Privy Council Appeal No. 3 of 1936

Frederick Alexander James - - - - - - - - *Appellant*

v.

Commonwealth of Australia (Respondents) and the State of New South Wales and others (Interveners)

FROM

THE HIGH COURT OF AUSTRALIA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED 17TH JULY 1936

Present at the Hearing:

THE LORD CHANCELLOR,
(VISCOUNT HAILSHAM).
LORD RUSSELL OF KILLOWEN.
THE MASTER OF THE ROLLS,
(LORD WRIGHT).
SIR GEORGE LOWNDES.
SIR SIDNEY ROWLATT.

[*Delivered by* THE MASTER OF THE ROLLS.]

The appellant, Frederick Alexander James, is a grower and processor of dried fruits in the State of South Australia: his products have been for many years largely sold in various States, including New South Wales, Victoria, Western Australia and South Australia. In the action he claimed damages for the seizure by or on behalf of the respondents (Commonwealth) of (1) 50 cases of dried fruits which he had shipped on a steamship in April, 1932, at Port Adelaide, consigned to E. D. Clarton for delivery at Sydney, New South Wales in part performance of a contract of sale, and (2) of 20 cases of dried fruits in June, 1932, which he had shipped at Port Adelaide consigned to H. Hooper & Co. for delivery at Sydney, New South Wales, in part performance of a contract. He further claimed a declaration that the Dried Fruits Act, 1928-35, of the Parliament of the Commonwealth contravenes section 92 of the Constitution embodied in the Commonwealth of Australia Constitution Act, 1901 (hereinafter called the Constitution) is invalid, and that the Regulations made under the Dried Fruits Act, 1928-35, or some part thereof are likewise invalid. He complained that under and in virtue of the Act and Regulations and a determination made thereunder, he had been prevented from sending his dried fruits out of South Australia in fulfilment of various inter-State contracts which he had made. The Commonwealth took out a summons to dismiss the claim as

an abuse of the process of the Court in that the substantial questions had already been litigated between the parties and decided against the appellant in an action (No. 54 of 1928) entitled *James* v. *The Commonwealth.* The Commonwealth also demurred to the whole of the statement of claim on the grounds in law that the Dried Fruits Act, 1928-35, and the Dried Fruits (Inter-State Trade) Regulations are valid laws of the Commonwealth and that the acts complained of were authorised by the Act or Regulations.

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

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

Section 92 is in the following terms :—

"92. On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free.

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

The Dried Fruits Act, 1928-35, enacted by section 3 (1) :—

"3.—(1) Except as provided by the Regulations—

"(*a*) the owner or person having possession or custody of dried fruits shall not deliver any dried fruits to any person for carriage into or through another State to a place in Australia beyond the State in which the delivery is made: and

"(*b*) the owner or any other person shall not carry any dried fruits from a place in one State into or through another State to a place in Australia beyond the State in which the carriage begins,

unless he is the holder of a licence then in force, issued under this Act, authorising him so to deliver or carry such dried fruits, as the case may be, and the delivery or carriage is in accordance with the terms and conditions of that licence.

"Penalty: One hundred pounds or imprisonment for six months.

"(2) Prescribed authorities may issue licences, for such periods and upon such terms and conditions as are prescribed, permitting the delivery of dried fruits to any person for carriage or the carriage

of dried fruits from a place in one State to a place in Australia beyond that State.

> "(3) Any dried fruits which have been, or are in process of being, carried in contravention of this Act, shall be forfeited to the King."

There was also power to the prescribed authority to forfeit and cancel a licence and the Governor-General was authorised to make, and has made, Regulations for giving effect to the Act. The relevant Regulations, Dried Fruit (Inter-State Trade) Regulations, in force at the material times provided that an owner's licence to export should be issued on the terms (*inter alia*) :—

> "(ii) That the licensee shall export from Australia, or cause to be exported on his behalf, during the period for which his licence has been issued and during such further period as a prescribed authority considers necessary, such percentage of the dried fruits produced in Australia during any specified periods which came into the possession or custody of the licensee prior to the date of issue of his licence, or which come into the possession or custody of the licensee on and after the date of issue of this licence, as is from time to time fixed by the Minister, upon the report of a prescribed authority, and notified in the *Gazette*. . . ."

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

The appellant, contending that the Act and Regulations and the determination were invalid, refused to apply for a licence or undertake the prescribed conditions. In consequence his consignments were seized and forfeited, and the railway authorities and shipping companies to whom he tendered his dried fruits for carriage from the State of South Australia to other States refused to take them, in virtue of the prohibitions and penalties imposed under the Act by reason of the circumstance that the appellant had no licence.

The High Court in allowing the demurrer, did so because they could not hold that the Commonwealth was bound by section 92 without departing from an opinion of the High Court given in 1920 in *McArthur* v. *State of Queensland*, 28 C.L.R. 530, that the Commonwealth was not bound by the section : at the same time Dixon, Evatt and McTiernan JJ. expressed their individual views to the contrary effect. Rich and Starke JJ. devoted their opinions rather to pointing out the difficulties that would attend a reconsideration of *McArthur's* case than to an approval of the interpretation of section 92 which it embodied. Starke J. said, "The case has been acted upon so long that this Court should now treat the law as settled. Its review should be undertaken if at all, by the Judicial Committee." It may, however, be noted

that this particular question of the interpretation of section 92 did not directly arise in *McArthur's* case; the Commonwealth was not a party and did not intervene in that case; in the words of Rich J., " Until the present case the question has not been presented to the Court for definitive judicial decision." But as Starke J. points out, the question cannot be decided without a careful consideration of the true effect of section 92 and of the numerous cases relating to State powers decided under that section. This is necessary because a principal, or, more precisely, the principal argument for the thesis maintained on behalf of the Commonwealth in this case is that section 92, if applied to the Commonwealth would practically nullify the express powers granted to the Commonwealth in section 51 (i). It must at the outset be admitted that though the judgments in the High Court on section 92 present a great, and perhaps embarrassing, wealth of experience, learning and ratiocination the decisions and the various reasons which they embody are not always easy to reconcile and present considerable differences of judicial opinion. This can cause no surprise when the extreme difficulty and high importance of the questions are remembered. Before the matter is examined in detail, some general observations may be made.

The Constitution of the Commonwealth was, in the words of Lord Haldane, delivering the judgment of this Board in *A.G. for the Commonwealth of Australia* v. *Colonial Sugar Refining Company, Limited* [1914] A.C. 237 at p. 252, " federal in the strict sense of the term." He goes on to say that :—

> " In a loose sense the word ' federal ' may be used, as it is there [i.e., in the British North America Act of 1867] used, to describe any arrangement under which self-contained States agree to delegate their powers to a common Government with a view to entirely new Constitutions even of the States themselves. But the natural and literal interpretation of the word confines its application to cases in which these States, while agreeing on a measure of delegation, yet in the main continue to preserve their original Constitutions."

On the following page he adds:—

> "In fashioning the Constitution of the Commonwealth of Australia the principle established by the United States was adopted in preference to that chosen by Canada. It is a matter of historical knowledge that in Australia the work of fashioning the future Constitution was one which occupied years of preparation through the medium of conventions and conferences in which the most distinguished statesmen of Australia took part. Alternative systems were discussed and weighed against each other with minute care. The Act of 1900 must accordingly be regarded as an instrument which was fashioned with great deliberation, and if there is at points obscurity in its language, this may be taken to be due not to any uncertainty as to the adoption of the stricter form of federal principle, but to that difficulty in obtaining ready agreement about phrases which attends the drafting of legislative measures by large assemblages."

The broad principle of this federal system is to be found as regards the States in particular, in section 107, which provides :—

> "107. Every power of the Parliament of a Colony which has become or becomes a State, shall unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be."

As regards the Commonwealth, section 51 contains a list of 39 enumerated powers with which it is vested. Section 52 defines the cases in which the power of the Commonwealth is to be exclusive. Section 51 begins as follows :—

> "51. The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to . . . ."

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

There are, however, certain sections of the Constitution which call for special mention as throwing light on sections 51 and 92. Thus reference may be made to the sections dealing with customs and excise duties, in particular sections 86 to 95, in the midst of which section 92 is placed. It is well known that one of the objects which the federation sought to achieve was the abolition of restrictions on trade between the Colonies and of the diversity in the different States of tariffs and border regulations; this was described as "the old inter-colonial trade war" (in *McArthur's* case at p. 545). Thus section 86 provides that on the establishment of the Commonwealth the collection and control of duties of customs and excise shall pass to the Commonwealth, section 87 deals with the disposal of the revenue as between Commonwealth and States, section 88 provides that uniform duties of customs shall be

imposed within two years after the establishment of the Commonwealth, section 90 provides that :—

> "90. On the imposition of uniform duties of customs the power of the Parliament to impose duties of customs and of excise, and to grant bounties on the production or export of goods, shall become exclusive.
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> "On the imposition of uniform duties of customs all laws of the several States imposing duties of customs or of excise, or offering bounties on the production or export of goods, shall cease to have effect, but any grant of or agreement for any such bounty lawfully made by or under the authority of the Government of any State shall be taken to be good if made before the thirtieth day of June, one thousand eight hundred and ninety-eight, and not otherwise."

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

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

The question then is one of construction, and in the ultimate resort must be determined upon the actual words used, read not in vacuo but as occurring in a single complex instrument, in which one part may throw light on another. The Constitution has been described as the federal compact and the construction must hold a balance between all its parts. Though the question here is not as to the division of powers between Commonwealth and States, but as to the existence in the Commonwealth of the power which is impugned, yet it is appropriate to apply the words of Lord Selborne in the *Queen* v. *Burah*, 3 A.C. 889 at p. 904 :—

> "The established Courts of Justice, when a question arises [in regard to a Constitution] whether the prescribed limits have been exceeded, must of necessity determine that question; and the only way in which they can properly do so, is by looking to the terms of the instrument by which, affirmatively, the legislative powers were created, and by which, negatively, they are restricted. If what

has been done is legislation, within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited (in which category would, of course, be included any Act of the Imperial Parliament at variance with it), it is not for any Court of Justice to inquire further, or to enlarge constructively those conditions and restrictions."

It is true that a Constitution must not be construed in any narrow and pedantic sense. The words used are necessarily general and their full import and true meaning can often only be appreciated when considered, as the years go on, in relation to the vicissitudes of fact which from time to time emerge. It is not that the meaning of the words changes, but the changing circumstances illustrate and illuminate the full import of that meaning. It has been said that " in interpreting a constituent or organic statute such as the Act [i.e., the British North America Act], that construction most beneficial to the widest possible amplitude of its powers must be adopted " (*British Coal Corporation* v. *The King*, [1935] A.C. 500 at p. 518). But that principle may not be helpful, where the section is, as section 92 may seem to be, a constitutional guarantee of rights, analogous to the guarantee of religious freedom in section 116, or of equal right of all residents in all States in section 117. The true test must, as always, be the actual language used. Nor can any decisive help here be derived from evidence of extraneous facts existing at the date of the Act of 1900; such evidence may in some cases help to throw light on the intention of the framers of the statute, though that intention can in truth be ascertained only from the language used. But new and unanticipated conditions of fact arise. It may be that in 1900 the framers of the Constitution were thinking of border tariffs and restrictions in the ordinary sense and desired to exclude difficulties of that nature, and to establish what was and still is called " free trade," and to abolish the barrier of the State boundaries so as to make Australia one single country. Thus they presumably did not anticipate those commercial and industrial difficulties which have in recent years led to marketing schemes and price control, or traffic regulations such as those for the co-ordination of rail and road services, to say nothing of new inventions, such as aviation or wireless. The problems, however, of the Constitution can only be solved as they emerge by giving effect to the language used.

Before their Lordships proceed to the task of construction they may observe that they cannot shelter under the decision in *McArthur's* case, as the High Court felt they ought to do. The construction of section 92 has recently been dealt with by this Board in *James* v. *Cowan* [1932] A.C. 542 at p. 560, where it was said :—

" At one time in the argument it was suggested that to determine the point it would be necessary to come to a conclusion on a matter which has been decided differently at different times by the High Court—namely, whether section 92 applies to the Commonwealth as

> well as to the individual States. If to both, it was almost conceded that no question of limits *inter se* would arise. If to the States alone, then the violation of section 92 would, it is said, amount to an invasion of Commonwealth powers which would involve a question under section 74. Their Lordships, however, do not find it necessary to decide the question as to the application of section 92, which will remain for them an open question. If the implied prohibition in section 92 applies to both Commonwealth and States it would seem reasonably clear that there are no competing powers; the prohibited area is denied to both. But similarly, if the prohibition is addressed to the States alone, no question arises as to limits of powers between State and Commonwealth."

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

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

In the decisions of the High Court on section 92 a line is generally drawn at *McArthur's* case in 1920. Before that case, the Judges of the High Court (including Griffiths C.J.

and Isaacs, Barton and Gavan Duffy JJ.) referred to the question and stated expressly that it applied equally to Commonwealth and States : it was also incidentally observed that section 92 left scope for the Commonwealth to act under section 51 (i).

The first case to be noted is *Fox* v. *Robbins* 8 C.L.R. 115, where it was held that a State law requiring a higher licence fee to be paid for selling wine manufactured from fruit grown in another State was invalid under section 92. " This provision ", said Griffiths C.J., " would be quite illusory if a State could impose disabilities upon the sale of products of other States what are not imposed upon the sale of home products ". The extra fiscal burden imposed on the imported products was clearly inconsistent with the absolute freedom of the border. In *R.* v. *Smithers*, 16 C.L.R. 99, it was held that " intercourse " in section 92 was not limited to commercial intercourse and that the right of the people of Australia to cross a State line was not so restricted; Isaacs J. said at p. 117 :—

> " In my opinion, the guarantee of inter-State freedom of transit and access for persons and property under section 92 is absolute—that is, it is an absolute prohibition on the Commonwealth and States alike to regard State borders as in themselves possible barriers to intercourse between Australians."

An Act prohibiting the entry into the State of ex-criminals from another State was held by Isaacs and Higgins JJ. to be invalid.

The three other cases before 1920 were not quite so simple. They dealt with war time State Acts for expropriating foodstuffs or for keeping them within the State. The first, generally described as the *Wheat Case*, 20 C.L.R. 54, held that the Wheat Acquisition Act, 1914, of New South Wales, was not a contravention of section 92; wheat had been expropriated under that Act, subject to compensation; contracts were to be cancelled so far as not completed by delivery : Isaacs J. thus summed up his opinion at p. 101 :—

> " I am clearly of opinion that section 92 has no such function, and that while neither States nor Commonwealth can detract from the absolute freedom of trade and commerce between Australian citizens in the property they possess, there is nothing to prevent either States or Commonwealth, for their own lawful purposes, from becoming themselves owners of that property and applying it, according to law, to the common welfare."

Gavan Duffy J. said at p. 104 :—

> " It is to be observed that section 51 (i) of the Constitution enables Parliament to make laws for the peace, order, and good government of the Commonwealth with respect to 'Trade and commerce with other countries, and among the States.' The words 'absolutely free' in section 92 must, therefore, be subject to some limitation so as to give them a meaning which is consistent with the existence of this legislative power, and the meaning when ascertained must be the same always and in all conceivable circumstances ; it must apply equally when we are considering the right of the Commonwealth to legislate under section 51 (1), and of the States to legislate under section 107."

But this case which has never been expressly overruled, was distinguished in *Foggitt Jones & Co.* v. *State of New South Wales,* 21 C.L.R. 357, where it was held that an Act declaring that all stock and meat in the State should be kept at the disposal of the Government in aid of army supplies, was in breach of section 92 because it prevented the transport of the stock across the border though the property in the stock was left in the owners. Soon afterwards, in *Duncan* v. *Queensland,* 22 C.L.R. 556, a different conclusion was arrived at by the majority of the Court on an Act not apparently distinguishable in its terms from the New South Wales Act; it was there said that the Act operated as " a dedication of the stock and meat to public purposes ". To the objection that the stock was removed from employment in inter-State trade, so that it could not be moved into another State, the answer was given that the real object of the Act was to conserve the stock and meat for the use of the Imperial forces.

The correctness of this last case may be questioned. and was indeed expressly dissented from in *McArthur's* case by the majority of the Court, but what is clear is that in this and the preceding cases the High Court was concerned with the question of freedom in passing the State borders. It might well be said that that freedom was not affected by a requisition, but was affected by a measure which prevented the taking of goods across the border into another State.

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

was reached that section 92 cannot apply to the Commonwealth. The Act in question in that case was the Queensland Profiteering Prevention Act, 1920, which made it unlawful for any trader in the State whether as principal or agent to sell goods at prices higher than the prices declared: the issue was whether agents for the plaintiffs, a Sydney firm, were committing a breach by selling in the State, at prices higher than the prescribed prices, goods of the plaintiffs to be despatched from Sydney and delivered to the purchasers in the State. It was held that the Act was invalid as contravening section 92: in other words the protection of section 92 was taken to extend over the whole of the transaction until the sale was completed by delivery. There was no prevention or hindrance under the Act in respect of the passage of goods from State to State; the law applied equally to all goods sold in the State whether or not they came across the border; there was no discrimination against the plaintiffs' goods; rather there was discrimination in favour of them: they were held to fall into a class of privileged goods. It was said the prices might be so fixed as to place the sellers from the adjoining States at a disadvantage and have the same effect as a customs duty or bounty. But nothing of the sort was suggested to be in fact the case; on the contrary it seems these sellers had a preference. In truth the decision deprived Queensland of its sovereign right to regulate its internal prices.

Thus the theory that section 92 did not bind the Commonwealth came into existence 20 years after the Commonwealth Act and as a corollary to a new construction of section 92.

Reference may now be made to later cases in which this idea appears to have been departed from. In *Roughley* v. *New South Wales* 42 C.L.R. 162, the validity of the Farm Produce Agents Act, 1926 (N.S.W.) was attacked. That Act made it an offence for any person in the State to act as a farm produce agent unless licensed by the State; it required a farm produce agent to produce accounts and obey various other regulations. The question was whether that Act could legally be applied to agents selling for principals in other States who sent their goods to Sydney for sale; it was claimed that the Act was invalid be-because it infringed section 92 as interfering with the freedom exacted by that section. That claim was rejected by the majority of the Court (Starke J. dissenting), on the ground that the agents' operations were purely intra-State or domestic, and constituted a separate business, distinct from that of their principals. But Isaacs J. consistently with *McArthur's case*, said at p. 185, " All agency is forbidden in the nature of farm produce agency, except as prescribed. Therefore agency as a part and in many cases an essential part of inter-State trade is included. That patently is an infringement of section 92."

In this connection it is convenient to pass at once, returning later to certain intervening cases, to an important series of cases, of which the *King* v. *Vizzard*, 50 C.L.R. 30, affords the best example. The question in that case was whether the State Transport (Co-ordination) Act, 1931 (N.S.W.) contravened section 92. That Act provided that no public motor vehicle should be operated in the State unless it was licensed; a Board was established with wide powers to grant or refuse licences and also to impose conditions; a licence fee was to be paid. For various reasons, in particular the heavy State expenditure on railways and roads, the problem of co-ordinating railway and road services had become of great national importance. The appellant's motor lorry was a commercial vehicle used for the conveyance of goods from Melbourne to a place in New South Wales. It was not licensed, with the result that the driver was convicted under the Act. He appealed on the ground that the Act was invalid because it contravened section 92. Gavan Duffy C.J., Rich, Evatt and McTiernan JJ. held it did not. Starke and Dixon JJ. dissented. The validity of the two propositions laid down in *McArthur's* case was there for the first time formally challenged. The Commonwealth had intervened and on their behalf that distinguished constitutional lawyer Sir Robert Garran K.C. submitted that within the limits to which section 92 should be confined, it bound the Commonwealth and that the ruling in *McArthur's* case was wrong. Gavan Duffy C.J., Evatt and McTiernan JJ. agreed with this argument in principle though Gavan Duffy C.J. thought it unnecessary that there should be an express decision by his casting vote. The elaborate judgment of Evatt J. in that case is of great importance. It is impossible to quote here at length from it; one short passage at p. 94 may be extracted:—

> " Section 92 does not guarantee that, in each and every part of a transaction which includes the inter-State carriage of commodities, the owner of the commodities, together with his servant and agent and each and every independent contractor co-operating in the delivery and marketing of the commodities, and each of his servants and agents, possesses, until delivery and marketing are completed, a right to ignore State transport or marketing regulations, and to choose how, when and where each of them will transport and market the commodities."

Evatt J. points out that *Roughley's* case is in truth inconsistent with what was laid down in *McArthur's* case. If this reasoning, which in *Vizzard's* case was primarily applied to the States, as it seems to be, correct, then in principle it applies *mutatis mutandis* to the Commonwealth's powers under section 51 (i) and shows that section 51 (i) has a wider range than that covered by section 92.

Vizzard's case was followed in *O. Gilpin, Ltd.* v. *Commissioner for Road Transport* (N.S.W.) 52 C.L.R. 189. A similar case had been *Willard* v. *Rawson*, 48 C.L.R. 316.

James v. *Cowan* (*supra*) had by that time been decided by this Board. That authority dealt with Dried Fruits legislation enacted by the State of South Australia: His Majesty in Council reversed the decision of the High Court, preferring the dissenting judgment of Isaacs J., and held that the State Act which gave to the State powers of compulsory acquisition and the orders and seizures made under it, were invalid as contravening section 92. The Board held that the Act in question, partly by reason of its actual provisions, partly by reason of its admitted object, was tantamount to a prohibition of export: Lord Atkin said at p. 558, in reference to the powers of expropriation:—

> "If the real object of arming the Minister with the power of acquisition is to enable him to place restrictions on inter-State commerce, as opposed to a real object of taking preventive measures against famine or disease and the like, the legislation is as invalid as if the legislature itself had imposed the commercial restrictions."

He added :—

> "It may be conceded that, even with powers granted in this form, if the Minister exercised them for a primary object which was not directed to trade or commerce, but to such matters as defence against the enemy, prevention of famine, disease and the like, he would not be open to attack because incidentally inter-State trade was affected."

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

James v. *Cowan* was followed and applied by the High Court (Evatt J. dissenting) in *Peanut Board* v. *Rockhampton Harbour Board*, 48 C.L.R. 266, in which the *Wheat* case was distinguished. The producers of the peanuts, it was held, were prevented by the Act from engaging in inter-State and other trade in the commodity. The Act embodied, so the majority of the Court held, a compulsory marketing scheme, entirely restrictive of any freedom of action on the part of the producers; it involved a compulsory regulation and control of all trade, domestic, inter-State and foreign; on the basis of that view, the principles laid down by this Board were applied by the Court.

There are only a few other cases to which their Lordships desire to refer. *Vacuum Oil Company Pty. Ltd.* v. *Queensland*, 51 C.L.R. 108, was a case in which it was held that a burden placed (in substance) on the first seller in the State of imported petroleum, was in truth, though not in

form, a sort of tax or impost; so regarded it clearly infringed section 92, though its operation and incidence only took effect at an interval after the border was passed.

The earlier case of *Ex parte Nelson No.* (1), 42 C.L.R. 209, may be contrasted with the case of *Tasmania* v. *Victoria*, 52 C.L.R. 157. In the latter case the validity of a Victorian proclamation was attacked: the proclamation absolutely prohibited the importation into Victoria of potatoes from Tasmania: it was held to be invalid not only because it was unauthorised by the State Act under which it purported to be made, but because it contravened section 92; it directly and absolutely put an end to the trade in potatoes between those States. It was said at p. 168 in the judgment of Gavan Duffy C.J., Evatt and McTiernan JJ.:

> "In the present case it is neither necessary nor desirable to mark out the precise degree to which a State may lawfully protect its citizens against the introduction of disease, but, certainly, the relation between the introduction of potatoes from Tasmania into the State of Victoria and the spread of any disease in the latter is, on the face of the Act and the proclamation, far too remote and attenuated to warrant the absolute prohibition imposed."

In *Nelson's* case 42 C.L.R. 209, the Act authorised the proclamation prohibiting or more correctly restricting the introduction into the State of cattle from a district in another State in which there was reason to believe infectious or contagious disease in stock existed. The High Court was equally divided; the view which prevailed that the Act was valid seems to have been based on the ground that the true nature of the legislation was not to restrict freedom of inter-State commerce, but to protect the flocks and herds of New South Wales against contagious and infectious diseases. This view was disputed by the three Judges who dissented. In *Tasmania* v. *Victoria*, some of the Judges in that case also questioned the correctness of that view while upholding the actual decision on other grounds. It is certainly difficult to read into the express words of section 92 an implied limitation based on public policy. It is true that once the cattle or goods have crossed the border, they become liable to inspection under section 112 and also to the State laws of health and sanitation; that circumstance may render the difficulty of principle less important practically. But the question whether in proper cases the maxim "salus populi est suprema lex" could be taken to override section 92 is one of great complexity. Their Lordships in this case will accordingly follow the example set by this Board in *James* v. *Cowan* and treat the question as reserved until it arises, if it ever does.

This survey of the cases, as it is, inevitably brief and incomplete has been undertaken simply in order to show that the propositions laid down in *McArthur's* case which are the foundation of the respondent's argument that section 92 does not bind the Commonwealth, were not merely novel when

first enunciated, but have not been applied by the High Court in practice in subsequent decisions, though re-affirmed from time to time in dissenting judgments.

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

The Post and Telegraph Act, 1901-1923, contains a great number of detailed regulations with reference to the posting, stamping, delivery and so forth of letters, the transmission of telegrams, etc., including inter-State intercourse. But if freedom is understood in a certain sense, all these matters come within the powers given by section 51 (i) and (v) to make laws with respect to trade and commerce and postal and other services. Section 98 of the Act calls for special notice: it forbids and makes it an offence subject to specified exceptions to send or carry a letter for reward otherwise than by post. As this provision applies to inter-State as well as intra-State correspondence, it is in one sense a limitation on freedom of intercourse, assuming that term to include correspondence and it may thus be regarded as an interference with trade. Whether that is so or not, it is however a limitation notoriously existing in ordinary usage in all modern civilised communities; it does not impede freedom of correspondence, but merely as it were, canalises its course just as "free speech" is limited by well known rules of law. Very much the same is true of the Wireless Telegraph Act, 1905. Nor can it be fairly said that the Secret Commission Act, 1905, interferes with freedom of commerce in any sense in which that term is properly used. It forbids irrespective of any State boundary, objectionable trade practices in inter-State trade. It merely illustrates how the Commonwealth can make laws under section 51 (i) with respect to inter-State trade and commerce without infringing section 92. The same is true of the Commerce (Trade Description) Act, 1905-1933, which is merely directed to a special form of falsification. The Australian Industries Preservation Act, 1906-1930 is for the repression of destructive monopolies and is aimed at preventing illegitimate methods of trading. Similarly the Sea Carriage of Goods Act, 1924, which, following the British Act, adopts the Hague Rules, and requires that any bill of lading to which the Act applies must either in fact conform to or must be deemed to conform to the conditions embodied in these Rules, does not even render compulsory the issue of a bill of lading; it merely says that if the parties choose to have a bill of lading it must contain or be deemed to contain the prescribed stipulations. The Transport Workers Act, 1928-29, was discussed in *Huddert Parker Ltd.* v. *Commonwealth*, 44 C.L.R. 492, where the validity of Regulations made under the Act was upheld, the point raised being whether the matter fell within the Commonwealth

powers under section 51 (i). Section 92 was not discussed because it was assumed that section 92 did not apply to the Commonwealth. Indeed as already stated, the question whether section 92 applied to the Commonwealth has never been the subject of decision in any case until the present. In the same way *James* v. *Commonwealth*, 41 C.L.R. 442, was decided on other grounds, it being assumed that section 92 did not bind the Commonwealth. In the Transport Workers Act as in the other like statutes, which need not be further here enumerated or discussed, there was no question of interference with freedom in passing across the State borders; they merely illustrate the width of the powers given by section 51 (i). On the other hand, the Dairy Produce Act, 1933-1935, raises exactly the same issue as that raised in this case in respect of the Dried Fruits Act, 1928-1935.

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

The first question is what is meant by "absolutely free" in section 92. It may be that the word absolutely adds nothing. The trade is either free or it is not free. "Absolutely" may perhaps be regarded as merely inserted to add emphasis. The expression "absolutely free" is generally described as popular or rhetorical. On the other hand "absolutely" may have been added with the object of excluding the risk of partial or veiled infringements. In any case the use of the language involves the fallacy that a word completely general and undefined is most effective. A good draftsman would realise that the mere generality of the word must compel limitation in its interpretation. "Free" in itself is vague and indeterminate. It must take its colour from the context. Compare, for instance, its use in free speech, free love, free dinner and free trade. Free speech does not mean free speech; it means speech hedged in by all the laws against defamation, blasphemy, sedition and so forth; it means freedom governed by law as was pointed out in *McArthur's* case. Free love on the contrary means licence or libertinage, though even so there are limitations based on public decency and so forth. Free dinner generally means free of expense, and sometimes a meal open to anyone who comes, subject however to his condition or behaviour not being objectionable. Free trade means in ordinary parlance freedom from tariffs.

Free in section 92 cannot be limited to freedom in the last-mentioned sense. There may at first sight appear to be some plausibility in that idea, because of the starting point in time specified in the section, because of the sections which surround section 92 and because the proviso to section 92 relates to customs duties. But it is clear that much more is included in the term; customs duties and other like matters constitute a merely pecuniary burden; there may be different

and perhaps more drastic ways of interfering with freedom, as by restriction or partial or complete prohibition of passing into or out of the State.

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

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

legislative measures of State or Commonwealth dealing with wharfs or warehouses or transport workers. It must be so subject. Otherwise the absurd result would follow that the inter-State operation of trade would be immune from the laws of either State, of the State of origin equally with the other State. There would thus be in every State a class of dealings and acts entirely immune from the general law of the State, though only distinguishable from other like dealings and acts by the fact that they are parts of an inter-State transaction. It is to avoid this paradox, that it was said that the gap can only be filled up by the Commonwealth—a point for the moment reserved.

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

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

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

This construction also makes section 51 (i) consistent with section 92, so far as concerns the Commonwealth, which in their Lordships' judgment, as they will now state, is bound by section 92 equally with the States. So far as the language of the section goes, no countenance is afforded for the contrary view. The language is quite general. It is in terms not subject to any exception or limitation. It is the declaration of a guaranteed right; it would be worthless if the Commonwealth was completely immune and could disregard it by legislative or executive act. It is difficult if not impossible to conceive that anyone drafting a statute, especially an organic statute like the Constitution, would have written out section 92 in its present form, if what was intended was a constitutional guarantee limited to the States but ineffective so far as regards the Commonwealth. Section 92 is found in a series of sections which deal both with the Commonwealth and the States : indeed the proviso to section 92 directly applies to the Commonwealth. The Constitution when it is enacting a section which is only to apply either to the Commonwealth or to the States exclusively, indicates that intention in clear terms, as in sections 98, 99, 100, 102, 116, which specifically relate to the Commonwealth, and sections 111, 112, 113, 114 and 115. It is true that there are certain sections which deal specifically with the trade and commerce power of the Commonwealth, in particular sections 98, 99, 100, though these sections do not either individually or collectively cover the same ground as section 92; there are also other sections which relate specifically to the trade powers of the States, in particular section 112 (inspection laws) and 113 (liquor laws). None of these sections however directly help in the construction of section 92.

The real argument on which the theory is based that section 92 does not bind the Commonwealth is that section 92 if it applied to the Commonwealth would nullify or practically nullify section 51 (i). If that were so, the same would be

true of various other heads in section 51. That was the theory expounded in *McArthur's* case. Their Lordships have explained why they reject that theory. They will only add a few observations. One is that though trade and commerce mean the same thing in section 92 as in section 51 (i), they do not cover the same area, because section 92 is limited to a narrower context by the word " free "; the critical test of the scope of section 92 is to ascertain what is meant by " free "; their Lordships have sufficiently stated, and will not repeat, their opinion on that point. But if that theory enunciated in *McArthur's* case fails, the only substantial argument for the respondents' contention fails. It may further be observed in reference to the contention that there is antinomy between section 92 and section 52 (i), that the same antinomy would arise between section 92 and section 107. By section 107 every State power is saved, unless it is exclusively vested in the Commonwealth or withdrawn from the Parliament of the State. Section 51 (i) does not give exclusive powers to the Commonwealth. Each State has therefore the full power except where section 109 applies, to interfere with inter-State freedom, within its own territory and at its border; hence if section 92 were construed as the respondents contend, there would be exactly the same antinomy in regard to the States; the only difference would be that section 51 (i) is express; but that is immaterial because both section 51 (i) and section 107 are expressly subject to the Constitution and the latter section imports every State power as fully as if specifically set out, whereas the Commonwealth only possesses powers expressly conferred. There could be no question in regard to the Commonwealth of powers withdrawn.

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

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

The result is that in their Lordships' judgment the Commonwealth should be held to have failed in its attempt by the method adopted under the Act in question to control prices and establish a marketing system, even though the Commonwealth Government are satisfied that such a policy is in the best interests of the Australian people. Such a result cannot fail to cause regrets. But these inconveniences are liable to flow from a written Constitution. Their Lordships

cannot arrive at any conclusion save that they could not give effect to the respondents' contention consistently with any construction of the Constitution which is in accord with sound principles of interpretation. To give that effect would amount to re-writing, not to construing, the Constitution. That is not their Lordships' function. The Constitution, including section 92, embodied the will of the people of Australia, and can only be altered by the will of the people of Australia expressed according to the provisions of section 128.

Though their Lordships are reversing the decision of the High Court, they do so with the greatest respect for the opinions of the distinguished Judges who have thought differently, and they do so with peculiar diffidence and reluctance on a constitutional matter. They have, however, the consolation that they are giving effect to the declared opinion of three of the five Judges of the High Court who sat in this case, while the other two seemed to indicate that their individual opinions tended the same way. But all five Judges thought they should follow what had been regarded as the law in the High Court for many years, and leave its reconsideration to the Judicial Committee, where as stated in *James* v. *Cowan*, it was an open question, and must here be dealt with on that footing.

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

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

Their Lordships will humbly so advise His Majesty.

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In the Privy Council.

FREDERICK ALEXANDER JAMES

v.

COMMONWEALTH OF AUSTRALIA (RESPONDENT) AND THE STATE OF NEW SOUTH WALES AND OTHERS (INTERVENERS)

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