REPORTS OF CASES

DETERMINED IN

HIGH COURT OF AUSTRALIA

[HIGH COURT OF AUSTRALIA.]

BANK OF NEW SOUTH WALES AND OTHERS . . . . . } PLAINTIFFS;

AND

THE COMMONWEALTH AND OTHERS . DEFENDANTS.

BANK OF AUSTRALASIA AND OTHERS . PLAINTIFFS;

AND

THE COMMONWEALTH AND OTHERS . DEFENDANTS.

STATE OF VICTORIA AND ANOTHER . PLAINTIFFS;

AND

THE COMMONWEALTH AND OTHERS . DEFENDANTS.

STATE OF SOUTH AUSTRALIA AND ANOTHER . . . . . } PLAINTIFFS;

AND

THE COMMONWEALTH AND OTHERS . DEFENDANTS.

STATE OF WESTERN AUSTRALIA AND ANOTHER . . . . . } PLAINTIFFS;

AND

THE COMMONWEALTH AND OTHERS . DEFENDANTS.

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MELBOURNE, *Feb.* 9-12, 16-20, 23-27; *March* 1-5, 8-12, 15-19, 22-25, 31; *April* 1, 2;

SYDNEY, *April* 13-15, *Aug.* 11.

Latham C.J., Rich, Starke, Dixon, McTiernan and Williams JJ.

Appl *Timberts & Repatriation Commission, Re* 16 ALD 19

Foll *Peters v A-G (NSW)* 37 ACrimR 102

Cons *State Bank of NSW v Cth Savings Bank of Australia* 161 CLR 639

Foll *Bourke v State Bank of New South Wales* 85 ALR 61

Cons *Crouch v Commissioner for Railways (Qld)* 159 CLR 22

Appl *NSW Aboriginal Land Commissioner v Minister* 15 ALD 191

Cons *Cole v Whitfield* 165 CLR 360

Appl *Queensland Electricity Commission v Cth* 59 ALJR 699

Appl *Bond Corp Pty Ltd v Thiess Contractors Pty Ltd* 71 ALR 615

Appl *Sloane v McDonald Industries (Sales) Pty Ltd* (1989) 17 NSWLR 86

Appl *Tracey, Re; Ex parte Ryan* 166 CLR 518

Appl *Aust Federation of Consumer Organisations v Tobacco Institute* (1991) 27 FCR 149

Cons *Gould v Brown as Liquidator of Amann Aviation Pty Ltd* (1998) 72 ALJR 375

Cons *Quickenden v O'Connor* (1999) 91 FCR 597

Refd to *SA Nat Football League Inc v City of Charles Sturt* (1998) 97 LGERA 293

Appl *Hamzy v Tricon International Restaurants* (2001) 115 FCR 78

Cons *State Bank of NSW v Cth Savings Bank of Australia* (1986) 60 ALJR 691

Appl *Advanced Hair Studio Pty Ltd v TVW Enterprises Ltd* 18 FCR 1

Cons *State Bank of NSW v Cth Savings Bank of Australia* 67 ALR 535

Appl *Caltex Oil (Aust) Pty Ltd v Best* 97 ALR 217

Foll *Concrete Constructions (NSW) Pty Ltd v Nelson* 92 ALR 193

Appl *R v Stanton; Ex parte Associated Airlines Pty Ltd* (1978) 141 CLR 281

Appl *DCT v State Bank of New South Wales* (1992) 105 ALR 161

Foll *DCT v State Bank of New South Wales* (1992) 66 ALJR 250

Cons *A-G (WA) v Aust National Airlines Commission* (1976) 138 CLR 492

Appl *Fitti v Minister for Primary Industries & Energy* (1993) 117 ALR 287

Foll *AFCO v Tobacco Institute* 98 ALR 670

Foll *Concrete Constructions (NSW) Pty Ltd v Nelson* 17 IPR 39

Foll *Bourke v State Bank of New South Wales* 22 FCR 378

Appl *DCT v State Bank of New South Wales* (1992) 23 ATR 1

Appl/Appl *Crouch v Commissioner for Railways (Qld)* (1985) ALR 1

Cons *C Sleigh Ltd v South Australia* (1977) 136 CLR 475

Appl *Nationwide News Pty Ltd v Wills* (1992) 108 ALR 681

Cons *Inglis v Commonwealth Trading Bank of Australia* (1969) 119 CLR 334

Appl *Fitti v Minister for Primary Industries & Energy* (1993) 40 FCR 286

Cons *Western Mining Corp v Commonwealth* (1994) 50 FCR 305

Appl *Dingjan, Re; Ex parte Wagner* (1995) 128 ALR 81

Appl *Collin v Botany Fork Crane Hire Pty Ltd* (1993) 43 FLR 83

Appl *Dingjan, Re; Ex parte Wagner* (1995) 16 ACSR 92

Appl *Coleman v Gray* (1994) 75 FCR 412

Foll *Coleman v Gray* (1994) 79 ACrimR 1

Appl *Coleman v Gray* (1994) 133 ALR 328

Appl *State Authorities Superboard v Comr of State Taxation WA* (1996) 140 ALR 129

Appl *Commonwealth of Australia v Western Mining Corporation Ltd* (1996) 67 FCR 153

Disod *Switzerland Insurance Australia Ltd v Mowie Fisheries Pty Ltd* (1997) 144 ALR 234

Cons *Totalizator Agency Board v F C T* (1996) 69 FCR 311

Appl *Newcrest Mining (WA) Limited v B H P Minerals Limited* (1997) 147 ALR 42

Appr *Commonwealth v Bank of New South Wales* (1949) 79 CLR 497

Cons *North Eastern Dairy Co v Dairy Industry Authority of NSW* (1975) 134 CLR 559

Cons *Rogers v Moore* (1992) 39 FCR 201

Cons *S O S (Mowbray) Pty Ltd v Mead* (1972) 124 CLR 529

Cons *Rogers v Moore* (1992) 29 ALD 35

Appl *Waterhouse v Minister for the Arts & Territories* (1993) 119 ALR 89

Expl *Waterhouse v Minister for the Arts & Territories* (1993) 43 FCR 175

Appl *Newcrest Mining (WA) Limited v B H P Minerals Limited & Cth* (1997) 71 ALJR 1346
Cons *Green v Davies* (1997) 95 ACrimR 238
Foll *Ebner, Re; Ebner v Official Trustee in Bankruptcy* (1999) 161 ALR 557
Refd to *R v Land Use Planning Review Panel; Ex p MF Cas Pty Ltd* (1998) 103 LGERA 38
Cons *Clenae Pty Ltd v ANZ Banking Group* [1999] 2 VR 573
Appl *R v O'Halloran* (2000) 157 FLR 11
Cons *Coleman* [2002] 2 QdR 620
Foll *P v Dunne* (2003) 31 FamLR 178

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BANK OF N.S.W. v. THE COMMONWEALTH.

Constitutional Law—Powers of Commonwealth Parliament—Banking—Acquisition of property—"Just terms"—Original jurisdiction of High Court—"The Commonwealth, or a person . . . sued on behalf of the Commonwealth"—Commonwealth Bank—Agency of Government—Freedom of trade, commerce and intercourse among the States—Interference with governmental functions of States—The Financial Agreement—Statute—Interpretation—Validity—Severability—The Constitution (63 & 64 *Vict. c.* 12), *ss.* 51 (*xiii.*), (*xx.*), (*xxxi.*), (*xxxix.*), 75 (*iii.*), 92, 105A—*Banking Act* 1947 (*No.* 57 *of* 1947)*—*Commonwealth Bank Act* 1945 (*No.* 13 *of* 1945).

The following provisions of the *Banking Act* 1947 are beyond the powers of the Parliament of the Commonwealth: Part IV., Division 2 (except in so far as it relates to voluntary acquisition and apart from any effect s. 14 (1) may have in relation to voluntary acquisition), Part IV., Division 3, ss. 24 and 25, Parts VI. and VII., and ss. 59 and 60.

So *held*:—

As to Part IV., Division 2—

By *Rich, Starke, Dixon* and *Williams* JJ. (*Latham* C.J. and *McTiernan* J. dissenting), because—so far as compulsory acquisition is concerned—the provisions of the Division (in particular, ss. 13 and 14) embody a scheme for the acquisition of property for which the Act fails to provide just terms as required by s. 51 (xxxi.) of the Constitution. Further grounds of invalidity are:—*Per Rich* and *Williams* JJ. (*Latham* C.J., *Dixon* and *McTiernan* JJ., *contra*): Section 13 is not a law for the acquisition of property for any purpose in respect of which the Commonwealth has power to make laws; it is not

* The following is a summary of the material provisions of the *Banking Act* 1947:—The objects of the Act, as stated in s. 3, include (*a*) the expansion of the banking business of the Commonwealth Bank as a publicly owned bank conducted in the interests of the people of Australia and not for private profit; (*b*) the taking over by the Commonwealth Bank of the banking business in Australia of private banks and the acquisition on just terms of property used in that business; (*c*) the prohibition of the carrying on of banking business in Australia by private banks. Section 5 provides that "private bank" means a body corporate the name of which is set out in the First Schedule to the Act. The Schedule contains a list, divided into three Parts, comprising all the institutions carrying on business in Australia which are commonly called trading banks: in Part I., those incorporated in Australia, in Part II., those incorporated in the United Kingdom, and, in Part III., those incorporated elsewhere. By s. 6 it is declared to be the intention of the Parliament—(*a*) that if any provision of the Act is inconsistent with the Constitution, that provision and all the other provisions of the Act shall nevertheless operate to the full extent to which they can operate consistently with the Constitution; (*b*) that the provisions of par. (*a*) shall be in addition to, and not in substitution for, the provisions of s. 15A of the *Acts Interpretation Act* 1901-1941; and (*c*) that s. 6 of the *Banking Act* and s. 15A of the *Acts Interpretation Act* 1901-1941 shall have effect notwithstanding that their operation may result in the *Banking Act* having an effect different, or apparently different, in substance from the effect of the provisions contained in the *Banking Act* in the form in which it was enacted by the Parliament. Part IV. (ss. 9-25) is headed "Expansion of Banking Business of Commonwealth Bank." Division 1—"Preliminary"—contains the following provisions:—Section 9: The powers specified in Divisions 2 and 3 of this Part are conferred for the purpose of facilitating the control by the Commonwealth Bank of the banking business in Aus-

related to s. 51 (xiii.) of the Constitution and would not be authorized by s. 51 (xxxi.) even if just terms were provided. *Per Rich*, *Starke* and *Williams* JJ.: Section 14 is not a law with respect to banking within the meaning of s. 51 (xiii.) of, and is not supported by any other power in, the Constitution. *Per Latham* C.J. and *Dixon* J.: Section 14 (2) is not a law with respect to the acquisition of property within the meaning of s. 51 (xxxi.) of, and is not supported by any other power in, the Constitution. *Per Rich* and *Williams* JJ. (*Latham* C.J., *Starke*, *Dixon* and *McTiernan* JJ. *contra*): Sections 13 and 14 are inconsistent with the Financial Agreement and, therefore, with s. 105A of the Constitution.

As to Part IV., Division 3—

By the whole Court, on the grounds following:—By *Latham* C.J., *Dixon* and *McTiernan* JJ.: It provides for the acquisition of property and because the Act fails in the provision of just terms for the acquisition it is, therefore, in conflict with s. 51 (xxxi.) of the Constitution. By *Rich* and *Williams* JJ.: It is not a law with respect to banking within the meaning of s. 51 (xiii.), and is not authorized by s. 51 (xxxi.), of the Constitution; it discloses no purpose related to s. 51 (xiii.) or to any other legislative power of the Commonwealth, and even if it was otherwise within s. 51 (xxxi.), it would fail because just terms are not provided; moreover (*Latham* C.J., *Starke*, *Dixon* and *McTiernan* JJ. *contra*), it is inconsistent with s. 105A of the Constitution. By *Starke* J.: It is not authorized by s. 51 (xiii.), (xxxi.), (xxxix.), together or separately; further, if it was otherwise within s. 51 (xxxi.), it would be invalid because just terms of acquisition are not provided.

tralia of private banks and for the purpose of furthering the expansion of the banking business of the Commonwealth Bank. Section 10: The provisions of Divisions 2 and 3 of this Part shall have effect notwithstanding anything in any other law, or in any charter or other instrument, which is inconsistent with those provisions. Section 11: It shall be the duty of the Commonwealth Bank—(*a*) to provide, in accordance with the conditions appropriate in the normal and proper conduct of banking business, adequate banking facilities for any State or person requiring them; (*b*) to conduct its business without discrimination except on such grounds as are appropriate in the normal and proper conduct of banking business; and (*c*) to observe, except as otherwise required by law, the practices and usages customary among bankers and, in particular, not to divulge any information relating to, or to the affairs of, a customer of the Commonwealth Bank except in circumstances in which it is, in accordance with law or the practices and usages customary among bankers, necessary or proper for the Commonwealth Bank to divulge that information. Division 2 (ss. 12-16) is headed "Acquisition of Shares in Private Banks." Section 12 gives authority to the Commonwealth Bank to purchase shares in private banks. Section 13 provides that where the Treasurer is satisfied that the majority in number of the shares in an Australian private bank are Australian shares, he may, by notice published in the *Gazette*, declare that, upon a date specified in the notice, the shares in that bank which are Australian shares upon that date shall be vested in the Commonwealth Bank (sub-s. 1); upon the date specified in the notice the shares in the Australian private bank concerned which, upon that date, are Australian shares shall be vested in the Commonwealth Bank (sub-s. 3); shares which subsequently become Australian shares shall upon the date upon which they become Australian shares, be vested in the Commonwealth Bank (sub-s. 4). Section 14 provides: The Commonwealth Bank shall, for all purposes, be the holder of the shares purchased or otherwise acquired under

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As to s. 24—

By *Latham* C.J., *Rich*, *Starke*, *Dixon* and *Williams* JJ. (*McTiernan* J. dissenting except as to s. 24 (8)), on the grounds following:—By *Latham* C.J.: By reason of the provisions of s. 23, the Act fails to provide just terms for an acquisition under s. 24 as required by s. 51 (xxxi.) of the Constitution. By *Rich* and *Williams* JJ.: The section is not within the power conferred by s. 51 (xxxi.) of the Constitution, which does not authorize the taking over of a business in the manner provided by s. 24; regarded as a law for the acquisition of property, the section is not related to any purpose in respect of which the Commonwealth has power to make laws, and, even if it was otherwise valid, it would fail because the Act does not provide just terms. By *Starke* and *Dixon* JJ.: Just terms of acquisition are not validly provided, and therefore the section is not authorized by s. 51 (xxxi.) of the Constitution.

As to s. 25—

Per curiam, s. 25 does not come into operation because of the invalidity of Part IV., Division 3, and further by *Rich*, *Starke*, *Dixon* and *Williams* JJ. (*Latham* C.J. and *McTiernan* J. dissenting), s. 25 is invalid because it depends for its operation on Part VI. which is invalid.

As to Part VI.—

By *Rich*, *Starke*, *Dixon* and *Williams* JJ. (*Latham* C.J. and *McTiernan* J. dissenting), because it conflicts with s. 75 (iii.) of the Constitution; and also, by *Rich* and *Williams* JJ. (*Latham* C.J., *Starke*, *Dixon* and *McTiernan* JJ. *contra*), because it is inconsistent with s. 105A of the Constitution.

As to Part VII.—

By *Rich*, *Starke*, *Dixon* and *Williams* JJ. (*Latham* C.J. and *McTiernan* J. dissenting), because sub-ss. 4-8 of s. 46 contravene s. 92 of the Constitution

the Division and shall be a member of the Australian private bank in respect of those shares (sub-s. 1); the Commonwealth Bank may transfer any of the shares to any person and that person shall, for all purposes, be the holder of those shares and be a member of that Australian private bank in respect of those shares (sub-s. 2). By s. 15 the Commonwealth Bank is required to pay fair and reasonable compensation in respect of the acquisition of shares under s. 13. Division 3 (ss. 17-21) is headed "Management of Private Banks." Section 17 provides that upon the date specified in a notice under s. 13 (1) the directors of the bank shall cease to hold office, and provision is made for compensation. Under s. 18 the Governor of the Commonwealth Bank may, with the approval of the Treasurer, appoint directors of an Australian private bank the directors of which have ceased to hold office under s. 17. These directors have full power, by virtue of s. 19 (1) to manage, direct and control the business and affairs of the Australian private bank of which they are directors and, in particular, (*a*) to declare dividends; (*b*) to dispose of the business in Australia of that Australian private bank to the Commonwealth Bank; and (*c*) to dispose of all or any of the other business of that Australian private bank. The exercise of any power under s. 19 (1) (*b*) or (*c*) is subject to the approval of the Treasurer after the Treasurer has obtained a recommendation from the Governor of the Commonwealth Bank. (s. 19 (2)). Subject to s. 19 (2), the exercise of any power by the directors of an Australian private bank appointed under s. 18 is in their sole discretion and is not subject to any qualification, restriction or condition provided by or under any law, charter or other instrument relating to the exercise of the powers of the directors of that bank. Section 21 renders ineffective provisions in any law, charter or instrument specifying a minimum number of members in an Australian private bank where the number of members falls below the specified minimum by reason of the acquisition of shares by the Commonwealth Bank. Division 4 (ss. 22-25) is headed "Tak-

and the section is not severable; and also, by *Rich* and *Williams* JJ. (*Latham* C.J., *Starke*, *Dixon* and *McTiernan* JJ. *contra*), because sub-ss. 1 and 4-8 of s. 46 are inconsistent with s. 105A of the Constitution. *Per Dixon* J.: Sub-section 3 of s. 46 fails because of the invalidity of preceding provisions of the Act.

As to ss. 59, 60—

By *Rich*, *Starke*, *Dixon* and *Williams* JJ. (*Latham* C.J. and *McTiernan* J. dissenting), because they are inseverable from the foregoing invalid provisions.

The provisions of the *Banking Act* 1947, if none of them was for any other reason invalid, would not amount to an inadmissible interference with the exercise by the States of their governmental functions.

So *held*, by *Latham* C.J., *Starke*, *Dixon* and *McTiernan* JJ.

Melbourne Corporation v. *The Commonwealth*, (1947) 74 C.L.R. 31, distinguished.

A claim against the Commonwealth Bank, as constituted under the *Commonwealth Bank Act* 1945, for the compensation for which Part VI. of the *Banking Act* 1947 purports to provide would, if made the subject of an action against the Bank in the High Court, be a claim in an action against "the Commonwealth, or a person . . . sued on behalf of the Commonwealth" in which jurisdiction is conferred on the High Court by s. 75 (iii.) of the Constitution. Accordingly, the provisions of ss. 40 (2) and 42 of the *Banking Act* to the effect that compensation shall be determined as provided by the Act "and not in any other manner" are invalid in that they purport to oust that jurisdiction of the High Court.

ing over the Businesses of Private Banks." Section 22 makes provision for agreements to take over such businesses. Section 23 provides for certain taxation concessions where the businesses are taken over by agreement. Section 24 authorizes the compulsory taking over of the businesses in Australia of the private banks. All the assets of a private bank which are Australian assets subsisting upon the date of transfer are vested in the Commonwealth Bank (sub-s. 4). All the liabilities of the private bank which are Australian liabilities subsisting upon the date of transfer become liabilities of the Commonwealth Bank, and the private bank is discharged from its obligations in respect of those liabilities (sub-s. 5). Similar provision is also made in respect of assets of a private bank which relate to banking transactions and become Australian assets after the date of transfer and in respect of liabilities which relate to banking transactions and become Australian liabilities after the date of transfer (sub-ss. 6 and 7). By sub-s. 8, the Commonwealth Bank may require an Australian private bank to take such action as is necessary to vest in the Commonwealth Bank, upon the date of transfer or upon such later date as the Commonwealth Bank specifies, such assets (not being Australian assets) of that Australian private bank as the Commonwealth Bank specifies. Under s. 25 the Commonwealth Bank is required to pay fair and reasonable compensation for property acquired under s. 24. Part V. (ss. 26-36) establishes a Federal Court of Claims. Part VI. (ss. 37-45) is headed "Assessment of Compensation," and Division 1 (ss. 37-41) "Compensation in respect of the Acquisition of Shares." By s. 40 (2) the amount of compensation payable shall, unless agreed upon, be determined by the Federal Court of Claims and not in any other manner. Division 2 (ss. 42-45) provides machinery for reference of disputed claims for compensation in respect of the acquisition of assets to the Federal Court of Claims. By s. 42 a claim is to be determined in accordance with the Division and in no other manner. Part VII. consists only of s. 46, and is entitled "Prohibition of

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So *held*, by *Rich*, *Starke*, *Dixon* and *Williams* JJ. (*Latham* C.J. and *McTiernan* J. dissenting).

Observations on—

(1) The meaning and effect of s. 51 (xiii.), (xx.), (xxxi.), (xxxix.), s. 75 (iii.) and s. 92 of the Constitution.

(2) The bearing of ss. 3 and 9 of the *Banking Act* 1947 on the interpretation of the other provisions of the Act.

(3) The effect of s. 6 of the *Banking Act* 1947 on the question of severability of valid and invalid provisions of the Act.

MOTIONS treated as trials of actions.

Five actions were brought in the High Court against the Commonwealth and its Treasurer and the Commonwealth Bank and its Governor.

In the action which is hereinafter referred to as the first action, the plaintiffs were all the bodies named in Part I. of the First Schedule to the *Banking Act* 1947 (being bodies incorporated in Australia) and also individual shareholders in several of the plaintiff companies who purported to sue in a representative capacity.

In the action hereinafter called the second action, the plaintiffs were the three bodies named in Part II. of the First Schedule to the Act (being bodies incorporated in the United Kingdom).

In the actions hereinafter called the third, fourth and fifth actions, the plaintiffs were respectively the States of Victoria, South Australia and Western Australia, the Attorney-General of the State being joined as co-plaintiff in each case.

In each action a declaration was sought that the *Banking Act* 1947 was, and, alternatively, various sections of the Act were, beyond the powers of the Parliament of the Commonwealth,

the Carrying on of Banking Business by Private Banks." Private banks are prohibited from carrying on business in Australia, except as required by the section (sub-s. 1). Each private bank is required, "subject to this section," to carry on banking business in Australia (sub-s. 2). The obligation to carry on does not apply to a private bank after its business has been taken over by the Commonwealth Bank (sub-s. 3). Sub-sections 4-8 empower the Treasurer, by a notice, to require a private bank to cease upon a date he specifies to carry on banking business in Australia. The period of the notice must not in the first instance be more than two months, but the Treasurer may by an amendment of his notice extend the time. Sub-section 8 forbids the private banks after the date or amended date specified to carry on business in Australia, and provides a penalty of £10,000 for each day on which a contravention occurs. Part VIII. (ss. 47-55) deals with the protection of rights of persons employed by private banks. Part IX.—"General"—includes s. 59 (examination of records of private banks by persons authorized in writing by the Governor of the Commonwealth Bank), s. 60 (directors and officers of private banks to assist in respect of transfer of business) and s. 61. The Commonwealth guarantees the payment of all compensation payable by the Commonwealth Bank under the Act.

contrary to the Constitution and void, and ancillary relief was claimed.

The plaintiffs in each action moved for an interlocutory injunction. Affidavits were filed, both in support of, and in opposition to, the motions, the contents of which appear sufficiently for the purposes of this report in the judgments hereunder.* The motions came before *Dixon* J., who, pursuant to the agreement of the parties, directed that they be treated as the trials of the actions and that they be heard together and argued before the Full Court.

Barwick K.C. and *Coppel* K.C. (with them *Adam*, *Ashburner*, *Eggleston* and *Riley*), for the plaintiffs in the first action.

Barwick K.C. There are five broad grounds of attack upon the *Banking Act* 1947 :—(1) It falls under no head of legislative power. It is not a law on the subject of banking within s. 51 (xiii.) of the Constitution. It is not within s. 51 (xx.). It is not acquisition on just terms for a purpose of Commonwealth power and is not within s. 51 (xxxi.). It is not within s. 51 (xxxix.). (2) The acquisition provisions, the management provisions and the prohibition provisions are contrary to s. 92 of the Constitution. (3) In so far as otherwise the acquisition might be justified, it is bad because it is not on just terms. (4) It invades the constitutional integrity of the States. (5) It is inconsistent with the Financial Agreement and s. 105A of the Constitution. I propose to argue that it does not fall under s. 51 (xiii.) and that it is obnoxious to s. 92. It is proposed that Dr. *Coppel* will then deal with s. 51 (xxxi.), that counsel for the plaintiffs in the second act on will deal with grounds 4 and 5, and that counsel for the States will deal with ground 4. The Act does four things : (1) It provides a method of acquiring shares in any one or more or all of the banks, i.e., the companies set out in the First Schedule, if Australian. (2) It provides a method for the management of any one or more of the Australian banks. (3) It provides methods of acquiring the assets (and liabilities) of any one or more of the Australian banks and English banks. (4) It provides a means of prohibiting any one or more or all of the scheduled banks from carrying on the business of banking in Australia. The question is whether the pith and substance, the direct operation, of the Act is within the head or heads of power. Part I., s. 3, the objects clause, has no significance ; the objects cannot be related to the

* See, particularly, the judgment of *Latham* C.J., *post*, pp. 149-247.

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actual provisions. It might possibly affect the question under s. 92. As to s. 3 (*a*), the expansion of the Commonwealth Bank's business, that must relate to its general trading division ; it can have nothing to do with its central-banking functions. The *Commonwealth Bank Act* treats the departments as distinct entities : contrast s. 17 with s. 13. As to s. 3 (*b*) of the *Banking Act* 1947, it is not true that the banking business of the banks is alone to be taken over ; it is all the business. The words " taken over " are to be noticed. They refer to an assumption of control including an acquisition. There is in fact no limitation to assets used in the Australian business. As to s. 3 (*c*), " private banks " means the companies in the schedule. Section 5 contains a wide definition of assets, not limited to those used in banking. The definition of Australian assets depends upon situation, or what the law deems situation. It is inapt to connect the assets with banking in Australia as contemplated by the power in s. 51 (xiii.). So with " liabilities deemed to be situated in Australia." The impossibility of identifying the assets and liabilities included goes to just terms because you cannot have just terms unless you can relate the thing to the terms definitely. Again with " shares." As to s. 6, it is not the formulation of a law : it is a declaration of intention. It does nothing. It cannot require the court to legislate. As to s. 7, the plaintiffs propose to contend that State banking covers banking by a State as customer. As to s. 9, it is expressed in terms of purpose (not object, as s. 3) and relates to Divisions 2 and 3, but not Division 4, of Part IV. The expression " facilitating the control . . . of the banking business in Australia of private banks " would seem to imply the continuance of the business of private banks. It is an attempt to substitute, as a device for invoking the power, a statement of purpose for actual subject matter. Section 10 serves no useful purpose. If valid, Divisions 2 and 3 would in any case displace existing laws and instruments : if invalid, s. 10 will not help. Section 11 is material only as another confirmation of the view that the Act does not aim at the relations of banker and customer ; it seeks to avoid any change in them. Division 2—" Acquisition of Shares in Private Banks "—is a subject outside the banking power. Section 12 applies to English as well as Australian banks. It gives power to make a voluntary purchase of shares. It adds a new power to those of the Commonwealth Bank. To authorize a company to buy a share in a pastoral company is not to make a law about pastoral pursuits, and to empower the Commonwealth Bank to buy shares in a banking company is not to make a law with respect to banking. It may be good under the incidental

power, or it may relate to the incorporation of banks within s. 51 (xiii.). Section 12 must be considered with s. 14 and s. 21, which attach consequences to a sale and purchase under s. 12 that invade the field of company law and vary the social contract of the members of the banking companies. They go beyond the banking power. Section 14 (2) contemplates resale: ss. 12 and 14 (2) empower trafficking in shares. Membership is conferred contrary to the articles of association, and the reduction of the number of members below the number required by statute or the constating instruments is authorized notwithstanding State law. This is not banking and not incidental to any Federal power. Section 13, unlike s. 12, places the power in the Treasurer, who can act against the will of the Commonwealth Bank. The only condition is that he must be satisfied that the majority of shares in an Australian bank is or is deemed to be situate in Australia. He may nevertheless be wrong. There may be a change in the situation or character of the shares before the notice expires. Section 13 will not necessarily give the Commonwealth Bank a majority of the shares. Section 13 (1) and (2) enable the Treasurer to select any bank and for any reason. To give such an authority is not to make a law with respect to banking. Section 13 (3) seeks to "vest" shares irrespective of the articles and would operate in defeasance of State law regulating the social contract. Section 13 (4) vests shares which become Australian shares. When this is considered with s. 17 and s. 19, it means that the directors put in, by closing share registers abroad, might bring about the acquisition of the shares abroad. Section 14 appears to be essential to the complete operation of s. 13 (3) or (4). Section 15 is confined to compensation for shares and does not extend to the acquisition of assets by the exercise of the powers contained in ss. 17 and 18. Some of the articles do not give voting strength to a majority, so that even if a majority of shares were obtained under s. 13, it would not in itself give control. Division 3 is headed "Management of Private Banks." Section 17 takes effect on the expiry of the notice, no matter whether the notice has proved effective or not to vest a majority or any shares in the Commonwealth Bank, and no matter whether that Bank retains them or has disposed of them in the meantime: compare s. 48, which is expressed to depend on actual vesting of the Australian shares. It is concerned with the internal regulation of the company, not with banking. Section 18 gives the Governor of the Commonwealth Bank power to appoint any number of directors, without limit and without qualification, and a chairman. For instance, bankruptcy would not be a disqualification. Since by

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s. 20 (2) the majority forms a quorum, three directors at least must be appointed, but otherwise there is no indication of number. There is no express power of removal in this Act, but perhaps that is supplied by s. 33 (4) of the *Acts Interpretation Act* 1901-1941, if the position of director is an office or place. By s. 19 (1) the whole of the business and affairs of the company (for " bank " means body corporate named in the schedule), whether relating to banking or not, is to be managed, directed and controlled by the new directors, whether Australian or not. The power to declare dividends is unaffected by any provision of the memorandum or articles of association as to rate, preferential rights, source or any prerequisite (s. 19 (3)). Perhaps the words " by or under any law " free the directors from the fiduciary obligations otherwise attaching to the office. These provisions may be taken together as a means of compulsory acquisition without just terms, or separately as company control. Section 19 (1) (*b*) distinguishes between the business in Australia and that outside Australia of the private bank. The Australian business may be disposed of to the Commonwealth Bank. Section 19 (1) (*c*) authorizes the disposal generally of other businesses of the private bank. Compare the distinction made by s. 22 (8) (*a*) and (*b*) with (*c*) and (*d*). The legislation concedes that the Australian and non-Australian businesses are two distinct things, not indispensable one to another. Yet s. 3 (*b*) expresses the object as one to take over the business in Australia of private banks, and s. 9 as " facilitating the control by the Commonwealth Bank of the banking business in Australia of private banks." In s. 19 (1) (*b*) and (*c*) the phrase is " dispose of," not " sell." It is much wider than sale. It would enable them to give away the assets. All this in consequence of a notice under s. 13, which may not operate to vest a majority or any of the shares in the specified bank. As to Division 4—" Taking over of Businesses of Private Banks " : Again, as s. 22 (1) shows, the Treasurer is empowered to select any private bank for the application of the Division. That goes to the subject matter with respect to which the law is made. The notice under s. 22 (1) is the condition upon which s. 24 operates. The powers of the Act may be used cumulatively and concurrently. By s. 13, the process for acquiring shares, appointing new directors and disposing of the business may be set in motion , at the same time an invitation may be given under s. 22 which will call into operation s. 24, leading to an acquisition of the business ; and also a notice might be given under s. 46 (4) requiring the cessation of the business. It is to be observed that the notice under s. 46 (4) is, by s. 46 (5), to be not more than two months, and that under

s. 22 (1) is, by s. 22 (2), to be of not more than two months. An agreement under s. 22 can hardly be called voluntary if a notice has been given under s. 46 (4). Under s. 22 you cannot agree as to part of the business because, under sub-s. (8), on the date of transfer all the Australian assets and liabilities go over without more and overseas assets and liabilities, if they relate to banking, go over upon their becoming Australian assets or liabilities. There seems to be a difference between "taking over" and "acquiring": perhaps the former looks to assumption of control. Sub-section (7) authorizes the extension of the agreement to any business, &c., of the private bank outside Australia; it includes all the scheduled banks, including, for example, the Bank of China. It goes beyond power on this ground alone. The date of transfer under s. 22 depends apparently on agreement and is not that defined in s. 24 (1): see s. 22 (9). Under s. 24 (5) and (6) a prescribed date limits the operation of each sub-section upon assets or liabilities becoming Australian, but different dates may be prescribed. If that for liabilities is earlier than that for assets, an unequal and unjust result may be produced. Section 24 (8) enables the Commonwealth Bank to require the private bank, subject to severe penalties, to take such action as is necessary to vest non-Australian assets. But it is not limited to assets concerned with banking even; still less with banking in Australia. As to Part V.—"The Federal Court of Claims": section 34 cannot operate to exclude challenge on constitutional grounds. Section 33 gives jurisdiction to determine claims for compensation. "Claim" includes title as well as quantum: see s. 39 and s. 40 (4) and (5). It is part of judicial power, and under s. 75 of the Constitution the jurisdiction of the High Court cannot be excluded. The words "not in any other manner" in s. 40 (5) cannot be struck out by the use of s. 6. As to Part VI., Division 2, s. 42. There is the question what "assets" means here. Sections 43 and 44 direct the disputed claim into the Court of Claims: and s. 45 makes payment by the Commonwealth Bank of the amount assessed a discharge. As to Part VII.—"Prohibition of the carrying on of Banking Business by Private Banks": section 46 is better read as if sub-ss. (2) and (3) preceded sub-s. (1). These three sub-sections seem to embody one provision, while sub-ss. (4) to (8) embody another. Section 46 is incidental to the acquisition provisions and inseparable from them, but, alternatively, if it is separated, it is clearly not a banking provision. Moreover, it is obnoxious to s. 92 of the Constitution. It is not a law with respect to banking, because it is not directed at the protection of the customer, at improving or dealing with banking facilities for

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him. Its purpose is to preserve the business for the Commonwealth Bank to take over when ready and then to authorize the Treasurer to stop the company carrying on business as a banker. Thus, it is ancillary. But sub-s. (4) gives the Treasurer an apparently uncontrolled discretion to shut up any bank independently of any other. No criterion or grounds affecting banking are indicated; there is no relation between the choice and the actual operation of the law. The only connection with banking is that only the private banks in the schedule come within the category upon which the Treasurer's choice operates. Section 8 of the *Banking Act* 1945 (No. 14 of 1945) entitles them to an authority from the Governor-General in Council. New banks may obtain one. The 1947 Act, Part VII., s. 46, leaves that untouched. An existing banking company may be singled out and stopped: new companies may be authorized. This shows that it is not "banking" that s. 46 is aimed at. As to Part VIII.—"Protection of Rights of Persons employed by Private Banks": under s. 47 (4), where a benefit would, as a matter of practice, have been granted under the terms of employment or of a provident or superannuation fund, the expectation of a person employed in a private bank in respect of which a committee under s. 47 (1) has been appointed is transformed into a right. Under s. 48, if a notice has been given under s. 13 and Australian shares are in fact vested as a result (though not necessarily a majority of the shares), persons then employed by the private bank shall continue so to be employed upon the terms and conditions applicable at that date or as subsequently varied by competent authority: cf. s. 54 (2) as to pensions. Section 51 (1) requires that salary shall not be reduced or terms made less favourable. Thus, by combining s. 13 with these provisions, you can have a private bank continuing (its Australian shares having passed to the Commonwealth Bank, but otherwise the same separate commercial entity) and yet its relations with its employees affected as indicated. This must be outside the power given by s. 51 (xiii.), (xxxi.) or (xxxix.). There is no definition of "competent authority." The result indicated continues to be true even if the Commonwealth Bank, having acquired the Australian shares, proceeds to dispose of them. Section 52 of the Act is directed to the danger of private banks conferring rights upon their employees more favourable than they would otherwise have received in order to give them undue advantages at the expense of the Commonwealth Bank. It would enable directors appointed under s. 18 to obtain for the company a variation of a contract made with its employee. Section 56 may be called an attempt at a statutory

novation. It is only necessary that the documents and transactions should relate to the business taken over. It is not restricted to banking. The proper law of the contract is ignored. It must be beyond power. Section 59 does not depend upon notice having been given under s. 13 or upon any other step having been taken towards exercising any powers conferred by the Act, but is independent. Section 60 must depend on the validity of the preceding provisions. Sub-section (1) (*b*) would apparently apply if there was a voluntary agreement under s. 12. Section 61 (the Commonwealth guarantee) does not amount to an appropriation. To summarize :—(1) The Act gives power to the Commonwealth Bank to purchase shares in any scheduled "private bank." As an incident, in order to enable the Commonwealth Bank to take the place of the shareholder, the Act purports to make it a shareholder, and so with its transferees, and sets aside the articles and any law or instrument requiring a minimum number of members (ss. 14 and 21). (2) The Act authorizes the Treasurer to select an Australian private bank and by his notice to vest in the Commonwealth Bank such of its shares as are Australian and such as afterwards become Australian shares. (3) On the expiry of a notice, it displaces the management of an Australian private bank and puts it in the hands of agents of the Commonwealth to whom it gives complete power over the business and affairs of the company, including a power of disposition. (4) It authorizes the Treasurer to select any private bank, whether Australian or not, and by statute to vest all its business, assets and liabilities in Australia in the Commonwealth Bank and to require the transfer of any non-Australian assets. (5) It authorizes the Treasurer to select any private bank and by his notice prohibit the bank from carrying on its business of banking in Australia. It will be seen that the so-called objects in s. 3 are remoter purposes or motives, perhaps, but not the objects in the sense of the substantial effect or operation of the provisions. The statement of these motives cannot give validity. They may be material to s. 92 of the Constitution. The questions to be dealt with first are (1) whether the Act in substance and reality is legislation with respect to any subject of Federal legislative power, and (2) whether it infringes the prohibition in s. 92. In dealing with the first, beginning with s. 6 of the Act, it does no more, it is submitted, than provide a rule of construction ; its effect is that, if an operative residuum can be found in the enactment or any part of it after rejecting the invalid provisions or portions, an intention to enact it is to be assumed, though otherwise it might not have been apparent. If there is something left that will operate, though it is partial in its

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operation, it is to receive effect. When the provisions as to each matter are taken severally, it will appear that, tested for pith and substance, each set fails. In that approach s. 6 plays no important part. To take s. 12, it simply authorizes the Commonwealth Bank to buy shares in any of the scheduled banking companies, Australian or English. In the case of shares in Australian banks ss. 10, 14 and 21 produce further effects flowing from the sale. A law authorizing the purchase of bank shares is not a law with respect to banking. The Commonwealth Bank is not to use the shares bought in connection with banking. It is quite uncertain to which division of the Commonwealth Bank such shares will belong. Presumably they will be capital assets forming a general investment as property and the dividends will be revenue of the institution, income from property. The purchasing of the share is not itself banking; the authorizing or empowering the transaction is not legislation in respect of banking. The latter view is confirmed by the addition, "also . . . the incorporation of banks," which implies that incorporating and empowering banks is not within the subject of "banking" as intended in s. 51 (xiii.) of the Constitution. "The issue of paper money" refers to an operation performed by bankers which is not conceived to be banking. Section 51 (xiii.), so far as it refers to banking, authorizes laws which really and substantially bear upon transactions or operations characteristic of banker and customer. The law must bear upon those transactions substantially. That will include the relation of banker and customer which springs out of the transactions. Examples are laws for the stability of the banker, for the protection of the customer, for returns facilitating supervision in the customer's interest. Some of the functions performed by the so-called central bank may not be banking, e.g., the control of the note issue, which more probably rests on s. 51 (xii.), currency, coinage and legal tender. But many are, because they bear upon transactions of banker and customer, e.g., the control of advances and interest rates. [He referred, as to the meaning of "banking," to *Tennant* v. *Union Bank of Canada* (1); *Ex parte Walsh and Johnson*; *Re Yates* (2); *Attorney-General for Canada* v. *Attorney-General for Quebec* (3); *Stenhouse* v. *Coleman* (4); *Melbourne Corporation* v. *The Commonwealth* (5); *Attorney-General for Alberta* v. *Attorney-General for Canada* (6). In s. 51 (xiii.) the word is "banking," not "banks," the operation or function, not the person or body carrying it on.

(1) (1894) A.C. 31, at p. 46.
(2) (1925) 37 C.L.R. 36, at p. 81.
(3) (1947) A.C. 33, at pp. 41, 42, 44.
(4) (1944) 69 C.L.R. 457, at p. 471.
(5) (1947) 74 C.L.R. 31, at pp. 51, 64, 69, 96.
(6) (1947) A.C. 503.

Separate words are used to authorize the giving of corporate existence to a bank. State banking can only extend beyond the limits of the State concerned by transactions. The power is over the transactions or operations characteristic of a banker which he conducts, over the business of bankers, which is not necessarily the same as a banker's business. The connotation does not change, the denotation may extend. Regard must be had to the true nature and character of the legislation, the pith and substance (*Gallagher* v. *Lynn* (1)). "With respect to" is not the same as "for." It means "on the topic of." A phrase used by *Higgins* J. is "directly regulatory of." In the United States Constitution verbs appropriate to the subject are employed. You "lay" taxes, "establish" this and "regulate" that. A law to authorize the acquisition of shares in, or the business of, a corporation is not a law "with respect to" the activity in which that business engages. A law to empower one merchandising company to acquire shares in another is not a law about merchandising. A law authorizing the Commonwealth Bank to take over a pawnbroker's business is neither a law about pawnbroking nor about banking. This is confirmed by the presence of the express power with respect to the incorporation of banks. If s. 12 of the Act is to be of any use, it must be aided by ss. 10, 14 and 21. Without them it can effect nothing except a change of beneficial interest. This is important in considering whether, having regard to their real operation, the subject of these provisions is not a matter of company law. The banking power does not extend to the variation of the social contract and of State law regulating the membership, transfer of shares and internal management of corporations. If it is said that the end is the expansion of the business of the Commonwealth Bank and the taking over by it of the banking business in Australia of private banks, as stated in s. 6, the answer is that there is no magic in its being the Commonwealth Bank. It is the same as if the purpose was to expand the business of another private bank and transfer the business of the first bank to it. To suggest it is in aid of central banking adds nothing. That depends on banking, i.e., the relation of banker and customer. Moreover, the elimination of all banks but one is the negation of central banking. The trading division of the Commonwealth Bank is the only one to which the acquired shares or assets could be annexed. It is a fallacy to argue that, because the banking power extends to authorizing a considerable measure of control, therefore it authorizes acquisition altogether. It is not banking simply because a thing is given to a bank to do.

(1) (1937) A.C. 863, at p. 870.

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For instance, the powers given by ss. 95 and 96 of the *Commonwealth Bank Act* 1945 to the Industrial Finance Department, including the purchase of shares, rest on s. 51 (xxxix.) of the Constitution, not on the banking power, or else the section is invalid. As to s. 3 (*a*) of the *Banking Act* 1947, a law to expand any farming business is not a law about farming. A law for the licensing of banks is another thing, for it may be a measure to secure integrity, continuity and other qualifications for the benefit of the customer and to give him confidence. Part II., Division 2, of the *Banking Act* 1945 is an illustration of a law with respect to banking. Sections 10, 14 and 21 of the 1947 Act are essential to s. 12 because it was never intended to authorize the purchase of a share in respect of which the Commonwealth Bank could not become a registered holder and member. In any case ss. 10, 14 and 21 cannot be supported as incidental to the acquisition for the purposes of banking. In *Attorney-General for the Commonwealth* v. *Colonial Sugar Refining Co. Ltd.* (1) Lord *Haldane* says the words of s. 51 (xxxix.) of the Constitution do not seem to do more than cover matters which are incidents in the exercise of some actually existing power: See, too, the quotations in *New South Wales* v. *The Commonwealth* [*No.* 1] (2), and those made by *Higgins* J. in *Ex parte Walsh and Johnson* (3), where he adopts the phrase, "whatever in a reasonable sense is necessary for the purposes, is impliedly granted." A consensual purchase does not import, as reasonably necessary to effectuate it, the consequences set out in ss. 10, 14 and 21. Lastly, these provisions cannot be sustained by s. 51 (xx.) of the Constitution. Section 13 of the *Banking Act* 1947 depends, no doubt, on s. 51 (xxxi.), but that involves the use of s. 51 (xiii.) as the source of the "purpose." The purpose cannot be found in s. 9; it states a remoter object and one not within s. 51 (xiii.). The dominant purpose is to set aside the articles of association and State law, establish an overriding status in the company and take control by appointees. Taking control under ss. 17-20 does not depend on the vesting of shares under s. 13 but follows on the same notice. The use of the power to supersede directors is not limited to particular grounds. The reason may be different from that which led to the selection of a particular bank by the Treasurer under s. 13. It is a company matter, not "banking." Section 9 cannot change its nature by declaring a purpose claimed to be a banking purpose. Section 17 needs no more of

(1) (1914) A.C. 237, at p. 256; 17 C.L.R. 644, at p. 655.

(2) (1932) 46 C.L.R. 155, at pp. 212, 213.

(3) (1925) 37 C.L.R., at pp. 120, 121.

s. 13 than sub-s. (1), describing the notice. In this respect s. 17 is unlike s. 48, which makes the vesting of Australian shares pursuant to the notice a condition of its application. Section 13 (3), coupled with s. 14 and s. 21 (and perhaps s. 10), may be said to attempt to create a new set of rights, a new situation, not to acquire what previously existed. Sections 17-20 are directed, not to the control of banking, but to the control of assets, including a banking business. The control is proprietary. In s. 9 the words "control of the banking business in Australia of private banks" are directed to the taking of the business as such, a congeries of assets and liabilities, to add them to other such assets and liabilities. The section is not directed to the regulation of transactions forming "banking." No change in the conduct of the transactions is contemplated by the Act, as, indeed, is manifested by s. 11. Section 46 (2) further secures it. The words "banking business," &c., in s. 9 are the same as in s. 19 (1) (*b*) and describe what is to be disposed of as a piece of property. With respect to Division 4, it must be borne in mind that the purposes of s. 9 do not include it. At best it is affected only by the declaration of motives contained in s. 3. As already pointed out, the Division distinguishes between the Australian and non-Australian business and the banking and non-banking assets and liabilities. It constitutes a law for acquisition, and, to sustain it, it must be shown that it subserves the subject of the banking power. To take a business that includes a banking business is not to do something within the banking power. The incorporation, establishing and organizing, as a fully empowered authority, of the Commonwealth Bank is an exercise, not of the banking power, but of the incidental power. As to the power under s. 51 (xiii.) of the Constitution to incorporate banks, it must be recollected that the legislature did not endow a body of people with corporate life: there are no corporators in the Commonwealth Bank. Many of its most important functions are not under the banking power, e.g., the issue of the currency; and a great deal of what it does must be sustained under a variety of powers: it cannot be supported as "banking." It is incidental to the exercise of the functions of government to have a bank as a financial agent, and, because of the need to handle large sums, the government bank trades as a banker to enable it to dispose of and control the money. It is like the view of *Marshall* C.J. in *M'Culloch* v. *Maryland* (1). Division 4 is simply a law to give proprietorship to going concerns, to a business or businesses. It acquires the assets and assumes the liabilities on the basis of situation, actual or legally ascribed.

(1) (1819) 17 U.S. 316 [4 Law. Ed. 579].

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Suppose the business in London advances to a London resident who furnishes as security a mortgage over land in Victoria. The instrument includes a personal covenant by the customer, and it is transmitted to Victoria. Its situation is here, but it has nothing to do with the Australian business of the bank. Suppose the same thing but with a New South Wales mortgage registered under the *Real Property Act* (N.S.W.), and therefore in New South Wales a specialty, but held by the bank in Victoria, where it would be a mere writing. A third illustration is that of a customer in England who there becomes a debtor of the bank and takes up his residence subsequently in Australia. The debt thus obtains an Australian situation. The nature of these assets, as illustrative of what is covered by Division 4, is material to the question whether the acquisition subserves a declared purpose which falls within the conception of banking. How can it fulfil a purpose of regulating or affecting the transaction of banking business or the relation between bankers and their customers to acquire such assets ? The width of the acquisition shows that to possess the Commonwealth Bank of property, not to control banking, was the substantial object of the law. The purpose must be nominated or appear, and then the necessary connection with it must exist in the acquisition authorized. That is why it is important to see that non-banking and non-Australian business assets are covered. There is a vast number of assets taken *in globo*, whether connected with the banking business or not. How can that be a law with respect to banking or a purpose of banking ? It would include former bank premises still owned by the banking company but let to solicitors and dentists. The power is to take any one or more businesses and need not be exercised to establish a government monopoly. The mere statement of purpose in s. 3 (or s. 9) will not do : if it would do, what is done goes beyond the statement ; it is not a banking purpose. The Act nowhere says that the assets are to be used in a particular way. A further illustration is the fact that the acquisition under ss. 22 and 24 would include the amounts at the credit of the special accounts established by the private banks with the Commonwealth Bank pursuant to Division 3 of Part II., of the *Banking Act* 1945. On acquisition they will cease ; if they have a banking significance their acquisition will end it. Under s. 24 (5) of the 1947 Act Australian liabilities are taken over, i.e., liabilities situated or deemed by law to be situated in Australia (s. 5). Section 24 (7) contemplates that liabilities will become Australian, i.e., that the test of situation is such that change of situation is possible. None of the legal tests of situation connect

the liability with the banking business carried on in Australia. Proper law, residence of the debtor, *locus solutionis*, these have nothing connecting the liability with Australian banking: further, they do not admit of change of situation. The residence of the bank cannot be changed. The discretion of the Treasurer to select a bank for his notice under s. 22 and s. 24 is uncontrolled. It is inconsistent with a connection with banking. Section 3 cannot eke it out. Its statement of objects is not exhaustive, and, moreover, they are motives and not immediate objects. Section 3 (*a*) merely recites a theory about public ownership and, perhaps, in addition, treats expansion of the banking business of the Commonwealth Bank as in itself a legislative end. It speaks of the entire business of the Commonwealth Bank of whatever description. Take by way of example Part IX. of the *Commonwealth Bank Act*, which sets up the Mortgage Bank Department. It is not conceded that that is banking, but, however that may be, if that is to be expanded by acquisition, it would mean that, under the power, the mortgage departments of trustee companies would be liable to be taken over. Again, Part X.—Industrial Finance Department—affords another instance. It enables the bank to provide money and assistance in setting up an undertaking; it may lend money and buy or obtain shares. Section 51 (xiii.) of the Constitution does not authorize suppression, total prohibition; it does not contemplate banking by the Government, but is concerned with subjects conducting banking with their customers. The Commonwealth Bank owes its existence to the incidental powers (s. 51 (xxxix.)), not to the banking power (s. 51 (xiii.)). It cannot be considered an exercise of the power to incorporate banks. It incorporates no-one, and that is a power to create an artificial person composed of individuals but distinct from them. There is no instance of a corporation without corporators, and to make one is not an exercise of the power given in s. 51 (xiii.). There are corporators under the following Imperial Acts: *British Overseas Airways Act* 1939, ss. 1 and 2: *Coal Act* 1938; *Ministry of Civil Aviation Act* 1945; *Coal Industry Nationalization Act* 1946; *Bank of England Act* 1946 and *London Passenger Transport Act* 1933. "Four things are essential to the creation of a corporation, namely: (1) Lawful authority of incorporation; (2) the person or persons to be incorporated; (3) a corporate name; (4) words sufficient in law, but no particular form of words is necessary" (*Halsbury, Laws of England*, 2nd ed., vol. 8, p. 18). To give to this government activity a personality in law, the incidental power in s. 51 (xxxix.) must be relied on, as with most of the activity itself. The Divisions of Part IV. of the Act have already

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been dealt with separately; but, combining them and dealing with the Part as one, the same observations apply. It remains wider than the power and displays the same want of connection with the subject matter of the power. Section 46, which constitutes Part VII., has two aspects. In one, it commands the continuance of banking operations: in the other, it allows the Treasurer to forbid them. In s. 51 of the Constitution the words "with respect to" become all important: they "are not words of enlargement, but of indication. They indicate that you are to look to the following enumeration to see the actual subjects of the power" (*Waterside Workers' Federation* v. *Commonwealth Steamship Owners' Association* (1)). Their effect depends upon the subject matter and the way the power is expressed: cf. *Swan Hill Corporation* v. *Bradbury* (2). Subject matter is no less important than expression. When an activity is the subject of a power, in the absence of express words the power will not authorize its complete suppression. Prima facie, it is a power to govern the thing *salva rei substantia*. So, in *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (3), Lord *Watson* said: "A power to regulate, naturally, if not necessarily, assumes, unless it is enlarged by the context, the conservation of the thing which is to be made the subject of regulation." "Banking" is specific and narrow and not a subject calling for suppression. As to form of expression, "State banking extending beyond the limits" &c. gives authority over the whole transaction in both States over which it extends. It is not limited to so much of it as extends. It involves the denial of a power of suppression. The subject of the power must subsist in order to extend. The transactions are necessarily consensual: i.e., characteristic of the relation between banker and customer. It is, therefore, in reality a power to make laws with respect to consensual transactions between a State bank and its customers extending &c.; a power to regulate or make rules for the governance of banking transactions between subjects as bankers and their customers. There are three points that emerge from a consideration of s. 51 (xiii.): (1) It does not authorize suppression of banking; (2) the subject depends upon a consensual relation, upon consensual transactions, and the power cannot be exercised to change their nature in that respect; (3) the transactions are between the subject as banker and his customer: cf. *Williams* v. *Melbourne Corporation* (4). In *Australian National Airways Pty. Ltd.* v. *The Commonwealth* (5), *Starke* J., after quoting

(1) (1920) 28 C.L.R. 209, at p. 232.
(2) (1937) 56 C.L.R. 746, at pp. 755, 761, 771.
(3) (1896) A.C. 348, at p. 362.
(4) (1933) 49 C.L.R. 142, at pp. 148, 155, 156.
(5) (1945) 71 C.L.R. 29, at pp. 76, 77.

from *United States* v. *Darby* (1), says that there is no reason to deny that the Parliament can under the commerce power exclude all persons from the field and grant to its own instrumentalities an exclusive right or monopoly in that field. In *Melbourne Corporation* v. *The Commonwealth* (2) he speaks of prohibiting banking. But an examination of the authorities relied upon, particularly of *Darby's Case* (3), shows that what was spoken of was a prohibition of some commercial act or description of trade for the purpose of regulating the subject. Section 46 (2) is invalid because it ignores the consensual character of the relation of banker and customer and seeks to compel the private bank to act on a non-consensual footing. Section 46 (4) gives the Treasurer an uncontrolled discretion to select any one bank and forbid it to carry on business. The discretion is in no way linked with any matter of banking. "Banking" depends on the activity or transaction. Banking may take different forms in the course of time, but nothing which has not the essential attributes as understood in 1900 can fall within the power. Further, the effect of the transaction and the activity must not be confused with its nature. Section 7 excludes State banking. But State banking is an indivisible activity and includes the operations of the State bank with other banks whose services as bankers' banks or as agents are essential to State banking. To forbid such transactions is to make at once a law about State banking. Section 7 cannot be used as a proviso to except, for example, from s. 46 banking so far as it serves State banks. That would not work. The reference to paper money helps the plaintiffs. Passing to the attack under s. 92. The following parts of the Act are obnoxious to s. 92: Division 4 of Part IV.; Part VII., s. 46, in two aspects, viz., sub-ss. (1), (2), (3) and (4); ss. 13-21, relating to the acquisition of assets, a matter with which Dr. *Coppel* will deal; then s. 13, standing by itself as a means of controlling the business by the acquisition of shares; Division 3 of Part IV., standing by itself as a provision for the compulsory management of the business. The attack is supported in two ways; first, on the view that in carrying on banking business the banker is engaged in trade, commerce and intercourse and that the Act stops him, and, secondly, on the view that his customers as traders in goods &c. are deprived of their freedom because compelled by Government authority to use only the Government facilities. If object, purpose or motive be the test or be material, the clear object is to stop the

(1) (1941) 312 U.S. 100, at p. 113 [85 Law. Ed. 609, at p. 616].
(2) (1947) 74 C.L.R., at p. 69.
(3) (1941) 312 U.S. 100 [85 Law. Ed. 616].

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trading : see s. 3. Its immediate purpose is to prevent the business of banking being carried on except by the Commonwealth Bank. If the test is whether the law seizes on some essential characteristic of commerce, that is satisfied because banking is commerce. The *Airlines Case* (1) is decisive of the question because it depends upon the fact that the operators were carrying on the business of transport and, therefore, engaged in inter-State commerce. The bankers are engaged in the business of banking and, therefore, in inter-State commerce. If object or motive be the test, it exists here : if the choice of commerce is a criterion, that exists here. Indeed, once it is seen that banking is commerce, that is decisive of the question under s. 92. On the decided cases as they stand, at least the proposition is correct that s. 92 is infringed whenever an individual or a corporation is engaged in inter-State trade, commerce or intercourse and, either by direct prohibition, or by acquisition with the object, purpose or motive of effecting such a prohibition, the carrying on of such business by him or it is forbidden. It is the individual's freedom to move from place to place and to conduct his business across State lines that is protected or guaranteed by s. 92. It confers an immunity on the individual. Thus, in *Fox* v. *Robbins* (2), *O'Connor* J. speaks of " the rights thus conferred on the people of each State of the Commonwealth in their dealings with each other." *Higgins* J. (3) says : " The question then arises, how is a person who wants to sell wine the produce of grapes grown in any of the other States to take advantage of the constitutional provisions *made for his protection.*" In *R.* v. *Smithers* ; *Ex parte Benson* (4), *Isaacs* J. speaks of " the personal right in an Australian as such . . . to pass over this continent irrespective of any State border as a reason in itself for interference." See also *W. & A. McArthur Ltd.* v. *Queensland* (5) ; *James* v. *South Australia* (6). In *James* v. *Cowan* (7) ; approved by the Privy Council (8), *Isaacs* J. spoke of the " right . . . protected by s. 92 " as " a personal right attaching to the individual and not attaching to the goods." In *Peanut Board* v. *Rockhampton Harbor Board* (9), *Rich* J. said that in his opinion " the enactment controls directly the commercial dealing in peanuts by the grower and aims at, and would, apart from s. 92 accomplish, the complete destruction of his freedom of commercial disposition of his product." See, too, per *Starke* J. (10). *Dixon* J. said : " The protection

(1) (1945) 71 C.L.R. 29.
(2) (1909) 8 C.L.R. 115, at p. 126.
(3) (1909) 8 C.L.R., at p. 131.
(4) (1912) 16 C.L.R. 99, at p. 113.
(5) (1920) 28 C.L.R. 530.
(6) (1927) 40 C.L.R. 1, at p. 32.
(7) (1930) 43 C.L.R. 386.
(8) (1932) A.C. 542 ; 47 C.L.R. 386.
(9) (1933) 48 C.L.R. 266, at p. 277.
(10) (1933) 48 C.L.R., at pp. 283, 285.

conferred by s. 92 is not a mere incident of property but is enjoyed by the individual, who may not be deprived of his goods in order to prevent his exercising his freedom of trade among the States" (1). See, too, per *McTiernan* J. (2). In his dissent in *O. Gilpin Ltd.* v. *Commissioner for Road Transport and Tramways (N.S.W.)* (3), *Dixon* J. deals with the question. In *James* v. *Commonwealth* (4), Lord *Wright* said that the rule of construction favouring a wide interpretation of grants of power "may not be helpful, where the section is, as s. 92 may seem to be, a constitutional guarantee of rights, analogous to the guarantee of religious freedom in s. 116, or of equal right of all residents in all States in s. 117". See, too, *James' Case* (5). In *Riverina Transport Pty. Ltd.* v. *Victoria* (6), *Evatt* J. says that it would be strange if the Commonwealth Parliament "which for sixteen years has sought to confer upon itself an entire immunity from the declaration of freedom in s. 92, were made the sole protector of the citizens against infringement of that section." In the *Airlines Case* (7), *Latham* C.J. spoke of s. 92 as protecting inter-State carriers as well as persons who use the services of carriers. See, too, per *Starke* J. (8); per *Dixon* J. (9); per *Williams* J. (10). See, also, *James* v. *The Commonwealth* (11), per *Dixon* J. The fundamental question in the transport cases was whether the licensing system there under consideration did hinder inter-State commerce; that question does not arise here, because there is a direct prohibition upon carrying on banking. The essence of banking is moving money about. Payment by cheque involves the transmission of money. Whether you regard the function as transferring or transmitting money or as redistributing credit, the banker moves something tangible or intangible. In *M'Culloch* v. *Maryland* (12), *Marshall* C.J., in stating his reasons why the establishment of a bank is incidental to the functions of government, says: "The exigencies of the nation may require that treasure raised in the north should be transported to the south, that raised in the east conveyed to the west, or that this order should be reversed." He goes on to say that it is not denied that the power to raise revenue implied "the power of conveying money from place to place . . . and of employing the usual means of conveyance." He includes the creation of a banking corporation

(1) (1933) 48 C.L.R., at p. 287.
(2) (1933) 48 C.L.R., at p. 313.
(3) (1935) 52 C.L.R. 189, at p. 211.
(4) (1936) A.C. 578, at p. 614; 55 C.L.R. 1, at pp. 43, 44.
(5) (1936) A.C., at pp. 629, 630, 631; 55 C.L.R., at pp. 58, 59.
(6) (1937) 57 C.L.R. 327, at p. 367.
(7) (1945) 71 C.L.R. 29, at p. 60.
(8) (1945) 71 C.L.R., at pp. 78, 79.
(9) (1945) 71 C.L.R., at p. 91.
(10) (1945) 71 C.L.R., at p. 107.
(11) (1939) 62 C.L.R. 339, at pp. 361, 362.
(12) (1819) 17 U.S. 316, at pp. 408, 409 [4 Law. Ed. 579, at p. 602].

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among the government's choice of means. To engage in banking is to engage in trade or commerce. The concept of trade, commerce and intercourse is a practical one depending upon established facts and known commercial methods. See *Swift & Co.* v. *United States* (1); *Public Utilities Commissioner* v. *Landon* (2); *Commonwealth Oil Refineries* v. *South Australia* (3); *R.* v. *Gates*; *Ex parte Maling* (4) per *Starke* J. In *Aristoc Ltd.* v. *Rysta Ltd.* (5), Lord *Wright* says, in dealing with the expression "course of trade": "Trade is a very wide term: it is one of the oldest and commonest words in the English language. Its great width of meaning and application can be seen by referring to the heading in the *Oxford English Dictionary*. But it must always be read in its context." See *Gibbons* v. *Ogden* (6), particularly per *Johnson* J. (7); *Hopkins* v. *United States* (8); *Jordan* v. *Tashiro* (9); *McArthur Ltd.* v. *Queensland* (10); *Public Utilities* v. *Landon* (11). In *James' Case* (12) Lord *Wright* reduced the area of freedom, but not of the conception of trade and commerce, and this passage stands as authority untouched. See, also, *R.* v. *Martin*; *Ex parte Wawn* (13); *Vacuum Oil Co.* v. *Queensland* (14); *Airlines Case* (15). [He also referred to *Bagehot, Lombard Street*, pp. 98, 166, 205, 210, 221; *Gide, Principles of Political Economy*, 2nd American ed., p. 367; *Hawtrey, Currency and Credit*, 3rd ed. (1928), pp. 4, 7, 120, 214; *McKenzie, Banking Systems of Great Britain, France, Germany and United States of America* (1932), p. 7; *Gilbart's History, Principles, and Practice of Banking*, p. 93; *McLeod, Theory and Practice of Banking*, 6th ed. (1902), p. 157; *Marshall, Money Credit and Commerce*, p. 82; *McLeod, History of Banking of All Leading Nations*, vol. 2, p. 201; *Paget* on *The Law of Banking*, 4th ed. (1930); *Grant, Law of Banking*, 7th ed. (1924), p. 260; *Hart* on *The Law of Banking*, 4th ed. (1931), pp. 700, 701; *Hamilton and Eagleson* on *The Law and Practice of Banking in Australia and New Zealand*, 2nd ed. (1900), pp. 3, 225-227; *Halsbury's Laws of England*, 2nd ed., vol. 1, p. 852.] The banker purchases a bill of exchange when he discounts it. He obtains an accompanying bill of lading or a lien over it. Move-

(1) (1905) 196 U.S. 375, at p. 398 [49 Law. Ed. 518, at p. 525].
(2) (1919) 249 U.S. 236, at p. 245 [63 Law. Ed. 577, at p. 586].
(3) (1926) 38 C.L.R. 408, at p. 429.
(4) (1928) 41 C.L.R. 519, at p. 531.
(5) (1945) A.C. 68, at p. 102.
(6) (1824) 22 U.S. 1, at p. 187 [6 Law. Ed. 23, at p. 69.]
(7) (1824) 22 U.S., at p. 229 [6 Law. Ed., at p. 78].
(8) (1898) 171 U.S. 578, at p. 597 [43 Law. Ed. 290, at p. 298].
(9) (1928) 278 U.S. 123, at p. 127 [73 Law. Ed. 214, at pp. 218, 219].
(10) (1920) 28 C.L.R., at p. 546.
(11) (1918) 249 U.S. 235 [63 Law. Ed. 577].
(12) (1936) A.C. 578; 55 C.L.R. 1.
(13) (1939) 62 C.L.R. 457, at p. 461.
(14) (1934) 51 C.L.R. 108, at p. 120.
(15) (1945) 71 C.L.R., at pp. 56, 57, 71, 76, 77, 82, 83, 91.

ment is involved in the use made with a banker of a letter of credit, of a draft or a cheque. The whole question is made clear by *Trinidad Lake Asphalt Operating Co. Ltd.* v. *Commissioners of Income Tax for Trinidad & Tobago* (1); *Auten* v. *United States National Bank of New York* (2); *M'Culloch* v. *Maryland* (3); *Osborn* v. *Bank of United States* (4). All these citations show that a banker carrying on his business is engaged in trade, commerce and intercourse and that when the transactions are inter-State he is engaged in trade, commerce and intercourse among the States: see, further, *Commissioner of State Savings Bank of Victoria* v. *Permewan, Wright & Co. Ltd.* (5); *Heiner* v. *Scott* (6). In *Citizens Insurance Co. of Canada* v. *Parsons* (7), banking is treated as within trade and commerce as ordinarily understood. For that reason the commerce power in the *British North America Act* was read down. In our Constitution the commerce power is limited to inter-State and oversea commerce. It was therefore necessary to express the banking power as a further power. In *Huddart Parker Ltd.* v. *The Commonwealth* (8), *Evatt* J. says: "Nor do I think that the express grant to the Commonwealth legislative power in other parts of s. 51 of matters such as banking, insurance, currency, and the like, really affects or limits the extent of the trade and commerce power of the Commonwealth; these other subjects within Commonwealth jurisdiction apply to all commercial transactions whether inter-State, foreign or confined to one State alone." In *Punjab Co-operative Bank Ltd., Amritsar* v. *Commissioner for Income Tax, Lahore* (9), the Judicial Committee, in holding that the realization of securities to meet probable demands of depositors formed part of the business of banking so that profits of the realization formed income, said: "In the ordinary case of a bank, the business consists in its essence of dealing with money and credit": see *Sayers, Modern Banking*, 1938 ed. and 1947 ed., c. 2. In the *Bank of England Act* 1833 (*Halsbury's Complete Statutes of England*, vol. 1, pp. 483, 530) and in the *Country Bankers Act* 1826 (*Halsbury's Complete Statutes of England*, vol. 1, p. 518) the business of bankers is referred to as trade: see, too, *Banks and Currency Act* 1890 (Vict.), s. 3; *Toronto Electric Commissioners* v. *Snider* (10)). In *United States*

(1) (1945) A.C. 1, at pp. 9-13.
(2) (1889) 174 U.S. 125, at pp. 142, 143 [43 Law. Ed. 920, at pp. 926, 927].
(3) (1819) 17 U.S., at p. 407 [4 Law. Ed., at pp. 601, 602.]
(4) (1824) 22 U.S. 738, at pp. 864, 865 [6 Law. Ed. 204, at p. 234].
(5) (1914) 19 C.L.R. 457, at p. 464.
(6) (1914) 19 C.L.R. 381, at p. 393.
(7) (1881) 7 App. Cas. 96, at pp. 111, 113.
(8) (1931) 44 C.L.R. 492, at pp. 527, 528.
(9) (1940) A.C. 1055, at p. 1072.
(10) (1925) A.C. 396, at p. 409.

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v. *South-Eastern Underwriters Association* (1) *Stone*, C.J. in his dissenting opinion (2) treats transactions across State lines incidental to insurance as undoubtedly inter-State trade, though he refuses so to regard the contract of insurance. In *Engel* v. *O'Malley* (3), *Holmes* J. treated the transmission of credit as within the commerce power. The telegraph-service cases proceed on the same reasoning: *Pensacola Telegraph Co.* v. *Western Union Telegraph Co.* (4); *Western Union Telegraph Co.* v. *Texas* (5). So, a correspondence school: *International Text-book Co.* v. *Pigg* (6); or broadcasting: *Fisher's Blend Station Inc.* v. *Washington Tax Commission* (7); or a news exchange or agency: *Associated Press* v. *National Labor Relations Board* (8). It is to be borne in mind that transfers or movements of credit are accompanied by actual communications, drafts, vouchers or telegrams. It is typical commercial intercourse. The decision and reasoning of *United States* v. *South-Eastern Underwriters Association* (1) goes further than is necessary here, but banking is *a fortiori* in its inter-State ramifications and as a complex covering Australia in disregard of State boundaries. It affects also almost every inter-State transaction in goods or transportation, in commerce or in intercourse. But the banks are integrated in an organization on a national basis. It is only thus that the standing excess of advances over deposits in Western Australia is accounted for. Deposits in other States to the extent of £6 million are drawn into Western Australia to support the advances. This is an instance, but throughout Australia the same movement of funds may be traced. What is said in the last-mentioned case (9) to the effect that only by using a technical instead of a practical conception could insurance be regarded as outside inter-State commerce is still more true of banking. Equally is this so as to the observation there that a nation-wide business is not deprived of its inter-State character because it is built on contracts of a local nature. In banking, however, the contracts are often inter-State and the customer requires many inter-State transactions. In *Polish National Alliance* v. *National Labor Relations Board* (10), a fraternal benefit society was organized in lodges scattered through twenty-three States.

(1) (1944) 322 U.S. 533 [88 Law. Ed. 1440].
(2) (1944) 322 U.S., at pp. 562, 563 [88 Law. Ed., at p. 1463].
(3) (1911) 219 U.S. 128 [55 Law. Ed. 128].
(4) (1878) 96 U.S. 1 [24 Law. Ed. 708].
(5) (1882) 105 U.S. 460, at p. 464 [26 Law. Ed. 1067, at p. 1068].
(6) (1910) 217 U.S. 91 [54 Law. Ed. 678].
(7) (1936) 297 U.S. 650 [80 Law. Ed. 956].
(8) (1937) 301 U.S. 103 [81 Law. Ed. 953].
(9) (1944) 322 U.S., at p. 547 [88 Law. Ed., at p. 1454].
(10) (1944) 322 U.S. 643 [88 Law. Ed. 1509].

Frankfurter J. said its activities showed that "the web of money-making transactions woven across many State lines" was such that a strike at the centre in Chicago "would as a practical matter certainly burden and obstruct the means of transmission and communications across these State lines": see also *Prudential Insurance Co.* v. *Benjamin* (1); *Robertson* v. *California* (2). Applying these cases, the features present in Australian banking are: a system organized on an inter-State basis; the business of each member so organized; funds employed or employable over the whole area, regardless of State boundaries; constant inter-State communications in carrying out the business; movement of credits, documents, communications, &c.; buying and selling of inter-State drafts, and acquisition of interests in bills of lading and goods in transit. Further, the banking transactions are indispensable to the inter-State trade, commerce and intercourse carried out by the customers &c. The collection and remission of the price is a necessary part of an inter-State transaction in goods. Thus *Evatt*, as counsel, in *Roughley* v. *New South Wales*; *Ex parte Beavis* (3) correctly argued that "the transaction of inter-State trade does not end with the sale of the goods: it includes the remitting of the proceeds to the grower." For that a bank is necessary. A most important and indivisible section of a business conducted for profit is inter-State. It is commercial according to judicial authority and writers, and bankers are described by them as traders, merchants, dealers and middlemen. The Privy Council declares emphatically that crediting money in one place in accordance with a debit in another is to transmit the money. There is transmission of credit documents and dealings. It is all indispensable to traffic in goods and transportation. There is nothing to distinguish it from the airlines in principle. Section 46 (4) is a prohibition plainly obnoxious to s. 92. Division 4 of Part IV. has the purpose and effect of preventing the carrying on of the business. It is followed by s. 46 (4), (3) and (1), in point of operation, and they are bad as prohibitions. Sections 13 et seq. and Division 3 have the same design. As to s. 46 (1), (2) and (3), if the main provisions fall, they must too, notwithstanding s. 6. But if that is not so and they are to be considered separately, then they continue to operate indefinitely. It compels the carrying on of a business including inter-State trade in a particular form. That is as much an invasion of freedom as prohibition. Division 3 excludes the

(1) (1946) 328 U.S. 408 [90 Law. Ed. 1342].

(2) (1946) 328 U.S. 440 [90 Law. Ed. 1366].

(3) (1928) 42 C.L.R. 162, at p. 172.

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owner from managing the business; that is obnoxious to s. 92. Section 13, considered independently, is designed to obtain a majority of the shares and thus control the company in order to stop or take over its banking business. That is only another way of assuming governmental control. To put in government directors, whether under Division 3 or by acquiring enough shares under s. 13 in order to control an inter-State business, is to impair the freedom protected by s. 92. If, contrary to what has been submitted, banking is not trade or commerce, there is still a contravention of s. 92. This Act not only authorizes the shutting up or taking over of each or any trading bank. It authorizes the taking over and closing of them all. That would deprive every citizen of the instruments of his inter-State trade, commerce and intercourse, of his indispensable media of conducting his inter-State business. To substitute a Government agency is not to comply with s. 92. To be allowed to bank through a Government agency is not to be free of Government control. In the *Airlines Case* (1), *Dixon* J. says: "If . . . the answer is offered that the transmutation of the business into a government undertaking means that the function is still freely carried on, it is met by the proposition, so often enunciated by *Isaacs* J., that in s. 92 'free' means free from governmental restriction or obstruction, whether legislative or executive." The following propositions are supported by authority:—(1) Any law, whatever its subject matter, that has the effect of impairing the freedom with which people, goods or tangible or intangible things are interchanged across State boundaries in the course of trade, commerce and intercourse is bad. (2) When the law takes the form of an authority to the Executive, it is invalid if it authorizes acts having that effect. (3) In either case, consequential or remote effects may be disregarded, but no intended effect can be considered consequential or remote. (4) The third statement embodies the meaning of Lord *Atkin* in *James* v. *Cowan* (2). He is not speaking of legislative motive or purpose, but of the abuse of administrative power. In *McArthur's Case* (3) the Court, having decided that s. 92 did not bind the Commonwealth, had no difficulty in denying to the States authority over the subject matter. Any "control" of anything belonging to the subject of trade, commerce and intercourse was outside the power of the States though within that of the Commonwealth. But, as soon as the Privy Council conceded that it did bind the Commonwealth,

(1) (1945) 71 C.L.R., at p. 91.
(2) (1932) A.C., at p. 558; 47 C.L.R., at p. 396.
(3) (1920) 28 C.L.R. 530.

control of subject matter could no longer afford a test, because s. 51 (i.) expressly gave such control to the Commonwealth. It was therefore necessary to revise the conception of freedom; but the subject matter in relation to which the revised notion of freedom would give immunity remained the same. That means that an operation to restrict inter-State trade becomes a test, and an Act has such an operation when it precludes traders from using any means but a Government banking agency of effectuating their inter-State transactions. If the interference with the inter-State trade of the customers of the private banks is a logical consequence of the legislation, it must be bad.

Coppel K.C. Section 6 (*a*) of the *Banking Act* means that, if any provision cannot be given full effect because it is ultra vires, the Act shall otherwise operate to the full extent to which it can do so consistently with the Constitution. Section 6 (*a*) relates to single provisions of a collective nature covering objects some of which may be outside power. It is only in such cases that the provision itself can be limited in operation so as to conform to the Constitution; it cannot where the nature of the provision makes it invalid. It relates to excess. "Nevertheless operate" refers to unchanged operation. It shall operate in the same manner but to a less extent. Section 6 (*b*) affirms the added operation of s. 15A partly lest it might be held impliedly superseded and excluded and partly because it is wider than s. 6 (*a*) in that its presumption favours the severance of entire provisions as well as the restriction of general expressions having a distributive application: see *Pidoto* v. *Victoria* (1); *Deputy Federal Commissioner of Taxation* (*N.S.W.*) v. *W. R. Moran Pty. Ltd.* (2); *Australian Railways Union* v. *Victorian Railways Commissioners* (3); *Vacuum Oil Co. Pty. Ltd.* v. *Queensland* [*No.* 2] (4); *Huddart Parker Ltd.* v. *The Commonwealth* (5); *McDonald* v. *Victoria* (6); *Airlines Case* (7). Section 6 (*c*) does not say or mean that particular provisions of the Act may be given a different operation in the process of saving them in whole or in part; it means that the Act, less the invalid provisions, considered as a piece of legislation, is to have effect notwithstanding that its operation may be different. Each provision saved by the application of s. 6 (*a*) of the *Banking Act* or s. 15A of the *Acts Interpreta-*

(1) (1943) 68 C.L.R. 87, at pp. 110, 111, 130, 131.
(2) (1939) 61 C.L.R. 735, at p. 807.
(3) (1930) 44 C.L.R. 319.
(4) (1935) 51 C.L.R. 677, at pp. 686-688.
(5) (1931) 44 C.L.R. 492.
(6) (1937) 58 C.L.R. 146, at pp. 151-154.
(7) (1945) 71 C.L.R., at p. 92.

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tion Act is to operate in the same manner although not to the same extent. No new or different operation of particular provisions is contemplated. A different operation of the residue of the Act as an entirety is not to displace s. 6 (*a*) of the *Banking Act* or s. 15A of the *Acts Interpretation Act*; but it remains a presumption of construction. The Court must still find an actual legislative intention to exist before it can give effect to the enactment. See *Hill* v. *Wallace* (1); *Dorchy* v. *Kansas* (2); *Williams* v. *Standard Oil Co. of Louisiana* (3) (see also the notes to this case); *Railroad Retirement Board* v. *Alton Railroad Co.* (4); *Watson* v. *Buck* (5); *Marsh* v. *Buck* (6). These cases show that, however strongly the severability clause may be expressed, the Court does not rewrite provisions or give them in point of policy or operation a different effect. The application of provisions may be more limited and the effect of the whole measure be different as a result of excisions. The elements of which the residue consists are not reframed. Applying these principles to s. 46 (4) to (8) of the Act, if sub-s. (8) is contrary to s. 92 of the Constitution, these provisions must go as a whole. For sub-s. (8) is a prohibition of a course of conduct, carrying on banking business in Australia; not of distributive acts. Section 6 cannot operate to eliminate from the prohibition inter-State banking business so that the provision prohibits carrying on intra-State banking business. That would convert it into a new and different law, a law prohibiting certain transactions. In any case you could not prohibit intra-State transactions without prejudicing inter-State banking. Moreover the business is indivisible. The passage in the reasons of *Dixon* J. in *Vacuum Oil Co. Pty. Ltd.* v. *Queensland* [*No.* 2] (7), gives grounds which apply here notwithstanding s. 6, though in that case there was no severability clause. It will be contended that Division 2 of Part VI. of the Act is bad under s. 51 (xxxi.) of the Constitution. Assuming this to be so, s. 25 cannot be treated as a severable provision fulfilling the requirement of s. 51 (xxxi.). It is not open to the interpretation and operation given in *Australian Apple and Pear Marketing Board* v. *Tonking* (8) to reg. 12 of the *Apple and Pear Acquisition Regulations*. It is only introductory or prefatory to s. 42, which in terms says that compensation is to be ascertained in no

(1) (1922) 259 U.S. 44, at p. 70 [66 Law. Ed. 822, at p. 831].
(2) (1924) 264 U.S. 286, at p. 290 [68 Law. Ed. 686, at p. 690].
(3) (1929) 278 U.S. 235 [73 Law. Ed. 287].
(4) (1935) 295 U.S. 330 [79 Law. Ed. 1468].
(5) (1941) 313 U.S. 387 [85 Law. Ed. 1416].
(6) (1941) 313 U.S. 406 [85 Law. Ed. 1426].
(7) (1935) 51 C.L.R., at pp. 691, 692.
(8) (1942) 66 C.L.R. 77.

other manner than according to Division 2 of Part VI. The meaning of s. 25, construed with s. 42, is clear. It does not mean to give an independent right to compensation. By invalidating s. 42 you cannot change the meaning of s. 25. [He referred to *R.* v. *Burgess*; *Ex parte Henry* (1).] Not only does s. 42 say that compensation shall be ascertained in no other manner, but s. 43 points out the method of agreement and makes it subject to the Treasurer, and s. 45 makes payment of the amount determined by the Court of Claims a discharge, "payable in full satisfaction of the claim to which the determination relates." In a similar way s. 15 is tied to Division 1. of Part VI., but in this case there are additional considerations against its being given an independent operation. Not only does s. 40 (2) say, in relation to persons on the register, and s. 40 (5), in relation to persons who, not being on the register, give notice within two months, that the compensation shall be determined by the Court and not in any other manner, but s. 13 (5) discharges the share of all mortgages, charges, liens, interests and other obligations, s. 39 provides the only way in which proprietors of such interests may claim, s. 40 (7) shuts them out of compensation if they do not so claim, s. 40 (4) gives the Court exclusive authority to decide their title and s. 40 (8) makes payment pursuant to the order of the Court of Claims a conclusive discharge and frees the Commonwealth Bank from any obligation to see to the application of the money. After that, the Court could not enlarge time under s. 40 (7). In the face of all this, s. 15 could not be given an independent operation covering the determination of the title to and the ascertainment of the compensation for all interests and by other tribunals. The bare words of s. 15, as a matter of meaning, were not intended to do this work. Their meaning cannot be changed; nor can the express negation contained in s. 40 (2), (4) and (5) be set aside; nor can they do the work; nor can all the other intentions expressed by Division 1 be not only frustrated but reversed. All this also reacts on s. 25; for it is in the same form as s. 15, and the meaning of one is the meaning of the other. You cannot rewrite the sections nor give them a new meaning. As to s. 51 (xxxi.), first, the Parliament has no power to legislate for the acquisition of property except that contained in that paragraph (*Johnston Fear & Kingham & The Offset Printing Co. Pty. Ltd.* v. *The Commonwealth* (2); *Minister of State for the Army* v. *Dalziel* (3)). Section 51 (xxxi.) depends upon the purposes of the other legislative powers.

(1) (1936) 55 C.L.R. 608, at pp. 675-677.
(2) (1943) 67 C.L.R. 314, at pp. 317, 318, 325, 331.
(3) (1944) 68 C.L.R. 261, at pp. 287, 289, 294.

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McClintock v. *The Commonwealth* (1) is not inconsistent with the view that a Commonwealth agency cannot be authorized to acquire property for purposes outside its agency, purposes not relating to its position as an agent of the Commonwealth. And the acquisition of the shares in a particular company or of the assets of a particular company is outside its legitimate purposes. The law made under s. 51 (xxxi.) must show on its face that it is for purposes within Commonwealth legislative power. Further, it must appear that all the property is for such purposes. In other words, the law must, to fall within s. 51 (xxxi.), be incidental to a subject of Commonwealth legislative power; it must provide for the acquisition of definite property, and it must give the parties expropriated just terms. The paragraph looks at the matter from the point of view of acquisition, while the Fifth Amendment looks at it from the point of view of deprivation. If the terms are not just, one consequence is that there is no acquisition. To apply these considerations to s. 24 it is necessary first to fix its meaning. It is devoted to "taking over the business": see s. 24 (2). That phrase occurs in s. 3 (*b*), s. 22 (1), (5), (7), (8), s. 43 (1), s. 46 (3), s. 49 (2), s. 54 (1) and (5), s. 65 (1), s. 56 (1), s. 57 (*a*), s. 58, s. 60 (1). It covers more than taking over the assets. Section 42 provides for compensation for the assets of a bank the business of which has been taken over, drawing the distinction: cf. s. 60 (1) (*a*) and (*b*). In s. 46 (3) the expression refers to a transaction between one private bank and another and to an acquisition of the Commonwealth Bank; see, too, s. 54 (1) for the same thing. If one private bank "took over the business" of another, the agreement between them would provide for (1) a transfer of physical assets, (2) a transfer of the customers' accounts, subject, where in credit, to the customers' acquiescence, (3) transfer of staff, (4) appropriate provision for pension, provident and superannuation funds for past and present employees: All this, without any break in continuity. If you did not do this, the transaction would break down. Section 24 (2) is the main provision, and, in pursuance of the taking over of the business, sub-ss. (4) and (5) vest assets and liabilities. In the same way s. 22 (5) provides for an agreement and sub-s. (8) vests assets and liabilities. The definitions in s. 5 of assets and of liabilities show that every contractual right and obligation, executory and executed, sounding in money or not, is to pass. There is an involuntary transfer of the whole contract of banker and customer and of every other contract, benefit and burden. That is assumed by s. 58, which excludes an obligation upon a customer, when taken

(1) (1947) 75 C.L.R. 1.

over, to continue. As to the staff, Part VIII. deals with the consequences of this transfer of contractual rights and obligations: see, particularly, s. 49 (1), which makes the transfer subject to the employees' election not later than the date of transfer, and s. 54 (5)-(8) as to pension liability. Thus, there is by compulsion the set of provisions a voluntary taking over would be expected to include. But the Australian assets and liabilities acquired on the date of transfer are not confined to those relating to the banking business, though overseas assets and liabilities subsequently becoming Australian vest only if they relate to banking transactions. Compare s. 22 (8) (*a*) and (*b*) with (*c*) and (*d*), and s. 24 (4) and (5) with (6) and (7). The present is not the time as at which the practical importance of the discrimination or failure to discriminate must be judged. The terminal date at which assets may accrue as Australian and vest is to be prescribed, presumably, by regulation under s. 62, but no regulation need ever be made. Now compare this with the area and operation of the compensation provisions. Section 42 limits the subject of compensation to assets: s. 25 to property, which does not differ; it is no wider. Division 2 of Part VI., is limited to the field covered by s. 42. Further, there is only one claim, one agreement determining compensation and one assessment. Fresh assets accruing as Australian at later dates are not the subject of claim, agreement or assessment; that is because there is but one acquisition, the acquisition of the business by s. 24 (2), and the rest (s. 24 (4)-(8)) is only vesting or conveyancing. Section 43 contemplates one agreement; further, if you make the agreement determining compensation, and fresh assets accrue as Australian, you cannot make a claim under s. 43 (3), because it is only in the absence of agreement that a claim may be made. There is a hiatus. The explanation is that the taking over of the business, not the passing of assets, is made the occasion on which everything turns. See, e.g., s. 49 (1) as to staff, s. 54 (5) as to pensions, s. 56 (1) (*a*) as to succession under instruments. Section 24 (6) and (7) are not restricted to assets and liabilities existing at the date of transfer as defined in s. 24 (1). They may be after-acquired. An intermediate acquisition or disposition by the Bank leaves the Commonwealth Bank entitled should the thing become an Australian asset later: cf. *In re Lind*; *Industrials Finance Syndicate Ltd.* v. *Lind* (1). There is thus no compensation except for assets, and then only if they are Australian assets at the date of transfer, or, at all events, before agreement or assessment of the

(1) (1915) 2 Ch. 345.

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amount of compensation. Not only is there a lack of compensation for what is included in "business" ultra assets and for assets after-accruing as Australian, but there is no compensation for the injurious affection of the total business of the private bank caused by the severance of its Australian operations and interests from, e.g., its New Zealand operations and interests. Then under s. 24 (8), coupled with s. 60, transfers may be required, without further compensation, of all sorts of overseas assets, whether connected with banking or not. An office in London, for example. This goes outside the banking power. If it were valid, the Commonwealth Bank could take the assets in New Zealand essential to the business there. They need pay no compensation for the assets if it were done after the compensation had been determined by agreement or by the Court, and in any case they need pay no compensation for the injury done to the New Zealand business. There are four reasons why s. 24 is bad generally :—(1) It is not an acquisition of property that is incidental to the subject matter of banking. (2) It attempts an acquisition which, on any view of the banking power, is wider than the power. (3) It does not define with sufficient certainty what is acquired. (4) Just terms are not provided. As to the first reason, this depends upon the contention already advanced that to acquire the business of one or more banking corporations is not a purpose of controlling or regulating the operations of banking as contemplated by s. 51 (xiii.). As to the second, it relates to the terms of s. 24 (2) which extend beyond the banking business in Australia. It must be borne in mind that the power given by s. 24 is exercisable now or at any future time. It may be years hence and therefore present facts are no test. Then there is s. 24 (8). A bank's business is a single business though it may extend into a number of countries or places : see *Maude* v. *Inland Revenue Commissioners* (1). As to the third, it follows that some method of defining what passes with the Australian business is needed. How can you tell whether a security, contract, liability, obligation or right belongs to the Australian or New Zealand business ? It is only guesswork to say what is included, and no two minds would work it out the same way. It is not acquisition on just terms. Section 24 (4) and (5) do not reduce the uncertainty, and, moreover, they only carry out the taking over which depends on s. 24 (2), and so many provisions hinge on taking over the business. The following would fail if there were no taking over : s. 49 (2), s. 54 (5), s. 55, s. 56 (1) (*a*), s. 56 (2) and the operative part of s. 56 altogether, s. 58, s. 60 (1) (*a*). As to the fourth reason,

(1) (1940) 1 K.B. 548, at pp. 552, 554.

the compensation is to be assessed under Division 2 of Part VI. (s. 42) in respect of assets, and there is no provision for the taking into account of liabilities. The terms of acquisition must be just, not only to the owner expropriated, but to the Commonwealth.

[STARKE J. When the Court has said it means just to both sides, it only meant that it was not unjust to the owner merely because the public interest was taken into consideration and what justice to it demanded placed in the scales.]

Again, there is no compensation for the prejudicial consequences to the New Zealand businesses of the taking of the Australian business. Section 24 strips a private bank of all its Australian assets and of any asset that reaches Australia. It leaves it without funds in Australia. In place of assets and funds it is given a claim to compensation which on any view is of extraordinary complexity, intricacy and difficulty involving prolonged and heavy litigation. Yet the Bank is *inops consilii*, and the Court in which it must litigate has no power to award costs (*Re Duff* (1); *Booker* v. *Gill* (2); *Service* v. *Flatau* (3)). As to the meaning of s. 24 (5): it would cover liabilities quite outside any dealings between bank and customer; and so would s. 24 (7), e.g., rates on its premises, the cost of stationery and office supplies, moneys owing under a building contract. Many people who dealt with a bank but not as its customers or in the course of banking are forcibly brought into relations with the Commonwealth and in a very obscure way. For example, a man undertakes to do work to the satisfaction of the Bank or one of its officers. To whose satisfaction must he do it if s. 24 is brought into play? There is a forced novation of all sorts of contracts. That is not within s. 51 (xiii.) or (xxxi.). Going now to the question whether Divisions 2 and 3 of Part IV. fail under s. 51 (xxxi.): First, s. 13 (3) involves an alteration of the rights not only of the holders of the shares acquired, but of the holders of the shares not acquired. For at once, by s. 17 (1), the directors "by force of this Act, cease to hold office." The shareholders are thus deprived of their right to have the company managed by their chosen directors. Under s. 13 (4) the vesting might in any case destroy the directors' share qualification, if the articles required one to continue. Then ss. 14, 10 and 21 all operate to change the incidents of the shares not acquired. The holder of such shares has an entirely different bundle of rights. Then s. 19 puts in new directors and places all the powers of the company in their hands, and by sub-s. (3) absolves them from every qualification, restriction

(1) (1918) V.L.R. 426.
(2) (1899) 15 W.N. (N.S.W.) 158.
(3) (1900) 16 W.N. (N.S.W.) 248.

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or condition upon the exercise of the powers. Under s. 19 (1) the new directors may dispose of the assets to the Commonwealth Bank for whatever consideration they think fit or for none. Indeed, their duty appears to be to the Commonwealth Bank. They may then, having so reduced the value of the shares, close the overseas branch registries, with the consequence that the shares thereon become Australian shares and are acquired at the reduced value. In s. 19 (3) the words " relating to " qualify " qualification, restriction or condition," though, if they qualify " law, charter or other instrument," the effect is the same ; for it means, not " specifically referring to," but " relating to " in the sense of " touching " or " affecting " : cf. s. 10, which contains some of the same words. It may be that, by a judicious use of the power in s. 19 (1) (*a*) to declare dividends out of reserves before making an agreement under s. 19 (1) (*c*), the effect of s. 23 could be impaired in substance. In fine, the rights of the outstanding shareholders are prejudiced by the profound alterations caused by the notice under s. 13 (1) and the acquisition of Australian shares under s. 13 (4). When their shares are turned into Australian shares, they are acquired at an under-value because of the use of the powers of s. 19 (1), particularly that of par. (*b*). It may, of course, be put the other way, viz., that the notice sets in train an acquisition of the company's assets under s. 19 (1) (*b*) on the new directors' terms, they being agents of the Bank, and that because of the ex-Australian shares outstanding that is unjust. But, as to the assets, it is submitted that the effect of the notice, when s. 19 takes effect, is to acquire all the beneficial advantages of property in them, leaving only the bare husk of legal ownership with the company. The business and affairs are placed under the dominion of the Commonwealth Bank's agents who are in possession and control. They dispose of them in course of business or *in globo* under par. (*b*) of sub-s. (1) to the Commonwealth Bank. They are subject only to the approval of the Treasurer and under no duty to the corporation or the shareholders, only to the Commonwealth Bank by whom they were appointed and may be removed (*Acts Interpretation Act*, s. 33). Section 51 (xxxi.) reaches every acquisition, direct or indirect, formal or disguised (*Dalziel's Case* (1) ; *The Commonwealth* v. *New South Wales* (2) ; *R.* v. *Registrar of Titles* ; *Ex parte The Commonwealth* (3)). It is like giving possession and enjoyment with a general power of appointment *inter vivos* and testamentary.

(1) (1944) 68 C.L.R., at p. 285.
(2) (1923) 33 C.L.R. 1, at p. 55.
(3) (1915) 20 C.L.R. 379, at p. 392.

Kitto K.C. and *A. R. Taylor* K.C. (with them *Dean* K.C., *Stanley Lewis*, *Spicer* and *T. W. Smith*), for the plaintiffs in the second action.

Kitto K.C. The provisions enabling the prohibition of banking, viz., s. 46 (4)-(8), are not warranted by s. 51 (xiii.), nor is the scheme involved in s. 24 together with s. 46, Part VIII. and s. 56. Even without s. 46, those provisions would provide for the taking over of a banking business as a going concern, and such a law is not warranted by s. 51 (xiii.). They provide for the taking over of a business not exclusively or predominantly a banking business, and for that reason are beyond power. If s. 24 be considered by itself, the three matters for which it provides are not warranted by s. 51 (xiii.) or (xxxi.), viz., the assumption of control, the assumption of liabilities and the acquisition of assets. Section 46 (4)-(8) may be invoked separately, so far as appears; but, on that footing, no ground suggesting the control of banking is anywhere indicated, that is, banking as a course of business. It may be used against one or all the banks. Does s. 51 (xiii.) authorize an absolute prohibition of all banking? Unless it does, s. 46 (4)-(8) cannot be supported. There is only purely literal and undiscriminating construction on which to rest such a conclusion. The subject is described as a continuing, existing activity to be governed, not as a subject for complete or universal suppression. The word "banking" suggests continuity. So does "State banking." "Extending" strongly suggests an activity continuing as a subject of current legislative regulation. State banking extending beyond the State concerned was placed under Federal authority so that the Commonwealth Parliament could see that the State into which it extended did not hamper or obstruct it or even suppress it. The Constitution was to govern a modern organized society in which banking in some form is an integral and essential element. The construction of s. 51 (xiii.) should be consistent with the principle of operation. The nature of the law that falls within the power is best ascertained from the nature of the subject matter, e.g., s. 51 (xxiv.), (xxv.), (xxviii.), (xxxiv.), (xxxv.). Some are prohibitive, some regulative and some facilitative. Section 51 (xiii.) is a power to govern and regulate for the better performance of the activity or operations. It would be contrary to common sense to say it meant prohibition. Section 46 (4)-(8) operating independently do not put the activity in other hands, but do enable the Treasurer at his will for no reason to determine the authority of the banks to carry on. If there is no power to legislate for the total abolition of banking, it must

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follow that you cannot legislate to prohibit even one individual except to form a means of regulating the activity itself. You must be able to discern in the prohibition that it is done in the course of regulating the activity. If the power to grant or withhold authority to carry on the trade were absolute, it could not be for regulating banking at all and could only be justified under a power extensive enough to authorize complete prohibition. It is submitted that the power is to regulate; therefore, any prohibition, to be valid, must be by way of regulation of the subject matter; a bare prohibition of an individual from carrying on banking is not a regulation of banking and could be justified only under a power of universal prohibition; a prohibition is not a regulation of the subject matter unless you can discern in it that it is based on considerations relevant to the regulation of the subject; accordingly, the validity of a prohibition depends upon discovering that it is so based; the subject of s. 51 (xiii.) is limited to the carrying out of operations in the course of the banker's business; s. 46 (4)-(8) are not based on considerations relevant to the regulation of the carrying out of such operations. A law excluding A from banking, if not directed to governing the operation or activity, is about A, not about the activity. To exclude on the ground that private control is undesirable, is to take a ground representing a political choice, not a concern as to the way banking is carried out. So with private profit. It is notable that, until it mentions the incorporation of banks, s. 51 (xiii.) refrains from mentioning the persons, bodies or institutions and chooses to base the power on the activity. The contrast is marked when you come to incorporation, and it is only then that banks in contrast to their activity come within the power. Regulation, of course, authorizes prohibition of some things in order to govern the activity. Compare the two passages by *Starke* J., one in the *Airlines Case* (1), and the other in *Melbourne Corporation* v. *The Commonwealth* (2), where prohibition is referred to as a means of regulation. There is no hint that the prohibition in the present case is based on the view that the private banks conduct the operation in an unsatisfactory or undesirable way or that those earning private profit may do so. On the contrary, s. 11 bids the Commonwealth continue their customs, practices and methods. The control of the activity is, therefore, not the basis of the prohibition. The scheme contained in s. 24, s. 46 (1)-(3), Part VIII., and s. 56, is directed simply to the exclusion of the scheduled banks from the field of banking for no consideration whatever affecting the conduct of banking. The heading of Division 4, " Taking over

(1) (1945) 71 C.L.R., at p. 76. (2) (1947) 74 C.L.R., at p. 69.

of Businesses of Private Banks," aptly describes the scheme. The collection of provisions produces an effect quite unrelated to the government of banking operations. It is simply exclusion therefrom. It is no answer that s. 3 says that it is in order to expand the business of the Commonwealth Bank. That expresses a motive or hope, and it may or may not be fulfilled. It is a thing the legislation does not effect. To exercise the power to close one private bank is better calculated to increase the business of the others rather than the Commonwealth Bank. It comes back to the fact that it relates to the transfer of banking businesses, not the operations of banking. It is a law relating to the ownership of banks. The legislation does not deal with what the banker does, but with what he owns. If you leave out s. 46 (1)-(3) from the scheme, it is still of that nature and does not regulate banking. When you look at what the provisions do take over, non-banking as well as banking business, it is impossible to relate them to the banking power. Part IV. is concerned with named companies and their businesses, however much this may be disguised by the words "private banks." The entirety of their businesses in Australia and their staffs are taken over by s. 22 and s. 24 and Part VIII. The draftsman may have been preoccupied with the facts of the present in relation to the scope of the businesses, but the present is not the relevant time. Take the powers of the Bank of Australasia, the Union Bank or the English, Scottish and Australian Bank. They might embark on undertakings widely different from banking before they (or their shares) were taken over. You cannot read down the scope of the acquisition by means of s. 6 to banking business, because the intention is plainly otherwise, and insuperable difficulties arise in separating the businesses and in applying Part VIII., by which the whole of the staff go over. The banks may be taken all together or one at a time, and they have chosen to include the whole of the business in Australia of each of them. It must follow that the legislation must stand or fall by the width of what it embraces, and the possibility of its operating universally or singly upon the banks. Section 56 confirms the width of the acquisition. Australian banking business does not yet embrace executorship, but banks are receivers and trustees, and under orders of State courts too. The draftsman had a difficult task to segregate banking from other activities, but escaping from it by resort to universal succession has involved him in insuperable difficulties. As to many of the duties and functions to be transferred, the Commonwealth Bank has no power to perform them, and they fall outside the subjects of Federal legislative power, as, for instance, trustee

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business. Section 13 of the *Banking Act* 1945 is on a different footing from s. 24 of this Act. The latter proceeds on this basis: here is a company; we take over its business, lock, stock and barrel, in Australia because it does banking business. Section 24, standing by itself, deals with assumption of control, assumption of liabilities and vesting of assets. As contended, the taking over of the entire business is not within s. 51 (xiii.). But, if s. 24 (2) be now considered as an assumption of control of the operations of a business, then it can only be justified if it is based on a policy or principle relating to the conduct of banking operations. You may exclude a body or person in order to regulate the activity, e.g., if a man had been guilty of embezzlement. But apart from exclusion as a means of regulation, the power does not extend to taking over a business. The regulating of banking is one thing, but the naked question of who shall be bankers is another. The power is with respect to banks, not banking; State banking is described as extending; banks are included in the restricted matter of incorporation and in that alone. All this shows that banking is not sufficiently wide to authorize any and every form of legislation bearing on "banks." To say that it shall be a State function, or that, for no reason, or any reason, a given bank shall not carry on banking, is outside such a power. Either you ascribe to s. 51 (xiii.) an intention to authorize the Parliament to abolish all banking or you treat it as aimed at regulation. Further, the business of each private bank includes many matters, e.g., the employment of staff and its incidents and operations outside banking, which must be outside the power. Section 24 (2), on taking over the business, goes much too far, for this reason, in any case. Section 24 (5) takes over all the liabilities situate in Australia and discharges the bank. That is a law as to property or civil rights. In the *Quebec Case* (1) the Privy Council held that a transfer of unclaimed deposits dealt with banking only because the repayment to the depositors of such deposits was part of the business of banking and the law dealt with that repayment. Otherwise it would be property or civil rights and not banking. Statutory novation of business liabilities is not banking, even if the business is banking. Section 24 (5) and s. 56 involve compulsory novation. They include such obligations and liabilities as accrued salaries for the time being unpaid, damages for negligence, future rent and covenants under tenancy agreements. Section 51 (xxxi.) is the sole source of power to which s. 24 (4) and (6) can be referred. That power necessitates some indication of purpose which is within other legislative powers—

(1) (1947) A.C. 33, at pp. 42, 44.

a purpose to which the property is to be applied. The only purpose appearing for the acquisition of the assets is to place them in the hands of the Commonwealth Bank to do what it likes with. The expansion of the business of the Commonwealth Bank is not a purpose to which all the assets will be applied, and it is not one indicated as one to which they are to be applied. All that the Act appears to mean is that it wants to divest the private bank in order to exclude the activities of the latter. When the assets are obtained, much will be disposed of or put out of use. The sub-sections give the entirety of the assets to the Commonwealth Bank, whether or not they are used in banking, and whether or not the Commonwealth Bank wants to use them at all for that or any other of its purposes, and without indicating in any way their destination.

A. R. Taylor K.C. It is submitted that certain provisions of the Act, particularly ss. 15, 25 and Part VI., which purport to provide for the acquisition of property, are incapable of severance one from another and that they are bad on two grounds: (1) The terms provided by ss. 15, 25 and Part VI. are not just; (2) they are invalidated by reason of s. 75 (iii.) of the Constitution. The construction of these provisions is necessarily the reverse of *Tonking's Case* (1), because they possess the very features the absence of which formed the foundation of that decision. Sections 15 and 25 are framed in very general terms. Part VI. then provides in effect that the compensation shall be determined, not by reference to those respective sections, but by reference to Division 1 or Division 2, as the case may be. In Division 1, s. 37 directs the keeping of the compensation register and the entry of the particulars of the shares as on the share register of the Bank. Section 38 provides for transfer and devolution and registration thereof and s. 39 for notice of interests. Section 40 has separate provisions for cases of no notice and of notice. In the latter case the Court of Claims determines the persons entitled to compensation; in both cases, the amount payable. These matters are to "be determined by the Court and not in any other manner." Thus, s. 15 means that the Commonwealth Bank will pay fair and reasonable compensation in respect of the acquisition of shares by it under s. 13 to the persons whom the Court of Claims determines to be entitled to compensation and not otherwise, and that they shall be paid the compensation determined by the Court of Claims and none other. Section 40 (7) deals with persons not on the register who have not within two months given notice, and these will necessarily be numerous.

(1) (1942) 66 C.L.R. 77.

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Except under an order of the Court of Claims they are to recover nothing. Section 40 (8) does two things. It makes payment by the Commonwealth Bank in pursuance of the section or of an order of the Court of Claims a discharge of the Bank. It makes it unnecessary for it to see to the application of the money or to the performance of any trust or discharge of any mortgage &c. Thus, ss. 15 and 25 look forward to the provisions for determining the amount of and rights to compensation, and these sections must stand or fall with Part VI. In Division 2 of Part VI., s. 42 makes compensation for the assets ascertainable only in accordance with the Division. Section 43 provides for settlement of the amount by agreement and in default of agreement for a notice of claim: see, too, s. 44 (1), which provides for the Commonwealth Bank giving notice of offer. Section 44 (3) provides that it shall be deemed to be accepted unless the private bank within two months requires the Commonwealth Bank to refer it to the Court of Claims. Section 44 (4) makes a corresponding provision where there is no notice of offer. Section 44 (5) requires the Court then to determine the compensation. Section 45 makes it a complete satisfaction. The private bank is thus turned to a court to go through a long, costly and most intricate and difficult litigation where there is no power to award costs or to add interest to the compensation or to make a judgment carrying interest (*Grace Bros. Pty. Ltd.* v. *The Commonwealth* (1)). There are, therefore, not just terms. Then s. 42 is inconsistent with s. 75 (iii.) of the Constitution. The Commonwealth Bank is a party sued on behalf of the Commonwealth, and in any case the Commonwealth is a necessary or proper party because it is a guarantor under s. 61. These points are submitted: (1) Section 75 (iii.) is self-executing and does not require legislation under s. 78. (2) By no law can the Parliament derogate from that jurisdiction. (3) Any law purporting to do so is invalid (*New South Wales* v. *The Commonwealth* (2); *R.* v. *Connell*; *Ex parte Hetton Bellbird Collieries Ltd.* (3); *R.* v. *Drake-Brockman*; *Ex parte National Oil Pty. Ltd.* (4); *Australian Coal and Shale Employees* v. *Aberfield Coal Mining Co. Ltd.* (5); *The Commonwealth* v. *New South Wales* (6); *Minister for the Navy* v. *Rae* (7); *Marine Board of Launceston* v. *Minister for the Navy* (8)). The Commonwealth Bank is the Commonwealth and is sued on behalf of the Common-

(1) (1946) 72 C.L.R. 269.
(2) (1932) 46 C.L.R. 155, at pp. 176, 208, 214, 229, 230, 233.
(3) (1944) 69 C.L.R. 407, at p. 428.
(4) (1943) 68 C.L.R. 51, at pp. 57, 58, 60, 64.
(5) (1942) 66 C.L.R. 161.
(6) (1923) 32 C.L.R. 200.
(7) (1945) 70 C.L.R. 339, at p. 341.
(8) (1945) 70 C.L.R. 518.

wealth (*Commonwealth Bank Act* 1945, s. 10). Section 75 (iii.) is dealing with substance and not the form of proceedings. It is not confined to nominal defendants, law officers and the like, but extends to every case where the right or liability in substance is that of the Commonwealth (*Graham* v. *Public Works Commissioners* (1); *Kirkpatrick* v. *War Service Homes Commissioner*, cor. *Starke* J. (2); *Commonwealth Bank Act* 1945, ss. 15 (1) (*c*), 20, 47, 61). The Commonwealth Bank carries on on behalf of the Commonwealth (*Railway Commissioners* (*N.S.W.*) v. *Orton* (3); *Hoad* v. *Swan* (4); *Harrison Moore, Liability for Acts of Public Servants, Law Quarterly Review* (1907), vol. 23, p. 19). Section 187 of the *Commonwealth Bank Act* 1945 gives no priority. In any case, as guarantor, the Commonwealth would be a proper party (s. 61). You cannot sever s. 42 or the exclusion of the High Court or s. 44 (3). Exclusive jurisdiction in the Court of Claims is essential to the scheme.

Hudson K.C. (with him *D. I. Menzies*), for the plaintiffs in the third action. These plaintiffs rely on the five grounds of attack indicated by Mr. *Barwick* at the commencement of his argument, and contend (1) that s. 51 (xiii.) and (xxxi.) of the Constitution will not support this Act, and (2) that the Act is invalid because it interferes with essential powers of the Governments of the States. As to the first contention, the argument will be directed to the operation the Act would have on banking operations of a State extending beyond the State. Banking consists of transactions characteristic of the relation between banker and customer. The power does not extend to prohibition. Though many of the subjects enumerated in s. 51 are subjects over which Commonwealth power is plenary, this is not one of them. It could not prohibit State banking from "extending." The express inclusion of incorporation of banks would be quite unnecessary if the question who could and who could not engage in banking formed part of the initial power. The Act assumes to take all Australian assets and overseas assets, if they relate to banking, *quando acciderint*, and to displace the directors, all under a power to legislate as to banking. This cannot be right. If it were, mark the consequence if the same meaning is attached to the word "banking" in the expression "State banking extending beyond the limits of the State concerned." Except that the subject matter is restricted by the condition that it must extend beyond the State

(1) (1901) 2 K.B. 781, at p. 789.
(2) (1925) Unreported.
(3) (1922) 30 C.L.R. 422.
(4) (1920) 28 C.L.R. 258.

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concerned, it is the same in character as banking carried on by a State. State banking within the State concerned is excluded no more and no less from the power than is non-banking business. If the power over banking (other than State banking) enables the Parliament to provide for the acquisition of the non-banking business of a private bank, then by a parity of reasoning the power over banking beyond the limits of the State concerned would enable the Parliament to provide for the acquisition of the State bank—the whole business, whether within or without the State concerned. Correspondingly, the directors or Commissioners could be displaced. Just as the basis of the Act is that anything that is necessary or convenient for banking other than State banking may be acquired or may be done, so it must follow that anything that is necessary or convenient for State banking extending beyond the State concerned may be acquired or may be done. If it is true that because a company carries on banking you can take over its entire business, whether banking or not, and give it the directors you choose, then it must also be true that because it carries on extra-State State banking you can do the same. For the two subjects are the same in description and form two parts of the same power. Logic demands that under a power over extra-State State banking it might be provided, not merely that the extra-State banking and the intra- and extra-State non-banking business should be taken over, but more than that, viz., that the whole business, intra-State and extra-State, banking and non-banking, should be acquired. That is no less to be considered an incident of taking over the extra-State banking than to take over the entire business, banking and non-banking, is incidental to the power over banking. Yet the consequence is a *reductio ad absurdum* when s. 51 (xiii.) is read naturally. It can only be avoided, however, by treating banking and State banking "extending" as continuing functions to be governed but not suppressed. It cannot be avoided by implying a prohibition from the words "other than State banking." These words form but part, a limiting part, of the description of the subject of the power. They are not prohibitions of its manner of exercise, when its ambit is ascertained from the definition of "subject matter." As to what is contained in the power to incorporate banks, see *The Case of Suttons' Hospital* (1). The creation in the case of the Commonwealth Bank of a *persona ficta* without corporators is not incorporation as meant by the power. The Act is bad for interference with State Government functions, an interference denied to

(1) (1612) 10 Co. Rep. 23a, at p. 29b [77 E.R. 960, at p. 968].

the Commonwealth in *Melbourne Corporation* v. *The Commonwealth* (1). For the same reasons, the present Act is bad, particularly Divisions 2, 3 and 4 of Part IV. and Part VII. An affidavit filed on behalf of the plaintiffs in this action shows a system depending upon the *Audit Act* 1928 (Vict.) and, alternatively, on s. 44 of the Victorian Constitution, which provides for a consolidated public revenue and appropriation therefrom by law. The *Audit Act* provides for the payment of public revenues into banking accounts by all officers receiving revenue. There is a binding contract between the State and all the plaintiff banks that they will provide banking facilities for the States to keep their public accounts and allow interest on balances. The public account is fed by payments in by receivers of revenue and collectors of imposts. There are 300 accounts of receivers and 400 of collectors in daily operation, the receipts amounting to £55 million per annum. There are also 700 advance accounts enabling State servants to carry on the particular departments or activities for which they are responsible. Section 56 would convert all these into debts by the Commonwealth Bank to the State. It appears that other States, particularly New South Wales, operate in the same way. It is submitted that a law such as the present, the operation and effect of which is to interfere unduly with, or to curtail in a substantial manner, the performance by a State of its functions of government is invalid even though it be in respect of a subject matter committed to the Commonwealth Parliament, and even though it is not discriminatory (*Melbourne Corporation* v. *The Commonwealth* (2)). The fact that the command in that case was addressed to banks and not to States was considered no reason for saying it did not interfere with the States. Discrimination is not an exhaustive test. Only *Dixon* J. used it, and he did not say the law would have been necessarily good had it survived the application of that test. Commonwealth laws which discriminate against the States are bad, but those which do not are not necessarily good. Although undue effect is an indefinite conception on which to base a determination of validity, it is really the basal consideration. If the operation and effect of an Act is to hamper or prevent the performance by the States of their functions or the conduct of their constitutional or governmental affairs, it unduly interferes and is bad. In the *Melbourne Corporation Case* (3) there was a law on the subject of banking, and the real basis of the decision of the majority was that the law

(1) (1947) 74 C.L.R. 31.
(2) (1947) 74 C.L.R., at pp. 55, 56, 66, 70, 81, 99.
(3) (1947) 74 C.L.R. 31.

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prejudicially affected State functions. When *Dixon* J. speaks of a law aimed at the States, that should be understood to mean a law the necessary effect and the operation of which is to interfere with the States (*Baxter* v. *Commissioners of Taxation* (*N.S.W.*) (1)). The present prohibition is addressed to the banks, but it forbids them to do business for the States and also for others. It excludes the States as persons needing the services of the banks alike with citizens needing to use them (*West* v. *Commissioner of Taxation* (*N.S.W.*) (2)). The reason for the rule is to preserve the existence of the States and enable them to fulfil their purpose as political organs. If s. 48 of the *Banking Act* 1945 had been directed to preventing the banks acting, not only for the States, but for insurance companies also, the result would have been the same. The basis of the decision in the *Melbourne Corporation Case* (3) is the nature of the Federal compact, and the freedom from interference must therefore be reciprocal. In *South Carolina* v. *United States* (4), the protection of the States from non-interference was explained. In *Panhandle Oil Co.* v. *Mississippi* (5), the dissent of *Holmes*, *Brandeis*, *Stone* and *McReynolds* JJ. was based on their view of the degree of interference, and they protested only against the rule, which they formulated, being taken beyond its purpose. In *Metcalf* v. *Mitchell* (6), the same view was taken of an income tax upon those performing services for the Federal Government. In *Indian Motocycle Co.* v. *United States* (7), a Federal tax on the sale of a motor cycle to a municipal police department was held bad. See also *James* v. *Dravo Contracting Co.* (8) ; *Helvering* v. *Mountain Producers Corporation* (9) ; *Graves* v. *New York* (10) ; *United States* v. *Allegheny County* (11) ; *New York* v. *United States* (*Saratoga Springs*) (12). In the last case *Stone* C.J., *Reid*, *Murphy* and *Burton* JJ., speak of the invalidity of a tax upon a State being due wholly to the fact that it is a State which is being taxed so as unduly to infringe in some manner the performance of its functions as a government which the Constitution recognizes as sovereign. *Frankfurter* J. advances no reason for adopting discrimination as a

(1) (1907) 4 C.L.R. 1087, at p. 1158.
(2) (1937) 56 C.L.R. 657, at pp. 688, 690, 693, 695, 698, 701, 706, 707.
(3) (1947) 74 C.L.R. 31.
(4) (1905) 199 U.S. 437, at pp. 451-456, 461 [50 Law. Ed. 261, at pp. 265-269].
(5) (1928) 277 U.S. 218 [72 Law. Ed. 857].
(6) (1926) 269 U.S. 514 [70 Law. Ed. 384].
(7) (1931) 283 U.S. 570 [75 Law. Ed. 1277].
(8) (1937) 302 U.S. 134 [82 Law. Ed. 155].
(9) (1938) 303 U.S. 376 [82 Law. Ed. 907].
(10) (1939) 306 U.S. 466 [83 Law. Ed. 927].
(11) (1944) 322 U.S. 174 [88 Law. Ed. 1209].
(12) (1946) 326 U.S. 572 [90 Law. Ed. 326].

test. Discrimination may be decisive, but the absence of it is not. To deprive the State of all banking facilities for performing governmental functions except those afforded by the Commonwealth is to place the State in a position of having to transport money by physical means, if the Commonwealth so chooses. Division 3 of Part IV. places the management of the States' banking business with the private bank, to which it is applied, under Commonwealth control. The legal person remains the same, but the two million pounds or three million pounds at credit is placed under the control of the Commonwealth as effectually as if the State account was transferred. Then, under s. 24, the private bank would be discharged of its debt to the State and the Commonwealth substituted as the debtor—a direct interference. Section 56, which is ancillary, compulsorily places the States in direct relations with the Commonwealth agency upon engagements made *alio intuitu* with others. Section 46, or for that matter s. 24, would prevent all the banks carrying on business with the States and withdraw all the facilities. It is no less effectual to deprive the States of the means of carrying on their functions because it deprives the subjects of His Majesty of the facilities for carrying on their affairs. If this can be done, the States can be completely isolated and destroyed, and the Federal nature of the compact must imply the necessary restraint on such a use of Federal power.

Hannan K.C. (with him *K. J. Healy*), for the plaintiffs in the fourth and fifth actions, adopted the foregoing arguments and also submitted that the Act was made incompetent by the Financial Agreement (reprinted, 1944 Commonwealth Statutes, p. 169). Clause 5 (9) of the agreement provides that a State may borrow money for a temporary purpose by way of overdraft or fixed, special or other deposit. That imports banks and a banking system. It is to continue the long-standing practice of all States of anticipating their revenue by borrowing from trading banks. Revenue comes in during the second part of a financial year, and the lag is provided for by the trading banks' advances. In submitting to the control of the Loan Council in the matter of public loans, the States stipulated with the Commonwealth for a secured right to borrow on overdraft. To have this right secured was of considerable importance in the administration of State Governments. Section 105A of the Constitution gives the Financial Agreement complete paramountcy (*New South Wales* v. *The Commonwealth* (1)). Section 48 of the *Banking Act* 1945 provided that a bank should

(1) (1932) 46 C.L.R. 155.

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not conduct any banking business for a State, and this was held by at least two justices in *Melbourne Corporation* v. *The Commonwealth* (1) to be inconsistent with clause 5 (9). Section 46 (1) of the *Banking Act* 1947 provides that a private bank shall not carry on banking business at all. This must be equally inconsistent with clause 5 (9). The States bargained for the preservation of their right to go to a private banker for an overdraft without the consent of anybody. Section 27 of the *Banking Act* 1945 could not control the policy of advances to the States. The Federal Parliament cannot legislate to weaken and impair the banking system so that the States have only a barren right. The destruction by one party to a contract of the conditions upon which the exercise of a right of the other party depends is a breach of contract; in the case of the Financial Agreement, s. 105A puts such a thing beyond power. The *Banking Act* 1947 cannot be carried out by the payment of the compensation for acquisition provided for by the Act without either the making of a loan contrary to the Financial Agreement or the issuing of paper money, necessarily causing an inflation of the currency, and a depreciated pound, which would result in the acquisition of the property otherwise than on just terms, because the pounds awarded or agreed upon as compensation would by the issue of paper money be worth a fraction only of the true value of the sum when awarded or issued. The amount for which the Commonwealth will become liable is well over one hundred million pounds. No provision is contained in the legislation for finding any part of it, whether by loan or otherwise. There seem to be four possibilities only:—(1) The sale of assets of the Commonwealth Bank and payment from the proceeds. It has no power to sell assets outside the ordinary course of business. (2) It may issue new notes. To do so involves such a depreciation of money that the compensation is not just. (3) It may seek to float a loan for the purpose. There is no Loan Act for the purpose and no power to issue inscribed stock or bonds or bills; s. 4 (*a*) of the *Commonwealth Inscribed Stock Act* 1911-1946 requires a statute. Next it would be necessary to obtain the consent of the Loan Council under the Financial Agreement. (4) Apparently it is intended to use Government securities; but s. 13 of the *Commonwealth Bank Act* 1945 provides, by par. (*e*), that the Bank shall have power to buy, sell, discount and rediscount bills of exchange, promissory notes and Treasury Bills, and, by par. (*f*), to buy and sell securities issued by the Government of the Commonwealth and other securities. What seems to be contemplated is that the claimant will, under a

(1) (1947) 74 C.L.R. 31, at pp. 62, 95, 101.

new obligation, leave his money with the Commonwealth Bank at interest. That is a new loan, for which there is no legal authority, and which would be within the Financial Agreement and require the consent of the Loan Council. The Commonwealth Bank is the Commonwealth, and it would be purporting to sell bonds and inscribed stock already redeemed; that is a re-issue or new loan, contrary to the Financial Agreement. That the Commonwealth Bank is the Commonwealth is shown by *Heiner* v. *Scott* (1); *Commonwealth Bank Act* 1945, ss. 8-10; *Public Works Commissioners* v. *Pontypridd Masonic Hall Co. Ltd.* (2); *Repatriation Commissioner* v. *Kirkland* (3); *Grain Elevators Board (Vict.)* v. *Dunmunkle Corporation* (4); *Sydney Harbour Trust Commissioners* v. *Ryan* (5); *Halsbury, Laws of England*, 2nd ed., vol. 7, p. 70.

The Attorney-General of the Commonwealth (*H. V. Evatt* K.C.) (with him the Solicitor-General of the Commonwealth (*K. H. Bailey*)), for the defendants: (with them: in the first action, *Weston* K.C., *Holmes* and *Benjafield*; in the second action, *Mason* K.C. and *B. P. Macfarlan*; in the third action, *Tait* K.C. and *Gowans*; in the fourth and fifth actions, *P. D. Phillips* K.C. and *Menhennitt*). The defendants make the following general submissions:—(1) The *Banking Act* 1947 is within the Commonwealth legislative power with respect to banking under s. 51 (xiii.) of the Constitution, to financial corporations under s. 51 (xx.), and to the acquisition of property under s. 51 (xxxi.). (2) A primary matter dealt with by the *Banking Acts* 1945 and 1947 is the selection of those who shall conduct banking business in Australia, and such a measure is plainly a law with respect to banking. (3) The *Banking Act* 1947 provides machinery for bringing under public ownership or control through the Commonwealth Bank the conduct of all banking business in Australia except banking business conducted by the States, and a law conferring, as this does, on the Commonwealth Bank the necessary powers and functions is within the banking power. (4) The Act discloses an unmistakable intention to assure fair and reasonable compensation in respect of every acquisition of property under the Act, and, with this end in view, Parliament has established a special and completely independent judicial tribunal. (5) *James* v. *Cowan* (6) and *James* v. *The Commonwealth* (7) in the Privy Council establish that the Act does not in

(1) (1914) 19 C.L.R. 381, at pp. 392, 400.
(2) (1920) 2 K.B. 233.
(3) (1923) 32 C.L.R. 1.
(4) (1946) 73 C.L.R. 70.
(5) (1911) 13 C.L.R. 358, at pp. 362-364.
(6) (1932) A.C. 542; 47 C.L.R. 386.
(7) (1936) A.C. 578; 55 C.L.R. 1.

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any way impair the freedom of inter-State trade, commerce or intercourse. (6) No unconstitutional interference with State functions is involved. The States will still be entitled to avail themselves of all facilities lawfully established by State and Federal laws. (7) The Act is in no respect inconsistent with the Financial Agreement. The plaintiffs' arguments are based on methods of interpretation entirely opposed to the principles established for the construction of constitutional powers. Powers are to be given an ample meaning and a wide operation. Further, the only question is whether an enactment said to be made under a power is in respect of the subject matter, whether it is relevant to it. Inquiries as to purpose, " pith and substance," " object," whether it is regulatory or prohibitory, and so on, are based on a test inappropriate to our Constitution and opposed to established principles. These principles are stated and illustrated by the following passages:— *British Coal Corporation* v. *The King* (1); *Gibbons* v. *Ogden* (2); *M'Culloch* v. *Maryland* (3); *Melbourne Corporation* v. *The Commonwealth* (4); *Cook* v. *Buckle* (5); *Attorney-General for New South Wales* v. *Brewery Employés Union of New South Wales* (6). To ask does an Act relate to, touch, concern, or is it relevant to, a subject matter is very different from asking whether the pith and substance of the enactment is to regulate, govern or deal with the subject. It is of great importance to ensure that you do not accept openly or assume tacitly that the Parliament can under the banking power do no more than regulate operations in connection with the business (*Commonwealth* v. *Queensland* (7); *R.* v. *Macfarlane*; *Ex parte O'Flanagan* (*the Irish Envoys' Case*) (8); *Stenhouse* v. *Coleman* (9)). Thus s. 46 of the *Banking Act* 1947 operates plainly upon the business of banking; it forbids the private banks to carry it on. It is ridiculous to require the double test and say, first, it must operate upon banking and, second, it must do so because of the subject matter, " for a banking reason ": see the distinction made in *Le Mesurier* v. *Connor* (10) between the plenary powers under s. 51 and such a special power as s. 77 (iii.). The words " with respect to " cannot be interpreted as if they were words giving a local-governing body a power of regulation. Section 46 should be approached in the light of the 1945 *Banking Act*. [He

(1) (1935) A.C. 500, at p. 517.
(2) (1824) 22 U.S. 1 [6 Law. Ed. 23].
(3) (1819) 17 U.S. 316, at p. 403 [4 Law. Ed. 579, at pp. 600, 601].
(4) (1947) 74 C.L.R. 31, at p. 78.
(5) (1917) 23 C.L.R. 311, at pp. 317, 318, 320.
(6) (1908) 6 C.L.R. 469, at pp. 613, 614.
(7) (1920) 29 C.L.R. 1, at pp. 20, 21.
(8) (1923) 32 C.L.R. 518, at pp. 557, 579, 581.
(9) (1944) 69 C.L.R. 457, at p. 471.
(10) (1929) 42 C.L.R. 481, at pp. 499, 500.

referred to *Gibbons* v. *Ogden* (1); *Attorney-General for Ontario* v. *Attorney-General for Canada* (2); *United States* v. *Marigold* (3); *Hammer* v. *Dagenhart* (4); *Prudential Insurance Co.* v. *Benjamin* (5); *Ex parte Walsh and Johnson*; *Re Yates* (6); *R.* v. *Brislan*; *Ex parte Williams* (7).] What can be more relevant to banking than a prohibition, a selection or a creation of persons or bodies to do it? The creation of the Commonwealth Bank rests on the banking power; it could be supported by the incidental power. *Australian National Airways Pty. Ltd.* v. *The Commonwealth* (8) is authority for the proposition that, apart from s. 92, the commerce power would enable the Parliament to establish a monopoly. In *Melbourne Corporation* v. *The Commonwealth* (9) *Starke* J. distinctly says that the power embraces the making of rules which prohibit banking. In *Levingston* v. *Heidelberg Corporation* (10), *Hodges* J. says that you should look at the body which is entrusted with the power and the power that is entrusted to the body and then at the subject matter with which the body is to deal. That is the rule also to be applied to constitutions (*Toronto* v. *Virgo* (11); *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (12)). In Canada you must say whether the law comes within the exclusive topic assigned to the Dominion and not more substantially within an exclusive topic assigned to the Provinces. The "pith and substance" test has nothing to do with the ascertainment of the application of an enumerated power under our Constitution, because a subject matter is assigned to the Commonwealth only. If a thing is inside the subject matters assigned to the Commonwealth, you have no need to consider any other category. Relevance is the test under s. 51. *Prafulla Kumar Mukherjee* v. *Bank of Commerce Limited, Khulna* (13) relates to a constitution with two rival exclusive lists and a concurrent list of powers. [He referred to *Gallagher* v. *Lynn* (14) relating to Northern Ireland; *Attorney-General for Alberta* v. *Attorney-General for Canada* (15); *Huddart Parker Ltd.* v. *The Commonwealth* (16); *Meakes* v. *Dignan* (17); *Proprietary Articles Trade Association*

(1) (1824) 22 U.S. 1, at pp. 196, 197 [6 Law. Ed. 23, at p. 70].
(2) (1937) A.C. 405.
(3) (1850) 50 U.S. 560, at pp. 566, 567 [13 Law. Ed. 257, at p. 260].
(4) (1918) 247 U.S. 251, at pp. 277-279 [62 Law. Ed. 1101, at p. 1108].
(5) (1946) 328 U.S. 408 [90 Law. Ed. 1342].
(6) (1925) 37 C.L.R. 36, at p. 110.
(7) (1935) 54 C.L.R. 262, at pp. 275, 276.
(8) (1945) 71 C.L.R. 29, at pp. 59, 72, 77-79, 112.
(9) (1947) 74 C.L.R., at p. 69.
(10) (1917) V.L.R. 263, at p. 275.
(11) (1896) A.C. 88.
(12) (1896) A.C. 348.
(13) (1947) L.R. 74 Ind. App. 23, at p. 42.
(14) (1937) A.C. 863, at p. 869.
(15) (1939) A.C. 117, at pp. 131, 137.
(16) (1931) 44 C.L.R. 492, at p. 514.
(17) (1931) 46 C.L.R. 73.

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v. *Attorney-General for Canada* (1); *Attorney-General for Ontario* v. *Attorney-General for Canada* (2); *Attorney-General for Alberta* v. *Attorney-General for Canada* (3).] In s. 51 (xiii.) "also" is used only because of the awkwardness of excepting State banking and then excepting from that exception State banking extending &c. The subjects enumerated in s. 51 overlap, and you cannot reason that one should be restricted because another otherwise would cover some of the same ground (*Attorney-General for the Commonwealth* v. *Colonial Sugar Refining Co. Ltd.* (4); *Australian Railways Union* v. *Victorian Railways Commissioners* (5)). The propositions that (1) banking and incorporation of banks are mutually exclusive terms as used in s. 51 (xiii.); (2) banking denotes only the operations characteristic of banking; (3) as to banks themselves the power of incorporation is all that the Commonwealth can exercise, are all wrong. The Commonwealth power extends to every incident and adjunct of the business of banking. It covers the whole system of banking. All the activities and divisions of the Commonwealth Bank are within the power. In *Tennant* v. *Union Bank of Canada* (6) the *Dominion Bank Act* made the warehouse receipt of certain callings, including sawmillers, if issued to a bank, as valid and effectual with respect to the property of the person issuing it as it would be if he were a bailee only of the goods. The law was upheld under the Dominion banking power, not because only bankers took such receipts—there was nothing characteristic or distinctive of banking in taking it—but because when taken by a bank it was in the course of banking business. *Attorney-General for Alberta* v. *Attorney-General for Canada* (7), affirmed (8), is based upon a conflict between the legislation of Alberta and the mere existence in the Dominion of the banking power. The Dominion alone could do what Alberta sought to do under the guise of exercising its power of direct taxation within the Province in order to raise a revenue for provincial purposes. One of the principles involved in the decision is that to prohibit banking is within the Dominion power in respect of banking. [He referred to *Attorney-General for Canada* v. *Attorney-General for Quebec* (9); *Attorney-General for Alberta* v. *Attorney-General for Canada* (10).] The Canadian *Banks Act* 1856 continued the incorporation of banks and gave various authorities to them. By an Act of 1871 the share capital, amount of dividends, voting, directors,

(1) (1931) A.C. 310, at pp. 323, 324.
(2) (1937) A.C. 405, at pp. 417, 418.
(3) (1947) A.C. 503.
(4) (1914) A.C. 237, at p. 254; 17 C.L.R. 644, at pp. 652, 653.
(5) (1930) 44 C.L.R. 319, at pp. 388, 391.
(6) (1894) A.C. 31.
(7) (1938) S.C.R. (Can.) 100.
(8) (1939) A.C. 117.
(9) (1947) A.C. 33.
(10) (1947) A.C. 503 and (1947) 1 D.L.R. (Can.), at p. 377.

meetings, &c., of banking companies were dealt with. The Dominion Parliament took into its own hands the whole subject of the internal management of banks. The legislation now in force is the *Bank Act* 1944, entitled an Act respecting Banks and Banking. It contains a prohibition of fresh banks without a certificate of the Treasury Board (s. 14). It governs the banks in many directions. So long as legislation touches the topic of banking, it may validly do anything Parliament decides—close banks, amalgamate them, keep them open, transfer or acquire their businesses, and so on. It is on this footing that the Canadian Act proceeds. In the case of the Crown Bank and Northern Bank a merger took place and was carried by a special Act which, among other things, vested assets (7 & 8 Edw. VII. c. 37). The statute in *Grand Trunk Railway Co. of Canada* v. *The King* (1) was based apparently on the power arising from s. 91 (29) and s. 92 (10) (*a*) of the *British North America Act* over undertakings or railways extending beyond the limits of the province. The business of banking is what from time to time bankers ordinarily do (*Quick and Garran, Annotated Constitution of the Australian Commonwealth*, p. 576). Whatever banks do incidentally belongs to the business. It is not suggested that the private banks are at present conducting any business not incidental to banking, but it is said they may do so before the Act takes effect. [He referred to *Punjab Co-operative Bank Ltd.* v. *Income-Tax Commissioners, Lahore* (2); *Colonial Mutual Life Assurance Society Ltd.* v. *Federal Commissioner of Taxation* (3); *Commissioner of Taxation* v. *Commercial Banking Co. of Sydney* (4); *Union Bank of Australia* v. *Commissioner of Taxes* (5).] The relation of banks to the administration of deceaseds' estates as executor or otherwise is settled differently in different countries. In the United States of America and the United Kingdom it is a function regularly undertaken by banks who are authorized by law to act as executors and administrators or trustees. Here the Commonwealth Parliament could forbid it or authorize it. In view of British and American practice it must be recognized as a permissible activity of bankers. Depending upon the incidental power, Congress has enacted banking legislation along five main lines. The first bank, which did not survive, was established in 1791; the second in 1816. That was liquidated in 1841. The validity of the establishment of these banks was established by *M'Culloch* v. *Maryland* (6) and

(1) (1923) A.C. 150, at p. 155.
(2) (1940) A.C. 1055, at pp. 1072, 1073.
(3) (1946) 73 C.L.R. 604, at pp. 619, 620.
(4) (1927) 27 S.R. (N.S.W.) 231, at p. 234; 44 W.N. 65.
(5) (1920) 39 N.Z.L.R. 649, at pp. 655, 656.
(6) (1819) 17 U.S. 316 [4 Law. Ed. 579].

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Osborn v. *Bank of the United States* (1). By the *National Bank Act* 1864 the system of national banks was set up. It was upheld in *Farmers & Mechanics National Bank of Buffalo* v. *Dearing* (2). The Government was not a stockholder and did not share in the appointment of directors. In 1865 a Federal tax was put upon bank notes of State banks with a view to stop their issue. It was upheld in *Veazie Bank* v. *Fenno* (3). Next came the Federal *Reserve Act* 1913. It established the Federal central banking system. It has never been challenged. Then the Federal *Farm Loan Act* 1916 established twelve Federal loan banks. It was upheld in *Smith* v. *Kansas City Title & Trust Co.* (4). "It is no longer an open question that Congress may establish banks for national purposes, only a small part of the capital of which is held by the government, and a majority of the ownership in which is represented by shares of capital stock, privately owned and held; the principal business of such banks being private banking, conducted with the usual methods of such business. While the express power to create a bank or incorporate one is not found in the Constitution the court, speaking by Chief Justice *Marshall* in *M'Culloch* v. *Maryland* (5), found authority so to do in the broad general powers conferred by the Constitution upon the Congress to levy and collect taxes, to borrow money, to regulate commerce, to pay the public debts, to declare and conduct war, to raise and support armies, and to provide and maintain a navy, &c." (per *Day* J. (6)). Once there is power to create the bank, there is power to arm it with every authority calculated to enable it to carry on successfully. *First National Bank of Bay City* v. *Fellows* (7), is important in its reasons for holding that under the incidental power Congress could authorize the Federal Reserve Board to grant permits to national banks to act as trustees, executors, administrators, &c., when not in contravention of State or local law. One reason was that it formed a component part of the functions of such a bank considered as an entity. To be an executor is not characteristically banking, but it may be incidental to banking. Whatever fields are commonly entered by banks fall under the power. In *Missouri* v. *Duncan* (8) a denial by a State of authority to its courts to grant probate to a national bank as executor was held invalid. It was regarded

(1) (1824) 22 U.S. 738 [6 Law. Ed. 204].
(2) (1875) 91 U.S. 29 [23 Law. Ed. 196].
(3) (1869) 75 U.S. 533 [19 Law. Ed. 482].
(4) (1921) 255 U.S. 180 [65 Law. Ed. 577].
(5) (1819) 17 U.S. 316 [4 Law. Ed. 579].
(6) (1921) 255 U.S., at p. 208 [65 Law. Ed., at pp. 588, 589].
(7) (1917) 244 U.S. 416 [61 Law. Ed. 1233].
(8) (1924) 265 U.S. 17 [68 Law. Ed. 881].

as a power necessary to sustain on the part of a national bank competition with trust companies which were entitled to act as executors &c. See, further, *Bank of Ontario* v. *Great West Lumber Co.* (1); *McFarland* v. *Bank of Montreal* (2); *Bank of Montreal* v. *Irvine* (3); *Cameron* v. *Royal Bank of Canada* (4). The foregoing shows how widely conceived is the province of banking in the United State of America and Canada. In the United Kingdom the same width is shown by the history of banking. See *Holdsworth, History of English Law*, vol. 8, pp. 177-192 (transmission of money is one of the earliest functions—p. 177); *Stephen's Commentaries*, 7th ed. (1874), vol. 3, c. 14, p. 3. As to the history of the Bank of England, see *Bank of England* v. *Anderson* (5). Banking has never been unaffected by the public interest and has always been one of the great services of a community upon which the stability of the monetary system depended and the maintenance of government rested. So disastrous have been the social consequences of unstable banking that (1) at different times many countries have found it necessary to set up State banking institutions and also to give them a special responsibility as financial agents for the Government; (2) most countries have imposed conditions to be fulfilled before the business of banking can be carried on; (3) most countries have removed from private banks to public control some characteristic function of bankers, e.g., the issue of notes; (4) most countries have established a governmental control of the creation of credit by banks, at all events in some measure. For the purposes of the 14th Amendment banking is "stamped with the public interest." [He referred to *Willoughby, Constitutional Law of the United States*, 2nd ed. (1929), vol. 3, pp. 1774, 1775; *Noble State Bank* v. *Haskell* (6).] In Australia the legal framework of the banking system is provided by the *Banking Act* 1945 and the *Commonwealth Bank Act* 1945. The legislative power is s. 51 (xiii.) of the Constitution, not s. 51 (xxxix.). This was left undecided by *Heiner* v. *Scott* (7), and *Butterworth* v. *Commonwealth Bank* (8), but was decided by *Latham* C.J. in the *Airlines Case* (9). The reference in the former head of power to the incorporation of banks is simply due to the Canadian Constitution, and that in its turn is to be explained by the amount of controversy in the United States the absence of such a power had caused. In s. 7 of the *Commonwealth*

(1) (1914) 17 D.L.R. 593.
(2) (1911) A.C. 96.
(3) (1924) 3 D.L.R. (Can.) 752.
(4) (1915) 21 D.L.R. (Can.) 824.
(5) (1837) 3 Bing. (N.C.) 589 [132 E.R. 538].
(6) (1911) 219 U.S. 104 [55 Law. Ed. 112].
(7) (1914) 19 C.L.R. 381.
(8) (1916) 22 C.L.R. 206.
(9) (1945) 71 C.L.R., at p. 58.

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Bank Act 1945 the absence of corporators has no importance: that is entirely a matter for the legislature, which is not restricted to the traditional form of corporations. Section 9, which deals with differences of opinion upon questions of policy between the Government and the Bank, is based on the fact that the Bank is distinct from the Government. See, too, s. 10. All the powers expressed in Parts II.-VI. of the Act are within s. 51 (xiii.) of the Constitution. The conferring of these powers is right within the centre of the subject matter. They do not rest on s. 51 (xxxix.). The validity of the *Banking Act* 1947 must be determined in the setting supplied by the *Banking Act* 1945 and the *Commonwealth Bank Act* 1945. Part II. of the *Banking Act* 1945 contains the provisions by which the conduct of banking business is governed. The purpose of Division 3, which embodies provisions made by regulation during the war, is to prevent the use of increasing deposits to build up the credit structure. Division 5 has the very important purpose of regulating advances in the public interest. Of the £1,500m. of "money" existing at present in Australia, only £200m. is legal tender. Of the money accepted, ninety per cent is bank money. Division 5 governs the contraction and expansion of this money, and it would be absurd if, by confining "banking" to transactions between banker and customer, this were put outside Commonwealth power. Parts III. and IV. deal with foreign exchange and gold, and Part V. with interest—obvious subjects of the banking power. Under Part VI.—Statistics—returns from the private banks are required. See, particularly, Form D of Schedule II. In Part VII.—Miscellaneous—s. 51 controls amalgamation and has a Canadian analogue. Going back to s. 6, which prohibits a natural person from carrying on banking, can there be any doubt of its validity? And if it is "banking legislation" to confine banking to corporate bodies, then, why is it not to confine it to government bodies? The policy of ss. 6, 7 and 8 is to exclude natural persons, require a licence, give a right to a licence in case of the "private banks" listed and make new licences discretionary. Surely that is all legislation about "banking." The fact that the discretion is subject to no express limitation is of no importance, because the prohibition is right on banking itself. *Harrison Moore, Constitution of the Commonwealth*, 2nd ed. (1910), p. 280, distinguishes the plenary powers of the Commonwealth Parliament from a mere regulatory power, "which as probably importing the existence and preservation of the things regulated" introduces a number of limiting considerations. He refers to the Commonwealth's assuming the administration of services to the total

exclusion of all others therefrom, and says: "The plenary power of legislation is not merely a power to regulate: it ranges from creation to destruction: it may establish as well as prohibit." There is no substance in the points made upon s. 51 (xiii.) to take it out of this principle. The use of the plural, "banks," in the phrase "incorporation of banks" is a mere description of subject matter. The word "banking" does not suggest continuity, does not import the continued existence and preservation of a pursuit. "Banking is the business of a banker: the keeping or management of a bank" (*Oxford English Dictionary*). It is a function, public or private or semi-private, and in relation to government. "Insurance" is its analogue. State banking is excluded because the State will be carrying out the function. "Also State banking extending" gives no greater indication of continuity. "Extending" only means existing in another State. See the five propositions in *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte William Holyman & Sons Ltd.* (1). "Extending" refers only to geographical operation. Then there is nothing in the character of the subject, "banking," to put prohibition beyond the power. To approach the construction of s. 51 (xiii.) by treating prohibition as an enormity that could never have been contemplated, and as therefore outside the power, is opposed to the principle that constitutions must be understood as sketching the main heads of power, outlines for the legislature to fill in. "The power should be given an ample meaning and a wide operation" (2). Cf. *Airways Case* (3). Clearly the following would fall under the legislative head of banking: The nationalizing of the Bank of England; imposing a condition that bank officers are to qualify in the subject; excluding from the business or employment directors or officers not British subjects; central banking; regulating advances to clients and interest on deposits; the contraction of credit; the relations between the bank and its officers (e.g., pensions); investment. In approaching s. 46 of the *Banking Act* 1947 these propositions are submitted:—(1) The Federal legislative powers are conferred in the widest and most comprehensive form in relation to subject matter and are plenary and of the same amplitude as those of the Parliament at Westminster. (2) The test of a law is whether its operation touches or concerns or is relevant to the subject matter. (3) It may be necessary to regard the substance of the law, as distinguished from form, but that is only to see it is not merely a colourable use of the power. The Canadian "pith and substance"

(1) (1914) 18 C.L.R. 273, at p. 285.
(2) (1947) 74 C.L.R., at p. 78.
(3) (1945) 71 C.L.R., at pp. 80, 81.

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doctrine is always inapplicable to the Commonwealth Constitution. (4) Section 51 (xiii.) was taken without material change from the Canadian Constitution, where the use of the power in enacting bank Acts, though unchallenged, is wholly inconsistent with the plaintiff's construction. (5) The subject matter covers not only the business of bankers, but the whole banking organization and system in all its aspect and with all its adjuncts; the whole monetary system so far as bankers do, or can, take part in its functioning. Banking is only one of a number of heads of power over the monetary system. (6) The charters and other constating instruments of banks show that banking is not confined to relations between banker and customer but includes such auxiliary businesses as the investment of assets, dealing in securities, merger with and acquisition of interests in other banks, and other methods of expansion. (7) Banking includes important public functions, and legislation directed towards the proper organization of the banking system is a characteristic of modern communities. (8) Commonwealth powers are not regulatory but include power to prohibit. (9) Commonwealth and State powers (apart from specific restraints like s. 92) cover the whole area of legislative power: on the plaintiffs' interpretation there would be nothing to govern the most important aspects of economic life. In s. 51 (xiii.) "the issue of paper money" includes both bank notes (payable on demand in legal tender) and inconvertible paper currency (legal tender). It is of no significance that the former would be included under bills of exchange and promissory notes under s. 51 (xvi.) and the latter under currency and legal tender under s. 51 (xii.). There is a great deal of overlapping in the extent of the application of the various powers. The expression "the incorporation of banks" overlaps with "banking" in s. 51 (xiii.). Under every head of power the Commonwealth can create corporations as instruments for dealing with specified matters within the given subject, and this the *Airways Case* (1) shows, as well as *M'Culloch* v. *Maryland* (2). Under banking, moreover, just as individual bankers must be liable to control, so must banking corporations. This is confirmed by the exclusion of State banking. The exclusion shows that, without it, State banking would be covered. The State is excepted in its character of an agency operating a bank, and, though the State is not itself a corporation, it follows that individuals and corporations acting as bankers must be subject to the power under the word "banking." Just as by s. 6 of the *Banking Act* 1945 natural

(1) (1945) 71 C.L.R.29.

(2) (1819) 17 U.S. 316 [4 Law. Ed. 579].

persons have been excluded from carrying on the business of banking, so, if the opposite policy had commended itself to the Parliament, banking might have been confined to natural persons and artificial persons excluded. The discretion given by the licensing system (s. 7) is only limited by the public interest. It must be exercised honestly and not for extraneous considerations, but s. 51 (xiii.) does not confine the legislature to a discretion limited to so-called "banking considerations." Cf. *Swan Hill Corporation* v. *Bradbury* (1); *Water Conservation and Irrigation Commission (N.S.W.)* v. *Browning* (2); *Shrimpton* v. *The Commonwealth* (3); *Country Roads Board* v. *Neale Ads Pty. Ltd.* (4); *Dawson* v. *The Commonwealth* (5). Section 46 of the *Banking Act* 1947 operates directly upon the business of banking and therefore must be within s. 51 (xiii.). It authorizes, not the suppression of banking, but the confining of it to the Commonwealth and the State Banks. It selects those who are to do banking; and it is therefore within the principle of *Huddart Parker Ltd.* v. *The Commonwealth* (6) and *Meakes* v. *Dignan* (7), and of the judgment of *Holmes* J. in *Hammer* v. *Dagenhart* (8); see, further, the passage in the judgment of *Starke* J. in *Melbourne Corporation* v. *The Commonwealth* (9), about prohibiting banking, and the passages in the *Airways Case* (10). It is enough for the validity of a Commonwealth law that it operates upon a subject matter: it is not also necessary that it shall do so for a reason falling within the subject matter. The discretion of the Treasurer to give a notice under s. 46 (4) would be validly conferred even if he were at large as to the grounds that moved him, but s. 3 states the purposes and indicates the scope of the enactment. To take banking into government hands is a "banking reason," and s. 46 (4) is aimed at doing this in an orderly fashion, according to the Treasurer's determinations. It is essentially a business impressed with a public character, and the legislature under s. 51 (xiii.) may well decide that it should be carried on by government. Section 46 (2) does not raise the abstract question whether a person may be compelled to act as a banker. It only prevents banks closing their doors pending a notice under s. 46 (4). It is not addressed to insolvent banks, but to banks licensed absolutely but now authorized to carry on conditionally. Section 46 shows the conditions, and the

(1) (1937) 56 C.L.R. 746, at pp. 757, 758.
(2) (1947) 74 C.L.R. 492.
(3) (1945) 69 C.L.R. 613, at pp. 619, 626, 627, 629, 632.
(4) (1930) 43 C.L.R. 126, at pp. 135, 139.
(5) (1946) 73 C.L.R. 157, at p. 182.
(6) (1931) 44 C.L.R. 492.
(7) (1931) 46 C.L.R. 73.
(8) (1918) 247 U.S. 251 [62 Law. Ed. 1101].
(9) (1947) 74 C.L.R., at p. 69.
(10) (1945) 71 C.L.R., at pp. 59, 72, 77, 81, 112.

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validity of sub-s. (4) depends on its part in that section, or at least should be so considered. But, in any case, it is a provision operating on bankers, and that is enough. However, s. 51 (xx.) is enough to authorize the whole of s. 46. Some of the banks affected are foreign corporations, and the others are financial corporations formed within the limits of the Commonwealth. By s. 5, " 'private bank' means a body corporate the name of which is set out in the First Schedule." So they are dealt with by the legislation as corporations. Section 46 in effect terminates the licence of foreign and financial corporations to carry on banking: all of them; for it lists all that do so in Australia. In *Attorney-General for Canada* v. *Attorney-General for Alberta* (1) (a case deciding that to forbid generally the doing of any insurance business in Canada without a licence was outside the Dominion authority to legislate for the regulation of trade and commerce) there are, nevertheless, two passages relevant, one to s. 51 (xiii.), and the other to s. 51 (xx.). Lord *Haldane* says: "Where the *British North America Act* has taken such forms of business out of provincial jurisdiction, as in the case of banking, it has done so by express words," &c. This definitely means that a licensing system is within the banking power from which s. 51 (xiii.) is taken. He also says, and the Board decides, that to require a foreign corporation to take out a licence from the Dominion Minister, "even in a case where the company desires to carry on its business only within the limits of a single Province," is within the powers over the regulation of trade and commerce and aliens. This necessarily imports that it is within a power over foreign corporations. One thing that emerges from *Huddart Parker & Co. Pty. Ltd.* v. *Moorehead* (2) (see *Harrison Moore, Constitution of the Commonwealth of Australia*, pp. 469-473) is that corporations may be directed to carry on no business at all in Australia, or none except such as are allowed by the Commonwealth, or only those selected by the Commonwealth; this is so, whether the power does or does not extend to incorporation or to affecting the terms of incorporation. The power over foreign corporations affects them, so to speak, at the entrance gates and attaches to their freedom of action within Australia. The Commonwealth cannot deal with their corporate existence or day-to-day management, but it can control their entry into business, forbid it or restrict it. The power was inserted on the view, which perhaps at the time was less favourable to corporations, that, just because they were corporations, powerful foreign financial or trading organizations were to be controlled and regulated by Federal authority. In *Huddart*

(1) (1916) 1 A.C. 588, at p. 597.

(2) (1909) 8 C.L.R. 330.

Parker & Co. Ltd. v. *Moorehead* (1) all the justices except *Isaacs* J., even *Higgins* J., were greatly affected by the then prevailing doctrine that s. 51 (i.) implied a prohibition against interference with domestic trade and commerce of a State. The decision accordingly is merely negative, i.e., it excludes trade combinations by corporations from the subject matter. The power extends to laying down the conditions on which corporations may undertake business at all and what businesses they may or may not undertake and upon what terms. The power of legislating with respect to foreign corporations is like that with respect to aliens; as to which, see *Robtelmes* v. *Brenan* (2). Section 51 (xx.) is plenary, like all the other heads of power, and the only test of the validity of a purported exercise of that power is whether it touches, is relevant to, operates upon, foreign corporations or trading and financial corporations formed within Australia. The law may exclude foreign corporations entirely: see *Paul* v. *Virginia* (3). A law limited to the corporations mentioned in s. 51 (xx.) and imposing duties or obligations upon them is valid. The *Life Insurance Act* 1945 (No. 28 of 1945) provides examples and tests of the construction given to s. 51 (xiv.) and (xx.), e.g., ss. 8, 14, 15, 17 (2), 18, 19, 21, 27, 29, 30, 37, 41, 55, 59, 60, 62, 64, 65, 66, 67, 69, 70, 72, 73, 75, 133-138 (Part VI., which authorizes the establishment of a government insurance office to undertake the business of insuring risks). These provisions are all good under s. 15 (xiv.), and some under s. 51 (xx.). Section 46 of the *Banking Act* 1947 not only relates to the business of banking, and so falls within s. 51 (xiii.), but also deals with the banks as corporations, foreign or financial, and undertakes to provide for the termination of their right to conduct their businesses and for their continuance in the meantime. It may be that a State bank that is incorporated under the law of the State is excluded from the operation of s. 51 (xx.) by implication from the express exclusion of State banking in the case of s. 51 (xiii.). It would be because s. 51 (xiii.) tells you that, so long as the State as a banker does not go beyond the State boundaries, the Commonwealth may not legislate for it as a banker. Accordingly other powers, or, at all events, s. 51 (xx.), may perhaps not be available to deal with it as a banker. In form it is an affirmative exception or exclusion, not something outside the primary lines of definition. The inference is not that banking corporations are not within the expression "financial corporations" in s. 51 (xx.): nor is it to be inferred that the phrase

(1) (1909) 8 C.L.R. 330.
(2) (1906) 4 C.L.R. 395, at pp. 403, 404.
(3) (1869) 75 U.S. 168 [19 Law. Ed. 357].

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"also . . . the incorporation of banks" was added to s. 51 (xiii.) because banking corporations were outside s. 51 (xx.). If you read the definition of private banks in s. 5 of the *Banking Act* 1947 into s. 46, you see that it is a law with respect to corporations, foreign and financial. Dealing with Part IV. of the Act, and referring first to s. 13: The *situs* of a share is determined by the locus of the register upon which it is registered. The suggestion that the Treasurer might be satisfied mistakenly that a majority of shares was upon an Australian register has no basis in the facts of the case. National Security Regulations, continued by legislation, prevent the transfer of shares to an overseas register. As to the *situs*, see *Cheshire, Private International Law*, 1st ed., pp. 367-369. By force of s. 13 (3) every share that on the specified date is Australian stands in effect in the name of the Commonwealth Bank. The registered owner is replaced by the Commonwealth Bank. Section 51 (xxxi.) of the Constitution is paramount over every State law; a share is property within its application, and s. 13 (3) of the Act is warranted by it (*Dalziel* v. *Minister of State for the Army* (1)). The only inquiry is: What property has the person affected? Whatever it is, the power enables the Commonwealth to replace him in that property. Section 13 (3), by the word "vests," does this, and without any assistance from s. 14 (1); it suffices to put the Commonwealth completely in the place of the shareholder as the registered shareholder with all the rights &c. which as registered shareholder he had. The authority acquiring the property is, by the acquisition which s. 51 (xxxi.) contemplates, put precisely in the same position as the State or person from whom the property is acquired; and s. 13 (3) does this by the word "vest." No doubt, a share is a bundle of rights, and, no doubt, when the Commonwealth Bank is placed in the position of the shareholder, it is subject to all the qualifications upon these rights that he was under. Thus, apart from some further provision, it would be subject to the same conditions affecting transfer. But no such conditions or qualifications could impede the acquisition by the Commonwealth Bank itself: they could not militate against the replacement of the legal owner by the Commonwealth Bank as shareholder. The word "vest" accomplishes this, notwithstanding any article of association—a provision depending upon State law. As to the incompetency of State law to obstruct the operation of Federal law, whether by failing to give capacity or otherwise, see *Australian Railways Union*

(1) (1944) 68 C.L.R. 261, at pp. 285, 290

v. *Victorian Railways Commissioners* (1): cf. *Commonwealth* v. *New South Wales* (*Royal Metals Case*) (2). If the State or any other law has brought into existence any interest that is property, there it is, and the Commonwealth can acquire it, and no condition or qualification to the contrary can affect the acquisition. Article 10 of the articles of the Commercial Banking Co. of Sydney provides that no member shall hold more than 2,000 shares, but that cannot stand in the way of the Commonwealth Bank's acquisition of all the shares on the Australian register: see *Inland Revenue Commissioners* v. *Crossman* (3). [He referred to *McClintock* v. *The Commonwealth* (4); *Jenkins* v. *The Commonwealth* (5).] Impediments arising from or under State law cannot prejudice the vesting pursuant to s. 13 (3) and s. 51 (xiii.) of the Constitution. For example, an incapacity in the owner under the law of ultra vires to sell or convey could not prevent a compulsory acquisition taking effect under Commonwealth law: a restriction upon transfer under articles of association could. Nor could a restraint on anticipation, a condition or covenant against transfer or alienation, general or particular, an embargo. In this respect there is no difference between tangible property and a chose in action consisting of a collection of rights and, perhaps, obligations, although the fetter or restriction upon alienation or transfer or the conditions form part of the collection (*Grace Bros. Pty. Ltd.* v. *The Commonwealth* (6)). If something inconsistent with the articles is involved, operating to the prejudice of other shareholders, they can get compensation. Under the constitution of the Bank of New South Wales, no body corporate can acquire shares in the bank. That is in conflict with s. 13 (3) and must give way. In the case of the Bank of New South Wales it is also provided that no-one shall hold more than 1/25th of the paid-up capital in the company and a transfer is wholly inoperative in so far as it would give an excess of the number. These do not apply, but, if they did apply to the case, they would be invalid. Article 10 of the articles of the Commercial Banking Co. of Sydney provides against any member holding more than 2,000 shares. Article 18 of the Ballarat Banking Co. has a similar restriction. Again, these probably do not apply to the mass compulsory acquisition, but, if they do, they are void: cf. *Wood* v. *W. & G. Dean Pty. Ltd.* (7). *Morgan's Case* (8) shows how Commonwealth power can disregard forms created by State

(1) (1930) 44 C.L.R. 319, at pp. 392, 393.
(2) (1923) 33 C.L.R. 1; See pp. 19, 22, 25, 27, 37, 40, 45, 53, 54.
(3) (1937) A.C. 26, at pp. 39, 40, 49, 51, 53, 54.
(4) (1947) 75 C.L.R. 1.
(5) (1947) 74 C.L.R. 400.
(6) (1946) 72 C.L.R. 269.
(7) (1929) 43 C.L.R. 77.
(8) (1912) 15 C.L.R. 661.

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law and operate upon substance. In a parallel way, the Commonwealth Bank may acquire the shares as representing the assets. Section 13 (5) frees the share from encumbrances, and the Commonwealth Bank takes a full title to the registered share. Independently of s. 14 (1), the Commonwealth Bank would be entitled to registration, but that section puts the Commonwealth Bank directly in the position of a member. Section 21, which applies to three banks 100 per cent of whose shares are Australian, is not of the essence in this case, but it does prevent the fact that the company has only one member exposing it to winding up or to any other consequence under State law. The banks concerned are the Adelaide Banking Co., the Ballarat Banking Co. and the Brisbane Permanent Banking Co. Section 14 (2) does not authorize trafficking in shares, but is merely there to enable the Commonwealth Bank to transfer to nominees. It must be remembered that s. 14 (2) forms part of Part IV., which is entitled "Expansion of Banking Business of Commonwealth Bank." In judging the validity of s. 14 (2) you look at the surrounding circumstances, and they show that an overwhelming majority of the shares will in all human probability vest in the Commonwealth Bank. Accordingly, it will be a case where the sole Australian interest is that of the Commonwealth Bank. Clearly s. 14 (2) can be validly enacted under the banking or the corporation power. Section 12 can cause no difficulty. A fallacy of the plaintiffs with respect to the acquisition of assets and of shares is to claim that some banking purpose must be shown as that for which they were acquired. Section 51 (xxxi.) is treated as requiring an application of the asset or share acquired to a banking purpose. This is an error, but, in any case, all that is deposed to in the affidavits is that, for some assets, there is no purpose that can arise out of the relation of banker and customer. That is a very different thing. Fixed assets do not so arise, but they are used for banking purposes. To acquire shares in other banks is an ordinary incident of banking business. The purposes for which the power conferred by s. 51 (xxxi.) is exercised by Division 2 are stated in s. 9, and they are valid purposes unless the *Commonwealth Bank Act* 1945 is invalid. For a Commonwealth enterprise to hold shares in a public company is illustrated by Amalgamated Wireless of Australia and the Commonwealth Oil Refineries. It is a mode of influencing, or—if there is a majority of Commonwealth shares—of controlling, the business carried on. It is accordingly within the legislative power over the subject matter to authorize the acquisition of any such shares, even though not giving a controlling interest. Section 3 (*a*) is a severable object,

and covers the purposes stated in s. 9. To acquire shares and membership (ss. 13 (3) and 14 (1)) is incidental to the power of legislation with respect to banking and corporations. It gives or tends to give control. Control might be taken directly. The *Commonwealth Bank Act* 1945 and the *Banking Act* 1945 include valid purposes committed to the Commonwealth Bank; s. 9 of the *Banking Act* 1947 sets out a purpose of the Commonwealth Bank in respect of which Parliament has power to make laws; to acquire shares assists the Commonwealth Bank to carry out its purposes by exercising influence upon the policy and activities of private banks, e.g., by expressing views to the management as a shareholder, by voting at meetings, participating at meetings, electing directors, exercising a voice at meetings. The acquisition of a comparatively few shares would be for a Commonwealth Bank purpose, a purpose within power. So with the voluntary acquisition under s. 12. In considering this question, the Court should neglect the management provisions (Part IV., Division 3) and s. 46. The Court should not examine precisely what use will be made of the shares, e.g., whether to continue the banking companies and work their businesses or to assist in contracting or closing up their businesses. The memorandum of the Commercial Banking Co. of Sydney contains a power of amalgamation with or acquisition of businesses &c., such as any which the company is authorized to carry on: cf. s. 38 of the *Commonwealth Bank Act* 1945 and s. 51 of the *Banking Act* 1945, prohibiting amalgamation without consent. The Bank of New South Wales has power to acquire shares, &c., of any company. The English, Scottish and Australian Bank has power to amalgamate and absorb, so, also, the National Bank, Union Bank and Bank of Australasia. How can similar powers be denied to the Commonwealth Bank? The inference should be drawn that the acquisition of shares and interests in other banks is an incident of the business. Sections 11, 12 and 13 of the *Banking Act* 1945 show that the Commonwealth Bank is put in a semi-supervisory position. Section 17 (dealing with special accounts), ss. 23 and 25 (foreign currency), assist these functions. The central-banking provisions gain strength from the position of the Commonwealth Bank as a shareholder. Moreover, they may be upheld as adding an item to the list of securities (s. 12 (1)). The word "purpose" in s. 51 (xxxi.) of the Constitution does not refer to motive, nor does it mean that the property must be applied to a specified use. It is just as if the head of power were written: "For any purpose with respect to which the Parliament has power to make laws the Commonwealth may acquire property on just terms." It is true that it is the law authorizing the

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executive act that must answer the description " law with respect to the acquisition of property on just terms from any person for any purpose in respect of which the Parliament has power to make laws." It is not the executive or administrative act acquiring the property that must be tested by that description. The latter must conform to the law, and the law must conform to the constitutional legislative power. But inevitably the two things merge into one another. How the shares will be used is an irrelevant question. The inquiry is whether the law is one for the acquisition of shares for (the purpose of) the legislative subject matter of banking. It would be enough to authorize the Commonwealth Bank to purchase and hold shares in a corporation carrying on banking business and also for that purpose compulsorily to acquire them. To trace and examine the possible uses and applications of the property, in this case the shares, is quite irrelevant and due to misconception of the nature of the power. You look objectively at the legislation to see if it is in respect of a Commonwealth purpose. That is enough. The Commonwealth could, under the trade and commerce power, enter into overseas trade as a trader itself. For that purpose it could compulsorily acquire merchandise. So in the case of banking with shares or securities. It is not necessary to distinguish between acquiring bank shares so that the Commonwealth Bank may exert control or influence and acquiring them in the course of a banking business as securities. It is sufficient to put, in a broad way, that the Commonwealth Bank may hold bank shares in the course of its business and, therefore, may be authorized to purchase or compulsorily to acquire them (*Small* v. *Smith* (1) ; *Grand Trunk Railway Co. of Canada* v. *Attorney-General of Canada* (2) ; *Attorney-General for British Columbia* v. *Canadian Pacific Railway Co.* (3) ; *In re Railway Act* (4)). By the *Bank of England Act* 1946, s. 1, all the capital stock in the Bank of England was taken over. By the *Bank of Canada Act* 1934-1938, s. 17 (2) and s. 17A (2), all the privately owned shares in the Bank of Canada were acquired. By the *Reserve Bank of New Zealand Amendment Act* 1936 the privately owned shares were taken over, as they were in the case of the Bank of New Zealand. Again, in France the privately owned shares in the major trading banks were acquired. Section 9 of the *Banking Act* 1947 gives the purpose of s. 12, which is incidental to banking by the Commonwealth Bank. It is also incidental to, or within, s. 51 (xxxi.), which includes voluntary acquisition. For example, it might be necessary to authorize persons not *sui juris* or artificial

(1) (1884) 10 App. Cas. 119, at p. 139.
(2) (1907) A.C. 65.
(3) (1906) A.C. 204.
(4) (1905) 36 S.C.R. (Can.) 136.

persons of limited capacity to sell and convey voluntarily. So much of s. 14 as applies to voluntary purchase is consequential. Whatever can be done under the legislative power to carry out a compulsory transaction can be done for a voluntary one. Compare the *Lands Acquisition Act*, ss. 8, 9, 10, Part II.; s. 10 is like s. 7 of the *Bills of Exchange Act*, s. 8 of the *Patents Act*, s. 8 of the *Trade Marks Act*, s. 5 of the *Marine Insurance Act*, s. 8 of the *Life Insurance Act* and s. 2 of the *Post and Telegraphs Act*. They displace State legislation by means of s. 109 of the Constitution, but they do not repeal it. Section 14 (1) of the *Banking Act* 1947 is a law with respect to the acquisition of property, whether the acquisition is under s. 12 or s. 13 (3), though in the former case there may be no antecedent "vesting" as in the latter. Section 14 (2) depends on s. 51 (xxxi.) less than s. 51 (xiii.). Its purpose is to enable the transfer of shares to nominees. The Canadian *Bank Act* 1944 contains a complete code about the transfer of shares. Section 21 of the *Banking Act* 1947 affects—as already mentioned—three banks where 100 per cent of the shares are Australian. It may be incidental to acquisition because it merely prevents untoward consequences flowing from the acquisition of so many shares; but it is also a law with respect to banking and a law with respect to foreign and financial corporations. Division 2 and Division 3 are severable, although one notice brings the provisions of each into operation in combination if both are valid, that is, simultaneously. If the notice is fully operative according to the Act, then *uno ictu* the Australian shares vest and the directors go out of office. There is a practical certainty that in the case of every Australian Bank the notice will vest a majority if not the whole of the shares in the Commonwealth Bank, and it is upon this footing that the validity of Division 3 should be dealt with. The Court should not deal with it on the imaginary and practically unreal hypothesis of a few shares only vesting in the Commonwealth Bank as a result of a notice under s. 13. In other words, the provisions of Division 3 will apply when the Commonwealth Bank has become the only shareholder or the holder of an overwhelming majority of the shares and the directors have ceased to be shareholders and have lost their share qualifications. There are no persons in Australia with any further interest in the private bank as a company. In that situation it is almost a necessary consequence that the Commonwealth Bank, the only shareholder here, should appoint its own directors to carry on. It is a situation with which the power to make laws with respect to banking must enable the Parliament to deal. It is not a question of providing for something incidental

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to acquisition. There is a situation affecting the management of a bank and a financial corporation, and it may be legislated for under s. 51 (xiii.) or (xx.). The corporation really "belongs" to the Commonwealth Bank when all the shares are acquired and may substantially belong when a preponderance has been acquired. The appointment of directors is really to protect what in substance "belongs" to the Commonwealth Bank. Of course, the provisions may be justified on the broader ground, which would support Division 3 even though Division 2 were held invalid, namely, that the power to make laws with respect to banking enables Parliament in the public interest to provide for the appointment of directors to any company carrying on banking. As to approaching the validity of legislation on a factual basis and not upon imaginary hypotheses, see *Crothers* v. *Sheil* (1); *Matthews* v. *Chicory Marketing Board (Vict.)* (2); *Andrews* v. *Howell* (3). Section 19 gives powers of management. It is ridiculous to find anything sinister in the word "dispose" in s. 19 (1) (*b*)—a word to be found in the various objects of the constating instruments of the different banks. Directors appointed under s. 17 are not relieved by anything in s. 19 of their fiduciary duties. Section 19 (3) is simply directed to provisions of the articles or private enactment placing the powers elsewhere, e.g., in a general meeting, or putting fetters on the directors. Section 19 is based on the banking power, and it might rest too on the corporation power. What has been done in Canada shows that the banking power includes all matters relating to directors and to management. In s. 19 (3) "law" means not the general principles of law or equity, but a legislative provision, a written law, something contained in an instrument. The context shows this. It does not affect the fiduciary position of the directors. The provisions of Division 3 must be applied successively and independently to each of the eight companies affected. In the case of three of them, all the shares will pass to the Commonwealth Bank. How can the duty of the directors be in question in these cases? Section 15 gives a paramount right to compensation, and nothing the new directors can do can prejudice that right or adversely affect the measure of compensation, which is to be assessed by an independent court. The position of the shareholder is illustrated by *Short* v. *Treasury Commissioners* (4), a decision of the Court of Appeal, now under appeal to the House of Lords. Both in declaring dividends, in disposing of the business or any of it, in managing,

(1) (1933) 49 C.L.R. 400.
(2) (1938) 60 C.L.R. 263, at pp. 281, 303.
(3) (1941) 65 C.L.R. 255, at p. 267.
(4) (1948) 1 K.B. 116.

and so on, the new directors are under a fiduciary duty. All their powers must be exercised in good faith and for the benefit of the company as a whole: see *Mills* v. *Mills* (1); *Richard Brady Franks Ltd.* v. *Price* (2). In the *Airways Case* (3), *Williams* J. says definitely that the commerce power enables the Commonwealth to incorporate a body to engage on its behalf in trade and commerce and that the power must be given a wide and liberal interpretation. In s. 19 (3) " their sole discretion " is not equivalent to " absolute discretion." It means only that the new directors are the people in whom the discretion is reposed and that, notwithstanding that the Commonwealth Bank appoints them, they are not responsible to the Commonwealth Bank. It is fiduciary and must be exercised in the interests of the company. The compulsory acquisition of shares under Division 2 is valid quite independently of the validity or operation of Division 3. It is a compulsory acquisition for the purpose of facilitating control. Section 14 (1) and (2) are valid with respect to shares voluntarily acquired as well as with respect to shares acquired compulsorily: sub-s. (1), because it is an effectuating of the acquisition, sub-s. (2), because it is a law with respect to a banking company directed to enable the Commonwealth Bank to appoint nominees to hold its shares in a banking company where it has become the sole or the predominant shareholder. Returning to ss. 17 and 18, the majority shareholding which on the facts will be acquired pursuant to s. 13 gives a right of management: for management should be entrusted to the appointees of the sole or predominant shareholder. A broader ground is that the management of every bank is a subject for legislation under the power with respect to banking. Independently of holding shares, it would, for instance, be competent for the Parliament to enact that the Commonwealth should have a representative on every bank's board. They are bodies of a public or semi-public character, whose operations are stamped with the public interest. As to s. 19, sub-s. (3) does not exclude the rules of law or equity. It is referring to specific provisions. The discretion given to the directors is merely to place them in independence of the Commonwealth Bank, and it is fiduciary. They must sell at a price determined by them in the interests of the shareholders, if there be any beside the Commonwealth Bank at the time. It is a voluntary agreement by officers of the company acting in its interests, and no question of just terms can arise. The power may never be exercised, and it cannot be regarded as an acquisition.

(1) (1938) 60 C.L.R. 150, at pp. 163, 169, 175, 185.

(2) (1937) 58 C.L.R. 112, at pp. 135, 136.

(3) (1945) 71 C.L.R., at p. 112.

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The directors are in the same situation in selling as trustees (*Halsbury's Laws of England*, 2nd ed., vol. 5, pp. 314-315; *Palmer, Company Law*, 16th ed. (1938), p. 178; *Clark* v. *Workman* (1)). This view is not inconsistent with the argument that s. 19 is justified as an exercise of the banking power to protect the public interest by appointing managers who will safeguard it. [He referred to *Allen* v. *Gold Reefs of West Africa Ltd.* (2).] The directors are not released by s. 19 (3) from their duty to the shareholders. The "sole discretion" has no other purpose than to free the directors from any direction by the Commonwealth Bank on the one hand or a general meeting of members on the other hand. Only those shareholders have an interest whose shares are upon a register abroad. If the shares were transferred to Australia by the closing of the foreign register first, then the question could not arise. No indirect purpose of prejudicing the interests of these shareholders should be assumed or imputed: ss. 15 and 25 are explicit and paramount in requiring fair and reasonable compensation. No proprietary interest of the shareholders is adversely affected by superseding the directors appointed under the articles. The shares not acquired must be valued without taking into account the scheme of which acquisition forms a part or anything done in pursuance of or under the scheme. That is the rule under the law of compensation. Now, as to Division 4, the taking over of businesses of private banks, a great point made was that non-banking assets were taken over as well as banking assets. There are no facts to suggest that there are any assets completely separate from the banking business and incidental activities. As to the relation of s. 19 to s. 22, there is no reason why an agreement made pursuant to s. 19 (1) (*b*) should not be an agreement under s. 22 within the meaning of ss. 22 (6) and 23 (1). Another power of absorption of a bank by the Commonwealth Bank is conferred by s. 38 of the *Commonwealth Bank Act* 1945. Section 22 (8) (*a*) and (*b*) and (*c*) and (*d*) of the *Banking Act* 1947 do not mean to institute a distinction between assets which do and which do not relate to banking transactions. But while pars. (*a*) and (*b*) are concerned with the assets and liabilities of the Australian business as an entirety, pars. (*c*) and (*d*) are concerned, not with an oversea business as such, but with those assets and liabilities so connected with the banking business here that, in the course of it, they come to have a *situs* here. At the time of taking over there will be bills and other documents in course of transmission. Such things, whether credits or debits, must be

(1) (1920) 1 Ir. R. 107, at pp. 111, 113, 114.

(2) (1900) 1 Ch. 656, at p. 671.

taken over, but not fixed assets overseas. The only thing the plaintiffs' affidavits suggest is that many assets and liabilities do not arise out of the relation between banker and customer. That means nothing for present purposes. Section 24 (4) and (5) and (6) and (7) are *in consimili casu*. Section 24 (4) is most clearly a law with respect to the acquisition of assets, and it is for a purpose within the banking power. It is unnecessary to name the purpose expressly in the legislation. It is enough to show that the assets are taken over for utilization by the Commonwealth Bank. As to the criterion of just terms and the use of Acts *in pari materia* of other British legislatures as evidence of the justice of particular directions or procedures, see *Grace Bros. Pty. Ltd.* v. *The Commonwealth* (1). Parallel enactments are *Transport Act* 1947 (10 and 11 Geo. VI., c. 49), ss. 3, 12, 16, 4th schedule; *Coal Industry Nationalization Act* 1946, ss. 5, 7, 9, 10; *Electricity Act* 1947, ss. 14, 20; *Bank of England Act* 1946; *Electricity Trust of South Australia Act* 1946 (S.A.), amended by No. 25 of 1946; *Railways Act* 1921 (11 and 12 Geo. V., c. 55). As to the United States, see 81 *American Law Reports* 1071. The assets caught by sub-s. 6 of s. 24 of the *Banking Act* 1947 need not be subsisting at "the date of transfer." The purpose was to deal with incomplete transactions and transactions that might not have originated at that date. There may be banking abroad by the private bank, notwithstanding that its assets here are taken over with its business, and that may go on for some time. As to s. 24 (5) and (7), it is essential to take over the liabilities in such a business as banking, if you take over the assets out of which they are to be discharged. You could not provide just terms if you did not take over the liabilities. Therefore s. 51 (xxxi.) is enough to support s. 24 (5) and (7). The expression "take over" is used and illustrated in *Palmer's Company Precedents*, 15th ed., Part 1, p. 464, Form 85, p. 465, Form 96, p. 346, Form 45: see also *Montreal Bank* v. *Irvine* (2); *Cameron* v. *Royal Bank of Canada* (3). It is obvious that, to take over as a going concern a huge financial undertaking like a bank, it is essential to assume the liabilities which from hour to hour are paid out of the assets you take over. The provision of just terms for the acquisition of the assets is in part accomplished by the taking over of the liabilities. Then it is directly a law within the banking power, because out of the acquisition of assets a situation arises in which the depositors cannot be paid by the private bank, and it is essential to continue the regular payments and to do so by assuming and

(1) (1946) 72 C.L.R. 269, at p. 290.
(2) (1924) 3 D.L.R. (Can.) 752.
(3) (1915) 21 D.L.R. (Can.) 824.

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discharging the liabilities. In the assessment of compensation, to give effect to s. 42 the Court of Claims takes into account the liabilities assumed. There is no need to inquire whether a " business " is within s. 51 (xxxi.), because what is acquired under s. 24 (4)-(8) is all within that provision of the Constitution. It is completely within s. 51 (xxxi.) because it is the acquisition of property for the purposes of the Commonwealth Bank in its business. You do not say : Can you acquire this under the banking powers ? Section 51 (xxxi.) is the power, and you only look for a Commonwealth purpose ; under s. 51 (xxxi.), in the first instance, you do not look beyond the question whether the property has been acquired. If it has, then you may ask : Is there, in the proposed utilization of the property, a purpose for which the Parliament may make laws ? You do not leave out s. 51 (xxxi.) and go directly to the question whether the acquisition of the property is authorized by the particular paragraph of s. 51 bestowing the legislative power in dispute, in this case s. 51 (xiii.) or (xx.). The question is not that propounded by the plaintiffs : Is it a regulation of banking to say that it should be carried on by X and not Y ? Apart from the narrow interpretation of s. 51 (xiii.) implied, the question ignores s. 51 (xxxi.). It should ask whether the acquisition is for a Commonwealth purpose, and that may involve the utilization proposed. Section 22 is a law under s. 51 (xxxi.), and sub-s. (8) gives effect to an acquisition voluntary in its inception. The sale of one bank's assets to another needs legislative action to carry it out because of its enormous extent and complication ; this has been found in Canada, where the power is the same. Section 24 (8) is incidental to the taking over as a going concern. The provisions of Part VIII. are part of the same plan, and they indicate the purpose for which the business is acquired. Section 56 is but a shadow of the vesting by s. 24 ; it does no more than insure the consequential operation of contracts &c. It is a law relevant to acquisition. The argument has no foundation that s. 24 fails for want of definition. If there is any question as to its application to an asset because its *situs* is in doubt, that is to be decided judicially in the ordinary way. In any case s. 40 and Form D of the *Banking Act* 1945 have secured the necessary information in advance. The general rules evolved for deciding such questions are stated in *Kennedy and Wells, Law of the Taxing Power in Canada*, pp. 94, 95 and in *Dicey, Conflict of Laws*, 4th ed. (1927), p. 942 ; 5th ed. (1932), p. 991. Section 42 of the 1947 Act gives complete compensation in pursuance of s. 25, which is paramount and, in its use of the word " property," covers everything. The question whether, in assessing compensation, liabilities may be deducted does

not go to the justice of the terms; if not, they would be just and more than just. It is, however, clear that they must be taken into account under s. 25 and s. 42 in arriving at an amount of compensation. As to the point that after-acquired assets vesting under s. 24 (6) may fall outside the provisions for compensation owing to the fact that they may accrue after an agreement has been made under s. 43 (1) or a claim lodged under s. 43 (3), an offer notionally accepted under s. 44 (3) or a determination made under s. 44 (5), the answer is that the machinery provided by Division 2 of Part VI. is to be used every time the acquisition of a further asset calls for its application. There may be more than one "claim for compensation" by each private bank. The singular includes the plural. The dates prescribed under s. 24 (6) and (7) will be fixed by regulation, and, though it is true they might differ, the purpose is evident, and the point could hardly affect validity. Any anomaly arising out of the point would be taken into account by the Court of Claims. There is nothing unfair or unreasonable in the limit of two months fixed by s. 39 (1) in respect of the interests dealt with by s. 13 (5). The acquisition would be a notorious fact. Under s. 46 (7), moreover, the Court may extend the time. The outstanding shareholders may claim compensation for any loss or injury they may show owing to the consequences flowing from the acquisition of the Australian shares and the substitution, in derogation of the articles or the like, of the Commonwealth Bank as the sole new shareholder and of new directors. A broad view should be taken of the compensation provisions. Section 19 (1) should not be approached as a circuitous method of acquiring control without property in the assets of the company and so indirectly attempting to overreach s. 51 (xxxi.). The desire to provide full compensation is a dominant intention of the legislation. The management must be done by the directors as fiduciaries, and what has already been argued applies to the whole situation under s. 19. The overseas shareholders could come on the Australian register, and thus secure that their shares would pass, and they would be fully compensated. As to what is enough in the way of independent ascertainment of value to satisfy s. 51 (xxxi.), see per *Starke* J. in *McClintock's Case* (1). Shareholders on a register overseas may, subject to any regulations of the country where the local register is located, apply to come on the Australian register and so have their shares acquired, or they may offer to sell them under s. 12. As to the ascertainment of compensation, no attack has been made on the constitution of the Court of Claims; but it is said that interest

(1) (1947) 75 C.L.R. 1.

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cannot be awarded and that without interest the terms cannot be just. But the Act leaves the Court of Claims to award such fair and reasonable compensation as it thinks fit. Unless the payment of interest enters into the conception of acquisition upon just terms, there is no constitutional necessity to authorize the Court to award it, but, if it does enter into that conception, the terms of ss. 15 and 25, of s. 33, s. 40 and s. 42 are ample to cover an award of interest. In any case, to comply with the requirement of s. 51 (xxxi.), it is enough for Parliament to provide what reasonable persons might regard as just terms. It is for the legislature to say whether the case is one for interest. The Court has been established with a complete discretion to compensate as may be just, and it is a question for it what should be done to compensate for the loss arising from the acquisition, including enhancement of the loss through time elapsing without the money or the property being available to the claimants. " Fair and reasonable compensation " is enough to enable the Court to grant interest if it be a proper case. " Compensation " includes interest where necessary to give the owner a full money equivalent. In *Australian Apple and Pear Marketing Board* v. *Tonking* (1), *Rich* J. quotes a passage from the United States Supreme Court which says that under the conception of just compensation the owner is not limited to the value of the property at the time of the taking : he is entitled to such addition as will produce the full equivalent of that value. Interest at a proper rate is a good measure by which to ascertain the amount so to be added. In *Commonwealth* v. *Huon Transport Pty. Ltd.* (2), *Rich* J. rejected the application of *Swift & Co.* v. *Board of Trade* (3) to the problem because that case relates to provisions for compensation in regulations uncontrolled by any such requirement as that of the Australian Constitution : see, further per *Williams* J. (4). But, even if compensation is considered to be too narrow, the contract made up of the acquisition notices and the occupation of the property is within the cognizance of a Court of Equity and therefore one on which interest can be given (*Minister of State for the Navy* v. *Rae* (5) ; *International Railway Company* v. *Niagara Parks Commission* (6)). The Court of Claims is not specifically made a Court of Equity, but its duty is to do what is fair and reasonable. [He referred to *Toronto Corporation* v. *Toronto Railway Corporation* (7) ; *Inglewood Pulp and Paper Co.*,

(1) (1942) 66 C.L.R. 77, at p. 106.
(2) (1945) 70 C.L.R., at p. 310.
(3) (1925) A.C. 520.
(4) (1945) 70 C.L.R., at pp. 337, 338.
(5) (1945) 70 C.L.R. 339, at p. 348.
(6) (1941) A.C. 328.
(7) (1925) A.C. 177.

Ltd. v. *New Brunswick Electric Power Commission* (1).] You look, not to the jurisdiction in Equity of the Court, but to the subject matter and situation. If the subject matter of the acquisition is such that specific performance of a voluntary contract to purchase it would be specifically enforced, that is enough. If the Constitution demands that interest should be allowed, ss. 15 and 25, with the aid of s. 6, must be interpreted to allow it. *Newport Corporation* v. *Monmouth Corporation* (2) is quite a different case. The objection that the Court has no power to award costs and that such a power is necessary to comply with s. 51 (xxxi.) is unfounded. The judicial power with which the Court is invested must authorize it to award costs; but s. 51 (xxxi.) imposes no such requirement. The attack based on the ground that s. 40 and s. 42 direct that the Court of Claims shall ascertain the compensation and that it shall not be ascertained in any other manner depends upon the contention that a claim for compensation is a matter in which a person sued on behalf of the Commonwealth is a party so that the High Court must have original jurisdiction to hear and determine it. This involves two things, first, that a claim for compensation under ss. 15 and 25 and ss. 40 and 42 is a "matter"—which is conceded—and, second, that the Commonwealth Bank, when a claim is made against it, is a party sued on behalf of the Commonwealth. The second is denied. If the Commonwealth could be sued under s. 61 of the Act, by which it guarantees the payment of all compensation payable by the Commonwealth Bank, the Commonwealth could not be sued in the same proceeding as that in which the claim was prosecuted against the Commonwealth Bank. The liability, if any, under s. 61 is secondary (*Halsbury's Laws of England*, 2nd ed., vol. 16, p. 57). Section 75 (iii.) of the Commonwealth Constitution was based on Article III., s. 2, clause 1, of the United States Constitution, which provides that "the judicial power shall extend to all cases in law and equity . . . to controversies to which the United States shall be a party." The words "or a person suing or being sued on behalf of the Commonwealth" were added to the Commonwealth provision because a strict application had been given to the words of the American provision. The additional words in the Commonwealth provision do no more than cover cases where it appears in the record that the Commonwealth is the real party and is represented by a Minister or officer in his official character. The use of a nominal defendant is illustrated by *Farnell* v. *Bowman* (3)

(1) (1928) A.C. 492 (in Canada (1927) 3 D.L.R. 967).
(2) (1947) A.C. 520.
(3) (1887) 12 App. Cas. 643.

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and *Jamieson* v. *Downie* (1). *Quick and Garran*, at p. 773, explain the words in that way. Section 75 (iii.) was considered in *R.* v. *Murray and Cormie*; *Ex parte The Commonwealth* (2). The device of a nominal defendant was employed in the *Claims Against The Commonwealth Act* 1902. Section 208 of the *Income Tax Assessment Act* 1936-1946 makes tax a debt due to the King but recoverable by the Commissioner, which is another example of the way s. 75 (iii.) may apply. The Commonwealth Bank is not a department of state to which Ministerial responsibility applies. It is an independent corporation. *War Service Homes* v. *Kirkpatrick* (3), *cor. Starke* J., is distinguishable because the Commissioner of War Service Homes was under the direction of the Minister. But it is submitted that, before a case comes within s. 75 (iii.), it must appear that the party is the Commonwealth itself or a person or body representing on the record the right of the Commonwealth. *Repatriation Commission* v. *Kirkland* (4) was another case of Ministerial responsibility: see, too, *Metropolitan Meat Industry Board* v. *Sheedy* (5). The service of the Commonwealth Bank is independent of the Crown service: cf. *Railway Commissioners (N.S.W.)* v. *Orton* (6); *Grain Elevators Board (Victoria)* v. *Dunmunkle Corporation* (7). The Commonwealth Bank is no mere agent of the Executive. Section 10 of the *Commonwealth Bank Act* 1945 shows that; so does s. 9; see, too, ss. 13, 15, 17, 23, 25. The question is one, not of the functions discharged, but of agency for the Crown. The Governor of the Bank is not an officer of the Commonwealth for the purpose of s. 75 (v.) of the Constitution: see *Commonwealth Bank Act*, s. 28. For the purpose of s. 75 (iii.) of the Constitution the judgment must operate, when given, for or against the Commonwealth, whether the suit is in the name of the Commonwealth or the party sued on its behalf. A depositor could not sue the Commonwealth, or, if he sued the Commonwealth Bank, recover from the Commonwealth under the judgment. It follows that on no other liability could the Commonwealth be made liable; for you cannot split up the personality and status of the Bank in this respect according to the kind of thing it does. The furthest point to which s. 75 (iii.) can be taken in its application to a corporation is when the corporation is under Ministerial direction and control. Section 78 of the Constitution lends support to the construction of s. 75 (iii.) which confines it to suits by or against the Commonwealth by a procedure

(1) (1923) A.C. 691.
(2) (1916) 22 C.L.R. 437: See particularly pp. 467-469.
(3) (1925) Unreported.
(4) (1923) 32 C.L.R. 1.
(5) (1927) A.C. 899, at pp. 902-905.
(6) (1922) 30 C.L.R. 422.
(7) (1946) 73 C.L.R. 70, at pp. 70, 75, 77-79.

which either permits suit in the name of the Commonwealth or the King or in the name of a nominee, a procedure laid down pursuant to s. 78. In any case, s. 6 of the 1947 Act operates to sever the words " in no other manner " from ss. 40 and 42 if they be invalid. They are really an attempt to make the jurisdiction of the Court of Claims exclusive. To confer an exclusive jurisdiction involves two separate steps—the creation of the jurisdiction and the giving it exclusiveness. As to s. 6, see and contrast *Australian Railways Union Case* (1). Again, if ss. 40 and 42 were bad, that would only leave s. 15 and s. 25 in unqualified operation. The argument that s. 46 is invalid because it is an unconstitutional interference with the performance of State functions has no foundation. It is nothing but an attempt to return to the completely discredited doctrine of *D'Emden* v. *Pedder* (2), even to the very word " interference." There is nothing in *Melbourne Corporation* v. *The Commonwealth* (3) to affect the definitive rejection by the *Engineers' Case* (4) of that doctrine. In *Melbourne Corporation* v. *The Commonwealth* (3) the Court examined the reservations made in the *Engineers' Case* (5) and applied one of them. The *Engineers' Case* (5) finally laid it down that a general law in the exercise of a specific Commonwealth power over a given subject binds the States, that is, if Parliament so intends. Section 46 and the whole *Banking Act* 1947 is such a general law. The reference to the prerogative of the Crown is to be explained by the argument of counsel for the States that, notwithstanding an award, the Crown might under the prerogative terminate the office or employment of a Crown servant. It is conceded that a tax on the grant or receipt of a pardon or upon what in America is called a " State house " would be beyond the power of the Commonwealth. The reference in the judgment to the *Bonanza Case* (6), which related to appeals to the Privy Council, shows what sort of thing was in mind when the prerogative was mentioned. But, putting aside the prerogative and taxation, a general rule is established by the decision, and it clearly governs this case. The power of the States consists of the residue after full effect has been given to s. 51. No limitations are to be inferred from the supposed intention to include any subject or matter in the residue. The enumerated powers are to be construed as extending to all the operations of the States unless a clear expression of intention to the contrary exists. It is quite wrong to treat the

(1) (1930) 44 C.L.R. 319.
(2) (1904) 1 C.L.R. 91.
(3) (1947) 74 C.L.R. 31.
(4) (1920) 28 C.L.R. 129: See p. 143.
(5) (1920) 28 C.L.R. 129.
(6) (1916) A.C. 566.

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Engineers' Case (1) as a decision only upon s. 51 (xxxv.). Under that power, as under banking, there was a contention as to its ambit, that is, what was an industrial dispute, but such a question is quite separate. If, as has been submitted, the banking power does authorize Parliament to select the instruments, corporations or persons who may do banking, then the principle of the *Engineers' Case* (1) applies and declares that the States are bound equally with the citizens by Parliament's choice or decision. The decision of the Court in *Melbourne Corporation* v. *The Commonwealth* (2) depended upon the particular provisions of s. 48 of the *Banking Act* 1945, that is to say, upon the facts of the case. Discrimination existed, although in the view of the Court discrimination was not an exhaustive or a decisive test. Here the situation is quite otherwise, and the analogy with the *Engineers' Case* (1) is complete. It is true that the present case has a distinguishing feature in the necessary tendency of the *Banking Act* 1947 to bring the States in their financial transactions into relationship with or dependency upon a Federal agency, the Commonwealth Bank ; but the answer is that in the *Engineers' Case* (1) the States were specifically controlled by the award and the provisions of the *Arbitration Act* bringing them under the authority of the Arbitration Court. Here it is but the consequence of a general law affecting States and citizens alike. As to the rule in the *Engineers' Case* (1), see *Australian Railways Union* v. *Victorian Railways Commissioners* (3), per *Dixon* J. The contrary intention must be found either in express words or from the necessary implications of what is expressed. To add " or in the structure of the political organization " may not be wrong, if it is understood that the " structure " must be found in specific clauses and not in presuppositions or general conceptions. What is the scope and consequence of the protection against interference in the choice of banks which the States claim ? Does it mean that a number of banks is to have permanent franchises ? How many and which are they ? Is it reciprocal so that the Commonwealth is entitled to have such banks kept open, notwithstanding any provision of State law ? The references in the *Engineers' Case* (4) to taxation were only by way of special illustration of problems that might arise in the future. Further, it clearly appears that from beginning to end the question was not as to the meaning of the arbitration power but as to the subjection of the States to the legislative powers generally of the Common-

(1) (1920) 28 C.L.R. 129.
(2) (1947) 74 C.L.R. 31.
(3) (1930) 44 C.L.R., at p. 390.
(4) (1920) 28 C.L.R. 129 : See pp. 141, 143, 144.

wealth: see, further, the judgment of *Higgins* J. (1). In the United States there has been the same complete retreat from the doctrine of inter-governmental immunity, and it would be extraordinary if this Court returned to the authorities now overruled in the United States, such as *The Collector* v. *Day* (2). The Constitution is one, not of dual, but of divided, sovereignty. The expression sovereignty in this connection seems to be sanctioned by authority, and it is used for that reason. Implications are to be made, no doubt, and from the situations created by the instrument as well as its words. It therefore cannot be denied that the co-existence of the Governments is not to be overlooked; but that has no bearing on a proposal to infer a prohibition against mutual "undue interference." Who is to determine what is "undue" or what is an "interference"? As to the latter word, see per *Higgins* J. (3). As is shown in these passages, the Commonwealth Constitution was much more completely expressed than that of the United States. The argument now made by the States cannot be tested except by s. 51 as an entirety. It goes to the root of the operation of all the concurrent powers. Laws which single out the States for special burdens or disabilities are not made in respect of the ostensible subject matters, and that is altogether a different thing. *Attorney-General for New South Wales* v. *Collector of Customs for New South Wales* (*Steel Rails Case*) (4) and *R.* v. *Sutton* (*Wire Netting Case*) (5) involved serious interferences in fact with the States in the carrying out of their functions. Actual interference is no test, and that is shown by the observations in the *Engineers' Case* (6). The purpose of a Constitution is to authorize the making of binding laws and to describe the extent of the powers so to do, whether with respect to the central or the local organs of government. The binding effect is upon each other. Of this *Pirrie* v. *McFarlane* (7) is a good example, deciding that once you get a subject matter, e.g., motor traffic, the law with respect thereto may be operated uniformly. When a law discriminates against the States, it is only to be explained on the view that it is deliberately aimed at State activities and therefore that is the real subject to which it is addressed. That is the true ground of the decision in *Melbourne Corporation* v. *The Commonwealth* (8). The denial to the States of facilities provided by the Commonwealth might be "discrimina-

(1) (1920) 28 C.L.R., at pp. 163, 167.
(2) (1870) 78 U.S. 113 [20 Law. Ed. 122].
(3) (1920) 28 C.L.R., at pp. 144, 145, 149, 152, 153, 158.
(4) (1908) 5 C.L.R. 818.
(5) (1908) 5 C.L.R. 789.
(6) (1920) 28 C.L.R., at pp. 153, 159.
(7) (1925) 36 C.L.R. 170.
(8) (1947) 74 C.L.R., at pp. 43, 45, 49, 54-57, 61, 65, 66.

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tion," but it would not be ultra vires, particularly if the States had the same kind of facilities of their own. Shipping might be an example. In the present case the States complaining of the substitution of Commonwealth facilities for those provided by the private banks have availed themselves very largely of the existing Commonwealth banking facilities. The Commonwealth Bank is a body managed and conducted independently of the Commonwealth Government. It is quite unreal to say that by using the Commonwealth Bank altogether the States would be placed in a position of disadvantage. Every judgment in *Melbourne Corporation* v. *The Commonwealth* (1) is based on the special disability in banking imposed by s. 48 of the 1945 Act on the States. *The Commonwealth* v. *Queensland* (2) involved a much greater interference with State powers, and it was a law which could affect the States only. Parts of the judgment of *Starke* J. in *Melbourne Corporation* v. *The Commonwealth* (3) are not consistent with the *Engineers' Case* (4) and should be reconsidered. But the decision depends on the law, owing to its singling out the States, not truly being a law with respect to banking (5). See also *South Australia* v. *The Commonwealth* (*Uniform Tax Case*) (6). The defendants contend for the rule of the undeviating application of Commonwealth law to the States and State law to the Commonwealth. The Commonwealth can protect itself by legislation paramount under s. 109, and the States cannot be made the subjects of legislation under the guise of dealing with the matters included in the enumerated powers. The question, as in *Melbourne Corporation* v. *The Commonwealth* (7), will be whether the law affecting the operations of the States is truly one in respect of a Federal head of power. A summary of the defendants' answer to the contention that s. 46 " unduly interferes " with State functions is that no immunity from interference from a Commonwealth law dealing with a Federal subject matter can be implied in favour of the States and that in any case the *Banking Act* 1947 does not interfere unduly or at all with the performance by the States of any of the functions of government. They may under the Constitution provide their own banks. Moreover, the Commonwealth Bank is available as an institution conducted without subjection to, or dependence upon, the Commonwealth Government. The functions of the States are not impaired in their performance by their ceasing to make the partial use

(1) (1947) 74 C.L.R., at pp. 67, 68, 70, 71, 72 et seq., 75.
(2) (1920) 29 C.L.R. 1.
(3) (1947) 74 C.L.R., at pp. 75 et seq.
(4) (1920) 28 C.L.R. 129.
(5) (1947) 74 C.L.R., at pp. 78, 80, 84, 87-89, 98, 99.
(6) (1942) 65 C.L.R. 373, at pp. 422, 426.
(7) (1947) 74 C.L.R. 31.

hitherto made of the trading banks. Section 46 is a general law affecting all alike, State or citizen. The State cannot have a "right" (*a*) to continue banking with its present bankers, or (*b*) with all existing banks, or (*c*) to have all persons or corporations free to become bankers and carry on State business. If the claim to immunity is reciprocal, it paralyzes all legislative power with respect to the subject of banking. In short, the claim is shown by examination to be absurd. The argument that the *Banking Act* 1947 is contrary to the Financial Agreement has no support in the true reading of clause 5 (9) of the instrument. Clause 6 (7) is the corresponding provision securing the freedom of the Commonwealth to borrow for temporary purposes. Both clauses are by way of proviso, excepting that particular financing from the restraints imposed by the agreement. It gives neither government a "right." The judgments of *Latham* C.J. and *Williams* J. in *Melbourne Corporation* v. *The Commonwealth* (1) are expressed in such a way that it is clear they did not mean that these clauses of the Financial Agreement gave State or Commonwealth a right to the continuance of all existing banking institutions. At best it is a right to resort to the institutions from time to time lawfully carrying on banking business. If the claim is regarded as depending upon a compact between States and Commonwealth that neither shall do anything to hinder or obstruct the other in borrowing on overdraft for temporary purposes, the test would be that explained in the House of Lords in *Luxor* (*Eastbourne*) *Ltd.* v. *Cooper* (2). Such an implication would have a very far-reaching effect. It would exclude the authority of the Commonwealth Bank to control advances, or expansion of credit, by private banks and the obligation to make the special deposits as a means of checking such expansion and even the control of interest rates. The argument that by providing compensation the Commonwealth Bank must inevitably depreciate the value of money so that the terms would not be just, though founded on the Financial Agreement and its restraints, is based on no evidence of any such thing; it involves considerations which Courts of law will not entertain and which are foreign to any principle of just terms or compensation. In fact, Australian currency and the currency of two other countries form the only three "hard" currencies in the modern world. The challenge to the *Banking Act* 1947 under s. 92 of the Constitution can best be considered by reference to s. 46 of the Act. For, if that is consistent with s. 92, the rest of the Act must be so. This objection is tantamount to

(1) (1947) 74 C.L.R., at pp. 62, 63, 101.

(2) (1941) A.C. 108, at p. 137.

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converting s. 92 from a protection of inter-State trade to a due-process clause; for it is invoked to invalidate legislation dealing on an Australia-wide basis with a business that has nothing to do with crossing borders. Banks make credit available at a distance; the distance may be inappreciable or at the other end of the world. There is nothing inter-State in the process. The transmission or remission of credit is an auxiliary function of the business, but it is indifferent whether it is across the street or at great distances, and it is altogether irrelevant to State boundaries. Banking is only a facility which may be used by commerce, an adjunct. It is not commerce. "Intercourse" has no bearing on the present question. It refers to persons crossing the border. In applying s. 92, you do not take the word "trade" and analyse that, and then "commerce," and then "intercourse," and take "among the States" for the purpose of analysing that expression. By so proceeding, you arrive at a result completely foreign to s. 92. Matters of currency, coinage, note issue, whether by banks or government, and the monetary system of the country generally, are outside the scope of s. 92. They are, of course, the means by which commerce fulfils its financial ends, but that is because they are the essential means by which the operations of every department of life are brought about. They have as much to do with bookmaking as with banking and with cricket as with commerce. This legislation is in substance taking into governmental hands the chief means of providing the "money" which the community uses. What has the freedom to trade over the border got to do with that? It was not contrary to s. 92 to tax bank notes out of existence or to provide Commonwealth notes as the only legal tender in use (for 40s. and over). In *Australian Insurance Staffs' Federation* v. *Accident Underwriters' Association* (1), *Isaacs* and *Rich* JJ. defined the position in industry of banking in a way that shows how banking interpenetrates the life of the community. It is not to be regarded simply as an affair of trade and commerce. Of the £1,500m. that forms the Australian money in circulation, £1,300m. is in the form of bank deposits. The legislation deals with the creation and use of the chief medium of exchange and places the functions in the hands of a Federal agency. That is in another field from that dealt with by s. 92: see, per *Starke* J. (2). Section 92 necessarily describes a category, and its operation is within that category, although in a sense it is a qualification of every Federal legislative power. It could not affect fisheries beyond territorial limits, copyright, patents, trade marks and designs, or marriage, or invalid and old-age pensions.

(1) (1923) 33 C.L.R. 517, at p. 527. (2) (1923) 33 C.L.R., at p. 536.

Yet a patent is a monopoly excluding others from selling what they may own. But in each of these subjects you are in a universe quite different from that in which s. 92 speaks: outside its category. Of course you can invent examples of laws touching these subjects of legislative power which might infringe s. 92 because it covers its own category independently of those of s. 51, but you invent something to come within the category of s. 92. Section 92 is, of course, notorious for its difficulty: see *James* v. *Cowan* (1), per *Rich* J. Much of the ground is covered by *James* v. *The Commonwealth* (2), though it does not profess to deal with every contingency. The first point is that the legislation here in question does not deal with transactions. It deals with banking as a business and totally. A law that no foreign corporation should trade, that no infant should trade, would not touch s. 92. So a prohibition upon aliens or immigrants becoming traders would be valid. The Parliament could say that an alien could not move more than three miles from his residence, but it would not invade the freedom of inter-State intercourse. All movement of persons might be stopped for a space so as to take a census, and that would be valid. It depends not upon the reason of the restraint, but upon the subject matter or operation of the enactment in relation to what is protected by s. 92. In *Tasmania* v. *Victoria* (3) the Act stood revealed as a colourable attempt to hide a naked prohibition of inter-State trade in potatoes under cover of a quarantine law. *Ex parte Nelson* [*No.* 1] (4) is discussed in *James* v. *The Commonwealth* (2) inconclusively. In *James* v. *The Commonwealth* (2) the Attorney-General who appeared produced six or seven Federal Acts and said that, if the Commonwealth was bound by s. 92, they would all be invalid. They included the *Post and Telegraph Act*, the *Wireless Telegraphy Act*, the *Australian Industries Preservation Act*, the *Sea Carriage of Goods Act*, the *Transport Workers Act*. There was no-one to support the Acts on the footing that s. 92 applied to the Commonwealth. That must be remembered in reading the discussion of these statutes in the reasons of Lord *Wright*. Of course, s. 92 only gives freedom to the inter-State part of any activities. Intra-State operations are subject to Federal legislation, as would be the ninety per cent of the trading banks' business which is inter-State. But s. 46 of the *Banking Act* 1947 is *in pari materia* with the *Transport Workers Act*, which was expressly approved as valid by the Privy Council. No distinction can be taken between the provisions upheld in *Huddart Parker*

(1) (1930) 43 C.L.R., at pp. 422, 423.
(2) (1936) A.C. 578; 55 C.L.R. 1.
(3) (1935) 52 C.L.R. 157.
(4) (1928) 42 C.L.R. 209.

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Ltd. v. *The Commonwealth* (1) and the grounds upon which s. 46 of the present Act is supported. Couple that decision with what the Privy Council said when removing the assumption upon which it proceeded, namely, that s. 92 had no application to the Commonwealth, and the whole proposition governing the validity of s. 46 is made out. The validity of s. 46 is therefore covered by the decision of the Privy Council. In the *Transport Workers' Case* (1) the decision was that it was open to the Commonwealth to select the persons who should be at liberty to take part in an operation of inter-State trade. The Privy Council said that s. 92 makes no difference to that proposition. Here the same thing applies to banking. The Commonwealth Parliament decides who shall take part in banking (2). To load the goods on the ship to carry them inter-State was as much inter-State commerce as to move them across the border instead of across the wharf; but, nevertheless, to regulate the choice of the persons to do it did not invade s. 92. The fact that s. 92 binds the Commonwealth makes it impossible to say that discrimination between inter-State and intra-State trade brings the law into opposition with s. 92; although, if a State discriminates, the inference may be that it attempts to obstruct inter-State trade. Banking itself is not trade, commerce or intercourse. Banking is finance: it provides, it creates, it withdraws, it destroys and it regulates the purchasing medium for the whole community. It begins with the deposit of funds by the depositor. The relation of banker and customer all turns on this. The plaintiffs found their contention on an ambiguous use of the word "trade." In *McArthur's Case* (3) there is a discussion of that term. Section 92 deals with "trade, commerce and intercourse" without regard to the number or nature of the transactions of individuals. You must look at the character of the thing which the statute does, not at the description, as trading or commercial, which may be applied to the occupation or transaction for which protection is claimed. Section 92 safeguards trade, commerce and intercourse among the States, not the trade exercised by an individual. To say that a particular pursuit or avocation is properly described as a trade does not begin even a claim for immunity. Is banking conducted by ocean navigation or internal carriage? No doubt, these are words of extension, but they show that s. 92 relates to the movement of things and persons. Intangible communications are not within it. Ocean navigation and internal

(1) (1931) 44 C.L.R. 492.
(2) (1936) A.C. at pp. 625-628; 55 C.L.R., at pp. 54, 55, 57.
(3) (1920) 28 C.L.R., at pp. 547 et seq.

transport are the means by which the subject protected moves. They are not the things protected. The *Transport Cases* can be properly regarded as decisions, not about the freedom of commerce, but about the instruments of commerce. The words employed in ss. 112 and 113 describe it as "passing into or out of the State." No doubt, a flock of sheep driven across the border would come under s. 92, but communications by letter, by telegram, by wireless and broadcasting and television would not. The American decisions go to great lengths, but they do not show what is commerce for the purposes of s. 92. A communication ordering goods from another State is not within s. 92. The consequent movement of the goods is what s. 92 contemplates and protects. What is free is the actual passing of the goods or persons across the boundary. That is the decision in *James* v. *The Commonwealth* (1). Of course, legislation may be aimed at that when it deals with antecedent or subsequent facts or transactions. In contrast to traffic of goods and persons across a border, currency, Commonwealth notes and bank credit percolate through the community and permeate its life. The printing and issue of notes is not commerce. If banks were left free to provide facilities for domestic trade of a State but were restrained from providing the facilities for inter-State trade, that would hit at the passing of goods across the border and so infringe s. 92. But s. 92 protects the thing and not the instruments for carrying it out, except as they are obstructed in order to obstruct the thing. For that reason also, because of the same distinction, s. 98 expressly includes railways and navigation within the power given by s. 51 (i.). The transmission of credit is not included in s. 92. *Trinidad Lake Asphalt Operating Co. Ltd.* v. *Commissioners of Income Tax for Trinidad and Tobago* (2) gives no guidance for the purpose of s. 92. Could it be said that, by reason of the crediting and debiting there, trade, commerce and intercourse took place by internal carriage or ocean navigation between Trinidad and New Jersey? There must be a movement of physical things—trade in being. Contracting is not within s. 92 *per se*. This argument is consistent with the *Airways Case* (3) because by a very curious type of enactment inter-State movement except by one operator was in fact prohibited. The *Transport Cases* and the explanation given in *James* v. *The Commonwealth* (1) by the Privy Council all go to show that you may have restrictions on the choice of means without any impairment of the inter-State trade for the carrying out of which these

(1) (1936) A.C. 578; 55 C.L.R. 1.
(2) (1945) A.C. 1.
(3) (1945) 71 C.L.R. 29.

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means exist. Banking is at best an aid to trade and commerce. It is not commerce itself. It is essentially finance. Its function is the organization of a means of exchange, and it is quite different from the exchange of physical goods. *International Text-book Co.* v. *Pigg* (1) and *Fisher's Blend Station Inc.* v. *Washington Tax Commissioner* (2) are very extreme cases. The effect of the argument for the plaintiffs would be that neither Commonwealth nor States could make a law restrictive of banking business. Lord *Wright's* judgment in *James* v. *Commonwealth* (3) contains the complete answer to it because the principle on which it proceeds is so fully illustrated by the discussion of the prior decisions as to place its application beyond doubt. Two matters are involved, first, that the crucial thing is passage over the border; that is what s. 92 protects; second, neither State nor Commonwealth laws may be directed against passage over the border, but, subject to that, State and Commonwealth, as to matters subject otherwise to their respective authorities, may make laws controlling, regulating and affecting the course and conduct of trade and commerce. It is entirely fallacious to inquire separately what is trade, commerce and intercourse, what is the meaning of free and what amounts to the qualification expressed by the words "among the States." It was in this way that the conclusion was reached in *McArthur's Case* (4). From the legal point of view it was a disaster. It has been repeatedly decided that s. 92 gives nobody a right to trade inter-State. The selection, whether by States or Commonwealth, of the persons to engage in inter-State trade is quite outside s. 92. It is quite different from saying that trade in a commodity shall not be carried on inter-State, as in *Tasmania* v. *Victoria* (5). Section 92 has nothing to say to a law providing that an infant, a bankrupt, a soldier or a barrister, shall not trade. It is not the purpose of s. 92 to say that every person in Australia and every corporation has a constitutional right to trade in inter-State commerce. To say that it means that no law shall be made preventing or hindering him from trading is only the same proposition in reverse. Thus, in *Roughley* v. *New South Wales* (6) the regulation of agents selling fruit was held within the competence of the State although some of the fruit was consigned from other States. Lord *Wright* treats this as sound (7). The *Wheat Case* (8) brings out two points:

(1) (1910) 217 U.S. 91 [54 Law. Ed. 678].
(2) (1936) 297 U.S. 650 [80 Law. Ed. 956].
(3) (1936) A.C. 578; 55 C.L.R. 1.
(4) (1920) 28 C.L.R. 530.
(5) (1935) 52 C.L.R. 157.
(6) (1928) 42 C.L.R. 162.
(7) (1936) A.C., at p. 620; 55 C.L.R., at p. 49.
(8) (1915) 20 C.L.R. 54.

(1) the business of the merchants and brokers who sold New South Wales wheat across the borders was completely terminated, but that did not matter in the application of s. 92; (2) an intended operation of the law to the prejudice of inter-State commerce would have been invalid. *Foggitt, Jones & Co. Ltd.* v. *New South Wales* (1) and *Duncan* v. *Queensland* (2) are examples of the latter. But the *Wheat Case* (3) establishes that the theory is wrong that an individual trader or merchant has any constitutional right to continue to perform his trade and, further, that a measure may be valid notwithstanding that it has an adverse and most prejudicial effect on the trader's business. Lord *Wright's* judgment held in effect that the Queensland *Profiteering Prevention Act* was valid in all respects. It follows that the States can fix prices without excepting inter-State sales, and so can the Commonwealth, as indeed it did throughout the war and still does. Section 92 has nothing to do with price-fixing; moreover, the whole notion is dispelled that because a business is conducted across State lines it obtains protection. In the *Road Transport Cases* the regulation had an adverse effect upon those engaged in the business of carriers and in one case—*Gilpin's Case* (4)—upon a merchant who carried his own goods. But, as Lord *Wright* said, there was no prevention or hindrance by the Act in respect of the passage of goods from State to State: the law applied whether or not they came across the border (5). *Vacuum Oil Co. Pty. Ltd.* v. *Queensland* (6) is quite different. The law related to an imported commodity and placed a burden on the importer, which meant a burden on the act of importation. It is true that the burden was placed alike on importation from overseas and from another State. But that is quite different from a law burdening trade uniformly, whether domestic or inter-State. At the same time the point at which any attack on the decision is made is that inter-State and overseas importations were treated uniformly. The appropriate legislative authority may always control or vary contracts so long as its legislation is not devised for the purpose of affecting the passage of goods across the border. Thus s. 92 does not cover, for example, advertising, the terms upon which contracts may be made, the regulation of the carriage or delivery of goods or of the price to be paid or of the enforcement of the obligation to pay. It does not touch the protection of the trade by measures of police. All these are governed by legislation of the appropriate Parliament, that is, so long as it does not "hit at" passage across

(1) (1916) 21 C.L.R. 357.
(2) (1916) 22 C.L.R. 556.
(3) (1915) 20 C.L.R. 54.
(4) (1940) 64 C.L.R. 169.
(5) (1936) A.C., at p. 630; 55 C.L.R., at p. 48.
(6) (1934) 51 C.L.R. 108.

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the border. Legislation may " hit at " inter-State passage without being discriminatory. The *Banking Act* 1947 has nothing to do with the border. It is plain from Lord *Wright's* discussion that the *Transport Cases* are affirmed, all of them. The roads are provided by the States, and the legislation there in question was directed to the preservation and upkeep of the highways and the maintenance of the State railways against unfair competition. The control and co-ordination of road traffic had been found essential by the States, and their laws were in no way directed against the passage of goods across the border. It was seen that s. 92 was not in the Constitution for the protection, against control, of commercial road transport. In the same way, in *James* v. *Cowan* (1), Lord *Atkin* is putting in another form the test adopted by Lord *Wright*, namely, if the acquisition is directed against trade across the border it is bad, but if it is to prevent the spread of disease it is not. You get back to the same point, interference as at the border. Lord *Wright's* comment on the case (2) bears out this view of it. A prohibition against selling more than ten per cent of the dried fruits produced on the Australian market and a command to export ninety per cent alike prevent the sale inter-State of any of the ninety per cent, and both are directed against inter-State commerce. In dealing with *Peanut Board* v. *Rockhampton Harbour Board* (3), Lord *Wright* expresses no approval. The test is the same : Was the plan directed wholly or partly against inter-State trade ? The answer is that it was not : but that is not material now. It is suggested that it is analogous to *Roughley* v. *New South Wales* (4) and to *Andrews* v. *Howell* (5). *Vacuum Oil Co. Pty. Ltd.* v. *Queensland* (6) is discussed on the same lines (7). There the burden upon importation was in part directed against inter-State trade. *Ex parte Nelson* [*No.* 1] (8) was directed, not against trade in cattle from Queensland into New South Wales, but to protection against the spread of disease amongst cattle ; whereas *Tasmania* v. *Victoria* (9) is a case where, under colour of dealing with disease, a prohibition of importing potatoes was directed against trade in potatoes from Tasmania to Victoria. *Gallagher* v. *Lynn* (10) is an example of a law directed against the dangers of an unregulated milk supply actually affecting trade with a place out of the jurisdiction but yet not being a law " with respect to " that trade.

(1) (1932) A.C. 542 ; 47 C.L.R. 386.
(2) (1936) A.C., at p. 623 ; 55 C.L.R., at p. 52.
(3) (1933) 48 C.L.R. 266.
(4) (1928) 42 C.L.R. 162.
(5) (1941) 65 C.L.R. 255.
(6) (1934) 51 C.L.R. 108.
(7) (1936) A.C., at p. 631 ; 55 C.L.R., at p. 59.
(8) (1928) 42 C.L.R. 209.
(9) (1935) 52 C.L.R. 157.
(10) (1937) A.C. 863, at p. 870.

With one exception Lord *Wright* reviews the Australian decisions without disapproving them. Further, he holds to be valid the list of statutes enumerated. All this illustrates the application of his principle and confirms its effect. It is not clear why Lord *Wright* called *McArthur's Case* (1) a doubtful exception. The American decisions which have given of late so wide an application to the commerce power are a consequence of the complicated economic national life and the necessity of expanding the national power to deal with it. They have no bearing and throw no light upon the operation of the prohibition contained in s. 92. *James* v. *The Commonwealth* (2) is a controlling authority settling all questions of principle and covering this case. After that decision *Hartley* v. *Walsh* (3) was decided in accordance with it. It would be competent for Victoria to make a law prohibiting the sale of burry wool produced in Victoria unless carbonised in a Victorian carbonising plant. The *Riverina Transport Case* (4) is another illustration. The administrative result that intra-State carriers obtained licences while carriers going beyond the border did not was an accidental consequence of a statute and executive decisions neither of which were in the least degree directed against inter-State commerce. Again, in *Home Benefits Pty. Ltd.* v. *Crafter* (5) the legislation of South Australia against the use of coupons in trading was properly upheld upon Lord *Wright's* principle. It had no concern with crossing the border. The argument in *James* v. *The Commonwealth* (2) included a reference to the *Sales Tax Acts* as examples of legislation that must fall if s. 92 was held to bind the Commonwealth. Clearly Lord *Wright* included these Acts amongst the other legislation he mentioned in general terms as valid. That is another example. The two decisons about lotteries supply another illustration: *R.* v. *Connare*; *Ex parte Wawn* (6); *R.* v. *Martin*; *Ex parte Wawn* (7). The interpretation or explanation of s. 92 by *Dixon* J. in *O. Gilpin Ltd.* v. *Commissioner for Taxation for New South Wales* (8) was given before *James* v. *The Commonwealth* (2) and is not consistent with Lord *Wright's* judgment. In some ways it involves a wider application of s. 92 than did *McArthur's Case* (1). It is more rigid and in some respects more drastic. In *Milk Board (N.S.W.)* v. *Metropolitan Cream Pty. Ltd.* (9) Lord *Wright's* principle was applied. The law was upheld because it dealt with the supply and distribution of pure milk in the metropolis of Sydney without

(1) (1920) 28 C.L.R. 530.
(2) (1936) A.C. 578; 55 C.L.R. 1.
(3) (1937) 57 C.L.R. 372.
(4) (1937) 57 C.L.R. 327.
(5) (1939) 61 C.L.R. 701.
(6) (1939) 61 C.L.R. 596.
(7) (1939) 62 C.L.R. 457.
(8) (1940) 64 C.L.R. 169.
(9) (1939) 62 C.L.R. 116.

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regard to the source in New South Wales or elsewhere whence the milk came. It had nothing whatever to do with the border. It imposed no burden upon milk with reference to its passing into New South Wales. It simply controlled the supply and distribution of milk to ensure a pure and adequate supply, a sufficient price to the producer and a reasonable price to the consumer and proper distribution. Milk from Victoria was not treated any differently from milk from New South Wales. Again, in *Andrews* v. *Howell* (1) the principle was applied to a war-time marketing plan where all trade in the commodity was placed in the hands of the Board. The correct ground for upholding the regulations so far as concerns s. 92 was given by *Starke* J., who said: "The expropriation of the apples and pears is not directed wholly or partially against inter-State trade, that is, selling them out of any State, but to the better disposal of the commodities in local as well as other markets, if possible. Such legislation, it appears, is not obnoxious to s. 92" (2). In *Gratwick* v. *Johnson* (3) the purpose of the regulations nowhere appeared. No facts were presented to the Court. The regulation took crossing the border as the event upon which its prohibition operated. It hit at passing across the border, or it was so regarded. Section 46 of the *Banking Act* 1947 is not hostile to communications or transmissions of credit from one State to another. It is indifferent to the relation any banking transactions may have to State boundaries. It is concerned with the business as such and in its entirety. The plaintiffs concentrate on the cheque system, the consequent transmission or transfer of credit and on the circumstance that in perhaps ten per cent of the cases a State boundary lies between the locations of the parties to the transfer of credit. The cheque system is a small or relatively small element in the composition of the business and function of banks. The separation by a State boundary of parties to a cheque transaction or a transfer of credit is fortuitous and irrelevant. In no way is s. 46 directed against anything passing over the border, whether a tangible or intangible thing. Since *Champion* v. *Ames* (4) it has been recognized in the United States that persons, objects or subjects may be excluded from commerce among the States. The Supreme Court held that lottery tickets were articles of commerce and that Congress might take measures to safeguard the people of the United States from the "widespread pestilence of lotteries" by preventing their transmission through the channels of commerce. The decisions of the

(1) (1941) 65 C.L.R. 255.
(2) (1941) 65 C.L.R., at p. 274.
(3) (1945) 70 C.L.R. 1.
(4) (1903) 188 U.S. 321 [47 Law. Ed. 492].

Supreme Court which show the control which the States possess over the moral and physical character of acts and things in fact forming part of inter-State commerce are relevant in answering the question under s. 92 whether laws are directed against inter-State commerce or are dealing with other aspects, with no design of prejudicially affecting inter-State commerce. It is not every restraint conditioned on the inter-State character of movement that is inconsistent with s. 92, as is shown by the example of the warrant under the *Service and Execution of Process Act*. *Hoke* v. *United States* (1) upheld the *White Slave Traffic Act* 1910 forbidding the inter-State transportation of women for immoral purposes. If this is within s. 51 (i.), it will not be struck at by s. 92. A law simply forbidding the sale or transport of margarine in inter-State trade in support of the dairying industry is a very different thing. A law regulating, by reference to inter-State trade, the manner in which margarine was prepared, coloured, or put up could, however, be supported, because it would deal with harmful trade practices. There is no reason why the Commonwealth Parliament should not pass laws dealing in all the ways suggested by the United States cases with inter-State commerce. Commonwealth or State could stop smallpox patients from travelling. Obscene literature could stop smallpox patients from travelling. Obscene literature could be excluded by State or Commonwealth from inter-State commerce. To come within the power over trade and commerce among the States, Commonwealth statutes must be laws with respect to commerce, but when you turn to s. 92 they must, to be inconsistent with it, be obstructive of the flow of goods across the border, and that is altogether another question. As to a law prohibiting the sale or transport inter-State of goods produced by child labour, *Hammer* v. *Dagenhart* (2) shows that it is a borderline case, but the reasons of *Holmes* J. treat the law as directed against the use of the facilities of inter-State trade for the disposal of goods made under disgraceful and reprehensible conditions. On this footing there would be no infringement of s. 92. It would come within *Hartley* v. *Walsh* (3). However, banking consists of contracts and debts and not of tangible things, and s. 46 deals with the business entirely apart from State boundaries, let alone the passing over them. It terminates the business of the private banks simply because it is banking conducted for private profit. Banking is not trade or commerce. It cannot possibly fit into a category described by the words " trade, commerce and

(1) (1913) 227 U.S. 308 [57 Law. Ed. 523].

(2) (1918) 247 U.S. 251 [62 Law. Ed. 1101].

(3) (1937) 57 C.L.R. 372.

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intercourse among the States whether by means of internal carriage or ocean navigation." Write in the word "banking," and how absurd it is! The affidavits show how small is the inter-State element in the business. The *Banking Act* 1947 cannot possibly be regarded as directed against this comparatively unimportant aspect of banking. Consequence, result, operation of the law, are not tests. Under the *Banking Act* 1945 only corporations may conduct the business of banking, and then it must be licensed. Is that contrary to s. 92 ? It is not directed partially or wholly against inter-State transactions. It has nothing to do with borders. Cannot States deal with moneylending, auctioneering, &c. ? The fact that a business is stopped is a completely neutral circumstance. The control of the distribution of milk in the Sydney metropolitan area, the suppression of coupons in South Australia, the compulsory pooling of apples and pears must all have stopped or prejudiced businesses. The plaintiffs, however, build up an argument by saying banking is business, that is part of trade, we conduct that part of trade, some of it is inter-State, this measure stops us continuing it, and therefore there is an impairment of freedom of trade between the States. Suppose the Commonwealth specifically prohibited payments by cheque, as it might under the power with respect to bills of exchange. The result on inter-State banking would be much the same ; yet no-one would say there was an infringement of s. 92. Sections 8 and 10 of the *Banking Act* 1945 deal with pastoral houses and other businesses which incidentally perform some of the functions of a bank. Most of them do not have a cheque system. The kind of business they conduct is illustrated by *Shields* v. *Bank of Ireland* (1). From all this it appears that you can have banking without cheques, and yet it is on the interference with the use by private banks of the cheque system that the invocation of s. 92 substantially depends. A law abolishing the cheque system could not possibly be regarded as directed against inter-State trade. Its purpose would obviously be to control the use of credit instead of currency, to eliminate what the legislature considered a form of "money" that ought not to be in private hands. The legislature would be in the realm of money, not of inter-State movement of goods or commerce over the border. The argument has been directed particularly to s. 46 of the 1947 Act because it is where the plaintiffs' case can be put at its best. If they fail there, as it is submitted they must, it is impossible for them to succeed on the provisions for acquisition whether of shares or assets. The provisions of the *Banking Act*

(1) (1901) 1 Ir. R. 222.

1945 governing the special deposits form another example of something which reacts on the creation, use and transmission of credit but clearly is outside s. 92. People engaged in inter-State trade have no constitutional franchise for the preservation permanently of their businesses, and bankers are not engaged in inter-State trade, in the thing itself. Section 46 is not a law impairing freedom in respect of "goods passing into or out of the State," and it is not a law concerned in any way with "freedom as at the frontier." It is not directed against inter-State trade in anything, tangible or intangible, "or against any form of inter-State communication" (1). It does not impose any special burden because a thing comes from another State (1), and it does not touch freedom from restriction or burden or impost because of or in respect of actual or prospective passing from State to State (2). Dealing now with the *Airways Case* (3), it is submitted that the legislation there in question was held invalid on the basis of the reasoning already referred to. The Commonwealth argued the matter upon the footing that according to that test the legislation was valid, but the Court held otherwise on the question of fact. The *Transport cases* were not and could not be overruled, but the Court held that in applying them the legislation did hit at inter-State trade. The *Airways Case* (3) is not a decision that, if in a trade there is a number of operators engaged in inter-State movement and commerce, they are all entitled to continue indefinitely without interference ; but the plaintiffs employ the case as if that were the decision. The inference that inter-State trade is attacked cannot be made from the mere fact that a monopoly is set up by legislation. That was the position the Commonwealth took in the *Airways Case* (3) and still takes. That decision, however, depends upon the peculiar circumstances, that is to say, the special provisions of the legislation considered with regard to the subject matter. To say that a monopoly imports an exclusion from inter-State trade that is contrary to s. 92, is irreconcilable with the *Milk Case* (4) and with *Andrews* v. *Howell* (5). Why can the Post Office be maintained as a monopoly ? Not because of historical associations, not because of particular references in the Constitution, but because to create a monopoly independently of State boundaries is not to make a law directed at passage of the frontier. The same might be said of the parcel post if that were monopolized, though it would be necessary to consider whether what was monopolized did not go beyond postal or other like service.

(1) (1936) A.C., at p. 631 ; 55 C.L.R., at p. 59.
(2) (1936) 55 C.L.R., at p. 49.
(3) (1945) 71 C.L.R. 29.
(4) (1939) 62 C.L.R. 116.
(5) (1941) 65 C.L.R. 255.

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But, so far as s. 92 is concerned, Lord *Wright* considered the postal monopoly valid because it was simply a canalization or exclusive service providing an instrument for communication. Stevedoring could be made an exclusive function without infringing s. 92. The circumstance that a monopoly is a Government monopoly has no materiality. *Isaacs* J., in speaking of freedom from governmental restriction was only dealing with the difference between legislative and executive interferences. It is of no importance that it is a government agency through which the trade must go. However, whatever may be said about such a case as the *Airlines Case* (1), banking, though it may serve some of the purposes of trading, and of inter-State trading, is not the thing itself. That cannot be said of it, as apparently was said of commercial air transportation. Ship-building serves trade purposes, but it is not commerce or trade. You cannot speak of "banking among the States." Banking is finance. Banking is not itself either trade, commerce or intercourse. In any case, s. 92 does not relate to the so-called passage of intangibles across State borders. Even if this were otherwise, no part of the *Banking Act* 1947 is directed against such passage. Laws dealing with aids to, or instruments of, trade and commerce are not invalidated by s. 92 unless they are shown to be directed against trade, commerce or intercourse amongst the States. Banking is a business and legally cannot be described as a trade. See *Harris* v. *Amery* (2), in which a numerous partnership carrying on farming was held unlawful under the *Companies Act* 1862; *Willes* J. said: "It is unnecessary to refer to the authorities to shew that 'business' has a more extensive signification than 'trade'. . . . It was never doubted that farming was a 'business,' though not a 'trade.' Banking is not strictly a trade." In *In re a Debtor* (3), *Scrutton* L.J. says that the word "trade" is often confined to buying and selling commodities. "Business" is a much wider term than trade. The word "business" at least covers a continuous occupation involving liabilities to others. See, further, *Smith* v. *Anderson* (4), per *Jessel* M.R. (reversed (5)). Before Federation the expression was "intercolonial free trade." The trade is the movement between the States, not the goods moved, not the transactions leading to their movement. *H. C. Gutteridge* in an article entitled "*An International Code of the Law of Sale*" (*British Year Book of International Law* (1933), p. 75, at p. 77), says: "Buying and selling are the essential elements of international

(1) (1945) 71 C.L.R. 29.
(2) (1865) 13 L.T. (N.S.) 504; L.R. 1 C.P. 148, at p. 154.
(3) (1927) 1 Ch. 97, at p. 105.
(4) (1880) 15 Ch. D. 247, at p. 258.
(5) (1880) 15 Ch. D., at p. 273.

commerce. Carriage, insurance, and finance are after all only ancillary to the main purpose of the interchange of goods." It is not the thing itself. Of course, special burdens might conceivably be placed on trade as at the frontier by laws relating to banking. But it is the same whatever be the head of power; for there is hardly any subject matter in s. 51 which could not be made the point of reference for an attack on inter-State trade. So far from banking being trade and commerce, the banker is concerned only with providing the means of paying debts and not with the transactions out of which they arise. An attempt on the part of one State to take over all the credits residents in that State had or obtained in other States and to assume control of all credits and balances due to the people of the State from other States would, it is conceded, be invalid under s. 92; but that is because it would have as a purpose the cutting off of trade with other States. But the banker is indifferent to inter-State trade. His system furnishes the effective medium of exchange for the whole community in any aspect of its life (*Keynes, Treatise on Money*, vol. 1., pp. 23, 26, 27, 31, 34-36, 40, 41). He is no more a trader than the government providing legal tender. The note issue affects trade and commerce very much, but it has nothing to do with movement over State boundaries. All this shows that banking is an adjunct to production, industry, trade and the pursuits generally of a community. It is not trade or commerce. It is not correct to say that the system transmits money or credit. All that happens is that an agreement is made in one place and perhaps a deposit there made pursuant to which the bank pays money in another or gives or creates credit there. A communication may pass from one place to another: a bill of exchange, perhaps, or a cheque; but that is all that passes from one State to another. The corresponding crediting and debiting in the so-called remission of funds is completely outside the realm of trade, commerce and intercourse between the States. Take the process dealt with in *Trinidad Lake Asphalt Operating Co. Ltd.* v. *Commissioners of Income Tax for Trinidad and Tobago* (1). Nothing took place except on the island. A mutual set-off took place the benefit of which accrued to a person who happened to be in New Jersey. Was that trade or commerce or intercourse between Trinidad and New Jersey? Nothing moved. To send a cheque or a bill of exchange would not be trade or commerce between the two countries. The stamp duty on bills of exchange and cheques is not an impost on trade or commerce. To say that an arrangement to make money or credit available at a distance is within s. 92 goes far

(1) (1945) A.C. 1.

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beyond anything hitherto suggested. The judgment of *Stone* C.J. in *United States* v. *South-Eastern Underwriters Association* (1) and the article by *Powell*, 57 *Harvard Law Review*, at p. 944, put the relation to inter-State commerce of insurance on the right basis. *International Text-book Co.* v. *Pigg* (2) could hardly be further removed from s. 92. Such forms of education are clearly within State control, and to regulate them involves no attack on inter-State commerce or intercourse. *Fisher's Blend Station Inc.* v. *Washington Tax Commissioner* (3) could not be decided in favour of immunity under s. 92. Coming to *United States* v. *South-Eastern Underwriters Association* (4): *Black* J. brings insurance under the commerce power on grounds unsustainable here. *Stone* C.J. is clearly right in his exposition. What he said applies *a fortiori* to banking, viz., (1) the business of insurance is not itself commerce; (2) the use of facilities to conduct insurance crossing State lines does not make it inter-State; (3) using these facilities with great frequency does not make it inter-State commerce. There is no movement and nothing to move, tangible or intangible. The communication or cheque may move, but to forgo money or credit in one place in order to obtain or provide them in another involves no movement. To urge, as the plaintiffs do, that the banks are instruments or means by which those engaged in commerce carry out their transactions is nothing to the point. A uniform law dealing with the implements or instruments of commerce does not hit at inter-State trade and is shown by all the reasoning of Lord *Wright* to be competent. Those to operate such instruments may be selected by law. As to the position of banking as an aid or auxiliary of commerce, see vol. 171 of publications of American Academy of Political Science (1934): *James, Banking and Transportation Problems*, p. 33. Finance and trade form a separate heading in the Constitution. In s. 51 (xx.) the distinction between the two types of corporation is significant. Finance and trade are separate and distinct conceptions, as the Constitution recognizes, and "banking" is certainly finance: compare, too, *Morgan* v. *The Commonwealth* (5). That banking is not considered commerce in the United States is shown by *Nathan* v. *Louisiana* (6), where *McLean* J., for the Court, said: "A bill of exchange is neither an export nor an import. It is not transmitted through the ordinary channels of commerce, but through the mail."

(1) (1944) 322 U.S. 533, at p. 567 [88 Law. Ed. 1440, at p. 1465].
(2) (1910) 217 U.S. 91 [54 Law. Ed. 678].
(3) (1936) 297 U.S. 650 [80 Law. Ed. 956].
(4) (1944) 322 U.S. 533 [88 Law. Ed. 1440].
(5) (1947) 74 C.L.R., at p. 454.
(6) (1850) 49 U.S. 73 [12 Law. Ed. 992].

[STARKE J. That decision is questioned: *Prentice and Egan, Commerce Clause of the Constitution*, p. 48; *Willoughby*, vol. 2, p. 741.]

It has not been departed from. Bills of exchange may be instruments of commerce in the same sense as a ship or a bridge, but they are not commerce. Banking consists only in a series of contracts for the lending, borrowing and payment of money. It is not different constitutionally from the lending of money by other institutions and persons. See *Republic Acceptance Corporation* v. *Bennett* (1), where it is said: "Money is not an article of commerce, merely a medium of exchange": see, further, the judgment of *Holmes* J. in *Engel* v. *O'Malley* (2). The decision of the majority in *United States* v. *South-Eastern Underwriters Association* (3) is wrong. It has been vigorously attacked by *Powell* in the *Harvard Law Review*, vol. 57 (1944), p. 937, "Insurance as Commerce in Constitution and State": see particularly pp. 942, 944, 945, 947, 949, 956, 982, 993, 997; see, also *Polish National Alliance* v. *National Labor Relations Board* (4), decided on the same day as the last-mentioned case. Actually the purpose and result of the *Banking Act* 1947 is and will be to further the use of banking. It is not a law intended to lessen, reduce or impair banking facilities in any way; its intent is merely to place them under the administration of the Commonwealth Bank. This is confirmed by s. 11. That provision is material to the plaintiffs' contention that the Act is to reduce banking facilities, a contention which it answers. How could a unification of port facilities be said to interfere with commerce? The fact that the concentration is in a governmental institution is of no relevance. In the *Wheat Case* (5) Mr. Commissioner *Piddington* (*Commonwealth Parliamentary Papers*, No. 69 of 1914-1915, at p. 29) referred to the possibility under the defence power of taking over factories and of making the production of some commodities an exclusive function of government and said that it would not be affected by s. 92. In any case the inter-State aspects of banking are trifling. In the case of the Ballarat Banking Co. Ltd. and the Brisbane Permanent Building and Banking Co. there are none. Their case is enough to show that the Act is not concerned with or directed at inter-State commerce; they are affected precisely in the same way as other private banks although they have no inter-State transactions. The Act deals with banking

(1) (1922) 20 Michigan S.R. 2109.
(2) (1911) 219 U.S. 128 [55 Law. Ed. 128].
(3) (1944) 322 U.S. 533 [88 Law. Ed. 1440].
(4) (1944) 322 U.S. 643 [88 Law. Ed. 1509].
(5) (1915) 20 C.L.R. 54.

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as a system for the creation and management of the main medium of exchange in the country. It is chiefly directed at the question whether such a function should be carried on for private profit. Any consequential effect on commerce or inter-State commerce is incidental and remote. The Act merely replaces one set of operators of the system by another. It is not directed against inter-State trade in tangible goods or intangible things, or against any form of inter-State communication. The argument of the plaintiffs that s. 46 (2) infringes s. 92 shows that really they go back to the proposition that "free" means free from all law, all commands or control. The provisions for the compulsory acquisition of shares are entirely remote from s. 92. The continuance of the business is not affected by a transfer of the ownership of the shares. Division 3 of Part IV. has nothing whatever to do with s. 92. It effects only a change of management. Division 4 is just a plain acquisition of property without regard to inter-State boundaries or commerce. The transfer of the ownership of any enterprise cannot have any relation to freedom of trade across borders. It is only changing the operator or actor. Even s. 46, severed from the rest of the provisions, would only reduce the number of bodies carrying on the function. It would not suppress it. The plaintiffs' proposition that s. 92 is infringed whenever a person or corporation is engaged in inter-State trade, commerce or intercourse and his or its carrying on of that business is forbidden either by direct prohibition or by acquisition with the object, motive or purpose of effecting such a prohibition cannot be supported. So far from being made out by the cases, it is inconsistent with all of them. Even according to the test employed by *Dixon* J. in *R.* v. *Martin*; *Ex parte Wawn* (1), s. 46 does not infringe s. 92; for it takes no commercial or trading criterion for its application and none relating to inter-State dealings and it is uniform and directed at another purpose. Even if s. 46 did infringe s. 92, the only consequence would be that the inter-State business of banking would be withdrawn from its operation and the intra-State business would remain within its prohibition. That is the effect of s. 92, which merely gives immunity to inter-State commerce, &c. Further, s. 6 of the *Banking Act* 1947 plainly expresses the intention of Parliament, and on this subject that is all the Court is concerned with. It would be absurd, because a small portion of the business to which s. 24 refers is withdrawn from its operation, to deny any operation to the section at all. It is exactly as if the legislature had said "except in so far as such business consists of transactions

(1) (1939) 62 C.L.R. 457.

extending beyond the limits of a State." Without a provision like s. 6 (*c*) this course was taken in *Roughley's Case* (1) and *Andrews* v. *Howell* (2). In *Vacuum Oil Co. Pty. Ltd.* v. *Queensland* [*No.* 2] (3) there was no severability provision and there was an inseparability in important provisions, those relating to the calculation. Section 24 is different because assets cannot be differentiated by some inter-State characteristic. So with s. 13. But s. 92 can have no application whatever to s. 24 or s. 13. As to the effect of s. 75 of the Constitution on Division 2 of Part VI., the private bank would have a choice of jurisdictions, if that argument of the plaintiffs succeeded. The choice would be exercisable by the private bank issuing a writ instead of making a claim under s. 43 (3) and (4). It is at that point that the notional severance takes place. The claimant could set in motion, by lodging his claim, the provisions which take him to the Court of Claims or, if he so chose, treat himself as under no compulsion to do so and issue his writ to enforce his claim in the High Court. His writ would not amount to making a claim within the meaning and operation of s. 43 (3) so as to set the machinery of s. 44 in motion. Divisions 2, 3 and 4 of Part IV. are all severable one from another. Part VII., i.e., s. 46, can be severed from the rest of the Act, which can operate without it, and the rest of the Act can be severed from it, and it can operate alone. It is true that a different effect or operation would be produced if this latter step were taken. The private banks would or might be closed instead of their businesses continuing in the hands of the Commonwealth Bank. But s. 6 (*c*) expressly says that such differences of operation are immaterial and intended. The Act is framed so that the various provisions can operate independently and be severable. As to s. 19 (*b*), if a requirement of good faith is a condition of its valid operation under s. 51 (xxxi.), that requirement must be imported into s. 19 (*b*) as a matter of interpretation in order to give effect to s. 6. It is a limitation upon or contraction of the discretion conferred by s. 19 (*b*) *ex hypothesi* necessitated by the ambit or nature of the legislative power. But, in any case, s. 19 (*b*) is severable, and, if it be bad, that simply means its elimination. That is true also of s. 19 (*c*). There is no constitutional reason why the legislature should not put forward in an enactment alternative propositions. To call such alternatives inconsistent is only to express a feeling of incongruity in the legislature's announcing a primary intention and, failing that, falling back on a more restricted

(1) (1928) 42 C.L.R., at pp. 206-208.
(2) (1941) 65 C.L.R. 255, at p. 281.
(3) (1935) 51 C.L.R. 677.

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or different secondary intention. [He referred to *R.* v. *Nat Bell Liquors Ltd.* (1); the note in the Lawyers' Edition of the *United States Reports*, vol. 85, at pp. 506 et seq.; note in *American Law Reports*, vol. 87, p. 42, "Blue Sky Laws"; *Hall* v. *Geiger-Jones Co.* (2).]

Hannan K.C., in reply. Clause 5 (9) of the Financial Agreement does confer upon the States a positive right to borrow money on overdraft for temporary purposes, and it imposes a legal duty upon the Commonwealth to do nothing to hinder them. Before the Financial Agreement the States had, under the implications of the Constitution, a financial independence of the Commonwealth and a right of a like nature. The purpose of clause 5 (9) was to define the right of the States in this respect. The subject of the Agreement is mutual financial relations of States and Commonwealth, and clause 5 (9) gave a constitutional right to the States to pursue their long-standing practice of borrowing from the private banks. The judgments of *Latham* C.J. and *Williams* J. in *Melbourne Corporation* v. *The Commonwealth* (3) are based upon the view that clause 5 (9) gave the States a constitutional right to borrow on overdraft and to exercise a free choice among the banks of an independent banking system, independent of the Commonwealth. It is necessarily implied in the clause that the Commonwealth will not hinder or obstruct the States in borrowing upon overdraft (and *e contra* upon clause 6 (7)) by any legislative or executive action. A breach of this implication involves invalidity. That is the effect of s. 105A of the Constitution. It is not like *Perpetual Trustees Co. (Ltd.)* v. *Federal Commissioner of Taxation* (4). There is no distinction in favour of the Commonwealth between s. 48 of the *Banking Act* 1945 and s. 46 of the *Banking Act* 1947. The one said: "You shall not have the Governments of the States as customers without the Treasurer's consent," and the other said: "You shall have no customers" (without his leave). The claim is not that the States have a right to the continuance of all existing banking facilities. The claim is that the Commonwealth has disabled itself from taking active steps to withdraw them. There are mutual guarantees that the right to borrow by overdraft shall be preserved, and the Commonwealth cannot derogate from this grant. If the Governments, parties to the Financial Agreement, had been asked at the time, they would have answered: "Of course, we cannot

(1) (1922) 2 A.C. 128, at pp. 137, 138.
(2) (1917) 242 U.S. 539 [61 Law. Ed. 480].
(3) (1947) 74 C.L.R. 31, at pp. 62, 63, 101.
(4) (1932) 47 C.L.R. 402, at p. 409.

under this do anything to destroy the private banks," and that is the test of implication. It is an agreement. The States were surrendering their uncontrolled right to borrow on public loans and obtained on the other side a constitutional protection of their liberty to borrow from the banks for temporary purposes. The test of implication is discussed by *Richards* J. in *Newland* v. *Cooper* (1). In both the 1945 and the 1947 provision, the "say so" is with the Federal Treasurer. He can give a notice under s. 48 of the 1945 Act cutting off the banks from State business. He can give a notice under s. 46 of the 1947 Act cutting off the banks from all business. In principle there is no difference. The Commonwealth is disabled from passing legislation inconsistent with the right conferred to borrow on overdraft for temporary purposes, and both provisions are inconsistent with it on like grounds. It is a mockery to tell the States that they can go to the Commonwealth Bank, the bank of the other Government, for the fulfilment of the right conferred, and subject to Ministerial control (*Commonwealth Bank Act* 1945, ss. 8, 9). Section 27 (1) of the *Banking Act* 1945 cannot apply to the States consistently with clause 5 (9) of the Financial Agreement. Next, as to s. 51 (xxxi.) of the Constitution: If the only means of paying compensation is by such a large increase in the quantity of money as to depreciate its value, just terms are not provided for the acquisition in the absence of some provision securing to the owner a full value in the depreciated currency. A large expansion of money necessarily defeats the purpose for which payment is made, that is, in the present instance, affording just terms for the acquisition of the property. The Act contains no provision by which, without inflation, compensation could be made good. It does not restrict the note issue or the expansion of credit. The fact that the payment is made in legal tender has no bearing on the question whether it affords just terms. A great length of time must elapse before the assessment of compensation is completed and payment falls to be made. The assessment will be made as at the date of acquisition. Unless the Court of Claims is directed to assess on the basis that payment will be in inflated currency, how can an assessment on the basis of the unalterability of money be just? The interest of the States consists in the necessity imposed by the Financial Agreement of approval by the Loan Council of borrowings, if the Commonwealth sought that way out, and in the stake the States have in maintaining the currency. The suggestion that some might take bonds cannot be taken

(1) (1940) S.A.S.R. 40, at p. 45.

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into account. Compensation is payable in legal tender, apart from other considerations.

Hudson K.C., in reply. The proposition that to make a law a valid exercise of Commonwealth legislative power it is enough that it touches one of the subjects enumerated in s. 51 is, in the state of authority, quite untenable and is contrary to principle. It must be tested by its real and substantial nature, and that is as much so under the Australian Constitution as under that of Canada, of India or of Northern Ireland. Essentially the problem is the same, of determining whether an enactment really belongs to a category. Fundamentally the problem under all the constitutions is whether a law falls within a defined power assigned to one Government or outside it so as to fall under the powers of the other Government. In the Privy Council and in this Court and elsewhere in British jurisdictions the test was settled, and American decisions based on other considerations are not in point. That is shown by *R.* v. *Barger* (1); *Ex parte Walsh and Johnson*; *Re Yates* (2); *Gallagher* v. *Lynn* (3); *Prafulla Kumar Mukherjee* v. *Bank of Commerce Ltd., Khulna* (4). See, further, *W. R. Moran Pty. Ltd.* v. *Deputy Commissioner of Taxation for New South Wales* (5); *Morgan* v. *The Commonwealth* (6). Indeed, in the end the Attorney-General was forced to abandon his test, more particularly as he explained the Court's decision in *Melbourne Corporation* v. *The Commonwealth* (7) on the ground that the Court held the law really and substantially not to be a law in respect of banking. The rule is that in order to ascertain whether an enactment is a law with respect to a given subject you must determine whether, in its pith and substance, and according to its real nature and character, it deals with that subject. There is no foundation for the contention that the ambit of each of the enumerated legislative powers is to be ascertained as if the other enumerated powers did not exist. It offends against the most elementary rule of construction. The most cursory examination of s. 51 will show that it is impossible to maintain such a proposition. For example, if s. 51 (xxi.)—marriage—stood alone, it would doubtless be construed as including dissolution of marriage, but s. 51 (xxii.)—divorce and matrimonial causes—indicates that s. 51 (xxi.) has a more restricted meaning. The presence in s. 51 (xiii.) of an express power with respect to the

(1) (1908) 6 C.L.R. 41, at pp. 65-75, 77.
(2) (1925) 37 C.L.R. 36, at pp. 70, 71.
(3) (1937) A.C. 863, at pp. 869, 870.
(4) (1947) 74 L.R. Ind. App. 23.
(5) (1940) A.C. 838, at p. 858; 63 C.L.R. 338.
(6) (1947) 74 C.L.R. 421, at pp. 454, 459.
(7) (1947) 74 C.L.R. 31.

incorporation of banks and the absence from s. 51 (xiv.) of a parallel power make it difficult to resist the conclusion that there is no power to incorporate insurance companies. A comparison of s. 51 (xxxv.) with s. 51 (xx.) leads to the conclusion that the Parliament could not make a law dealing with the industrial disputes (intra-State) or industrial relations of foreign and financial or trading corporations. If, as is contended for the Commonwealth, s. 51 (xx.) authorizes laws dealing with the external relations of foreign or trading or financial corporations, then it might be said that the Parliament could control all State banking done through a corporation. But s. 51 (xiii.) shows that this could not be so, and that and other paragraphs indicate that s. 51 (xx.) cannot extend to the control by way of regulation and prohibition of the transactions of trade of corporations. Take s. 51 (i.) and (iii.): The latter makes it clear that under the former you could not grant bounties on export that are not uniform. To the argument made in chief that the *Banking Act* 1947 involved an undue interference with the execution of the governmental functions of the States the Attorney-General's answer appears to be that there are no implied limitations upon Commonwealth powers for the protection of the States, the *Engineers' Case* (1) decided that there was no room for any such limitation as contended for, and in any case the *Banking Act* does not contravene that limitation. The plaintiffs submit that it is a fundamental error to ignore the existence of the States and the nature of a Federal system: the very first words of the Constitution emphasize the nature of the compact embodied in the instrument, as does s. 3. The Attorney-General's answer is opposed to the descriptions given by the Privy Council of the federation in *Attorney-General for the Commonwealth* v. *Colonial Sugar Refining Co., Ltd.* (2), *James* v. *The Commonwealth* (3), and *W. R. Moran Pty. Ltd.* v. *Deputy Commissioner of Taxation for New South Wales* (4), and it is in flat contradiction of *Melbourne Corporation* v. *The Commonwealth* (5): see, further, *M'Culloch* v. *Maryland* (6). The suggestion that the reference to State banking in s. 51 (xiii.) is enough to rebut the implication (on the ground *expressum facit tacitum cessare*) is met by *Melbourne Corporation* v. *The Commonwealth* (5), and in any case is misconceived. The exception is in favour of the State as a banker, not as a Government with fiscal and financial responsibilities discharged habitually and necessarily through a banking system. The States are bodies politic of the well-known British

(1) (1920) 28 C.L.R. 129.
(2) (1914) A.C. 237, at pp. 252-254.
(3) (1936) A.C., at pp. 610, 611.
(4) (1940) A.C., at p. 855.
(5) (1947) 74 C.L.R. 31.
(6) (1819) 17 U.S. 316, at pp. 423-424 [4 Law. Ed. 579, at pp. 604, 605].

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pattern, with Parliaments, Executives, Courts and revenue systems. They form independent governments ordinarily performing the major work of government. It is a narrow and pedantic interpretation of the Federal legislative powers to treat them as literally enabling the Commonwealth to destroy the system and make its operation impossible so far as concerned the States. Section 51 begins with the words "subject to this Constitution." The continued existence of the States involves the continued existence of their functions; the question is not of express grant but of necessary implication. The Attorney-General's argument confuses the ascertainment of State legislative power with the description of the nature of the Government and the Federal organization. No-one treats ss. 106, 107 of the Constitution as prior grants. The plaintiffs simply ask that these sections be read as part of the Constitution. From a reading of the whole Constitution an implication necessarily arises that power given by s. 51 to the Parliament to legislate subject to the Constitution does not enable the passing of legislation calculated to destroy or impair the existence of the States or their capacity to function as States whether in respect of their legislative, judicial or executive functions. The important words in the statement in the *Engineers' Case* (1) are "over and (above) beyond the general fundamental considerations applying to all the placita". The Court in effect says that an exercise of the legislative power with respect to any specified subject matter may not bind the State, because of express provisions, or of the nature of the subject matter, or of the manner in which the power is expressed, or because of general fundamental considerations applying to all the enumerated powers. One such fundamental consideration is the possibility of a particular exercise of power resulting in the destruction or impairment of the States. Divisions 2 and 3 of Part IV. of the 1947 Act attempt to place under the control of the Commonwealth Bank or its nominees all banking facilities and thus to control the States in respect of their banking in connection with their finances. Division 4 attempts to substitute the Commonwealth Bank as the only means by which States may bank and to destroy the existing obligations of the banking companies to the States. Section 46 (4) says to the States and their officials that the States shall not transact any banking business with private banks to whom the Treasurer has given notice. The direct operation of the provisions of the Act is to deny to the States the right to go to the various private banks which they are using and say: "Honour this cheque, establish that credit, transmit such a sum." The bank would answer:

(1) (1920) 28 C.L.R., at p. 143.

"We no longer hold your money. You must go to the Commonwealth Bank, which has assumed control of the funds." There is no difference, as *Melbourne Corporation* v. *The Commonwealth* (1) shows, between a law addressed to the States forbidding them from banking with private banks and a law addressed to the private banks forbidding the private banks to do banking for the States. Besides, s. 5 of the *Crimes Act* operates to include the States or their officers within the immediate prohibition of the law. Notwithstanding some of the statements contained in the *Engineers' Case* (2), the judgment in fact recognized the necessity of an implied limitation upon the use of Commonwealth power against the States: Witness the references to the prerogative, taxation and its peculiar character, discriminatory enactments, "the general fundamental considerations applying to all the placita" and "taking into account the special nature of the power." Such a case as the present was right outside the contemplation of those deciding the *Engineers' Case* (2), which in its nature and its circumstances differs *toto coelo* from this. To require the State to pay award wages to those it employs in industry is remote from a law operating upon or affecting the functions of the State essential to its existence. The use of taxation as an illustration demonstrates that the judgment does not exclude implication as necessarily limiting the operation of Federal legislative powers. It is not right to say that discrimination matters only in State laws. The Canadian cases contemplate the invalidity of discriminatory laws, but they contain nothing to exclude the doctrine for which the plaintiffs contend. Section 109 of the Constitution does not meet the necessities of the Federal compact or form of government. It is quite inadequate to protect the Commonwealth, e.g., if New South Wales forbade ingress into or egress from the Australian Capital Territory. The Constitution contains nothing by which the logical necessity of protecting the States from attempts on the part of the Commonwealth to control the States in the performance of their functions is displaced. It is true that the *Banking Act* 1947 is not addressed to the States and is not limited to banking for the States, but it is as true of that Act as it was of s. 48 of the *Banking Act* 1945 that the States are compelled to do their banking business with the Commonwealth Bank upon terms acceptable to the Commonwealth Bank or else do no banking at all, where, as in Victoria, there is no State Bank or where a State Bank is inadequate: cf. *Melbourne Corporation* v. *The Commonwealth* (3), per *Latham* C.J. As in that case, the present statute, by s. 46

(1) (1947) 74 C.L.R. 31.
(2) (1920) 28 C.L.R. 129.
(3) (1947) 74 C.L.R. 31, at pp. 44, 45, 63.

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and Divisions 2 and 3 of Part IV., takes hold of the States in relation to the banks and compels them to change to the Commonwealth Bank, but it goes further and destroys the existing relationship, liabilities and obligations and substitutes others. It is no answer to say that nationalization of banking must, according to the plaintiffs, be inconsistent with State rights; if the effect is to constrain the States to submit their funds to a Commonwealth agency, it is not within power. To the suggestion that the plaintiffs' argument negatives the possibility of the Commonwealth closing any bank, if a State uses it, and negatives the successive closing of banks, the answer is that it depends upon the actual interference with State functions designed or effected. The Commonwealth cannot compel the States to entrust their funds to a Commonwealth agency, whether as a bank or otherwise, and it cannot discharge a bank of its liabilities to the States or novate them to the Commonwealth. Indirect methods of achieving these results are equally outside power and will be reached by judicial process. The following passages support the restriction or limitation upon legislative power: *Federated Municipal and Shire Council Employees' Union of Australia* v. *Melbourne Corporation* (1); *Pirrie* v. *McFarlane* (2); *Federated State School Teachers' Association of Australia* v. *Victoria* (3); *Australian Railways Union* v. *Victorian Railways Commissioners* (4); *West's Case* (5); *Victoria* v. *The Commonwealth* (6); *Pidoto* v. *Victoria* (7). Neither the *Steel Rails Case* (*Attorney-General for New South Wales* v. *Collector of Customs for New South Wales*) (8), nor the *Wire Netting Case* (*R.* v. *Sutton*) (9) has any relation to this case except that the laws involved happened to be uniform and affected everybody. They depended upon the very special nature of the power invoked. Compare *University of Illinois* v. *United States* (10). *The Commonwealth* v. *Queensland* (11) has nothing to do with the question; it depended on s. 109, and no question of legislative interference by the Commonwealth with the functions of the States was raised: see as to this case, *West* v. *Commissioner of Taxation* (*N.S.W.*) (12). The plaintiffs' contention need not, and does not, go further than a claim that the States can carry on their executive government, their legislative

(1) (1919) 26 C.L.R. 508, at p. 533.
(2) (1925) 36 C.L.R. 170, at pp. 191, 192, 214, 221.
(3) (1929) 41 C.L.R. 569, at pp. 584, 585.
(4) (1930) 44 C.L.R. 319, at pp. 388, 390, 391.
(5) (1937) 56 C.L.R. 657, at pp. 668, 679-681, 687-690, 694, 698, 699.
(6) (1942) 66 C.L.R. 488, at pp. 507, 515, 529-533.
(7) (1943) 68 C.L.R. 87, at p. 116.
(8) (1908) 5 C.L.R. 818.
(9) (1908) 5 C.L.R. 789.
(10) (1933) 289 U.S. 48, at p. 59 [77 Law. Ed. 1025, at p. 1029].
(11) (1920) 29 C.L.R. 1.
(12) (1937) 56 C.L.R., at p. 686.

functions and the administration of justice—essentials of the very existence of States—without Commonwealth interference. When interference reaches a point in character or effect at which the independent exercise of the functions of the State is threatened, then the necessity arises of drawing the boundary of Commonwealth power. For that purpose the test of relation to the subject of the power is not adequate. The contention of the Attorney-General that there is no undue interference by the *Banking Act* 1947 with the exercise by the States of their functions is based, not on the actual considerations arising from the intended operation of the Act, but on the question whether something less than a monopoly in the Commonwealth Bank would suffice to cause the doctrine to apply. Actually it will compel the States to submit their finances to the control exercisable by the Commonwealth Bank as affected by any exercise of the Treasurer's authority. The whole administration of the government of the States is involved; payment of the public service, of judges, magistrates, members of Parliament, the convening of Parliament and, in fact, every function involving any expenditure. In *Melbourne Corporation* v. *The Commonwealth* (1) the Court took judicial notice of all this and treated it as obvious: in this case it has detailed proof. To say that, instead of the private banks, the States have the Commonwealth Bank is no answer. It is only saying that, instead of the services which they obtain as a matter of free contract, they have the control of an agency of another government. Section 11 of the Act has no bearing on the question. It is inapplicable, unenforceable and, in any case, illusory. As to the ill-considered statement that mandamus would be available, see *Short*, pp. 227, 231. It is absurd to suggest that indictment or injunction would enforce the provision. The argument that s. 6 requires the enactment to be "severed" so as to except the States if otherwise there would be an unconstitutional interference with their functions has no basis in reason. How could, for example, s. 24 or s. 46 be worked on such a basis? In any case, how could the private banks carry on with only the States as customers? It is submitted that the whole question is governed by *Melbourne Corporation* v. *The Commonwealth* (1), because it establishes (*a*) that the management and disposition of public moneys are administrative necessities essential to the existence of the States (2); (*b*) that Commonwealth legislation denying to the States the right to bank elsewhere than at the Commonwealth Bank is beyond power; (*c*) that s. 48 of the *Banking Act* 1945 was

(1) (1947) 74 C.L.R. 31.

(2) (1947) 74 C.L.R., at pp. 52, 53, 67, 75, 84, 93, 98.

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a law with respect to banking; (*d*) that there was an implication drawn from the nature of the Federal system set up by the Constitution disabling the Commonwealth from enacting s. 48. The invalidity of the present law results simply from a logical application of the decision; the constitutional limitation there established must be applied to an Act such as that now in question, otherwise it is illusory. The decision of *Rich* and *Starke* JJ. is expressed in terms completely covering this case. As to clause 5 (9) of the Financial Agreement: It is not a tenable distinction between s. 48 of the *Banking Act* 1945 and the present legislation to say that the former adds to the conditions describing the States' right to borrow from a bank the further condition that it must be with the leave of the Treasurer, while the latter forbids all transactions with private banks and abolishes them. The foundation of the decision that s. 48 could not so enact consistently with clause 5 (9) was that the clause conferred a right to borrow for temporary purposes from a private bank willing to advance the money. "To borrow money in this way (subject only to the conditions specified in the Agreement) is a right conferred upon a State by the Financial Agreement and no law, federal or State, can limit or restrict it" (1). That being established, it makes no difference whether the impairment or denial of the right takes the form of a prohibition upon a bank doing business for a State without the consent of the Commonwealth Treasurer or a prohibition upon a bank doing business at all or a total destruction of the private banks. The last mentioned is indeed a more complete invasion of the right secured by the Financial Agreement. Moreover, having regard to the failure of the statute to indicate the source of the compensation and the consequent inflationary measures that must be resorted to, there is no provision for "just terms." It is submitted that, prima facie, the compensation when assessed must be paid in legal tender; there is no other source from which the money can be found except expansion of the note issue under the powers of the Commonwealth Bank, and such an expansion necessarily depreciates the value of the payment made. It is not a question of the use of legal tender to discharge a debt expressed in money. Once a debt arises expressed in money, of course, legal tender of the amount and denomination expressed must be treated by a court as a medium of discharge or payment. For that purpose the "value" of the "money" is not examined. But this is a question of just terms: that is, whether to assess the value of assets according to one measure and pay it according to another is just. To find the money by increasing the note issue depreciates the

(1) (1947) 74 C.L.R., at p. 63.

currency as a measure in relation to the assets. Much time must elapse, with ever increasing disparity caused by the expansion made to meet the claim. On one view £840m. will be the expansion, and on the lowest estimate £100m. must be found. It is not difficult to see the drop in the purchasing power which must at once result. It is no answer to s. 51 (xxxi.), which requires that the law shall provide just terms, to say that the law abides by the nominal amount of units of money for the discharge of a debt in units of money. The question is one, not of discharging a debt, but of providing just terms of acquisition. Provision could have been made for payment without inflation or, if inflation must be resorted to, for adjustment to avoid its unjust consequences.

Kitto K.C., in reply. As to the validity of s. 24 : The Attorney-General supports the section by placing the acquisition of assets upon s. 51 (xxxi.) and treating the assumption of liabilities as consequential. That ignores the real nature of the provision, which appears from s. 24 (2), from s. 3 (*a*) and (*b*) and from the heading of Part IV. and that of Division 4. It extends to much more than the banking business of a private bank, but its chief concern doubtless is the banking business. In handing over a banking business, the principal thing to make over is the customers' accounts : that is the centre of the business, and it is by them that the expansion of the business of the Commonwealth Bank will be accomplished. A great part of them, the most important, will be in credit, not overdrawn. So it is quite a mistake to regard liabilities as a secondary or consequential concern in s. 24. The novation of liabilities cannot be supported under any head of power, and—as the section is a carefully articulated plan, unworkable without a taking over of liabilities—the whole section must fall. The novation of non-banking liabilities is beyond the banking power. Even as to banking liabilities, the banking power does not extend to authorize the termination of liabilities and the creation of new liabilities in place of them. Even if a private bank is carrying on no other business than banking, it must have many liabilities that are independent of banking, e.g., for personal injuries caused by an employee's negligence or for wrongful dismissal. This depends on no narrow definition of "banking" in s. 51 (xiii.). It is true, however widely the expression may be defined. For instance, permanent investments, as distinguished from liquid securities forming a second reserve, would not be assets of the business ; but this argument relates at its inception to liabilities, not assets. Section 24 is not limited in its application to the present time and

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it may be put into effect at a date when the companies now carrying on banking have other businesses. It has been carefully drawn so that it may apply to a banking company in the schedule at any future time without limitation, and its validity must be determined on that basis. The facts as they may stand at the moment are quite irrelevant to the question. The memorandum of association of each of the English banks gives wide powers of embarking on other businesses, and in any case there is ample power now under the English *Companies Act* 1947, ss. 76, 77, to alter the memorandum without even the sanction of the Court. A bank may sell its banking business to the Commonwealth Bank under s. 38 of the *Commonwealth Bank Act*, or may discontinue it and take up some other business. Its banking business might be stopped under s. 46 (4) of the *Banking Act* 1947. Its business might be taken over under s. 24 (2). With the compensation it might begin another business. In all these events s. 24 (5) would, if a notice were given under s. 22 (1), have the effect of discharging the company of non-banking liabilities and imposing them on the Commonwealth Bank. There is nothing to prevent a second application of s. 24 or any number of applications. Section 24 is plainly too wide ; it covers all liabilities, however disconnected with banking, and all businesses the company has or may at any time undertake. Suppose the present business of the Bank of Australasia is taken over. Under its memorandum it may start a trustee business. If it did so, it would carry it on always subject to s. 24 and the liability to a notice from the Treasurer under s. 22 (1). An enactment for the acquisition of a " business " cannot be based on s. 51 (xxxi.) : the word " property " is not wide enough ; business includes property, but it also includes much more. Further, there could hardly be any Federal purpose : only a purpose of having the business, and that is not enough for s. 51 (xxxi.). Only " assets " could conceivably fall under s. 51 (xxxi.). For the reasons already given, the novation of liabilities falls outside all power. What is novated is a collection of liabilities having no necessary connection with banking or any other subject of power. The suggestion that to take over a banking business it may be necessary to include non-banking liabilities gives no support for the provision, first, because there is no difficulty in separating banking from non-banking business or liabilities, and, secondly, because s. 24 applies equally well at a time when the company may have no banking business at all. The liabilities in s. 24 (5) cannot be limited to those of the business mentioned in s. 24 (2), but, in any case, that is the business of the company carried on at the time of the notice.

The definition in s. 5 precludes any limitation of the word "liabilities." "Private bank" is a misleading expression. By definition it means the company. Even had the taking over of liabilities been limited to banking liabilities, its validity would be dubious; but, unless it can be stated affirmatively, and with certainty, that nothing can be taken over under s. 24 (5) but banking liabilities (that is to say, nothing but liabilities for which s. 51 (xiii.) affords a sufficient warrant), the foundation of the validity of the provision goes. That cannot be done, according to the plain meaning of the provision. It is not possible by construction, artificial or otherwise, to limit its application to something less than all the liabilities of the company. Section 56 applies to all liabilities of the company arising in connection with written instruments. In any case, s. 24 (5) purports to effect a statutory novation which would convert all the continuing and ever-changing incidents of the relation of banker and customer, if an account is in credit on the day of transfer, into a fixed debt by the Commonwealth Bank of an entirely different order: that is outside power. Beginning with the proposition in s. 24 (2) that the business in Australia should be taken over, the draftsman realized that that was too vague and uncertain an idea to receive effect unless it was worked out by detailed directions. Section 24 (4) and (5) are, therefore, the effective provisions. But they cast the net much too widely for the power. Having provided in one for acquiring all the Australian assets of the company and in the other for imposing all Australian liabilities upon the Commonwealth Bank and discharging the company from them, the draftsman relieves the Court from considering what s. 24 (2) alone could have effected and confronts the Court with a different question of validity. It is impossible to predicate of the liabilities existing now, and still less of those existing at an unknown future time, that their assumption by the Commonwealth Bank and the discharge of them as debts or obligations of the company can in any way be connected with or justified under s. 51 (xiii.). The "incorporation of banks" under that paragraph can have nothing to do with the matter, nor can s. 51 (xx.). The Attorney-General sought to support the taking over of liabilities on three grounds, (1) that it formed part of a provision of just terms; (2) that it was an acquisition of property; (3) that to acquire the assets would create a situation between the private bank and its customers necessitating such a course as the taking over of the correlative or corresponding liabilities. As to the first ground, the requirement that just terms shall be afforded does not confer a power; it imposes a condition or limitation upon the power to acquire assets. It is an odd idea

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that by a particular use of one power you can acquire a further power, otherwise non-existent. The suggestion that the part of sub-ss. (5) and (7) discharging the private banks from their obligations may be severed and the rest of these sub-sections upheld cannot be supported. The discharge is an essential part of the operation of the sub-sections. Without it, the difficulty of deducting liabilities for the purpose of s. 42 becomes an impossibility. You cannot graft an indemnity clause upon sub-s. (5) or sub-s. (7). They depend, not on indemnity, but discharge. Sub-section (7) is enough to show that neither it nor sub-s. (5) has any connection with just terms. Sub-section (7) operates notwithstanding that all the assets have been taken over, compensation has been assessed and has been paid. The Attorney-General conceded that sub-s. (7) applied to future liabilities, but he qualified the concession by saying that the future liabilities must arise out of current transactions. The qualification is just taken out of the air: it has no basis in the context. It is plain that in sub-ss. (5) and (7) liabilities are being dealt with for their own sake, because they are the essence of taking over a business. As to the second ground, to treat the Commonwealth Bank as acquiring the creditor's or customer's interest in the private bank's liability or obligation to him is opposed to the whole conception. The private bank's liability is annihilated and replaced by a similar liability on the part of the Commonwealth Bank. As to the third ground, what creates the situation is the taking of the assets. It is not a banking situation in any other sense than a position of difficulty for creditors. To elevate the acquisition of assets to a place of dominance and reduce the taking over of liabilities to a mere consequence or subsidiary incident of the acquisition of assets is to ignore sub-s. (2), which declares that the business is taken over. To assume the liabilities is just as important a part of carrying out this declaration as to acquire the assets. Further, the argument makes the validity of sub-s. (5) dependent upon the validity of sub-s. (4). Thus, there are three objections to the third ground of the Attorney-General: (1) It is not a banking situation or necessarily one; (2) the ground is inconsistent with the scheme of the section; (3) sub-s. (5) cannot be valid unless sub-s. (4) is valid. Turning to the validity of sub-ss. (4) and (6): The Attorney-General supported them on the ground that the assets are all to be used by the Commonwealth Bank in its business. Section 24 makes it plain enough that the Commonwealth Bank wants to take over the business of the private banks; but what it is to do with the business and the assets when it gets them nowhere appears. To satisfy s. 51 (xxxi.), the legislation

must disclose a valid purpose to which the assets are to be applied or for which they are acquired. Goodwill, for example, is not going to be put to any purpose; it is just going to be destroyed. Take, again, the special deposits. There the debtor acquires the debt. That, of course, extinguishes the debt; and it is inconsistent with the application of the debt to a purpose. Another instance is the Commonwealth notes which at the time of acquisition the private bank may hold. What is to be done with them? Destroyed? Spent, and if so on what? Suppose that there is a banking chamber and offices and a separate building used by a private bank for another distinct business, e.g., a trustee business. The first may be acquired to continue the banking business for a time, however short. But the second cannot be acquired for any such purpose. A universal succession means an attempt to acquire assets, including many that cannot be used for any purpose under s. 51 (xiii.). There is nothing in the Act to show that any asset whatever is to be used for a purpose within that head of power. The suggestion that the purpose of taking over the business of a private bank with its assets and liabilities is to enable the continuance of the business as a going concern without interruption, leaving it to the Commonwealth Bank to decide whether and when it will close it down or absorb it as a separate business, does not suffice to support the validity of s. 24. It means that the real purpose of the acquisition is to close down the business. That it will be carried on for an interval, however long or short, does not give a purpose of carrying on, but only a delay in shutting up the business. Moreover, the suggestion does not account for sub-ss. (6) and (7). The taking over of existing and future assets abroad, when they become Australian, has nothing to do with carrying on an Australian business or overcoming dislocation by continuing the business after a notice under s. 46 (4) or the operation of s. 46 (3). Such assets may have nothing to do with the Australian business notwithstanding that they relate to banking, nor need the liabilities. The defendants' suggestion does not account for the taking over of many assets that are not capable of use in the banking part of the business to be continued and of many liabilities that do not arise out of it. It does not account for the extinguishment of the Commonwealth Bank's liability to the private banks in respect of the special accounts. They will disappear immediately. The basal fact is that the Act is completely silent on the purpose to which the things acquired are to be applied. It is left to speculation. But there are some things the purpose of acquiring which must lie outside power. For the

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rest, there is no purpose indicated and, therefore, nothing to bring the acquisition within power. You cannot imply in s. 24 (4) a limitation to assets connected with the business taken over pursuant to sub-s. (2). Its intention to cover all the Australian assets of the company is manifest. You cannot imply a limitation to the assets which relate to banking transactions ; among other reasons, sub-s. (6) shows that it was not so intended. And you cannot limit s. 24 (6) to assets existing on the day of transfer or to those connected in some way with the Australian business. The definitions in s. 5 of " assets," " liabilities," " Australian assets " and " Australian liabilities " are as specific as they could be. The provisions of sub-ss. (4)-(7) remove the difficulty of ascertaining what assets or liabilities would be covered by the expression " business in Australia " in sub-s. (2). Such a difficulty arose under the *Trading with the Enemy Amendment Act* 1916 (Imp.), which referred to " the business carried on in the United Kingdom by any person firm or company." As a result of a line of cases it was held that assets situated in the United Kingdom arising from transactions in the United Kingdom and liabilities arising out of such transactions were comprehended. Uncalled capital was not included. The cases are : *In re W. Hagelberg Aktien-Gesellschaft* (1) ; *In re Th. Goldschmidt Ltd.* (2) ; *In re Francke and Rasch* (3) ; *Meyer & Co.* v. *Faber* [*No.* 2] (4) ; *Re Banca Commerciale Italiana* (5) ; *Re Banca Commerciale Italiana* (6). The suggestion that s. 24 might be supported on the footing that to provide for the transition which s. 46 necessitated might be incidental to the power (that is, assuming s. 46 to be valid) is inconsistent with the real character of the statute. Section 46 is itself not a principal, or the principal, provision, but is subsidiary. Section 46 (2) keeps the business alive only for the purpose of its being taken over. Section 46 (3) releases the application of s. 46 (2) when the business is taken over. The prohibition in sub-s. (1) of s. 46 is not a principal provision to which you can attach s. 24 as a transitional provision. Sub-section (1) of s. 46 comes into operation only after sub-s. (3) has been fulfilled by the use of s. 24, or sub-s. (4) of s. 46 has been invoked. Section 24 provides for a complete and universal absorption of the business, assets and liabilities of a private bank in Australia and of those assets and liabilities that come to Australia, and it so provides as one coherent and indivisible enactment which cannot be supported

(1) (1916) 2 Ch. 503.
(2) (1917) 2 Ch. 194.
(3) (1918) 1 Ch. 470.
(4) (1923) 2 Ch. 421 (C.A.).
(5) (1943) 1 All E.R. 480 ; 112 L.J. Ch. 214 ; 169 L.T. 258.
(6) (1942) Ch. 406.

upon any of the three grounds taken by the Attorney-General or upon any other ground.

Barwick K.C., in reply. The argument of the Attorney-General consisted of claims for the extension by every means and in every direction of Commonwealth power, by widening rules of construction, denying implication, denying the influence of one grant of power upon the meaning and operation of another, invoking the "foot hold" test of the connection between legislation and the legislative power, denying any substantial criterion for ascertaining the nature of an enactment and extending the notion of purpose in s. 51 (xxxi.). It consisted in a complete refusal to face the operation of the Act, to deal with its actual provisions, and a preference for generalities: in a refusal to recognize that the Act deals with the future as well as the existing state of things. It was characterized by a determined attempt to maintain s. 46 as an independent provision, notwithstanding that as a severed provision it would operate to destroy the banking system, disperse the staffs and cause chaos. A survey of the Act begins with the statement of objects in s. 3. It would be odd to treat the prohibition of private banking mentioned in s. 3 (*c*) as the main object. Putting aside the definitions in Part I., the legislative intent declared by Part II. and the application of the Act with which Part III. is concerned, you begin with Part IV., containing elaborate provisions for two, or perhaps three, principal methods of acquisition. Then you have a new court established by Part V., a thing consequent upon acquisition. Then comes Part VI., dealing with compensation as a result of acquisition. Part VIII. deals with the treatment of the staffs of the private banks upon acquisition. Part IX.—General—contains s. 56, which is dependent on acquisition. Yet the argument for the Commonwealth is that s. 46, constituting Part VII., does not form a provision for carrying out the same scheme, but that there are two distinct schemes, one for acquisition and its consequences, another, lest that should fail, for prohibition of private banking, with no ancillary provisions to deal with the consequences of prohibition. The proposition is that s. 46 is entirely severable. In fact s. 46 (1), (2) and (3) are directed to provide for the interregnum between the enactment of the statute and the date when the Commonwealth acquires the businesses, and this the Attorney-General in fact said, though it is inconsistent with his severance of s. 46 from the acquisition provisions. The reference in sub-s. (3) to another private bank taking over a private bank's business is not against this view, because it is only a provision

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to cover the case of the acquisition of the Queensland National Bank, which was in course of absorption when the Act was framed and had been taken over before it was passed. The words are " has been taken over by another bank," and " has been " means before the passing of the Act. Notice the change to " after " from " if " in the phrase that follows. Section 51 of the *Banking Act* 1945 stops an amalgamation after the passing of the Act; that is, unless the Treasurer should see fit to allow it. The operation of s. 46 (1)-(3) of the 1947 Act is to prevent a bank closing down in anticipation of being taken over, and to prevent it restarting business as a banker once it is taken over, as otherwise it might do pursuant to the authority it still holds. The authority may be withdrawn under s. 8 (9) of the *Banking Act* 1945, when, pursuant to s. 46 (1) and (3) of the 1947 Act, the private bank ceases to carry on business as a banker in Australia. Of course, if s. 24 were upheld, the validity of s. 46 (1), (2) and (3) would be of little importance to the plaintiffs. But sub-s. (1), (2) and (3) are tied to acquisition (so much so that there is no point in placing them in a separate part of the statute), and they could not survive the invalidity of s. 24. The question remains whether sub-ss. (4)-(8) (which are tied together and may be considered as one) have an independent operation as a distinct and severable scheme for prohibiting private banks from continuing banking business. It would be an odd thing to find such a different scheme with such momentous consequences to the community and its business tucked away in these sub-sections. It is important first to consider what in relation to the rest of the Act may be its operation. It will be found to be also an incidental provision. To begin with, sub-ss. (4) and (8) form an exception, so to speak, from sub-s. (2), covered by the words in that sub-section " subject to this section." Suppose notices were given under s. 22 (1) to all the private banks specifying the same date. That would result, through either s. 22 (8) or s. 24 (2) &c., in bringing into operation s. 46 (3), and, so, s. 46 (1). There would then never be any operation for s. 46 (4). Suppose, alternatively, that in relation to the Australian private banks notices are given under s. 13 (1). Division 3 of Part IV. will then come into operation. Without going into the question what may govern the discretion of the new directors to sell to the Commonwealth Bank pursuant to s. 19 (1) (*b*) if left to themselves, it is clear that they can be constrained to sell by a notice under s. 46 (4) to cease carrying on the company's banking business. That means that it can be used as a weapon to bring the new directors under a necessity to sell; that is an incidental use. Again, the last use may be varied by giving contemporaneous

notices under s. 22 (1) and s. 46 (4). If that were done, the existing directors would be faced with the choice between selling and having the business closed up. That also is an incidental use of s. 46 (4). Next, suppose a notice under s. 13 (1), a consequent replacement of directors, and a sale by the new directors in pursuance of s. 19 (1) (*b*). That would not be an agreement under s. 22 (5) attracting the operation of s. 46 (3), and, so, s. 46 (1), because an agreement under s. 22 (5) inexorably puts into operation s. 22 (8), pars. (*c*) and (*d*) of which transfer oversea assets and liabilities if and when they obtain an Australian localization, whereas s. 19 (1) (*b*) is limited to the disposal of the business in Australia. Neither s. 22 (5) nor s. 22 (8) is confined to assets and liabilities arising from the business of the company. They extend to all assets and liabilities of the company. But s. 19 (1) (*b*) is confined to the business. Section 22 (8) (*c*) and (*d*), and also s. 24 (6) and (7), include assets and liabilities coming into existence after the taking over, while s. 19 (1) (*b*) is concerned only with an existing business as on the date of agreement. Section 22 (8) (*c*) and (*d*) and s. 24 (6) and (7) must relate to or include assets and liabilities of an ex-Australian business. Section 19 (1) (*c*) authorizes the new directors to sell any other business of the private bank, which means any other than the private bank's business in Australia. They could, therefore, sell the ex-Australian business, and they could do that first. That will not fit in with s. 22 (8) and in itself shows that an agreement disposing of the Australian or oversea business of the private bank pursuant to s. 19 (1) cannot be an agreement under s. 22 (5). These reasons establish the proposition that an agreement for taking over made by new directors exercising the authority given by s. 19 (1) (*b*) does not amount to or involve the taking over of the private bank's business in Australia by the Commonwealth Bank within s. 46 (3) so as to displace the application of s. 46 (2) and so bring into operation the prohibition of s. 46 (1). That being so, the situation supposed of a sale to the Commonwealth Bank pursuant to s. 19 (1) (*b*) has need of s. 46 (4) if the private bank is to be relieved of the duty of carrying on banking in conformity with s. 46 (2) and placed under a prohibition of ever carrying on banking business again. Section 38 of the Commonwealth *Banking Act* 1945 arms the Commonwealth Bank with power to acquire from the new directors selling the business pursuant to s. 19 (1) (*b*) of the 1947 Act. To take a further case in which s. 46 (4) may be used: Suppose the Treasurer gives a notice under s. 46 (4) and so stops it carrying on banking in Australia. It carries on whatever other Australian business it has. Then the Treasurer gives the company a notice

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under s. 22 (1) and thus brings s. 24 into operation on the non-banking business. That operation of s. 24 would be outside power. So, if the company starts a new business after the banking business is stopped. But it is said that it is not the nature of the business in which assets are used by the body expropriated but the use for which the Commonwealth requires them that matters for the purpose of s. 51 (xxxi.). The logical consequence of that contention is that the Commonwealth may compulsorily acquire any business or its assets. To this the only answer made was that you are not to be too logical about consequences. The final case suggested for s. 46 (4) is that of using it indepdentenly of other provisions of the Act. If it can be used independently, the Treasurer may give one bank notice under s. 22 (1) and another under s. 46 (4) and so determine that the former shall be compensated and that the latter shall not. Or the Treasurer can close up all the private banks without compensation. It is this last operation for which the Commonwealth contends. Although the rest of the Act falls, the Commonwealth says that s. 46 (4) and (8) enable the Treasurer to prohibit the private banks from carrying on banking business in Australia. It would reduce the purposes of the Act to that stated in s. 3 (*c*) and impute to the Parliament an intention producing a chaos which it is needless to describe. Section 15A of the *Acts Interpretation Act* would be no warrant for severing s. 46 (4)-(8). Section 6 of the 1947 Act is not an enactment : it is a statement. Parliament states an intention ; that is all. It does not affect the construction or meaning of any part of the statute. That must be ascertained by reading the whole instrument, valid and invalid portions alike. It affects only the possibility of severing good from bad : but the good when severed bears the same meaning as it would if there were no severance. Section 46 (4), as part of the entire statute, has the various effects already described. How can it be severed and deprived of all its effects except the possibility of prohibiting banking without compensation ? Parliament cannot delegate the task of legislating to the Court. It cannot blindly leave it to the Court to produce by a process of textual excision a piece of legislation with an operation of which Parliament was never conscious and could not forsee. An intention to enact the very law must be discoverable. Section 6 is only to be taken into account as part of the materials upon which the legislative intention of the statute is ascertained. The possibility of a separate or independent operation of a particular subsection or clause must depend upon its real relation to other clauses or expressions and the effect produced. Section 6 (*c*) states an intention that an effect different or apparently different in substance

shall not by itself be a consideration sufficient to displace the application of s. 6 (*a*) or of s. 15A of the *Acts Interpretation Act*. But it may still take its place as a consideration which with other evidences will show that a given clause cannot be given an operation within the actual intention of Parliament. Thus, s. 46 (4) could not be given an effect which places it within the uncontrolled discretion of the Treasurer to prohibit any bank he singles out and close up its business without compensation or provision for its customers' cheques or other transactions. The ground might be that the bank was about to give Western Australia an overdraft and thus enable it to pursue a policy or project contrary to the wish of the Treasurer or his government. The Parliament cannot pass an Act consisting of an integrated series of provisions stating a coherent intention in the form of a plan and then add that, if it cannot be put into operation because of the Constitution, they have an intention to enact they know not what, made up of pieces or a piece of the enactment. As already pointed out, s. 46 (4), in a number of respects, has an operation incidental to the preceding provisions of the Act. The Court is asked, by applying s. 6, to say it can have none of these incidental effects but shall have an entirely independent operation of an extraordinarily drastic kind and one incompatible with the general policy disclosed by the Act. Section 6 is invoked in relation to s. 46 (4)-(8) on the footing, not only that all other parts of the Act may go, but also that there is an indefinite number of permutations and combinations of parts of the Act with s. 46 (4)-(8) appearing to the Court to be valid, a consideration strongly reinforcing the submission that it is not competent to Parliament to proceed by a blind intent. What s. 6 (*c*) authorizes is a "result in this Act having an effect different" &c., not in a section or provision surviving the destruction of almost the whole Act and producing an effect. Considered as an independent provision severed from the rest of the Act, s. 46 (4) would be invalid. It is invalid, first, because s. 51 (xiii.) does not include a power to prohibit. It does not contain a power to prohibit, because it is so expressed as to establish certain internal limitations upon what may be done under it. A consideration of the references to State banking, to the incorporation of banks, to paper money, the use of the word "also" and the nature of banking itself and the assumptions involved in "State banking extending" show that the activity consists of consensual transactions. The banking contemplated by the power consists in transactions between subject and subject. The Parliament cannot legislate about State banking "extending" &c. by saying that the State shall do no banking that extends. The subject, or rather the

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section of the subject, is an activity extending from one geographically defined political area into another. The power is based upon the assumption that such an activity will exist, and it does not enable the Commonwealth to suppress that kind of banking. But the power is one, and the word " banking " has the same meaning in both parts of s. 51 (xiii.). To prohibit State banking extending beyond the limits of a State would interfere seriously with banking within the State. The Constitution adopts the assumption that laws with respect to State banking extending beyond the limits of a State will not diminish or destroy State banking within those limits. Why ? Because the power does not authorize suppression of extra-State State banking or of banking at all. The continued existence of the subject is contemplated. Again, the reference to " State banking extending " proceeds upon the footing that banking is consensual, as, of course, it is. It cannot be supposed that this part of the power enables the Commonwealth Parliament to compel the State Bank whose business extends into another State to transact business with customers, the relation being not consensual but obligatory. Again, the reference, by way of exception, to State banking shows that " banking other than State banking " means banking transacted between subject and subject ; just as to speak of trade imports consensual transactions, so with banking. Compulsory sale and purchase is not trade. The second reason why s. 46 (4), if considered as an independent provision severed from the rest of the Act, is invalid is that the sub-section would give an uncontrolled power to the Treasurer to pick out any private bank for any reason he liked and close up its banking business. That is not a law with respect to banking. Unless the choice is limited to considerations affecting some matter or matters connected with the subject of banking, the mere fact that the prohibition when applied must relate to a " private bank's " business is not enough to establish that in pith and substance the law is one with respect to banking. To that contention several answers have been made by the Attorney-General. First, it was said that Federal legislative power is plenary. To that the plaintiffs say : " Of course it is, once you find out what the power is ; but you must ascertain its ambit." Next, it was said that s. 51 (xiii.) must be construed as if it stood alone ; and that " banking," where it first occurs in s. 51 (xiii.), must be construed without limitation from the rest of the paragraph. The answer to these contentions has been given. Then, it was said that the power over the subject of banking and the incorporation of banks was as wide as that conferred by s. 91 (15) of the *British North America Act.*

That contention fell into two divisions. Of these, the first was that by legislation now embodied in the Canadian *Bank Act* 1944 the Canadian Parliament had without challenge exercised the power on the footing that it had a wide ambit. That is no argument. But, in any case, unless the question is whether Dominion legislation properly belongs to a Provincial subject matter enumerated in s. 92 of the *British North America Act*, the definition of a subject enumerated in s. 91 is not material to a question of Dominion power to pass the legislation, because under the initial words of s. 91 the Dominion may "make laws for the peace, order and good government of Canada in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the legislatures of the Provinces." The enumerated Dominion powers are only conferred "for greater Certainty" and to declare that "the exclusive Legislative Authority of the Parliament of *Canada* extends to all matters coming within the classes of subjects" so enumerated. So, the residual power belongs to the Dominion Parliament. The second division of the contention consists in a use of the Canadian cases decided in the Privy Council or the Canadian Courts with some reference to the banking power. These do not touch nationalization or anything like it, and they were decided without any necessity of defining the power. *McFarland* v. *Bank of Montreal* (1) involved only a question whether a given transaction fell within the description of a sale by one bank to another of the whole or part of its assets under s. 29 of the Canadian *Bank Act* 1906, which made such a transaction of no effect unless it complied with certain conditions. *Ontario Bank* v. *McAllister* (2) related to a prohibition against banks carrying on any business not appertaining to the business of banking. What was done by the particular bank was held to appertain to the business of banking because it was part of a compromise or settlement of a banking debt. The case supports the view that the business of banking is what arises from the relation between banker and customer. *Cameron* v. *Royal Bank of Canada* (3) only decided that a promissory note vested by statute, independently of indorsement, under a provision dealing with amalgamation. But *McKay* J. (4) speaks on the footing that amalgamation is not part of the business of banking. *Bank of Montreal* v. *Irvine* (5) also turned on the word "vest." *Northern Crown Bank* v. *Great West Lumber*

(1) (1911) A.C. 96.
(2) (1910) 43 S.C.R. (Can.) 338.
(3) (1915) 21 D.L.R. (Can.) 824.
(4) (1915) 21 D.L.R. (Can.), at p. 826.
(5) (1924) 3 D.L.R. (Can.) 752.

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Co. (1) turned on statutory construction and is not in point. *In the matter of three Bills passed by the Legislative Assembly of the Province of Alberta* 1937 (2) was the subject of a submission by the Attorney-General which concluded that the case decided that legislation for the direct management and drastic control of banking or credit institutions fell within the banking power. This is misleading. The case shows on examination the following: (*a*) The *Alberta Social Credit Act* was held to fall outside s. 92 (13) of the *British North America Act* (Property and Civil Rights in the Province) and s. 92 (16) (matters of a merely local nature in the Province) because in its essential components and features it fell under s. 91 (15) (Banks and Banking (*sic.*)) or within s. 91 (14) (Currency) or, if not strictly within the ambit of s. 91 (14) and (15), or partly within one and partly within the other, then within s. 91 (2) (Regulation of Trade and Commerce). The features which gave the plan embodied in the Alberta *Social Credit Act* a complexion of banking were (i.) that it involved the issue of Alberta credit certificates by which credit might be transferred; (ii.) that they were intended, not as legal tender, but to represent or replace it in discharging debits; (iii.) that they were to be issued by the credit house, which was to accept deposits of currency and securities, to transfer credit, to receive deposits of credit vouchers and of transfers of Alberta credit, to convert currency and negotiable instruments into Alberta credit and to honour instruments in a prescribed form whereby customers drew against Alberta credit; (iv.) that it envisaged a form of credit which would be acceptable as bank credit is and would serve as a substitute therefor: cf. (3). (*b*) The *Credit of Alberta Regulation Act* was held ultra vires because, notwithstanding a disclaimer of " transactions which are banking within the meaning of the word ' banking ' as used in s. 91 (15)," it was held that the licensing of credit institutions it set up embraced banks and this amounted to legislation in relation to banking and a regulation of trade and commerce. That means that it dealt inconsistently with a matter belonging to the Dominion. (*c*) The *Bank Taxation Act* was held ultra vires because its pith and substance was considered not to be the raising of revenue for provincial purposes by direct taxation but prohibitive taxation upon banking so directed by the provincial legislature as to frustrate the intention of the Dominion *Bank Act* by preventing banks carrying on their business or controlling them in the exercise of their powers (4). The same view

(1) (1914) 17 D.L.R. (Can.) 593.
(2) (1938) S.C.R. (Can.) 100.
(3) (1938) S.C.R. (Can.), at pp. 113, 114, 116.
(4) (1938) S.C.R. (Can.), at pp. 128-130.

is taken of this Bill in the Privy Council (*Attorney-General for Alberta* v. *Attorney-General for Canada* (1): see, further, *Moran's Case* (2). The Dominion Parliament having exclusive power over the incorporation of banks and banking and having licensed banks, it necessarily followed that Alberta could not interfere with their powers and their exercise. The argument that the power to suppress banks must reside in State or Commonwealth is fallacious. Once the Commonwealth has legislated, s. 109 of the Constitution operates to make inconsistent legislation of the States inoperative, and State legislation may be inconsistent notwithstanding that it would not be competent for the Commonwealth to enact it: cf. *Attorney-General for Ontario* v. *Attorney-General for Canada* (3). The decision in *In the matter of three Bills passed by the Legislative Assembly of the Province of Alberta* 1937 (4); s.c. on appeal *Attorney-General for Alberta* v. *Attorney-General for Canada* (5), may be summed up in the proposition that the Alberta legislation impinged upon the exercise of Dominion power. It is not a decision that the legislation was an attempt to exercise Dominion power. The decision in *Attorney-General for Alberta* v. *Attorney-General for Canada* (6), was that a provincial statute licensing credit institutions, including banks, and requiring them to create in favour of their customers credit deposits against Alberta credit certificates impinged upon banking as an exclusive legislative subject of the Dominion power. It is tied closely to the transactions between banker and customer. It was contended that in 1867 it was not the practice of banks in Canada to expand credit beyond the amount of their cash reserves and, accordingly, that the use of credit was outside the power (7). It is in reference to this argument that Lord *Simon* says the question is not what was the extent and kind of business carried on in 1867, but what is the meaning of the term in the Act (8). The decision is that it is not beyond the business covered by the word "banking" to make loans which involve an expansion of credit and that legislation aimed at restricting this practice must be beyond the powers of a provincial legislature (9). It goes directly to the relation of banker and customer. This review of the Canadian decisions shows that they contain nothing to support the proposition that such a law as s. 46 (4)-(8) of the *Banking Act* 1947 would be, if it stood severed and alone—conferring an uncontrolled and arbitrary discretion to stop the carrying on of all or any banking businesses

(1) (1939) A.C. 117, at p. 133.
(2) (1939) 61 C.L.R. 735, at pp. 759, 760, 776, 777.
(3) (1896) A.C. 348, at p. 369.
(4) (1938) S.C.R. (Can.) 100.
(5) (1939) A.C. 117.
(6) (1947) A.C. 503.
(7) (1947) A.C., at p. 505.
(8) (1947) A.C., at p. 516.
(9) (1947) A.C., at p. 518.

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—is in pith and substance a law with respect to banking. The discretion cannot be confined to grounds falling within the power. Section 46 (4) is bad on each of two grounds: First, because it is a prohibition or suppression of banking, and on the true interpretation of s. 51 (xiii.) of the Constitution that is beyond power; second, because in pith and substance it is not a law with respect to banking. In support of the second, the proposition is submitted that, where a class is selected for treatment in relation to an activity falling under a head of power, the law cannot be said in substance to be in respect of the subject matter unless it appears that the selection is founded upon the subject matter. Where a power to select amongst a class is conferred without any limitation of the grounds upon which the selection is to be made, it is not possible to determine that the law is upon the subject matter in substance. Under s. 46 (4), the Treasurer may, for a reason quite outside considerations of banking or finance, close a given bank. The first answer given by the Attorney-General to this was that the power is plenary, and that answer has been dealt with. The next consisted in reference to Canadian example and authority; that, also, has been dealt with. Then followed recourse to certain American decisions. First, a group consisting of *M'Culloch* v. *Maryland* (1); *Osborn* v. *Bank of United States* (2); *Farmers' & Mechanics' National Bank of Buffalo* v. *Dearing* (3). These cases, however, depend upon the incidental power as conceived in the United States and not upon any definition of a power with respect to banking. Next, *Veazie Bank* v. *Fenno* (4); but that case does not depend on any conception of banking, but on the use of the Federal power of taxation over State bank notes. Then, *Smith* v. *Kansas City Title & Trust Co.* (5); *First National Bank of Bay City* v. *Fellows* (6), and *Missouri* v. *Duncan* (7). These cases, too, concern, not a definition of banking or of a power with respect to such a subject, but the scope of the United States incidental powers. The first-named sustained the laws establishing Federal land banks and joint-stock land banks on the ground that creating them to act for the Government as depositories of public moneys and purchasers of government bonds brought them within that power although they were also intended to facilitate the making of loans upon fair

(1) (1819) 17 U.S. 316 [4 Law. Ed. 579].
(2) (1824) 22 U.S. 738 [6 Law. Ed. 204].
(3) (1875) 91 U.S. 29 [23 Law. Ed. 196].
(4) (1869) 75 U.S. 533 [19 Law. Ed. 482].
(5) (1921) 255 U.S. 180 [65 Law. Ed. 577].
(6) (1917) 244 U.S. 416 [61 Law. Ed. 1233].
(7) (1924) 265 U.S. 17 [68 Law. Ed. 881].

securities at low rates of interest and to do other things. "Whether technically banks, or not, these organizations may serve the governmental purposes declared by Congress in their creation" (per *Day* J. (1)). The other two cases support the power of Congress to authorize the Federal Reserve Board to grant permits to national banks to act as executors, administrators, trustees &c. and do so upon the ground that the incidental power extends to attaching to the agencies established as banks whatever is relevant in the judgment of Congress to make the business of the bank successful. Such a criterion could hardly be adopted in this country, and, in any case, it has nothing to do with the scope of a banking power; it relates only to the possible extension of the incidental power. Next, the Attorney-General invoked *Hammer* v. *Dagenhart* (2), treating the dissent of *Holmes* J. as now the authoritative decision, and *United States* v. *Darby* (3). He did so for the proposition that, if the law operates upon the subject of the power, it is enough, and it does not matter that the purpose or object of the law is to effect a result quite outside the subject matter; accordingly, if s. 46 (4) operates on "banking," it does not matter that the Treasurer may exercise the power it gives in order to effect an object, or for a motive, quite irrelevant to banking. These cases, however, do not proceed upon the basis that a law may simply touch inter-State commerce or get a foothold upon that subject and deal then with something else. They distinguish between motive or policy animating a law and what the law does, how it operates, and the distinction is not only sound but commonplace; but they uphold laws which do directly deal with inter-State commerce and are not colourable. In *Darby's Case* (4), *Stone* C.J. says: "The motive and purpose of the present regulation are plainly to make effective the Congressional conception of public policy that inter-State commerce should not be made the instrument of competition in the distribution of goods produced under substandard labor conditions, which competition is injurious to the commerce and to the states from and to which the commerce flows." "The various subjects of legislation are not mere pegs on which the Federal Parliament may hang legislation on any other subject it likes" (*R.* v. *Macfarlane*; *Ex parte O'Flanagan and O'Kelly* (5) per *Higgins* J.). You must look at the true nature and character of the legislation and see whether it really deals with the

(1) (1921) 255 U.S., at pp. 210, 211 [65 Law. Ed., at p. 590].
(2) (1918) 247 U.S. 251 [62 Law. Ed. 1101].
(3) (1941) 312 U.S. 100 [85 Law. Ed. 609].
(4) (1941) 312 U.S., at p. 115 [85 Law. Ed., at p. 617].
(5) (1923) 32 C.L.R. 518, at p. 574.

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subject. Any other test, particularly the "foothold" test, would be inconsistent with *Waterhouse* v. *Deputy Federal Commissioner of Land Tax (S.A.)* (1); *Huddart Parker & Co. Ltd.* v. *Moorehead* (2); *Pirrie* v. *McFarlane* (3); *Ex parte Walsh and Johnson* (4); *Crowe* v. *The Commonwealth* (5); *Radio Corporation Pty. Ltd.* v. *The Commonwealth* (6); *Victoria* v. *The Commonwealth* (7); *Victorian Chamber of Manufactures* v. *The Commonwealth* (*Women's Employment Regulations*) (8); *Morgan* v. *The Commonwealth* (9). It is not correct that *Huddart Parker Ltd.* v. *The Commonwealth* (10) is based on a contrary doctrine. Membership of a trade union forming part of the organization of labour engaged directly in commerce with other countries and amongst the States is by no means a matter extraneous to the subject, a consideration treated as of importance, particularly by *Evatt* J. (11), who quoted a passage upon the subject from the judgment of *Holmes* J. in *Adair* v. *United States* (12). *Prafulla Kumar Mukherjee* v. *Bank of Commerce Ltd. Khulna* (13) shows that in all constitutions in which defined powers are enumerated the same test is applied. To confer, as s. 46 (4) does, a discretion, exercisable for any or no reason, to prohibit conduct is not to make a law which according to its true nature and substantial character deals with the subject within the description of which the conduct might fall. If, for example, the law said that a bank should be closed if it did not devote fifty per cent of its profits to specified public charities, that would not be a law with respect to banking; nor is a law that enables the Treasurer to do the same thing. It makes no difference for this purpose whether the power over banking does or does not extend to the prohibition of banking. In either case it is not in substance a law about banking. Sometimes under the Commonwealth Constitution, as with Canada, it is necessary to say within which of two specific heads of legislative power a law properly falls. Suppose it was enacted that certain races, including aborigines, should or should not have an insurance policy. Would the law upon its true nature and character be referred to s. 51 (xiv.) or s. 51 (xxvi.) of the Constitution? Would s. 51 (x.) or s. 51 (xx.) govern a law about fishing within, as well as beyond, the three mile limit by foreign corporations? These

(1) (1914) 17 C.L.R. 665.
(2) (1909) 8 C.L.R. 330, at pp. 349, 350, 364-366, 397, 398, 409-411, 414-416.
(3) (1925) 36 C.L.R. 170: See p. 226.
(4) (1925) 37 C.L.R. 36, at pp. 69, 70.
(5) (1935) 54 C.L.R. 69.
(6) (1938) 59 C.L.R. 170, at pp. 180, 181.
(7) (1942) 66 C.L.R. 488, at pp. 508, 513, 514.
(8) (1943) 67 C.L.R. 347, at pp. 380, 381.
(9) (1947) 74 C.L.R., at pp. 454, 459.
(10) (1931) 44 C.L.R. 492.
(11) (1931) 44 C.L.R., at p. 525.
(12) (1908) 208 U.S. 161, at p. 191 [52 Law. Ed. 436, at p. 449].
(13) (1947) L.R. 74 Ind. App. 23.

questions would be decided by applying the same test: What is the true nature and character of the law? The "foothold" test is not countenanced by *Huddart Parker Ltd.* v. *The Commonwealth* (1). It is a decision that the particular law dealing specifically with operations essentially of inter-State and oversea commerce bore as a matter of substance the description of a law with respect to that subject, and the conclusion was influenced by the relation of unionism to the carrying on of such operations. The decision was regarded as a consequence of *Australian Steamships Ltd.* v. *Malcolm* (2). See, further, *Victorian Stevedoring and General Contracting Co. Pty. Ltd.* v. *Dignan* (3), where *Dixon* J. speaks of the conflict between two possible categories for a law. No limit can be placed upon the reasons which may actuate the Treasurer in giving a notice under s. 46 (4). There is nothing in the Act to found a restriction by interpretation to enlarging government participation in banking or monopolizing it. Unlike the commerce power dealt with in the *Airways Case* (4), the power to make laws with respect to banking cannot extend to incorporating a body to participate on behalf of the Commonwealth in carrying on an activity of banking. That is shown by the presence in s. 51 (xiii.) of the words "also the incorporation of banks." It is, however, not under these words but under s. 51 (xxxix.) that the Commonwealth Bank is set up. Apart from the question of interpretation, s. 46 (4) could not validly be related to strengthening the government participation in banking. As to monopolizing banking, there is no virtue in the monopoly being a government monopoly. If that is valid, so would be a law to confer a monopoly on a private bank. Neither as a matter of construction nor as a matter of validity can s. 46 (4) be treated as directed to monopolizing banking with a consequent limitation upon the grounds for exercising the discretion it gives. Section 46 (2) is inseverable from s. 46 (3) and (4), but, if it were severed, it could not be supported. A law requiring each and every private bank to keep open and do business indefinitely until expropriated or given a notice is outside s. 51 (xiii.). To say that wherever you can prohibit you can compel is not an answer; it is not correct: see, for example, *Ex parte Walsh and Johnson* (5), per *Knox* C.J. Section 46 (4) cannot be supported under s. 51 (xx.). It is legislation as to the private banks, not *qua* corporations, but *qua* banks; but, if the law dealt with the private banks *qua* corporations, it could receive no support from s. 51 (xx.), because that

(1) (1931) 44 C.L.R. 492.
(2) (1914) 19 C.L.R. 298.
(3) (1931) 46 C.L.R. 73, at pp. 103, 104.
(4) (1945) 71 C.L.R. 29, at pp. 58, 71, 76, 81, 112.
(5) (1925) 37 C.L.R. 36, at p. 65.

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power does not extend to the complete control of the external acts or activities of the corporations mentioned. The Attorney-General in the end claimed that it enabled the Parliament to control the internal management and the external relations of such corporations. That is wrong, clearly. In construing such a power you should look for the common attributes of the bodies it mentions. There are two common attributes, and the power is based upon them. First, the corporations have a local incorporation not entitling them to operate outside the local limits except by the comity or tolerance of the laws of other places. The foreign corporations depend on their incorporation abroad and the trading and financial corporations on their incorporation in a State or a Territory. The second attribute is that their description shows that they are of a class likely or tending to operate in more than one State. Substantially, the view of *O'Connor J.* in *Huddart Parker & Co. Pty. Ltd.* v. *Moorehead* (1) is correct; the power relates to the recognition throughout Australia of these bodies as legal entities and the conditions upon which they should be so recognized and permitted to carry on business. The wide meaning claimed on the part of the Commonwealth for s. 51 (xx.) denies much of the limiting effect of the words of s. 51 (i.). Conceding that overlapping among the paragraphs of s. 51 does occur, yet you cannot construe a constitution in this way. You must read the whole document, and, if you do so, you see clearly that it was never meant that the domestic trade of the States was to be controlled federally wherever a corporation was used in trade. It would destroy the whole balance of the Constitution. You cannot get from *Huddart Parker & Co. Pty. Ltd.* v. *Moorehead* (1), as a decision of the Court, support for the view that the Commonwealth may prohibit financial corporations formed within the limits of the Commonwealth from carrying on business; but it does decide that the Commonwealth under s. 51 (xx.) can neither incorporate companies nor interfere with their internal structure or management, and also that a law dealing with matters otherwise outside the Federal province is not within power because it deals with them in reference to corporations and lays the duties and liabilities upon corporations in reference to them. To interpret the power as meaning that it is for Federal law to deal with the external relations of foreign and trading and financial corporations is to treat it as contemplating a separate jurisprudence for all transactions to which such corporations are parties; that would spell chaos. If a New South Wales State bank does business in Victoria, it does it under

(1) (1909) 8 C.L.R. 330.

the authority or with the leave of Victorian law. If under s. 51 (xx.) a State bank is a financial corporation, it cannot be denied a right to carry on business in Australia. The exclusion from s. 51 (xiii.) of State banking makes it impossible to suppose that s. 51 (xx.) enables the Commonwealth to legislate about State banking within the State concerned; but, whatever construction is placed upon s. 51 (xx.), s. 46 of the *Banking Act* cannot be supported as an exercise of the power. For it does not select the private banks because they are corporations or in reference to anything arising from their corporate or artificial character (as distinct from natural persons). Section 3 (*a*) gives the basis of the law as the abolition of banking for private profit, and that has nothing to do with the corporate nature of the banks. To establish that banks and insurance offices do buy securities and resell them and that they do so in the course of their business so that the profit therefrom is taxable income, the Attorney-General cited three cases: *Colonial Mutual Life Assurance Society Ltd.* v. *Federal Commissioner of Taxation* (1); *Commissioner of Taxation* v. *Commercial Banking Co. of Sydney* (2); *Union Bank of Australia* v. *Commissioner of Taxes* (3). The steps in his argument from this are (1) that the buying of securities is banking; (2) that buying and compulsory acquisition are upon the same footing; (3) that the compulsory acquisition of shares is therefore banking. If this were right, the Commonwealth Bank could acquire compulsorily the whole intangible assets of the community. Passing to Division 2 of Part IV., the Attorney-General justified s. 13 under s. 51 (xxxi.) and relied upon the word "vest" in s. 13 (3) to give the Commonwealth Bank the full legal and beneficial ownership in the shares and notionally to place the Commonwealth Bank upon the company's share register. A share, however, is a bundle of rights, and acquisition cannot increase or vary them. The restrictions on the right to transfer membership or substitute another as member are inherent in the property—the share—acquired. Vesting can give no right to get on the register as a member. The former owners from whom the shares are acquired had no right to place their successors in title upon the register as members. *Wood* v. *W. & G. Dean Pty. Ltd.* (4) lays down the rule that the right of the trustee in bankruptcy to be registered is subject to any restrictions in the articles. Though in that case there were no such restrictions, the case laid down the principle. The necessity of getting upon the register to exercise voting and other rights of membership is

(1) (1946) 73 C.L.R. 604.
(2) (1927) 27 S.R. (N.S.W.) 231.
(3) (1920) 39 N.Z.L.R. 649.
(4) (1929) 43 C.L.R. 77, at pp. 86, 88, 89.

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inherent in the share, and "acquisition" of the property in the share cannot overreach a restriction or disability forming part of the property acquired. The decision in *The Commonwealth* v. *New South Wales* (1), that s. 20 of the *Lands Acquisition Act* is void in its attempt to require the State Registrar of Titles to register the Commonwealth as proprietor pursuant to the statutory acquisition, is decisive against the validity of s. 13 (3) in so far as it is correct that it places the Commonwealth Bank in the position of a registered member, of s. 14 (1) in so far as it does the like, and of s. 60 in so far as it requires the directors and secretary to register the Commonwealth Bank as member. Section 14 (1) is not a law with respect to acquisition, and it cannot be supported under other powers, e.g., s. 51 (xiii.); nor is s. 41 nor s. 60. The latter on construction does not require the officer of the company to do anything the articles do not justify. The suggestion that, because the shares are in a company which is a financial corporation, s. 51 (xx.) enables the Parliament to remove any restrictions upon admission to membership ascribes to that power a meaning and effect it cannot possibly carry. Section 14 (2), clearly, is not confined to transfers to nominees. It gives a full power of disposition at the expense of any restrictions or conditions arising from the constitutions of the companies and cannot be justified whether under s. 51 (xiii.), (xx.), (xxxi.), or (xxxix.). It is not correct that s. 21 of the Act can have no present operation except on the three banks mentioned in Part II. of the First Schedule. It depends upon the reduction in the numbers of shares upon ex-Australian registers. In any case the law must be tested by its general operation, not by reference to the special facts of the moment. Section 21, if valid, operates to relieve from liability the shareholders who, in spite of the reduction in number, continue to permit the company to carry on business. Division 2 of Part IV. cannot be supported under s. 51 (xxxi.); it does not fulfil the condition expressed by the words "for any purpose in respect of which the Parliament has power to make laws." To do so, the acquisition must be for what may be called a legislative purpose: it must not be referable to some other purpose or capable of subserving some other purpose: the legislative purpose must be indicated expressly or by necessary implication. The purpose must appear. The acquisition cannot be supported by invoking a purpose different from that nominated, though it might be invalidated if it were shown that the true purpose was not that nominated. Here s. 9 nominates the purposes. Two additional purposes were enlisted by the Attorney-General:

(1) (1923) 33 C.L.R. 1.

(i.) so-called purposes (really powers) committed to the Commonwealth Bank by the *Commonwealth Bank Act* 1945 and the *Banking Act* 1945, and (ii.) the purpose of assisting the Commonwealth Bank in carrying out its functions, particularly its central banking functions, by (*a*) the influence it could exert on the policy of private banks as a shareholder; (*b*) the exercise by it of its vote at a general meeting; (*c*) taking part in the meetings; (*d*) taking part in the election of directors; (*e*) having a voice in the management. The argument of the Attorney-General with reference to Part IV., Division 2 of the 1947 Act, was on the basis of the present state of facts and the assumption that Division 3 was invalid and out of the way; but the validity of Division 2 must be considered as a general law of continuing operation over an indefinite duration of time and in conjunction with Division 3, with which it was intended to work. The operation of Division 2 without Division 3 might be quite different, and s. 6 does not authorize the saving of a provision by giving it a different operation, even if it makes it no longer a fatal objection that it would operate differently because an invalid provision is held bad. Whether it is within power itself is a matter to be tested for every provision according to the meaning and effect intended in the first instance. Where a notice given under s. 13 (1) takes effect, then under Division 3 the control of the management of the private bank passes out of the hands of the directors and shareholders into those of the agents of the Commonwealth Bank appointed to replace the directors elected under the articles. The result is that as a shareholder the Commonwealth Bank and its nominee transferees (under s. 14 (2)) could not take an effectual part at a meeting of members to effect the banking policy &c., vote for directors, have a voice in the management or influence directors. Ownership of the shares becomes a matter of property simply: membership carries nothing with it. The acquisition of shares must therefore be considered on the footing that they are shares in a company the entire control of which is removed at the same time from the shareholders. Of course, it would in any case be ludicrous to suppose that shareholding gave any influence or control on banking policy: cf., for example, the provisions of the articles of the Commercial Banking Co. of Sydney and of the deed of settlement of the Bank of New South Wales excluding members from access to the accounts, and Divisions 3 and 5 of Part II. of the *Banking Act* 1945. As to the purposes mentioned in s. 9 of the 1947 Act, how could holding shares facilitate control and how could it further the expansion of the Commonwealth Bank's business? To acquire shares may

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increase the Commonwealth Bank's " investments " (and liabilities) but not its business. Then, as to the purposes or powers committed to the Commonwealth Bank by the legislation of 1945, to empower the Commonwealth Bank to include bank shares among the securities it may purchase is not to provide a purpose for which compulsory acquisition may be authorized under s. 51 (xxxi.). It is entirely fallacious to say that, because a power can constitutionally be conferred upon a corporate agency of the Commonwealth to pursue a course of action or enter upon a transaction like buying and selling securities, then the exercise of the power and anything done in its exercise is itself a purpose for which the Parliament may make laws within the meaning of s. 51 (xxxi.) : cf. *Attorney-General for Victoria* v. *The Commonwealth* (1), per *Latham* C.J. To find the legislative purpose which s. 51 (xxxi.) requires, you must go back to the powers conferred by the other paragraphs of s. 51, not to the powers conferred under them upon corporate agencies of the Commonwealth. Division 3 of Part IV. of the 1947 Act was supported by the Attorney-General as a provision giving the Commonwealth Bank—as the only, or the dominant, shareholder—control of its own company ; he assumed that it applied only to the present state of facts and that s. 13 would vest in the Commonwealth Bank all or nearly all the shares in the company. The argument overlooks the fact that, *qua* shareholder, the Commonwealth Bank is deprived of all control or influence ; directors are named by the Governor of the Bank, and they continue indefinitely without recourse to the shareholders. It is not a law with respect to banking, to the incorporation of banks, or to financial or foreign corporations. Section 19 is bad under s. 51 (xxxi.). The injustice of permitting the nominee directors to sell depends, not upon their possible dishonesty or *mala fides* in fixing the price, but upon their doing it in their sole discretion as nominees of the Bank—at a price approved by the Treasurer, moreover, on the recommendation of the Commonwealth Bank. Irrespective of their being relieved of their fiduciary duty, it is bad. The two Divisions form a scheme for the acquisition of the assets, and not upon just terms. Another approach is to treat the power conferred by s. 19 (1) (*b*) and (*c*) upon the nominee directors to bind the private bank by a disposition of its assets as a power conferred by the Parliament in the exercise of its legislative power under s. 51 (xxxi.), which, according to the Attorney-General, extends to voluntary acquisition and the incidents of voluntary acquisition as well as to compulsory purchase. Thus to arm directors with authority to sell voluntarily to the Commonwealth

(1) (1945) 71 C.L.R. 237, at p. 252.

Bank would be an exercise of the power given by s. 51 (xxxi.); but it is not on just terms. It is not on just terms because the agents, involuntarily bestowed upon the company, are not bound to sell at a fairly fixed price. As to the question whether Division 2 (combined with Division 3) and Division 4 are mutually exclusive alternatives, the plaintiffs do not contend that they are. The interactions of the two Divisions (2 and 4) include the following possible examples:—(1) The Treasurer might first give notice under s. 22 (1). Before the notice expired he might next give a notice under s. 13 (1). He could then, under s. 22 (3), extend his notice under s. 22 (1) until, by operation of the notice under s. 13 (1) and (3) and s. 17, the directors were displaced and nominees were appointed under s. 18. The nominees might then make an agreement under s. 22 (5). By that means all troublesome questions of compensation and the like under s. 24 might be avoided. The authority of the nominees to act on behalf of the private bank in making such an agreement would be derived from the opening words of s. 19 (1) or from the articles of association conferring power to dispose of the business upon the directors. Section 19 (1) (in particular, pars. (*a*), (*b*) and (*c*)) is not an exhaustive statement of the powers of the directors. (2) The Treasurer may give a notice under s. 22 (1) and allow it to expire, so that the assets vest under s. 24, and he may fail to agree upon compensation with the legitimate directors of the company pursuant to s. 43. Then he may give a notice under s. 13 (1), which upon its expiration will result under s. 17 and s. 18 with the replacement of the directors by nominees, who will forthwith make an agreement with him as to compensation under s. 43. (3) The Treasurer may give a notice under s. 22 (1), allow it to expire, so that there is a vesting under s. 24 (2) and (4), make an agreement with the legitimate directors under s. 43 and then give a notice under s. 13 (1) operating to displace the directors under s. 17 and enable the appointment of nominees under s. 18. Then the nominees can prevent the distribution of the compensation moneys or the winding up of the company. That would be a way of preventing inflation by the release of credit or currency. (4) The Treasurer might, under s. 22 (1), s. 24 and s. 43, acquire the assets and make an agreement as to compensation and pay the amount. The company might continue its banking business overseas, as, for example, in New Zealand, and it might establish a new non-banking business here. Then the Treasurer might give a notice under s. 13 (1) and appoint nominees under s. 18, and they would take control of the entire business in New Zealand and Australia of the company. (5) The Treasurer might give a notice under s.

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13 (1) and appoint nominees under s. 18; they might sell the business under s. 19 and with the purchase money establish some new business in Australia. Then the Treasurer might give a notice under s. 22 (1), resulting under s. 24 in the vesting of the new business and its assets in the Commonwealth Bank. All these examples are important upon just terms. It must be borne in mind that under s. 44 (3) a private bank is bound by a notice offering compensation unless the private bank requires the claim to be referred to the Court of Claims. All that the Treasurer needs is a board of directors who do not so require when they receive an offer, and such a board he can always get by proceeding under ss. 13 (1), 17 and 18. The presence of s. 19 invalidates Part IV., Division 4, because it enables the nominees to fix the compensation and makes Part IV., Division 4, and Part VI., Division 2, inadequate to secure just terms. It is not sufficient to say that s. 19 is invalid because it might be used with reference to s. 22 and s. 24 and invalidate them. Section 6 cannot help in saving these provisions, because (*a*) s. 19 cannot be construed so as to disable the directors from making the agreement; (*b*) they need only remain inactive under s. 44 (3). The nominees could affect the value of the shares by the reaction of their selling price or amount of agreed compensation upon the market value. As to s. 8, if the rest of the Act fell, an operation confined to Territories could not be given to the Act. For one reason, the notices required by, e.g., s. 13 (1) and s. 22 (1), could not be severed or the territorial ambit reduced to Territories. Next, the Act fails to give just terms, because no provision is made for interest on compensation calculated from the time of acquisition. The Attorney-General conceded that, for the terms to be just, there must be a power to allow interest. He cited *International Railway Co.* v. *Niagara Parks Commission* (1). In *Grace Bros. Pty. Ltd.* v. *The Commonwealth* (2), *Latham* C.J. says that so far there is no decision of the Court that interest must be granted; but that merely means that there is no such rule for all cases, or no general rule. This is a special case where the necessity of interest is indisputable. Sections 15 and 25 cannot be construed as giving a right to interest, and s. 33 cannot be construed as conferring a jurisdiction to award interest. It was said that the jurisdiction is coextensive with the obligation to pay: but there is no obligation to pay interest. Really the Court of Claims has exclusive jurisdiction to decide what compensation shall be paid, but no power to add interest. In a statute enacted in the state of the decisions

(1) (1941) A.C. 328, at p. 344.

(2) (1946) 72 C.L.R. 269, at pp. 280, 283.

now existing it would be impossible to construe "compensation" as including interest. Moreover, a group of sections shows plainly that interest is not included in the expression: they are ss. 40, 42 (5), 43, 44 (5) and 45. In all of them "compensation" is used to represent the pecuniary equivalent of the subject taken as at the time of acquisition, and no more. Interest could not be awarded as a consequence of the principles of equity, because (1) the Court of Claims has no equitable jurisdiction; (2) the instantaneous acquisition of property and conferring of a right to compensation obtained by prescribed steps leaves no room for equitable relief or remedy; (3) the case is not within the competence of equitable jurisdiction. *Inglewood Pulp and Paper Co.* v. *New Brunswick Electric Power Commission* (1) cannot be treated as an authority to the contrary, for nothing appears or can be found to indicate the statutory authority of the arbitrator, and in any case no point about his authority was taken. The Attorney-General does not say the case is one susceptible of equitable remedies. A suggestion was made that a regulation made pursuant to s. 62 could give interest. There is no such regulation in fact; if there was, it would not be supported by the section. To the argument that ss. 40 and 42-45 are void as inconsistent with s. 75 (iii.) of the Constitution the Attorney-General replied (*a*) that the provisions attempting to exclude the jurisdiction of the High Court were severable from the remainder of these sections, and (*b*) that you fall back in any case on ss. 15 and 25 and treat them as giving an independent right to compensation recoverable in any Court; but it is impossible to sever s. 40 (2) and (4) from s. 40 (7). To remove the words "and not in any other manner" from s. 40 (2) or s. 40 (4) would not throw open the jurisdiction of the High Court. For these sub-sections would still require that the determination be made by the Court of Claims. Section 40 and Division 2 depend upon the jurisdiction they prescribe and are unworkable unless it is resorted to. It is impossible to sever s. 43 at sub-s. (3) and, instead of making a claim, issue a writ in the High Court. The writ itself would be a claim. Section 42 would afford an answer to the writ: cf. *Schweppes Ltd.* v. *The Commonwealth* (2). Sections 15 and 25 do not give independent rights to compensation justiciable elsewhere than in the Court of Claims. These two sections cannot be construed as if they stood alone; obviously, they mean that the Commonwealth Bank shall pay fair and reasonable compensation as in the Act afterwards set out. Further, they do not confer a private right; that is left to s. 40 and ss. 42 et seq. A claim for

(1) (1928) A.C. 492.

(2) (1945) 45 S.R. (N.S.W.) 35.

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compensation is a matter in which a person sued on behalf of the Commonwealth is a party within the meaning of s. 75 (iii.). The Attorney-General is wrong in contending that the reference to a person suing or being sued on behalf of the Commonwealth is limited to (1) the Attorney-General as representing the Crown; (2) persons in official positions or authorized by statute to sue or defend in their own names for the Crown in right of the Commonwealth, as, for example, the Commissioner of Taxation, and (3) persons or bodies acting under the direction or control of, or answerable to, a responsible Minister of the Crown. The very terms of s. 75 (iii.) show that the Commonwealth may be sued by that name as a body politic without the appointment of a nominal defendant. Section 75 (iii.) covers the case of an actionable right or liability being vested in or imposed upon an officer or a corporation who or which forms part of the organization of the central government of the country. The words do not refer to procedure: they are concerned with substantive rights and liabilities enjoyed or incurred in an official or representative capacity or as an instrument of government. In the present case the liability arises from an acquisition in which the Commonwealth Bank is not the actor but the Treasurer is. The acquiring is done by the Commonwealth through the Treasurer, and the property in what is so acquired is placed in the Commonwealth Bank as a legal entity established for the purposes of the Commonwealth. The determination of the question whether and when such an acquisition shall be made lies entirely with the Treasurer. The Commonwealth Bank is voiceless and passive. The liability is placed upon the Commonwealth Bank, but otherwise there is nothing about the expenditure by it of funds or the source where they are to be found. Before the Federal Court of Claims the Commonwealth would be a proper party to the proceedings. It is a guarantor, it acquires the property, makes the Commonwealth Bank the respository and is under the constitutional necessity of seeing that the compensation is found. The deprivation is done by the Treasurer, and the enactment says that the Commonwealth Bank shall pay for it. It pays in respect of the Treasurer's act. When it is sued on the liability, it is sued on behalf of the Commonwealth, according to the ordinary meaning of language. The position of the Treasurer as the active agency throughout is shown by ss. 19 (2), 22 (1), (3), 40 (3), 43 (2), 44 (2), 49. The position of the Commonwealth Bank as an adjunct of government is illustrated by ss. 8, 9, 12, 15, 20, 23, 28, Part VII., Part VIII., s. 65, ss. 182, 183, 187, 191, of the *Commonwealth Bank Act* 1945. It controls the currency. Part II., Division 3, of the

Banking Act 1945 gives the Bank a central-banking function forming part of governmental financial administration. So with Division 4—Mobilization of foreign currency. Part IV.—Gold—depends on the Commonwealth Bank (ss. 32 and 33) for a governmental function. Again, Part V.—Interest. These show that the Commonwealth Bank forms part of the Government. When it sues or is sued, it is on behalf of the Government. The whole justification of the *Banking Act* 1947 in the argument for the Commonwealth is that the purpose of acquisition is a Commonwealth purpose. The acquisition, therefore, is the act of the Commonwealth Government for a purpose of the Government, and it is an interested party. Section 10 of the *Commonwealth Bank Act* 1945 does not mean that when the Bank is sued it is not sued on behalf of the Commonwealth. Ministerial control cannot be the test of the application of the words "suing or being sued on behalf of the Commonwealth" because where there is such control the Commonwealth itself may be sued or may sue. However, s. 9 of the *Commonwealth Bank Act* 1945 supplies that element. Next, having regard to s. 61 of the *Banking Act* 1947, the Commonwealth is a proper party to a proceeding to recover compensation. The contention that s. 61 imposes a liability only when compensation has been agreed or assessed is without foundation. The liability to pay compensation arises on acquisition, and the liability under the guarantee then attaches. The proceedings are for the enforcement of the liability to pay compensation, on the Attorney-General's argument, under s. 15 and s. 25, but it is for an antecedent liability. Accordingly, the Commonwealth may be joined in the proceeding against the Commonwealth Bank. To test this argument, you assume that the provisions exclusively committing the ascertainment of compensation to the determination of the Court of Claims are out of the way; for the question is whether the High Court would, but for those provisions, have jurisdiction to entertain a claim for compensation. It would, for the alternative reasons that the Commonwealth Bank is sued in such a claim on behalf of the Commonwealth and that in any case in such a claim the Commonwealth is a proper party as guarantor. As to s. 92 of the Constitution, it will be recalled that the argument in chief for the plaintiffs took the following form: (1) Section 46 of the Act is obnoxious to s. 92 because it prohibits private banks from carrying on banking, including inter-State transactions, and, if purpose be material, to the end that no-one, except the Government, should carry on banking, including inter-State banking, and, further, by adopting, if that be material, a trading or commercial criterion, viz., banking.

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(2) The invalidity of ss. 23 and 24, and also of Divisions 2 and 3 of Part IV., when those Divisions are regarded as a plan to acquire assets, is *a fortiori* from *Peanut Board* v. *Rockhampton Harbour Board* (1). (3) Division 3 of Part IV., regarded as a provision for the management of the private banks, is an attempt to control banking transactions, including inter-State banking, and offends against s. 92. (4) Even if the plaintiffs' argument that banking is a part of trade, commerce and intercourse is wrong, still the provisions mentioned impair the freedom of the customer to conduct his inter-State trade, commerce or intercourse; further, they are directed to the control of trade and commerce, as is shown by the defendants' argument and by s. 8 of the *Commonwealth Bank Act* 1945. The necessary operation of the law is to invade the freedom of traders, because funds cannot be remitted inter-State except through a government agency, and that is part of the purpose of the law. It is a direct, and not an incidental, effect. The answer made by the Attorney-General reduces itself to three propositions: (1) An enactment is not invalidated by s. 92 unless it is directed against, or hostile to, inter-State trade; (2) " trade, commerce and intercourse among the States " relates to the passage of goods and persons across the border and does not extend beyond the movement of physical things and people; (3) banking is not and does not include trade, commerce or intercourse. In support or amplification of the first proposition the Attorney-General maintained that (*a*) s. 46 of the Act had a general monetary purpose; (*b*) it did not interfere with the flow of transactions; (*c*) only ten per cent of banking transactions are inter-State; (*d*) s. 11 showed that there should be no diminution of the facilities provided by banks; (*e*) s. 46 is severable in relation to intra-State business; (*f*) Part IV. is not, and none of its provisions are, directed against freedom at the frontier, and they bear no relation to it; to be invalid they must have a specific purpose of limiting inter-State trade or commerce. He also argued that laws apparently directed to or hostile to inter-State trade may on scrutiny turn out to be concerned with another purpose, as, for example, health, obscenity or defence; that inter-State trade may be restricted on those grounds; that s. 92 is concerned, not with the freedom of the individual, but with freedom of trade in the abstract. The argument that, to be obnoxious to s. 92, a law must be directed against or hostile to inter-State trade, will on analysis be found to be only another form of the old theory that s. 92 only protects the free flow of trade, the total amount of trading, its volume. Logically, the argument about hostility might

(1) (1933) 48 C.L.R. 266.

be taken to mean discrimination against inter-State trade; but discrimination as a test is rejected in *James* v. *The Commonwealth* (1). Apparently what was meant was that, unless the total volume of inter-State trade is diminished by a law, it does not offend against s. 92. That is shown by the frequent assertion that it is open to the Commonwealth to choose who shall take part in inter-State activities. Such an assertion necessarily means that s. 92 is concerned only with trade in the abstract. The idea is one that has not been, and cannot be, precisely defined. The corresponding proposition has been put repeatedly, that s. 92 confers no individual rights, gives individual traders no protection. Still another meaning of the argument that s. 92 invalidates only enactments directed against or hostile to inter-State trade is that an interference may be justified if another purpose can be found, or a good motive, or a different subject matter. Perhaps a fourth possible meaning of the argument is that the law cannot be obnoxious to s. 92 unless it deals solely with inter-State trade. In *James* v. *Cowan* (2) the words " directed to " are used in relation to a compulsory acquisition of goods which might be indifferent if it were not made in order to stop the trade; that is to say, the purpose is relied upon to displace the merely incidental effect of acquisition. In *Peanut Board* v. *Rockhampton Harbour Board* (3), the nature of the statute, its necessary operation, showed that it was " directed at " marketing, that is, inter-State trade. When, in *James* v. *The Commonwealth* (4), Lord *Wright* gave these two cases as examples of compulsory acquisition of goods which may offend against s. 92 " if in truth the expropriation is directed wholly or partially against inter-State trade in the goods," he was not suggesting that you looked outside the Act or at anything but its necessary operation: he was reflecting what Lord *Atkin* said in *James* v. *Cowan* (5). An individual requisition stands in a different position from an enactment making a general or universal expropriation. The former may be indifferent until you get an intention to interfere with trade: its effects may be incidental. But the latter is bad if its operation is wholly or partially to interfere with the trade: see in *McArthur's Case* (6), per *Rich* J. Lord *Atkin* never meant, nor did Lord *Wright* mean, that the existence of some other subject or object will take out of s. 92 an interference otherwise within it: see *James* v. *The Com-*

(1) (1936) A.C., at p. 628; 55 C.L.R., at p. 56.
(2) (1932) A.C. 542; 47 C.L.R. 386.
(3) (1933) 48 C.L.R. 266.
(4) (1936) A.C. 578, at p. 631; 55 C.L.R., at p. 59.
(5) (1932) A.C., at p. 558; 47 C.L.R., at p. 396.
(6) (1920) 28 C.L.R., at pp. 569, 570.

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monwealth (1). The *Wheat Case* (2) ought to be regarded, not as a total, but as an individually authorized, acquisition. *Griffith* C.J. was not prepared to say the Act was good if it authorized universal acquisition (3). The varying foundations upon which the *Wheat Case* (2) has been placed have none of them endured. It may be explained on the ground that the acquisition was colourless and indifferent as to inter-State trade or, as by *Rich* J., on the ground that the interferences were incidental and unintended. But the expressions of Lord *Atkin* and Lord *Wright* concerning acquisitions cannot be carried into other cases and treated as of general application. Section 92 does not give an individual a cause of action if his freedom to trade inter-State is infringed upon, but it does contemplate the activities of the subject and say that they shall be free: see *James* v. *The Commonwealth* (4); *Airways Case* (5). "Free," in s. 92, means free of government restraint or control, and it applies distributively to the specific trading of His Majesty's subjects. Great difficulties arise if an attempt is made to attach the notion of freedom to some abstract totality of trade—to some idea. *James* v. *The Commonwealth* (6) rejects the view that every step or element forming any part of inter-State trade is free from legal regulation or control; it confines, so to speak, the area of action over which freedom operates and limits it to that which affects interchange across the border; but in no way does it warrant any reduction or qualification of the immunity from interference within that area. "Hostile" may be used to describe an inhibition or burden upon inter-State trade, but, when there is a prohibition, restriction or burden, you cannot look *aliunde* for a friendly or unfriendly purpose as to inter-State trade. When *Huddart Parker Ltd.* v. *The Commonwealth* (7) was decided it was assumed that s. 92 did not bind the Commonwealth, and nothing the Privy Council said in *James* v. *The Commonwealth* (8) supports the view that the same result is approved on the opposite footing. Indeed, the passage about licensing (9) is opposed to such an inference. The decision about reg. 79 in the *Airways Case* (10) is inconsistent with the proposition that by a licensing system you can select the actors consistently with s. 92. In any case, it does

(1) (1936) A.C., at pp. 623, 624, 628, 631; 55 C.L.R., at pp. 52, 53, 56, 59.
(2) (1915) 20 C.L.R. 54.
(3) (1915) 20 C.L.R., at pp. 66, 67.
(4) (1936) A.C., at pp. 614, 615, 624, 628, 630, 631; 55 C.L.R., at pp. 43, 44, 53, 56, 58, 59.
(5) (1945) 71 C.L.R., at pp. 61, 73, 78, 79, 91, 110, 111.
(6) (1936) A.C. 578; 55 C.L.R. 1.
(7) (1931) 44 C.L.R. 492.
(8) (1936) A.C., at p. 626; 55 C.L.R., at p. 55.
(9) (1936) A.C., at p. 580; 55 C.L.R., at p. 61.
(10) (1945) 71 C.L.R. 29.

not follow that, if you can license men who, like wharf labourers, do some work connected with inter-State trade, you can license persons to transact the business of inter-State trade itself. Of course, you may regulate the incidents of inter-State trade by a licensing system by which licences may be obtained on the fulfilment of conditions, as, for instance, the safety of ships, and it is to be noted that, as was afterwards held, the waterside workers did have a right to the renewal of a licence and to the licence itself. Further, all that was done was to require the stevedore to give preference in picking up his labour. In no real sense did this adversely affect inter-State trade at all. Compare the position of the agents in *Roughley* v. *New South Wales* (1). It may be lawful to exclude people from trading on the ground of status, e.g., aliens, bankrupts and infants. A military officer, and similar examples, may be given of persons who by voluntarily enlisting or enrolling in a profession incur a like disability; but an alien may be a more doubtful case, unless specific circumstances make his trading dangerous or undesirable. Policy is no answer to s. 92, and outside some general disability it may be difficult to justify exclusion from inter-State trade. Patents and copyrights cover only forms of things or art, literature and music not hitherto published or made the subject of trade. The holder gives it to the world on the footing that others cannot appropriate his ideas. It is wrong to say that the argument means that s. 92 gives a perpetual franchise of businesses including inter-State transactions. All it does is to give the persons carrying them on freedom from prohibition against carrying on inter-State business. As to other cases cited: *Hartley* v. *Walsh* (2) depends upon the view that dealings in fruit before processing might be regulated; it was not the suppression of a recognized trade in unprocessed fruit. *Home Benefits Pty. Ltd.* v. *Crafter* (3) related to a trade practice, not a trade, an illegitimate practice. *Milk Board* (*N.S.W.*) v. *Metropolitan Cream Pty. Ltd.* (4), was said by the Attorney-General to be inconsistent with *Peanut Board* v. *Rockhampton Harbour Board* (5), but, regarded as a health measure, the enactment there in question produced only an incidental effect upon trading inter-State in milk. *R.* v. *Connare*; *Ex parte Wawn* (6) and *R.* v. *Martin*; *Ex parte Wawn* (7) depend, as to some justices, on the illegitimate character of the trading and, as to others, upon the lack of commercial and inter-State characteristics, but they contain nothing suggesting that actors in inter-State

(1) (1928) 42 C.L.R. 162.
(2) (1937) 57 C.L.R. 372.
(3) (1939) 61 C.L.R. 701.
(4) (1939) 62 C.L.R. 116.
(5) (1933) 48 C.L.R. 266.
(6) (1939) 61 C.L.R. 596.
(7) (1939) 62 C.L.R. 457.

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trade may be selected or business prohibited. *Andrews* v. *Howell* (1), on this point, depends upon the absence of any interest in the plaintiff and the refusal of the Court to be astute in finding hypothetical possibilities to bring a law within s. 92. *Starke* J. ought not to have allowed the objects clause of the regulations there to overcome the operation of the regulations where they touched inter-State transactions in apples and pears. The Privy Council, in *James* v. *The Commonwealth* (2), did not approve *Nelson's Case* [*No.* 1] (3), nor *Duncan's Case* (4). The passage in Lord *Atkin's* judgment in *James* v. *Cowan* (5), concerning the purpose of a power of acquisition, means that, if upon the proper interpretation of a statute conferring a power of acquisition its exercise is authorized for the purpose of controlling or restraining inter-State trade, it is to that extent in conflict with s. 92; but, if its exercise is authorized only for the purpose of dealing with famine, disease or the like, any incidental or consequential effect upon inter-State trade that may be produced will not bring it into conflict with s. 92. In the *Banking Act* 1947 the power of acquisition is followed by an express prohibition upon engaging in banking, including inter-State banking, which arises upon the exercise of the power. On its face, therefore, the Act shows that the purpose of the power of acquisition is to interfere with inter-State trade, commerce and intercourse. The interference is not a mere accidental or incidental consequence of the acquisition. *James* v. *The Commonwealth* (2) denies that the test of a law's inconsistency with s. 92 is to be found in the subject matter with which the law deals or in the presence or absence of discrimination against inter-State trade. It follows that the test is to be found in the operation of the law as a restraint upon inter-State trade. A universal or general expropriation of a commodity in the course of a marketing scheme must operate as an impairment of freedom of trade in that commodity; but the effect upon inter-State trade of the acquisition of the chattel of an individual may be indirect, incidental or consequential or nothing at all. It may, on the other hand, be done for the very purpose of stopping his trade: that is the present case. If hostility is an element, you find it inside the law itself. No inconsistent principle can be extracted from the *Transport Cases*, but the *Airways Case* (6) decides that s. 92 does not permit exclusion from inter-State trade by an arbitrary licensing system. Except for the purpose of attempting to support some such proposition the *Transport Cases*

(1) (1941) 65 C.L.R. 255.
(2) (1936) A.C. 578; 55 C.L.R. 1.
(3) (1928) 42 C.L.R. 209.
(4) (1916) 22 C.L.R. 556.
(5) (1932) A.C., at p. 558; 47 C.L.R., at p. 396.
(6) (1945) 71 C.L.R. 29

have no relevance to the present case. *James* v. *The Commonwealth* (1) itself shows that the Commonwealth cannot choose the actors in inter-State trade. The argument that only ten per cent of the business of the private banks is inter-State has no point. It is a very substantial amount; the law operates directly upon it and means to, and will, stop it. In fact it is a misleading and unfair computation. It relates only to the credits and debits of documents passing over State lines, and it assumes an even spread as between States and as among banks. Proof of carrying on inter-State banking would support a prosecution based on s. 46. In *Vacuum Oil Co. Pty. Ltd.* v. *Queensland* (2), and *Vacuum Oil Co. Pty. Ltd.* v. *Queensland* [No. 2] (3), it appeared that the percentages of inter-State transactions were 9.5 per cent and 5.73 per cent. The argument that the *Banking Act* 1947 does not offend against s. 92 because it deals with the business of the private banks as a whole may mean that discrimination is the test or subject matter is the test. If so, it is answered by *James* v. *The Commonwealth* (4). It is ridiculous to suggest that, while you cannot forbid the inter-State transactions, you can stop them by destroying the business. To sum up: Banking is trade and commerce. If so, the *Airways Case* (5) is conclusive. No extraneous hostility to inter-State trade need be looked for. You do not go outside the operation of the law. But, if you did, you would find it in s. 3, which states a plan of stopping the trade, banking. If, however, banking is not trade or commerce in itself, nevertheless, the law necessarily operates upon traders and prevents them from remitting funds inter-State both in respect of goods passing over the border and otherwise, except through a government agency and one exerting control. Freedom means freedom from government control. There is no analogy to s. 27 of the *Banking Act* 1945. That provision has no immediate or direct effect upon the trader. It authorizes instructions as to policy in advances &c. It does not authorize the prohibition of the transmission of funds. Again, to forbid banks to issue bank notes is not to interfere with inter-State trade. As to the argument that s. 92 relates only to the passage of goods or persons across State boundaries: it differs only apparently from the argument that hostility to inter-State trade must be exhibited; for it cannot be imagined that, if a law prohibits inter-State trade, a further hostile intent would be required. The argument may only mean that the freedom attaches to trading and commercial

(1) (1936) A.C., at p. 632; 55 C.L.R., at p. 61.
(2) (1934) 51 C.L.R. 108.
(3) (1934) 51 C.L.R. 677, at p. 680.
(4) (1936) A.C. 578; 55 C.L.R. 1.
(5) (1945) 71 C.L.R. 29.

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dealings relating to the movement over the border of goods or persons; but it was pressed as if it meant that the freedom attached to nothing but the movement of goods or people over the border. The former construction leads to no result in this case. The latter is wrong. If it were right, why, in *James* v. *The Commonwealth* (1), did Lord *Wright* refer to and deal with communications, bills of exchange, postal and telegraph services? The expression "trade, commerce and intercourse," clearly is not limited to the movement of physical or tangible things and persons. It has the same meaning as in s. 51 (i.) (2). "Internal carriage and ocean navigation" are words of extension. They exhaust all kinds of carriage, if there be carriage (*R.* v. *Smithers*; *Ex parte Benson* (3)). Compare s. 98, which was not treated as a foundation for inferring that aeroplanes were outside s. 51 (i.). Many contracts of an inter-State character do not end in the passing of goods from one State to another. Nor is there any justification for excluding intangibles from the freedom conferred by s. 92. To do so would be narrow and pedantic. [He referred to *Freeman* v. *Hewit* (4); *R.* v. *Gates*; *Ex parte Maling* (5); *Gibbons* v. *Ogden* (6); *Forget* v. *Baxter* (7).] The Attorney-General cited certain cases to show that banking was not a trade. In *Harris* v. *Amery* (8) *Willes* J. made the observation that, strictly, banking was not a trade only because the reference to it in the Act there under consideration showed that business had a wider meaning. *In re a Debtor* (9) has no bearing on the matter. *Smith* v. *Anderson* (10) has no relevance except for the quotation of the passage from *Willes* J. It may be that in international trade the sale of goods is the main thing and that carriage, insurance and finance are ancillary; it does not follow that they do not fall within the conception of trade, to say nothing of intercourse. The second matter relied upon by the Attorney-General was the economic function of banking as a means of providing a medium of exchange and credit; but that is only a result or function of the activities that are trade, commerce and intercourse. The third was that communication over State lines was nothing but an accidental feature of some part of the business done, and reliance was placed on the dissent of *Stone* C.J. in *United States* v. *South-Eastern Underwriters Association* (11);

(1) (1936) A.C. 578; 55 C.L.R. 1.
(2) (1936) A.C., at p. 632; 55 C.L.R., at p. 60.
(3) (1912) 16 C.L.R. 99, at p. 118.
(4) (1946) [91 Law. Ed. (U.S.) Adv. Opinions 265, at p. 270].
(5) (1928) 41 C.L.R. 519, at p. 530.
(6) (1824) 22 U.S. 1, at p. 229 [6 Law. Ed., at p. 23].
(7) (1900) A.C. 467, at p. 475.
(8) (1865) L.R. 1 C.P., at p. 154.
(9) (1927) 1 Ch. 97, at pp. 105, 106.
(10) (1880) 15 Ch. D. 247, at p. 259.
(11) (1944) 322 U.S. 533, at pp. 569-571 [88 Law. Ed. 1465].

but banking business is, or involves, intercourse, whether over State lines or not, and what *Stone* C.J. denied was that anything more than inter-State contracts of insurance amounted to inter-State commerce. The fourth was that the presence of "intercourse" in s. 92 displaced the application of the American decisions about communication. It is odd reasoning and is inconsistent with *Huddart Parker Ltd.* v. *The Commonwealth* (1). It makes the application of the American decisions to s. 92 *a fortiori*. The fifth point made was that in banking transactions the credit does not "move"—there is no movement between States, even if banking is a trade. That is an economic and theoretical interpretation inconsistent both with common understanding and reality. In any case, the documents evidencing and carrying out the transactions do move. The sixth point was that to speak of the purchase of credit, of bills of exchange and of "money" is to use a merely figurative expression. It was said that the Privy Council had resorted to such a figurative expression in *Punjab Co-operative Bank Ltd., Amritsar* v. *Income Tax Commissioner, Lahore* (2); but in the *Alberta Case* (3); s.c. on appeal, *Attorney-General for Alberta* v. *Attorney-General for Canada* (4), there are citations fully justifying the application of such terms. Seventhly, an article in the *Annals of the American Academy of Political Science* was relied upon for the view that, while banking might be within the commerce power as an incidental matter, it was not commerce itself; but the view which is not legal has neither authority nor weight. Eighthly, it was said that, because many customers use banks for non-commercial transactions, banking was not trade or commerce; but the purpose of the customer has no bearing on the character of the relation or service, any more than the purpose or occasion for which a tailor's customer buys his clothes has any effect on the character of the tailor's business as trade and commerce. Ninthly, it was relied on that Chapter IV. of the Constitution, in which s. 92 occurs, is headed "Finance and Trade"; but "finance" there means public finance: it is not a distinction between the business of finance and the business of trade or commerce. Tenthly, it was said that in s. 51 (xx.) there was a contrast between trading and financial corporations; but that is not mutually exclusive. There is no more in this point than in the supposed contrast drawn between the phrase "banking extending beyond the limits of the State concerned," in s. 51 (xiii.), and "trade and commerce among the States," in s. 51 (i.) and the similar phrase in s. 92. The eleventh

(1) (1939) 44 C.L.R., at p. 527.
(2) (1940) A.C. 1055, at p. 1072.
(3) (1938) S.C.R. (Can.) 100.
(4) (1939) A.C. 117.

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point was that the decisions in Canada meant that banking was not trade and commerce. A proper examination of the three cases relied on shows the contrary to be the case : see *Citizens Insurance Co. of Canada* v. *Parsons* (1) ; *Toronto Electric Commissioners* v. *Snider* (2) ; *Reference Re Alberta Statutes* (3). Lastly, it was said that the American authorities treated banking as not trade or commerce. There are in fact no express decisions. *Nathan* v. *Louisiana* (4) depended on the business not being inter-State : its reasoning is criticized in *Prentice and Egan, The Commerce Clause of the Federal Constitution* : see *Willoughby, Constitutional Law of the United States*, vol. 2, p. 741 : cf. *Thomas Reed Powell* in (1944) 57 *Harvard Law Review*, p. 937. In *Engel* v. *O'Malley* (5) *Holmes* J. regarded the transactions as commerce, but not inter-State. In *Republic Acceptance Corporation* v. *Bennett* (6) there was no inter-State element. As to the argument of the Attorney-General that s. 46 (4) is severable or distributable, s. 6 cannot produce the result that s. 46 applies only to intra-State business. The business cannot be so severed. The section does not contemplate a partial taking over or prohibition. The notice must relate to the whole business and cannot be restricted or severed. The argument that s. 92 is not infringed because the section deals with business as a whole is inconsistent with the notion of severance. Further, as a practical matter, inter-State business cannot be extricated from other business ; what is carried on is a business as an entirety. Under s. 46 (8) carrying on any of the inter-State transactions would establish an offence. You cannot rewrite the section. The provisions for the acquisition of shares, for the assumption of management and for the acquisition of assets are avowedly designed to effect the purposes of the Act, viz., the prohibition of private banking, including inter-State banking. On the narrowest view of s. 92, they are invalid because they are aimed at the prevention of the business of banking, including inter-State banking, and at the carrying out of commercial dealings by that means. The acquisition cannot be regarded as neutral nor the interference as consequential or incidental. Banking by inter-State transactions is trade, commerce and intercourse among the States ; even if object, purpose and motive are material, they are found here. There are no other purposes or motives, no disease, famine, &c. The *Airways Case* (7)

(1) (1881) 7 App. Cas. 96, at pp. 111, 112.
(2) (1925) A.C. 396, at p. 409.
(3) (1938) S.C.R. (Can.), at pp. 116, 117.
(4) (1850) 49 U.S. 73, at p. 180 [12 Law. Ed. 992, at p. 996].
(5) (1911) 219 U.S. 128, at p. 139 [55 Law. Ed. 128].
(6) (1922) 20 Michigan S.R. 2109.
(7) (1945) 71 C.L.R. 29.

is directly in point and covers the case. Even if banking is not itself trade, commerce or intercourse, the trader using banks to effect his transactions is engaged in trade, commerce and intercourse, and the private individual, at least, in intercourse. The direct and necessary operation of the law is to make his trade, commerce and intercourse unfree. It submits him to the control of a government bank—to governmental control. The purpose is to put into effect a scheme to control trade and commerce in the use of banking. That is seen in the terms of the Act and is shown *aliunde*. The defendants say they need to concentrate banking in government control in order to keep the level of trading at the point desired. The provisions will not be good as to some banks and bad as to others. So, whether a given bank does none or more or less inter-State business is not material. If the Court thinks that banking is only an instrument of commerce and not in itself commerce, that is not decisive, because subject matter is not the test under s. 92. It still operates across State lines to subject the trader to governmental control. If purpose is required, it is there. For these reasons s. 92 renders the provisions bad.

The Attorney-General, by leave. In opening, counsel for the plaintiffs put the view that s. 46 gave power exercisable independently of the powers which flow from the use of either s. 13 or s. 22. The defendants adopted the view that s. 46 was an independent and severable provision. But in the reply plaintiffs' counsel took the position that s. 46 is interdependent with the acquisition provisions and that it cannot stand without them. That is wrong. Section 3 (*c*) expresses a separate object which s. 46 carries out. No doubt, if the whole statute is valid, s. 46 (4) would be used as the end process. But Part VII., as the heading shows, is drafted as a provision capable of separate and independent use and operation. It has been devised so that it will have an independent existence, and s. 6 has been drawn as a statement of several separate objects, not a collection of objects. Next, cases were cited to the Court as inconsistent with the adoption of any test but that of "pith and substance" for determining whether a given law was one made with respect to the subject matter of a head of Federal legislative power. An examination of those cases will show that none requires or establishes the adoption of that test. Then, as to s. 51 (xx.) of the Constitution, there has been no answer to the submission that, according to their reasons in *Huddart Parker & Co. Pty. Ltd.* v. *Moorehead* (1), *Griffith* C.J., *Barton* and *Higgins* JJ.

(1) (1909) 8 C.L.R. 330.

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would have held that the Parliament might terminate the right of foreign and of financial and trading corporations to carry on business in Australia. It is submitted, *quam fortissime*, that the power of legislating in respect of these corporations cannot be limited to recognition and its consequences. No restriction can be adopted which would leave s. 46 outside the power. The consideration that trading and financial corporations formed within the limits of the Commonwealth will for the most part be incorporated and armed with powers by or under State law does not tell against the view that s. 51 (xx.) enables the Federal Parliament to prohibit their carrying on a trading or a financial business. The power covers foreign corporations equally. In the argument of the *Colonial Sugar Co.'s Case* (1) Sir *Robert Finlay* dealt fully with s. 51 (xx.) and stressed the impossibility of distinguishing between foreign corporations and the trading and financial corporations formed within the Commonwealth. The latter were regarded as "foreign" in every colony or State except that of incorporation. The observations of their Lordships during the course of the argument strongly tend to support the view that s. 51 (xx.) gives a power to make a general law as to such corporations. As to s. 24 of the Act its purpose is to provide for the orderly transition of private banking into the control of the Commonwealth Bank: cf. s. 3, and sub-ss. (4)-(8) of s. 24, and s. 9. An examination of s. 24 makes it clear that it cannot be repeatedly used with respect to a given company: it could not be applied to a business that came to have nothing to do with banking. The private banks are in fact engaged in banking, and s. 46 (2) ensures that they shall continue so to be engaged, until taken over. Section 3 says in the plainest terms that it is aimed at banking business. The need to provide for such a transition explains and justifies the assumption of liabilities. As to s. 13, the Commonwealth obtains the exact property pursuant to s. 51 (xxxi.) of the Constitution, which the shareholder had, and that implies registration: see *Inland Revenue Commissioners* v. *Crossman* (2). It is the purpose of s. 14 (1) of the Act to secure registration or its equivalent: it is a shadow of s. 13. Section 51 (xxxi.) of the Constitution speaks of purposes for which the Commonwealth may make laws. It must be a matter in respect of which the Commonwealth may make laws; and it is not contended that any other purpose suffices. What is submitted is that, if you find a power, whether it be s. 51 (xiii.), (xx.), or (xxxix.), under which the Commonwealth may authorize the voluntary acquisition of property, then it is a matter or purpose

(1) (1914) A.C. 237.

(2) (1937) A.C. 26, at pp. 52, 53.

also for the exercise of the compulsory power authorized by s. 51 (xxxi.). For the Commonwealth Bank to hold one or all shares in a private bank is a matter with which the Commonwealth Parliament may deal. Federal legislative power extends to authorizing the Commonwealth Bank to purchase and to hold such a share or shares. It is, accordingly, within s. 51 (xxxi.) to authorize a compulsory acquisition thereof. Section 13 of the Act is justified independently of Division 3. The *Reference re Alberta Statutes* (1) shows that the Province had appointed three out of five directors. As to the argument based on *James* v. *The Commonwealth* (2) (to the effect that the Privy Council denied power to choose those to take part in inter-State trade), the quota system was embodied in the conditions of the licence and in the regulations, and it was to the quota system that the Privy Council addressed the passage: see, too, (3). If the dried fruit growers did not accept the quota restriction, they got no licence; if they did, their trade was limited. In *Hartley* v. *Walsh* (4), there was a fencing off of a trade. In the *Airways Case* (5) there was no decision that everyone had a right to run an air service inter-State. As to the application of the Canadian test of "pith and substance," in every case decided on s. 91 and s. 92 of the *British North America Act* it is a question of excluding something from the power. It is necessary to put the questioned legislation within one or other of two groups of exclusive powers. It must be determined on balance to which it is more suitably referred. As to s. 75 (iii.) of the Constitution, it must be borne in mind that it is only the jurisdiction of the High Court which it confers. All other jurisdictions may be excluded on the matters to which s. 75 relates. Like s. 92, it is self-executing.

Cur. adv. vult.

Aug. 11.

The following written judgments were delivered:—

LATHAM C.J. In these five actions referred for trial to the Full Court the plaintiffs challenged the validity of the *Banking Act* 1947, enacted by the Commonwealth Parliament.

Introduction.

The Act does not apply to State banking, but, with this exception, it would, if put into full operation, give a monopoly of banking in Australia to the Commonwealth Bank of Australia constituted

(1) (1938) S.C.R. (Can.) 100.
(2) (1936) A.C., at p. 633; 55 C.L.R., at p. 61.
(3) (1936) A.C., at pp. 607, 608; 55 C.L.R., at pp. 37, 38.
(4) (1937) 57 C.L.R. 372.
(5) (1945) 71 C.L.R. 29.

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under the *Commonwealth Bank Act* 1945. The 1947 Act applies to fourteen named companies carrying on banking business in Australia. Eight of these companies are incorporated in Australia, three in England and three elsewhere. They are called "private banks" in the Act.

The Act provides means for the acquisition of shares by the Commonwealth Bank in any private bank by agreement or, in the case of the Australian banks, by compulsion; for the management of Australian banks by directors chosen and appointed by joint action of the Commonwealth Bank and the Treasurer of the Commonwealth; for the taking over by the Commonwealth Bank of the business in Australia of any of the banks by agreement or by compulsion; for the acquisition by the Commonwealth Bank of the assets of any private bank in Australia and elsewhere by agreement or by compulsion; for transfer of liabilities of the banks to the Commonwealth Bank; for the payment of compensation as determined by a Court of Claims; for the prohibition of the carrying on of banking by any of the private banks upon notice given by the Treasurer; and for the taking over of the staffs of the plaintiff banks by the Commonwealth Bank. The operation of all the provisions of the Act depends upon some action by the Commonwealth Treasurer in giving a notice to a particular bank or approving a recommendation or agreement made by the Commonwealth Bank.

This legislation is valid only if it is legislation with respect to a subject matter with respect to which the Commonwealth Constitution gives power to the Commonwealth Parliament to make laws and if it does not infringe any relevant constitutional prohibition. The plaintiffs contend that the Act is not legislation with respect to any such subject matter and, in particular, that it is not authorized by the powers which the Constitution, s. 51, vests in the Commonwealth Parliament to make laws with respect to :—

> "(xiii.) Banking, other than State banking; also State banking extending beyond the limits of the State concerned, the incorporation of banks, and the issue of paper money:"
>
> "(xx.) Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth:"
>
> "(xxxi.) The acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws:"
>
> "(xxxix.) Matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the

Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth."

It is contended for the plaintiffs that the fact that the legislation applies to banks does not make it legislation with respect to "banking" and that it is not a law on that subject; that s. 51 (xx.) does not apply to banking corporations, and that it does not authorize in the case of any corporation the making of laws prohibiting the carrying on of business by the corporation or controlling the manner of carrying on such business; that the acquisition of shares and assets for which the Act provides is for various reasons not acquisition of property for a purpose in respect of which the Commonwealth Parliament has power to make laws; that the acquisition is not upon just terms; that the provisions with respect to the Court of Claims oust the jurisdiction conferred by the Constitution upon the High Court, and are therefore invalid; and that the provisions under which the Commonwealth Treasurer at his arbitrary will can prohibit a bank from carrying on banking business are not authorized by the Constitution.

It is also argued for the plaintiffs that the provisions with respect to the acquisition of shares and assets and the prohibition of carrying on banking business infringe s. 92 of the Constitution, which provides that "trade, commerce and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free."

The plaintiffs further contend that the Act is invalid as interfering with the performance of essential governmental functions by the Governments of the States in relation to the management, custody and control of public moneys, and that it is invalid as being inconsistent with provisions of the Financial Agreement between the Commonwealth and the States (see *Financial Agreement Act* 1944, Schedule) to which overriding effect is given by s. 105A of the Constitution.

The 1947 Act deals only with certain specified banks—but they are all the private banks which in fact carry on business in Australia. No bank can carry on business in Australia without the authority of the Governor-General: *Banking Act* 1945, ss. 6, 7. Accordingly, the 1947 Act, if put into full operation, together with the last-mentioned Act, enables the Commonwealth through the Treasurer and the Commonwealth Bank to control or to conduct the whole of the banking business of Australia except in the case of State banks.

The Act, if put into full operation, provides for the nationalization of banking, but the questions before the Court are not to be deter-

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mined by any opinion with respect to the merits or demerits of such a policy. Such opinions have nothing to do with any of the legal questions to be decided by the Court, which are whether the legislative provisions which the *Banking Act* 1947 contains are within the constitutional powers of the Commonwealth Parliament, and not whether the policy which they represent is wise or prudent or desirable.

The constitutional validity of a statute, it should be observed at the outset, cannot be determined by the fact that Parliament desires or hopes to attain a particular object by the legislation (see *South Australia* v. *The Commonwealth* (1) and cases there cited), but by what the law actually enacts. Thus in the present cases the questions are whether the particular provisions of the Act are valid. It is not a general question as to whether the Commonwealth Parliament has power by some means or other to acquire a monopoly of banking (other than State banking) for a corporation controlled or controllable by the Commonwealth. The question of power must be separately considered in relation to the particular means adopted in the Act; for example, the acquisition provisions, the prohibition provisions—are these specific provisions within power or beyond power ? Another operation of the Act, if valid, is to enable directors appointed by the Governor of the Commonwealth Bank and approved by the Commonwealth Treasurer to control Australian banks. Is such legislation valid ? Another operation of the Act, if valid, will be to prevent some or all of the private banks from carrying on any banking business in Australia. Is such legislation valid ? These are examples of the actual operation of the Act. It is such particular and precise matters which have to be considered in relation to the provisions of the Commonwealth Constitution.

" Private bank " means a body corporate the name of which is set out in the First Schedule : 1947 Act, s. 5. These corporations are divided in that schedule into three classes : Part I., private banks incorporated in Australia (eight banks) ; Part II., private banks incorporated in the United Kingdom (three banks) ; Part III., private banks incorporated elsewhere (three banks).

In the first of the five actions now before the Court all the private banks incorporated in Australia (Part I. of First Schedule) are plaintiffs. Shareholders and directors are also parties (except in the case of the Queensland National Bank Ltd., which is in liquidation) who sue on behalf of themselves and all other shareholders on any register in Australia of the bank, and other shareholders who

(1) (1942) 65 C.L.R. 373, at p. 412.

sue on behalf of themselves and of other holders of shares on any register outside Australia of the bank.

In the second action the banks incorporated in England are the plaintiffs. In the other three actions the States of Victoria, South Australia, Western Australia and their respective Attornies-General are plaintiffs.

The defendants are the Commonwealth of Australia, the Treasurer of the Commonwealth and the Governor of the Commonwealth Bank of Australia.

Claims of the Plaintiff Companies.

In the first and second actions (in which the Australian and English banks respectively are plaintiffs) the plaintiffs claim declarations that the *Banking Act* 1947 is beyond the powers of the Parliament of the Commonwealth, contrary to the Constitution of the Commonwealth, and void and, alternatively, declarations that specified sections are void. There is also a claim for injunctions restraining the Commonwealth Treasurer and the Governor of the Commonwealth Bank from giving notices &c. which would bring the Act into operation. The claims of the English banks are substantially identical with those made by the Australian banks, with certain omissions in respect of sections which do not apply to the English banks, as, for example, ss. 17-19, purporting to authorize the Governor of the Commonwealth Bank to appoint directors of a bank—a provision which is limited to Australian banks.

In the actions in which the States are plaintiffs claims are made that the *Banking Act*, or certain provisions thereof, are invalid, and injunctions are sought against the Treasurer giving notices under certain sections for the purpose of bringing the Act into operation. In the actions in which the States of South Australia and Western Australia are plaintiffs a declaration is sought that certain provisions of the Act are breaches of the Financial Agreement contained in the schedule to the appendix to the amending *Financial Agreement Act* 1944.

The plaintiffs applied for interlocutory injunctions in each action. Affidavits were filed in support of the motions and in reply. The parties agreed that the motions for interlocutory injunctions in each action should be treated as the trial of the action, and also that the actions should be heard together. An order was made that the motions be treated as the trials of the actions and be heard together upon the affidavits filed in the applications for interlocutory injunctions.

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Constitution of Plaintiff Companies.

The Australian banks are incorporated under the Companies Acts of the various States with the exception of the Bank of New South Wales which was incorporated under the *Bank of New South Wales Act* 1850. The English banks are incorporated in Great Britain—the Bank of Australasia under a Royal Charter of 1834 as amended, the Union Bank and the English Scottish and Australian Bank under the English Companies Act.

The memoranda of association of the Australian private banks in all cases authorize the banks to carry on the business of banking. There is to be found in either the memorandum of association or the articles of all the plaintiffs express power in some form to sell the business and undertaking of the bank—in some cases subject to ratification by the company in general meeting. The memoranda of association also contain powers, in the case of all the Australian banks except two, to amalgamate with other banks or to purchase the business of other banks.

The memoranda of association of the plaintiff banks in several cases give power to carry on any business which may conveniently be carried on with banking business and to carry on any business of a financial character ; that is, the plaintiff banks are not absolutely limited by their memoranda of association to what is strictly banking business. In some cases there is express power to act as executor or trustee and to enter into guarantees.

The deed of settlement of the Bank of New South Wales provides that no corporation shall be a shareholder.

The articles of association of three of the plaintiff banks provide that no member shall hold more than a fixed number of shares. In the case of the Bank of New South Wales the limit is 1/25th of the paid up capital ; in the case of the Commercial Banking Co. of Sydney and the Ballarat Banking Co. Ltd. the maximum number of shares that any member can hold is 2,000.

All the banks concerned in this litigation, Australian and English, have provisions in their articles of association dealing with the voting power of members. In some cases one vote is given for every five, or some other small number of shares, and there is a provision that no vote is given beyond a certain fixed number.

The articles of association of all the banks, Australian and English, contain restrictive provisions with respect to the transfer of shares. In some cases the approval of a transferee by the directors is required in the case of any transfer of shares : in other cases, only when the shares are not fully paid or the company has a lien upon them.

The articles of association of all the banks provide for the election of directors by shareholders.

Evidence.

The evidence upon which the plaintiff banks relied was contained in affidavits of experienced banking officers.

The shareholders in the Bank of Adelaide, the Ballarat Bank and the Brisbane Bank are all on registers which are kept in Australia. In the case of all the other banks, there are principal registers and branch registers. Registers of these banks are kept at several of the State capital cities in Australia and in some cases in London and New Zealand. The shares on the Australian registers varied in number from sixty-eight per cent to ninety-nine per cent of the shares issued (figures as at 19th December 1947). There is nothing to prevent the registers outside Australia being closed at the will of the shareholders or directors, with the result of bringing all the shares on to Australian registers.

The Australian private banks have nearly 1,600 branches in Australia, New Zealand and London and many hundreds of agencies. These banks have about 1,038,000 customers' accounts. The English private banks have about 500 branches and a large number of agencies. There are about 250,000 accounts in these banks.

The customers of the private banks include several State Governments, and those banks hold some hundreds of accounts of State Government Departments of one kind and another. In the case of the State of New South Wales and the State of Victoria formal agreements have been made under the provisions of State Audit Acts between the Governments and certain of the banks for the conduct of the banking business of the State Government. Most of the private banks hold accounts of State Savings Banks.

The affidavits filed on behalf of the plaintiffs in the first two actions show that the plaintiff banks are organized upon an Australian basis and that the members of their staffs are interchanged between branches in the different States. The banks conduct a great deal of inter-State banking business, the nature of which is explained under the following heads :—

"(*a*) the collection and negotiation of inter-State Bills of Exchange, cheques and Promissory Notes,

(*b*) the transfer of funds inter-State,

(*c*) the establishment of inter-State credits,

(*d*) the issue and negotiation of travellers cheques."

Transactions of this character involve large numbers of communications between the branches of a bank or the branches of one bank and the branches of another bank in different States and the transmission of many documents across State boundaries. The nature of these transactions is stated in detail in the affidavits filed on

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behalf of the plaintiffs. The amount of money dealt with in inter-State banking operations carried on by the private banks is stated to be "of the order of £300,000,000 per annum."

The evidence for the plaintiffs shows that the conduct of modern business and, in particular, of trade and commerce, requires for its normal operation the utilization of banking facilities. These banking facilities in Australia are provided principally by the private banks.

Inter-State and intra-State banking operations are not only closely associated, but are so interwoven that it would be difficult to disentangle them and treat them separately. What begins as an intra-State transaction may lead up to and develop into a inter-State transaction and vice versa, and intra-State elements and inter-State elements may appear at several stages of the same transaction. The funds of the banks are used indifferently for inter-State and intra-State transactions.

The affidavits filed on behalf of the plaintiffs show that at any given time thousands of transactions are in progress which involve the transport or transmission of goods or funds in which the banks are interested. The persons with whom these transactions are conducted will be in many countries and will possibly be changing their residence from time to time. Upon these facts an argument is founded that it would be difficult, if not impossible, to distinguish between assets and liabilities which should be regarded as being situated in Australia and those which should be regarded as being situated outside Australia (see definition of Australian assets and Australian liabilities in s. 5 of the Act).

In the affidavits filed on behalf of the plaintiffs in the actions in which the States are parties it is stated that banking facilities are essential in order to enable a State to carry on and perform its necessary governmental functions. The State Audit Acts provide for the appointment of banks by the Governor in Council into which public moneys are to be paid and in pursuance of these provisions a number of the plaintiff banks have been so appointed and they transact the banking business of the States. As already stated, in the case of Victoria and New South Wales formal agreements exist between certain of the banks and the Governments with respect to the public accounts and the transaction of banking business for State Governments, and those Governments maintain a large number of accounts with the private banks.

There is a Commonwealth Savings Bank which is associated with the Commonwealth Bank. The Commonwealth Bank is stated to be an active competitor for Savings Bank business with

the State Savings Bank of Victoria and South Australia and therefore, it is said, it would not be feasible to appoint the Commonwealth Bank as agent for the existing State Savings Banks or for others which might be established.

In the action in which the State of South Australia is the plaintiff an affidavit directs attention to the balance sheet of the Commonwealth Bank showing that the only assets available to pay compensation to shareholders of the private banks consist of Commonwealth Government securities, including Commonwealth Treasury bills and debentures, of the aggregate face value of about £500,000,000. No public loan for the purpose of paying compensation has been authorized by the Loan Council in accordance with the Financial Agreement. In the State of South Australia there is a State bank, but at present it operates on a rather small scale. The principal banking account of the State is kept with the Commonwealth Bank. The affidavit records an objection to the State being compelled to do all its business with the Commonwealth Bank for the reason that "if the Treasurer of the Commonwealth were to give to the Council of the Commonwealth Bank a direction as to its policy which affected prejudicially or sought to control the banking business of the State or any part thereof, the State would be unable to avoid such prejudice or escape such control by transferring its banking business to any other bank or conducting it by any other means."

The State bank has made arrangements with the private banks and the Commonwealth Bank for clearing-house facilities and providing moneys for customers at places where the State bank has no branch or agency. The affidavit expresses the following opinion: "In order to enable the State to perform its governmental functions it is essential that it should be able to have independence and freedom from the control of any other Government, and any governmental instrumentality, and any person or body of persons or any corporation, in the selection of a bank or banks which will act as the bank or banks for the State."

In the action in which the State of Western Australia is the plaintiff the evidence for the plaintiffs is similar to that in the case of the State of South Australia. There is a State bank in Western Australia operating upon a small scale.

The evidence for the defendants consists in the first place of an affidavit by Professor L. G. Melville, Chief Economic Adviser to the Commonwealth Bank, a Fellow of the Institute of Actuaries, and formerly Professor of Economics in the University of Adelaide. Professor Melville has had extensive experience in relation to

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banking. He refers to the report of the Royal Commission on Monetary and Banking Systems in Australia dated July 1937. He states that the Australian banking system consists of the Commonwealth Bank and the Commonwealth Savings Bank, State banks in New South Wales (the Rural Bank of New South Wales), South Australia and Western Australia, State Savings Banks in Victoria and South Australia, private banks specified in the First Schedule to the *Banking Act* 1947, and the Agricultural Banks of Queensland and Tasmania. Reference is also made to pastoral and finance companies and building societies which carry on a limited form of banking business but not the general business of banking, which have been exempted by the Treasurer of the Commonwealth under s. 10 of the *Banking Act* 1945 from certain of the provisions of that Act.

Professor Melville refers to the fact that the number of banks in Australia has been reduced by amalgamations and other means to ten since 1893, when there were twenty-three banks. Evidence as to the increase of trade and commerce in Australia since 1893, as to the facilities provided by the Post Office for transmission of money by money orders and postal notes, and a statement of opinion that the Commonwealth Bank will, when the *Banking Act* 1947 is in operation, be capable of providing full banking facilities without any adverse effects on Australian business were objected to. This evidence is, in my opinion, inadmissible.

With respect to the suggested difficulties in the way of determining the location of assets and liabilities, Professor Melville points out that under ss. 40 and 41 of the *Banking Act* 1945 a weekly statement of liabilities and assets within Australia is prepared and delivered to the Commonwealth Statistician, no difficulties being experienced in practice in the performance of this obligation. But the fact that there may, in some cases, be difficulties in determing the locality of assets or liabilities cannot have any bearing upon the constitutional validity of the Act.

The opinion is expressed by Professor Melville that the Commonwealth Bank will be able to pay in cash any required amount of compensation and it is stated (as the fact is) that the Commonwealth Bank has power to expand credit without any limitation depending upon the value of the assets held by the bank at any particular time. The extent to which this power is exercised on particular occasions will depend upon the policy adopted by the bank.

It is further pointed out that the course of banking business is the same in inter-State as in intra-State transactions.

Much of Professor Melville's affidavit consists of argumentative material relating to the function of banks in relation to the creation of credit, and expounding, in particular, the theory of central banking. He expresses the opinion that the primary functions of the private banks are to borrow and to lend and to recall credit.

The working of exchange settlement accounts, whereby cheques drawn on the various banks are cleared, is explained. The banks maintain exchange settlement accounts with the Commonwealth Bank, and through these accounts inter-bank liabilities are adjusted. The transmission of funds by a private bank from one State to another is generally effected through an exchange settlement account in the Commonwealth Bank.

Professor Melville explains the relation of trading banks to a central bank which is "a banker's bank" controlling credit and monetary policy. Legal tender in Australia at the time when the affidavit was sworn amounted to about £203,000,000, but the the amount of credits in the deposit accounts (excluding accounts of Governments and other banks) in all banks amounted to £1,560,000,000, the difference, £1,357,000,000, representing credit created by the banks. This creation of credit was controlled by the Commonwealth Bank under the *Banking Act* 1945. The banks determined their policy in relation to making advances by reference to the amount of their cash reserves, but the policy of one bank was necessarily affected by the policy of the other banks, and the banking system as a whole was subject to a large degree of control by the central bank. The banks were compelled under s. 20 of the *Banking Act* 1945 to maintain in special accounts with the Commonwealth Bank amounts determined by the Commonwealth Bank under that Act. In November 1947 the amount standing to the credit of the special accounts of the plaintiff banks was £249,000,000. The Commonwealth Bank could, by requiring additions to or permitting subtractions from the special accounts, exercise an effective instrument of credit control. Under s. 27 of the *Banking Act* 1945 the Commonwealth Bank had the power of determining the policy in relation to advances to be followed by private banks. This power had been exercised by giving to private banks extensive and detailed directions with respect to the classes of advances to be made and the matters to be taken into consideration in making advances. The degree of control exercised by the Commonwealth Bank was illustrated by reference to a list of subject matters in respect of which directions had been given to the private banks by the Commonwealth Bank. These subject matters included the following:—

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"Construction of new buildings, alterations and additions to, and repair of existing buildings.
Investments in shares, stock, &c.
Retailers.
Agricultural, pastoral and dairying production.
Semi-governmental and local authorities.
Advances to take up Commonwealth Loans.
Purchase of real estate.
Financing of hire purchase transactions and cash order businesses.
Manufacturers.
Advances to repay existing mortgages or retire debts which have not yet matured.
Amusement and sporting activities.
Advances for the purpose of meeting taxation commitments.
Wholesalers, manufacturers' agents, and indent agents, selling and commission agents.
Exports.
Imports.
Establishment of new businesses or purchase of an existing business.
Ex-servicemen.
Fixed deposits.
Speculative buying or holding of commodities.
Production and exploitation of raw materials.
Probate duties and payment of legacies.
Transport (including aviation and shipping).
Personal needs.
Companies and/or their subsidiaries and persons resident outside the sterling area."

Reference is also made to the fact that under s. 28 of the *Banking Act* 1945 the Commonwealth Bank has power to limit the purchase by private banks of Government securities, and also, under s. 39, to control the rates of interest payable to or by private banks.

Professor Melville explains how the central bank affects the amount of credit available by issuing Australian notes, by financing Commonwealth and State Government operations, by purchasing or subscribing to securities, by granting loans to customers and by acquiring overseas funds. By the use of these means the Commonwealth Bank was able to regulate the volume of money in the community and thereby facilitate and maintain not only trade and commerce, but also production, manufacture and many other important activities of its citizens.

The affidavit of Mr. G. M. Shain, Deputy Governor of the Commonwealth Bank, sets out the history of the Commonwealth Bank and its functions as a general banker and as the Commonwealth Savings Bank.

Mr. S. G. McFarlane, Secretary to the Treasury, states in his affidavit that until 1930 the State Governments obtained necessary temporary financial accommodation by overdraft from banks in Australia, but that thereafter this banking accommodation (particularly for the purpose of financing the Governments during annual lags in receipt of revenue) had in fact been provided by the issue of Commonwealth Treasury bills.

The affidavits in reply of the plaintiffs refer to the extent of inter-State operations and restate that the private banks sometimes themselves become the owners of drafts and the pledgees of bills of lading. The affidavit of Mr. S. J. Gandon in reply included the following paragraph :—" In each of the countries in which it carries on business the plaintiff the Bank of New South Wales has numerous and valuable rights against and is subject to numerous and substantial obligations in favour of persons who are not customers of that Bank and which rights and obligations do not arise out of any relation of banker and customer. From my knowledge of the nature of the businesses carried on by the other private trading banks I am of opinion that the same is true of each of such other banks." The banks own, or lease, for example, many buildings in the Commonwealth and elsewhere. Accordingly, they have many rights and obligations as property owners.

A further affidavit in reply was sworn by Professor Torleiv Hytten, Economist to the Bank of New South Wales, Mr. Donald Henry Merry, Mr. A. J. Tyrer and Mr. G. R. Mountain. All these gentlemen are experienced in banking and economics. The effect of their affidavit is that in their opinion the essential function of trading banks is " to transact general banking business with the public. The essential function, on the other hand, of a central bank is to exercise control over the volume of credit. A central bank commonly acts as a banker's bank and as banker for the Central Government. It is not an essential function of a central bank as such to transact general banking business with the public." It was accordingly argued in the affidavit that a central bank in the true sense necessarily involved the co-existence of other banks which were trading banks and that the operations and functions of those trading banks were in substance and essence the same whether there was a central bank or not. A central bank was only one of several means

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by which to influence (*inter alia*) the volume of production, the flow of trade and the level of employment. Among other such means were fiscal policy, including taxation and loan operations, price control, customs regulations, &c. Accordingly, it was submitted that the abolition of independent trading banks would not be a development of central banking, as Professor Melville was understood to suggest.

Upon this evidence *Dixon* J. made the order for trial before the Full Court and granted interlocutory injunctions preventing the Act being brought into operation until judgment was finally pronounced in the actions or until further order of the court.

Banking Act 1947.

Part I.

Part I. of the Act contains the following provision in s. 3:—"The several objects of this Act include—(*a*) the expansion of the banking business of the Commonwealth Bank as a publicly-owned bank conducted in the interests of the people of Australia and not for private profit; (*b*) the taking over by the Commonwealth Bank of the banking business in Australia of private banks and the acquisition on just terms of property used in that business; (*c*) the prohibition of the carrying on of banking business in Australia by private banks."

It is a practice in some countries to introduce statutes with a statement of the objects of the legislature in making an enactment and an explanation of its general character. Such a statement is useful for the information of legislators and of the public. Where, however, a Parliament, as in the case of the Commonwealth Parliament, has only limited powers, the declaration of Parliament that a law is enacted for the purpose of securing the stated objects cannot bring an enactment within power if its operative provisions have no real connection with a subject with respect to which the Parliament has power to make laws. Such a declaration is entitled to respectful consideration, but it cannot be decisive upon a question of validity. Under a unitary constitution, a parliament may be the judge of its own powers, but that is not the case under the Federal Constitution of Australia.

The validity of many of the provisions of the Act is challenged. These provisions must be considered according to their own terms and their actual operation, and the belief of Parliament that they would assist in achieving particular objects cannot in itself establish their validity, even if the objects specified are themselves directly within parliamentary power. Each provision must be considered in

the context of the Act, independently of any such statement of objects—though such a statement may suggest a connection between the legislation and a relevant subject matter: cf. for example, *Andrews* v. *Howell* (1). These considerations become important in relation to the power conferred upon the Federal Parliament by s. 51 (xxxi.) to make laws for the acquisition of property on just terms for any purpose in respect of which the Parliament has power to make laws.

Section 5 contains various definitions. "Australian assets and liabilities" means assets and liabilities situated, or deemed by law to be situated, in Australia. "Australian private bank" means a private bank which was formed within the limits of the Commonwealth and the name of which is set out in Part I. of the First Schedule. "Australian shares" means shares situated, or deemed by law to be situated, in Australia. "Private bank" means a body corporate the name of which is set out in the First Schedule.

Part II.

Part II. consists of s. 6, which is a declaration of legislative intention. It is in the following terms:—"It is hereby declared to be the intention of the Parliament—(*a*) that if any provision of this Act is inconsistent with the Constitution, that provision and all the other provisions of this Act shall nevertheless operate to the full extent to which they can operate consistently with the Constitution; (*b*) that the provisions of the last preceding paragraph shall be in addition to, and not in substitution for, the provisions of section fifteen A of the *Acts Interpretation Act* 1901-1941; and (*c*) that this section and section fifteen A of the *Acts Interpretation Act* 1901-1941 shall have effect notwithstanding that their operation may result in this Act having an effect different, or apparently different, in substance from the effect of the provisions contained in this Act in the form in which this Act was enacted by the Parliament." This provision requires that the Act shall be interpreted as far as possible so as to be valid, though parts of it may be declared to be invalid. Thus the Act is to be construed upon a general presumption of severability. Each provision is to be given its fullest possible valid operation, even though, by reason of the invalidity of other provisions of the Act, that provision may have an effect which is different from that which it would have had if those provisions had been valid. In *Vacuum Oil Co. Pty. Ltd.* v. *Queensland* (2) in considering the question of the severability of valid from invalid provisions of a statute, *Dixon* J. said (3): "The

(1) (1941) 65 C.L.R. 255, at p. 275.
(2) (1935) 51 C.L.R. 677.
(3) (1935) 51 C.L.R., at p. 692.

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statute will not operate upon the matters within the powers of the legislature unless it is capable of applying to them in the same way and with the same consequences to the persons and things affected." I call attention to the words "with the same consequences." Section 6 (*c*) is directed to the exclusion of the principle there stated. Part I. has declared its intention that effect shall be given to any valid provisions of the Act whatever the consequences may be. But, nevertheless, one provision of the Act may be so dependent upon another provision that the invalidity of the latter necessarily involves the invalidity of the former. The Court cannot re-write a statute and so assume the functions of the legislature.

Whatever view may be taken as to the severability of particular provisions, it is the first duty of the Court to consider the validity of each provision of the Act which is challenged according to its terms, construed in their context. Questions of severability—of necessary dependence of one provision upon some other provision—arise only after questions of construction have been determined.

The provisions of the Act have been so drafted that they can be utilized separately or together in varying combinations, the Commonwealth Bank or the Treasurer of the Commonwealth bringing them into operation by taking specified action—giving a notice or making an agreement. The compulsory acquisition of shares, the cesser of office of existing directors and the substitution of other directors, the compulsory acquisition of assets and transfer of liabilities, and the prohibition against a bank carrying on business, come into operation only when certain notices are given. There is no provision which compels the giving of all of these notices or of any particular one of these notices.

Such notices may be given to one or more of the plaintiff banks or to all of them.

They may be given at the same time or at different times.

They may be given immediately or in the distant future.

The validity of the Act must be considered in relation to all these possibilities, and not merely in relation to the present position of the plaintiff companies in respect of shareholdings, of assets and liabilities, or to the business which at the present time is carried on by them.

Part III. Application of Act.

Section 7 provides that nothing in the Act shall apply to State banking. This section is a recognition of the constitutional limitation involved in s. 51 (xiii.) of the Constitution, which gives to the Commonwealth Parliament power to make laws with respect to

"banking other than State banking: also State banking extending beyond the limits of the State concerned." In *Melbourne Corporation* v. *The Commonwealth* (1) it was held that the words, "State banking," in this provision refer to the business of banking conducted by a State as a banker and not to transactions between a State as a customer and a bank. In this Court the plaintiffs had to argue upon the basis of accepting this decision.

Section 8 provides that the Act shall extend to the territories under the authority of the Commonwealth.

Part IV.

Part IV. is entitled "Expansion of Banking Business of Commonwealth Bank." It consists of four Divisions: Division 1—Preliminary; Division 2—Acquisition of Shares in Private Banks; Division 3—Management of Private Banks; Division 4—Taking over of Businesses of Private Banks.

Part IV. Division 1. Section 9 declares that the powers with respect to the acquisition of shares in private banks and the management of private banks are conferred "for the purposes of facilitating the control by the Commonwealth Bank of the banking business in Australia of private banks and for the purpose of furthering the expansion of the banking business of the Commonwealth Bank."

If, as the defendants contend, the power of the Commonwealth to make laws with respect to banking enables the Commonwealth to make laws in order to facilitate control of banking by the Commonwealth Bank and of furthering its expansion, then s. 9 states purposes with respect to which the Parliament has power to make laws. But, as already stated in relation to s. 3, the declaration by Parliament of its purpose in making a law, though entitled to careful consideration and respect, cannot be conclusive upon a question of validity. The law must really be a law with respect to a subject matter with respect to which Parliament has power to make laws. The declaration by Parliament that it has a particular purpose in view might, in some circumstances, operate to invalidate a law (e.g., by reason of s. 92 of the Constitution), but it can never in itself establish the validity of a law. The Court must consider the actual operation and effect of the actual provisions contained in an enactment apart from any declaration by Parliament itself that in the opinion of Parliament the enactment falls within some particular category.

Section 10 of the Act provides that the provisions of Divisions 2 and 3 of Part IV. shall have effect, notwithstanding anything in

(1) (1947) 74 C.L.R. 31.

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any other law, or in any charter or other instrument, which is inconsistent with those provisions. So far as State laws are concerned, this section states only what the position would have been if the section had not been included in the Act. A Commonwealth law, if valid, prevails over any State law independently of such a provision as s. 10 : see the Constitution, s. 109. So also, a charter or other instrument cannot prevail against a valid Commonwealth law. But, as will be seen, in some cases a Commonwealth law can have a valid operation only with respect to matters the existence and characteristics of which depend upon State laws or charters or other instruments. For example, the Act provides for the acquisition of shares in the plaintiff banks by the Commonwealth Bank. But it is State law or English law which determines what a share in a company is.

Section 11 provides that it shall be the duty of the Commonwealth Bank to provide adequate banking facilities for any State or person requiring them, to conduct its business without discrimination, to observe ordinary banking usages, and not to divulge information except in accordance with the law or customary practices and usages.

Part IV. Division 2—Acquisition of Shares. This Division provides for the acquisition of shares in private banks by agreement or by compulsion. The provisions relating to agreement apply to all private banks. The provisions for compulsion are limited to Australian private banks.

Section 12 contains the provision for acquisition of shares by agreement. It provides that the Commonwealth Bank may, subject to the approval of the Treasurer, purchase all or any of the shares in any of the Australian or English banks at a price not less than the market price of 15th August 1947.

Under the *Commonwealth Bank Act* 1945 s. 13, the Commonwealth Bank has power (*inter alia*) to buy, sell, discount and rediscount bills of exchange, promissory notes and Treasury bills, to buy and sell securities issued by the Government and other securities, and to buy, sell and otherwise deal in foreign currency, specie, gold and other precious metals. Section 12 of the 1947 Act increases the power of the Commonwealth Bank by allowing it to purchase shares in private banks with the approval of the Treasurer.

Section 13 contains the provisions for compulsory acquisition by the Commonwealth Bank of Australian shares in Australian private banks. It provides that :—" Where the Treasurer is satisfied that the majority in number of the shares in an Australian private bank are Australian shares, the Treasurer may, by notice published in

the *Gazette*, declare that, upon a date specified in the notice, the shares in that bank which are Australian shares upon that date shall be vested in the Commonwealth Bank."

Sub-section (2) provides that a notice may be amended from time to time by substituting a later date. Sub-section (3) provides that upon the date specified in the notice the shares in the Australian private bank concerned which upon that date are Australian shares (see definition in s. 5) shall by force of the Act be vested in the Commonwealth Bank. The effect of this section is that shares on the Australian register of an Australian bank will on the date specified become vested in the Commonwealth Bank so as to become the property of the Commonwealth Bank.

Sub-section (4) provides that all other shares in that Australian private bank which, after the specified date, become Australian shares shall, by force of the Act, upon the date when they become Australian shares, be vested in the Commonwealth Bank. Sub-section (5) provides for freeing shares vested in the Commonwealth Bank from trusts, mortgages, charges, &c.

Section 14 provides, first, that the Commonwealth Bank shall be the "holder" of the shares in an Australian private bank which have been purchased or acquired under Division 2 and, secondly, that the Commonwealth Bank shall be "a member" of the Australian private bank in respect of those shares. Section 14 (2) provides that the Commonwealth Bank may transfer any such shares to any person, and that that person shall, for all purposes, be the holder of those shares and be a member of the bank in respect of such shares.

Section 15 provides for the payment by the Commonwealth Bank of fair and reasonable compensation in respect of the acquisition of shares by the Commonwealth Bank under s. 13.

It is convenient to make some short comments upon these provisions before examining other provisions with which they are associated.

As already stated, the Treasurer is under no obligation to give a notice under s. 13 to all the banks or to any particular bank. The legislation as enacted is of indefinite duration and action could be taken with respect to one bank now and to other banks from time to time and possibly many years later.

The plaintiffs drew attention to the fact that the operation of s. 13 depends upon the Treasurer being satisfied that the majority of shares in an Australian bank are Australian shares and it is argued that the Treasurer may make a mistake in forming an opinion as to whether the majority of shares are Australian shares.

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It was suggested that this possibility in some way affected the validity of the section. No satisfactory argument, however, was presented upon this matter. The condition of the operation of the section is that the Treasurer is satisfied as to a particular matter, and not that his opinion on the matter is accurate in fact.

It is further pointed out by the plaintiffs that it is *possible* (though doubtless improbable) that the operation of s. 13 might not, in a particular case, result in the Commonwealth Bank becoming the owner of a majority of shares in a bank or obtaining voting control. It is true that the Act must be considered in relation to any possible operation and not upon any assumption as to the probable proportions of Australian and other shares at the time when the power conferred by s. 13 is exercised. But the particular possibility mentioned cannot affect the validity of the Act. If the Commonwealth Bank did not have sufficient shares to control voting by shareholders, the only consequence would be that the Bank could not, until it gained that control, do what only an effective majority of votes could accomplish. But every share acquired would be a step towards control, and if extending control of banking by the Commonwealth Bank is within Federal legislative power, the fact that s. 13 does not, in all conceivable circumstances, place the Commonwealth Bank in control of another bank *uno ictu*, does not place s. 13 beyond power.

The date specified in the Treasurer's notice under s. 13 may be any date chosen by him now or years ahead, and a later date may be substituted from time to time. These provisions would enable a Commonwealth Treasurer to keep shareholders in what might be described as a state of suspended animation for an indefinite period; but that fact does not constitute any objection to the validity of the legislation.

The provisions as to the shares becoming vested in the Commonwealth Bank, the Commonwealth Bank becoming the holder of those shares and a member of the banking company, and as to the power to transfer shares to " any person " raise questions as to the power of the Commonwealth Parliament to exclude the operation of State legislation and articles of association dealing with these matters.

Part IV., Division 3—Management of Private Banks.—This Division applies only to Australian private banks and not to private banks incorporated elsewhere than in Australia. Under this Division the Commonwealth Bank, with the approval of the Commonwealth Treasurer, may assume the management of any

Australian private bank through directors appointed by the Governor of the Commonwealth Bank.

Section 17 provides as follows :—" (1) Upon the date specified in a notice under sub-section (1) of section thirteen of this Act (or, if that notice has been amended under sub-section (2) of that section, upon the date specified in that notice as so amended), the directors of the Australian private bank in relation to the shares in which the notice was given shall, by force of this Act, cease to hold office." This is followed by a provision for compensation of directors for loss of office.

It is pointed out by the plaintiffs that this provision operates upon a date specified in a notice given under s. 13 (1), whether or not a majority of the shares in the bank are in fact Australian shares, and whether or not any of the shares are in fact acquired. It is the giving of a notice under s. 13, and not the actual acquisition of shares, which brings s. 17 into operation.

Section 18 provides as follows :—" (1) The Governor of the Commonwealth Bank may, with the approval of the Treasurer, appoint directors of an Australian private bank the directors of which have ceased to hold office under the last preceding section and may appoint one of the directors so appointed to be chairman of directors. (2) The directors so appointed shall hold office notwithstanding any lack of qualification or any disqualification arising under any law, charter or other instrument."

This provision is permissive and not mandatory in form—the Governor of the Commonwealth Bank " *may* " appoint directors. But in fact, as the original directors would have ceased to hold office by virtue of s. 17 (1), the bank would be left without any directors at all and, accordingly, with no provision for management, unless the Governor of the Commonwealth Bank actually exercised his powers under s. 18. The articles of association of the plaintiff banks provide for a share qualification for directors, and State laws prevent undischarged bankrupts from holding office as directors. Section 18 (2) excludes the operation of any such provisions.

The powers of the directors appointed under s. 18 are defined in s. 19 as follows :—" (1) Directors appointed under the last preceding section shall have full power to manage, direct and control the business and affairs of the Australian private bank of which they are directors and, in particular, shall have power—(*a*) to declare dividends ; (*b*) to dispose of the business in Australia of that Australian private bank to the Commonwealth Bank ; and (*c*) to dispose of all or any of the other business of that Australian private bank. (2) The exercise of any power under paragraph (*b*) or (*c*) of the last

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preceding sub-section shall be subject to the approval of the Treasurer after the Treasurer has obtained a recommendation from the Governor of the Commonwealth Bank. (3) Subject to the last preceding sub-section, the exercise of any power by the directors of an Australian private bank appointed under the last preceding section shall be in their sole discretion and shall not be subject to any qualification, restriction or condition provided by or under any law, charter or other instrument relating to the exercise of the powers of the directors of that bank."

Section 21 deals with the intended result of the Commonwealth Bank becoming the sole shareholder in one of the private banks (e.g., as in the case of the Bank of Adelaide, the Ballarat Banking Co. and the Brisbane Permanent Building and Banking Co. Ltd., where all the shares are Australian shares), or acquiring so many shares that the number of shareholders would be reduced below the number required by the provisions of the relevant State Companies Act. The State Companies Acts contain provisions imposing unlimited liability for certain debts of the company upon shareholders if the number of shareholders falls below a specified number ; for example, the *Companies Act* 1928 (Vict.), s. 124, provides that in the case of a (non-proprietary) company if the number of shareholders falls below five and the company carries on business for more than six months while the number is so reduced, the members of the company during the time that it so carries on business thereafter, having cognizance of the fact that it is carrying on business with fewer than five members, shall be severally liable for the payment of the whole of the debts of the company contracted during that time. State laws also provide, e.g., *Companies Act* (Vict.) 1928, s. 137 (4), that if the number of members of a company is reduced below a specified number the company may be wound up by the court.

Part IV. Division 4—*Taking over of Businesses of Private Banks.* This Division provides that the business in Australia or outside Australia of any private bank (Australian or English) may be taken over by agreement (s. 22) and that the business in Australia of any of the private banks may, if an agreement is not made in response to an invitation of the Treasurer be taken over by compulsion (s. 24) —with assets and liabilities as defined.

Section 22 provides a carefully specified procedure for the purpose of making an agreement and (sub-s. (8)) for the effect of an agreement made under the section. An agreement made under the section has the operation and effect specified in the section, and therefore is to be distinguished from an agreement made, for

example, with a private bank through its directors (original or substituted) which is not made as a result of the procedure prescribed by s. 22, and which, as will appear, could not, as an agreement, bring about the results specified in s. 22 (8).

Section 22 (1) provides that the Treasurer may, by notice given in writing to a private bank, invite a private bank to make an agreement with the Commonwealth Bank not later than the date specified in the notice for the taking over by the Commonwealth Bank of the business in Australia of that private bank.

It should be observed that a notice may be given under s. 22 (1) independently of any acquisition of shares by the Commonwealth Bank, and that it may be given either before or after nominee directors have been placed in control of a bank under Division 3 of Part IV. If the notice is given after Division 3 has been brought into operation, the nominee directors would be the persons to deal with the invitation of the Treasurer to make an agreement for disposing of the business of the bank.

Other provisions in s. 22 provide for the amendment of a notice. Sub-section (5) provides that the Commonwealth Bank may, subject to the approval of the Treasurer, make an agreement with a private bank for the taking over by the Commonwealth Bank of all the business in Australia of that bank. Sub-section (6) provides that an agreement under the section " may be made with a private bank, whether or not a notice has been given under sub-section (1)," but that if such a notice has been given an agreement with a private bank shall not be made after the original or amended date specified in the notice. Thus an agreement under s. 22 can be made only before or on the specified date.

Sub-section (7) provides that " an agreement under this section " may include provisions for the taking over by the Commonwealth Bank of " any of the business, assets and liabilities outside Australia " of a private bank.

Sub-section (8) contains provisions with respect to the effect of an agreement made under the section. It will be seen that this sub-section is a statutory enactment purporting to give an effect to " an agreement made under this section " which, apart from statute, no agreement between the Commonwealth Bank and a private bank could accomplish.

Paragraphs (*a*) and (*b*) relate to Australian assets and Australian liabilities " subsisting " upon the date of taking over of the business. Paragraph (*b*) provides, not only that the liabilities of the private bank shall become liabilities of the Commonwealth Bank, but also that the private bank shall be discharged from its obligations in

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respect of those liabilities. Accordingly, a depositor in a private bank or any other creditor of the bank would, when these provisions came into operation, find that instead of being a creditor of the private bank he had become a creditor of the Commonwealth Bank and that the private bank owed nothing to him. No agreement between the Commonwealth Bank and a private bank to which the creditor was not a party could bring about such a result. The creditor is, without his consent, deprived by statute of his rights against the private bank, that bank is released from its liabilities to him, and the Commonwealth Bank is substituted as his debtor. This result depends upon the statute and not upon the agreement as such. The agreement has the effect, as a consequence of the statutory provision, which is set forth in detail in pars. (*a*), (*b*), (*c*), (*d*) of s. 22 (8).

Paragraphs (*a*) and (*b*) relate to assets and liabilities which are Australian assets and liabilities whether they have a direct connection with banking transactions or not; for example, the buildings in Australia owned by a bank would pass as Australian assets, and Australian liabilities of a bank for rent of buildings occupied by the bank would pass as Australian liabilities.

Paragraph (*c*) relates to assets which become Australian assets after the date of transfer. These assets are vested in the Commonwealth Bank upon the date upon which they become Australian assets but only if they are assets " which relate to banking transactions." Such assets might become so vested from time to time at different dates. This fact has a bearing upon the question whether the Court of Claims, which determines compensation, must determine compensation once and for all in a single proceeding.

Paragraph (*d*) corresponds in the case of liabilities to par. (*c*) in the case of assets. It provides for the transfer of all the liabilities of the bank " which relate to banking transactions " which become Australian liabilities after the date of transfer. The section provides (as in par. (*b*)) for the discharge of the private bank from such liabilities.

Section 23 provides for a taxation concession to a private bank and its shareholders in respect of taxation upon incomes or profits in a case where an agreement has been made " under the last preceding section." Thus if a company makes an agreement under s. 22—which, as already pointed out, is different from an agreement made apart from s. 22—the bank and its shareholders receive a benefit in respect of taxation. If, however, a bank declines to make an agreement and insists upon its rights under the Act and proceedings are instituted for compensation, there is no such

taxation concession. This provision raises questions as to whether the terms of compulsory acquisition of assets are just terms within s. 51 (xxxi.) of the Constitution.

Section 24 contains the provisions for compulsory taking over of business, acquisition of assets and transfer of liabilities. Its operation depends upon the giving of a notice under s. 22 (1) of the Act. Such a notice specifies a date not later than which a private bank is invited by the Treasurer to make an agreement with the Commonwealth Bank.

Section 24 (2) provides that where a private bank to which a notice has been given under s. 22 (1) has not made an agreement with the Commonwealth Bank " under that section " before the specified date the business in Australia of that private bank shall, upon the date of transfer (that is, the day after the specified date : sub-s. (1)) be taken over by the Commonwealth Bank. " Taking over a business " is not a technical legal term. When a business is taken over by agreement, the agreement provides for the transfer of identified assets, including goodwill, perhaps for an indemnity against business liabilities, and perhaps the agreement contains a covenant in restraint of trade. The agreement may or may not contain provisions relating to the staff employed in the business. There is a distinction between the assets of a business and the property of the person or company which carries on the business : *In re Th. Goldschmidt Ltd.* (1). Where a statute provides for the " taking over of a business " the effect depends entirely upon the terms of the statute. In the present case s. 24, sub-ss. (4) to (8), expressly state what taking over the business of a private bank means. Taking over the business of a bank does not terminate the juristic existence of the company whose business is taken over, nor does it itself prevent the bank from continuing to carry on business, including banking business. (But s. 46 (3) does, where the business of a bank is acquired, prevent the bank carrying on banking business.) Sub-sections (4), (5), (6) and (7) correspond to pars. (*a*), (*b*), (*c*) and (*d*) of sub-s. (8) of s. 22. Paragraphs (*a*) and (*b*) provide for vesting of " subsisting " assets, transfer of subsisting liabilities, and the discharge of the private bank from the liabilities taken over by the Commonwealth Bank. Under sub-s. (6) assets which relate to banking transactions and become Australian assets after the date of transfer but before a date prescribed in respect of a particular private bank become vested in the Commonwealth Bank upon the date upon which they become Australian assets. Sub-section (7) is a similar provision with respect to liabilities which relate to banking transactions.

(1) (1917) 2 Ch. 194. at p. 197.

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The prescribed date under sub-ss. (6) and (7) might be any date in the future.

All the Australian assets " subsisting upon the date of transfer " are taken over (s. 24 (4)) and all the " subsisting " Australian liabilities are transferred (s. 24 (5)). These provisions relate to all such assets and liabilities, whether they " relate to banking transactions " or not. Assets which become Australian after the date of transfer and before a prescribed date become vested in the Commonwealth Bank under s. 24 (6) only if they " relate to banking transactions." Thus the bank could continue in a non-banking business in Australia or elsewhere and could own assets of any kind in Australia, provided that it was not attempting to carry on banking transactions. Sub-section (8) of s. 24 applies to assets of a private bank which are not Australian assets, e.g., buildings or other property in London or New Zealand, bills of exchange or deposits with other banks anywhere in the world outside Australia. The section provides that the Commonwealth Bank may, at any time after a notice has been given to an Australian private bank under s. 22 (1), require the private bank to take such action as is necessary to vest in the Commonwealth Bank such assets (not being Australian assets of the bank) as the Commonwealth Bank specifies. The application of this provision does not depend upon any relation of the assets to " banking transactions " or even to a business carried on in Australia. If valid, it enables the Commonwealth Bank, at any time in the future, to require any of the plaintiff banks to transfer to the Commonwealth Bank any property which it may own in any part of the world outside Australia. This section is the first of a number of sections which provide for a penalty of £10,000 a day for each day on which a contravention occurs.

Section 25 completes Division 4 by providing that the Commonwealth Bank shall pay fair and reasonable compensation in respect of the acquisition of property by the Commonwealth Bank under s. 24.

Part V.—The Federal Court of Claims.

Under this Part a Court of Claims is established in accordance with the provisions of the Constitution with valid provisions for the appointment and tenure of judges &c. Section 33 provides that the court shall have jurisdiction to hear and determine claims for compensation arising under the Act. Section 34 provides, *inter alia*, that the judgment of the court shall not be subject to prohibition, mandamus or injunction in any court on any account whatever. This particular provision is invalid in so far as it seeks

to exclude the jurisdiction conferred upon the High Court by s. 75 (v.) of the Constitution to grant writs of mandamus, prohibition or injunction against officers of the Commonwealth : see, for recent cases in which this matter has received consideration, *R.* v. *Connell* ; *Ex parte Hetton Bellbird Collieries Ltd.* (1) ; *R.* v. *Hickman* ; *Ex parte Fox* (2).

Part VI. Assessment of Compensation for Shares.

Division 1 provides for the keeping by the Commonwealth Bank of a register of rights to payment of compensation in respect of the acquisition of shares and for notification of interests in compensation by persons whose names are not on the register. Persons who do not give such a notice can obtain compensation only in pursuance of an order made by the court : s. 40 (7).

Section 40 provides that the amount of compensation payable shall, unless agreed upon, " be determined by the court and not in any other manner." Where a person whose name is not upon the register claims to be entitled, then under s. 40 (4) " the persons entitled to payment of compensation in respect of the acquisition of these shares shall be determined by the court and not in any other manner." The determination of the persons entitled to compensation is plainly a judicial act. Section 40 (5) emphasizes the intention of Parliament that only the Court of Claims shall deal with questions of compensation, by providing :—" The amount of compensation payable, and the amount payable to each person, shall be determined by the Court and not in any other manner and payment shall be made accordingly."

Sub-section (8) provides—" The payment of compensation by the Commonwealth Bank in pursuance of this section or of an order made by the Court shall be a good and valid discharge to the Commonwealth Bank."

Part VI.—Division 2. Compensation in respect of the Acquisition of Assets.

Section 42 provides that such compensation shall be ascertained in accordance with Division 2 and " not in any other manner." Section 43 provides that a private bank the business of which has been taken over by the Commonwealth Bank in pursuance of section twenty-four shall, subject to Division 2, be paid such compensation as is determined by agreement between the Commonwealth Bank and the bank. Such an agreement is subject to the approval of the Treasurer (sub-s. (2)). A bank might refuse to make an agreement

(1) (1944) 69 C.L.R. 407. (2) (1945) 70 C.L.R. 598.

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under s. 22 to sell its business to the Commonwealth Bank. The Treasurer could then bring about the taking over of the business by the Commonwealth Bank under s. 24. He could then give a notice under s. 13 (1) and displace the original directors (s. 17) and place nominee directors in office (s. 18). Those directors could then make an agreement for compensation under s. 43 (1) with the Commonwealth Bank with the approval of the Treasurer.

If no agreement as to compensation is made a private bank may make a claim in writing to the Commonwealth Bank for compensation (s. 43 (3)).

Section 44 deals with procedure. Where a claim for compensation is made the Commonwealth Bank shall, as soon as practicable, serve a notice specifying how much the Commonwealth Bank is prepared to pay (sub-s. (3)). That offer is deemed to be accepted unless within two months after service the private bank requires the Commonwealth Bank to refer the claim to the court (sub-s. (3)). If within six months after a claim is made the Commonwealth Bank does not serve a notice specifying the amount of compensation which it is prepared to pay the private bank may require the Commonwealth Bank to refer the claim to the court (sub-s. (4)) and the court then determines the compensation which it thinks fair and reasonable (sub-s. (5)). Section 45 provides that the amount of compensation determined by the court under s. 44 shall be payable by the Commonwealth Bank to the private bank in full satisfaction of the claim to which the determination relates.

Part VII. Prohibition of the Carrying on of Banking Business by Private Banks.

Section 46 provides in sub-s. (1) that : " Notwithstanding anything contained in any other law, or in any charter or other instrument, a private bank shall not, after the commencement of this Act, carry on banking business in Australia except as required by this section." The *Banking Act* 1945, s. 7, provided that a body corporate should not carry on business without an authority granted by the Governor-General, and s. 8 provided that such an authority should be granted to all the banks which are plaintiffs in these cases. Section 46 substitutes for the general authority to carry on banking business given to the plaintiff banks under the *Banking Act* the limited authority conferred by s. 46. The private banks are to carry on banking business only as required by s. 46.

Section 46 (2) provides that each private bank shall, subject to s. 46, carry on banking business in Australia and shall not " except on grounds which are appropriate in the normal and proper conduct

of banking business" cease to provide any facility or service provided by it in the course of its banking business on 15th August 1947. Section 46 concludes with the provision: "Penalty: Ten thousand pounds for each day on which the contravention occurs." If this provision applies to sub-s. (2), then this penalty is incurred if the private bank ceases to continue to provide an existing facility or service in respect of each day upon which it so ceases.

Sub-section (3) provides that sub-s. (2) shall not apply to a private bank if its business in Australia has been taken over by another private bank (e.g. as in the case of the Queensland National Bank, the business of which has been taken over by the National Bank) or after that business has been taken over by the Commonwealth Bank (e.g.—under ss. 19, 22, or 24).

Sub-section (4) enables the Treasurer to prohibit the carrying on of banking business by any of the plaintiff banks from a date selected by him. Sub-section (4) is in the following terms:—"The Treasurer may, by notice published in the *Gazette* and given in writing to a private bank, require that private bank to cease, upon a date specified in the notice, carrying on banking business in Australia." Sub-sections (5), (6), and (7) refer to the specification of a date and the amendment of a notice. Sub-section (8) provides that upon and after the date specified in a notice (original or amended) the private bank to which the notice was given "shall not carry on banking business in Australia." The effect of this provision is that the private bank (that is, the company) shall not, after the specified date, do any act in Australia which falls within the definition of banking business. If it does any such act, then the bank is liable to a penalty of £10,000 for each day on which a contravention occurs. Apparently, therefore, after the specified notice had been given, no banking transaction could take place by or on behalf of the private bank to which the notice was given. A direction by the Treasurer that the private bank should use its own name in a transaction so as actually to conduct that transaction would not be a defence in a prosecution under the section. When the specified date arrives the banking business of the private bank is completely stopped, and whatever is done thereafter in relation to current and outstanding transactions cannot be done by the bank or by any person on behalf of the bank if it can be brought within the description of "carrying on banking business in Australia." A bank to which s. 24 (8) became applicable would be tempted to act upon the view that the only prudent course would be to do nothing about anything. But it will be seen that s. 60 requires certain action—also under a penalty of £10,000 a day.

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Sections 46 (4) and (8) apply whether or not the business of a bank has been taken over by the Commonwealth Bank, and whether or not any of the shares in a bank have been acquired by the Commonwealth Bank. If the Treasurer should elect to give a notice under s. 46 (4) at any time without exercising any of the other powers of the Act (and as to whether he would do so would depend entirely upon his own discretion) the business of the private bank would stop, and it is difficult to see that there would be any provision for carrying on current transactions. The bank would still have its assets and all its liabilities, but would be unable to do anything which fell within the description of banking business, e.g., it would be unable to repay a deposit except at the risk of a penalty of £10,000.

Part VIII.—Protection of Rights of Persons Employed by Private Banks.

This Part provides for the transfer of the staff of the private banks to the service of the Commonwealth Bank unless those persons elect within a specified time not to be employed by the Commonwealth Bank: s. 49. The part contains provisions for the preservation of rights and also for preventing alterations in terms and conditions of employment which it is presumably thought might impose unreasonable obligations upon the Commonwealth Bank in the case of transferred employees. Superannuation rights are also preserved.

Part IX.—General.

Section 56 contains a provision relating to instruments very widely defined so as to include contracts, bonds, guarantees, mortgages, &c. to which a private bank, the business of which in Australia has been taken over by the Commonwealth Bank, is a party, under which any money is or may become payable or any other property is to be or may become liable to be transferred to the bank or by the bank. The provision applies to such instruments which are subsisting upon the date upon which the business of the bank is taken over or which comes into existence later, but before a prescribed date, with the exception of agreements between a bank and a director or employee. They are to continue in full force and effect and the Commonwealth Bank is, by force of the Act, substituted for the private bank as a party thereto. This provision would apply to agreements for overdrafts, to bills of exchange, including cheques, and to all agreements to which the private bank was a party. Under this provision, if the bank had made a contract, for example, for the erection of a building, and the business of the

bank were taken over, the contract would then become a contract between the builder and the Commonwealth Bank for the erection of the building.

Section 58 provides that: "Nothing in this Act shall require a State or person, being a customer of a private bank the business of which in Australia has been taken over under this Act, to continue as a customer of the Commonwealth Bank."

Section 59 provides that "So far as is necessary for the purposes of assisting the operation of any of the provisions of this Act," a private bank, and every director or person employed by a private bank, shall permit an authorized person to inspect the property of the private bank and the books &c. of the bank. Penalty: ten thousand pounds per day in the case of a bank; in other cases one thousand pounds per day.

Section 60 provides that a private bank and every director of and person employed by a private bank shall do or join in doing "all acts or things which it is necessary or convenient to do for or in relation to the operation of any of the provisions of this Act and, in particular, for or in relation to:—(*a*) the taking over by the Commonwealth Bank under this Act of any of the business of that private bank; (*b*) the acquisition by, or the transfer to, the Commonwealth Bank by force of or under this Act of any shares in, or assets of, that private bank; and (*c*) the assumption by the Commonwealth Bank by force of or under this Act of any liabilities of that private bank." If a private bank or a person employed by such a bank fails to do or "join in doing" something which it is "convenient" to do "in relation to the operation" of any of the provisions of the Act as required by the introductory words of this section, the penalty is ten thousand pounds per day for the bank and one thousand pounds per day for the defaulting director or person employed by a private bank. As already suggested, if s. 46 (4) had been applied to a private bank, its directors and staff would need to be careful in order to comply with s. 60 without aiding or abetting an infringement of s. 46 (8).

Section 61 provides that "The Commonwealth guarantees the payment of all compensation payable by the Commonwealth Bank under this Act."

The Commonwealth Bank Act 1945.

The *Banking Act* 1947 should be considered in conjunction with the *Commonwealth Bank Act* 1945 and the *Banking Act* 1945.

Section 7 of the former Act provides that the corporate entity of the Commonwealth Bank shall not be affected by the repeal of

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certain statutes and that the bank shall be preserved and continue in existence under and subject to the Act. This is an explicit provision for the continuance in existence of the Commonwealth Bank as a corporation.

The *Commonwealth Bank Act* 1945, s. 25, provides that the bank shall be managed by the Governor, but (s. 9) that the Treasurer shall be informed from time to time by the bank of its monetary and banking policy and that in the event of any difference of opinion between the bank and the Government with respect to such policy, the Treasurer and the bank shall endeavour to agree, and that in the event of failure to agree the bank shall adopt and give effect to the policy approved by the Government.

Section 11 provides that the bank shall act as a central bank and (s. 12) that it shall, in so far as the Commonwealth requires it to do so, act as banker and financial agent of the Commonwealth. Section 13 confers power to regulate the note issue, to receive money on deposit, to borrow and lend money, to deal in bills of exchange &c., and to buy and sell securities issued by the Government of the Commonwealth and other securities.

Section 17 provides that the Commonwealth Bank shall carry on general banking business, and s. 18 imposes upon the bank a duty to develop and expand that business.

Section 38 provides that the bank may, with the approval of the Treasurer, enter into an arrangement with any other bank for the transfer to the bank upon agreed terms of the whole or any part of the assets, liabilities and business of the other bank. This provision may be compared with the more specific and detailed provisions of s. 22 of the 1947 Act, under which an agreement for taking over the business of a private bank by the Commonwealth Bank may be made if the Treasurer invites the bank to make an agreement under the section. The *Commonwealth Bank Act* 1945 does not contain any provisions authorizing compulsory, as distinct from consensual, acquisition of the assets or business of another bank.

The *Commonwealth Bank Act* places the control of the note issue in the Bank (Part VII.) and contains provisions dealing with rural credits, mortgage bank business, industrial finance, housing loans, and the Commonwealth Savings Bank.

The Banking Act 1945.

Section 6 of this Act provides that, subject to the Act, a person other than a body corporate shall not carry on any banking business in Australia. Thus individual persons are prohibited from carrying on banking business.

Section 7 provides that a body corporate shall not carry on banking business unless it is in possession of an authority in writing granted by the Governor-General. Thus corporations which do not possess such an authority are also prohibited from carrying on banking business. Under s. 8 the plaintiff banks are specified as being entitled to obtain an authority and they all possess such an authority.

Section 46 of the 1947 Act adds a third prohibition. It provides that the Treasurer may prohibit the carrying on of banking business by any of the plaintiff banks. The result of this series of prohibitions, if they are all in operation, is to confine banking business in Australia to the Commonwealth Bank and State banks.

Section 10 provides for exemptions from the Act as determined by the Treasurer in the case of persons desiring to carry on banking business but not the general business of banking. Under this section exemptions have been given to certain pastoral companies.

The *Banking Act* 1945 also contains in ss. 11 to 15 provisions for the protection of depositors which are administered by the Commonwealth Bank. Sections 16 to 22 provide for the establishment of special accounts by private banks with the Commonwealth Bank of such amounts as are from time to time determined by the Commonwealth Bank.

Other provisions in the *Banking Act* 1945 deal with the mobilization of foreign currency, foreign exchange, gold, the delivery of gold to the Commonwealth Bank, and control of the export of gold.

Section 27 provides that the Commonwealth Bank may determine the policy in relation to advances to be followed by banks, and that each bank shall follow the policy so determined. Section 27 (2) provides that the Commonwealth Bank may give directions as to the classes of purposes for which advances may or may not be made by banks, and that each bank shall comply with any directions so given. Reference has already been made to the directions given by the Commonwealth Bank in pursuance of this power.

Section 39 provides that the Commonwealth Bank may, with the approval of the Treasurer, make regulations making provision for the control of rates of interest payable to or by banks or to or by other persons in the course of any banking business carried on by them. Under this provision the Commonwealth Bank controls rates of interest on bank overdrafts.

Section 51 provides that, " except with the prior consent in writing of the Treasurer after receipt by him of the recommendation of the Commonwealth Bank, a bank shall not enter into any arrangement or agreement for any sale or disposal of its business by amalgamation

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or otherwise." Under the 1947 Act an agreement for such sale or disposal may be made under ss. 19 or 22, and there may be a compulsory disposal under s. 24.

The two Acts of 1945 have therefore already established a far-reaching control over the business of the plaintiff banks, such control being exercised through the Commonwealth Bank.

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Construction of Legislative Powers: Pith and Substance &c.

Section 51 of the Constitution provides that the Parliament shall, subject to the Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to :—" (xiii) Banking other than State banking; also State banking extending beyond the limits of the State concerned, the incorporation of banks and the issue of paper money."

It was argued for the defendants that the 1947 Act was valid because it related to and affected banks and banking and therefore " touched and concerned banking " and was " relevant " to the subject matter of banking. The plaintiffs, on the other hand, argued that the constitutional validity of legislation should be determined by enquiring what was the " pith and substance " of the law; whether the legislation had what was called " substantial impact " upon an authorized subject matter.

The phrase " pith and substance " has been used in many cases where the validity of statutes has come into question: e.g. *Union Colliery Co. of British Columbia* v. *Bryden* (1); *Attorney-General for Ontario* v. *Reciprocal Insurers* (2); *Gallagher* v. *Lynn* (3); *Attorney-General for Alberta* v. *Attorney-General for Canada* (4); *Attorney-General for Canada* v. *Attorney-General for Quebec* (5); *Attorney-General for Alberta* v. *Attorney-General for Canada* (6). In the recent case of *Prafulla Kumar Mukherjee* v. *Bank of Commerce Ltd., Khulna* (7) a decision was based upon what was regarded as the " pith and substance " of legislation passed under the Indian Constitution.

The Attorney-General contended that the cases in which reference was made to " pith and substance " were cases in which it had been necessary to deal with the difficulties created by an attempt in the Canadian Constitution (which had been repeated in the Indian Constitution) to provide lists of legislative subjects which were exclusive of one another. A law might relate directly to two subjects, one belonging to one legislature exclusively, and another

(1) (1899) A.C. 580.
(2) (1924) A.C. 328, at pp. 336-338.
(3) (1937) A.C. 863.
(4) (1943) A.C. 356.
(5) (1947) A.C. 33.
(6) (1947) A.C. 503.
(7) (1947) L.R. 74 Ind. App. 23.

belonging to another legislature exclusively. This had often happened in Canada by reason of the over-lapping between, on the one hand, Dominion legislative powers, and, on the other hand, the powers of the Provincial Parliaments to make laws with respect to (*inter alia*) such subjects as "property and civil rights in the Province" and "generally, all matters of a merely local or private nature in the Province": *British North America Act* 1867, s. 92. As the grants were grants of powers described as exclusive, some means had to be adopted for determining the predominant characteristics of a law so that it could be assigned to one category rather than to some other category. This, it was contended, was really the meaning of the pith and substance test, and it was inapplicable to the Australian Constitution because exclusive powers had not therein been assigned to both Commonwealth and States. In the case of the Commonwealth Constitution, it was argued, the only question arising with respect to the validity of legislation was whether the legislation was a law "with respect" to a certain subject matter; that is, it was said, whether it was a law which "touched and concerned" that subject matter. If, for example, a law was a law with respect to banking, then it would be irrelevant that it might also be a law with respect to some other subject—unless there was some express prohibition in the Constitution against the Commonwealth Parliament dealing with that other subject. The defendants contended that these propositions were supported by the cases in this court of *Huddart Parker Ltd.* v. *The Commonwealth* (1); *Meakes* v. *Dignan* (2) and the judgment of *Holmes* J. in *Hammer* v. *Dagenhart* (3) where he referred to the use of a Federal power as a "foothold" for legislation.

There are in my opinion grave difficulties in the way of accepting the proposition that a law which "touches and concerns" an authorized subject matter is valid unless it contravenes some express prohibition to be found in the Constitution.

An example of the difficulties which would arise from the adoption of such a principle is readily afforded by the power of the Commonwealth Parliament to make laws with respect to taxation. If all laws passed by the Commonwealth Parliament imposing taxes of any kind were held to be valid, then the taxation power alone would enable the Commonwealth Parliament to pass laws upon any subject whatever by imposing a tax upon specified acts or omissions. That this is the case was recognized early in the history

(1) (1931) 44 C.L.R. 492.
(2) (1931) 46 C.L.R. 73.
(3) (1918) 247 U.S. 251, at p. 279 [62 Law. Ed. 1101, at p. 1109].

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of the Commonwealth : see *R.* v. *Barger* (1) per *Griffith* C.J., where it was pointed out that if the taxation power were construed in the wide manner suggested " the Commonwealth Parliament might assume and exercise complete control over every act of every person in the Commonwealth by the simple method of imposing a pecuniary liability on everyone who did not conform to specified rules of action, and calling that obligation a tax, not a penalty."

Another example can be found in provisions which are directly relevant to the present cases. Under s. 51 (xx.) of the Constitution there is power to make laws with respect to financial corporations formed within the limits of the Commonwealth. Under s. 51 (xiii.) there is power to make laws with respect to banking other than State banking. A State bank would almost certainly be a corporation, and, if so, it would be a financial corporation. If pl. (xx.) were construed to mean that the Commonwealth Parliament could pass any law whatever which touched and concerned financial corporations, then the Commonwealth Parliament could make laws controlling State banks. The result would be that the exception of State banking from the power conferred by pl. (xiii.) would mean nothing. When the two provisions are read together it is a reasonable conclusion that pl. (xx.) was not meant to reduce to complete insignificance the specific provision excluding State banking from Federal legislative power.

Thus the Constitution must be read as a whole, and each power conferred upon the Federal Parliament must be read in the context of the words prescribing the other legislative powers of the Parliament.

The Constitution assigns only specific legislative powers to the Commonwealth Parliament. It is a Federal Constitution, not a unitary Constitution. This has been emphasised again and again in the judgments of this Court, and in no case more clearly than in the *Amalgamated Society of Engineers* v. *Adelaide Steamship Co. Ltd.* (2) where reference is made to the conclusion " as to which this court has never faltered, that the Commonwealth is a government of enumerated or selected legislative powers " : see also (3) : " It is undoubted that those who maintain the authority of the Commonwealth Parliament to pass a certain law should be able to point to some enumerated power containing the requisite authority." Accordingly, no single power should be construed in such a way as to give to the Commonwealth Parliament a universal power of legislation which would render absurd the assignment of

(1) (1908) 6 C.L.R. 41, at p. 77.
(2) (1920) 28 C.L.R. 129, at p. 150.
(3) (1920) 28 C.L.R., at p. 154.

particular carefully defined powers to that Parliament. Each provision of the Constitution should be regarded, not as operating independently, but as intended to be construed and applied in the light of other provisions of the Constitution. Thus an endeavour should be made to " reconcile the respective powers . . . and give effect to all " : *Citizens Insurance Co. of Canada* v. *Parsons* (1). A recent application of this principle is to be found in *Melbourne Corporation* v. *The Commonwealth* (2). If the fact that a statute " touched and concerned " a matter within the power of the Commonwealth Parliament were held to be sufficient to establish its validity, there would be no distribution of powers between Commonwealth and States—the Commonwealth would have complete power of controlling by law all persons and things in Australia, subject only to such prohibitions as the Constitution contains. For the reasons which I have stated, I am of opinion that the Commonwealth Constitution should not be construed upon the basis that any legislation is valid if it can be said to " touch and concern " one of the subject matters assigned to the Commonwealth Parliament.

Nor, on the other hand, am I of opinion that the phrase " pith and substance," in spite of its frequent use by high authorities, solves any difficulties. It lends itself to emphatic asseveration, but it provides but little illumination. It is a metaphorical phrase possibly derived from " pith and marrow " in patent law. *Wills* J. in *Incandescent Gas Light Co.* v. *De Mare Incandescent Gas Light System Ltd.* (3), said of the latter phrase :—" ' Pith ' is a great deal less than the substance of the vegetable structure of which it is part, and ' marrow ' a great deal less than the substance of the animal structure of which it is part. Metaphors are very apt to mislead, as they are seldom close enough to the things to which they are applied." The difference, if any, between " pith " and " substance " is not explained.

The distinction marked by the phrase is a distinction between " pith and substance " as representing " primary object and effect " and incidental application to other matter : *Attorney-General for Canada* v. *Attorney-General for Quebec* (4). The case of *Prafulla Kumar Mukherjee* v. *Bank of Commerce* (5) shows that there is no difference between asking : " What is the pith and substance of a statute ? " and asking : " What is its true nature and character ? " (6). In *Great West Saddlery Co. Ltd.* v. *The King* (7) it was said with respect to the construction of statutes for the purpose of

(1) (1881) 7 App. Cas. 96, at p. 109.
(2) (1947) 74 C.L.R. 31.
(3) (1896) 13 R.P.C. 301, at p. 332.
(4) (1947) A.C. 33, at p. 44.
(5) (1947) L.R. 74 Ind. App. 23.
(6) (1947) L.R. 74 Ind. App., at p. 43.
(7) (1921) 2 A.C. 91, at p. 117.

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determining constitutional validity : " The only principle that can be laid down for such cases is that legislation the validity of which has to be tested must be scrutinized in its entirety in order to determine its true character." But there is no rule which will settle all cases. A question of *ultra vires* " must be determined in each case as it arises, for no general test applicable to all cases can safely be laid down " : *Attorney-General for Alberta* v. *Attorney-General for Canada* (1).

A power to make laws " with respect to " a specific subject is as wide a legislative power as can be created. No form of words has been suggested which would give a wider power. The power conferred upon a Parliament by such words in an Imperial statute is plenary—as wide as that of the Imperial Parliament itself: *R. v. Burah* (2) ; *Hodge* v. *The Queen* (3). But the power is plenary only with respect to the specified subject. In determining the validity of a law it is in the first place obviously necessary to construe the law and to determine its operation and effect (that is, to decide what the Act actually does), and in the second place to determine the relation of that which the Act does to a subject matter in respect of which it is contended that the relevant Parliament has power to make laws. A power to make laws with respect to a subject matter is a power to make laws which in reality and substance are laws upon the subject matter. It is not enough that a law should refer to the subject matter or apply to the subject matter : for example, income tax laws apply to clergymen and to hotelkeepers as members of the public ; but no-one would describe an income tax law as being, for that reason, a law with respect to clergymen or hotelkeepers. Building regulations apply to buildings erected for or by banks ; but such regulations could not properly be described as laws with respect to banks or to banking.

It has often been decided that the motives of Parliament, and, as a general rule, the objects which a Parliament seeks to achieve, are not relevant to questions of constitutional validity : see cases cited in *South Australia* v. *The Commonwealth* (*Uniform Tax Case*) (4). The operation and effect of a customs duty on certain goods is to make the importation of those goods subject to the duty imposed. That is what the law does. The motive of Parliament may have been to assist a particular industry or business. When validity is in question, that fact is irrelevant. An indirect consequence of the law may be to ruin some other industry or business. That fact also is irrelevant.

(1) (1939) A.C. 117, at p. 129.
(2) (1878) 3 App. Cas. 889.
(3) (1883) 9 App. Cas. 117.
(4) (1942) 65 C.L.R. 373, at pp. 424-426.

Thus when a question arises as to the validity of legislation it is the duty of the Court to determine what is the actual operation of the law in question in creating, changing, regulating or abolishing rights, duties, powers or privileges, and then to consider whether that which the enactment does falls in substance within the relevant authorized subject matter, or whether it touches it only incidentally, or whether it is really an endeavour, by purporting to use one power, to make a law upon a subject which is beyond power.

Commonwealth Power as to Banking.

In the first place, it is necessary to ascertain the meaning of the word "banking" as used in s. 51 (xiii.).

The plaintiffs emphasised the fact that the word is "banking," not "banks." Banking, it is said, means the performance of a function, which means that which is done in the actual conduct of banking business. If there are no banker-customer transactions, then there is no banking. The power authorizes laws, it is said, which really and substantially bear upon transactions or operations between and characteristic of banker and customer, and no other laws.

A separate power is given with respect to "the incorporation of banks." It is argued that the separate mention of this subject shows that the word "banking" in pl. (xiii.) does not itself include the subject of the incorporation of banks, although otherwise it might have been construed so as to include that subject. This is a circumstance which is relied upon to support the argument that "banking" is used in rather a narrow than a wide sense in s. 51 (xiii.).

Attention is called to the word "also" in pl. (xiii.) which, it is said, emphasizes the point that the incorporation of banks and the issue of paper money are not included within the word "banking" as used in the placitum.

The plaintiffs based an argument as to the meaning of "banking" in s. 51 (xiii.) upon the power to make laws with respect to "State banking extending beyond the limits of the State concerned." This power must be a power which is limited to the power of making laws dealing with banking *transactions* which take place in more than one State. "Banking" can only be said to "extend," it is argued, where there is an actual transaction which takes place in more than one State. If the power to make laws with respect to "State banking extending" &c. were construed to authorize in relation to State banking so extending such a statute as the *Banking*

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Act 1947 then it would be possible for the Commonwealth Parliament to authorize the Commonwealth Bank to acquire *all the assets* of any State bank whose operations extended beyond a single State, to put in new managers *of its whole business* (intra-State as well as inter-State), and to prohibit it carrying on any banking business. It is contended that such an intention cannot rationally be derived from the words used. Thus " banking " in the phrase " State banking extending," must mean " banking transactions "—and not the acquisition of banks, the management of banks or the prohibition of banking. It is argued that the word " banking " should be given the same meaning when it appears as the initial word of pl. (xiii.).

Accordingly, it is contended that the power to make laws with respect to " banking " is a power to make laws with respect to the relations between a banker and his customer, and not with respect to the management of banks, the acquisition of shares in a banking company, the acquisition of assets by or from banks, or the prohibition of banking. Upon this view of the meaning of the word " banking " the following propositions are submitted by the plaintiffs :—(*a*) Acquisition of shares *in a bank*, whether by another bank or a private person, is not itself a " banking " operation, and a law with respect to such acquisition cannot be supported as being itself legislation with respect to banking. (*b*) Acquisition of assets *by a bank* (e.g. the Commonwealth Bank) may be necessary in order to establish and carry on a bank, but the acquisition of assets whether from a bank or not, is not itself " banking," and cannot be made a subject of legislation under the banking power. (*c*) Similarly, the taking over by a bank of the banking business or other business of another bank is not itself a " banking " operation.

The defendants conceded that there could be no " banking " without banking transactions. If an establishment which was called a bank never did any banking business it would be impossible to say that it was engaged in banking. But banking, it was argued, was essentially a business. It included, it was contended, not only " over-the-counter " transactions with customers, but also the selection of persons who should be allowed to conduct banks. It was under this power that the *Banking Act* 1945 was enacted to exclude individuals from banking, and to limit the carrying on of the business of banking to corporations and to licensed corporations. The plaintiffs had not ventured to challenge the validity of these provisions. It was pointed out that in *Huddart Parker Ltd.* v. *The Commonwealth* (1) where this Court considered the trade and com-

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

merce power, it was definitely held that under a power to make laws with respect to trade and commerce it was competent to the Commonwealth Parliament to select the persons who should be permitted to engage in such trade and commerce. These cases were impliedly approved by the reference of the Privy Council to them in *James* v. *The Commonwealth* (1) where the *Transport Workers' Act*, in relation to which they were decided, was plainly held to be valid. The essence of this Act was that only licensed persons were allowed to engage in particular operations in inter-State trade and commerce. Selection of individuals means inclusion of some and exclusion of others. The reasoning which justified such selection in the case of transport workers applied equally to banking and therefore authorized the enactment of legislation which permitted some banks to operate and prevented others from operating.

It was also argued for the defendants that the subject of "banking" should be held to include the determination of the powers of banking corporations, including the Commonwealth Bank, the subject of the management and control of banks, and the determination of the policy to be pursued by banks.

Reference was made to English legislation with reference to the Bank of England, Canadian banking legislation and United States banking legislation, all of which deal with some or all of the subjects last mentioned as belonging to the same category of subject matter, namely laws with respect to banking.

The Attorney-General relied strongly upon the Canadian cases dealing with legislation of the Province of Alberta which was declared to be invalid because it dealt with banking, which was a subject of exclusive Dominion power: see *British North America Act*, s. 91 (15), whereby it is declared that the exclusive legislative authority of the Parliament of Canada extends to "banking, incorporation of banks and the issue of paper money." The Canadian decisions show, it was contended, that the control of the creation of credit through a banking system was an important part of banking: see *In the matter of Three Bills passed by the Legislative Assembly of the Province of Alberta* 1937 (2). In that case it was held that a system of credit control, using the same kind of methods of dealing with credit as were used by ordinary banks in dealing with credit, was a financial system which amounted to banking within the meaning of s. 91 (15) of the *British North America Act*. It was suggested in reply to the argument of the Attorney-General upon this point that the decision of the Supreme Court of Canada

(1) (1936) A.C. 578, at pp. 627-629; 55 C.L.R. 1, at pp. 55-57.

(2) (1938) S.C.R. (Can.) 100.

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was only a decision upon the residual power of the Dominion Parliament. That, however, was not the case. It was held (1) that the " system of administration, management and circulation of credit . . . constitutes in our view a system of ' banking ' within the intendment of section 91." It was therefore legislation upon a subject, viz., banking, which fell exclusively within Dominion power and it was for that reason that the legislation was held to be invalid.

The defendants further pointed out that the plaintiffs had not contended that the central banking provisions contained in the *Banking Act* 1945 were not within Federal legislative power. Such provisions were plainly valid, and this fact showed that a meaning must be given to the word " banking " which was wider than that which would confine it to particular banker and customer transactions. The subject of banking included a determination of general banking and credit policy.

The 1947 Act does not deal with central banking at all. The subject of central banking is greatly emphasised in the evidence and arguments submitted for the defendant, but considerations relating to central banking are of significance in the present cases only because they support the last-mentioned argument, viz., that if " central banking," including determination of banking policy, control of credit &c., is included within " banking," it is impossible to accept the plaintiffs' identification of " banking "with " banking transactions between banks and customers."

The plaintiffs sought to avoid this inclusion by denying that s. 51 (xiii.) was the source of the power which was exercised in creating the Commonwealth Bank and in endowing it with powers. (The Commonwealth Bank was created as a corporation without corporators—*Heiner* v. *Scott* (2) ; *Butterworth* v. *Commonwealth Bank* (3). This is impossible at common law, but I do not see why it should be beyond statutory power to make a new kind of corporation.) The plaintiffs contended that the existence of the Commonwealth Bank depended upon s. 51 (xxxi.) of the Constitution (the incidental power) and not upon s. 51 (xiii.) (the banking power). It was argued that the incorporation of the Commonwealth Bank and the assignment of powers to it was to be justified only by the reasoning in *M'Culloch* v. *Maryland* (4) that is, that the bank was created as the financial agent of the Government and as part of the governmental system and that it could therefore be given powers and functions which were not limited to the subject of " banking."

(1) (1938) S.C.R. (Can.), at p. 117.
(2) (1914) 19 C.L.R. 381.
(3) (1916) 22 C.L.R. 206.
(4) (1819) 17 U.S. 316 [4 Law. Ed. 579].

The Commonwealth Bank might have been constituted and established as the financial agent of the Commonwealth Government and as a government instrumentality, but in fact this is not what was done when the bank was created in 1911. The bank was established under the *Commonwealth Bank Act* 1911, and there is nothing in that Act about the bank acting for or as agent for the Commonwealth. The bank was constituted with ordinary banking functions. The 1911 Act contained no provisions such as ss. 8, 9, 11 and 12 of the *Commonwealth Bank Act* 1945 or any provisions such as those of the *Banking Act* 1945 conferring powers upon the Commonwealth Bank in relation to the control of credit and banking policy and the other matters, such as exchange control, foreign exchange, special accounts, with which that Act deals. There is, in my opinion, no reason for regarding the legislative powers conferred by s. 51 (xiii.) as inapplicable to the Commonwealth Bank and applicable only in the case of banking conducted by other banks. The validity of the *Commonwealth Bank Act* 1945 is not in question in these cases, but I can see no reason why it should not be supported, if it were alleged to be invalid, more effectively under s. 51 (xiii.) than under s. 51 (xxxix.). But the question whether the legislation with respect to the Commonwealth Bank depends upon s. 51 (xiii.) or upon s. 51 (xxxi.) does not appear to me to have any direct relevance to the questions which have to be decided in this case.

The 1947 Act contains no provisions with respect to central banking, and if it were put completely into operation it would result merely in there being no central bank as distinguished from other banks, but only the Commonwealth Bank and State banks. The State bank would be beyond Federal control. Therefore there would be no central bank determining the policy of other banks because there would be no other banks for it to control.

In my opinion considerations as to central banking and all the evidence and argument as to credit control are irrelevant in the present cases. Central banking is not a matter in issue in the present cases. It is true that expansion or contraction of credit is the consequence of many banking transactions. But expansion and contraction of credit is brought about also by other agencies than the activities of banks, and the legislative power of the Commonwealth Parliament is not a power to make laws with respect to the control of credit. In so far as Parliament can make laws with respect to banking it can affect the volume of credit in the community. It can do the same thing by laws with respect to taxation, borrowing, imports and exports, and (under the defence

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power) price control; but the Commonwealth Parliament has not been given any power to make laws with respect to the control of credit as a subject in itself. But I agree with the argument of the defendants that "banking" includes central banking. If this be so "banking" cannot be given the limited sense of banking transactions between banks and customers for which the plaintiffs contend. Determination of banking policy and of systems of management are as essential to the existence of banking as are transactions with depositors and borrowers.

Both plaintiffs and defendants made reference to cases decided in the United States which had some reference to the subject of banking, but in none of these cases was it necessary to formulate a precise definition of banking in order to apply any constitutional provision upon that subject. The power of Congress to make laws with respect to banking has been founded in the United States upon the incidental power: *M'Culloch* v. *Maryland* (1). There is no constitutional provision dealing with the subject of banking and the American authorities cited are of little assistance in these cases.

The provisions of the Canadian Constitution (s. 91 (15).) which have already been quoted, are, it would appear, the basis of the provisions in the Commonwealth Constitution. The controversies which followed the decision in *M'Culloch* v. *Maryland* (1) may well have been the reason why, in the Canadian Constitution, and subsequently in the Commonwealth Constitution, a specific power as to incorporation of banks was added to the power to make laws with respect to banking. Similarly the special mention of the issue of paper money is probably explained by the history of the paper money controversy in the United States: see *Quick & Garran, Annotated Constitution of the Australian Commonwealth* p. 579.

At this point it is convenient to notice the argument of the plaintiffs that the word "banking" must be given a narrow construction because in pl. (xiii.) it is used in a sense which excludes incorporation of banks. In my opinion little weight should be attached to such an argument. The historical antecedents of the placitum to which reference has been made almost certainly explain its form. But, it must be recognized, words are sometimes added in constitutions for the (generally unsuccessful) purpose of preventing argument by making a definite provision with respect to a particular subject, even though some overlapping may result. The words conferring legislative power upon the Commonwealth Parliament should not be construed upon the basis of a hard and fast mechanical rule that there is no overlapping between any of them.

(1) (1819) 17 U.S. 316 [4 Law. Ed. 579].

See, for example, Constitution, s. 51 (xii.)—"Currency, coinage, and legal tender"—a very clear case of overlapping. It was said concerning the Indian Constitution in *Prafulla Kumar Mukherjee* v. *Bank of Commerce* (1): "It is not possible to make so clean a cut between the powers of the various legislations: they are bound to overlap from time to time": and see *Attorney-General for Canada* v. *Attorney-General for Quebec* (2).

It was strongly contended for the defendants that the essential characteristic of banking is the creation of credit. See *Punjab Co-operative Bank Ltd.* v. *Income Tax Commissioner* (3). The defendants' contention was put in the following words: "The primary function of a bank is granting and recalling credit." Undoubtedly a bank does deal in credit. Depositors have credit by reason of their deposits and a bank, when it grants an overdraft, creates a credit in favour of a customer, and when it lends money in any way it creates credit. Similarly, it affects the volume of credit in the community by buying and selling securities and by other operations. But this means no more than that, as Lord *Simon* said in *Attorney-General for Alberta* v. *Attorney-General for Canada* (4): "The concept of banking certainly includes the granting of credit by banks." The actual or potential creation of credit is a feature of all transactions which involve a pecuniary element where the transaction is not conducted upon a cash basis. Any transaction which creates an outstanding liability involves a creation of credit. The ordinary sale of goods on credit creates a credit which did not previously exist. It cannot be said that wherever credit is granted or recalled there is a transaction which is essentially a banking transaction. Creation of credit is not the distinctive feature of banking as compared with other activities.

In my opinion the contention of the defendants that banking is essentially a business is well founded. A single transaction by an individual person who receives a deposit of money and promises to repay it is not a banking transaction. Banking is a business. See the cases cited in *Paget, The Law of Banking*, 4th ed., (1930) p. 5. In order to be a banker a man must "hold himself out as a banker and the public take him as such": *Stafford* v. *Henry* (5). If a man carries on other businesses besides that of banking, and if the banking is only subsidiary to the other businesses, he cannot be regarded as a banker: *Re Shields' Estate* (6).

(1) (1947) L.R. 74 Ind. App. 23, at p. 42.
(2) (1947) A.C. 33, at p. 43.
(3) (1940) A.C. 1055, at p. 1072.
(4) (1947) A.C. 503, at p. 517.
(5) (1850) 12 Ir. Eq. R. 400.
(6) (1901) I.R. Ch. 172, at p. 199.

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Banking began with the receipt of money subject to an obligation to make money available to or according to the directions of the depositor. An establishment which does not deal in money (using the term " money " to include legal tender and all forms of generally acceptable credit) as a regular business and as its principal business would not be called a bank. An establishment which did not deal with money belonging to other persons would not be called a bank.

The essential nature of the relations between banker and customer was most clearly defined in *Foley* v. *Hill* (1) where it was held that a bank which receives the money of a depositor becomes the debtor of a depositor " with a superadded obligation arising out of the custom of bankers to honour the customer's drafts " : see *Attorney-General for Canada* v. *Attorney-General for Quebec* (2). The conduct of business upon this basis is the central and distinctive feature of banking. Without it, in my opinion, there can be no banking. Banking also includes the lending of money upon or without security if such lending is associated with the business which I have specified. Money lending not so associated is not banking : see *Halsbury, Laws of England*, 2nd ed., vol. 1, p. 782 :—" A ' banker ' is an individual, partnership, or corporation, whose sole or predominating business is banking, that is the receipt of money on current or deposit account and the payment and collection of cheques, drawn by or paid in by a customer." It also includes " the business of making of advances or the granting of overdrafts to customers." See *Commissioners of The State Savings Bank of Victoria* v. *Permewan Wright & Co. Ltd.* (3) to the same effect.

Accordingly, I do not agree with the contention of the defendant that the creation, expansion and contraction of credit (though resulting in large measure from banking operations) constitute the essence of banking.

Banks which are corporations must have an internal organization as corporations and there must be some definition of their powers. The Commonwealth Parliament may legislate upon these subjects under s. 51 (xiii.)—banking and the incorporation of banks.

A bank, in order to carry on business successfully, must have a policy with respect to deposits, overdrafts &c. It must have managers and a system of management, a staff and offices. Further, in order to carry on successfully, it must be able to invest its funds. All these subjects, in my opinion, fall within the concept of banking as a business. They are naturally, and necessarily, involved in the existence and legitimate activity of any banking business. A bank

(1) (1848) 2 H.L.C. 28 [9 E.R. 1002].
(2) (1947) A.C., at p. 44.
(3) (1914) 19 C.L.R. 457.

which omitted to deal with these matters would soon find itself in difficulties. They are, in my opinion, all part of the every-day business of banking.

I agree with the argument of the plaintiffs that the acquisition of a share in a bank by any person (whether a bank or not) is not itself a banking operation, and similarly that the purchase by any person, whether a bank or not, of assets from a bank is not itself a banking operation and that the taking over of the business of another bank probably would not be described as a banking "transaction." But a law which controls such matters is a law dealing with the business of banking, because such matters affect the conduct and control of the business and are things which may be done from time to time in the course of the business of banking, although they are not banking transactions between a banker and a customer. It is easy to give examples of laws which are laws having a most immediate relation to banking and which are therefore laws with respect to banking, though they do not deal with banker-customer relations as such. Among such laws would be a law requiring a bank to have a certain minimum capital or to maintain a percentage of uncalled capital, or a law prescribing the persons who may be allowed to hold bank shares, e.g. excluding bankrupts, or a law preventing banks in certain circumstances from disposing of their assets, or a law prescribing permissible forms of investment by banks. A law dealing with the management and staffing of banks would be a law relating to essential elements in the business of banking though not dealing with any transactions between any bank and any customer.

The argument for the plaintiffs devoted a great deal of attention to the case of *Tennant* v. *Union Bank of Canada* (1) where the Privy Council considered a Dominion Bank Act which provided that a bank should have certain rights under and in respect of warehouse receipts taken as securities in the course of its business—in effect that they should be negotiable instruments. The Provincial Parliaments had exclusive power to legislate with respect to warehouse receipts under the heading "property and civil rights in the Province." Under provincial law the warehouse receipts were not negotiable instruments. It was held that the Dominion law was a law with respect to banking (as to which the Dominion Parliament had exclusive power) and that it was valid. In the reasons for judgment it was said that "banking" was "an expression . . . wide enough to embrace every transaction coming within the legitimate business of a banker." (2) The plaintiffs used this statement

(1) (1894) A.C. 31.

(2) (1894) A.C., at p. 47.

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as if it meant: "Banking consists entirely of 'transactions'." But the sentence quoted only states what is obvious—that the business of banking includes banking transactions. No-one has ever disputed that proposition. It serves only to put one upon enquiry as to what is the "legitimate business of a banker" and makes it clear that banking is a business.

Under s. 51 (xiii.) the Commonwealth Parliament has (as the plaintiffs contend) power to make laws with respect to transactions between banker and customer. But the power is, in my opinion, not limited to such matters. This provision also covers power to make laws with respect to the powers, and the limitation of the powers, to be exercised by persons or corporations engaging in the business of banking, the management of banks, the acquisition of assets by banks, the "taking over" of one bank by another bank, the disposition of assets by banks, the management of banks and what persons shall be allowed to hold or retain shares in banks.

I come now to the argument of the plaintiffs that the word "banking" in the phrase, "State banking extending beyond the limits of the State concerned," cannot be fairly construed in the wide sense just stated. I agree with the reasoning that such a construction would have the effect of destroying the exception of State banking from Federal power. In my opinion, the power to make laws with respect to "State banking extending" &c. must be given a limited construction so as not to destroy that exception. The Federal power, in this case, must be limited by reason of the fact that other State banking is beyond Federal power, and that the wide construction of "banking" in "banking extending" would have the actual result of subjecting that other State banking to Federal legislative power. Thus the Commonwealth power should not be held to include a power to prohibit State banking extending &c.—for the reason that such a construction would defeat the reasonably plain intention of the provisions with respect to State banking. The intention of these provisions is that the States shall be free to set up State banks and that the Commonwealth Parliament may remove obstacles to the operation of such banks in other States. Such a view gives, in my opinion, a sensible and practical interpretation to the provisions with respect to State banking. But none of these considerations appear to me to reflect back upon the interpretation of the general power to make laws with respect to "banking." They are all associated with and dependent upon the nature of State banking as being banking under State control, management and direction as distinct from Commonwealth control, management and direction. These considerations

have, in my opinion, no relation to the interpretation of the general power to make laws with respect to "banking."

Section 46.

This section enables the Treasurer to prohibit the carrying on of banking business in Australia by a private bank. The power may be exercised at any time, in respect of any one or more of the banks, together or separately, and for any reason that may commend itself to the Treasurer—the section does not require him to act upon any specified ground. The prohibition provisions of the section (sub-ss. (4) to (8)) can be used quite independently of any other provisions of the Act—i.e. independently of whether shares or assets have been acquired or whether the management of a bank has been taken over under Part IV., Division 3. These provisions were attacked upon various grounds as not justified by s. 51 (xiii.). (Separate arguments were based upon s. 51 (xx.) and s. 92.).

In the first place, the plaintiffs argued that the power to make laws with respect to banking is really a power to *regulate* banking, and that the grant of such a power assumes the continuance, and not the destruction, of the subject matter.

The latter proposition was supported by reference to *Toronto Corporation* v. *Virgo* (1). The principle stated in *Toronto Corporation* v. *Virgo* (1) that a power to regulate "seems to imply the continued existence of that which is to be regulated," was applied for the purpose of interpreting the Canadian Constitution in *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (2). This principle has frequently been applied to municipal by-laws: see e.g. *Melbourne Corporation* v. *Barry* (3) and *Swan Hill Corporation* v. *Bradbury* (4). But, the legislative power is not a power to "regulate" banking. It is a power to make laws *with respect to* banking, and this is the most general form in which power can be given in relation to any subject matter.

Next, under a plenary power with respect to a particular subject the legislature can prima facie allow the subject to be uncontrolled or may control it to such extent as it thinks proper. "The plenary power of legislation is not merely a power to regulate: it ranges from creation to destruction; it may establish as well as prohibit": *Harrison Moore, Constitution of the Commonwealth of Australia*, 2nd ed., (1910) p. 280. In the United States the power of Congress to "regulate commerce with foreign nations and among the several States" has on very many occasions been held to extend "not only

(1) (1896) A.C. 88, at p. 93.
(2) (1896) A.C. 348, at p. 363.
(3) (1922) 31 C.L.R. 174.
(4) (1937) 56 C.L.R. 746.

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to those regulations which aid, foster and protect the commerce, but [it] embraces those which prohibit it" : *United States* v. *Darby* (1) and the long list of cases there cited. So also in Australia this Court has held that power to make laws with respect to trade and commerce among the States enables the Parliament to prohibit persons from engaging in such trade and commerce : *Huddart Parker Ltd.* v. *The Commonwealth* (2) ; *Meakes* v. *Dignan* (3) ; *Australian National Airways Pty. Ltd.* v. *The Commonwealth* (4) ; *Melbourne Corporation* v. *The Commonwealth* (5) where a particular prohibition of certain banking was held to be a law with respect to banking.

A further argument of the plaintiffs with respect to s. 46 was based upon the submission that the power to prohibit banking conferred by s. 46 was an arbitrary power and that any power of prohibition, if it existed at all, must be a power to prohibit only by reason of what were described as " banking considerations "—considerations which could be said to be " relevant " or " germane " to banking. Political considerations such as a policy of substituting public control of banking for private control of banking were said to be irrelevant. In some cases, more particularly in the case of subordinate legislative authorities, it may be proper, having regard to the character of the authority and the nature of the subject matter, to construe a statute as not intended to confer a power to prohibit : *Toronto Corporation* v. *Virgo* (6) ; *Shire of Swan Hill* v. *Bradbury* (7). In some cases the character of the statute under which an authority acts is such that the authority is limited to action on grounds which are relevant to a particular object or purpose : *Victorian Railways Commissioners* v. *McCartney* (8) and cases cited in *Arthur Yates & Co. Pty. Ltd.* v. *Vegetable Seeds Committee* (9). In others an exercise of power is validly authorized only where it is exercised upon grounds which are relevant to a subject upon a connection with which the validity of the statute depends—as in *Shrimpton* v. *The Commonwealth* (10). In the last-mentioned case it was held that under a particular National Security regulation a purely arbitrary discretion could not be vested in a Minister or a public officer, and that it must appear that the exercise of the discretion was based upon considerations relevant to the subject matter which was relied upon for the purpose of supporting

(1) (1941) 312 U.S. 100, at p. 113 [85 Law. Ed. 609, at p. 616].
(2) (1931) 44 C.L.R. 492.
(3) (1931) 46 C.L.R. 73.
(4) (1945) 71 C.L.R. 29, at pp. 72, 77, 81.
(5) (1947) 74 C.L.R. 31.
(6) (1896) A.C. 88.
(7) (1937) 56 C.L.R. 746.
(8) (1935) 52 C.L.R. 383.
(9) (1945) 72 C.L.R. 37, at p. 66.
(10) (1945) 69 C.L.R. 613.

the law—in the case in question the subject matter of defence. In that case the position was that the Commonwealth Parliament had no power to deal with sales of land as such (which was the subject matter of the regulations) unless there was sufficient connection between that subject and the subject of defence. It was for this reason, and this reason only, that it was held that the discretion conferred upon the Treasurer had to be exercised in relation to considerations of defence. If there had been a general power in the Commonwealth Parliament to make laws with respect to land sales no question as to the grounds upon which a discretion could be exercised would have arisen.

If a discretion given by a law is exercised fraudulently or dishonestly, then there is no true exercise of the discretion: *Arthur Yates & Co. Pty. Ltd.* v. *Vegetable Seeds Committee* (1). But a legislature with plenary power over a subject can provide—and frequently does provide—for the operation of specific provisions in particular cases to depend upon an exercise of discretion by a particular person. In *Australian Commonwealth Shipping Board* v. *Federated Seamen's Union of Australasia* (2) it was said that it was a "well established parliamentary practice . . . to legislate conditionally on the exercise of discretion by a person in whom the Legislature places confidence." In the 1947 Act the legislature has expressed confidence in all Treasurers of the Commonwealth. The Parliament cannot be held to have authorized a fraudulent or dishonest act, but I am of opinion that Parliament has placed no other limitations upon a Treasurer's exercise of discretion in acting under the many provisions of the 1947 Act where action depends merely upon his own volition—or when his approval is required e.g. ss. 12, 13, 18, 19 (2), 22, 24, 43 (2) and 46. If the power under s. 46 can be exercised only for what is called "a banking reason," what is to be said of the various discretions conferred by the other sections mentioned? In my opinion the argument of the plaintiffs that s. 46 is invalid by reason of the power to prohibit being simply vested in the Treasurer without any provision as to the grounds upon which he may act is not applicable in the case of a legislature making a law upon a subject as to which it has plenary power. The legislature takes an obvious risk in enacting such provisions but that is a matter for the judgment of the legislature itself.

Public Control of Banking.

There are other considerations more general in character which are, in my opinion, relevant to the subject of banking in relation to the four sets of provisions attacked by the plaintiffs—

(1) (1945) 72 C.L.R. 37.

(2) (1925) 36 C.L.R. 442 at p. 453.

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(*a*) the acquisition by the Commonwealth Bank of shares in other banks;

(*b*) the acquisition by the Commonwealth Bank of assets of other banks and the transfer to the Commonwealth Bank of liabilities of other banks;

(*c*) the control of the management of banks;

(*d*) prohibition of the carrying on of banking business by particular banks.

I propose to consider generally whether legislation dealing with these subjects is included within the power to make laws with respect to banking, reserving some of the details of the provisions contained in the 1947 Act for later consideration.

Under a power to make laws with respect to banking a legislature may determine the type of banking which should be allowed and encouraged. The legislature can prefer one bank to other banks and give one bank advantages which it denies to other banks. It can determine a policy with respect to the conduct of the business of banking.

The Commonwealth Parliament has chosen the Commonwealth Bank as its instrument for establishing a system of public control of banking as distinguished from private control of banking. The Parliament finds a field of banking occupied by the Commonwealth Bank, some State banks and private banks. The State banks are beyond Federal power. But the Commonwealth Parliament may make laws specifying the kind or kinds of other banks which are to be allowed to carry on banking business. In the exercise of this power the Commonwealth Parliament provided in the *Banking Act* 1945 means for determining how many banks there should be (ss. 6, 7 and 8) and for the control in large measure of the business of private banks by the Commonwealth Bank, which is under public control.

In the 1947 Act there is a further development of this policy. In that Act Parliament has expressed its decision that the Commonwealth Treasurer shall be given the power of getting rid of the private banks so as to leave an open field for the Commonwealth Bank. The means adopted is to enable the Commonwealth Bank to acquire either partial or complete control of the business of private banks to such extent as is thought desirable from time to time. One of the well-known methods of acquiring control of a business carried on by a company is the purchase of shares in the company—if possible, ownership of all the shares in the company. This is one method adopted in the 1947 Act (s. 12, acquisition of shares by purchase). But the Commonwealth Parliament has a power to

make laws for the acquisition of property by compulsion. This is another method adopted in the Act (s. 13, compulsory acquisition of shares). A company which wishes to get rid of competition and to extend its business may acquire the business and assets and take over the liabilities of another company by agreement with that company. This method is made available by s. 19 and by s. 22. But the Commonwealth Parliament has powers of legislation and can make statutory provision for acquiring property for any purpose, such as banking, in respect of which the Parliament has power to make laws. This method of extending the area of operations and the influence of the Commonwealth Bank is applied in s. 24. Few means of dealing with a company which is a business competitor could be more effective than taking control of its management, if this is possible. Private individuals cannot do this, but the Commonwealth Parliament has chosen this also as one of the means of securing its objective, namely obtaining increased and possibly complete control of banking other than State banking by the Commonwealth Bank: ss. 17, 18 and 19. Another method of excluding competition is to stop by some lawful means the business of competing enterprises. Under a power to make laws with respect to banking the Commonwealth Parliament can determine whether and to what extent and by whom the business of banking shall be carried on. The Parliament has exercised this power in s. 46, going further than had been done in the *Banking Act* 1945, ss. 6, 7 and 8.

All these provisions (whether used together or piecemeal and whether applied to all or only to some of the private banks) have a direct relation to the substitution of public for private control of banking and, in my opinion, are laws with respect to the conduct of the business of banking and therefore are laws with respect to banking within the meaning of s. 51 (xiii.) of the Constitution.

Constitution, s. 51 (*xx.*)—*Financial Corporations.*

Before proceeding to examine some of the details of these provisions which may not be justified under the general propositions which I have stated, or which may be invalidated by reason of failure to comply with other constitutional provisions, it is convenient to refer to another source of legislative power upon which the defendants rely, namely s. 51 (xx.) of the Constitution. This placitum confers power upon the Commonwealth Parliament to make laws with respect to "Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth."

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Banking corporations are financial corporations. It is therefore argued for the defendants that laws can be made with respect to banking corporations (and all the plaintiff banks are corporations) under s. 51 (xx.). The contention of the defendants was that s. 51 (xx.) gave full power to make any law upon any subject so long as it was a law which applied to and controlled the conduct of the corporations mentioned in this paragraph of the Constitution.

The judgments in *Huddart, Parker & Co. Pty. Ltd.* v. *Moorehead* (1) provide several alternative interpretations of this difficult provision. The one thing that is clear about it is that the provision assumes the existence of corporations either under foreign law or under some law which is in force in the Commonwealth. If the corporation is already formed it derives its existence and its capacity from the law which provided for its formation : see the quotation from *Dartmouth College* v. *Woodward* (2) in the judgment of *Isaacs* J. in *Huddart, Parker & Co. Pty. Ltd.* v. *Moorehead* (3) : " Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence." Thus the existence and the powers and capacities of any corporation to which s. 51 (xx.) applies depend upon some law other than a law made under that provision.

If the proposition submitted for the defendants were accepted, then the Commonwealth could make any law at all for the control of the corporations mentioned. The position would then be that the Commonwealth Parliament would have complete powers of legislation by way of direction or prohibition with respect to anything that such corporations might do. As to all individual persons and as to all other corporations (e.g. charitable, literary, scientific) the Commonwealth Parliament would have powers only in relation to the particular subject matters included within the specific provisions of s. 51 and other sections of the Constitution. But as to the corporations described in pl. (xx.), the Parliament would be able to make any kind of law on any subject. *Higgins* J. in *Huddart, Parker & Co. Pty. Ltd.* v. *Moorehead* (4) gave some illustrations of the consequences of such a view. He said that if the view stated was right :—" the Federal Parliament is in a position to frame a new system of libel laws applicable to newspapers owned by corporations, while the State law of libel would have to remain applicable to newspapers owned by individuals. If it is right, the Federal Parliament is competent to enact licensing Acts, creating a new scheme

(1) (1909) 8 C.L.R. 330.
(2) (1819) 19 U.S. 518 [4 Law. Ed. 629].
(3) (1909) 8 C.L.R., at p. 394.
(4) (1909) 8 C.L.R., at pp. 409, 410.

of administration and of offences applicable only to hotels belonging to corporations. If it is right, the Federal Parliament may enact that no foreign or trading or financial corporation shall pay its employés less than 10s. per day, or charge more than 6 per cent interest, whereas other corporations and persons would be free from such restrictions. If it is right, the Federal Parliament can enact that no officer of a corporation shall be an Atheist or a Baptist, or that all must be teetotallers. If it is right, the Federal Parliament can repeal the *Statute of Frauds* for contracts of a corporation, or may make some new *Statute of Limitations* applicable only to corporations. Taking the analogous power to make laws with regard to lighthouses, if the respondent's argument is right, the Federal Parliament can license a lighthouse for the sale of beer and spirits, or may establish schools in lighthouses with distinctive doctrinal teaching, although the licensing laws and the education laws are, for ordinary purposes, left to the State legislatures." But, as his Honour said, these arguments from inconvenience are not conclusive.

In the present cases, however, it is not necessary to deal with all the questions which arise as to the meaning of pl. (xx.). In these cases the Court is concerned with the subject of banking. Placitum (xiii.) confers an express power with respect to banking including, of course, banking conducted by corporations, and a further express power with respect to the incorporation of banks. Under pl. (xiii.), therefore, a power (incorporation) exists in relation to banking corporations which does not exist in relation to corporations mentioned in pl. (xiii.). A banking corporation created under a law passed under the powers conferred by s. 51 (xiii.) would be a financial corporation formed within the limits of the Commonwealth.

Any banking corporation carrying on business in Australia must be either a foreign corporation or a corporation formed within the limits of the Commonwealth. If under pl. (xx.) there is therefore complete power to pass any law of any description in so far as it is made applicable to banking corporations, pl. (xiii.) in relation to "banking" would be required only for the purpose of giving power to make laws with respect to individual persons carrying on banking business—which would be a rather surprising result.

There is, in my opinion, a decisive argument against the suggested interpretation of s. 51 (xx.). It is, in my opinion, impossible to reconcile that interpretation with the provisions in pl. (xiii.) relating to State banking. Upon that interpretation, if State banking were carried on by a corporation, that corporation, being a financial corporation formed within the limits of the Commonwealth, would

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be completely subject to any Federal law made under pl. (xx.). The result would be that the exclusion of State banking from the banking power would be entirely deprived of effect in all such cases. The Constitution should not be construed so as to bring about a result so unreasonable if another construction is reasonably open. In my opinion such a construction is reasonably open. The difficulties to which I have referred disappear if s. 51 (xiii.) is interpreted as a special provision which provides for the whole legislative power of the Commonwealth Parliament so far as laws with respect to banking corporations and banking are concerned. This is a proper occasion for interpreting a provision "as excluding cases expressly dealt with elsewhere . . . notwithstanding the generality of the words": *John Deere Plow Co. Ltd.* v. *Wharton* (1). Upon this view pl. (xx.) should be regarded as not applying to corporations so far as they are engaged in banking. Accordingly, in my opinion s. 51 (xx.) is irrelevant for the purposes of determining the validity of any of the provisions of the 1947 Act.

Constitution, s. 51 (xxxi.)—Acquisition.

Section 51 (xxxi.) of the Constitution provides that the Commonwealth Parliament may make laws for "The acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws." In the 1947 Act the Parliament has purported to exercise this power in relation to shares in the plaintiff banks and to assets of the plaintiff banks. The Act also makes provision for transfer of liabilities from the plaintiff banks to the Commonwealth Bank and discharge of the plaintiff banks from their liabilities in cases where either s. 22 or s. 24 is put into operation.

I propose to deal first with the subject of "acquisition" (that is, the question of what can be acquired) and, secondly, with the subject of "just terms."

The plaintiff banks have, by their memoranda of association, power to buy shares in other banks and companies, to sell their businesses and to amalgamate with other banks. The defendants argued that the provisions of the Act as to acquisition of shares and assets merely adopt provisions of this type for the Commonwealth Bank, and that such provisions in the memoranda of association of the plaintiff banks show a quite common and well-recognized feature of banking law. But this argument ignores the compulsory elements in the Act. It may be within the power of the Federal Parliament to give to the Commonwealth Bank the

(1) (1915) A.C. 330, at p. 340.

powers which the plaintiff banks, in common with many other banks in other countries, may possess. But it is quite a different thing to arm the Commonwealth Bank with powers of compulsory acquisition. A power of compulsory acquisition as such is not itself a banking power.

The power to make laws with respect to the acquisition of property is separated in the Constitution from the other powers and such laws must be laws for the acquisition of property for a purpose in respect of which the Parliament has power to make laws, and they must provide for acquisition on just terms: *Johnston, Fear & Kingham and The Offset Printing Co. Pty. Ltd.* v. *The Commonwealth* (1).

The power of acquisition of particular property does not depend in any way upon the purpose for which that property is being used at the time of acquisition: for example, a factory might be acquired in order to be used as public offices. I therefore cannot accept the arguments presented to the court attacking the acquisition of assets because, it is said, they may not be in use for banking purposes at the time of acquisition.

I notice here an argument based on the powers conferred by the Act to purchase and to take over by compulsion any business carried on by the plaintiff companies in Australia. The plaintiff companies are at present engaged only in banking business, but they might enter into other forms of business which are authorized by their memoranda of association. Under ss. 19, 22 or 24 such a non-banking business could be acquired by the Commonwealth Bank either at the present time or at any time in the future. Such provisions, it is submitted, have no relation to the subject of banking. I have already referred to the fact that "taking over a business" is not a technical legal conception. If the Commonwealth Bank takes over a business under the compulsory provisions of the Act, all it gets are certain assets and certain liabilities, as specified in s. 24. The power to acquire the assets is not affected by the nature of the business in which they are used when they are acquired. The transfer of liabilities requires separate consideration. Similar considerations apply to the special kind of agreement for which s. 22 provides. If a business is sold under the power conferred by s. 19 (2) (*b*) or (*c*) the vendor decides what will be sold and upon what terms—the Act makes no provision on these matters.

It was also argued that the Commonwealth Bank would not need to use a great deal of the property which it would acquire from the plaintiffs if the acquisition provisions of the Act were applied. It

(1) (1943) 67 C.L.R. 314.

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has already been stated that the only business which the plaintiff companies in fact now carry on is the business of banking and the property which the plaintiffs own, whether in the form of land and buildings or chattels or investments, is property which has all been acquired by them in the course of carrying on the business of banking. In my opinion there is no satisfactory ground upon which it can be said that any particular part of that property could not possibly be used by the Commonwealth Bank in the same way as it has been used by the plaintiff banks. Similar considerations apply to property which may be acquired by the Bank in the future. It has not yet been held that an acquisition of property by the Commonwealth will be invalid unless it can be shown to a court that the property will certainly be used by the Commonwealth for some particular purpose. The Commonwealth might validly acquire property for the purpose of destroying it—e.g. land with buildings on it for the purpose of a rifle range, dangerous explosives in the possession of persons of dubious loyalty.

The Commonwealth may acquire property for the purpose of giving effect to a law with respect to banking. I have already given reasons for my opinion that the legislative substitution of public for private control of banking is a law with respect to banking and, accordingly, in my opinion, the Commonwealth may make provision for the acquisition of property by the Commonwealth Bank from the plaintiff banks or from a State or any other person in order to give effect to the provisions of the 1947 Act.

Acquisition of Shares.

There are, however, some details of the provisions relating to acquisition as to which particular objections are made. These objections must be considered in the light of the fact that the Commonwealth Constitution, s. 51 (xxxi.), confers power on the Commonwealth Parliament to make laws for the acquisition of property from persons or States. When the Commonwealth Parliament validly exercises this power the Commonwealth law prevails over any inconsistent State law (Constitution, s. 109). Therefore a State law cannot prevent the Commonwealth acquiring property; for example, a State law could not, by making property completely inalienable, prevent the Commonwealth acquiring that property. Similarly, a State law could not exclude the application of a Commonwealth law for the acquisition of property by providing that that particular property should never become the property of the Commonwealth or of an agency of the Commonwealth authorized by Commonwealth law to acquire it.

But the Commonwealth Parliament can provide under this constitutional provision for the acquisition only of that which *is* property; that is, it must take "property" as it finds it. The Commonwealth, by acquiring property or providing for the acquisition of property, does not and cannot change the nature and character of the property acquired. It can acquire from an owner of property only the property which that person owned.

The foregoing considerations are relevant to ss. 10, 13, 14 and 21 of the Act.

It has already been stated that s. 10 makes no real change in the law so far as State laws are concerned. It accomplishes in this respect no more than would be accomplished by s. 109 without the separate enactment of the provisions of s. 10. Three of the plaintiff banks are established under English law. The Commonwealth Parliament cannot affect the provisions of that law. But the question as to the limiting effect (if any) of other laws upon the operation of a Commonwealth law for the compulsory acquisition of property arises only in relation to the compulsory acquisition of shares, and there is no provision for such acquisition in the case of shares in the English banks.

Section 13 provides for compulsory acquisition of Australian shares in Australian private banks. It provides that, upon the Treasurer giving a notice, such shares shall become vested in the Commonwealth Bank: s. 13 (1) and (3). The Companies Acts and articles of association under which the plaintiff companies operate provide for the method of transfer of shares. The provisions in all cases are to the effect that an instrument of transfer duly executed by a shareholder must be produced to the directors. The Acts and articles of association do not contain any provision for the transfer and vesting of shares by virtue of the Commonwealth statute. Accordingly, the provisions of s. 13 to the effect that shares in the plaintiff companies shall become vested in the Commonwealth Bank upon the happening of a certain event, namely the giving of a notice by the Treasurer, are provisions with which the provisions of the State Act and articles of association are inconsistent. But the latter provisions cannot take effect so as to prevent the operation of the Commonwealth law. Accordingly, in my opinion, s. 13 contains provisions which are effective to vest in the Commonwealth Bank shares in the plaintiff banks, even though the relevant Companies Acts and articles of association contain what is intended to be an exhaustive statement of the means of transferring shares so as to vest them in a transferee.

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Section 14 (1) of the Act provides that the Commonwealth Bank shall, for all purposes, be the holder of the shares in an Australian bank which have been purchased or otherwise acquired by the Commonwealth Bank under Division 2 of Part IV. of the Act and shall be a member of that Australian private bank in respect of those shares. This provision applies both to shares purchased by agreement under s. 12 and to shares acquired compulsorily under s. 13. In my opinion such a provision is incidental to the acquisition of the shares. It makes the Commonwealth Bank the holder of the shares and a member of the company without the necessity of registration under the State Act, which registration might, in the case of several of the private banks, be refused at the will of the directors. In *The Commonwealth* v. *New South Wales* (1) the Court considered the acquisition of land under the *Real Property Act* (1900) (N.S.W.). It was held that the Commonwealth could compulsorily acquire land (without any transfer as required by that Act) and that the Commonwealth became the owner of the land without registration in pursuance of the Act. It was the basis of the Act that the legal title to land depended upon registration, but, notwithstanding the provisions of the Act which secured this result, the Commonwealth obtained full rights of ownership in the land after compulsory acquisition. This reasoning, in my opinion, establishes the validity of s. 14 (1) in relation to shares acquired by the Commonwealth Bank under the Act.

In the case of the Bank of New South Wales there is a provision which prevents the holding of shares in the bank by any corporation. This provision must, for the reasons stated, yield to a Commonwealth law providing for the acquisition of shares by the Commonwealth Bank, which is a corporation.

There are provisions in the case of several of the plaintiff companies which limit the number of shares which can be held by a shareholder. These provisions cannot, in my opinion, prevent the Commonwealth Bank acquiring under the Act any number of shares in any of the plaintiff banks. They are provisions which, viewed in the light of the Commonwealth law, would have the effect of preventing the operation of the Commonwealth law. Therefore the Commonwealth law prevails over them. If State law or provisions in the memorandum or articles of association of a company could make the Commonwealth or any Commonwealth instrumentality incapable of being a shareholder the effect would be that it would be impossible for the Commonwealth to acquire shares in the company under the power of legislation conferred by

(1) (1923) 33 C.L.R. 1.

s. 51 (xxxi.) of the Constitution. No such State legislation or memorandum or articles of association can prevent the application of a Commonwealth law for acquisition of shares.

A share in a company is described as a share in the capital of a company. The capital of a company is expressed by a sum of money, but a shareholder does not become a part owner of property owned by the company or of a balance of assets over liabilities. A share in a company, regarded as property, consists of the rights to which the shareholder is entitled by reason of the provisions of the articles and memorandum of association and any relevant statute: *Borland's Trustee* v. *Steel Bros. & Co. Ltd.* (1).

When the Commonwealth Bank acquires a share, that which it acquires is a share in a particular company with a particular memorandum and articles of association to which effect is given by a statute or charter to which the company and the shareholders are subject. The bank must take the share, if at all, with the rights which it confers, and the obligations to which its holder is subject, according to the relevant provisions of the articles &c. A power to acquire a share does not give a power to alter the nature of those rights. It is true, as already stated, that no provisions in the articles or memoranda of association or State law can prevent the Commonwealth acquiring shares and becoming the owner of them and exercising all the rights which belong to the owner. But those rights cannot be altered so as to give to the Commonwealth Bank, once it has become the owner, rights which would not belong to it as a shareholder under the articles of association &c.

It is now necessary to consider the effect of this conclusion in relation to various provisions contained in the memoranda or articles of association of the plaintiff companies.

There are provisions in the articles of association of the plaintiff companies which are of a quite different character from those just mentioned. These are provisions which specify the rights which belong to a person when he has become a shareholder in a company by virtue of his shareholding and membership of the company. In some cases the voting power of shareholders is limited. In, for example, the case of the Bank of New South Wales, shareholders have one vote for every five shares which have been held for three months before the meeting at which it is proposed to exercise the vote, and no voting is allowed in respect of any shares over the number of 1,000. There are provisions of a similar nature in the case of several others of the plaintiffs, in some cases, however,

(1) (1901) 1 Ch. 279, at p. 288.

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applying only where a poll is held. When the Commonwealth Bank acquires shares in a bank in which the voting power of members is limited in the manner stated, the Commonwealth Bank will, in my opinion, be subject to the same limitation of voting power as applied in the case of other shareholders. The Bank will have only the same rights as any other shareholder holding the same number of shares.

In the articles of association of eleven of the plaintiff companies there are provisions to the effect that the directors may decline to register a transfer of shares, in some cases, to any person of whom they do not approve, while in other cases the power of the directors to decline to register transfers is limited to cases in which the shares sought to be transferred are not fully paid or the company has a lien upon them. Such provisions as these, for the reasons which I have stated, do not prevent the Commonwealth Bank from becoming the owner of shares and a member of the company. But it must still be the case that the Commonwealth Bank only becomes the owner of the shares as they exist, and not of shares with rights different from those which attach to the other shares in the company.

Section 14 (2) of the Act provides that the Commonwealth Bank may transfer shares which it has acquired "to any person" and that that person shall, for all purposes, be the holder of those shares and be a member of the Australian bank in respect of those shares. This section was defended not as giving a permission to the Commonwealth Bank to transfer shares as it thought proper (subject to the articles of association of the company) but as giving a right to the bank to transfer to any person, notwithstanding the articles. Section 14 (2) relates to *transfer by* the Commonwealth Bank, and not to *acquisition by* the Commonwealth Bank. Where there are such restrictions on transfers as those mentioned, this provision would give to the Commonwealth Bank rights of transfer which would not attach to shares of the company owned by any other shareholder. Section 14 (2) is, in my opinion, not effective for that purpose. If the rights of transfer are prescribed by State law or the memoranda or articles of association those are the only rights of transfer that exist in the case of the Commonwealth Bank or of any other shareholder. Thus, if the Commonwealth Bank becomes the owner of shares in the plaintiff companies, it is subject to the provisions of articles of association to the effect that, for example, no transfer of shares can be made to a corporation, or to a person not approved by the directors, or so that the transferee would hold a number of shares beyond those permitted by the articles of association. Section 14 (2) cannot override such provisions as

these. Section 14 (2) is not legislation with respect to the acquisition of shares and, in my opinion, there is no other power under which it can be supported. In my opinion s. 14 (2) is invalid.

The Commonwealth cannot, in acquiring property from one person A, make a law which deprives another person B of rights in respect of property owned by B. The Commonwealth might, if B were subject to the legislative power of the Commonwealth Parliament, acquire proprietary rights from B, but a law which, for example, takes shares from A, cannot deprive another shareholder B of his rights in respect of shares which he, B, continues to own. If the Treasurer gives a notice under s. 13 (1) the directors of a bank elected by the shareholders are displaced under s. 17 and, for the future, the directors will be persons appointed by the Commonwealth Bank with the approval of the Treasurer: s. 18. Only Australian shares become vested in the Commonwealth Bank under s. 13. Shares which are not Australian shares remain vested in other shareholders. Those other shareholders have a right to join in electing directors by virtue of the articles of association of the companies, and a right to have the companies managed by directors so elected. Sections 17 to 20, if they are valid, abolish those rights. But, as I have said, a power to acquire property which is exercised in respect of the property of a person A, does not include any power to destroy the rights of B in respect of other property. In my opinion, therefore, ss. 17 to 20 would be invalid if they were dependent upon s. 51 (xxxi.). But I have already given reasons for my opinion that a power to make laws with respect to banking enables a Parliament to legislate upon the subject of the management and internal regulation of and shareholdings in banks. Accordingly, the provisions with respect to this subject are not, in my opinion, invalid by reason of the fact that they alter the rights of shareholders whose shares are not acquired by the Commonwealth Bank. This reasoning applies also to s. 19 (3), which provides that the exercise of the powers of the nominee directors of an Australian private bank shall (subject to one exception specified in s. 19 (2)) be in their sole discretion and shall not be subject to any qualification, restriction or condition provided by or under any law, charter or other instrument relating to the exercise of the powers of the directors of that bank. The directors must doubtless act honestly, but they are not compellable to pay any attention to the wishes of the shareholders. They can manage the bank (s. 19 (1)) at their sole discretion (s. 19 (3)). This is a most far-reaching provision in very unusual terms, but it does provide a method of controlling banking

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business, and, in my opinion, is not outside the power to make laws with respect to banking.

Section 21 of the Act provides that: "Where the number of members of an Australian private bank has, by reason of the purchase or other acquisition by the Commonwealth Bank . . . of shares in that bank, fallen below the number specified in any law" &c. then that law &c. shall have no effect. The laws referred to in this section are laws such as the *Companies Act* (Vict.) 1928, s. 124, which provides that where the number of shareholders in a company falls below five the shareholders who carry on the business of the company shall be liable for certain debts of the company.

If the Act were put into operation in the case of three of the plaintiffs (as the shareholdings stand at present) the Commonwealth Bank would become the owner of all the shares in the companies and, accordingly, these State Acts would operate. In the case of the other Australian private banks the Commonwealth Bank might acquire so many shares that the number of shareholders would be reduced below the minimum number required by State law.

The provisions of s. 21 cannot be regarded as incidental to the acquisition of shares. They are provisions relating to the creditors of a bank and the responsibilities of shareholders. The Commonwealth Parliament might have allowed them to continue to operate unchanged, but the Commonwealth Parliament has determined in s. 21 that such provisions shall not apply in the case of the plaintiff banking companies. In my opinion this provision is a law relating to the organization and control of banking business by defining the relations of a bank and of the shareholders of a bank to the creditors of the bank, though it is not legislation with respect to acquisition of shares. It is, in my opinion, legislation with respect to the conduct of the business of banking and should therefore be held to be valid under s. 51 (xiii.) of the Constitution.

Acquisition of Assets and Business.

The scheme contained in the Act for acquiring assets of banks as distinct from shares in banking companies provides in s. 22 for such acquisition by agreement and in s. 24 for compulsory acquisition. Under an ordinary agreement the effect of the transaction in creating rights or duties is limited to the parties to the agreement and depends upon the terms of the agreement. But s. 22 provides that a particular effect shall be given to an agreement made under the section for the taking over by the Commonwealth Bank of the business in Australia of that bank.

The procedure of making an agreement under the section is carefully defined. It begins by an invitation in writing given to the bank by the Treasurer inviting the bank to make an agreement not later than a specified date for the taking over by the Commonwealth Bank of the business in Australia of the bank. The date specified in the notice may be amended from time to time. Section 22 (5) provides that the Commonwealth Bank may, subject to the approval of the Treasurer, make an agreement with a private bank for the taking over by the Commonwealth Bank of its business in Australia. Section 22 (6) provides that an agreement under the section may be made with a private bank whether or not a notice under sub-s. (1) has been given, but that if such a notice has been given an agreement with that bank shall not be made after the date specified in an original or amended notice. Sub-section (7) provides that an agreement under the section may include provisions for the taking over by the Commonwealth Bank of any of the business, assets and liabilities outside Australia of the private bank.

It has already been stated that the "taking over of a business" involves acquisition of assets of the business and generally some provisions as to the business liabilities of the person who has been conducting the business. But an agreement for taking over a business made between private persons cannot deprive of their rights the creditors of the former owner of the business.

Section 22 (8) states what is to be the effect of an agreement "made under the section." Paragraphs (*a*) and (*c*) of sub-s. (8) relate to assets, and no difficulty is created by a provision that a bank owning assets may dispose of them by agreement. Paragraphs (*b*) and (*d*), however, relate to liabilities, present and future. They provide that the effect of making an agreement under the section shall be that the liabilities of the private bank become liabilities of the Commonwealth Bank and that *the private bank shall be discharged* from its obligations in respect of those liabilities. Section 56 carries out this idea in detail. If the Commonwealth Parliament chooses to declare that the Commonwealth Bank, which is the creature of the Parliament, shall become subject to certain liabilities, it is difficult to see why it should not so provide. It is quite a different thing, however, to provide that a private bank shall be discharged from its obligations in respect of its liabilities to creditors. No agreement between such a bank and the Commonwealth Bank could bring about such a result. The discharge of the private bank from liability means that the statute effects a compulsory novation, with the result that the creditor of a private bank would find that, instead of having a claim against a private

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bank, he would have no claim whatever against a private bank, but would have a claim against the Commonwealth Bank.

A law which makes such a provision is not a law for the acquisition of property. The acquisition of property is a subject which is completely different from that of the transfer of liabilities. The Commonwealth can acquire, for example, a factory or machinery, but the Commonwealth has no power, because it acquires a man's factory or machinery, to provide that he shall be released from his trade or other debts. A power to acquire property from one person does not include a power to abolish the rights of creditors of that person. If the rights which the creditors of such a person has are themselves property, those rights could be acquired (upon just terms) but the Act contains no such provision in relation to creditors of the private banks.

Accordingly, in my opinion the provisions for the discharge of the private banks from liabilities which are contained in s. 22 (8) (*b*) and (*d*) (and repeated in s. 24 (5) and (7)) cannot be supported as laws made under the power to make laws for the acquisition of property : s. 51 (xxxi.) of the Constitution.

But the provisions for discharge of the private banks from liabilities must be considered not only in relation to the power to make laws with respect to acquisition, but also in relation to the power to make laws with respect to banking. Is it a law with respect to banking to provide that the customer of a bank shall no longer continue to have a claim against that bank for his deposit, but that he shall have some different rights ?

Legislation of this character has been passed from time to time in emergencies. After the banking crisis in Victoria in 1893 Acts were passed which varied the rights of creditors of banks as well as the rights of shareholders. Depositors were compelled by this legislation to accept rights which were different from the rights which they originally had. That legislation was passed because of the insolvency or financial embarrassment of some of the banks. It would be difficult to deny to it the character of legislation with respect to banking. In the case of the present Act the reason why the rights of creditors of banks are altered is entirely different. The reason is that it is thought desirable to put the Commonwealth Bank in possession of the business of the private banks, and accordingly to take over, not only the assets of those banks, but also their liabilities, and thus compel the customers of those banks to deal, at least at the beginning, with the Commonwealth Bank. The general character of the legislation, however, in altering the rights of creditors of banks remains the same, whatever the reason for

passing it. In my opinion the provision for discharging the private banks from liabilities upon a taking over of the business by agreement under s. 22 (or by compulsion under s. 24) is valid, as being legislation with respect to banking under s. 51 (xiii.) of the Constitution, though not as being legislation with respect to the acquisition of property under s. 51 (xxxi.).

These provisions, it may be added, really provide for what amounts to an amalgamation of the businesses of a private bank and the Commonwealth Bank, though they do not affect the continued juristic existence of a private bank as a corporation. Legislative control of the amalgamation of banks is a common feature of banking legislation in many countries. Amalgamation normally involves some transfer of liabilities—by indemnity or otherwise. Such legislation contains provisions requiring official permission before such amalgamation takes place, and provisions for compulsory amalgamation in circumstances of emergency are not unknown. It is purely a question of policy as to whether such amalgamation is desirable. Provisions for the amalgamation of banking businesses by acquisition of assets (or of shares) with or without transfer of liabilities are in my opinion within the power to make laws with respect to banking.

The cases have been argued upon the basis that the amount of compensation payable for assets acquired would be their total value less the liabilities of the bank from which they were acquired. I see no provision in the Act which provides for a deduction of liabilities. If there were such a provision it would be difficult to justify it under s. 51 (xxxi.) of the Constitution. If the Commonwealth acquires property it must pay full value for it. The amount of the debts owed by the owner of the property has nothing to do with the value of his property. The value of property is the same whether the owner of the property is rich or poor, prosperous or insolvent. If, however, the Act upon its true construction means that liabilities are to be deducted in assessing compensation but if the provision for discharge from liabilities is held to be invalid, the result would be that the private bank would still be subject to its liabilities. Then there would be no ground for deduction of liabilities in assessing compensation, and the Commonwealth Bank would have to pay compensation for all the assets of a private bank without any deduction for liabilities. The Court was informed that the result would be that the compensation payable to all the private banks on this basis would (on present figures) be about £800,000,000 instead of about £100,000,000. Independently, however, of the position as to assets and liabilities as it happens to exist today, it is plain that

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there is such a great difference between (1) the taking over of assets and paying in full for them without any deduction for liabilities, and (2) paying for them with such a deduction, that if the provision for taking over liabilities, including as it does the provision for discharge of the private banks from liabilities, is invalid, all the provisions for acquisition of assets should be held to be invalid because the result would be so completely different from any intention which could reasonably be attributed to the Parliament.

But, for the reasons which I have stated, my conclusion is that the provisions with respect to the acquisition of shares and assets and the transfer of liabilities should not be held to be invalid as not being legislation either with respect to the acquisition of property or with respect to banking.

Just Terms.

Sections 15 and 25 of the Act provide for fair and reasonable compensation for shares and assets respectively, and the compensation is to be assessed by a court. Such provisions taken by themselves prima facie comply with the requirement of just terms imposed by s. 51 (xxxi.) of the Constitution as a condition to be satisfied by laws providing for the acquisition of property.

But there are positive provisions in the Act and certain suggested deficiencies in the Act which, it is argued for the plaintiffs, will or may prevent the plaintiffs or their shareholders from in fact receiving compensation which is fair and reasonable in all the circumstances.

The Management Provisions in relation to Just Terms. When the provisions of ss. 17-20 have been put into operation the Australian private bank will be under the control of nominee directors with full power to manage, direct and control the business and affairs of the bank of which they are directors and, in particular, with power (s. 19 (1) (*b*) and (*c*)) to dispose of the business in Australia of the private bank to the Commonwealth Bank and to dispose of all or any of the other business of the Australian private bank. Section 19 (2) provides that the exercise of either of these powers shall be subject to the approval of the Treasurer after the Treasurer has obtained a recommendation from the Governor of the Commonwealth Bank.

Under s. 19 (3) the exercise of any power by directors appointed under s. 18 shall be in their sole discretion " and shall not be subject to any qualification, restriction or condition provided by or under

any law, charter or other instrument relating to the exercise of the powers of the directors of that bank."

(*a*) The nominee directors can sell any of the assets of the bank; they can sell the whole business of the bank—in each case for such price as they may think proper.

(*b*) Under s. 22 the nominee directors could respond to an invitation of the Treasurer by making an agreement with the Treasurer for the taking over of the business of a private bank for a sum determined by the Treasurer and themselves.

(*c*) Under s. 24 the Treasurer could take action which would result in the Commonwealth Bank taking over the assets of the bank and the liabilities of the bank without the consent of either the original or the nominee directors, and, when this action had been taken, the directors (original or nominee) could make an agreement with the Treasurer as to the compensation to be paid to the bank in respect of the acquisition of those assets: s. 43.

Thus nominee directors chosen by the Commonwealth Bank and the Treasurer could agree with the bank and the Treasurer upon the price to be paid to the private bank for its property and business and could also, after a compulsory acquisition, agree with the Commonwealth Bank and the Treasurer upon the amount of compensation to be paid to the bank.

It was argued for the plaintiffs that s. 19 (3) of the Act discharges nominee directors from all obligations to shareholders, including their fiduciary obligations. I have given reasons for my opinion that s. 19 (3) is valid, but that it does not authorize any fraudulent or dishonest conduct. It was argued for the defendants that this provision referred only to some specific law &c. applying only to a particular private bank: cf. *Barry* v. *Heider* (1) where it was held by *Griffith* C.J. that a provision relating to "laws, rules and practice" did not include the body of law recognized and administered by courts of equity. But the question whether or not the nominee directors are effectively discharged by s. 19 (3) from their fiduciary and statutory obligations to shareholders (including, it may be observed, shareholders other than the Commonwealth Bank) is not very important in relation to the questions which arise in these cases. Whatever view may be taken on that question, nominee directors would have at best a divided duty. It is obvious that they would have been placed in their position in order to promote and protect the interests and policy of the Commonwealth Bank. They take office as nominees of the Commonwealth Bank and are put in office with an express power to dispose of the business to the

(1) (1914) 19 C.L.R. 197, at p. 205.

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Commonwealth Bank. They might honestly regard themselves as doing their duty if, without being dishonest, they made a good bargain with the Commonwealth Bank. Even if such directors acted with the utmost honesty, they would be in an impossible position. They could not represent the interests of both the Commonwealth Bank and of the private bank or its shareholders, who would look for the return of their capital, and hope for a dividend, out of either the price to be paid if the directors sold the assets, or the compensation to be paid to the bank if the Treasurer resorted to the compulsory procedure of s. 24.

The provisions with respect to management of the bank provide, by reason of s. 19, a means of acquiring property. That being so, they must provide for just terms of acquisition. It cannot, in my opinion, be said to be just that an authority with powers of compulsory purchase should appoint managers of the property to be acquired with power to sell the property to the authority for a price fixed by those managers and the authority. It is equally unjust that such managers should have the power to bind the owner of the property as to the amount of compensation to be paid and to do this by an agreement made between themselves and the acquiring authority.

Accordingly, in my opinion, the provisions of Division 3 of Part IV., which bring about this result, that is ss. 17-20, should be held to be invalid.

In my opinion this conclusion does not affect the validity of any other part of the Act. In the first place, it has no relation to any of the provisions, with respect to the acquisition of shares. The management provisions, it is true, come into operation upon the giving of a notice under s. 13 which declares that shares shall be vested in the Commonwealth Bank, but s. 17 merely utilizes that notice for the purpose of specifying a date. Accordingly, the management provisions can be applied whether or not any shares are actually acquired in pursuance of the notice and independently of whether or not a majority of the shares is acquired.

As far as assets are concerned, the provisions of s. 22 and s. 24 are not affected by the invalidity of ss. 17-20. The only result would be that the actual, and not the nominee, directors would be in office and they would be able to make agreements or not as they thought fit. As the Treasurer need not acquire shares and therefore need not give the notice which would under s. 17 bring the management provisions into operation, the Act contemplates that action under s. 22 by way of making an agreement could be taken by the original directors. Section 24 can operate according to its terms

even though the provisions of Division 3 as to management are invalid.

There is, however, another provision affecting the acquisition of assets which requires special attention. Section 23 of the Act provides for a special taxation concession in cases of acquisition of assets by agreement under s. 22.

(*a*) That concession does not apply where an agreement is made otherwise than "under" s. 22; for example, it would not apply if nominee directors disposed of the business of the bank in Australia or outside Australia under s. 19. Such an agreement would not be an agreement under s. 22 and it would not have the effect given to an agreement under s. 22 by sub-s. (8) of that section. Accordingly, the taxation concession is allowed in the case of some agreements for sale of the business of a bank and not in the case of other agreements for such sale.

(*b*) If the Treasurer gave an invitation under s. 22 and the directors (original or nominee) did not agree upon the sale of the business and the Treasurer exercised the power conferred by s. 24, no taxation concession would be allowable; that is to say, no taxation concession would ever be given in a case of compulsory acquisition.

(*c*) Again, nominee directors might, by declaring dividends out of one fund rather than another, affect the amount of, or perhaps destroy, the benefit of s. 23 at their own discretion.

If the provisions as to nominee directors are invalid, objections (*a*) and (*c*) would disappear and also objection (*b*), so far as nominee directors were concerned. But it would still be the case that a private bank which made an agreement acceptable to the Treasurer under s. 22 would get the benefit for its shareholders of s. 23; but that a bank which stood out and did not make an agreement, but exercised its rights under the Act to obtain an assessment of compensation by the Court of Claims, would not receive the benefit of s. 23. Thus a bank which agreed would be in a better position than a bank which did not agree. Section 23 is part of the terms on which the assets are taken over in the case of a bank that makes an agreement under s. 22. In my opinion it is not just that in the case of other banks they should be excluded from such benefit simply because they are not willing to accede to an agreement which is acceptable to the Treasurer and because they exercise their rights under the Act of having compensation determined by a court. The result is that in my opinion the provisions for compulsory acquisition of assets (s. 24) are rendered invalid.

There were other objections to the provisions for compulsory acquisition of shares and assets which, in my opinion, are not well-founded.

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(*a*) It was argued for the plaintiffs that if the nominee directors made an agreement for the sale of the business of a bank the price paid would represent the assets of a bank. If they sold at a low price, it was argued that this would diminish the amount of compensation payable to shareholders whose shares had been acquired, and that it would also depreciate the value of shares which were not Australian shares which had not been acquired, but which might subsequently be acquired. For this reason, it was contended that if the provisions relating to the appointment of nominee directors were invalid, the provisions for compulsory acquisition of shares must also be held to be invalid. But the Court of Claims would not be bound by any agreement made by nominee directors when it was determining the value of shares at the time when they were acquired. The court would be under a duty to make up its own mind as to their value, independently of any agreement made by nominee directors.

(*b*) There were various criticisms as to the taking over of assets which became Australian assets after an original taking over, based upon the contention that no provision was made for compensation in such cases. The acquisition provisions plainly contemplate acquisitions at different times in the case of any bank: as to shares see s. 13 (4) and as to assets s. 24 (6), (7) and (8). Shareholders are dealt with severally under ss. 37, 39 and 40 in respect of their claims. A claim for compensation for assets is a claim in respect of particular specified assets—s. 43 (4): and the compensation awarded would be payable only in respect of a particular claim as made: s. 45. These provisions enable claims for compensation to be made and compensation to be assessed whenever shares or assets are taken over. There is, in my opinion, nothing in the compensation provisions which limits a shareholder who owns both Australian and ex-Australian shares or a bank to a single proceeding for compensation.

(*c*) Section 46 (4) and (8) enable the Treasurer at will to close up a bank before and independently of any acquisition of shares in the bank. It is argued that the Treasurer would, by taking such action, affect very greatly the value of the assets of the bank because they would become assets held by a condemned institution, and not assets in a going concern. If the prohibition power (s. 46) were exercised, the banking business of the bank, it is true, would cease and there would be no such business to be acquired under s. 24, but the value of the assets, it is argued, would be affected by the prohibition, so that if the shares were subsequently acquired the shareholders would not get full value. In my opinion this argument

is not a good objection to the justice of the terms of acquisition of either shares or assets. If s. 46 were applied against a bank, the bank could immediately dispose of its property as it thought proper and obtain such a price for it as the market was prepared to give.

(*d*) It is further argued that the provisions of s. 46 enable the Treasurer to threaten a bank with closure unless its policy conforms to his desires and, accordingly, to force a bank to adopt a particular line of policy. This comment is well-founded, but it is an argument to be considered by Parliament and the electors, and not by a court.

(*e*) It was similarly argued that the threat of closing a bank altogether could be used for the purpose of forcing a bank to accept a proposed price for its business in preference to being put right out of business under s. 46 without any acquisition of assets and therefore without any compensation therefor. This, like the last objection, is an objection that the Act confers an arbitrary power on the Treasurer which may be used for the purpose of enabling him to force banks into a course of action desired by him. This is the case if Parliament is prepared, in relation to a matter as to which it has plenary power of legislation, to entrust arbitrary powers to an individual. The responsibility is with Parliament and the legislation cannot, simply because it contains such provisions, be set aside by a court.

(*f*) It is further argued for the plaintiffs that the payment of compensation to the private banks (particularly if shares in all of them or the assets of all of them were acquired at about the same time) would involve the payment of so large a sum of money that the value of money in the community would diminish, with the result that the compensation would not be just. In my opinion any court must assume that payment in money which is legal tender is sufficient to discharge any pecuniary obligation. It would be a most difficult problem to determine how much inflation and associated depreciation of the value of currency which might be apparent at one date as compared with some other prior date was due to the payment of a large sum of money by way of compensation to a particular bank or banks. But, apart from the practical difficulties of applying the principle suggested, there is no authority for introducing any exception to the well-established principle that a money obligation can always be satisfied by payment in legal tender.

Section 24 (8) however, is open to an objection which, in my opinion, has more weight than those which I have just considered. The assets of a bank in Australia might be acquired under s. 22 or s. 24. The whole business of the bank in Australia would then necessarily come to an end because it and all the Australian assets

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would be taken over by the Commonwealth Bank ; and see s. 46 (1), (2), and (3). But the bank would still exist as a company. (Incidentally it may be observed that the bank could still carry on some non-banking business in Australia with new assets). Some of the banks have extensive businesses in New Zealand. After s. 24 had been put into operation in the case of such a bank it could still carry on in New Zealand not only the business of banking, but also some other business authorized by its present memorandum of association or by an amended memorandum of association. But under s. 24 (8) the Commonwealth Bank might at any time require the Australian bank to vest its New Zealand assets, whether they were associated with banking or not, in the Commonwealth Bank, and the private bank would incur a penalty of £10,000 for each day on which it failed to take the necessary action to vest the desired property in the Commonwealth Bank. This power of compulsory acquisition would be applicable in such a case to a company doing no banking business and possibly no business at all in Australia just because, at some time—it may have been many years previously —that company had carried on the business of banking in Australia. In such a case the relation of the acquisition of the property to a purpose with respect to which the Commonwealth Parliament has power to make laws—viz., banking in Australia—is too tenuous and remote to support the law. In my opinion, therefore, s. 24 (8) is invalid.

But the invalidity of this provision does not, in my opinion, affect the validity of any other provisions of the Act, because they will all work and operate according to their terms in exactly the same way if s. 24 (8) is struck out of the Act. The question of the validity of s. 24 (8) may not be of great importance to the banks because, in the case which I have put, the Australian private bank could readily cease to be an Australian company by winding up here and another company could be incorporated in New Zealand. Then s. 24 (8) would have no field of operation in relation to the assets in New Zealand of the new company. But such a re-organization would take time, and the possibility of making it does not affect the objection to the legislation.

I summarize my opinion on this part of the case by saying that the provisions for the acquisition of shares contained in Division 2 of Part IV. are not invalid by reason of any of the objections to them which have been considered ; that ss. 17-20 in Division 3 of Part IV. are invalid ; that s. 24 is invalid for reasons connected with s. 23 ; that, for another reason, s. 24 (8) is invalid ; but that

the invalidity of these provisions does not make any other provisions of the Act invalid ; but s. 25 is deprived of any operation.

Court of Claims.

It was not contended that the court was not validly constituted. Compensation is to be determined by the Court of Claims " and not in any other manner." This provision is to be found in s. 40 (2), (4) and (5) with respect to shares, and in s. 40 (2) with respect to assets. Section 40 (5) provides that the amount of compensation " determined by the court " (that is, the Court of Claims) shall be payable by the Commonwealth Bank to the private bank in full satisfaction of the claim to which the determination relates. There is a similar provision with respect to compensation for shares in s. 40 (8). The result is that any jurisdiction of the High Court is excluded in claims for compensation made against the Commonwealth Bank. Such claims are to be determined by the Court of Claims in accordance with the Act, and not in any other manner.

The plaintiffs contended that these provisions were invalid because they excluded the jurisdiction of the High Court in claims for compensation. The Constitution, s. 75 (iii.), gives to the High Court original jurisdiction in all matters in which the Commonwealth or a person being sued on behalf of the Commonwealth is a party. No statute can deprive the Court of this constitutional jurisdiction. The plaintiffs argued that, in a claim for compensation against the Commonwealth Bank, either the Bank was a person being sued on behalf of the Commonwealth, or the Commonwealth itself was a party. If the provisions which had the effect of excluding the jurisdiction of the High Court were invalid, then all the provisions relating to the Court of Claims were invalid, there were therefore no provisions for compensation, and the whole Act was invalid.

The defendants in the first place sought to meet this argument by contending that the jurisdiction of the High Court had not been really excluded by the Act because a writ against the Commonwealth Bank for compensation could be issued in the High Court without the private bank making any claim in writing to the Commonwealth Bank for compensation (s. 43 (3)) with the result that a claim for compensation would never come before the Court of Claims (s. 44) so that the action would simply proceed in the High Court. To this contention it was replied, and in my opinion rightly, by the plaintiffs that such a claim would be demurrable because s. 42 provides that compensation for assets is to be ascertained in accordance with Division 2 " and not in any other manner." Thus it would immediately appear that the Act provides that no court

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other than the Court of Claims should entertain a claim for compensation under the Act against the Commonwealth Bank. Further, this argument for the defendants has no relevance to the case of shares, where the procedure (s. 40) is quite different from that under s. 43, which deals with assets.

If any person were to sue the Commonwealth itself as a defendant for compensation in the High Court, the Court would have jurisdiction, because s. 75 (iii.) of the Constitution gives jurisdiction in any matter in which the Commonwealth is a party. No difficulty as to jurisdiction would arise in such a case, but as ss. 15 and 25 of the Act place the obligation to pay compensation most specifically only upon the Commonwealth Bank and not upon the Commonwealth, any action against the Commonwealth itself for compensation would fail.

Under s. 61 of the Act the Commonwealth guarantees the payment of all compensation payable by the Commonwealth Bank under the Act. It is a matter for argument whether, in view of the provisions of the Act placing liability for compensation expressly upon the Commonwealth Bank, this section gives any right to any private bank or any shareholder to make any claim against the Commonwealth. But if it does and such a claim were made the position would be that the private bank or shareholder would sue the Commonwealth itself on its guarantee. The action would be an action on the guarantee, and not a proceeding for assessment of compensation. Because the Commonwealth was an actual party to the action the High Court would have jurisdiction in such an action under s. 75 (iii.). Further, it may be pointed out that the Commonwealth, if it were held that under s. 61 it guaranteed as between itself and a bank or a shareholder the assessed compensation payable by the Commonwealth Bank, would not be subject to any liability under such a guarantee until the amount of compensation had been ascertained in proceedings against the Commonwealth Bank.

The question, therefore, as to the effect of provisions which prevent proceedings for assessment of compensation in the High Court could arise only if an action for compensation were brought in the High Court against the Commonwealth Bank, and the Commonwealth was not a defendant in the action. I deal first with the question whether the Bank in such a case would be "a person being sued on behalf of the Commonwealth."

In *Quick and Garran, Annotated Constitution of the Australian Commonwealth*, p. 773, the view is expressed that s. 75 (iii.) in the relevant provision is limited to cases in which the Commonwealth

is the real defendant (in interest) but is represented in legal proceedings by the Attorney-General, or some other Minister, or a nominal defendant, or a person such as the Commissioner of Taxation: see *Income Tax Assessment Act* 1936-1947, s. 209.

In the United States of America the Supreme Court has jurisdiction in all "controversies to which the United States shall be a party"—Constitution of the United States, Art. III., s. 2. But this jurisdiction can be exercised only if the United States consents: see *Willoughby, Constitutional Law of the United States*, 2nd ed. (1929) vol. 3, pp. 1381, 1422. Judicial opinion as to the meaning of the words "controversies to which the United States shall be a party" has varied. In the leading case of *Osborn* v. *Bank of the United States* (1) it was said with reference to this provision:—"The jurisdiction of the court depends not upon interest, but upon the actual party on the record. . . . In all cases where jurisdiction depends on the party it is the party named in the record": see also *United States* v. *Lee* (2). On the other hand, later cases have adopted a different point of view. In *Louisiana* v. *McAdoo* (3) the point is said to be not who is the party on the record, but "the effect of the judgment or decree which can here be rendered." But this test has not been uniformly applied in still later cases: see *Sloan Shipyards Corporation* v. *United States Shipping Board Emergency Fleet Corporation* (4). In that case the evidence showed that the Government owned all the stock in a very large corporation which exercised extensive powers of requisition and control of shipping &c. The Government was the only person which could be interested in a judgment for or against the corporation (except, of course, the opposite party). There was no consent on behalf of the United States to be sued. The court, however, acted simply upon the facts disclosed upon the record, namely that the Shipping Board was the party to the proceedings and that the controversy was not one to which the United States was a party. The court accordingly assumed jurisdiction.

In the Commonwealth Constitution the words used are not "a party to a controversy," but "being sued on behalf of the Commonwealth." In the case of the United States Constitution there is much to be said for the proposition that the court should look at the controversy, whatever it may be, and ascertain who are the real parties to it, whoever or whatever may be the agents through

(1) (1824) 22 U.S. 738, at p. 857 [6 Law. Ed. 204, at p. 232].
(2) (1882) 106 U.S. 196 [27 Law. Ed. 171].
(3) (1914) 234 U.S. 627 [58 Law. Ed. 1506].
(4) (1922) 258 U.S. 549 [66 Law. Ed. 762].

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whom they act. But in the case of the Commonwealth Constitution the reference to the record is much more direct. It is necessary only to find out who is actually being sued and then to ask whether that person is being sued on behalf of the Commonwealth. In the case of the Attorney-General or a Minister or a nominal defendant it would be easy to answer the question. He would be sued, not in respect of any alleged personal liability, but in order to enforce a claim against a Government. But in proceedings for compensation under the Act the basis of the claim is the liability of the Commonwealth Bank itself, specifically imposed upon the Bank, and only upon the Bank, by the statute. Any allegation with respect to any alleged liability of the Commonwealth would be irrelevant in such an action and should be struck out of any statement of claim. Accordingly, in my opinion, in such an action the corporation which was the defendant (the Commonwealth Bank) would be shown by the record not to be a person being sued on behalf of the Commonwealth and the action would not come within the provisions of s. 75 (iii.).

The contrary view submitted for the plaintiffs is based on the contention that the Commonwealth is financially interested in the question of compensation by reason of its guarantee, and that therefore the Commonwealth Bank should be regarded as in some manner representing the Government when action is brought against it for compensation. If then it " represents " the Government, it should be held, it is argued, that the Bank is being sued on behalf of the Government. This contention was supported by a further argument that when a principal debtor is sued he is sued on behalf of his surety. I am not aware of any authority whatever for such a proposition.

The other argument for the plaintiffs was that the Commonwealth Bank is really a department of the Commonwealth Government. This contention was supported by reference to a dictum of *Griffith* C.J. in *Heiner* v. *Scott* (1). But the Commonwealth Bank (which is a creation of statute) has never been so treated. Its receipts do not go into consolidated revenue (see s. 81 of the Constitution), the administration of the bank has never been entrusted to a Minister, the officers of the bank are not civil servants, and the accounts of the bank are not part of the Commonwealth Budget. The bank may act as the agent of the Commonwealth, but it can so act only when express authority has been given to it by the Commonwealth. What the Commonwealth Bank does is not done by the Commonwealth, but by the bank ; for example, surely the

(1) (1914) 19 C.L.R. 381, at p. 393.

Commonwealth could not be sued if the bank wrongly dishonoured a cheque or if one of the bank's motor-cars injured a person by negligent driving.

The Commonwealth Parliament has declared that the bank is a corporation and the Court must on this, as on many previous occasions, accept that the bank (though it has no corporators) exists as a new kind of juristic person. The Parliament has gone out of its way to declare the continued existence of the bank as a corporation: *Commonwealth Bank Act* 1945, s. 7. The Governor, and not any Minister, manages the bank: s. 25. The bank is treated as a separate person not subject to ministerial control in the daily conduct of its business. Section 9 provides for consultation between the bank and the Treasurer on policy in terms which, in my opinion, are inconsistent with the bank having the characteristics of a Government department. Section 10 provides that the bank is guaranteed by the Commonwealth. It is in the following terms:—"The Commonwealth shall be responsible for the payment of all moneys due by the Bank but nothing in this section shall authorize any creditor or other person claiming against the Bank to sue the Commonwealth in respect of his claim." Here again the separation of the bank from the Commonwealth is emphasized. I have difficulty in understanding how the Commonwealth can give anything like a guarantee to itself.

For these reasons it should not be held that the Commonwealth Bank is a department of the Commonwealth doing banking business. In my opinion the objection of the plaintiffs based on s. 75 (iii.) of the Constitution fails.

If, however, this objection is held to be good, it will result in striking out the words "and not in any other manner" from ss. 40 and 43 of the Act. The result would be to make an important and far-reaching change in the whole Act. Where Parliament provides that compensation is to be assessed in a particular way and in no other way it appears to me that even such a provision as s. 6 cannot entitle a court to uphold the law after striking out the limiting words. The result would be that the enactment as left surviving would contradict the express original provision by allowing compensation to be assessed by other tribunals than that specified. Such tribunals would include the High Court, and also State courts. Accordingly, if it is held that the words "and not in any other manner" should be eliminated as enacting an invalid provision, the whole of the provisions relating to the assessment of compensation for both shares and assets should be held to be invalid—including ss. 15 and 25, which provide only for compensation as assessed

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by the Court of Claims. There would then be no valid provision for compensation and all the provisions for compulsory acquisition would be invalid.

Interest.

It was argued for the plaintiffs that the compensation provisions of the Act with respect to both shares and assets are not just because the court is not given express power to award interest on compensation, the general power to give fair and reasonable compensation not empowering the court to give interest. The defendants, on the other hand, argued that the court had power to award interest if the payment of interest were necessary to make compensation fair and reasonable. In the alternative, the defendants argued that the principle of the common law that fair compensation does not include interest cannot be held not to amount to just terms.

This question has been before the Court recently on several occasions and in different circumstances. The decisions are conveniently referred to in *Grace Bros. Pty. Ltd.* v. *The Commonwealth* (1). All the decisions mentioned were given in relation to particular cases which varied in circumstances, and no general rule has been authoritatively determined by the Court. I do not repeat what I have said in several of these cases to the effect that the conception of compensation does not in itself include any provision for interest. Interest, in my opinion, is not part of compensation, but is interest *on* compensation. It is recompense for delay in the payment of the compensation which represents the fair value of the property acquired and so cannot itself be compensation. Thus in my opinion the Act does not, in providing for fair and reasonable compensation, provide for payment of interest.

The requirement of s. 51 (xxxi.) of the Constitution is that a law for the acquisition of property must provide for just terms for such acquisition. The payment of compensation which fairly and reasonably represents the value of the property satisfies this requirement. A complaint that compensation has not been paid promptly is not a complaint that the amount of compensation is inadequate. Payment for delay in payment of compensation would not be payment for the property, but would be compensation for something other than the property or the loss of the property—namely, for the loss of the use of the compensation moneys during the period from the time of acquisition to the time of payment of the compensation.

It would be a fair and reasonable thing for Parliament to make provision for such further compensation—especially in the present

(1) (1946) 72 C.L.R. 269.

cases, where the assessment of compensation would occupy months in the case of a single bank, and possibly years in the case of all the banks. But the Constitution does not, in my opinion, require as a condition of the validity of a law for acquisition of property that compensation—in the form of interest or damages—should be paid to make up for delay in paying compensation. Thus in my opinion the Act does not give jurisdiction to the Court of Claims to award interest, but this fact does not invalidate the provisions for assessing compensation for the property taken.

Costs.

It was further contended by the plaintiff that the compensation provisions were unjust because the Court of Claims has no power to give costs. The defendants, on the other hand, argued that the Court of Claims had inherent power to give costs. But in many cases it has been held that, as it was put in *London County Council* v. *Overseers of West Ham* (1) there is no "inherent or original jurisdiction in the Courts to deal with costs." The power of the Court of Claims is a power to award fair and reasonable compensation—ss. 15, 25—and such a power does not authorize the creation by the court of a duty to pay any sum, by way of costs or otherwise, in addition to the fair and reasonable compensation assessed by the court. Legislatures appear from time to time to find great satisfaction in providing that particular tribunals shall have no power to award costs, with the result that a man whose rights have been infringed may be deprived of any real remedy because the expense of effectively litigating his claim may exceed what he can recover. Similarly, a man may have to defend his rights against a completely false and unjustifiable claim, and yet have no remedy for his expenses against a claimant who is without any merits whatever. But, in spite of these considerations, it is difficult to hold that the absence of a power to award costs (to either side) necessarily makes provisions for compensation unjust.

Section 92—Freedom of Trade and Commerce.

The plaintiffs contend that the whole of the Act is invalid because it offends against s. 92 of the Constitution, which provides that "trade, commerce and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free."

The attack is directed against all the provisions for acquisition and against s. 46, which provides for the prohibition at the will of

(1) (1892) 2 Q.B. 173, at p. 176.

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the Commonwealth Treasurer of the carrying on of banking business by any one or more of the plaintiff banks.

It is argued that the object of the acquisition provisions is to put the banks out of business. The business of the banks includes inter-State elements in arranging in State A to make funds available in State B and in financing inter-State trade and commerce. Further, the business of the banks involves a great deal of inter-State communication. Banking documents are transmitted between the States and the facilities of posts and telegraphs are widely used.

Section 46 purports to authorize a straight-out prohibition of banking business.

There is no doubt that the provisions mentioned are directed towards putting the plaintiff banks out of business or that, if put into operation, they will achieve that result. The question is whether the Act is therefore invalid as infringing s. 92.

I make some preliminary observations.

(1) Section 92 does not prevent legislation with respect to inter-State trade and commerce. Section 51 (i) confers upon the Federal Parliament express power to make laws with respect to trade and commerce among the States. The State Parliaments have a concurrent power to make such laws, though the legislation of any one State cannot operate outside its borders. But, within its limits, the power of the State is as plenary as that of the Commonwealth: *James* v. *The Commonwealth* (1). Section 92 cannot therefore be construed as meaning that inter-State trade and commerce is to be free from all legal control.

(2) Section 92 binds the Commonwealth and the States: *James* v. *The Commonwealth* (2). Precisely the same rule applies to both Commonwealth and States. If a State law is invalid as infringing s. 92, a law in the same terms would equally infringe s. 92 if it were passed by the Commonwealth Parliament, and vice versa. The validity of a law in relation to s. 92 cannot depend upon whether it is a Commonwealth law or a State law. Thus, if any of the provisions of the *Banking Act* 1947 are invalid because they conflict with s. 92, then no State Parliament could enact such provisions. They would be outside all legislative power existing in Australia.

(3) Section 92 is directed to laws made by the Commonwealth or States, and not to actions of individuals. If a plaintiff complains of an act done by a defendant, he must show some infringement of a right which he, the plaintiff, possesses. He may show an interference with his goods which is prima facie a trespass because

(1) (1936) A.C. 578, at p. 611; 55 C.L.R. 1, at p. 41.

(2) (1936) A.C. 578; 55 C.L.R. 1.

unauthorized by him. The defendant may contend that what he did was authorized by a statute. But if the statute is invalid because it purports to authorize acts which wrongly interfere with the freedom of inter-State trade and commerce, then the defence fails, the plaintiff succeeds, and obtains damages for a breach of his common law right—not for an infringement of s. 92. Section 92 operates to protect individuals, but does not give a cause of action to individuals. No plaintiff would have a good cause of action merely upon an allegation that the defendant had committed a breach of s. 92: see *James* v. *The Commonwealth* (1): see also *Riverina Transport Pty. Ltd* v. *Victoria* (2).

(4) Whenever a law authorizes a Government to acquire by compulsion property which is used or which may be used for the purposes of a business which includes inter-State elements, the operation of the law will or may obstruct and interfere with, and possibly put an end to, inter-State business of the person from whom the property is acquired. An acquisition of his land may put an inter-State trader out of business. Any acquisition of chattels whatever necessarily prevents the owner of these chattels from selling them inter-State. But it has never been held that therefore s. 92 makes all acquisition of property impossible. Section 51 (xxxi.) shows that such a proposition cannot possibly be accepted, for if it were accepted the Commonwealth Parliament could not make any law for the acquisition of property. Some other element than the mere acquisition of property must be found before a legislative provision can be held to infringe s. 92.

I do not propose to review the whole course of decisions upon the difficult provision contained in s. 92. The consideration of s. 92 must now begin with *James* v. *The Commonwealth* (3). I do not repeat the analysis of *James* v. *The Commonwealth* (3) which I made in *Milk Board (N.S.W.)* v. *Metropolitan Cream Pty. Ltd.* (4)—an analysis which is stated in summary form in *Gratwick* v. *Johnson* (5). The proposition submitted for the plaintiffs was stated in the following terms: "s. 92 is infringed whenever an individual or corporation is engaged in inter-State trade, commerce or intercourse, and either by direction, prohibition or acquisition, with the object, purpose or motive of effecting such a prohibition, the carrying on of such business by him or it is forbidden." There is no doubt that, if s. 46 (4) is applied to a bank, it will stop the carrying on of the banking business of that bank. The provisions

(1) (1939) 62 C.L.R. 339, at p. 362.
(2) (1937) 57 C.L.R. 327, at pp. 341, 342.
(3) (1936) A.C. 578; 55 C.L.R. 1.
(4) (1939) 62 C.L.R. 116, at pp. 121, 127.
(5) (1945) 70 C.L.R. 1, at pp. 13, 14.

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as to acquisition of property are also plainly directed towards this end: see s. 3 (*c*).

The ownership of property does not itself constitute inter-State trade and commerce, and it would seem to follow that a change in ownership of property by reason of compulsory acquisition is not an interference with trade and commerce, though, as already stated, any acquisition of any property from any person necessarily prevents him from using it for any purpose of trade and commerce, including inter-State trade and commerce. This was the view taken in *New South Wales* v. *The Commonwealth* (*The Wheat Case*) (1). No definite opinion as to this particular case was stated in *James* v. *The Commonwealth* (2). It is mentioned in an historical survey with the comment that it "has never been expressly overruled" (3). *James* v. *The Commonwealth* (2) does not over rule the *Wheat Case* (4). The reasoning in *James* v. *The Commonwealth* (2) does not condemn any and every expropriation of owners because it prevents the expropriated owner using property in inter-State trade. Expropriation is held to involve a breach of s. 92 only when it "is directed wholly or partially against inter-State trade in the goods, that is, against selling them out of the State" (5). This view is in accordance with *James* v. *Cowan* (6) where it was held that if it appeared from the terms of a statute that the acquisition of property was authorized by the statute for a "real object" of restricting inter-State trade, then there was an infringement of s. 92. See passages quoted from this case in *James* v. *The Commonwealth* (7). It was also held in *James* v. *The Commonwealth* (2) that a mere prohibition of inter-State trade and commerce was an infringement of s. 92: see *James* v. *The Commonwealth* (8) where the Act in question was held to be invalid for the reason that it prohibited such trade either entirely or partially.

Section 46 (4) and (8) can be used independently of any other provisions of the Act.

The question of s. 92 may therefore be approached in relation to both acquisition of property and prohibition of banking by considering two questions: (1) Is banking trade or commerce and, if so, do the challenged provisions restrict the freedom of inter-State trade or commerce as explained in *James* v. *The Commonwealth* (2)? (2) If banking is not itself trade or commerce, but

(1) (1915) 20 C.L.R. 54.
(2) (1936) A.C. 578; 55 C.L.R. 1.
(3) (1936) A.C., at p. 618; 55 C.L.R., at p. 47.
(4) (1915) 20 C.L.R. 54.
(5) (1936) A.C., at p. 630; 55 C.L.R., at p. 59.
(6) (1932) A.C. 542; 47 C.L.R. 386.
(7) (1936) A.C., at pp. 622, 623; 55 C.L.R., at pp. 51, 52.
(8) (1936) A.C., at p. 633; 55 C.L.R., at p. 61.

is an instrument of trade or commerce, does the Act place such restrictions upon the use of the instrument in inter-State trade or commerce as to impose a restriction upon inter-State trade or commerce which is inconsistent with s. 92 ?

Is Banking Trade or Commerce ?

The plaintiffs' argument on this question depends very largely upon the development of statements to be found in various books on banking and in judgments as, for example, in the last *Alberta Case* (1) that bankers are "dealers in credit." Statements to this effect made by leading authorities are to be found in *In reference re Alberta Statutes* (2).

The authorities in other courts to which reference was made do not give much assistance in the endeavour to answer the question whether banking is itself "trade or commerce" as used in the Commonwealth Constitution. The reference to this subject in English cases (apart from the decisions on Canadian statutes) are incidental to the consideration of other questions in bankruptcy law and the like, and can hardly be relied upon for the purpose of interpreting the Commonwealth Constitution.

The cases in the United States in which reference is made to banking do not include any considered decision of the question whether banking is trade or commerce. In *United States* v. *South-Eastern Underwriters Association* (3) the Supreme Court overruled *Paul* v. *Virginia* (4) which was a decision of long standing to the effect that insurance was not trade or commerce. The *South-Eastern Underwriters' Case* (3) exhibited great differences of opinion and accordingly provided both sides in these present cases with arguments by way of more or less distant analogy. See the comment upon this case by *Thomas Reed Powell* in (1944) 57 *Harvard Law Review*, p. 937, to which reference was made in argument.

The provision with respect to banking in the Canadian Constitution which has already been quoted is much the same as that contained in the Australian Constitution. The decision *In reference re Alberta Statutes* (5), which was relied upon by both sides, does not contain any clear decision that banking is trade or commerce : see for example (6) the statement of the Chief Justice that the machinery provided by the Act in its essential components and features came under the head of "banks and banking" but, if not, then its subject matter was embraced within trade and commerce. What

(1) (1947) A.C. 503, at p. 517.
(2) (1938) S.C.R. (Can.) 100, at p. 124.
(3) (1944) 322 U.S. 533 [88 Law. Ed. 1440].
(4) (1869) 75 U.S. 168 [19 Law. Ed. 357].
(5) (1938) S.C.R. (Can.) 100.
(6) (1938) S.C.R. (Can.), at p. 116.

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was held was that it *was* banking, and therefore presumably was not trade and commerce. That it was banking was the ground of the decision. The decision was not based on any proposition about the nature of trade and commerce.

The argument of the plaintiffs is that a banker buys and sells credit and that for this reason banking is trade and commerce. But a banker does not buy or sell credit in the same way as a trader buys or sells goods. When it is said that a banker deals in credit the fact is that he receives deposits which he engages to repay or that he lends or agrees to lend money. A loan transaction is a business transaction, but is not therefore itself trade or commerce—unless all business transactions, from building a house to pulling out a tooth, are to be described as trade or commerce simply because they are business transactions. The fact that a business is carried on for profit or that an occupation is pursued for profit does show that it is trade or commerce.

The word " sale " is used in various metaphorical senses. When a man enters into a contract of employment he is sometimes said to " sell his labour," but really there is no transaction of sale ; the contract is a contract of employment, not a contract of sale. Similarly, when a banker " deals in credit " he makes loan contracts and does not sell anything. If he agrees in Victoria to make available money by way of overdraft in New South Wales, he does not sell anything which passes across the border between the States. The word " trade " is used in several senses. A carpenter is " a carpenter by trade." But no-one would say that the craft of carpentry—as distinct from the sale and purchase of its products—is trade or commerce. The trade and commerce to which s. 92 relates is " trade and commerce among the States, whether by means of internal carriage or ocean navigation." The reference is to something which can be carried by land or by sea. Inter-State trade and commerce is concerned with movement of something from one State to another State. In the business of a bank there are no " goods passing into or out of the State "—there is no passage across the border of anything—which, it was decided in *James* v. *The Commonwealth* (1) is what s. 92 protects.

I notice, for the purpose of rejecting it, an argument for the plaintiffs that banking is inter-State trade and commerce because inter-State banking transactions involve large use of the postal and telegraph systems. If the use of correspondence inter-State gives a dealing between persons the character of inter-State trade and commerce then the sphere of trade and commerce will be

(1) (1936) A.C., at p. 630 ; 55 C.L.R., at p. 58.

extended so as to include advice by a mother to her daughter and lovers' greetings—if sent by inter-State post. At this point a further argument for the plaintiffs may be noticed. In the case of *Trinidad Lake Asphalt Operating Co. Ltd.* v. *Commissioners of Income Tax for Trinidad and Tobago* (1) it was necessary to interpret an income tax statute which provided that any resident person "who transmits rent interest or income . . . to a non-resident person" should be deemed to be the agent of the latter person. In pursuance of an agreement a New Jersey company declared a dividend payable by cancellation of a claim against the company by a Trinidad company in an equivalent amount. Both companies made entries in their books which recorded the transaction of set-off. It was held that the transaction was a payment by the Trinidad company to the other company and that it involved a transmission of revenue within the meaning of the statute. There is little difficulty in arriving at the conclusion that the terms of the statute were intended to include such a case, but the decision has no bearing whatever upon the question whether such a transaction is trade or commerce or whether banking is trade or commerce.

I therefore answer the question "Is banking itself trade or commerce?" in the negative. Accordingly, in my opinion, the prohibition of banking authorized by s. 46 is not a prohibition of any trade or commerce and therefore is not, for that suggested reason, rendered invalid by s. 92 of the Constitution.

Banking as an Instrument of Trade or Commerce.

The next contention of the plaintiffs is that banking is an instrument of trade and commerce and that the acquisition and prohibition provisions of the Act constitute an interference with it which is an infringement of s. 92. I have already said that these provisions are intended to put an end to banking by the private banks and that, so far as they are put into operation, they will accomplish this object.

I agree that banking facilities are, in these days, necessary for trade and commerce generally as actually carried on, and for inter-State trade and commerce. Banking may be described as an instrument which is used in inter-State trade and commerce. But the business of a banker, consisting in receiving deposits, paying out deposits, lending money and associated transactions, provides service of a financial character which is used in relation to all forms of human activity. A banker's business serves the purposes not only of trade and commerce, but also of all kinds of financial trans-

(1) (1945) A.C. 1.

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actions which have nothing whatever to do with trade or commerce. A law which was directed against the use of such facilities in inter-State trade and commerce, which had the " real object " of restricting such trade and commerce, would be obnoxious to s. 92 for the reasons stated in *James* v. *Cowan* (1) and *James* v. *The Commonwealth* (2). But the *Banking Act* 1947 is a general law dealing with the persons who conduct financial transactions in a banking system, with no reference to the inter-State character of any transaction. Such a law cannot be said to be " directed against " the use of banking in inter-State transactions. The Act makes no reference whatever to inter-State transactions. The choice of the banks to be prohibited from carrying on banking business " has no relation to . . . passage across the border "—to use the words of *Williams* J. in *Australian National Airways Pty. Ltd.* v. *The Commonwealth* (3). The Act does not prevent the transportation of anything across State borders. It is true that it is intended to control the businesses of private banks and, if thought proper, to put them out of business. This, however, is to be done without reference to any inter-State element in the business.

The plaintiffs argue, however, that this fact is immaterial and that s. 92 prevents the closing by legislative action of any business which is auxiliary to inter-State trade and commerce. I restate the carefully-framed proposition which was submitted on behalf of the plaintiffs :—" Section 92 is infringed whenever an individual or corporation is engaged in inter-State trade, commerce or intercourse, and, either by a direction, prohibition or acquisition, with the object or purpose of effecting such a prohibition, the carrying on of such a business by him or it is forbidden."

In my opinion the plaintiffs did, as the defendants contended, really seek to set up again the principle of *W. & A. McArthur Ltd.* v. *Queensland* (4). In *McArthur's Case* (5) it was said : " Once determine what is comprised in ' trade, commerce, and intercourse,' then, as the ' absolute freedom ' extends to the *whole* of it, many of the suggested difficulties vanish on the instant." It was then held that all the commercial arrangements of which transportation is the direct and necessary result form part of trade and commerce—all the mutual communings, negotiations, verbal and by correspondence, the bargain, the transport and the delivery. (There was no dissent from this proposition in *James* v. *The Commonwealth* (2). It was held in *McArthur's Case* (4) that s. 92 protected all of these

(1) (1932) A.C. 542 ; 47 C.L.R. 386.
(2) (1936) A.C. 578 ; 55 C.L.R. 1.
(3) (1945) 71 C.L.R. 29, at p. 109.
(4) (1920) 28 C.L.R. 530.
(5) (1920) 28 C.L.R., at p. 546.

elements from all governmental control by every governmental authority to whom the command contained in the section was addressed. The proposition of *McArthur's Case* (1) was so stated in *James* v. *The Commonwealth* (2): "Then there is the conception enunciated in *McArthur's Case* (1) that 'free' means free from every sort of impediment or control by any organ of Government, legislature or executive to which s. 92 is addressed with respect to trade, commerce or intercourse, considered as trade, commerce and intercourse" (3). Lord *Wright* M.R. proceeds (4): "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 s. 92 binds the Commonwealth, then it is equally true that control under any Federal law must be such an interference. It is now settled that s. 92 does bind the Commonwealth. Accordingly the adoption now of the doctrine of *McArthur's Case* (1) would mean that inter-State trading and commercial dealings would be immune from both Federal and State law: see *James* v. *The Commonwealth* (5).

The Privy Council very clearly rejected the doctrine of *McArthur's Case* (1). Under that doctrine an infringement of s. 92 would take place in the case of any law which controlled a business containing inter-State elements because if the law were not observed the business would be interfered with, or possibly stopped altogether, or a penalty would be incurred. Since *James* v. *The Commonwealth* (6) it cannot be maintained that the fact that a law which necessarily involves some control of inter-State business and possibly, in the course of such control, an exclusion of some persons from such business, is an infringement of s. 92.

It is the duty of this Court to apply *James* v. *The Commonwealth* (6) and to follow the decisions which were approved in *James* v. *The Commonwealth* (6) and which have subsequently been given by this Court. In my opinion it would be wrong, after *James* v. *The Commonwealth* (6) to hold that a law controlling a business, even though that business is directly related to and is even part of inter-State trade and commerce, is necessarily an infringement of s. 92, and even though the application of the law may render the carrying on of business by a particular individual impossible. I refer to the statutes which were held in *James* v.

(1) (1920) 28 C.L.R. 530.
(2) (1936) A.C., at p. 619; 55 C.L.R., at p. 48.
(3) (1936) A.C., at p. 628; 55 C.L.R., pp. 56, 57.
(4) (1936) A.C., at p. 629; 55 C.L.R., at p. 57.
(5) (1936) A.C., at p. 629; 55 C.L.R., at pp. 57, 58.
(6) (1936) A.C. 578; 55 C.L.R. 1.

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The Commonwealth (1) to be valid. All of these statutes involve a control under law which (2) " must be an interference with . . . freedom " in " trade." Among the statutes to which reference was made are general price-fixing Acts (3) : State marketing and transport regulations (4) : State laws of health and sanitation (5) : the *Post and Telegraph Act* 1901-1923 (6) : the *Secret Commission Act* 1905 (7) : the *Commerce* (*Trade Descriptions*) *Act* 1905-1933 (7) : the *Australian Industries Preservation* Act 1906-1930 (8) : the *Sea Carriage of Goods Act* 1924 (9) : the *Transport Workers' Act* 1928-1929 (10) : *Sale of Goods Acts* (2) : *Bills of Exchange Acts* (2) : Acts relating to sea, roadway or motor carriage (2) and State or Commonwealth Acts dealing with wharves or warehouses or transport workers (2) : cf. judgment of *Evatt* J. in *R.* v. *Vizzard* ; *Ex parte Hill* (11). All these statutes prevent some transactions taking place in inter-State trade and commerce or deprive them of effect if they do take place, and in some cases subject the participants to penalties. Although they all operate to impose some degree of control and restraint upon inter-State businesses, they were held to be valid. They are all either general Acts which apply to but have no differential reference to inter-State transactions, or, if limited to such transactions, cannot be said to be " directed against " them. I have difficulty in seeing how the proposition submitted for the plaintiffs would allow the enactment of a general statute imposing penalties upon persons who sold uninspected meat, or diseased meat, or other goods dangerous to health—or upon unqualified persons who carried on the business of chemists and druggists. A business cannot exempt itself from control by law by introducing inter-State elements into its transactions, and a law is not rendered invalid by s. 92 because it applies to such transactions. If it is " directed against " such transactions it is an entirely different matter. The *Banking Act* 1947 is not directed against inter-State banking. It is a general law dealing with financial business as carried on by bankers.

If it were now held that, because the *Banking Act* can be applied so as to prevent one or more, or possibly all, of the plaintiff banks

(1) (1936) A.C. 578 ; 55 C.L.R. 1.
(2) (1936) A.C., at p. 629 ; 55 C.L.R., at p. 57.
(3) (1936) A.C., at pp. 619, 620 ; 55 C.L.R., at p. 49.
(4) (1936) A.C., at pp. 621, 622 ; 55 C.L.R., at pp. 50, 51.
(5) (1936) A.C. at pp. 624, 625 ; 55 C.L.R. at p. 53.
(6) (1936) A.C., at p. 625 ; 55 C.L.R., at p. 54.
(7) (1936) A.C., at p. 626 ; 55 C.L.R., at p. 54.
(8) (1936) A.C., at p. 626 ; 55 C.L.R., at pp. 54, 55.
(9) (1936) A.C., at p. 626 ; 55 C.L.R., at p. 55.
(10) (1936) A.C., at p. 627 ; 55 C.L.R., at p. 55.
(11) (1933) 50 C.L.R. 30, at pp. 81, 82.

from carrying on banking business (banking being an instrument used in inter-State trade and commerce), therefore the Act was invalid, it would be necessary to overrule several decisions given by this Court. In each of these cases statutes subjected the inter-State business of particular persons to restrictions and limitations and were such as possibly to put them out of business. The statutes nevertheless were held to be valid. The cases decided before *James* v. *The Commonwealth* (1) and approved in *James* v. *The Commonwealth* (1) which were of this character were: *Willard* v. *Rawson* (2); *R.* v. *Vizzard*; *Ex parte Hill* (3); *O. Gilpin Ltd.* v. *Commissioner of Road Transport and Tramways (N.S.W.)* (4). After *James* v. *The Commonwealth* (1) cases in which legislation was upheld which either restricted or put a stop to the inter-State business of some persons were: *Riverina Transport Pty. Ltd.* v. *Victoria* (5); *Hartley* v. *Walsh* (6); *Home Benefits Pty. Ltd.* v. *Crafter* (7); *Milk Board (N.S.W.)* v. *Metropolitan Cream Pty. Ltd.* (8); *Andrews* v. *Howell* (9).

In my opinion all these cases would have to be overruled if the contention of the plaintiffs that s. 92 prohibited interference by law with a business which contained inter-State elements or which was an instrument used in inter-State trade and commerce were accepted.

The plaintiffs naturally relied strongly upon the degree of approval given in *James* v. *The Commonwealth* (1) to *Peanut Board* v. *Rockhampton Harbour Board* (10). Such approval as was given was expressed to be upon the basis only of a particular view of the Act which was accepted without further examination by the Privy Council. It was said that "on the basis of that view [that is, a particular construction of the Act as representing its true character] the principles laid down by this Board (in *James* v. *Cowan* (11) were applied by the Court," that is, by the High Court. Such a statement is a very cautious and limited approval if, indeed, it is an approval at all. The other reference to the *Peanut Board Case* (10) is (12) where, with reference to burdens and hindrances upon inter-State trade which might assume various forms, it is said that "One form may be a compulsory acquisition of goods, as in *James* v. *Cowan* (11) or the *Peanut Case* (10) 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." If the statute dealt with

(1) (1936) A.C. 578; 55 C.L.R. 1.
(2) (1933) 48 C.L.R. 316.
(3) (1933) 50 C.L.R. 30.
(4) (1935) 52 C.L.R. 189.
(5) (1937) 57 C.L.R. 327.
(6) (1937) 57 C.L.R. 372.
(7) (1939) 61 C.L.R. 70.
(8) (1939) 62 C.L.R. 116.
(9) (1941) 65 C.L.R. 255.
(10) (1933) 48 C.L.R. 266.
(11) (1932) A.C. 542; 47 C.L.R. 386.
(12) (1936) A.C., at p. 630; 55 C.L.R., at p. 59.

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in the *Peanut Case* (1) did provide for an expropriation which was "directed" wholly or partially against inter-State trade in the goods, then the *Peanut Case* (1) falls completely into line with the reasoning in *James* v. *The Commonwealth* (2). The question whether the statute which was under consideration in the *Peanut Case* (1) could properly be construed as providing for expropriation "directed" against inter-State trade is not a question with which the Privy Council itself dealt. Finally, as to the *Peanut Case* (1) *Andrews* v. *Howell* (3) is a decision directly to the contrary effect and is in my opinion completely in accord with the decision in *James* v. *The Commonwealth* (2). In *Andrews* v. *Howell* (3) the Court considered a general marketing scheme which, so far as expropriation of goods was concerned, was not distinguished, and, in my opinion, cannot be distinguished, from that which was the subject of decision in the *Peanut Case* (1). But in *Andrews* v. *Howell* (3) the scheme was not described as a marketing scheme which was "entirely restrictive of any freedom of action by the producers." It was described as not being directed wholly or partially against inter-State trade, but to the better disposal of the commodities in local and other markets. The regulations establishing the scheme were held not to be obnoxious to s. 92.

For these reasons I am of opinion that the provisions of the *Banking Act* 1947 do not infringe s. 92 of the Commonwealth Constitution. In my opinion banking is not itself trade or commerce. It is an instrument used by trade and commerce. The legislative control introduced by the Act is a control which is not directed against any inter-State element in banking. It is a general provision for the control of banking and is as valid as a general money-lending law. In my opinion the objections based on s. 92 fail.

The Act in relation to State Governments.

The Act is attacked as unduly interfering with and impairing the powers and functions of State Governments and excluding them from necessary facilities for the conduct of governmental business. The receipt, custody, management and control, and expenditure of the public moneys of the States is a governmental function and an essential governmental function; that is, it is a function the performance of which is necessary to the existence of the States as political organisms. This proposition has been established by *Melbourne Corporation* v. *The Commonwealth* (4) where it was held that s. 48 of the *Banking Act* 1945 was invalid. This section provided that,

(1) (1933) 48 C.L.R. 266.
(2) (1936) A.C. 578; 55 C.L.R. 1.
(3) (1941) 65 C.L.R. 255.
(4) (1947) 74 C.L.R. 331.

except with the consent in writing of the Commonwealth Treasurer, a bank should not conduct any banking business for a State or for any authority of a State, including a local government authority.

The States may create State banks, but it is argued for the plaintiffs that State banks cannot meet all government requirements. Such banks would not have the resources which are at the command of the plaintiff banks and, further, it is argued that a State should not be compelled to establish a State bank in order to maintain its independence of the Commonwealth. The effect of the Act, the plaintiffs argue, is that in the case of States which have no State bank, the Government will be compelled to do all its banking through a bank which is really controlled as to policy by the Government of the Commonwealth: see *Commonwealth Bank Act* 1945, s. 9: *Banking Act* 1945, s. 27.

It is contended that it is inconsistent with the maintenance of a Federal system of government consisting of Commonwealth and States that the Governments of the States should be compelled to conduct their financial operations through a Commonwealth bank.

The *Commonwealth Bank Act* 1945, s. 25, places the day to day business of the bank under the management of the Governor of the bank, and not under the management of the Government. The *Banking Act* 1947, s. 11, provides that it shall be the duty of the Commonwealth Bank to provide adequate banking facilities for any State to conduct its business without improper discrimination, to observe obligations of secrecy &c. But in the case of a bank established under Commonwealth law, all these provisions exist only at the will of the Commonwealth Parliament and can be altered by that Parliament. Thus, in principle, the objection of the States which is now under consideration is an objection, not merely to the particular provisions of the 1947 Act, but to any practical compulsion upon the States to use an institution under the control of the Commonwealth for their financial operations.

The control of finance may be used in modern society so as to control nearly anything and everything. If the States are to be subject to Commonwealth control in their daily finance, then, it is argued, they lose all their independence as political organisms. Long term borrowing by the States is controlled by the Loan Council under the Financial Agreement: see Financial Agreement as set out in the Schedule to the *Financial Agreement Act* 1944, cl. 3 (8) and (9) and cl. 4. Short term borrowing, however, is not so controlled, except in relation to certain maximum limits as to discount, interest &c.: Financial Agreement, cl. 5 (1) and (9).

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(Similar provisions apply in the case of the Commonwealth: see cl. 6 of the Agreement.) It is argued that the effect of the 1947 Act is to place all short term financing of the States under the actual or possible control of the Commonwealth Treasurer, and therefore to place State Governments themselves under the control of the Commonwealth Treasurer.

The defendants' reply to this argument is that if the Commonwealth Parliament has power to create what may amount to a practical banking monopoly, the States must put up with it, just as they must put up with many other things in respect of which power is given to the Commonwealth Parliament. There are many subjects in respect of which the Commonwealth can use its powers so as to create a monopoly in the form of exclusive Commonwealth control; e.g. bounties on the production and export of goods, quarantine, currency, coinage, legal tender, certain industrial disputes. The Commonwealth has exclusive powers with respect to customs and excise duties. Legislation upon any of these matters may provide for control to be completely in Commonwealth hands. In relation to all matters where the Commonwealth Parliament has power, the States are in general bound by the laws of the Commonwealth. This was the decision in the *Engineers' Case* (1) and the defendants contend that there is no reason why that decision should be whittled down in the case of banking.

The defendants further emphasize the exception of "State banking" from the Commonwealth legislative power. This is an express exception in favour of the States which enables the States to establish their own banks and to be completely free of any Commonwealth control in banking. This express exception, it is argued, excludes any further implied exception in relation to this subject matter. In reply to the arguments founded upon the *Melbourne Corporation Case* (2) the defendants point out that s. 48 of the *Banking Act* 1945 dealt specifically and particularly with the States and State authorities.

In the *Melbourne Corporation Case* (2) it was held that a system of Federal government, involving the co-existence of Commonwealth and States, involved the continuance of the existence of the States as political entities not subject to any form of Commonwealth control in respect of the discharge of their own lawful functions. The States may be bound by some Commonwealth laws (*Engineers' Case* (1)) but, as governments, the States are independent of the Commonwealth and are not subjects of the Commonwealth; and in respect of the functions which are left to the States the Common-

(1) (1920) 28 C.L.R. 129. (2) (1947) 74 C.L.R. 31.

wealth has no power by means of legislation of restricting the States in the performance of the normal and essential functions of government: per *Rich* J. (1). Thus the Commonwealth Parliament cannot destroy, curtail or interfere with the exercise of constitutional power by a State, and the management and control by the States of their revenues and funds is a constitutional power of vital importance to them: per *Starke* J. (2). The Constitution should not be understood as authorizing the Commonwealth to make a law "aimed at the restriction or control of a State in the exercise of its executive authority": per *Dixon* J. (3). *Williams* J. (4) held that s. 48 of the *Banking Act* 1945 was a law which discriminated against the States and their agencies and was in substance a law which sought to give direction to the States as to the manner in which they should exercise their executive, legislative, judicial or governmental functions and that it was therefore invalid.

The plaintiffs rely upon all these propositions in their challenge to the 1947 Act.

The 1947 Act is general in its terms. It is quite different from s. 48 of the *Banking Act* 1945, which dealt specifically and in a special manner, and in a discriminatory manner, with States and State agencies. The 1947 Act cannot be said to be aimed at or directed against the States in this manner.

Further, the States are at liberty to use the Commonwealth Bank and, if they prefer not to do so, they can establish their own banks. The intention of s. 51 (xiii.) is, I suggest, to give to the States independence of the Commonwealth in respect of banking if they desire to have and to exercise such independence. State banking is removed from Commonwealth control except in so far as it extends beyond the limits of the State concerned. The Commonwealth legislative power in relation to "State banking extending" should (as I have already said) be construed in the light of the prior exception of State banking from Commonwealth control, and should be read as authorizing Federal laws under which a State bank may extend its business from one State into another, even though the other State might itself object to such extension. If the Commonwealth power of legislation with respect to "State banking extending" &c. were held to include a power to prohibit "State banking extending" &c. then, as a State bank of any magnitude could not carry on if it were limited in all its transactions to transactions within the State, the result would be that the Commonwealth Parliament, by exercising its legislative powers, could actually in

(1) (1947) 74 C.L.R., at p. 66.
(2) (1947) 74 C.L.R., at p. 75.
(3) (1947) 74 C.L.R., at p. 83.
(4) (1947) 74 C.L.R., at p. 99.

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practice abolish State banking upon any substantial scale, notwithstanding the exclusion of "State banking" from Commonwealth legislative power. I am therefore of opinion that the Commonwealth Parliament cannot, under the power to make laws with respect to "State banking extending," either prohibit or substantially impede such banking. To hold that such legislation is valid would, in my opinion, be inconsistent with the only reason that can be suggested for excepting State banking from the power conferred by s. 51 (xiii.).

Thus I am of opinion that, by reason of this exception, the provisions with respect to State banking contained in s. 51 (xiii.) make provision, of which the States are at liberty to avail themselves, for independence of the States from Commonwealth control in respect of banking, and that the principles stated in the *Melbourne Corporation Case* (1) do not invalidate the *Banking Act* 1947.

Financial Agreement.

It is contended for the plaintiffs that the Act is invalid because it is inconsistent with the Financial Agreement between the Commonwealth and the States: see Schedule to *Financial Agreement Act* 1944. Section 105A of the Constitution provides that an agreement made in pursuance of the section shall be binding upon the Commonwealth and the States parties thereto, notwithstanding anything contained in the Constitution of the Commonwealth or the Constitution of the several States or in any law of the Parliament of the Commonwealth or of any State. Thus, if a Commonwealth Act contains provisions inconsistent with a term of an agreement made in pursuance of s. 105A of the Constitution, the *Commonwealth Act* is necessarily invalid.

The Financial Agreement is an agreement made pursuant to s. 105A. Clause 5 (1) provides that the States may, for any purpose, subject to any maximum limits decided upon by the Loan Council for interest, brokerage &c., borrow moneys within the States from authorities, bodies, funds or institutions (including Savings Banks) constituted or established under Commonwealth or State law or practice. Clause 5 (9) has a more direct reference to the present case, because it deals more specifically with borrowings from banks. Clause 5 (9) is as follows:—"Notwithstanding anything contained in this Agreement, any State may use for temporary purposes any public moneys of the State which are available under the laws of the State, or may, subject to maximum limits (if any) decided upon by the Loan Council from time to time for interest, brokerage,

(1) (1947) 74 C.L.R. 31.

discount and other charges, borrow money for temporary purposes by way of overdraft or fixed, special or other deposit, and the provisions of this Agreement other than this sub-clause shall not apply to such moneys."

These clauses confer a right upon a State Government, subject only to the conditions mentioned, to borrow money upon overdraft from banks.

The plaintiffs contend that the principle stated in *Stirling* v. *Maitland* (1) in the following words is applicable:—"If a party enters into an arrangement which can only take effect by the continuance of a certain existing state of circumstances, there is an implied engagement on his part that he shall do nothing of his own motion to put an end to that state of circumstances, under which alone the arrangement can be operative." A recent case in which this principle was applied is *Southern Foundries* (1926) *Ltd.* v. *Shirlaw* (2).

The plaintiffs contend that it is an implied term of the Agreement that the Commonwealth will not do anything to render the right given by the quoted clause nugatory or to diminish or prejudicially affect it. At the present time the States are able to go to a certain number of private banks "in a private banking system" and make agreements for overdrafts. The *Banking Act* 1947 contains provisions which, so far as they are applied, will bring about the abolition of some or all of the private banks. This, it is contended, is inconsistent with the implied term of the Financial Agreement.

The 1947 Act may be used and is plainly intended to be used for the purpose of diminishing the number of banks. There is no express prohibition in the Financial Agreement against such legislation. The plaintiffs disclaim any contention that the Agreement produces the result that no Parliament, Commonwealth or State, could terminate the existence of a bank, but they found a difficulty in stating with any precision any principle short of that proposition upon which they were prepared to stand. The plaintiffs, in my opinion, have not shown how their argument on this point can be accepted without conferring on existing banks a permanent guarantee that their existence will never be terminated by any Commonwealth or State legislative action. Even a statutory amalgamation would be impossible. But these propositions the plaintiffs disclaim.

In my opinion the Financial Agreement does not contain any implication that the number of banks is never to be decreased by

(1) (1864) 5 B. & S. 840, at p. 852 [122 E.R. 1043, at p. 1047].

(2) (1940) A.C. 701.

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legislative action. It provides only that the States (and the Commonwealth) shall be entitled to obtain overdrafts from banks, that is, from such banks as there are, from time to time. If the 1947 Act is put into full operation there will still be the Commonwealth Bank and such State banks as now exist and as the States may decide to establish hereafter. Accordingly, the States will still have the right to obtain by agreement overdrafts from all such banks as exist.

In the *Melbourne Corporation Case* (1) my brother *Williams* and I expressed our opinion that s. 48 of the *Banking Act* 1945 was inconsistent with the Financial Agreement, cl. 5 (9). That section prevented any State obtaining an overdraft from any bank without the consent in writing of the Federal Treasurer. The Financial Agreement gives a right to a State to arrange with banks for overdrafts subject only to the conditions specified in the Agreement. Section 48 was therefore in our opinion invalid because it imposed a condition upon the exercise of a right which had been given to the States independently of any such condition. The 1947 Act, however, does not affect this right in respect of any banks which may be in existence from time to time.

In my opinion, the objections of the plaintiffs based upon the Financial Agreement have not been establised as good objections to the validity of the Act.

Part VIII.

Part VIII. of the Act provides for the protection of the rights of the staff of a private bank when shares in the bank are acquired by the Commonwealth Bank and new directors assume office, and for the transfer to the Commonwealth Bank of the staff of a private bank when the Commonwealth Bank takes over the business of the bank. If the provisions for displacement of directors and introduction of nominee directors are invalid, and the provisions for taking over the business of a bank by compulsion are also invalid, the provisions of Part VIII. will not come into operation.

Conclusion.

For the reasons which I have stated I am of opinion that the following sections of the Act are invalid:—s. 14 (2) relating to transfer by the Commonwealth Bank of shares, ss. 17 to 20 relating to taking over control of the management of Australian banks, and ss. 23 and 24 relating to the acquisition of the assets of banks. Section 14 (2) is not a law with respect to acquisition of property,

(1) (1947) 74 C.L.R. 31.

and the other sections are laws with respect to such acquisition but in my opinion do not provide just terms of acquisition. Declarations of invalidity should be made accordingly and appropriate injunctions should be granted. The defendants should pay the costs of the plaintiffs. The parties will be given an opportunity of being heard with respect to the terms of the judgments in the several actions.

RICH AND WILLIAMS JJ. These are five actions in which the plaintiffs claim that the *Banking Act* 1947, hereinafter called the Act, or alternatively certain sections and parts of the Act, are beyond the powers of the Commonwealth Parliament, contrary to the Constitution of the Commonwealth and invalid. The important sections and parts of the Act are ss. 13, 14, 15, 17 to 21 inclusive, 24, 25 and 56 and Parts VI. and VII.

The plaintiffs can be divided into three classes—(1) the eight private banks (that is banks carried on for private profit) incorporated in Australia which are enumerated in the first part of the First Schedule to the Act; (2) the three private banks incorporated in the United Kingdom which are enumerated in the second part of the First Schedule to the Act; and (3) the States of Victoria, South Australia and Western Australia. Joined as plaintiffs with four of the banks in the first class, namely the Bank of New South Wales, the Commercial Banking Company of Sydney Limited, the National Bank of Australasia Ltd. and the Commercial Bank of Australia Ltd., there is in each case a director and shareholder suing on behalf of himself and all other holders of shares on any register in Australia and a shareholder suing on behalf of himself and all other holders of shares on any register outside Australia. Joined as plaintiffs with three of the remaining banks, namely the Bank of Adelaide, the Ballarat Banking Company Limited, and the Brisbane Permanent Building and Banking Company Limited, there is in each case a director and shareholder suing on behalf of himself and all other holders of shares. The eighth plaintiff the Queensland National Bank Limited is in voluntary liquidation and the liquidator is a co-plaintiff. No objection was raised to the form of the actions so far as they are actions by a shareholder on behalf of himself and all other shareholders, but it is impossible to say whether it would be in the pecuniary interest of shareholders or not that their shares in the Australian Banks should be acquired under the Act, so that they cannot be said to be numerous persons having the same interest in the subject matter of the action within the meaning of rule 8 of Order II. of the rules of this Court, and we do not regard

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the actions as other than actions by the shareholders who are parties on their own behalf.

Section 3 states that the several objects of the Act include—(*a*) the expansion of the banking business of the Commonwealth Bank as a publicly-owned bank conducted in the interests of the people of Australia and not for private profit; (*b*) the taking over by the Commonwealth Bank of the banking business in Australia of private banks and the acquisition on just terms of property used in that business; (*c*) the prohibition of the carrying on of banking business in Australia by private banks.

A statement of objects in an Act can operate like a preamble "as a key to open the meaning of the makers of an Act and the mischiefs it was intended to remedy," *Halsbury, Laws of England*, 2nd ed., vol. 31, p. 461, but in the end the objects of the Act must be ascertained from its actual operation and effect.

Considerable care has been taken to leave to the sole and uncontrolled discretion of the Treasurer the determination of the extent to which the relevant provisions of the Act shall be applied to the private banks enumerated in the First Schedule. The Act is therefore capable of a complete or partial operation depending on the extent to which the Treasurer chooses to exercise his discretion. It is not an Act the necessary operation and effect of which will be to transfer the banking business of every one of these banks to the Commonwealth Bank and to prohibit them all from carrying on banking business in Australia. Further the operation of the Act is restricted to prohibiting the corporations at present carrying on the business of banking in Australia for private profit from further carrying on such business, and to the transfer of their businesses to the Commonwealth Bank, so that its operation is not as wide as its objects indicate. But as the *Banking Act* 1945 prohibits persons other than corporations carrying on banking business in Australia and corporations from carrying on such business without a licence the objects of the Act can be achieved by refusing any further licences. The complete operation of the Act will therefore have the effect in every practical sense of changing the present banking structure of Australia from one in which the Commonwealth Bank of Australia acts as a central bank and is in competition with the private banks in the general banking business into one in which the whole of this general banking business shall be conducted by the Commonwealth Bank subject only to such competition as may be provided by State Banks. This purpose could be achieved either by the Commonwealth Bank taking over the businesses of the private banks voluntarily or by compulsion, or possibly by the

private banks being prohibited from carrying on business which would force those seeking banking facilities to go to the Commonwealth Bank, or partly by one or other of these means.

The Act therefore contains provisions by which the business of the private banks at present carrying on business in Australia may be acquired by the Commonwealth Bank and by which the carrying on of the business of banking in Australia by these banks may be prohibited. Two methods are provided by which the business of a private bank may be acquired by the Commonwealth Bank. The first method, which is confined to the banks incorporated in Australia, is contained in Divisions 2 and 3 of Part IV. of the Act, and combines provisions for the voluntary or compulsory acquisition of the shares of these banks situated or deemed by law to be situated in Australia with provisions for the compulsory transfer of their management, direction and control from the directors appointed in accordance with their memoranda and articles of association or other constating instruments (hereinafter called regulations) to directors appointed by the Governor of the Commonwealth Bank with the approval of the Treasurer. The second method which can be applied to all the plaintiff banks is contained in Division 4 of Part IV. and provides for the voluntary or compulsory taking over of their businesses in Australia by the Commonwealth Bank. The business is taken over by the Commonwealth Bank acquiring all the assets of the private bank which are situated in Australia at the date of acquisition and assets which relate to banking transactions and become Australian assets after that date; and discharging the private bank from all liabilities which are situated in Australia at the date of the acquisition and all liabilities which relate to banking transactions and become Australian liabilities after that date, and by transferring these liabilities to the Commonwealth Bank.

The Act embodies, but with important variations, two methods which are now well recognized by which one company may absorb the business of another—that is to say by the former company purchasing the assets and undertaking to discharge the liabilities of the latter, or the former company acquiring all or substantially all or at least sufficient shares in the capital of the latter to obtain a controlling interest, that is to say at least sufficient shares to pass a special resolution. But the important distinction between these methods of absorption and those provided by the Act is that where shares are acquired the nominees of the Commonwealth Bank are placed in the management, direction and control of the business and affairs of the private bank not by the Commonwealth Bank exercising its rights as a shareholder but by the Act: and that in

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the case of the acquisition of assets the private bank is discharged from its contractual liabilities and the rights of its creditors compulsorily novated to rights against the Commonwealth Bank.

The Act confers on the Treasurer the sole right to decide in his absolute discretion whether either, and if so, which method of acquisition shall be applied to each of the Australian private banks and the time of application, whether and when the businesses of each of the private banks incorporated in the United Kingdom and elsewhere shall be taken over, and whether there shall be simultaneous applications of the provisions of the Act to one or more or all of the banks or whether the Act shall be applied to the banks one by one. Obviously the transfer of the businesses in Australia of the plaintiff banks to the Commonwealth Bank is a task of great magnitude, and may explain the presence in the Act of the method of acquisition provided for by Divisions 2 and 3 of Part IV., because by this method the separate business of each of the Australian banks can be continued as a mere adjunct of the Commonwealth Bank for as short or as long a period as the Treasurer thinks fit. But it is plainly intended that the business of each of these Banks may at some convenient future time be taken over by the Commonwealth Bank, and s. 19 (1) (*b*) therefore authorizes the directors nominated by the Governor of the Commonwealth Bank to dispose of the business in Australia of each bank to the Commonwealth Bank with the approval of the Treasurer. Further it would seem that the provisions of Division 4 of Part IV. may be applied to a private bank incorporated in Australia after it has already been subjected to the provisions of Divisions 2 and 3 of that Part. Indeed, unless this is done, the employees have no statutory rights to become employees of the Commonwealth Bank. Ultimately the Commonwealth Bank can acquire the businesses of all the private banks.

But s. 51 (xxxi.) of the Constitution requires that laws for the acquisition of property shall provide for the acquisition on just terms. The requirement applies whether the law authorizes the Commonwealth or some person or corporation to acquire the property: *McClintock* v. *The Commonwealth* (1); *Jenkins* v. *The Commonwealth* (2). Section 15 of the Act therefore provides that: "The Commonwealth Bank shall pay fair and reasonable compensation in respect of the acquisition of shares by the Commonwealth Bank under section thirteen of this Act," and s. 25 that: "The Commonwealth Bank shall pay fair and reasonable compensation in respect of the acquisition of property by the Commonwealth

(1) (1947) 75 C.L.R. 1. (2) (1947) 74 C.L.R. 400.

Bank under the last preceding section" (that is, section twenty-four). Part V. provides for the constitution of a new Federal Court of Claims, and Part VI. for the determination of claims for compensation in respect of the acquisition of shares and assets by that Court and not in any other manner.

Part VIII. gives a statutory right to persons employed by an Australian private bank to continue to be employed by that bank after the date upon which shares in that bank have become vested in the Commonwealth Bank, and a statutory right to persons employed by a private bank the business of which is taken over by the Commonwealth Bank to be employed by the Commonwealth Bank.

Section 56 provides that upon the taking over of the business of a private bank by the Commonwealth Bank, the Commonwealth Bank shall be substituted for the private bank as a party to all instruments under which any money may be payable or property transferable to or by a private bank.

Section 61 provides that the Commonwealth guarantees the payment of all compensation payable by the Commonwealth Bank under the Act.

Prior to the Act, each of the plaintiff banks was carrying on business under the authority of s. 8 of the *Banking Act* 1945. This authority could only be revoked if the Governor-General was satisfied that the bank had ceased to carry on banking business in Australia. Section 46 (1) of the Act provides that "notwithstanding anything contained in any other law or in any charter or other instrument, a private bank shall not, after the commencement of this Act, carry on banking business in Australia except as required by this section." The existing authorities of the plaintiff banks are therefore revoked, and s. 46 makes it unlawful for them to carry on business except to the extent provided by the later sub-sections. In the meantime, each bank, however difficult it might be for it to maintain its business in such circumstances, is nevertheless required by sub-s. 2 to carry on business in Australia indefinitely and to provide any facility or service provided by it in the course of its banking business on 15th August 1947. Each bank, except a bank the business of which has been taken over by another private bank between this date and the date of the Act, must continue to carry on business until (1) its business is taken over by the Commonwealth Bank (sub-s. 3); or (2) the Treasurer by notice published in the *Gazette* and given in writing to a private bank, requires it to cease upon a date stated in the notice carrying on banking business in Australia (sub-ss. 4 to 8).

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It will be convenient at this stage to refer to s. 6 of the Act. This section conveys an intimation to the Court that it is the intention of Parliament that every provision of the Act shall operate to the full extent to which it can operate consistently with the Constitution. It intimates that the true meaning of each provision is first to be ascertained in the context of the whole Act. Unless this meaning is inconsistent with the Constitution, the provision is to have this meaning and operate accordingly although every other provision of the Act should be totally inconsistent with the Constitution and wholly invalid. If any provision of the Act is inconsistent with the Constitution, it is nevertheless to operate to the full extent to which it can operate consistently with the Constitution. But the Court is not a legislative but a judicial body. It cannot legislate; that is the function of Parliament. It can only read down a provision which is in excess of power so that it will have an operation consistent with the Constitution where the provision contains independent portions within power which are severable, or the provision is capable of operating in a distributive manner in respect of each and every part of the subject matter and its operation can be confined to those parts which are within power: *Pidoto* v. *Victoria* (1). When each provision which is inconsistent with the Constitution has been examined and if possible read down so as to have a residue of consistency or if this is impossible rejected, the Act is to be regarded as an Act consisting of those provisions which are consistent with the Constitution still having their original meaning and of the above residues, and this collation is to be the *Banking Act* 1947, notwithstanding that what is left of the Act may result in the Act having a different effect in substance from the true meaning of the Act as a whole.

When the Act is construed in the light of the several objects set out in s. 3, particularly the third object, and of this remarkable manifestation of parliamentary intention, it becomes clear that s. 46 is intended to have an operation independent of the validity of any other provisions of the Act. The Act therefore authorizes the Treasurer in his absolute discretion and in his own time to determine the banking business in Australia of each of the plaintiffs with compensation by causing the Commonwealth Bank to take over its business, or to close down its business without any compensation, or to compel it to carry on business indefinitely. The Act can only be completely valid if the Commonwealth Parliament can pass laws (1) prohibiting any banking business other than the business

(1) (1943) 68 C.L.R. 87.

carried on by State banks being carried on in Australia ; (2) compelling any person engaged in the business of banking to carry on that business indefinitely ; (3) compelling any person who has a contract with a bank carrying on business in Australia to novate that contract into a contract with another bank carrying on business in Australia ; (4) altering the regulations of any corporation formed under the laws of any State carrying on the business of banking in Australia, and taking the management, direction and control of its business and affairs out of the hands of the directors appointed by the shareholders and placing them in the hands of the nominees of another bank ; (5) authorizing any bank carrying on business in Australia compulsorily to acquire shares in any other bank carrying on business in Australia ; (6) authorizing any bank in Australia compulsorily to acquire the business of any other bank carrying on business in Australia.

The defendants contend that the Act is authorized by the powers, separately or in conjunction, of the Commonwealth Parliament to make laws, subject to the Constitution, for the peace, order and good government of the Commonwealth with respect to the subject matters enumerated in s. 51, placita (xiii.), (xx.), (xxxi.), and (xxxix.). The text of these placita is as follows :—

(xiii.) Banking, other than State banking ; also State banking extending beyond the limits of the State concerned, the incorporation of banks, and the issue of paper money.

(xx.) Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth.

(xxxi.) The acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws.

(xxxix.) Matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth.

The defendants submit that a Federal law is authorized by the Constitution if it is relevant to, that is to say if it touches and concerns, a specific matter on which the Commonwealth Parliament has power to legislate, and that it is wrong to inquire whether the law is in its pith and substance or true nature and character a law on one or more of the specific matters of Federal legislative powers or is a law on a matter not transferred by the Constitution to the Commonwealth Parliament and therefore exclusively vested in in the States. The test of pith and substance or true nature and

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character of the law was first used by the Privy Council in order to decide whether a law was a law upon one of the classes of subjects over which the Canadian Parliament has exclusive power under s. 91 or the Parliaments of the Provinces exclusive power under s. 92 of the Canadian Constitution. And in the recent case of *Prafulla Kumar Mukherjee* v. *Bank of Commerce, Limited, Khulna* (1), where the same test was applied to the *Government of India Act* 1935, there were three lists of powers, a Federal legislative list with respect to which the Federal legislature had exclusive powers, a provincial list with respect to which the provincial legislatures had exclusive powers, and a concurrent list with respect to which the Federal and provincial legislatures had concurrent powers. But there is in the judgment of the Privy Council the specific statement that the same test is to be applied however the powers are distributed between the parliaments in a federal system. In *Gallagher* v. *Lynn* (2), Lord *Atkin* said : " These questions affecting limitation on the legislative powers of subordinate parliaments or the distribution of powers between parliaments in a federal system are now familiar, and I do not propose to cite the whole range of authority which has largely arisen in discussion of the powers of Canadian Parliaments. It is well established that you are to look at the 'true nature and character of the legislation' : *Russell* v. *The Queen* (3), 'the pith and substance of the legislation.' If, on the view of the statute as a whole, you find that the substance of the legislation is within the express powers, then it is not invalidated if incidentally it affects matters which are outside the authorized field. The legislation must not under the guise of dealing with one matter in fact encroach upon the forbidden field."

The cases have been argued at great length and with great care on behalf of the plaintiffs and of the defendants. We only propose to deal with some of the more outstanding questions that have arisen because, after careful consideration, we have reached the following conclusions :—(1) that on the true construction of placita (xiii.), (xx.) (xxxi.) and (xxxix.) of s. 51 of the Constitution none of the material provisions of the Act is authorized by these placita ; (2) that on any construction, ss. 13, 14, 17 to 21 inclusive, and 24 are not authorized by these placita ; (3) that if placitum (xxxi.) is wide enough to authorize the acquisition of the shares or the taking over of the businesses, the acquisitions fail because the Act does not provide just terms ; (4) that the Act in all its material sections is contrary to clause 5 (9) of the Financial Agreement and to s. 92

(1) (1947) L.R. 74 Ind. App. 23.
(2) (1937) A.C. 863, at p. 870.
(3) (1882) 7 App. Cas. 829, at pp. 839, 840.

of the Constitution. We shall proceed shortly to explain our reasons for reaching these conclusions.

The complete validity of the Act must rest on the power of the Commonwealth Parliament to select one person or corporation and confer on that person or corporation the sole right to carry on the whole of the banking business in Australia other than the business carried on by State banks. The conferment of such a privilege on one bank must be a partial exercise of a power to prohibit all persons and corporations except State banks carrying on this business. The corporation selected in the Act is the Commonwealth Bank, but it would be equally within power to select one of the private banks. The defendants contend that this power of selection is conferred by pl. (xiii.) or alternatively by pl. (xx.) of s. 51 of the Constitution. The only decision on pl. (xx.) is *Huddart Parker & Co. Pty. Ltd.* v. *Moorehead* (1). Very conflicting views of the meaning of this placitum were there expressed. But there was agreement that the placitum does not authorize the Commonwealth Parliament to create corporations but relates to legislation with respect to corporations as existing entities. For the purposes of private international law, each of the States of Australia is regarded as a foreign country in the courts of another State, so that bodies incorporated in one State are just as much foreign corporations in another State as bodies incorporated abroad. The language of the placitum indicates an intention to give the Commonwealth Parliament power to make laws from time to time with respect to the conditions, subject to the performance of which, corporations of all kinds created beyond Australia and trading and financial corporations incorporated in Australia should be entitled to carry on business throughout Australia or in any part thereof. It was contended that the power was sufficiently wide to enable the Commonwealth Parliament to prohibit such corporations carrying on business at all in Australia. But the power operates on such corporations as existing entities, and we think that it would be inconsistent with a power to legislate depending on such a basis, particularly where corporations formed within the limits of the Commonwealth are subject to the power to the same extent as foreign corporations, to construe the power as wide enough to authorize the Commonwealth Parliament simply to prohibit one or more or all of such corporations carrying on business in Australia at all. It was also contended that the placitum would authorize the Commonwealth Parliament to legislate directly to alter the regulations of such corporations, but since the power is with respect

(1) (1909) 8 C.L.R. 330.

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to existing corporations and the regulations are part of their formation such legislation would be beyond power. All that the Commonwealth Parliament could do would be to impose conditions appropriate to the carrying on of a particular class of business which might require corporations engaged in the business to alter their regulations in accordance with the law of the place of their incorporation so as to be in a position to comply with the conditions.

But it is unnecessary to pursue the meaning of the power because we are of opinion that it does not apply to corporations whether created abroad or within Australia engaged in the business of banking. Placitum (xiii.) contains an express exclusion of State banks from this head of power. It was held in *Melbourne Corporation* v. *The Commonwealth* (1) that "State banking" means banks constituted and controlled by States. The ordinary way to constitute such banks would be to incorporate them. Such banks would be trading or financial corporations formed within the limits of the Commonwealth. If pl. (xx.) was intended to apply to banks, the Commonwealth Parliament would thereby acquire legislative powers over State banks from which it is expressly excluded by pl. (xiii.). It was contended that the placita could be reconciled by implying an exclusion of State banks from pl. (xx.), but to do this would require the insertion at the end of this placitum of some such words as "other than trading or financial corporations formed within the limits of the Commonwealth which are banks constituted and controlled by States the business of which does not extend beyond the limits of the States concerned." We can find no justification for such an implication, and in our opinion the placita can only be reconciled by applying the maxim *generalia specialibus non derogant*, and by regarding corporations which are banks as placed in the separate category expressly provided for by pl. (xiii.) and therefore as corporations outside the generality of the classes of corporations referred to in pl. (xx.).

The crucial matter is therefore to determine the meaning of pl. (xiii.). It authorizes the Commonwealth Parliament to make laws with respect to (1) Banking other than State banking; (2) State banking extending beyond the limits of the State concerned; (3) The incorporation of banks; and (4) The issue of paper money. It thus contains four legislative powers. It is clear, of course, that in a Constitution there may be considerable overlapping in the various heads of legislative power and in the sub-heads contained in any head, but we can see no reason why a Constitution, like any other statute or document, should not be subject to the general

(1) (1947) 74 C.L.R. 31.

rule that every clause should be construed with reference to the context of the other clauses of the Act, so as, so far as possible, to make a consistent enactment of the whole statute and to give a meaning if possible to every part thereof: *Lamplugh* v. *Norton* (1); *Canada Sugar Refining Co. Ltd.* v. *The Queen* (2); *A. Lewis & Co. (Westminster) Ltd.* v. *Bell Property Trust Ltd.* (3). Accordingly when pl. (xiii.) gives a power to legislate with respect to banking and a further power to legislate with respect to the incorporation of banks, the framers of the Constitution could not have intended by the word "banking" to authorize laws with respect to the incorporation of banks. The origin of the placitum is s. 91 (15) of the *British North America Act* 1867, which gives the Canadian Parliament exclusive legislative authority over "banking, the incorporation of banks, and the issue of paper money." The additional words "other than State banking, also State banking extending beyond the limits of the State concerned" have been incorporated in the placitum. In *Tennant* v. *Union Bank of Canada* (4) Lord *Watson* in delivering the judgment of the Privy Council said that banking is "an expression which is wide enough to embrace every transaction coming within the legitimate business of a banker." This definition has been repeated in two recent judgments of the Privy Council: *Attorney-General for Canada* v. *Attorney-General for Quebec* (5); *Attorney-General for Alberta* v. *Attorney-General for Canada* (6). It would seem therefore that Lord *Watson* had taken the view that the words "incorporation of banks" authorized laws relating to the existence of banks as corporate bodies while the word "banking" authorized laws relating to the conduct of banking business. The word "banking" had been given this meaning by Lord *Watson* when s. 91 (15) of the Canadian Constitution was adopted with amendments in the Australian Constitution. The amendments strengthen the view that the word was intended to have this meaning in pl. (xiii.) because the only power of the Commonwealth Parliament over State banking is over State banking extending beyond the limits of the State concerned. It has no power over the creation or regulations or winding up of State banks. It can only make laws with respect to the banking transactions which they carry on beyond the limits of their own State. The meaning given to the word "banking" by Lord *Watson* is accordingly consistent with the meaning which the word must have where it occurs in the

(1) (1889) 22 Q.B.D. 452, at p. 459.
(2) (1898) A.C. 735, at p. 741.
(3) (1940) Ch. 345, at p. 348.
(4) (1894) A.C. 31, at p. 46.
(5) (1947) A.C. 33, at pp. 41, 42.
(6) (1947) A.C. 503, at p. 517.

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expression "State banking extending beyond the limits of the State concerned." Laws with respect to banking are not therefore laws which deal with the incorporation, regulations and winding up of banks, but are laws with respect to the conduct of the business carried on by banks.

It was contended that a power to make such laws was wide enough to authorize laws selecting the persons or bodies to engage in the conduct of such business. But the Commonwealth Parliament has the same power over the conduct by State banks of inter-State business as it has over the conduct by other banks of their business whether intra-State or inter-State. If therefore the power is wide enough to authorize the selection of banks other than State banks which alone may be allowed to carry on intra and inter-State business, it must also be wide enough to authorize the selection of the State banks which alone may be allowed to carry on inter-State business. But the Commonwealth Parliament cannot suppress State banks, and it would be most unreasonable to construe the latter power as a power to authorize some State banks to conduct business beyond the limits of their own States to the exclusion of others and to prohibit all State banks from having branches or even agencies anywhere beyond the limits of their own States, either within or without Australia, or even from having dealings with one another. The use of the word "extending" assumes and implies that State banks can lawfully extend and continue to extend their businesses beyond the limits of their own States. The power must be a power to regulate the conduct of the inter-State business of such banks. This power over this portion of State banking is of the same quality as the power over the conduct of all banking business by other banks. The latter power is not therefore a power to prohibit all or some corporations other than State banks engaging in the business of banking, but a wide power to regulate the conduct of banking business. In *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (1) Lord *Watson* said in reference to the power in s. 91 of the Canadian Constitution to regulate trade and commerce that: "A power to regulate, naturally, if not necessarily, assumes, unless it is enlarged by the context, the conservation of the thing which is to be made the subject of regulation." He cited a passage in the judgment of Lord *Davey* in *Municipal Corporation of the City of Toronto* v. *Virgo* (2): "Their Lordships think there is marked distinction to be drawn between the prohibition or prevention of a trade and the regulation or governance of it, and indeed a

(1) (1896) A.C. 348, at p. 363.

(2) (1896) A.C. 88, at p. 93.

power to regulate and govern seems to imply the continued existence of that which is to be regulated or governed."

For these reasons we are of opinion that s. 46 (1) and sub-ss. (4) to (8) are not authorized by pl. (xiii.), and are totally inconsistent with the Constitution and incapable of being read down in accordance with s. 6, and are therefore wholly invalid. Sections 13 and 24 are attempted exercises of the power conferred on the Commonwealth Parliament by pl. (xxxi.) to make laws for the acquisition of property. But property can only be acquired under this power for any purpose in respect of which the Commonwealth Parliament has power to make laws. Laws providing for the compulsory acquisition of shares in one bank by another bank and for the compulsory taking over of the business of one bank by another bank are not in any sense a purpose of a law with respect to the conduct of banking business. Sections 13 and 24 are therefore also wholly invalid. Sections 14 and 17 to 21 inclusive are, for reasons more particularly stated hereafter, laws which attempt to alter the regulations of bodies incorporated under State legislation and are not laws with respect to the conduct of banking business by such bodies but are company laws. Placitum (xiii.) authorizes the Commonwealth Parliament to make laws with respect to the incorporation of banks. This power would probably authorize s. 6 of the *Banking Act* 1945 which provides that only corporations shall carry on banking business in Australia and would also probably authorize a law for the incorporation of a particular bank. But the word used is "banks" and not the words "bank or banks" and the phrase "a law with respect to the incorporation of banks" in its ordinary signification would appear to point rather to a power to make a general law governing the incorporation, regulations and winding up of banks. The banking power in the Australian Constitution is not, like the banking power in the Canadian Constitution, an exclusive power. It is a concurrent power. Unless the Commonwealth Parliament legislates with respect to the incorporation of banks, banks, like other bodies, can be incorporated under State laws. If the Commonwealth wishes to legislate with respect to the incorporation of banks and to occupy this legislative field, its legislation will prevail over State legislation by virtue of s. 109 of the Constitution. Persons desirous of engaging in the business of banking in Australia would then have to be incorporated under Federal law. But such a power would not authorize laws altering the regulations of bodies incorporated under State laws. Sections 17 to 21 inclusive are therefore wholly invalid. Section 46 (2) may be regarded from two aspects. Regarded as a law incidental to

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the taking over of the business of a plaintiff bank by the Commonwealth Bank and intended to preserve that business in the meantime it might be valid. But when the law for the taking over of the business fails, s. 46 (2) must fail also. Regarded as an independent law s. 46 (2) must fail because a power to make laws with respect to the conduct of the business of banking would not authorize a law compelling a person or corporation already engaged in the business of banking to continue to carry on that business indefinitely any more than it would authorize a law compelling a person or corporation to commence to carry on that business. Laws with respect to the conduct of the business of banking are laws which operate on persons and corporations while engaged in that business.

We shall now discuss the validity of the Act on the basis that, contrary to our opinion, the Commonwealth Parliament can under its power to make laws with respect to banking prohibit any person or corporation from carrying on the business of banking, and therefore select one or more banks and grant to it or them a monopoly of this business in Australia other than the bsuiness carried on by State banks. On this construction of the power the Commonwealth Parliament must also have power to prohibit State banks doing any business beyond the limits of their own States, and therefore power to authorize some State banks to do business and to deny to others the right to carry on business beyond such limits either anywhere or as prescribed. On this construction, subject to the questions that arise with respect to s. 92 of the Constitution and the contentions of the States, s. 46 (1) and (4) to (8) would be valid. But because a law may be made giving a monopoly to the Commonwealth Bank, it does not follow that laws may also be made giving the Commonwealth Bank power compulsorily to acquire shares in other banks whilst they are still permitted to carry on banking business, or compulsorily to acquire their businesses, or authorizing the Governor of the Commonwealth Bank to appoint his nominees as directors of such banks to direct, manage and control their business and otherwise to alter their regulations.

Questions immediately arise with respect to the validity of (1) ss. 13 and 14 ; (2) Division 3 of Part IV. ; (3) s. 24 of the Act. We shall proceed to deal with these questions.

Questions (1) and (2). Section 13 (1), (2) and (3) authorize the Treasurer to give a notice which will have the effect of vesting the Australian shares in an Australian private bank in the Commonwealth Bank upon a date specified in the notice. This is a law with respect to the acquisition of property. Such a law can only be valid provided that (*a*) the acquisition is on just terms and (*b*) it is

for a purpose in respect of which the Commonwealth Parliament has power to make laws. The regulations of all the Australian private banks contain provisions authorizing the directors in the exercise of their discretion to refuse to register any transfer of shares. The regulations of two of these banks prohibit a corporation becoming a member. The nature of the property in a share was described by Lord *Russell* of *Killowen* in *Inland Revenue Commissioners* v. *Crossman* (1):—"A share in a limited company is a property the nature of which has been accurately expounded by *Farwell* J. in *Borland's Trustee* v. *Steel* (2). It is the interest of a person in the Company, that interest being composed of rights and obligations which are defined by the Companies Act and by the memorandum and articles of association of the company. A sale of a share is a sale of the interest so defined, and the subject matter of the sale is effectively vested in the purchaser by the entry of his name in the register of members. It may be that owing to provisions in the articles of association the subject matter of the sale cannot be effectively vested in the purchaser because the directors refuse to and cannot be compelled to register the purchaser as shareholder. The purchaser could then secure the benefit of the sale by the registered shareholder becoming a trustee for him of the rights with an indemnity in respect of the obligations. In the case of the sale of such a share the risk of a refusal to register might well be reflected in a smaller price being obtainable than would have been obtained had there been no such risk. The share was property with that risk as one of its incidents." Unless a person who acquires a share in a company becomes registered as the holder of that share he does not become a member of the company or as it is sometimes said does not become the legal owner of the share in the sense that he is entitled directly to exercise the rights conferred and is subject directly to the obligations imposed upon the members of a company by the regulations. Until he is registered he is only the equitable owner of the shares in the sense that the vendor who is registered is under certain fiduciary duties towards him e.g. to exercise his vote and to dispose of any dividends as the purchaser shall direct. The word "vest" when used with reference to the acquisition of property in shares would not, if it stood alone, be sufficient to make the person who acquired the shares more than the equitable owner with a right to apply to be registered as a member, if he was eligible for membership under the regulations, and thereby become the legal owner of the shares. A law under pl. (xxxi.) can only authorize the Commonwealth Bank to acquire

(1) (1937) A.C. 26, at p. 66. (2) (1901) 1 Ch. 279.

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the property in the shares which the member of the company has power to dispose of under its regulations, that is to say, the equitable title to the shares and the same right that a purchaser of the shares who duly presented a transfer for registration would have to become a member of the company. But it is obvious that the risk would be great that the directors of the Australian private banks would refuse to register the Commonwealth Bank as a member, even where the regulations authorized corporations to become members. Section 14, which applies not only to shares compulsorily acquired under s. 13 but also to shares voluntarily purchased under s. 12, therefore reinforces these sections and overrides the regulations of the company by providing that the Commonwealth Bank shall become a member of the company, although the directors refuse to consent and although the regulations provide that a corporation shall not become a member of the company. Section 14 also authorizes the Commonwealth Bank to transfer any such shares to any person and provides that the regulations of the company shall also be overridden in a similar manner in favour of such person. We do not think that the section is authorized by pl. (xxxix.). In *Attorney-General for the Commonwealth* v. *Colonial Sugar Refining Co. Ltd.* (1) Viscount *Haldane* L.C., in delivering judgment of the Privy Council, said that the words of this placitum "do not seem . . . to do more than cover matters which are incidents in the exercise of some actually existing power, conferred by statute or by the common law." In *The Commonwealth* v. *New South Wales* (2) it was held that it was not incidental to the compulsory acquisition of land under the *Lands Acquisition Act* 1906 to require the Registrar-General of New South Wales to register a copy of the Governor-General's notification as if it were a duly executed instrument of transfer under the *Real Property Act* (N.S.W.). It was pointed out that the Commonwealth law itself gave a complete statutory title to the land independently of State law and the Commonwealth could rely on that title if it wished; but that if the Commonwealth wished to be registered as the proprietor of the land under the *Real Property Act*, it must comply with the conditions imposed by State law. That case does not appear to have much bearing on the present case because the Court was there dealing with the acquisition of tangible property, whereas a share is intangible property consisting of legal rights and obligations, and it can not be incidental to the acquisition of such property to alter its very nature by providing that it should have proprietary rights extraneous to those comprised in the chose in action at the date of acquisition.

(1) (1914) A.C. 237, at p. 256. (2) (1923) 33 C.L.R. 1.

So far as the case has any bearing, it supports the view that the Commonwealth could not become a member of an Australian bank otherwise than in accordance with the regulations of that bank.

To be valid therefore s. 14 must be a law with respect to banking. It was urged that the Commonwealth Bank by virtue of its right to vote at general meetings and in particular to participate in the election of directors would exercise some control over the management of the business of the private bank of which it was a member. But such control would be remote. The real control of the business of a company resides in the directors (*Gramophone & Typewriter Ltd.* v. *Stanley* (1); *Quin & Axtens Ltd.* v. *Salmon* (2); *Scott* v. *Scott* (3)). Section 14 is therefore supplemented by Division 3 of Part IV. which substitutes the nominees of the Governor of the Commonwealth Bank as directors of the company in lieu of the directors elected by the shareholders and confers on the new directors wide powers not given to the directors by the regulations of the company. In an attempt to make ss. 13 and 14 and Division 3 laws with respect to banking within the meaning of pl. (xiii.) s. 9 provides that: "The powers specified in Divisions 2 and 3 of this Part are conferred for the purpose of facilitating the control by the Commonwealth Bank of the banking business in Australia of private banks and for the purpose of furthering the expansion of the banking business of the Commonwealth Bank." But an acquisition of shares in one company by another company is simply an investment by the latter company of part of its funds in the capital of the former company. It does not in any real sense facilitate control by the latter company of the business of the former company or expand the business of the new shareholder. Division 3 would no doubt facilitate control by the Commonwealth Bank of the business in Australia of private banks. It would give the Commonwealth Bank complete control of the business of any Australian bank to which the Division may be applied. It is a control in perpetuity because the nominee directors remain in office although the Commonwealth Bank may have disposed of all its shares in the Australian bank. Shareholders and other persons having proprietary interests in the Australian shares which are acquired by the Commonwealth Bank at the same time as it obtains such control and whose interests are then converted into claims for compensation would not be affected by such change of control, but the holders of ex Australian shares might be gravely prejudiced by the change and particularly by the power conferred by the division on the

(1) (1908) 2 K.B. 89.
(2) (1909) A.C. 442.
(3) (1943) 1 All E.R. 582.

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new directors nominated by the Commonwealth Bank to dispose of the business in Australia to that bank. The rights of such shareholders would only be converted into claims for compensation if and when their shares became Australian shares. Since this might never happen and such conversion might never take place, the value of their shares might depend upon the consideration for which the business will be disposed of to the Commonwealth Bank.

In *R.* v. *Registrar of Titles* (*Vict.*); *Ex parte the Commonwealth* (1) and in *Commonwealth* v. *New South Wales* (2) *Isaacs* J. said that an acquisition under pl. (xxxi.) includes both voluntary and compulsory acquisitions. An agreement freely entered into between parties truly at arms length for a voluntary acquisition would contain intrinsic evidence that the acquisition was on just terms, but it would be difficult to describe an agreement made by the directors of an Australian private bank nominated by the Commonwealth Bank for the sale of the business to the latter bank as a voluntary sale. A sale under s. 19 (1) (*b*) might be made to the Commonwealth Bank by the latter bank acting under s. 38 of the *Commonwealth Bank Act* 1945 or under s. 22 of the *Banking Act* 1947. In each case the sale would have to be approved of by the Treasurer on behalf of both the vendor and the purchaser companies, and this supervision of both parties would not be conducive to complete freedom of contract. We are prepared to accept the submission of the defendants that there is nothing in ss. 10 and 19 (3) to relieve the nominee directors from the ordinary fiduciary obligation of directors with respect to property under their control. But it is an established principle of equity that a trustee should never be placed in a position where his duty and his interest conflict, and such directors in their dealings with the bank by which they were nominated would plainly be placed in this position. A sale by them of the business of an Australian private bank to the Commonwealth Bank would not necessarily be a sale on just terms. We are of opinion that Division 3 of Part IV., coupled with ss. 13, 14 and 46, is intended to provide a method by which the Commonwealth Bank may control for a period and then acquire the business of each Australian private bank as a going concern at an appropriate time. Section 19 (1) (*b*) is therefore in its true nature and character legislation for the acquisition of property by the Commonwealth Bank and must provide just terms for the acquisition, otherwise it is invalid. For the reasons already given, we are of opinion that just terms are not provided, so that s. 19 (1) (*b*) does not comply with pl. (xxxi.) and is invalid. If it is struck out, Division 3

(1) (1915) 20 C.L.R. 379, at p. 392. (2) (1923) 33 C.L.R., at p. 55.

remains as a law for the management and control of the Australian private banks being placed in the hands of directors nominated by the Commonwealth Bank. Such legislation might be valid as an intermediate step towards the final absorption of the businesses of the Australian private banks by the monopolistic bank. But the power to legislate with respect to banking in its widest meaning could not justify a law placing the nominees of one bank, whether an agent of the Commonwealth or not, permanently in the management and control of the business of another bank. In our opinion therefore ss. 17 to 20 of Division 3 are invalid.

We are also of opinion that s. 14 and Division 3 of Part IV. are beyond the constitutional powers of the Commonwealth Parliament on the ground that they are in their true nature and character legislation altering the regulations of bodies incorporated under State laws, but the power to legislate on this subject resides in the States. It might be a law with respect to banking to provide that bodies incorporated under State laws desirous of engaging in the business of banking should include in their regulations certain provisions which were reasonably required to safeguard the interests of their depositors and other creditors as a condition of such bodies being authorized to carry on the business of banking. It would be a law with respect to the incorporation of banks to make a general law regulating the incorporation of all persons desirous of carrying on the business of banking and requiring that they should be incorporated under this law. But a law which seeks directly to alter the regulations of a body incorporated under State law simply because it is carrying on the business of banking is not a law with respect to banking, but a law with respect to the capacities and internal organization of corporations, that is to say a law on a matter exclusively within the sphere of State legislative power. If such laws are authorized by the Constitution it must follow that if any body incorporated under State laws is engaged in any business in respect of which the Commonwealth Parliament can legislate e.g. in trade and commerce among the States, the Commonwealth Parliament can make a law leaving that corporate body with the shell of its name and incorporation under State law but substituting a completely new set of regulations for its regulations made in conformity with that law.

There is also, we think, a further objection to ss. 13 and 14, namely, that to give to the Commonwealth Bank a power compulsorily to acquire shares in another bank is not a purpose in respect of which the Commonwealth Parliament has power to make laws within the meaning of pl. (xxxi.). The Commonwealth Bank was

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first established by the *Commonwealth Bank Act* 1911 which provided that the bank should be a body corporate with perpetual succession and a common seal and with power to hold land and to sue and to be sued in its corporate name. This Act, after having been amended on several occasions, was repealed and replaced by the *Commonwealth Bank Act* 1945 which preserves and continues the corporate identity and existence of the Bank. But there have never been any corporators. The word "incorporation" in pl. (xiii.) must be given its ordinary meaning at the date of the Constitution. In English law it has always been of the essence of the legal conception of a corporation that there should be a person in the case of a corporation sole or persons in the case of a corporation aggregate to be incorporated. It would seem therefore that the incorporation of the Commonwealth Bank must rest on pl. (xxxix.) and that the validity of the incorporation, which has not been challenged, must depend on similar principles as those enunciated in *M'Culloch* v. *Maryland* (1). It may be that as *Griffith* C.J. said in *Heiner* v. *Scott* (2): "Probably the true effect of the Act (that is, the *Commonwealth Bank Act* 1911) is a declaration that the Commonwealth may itself carry on the business of banking under the name of the 'Commonwealth Bank of Australia.'" His Honour then assumed that the power to incorporate banks in pl. (xiii.) was sufficient to establish the legal existence of the corporation. But it is unnecessary to pursue the point because on either view the purpose in respect of which the Commonwealth Parliament has power to make a law is the incorporation of the bank. This law might confer upon the bank such ancillary powers of investment and of engaging in other businesses as it is usual to confer on banks to enable them to carry out their banking functions and compete with other banks. But these ancillary powers are not in our opinion purposes in respect of which the Parliament has power to make laws within the meaning of pl. (xxxi.). This placitum enables the Commonwealth Parliament to make a law for the acquisition of property on just terms whenever the acquisition of property forms part of the effective exercise of any of its legislative purposes. The only legislative purpose in the present cases is the incorporation of the Commonwealth Bank. The Bank must have banking chambers and the necessary furniture, stationery and other equipment to carry on business and a law might be made for the compulsory acquisition of the real and personal property necessary for this purpose. But a power to invest the

(1) (1819) 17 U.S. 316 [4 Law. Ed. 579].

(2) (1914) 19 C.L.R. 381, at p. 393.

funds of the Bank in shares in other companies including other banks would not make the investment of these funds a legislative purpose of the Commonwealth. If it were a purpose, the Commonwealth Parliament could, by conferring investment powers upon any body which it could lawfully incorporate by a law made under s. 51 of the Constitution, confer power on the corporation compulsorily to acquire shares in any company in which it was authorized to invest. By conferring a power to invest in land Parliament could authorize the corporation compulsorily to acquire vast areas of land not required to carry on its business. During the argument we were referred to the practice of banks in other countries in carrying on the business of executors and trustees as ancillary to the business of banking. If such a practice spread to Australia, it would be lawful for the Commonwealth Parliament to empower the Commonwealth Bank to engage in such a business. If such a power were a purpose of the Commonwealth it would be within the authority of the Commonwealth Parliament to make a law for the compulsory acquisition by the Commonwealth Bank of the businesses of all the trustee companies and thereby make the Commonwealth Bank the sole corporation carrying on the business of executor and trustee in Australia. These illustrations are sufficient to show that such powers are in no sense purposes within the meaning of pl. (xxxi.). The purpose of a law made with respect to the incorporation of a bank is to incorporate the bank and to equip it with the necessary property to carry on the business of banking. The object of including powers in its charter to invest its funds and carry on certain businesses is to define some of the ancillary activities in which the corporation may engage in the course of carrying on this business. But they are not legislative purposes of the Commonwealth. For these reasons we are of opinion that ss. 13 and 14 and Division 3 of Part IV. are not authorized by pl. (xiii.), (xxxi.) or (xxxix.) and are wholly invalid.

Question (3). Section 24 provides for the compulsory taking over of the business of any or all of the private banks by the Commonwealth Bank. The taking over consists in the acquisition by the Commonwealth Bank of all the assets of the private bank and the discharge of the private bank from all its liabilities and the assumption of these liabilities by the Commonwealth Bank. The assets only can be property within the meaning of pl. (xxxi.). The liabilities are not property within its meaning. It was contended that a law for the assumption of the liabilities simultaneously with the acquisition of the assets of a business would be justified under

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pl. (xxxi.) on the ground that just terms would require that the owner of a business who was deprived of the assets should at the same time be relieved from the liabilities associated with the assets. This contention, if carried to its logical conclusion, would mean that where the amount of the liabilities exceeded the value of the assets, the owner would not only lose his business but would become indebted to the acquirer for the difference between the amount of the liabilities and the value of the assets. If the contention is sound, we can see no logical reason why it would not also be just, upon the acquisition of premises in which the business of a boarding house is being carried on or even the acquisition of a dwelling house, for the law to discharge the owner from the tradesmen's debts and reduce the amount of compensation accordingly. It is not unusual where a business is purchased for the contract to provide that the purchaser shall discharge the liabilities of the business. But such a term rests on the agreement of the parties. The purchaser in effect agrees at the request of the vendor to apply part of the purchase money in paying some of the latter's debts. But just terms require that the legislation shall provide for the payment to the owner of the business of the full equivalent in money for the value of the assets of which he is deprived. He and not the acquirer should be given the discretion to decide whether or not the latter should undertake the discharge of the liabilities of the business on his behalf. The draughtsman of the Act appears to have recognized the difficulty of bringing a law for the assumption of liabilities as an incident of the taking over of a business within the scope of pl. (xxxi.), because s. 25 provides that the Commonwealth Bank shall pay fair and reasonable compensation in respect of the acquisition of property under s. 24, and s. 42 refers to the compensation payable in respect of the acquisition under s. 24 of the Act of the assets of a private bank. These sections do not therefore expressly provide for the deduction of the amount of the liabilities from which the private bank is discharged from the value of the assets, and the defendants were content to submit that it was for the Court to decide to what extent the fact that the private bank had been discharged from its liabilities should be taken into account in assessing the compensation payable in respect of the acquisition of the assets. Unless this discharge is taken into account the amount of compensation payable in respect of the acquisition of shares would be determined on a different basis to the compensation for the taking over of a business because in the former case the liabilities would be taken into account in assessing the compensation and in the latter they would not. We have no doubt that it

was the intention of Parliament that the amount of the liabilities should be deducted from the value of the assets and that the balance should be the sum payable for compensation. The presence of the words " in respect of " in ss. 25 and 42, the words " fair and reasonable " in s. 25 and the reference in s. 42 to the taking over of the business, indicating that the terms of the taking over are to be taken into consideration, suffice in our opinion to enable the Court to give effect to this intention. But there is then the paradox that if the liabilities are to be taken into account, the Act does not provide just terms because it does not provide for the payment to the private bank of the full equivalent in money for the value of the assets taken. The private bank is placed in the same position as it would be if the liabilities were secured on the assets and it was merely the owner of the equity of redemption.

The explanation of the paradox is that pl. (xxxi.) does not authorize the taking over of a business, at any rate in the manner provided in the Act. The reason why the Act provides for the discharge of the private bank from its liabilities and the assumption of these liabilities by the Commonwealth Bank is that the liabilities consist substantially of the indebtedness of the private bank to its customers whose accounts are in credit. The assets of the private bank also consist substantially of the indebtedness to it of its customers whose accounts are overdrawn. One of the several objects of the Act is to expand the business of the Commonwealth Bank. This object would be advanced as the customers of each private bank became customers of the Commonwealth Bank. The Act therefore seeks compulsorily to transfer the accounts of all the customers of the private banks to the Commonwealth Bank. The Commonwealth Bank would only need the other assets of a private bank, consisting substantially of the bank buildings and their contents and the services of its staff, if the Commonwealth Bank is able to obtain this new business. The transfer of all these accounts is effected by s. 56 of the Act which provides for the novation of all the contracts with the private banks into contracts with the Commonwealth Bank whether moneys are payable under these contracts by or to the private bank. The accounts of the customers with the private banks become accounts with the Commonwealth Bank whether the accounts are in credit or overdrawn. The section substitutes the name of the Commonwealth Bank for that of the private bank as a party to every contract existing between the private bank and a third person, so that the contract becomes a contract between the Commonwealth Bank and that person in lieu of the contract between the private bank and that person.

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In every case the Act operates to discharge one contract and to substitute a new one. The customers of the private bank are given no option of doing without a bank account or choosing a new bank from those then carrying on business. They are recruited as customers of the Commonwealth Bank. The customers include States which have accounts with private banks. It is true that s. 58 provides that nothing in the Act shall require a State or person being a customer of a private bank the business of which in Australia has been taken over by the Commonwealth Bank under this Act, to continue as a customer of the Commonwealth Bank. But if a person can be compelled to become a customer of a bank he can be compelled to remain a customer. The only nexus with the business of banking is that one of the parties to the original contract is a private bank. Because of this nexus selected members of the public are compelled to make a contract with another bank. In *Attorney-General for Canada* v. *Attorney-General for Quebec* (1) Lord *Porter* said :—" The relation between banker and customer who pays money into the bank is stated in words which have ever since been accepted in *Foley* v. *Hill* (2), as ' the ordinary relation of debtor and creditor, with a super-added obligation arising out of the custom of bankers to honour the customer's drafts.' No question of possession of or property in the deposit arises. The obligation is *mutuum* not *commodatum*. Once the deposit is made there remains only a debt due from the banker to the customer." If this nexus be sufficient, the mere existence of a bank must afford a justification for a law compelling persons to lend their money to a bank or borrow from a bank and otherwise to enter into such contracts with that bank as the Commonwealth Parliament thinks fit. But the banking power on its widest construction is a power to select the persons or corporations who are to engage in the business of banking and to regulate the conduct of that business between such selected bankers and those members who choose to become their customers. A person does not reach the threshold of the power until he starts to bring about the relationship of banker and customer with a particular bank. Until then, he is beyond its scope. A law which seeks to force a person into this relationship is a law with respect to this person's liberty to enter into such contracts as he thinks fit. Such a law is beyond the scope of any of the enumerated specific subjects of legislative power conferred upon the Commonwealth Parliament by the Constitution and is therefore a law which continues within the exclusive powers of the States. For these reasons we are of opinion that the provisions

(1) (1947) A.C., at p. 44.

(2) (1848) 2 H.L.C. 28 [9 E.R. 1002].

of ss. 24 and 56 with respect to the discharge of a private bank from its liabilities and the assumption of those liabilities by the Commonwealth Bank are totally inconsistent with the Constitution and incapable of being read down under s. 6 and wholly invalid. We are also of opinion that the acquisition of the assets and the taking over of the staffs of the private banks are so interlocked with the assumption of these liabilities by the Commonwealth Bank that the whole of the provisions for the taking over of the business of a private bank in the manner provided by the Act form part of one inseverable scheme, and that the whole of ss. 24 and 56 are invalid. For similar reasons s. 22, sub-ss. (8) (*b*) and (*d*) are invalid.

Sections 13 and 24 are laws for the compulsory acquisition of property. They must therefore comply with the conditions of pl. (xxxi.). One of these conditions is that these laws shall provide just terms for the acquisition of the shares and assets. Shares in an Australian private bank are divided into two classes by s. 13. (1) Australian shares which presumably comprise all the shares on the Australian registers of these banks. (2) All other shares which presumably comprise all the shares on the registers of these banks outside Australia. Any of these shares which become Australian shares after the date on which the Australian shares are vested in the Commonwealth Bank become vested in that Bank upon the date upon which they become Australian shares. It was contended on a number of grounds that the Act does not contain just terms for the acquisition of the shares under s. 13 or the taking over of the businesses under s. 24, but we need only refer to two which affect both methods of acquisition—(1) that the Act provides that the compensation shall be assessed by the Federal Court of Claims and in no other manner, and that this infringes s. 75 (iii.) of the Constitution which provides that in all matters in which the Commonwealth or a person suing or being sued on behalf of the Commonwealth is a party the High Court shall have original jurisdiction; (2) that the Act does not contain just terms because it does not authorize the Federal Court of Claims to award interest on the compensation moneys from the date of the acquisition of the shares or the taking over of the businesses as the case may be.

Ground (1). The Commonwealth Bank was first incorporated by the *Commonwealth Bank Act* 1911. It was financed in its early stages by loans made out of consolidated revenue. It has never had any corporators. The original incorporation of the bank has been continued by the *Commonwealth Bank Act* 1945 which is the Act at present in force. It has important functions, duties and powers under this Act and the *Banking Act* 1945. Both Acts were

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assented to on the same date. Section 11 of the *Commonwealth Bank Act* provides that the Commonwealth Bank shall act as a central bank. By s. 13 (*a*) the Bank is empowered to regulate the note issue in accordance with Part VII. of the Act. Section 12 provides that the Bank shall, in so far as the Commonwealth requires it to do so, act as banker and financial agent of the Commonwealth. Part IV. provides that the Bank shall carry on a general banking business. The Bank has a Rural Credits Department (Part VIII.), Mortgage Bank Department (Part IX.) and Industrial Finance Department (Part X.). One half of the net profits arising from the carrying on of the business of central banking and general banking are paid each year into the National Debt Sinking Fund. Otherwise the net profits are retained by the Bank. The Bank has important functions under the *Banking Act* 1945. It controls the payment of moneys into and out of the special accounts by the private banks (ss. 20 and 21), the mobilization of foreign currency (s. 23), advances and investments by banks (ss. 27 and 28), and with the approval of the Treasurer may make regulations for the control of interest rates payable to or by banks or to or by other persons in the course of any banking business carried on by them and discount rates charged by banks or by any other persons in the course of any banking business carried on by them (s. 39). Section 8 of the *Commonwealth Bank Act* 1945 provides that it shall be the duty of the Commonwealth Bank within the limits of its powers, to pursue a monetary and banking policy directed to the greatest advantage of the people of Australia, and to exercise its powers under this Act and the *Banking Act* 1945 in such a manner as, in the opinion of the Bank, will best contribute to (*a*) the stability of the currency of Australia; (*b*) the maintenance of full employment in Australia; and (*c*) the economic prosperity and welfare of the people of Australia. Section 25 provides that the Bank shall be managed by the Governor. But the Governor is subject to the provisions of s. 9. This section provides that (1) The Bank shall, from time to time, inform the Treasurer of its monetary and banking policy; (2) In the event of any difference of opinion between the Bank and the Government as to whether the monetary and banking policy of the Bank is directed to the greatest advantage of the people of Australia, the Treasurer and the Bank shall endeavour to reach agreement; (3) If the Treasurer and the Bank are unable to reach agreement, the Treasurer may inform the Bank that the Government accepts responsibility for the adoption by the Bank of a policy in accordance with the opinion of the Government

and will take such action (if any) within its powers as the Government considers to be necessary by reason of the adoption of that policy; (4) The Bank shall then give effect to that policy. The ultimate control of the monetary and banking policy of the Bank is therefore vested in the Treasurer. The Governor of the Bank has wide powers of management. But all these powers are vested in him for the purpose of carrying into effect the monetary and banking policy of the Government. The Governor of the Bank is in an analogous position to the Treasurer as that of a general manager of a company to the board of directors. The control of the note issue is plainly a governmental function. Other functions such as the control of the special accounts, advances, investments, and discount rates could be the function of an independent central bank but are plainly made by ss. 8 and 9 governmental functions. Section 7 provides that the Bank may sue and be sued in its corporate name. Section 10 provides that the Commonwealth shall be responsibile for the payment of all moneys due by the Bank but nothing in this section shall authorize any creditor or other person claiming against the Bank to sue the Commonwealth in respect of his claim. Persons who have claims against the Bank may therefore, and in view of s. 10 probably must, sue the Bank and not the Commonwealth as the principal, and the Bank may sue persons against whom it has claims as the principal. But it is not unusual for a statute to provide that a corporate body which is an agent of the executive shall be the party to sue and be sued in respect of the functions it is performing on behalf of the Crown. If such a body is sued the question arises whether it is an agent of the Crown and entitled to claim the prerogatives, privileges and immunities of the Crown. There is a valuable collection of the authorities on this point in the judgment of *Jordan* C.J. in *Skinner* v. *Commissioner for Railways* (1). To these authorities may be added three later decisions of the Court of Appeal in *Minister of Supply* v. *British Thomson-Houston Co. Ltd.* (2); *Minister of Health* v. *Bellotti* (3) and *Tyne Improvement Commissioners* v. *Armement Anversois Societe Anonyme* (4); and three later decisions of this Court: *Grain Elevators Board (Vict.)* v. *Dunmunkle Corporation* (5); *Chaff and Hay Acquisition Committee* v. *J. A. Hemphill & Sons Pty. Ltd.* (6) and *Rural Bank of New South Wales* v. *Shire of Bland* (7). The three decisions of the Court of Appeal show that

(1) (1937) 37 S.R. (N.S.W.) 261, at pp. 269, 270; 54 W.N. 108, at p. 109.
(2) (1943) K.B. 478.
(3) (1944) K.B. 298.
(4) (1947) 2 All E.R. 363.
(5) (1946) 73 C.L.R. 70.
(6) (1947) 74 C.L.R. 375.
(7) (1947) 74 C.L.R. 408.

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an Act may make a person or corporation the principal for the purpose of suing or being sued by members of the public although that person or corporation is an agent of the Crown. The problem whether a corporation is an independent entity or an agent of the Crown must be resolved by a consideration of the purpose and effect of the particular Act by which the statutory body is established and of any other Acts which relate to its corporate functions, duties and powers. A corporation may be an agent of the Crown for some purposes and an independent entity for other purposes. In *Heiner* v. *Scott* (1) *Isaacs* J., *Gavan Duffy* J. and *Rich* J. said: "We do not think the Act" (that is the *Commonwealth Bank Act* 1911) "constitutes the Bank universally the agent of the Commonwealth in the sense necessary to make all its acts the acts of the Commonwealth itself—in other words Sovereign Acts." But the Court was there concerned with the question whether the Queensland *Stamp Act*, which imposed a stamp duty on every inland bill of exchange payable on demand (including a cheque on a banker), was an interference with the efficiency of an instrumentality of the Commonwealth, and therefore impliedly forbidden by the rule (since exploded) laid down by this Court in *D'Emden* v. *Pedder* (2). To come within the rule the appellant had to establish that the carrying on of the ordinary business of banking by the Commonwealth Bank was an exercise of the executive power of the Commonwealth. The remarks of their Honours, and similar remarks by *Griffith* C.J. (3) were on this question. In the present case it is a different problem. The problem is simply whether the Commonwealth Bank is an agent of the Commonwealth or an independent entity, and it can be an agent of the Commonwealth whether or not it is performing governmental functions in the strict sense. Taking into account the provisions of the *Commonwealth Bank Act* 1945 and the *Banking Act* 1945 already mentioned, we are of opinion that the Commonwealth Bank is an agent of the Commonwealth. The absence of any corporators is the first significant circumstance. This points to an intention on behalf of the Commonwealth to transmute a part of itself into the outward form of a corporation as a convenient means of carrying on a Commonwealth activity. The Commonwealth therefore created the Bank to act as its banker and financial agent and carry on the business of banking. In the course of time the Bank has become more and more identified with the Commonwealth. Since 1945 it has been subject to government control and has been performing several functions which are governmental functions.

(1) (1914) 19 C.L.R., at p. 400.
(2) (1904) 1 C.L.R. 91.
(3) (1914) 19 C.L.R., at p. 393.

Section 183 of the *Commonwealth Bank Act* 1945 provides that the property, income and operations of the Bank and of the Savings Bank shall not be liable, and shall be deemed never to have been liable, to income tax or land tax under any law of the Commonwealth, or to taxation under any law of a State to which the Commonwealth is not subject. This section could only be valid with respect to State law if the Bank is an agent of the Commonwealth. Even if the Bank is not an agent of the Commonwealth for all purposes it is in our opinion clearly the agent of the Commonwealth for the purpose of the *Banking Act* 1947. The Act handcuffs the Bank to the Treasurer. It is not the Governor of the Commonwealth Bank but the Treasurer who decides whether and when to acquire the shares or to take over the business of one or more or all of the private banks incorporated in Australia or the business of one or more or all of the private banks incorporated elsewhere, so that the Commonwealth Bank is completely subject to the dictation of the Treasurer in these matters. Even where the Act confers some initiative on the Commonwealth Bank or its nominees as in ss. 18, 19 (*b*) and (*c*), 22 (5), 40 (2) and 44 (1), this initiative can only be exercised subject to the approval of the Treasurer. Such subjugation is quite inconsistent with the Bank being an independent entity.

The next question is whether a proceeding against the Commonwealth Bank for compensation under the Act is a matter in which a person is being sued on behalf of the Commonwealth within the meaning of s. 75 (iii.) of the Constitution. The choice is between holding that a person being sued on behalf of the Commonwealth is limited to a person who is appointed as a nominal defendant to represent the Commonwealth or that a person is being sued on behalf of the Commonwealth where that person was acting as its agent in the transaction out of which the claim arose. It was usual in Australia before federation for the States to have Acts providing for the appointment of a nominal defendant to be sued on behalf of the Crown. But there was never any Act so far as we know providing for the appointment of a person as a nominal plaintiff to sue on behalf of the Crown. Such an appointment would have been quite unnecessary because the Crown has always had the right to sue in its own courts. The words were given the wider construction by *Starke* J. in the unreported case of *War Service Homes Commissioner* v. *Kirkpatrick* and we are of opinion that his Honour was right. The decision is in line with that of *Phillimore* J. in *Graham* v. *Public Works Commissioners* (1), and

(1) (1901) 2 K.B. 781.

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the three recent decisions of the Court of Appeal already cited. Proceedings for compensation under the Act are therefore matters in which a person, that is the Commonwealth Bank, is being sued on behalf of the Commonwealth, so that this Court has original jurisdiction under the Constitution of which it cannot be deprived by the Act. The provisions in Divisions 1 and 2 of Part VI., that the compensation shall be determined by the Federal Court of Claims and not in any other manner are therefore invalid to the extent to which they prevent claims for compensation being brought in this Court.

The next question is whether the provisions of Divisions 1 and 2 can be read down so as to confer on the Federal Court of Claims a jurisdiction under the Act concurrent with the jurisdiction of this Court under the Constitution but exclusive of the jurisdiction of any other court. It was contended that the Act could be construed as giving a claimant for compensation who failed to make an agreement with the Commonwealth Bank a right to elect either to issue a writ in this Court claiming compensation or to proceed in accordance with the Act and have the compensation determined by the Federal Court of Claims. But we find it impossible to reconcile a right to claim compensation in this Court with Divisions 1 and 2. These Divisions can only operate on the basis that the Federal Court of Claims has an exclusive jurisdiction. For instance, s. 44 provides that unless the Commonwealth Bank is required by the private bank to refer its offer of compensation to that Court within a specified time the offer shall be deemed to have been accepted by the private bank. There are also the provisions of ss. 40 and 45 which make a determination of the amount of the compensation by that Court a condition precedent to the liability of the Commonwealth Bank to pay compensation. To reconcile the Act with s. 75 (iii.) of the Constitution, Divisions 1 and 2 must therefore be struck out of the Act altogether. Sections 15 and 25 would then be the only sections left relating to compensation. If these sections could be construed as intended to create a right of action independent of the particular manner of enforcing it prescribed by Divisions 1 and 2, just terms would be provided because a shareholder or private bank could bring an action claiming compensation in any competent court. But the view that the sections are intended to create independent rights is full of difficulty. In the case of taking over a business there would only be one large amount to be assessed. Even then an action based on s. 25 could be brought in the Supreme Court of a State under the *Judiciary Act* 1903-1947, s. 39 (2) or in the Federal Court of Claims or in this

Court. In the case of claims arising out of the acquisition of shares, some of the amounts claimed might be small and actions based on s. 15 might also be brought under s. 39 (2) of the *Judiciary Act* in the inferior courts of the States. It could hardly have been intended that the Act should operate so as to give rise to such a multiplicity of actions in so many courts. The failure of Divisions 1 and 2 cannot impart to ss. 15 and 25 any greater effect than they were intended to have if these Divisions had been valid. When the whole of the provisions of the Act relating to compensation are considered, we do not think that the sections were intended to give a right of action other than a right to have the compensation determined in accordance with Divisions 1 and 2 and not in any other manner. In other words the sections are introductory only to the operative provisions which follow. For these reasons we are of opinion that the provisions of the Act for the acquisition of the shares and the taking over of the businesses fail because the Act does not contain any valid provisions for the payment of compensation.

Even if this opinion is erroneous, and there is no constitutional objection to the Act providing that compensation shall be determined by the Federal Court of Claims and in no other manner, there is the second ground that just terms are not provided because that Court has no power to award interest. It is empowered to determine the amount of compensation payable in respect of the acquisition of the shares (s. 40 (1)) and of the assets (s. 42). In these sections compensation means no doubt the same thing as fair and reasonable compensation in ss. 15 and 25. We have already expressed the opinion that a Federal law for the acquisition of income-producing property must, in order to provide just terms, empower the tribunal which is to assess the compensation to award interest from the date the acquirer enters into possession, so that, if the law provides for the assessment of "compensation," this word, read in the light of constitutional requirement, should be construed as including such a power in its content (*The Commonwealth* v. *Huon Transport Pty. Ltd.* (1); *Marine Board of Launceston* v. *Minister of State for the Navy* (2)). The same opinion has recently been expressed by the Supreme Court of the United States in *United States* v. *Thayer-West Point Hotel Co.* (3). But this opinion has not been adopted by the majority of this Court who appear to think that we are bound by *Swift & Co.* v. *Board of Trade* (4) and the very recent case of *Newport Borough Council* v. *Mon-*

(1) (1945) 70 C.L.R. 293.
(2) (1945) 70 C.L.R. 518.
(3) (1947) 329 U.S. 585 [91 Law. Ed. 521].
(4) (1925) A.C. 520.

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mouthshire County Council (1), to hold that, whatever may be the view in the United States, the word " compensation " in English law does not connote more than the payment of the equivalent in money of the capital value of the property taken. Accordingly, before interest can be awarded, the Act must so authorize the tribunal charged with the duty of determining the compensation expressly or by implication. The Act does not give an express right to the Federal Court of Claims to award interest, and we do not think that the insertion of the words " fair and reasonable " before the word " compensation " in ss. 15 and 25 would be thought sufficient by a majority of this Court to create a right by implication. There is however an exception to the rule in *Swift & Co.* v. *Board of Trade* (2), which does appear to have the approval of a majority of this Court. The exception is where there is a compulsory purchase of property of such a nature that, if it had been purchased under a contract, the Court of Equity could have decreed specific performance. By analogy to the general equitable rule under which a purchaser who takes possession is charged with interest on his purchase money from that date until it is paid, the Court in assessing compensation can, in the absence of a statutory prohibition, order the payment of interest on the amount awarded from the date that the compulsory purchaser entered into possession. The point was taken that this power to award interest is dependent upon the tribunal which is assessing the compensation being a court invested with equitable jurisdiction. But in *Inglewood Pulp & Paper Co.* v. *New Brunswick Electric Power Commission* (3), where interest was awarded on this principle, the tribunal was a judge of the Supreme Court of New Brunswick sitting as an arbitrator. He refused to award interest. The relevant statute allowed an appeal upon any question of law or fact to the Appeal Division of the Supreme Court. There was an appeal and the Appeal Division allowed the interest refused by the arbitrator. The Privy Council upheld the Court of Appeal. In *Monmouth County Council* v. *Newport Corporation* (4) the tribunal was also an arbitrator and not a court invested with equitable jurisdiction. But the case was not disposed of on that ground. In the Court of Appeal (5) Lord *Greene* said : " On behalf of the county council it was argued that interest could be awarded on the principle on which it is awarded by courts of equity against purchasers who have gone into possession. This argument, in my opinion, cannot be supported. There

(1) (1947) A.C. 520.
(2) (1925) A.C. 520.
(3) (1928) A.C. 492.
(4) (1946) 175 L.T. 293.
(5) (1946) 175 L.T. 293, at p. 303.

is no analogy between a statutory transfer of an area from one authority to another (a thing which cannot be carried out contractually) and a contract of sale and purchase or a compulsory purchase under, for example, the Land Clauses Act."

It would seem therefore that the power to award interest does not depend on the tribunal being a court invested with equitable jurisdiction but on the kind of property acquired. But it is by no means certain that there is the requisite analogy between the relevant provisions of the Act and the terms of a contract for the voluntary purchase of shares or of a business which would be capable of being specifically enforced. Provisions that a purchaser should be registered as a member of a company despite the articles of association, and that the vendor of a business should be discharged from his liabilities could have no place in a voluntary contract. The assessment of compensation in respect of either form of acquisition is likely to be prolonged. Shareholders deprived of their shares and banks deprived of their businesses will have lost the right to retain possession of income-producing assets in the meantime. Just terms will not therefore be provided unless the Federal Court of Claims can award interest. In *Johnston Fear & Kingham & The Offset Printing Co. Pty. Ltd.* v. *The Commonwealth* (1) *Williams* J. said and we now repeat that " terms to be just should be clear and not obscure." The draughtsman of the Act must be presumed to have been aware of the conflict of opinion in this Court with respect to the power of a tribunal to award interest, so that, to clarify the position and to ensure just terms, the Act should have expressly empowered that Court to award interest.

It was contended for the States that the Act is invalid because it infringes clause 5 (9) of the Financial Agreement. Section 105A (5) of the Constitution provides that this agreement and any variation thereof shall be binding upon the Commonwealth and the States parties thereto notwithstanding anything contained in this Constitution or the Constitution of the several States or in any law of the Parliament of the Commonwealth or of any State. The history of the agreement appears in *New South Wales* v. *The Commonwealth* [*No.* 1] (2). In that case (3) *Starke* J. said that the agreement " is part of the organic law of the Commonwealth. It can only be varied or rescinded by the parties thereto. Nothing in the Constitution or the Constitutions of the States can affect it or prevent its operation. It creates rights and duties as between the Commonwealth and the States upon and in respect of which the

(1) (1943) 67 C.L.R. 314, at p. 334.
(2) (1932) 46 C.L.R. 155.
(3) (1932) 46 C.L.R., at p. 186.

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judicial power of the Commonwealth can be exerted." The agreement sets up an Australian Loan Council consisting of the representatives of the Commonwealth (the Prime Minister or a Minister nominated by him in writing) and of the States (the Premier or a Minister nominated by him in writing) to regulate *inter alia* the annual borrowings of the Commonwealth and the States. Clauses 4, 5 and 6 relate to the future borrowings of Commonwealth and States. Clause 4 (1) provides, so far as material, that except in cases where the Loan Council has decided that money shall be borrowed by a State, the Commonwealth shall, subject to the decisions of the Loan Council and *subject also to clauses* 5 *and* 6 *of this agreement*, arrange for all borrowings for or on behalf of the Commonwealth or any State. Clause 4 (4) provides, so far as material, that moneys shall not be borrowed by the Commonwealth or any State otherwise than in accordance with this agreement. Clause 5 relates to borrowing by the States and clause 6 to borrowing by the Commonwealth. Clause 5 (1) to (8) gives the States the right, subject to any maximum limits decided upon by the Loan Council from time to time for interest brokerage discount and other charges, to borrow moneys within the State from authorities, bodies, funds or institutions (including savings banks) constituted or established under Commonwealth or State law or practice and from the public by counter sales of securities and to use any public moneys of the State which are available under the laws of the State.

Clause 6 (1) to (6) gives the Commonwealth a similar right to borrow moneys within the Commonwealth and to use any public moneys of the Commonwealth which are available under the laws of the Commonwealth. Clause 5 (9) provides that, notwithstanding anything contained in this agreement, any State may use for temporary purposes any public moneys of the State which are available under the laws of the State, *or may, subject to maximum limits (if any) decided upon by the Loan Council from time to time for interest, brokerage, discount and other charges, borrow money for temporary purposes by way of overdraft or fixed, special or other deposit, and the provisions of this agreement other than this sub-clause shall not apply to such moneys.* Clause 6 (7) contains similar provisions in favour of the Commonwealth. Clauses 5 and 6 therefore confer upon the States and Commonwealth respectively limited powers of borrowing money on their own behalf which do not require the approval of the Loan Council, although the Loan Council can fix maximum limits for interest brokerage discount and other charges. These powers fall into the two classes, namely borrowings authorized by clause 5 (1) to (8) and clause 6 (1) to (6)

and those authorized by clause 5 (9) and clause 6 (7). It was contended that clauses 5 (9) and 6 (7) were not intended to create contractual rights and obligations, but were in the nature of saving clauses inserted in the agreement to make it clear that it was intended to except from its operation the practice of the States and of the Commonwealth of using for temporary purposes any public moneys which were available and of borrowing money by way of overdraft or fixed, special or other deposit. We accept the opinion already expressed by the Chief Justice and *Williams* J. in *Melbourne Corporation* v. *The Commonwealth* (1) that clause 5 (9) (and it necessarily follows clause 6 (7)) create positive rights and obligations flowing from the agreement. It necessarily follows from clause 4 (4) that the whole of the rights of the Commonwealth and of the States to borrow are included in the agreement and that no such rights exist outside the agreement. There would be a clear breach of clause 4 (4) if the States or the Commonwealth borrowed moneys by way of overdraft in excess of the maximum limits decided upon by the Loan Council for interest and other charges. Clauses 5 (9) and 6 (7) create rights to borrow for temporary purposes by way of overdraft or fixed, special or other deposit and impose obligations on the exercise of these rights. The introductory words " notwithstanding anything contained in this agreement " cannot have been intended to except clauses 5 (9) and 6 (7) from the agreement altogether, because the sub-clauses conclude by providing that " the provisions of this agreement other than this sub-clause shall not apply to such moneys." The function of the introductory and concluding words is to make it clear that the rights and obligations of the States and Commonwealth with respect to the kinds of borrowings for temporary purposes described in the sub-clauses are wholly contained in these sub-clauses. In *Stirling* v. *Maitland* (2) *Cockburn* C.J. said : " I look on the law to be that, if a party enters into an arrangement which can only take effect by the continuance of a certain existing state of circumstances, there is an implied engagement on his part that he shall do nothing of his own motion to put an end to that state of circumstances, under which alone the arrangement can be operative. I agree that if the company had come to an end by some independent circumstance, not created by the defendants themselves, it might very well be that the covenant would not have the effect contended for ; but if it is put an end to by their own voluntary act, that is a breach of covenant for which the plaintiff may sue." The proposition has been applied in many subsequent cases.

(1) (1947) 74 C.L.R. 3.

(2) (1864) 5 B. & S. 840, at p. 852 [122 E.R. 1043, at p. 1047].

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Two recent cases are *Southern Foundries* (1926) *Ltd.* v. *Shirlaw* (1) and *Greenhalgh* v. *Mallard* (2). In *Shirlaw's Case* Lord *Atkin* said (3): "That proposition in my opinion is well established law. Personally I should not so much base the law on an implied term, as on a positive rule of the law of contract that conduct of either promisor or promisee which can be said to amount to himself 'of his own motion' bringing about the impossibility of performance is in itself a breach." The proposition is, in our opinion, directly applicable to clause 5 (9) and clause 6 (7) of the Financial Agreement. A contract is construed by reference to the state of facts existing at the date when it is entered into. At the date of the Financial Agreement there was a chain of banks carrying on general banking business in Australia and the intention of clause 5 (9) and clause 6 (7) was plainly to give the States and the Commonwealth the right to borrow moneys on overdraft from these banks. That right can only continue to exist in any real sense so long as that banking structure is not destroyed by either the States or the Commonwealth. Compliance with the proposition in *Stirling* v. *Maitland* (4) therefore requires that neither the States nor the Commonwealth should of their own volition put an end to that state of circumstances. The *Banking Act* 1947 violates the proposition.

If the matter rested in contract the Act would be a grave breach of the agreement by the Commonwealth: *Magrath* v. *The Commonwealth* (5). But the agreement derives overriding statutory force from s. 105A of the Constitution. It binds the Commonwealth notwithstanding anything contained in the Constitution. Any exercise of legislative power under s. 51 which is inconsistent with the agreement is to that extent invalid. There is evidence that borrowings for temporary purposes by the States have in recent years been financed by the issue of Treasury bills, and that the practice of borrowing money on overdraft from the private banks is now in abeyance. But the rights created by clause 5 (9) cannot be destroyed by disuse. Section 105A (4) provides that the agreement may be varied or rescinded by the parties thereto. Unless and until clause 5 (9) is so varied or rescinded, these rights must continue to have the same force and effect as they had at the date the agreement was made. The proposition in *Stirling* v. *Maitland* (4) is directly infringed by s. 46 (1) and (4) to (8) of the Act. It is indirectly but equally infringed by ss. 13 and 14, Division 3 of Part

(1) (1940) A.C. 701.
(2) (1943) 2 All E.R. 234.
(3) (1940) A.C., at p. 717.
(4) (1864) 5 B. & S. 840 [122 E.R. 1043].
(5) (1944) 69 C.L.R. 156.

IV. and s. 24 of the Act. All these provisions of the Act are therefore invalid. In view of this conclusion it is unnecessary to deal with the other contentions of the States and we express no opinion upon them.

Section 92 provides, so far as material, that trade commerce and intercourse among the States whether by means of internal carriage or ocean navigation shall be absolutely free. We adhere to the opinion already expressed by *Rich* J. in *Peanut Board* v. *Rockhampton Harbour Board* (1) and *Williams* J. in *Australian National Airways Pty. Ltd.* v. *The Commonwealth* (2) that the freedom guaranteed by s. 92 is a personal right attaching to the individual. The same opinion has been expressed by several judges of this Court; see for instance *O'Connor* J. in *Fox* v. *Robbins* (3); *Higgins* J. (4); *Isaacs* J. in *R.* v. *Smithers*; *Ex parte Benson* (5) in *James* v. *South Australia* (6) and particularly in *James* v. *Cowan* (7) (a judgment described by Lord *Atkin* in delivering the judgment of the Privy Council on appeal (8) as a convincing judgment). In that case (9) *Isaacs* J. referring to the expropriation of goods by a State, said: "The question is, how has the personal right of trading inter-State by the former owner been interfered with? That is a personal right, not a property right." In the *Peanut Case* (10) *Dixon* J. said: "The provisions operate directly upon the individual grower's liberty of disposing of the peanuts he produces for sale." In *O. Gilpin Ltd.* v. *Commissioner for Road Transport and Tramways* (N.S.W.) (11) *Dixon* J. said: "Trade, commerce and intercourse among the States is an expression which describes the activities of individuals. The object of s. 92 is to enable individuals to conduct their commercial dealings and their personal intercourse with one another independently of State boundaries." In *James* v. *Commonwealth* (12), Lord *Wright*, in delivering the judgment of the Privy Council, said section 92 may seem to be, "a constitutional guarantee of rights, analogous to the guarantee of religious freedom in s. 116, or of equal rights of all residents in all States in s. 117." He referred to s. 92 as "the declaration of a guaranteed right" (13). It is to be noted that His Lordship groups with s. 92 ss. 116 and 117, that the provision in s. 116 that no religious test

(1) (1933) 48 C.L.R. 266, at p. 277.
(2) (1945) 71 C.L.R. 29, at pp. 107, 110.
(3) (1909) 8 C.L.R. 115, at pp. 126, 127.
(4) (1909) 8 C.L.R., at p. 131.
(5) (1912) 16 C.L.R. 99, at p. 113.
(6) (1927) 40 C.L.R. 1, at p. 32.
(7) (1930) 43 C.L.R. 386, at pp. 418, 419.
(8) (1932) A.C., at p. 561; 47 C.L.R., at p. 398.
(9) (1930) 43 C.L.R., at p. 418.
(10) (1933) 48 C.L.R., at p. 288.
(11) (1935) 52 C.L.R. 189, at p. 211.
(12) (1936) A.C. 578, at p. 614; 55 C.L.R. 1, at pp. 43, 44.
(13) (1936) A.C., at p. 631; 55 C.L.R., at p. 59.

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shall be required as a qualification for any office or public trust under the Commonwealth is an express personal guarantee, and that s. 117 is also an express personal guarantee. His Lordship would appear therefore also to have been of opinion that the freedom guaranteed by s. 92 is a personal right.

In our opinion a banker who carries on business in more than one State is engaged in trade, commerce and intercourse among the States. It was said by *Willes* J. in *Harris* v. *Amery* (1) in a passage cited by *Jessel* M.R. in *Smith* v. *Anderson* (2) that banking is not strictly a trade. Presumably that was because his Lordship considered that trade consisted of trafficking in goods, that is to say the buying and selling and exchange of goods. But in a modern community it is clear, we think, that traffic in intangibles is just as much trade and commerce as traffic in tangibles. In *Brandao* v. *Barnett* (3) Lord *Campbell* said that "there is no finding that the exchequer bills . . . were in the possession of the defendants in the course of their trade as bankers." In *Foley* v. *Hill* (4) Lord *Brougham* made several references to a banker as a person carrying on a trade. He said that the trade of a banker consisted of using the money which he received from his customers as his own and trading with it. In *Forget* v. *Baxter* (5) Sir Henry *Strong*, in delivering the judgment of the Privy Council, said, in reference to the business of stockbrokers: "It cannot be doubted . . . that the purchases and sales of shares by the appellants . . . in the ordinary course of that business were operations of commerce." The same view has recently been expressed by *Frankfurter* J. in the Supreme Court of the United States in *Freeman* v. *Hewit* (6). In reference to a sale by a broker to a purchaser in one State of securities owned by a person in another State he said: "Of course this is an interstate sale. And constitutionally it is commerce no less and no different because the subject was pieces of paper . . . rather than machines." In *Bank of India* v. *Wilson* (7) cited in *W. & A. McArthur Ltd.* v. *Queensland* (8) it was held that both a bank and a telegraph company were carrying on a trade within the meaning of the Acts relating to inhabited houses. *Pollock* B. (9) referred to the meaning of trade as including that of "an occupation; particular employment, whether manual or mercantile, distinguished from the liberal arts or learned profes-

(1) (1865) L.R. 1 C.P. 148, at p. 154.
(2) (1880) 15 Ch. D. 247, at p. 259.
(3) (1846) 12 Cl. & Fin. 786, at p. 809 [8 E.R. 1622, at p. 1631].
(4) (1848) 2 H.L.C. 28, at pp. 43, 44 [9 E.R. 1002, at p. 1008].
(5) (1900) A.C. 467, at p. 475.
(6) (1946) 329 U.S. 249, at p. 259 [91 Law. Ed. 265, at p. 275].
(7) (1877) L.R. 3 Ex. D. 108.
(8) (1920) 28 C.L.R. 530, at p. 547.
(9) (1877) L.R. 3 Ex. D., at p. 120.

sions." The same view of the meaning of trade was expressed by *Sutherland* J. in *Atlantic Cleaners & Dyers Inc.* v. *United States* (1). He cited *Bank of India* v. *Wilson* (2) and also a statement by Mr. Justice *Story* to the same effect. In *Aristoc Ltd.* v. *Rysta Ltd.* (3) Lord *Wright* said, in a passage cited by *Rich* J. in *Australian National Airways Pty. Ltd.* v. *The Commonwealth* (4): "'Trade' is a very wide term: it is one of the oldest and commonest words in the English language. Its great width of meaning and application can be seen by referring to the heading in the *Oxford English Dictionary*. But it must always be read in its context." The power of Congress under the Constitution of the United States is to regulate commerce with foreign nations and among the several States. It was held in *Paul* v. *Virginia* (5) and several subsequent cases that issuing a policy of insurance was not a transaction of commerce but in *United States* v. *South-Eastern Underwriters Association* (6) these cases were overruled and it was held that the business of insurance when conducted across State lines is part of inter-State commerce. A number of definitions of the meaning of banking were handed in during the argument of which the definition of a bank in the Imperial Dictionary cited in *Russell* on *Banker and Customer in Australia*, 3rd ed. (1935), p. 52, is short and precise—"*Bank.*—An establishment which trades in money; as establishment for the deposit, custody and issue of money, as also for granting loans, discounting bills, and facilitating the transmission of remittances from one place to another; a company or association carrying on such business." In *In re Shields' Estate* (7) *Fitzgibbon* L.J. said, in a passage cited with approval by *Isaacs* J. in *Commissioners of the State Savings Bank of Victoria* v. *Permewan, Wright & Co. Ltd.* (8): "In my opinion, the essence of the trade, business, or calling of a banker, is not primarily or essentially to be found in the mode in which he disposes of the money which is deposited with him, but in the mode in which he receives the money of others. If he keeps open shop for the receipt of money from all who choose to deposit it with him; if his business is to trade for profit in money deposited with him for the purpose, he answers the description of a 'Banker'." In *Punjab Co-operative Bank Ltd., Amritsar* v. *Commissioner of Income Tax, Lahore* (9) Viscount *Maugham*, in delivering the judgment of the Privy Council, said:

(1) (1932) 286 U.S. 427, at p. 436 [76 Law. Ed. 1204, at p. 1209].
(2) (1877) L.R. 3 Ex. D. 108.
(3) (1945) A.C. 68, at p. 102.
(4) (1945) 71 C.L.R., at p. 71.
(5) (1869) 75 U.S. 168, at p. 183 [19 Law. Ed. 357, at p. 361].
(6) (1944) 322 U.S. 533 [88 Law. Ed. 1440].
(7) (1901) 1 I.R. 172, at p. 198.
(8) (1914) 19 C.L.R. 457, at p. 471.
(9) (1940) A.C. 1055, at p. 1072.

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"In the ordinary case of a bank, the business consists in its essence of dealing with money and credit." It seems to be clear that in *Citizens Insurance Co. of Canada* v. *Parsons* (1) the Privy Council would have considered banking to be within the regulation of trade and commerce, that is within Class 2 of s. 91 of the *British North America Act*, if banking had not been specifically mentioned in Class 15 of that section. The powers of the Canadian Parliament in relation to the regulation of trade and commerce and in relation to banking are each powers over the whole subject matter. The first power is not, like the corresponding power in s. 51 (1) of the Australian Constitution, confined to trade and commerce with other countries and among the provinces. There is therefore a reason why particular aspects of trade and commerce over which it was intended that the Commonwealth Parliament should have power irrespective of their overseas or inter-State character should be specifically enumerated. This may explain the presence of the specific powers with respect to insurance and trade marks, in addition to the power with respect to banking, in s. 51 of the Australian Constitution. These powers do not appear in s. 91 of the Canadian Constitution, but they have been held in certain aspects to be within the trade and commerce power (*Attorney-General for Canada* v. *Attorney-General for Alberta* (2); *Attorney-General for Ontario* v. *Attorney-General for Canada* (3)). There is no reason therefore why laws with respect to banking, insurance and trade marks should not be trade, commerce and intercourse within the meaning of s. 92 simply because they are specifically enumerated in s. 51 and may not fall, so far as they are trade and commerce with other countries and among the States, within s. 51 (1). But it was contended that inter-State banking was not trade, commerce and intercourse within the meaning of s. 92 because that section contains the words "whether by means of internal carriage or ocean navigation." It was submitted that these words indicated that the section was confined to trade and commerce in the sense of traffic in goods because only goods could be carried by land or sea. This construction of the section really seeks to read the word "whether" as "if" or "provided." The submission was discussed and disposed of in the joint judgment of *Knox* C.J., *Isaacs* J. and *Starke* J. in *McArthur's Case* (4) and there is nothing in the subsequent cases to throw any doubt on the correctness of the views there expressed. In *R.* v. *Smithers* (5)

(1) (1881) 7 App. Cas. 96.
(2) (1916) A.C. 588.
(3) (1937) A.C. 405.
(4) (1920) 28 C.L.R., at pp. 549-550.
(5) (1912) 16 C.L.R., at p. 118.

Higgins J. said: "It is curious that the section seems to overlook the possibility that a man may walk across the border into another State, as well as be carried 'by internal carriage or ocean navigation'; but these words must be merely meant to exhaust all kinds of carriage, if there be carriage. If not, they qualify the words 'trade' and 'commerce' as well; and a State might, then, impose a duty on, or obstruct the passage of, cattle driven over the border: a result which would be absurd."

All the plaintiff banks except the Ballarat Banking Co. Ltd. and the Brisbane Permanent Building & Banking Co. Ltd. are engaged in transactions of inter-State banking. These transactions consist principally of (*a*) the collection and negotiation of inter-State bills of exchange, cheques and promissory notes; (*b*) the transfer of funds inter-State; (*c*) the establishment of inter-State credits; (*d*) the issue and negotiation of travellers' cheques. These transactions seldom involve any movement of money between States in the sense of the physical transfer of bank notes or coin from one State to another. The transactions are usually financed through accounts which the banks keep in each State with the Commonwelath Bank known as exchange settlement accounts. The effect of the payment of a cheque drawn by A on his bank in Sydney in favour of B in Melbourne is that A's deposit account is reduced or his loan account increased, B's deposit account is increased or his loan account reduced, the exchange settlement account of A's bank is reduced and the exchange settlement account of B's bank is increased. But the same legal results flow from the transaction as though the amount debited to the payer and credited to the payee had been sent from Sydney to Melbourne in the form of notes or coin. This appears clearly from the recent decision by the Privy Council in *Trinidad Lake Asphalt Operating Co. Ltd.* v. *Commissioners of Income Tax for Trinidad* (1). In that case a resident in the United States owed money to a company in Trinidad in which he was a shareholder. The company became indebted to him for a dividend of the like amount. It was agreed that the one debt should be set off against the other, and the transaction was effected by each party making corresponding entries. It was held that there was an actual payment and receipt of the indebtedness on either side, and therefore a transmission of revenue from Trinidad to the United States. Lord *Wright* said (2):—"Was there, then, such a transmission? No actual money passed. If the dividend had been transmitted by a banker's draft sent by the appellant to Barber it could not have been questioned that the dividend had

(1) (1945) A.C. 1. (2) (1945) A.C., at pp. 10, 11, 12.

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been transmitted, but the two companies might do their own banking transactions between themselves and dispense with the intervention of banking facilities. The transaction involved the sending to Barber by the appellant, and receipt by Barber from the appellant, of the dividend. This was effected by the agreement that payment should be made by cancellation of the debt for goods supplied. This method had been mutually agreed before the dividend was declared. The agreement was carried out by each party making corresponding entries in its books. These were not merely book-keeping entries. They represented the actual receipt of the dividend by Barber, and the actual payment of it by the appellant to Barber, and concurrently, the actual receipt by the appellant from Barber of payment of his debt for goods supplied. . . . There is actual, not merely notional or constructive payment of the indebtedness on either side. . . . Since 1902, the transmission of funds has become still more divorced in the minds of business men, and even of lawyers, from the idea of any material embodiment. No document is necessary. Two companies separated by the ocean may orally agree over the wireless telephone that the debt of one may be set against a debt of the other and both cancelled. The only evidence or material embodiment of the transaction may consist of entries in the books on each side made in pursuance of their agreement, but what has happened is, if so intended, equivalent to a receipt of money, in Lord *Lindley's* words, and a receipt of anything by a person who is at a distance from the sender involves a transmission."

In *James* v. *The Commonwealth* (1) Lord *Wright* said that the freedom guaranteed by s. 92 is " freedom as at the frontier or, to use the words of s. 112, in respect of ' goods passing into or out of the State.' " His Lordship then proceeded to explain what that meant and said (2) : " As a matter of actual language, freedom in s. 92 must be somehow limited, and the only limitation which emerges from the context, and which can logically and realistically be applied, is freedom at what is the crucial point in inter-State trade, that is at the State barrier." His Lordship was discussing an Act which prohibited the plaintiff entirely without a licence or if a licence was granted partially from delivering dried fruits for carriage into or through another State to a place in Australia beyond the State in which the delivery was made, and his remarks, like the remarks in any other judgment, must be read in the light of the particular facts. We do not understand his Lordship to

(1) (1936) A.C., at p. 630 ; 55 C.L.R., at p. 58.

(2) (1936) A.C., at p. 631 ; 55 C.L.R., at p. 59.

mean that s. 92 only protects the actual passage of goods or persons from one State into another. Section 92 refers to trade commerce and intercourse among the States. A contract for the sale of goods by A to B to be delivered in Melbourne is just as much a transaction of trade and commerce among the States whether A's goods are sent from Sydney to Melbourne subsequently to the contract or A has a supply of the goods available in Melbourne and makes the delivery out of these goods. A contract between A in Sydney and B in Melbourne by which A agrees to deliver goods to B in Sydney in exchange for goods to be delivered by B to A in Melbourne is a transaction of trade and commerce among the States. Where a bank has a fund in the form of an exchange settlement account in Melbourne available to make a payment to B in Victoria on behalf of A in Sydney the transfer of credit from A to B is just as much an inter-State transaction as it would be if actual money was sent from Sydney to Melbourne to make the payment. To carry out such transactions something tangible for instance documents, or intangible for instance telegraphic messages, must cross State boundaries and such documents or messages are essential elements of the transaction and make it one of trade and commerce among the States. It is true that in a modern community, as the evidence in the present cases proves and as Lord *Wright* pointed out in the *Trinidad Case* (1), the principal means of payment and exchange is not legal tender in the shape of notes and coin but bank credit or bank money as it has been called, and that payment by bank money is a matter of book entries involving a debit in one bank to the account of the debtor and a credit in the same or another bank to the account of the payer. But as *Duff* C.J. said in *Reference re Alberta Statutes* (2) money as commonly understood is not necessarily legal tender. Any medium which by practice fulfills the function of money and which everbody will accept in payment of a debt is money in the ordinary sense of the word even although it may not be legal tender. The banks are engaged in moving money or its equivalent bank credit about intra-State and inter-State for reward whether the movement is effected by the transfer of actual money in the shape of notes or coin from one place to another or by means of cheques or other documents or telegraphic transfers and subsequent debits and credits in customers' accounts. In *Huddart Parker & Co. Pty. Ltd.* v. *Moorehead* (3) *Isaacs* J. said : " the increase in the formation of corporations for all kinds of business enterprises,

(1) (1945) A.C. 1.
(2) (1938) S.C.R. (Can.) 100, at p. 116.
(3) (1909) 8 C.L.R., at pp. 405, 406.

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commercial, industrial and financial, is one of the most notable characteristics of modern life. They are incorporated in one State, and can take the capacity to trade in all, *and the freedom of inter-State trade introduced by the Constitution increased the likelihood of their doing so.*" (The words italicized must refer to s. 92). It is evident that his Honour thought that all the corporations he mentioned, commercial, industrial and financial, would, if they were carrying on business in more States than one, be engaged in trade, commerce and intercourse among the States within the meaning of s. 92. In our opinion the plaintiff banks other than the two mentioned are in their inter-State business engaged in such trade, commerce and intercourse.

Section 46 (4) authorizes the Treasurer to give a notice which will have the effect of prohibiting a private bank carrying on any further banking business after the period fixed in the notice has expired. It will then be unlawful for the bank to carry on the business of banking either intra or inter-State. Divisions 2 and 3 of Part IV. and s. 24 have the same effect. They operate after an interval or immediately to strip the banks of their undertakings and thereby deprive them of their power to carry on the business of banking either intra or inter-State. From our reading of the cases, and particularly the two decisions of the Privy Council, we understand that legislation Commonwealth or State infringes s. 92 where it operates directly and not merely incidentally to burden, hinder or prevent persons or corporations engaging wholly or partially in trade or commerce across State boundaries.

We also understand that discrimination is not the test and that such legislation may infringe the section although it operates in restraint both of intra and inter-State trade. In the *Peanut Case* (1) *Rich* J. pointed out that the reasons given by the Privy Council in *James* v. *Cowan* (2) " make it quite plain that compulsory acquisition may directly operate to interfere with the freedom of inter-State commerce." The question is in each case one of fact. Section 92 invalidates the infringing legislation and gives to the person or corporation aggrieved the right to treat the legislation as null and void and to sue for a declaration to this effect. It also gives such person or corporation the right to treat any other person or corporation as a wrongdoer whose conduct would only be justified if the legislation were valid. If the legislation operates directly to hinder burden or prevent all trade both intra-State and inter-State, the question arises whether the legislation can be read down so that it can operate with respect to intra-State trade although it is invalid

(1) (1933) 48 C.L.R., at p. 275. (2) (1930) 43 C.L.R. 386.

with respect to inter-State trade. Section 46 (4) to (8) of the *Banking Act* 1947 is legislation which in fact operates directly to prevent the private banks continuing to carry on either intra-State or inter-State trade. It is therefore legislation which infringes s. 92. But it is not legislation which is capable of being severed in its operation. The notice authorized by the section is an inseverable notice which can have one effect only, namely to make it unlawful for a private bank to carry on banking business in Australia at all. It is impossible without resort to legislation to convert such a notice into a notice which will only make it unlawful for a private bank to carry on intra-State business. The acquisition of the undertaking of a private bank is in a similar position. The assets and liabilities and staff of the bank are completely taken over by the Commonwealth Bank, and no means are provided by which the private bank could be left with those assets and liabilities employed in the inter-State business and sufficient staff to carry on this business and the balance of the assets and liabilities and staff could be taken over by the Commonwealth Bank. Two of the private banks are doing no inter-State business and the inter-State business of the other private banks only amounts to about ten per cent of their banking business in Australia. It was therefore contended that the amount of inter-State business included in a total prohibition of the banking business in Australia of a private bank would be relatively insignificant so that the prohibition of inter-State business would be a mere incidental and indirect and remote consequence of the total prohibition. But with these two exceptions the inter-State business of each of the private banks is substantial, the Act operates directly on this business, and the operation of the Act cannot be converted from a direct to an incidental operation by a mere calculation of percentages. The present percentage of ten per cent is higher than the corresponding percentage in *Vacuum Oil Co. Pty. Ltd.* v. *Queensland* (1).

It seems to us that the prohibition of the inter-State business would only be an incidental consequence of the total prohibition if, as the defendants contended, s. 92 does not confer a personal right on individuals to engage in trade and commerce among the States. The defendants contended that s. 92 is not concerned with the right of an owner of goods to sell them out of the State, and therefore is not concerned with the ownership of such goods prior to, at the time of, or subsequent to the passage of the goods across State boundaries. Accordingly the Commonwealth and State Parliaments legislating within their constitutional powers can select the

(1) (1934) 51 C.L.R. 108.

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individuals who are to engage in inter-State trade. But they must not place any hindrance, burden or restriction on the free passage of the goods of such individuals across State boundaries. It was claimed that this contention is supported by the decision of this Court in *New South Wales* v. *The Commonwealth* (*The Wheat Case*) (1). In that case the *Wheat Acquisition Act* 1914 (N.S.W.) authorized the Governor by notification published in the Gazette to declare that any wheat therein described or referred to was acquired by His Majesty and that upon such publication the wheat acquired should become the absolute property of His Majesty and the rights and interests of every person in the wheat at the date of such publication should be converted into a claim for compensation. The Act constituted a Board which was authorized on behalf of the Government to sell or dispose of any wheat acquired under the Act at such times, at such prices and on such terms of payment as might be thought fit. Some of the wheat acquired under the Act had been sold to purchasers in Victoria and it was contended that to acquire this wheat would contravene s. 92, but the contention failed. *Griffith* C.J. said that s. 92, so far as it relates to commerce, might be paraphrased thus (2): "Every owner of goods shall be at liberty to make such contracts for the transportation of goods from one State to another as he thinks fit without interference by law. It follows that as soon as he ceases to be the owner of goods the section ceases to have any operation so far as those goods are concerned. When the wheat in New South Wales became the property of His Majesty, the Sovereign, as the new owner, had the exclusive right of disposing of it. If the Government desired to export it to another State they were free to do so. Whether they did or did not, their power of disposition was not interfered with."

The comment on this case by Lord *Wright* in *James* v. *The Commonwealth* (3) was that it had never been expressly overruled which can hardly be said to be an approval of the case. If it was rightly decided it must be on the ground stated by Lord *Atkin* in *James* v. *Cowan* (4) that legislation which has for its primary object such matters as defence against an enemy, prevention of famine, disease and the like, is directed primarily to such matters and does not infringe s. 92 because incidentally inter-State trade is affected. The acquisition by the Commonwealth Bank of the business of one bank or the businesses of a number of banks or even of all the banks carrying on the business of banking in Australia would not come

(1) (1915) 20 C.L.R. 54.
(2) (1915) 20 C.L.R., at p. 68.
(3) (1936) A.C. 578; 55 C.L.R. 1.
(4) (1932) A.C., at pp. 558, 559; 47 C.L.R., at p. 396.

within the instances given by Lord *Atkin*. There is no suggestion that the private banks are carrying on business in a way that is a menace to the common welfare. On the contrary s. 11 of the Act imposes on the Commonwealth Bank a duty to carry on in the future the business of banking in the same manner as it is at present being carried on by the private banks. The defendants' contention appears to us to be substantially in line with the view of s. 92 expressed by *Griffith* C.J. in the passage cited. But in *James* v. *Cowan* (1) Lord *Atkin* said that their Lordships would not be prepared to assent to it stated in the simple form which commended itself to *Griffith* C.J. It is plain from *James* v. *Cowan* (1) that the cases in which the Commonwealth or the States can exercise their powers of acquisition so as to deprive an owner of his right to sell his goods inter-State are limited. It would seem that Lord *Wright* found some difficulty in justifying the instances given by Lord *Atkin*. Such legislation would seem to be based on the principle that in cases of grave emergency the maxim *salus populi est suprema lex* can override s. 92, a point which the Privy Council in *James* v. *The Commonwealth* (2) treated as reserved until it arose, and which was not upheld by this Court in *Gratwick* v. *Johnson* (3).

It is clear to us that Lord *Wright* thought that the *Peanut Case* (4) was rightly decided. He said (5): "*James* v. *Cowan* (6) was followed and applied by the High Court (*Evatt* J. dissenting) in *Peanut Board* v. *Rockhampton Harbour Board* (4) in which the *Wheat Case* (7) 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." He said at (8): "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* (9) or the *Peanut Case* (4) if in truth the expropriation is directed wholly or partially against inter-State trade in the goods,

(1) (1932) A.C. 542; 47 C.L.R. 386.
(2) (1936) A.C. 578; 55 C.L.R. 1.
(3) (1945) 70 C.L.R. 1.
(4) (1933) 48 C.L.R. 266.
(5) (1936) A.C., at p. 623; 55 C.L.R., at p. 52.
(6) (1932) A.C. 542; 47 C.L.R. 386.
(7) (1915) 20 C.L.R. 54.
(8) (1936) A.C., at p. 630; 55 C.L.R., at pp. 58-59.
(9) (1932) A.C. 542; 47 C.L.R. 386.

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that is, against selling them out of the State." In *James* v. *Cowan* (1) the plaintiff's goods were acquired to prevent him exercising his personal right to sell them inter-State. In the *Peanut Case* (2) the peanuts were acquired to deprive each individual grower of his personal right to sell his peanuts intra-State or inter-State. The Peanut Board was selected by the Queensland parliament as the sole body entitled to engage in inter-State trade in peanuts just as the *Banking Act* 1947 authorizes the Treasurer to select the Commonwealth Bank as the sole body entitled to engage in inter-State trade in banking. In *James* v. *The Commonwealth* (3) the individual owners of dried fruits including the plaintiff in South Australia were entirely prohibited without a licence or if a licence was granted partially prohibited from selling their goods out of the State. In the case of *James* v. *Cowan* (1) the executive act of the Minister and in the two later cases the legislation infringed s. 92 because individuals were deprived of their personal rights guaranteed to them by s. 92. The plaintiffs would not have had any *locus standi* to maintain the actions if their personal rights had not been infringed. Admittedly freedom of intercourse among the States means that individuals are to be free to pass from State to State, and it would be strange if freedom of trade and commerce does not mean that individuals are to be free to engage in inter-State trade when freedom of intercourse means that individuals are to be free to pass from State to State.

The contention under discussion is in our opinion opposed to the recent decision of this Court in *Australian National Airways Pty. Ltd.* v. *The Commonwealth* (4). The legislation there in question operated directly to prohibit any persons engaging in the business of carrying passengers and goods by air for reward across State lines and to grant a monopoly of this business to the Australian National Airlines Commission. Such carriage was held to be trade and commerce among the States within the meaning of s. 92. Some members of the Court, including *Williams* J., expressed the opinion that the Commonwealth Parliament could, in the exercise of the legislative power conferred by s. 51 (i.) to make laws with respect to trade and commerce among the States, select the persons or corporations to engage in any activity of trade and commerce among the States, and could therefore grant a monopoly of the inter-State carriage of persons and goods to the Commission. It seemed to *Williams* J. that this necessarily followed from the decision of

(1) (1932) A.C. 542; 47 C.L.R. 386.
(2) (1933) 48 C.L.R. 266.
(3) (1936) A.C. 578; 55 C.L.R. 1.
(4) (1945) 71 C.L.R. 29.

this Court in *Huddart Parker Ltd.* v. *The Commonwealth* (1). In that case it was held that legislation which required shipowners and stevedores in certain ports to give preference in employment in loading and unloading ships engaged in inter-State and overseas trade to members of the Waterside Workers Federation of Australia was a valid exercise of the trade and commerce power. No question of s. 92 arose in that case. In the first place it was then assumed that the section did not bind the Commonwealth. In the second place the transport workers legislation there in question did not infringe the section. The section does not invalidate legislation regulating the operations of inter-State trade. There is no suggestion that sections such as ss. 27 and 39 of the *Banking Act* 1945 which regulate the trade of banking infringe s. 92. The section invalidates legislation which deprives individuals of their freedom to trade in more States than one. There was nothing in the transport workers legislation to prevent wharf labourers passing from one State to another and seeking work in as many States as they liked. There was also nothing in the legislation to prevent shipowners sailing their ships from any ports in one State to any ports in another State. But in the *Australian National Airways Case* (2) in spite of the opinion that s. 51 (i.) standing alone would authorize the Commonwealth Parliament to create a monopoly in inter-State carriage by air, the Court was unanimously of opinion that legislation for that purpose infringed s. 92. The only difference between the legislation in the *Australian National Airways Case* (2) and the material provisions of the *Banking Act* 1947 is that the earlier legislation was directed wholly against persons other than the Commission engaging in inter-State trade, whereas the present legislation is directed only partially against the private banks engaging in inter-State trade. But the intention in each case is to create a monopoly, in the earlier case in inter-State trade, and in the present cases in both intra-State and inter-State trade, and s. 92 is, for the reasons already given, infringed in each case. The difference between the two Acts is explained by the difference in the ambit of the trade and commerce power and that of the banking power, the former being limited to trade and commerce among the States and the latter extending to all banking either intra or inter-State. It would be quite impossible for any bank engaged in inter-State business not to be also engaged in intra-State business, so that if legislation which operates directly but indiscriminately to prevent a bank doing any business in Australia does not infringe s. 92 in its operation upon inter-State trade, it would seem to follow that

(1) (1931) 44 C.L.R. 492. (2) (1945) 71 C.L.R. 29.

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legislation based on pl. (xiii.) and other placita of similar ambit, for instance (xiv.) and (xx.), would not be subject to s. 92. But we agree with respect with the opinion of *Isaacs* J. in *Huddart Parker & Co. Pty. Ltd.* v. *Moorehead* (1) already cited that legislation under pl. (xx.) is subject to s. 92, and it necessarily follows that legislation under pl. (xiii.), if banking be trade and commerce, as in our opinion it is, must also be subject to the section. As we have already said, two of the plaintiff banks are not at present engaged in inter-State banking, but an Act which operates directly to prevent an individual ever engaging in inter-State trade must be void whether he is at the moment engaged in such trade or not. It may be that he would not have a sufficient interest to challenge the Act until he desired to engage in such trade. But it is unnecessary to pursue this point because the two banks in question are entitled to succeed on other grounds.

We have not yet referred to ss. 59 and 60 of the Act. These sections state that their purpose is to assist the operation of the provisions of the Act. The only provisions of the Act which could require the assistance of these highly punitive sections are those relating to the compulsory acquisition of the shares and the businesses of the private banks. They could not form part of any scheme of voluntary bargaining. They are therefore incidental to and inseverably bound up with the operation of provisions which we have already held to be invalid and as such are in our opinion also invalid.

For these reasons we would give judgment for the plaintiffs in all five actions. In the actions by the eight private banks incorporated in Australia and by the States of Victoria, South Australia and Western Australia we would declare that ss. 13, 14, 17 to 21 inclusive, 22 (8) (*b*) and (*d*), 24, 56, 59 and 60 and Parts VI. and VII. of the *Banking Act* 1947 are invalid with consequential relief. In the action by the three private banks incorporated in the United Kingdom we would declare that ss. 22 (8) (*b*) and (*d*), 24, 56, 59 and 60 and Parts VI. and VII. of the Act are invalid with consequential relief.

STARKE J. Motions to this Court for interlocutory injunctions in each of five actions which the parties agreed to treat as a trial of the action and which by order of 15th January 1948 were directed to be so treated and heard together upon affidavits filed in the said actions and upon such further affidavits or evidence as the Court or a Justice might allow. And it was also directed, pursuant

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

to the *Judiciary Act* 1903-1947, that the cases be argued before the Full Court and that all questions involved in or arising upon the trials be referred for the consideration of the Full Court.

The plaintiffs in one action are banking companies incorporated in Australia whose names are set forth in the first Schedule, Part I, to the *Banking Act* 1947 and individuals in representative capacities; in another action the plaintiffs are banking companies incorporated in the United Kingdom but carrying on business in Australia whose names are set forth in the first Schedule, Part II, and individuals in representative capacities and the other three actions are brought by the States of Victoria, South Australia and Western Australia respectively.

In each action the plaintiffs claim a declaration that the *Banking Act* 1947 is beyond the powers of the Parliament of the Commonwealth, contrary to the Constitution and void, and alternatively that various sections of the Act are void for the same reasons and ancillary relief is also claimed.

The objects of the Act are stated in s. 3 and envisage apparently the nationalization of banking in Australia. England, it was said, had nationalized the Bank of England (9 & 10 Geo. 6, c. 27), the coal industry (9 & 10 Geo. 6, c. 59) and the States might have nationalized banking within the limits of their territories.

But the Parliament of the Commonwealth is not omnipotent as is the English Parliament nor has it a general authority to make laws for the peace, order and good government of the Commonwealth in the like manner as the States have to make laws for the peace, order and good government of their several territories. The Constitution enumerates the powers of the Commonwealth and within the framework of those powers must be found the authority of the Commonwealth to enact the *Banking Act* 1947.

The main features of that Act are the provisions made for the acquisition by agreement of shares in banking companies incorporated in Australia or in the United Kingdom, the compulsory acquisition of shares in banks incorporated in Australia, the management of banks incorporated in Australia, the acquisition by agreement of the business of the banking companies set out in the first Schedule to the Act whether incorporated in Australia, United Kingdom or elsewhere, the compulsory acquisition of the business in Australia of those banks and the provisions prohibiting the banks from carrying on business in Australia.

Subject to the Constitution (see s. 51) the Parliament of the Commonwealth has power to make laws for the peace, order and good government of the Commonwealth with respect to :—

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The acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws (s. 51 (xxxi.)).

Banking other than State banking ; also State banking extending beyond the limits of the State concerned, the incorporation of banks, and the issue of paper money (s. 51 (xiii.)).

Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth (s. 51 (xx.)).

Matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth (s. 51 (xxxix.)).

The constitutional validity of the *Banking Act* 1947 was referred to these powers.

The commerce power was not called in aid (cf. *Toronto Electric Commissioners* v. *Snider* (1)).

Unlike the trade and commerce power conferred upon the Parliament of Canada by the *British North America Act* 1867, the power is limited to trade and commerce with other countries and among the States. And it was also said that banking was not trade or commerce, a contention that, incidentally, denied that the *Banking Act* 1947 in any way infringed the constitutional guarantee that trade, commerce and intercourse among the States should be absolutely free (Constitution, s. 92).

The Constitution is an instrument of government in general terms and, as *Higgins* J. said in *Attorney-General for New South Wales* v. *Brewery Employes Union of New South Wales* (2): " although we are to interpret the words of the Constitution on the same principles of interpretation as we apply to any ordinary law, these very principles of interpretation compel us to take into account the nature and scope of the Act that we are interpreting—to remember that *it is a Constitution, a mechanism under which laws are to be made, and not a mere Act which declares what the law is to be.*" The Constitution must not, therefore, be cut down by " a narrow and technical construction " but given a " large and liberal interpretation " (See *Edwards* v. *Attorney-General for Canada* (3) ; *British Coal Corporation* v. *The King* (4)).

The legislative power of the Parliament of the Commonwealth is not, however, to make laws for the peace, order and good government of Australia but to make laws with respect to enumerated

(1) (1925) A.C. 396, at p. 409.
(2) (1908) 6 C.L.R. 469, at pp. 611, 612.
(3) (1930) A.C. 124, at pp. 136, 137.
(4) (1935) A.C. 500, at p. 518.

subjects but, within the appointed limits, the Parliament is supreme. Its powers also are subject to all the limitations imposed by the Constitution. Those limitations may be found in the Federal system itself (*Melbourne Corporation* v. *The Commonwealth* (1)) or in some express provision of the Constitution such as s. 92.

The extent of the constitutional powers relied upon in support of the *Banking Act* 1947 must now be examined in the light of these considerations and of judicial decisions.

The acquisition power.

Upon this power are founded the main sections of the *Banking Act* 1947. It is this power, and no other, that authorized the acquisition of property though the acquisition must be for a purpose in respect of which the Parliament has power to make laws (See *Johnston Fear & Kingham & The Offset Printing Co. Pty. Ltd.* v. *The Commonwealth* (2)).

The acquisition power is, however, large and extensive, for property is "*nomen generalissimum* and extends to every species of valuable right and interest including real and personal property" (See *Minister of State for the Army* v. *Dalziel* (3) ; and cf. *Australasian United Steam Navigation Co. Ltd.* v. *The Shipping Control Board* (4)). And under this power I see no objection to the acquisition of a business being carried on—a going concern, to use an expression of business (cf. *Governments Stock and Other Securities Investment Co.* v. *Manila Railway Co.* (5) ; *Palmer, Company Precedents*, Part I, 14th ed., (1931) p. 459). But the power is not, in itself, wide enough to include the taking over of liabilities. Vendors and purchasers provide in their agreements how and in what manner the liabilities of a going concern are to be discharged. It appears to me, however, that the incidental power (Constitution, s. 51 (xxxix.)), which is not a limitation or restriction but rather an enlargement of power, warrants legislation providing how and in what manner the liabilities of a going concern taken over should be discharged. The incidental power is not limited to such measures without which the granted power would fail but covers all appropriate means conducive or adapted to the end to be accomplished (cf. *Julliard* v. *Greenman* (6)). Provisions for the discharge of the liabilities of a going concern are not, I venture to think, essential to the justice of the terms provided for the acquisition of the concern.

(1) (1947) 74 C.L.R. 31.
(2) (1943) 67 C.L.R. 314, at pp. 317, 318, 325.
(3) (1944) 68 C.L.R. 261, at p. 290.
(4) (1945) 71 C.L.R. 508.
(5) (1897) A.C. 81, at p. 86.
(6) (1884) 110 U.S. 421, at pp. 440, 441 [28 Law. Ed. 204, at pp. 211, 212].

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And it is not the constitutional requirement of " just terms " that authorizes the taking over of liabilities. Liabilities might be discharged out of the moneys obtained for the concern.

An obligation, however, is imposed upon the Parliament to provide " just terms " for the acquisition of property. But the obligation to provide such terms, it is now recognized in this Court, is " a legislative function . . . and the Constitution does not mean to deprive the legislature of all discretion in the matter " (*McClintock* v. *The Commonwealth* (1)). The law must not be so unreasonable as to terms that it cannot find justification in the minds of reasonable men. " Just terms " do not require a disregard of the interests of the public or of the Commonwealth (See *Grace Bros. Pty. Ltd.* v. *The Commonwealth* (2)).

Ultimately, it is the function of the Courts to determine whether " just terms " have or have not been provided.

And " just terms " require that a party whose property is acquired shall have the pecuniary equivalent of the property acquired (*Australian Apple and Pear Marketing Board* v. *Tonking* (3) ; *Johnston Fear & Kingham & The Offset Printing Co. Pty. Ltd.* v. *The Commonwealth* (4)). Thus the Judicial Committee have said, in respect of a claim for compensation payable to the owner of land resumed, that the party, whose property is acquired, is entitled to receive the sum which a prudent purchaser would have been willing to give for the property sooner than fail to obtain it (*Pastoral Finance Association Ltd.* v. *The Minister* (5)). " The ascertainment of value is not controlled by artificial rules. It is not a matter of formulas, but there must be a reasonable judgment having its basis in a proper consideration of all relevant facts " (cf. *Standard Oil Co. of New Jersey* v. *Southern Pacific Co.* (6)). " Just terms " may well be provided by means of a pool but whether " just terms " have been provided by that method depends upon the character of the pool provided (cf. *Nelungaloo Pty. Ltd.* v. *The Commonwealth* (7)). Again, in considering the justice of the terms provided the method of ascertaining the value of the property acquired may be considered. A party whose property is compulsorily acquired is entitled to a fair ascertainment of its value and not an arbitrary fixation by the authority acquiring the property (*Johnston Fear & Kingham & The Offset Printing Co. Pty. Ltd.* v. *The Commonwealth* (8) ; *McClintock* v. *The Commonwealth* (9)). And, further,

(1) (1947) 75 C.L.R. 1, at p. 34.
(2) (1946) 72 C.L.R. 269, at p. 291.
(3) (1942) 66 C.L.R. 77, at p. 85.
(4) (1943) 67 C.L.R., at pp. 323, 324, 327.
(5) (1914) A.C. 1083.
(6) (1925) 268 U.S. 146, at p. 156 [69 Law. Ed. 890, at p. 895].
(7) (1948) 75 C.L.R. 495.
(8) (1943) 67 C.L.R. 314.
(9) (1947) 75 C.L.R., at pp. 25, 26.

it has been said in this Court that "just terms . . . involve, as a matter of elementary fairness, the payment . . . of interest" on the ascertained value of the property until payment (*The Commonwealth* v. *Huon Transport Pty. Ltd.* (1)). *Scrutton* L.J., in his dissenting judgment, said in *Swift & Co.* v. *Board of Trade* (2) "the owner of property seized does not receive full compensation, if he loses the property in one year and only receives the value of the property at the time of loss five years afterwards."

Doubtless, under the acquisition power, the Parliament can provide for payment of interest on unpaid compensation but it is, in all cases, a matter of construction of the particular legislation whether it has done so and if not whether "just terms" have been provided.

Next the acquisition must be for a purpose in respect of which the Parliament has power to make laws. The only powers relied upon in support of the *Banking Act* 1947 were the banking power (s. 51 (xiii.)) and the foreign corporations and trading or financial corporations power (s. 51 (xx.)) coupled with the incidental power (s. 51 (xxxix.)).

The banking power.

It relates, of course, to the business of bankers but it was said that the power implied the continued existence of the activity and was indeed but a power to regulate and govern it (cf. *Toronto Corporation* v. *Virgo* (3)). The form of the section was relied upon in support of this view. State banking is excluded from the power. This means the business of banking engaged in by a State as banker and not the transactions of a State as the customer of a bank (*Melbourne Corporation* v. *The Commonwealth* (4)). The banking power, however, also extends to State banking beyond the limits of the State concerned. These words, it was said, imply the continued existence of inter-State activities on the part of a State bank which the Parliament of the Commonwealth may regulate and govern but cannot suppress. The word "also," it was suggested relates that construction of the power over inter-State transactions back to the subject of banking itself in the constitutional power.

Again, it was also suggested that the express power to incorporate banks contained in the constitutional power, as an extension or addition to the banking power, indicated that the incorporation of banks is not included within the subject of banking. And this

(1) (1945) 70 C.L.R. 293, at pp. 306, 307.
(2) (1924) 93 L.J. K.B. 529, at p. 535; 40 T.L.R. 424, at p. 429.
(3) (1896) A.C. 88.
(4) (1947) 74 C.L.R. 31.

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supported the view that the banking power was a power to regulate and govern banking and not to suppress it.

But I am unable to accede to this construction of the Constitution. State banking is excluded from the banking power but States have no power to legislate with respect to transactions in banking extending beyond the limits of the State concerned. It was a special case and the power is therefore conferred upon the National or Federal Parliament.

But this limited power over State banking does not control or in any way restrict the banking power, rather it extends that power.

The express power to incorporate banks was adopted, I should think, from the *British North America Act* 1867, s. 91 (15). In the Constitution of the United States no power in express terms is given to Congress to incorporate banks yet such a power was deduced by inference or implication from the Constitution (*McCulloch* v. *Maryland* (1)). Possibly it was to avoid the necessity of such inferences or implications that the express power was inserted both in the Canadian and Australian Constitutions.

Abundans cautela non nocet.

In any case the power does not control or restrict the banking power.

Subject to the Constitution, including the limitation in the banking power itself, the banking power extends over the entire subject. It is plenary and Parliament may embrace within its legislation whatever is necessary or appropriate to a complete and effective banking system. The power, as I have already said, " extends not only to those regulations which aid, foster and protect banking and the choice of persons engaging in it : it also embraces the making of rules which prohibit it " (*Melbourne Corporation* v. *The Commonwealth* (2) and cases there cited).

In the recent decisions, *Attorney-General for Alberta* v. *Attorney-General for Canada* (3) and *Attorney-General for Alberta* v. *Attorney-General for Canada* (4) in which Alberta social credit legislation was considered, the question was whether the legislation was invalid. In the former case an Act respecting the taxation of banks was declared invalid in the Privy Council because it was part of a legislative plan to prevent the operation within the Province of those banking institutions which were carrying on business under the authority of the Parliament of Canada. In short the legislation was inconsistent with the Dominion legislation which prevailed.

(1) (1819) 17 U.S. 316 [4 Law. Ed. 579].
(2) (1947) 74 C.L.R., at p. 69.
(3) (1939) A.C. 117, affirming (1938) S.C.R. (Can.) 100.
(4) (1947) A.C. 503.

But in the Supreme Court of Canada the *Social Credit Act* which was the basis of the plan was also declared invalid because it was legislation in relation to banking which was exclusively assigned to the Parliament of Canada under the *British North America Act* 1867. The Judicial Committee did not deal with this Act for reasons stated in the report of the case (1).

In the latter case the Judicial Committee declared the *Alberta Bill of Rights Act*, which provided for loans involving an expansion of credit, invalid because it was legislation in relation to banking exclusively assigned to the Dominion Parliament. "Legislation which aims at restricting (credit) or controlling this practice must," said the Lord Chanceller, Lord *Simon*, "be beyond the powers of a provincial legislature."

It was said that this decision does not necessarily require the banking power in the *British North America Act* to support it for the general power of the Dominion (Act s. 91) to make laws for the peace, order and good government of Canada in relation to all matters not coming within the classes of subjects exclusively assigned to the legislatures of the Provinces equally supports it. That may be true, but the Judicial Committee rested its decision upon the banking power and not upon the general power. And the reasoning is an exposition of the banking power.

Still, legislation under the acquisition power must have some real connection with and afford some reasonable and substantial basis for the conclusion that it is for a purpose in respect of which the Parliament has power to make laws, for example, in the present case that the legislation has a real and substantial connection with banking (*Victoria* v. *The Commonwealth* (2); *Reid* v. *Sinderberry* (3); *Australian Woollen Mills Ltd.* v. *The Commonwealth* (4)). "These questions affecting limitation on the legislative powers of subordinate parliaments . . . in a Federal system are now familiar . . . It is well established that you are to look at the 'true nature and character of the legislation' . . . 'the pith and substance of the legislation.' If, on the view of the statute as a whole, you find that the substance of the legislation is within the express powers, then it is not invalidated if incidentally it affects matters which are outside the authorized field. The legislation must not under the guise of dealing with one matter in fact encroach upon the forbidden field" (*Gallagher* v. *Lynn* (5)).

(1) (1939) A.C. 117, at pp. 127, 128.
(2) (1942) 66 C.L.R. 488, at p. 508.
(3) (1944) 68 C.L.R. 504, at pp. 515, 516.
(4) (1944) 69 C.L.R. 476, at pp. 490, 491.
(5) (1937) A.C. 863, at p. 870.

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The foreign corporations and trading or financial corporations power.

This provision of the Constitution s. 51 (xx.) does not give any power to incorporate companies (*Huddart, Parker & Co. Pty. Ltd.* v. *Moorehead* (1)). *Isaacs* J. was of opinion that it gave to the Commonwealth Parliament power to regulate the conduct of the corporations in their transactions with or as affecting the public (see (2)). *Higgins* J. regarded it as a power to legislate with respect to corporations as corporations.

The capacities and faculties of these corporations are unalterable by the Commonwealth (2). The power is, as are all the powers granted by s. 51, subject to the Constitution.

It is an independent power complete in itself. And, in my opinion, the power authorizes the Commonwealth to govern and regulate the operation of these companies but would not authorize the suppression of all such corporations or the nationalization of their activities. Thus, the carrying on business in Australia by these corporations might be prohibited absolutely or except upon certain conditions and the exercise of their powers in Australia might be regulated and so forth. Moreover, the Constitution must be construed as one whole document (*James* v. *The Commonwealth* (3)) and it may well be that this corporation power is confined to corporations that are not within the banking power.

Be this as it may, this power does not, I think, support the *Banking Act* 1947. The banking power is the appropriate power and the one upon which reliance must be placed. It is unnecessary, therefore, to refer again to this corporation power.

Limitations upon power.

The limitations upon Federal constitutional power, which have been relied upon in this case, may now be examined.

The States.

" The federal character of the Australian Constitution," I said in *Melbourne Corporation* v. *The Commonwealth* " carries implications of its own . . . the government of Australia is a dual system based upon a separation of organs and of powers. The maintenance of the States and their powers is as much the object of the Constitution as the maintenance of the Commonwealth and its powers. Therefore it is beyond the power of either to abolish or destroy the other " (4) ; " neither Federal nor State governments

(1) (1909) 8 C.L.R. 330.
(2) (1909) 8 C.L.R., at p. 395.
(3) (1936) A.C. 578, at p. 613 ; 55 C.L.R. 1, at p. 43.
(4) (1947) 74 C.L.R., at p. 70.

may destroy the other nor curtail in any substantial manner the exercise of its powers or "obviously interfere with one another's operations" (1)."

Three of the States contend that the *Banking Act* 1947 curtails their constitutional powers in a substantial manner and interferes with the exercise of those powers. But I shall return later on to this contention.

Freedom of Trade.

Trade, commerce and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free.

So s. 92 of the Constitution prescribes but judicial decisions have much weakened its operation.

It is now settled, I think, after some fluctuation in opinion, that s. 92 is an inhibition addressed to the Parliaments of the Commonwealth and the States preventing them from legislating so as to interfere with the freedom prescribed by the section. It gives no rights to the citizens of the Commonwealth except the right to ignore and if necessary to procure the assistance of the judicial power in resisting any such legislation (*James* v. *South Australia* (2); *James* v. *The Commonwealth* (3); *James* v. *The Commonwealth* (4)). Still the freedom is not limited "to freedom from legislative control; it must equally include executive control" (*James* v. *The Commonwealth* (5)). But, doubtless, the expression trade, commerce and intercourse "describes the activities of individuals. The object of s. 92 is to enable individuals to conduct their commercial dealings and their personal intercourse with one another independently of State boundaries" (*O. Gilpin Ltd.* v. *Commissioner for Road Transport and Tramways (N.S.W.)* (6)). It was said, however, that s. 92 relates only to the passage of goods or visible tangible things and persons across the borders of the States and is wholly inapplicable to intangible things or commercial intercourse across State borders. And it was claimed that the addition of the words "whether by means of internal carriage or ocean navigation" in s. 92 supported this view. And so, also, it was claimed that the opinion of the Judicial Committee in *James* v. *The Commonwealth* (4) was based upon this assumption.

But I am unable to agree with the argument.

(1) (1947) 74 C.L.R. at p. 74.
(2) (1927) 40 C.L.R. 1, at p. 31.
(3) (1939) 62 C.L.R. 339, at pp. 361, 362.
(4) (1936) A.C. 578; 55 C.L.R. 1.
(5) (1936) A.C. 578, at p. 628; 55 C.L.R., at p. 56.
(6) (1935) 52 C.L.R. 189, at p. 211.

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Trade, commerce and intercourse among the States includes, in my opinion, not only the sale of tangibles but also of intangibles by a person in one State to a person in another State and also the transportation from one State to another of goods or persons and commercial intercourse whether by air, telegraph, telephone, wireless or other means. This, I think, accords with the view taken in the United States of America under the power in the American Constitution to regulate commerce with foreign nations and among the several States and with the Indian tribes. The word " intercourse " in s. 92 is as applicable to commercial intercourse as to personal intercourse. Indeed, in the basic case in the United States, *Gibbons* v. *Ogden* (1) *Marshall* C.J. said : " Commerce, undoubtedly, is traffic, but it is something more ; it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse." It may be that the word " intercourse " found its way into s. 92 of the Australian Constitution through some such source.

James v. *Cowan* (2) dealt with the nature of the freedom prescribed by s. 92 but not with the subject of that freedom.

And the addition of the words " whether by means of internal carriage or ocean navigation " are " not descriptive or limiting ; they are to prevent limitation " (*W. & A. McArthur Ltd.* v. *Queensland* (3)).

The decisions of the United States Courts are not authoritative upon the interpretation of the Australian Constitution. Thus the power given to Congress to regulate commerce has repeatedly been declared, as to those subjects which require a general system of uniformity of regulation, to be exclusive. In other matters, admitting of diversity of treatment according to the special requirements of local conditions, the States may act within their respective jurisdictions until Congress sees fit to act ; and, when Congress does act, the exercise of its authority overrides all conflicting State legislation (*The Minnesota Rate Cases* : *Simpson* v. *Shepard* (4)).

No such doctrine exists in Australia. The powers of the Commonwealth and the States within the limits of their constitutional powers are concurrent, but when the law of a State is inconsistent with a law of the Commonwealth the latter prevails (Constitution, s. 109 ; *James* v. *The Commonwealth* (5)). Still, what is " com-

(1) (1824) 22 U.S. 1, at pp. 189, 190 [6 Law. Ed. 1, at p. 68].
(2) (1932) A.C. 542 ; 47 C.L.R. 386.
(3) (1920) 28 C.L.R. 530, at p. 550.
(4) (1913) 230 U.S. 352, at pp. 399, 400 [57 Law. Ed. 1511, at p. 1541].
(5) (1936) A.C., at p. 611 ; 55 C.L.R., at p. 41.

merce" has been thoroughly explored in the United States of America and what is trade and commerce under the Australian Constitution are indistinguishable descriptions of the same thing. And before "commerce" can be inter-State it must be "commerce."

Much light is thrown upon the whole subject in the judgments of the Supreme Court of the United States and by text writers and others upon the commerce power in the Constitution of the United States (See, for instance, *Willoughby* on *The Constitutional Law of the United States*, 2nd ed. (1929), vol. 2, pp. 721-777; *Willis* on *Constitutional Law* pp. 281-304; *Judson* on *The Law of Interstate Commerce*, 2nd ed. (1912); *Prentice & Egan* on *The Commerce Clause of the Federal Constitution*; *Constitution of United States* (*Annotated*) to January 1938 compiled pursuant to resolutions of the Senate and the House of Representatives).

The extent of the commerce power in the United States is well illustrated in a recent case before the Supreme Court of the United States (*United States* v. *South-Eastern Underwriters Association* (1)). The question was whether the business of entering into contracts in one State insuring against the risk of loss by fire of property in others was in itself inter-State commerce. There were numerous decisions of the Court that insurance was not commerce. But these decisions were overruled. The majority of the learned Justices accepted the general description of "commerce" given by *Marshall* C.J. in *Gibbons* v. *Ogden* (2). And even those Justices who did not agree with the disposal of the case made by the majority of the Court, in view of the prior decisions of the Court, agree that the business in question in that case did constitute "commerce."

Thus *Frankfurter* J. (3): "The relations of the insurance business to national commerce and finance . . . afford constitutional authority for appropriate regulation by Congress of the business of insurance."

And *Jackson* J. (4): "The doctrine that insurance business is not commerce always has been criticized as unrealistic, illogical, and inconsistent with other" decisions. "As a *matter of fact*, modern insurance business, as usually conducted, is commerce; and where it is conducted across State lines, it is *in fact* inter-State commerce. In contemplation of law, however, insurance has acquired an established doctrinal status not based on present-day facts. For constitutional purposes a fiction has been established,

(1) (1944) 322 U.S. 533 [88 Law. Ed. 1440].
(2) (1824) 22 U.S., at pp. 189, 190 [6 Law Ed. at., p. 68].
(3) (1944) 322 U.S., at p. 583 [88 Law. Ed., at p. 1474].
(4) (1944) 322 U.S., at p. 585 [88 Law. Ed., at p. 1475].

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and long acted upon by the Court, the states, and the Congress, that insurance is not commerce " (1).

Stone C.J. was more cautious : " The numerous and unvarying decisions of this Court . . . have never denied that acts of inter-State commerce may be incidental to the business of writing and performing contracts of insurance, or that those incidental acts are subject to the commerce power. Our decisions on this subject have uniformly rested on the ground that the formation of an insurance contract, even though it insures against risk of loss to property located in other states or moving in inter-State commerce, is not inter-State commerce, and that although the incidents of inter-State communication and transportation which often attend the formation and performance of an insurance contract are inter-State commerce, they do not serve to render the business of insurance itself inter-State commerce " (2).

In *Nathan* v. *Louisiana* (3) the Supreme Court of the United States held that a person engaged in buying and selling foreign bills of exchange was not engaged in " commerce " but in supplying instruments of commerce and that a State tax on his business was not an infringement of the constitutional power of Congress to regulate " commerce."

Despite this authority the decision in the *Insurance Case* (4) suggests that in the United States the business of banking as usually conducted would now be regarded as commerce or as involving acts or transactions in commerce which if conducted across State lines would be inter-State commerce. *Prentice & Egan* (5) comment upon the case : " To say that an inter-State bill of exchange is merely evidence of the transfer of title to personal property located in another State is not only to ignore the fact that money, as the circulating medium, is essential to all commerce."

It is true that in the Australian Constitution the trade and commerce power, the banking power and the insurance power are separately enumerated but that does not exclude banking and insurance from the inhibition of s. 92 that trade, commerce and intercourse among the States shall be absolutely free if the business of banking and insurance conducted across State lines be trade, commerce or commercial intercourse. Among their multifarious functions bankers finance the sale and purchase of goods and of commerce in general and they also issue, buy, sell and discount bills, often against mercantile documents, transmit moneys and provide

(1) (1944) 322 U.S., at pp. 587, 588 [88 Law. Ed., at p. 1477].
(2) (1944) 322 U.S., at p. 567 [88 Law. Ed., at p. 1465].
(3) (1850) 49 U.S. 73 [12 Law. Ed. 992].
(4) (1944) 332 U.S. 533 [88 Law. Ed. 1440].
(5) The Commerce Clause of The Federal Constitution (1898), at p. 48.

credits and engage in commercial intercourse. Such transactions and acts, if conducted across State lines, fall within the general description of trade, commerce and intercourse among the States, already stated. It is not every transaction and act of bankers that belongs to inter-State trade but in Australia bankers do a considerable business across State lines. It would be "unrealistic and illogical" to deny the character of inter-State commerce to business so conducted.

And it is that trade, commerce and intercourse that s. 92 requires shall be "absolutely free." But that means "freedom as at the frontier" or in other words across State boundaries. It must be free from all restraints, hindrances, obstructions, interferences and devices of every kind employed to interfere with that freedom. Those restraints, hindrances and interferences may take many forms such as customs and border duties, prohibitions of every kind, compulsory acquisitions of property directed against inter-State trade, compulsory marketing schemes entirely restrictive of freedom of action on the part of producers and the elimination of the business of inter-State transportation as such in favour of a State undertaking and so forth (*James* v. *Cowan* (1); *James* v. *The Commonwealth* (2); *Peanut Board* v. *Rockhampton Harbour Board* (3); *Australian National Airways Pty. Ltd.* v. *The Commonwealth* (4)).

The actual restraint or burden may operate while the property is still in the State of origin (*James* v. *The Commonwealth* (2)). "In every case," it was said in *James* v. *The Commonwealth* (5) "it must be a question of fact whether there is an interference with this freedom of passage." But the question of fact is, like some other matters of fact in the law, for the Court and not for the jury. The difficulties that arise in the application of s. 92 to legislative and executive action arise, I think, at this point. *James* v. *The Commonwealth* (6) denied that the freedom prescribed by s. 92 was "freedom from all governmental control extending over the whole of any transaction which is treated as having the characteristic of inter-State commerce" and substituted "freedom as at the frontier" as the true criterion (7).

In *O. Gilpin Ltd.* v. *Commissioner for Road Transport and Tramways (N.S.W.)* (8) *Dixon* J. examined many cases decided in this

(1) (1932) A.C. 542; 47 C.L.R. 386.
(2) (1936) A.C. 578; 55 C.L.R. 1.
(3) (1933) 48 C.L.R. 266.
(4) (1945) 71 C.L.R. 29.
(5) (1936) A.C., at p. 631; 55 C.L.R., at p. 59.
(6) (1936) A.C., at p. 619; 55 C.L.R., at p. 48.
(7) (1936) A.C., at p. 630; 55 C.L.R., at p. 58.
(8) (1935) 52 C.L.R. 189.

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Court and summed up his own opinion in the following proposition: —" But, given an act or transaction which falls within the conception of trade, commerce, or intercourse among the States and a restriction or burden operating upon that act or transaction, it appears to me that it must be an infringement upon the absolute freedom guaranteed by sec. 92 unless the restriction or burden is imposed in virtue of or in reference to none of the essential qualities which are connoted by the description 'trade, commerce, and intercourse among the States' " (1).

It is not therefore " every regulation of commerce or of movement that involves a restriction or burden constituting an impairment of freedom. Traffic regulations affecting the lighting and speed of vehicles, tolls for the use of a bridge, prohibition of fraudulent descriptions upon goods, and provisions for the safe carriage of dangerous things, supply examples " (1) (Cf. *Home Benefits Pty. Ltd.* v. *Crafter* (2); *R.* v. *Connare*; *Ex parte Wawn* (3); *R.* v. *Martin*; *Ex parte Wawn* (4)).

That proposition of my brother *Dixon* runs counter, I believe, to several decisions of this Court, notably, *Ex parte Nelson* [*No.* 1] (5), and what are known as the transport cases (*R.* v. *Vizzard*; *Ex parte Hill* (6); *O. Gilpin Ltd.* v. *Commissioner of Road Transport* (7); *Bessell* v. *Dayman* (8); *Duncan* v. *Vizzard* (9); *Riverina Transport Pty. Ltd.* v. *Victoria* (10); and to *Hartley* v. *Walsh* (11) and *Milk Board* (*N.S.W.*) v. *Metropolitan Cream Pty. Ltd.* (12)). And it is opposed to the generalization which is, I think, the prevailing view in this Court that the legislation must be scrutinized in its entirety and its real object, true character and real effect—its pith and substance—in the particular instance under discussion must be determined (*James* v. *Cowan* (13); *Peanut Board* v. *Rockhampton Harbour Board* (14); *Milk Board Case* (15)). Or perhaps to express the matter more shortly that legislative or executive action is obnoxious to s. 92 if it restrains or interferes with the freedom of trade and commerce among the States in some real and substantial manner. But the freedom guaranteed by s. 92 is not an unrestricted privilege to engage in business or to conduct it as one pleases. Unfortunately this generalization has led to many opposite conclusions of " fact " in this Court. On the one

(1) (1935) 52 C.L.R., at p. 206.
(2) (1939) 61 C.L.R. 701.
(3) (1939) 61 C.L.R. 596.
(4) (1939) 62 C.L.R. 457.
(5) (1928) 42 C.L.R. 209.
(6) (1933) 50 C.L.R. 30.
(7) (1935) 52 C.L.R. 189.
(8) (1935) 52 C.L.R. 215.
(9) (1935) 53 C.L.R. 493.
(10) (1937) 57 C.L.R. 327.
(11) (1937) 57 C.L.R. 372.
(12) (1939) 62 C.L.R. 116.
(13) (1932) A.C. 542; 47 C.L.R. 386.
(14) (1933) 48 C.L.R. 266.
(15) (1939) 62 C.L.R., at p. 153.

hand it is claimed that the *Peanut Case* (1) has the approval of the Judicial Committee and on the other that the *Transport Cases* have that approval.

Neither claim is, I think, beyond question. The passage in *James* v. *The Commonwealth* (2) is guarded and not a clear and definite approval and in *Gratwick* v. *Johnson* (3) will be found my reasons for thinking that the Judicial Committee did not express approval or disapproval of the actual decisions in the *Transport Cases*.

Nelson's Case (4) may be compared with *Tasmania* v. *Victoria* (5), and the *Peanut Board* (1) and the *Air Line Cases* (6) with *Hartley* v. *Walsh* (7) and the *Milk Board Case* (8).

The *Transport Cases* including *Willard* v. *Rawson* (9) are applications of the generalization. But if all the States legislated or acted in like manner then freedom of inter-State transportation would be greatly hampered. I think the *Transport Cases* were wrongly decided, they were not mere traffic regulations as I regard *Willard's Case* (9) but a burden imposed directly and immediately upon the transport or movement of passengers and goods whether engaged in domestic, inter-State or other trade and commerce.

The Banking Act 1947.

Turning now to the *Banking Act* 1947. Part I. of the first Schedule sets out the names of eight banks incorporated in Australia which I shall refer to as the Australian banks, Part II., three banks incorporated in the United Kingdom which I shall refer to as the English banks, and Part III., three banks incorporated elsewhere which I shall refer to as the foreign banks. These banks, often in Australia called " the trading banks," are referred to in the *Banking Act* as private banks though the Australian and English banks, at all events, are public or chartered companies. And these banks have carried on the banking business of Australia for many years, one, at least, I believe, for more than one hundred years.

In 1911 the Commonwealth Bank was established by the Act 1911 No. 18 and it was authorized to carry on, and has from its establishment carried on, *inter alia*, a general business of banking. But it is now governed by the *Commonwealth Bank Act* 1945 (1945 No. 13).

The *Banking Act* 1947 makes provision for :—(1) The purchase or acquisition by agreement of all or any of the shares in the

(1) (1933) 48 C.L.R. 266.
(2) (1936) A.C., at p. 623 ; 55 C.L.R., at p. 52.
(3) (1945) 70 C.L.R. 1, at pp. 17-19.
(4) (1928) 42 C.L.R. 209.
(5) (1935) 52 C.L.R. 157.
(6) (1945) 71 C.L.R. 29.
(7) (1937) 57 C.L.R. 372.
(8) (1939) 62 C.L.R. 116.
(9) (1933) 48 C.L.R. 316.

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Australian and English banks by the Commonwealth Bank subject to the approval of the Treasurer.

(2) The compulsory acquisition of Australian shares in Australian banks.

Section 13 (1): "Where the Treasurer is satisfied that the majority in number of the shares in an Australian private bank are Australian shares, the Treasurer may, by notice . . . declare that, upon a date specified . . . the shares in that bank which are Australian shares . . . shall be vested in the Commonwealth Bank."

"Australian shares" means shares situated, or deemed by law to be situated, in Australia.

All other shares in that Australian bank which . . . become Australian shares are vested in the Commonwealth Bank upon the date upon which they become Australian shares.

(3) The management of Australian banks.

Upon the date specified as already mentioned the directors of the Australian bank in relation to which the notice was given, cease, by force of the Act, to hold office and the Governor of the Commonwealth Bank may with the approval of the Treasurer appoint directors in their stead.

Directors so appointed have full power to manage, direct and control the business and affairs of the Australian bank of which they are directors and, in particular, have power to :—

(*a*) declare dividends ;

(*b*) dispose of the business in Australia of that Australian bank to the Commonwealth Bank ;

(*c*) dispose of all or any of the other business of that Australian bank.

Further the Commonwealth Bank is for all purposes the holder of the shares which have been purchased or acquired under the Act and shall be a member of that Australian bank in respect of those shares.

(4) The taking over by agreement with the Commonwealth Bank of the business in Australia of any of the Australian, English or foreign banks mentioned in the Schedule.

(5) The compulsory taking over by the Commonwealth Bank of the business in Australia of any Australian, English or foreign bank already mentioned which has not made an agreement for the taking over of its business.

And provisions are made for taking over Australian assets and liabilities, vesting assets, novating liabilities and discharging the bank taken over from its obligation in respect of those liabilities.

"Australian assets" means assets situated, or deemed by law to be situated, in Australia and "Australian liabilities" means liabilities situated, or deemed by law to be situated, in Australia.

(6) Compensation for property compulsorily acquired and the setting up of a Federal Court of Claims with jurisdiction to hear and determine claims for compensation under the Act.

The Commonwealth Bank, the Act provides, shall pay fair and reasonable compensation in respect of the acquisition of shares by the Commonwealth Bank (s. 15).

The Commonwealth Bank, the Act also provides, shall pay fair and reasonable compensation in respect of the acquisition or taking over by the Commonwealth of the business in Australia of any bank (s. 25).

(7) Prohibition of the carrying on of banking business in Australia by the Australian, English or foreign banks.

Notwithstanding anything contained in any other law, or in any charter or other instrument, a private bank shall not, after the commencement of this Act, carry on banking business in Australia except as required by the Act (s. 46).

But the Act requires each bank to carry on until the Treasurer by notice requires it to cease carrying on banking business in Australia.

(8) Protection and continuation in employment by the Commonwealth Bank of the staff of banks taken over pursuant to the Act.

(9) And there is a declaration of legislative intent with respect to the divisibility or separability of the provisions of the Act (s. 6).

It provides a rule of construction that the legislature intended the provisions of the Act to be divisible.

But it is not, as has been said, an inexorable command and the presumption may be "overcome by considerations which make evident the inseparability of its provisions or the clear probability that the invalid part being eliminated the legislature would not have been satisfied with what remains." "The presumption in favour of separability does not authorize the Court to give the Statute an effect altogether different from that sought by the measure viewed as a whole" (*R.* v. *Poole*; *Ex parte Henry* (1); cf. *Williams* v. *Standard Oil Co. of Louisiana* (2); *Railroad Retirement Board* v. *Alton Railroad Co.* (3); *Carter* v. *Carter Coal Co.* (4); *Attorney-General for Alberta* v. *Attorney-General for Canada* (5)).

(1) (1939) 61 C.L.R. 634.
(2) (1929) 278 U.S. 235, at p. 242 [73 Law. Ed. 287, at p. 309].
(3) (1935) 295 U.S. 330, at p. 361 [79 Law. Ed. 1468, at p. 1482].
(4) (1936) 298 U.S. 238, at pp. 312, 334 [80 Law. Ed. 1160, at pp. 1189, 1201].
(5) (1947) A.C. 503, at pp. 519, 520.

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The several objects of the Act and the purpose of the powers in Divisions 2 and 3 of Part IV. of the Act are stated in ss. 3 and 9 and are designed, I suppose, to relate the provisions of the Act to some constitutional power. In the end, however, these provisions must find constitutional warrant in some one or more of the enumerated powers conferred upon the Parliament of the Commonwealth by the Constitution. And that warrant is found, so it is contended, in the acquisition power and the banking power together or separately and the incidental power.

Acquisition of Shares.

The authority to acquire shares and to take over businesses of the trading banks by agreement raises no difficulties. The Act confers upon the Commonwealth Bank the capacity so to acquire shares and to take over businesses and there is nothing to prevent the proprietors or owners agreeing to sell if they so desire upon agreed terms. But the purchaser—the Commonwealth Bank—can, in such cases, stand in no better position than any other purchaser ; it must take what the proprietor or owner has and be subject to the memorandum and articles of association or other regulations of the banking company. A compulsory purchase authorized under the Constitution stands in a somewhat different position for no provisions in the regulations of the company prohibiting or restricting alienation can prevail against the statutory authority. Still, in my opinion, such a purchase does not in itself entitle the purchaser to ignore all the regulations of the banking company. The right the purchaser acquires is a share in the capital of the company freed from all trusts, mortgages, charges, liens, interests and other obligations affecting those shares (s. 13 (5)), and the incidental rights to be exercised in accordance with the regulations of the company.

The complete title to the shares is acquired upon the vesting thereof in the Commonwealth (cf. *The Commonwealth* v. *New South Wales* (1)). And the Act vests the shares in the Commonwealth Bank but, in my opinion, the regulations of the banking companies govern the right of the Commonwealth Bank or its nominees to go upon the share register as members : if they desire the advantages of registration by the banking company then they must comply with the regulations of the company governing registration (cf. *The Commonwealth* v. *New South Wales* (2)). Thus, if authority were given to directors enabling them for instance to refuse any transferee of whom they did not approve, then ordinarily the Courts

(1) (1923) 33 C.L.R. 1, at pp. 27, 28. (2) (1923) 33 C.L.R. 1.

would not interfere with the exercise of their discretion unless the authority were exercised capriciously and wantonly. In short, the Parliament of the Commonwealth cannot, under the banking power, ignore the internal structure and regulations of the trading banks and shape that structure and those regulations as it pleases. Legislation of that character would relate to companies or corporations, as *Higgins* J. might have said, and not to banking (cf. *Huddart, Parker & Co. Pty. Ltd.* v. *Moorehead* (1)).

Consequently s. 14 of the *Banking Act* 1947 is not a valid exercise of power.

Still the compulsory acquisition of shares and of the businesses in Australia of the trading banks, including inter-State banking, is within the plenary power of Parliament under the acquisition, banking and incidental powers, but only if the purpose of the acquisition is banking, that just terms are provided for the acquisition and that trade, commerce and intercourse among the States is absolutely free. The purpose of the acquisition of the shares is to facilitate the control by the Commonwealth Bank of the banking business in Australia of the banking companies and for the purpose of furthering the expansion of the banking business of the Commonwealth. It was pointed out that the acquisition of the shares in a company was one method of acquiring the business or the control of the business of that company. Under the *Banking Act*, however, it is to be noticed that the acquisition of shares in the Australian banks may be piecemeal. Shareholders in the Australian banks are not bankers and shareholding cannot be described as banking though it does enable those holding shares in banks to exercise, through their holdings, subject to the regulations of the banks, some control over their operations. Nationalization and control of Australian banking was, it was said, the aim of the provisions relating to the acquisition of shares and other property, but that control was already established under the *Banking Act* 1945. Therefore the real aim and object of the Act, it was contended, is not for any purpose of banking but for the purpose of acquiring for the Commonwealth the profitable business of selected Australian banks. The provisions for the management of the banks, the astounding penalties imposed by such sections as 24 (8), 46 (8), 59 and 60, and the case of *Melbourne Corporation* v. *The Commonwealth* (2) were referred to in support of this view. Doubtless the Court must ascertain the purpose of the acquisition but that purpose must be discovered from the words of the Act and any relevant surrounding circumstances and not by any other means. The

(1) (1909) 8 C.L.R. 330. (2) (1947) 74 C.L.R. 31.

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argument has something of truth in it but I put it on one side partly because the Court properly assumes the integrity of the legislative body and presumes in favour of the validity of legislation until its violation of the Constitution is clearly established and partly because of the provisions for compensation contained in the Act.

Just Terms.

And that leads to the inquiry whether " just terms " are provided in the *Banking Act* 1947 for the acquisition of shares in the Australian banks. It was contended that the Act makes no provision for interest from the date of acquisition to the date of payment. It would not be just that the Commonwealth Bank or any other body should at one and the same time enjoy the benefits flowing from the acquisition of the shares, for instance, of profits earned in the business and those flowing from unpaid compensation moneys. And yet it is plain, I think, in an acquisition under the *Banking Act* 1947 that some considerable time must elapse in this case between the acquisition of the shares and the assessment of compensation. It is clear, I think, that the acquisition power in the Constitution enables the Parliament to make provisions for interest. That such a provision is just there can be no doubt. But what is provided is that the bank shall pay fair and reasonable compensation in respect of the acquisition of shares by the Commonwealth Bank. The compensation is given in respect of the acquisition of the shares. Interest cannot be allowed as compensation. There is nothing in the Act to attach an allowance of interest to it (*Swift & Co.* v. *Board of Trade* (1) ; *Newport Borough Council* v. *Monmouthshire Borough Council* (2) ; cf. *Marine Board of Launceston* v. *Minister of State for the Navy* (3)).

The equitable principle stated in *International Railway Co.* v. *Niagara Parks Commission* (4) has no bearing upon the present case, for specific performance would be an inappropriate remedy in the circumstances of the case (cf. *Marine Board of Launceston* v. *Minister of State for the Navy* (5)).

This question has been considered in America and " just compensation " has there " a constitutional connotation." It entitles the property owner to receive interest from the date of the taking to the date of payment as part of his just compensation. However, as Lord *Sumner* remarked in *Swift's Case* (1) the law of other countries has no bearing on the case. Ordinarily, even in the

(1) (1925) A.C. 520.
(2) (1947) A.C. 520, at pp. 561-563.
(3) (1945) 70 C.L.R. 518.
(4) (1941) A.C. 328.
(5) (1945) 70 C.L.R., at p. 529.

United States, provision for payment of interest must be "affirmative, clear cut and unambiguous." It is not enough that the terms might be construed to include interest (*United States* v. *Thayer-West Point Hotel Co.* (1)). "Just terms" in the present case require that a right to interest should be given and not some merely discretionary authority to award interest.

I should add that the Court of Claims established under the *Banking Act* 1947 is given jurisdiction to hear and determine claims for compensation arising under the Act. It has no jurisdiction other than that conferred upon it by the Act; it has no inherent or equitable jurisdiction; it has no jurisdiction to award interest.

Consequently, "just terms" have not been provided by the *Banking Act* 1947 for the acquisition of shares in the Australian banks and the provisions for their acquisition are therefore invalid.

It was also said that "just terms" had not been provided because no provision was made for shareholders' costs in asserting their claims for compensation before the Court of Claims. But that is not a matter affecting justice as a term of acquisition and is no breach of the acquisition power.

And here it is convenient to dispose of an argument presented by the States that the Act does not provide "just terms" for the acquisition of shares or the businesses in Australia of the trading banks. It was said that the banks are possessed of assets of the value of many millions of pounds which the Commonwealth acquires but must provide the full pecuniary value thereof as compensation for the owners. And that the Commonwealth can only discharge that obligation by means of loans, the issue of Treasury Bonds or of paper money by the Commonwealth Bank or out of the assets acquired. But this must involve further inflation of a depreciating currency and a ruinous fall in the value of money. These economic considerations are not, I think, matters that concern the Court or which it can consider. The Court cannot investigate the value of the lawful currency of Australia. The Commonwealth Bank, as any other body, may discharge its obligations in lawful currency. If it does so that is a good discharge of its obligations. Doubtless, a depreciated or depreciating currency entails great hardships but the Court cannot alter, amend or mitigate the law relating to the currency. The argument is untenable.

Management of Private Banks.

The provisions for the management of the Australian banks and their relation to the provision of s. 13 for the acquisition of shares in those banks next fall for consideration.

(1) (1947) 329 U.S. 585 [91 Law. Ed. 521].

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Upon the notice given under s. 13 and the vesting of shares pursuant to the section, the directors of the Australian banks affected by the notice cease to hold office ; new directors may be appointed by the Governor of the Commonwealth Bank, with the approval of the Treasurer, in their place notwithstanding any lack of qualification and the directors so appointed have full power to manage, direct and control the business and affairs of the Australian banks of which they are directors and in particular have power to declare dividends, dispose of the business in Australia of that bank to the Commonwealth Bank and to dispose of all or any of the other business of that Australian bank. The scheme is a connected whole which cannot, notwithstanding s. 6 of the Act, be severed. The presumption of severability established by that section is overcome by the evident inseparability of the provisions themselves. The invalidity of s. 13 relating to the acquisition of shares brings down the provisions relating to the management of private banks but the invalidity of the provisions for the management of private banks would likewise bring down the provisions relating to the acquisition of shares.

Ordinarily those holding shares may, through and by means of their shareholdings, remove directors and appoint others in their place. But that flows from their rights and voting power incident to the ownership of the shares and the regulations of the particular company. Here the directors are removed and others appointed in their place compulsorily without any exercise of shareholding rights. But, as I said before, the constitutional powers with respect to the acquisition of property, and banking and the incidental power together or separately do not authorize the Parliament of the Commonwealth to ignore the internal structure and organization of the trading banks and shape that structure as it pleases.

Shares may be acquired by agreement or compulsorily and if so the rights attaching to those shares may be exercised in accordance with the regulations of the bank. It is another matter, however, when those rights are not exercised but the Parliament removes directors, appoints new directors in their places and gives them full control of the business. In my opinion, that is not a law with respect to banking but a law with respect to the internal structure and organization of corporations or banks, which is a matter for regulation by the incorporating authority.

But if these provisions can be supported under the constitutional powers already mentioned, then they raise in another form the question whether "just terms" have been provided for the

acquisition of property of the Australian banks. The substance of the matter is, as already appears, that the directors of Australian banks are removed from office and control is given to directors appointed by the Governor of the Commonwealth Bank with the approval of the Treasurer with power to dispose of the business in Australia of any Australian bank to the Commonwealth Bank. Further the directors appointed pursuant to the Act are also authorized " to dispose of all or any of the other business of that Australian " bank.

In my opinion, these provisions constitute an acquisition or attempted acquistion of the property of Australian banks. By this means, Australian banks and their shareholders are deprived of any bargaining power through their own directorate and the Commonwealth Bank may acquire the business in Australia of any Australian bank upon terms agreed between the directors appointed under the Act and the Commonwealth Bank. And " all or any of the other business of that Australian " bank may be disposed of by the directors appointed under the Act at amounts or values fixed by themselves. But, in my opinion, the Australian banks and their shareholders are entitled to a fair ascertainment of the value of their property and not an arbitrary fixation by the authority disposing of or acquiring that property.

In my opinion, the provisions of Part IV., Division 3, Management of Private Banks are invalid because " just terms " of acquisition have not been provided in accordance with the constitutional requirement.

Taking over of Businesses.

The provisions for taking over the business of the Australian, English and foreign banks in Part IV., Division 4 fall here for consideration.

Postponing for the moment any observations upon the provisions of s. 22, especially sub-s. (8), and s. 23, I come to s. 24 which provides for the taking over in Australia of the business of banks just mentioned.

Standing alone, I should be prepared to say, as already indicated, that the acquisition and banking powers and the incidental power conferred upon the Parliament by the Constitution authorize it to legislate for the acquisition and taking over as a going concern the businesses in Australia of banking companies and of all or any assets and liabilities in connection with such businesses. But I am unable to agree that these powers enable the Parliament to legislate so as to effect a novation of the obligations and contracts of the

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banking companies with their creditors. Legislation that the Commonwealth Bank shall pay, satisfy and discharge all the liabilities of the banking companies, indemnify and keep them harmless in respect of such liabilities is one thing but legislation that the banking companies shall be discharged from those liabilities and that they shall become the liabilities of the Commonwealth Bank or of any other institution is another. Yet, that is precisely the effect of s. 24, sub-ss. (5) and (7).

The constitutional powers of the Parliament do not enable it to convert the creditors of the banking companies into creditors of the Commonwealth Bank or any other institution and create the relationship between them of creditor and debtor. And the provisions with respect to the liabilities of the banking companies cannot, I think, be severed from the rest of the section. And these constitutional powers also require that legislation for the acquisition of property shall provide "just terms." As in the case of provision for the acquisition of shares in Australian banks so in the case of taking over the business in Australia of the banks, already mentioned, no provision is made for the payment of interest from the date of acquisition of the business to the date of payment. A profit-earning business or concern is taken over and vested in the Commonwealth Bank. It is not just that the Commonwealth Bank or any other institution should at one and the same time enjoy the benefits flowing from possession of the property taken over and those flowing from possession of purchase or compensation money.

A strange provision is found in s. 23 of the *Banking Act* 1947. Where an agreement has been made by any private bank under s. 22 relief is given from tax upon incomes or profits but if no agreement has been made then the banking companies which have not agreed are not relieved from tax upon incomes or profits. It obviously was passed for the purpose of putting pressure upon the banking companies. It was not suggested, during the long argument of this case, that it involved any contravention of the constitutional provision requiring "just terms" in respect of the acquisition of property. Therefore, I pass it by.

"Just terms" have not been provided for the taking over of the businesses of the Australian, English and foreign banks. For these various reasons the provisions of s. 24 of the *Banking Act* 1947 fail and are invalid.

Here, I would add, in relation to s. 22 of the Act that I see no objection to an agreement between the Australian, English and foreign banks and the Commonwealth Bank for the acquisition of the business of any of those banks as a going concern but I do not

think that sub-s. (8) (*b*) and (*d*) can novate the liabilities of the banks, without the agreement of creditors as sub-s. (8) (*b*) and (*d*) provide.

Compensation.

Another attack has been made upon the validity of the *Banking Act* 1947 connected with the Federal Court of Claims and the assessment of compensation.

The Constitution, s. 75, provides that in all matters in which the Commonwealth or a person suing or being sued on behalf of the Commonwealth is a party the High Court shall have original jurisdiction. The jurisdiction so conferred upon the High Court cannot be taken away or withdrawn by the Parliament. It is a constitutional provision in the same position as the provision contained in s. 75 (v.) in relation to mandamus, prohibition and injunction (See *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Brisbane Tramways Co. Ltd.* (1)).

The compensation under the *Banking Act* 1947 is payable by the Commonwealth Bank (See ss. 15 and 25, Part VI., Divisions 1 and 2). And it is argued that the Commonwealth Bank is but an agency or instrumentality of the Commonwealth and consequently that the High Court has original jurisdiction in any claim for compensation against the Bank because that would be a matter in which the Commonwealth was a party or the Bank was being sued as a party on behalf of the Commonwealth. Consequently, it is said that the *Banking Act* 1947 is invalid in attempting to withdraw that jurisdiction and providing that claims for compensation shall be determined and ascertained by the Federal Court of Claims and in no other manner.

In 1925 in an unreported case the question was whether the War Service Homes Commissioner, a body corporate established under the *War Service Homes Act*, was a party suing on behalf of the Commonwealth. I held that he was, because he was but an agency or instrumentality of the Commonwealth (*War Service Homes Commissioner* v. *Kirkpatrick* (2)). The fact that the Commissioner was a body corporate did not prevent him being an agent or instrumentality of the Commonwealth (*Repatriation Commission* v. *Kirkland* (3)). And the fact that the Commonwealth was not a party on record did not exclude the original jurisdiction conferred upon this Court by s. 75 (iii.) in matters in which a person suing or

(1) (1914) 18 C.L.R. 54.
(2) (1925) Unreported.
(3) (1923) 32 C.L.R. 1, at p. 15.

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being sued on behalf of the Commonwealth was a party. I adhere to the view I took in *Kirkpatrick's Case* (1).

Considerable light is thrown, as *Higgins* J. said in *R.* v. *Murray*; *Ex parte The Commonwealth* (2) upon s. 75 (iii.) by the Constitution of the United States and decisions given in relation to its provisions. Under that Constitution judicial power extends, *inter alia*, to "controversies to which the United States shall be a party." The United States may not be sued in the courts of that country without its consent. That position is met in Australia by the provisions of the *Judiciary Act* 1903-1947 (*Baume* v. *The Commonwealth* (3)); *Pitcher* v. *Federal Capital Commission* (4)). But in cases in which the United States can be sued "the question whether the United States is in legal effect a party to the controversy is not always determined by the fact that it is not named as a party on record, but by the effect of the judgment or decree which can be rendered" (See *Constitution of the United States* (*Annotated*) published pursuant to resolutions of the Senate and House of Representatives, p. 478).

It was, no doubt, because of certain American decisions, said *Higgins* J., that in s. 75 (iii.) of the Australian Constitution the words were added, "or a person suing or being sued on behalf of the Commonwealth" (*R.* v. *Murray*; *Ex parte The Commonwealth* (5)).

And, in my opinion, if the Commonwealth Bank be an agency or instrumentality of the Commonwealth in relation to its functions and in particular in relation to the acquisitions the subject of the legislative provisions in the *Banking Act* 1947, then the original jurisdiction of this Court in respect of claims for compensation is established and cannot be taken away as the *Banking Act* 1947 enacts. That it is such an agency or instrumentality is manifest, I think, from the *Commonwealth Bank Act* 1945 (No. 13 of 1945), the *Banking Act* 1945 (No. 14 of 1945) and the *Banking Act* 1947.

In 1911 "a Commonwealth Bank, to be called the Commonwealth Bank of Australia," was established without corporators (Act No. 18 of 1911). Its existence is continued by the *Commonwealth Bank Act* 1945, s. 7. It is managed by a Governor appointed by the Commonwealth government and its monetary and banking policy is subject to political and governmental direction.

The capital of the bank was twenty million pounds provided in part out of moneys provided by the Commonwealth (See Act No. 15 of 1924, s. 5). But its capital is now governed by the *Commonwealth*

(1) (1925) Unreported.
(2) (1916) 22 C.L.R. 437, at p. 467.
(3) (1906) 4 C.L.R. 97.
(4) (1928) 41 C.L.R. 385.
(5) (1916) 22 C.L.R., at p. 468.

Bank Act 1945. That of the General Banking Division is the aggregate of sums provided from the capital and reserve fund of the Commonwealth Bank and other sums transferred from the General Banking Reserve fund and from profits transferred from the General Banking Division to capital account. One half of those net profits is payable to the National Debt Sinking Fund. The property, income and operation of the Bank are not liable and shall be deemed never to have been liable to income tax or land tax under any law of the Commonwealth or to taxation under any law of a State to which the Commonwealth is not subject (*Commonwealth Bank Act* 1945, s. 163). Many other functions are also exercised by the Commonwealth Bank under that Act with respect to rural credits, mortgages and industrial finance.

But I shall not go into all the details of the powers and functions of the Bank which may be found at large in the Acts, already mentioned, for what I have said is enough, I think, to establish that the Commonwealth Bank is an agency or instrumentality of the Commonwealth.

The provision in the *Banking Act* 1947 giving the Federal Court of Claims exclusive jurisdiction in respect of claims for compensation cannot, therefore, operate to oust the jurisdiction of the High Court under s. 75 (iii.) of the Constitution. The consequence is that the whole of the provisions of the Act for the assessment of compensation in respect of the acquisition of shares and assets are invalid for the presumption of severability is overcome by the nature of the provision itself.

Compensation is to be assessed by the Federal Court of Claims and not in any other manner. The Court cannot rewrite that provision and give it an effect entirely different, namely, that compensation may be assessed by the High Court. And the invalidity of the provision for the assessment of compensation necessarily, in my opinion, brings down in its train the provisions for the acquisition of shares in Australian banks and the taking over of the business of the banking corporations mentioned in the Act for there is then no provision under which the compensation provided for in ss. 15 and 25 can be assessed. The Act is explicit that the compensation shall be assessed by the Federal Court of Claims and in no other manner.

Prohibition of the Carrying on of Banking Business.

The provisions of Part VII. of the *Banking Act* 1947 also require consideration.

Those provisions prohibit the carrying on of banking business in

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Australia by any of the Australian, English and foreign banks mentioned in the Schedule.

The question is whether those provisions contravene the constitutional requirement of s. 92 that trade, commerce and intercourse among the States shall be absolutely free.

It appears to me that the provisions are so connected and linked up with the provisions for the acquisition of shares and businesses of private banks that they necessarily fall with those provisions. The presumption of severability raised by s. 6 of the Act is overcome, to my mind, by considerations and consequences that make evident their inseparability. They are in their nature ancillary to the acquisition of the shares and businesses of the banks dealt with in earlier sections of the Act. And putting into operation the provisions of Part VII. of the Act would reduce to chaos the trade and commerce of Australia unless the businesses of the banks were compulsorily acquired or the banks under pressure agreed to make them over to the Commonwealth.

A court is not required to attribute such an intention to Parliament if another construction is open.

Let it be assumed, however, that the provisions of Part VII. are severable from the other provisions of the Act. Then the Australian, English and foreign banks are prohibited from carrying on banking business in Australia except as required in Part VII. and those banks are required to carry on until the Treasurer gives notice requiring them to cease. The notice may be given to all or any one or more of the banks. Already, I have expressed the opinion that the business of banking as usually conducted is part of the trade and commerce of Australia and when conducted across State lines forms part of trade, commerce and intercourse among the States. The *Banking Act* 1947 prohibits all such business on the part of the banks, domestic, inter-State and foreign. And it is not possible to divide the business of banking into compartments; it is one whole and nation-wide.

Yet the *Banking Act* 1947 prohibits the whole of that business irrespective of "such matters as defence . . . prevention of famine, disease and the like" reserved for consideration in *James* v. *Cowan* (1). "The object of s. 92, is," as I said in the case of *Australian National Airways Ltd.* v. *The Commonwealth* (2), "to maintain freedom of inter-State competition—the open and not the closed door—absolute freedom of inter-State trade and commerce."

(1) (1932) A.C., at p. 559; 47 C.L.R., at p. 397.

(2) (1945) 71 C.L.R., at p. 78.

In my opinion, the *Banking Act* of 1947 closes that door and excludes the banks from the business of inter-State banking in Australia. That, I think, is inconsistent with the provisions of s. 92 of the Constitution, and with the reasons of their Lordships of the Judicial Committee in *James* v. *Cowan* (1); *James* v. *The Commonwealth* (2) and of this Court in *Peanut Board* v. *Rockhampton Harbour Board* (3) and *Australian National Airways Ltd.* v. *The Commonwealth* (4).

Incidentally, the provision of Part VII. of the *Banking Act* 1947 standing alone and severed from the other provisions of the Act would result in the banks and their shareholders being deprived of their property without any compensation whatever. That also tends to support the view I have that Part VII. cannot be severed from the provisions of the Act relating to the acquisition of shares and the businesses of the banking companies.

Part VII. of the *Banking Act* 1947 is invalid and, in my opinion, brings down in its train the connected or linked provisions relating to the acquisition of shares and the businesses of the banking companies.

Protection of Staff.

The invalidity of the various provisions of the *Banking Act* of 1947, already mentioned, render the provisions of Part VIII. of the *Banking Act* 1947 inoperative and it is unnecessary, therefore, to further consider them.

General.

The provisions of Part IX., General, likewise become inoperative but ss. 59-62 necessarily fail with the provisions of the Act which are invalid.

The States.

All that remains for consideration is the contention of the States that the *Banking Act* of 1947 curtails in a substantial manner the exercise by them of their constitutional powers and functions and also contravenes the provisions of the Financial Agreement scheduled to the *Financial Agreement Act* 1944 (No. 46 of 1944) which obtain constitutional force under an amendment to the Constitution now appearing in s. 105A of that instrument.

In my opinion, the contentions are untenable.

If the Parliament of the Commonwealth has power to enact the *Banking Act* of 1947 no constitutional power or function of a State

(1) (1932) A.C. 542; 47 C.L.R. 386.
(2) (1936) A.C. 578; 55 C.L.R. 1.
(3) (1933) 48 C.L.R. 266.
(4) (1945) 71 C.L.R. 29.

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is curtailed or impeded. The States can, through their own banks, provide their own financial facilities or resort to the general banking system otherwise established. The *Melbourne Corporation Case* (1) is distinguishable because there the States were subjected to a particular direction.

The *Financial Agreement Act* contemplates the borrowings by the States from various institutions, including banks, and gives some flexibility in the working of that Agreement. But that it imposes any constitutional restriction upon the Commonwealth to maintain financial institutions as they existed at the time of the agreement and so to keep them that the States should not be hindered or inconvenienced in their arrangements with financial institutions is a hopeless construction, I think, of the Agreement and hopeless also, I think, as a business arrangement.

Summarizing my conclusions the following provisions of the *Banking Act* 1947 are invalid :—

Part IV., Division 2, except in so far as it provides for the acquisition of shares by agreement.

Part IV., Division 3, the management of banks, is wholly invalid.

Part IV., Division 4, taking over of businesses of banks, is invalid except so far as it provides for the acquisition of such businesses by agreement.

Part VI., assessment of compensation is wholly invalid.

Part VII., is wholly invalid.

Part VIII., protection of rights of persons employed by private banks, is inoperative.

Part IX., is inoperative except in so far as the provisions thereof can be applied to the acquisition of shares or businesses by agreement and in any case ss. 59, 60 and 62 are invalid.

Declarations should be made accordingly and ancillary relief granted by way of injunction.

DIXON J. The purpose of all these five actions is to obtain a decision that the *Banking Act* 1947 or its more material provisions are unconstitutional and void. " Unconstitutional " means beyond the powers which the Constitution affirmatively grants to the Commonwealth Parliament or contrary to the restrictions or limitations which the Constitution imposes upon them.

The *Banking Act* 1947 is an enactment of sixty-two sections conferring a variety of powers, sometimes upon the Treasurer, sometimes upon the Governor of the Commonwealth Bank, and sometimes upon the Commonwealth Bank itself, and containing a

(1) (1947) 74 C.L.R. 31.

number of auxiliary and ancillary provisions and provisions dealing with matters consequential upon the exercise of one or other or all of the powers. The Act is evidently the product of much ingenuity and resource upon the part of those who drew it. The result is a measure of anything but a simple description, one that seems rather to exploit the possible uses of Federal power than to try to exclude any constitutional questions except such as arise necessarily from the character of the banking power or from the presence of s. 92 in the Constitution and are therefore inseparable from any pursuit of the end in view.

It is usual in dealing with the constitutional validity of a statute to begin with some account of the manner in which it is constructed and what it provides, in order to show its relation to legislative power and what are the constitutional questions to which its nature and characteristics give rise. But to do this adequately with respect to the *Banking Act* 1947 would mean a prolonged examination, not simply of its general plan, but of the nature and specific features of a number of powers and of their interaction, both necessary and possible, and, what is worse, of the combinations in which they might conceivably be called into use. I shall therefore do no more than state at this point the chief objects pursued by the main parts of the Act and, when I come to deal with particular questions of validity turning upon the character of specific provisions, I shall then describe them so far as may seem necessary. Otherwise I shall assume that the text of the statute when studied has, or will have, told its own somewhat intricate story. The principal objects to which the provisions of the Act are addressed may be indicated briefly. In the first place, its application is confined to a list of what it calls "private banks," an expression meaning the corporations or companies carrying on banking. The list comprises all the institutions carrying on business in Australia which are commonly called trading banks. These private banks, as the Act calls them, are divided into those incorporated in Australia, those incorporated in the United Kingdom and those incorporated elsewhere. The Commonwealth Bank is authorized to purchase by agreement shares in a bank incorporated in Australia or in the United Kingdom. The Treasurer must approve. Shares in an Australian bank so purchased are, by force of the Act and in spite of anything the articles of association may say, vested in the Commonwealth Bank, which thereupon becomes a member of the company. This is the first operative provision (ss. 12, 14, 10). Next, the Treasurer is enabled to publish a notice in respect of any bank incorporated in Australia that on a named date the shares situated in Australia shall vest in the Commonwealth Bank. The

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consequences are twofold. On the expiry of the notice shares then on the Australian register, or afterwards coming upon it, vest in the Commonwealth Bank which, as before, becomes a member of the company, notwithstanding the articles of association. At the same time the directors are removed and nominees of the Governor of the Commonwealth Bank, approved by the Treasurer, take the place of the directors and assume all the powers of the company (ss. 13, 14, 10, 17-19). In the third place, provision is made for the purchase by the Commonwealth Bank by agreement or, in default of agreement, compulsorily, of the business in Australia of any private bank. The acquisition is the consequence of a notice by the Treasurer, upon whose discretion the exercise of the power depends. The acquisition of the business in Australia includes assets and liabilities which have or afterwards obtain a situation in Australia. The transfer of non-Australian assets may be required. A private bank is prohibited from carrying on banking business in Australia when its business is thus acquired (ss. 22, 24, 46 (1)-(3)). Fourthly, the Treasurer is armed with a discretionary power to forbid a private bank from carrying on banking business, a power that is independent of any acquisition of assets or shares. Fifthly, a provision is made for compensation for the acquisition of shares or assets (ss. 15, 25, 37-41, 42-45). A Court of Claims is set up with exclusive jurisdiction over claims for compensation (ss. 26-36, 40 (2) and (5), 42). Seventhly, there are elaborate provisions respecting the staff of banks whose business or shares are acquired, the general purport of which is to continue the officers in the employment of the Commonwealth Bank without prejudicing the rights accruing to them in their former service (ss. 47-55).

A governing consideration in an examination of the validity of the provisions by which the purposes indicated by the foregoing summary are worked out must be that the powers are all conferred in terms which insure that each of them is exercisable independently of every other power and that each of them is exercisable against any one bank to the exclusion of other banks. At the same time, each power may be exercised simultaneously against all the Australian banks and, except for the acquisition of shares and concomitant replacement of directors, against all the English banks. Again, the powers of prohibiting the carrying on of banking business, of acquiring shares and displacing directors and of taking over the business may, as I think, be exercised cumulatively in relation to a private bank or one or more of these powers may be exercised and not the others. Further, the Act does not concern itself with any question of time. It contains nothing which would make it impos-

sible to put all the powers into execution against all the banks at once or to defer doing so indefinitely or to allow any interval to elapse between dealing with different banks or using different powers against one bank. It will be seen therefore that for a court that must consider the powers which the Act describes and not any intention as to their use that may be entertained on the part of the Executive it is not enough that a power conferred by the Act, exercisable by itself, would find support in the Constitution. Its validity must also be examined on the footing that it is exercised in combination with others. And *é converso* it would not be enough if the conclusion were that, by a simultaneous use of certain of the powers given by the Act, a government monopoly of banking might be set up and an orderly transition from the present system accomplished, and that such a thing might be within power. It would still be necessary to consider the validity of the provisions on the footing that the powers were exercised separately and the banks were dealt with piecemeal.

The Act cannot be supported simply on the footing that it is one to accomplish the immediate setting up of a governmental monopoly in banking and otherwise to do no more than to provide for matters incidental to that purpose, that is to say, to provide the means by which an object of such a character might be effected and the dislocation and disturbance that might otherwise attend the change avoided. For in point of law the provisions of the Act, if valid, would make other courses possible and authorize the pursuit of other ends.

Of the foregoing considerations the last is more material to the justification of the provisions of the Act under s. 51 (xiii.) of the Constitution; but, for my part, it is not upon that paragraph that my decision depends. Speaking generally, however, they are considerations which must in different ways affect the question of the constitutionality of this or that provision of the Act.

The attack upon the validity of the Act is supported by contentions which are of two descriptions. Some of them are so fundamental, that if sound, they would annihilate the Act independently of its detailed structure. Others depend upon the manner in which the Act is constructed, and some of these involve a question of the operation of s. 6, which declares an intention that the provisions of the Act shall be separable. I have formed the conclusion, for various reasons the greater number of which may be thought to be of the second description, that certain cardinal provisions of the Act cannot be upheld as valid, namely s. 13 (3) and (4), ss. 17-19, s. 24, ss. 39 and 40, ss. 42-44 and s. 46 (4)-(8). The source of their

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invalidity lies in s. 51 (xxxi.) or s. 92 of the Constitution. I shall set out with some fullness the reasoning by which I have been led to adopt this conclusion, and I shall explain the consequences upon some other provisions. The result of my opinion is the failure of the more essential parts of the Act, as distinguished from incidental or subsidiary provisions. In these circumstances any expression of my opinion on the many contentions raised which do not enter into the grounds of the conclusion I have just stated can form no part of my *ratio decidendi*. I shall therefore not embark upon any full examination of these contentions ; but I think that, before taking up the matters which govern my ultimate decision, I should say something about certain of the more basal grounds upon which the plaintiffs impeached the Act and why I have not accepted them.

Although s. 51 (xx.) of the Constitution was relied upon by the Commonwealth as an alternative source of power in itself sufficient to sustain much of the Act, it is evident that the legislation primarily rests upon par. (xiii.) of s. 51, combined, of course, with par. (xxxi.) to sustain the expropriation of shares or assets, and with ss. 71, 77 (1), 78 and 79 to sustain the erection of a Court of Claims. The sufficiency of s. 51 (xiii.) for this purpose is denied, and if the denial were well founded, the Act could only be supported by the very widest interpretation of par. (xx.). The considerations advanced for a limited construction of par. (xiii.) are of two sorts. There are general considerations found in the nature of the subject matter, banking, and in the place it takes in the social and commercial organization of the community. Then there are particular considerations arising from the context, that is to say, from what the paragraph is expressed to cover besides the form of the exception, and the terms employed. Banking describes a well-understood activity which in one form or another has been found in modern times to be indispensable to the needs of any highly organized western community. It is not a business or operation that calls for suppression or restriction. Support, guidance, regulation, and superintendence might be necessary. But it would be contrary to common sense to suppose that banking would be the subject of total prohibition. Then, beginning thus, the argument goes on to maintain that banking depends on a consensual relation between banker and customer. That is its essence, so it was contended. Such were the general considerations adduced. Upon the terms of the paragraph itself a number of points was made. First, the word is " banking," not " banks "—the activity, not the bodies carrying it on—a word, it was said, descriptive of a continuing activity to be governed, not stopped. " State banking " too suggests continuity ;

" extending " necessarily implies a continuing subject, proper for recurrent regulation. A second point was that the very idea of excepting " State banking " implied an assumption that it would exist as part of a system of banks. A third point was that the addition of " the incorporation of banks " and the use of the word " also " showed clearly that the word " banking " does not describe a legislative subject matter extending to the incorporation of the banks that carry on the activity. Accordingly " banking " is not used as the name of a wide field of legislation extending from the establishment of the bodies to act as bankers to the suppression of all but government banking. Rather it refers to the exercise of a trade or business to be regulated. Then reliance was placed upon the addition to the power of the subject of the " issue of paper money," governed likewise by the word " also." The deduction drawn from this was that banking was conceived as depending on the relation of banker and customer and therefore as not necessarily extending to the issue of bank notes.

From all this the conclusion was drawn that the legislative power over banking is, so to speak, to govern the thing " *salvâ rei substantiâ*," and does not authorize the suppression of banking, either totally or with the exception of government banking. Another conclusion drawn was that banking depends on a consensual relation and, further, that the transactions are between subject and subject as distinguished from government and subject. I shall not go into the applications which were made of these propositions in order to show that the provisions of the Act relating to the acquisition of shares, the replacement of directors, the acquisition of assets, the taking over of liabilities and the prohibition of the carrying on of banking business fell outside the power. It will suffice to say that, according to the contention, nothing but a power to suppress banking completely would authorize the bestowal upon the Treasurer of an unlimited and possibly arbitrary discretion to close any or all trading banks ; that the compulsory transfer to the Commonwealth Bank of liabilities to customers and of their accounts is inconsistent with the consensual character ascribed to the relation of banker and customer and so is the provision as to trading banks carrying on business pending acquisition.

It must be acknowledged that the cumulative weight is considerable of the matters upon which reliance is placed as evidence that the banking power is not a wide one. I do not know that the weight is diminished by the history of the paragraph, which seems to have been taken, save for a reference to State banking, from s. 91 (15) of the *British North America Act* 1867. It may be

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suspected that not much consideration was given to the material expressions borrowed. The form of the Canadian clause was doubtless in part the result of the experience of the neighbouring Union. Under the American Constitution the power to incorporate banks had been founded upon implication. The issue of paper money was there a contemporaneous question, one which was agitated for some years after 1867. It well may be that the framers of the Australian Constitution instinctively assumed that banking would not form a subject of prohibition, that it would be carried on by trading banks and that the relation of banker and customer would remain consensual. The assumption perhaps accounts for the form and content of par. (xiii.). But the assumptions made in framing a power and the restrictive intentions which it expresses or embodies are two very different things.

To my mind the argument is answered by the principles of constitutional interpretation which this Court adopted early in its history and from which, I believe, it has never intentionally departed.

They are well expressed in a passage from the judgment of *O'Connor* J. in the *Jumbunna Coal Mine, No Liability* v. *Victorian Coal Miners' Association* (1) which I shall quote :—" Where it becomes a question of construing words used in conferring a power of that kind on the Commonwealth Parliament, it must always be remembered that we are interpreting a Constitution broad and general in its terms, intended to apply to the varying conditions which the development of our community must involve. For that reason, where the question is whether the Constitution has used an expression in the wider or in the narrower sense, the Court should, in my opinion, always lean to the broader interpretation unless there is something in the context or in the rest of the Constitution to indicate that the narrower interpretation will best carry out its object and purpose."

The foundation of these principles is expressed by *Higgins* J. in *Attorney-General for New South Wales* v. *Brewery Employés Union of New South Wales* (2) where he says, " although we are to interpret the words of the Constitution on the same principles of interpretation as we apply to any ordinary law, these very principles of interpretation compel us to take into account the nature and scope of the Act that we are interpreting—to remember that it is a Constitution, a mechanism under which laws are to be made, and not a mere Act which declares what the law is to be." His Honour proceeds to quote from *Story, Commentaries*, 2nd ed., s. 455 :

(1) (1908) 6 C.L.R. 309, at pp. 367, 368.

(2) (1908) 6 C.L.R. 469, at pp. 611, 612.

" While, then, we may well resort to the meaning of single words to assist our inquiries, we should never forget, that it is an instrument of government that we are to construe " (1).

The purpose of the enumeration of powers in s. 51 is not to define or delimit the description of law that the Parliament may make upon any of the subjects assigned to it. Speaking generally, the legislative power so given is plenary in its quality. The purpose of the enumeration is to name a subject for the purpose of assigning it to that power. The names or descriptions employed are usually of the briefest kind. It is true that certain powers do involve a description amounting almost to a formal definition; examples are pars. (iii.), (xxiv.) and (xxv.), (xxxv.), (xxxvii.), (xxxviii.) and (xxxix.). But more often they are the most general names of general topics.

To borrow the words of *Gray* J. delivering the opinion of the Supreme Court in *Juilliard* v. *Greenman* (2): " the Constitution . . . by apt words of designation or general description, marks the outlines of the powers granted to the National Legislature; but it does not undertake, with the precision and detail of a code of laws, to enumerate the subdivisions of those powers, or to specify all the means by which they may be carried into execution."

The power with respect to banking seems to me a plain example of the designation of a broad subject without any indication of the means by which it is to be dealt with or of the existence of limits upon the description of laws to be made with respect thereto. To say that it is not a question of what limits there may be upon the description of legislation but of the definition of the subject to which they may be addressed, and that continuance is an attribute of the subject, is not, I think, a satisfactory answer. For the question is whether there should be extracted from the word " banking " and its content an intention that, among other things, it should continue, that it should remain consensual, or that it should be a matter between subject and subject. Such an intention narrows the definition of the subject in a way which reduces the area, not of relevance, but rather of legislative discretion or policy. Of course " banking " describes an activity which is carried on and in that sense continues. But no-one would feel that it was anything but an ordinary use of the word to say that a statute declaring that banking should no longer be carried on was a law about banking. It is as easy to explain the addition of the words " also . . . the incorporation of banks and the issue of paper money " as made

(1) (1908) 6 C.L.R., at p. 612.

(2) (1884) 110 U.S. 421, at p. 439 [28 Law. Ed. 204, at p. 211].

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to remove any doubt and to insure that those subjects were included as to infer an actual intention that "banking" should have a restrictive or narrow construction.

For the reasons I have indicated, I am unable to accept the view that the word "banking" should have ascribed to it anything but the wide meaning and flexible application of a general expression designating, as a subject of legislative power, a matter forming part of the commercial economic and social organization of the community. I see no sufficient reason for importing into it any of the three limitations suggested, viz., (1) confining the power to laws for the governance of a continuing activity, to something that does not go beyond regulation, (2) the limitation of the conception of banking to transactions entirely consensual, and (3) to transactions between subject and subject.

While I reject this view, it does not follow that I am prepared to say that all that the *Banking Act* 1947 contains can be supported under the legislative power with respect to banking conferred by par. (xiii.) of s. 51, that is, of course, aided as to acquisition by par. (xxxi.) and as to the Court of Claims by Chapter III. of the Constitution. To give an example, there are peculiar difficulties with respect to the acquisition of shares, if s. 13 (2), (3) and (4) and s. 14 (1) are severed from the general plan and considered on their own basis. Again, with respect to more than one provision arguments were advanced that depend upon the supposed possibility of its applying to distinct businesses or transactions outside banking or to effect purposes said to be irrelevant to the banking power upon any construction that might be placed upon it. But these contentions I find it unnecessary to examine. Indeed, in the course of the elaborate argument, which covered a wide field and dealt piecemeal with the whole Act, very many points were made and contentions advanced that I am relieved from even mentioning by the conclusion I have reached.

While I reject the limitations it was sought to place upon par. (xiii.), I shall not attempt to state affirmatively what is the extent of the power it confers. To give an inclusive and exclusive definition of such a conception as banking is almost impossible. Dr. *Walter Leaf* begins his little book on the subject by saying that it is quite impossible; that the theory and practice of banking have varied from age to age and still vary from country to country. He does, however, bring himself to give a definition of English banking and defines a bank in terms of its deposit business, saying that a bank is a person or corporation which holds itself out to receive from the public deposits payable on demand by cheque. It will be noticed

that here the emphasis is not upon the economic function fulfilled, but upon the description of business done, or, if it preferred, of the service performed. Whatever may be the indispensable characteristics of banking, it seems probable that, for the purpose of par. (xiii.), they should be sought rather in the relations between banks and those who use them than in a more abstract consideration of the true economic nature of the contribution made by banking to the monetary system and public finance of a country by banks. It is, however, enough for me to say that I do not adopt the reading of par. (xiii.) contended for, and that I find no ground for holding that if the Act must rest upon that power, and upon par. (xxxi.) in its application to par. (xiii.), it would fail in all its substantial provisions because of the insufficiency of par. (xiii.) to support it.

I turn to another contention which, if valid, would annihilate all the substantial parts of the Act. It is that the statute is invalid because its operation will produce an undue interference with the administration of State Governments. This attack was supported by the States who are plaintiffs : South Australia, Western Australia and Victoria. In an able argument counsel for Victoria took as an example the constitutional and statutory provisions of that State governing the course of financial administration. A consolidated public revenue and appropriation therefrom by law are required by the Constitution. The *Audit Act* provides for the payment of moneys forming part of the public revenue into banking accounts by all officers receiving such moneys. Under a contract between Victoria and the trading banks they provide banking facilities for the State to keep its public accounts and they allow interest on balances. The public account is fed by receivers of revenue and collectors of imposts and their receipts amount to £55m. per annum. The accounts of receivers number some 300 and of collectors some 400. Further, to enable Victorian State servants to carry on particular departments or operations for which they are responsible, 700 advance accounts exist. These figures were given for the purpose of emphasizing the importance of the part played by the private banks in the State's financial administration. Counsel maintained that the operation of the *Banking Act* 1947 was calculated to defeat the course of administration pursued by the States with respect to the receipt and disbursement of money and to close to the States all banking facilities except such as might be provided by the Commonwealth Bank. This, it was said, amounted to an undue interference with or substantial curtailment of the performance by a State of its functions of government. Such an interference or curtailment, counsel contended, was invalid, even although it was attempted by a law

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which in point of subject matter might otherwise be connected with Federal power and even although the law did not discriminate against the States. It constrains the States to submit their funds to a Commonwealth agency, the Commonwealth Bank. Section 11 (*a*) was treated as illusory and no safeguard. A specific point was made of the operation of s. 24 (5) and of s. 46 (4) respectively. One transfers the States' credits at the trading banks to the Commonwealth Bank without the States' consent; the other would disable the State from operating by cheques upon the States' funds lying at the trading bank. It was said that the *Banking Act* 1947 was as much an attempt to control the States in reference to the use of banks in the administration of public moneys and public finance as was s. 48 of the *Banking Act* 1945, held void in *Melbourne Corporation* v. *The Commonwealth* (1).

No doubt, from the point of view of the States, no distinction can be seen between the effect which s. 48 of the earlier Act was calculated to produce upon the performance of State functions and that which would result from the exercise of the Treasurer's powers under the *Banking Act* 1947. In some ways, indeed, the position of the States might seem worse under the later Act. For it might be possible to set up and use State banks as part of the banking system that now exists in a way which might not be practicable if there were no trading banks. But a question whether the Commonwealth has gone beyond power by interfering with State functions cannot be determined by reference only to the consequences upon the States which Federal legislation in fact produces. Enactments of quite different descriptions may result in the same embarrassments to the States.

Section 48 of the Act of 1945 dealt specifically with the use by the States of the existing banking system. The Act of 1947 contains powers under which the existing banking system may be terminated and replaced by a government system. To forbid trading banks to bank for the States and to abolish trading banks are two different things, and the validity of a law for the one purpose must depend on different considerations from those governing the validity of a law for the other purpose. It is only by confining attention to the similarity of the consequences to the States, that it may seem that the test of validity ought to be the same.

I do not propose to discuss again the grounds upon which we based the decision that s. 48 of the 1945 Act is invalid. They are stated in the report of *Melbourne Corporation* v. *The Commonwealth* (2), and further discussion will make them no clearer. Indeed, I

(1) (1947) 74 C.L.R. 31. (2) (1947) 74 C.L.R. 31.

should have thought that the root principle was made clear enough in the passages in *West* v. *Commissioner of Taxation (N.S.W.)* (1), directing attention to it and that for the rest it was but a question of the specific application of the principle. The reason why I am unable to accept the argument advanced for the States under this head appears from a passage, part of which I shall repeat, from my reasons in the *Melbourne Corporation Case* (2) :—"At bottom the principle upon which the States become subject to Commonwealth laws is that when a State avails itself of any part of the established organization of the Australian community it must take it as it finds it. Except in so far as under its legislative power it may be able to alter the legal system, a State must accept the general legal system as it is established. If there be a monopoly in banking lawfully established by the Commonwealth, the State must put up with it. But it is the contrary of this principle to attempt to isolate the State from the general system, deny it the choice of the machinery the system provides and so place it under a particular disability."

It is necessary for the purpose of the argument of the States to assume that the validity of the main provisions of the Act could be made out were it not for the effect it would produce upon the States. For otherwise there would be no point in it. That means, however, but for the position of the States, the question how and by what agencies banking may be carried on would be within the province of the Commonwealth Parliament. Once that question is settled for the whole community, the banking system which results is that which must serve the banking needs of the entire country.

It is open to the States, at all events in contemplation of law, under the exception of State banking, to provide for their own needs. But even if that were not so, the States would be bound to take the banking system as any general law, made in the exercise of Federal power, left it. Just as when the Federal Government desires to use or take advantage of anything the nature or character of which is determined by an exercise of the exclusive power of the State, it must take it as it finds it, so the States, when they avail themselves of services or facilities regulated or determined by Federal law, must accept it as part of the system enjoyed by the whole community. Such things are a consequence of the distribution of powers and stand apart altogether from some exercise of legislative power which singles out the States or which operates specially to impede them in their functions. Section 48 of the Act of 1945

(1) (1937) 56 C.L.R. 657, at pp. 681-683, 687, 698, 699.

(2) (1947) 74 C.L.R. 31, at p. 84.

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discriminated against States and in that way singled out the States in order to curtail their freedom in using the general banking system. No doubt without discrimination laws applying to States may operate against them in such a way that it must be beyond Federal power to enact them. That is perhaps shown by the discussion in *New York* v. *United States* (1). But it is a question which lies outside such a case as the present where the law relates to the form to be taken by part of the established organization of the community affecting all alike. The variety of ways in which, as the Act is constructed, the powers might be exercised make a reservation necessary. Conceivably it might be possible to employ some of the powers, s. 46 (4)-(8) for example, for the purpose of requiring a bank, which upon compliance would be left untouched, to cease to transact State Government business. If such a use of them were made the principle of the *Melbourne Corporation Case* (2) would be encountered. But such an hypothesis, arising as it does only upon the form of the powers, does not go to the validity of the Act generally.

For the reasons I have stated, I think the attack upon the substance of the enactment as an invasion of State functions fails.

Somewhat analogous considerations appear to me to affect another independent ground taken for impugning the Act, a ground to which I next turn. It is based upon the Financial Agreement of 1927 (reprinted in consolidated form in Commonwealth Statutes 1944, p. 169). Section 105A of the Constitution gives the Financial Agreement paramountcy. By it the States submitted to the control of the Loan Council with respect to public borrowing. But the practice of borrowing upon overdraft for temporary purposes had been followed and had been found necessary in the ordinary course of the administration of government finances. By clause 5 (9) (a clause with which clause 6 (7) corresponds in the case of the Commonwealth) it is provided that a State may, amongst other things, borrow money for a temporary purpose by way of overdraft or fixed or other special deposit. This, it is contended, secures to the States a right as against the Commonwealth to borrow money on overdraft for temporary purposes and imports the existence of banks and a system of banking. Accordingly, it is said, the Commonwealth may not defeat the right by abolishing the system. Reliance is placed upon the judgments of *Latham* C.J. and *Williams* J. in *Melbourne Corporation* v. *The Commonwealth* (3), as showing

(1) (1946) 326 U.S. 572 [90 Law. Ed. 326.]
(2) (1947) 74 C.L.R. 31.
(3) (1947) 74 C.L.R. 31, at pp. 62, 63, 101.

that the States obtained by means of the clause a constitutional right to go to a private banker for an overdraft without the consent of anyone. That being established, so counsel contend, it makes no difference whether the impairment or denial of the right takes the form of a prohibition upon a bank doing business for a State without the consent of the Commonwealth Treasurer, as under s. 48 of the *Banking Act* 1945, or a prohibition upon a trading bank doing business at all, as under s. 46 of the *Banking Act* 1947, or a total destruction of the private banks.

The argument depends upon the interpretation of the Financial Agreement and the effect to be ascribed to it. I think that the argument imports into the agreement more than was intended by the parties to it. The agreement doubtless assumes a banking system to which the States, and for that matter the Commonwealth might resort to borrow by way of overdraft. But I do not think that it implies, much less expresses, anything as to the form the system is to take. If the clause confers upon the States any constitutional right, as against the Commonwealth, to borrow by way of overdraft, I should put it no higher than a right to seek an overdraft from whatever banking institutions are from time to time provided or permitted by law and are conducting banking business.

Two further grounds of attack were made which, if sound, while they would not affect s. 46 (4)-(8) unless held inseverable, would otherwise bring down all that matters of the Act. They both depend upon the requirement of s. 51 (xxxi.) that compulsory acquisition must be upon just terms. The first of them arises from the failure of the *Banking Act* 1947 to indicate in any way the source of the compensation moneys, which, it is said, must amount to £100m. at least if all the banks are to be compensated. The Financial Agreement makes the consent of the Loan Council necessary for it to be done by borrowing and an examination was made by counsel of other resources lawfully open with a view of showing that nothing but an expansion of the note issue or an equivalent expansion of credit would make payment of the compensation possible. This, it was argued, would mean a considerable depreciation of the money in which compensation was paid. The value of the assets would be estimated as at a time before the depreciation and the monetary expression of the compensation would at once be deprived of its value. I do not think that it is an answer to this argument to fall back upon the nominalistic principle, according to which English law disregards all fluctuations in the "value" of money expressing or measuring an obligation.

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We are concerned with just terms of acquisition and if it were true that the terms of acquisition necessarily involved the valuation of assets in terms of money which would lose its value as a result of the very transaction involved in compensating the owners, I should have thought the constitutional requirement had not been fulfilled. It seems to me that the scope of the nominalistic principle of our law does not go beyond questions concerning the discharge of obligations expressed in money. The money of account measuring an obligation, because it is the money denominated, is conclusively identified by the nominalistic principle with the money which at the time of payment suffices to discharge an obligation of the stated amount, or to ascertain it for the purpose of discharge, without any regard to changes in exchange value or purchasing power. Just terms do not mean that compensation must necessarily stand at one end as an obligation fixed in monetary expression so that all that need be inquired into is what money at the other end will discharge an obligation so expressed. That is to separate the steps by which just terms are afforded ; indeed, in strict logic it means that justice is satisfied by the assessment of an amount independently of the question whether the actual payment is commensurate with the deprivation suffered.

Nor do I think that it is correct to say that courts cannot inquire into such matters. There are few, if any, questions of fact that courts cannot undertake to inquire into. In fact it may be said that under the maxim *res iudicata pro veritate accipitur* courts have an advantage over other seekers after truth. For by their judgment they can reduce to legal certainty questions to which no other conclusive answer can be given. In the *Banco de Portugal* v. *Waterlow & Sons Ltd.* (1) an example is to be found of a judicial inquiry into the effect of an increased issue of notes.

But to support the conclusion that a statute providing for compensation does not afford just terms because an assessment of compensation would necessarily be followed by a discharge of the compensation in depreciated money, it surely is not enough to suggest as a matter of argument that, because of the existing condition of statute law, no course is legally open but to increase the note issue, and then to appeal to common knowledge as to the effect upon the " value " of money. It would, I should imagine, be necessary completely to satisfy a court of the legal, factual and economic considerations which made it inevitable that the very transaction involved a substantial depreciation of the money in which, as at an anterior time, compensation was to be expressed,

(1) (1932) A.C. 452.

so substantial as to violate any conception of the justice of the terms. In my opinion no sufficient foundation has been established for the support of the argument.

The second ground upon which the statute was impeached for failure to provide just terms of acquisition as required by s. 51 (xxxi.) is that the Court of Claims is unable to award interest upon the compensation, or to give costs. Once an award of compensation has been made the judgment or order of the Court will carry interest calculated from the date when it is pronounced. But it is contended that, as the Act is drawn, the amount assessed as compensation cannot include or carry interest calculated from the date of acquisition upon the value of the assets acquired. Upon this footing it is claimed that, over a very long period, the Commonwealth Bank may be left in possession both of the business of a private bank and of the purchase money. For it need pay nothing on account of compensation before the amount is assessed. Thus the profits of the business would belong to the Commonwealth Bank and yet, so it is said, no liability for interest in the meantime is imposed and none can be imposed by the Court of Claims. Thus, it is asserted, there is a failure to provide just terms and all the provisions for compulsory acquisition must fail. The jurisdiction of the Court of Claims is simply "to hear and determine claims for compensation" (s. 33 (1)). When shares are acquired or businesses taken over, the right given is simply to compensation or fair compensation (ss. 15, 25, 40, 42, 44). In *Swift & Co.* v. *Board of Trade* (1) the House of Lords made it clear that compensation and interest upon the value of the property acquired from the date of possession are two different things. A bare right to compensation does not imply interest in the meantime. Where the principles of equity apply to a compulsory acquisition, as they do when a notice to treat is given in respect of land and the acquiring authority enters into possession, these principles may give interest on unpaid "purchase money," that is compensation, even if unascertained. But that is because the relation of vendor and purchaser is established and specific performance might be decreed. A difference exists, however, between compensation for the loss of property and interest as compensation for the time occupied in assessing the loss. That is pointed out by Lord *Cave* L.C. and by Lord *Sumner* (2).

But under the Fifth Amendment of the Constitution of the United States, which provides that private property shall not be taken for public use without just compensation "it has consistently been held that the Fifth Amendment's reference to 'just compensation'

(1) (1925) A.C. 520.

(2) (1925) A.C., at pp. 533, 548.

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entitles the property-owner to receive interest from the date of the taking to the date of payment as a part of his just compensation" : *United States* v. *Thayer-West Point Hotel Co.* (1). Nevertheless, in the United States the word "compensation" has no prima-facie meaning that covers interest. "The fact that 'just compensation' includes interest in the eminent domain setting does not necessarily mean that the term must be given the same scope in other situations . . . in the absence of constitutional connotations, 'just compensation' is not a term of art so far as interest is concerned" (2). The contention on the part of the plaintiffs is that in our s. 51 (xxxi.) "just terms," like "just compensation" in the United States Constitution, imposes a requirement that cannot be fulfilled unless interest is given upon compensation from the date when possession is taken by the acquiring authority until compensation is actually paid. But, at the same time, it is contended that in conformity with the view taken in the House of Lords and with the natural meaning of the word "compensation," the right to compensation given by the *Banking Act* 1947 and the jurisdiction conferred to determine claims for compensation does not authorize an allowance of interest. It was suggested for the Commonwealth that the dilemma thus constructed was not complete, because the acquisitions authorized by the Act would fall within the cognizance of a Court of Equity as transactions in respect of which relief by way of specific performance might be given. But the answer made to this suggestion seems to be correct, namely, that first the Court of Claims has no equitable jurisdiction, secondly the instantaneous acquisition of property and immediate vesting of a right to compensation obtainable by prescribed steps leaves no room for the remedy of specific performance and thirdly that the case would not be within the competence of a jurisdiction in equity. In this Court the questions how far interest can be given as or upon "compensation" and what is the bearing of s. 51 (xxxi.) upon statutory provisions for "compensation" and "recompense" in that connection are matters that have been much discussed, and varying opinions have been adopted.

It is enough to refer to the consideration of the subject in *The Commonwealth* v. *Huon Transport Pty. Ltd.* (3) ; *Minister of State for the Navy* v. *Rae* (4) ; *Marine Board of Launceston* v. *Minister*

(1) (1947) 329 U.S. 585, at p. 588 [91 Law. Ed. 521, at p. 525].
(2) (1947) 329 U.S., at p. 589 [91 Law. Ed., at p. 526].
(3) (1945) 70 C.L.R. 293, at pp. 303-305, 307-311, 315, 323-329, 333-338.
(4) (1945) 70 C.L.R. 339, at pp. 348, 349.

of State for the Navy (1) and *Grace Bros. Pty. Ltd.* v. *The Commonwealth* (2).

I shall not repeat the views I expressed in those cases. In the United States the answer that would be given to the argument advanced for the plaintiffs is that in the setting in which the word "compensation" occurs in the *Banking Act* 1947 it has a "constitutional connotation": if, therefore, justice demands interest in the circumstances, the word covers it. There is much to be said for making the same answer here under s. 51 (xxxi.). But on the whole, in view of the less flexible meaning of which in English law, judging from the decision in *Swift's Case* (3) the word seems capable, I prefer the answer which I suggested in the *Huon Transport Company's Case* (4). The passage is as follows: "Our Constitution, when it refers to 'just terms,' is placing a qualification on the legislative power it bestows to acquire property compulsorily. But it is, I think, difficult to say that it makes it necessary for the legislature to give more than the full content of 'compensation', as compensation is understood in English law, and we know from the House of Lords that a right to interest on the amount payable for the thing is not always or necessarily included. Section 51 (xxxi.) has not the effect of transferring into our Constitution the Fifth Amendment, nor all the glosses placed upon it."

On either view, however, the argument fails.

The further point is made that the terms are unjust because the Court of Claims cannot award costs. I am not altogether satisfied that an award of costs is beyond the powers of the Court. But in any case I cannot think that such an omission would bring the statute into necessary conflict with s. 51 (xxxi.).

From these more general grounds of attack upon the *Banking Act* 1947 as a whole, or upon the substantive or operative parts of it, I shall now pass to the consideration in detail of some grave difficulties which three sets of provisions respectively raise. They are contained in (1) Part IV., Divisions 2 and 3; (2) Part VI., Divisions 1 and 2; and (3) Part VII. I shall deal in that order with the provisions in question.

In Divisions 2 and 3 of Part IV. of the *Banking Act* 1947 elaborate provision is made enabling the Treasurer to set in motion machinery for vesting in the Commonwealth Bank the Australian shares of an Australian Banking company, for displacing the directors in favour of nominees of the Commonwealth Bank, and for entrusting the

(1) (1945) 70 C.L.R. 518.
(2) (1946) 72 C.L.R. 269 at pp. 281-283, 286, 293, 296, 300.
(3) (1925) A.C. 520.
(4) (1945) 70 C.L.R., at p. 326.

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latter with the entire conduct and management of the company, including the disposal of its business. From these provisions and from the possible uses in relation to them of s. 22, s. 46 (4)-(8) and ss. 43 and 44, a pattern of powers results which may fairly be described as intricate. It is aimed at enabling the Commonwealth Bank by means of nominees to assume control of the business of an Australian bank without necessarily invoking the power for compulsorily acquiring the business, which would mean an assessment of the compensation for the whole undertaking. The exercise of these powers would necessitate dealing directly with the shareholders as such, some, presumptively the greater number, by acquiring their shares and compensating them, others perhaps as contributories in an ultimate liquidation.

I have formed the opinion that the provisions are bad because they would enable the Treasurer and the Commonwealth Bank to defeat the constitutional requirement imposed by s. 51 (xxxi.) that the acquisition of property shall only be upon just terms. This conclusion, the grounds for which I shall now state, would, if it were not for s. 6, affect with invalidity not only Division 3, but also the more important of the provisions of Division 2. For an examination of the provisions of the two Divisions shows that they form an interconnected plan in which the compulsory acquisition of shares is necessarily accompanied by the replacement of the directors with nominees. But s. 6 must be applied, and out of its application some further questions arise with which I must afterwards deal. In stating why I think that these provisions amount to a law for the acquisition of the property comprised in the business of a bank against which the Treasurer may direct them, I shall begin by describing the effect of the provisions.

They relate only to an Australian private bank, an expression which by definition means one of the bodies corporate named in the First Schedule : s. 5. A condition of the operation of the provisions upon such a banking company is that the Treasurer is of opinion that a majority of the shares is situated in Australia : s. 13 (1) and s. 5. In fact the very great majority of the shares of each of the Australian private banks is at the present time upon the Australian share register and therefore situated in Australia, a proportion ranging from seventy-five per cent in the case of the Bank of New South Wales to the whole in the case of the Bank of Adelaide, the Ballarat Banking Co. Ltd. and the Brisbane Permanent Building and Banking Co. Ltd. But one curious feature of the *Banking Act* 1947 is that it is so drawn that not only may any of the powers it is expressed to confer be exercised singly and moreover in relation

to one bank alone, but they are of indefinite duration, so that the time when any one of them is called into operation may be indefinitely postponed. In point of law, therefore, whatever may be the intention of the Executive as to the time and manner of the exercise of powers, the present state of facts cannot control any question of the operation and validity of the statute. It is not perhaps a matter of much importance because, although the opinion of the Treasurer that a majority of shares is situated in Australia is not examinable, it is hard to suppose that he would form such an opinion erroneously. Being satisfied of the fact, he may publish a notice in the *Gazette* vesting in the Commonwealth Bank all the Australian shares in the Australian private bank as from a specified date. Any date may be chosen, neither a minimum nor a maximum length of notice is prescribed. In any case the Treasurer may from time to time amend his notice by naming a later date : s. 13 (1) and (2). When the date arrives all the Australian shares are, by force of the Act, to be vested in the Commonwealth Bank : s. 13 (3). Further, the Commonwealth Bank is to become the shareholder for all purposes and is to be a member of the banking company, notwithstanding any provisions in that company's articles or charter : s. 14 (1) and s. 10. It has been pointed out that before the notice takes effect it may have ceased to be true that a majority of shares is situated in Australia and that nevertheless the notice would operate to vest such shares, if any, as continued to be situated here.

But, again, that does not seem to me to be of much importance. On the other hand, a provision is made for the possibility of shares that are situated out of Australia, when the notice takes effect, afterwards obtaining an Australian situation. Upon that happening the shares at once vest in the Commonwealth Bank. Upon the vesting of shares the Commonwealth Bank becomes the shareholder and a member of the company in respect of the shares, notwithstanding any provisions of the articles of association or charter : s. 14 (1) and s. 10. Compensation is, of course, to be paid for the shares that vest in the Commonwealth Bank : s. 15 and ss. 37-40.

The directors and officers of a private bank are required, under heavy penalty, to do and join in doing all acts or things necessary or convenient to do for or in relation to the acquisition under the Act of any shares in a private bank : s. 60 (1) (*b*). This doubtless would cover the placing of the Commonwealth Bank on the share register. The provision overruling the articles in the foregoing respects would be not unimportant practically because all the private banks have articles restricting or qualifying the right of

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transfer, either by interposing the discretion of the directors or by limiting the number of shares that one member may hold or, in the case of the Bank of New South Wales, by confining membership to natural persons.

Another provision that would be necessary if the private bank in which the shares are acquired is to carry on business as a separate entity, is s. 21, which purports to exclude the operation of so much of the State Company law as attaches consequences to the number of members falling below a specified figure, e.g. the liability of the continuing members after six months to the debts of the company and the liability of the company to winding up, which under Victorian law arises when the number of members falls below five. Upon the day the gazetted notice has fixed for the vesting of the shares the directors of the company go out of office, receiving compensation: s. 17. Thereupon the Governor of the Commonwealth Bank, with the approval of the Treasurer, appoints directors in their place, including a Chairman: s. 18. They hold office notwithstanding any lack of qualification or any disqualification: s. 18 (2). But they are removable by the Governor of the Commonwealth Bank with the approval of the Treasurer: s. 33 (4) of the *Acts Interpretation Act* 1901-1941. In the directors so appointed is placed full power to manage, direct and control the business and affairs of the private banking company: s. 19 (1). The exercise of any such power is to be in their sole discretion: it is not to be subject to any qualification, restriction or condition provided by or under any law, charter or other instrument relating to the exercise of the powers of the directors of the private banking company: s. 19 (3). There is some dispute as to the extent of this exclusion, that is to say, whether it excludes the principles or rules of law and equity which control directors in the exercise of their powers or only written enactments and provisions of the company's charter or articles. It is a point of small moment, I should think. For, in any case, a very full statutory discretion is given to the nominee directors in the exercise of statutory powers as wide as, and perhaps even wider than, the company's corporate powers. Short of dishonesty it is difficult to see on what ground they could be controlled. But perhaps the words "or other instrument" make it proper to understand the exclusion as operating only upon what may be called the *lex scripta* of the company and not upon the *lex non scripta*, though the distinction must in some respects be difficult to maintain. Theoretically it may remain necessary that they should remember the shareholders and the creditors in making their decisions, but practically they would be a body of

administrators appointed by and removable by the Treasurer and the Governor of the Commonwealth Bank in combination and designated for a provisional task which, humanly speaking, they could hardly be expected to consider otherwise than as one to be executed in furtherance of governmental policy. The wide general power with which the nominee directors are invested is followed by a particular statement of three specific powers, viz., (*a*) to declare dividends; (*b*) to dispose of the business in Australia of the Australian private bank to the Commonwealth Bank; (*c*) to dispose of all or any other business of the Australian private bank. As the general power invests the nominee directors with what seems to be the full capacity of the banking company to which they are appointed, the particular powers probably add nothing; but apparently they are, as so often, mentioned specially to avoid any doubt. It will be noticed that a combination of the second and third of the powers would cover the disposal to the Commonwealth Bank of the entire business of the private banking company both within and beyond Australia. Further, if any of the Australian private banking companies should develop an additional and separate business falling outside the conception of banking, as it is suggested they might do in some events arising from the operation of the Act, then, unless the powers were read down artificially, they would cover that business. The nominee directors would, I think, be subject to s. 22 so that, if a notice were given to the private banking company inviting it to make an agreement with the Commonwealth Bank for the taking over by the latter of the business of the former, the nominee directors might comply with it within the specified time or might, by failing so to agree, deprive the shareholders of the taxation benefits which under s. 23 ensue from agreeing. An argument to the contrary was based on the apparent incongruity of s. 22 (8) (*c*) and (*d*) and of s. 22 (7) with the words of s. 19 (1) (*b*) "the business in Australia." But exactly the same words occur in s. 22 (1) and (5) to which s. 22 (8) is epexegetical. Further, sub-par. (*c*) of s. 19 (1) covers a provision under s. 22 (7), even if the general power is not enough. There seems to me to be no incompatibility between the direction in s. 19 (2) requiring the approval of the Treasurer after a recommendation of the Governor of the Commonwealth Bank and that in s. 22 (5) requiring the approval of the Treasurer. The latter is of general application and includes all banks, English as well as Australian and is concerned with the purchaser's side. Any other view of the relation of s. 19 (1) (*b*) and (*c*) would exclude ss. 23 and 49 et seq. from an agreement made thereunder. The nominee directors

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might also be encouraged to make an agreement by a notice under s. 46 (4) to cease carrying on banking business. Further, under s. 43 (1) the nominee directors might agree on the compensation for the taking over of the business or under s. 44 (3) they might fail to require the Commonwealth Bank to refer the claim to the Court of Claims and conclude the private banking company by a course of inaction which, assuming the provision to be valid, causes the Commonwealth Bank's offer to be deemed to have been accepted.

From the foregoing account of the material provisions of Divisions 2 and 3 of Part IV. and the relation thereto of ss. 22, 46 (4) and 43 (1) and 44 (3), it will be seen that a notice by the Treasurer under s. 13 (1) operates to set in motion a process which expropriates the shares localized in Australia and at the same time displaces the authority over the affairs of the company, not only of the directors chosen by the shareholders, but of the shareholders themselves. It places all the property and all the activities of the company under the supreme control of the nominees of the Treasurer and the Bank and leaves them in entire control indefinitely with complete powers of disposition and complete power to bind the company as to the recompense it will receive for its assets. The corporate entity of the company remains and in it the legal property in the assets continues to reside. Shareholders are entitled to dividends if the nominees see fit to declare any. In a winding up, if there be one, shareholders remain entitled to participate as contributories. But in all other respects the beneficial enjoyment and control of the undertaking has been placed in the hands of agents of the Commonwealth, or of the Commonwealth Bank if the distinction is insisted on and in this matter can be clearly maintained. The purpose of removing the directors appointed by the shareholders and replacing them with nominees of the Treasurer and of the Governor of the Bank is that agents of the Commonwealth may take command of the undertaking of the banking company and carry it on in the public, as opposed to private, interests pending decisions, in which they will play a part, concerning the acquisition of the assets by or their disposal to the Commonwealth Bank, the settling of the amount of compensation or the purchase price, and the transfer of the staff. The purposes of the whole operation authorized by Division 3 appear to me to be public. No doubt there is no interference with the ultimate right of the shareholders as contributories in a winding up to receive as a component of the distributable surplus so much profit as may have been earned under the regime of the nominees and as they have not chosen to distribute

as dividend. But that and the legal conceptions involved in the continuance of the corporate existence of the banking company as the repository of the title to the undertaking is all that is left. In other words the undertaking is taken into the hands of agents of the Commonwealth so that it may be carried on, as it is conceived, in the public interest. The company and its shareholders are in a real sense, although not formally, stripped of the possession and control of the entire undertaking. The profits which may arise from it in the hands of the Commonwealth's agents are still to be accounted for and in some form they will be represented in what the shareholders receive. But the effective deprivation of the company and its shareholders of the reality of proprietorship is the same. It must be remembered that complete dispositive power accompanies the control of the assets which passes to the nominees. It is as if an intending purchaser were enabled to put a receiver in possession of an estate and also to take a power of sale in the receiver's name, remaining however accountable, until he pays the purchase money, for the rents and profits, which nevertheless he may apply towards the upkeep of the property and, subject thereto, accumulate.

Upon consideration I have reached the conclusion that this is but a circuitous device to acquire indirectly the substance of a proprietary interest without at once providing the just terms guaranteed by s. 51 (xxxi.) of the Constitution when that is done.

I take *Minister of State for the Army* v. *Dalziel* (1) to mean that s. 51 (xxxi.) is not to be confined pedantically to the taking of title by the Commonwealth to some specific estate or interest in land recognized at law or in equity and to some specific form of property in a chattel or chose in action similarly recognized, but that it extends to innominate and anomalous interests and includes the assumption and indefinite continuance of exclusive possession and control for the purposes of the Commonwealth of any subject of property. Section 51 (xxxi.) serves a double purpose. It provides the Commonwealth Parliament with a legislative power of acquiring property: at the same time as a condition upon the exercise of the power it provides the individual or the State, affected with a protection against governmental interferences with his proprietary rights without just recompense. In both aspects consistency with the principles upon which constitutional provisions are interpreted and applied demands that the paragraph should be given as full and flexible an operation as will cover the objects it was designed to effect. Moreover, when a constitution undertakes

(1) (1944) 68 C.L.R. 261.

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to forbid or restrain some legislative course, there can be no prohibition to which it is more proper to apply the principle embodied in the maxim *quando aliquid prohibetur, prohibetur et omne per quod devenitur ad illud.* In requiring just terms s. 51 (xxxi.) fetters the legislative power by forbidding laws with respect to acquisition on any terms that are not just.

In my opinion the provisions of s. 13 (1) and ss. 17, 18, 19 amount to an indirect means of doing what the paragraph does not allow.

It may be true that a probability amounting nearly to a certainty exists that if a notice under s. 13 (1) takes effect at least a majority of shares in the banking company against which the provision is employed will vest in the Commonwealth Bank. But unless all the shares so vest, interests will remain outstanding in the other shareholders which are sufficient to exclude the answer that substantially the undertaking passes to the Bank as shareholder under s. 13 (3) and therefore that what is done under ss. 17-19 does not matter. Nor is this point met, as it appears to me, by saying that once the nominee directors are established in office they may close the share registers abroad and place the shares upon the Australian register and so give the shares a situation in Australia, in consequence of which they will vest in the Commonwealth Bank pursuant to s. 13 (4). The nominees are not compelled to do so and they may prefer not to do it. At all events until they do so there will be outstanding interests that make it useless for the Commonwealth to attempt to " lift the veil " which the distinct personality of the private bank as a corporation places between the shareholders and the ownership of the undertaking. The foregoing examination of ss. 13 (1), 17, 18 and 19 is concerned with their operation in placing agents of the Commonwealth or of the Commonwealth Bank in control of the undertaking and arming them with powers. From that point of view I think they amount to an attempt to defeat the operation of s. 51 (xxxi.). But the powers of disposition given by s. 19 are themselves open to independent attack under s. 51 (xxxi.). They are exercisable in favour of the Commonwealth Bank. When they are so exercised the Commonwealth Bank will acquire the Australian business of the private banking company in respect of which s. 13 (1) has been invoked or perhaps the whole undertaking of that company. It will do so on terms agreed between the nominees whom the Governor of the Commonwealth Bank has appointed with the approval of the Treasurer. Further, if the Treasurer gives a notice under s. 22 (1) and, whether before or after that notice, the nominees are appointed in consequence of a notice given under s. 13 (1), the nominees may make an agreement under

s. 22 (5), or they may suffer an acquisition under s. 24 (4) and agree on the compensation under s. 43 (2), or fail to request a reference to the Court of Claims under s. 44 (3) and so accept the offer of the Commonwealth Bank. I cannot see how the powers of the nominees under s. 19 can be reduced by any process of interpretation based on s. 6 so as to avoid all or any of those positions.

In my opinion each of them involves a conflict with s. 51 (xxxi.).

In each case the amount payable by the Commonwealth Bank for the assets of the private bank is left to the judgment of the nominees of the Commonwealth Bank. However high may be the level to which their legal duty may be raised, even if they be treated as full fiduciaries for the creditors and shareholders, it is all left to their judgment. In every case the acquisition by the Commonwealth Bank should, in my opinion, be regarded as on the side of the company an involuntary disposition. For it would, I think, be quite wrong for the purposes of s. 51 (xxxi.) to separate out the steps by which it is accomplished and exclude from consideration the compulsory superseding of the company's directors chosen by the shareholders and the substitution of nominees of the Treasurer and the Governor. The fact that these officers may be free to act according to their own discretion in disposing of the company's assets or in binding it to an amount of purchase money as compensation, appears to me to be nothing to the point. They are not agents appointed by the company. Any relation of agency on behalf of the company is compulsory and the work of statute. Their appointment would have been against the authentic will of the company. In substance they are agents of the Commonwealth armed by statute with power to bind the company. I think that the powers conferred by s. 19 involve a conflict with s. 51 (xxxi.).

An argument was advanced to the effect that s. 19 (1) (*b*) and (*c*) might be held bad and severed from the rest of the section and from Division 3. This contention must encounter the difficulty that the general words of s. 19 necessarily enable the nominees to dispose of the assets of the private bank and the further difficulty that it is under them that the nominees would bind the private bank to an amount of compensation. No doubt sub-s. (2) of s. 19 provides a cogent argument against the doing under the general words of the very thing mentioned in paragraphs (*b*) and (*c*) of sub-s. (1). But those paragraphs relate to disposing of the business in Australia and the business elsewhere as going concerns.

I cannot see how by any manipulation the general power in s. 19 (1) can be so reduced as to include no power of disposing of any assets to the Commonwealth Bank or any other organ of the

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Commonwealth and no power of agreeing upon purchase money pursuant to s. 22 or binding the private bank in respect of compensation under ss. 43 and 44.

Further, if s. 19 were eliminated by some application of s. 6, the nominees would still be directors and enjoy whatever powers the constating instruments of the particular company gave its directors. These, in the case of most of the Australian banks, are of the widest description.

It appears to me to follow that s. 18 must also be treated as bad and as it is quite impossible to treat the removal of the directors under s. 17 as independent of their replacement by nominees under s. 18, s. 17 must fall also. The fate of s. 20 is doubtless immaterial but obviously it cannot survive the invalidity of ss. 17-19.

A curious and difficult question then arises concerning the operation of s. 6 in respect of s. 13. It is a question which turns in some measure upon the source of the positive power which, independently of the limitation expressed by the requirement of just terms, would support Divisions 2 and 3.

So far I have discussed the validity of Division 3 upon the assumption that, but for a conflict with that requirement, it would or might amount to an exercise of the legislative power of the Commonwealth. Division 2 contains in s. 13 an acquisition of property, namely shares, which of course must be supported under s. 51 (xxxi.) or not at all. But s. 51 (xxxi.) is itself dependent upon other legislative powers, in the sense that the acquisition upon just terms " with respect to " which it authorizes the making of laws must be for a purpose " in respect of which the Parliament has power to make laws." Now, if the provisions of s. 13 and ss. 17-19 had not been in conflict with the requirement of just terms or any other similar general limitation or check upon legislative power and their validity had depended only upon their falling under some head of affirmative power, I think that I should have felt no great difficulty. For, if it were possible to take them together and consider them as forming an entire plan, coherent and connected, then I think that, having regard to the interpretation of s. 51 (xiii.) I have adopted, I would hold that together s. 13 and ss. 17-19 were enacted for the purpose of that power and were therefore justified by s. 51 (xiii.) and (xxxi.) in combination. The reason for such a conclusion is that the provisions appear to be directed to establish a control of a banking business or businesses by, in effect, government nominees and as a concomitant of that control to acquire the Australian shares in the bank affected. The same notice on its gazettal under s. 13 (1) accomplishes at one blow a double purpose.

It displaces the directors and thus removes all control by the agents of the shareholders, and for that matter all control by the shareholders themselves; at the same time it vests the Australian shares in the Commonwealth Bank. The purpose of so vesting the shares cannot be to give control through the voting strength they confer. For under ss. 17-19 all control by the shareholders and their chosen directors ceases. The nominees take charge and shareholding ceases to carry with it any means of affecting the management of the business or the choice of those whose responsibility it is. A shareholder from then on has no more significant place than a debenture-holder, if a place as significant. The Australian Banks are, as the heading of Part I of the First Schedule indicates, all incorporated in Australia, some under the law of one State, some under the law of another. It is not clear to me why s. 13 (1) was framed so as to require that the Treasurer should be satisfied that a majority of the shares are situated in Australia before he exercised the power it gives him. But I suppose it was felt that the acquisition of a majority of shares gave moral support for the steps prescribed by ss. 17-19. Perhaps also it facilitated the transition and led to less disturbance among investors. Constitutionally it does not seem to matter whether the Australian shares taken were a minority or whether no shares at all were taken. The reason could not have been in order that through a majority of shares control of the business of the company might be obtained. For in the first place a majority would not give control or even influence over the conduct of the business having regard to the articles or charter of most of the Australian Banks and, what is decisive, control was given by ss. 17-19 and in a manner inconsistent with the possession of shares or membership continuing to have a bearing upon any such question. But the acquisition of the Australian shares in a bank to which ss. 17-19 is applied would be a natural corollary and would form a relevant part of the plan, the whole of which would form a purpose for which laws could be made under par. (xiii.) of s. 51, and so under par. (xxxi.). What is material is that the basis of the plan is the control effected by ss. 17-19. That gives not only the foundation upon which the plan is based in point of purpose, but also that upon which it is justified as an exercise of affirmative constitutional power, by which I mean legislative power considered for the moment independently of just terms. Conclude, however, that ss. 17-19 are void as conflicting with just terms, as in my opinion they do. Then what becomes of the plan as an integral part of which s. 13 derived its constitutional support?

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Plainly it disappears. Section 13 stands as a mere acquisition of shares. It loses its place and its purpose as a concomitant of a change of control over the undertaking and must assume a new character. If it can be supported now as directed to an end within s. 51 (xiii.) and therefore one for which the legislative power of acquisition may be exercised, it must be in virtue of this new character. The relevance of a bare acquisition of shares to a power to make laws with respect to banking and for the acquisition of property for that purpose was sought in more than one possible relation. Influence upon policy: information as to policy: investment: these were some of them. I am not disposed to deny that in some circumstances these purposes may suffice to bring an acquisition of bank shares under this power. But in all cases where it is sought to connect with a legislative power a measure which lies at the circumference of the subject or can at best be only incidental to it, the end or purpose of the provision, if discernable, will give the key. Here it is only by shutting out Division 3 from view that it could be supposed that any of the suggested purposes was contemplated by Division 2. In its full setting to ascribe to s. 13 the purpose of providing the Commonwealth Bank with a suitable investment for its funds would be absurd. No less absurd would it be to attribute a purpose of placing it in the position of a shareholder in order to acquire information, to vote at meetings, or to influence the directors. The truth is that in its context there was only one real ground upon which s. 13 was relevant to the power and that ground has failed with the context. Can s. 6 not only require that provisions, although prima facie interdependent, should be construed as divisible and be separated accordingly, but also supply a new scope and object to the separated provision, a new purpose or relevance or, in other words, place it upon a fresh constitutional basis? It is to this question that I referred when I said that there arose concerning the operation of s. 6 in respect of s. 13 a curious and difficult question. My answer to it is that if s. 13 is to be segregated from ss. 17-19 in obedience to s. 6, it still remains necessary to refer it to the same constitutional basis of power. It is not open to ascribe fresh purposes to it, find another possible relevance to the subject. To do so would mean giving the provision a new operation for the purpose of saving it. It will be necessary to discuss a similar question more fully at a later point in this judgment where it is more convenient to deal with it. In the meantime, it is enough to say that s. 6 makes the fact that it would receive a different operation not inconsistent with severance: but that is altogether another thing. In my opinion s. 13 (3) was

not enacted either to enable the Commonwealth Bank to vote at meetings, or to receive or obtain the information to which a shareholder is entitled about the business of the company or otherwise to influence the conduct of the business by the directorate chosen by the shareholders. Nor was it enacted to provide an investment for the Commonwealth Bank. It was enacted as part of a plan aimed at the immediate control and ultimate absorption of the business and has no other constitutional purpose relevant to power. It must therefore fail with the plan. To place s. 13 (3) on any other basis would amount to " transforming it into one to which the Legislature has not given its assent," to use the words of *Duff* J. in delivering the reasons of the Privy Council in *Attorney-General for Ontario* v. *Reciprocal Insurers* (1).

I am of opinion that s. 13 is void and, of course, s. 14 (except so far as it relates to shares purchased), s. 15 and s. 16 have no basis but s. 13. It follows that Part IV., Division 2, except s. 12 and so much of s. 14 as relates to it, is invalid. I shall not stop to consider what remains of s. 14, for it hardly arises for separate consideration.

I shall proceed to deal with the validity of Part VI., Divisions 1 and 2, as they are affected by s. 75 (iii.) of the Constitution and, as part of the same matter, I shall go on to consider what consequences ensue from a conflict between those Divisions and s. 75 (iii.).

The Court of Claims is erected by Part V. as a superior court of record in which is vested part of the judicial power of the Commonwealth. The Parliament has created it pursuant to s. 71 of the Constitution and has defined its jurisdiction pursuant to s. 77. The jurisdiction of the court is to hear and determine claims for compensation under the Act (s. 33 (1) of the *Banking Act* 1947), a jurisdiction which covers, not only the ascertainment of the amount of compensation in respect to the shares or assets acquired, but the determination of the question who are entitled to be paid as interested parties (cf. s. 40 (4)-(8) and s. 38 (1) of the *Banking Act* 1947).

Both the ascertainment of the amount of, and the decision of the title to, compensation are thus treated as matters to be dealt with under the judicial power; and, whatever views may be held about the necessity of so treating the former of these two questions, there can be no doubt that the latter forms a claim of right which constitutionally cannot be determined conclusively without recourse to the judicial power.

The power to define the jurisdiction of a Federal Court which is given by s. 77 (1) of the Constitution is confined to the nine matters

(1) (1924) A.C. 328, at p. 343.

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of original jurisdiction enumerated in ss. 75 and 76. There can be no doubt, however, that claims for compensation are covered by the enumerated matters. The nine matters are not mutually exclusive categories and any given claim of right may fall within more than one of them. If a claim for compensation is not within s. 75 (iii.) as a matter in which the Commonwealth or a person being sued on behalf of the Commonwealth is a party, and that in the view I take is one of the cardinal questions in this part of the case, it would at least be a matter arising under a law made by the Parliament, namely under the acquisition provisions of the *Banking Act* 1947. But it is an aim of Part VI. to confine to the Court of Claims the entire jurisdiction to determine claims for compensation under the Act and much care and, indeed, ingenuity have been expended to secure that object. Section 77 (ii.) contemplates laws defining the extent to which the jurisdiction of a Federal Court shall be exclusive, but it is careful to limit the power to make such a law so that the Parliament may exclude only the jurisdiction of State Courts and not the jurisdiction of other Federal Courts. In the absence of any power positively to exclude the jurisdiction of other Federal Courts, which in effect means the High Court, for there is no other relevant Federal Court, the Act has been drafted with a view first to give claims for compensation a character placing them outside the descriptions of matters mentioned in s. 75, which confers original jurisdiction on the High Court, and second to provide a procedure for making and settling claims which will ensure that they do not get into the High Court. What is relied upon as placing claims for compensation outside the jurisdiction conferred by s. 75 (iii.) upon the High Court is that the liability to pay compensation is imposed upon the Commonwealth Bank in the first instance and not upon the Commonwealth itself, which is made liable only as a guarantor (ss. 15, 25, 40 (7), 45 of the *Banking Act* 1947 in combination and s. 61).

The procedure which, if valid, would, in the case of claims for compensation for the acquisition of assets, operate to ensure that the claims could not be put forward in the High Court, is prescribed by ss. 43 and 44. These provisions are governed by s. 42, which says that compensation in respect of the acquisition of assets shall be ascertained in no other manner. The effect of ss. 43 and 44 is, in default of agreement, to require the private bank to make a claim in writing to the Commonwealth Bank in response to which the latter must serve a notice specifying the amount of compensation which it is prepared to pay. Then, unless within two months the private bank requires the Commonwealth Bank to refer the claim to

the Court of Claims, the private bank is deemed to have accepted the offer and compensation will be payable to the private bank by the Commonwealth Bank according to the tenor of the notice. When the Commonwealth Bank is required to refer the claim to the Court of Claims it is to forward the claim to that court which must determine the compensation it thinks fair and reasonable. When the acquisition is of shares another procedure is provided, but the curial part of it is less specific. A compensation register is to be made up by the Commonwealth Bank from the share register of the private bank. Persons claiming interests not shown for the time being by the compensation register may, within two months of acquisition, give a notice and then the persons entitled to payment of compensation in respect of the acquisition of the shares affected must be determined by the court and not in any other manner. If a person claiming an interest who is not on the compensation register has failed to give a notice he is not to be entitled to compensation except in pursuance of an order of the Court of Claims. If no notice is given in respect of any shares the person on the compensation register is to receive the compensation. But in every case the amount of compensation must, unless agreed upon, be determined by the Court of Claims and not in any other manner (ss. 38, 39 and 40). It is in this way that an expropriated bank or shareholders must proceed for the recovery of the compensation for which it is constitutionally necessary to provide, if the power to make laws with respect to the acquisition of property on just terms is to be validly exercised. The acquisition is accomplished not by the Commonwealth Bank, but by the Treasurer as the responsible Minister. His notice under s. 13 (1) or s. 22 (1) divests the shares or assets and vests them in the Commonwealth Bank as a separate juristic person (s. 13 (3) and (4) and s. 24 (2), (4) and (6)).

The principal liability for compensation is imposed upon the Commonwealth Bank. That liability in default of agreement can be quantified and enforced in the Court of Claims and not otherwise. The liability of the Commonwealth considered as another legal entity may be ultimate, but it is to be secondary only. The question is whether this arrangement of the constitutionally indispensable responsibility for compensation can place the claim of the expropriated bank or shareholder outside the jurisdiction conferred by the Constitution upon the High Court in all matters in which the Commonwealth or a person sued on behalf of the Commonwealth is a party. As it is beyond the power of the Parliament to withdraw any matter from the jurisdiction conferred by s. 75 an enactment in so far as it attempts to do so must be invalid. The question stated

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depends primarily upon the interpretation of s. 75 (iii.). What is covered by the expression "the Commonwealth"? What is contemplated by the words "a person suing or being sued on behalf of the Commonwealth"? By the use of these expressions does the third paragraph of s. 75 intend to give a jurisdiction confined to matters in which the Crown exercising (through the Governor-General) the Executive power of the Commonwealth is itself a party, whether suing or sued in the name of the King or by the Attorney-General or some other officer or nominal party authorized for the purpose as a matter of procedure? Or, on the other hand, does the paragraph intend to place within the jurisdiction of the High Court all matters in which a claim of right is made by or against any part of the central government of the country in its executive department including the corporate and other agencies by which it is administered? Are the words "person suing or being sued on behalf of the Commonwealth" meant to cover not merely procedural representative but also officers and agencies (whether corporate or not) of the Commonwealth suing or sued as such in respect of causes of action enforceable by or against them in their official or governmental capacity?

It appears to me to be much more a question of what the jurisdiction was intended to embrace than a matter depending upon the characterization of the Commonwealth Bank as an agency of the Crown enjoying, as such, the Crown's privileges and immunities. It is true, of course, as a matter of logic that whatever meaning may be attached to s. 75 (iii.) its application to a claim against the Commonwealth Bank must depend on the relation found to exist between that corporation and the Executive Government of the Commonwealth. But that is not the same thing as inquiring whether the corporate entity is established for the use and service of the Crown, so that, for example, its occupation of property, if not that of the Crown itself, is for the behoof of the Crown, or so that those whom it employs are the servants of the Crown for whose torts the corporation is not responsible as the master, or so that debts due to the corporation are to be preferred in an administration of assets to which the common law rules of priority apply. Our familiarity with questions of this kind will naturally lead us to find an analogy in them and to seek for assistance in the formulas applied and in the considerations relied upon in the ever lengthening line of cases dealing with such questions. But beyond mentioning *Metropolitan Meat Industry Board* v. *Sheedy* (1); *City of Halifax* v. *Halifax Harbour Commissioners* (2); *Skinner* v. *Commissioner for*

(1) (1927) A.C. 899.

(2) (1935) S.C.R. (Can.) 215.

Railways (1) for the discussions and citations they contain, I shall not pursue the analogy. Such questions depend in the end upon the intention ascribed to the legislature establishing the corporate agency. It is within the province of the legislature to say whether the body it forms shall or shall not be suable for the torts of the persons employed in its work : to say whether it is or is not to enjoy this or that immunity or privilege of the Crown. It is true that the text of an enactment seldom contains any statement of intention, express or implied, upon the matter and that the solution is, more often than not, found in what the legislature has done in erecting the body, furnishing it with powers and subjecting it to control. But the question here depends upon the meaning and operation of an unalterable constitutional provision which the intention of the legislature cannot affect. Once the meaning and scope of the constitutional provision is ascertained its application depends on the legal situation, as it exists, of the corporate entity said to form part of, or an agency of, the central government. But, perhaps, before discussing the meaning of s. 75 (iii.), it is better to state shortly what is the position of the Commonwealth Bank. It took its existence from ss. 5 and 6 of the *Commonwealth Bank Act* 1911, which stated simply that a Commonwealth Bank to be called the Commonwealth Bank of Australia was thereby established, and that the Bank should be a body corporate with perpetual succession and a common seal and might hold land and might sue and be sued in its corporate name. Now it is governed by the *Commonwealth Bank Act* 1945 (No. 13), but that Act preserves the Bank and continues it in existence so that its corporate identity shall not be affected (s. 7). There is a Governor of the Bank and a Deputy Governor, who are appointed by the Governor-General in Council. The Bank is managed by the Governor and he directs what duties the Deputy Governor shall perform (ss. 23, 25 and 26). An Advisory Council is set up to advise the Governor with respect to the monetary and banking policy of the Bank and with respect to such other matters as the Governor may refer to it. The Advisory Council consists of the Secretary to the Treasury, the Deputy Governor, two other respresentatives of the Treasury appointed by the Governor-General in Council, and two officers of the Bank appointed by the Treasurer on the recommendation of the Governor (s. 29). The Bank's officers are organized as a Commonwealth Bank Service to which appointments are made by "the Bank" (Part XIII.). By s. 8 it is declared that it shall be the duty of the Commonwealth Bank, within the limits of its powers, to pursue a

(1) (1937) S.R. (N.S.W.) 261, at pp. 269, 270.

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monetary and a banking policy directed to the greatest advantage of the people of Australia and to exercise its powers under the *Commonwealth Bank Act* 1945 (No. 13) and the *Banking Act* 1945 (No. 14) in such manner as in the opinion of the Bank will best contribute to (*a*) the stability of the currency of Australia; (*b*) the maintenance of full employment in Australia; and (*c*) the economic prosperity and welfare of the people of Australia. By s. 9 the Bank is required from time to time to inform the Treasurer of its monetary and banking policy. If there is difference of opinion between the Bank and the Government as to whether that policy is directed to the greatest advantage of the people of Australia the Treasurer and the Bank must endeavour to reach agreement; but if they do not, then the Treasurer may inform the Bank that the Government accepts responsibility for the adoption by the Bank of a policy in accordance with the opinion of the Government, whereupon the Bank must give effect to that policy. The functions of the Bank cover a wide field. It is the Central Bank and financial agent of the Government (Part III.). It prints, issues and controls the notes which form the currency of the country for any denomination above two shillings and are of course expressed in the name of the Commonwealth and made legal tender throughout Australia (Part VII.). It carries on general banking business. Distinct divisions of the Bank are established and treated almost as separate entities with their own capital funds and accounts. Thus there is a Rural Credits Department to make advances in connection with the production and marketing of primary produce (Part VIII.); a Mortgage Bank Department to make loans upon the security of land used for agricultural or pastoral pursuits to those engaged in primary production (Part IX.); and an Industrial Finance Department to lend money and give assistance and advice for the establishment and development of industrial undertakings, particularly small undertakings (Part X). The General Banking Division is, moreover, charged with the function of lending money at the lowest practicable rates of interest to individuals and building societies for the erection and purchase of homes and for the discharge of mortgages on homes.

There is an express declaration that the Commonwealth Bank shall not be liable to Federal land or income tax or to any State taxation to which the Commonwealth is not subject (s. 183). Under the bankruptcy law there is no preference to Crown debts in virtue of the prerogative and, except for land and income tax, the Crown has no statutory rank above ordinary creditors; but s. 187 of the

Commonwealth Bank Act 1945 gives a preference to the Commonwealth Bank in the winding up of other Banks.

The powers of regulation and control of monetary policy and affairs taken by the *Banking Act* 1945 (No. 14) are for the most part vested in the Commonwealth Bank. It exercises the function of stepping in to protect depositors if there is reason to fear the failure of a trading bank (Part II., Division 2): of directing the amount of the increase in assets of a trading bank that must be lodged with the Commonwealth Bank as a special account (Part II., Division 3): of acquiring compulsorily from trading banks excess balances of foreign currency (Part II., Division 4): of acquiring gold and of licensing the sale or export of gold (Part IV.): of regulating interest rates charged by banks (Part V.): and of making recommendations to the Treasurer as to the exercise of his power to allow or disallow an amalgamation of banks or a reconstruction (s. 51).

Although the Commonwealth Bank is declared to be a body corporate there are no corporators. I see no reason to doubt the constitutional power of the Federal parliament, for a purpose within its competence, to create a juristic person without identifying an individual or a group of natural persons with it, as the living constituent or constituents of the corporation. In other legal systems an abstraction or even an inanimate physical thing has been made an artificial person as the object of rights and duties. The legislative powers of the Commonwealth, while limited in point of subject matter, do not confine the legislature to the use of existing or customary legal concepts or devices, that is, except in so far as a given subject matter may be defined in terms of existing legal conceptions, as perhaps in some respects may be the case in, for example, pars. (ii.), (xii.), (xiv.), (xvii.), (xviii.), (xxiv.) and (xxv.) of s. 51. The matter was considered to some extent in *Heiner* v. *Scott* (1) where *Griffith* C.J. said: "I pass by the question whether in the nature of things it is competent for the Commonwealth Parliament to declare that such an abstraction dissociated from any material persons shall be regarded as a corporation, and will assume that it is, and that the Bank is a real entity cognizable by law. Probably the true effect of the Act is a declaration that the Commonwealth may itself carry on the business of banking under the name of the 'Commonwealth Bank of Australia'". *Isaacs* J., speaking for himself and *Gavan Duffy* and *Rich* JJ., said (2): "We do not think the Act constitutes the Bank universally the agent of the Commonwealth in the sense necessary to make all its acts the acts of the Commonwealth itself—in other words Sovereign Acts.

(1) (1914) 19 C.L.R. 381, at p. 393. (2) (1914) 19 C.L.R., at p. 400.

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In respect of sub-s. (*c*) of s. 7 (cf. s. 17 (2) and s. 13 (*b*) of the present Act), its personality is kept distinct from that of the Commonwealth. In respect of some of its functions and obligations, it may or may not be identified with the Commonwealth—a matter for possible future consideration."

Both in respect of its powers or its purposes and its executive control the Commonwealth Bank was then differently constituted. But the difficult conception of an organ sometimes acting as part of the Commonwealth and sometimes not is to be explained less by the manner in which the Commonwealth Bank was constituted than by the conditions the learned judge had in mind as necessary or sufficient to give immunity to the operations of a Federal governmental agency. It is indeed an illustration of the difference in the legal purposes for which an examination of the relation between a governmental agency and the executive government may be necessary and of the fallacy of supposing that the question lies in the characterization of the agency rather than in determining the scope and operation of the principle, or the meaning and extent of the category, the application of which is in controversy.

Here the attributes of the Commonwealth Bank as an agency of the Federal Government, though unusual, are clear enough. If it is to be compendiously described, it is an organized service of government given a separate legal personality, in virtue of which it owns property, incurs duties and obligations and enjoys rights, set up as the banking and monetary authority of the country and charged with the functions of currency control, central banking, exchange control and ordinary general banking, together with some superadded responsibilities of providing financial aid to production and industry, and placed under the administrative direction and authority of its chief officer, to whom is given a greater degree of independence than the permanent head of a department, but who is bound ultimately to carry out the policy prescribed by his responsible Minister.

The matter comes back to the question whether such an organ is within the scope of the expression "the Commonwealth or a person sued on behalf of the Commonwealth." The "Commonwealth" means the central Government of the country. It is perhaps strictly correct to say that it means the Crown in right of the Commonwealth. But it must be borne in mind that the dual system of government, which is of the essence of federation, involves a legal recognition of the distinct existence of the component polities. It would be difficult otherwise to accomplish a distribution

among them of defined powers and authorities by means of a supreme law enforceable by the courts.

The Constitution sweeps aside the difficulties which might be thought to arise in a federation from the traditional distinction between, on the one hand the position of the Sovereign as the representative of the State in a monarchy, and the other hand the State as a legal person in other forms of government (see per *Cairns* L.J. in *U.S.A.* v. *Wagner* (1) and goes directly to the conceptions of ordinary life. From beginning to end it treats the Commonwealth and the States as organizations or institutions of government possessing distinct individualities. Formally they may not be juristic persons, but they are conceived as politically organized bodies having mutual legal relations and amenable to the jurisdiction of courts upon which the responsibility of enforcing the Constitution rests. It is from this point of view that the interpretation of s. 75 must be approached. Moreover, the nature of the instrument in which the provision is found is not to be ignored. It is devoted, even in the judiciary chapter, to broad propositions in the field of government and it is hardly likely to concern itself with peculiarities of procedure. The purpose of s. 75 (iii.) obviously was to ensure that the political organization called into existence under the name of the Commonwealth and armed with enumerated powers and authorities, limited by definition, fell in every way within a jurisdiction in which it could be impleaded and which it could invoke.

Section 75 (iii.) cannot be read without s. 75 (v.) which, it is apparent, was written into the instrument to make it constitutionally certain that there would be a jurisdiction capable of restraining officers of the Commonwealth from exceeding Federal power. There is the strongest presumption that in using the expression " or person suing or being sued on behalf of the Commonwealth " the framers of the Constitution were not concerned with the Attorney-General or any other officer by or through whom the Crown might come or be brought into court. In s. 75 (iv.), referring to the States as parties, there is no concern on this procedural topic. But what they were concerned with was amenability to the jurisdiction of persons in whom causes of action were vested, or against whom causes of action lay, but in their official capacity only and as agencies or emanations of the Commonwealth. This view is completely confirmed by the history of the provision, which explains, if indeed it does not illuminate, the whole matter. The source of s. 75 lies in Article III., s. 2, of the Constitution of the

(1) (1867) L.R. 2 Ch. 582, at pp. 593, 594.

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United States. So much of Article III. as supplied the basis of par. (iii.) of s. 75 runs : " The judicial power shall extend to . . . controversies to which the United States shall be a party." The doctrine that a sovereign government cannot be impleaded without its own consent had a firm hold in America and was applied at once to the United States itself. Moreover, by what to us may seem a paradox, the procedure by way of petition of right was rejected as belonging only to a monarchical, and not to the republican, form of government. It was necessary that the consent to suit should be granted by an enactment of the legislative organ of government. As Congress made no general law conferring rights of suit against the United States outside the Court of Claims, the question whether a cause of action put in suit amounted to a controversy to which the United States was a party usually presented itself as a claim that no action lay, made by the defendant or party impleaded, or perhaps made on the intervention of the United States Attorney-General. In consequence of the Eleventh Amendment corresponding questions arose as to what amounts to a suit against a State. It is perhaps a somewhat striking illustration of the difference in the British outlook upon government immunity from suit, that this Court treated s. 75 as involving liability on the part of the States to suit and for reasons which would apply equally to the Commonwealth : *Commonwealth* v. *New South Wales* (1); cf. *Werrin* v. *The Commonwealth* (2). In the United States the general doctrine that the servant or agent of the executive government is personally liable and may be sued in respect of any act or omission on his part not justified by law and that the directions or authorization of the Government afford him no protection was treated as a correlative of the immunity of the United States from suit, sufficiently mitigating the harshness of the operation of the doctrine of immunity. But naturally this gave rise to a readiness to admit proceedings against officers and agencies of the United States in respect of claims in which they had little or no personal interest but in which the United States was deeply interested as the party really affected. A celebrated case was that in which the Arlington estate was recovered in ejectment by General Robert E. Lee's son claiming as devisee of his grandfather, G. W. P. Custis. The United States claimed the land, which formed the national cemetery, under a title consisting of a tax sale certificate, held in the event to be void. Notwithstanding a suggestion filed by the Attorney-General alleging that the land was held, occupied and

(1) (1923) 32 C.L.R. 200, at pp. 213-216.

(2) (1938) 59 C.L.R. 150, at pp. 165-168.

possessed by the United States, ejectment was successfully maintained against the officers controlling the land, the United States not being a party upon the record. Four of the justices took the view that once it was made to appear, by the interposition of the Attorney-General, that possession and occupation was that of the United States and the defendants named on the record held only as officers of the United States, it was not competent for the Court to proceed to judgment in what was in truth a proceeding against the United States. Five took the view that as the United States could not be joined and as its title was void, the defendants in actual occupation could not resist the action on the ground of the official capacity in which they held: *United States* v. *Lee* (1). In *Osborn* v. *Bank of the United States* (2) *Marshall* C.J. had said, after referring to "controversies to which the United States is a party": "It may, we think, be laid down as a rule which admits of no exception, that, in all cases where jurisdiction depends upon the party, it is the party named in the record." But to this proposition experience showed that it was hardly possible to adhere: see *Minnesota* v. *Hitchcock* (3). Thus suits to restrain the Secretary of the Interior from acting in a particular way in the execution of his office have been held to be suits against the United States: *Oregon* v. *Hitchcock* (4); *Naganab* v. *Hitchcock* (5). And so have suits against officers of the United States to restrain the use by them in the course of their duties of articles belonging to the United States alleged to be infringements of patents: *Belknap* v. *Schild* (6); *International Supply Co. of New York* v. *Bruce* (7). But it is clear that great difficulty has been experienced by the courts in America in maintaining a distinction between cases in which the suit is against the official in respect of acts for which he is himself responsible to the plaintiff and those in which it is sought to affect the interests of the United States by suing him in his official capacity. The distinction must rest upon the conception that, although in both cases the cause of action is necessarily against the officer or agent who is the defendant on the record and therefore depends upon actual or threatened wrongful acts or omissions on his part, in the one case the complaint is against him personally while in the other he "represents" the government. Where the defendant on the

(1) (1882) 106 U.S. 196 [27 Law. Ed. 171].
(2) (1824) 22 U.S. 738, at p. 857 [6 Law. Ed. 204, at p. 232].
(3) (1901) 185 U.S. 373, at p. 386 [46 Law. Ed. 954, at p. 962].
(4) (1906) 202 U.S. 60 [50 Law. Ed. 935].
(5) (1906) 202 U.S. 473 [50 Law. Ed. 1113].
(6) (1896) 161 U.S. 10 [40 Law. Ed. 599].
(7) (1904) 194 U.S. 601 [48 Law. Ed. 1134].

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record denying jurisdiction was not an individual but an incorporated agency of the United States, or of a State, the question of its amenability to suit wore a double aspect. Is the agency of such a character as to share in the immunity of the United States or of the State ? Had the legislature made it suable and waived the immunity ?

It is not to be expected that in the practical decision of cases these two questions would be kept clearly separate. But now it is definitely laid down that it is not enough that a corporate agency has been created by Congress for the execution of some governmental purpose or power, even if the usual authority to sue and be sued in the corporate name is omitted : congressional intention must be interpreted in the light of congressional policy, seen in a course of legislation which is uniformly against denying to the citizens a remedy against such an agency, and also in the light of contemporary opinion : *Keifer* v. *Reconstruction Finance Corporation* (1). But the courts seem to have assumed that a corporate agency set up by statute may be so much a department of government that, unless a positive indication of a contrary intention is found, it shares in the immunity : see *Annotation*, 83 Law. Ed., at pp. 796, 797.

From all this it is apparent that when the framers of the Commonwealth Constitution took up the study of the Constitution of the United States with a view to modelling upon it the new Australian instrument of Government, and reached the clause in question, the first difficulty they must have encountered was to say how stood suits against officers and agents of the United States. We may be permitted to know as a matter of history that what is now s. 75 (iii.) appeared in its present form in the draft Constitution presented at the Convention of 1891 and that before it so emerged it had gone through the hands of Sir *Samuel Griffith* who had before him the report of the Judicial Committee over which *Inglis Clark* J. presided.

Anyone who takes Article III. of the American Constitution and acquaints himself with the difficulties that arose under it and the manner in which they were dealt with by the Supreme Court and Congress and then compares it with Chapter III. of our Constitution will at once see that the text of the latter is the outcome of much knowledge of the judicial exegesis by which judicial power of the United States has been defined. The addition of the words " or a person suing or being sued on behalf of the Commonwealth " appear appropriate to ensure that the jurisdiction over matters in which the Commonwealth is a party should not be limited to cases

(1) (1939) 306 U.S. 381, at pp. 388-391 [83 Law. Ed. 784, at p. 790].

in which the Commonwealth is a party on the record and to ensure that on the contrary it covered officers and agencies of the Government sued or suing in their official or governmental capacity such as those whose position had been the cause of so much trouble in the United States. The idea of the immunity of the Commonwealth was probably rejected altogether (cf. *Commonwealth* v. *New South Wales* (1)) but, in any event, s. 78 was introduced enabling the Parliament to confer rights of suit ; and there could be little doubt that the Commonwealth would have no such privilege. The framers of the Constitution, concerned as they would be with giving a sufficiently wide jurisdiction, could not but perceive the possible limiting effect of the American case law. At all events, the purpose of providing a jurisdiction which might be invoked by or against the Commonwealth could not, in modern times, be adequately attained and secured against colourable evasion, unless it was expressed so as to cover the enforcement of actionable rights and liabilities of officers and agencies in their official and governmental capacity, when in substance they formed part of or represented the Commonwealth.

It may be true that the restrictive interpretation or application of the conception of the " United States " arose in America from the fact that to widen it would be to enlarge an unjust immunity or privilege. Indeed, *Frankfurter* J. for the Court in *Keifer's Case* (2), speaking of the principle that the United States could not be sued without the consent of Congress, said : " But because the doctrine gives the Government a privileged position, it has been appropriately confined. Therefore, the Government does not become the conduit of its immunity in suit against its agents or instrumentalities merely because they do its work." But however it may be explained, the result held a lesson for the Australian Constitution makers.

There is no reason to treat the words in question as anything but an endeavour to ensure that, for the purposes of the jurisdiction, the conception of the Commonwealth included the agents and instrumentalities of the Commonwealth suing or being sued in their official or governmental capacity and so " on behalf of the Commonwealth." In my opinion so understood the provision covers the Commonwealth Bank as a corporate agency of the Commonwealth, appointed, as it has been, to take over the assets of the private banks and correspondingly to meet the claim for compensation for the acquisition. That it is so appears to me inevitably to follow from the description of its nature and functions that I have already

(1) (1923) 32 C.L.R. 200.

(2) (1939) 306 U.S. 381, at p. 388 [83 Law. Ed. 784, at p. 788].

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given. Much support for this conclusion is contained in one well-known opinion in the Supreme Court of the United States to which I shall give a reference. It is the judgment of *Story* J. in *Briscoe* v. *Bank of Kentucky* (1). The persuasive authority of that great lawyer's view may be lessened by the fact that he was a dissentient, but this part of his opinion appears to me to be convincing and is much in point. It is to be remembered that the majority decision has been held to mark the beginning of a period of deviation from the broad interpretation established by *Marshall* C.J.: see *Willoughby, Constitutional Law of the United States*, 2nd ed. (1929), vol. 1, p. 134; *Wright, Growth of American Constitutional Law*, pp. 51 and 61.

For these reasons I think that the jurisdiction which the Constitution gives to the High Court embraces claims for compensation for the acquisition of shares pursuant to s. 13 or of assets pursuant to s. 24, notwithstanding that the primary liability to pay compensation is imposed on the Commonwealth Bank and only the secondary liability on the Commonwealth by name.

I have dealt with the effect of s. 75 (iii.) somewhat fully because the consequences upon the Act of the conclusion I have adopted that a claim for compensation falls within the jurisdiction bestowed on this Court by that provision are in my opinion far-reaching. This arises from the fact that under the Constitution any provisions for the acquisition of property must be void unless they are accompanied by a valid provision affording just terms and from the further fact that for some reason the Act is most explicit in making the ascertainment of compensation dependent exclusively either upon agreement or upon proceedings in the Court of Claims. A provision making compensation, in default of agreement, exclusively dependent upon the judgment of the Court of Claims cannot be valid when the Constitution places a claim for such compensation within the jurisdiction of the High Court and, unless the chain of consequences which is thus set up is interrupted at some point by severance, it must mean that the acquisition provisions are destroyed by the invalidation of the compensation provisions constituting the just terms constitutionally indispensable to valid acquisition.

Whether there can be a severance and at what point of the relevant provisions of the Act depends upon the legal operation of s. 6 of the Act and its application to the structure of the portions of the Act that are in question. Whether one provision of an enactment may survive the invalidation of another is a matter sometimes controlled by the Constitution, as for example, if an

(1) (1837) 36 U.S. 257, at pp. 342-345 [9 Law. Ed. 709, at pp. 742-744].

attempt were made to authorize the acquisition of property without validly providing just terms, or, in a law imposing taxation, to deal with some other matter or to create a Federal court consisting of judges appointed for a term of years or otherwise than by the Governor-General in Council. But if the possibility of severance is not negatived or controlled by the Constitution, it becomes a question of interpretation how far the invalidity extends beyond what in itself is obnoxious to the Constitution, that is to say, how far the invalidity extends into apparently connected provisions which would not of themselves necessarily be invalid. For this reason, no doubt, s. 6 is framed as a statement of intention and not as a command addressed to the Court. The question of interpretation is whether, after the extent to which the intended operation of the enactment is invalid has been ascertained, it is nevertheless the expressed will of the legislature that the whole or any part of the rest of the intended operation of the enactment should take effect by itself as a law of the Commonwealth. In so stating the question I have preferred to speak of the two parts of the intended operation of the statute rather than of portions of its provisions capable and incapable of valid enactment. The latter way of stating the matter suggests that the problem is one of separating clauses or expressions. But more often than not, when a statute or statutory instrument goes beyond the Constitution the question for the Court is whether a provision too widely or generally expressed should be confined in its operation to so much of the subject it is capable of covering as is constitutionally competent to the legislature, or, as it is sometimes said, whether the general words are to be read and applied distributively: see *Jenkins* v. *The Commonwealth* (1); *Dawson* v. *The Commonwealth* (2); *Australian National Airways Pty. Ltd.* v. *The Commonwealth* (3); *Fraser Henleins Pty. Ltd.* v. *Cody* (4); *Shrimpton* v. *The Commonwealth* (5); *R.* v. *Poole*; *Ex parte Henry* (6) and the authorities cited in these cases.

In many jurisdictions where legislation is subject to the doctrine of ultra vires, statutory provisions are found governing the principle to be applied in deciding the extent to which the invalidity of part of an enactment or of its intended operation affects the remainder. In the absence of such a provision the rule is that legislation which

(1) (1947) 74 C.L.R. 400, at p. 403.
(2) (1946) 73 C.L.R. 157, at pp. 178, 181, 186.
(3) (1945) 71 C.L.R. 29.
(4) (1945) 70 C.L.R. 100.
(5) (1945) 69 C.L.R. 613, at pp. 628-630.
(6) (1939) 61 C.L.R. 634, at pp. 650-652.

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by a general collective expression covers objects some of which are and some of which are not within the scope of the power of the legislature, the whole must be considered bad. For although the test is one of intention, it cannot be presumed that Parliament gave its assent to a partial operation of its enactment. Thus unless Parliament has said otherwise, a uniform general rule including persons or matters some of which are outside the competence of the legislature must fall as a whole because there is no warrant for the introduction of unexpressed exceptions and limitations and only thus could the provision be given the more restricted operation. Further, if the invalid portion consists in or contains provisoes, qualifications, exceptions or conditions affecting the operation of the other provisions severance is impossible. In the same way the invalidity of a clause which would operate by way of relief, compensation or alleviation brings down the provisions to which it has this relation. All these matters were considered to be incompatible with the supposition that the provisions were meant to receive an independent or distributive operation or, at all events, they were thought to tend too strongly against such an assumption. It was not to be assumed that connected or associated provisions were enacted as separate expressions of the will of the legislature. No severance could be effected unless an inference that the provisions are not to be interdependent can be positively drawn from the nature of the provisions, from the manner in which they are expressed or from the fact that they independently affect the persons or things within power in the same way and with the same results as if the full intended operation of the legislation had been valid. See per *Isaacs* J. in *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Whybrow & Co.* (1) and in *Roughley* v. *New South Wales* (2); and per curiam in *Newcastle & Hunter River S.S. Co. Ltd.* v. *The Commonwealth* (3): see too *Vacuum Oil Co. Pty. Ltd.* v. *Queensland* [No. 2] (4).

The practice of introducing what are called "severability clauses" into legislation became common in the United States, where much consideration has been given to their operation and effect. See particularly *Williams* v. *Standard Oil Co. of Louisiana* (5); *Utah Power & Light Co.* v. *Pfost* (6); *Addison* v. *Holly Hill Fruits Products* (7); *Railroad Retirement Board* v. *Alton Railroad Co.* (8);

(1) (1910) 11 C.L.R. 1, at pp. 53-55.
(2) (1928) 42 C.L.R. 162, at pp. 186, 187.
(3) (1921) 29 C.L.R. 357, at pp. 369, 370.
(4) (1935) 51 C.L.R. 677.
(5) (1929) 278 U.S. 235 [73 Law. Ed. 287].
(6) (1932) 286 U.S. 165, at p. 184 [76 Law. Ed. 1038, at p. 1048].
(7) (1944) 322 U.S. 607, at pp. 618, 619 [86 Law. Ed. 1488, at p. 1497].
(8) (1935) 295 U.S. 330, at p. 361 [79 Law. Ed. 1468, at p. 1482].

Carter v. *Carter Coal Co.* (1) and the *Annotation* to *Williams' Case* (2) and an article by *Robert L. Stern*, (1937) 51 *Harvard Law Review*, *p.* 76.

The effect of such clauses is to reverse the presumption that a statute is to operate as a whole, so that the intention of the legislature is to be taken prima facie to be that the enactment should be divisible and that any parts found constitutionally unobjectionable should be carried into effect independently of those which fail. To displace the application of this new presumption to any given situation arising under the statute by reason of the invalidation of part, it must sufficiently appear that the invalid provision forms part of an inseparable context. The general provision contained in s. 15A of the *Acts Interpretation Act* 1901-1941 produces this effect, as does s. 46 (*b*), which similarly deals with severance in subordinate legislation.

But in applying s. 15A and s. 46 (*b*) the courts have insisted that a provision, though in itself unobjectionable constitutionally, must share the fate of so much of the statute, regulation or order as is found to be invalid, once it appears that the rejection of the invalid part would mean that the otherwise unobjectionable provision would operate differently upon the persons, matters or things falling under it or in some other way would produce a different result. This consideration supplies a strong logical ground for holding provisions to be inseverable, whether the prima-facie presumption be in favour or against severability. It is important where there is no statutory clause like s. 15A and it is important in using s. 15A. For the inference in such a case is strong that provisions so associated form an entire law and that no legislative intention existed that anything less should operate as a law.

Further, where severance would produce a result upon the persons and matters affected different from that which the entire enactment would have produced upon them, had it been valid, it might be said with justice that unless the legislature had specifically assented to that result, contingently on the failure of its primary intent, it could not amount to a law. The purpose of s. 6 is to carry further in the case of the *Banking Act* 1947 the rule that provisions are to be considered severable and general words distributable. After some study of par. (*a*) of s. 6, I remain unable to perceive clearly how it extends the rule established by the decisions under s. 15A. The fact that it is not a general law governing all statutes but is a particular provision of the *Banking Act* itself doubtless strengthens

(1) (1936) 298 U.S. 238, at p. 312 [80 Law. Ed. 1160, at p. 1189].

(2) (1929) 278 U.S. 235 [73 Law. Ed. 287].

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its effect. The Court has gone very far as a result of s. 15A and in spite of the difference in form of par. (*a*) of s. 6, I doubt whether the paragraph in any way extends the operation of the rule of construction as we have applied it. Paragraph (*c*) of s. 6, however, is a very distinct extension of the doctrine of the Court. At first sight it may seem to express the somewhat disconcerting intention that the Court, having ascertained at what points the Act as passed offends against the Constitution, should then undertake the task of reframing it from the fragments that might remain. But a closer examination of the paragraph shows that it does not attempt an inadmissible delegation to the Court of the legislative task of making a new law from the constitutionally unobjectionable parts of the old. The point at which the paragraph applies is in effect when it is found how much of the Act is necessarily inconsistent with the Constitution. Then, if it appears that the Act, with those parts excised, would have a different effect in substance, the paragraph declares that that consideration shall not be enough in itself to displace the application of the directions or statement of intention contained in s. 15A. or in par. (*a*) of s. 6. It does not assume to require the Court to give to any provision a different meaning or even operation from that which it possesses as it stands in the statute read as a whole. What it is concerned with is the consequences which the same immediate operation resulting from the fixed meaning of the Act will produce upon acts, matters and things it covers. Section 6 (*c*) may be said to express an intention that, however much amputation and excision may be necessary, what is left of the Act shall be law, but it does not say that it shall be submitted to plastic surgery. In any case s. 6 is a declaration of intention that provides a guide in ascertaining whether any given provision is, according to the true meaning of the enactment, conditional upon the valid operation of another. But in the nature of things it cannot be more than a guide. In the end the extent to which any part of the enactment held to be bad is inoperative must depend upon the real intention of the legislature in relation to the particular situation resulting from the invalidity found to exist.

The manner in which the Act is constructed creates peculiar difficulties in relation to the place of the intended exclusive authority of the Court of Claims over claims for compensation. It is convenient first to take compensation in respect of the acquisition of assets which is governed by Division 2 of Part VI.

The very definite and emphatic statement in s. 42 that the compensation payable in respect of the acquisition under s. 24 of the

assets of a private bank shall be ascertained in accordance with that Division and in no other manner expresses a positive intention of excluding all other procedures. Section 45 is then expressed so as to impose a duty upon the Commonwealth Bank to pay the compensation assessed by the Court of Claims at the same time giving a discharge to all concerned upon payment. Section 43 (1) and (2) deal with the possibility of an agreement being made as to compensation. Then s. 43 (3) and (4) and s. 44 provide for the course to be taken in the absence of agreement. As will be seen from sub-s. (3) of s. 44, that course is devised so as to make it impossible for the private bank to escape the Court of Claims, except at the expense of having imputed to it an agreement in the terms proposed by the Commonwealth Bank and approved by the Treasurer. It was suggested on the part of the Commonwealth that if s. 42 were held invalid as in conflict with s. 75 (iii.) a notional severance of Division 2 might be effected after sub-s. (2) of s. 43. The suggestion was that at that point the claimant should be treated as entitled to invoke the jurisdiction of the High Court instead of proceeding under sub-s. (3) to make a claim in writing to the Commonwealth. The difference between such a mode of severance and simply excising Division 2 altogether is not appreciable. For all it does is to leave the sub-sections authorizing agreement and their only effect is to place a condition upon the freedom to agree which would otherwise exist, a condition that the Treasurer must approve. The objection to the suggestion is that it is plainly inconsistent with s. 42 and with the real meaning s. 43. It is not a removal of an invalid provision but a reshaping of the provision in the hope of validating it. Section 42 not only provides that compensation shall not be ascertained in any other manner, but it also provides imperatively that it shall be ascertained in accordance with the Division. No excision will reconcile such a provision with s. 75 (iii.). To introduce the alternative of proceeding under s. 75 (iii.), it would be necessary completely to rewrite s. 42 with a consequent change of the policy and operation of the Division. The truth is that the draftsman determined that he would state exhaustively how claims were to be dealt with so that no alternative choice should be left open. He therefore expressed his intention in a form and with a completeness and definitiveness that give neither place nor means for the application of the general intention in favour of severance. For the Commonwealth it was also contended that all s. 75 (iii.) could require is that an exception, so to speak, from Division 2 be made in favour of the jurisdiction of the High Court. In that I cannot agree. To write such an

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exception into the Division is impossible. That would be to amend, not sever, the provision. I think that Division 2 is void with the exception of s. 43 (1) and (2). But the chief argument of the Commonwealth upon this matter was that Division 2 might be notionally deleted from the Act, because, if that were done, s. 25 would then confer a sufficient general right to compensation recoverable by suit in the ordinary courts.

To my mind this argument gives a new meaning and a new immediate operation to s. 25. That section as it stands in the Act must be read with Division 2 and, so read, does not mean to invest the private banks with a cause of action by which they may recover compensation. It is a general declaration of the obligation of the Commonwealth Bank to pay compensation in the manner hereinafter provided. It is the subsequent provisions which give the right, and the only right the private bank is to have is that of obtaining compensation by agreement (whether actual or imputed under s. 44 (3)), or by a reference to the Court of Claims under s. 44 (5). To find in s. 25 the creation of an actionable right is to ignore the fact that Division 2 clearly shows that it has no such meaning. To change the meaning of s. 25 by reinterpreting its language is just as inadmissible as a rewriting of its text. Some suggestion was made that once a provision was pronounced ultra vires you ignored its existence and its terms for the purpose of interpreting the rest of the Act. In this way you were to proceed to attach a meaning to s. 25 only after you had eliminated Division 2, not only from the Act, but from judicial consideration. But it is quite wrong to suppose that you construe the valid portions of an Act as if the invalid portions do not exist. The latter are as much an expression of the intention of the legislature as the former. You should first obtain the meaning of every part of the instrument containing the complete expression of the will of the legislature by reading and construing the whole. Only then do you proceed to decide whether the legislature has gone beyond its powers. Construed as an integral part of the whole Act, s. 25 amounts to no more than a general statement for the purpose of making it clear that the acquisition of the assets by the Commonwealth Bank is in the character of a purchaser liable to pay compensation. In this way it is introductory to the provisions of Division 2 . We are not here dealing with a gift in a will of property to a legatee definitively made over to him and then subjected to a superadded direction controlling the extent of his enjoyment and the devolution of the interest. Doctrines such as govern the consequences upon such a gift of the invalidity of the superadded directions have no place

whatever in the construction of an Act of Parliament. Nor could they have any application to a connected series of provisions dealing with a liability to compensation and the exclusive method of ascertaining and enforcing it. If any analogy is to be sought elsewhere in the law it might well be in the many authorities which say that when an enactment creates an obligation and specifies the remedy or the procedure to be pursued, it means that ordinary proceedings are not open.

But again, the truth is that the emphatic proposition in s. 42 that compensation is to be ascertained in no other manner than according to Division 2 governs the meaning and effect of s. 25 and makes it impossible to substitute a new and alternative meaning for s. 25. In short to do so would produce a different law from that to which the legislature gave its assent.

Section 6 (c) authorizes a severance notwithstanding that what remains may then have a different effect. But it does not, and, indeed, without an unconstitutional delegation of legislative power to the judiciary it could not, say that when a new meaning producing a new operation is indispensable to the validity of a provision that meaning shall be assigned with a view to saving it. By "effect" as used in s. 6 I do not understand the paragraph to mean a change in the immediate operation of a provision. There is, I think, a wide difference between giving a provision a new meaning resulting in the creation of rights, duties, powers, capacities or immunities of a kind uncontemplated by the legislature and the removal of other provisions, which if valid, would or might have produced indirect or consequential effects upon the enjoyment of rights, duties, powers, capacities or immunities independently created by the clause to be severed from the invalid provision. Paragraph (c) of s. 6, in speaking of a different effect doubtless refers to the latter case. The terms of the paragraph do not support the idea that a different effect may be given by attaching a new meaning to the clause it is sought to sever in order that it should survive.

I am therefore of opinion that the provisions of the Act relating to compensation for the acquisition of assets are ineffectual. It follows that s. 24 of the Act is void.

It is unnecessary after the foregoing discussion to say very much about the provisions governing the compensation for the compulsory acquisition of shares. I have already discussed them in relation to s. 51 (xxxi.) of the Constitution. They are not precisely the same but they contain the same vice as the provisions relating to compensation for assets. Indeed, in some respects it is exhibited

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even more strikingly. For s. 40 deals in separate sub-sections; (*a*) with the compensation payable to persons whose names the Commonwealth Bank has placed on the compensation register when no other claim has been notified with respect to the same shares; (*b*) with the claims of persons whose names have not been placed upon the compensation register but who have given notice of a claim to an interest in the shares acquired; (*c*) with the amount of compensation payable in respect of shares where such claims have been notified and the amount payable to each person. As to each of these matters s. 40 states emphatically that it shall be determined by the Court of Claims and in no other manner. Section 40 (7) excludes all claims by persons not on the compensation register who have not notified them under s. 39, unless under an order made by the Court of Claims. It is apparent that unless a claimant is upon the compensation register he must establish his claim in the Court of Claims and by no other procedure may he do so. It is impossible to desert the whole of Division 1 of Part VI. and attribute to shareholders and persons interested in shares a statutory cause of action for the recovery of compensation independently of the compensation register and of notice. Yet it is only on such a footing that s. 40 can be treated as a divisible provision the invalidity of which does not affect the acquisition provisions. Section 15 corresponds in the case of shares to s. 25. It does not mean to give an actionable right to compensation. Read as part of the Act its meaning is that the Commonwealth Bank shall pay compensation in respect of the acquisition of shares in the manner afterwards prescribed. A different meaning cannot be placed upon it because s. 40 is invalid.

I am therefore of opinion that s. 40 is invalid and that provisions for the compulsory acquisition of shares must fall with it. That means that at all events s. 13 (3), (4) and (5) must be ineffectual.

An examination of Division 2 of Part IV. will show that the invalidity of s. 13 (3) and (4) involves the validity of the consequential provisions contained in s. 14 (1) (except perhaps in its application to acquisition by agreement), s. 15 and s. 16 (with the like exception). Section 14 (2) cannot be supported for many reasons. A similar examination of s. 24 will show that no case can be made for saving any of its sub-sections from the fate of sub-ss. (2), (4) and (6).

At this point it is desirable to combine the conclusions I have just expressed with those I stated with respect to the conflict of provisions contained in Part IV., Divisions 2 and 3, with the requirement of just terms of acquisition imposed by s. 51 (xxxi.) of the

Constitution. The result of the combination is that, except for s. 12 and the possibility of s. 14 (1) and s. 16 being valid in their application to a voluntary acquisition under s. 12, the whole of Division 2 of Part IV. is invalid and Division 3 is invalid. Section 24 is invalid. Part VI. of course fails. It also follows that s. 46 (3) fails. I should perhaps say that the reference in sub-s. (3) of s. 46 to a private bank taking over another private bank is for the purpose of a particular absorption, one that has been effected, and it can be neglected.

Section 46 (4)-(8) contain a power of prohibiting banking which, on the face of the sub-sections, shows no apparent dependance upon the acquisition provisions of the Act.

I shall therefore now pass to a consideration of the validity of s. 46.

Part VII. of the *Banking Act* 1947, which consists only of s. 46, is entitled : " Prohibition of the carrying on of banking business by private banks." The part applies to all private banks whether incorporated in Australia, in the United Kingdom or elsewhere. The section is constructed upon a curious plan. It begins by a general prohibition laid on all private banks against carrying on banking business in Australia ; but the prohibition is followed by the words " except as required by this section " (sub-s. (1)). Next, there immediately follows a command laid on every private bank, " subject to this section," to carry on banking business in Australia (sub-s. (2)). Then follow two alternative provisions directed to prescribing how the obligation to carry on banking business shall terminate. One alternative consists in sub-s. (3) which provides in effect that the obligation to carry on shall not apply to a private bank after its business has been taken over by the Commonwealth Bank. That refers to a taking over by agreement pursuant to s. 22 (5) or compulsorily under s. 24 (2). The other alternative is contained in sub-ss. (4)-(8). These provisions empower the Treasurer, by a notice, to require a private bank to cease upon a date he specifies to carry on banking business in Australia. The period of the notice must not in the first instance be more than two months, but the Treasurer may by an amendment of his notice extend the time. Sub-section (8) then expressly forbids the private bank after the date or amended date specified to carry on banking business in Australia. It will be noticed that sub-s. (8) expresses a particular prohibition which might have been thought to be contained in the general prohibition of sub-s. (1). The first of the two alternatives to which sub-s. (2) is subject and which therefore, so to speak, take up the general prohibition, is almost nullified by

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the invalidation of s. 24. But of course the nullification is not complete because the alternative covers the contingency of a voluntary agreement under s. 22 (5) as well as compulsory acquisition under s. 24. Upon the view I have already expressed, that s. 24 is invalid as one of the consequences of the conflict of Division 2 of Part VI. with s. 75 (iii.) of the Constitution, sub-s. (2) of s. 46 will prevent sub-s. (1) from taking effect unless either an agreement is made under s. 22 (5) or a notice is given under sub-s. (4) of s. 46. In the latter event, however, on the expiry of the notice or amended notice, as the case may be, sub-s. (8) will operate specifically upon the private bank concerned. The expiry of the notice results under sub-s. (4) in a prohibition which may be included in the expression in sub-s. (2) "subject to this section." If so it is a contingency which, as a matter of words, might release the operation of sub-s. (2) and so bring into operation sub-s. (1). But apparently it is intended in such a case that sub-s. (8) shall be the source of the prohibition, and not sub-s. (1). It is not, I think, a matter of any importance because it is exactly the same "law" whether a notice under sub-s. (4) brings into play sub-s. (1) or sub-s. (8) or both. It is a law which enables the Treasurer by a notice or notices to make it a penal offence for any or all private banks to carry on the business of banking in Australia after a given date or dates. The grounds upon which the Treasurer is to proceed in deciding whether and when he will give any and what notices are not defined or in any way limited.

As in my opinion the provisions for the acquisition of shares in and of the assets of a private bank are ineffective, a question at once arises whether this conclusion does not also involve the validity of s. 46 (4)-(8) (and of s. 46 (1) if and so far as it takes effect by the use of s. 46 (4)). This question depends upon the declaration contained in s. 6 of a legislative intention that all provisions of the Act other than those found to be inconsistent with the Constitution shall operate to the full extent they may under the Constitution and that such intention shall have effect notwithstanding it may result in the Act having a different effect in substance from that it would otherwise have produced. To isolate s. 46 (4)-(8) and give them an operation quite independent of the compulsory acquisition provisions would, indeed, give the enactment a different effect in substance from that which, it may be supposed, was contemplated. For it would enable the Treasurer to close any or all of the private banks, but not to take over the businesses. Extraordinary confusion and disturbance, if not worse, would no doubt be caused by the use by itself of such a power to close up even

one large bank, to say nothing of the result if it were applied at the same time to all.

But it must be remembered that, as s. 46 is drawn, even although the whole Act were upheld as valid, it would nevertheless be open to the Treasurer to invoke the power which sub-ss. (4)-(8) purport to give him.

It may be assumed that it was outside the contemplation of anybody that the private banks should be closed, not only without compensation, but without any arrangement in respect of the bank officers and staff and without any provision for continuance of the customers' accounts and without any other transitional arrangements. Yet it is a thing that s. 46 on its terms unmistakably permits. In these circumstances I am of opinion that s. 6 should be put into effect and that s. 46 (4)-(8) (and sub-s. (1) if and so far as dependent on sub-s. (4)) if otherwise valid should accordingly be considered severable.

But so considered these provisions must be regarded as standing alone and that means as bare authorities to the Treasurer by a notice or notices given whenever and for whatever reason he thinks fit to stop any private bank or all private banks from carrying on banking business within the Commonwealth. So regarded the provisions at once provoke the question whether they are consistent with the constitutional guarantee of the freedom of inter-State trade, commerce and intercourse.

In considering this question it may not be unimportant to notice the widely varying applications of which the power conferred by s. 46 (4)-(8) is capable. It may be used to close one bank, which may be large or small. That may or may not be followed by the closing of another or others. If it is, the intervals of time may be short or, on the contrary, may be spread over years. The purpose for closing one bank may be entirely different from that for which another is closed. On the other hand, by notices given about the same time, the Treasurer may close all the private banks upon one day. This, coupled with the operation of s. 7 of the *Banking Act* 1945, would mean that all banking would be forbidden except by the Commonwealth Bank and the State Banks.

Now, the existing system of private banking maintains an Australia-wide business upon which its whole structure rests. It sustains with respect to the transfer of money or bank credit the greater part of the commerce of the country. Branches and agencies of the various private banks are distributed over the Commonwealth and there are few towns or centres in which one or more of them is not represented. The volume of the banking transactions which cross

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State lines is, of course, widely different with different banks, and that is said to be true also of the proportion which in number or value inter-State transactions over a period bear to the whole business done. But the total quantity for all banks is very large, although the proportion in money is said to be but ten per cent of the amount involved in all transactions. If it matters it appears that there are constant changes in the funds made available in the various States, the excess of advances over deposits in one State being supplied or supported by resources in other States. In the daily course of business the private banks (with two minor exceptions) regularly transfer funds among the States, establish credits across State boundaries, and collect cheques, bills of exchange and promissory notes drawn and lodged in one State and payable in another, and of course they negotiate such instruments. There have been placed before the Court elaborate descriptions of the many different kinds of inter-State transactions the private banks carry out, considered both from the banks' side and from the customers' side, that is an essential part of his commercial dealings. But it is enough to say that, as common knowledge might suggest, this material confirms in detail what seem to be the essential conclusions. These are that the business of the private banks necessarily includes :—(*a*) the constant inter-State transmission of funds and transfer of credit ; (*b*) constant business communication and intercourse among the States ; (*c*) the regular use for the purposes of inter-State transactions of instruments of credit and of title to goods and their inter-State transmission ; (*d*) the integration of inter-State banking transactions with the entire business of the bank to form a system spreading over the Commonwealth without regard to State lines ; (*e*) the furtherance of commercial dealings by inter-State traders in goods by performing an indispensable part in such transactions.

The first question for decision is whether the trade, commerce and intercourse to which s. 92 gives freedom covers matters of the foregoing description. It is said that the protection s. 92 provides extends to the transfer from one State to another of nothing but commodities and persons. Intangibles are said not to be covered. In my opinion this is an unwarranted limitation upon a constitutional provision that was intended to guarantee freedom from restriction to a broad category of interchange, converse and dealings between States in the affairs of life.

It was part of the purpose of s. 92 to remove from the possibility of legislative and governmental restriction activities conducted

across State boundaries and to do so rather because of their inter-State character than of any special claim to immunity from interference that particular activities might have except their inter-State character. To say figuratively that the purpose was to enable Australians to disregard State boundaries and not simply to give an immunity from interference to buying, selling and journeying makes clear the point, even if the statement may be inadequate and open to objection otherwise. Those who introduced s. 92 into the Australian Constitution did so in the full light of American experience. In s. 51 (i.) they coupled the word "trade" with the word "commerce," which stood alone in the United States Constitution to define the subject matter of the power of Congress to regulate commerce with foreign nations and among the several States. Not content with the expression "trade and commerce" for the purposes of s. 92, they there added the word "intercourse."

It has been said that "trade" strictly means the buying and selling of goods. That, however, is a specialized meaning of the word. The present primary meaning is much wider, covering as it does the pursuit of a calling or handicraft, and its history emphasizes rather use, regularity and course of conduct, than concern with commodities. "Intercourse" was doubtless added because of the view, now no longer open in the United States, that commerce might not extend to intercourse that was not concerned with business profit or pecuniary gain and because of the degree to which the right of the citizen to access to every constituent part of the Union had been rested on implication. I cannot think that the essential content of the expression "trade commerce and intercourse" in s. 92 is any less than is included in the conception of commerce in the modern American view of the commerce power. I am not speaking of the spread of that power over an immense field of activities that are incident to commerce. It is the central conception expressed in the word to which I refer. It covers intangibles as well as the movement of goods and persons. The supply of gas and the transmission of electric current may be considered only an obvious extension of the movement of physical goods. But it covers communication. The telegraph, the telephone, the wireless may be the means employed. It includes broadcasting and, no doubt, it will take in television. In principle there is no reason to exclude visual signals. The conception covers, in the United States, the business of press agencies and the transmission of all intelligence, whether for gain or not. Transportation, traffic, movement, transfer, interchange, communication, are words which perhaps together embrace an idea which is dominant in the conception of

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what the commerce clause requires. But to confine the subject matter to physical things and persons would be quite out of keeping with all modern developments. The essential attributes which belong to the conception should determine the field of human activities to which it applies. To place among the essential attributes the requirement that there should be goods for sale or delivery or a man upon a journey, is to mistake the particular for the general, the concrete example for the abstract definition, and to yield to habits of thought inherited from a more primitive organization of society.

The words " trade, commerce and intercourse " are not naturally susceptible of such a reactionary interpretation. The very manner in which they are combined would carry, even to a mind unfamiliar with their background, an intention to include all forms and variety of inter-State transaction whether by way of commercial dealing or of personal converse or passage. An understanding of what lies behind the choice of expression confirms the natural impression produced by the language itself. In the long history of the interpretation of the commerce clause in the United States tendencies have been disclosed from time to time to deny the inclusion within it of transactions which relate only to the payment of moneys, such as insurance (*Paul* v. *Virginia* (1)) or as inter-State bills of exchange considered as subjects of intra-State sale (*Nathan* v. *Louisiana* (2)). But these tendencies have been considered anomalous : cf. *Willoughby, Constitutional Law of the United States*, 2nd ed. (1929), par. 441 pp. 744-746 and par. 435, p. 741 ; *Willis, Constitutional Law*, pp. 284, 285, and now the basis of such a distinction has been swept away : *United States* v. *South-Eastern Underwriters' Association* (3) ; *Polish National Alliance of United States of America* v. *National Labor Relations Board* (4) ; *Prudential Insurance Co.* v. *Benjamin* (5) ; *Robertson* v. *California* (6) ; *Freeman* v. *Hewit* (7). So far from *Engel* v. *O'Malley* (8) containing anything to the contrary I think that a close reading of the judgment of *Holmes* J. (particularly at (9)) will show that he clearly implies an opinion that the transmission of money by a bank from one State to another is inter-State commerce.

(1) (1869) 75 U.S. 168 [19 Law. Ed. 357].
(2) (1850) 49 U.S. 73 [12 Law. Ed. 992].
(3) (1944) 322 U.S. 533 [88 Law. Ed. 1440].
(4) (1944) 322 U.S. 643 [88 Law. Ed. 1509].
(5) (1946) 328 U.S. 408 [90 Law. Ed. 1342].
(6) (1946) 328 U.S. 440 [90 Law. Ed. 1366].
(7) (1947) 329 U.S. 249, at pp. 258, 259 [91 Law. Ed. 265, at p. 275].
(8) (1911) 219 U.S. 128 [55 Law. Ed. 128].
(9) (1911) 219 U.S., at pp. 138, 139 [55 Law. Ed., at pp. 136, 137].

In my opinion a large part of the business of banking, if transacted across State lines, involves trade, commerce and intercourse among the States. The presence in the Constitution of s. 51 (xiii.) affords no reason for treating the trade and commerce power conferred by s. 51 (i.) as inappropriate to banking transactions if they are carried out with other countries or among the States. Section 51 (xiii.) was placed in the Constitution because it was desired that the subject of banking as a whole should fall under Federal legislative authority: not because it was considered that so much of banking as involved transactions with other countries or among the States could not fall under s. 51 (i).

Again, I am unable to see that the parenthesis in s. 92 of the words "whether by means of internal carriage or ocean navigation" militates against the conclusion that transactions in intangibles are covered by the provision. These are words of extension, not of restriction. Their purpose would be expressed if they were written "although by ocean navigation and not by internal transport" or "by land or sea."

The contention made that what is commonly called a transmission of money or credit by a bank involves no movement, no interchange, nothing occurring across State lines, but merely the reduction of credit in one place and an increase in another, seems to substitute an analysis—and one of doubtful adequacy—belonging to monetary theory for the common understanding of the course business takes and the complexion which the law places upon it. But for myself I should think that if these interdependent and significant phenomena occurred in different States, involving, as they must, communication between the States, it would be enough. Nor do I see that it is anything to the point to consider the function of banking in providing and regulating the medium of exchange chiefly employed in the Anglo-American world, bank money or credit. That is a consequence of the relation of banker and customer. But whether, from the standpoint of the fulfilment of that vital economic function, the banking transactions that are important as inter-State trade, commerce and intercourse are regarded as falling under the category of cause, of result or of accompanying circumstance, nevertheless, as between the parties to them, they continue to possess the characteristics which give them the complexion of trade, commerce and intercourse among the States.

For the reasons I have stated, the subject matter of the prohibition authorized by s. 46 (4)-(8) of the *Banking Act* 1947 appears

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to me to be comprised within s. 92 so far as the business consists of inter-State transactions.

The operation of s. 46 (8) (or s. 46 (1)), when the power given by s. 46 (4) is exercised in relation to all private banks, is to suppress all banking except that carried on by the Commonwealth Bank or by State banks. There is, of course, no discrimination between inter-State business and intra-State business. The whole business, intra-State, inter-State and foreign, is prohibited. But the prohibition directly imposed upon the conduct of any banking business, except under Government, is direct and the direct prohibition includes in its operation all inter-State banking business.

In *James* v. *The Commonwealth* (1) to which we have all given close and repeated study, the test laid down for the application of the constitutional guarantee of freedom contained in s. 92 amounts to freedom of what constitutes trade, commerce and intercourse to pass from one State to another. It is described as freedom as at the frontier or border, the crucial point in inter-State trade. But that freedom may be impaired by a prohibition, restriction or burden, the application of which is not at the border but at some prior or subsequent stage in the course of inter-State trade, commerce and intercourse. This is explained by reference to cases arising in this Court which include the following examples :—(1) a legislative declaration by a State that stock and meat in a State are to be held for the purposes of and kept for disposal of the Crown in aid of supplies for the armed forces (*Foggitt, Jones & Co. Ltd.* v. *New South Wales* (2) ; *Duncan* v. *Queensland* (3) ; cf. *James* v. *The Commonwealth* (4) ; (2) a State statute and an order thereunder the combined effect of which was to fix a proportion or quota of a product and forbid the marketing in Australia of any greater quantity : *James* v. *South Australia* (5) ; *James* v. *Cowan* (6) ; *James* v. *Cowan* (7) ; cf. *James* v. *The Commonwealth* (8) ; (3) the expropriation under the same statute of parcels of the product in the hands of a producer so as to prevent him selling them in defiance of the quota fixed (9) ; (4) a State scheme for the compulsory marketing of a product, acquiring the product, restricting freedom of action on the part of producers and involving the compulsory regulation and control of all trade, domestic, inter-State and foreign (10) ; (5) the imposition by a State on an importer of petrol of an

(1) (1936) A.C. 578, at pp. 630-633 ; 55 C.L.R. 1, at pp. 58-61.
(2) (1916) 21 C.L.R. 357.
(3) (1916) 22 C.L.R. 556.
(4) (1936) A.C., at p. 618 ; 55 C.L.R., at p. 47.
(5) (1927) 40 C.L.R. 1.
(6) (1930) 43 C.L.R. 386.
(7) (1932) A.C. 542 ; 47 C.L.R. 386.
(8) (1936) A.C., at p. 622 ; 55 C.L.R., at p. 51.
(9) (1936) A.C., at p. 622.
(10) (1934) 51 C.L.R. 108 ; cf. (1936) A.C., at pp. 623, 624 ; 55 C.L.R., at p. 52.

obligation to buy locally a proportion of power alcohol, petrol which is not produced in Australia, being imported into the State sometimes directly from abroad and sometimes immediately from another State (1); (6) a State law requiring payment of a higher licence fee for a licence to sell wine from another State than for a licence to sell wine produced in the State concerned (2).

Thus freedom as at State boundaries has no narrower meaning than that there shall not be imposed prohibitions, restrictions and burdens preventing, impeding or prejudicing the passing from State to State of what amounts to trade, commerce and intercourse. Lord *Wright* evidently regarded this as an application of the word "free" that was limited by context and subject matter. Yet I think that a ready assent to the limitation would have been given by all the judges who have sat in this Court, notwithstanding that from the beginning they have given such diverse effects to s. 92. Indeed, I believe that each would have claimed that the proposition was the point from which he began. Perhaps *Isaacs* C.J. would have amended it by adding the word "control"; an unfortunate word of such wide and ambiguous import that it has been taken to mean something weaker than "restraint," something equivalent to "regulation." So to understand it amid the *copia verborum* and vigor of expression *Isaacs* C.J. was accustomed to employ where his opinion was strong is natural enough. But it is perhaps worth remark that no actual decision or order given or made applying s. 92 to the facts of a case seems to be based on any very extended meaning of the notion of restraint or burden or, for that matter, on a wide or distributive interpretation of "trade, commerce or intercourse." This, I imagine, is the explanation of Lord *Wright's* apparent hesitation to express any greater disagreement with the actual decision in *W. & A. McArthur Ltd.* v. *Queensland* (3) than is involved in describing it as a doubtful exception to the statement that their Lordships' construction of s. 92 is not inconsistent with any decided case (4). What, as it seems to me, the judgment in *James* v. *The Commonwealth* (5) has corrected is the error of applying the conception of freedom where there was no real burden upon and no real obstruction to passing from one State to another or dealing across State lines and in addition the failure to recognize that regulation of trade, commerce and intercourse is compatible with freedom of inter-State passage or converse.

(1) (1934) 51 C.L.R. 108; cf. (1936) A.C., at pp. 623, 624; 55 C.L.R., at p. 52.
(2) (1909) 8 C.L.R. 115; cf. (1936) A.C., at pp. 616, 617; 55 C.L.R., at p. 46.
(3) (1920) 28 C.L.R. 530.
(4) (1936) A.C., at pp. 631, 632; 55 C.L.R., at pp. 59, 60.
(5) (1936) A.C. 578; 55 C.L.R. 1.

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The view that what is preserved by s. 92 is freedom as at the frontier might suggest that the protection is against obstructions, burdens or disadvantages which operate against inter-State transactions in a special manner because, whether in form or in substance, there is a differential treatment of domestic and inter-State transactions, or because what is done has a greater significance or importance for inter-State commerce. To limit s. 92 to freedom from laws discriminating against inter-State commerce was an interpretation which at one time proved attractive and it had strong support. But that cause was lost at an early stage of the struggle which expediency has so long sustained with such varying fortune against the apparently inflexible terms in which the framers of the Constitution chose to express a policy regarded, it is said, as basal to the federation. It seems now to be rejected of all men. *Barton* J. said as early as *Duncan's Case* (1) that if the restriction of inter-State trade is included in the direct operation of an Act the fact that intra-State trade is also more or less affected does not diminish the restriction and that if the State legislature could make a burden apply alike to all the people of Australia as well as the people of the State, still the considerations affecting the case would not differ. The decision of the Privy Council in *James* v. *Cowan* (2) is quite inconsistent with the doctrine, and in *James* v. *The Commonwealth* (3), Lord *Wright* rejected it. He said: "An Act may contravene s. 92 though it operates in restriction both of intra-State and of inter-State trade." In the United States another step has recently been taken which brings the American doctrine whereby the commerce clause operates to confer a freedom against State restriction even closer to the operation given to s. 92. The opinion in which the step is taken deals also with discrimination. It is that of *Frankfurter* J. for the Court in *Freeman* v. *Hewit* (4). His Honour said:—"In two recent cases we applied the principle that the Commerce Clause was not merely an authorization to Congress to enact laws for the protection and encouragement of commerce among the States, but by its own force created an area of trade free from interference by the States. In short, the Commerce Clause even without implementing legislation by Congress is a limitation upon the power of the States. . . . In so deciding we reaffirmed, upon fullest consideration, the course of adjudication unbroken through the Nation's history. This limitation on State power . . . does not merely forbid a State to single out inter-State commerce for hostile action. A State is also precluded from

(1) (1916) 22 C.L.R. 556, at p. 585.
(2) (1932) A.C. 542, at p. 555; 47 C.L.R. 386, at pp. 393-394.
(3) (1936) A.C., at p. 628; 55 C.L.R., at p. 56.
(4) (1946) 329 U.S. 249, at p. 252 [91 Law. Ed. 265, at pp. 271, 272].

taking any action which may fairly be deemed to have the effect of impeding the free flow of trade between States. It is immaterial that local commerce is subjected to a similar encumbrance. It may commend itself to a State to encourage a pastoral instead of an industrial society. That is its concern and its privilege. But to compare a State's treatment of its local trade with the exertion of its authority against commerce in the national domain is to compare incomparables."

It would be surprising if the Australian express enactment were less effective and narrower than the American implication which it was intended, as a positive provision, to replace. No doubt a law that applied only to inter-State trade might be seen to impose a burden upon it, while if it had applied uniformly over the whole field of trade it might have worn the appearance of a mere regulation. But that is another matter.

To describe the characteristics necessary to render a law obnoxious to s. 92 there has been much use of figurative expressions. It has been said that the law must be " pointed at " inter-State commerce, " directed against it," " inimical to it," " hostile to it " or " antagonistic to it," or that it must " hit at " inter-State commerce. I have never been certain what these expressions connote when so used. Indeed, sometimes the question whether a law does or does not impair the freedom of inter-State commerce seems to be brought down to a choice between a dyslogistic and a eulogistic epithet to describe the same legislative provision.

The expressions that I have mentioned, however, appear capable of three meanings. They may mean that the law must discriminate against inter-State commerce. If so, they lay down an erroneous test. They may mean that the application of the law to inter-State commerce must be direct and its operation prejudicial, whether or not the law also includes intra-State commerce. If so, the expressions add nothing in explanation or elucidation of s. 92 ; indeed, their use but tends to confuse the question. Thirdly, they may mean that there must appear an actuating purpose on the part of the legislature to injure inter-State commerce. If so, it is the doctrine of which *Isaacs* C.J. said that it imported the necessity of a legislative *mens rea*. With that description it may be dismissed from consideration. But once it appears that trade, commerce and intercourse among the States is a concept within which fall inter-State transactions in the common course of banking, then the intention of the legislation to prohibit a portion of inter-State commerce, unless carried on by government agency, becomes undeniable, and surely such an intention is hostile to inter-State

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commerce, that is unless the fact that it may still be carried on by or under government saves its freedom.

I cannot see how to close up every bank but a government bank leaves inter-State banking free.

It has appeared to me that to say that a given branch of inter-State commerce can be carried on only by government, so that it may be under governmental control, is inconsistent with the proposition, which I understand to be established, that inter-State trade shall be free of governmental prohibitions, restrictions and burdens whether they be legislative or executive in character.

To take the volume or flow of inter-State banking business independently of the freedom of private banks to transact it, and make the inquiry whether the law closing them has a purpose or a necessary tendency to reduce the volume of flow is, I think, to raise an irrelevant consideration. It is, moreover, a consideration of an economic and not a legal character. But it is one that has no basis of fact. For, so far as it is possible to speak confidently of hypothetical events, to close the private banks, not taking over their businesses as going concerns, but abruptly terminating them, must interrupt the flow of inter-State business and cause its total suspension. Not only that, but it would cause a dislocation the recovery from which would not be likely to be rapid. It would be impossible to say whether and when the volume had been restored and to assess its quantitative relation to the volume of the business that otherwise would have been done. It is an irrelevant consideration, because s. 92 treats inter-State traffic and intercourse, not as a mere economic phenomenon, but as an activity, and as such sets it free for people to engage in. Juristically it is doubtless true that s. 92 does not confer private rights upon individuals : at all events so I decided in *James* v. *The Commonwealth* (1). It may perhaps also be true that its purpose is not the protection of the individual trader. But it assumes that without governmental interference trade, commerce and intercourse would be carried on by the people of Australia across State lines, and its purpose is to disable the governments from preventing or hampering that activity.

It appears plainly, as I think, from the passage in *James* v. *The Commonwealth* (2) that in the opinion of their Lordships a compulsory marketing scheme under a Government board restricting the freedom of action of producers and compulsorily regulating and controlling all trade in a commodity, whether intra-State, inter-State or overseas, involved an impairment of the freedom of inter-

(1) (1939) 62 C.L.R., at pp. 361, 362.

(2) (1936) A.C., at p. 623; 55 C.L.R., at p. 52.

State trade. From this conclusion more than one consequence follows. In the first place, it means that the transfer of the marketing of the commodity, that is to say, of the whole trade in the commodity, from the ordinary channels used by individuals to a Government board is an interference with freedom of inter-State trade. Next, it necessarily follows that a consideration of the question whether this will or will not influence the volume of traffic across the border in the commodity is beside the point. Again, it is inconsistent with the view that a measure may be good because its purpose or object is to increase the volume or value of a trade, including trade with other States, considered apart from the freedom of people to engage in the trade. For the object of the marketing scheme in question was to increase the sales of the commodity and the returns to the producer. Lastly, their Lordships' view of such a marketing scheme does not appear to give room for the contention that s. 92 leaves it always open to the legislatures to determine by whom operations of inter-State trade may lawfully be conducted.

No doubt s. 92 leaves open the regulation of trade and commerce, at all events until regulation is pressed to the point of impairing true freedom of inter-State commerce. And there can be even less doubt that a regulation of some other subject will not collide with s. 92 simply because inter-State trade or commerce may be affected consequentially and indirectly. The freedom of inter-State trade, commerce and intercourse which s. 92 assures supposes an ordered society where the mutual relations of man and man and man and government are regulated by law.

But there has not been worked out a logical distinction between the restrictions and burdens which may not be imposed upon inter-State commerce and the directions which may be given for the orderly and proper conduct of commerce. It is this which I think accounts more than any other consideration arising from s. 92 for the widely divergent conclusions that have been reached as to the application of the provision in specific cases. I am aware that it has been said that in s. 92 "trade, commerce and intercourse" have now been interpreted as meaning something less than "trade and commerce" mean in s. 51 (i.) and "free" as meaning "subject to reasonable restrictions" and "absolutely" as meaning "subject to qualifications." But be that as it may, it nevertheless remains undeniable that all trade and commerce must be conducted subject to law and this means compliance with a multitude of regulatory directions. I do not, for example, desire to cast any doubt upon the validity of laws directly regulating banking in the interests of security, reliability, efficiency, uniformity of practice and so on.

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But my decision upon s. 92 is confined to its effect upon s. 46 (4)-(8), which authorize a direct and absolute prohibition. No such questions, therefore, arise. Nor am I concerned with the effect of s. 92 in relation to expropriation. That, I think, turns on another and different set of considerations. As a test of the validity of prohibition of carrying on a trade it was said that surely consistently with s. 92 a law might be made providing that no bankrupt, no soldier, no person under twenty-five, no barrister, should engage in commerce. The examples seem to me to throw no light upon a complete prohibition of a branch of commerce, excluding everyone from it except a government undertaking. Some of the examples relate to capacity, others to the incidents of a profession. The personal incompetence, under the law, of classes of people by reason of status or the like to trade stands apart altogether from restraints or restrictions upon inter-State commerce. They are but examples of special positions in which, in an ordered community, the law of persons may place individuals. The law of persons and of status, like the law of property, of contract and of tort, is assumed by a guarantee of freedom of inter-State trade. Section 46 (4)-(8) stand, in the view I have formed of the validity of ss. 13, 17-19, and 24, as bare prohibitions of so much of banking as forms part of trade, commerce and intercourse, excepting only government banks. These sub-sections are, therefore, in my opinion, in conflict with s. 92.

It was contended that this did not spell total invalidity for the sub-sections in question but that, by construction of law, inter-State banking might simply be withdrawn from their operation. This, it was claimed, is a proper effect of s. 6.

Speaking generally, the operation of s. 92 is to give immunity from an enactment applying generally to commerce rather than to destroy the enactment. But that is on the ground that the enactment, as more often than not is the case, has a distributive application to all transactions falling within its terms. In this case, however, s. 46 (4)-(8) deal with a business as an entirety. There is one notice in the case of each bank. It must be expressed to apply to a business considered as a unit or entirety. Sub-section (8), and if it is in point sub-s. (1), then forbid the carrying on of any such business. I cannot see how, even with the aid of s. 6, any intention can be discovered to deal piecemeal with component parts of the business or, to state it more accurately, with descriptions of transactions by which the business is made up.

The notice required by sub-s. (4) could not be moulded to that end consistently with the sub-section. The purpose is to close up a bank's business, not to dismember it.

I am therefore of opinion that s. 46 (4)-(8) are void and that, if and so far as s. 46 (1) would otherwise take effect in consequence of a notice under s. 46 (4), it also is void.

I have said nothing about s. 59 and, having regard to the conclusions I have reached, there is little to be said about it. It expresses its own purpose in its opening words: "So far as is necessary for the purpose of facilitating or assisting the operation of any of the provisions of the Act". This purpose ceases to have any significance when it is decided that s. 46 (4)-(8) and substantially the whole of Part IV., Divisions 2 and 3, and s. 24 are invalid. Section 60 is a fortiori. Part V., dealing with the Court of Claims, becomes otiose. Part VI., dealing with compensation, is substantially bad, and Part VIII. ceases to have an effective existence, even if theoretically s. 6 may save the validity of some sub-sections contained in it. Section 46 ceases to have any effect because sub-s. (1) is dependent on sub-s. (3) or upon sub-s. (8). Counsel for the plaintiffs at the end of his reply asked that the court should not pronounce an order finally without allowing the parties to speak to the form of relief after delivering the reasons of the members of the Court for judgment and to this course the Commonwealth had no objection. I shall not therefore now formulate definitely the relief which I should be in favour of granting.

I think that it is neither necessary nor desirable to examine every provision of the Act without regard to its real bearing upon the validity of provisions that really matter or upon the interest which entitles the plaintiffs to sue and to say whether each such provision is independently valid, if s. 6 makes it severable, or whether in spite of s. 6 it is inseverable or on its own terms its operation fails.

I am disposed to think that it would be enough if the declaration of right were confined to what I would regard as the pivotal sections of those which I consider bad together with some of the more important of those obviously sharing the same fate.

I would continue the interlocutory injunction contained in the orders of 15th December 1947 and make it permanent. It would, I think, be enough to declare invalid s. 13: Part IV., Division 2 (except in relation to voluntary purchase): Division 3: s. 24: Part VI.: ss. 46: 59 and 60 and for the rest to reserve liberty to apply. The plaintiffs should have the costs of the suits.

McTiernan J. As I am the sixth member of the Court to state his opinion, I do so as briefly as possible.

The primary question is the interpretation of s. 51 (xiii.) of the Constitution of the Commonwealth.

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The conclusion on this question which I think is required by settled principles governing the interpretation of the Constitution and the statements of authority bearing upon the interpretation of s. 51 (xiii.) in particular, is that this provision is a grant of plenary legislative power which extends to the whole subject of banking, that is, the economic activity described by that name and all its adjuncts, subject to the reservation made in regard to State banking, that is, banking by a State-owned bank.

The reservation may make it necessary to imply limitations upon the powers to legislate with respect to " State banking extending beyond the limits of the State concerned " in order to preserve the immunity given to State banking which does not extend beyond State limits. The limitations might be implied from the connection between State banking beyond and State banking within the legislative powers. But such limitations could not logically apply to the powers to legislate with respect to " banking other than State banking." Even if the word " extending " imports survival, that is, it is not merely descriptive of the part of State banking placed under the control of the national Parliament, it would not follow that the power granted to legislate with respect to banking conducted by banks which are not owned by any State is any less than plenary power.

This plenary power is of course subject to anything in the Constitution restricting the powers of the Parliament.

The term " banking " is a statement in outline of the subject matter of the power. It must be given an ample not a narrow meaning.

The grant of power to legislate with respect to banking naturally extends to such matters as the ownership and management of banks and the control of banks and banking. The purposes in respect of which Parliament has power to make laws include the limitation of the number of banks, the selection of banks to carry on banking, the licensing of banks, the prohibition of the carrying on of banking by any bank, the conversion of private ownership or management of any bank into public ownership or management. These observations, of course, do not apply to State-owned banks. If Parliament should seek to accomplish any of these purposes by the acquisition of property from any person, the acquisition could not be made under s. 51 (xiii.) : it could be validly made only under s. 51 (xxxi.) : it would not be valid unless it was made upon just terms. It would also be a condition of the validity of the acquisition that it was made for a purpose in respect of which the Parliament has power to make laws. If the acquisition is an appropriate means of effectuating or

furthering any of the above mentioned purposes it would satisfy that condition.

It follows from this interpretation of s. 51 (xiii.) that a law which prohibits any bank from carrying on banking is a law with respect to banking. The motive of Parliament, if that could be ascertained, for enacting the law is irrelevant to the question whether or not the law is within this legislative power. If, however, the prohibition were made to depend upon some condition, the law might not be a law with respect to banking. The question whether or not it would be a law of this description would be tested by considering its effect and operation. The provisions of s. 46 relating to prohibition contain no such condition. Section 46 (1) is a law with respect to banking. Section 46 (2) and (3) are constitutionally justified by the plenary nature and extent of the power vested by s. 51 (xiii.) in the Parliament. Section 46 (4) is also constitutionally justified by s. 51 (xxxi.). The Parliament has power to make a law prohibiting any bank from carrying on banking. It can confer power upon the Treasurer to accomplish any object within its legislative power. That is an attribute of plenary legislative power. In s. 46 (4) Parliament has not purported to confer upon the Treasurer power to do anything which Parliament has not the power to accomplish. The extent of the powers conferred depends upon the interpretation of the *Banking Act*. Section 46 (4) is in substance a law with respect to banking.

Section 51 (xiii.), aided if necessary by s. 51 (xxxix.), supports the establishment of the Commonwealth Bank.

Sections 12 and 13 of the *Banking Act* 1947 provide respectively for the purchase and compulsory acquisition by the Commonwealth Bank of shares in a " private bank." The validity of either of these sections is not to be finally tested by the principle whether the acquisition of shares by the Commonwealth Bank is necessary for or incidental to the carrying on of its banking business. To determine their validity finally by that test is to overlook s. 51 (xxxi.) of the Constitution. This grant of legislative power extends to the making of a law with respect to the acquisition by the Commonwealth Bank of shares (because they are " property ") on just terms from any shareholder in a " private bank " for any purpose in respect of which the Parliament has power to make laws. Such purposes are obviously wider than the purposes of any bank. The public control of the banking business of a " private " bank is a purpose in respect of which the Parliament has power under s. 51 (xiii.) of the Constitution to make laws. It is within the discretion of the Parliament to select any appropriate authority, for example

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the Treasurer or the Commonwealth Bank, as the agency to exercise such control. The acquisition of shares in a " private bank " by the Commonwealth Bank is an appropriate means of initiating and extending control by the Commonwealth Bank of the banking business of the private bank. Consequently the acquisition is warranted by s. 51 (xxxi.) : but it is necessary that the acquisition should be on just terms.

The Parliament has power under s. 51 (xxxi.), (xxxix.) and (xiii.) to enact the provisions of ss. 12, 13 and 14 (1). Section 14 (1) is necessary to make the acquisition effective for the purpose which constitutionally justifies it.

Section 14 (2) purports to confer upon the Commonwealth Bank a right to transfer any acquired share. This right is not incident to the shares in all the companies. The power of the Parliament under s. 51 (xxxi.) is to acquire shares with the incidents only which attach to them under the constitutions of the companies respectively. It is not within the powers of Parliament to add a right to the bundle of rights which constitute an acquired share. But subject to this principle, the Parliament can authorize the Commonwealth Bank to transfer an acquired share to a nominee to hold the share for it and to act for it as a member of the company. Section 14 (2) is justified by s. 51 (xiii.) but not by s. 51 (xxxi.).

The acquisition of the business of a " private bank " by the Commonwealth Bank is, in my opinion, an integral part of the plan for the management of the " private bank " devised in ss. 17-20 of the *Banking Act* 1947. Their effect is as follows. The directors appointed under the Constitution of the company are compulsorily retired ; power is conferred upon the Governor of the Commonwealth Bank to appoint directors in their place ; these directors are given " full power to manage, direct and control the business and affairs of the . . . bank " and in particular to dispose of the business of the bank to the Commonwealth Bank. The purposes for which these powers are conferred are declared to be " facilitating the control by the Commonwealth Bank of the banking business in Australia of private banks " and " furthering the expansion of the banking business of the Commonwealth Bank." Any dispositive powers over the assets of the " private bank ", which the statutory directors would derive from their general statutory powers or the particular power to dispose of the business of the bank, could hardly be exercised for the purpose of furthering the expansion of the Commonwealth Bank in any way other than by disposing of the assets or the business of the " private bank " to the Commonwealth Bank. This is not to say that it is necessarily a scheme to enable the

Commonwealth Bank to get assets of a " private bank " or its business at less than value. Section 19 (3) would not relieve the statutory directors of any fiduciary obligations which would arise from the circumstances. But I cannot agree that an acquisition by the Commonwealth Bank of any property from a " private bank " by the machinery devised in these sections of the Act is within the conception of acquisition upon just terms. I think that, in order to come up to that standard, independent approval of the terms of sale would be necessary. Sections 17-20 are, in my opinion, invalid for the above reasons.

But I do not deny that the conversion of the management of " private banks " into management by directors appointed by an appropriate public authority is a purpose in respect of which the Parliament has power under s. 51 (xiii.) to make laws.

Section 21 is, in my opinion, a law with respect to banking.

The taking over of the business of a " private bank " by the Commonwealth Bank involves the acquisition by the latter bank of the assets used in the business and the taking over of the liabilities. None of the " private banks " carries on any business in Australia other than the business of banking or services incidental to it. The Parliament has power to convert the ownership and management of any " private bank " from private to public ownership and control ; and to expand and strengthen the Commonwealth Bank. The taking over of the business of " private banks " is a means which is logically appropriate to accomplish those objects. It follows that the Parliament has power under s. 51 (xxxi.) to make a law for the acquisition of the assets on just terms from the " private bank " by the Commonwealth Bank. The liabilities of the business of the " private bank " are not property of the bank. Section 22 (8) (*b*) and (*d*) and s. 24 (5) and (7), which make liabilities of the " private bank " liabilities of the Commonwealth Bank and discharge the " private bank " from those liabilities are laws with respect to banking and are authorized by s. 51 (xiii.). It may be that those provisions could be justified on the ground that they are incidental to the execution by Parliament of its legislative power to acquire the assets. Provisions somewhat analogous to s. 22 (8) (*b*) and (*d*) are to be found in the laws passed by the legislature of the United States of America : see *United States Code*, 1946 Edition, Title 12, Banks & Banking. Sections 34 and 34 (*a*) of that statute prescribe what is the effect of the consolidation of banks on the property and choses in action of a bank consolidating with another bank.

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If the Court of Claims is validly given exclusive jurisdiction to determine claims for compensation against the Commonwealth Bank under ss. 15 and 25 respectively, then, subject to the questions about interest and costs, there could be no doubt that the compulsory acquisition of shares under s. 13 and of property under s. 24 would be on just terms. The concessions in respect of taxation made by s. 23 are limited to voluntary purchases. But that cannot alter the result that compulsory acquisition is on just terms if any bank whose property is compulsorily taken is entitled to recover fair and reasonable compensation in respect of the acquisition. The provisions of the Act giving exclusive jurisdiction to the Court of Claims raise questions under s. 75 (iii.) of the Constitution. These questions are whether a claim against the Commonwealth Bank for compensation under s. 15 or s. 25 is a matter in which the Commonwealth or a person sued on behalf of the Commonwealth is a party. I agree with the opinion of the Chief Justice on these questions.

It is within the legislative power to incorporate a bank and make it an agency to carry on banking for the executive government, the Crown being in effect the banker, or to give the bank authority to carry on banking on its own behalf, the corporation being the banker. In my opinion the Commonwealth Parliament has followed the latter course. Section 11 of the *Commonwealth Bank Act* 1945 says that the Commonwealth Bank shall act as a central bank. A central bank is not necessarily a branch of the executive government. Section 12 provides that the Commonwealth Bank " shall in so far as the Commonwealth requires it to do so, act as banker and financial agent of the Commonwealth." It is common practice even for a privately owned bank to be the banker and financial agent of a government. Section 17 provides that the Commonwealth Bank shall carry on general banking business. The Crown is not the banker of the customers of the Commonwealth Bank. The bank has a Note Issue Department : Part VII. The privilege of issuing notes is one also which might be granted to a privately owned bank. Section 43 provides that the notes shall be legal tender. This character could be given to notes issued by a privately owned bank. None of these circumstances could justify the conclusion that the Commonwealth Bank is a branch of any Commonwealth department. The provisions of Part V., relating to the management of the Commonwealth Bank, are strong to show that it is not a corporation under the Crown. Indeed s. 9 takes it for granted that the Commonwealth Bank is not a branch of a department of State of the Commonwealth and accordingly provides a means for surmounting a crisis resulting from the general independence of the executive government which the bank has under the *Commonwealth Bank Act*.

In regard to the questions of interest and costs, I am of the same opinion as the Chief Justice.

It follows that the *Banking Act* 1947 contains valid and effective provisions for the enforcement of the liability imposed upon the Commonwealth Bank by ss. 15 and 25 and that any acquisition, either of shares in a "private bank" or of its property by the Commonwealth, would be "on just terms."

I agree with the Chief Justice that s. 24 (8) is not justified by any grant of legislative power to the Parliament.

The arguments for the plaintiffs that the *Banking Act* 1947 is an unconstitutional interference with the rights reserved to the States by the Constitution are answered by the statement of principle in the judgment of *Dixon* J. in *Melbourne Corporation* v. *The Commonwealth* (1). The *Banking Act* 1947 is a general Act in the sense that the alterations which its operation would make in the present legal framework of banking would affect the States and everyone else in the same way. In this way its operation differs from that of s. 48 of the *Banking Act* 1945 which was declared in the above case to be invalid.

The *Banking Act* 1947 is not inconsistent with the Financial Agreement. There is no express stipulation in the agreement that the system of banking existing at the time it was made should not be altered by either Federal or State legislation and it is, in my opinion, impossible to imply such a stipulation from the terms of the agreement.

I am of opinion that the *Banking Act* 1947 does not violate s. 92 of the Constitution. On this question I agree entirely with the reasons of the Chief Justice and respectfully adopt them. If the principles laid down in *James* v. *The Commonwealth* (2) are applied, I think that the argument for the plaintiffs on this question must be rejected.

Section 51 of the Constitution makes trade and commerce on the one hand and banking on the other hand different heads of power. If banking is trade and commerce as plaintiffs' counsel argued, the Commonwealth could create a bank under s. 51 (i.) to operate within the territorial limits mentioned in this provision. Compare *Australian National Airways* v. *The Commonwealth* (3). Section 51 (i.) would give power to the Parliament to control banks operating across State lines and inter-State banking and do other things in respect of banks and banking which counsel for the plaintiffs argued could not be done under s. 51 (xiii.). They argued that this

(1) (1947) 74 C.L.R. 31, at p. 84.
(2) (1936) A.C. 578; 55 C.L.R. 1.
(3) (1945) 71 C.L.R. 29.

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placitum does not give power to Parliament to create a bank, and that the source of this authority is s. 51 (xxxix.).

Banking is not, in my opinion, trade, commerce or intercourse. Banks provide aids to these activities but banking itself is not one of these things. It is not the buying, selling, bartering or exchange of any commodity, or transportation or communication. Section 92 would of course nullify any legislative restriction on banking depending for its operation on the relation of any banking transaction to trade, commerce and intercourse among the States.

To say that credit is transmitted across a State border is to speak figuratively. Credit is not a commodity or a physical thing. It is not like a message sent by wire or by wireless which could be intercepted. A banker resorts to the post office or other means of communication between the States. If that circumstance attracts the application of s. 92, then any business which is spread over State lines could claim the protection of s. 92 against both State and Federal legislation. Section 92 binds the Commonwealth and the States. If the *Banking Act* violates s. 92, it is difficult to see how, for example, s. 6 or s. 7 of the *Banking Act* 1945 could survive an attack on the ground that it violates s. 92 ; another example is legislation providing for bank holidays ; this might be bad for interference with the freedom of trade, commerce and intercourse among the States on those days.

I think that the only declaration which should be made now is that ss. 17-20 inclusive and s. 24 (8) of the *Banking Act* are invalid.

BANK OF NEW SOUTH WALES AND OTHERS, No. 42 OF 1947 *v.* THE COMMONWEALTH OF AUSTRALIA AND OTHERS.

Declare that the following provisions of the Banking Act 1947 *are invalid :—Part IV., Division* 2, *except in so far as it relates to the voluntary acquisition of shares and without prejudice to the question whether s.* 14 (1) *is valid in relation thereto : Part IV., Division* 3, *ss.* 24, 25, 37 *to* 45 *inclusive,* 46, 59 *and* 60.

Order—

(*a*) *that the defendant the Treasurer and any Minister of the defendant the Commonwealth of Australia or any member of the Executive Council for the time being acting or purporting to act for or on behalf of the Treasurer of the Commonwealth of Australia be restrained from publishing or causing or permitting to be published any notice pursuant to sub-s.* (1) *of s.* 13 *of the Banking Act* 1947 ;

(*b*) *that the defendant Hugh Trail Armitage and every other person for the time being entitled by law or purporting to exercise the powers of the Governor of the Commonwealth Bank of Australia be restrained from appointing or purporting to appoint any person a director of any of the plaintiff companies* ;

(*c*) *that the defendant the Treasurer and any Minister of the defendant the Commonwealth of Australia or any member of the Executive Council for the time being acting or purporting to act for or on behalf of the Treasurer of the Commonwealth of Australia be restrained from giving or causing or permitting to be given any notice pursuant to sub-s.* (1) *of s.* 22 *of the Banking Act* 1947 ;

(*d*) *that the defendant the Commonwealth Bank of Australia its officers and servants be restrained from requiring any of the plaintiff companies to take any action pursuant to sub-s.* (8) *of s.* 24 *of the Banking Act* 1947 ;

(*e*) *that the defendant the Treasurer and any Minister of the defendant the Commonwealth of Australia or any member of the Executive Council for the time being acting or purporting to act for or on behalf of the Treasurer of the Commonwealth of Australia be restrained from publishing or causing or permitting to be published in the Commonwealth Gazette any notice pursuant to sub-s.* (4) *of s.* 46 *of the Banking Act* 1947 ; *and*

(*f*) *that the defendant Hugh Trail Armitage and every other person for the time being entitled by law or purporting to exercise the powers of the Governor of the Commonwealth Bank of Australia be restrained from authorizing any person to act under s.* 59 *of the Banking Act* 1947.

Defendants to pay costs of plaintiffs including reserved costs, if any.

THE BANK OF AUSTRALASIA AND OTHERS, No. 43 OF 1947 *v.* THE COMMONWEALTH OF AUSTRALIA AND OTHERS.

Declare that the following provisions of the Banking Act 1947 *are invalid* : *ss.* 24, 25, 37 *to* 45 *inclusive*, 46, 59 *and* 60.

Order—

(*a*) *that the defendant the Treasurer and any Minister of the defendant the Commonwealth of Australia or any member of the Executive Council for the time being acting or purporting to act for or on behalf of the Treasurer of the Commonwealth of Australia be restrained from giving or causing or*

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permitting to be given any notice pursuant to sub-s. (1) *of s.* 22 *of the Banking Act* 1947 ;

(*b*) *that the defendant the Commonwealth Bank of Australia its officers and servants be restrained from requiring any of the plaintiff companies to take any action pursuant to sub-s.* (8) *of s.* 24 *of the Banking Act* 1947 ;

(*c*) *that the defendant the Treasurer and any Minister of the defendant the Commonwealth of Australia or any member of the Executive Council for the time being acting or purporting to act for or on behalf of the Treasurer of the Commonwealth of Australia be restrained from publishing or causing or permitting to be published in the Commonwealth Gazette any notice pursuant to sub-s.* (4) *of s.* 46 *of the Banking Act* 1947 ; *and*

(*d*) *that the defendant Hugh Trail Armitage and every other person for the time being entitled by law or purporting to exercise the powers of the Governor of the Commonwealth Bank of Australia be restrained from authorizing any person to act under s.* 59 *of the Banking Act* 1947.

Defendants to pay costs of plaintiffs including reserved costs, if any.

THE STATE OF VICTORIA AND ANOTHER, No. 44 OF 1947 *v.* THE COMMONWEALTH OF AUSTRALIA AND OTHERS—*Judgment in the same terms as in Action No.* 42 *of* 1947.

THE STATE OF SOUTH AUSTRALIA AND ANOTHER, No. 47 OF 1947 *v.* THE COMMONWEALTH OF AUSTRALIA AND OTHERS—*Judgment in the same terms as in Action No.* 42 *of* 1947.

THE STATE OF WESTERN AUSTRALIA AND ANOTHER, No. 48 OF 1947 *v.* THE COMMONWEALTH OF AUSTRALIA AND OTHERS—*Judgment in the same terms as in Action No.* 42 *of* 1947.

Solicitors for the plaintiffs : in the first action, *Allen, Allen & Hemsley* ; in the second action, *Blake & Riggall* ; in the third action, *F. G. Menzies*, Crown Solicitor for Victoria ; in the fourth action, *A. J. Hannan*, Crown Solicitor for South Australia ; in the fifth action, *R. V. Nevile*, Crown Solicitor for Western Australia.

Solicitor for the defendants : *H. F. E. Whitlam*, Crown Solicitor for the Commonwealth.

E. F. H.