is capable of more than one interpretation, that interpretation should be taken which will enable the combined legislature to cover the whole field of legislative power.

The Attorney-General for New South Wales (with him *A. C. Nesbitt*), for the State of New South Wales and the State of Queensland, intervening. The primary object of these States in intervening is to support the ultimate contention of the Commonwealth for the purpose of protecting certain State legislation which is regarded by the States and probably also by the Commonwealth as vital legislation for the purpose of carrying out not only marketing schemes but other schemes and in general for regulating the internal affairs of those States. There are many enactments of the States which would be in jeopardy to some extent by the decision in this case if it were adverse to the respondent. All the State legislation upon this subject would be rendered quite ineffectual unless the Commonwealth has had power to pass complementary legislation in order to assist it. Acts such as the *Dried Fruits Act*, the *Dairy Produce Act*, the *Wheat and Wheat Products Act* are affected by the decision in this case. The whole of the dried fruits industry and the dairy products industry has been organized under the system of collective marketing and quite irrespective of what decisions may have been given by the Courts, after the decision in *McArthur's Case* (1) these methods of collective marketing were all undertaken on the assumption that the decision in that case was correct, that is that sec. 92 did not bind the Commonwealth. First, sec. 92 is not binding on the Commonwealth. Secondly, if it is then sec. 92 on its proper construction should receive the narrower interpretation, that is the freedom which is provided for in sec. 92 is freedom from customs duties on goods passing from one State to another.

McArthur's Case (1) was followed in *James* v. *South Australia* (2). The matter was also referred to in *James* v. *The Commonwealth* (3),

(1) (1920) 28 C.L.R. 530.
(2) (1927) 40 C.L.R. 1.
(3) (1928) 41 C.L.R., at p. 455.

and in *James* v. *Cowan* (1), and *Huddart Parker Ltd.* v. *The Commonwealth* (2). So that the decision in the *McArthur Case* (3) really stood from 1920 without any expression of dissatisfaction until 1933. In *Vizzard's Case* (4), which was similar to *Gilpin's Case* (5), three of the Justices indicated disapproval of the finding in *McArthur's Case* (3). The position is summarized by *Dixon* J. in *James* v. *The Commonwealth* (6). *Roughley's Case* (7); *Nelson's Case* (8) and *Vizzard's Case* (4) were correctly decided. *Nelson's Case* (8) was not overruled by *Tasmania* v. *Victoria* (9). The meaning of the word " freedom " must be considered in relation to the particular facts which are presented by the case in question. " Absolutely free " in sec. 92 means free from customs duties. " Absolutely " is contrasted with " relatively." Before Federation New South Wales was a free trade State but there were some insignificant customs duties and it might be said that New South Wales was relatively free from customs duties. " Absolutely free " was intended to cover such a position as that. I adopt the argument which was put by the Attorney-General for the Commonwealth.

Sir *Stafford Cripps*, in reply. The inconvenience which it is said will arise if the Commonwealth is bound by sec. 92 is inconvenience as viewed by the Commonwealth, but from the point of view of the States there is just as great, or even greater, inconvenience, if the Commonwealth is not bound by sec. 92. The matter of convenience is thus not a proper criterion for interpretation. It is a mere point of prejudice and nothing else. As to the contention that if sec. 92 binds the Commonwealth there will be a gap in the legislative powers. It is to be observed that in every Federal Constitution where it is desired that certain fundamental powers are to be preserved after Federation there must always be a gap in the Constitution co-terminus with those fundamental freedoms. The whole object of such a declaration is to create a gap, that is to say, to put it out of the power of anyone to

(1) (1930) 43 C.L.R., at p. 421.
(2) (1931) 44 C.L.R. 492.
(3) (1920) 28 C.L.R. 530.
(4) (1933) 50 C.L.R. 30.
(5) (1935) 52 C.L.R. 189.
(6) (1935) 52 C.L.R., at p. 591.
(7) (1928) 42 C.L.R. 162.
(8) (1928) 42 C.L.R. 209.
(9) (1935) 52 C.L.R. 157.

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legislate contrary to those express freedoms. At the time the Constitution was made the States had power to restrict, burden and prohibit inter-State trade, and it was that power that the Australian inhabitants desired to get rid of because it had so embarrassed them. They did not desire to transfer it to somebody else, and there is no evidence in the surrounding circumstances that they did. The more difficult the Constitution is to amend the stronger is the argument for sticking to the rigidity of the Constitution because the people of Australia themselves have stated that it is not to be amended except by this very special procedure and that shows that every care must be taken not to come to a decision which would in fact be an amendment of the Constitution rather than the other way round. Secs. 92 and 117 were intended to fix absolute limits for legislative and executive power. Sec. 92 is for the protection of trade and commerce, not of the individual who is carrying on the business of trade and commerce as an individual. The word " free " in the last hundred years has always meant free in connection with the liberties of the people and so on, not free from all legislation. It is clear that sec. 92 is not limited to any legislative or executive authority.

Trade and commerce among the States include all those acts which are essential to effect the physical transference of articles of trade and commerce from one State to another. The only way in which it is possible to limit sec. 92 is to read into that section words which clearly are not there. It would be necessary to read sec. 92 as having after the words " shall be absolutely free " " from State legislation " or " from State interference." Sec. 92 is in the nature of a proviso to sec. 51 (I.) and to that extent controls the operation of sec. 51 (I.). The word " free " must be given a meaning which attached to it in 1900 by the people who used it. If *McArthur's Case* (1) is correct, it will have the effect of extending the scope of sec. 51 (1) to such an extent as to give the Commonwealth heads of legislative power which it has not got. As to the six possible interpretations of " absolutely free " the first has been dealt with and rightly rejected for the reason that there are certain categories of laws to which this section does not apply. The second interpretation

(1) (1920) 28 C.L.R. 530.

cannot be supported. The third proposition does not accurately set out what was decided in *McArthur's Case* (1) and cannot be supported. The fourth test is like the third, but adds the words " inter-State " instead of trade and commerce. This makes a category of laws regulating inter-State trade and commerce as if that were a particular category. In the fifth test freedom attaches to trade and commerce as a whole and not distributively. This in substance is a summary of the views of *Evatt* J. When one is regarding whether trade and commerce as a whole are not impaired, what the fifth test means is that inter-State trade and commerce as a whole is not impaired. The rule should be that, having due regard to the necessity for all these regulatory enactments designed to produce an orderly society and dealing with such categories as health, defence, criminal and property laws there should be no law passed or executed, or prohibitive act done which should prohibit or restrict the physical transferance of articles of commerce from one State to another. The object of sec. 92 was not the extinction of orderliness in commercial dealings or the orderliness of the acts and intercourse of individuals but was to prevent the interference with inter-State commercial transactions. Even if sec. 92 applies to the Commonwealth, the Commonwealth can still legislate on certain matters under sec. 51 (I.). It may legislate in every case of non-restrictive statutes. Statutes that do not hamper the passage of goods. There is, in fact, quite a large field for the Commonwealth to legislate in under sec. 51 (I.). As to the sixth meaning, this may be divided into two heads—(*a*) Free from pecuniary imposts but not free from prohibition ; (*b*) Free from pecuniary imposts and such prohibition as was customarily imposed by customs laws. This method of interpretation has been uniformly rejected by every Court. It is quite clear that the words " absolutely free " cannot have been intended to be limited to customs laws. It would be quite meaningless to say, for example, that they are entitled to make laws with respect to navigation, not shipping. How can navigation be free from customs imposts ? The words " absolutely free " cannot be limited in either of the ways suggested under 6 (*a*) and 6 (*b*) without reducing a number of the other sections of the Act, to

(1) (1920) 28 C.L.R. 530.

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what would be a substantial absurdity. The real result of the argument based upon those six interpretations which the Attorney-General put before your Lordships is to ask the Court to decide which is the most convenient interpretation to be adopted in view of the powers which it is suggested it would be right and proper to find in the Commonwealth legislation and also the suggestion is impliedly made that where as it is very difficult to ascertain what laws would be *ultra vires* under sec. 92 if made by the Commonwealth, it is far easier to say the Commonwealth is not bound at all and therefore there is no need to make an examination of the laws. Neither of these two points are points which are admissible as regards the interpretation. It is said that if sec. 92 binds the Commonwealth they will not be able to deal with the movement of diseased cattle, but that would not be because sec. 92 binds them but because they have no power under sec. 51 (I.) to deal with the subject matter of legislation at all. With regard to transport cases the true view is that if the matter of traffic control and motor licenses is a State matter, as it is, and exclusively a State matter, because no power is given under sec. 51, the Commonwealth has no legislative power at all, and sec. 92 has nothing to do with such legislation. To summarize the position, first as a matter of interpretation, the surrounding circumstances at the date of the Constitution can be looked at, but not the conveniences or necessities of the present day. Secondly, the words of the Constitution must be regarded strictly bearing in mind that alterations of the powers granted can only be made by the Australian people and not by the Court. Thirdly, the general and unqualified sections of the Constitution must be first looked at to ascertain any fundamental reservations or prohibitions imposed by the Constitution such sections must be given their full ambit where that ambit is unrestricted. Sec. 92 is such a section, and there is no doubt in its terms as to its application to all legislative and executive bodies. The words "subject to this Constitution" in secs. 51, 52 and 106 mean that those sections must be read as subject (*inter alia*) to sec. 92. The fact that such a reading cuts down or diminishes powers under any of these sections is not material to the interpretation of sec. 92 since it is clearly intended to be an over-riding section. The terms "trade and

commerce " have the same significance in sec. 92 as in sec. 51 (I.). Their meaning is qualified by the juxta-position of other categories of legislative powers in sec. 51, and by the express or implied inclusion of certain matters under secs. 98, 99 and 100. It is " trade and commerce " so defined that is " absolutely free." " Absolutely free " must be read in the light of the surrounding circumstances in Australia in 1900 and the general practice of legislative control in civilized countries. As so read it does not prohibit interference with individual actions or specified goods by laws of different categories to trade and commerce which are usual and customary for controlling and protecting civilized communities. The substance and not the form of an alleged infringing statute must be looked at, and if in substance it is not within the category of trade and commerce laws as above defined it does not offend against sec. 92. If it is in the category of trade and commerce laws then it may offend if in fact it results in a limitation or prohibition of the transference of articles of commerce from one State to another. Other statutes in other categories cannot themselves offend against the implied prohibition of sec. 92, but executive acts purported to be done under them may so offend if they are done to restrict trade and commerce and not to regulate individual acts for the purpose of laws of another category. Although sec. 92 cuts down the generality of powers in sec. 51 (I.) as it was intended to, it does not create a repugnancy, since there remain within sec. 51 (I.) all laws tending to remove restrictions from inter-State commerce or regulating it without imposing restrictions upon it. The Commonwealth is therefore equally bound with the States under sec. 92. This interpretation of sec. 92 is in accordance with the decision in *James* v. *Cowan* (1), and the trend of reasoning of the majority of the High Court in all cases since *McArthur's Case* (2), and in accordance with the reasoning in *James* v. *Cowan* (1). The *Dried Fruits Acts* here in suit offend against sec. 92 even if that section were given the far narrowed interpretation, that is, limited to such acts as would normally fall under the head of customs laws, the prohibitions in and under the *Dried Fruits Act* are such as to fall within the prohibition of sec. 92. Such

(1) (1932) A.C. 542 ; 47 C.L.R. 386. (2) (1920) 28 C.L.R. 530.

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an interpretation has been uniformally rejected, and is inconsistent with the other sections in Ch. IV., notably secs. 98 and 100.

THE MASTER OF THE ROLLS (LORD WRIGHT) delivered the judgment of their Lordships, which was as follows :—

The appellant, Frederick Alexander James, is a grower and processor of dried fruits in the State of South Australia: his products have been for many years largely sold in various States, including New South Wales, Victoria, Western Australia and South Australia. In the action he claimed damages for the seizure by or on behalf of the respondents (Commonwealth) of (1) 50 cases of dried fruits which he had shipped on a steamship in April 1932, at Port Adelaide, consigned to E. D. Clarton for delivery at Sydney, New South Wales in part performance of a contract of sale, and (2) of 20 cases of dried fruits in June 1932, which he had shipped at Port Adelaide consigned to H. Hooper & Co. for delivery at Sydney, New South Wales, in part performance of a contract. He further claimed a declaration that the *Dried Fruits Act* 1928-1935, of the Parliament of the Commonwealth contravenes sec. 92 of the Constitution embodied in the *Commonwealth of Australia Constitution Act* 1901 (hereinafter called the Constitution) is invalid, and that the regulations made under the *Dried Fruits Act* 1928-1935, or some part thereof are likewise invalid. He complained that under and in virtue of the Act and regulations and a determination made thereunder, he had been prevented from sending his dried fruits out of South Australia in fulfilment of various inter-State contracts which he had made. The Commonwealth took out a summons to dismiss the claim as an abuse of the process of the Court in that the substantial questions had already been litigated between the parties and decided against the appellant in an action (No. 54 of 1928) entitled *James* v. *The Commonwealth* (1). The Commonwealth also demurred to the whole of the statement of claim on the grounds in law that the *Dried Fruits Act* 1928-1935, and the Dried Fruits (Inter-State Trade) Regulations are valid laws of the Commonwealth and that the acts complained of were authorized by the Act or regulations.

(1) (1928) 41 C.L.R. 442.

The summons and demurrer were heard together by the High Court of Australia. The summons was dismissed and the Commonwealth does not appeal against that dismissal. The demurrer was however allowed and the action dismissed; it is from this that the present appeal is by special leave brought. The States of New South Wales, Queensland and Victoria have intervened in support of the contentions of the Commonwealth, while the States of Tasmania and Western Australia have intervened in support of the contentions of the appellant.

The substantial question in this appeal, which is of great constitutional and commercial importance, is whether sec. 92 of the Constitution binds the Commonwealth, and if so whether the *Dried Fruits Act* and regulations contravene it.

Sec. 92 is in the following terms:—"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. But notwithstanding anything in this Constitution, goods imported before the imposition of uniform duties of customs into any State, or into any Colony which, whilst the goods remain therein, becomes a State, shall, on thence passing into another State within two years after the imposition of such duties, be liable to any duty chargeable on the importation of such goods into the Commonwealth, less any duty paid in respect of the goods on their importation."

The *Dried Fruits Act* 1928-1935 enacted by sec. 3:—"(1) Except as provided by the regulations—(*a*) the owner or person having possession or custody of dried fruits shall not deliver any dried fruits to any person for carriage into or through another State to a place in Australia beyond the State in which the delivery is made: and (*b*) the owner or any other person shall not carry any dried fruits from a place in one State into or through another State to a place in Australia beyond the State in which the carriage begins, unless he is the holder of a licence then in force, issued under this Act, authorising him so to deliver or carry such dried fruits, as the case may be, and the delivery or carriage is in accordance with the

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terms and conditions of that licence. Penalty: One hundred pounds or imprisonment for six months. (2) Prescribed authorities may issue licences, for such periods and upon such terms and conditions as are prescribed, permitting the delivery of dried fruits to any person for carriage or the carriage of dried fruits from a place in one State to a place in Australia beyond that State. (3) Any dried fruits which have been, or are in process of being, carried in contravention of this Act, shall be forfeited to the King."

There was also power to the prescribed authority to forfeit and cancel a licence and the Governor-General was authorized to make, and has made, regulations for giving effect to the Act. The relevant regulations, *Dried Fruit (Inter-State Trade) Regulations*, in force at the material times provided that an owner's licence to export should be issued on the terms (*inter alia*):—" (ii) That the licensee shall export from Australia, or cause to be exported on his behalf, during the period for which his licence has been issued and during such further period as a prescribed authority considers necessary, such percentage of the dried fruits produced in Australia during any specified periods which came into the possession or custody of the licensee prior to the date of issue of his licence, or which come into the possession or custody of the licensee on and after the date of issue of this licence, as is from time to time fixed by the Minister, upon the report of a prescribed authority, and notified in the *Gazette*."

In accordance with the Act and regulations the Commonwealth Minister of State for Commerce on 20th February 1935 determined that it should be a condition of the granting of a licence that the licensee should cause to be exported from Australia certain specified proportions, of the Australian dried fruits possessed by him, varying from 60 to 90 per cent according to the description of the fruit.

The appellant, contending that the Act and regulations and the determination were invalid, refused to apply for a licence or undertake the prescribed conditions. In consequence his consignments were seized and forfeited, and the railway authorities and shipping companies to whom he tendered his dried fruits for carriage from the State of South Australia to other States refused to take them,

in virtue of the prohibitions and penalties imposed under the Act by reason of the circumstance that the appellant had no licence.

The High Court in allowing the demurrer, did so because they could not hold that the Commonwealth was bound by sec. 92 without departing from an opinion of the High Court given in 1920 in *W. & A. McArthur Ltd.* v. *Queensland* (1), that the Commonwealth was not bound by the section: at the same time *Dixon*, *Evatt* and *McTiernan* JJ. expressed their individual views to the contrary effect. *Rich* and *Starke* JJ. devoted their opinions rather to pointing out the difficulties that would attend a reconsideration of *McArthur's Case* (1) than to an approval of the interpretation of sec. 92 which it embodied. *Starke* J. said: "The case has been acted upon for so long that this Court should now treat the law as settled. Its review should be undertaken, if undertaken at all, by the Judicial Committee" (2). It may, however, be noted that this particular question of the interpretation of sec. 92 did not directly arise in *McArthur's Case* (1); the Commonwealth was not a party and did not intervene in that case; in the words of *Rich* J., "Until the present case . . . the question has not been presented to the Court for definitive judicial decision" (3). But as *Starke* J. points out, the question cannot be decided without a careful consideration of the true effect of sec. 92 and of the numerous cases relating to State powers decided under that section. This is necessary because a principal, or, more precisely, the principal argument for the thesis maintained on behalf of the Commonwealth in this case is that sec. 92, if applied to the Commonwealth would practically nullify the express powers granted to the Commonwealth in sec. 51 (i.). It must at the outset be admitted that though the judgments in the High Court on sec. 92 present a great, and perhaps embarrassing, wealth of experience, learning and ratiocination, the decisions and the various reasons which they embody are not always easy to reconcile and present considerable differences of judicial opinion. This can cause no surprise when the extreme difficulty and high importance of the questions are remembered. Before the matter is examined in detail, some general observations may be made.

(1) (1920) 28 C.L.R. 530. (2) (1935) 52 C.L.R., at p. 589.
(3) (1935) 52 C.L.R., at p. 585.

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The Constitution of the Commonwealth was, in the words of Lord *Haldane*, delivering the judgment of this Board in *Attorney-General for the Commonwealth of Australia* v. *Colonial Sugar Refining Co. Ltd.* (1), "Federal in the strict sense of the term." He goes on to say that:—"In a loose sense the word 'Federal' may be used, as it is there" [i.e., in the *British North America Act of* 1867] "used, to describe any arrangement under which self-contained States agree to delegate their powers to a common Government with a view to entirely new Constitutions even of the States themselves. But the natural and literal interpretation of the word confines its application to cases in which these States, while agreeing on a measure of delegation, yet in the main continue to preserve their original Constitutions" (2). On the following page he adds:—"In fashioning the Constitution of the Commonwealth of Australia the principle established by the United States was adopted in preference to that chosen by Canada. It is a matter of historical knowledge that in Australia the work of fashioning the future Constitution was one which occupied years of preparation through the medium of conventions and conferences in which the most distinguished statesmen of Australia took part. Alternative systems were discussed and weighed against each other with minute care. The Act of 1900 must accordingly be regarded as an instrument which was fashioned with great deliberation, and if there is at points obscurity in its language, this may be taken to be due not to any uncertainty as to the adoption of the stricter form of Federal principle, but to that difficulty in obtaining ready agreement about phrases which attends the drafting of legislative measures by large assemblages" (3).

The broad principle of this Federal system is to be found as regards the States in particular, in sec. 107, which provides:—"107. 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 as at the admission or establishment of the State, as the case may be."

(1) (1914) A.C. at p. 252. (2) (1914) A.C., at p. 253.
(3) (1914) A.C., at p. 254.

As regards the Commonwealth, sec. 51 contains a list of thirty-nine enumerated powers with which it is vested. Sec. 52 defines the cases in which the power of the Commonwealth is to be exclusive. Sec. 51 begins as follows:—"51. The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to . . ." Then comes head (i.) which is essentially material in this case. "Trade and commerce with other countries, and among the States." Other heads are "taxation, but not so as to discriminate between States or parts of States," bounties, postal, telegraphic, telephone and other like services, quarantine, currency, banking and insurance subject to limitations, bills of exchange, influx of criminals and a number of other powers. Thus the powers of the States were left unaffected by the Constitution except in so far as the contrary was expressly provided; subject to that each State remained sovereign within its own sphere. The powers of the State within those limits are as plenary as are the powers of the Commonwealth. Thus the State has the same power as the Commonwealth to legislate for the peace, order and good government of the State with respect to inter-State trade, commerce and intercourse subject to the limitations of its territorial sovereignty and so far as sec. 109, which provides that in the event of inconsistency between the law of the Commonwealth and of a State, the former shall prevail, does not apply.

There are, however, certain sections of the Constitution which call for special mention as throwing light on secs. 51 and 92. Thus reference may be made to the sections dealing with customs and excise duties, in particular secs. 86 to 95, in the midst of which sec. 92 is placed. It is well known that one of the objects which the Federation sought to achieve was the abolition of restrictions on trade between the Colonies and of the diversity in the different States of tariffs and border regulations; this was described as "the old inter-colonial trade war" (in *McArthur's Case* (1)). Thus sec. 86 provides that on the establishment of the Commonwealth the

(1) (1920) 28 C.L.R., at p. 545.

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collection and control of duties of customs and excise shall pass to the Commonwealth, sec. 87 deals with the disposal of the revenue as between Commonwealth and States, sec. 88 provides that uniform duties of customs shall be imposed within two years after the establishment of the Commonwealth, sec. 90 provides that:—"90. On the imposition of uniform duties of customs the power of the Parliament to impose duties of customs and of excise, and to grant bounties on the production or export of goods, shall become exclusive. On the imposition of uniform duties of customs all laws of the several States imposing duties of customs or of excise, or offering bounties on the production or export of goods, shall cease to have effect, but any grant of or agreement for any such bounty lawfully made by or under the authority of the Government of any State shall be taken to be good if made before the thirtieth day of June, one thousand eight hundred and ninety-eight, and not otherwise."

Then sec. 92, after the interposition of sec. 91, which deals with bounties, follows. By sec. 95, Western Australia was given a temporary and exceptional power to impose duties of customs on goods passing into that State and not originally imported from beyond the limits of the Commonwealth, but such duties were to be collected by the Commonwealth. In addition to these sections may be noted sec. 112, which gives a State power to levy on imports and exports or on goods passing into or out of a State such charges as may be necessary for executing the inspection laws of the State, but these inspection laws are subject to be annulled by the Parliament of the Commonwealth, and the net produce of the charges is to be for the use of the Commonwealth.

Certain other sections must be read with sec. 51 (i.): thus sec. 98 specifies that trade and commerce is to include navigation and State railways, sec. 99 provides against any preference by the Commonwealth to any State in respect of trade, commerce or revenue, sec. 100 forbids the Commonwealth by any law or regulation of trade or commerce, to abridge the use of waters of rivers, and secs. 101 to 104 deal with the constitution of an inter-State commission for the execution and maintenance of the provisions of the Constitution and of laws made thereunder relating to trade and commerce.

The question then is one of construction, and in the ultimate resort must be determined upon the actual words used, read not *in vacuo* but as occurring in a single complex instrument, in which one part may throw light on another. The Constitution has been described as the Federal compact and the construction must hold a balance between all its parts. Though the question here is not as to the division of powers between Commonwealth and States, but as to the existence in the Commonwealth of the power which is impugned, yet it is appropriate to apply the words of Lord *Selborne* in *R.* v. *Burah* (1) :—" The established Courts of Justice, when a question arises [in regard to a Constitution] whether the prescribed limits have been exceeded, must of necessity determine that question ; and 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."

It is true that a Constitution must not be construed in any narrow and pedantic sense. The words used are necessarily general and their full import and true meaning can often only be appreciated when considered, as the years go on, in relation to the vicissitudes of fact which from time to time emerge. It is not that the meaning of the words changes, but the changing circumstances illustrate and illuminate the full import of that meaning. It has been said that " in interpreting a constituent or organic statute such as the Act [i.e., the *British North America Act*], that construction most beneficial to the widest possible amplitude of its powers must be adopted " (*British Coal Corporation* v. *The King* (2)). But that principle may not be helpful, where the section is, as sec. 92 may seem to be, a constitutional guarantee of rights, analogous to the guarantee of religious freedom in sec. 116, or of equal right of all

(1) (1878) 3 App. Cas. 889, at pp. 904, 905. (2) (1935) A.C. 500, at p. 518.

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residents in all States in sec. 117. The true test must, as always, be the actual language used. Nor can any decisive help here be derived from evidence of extraneous facts existing at the date of the Act of 1900; such evidence may in some cases help to throw light on the intention of the framers of the statute, though that intention can in truth be ascertained only from the language used. But new and unanticipated conditions of fact arise. It may be that in 1900 the framers of the Constitution were thinking of border tariffs and restrictions in the ordinary sense and desired to exclude difficulties of that nature, and to establish what was and still is called "free trade," and to abolish the barrier of the State boundaries so as to make Australia one single country. Thus they presumably did not anticipate those commercial and industrial difficulties which have in recent years led to marketing schemes and price control, or traffic regulations such as those for the co-ordination of rail and road services, to say nothing of new inventions, such as aviation or wireless. The problems, however, of the Constitution can only be solved as they emerge by giving effect to the language used.

Before their Lordships proceed to the task of construction they may observe that they cannot shelter under the decision in *McArthur's Case* (1), as the High Court felt they ought to do. The construction of sec. 92 has recently been dealt with by this Board in *James* v. *Cowan* (2), where it was said:—"At one time in the argument it was suggested that to determine the point it would be necessary to come to a conclusion on a matter which has been decided differently at different times by the High Court—namely, whether sec. 92 applies to the Commonwealth as well as to the individual States. If to both, it was almost conceded that no question of limits *inter se* would arise. If to the States alone, then the violation of sec. 92 would, it is said, amount to an invasion of Commonwealth powers which would involve a question under sec. 74. Their Lordships, however, do not find it necessary to decide the question as to the application of sec. 92, which will remain for them an open question. If the implied prohibition in sec. 92 applies

(1) (1920) 28 C.L.R. 530.
(2) (1932) A.C. 542, at p. 560; 47 C.L.R. 386, at pp. 397, 398.

to both Commonwealth and States it would seem reasonably clear that there are no competing powers; the prohibited area is denied to both. But similarly, if the prohibition is addressed to the States alone, no question arises as to limits of powers between State and Commonwealth."

Hence the actual decision in that case does not throw light directly on the question before their Lordships in this appeal. This Board were there dealing with the effect of sec. 92 in the special circumstances of that case; no doubt they were considering the section only as applying to the States, but the decision must be considered now, along with the various decisions in the High Court in order to examine the argument that there is such an antinomy between sec. 51 and sec. 92 that they cannot both apply to the Commonwealth. The argument advanced on behalf of the respondents, may be baldly thus expressed: trade and commerce mean the same thing in sec. 51 (i.) and in sec. 92: the former section gives the Commonwealth power to make laws with respect to inter-State trade and commerce: sec. 92 enacts that inter-State trade and commerce are to be absolutely free: "absolutely free" means absolutely free from all governmental interference and control, whether legislative or executive: hence, it is said, there arises a direct and complete antinomy. The solution propounded has an attractive aspect of simplicity, but is it not merely illusory? Will it bear examination? Furthermore, the solution is not that sec. 92 simply cancels sec. 51 (i.), but that sec. 51 (i.) over-rides sec. 92 so that the Commonwealth is unaffected by sec. 92, though sec. 51 (i.) is prefaced by the words "subject to the Constitution," of which sec. 92 is a part, and though the provision for absolute freedom of inter-State trade would obviously come to nothing, if the Commonwealth were unaffected by sec. 92. The section on its face is not qualified or limited.

Before turning to the statute with the object of construing its language in order to settle the problem, it seems to be convenient to refer briefly to some of the decisions of the High Court and to the decision of the Judicial Committee in order to see if they support the theory that there is the complete antinomy or overlapping between the two sections which has been propounded. It will be remembered that these decisions deal with sec. 92 as applied to the

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States but they are helpful in seeking to ascertain what exactly sec. 92 means.

In the decisions of the High Court on sec. 92 a line is generally drawn at *McArthur's Case* (1) in 1920. Before that case, the Judges of the High Court (including *Griffith* C.J. and *Isaacs*, *Barton* and *Gavan Duffy* JJ.) referred to the question and stated expressly that it applied equally to Commonwealth and States: it was also incidentally observed that sec. 92 left scope for the Commonwealth to act under sec. 51 (i.).

The first case to be noted is *Fox* v. *Robbins* (2), where it was held that a State law requiring a higher licence fee to be paid for selling wine manufactured from fruit grown in another State was invalid under sec. 92. "This provision," said *Griffith* C.J., "would be quite illusory if a State could impose disabilities upon the sale of the products of other States which are not imposed upon the sale of home products (3)." The extra fiscal burden imposed on the imported products was clearly inconsistent with the absolute freedom of the border. In *R.* v. *Smithers*; *Ex parte Benson* (4), it was held that "intercourse" in sec. 92 was not limited to commercial intercourse and that the right of the people of Australia to cross a State line was not so restricted. *Isaacs* J. said:—"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 (5)." An Act prohibiting the entry into the State of ex-criminals from another State was held by *Isaacs* and *Higgins* JJ. to be invalid.

The three other cases before 1920 were not quite so simple. They dealt with war-time State Acts for expropriating foodstuffs or for keeping them within the State. The first, generally described as the *Wheat Case* (6), held that the *Wheat Acquisition Act* 1914, of New South Wales, was not a contravention of sec. 92; wheat had been expropriated under that Act, subject to compensation, contracts were to be cancelled so far as not completed by delivery. *Isaacs* J. thus summed up his opinion:—"I am clearly of opinion that sec.

(1) (1920) 28 C.L.R. 530.
(2) (1909) 8 C.L.R. 115.
(3) (1912) 16 C.L.R., at pp. 119, 120.
(4) (1912) 16 C.L.R. 99.
(5) (1912) 16 C.L.R., at p. 117.
(6) (1915) 20 C.L.R. 54.

92 has no such function, and that while neither States nor Commonwealth can detract from the absolute freedom of trade and commerce between Australian citizens in the property they possess, there is nothing to prevent either States or Commonwealth, for their own lawful purposes, from becoming themselves owners of that property and applying it, according to law, to the common welfare" (1). *Gavan Duffy* J. said :—"It is to be observed that sec. 51 (i.) of the Constitution enables Parliament to make laws for the peace, order, and good government of the Commonwealth with respect to 'Trade and commerce with other countries, and among the States.' The words 'absolutely free' in sec. 92 must, therefore, be subject to some limitation so as to give them a meaning which is consistent with the existence of this legislative power, and the meaning when ascertained must be the same always and in all conceivable circumstances; it must apply equally when we are considering the right of the Commonwealth to legislate under sec. 51 (i.), and of the States to legislate under sec. 107" (2).

But this case which has never been expressly overruled, was distinguished in *Foggitt Jones & Co.* v. *New South Wales* (3), where it was held that an Act declaring that all stock and meat in the State should be kept at the disposal of the Government in aid of army supplies, was in breach of sec. 92 because it prevented the transport of the stock across the border though the property in the stock was left in the owners. Soon afterwards, in *Duncan* v. *Queensland* (4), a different conclusion was arrived at by the majority of the Court on an Act not apparently distinguishable in its terms from the New South Wales Act; it was there said that the Act operated as "a dedication of the stock and meat to public purposes." To the objection that the stock was removed from employment in inter-State trade, so that it could not be moved into another State, the answer was given that the real object of the Act was to conserve the stock and meat for the use of the Imperial forces.

The correctness of this last case may be questioned, and was indeed expressly dissented from in *McArthur's Case* (5) by the

(1) (1915) 20 C.L.R., at p. 101.
(2) (1915) 20 C.L.R., at pp. 104, 105.
(3) (1916) 21 C.L.R. 357.
(4) (1916) 22 C.L.R. 556.
(5) (1920) 28 C.L.R. 530.

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majority of the Court, but what is clear is that in this and the preceding cases the High Court was concerned with the question of freedom in passing the State borders. It might well be said that that freedom was not affected by a requisition, but was affected by a measure which prevented the taking of goods across the border into another State.

Then came *McArthur's Case* (1)—which introduced a new conception. The question there was not limited to the question of freedom from restriction or burden or impost because of or in respect of actual or prospective passing from State to State. The freedom claimed and admitted was freedom from all governmental control extending over the whole of any transaction which is treated as having the characteristic of inter-State commerce. This is something which goes beyond the mere act of transportation over the territorial frontier. "All the commercial dealings and all the accessory methods in fact adopted by Australians to initiate, combine and effectuate the movement of persons and things from State to State are all parts of the concept, because they are essential for accomplishing the acknowledged end (2)." "Absolutely free" means, so the majority of the Court held, free from all governmental control by every governmental authority to whom the command contained in the section is addressed, that is, as trade and commerce and intercourse. But liberty it is conceded is not equivalent to anarchy or license. The analogy of free speech was adduced, as an instance in which freedom was reconciled with law. But this wide conception of the freedom given under sec. 92, if applied to the Commonwealth, would, so the judgment proceeded, practically nullify sec. 51 (i.) and render impossible various Commonwealth Acts, so far as they relate to inter-State transactions, such as the *Australian Industries Preservation Act*, and others; hence the conclusion was reached that sec. 92 cannot apply to the Commonwealth. The Act in question in that case was the Queensland *Profiteering Prevention Act* 1920, which made it unlawful for any trader in the State whether as principal or agent to sell goods at prices higher than the prices declared: the issue was whether agents for the plaintiffs, a Sydney firm, were committing a breach by selling in the State, at prices

(1) (1920) 28 C.L.R. 530. (2) 28 C.L.R., at p. 549.

higher than the prescribed prices, goods of the plaintiffs to be despatched from Sydney and delivered to the purchasers in the State. It was held that the Act was invalid as contravening sec. 92: in other words the protection of sec. 92 was taken to extend over the whole of the transaction until the sale was completed by delivery. There was no prevention or hindrance under the Act in respect of the passage of goods from State to State; the law applied equally to all goods sold in the State whether or not they came across the border; there was no discrimination against the plaintiffs' goods: rather there was discrimination in favour of them: they were held to fall into a class of privileged goods. It was said the prices might be so fixed as to place the sellers from the adjoining States at a disadvantage and have the same effect as a customs duty or bounty. But nothing of the sort was suggested to be in fact the case; on the contrary it seems these sellers had a preference. In truth the decision deprived Queensland of its sovereign right to regulate its internal prices.

Thus the theory that sec. 92 did not bind the Commonwealth came into existence twenty years after the Commonwealth Act and as a corollary to a new construction of sec. 92.

Reference may now be made to later cases in which this idea appears to have been departed from. In *Roughley* v. *New South Wales*; *Ex parte Beavis* (1), the validity of the *Farm Produce Agents Act* 1926 (N.S.W.) was attacked. That Act made it an offence for any person in the State to act as a farm produce agent unless licensed by the State; it required a farm produce agent to produce accounts and obey various other regulations. The question was whether that Act could legally be applied to agents selling for principals in other States who sent their goods to Sydney for sale; it was claimed that the Act was invalid because it infringed sec. 92 as interfering with the freedom exacted by that section. That claim was rejected by the majority of the Court (*Starke* J. dissenting), on the ground that the agents' operations were purely intra-State or domestic, and constituted a separate business, distinct from that of their principals. But *Isaacs* J. consistently with *McArthur's Case* (2) said:—"All agency is forbidden in the nature of farm produce agency, except

(1) (1928) 42 C.L.R. 162.

(2) (1920) 28 C.L.R. 530.

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as prescribed. Therefore, agency as a part, and in many cases an essential part, of inter-State trade is included. That is patently an infringement of sec. 92 " (1).

In this connection it is convenient to pass at once, returning later to certain intervening cases, to an important series of cases, of which *R.* v. *Vizzard*; *Ex parte Hill* (2) affords the best example. The question in that case was whether the *State Transport (Co-ordination) Act* 1931 (N.S.W.) contravened sec. 92. That Act provided that no public motor vehicle should be operated in the State unless it was licensed; a Board was established with wide powers to grant or refuse licences and also to impose conditions; a licence fee was to be paid. For various reasons, in particular the heavy State expenditure on railways and roads, the problem of co-ordinating railway and road services had become of great national importance. The appellant's motor lorry was a commercial vehicle used for the conveyance of goods from Melbourne to a place in New South Wales. It was not licensed, with the result that the driver was convicted under the Act. He appealed on the ground that the Act was invalid because it contravened sec. 92. *Gavan Duffy* C.J., *Rich*, *Evatt* and *McTiernan* JJ. held it did not. *Starke* and *Dixon* JJ. dissented. The validity of the two propositions laid down in *McArthur's Case* (3) was there for the first time formally challenged. The Commonwealth had intervened and on their behalf that distinguished constitutional lawyer, Sir *Robert Garran*, K.C., submitted that within the limits to which sec. 92 should be confined, it bound the Commonwealth and that the ruling in *McArthur's Case* (3) was wrong. *Gavan Duffy* C.J., *Evatt* and *McTiernan* JJ. agreed with this argument in principle though *Gavan Duffy* C.J. thought it unnecessary that there should be an express decision by his casting vote. The elaborate judgment of *Evatt* J. in that case is of great importance. It is impossible to quote here at length from it; one short passage (4) may be extracted :—" Sec. 92 does not guarantee that, in each and every part of a transaction which includes the inter-State carriage of commodities, the owner of the commodities, together with his servant and agent and each and every independent

(1) (1928) 42 C.L.R., at p. 185.
(2) (1933) 50 C.L.R. 30.
(3) (1920) 28 C.L.R. 530.
(4) (1933) 50 C.L.R., at p. 94.

contractor co-operating in the delivery and marketing of the commodities, and each of his servants and agents, possesses, until delivery and marketing are completed, a right to ignore State transport or marketing regulations, and to choose how, when and where each of them will transport and market the commodities." *Evatt* J. points out that *Roughley's Case* (1) is in truth inconsistent with what was laid down in *McArthur's Case* (2). If this reasoning, which in *Vizzard's Case* (3) was primarily applied to the States, as it seems to be, is correct, then in principle it applies *mutatis mutandis* to the Commonwealth's powers under sec. 51 (i.) and shows that sec. 51 (i.) has a wider range than that covered by sec. 92.

Vizzard's Case (3) was followed in *O. Gilpin Ltd.* v. *Commissioner for Road Transport and Tramways (N.S.W.)* (4). A similar case had been *Willard* v. *Rawson* (5).

James v. *Cowan* (6) had by that time been decided by this Board. That authority dealt with dried fruits legislation enacted by the State of South Australia: His Majesty in Council reversed the decision of the High Court, preferring the dissenting judgment of *Isaacs* J., and held that the State Act which gave to the State powers of compulsory acquisition and the orders and seizures made under it, were invalid as contravening sec. 92. The Board held that the Act in question, partly by reason of its actual provisions, partly by reason of its admitted object, was tantamount to a prohibition of export: Lord *Atkin* said (7), in reference to the powers of expropriation:— "If the real object of arming the Minister with the power of acquisition is to enable him to place restrictions on inter-State commerce, as opposed to a real object of taking preventive measures against famine or disease and the like, the legislation is as invalid as if the Legislature itself had imposed the commercial restrictions." He added:—"It may be conceded that, even with powers granted in this form, if the Minister exercised them for a primary object which was not directed to trade or commerce, but to such matters as defence against the enemy, prevention of famine, disease and the

(1) (1928) 42 C.L.R. 162.
(2) (1920) 28 C.L.R. 530.
(3) (1933) 50 C.L.R. 30.
(4) (1935) 52 C.L.R. 189.
(5) (1933) 48 C.L.R. 316.
(6) (1932) A.C. 542; 47 C.L.R. 386.
(7) (1932) A.C., at pp. 558, 559; 47 C.L.R., at pp. 396, 397.

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like, he would not be open to attack because incidentally inter-State trade was affected."

The importance of this decision for the present purpose is that the test there adopted was whether the object of the Act was to prevent "the sale of the balance of the output in Australia"; the Act was directed "against selling to any of the States" in Lord *Atkin's* words; so regarded the case is simply that of a restriction or prohibition of export from State to State, which necessarily involves an interference with the absolute freedom of trade among the States. The Board found it unnecessary to undertake the difficult task of defining the precise boundaries of the absolute freedom granted to inter-State commerce by sec. 92.

James v. *Cowan* (1) was followed and applied by the High Court (*Evatt* J. dissenting) in *Peanut Board* v. *Rockhampton Harbour Board* (2), in which the *Wheat Case* (3) was distinguished. The producers of the peanuts, it was held, were prevented by the Act from engaging in inter-State and other trade in the commodity. The Act embodied, so the majority of the Court held, a compulsory marketing scheme, entirely restrictive of any freedom of action on the part of the producers; it involved a compulsory regulation and control of all trade, domestic, inter-State and foreign; on the basis of that view, the principles laid down by this Board were applied by the Court.

There are only a few other cases to which their Lordships desire to refer. *Vacuum Oil Co. Pty. Ltd.* v. *Queensland* (4) was a case in which it was held that a burden placed (in substance) on the first seller in the State of imported petroleum, was in truth, though not in form, a sort of tax or impost; so regarded it clearly infringed sec. 92, though its operation and incidence only took effect at an interval after the border was passed.

The earlier case of *Ex parte Nelson* [*No.* 1] (5) may be contrasted with the case of *Tasmania* v. *Victoria* (6). In the latter case the validity of a Victorian proclamation was attacked: the proclamation absolutely prohibited the importation into Victoria of potatoes from Tasmania: it was held to be invalid not only because it was

(1) (1932) A.C. 542; 47 C.L.R. 386.
(2) (1933) 48 C.L.R. 266.
(3) (1915) 20 C.L.R. 54.
(4) (1934) 51 C.L.R. 108.
(5) (1928) 42 C.L.R. 209.
(6) (1935) 52 C.L.R. 157.

unauthorized by the State Act under which it purported to be made, but because it contravened sec. 92; it directly and absolutely put an end to the trade in potatoes between those States. It was said (1) in the judgment of *Gavan Duffy* C.J., *Evatt* and *McTiernan* JJ.:— "In the present case it is neither necessary nor desirable to mark out the precise degree to which a State may lawfully protect its citizens against the introduction of disease, but, certainly, the relation between the introduction of potatoes from Tasmania into the State of Victoria and the spread of any disease in the latter is, on the face of the Act and the proclamation, far too remote and attenuated to warrant the absolute prohibition imposed." In *Nelson's Case* (2), the Act authorized the proclamation prohibiting or more correctly restricting the introduction into the State of cattle from a district in another State in which there was reason to believe infectious or contagious disease in stock existed. The High Court was equally divided; the view which prevailed that the Act was valid seems to have been based on the ground that the true nature of the legislation was not to restrict freedom of inter-State commerce, but to protect the flocks and herds of New South Wales against contagious and infectious diseases. This view was disputed by the three Judges who dissented. In *Tasmania* v. *Victoria* (3) some of the Judges in that case also questioned the correctness of that view while upholding the actual decision on other grounds. It is certainly difficult to read into the express words of sec. 92 an implied limitation based on public policy. It is true that once the cattle or goods have crossed the border, they become liable to inspection under sec. 112 and also to the State laws of health and sanitation; that circumstance may render the difficulty of principle less important practically. But the question whether in proper cases the maxim "*salus populi est suprema lex*" could be taken to override sec. 92 is one of great complexity. Their Lordships in this case will accordingly follow the example set by this Board in *James* v. *Cowan* (4) and treat the question as reserved until it arises, if it ever does.

This survey of the cases, as it is, inevitably brief and incomplete has been undertaken simply in order to show that the propositions

(1) (1935) 52 C.L.R., at p. 168.
(2) (1928) 42 C.L.R. 209.
(3) (1935) 52 C.L.R. 157.
(4) (1932) A.C. 542; 47 C.L.R. 386.

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laid down in *McArthur's Case* (1), which are the foundations of the respondent's argument that sec. 92 does not bind the Commonwealth, were not merely novel when first enunciated, but have not been applied by the High Court in practice in subsequent decisions, though re-affirmed from time to time in dissenting judgments.

Before their Lordships proceed to construe the relevant sections of the Constitution, they desire to notice the argument that certain Federal statutes have been enacted on the assumption that sec. 92 does not bind the Commonwealth.

The *Post and Telegraph Act* 1901-1923, contains a great number of detailed regulations with reference to the posting, stamping, delivery and so forth of letters, the transmission of telegrams, etc., including inter-State intercourse. But if freedom is understood in a certain sense, all these matters come within the powers given by sec. 51 (i.) and (v.) to make laws with respect to trade and commerce and postal and other services. Sec. 98 of the Act calls for special notice : it forbids and makes it an offence subject to specified exceptions to send or carry a letter for reward otherwise than by post. As this provision applies to inter-State as well as intra-State correspondence, it is in one sense a limitation on freedom of intercourse, assuming that term to include correspondence and it may thus be regarded as an interference with trade. Whether that is so or not, it is however a limitation notoriously existing in ordinary usage in all modern civilized communities ; it does not impede freedom of correspondence, but merely as it were, canalizes its course just as " free speech " is limited by well known rules of law. Very much the same is true of the *Wireless Telegraph Act* 1905. Nor can it be fairly said that the *Secret Commission Act* 1905, interferes with freedom of commerce in any sense in which that term is properly used. It forbids irrespective of any State boundary, objectionable trade practices in inter-State trade. It merely illustrates how the Commonwealth can make laws under sec. 51 (i.) with respect to inter-State trade and commerce without infringing sec. 92. The same is true of the *Commerce (Trade Description) Act* 1905-1933, which is merely directed to a special form of falsification. The *Australian Industries Preservation Act* 1906-1930 is for the repression

(1) (1920) 28 C.L.R. 530.

of destructive monopolies and is aimed at preventing illegitimate methods of trading. Similarly the *Sea Carriage of Goods Act* 1924, which, following the British Act, adopts the Hague Rules, and requires that any bill of lading to which the Act applies must either in fact conform to or must be deemed to conform to the conditions embodied in these Rules, does not even render compulsory the issue of a bill of lading; it merely says that if the parties choose to have a bill of lading it must contain or be deemed to contain the prescribed stipulations. The *Transport Workers Act* 1928-1929 was discussed in *Huddart Parker Ltd.* v. *The Commonwealth* (1), where the validity of regulations made under the Act was upheld, the point raised being whether the matter fell within the Commonwealth powers under sec. 51 (i.). Sec. 92 was not discussed because it was assumed that sec. 92 did not apply to the Commonwealth. Indeed, as already stated, the question whether sec. 92 applied to the Commonwealth has never been the subject of decision in any case until the present. In the same way, *James* v. *The Commonwealth* (2) was decided on other grounds, it being assumed that sec. 92 did not bind the Commonwealth. In the *Transport Workers Act* as in other like statutes, which need not be further here enumerated or discussed, there was no question of interference with freedom in passing across the State borders; they merely illustrate the width of the powers given by sec. 51 (i.). On the other hand, the *Dairy Produce Act* 1933-1935, raises exactly the same issue as that raised in this case in respect of the *Dried Fruits Act* 1928-1935.

It is now convenient to examine the actual language of the Constitution so far as relevant, in order to ascertain its true construction.

The first question is what is meant by "absolutely free" in sec. 92. It may be that the word absolutely adds nothing. The trade is either free or it is not free. "Absolutely" may perhaps be regarded as merely inserted to add emphasis. The expression "absolutely free" is generally described as popular or rhetorical. On the other hand "absolutely" may have been added with the object of excluding the risk of partial or veiled infringements. In any case the use of the language involves the fallacy that a word completely general

(1) (1931) 44 C.L.R. 492.

(2) (1928) 41 C.L.R. 442.

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and undefined is most effective. A good draftsman would realize that the mere generality of the word must compel limitation in its interpretation. "Free" in itself is vague and indeterminate. It must take its colour from the context. Compare, for instance, its use in free speech, free love, free dinner and free trade. Free speech does not mean free speech; it means speech hedged in by all the laws against defamation, blasphemy, sedition and so forth; it means freedom governed by law as was pointed out in *McArthur's Case* (1). Free love, on the contrary, means licence or libertinage, though even so there are limitations based on public decency and so forth. Free dinner generally means free of expense, and sometimes a meal open to anyone who comes, subject however to his condition or behaviour not being objectionable. Free trade means in ordinary parlance freedom from tariffs.

Free in sec. 92 cannot be limited to freedom in the last-mentioned sense. There may at first sight appear to be some plausibility in that idea, because of the starting point in time specified in the section, because of the sections which surround sec. 92 and because the proviso to sec. 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.

Nor does "free" necessarily connote absence of discrimination between inter-State and intra-State trade? No doubt conditions restrictive of freedom of trade among the States will frequently involve a discrimination; but that is not essential or decisive. An Act may contravene sec. 92 though it operates in restriction both of intra-State and of inter-State trade. A compulsory seizure of goods such as that in *James* v. *Cowan* (2) may include indifferently goods intended for intra-State trade and goods intended for trade among the States. Nor can freedom be limited to freedom from legislative control; it must equally include executive control.

Then there is the conception enunciated in *McArthur's Case* (1) that "free" means free from every sort of impediment or control

(1) (1920) 28 C.L.R. 530.

(2) (1932) A.C. 542; 47 C.L.R. 386.

by any organ of Government, legislature or executive to which sec. 92 is addressed with respect to trade, commerce or intercourse, considered as trade, commerce and intercourse. The scope of this view has already been indicated. It involves a conception of inter-State trade, commerce and intercourse commencing at whatever stage in the State of origin the operation can be said to begin and continuing until the moment in the other State when the operation of inter-State trade can be said to end: the freedom is postulated as attaching to every step in the sequence of events from first to last. Now it is true that for purposes of sec. 51 (i.), the legislative powers of the Commonwealth may attach to the whole series of operations which constitute the trade in question, once it has fallen into the category of inter-State trade; hence the various Acts to some of which reference has been made here. But when it is sought to apply this to sec. 92, difficulties at once arise. It seems in practice only to have been so applied in *McArthur's Case* (1), and it is doubtful if it was so applied even there, but it has been rejected in *Roughley's Case* (2) and in *Vizzard's Case* (3), and the other transport cases. But even in *McArthur's case* (1) it was recognized that such freedom was qualified; the analogue of freedom of speech was there taken, but it has already been explained what limitations that involves. Nor is help to be derived from speaking of freedom of trade as trade: as well speak of freedom of speech as speech. Every step in the series of operations which constitute the 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 as trade. If the transaction is one of sale, it is governed at every stage, from making the contract, until delivery—by the relevant *Sale of Goods Act*. If it is a bill of exchange, similarly the *Bills of Exchange Act* applies. If it involves sea, railway or motor carriage, relevant Acts operate on it; it is subject to executive or legislative measures of State or Commonwealth dealing with wharfs or warehouses or transport workers. It must be so subject. Otherwise the absurd result would follow that the inter-State operation of trade would be immune from the laws of either State, of the State of origin equally with the

(1) (1920) 28 C.L.R. 530. (2) (1928) 42 C.L.R. 162.
(3) (1933) 50 C.L.R. 30.

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other State. There would thus be in every State a class of dealings and acts entirely immune from the general law of the State, though only distinguishable from other like dealings and acts by the fact that they are parts of an inter-State transaction. It is to avoid this paradox, that it was said that the gap can only be filled up by the Commonwealth—a point for the moment reserved.

But if freedom is to be found in practice the line must be drawn somewhere. If no help is to be got from the formula " trade and commerce as such," neither can it be found by saying that freedom under sec. 92 is applied to acts not persons. For instance it is said a man may be arrested for crime while about to cross the frontier in the course of a trade operation, and that is no infringement of sec. 92. That is true enough, but not very helpful: trade no doubt consists of acts (including documents), but acts imply persons who perform or create them even if only to work the necessary machines. Nor is much help to be got by reflecting that trade may still be free, though the trader has to pay for the different operations, such as tolls, railway rates, freight and so forth. Nor has it been suggested that sec. 92 bars the seller's ordinary right of stoppage *in transitu* if the sale is inter-State.

If no definite delimitation of the relevant idea of freedom is to be derived from these considerations, in particular, if the formula freedom of trade " as such " is not sufficient, where is the line to be drawn and where is the necessary delimitation to be found? The true criterion seems to be that what is meant is freedom as at the frontier or, to use the words of sec. 112, in respect of " goods passing into or out of the State." What is meant by that needs explanation. The idea starts with the admitted fact that federation in Australia, was intended (*inter alia*) to abolish the frontiers between the different States and create one Australia. That conception involved freedom from customs duties, imports, border prohibitions and restrictions of every kind: the people of Australia were to be free to trade with each other and to pass to and fro among the States without any burden, hindrance or restriction based merely on the fact that they were not members of the same State. But it has become clear from the various decisions already cited that such burdens and hindrances may take diverse forms, and indeed appear under various disguises.

One form may be a compulsory acquisition of goods, as in *James* v. *Cowan* (1), or the *Peanut Case* (2), 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. Another form may be that of placing a special burden on the goods in the State to which they have come, simply because they have come from the other State, as in the *Vacuum Oil Case* (3); more obvious cases are those of undisguised restrictions on passing from State to State. The actual restraint or burden may operate while the goods are still in the State of origin, as in the case of a compulsory expropriation or a standstill order, or it may operate after they have arrived in the other State, as in the *Vacuum Oil Case* (3). In every case it must be a question of fact, whether there is an interference with this freedom of passage. Their Lordships are of opinion that this construction is not inconsistent with any decided case, with the doubtful exception of *McArthur's Case* (4). As a matter of actual language, freedom in sec. 92 must be somehow limited, and the only limitation which emerges from the context and which can logically and realistically be applied is freedom at what is the crucial point in inter-State trade, that is at the State barrier.

This construction also makes sec. 51 (i.) consistent with sec. 92, so far as concerns the Commonwealth, which in their Lordships' judgment, as they will now state, is bound by sec. 92 equally with the States. So far as the language of the section goes, no countenance is afforded for the contrary view. The language is quite general. It is in terms not subject to any exception or limitation. It is the declaration of a guaranteed right; it would be worthless if the Commonwealth was completely immune and could disregard it by legislative or executive act. It is difficult if not impossible to conceive that anyone drafting a statute, especially an organic statute like the Constitution, would have written out sec. 92 in its present form, if what was intended was a constitutional guarantee limited to the States but ineffective so far as regards the Commonwealth. Sec. 92 is found in a series of sections which deal both with the Commonwealth and the States: indeed the proviso to sec. 92 directly applies

(1) (1932) A.C. 542; 47 C.L.R. 266.
(2) (1933) 48 C.L.R. 266.
(3) (1934) 51 C.L.R. 108.
(4) (1920) 28 C.L.R. 530.

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to the Commonwealth. The Constitution when it is enacting a section which is only to apply either to the Commonwealth or to the States exclusively, indicates that intention in clear terms, as in secs. 98, 99, 100, 102, 116, which specifically relate to the Commonwealth, and secs. 111, 112, 113, 114 and 115. It is true that there are certain sections which deal specifically with the trade and commerce power of the Commonwealth, in particular, secs. 98, 99, 100, though these sections do not either individually or collectively cover the same ground as sec. 92 ; there are also other sections which relate specifically to the trade powers of the States, in particular sec. 112 (inspection laws) and 113 (liquor laws). None of these sections however directly help in the construction of sec. 92.

The real argument on which the theory is based that sec. 92 does not bind the Commonwealth is that sec. 92 if it applied to the Commonwealth would nullify or practically nullify sec. 51 (i.). If that were so, the same would be true of various other heads in sec. 51. That was the theory expounded in *McArthur's Case* (1). Their Lordships have explained why they reject that theory. They will only add a few observations. One is that though trade and commerce mean the same thing in sec. 92 as in sec. 51 (i.), they do not cover the same area, because sec. 92 is limited to a narrower context by the word " free " ; the critical test of the scope of sec. 92 is to ascertain what is meant by " free " ; their Lordships have sufficiently stated, and will not repeat, their opinion on that point. But if that theory enunciated in *McArthur's Case* (1) fails, the only substantial argument for the respondent's contention fails. It may further be observed in reference to the contention that there is antimony between sec. 92 and sec. 52 (i.), that the same antimony would arise between sec. 92 and sec. 107. By sec. 107 every State power is saved unless it is exclusively vested in the Commonwealth or withdrawn from the Parliament of the State. Sec. 51 (i.) does not give exclusive powers to the Commonwealth. Each State has therefore the full power except where sec. 109 applies, to interfere with inter-State freedom, within its own territory and at its border ; hence if sec. 92 were construed as the respondents contend, there would be exactly the same antimony in regard to the States ; the only difference would be that sec. 51 (i.) is express ; but that

(1) (1920) 28 C.L.R. 530.

is immaterial because both sec. 51 (i.) and sec. 107 are expressly subject to the Constitution and the latter section imports every State power as fully as if specifically set out, whereas the Commonwealth only possesses powers expressly conferred. There could be no question in regard to the Commonwealth of powers withdrawn.

For these reasons their Lordships are of opinion that sec. 92 binds the Commonwealth. On that footing it seems to follow necessarily that the *Dried Fruits Act* 1928-35 must be held to be invalid. On the interpretation of " free " in sec. 92, the Acts and the regulations either prohibit entirely, if there is no licence, or if a licence is granted, partially prohibit inter-State trade. Indeed the contrary was but faintly contended if the Commonwealth were held to be bound by the section.

The conclusion of the matter is that in their Lordships' judgment sec. 92 applies to the Commonwealth and that being so, the *Dried Fruits Act* and regulations should be declared invalid as contravening sec. 92.

The result is that in their Lordships' judgment the Commonwealth should be held to have failed in its attempt by the method adopted under the Act in question to control prices and establish a marketing system, even though the Commonwealth Government are satisfied that such a policy is in the best interests of the Australian people. Such a result cannot fail to cause regrets. But these inconveniences are liable to flow from a written Constitution. Their Lordships cannot arrive at any conclusion save that they could not give effect to the respondents' contention consistently with any construction of the Constitution which is in accord with sound principles of interpretation. To give that effect would amount to re-writing, not to construing, the Constitution. That is not their Lordships' function. The Constitution, including sec. 92, embodied the will of the people of Australia, and can only be altered by the will of the people of Australia expressed according to the provisions of sec. 128.

Though their Lordships are reversing the decision of the High Court, they do so with the greatest respect for the opinions of the distinguished Judges who have thought differently, and they do so with peculiar diffidence and reluctance on a constitutional matter. They have, however, the consolation that they are giving effect to

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the declared opinion of three of the five Judges of the High Court who sat in this case, while the other two seemed to indicate that their individual opinions tended the same way. But all five Judges thought they should follow what had been regarded as the law in the High Court for many years, and leave its reconsideration to the Judicial Committee, where as stated in *James* v. *Cowan* (1), it was an open question, and must here be dealt with on that footing.

Their Lordships wish to express their appreciation of the help given to them by the counsel who have argued in this appeal, in particular the Attorney-General for the Commonwealth, the merit of whose admirable argument is in no way diminished because it has not succeeded.

In the result the appeal in their Lordships' judgment should be allowed, the demurrer should be overruled and the matter remitted for trial to the High Court. The respondents should pay the appellant's costs and bear their own costs of the hearing below and of this appeal. The interveners will bear their own costs.

Their Lordships will humbly so advise His Majesty.

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Solicitors for Victoria, intervening, *Freshfields, Leese & Munns.*

Solicitors for New South Wales and Queensland, intervening, *Light & Fulton.*

Solicitors for Western Australia and Tasmania, intervening, *Galbraith & Best.*

(1) (1932) A.C. 542 ; 47 C.L.R. 386.