In the Privy Council.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

BETWEEN THE COMMONWEALTH OF AUSTRALIA, THE RIGHT HONOURABLE JOSEPH BENEDICT CHIFLEY, the Treasurer of the said Commonwealth, THE COMMONWEALTH BANK OF AUSTRALIA and HUGH TRAILL ARMITAGE, the Governor of the Commonwealth Bank of Australia (Defendants) – *–Appellants in each appeal.*

AND

BANK OF NEW SOUTH WALES and GEORGE ROLAND LOVE (a shareholder and director of the said Bank suing on behalf of himself and all other holders of shares on any register in Australia of the said Bank) and NORMAN BURGOYNE PERKINS (a shareholder of the said Bank suing on behalf of himself and all other holders of shares on any register outside Australia of the said Bank), THE COMMERCIAL BANKING COMPANY OF SYDNEY LIMITED and EDWARD RITCHIE KNOX (a shareholder and director of the said Bank suing on behalf of himself and all other holders of shares on any register in Australia of the said Bank) and BASIL COLIN SHUBRA HORDERN (a shareholder of the said Bank suing on behalf of himself and all other holders of shares on any register outside Australia of the said Bank), THE NATIONAL BANK OF AUSTRALASIA LIMITED and HARRY DOUGLAS GIDDY (a shareholder and director of the said Bank suing on behalf of himself and all other holders of shares on any register in Australia of the said Bank) and VERA DE LAURET RANKIN (a shareholder of the said Bank suing on behalf of herself and all other holders of shares on any register outside Australia of the said Bank), THE QUEENSLAND AND NATIONAL BANK LIMITED (in voluntary liquidation) and FRED PACE, the Liquidator thereof, THE COMMERCIAL BANK OF AUSTRALIA LIMITED and JOHN LANGLEY WEBB (a shareholder and director of the said Bank suing on behalf of himself and all other holders of shares on any register in Australia of the said Bank) and LESLIE HORACE AYLIFF

WHITE (a shareholder of the said Bank suing on behalf of himself and all other holders of shares on any register outside Australia of the said Bank), THE BANK OF ADELAIDE and SIR HOWARD WATSON LLOYD (a shareholder and director of the said Bank suing on behalf of himself and all other holders of shares of the said Bank), THE BALLARAT BANKING COMPANY LIMITED and the HONOURABLE JAMES FREDERICK KITTSON (a shareholder and director of the said Bank suing on behalf of himself and all other holders of shares of the said Bank), THE BRISBANE PERMANENT BUILDING AND BANKING COMPANY LIMITED and WALTER EDWIN SAVAGE (a shareholder and director of the said Bank suing on behalf of himself and all other holders of shares of the said Bank) (Plaintiffs) – – – – – – – – *Respondents in the first appeal.*

AND BETWEEN

SAME

AND

THE BANK OF AUSTRALASIA, THE UNION BANK OF AUSTRALIA LIMITED, THE ENGLISH SCOTTISH & AUSTRALIAN BANK LIMITED (Plaintiffs) – – – – – – – – *Respondents in the second appeal.*

AND BETWEEN

SAME

AND

THE STATE OF VICTORIA and the ATTORNEY-GENERAL OF THE STATE OF VICTORIA (Plaintiffs) – – – – – – – – *Respondents in the third appeal.*

AND BETWEEN

SAME

AND

THE STATE OF SOUTH AUSTRALIA and the ATTORNEY-GENERAL OF THE SAID STATE (Plaintiffs) – – – – – – – – *Respondents in the fourth appeal.*

AND BETWEEN

SAME

AND

THE STATE OF WESTERN AUSTRALIA and the ATTORNEY-GENERAL OF THE SAID STATE (Plaintiffs) – – – – – – – – *Respondents in the fifth appeal.*

(*Consolidated Appeals*).

Case for the Appellants.

RECORD.

1. These are consolidated appeals from five Orders made by the High Court of Australia, in the exercise of its original jurisdiction, on the 11th August, 1948, in so far as such Orders declare that Section 46 of the Banking Act 1947, (No. 57 of 1947, hereinafter called the Act) is invalid, and grant injunctions consequent upon such declarations. Vol. 3. p. 176–185.

Analysis of the judgments shows that the said declarations and injunctions were based on the decisions of a majority of the Court (Rich, Starke, Dixon and Williams JJ., Latham C. J. and McTiernan J. dissenting) that Section 46 of the Act (see paragraph 8, below) offends against Section 92 of the Constitution (see paragraph 22, below). Vol. 3. p. 59, l. 22—p. 66, l. 42; p. 95, l. 25—p. 104, l. 41; p. 111, l. 4—p. 115, l. 25; p. 124, l. 34—p. 125, l. 10; p. 161, l. 8—p. 170, l. 24; p. 175, ll. 14–45.

2. The appeals are brought by special leave of His Majesty in Council granted by Order dated the 26th November, 1948. By the said Order the right was reserved to the Respondents to raise as a preliminary point upon the hearing of the appeals the plea that the appeals do not lie without a certificate of the High Court of Australia under Section 74 of the Constitution; and it was directed that if this preliminary point be decided against the Respondents they shall be at liberty to raise all such constitutional points as they think fit. Vol. 3. pp. 186–188. p. 187, ll. 48–49. p. 187, ll. 50–51.

3. For convenience of reference, the following table of contents of this Case is given :—

Introduction, paragraphs 4-5, (page 4).

Preliminary point, paragraphs 6-21, (pages 4–9).

The question raised on the Appeals: Section 92, paragraphs 22-28, (pages 9-11).

The judgments on Section 92, paragraphs 29-40, (pages 11-15).

The Appellant's Contentions on Section 92, paragraphs 41-54, (pages 15-18).

Consideration of British and Australian cases on Section 92, paragraphs 55-63, (pages 18-22).

Criticism of the majority judgments on Section 92, paragraphs 64-67, (pages 22–24).

Discussion of points which may be raised by the Respondents, paragraphs 68-89, (pages 24–32).

(i) The question of the "banking" power, paragraphs 69-73, (pages 24–26).

(ii) The question of "implied State immunity", paragraphs 74-80, (pages 26–29).

(iii) The question of Section 105A of the Constitution, paragraphs 81-84, (pages 29–30).

(iv) The question of severability, paragraphs 85-89, (pages 31–32).

Conclusion, paragraph 90, (pages 32–33).

RECORD.

INTRODUCTION.

4. The Appellants are the defendants in five actions brought to test the constitutional validity of the Act. The plaintiffs in the first action and Respondents in the first appeal are banks incorporated in Australia and carrying on business in Australia whose names are set out in Part 1 of the First Schedule to the Act, and persons suing on behalf of the shareholders thereof, and in one case the Liquidator of the Bank. The plaintiffs in the second action and Respondents in the second appeal are banks incorporated in the United Kingdom and carrying on business in Australia whose names are set out in Part 2 of the First Schedule to the Act. The remaining plaintiffs and Respondents in the other appeals are three of the States and their Attorneys General.

5. Copies of the Constitution (63 and 64 Victoria c.12), the Commonwealth Bank Act 1945, the Banking Act 1945 and the Act (the Banking Act 1947) are lodged with this Case.

PRELIMINARY POINT.

6. The preliminary point reserved as above mentioned, if it be raised by the Respondents, turns on the construction of Section 74 of the Constitution which is as follows :—

> " 74. 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."

7. The Appellants submit that these appeals lie without a certificate of the High Court.

8. Section 46 of the Act, which comprises the whole of Part VII thereof, is as follows :—

> " 46. (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 fortyseven.

(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."

9. In order to ascertain whether Section 74 of the Constitution bars the present appeals in the absence of a certificate from the High Court, it is necessary to ascertain :

(i) what is the question upon which the High Court gave any decision against which the Appellants are seeking to appeal ; and

(ii) whether that question, thus decided, is a question as to the limits inter se of the Constitutional powers of the Commonwealth and those of any State or States.

10. In the High Court, the Respondents' attack on the validity of Section 46 of the Act included an attack on four distinct constitutional grounds, but the attack succeeded on one of these grounds only, namely, that the Section offended against Section 92 of the Constitution (set out in paragraph 22 below). Decisions of the Privy Council shew that this did not raise any question " as to the limits inter se of the Constitutional powers of the Commonwealth and those of any State or States " ; *James v. Cowan* (1932) A.C. 542, *James v. The Commonwealth* (1936) A.C. 578. The question concerned only the operation of a constitutional limitation affecting equally and without mutual demarcation the powers of both the Commonwealth and the States.

11. Of the four questions as to the validity of Section 46 of the Act referred to in the preceding paragraph, the following three were decided in the Appellants' favour :

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Vol. 3.
p. 29, l. 42—
p. 39, l. 45;
p. 108, l. 21—
p. 109, l. 14;
p. 129, l. 4—
p. 132, l. 27;
p. 171, l. 6—
p. 172, l. 13;
p. 77, l. 42;
p. 80, l. 8.

(i) The Respondents contended that Section 46 of the Act was not within the power to make laws granted to the Commonwealth Parliament. In the Appellants' submission the High Court (Latham C. J., Starke, Dixon and McTiernan JJ., Rich and Williams JJ. dissenting) rejected that contention of the Respondents and decided this question in the Appellants' favour, by deciding, either expressly or by necessary implication, that Section 46 was within the power granted to the Commonwealth Parliament by Section 51 (xiii) of the Constitution, which runs 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 :—
>
> .....
>
> (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: "

(ii) The Respondents contended that Section 46 might or would prejudicially affect the exercise by the States of their executive powers or functions by depriving them of the opportunity to bank with, consult or endeavour to obtain financial assistance from one or more of the existing private banks. The Respondents argued that thus Section 46 infringed an implied limitation upon the legislative powers of the Commonwealth granted by the Constitution. The High Court rejected this contention of the Respondents and decided the question in favour of the Appellants by the decision of four Judges (Latham C. J., Starke, Dixon and McTiernan JJ.) without dissent, Rich and Williams JJ. expressing no opinion on the point.

Vol. 3.
p. 66, l. 43—
p. 69, l. 17;
p. 125, ll. 27–40;
p. 132, l. 28—
p. 134, l. 36;
p. 175, ll. 1–8;
p. 95, ll. 22–24.

(iii) The Respondents also contended that the enactment of Section 46 was contrary to Section 105A of the Constitution (set out in paragraph 81 below) and the Financial Agreement of 1927 which was validated by a law made thereunder. The High Court (Latham C. J., Starke, Dixon and McTiernan JJ., Rich and Williams JJ. dissenting) rejected this contention of the Respondents and decided the question in the Appellants' favour.

Vol. 3.
p. 69, l. 18—
p. 70, l. 44;
p. 125, ll. 41–48;
p. 134, l. 37—
p. 135, l. 19;
p. 175, ll. 9–13;
p. 93, l. 10—
p. 95, l. 22.

12. As to the question of the " banking " power referred to in paragraph 11 (i) above, the Respondents may contend that the High Court did not reach any decision. As stated above, the Appellants maintain that an examination of the judgments reveals that this question was decided in favour of the Appellants. If the question had been left undecided, the Appellants would still not be appealing from any decision on this question. On no view can this question be said to have been decided adversely to the Appellants.

Vol. 3.
p. 29, l. 42—p. 39, l. 45; p. 108, l. 21—p. 109, l. 14; p. 129, l. 4—p. 132, l. 27; p. 171, l. 6—p. 172, l. 13; p. 77, l. 42—p. 80, l. 8.

13. The Orders which followed upon the reasons for judgment of the several Judges of the High Court, (the majority holding that the attack upon the validity of Section 46 of the Act succeeded on the ground of its infringement of Section 92 of the Constitution and failed upon all other grounds) were declarations, without reason specifically assigned, that Section 46 was invalid, together with consequential injunctions. Section 74 of the Constitution does not preclude an appeal unless the Respondents show that the Appellants are appealing, without a certificate, to His Majesty in Council against " a decision of the High Court upon a question as to the limits inter se . . ."

Vol. 3.
pp. 176–185.
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p. 59, l. 22—
p. 66, l. 42;
p. 95, l. 25—
p. 104, l. 41;
p. 111, l. 4—
p. 115, l. 25;
p. 124, l. 34—
p. 125, l. 10;
p. 161, l. 8—
p. 170, l. 24;
p. 175, ll. 14–45.

14. In the Appellants' submission the express terms of Section 74 require that attention be directed beyond the mere formal Order to the question upon which a decision has been made. The Section thus imports an examination of the Court's reasons for judgment as well as the formal Order, for the purpose of ascertaining the question or questions which the High Court decided in determining what formal Order or judgment was to be made. In many, if not in most, cases the Order itself may not show what question or questions have been decided.

15. Section 74 requires a certificate only for an appeal from a decision " upon " a certain type of question. The decision must specifically resolve the question raised. Necessarily also, if a certificate is required, the question thus resolved must be " as to " the limits inter se of constitutional powers. Accordingly it is erroneous to contend that Section 74 requires a certificate merely because some question as to " limits inter se " of constitutional powers has been debated in the course of the hearing in the High Court even though the decision upon that question was not the reason for making the order appealed against.

16. The Appellants submit that their reading of the Section and no other gives full effect to its express terms, and that their argument is supported by the views of four of the Judges of the High Court of Australia in the case of *Baxter v. The Commissioners of Taxation* (1907) 4 C.L.R. 1087, at pp. 1115-8 (Griffith C. J., Barton and O'Connor JJ.), 1148-51 (Isaacs J.).

17. The authoritative opinion of Quick and Garran in their " Annotated Constitution of Australia " at page 755 is as follows :—

> " 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 Section 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."

18. The construction of Section 74 upon which the Respondents rely for their contention that these appeals do not lie without a certificate from the High Court appears, in the Appellants' submission, to involve two distinct steps or propositions.

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The first step is that Section 74 should be construed as though some of the opening phrases were transposed, so that in effect the Section would read as follows :—

> " No appeal upon any question, howsoever arising, as to . . . limits inter se . . . shall be permitted to the Queen in Council from any decision of the High Court . . ."

The second step is that the preposition " upon " in the phrase " appeal upon any question " should be read in a broad sense as equivalent to "involving". The Appellants submit that both propositions are erroneous.

As to the first, the Appellants submit that it could not be made good without rewriting the Section so as to give it a substantially different meaning and effect. As enacted, the words " appeal from a decision of the High Court " are linked inseparably in structure and sense with the immediately succeeding words " upon any question as to . . . limits inter se ", so that it is for an appeal from "*a decision upon a question*" of a certain kind that a certificate is required. The plain language of the Section, it is submitted, cannot be dismembered, as the Respondents' first proposition requires, so as to dissociate " decision " from " question ".

Even as rearranged by the Respondents the Section still would not make a certificate necessary in the present cases, because in the ordinary natural meaning of the word " upon " the Appellants are not appealing " upon " any question as to limits inter se. In order to debar the Appellants from appealing in the present cases without a certificate from the High Court, the Respondents have to take the second step of interpreting the phrase " appeal upon any question as to . . . limits inter se " as meaning " appeal in any case which a question as to limits inter se has arisen or is involved ". Such an interpretation, in the Appellants' submission, cannot be reconciled with the express terms of Section 74, or be justified by any canon or principle of construction. This point is further considered in the next succeeding paragraph.

19. An alternative view has been submitted that the word " decision " in Section 74 refers to the formal order or judgment of the High Court and that in determining whether a certificate is required under Section 74 attention must be limited to the formal order against which the appeal is brought. In the present cases the formal orders, being without reasons assigned, do not disclose ex facie whether any question as to the limits inter se of constitutional powers was involved or not. It may be asserted, however, that such questions might conceivably have been involved in the orders, because the orders determined a matter of validity of legislation, and such a matter could possibly depend upon resolving a question as to the limits of constitutional powers inter se. If it be hypothetically conceded that the " decision " referred to in Section 74 is the formal order or judgment, the Appellants submit that the theoretical possibility of the order being based on some inter se point would not result in the order being a " decision upon " such a point. If the examination of the basis of the formal orders be excluded, then the orders cannot on their face be shown to be decisions upon inter se questions in the present cases. If attention be not confined to the formal orders, but examination be undertaken of the reasons upon which they are based, then again the orders cannot be shown to be decisions upon inter se questions in the present cases. The contention that reasons which were rejected by the Court and did not form the basis for the orders made can nevertheless give a character or quality to the formal orders themselves is, it is submitted, manifestly untenable.

Vol. 3. pp. 176–185.

20. Having regard to the terms of the special leave, it is assumed that the Respondents will seek to raise, as substantive points upon these appeals, the three questions decided in the Appellants' favour which are mentioned above in paragraph 11. These questions are, therefore, dealt with below, the first in paragraphs 69 to 73 ; the second in paragraphs 74 to 80 ; and the third in paragraphs 81 to 84.

21. The Appellants submit accordingly that the decision of the High Court from which they seek to appeal is not a decision upon any question as to the limits inter se of constitutional powers, and that Section 74 of the Constitution does not bar these appeals.

THE QUESTION RAISED ON THE APPEALS : SECTION 92.

22. Turning now to the decisions from which special leave to appeal has been granted, and assuming for this purpose that the preliminary point is, as it is submitted it should be, decided in the Appellants' favour, the only question raised by the Appellants' appeals is whether the provisions of Section 46 of the Act, set out in paragraph 8 above, offend against Section 92 of the Constitution, which is as follows :—

> " 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."

23. The effect of the Act on the private banks has to be considered in relation to the position of the Commonwealth Bank of Australia and in the light of other Commonwealth legislation. The Commonwealth Bank of Australia, which was established by the Commonwealth Bank Act 1911, was continued by the Commonwealth Bank Act 1945 (No. 13 of 1945). The Bank performs the function of a central bank, and also carries on an Australia-wide business as a general banker by means of very many branches throughout the Commonwealth of Australia. In addition, it has two branches in the United Kingdom. Moreover, the Commonwealth Bank from its establishment has acted as the banker for the Commonwealth Government and for many years has also acted as the banker of four out of the six State Governments in Australia, namely, Western Australia since 1914, Tasmania since 1914, South Australia since 1916 and Queensland since 1920. Further, by virtue of Sections 41 and 51 of the Commonwealth Bank Act 1945, it alone is authorised to issue paper money (" Australian notes ") in Australia.

24. Two years before the passing of the Act (the Banking Act 1947) there was enacted an earlier Act, the Banking Act 1945 (No. 14 of 1945), which contains or authorises various provisions governing banking in Australia, so far as it is carried on by private banks. The private banks did then, and still do, carry on the business of general bankers in Australia, and most of them have numerous branches in the various States of the Commonwealth. Their business includes all

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the general services and facilities furnished by bankers, other than the issue of bank notes, which is forbidden to them by Section 51 of the Commonwealth Bank Act 1945. The general banking business of the private banks (with the exception of the Ballarat Banking Company Ltd. and the Brisbane Permanent Building and Banking Company Ltd.) is Australia-wide and is conducted irrespective of State boundaries, and when the Respondent sought to make an analysis for the purpose of this case it appeared therefrom that banking transactions involving operations in more than one State were of the order of 10 to 15 per cent. of the total transactions of the private banks. By the Banking Act 1945, banking, other than State banking, is confined to corporations either named in the Schedule to the Act or subsequently licensed by the Governor-General. This Act also provides a statutory basis for some of the powers exercised by the Commonwealth Bank, as the central bank, in relation to the private banks. Such provisions regulate, for example, all foreign exchange operations; the investible assets of private banks (regulated through special accounts with the Commonwealth Bank); all buying, selling and transferring of gold; the detailed fixing of interest rates by private banks; and the general policy of such banks with regard to the making of advances.

25. The Act (the Banking Act 1947) does not apply to State banking. At present there are in Australia nine State banks, that is, banks established and controlled by a State or some State authority. The importance of these State banks appears from the description of their functions and activities in the affidavit of Leslie Galfreid Melville.

Vol. 2. pp. 192, l. 9—195, l. 19.

26. The Act, which was assented to on the 27th November 1947, sets out to provide alternative means whereby the business of general banking in Australia may, by an orderly process of transition, be confined to the long-established Commonwealth Bank of Australia (the history, character and existing functions of which are described above) together with State banks. The provisions of the Act directly relevant to these appeals, in addition to Section 46 which is quoted above in paragraph 8, and Section 6 which is quoted below in paragraph 88, are as follows:—

Part I.—Preliminary.

Section 3 provides—

"The several objects of this Act include—

. . . (c) the prohibition of the carrying on of banking business in Australia by private banks."

Section 7 provides that the Act shall not apply to State banking.

Section 11 imposes on the Commonwealth Bank a statutory duty to provide adequate banking facilities for any person or State requiring them, without improper discrimination, in accordance with established banking practice.

27. In each of the five actions involved in these appeals the Respondents as plaintiffs claimed against the Appellants as defendants substantially the same relief by way of declarations and injunctions, and therefore, by consent, Dixon J., on motions for interlocutory injunctions, ordered that the motions in all five actions should be heard together by the full Court and should be treated as the trials of the actions. The hearing of the motions took place before the full Court between February 9th and April 2nd, 1948, and from April 13th to 15th, 1948.

Vol. 1. pp. 9–12; 80–82; pp. 136–137; pp. 156–157; pp. 176–177. Vol. 1. p. 4, ll. 17–28. Vol. 2. p. 336, ll. 17–19; p. 343, ll. 10–12; p. 349, ll. 8–10; p. 355, ll. 2–4; p. 360, ll. 26–29.

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28. Considered judgments were delivered on August 11th, 1948. By a majority, the Judges declared that a number of the provisions of the Act was invalid, including Section 46, and in consequence it was ordered that the Appellants or one or other of them be restrained from taking action under Section 46(4). The declaration of invalidity of Section 46 and the consequential restraining Orders referring to Section 46(4) are alone the subject of these appeals.

Vol. 3. pp. 2–175. Vol. 3. p. 176, ll. 26–31; p. 178, ll. 25–27; p. 180, ll. 24–29; p. 182, ll. 24–29; p. 184, ll. 25–30. Vol. 3. p. 177, ll. 3–8; p. 178, ll. 39–44; p. 181, ll. 3–8; p. 183, ll. 3–8; p. 185, ll. 5–10.

THE JUDGMENTS ON SECTION 92.

29. The reasoning of the Judges dealing with the application of Section 92 of the Constitution to Section 46 of the Act may be summarised as follows :—

(i) Latham C. J. and McTiernan J. held that banking is not trade, commerce or intercourse and that accordingly Section 46 of the Act does not offend against Section 92 of the Constitution. It is submitted that the judgment of Latham C. J. (with which McTiernan J. agreed) necessarily implies also that in their opinion Section 46 does not offend against Section 92 even if banking be regarded as trade, commerce or intercourse.

Vol. 3. p. 59, l. 22—p. 66, l. 42; p. 175, ll. 14–45.

(ii) Rich, Starke, Dixon and Williams JJ. held that banking is trade and commerce within the meaning of Section 92 and that Section 46 of the Act offends against Section 92.

Vol. 3. p. 95, l. 25—p. 104, l. 41. Vol. 3. p. 111, l. 4—p. 115, l. 25; p. 124, l. 34—p. 125, l. 10. Vol. 3. p. 161, l. 8—p. 170, l. 23.

30. In dealing with the question whether banking is trade or commerce within the meaning of Section 92 of the Constitution, Latham C. J. (whose reasoning was adopted by McTiernan J.) said :

Vol. 3. p. 61, l. 35—p. 63, l. 21.

" The argument of the plaintiffs is that a banker buys and sells credit and that for this reason banking is trade and commerce. But a banker does not buy or sell credit in the same way as a trader buys or sells goods. When it is said that a banker deals in credit the fact is that he receives deposits which he engages to repay or that he lends or agrees to lend money. A loan transaction is a business transaction, but it is not therefore itself trade or commerce . . . The fact that a business is carried on for profit or that an occupation is pursued for profit does not show that it is trade or commerce . . .".

Vol. 3. p. 175, ll. 15–16. Vol. 3. p. 62, ll. 21–26. Vol. 3. p. 62, ll. 28–30.

" The trade and commerce to which sec. 92 relates is ' trade and commerce among the States, whether by means of internal carriage or ocean navigation ' . . . Interstate trade and commerce is concerned with movement of something from one State to another State. In the business of a bank there are no ' goods passing into or out of the State '—there is no passage across the border of anything—which, it was decided in *James v. The Commonwealth*, is what sec. 92 protects."

Vol. 3. p. 62, ll. 40–46.

" I notice, for the purpose of rejecting it, an argument for the plaintiffs that banking is interstate trade and commerce because interstate banking transactions involve large use of the postal and telegraph systems."

Vol. 3. p. 62, ll. 48–50.

Accordingly Latham C. J. concluded that " banking is not itself trade or commerce. It is an instrument used by trade and commerce."

Vol. 3. p. 66, ll. 37–38.

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31. On the question of the validity of Section 46 of the Act in relation to Section 92, Latham C. J. considered a proposition formulated by Counsel for the private banks, which the learned Chief Justice stated in the following terms :—

Vol. 3. p. 63, l. 22— p. 66, l. 42.

Vol. 3. p. 64, ll. 6–11.

> " Section 92 is infringed whenever an individual or corporation is engaged in interstate trade, commerce or intercourse and, either by a direction, prohibition or acquisition, with the object or purpose of effecting such a prohibition, the carrying on of such a business by him or it is forbidden."

For the private banks it has been explained that in order accurately to state this proposition the quotation above should be corrected by substituting the words " a direct prohibition " for " a direction, prohibition." In the Appellants' submission this alteration does not affect the substance of the matter. In either form, the essential element is the erroneous assertion that all legislation which forbids the carrying-on of a particular business involving interstate elements is necessarily in conflict with Section 92.

Vol. 3. p. 65, ll. 1–8.

32. Latham C. J. denied that a law controlling a business which was part of interstate trade and commerce would necessarily infringe Section 92, even though such a law might render impossible the carrying on of the business by the proprietor.

Vol. 3. p. 65, ll. 8–20.

He referred to the legislation recognized as valid in *James v. The Commonwealth*, (1936) A.C. 578, such as general price-fixing Acts, State marketing and transport regulations, health and sanitation laws, the Post and Telegraph Act, the Transport Workers Act and other Acts. He said :—

Vol. 3. p. 65, ll. 20–22, p. 65, ll. 24–26.

> " All of these statutes prevent some transactions taking place in interstate trade and commerce, or deprive them of effect if they do take place, and in some cases subject the participants to penalties . . . They are all either general Acts which apply to but have no differential reference to interstate transactions, or, if limited to such transactions, cannot be said to be ' directed against ' them."

Vol. 3. p. 65, ll. 33–35.

He then emphasised that the Act is not directed against interstate banking but is a general law dealing with financial business as carried on by bankers.

Vol. 3. p. 65, ll. 36–42.

33. The Chief Justice pointed out that a decision invalidating the Act on the ground that it prevents one or more or all of the private banks from carrying on banking business would necessarily require the over-ruling of several decisions of the Court, which held to be valid statutes that either restricted or eliminated the interstate business of particular persons. (The statutes concerned included those regulating interstate transportation, trade in dried fruits, coupon trading, the sale of milk, and the merchandising of apples and pears throughout the Commonwealth).

Vol. 3. p. 65, ll. 44–51.

He cited the following cases (the issues in which are briefly explained in paragraphs 57, 59, 60, and 63 below) :—

Willard v. Rawson (1933) 48 C.L.R. 316 ; *The King v. Vizzard* (1933) 50 C.L.R. 30 ; *O. Gilpin Ltd. v. Commissioner of Road Transport & Tramways* (1935) 52 C.L.R. 189 ; *Riverina Transport Co. v. The State of Victoria* (1937) 57 C.L.R. 327 ; *Hartley v. Walsh* (1937) 57 C.L.R. 372 ; *Home Benefits Pty. Ltd. v. Crafter* (1939) 61 C.L.R. 701 ; *Milk Board (N.S.W.) v. Metropolitan Cream Pty. Ltd.* (1939) 62 C.L.R. 116 ; *Andrews v. Howell* (1941) 65 C.L.R. 255 ; and added :—

Vol. 3. p. 66, ll. 1-4.

> " In my opinion all these cases would have to be over-ruled if the contention of the plaintiffs that sec. 92 prohibited interference by law with a

business which contained interstate elements, or which was an instrument used in interstate trade and commerce, were accepted."

34. The Chief Justice concluded :— Vol. 3. p. 66, ll. 36–42.

" For these reasons I am of opinion that the provisions of the Banking Act 1947, do not infringe sec. 92 of the Commonwealth Constitution. In my opinion banking is not itself trade or commerce. It is an instrument used by trade and commerce. The legislative control introduced by the Act is a control which is not directed against any interstate element in banking. It is a general provision for the control of banking and is as valid as a general money-lending law. In my opinion the objections based on sec. 92 fail."

35. The Appellants contend that the judgment of Latham C. J. (with which McTiernan J. agreed) necessarily implies that Section 46 would not infringe Section 92 even if banking were regarded as " trade, commerce and intercourse." The Chief Justice commenced by emphasising the generality of the law and the absence of any reference to interstate transactions. He then examined a proposition, the essential element of which is the reference to the forbidding of the carrying on of a business. In the light of these preliminary considerations, the subsequent reference to laws and decisions which relate to trade and commerce themselves or persons engaged therein, as distinct from aids or instruments of trade and commerce, would have been quite irrelevant unless the Chief Justice had intended the principles he was enunciating to apply just as much to trade, commerce and intercourse themselves as to aids or instruments thereof. The above laws and decisions were the State marketing regulations ; *Hartley v. Walsh* (1937) 57 C.L.R. 372 ; *Home Benefits Pty. Ltd. v. Crafter* (1939) 61 C.L.R. 701 ; *Milk Board (N.S.W.) v. Metropolitan Cream Pty. Ltd.* (1939) 62 C.L.R. 116 ; *Andrews v. Howell* (1941) 65 C.L.R. 255.

Vol. 3. p. 175, ll. 15–16.
Vol. 3. p. 63, ll. 40–43.
Vol. 3. p. 64, ll. 6–11.
Vol. 3. p. 65, ll. 3–20, and ll. 36–51.
Vol. 3. p. 65, ll. 11–12 ; p. 65, ll. 1–16 ; p. 65, ll. 44–51.

Support for the Appellants' contention is also found in the Chief Justice's opinion that the above cases would have to be over-ruled, because he related his opinion to interference by law not only with a business " which was an instrument used in interstate trade and commerce " but also with a business " which contained interstate elements." In general, it is submitted that the Chief Justice's opinion that banking is not itself trade or commerce was a separate part of his reasoning.

Vol. 3. p. 66, ll. 1–4.

36. Rich, Starke, Dixon and Williams JJ. all decided that the business of banking, in so far as it consists of interstate transactions, itself constitutes part of trade, commerce and intercourse among the States. They rejected the view that banking is merely an aid or instrument of trade, commerce and intercourse. They also rejected the further view that Section 92 is confined in its operation to the movement of goods and persons and does not extend to intangibles. In consequence they did not agree that the presence of the words " whether by means of internal carriage or ocean navigation " in Section 92 points to a construction excluding activities such as banking from the operation of Section 92.

Vol. 3. p. 96, l. 13— p. 100, l. 35 ; p. 111, l. 24— p. 113, l. 56 ; p. 124, ll. 39–42 ; p. 162, l. 45— p. 165, l. 32.

37. On the question of the application of Section 92 of the Constitution to Section 46 of the Act, Rich and Williams JJ., in a joint judgment, said :—" We adhere to the opinion . . . . that the freedom guaranteed by sec. 92 is a personal right attaching to the individual." They further decided that " legislation

Vol. 3. p. 95, ll. 27–30.
Vol. 3. p. 100, ll. 44–47.

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Commonwealth or State infringes sec. 92 where it operates directly and not merely incidentally to burden, hinder or prevent persons or corporations engaging wholly or partially in trade or commerce across State boundaries." By way of illustrating and applying this view they said :—

Vol. 3. p. 101, ll. 37-40.

> " It seems to us that the prohibition of the interstate business would only be an incidental consequence of the total prohibition if, as the defendants contend, sec. 92 does not confer a personal right on individuals to engage in trade and commerce among the States."

Vol. 3. p. 103, l. 33— p. 104, l. 34.

Referring to the case of *Australian National Airways Pty. Ltd. v. The Commonwealth* (1945) 71 C.L.R. 29 (which is discussed later, in paragraph 61) and to the instant cases they said :—

Vol. 3. p. 104, ll. 19-21.

> " But the intention in each case is to create a monopoly, in the earlier case in interstate trade, and in the present case in both intrastate and interstate trade, and sec. 92 is, for the reasons already given, infringed in each case."

38. Rich and Williams JJ. did not discuss the decisions of the High Court on Section 92 following and applying *James v. The Commonwealth* and in consequence expressed no opinion as to whether they are correct or not.

Vol. 3. p. 114, ll. 21-30.

39. Starke J., in his judgment on this point, said :—

> " In *O. Gilpin Ltd. v. Commissioner for Road Transport & Tramways (N.S.W.)* 52 C.L.R. 189, Dixon J. examined many cases decided in this Court and summed up his own opinion in the following proposition : ' But given an act or transaction which falls within the conception of trade, commerce or intercourse among the States, and a restriction or burden operating upon that act or transaction, it appears to me that it must be an infringement upon the absolute freedom guaranteed by sec. 92 unless the restriction or burden is imposed in virtue of or in reference to none of the essential qualities which are connoted by the description ' trade, commerce, and intercourse among the States.' ' "

Vol. 3. p. 114, l. 40— p. 115, l. 2.

Starke J. continued later :—

> " That proposition of my brother Dixon runs counter, I believe, to several decisions of this Court, notably, *Ex parte Nelson No.* (1) 42 C.L.R. 209, and what are known as the transport cases* . . . *Hartley v. Walsh*, 57 C.L.R. 372, and the *Milk Board* case, 62 C.L.R. 116.** And it is opposed to the generalisation which is, I think, the prevailing view in this Court that the legislation must be scrutinised in its entirety and its real object, true character and real effect—its pith and substance—in the particular instance under discussion must be determined (*James v. Cowan ; Peanut Board v. Rockhampton Harbour Board ; Milk Board* case)."

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*The " transport cases " were *Rex v. Vizzard Ex parte Hill*, (1933) 50 C.L.R. 30 ; *O. Gilpin Ltd. v. Commissioner of Road Transport*, (1935) 52 C.L.R. 189 ; *Bessell v. Dayman*, (1935) 52 C.L.R. 215 ; *Duncan and Green Star Trading Co. Pty. Ltd. v. Vizzard* (1935) 53 C.L.R. 493 ; *Riverina Transport Pty. Ltd. v. Victoria* (1937) 57 C.L.R. 327.

**See paragraph 57 below.

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Later in his judgment Starke J. said :—

" I think the Transport cases were wrongly decided." Vol. 3. p. 115, ll. 21-22.

Starke J. also said :— Vol. 3. p. 124, l. 47— p. 125, l. 5.

" ' The object of Sec. 92 is,' as I said in the case of *Australian National Airways Pty. Ltd. v. The Commonwealth* † . . . ' to maintain freedom of interstate competition—the open and not the closed door—absolute freedom of interstate trade and commerce.' In my opinion the Banking Act of 1947 closes that door and excludes the banks from the business of interstate banking in Australia."

10 40. The view of Dixon J. as to the effect of Section 92 upon a law of the class involved in the instant cases is disclosed in the following general statement in his judgment :—

" But once it appears that trade, commerce and intercourse among the States is a concept within which fall interstate transactions in the common course of banking, then the intention of the legislation to prohibit a portion of interstate commerce, unless carried on by government agency, becomes undeniable, and surely such an intention is hostile to interstate commerce, that is unless the fact that it may still be carried on by or under government saves its freedom." Vol. 3. p. 168, ll. 13-18.

20 Dixon J. did not specifically mention the important decisions of the High Court on Section 92 following *James v. The Commonwealth* which are approved and followed by Latham C. J. and McTiernan J., as stated in paragraph 33 above.

THE APPELLANTS' CONTENTIONS ON SECTION 92.

41. Turning now to the contentions of the Appellants, they may be stated in outline thus :—

(1) Section 92 has no relevance whatever to such a law as is contained in Section 46, i.e., a law which regulates the business of banking in Australia by selecting, or empowering the selection by the Treasurer of, those who may and those who may not engage in the business of banking in Australia.

30 (2) whether or not banking is trade, commerce or intercourse within the meaning of Section 92, Section 46 of the Act does not interfere with the freedom guaranteed by Section 92.

(3) in any case banking is not trade, commerce or intercourse, and for this further reason Section 46 of the Act does not offend against Section 92.

42. In order to interpret Section 92, the Appellants submit that it is of advantage to remember its historical background. Before the Australian Constitution came into force, and turned the then existing colonies into States of the new Commonwealth, there existed certain tariff barriers between these colonies. One of the main objects of federation was to remove these barriers to intercolonial 40 free trade by the creation of one system of customs duties under the exclusive power of the new Commonwealth Parliament, which should operate at the boundaries of the Commonwealth and be uniform for the Commonwealth.

†(1945) 71 C.L.R. 29. See paragraph 61 below.

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43. This historical context, the position of the Section in the Constitution, and its co-existence with provisions conferring legislative powers upon the Commonwealth Parliament, all have a bearing on the true interpretation of that Section, and were briefly referred to in *James v. The Commonwealth* (1936) A.C. 578.

44. The Appellants submit that the wording of Section 92 reflects its origin and true purpose. The expression used is " among the States " and not such a phrase as " throughout the Commonwealth." This points to the State frontier as the point in relation to which trade, commerce and intercourse were to be free, once the powers of the colonies to impose separate customs duties were abolished. Subject to trade, commerce and intercourse enjoying " freedom as at the frontier " (per Lord Wright in *James v. The Commonwealth* (1936) A.C. 578, at p. 630) the Commonwealth Parliament was to have plenary power under Section 51 of the constitution to make laws with respect, *inter alia*, to trade and commerce . . . . among the States, to banking and insurance (with express exceptions), to posts and telegraphs.

45. With respect to the setting of Section 92, it will be seen that it is part of a chapter in the Constitution entitled " Finance and Trade." Sections 81 to 85 of this chapter deal with aspects of public finance. Sections 86 to 95 deal with various aspects of the imposition of duties of customs and excise and the grant of bounties, all of which are levies or grants in respect of goods and have no relation to services such as banking.

46. Further, it should be noted that the full expression occurring in Section 92 is " trade, commerce and intercourse among the States, whether by means of internal carriage or ocean navigation." The use of the qualifying phrase " whether by means of internal carriage or ocean navigation " is significant as emphasising, first, that the interstate activity in contemplation is that which is conducted by the medium or instrumentality of physical passage or transport of goods across a State frontier, and second, that the protection given to the interstate activity is not given to the medium of physical transport by which it is conducted. Lord Wright in *James v. The Commonwealth* (1936) A.C. at p. 630, refers to the Section as guaranteeing " freedom . . . in respect of goods passing into and out of the State." The collocation in which the expression " trade and commerce " occurs in the Constitution itself gives further emphasis to the contrast between the terms " trade " and " finance " as generally employed.

47. The Appellants contend that Section 46 of the Act, whilst relating to the whole business of banking carried on by each private banking company, including as incidents of such business those of its transactions which have interstate elements, does not interfere with the concept of freedom of " trade, commerce and intercourse among the States." The purpose and effect of Section 46 are to provide a means whereby the Treasurer may, by an orderly process of transition, terminate the right of specified private banks to conduct general banking business in Australia. Its terms are general and contain no reference to any inter-state aspect of banking.

Accordingly, it is submitted that there is no interference with freedom as at the State frontiers, and that the Act is not directed against interstate trade. Any impact on interstate transactions is incidental.

If the provisions of Sections 3, 7, 11 and 46 of the Act be considered as a whole, they will be seen to aim at the regulation and organisation of a public

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utility, namely, the service or system of banking. Financial control in general and banking in particular are matters of fundamental importance in a modern community. The selection by Parliament of the person or persons who shall conduct these fundamentally important matters (and the rejection of those who may not) does not in any way interfere with the freedom of interstate trade and commerce. In particular, Section 92 has no relation of any kind to the political contention or theory that government or semi-governmental authorities should not be preferred to private corporations in the choice of those who are to conduct banking business. In the Appellants' submission the emphasis of Dixon J. to the contrary is clearly erroneous. Vol. 3. p. 162, l. 28— p. 169, l. 38.

48. As applied to the Parliament's power under Section 51 (xiii) of the Constitution to make laws with respect to banking, the majority view of the High Court on Section 92 produces anomalous and even absurd results. The majority of the Judges held that Section 92 prohibits Parliament from confining to publicly-owned banks the right to carry on banking business but only so far as such business consists of interstate transactions. But clearly the business of banking in so far as it consists of wholly intrastate operations can derive no such immunity from Section 92 and could, therefore, be confined to publicly-owned banks if Parliament thought fit. (The High Court held that Section 46 was not in fact so expressed as to have this effect, but that is for present purposes immaterial). The power conferred by Section 51 (xiii) is (except in relation to State banks), a power to make laws for the peace, order and good government of Australia with respect to the whole subject-matter of banking in Australia, irrespective altogether of any question of State boundaries. But the view of the majority of the Judges gives the extraordinary result that, whereas Parliament has a discretion unfettered by Section 92 in the choice of persons to conduct banking business so long as any such business is conducted within the boundaries of each one of the six several States of Australia, Section 92 destroys the discretion of the national Parliament solely in relation to that small part (about 10 to 15 per cent) of credit and cash transactions which involves interstate elements. Moreover it is in respect of these very interstate transactions that the Australia-wide character of banking is most clearly disclosed. These considerations, in the submission of the Appellants, reinforce their contention that Section 92 has no operation at all in relation to Section 46 of the Act, which deals with the business of banking on an Australia-wide basis and without any regard to or relevance to State boundaries.

Vol. 3. p. 100, l. 18— p. 101, l. 20; p. 124, l. 15— p. 125, l. 10; p. 165, ll. 30–40.

Vol. 3. p. 101, ll. 11–19; p. 124, ll. 39–44; p. 165, ll. 35–37.

49. For these reasons, it is submitted not only that Latham C. J. and McTiernan J. were right in their conclusion that Section 46 does not offend against Section 92 of the Constitution, and that the Judges who took the contrary view were wrong, but also that legislation such as Section 46 cannot be regarded as having any relevance to the command contained in Section 92.

Vol. 3. p. 59, l. 22— p. 66, l. 42; p. 175, ll. 14-45.

50. On the Appellants' further contention, that banking is not trade, commerce or intercourse, but is merely an aid thereto, the Appellants submit that, in the light of modern business experience and community activity, banking is properly described as " finance," by way of contrast not only with " industry " and " manufacture " but also with " trade and commerce." " Finance," in this sense, is an aid or instrument not only for all these economic activities, but also for many non-economic activities in the community.

51. From the point of view of national economy, the prime function of modern banking is to provide, expand, reduce and generally manage the purchasing

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medium (money) of the community. Money is an essential means or instrument used in practically every activity of the life of the community, and is in that aspect an instrument of trade and commerce. The relatively simple acts of receiving deposits and making loans and facilitating payments, even if they were thought to approach more nearly to " trade and commerce," tend to conceal the essential role of banks as creators and guardians of the purchasing medium. The classic modern discussion of the place of banking in the life of the community is to be found in the Report of the Committee on Finance and Industry (1931) Cmd. 3897 (The Macmillan Committee) relevant extracts from which are set out in the Record of Proceedings in the High Court.

Vol. 2. pp. 231–261.

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52. The expression " intercourse " also occurs in Section 92. " Intercourse " refers to the movements of persons from State to State, and possibly to interstate communications. Banking, it is submitted, is not itself intercourse any more than it is trade or commerce. Bankers, of course, use methods of communication such as posts and telegraphs, which themselves are a Government monopoly not in any way infringing Section 92 of the Constitution (*James v. The Commonwealth* (1936) A.C. 578 at pp. 625–26). Assuming these communications to constitute " intercourse," they are means of communication available to bankers and the public alike.

Vol. 3. p. 61, l. 35— p. 63, l. 21 ; p. 175, ll. 29–40.

53. For these reasons, it is submitted that Latham C. J. and McTiernan J. were right in holding that banking is not trade, commerce or intercourse and that the majority of the Judges, who held that it was, were wrong.

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54. It is to be observed that if banking is not trade, commerce or intercourse, then the limitation of banking to publicly owned banks cannot possibly be regarded as infringing Section 92.

CONSIDERATION OF BRITISH AND AUSTRALIAN CASES ON SECTION 92.

55. It is submitted that the decisions of the Judicial Committee and the High Court strongly support the Appellants' contentions. These authorities are summarised and discussed under certain general descriptions or headings in the following paragraphs.

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56. When laws are directed against or aimed against interstate trade and commerce they have been held to infringe Section 92. In *James v. The Commonwealth* the expression used by Lord Wright was ; " directed wholly or partially against inter-State trade in goods " (1936) A.C. at p. 630. Illustrations will be found in :—

James v. Cowan (1932) A.C. 542 :

(A South Australian marketing statute authorised the compulsory acquisition of all dried fruit in South Australia. The acquisition provisions were used as a means of enforcing a quota system limiting the quantities of dried fruits which could be sold on the Australian market. The powers under the Act were used " to force the surplus fruit off the Australian market " (at p. 557) and it was held that Section 92 was infringed, because " the direct object of the exercise of the powers was to interfere with inter-State trade " (at p. 559)).

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James v. The Commonwealth (1936) A.C. 578 :

(A Commonwealth statute prohibited the delivery of dried fruits interstate except by licence, compliance with an export quota being made a condition of licence. Thus the law was in principle covered by *James v. Cowan*, the law being directed against interstate sales of dried fruits and held to infringe Section 92).

Gratwick v. Johnson (1945) 70 C.L.R. 1 :

(The High Court held that Section 92 was infringed by a Commonwealth law which prohibited the interstate movement of persons except at the absolute discretion of a Director-General of Land Transport ; the law was held to be directed against interstate intercourse).

57. On the other hand, laws which affect interstate trade or commerce only incidentally have been held to be outside the operation of the Section. The incidental impact is often revealed by analysis of the nature, or the real object, of the law impugned.

The idea that examination of the nature of the law may reveal that its impact on interstate trade is only incidental and so not an interference with the freedom guaranteed by Section 92 was expressed as follows by Lord Atkin in *James v. Cowan* (1932) A.C. at p. 558 :

> " 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 same idea was crystallised in Lord Wright's definition of the freedom guaranteed by Section 92 as " freedom as at the frontier or .... in respect of goods passing into or out of the State."

Illustrations may be found in :—

Willard v. Rawson (1933) 48 C.L.R. 316 :

(It was held that Section 92 was not infringed by a Victorian statute, which required owners to register and pay prescribed fees in relation to all motor vehicles (including therein, although no specific reference was made thereto, vehicles operating exclusively in carrying goods from one State into another)).

Hartley v. Walsh (1937) 57 C.L.R. 372 :

(A Victorian law which prohibited the sale of dried fruit unless packed and processed in a registered packing shed was held not to offend against Section 92).

The King v. Connare ex Parte Wawn (1939) 61 C.L.R. 596 :

The King v. Martin ex Parte Wawn (1939) 62 C.L.R. 457 :

(In these cases, known as the Lotteries Cases, the High Court held that Section 92 was not infringed by a New South Wales statute which penalised the sale in New South Wales of tickets in a foreign lottery, including therein a lottery conducted in another State even though the condition of sale required the sending of money interstate).

Home Benefits Pty. Ltd. v. Crafter (1939) 61 C.L.R. 701 :

(The High Court held valid a South Australian statute which prohibited the trading of goods in exchange for coupons although the trading was of an interstate character).

Milk Board (N.S.W.) v. Metropolitan Cream Pty. Ltd. (1939) 62 C.L.R. 116 :

(A New South Wales statute created a government Milk Board in which was compulsorily vested all milk and cream in the Sydney Metropolitan area including cream which had come from Victoria. It was held that Section 92 was not infringed).

Andrews v. Howell (1941) 65 C.L.R. 255 :

(The High Court held that Section 92 was not infringed by a Commonwealth regulation made in time of war which provided for a marketing scheme for apples and pears, the method adopted being the compulsory acquisition of all apples and pears and the establishment of a government Marketing Board which had the exclusive right of commerce in all apples and pears. The regulation applied to all apples and pears, whether the subject of interstate trade or not).

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58. A very different view, namely, that any law regulating or controlling acts in the course of interstate trade will infringe Section 92, was adopted by the High Court of Australia in *McArthur v. Queensland* (1920) 28 C.L.R. 530, where a Queensland Profiteering Prevention Act which fixed a maximum price at which certain goods could be sold was held to infringe Section 92 in so far as it related to certain interstate sales. This view was rejected in the decision in *James v. The Commonwealth* (1936) A.C. 578.

59. The view that any law regulating or controlling acts in the course of interstate trade will infringe Section 92 found expression again in one aspect of the decision in *Peanut Board v. Rockhampton Harbour Board* (1933) 48 C.L.R. 266 (where a marketing scheme by compulsory acquisition was held to infringe Section 92), but in this aspect the decision had no approval in the judgment of the Judicial Committee in *James v. The Commonwealth* (1936) A.C. 578. On the other hand, the view that business transactions or activities achieve immunity from Commonwealth or State legislative authority if the transactions are interstate is inconsistent with the reasons of the High Court in :—

Rex v. Vizzard, Ex Parte Hill (1933) 50 C.L.R. 30 ; *O. Gilpin Ltd., v. Commissioner for Road Transport N.S.W.* (1935) 52 C.L.R. 189 ; and *Duncan & Green Star Trading Co. v. Vizzard* (1935) 53 C.L.R. 493.

In these cases, which are some of those known as the " transport cases," the High Court held that Section 92 was not infringed by a New South Wales statute (the terms of which were completely general and covered both interstate and intrastate activities) which

(*a*) prohibited certain road transport operations unless the operator obtained a licence from an established authority with discretionary licensing powers, (the two *Vizzard* cases) ;

(*b*) required the payment of a tax based upon mileage and tonnage for road transport operations beyond certain distances (*Gilpin's* case).

The first two of these cases were approved by the Judicial Committee in *James v. The Commonwealth* (1936) A.C. at pp. 621-2.

60. Subsequently, in applying the principles laid down in the decision of the Judicial Committee, the High Court impliedly but consistently and repeatedly denied, in the case of laws not directed against interstate trade, and having a real object concerned with other matters, that complete immunity from regulatory legislation could be claimed for businesses trading interstate. This is illustrated in the following cases :—

Hartley v. Walsh (1937) 57 C.L.R. 372 ;

The King v. Connare ex Parte Wawn (1939) 61 C.L.R. 596 ;

The King v. Martin ex Parte Wawn (1939) 62 C.L.R. 457 ;

Home Benefits Pty. Ltd. v. Crafter (1939) 61 C.L.R. 701 ;

Milk Board (N.S.W.) v. Metropolitan Cream Pty. Ltd. (1939) 62 C.L.R. 116 ;

Andrews v. Howell (1941) 65 C.L.R. 255.

(See paragraph 57.)

Thus the principle established prior to the case of *James v. The Commonwealth* was reaffirmed subsequently by the High Court on the basis of that decision.

61. A new trend, however, appeared in the case of *Australian National Airways Pty. Ltd. v. The Commonwealth* (1945) 71 C.L.R. 29, where the High Court considered the validity of a Commonwealth statute establishing nationally owned and operated airline services which, when they became adequate, were to supersede operations by private interstate airline companies.

Despite the cases in which the High Court had followed the principles of the decision in *James v. The Commonwealth*, the contention of the private airline companies that, by reason of Section 92, their interstate business could not be terminated was upheld by certain members of the High Court. The constitutional guarantee contained in Section 92 thus appeared to be changing from a provision designed to eliminate frontier restrictions into a provision involving far-reaching limitations upon the powers and capacities of all the Parliaments and people of Australia to license, control and regulate the conduct of business pursuits. However, the full implications of the decision in *Australian National Airways Pty. Ltd. v. The Commonwealth* (1945) 71 C.L.R. 29 were not at once fully revealed, largely because the actual subject matter of the legislation there impugned was not commercial air transportation generally, but specifically interstate commercial air transportation and, in the view of some of the Judges, the law in question was in fact directed against or aimed at interstate trade. If necessary, the Appellants will submit that this case, *Australian National Airways Pty. Ltd. v. The Commonwealth*, was wrongly decided by the High Court.

62. It is submitted that the conclusions of Latham C. J. and McTiernan J. on the application of Section 92 to Section 46 of the Act :—

(i) give effect to the definitive exposition of the meaning and operation of Section 92 contained in the decisions of the Judicial Committee in the cases of *James v. Cowan* (1932) A.C. 542, and *James v. The Commonwealth* (1936) A.C. 578;

(ii) are consistent with and supported by those decisions of the High Court, interpreting Section 92, which had the approval of the Judicial Committee as disclosed in the reasons for the decisions in the two cases above mentioned ; and

(iii) are consistent with and supported by those decisions of the High Court, interpreting Section 92, delivered after the case of *James v. The Commonwealth* up to the year 1945, which decisions applied the principles expounded by the Judicial Committee.

63. It is further submitted that the operation given by Rich, Starke, Dixon and Williams JJ. to Section 92 is wrong and contrary to the decisions of the Judicial Committee and of the High Court, referred to above. Rich, Starke and Williams JJ. cited with either express or tacit approval the reasoning in the dissenting judgment of Dixon J. in the case of *O. Gilpin Ltd. v. Commissioner of Road Transport and Tramways* (1935) 52 C.L.R. 189. This dissenting judgment, it is submitted, was inconsistent with the decisions in the other transport cases, including the case of *R. v. Vizzard Ex parte Hill* (1933) 50 C.L.R. 30, which was approved by the Judicial Committee in *James v. The Commonwealth*. An essential part of the reasoning of Dixon J. in his dissenting judgment in Gilpin's case is contained in the following sentence from that judgment :

Vol. 3. p. 95, ll. 45–50; p. 114, l. 21— p. 115, l. 25.

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" ' Free ' must at least mean free of a restriction or burden placed upon an act because it is commerce, or trade, or intercourse, or because it involves movement into or out of the State."

This view is even more restrictive, it is submitted, than the view as to the operation of Section 92 stated by the High Court in *W. & A. McArthur Ltd. v. State of Queensland* (1920) 28 C.L.R. 530, which is referred to in paragraph 58 above. This dissenting view of Dixon J. was canvassed in argument before the Judicial Committee in the case of *James v. The Commonwealth*. It is submitted that the view embodied in the decision of the Judicial Committee in that case is in opposition to the interpretation of Section 92 expressed by the High Court in *McArthur's* case and *a fortiori* to the view expressed by Dixon J. in his dissenting judgment in *Gilpin's* case. Shortly after *James v. The Commonwealth*, in *Riverina Transport Pty. Ltd. v. Victoria* (1937) 57 C.L.R. 327, the Court, of which Dixon J. was a member, in following *James v. The Commonwealth*, unanimously gave effect to the view which had prevailed in *Vizzard's* case. However, in the present cases neither Rich and Williams JJ. nor Dixon J. dealt with any of the High Court cases subsequent to the decision in *James v. The Commonwealth* in which the immunity of business from control by law had been impliedly rejected. In the opinion of Latham C. J., and in the Appellants' submission, the view of the majority of the Court is inconsistent with all of those cases. Starke J. expressly stated : " I think the Transport cases were wrongly decided."

Vol. 3. p. 95, l. 25— p. 104, l. 41 ; p. 162, l. 28— p. 170, l. 24 ; Vol. 3. p. 65, l. 36— p. 66, l. 4.

CRITICISM OF THE MAJORITY JUDGMENTS ON SECTION 92.

64. The views of the majority of the Judges in the judgments under consideration, that Section 92 prevents legislatures from determining by whom certain businesses may lawfully be conducted, are, it is respectfully contended, quite inconsistent with the decisions of the Judicial Committee and of the High Court. Similarly, it is contended that the view of Starke J. that Section 92 guarantees a policy of freedom of competition, or in other words *laissez faire* in interstate trade, is contrary to the test laid down by the Judicial Committee in *James v. The Commonwealth*. Further and in particular, it is contended that Dixon J. was in error in insisting that a law which selects a governmental agency in preference to private concerns in the conduct of a service or business with interstate elements is necessarily invalidated by Section 92.

Vol. 3. p. 115, ll. 21–22. Vol. 3. p. 95, l. 27— p. 96, l. 12 ; p. 100, l. 48— p. 104, l. 34 ; p. 113, l. 47— p. 115, l. 25 ; p. 124, l. 42— p. 125, l. 10 ; p. 168, l. 13— p. 169, l. 14. Vol. 3. p. 124, l. 27— p. 125, l. 3. Vol. 3. p. 168, ll. 19–25.

65. As shown in the two preceding paragraphs, a wider principle even than that which was previously rejected by *James v. The Commonwealth* seems now to be declared in the judgments of the majority of the Judges appealed from. This principle is that, if once it be established that an individual or corporation is carrying on (or may in the future seek to carry on) a business involving partly or wholly interstate transactions, then the interstate elements in that business would obtain immunity from restriction, control or regulation by any law whether of a State or of the Commonwealth (whatever the real nature or object of the law).

Vol. 3. p. 64, ll. 8–11.

66. For instance, it appears inescapable that the general principle involved in the majority decisions puts substantial provisions of the Banking Act 1945 in grave danger of being held invalid by the High Court. The Banking Act 1945 contains various provisions for the regulation and control of banks in Australia. Sections 6 and 7 prohibit all individual persons from carrying on banking and limit banking by corporations to such corporations as are licensed by the Governor-General. Sections 16 to 22 require each private bank to lodge in a Special Account with the Commonwealth Bank funds determined from time to time by the Common-

wealth Bank but not exceeding the total lodged by that private bank under war conditions, (representing surplus investible assets) plus any increase in the bank's assets. The private bank may not withdraw any sum from the Special Account without the consent of the Commonwealth Bank. Section 27 also requires each private bank to follow the policy determined by the Commonwealth Bank in relation to advances to be made by it and to comply with any directions by it in relation thereto. Section 39 empowers the Commonwealth Bank to fix rates of interest to be charged by the private banks and requires them to comply with such fixation.

These provisions are all designed for the protection of the public interest and are also vital to the effective control of the banking system in Australia by the central bank or the Governor-General as the case may be. But each provision applies to banking business with interstate as well as intrastate activities. If Section 92 is to be given the operation which the majority of the High Court has determined, it is submitted that all the above mentioned provisions of the Banking Act 1945 are liable to be invalidated under Section 92. As McTiernan J. stated in his judgment :- Vol. 3. p. 175, ll. 31-33.

" If the Banking Act violates sec. 92, it is difficult to see how, for example, sec. 6 or sec. 7 of the Banking Act 1945 could survive an attack on the ground that it violates sec. 92."

If this submission is well founded, the legislatures of the States in Australia would likewise be unable to pass similar legislation, because Section 92 applies equally to them. Grave consequences to the people of Australia might result if the banks were free of central bank control, not only under normal conditions but in times of national crisis, whether caused by war, economic disruption or otherwise. It has to be remembered that not only the banking power of Parliament (Section 51 (xiii)) but also the defence power in Section 51 (vi) is subject to Section 92.

67. Therefore the interpretation given by the majority of the Judges to Section 92 threatens in whole or in part not only the validity of the Banking Act 1945, but also, it is submitted, that of a number of important Commonwealth and State statutes and statutory regulations, and might put the subject matters thereof beyond all legislative control in Australia. Examples of such statutes and regulations are set out by Latham C. J. in his judgment, and further examples are provided in the following statutes and regulations :— Vol. 3. p. 65, ll. 8-20.

Commonwealth.

Navigation Act 1912—1942, Section 288 :

(Provisions for the licensing of ships engaged in the coasting trade).

Marketing Regulations made under the National Security Act and other Acts :

(Marketing regulations providing for the marketing of various products, the schemes being similar to that held valid in *Andrews v. Howell* (1941) 65 C.L.R. 255, referred to in paragraph 57).

New South Wales.

Business Agents Act 1935, Sections 4, 7 (3) and (8) and 14 (3) :

(Provisions for licensing business agents comparable with the provisions held valid in *Roughley v. New South Wales* (1928) 42 C.L.R. 162).

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Victoria.

Farm Produce Agents Act 1928, Sections 6 and 7 (as amended by the Farm Produce Agents Act 1933, Section 3, and the Farm Produce Agents Act 1939, Section 2) :

(Provisions for discretionary licensing of farm produce agents comparable with the provisions held valid in *Roughley v. N.S.W.* (1928) 42 C.L.R. 162).

Milk and Dairy Supervision Act, Sections 47 and 48 (1928 Act as amended by Acts numbered 3943, 4183, 4276 and 4997) :

(Provisions for discretionary licensing of vendors of milk).

Business Agents Act, 1930 Sections 4 and 6 :

(Provisions for discretionary licensing of business agents).

DISCUSSION OF POINTS WHICH MAY BE RAISED BY THE RESPONDENTS.

68. Whilst the Appellants are appealing solely from the decision of the High Court on the question whether Section 46 of the Act infringes Section 92 of the Constitution, special leave was granted upon the footing that if the preliminary point referred to in paragraphs 6—21 above be decided against the Respondents, they shall be at liberty to raise all such constitutional points as they think fit. It is therefore assumed that the Respondents will seek to support the judgment *a quo* by raising other points upon which they failed in the High Court of Australia. It becomes necessary, therefore, for the Appellants to deal at this stage with these points.

(i) THE QUESTION OF THE " BANKING " POWER.

69. It is assumed that the Respondents will seek to contend that Section 46 of the Act is outside any of the legislative powers of the Commonwealth. It is submitted that Section 46 is a very clear example of a law with respect to banking, which is one of the subjects with respect to which the Commonwealth Parliament has power to make laws (Section 51 (xiii)). These sections are set out above in full in paragraphs 8 and 11 respectively.

70. The reasoning of the Judges upon this question of the " banking " power may be summarised as follows :—

Vol. 3. p. 36, l. 36— p. 39, l. 45 ; particularly p. 37, ll. 12–17 ; p. 36, l. 47— p. 37, l. 28 ; p. 39, ll. 36–38 ; p. 39, ll. 36–45.

(1) Latham C. J. held that the power of the Commonwealth Parliament under Section 51 (xiii) is a plenary power ; that it is not limited to the making of laws *regulating* banking ; that by reason of the power so granted the Commonwealth Parliament can make laws determining whether and to what extent and by whom the business of banking shall be carried on ; and that accordingly in enacting Section 46 Parliament has made a law with respect to banking within the meaning of Section 51 (xiii), which is consequently valid.

Vol. 3. p. 79, ll. 16–19 ; p. 79, ll. 4–5 ; p. 77, l. 42 ; p. 79, l. 19.

(2) Rich and Williams JJ. held that the provisions of Section 46 are not authorised by Section 51 (xiii) of the Constitution, which they interpreted as confined to a power merely to regulate the conduct of banking business. They reached this result because of certain inferences they drew from the presence in Section 51(xiii) of certain powers in addition to the power with respect to " banking."

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(3) Starke J. held that the power of the Commonwealth Parliament in Section 51 (xiii) is plenary and that the power to make laws with respect to banking " extends not only to those regulations which aid, foster and protect banking and the choice of the persons engaged in it: it also embraces the making of rules which prohibit it." Vol. 3. p. 109, l. 8; p. 109, ll. 11–13.

(4) Dixon J. declined to adopt the reading of Section 51 (xiii) contended for by the Respondents and declined to import into the word " banking " in that section any of the limitations suggested by the Respondents, namely (1) a limitation reducing the power to one authorising laws regulating a continuing activity but not prohibiting it. (2) a limitation of the subject matter (" banking ") with which Parliament could deal to consensual transactions between banker and customer or alternatively to transactions between subject and subject. He said that no one would feel that it was anything but an ordinary use of the word to say that a statute declaring that banking should no longer be carried on was a law about banking. Vol. 3. p. 129, l. 4— p. 132, l. 27; particularly p. 131, ll. 35–43, & p. 132, ll. 23–24. Vol. 3. p. 131, ll. 29–31.

(5) McTiernan J. held that Section 51 (xiii) is a grant of plenary legislative power; that it must be given an ample not a narrow meaning; that Parliament has power to prohibit any bank from carrying on banking; and that accordingly Section 46 is a law with respect to banking, and consequently valid. Vol. 3. p. 171, l. 11; p. 171, l. 29; p. 171, l. 34; p. 171, ll. 45–46.

71. The Appellants submit that the conclusions of Latham C. J., Starke, Dixon and McTiernan JJ. on this question are correct.

The powers granted by Section 51 of the Constitution are as plenary as those of the Imperial Parliament and the words of Section 51, " power to make laws . . . . . with respect to " constitute the widest and most comprehensive terms in which power can be conferred.

Cook v. Buckle (1917) 23 C.L.R. 311 at pp. 314, 316–317 and 320.

R. v. Macfarlane ex parte O'Flanagan and O'Kelly (1923) 32 C.L.R. 518 at pp. 556–557 and 580–583.

The width and nature of the powers of the Commonwealth Parliament are clearly defined by Harrison Moore in his authoritative work " The Constitution of the Commonwealth of Australia " 2nd Edition at page 280 as follows :—

> " The plenary power of legislation in the Commonwealth may be distinguished from a mere regulatory power, which, as probably importing the existence and preservation of the thing regulated, introduces a number of considerations which, varying with the particular subject-matter, have the effect of limiting in various directions the discretion of the authority concerned. It would, for instance, be doubtful whether, under a mere regulatory power, the Legislature was not restricted to control and supervision of the operations of other people, whether it could assume the administration of services to the total exclusion of all others therefrom. The plenary power of legislation is not merely a power to regulate: it ranges from creation to destruction; it may establish as well as prohibit."

72. Whether a statute contains a command to a banker to continue to carry on his business of banking, or contains a determination or selection of the persons who may so continue, or contains a power in the executive so to determine or select, in each case it is a law with respect to banking. Hence Section 46 plainly is a law with respect to banking.

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Vol. 3. p. 79, ll. 4–5; p. 77, l. 42— p. 78, l. 34; p. 78, l. 35— p. 79, l. 19.

73. In the submission of the Appellants, Rich and Williams JJ. were wrong in restricting the power granted by Section 51 (xiii) to a power merely to regulate the conduct of banking business. They reached this conclusion by drawing inferences from the inclusion in Section 51 (xiii) of express power to make laws first with respect to "the incorporation of banks" and secondly with respect to "State banking extending beyond the limits of the State concerned." The Appellants submit that neither the origin of Section 51 (xiii) nor the established principles for the interpretation of such instruments as the Australian Constitution support any such limitation of broad national powers. The considerations which make untenable the contentions put forward in the High Court by the Respondents as to the scope of the "banking" power will be found set forth in the judgments of the majority of the Court.

(ii) The Question of "Implied State Immunity."

Vol. 3. p. 29, l. 42— p. 36, l. 35; p. 108, l. 21— p. 110, l. 9; p. 129, l. 4— p. 132, l. 27; p. 171, l. 6— p. 172, l. 46.

74. In view of the terms of special leave, it is assumed that the Respondents will seek to contend also that the provisions of Section 46 of the Act are an unconstitutional interference with the rights of the States, but the Appellants maintain that such an argument is completely without foundation. This argument, as advanced by the Respondent States in the High Court, was, in substance, that there is to be implied from the fact that the Commonwealth Constitution is a federal constitution a rule that the legislative power expressly granted to the Commonwealth Parliament is to be subject to an implied limitation that it cannot be exercised in any manner which results in "interference with" or "substantial interference with" the essential functions of the States. It was contended that the opportunity for a State to become a customer of, and to consult and endeavour to obtain financial assistance from, one or more of the existing private banks is an essential function of the State, and that the provisions of the Act (including Section 46) are invalid because they interfere with this "essential function." The proposition when applied to the present cases results in a contention that there should be implied in favour of the States a rule of law that the States shall be permitted to have dealings in perpetuity with the banks or banking system which existed in the year 1901 and that the powers expressly granted to the Commonwealth Parliament to make laws with respect to banking should be read subject to an implication that this "right" of the States is not to be modified or withdrawn, even incidentally or indirectly, by any legislative action of the Commonwealth.

75. The reasoning of the Judges of the High Court on this question may be summarised as follows:—

Vol. 3. p. 66, l. 43— p. 69, l. 17; particularly p. 68 ll. 36–40; p. 68, l. 41; p. 69, l. 12; p. 69, ll. 13–17.

(1) Latham C. J. held that, as the Act is quite general in its terms, it can not be said to be aimed at or directed against the States; that the States are at liberty under Section 51 (xiii) to establish their own banks; and that accordingly the provisions of the Act do not involve any unconstitutional interference with the governmental independence or the necessary powers of the States.

Vol. 3. p. 95, ll. 22–24;

(2) Rich and Williams JJ. did not deal at all with the point.

Vol. 3. p. 125, ll. 28–40; particularly ll. 35–36; Vol. 3. p. 125, ll. 36–38.

(3) Starke J. decided that the Act does not curtail or impede any constitutional power or function of a State; and that the States could, after the Act has come into operation, through their own banks, provide their own banking and financial facilities or resort to the general banking system otherwise established.

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(4) Dixon J. held that it is open to the States, under the exception of State banking contained in the Act, to provide for their own needs. Even if that were not so, he held that the constitution requires the States to accept the banking system as it might be established by any general law made from time to time pursuant to the powers of the Commonwealth Parliament; that when the States avail themselves of services or facilities regulated or determined by federal law they must accept them as part of a system enjoyed by the whole community; and that such things stand apart from a law which singles out States or operates specially to impede them in the exercise of their functions. He accordingly decided that the attack on the substance of the Act as an invasion of State powers failed.

Vol. 3. p. 132, l. 28—p. 134, l. 36; particularly p. 134, ll. 9–10; p. 134, ll. 10–11; p. 134, ll. 15–17. p. 134, ll. 17–19. p. 134, ll. 35–36.

(5) McTiernan J. rejected the contention of the Respondents that the Banking Act is an unconstitutional interference with rights reserved to the States by the Constitution. He pointed out that the Banking Act 1947 is a general Act.

76. The Appellants contend that the Respondent States' argument on this point has no sound foundation in law.

There is no specific provision in the Constitution which can be pointed to in support of the Respondent States' contentions. The Respondent States contend that the "federal nature" of the Constitution cuts down the power which the words appear to confer by importing a prohibition which debars the Commonwealth Parliament from any exercise of the power which results in "interference" or in "substantial interference" with what are said to be the essential or governmental functions of the States. In this particular case, the suggestion of the Respondent States is that, in consulting or endeavouring to obtain financial assistance from any existing bank, a State is to be considered as exercising an essential or governmental function of the State. The Appellants submit that the States' contentions are unfounded and received no support from any of the Judges of the High Court.

77. In the early years of the history of the Commonwealth the High Court of Australia decided certain cases upon the basis of a doctrine that the instrumentalities of the States and the Commonwealth were immune from any interference by the legislative or other organs of the Commonwealth and States respectively. Thus in *D'Emden v. Pedder* (1904) 1 C.L.R. 91 and *Deakin v. Webb* (1904) 1 C.L.R. 585 the doctrine was applied and produced the result that salaries of Commonwealth members of Parliament and other officers were held to be immune from State taxation.

The doctrine was rejected by the Privy Council in *Webb v. Outrim* (1907) A.C. 81, in which it was held that the States could validly tax salaries of members of the Commonwealth Parliament. At first in *Baxter v. Commissioners of Taxation* (1904) 4 C.L.R. 1087 the High Court refused to follow the Privy Council decision or to depart from its doctrine, despite dissent. However, in 1920, in *Amalgamated Society of Engineers v. Adelaide S.S. Co.*, 28 C.L.R. 129 (the *Engineers'* case), the High Court reviewed all the earlier cases and adopted the principle of interpretation which had been laid down in *Webb v. Outrim*. Thus the alleged doctrine of immunity of government instrumentalities was exploded. It was held that the Constitution is to be construed in accordance with the ordinary principles of statutory interpretation and that if legislation under the Constitution is within a granted power and does not violate any express condition or restriction

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it is not for a Court " to enquire further, or to enlarge constructively those conditions and restrictions " (p. 149, quoting *Reg v. Burah*, 3 App. Cas. at 904-5). The broad principles enunciated in the *Engineers'* case have been recognised ever since 1920 as forming the foundation of the constitutional jurisprudence of Australia and have been repeatedly followed by the High Court since 1920, although it has also been suggested that if State or Commonwealth legislation was found to be expressly directed against the activities of Commonwealth or State, the legislation would or might be regarded as being in excess of this legislative power.

78. In 1947, the High Court in *Melbourne Corporation v. The Commonwealth* 74 C.L.R. 31 held invalid a section of the Banking Act 1945 which related to and affected the exercise of choice by State Governments and municipalities of the bank with which they should carry on banking business. Because the Section there under consideration related to States (and municipalities) it was considered by some of the Judges to be directed specifically against State Governments and for this reason not to be a law in respect of banking. Alternatively, because of the direct selection of the States as the objects of legislative restriction, it was held necessarily to involve so marked an intrusion into the functions of the States as to be invalidated by a supposed implied limitation upon the grant of legislative power to the Commonwealth Parliament. If necessary, it will be submitted that that case was wrongly decided. In any event neither of these propositions is applicable to the Banking Act 1947.

79. The provision now under challenge, namely Section 46 of the Act, is completely general in its terms and operation. It makes no reference to the States or their Governments, and Section 7 of the Act expressly excludes State banks from its operation. It leaves States and all other customers of banks with free access to the banking system as constituted by law from time to time. The attempt to invalidate the law upon the ground now under consideration, as also the attempt to invalidate the law by reason of supposed infringement of Section 92, emphasises a secondary aspect or result of its operation. The attempt of three of the States to extend the principles of the *Melbourne Corporation* case to the present cases did not obtain support from any one of the Judges who decided the *Melbourne Corporation* case and the present cases. Such an extension of the principles would, it is submitted, involve a reversal of the established law of Australia for many years, and the enunciation of a vague and dangerous principle of construction.

80. The Appellants contend that, upon the true view of the interpretation of the Constitution, the only implications which should be drawn are those which arise necessarily from the terms of the instrument ; and that no speculative implications can be based upon any a priori conception of the " nature " or " structure " of a federal form of government. Accordingly there is no basis in the Constitution for the alleged right claimed on behalf of the States, namely, that the grant of legislative power to the Commonwealth in Section 51 (xiii) is to be read subject to a limitation that the Commonwealth Parliament cannot alter the prevailing system of banking in the community if incidentally the States would thereby be deprived of their right to choose with whom to carry on their banking business.

The true view, it is submitted, is that the final rule of interpretation of the Constitution is to reject any general implied immunity to either State or Commonwealth from the operation of Commonwealth or State law, and, on the contrary, to insist on an essential feature of Australian federation, viz., subjection of both Commonwealth and State and all their instrumentalities to the law of the relevant

law-making authority. The Commonwealth may, therefore, in the Appellants' submission, exercise the legislative power granted to it in such manner as Parliament thinks fit, and the States, along with all other bodies and persons, may deal with the banking system thus provided for the whole community. Further, in any event, Section 46 of the Act makes no reference to the States, being completely general in its terms.

(iii) THE QUESTION OF SECTION 105A OF THE CONSTITUTION.

81. In view of the terms of special leave, it is assumed that the Respondents will seek to raise a further contention which the Appellants submit is without substance, namely that the provisions of Section 46 of the Act are invalid because they are inconsistent with the provisions of the Financial Agreement of 1927, validated by legislation made under Section 105A of the Constitution,which runs as follows :—

" 105A.—(1) The Commonwealth may make agreements with the States with respect to the public debts of the States, including—

(*a*) the taking over of such debts by the Commonwealth ;

(*b*) the management of such debts ;

(*c*) the payment of interest and the provision and management of sinking funds in respect of such debts ;

(*d*) the consolidation, renewal, conversion, and redemption of such debts ;

(*e*) the indemnification of the Commonwealth by the States in respect of debts taken over by the Commonwealth ; and

(*f*) the borrowing of money by the States or by the Commonwealth, or by the Commonwealth for the States.

(2) The Parliament may make laws for validating any such agreement made before the commencement of this section.

(3) The Parliament may make laws for the carrying out by the parties thereto of any such agreement.

(4) Any such agreement may be varied or rescinded by the parties thereto.

(5) Every such agreement and any such variation thereof shall be binding upon the Commonwealth and the States parties thereto notwithstanding anything contained in this Constitution or the Constitution of the several States or in any law of the Parliament of the Commonwealth or of any State.

(6) The powers conferred by this section shall not be construed as being limited in any way by the provisions of section one hundred and five of this Constitution."

82. The only basis hitherto suggested for such a contention is said to be found in the terms of clause 5 (9) of the Financial Agreement. Clause 4 (*a*) of that Agreement provides that, unless the Loan Council otherwise decides, the Commonwealth shall, subject to clauses 5 and 6 of Part I of the Agreement, arrange for all borrowings for or on behalf of any State.

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Clause 5 (9) is in the following terms :—

" Notwithstanding anything contained in this Agreement, any State may use for temporary purposes any public moneys of the State which are available under the laws of the State, or may, subject to maximum limits (if any) decided upon by the Loan Council from time to time for interest, brokerage, discount, and other charges, borrow money for temporary purposes by way of overdraft, or fixed, special, or other deposit, and the provisions of this Agreement other than this paragraph shall not apply to such moneys."

Clause 6 contains identical provisions applicable, *mutatis mutandis*, to the Commonwealth.

83. The reasoning of the Judges of the High Court upon this question is as follows :—

Vol. 3. p. 69, l. 18 p. 70, l. 44 ; particularly p. 70, ll. 25–28 ; Vol. 3. p. 70, ll. 43–44.

(1) Latham C. J. decided that the Financial Agreement does not contain any implication that the number of banks is never to be decreased by legislative action, but provides only that the States shall be entitled to obtain overdrafts from such banks as exist from time to time ; and that, accordingly, the objections of the Respondents based on Section 105A and the Financial Agreement failed.

Vol. 3. p. 95, ll. 19–22

(2) Rich and Williams JJ. decided that Section 46 (1) and (4) to (8) of the Act is invalid as contrary to the Financial Agreement.

Vol. 3. p. 125, ll. 41–48.

(3) Starke J. decided that the contention of the Respondent States involves a hopeless construction of the Financial Agreement and is untenable.

Vol. 3. p. 134, l. 37— p. 135, l. 19 ; particularly p. 135, ll. 12–14 ; Vol. 3. p. 135, ll. 16–19.

(4) Dixon J. decided that the Financial Agreement assumes a banking system to which the States might resort to borrow by way of overdraft, but that if the Financial Agreement confers upon the States any constitutional right, as against the Commonwealth, to borrow by way of overdraft, it is no higher than a right to seek an overdraft from whatever banking institutions are from time to time provided or permitted by law and are conducting banking business.

Vol. 3. p. 175, ll. 9–13.

(5) McTiernan J. held that it is impossible to imply in the Financial Agreement a stipulation that the system of banking existing at the time the Financial Agreement was made should not be altered. Accordingly he held that the Act is not inconsistent with the Financial Agreement.

Vol. 3. p. 175, l. 9.

84. The Appellants contend that the decisions of Latham C. J., Starke, Dixon and McTiernan JJ. on these questions are correct.

The Appellants do not concede that inconsistency between a Commonwealth statute and the terms of the Financial Agreement necessarily invalidates a Commonwealth Act. But in any event, clause 5 (9) is merely an exception to the prohibition on independent borrowing by the States contained in clause 4. The Commonwealth is given the benefit of a similarly expressed exception. An exception to a prohibition does not constitute a constitutional right. Further, even if a so-called right could be read into clause 5 (9), the most that such a " right " would constitute would be the " right " to endeavour to obtain an overdraft from such banking and other financial institutions as are in fact permitted to offer financial assistance to the community generally under the law as it exists from time to time.

(iv) THE QUESTION OF SEVERABILITY. RECORD.

85. The Respondents may seek to contend in addition that Section 46 is invalid because it is inseverable from other provisions of the Act which were held invalid by the High Court. Though in their reply in the High Court the Respondents did seek to establish that Section 46 (4) to (8) was inseverable as being purely ancillary to the earlier provisions of the Act, they had, in their opening, said that the power conferred " is not made contingent on the exercise of any other power in the Act." Five of the six Judges (Latham C. J., Rich, Dixon, McTiernan and Williams JJ. ; Starke J. contra) held that Section 46 (4) to (8) is an independent provision severable from the remainder of the Act and they considered its validity on this basis.

Vol. 3. p. 61, ll. 25-26 ; p. 75, ll. 5-8 ; p. 162, ll. 24-27 ; p. 175 ; p. 124, ll. 22-24.

86. The Appellants will contend if necessary that the decision of the High Court that Section 46 (4) to (8) is severable was clearly correct and indeed that the whole of Section 46 is severable. Section 46 (4) provides for the giving of a notice by the Treasurer. The giving of this notice is not dependent in any way upon the operation or putting into effect of any other provision of the Act. That Parliament intended Section 46 (4) to (8) to be a completely independent substantive provision is clear from considering the position on an assumption that the whole Act is valid. On that assumption, the Treasurer could in his discretion exercise his power to give a notice under Section 46 (4) without putting into operation any of the other provisions of the Act. Equally, on the assumption that the whole of the residue of the Act is invalid, Section 3 of the Act makes it clear that Section 46 (4) to (8) is a separate and independent provision. This being so, it follows that on any recognised canon of construction, and quite apart from any special statutory provisions, Section 46 (4) to (8) is clearly severable.

87. There are, however, relevant statutory provisions dealing with severability which, in the Appellants' submission, are clearly applicable to Section 46. Mention should first be made of Section 15A of the Acts Interpretation Act 1901-1941 which is in the following terms :—

" 15A. Every Act shall be read and construed subject to the Constitution, and so as not to exceed the legislative power of the Commonwealth, to the intent that where any enactment thereof would, but for this section, have been construed as being in excess of that power, it shall nevertheless be a valid enactment to the extent to which it is not in excess of that power."

The result of applying this section to the present enactment (the Banking Act 1947) is that, whilst portions of the enactment have been held to be in excess of the powers of the Commonwealth Parliament, Section 46 (4) to (8) is nevertheless a valid enactment because in itself it is not in excess of the Parliament's power.

88. The Act itself also deals with severability in Section 6, which runs as follows :—

" 6. 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 ;

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(*b*) that the provisions of the last preceding paragraph shall be in addition to, and not in substitution for, the provisions of section fifteen A of the Acts Interpretation Act, 1901-1941 ; and

(*c*) that this section and section fifteen A of the Acts Interpretation Act, 1901-1941 shall have effect notwithstanding that their operation may result in this Act having an effect different, or apparently different, in substance from the effect of the provisions contained in this Act in the form in which this Act was enacted by the Parliament."

The High Court has held invalid some of the provisions of the Act. The invalidity however of provisions other than Section 46 would not alter the operation or effect of Section 46 (4) to (8). But even if the operation or effect of those subsections had been so altered Parliament in Section 6 has plainly declared its intention that notwithstanding any such alteration provisions such as these subsections, if valid, should not be deemed inseverable.

89. For the foregoing reasons the Appellants contend that the decision of the High Court on this point (Latham C. J., Rich, Dixon, McTiernan and Williams JJ. ; Starke J. contra) is clearly correct.

CONCLUSION.

90. The Appellants respectfully submit that, with reference to the only decision of the High Court upon a question on which the Appellants are appealing, namely the interpretation of Section 92 of the Constitution in relation to Section 46 of the Act, the decision of Latham C. J. and McTiernan J. is correct, and the decision of the majority of the Judges of the High Court is erroneous and ought to be reversed, and that these appeals should be allowed and the Orders of the High Court declaring Section 46 to be invalid and the consequential injunctions based upon such declaration should be set aside and the Orders of the High Court varied accordingly, for the following among other

REASONS.

(1) Because on the proper construction of Section 74 of the Constitution these appeals to His Majesty in Council do not require a certificate of the High Court.

(2) Because Section 92 of the Commonwealth Constitution does not invalidate Section 46 of the Banking Act 1947.

(3) Because the decision of the majority of the High Court in relation to Section 92 is inconsistent with the decisions of the Judicial Committee in the cases of *James v. The Commonwealth* (1936) A.C. 578, and *James v. Cowan* (1932) A.C. 542.

(4) Because the object of Section 92 of the Constitution is to secure free passage across State frontiers, and not to limit the powers of the Parliament under Section 51 (xiii) for the peace, order and good government of the whole Commonwealth to choose the persons who are to conduct the business of banking throughout the Commonwealth.

(5) Because the real object of Section 46 of the Banking Act 1947 is to regulate on a nation-wide basis and in the national interest an important factor in the financial activities of the community, namely, banking.

(6) Because Section 46 of the Banking Act 1947 does not deal with any interstate aspect of banking and any effect of the section on interstate trade and commerce is merely indirect and incidental.

(7) Because banking does not fall within the expression " trade, commerce and intercourse " in Section 92 of the Constitution, and accordingly Section 46 of the Act does not impair the freedom of interstate trade, commerce or intercourse.

(8) Because any other objections which the Respondents may raise or be permitted to raise against the validity of Section 46 were rejected by the majority of the Judges of the High Court and those Judges were right in rejecting such objections.

H. V. EVATT.

K. H. BAILEY.

D. N. PRITT.

P. D. PHILLIPS.

F. GAHAN.

H. L. PARKER.

C. I. MENHENNITT.

No. 55 of 1948.

In the Privy Council.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

BETWEEN
THE COMMONWEALTH OF AUSTRALIA AND OTHERS
AND
BANK OF NEW SOUTH WALES AND OTHERS
SAME
AND
THE BANK OF AUSTRALASIA AND OTHERS
SAME
AND
THE STATE OF VICTORIA AND ANOTHER
SAME
AND
THE STATE OF SOUTH AUSTRALIA AND ANOTHER
SAME
AND
THE STATE OF WESTERN AUSTRALIA AND ANOTHER
(Consolidated Appeals).

Case for the Appellants.

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