[PRIVY COUNCIL.]

THE COMMONWEALTH AND OTHERS . APPELLANTS;
DEFENDANTS,

AND

BANK OF NEW SOUTH WALES AND OTHERS . . . . . } RESPONDENTS.
PLAINTIFFS,

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THE COMMONWEALTH AND OTHERS . APPELLANTS;
DEFENDANTS,

AND

BANK OF AUSTRALASIA AND OTHERS . RESPONDENTS.
PLAINTIFFS,

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THE COMMONWEALTH AND OTHERS . APPELLANTS;
DEFENDANTS,

AND

STATE OF VICTORIA AND ANOTHER : RESPONDENTS.
PLAINTIFFS

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THE COMMONWEALTH AND OTHERS . APPELLANTS;
DEFENDANTS,

AND

STATE OF SOUTH AUSTRALIA AND ANOTHER . . . . . } RESPONDENTS.
PLAINTIFFS,

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THE COMMONWEALTH AND OTHERS . APPELLANTS;
DEFENDANTS,

AND

STATE OF WESTERN AUSTRALIA AND ANOTHER . . . . . } RESPONDENTS.
PLAINTIFFS,

PRIVY COUNCIL.
1949.

*Mar.* 14-17, 21-25, 28-31; *Apr.* 1, 4-7, 26-29; *May* 2-5, 9, 10, 23-27, 30, 31; *June* 1; *July* 26; *Oct.* 26.

Lords Porter, Simonds, Normand, Morton of Henryton, and MacDermott.

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1949.
THE COMMONWEALTH v. BANK OF N.S.W.

*Constitutional Law (Cth.)—Appeal from High Court to Privy Council—Whether appeal is from judicial act or pronouncement of opinion on question of law—Certificate of High Court—Cases in which certificate necessary—"Decision of the High Court upon any question . . . as to the limits inter se of the constitutional powers of the Commonwealth and those of any State or States"—Validity of Commonwealth statute attacked in action in High Court on grounds of contravention of s. 92 of Constitution and also of lack of power otherwise—Order of High Court declaring section of statute invalid—Nothing on face of order to show decision founded on any question of "limits inter se" of constitutional power—Reasons for judgment showing section held invalid on ground of contravention of s. 92—Question of "limits inter se" argued before High Court but not decided—Attempt by Commonwealth without certificate of High Court to appeal to Privy Council against the judgments in so far as they expressed the opinion that the section contravened s. 92—Need for determination that challenged section otherwise within power—"Inter se" questions thereby raised before Privy Council—Freedom of trade, commerce and intercourse among the States—Banking—Prohibition of private banking—Statute—Validity—Severability—The Constitution* (63 & 64 *Vict. c.* 12), *ss.* 51 (xiii.), 74, 92—*Banking Act* 1947 (*No.* 57 *of* 1947), *ss.* 6, 11, 46—*Acts Interpretation Act* 1901-1941 (*No.* 2 *of* 1901—*No.* 7 *of* 1941), *s.* 15A.

By reason of the provisions of s. 74 of the Commonwealth Constitution, in every case in which the relief sought on an appeal from the High Court to the Privy Council cannot be granted without the determination of a question as to the limits *inter se* of the constitutional powers of the Commonwealth and those of any State or States, no appeal will lie without the certificate of the High Court under s. 74, and, when that certificate has been given, no further leave from the Privy Council will be necessary even though other questions, which are not questions as to "limits *inter se*," will have to be determined.

Without having obtained a certificate of the High Court under s. 74 of the Constitution, the defendants in the actions reported under the title *Bank of New South Wales* v. *The Commonwealth*, (1948) 76 C.L.R. 1, sought to appeal to the Privy Council from the decision of the High Court in so far as it declared that s. 46 of the *Banking Act* 1947 was invalid. The plaintiffs in the actions objected that the appeal did not lie because it was within the opening words of s. 74 of the Constitution to the effect that, in the absence of a certificate, no appeal should be permitted to the Privy Council "from a decision of the High Court upon any question, however arising, as to the limits *inter se* of the constitutional powers of the Commonwealth and those of any State or States." The argument for the plaintiffs was that, on its true construction, s. 74 meant that no appeal to the Privy Council was permissible without a certificate, if the relief sought on the appeal could not be granted without the determination of a question of "limits *inter se*," and that such was the case here because, before the order of the High Court declaring s. 46 to be invalid could be set aside, the Privy Council would have to determine the correctness of the plaintiffs' contentions that the section was not within

any legislative power conferred by the Constitution. The defendants contended that there had been no " decision " adverse to them in relation to s. 46 except to the extent to which it appeared from the reasons for judgment of the members of the Court that a majority had held the section invalid on the ground solely that it contravened s. 92 of the Constitution, which involved no " *inter se* " question. A certificate, the defendants argued, was not required merely because an " *inter se* " question had been raised in the proceedings before the High Court and might have to be decided in the appeal to the Privy Council, but was necessary only if there had been a specific decision adverse to an appellant on an " *inter se* " question which he, and he alone, wished to challenge.

*Held* that under s. 74 an appeal would lie only from a judicial act—in this case the order of the High Court declaring s. 46 to be invalid—and not from the pronouncement of an opinion on a question of law; the present appeal could not be determined without a decision on " *inter se* " questions, and therefore without a certificate the appeal did not lie.

Dicta in *Baxter* v. *Commissioners of Taxation* (*N.S.W.*), (1907) 4 C.L.R. 1087, as to the meaning of the word " decision " in s. 74 of the Constitution, disapproved.

The freedom stipulated by s. 92 of the Constitution is not merely " freedom at the frontier "; a restriction applied, not at the border, but at a prior or subsequent stage of inter-State trade, commerce or intercourse may offend against the section. Nor is it in respect of the passage of goods only that such trade, commerce and intercourse is protected.

Regulation of trade, commerce and intercourse among the States is compatible with its absolute freedom under s. 92 of the Constitution. The section is violated only when a legislative or executive act operates to restrict such trade, commerce and intercourse directly and immediately as distinct from creating some indirect or consequential impediment which may fairly be regarded as remote.

Regulation of trade may, without contravening s. 92 of the Constitution, take the form of denying certain activities to persons by age or circumstances unfit to perform them or of excluding from passage across the frontier of a State creatures or things calculated to injure its citizens.

The business of banking, carried on by inter-State transactions, is " trade commerce and intercourse among the States " within the meaning of s. 92 of the Constitution.

Section 46 of the *Banking Act* 1947, inasmuch as it purports to empower the total prohibition of private banking, both intra-State and inter-State, contravenes s. 92 of the Constitution and is, therefore, invalid. The section is severable from the rest of the provisions of the Act which the High Court held to be invalid, but the provisions of the section are not severable from each other.

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*James* v. *Cowan*, (1932) A.C. 542; 47 C.L.R. 386, and *James* v. *The Commonwealth*, (1936) A.C. 578; 55 C.L.R. 1, considered.

Decision of the High Court: *Bank of New South Wales* v. *The Commonwealth*, (1948) 76 C.L.R. 1, in so far as it declared s. 46 of the *Banking Act* 1947 to be invalid, approved.

APPEALS from the High Court to the Privy Council.

These were consolidated appeals from the decision of the High Court to the Privy Council, by special leave, by the defendants in the various actions reported under the title *Bank of New South Wales* v. *The Commonwealth* (1). The respondents to the appeals were the plaintiffs in the several actions, and the States of New South Wales and Queensland intervened, by leave of their Lordships, in support of the appellants.

The Attorney-General of the Commonwealth (*H. V. Evatt* K.C.) (with him the Solicitor-General of the Commonwealth (*K. H. Bailey*), *D. N. Pritt* K.C., *P. D. Phillips* K.C., *Frank Gahan*, *H. L. Parker* and *C. I. Menhennitt*), for the appellants. As to the right of appeal without a certificate under s. 74 of the Constitution, the prohibition of that section is only in relation to appeals from the High Court upon a particular type of question, namely, a decision of the High Court upon any question, howsoever arising, as to "limits *inter se*." If one knew no more than what appeared from the form of the declaration and the order of the High Court, there would be nothing to show any infringement of s. 74. Of course, behind the form is the substance of the matter. The substance of the matter makes it plain that the appeal is not from any decision of the High Court upon an *inter se* question. The only question which the appellants seek to raise, whether s. 46 of the *Banking Act* 1947 offends s. 92 of the Constitution, is not a question of limits *inter se* (*James* v. *Cowan* (2); *Jones* v. *Commonwealth Court of Conciliation and Arbitration* (3); *James* v. *The Commonwealth* (4)). So, if s. 46 is decided to be invalid by reason of s. 92 of the Constitution and by reason of that alone (taking the simplest case where that is the only matter that has arisen in the High Court and there is no complication by other questions coming into the matter at all), that would plainly not be a question as to the limits *inter se*, and a decision of the High Court either that s. 92 operated to invalidate s. 46 or that it did not invalidate s. 46 (that is to say, however the question was decided) would not be a decision on an *inter se* question according to the

(1) (1948) 76 C.L.R. 1.
(2) (1932) A.C. 542, at p. 560.
(3) (1917) A.C. 528.
(4) (1936) A.C. 578; 55 C.L.R. 1.

authorities, and, therefore, there would be no prohibition under s. 74 against the exercise by the King of the prerogative of appeal. Leaving out the form of the order appealed from, our submission is that it is from the High Court's decision upon the question whether s. 46 does offend against s. 92 and upon no other question that this appeal is being brought or, putting it in the precise terms of s. 74, that in fact this appeal is an appeal from a decision of the High Court upon the question as to whether s. 46 is rendered invalid by reason of s. 92 of the Constitution. In our view there is no other decision of the High Court in relation to s. 46 from which we could appeal, except the question whether s. 46 is supported by the power in s. 51 (xx.). The High Court gave a decision that s. 46 was not authorized by s. 51 (xx.): "Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth," and from that decision we are not seeking to appeal. I submit that all other questions in relation to s. 46 were decided in favour of the present appellants.

[Lord MORTON. Let us suppose that instead of the decision on the s. 51 (xiii.) point, the banking point, being four to two in your favour in the High Court, it had been four to two against you so that you would be appealing not only against the decision that s. 46 infringes s. 92 of the Constitution, but against a decision that s. 46 was outside your powers under s. 51 (xiii.). In that event it would clearly have been necessary to get a certificate, would it not ?]

Yes, and if we wanted to make sure that the appeal would not be futile, also to get the exercise of the prerogative to grant special leave. We would have to get both.

[Lord MORTON. It is only because the decision was in your favour on s. 51 (xiii.) that you say you do not require the certificate ?]

Either that the decision is in our favour or that there is no decision adverse to us on the *inter se* question. But really the question raised by my Lord *Morton* is the test, and I think I can show that proper practice and the recognized way of dealing with such a position, that is, if the order was that s. 46 was invalid on the two grounds—(1) the *inter se* ground and (2) the constitutional ground on s. 92, which is not an *inter se* ground—would be to obtain the certificate of the High Court of Australia in order to clear the way for the appeal (the *inter se* question having been decided against us by the High Court) and at the same time (because of the position that that could be decided in favour of the appellant and yet no effective order could have been made upon it except a declaration—perhaps that hardly could have been done) to obtain from the Privy Council, if it were possible to obtain it, their special leave

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to appeal by virtue of the prerogative which is retained by the third paragraph of s. 74. That course was taken in *Attorney-General for the Commonwealth of Australia* v. *Colonial Sugar Refining Co. Ltd.* (1).

The essence of the command in s. 74, first paragraph, is that, if there is a decision of the High Court upon any *inter se* question, no appeal lies to the Queen in Council from that decision unless the High Court certifies something. What does it certify ? It certifies, not that the case as a whole or that the cause or matter ought to be determined, but merely " that the question is one which ought to be determined by Her Majesty in Council," and the certificate must be in that form. It is a certificate directed exclusively, I submit, to a particular question, answering the description of a question " as to the limits *inter se*," &c., and the certificate of the High Court in form will be : " This Court certifies that a certain question (stating what it is) being an *inter se* question ought to be determined by Her Majesty in Council." If the High Court does not so certify, then no appeal can be brought to the Queen in Council from a decision of the High Court upon that question. That is re-inforced and made clear by the second paragraph of s. 74 : " The High Court may so certify if satisfied that for any special reason the certificate "—that is the same certificate—" should be granted, and thereupon an appeal shall lie to Her Majesty in Council on the question without further leave." That is a specific question, being a question " as to the limits *inter se*," and the prohibition in the first paragraph is strictly commensurate, I submit, with the provision in the second paragraph opening the way to the Privy Council on that question, and there is no other means of approach to the Privy Council except by means of a certificate if the appeal is from a decision of the High Court upon that *inter se* question. It follows that if the decision is against a party upon two concurrent grounds—(1) under s. 51 (xiii.), being an *inter se* question, and (2) under s. 92, being not an *inter se* question—the unsuccessful party losing on both grounds cannot have his appeal to the Privy Council on the decision on the *inter se* question without a certificate, but that is not enough for him, because the High Court has no right to exercise jurisdiction in substitution for the jurisdiction of the Judicial Committee, except in the one case. We are in the realm of the prerogative, and one need not quote cases to show that you look at provisions trenching upon it with some care. But what reason is shown in the words of the section for saying that the High Court should be empowered to permit a general appeal to the

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

Privy Council simply because the *inter se* question was involved in the matter or cause ? That is the view taken by the Justices of the High Court in the early days when the question of s. 74 became one of very great importance indeed and caused something of a crisis. It says in the third paragraph : " Except as provided in this section, this Constitution shall not impair any right which the Queen may be pleased to exercise by virtue of Her Royal prerogative to grant special leave of appeal." That means that except so far as is expressly provided above, that is, in the case of *inter se* questions, the whole matter rests as it is, namely, completely within the jurisdiction and discretion of the Judicial Committee of the Privy Council. Of course, that is an unusual form of procedure, but it was an unusual situation. It appears from one of the cases that I will cite that s. 74 was a section which reached its present form only after a very considerable amount of discussion, both in Australia and here, and one can quickly see that this is a compromise between two points of view, one excluding the prerogative of appeal from the High Court, and one retaining it in its full force and effect. The limitation is, I submit, quite clearly expressed, and in this particular case there is no difficulty in concluding that the first sentence does not prohibit our appeal.

Perhaps I should remind your Lordships of what I call the three *inter se* questions. First of all, there is the banking power : we submit that the decision was four to two in favour of the present appellants, that is to say, we had the Chief Justice, *Starke*, *Dixon* and *McTiernan* JJ. in our favour on the question arising under s. 51 (xiii.), and we are certainly not appealing from that decision. Secondly, on the point about the implied immunity of the States, we had a decision of four Justices in our favour with no Justice dissenting ; they were again, the Chief Justice, *Starke*, *Dixon* and *McTiernan* JJ., and no dissent from that view was expressed. Thirdly, on the Financial Agreement point, being a third *inter se* question, we had in our favour the same four Justices as determined the first and second points, with *Rich* and *Williams* JJ. dissenting.

Where the High Court has said : " Section 92 is enough in our opinion to invalidate s. 46, and we express no opinion whatever on the other point," I submit then the unsuccessful party could ask for special leave, and s. 74 would be no bar to the granting of special leave. Then the next question is : Could the Privy Council, in hearing that appeal, permit the successful party, the respondents to the appeal, from doing what is quite ordinary practice, namely, supporting that order on other grounds, including *inter se* grounds ?

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[Lord PORTER. I am thinking of the case in which one side wins on an *inter se* point and loses upon the non *inter se* point. Then I suppose your respondent is going to ask for leave of the High Court on the *inter se* point ?]

There would be a cross-appeal, I presume.

[Lord SIMONDS. To illustrate what my Lord has said in this particular case, would it be your submission that it would have been competent for the respondents here to ask the High Court for a certificate for leave to appeal from their decision upon the *inter se* question ?]

Yes. I put that on the special application for leave. I put the view that in substance that could and perhaps should be regarded as an attempt to appeal from a decision, but the submission did not meet with acceptance in the Privy Council. The view expressed during the argument was that that course would be unnecessary because the respondents argued, as they will argue here no doubt : Why should we, who have an order in our favour, go to the High Court for a certificate in order to uphold the order that we have ?

[Lord MACDERMOTT. Do you say that the words " upon any question " relate to the words " decision of the High Court " ?]

Yes : " decision of the High Court upon any question." I submit that as a matter of English it cannot be read in any other way. *Dixon* J. referred in one of the judgments to the process of amputation as being distinct from plastic surgery, but I submit that when one looks at the way that the respondents have to re-write the section it really is a suggestion which would not commend itself to your Lordships. " No appeal shall be permitted to the Queen in Council " from something. It is an appeal from what ? One of the proposals is to put the words " decision of the High Court " as though brackets were surrounding them, as though they were isolated from the context. I do not know how it would read then. I submit that it plainly means that no appeal shall be permitted to the Queen in Council from a certain type of decision. What is the decision ? It is the decision of the High Court upon a question.

[Lord MACDERMOTT. It necessarily means, does it not, that you take " decision " as including the reasons for the adjudication ?]

Only for the purpose of finding out what was decided. If you do not look at the reasons in this case, you cannot see on what basis the order is made. It is simply a declaration of invalidity and consequential injunction. I submit that that reading is supported very strongly by the second and third paragraphs of the section. The certificate which must be obtained to get rid of the prohibition

in the first paragraph is a certificate, not that the appeal is one which ought to be heard, but that the question is one which ought to be determined. The words show clearly that it is something in the nature of a special case on a particular question which is contemplated by the framers of this section. That is supported, I submit, by the second paragraph, that when the certificate is granted an appeal lies on the question.

That is the way it is put by Lord *Atkin* in *James* v. *Cowan*: "It remains, however, to dispose of the preliminary point that the decision of the High Court was a decision upon a question 'as to the limits *inter se*'," &c. "and that by s. 74 no appeal lay . . . from such a decision without a certificate . . . which had not been asked for"—although the present point is not the point in that case, I submit that that is the natural meaning of the words that are used. So that we submit first of all that the words of s. 74 are clear and that they require to be given their ordinary, natural meaning.

[Lord NORMAND. I am puzzled by the fact that in the second paragraph it says: "an appeal shall lie to her Majesty in Council on the question." One would rather have expected it would be "an appeal shall lie to her Majesty in Council from the decision," repeating the opening words of the first paragraph.]

I submit that it makes the position stronger. It is an appeal from the decision of the High Court, but it is a decision limited to the question, so it is an appeal certified to and the appeal then lies on the question without further leave. Those are words appropriate to a question *inter se* being decided and being appealed from.

I submit that the second paragraph does not weaken the contention but rather strengthens it. It is an appeal on the question and on nothing else. It is an appeal from a decision on the question. The word "decision" is not repeated because the reference to the High Court giving a certificate is stated earlier in the paragraph.

[Lord MORTON. That gives rise to this difficulty, that when the appeal takes place on the question it must, one would have thought, be open to the respondents to raise any objection or argument which they wish as to the question that has come before the Privy Council, but, if that is so, it must be open to them to raise the *inter se* question which is bound up with it. Then you get the position that the Board is considering an *inter se* question without any certificate having been granted.]

Yes.

[Lord MORTON. That seems almost a dilemma. You must either shut them out from discussion of the *inter se* question or else, if you

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do not do that, you must have an *inter se* question being debated here as to which there is no certificate, which may be just what the section is intended to prevent.]

No. It is intended to prevent an appeal from a decision of the High Court on the *inter se* question. There being an *inter se* question, if it chooses not to give a decision, then the prerogative still attaches, and indeed there were means of appeal to the Privy Council direct from the Supreme Courts of the States in which there was no limitation upon the prerogative at all. It is only a decision of the High Court to which this special immunity is given in relation to Privy Council appeals. There is no such provision with regard to the Supreme Court of each colony which became a State. In the case of the Supreme Court the Privy Council did on one important occasion give a decision on an *inter se* question. Then the Commonwealth Parliament passed special legislation to try and stop the Supreme Court from deciding *inter se* questions and bring those up automatically to the High Court so that there could not be an appeal. At the time of the Constitution in 1901 there was an appeal to the Privy Council from the established Supreme Courts of the States. So that it is only the High Court that is put in this special position.

[Lord NORMAND. What value do you attach to the words " howsoever arising " ?]

The value that attaches to the words is this. It says " from a decision of the High Court upon any question, howsoever arising, as to." What is the nature of the question first of all before we examine how it might arise ? It is a question " as to the limits *inter se* of the constitutional powers of the Commonwealth and those of any State or States " and the States in relation to each other. Such a question might arise as between individuals. In an action between A and B under a statute, it might well happen that one party would raise the point that the statute in question was *ultra vires* and the question would therefore be a question as between Commonwealth and State *inter se* or State and State, even though it might arise as between individual parties ; " howsoever arising " is intended to apply to that case.

*Isaacs* J. said in *Baxter* v. *Commissioners of Taxation (N.S.W.)* (1) that the words are meant to apply to the question, however it is embedded in the procedure or proceedings of the High Court, howsoever it arises as between parties. A question as between State and State might occur in relation to the question of title to land at or near a boundary in which the mere action of ejectment

(1) (1907) 4 C.L.R. 1087.

or trespass might really involve the question as to the sovereignty in relation to that particular portion of the earth's surface. It might raise the question as to the physical boundaries of the State, and therefore as to the authority of the State to give a title, all titles in Australia proceeding from the Crown.

The respondents suggest that the word " decision " really means a judgment, order or sentence, or an expression of that character. I point first of all to s. 73, which deals with the appellate jurisdiction of the High Court, and there, in terms that are repeated in many other statutes, the phrase is " to hear and determine appeals from all judgments, decrees, orders and sentences " of any other Federal Court or a Supreme Court of any State and of the inter-State commission.

You get a contrast between the phrase " judgments, decrees, orders and sentences " and " decision." In fact, you could not omit the word " decision " from s. 74 and substitute each of those words without getting nonsense out of the first sentence. Supposing for instance the words were : " No appeal shall be permitted to the Queen in Council from a judgment of the High Court upon any question." That might read sufficiently satisfactorily, but supposing it were : " No appeal shall be permitted to the Queen in Council from an order of the High Court upon any question." You never speak of an order of any court upon any question ; it is not the language which would be used. Then, taking the last word " sentence," it would read : " No appeal shall be permitted to the Queen in Council from a sentence of the High Court upon any question." So that you cannot, I submit, omit the word " decision " and substitute for it the collection of words which is usually employed to indicate the final order of a court. I submit that the word " decision " is used advisedly ; it means a decision on a point of law.

There is one thing I submit that follows from the words of s. 74. By restricting the appeal without a certificate on a particular type of constitutional question, I submit that the Parliament of Westminster, giving effect to this new Constitution, has postulated that there may be an appeal from the High Court to the Privy Council upon all constitutional questions other than these *inter se* questions, which are questions of what one might call domestic jurisdiction, disputes between the Commonwealth and State legislatures or executives or State and State legislature or executive. It is a limited class of constitutional controversy which is put in this special category. The very strong implication is that the reason for that was to leave unamended the access to the Privy Council

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by way of exercise of the prerogative in cases of decisions of the High Court upon all other constitutional questions. I submit that that is so by the very precision and narrowness of the definition of this type of constitutional question and that one can see that very important constitutional questions are intended to be determined by the Privy Council providing that the prerogative is exercised.

The phrase used in s. 74 may be contrasted with that in s. 76 of the Constitution giving power to the Parliament to make laws conferring original jurisdiction on the High Court in any matter "arising under this Constitution or involving its interpretation." That is an area which in fact is very much wider indeed than the type of constitutional question defined in s. 74 itself.

The practice of the High Court and, to some extent, of the Privy Council itself supports the reading of the section which we submit.

Sir *Robert Garran* and Sir *John Quick* in their *Annotated Constitution* (1901), at p. 755, say of s. 74: "The appeals forbidden by this section are appeals 'from a *decision* of the High Court *upon any question*' of a certain character. The distinction should be noted between the phrase 'decision of the High Court' in this section and the phrase 'judgment of the High Court' in s. 73. A judgment of the court is its order upon a case; a decision of the court is its finding upon a question of law or fact arising in a case. A decision upon a question is not of itself a judgment, but is the basis of a judgment; and one judgment may be based on the decision of several questions. This section, then, forbids not an appeal from a judgment, but an appeal from the decision of a question. Where a judgment is based upon the decision of several questions, one of which is a question as to the limits of constitutional powers, the section does not forbid the Privy Council to grant special leave of appeal from the judgment; what it does is to forbid the Privy Council from disturbing the decision of the High Court *on that particular question*. It may be that, apart from the constitutional question, there are other questions of law or of fact which the Privy Council may hold to have been erroneously decided by the High Court, and which are material to the judgment. The Privy Council has power to deal with the whole matter, except that it cannot disturb the decision of the High Court on the constitutional question unless the High Court has certified that the question ought to be determined by the Privy Council."

*Quick & Garran* go further than I need go. The authors do not address their minds to the question of the rights of the respondent. But supposing no certificate is granted but yet the party seeking

to appeal to the Privy Council can win his case or get some effective order in the cause. He is entitled to ask the Privy Council for special leave. If he gets it without there being a certificate, he cannot question the decision of the High Court on an *inter se* question.

[Lord NORMAND. It would be little use bringing an appeal then.]

He may have two points. He may have an appeal on law or on fact or on interpretation or construction, and the constitutional point may be simply one of a number of concurring grounds which he has put before the High Court in order to try to get an effective order. It may be in the circumstances of the case that, the other portions of the judgment being under review, the other decision could be and should be reversed and he may get relief. It depends upon the way in which the constitutional question is embedded in the litigation.

[Lord MORTON. May I try and apply *Quick & Garran* to the present case to see whether I have understood your proposition? Would they say this, that you can come here without a certificate and say to the Privy Council: "Please decide whether s. 46 offends against s. 92"?]

Yes.

[Lord MORTON. That and nothing else. But you will observe that if we did that we should not be giving a decision on the validity of s. 46 at all, and that is the only question which the High Court order dealt with. It might be rather a barren discussion, might it not?]

Your Lordship is taking a case where the High Court decided both points against the party seeking to appeal?

[Lord MORTON. No, I am taking the concrete case before us now, and trying to apply *Quick & Garran* to it. If they are right, I should have thought they were saying you, the appellants, can come here and say: "Please decide whether s. 46 offends against s. 92 of the Constitution," and that the Privy Council, being unable to give any other reason against the validity of s. 46, is expected to sit here and give a decision on that naked point. Is not that what they are saying?]

They do not put it quite in that way. I submit that in such a case, which assumes that the appellant has succeeded in the High Court on the *inter se* question—I am taking that case—if s. 74 means, as I submit it does, that the non *inter se* points are not debarred from consideration by the Privy Council, then before the Privy Council a number of courses are open to their Lordships. They could say that the respondent is to be permitted to raise *inter se*

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questions. They might be bound to do that in any case, and I would submit so, if necessary. They could in such a case at least make a declaration setting aside the declaration of invalidity if it proceeds upon the basis of s. 92, remitting the matter to the High Court with a declaration that it does not infringe s. 92, and then direct the Court to make such order as is consistent with that declaration.

[Lord MORTON. That means, does it not, that the other side, having been successful below, have got to incur all the expense of coming here to have a point decided which may be purely academic ?]

It would not be academic because I am assuming that the other points are decided in favour of the appellants. So that, if s. 92 is the only obstacle between the appellant and an order in his favour declaring the validity of s. 46, and the Privy Council thinks s. 92 has not been infringed, then one would suppose that this section had addressed itself to the particular question of the respondent and that a very just settlement of the matter would be for the Privy Council either to make that declaration on the basis of the High Court's findings on the *inter se* question, or else remit the matter to the High Court with its declaration on the s. 92 point. Then the High Court would make its final order.

[Lord PORTER. If the proposition is that you can bring an appeal to this Board on a particular point without having to say : " I want the whole judgment set aside so that I may succeed," then, as at present advised, I would not accept that view. You have to appeal against the judgment, but in the course of the matter the question whether you can discuss *inter se* questions depends upon whether or not you have got leave to discuss them.]

[Lord MORTON. That is, I think, the difficulty I was trying to put. On the one hand, you may be shutting out the respondents from a particular argument, which seems unfair. On the other hand, if you let them have leave to argue, you are discussing here an *inter se* point.]

That was the way the matter was put on the special-leave application. It is unlikely that you would get a case where the appellant simply wants to debate a point before the Privy Council if there are other *inter se* points held against him, because he would need a certificate as well. But in this particular case I submit that there is no difficulty. We are appealing from the declaration and the injunction and we have special leave to appeal from it. What is it that bars the appeal ? The respondents must show that this is an appeal from a decision of the High Court upon an *inter se* question.

We say there is no such decision and we are not appealing from that decision. True that the cause involves such a question, but we are not appealing against it. If we wished to discuss an *inter se* point relevant and material to the order, we would be debarred by the statute and we could not do that without a certificate of the High Court.

[Lord PORTER. If you want to appeal, you must have something to appeal against. You could not come up on a mere academic question.]

I accept that entirely. We are appealing against the declaration and injunction. On the face of it it has nothing to do with an *inter se* question, but when we look behind it, as I submit we should, we find that there is no decision of the High Court upon an *inter se* question adverse to the appellants. Then I submit the way is clear, so far as s. 74 is concerned. If the *inter se* question has been decided by the High Court against you, and it is material to the appeal, you may get a certificate of the High Court, and an appeal then lies on the question. [He referred to *Baxter* v. *Commissioners of Taxation* (1).] The first submission therefore is that the general intention of s. 74 is to make an *inter se* question not reviewable by the Privy Council except on a certificate of the High Court. It is sufficient, however, for the appellants if the prohibition of s. 74 is regarded as applying only to appellants, so that a respondent could raise an *inter se* question in order to retain a judgment in his favour. So far as the appellants are concerned, s. 74 deals only with *inter se* questions which have been decided in the High Court, not with every such question as may have been raised.

In the first paragraph the provision is: "No appeal shall be permitted to the Queen in Council from a decision of the High Court upon any question, howsoever arising, as to the limits *inter se* . . . unless the High Court shall certify that the question is one which ought to be determined by Her Majesty in Council," that is, the *inter se* question. My submission is that that question arising between the parties is a question which is contained and set out in the certificate of the High Court. The High Court does not certify that there is an appeal before them or a cause before them in which a question has arisen. They simply certify that the question (specifying it) is one which ought to be determined by Her Majesty in Council. It must be specific. In this case, for instance, the Commonwealth relied upon s. 51 (xiii.), that is, the banking power. It also relied upon s. 51 (xx.), that is, the corporations power, for the authority to pass s. 46. We are not appealing on the first point,

(1) (1907) 4 C.L.R. 1087.

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the question of power, because in our submission there has been no decision of the High Court upon the *inter se* question adverse to us, that is on the s. 51 (xiii.) point. My submission is that an analysis of the judgments supports the view, so far as s. 46 is concerned, that there is a decision of the High Court in our favour; there is no decision of the High Court adverse to us. Secondly, on the s. 51 (xx.) point the High Court rules against us. In such a case we would not be entitled, because of s. 74, to raise the question whether s. 46 is validly enacted under s. 51 (xx.) without a certificate of the High Court, even although the result of such a holding would be to give us a declaration in favour of the validity of the particular section. We would need such a certificate. That is the basis upon which we have brought the appeal, and we have not challenged in this appeal the decision of the High Court on that part of the cause. That being a decision of the High Court against us, there is no certificate, but there is no decision of the High Court at all adverse to us on the other point, and, therefore, in our submission there is no prohibition under the first paragraph of s. 74.

Referring to the second paragraph of s. 74, there is no difficulty in the procedure outlined. It is unusual, but it provides that if the certificate is granted "an appeal shall lie to Her Majesty in Council on the question without further leave." I submit also, that, if the appellant to the Privy Council wishes to challenge the order, there being both an *inter se* question decided against him and also other questions decided against him which are material to the order, he must conform to two procedures. He must get the certificate on the *inter se* question from the High Court, but that will not suffice him if a decision on the *inter se* question could not result in any variation of the final order that is made against him. [He referred to *R.* v. *Louw* (1); *Australian National Airways Ltd.* v. *The Commonwealth* [*No.* 2] (2).]

The word "upon" in the first paragraph and "on" in the second paragraph are extremely important words. If one starts with the first "upon," that is "upon any question howsoever arising," that is an identifiable decision and it must be a decision given on and in relation to that very question. The High Court having given that decision, the appeal is prohibited by s. 74 unless the certificate is to the effect that that very question *inter se* is one which ought to be determined by the Privy Council. When the certificate is granted the second paragraph says that the appeal is an appeal to the Privy Council on the question, that is, the same question, the question which has been certified and which is identical with the question which has been decided in the High Court.

(1) (1904) A.C. 412.

(2) (1946) 71 C.L.R. 115.

The respondents attempt to say that in the Privy Council new questions may arise and you look to see whether the relief asked can be given without determining an *inter se* question in the Privy Council.

My submission is that you take the decision of the High Court and ask first of all: Is there a decision of the High Court upon any question *inter se*? If the answer is: Yes, and you do not get a certificate, there is no appeal permissible to the Privy Council from that decision upon that question, but if a certificate is granted, then the nature of the appeal is defined and therefore delimited in the second paragraph; it is an appeal on the question and it is the same question as the question which the High Court has decided. The respondents' contention would involve very severe and drastic alterations of the section.

We submit that we do not require a certificate in the present case because we could get substantial relief if our point is right on s. 92 without necessarily deciding the *inter se* question at all; but, that apart, we submit that what the respondents seek to do is to alter the whole tenor and effect of s. 74. What they are trying to do is to change it from a section establishing a special and very limited inroad upon the prerogative in relation to certain questions into a section establishing a procedure for dealing with appeals in which such a question may be involved; it might be only one of a dozen questions involved in the case.

I submit that what they are doing in the result is to try to restore phraseology which would have the same result as in the original draft referred to by Sir *Samuel Griffith* in *Baxter's Case* (1), which was: "No appeal shall be directed to the Queen in Council in any matter involving the interpretation of this Constitution or of the Constitution of a State unless the public interests or some part of her Majesty's Dominions other than the Commonwealth are involved."

That would have considerably altered the position about the prerogative; it would have taken it away in a matter in which it appeared that the interpretation of the Constitution was involved. That limitation was completely removed, and the present form is very different.

[Lord NORMAND. A simple illustration would be a decision by the High Court in which it first found certain facts, and then upon those facts a question *inter se* arose and it decided that. Then the appellant could come forward without a certificate and by displacing the facts he could succeed.]

(1) (1907) 4 C.L.R., at p. 1114.

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Yes, that would be one illustration. Another illustration would be where, taking the present case, if they had held that s. 46 was invalid on an *inter se* ground and also by reason of s. 92, they would say, I presume, that we could not appeal from the final order by special leave. I do not think that is quite an analogous case.

[Lord PORTER. You might have two separate questions of law, one involving an *inter se* question and another involving something quite different.]

Construction.

[Lord PORTER. On your proposition the Board could decide the construction question but not the *inter se* one.]

That is so. Then one has to turn to s. 74 and see what the prohibition is. My submission is that the prohibition applies and applies only to the case where the appellant is questioning a decision on an *inter se* question.

The form of s. 74 shows that appeals from the States' Supreme Courts to the Privy Council are retained and the prerogative there is entirely unaffected. One must look at it as if this case were being decided the day after the Constitution came into force. Then you would have appeals from the Supreme Court in which *inter se* questions could be brought here without any restriction, except the restrictions upon the amount or by the leave of the Supreme Court or by special leave of the Privy Council.

The first proposition of the respondents is that s. 74 bars any appeal in which the relief sought by the appellant cannot be granted without determining an *inter se* question; that the words in s. 74 "appeal upon any question" mean an appeal in which the relief sought cannot be granted without determining such a question.

We submit that it is inadmissible. It is not the effect of the words used. It is saying in other words that *inter se* questions upon which another party, the respondent, has been defeated, or *inter se* questions which have been raised and not determined by the High Court, may both be raised by the respondents and *inter se* questions can therefore fall to be determined by the Privy Council.

Then the main proposition of the respondents is based upon the contention as to the meaning of the words "decision of the High Court." It rests, we submit, on a complete misunderstanding. They argue that unless "decision" means "judgment, decree, order or sentence" an entirely new kind of appeal has been created, because they say that there was no such procedure known before. The misunderstanding is that the appeal that we are bringing, an appeal where we are not raising an *inter se* question, is an appeal brought in the normal way from a judgment, decree, order or

sentence and seeking to reverse it; secondly, that it is upon a question of law which has nothing to do with *inter se* questions. The section assumes and indeed postulates that there is a right to come to the King in Council asking for the exercise of the prerogative in all questions decided by the High Court except *inter se* questions, whether they are questions of construction, questions of fact, constitutional questions which are not *inter se*, or any other question. I submit that it is unnecessary to go back to the *Judicial Committee Act* to see the phraseology used there. There is nothing in my view inconsistent with that.

When the second paragraph of s. 74 says " appeal on the question " after the certificate is granted by the High Court, that is foreshortening the phrase " appeal from a decision of the High Court upon any question," the words used in the first paragraph, which is properly called " an appeal on the question." It has the same meaning as in the first paragraph, and the first paragraph is the decisive paragraph. Then it is suggested by the respondents that the words " howsoever arising " have no significance if the appellants' argument is accepted and mean howsoever arising, looking forward to what happens in the Privy Council. These are the words: " No appeal shall be permitted to the Queen in Council from a decision of the High Court upon any question, howsoever arising, as to the limits *inter se*," and the respondents want to get to the position in which " howsoever arising " looks forward to what happens or may happen in the Privy Council. I submit that the natural meaning of the words is that the question is one which arises in the High Court and is decided by the High Court, and that " howsoever arising " means what *Isaacs* J. said in *Baxter's Case* (1). He says, obviously referring to the phrase " howsoever arising ": It matters not how the question arises, whether as to parties or procedure, whether singly or in conjunction with other questions, whatever the nature of the dispute, whatever the amount involved, and then he gives an illustration; in such cases the decision of the High Court is absolutely final, &c. He is referring to a question which has arisen in the High Court of Australia. It might arise on demurrer or the very point of law may be determined by the High Court without demurrer; there may be many ways in which it is decided. However it is decided, the decision of the High Court upon the question is a decision which cannot be appealed from to the Queen in Council without a certificate.

The respondents take the view that " howsoever arising " rather suggests looking forward to a possibility of it arising thereafter.

(1) (1907) 4 C.L.R., at p. 1149.

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The respondents assert that our construction restricts s. 74 to a relatively narrow scope.

The truth is that the Constitution did in its final form preserve the prerogative to a greater extent in s. 74 than was at first proposed, and that was not done accidentally.

Then they refer to the sections of the *Judiciary Act* of Australia, s. 38A and s. 40A. Section 38A provides: Any matters involving any question howsoever arising as to the limits *inter se*—incidentally showing that they are dealing with the possibility of the point arising in Australia and not in the final court of appeal—the jurisdiction of the High Court shall be exclusive of the jurisdiction of the Supreme Courts so that the Supreme Courts shall not have jurisdiction to entertain or determine any such matter. That is, the whole cause is completely stopped at that stage if an *inter se* question is involved in the matter. It is a very different conception from s. 74. The statute was passed after the Constitution was enacted, and it results to some extent from the suggestions of the judges in *Baxter's Case*. The respondents cannot succeed in establishing a wider prohibited area in the Imperial statute, of which the Constitution is a part, by relying upon sections subsequently enacted by the Commonwealth Parliament for the purpose of cutting short or preventing an appeal on *inter se* questions from the Supreme Court to the Privy Council. The wording of s. 74 really is an answer to that contention.

[Lord SIMONDS. What would the result be supposing you got a tribunal of six judges and they decided an *inter se* point and a s. 92 point; two judges declare the Act invalid because of *inter se* points, two declare it is invalid because of s. 92 points, and therefore you have a clear majority of four that the particular legislation is invalid. The other two do not express an opinion. Now you have not a decision of the majority on any point at all?]

No. The only difficulty as far as s. 74 is concerned is the first point: Has there been a decision of the High Court upon a question as to the limits *inter se*, and in the case of six Justices sitting, the opinions of two would not be a decision of the High Court, because there is a section in our *Judiciary Act* which deals with that very point; it is s. 23.

[Lord SIMONDS. An answer is that there is no decision upon which anybody could appeal.]

No, I do not say that. Section 74 barring an appeal would not apply in such a case, because there is no decision. It is not determined by the High Court and under s. 23 of the *Judiciary Act* it is provided: "A Full Court consisting of less than all the Justices

shall not give a decision on a question affecting the constitutional powers of the Commonwealth "—it is even wider than *inter se* questions—" unless at least three Justices concur in the decision." You might theoretically get six Justices each deciding in favour of invalidity on a different ground, but nonetheless there is a decision of the High Court upon an *inter se* question in accordance with the *Judiciary Act*. Unless you can point to such a determination of that question, all that happens is that s. 74 does not prevent an application for special leave being heard and the appeal being fully determined.

[Lord MORTON. The certificate would not be needed?]

No.

[Lord MORTON. The result would be that all those *inter se* questions would in fact be debated. You say: Never mind, it does not come within s. 74.]

Yes. I submit that is the importance of the word " decision." Is not that from the broad point of view the only satisfactory practice? If the High Court, having an *inter se* question before it, chooses not to determine it but, let us say, determines the case on the question of construction or on a non *inter se* point and determines it wrongly, because that is the hypothesis, should the losing party be debarred the right of access to the Privy Council to correct that error simply because the High Court has deliberately chosen not to decide the other point? It would be quite in accordance with practice, or, at all events, it would be just and convenient, if the Privy Council in dealing with these matters dealt with them and then remitted the matter back to the High Court so that they would have to determine the *inter se* questions, but as far as s. 74 is concerned I submit there is no embargo.

[Lord MORTON. Suppose six objections were raised to the statute of which five were *inter se* questions and one was not and you had six judges sitting and each one thought the statute was invalid but each one for a different reason?]

A different *inter se* reason?

[Lord MORTON. So that five of them thought for different *inter se* reasons it was bad and the sixth thought for a non *inter se* reason it was bad, so that you got a decision that it was bad. You say that does not come within s. 74?]

That is so.

[Lord MORTON. What would you suggest? When it comes to the Privy Council they might decide the non *inter se* question and remit the other five questions back to the High Court who had already considered them?]

Yes.

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[Lord MORTON. The Board, whatever it thought fit to do, could decide the five *inter se* questions ?]

Certainly. There is here no decision of the High Court on any *inter se* question in relation to s. 46 and therefore none requiring a certificate. Putting it at its worst for the appellants, there were two judges each way, *Latham* C.J. and *McTiernan* J. on one side and *Rich* and *Williams* JJ. on the other. It is not relevant for this purpose that *Latham* C.J. and *McTiernan* J. were dissentients on the s. 92 point. The doctrine of *ratio decidendi* is not relevant here. By reason of s. 23 of the *Judiciary Act* there cannot be a decision on an *inter se* question by less than three justices.

[Lord PORTER. As I understand your proposition, it is this. The whole problem has to be decided upon whether there is an *inter se* question. If there is an *inter se* question, then you cannot go up on that, though you may go up on other matters in the case. Coming to the problem here, what is the *inter se* question ? If you put it in one way, you may say the *inter se* question is : Is s. 46 valid ? With regard to that there are (for different reasons, it is true) three decisions one particular way. Is that a decision of one question, or is that a decision of two questions, and, if so, why two ?]

The decision that s. 46 is invalid—I am looking at that in isolation from the point of view of the grounds on which it might be based—does not show whether or not it is an *inter se* question that has been decided, because it has been held to be invalid by reason of conflict with s. 92.

[Lord PORTER. Leave out s. 92 altogether and take the other point.]

Then it comes to your Lordships, because we get special leave to appeal from the order. Leaving out s. 92 altogether, what is the prohibition ? There is a prohibition in relation to something. It is in relation to appeals " from a decision of the High Court upon an *inter se* question." What is the *inter se* question which has been decided by the High Court of Australia in relation to s. 46 ? Perhaps it is clearer to put this in the inverse order. There are three separate *inter se* questions in relation to s. 46, or perhaps four. The first is whether s. 46 is authorized by the banking power in s. 51 (xiii.) ; that is an *inter se* question. The second is whether s. 46 is invalid because of the implied immunity claimed by the States from the operation of certain Federal legislation ; that is an *inter se* question. Thirdly, there is an *inter se* question dealing with the Financial Agreement. Then, fourthly, there was in fact an *inter se* question decided by the High Court adversely to the Commonwealth in relation to s. 51 (xx.), that is, the corporations

power, and we are not challenging that decision. With regard to the doctrine of immunity, we say four Justices decided that in our favour, no Justices dissenting. With regard to the Financial Agreement, there were four Justices in our favour with two dissenting, namely, *Rich* and *Williams* JJ., thus deciding it in favour of the present appellants. That leaves as the only possible *inter se* question which might be referred to in relation to the prohibition in s. 74, the question whether s. 46 is authorized by s. 51 (xiii.) of the Constitution.

First of all, has there been a decision of the High Court upon that *inter se* question ? There is no other suggested, there cannot be any other suggested, and there is not any other suggested in the case, as I follow it. What is the decision ? My submission is that the Chief Justice and *McTiernan* J. quite clearly and explicitly have held that s. 46 is authorized by s. 51 (xiii.), and that *Rich* and *Williams* JJ. equally clearly held that it is not so authorized. So there are two to two. When your Lordships, on the application for special leave, pressed those appearing for the banks : " What is the decision on the *inter se* question ? ", the answer was : " Two to two, two for validity, two against validity." Our submission was then, and still is, that it is really four in favour of the validity of s. 46 as far as it raises an *inter se* question. There are the Chief Justice and *McTiernan* J., and we say that there should be added *Dixon* J., for the reasons given in his judgment, and *Starke* J., because of his analysis of the banking power and because of the fact that he says s. 46 is invalid either because of s. 92 or because s. 46 cannot, as a matter of construction, be treated as a separate enactment from s. 24, which is invalid. So there is, I submit, either a decision of the High Court in our favour upon the only *inter se* question to which the prohibition could apply—that is, taking my view of the section—or at any rate no decision on that point against the appellants.

[Lord PORTER. Actually your answer to me is that there is not one question, but four.]

I have gone through them all, but there is this to be said : of course, if the respondents' argument is right, that they have authority to raise them here, then they may raise them all, being, as I submit, questions on which they have lost.

[Lord PORTER. But they go further. They say it need not be one question, at least as I am at present advised ; that is to say, there are three possible propositions : firstly, that all you have to have is a decision— and it can be on any question.]

I say there is not a decision on any question.

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[Lord PORTER. Secondly, they say that you must have a decision upon a question, but what is " a question " ? That is the proposition I am putting now. Thirdly, there is your proposition : " Yes, and here are the four questions that I say there are."]

Yes, and I say on none of them can they show a decision.

[Lord PORTER. Yes, I follow that.]

Indeed, I submit that on all of them, though not so clearly on s. 46 in the way I put it, by necessary implication it does emerge clearly, taking them separately, that there is a decision in our favour, and I do not see how by aggregating them the respondents can be in any better position, because the only two Justices who held in their favour on the *inter se* question in connection with the Financial Agreement, namely, *Rich* and *Williams* JJ., also held in their favour on the *inter se* question under s. 51 (xiii.), so they have already counted them, and I submit they cannot count them twice. Dealing with *Starke* J's. judgment, I submit that the question of severability of an enactment only arises when that enactment, treated separately, as a matter of construction would, for the purpose of determining the point, be treated as valid. What *Starke* J. has done by holding that s. 46 is associated with s. 24 for the purpose of validity is to hold two things : firstly, that s. 24 is invalid, and, secondly, as a matter of construction, that s. 46 is not to be treated as a separate enactment.

[Lord MACDERMOTT. Could a successful litigant apply for a certificate to the High Court ?]

That is the position the respondents were in. It is really a parallel question to the question whether the respondents may raise those points without a certificate if they have got an order in their favour in the High Court.

[Lord MACDERMOTT. I was thinking of a case, for instance, where an individual sues the Commonwealth for some relief based mainly on the contention that a particular statute is *ultra vires*. It comes to the Court and the Court holds the statute is not *ultra vires*, but dismisses the claim for some other reason, say it is out of time. Could the Commonwealth seek a certificate for having a constitutional point carried further ?]

The Commonwealth could get no greater relief than the dismissal of the action.

[Lord MACDERMOTT. In other words, s. 74 does not deal with an abstract point.]

That is the view I would accept. It would be purely an abstract question ; it could not affect the order or the declaration made.

[Lord PORTER. It must be an appeal from a decision; unless you have got a decision against you, you cannot have an appeal from the decision, and it has to involve a question. The dispute between you is as to what involving a question means.]

[Lord MACDERMOTT. I think my Lord's point comes down to mine in a sense. If one cannot decide an abstract question by certification under s. 74, one has to recognize the ordinary rules as to appeal. You appeal not from a decision on an abstract point but from an order or judgment.]

Yes.

[Lord MACDERMOTT. Yet on your main contention on this section the section does not contemplate an appeal from an order or judgment at all, but from the reason for an order or judgment.]

It is not that we are bringing ourselves under the prohibition of s. 74. We are trying to answer the suggestion that s. 74 operates to prohibit the appeal.

[Lord NORMAND. The difficulty, if there is a difficulty, in construing s. 74 arises from the use of the words "appeal . . . from a decision." Usually an appeal is from an order. You are expanding the sentence at the beginning of s. 74 somewhat as follows: "No appeal shall be permitted to the Privy Council from an order of the High Court in so far as it is a decision upon a question of law." You are drawing a distinction between an order and a decision, I think.]

The word "order" cannot be substituted for "decision."

[Lord NORMAND. The word "appeal" immediately suggests a word like "order" of a court. I think your argument is that there shall be permitted an appeal against an order except in so far as it is a decision upon a question arising *inter se*.]

Yes.

[Lord PORTER. But "decision" is still required on your argument for another purpose.]

Yes.

The next question is the validity of s. 46 of the *Banking Act* under s. 92 of the Constitution. When you look at s. 46 in the light of the fact that the Commonwealth Bank is established—it continues in operation—and the banks of the States are established and presumably will continue in operation, and perhaps be increased in number, what s. 46 in substance does is to empower the Government acting through the Treasurer to reject, and, by rejecting, to select persons who are to be entitled to carry on a certain type of business. For the purpose of s. 92, I am assuming that the law is not invalid on any other ground—I must do that until I deal with

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those points—and that it is an enactment which can stand of itself. The purpose of s. 46 appears in s. 3 of the *Banking Act*, which states that "the several objects of this Act include . . . (*c*) the prohibition of the carrying on of banking business in Australia by private banks." "Private banks" are defined as bodies corporate. There is a distinction in s. 3 (*a*) between publicly-owned banks and banks conducted for private profit. So you have in s. 46 an enactment which enables the Executive Government, responsible to Parliament, and answerable to Parliament for any action taken, empowered to say who shall carry on and who shall not carry on this business. It is not a prohibition of the service of banking that is the aim of s. 46. It is the substitution of publicly-owned banking businesses for privately-owned banking businesses.

[Lord PORTER. As I understand the claim, it is the right to select one person or one body to carry on banking business to the exclusion of all others, at the discretion of the Treasurer.]

Yes.

[Lord MORTON. May I take something which is obviously a business, such as the buying and selling of dried fruit? As I understand it, you would say, would you not, that the Commonwealth could set up a Commonwealth dried-fruit society and say that nobody else shall buy or sell dried fruit in Australia except that institution?]

Yes.

[Lord MORTON. If that is so, then I suppose the State could set up a series of corporations to carry out every branch of trade, and it could say in each case that branch of trade shall be carried out only by that corporation?]

It is quite possible. I think it could.

[Lord MORTON. So that the result would be that no private individual could engage in any of those trades in Australia?]

Quite possibly. May I put what is the result of the respondents' contention, that every person has got the right to engage in those activities? There cannot be an exception if it is a civil right for everybody. The *Banking Act* of 1945 has limited banking in Australia to a selected number of corporations, and no individual can bank; in other words, passing the law on the subject of banking, the Commonwealth Parliament has selected those who may lawfully conduct business in Australia. If that is valid, and I submit it clearly is as a licensing system, then s. 92 is not a section which would make an enactment invalid simply because the number was reduced from 11 to 9, from 9 to 3, or from 3 to 1.

In connection with s. 92 of the Constitution there is a tremendous field of case law. The interpretation of the section has taken many turns. There has been a good deal of revision of opinions as the law developed until 1920, when *W. & A. McArthur Ltd.* v. *Queensland* (1) was decided. It was accepted on all hands and in all references that were made to the subject that the Commonwealth and the States were equally bound by s. 92 ; s. 92 says nothing to suggest otherwise, and that was the uniform view of the text-writers. There was not, I think, a suggestion of dissent from that general proposition.

1920 was the turning point in the interpretation of the Constitution so far as s. 92 is concerned, when *McArthur's Case* (1) fell to be determined by the High Court. In the post-war period of shortages the Queensland Parliament enacted what was called a *Profiteering Prevention Act*, really a price-fixing Act, an Act fixing ceiling prices for commodities. A New South Wales merchant challenged the validity of that statute in relation to various types of contracts for the supply of goods from his warehouse in Sydney to Queensland. In every case the final sale with the customer would be completed in Queensland, and the question arose as to whether s. 92 operated to destroy any portion of that enactment. The court held that it did. It held that if there was a contract of sale which stipulated for the dispatch of goods from Sydney to Brisbane, then that contract was commerce itself, it was right in the area of trade and commerce protected by s. 92, and it was to be free of regulation or control as to the price to be fixed in the contract of sale. In reaching that conclusion the court had to give a meaning to s. 92, and they gave so wide a meaning to the section that they had to try and reconcile, so far as the Commonwealth was concerned, the fact that the Commonwealth had legislative power under s. 51 (i.) of the Constitution to make laws for the peace, order and good government of the Commonwealth with respect to trade and commerce with other countries and among the States. They held that the Commonwealth was not bound by s. 92 of the Constitution.

The result was that in a number of important cases after 1920 the States, who were admittedly bound by s. 92, were faced with an interpretation of s. 92 which resulted in the Commonwealth being deemed immune altogether from the operation of s. 92. After many years of litigation dealing with subjects like licensed agencies for the sale of fruit, the introduction into a State of cattle from another State where it was believed or suspected that cattle fever

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

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existed, a system of controlled marketing which took various forms and with which the name of a Mr. James is very prominently associated, the Court itself, although it did not formally determine the point, before 1936 came to the conclusion that in 1920 the Court, obviously because of the strong opinion of *Isaacs* J., had made an error in holding that the Commonwealth was not bound and that the field of immunity given by s. 92 was not nearly so extensive as was laid down in *McArthur's Case*. The Court did not formally hold that, but a majority of justices were of that opinion, and in *James* v. *The Commonwealth* (1) the question came to the Privy Council. It was determined, firstly that the Commonwealth was bound by s. 92, and secondly that the particular restriction imposed by the Commonwealth legislature in that case was almost identical or closely analogous with a restriction previously held invalid in *James* v. *Cowan* (2).

It became necessary to examine the history of s. 92 so far as the decisions of the courts were concerned and to lay down what was the rule in relation to s. 92. *James* v. *The Commonwealth* (1) answers every question of principle that arises in the present case.

Unfortunately several of the justices of the High Court have, it is submitted, on occasions failed to apply that decision. *Starke* J., for instance, has more than once said that what are called the *Transport Cases* (*Willard* v. *Rawson* (3); *R.* v. *Vizzard*; *Ex parte Hill* (4); *O. Gilpin Ltd.* v. *Commissioner for Road Transport & Tramways* (*N.S.W.*) (5); *Bessell* v. *Dayman* (6); *Duncan* v. *Vizzard* (7); *Riverina Transport Pty. Ltd.* v. *Victoria* (8)) were wrongly decided. This, it is submitted, is in complete contradiction with *James* v. *The Commonwealth*. The last-mentioned decision was preceded by some four years by *James* v. *Cowan*, which is in line with it. The true criterion is stated by Lord *Wright* in *James* v. *The Commonwealth*: "The true criterion seems to be that what is meant 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'". Section 112 is the section recognizing the right of the State to levy charges under inspection laws, and the phrase used is "goods passing into or out of the State." *James* v. *The Commonwealth* is a decision, not merely dealing with whether the Commonwealth is bound by s. 92, but, for the purpose of deciding that point, marking out the area which is protected as a result of the operation of s. 92 of the Constitution. The area is enormously contracted from the area deemed

(1) (1936) A.C. 578; 55 C.L.R. 1.
(2) (1932) A.C. 542; 47 C.L.R. 386.
(3) (1933) 48 C.L.R. 316.
(4) (1933) 50 C.L.R. 30.
(5) (1935) 52 C.L.R. 189.
(6) (1935) 52 C.L.R. 215.
(7) (1935) 53 C.L.R. 493.
(8) (1937) 57 C.L.R. 327.

to be protected in *McArthur's Case*, where even the contract of sale between the parties (as a result of which and because of which goods were to be sent from State A to State B) was given a special constitutional position by reason of s. 92 of the Constitution, and it was held that the parties' fixation of the price in those circumstances was supreme over the relevant legislature of Australia, which, in that case, was the Queensland Legislature. Their Lordships make it plain that the conception of *McArthur's Case*, applying freedom to each and every portion of inter-State trade, is erroneous. Section 92 recognizes that this freedom of trade and freedom of intercourse across the borders is to be applied in a system of law, that is to say, that the laws of the Commonwealth and the States apply generally in accordance with the division of powers in the Constitution, subject only to this area being protected. If you find burdens or restrictions or prohibitions of Customs duties imposed at or in relation to the passage across the border in the course of trade or intercourse, then and only then does s. 92 apply.

I submit you cannot get a piece of legislation further removed from that principle than the legislation in this case, where all you have is a system of determining who shall conduct the business of banking in Australia under the constitutional power to deal with banking. The enactment here is of a type which is approved in *James* v. *The Commonwealth* by way of illustration in relation to the postal monopoly, the wireless-telegraphy monopoly and the system of selecting those who are to be preferred in performing work as instruments in inter-State trade in connection with shipping. A business projected across State lines cannot be stopped, according to the contention of the respondents, by any direct enactment prohibiting it, whether it is passed by the Commonwealth or the States. It does not matter what kind of business it is as long as it is part of inter-State business. It might be money-lending. Take a money-lending business which is conducted near the border. In many cases necessarily it might be the smallest type of business conducted across State lines. If the business is organized so as to be conducted across State lines, then of course there have to be continual journeyings across the border, and letters have got to be sent. It is put by the respondents that a direct prohibition of that business must be an infringement of s. 92. I submit it has got nothing to do with s. 92, that you can have a licensing system for the business of money-lending or the business of pawnbroking, for instance. There is hardly any business in Australia of any size which has not got inter-State aspects or branches. Therefore, businesses of that kind, according to the respondents' argument,

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get an immunity from s. 92 because of their independent life as businesses. There is no suggestion in s. 92 that it is intended to give some freedom of vocation, or anything of that kind.

In some aspects of both banking and insurance you get relationship to trade and commerce; but it is not only in connection with trade and commerce that you have the banking system or the insurance system. They are both related to the life of the community, and production is just as much aided by finance as is the actual commerce.

The whole of the price-fixing system of Australia throughout the six war years and some post-war years has consisted in Commonwealth enactments or regulations fixing prices; fixing prices whether the goods are goods in the course of inter-State trade or whether they are not. Many opportunities of bringing up a question on that type of law have presented themselves; but the power to fix prices has been exercised repeatedly both during the war and subsequently to an enormous extent by the Commonwealth, and later by the States.

You could not have a greater interference with inter-State trade than to fix the sale price of goods. The point is, we submit, that it has nothing to do with the express command in s. 92; it is a command guaranteeing freedom from prohibition or restriction in relation to the goods passing into or out of a State and no more.

In *New South Wales* v. *The Commonwealth* (the *Wheat Case*) (1) the High Court held that s. 92 was not contravened by legislation providing for the acquisition by the State of all the wheat in the State, though some of it would otherwise have gone into inter-State trade. This decision was approved in *James* v. *The Commonwealth*.

The Privy Council in *James* v. *Cowan* rejected the simple proposition of the Chief Justice that there could never be any conflict between an acquisition law and s. 92; but they did not hold that every acquisition would be invalid because the necessary consequence of such a law would be interference with the right to trade of the pre-existing owners.

What Lord *Atkin* found in the last-mentioned case was that by means of acquisition the same prohibition on inter-State sales was enforced. The property was taken from James and he was given the London price, which was a lower price; and that was done to prevent him, it was for the very purpose of preventing him, selling the goods across the border in the Eastern States where the market price was higher. Therefore by means of acquisition inter-State trade had been limited and prohibited, and the executive action

(1) (1915) 20 C.L.R. 54.

which was revealed was no more than governmental action taken by way of prohibition or restriction in respect of the passage of goods across the frontier.

[Lord MORTON. In each of the cases, the *Wheat Case* and *James* v. *Cowan*, there was an acquisition. In each of these cases that acquisition had the effect of interfering with inter-State trade. The only distinction which seems possible is to say one was made with the object of preventing famine and the other was made with the object of preventing inter-State trade. Therefore it seems to come down to a question of object and intention.]

It is very largely that.

[Lord MORTON. Is there any other distinction? I do not find that a very happy distinction.]

I would prefer to put it in the positive way suggested in *James* v. *The Commonwealth*: Does the action taken, legislative or executive, amount to a restriction or prohibition in respect of and in relation to the passage of goods across the State frontier? In one case the answer would be: Yes; that is *James* v. *Cowan*. In the other case I submit equally clearly it would be: No; it would not in the *Wheat Case*. Lord *Morton* used the phrase that it would be the same, and I respectfully accept that from the point of view of consequence; in each case the consequence would be the same. Of course there are different types of action; getting hold of one grower's fruit under the circumstances of James seems very different in character from a universal acquisition of a whole commodity within a State. That aspect came into *James* v. *Cowan*. I submit that is the distinction between the cases. That is only an application of the test in *James* v. *The Commonwealth*. What is the restriction? It is an acquisition. It is a restriction or a law which takes away the owner's property from him. Is that a restriction, prohibition or burden imposed in respect of the passage of goods across the frontier between the States?

In *James* v. *Cowan* both in respect of the decision on the quota and the acquisition itself, such action was clearly within the general rule enunciated in *James* v. *The Commonwealth*. The new owner in every case of acquisition has rights as owner and the rights of the previous owner are gone, and, therefore, s. 92 can never be infringed in such circumstances.

[Lord SIMONDS. Assuming that there are two Acts, each of them in more or less the same degree directly affecting inter-State trade, would the validity of one or the other depend upon the purpose which the Act was intended to achieve?]

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I do not think it would if what is meant is some purpose which is not a purpose that is discoverable from the Act or executive instrument.

[Lord SIMONDS. One cannot imagine the legislature having as its single object and intention the interference with inter-State trade.]

It is very seldom that you would have such an object, and it is because of that that s. 92 is a safeguard against action which would of necessity be very rare. There seldom could be any point in any legislature wishing to restrict inter-State trade because it is trade between itself and other States. One cannot imagine an attempt to do that in the sense of a systematic plan to prejudice other States and to interfere with inter-State trade in that sense.

In *James* v. *Cowan* *Isaacs* J., whose judgment was approved by the Privy Council, denied that the right given by s. 92 is a right which attached to the property used in inter-State trade, and by antithesis to that he says it is a "personal right." What he means by "personal right," is merely a right of an individual when an enactment is passed that is invalid to call upon the appropriate judicial authority to declare the enactment invalid and to give him the right that attaches to him by virtue of the law. For instance, in the case of *James* v. *Cowan* the action was for trespass. The property was seized, and the right James enforced was a right which he had as owner of the goods because the acquisition was void.

Anything else, I submit, is completely inconsistent with *Isaacs* J.'s own reasoning in the case.

[He referred to *Andrews* v. *Howell* (1); *Milk Board* (*N.S.W.*) v. *Metropolitan Cream Pty. Ltd.* (2); *Crothers* v. *Sheil* (3).] The Act in the *Milk Board Case* clearly affected the rights of the individual, and the decision is plainly in conflict with the claim of an absolute right of an individual to conduct his business as he thinks fit, even if it is an inter-State business or a business said to be organized across State lines. It was held that the establishment of the monopoly in the circumstances of the case was valid.

Under the Constitution of Australia complete legislative control over production is vested in the State legislatures. There is no Commonwealth power over production except in connection with the granting of bounties and taxation and matters of that kind, and production is left to the State, so that the State could in respect of all these commodity cases completely control the production at

(1) (1941) 65 C.L.R. 255.
(2) (1939) 62 C.L.R. 116.
(3) (1933) 49 C.L.R. 399.

any point it chose; it could monopolize it, it could licence production, it could restrict it, it could encourage it; there are no limits whatever on its powers. There is nothing in s. 92 on any view that could have any relation to production.

*Peanut Board* v. *Rockhampton Harbour Board* (1) was wrongly decided on the facts. On its correct facts it should have been decided in the same way as the *Milk Board Case* (2).

Intention or object only becomes relevant from the point of view of the respondents, not from the point of view of those who are upholding the law. The words "intention, motive and object" describe findings which must be made in relation to an enactment, and, if you have got to add to an expropriation Act a finding that the expropriation is directed against the freedom of the border or has the direct object of interfering with inter-State sales or is intended to prevent inter-State trade, all those are things which must be established by those who challenge the validity of the enactment.

[He referred to *Ex parte Nelson* [*No.* 1] (3); *Ex parte Nelson* [*No.* 2] (4); *Tasmania* v. *Victoria* (5).]

*James* v. *The Commonwealth* is a clear decision to this effect, that the rule of s. 92, that no restrictions may lawfully be imposed by State or Commonwealth upon or in relation to the passage of goods from State to State, is not infringed by a law which fixes the price to the seller of goods, although those particular goods may be solely in inter-State trade, and the particular person who sells them engages solely in inter-State trade. That means that inter-State business is subject to regulation.

The Commonwealth in these cases of acquisition has always submitted that when you look at the acquisition of a character similar to that in the *Peanut Case* (1) there is no infringement of s. 92, even although the individual grower is not permitted to sell his product himself but must sell it through the selected agency, the Government, and selling it through the Government, the goods being sold through the pool, he gets only his portion of the proceeds of the pool products. In our submission that is not a restriction imposed in relation to the passage of goods across the frontier within the meaning of *James* v. *The Commonwealth*.

The Privy Council in *James* v. *The Commonwealth* treated the *Peanut Case* as belonging to the *James* v. *Cowan* category. It is submitted that the expropriation in the *Peanut Case* was not directed against inter-State trade.

(1) (1933) 48 C.L.R. 266.
(2) (1939) 62 C.L.R. 116.
(3) (1929) 42 C.L.R. 209.
(4) (1929) 42 C.L.R. 258.
(5) (1935) 52 C.L.R. 157.

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There is no room after *James* v. *The Commonwealth* for the overriding doctrine of a personal right to conduct inter-State trade. Once this idea of the personal right is destroyed, then the case for the respondents on s. 46 breaks down.

[He referred to *Field Peas Marketing Board (Tas.)* v. *Clements & Marshall Pty. Ltd.* (1).] In the case last-mentioned *Dixon* J. said: " . . . the considerations applicable to a State pooling of commodities are not the same as those applicable to an Australia-wide pool, when the question is whether it is obnoxious to s. 92. A State pooling of any commodity exported from the State is necessarily directed wholly or in part to trade across the boundaries of the State concerned and that includes export to the other States as well as to other countries. An Australia-wide pool is concerned with exports to other countries and Australian domestic trade independently of State boundaries. The manner in which Australian domestic trade is affected by the pool may or may not be considered to involve an invasion of freedom of inter-State trade. But the considerations will not be the same for the pool cannot be 'pointed at' inter-State trade in the same way as a State pool must be." (2)

That is a new thought that appears for the first time in this recent decision, and the implications of it are very important. If you have an Australia-wide pooling of commodities in time of war, because it is only in time of war that there can be such a plan owing to the limitation as to commerce normally, his Honour says that on the facts it may not be easy or it may be very difficult to reach a necessary finding of fact that the acquisition, universal and continent-wide as it is, is directed against the freedom of the border. He says it is different in the case of the State. I submit there is no substantial difference and this view leads to insuperable difficulties.

[He referred to *Hartley* v. *Walsh* (3); *R.* v. *Connare*; *Ex parte Wawn* (4); *R.* v. *Martin*; *Ex parte Wawn* (5); *Home Benefits Pty. Ltd. & Household Helps Pty. Ltd.* v. *Crafter* (6).]

Section 92 has not got that wide ambit which was sought to be given to it in *McArthur's Case* and which *Starke* and *Dixon* JJ. sought to give to it in the *Transport Cases*. It has a narrower ambit; the ambit is fixed as at the border. It is not as wide as the field of inter-State commerce at all; it is a much narrower area, but when you come to ask what restrictions can be imposed, at least what restrictions are forbidden and what prohibitions are

(1) (1948) 76 C.L.R. 414.
(2) (1948) 76 C.L.R., at pp. 425, 426.
(3) (1937) 57 C.L.R. 372.
(4) (1939) 61 C.L.R. 596.
(5) (1939) 62 C.L.R. 457.
(6) (1939) 61 C.L.R. 701.

denied to the legislature, they must be prohibitions and restrictions as at the frontier or in respect of goods passing into or out of the State.

In *Huddart Parker Ltd.* v. *The Commonwealth* (1) a system of licensing transport workers was held to be within the commerce power of the Commonwealth, on the assumption, of course, then current, that s. 92 did not bind the Commonwealth. That case, however, was approved in *James* v. *The Commonwealth*, even on the assumption that the Commonwealth was bound by s. 92.

That was a case of a licensing system determining who were and who were not to be employed in the carriage of goods in inter-State trade, analogous again to the carriage of commodities by vehicle or by train, and a system of co-ordination is embarked upon not by the State but by the Commonwealth under s. 51 (i.). The constitutional power is asserted to exist because it is said this law is with respect to trade and commerce among the States, so far as inter-State trade is concerned. Is that invalidated by s. 92 ? It is perfectly true that ports themselves are not the border, the ports themselves at no place constitute the border between States, but none the less, those who engage in inter-State carriage do work at the ports and the power to license them is a power to say who shall do the work, a power to choose the actors in that part of inter-State trade. Does that infringe s. 92 ? The judgment of the Privy Council is that there is no real question of a law prohibitory or restrictive in respect of the passage of goods across the frontier, and yet the goods they carry are goods being carried in inter-State trade. That is a further illustration of the point which was in one form or another stated in *James* v. *The Commonwealth*, that you have to relate the infringing enactment to the actual passage of goods across the frontier.

That is a clear ruling of the Privy Council that the *Transport Workers Act* is operated on the assumption that s. 92 does apply to the Commonwealth, and although the goods are going into inter-State trade and although the workmen and those working the cranes at the wharves are in fact selected to do that work and others rejected in order to carry out that part of inter-State trade, yet s. 92 does not apply because that is not a law passed in respect of the freedom of the frontier.

*Gratwick* v. *Johnson* (2) was wrongly decided. The order there in question which restricted inter-State travel was within the legislative power on defence. We concede, of course, that everything in s. 51 is subject to the Constitution, and legislation cannot

(1) (1931) 44 C.L.R. 492. (2) (1945) 70 C.L.R. 1.

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escape just because it is called defence. But in each case the test is: "Was this burden or restriction imposed in relation to or because of the passage of goods or persons from State to State?" Is that the essence of the enactment in that case? It certainly wears that aspect, because it is called: "Restriction of Inter-State Passenger Transport Order." But, looking more deeply at the facts, it will be found that the reason for the restriction of inter-State travel was because of the extent of the travel by rail or by road, and the necessity of conserving rail facilities, coal, petrol and the like; in other words, the necessity of giving first choice to the armed forces, not only Australian Forces, but British and American Forces then in Australia. In truth it was not a restriction imposed because of the passage of persons from State to State. It was imposed at the border certainly, for the reality of the matter was the overriding war-time necessity for rationing travelling facilities. If that is correct, it links very closely with the problem of the prohibition of the importation of certain types of deleterious goods into a State. It is true in those cases there is a restriction upon movement of commodities inter-State, but there too the restriction is not imposed by an enactment the substance of which is to restrict inter-State trade at all. In other words, inter-State trade, and everything else, was in peril, the whole life of the community was in peril at the time, and in order to meet the peril, amongst other measures taken, these measures were taken. You do not have to say in every particular Order that it is to carry out the purpose stated in the Regulation which gave the Minister power to make the Order. The Chief Justice puts the decision on a narrow ground.

[Lord MACDERMOTT. If one assumes that s. 92 prohibits any interference with the freedom of travel from State to State, then it would seem that par. 3 of this Order in terms clashed with the section. It provides that "no person shall without a permit travel by rail or by commercial passenger vehicle" from State to State.]

Yes; that is the basis of it.

[Lord MACDERMOTT. If there is a clash on the face of the documents, how can one resort as the criterion of infringement to a test of intention?]

I submit in the same way as in *Ex parte Nelson* [*No.* 1] (1) where you have prohibited or restricted the importation into a State of commodities which are deleterious, or cattle which are diseased.

(1) (1929) 42 C.L.R. 209.

[Lord MACDERMOTT. Your test opens a rather wide vista, does it not? If the legislature according to the ordinary canons of construction said so and so, notwithstanding that it is in conflict with s. 92, you can still hold that the legislation is valid by exploring the objects or motives of the legislature.]

No, I am not putting it on the ground of motives at all, but simply on the grounds which have emerged in the cases: What is the substance of that particular enactment, what is it really doing? The order restricts two means of travel, not all means, that is to say, commercial road transport and railway transport, between States. Is it doing that as a commercial restriction or a restriction upon intercourse, or do not the very words of the Order show that that is not the substance of what is being done? I only put it on that ground, and I submit that s. 92 does not address itself to such a problem. It is referring to restrictions of a commercial character or of a character relating to intercourse between States, not to a situation of this character. I am not putting it simply on the ground that every defence enactment provides an illustration of the doctrine *salus populi* by which s. 92 would be avoided.

[Lord SIMONDS. I know your point when you come to trade and commerce, but it is difficult when one looks at intercourse to see how it can involve anything but the freedom of the individual which is restrained by this order.]

When an individual travels from one end of Australia to the other without a permit and is convicted and succeeds in getting the conviction set aside, it always wears the aspect of an individual right. In some aspects it is an individual right, but I submit that that does not mean that every individual has a right to pass inter-State no matter what the conditions may be.

The decision in *Australian National Airways* v. *The Commonwealth* (1) should be rejected. Some of the justices in that case and some of those who have treated the Act now in question as invalid have either openly treated the *Transport Cases* as not binding on them or have not given effect to them. As those cases were approved in *James* v. *Commonwealth* they should now be accepted.

The New South Wales and other States' *Transport Acts* are of exactly the same order and quality as the Act in question in the *Airways Case* except that in the case of air it was carried to the point of monopoly. It was in a special way a monopoly rationally to be determined upon by Parliament because of the very nature of air service. I submit commercial motor transport between States could be monopolized by the Commonwealth or by the

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

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States within their territorial limits, and before you can say that such enactments are struck at by s. 92 a finding of fact has to be made that those enactments are prohibitions upon the passage of goods or persons across the border because it is the border. Of course, there is a difference between a State enactment covering the whole territorial area of the State and including inter-State trade too, and a Commonwealth enactment which deals solely with trade and commerce among the States. *James* v. *The Commonwealth* asserts the right of the Commonwealth Parliament to regulate inter-State trade and to regulate all the instruments used in inter-State trade. It is none the less a regulation of the instruments used in inter-State trade that the plan approved by Parliament says the instruments are to be limited to the number deemed sufficient in the circumstances to provide the necessary services. It could not make any difference in principle whether the number of licensed services is to be three, two, one or three hundred. It is a matter for legislative discretion. There is just as much interference with the freedom at the border if there are three hundred as if there is one. It depends on how the service is run and not upon the number of licensed operators for that particular service.

In the *Airways Case* and in the judgments in the High Court in the present case one finds a new concept: that s. 92 is dealing with trade and commerce and intercourse by transport from State to State, that what is really protected is what is called a business which is organized across State lines. If that business acquired special constitutional protection and immunity and privilege which is not applicable to businesses which are not so conducted, then you would have a new rule in the Constitution saying that the State may in the course of its general powers to make laws for the peace, order and good government limit businesses to conducting certain activities but if the businesses are conducted across State lines they cannot be so limited; therefore everybody who is so fortunate or so clever as to have his business so organized can have that part of his business protected.

Now the suggestion is put that banking is to be identified with trade and commerce. No-one disputes its great importance to trade and commerce; no-one disputes that bankers carry on a trade just as almost every organized business is a trade. Section 92 is looking to the flow of trade. You can speak of the flow of trade across a border, and everybody does. International trade means trade moving between nations. Trade "among the States," or, "between States," is referring to the movement of trade, trade in being, trade going across the border. Similarly with commerce,

and similarly with intercourse. To make that point of view clear one need only refer to the means of doing it: "whether by means of internal carriage or ocean navigation." One is referring to the movement of trade, of commerce, of intercourse among the States. But banking, or rather the business of banking, because that alone is the subject of s. 46 of the *Banking Act*, is centred somewhere; it is not a thing which in itself moves. It provides facilities, and in the course of a banking business moneys are remitted, but the essence of banking is the relationship which is brought into existence at the time of the deposit. That is the core of banking. It is a business which causes and produces results of many characters, including transactions of an inter-State character. Ten per cent or fifteen per cent of the whole of the transactions of these banks are said to be of an inter-State character, and that is accepted. Because of that fact, that the remittances of money are of that extent, it is said that the business of banking, not those transactions themselves, but the business of banking, is itself a business which is given constitutional immunity by s. 92 and it cannot be stopped. That is a proposition for which there is no authority; it is quite inconsistent with the test in *James* v. *The Commonwealth*. The fallacy in *McArthur's Case* was to say that s. 92 gave absolute freedom to the whole sequence of events commencing at the point where inter-State trade commenced in one State right through the intervening stages until the final moment when the goods, to take the simplest case, were paid for by a remittance. That particular transaction and all those goods and dealings are in a sense for the purpose of s. 51 (i.) trade and commerce among the States. The fallacy in *McArthur's Case* was to apply freedom to all of it, but this goes further than *McArthur's Case*. There might be a customer of a bank who has no inter-State dealings at all and whose cheques are honoured without the slightest reference to inter-State trade. When you say that ten per cent or fifteen per cent of the total amount of remittances do cross a border in the sense that the cheques involved in those transactions are honoured, it does not mean that each customer of the bank has ten per cent or fifteen per cent of his transactions of that character; some customers may be almost exclusively inter-State, some not at all.

The business of banking, localized either at a central office or a central office plus branch offices, is further removed from that flow of trade and commerce across the border than those transactions and acts and dealings which were referred to in *McArthur's Case* and which erroneously, as the Privy Council pointed out, it was asserted are all entitled to freedom.

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[Lord MACDERMOTT. Is there a distinction between putting the goods on board ship by means of a stevedore and arranging for the payment by means of a banker ?]

Taking the second case, arranging for payment through a bank, although you might regard it in its inter-State manifestation as relating to inter-State trade, it is precisely of the character of the dealings which were regarded in *McArthur's Case* as being protected by s. 92, a denial to that point of view being subsequently given in *James* v. *The Commonwealth*. I am not concerned to question that many transactions taking place in the course of a banking business are inter-State transactions; they are in almost every business that is organized in Australia. There is hardly any business which has not inter-State manifestations and, to some extent, divisions. My point is this, that the sequence of events, from beginning to end of a State transaction, was regarded in *McArthur's Case* as being protected by s. 92, and that that is denied by the decision of the Privy Council in dealing with *McArthur's Case*. So that from the point of view of s. 92 it would be completely immaterial, if my submission is right, whether banking in a broad sense was to be regarded as commerce or not. The business of banking, I submit, is a centre. The essence of it is the relationship between the banker and the customer and the contract expressed or implied between the banker and customer.

Suppose a law were passed that there should be no bills of exchange and cheques should not be employed for the purpose of inter-State trade, that the cheque system should not apply to inter-State trade, the Commonwealth passing such a law under its power over bills of exchange together with its power over commerce. That would present some analogy to the view expressed by the High Court in *McArthur's Case*; in other words, you would have in that case some definite and inherent relationship between what was being enacted and the flow of trade and commerce and intercourse among the States, because cheques of that character could be deemed an integral portion of the trade. A Commonwealth law which forbade the use of the cheque system in inter-State trade, and to that extent had disadvantaged inter-State trade and denied it a facility which was valuable to trade generally and to persons generally, could be regarded and would be regarded, I think, as an infringement of s. 92. Suppose a tax were imposed upon cheques in inter-State trade and each cheque had to bear a special duty.

[Lord PORTER. I do not know how far you want to press that because we at present have to pay twopence on every cheque. Is that an interference with trade ?]

Consider a suppression of cheques in inter-State trade.

[Lord PORTER. I thought you were saying, suppose you put a tax on them.]

I am talking of a tax and I would like to put my view upon that. I should say that a tax imposed upon the cheque system would be perfectly valid as long as it did not pick out inter-State transactions, and, of course, that is the practice.

[Lord PORTER. The only reason why you would say that discrimination made any difference would be because you could then gather that it was intended to discriminate against inter-State trade.]

That puts what I submit is the summing up of all the cases referring to discrimination. Discrimination is evidentiary of the fact that what is being hit at in substance is the freedom of the border. It is not because discrimination in itself is necessary to establish an infringement of s. 92, but you can show from discrimination of that kind that Parliament is really interfering with the freedom as at the border.

As air, rail and land transport may be co-ordinated by State law with direct consequences to the inter-State trade, including the inter-State carrier, preventing him perhaps from carrying on his business, refusing him, because of the scheme of co-ordination, licences for his inter-State vehicles—the same principle applies to every subject of law. If you can apply that in the case of trade and traffic among the States, it must apply *a fortiori* to subjects which are further removed than that concept, subjects like banking or insurance or trade-marks, or matters of that kind. Just as the number of workers on the waterfront actually engaged in inter-State trade and transport may be fixed, and the persons selected, the same principle is applicable to all aspects of trade, warehousing, wharving and navigation, so far as they are facilities for trade, and trade itself. You can have by Commonwealth law within its jurisdiction, limited by subject-matter, and the State within its jurisdiction, limited only territorially, a complete rationalization or co-ordination of trade and its instruments and facilities subject only to one condition. That condition takes one back to *James* v. *The Commonwealth* and the application of the true criterion. That condition is that the substance of any such plan of co-ordination or enactment must not be directed against the freedom of the frontier. In other words, it must not be enacted with the object of limiting or prohibiting trade, commerce and intercourse across the borders.

Part II., Div. 1, of the *Banking Act* 1945 provides, by s. 6 that "Subject to this Act, a person other than a body corporate shall

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not, at any time after the expiration of six months from the commencement of this Part, carry on any banking business in Australia." This is a complete prohibition directed against individuals from carrying on banking business in Australia. The section therefore denies that there is anything in the theory that an individual has a constitutional right to carry on banking business. Then, ss. 7-9 provide a system of discretionary licensing to carry on the business of banking in Australia; every individual is prohibited, some corporate bodies are selected, and others must get the authority of the Executive for doing it.

One question which arises in connection with s. 46, to which I must turn as soon as I conclude on s. 92, is whether such a system is in respect of banking, which I submit it is. Assuming that it is a law with respect to banking, I submit that that system of selecting chosen instruments to perform the business of banking in Australia cannot be regarded as an infringement of s. 92 of the Constitution.

The test question in this case is whether such a scheme of licensing planning and choosing those who are to do banking in Australia can possibly be regarded as a law infringing s. 92 of the Constitution. Could the individual then come forward and say immediately after that has passed: I want a declaration that s. 6 is invalid because I have all the assets that are required in banking and I can fulfil the functions of a merchant banker; I have a constitutional right to trade at any rate inter-State, and I am going to limit my business to inter-State banking?

Is there a prohibition or restriction imposed in relation to or in respect of the passage of goods across the border by the selection of the actors in banking? I submit that it could not be seriously put forward.

In principle it is exactly the same conclusion which must be drawn as to s. 46 of the 1947 Act.

Section 3 of the 1947 Act states: "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."

Section 5 defines a private bank as "a body corporate the name of which is set out in the First Schedule," and they are the same banks as are contained in the Schedule to the 1945 Act, but they are divided into three groups, those incorporated in Australia, those

incorporated in the United Kingdom, and those incorporated elsewhere. There are three objects of the Act, not one; they are several and separate objects. One is an expansion of the banking business of the Commonwealth Bank because it is publicly owned as opposed to those institutions which are not. Then one of the separate objects of the Act is to prohibit the carrying on of banking business in Australia by private banks.

It is in that light that one turns to Part VII., which deals with the prohibition of the carrying on of banking business by private banks. This supervened on the 1945 system of selection of corporations. Section 46 provides: "(1) 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. (2) Each private bank shall, subject to this section, 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 the fifteenth day of August, one thousand nine hundred and forty seven."

Stopping there, s. 46 (1) purports to terminate authority to carry on banking business conferred by the 1945 Act with the exception that if the section requires the particular bank to do so, then the bank has the right to carry on the business. The sub-section says that the bank, subject also to the rest of the section, is to carry on banking business for the time being.

The section then provides: "(3) The last preceding sub-section shall not apply to a private bank if its business in Australia has been taken over by another private bank." That means that, if there is an amalgamation or a taking over of the business of the private bank, then the bank which is taken over is under no duty to carry on, and therefore it would be in that case hit at by s. 46 (1), that is to say, it would be directed to terminate its business. It could not, after it was amalgamated with another bank or its business was taken over by another bank, re-start as a corporation doing business in the field of banking.

Then the other things shall not apply to a private bank if its business has been taken over by the Commonwealth Bank. Similarly, if the business is taken over by the Commonwealth Bank, there is no duty on the part of the corporation to conduct banking business, and, if there is no duty to conduct banking business under sub-s. (2), then the authority to continue banking business is withdrawn by sub-s. (1).

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Apart from those two cases there is a general power to prohibition in sub-s. (4): "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 in Australia."

Sub-section (5) deals with the date in the notice, sub-s. (6) deals with the amendment of the notice, and sub-s. (7) deals with a later date that can be put in the notice.

Sub-section (8) provides that after the date specified in the notice, or the amended notice, the private bank shall not carry on any banking business in Australia.

The same Parliament, having given authority to the corporation to do banking business, and also having given authority to the Treasurer to give licences to additional corporations, in sub-s. 4 gives the Treasurer power to require a private bank to cease to carry on that business with the appropriate sanction, and the question of severability really does not arise with regard to s. 46 (4)-(8), and so *Dixon* J. rightly held.

[Lord PORTER. Are you arguing now upon the basis that s. 46 is the only section of the Act ?]

No, not the only section.

[Lord NORMAND. Does s. 3 (*b*) survive now that the acquisition and compensation part of the Act has been declared invalid ?]

As a purpose, certainly.

[Lord NORMAND. It was a purpose of the Act as it was originally framed, but can it be said to be a purpose of the Act as it now stands ? Section 3 (*b*) provides that one of the objects is the acquisition on just terms of property used in banking business.]

Yes.

[Lord NORMAND. I understand that the High Court has declared invalid the compulsory acquisition clauses and the compensation clauses.]

Yes.

[Lord NORMAND. What is the result of that upon s. 3 (*b*) ?]

These are statements of the several objects, that is to say, separate objects, not objects which cannot be pursued unless they are all pursued. We submit that (*c*) must be read separately from both (*b*) and (*a*). The High Court left standing in the Act s. 22, which provides for the taking over of the business of a private bank by voluntary arrangement. That remains in the statute. To that extent s. 46 (2) can have operation in that particular case.

[Lord PORTER. The only reason for leaving in s. 22 is to enable the State to arrange to take over private banks. So far as the

private banks are concerned, they could be taken over by anybody by whom they chose to be taken over provided that person had the power to take them over.]

Yes. The general process of banking in Australia, I suppose, is not different from that in other countries so far as absorption and amalgamations are concerned. There is a process towards concentration. I should tell my Lord *Normand* with regard to compulsory taking over of property used in the business that the ground upon which the section was deemed invalid was substantially (although one or two of the justices took the matter further) that the Court of Claims which had been set up for the purpose of assessing compensation was set up to the exclusion of the jurisdiction of the High Court. It was a point which does not go to the constitutional power in the Parliament. I submit that it would not affect the validity of s. 46 in any way, because s. 46 contemplates two possibilities, one the acquisition of the business of a bank whose business has been taken over by the Commonwealth Bank either voluntarily under s. 22, which can still be done by agreement, or under s. 24, which cannot be done with the Act in its present form, but it also contemplates the power of the Treasurer to terminate altogether the business of any private bank.

[Lord SIMONDS. To clear up further the point my Lord *Normand* put to you, s. 3 (*b*) relates, as we see, to taking over banking businesses compulsorily.]

Or voluntarily.

[Lord SIMONDS. Compulsorily as well as voluntarily ?]

Yes.

[Lord SIMONDS. When the acquisition and compensation clauses are gone it may remain an object of the legislature but it is no longer one of the objects of the Act except to a limited extent.]

To the limited extent which your Lordship points out, that it can be made good only in the case of s. 22, which deals solely with voluntary acquisition.

[Lord SIMONDS. Does Part VII. apply only to the case where there being a compulsory acquisition, prohibition becomes necessary ?]

No.

[Lord SIMONDS. Is not that so ? Where you are acquiring voluntarily the business of a bank you do not have a prohibition ?]

You really do if you are to stop it from carrying on business at all. It would have restrictions imposed upon its conducting a business in certain aspects, but it would not automatically be deprived from continuing or re-starting business. Therefore pro-

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hibition applies in that case. It also applies under sub-s. (4) irrespective of whether the business is taken over or not. That is the meaning of sub-s. (4). That is the point. I mention that to bring to a point what I submit is the importance of s. 46. There are two aspects, one prohibition imposed by law as an incident to the taking over by the Commonwealth Bank of the business of that private bank. Section 46 (1) really is the operative sub-section when read particularly with sub-ss. (2) and (3).

Taking both aspects of s. 46, that is to say prohibition as an incident of acquisition of a business, whether compulsory or voluntary and prohibition *simpliciter* under s. 46, sub-ss. (4)-(8), the prohibition in those cases is simply the termination of the authority to do banking business conferred upon the particular corporation under the 1945 Act. It merely means this, that the authority to do the business is withdrawn, and I submit the validity of s. 46, as far as s. 92 is concerned, depends on precisely the same considerations as the validity of the provisions of s. 6 and the following sections of the 1945 Act. My submission is that in neither case, if you apply *James* v. *The Commonwealth*, can you say of those laws that they impose prohibitions, restrictions or burdens in respect of the passage of goods across the frontier or the passing of persons across the frontier.

[Lord MORTON. I gather that it is your case that you can prohibit banking altogether, but you cannot prohibit inter-State banking. Does it matter, if that is your case, whether you call it trade, commerce or intercourse ?]

Yes. A general law prohibiting banking is not limited to, nor has it any reference to, the passage of goods across the border.

[Lord PORTER. Would you say this: Banking is not trade and commerce and intercourse; but its stoppage may interfere with trade and commerce and intercourse and, in so far as an Act is passed directed to stop banking, which will thereby interfere with trade and commerce and intercourse, that is forbidden ?]

I would say that it is only bad if you can find as a fact from the substance of the enactment or from the material that is available exactly what was found in *James* v. *Cowan*: that that enactment is directed against the passage of goods across the border—not merely that it has an adverse effect upon it or that the court thinks that it might; it must be directed against it. It is not enough to say: We think that it will reduce the flow, because that is purely hypothetical and mainly guesswork. It might increase it. You must relate the enactment that is challenged to the free passage of goods across the border.

[Lord PORTER. Is this right: A prohibition against banking across the border would, however, offend, because the inference to be drawn is that it is directed to impair the freedom of commerce?]

Yes. As to severability.—Section 46 of the Act can operate independently of any of the other provisions which have been held invalid; alternatively, sub-ss. (4)-(8) provide a scheme which is independent of sub-ss. (1)-(3), so that, even if the last-mentioned sub-sections are invalid, sub-ss. (4)-(8) should stand. This is so as a matter of construction even apart from s. 6 of the Act. [He referred to *Australian Railways Union* v. *Victorian Railways Commissioners* (1); *Pidoto* v. *Victoria* (2).] Sub-section (4) confers on the Treasurer a general and unconditional authority to require any private bank to cease to carry on business; sub-ss. (5)-(7) are merely machinery in aid of sub-s. (4) and sub-s. (8) imposes the duty on the private bank to cease, as required, to carry on banking business.

There is nothing in s. 46—especially sub-s. (4)—to attract s. 51 (xxxi.) of the Constitution. No acquisition of any property of the private bank is involved. The result is that there is no obligation to pay compensation when a bank is compelled to cease business under the section.

*D. N. Pritt* K.C. (with him *Frank Gahan*), for the States of New South Wales and Queensland. The interveners desire to support the argument for the appellants on s. 92 of the Constitution but do not desire to take part in any other section of the argument. Although there is no conflict between the argument they desire to present and that on behalf of the appellants, the States' specific fields of legislation are different from those of the Commonwealth to some extent and are differently affected. If s. 92 is to have the wide interpretation given to it by the majority of the court below, there are a good many things that neither the Commonwealth nor the States can do and a great gap will be left in the legislative powers of Australia. Although this type of argument is not of the greatest cogency, it has some weight, and it is of particular interest to the States because various fields of legislative activity are threatened: for instance, price-fixing, licensing controls of business, pooling schemes and also direct dealing by the States themselves in commodities. Moreover, the States are concerned to support the *Transport Cases*; if the challenge to them in the present case were made good, then the States would suffer considerable inconvenience and difficulty in managing their economies, particularly having regard to the fact that they have the railways to carry.

(1) (1930) 44 C.L.R. 319. (2) (1943) 68 C.L.R. 87.

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The decision of the majority in the court below in the present case seeks to overthrow the authority of those cases.

As to the *Peanut Case*, it is true that the Board in *James* v. *The Commonwealth* seemed to lend it some approval, but it was a qualified approval which regarded the case on a somewhat special and narrow basis. When one looks into the facts of the case, it is seen that it goes much further than appears to have been thought in *James* v. *The Commonwealth*. It is submitted therefore that the *Peanut Case* should now be rejected and that this can be done consistently with *James* v. *The Commonwealth*. There was nothing in the facts of the *Peanut Case*, except the bare fact that the scheme had deprived the individual grower of his right to trade in his peanuts, which provided any basis for a holding that the scheme was directed against inter-State trade. The Board was not looking at it from that point of view in *James* v. *The Commonwealth* ; what was said in effect was that, if the Act in question was directed against inter-State trade, the decision was correct in principle. The judgment of *Evatt* J. in *Vizzard's Case* was, in substance, approved in *James* v. *The Commonwealth* and, as it is substantially the same as his dissenting judgment in the *Peanut Case*, the Board's approval in *James* v. *The Commonwealth* of his judgment in *Vizzard's Case* must be taken to go some way towards approving his judgment in the *Peanut Case*.

There is a considerable danger, in fact the danger has been made real, of some of the judges in Australia firstly applying the *Peanut Case*, and secondly treating it as having been fully approved by your Lordships in *James* v. *The Commonwealth*.

There was nothing established in the case in the way of invalidation of the statute except that there was an expropriation for the purpose of allowing sales to be made by the Marketing Board, and there was no finding and no evidence that it was pointed against inter-State trade.

The majority were taking the view that really in order to follow the decision in *James* v. *Cowan* they had to hold the Act invalid on the basis that it provided nothing more than expropriation for the purpose of allowing sales by the Marketing Board.

The decision of *Williams* J. in the *Field Peas Case* also goes too far.

The correct view of s. 92, it is submitted was taken in the *Milk Board Case* and also in the *Transport Cases*.

Section 92 deals primarily with freedom of trade from tariff fetters, although, of course, it must now be accepted that its effect is somewhat wider than that. It does not, however, provide—as

it appears the respondents will contend—for a sort of universal freedom of competition nor does it establish a constitutional right in every citizen of Australia to insist on trading across a frontier in anything he likes to trade in.

Assuming that banking is within the expression " trade commerce and intercourse," nevertheless s. 46 of the *Banking Act* does not offend s. 92 ; it does not interfere with banking at all, but merely selects the people who shall carry on banking in the future. The section does not say that banking is to be stopped or altered in any way.

[He referred to *Willard* v. *Rawson* (1) ; *Tasmania* v. *Victoria* (2) ; *Gilpin's Case* (3) ; *Riverina Transport Case* (4) ; *Milk Board Case* (5); *R.* v. *Martin* ; *Ex parte Wawn* (6) ; *Roughley* v. *New South Wales* ; *Ex parte Beavis* (7).]

*Sir Walter Monckton* K.C., *Sir Cyril Radcliffe* K.C., *G. E. Barwick* K.C., *F. W. Kitto* K.C., *E. G. Coppel* K.C., *Sir Valentine Holmes* K.C., *Kenneth Diplock* K.C. and *B. J. M. Mackenna*, for the respondents in the first appeal (the Bank of New South Wales and others) and in the second appeal (the Bank of Australasia, the Union Bank of Australia Ltd. and the English, Scottish and Australian Bank Ltd.).

Sir *Cyril Radcliffe* K.C. Although the appeal may fail because the appellants cannot establish that the court below has misunderstood the meaning of s. 92 of the Constitution, it cannot succeed without your Lordships hearing argument upon and deciding the questions raised by the respondents as to the legislative powers of the Commonwealth under s. 51—questions which are *inter se* questions within the meaning of s. 74. As to the construction of s. 74 the Attorney-General throws all the weight upon the question whether in arguing his case before this Board an appellant desires the Board to take a different view on an *inter se* question from that taken by the numerical majority of judges in the court below. In my submission it does not matter who has got what is called a win or a loss in the High Court in the sense that by counting the views of the total number of judges who made up the High Court you will find a preponderance of view one way or the other. The word

(1) (1933) 48 C.L.R. 316.
(2) (1935) 52 C.L.R., at pp. 167-170.
(3) (1935) 52 C.L.R., at pp. 212 et seq.
(4) (1937) 57 C.L.R., at pp. 342 et seq., 364 et seq.
(5) (1939) 62 C.L.R., at pp. 144 et seq.
(6) (1939) 62 C.L.R., at pp. 463 et seq.
(7) (1928) 42 C.L.R. 162, at pp. 192-203.

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"appeal" in s. 74 should bear the same meaning as it clearly has in s. 73; that is, appeal from the act of the court, the judgment, decree, order or sentence. There is no ground for supposing that s. 74 created, as it were, a new kind of jurisdiction in appeal under which points of law as such might be referred by the certificate to the Judicial Committee for decision—something like the procedure on a special case. The section merely envisages the existing appellate rights and the position of the Judicial Committee and proceeds to prescribe (for the section starts with a negative, "No appeal") some restriction upon the existing system.

If you look at the opening of the section: "No appeal shall be permitted to the Queen in Council," &c., and then look at the opening of the third paragraph: "Except as provided in this section, the Constitution shall not impair any right which the Queen may be pleased to exercise," &c., your Lordships, in my submission, must conclude that this is not the creation of a new appellate jurisdiction, but a certain restriction for constitutional reasons upon an existing one. It shifts in this class of appeal the right which otherwise would have existed under the prerogative on the creation of this new court, the High Court, from Her Majesty in her Privy Council to the High Court. In appeals which raise this particular form of constitutional issue it is the High Court to which is entrusted the duty of deciding whether appeal shall come to Her Majesty in Council or not.

The Judicial Committee acted as a Court of Error, and it had frequently affirmed during the course of the nineteenth century that that was its position. It was only concerned as a Court of Error with the question whether when an appeal came before it it was right or wrong to modify or reverse the action of the court appealed from. "Appeal" in s. 74, in my submission, must mean just this: an application, the nature of which was quite familiar to those dealing with the jurisdiction of the Privy Council, under which one party to a suit asks the Queen in Council to have the act of the court from which he appeals reversed or varied in his favour.

As to the word "decision," it is not suggested that it is in all circumstances a word of art, but in s. 74 there is no doubt that it must be a word of art, and no doubt that it must be a compendious phrase for that larger, more detailed phrase: "judgments, decrees, orders and sentences," which has been used in s. 73 above. When you speak of an "appeal from a decision of the High Court," as you are doing in the first two lines of s. 74, what can you be meaning except an application under which the act of the court which you

appeal from is, according to your prayer, to be altered in some way, either by reversal or by modification? An appeal which merely asked the appellate court to express a disapproving view with regard to something which had been said in this reason or in that or in a collection of reasons by individual members of the Court below, would not be an appeal at all for the purposes of Privy Council jurisdiction; it would mean nothing. In my submission it is the essential thing on this point of construction to ask oneself: Can "decision" in this section, in this setting, mean anything except the judgment, decree, order or sentence, the act which the court below has passed against the person who wishes to appear as appellant before the Judicial Committee? It is submitted that it cannot. This submission is supported by the words of the preamble to, and ss. 3, 8, 16, 21 and 24 of, the *Judicial Committee Act* 1833. Wherever "decision" is used in this Act, which is the foundation of the jurisdiction of the Privy Council, it is plainly a comprehensive phrase for the act of the court appealed from. Further support is to be found in the preamble to, and ss. 10 and 11 of, the *Judicial Committee Act* 1844 and in *Rajah Tafadduq Raful Khan* v. *Manik Chand* (1).

It is agreed, however, that the mere form of the act of the court cannot be the source by itself for determining whether an *inter se* question is involved or not.

Whatever else be the significance of the words "howsoever arising," they are intended to make plain that, whatever the form of the judgment or order which is complained of, if there is in it, howsoever arising, in whatever way, an *inter se* question, then the High Court is to be master of the question whether it is to go to the Privy Council or not. It is inconceivable that only declaratory orders which show upon their face the presence of the *inter se* question are dealt with: for instance, if it took the form in this case of a declaration that s. 46 is invalid because it is not within the power of the Commonwealth under s. 51 (xiii.). It cannot be only those cases with which s. 74 is dealing; one has to face the question: What is the significance in this setting of the word "upon"?

In my submission there may be two readings, and it depends whether you read "appeal from a decision of the High Court" as being as it were a hyphened phrase, and then the words "upon any question" as being directed to the appeal rather than to the decision, which in our submission is the preferable reading, or whether you read it as "appeal" and then hyphen, as it were,

(1) (1902) L.R. 30 Ind. App. 35.

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" a decision of the High Court upon any question," and therefore look at " a decision upon the question " as being the determining phrase. They come to very much the same thing in the end, in my submission. In either way they must mean this. If it is " an appeal upon a question," which the second paragraph rather suggests by its phrasing, it must mean an appeal in which the relief sought in respect of the act of the court below cannot be obtained without a decision of that question.

The appellants want to say that the High Court's order that s. 46 is invalid and that the Treasurer must be restrained from acting under it is wrong. In my submission it is demonstrably plain that, in conducting the appeal asking you to alter that order and say that s. 46 is valid and that the Treasurer can act under it, the appellants must ask you to consider what the appeal involves. The appellants are asking you to do that without the certificate of the High Court and to make law upon *inter se* constitutional questions here for the High Court, for it is on appeal from them without their certificate.

I will in my argument read it the other way ; I will say that the true hyphens for this composite phrase are " a decision of the High Court upon any question." Then again the question arises, what is the true meaning of " upon." Was the legislative validity under s. 51 of this section involved in the act of the High Court in saying that s. 46 was invalid ? Which way they decided that particular point does not matter for the moment, but surely it is demonstrably plain that it is involved in their decision.

[Lord PORTER. Does not that involve a decision as to what " the question " means there ? The word which is stressed in my mind is " question."]

The question is : Aye or No, is s. 46 within the legislative power of the Commonwealth Parliament ? The High Court has said : Section 46 invalid, Treasurer restrained. In my submission that decision must have been upon that question ; indeed you cannot reach s. 92 until you have decided whether there is enacting power under s. 51, and that is the way every judge has approached it in this case. Whether any particular judge thought s. 51 authorized it or did not, or whether any collection of their reasons produces a majority one way or the other is not the point ; the point is whether that *inter se* question was involved in their decision and is going to be involved in the decision on appeal. If " decision " only means the act of the court, then you have only one other question to face, that is, did the act of the court in declaring s. 46 invalid involve an *inter se* question ?

[Lord MORTON. In bringing in "involve," are you not bringing in something that is not there ?]

In my submission I am only bringing in what the word "upon" must mean in that connection. What is the subject matter of the suit in which the order has been made that s. 46 is invalid ? The subject matter of the suit is inevitably : Is s. 46 within power ?

[Lord SIMONDS. Suppose the challenge is that s. 46 is invalid for two reasons, first of all, as not being within the legislative power of s. 51, and then as infringing s. 92, and an order is made that it is invalid but no reasons are given. What would your answer be then ?]

That the appeal was restrained in just the same way. You would look at the materials at which you can look in all these cases. It is the same as in *res judicata*, that is, a judgment which is said to involve a bar between the parties ; what is the subject matter of the suit in which it was given ?

[Lord NORMAND. How do you fit into your submission the second paragraph, which speaks of "an appeal on the question" ? One does not associate that phrase with the ordinary phraseology about appeals.]

It supports the view which I have put forward as the preferable one, that is, what is being spoken of is the appeal on the question and not the decision on the question, because there, having made your negative prescription in the first paragraph, you then say : An appeal on the question lies without further leave. But what else it does, in my submission, is this, and it is not to be understood without the presence of the first paragraph. You have said negatively in the first paragraph that no appeal shall be permitted upon a certain question without leave. The second paragraph has not got independent significance, it merely says : If that leave is given, an appeal on the question shall lie without further leave. If I am right in the submission that the word in the first paragraph "upon" is equivalent to "involving," then the word "on" in the second paragraph means the same thing, an appeal involving that question lies without further leave, and "involve" means an appeal in which the relief sought in respect of the act of the court below cannot be given without deciding the *inter se* question. If I am right on the meaning of the restriction in the first paragraph, the second is a mere appendant to it. In any case which raises an *inter se* question it is for the High Court—not His Majesty in Council—to say that an appeal shall lie to His Majesty in Council.

The views of the majority in *Baxter* v. *Commissioners of Taxation (N.S.W.)* (1) as to the meaning of "decision" in s. 74 are wrong.

(1) (1907) 4 C.L.R. 1087.

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They do not solve the difficulties presented by that section. Moreover, the case was not concerned with the implementation of the section.

As to the passage in *Quick & Garran* which has been referred to, there was no jurisprudence behind s. 74 when it was written, and it, like *Baxter's Case*, fails to meet the difficulties of the section. One really cannot get any support from alleged practice that has been followed in the past with regard to matters of this kind. This is the first time that the Board has been faced with the question of the full meaning of s. 74, and the occasions when, as a matter of precaution or as a matter of tactics or as a matter of assumption, which nobody disputed, special leave has been given as it were on one branch of the case, or not given, and applications have been made independently with or without success to the High Court for that leave, really afford no guide to the interpretation of the section, if only because the views of the High Court in *Baxter's Case*, until one examines them in complete detail, may well have guided the formation of the practice.

In *James* v. *The Commonwealth* no *inter se* question was raised; it was concerned only with s. 92.

*G. E. Barwick* K.C. Section 46 of the *Banking Act*, when it says that the banker shall not carry on any banking business in Australia, means that he shall not carry out any banking *transaction* in Australia. No doubt the transaction is in the business of banking, but what is forbidden is the transaction. The section forbids all such transactions, so that it necessarily follows that it forbids inter-State banking transactions. It operates to exclude from the activity of inter-State banking all who are now engaged in it. It does so in order to create a monopoly in the Commonwealth Bank. From the point of view of the trader in goods—the customer of a bank—the result would be to subject his trading to the arbitrary control—through the Commonwealth Bank—of the Executive in respect of an indispensable step, namely, the remission of the price for the goods sold.

The exclusion of persons from participation in inter-State trade infringes s. 92 of the Constitution unless their exclusion proves to be no more than a regulation of the activity. "Regulation" in this context means regulating the activities of individuals (using that word in a sense which includes incorporated bodies). Section 46 is not within that description; it is an outright prohibition, not a regulation of bankers in relation to each other or to their customers.

The question whether an Act infringes s. 92 cannot be resolved on a subject-matter basis, by reference to the " pith and substance " of the Act; if it has a substantial operation to prevent movement inter-State, it offends the section.

The decisions of the Board in *James* v. *Cowan* and *James* v. *The Commonwealth* are authority for the following propositions: (1) A law authorizing executive determination of where and in what quantities persons may market their goods is inconsistent with s. 92 in cases where there is an inter-State market; (2) a law which prohibits persons, except upon licence, from carrying goods inter-State is invalid; (3) the generality of a law such as that in the first proposition will not save it if it operates upon the inter-State activity; (4) the absence of discrimination against the inter-State activity will not save the law.

In *James* v. *Cowan* the Board approved *James* v. *South Australia* (1), the decision in which was simply this, that s. 20 of the *Dried Fruits Act* which gives to the Minister power to determine where and in what quantities persons may market their dried fruits, was invalid. There was no question of any external evidence as to how the legislation was intended by the Parliament to be used; there was evidence of what the Minister had done, but the law did not depend for its validity on what he had done, it depended for its validity or invalidity on what it authorized him to do. In *James* v. *South Australia* it was demonstrated that there was an inter-State market, and to give power to tell a man where and in what quantities he might market his goods was to give power to tell him that he could not sell them inter-State. It is very difficult to see how s. 92 can be reduced into some protection of an abstract trade against some laws motivated in some particular way. When a law merely authorizes the Minister to determine where and in what quantities a man might sell his fruit it infringes the section, and that looks very much like a clear assent to the doctrine that this section protects individuals and leaves them free themselves to determine where and in what quantities they will sell their fruit, unless the law is simply regulating them in some way in order to preserve the freedom.

We submit that *James* v. *The Commonwealth* decided firstly that the absolute freedom of which s. 92 speaks is not freedom from all laws which affect activities of trade, commerce and intercourse among the States, but is freedom from such laws as substantially burden, restrict or prevent such activities as at the borders in this sense, in respect of the interchange or movement from State to

(1) (1927) 40 C.L.R. 1.

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State. In the words " burden, restrict or prevent," there is wrapped up the antithesis of the word " regulate ". If one adds to it " as distinct from regulating such activities ", the whole idea is complete.

Next, *James* v. *The Commonwealth* did not apply that freedom as so conceived to anything less than the whole of the trade, commerce and intercourse, which as to trade and commerce certainly s. 51 (i.) spoke, because the word " intercourse " is not in s. 51 (i.).

[Lord SIMONDS. You are dealing with the difficult question of the reduction of the area between s. 51 (i.) and s. 92 ?]

Yes. One of the possible ways of getting out of the contradiction which *McArthur's Case* had suggested existed between s. 51 (i.) and s. 92 was to say : Section 51 (i.) speaks of all the activities of trade, commerce and intercourse, and s. 92 only speaks of some of them. We deny that that is the effect of s. 92. What *James* v. *The Commonwealth* did, in our submission, on the contrary, was not to touch the subject of which the freedom was predicated ; it left the subject as it was, and indeed there was good reason for doing it, because as you cut down the subject you are interfering with s. 51 (i.). The words must mean the same thing in both places. Rather than cut down the subject, what *James* v. *The Commonwealth* did, and did quite naturally, was to indicate what was the scope of the word " free."

The judgment in *James* v. *The Commonwealth* has always been read in the light of the argument which *McArthur's Case* supported. It was answering that argument. *McArthur's Case* did this ; it did two things, and they are very close to each other, but they are distinct. *McArthur's Case* said : The freedom is freedom from all laws on the subject of trade. Having defined the freedom, it applied that freedom to the whole of the trade, that is to say, to all the steps in the trade, and *irrespective of what effect the law had on the inter-State movement.* They are the critical words in connection with *McArthur's Case.* The conception was that this freedom from all laws attached to the whole of the inter-State transaction from beginning to end, irrespective of the effect which the law had on the inter-State movement which the transaction would include.

What *James* v. *The Commonwealth* did was to deal with both those aspects. It reduced the freedom from freedom from all laws to freedom from only certain laws, and in defining the certain laws from which the trade was to be free, it corrected the main aspect of *McArthur's Case* ; it said that those laws were laws—which had to bear on the movement as at the border—as at the frontier, in the phrase which has become so frequently used.

I could express that in this way. As the result of the decision in *James* v. *The Commonwealth*, that the invalidity or validity of the law is a question of degree to be tested by the extent to which the law operates upon the inter-State activity, there are two things to be found; you must find that its operation is a burden in the sense in which I use the word, gone beyond regulation to burden, and secondly, it must be a burden as on the movement, the interchange, from State to State. That is the question of fact of which we submit Lord *Wright* spoke.

*James* v. *The Commonwealth* does not support the view that s. 92 permits a choice of actors in inter-State trade; on the contrary, it denies it in terms. *Huddart Parker Ltd.* v. *The Commonwealth* (1) has no bearing on this point; s. 92 was not in question there.

To say to a man: "You cannot engage in inter-State trade" burdens it at the frontier; it follows that he cannot cross the frontier with his trade if he cannot begin.

A law which creates a monopoly in an activity of inter-State trade offends s. 92. Freedom of trade is infringed by monopoly in the common-law sense: See *Attorney-General of the Commonwealth of Australia* v. *Adelaide Steamship Co. Ltd.* (2); *Gibbons* v. *Ogden* (3); *Pensacola Telegraph Co.* v. *Western Union Telegraph Co.* (4). A licensing system, however, might be merely regulatory, and it is not suggested that that would be bad. To that extent a choice of actors would be permissible, but to subject an activity to arbitrary executive control, the emphasis being on the word "arbitrary," is to burden it.

We do not say that a "business" as such has any immunity under s. 92. What we do say is that a man who carries out inter-State banking transactions as a business is in trade, which is a different thing. In *Vizzard's Case* it appears to have been assumed that the carrier was not himself engaged in inter-State trade; no argument to the contrary seems to have been presented.

When you come to the *Airways Case* you find arguments presented and judgments given which begin to use the word "business" as important in relation to inter-State carriage. In other words, in the *Airways Case* there is a clear realization that the man who is in business to carry is himself in trade. So the word gets significance in that way and it is carried down, of course, to this case where it is said that the man who is in business to move money is in trade. That is the sense in which importance is given to the

(1) (1931) 44 C.L.R. 492.
(2) (1913) A.C. 781.
(3) (1824) 22 U.S. 1 [6 Law. Ed. 23].
(4) (1878) 96 U.S. 1 [24 Law. Ed. 708].

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word "business" by the respondents. Never is there any claim that a business as such gets any immunity because it is a business.

The Commonwealth Constitution having been modelled on that of the United States, decisions on the latter which were in existence in 1900, throw some light on s. 92—in particular, as to what is "commerce." It had been decided in America before 1900 that the commerce power was exclusive; that is to say, the power of Congress to regulate commerce among the States ("among the States" being the precise expression) was exclusive. It had been held that because of this exclusiveness the States could not pass laws which impaired the freedom of commerce in the States certainly so long as Congress itself had passed no law on the subject. That was a peculiar doctrine in some ways, that because of the silence of Congress there had been an idea of freedom of commerce among the States created. It had been decided that commerce included all forms of commercial intercourse. In particular it included transportation as a business and it included dealings with such intangibles as information.

[Lord MORTON. You mean the circulation of information?]

Yes, that is by telegraph or that type of communication. It had been decided that monopoly in the individual was a breach of this freedom of commerce. [Counsel referred to *Gibbons* v. *Ogden* (1); *Prentice & Egan, The Commerce Clause of the Federal Constitution* (1898), at pp. 43, 46, 48, 315, 316.]

One thing more had been decided in America, and it was this, that every citizen of the Federation had a right of access to every part of the Federation. There was no provision in the Constitution for that, but by judicial exposition there had been that decision that every citizen had a right of access to every part of the Federation.

In the light of that, what is the particular significance of s. 92? Is it not that whereas the Constitution which was the model for the Australian Constitution had created a doctrine of free commerce and free intercourse by judicial exposition—that is how those things had come about in America—the Australian Constitution in the first place made those things express? It put expressly into the Constitution at least that—indeed, it did more, but at least it brought in that—which had been decided before 1900 by judicial exposition to be the position in America.

It did more. It not only made it express, it extended it, because the American doctrine was limited to an inability on the part of the States to burden inter-State Commerce. The commerce power in

(1) (1824) 22 U.S., at pp. 193, 229 [6 Law. Ed., at pp. 32, 78].

the Federal body, the Congress, was absolute and exclusive, but the framers of the Australian Constitution extended the American doctrine most notably. They did two things. First of all, they made s. 51 (i.) only a concurrent power. They did not make the commerce power of the Federation exclusive, they made it expressly concurrent. Then they put s. 92 in as binding both the Federal body and the State body. Then, apparently for a more abundant caution, they put in the word " absolutely." The American doctrine was of freedom from State intervention. In the Australian Constitution the word " absolutely " was inserted to make quite clear two things. There was to be no interference in the way not permitted; and neither the Federal nor the State body was to have the power of interference. Of course, the word " absolute " also carried with it the idea that it was not comparative: it was not a comparative freedom, it was an absolute freedom.

It would be an extremely odd thing, with that background, to say, as is said and as is fundamental to the appellants' case here, that s. 92 only protects the passage of goods. The steps in my argument against it, as far as I have developed it, are these. You had as at 1900 a settled American doctrine of free inter-State commerce. You had a definition of the word " commerce " wide enough to include all forms of commercial intercourse. You had an American doctrine of free access, a physical access on the part of persons, to all parts of the Federation. You then find s. 92 inserted by a deliberative assembly, as Lord *Haldane* said, where everything had been examined with minute care, and they use the American word " commerce," which has been defined in the Constitution they are copying, when they say: " Trade, commerce and intercourse among the States "—using the American words " among the States "—" shall be absolutely free."

In a case where the validity of an Act is questioned in relation to s. 92 or where the question is as to the scope of s. 92, which may be almost the same question, the Court sits as part and parcel of the constitutional machinery, and its function is not to make a Parliamentary enactment workable, not to carry out the Parliamentary function, but to maintain the Constitution in which the dominant idea is the reservation in the hands of the people themselves of this area of inter-State commerce.

In the intervening years between the decision in *McArthur's Case* that s. 92 did not bind the Commonwealth and the decision to the contrary in *James* v. *The Commonwealth* the test sometimes applied by the High Court in determining whether a State law infringed s. 92 was a subject-matter test, " pith and substance ". You

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asked the question : Is this a law on the subject of trade ? If it is, then it infringes, because s. 92 prevents the States from making laws on that subject. Of course, that soon appeared to limit the powers of the States unduly, and you then had distinctions made which were only important because of this subject-matter rule, distinctions between trade and instruments of trade. Having divided the topic up into trade and " not trade," more particularly trade and instruments of trade, because it is realized that a State may in the guise of legislating about an instrument of trade be really making laws on trade, and so still using this subject-matter idea, the words " directed against " creep in. You find passages which say : " Well, now, if a State making a law not on the subject of trade but on some other subject is directing itself against trade, that will be bad." The reason is not the reason which is suggested by the Attorney-General. The reason was because in reality it had become a law on the subject of trade. That is where one first sees in the decisions of the High Court the intrusion of this idea of " directed against." It is introduced not by way of speaking of motive for the Act or the reason or policy of it ; it is introduced first as a means of identifying the subject-matter of the law. Is it a law about trade ? It purports to regulate bankers, but we see from the way in which it does it that it is really a law on trade. If it is, it is a law which is bad. A State has no power to legislate on trade, and therefore it is bad if it is a law on trade. It is into that area that *James* v. *The Commonwealth* comes, and it reduces the scope of the freedom. It qualifies that statement in *McArthur's Case* as to the scope of the freedom and it emphasizes the fact that you have to impair the freedom of the movement. It is not enough that the law burdens some incident of an inter-State transaction which is not related to its inter-State character, its movement, its interchange. That is expressed by the phrase " as at the frontier." The other consequence was that you could no longer test the validity or invalidity of a law by simply finding out what it was about. To deny the States any power to legislate on the topic of inter-State trade was to say, in substance, that the Commonwealth power was exclusive. *James* v. *The Commonwealth* says there is a concurrent power. Once you have got a concurrent power, the test of simply finding out whether a law is on the subject of trade will not work. A great deal of what is said in the cases about " directed against " when used in connection with the subject-matter test must, of necessity, go by the board ; it is no longer apposite. The test is : What is the operation of the law ?

As a result of the decision in *McArthur's Case* s. 51 (i.) of the Commonwealth Constitution had virtually become an exclusive power. To state that in another way one could say: The State could not pass any law on the subject of inter-State trade which affected part of an inter-State transaction in any respect, and the emphasis here is on "in any respect." That was the result of *McArthur's Case*, and it is a consequence of regarding s. 51 (i.) as exclusive. In the intervening years before the decision of *James* v. *The Commonwealth*, logically each case ought to have been decided on the simple question: Is this a law on the subject of inter-State trade (a State law, because by hypothesis the Commonwealth was not bound)? If it is, it is bad. As Lord *Wright* pointed out in *James* v. *The Commonwealth* that course was not uniformly followed. Lord *Wright* was at some pains to point out in his review of the cases that the High Court did not logically apply what flowed from *McArthur's Case* in that respect but began to regard only certain laws on the subject of inter-State trade as invalid. Lord *Wright* said that it had been pointed out that *Roughley* v. *New South Wales*; *Ex parte Beavis* (1) was in truth inconsistent with *McArthur's Case* and that is correct for this reason. In *Roughley's Case* the law said that the inter-State trader in fruit had to market his fruit through a registered agent, and *Isaacs* J. quite logically said in his judgment: That is a law on the subject of inter-State trade; you have touched a step in the inter-State transaction in some respect, and that is the power that is denied by *McArthur's Case*. Some of the cases were decided straight out on a subject-matter basis like *Nelson's Case* [*No.* 1] (2). Then a distinction was made between trade and the vehicles or the instruments of trade, thus enabling the States to make laws about the instruments. *Willard* v. *Rawson* (3) and the judgments of *Gavan Duffy* and *Rich* JJ. in *Vizzard's Case* (4) are illustrations.

[Lord PORTER. I am not sure that you do not get it marked in the Chief Justice's judgment in the *Airways Case*.]

To some extent, to show that *Vizzard's Case* was not inconsistent with what he was deciding. The effect of this subject-matter test, which came from *Vizzard's Case*, one can find still in some of the judgments; it has not been completely removed and naturally after such a long period of judgments it is not readily removed. Flowing from the decision of *McArthur's Case* also is a sort of reservation which was made by the courts when the division between instruments and trade was made. It was apparently

(1) (1928) 42 C.L.R. 162.
(2) (1929) 42 C.L.R. 209.
(3) (1933) 48 C.L.R. 316.
(4) (1933) 50 C.L.R. 30.

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recognized that the State might make a law normally about instruments of trade but really thereby regulating trade, and so, quite consistently with the subject-matter test, you get a phrase used like " directed against." If you make a law about the instruments of trade and that is directed against trade, that will be regarded as a law on trade. That was another way of expressing the subject-matter test; this is a law on trade. If you have bent your law on vehicles to operate on trade, to regulate it, that will be an infringement. That broadly was the state of the matter when *James* v. *Cowan* was decided and also to some extent when *James* v. *The Commonwealth* was decided.

It was to get rid of the consequence of holding that s. 51 (i.) was an exclusive power that a great deal of what was said in *Evatt* J.'s judgment in *Vizzard's Case* and in the judgment of Lord *Wright* in *James* v. *The Commonwealth* was directed. You first say by straight-out construction that s. 92 binds the Commonwealth. Immediately s. 51 (i.) must sink to the level of a concurrent power. That is inevitable because if s. 51 (i.) was an exclusive power, the contradiction or the antinomy would remain. It was the decision that s. 92 bound the Commonwealth that brought s. 51 (i.) back to its proper place as a concurrent power, and that left the problem of the extent to which a law could be made under s. 51 (i.) without infringing the freedom guarantee. The solution offered to the problem in *James* v. *The Commonwealth* is that it is a question of the extent of the operation of the law. The hypothesis implicit in the judgment is that a court can recognize the point at which freedom is impaired and regulation (or accommodation as you might call it) between individuals ceases.

The appellants contended that s. 92 gave no protection to individuals. A further contention was that a law is only bad if it is " directed against " inter-State trade. This could mean " discriminating against " or " having a policy or motive to harm "; it seems to be used in the latter sense. The expression " directed against " as used in *James* v. *Cowan* and *James* v. *The Commonwealth* means, it is submitted, simply " operates upon to prevent."

The phrase used by Lord *Wright* in *James* v. *The Commonwealth* was also relied on for the proposition that the law must be made because of or in respect of the border. It is not clear, I submit, in what sense that is used. If it is used in the sense that the law must select the border as the criterion of its operation, then it is just another way of stating the discrimination test. If it simply means that the law must operate upon the movement inter-State, then

it says nothing different from what I am putting. *James* v. *Cowan* and *James* v. *The Commonwealth* answer all those arguments.

The appellants have another argument outside that group of arguments altogether, and that is that the trade which is protected is only the passage of goods across the border. That is a separate argument, and as to that *James* v. *Cowan* has nothing to say. One has to look at *James* v. *The Commonwealth* to deal with that argument. *James* v. *Cowan* decided that the section does protect individuals, that there is no need for discrimination and that the motive or purpose or policy of the law cannot be called in aid to validate it.

The *Milk Board Case* was wrongly decided; it is inconsistent with the *Peanut Case* and it misapplies *James* v. *Cowan* and *James* v. *The Commonwealth* on the question of motive or policy, being based on the theory that *James* v. *Cowan* decides that you can look beyond the actual operation of the law to go into its policy in order to determine whether it does or does not offend s. 92. The *Peanut Case*, I submit, is right on the basis upon which Lord *Wright* put it, that is to say, on the precise reasoning in *James* v. *Cowan* and *James* v. *South Australia*. I do not contend that all the reasoning in the *Peanut Case* is right, because one can find traces through it of the effect of *McArthur's Case*. It may be because there was so much trace of subject matter in the reasoning that Lord *Wright* preferred to say, on the basis of *James* v. *Cowan*, that the *Peanut Case* was right.

It is a mistake to assume that marketing schemes cannot operate consistently with s. 92 as construed by the respondents. In *Matthews* v. *Chicory Marketing Board (Vict.)* (1) the Act in question was expressed to be subject to s. 92 and was held to be valid. The marketing of chicory as provided for in that Act is operating successfully without any conflict with s. 92.

*James* v. *Cowan* does not purport to lay down any final or exhaustive principle for dealing with laws with respect to the acquisition of property. There is a reservation with regard to the reasoning in the *Wheat Case*, but the precise extent to which that reasoning is not acceptable is not defined.

The appellants say that the decision in *Vizzard's Case* was a decision that a State could subject the inter-State carrier to an arbitrary licensing system. This decision is of no use to the appellants unless it will go that far. They say it decides that the State could subject the inter-State carrier of goods to an arbitrary

(1) (1938) 60 C.L.R. 263.

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licensing system, and the appellants claim that in that sense it was approved by this Board.

The first answer to that is that *James* v. *The Commonwealth* in its actual decision denied the very proposition, because it decided that you cannot subject the inter-State carrier to an arbitrary licensing system. The enactment held invalid in that case purported to establish an arbitrary licensing scheme applied to the inter-State carrier. It gave to the prescribed authorities power to issue licences upon such terms and conditions as might be prescribed.

In *Vizzard's Case* the decision of the majority proceeded on the basis that the law in question was not a law about inter-State trade; it was a law about vehicles, which had only an indirect or incidental (in the subject-matter sense) operation upon any commerce or any person in commerce; it was defined as a traffic co-ordination measure not being a law of trade.

As to the passage—relied on by the appellants—in the judgment in *James* v. *The Commonwealth* referring to *Vizzard's Case*, it is important to see what the argument for the appellant was in the latter case. It was this: "*McArthur's Case* says that the State may not make any law which operates upon inter-State commerce in any respect. I have a vehicle which is only used in inter-State commerce. You have made a law which directly prevents me from using that vehicle on the roads unless I submit to your terms. That is in flat contradiction of *McArthur's Case*. I am entitled to disregard all your laws because I am an inter-State carrier moving inter-State at the particular point of time." It brought the answer that s. 92 does not guarantee that in each and every part of a transaction which includes the inter-State carriage of commodities the owner of the commodities—and I lay stress on that—together with his servant and agent and each and every independent contractor co-operating in the delivery and marketing of the commodity and each of his servants and agents possesses until delivery and marketing are completed a right to ignore transport or marketing regulations and to choose how, when and where each of them will transport and market the commodities. It denies that the owner can say: "I am going to sell my goods in the street if I like. You cannot send me to a market-place. I am going to drive my vehicle down any road I choose and you cannot direct my traffic." Throughout the judgment of *Evatt* J. in *Vizzard's Case* he was endeavouring to show that *McArthur's Case* was wrong when it said that the States could not pass any law at all and to show that there were some laws which the States could pass. When Lord *Wright* in *James* v. *The Commonwealth* refers to that judgment

it is in the course of pointing out that there are laws which the State can pass, and there are laws which the Commonwealth can pass, without invading the freedom guaranteed. He said (1): "If this reasoning, which in *Vizzard's Case* was primarily applied to the States, is, as it seems to be, correct, then in principle it applies mutatis mutandis to the Commonwealth's powers under s. 51 (i.) and shows that s. 51 (i.) has a wider range than that covered by s. 92," namely, that s. 92 does not prohibit the whole field of law under s. 51 (i.). Section 51 (i.) will authorize a great number of regulatory laws, and, therefore, it has a wider range than s. 92. This passage is used to suggest that Lord *Wright* when he was using the expression "s. 51 (i.) has a wider range than that covered by s. 92" was really saying that, in s. 92 trade, commerce and intercourse really mean only passage of goods.

Lord *Wright* says (2) that he will add a few observations: "One is that though trade and commerce mean the same thing in s. 92 as in s. 51 (i.) they do not cover the same area because s. 92 is limited to a narrower context by the word 'free': the critical test of the scope of s. 92 is to ascertain what is meant by 'free'." The appellants read "they" as if it was a reference to trade and commerce. Plainly it is not; it is a reference to the two sections. Its effect is that, though trade and commerce mean the same thing in the two sections, "they," the sections, do not cover the same area, because s. 92 is limited by the word "free."

From the two passages cited it is clear that this is what Lord *Wright* is saying. He says it is plain that there are laws which the States can make because a man who is engaged in trade cannot decide for himself which road he will drive in, or how fast he will drive, or where he will market his commodities (in the sense of what market-place he will use). Under s. 51 (i.) the Commonwealth could pass like laws. It could regulate the inter-State trader. It could say to the inter-State trader: "Well, people who want to sell fat stock cannot bring them into the centre of Melbourne. They have to take them into the markets," and because it can make that sort of law it shows that s. 51 (i.) has a wider range than that which is covered by s. 92 by way of prohibition. Therefore, there is no antinomy. When he comes to s. 92, he says the words mean the same thing, but the two sections do not get the same area. They could not; otherwise *James* v. *The Commonwealth* must of necessity have been decided the other way.

(1) (1936) A.C., at p. 622; 55 C.L.R., at p. 51.

(2) (1936) A.C., at p. 632; 55 C.L.R., at p. 59.

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[Lord MACDERMOTT. Does not it come to very much the same thing in the end ? The words mean the same thing but the operation of each section covers a different area.]

No, there are two separate ideas. If the words mean the same thing then everything which falls within the meaning of trade and commerce is to be free. You are to find out, says Lord *Wright*, what that covers by defining the scope of the word "free," not altering the meaning or the denotation of the words "trade and commerce." The other view is that, so far from that being the position, you reduce the denotation of trade and commerce by saying : The words do not cover *qua* s. 92 all that they cover in s. 51 (i.). They only cover passage of goods under s. 92, and s. 92 only gives freedom of passage of goods. In other words, the argument attributes to Lord *Wright* this, that he thought that trade and commerce was passage of goods. The passage of goods is not trade. Trade is the exchange at least of goods for money. It also attributes to Lord *Wright* the very opposite of what he decided. He decided that you could resolve the argument which was put, not by reducing the area of trade and commerce to which s. 92 applied, but by reducing the scope of the freedom as attributed in *McArthur's Case*. So, I would submit it is not the same thing when you change the nominative of the word "they," as I suggest is the right thing.

[Lord NORMAND. Do you maintain that the freedom which is given to whatever can be called trade at the frontier is absolute ?]

No, and I do not propose to submit that Lord *Wright* was saying it. It is possible to read his judgment in that way, but only possible because in one sense Lord *Wright* did not make express the first part of his conclusion. The judgment must be read, bearing in mind what *McArthur's Case* had done. One must not leave out of mind at any point in the reading of it that *McArthur's Case* had said this : Freedom is freedom from all law and it is freedom from all law at every point irrespective of whether the law burdens the movement, whether it operates as at the frontier. Lord *Wright* answered both of those things. Although they are very cognate, he almost takes the obverse and reverse of the one thing. He said that "free" is in itself vague and indeterminate, it must take colour from its context. He gives various illustrations, free speech and free trade.

The emphasis put by Lord *Wright* on the frontier is the emphasis on the need for the burden of the law to be on movement, on the inter-State characteristic. It is not sufficient that you should make a law on inter-State trade which does not hamper the movement ; it must be as at the border. I would concede that you could

regulate in one sense the actual inter-State crossing. You could say to an inter-State carrier who was coming up to the border: "You are not going to cross at Albury because that road is in disrepair. You go down the road five miles and cross at some other place." You could make that regulation about the actual crossing. [Counsel referred to *Duncan & Green Star Trading Co.* v. *Vizzard* (1); *Willard* v. *Rawson* (2).]

The actual basis of the decision in *Vizzard's Case* was *McArthur's Case*, and it is somewhat peculiar to suggest that Lord *Wright* adopted the case on a basis which *James* v. *The Commonwealth* itself denied. It is suggested that the actual decision in *Vizzard's Case*, irrespective of the reasoning, was approved in *James* v. *The Commonwealth*. In *Riverina Transport Co.* v. *Victoria* (3) *Evatt* J. maintained that Lord *Wright* had approved the actual decision. He said: "In each case, moreover"—that is a reference both to the New South Wales and the Victorian *Transport Acts*, which were very similar—"it is a necessary consequence of the statutory scheme that particular operators must be seriously affected in their business activities, and also that, in the absence of the necessary State licence, vehicles which have been engaged solely in journeys from within one State to points in another State will be unable to proceed in the regulating State without penalties being incurred. But *R.* v. *Vizzard* finally establishes that such restrictions do not constitute an infringement of the freedom of inter-State trade declared by s. 92." The fact that there was an arbitrary licensing scheme or some sort of a licensing scheme of the carrier in *Vizzard's Case* was seized upon later when it was said that the actual decision was approved, in an attempt to use *Vizzard's Case* and Lord *Wright's* mention of it as justifying the direct exclusion of the inter-State carrier from the carrying at all. In the *Riverina Transport Case* inter-State carriers were refused licences altogether and they were excluded from inter-State carriage.

[Lord MORTON. I suppose your comment is that *Evatt* J. treats *Vizzard's Case* as if it had been decided on the basis that the driver of the truck was himself in trade?]

Yes.

[Lord MORTON. You say that is not justified?]

It is submitted that it is not justified, and there is one other element to which reference should be made. No argument was presented in *Vizzard's Case* that the licensing scheme in question

(1) (1935) 53 C.L.R., at pp. 493, 508.
(2) (1933) 48 C.L.R., at p. 366.
(3) (1937) 57 C.L.R. 327.

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was in reality arbitrary in its nature and the decision of the Court was not directed to a consideration of that matter.

[Lord NORMAND. In the *Riverina Transport Case* the Court had regard to the advantages of the services proposed, the convenience of the public, the adequacy of the existing transport services, and the character, qualification and financial stability of the applicant.]

Yes.

[Lord NORMAND. Are you saying that was invalid ?]

Yes. The change which has taken place is this. If *Vizzard's Case* is rightly described as co-ordination, then that is one thing, but when under the guise of co-ordination you simply exclude from competition, that is quite a different idea, and that is the twist which the cases take as they develop.

[Lord SIMONDS. It was not co-ordination of road and rail but was to keep off the road altogether. That is your point ?]

That is so. On the facts of the case no licences were granted to the inter-State carriers at all, but the reasons which were advanced were those reasons which are mentioned in the case. The *Riverina Transport Case* is complicated by this circumstance that the Transport Board had the primary task of determining whether a licence would be granted or not but the Executive Government had to endorse their action. The ultimate refusal of the licence had to be laid at the door of the Executive Government. When a person who had not got a licence sought to bring any proceedings he was first met with the argument: You cannot get mandamus to the Crown; you have no cause of action here at all; s. 92 does not give you a cause of action and you cannot get any remedy against the Crown. The Chief Justice in substance decides the case on that basis. Then other justices go into the question of whether there was in fact what is called discrimination, that is to say, whether the inter-State carrier was excluded by some special consideration laid at his door. The answer made is illustrated in the judgment of *Evatt* J. (1): "The third allegation of discrimination is that the defendant board refused all licences for vehicles carrying goods inter-State for the reason that such vehicles were carrying, or intended to carry, goods inter-State. I consider that this allegation, if true, would alter the legal situation. But the facts entirely negative the allegation. The applications were refused, not because the vehicles were carrying, or intended to carry, goods inter-State, but because, in the board's opinion, the carriage of goods inter-State was being provided for already and in a more efficient manner by co-ordinating the services of the railway systems of the two

(1) (1937) 57 C.L.R., at p. 369.

States with local motor transport "—that means feeder transport— " from all points in the Riverina to appropriate railways ter minals." That is to say: You want to carry these goods inter-State. You are not going to. I am not excluding you because you want to carry them inter-State but I am not going to let you carry them inter-State because I think somebody else ought to carry them inter-State. That is characterized as not refusing the licence because you want to carry them inter-State. One would have thought it was clearly refusing it. The confusion of thought is this. The first reason for refusing the licence is that the man wants to carry inter-State. The reason for the refusal is because you prefer somebody else to carry the goods. That is precisely what the passage cited says. It says the licence was not refused because the carrier was intending to carry goods inter-State; it was refused because the person who so refused thought he would rather have somebody else carry them inter-State. We submit that means: I am not going to let you carry them inter-State. I choose you because you are going to carry them inter-State and I make that choice because I would rather somebody else carry them inter-State, namely, the State Railways.

[Lord PORTER. This was an action by the carrier.]

Yes.

[Lord PORTER. What would have been the result if the action had been by the owner of the goods?]

He would have been more readily answered, in my submission.

[Lord PORTER. Let us get back to the statement as found here. Your goods are adequately carried by the railways and therefore you have no cause of complaint. Traffic between the States is in no way restricted or interfered with.]

The reason given that they were adequately carried would be in my submission quite irrelevant. To say here is a road down which eight only can go because the road is not big enough for ten and we will select which eight, whether that eight can carry all the goods or not is irrelevant; it does not matter; it is the adjustment of the people to each other which matters. To say of a road down which eight can go, only one will go, is not to leave the traffic free.

There is a difference between monopoly and ordinary competition in trade. If I want to have something done in the City of London and there are five people who can do it, it may be all five will refuse me, but while there are five of them there is a good chance that they will not, while, if there is one only, I am at his discretion. Section 92 does not say goods shall continue to be carried; it does not

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say trade shall be continued to be carried on. It says it shall be free, which is a very different thing.

So far as *Vizzard's Case* itself is concerned, it contains nothing by way of reasoning which advances the appellants at all. *Evatt* J. at no point in his judgment remotely approaches the question of whether you can arbitrarily prohibit a trade or traders. Indeed, that subject is never brought forward. That aspect of the matter was not one which would be relevant in *James* v. *The Commonwealth*. In my submission Lord *Wright* neither approved the whole of the reasoning nor the actual decision. One can accept the judgment of *Evatt* J. where he points out that *McArthur's Case* was wrong and the way in which it was wrong; that was what Lord *Wright* accepted.

The idea that I want particularly to controvert is that in some way trade in the abstract or trade *in globo* is of significance in this discussion. The section, of course, includes the word "intercourse" —"trade commerce and intercourse." You cannot have a different set of principles operating *qua* intercourse from those you have operating with respect to trade and commerce, because whilst some forms of personal intercourse are different from trade, much trade is intercourse. Indeed, the definition which was given to "trade and commerce" in *Gibbons* v. *Ogden* (1), from which the definition of it comes so far as Australia is concerned, was that it was intercourse in all its forms, all commercial intercourse; so a great deal of trade is intercourse. When I come to deal with the position of a banker his inter-State transactions are essentially intercourse. His communication from one State to another is a banking transaction so far as he is concerned. It is intercourse. So that, so far as intercourse is concerned, you could not have intercourse *in globo* or in the abstract. That is essentially personal. When one speaks of freedom of intercourse one has really to paraphrase it as being freedom to move and communicate. You cannot abstract that; that means for persons to move and to communicate. The idea of a monopoly of intercourse is a strange idea in the light of that. How could you say: "Well, it is all very well, we will substitute one or just one or two. We will keep the same flow of intercourse in totality"—you just cannot phrase it. If you carry that down to the word "trade," it is freedom of trade and intercourse. The endeavour was early made and early disowned to say that freedom of trade means free trade in the 1900 economic sense. There you do take trade as an abstraction and you do annex the word "free" to "trade" as an abstraction.

(1) (1824) 22 U.S. 1 [24 Law. Ed. 23].

To substitute one banker for all the others might be to say that the trade shall be carried on, but that is not what the section says. The section says it shall be free. It does not say it shall be carried on in some quantitative or qualitative way. It is not a question of quantity or quality; it is to be free.

If the banker is in trade it is the banker's trade. If the banker is not in trade, you look at the trader in the case and ask the question: Is the trade of a trader in goods free if an essential step is at the behest of one particular institution where the one is the Government? There was an argument put that s. 92 in some way called attention to the need for there being trade in being and in motion. That phrase was used to show that whilst s. 92 might prevent you interfering with a man while he was trading, it did not prevent you stopping him from trading. That would be a very odd result. If you applied that to intercourse, it would mean that while a man was actually travelling you could not interfere with him, but you could stop him starting. That cannot be right. That was also characterized by the phrase that my argument was an argument for freedom of vocation. The suggestion was that there had to be trade in being and it was only when a man was in trade that he could get the benefit of the protection of s. 92. That indeed is the same heresy as was present in the original *Wheat Case*, because there the suggestion was a man is only protected while he has the goods. You can take them from him and you do not hurt him. It is a very similar line of reasoning.

[Lord PORTER. That depended upon a compulsory acquisition. If you bought him out there would be no objection, but I should imagine on your argument that, even if you bought him out, you must not stop other people carrying on.]

Quite. Moreover, if you bought him out, you could not stop him starting again unless he agreed to a restrictive covenant.

Section 11 of the *Banking Act* does not affect the respondents' argument. The section is unenforceable; it is without any sanction whatever. There is no penalty laid on the bank for breach of it, and no individual person could complain of it. It purports to set some standard for the Commonwealth Bank, but a standard which the individual cannot enforce or insist upon.

Amongst other things the Commonwealth Bank is by ss. 8 and 9, particularly s. 9, of the *Commonwealth Bank Act* 1945 placed under the direct control of the Treasurer and is bound to carry out the policy which he nominates.

Section 11 must be read with s. 9 of the *Commonwealth Bank Act*. Although it is a later piece of legislation, it can scarcely be regarded

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as a repeal of s. 9. It is very difficult to regard it as a gloss on s. 9. The overriding provision, I submit, is the provision in the instrument of the Bank itself which subjects it to the policy of the Treasurer. Further, s. 11 is obscurely expressed; it does not commit the bank to any definite policy.

There is a further element introduced into banking affairs in Australia since 1945, and it is this. Under s. 27 of the *Banking Act* 1945 power is taken to direct the private banks, the trading banks, as to the class of security upon which they would lend.

The normal conduct of a banker at this particular date is to follow the direction as to policy of a Government agency, so that as at this date the bank is to follow Government policy. The private trading bank has to conform to Government policy. So that when you say in an Act such as the *Banking Act* 1947 that the Commonwealth Bank is to conduct its business without discrimination except on such grounds as are appropriate or normal in the proper conduct of banking business upon the date this Act is passed, it is part of the normal and appropriate conduct of banking business to subserve Government policy.

[Lord MACDERMOTT. Do you cast any doubt on the validity of s. 27 ?]

Section 27 raises a series of considerations. It may be that the right way to look at s. 27 is that it is a form of regulation. I do not put any final view about it. It may be that you could say that it is really directed to securing stability in the Bank. It may be, on the other hand, that the right thing to say is it is not, that it is really endeavouring to turn the Bank into a mere instrument of Government policy. That question would have to be decided as a question by itself. The way in which it would be decided, the principle to be applied, in my submission would be : Is it, when you look at it, an impairment of the bank in its trading, its freedom to trade, or is it a mere regulation and adjustment of individuals in the community ?

It is submitted that banking is " trade " &c. within s. 92. If that section protects individuals, if s. 46 of the *Banking Act* is a law which merely excludes the banker from participation in his banking activities, if one has not got to find some malevolent motive in the legislature and if a banker is in trade, then the case for the respondents is complete in a very short and direct way. It is the *Airways Case* again in a simpler form. The *Airways Case* is a case where the air-line operator is found to be in trade and you merely exclude him, and the High Court has unanimously held that you could not do that. Therefore, if you take the step that

the banker is in trade, the *Airways Case* precisely covers the point, and, it is submitted, is clearly right.

The suggestion that a banker is not in trade has not been pressed by the appellants, but it was contended that he is not in inter-State trade, and this for two reasons. One is that s. 92 only protects the passage of goods across the border. That is one aspect of it. The other aspect of it is that when a banker has an inter-State banking transaction nothing moves and because you have no movement you have not got anything inter-State. The latter from a practical point of view is very puzzling. If I take £100 to a banker and say: "I do not want to carry this in my hip pocket but I am going to Paris and I would like to have that £100 in Paris," it is a very odd conception that nothing gets over there when I manage to get the £100 or the equivalent in Paris; it is an odd conception that nothing moves, and your Lordships in *Trinidad Lake Asphalt Operating Co. Ltd.* v. *Commissioners of Income Tax for Trinidad and Tobago* (1) in Lord *Wright's* judgment said: Of course if you shift money or credit from one place and make it available in another, that is a movement, a transaction; something has gone, whether it is a piece of paper or coins in a bag or whether it is in reality bank credit or chose in action or purchasing power; call it what you will, something has travelled. It is a very odd conception that when a banker gets the price back from a trader nothing has moved, although he has done the very same thing by his own methods as a carrier would do if he put the price in a bag and brought it over on a lorry and handed it over.

For the contention that s. 92 is concerned only with the passage of goods the appellants sought to rely on the judgment delivered by Lord *Wright* in *James* v. *The Commonwealth*; but that judgment does not support the contention. The case Lord *Wright* was dealing with and practically all the cases he had to review were cases about the passage of goods. Until the *Airways Case* the question does not appear to have been raised of persons who were in trade except persons who were trading in goods. Naturally his Lordship would deal with those things which were before him. When his Lordship said: "The true criterion seems to be that what is meant 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'" he was emphasizing the word "passing"; the appellants put the emphasis on "goods." The passage of goods is not in itself trade. Trade is at least the exchange of goods for money. [Counsel referred to *Aristoc Ltd.* v. *Rysta Ltd.* (2); *Quick & Garran* (1901), pp. 521-539; *Prentice*

(1) (1945) A.C. 1. (2) (1945) A.C. 68.

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*& Egan, The Commerce Clause of the Federal Constitution* (1898), pp. 27, 28, 43, 46-49, 315, 316; *Rottschaefer* on *Constitutional Law* (1939), pp. 229-237.]

The next step to take is to see what it is that a banker really does. He conducts his affairs as a business, for profit. In that business he employs both his own capital and the deposits of others, with a view to making profit. Writers on banking and economics regard him as a dealer. A list of such writers appears in the report of the argument of this case in the court below (1). He is called variously a merchant, a trader, a commercial banker. In the *Macmillan Report* private banks, such as the Australian banks, are referred to as commercial banks. In essence one of the principal functions of the banker is the movement of money from place to place. A great deal of attention is given by the appellants to what happens when a banker grants an overdraft and too little attention to what he does when he sells a draft or when he furnishes a traveller's cheque or when he establishes a credit across the State border, not to fulfil an overdraft, but upon a deposit made with him in one State. If I go to the banker and give him £100 and get a letter of credit to somebody in the next State, the banker has undertaken to move what I have in one State so that I may have it in another. Whether he physically posts the money across or whether he manages to get somebody to provide the money for him in the next State, or whether he already has some money there out of which he can honour his contract, is little to the point. His actual bargain with me is that that which I have here I shall have in another place.

[Lord PORTER. I am not quite sure how far you can carry that. What the actual letter promises is that a credit which you have in one place shall be transferred into a credit at the other place, and that does not necessarily involve the shifting of money.]

May I take it back to the days when we had sovereigns? Say I took to the banker 100 sovereigns and I said to him: "Here are 100 sovereigns. I do not want the risk of them being stolen from me whilst I am on the Melbourne Express tonight. You give me something which will entitle me to get 100 sovereigns in Melbourne tomorrow." The banker says: "Very well, I will send the 100 sovereigns down in a strong room on the train so that you can have that 100 sovereigns tomorrow."

[Lord PORTER. And you would in fact get those particular sovereigns. There is no obligation of that kind. It is credit, it is not a physical thing.]

(1) (1948) 76 C.L.R., at p. 24.

But would it matter a bit so far as the real transaction was concerned if the banker, instead of sending those specific sovereigns, arranged with somebody whom he rang up in Melbourne to get another 100 sovereigns and provide them for me when I arrived in Melbourne? There would be no difference.

[Lord PORTER. Not a bit, but on the other hand it need not involve the transfer of something physically from one State to another; that is all.]

True, but it does involve this: if he does not actually send the money he has to ring up or write a letter, he has to communicate. He cannot avoid crossing the border in some form. Of course all the evidence in this case was that he sends letters every time that he has got to do these things. But if instead of sending a letter to his correspondent, his agent or his branch, he rings up, equally he has engaged in commercial intercourse with his own branch, and to say to the banker: "You shall not have that inter-State banking transaction," is essentially to prevent at least his intercourse across the State line, whether one is tied to the notion of something moving or not. [Counsel referred to *Trinidad Lake Asphalt Operating Company Limited* v. *Commissioners of Income Tax for Trinidad and Tobago* (1).]

[Lord NORMAND. Once you have said that intangibles come within the purview of s. 92 you are no longer concerned to show that there is anything actually moving.]

Only this, that I am answering a second very closely allied argument that even if you could have a trade in an intangible, when you come to s. 92 you must have something which is forbidding movement, and unless the intangible is moving in some way then s. 92 cannot operate.

[Lord NORMAND. Intangibles cannot move literally. Therefore, all you have to show is that something is done on one side of the border which has an effect on the other side of the border.]

I would accept that.

[Lord SIMONDS. You are simply dealing with the too literal use of the words, "movement of goods across the frontier," and trying to get rid of the application of that phrase.]

It would be far too narrow to say there must be an actual movement. Take the activities, say, of a flour miller who buys wheat at the early part of a season. He is not sure what the movement of world markets will be through the season, so he has to hedge. Through the season he buys and sells wheat in order to keep his

(1) (1945) A.C., at pp. 9-13.

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over-all price of flour within limits. So he makes his hedging contracts in one State for delivery to him in that State with a person who is in another State. Both of those persons may know that before the delivery date falls due the miller is going to sub-sell. So far as that wheat is concerned it may never move. It may be in a Government silo, and for it you have a wheat warrant issued. That is the way in which you deal in wheat in Australia at any rate. The wheat warrant is like a negotiable instrument which can be bought and passed about. The miller never moves the wheat. It has a contemplated movement by the contract, because it calls for delivery. It would be a far-fetched thing to say that that miller is not engaged in inter-State trade and you can forbid him hedging.

[Lord MACDERMOTT. Does it matter very much whether the intangible element is to be found in the word " inter-State " or in the words " trade and commerce " ?]

Not much ; we have become accustomed to speak of " trade and commerce," but the other word is there, and, as I have indicated as regards a banker's inter-State trade, it is not a case of a man writing a letter about his transaction, it is a case of a man having a communication which is the transaction, because that is how the money gets over the border, by the transaction.

It has been held, of course, in the *Airways Case* and *McArthur's Case*, following the American authorities, that a carrier is in trade. The carrier does for the dealer as to the goods what the banker does for him as to the price. [Counsel referred to *Western Union Telegraph Co.* v. *Texas* (1).] When people send messages by wireless so that they have less physical movement than a telegraph company has, the same principle would apply, and so with the banker. He is a sort of carrier of money ; he moves the money. He stands closer to commerce, in my submission, or as close as, the carrier. If, indeed, as the appellants assert, *Huddart Parker's Case* is rightly decided, so that even a man who works for the stevedore is within the power of the Commonwealth under s. 51 (i.), so much more is the stevedore, a man who is there to provide the service of loading and unloading the ship. The banker is even closer to the transaction than is the stevedore.

So far as a banker being in trade is concerned, the only argument of the appellants was that a banker was engaged in finance and that he financed all sorts of things which were not commercial activities. In this regard his position is not materially different from that of a carrier. The latter carries people who are not travel-

(1) (1882) 105 U.S. 460, at p. 464 [26 Law. Ed. 1067, at p. 1071].

ling on commercial activities, and, no doubt, he carries goods which are the subject of gift from one person to another. But he is none the less in inter-State trade. You might say he is in transport and not trade, but that does not carry the appellants very far.

[Lord NORMAND. It is all intercourse, whether it is commercial or not, is it not ?].

That is so. By s. 46 of the *Banking Act* the banker is forbidden to engage in inter-State transactions, which are, at least, inter-State intercourse. The section is a law of prohibition which excludes individuals, and not for any quality, character or conduct of theirs or anything associated with them. It excludes them from an activity in trade or commerce ; even if they are not in trade or commerce, it burdens those who unquestionably are.

The effect of s. 92 was dealt with by *Barton* J. in *Duncan* v. *Queensland* (1) in a manner which supports the argument of the respondents.

Sir *David Maxwell Fyfe* K.C. (with him *D. I. Menzies*), for the respondent in the third appeal (the State of Victoria and another). As to the preliminary point on s. 74, we support the construction of the section submitted by Sir *Cyril Radcliffe* and join in the submission that an " appeal . . . upon any question " means an appeal in which the relief sought cannot be granted without determining the question. If the Board comes to the conclusion that the words " upon any question howsoever arising " qualify " decision of the High Court," then we submit that the declaration that s. 46 is invalid is itself a decision on an *inter se question*. We say that the existence of s. 46 raises a conflict between the legislative power of the Commonwealth and the executive power of the States and delimits that executive power. That means that on what we would term the narrowest construction of s. 74 it forbids an appeal to the Privy Council from a decision of the High Court which defines the limits of Commonwealth and State powers. On the question of limits *inter se* I adopt the definition of *Dixon* J. in *Ex parte Nelson* [*No.* 2] (2) : " The expression ' limits *inter se* ' refers to some mutual relation between the powers belonging to the respective Governments of the Federal system."

The State of Victoria uses the banks to which s. 46 relates for the conduct of its fiscal operations. The State's claim is that it is beyond the legislative power of the Commonwealth to prevent the State from continuing to use these banks. In support of this claim the State relied on two contentions in its statement of claim. The

(1) (1916) 22 C.L.R. 556, at pp. 584 et seq.

(2) (1929) 42 C.L.R., at p. 270.

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first was that s. 46 was contrary to an implied constitutional limitation of Commonwealth legislation. The State puts it in this way: There is an implication, resulting from the terms of the Constitution and the Federal structure it erects for the government of Australia, that neither the Commonwealth nor a State can exercise its powers so as either (1) to prevent the other from performing the constitutional functions necessary for its continued existence as a co-ordinate and independent body politic within the Federation, or (2) to interfere with or control the other in the performance of such functions so as to deprive it of its co-ordinate and independent position. The second contention was that s. 46 was contrary to an express constitutional limitation of Commonwealth legislative power, namely s. 92. The appellants have conceded that the question of the implied limitation is an *inter se* question. It cannot be correct that an implied limitation would *ex concessis* raise an *inter se* point, and the question of an express limitation would not. In the case of the implied limitation the powers that conflict are clearly the Commonwealth legislative power and the State executive power, the executive power to manage its fiscal operations through a private bank. It is submitted that the second contention of the State, based on s. 92, raises a question of just the same character, the only difference being that the limitation on the Commonwealth legislative power is in this case express. This was in effect decided, it is submitted, in *Attorney-General for New South Wales* v. *Collector of Customs for New South Wales* (the *Steel Rails Case*) (1).

[Lord PORTER. You are saying broadly, are you not, that a s. 92 point is an *inter se* point ?]

When there is involved the question of the executive powers of the State.

[Lord NORMAND. Does it come to this, that if the Commonwealth Act trammels the executive powers of the State, the challenge of that Act raises an *inter se* point ?]

Yes, if it trammels the powers of the State. For the moment on this point it is enough for me to go to the extent that that point arises and has to be decided.

[Lord SIMONDS. I do not quite follow why you bring in s. 92. Your point is that it is an interference with the executive power.]

Yes.

[Lord SIMONDS. And it is an interference with the executive power whether s. 92 is in the *Constitution Act* or not.]

(1) (1908) 5 C.L.R. 818.

Yes, but for the moment I am arguing that a decision of the High Court, whether it be based on an express constitutional limitation or an implied constitutional limitation, is a decision on an *inter se* point when the executive powers of a State are involved.

[Lord PORTER. Your answer to my Lord, as I understand it, is this: I am distinguishing between the implied breach of an inter-State right and the express breach and I am quoting s. 92 because that is where I find the express breach, whereas if I do not deal with s. 92 I am merely relying on an implied one.]

I start with this. It is conceded that, if it is an implied limitation, it is an *inter se* point. The Attorney-General has conceded that. He says it is not an *inter se* point if it is an express limitation because apparently that then becomes a decision on the limitation, that is, a decision on s. 92 and not on the *inter se* point. My answer is that it does not matter whether it is express or implied if the effect of the decision is to leave operating a statute which infringes the powers of the State or delimits the powers of the State.

[Counsel referred to *Baxter's Case* (1); *Pirrie* v. *McFarlane* (2).]

*James* v. *Cowan* is not opposed to the present submission. The question there was whether a State Act stood up in the concurrent field; that did not affect the Commonwealth one way or the other. At all events, the point was not taken that the Act would interfere with the executive powers of the Commonwealth. No such question was raised in *James* v. *The Commonwealth*.

The power to manage and control its public moneys, including the power to deal with private banks, is a power essential to the efficient working of the business of Government. Such a power in a State is part of the executive power of the State (*Melbourne Corporation* v. *The Commonwealth* (3)).

As already mentioned, Victoria banks with private banks, and its Ministers and officers would be guilty of an offence in withdrawing the public revenue of the State from the Public Account in a private bank to which a notice had been given under s. 46, on the expiry of that notice. In addition s. 46 would override the provisions of the *Audit Act* of Victoria and the appointments made by the Governor in Council thereunder. The evidence also is that, if private banking were to be prohibited, the States would have to bank with the Commonwealth Bank. In this case the Commonwealth Bank has been held to be a corporate agency of the Commonwealth. It follows that to prohibit private banking would in

(1) (1907) 4 C.L.R., at pp. 1118, 1119, 1154.
(2) (1925) 36 C.L.R. 170, at p. 194.
(3) (1947) 74 C.L.R. 31, at pp. 52, 54, 67, 75, 77.

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practice compel the States to bank with an agency of the Commonwealth and the finances of the States would, therefore, be subject to control by the Commonwealth or an agency of the Commonwealth.

It is submitted, as an alternative, that, if, contrary to the State's primary submission, a construction of s. 74 should be adopted which gives to the word "decision" the meaning of the *ratio decidendi*, or—to use the expression in *Baxter's Case* (1)—the declaration of the law as affirmed by the court, upon which the actual judgment or order was based, and treats the words "upon any question, however arising" as qualifying the expression "decision of the High Court," then the declaration of the High Court that s. 46 is invalid has for its *ratio decidendi*—or the declaration of the law as affirmed by the court is based on—the decision of an *inter se* question.

An analysis of the reasons for judgment of the members of the High Court shows:—(i) That *Latham* C.J. and *McTiernan* J. dissented from the declaration of the Court that s. 46 is invalid. Their individual judgments on the validity of this section form no part of the decision (in any sense) of the Court, and must therefore be disregarded altogether in ascertaining what was the decision of the High Court. The fact that both dissenting judges thought that s. 46 of the Act was authorized by s. 51 of the Constitution cannot, as the appellants argued upon the application for special leave to appeal, be taken into consideration in determining what was the "decision of the High Court," or what were the reasons upon which the order actually made by the Court was based. (ii) That *Rich* and *Williams* JJ. held that s. 46 of the Act was not authorized by s. 51 of the Constitution, and was contrary to s. 105A and to s. 92 of the Constitution. (iii) That *Starke* J. held that s. 46 of the Act was invalid because it was not severable from s. 24 of the Act, which, he, in common with all the other members of the Court except *McTiernan* J. held was invalid because it was not authorized by s. 51 of the Constitution. He therefore held that s. 46 was beyond the power of the Commonwealth. He also held that s. 46 was contrary to s. 92 of the Constitution. (iv) That *Dixon* J. did not express any concluded opinion upon the question whether s. 46 of the Act was authorized by s. 51 of the Constitution, but held that s. 46 was contrary to s. 92 of the Constitution.

This analysis shows that, of the four Justices who participated in the declaration of the High Court that s. 46 was invalid, three held that the section was invalid because of a lack of Commonwealth power under s. 51 of the Constitution, and two of them held

(1) (1907) 4 C.L.R., at p. 1150.

further that the section was contrary to s. 105A of the Constitution. All three also held, with *Dixon* J., that the section was contrary to s. 92 of the Constitution. The declaration of the Court that s. 46 is invalid is therefore based at least as much upon the determination that the section is beyond power as upon the determination that it offends s. 92. Thus upon the appellants' construction of s. 74 there is a decision of the Court upon an *inter se* question adverse to the appellants. If an attempt is made to give to "decision" the meaning of *ratio decidendi* or the declaration of the law as affirmed by the Court, unless the reasoning of all the judges who are party to the decision is included, then the uncertainties or possible anomalies are so great that the attempt to give this meaning fails. If you include all the *rationes*, then you have so many uncertainties and in addition so many possible anomalies that the attempt to give the meaning of "*ratio decidendi* or the declaration of the law as affirmed by the court" fails and one is driven back to the submission which Sir *Cyril* propounded.

[Counsel referred to the *Law Quarterly Review*, vol. 63 (1947), pp. 461 et seq.]

The question with regard to "decision" is whether it means the actual judgment or whether it means the law that leads up to that judgment. We say that in neither sense can you take dissentients' opinions into account. If you take "decision" as meaning "declaration of the law," you are bound to take all the grounds of the affirmants.

That concludes the State's argument on the preliminary point.

On the main point the State submits the following propositions :— The first is that it is beyond the power of the Commonwealth Parliament to enact legislation which would or could be used to deprive the States of their position as self-governing bodies politic co-ordinate with the Commonwealth within the Federation and to make them in any sense dependencies of the Commonwealth. The second one is really a particularization that it is beyond the power of the Parliament to enact legislation which would or could be used to control the States. Then the third point is the one which I extract from the *Melbourne Corporation Case*, that the State would not be autonomous and would be subordinate to the Commonwealth if its arrangements for the collection, management and custody of public moneys were to be subjected to the control of the Commonwealth because if that control could be exercised so as to render the State dependent on the Commonwealth for the facilities necessary for the purpose, then the Commonwealth could control the States. That simply relates it to the banking power.

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The fourth is the one which I have put already on the first part of the argument, that s. 46 of the *Banking Act* does authorize the Treasurer of the Commonwealth to control the States in arranging for the collection, management and custody of public moneys and to render the States dependent on the Commonwealth Bank.

The first of these propositions requires a consideration of the position of the States as self-governing bodies politic. The constitution of Victoria before the federation in 1901 is to be found in the Victorian *Constitution Act* of 1855, 18 and 19 Vict., c. 55. By s. 1 Her Majesty had power by and with the advice of the legislative council, that is the legislative assembly established by the Act, to make laws in and for Victoria for all cases whatsoever. The other notable point is that by s. 60 the legislature of Victoria should have power to alter the *Constitution Act* notwithstanding its character as an Imperial Act. The executive power was in the Governor in Council. The position was that, apart from the power to make laws in and for Victoria in all cases whatsoever, there was a power to change the Constitution, there were provisions as to the executive and the judicial system and the consolidated revenue.

Even before the federation, Victoria already had its *Audit Act* in 1890, which is practically the same as the *Audit Act* which comes into this case and is one of the Acts which were preserved in the federation. The position was that before the federation Victoria was a self-governing colony with a system of responsible self-government on the English pattern and with its own executive, legislature, judiciary, civil service and financial system, and the only limitation on its sovereignty was the legislative omnipotence of the Imperial Parliament with the usual consequence that any Act of the Victorian Parliament inconsistent with an Act of the Imperial Parliament applicable to Victoria was invalid under the *Colonial Laws Validity Act*.

On federation the colony became a State without any change in its constitutional structure, and the executive, legislative and judicial powers, the civil service and financial system remained, and its system of responsible Government remained also. As far as the Commonwealth *Constitution Act* was concerned, it did not amend any particular provision of the State Constitution or the laws of the State but of course it provided that the *Constitution Act* and the laws made by the Parliament of the Commonwealth should be binding throughout Australia notwithstanding anything in the laws of any State. In the Commonwealth *Constitution Act*, one sees in the preamble the words "Indissoluble Federal Commonwealth" and in s. 3 "Federal Commonwealth." These Lord

*Haldane* underlines in *Attorney-General of the Commonwealth* v. *Colonial Sugar Refining Co.* (1). The implication that is relied on arises from the fact that the Imperial Parliament established both Commonwealth and States in such a way that the continued existence of both the Commonwealth and the States is necessary if the federal form is to go on. That is far from being a " speculative " conception, as the appellants say it is. It is a necessary implication in the position that was set up.

The State's proposition is supported by the Australian authorities. The first of these is *D'Emden* v. *Pedder* (2), which was applied in *Deakin* v. *Webb* (3). It is conceded that these and other cases prior to *Amalgamated Society of Engineers* v. *Adelaide Steamship Co. Ltd.* (4) carried the doctrine of implication too far, as was shown in the last-mentioned case, but it is not correct to say that the last-mentioned case destroyed the doctrine of implication.

*D'Emden* v. *Pedder* (2) and *Deakin* v. *Webb* (3) were disapproved by the Board in *Webb* v. *Outrim* (5), but, whenever that decision has been considered, it has been almost universally accepted that part, at any rate, of the reasoning was unsatisfactory. It attempted to apply the principles of a unitary, to a federal, constitution and attached too much importance to the fact that the Australian Constitution is monarchical. Other early cases to which it is desired to refer are :—*Baxter's Case* (6) ; *R.* v. *Sutton* (the *Wire Netting Case*) (7) ; *Attorney-General* (*N.S.W.*) v. *Collector of Customs* (*N.S.W.*) (8) ; *R.* v. *Barger* (9) ; *Chaplin* v. *Commissioner of Taxes for South Australia* (10).

The *Engineers' Case* (11) must be considered subject to the comments of *Dixon* J. and *Evatt* J. in *West* v. *Commissioner of Taxation* (*N.S.W.*) (12), which show that some implications are necessary and support at least the implication which is now contended for.

It would be contended, if necessary, that the dissenting judgments in *Pirrie* v. *McFarlane* (13) are correct.

In *South Australia* v. *The Commonwealth* (the *Uniform Tax Case*) (14) four Commonwealth Statutes were under consideration. The first was the *Income Tax Act* 1942. That imposed a tax at the high rates which, of course, were necessary during a war, and the effect of it was that the rates at which the tax was imposed were calculated

(1) (1914) A.C. 237, at p. 253.
(2) (1904) 1 C.L.R. 91.
(3) (1904) 1 C.L.R. 585.
(4) (1920) 28 C.L.R. 129.
(5) (1907) A.C. 81.
(6) (1907) 4 C.L.R. 1087.
(7) (1908) 5 C.L.R. 789.
(8) (1908) 5 C.L.R. 818.
(9) (1908) 6 C.L.R. 41.
(10) (1911) 12 C.L.R. 375.
(11) (1920) 28 C.L.R. 129.
(12) (1937) 56 C.L.R. 657.
(13) (1925) 36 C.L.R. 170.
(14) (1942) 65 C.L.R. 373.

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to bring in as much taxation as had been raised by the Commonwealth and the States together in the preceding year. The second Act, the *State Grants* (*Income Tax Reimbursement*) *Act* 1942, provided for the payment of a grant by the Commonwealth to any State which did not impose income tax, the amount of the grant being approximately the sum that the State had raised in income tax. The third Act was the *Income Tax Assessment Act* 1942, and that prohibited a taxpayer from paying any State income tax until he had paid all the Commonwealth income tax. The fourth Act was the *Income Tax* (*War-time Arrangements*) *Act*, which authorized the Commonwealth Treasurer to transfer to the Commonwealth the officers, premises and furniture of any State income-tax department. The States contended that the purpose and effect and operation of the Acts was to make the Commonwealth the exclusive taxing authority and to prevent the States from exercising their constitutional power to impose income tax. The Commonwealth contended that at a time of national emergency—this was at the height of the war, after Pearl Harbour—the necessity for self-preservation made the defence power practically unlimited, and that in the circumstances the scheme should not be regarded as an attempt at destroying the States or their powers and functions, but as a proper exercise of Commonwealth defence powers. That was the issue, and the Court upheld the validity of all the Acts, but the Chief Justice and *Starke* J. dissented as to the fourth Act, that is, the Act transferring personnel, premises and furniture of the State income-tax departments. *Starke* J. also considered that the second Act, that is, the Act that provided for the payment of a grant by the Commonwealth to any State that did not impose tax, was also invalid. So there was considerable difference of opinion. I should submit that the test that was applied by the judges was whether the various Acts were in pith and substance laws for defence and taxation, or whether they were an attack on the powers and self-government of the States. As to whether or not that is a sufficient or conclusive test, I submit that it was not. Obviously, in view of the dissent that I have quoted, there was room for two views as to whether the test was properly applied. I should be prepared to submit that a law prohibiting the payment of State income tax could not be justified under s. 51 (ii.), and I should also be prepared to submit that it was extremely doubtful whether you could make it impossible for a State to raise income tax and then relieve the necessity that you have created by a dole. I should be prepared to submit that the decision was wrong at least as to the two Acts upon which there was dissent, particularly as to the one as to which the

Chief Justice and *Starke* J. dissented. The *Melbourne Corporation Case* is inconsistent certainly with the validity of Act No. 4, that is, the Act transferring the personnel, offices and furniture, &c., and the *Uniform Tax Case* should be overruled at least to that extent.

Support for the State's view is also to be found in *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Victoria* (1) and *Pidoto* v. *Victoria* (2) and in the judgment of *Dixon* J. in *Essendon Corporation* v. *Criterion Theatres Ltd.* (3). That judgment of *Dixon* J. has four points of significance. Firstly, he treats the Commonwealth as immune from the operation of a non-discriminatory State law; and, secondly, he does so, not because of any particular provision in the Constitution, but because of the inconsistency of so doing with a system of government established by the Constitution. The third point is this: he demonstrates that the *Engineers' Case* has been misapprehended by those who have regarded the decision as meaning that the Constitution implies nothing, and that it means nothing which it does not say in express words; and, fourthly, he gives the picture of the development of the doctrine in the United States.

*W. R. Moran Pty. Ltd.* v. *Deputy Commissioner of Taxation for New South Wales* (4) stresses the Federal principle of the Commonwealth Constitution and indicates that not all restrictions on legislative power are expressed.

[Counsel also referred to *Great Western Saddlery Co.* v. *The King* (5); *Caron* v. *The King* (6); *Attorney-General for Canada* v. *Attorney-General for Ontario* (7); *M'Culloch* v. *Maryland* (8); *Osborn* v. *United States Bank* (9); *University of Illinois* v. *United States* (10); *James* v. *Dravo Contracting Co.* (11); *Helvering* v. *Mountain Producers Corporation* (12); *Helvering* v. *Gerhardt*; *Wilson* v. *Mulcahy* (13); *Graves* v. *New York* (14); *United States* v. *Allegheny County, Pennsylvania* (15); *New York and Saratoga Springs Commission* v. *United States* (16).]

(1) (1942) 66 C.L.R. 488.
(2) (1943) 68 C.L.R. 87.
(3) (1947) 74 C.L.R. 1, at pp. 17 et seq.
(4) (1940) A.C. 855.
(5) (1921) 2 A.C. 91, at p. 100.
(6) (1924) A.C. 999, at pp. 1005, 1006.
(7) (1937) A.C. 326, at pp. 352-354.
(8) (1819) 17 U.S. 316 [4 Law. Ed. 579].
(9) (1824) 22 U.S. 738, at pp. 859-867 [6 Law. Ed. 204, at p. 333].
(10) (1922) 289 U.S. 48, at pp. 56-59 [77 Law. Ed. 1025, at p. 1029].
(11) (1937) 302 U.S. 134, at pp. 145-150, 157 [82 Law. Ed. 155, at pp. 168, 169].
(12) (1937) 303 U.S. 376, at pp. 384, 385, 387 [82 Law. Ed. 907, at pp. 912-915].
(13) (1937) 304 U.S. 405, at pp. 414-416, 421 [82 Law. Ed. 1427, at pp. 1434-1437].
(14) (1938) 306 U.S. 466, at pp. 483, 485, 487-492, particularly at p. 488 [83 Law. Ed. 927, at p. 937].
(15) (1943) 322 U.S. 174, at pp. 186-188 [88 Law. Ed. 1209, at p. 1219].
(16) (1945) 326 U.S. 572, at pp. 581, 586 [90 Law. Ed. 326, at pp. 333-335].

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*Melbourne Corporation* v. *The Commonwealth* is an instance of the recognition and application of the implication for which the respondents contend. The case is particularly in point because it decided that such an implication rendered invalid s. 48 of the *Banking Act* 1945, which authorized the prohibition of private banks from carrying on banking business for the States. The decision in that case is submitted to be indistinguishable in principle from the present case. The ground upon which it was sought to be distinguished by *Latham* C.J., *Starke*, *Dixon* and *McTiernan* JJ., in the present case was that the earlier decision depended upon the circumstance that s. 48 of the *Banking Act* 1945 discriminated against the States and operated specially to impede them in their functions, whereas s. 46 of the *Banking Act* 1947 is a section of general application, and, notwithstanding that its consequences to the States may be even more drastic than those of the earlier section, the States are bound to take the banking system as any general law made in the exercise of Federal power may leave it. It is to be observed that their Honours did not consider s. 46 independently of a scheme for nationalization by orderly transfer of all banking functions to the Commonwealth Bank. In answer to the view that the *Melbourne Corporation Case* can be distinguished on the ground mentioned, the respondents submit:—(*a*) Although s. 48 of the *Banking Act* 1945 was a law which affected the States specially, and so may be said to have discriminated against them, the decision that it was invalid was not, except in the judgment of *Dixon* J., based upon that consideration. The ground of invalidity was the broader one that the section authorized the Treasurer of the Commonwealth to interfere with or control the States in the exercise of the power to manage and dispose of their public funds, which was a power essential to the existence of Government. (*b*) Discrimination is not decisive as to whether Commonwealth or State legislation is invalid as being inconsistent with the implications to be drawn from the Federal nature of the Constitution. This is shown in the judgment of *Dixon J.* in *Essendon Corporation* v. *Criterion Theatres Ltd.* (1) and by the judgment of the court in *New York* v. *United States* (2). The operation of the law is submitted to be the decisive consideration. Moreover, if discrimination were to be adopted as the decisive test, invalidity could always be avoided by making a general instead of a special law. So a special law, such as s. 48 of the *Banking Act* 1945 could, when declared invalid, be followed by a general law such as s. 46 of the *Banking*

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

(2) (1945) 326 U.S. 572 [90 Law. Ed. 326].

*Act* 1947, having the same object and the same effect as regards the States. (*c*) Although it cannot be questioned that to some extent one government in a Federal system must accept, as it finds them, facilities which are, by reason of the constitutional distribution of powers, subject to control by another government in the system, a limit is reached when the control which it is sought to exercise would make the one government dependent upon the other for the exercise of essential governmental functions. Both the rule and the limitation are consequences of the distribution of powers within the system, and without the limitation the constitutional distribution of powers would not serve the purpose for which it was made, namely, the maintenance side by side of independent governments, each performing major work of government. It follows that, even if the States may have to accept a banking system controlled by the Commonwealth, at least they cannot be compelled to accept the Commonwealth as their bank.

We support the argument on ss. 51 and 105A which will be presented by Sir *Cyril Radcliffe* and Mr. *Hannan* K.C.

Sir *Cyril Radcliffe* K.C. The argument for the appellants has been conducted on the assumption that there arises in s. 46 (4)-(8) of the *Banking Act* an independent power—a power given to the Treasurer to stop any bank by his notice—and that that is something which can be operated quite apart from the operation of the rest of the scheme of the Act. The respondents submit that that is a misunderstanding of the construction of this Act altogether and that there is no such thing on the construction of the Act as a separate and independent power under s. 46 (4). This power is a mere appendant to the acquisition of the businesses of the private banks, which the Act was intended to achieve. Here we have in this *Banking Act* a detailed set of sections amounting to sixty odd, and they are intended avowedly to achieve the taking over under the powers of the Act of the businesses of the private banks in Australia by the Commonwealth Bank and the giving of fair and proper compensation in exchange for the businesses so acquired. It would, in my submission, be not a natural but a surprising thing if it turned out that in the middle of the sections—because the sections which follow s. 46, just as the sections which precede it, are devoted to carrying out this scheme to acquire the businesses of the private banks—one found buried in a sub-section of this one section a power, to run quite independently of the rest, to put an end on mere notice to the business of this bank or that bank which

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the Treasurer, whose discretion is not controlled by anything in the Act, may like to select, and that without any resulting compensation.

Therefore one would approach this, reading the Act through from beginning to end, at first sight with the assumption that it would be a very unlikely thing if you found that the Act provided two quite separate roads for clearing the private banks out of the way of the Commonwealth Bank, one by acquisition, whether voluntary or compulsory, with proper compensation, and the other as a mere suppression *brevi manu* and without a penny paid for the loss of your business.

If it be, as is suggested, an independent power operable, not as a consequence and by way of completing the process of acquisition of a business, but at any time and under any conditions, it is merely an essay in ingenuity to see what baffling positions might arise if you associated the exercise of that power with the process of acquisition. You might have a case in which, first of all, you had taken compulsorily the Australian shares of a bank, as you can under the early sections, and then the Treasurer gave notice that that bank was to stop its business by virtue of this alleged power under s. 46. What would happen in such a case to the measurement of the compensation to those shareholders who had been compulsorily divested of their shares ? Would the fact that he had given notice, as apparently on this argument he would be entitled to do, affect the measure by which they were to be paid for having by compulsion lost their property to the Commonwealth ; shares in a bank which had been told to stop and get out within two months, or shares in a bank which was an effective and prosperous going concern ? Indeed, whether he exercised the power or not, if it is in truth an independent and discretionary power, that must by itself, by its creation, affect the measure of compensation for the property that is taken, because instead of having the prospect of continuance of business—and, if you were operating profitably, then of a profitable continuance of your business—over a period of years, and the measurement of the value of the property which you had lost ascertained accordingly, it would be said : " But see, by this Act you all live and your businesses live with a sword of Damocles suspended over you and which merely needs the cutting of the thread that holds the sword on two months' notice to put an end to all your chance of working and earning profit in this country at all." If one tries to work out the combinations, if this be an independent power, with which the question alone of the assessment of compensation might be vexed, one sees how unlikely it is that under a scheme of this sort, providing for taking over with fair

compensation shares or businesses, you would find running side by side and loose from that scheme this power to stop everybody from doing anything.

Apart from the shares there is, of course, the provision, again on fair compensation, for the acquisition of businesses, and I may put it because I am only giving illustrations of the kind of problem which this argument would raise: Is it really the true construction of this Act that Parliament has armed the Treasurer with alternative powers, either to buy the business of a private bank by agreement —that is one power, which is given under s. 22—or to buy the business of a private bank compulsorily by notice—that is the provision made under s. 24—or, thirdly, as an independent alternative to stop the business of that bank without compensation under s. 46 (4), thereby incidentally transferring to any other surviving banks or to the Commonwealth Bank the benefit of the custom of the bank that it has stopped.

Your Lordships' attention has been drawn by the Attorney-General in the course of his argument more than once to the provisions of s. 3 of the *Banking Act*, and he has suggested that s. 3 with its reference to the "several objects" of the Act is so worded as to make it plain that Parliament did mean that the power under s. 46 (4) was to have an independent and unconditioned life of its own.

Section 3 of the Act is a declaration of Parliamentary intention, and, therefore, one may liken it to a preamble. It states: "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." If one pauses there and treats that as an object independent of the two objects which follow, there is nothing in the Act, apart from those things which are achieved under headings (*b*) and (*c*) that follow, which brings about the expansion of the banking business of the Commonwealth at all. It is only intended by the Act to be expanded by being given the power to acquire the businesses and the property of the private banks and by being allowed to clear them out of its way for the future. Therefore, from the very first the assumption that these are three independent objects and that, therefore, heading (*c*) shows that the prohibition stands independent in the mind of Parliament from the others breaks down; headings (*b*) and (*c*) must be mere ways of attaining the object of (*a*) and not separate things from (*a*) or from each other.

That becomes demonstrably plain if it is noted that the first of the "several objects" is the expansion of the banking business of

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the Commonwealth Bank. If you then turn to Part IV. of the Act (that consists of ss. 9-25), you will see that in the heading above s. 9 it bears the legend " Expansion of Banking Business of Commonwealth Bank " ; in other words (*a*) of s. 3. But what does it include ? It includes, if you look at the headings set out in s. 4 : " Expansion of Banking Business of Commonwealth Bank. (1) Preliminary. (2) Acquisition of Shares in Private Banks. (3) Management of Private Banks. (4) Taking over of businesses of Private Banks." So the very legend of Part IV., " Expansion of Banking Business of Commonwealth Bank", in fact includes the whole of (*b*) in s. 3. So that the draftsman of the Act himself shows by the description he has given to Part IV. that he regards the taking over by the Commonwealth Bank of the banking business in Australia of private banks and the acquisition on just terms of their property as part of the expansion of the banking business of the Commonwealth Bank, as, of course, it is.

[Lord MORTON. I quite see that if you look at Part IV., ss. 9-25, they intimately link up s. 3 (*b*) with s. 3 (*a*), but they do not contain any reference at all to s. 3 (*c*).]

I accept that.

[Lord MORTON. That comes quite a lot later and under a separate heading. It seems to me your argument perhaps applies with greater force to (*b*) than (*c*).]

The appellants' contention that " several " in the opening line of s. 3 really means " the three things that follow under headings (*a*), (*b*) and (*c*) must all be regarded as independent objects," cannot be a good argument if you see that (*b*) and (*a*) are part of each other and if it does not mean that with regard to (*b*) and (*a*) there is no more reason for giving it a special meaning of " independent " with regard to (*c*).]

Section 46 is a separate Part of the Act, and it is headed " Prohibition of the carrying on of banking business by private banks " ; not " prohibitions," but " prohibition." The fallacy of the construction which the appellants' argument introduces is that this section contains two quite separate forms of prohibition and that one of them suddenly emerges in sub-s. 4. In my submission it is sub-s. 1, as one would expect, which gives the note to the section and which contains all the prohibition which appears under the section to be needed. It says : " 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." There, in sub-s. 1, at the beginning of the section, you have a

complete prohibition, an injunction, to a private bank not to carry on banking business in Australia after the commencement of the Act except as required, that is, except so far as there are affirmative requirements put upon it by what follows in the section. There follows sub-s. 2 which does make a requirement: "Each private bank shall, subject to this section, 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. One may assume without unreason that this is not a provision that each private bank is to bank in perpetuity in Australia, or that the facilities or services that it was extending on a fixed date in August 1947 are to be maintained for ever and for ever in perpetuity by that bank. One may therefore reasonably infer that the requirement which alone excepts the bank from the prohibition of sub-s. 1 is a requirement for a certain purpose and for a limited time. Sub-section 3 goes on: "The last preceding sub-section shall not apply to a private bank if its business in Australia has been taken over by another private bank or after that business has been taken over by the Commonwealth Bank."

If I may pause there, omitting the question as to merger with another private bank, it will be seen that, although the exact date may be uncertain when the prohibition has to descend, once the business of a private bank has been taken over by the Commonwealth Bank as referred to in sub-s. 3, then the requirement which alone exempted it from the prohibition of sub-s. 1 is withdrawn. In that event the private bank would find itself without the directions to carry on effected by the section and told that it must stop. Having got that far, what further scope is there for a notice by the Treasurer requiring a private bank to cease upon a date specified in the notice carrying on banking business in Australia? In my submission it can only be this, that since the acquisition of the banking business in Australia did not necessarily put an end to the existence of the bank or the possibility of it resuming operations in the future after its assets had been acquired, they were providing in sub-s. 4, after the preceding sub-sections, for putting an end for good to the right or possibility of the bank ever to rise again by giving the Treasurer power to determine on notice the exact date when that bank should not have a right to carry on business, although it had lost its assets already by acquisition under the other Parts of the Act. So, in my submission, sub-s. 4 in the setting of that section is a way of carrying out the

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scheme which sub-ss. 1, 2 and 3 are dealing with, that is, since the avowed intention of the Act is to acquire the businesses of the private banks, to steady them, as it were, in their position at August 1947 until the taking over could be effected. Just as a vendor who has sold his business by a contract of sale must continue the business reasonably in operation pending the transfer, they were steadying intended transferors until the taking over could become effective. That was what sub-ss. 1, 2 and 3 were directed to, and sub-s. 4, instead of being something independent from the rest of the section and creating a new and quite separate prohibition from that effected by sub-s. 1, is merely a way of winding up the whole intended transfer by preventing the private bank when it has been expropriated ever rising again, providing as they should a precise day to be fixed under the statute as from which the maintenance of banking business should become a legal impossibility.

On this question of construction of the Act s. 6 neither advances nor impedes the argument. It is something which comes and is intended to come after the question of the construction of the Act has been solved. In putting that view of the effect of s. 6 and of comparable though perhaps less elaborate provisions such as you get in the general Act, the *Acts Interpretation Act*, I am only putting the unanimous view of the Judges of the High Court. They were all, as they would be, very familiar with the purpose and operation of provisions of this kind, intended to deal with some of the problems raised by the question of severability or inseverability, and they all agreed that provisions of this kind do not, and are not intended to, affect the construction of the Act itself. They are intended to meet, and if possible to solve, questions that arise after the construction of the Act as a whole has been determined and when it has been found, if it be found, that parts of an Act are incapable of having legislative validity owing to the impediments of the Constitution. Section 6 is nothing more than a declaration of the intention of Parliament. It is not in itself enacting and it cannot be: "It is hereby declared to be the intention of Parliament." Giving it the fullest possible measure which a court treating the legislation of Parliament with respect would wish to do, it remains true, as all the judges have said, that the legislative function under the Constitution lies with Parliament and the judicial function with the High Court, and it is not for Parliament so to express itself as to leave to the High Court the power in effect of making legislation which it has not made itself. Provisions such as s. 6, if they are driven too far, are in danger really of presenting a picture of Parliament putting together a series of phrases and handing them to the

High Court and saying: See what law you can make out of them. That, as the High Court accepts, is impossible because it turns the judicial body into a law-making body. All it can do, therefore, with this declaration of the intention of Parliament before it and with the desire to honour it is to attribute to this declaration the maximum effect that it can consistently with the fact that law in the end must be made by Parliament and not by the High Court. This is very much the same thing as the High Court recognized in relation to the provisions in s. 15 and s. 25 of this Act, that fair compensation should be paid for the compulsory acquisition of shares or of businesses; they found that the court which had been created for finding the compensation was not valid, and they felt that they could not, owing to the condition of making provision for compensation dependent upon the intended court of claims, hold that ss. 15 and 25 were effective.

[Lord SIMONDS. Has it ever been suggested that such a section as s. 6 is unconstitutional and ultra vires in that it purports to give legislative power to a judicial body?]

I think it is accepted by all the members of the Court that if you pressed it too far it would be unconstitutional. I think that is what *Dixon* J. calls an inadmissible delegation. I think (*c*) is in a more extreme form than has appeared before. I think all the judges are careful to say: After all, s. 6 is only a general statement of parliamentary intention, and if we were going, having avoided one part of the Act, to allow another part of the Act to survive, and really make that into a new law simply because of the mandate given by s. 6, we would be going too far because it is only a general guide as to what Parliament wanted done. It is not a specific direction that the Act could be operated so as to be a law for the destruction of businesses without compensation.

The result of the appellants' argument would be that, in an Act the major part of which is devoted to the acquisition by one means or another of the assets of these private banks, Parliament is to be treated as having inserted an unconditional power in the Treasurer to determine the businesses of any one or more of these private banks at any time and in any circumstances, and that without paying a penny for the right so to stop their activities. The only power given to the Commonwealth to provide for the acquisition of property is the power to do it upon just terms. That means that when it legislates for the acquisition of property it must be careful, if it should not be scrupulous, to see that it does not arm the acquiring authority or person with a power as between himself and the expropriated party that is too great for justice, because then

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it will not be legislating for the acquisition of property on just terms but for the acquisition of property by a form of oppression. If this is in truth a separate and independent power given to the Treasurer to exercise at his discretion, it does, in my submission, make it *ipso facto* impossible to say that the terms of acquisition provided under this statute are just. By adding this power to the situation of banks, whose property you are going to take over, you have by so doing materially affected the value of their property which you are going to pay for because you have turned their businesses for which you are to give them just compensation from well-established businesses with an assured future into businesses or activities which are pursued merely at the will of the Treasurer and under the threat of discontinuance at short notice. You destroy by the very enactment of s. 46, if it really means this, half the value of what you are going to take and pay for. But you do more. Parliament has provided under s. 22, as one of the methods of acquisition, for the making of what it has called voluntary agreements, negotiated agreements, as between the owners of the private bank and the Treasurer. How as between those two parties can it be expected that the private bank is to obtain a satisfactory purchase price when it is faced by a purchaser whose duty it is to warn it that if he so decides—and no one can prevent him—he can stop their business on two months' notice and pay them nothing? On the appellants' construction the armour with which the Treasurer has been clothed in the interests of the Commonwealth Bank is, in my submission, far too heavy for justice. He can say: "I want your property and I want it on these terms. You may not think they are satisfactory terms, but you must always remember that I have been given power by Parliament, and they have imposed no restrictions on me because they chose not to do it, the right to stop you carrying on at all and pay you nothing. Now would it not be better to come to an agreement?"

What is strange about this is that a much milder form of this, contained in those sections which provide for turning out the directors of the Australian private banks and the putting in of nominee directors by the Treasurer, those directors being empowered to dispose of the business of the private bank by agreement—or to agree the compensation money, the sum, if it is taken compulsorily—was avoided unanimously by the Judges of the High Court in this case just on that ground. They said: Acquisition on just terms cannot allow the intended acquirer to have this amount of control over the position of the intended vendor, that his nominees may be put in in the place of the existing directors and those

nominees have as much authority given to them by the Act as will enable them to agree to the sale or to agree what the sum of the purchase price is to be. Therefore they tore up those sections. If they were right in taking that view with regard to the comparatively mild form of appropriation which is contained in ss. 17-21, how much stronger is the argument for avoiding on exactly the same ground that most opprobrious form of oppression which is contained in s. 46 sub-ss. 4-8, if the construction of it being an independent power can be the right one ?

A court will endeavour to construe a statute so that it does not deprive persons of property without compensation (*Attorney-General* v. *De Keyser's Royal Hotel Ltd.* (1), per Lord *Atkinson*). In my submission, one would make every effort if it was legitimately open to ensure that on the construction of this statute it was not intended that there should be an independent power in the Treasurer to stop the businesses of these banks without paying them a penny of compensation for it. The only solution, in my submission, is to harmonize sub-s. 1 and sub-s. 4 and make them one prohibition, and not two separate ones, and then it is fairly plain that sub-s. 1 is directed to the acquisition which the Act intended to achieve. It is not spoken of as being subject to sub-s. 4. It is in terms a general prohibition effected by the Act itself : " Go on as you are doing until we take you over, but when that is done no more banking business for you."

If s. 46 on its true construction does confer this independent power for which the appellants contend, the question arises whether the section is within the power conferred by s. 51 (xiii.) of the Constitution. For this purpose it is assumed that sub-ss. 4-8 stand alone. The question that then arises is whether an Act which simply confers a power, in isolation, to say : " A and B shall not bank " is within the legislative power. If it is, it must be equally within power to provide that " A and B shall bank "—a form of industrial conscription that one would not have envisaged. It is submitted that an Act in either of these forms is inherently an Act about A and B—that is, an Act about persons, not about banking.

There are certain defined powers set out in s. 51 as being those which are entrusted to the Commonwealth. Either a particular Act comes within those subjects—is " with respect to " them—or not. The question that arises here cannot be solved by saying, as the Attorney-General said : " If this is not a law about banking, what is it a law about ? " It may be nothing that is within Commonwealth power. The question that must be answered is : Is the

(1) (1920) A.C. 508, at p. 542.

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particular law a law " with respect to " the activity of banking ? The power is to make laws with respect to what bankers do or are to do *qua* bankers. An Act to the effect that no banker should own more than two private houses would not be within power. It might be called an Act about bankers, but it would be about bankers in relation to something which did not bear upon a banker's activity. " Banking " does not mean a banking system as an entity, or the banking community or the like ; it refers strictly to the activities of bankers (*Tennant* v. *Union Bank of Canada* (1) ; *Attorney-General for Canada* v. *Attorney-General for Quebec* (2) ; *In the matter of Three Bills passed by the Legislative Assembly of Alberta* (3) ).

[Lord SIMONDS. You do not adhere to the somewhat narrow definition which would limit banking to transactions between bankers and their customers ?]

No.

[Lord SIMONDS. Would you give me an example of a banking transaction which falls within the definition, as you would have it, which is not a relationship between banker and customer ?]

I would say relations between the banker and his staff would be also included in the term " banking " ; or, at any rate, the placing of his money.

[Counsel referred to *United States* v. *Darby* (4) ].

As to *Huddart Parker Ltd.* v. *The Commonwealth* (5), the appellants claimed that it was approved by the Judicial Committee in *James* v. *The Commonwealth*. It is true that it was referred to, but it was merely a passing reference ; it certainly cannot be taken as approving everything said in the judgments. In the *Huddart Parker Case* there was a licensing system which is described accurately in the *Melbourne Corporation Case* by *Latham* C.J. when he says that every person had a right to obtain a renewal of a licence.

[Lord SIMONDS. The distinction which you seek to make is this, if I understand your argument : it would be a law in respect of trade and commerce to select persons who could undertake some operation which was a part of trade and commerce ; but it would not be a law in respect of trade and commerce if you passed a law which arbitrarily excluded anybody from taking part in a particular trade and operation.]

That is the distinction in my submission.

(1) (1894) A.C. 31, at p. 44.
(2) (1947) A.C. 33, at pp. 41, 43.
(3) (1938) S.C.R. (Can.) 100 ; (1939) A.C. 117.
(4) (1940) 312 U.S. 100 [85 Law. Ed. 609].
(5) (1931) 44 C.L.R. 492.

[Lord PORTER. I am not sure on that aspect how it is adequately dealt with by the Chief Justice in the *Melbourne Corporation Case*.]

I do not think it is. What the Chief Justice says in the *Melbourne Corporation Case* is interesting, because he evidently felt that *Huddart Parker* might be pushed too far unless it was limited to the exact circumstances of the *Transport Workers Act* and the scheme it set up. That is what he seems to be saying.

[Lord SIMONDS. But then he brings it back in the instant case by treating *Huddart Parker* in the very simplest terms as if it were a law prohibiting persons without any qualification. He does not refer to the qualification upon which in the *Melbourne Corporation Case* he relied. Is not that so ?]

Yes, it is so.

Neither the *Airways Case* nor the *Melbourne Corporation Case* bears on the question of power under s. 51 (xiii.) which arises here. Although you have these individual banks who can be excluded *nominatim* under s. 46 (4)-(8), there is no general provision in this case which could prevent further private banks being licensed in the future under the *Banking Act* 1945. There is not even the resolution that there shall be a monopoly in banking in the Commonwealth. There is merely a provision that these particular individual named banks called private banks can be turned out if the Treasurer so decides.

If the power which s. 46 (4) purports to confer on the Treasurer were an arbitrary and uncontrolled power, there could be no ground, however irrelevant the reason which avowedly had moved him, for saying that it was not a prohibition operating under the Commonwealth statute. If it is not given to him subject to some conditions, if it is truly a pure power to prohibit, then he is entitled by this grant of power from the Commonwealth to exercise it as irrelevantly or as irresponsibly as he may choose. He is not to do it only because he has reasons to suppose that the banks are banking well or ill, or on any such consideration as that—any banking reason or consideration ; indeed, the whole basis of the Act, so far as appears, is not that banking, if conducted for private profit, leads to a bad system of banking, because the practices which these banks have been carrying out as bankers are to be continued and honoured by the Commonwealth Bank. So far as they have any category discernible from the Act by being called private banks, it is the nature of the ownership of the assets which are launched into banking and not the methods of banking which that ownership brings about which is in question. The Treasurer, of course, is a responsible Minister in this sense, that he may be questioned in

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Parliament about his exercise of this power which it is said has been given him by the statute, and he may be subject to expressions of Parliamentary approval or disapproval according to what he has done. But, if it be right that the true meaning of the Act is that they have said to him: "You may have this power, and you are limited by no restrictions or conditions in your exercise," his answer is: "You gave me an arbitrary and uncontrolled power. It was you in making the Act that imposed no conditions upon me, and, therefore, there is no ground for querying or disapproving of any particular application of that arbitrary power which your statute has conferred upon me." It really amounts to this: when one says "arbitrary power" one means a power—one tests this by possibilities—which might be exercised for any irresponsible, irrelevant or personal reason having no connection with the activity of banking and yet be a good exercise of the power as given. That, in my submission, is something which, since the Commonwealth power can be derived only from a power to legislate with respect to the activity of banking, cannot be achieved under the Constitution.

*A. J. Hannan* K.C. (with him *J. Harcourt Barrington*), for the respondents in the fourth and fifth appeals (the States of South Australia and Western Australia and others.) It is submitted that s. 46 is invalid for the reasons that have already been presented in argument on behalf of the respondents.

It is submitted that s. 46 is invalid on the further ground that it is inconsistent with clause 5 (9) of the Financial Agreement, which, by virtue of s. 105A (5) of the Constitution, limits the legislative powers of the Commonwealth. The effect of s. 105A (5) is to make the Financial Agreement and all its terms a part of the Commonwealth Constitution and to give to the Agreement and its terms the effect of a paramount binding source of rules of constitutional law, to that extent overriding the constitutional powers of the Commonwealth Parliament conferred by the *Constitution Act* and the various State Parliaments acting under their own Constitutions.

The power which s. 46, if valid, would give to the Treasurer to put an end to the business of the private banks necessarily involves the prohibition of their doing business with the States. The necessary effect of that is that if the States want to borrow money at all they must borrow from the Commonwealth Bank and they thereby immediately fall under the control of the other party to the agreement, which is the Commonwealth.

The effect of clause 5 of the Financial Agreement may be stated as follows :—(1) Borrowing for permanent purposes is controlled as follows : (*a*) The State must not invite the public to lend it money by the issue of a public prospectus, that is, public borrowing is prohibited (sub-clause 8) ; (*b*) Semi-private borrowing for permanent purposes must be used for the purposes mentioned in a programme approved by the Loan Council ; (*c*) It is only intra-State. That is sub-clause 1 (*a*). (2) Borrowing for temporary purposes is controlled if securities are issued for the loan, for these must be Commonwealth securities and the Loan Council fixes their terms (sub-clause 2). The only cases where securities will not be issued are where the loan is on overdraft or on fixed or special deposit. Such temporary borrowing is only intra-State. (3) Borrowing for temporary purposes is not controlled (except as to maximum interest rates) if the loan is on overdraft from a bank or on fixed or special deposit, for in these cases no security is issued and the only control whether by the Loan Council or by the Commonwealth or any other authority is that specified in sub-clause 9. It may be inside or anywhere outside the State. Clause 5 (9) of the agreement gives each State the legal right to borrow on overdraft from a bank for temporary purposes without being subject to the control of the Commonwealth. Such borrowing is not to be subject to the control either of the Commonwealth or of the Loan Council as other kinds of borrowing are ; it is subject only to the one kind of control (which is permissive) expressed in that sub-clause, namely, that of the Loan Council in relation to maximum rates of interest &c. This right of the States imports a contractual obligation on the part of the Commonwealth, the party on which the burden of the right is imposed. That obligation involves a promise on the part of the Commonwealth that the Commonwealth Parliament will not use its power under s. 51 (xiii.) of the Constitution to make any law which would prevent the States from borrowing on overdraft in accordance with clause 5 (9) of the agreement or would control such borrowing. The legislative power to which a limitation is put is necessarily that in s. 51 (xiii.) ; the Commonwealth has no other power through which it could touch the States in breach of the sub-clause. Included in the class of statutes which the Commonwealth is forbidden to enact is any Act the effect of which is to give the States no alternative but to borrow from the Commonwealth Bank if they wish to borrow on overdraft. The passing of s. 46 of the *Banking Act* 1947 is a breach of contract, for it is legislation which subjects the States in their borrowing on overdraft to the control of the Commonwealth by reason of ss. 8 and 9 of the *Commonwealth Bank Act*, for borrowing

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from the Commonwealth Bank means borrowing subject to Commonwealth control. Accordingly, s. 46 of the *Banking Act* is invalid, for it is legislation inconsistent with the Financial Agreement which the Commonwealth has contracted not to enact and this legislation by reason of s. 105A (5) of the Constitution is invalid.

It is no answer to the present submission to say that a State can have its own bank and obtain advances from it. This would not be borrowing on overdraft at all. Moreover, it would not be practicable for a State bank to have on hand such large sums as are needed.

If, as is submitted, clause 5 (9) confers a right on the States, it follows that action on the part of the Commonwealth which impaired that right would be a breach of the contract. If one asks what kind of action that might be, the typical—if not the only—kind of action would be legislative action. Regard must be had to the fact that this agreement is between sovereign Governments. It cannot be construed like a contract between private citizens on the assumption that, whatever terms the contract contains, they are subject to future changes in the law of the land. *Dixon* J. was in error in the present case in construing it in that way.

[Lord MORTON. Supposing there were three private banks in South Australia and the Federal Government passed a law forbidding one of them to carry on banking business and that was one which the State had been in the habit of going to for its overdrafts, but it still had the choice of two others, would such an Act be contrary to the Constitution with this clause inserted in it ?]

It would be a question of fact : Does the elimination of one bank out of three defeat or diminish or condition the State's power to raise on overdraft from the remaining banks the money it requires in as complete a manner as is necessary ?

[Lord MORTON. It is a question of degree and fact ?]

It is a question of degree.

[Lord MORTON. At any rate you say that to shut all the private banks is well beyond the line.]

Yes ; the effect is equivalent to what was held in the *Melbourne Corporation Case* to be prohibited legislation.

[Lord MACDERMOTT. You have stressed sub-clause 9. Does it carry you any further than sub-clause 1 (*a*) ?]

Yes ; because of sub-clause 2 of clause 5 : " Any securities that are issued for moneys so borrowed or used shall be Commonwealth securities, to be provided by the Commonwealth upon terms approved by the Loan Council." When the State borrows under the first sub-clause of clause 5, the Loan Council fixes the terms of

the securities which it offers in exchange for the money. It is controlled borrowing. The contrast is between controlled borrowing, which is dealt with in sub-clauses 1-7 of clause 5, and sub-clause 9 which is uncontrolled borrowing without security. In the practical exigencies of the situation the State would not borrow except either on security when it is permanent or by way of overdraft when it is temporary.

That s. 105A (5) and the Financial Agreement constitute a paramount and overriding rule of constitutional law is the view expressed in *New South Wales* v. *The Commonwealth* [*No.* 1] (1), per *Rich* and *Dixon* JJ. (2) and per *Starke* J. (3).

In the *Melbourne Corporation Case* the present point was not taken in argument, and the effect of clause 5 (9) of the agreement was not appreciated by the members of the Court other than *Latham* C.J. and *Williams* J. *Starke* J. in that case referred to the words of clause 5 (1), but he does not appear to have addressed his mind to clause 5 (9) at all, and in the present case he failed to recognize the obligation imposed by sub-clause 9 on the Commonwealth.

It is submitted that the view of clause 5 (9) taken by *Rich* and *Williams* JJ. in the present case is consistent with that of *Williams* J. in the *Melbourne Corporation Case* and is correct. Logically, *Latham* C.J. should have taken the same view in the present case as in the *Melbourne Corporation Case*, but he did not do so. Taking his two judgments together, it is correct, it is thought, to say that he recognizes that clause 5 (9) confers a right on the States, but he regards it merely as a right to prevent the Commonwealth from discriminating against the banks by legislation expressly designed to prevent them from borrowing on overdraft from the banks for temporary purposes. This confuses the discrimination argument with that relating to the Financial Agreement. The control over the banks given to the Federal Treasurer by s. 48 of the *Banking Act* 1945 is indistinguishable for the purposes of the present argument from the power given to the same Treasurer by s. 46 of the 1947 Act to forbid the banks doing any banking business. It cannot be that s. 105A means that the Commonwealth is forbidden to pass legislation, directly aimed at a State, forbidding banks to deal with it, and permits the Commonwealth, without committing a breach of sub-clause 9, to pass legislation which affects the States just as intimately, works just as great a destruction of the right, and is excusable only on the unsubstantial ground that it is

(1) (1932) 46 C.L.R. 155.
(2) (1932) 46 C.L.R., at p. 177.
(3) (1932) 46 C.L.R., at p. 186.

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general legislation. It is to misunderstand what the States stipulated for in sub-clause 9. The States did not stipulate that their financial independence should be preserved and protected against legislation directly aimed at it. They wanted it to be preserved. Of the other judges who rejected this argument in the present case, it is submitted that *Starke* and *McTiernan* JJ. misunderstood it and that *Dixon* J. misconstrued it, he having clearly construed it as being subject to the frustration rule of contracts and the impossibility of performance owing to change in the law.

The question is not as to how many banks can be left and how many can be eliminated. It is: How is the free exercise of the right conferred on the States affected? It never was the argument that clause 5 (9) conferred a kind of immortality on existing banks. The contention has always been that the obligation was purely negative, to refrain from the enactment of legislation of the prohibited nature, that is, rendering the right of the States nugatory or diminishing or prejudicially affecting it.

The Attorney-General of the Commonwealth, in reply. The appellants submit that s. 74 of the Constitution prescribes a procedure for isolating certain types of constitutional questions decided in the High Court of Australia and for preventing an appellant from challenging the High Court decision on any such question without a certificate of the High Court itself. The third paragraph of the section makes it clear that the preceding paragraphs may involve an invasion of the Royal prerogative. The words limiting or controlling the prerogative should be construed strictly. It was suggested that the appellants make the word "decision" do a double duty. In ordinary language it always does a double duty. The word should not be separated from its context in the first paragraph of s. 74. The word cannot merely mean the formal order in that context, because it does not make sense. If you read the word "order" in "No appeal shall be permitted to the Queen in Council from an order of the High Court upon any question," there is never an order of the High Court "upon any question." There would have to be some words added, even to make sense of the phraseology. Therefore it means in this context that you see what the High Court has decided and you see if it has made a decision upon an *inter se* question, and it is only that decision which is given a special position by the first paragraph of s. 74, a decision of the High Court upon a particular *inter se* question, and even in that case the High Court is enabled to certify, not that the case as a whole is one fit for determination here, but that the question is one

which ought to be determined by Her Majesty in Council. The policy behind this is clear. It is not to treat the cause as a whole in a special way because an *inter se* question is involved in some degree in the litigation, but the policy is simply that a decision of the High Court upon this type of question, involving matters of domestic jurisdiction, so to speak, domestic concern in Australia, stands unless the High Court itself thinks that the question ought to be brought to Her Majesty in Council. Parallel with the first paragraph is the provision in the second paragraph, and the certificate is granted only if the High Court is satisfied that for a special reason it should be granted, and, if it is granted, an appeal lies to Her Majesty in Council on the question without further leave.

In *Jones* v. *Commonwealth Court of Conciliation and Arbitration* (1) the appeal was held incompetent because an *inter se* question arose. In that case the Board went behind the formal order. On an application for special leave, or, if leave is granted, on an appeal, the Board always has before it the material necessary for this purpose—the formal order of the High Court and the reasons for judgment.

[Lord PORTER. Are these propositions right: (1) An appellant can always defend a decision upon an *inter se* question if it has been decided in his favour in the High Court. (2) A respondent can always raise an *inter se* question in order to defend a decision which has been made for him below?]

Yes.

[Lord PORTER. In the first case I put you rely on the word "decision," and in the second case you rely on the word "appeal."]

[Lord SIMONDS. The policy which the High Court, since the Commonwealth was established, has insisted upon is that this question of *inter se* power is a matter for the High Court to determine; and yet by a side wind it may be brought up for determination by this Board.]

The policy is merely to cut off the right of access to the Privy Council in the case of a person who wants to appeal against a decision on an *inter se* question in the High Court when he has lost the day. The only difficulty is the case of the respondent.

[Lord SIMONDS. It is a matter of great importance, one would assume, that *inter se* questions, such as we have here, should be determined by the High Court, unless they certify. We have to determine those very points. What is to happen? The High Court will give what persuasive power they think fit to our judgment. Is that right?]

(1) (1917) A.C. 528.

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I submit that is the position and there is no alternative.

As to the point taken by Sir *David Maxwell Fyfe*, it is submitted that the interpretation of s. 92 can never raise an *inter se* question. That is decided in substance in *James* v. *Cowan*. See also *Ex parte Nelson* [*No.* 2], per *Dixon* J. (1). The section confers no power, and it cannot mark out the limit of power as between the Commonwealth and a State. It denies power to both. The question whether s. 46 of the Act contravenes s. 92 is not a question as to whether the Commonwealth vis-a-vis a State has power to enact s.46.

It is submitted that no enactment of Commonwealth or State can be invalidated by s. 92 unless it imposes a restriction or burden in respect of or because of the border between States.

The respondents have put forward s. 92 as essentially predicating a regime of free trade in the sense of free competition in inter-State activities; in other words, in relation to the activity of trading inter-State. They say that is the unit you look to: the whole business of trading across State lines or carrying on a business across State lines. They ask the question of any law: Is that trade, in the sense of the business so conducted, impeded? If the impediment is a little one it is, according to the respondents, only a regulation, but if it is a bigger one—how big it is not easy to say—then it is a burden and the enactment is invalid. This is inconsistent with the test laid down in *James* v. *The Commonwealth*. The respondents seek to explain away the references to the border in that case as being metaphorical.

There is no basis for the suggestion of the respondents that s. 92 was inserted in the Australian Constitution to make applicable the American doctrine of the individual being able to trade from State to State. In *Prentice & Egan, The Commerce Clause of the Federal Constitution* (1898), at pp. 39 et seq., it is shown that this individual right of the citizen is not merely a question of interpreting the commerce clause in the United States Constitution. It is something for which provision is made by special constitutional guarantees which are completely absent from the Australian Constitution. See also pp. 46 and 48 of the same work and *Prentice, The Federal Power over Carriers and Corporations*. The United States Constitution would be a most uncertain foundation on which to build any interpretation of the Australian Constitution. The historical background of s. 92 is quite different from that suggested by the respondents, as is shown in *Quick & Garran* on the *Australian Constitution*, p. 125. See also *Harrison Moore, Constitution of the Commonwealth of Australia*, 2nd ed., p. 565.

(1) (1928) 42 C.L.R. 258, at pp. 269 et seq.

The test laid down in *James* v. *The Commonwealth* as to s. 92 is analogous to the test applied to legislation challenged as being not authorized by Constitutions which give power to make laws in respect of certain subject matters. It is similar to the phrasing in our Constitution, " with respect to." Section 51 says that the Commonwealth shall have " power to make laws for the peace, order and good government of the Commonwealth with respect to," which are words rather introductory to an enumeration, but the words " in respect of " are words more definitely indicating or demanding a direct relationship between the law that is challenged and the subject in respect of which that law must be passed. If the true criterion is that the law must be a law imposing a restriction or hindrance or burden or prohibition in respect of goods passing into or out of a State, " in respect of " that, you have the exact phraseology that you find in some of the Dominion Constitutions. If so, the question that is asked in each case is a question involving considerations of the real nature of the challenged enactment, its true character, the substance of the enactment, the degree of its relationship to the border ; all those are very relevant facts if you are going to make a determination that the restriction is in respect of the passage of goods across the border. In that sense the court which is asked to apply s. 92 to an enactment, to see whether there is an infringement, must deal with it having regard to the whole of the provisions of the law, the circumstances in which it is to operate, its true character and its essence, and whether in truth it is a law for the creation of restrictions upon the movement of goods across the border. Whether the law deals with a concomitant of trade or with trade itself is an important factor in ascertaining what it does, what its substance is or its true character is from the relevant aspect. It is possible that you may have a law so dealing with instruments of trade or concomitants of trade that it would be regarded in its setting as a law imposing prohibition in respect of the passage of goods across the border. It is difficult to imagine, for instance, a law passed which prohibits the use of railways in inter-State trade except perhaps as part of a process of setting up some other form of transport. It would be a completely wanton law to pass ; no purpose that one can see would be served by such a law. One can easily imagine a law preferring railway transport to road transport, or road transport to railway transport or air transport to both, and one cannot therefore overlook the setting in which you would find a law of that character. In short, you must look at the law in its setting, and see its essential character. You cannot say : This law contains a clause which by itself is a

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restriction and therefore that restriction is to be regarded as a restriction in respect of the passage of goods from State to State. Seen in its context you may find that what Lord *Atkin* calls the real object is of a different character. It may be to facilitate or to compel the use of different forms of transport, to use different methods of exchange currency or some substitute for currency. It may therefore come within the rule in *James* v. *The Commonwealth* according to the context in which you find the law. The process does not involve any question of the motive of the legislature. A great deal of the argument of the respondents has been addressed to suggesting that the appellants are saying that for a good object, in the sense of something that is praiseworthy or something that is politically desirable, you can impose a restriction which is otherwise contrary to s. 92. Motive has nothing to do with it. It was suggested that when we used the phrase "directed against the border" or "directed against inter-State trade," we were really referring to the motive of the legislature. We are referring to nothing of the kind; we are referring to the terms of the enactment in the setting of circumstances in which the enactment is applied, and, if that is the inquiry, as I submit it is, one must always pay regard to the circumstances to see whether the enactment that is challenged, as being contrary to s. 92, is an enactment imposing prohibitions, restrictions or imposts in respect of the passage of goods into and out of a State.

Apart from the case of a mere prohibition, which might stand in a special category—it is said by the respondents to do so—the case for the respondents is that you do not look at the border; the border is mentioned, it is true, but the border is simply a signpost to tell you that you are looking at the whole area of inter-State trade. Then in connection with the whole area of inter-State trade, which, of course, must include transactions, and be built up of transactions which at some stage or other involve the crossing of the border, otherwise the trade would not be inter-State, the view of the respondents is that the courts are to determine whether the particular legislative restriction is merely a regulation, defining it in the sense of a law which accommodates persons to each other in a society, or whether it is to be regarded as a burden; whether it is a burden on the individual or a burden on the trade as a whole, is not quite clear. I submit you can apply to every case the test in *James* v. *The Commonwealth*, but I do not know how a court is to apply the test of burden as distinct from regulation, because the Constitution says nothing about a burden or regulation. Section 92 has an operative effect no doubt for the protection of the individuals,

but what we are concerned to say is that it does not specifically give rights to individuals in the sense of the clauses of the United States Constitution. It results in individuals being able to challenge restrictions imposed by legislatures in respect of the border.

There is no misapprehension as to what was decided in *James* v. *South Australia* (1). Section 20 of the Act there in question was said by Lord *Atkin* in *James* v. *Cowan* to have been held invalid by the High Court, but the fact is that it was not held invalid *in toto*. The decision was merely that s. 20 was invalid to the extent that it authorized determinations by a Board in contravention of s. 92.

Section 92 does not embody any conception of freedom of trade, or freedom of trading, or freedom to trade, or freedom of the trader in the sense that freedom of competition is to be unrestricted. Freedom of trade at common law, as stated by Lord *Parker* in *Attorney-General (Cth)* v. *Adelaide Steamship Co.* (2), is the right or liberty of a citizen (subject always to any restraints imposed by statute) to engage in trade at his own choice. An intention to establish a constitutional guarantee of any such right would have been expressed in the clearest and most direct language, and certainly it would never have been applied only to trade "among the States." What s. 92 guarantees is a particular absence of restraint, that is, freedom from a specific kind of restraint. Substantially, what is guaranteed is that legislative or executive restrictions in respect of the passage of goods or persons across the State boundaries shall not be adopted either by the Commonwealth or the State. The "freedom of trade" which is denied, for instance, by a law creating a State monopoly has no connection with the specific freedom of passage or movement across the State frontiers. As a result of the specific freedom or exemption conferred by s. 92, there may be said to flow consequentially a general "right" to ignore laws of the prohibited character; but, if a specific freedom or exemption or immunity is alone conferred by s. 92, this does not imply a positive liberty on the part of any individual to trade inter-State, even though legislative denial of such a liberty would incidentally deprive some persons of occasions to avail themselves of the specific freedom, exemption or immunity which alone is guaranteed by s. 92. The fallacy of the respondents is to deduce the scope of the individual rights which they assert from the concept of trade and commerce among the States, rather than from the scope of the freedom which the section guarantees. Section 92 must be read as meaning that trade is to be free from burdens, hindrances or restrictions imposed in respect of the passage of goods or persons

(1) (1927) 40 C.L.R. 1.

(2) (1913) A.C. 781, at p. 793.

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into or out of a State. If those words had been expressly inserted in s. 92, it would at once become apparent that nobody could assert exemption or immunity from burdens or restrictions imposed on trade and commerce among the States in respect of other matters. No statute otherwise valid would be invalid under s. 92 merely because it cut down in other respects the common-law liberty to trade. Legislative denial of what is frequently called a general "freedom" or "liberty" "to trade" takes place in the case of every statute creating a trade monopoly or a selective licensing system or the prohibition of an individual from trading; all such enactments will have the incidental effect of preventing individuals from moving or passing goods across the frontier in the course of trade if they are at liberty to trade. These impacts are mere by-products of the enactments, because it is not in respect of the movement or passage across the border that such enactments are passed. There is no distinction in principle between a law which directly prohibits one individual from trading either generally or in respect of inter-State trade and a law which prohibits all except one chosen instrument from trading. In no way can the law be correctly described as having been imposed "in respect of" the passage of goods or persons across the State frontier. It is imposed for a wider, different and disparate purpose. It is clear, and perhaps admitted, that in the case of an infant, a bankrupt, an alien or a foreign corporation, a direct denial by law of the individual right to trade could not offend s. 92. The special characteristic of each such example (for example, infancy, bankruptcy, alienage) would re-inforce the conclusion that the particular restriction on the would-be trader is not one "in respect of the passage of goods across the State frontier." Equally, in the absence of such characteristic, the direct prohibition of named persons, of all persons except one, cannot be regarded as a law in respect of the movement across the State frontier. If the interpretation of s. 92 applied in *James* v. *The Commonwealth* is correct, it follows that, except in respect of the prohibited area of the border, both the Commonwealth Parliament and the State legislatures possess plenary legislative power for peace, order and good government in relation to trade and commerce among the States. The test of detrimental impact upon an individual trader of any law challenged under s. 92 is quite irrelevant to that section, even though such impact includes interference with the trader's operations in inter-State trade and may effectually obstruct his liberty to trade inter-State. Discrimination against inter-State trade in the forbidden area is good, though not conclusive, evidence that the law is obnoxious to s. 92. Prima facie,

a general law which does not discriminate will not offend against the section. Such a general law will not offend unless some special circumstances are present which show that in truth it is " in respect of " or made " because of " the passage of goods or persons across the border. There is no basis either in authority or in reason for any test of validity as to whether the law operates to " burden " as opposed to " regulate." The line between " burden " and " regulation " changes with economic and social conditions and cannot be ascertained by legal considerations. The test in *James* v. *Cowan* never changes; it is applicable in all the circumstances. You do not make exceptions for acquisition cases, as the respondents wish to do, saying that they are in a special category. They cannot be. The command of s. 92 must be applicable to every law. Laws acquiring commodities are valid unless it is affirmatively established by those attacking the law (because of s. 92) that the acquisition is, in truth, imposing a restriction " in respect of " the passage or movement of goods across the State frontier. Accordingly, the *Wheat Case*, although not the paraphrase of the principle stated by *Griffith* C.J. and *Barton* J., is approved impliedly in *James* v. *Cowan*. Its correctness is supported by the tests adopted by the High Court in the *Milk Board Case* and *Andrews* v. *Howell* (1). The *Milk Act* is indistinguishable from the *Wheat Acquisition Act*, and from the laws for the acquisition of peanuts in Queensland, the acquisition of apples and pears by the Commonwealth, and the acquisition of field peas by Tasmania. The acquisition cases can be regarded, so far as concerns the application of s. 92, in either of two aspects. You may say that the obligation of the law is imposed in respect of the ownership of property or the owner's freedom of contract, and any effect upon the passage of goods is remote, indirect and incidental. Another way of putting it is that the substance of the law is to substitute a government instrumentality for individual owners in the sale of the goods, and the obligation of the law is imposed not " in respect of " the passage of goods across the borders but in respect of the capacity to sell. A crucial test is *McArthur's Case*, where a State law passed to protect the Queensland consumer against excessive prices, was deemed by reason of s. 92 not to apply to transactions of sale where the contract stipulated for delivery to the Queensland consumer by the New South Wales seller. This law certainly imposed a restriction upon the inter-State trader's general " freedom of trade " in the sense of " freedom of contract," but the legislative restriction as to the price had no direct, proximate or substantial relationship to the

(1) (1941) 65 C.L.R. 255.

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exemption granted by s. 92 and was not, in truth, a restriction imposed in relation to the passage of the goods across the frontier. The *Transport Cases* decided before *James* v. *The Commonwealth* are shown in that case to have been correctly decided notwithstanding that the Acts challenged imposed restrictions adversely affecting individual businesses of trade and transport. The later cases relating to land transport are in line with the earlier ones. The restrictions and prohibitions imposed by the *State Transport (Co-ordination) Act* 1931 (N.S.W.) were all imposed in respect of the better regulation, organization and co-ordination of land transport throughout the State, including railway, road, and possibly air transport, particular means of transport being selected or rejected solely in order to carry out a plan of better organization. The appellants do not contend that, so long as the volume of trade across the frontier is not diminished by the operation of the challenged law, s. 92 is not infringed; but it does not follow that every law causing diminution of inter-State trade offends against s. 92. The fallacy of regarding s. 92 as affording something in the nature of a guarantee to individuals of a right to trade inter-State led to an erroneous conclusion in the *Airways Case*.

It is not conceded that banking is included in the "trade commerce and intercourse" which is protected by s. 92. It is submitted that it is merely an instrument or concomitant of trade. The banking business, in our submission, cannot as a business be regarded as included in the concept of the movement of trade, commerce and intercourse referred to in s. 92. You cannot substitute the word "banking" for the word "trade" or add the word "banking" to the word "trade" in s. 92, without producing an expression which is in itself quite meaningless. You never speak of banking among States. You speak of trade among States, and you know that banking comes in as a facility or a concomitant of trade; but no-one could possibly speak of the "flow of banking" or could ever use the phrase "banking among the States," just as you do naturally refer to "commerce among the States" and "trade among the States" and "intercourse among the States."

In determining the nature of s. 46, the legislative ground appearing in s. 3 for the selection of the private banks for action by the Treasurer in accordance with s. 46 cannot be excluded from consideration. That is to say the real object (to use the phrase of Lord *Atkin*) in connection with s. 46 is to eliminate from the business of banking in Australia the element of private profit and to confine by elimination the business of banking in Australia to the Commonwealth Bank of Australia and the banks of the States.

That is the essence of s. 46, that is its real object, that is what it does. That has nothing to do with s. 92, with its guarantee that laws shall not be passed which are restrictive in respect of the crossing of the territorial border. In dealing with the question of severability the appellants will contend that sub-ss. 1-3 and 4-8 are separable sets of provisions. If either set is struck out, the other can stand, but, whether the section is regarded in that way or not, it does not offend s. 92. Whether banking is or is not to be identified with trade, commerce or intercourse, s. 46 does not impose any restriction "in respect of" passage or movement into or out of any State. The true nature, real object and substance of s. 46 is to terminate in an orderly way all banking for private profit, leaving only the Commonwealth Bank and the State banks as the exclusive instruments by which the business of banking in Australia is to be conducted. Section 46 is a general law, and there are no special circumstances from which it can be said that the law is "directed against" inter-State trade in the forbidden area; any impact thereon is merely incidental. The only basis upon which s. 46 could be deemed to infringe s. 92 is the contention of the respondents that the section guarantees a positive right in the individual to trade inter-State, and this contention is entirely erroneous. [He referred to *Bryce, Studies in History and Jurisprudence* (1901).] In any event, the prohibition (contained in sub-s. 1 of s. 46) of the carrying on of banking business by a private bank following upon the taking over by the Commonwealth Bank, by agreement, of the business of the private bank is clearly not invalidated by s. 92. Further, banking is a concomitant, instrument or facility of trade (as well as of manufacture, public administration &c.); it is not intercourse, though banks resort to intercourse; and the respondents, upon whom the burden lies, have not shown that the operation of s. 46 will necessarily have even an incidental restrictive impact upon inter-State trade within the forbidden area. As to the burden being on the respondents, cf. *Shell Co. of Australia* v. *Federal Commissioner of Taxation* (1). As to the relation of banking to commerce under the United States Constitution, see *Annals of the American Academy of Political and Social Science*, January, 1934, at pp. 33, 34.

[He referred to *Vizzard's Case* (2); *Duncan and Green Star Trading Co. Pty. Ltd.* v. *Vizzard* (3).]

As to the severability of s. 46, it was suggested by the respondents that sub-ss. 1-3 are the operative provisions which prevent a bank,

(1) (1931) A.C., at p. 298.
(2) (1933) 50 C.L.R., at pp. 80-82, 87, 94.
(3) (1935) 53 C.L.R. 493, at pp. 503, 504, 508.

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the business of which has been acquired, from carrying on business and that sub-ss. 4-8 merely provide for the fixing of the time when the prohibition in sub-s. 1 will operate. Sub-ss. 1, 2 and 3 in themselves prevent a bank, the business of which has been acquired, from carrying on a banking business, and the date from which the prohibition operates is provided for by s. 22 (9). That is dealing with voluntary acquisition and is to the effect that the Commonwealth publishes in the *Gazette* a notice of the making of the agreement and the notice is to specify the date upon which the business in Australia of the private bank with which the agreement has been made is to be taken over by the Commonwealth Bank. Similarly in connection with compulsory acquisition, s. 24 (1)-(3). So the date, so far as sub-ss. 1-3 are concerned, is fixed. The precise date of the taking over is ascertained elsewhere in the statute, and you do not need provisions like 4-8 for the purpose of fixing the date. Sub-sections 5, 6 and 7, which deal with amendments of the notice to extend the time, are quite inconsistent with the suggestion of the respondents, and, above all, sub-s. 8 is inconsistent with it. If the really disabling provision in relation to the carrying on of business is sub-s. 1, and sub-s. 4 deals with the fixing of a date for the purpose of ascertaining when the obligation to cease to carry on the business arises, then you would not need sub-s. 8 at all. We submit that sub-ss. 4-8 constitute an independent power of prohibition which is not dependent at all upon any acquisition of a bank's business.

[Lord SIMONDS. Is that the view you are putting forward, that whereas all the rest of the Act makes careful provision for providing for compensation where the business of a private bank is taken, and it is prevented from carrying on business, yet sub-ss. 4-8 of s. 46 provide a wholly independent way by which the Commonwealth can stop a private bank carrying on business, making no provision for compensation ?]

I submit there is no escape from it. Section 6 says that each section is to be read separately. Part VII. deals with the prohibition of the carrying on of banking business. That is one of the objects of the Act.

It was also suggested that sub-ss. 4-8 had the effect that property would be acquired otherwise than on just terms. The answer is that there is no acquisition of property at all under those sub-sections.

Even if sub-ss. 4-8 are struck out, sub-ss. 1-3 will still operate, in conjunction with s. 22, in the case of voluntary acquisitions.

It is submitted that s. 46 is validly enacted under s. 51 (xiii.) of the Constitution. The respondents have contended that a law

which says that certain corporations shall not carry on banking business is not a law with respect to banking unless it is related in some way to considerations bearing upon the subject of banking. They put the same thing in another way by saying that a law preventing A, B and C from carrying on banking business is not a law with respect to banking if the prohibition enacted is for no reason assigned or the prohibition does not relate to any consideration that bears upon the subject of banking. So according to that view, for a law to be a law with respect to banking it is not enough that it shall prohibit banking, but it has to prohibit banking for a banking reason ; there is a kind of double test which the legislation must satisfy. That is not the way in which you deal with the legislative power of a nation if it is to be of the same quality as the legislative power of the Parliament at Westminster described in *Dicey's Law of the Constitution*. It is quite unnecessary for the appellants to accept any test other than the test applied in the Canadian Constitution, namely, the "pith and substance" test. We submit that a law which says to persons who are banking that they shall cease to bank, and does so simply on grounds of public interest, the legislature or the Executive being the sole judge of public interest, is clearly a law with respect to banking, and with respect to no other subject. To say that A, a corporation which is engaged in the business of banking and holds an authority from the Commonwealth under the 1945 Act to perform banking, shall not continue to do banking business, is plainly and obviously a law with respect to the topic of banking : banking by the corporation, of course, but still banking is the subject-matter. Banking is not performed by imaginary persons, it is not an abstract conception. It means some person is banking and doing that business, and the prohibition, therefore, is clearly a prohibition of the carrying out of the very business in respect of which the legislative power has been granted. Section 46 deals with these corporations as bankers, it does not deal with them in any other capacity, and I submit that a law which prohibited any one person or any group of persons or companies from carrying on banking business would be equally a law with respect to banking.

A further element is introduced in s. 46, and that is the vesting of the power in the Treasurer ; the Treasurer may issue the order. The Treasurer's discretion as to his giving a notice or refraining from giving a notice or the manner of giving a notice is immaterial to the question of power. What is prohibited if the notice is issued is the business of banking by the particular corporation. If the law dealt with specified banks and the thing they were prohibited from

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doing was not banking but some unrelated activity or apparently unrelated activity, for instance, engaging in some charitable activity, the mere fact that the Parliament acting through the Treasurer issued a command which dealt with corporations carrying on banking might not be sufficient to make the law a law on the subject of banking, but, when the activity prohibited is banking, the nature or extent of the class affected by the law or the introduction of a power in an officer to determine when and the order in which the prohibition is to operate cannot alter the fundamental characteristic which makes the law a law about banking. Even applying the respondents' test that the law must relate in some way to considerations bearing upon the subject of banking, we submit that s. 46 is still a valid law with respect to banking because it complies even with that test. The context of s. 46 (4)-(8) is to be found in other parts of the Act such as s. 11, which imposes a duty upon the Commonwealth Bank to provide banking facilities. It is also to be ascertained from s. 3 that the object of the Act includes the prohibition of the carrying on of banking business in Australia by private banks, the intent clearly being under s. 3 (*a*) that the publicly-owned banks not conducted for private profit shall be the banks conducting the business of banking in Australia. That is the context of s. 46 (4)-(8), and in that context a law which said directly that banking business should not be carried on for private profit would be a perfectly valid law on the subject of banking. The Treasurer is empowered not merely to prohibit one or more of a group of named persons from carrying on the business of banking; the fact is he is empowered only to prohibit private banking corporations. He is empowered to prohibit every private banking corporation in Australia, and, whether he prohibits one or all, he is achieving the express objects of the Act. Those objects clearly have a bearing upon and are directly relevant to the subject of banking. In short, under this statute it is clear that Parliament has decided that banking facilities would be more efficiently provided if the business was conducted by publicly-owned banks as distinct from private banks. That is a consideration which bears upon the subject of banking, and it is a consideration which is achieved as each private bank is prohibited under the terms of s. 46 (4)-(8) or any other methods set out in the Act. The object of the Act being to close all private banks, it is clear that the discretion entrusted to the Treasurer must be exercised in accordance with that general principle.

There are a few Australian cases to which I want to refer on the power. First of all there is the case of *Huddart Parker Ltd.* v.

*The Commonwealth* (1). It has been referred to in another connection but I am dealing with it simply on the question of legislative power. There was, in effect, a licensing system in inter-State commerce, and the question of Commonwealth power to give preference to one group in inter-State commerce as against another group was the real issue in the case.

As to the suggested implication in relation to the functions of the States, it is submitted that it is not warranted by anything to be found in the Constitution. It is a revival of the American doctrine of immunity which was rejected in the *Engineers' Case* (2). The *Melbourne Corporation Case* (3) is distinguishable from the present case for the reasons given by the majority in the Court below. Moreover, it is submitted that that case was wrongly decided and that the dissenting judgment delivered by *McTiernan* J. in that case is correct. The decision of the majority in the *Melbourne Corporation Case* is inconsistent with the *Engineers' Case* and also with the *Uniform Tax Case* (4).

The first case after the *Engineers' Case* in which one sees this revival of the immunity doctrine is *West* v. *Commissioner of Taxation (N.S.W.)* (5), per *Dixon* J., although the actual decision there is not inconsistent with the appellants' submission. That was followed by the judgment, again of *Dixon* J., in the *Essendon Corporation Case* (6) and—close to it in point of time—the *Melbourne Corporation Case*. Section 51 (xiii.) contains its own express limitation of the banking power so far as the States are concerned, and no further limitation can be read into it by implication. The alleged implication against "undue interference" with governmental functions is a very vague concept, which comes from the American cases.

[Lord SIMONDS. These are the alternative ways of putting it against you, and they coalesce. The first is this: "Ex facie the power in s. 51 is wide enough to validate the law that is being challenged, but there is an implied term of the Constitution that that power shall not be so exercised as unduly to interfere." The other way of putting it is this: "In its context the power in s. 51 must be so construed as not to authorize the making of a law which will unduly interfere" and so on.]

Yes, but as regards the first one we say there is no such implication in the Constitution; if there is said to be an implication against "undue interference," I do not know what it means and I submit it is impossible to apply.

(1) (1931) 44 C.L.R. 492.
(2) (1920) 28 C.L.R. 129.
(3) (1947) 74 C.L.R. 31.
(4) (1942) 65 C.L.R. 373.
(5) (1937) 56 C.L.R. 657.
(6) (1947) 74 C.L.R., at p. 17.

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[Lord SIMONDS. It means that the Commonwealth is itself a commonwealth of self-governing units and it is to be presumed that they will continue to be such self-governing units, a thing which is impossible if their essential activities are unduly interfered with.]

We say the foundation of the Constitution is the subjection of both Commonwealth and States to law, that there is no room for such a general implication. If we can see something indicative of an attempt by the Commonwealth to exercise a power so as, for instance, to tax the State under an *Income Tax Assessment Act*, I submit the answer to the suggestion of undue interference is that the court would not hold that to be a law with respect to taxation, because the term " taxation " implies that the Parliament is dealing with subjects and the State is not a subject in that sense. But, whichever way it is put, we submit that it is unsound.

[Counsel referred to *In re Silver Brothers Ltd.* (1).]

As to the Financial Agreement, it is submitted that clause 5 (9) merely puts outside the scope of the Financial Agreement certain transactions which are mentioned, that is, the use of moneys for temporary purposes if the moneys are available under State law, and, secondly, it permits that moneys may be borrowed for temporary purposes on a similar principle to meet a lag in revenue, or matters of that kind. It does not lay down a rule of the Constitution itself, and it is not intended to. It simply says that there are serious restrictions imposed upon State borrowing for the future through the Loan Council system. Those restrictions are not to apply, and the parties recognize, both the Commonwealth and the State, that this system of temporary finance or temporary use of State moneys may go on without that being regarded as governed by the agreement. I submit in truth it is to be regarded as an exception from the agreement. In fact, it says: " And the provisions of this agreement shall not apply to such moneys." The agreement is not couched in the terms of constitutional right.

[Lord MORTON. Does it come to this, that your submission is that clause 5 (9) has no contractual or constitutional force but is merely an exception which leaves matters as they were, or has it any force at all, directly or otherwise ?]

It is a declaration of liberty and has a contractual force, because it is part of the agreement, but it is not to be regarded as an overriding constitutional command. It simply says: " These matters are outside the scope of the agreement."

Assuming that the sub-clause has the same force as any other portion of the agreement, it merely says, in its first branch, that

(1) (1932) A.C. 514.

the State may use for temporary purposes any public moneys of the State which are available under the laws of the State. It is a curious position if that is some constitutional right which is given to the State, to use for temporary purposes its own moneys which the State law makes available. It does not seem to sound in constitutional right. Then turning to the second branch: "Or may, subject to maximum limits (if any) decided upon by the Loan Council . . . borrow money for temporary purposes by way of overdraft or fixed, special, or other deposit," all it does is to say: "You may borrow temporarily by way of overdraft from such financial institutions as you are able to deal with and with whom you are able to make an arrangement." It expresses a liberty rather than a right. The authority of the State is to use for temporary purposes certain moneys. What moneys? Those which are available under the laws of the State. That means the laws of the State in force from time to time. So, when authority is given in the second part of the same paragraph to borrow money for temporary purposes by way of overdraft, the agreement is not directing itself to, and is not concerned with, the groups from whom that may be done, except in the general way that you find used in clause 5 (1) (*a*), that is, all authorities, bodies, funds, or institutions (including savings banks) constituted or established under Commonwealth or State law or practice. That means from time to time existing. If the implication that the respondents suggest is to be made from this sub-clause, it is an implication that must be considered in conjunction with Commonwealth borrowing under clause 6 (7) as well as in conjunction with State borrowing under clause 5 (9). It would mean that a State Parliament could not terminate or abolish a State bank because under the next clause the Commonwealth may wish to have recourse to a State bank for a purpose of temporary borrowing. Equally it means that the Commonwealth Parliament could not repeal the *Commonwealth Bank Act*, because the termination of the existence of the Commonwealth bank would directly limit the possible source of borrowing for the States.

Sir *Walter Monckton* K.C., in reply on the preliminary point. If the appellants' argument on s. 74 of the Constitution is right, then the High Court's determination of the *inter se* question can be reversed by the Judicial Committee on appeal without a certificate being obtained from the High Court. The argument came to this: Section 74 precludes an appeal without a certificate only in a case when an *inter se* question has been answered adversely to the

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appellant. The argument is that it is only when the appellant has failed upon the *inter se* point that a certificate becomes necessary. It is apparent from that, and it has been conceded, that, if the High Court has determined the *inter se* question adversely to the respondent, the respondent can ask the Judicial Committee to reverse that determination. That at once creates a fundamental difficulty. It can almost be called a legislative absurdity, for upon what ground of legislative policy can it be wished to give the High Court power to make its determination on an *inter se* question final where it is against the appellant but not give the power where the determination is against the respondent ?

In *Baxter's Case* (1) one finds the first documentation of what I suggest is the acknowledged purpose of the legislation, to make in these *inter se* questions the High Court of Australia the final tribunal save in instances where it itself asks for guidance. If the purpose of the legislation is clear, that the High Court is master of these subjects, then it is a very serious objection to the construction which the appellants seek to put upon the section that it does violence to that purpose. It says that the matter can come before the Privy Council if decided for one purpose and not if decided for the other. One would not readily, if there were alternative constructions, accept a construction which did that amount of violence to the purpose which must underlie the section.

It appears that the Attorney-General accepted the construction of the word " appeal " for which the respondents contend. We say that an appeal is a proceeding in which the appellant seeks to reverse or vary an order or decree which has been made in the court appealed from ; in other words, to vary it in his favour.

It is clear that the Attorney-General does not accept the view we have submitted about " decision." We have said that " decision " means the decree or order, the act of the court below. When one comes to see exactly what is meant in the submission of the other side about " decision," there is some difficulty in disentangling the precise meaning. It was suggested to the Attorney-General in the course of the argument that the *ratio decidendi* might be the basis of the word " decision " ; but he rejected that. So he will not have decree or order, and he will not say it depends upon the *ratio decidendi*. The Attorney-General says that the judgments in the court below constitute a decision upon an *inter se* question in his favour by a majority of four to two. This involves counting in the Chief Justice and *McTiernan* J. with *Starke* and *Dixon* JJ. as contributing to the decision. *Starke* J. expressed the opinion that

(1) (1907) 4 C.L.R., at pp. 1117, 1149.

s. 51 (xiii.) would support a law prohibiting banking. He expressed that opinion, but he went on to decide the invalidity of s. 46 on two grounds; first of all, that in his view it was inseverable from the other parts of the Act which he found invalid, and, secondly, because of s. 92. It is true to say that he expressed an opinion. It is plain that it was no part of his *ratio decidendi*, because he decided the case against the now appellants, and it is also, in my submission, clear that he was not giving a formal rejection to the respondents' case on this point. But the matter is much clearer as to what the appellants must mean by "decision" based upon this analysis, when you look at the decision of *Dixon* J., because he upon this point expresses an opinion which he carefully prevents from being treated as a decision, much less a formal rejection of the matter. *Dixon* J. did not make this point a ground of his decision; in so far as he expressed an opinion, it was not merely not part of the *ratio decidendi*, but he was expressly reserving himself from going into the matter at full length and an *obiter* expression of opinion is all that it is. That nevertheless, as also the opinion of *Starke* J., is founded upon something which contributes to the so-called "decision" which we have here to consider. Tested in this way, "decision," on the submission of the appellants, means an opinion upon a question of law expressed by a majority of the judges who constituted the court. I say "constituted the court" remembering this, that in this case to get the majority upon the point you have to include the dissenting judges in the result. It would be a very odd thing if, when you are dealing with a "decision" in the sense of something less than the *ratio decidendi* of the case, there is a provision whereby that can be the subject of review, but *ex hypothesi* it will not have any effect upon the result as between the parties and will not affect the order which is going to be made as a result of the litigation. It is really saying: You have a point of law, and, if you find that the majority of the judges express an opinion about it which does not secure a conclusion to the case, there is nevertheless an opportunity of review.

The respondents submit that "decision" means "decree or order of the court." First of all, it is because it is the primary and natural meaning of the word "decision" when used in conjunction with the word "appeal." Then there is the difficulty of finding a satisfactory alternative solution illustrated by the examination of the argument on the other side on this point.

Upon the appellants' construction s. 74 would read like this: "No appeal shall be permitted to the Queen in Council from an opinion upon an *inter se* question expressed by a majority of the

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judges of the High Court unless the High Court shall certify," &c. Then the second paragraph of the section would read: "The High Court may so certify if satisfied that for any special reason the certificate should be granted, and thereupon an appeal shall lie to Her Majesty in Council from the opinion on the question without further leave." Apart from the implications of the word "appeal," that must mean that, if the certificate is granted, then the appeal lies from the opinion on the *inter se* question without further leave; if the party who is dissatisfied with the opinion gets a certificate, then he can bring the question before the Judicial Committee, isolated from any other question, because that depends upon what is meant by "decision." Again apart from the implications in the word "appeal," the reversal of the opinion in such a case, and that is all that has come up in isolation for consideration, may have absolutely no effect upon the rights of the parties; for instance, if the plaintiff has succeeded on an *inter se* question and upon a non-*inter se* question, then he will not be able, as far as I have gone at present, to get more than an answer to an academic question unless he gets special leave to appeal upon the other point upon which he has also succeeded.

[Lord PORTER. If you have a decision in your favour, you have not anything to appeal about.]

The appellants have sought to use that argument here, that the use of the word "appeal" means that although you might get a certificate no appeal will lie unless the party aggrieved applies for and obtains special leave to appeal on the other question. The Attorney-General said he thought the word "appeal" carried with it the calling into question, not merely of the decision on the question, but of some order following upon the decision of the question or wrapped up in it. He is saying: Appeal connotes some effective attempt at relief. The language of the second paragraph of this section, on his construction of the first paragraph, is not patient of that construction, because it is saying, an appeal on a question without further leave, and we have seen it is an appeal from an opinion upon a question. However reasonable the attempt may be to escape by that route, the route is not open.

[Lord MORTON. It is not really an appeal but a reference on a question of law in that case.]

It would be opening the door to let in something which has never been treated as an appeal hitherto, a consultation of the Privy Council.

[Lord MORTON. I was trying to imagine myself writing the advice which the Board would tender to His Majesty in such a case.

What would they humbly advise His Majesty, if it was an appeal from an opinion expressed by a majority of those sitting ?]

All they could humbly advise His Majesty, I submit, would be quite a novel thing—the answer to the question or something without giving any relief. That is quite foreign to any jurisdiction which exists at present.

Those are the reasons which, in my submission, make it desirable to see whether some construction is not open which does not meet with the objections which I have been advancing and also the objection that it seems as if the appellants' construction involves a failure of the purpose for which this part of the legislation was introduced. In my submission the only remedy is the remedy for which we have contended in this case. There are the two alternatives, but it is the first which I submit is the right answer. You take an appeal upon a question—those words together. You take " decision " as meaning an order or decree, and you treat the words " upon any question " as " involving any question," so that on our construction it would read in this way : " From an order of the High Court no appeal involving an *inter se* question shall be permitted to the Queen in Council " &c. Then the certificate under the second paragraph permits the appeal without more. It is the appeal from a decision, the whole decision is coming up, and, if the certificate is granted, then the appeal lies without further leave. The only way one can give a fair meaning to this section is by reading " upon " as equivalent to " involve."

Our second alternative is that you read the language : " No appeal from a decision upon an *inter se* question." An order is upon an *inter se* question if it is made in a cause which involves an *inter se* question. The next step is to ask : What is the cause which involves an *inter se* question ? Then the matter to be determined is : Is it on the face of the order or is it in the pleadings and not abandoned in the court below ? If that is so, then it is a cause in which an *inter se* question is involved. It may be there ought to be an alternative limitation, that is to say, if it is raised in the pleadings and not abandoned in the court below, and if the answer to the question can determine the issue in the action. The mere fact that something is put in the pleadings for better measure, as you sometimes get in pleadings, may not constitute reality ; it may be put in although it has no relation to the issue in the action. The matter cannot be decided by that. This alternative construction is advanced because of the suggestion that the natural way of looking at the words is to read them straight ahead : " No appeal from a decision on a question." If that is so, in spite of what I

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have urged by reason of the second paragraph, then I submit this construction I am now contending for is preferable to that on the other side. Whatever construction is adopted, it will not reconcile all the objections.

As to the suggestion put to Sir *Cyril* that " decision " might mean the order of the court so far as it was based on the answer to an *inter se* question, he said first of all that that involved the word " decision " doing double duty ; it had first of all to mean the order of the court and then the reasons of the court dealing with the *inter se* question. The Attorney-General cannot rely on this when he has rejected the *ratio decidendi* basis. The second duty which the word " decision " was doing was in relation to the *ratio decidendi* of the case, so that it is not consistent with the rejection of the *ratio decidendi* meaning for " decision." That is quite apart from the inherent objection to giving it a double meaning. Also, it leaves the main objection which I have advanced still unmet.

Their Lordships took time to consider the advice which they would tender to His Majesty.

Oct. 26. LORD PORTER delivered the judgment of their Lordships as follows :—

These consolidated appeals from orders of the High Court of Australia raise important and difficult questions as to the legislative power of the Commonwealth Government under the Australian Constitution and as to the limitations expressly or by implication imposed upon it by that Constitution.

The Act of which the validity is challenged is the *Banking Act* 1947 hereafter called " The Act." Its provisions will be referred to later in detail but its objects as stated in s. 3 may be at once set out. They are as follows :—" (*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."

The legislative power of the Commonwealth is defined in s. 51 of the Constitution, which is, so far as is relevant, as follows :— " The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to—(i) trade and commerce with other countries and among the States : (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."

Purporting to exercise the power thus vested in it the Commonwealth enacted the Act. It does not touch State banking even within the limits authorized by placitum (xiii). The expansion of the Commonwealth Bank and the suppression of private banks are its aim. By " private banks " is meant the bodies corporate whose names are set out in the first schedule to the Act. They are the banks authorized to carry on the business of banking in Australia under the provisions of the *Banking Act* of 1945. They are fourteen in number, eight of them incorporated in Australia, three of them in England and three elsewhere.

Forthwith upon the passing of the Act numerous actions were commenced in the High Court in which the plaintiffs claimed that the Act was invalid. It is unnecessary to state the parties to the several actions beyond saying that the plaintiffs included the eight private banks incorporated in Australia, the three private banks incorporated in England together with, in some cases, a director and representative shareholder, and, in addition, the States of Victoria, South Australia and Western Australia, while the defendants were the Commonwealth of Australia, the Right Hon. Joseph Benedict Chifley (the Treasurer of the Commonwealth), the Commonwealth Bank of Australia and Hugh Traill Armitage (the Governor of that Bank). The defendants are the appellants in the present consolidated appeals, while the plaintiffs in the several actions are the respondents. In addition the States of New South Wales and Queensland have by leave of their Lordships intervened in the appeal in support of the appellants.

Their Lordships are directly concerned in these appeals with one section only of the Act, s. 46, the terms of which will be presently set out. But in the High Court not only s. 46 but numerous other provisions of the Act were successfully attacked and in respect of their declared invalidity the appellants have brought no appeal. It will be convenient as an introduction to s. 46 to state briefly the provisions of the Act and to explain what remains of them after the judgment of the High Court.

Section 3 stating the objects of the Act has already been set out. Other relevant provisions were of the following character: Section 6. A severability clause in terms at least as wide as and possibly wider than those to be found in s. 15A of the *Acts Interpretation Act* 1901-1941. Section 11. A declaration that it shall be the duty of the Commonwealth Bank to provide adequate banking facilities for any State or person requiring them. Section 12. A power to acquire

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by agreement all or any of the shares in a private bank. Section 13. Powers of compulsory acquisition of Australian shares in any of the Australian private banks where the Treasurer is satisfied that the majority in number of the shares in that Bank are Australian shares, and a consequent provision (s. 15) for the payment of fair compensation therefor. Section 17. An enactment that where Australian shares are so acquired the existing directors shall cease to hold office, and Section 18 et seq. Power to the Governor of the Commonwealth Bank to appoint other directors in their stead, and certain provisions incidental thereto. Section 22. Power to the Treasurer to invite a private bank to make an agreement with the Commonwealth Bank for the taking over of the business of that private bank. Section 24. Where no such agreement is arrived at by a specified date provision for a compulsory transfer of the business in Australia of that bank to the Commonwealth Bank with the consequent transfer of assets and for the payment of fair compensation. Sections 26-45. The setting up of a Court of Claims to assess compensation and a provision that the computation of its amount should be entrusted to the Court of Claims exclusively and should consequently be withdrawn from the jurisdiction of the High Court.

By orders made by the High Court in each action it was declared that the following provisions of the Act were invalid, namely, Division 2 of Part IV. (which contained ss. 12 to 16 inclusive) except in so far as it related to the voluntary acquisition of shares and without prejudice as therein mentioned, and Division 3 of Part IV. (which contained ss. 17 to 21 inclusive) and ss. 24, 25, 37 to 45 inclusive, 46, 59 and 60. As has been already stated, these orders have not been appealed, except in regard to s. 46. This section is contained in and makes up the whole of Part VII. of the Act. It is entitled "Prohibition of the carrying on of banking business by private banks" and is as follows:—"(1) 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. (2) Each private bank shall, subject to this section, 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 the fifteenth day of August, One thousand nine hundred and forty-seven. (3) The last preceding sub-section shall not apply to a private bank if its business in Australia has been taken over by another private bank or after

that business has been taken over by the Commonwealth Bank. (4) 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. (5) The date specified in a notice under the last preceding sub-section shall be not more than two months after the date upon which the notice is published in the *Gazette*. (6) The Treasurer may, from time to time, by notice published in the *Gazette* and given in writing to the private bank concerned, amend a notice under sub-section (4) of this section (including such a notice as previously amended under this sub-section) by substituting a later date for the date specified in that notice (or in that notice as so amended). (7) That later date may be a date either before or after the expiration of the period of two months referred to in sub-section (5) of this section. (8) Upon and after the date specified in a notice under sub-section (4) of this section (or, if that notice has been amended under sub-section (6) of this section, upon and after the date specified in that notice as so amended), the private bank to which that notice was given shall not carry on banking business in Australia. Penalty: Ten thousand pounds for each day on which the contravention occurs."

It is the validity of this section, divorced from the other sections of the Act which have been declared invalid, that the appellants seek to maintain. In the High Court and before this Board its validity has been challenged upon grounds, which, though not all of them will be discussed, it is convenient to set out. It is attacked upon the grounds—(i) that its provisions do not constitute a law for the peace order and good government of the Commonwealth with respect to any of the matters with respect to which the Commonwealth Parliament has, by virtue of s. 51 of the Constitution or otherwise, power to make laws; (ii) that they contravene s. 92 of the Constitution; (iii) that they are inconsistent with the maintenance of the constitutional integrity of the States; (iv) that they are inconsistent with s. 105A of the Constitution and the financial agreement made thereunder; (v) that they are inseparable from other provisions of the Act which are themselves invalid.

The appellants, contending that upon none of these grounds was the decision of the High Court adverse to them except that which was based upon the contravention of s. 92, seek to obtain from the Board a contrary decision upon this point, and, as will appear, their Lordships will express their opinion upon it. But before doing so they must examine and deal with another question of far-reaching importance. Special leave to appeal against the

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several Orders of the High Court of Australia was granted to the appellants upon the footing that at the hearing of the appeals the right should be reserved to the respondents to raise the preliminary plea that such appeals did not lie without the certificate of the High Court. It is this plea, which was duly raised by the respondents, that must now be considered, no such certificate having been sought or given. Chapter III. of the Constitution which is entitled "The Judicature" consists of s. 71 to s. 80 inclusive, of which s. 73 defines the appellate, and s. 75 the original, jurisdiction of the High Court of Australia thereby established. Section 74, which for the present purpose is all-important, is in the following terms: —"No appeal shall be permitted to the Queen in Council from a decision of the High Court upon any question, howsoever arising, as to the limits *inter se* of the constitutional powers of the Commonwealth and those of any State or States, or as to the limits *inter se* of the constitutional powers of any two or more States, unless the High Court shall certify that the question is one which ought to be determined by Her Majesty in Council. The High Court may so certify if satisfied that for any special reason the certificate should be granted, and thereupon an appeal shall lie to Her Majesty in Council on the question without further leave. Except as provided in this section, this Constitution shall not impair any right which the Queen may be pleased to exercise by virtue of Her Royal prerogative to grant special leave of appeal from the High Court to Her Majesty in Council. The Parliament may make laws limiting the matters in which such leave may be asked, but proposed laws containing any such limitation shall be reserved by the Governor-General for Her Majesty's pleasure."

The question for determination is whether by reason of the provisions of this section the right of His Majesty by virtue of His Royal prerogative to grant to the appellants special leave to appeal was, in the circumstances to which their Lordships must now refer, abrogated unless the High Court certified in the manner required by the section. It will be convenient to refer to a question of the kind described in s. 74 as an "*inter se* question." The relevant circumstances appear to be these: (1) The formal orders of the High Court make no reference to any "*inter se*" question. Declarations of invalidity are made and injunctions are granted, but upon the face of the orders the necessity for a certificate under s. 74 is not apparent. (2) The several cases were heard without pleadings upon motion. It is, therefore, only from the evidence which was given on affidavit, the statements made at the Bar as to the argument and the contents of the judgments of the learned judges of the High

Court that it can be ascertained what were the issues raised and debated. (3) A consideration of these matters places it beyond doubt that the validity of the Act in general and of s. 46 in particular was, as has already been stated, challenged upon (*inter alia*) the grounds—(*a*) that its provisions were not a law for the peace, order and good government of the Commonwealth with respect to any of the matters with respect to which the Commonwealth Parliament had power by virtue of s. 51 of the Constitution or otherwise to make laws, (*b*) that they were inconsistent with the maintenance of the constitutional integrity of the States, and (*c*) that they were inconsistent with s. 105A of the Constitution and the financial agreement made thereunder. These grounds admittedly raise *inter se* questions. (4) The determination of each of these *inter se* questions in favour of the appellants was a necessary condition of a successful defence of the impugned Act in the High Court and it remains a necessary condition of obtaining the relief sought upon the appeal to His Majesty in Council. If these *inter se* questions are so determined the question whether the Act or any of its provisions contravenes s. 92 of the Constitution must then be decided. But this question appears not to be an *inter se* question. (5) A clear majority of the judges of the High Court were of opinion that s. 46 of the Act contravened s. 92 of the Constitution and was accordingly invalid. The present appeal is brought to challenge the correctness of this opinion. Upon the *inter se* questions (except that of inconsistency with the maintenance of the constitutional integrity of the States) there was a considerable diversity of opinion and in regard to this there was some controversy before their Lordships whether, if indeed it became necessary to determine whether a " decision " had been given on any *inter se* question, a final opinion could be attributed to some members of the Court.

It is to these circumstances that the provisions of s. 74 of the Constitution must be applied, and it is convenient to state summarily the rival submissions of the parties. By the respondents, who contend that in the absence of a certificate no appeal lies, it is urged that upon its true construction the section means that no appeal to His Majesty is permissible without certificate, if the relief sought upon the appeal cannot be granted without the determination of an *inter se* question. The appellants on the other hand, though they agree that it may be necessary to look beyond the terms of the formal order, contend that a certificate is not necessary unless there has been a specific decision adverse to an appellant upon an *inter se* question, which he and he alone wishes to challenge, and that it is erroneous to contend that a certificate is required merely because

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an *inter se* question has been raised in the proceedings before the High Court and may have to be decided in the appeal to His Majesty in Council.

Before considering how far these conflicting views accord with the actual language of s. 74 their Lordships would briefly examine the section in a somewhat wider aspect. It is, in the first place, clear that in the establishment of the Federal Constitution of the Commonwealth of Australia it was a matter of high policy to reserve for the jurisdiction of her own High Court the solution of those *inter se* questions which were of such vital importance to Commonwealth and States alike. Reference may be made upon this aspect of the matter to the judgment of *Griffith* C.J. and *Barton* and *O'Connor* JJ. in *Baxter* v. *Commissioners of Taxation* (1). In its broad outlines s. 74 speaks for itself in this respect and the policy which it embodied is emphasised in later *Judiciary Acts*: see s. 38A of the *Judiciary Act* 1903-1934 which reproduces s. 2 of Act No. 8 of 1907. It would be a paradoxical result if, in the face of s. 74, the determination of *inter se* questions, which might be of transcendent importance, was left to this Board by the accident that the respondent, having won before the High Court on some other point, yet wished to rely also on a contention which raised an *inter se* point. To this matter their Lordships will return when they consider the practical aspect of their decision. It is sufficient here to say that this argument appears to weigh heavily against the submission of the appellants.

In the second place there appears to their Lordships to be no ground for suggesting that any new kind of jurisdiction is created by s. 74. It deals with the Royal prerogative to grant special leave to appeal and imposes certain limitations upon, or, in the language of the section, in some degree "impairs," that right. But the appeal by special leave is what it always has been, an appeal from an Order or other judicial act which affects adversely the rights claimed by the appellant party. It is in the light of this consideration that the section must, if possible, be construed. To give effect to the appellants' submission would appear to involve the admission of an appeal not from a judicial act but from the pronouncement of an opinion upon a question of law.

The conclusion to which these broad considerations point is in their Lordships' opinion assisted by a closer examination of the section, though its language suggests that the difficulty which now arises had not been in the mind of its authors.

(1) (1907) 4 C.L.R. 1087.

As its opening words show, the section deals with "appeals" to His Majesty in Council and, as already observed, an appeal is the formal proceeding by which an unsuccessful party seeks to have the formal Order of a court set aside or varied in his favour by an appellate court. It is only from such an order that an appeal can be brought. In s. 74 the appeal is described as an appeal "from a decision of the High Court" and so far no difficulty arises. "Decision" is an apt compendious word to cover "judgments, decrees, orders and sentences", an expression that occurs in s. 73. It was used in the comparable context of the *Judicial Committee Acts* of 1833 and 1843 as a general term to cover "determination, sentence, rule or order" and "order, sentence or decree." Further, though it is not necessarily a word of art, there is high authority for saying that even without such a context the "natural, obvious and prima-facie meaning of the word 'decision' is decision of the suit by the Court": see *Rajah Tafadduq Raful Khan* v. *Manik Chand* (1) where the question was whether in the Indian *Civil Procedure Code* "decision" meant the formal expression of an adjudication in a suit or the statement given by the Judge of the grounds of a decree or order, and Lord *Davey*, delivering the opinion of this Board, used the words that have been cited above.

It is however upon the words next following that the appellants primarily rely. The appeal which is not permitted is an appeal "from a decision of the High Court upon any question, howsoever arising, as to the limits *inter se* etc." and it is said by the appellants that the words "upon any question" are to be read with the immediately preceding word "decision" and that, so read, they qualify the meaning of that word so that it must be interpreted as the expression of an opinion by the Court upon a particular *inter se* question, with the result (as their Lordships understand the argument) that the only prohibited appeal is one in which the appellants seek to obtain a reversal of that expression of opinion in an appellate court. In support of this contention the appellants rely also on the repetition of the word "question" at the end of the first paragraph, and again in the second paragraph of the section.

It appears to their Lordships to be of little significance whether the words "upon any question" are linked (as the appellants contend) with "decision" or (as the respondents contend) with "appeal." The former is the natural grammatical meaning and is to be preferred. Then, so runs the appellants' argument, the respondents' construction requires that the word "upon" should be read as equivalent to "involving" and this, they say, is an

(1) (1902) L.R. 30 Ind. App. 35.

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illegitimate straining of language. It may be conceded that the word " upon " is not the word most apt to the occasion. But, if the alternative construction involves (as it appears to involve) giving to both the words " appeal " and " decision " some other than their natural and primary meaning and further involves a grave departure from the policy which clearly inspires this part of the Constitution, it does not appear to their Lordships that the use of the word " upon " where " involving " would more aptly be used should deter them from adopting the respondents' construction. It is a somewhat elliptical but by no means an impossible use of language to speak of a decision upon a certain question when what is meant is a decision in a suit, which cannot be decided without the determination of that question, or, more shortly, a decision involving a certain question or involving the determination of a certain question.

Moreover, if the construction for which the respondents contend may be criticised as departing from the strict meaning of the word " upon ", the construction put forward by the appellants cannot escape a similar criticism. It was urged that, if the phrase " no appeal from a decision of the High Court upon any question " is read as a whole without pausing upon its several elements, its meaning is clear. But, as so read, it has not, or at least has not clearly, the meaning attributed to it by the appellants unless it is amplified so as to read " no appeal from an order of the High Court being a decision adverse to the appellant upon a question " (or " in so far as it is a decision adverse to the appellants upon a question "). For this paraphrase, which is not artistic nor itself free from ambiguity, there seems to be no justification. To their Lordships it appears preferable to adhere strictly to the proper meaning of " appeal " and of " decision " when it is used in relation to an appeal. If any other interpretation is adopted, the word " decision " is required to do double duty, meaning at the same time the order of the court and an expression of opinion by the court.

The appellants, as has already been said, rely on the further references in the section to " the question." So also do the respondents who contend that the phrase in the second paragraph " an appeal . . . on the question " not only supports their view that the words " upon any question " are to be linked with " appeal " rather than with " decision " but also, since " appeal " can have only one meaning, emphasises the contention that the " question " means the suit in which the question is raised. In their Lordships' opinion, however, little assistance is given by the repetition of the

word; the meaning of the first paragraph of the section must be determined by its own language.

In the next place their Lordships must consider what is the scope and meaning of the section if the respondents' submission is not accepted. They have not found it easy to ascertain or to state precisely what is at this stage of the argument the contention of the appellants. It is clear that no difficulty arises unless it is sought to bring an appeal in a suit in which two pleas are involved, the one a plea which challenges the validity of a statute upon an *inter se* question, the other a plea which may be a challenge of its validity on some other ground, e.g., that it offends against s. 92 of the Constitution, or may turn purely on some question of fact. Further it is clear that no difficulty arises, if both pleas are decided against the same party. It could not in that case be contended (subject only to a qualification appearing later) that an appeal would lie without a certificate of the High Court. But the difficulty arises where there are two pleas of the kind described and either the *inter se* plea (as it may briefly be called) is decided one way and the other plea the other way, or, a decision on the other plea being sufficient to determine the rights of the parties, the High Court think it unnecessary to express any, or any final, opinion upon the *inter se* plea. And, as the present appeal well illustrates, the situation is capable of numerous and by no means fanciful variations. Thus, in a case in which two or three or more pleas, amongst them an *inter se* plea, were raised, it might well not be possible to say that there had been in favour of one party or the other a decision, or even an expression of opinion upon the *inter se* plea, by a majority of the judges constituting the Court, yet in such a case it might be clear that the unsuccessful party who sought to appeal could not succeed upon his appeal unless the appellate court decided the *inter se* plea in his favour. It appears to their Lordships that, as soon as it is conceded (as both sides concede) that s. 74 cannot be confined to simple cases of declaratory judgments where the validity or invalidity of the impugned statute and the reason therefor appear on the face of the order, the limitation of its scope, for which the appellants contend, ought not to be accepted. They have already stated that in their opinion the definition for which the respondents contend gives a legitimate meaning to its actual language and is consonant with its obvious purpose.

Their Lordships in coming to this conclusion perforce disagree with the views expressed by the majority of the Court in *Baxter's Case* (1) as to the meaning of the word "decision" in s. 74, preferring that expressed by *Higgins* J. They would, however,

(1) (1907) 4 C.L.R. 1087.

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observe that in that case it was unnecessary for the Court to consider a case such as the present appeal, in which different pleas have been decided in favour of different parties, and to pursue to its logical conclusion the construction of the section which they favoured. Nor, valuable and important though their observations were, were they necessary to the decision of the case. The appellants further relied on the opinion expressed in a book entitled "*The Annotated Constitution of the Australian Commonwealth*" a work published in 1901 in the early days of the Constitution. It does not appear to their Lordships that, however learned and distinguished its authors, they can give authoritative weight to an opinion which was expressed before the construction of the section had been tested before the Court.

Before leaving this question their Lordships think it right to deal with a point that arises on the second paragraph of the section. It is there provided that, if the High Court grants a certificate, "thereupon an appeal shall lie to His Majesty in Council on the question without further leave." If, as their Lordships hold, the certificate of the High Court is necessary whenever the appellant cannot obtain the relief that he claims without the determination of an *inter se* question, does it follow that, when such a certificate has been given, no further leave is required, even though other questions, which are not *inter se* questions, will have to be determined? In their Lordships' opinion it does. Upon this question no settled practice has or could be established until the scope of s. 74 had been finally determined. It may now be stated that in every case in which the relief sought upon the appeal cannot be granted without the determination of an *inter se* question, (*a*) no appeal will lie without the certificate of the High Court, and (*b*) when that certificate has been given no further leave from His Majesty in Council will be necessary. It was suggested that the prerogative right to grant leave to appeal might, in this way, be unduly restricted, for a litigant might raise an *inter se* question upon some unsubstantial pretext in the hope that thus the way to an appeal to His Majesty in Council would be barred. But the possibility of abuse is no reason for departure from what appears to be the logical procedure and it can be assumed that the High Court or this Board will deal with such action summarily.

Finally, mention should be made of one class of case which requires special treatment. If, for example, a party to a suit contends (1) that the facts of his case do not bring him within the operation of a statute, and (2) that, even if they do, the statute

is invalid upon some *inter se* ground, and both pleas are decided against him, there appears to be no reason why he should not accept the decision of the High Court upon the *inter se* question but present a petition to His Majesty in Council for special leave to appeal on the other question. In such a case, if leave were granted, the Board would, upon the hearing of the appeal, have no concern with any *inter se* question and, in harmony with the formula already stated, the appellant could obtain the relief he claimed without the determination by the Board of any such question. The example given is not exhaustive of this class of case. The plea other than the *inter se* plea might be founded not on fact but upon some other ground of invalidity, in which case the same principle would apply.

The view which their Lordships have expressed that no appeal lies to them without a certificate from the High Court of Australia is conclusive of the case and in normal circumstances they would not give any opinion upon the many other matters argued before them. Nor do they propose to express any opinion upon the "*inter se*" questions which it is the function of the High Court finally to determine unless a certificate is given under s. 74. But for two reasons they think it right to state their views upon the question to which so large a part of the argument of the appellants was directed, viz. whether s. 46 of the Act offends against s. 92 of the Constitution; first, because it might yet be possible to apply for, and if the High Court should think fit to grant it, to obtain a certificate which would enable the appellants to re-argue a case already fully argued, and, secondly, because it appears to them that a large part of the appellants' argument was based upon a misapprehension of two cases already decided by this Board which it is their Lordships' duty so far as they can to correct.

The familiar terms of the first part of s. 92 may be set out— "On the imposition of uniform duties of Customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free."

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

Upon these questions the parties put forward conflicting contentions. The appellants (who claim support in the dissenting judg-

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ments of the Chief Justice and *McTiernan* J.) contend that banking, though it may be carried on by means of inter-State transactions, is not " trade commerce and intercourse among the States " within s. 92 and, further, that, even if it is, the Act does not infringe any guaranteed freedom. The contrary on both points is contended by the respondents whose contention was upheld by the other four Judges of the High Court. In considering these rival contentions, their Lordships will examine the decisions in the *James* cases (1) claimed by both sides to be decisive in their favour, and then consider the bearing of those decisions and the reasoning which appears to be implicit in them upon the present case.

But before this is done it remains to complete the statement of relevant facts and to deal with one matter, not indeed of general importance but peculiar to the present case, viz. the question whether s. 46 as a whole is severable from the parts of the Act which have been declared invalid and the further question whether, if part of s. 46 itself is invalid, yet the rest of it is valid.

As may be surmised from what has already been said, the business of banking in Australia is at the present time carried on by three kinds of organization—(1) the Commonwealth Bank of Australia, (2) State banks, and (3) the private banks which have been already described.

The private banks carry on a substantial volume of inter-State business amounting to about fifteen per cent of their total business and some of them act as bankers for certain of the States. The Act does not differentiate, or authorize a differentiation, between their inter-State and intra-State business. It has not been suggested that it would be possible to do so. They are already under a large measure of control by the Commonwealth Bank under the *Banking Act* of 1945, the provisions of which Act have not been challenged in these proceedings. The expansion of the Commonwealth Bank is one of the avowed objects of the Act and must inevitably follow from the prohibition of private banking. Since the appellants rely upon it for one part of their argument, it may be well to repeat that s. 11 of the Act imposes on the Commonwealth Bank the duty— " (*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,

(1) (1927) 40 C.L.R. 1; (1932) A.C. 542; 47 C.L.R. 386; (1936) A.C. 578; 55 C.L.R. 1.

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."

These being the relevant facts, their Lordships turn first to what has been called the severability point. It is enacted by s. 6 of the Act as follows :—" 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 the Act was enacted by the Parliament."

Taking into consideration the wide terms of this section supplementing those of s. 15A of the *Acts Interpretation Act* 1901-1941, their Lordships have come with some hesitation to the conclusion that s. 46 is severable from the invalidated provisions of the Act and that its validity must be tested as if it were a separate enactment. It may be observed however that, since, as will appear, so regarded it falls by its own offence against s. 92, it is an academic question whether it should suffer from association with other sections. The further question, whether the validity of any part of s. 46 can be maintained if other parts of it are invalid, is in the same sense academic: it will not help the appellants, if, for example, sub-ss. (1) to (3) inclusive can be considered as one enactment and sub-ss. (4) to (8) as another. But, since the matter has been argued before them, their Lordships state their opinion that upon its true construction s. 46 contains one indivisible scheme, no part of which can be severed from the rest. Sub-section (1) contains the primary enactment, the prohibition of private banking: sub-section (2), which is barely intelligible except by reference to provisions for compulsory acquisition now excised from the Act, is intended to ensure an orderly continuance of banking facilities, until the private banks are dissolved, by compelling each of them to carry on its business " subject to the section." From the date specified

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by notice given by the Treasurer under sub-s. (4) or a substituted date (sub-ss. (6) and (7) ) the bank to which notice has been given must not carry on business in Australia (sub-s. (8) ). There is upon the true construction of the section a single indivisible scheme by which the extinction of all private banking is to be brought about immediately or step by step at the will of the Treasurer. It is upon this footing that the validity of the section will be examined. As was observed by the learned Chief Justice in the course of his judgment: "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." From this way of stating the problem the appellants do not shrink. The question then is whether an Act which, leaving untouched the Commonwealth and State banks, authorizes the total prohibition of all private banking, offends against s. 92.

The problem being thus stated the first question that must be answered is whether a prohibition of banking business is in any view within the ambit of s. 92. This question can itself be resolved into two questions: (1) is the business of banking included among those activities described as trade commerce and intercourse in s. 92? (2) If not, is a prohibition of private banking, involving the denial of a choice of banking facilities to those engaged in trade and commerce among the States, a restriction upon the freedom of that trade and commerce which is guaranteed by s. 92? Concluding, as they do, that the first question must be answered in the affirmative, their Lordships do not think it necessary to discuss the second, which presents many difficulties. It is in their opinion clear that such words as trade commerce and intercourse are not naturally susceptible of such a narrow interpretation as the appellants would put upon them. And, if they may say so with all respect to the learned Chief Justice who has taken the opposite view, it would be contrary to the trend of judicial decision both in Australia and (so far as that is relevant) in the United States of America to hold otherwise. The view which at one time appeared to be put forward in argument that the words of s. 92 "whether by means of internal carriage or ocean navigation" restricted its operation to such things and persons as are carried by land or sea, has long since been rejected and cannot be entertained. The business of banking, consisting of the creation and transfer of credit, the making of loans, the purchase and disposal of investments and other kindred activities, is a part of the trade commerce and intercourse of a modern society and, in so far as it is carried on by means of inter-State transactions, is within the ambit of s. 92. Upon this

part of the case they respectfully adopt the language and reasoning of *Dixon* J. to which they can add nothing.

The business of banking being an activity of which the freedom is protected by s. 92, the next question is whether the Act offends that section, and their Lordships turn at once to the cases of *James* v. *Cowan* (1) and *James* v. *The Commonwealth* (2). Of these two cases, the more important, for what it decided, is *James* v. *Cowan* (1).

The facts in *James* v. *Cowan* (1) can only be understood if they are read in conjunction with the earlier case of *James* v. *South Australia* (3). James carried on business in South Australia as a grower and producer of dried fruits and in the course of it sold his products outside that State. For reasons which have been many times stated in judgments of this Board and of the High Court and need not be repeated, the Commonwealth and certain of the States, including South Australia, had recourse to legislation to deal with the whole question of marketing dried fruits. In 1924 the South Australian legislature enacted the *Dried Fruits Act* 1924. The material provisions of this Act are set out at large in the judgment of *James* v. *Cowan* (1). It is essential only to notice that the Act contained two sections, s. 20 and s. 28, each of which authorized an interference with the free disposal by the grower of his products, s. 20 by empowering the Dried Fruits Board, which was established under the Act, in its absolute discretion to determine where and in what quantities the output of dried fruits produced in any year should be marketed, and s. 28 (which was expressed to be subject to s. 92 of the Constitution) by empowering the Minister to purchase by agreement, or acquire compulsorily, any dried fruits in South Australia grown and dried in Australia subject to certain exceptions which need not be particularized.

In the earlier case of *James* v. *South Australia* (3) it was in the first place the validity of s. 20 of the Act and of determinations made under it that came in question and it was held by the whole Court (*Isaacs* A.C.J., *Gavan Duffy*, *Rich*, *Starke* and *Powers* JJ.) that that section, so far as it authorized a determination by the Board limiting the quantities of dried fruits which might be marketed within the Commonwealth, was obnoxious to s. 92. From the decision of the High Court no appeal was brought to this Board. But, s. 20 failing him, the Minister of Agriculture in South Australia sought to make use of his powers under s. 28. Once more James invoked s. 92 of the Constitution and in the case of *James* v. *Cowan* (1) challenged the validity of the executive action taken

(1) (1932) A.C. 542; 47 C.L.R. 386.
(2) (1936) A.C. 578; 55 C.L.R. 1.
(3) (1927) 40 C.L.R. 1.

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under s. 28 and it was in this case when it came before the Board that the decision was given, which, as their Lordships, think, goes far to determine the present case. For, as part of the *ratio decidendi* of the case and by no means *obiter* or by way of a historical narrative, the Board expressly affirmed the decision of the High Court in *James* v. *South Australia* (1). The primary importance of the decision lies in this, that in regard to s. 20, Lord *Atkin* delivering the opinion of the Board, said (2): "in the result, therefore, one returns to the precise situation created by s. 20 with its determination of where and in what quantities the fruit is to be marketed. Section 20 and the determinations are invalid, and for precisely the same reasons it appears to their Lordships inevitable that the exercise of the powers of the Minister crediting him with the precise object and intention found by the High Court, were also invalid."

Before further examining what is involved in this decision their Lordships think it convenient to note what was actually decided in the other of the two cases which have come before them. In *James* v. *The Commonwealth* (3) it was a similar Act, but in this case an Act of the Commonwealth, that was under attack, and the substantial issue was whether the Commonwealth, as well as the States, was bound by s. 92. If it was bound, then the further question arose whether the Act in question was obnoxious to s. 92. The decision of the Board was that the Commonwealth was bound by s. 92 and it is significant that the judgment thus proceeds (4): "For these reasons their Lordships are of opinion that s. 92 binds the Commonwealth. On that footing it seems to follow necessarily that the *Dried Fruits Act* 1928-1935 must be held to be invalid. On the interpretation of 'free' in s. 92, the Acts and the Regulations either prohibit entirely, if there is no licence, or if a licence is granted, partially prohibit inter-State trade. Indeed, the contrary was but faintly contended, if the Commonwealth was held to be bound by the section." There does not in fact appear to have been any ground for contending that, if the Act which was challenged in *James* v. *Cowan* (5) was invalid, that challenged in *James* v. *The Commonwealth* (3) could be valid.

It might well appear that these two decisions were a serious obstacle to the present appellants' case. Section 20 of the South Australian Act was invalid. It was general in its terms: it did not discriminate between inter-State and intra-State trade in dried fruits. But because it authorized a determination at the will of

(1) (1927) 40 C.L.R. 1.
(2) (1932) A.C., at p. 559; 47 C.L.R., at p. 397.
(3) (1936) A.C. 578; 55 C.L.R. 1.
(4) (1936) A.C., at p. 633; 55 C.L.R., at p. 61.
(5) (1932) A.C. 542; 47 C.L.R. 386.

the Board the effect of which would be to interfere with the freedom of the grower to dispose of his products to a buyer in another State, it was invalid. And for the same reason the Commonwealth Act fell.

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

Linked with the contention last discussed was another which their Lordships do not find it easy to formulate. It was urged that, if the same volume of trade flowed from State to State before as after the interference with the individual trader, and it might be, the forcible acquisition of his goods, then the freedom of trade among the States remained unimpaired. In the first place this view seems to be in direct conflict with the decisions in the *James Cases* for there the section was infringed though it was not the passage of dried fruit in general, but the passage of the dried fruit of James from State to State that was impeded. Secondly the test of total volume is unreal and unpractical, for it is unpredictable whether by interference with the individual flow the total volume will be affected and it is incalculable what might have been the total volume but for the individual interference. Thirdly, whether or not it might be possible, if trade and commerce stood alone, to give some meaning to this concept of freedom, in s. 92 "trade and commerce" are joined with "intercourse" and it has not been suggested what freedom of intercourse among the States is protected except the freedom of an individual citizen of one State to cross its frontier into another State or to have such dealings with citizens of another State as his lawful occasions may require.

The bearing of those decisions with their implications upon the present appeal is manifest. Let it be admitted, let it indeed be emphatically asserted, that the impact of s. 92 upon any legislative or executive action must depend upon the facts of the case. Yet it would be a strange anomaly if a grower of fruit could successfully challenge an unqualified power to interfere with his liberty to dispose

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of his produce at his will by an inter-State or intra-State transaction, but a banker could be prohibited altogether from carrying on his business both inter-State and intra-State and against the prohibition would invoke s. 92 in vain. In their Lordships' opinion there is no justification for such an anomaly. On the contrary the considerations which led the Board to the conclusion that s. 20 of the South Australian *Dried Fruits Act* 1924 offended against s. 92 of the Constitution lead them to a similar conclusion in regard to s. 46 of the *Banking Act* 1947. It is no answer that under the compulsion of s. 11 of the Act the Commonwealth Bank will provide the banking facilities that the community may require, nor, if anyone dared so to prophesy, that the volume of banking would be the same. Nor is it relevant that the prohibition affects the intra-State transactions of a private bank as well as its inter-State transactions. So also in the *James Cases* there was no discrimination; his fruit, for whatever market destined, was liable to be the subject of a "determination."

Yet it is upon these very decisions and in particular upon that in *James* v. *The Commonwealth* (1) that the appellants rely. The third of their reasons in their formal case is that "the decision of the majority of the High Court in relation to s. 92 is inconsistent with the decisions of the Judicial Committee [in the two cases cited]."

It appears to their Lordships that this contention ignores the actual decisions and is based upon a misapprehension of certain language used in the judgments of the Board. In *James* v. *Cowan* (2), Lord *Atkin* (3) speaks of s. 20 and the determinations made under it as "directed at inter-State commerce as such." Elsewhere he speaks of the "objects" of the Minister and the Board and of the "real object" of arming the Minister with a certain power. It is possible that this language is open to misconception. But, in whatever sense the word "object" or "intention" may be used in reference to a Minister exercising a statutory power, in relation to an Act of Parliament it can be ascertained in one way only, which can best be stated in the words of Lord *Watson* in *Aron Salomon* v. *A. Salomon & Co. Ltd.* (4): "In a Court of Law or Equity what the legislature intended to be done or not to be done can only be legitimately ascertained from that which it has chosen to enact, either in express words or by reasonable and necessary implication." The same idea is felicitously expressed in an opinion of the English law officers Sir *Roundell Palmer* and Sir *Robert*

(1) (1936) A.C. 578; 55 C.L.R. 1.
(2) (1932) A.C. 542; 47 C.L.R. 386.
(3) (1932) A.C., at p. 555.
(4) (1897) A.C. 22, at p. 38.

*Collier* cited by *Isaacs* J. in *James* v. *Cowan* (1): "It must be presumed that a legislative body intends that which is the necessary effect of its enactments: the object, the purpose, and the intention of the enactment, is the same." The same learned Judge adds: "By the 'necessary effect,' it need scarcely be said, these learned jurists meant the necessary legal effect, not the ulterior effect economically or socially." It was because s. 20 of the *Dried Fruits Act* of South Australia operated according to the natural meaning of its words to authorize a direct restriction upon the manner in which James could dispose of his product by an inter-State transaction that it offended against s. 92, not because some other extraneous purpose, object or intention was ascribable to the South Australian legislature.

So also, in *James* v. *The Commonwealth* (2) Lord *Wright* in delivering the opinion of the Board uses somewhat similar language: he speaks (3) of the "real object" of an Act, of "its admitted object," citing words used by Lord *Atkin* in the earlier case, and again of an Act being "directed against" or "aimed at" a particular result. Upon these expressions the appellants have fastened, contending that an Act cannot offend against s. 92 unless it can be shown that the intention of the legislature was to interfere in some way with inter-State trade, and they go on to say that in the *Banking Act* 1947 there is to be found no intention to interfere with inter-State trade: that Act, they say, is not directed or aimed at such trade. To this their Lordships would say that the test is clear: does the Act, not remotely or incidentally (as to which they will say something later) but directly, restrict the inter-State business of banking? Beyond doubt it does, since it authorizes in terms the total prohibition of private banking. If so, then in the only sense in which those words can be appropriately used in this case, it is an Act which is aimed at, directed at, and the purpose, object and intention of which is to restrict, inter-State trade commerce and intercourse.

It is not, however, only upon a misunderstanding of the expressions last mentioned that the appellants base their claim that *James* v. *The Commonwealth* (2) is decisive in their favour. They further find support in such phrases as "freedom as at the frontier or . . . in respect of goods passing into or out of the State" and "freedom at what is the crucial point in inter-State trade, that is at the State barrier," which are to be found in the course of the judgment in that case. These words must (as must every word of

(1) (1930) 43 C.L.R., at p. 409.
(2) (1936) A.C. 578; 55 C.L.R. 1.
(3) (1936) A.C., at pp. 618, 622.

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every judgment) be read *secundum subjectam materiam.* They were appropriate to their context and must be read in their context. They cannot be interpreted as a decision either that it is only the passage of goods which is protected by s. 92 or that it is only at the frontier that the stipulated freedom may be impaired. It is not to be doubted that a restriction, applied not at the border but at a prior or subsequent stage of inter-State trade commerce or intercourse, may offend against s. 92. Nor, as their Lordships hold, in accordance with the view long entertained in Australia, is it in respect of the passage of goods only that such trade commerce and intercourse is protected.

Lastly, the judgment in *James* v. *The Commonwealth* (1) was invoked by the appellants upon the ground that it contained expressions of approval of certain decisions previously given by the High Court of Australia, and (so the argument ran), if those decisions were right, then the judgment of the High Court in the present case could not be maintained. This is a dangerous line of argument. It is true that in the course of a narrative of the leading High Court decisions upon s. 92 Lord *Wright* observed (2) in regard to a passage in the judgment of *Evatt* J. in *R.* v. *Vizzard*; *Ex parte Hill* (3) :— " If this reasoning, which in *Vizzard's Case* (3) was primarily applied to the States, is, as it seems to be, correct, then in principle it applies *mutatis mutandis* to the Commonwealth's powers under s. 51 (i) . . . ". But it does not appear to their Lordships that the whole of that learned Judge's reasoning received the considered approval of the Board. Nor, even if it were otherwise, would it follow that the judgment of the High Court in the present case could not be maintained. " In every case " it was said in the same case " it must be a question of fact whether there is an interference with this freedom of passage." The facts in relation both to subject-matter and to manner of restriction or interference are so widely different in the two cases that it is difficult to apply to one case all that was said in the other. In this connection it may be noted that in *James* v. *Cowan* (4) their Lordships observed that they found themselves " in accord with the convincing judgment delivered by *Isaacs* J. in the High Court." The decisions in *James* v. *Cowan* (5) and in *Vizzard's Case* (3) may be reconciled. It would not be easy to reconcile all that was said by *Evatt* J. in the one case with all that was said by *Isaacs* J. in the other.

Their Lordships have thought it proper to deal at considerable length with the earlier decisions of this Board because so much

(1) (1936) A.C. 578; 55 C.L.R. 1.
(2) (1936) 55 C.L.R., at p. 51.
(3) (1933) 50 C.L.R. 30.
(4) (1932) A.C. 542; 47 C.L.R. 386.
(5) (1930) 43 C.L.R. 386.

reliance was placed upon them by the appellants. It is, they think, clear that, far from assisting the appellants, these two decisions are, as the respondents have throughout contended, strongly against them.

In observing upon the *James Cases* (1) and their bearing upon the present case their Lordships noted that the Act now under consideration operated to restrict the freedom of inter-State trade commerce and intercourse not remotely or incidentally but directly. Upon this and upon a cognate matter, the distinction between restrictions which are regulatory and do not offend against s. 92 and those which are something more than regulatory and do so offend, their Lordships think it proper to make certain further observations.

It is generally recognised that the expression "free" in s. 92, though emphasised by the accompanying "absolutely," yet must receive some qualification. It was, indeed, common ground in the present case that the conception of freedom of trade commerce and intercourse in a community regulated by law presupposes some degree of restriction upon the individual. As long ago as 1916 in *Duncan* v. *State of Queensland* (2), Sir Samuel *Griffith* C.J. said: "But the word 'free' does not mean *extra legem*, any more than freedom means anarchy. We boast of being an absolutely free people, but that does not mean that we are not subject to law." And through all the subsequent cases in which s. 92 has been discussed, the problem has been to define the qualification of that which in the Constitution is left unqualified. In this labyrinth there is no golden thread. But it seems that two general propositions may be accepted: (1) that regulation of trade commerce and intercourse among the States is compatible with its absolute freedom and (2) that s. 92 is violated only when a legislative or executive act operates to restrict such trade commerce and intercourse directly and immediately as distinct from creating some indirect or consequential impediment which may fairly be regarded as remote. In the application of these general propositions, in determining whether an enactment is regulatory or something more, or whether a restriction is direct or only remote or incidental, there cannot fail to be differences of opinion. The problem to be solved will often be not so much legal as political, social or economic. Yet it must be solved by a court of law. For where the dispute is, as here, not only between Commonwealth and citizen but between

(1) (1927) 40 C.L.R. 1; (1932) A.C. 542; 47 C.L.R. 386; (1936) A.C. 578; 55 C.L.R. 1.

(2) (1916) 22 C.L.R. 556, at p. 573.

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Commonwealth and intervening States on the one hand and citizens and States on the other, it is only the Court that can decide the issue. It is vain to invoke the voice of Parliament.

Difficult as the application of these general propositions must be in the infinite variety of situations that in peace or in war confront a nation, it appears to their Lordships that this further guidance may be given. In the recent case of *Australian National Airways Pty. Ltd.* v. *The Commonwealth* (1) the learned Chief Justice used these words (2): "I venture to repeat what I said in the former case [viz. *Milk Board (N.S.W.)* v. *Metropolitan Cream Pty. Ltd.* (3)]: One proposition which I regard as established is that simple legislative prohibition (Federal or State), as distinct from regulation, of inter-State trade and commerce is invalid. Further, a law which is directed against inter-State trade and commerce is invalid. Such a law does not regulate such trade, it merely prevents it. But a law prescribing rules as to the manner in which trade (including transport) is to be conducted is not a mere prohibition and may be valid in its application to inter-State trade, notwithstanding s. 92." With this statement which both repeats the general proposition and precisely states that simple prohibition is not regulation their Lordships agree. And it is, as they think, a test which must have led the Chief Justice to a different conclusion in this case had he decided that the business of banking was within the ambit of s. 92. They do not doubt that it led him to a correct decision in the *Airways Case* (1). There he said (2): "In the present case the Act is directed against all competition with the inter-State services of the Commission. The exclusion of other services is based simply upon the fact that the competing services are themselves inter-State services. . . . The exclusion of competition with the Commission is not a system of regulation and is, in my opinion, a violation of s. 92. . . ." *Mutatis mutandis*, these words may be applied to the Act now impugned, for it is an irrelevant factor that the prohibition prohibits inter-State and intra-State activities at the same time.

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

(1) (1945) 71 C.L.R. 29.
(2) (1945) 71 C.L.R., at p. 61.
(3) (1939) 62 C.L.R. 116.

judged on its own facts and in its own setting of time and circumstance, and it may be that in regard to some economic activities and at some stage of social development it might be maintained that prohibition with a view to State monopoly was the only practical and reasonable manner of regulation and that inter-State trade commerce and intercourse thus prohibited and thus monopolized remained absolutely free.

Nor can one further aspect of prohibition be ignored. It was urged by the appellants that prohibitory measures must be permissible, for otherwise lunatics, infants and bankrupts could without restraint embark upon inter-State trade, and diseased cattle or noxious drugs could freely be taken across State frontiers. Their Lordships must therefore add, what, but for this argument so strenuously urged, they would have thought it unnecessary to add, that regulation of trade may clearly take the form of denying certain activities to persons by age or circumstances unfit to perform them or of excluding from passage across the frontier of a State creatures or things calculated to injure its citizens. Here again a question of fact and degree is involved which is nowhere better exemplified than in the *Potato Case—Tasmania* v. *Victoria* (1)—where the following passage occurs in the judgment of *Gavan Duffy* C.J. and *Evatt* and *McTiernan* JJ.: "In the present case it is neither necessary nor desirable to mark out the precise degree to which a State may lawfully protect its citizens against the introduction of disease, but, certainly, the relation between the introduction of potatoes from Tasmania into the State of Victoria, and the spread of any disease in the latter is, on the face of the Act and the proclamation, far too remote and attenuated to warrant the absolute prohibition imposed."

The same difficulty arises in applying the other discriminatory test, that between a restriction which is direct and one that is too remote. Yet the distinction is a real one and their Lordships have no doubt on which side of the boundary the present case falls. It is the direct and immediate result of the Act to restrict the freedom of trade commerce and intercourse among the States.

Their Lordships will not attempt to define this boundary. An analogous difficulty in one section of constitutional law, viz., in the determination of the question where legislative power resides, has led to the use of such phrases as "pith and substance" in relation to a particular enactment. These phrases have found their way into the discussion of the present problem also and, as so used, are the subject of just criticism by the learned Chief Justice. They,

(1) (1935) 52 C.L.R. 157, at pp. 168, 169.

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no doubt, raise in convenient form an appropriate question in cases where the real issue is one of subject matter as when the point is whether a particular piece of legislation is a law in respect of some subject within the permitted field. They may also serve a useful purpose in the process of deciding whether an enactment which works some interference with trade commerce and intercourse among the States is, nevertheless, untouched by s. 92 as being essentially regulatory in character. But where, as here, no question of regulatory legislation can fairly be said to arise, they do not help in solving the problems which s. 92 presents. Used as they have been to advance the argument of the appellants they but illustrate the way in which the human mind tries, and vainly tries, to give to a particular subject matter a higher degree of definition than it will admit. In the field of constitutional law, and particularly in relation to a Federal Constitution, this is conspicuously true, and it applies equally to the use of the words " direct " and " remote " as to " pith and substance." But it appears to their Lordships that, if these two tests are applied firstly, whether the effect of the Act is in a particular respect direct or remote and, secondly, whether in its true character it is regulatory, the area of dispute may be considerably narrower. It is beyond hope that it should be eliminated.

Their Lordships will humbly advise His Majesty that these appeals should be dismissed.

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E. F. H.