In the Privy Council.

No. 55 of 1948.

ON APPEAL
FROM THE HIGH COURT OF AUSTRALIA

BETWEEN

THE COMMONWEALTH OF AUSTRALIA and Others (Defendants) - *Appellants in each appeal*

AND

BANK OF NEW SOUTH WALES and Others (Plaintiffs) *Respondents in the first appeal*

AND BETWEEN

SAME

AND

THE BANK OF AUSTRALASIA and Others (Plaintiffs) - - - - *Respondents in the second appeal*

AND BETWEEN

SAME

AND

THE STATE OF VICTORIA and Another (Plaintiffs) - - - - *Respondents in the third appeal*

AND BETWEEN

SAME

AND

THE STATE OF SOUTH AUSTRALIA and Another (Plaintiffs) *Respondents in the fourth appeal*

AND BETWEEN

SAME

AND

THE STATE OF WESTERN AUSTRALIA and Another (Plaintiffs) *Respondents in the fifth appeal*

RECORD OF PROCEEDINGS

Coward, Chance & Co.,
Stevenson House,
155, Fenchurch St., E.C.3.
Solicitors for the Appellants.

Linklaters & Paines,
Austin Friars House,
6, Austin Friars, London, E.C.2.
Solicitors for the Respondents in the first appeal.

Farrer & Co.,
66, Lincoln's Inn Fields,
London, W.C.2.
Solicitors for the Respondents The Bank of Australasia

Bircham & Co.,
Winchester House,
100, Old Broad Street,
London, E.C.2.
Solicitors for the Respondents The Union Bank of Australia, Limited.

Slaughter & May,
18, Austin Friars, London, E.C.2.
Solicitors for the Respondents The English Scottish and Australian Bank Limited

Freshfields,
1, Bank Buildings,
Princes Street, London, E.C.2.
Solicitors for the Respondent States.

No. 55 of 1948.

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 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 and 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.)

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BETWEEN

THE COMMONWEALTH OF AUSTRALIA and others (Defendants) - *Appellants in each appeal*

AND

BANK OF NEW SOUTH WALES and others (Plaintiffs) *Respondents in the first appeal*

AND BETWEEN
SAME
AND

THE BANK OF AUSTRALASIA and others (Plaintiffs) *Respondents in the second appeal*

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THE STATE OF VICTORIA and another (Plaintiffs) *Respondents in the third appeal*

AND BETWEEN
SAME
AND

THE STATE OF SOUTH AUSTRALIA and another (Plaintiffs) - *Respondents in the fourth appeal*

AND BETWEEN
SAME
AND

THE STATE OF WESTERN AUSTRALIA and another (Plaintiffs) - *Respondents in the fifth appeal*

(CONSOLIDATED APPEALS.)

RECORD OF PROCEEDINGS

In the High Court of Australia.

No. 32
Judgments, 11th August 1948.

Latham, C.J.

No. 32

JUDGMENTS.

In these five actions referred for trial to the Full Court the plaintiffs challenge the validity of the Banking Act 1947, enacted by the Commonwealth Parliament.

The Act does not apply to State banking, but, with this exception, it would, if put into full operation, give a monopoly of banking in Australia to the Commonwealth Bank of Australia constituted under the Commonwealth Bank Act 1945. The 1947 Act applies to fourteen named companies carrying on banking business in Australia. Eight of these companies are incorporated in Australia, three in England and three elsewhere. They are called " private banks " in the Act.

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

This legislation is valid only if it is legislation with respect to a subject matter with respect to which the Commonwealth Constitution gives power to the Commonwealth Parliament to make laws and if it does not infringe any relevant

constitutional prohibition. The plaintiffs contend that the Act is not legislation with respect to any such subject matter and, in particular, that it is not authorised by the powers which the Constitution, sec. 51, vests in the Commonwealth Parliament to make laws with respect to :—

"(XIII) Banking, other than State banking; also State banking extending beyond the limits of the State concerned, the incorporation of banks, and the issue of paper money :"

"(XX) Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth :"

"(XXXI) The acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws :"

"(XXXIX) Matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth."

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

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

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

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

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The Act, if put into full operation, provides for the nationalisation of banking, but the questions before the court are not to be determined by any opinion with respect to the merits or demerits of such a policy. Such opinions have nothing to do with any of the legal questions to be decided by the court, which are whether the legislative provisions which the Banking Act 1947 contains are within the constitutional powers of the Commonwealth Parliament, and not whether the policy which they represent is wise or prudent or desirable.

The constitutional validity of a statute, it should be observed at the outset, cannot be determined by the fact that Parliament desires or hopes to attain a particular object by the legislation (see *South Australia v. Commonwealth*, 65 C.L.R. 373, at p. 412, and cases there cited), but by what the law actually enacts. Thus in the present cases the questions are whether the particular provisions of the Act are valid. It is not a general question as to whether the Commonwealth Parliament has power by some means or other to acquire a monopoly of banking (other than State banking) for a corporation controlled or controllable by the Commonwealth. The question of power must be separately considered in relation to the particular means adopted in the Act; for example, the acquisition provisions, the prohibition provisions—are these specific provisions within power or beyond power? Another operation of the Act, if valid, is to enable directors appointed by the Governor of the Commonwealth Bank and approved by the Commonwealth Treasurer to control Australian banks. Is such legislation valid? Another operation of the Act, if valid, will be to prevent some or all of the private banks from carrying on any banking business in Australia. Is such legislation valid? These are examples of the actual operation of the Act. It is such particular and precise matters which have to be considered in relation to the provisions of the Commonwealth Constitution.

"Private bank" means a body corporate the name of which is set out in the First Schedule—1947 Act, sec. 5. These corporations are divided in that schedule into three classes: Part I, private banks incorporated in Australia (8 banks); Part II, private banks incorporated in the United Kingdom (3 banks); Part III, private banks incorporated elsewhere (3 banks).

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

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

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

CLAIMS OF THE PLAINTIFF COMPANIES.

In the first and second actions (in which the Australian and English banks respectively are plaintiffs) the plaintiffs claim declarations that the Banking Act 1947 is beyond the powers of the Parliament of the Commonwealth, contrary to the Constitution of the Commonwealth, and void and, alternatively, declarations that specified sections are void. There is also a claim for injunctions restraining the Commonwealth Treasurer and the Governor of the Commonwealth Bank from

giving notices etc. which would bring the Act into operation. The claims of the English banks are substantially identical with those made by the Australian banks, with certain omissions in respect of sections which do not apply to the English banks, as, for example, secs. 17-19, purporting to authorise the Governor of the Commonwealth Bank to appoint directors of a bank—a provision which is limited to Australian banks.

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

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

CONSTITUTION OF PLAINTIFF COMPANIES.

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

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

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

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

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

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

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

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

EVIDENCE.

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

The shareholders in the Bank of Adelaide, the Ballarat Bank and the Brisbane Bank are all on registers which are kept in Australia. In the case of all the other banks, there are principal registers and branch registers. Registers of these banks are kept at several of the State capital cities in Australia and in some cases in London and New Zealand. The shares on the Australian registers varied in number from 68% to 99% of the shares issued (figures as at 19th December 1947). There is nothing to prevent the registers outside Australia being closed at the will of the shareholders or directors, with the result of bringing all the shares on to Australian registers.

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

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

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

> "(A) the collection and negotiation of interstate bills of exchange, cheques and promissory notes,
>
> (B) the transfer of funds interstate,
>
> (C) the establishment of interstate credits,
>
> (D) the issue and negotiation of travellers' cheques."

Transactions of this character involve large numbers of communications between the branches of a bank or the branches of one bank and the branches of another bank in different States and the transmission of many documents across State boundaries. The nature of these transactions is stated in detail in the affidavits filed on behalf of the plaintiffs. The amount of money dealt with in interstate banking operations carried on by the private banks is stated to be " of the order of £300,000,000 per annum."

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

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

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

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

There is a Commonwealth Savings Bank which is associated with the Commonwealth Bank. The Commonwealth Bank is stated to be an active competitor for Savings Bank business with the State Savings Bank of Victoria and South Australia and therefore, it is said, it would not be feasible to appoint the Commonwealth Bank as agent for the existing State Savings Banks or for others which might be established.

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

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escape such control by transferring its banking business to any other bank or conducting it by any other means."

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

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

The evidence for the defendants consists in the first place of an affidavit by Professor L. G. Melville, Chief Economic Adviser to the Commonwealth Bank, a Fellow of the Institute of Actuaries, and formerly Professor of Economics in the University of Adelaide. Professor Melville has had extensive experience in relation to banking. He refers to the report of the Royal Commission on Monetary and Banking Systems in Australia dated July 1937. He states that the Australian banking system consists of the Commonwealth Bank and the Commonwealth Savings Bank, State banks in New South Wales (the Rural Bank of New South Wales), South Australia and Western Australia, State Savings Banks in Victoria and South Australia, private banks specified in the First Schedule to the Banking Act 1947, and the Agricultural Banks of Queensland and Tasmania. Reference is also made to pastoral and finance companies and building societies which carry on a limited form of banking business but not the general business of banking, which have been exempted by the Treasurer of the Commonwealth under sec. 10 of the Banking Act 1945 from certain of the provisions of that Act.

Professor Melville refers to the fact that the number of banks in Australia has been reduced by amalgamations and other means to ten since 1893, when there were 23 banks. Evidence as to the increase of trade and commerce in Australia since 1893, as to the facilities provided by the post-office for transmission of money by money orders and postal notes, and a statement of opinion that the Commonwealth Bank will, when the Banking Act 1947 is in operation, be capable of providing full banking facilities without any adverse effects on Australian business were objected to. This evidence is, in my opinion, inadmissible.

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

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

It is further pointed out that the course of banking business is the same in interstate as in intrastate transactions.

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

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

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

" Construction of new buildings, alterations and additions to, and repair of existing buildings.

Investments in shares, stock, etc.

Retailers.

Agricultural, pastoral and dairying production.

Semi-governmental and local authorities.

Advances to take up Commonwealth loans.

Purchase of real estate.

Financing of hire-purchase transactions and cash order businesses.

Manufacturers.

Advances to repay existing mortgages or retire debts which have not yet matured.

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Amusement and sporting activities.

Advances for the purpose of meeting taxation commitments.

Wholesalers, manufacturers' agents, and indent agents, selling and commission agents.

Exports.

Imports.

Establishment of new businesses or purchase of an existing business.

Ex-servicemen.

Fixed deposits.

Speculative buying or holding of commodities.

Production and exploitation of raw materials.

Probate duties and payment of legacies.

Transport (including aviation and shipping).

Personal needs.

Companies and/or their subsidiaries and persons resident outside the sterling area."

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

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

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

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

The affidavits in reply of the plaintiffs refer to the extent of interstate operations and re-state that the private banks sometimes themselves become the owners of drafts and the pledgees of bills of lading. The affidavit of Mr. S. J. Gandon in reply included the following paragraph :—

> "In each of the countries in which it carries on business the plaintiff the Bank of New South Wales has numerous and valuable rights against and is subject to numerous and substantial obligations in favour of persons who are not customers of that Bank and which rights and obligations do not arise out of any relation of banker and customer. From my knowledge of the nature of the businesses carried on by the other private trading banks I am of opinion that the same is true of each of such other banks."

The banks own, or lease, for example, many buildings in the Commonwealth and elsewhere. Accordingly, they have many rights and obligations as property owners.

A further affidavit in reply was sworn by Professor Torleiv Hytten, economist to the Bank of New South Wales, Mr. D. H. Merry, Mr. A. J. Tyrer and Mr. G. R. Mountain. All these three gentlemen are experienced in banking and economics. The effect of their affidavit is that in their opinion the essential function of trading banks is " to transact general banking business with the public." The essential function, on the other hand, of a central bank is to exercise control over the volume of credit. A central bank commonly acts as a banker's bank and as banker for the Central Government. It is not an essential function of a central bank as such "to transact general banking business with the public." It was accordingly argued in the affidavit that a central bank in the true sense necessarily involved the co-existence of other banks which were trading banks and that the operations and functions of those trading banks were in substance and essence the same whether there was a central bank or not. A central bank was only one of several means by which to influence (*inter alia*) the volume of production, the flow of trade and the level of employment. Among other such means were fiscal policy, including taxation and loan operations, price control, customs regulations, etc. Accordingly, it was submitted that the abolition of independent trading banks would not be a development of central banking, as Professor Melville was understood to suggest.

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

BANKING ACT 1947. PART I.

Part I of the Act contains the following provision in sec. 3 :—

" The several objects of this Act include—

(A) the expansion of the banking business of the Commonwealth Bank as a publicly owned bank conducted in the interests of the people of Australia and not for private profit ;

(B) the taking over by the Commonwealth Bank of the banking business in Australia of private banks and the acquisition on just terms of property used in that business ;

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

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

The validity of many of the provisions of the Act is challenged. These provisions must be considered according to their own terms and their actual

operation, and the belief of Parliament that they would assist in achieving particular objects cannot in itself establish their validity, even if the objects specified are themselves directly within parliamentary power. Each provision must be considered in the context of the Act, independently of any such statement of objects—though such a statement may suggest a connection between the legislation and a relevant subject matter—*cf.* for example, *Andrews v. Howell*, 65 C.L.R. 255, at p. 275. These considerations become important in relation to the power conferred upon the Federal Parliament by sec. 51 (xxxi) to make laws for the acquisition of property on just terms for any purpose in respect of which the Parliament has power to make laws.

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

PART II.

Part II consists of sec. 6, which is a declaration of legislative intention. It is in the following terms :—

> " It is hereby declared to be the intention of the Parliament—
>
> (A) that if any provision of this Act is inconsistent with the Constitution that provision and all the other provisions of this Act shall nevertheless operate to the full extent to which they can operate consistently with the Constitution ;
>
> (B) that the provisions of the last preceding paragraph shall be in addition to and not in substitution for the provisions of section fifteen A of the Acts Interpretation Act 1901-1941 ; and
>
> (C) that this section and section fifteen A of the Acts Interpretation Act 1901-1941 shall have effect notwithstanding that their operation may result in this Act having an effect different or apparently different in substance from the effect of the provisions contained in this Act in the form in which this Act was enacted by the Parliament."

This provision requires that the Act shall be interpreted as far as possible so as to be valid, though parts of it may be declared to be invalid. Thus the Act is to be construed upon a general presumption of severability. Each provision is to be given its fullest possible valid operation, even though, by reason of the invalidity of other provisions of the Act, that provision may have an effect which is different from that which it would have had if those provisions had been valid. In *Vacuum Oil Co. Pty. Ltd. v. Queensland*, 51 C.L.R. 677, in considering the question of the severability of valid from invalid provisions of a statute, Dixon J., said (p. 692)— " The statute will not operate upon the matters within the powers of the legislature unless it is capable of applying to them in the same way and with the same consequences to the persons and things affected." I call attention to the words " with the same consequences." Sec. 6 (c) is directed to the exclusion of the principle there stated. Part I has declared its intention that effect shall be given to any valid provisions of the Act whatever the consequences may be. But, nevertheless, one provision of the Act may be so dependent upon another provision that the invalidity

of the latter necessarily involves the invalidity of the former. The court cannot re-write a statute and so assume the functions of the legislature.

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

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

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

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

They may be given immediately or in the distant future.

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

PART III. APPLICATION OF ACT.

Sec. 7 provides that nothing in the Act shall apply to State banking. This section is a recognition of the constitutional limitation involved in sec. 51 (xiii) of the Constitution, which gives to the Commonwealth Parliament power to make laws with respect to " banking other than State banking: also State banking extending beyond the limits of the State concerned . . ." In *Melbourne Corporation v. the Commonwealth*, 74 C.L.R. 31, it was held that the words " State banking " in this provision refer to the business of banking conducted by a State as a banker and not to transactions between a State as a customer and a bank. In this Court the plaintiffs had to argue upon the basis of accepting this decision.

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

PART IV.

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

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

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

Sec. 10 of the Act provides that the provisions of Divisions 2 and 3 of Part IV shall have effect, notwithstanding anything in any other law, or in any charter or other instrument, which is inconsistent with those provisions. So far as State laws are concerned, this section states only what the position would have been if the section had not been included in the Act. A Commonwealth law, if valid, prevails over any State law independently of such a provision as sec. 10 : see the Constitution, sec. 109. So also, a charter or other instrument cannot prevail against a valid Commonwealth law. But, as will be seen, in some cases a Commonwealth law can have a valid operation only with respect to matters the existence and characteristics of which depend upon State laws or charters or other instruments. For example—the Act provides for the acquisition of shares in the plaintiff banks by the Commonwealth Bank. But it is State law or English law which determines what a share in a company is.

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

PART IV, *Division 2 : Acquisition of Shares.*

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

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

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

Sec. 13 contains the provisions for compulsory acquisition by the Commonwealth Bank of Australian shares in Australian private banks. It provides that :—

"Where the Treasurer is satisfied that the majority in number of the shares in an Australian private bank are Australian shares the Treasurer may by notice published in the *Gazette* declare that upon a date specified in the notice the shares in that bank which are Australian shares upon that date shall be vested in the Commonwealth Bank."

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

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

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

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

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

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

The plaintiffs draw attention to the fact that the operation of sec. 13 depends upon the Treasurer being satisfied that the majority of shares in an Australian bank are Australian shares and it is argued that the Treasurer may make a mistake in forming an opinion as to whether the majority of shares are Australian shares. It was suggested that this possibility in some way affected the validity of the section. No satisfactory argument, however, was presented upon this matter. The condition of the operation of the section is that the Treasurer is satisfied as to a particular matter and not that his opinion on the matter is accurate in fact.

It is further pointed out by the plaintiffs that it is *possible* (though doubtless improbable) that the operation of sec. 13 might not, in a particular case, result in the Commonwealth Bank becoming the owner of a majority of shares in a bank or obtaining voting control. It is true that the Act must be considered in relation to any possible operation and not upon any assumption as to the probable proportions of Australian and other shares at the time when the power conferred by sec. 13 is exercised. But the particular possibility mentioned cannot affect the validity of the Act. If the Commonwealth Bank did not have sufficient shares to control voting by shareholders, the only consequence would be that the Bank could not,

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until it gained that control, do what only an effective majority of votes could accomplish. But every share acquired would be a step towards control, and if extending control of banking by the Commonwealth Bank is within federal legislative power, the fact that sec. 13 does not, in all conceivable circumstances, place the Commonwealth Bank in control of another bank *uno ictu*, does not place sec. 13 beyond power.

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

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

PART IV, *Division 3: Management of Private Banks.*

This division applies only to Australian private banks and not to private banks incorporated elsewhere than in Australia. Under this division the Commonwealth Bank, with the approval of the Commonwealth Treasurer, may assume that management of any Australian private bank through directors appointed by the Governor of the Commonwealth Bank.

Sec. 17 provides as follows:—

> "(1) Upon the date specified in a notice under sub-section (1) of section thirteen of this Act (or if that notice has been amended under sub-section (2) of that section upon the date specified in that notice as so amended) the directors of the Australian private bank in relation to the shares in which the notice was given shall by force of this Act cease to hold office."

This is followed by a provision for compensation of directors for loss of office.

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

Sec. 18 provides as follows:—

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

This provision is permissive and not mandatory in form. The Governor of the Commonwealth Bank "*may*" appoint directors. But in fact, as the original directors would have ceased to hold office by virtue of sec. 17 (1), the bank would

be left without any directors at all, and, accordingly, with no provision for management, unless the Governor of the Commonwealth Bank actually exercised his powers under sec. 18. The articles of association of the plaintiff banks provide for a share qualification for directors, and State laws prevent undischarged bankrupts from holding office as directors. Sec. 18 (2) excludes the operation of any such provisions.

The powers of the directors appointed under sec. 18 are defined in sec. 19 as follows :—

" (1) Directors appointed under the last preceding section shall have full power to manage, direct and control the business and affairs of the Australian private bank of which they are directors and, in particular, shall have power—

(A) to declare dividends ;

(B) to dispose of the business in Australia of that Australian private bank to the Commonwealth Bank ; and

(C) to dispose of all or any of the other business of that Australian private bank.

(2) The exercise of any power under paragraph (B) or (C) of the last preceding sub-section shall be subject to the approval of the Treasurer after the Treasurer has obtained a recommendation from the Governor of the Commonwealth Bank.

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

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

PART IV, *Division 4: Taking Over of Businesses of Private Banks.*

This division provides that the business in Australia or outside Australia of any private bank (Australian or English) may be taken over by agreement (sec. 22) and that the business in Australia of any of the private banks may, if an agreement is not made in response to an invitation of the Treasurer, be taken over by compulsion (sec. 24)—with assets and liabilities as defined.

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Sec. 22 provides a carefully specified procedure for the purpose of making an agreement and [sub-sec. (8)] for the effect of an agreement made under the section. An agreement made under the section has the operation and effect specified in the section, and therefore is to be distinguished from an agreement made, for example, with a private bank through its directors (original or substituted) which is not made as a result of the procedure prescribed by sec. 22, and which, as will appear, could not, as an agreement, bring about the results specified in sec. 22 (8).

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

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

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

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

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

Paragraphs (a) and (b) relate to Australian assets and Australian liabilities " subsisting " upon the date of taking over of the business. Paragraph (b) provides, not only that the liabilities of the private bank shall become liabilities of the Commonwealth Bank, but also that the private bank shall be discharged from its obligations in respect of those liabilities. Accordingly, a depositor in a private bank or any other creditor of the bank would, when these provisions came into operation find that instead of being a creditor of the private bank he had become a creditor of the Commonwealth Bank and that the private bank owed nothing to him. No agreement between the Commonwealth Bank and a private bank to which the creditor was not a party could bring about such a result. The creditor is, without his consent, deprived by statute of his rights against the private bank, that bank is released from its liabilities to him, and the Commonwealth Bank is substituted as his debtor. This result depends upon the statute and not upon the agreement as such. The agreement has the effect, as a consequence of the statutory provision, which is set forth in detail in paragraphs (a), (b), (c), (d) of sec. 22 (8).

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

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

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

Sec. 23 provides for a taxation concession to a private bank and its shareholders in respect of taxation upon incomes or profits in a case where an agreement has been made " under the last preceding section." Thus if a company makes an agreement under sec. 22—which, as already pointed out, is different from an agreement made apart from sec. 22—the bank and its shareholders receive a benefit in respect of taxation. If, however, a bank declines to make an agreement and insists upon its rights under the Act and proceedings are instituted for compensation, there is no such taxation concession. This provision raises questions as to whether the terms of compulsory acquisition of assets are just terms within sec. 51 (xxxi) of the Constitution.

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

Sec. 24 (2) provides that where a private bank to which a notice has been given under sec. 22 (1) has not made an agreement with the Commonwealth Bank " under that section " before the specified date the business in Australia of that private bank shall, upon the date of transfer [that is, the day after the specified date—sub-sec. (1)] be taken over by the Commonwealth Bank. " Taking over a business " is not a technical legal term. When a business is taken over by agreement, the agreement provides for the transfer of identified assets, including goodwill, perhaps for an indemnity against business liabilities, and perhaps the agreement contains a covenant in restraint of trade. The agreement may or may not contain provisions relating to the staff employed in the business. There is a distinction between the assets of a business and the property of the person or company which carries on the business: *In re Th. Goldschmidt Ltd.*, [1917] 2 Ch. 194 at p. 197. Where a statute provides for the " taking over of a business " the effect depends entirely upon the terms of the statute. In the present case sec. 24, sub-secs. (4) to (8), expressly state what taking over the business of a private bank means. Taking over the business of a bank does not terminate the juristic existence of the company whose business is taken over, nor does it itself prevent the bank from continuing to carry on business, including banking business. [But sec. 46 (8) does, where the business of a

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bank is acquired, prevent the bank carrying on banking business.] Sub-secs. (4), (5), (6) and (7) correspond to paragraphs (a), (b), (c) and (d) of sub-sec. (8) of sec. 22. Paragraphs (a) and (b) provide for the vesting of " subsisting " assets, transfer of subsisting liabilities, and the discharge of the private bank from the liabilities taken over by the Commonwealth Bank. Under sub-sec. (6) assets which relate to banking transactions and become Australian assets after the date of transfer but before a date prescribed in respect of a particular private bank become vested in the Commonwealth Bank upon the date upon which they become Australian assets. Sub-sec. (7) is a similar provision with respect to liabilities which relate to banking transactions.

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

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

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

PART V. THE FEDERAL COURT OF CLAIMS.

Under this part a Court of Claims is established in accordance with the provisions of the Constitution with valid provisions for the appointment and tenure of judges, etc. Sec. 33 provides that the court shall have jurisdiction to hear and determine claims for compensation arising under the Act. Sec. 34 provides, *inter alia*, that the judgment of the court shall not be subject to prohibition, mandamus or injunction in any court on any account whatever. This particular provision is invalid in so far as it seeks to exclude the jurisdiction conferred upon the High Court by sec. 75 (v) of the Constitution to grant writs of mandamus, prohibition or injunction against officers of the Commonwealth : see, for recent cases in which this matter has received consideration, *R. v. Connell*, 69 C.L.R. 467 : *R. v. Hickman*, 70 C.L.R. 598.

PART VI. ASSESSMENT OF COMPENSATION FOR SHARES.

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

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

> "The amount of compensation payable, and the amount payable to each person, shall be determined by the Court and not in any other manner and payment shall be made accordingly."

Sub-sec. (8) provides:—

> "The payment of compensation by the Commonwealth Bank in pursuance of this section or of an order made by the Court shall be a good and valid discharge to the Commonwealth Bank . . ."

PART VI, *Division 2: Compensation in Respect of the Acquisition of Assets.*

Sec. 42 provides that such compensation shall be ascertained in accordance with Division 2 and "not in any other manner." Sec. 43 provides that a private bank the business of which has been taken over by the Commonwealth Bank in pursuance of section twenty-four shall, subject to Division 2, be paid such compensation as is determined by agreement between the Commonwealth Bank and the bank. Such an agreement is subject to the approval of the Treasurer [sub-sec. (2)]. A bank might refuse to make an agreement under sec. 22 to sell its business to the Commonwealth Bank. The Treasurer could then bring about the taking over of the business by the Commonwealth Bank under sec. 24. He could then give a notice under sec. 13 (1) and displace the original directors (sec. 17) and place nominee directors in office (sec. 18). Those directors could then make an agreement for compensation under sec. 43 (1) with the Commonwealth Bank with the approval of the Treasurer.

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

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

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compensation determined by the court under sec. 44 shall be payable by the Commonwealth Bank to the private bank in full satisfaction of the claim to which the determination relates.

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PART VII. PROHIBITION OF THE CARRYING ON OF BANKING BUSINESS BY PRIVATE BANKS.

Sec. 46 provides in sub-sec. (1) that :—

"Notwithstanding anything contained in any other law or in any charter or other instrument, a private bank shall not after the commencement of this Act carry on banking business in Australia except as required by this section."

The Banking Act 1945, sec. 7, provided that a body corporate should not carry on business without an authority granted by the Governor-General, and sec. 8 provided that such an authority should be granted to all the banks which are plaintiffs in these cases. Sec. 46 substitutes for the general authority to carry on banking business given to the plaintiff banks under the Banking Act limited authority conferred by sec. 46. The private banks are to carry on banking business only as required by sec. 46.

Sec. 46 (2) provides that each private bank shall, subject to sec. 46, carry on banking business in Australia and shall not " except on grounds which are appropriate in the normal and proper conduct of banking business " cease to provide any facility or service provided by it in the course of its banking business on the 15th August, 1947. Sec. 46 concludes with the provision : " Penalty : Ten thousand pounds for each day on which the contravention occurs." If this provision applies to sub-sec. (2), then this penalty is incurred if the private bank ceases to continue to provide an existing facility or service in respect of each day upon which it so ceases.

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

Sub-sec. (4) enables the Treasurer to prohibit the carrying on of banking business by any of the plaintiff banks from a date selected by him. Sub-sec. (4) is in the following terms :—

"The Treasurer may, by notice published in the *Gazette* and given in writing to a private bank, require that private bank to cease upon a date specified in the notice carrying on banking business in Australia."

Sub-secs. (5), (6) and (7) refer to the specification of a date and the amendment of a notice. Sub-sec. (8) provides that upon and after the date specified in a notice (original or amended) the private bank to which the notice was given " shall not carry on banking business in Australia." The effect of this provision is that the private bank (that is, the company) shall not, after the specified date, do any act in Australia which falls within the definition of banking business. If it does any such act, then the bank is liable to a penalty of £10,000 for each day on which a contravention occurs. Apparently, therefore, after the specified notice had been given, no banking transaction could take place by or on behalf of the private bank to which the notice was given. A direction by the Treasurer that the private bank should use its own name in a transaction so as actually to conduct that transaction would not be a defence in a prosecution under the section. When the specified

date arrives the banking business of the private bank is completely stopped, and whatever is done thereafter in relation to current and outstanding transactions cannot be done by the bank or by any person on behalf of the bank if it can be brought within the description of " carrying on banking business in Australia." A bank to which sec. 24 (8) became applicable would be tempted to act upon the view that the only prudent course would be to do nothing about anything. But it will be seen that sec. 60 requires certain action—also under a penalty of £10,000 a day.

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

PART VIII. PROTECTION OF RIGHTS OF PERSONS EMPLOYED BY PRIVATE BANKS.

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

PART IX. GENERAL.

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

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

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

Sec. 60 provides that a private bank and every director of and person employed by a private bank shall do or join in doing " all acts or things which it is necessary or convenient to do for or in relation to the operation of any of the provisions of this Act and, in particular, for or in relation to :—

" (A) the taking over by the Commonwealth Bank under this Act of any of the business of that private bank ;

(B) the acquisition by, or the transfer to, the Commonwealth Bank by force of or under this Act of any shares in, or assets of, that private bank ; and

(C) the assumption by the Commonwealth Bank by force of or under this Act of any liabilities of that private bank."

If a private bank or a person employed by such a bank fails to do or " join in doing " something which it is " convenient " to do " in relation to the operation " of any of the provisions of the Act as required by the introductory words of this section, the penalty is ten thousand pounds per day for the bank and one thousand pounds per day for the defaulting director or person employed by a private bank. As already suggested, if sec. 46 (4) had been applied to a private bank, its directors and staff would need to be careful in order to comply with sec. 60 without aiding or abetting an infringement of sec. 46 (8).

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

THE COMMONWEALTH BANK ACT 1945.

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

Sec. 7 of the former Act provides that the corporate entity of the Commonwealth Bank shall not be affected by the repeal of certain statutes and that the bank shall be preserved and continue in existence under and subject to the Act. This is an explicit provision for the continuance in existence of the Commonwealth Bank as a corporation.

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

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

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

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

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

THE BANKING ACT 1945.

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

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

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

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

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

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

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

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

Sec. 51 provides that, " except with the prior consent in writing of the Treasurer after receipt by him of the recommendation of the Commonwealth Bank, a bank shall not enter into any arrangement or agreement for any sale or disposal of its business by amalgamation or otherwise . . ." Under the 1947 Act an agreement for such sale or disposal may be made under secs. 19 or 22, and there may be a compulsory disposal under sec. 24.

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

CONSTRUCTION OF LEGISLATIVE POWERS: PITH AND SUBSTANCE, ETC.

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

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

The phrase " pith and substance " has been used in many cases where the validity of statutes has come into question—e.g., *Union Colliery Co. of British Columbia v. Bryden*, [1899] A.C. 580; *Attorney-General for Ontario v. Reciprocal Insurers*, [1924] A.C. 328 at pp. 336-338; *Gallagher v. Lynn*, [1937] A.C. 863; *Attorney-General for Alberta v. Attorney-General for Canada*, [1943] A.C. 356; *Attorney-General for Canada v. Attorney-General for Quebec and Others*, [1947] A.C. 33; *Attorney-General for Alberta v. Attorney-General for Canada*, [1947] A.C. 503. In the recent case of *Prafulla Kumar Mukherjee v. Bank of Commerce Ltd., Khulna*, 74 Ind. App. 23, a decision was based upon what was regarded as the " pith and substance " of legislation passed under the Indian Constitution.

The Attorney-General contended that the cases in which reference was made to " pith and substance " were cases in which it had been necessary to deal with the difficulties created by an attempt in the Canadian Constitution (which had been repeated in the Indian Constitution) to provide lists of legislative subjects which were exclusive of one another. A law might relate directly to two subjects, one belonging to one legislature exclusively, and another belonging to another legislature exclusively. This had often happened in Canada by reason of the overlapping between, on the one hand, Dominion legislative powers, and, on the other hand, the powers of the Provincial Parliaments to make laws with respect to (*inter alia*) such subjects as " property and civil rights in a Province " and " generally all matters of a merely local or private nature in the Province ": British North America Act 1867, sec. 92. As the grants were grants of powers described as

exclusive, some means had to be adopted for determining the predominant characteristics of a law so that it could be assigned to one category rather than to some other category. This, it was contended, was really the meaning of the pith and substance test, and it was inapplicable to the Australian Constitution because exclusive powers had not therein been assigned to both Commonwealth and States. In the case of the Commonwealth Constitution, it was argued, the only question arising with respect to the validity of legislation was whether the legislation was a law " with respect " to a certain subject matter ; that is, it was said, whether it was a law which " touched and concerned " that subject matter. If, for example, a law was a law with respect to banking, then it would be irrelevant that it might also be a law with respect to some other subject—unless there was some express prohibition in the Constitution against the Commonwealth Parliament dealing with that other subject. The defendants contended that these propositions were supported by the cases in this court of *Huddart Parker v. The Commonwealth*, 34 C.L.R. 492 ; *Meakes v. Dignan*, 46 C.L.R. 73, and the judgment of Holmes, J., in *Hammer v. Dagenhart*, 247 U.S. 279, where he referred to the use of a federal power as a " foothold " for legislation.

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

An example of the difficulties which would arise from the adoption of such a principle is readily afforded by the power of the Commonwealth Parliament to make laws with respect to taxation. If all laws passed by the Commonwealth Parliament imposing taxes of any kind were held to be valid, then the taxation power alone would enable the Commonwealth Parliament to pass laws upon any subject whatever by imposing a tax upon specified acts or omissions. That this is the case was recognised early in the history of the Commonwealth : see *The King v. Barger*, 6 C.L.R. 41, *per* Griffith, C.J., at p. 77, where it was pointed out that if the taxation power were construed in the wide manner suggested " the Commonwealth Parliament might assume and exercise complete control over every act of every person in the Commonwealth by the simple method of imposing a pecuniary liability on everyone who did not conform to specified rules of action, and calling that obligation a tax, not a penalty."

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

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

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The Constitution assigns only specific legislative powers to the Commonwealth Parliament. It is a federal Constitution, not a unitary Constitution. This has been emphasised again and again in the judgments of this court, and in no case more clearly than in the *Engineers' Case*, 28 C.L.R. 129, at p. 150, where reference is made to the conclusion :—

> "as to which this Court has never faltered, that the Commonwealth is a Government of enumerated or selected legislative powers."

see also at p. 154—

> "It is undoubted that those who maintain the authority of the Commonwealth Parliament to pass a certain law should be able to point to some enumerated power containing the requisite authority."

Accordingly, no single power should be construed in such a way as to give to the Commonwealth Parliament a universal power of legislation which would render absurd the assignment of particular carefully defined powers to that Parliament. Each provision of the Constitution should be regarded, not as operating independently, but as intended to be construed and applied in the light of other provisions of the Constitution. Thus an endeavour should be made to " reconcile the respective powers and give effect to all " : *Citizens Insurance Co. of Canada v. Parsons*, 7 A.C. 96, at p. 109. A recent application of this principle is to be found in *Melbourne Corporation v. The Commonwealth*, 74 C.L.R. 31. If the fact that a statute " touched and concerned " a matter within the power of the Commonwealth Parliament were held to be sufficient to establish its validity, there would be no distribution of powers between Commonwealth and States—the Commonwealth would have complete power of controlling by law all persons and things in Australia, subject only to such prohibitions as the Constitution contains. For the reasons which I have stated, I am of opinion that the Commonwealth Constitution should not be construed upon the basis that any legislation is valid if it can be said to " touch and concern " one of the subject matters assigned to the Commonwealth Parliament.

Nor, on the other hand, am I of opinion that the phrase " pith and substance," in spite of its frequent use by high authorities, solves any difficulties. It lends itself to emphatic asseveration but it provides but little illumination. It is a metaphorical phrase possibly derived from " pith and marrow " in patent law. Wills J. in *Incandescent Gas Light Co. v. De Mare Incandescent Gas Light Systems*, 13 R.P.C. 301, said of the latter phrase :—

> " 'Pith' is a great deal less than the substance of the vegetable structure of which it is part, and ' marrow ' a great deal less than the substance of the animal structure of which it is part. Metaphors are very apt to mislead, as they are seldom close enough to the things to which they are applied."

The difference, if any, between " pith " and " substance " is not explained.

The distinction marked by the phrase is a distinction between " pith and substance " as representing " primary object and effect " and incidental application to other matter : *Attorney-General for Canada v. Attorney-General for Quebec & ors.*, 1947 A.C. 33, at p. 44. The case of *Prafulla Kumar Mukherjee v. Bank of Commerce* (*supra*) shows that there is no difference between asking " What is the pith and substance of a statute ? " and asking " What is its true nature and character ? "—74 Ind. App. at p. 43. In *Great Western Saddlery Co. v. The King*, 1921 2 A.C. 91, at p. 117, it was said with respect to the construction of statutes for the purpose of determining constitutional validity—

" The only principle that can be laid down for such cases is that legislation the validity of which has to be tested must be scrutinised in its entirety in order to determine its true character."

But there is no rule which will settle all cases. A question of *ultra vires* " must be determined in each case as it arises, for no general test applicable to all cases can safely be laid down " : *Attorney-General for Alberta v. Attorney-General for Canada*, 1939 A.C. 117, at p. 129.

A power to make laws " with respect to " a specific subject is as wide a legislative power as can be created. No form of words has been suggested which would give a wider power. The power conferred upon a Parliament by such words in an Imperial Statute is plenary—as wide as that of the Imperial Parliament itself—*R. v. Burah*, 3 A.C. 889 ; *Hodge v. The Queen*, 9 A.C. 117. But the power is plenary only with respect to the specified subject. In determining the validity of a law it is in the first place obviously necessary to construe the law and to determine its operation and effect (that is, to decide what the Act actually does), and in the second place to determine the relation of that which the Act does to a subject matter in respect of which it is contended that the relevant Parliament has power to make laws. A power to make laws with respect to a subject matter is a power to make laws which in reality and substance are laws upon the subject matter. It is not enough that a law should refer to the subject matter or apply to the subject matter : for example, income tax laws apply to clergymen and to hotelkeepers as members of the public ; but no one would describe an income tax law as being, for that reason, a law with respect to clergymen or hotelkeepers. Building regulations apply to buildings erected for or by banks ; but such regulations could not properly be described as laws with respect to banks or to banking.

It has often been decided that the motives of Parliament, and, as a general rule, the objects which a Parliament seeks to achieve, are not relevant to questions of constitutional validity : see cases cited in the Uniform Tax Case—*South Australia v. The Commonwealth*, 65 C.L.R. 373, at pp. 424-426. The operation and effect of a customs duty on certain goods is to make the importation of those goods subject to the duty imposed. That is what the law does. The motive of Parliament may have been to assist a particular industry or business. When validity is in question, that fact is irrelevant. An indirect consequence of the law may be to ruin some other industry or business. That fact also is irrelevant.

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

COMMONWEALTH POWER AS TO BANKING.

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

The plaintiffs emphasised the fact that the word is " banking," not " banks." Banking, it is said, means the performance of a function, which means that which is done in the actual conduct of banking business. If there are no banker-customer

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transactions, then there is no banking. The power authorises laws, it is said, which really and substantially bear upon transactions or operations between and characteristic of banker and customer, and no other laws.

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

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

The plaintiffs based an argument as to the meaning of " banking " in sec. 51 (xiii) upon the power to make laws with respect to " State banking extending beyond the limits of the State concerned." This power must be a power which is limited to the power of making laws dealing with banking *transactions* which take place in more than one State. " Banking " can only be said to " extend," it is argued, where there is an actual transaction which takes place in more than one State. If the power to make laws with respect to " State banking extending, etc." were construed to authorise in relation to State banking so extending such a statute as the Banking Act 1947 then it would be possible for the Commonwealth Parliament to authorise the Commonwealth Bank to acquire *all the assets* of any State bank whose operations extended beyond a single State, to put in new managers *of its whole business* (intrastate as well as interstate), and to prohibit it carrying on any banking business. It is contended that such an intention cannot rationally be derived from the words used. Thus " banking " in the phrase " State banking extending," must mean " banking transactions "—and not the acquisition of banks, the management of banks or the prohibition of banking. It is argued that the word " banking " should be given the same meaning when it appears as the initial word of placitum (xiii).

Accordingly, it is contended that the power to make laws with respect to " banking " is a power to make laws with respect to the relations between a banker and his customer, and not with respect to the management of banks, the acquisition of shares in a banking company, the acquisition of assets by or from banks, or the prohibition of banking. Upon this view of the meaning of the word " banking " the following propositions are submitted by the plaintiffs :—

(A) Acquisition of shares *in a bank*, whether by another bank or a private person, is not itself a " banking " operation, and a law with respect to such acquisition cannot be supported as being itself legislation with respect to banking.

(B) Acquisition of assets *by a bank* (*e.g.*, the Commonwealth Bank) may be necessary in order to establish and carry on a bank, but the acquisition of assets, whether from a bank or not, is not itself " banking," and cannot be made a subject of legislation under the banking power.

(C) Similarly, the taking over by a bank of the banking business or other business of another bank is not itself a " banking " operation.

The defendants conceded that there could be no " banking " without banking transactions. If an establishment which was called a bank never did any banking business it would be impossible to say that it was engaged in banking. But banking, it was argued, was essentially a business. It included, it was contended, not only

" over-the-counter " transactions with customers, but also the selection of persons who should be allowed to conduct banks. It was under this power that the Banking Act 1945 was enacted to exclude individuals from banking, and to limit the carrying on of the business of banking to corporations and to licensed corporations. The plaintiffs had not ventured to challenge the validity of these provisions. It was pointed out that in *Huddart Parker v. The Commonwealth*, 44 C.L.R. 47, where this court considered the trade and commerce power, it was definitely held that under a power to make laws with respect to trade and commerce it was competent to the Commonwealth Parliament to select the persons who should be permitted to engage in such trade and commerce. These cases were impliedly approved by the reference of the Privy Council to them in *James v. The Commonwealth*, 55 C.L.R. 1, at pp. 55-7, where the Transport Workers' Act, in relation to which they were decided, was plainly held to be valid. The essence of this Act was that only licensed persons were allowed to engage in particular operations in interstate trade and commerce. Selection of individuals means inclusion of some and exclusion of others. The reasoning which justified such selection in the case of transport workers applied equally to banking and therefore authorised the enactment of legislation which permitted some banks to operate and prevented others from operating.

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

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

The Attorney-General relied strongly upon the Canadian cases dealing with legislation of the Province of Alberta which was declared to be invalid because it dealt with banking, which was a subject of exclusive Dominion power : see British North America Act, sec. 91 (15), whereby it is declared that the exclusive legislative authority of the Parliament of Canada extends to " banking, incorporation of banks and the issue of paper money." The Canadian decisions show, it was contended, that the control of the creation of credit through a banking system was an important part of banking : see *In the matter of Three Bills passed by the Legislative Assembly of the Province of Alberta 1937*, 1938 Can. S.C.R. 100. In that case it was held that a system of credit control, using the same kind of methods of dealing with credit as were used by ordinary banks in dealing with credit, was a financial system which amounted to banking within the meaning of sec. 91 (15) of the British North America Act. It was suggested in reply to the argument of the Attorney-General upon this point that the decision of the Supreme Court of Canada was only a decision upon the residual power of the Dominion Parliament. That, however, was not the case. It was held (see p. 117) that the :—

> "system of administration, management and circulation of credit . . . constitutes in our view a system of banking within the intendment of sec. 91."

It was therefore legislation upon a subject, viz. banking, which fell exclusively within Dominion power and it was for that reason that the legislation was held to be invalid.

The defendants further pointed out that the plaintiffs had not contended that the central banking provisions contained in the Banking Act 1945 were not within

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federal legislative power. Such provisions were plainly valid, and this fact showed that a meaning must be given to the word " banking " which was wider than that which would confine it to particular banker and customer transactions. The subject of banking included a determination of general banking and credit policy.

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

The plaintiffs sought to avoid this inclusion by denying that sec. 51 (xiii) was the source of the power which was exercised in creating the Commonwealth Bank and in endowing it with powers. (The Commonwealth Bank was created as a corporation without corporators—*Heiner v. Scott*, 19 C.L.R. 381 : *Butterworth v. Commonwealth Bank*, 22 C.L.R. 206. This is impossible at common law, but I do not see why it should be beyond statutory power to make a new kind of corporation.) The plaintiffs contended that the existence of the Commonwealth Bank depended upon sec. 51 (xxxi) of the Constitution (the incidental power) and not upon sec. 51 (xiii) (the banking power). It was argued that the incorporation of the Commonwealth Bank and the assignment of powers to it was to be justified only by the reasoning in *McCulloch v. Maryland*, 4 Wheat, 316 ; that is, that the bank was created as the financial agent of the Government and as part of the governmental system and that it could therefore be given powers and functions which were not limited to the subject of " banking."

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

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

In my opinion considerations as to central banking and all the evidence and argument as to credit control are irrelevant in the present cases. Central banking is not a matter in issue in the present cases. It is true that expansion or contraction of credit is the consequence of many banking transactions. But expansion and contraction of credit is brought about also by other agencies than the activities of banks, and the legislative power of the Commonwealth Parliament is not a power to make laws with respect to the control of credit. In so far as Parliament can make laws with respect to banking it can affect the volume of credit in the community. It can do the same thing by laws with respect to taxation, borrowing, imports and exports, and (under the defence power) price control; but the Commonwealth Parliament has not been given any power to make laws with respect to the control of credit as a subject in itself. But I agree with the argument of the defendants that " banking " includes central banking. If this be so " banking " cannot be given the limited sense of banking transactions between banks and customers for which the plaintiffs contend. Determination of banking policy and of systems of management are as essential to the existence of banking as are transactions with depositors and borrowers.

Both plaintiffs and defendants made reference to cases decided in the United States which had some reference to the subject of banking, but in none of these cases was it necessary to formulate a precise definition of banking in order to apply any constitutional provision upon that subject. The power of Congress to make laws with respect to banking has been founded in the United States upon the incidental power: *McCulloch v. Maryland*, 4 Wheat. 316. There is no constitutional provision dealing with the subject of banking and the American authorities cited are of little assistance in these cases.

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

At this point it is convenient to notice the argument of the plaintiffs that the word " banking " must be given a narrow construction because in placitum (xiii) it is used in a sense which excludes incorporation of banks. In my opinion little weight should be attached to such an argument. The historical antecedents of the placitum to which reference has been made almost certainly explain its form. But it must be recognized that words are sometimes added in constitutions for the (generally unsuccessful) purpose of preventing argument by making a definite provision with respect to a particular subject, even though some overlapping may result. The words conferring legislative power upon the Commonwealth Parliament should not be construed upon the basis of any hard and fast mechanical rule that there is no overlapping between any of them. See, for example, Constitution, sec. 51 (xii)—" Currency, coinage, and legal tender "—a very clear case of overlapping. It was said concerning the Indian Constitution in *Prafulla Kumar Mukherjee v. Bank of Commerce*, 74 Ind. App. 23 at p. 42—" It is not possible to make so clean a cut between the powers of the various legislatures: they are bound to overlap from time to time." And see *Attorney-General for Canada v. Attorney-General for Quebec and Others*, [1947] A.C. 33 at p. 43.

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It was strongly contended for the defendants that the essential characteristic of banking is the creation of credit. See *Punjab Co-operative Bank Ltd. Amritsar v. Income Tax Commissioners*, [1940] A.C. 1055 at p. 1072. The defendants' contention was put in the following words : " The primary function of a bank is granting and recalling credit." Undoubtedly a bank does deal in credit. Depositors have credit by reason of their deposits and a bank, when it grants an overdraft, creates a credit in favour of a customer, and when it lends money in any way it creates credit. Similarly, it affects the volume of credit in the community by buying and selling securities and by other operations. But this means no more than that, as Lord Simon said in *Attorney-General for Alberta v. Attorney-General for Canada*, 1947, A.C. 503, at p. 517 : " The concept of banking certainly includes the granting of credit by banks." The actual or potential creation of credit is a feature of all transactions which involve a pecuniary element where the transaction is not conducted upon a cash basis. Any transaction which creates an outstanding liability involves a creation of credit. 'The ordinary sale of goods on credit creates a credit which did not previously exist. It cannot be said that wherever credit is granted or recalled there is a transaction which is essentially a banking transaction. Creation of credit is not the distinctive feature of banking as compared with other activities.

In my opinion the contention of the defendants that banking is essentially a business is well founded. A single transaction by an individual person who receives a deposit of money and promises to repay it is not a banking transaction. Banking is a business. See the cases cited in Paget—The Law of Banking, 4th Edn. (1930), p. 5—In order to be a banker a man must " hold himself out as a banker and the public take him as such "—*Stafford v. Henry*, 12 Ir. Eq. R. 400.

> "If a man carries on other businesses besides that of banking, and if the banking is only subsidiary to the other businesses, he cannot be regarded as a banker."

—*Shields Case v. Bank of Ireland* (1901) I.R. Ch. at p. 199.

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

The essential nature of the relations between banker and customer was most clearly defined in *Foley v. Hill*, 2 H.L.C. 28, where it was held that a bank which receives the money of a depositor becomes the debtor of a depositor " with a super-added obligation arising out of the custom of bankers to honour the customer's drafts " : see *Attorney-General for Canada v. Attorney-General for Quebec and Others*, [1947] A.C. at p. 44. The conduct of business upon this basis is the central and distinctive feature of banking. Without it, in my opinion, there can be no banking. Banking also includes the lending of money upon or without security if such lending is associated with the business which I have specified. Money-lending not so associated is not banking : see *Laws of England*, 2nd Edn., Vol. 1, p. 782 :—

> "A banker is an individual, partnership or corporation whose sole or predominating business is banking, that is the receipt of money on current or deposit account and the payment and collection of cheques, drawn by or paid in by a customer." It also includes "the business of making of advances or the granting of overdrafts to customers."

See *Commissioner of State Savings Bank v. Permewan Wright*, 19 C.L.R. 457, to the same effect.

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

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

A bank, in order to carry on business successfully, must have a policy with respect to deposits, overdrafts, etc. It must have managers and a system of management, a staff and offices. Further, in order to carry on successfully, it must be able to invest its funds. All these subjects, in my opinion, fall within the concept of banking as a business. They are naturally, and necessarily, involved in the existence and legitimate activity of any banking business. A bank which omitted to deal with these matters would soon find itself in difficulties. They are, in my opinion, all part of the every-day business of banking.

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

The argument for the plaintiffs devoted a great deal of attention to the case of *Tennant v. Union Bank*, [1894] A.C. 31, where the Privy Council considered a Dominion Bank Act which provided that a bank should have certain rights under and in respect of warehouse receipts taken as securities in the course of its business—in effect that they should be negotiable instruments. The Provincial Parliaments had exclusive power to legislate with respect to warehouse receipts under the heading " property and civil rights in the Province." Under provincial law the warehouse receipts were not negotiable instruments. It was held that the Dominion law was a law with respect to banking (as to which the Dominion Parliament had exclusive power) and that it was valid. In the reasons for judgment it was said that " banking " was " an expression wide enough to embrace any transaction coming within the legitimate business of a banker." The plaintiffs used this statement as if it meant " Banking consists entirely of ' transactions '." But the sentence quoted only states what is obvious: that the business of banking includes banking

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transactions. No one has ever disputed that proposition. It serves only to put one upon enquiry as to what is the " legitimate business of a banker " and makes it clear that banking is a business.

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

I come now to the argument of the plaintiffs that the word " banking " in the phrase " State banking extending beyond the limits of the State concerned " cannot be fairly construed in the wide sense just stated. I agree with the reasoning that such a construction would have the effect of destroying the exception of State banking from federal power. In my opinion, the power to make laws with respect to " State banking extending, etc.," must be given a limited construction so as not to destroy that exception. The federal power, in this case, must be limited by reason of the fact that other State banking is beyond federal power, and that the wide construction of " banking " in " banking extending " would have the actual result of subjecting that other State banking to federal legislative power. Thus the Commonwealth power should not be held to include a power to prohibit State banking extending, etc.—for the reason that such a construction would defeat the reasonably plain intention of the provisions with respect to State banking. The intention of these provisions is that the States shall be free to set up State banks and that the Commonwealth Parliament may remove obstacles to the operation of such banks in other States. Such a view gives, in my opinion, a sensible and practical interpretation to the provisions with respect to State banking. But none of these considerations appear to me to reflect back upon the interpretation of the general power to make laws with respect to " banking." They are all associated with and dependent upon the nature of State banking as being banking under State control, management and direction, as distinct from Commonwealth control, management and direction. These considerations have, in my opinion, no relation to the interpretation of the general power to make laws with respect to " banking."

SECTION 46.

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

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

The latter proposition was supported by reference to *Municipal Corporation of Toronto v. Virgo*, [1896] A.C. 88 at p. 93. The principle stated in *Toronto v. Virgo* that a power to regulate " seems to imply the continued existence of that which is to be regulated," was applied for the purpose of interpreting the Canadian Constitution in *Attorney-General for Ontario v. Attorney-General for the Dominion*, [1896] A.C. 348, see p. 363. This principle has frequently been applied to municipal by-laws—see, e.g., *Melbourne Corporation v. Barry*, 31 C.L.R. 174, and *Shire of Swan Hill v. Bradbury*, 56 C.L.R. 747. But, the legislative power is not a power to " regulate " banking. It is a power to make laws *with respect to* banking, and this is the most general form in which power can be given in relation to any subject matter.

Next, under a plenary power with respect to a particular subject the Legislature can *prima facie* allow the subject to be uncontrolled or may control it to such extent as it thinks proper :—

> "The plenary power of legislation is not merely a power to regulate : it ranges from creation to destruction and it may establish as well as prohibit."

—Harrison Moore, *The Commonwealth of Australia*, 2nd Edn., p. 280. In the United States the power of Congress to " regulate commerce with foreign nations and among the several States " has on very many occasions been held to extend "not only to those regulations which aid, foster and protect the commerce, but it embraces those which prohibit it"—*United States v. Darby*, 312 U.S. 100, at p. 113, and the long list of cases there cited. So also in Australia this court has held that power to make laws with respect to trade and commerce among the States enables the Parliament to prohibit persons from engaging in such trade and commerce: *Huddart Parker v. The Commonwealth*, 44 C.L.R. 492 ; *Meakes v. Dignan*, 48 C.L.R. 73 ; *Australian National Airways v. The Commonwealth*, 71 C.L.R. 29, see pp. 72, 77 and 81 ; *Melbourne Corporation v. The Commonwealth*, 74 C.L.R. 31, where a particular prohibition of certain banking was held to be a law with respect to banking.

A further argument of the plaintiffs with respect to sec. 46 was based upon the submission that the power to prohibit banking conferred by sec. 46 was an arbitrary power and that any power of prohibition, if it existed at all, must be a power to prohibit only by reason of what were described as " banking considerations "—considerations which could be said to be " relevant " or " germane " to banking. Political considerations such as a policy of substituting public control of banking for private control of banking were said to be irrelevant. In some cases—more particularly in the case of subordinate legislative authorities, it may be proper, having regard to the character of the authority and the nature of the subject matter, to construe a statute as not intended to confer a power to prohibit : *Municipal Corporation of Toronto v. Virgo*, [1896] A.C. 88 ; *Shire of Swan Hill v. Bradbury*, 56 C.L.R. 747. In some cases the character of the statute under which an authority acts is such that the authority is limited to action on grounds which are relevant to a particular object or purpose : *Victorian Railways Commissioner v. McCartney*, 52 C.L.R. 383, and cases cited in *Arthur Yates & Co. v. Vegetable Seeds Committee*, 72 C.L.R. 37, at p. 66. In others an exercise of power is validly authorised only where it is exercised upon grounds which are relevant to a subject upon a connection with which the validity of the statute depends—as in *Shrimpton v. The Commonwealth*, 69 C.L.R. 613. In the last-mentioned case it was held that under a particular National Security regulation a purely arbitrary discretion could not be vested in a Minister or a public officer, and that it must appear that the exercise of the discretion was based upon considerations relevant to the subject matter which was relied upon for the purpose of supporting the law—in the case in question the subject matter of

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

If a discretion given by a law is exercised fraudulently or dishonestly, then there is no true exercise of the discretion: *Arthur Yates & Co. v. Vegetable Seeds Committee (supra)*. But a legislature with plenary power over a subject can provide—and frequently does provide—for the operation of specific provisions in particular cases to depend upon an exercise of discretion by a particular person. In *Australian Commonwealth Shipping Board v. Federated Seamen's Union*, 36 C.L.R. 442, at p. 453, it was said that it was a :—

> "well-established parliamentary practice . . . to legislate conditionally upon the exercise of discretion by a person in whom the Legislature places confidence."

In the 1947 Act the Legislature has expressed confidence in all Treasurers of the Commonwealth. The Parliament cannot be held to have authorised a fraudulent or dishonest act, but I am of opinion that Parliament has placed no other limitations upon a Treasurer's exercise of discretion in acting under the many provisions of the 1947 Act where action depends merely upon his own volition—or when his approval is required—e.g., secs. 12, 13, 18, 19 (2), 22, 24, 43 (2) and 46. If the power under sec. 46 can be exercised only for what is called " a banking reason "—what is to be said of the various discretions conferred by the other sections mentioned ? In my opinion the argument of the plaintiffs that sec. 46 is invalid by reason of the power to prohibit being simply vested in the Treasurer without any provision as to the grounds upon which he may act is not applicable in the case of a legislature making a law upon a subject as to which it has plenary power. The Legislature takes an obvious risk in enacting such provisions—but that is a matter for the judgment of the Legislature itself.

PUBLIC CONTROL OF BANKING.

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

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

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

(C) the control of the management of banks ;

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

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

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

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

In the 1947 Act there is a further development of this policy. In that Act Parliament has expressed its decision that the Commonwealth Treasurer shall be given the power of getting rid of the private banks so as to leave an open field for the Commonwealth Bank. The means adopted is to enable the Commonwealth Bank to acquire either partial or complete control of the business of private banks to such extent as is thought desirable from time to time. One of the well known methods of acquiring control of a business carried on by a company is the purchase of shares in the company—if possible, ownership of all the shares in the company. This is one method adopted in the 1947 Act (sec. 12—acquisition of shares by purchase). But the Commonwealth Parliament has a power to make laws for the acquisition of property by compulsion. This is another method adopted in the Act (sec. 13—compulsory acquisition of shares). A company which wishes to get rid of competition and to extend its business may acquire the business and assets and take over the liabilities of another company by agreement with that company. This method is made available by sec. 19 and by sec. 22. But the Commonwealth Parliament has powers of legislation and can make statutory provision for acquiring property for any purpose, such as banking, in respect of which the Parliament has power to make laws. This method of extending the area of operations and the influence of the Commonwealth Bank is applied in sec. 24. Few means of dealing with a company which is a business competitor could be more effective than taking control of its management, if this is possible. Private individuals cannot do this, but the Commonwealth Parliament has chosen this also as one of the means of securing its objective, namely obtaining increased and possibly complete control of banking other than State banking by the Commonwealth Bank : secs. 17, 18 and 19. Another method of excluding competition is to stop by some lawful means the business of competing enterprises. Under a power to make laws with respect to banking the Commonwealth Parliament can determine whether and to what extent and by whom the business of banking shall be carried on. The Parliament has exercised this power in sec. 46, going further than had been done in the Banking Act 1945, secs. 6, 7 and 8.

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

CONSTITUTION, SEC. 51 (xx)—FINANCIAL CORPORATIONS.

Before proceeding to examine some of the details of these provisions which may not be justified under the general propositions which I have stated, or which may be invalidated by reason of failure to comply with other constitutional provisions, it is convenient to refer to another source of legislative power upon which the

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defendants rely, namely sec. 51 (xx) of the Constitution. This placitum confers power upon the Commonwealth Parliament to make laws with respect to " Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth."

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

The judgments in *Huddart Parker v. Moorehead*, 8 C.L.R. 330, provide several alternative interpretations of this difficult provision. The one thing that is clear about it is that the provision assumes the existence of corporations either under foreign law or under some law which is in force in the Commonwealth. If the corporation is already formed it derives its existence and its capacity from the law which provided for its formation: see the quotation from *Dartmouth College v. Woodward*, 4 Wheat. at p. 636, in the judgment of Isaacs J. in *Huddart Parker v. Moorehead* (*supra*):—

> "Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence."

Thus the existence and the powers and capacities of any corporation to which sec. 51 (xx) applies depend upon some law other than a law made under that provision.

If the proposition submitted for the defendants were accepted, then the Commonwealth could make any law at all for the control of the corporations mentioned. The position would then be that the Commonwealth Parliament would have complete powers of legislation by way of direction or prohibition with respect to anything that such corporations might do. As to all individual persons and as to all other corporations (e.g. charitable, literary, scientific) the Commonwealth Parliament would have powers only in relation to the particular subject matters included within the specific provisions of sec. 51 and other sections of the Constitution. But as to the corporations described in placitum (xx), the Parliament would be able to make any kind of law on any subject: Higgins J. in *Huddart Parker v. Moorehead* (supra), at pp. 409, 410, gave some illustrations of the consequences of such a view. He said that if the view stated was right:—

> ". . . . the Federal Parliament is in a position to frame a new system of libel laws applicable to newspapers owned by corporations, while the State law of libel would have to remain applicable to newspapers owned by individuals. If it is right, the Federal Parliament is competent to enact licensing Acts, creating a new scheme of administration and of offences applicable only to hotels belonging to corporations. If it is right, the Federal Parliament may enact that no foreign or trading or financial corporation shall pay its employees less than 10s. per day, or charge more than 6 per cent. interest, whereas other corporations and persons would be free from such restrictions. If it is right, the Federal Parliament can enact that no officer of a corporation shall be an Atheist or a Baptist, or that all must be teetotallers. If it is right, the Federal Parliament can repeal the Statute of Frauds for contracts of a corporation, or may make some new Statute of Limitations applicable only to corporations. Taking the analogous power to make laws with regard to lighthouses, if the

respondent's argument is right, the Federal Parliament can license a lighthouse for the sale of beer and spirits, or may establish schools in lighthouses with distinctive doctrinal teaching, although the licensing laws and the education laws are for ordinary purposes, left to the State Legislatures."

But, as His Honour said, these arguments from inconvenience are not conclusive.

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

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

There is, in my opinion, a decisive argument against the suggested interpretation of sec. 51 (xx). It is, in my opinion, impossible to reconcile that interpretation with the provisions in placitum (xiii) relating to State banking. Upon that interpretation, if State banking were carried on by a corporation, that corporation, being a financial corporation formed within the limits of the Commonwealth, would be completely subject to any federal law made under placitum (xx). The result would be that the exclusion of State banking from the banking power would be entirely deprived of effect in all such cases. The Constitution should not be construed so as to bring about a result so unreasonable if another construction is reasonably open. In my opinion such a construction is reasonably open. The difficulties to which I have referred disappear if sec. 51 (xiii) is interpreted as a special provision which provides for the whole legislative power of the Commonwealth Parliament so far as laws with respect to banking corporations and banking are concerned. This is a proper occasion for interpreting a provision "as excluding cases expressly dealt with elsewhere . . . notwithstanding the generality of the words": *John Deere Plow Co. Ltd. v. Wharton.* [1915] A.C. 330 at p. 340. Upon this view placitum (xx) should be regarded as not applying to corporations so far as they are engaged in banking. Accordingly, in my opinion sec. 51 (xx) is irrelevant for the purposes of determining the validity of any of the provisions of the 1947 Act.

CONSTITUTION, SEC. 51 (xxxi)—ACQUISITION.

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

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

The plaintiff banks have, by their memoranda of association, power to buy shares in other banks and companies, to sell their businesses and to amalgamate with other banks. The defendants argued that the provisions of the Act as to acquisition of shares and assets merely adopt provisions of this type for the Commonwealth Bank, and that such provisions in the memoranda of association of the plaintiff banks show a quite common and well-recognised feature of banking law. But this argument ignores the compulsory elements in the Act. It may be within the power of the Federal Parliament to give to the Commonwealth Bank the powers which the plaintiff banks, in common with many other banks in other countries, may possess. But it is quite a different thing to arm the Commonwealth Bank with powers of compulsory acquisition. A power of compulsory acquisition as such is not itself a banking power.

The power to make laws with respect to the acquisition of property is separated in the Constitution from the other powers and such laws must be laws for the acquisition of property for a purpose in respect of which the Parliament has power to make laws, and they must provide for acquisition on just terms : *Johnston Fear and Kingham v. The Commonwealth*, 67 C.L.R. 314.

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

I notice here an argument based on the powers conferred by the Act to purchase and to take over by compulsion any business carried on by the plaintiff companies in Australia. The plaintiff companies are at present engaged only in banking business, but they might enter into other forms of business which are authorised by their memoranda of association. Under secs. 19, 22 or 24 such a non-banking business could be acquired by the Commonwealth Bank either at the present time or at any time in the future. Such provisions, it is submitted, have no relation to the subject of banking. I have already referred to the fact that " taking over a business " is not a technical legal conception. If the Commonwealth Bank takes over a business under the compulsory provisions of the Act, all it gets are certain assets and certain liabilities, as specified in sec. 24. The power to acquire the assets is not affected by the nature of the business in which they are used when they are acquired. The transfer of liabilities requires separate consideration. Similar considerations apply to the special kind of agreement for which sec. 22 provides. If a business is sold under the power conferred by sec. 19 (1) (b) or (c) the vendor decides what will be sold and upon what terms—the Act makes no provision on these matters.

It was also argued that the Commonwealth Bank would not need to use a great deal of the property which it would acquire from the plaintiffs if the acquisition provisions of the Act were applied. It has already been stated that the only business which the plaintiff companies in fact now carry on is the business of banking and the property which the plaintiffs own, whether in the form of land and buildings or chattels or investments, is property which has all been acquired by them in the course of carrying on the business of banking. In my opinion there is no satisfactory ground upon which it can be said that any particular part of that property could

not possibly be used by the Commonwealth Bank in the same way as it has been used by the plaintiff banks. Similar considerations apply to property which may be acquired by the Bank in the future. It has not yet been held that an acquisition of property by the Commonwealth will be invalid unless it can be shown to a court that the property will certainly be used by the Commonwealth for some particular purpose. The Commonwealth might validly acquire property for the purpose of destroying it—e.g. land with buildings on it for the purpose of a rifle range, where dangerous explosives were in the possession of persons of dubious loyalty.

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

ACQUISITION OF SHARES.

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

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

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

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

Sec. 13 provides for compulsory acquisition of Australian shares in Australian private banks. It provides that, upon the Treasurer giving a notice, such shares shall become vested in the Commonwealth Bank : secs. 13 (1) and (3). The Companies Acts and articles of association under which the plaintiff companies operate provide

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

Sec. 14 (1) of the Act provides that the Commonwealth Bank shall, for all purposes, be the holder of the shares in an Australian bank which have been purchased or otherwise acquired by the Commonwealth Bank under Division 2 of Part IV of the Act and shall be a member of that Australian private bank in respect of those shares. This provision applies both to shares purchased by agreement under sec. 12 and to shares acquired compulsorily under sec. 13. In my opinion such a provision is incidental to the acquisition of the shares. It makes the Commonwealth Bank the holder of the shares and a member of the company without the necessity of registration under the State Act, which registration might, in the case of several of the private banks, be refused at the will of the directors. In *The Commonwealth v. New South Wales*, 33 C.L.R. 1, the court considered the acquisition of land under the Real Property Act, 1900 (N.S.W.). It was held that the Commonwealth could compulsorily acquire land (without any transfer as required by that Act) and that the Commonwealth became the owner of the land without registration in pursuance of the Act. It was the basis of the Act that the legal title to land depended upon registration, but, notwithstanding the provisions of the Act which secured this result, the Commonwealth obtained full rights of ownership in the land after compulsory acquisition. This reasoning, in my opinion, establishes the validity of sec. 14 (1) in relation to shares acquired by the Commonwealth Bank under the Act.

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

There are provisions in the case of several of the plaintiff companies which limit the number of shares which can be held by a shareholder. These provisions cannot, in my opinion, prevent the Commonwealth Bank acquiring under the Act any number of shares in any of the plaintiff banks. They are provisions which, viewed in the light of the Commonwealth law, would have the effect of preventing the operation of the Commonwealth law. Therefore the Commonwealth law prevails over them. If State law or provisions in the memorandum or articles of association of a company could make the Commonwealth or any Commonwealth instrumentality incapable of being a shareholder the effect would be that it would be impossible for the Commonwealth to acquire shares in the company under the power of legislation conferred by sec. 51 (xxxi) of the Constitution. No such State legislation or memorandum or articles of association can prevent the application of a Commonwealth law for acquisition of shares.

A share in a company is described as a share in the capital of a company. The capital of a company is expressed by a sum of money, but a shareholder does not become a part owner of property owned by the company or of a balance of assets over liabilities. A share in a company, regarded as property, consists of the rights to which the shareholder is entitled by reason of the provisions of the articles and memorandum of association and any relevant statute: *Borland's Trustee v. Steel Bros & Co. Ltd.*, [1901] 1 Ch. 279 at p. 288.

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

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

There are provisions in the articles of association of the plaintiff companies which are of a quite different character from those just mentioned. These are provisions which specify the rights which belong to a person when he has become a shareholder in a company by virtue of his shareholding and membership of the company. In some cases the voting power of shareholders is limited. In, for example, the case of the Bank of New South Wales, shareholders have one vote for every five shares which have been held for three months before the meeting at which it is proposed to exercise the vote, and no voting is allowed in respect of any shares over the number of 1,000. There are provisions of a similar nature in the case of several others of the plaintiffs, in some cases, however, applying only where a poll is held. When the Commonwealth Bank acquires shares in a bank in which the voting power of members is limited in the manner stated, the Commonwealth will, in my opinion, be subject to the same limitation of voting power as applied in the case of other shareholders. The Bank will have only the same rights as any other shareholder holding the same number of shares.

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

Sec. 14 (2) of the Act provides that the Commonwealth Bank may transfer shares which it has acquired " to any person " and that that person shall, for all purposes, be the holder of those shares and be a member of the Australian Bank in

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

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

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

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

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

ACQUISITION OF ASSETS AND BUSINESS:

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

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

It has already been stated that the " taking over of a business " involves acquisition of assets of the business and generally some provisions as to the business liabilities of the person who has been conducting the business. But an agreement

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for taking over a business made between private persons cannot deprive of their rights the creditors of the former owner of the business.

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

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

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

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

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

banks, but also their liabilities, and thus compel the customers of those banks to deal, at least at the beginning, with the Commonwealth Bank. The general character of the legislation, however, in altering the rights of creditors of banks remains the same, whatever the reason for passing it. In my opinion the provision for discharging the private banks from liabilities upon a taking over of the business by agreement under sec. 22 (or by compulsion under sec. 24) is valid, as being legislation with respect to banking under sec. 51 (xiii) of the Constitution, though not as being legislation with respect to the acquisition of property under sec. 51 (xxxi).

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

The cases have been argued upon the basis that the amount of compensation payable for assets acquired would be their total value less the liabilities of the bank from which they were acquired. I see no provision in the Act which provides for a deduction of liabilities. If there were such a provision it would be difficult to justify it under sec. 51 (xxxi) of the Constitution. If the Commonwealth acquires property it must pay full value for it. The amount of the debts owed by the owner of the property has nothing to do with the value of his property. The value of property is the same whether the owner of the property is rich or poor, prosperous or insolvent. If, however, the Act upon its true construction means that liabilities are to be deducted in assessing compensation, and if the provision for discharge from liabilities is held to be invalid, the result would be that the private bank would still be subject to its liabilities. Then there would be no ground for deduction of liabilities in assessing compensation, and the Commonwealth Bank would have to pay compensation for all the assets of a private bank without any deduction for liabilities. The court was informed that the result would be that the compensation payable to all the private banks on this basis would (on present figures) be about £800,000,000 instead of about £100,000,000. Independently, however, of the position as to assets and liabilities as it happens to exist today, it is plain that there is such a great difference between (1) the taking over of assets and paying in full for them without any deduction for liabilities, and (2) paying for them with such a deduction, that if the provision for taking over liabilities, including as it does the provision for discharge of the private banks from liabilities, is invalid, all the provisions for acquisition of assets should be held to be invalid because the result would be so completely different from any intention which could reasonably be attributed to the Parliament.

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

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JUST TERMS.

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

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

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

Under sec. 19 (3) the exercise of any power by directors appointed under sec. 18 shall be in their sole discretion " and shall not be subject to any qualification, restriction, or condition provided by or under any law, charter or other instrument relating to the exercise of the powers of the directors of that bank."

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

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

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

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

It was argued for the plaintiffs that sec. 19 (3) of the Act discharges nominee directors from all obligations to shareholders, including their fiduciary obligations. I have given reasons for my opinion that sec. 19 (3) is valid, but that it does not authorise any fraudulent or dishonest conduct. It was argued for the defendants that this provision referred only to some specific law, etc., applying only to a particular private bank : cf. *Barry v. Heider*, 19 C.L.R. 205, where it was held by Griffith C.J. that a provision relating to " laws, rules and practice " did not include the body of law recognised and administered by courts of equity. But the question

whether or not the nominee directors are effectively discharged by sec. 19 (3) from their fiduciary and statutory obligations to shareholders (including, it may be observed, shareholders other than the Commonwealth Bank) is not very important in relation to the questions which arise in these cases. Whatever view may be taken on that question, nominee directors would have at best a divided duty. It is obvious that they would have been placed in their position in order to promote and protect the interests and policy of the Commonwealth Bank. They take office as nominees of the Commonwealth Bank and are put in office with an express power to dispose of the business to the Commonwealth Bank. They might honestly regard themselves as doing their duty if, without being dishonest, they made a good bargain with the Commonwealth Bank. Even if such directors acted with the utmost honesty, they would be in an impossible position. They could not represent the interests of both the Commonwealth Bank and of the private bank or its shareholders, who would look for the return of their capital, and hope for a dividend, out of either the price to be paid if the directors sold the assets, or the compensation to be paid to the bank if the Treasurer resorted to the compulsory procedure of sec. 24.

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

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

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

As far as assets are concerned, the provisions of sec. 22 and sec. 24 are not affected by the invalidity of secs. 17–20. The only result would be that the actual, and not the nominee, directors would be in office and they would be able to make agreements or not as they thought fit. As the Treasurer need not acquire shares and therefore need not give the notice which would under sec. 17 bring the management provisions into operation, the Act contemplates that action under sec. 22 by way of making an agreement could be taken by the original directors. Sec. 24 can operate according to its terms even though the provisions of Division 3 as to management are invalid.

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

(a) That concession does not apply where an agreement is made otherwise than " under " sec. 22 ; for example, it would not apply if nominee directors disposed of the business of the bank in Australia or outside Australia under sec. 19. Such an

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agreement would not be an agreement under sec. 22 and it would not have the effect given to an agreement under sec. 22 by sub-sec. (8) of that section. Accordingly, the taxation concession is allowed in the case of some agreements for sale of the business of a bank and not in the case of other agreements for such sale.

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

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

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

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

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

(b) There were various criticisms as to the taking over of assets which became Australian assets after an original taking over, based upon the contention that no provision was made for compensation in such cases. The acquisition provisions plainly contemplate acquisitions at different times in the case of any bank : as to shares see sec. 13 (4) and as to assets sec. 24 (6), (7) and (8). Shareholders are dealt with severally under secs. 37, 39 and 40 in respect of their claims. A claim for compensation for assets is a claim in respect of particular specified assets : sec. 43 (4) and the compensation awarded would be payable only in respect of a particular claim as made—sec. 45. These provisions enable claims for compensation to be

made and compensation to be assessed whenever shares or assets are taken over. There is, in my opinion, nothing in the compensation provisions which limits a shareholder who owns both Australian and ex-Australian shares or a bank to a single proceeding for compensation.

(c) Sec. 46 (4) and (8) enable the Treasurer at will to close up a bank before and independently of any acquisition of shares in the bank. It is argued that the Treasurer would, by taking such action, affect very greatly the value of the assets of the bank because they would become assets held by a condemned institution, and not assets in a going concern. If the prohibition power (sec. 46) were exercised, the banking business of the bank, it is true, would cease and there would be no such business to be acquired under sec. 24, but the value of the assets, it is argued, would be affected by the prohibition, so that if the shares were subsequently acquired the shareholders would not get full value. In my opinion this argument is not a good objection to the justice of the terms of acquisition of either shares or assets. If sec. 46 were applied against a bank, the bank could immediately dispose of its property as it thought proper and obtain such a price for it as the market was prepared to give.

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

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

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

Sec. 24 (8), however, is open to an objection which, in my opinion, has more weight than those which I have just considered. The assets of a bank in Australia might be acquired under sec. 22 or sec. 24. The whole business of the bank in Australia would then necessarily come to an end because it and all the Australian assets would be taken over by the Commonwealth Bank and see sec. 46 (1), (2)

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

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

I summarise my opinion on this part of the case by saying that the provisions for the acquisition of shares contained in Division 2 of Part IV are not invalid by reason of any of the objections to them which have been considered; that secs. 17-20 in Division 3 of Part IV are invalid; that sec. 24 is invalid for reasons connected with sec. 23; that, for another reason, sec. 24 (8) is invalid; but that the invalidity of these provisions does not make any other provisions of the Act invalid; but sec. 25 is deprived of any operation.

COURT OF CLAIMS.

It was not contended that the court was not validly constituted.

Compensation is to be determined by the Court of Claims "and not in any other manner." This provision is to be found in sec. 40 (2), (4) and (5) with respect to shares, and in sec. 42 with respect to assets. Sec. 40 (5) provides that the amount of compensation "determined by the Court" (that is, the Court of Claims) shall be payable by the Commonwealth Bank to the private bank in full satisfaction of the claim to which the determination relates. There is a similar provision with respect to compensation for shares in sec. 40 (8). The result is that any jurisdiction of the High Court is excluded in claims for compensation made against the Commonwealth Bank. Such claims are to be determined by the Court of Claims in accordance with the Act, and not in any other manner.

The plaintiffs contended that these provisions were invalid because they excluded the jurisdiction of the High Court in claims for compensation. The

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

The defendants in the first place sought to meet this argument by contending that the jurisdiction of the High Court had not been really excluded by the Act because a writ against the Commonwealth Bank for compensation could be issued in the High Court without the private bank making any claim in writing to the Commonwealth Bank for compensation [sec. 43 (3)] with the result that a claim for compensation would never come before the Court of Claims (sec. 44) so that the action would simply proceed in the High Court. To this contention it was replied, and in my opinion rightly, by the plaintiffs that such a claim would be demurrable because sec. 42 provides that compensation for assets is to be ascertained in accordance with Division 2 " and not in any other manner." Thus it would immediately appear that the Act provides that no court other than the Court of Claims should entertain a claim for compensation under the Act against the Commonwealth Bank. Further, this argument for the defendants has no relevance to the case of shares, where the procedure (sec. 40) is quite different from that under sec. 43, which deals with assets.

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

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

The question, therefore, as to the effect of provisions which prevent proceedings for assessment of compensation in the High Court could arise only if an action for compensation were brought in the High Court against the Commonwealth Bank and the Commonwealth was not a defendant in the action. I deal first with the

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question whether the bank in such a case would be " a person being sued on behalf of the Commonwealth."

In Quick & Garran, *Annotated Constitution of the Commonwealth*, p. 773, the view is expressed that sec. 75 (iii) in the relevant provision is limited to cases in which the Commonwealth is the real defendant (in interest) but is represented in legal proceedings by the Attorney-General, or some other Minister, or a nominal defendant, or a person such as the Commissioner of Taxation; see Income Tax Assessment Act 1936–1947, sec. 209.

In the United States of America the Supreme Court has jurisdiction in " all controversies to which the United States shall be a party "—Constitution, Art III, sec. 2. But this jurisdiction can be exercised only if the United States consents: see Willoughby on *The Constitution*, 2nd Edn., Vol. 3, pp. 1381, 1422. Judicial opinion as to the meaning of the words " controversies to which the United States shall be a party " has varied. In the leading case of *Osborn v. U.S. Bank*, 9 Wheat., p. 737, at pp. 855-6, it was said with reference to this provision :—

> "The jurisdiction of the court depends not upon interest, but upon the actual party on the record . . . . In all cases where jurisdiction depends on the party it is the party named in the record."

see also *U.S. v. Lee*, 106 U.S. 196. On the other hand, later cases have adopted a different point of view. In *Louisiana v. McAdoo*, 234 U.S. 627, the point is said to be not who is the party on the record, but " the effect of the judgment or decision which can here be rendered." But this test has not been uniformly applied in still later cases: see *Sloan Shipyards v. United States Shipping Board*, 258 U.S. 549. In that case the evidence showed that the Government owned all the stock in a very large corporation which exercised extensive powers of requisition and control of shipping, etc. The Government was the only person which could be interested in a judgment for or against the corporation (except, of course, the opposite party). There was no consent on behalf of the United States to be sued. The court, however, acted simply upon the facts disclosed upon the record, namely that the Shipping Board was the party to the proceedings and that the controversy was not one to which the United States was a party. The court accordingly assumed jurisdiction.

In the Commonwealth Constitution the words used are not " a party to a controversy," but " being sued on behalf of the Commonwealth." In the case of the United States Constitution there is much to be said for the proposition that the court should look at the controversy, whatever it may be, and ascertain who are the real parties to it, whoever or whatever may be the agents through whom they act. But in the case of the Commonwealth Constitution the reference to the record is much more direct. It is necessary only to find out who is actually being sued and then to ask whether that person is being sued on behalf of the Commonwealth. In the case of the Attorney-General or a Minister or a nominal defendant it would be easy to answer the question. He would be sued, not in respect of any alleged personal liability, but in order to enforce a claim against a Government. But in proceedings for compensation under the Act the basis of the claim is the liability of the Commonwealth Bank itself, specifically imposed upon the bank, and only upon the bank, by the statute. Any allegation with respect to any alleged liability of the Commonwealth would be irrelevant in such an action and should be struck out of any statement of claim. Accordingly, in my opinion, in such an action the corporation which was the defendant (the Commonwealth Bank) would be shown by the record not to be a person being sued on behalf of

the Commonwealth and the action would not come within the provisions of sec. 75 (iii).

The contrary view submitted for the plaintiffs is based on the contention that the Commonwealth is financially interested in the question of compensation by reason of its guarantee, and that therefore the Commonwealth Bank should be regarded as in some manner representing the Government when action is brought against it for compensation. If then it " represents " the Government, it should be held, it is argued, that the bank is being sued on behalf of the Government.

This contention was supported by a further argument that when a principal debtor is sued he is sued on behalf of his surety. I am not aware of any authority whatever for such a proposition.

The other argument for the plaintiffs was that the Commonwealth Bank is really a department of the Commonwealth Government. This contention was supported by reference to a dictum of Griffith C.J. in *Heiner v. Scott*, 19 C.L.R. 381, at p. 393. But the Commonwealth Bank (which is a creation of statute) has never been so treated. Its receipts do not go into consolidated revenue (see sec. 81 of the Constitution), the administration of the bank has never been entrusted to a minister, the officers of the bank are not civil servants, and the accounts of the bank are not part of the Commonwealth Budget. The bank may act as the agent of the Commonwealth, but it can so act only when express authority has been given to it by the Commonwealth. What the Commonwealth Bank does is not done by the Commonwealth, but by the bank; for example, surely the Commonwealth could not be sued if the bank wrongly dishonoured a cheque or if one of the bank's motor-cars injured a person by negligent driving.

The Commonwealth Parliament has declared that the bank is a corporation and the court must on this, as on many previous occasions, accept that the bank (though it has no corporators) exists as a new kind of juristic person. The Parliament has gone out of its way to declare the continued existence of the bank as a corporation—Commonwealth Bank Act 1945, sec. 7. The Governor and not any Minister, manages the bank—sec. 25. The bank is treated as a separate person not subject to ministerial control in the daily conduct of its business. Sec. 9 provides for consultation between the bank and the Treasurer on policy in terms which, in my opinion, are inconsistent with the bank having the characteristics of a Government department. Sec. 10 provides that the bank is guaranteed by the Commonwealth. It is in the following terms :—

> "The Commonwealth shall be responsible for the payment of all moneys due by the Bank but nothing in this section shall authorise any creditor or other person claiming against the Bank to sue the Commonwealth in respect of his claim."

Here again the separation of the bank from the Commonwealth is emphasised. I have difficulty in understanding how the Commonwealth can give anything like a guarantee to itself.

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

If, however, this objection is held to be good, it will result in striking out the words " and not in any other manner " from secs. 40 and 43 of the Act. The result would be to make an important and far-reaching change in the whole Act. Where Parliament provides that compensation is to be assessed in a particular way and in no other way it appears to me that even such a provision as sec. 6 cannot entitle

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a court to uphold the law after striking out the limiting words. The result would be that the enactment as left surviving would contradict the express original provision by allowing compensation to be assessed by other tribunals than that specified. Such tribunals would include the High Court, and also State courts. Accordingly, if it is held that the words " and not in any other manner " should be eliminated as enacting an invalid provision, the whole of the provisions relating to the assessment of compensation for both shares and assets should be held to be invalid—including secs. 15 and 25, which provide only for compensation as assessed by the Court of Claims. There would then be no valid provision for compensation and all the provisions for compulsory acquisition would be invalid.

INTEREST :

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

This question has been before the Court recently on several occasions and in different circumstances. The decisions are conveniently referred to in *Grace Bros. Pty. Limited v. The Commonwealth*, 72 C.L.R. 269. All the decisions mentioned were given in relation to particular cases which varied in circumstances, and no general rule has been authoritatively determined by the Court. I do not repeat what I have said in several of these cases to the effect that the conception of compensation does not in itself include any provision for interest. Interest, in my opinion, is not part of compensation, but is interest *on* compensation. It is recompense for delay in the payment of the compensation which represents the fair value of the property acquired and so cannot itself be compensation. Thus in my opinion, the Act does not, in providing for fair and reasonable compensation, provide for payment of interest.

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

It would be a fair and reasonable thing for Parliament to make provision for such further compensation—especially in the present cases, where the assessment of compensation would occupy months in the case of a single bank, and possibly years in the case of all the banks. But the Constitution does not, in my opinion, require as a condition of the validity of a law for acquisition of property that compensation—in the form of interest or damages—should be paid to make up for delay in paying compensation. Thus in my opinion the Act does not give juris-

diction to the Court of Claims to award interest, but this fact does not invalidate the provisions for assessing compensation for the property taken.

COSTS.

It was further contended by the plaintiffs that the compensation provisions were unjust because the Court of Claims has no power to give costs. The defendants, on the other hand, argued that the Court of Claims had inherent power to give costs. But in many cases it has been held that, as it was put in *London County Council v. Churchwardens, &c.*, [1892] 2 Q.B. 173 at p. 176—there is no "inherent or original jurisdiction in the courts to deal with costs." The power of the Court of Claims is a power to award fair and reasonable compensation—secs. 15, 25—and such a power does not authorise the creation by the court of a duty to pay any sum, by way of costs or otherwise, in addition to the fair and reasonable compensation assessed by the court. Legislatures appear from time to time to find great satisfaction in providing that particular tribunals shall have no power to award costs, with the result that a man whose rights have been infringed may be deprived of any real remedy because the expense of effectively litigating his claim may exceed what he can recover. Similarly, a man may have to defend his rights against a completely false and unjustifiable claim, and yet have no remedy for his expenses against a claimant who is without any merits whatever. But, in spite of these considerations, it is difficult to hold that the absence of a power to award costs (to either side) necessarily makes provisions for compensation unjust.

SEC. 92—FREEDOM OF TRADE AND COMMERCE.

The plaintiffs contend that the whole of the Act is invalid because it offends against sec. 92 of the Constitution, which provides that

> "trade commerce and intercourse among the States whether by means of internal carriage or ocean navigation shall be absolutely free."

The attack is directed against all the provisions for acquisition and against sec. 46, which provides for the prohibition at the will of the Commonwealth Treasurer of the carrying on of banking business by any one or more of the plaintiff banks.

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

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

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

I make some preliminary observations.

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

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55 C.L.R. 1, at p. 41. Sec. 92 cannot therefore be construed as meaning that interstate trade and commerce is to be free from all legal control.

(2) Sec. 92 binds the Commonwealth and the States: *James v. The Commonwealth*, 55 C.L.R. 1. Precisely the same rule applies to both Commonwealth and States. If a State law is invalid as infringing sec. 92, a law in the same terms would equally infringe sec. 92 if it were passed by the Commonwealth Parliament, and *vice versa*. The validity of a law in relation to sec. 92 cannot depend upon whether it is a Commonwealth law or a State law. Thus, if any of the provisions of the Banking Act 1947 are invalid because they conflict with sec. 92, then no State Parliament could enact such provisions. They would be outside all legislative power existing in Australia.

(3) Sec. 92 is directed to laws made by the Commonwealth or States, and not to actions of individuals. If a plaintiff complains of an act done by a defendant, he must show some infringement of a right which he, the plaintiff, possesses. He may show an interference with his goods which is *prima facie* a trespass because unauthorised by him. The defendant may contend that what he did was authorised by a statute. But if the statute is invalid because it purports to authorise acts which wrongly interfere with the freedom of interstate trade and commerce, then the defence fails, the plaintiff succeeds, and obtains damages for a breach of his common law right—not for an infringement of sec. 92. Sec. 92 operates to protect individuals, but does not give a cause of action to individuals. No plaintiff would have a good cause of action merely upon an allegation that the defendant had committed a breach of sec. 92; see *James v. The Commonwealth*, 62 C.L.R. 339, at p. 362; see also *Riverina Transport Pty. Ltd. v. Victoria*, 57 C.L.R. 327, at pp. 341-342.

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

I do not propose to review the whole course of decisions upon the difficult provision contained in sec. 92. The consideration of sec. 92 must now begin with *James v. The Commonwealth*, 55 C.L.R. 1 : 1936 A.C. 578. I do not repeat the analysis of *James v. The Commonwealth* which I made in *The Milk Board (N.S.W.) v. Metropolitan Cream Pty. Ltd.*, 62 C.L.R. 116, at pp. 121, 127—an analysis which is stated in summary form in *Gratwick v. Johnson*, 70 C.L.R. 1, at pp. 13-14. The proposition submitted for the plaintiffs was stated in the following terms: " Sec. 92 is infringed whenever an individual or corporation is engaged in interstate trade, commerce or intercourse, and either by direction, prohibition or acquisition, with the object, purpose or motive of effecting such a prohibition, the carrying on of such business by him or it is forbidden."* There is no doubt that, if sec. 46 (4) is applied to a bank, it will stop the carrying on of the banking business of that bank. The provisions as to acquisition of property are also plainly directed towards this end; see sec. 3 (c).

* The Appellants and the Respondents agree that the proposition submitted for the Plaintiffs was as follows:— " Sec. 92 is infringed whenever an individual or corporation is engaged in interstate trade, commerce or intercourse, and either by *direct prohibition*, or by acquisition, with the object, purpose or motive of effecting such a prohibition, the carrying on of such business by him or it is forbidden."

The ownership of property does not itself constitute interstate trade and commerce, and it would seem to follow that a change in ownership of property by reason of compulsory acquisition is not an interference with trade and commerce, though, as already stated, any acquisition of any property from any person necessarily prevents him from using it for any purpose of trade and commerce, including interstate trade and commerce. This was the view taken in *N.S.W. v. the Commonwealth* (the *Wheat Case*), 20 C.L.R. 54. No definite opinion as to this particular case was stated in *James v. The Commonwealth*. It is mentioned in an historical survey with the comment that it "has never been expressly overruled"—55 C.L.R., at p. 47. *James v. The Commonwealth* does not overrule the *Wheat Case*. The reasoning in *James v. The Commonwealth* does not condemn any and every expropriation of owners because it prevents the expropriated owner using property in interstate trade. Expropriation is held to involve a breach of sec. 92 only when "it is directed wholly or partially against interstate trade in the goods, that is, against selling them out of the State"—55 C.L.R. at p. 59. This view is in accordance with *James v. Cowan*, 1932 A.C. 542; 47 C.L.R. 386, where it was held that if it appeared from the terms of a statute that the acquisition of property was authorised by the statute for a "real object" of restricting interstate trade, then there was an infringement of sec. 92. See passages quoted from this case in *James v. The Commonwealth*, 55 C.L.R., at pp. 51-52. It was also held in *James v. The Commonwealth* that a mere prohibition of interstate trade and commerce was an infringement of sec. 92—see *James v. The Commonwealth*, 55 C.L.R., at p. 61, where the Act in question was held to be invalid for the reason that it prohibited such trade either entirely or partially.

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

The question of sec. 92 may therefore be approached in relation to both acquisition of property and prohibition of banking by considering two questions. (1) Is banking trade or commerce and, if so, do the challenged provisions restrict the freedom of interstate trade or commerce as explained in *James v. The Commonwealth*? (2) If banking is not itself trade or commerce, but is an instrument of trade or commerce, does the Act place such restrictions upon the use of the instrument in interstate trade or commerce as to impose a restriction upon interstate trade or commerce which is inconsistent with sec. 92?

IS BANKING TRADE OR COMMERCE?

The plaintiffs' argument on this question depends very largely upon the development of statements to be found in various books on banking and in judgments as, for example, in the last *Alberta Case*, 1947 A.C. 503, at p. 517, that bankers are "dealers in credit." Statements to this effect made by leading authorities are to be found in *In reference re Alberta Statutes*, 1938 Can. S.C.R. 100, at p. 124.

The authorities in other courts to which reference was made do not give much assistance in the endeavour to answer the question whether banking is itself "trade or commerce" as used in the Commonwealth Constitution. The references to this subject in English cases (apart from the decisions on Canadian statutes) are incidental to the consideration of other questions in bankruptcy law and the like, and can hardly be relied upon for the purpose of interpreting the Commonwealth Constitution.

The cases in the United States in which reference is made to banking do not include any considered decision of the question whether banking is trade or commerce. In *U.S. v. South Eastern Underwriters' Association*, 322 U.S. 533, the Supreme Court overruled *Paul v. Virginia*, 8 Wall 168, which was a decision of long standing to the effect that insurance was not trade or commerce. The *South Eastern Underwriters' Case* exhibited great differences of opinion and accordingly provided both sides in these present cases with arguments by way of more or less distant analogy. See the comment upon this case by Thomas Reed Powell in 57 *Harvard Law Review*, p. 937, to which reference was made in argument.

The provision with respect to banking in the Canadian Constitution which has already been quoted is much the same as that contained in the Australian Constitution. The decision *In reference re Alberta Statutes*, 1938 Can. S.C.R. 100, which was relied upon by both sides, does not contain any clear decision that banking is trade or commerce : see, for example, at p. 116, where the Chief Justice states that the machinery provided by the Act in its essential components and features came under the head of " banks and banking " but, if not, then its subject matter was embraced within trade and commerce. What was held was that it *was* banking, and therefore presumably was not trade and commerce. That it was banking was the ground of the decision. The decision was not based on any proposition about the nature of trade and commerce.

The argument of the plaintiffs is that a banker buys and sells credit and that for this reason banking is trade and commerce. But a banker does not buy or sell credit in the same way as a trader buys or sells goods. When it is said that a banker deals in credit the fact is that he receives deposits which he engages to repay or that he lends or agrees to lend money. A loan transaction is a business transaction, but is not therefore itself trade or commerce—unless all business transactions, from building a house to pulling out a tooth, are to be described as trade or commerce simply because they are business transactions. The fact that a business is carried on for profit or that an occupation is pursued for profit does not show that it is trade or commerce.

The word " sale " is used in various metaphorical senses. When a man enters into a contract of employment he is sometimes said to " sell his labour," but really there is no transaction of sale ; the contract is a contract of employment, not a contract of sale. Similarly, when a banker " deals in credit " he makes loan contracts and does not sell anything. If he agrees in Victoria to make available money by way of overdraft in New South Wales, he does not sell anything which passes across the border between the States. The word " trade " is used in several senses. A carpenter is " a carpenter by trade." But no one would say that the craft of carpentry—as distinct from the sale and purchase of its products—is trade or commerce. The trade and commerce to which sec. 92 relates is " trade and commerce among the States, whether by means of internal carriage or ocean navigation." The reference is to something which can be carried by land or by sea. 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—55 C.L.R., at p. 58.

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. If the use of correspondence

interstate gives a dealing between persons the character of interstate trade and commerce, then the sphere of trade and commerce will be extended so as to include advice by a mother to her daughter and lovers' greetings—if sent by interstate post. At this point a further argument for the plaintiffs may be noticed. In the case of *Trinidad Lake Asphalt Operating Co. Ltd. v. Commissioner of Income Tax for Trinidad and Tobago,* 1945 A.C. 1, it was necessary to interpret an income tax statute which provided that any resident person " who transmits rent interest or income . . . to a non-resident person " should be deemed to be the agent of the latter person. In pursuance of an agreement a New Jersey company declared a dividend payable by cancellation of a claim against the company by a Trinidad company in an equivalent amount. Both companies made entries in their books which recorded the transaction of set off. It was held that the transaction was a payment by the Trinidad company to the other company and that it involved a transmission of revenue within the meaning of the statute. There is little difficulty in arriving at the conclusion that the terms of the statute were intended to include such a case, but the decision has no bearing whatever upon the question whether such a transaction is trade or commerce or whether banking is trade or commerce.

I therefore answer the question " Is banking itself trade or commerce ? " in the negative. Accordingly, in my opinion, the prohibition of banking authorised by sec. 46 is not a prohibition of any trade or commerce and therefore is not, for that suggested reason, rendered invalid by sec. 92 of the Constitution.

BANKING AS AN INSTRUMENT OF TRADE OR COMMERCE.

The next contention of the plaintiffs is that banking is an instrument of trade and commerce and that the acquisition and prohibition provisions of the Act constitute an interference with it which is an infringement of sec. 92. I have already said that these provisions are intended to put an end to banking by the private banks and that, so far as they are put into operation, they will accomplish this object.

I agree that banking facilities are, in these days, necessary for trade and commerce generally as actually carried on, and for interstate trade and commerce. Banking may be described as an instrument which is used in interstate trade and commerce. But the business of a banker, consisting in receiving deposits, paying out deposits, lending money and associated transactions, provides service of a financial character which is used in relation to all forms of human activity. A banker's business serves the purposes not only of trade and commerce, but also of all kinds of financial transactions which have nothing whatever to do with trade or commerce. A law which was directed against the use of such facilities in interstate trade and commerce—which had the " real object " of restricting such trade and commerce, would be obnoxious to sec. 92 for the reasons stated in *James v. Cowan,* [1932] A.C. 542, and *James v. The Commonwealth,* 55 C.L.R. 1. But the Banking Act 1947 is a general law dealing with the persons who conduct financial transactions in a banking system, with no reference to the interstate character of any transaction. Such a law cannot be said to be " directed against " the use of banking in interstate transactions. The Act makes no reference whatever to interstate transactions. The choice of the banks to be prohibited from carrying on banking business " has no relation to . . . passage across the border "—to use the words of Williams, J., in *Australian National Airways v. The Commonwealth,* 71 C.L.R. 29, at p. 109. The Act does not prevent the transportation of anything

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across State borders. It is true that it is intended to control the businesses of private banks and, if thought proper, to put them out of business. This, however, is to be done without reference to any interstate element in the business.

The plaintiffs argue, however, that this fact is immaterial and that sec. 92 prevents the closing by legislative action of any business which is auxiliary to interstate trade and commerce. I re-state the carefully framed proposition which was submitted on behalf of the plaintiffs :—

> "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."*

In my opinion the plaintiffs did, as the defendants contended, really seek to set up again the principle of *McArthur's Case*, 28 C.L.R. 530. In *McArthur's Case* it was said (p. 546)

> "Once determine what is comprised in trade, commerce and intercourse, then, as the " absolute freedom " extends to the whole of it, many of the suggested difficulties vanish on the instant."

It was then held that all the commercial arrangements of which transportation is the direct and necessary result form part of trade and commerce—all the mutual communings, negotiations, verbal and by correspondence, the bargain, the transport and the delivery. (There was no dissent from this proposition in *James v. The Commonwealth.*) It was held in *McArthur's Case* that sec. 92 protected all of these elements from all governmental control by every governmental authority to whom the command contained in the section was addressed. The proposition of *McArthur's Case* was so stated in *James v. The Commonwealth*, 55 C.L.R., at p. 48, and pp. 56-57 :—

> "Then there is the conception enunciated in *McArthur's Case*, 28 C.L.R. 530, that "free" means free from every sort of impediment or control by any organ of Government, legislature or executive to which sec. 92 is addressed with respect to trade, commerce or intercourse, considered as trade, commerce and intercourse (pp. 56-57)."

Lord Wright, M.R., proceeds (p. 57) :—

> "Every step in the series of operations which constitute the particular transaction, is an act of trade ; and control under the State law of any of these steps must be an interference with its freedom as trade."

If sec. 92 binds the Commonwealth, then it is equally true that control under any Federal law must be such an interference. It is now settled that sec. 92 does bind the Commonwealth. Accordingly the adoption now of the doctrine of *McArthur's Case* would mean that interstate trading and commercial dealings would be immune from both Federal and State law : see *James v. The Commonwealth*, 55 C.L.R., at pp. 57-58.

The Privy Council very clearly rejected the doctrine of *McArthur's Case.* Under that doctrine an infringement of sec. 92 would take place in the case of any law which controlled a business containing interstate elements because if the law were not observed the business would be interfered with, or possibly stopped altogether, or a penalty would be incurred. Since *James v. The Commonwealth* it cannot be maintained that the fact that a law which necessarily involves some control of interstate business and possibly, in the course of such control, an exclusion of some persons from such business, is an infringement of sec. 92.

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* See the footnote at page 60.

It is the duty of this court to apply *James v. The Commonwealth* and to follow the decisions which were approved in *James v. The Commonwealth* and which have subsequently been given by this Court. In my opinion it would be wrong, after *James v. The Commonwealth*, to hold that a law controlling a business, even though that business is directly related to and is even part of interstate trade and commerce, is necessarily an infringement of sec. 92, and even though the application of the law may render the carrying on of business by a particular individual impossible I refer to the statutes which were held in *James v. The Commonwealth* to be valid. All of these statutes involve a control under law which (55 C.L.R., p. 57) " must be an interference with freedom in trade." Among the statutes to which reference was made are general price fixing Acts (p. 49): State marketing and transport regulations (55 C.L.R., at pp. 50-51); State laws of health and sanitation (p. 53); the Post and Telegraph Act 1901-23 (p. 54); the Secret Commissions Act 1905 (p. 54); the Commerce (Trade Descriptions) Act 1905-33 (p. 54); the Australian Industries Preservation Act 1906-30 (p. 54); the Sea Carriage of Goods Act 1924 (p. 55); the Transport Workers' Act 1928-29 (p. 55); Sale of Goods Acts (p. 57); Bills of Exchange Act (p. 57); Acts relating to sea, roadways or motor carriage (p. 57); and State or Commonwealth Acts dealing with wharves or warehouses or transport workers (p. 57—cf. judgment of Evatt, J., in *Vizzard's Case*, 50 C.L.R. 30, at pp. 81, 82). All 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. Although they all operate to impose some degree of control and restraint upon interstate businesses, they were held to be valid. 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. I have difficulty in seeing how the proposition submitted for the plaintiffs would allow the enactment of a general statute imposing penalties upon persons who sold uninspected meat, or diseased meat or other goods dangerous to health—or upon unqualified persons who carried on the business of chemists and druggists. A business cannot exempt itself from control by law by introducing interstate elements into its transactions, and a law is not rendered invalid by sec. 92 because it applies to such transactions. If it is " directed against " such transactions it is an entirely different matter. The Banking Act 1947 is not directed against interstate banking. It is a general law dealing with financial business as carried on by bankers.

If it were now held that, because the Banking Act can be applied so as to prevent one or more, or possibly all, of the plaintiff banks from carrying on banking business (banking being an instrument used in interstate trade and commerce), therefore the Act was invalid, it would be necessary to overrule several decisions given by this Court. In each of these cases statutes subjected the interstate business of particular persons to restrictions and limitations and were such as possibly to put them out of business. The statutes nevertheless were held to be valid. The cases decided before *James v. The Commonwealth* and approved in *James v. The Commonwealth* which were of this character were: *Willard v. Rawson*, 48 C.L.R. 316; *The King v. Vizzard*, 50 C.L.R. 30; *O. Gilpin Ltd. v. Commissioner of Road Transport & Tramways*, 52 C.L.R. 189. After *James v. The Commonwealth* cases in which legislation was upheld which either restricted or put a stop to the interstate business of some persons were: *Riverina Transport Co. v. The State of Victoria*, 57 C.L.R. 327; *Hartley v. Walsh*, 57 C.L.R. 372; *Home Benefits Pty. Ltd. v. Crafter*, 61 C.L.R. 701; *Milk Board (N.S.W.) v. Metropolitan Cream Pty. Ltd.*, 62 C.L.R. 116; *Andrews v. Howell*, 65 C.L.R. 255.

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In my opinion all these cases would have to be overruled 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.

The plaintiffs naturally relied strongly upon the degree of approval given in *James v. The Commonwealth* to *The Peanut Board v. The Rockhampton Harbour Board*, 48 C.L.R. 260. Such approval as was given was expressed to be upon the basis only of a particular view of the Act which was accepted without further examination by the Privy Council. It was said that " on the basis of that view (that is, a particular construction of the Act as representing its true character) the principles laid down by this Board (in *James v. Cowan*) were applied by the Court," that is, by the High Court. Such a statement is a very cautious and limited approval if, indeed, it is an approval at all. The other reference to the *Peanut Board Case* is on p. 59, where, with reference to burdens and hindrances upon interstate trade which might assume various forms, it is said that " one form may be a compulsory acquisition of goods, as in *James v. Cowan*, or the *Peanut Case*, if in truth the expropriation is directed wholly or partially against inter-State trade in the goods, that is, against selling them out of the State." If the statute dealt with in the *Peanut Case* did provide for an expropriation which was " directed" wholly or partially against interstate trade in the goods, then the *Peanut Case* falls completely into line with the reasoning in *James v. The Commonwealth*. The question whether the statute which was under consideration in the *Peanut Case* could properly be construed as providing for expropriation " directed " against interstate trade is not a question with which the Privy Council itself dealt. Finally, as to the *Peanut Case*, *Andrews v. Howell*, 65 C.L.R. 255, is a decision directly to the contrary effect and is in my opinion completely in accord with the decision in *James v. The Commonwealth*. In *Andrews v. Howell* the Court considered a general marketing scheme which, so far as expropriation of goods was concerned, was not distinguished, and, in my opinion, cannot be distinguished, from that which was the subject of decision in the *Peanut Case*. But in *Andrews v. Howell* the scheme was not described as a marketing scheme which was " entirely restrictive of any freedom of action by the producers." It was described as not being directed wholly or partially against interstate trade, but to the better disposal of the commodities in local and other markets. The regulations establishing the scheme were held not to be obnoxious to sec. 92.

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.

THE ACT IN RELATION TO STATE GOVERNMENTS.

The Act is attacked as unduly interfering with and impairing the powers and functions of State Governments and excluding them from necessary facilities for the conduct of governmental business. The receipt, custody, management and control, and expenditure of the public moneys of the States is a governmental function and an essential governmental function ; that is, it is a function the performance of which is necessary to the existence of the States as political organisms. This proposition has been established by the *Melbourne Corporation v. The Common-*

wealth, 74 C.L.R. 31, where it was held that sec. 48 of the Banking Act 1945 was invalid. This section provided that, except with the consent in writing of the Commonwealth Treasurer, a bank should not conduct any banking business for a State or for any authority of a State, including a local government authority.

The States may create State banks, but it is argued for the plaintiffs that State banks cannot meet all government requirements. Such banks would not have the resources which are at the command of the plaintiff banks and, further, it is argued that a State should not be compelled to establish a State bank in order to maintain its independence of the Commonwealth. The effect of the Act, the plaintiffs argue, is that in the case of States which have no State bank, the Government will be compelled to do all its banking through a bank which is really controlled as to policy by the Government of the Commonwealth : see Commonwealth Bank Act 1945, sec. 9 ; Banking Act 1945, sec. 27.

It is contended that it is inconsistent with the maintenance of a Federal system of government consisting of Commonwealth and States that the Governments of the States should be compelled to conduct their financial operations through a Commonwealth Bank.

The Commonwealth Bank Act 1945, sec. 25, places the day to day business of the bank under the management of the Governor of the bank, and not under the management of the Government. The Banking Act 1947, sec. 11, provides that it shall be the duty of the Commonwealth Bank to provide adequate banking facilities for any State to conduct its business without improper discrimination, to observe obligations of secrecy, etc. But in the case of a bank established under Commonwealth law, all these provisions exist only at the will of the Commonwealth Parliament and can be altered by that Parliament. Thus, in principle, the objection of the States which is now under consideration is an objection, not merely to the particular provisions of the 1947 Act, but to any practical compulsion upon the States to use an institution under the control of the Commonwealth for their financial operations.

The control of finance may be used in modern society so as to control nearly anything and everything. If the States are to be subject to Commonwealth control in their daily finance, then, it is argued, they lose all their independence as political organisms. Long-term borrowing by the States is controlled by the Loan Council under the Financial Agreement : see Financial Agreement as set out in the Schedule to the Financial Agreement Act 1944 (Commonwealth), clause 3 (8) and (9) and clause 4. Short-term borrowing, however, is not so controlled, except in relation to certain maximum limits as to discount, interest, etc. : Financial Agreement, clauses 5 (1) and (9). (Similar provisions apply in the case of the Commonwealth : see clause 6 of the Agreement.) It is argued that the effect of the 1947 Act is to place all short-term financing of the States under the actual or possible control of the Commonwealth Treasurer, and therefore to place State Governments themselves under the control of the Commonwealth Treasurer.

The defendants' reply to this argument is that if the Commonwealth Parliament has power to create what may amount to a practical banking monopoly, the States must put up with it, just as they must put up with many other things in respect of which power is given to the Commonwealth Parliament. There are many subjects in respect of which the Commonwealth can use its powers so as to create a monopoly in the form of exclusive Commonwealth control ; e.g., bounties on the production and export of goods, quarantine, currency, coinage, legal tender, certain industrial disputes. The Commonwealth has exclusive powers with respect

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to customs and excise duties. Legislation upon any of these matters may provide for control to be completely in Commonwealth hands. In relation to all matters where the Commonwealth Parliament has power, the States are in general bound by the laws of the Commonwealth. This was the decision in the *Engineers' Case*, 28 C.L.R. 129, and the defendants contend that there is no reason why that decision should be whittled down in the case of banking.

The defendants further emphasise the exception of " State banking " from the Commonwealth legislative power. This is an express exception in favour of the States which enables the States to establish their own banks and to be completely free of any Commonwealth control in banking. This express exception, it is argued, excludes any further implied exception in relation to this subject matter. In reply to the arguments founded upon the *Melbourne Corporation Case*, the defendants point out that sec. 48 of the Banking Act 1945 dealt specifically and particularly with the States and State authorities.

In the *Melbourne Corporation Case*, 74 C.L.R. 31, it was held that a system of Federal government, involving the co-existence of Commonwealth and States, involved the continuance of the existence of the States as political entities not subject to any form of Commonwealth control in respect of the discharge of their own lawful functions. The States may be bound by some Commonwealth laws (*Engineers' Case*), but, as governments, the States are independent of the Commonwealth and are not subjects of the Commonwealth ; and in respect of the functions which are left to the States the Commonwealth has no power by means of legislation of restricting the States in the performance of the normal and essential functions of government : *per* Rich, J., 74 C.L.R., p. 66. Thus the Commonwealth Parliament cannot destroy, curtail or interfere with the exercise of constitutional power by a State, and the management and control by the States of their revenues and funds is a constitutional power of vital importance to them : *per* Starke, J., p. 75. The Constitution should not be understood as authorising the Commonwealth to make a law " aimed at the restriction or control of a State in the exercise of its executive authority " : *per* Dixon, J., p. 83. Williams, J. (p. 99), held that sec. 48 of the Banking Act 1945 was a law which discriminated against the States and their agencies and was in substance a law which sought to give directions to the States as to the manner in which they should exercise their executive, legislative, judicial or governmental functions and that it was therefore invalid.

The plaintiffs rely upon all these propositions in their challenge to the 1947 Act.

The 1947 Act is general in its terms. It is quite different from sec. 48 of the Banking Act 1945, which dealt specifically and in a special manner, and in a discriminatory manner, with States and State agencies. The 1947 Act cannot be said to be aimed at or directed against the States in this manner.

Further, the States are at liberty to use the Commonwealth Bank and, if they prefer not to do so, they can establish their own banks. The intention of sec. 51 (xiii) is, I suggest, to give to the States independence of the Commonwealth in respect of banking if they desire to have and to exercise such independence. State banking is removed from Commonwealth control except in so far as it extends beyond the limits of the State concerned. The Commonwealth legislative power in relation to " State banking extending " should (as I have already said) be construed in the light of the prior exception of State banking from Commonwealth control, and should be read as authorising Federal laws under which a State bank may extend its business from one State into another, even though the other State might

itself object to such extension. If the Commonwealth power of legislation with respect to " State banking extending, etc.," were held to include a power to prohibit " State banking extending, etc.," then, as a State bank of any magnitude could not carry on if it were limited in all its transactions to transactions within the State, the result would be that the Commonwealth Parliament, by exercising its legislative powers, could actually in practice abolish State banking upon any substantial scale, notwithstanding the exclusion of " State banking " from Commonwealth legislative power. I am therefore of opinion that the Commonwealth Parliament cannot, under the power to make laws with respect to " State banking extending," either prohibit or substantially impede such banking. To hold that such legislation is valid would, in my opinion, be inconsistent with the only reason that can be suggested for excepting State banking from the power conferred by sec. 51 (xiii).

Thus I am of opinion that, by reason of this exception, the provisions with respect to State banking contained in sec. 51 (xiii) make provision, of which the States are at liberty to avail themselves, for independence of the States from Commonwealth control in respect of banking, and that the principles stated in the *Melbourne Corporation Case* do not invalidate the Banking Act 1947.

FINANCIAL AGREEMENT.

It is contended for the plaintiffs that the Act is invalid because it is inconsistent with the Financial Agreement between the Commonwealth and the States : see Schedule to Financial Agreement Act 1944 (Commonwealth). Sec. 105A of the Constitution provides that an agreement made in pursuance of the section shall be binding upon the Commonwealth and the States parties thereto, notwithstanding anything contained in the Constitution of the Commonwealth or the Constitution of the several States or in any law of the Parliament of the Commonwealth or of any State. Thus, if a Commonwealth Act contains provisions inconsistent with a term of an agreement made in pursuance of sec. 105A of the Constitution, the Commonwealth Act is necessarily invalid.

The Financial Agreement is an agreement made pursuant to sec. 105A. Clause 5 (1) provides that the States may, for any purpose, subject to any maximum limits decided upon by the Loan Council for interest, brokerage, etc., borrow moneys within the States from authorities, bodies, funds or institutions (including Savings Banks) constituted or established under Commonwealth or State law or practice. Clause 5 (9) has a more direct reference to the present case, because it deals more specifically with borrowings from banks. Clause 5 (9) is as follows :—

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

These clauses confer a right upon a State Government, subject only to the conditions mentioned, to borrow money upon overdraft from banks.

The plaintiffs contend that the principle stated in *Stirling v. Maitland*, 5 B. & S. 840, at p. 852, in the following words is applicable :—

> " If a party enters into an arrangement which can only take effect by the continuance of a certain existing state of circumstances, there is an implied

engagement on his part that he shall do nothing of his own motion to put an end to that state of circumstances, under which alone the arrangement can be operative."

A recent case in which this principle was applied is *Southern Foundries (1926) Ltd. v. Shirlaw*, [1940] A.C. 701.

The plaintiffs contend that it is an implied term of the Agreement that the Commonwealth will not do anything to render the right given by the quoted clause nugatory or to diminish or prejudicially affect it. At the present time the States are able to go to a certain number of private banks " in a private banking system " and make agreements for overdrafts. The Banking Act 1947 contains provisions which, so far as they are applied, will bring about the abolition of some or all of the private banks. This, it is contended, is inconsistent with the implied term of the Financial Agreement.

The 1947 Act may be used and is plainly intended to be used for the purpose of diminishing the number of banks. There is no express prohibition in the Financial Agreement against such legislation. The plaintiffs disclaim any contention that the Agreement produces the result that no Parliament, Commonwealth or State, could terminate the existence of a bank, but they found a difficulty in stating with any precision any principle short of that proposition upon which they were prepared to stand. The plaintiffs, in my opinion, have not shown how their argument on this point can be accepted without conferring on existing banks a permanent guarantee that their existence will never be terminated by any Commonwealth or State legislative action. Even a statutory amalgamation would be impossible. But these propositions the plaintiffs disclaim.

In my opinion the Financial Agreement does not contain any implication that the number of banks is never to be decreased by legislative action. It provides only that the States (and the Commonwealth) shall be entitled to obtain overdrafts from banks, that is, from such banks as there are, from time to time. If the 1947 Act is put into full operation there will still be the Commonwealth Bank and such State banks as now exist, and as the States may decide to establish hereafter. Accordingly, the States will still have the right to obtain by agreement overdrafts from all such banks as exist.

In the *Melbourne Corporation Case*, 74 C.L.R. 31, my brother Williams and I expressed our opinion that sec. 48 of the Banking Act 1945 was inconsistent with the Financial Agreement, clause 5 (9). That section prevented any State obtaining an overdraft from any bank without the consent in writing of the Federal Treasurer. The Financial Agreement gives a right to a State to arrange with banks for overdrafts subject only to the conditions specified in the Agreement. Sec. 48 was therefore in our opinion invalid because it imposed a condition upon the exercise of a right which had been given to the States independently of any such condition. The 1947 Act, however, does not affect this right in respect of any banks which may be in existence from time to time.

In my opinion, the objections of the plaintiffs based upon the Financial Agreement have not been established as good objections to the validity of the Act.

PART VIII.

Part VIII of the Act provides for the protection of the rights of the staff of a private bank when shares in the bank are acquired by the Commonwealth Bank and new directors assume office, and for the transfer to the Commonwealth Bank of the staff of a private bank when the Commonwealth Bank takes over the business

of the bank. If the provisions for displacement of directors and introduction of nominee directors are invalid, and the provisions for taking over the business of a bank by compulsion are also invalid, the provisions of Part VIII will not come into operation.

CONCLUSION.

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For the reasons which I have stated I am of opinion that the following sections of the Act are invalid :—Section 14 (2) relating to transfer by the Commonwealth Bank of shares, secs. 17 to 20 relating to taking over control of the management of Australian banks, and secs. 23 and 24 relating to the acquisition of the assets of banks. Sec. 14 (2) is not a law with respect to acquisition of property, and the other sections are laws with respect to such acquisition, but in my opinion do not provide just terms of acquisition. Declarations of invalidity should be made accordingly and appropriate injunctions should be granted. The defendants should pay the costs of the plaintiffs. The parties will be given an opportunity of being heard with respect to the terms of the judgments in the several actions.

Rich and Williams, JJ.

These are five actions in which the plaintiffs claim that the Banking Act 1947, hereinafter called the Act, or alternatively certain sections and parts of the Act, are beyond the powers of the Commonwealth Parliament, contrary to the Constitution of the Commonwealth and invalid. The important sections and parts of the Act are sections 13, 14, 15, 17 to 21 inclusive, 24, 25, and 56 and parts VI and VII.

The plaintiffs can be divided into three classes (1) the eight private banks (that is banks carried on for private profit) incorporated in Australia which are enumerated in the first part of the First Schedule to the Act ; (2) the three private banks incorporated in the United Kingdom which are enumerated in the second part of the First Schedule to the Act ; and (3) the States of Victoria, South Australia and Western Australia. Joined as plaintiffs with four of the banks in the first class, namely the Bank of New South Wales, the Commerical Banking Company of Sydney Limited, the National Bank of Australasia Ltd., and the Commercial Bank of Australia Ltd., there is in each case a director and shareholder suing on behalf of himself and all other holders of shares on any register in Australia and a shareholder suing on behalf of himself and all other holders of shares on any register outside Australia. Joined as plaintiffs with three of the remaining banks, namely the Bank of Adelaide, the Ballarat Banking Company Limited, and the Brisbane Permanent Building and Banking Company Limited, there is in each case a director and shareholder suing on behalf of himself and all other holders of shares. The eighth plaintiff the Queensland National Bank Limited is in voluntary liquidation and the liquidator is a co-plaintiff. No objection was raised to the form of the actions so far as they are actions by a shareholder on behalf of himself and all other shareholders, but it is impossible to say whether it would be in the pecuniary interest of shareholders or not that their shares in the Australian Banks should be acquired under the Act, so that they cannot be said to be numerous persons having the same interest in the subject matter of the action within the meaning of rule 8 of the rules of this Court, and we do not regard the actions as other than actions by the shareholders who are parties on their own behalf.

Section 3 states that the several objects of the Act include—(a) the expansion of the banking business of the Commonwealth Bank as a publicly-owned bank conducted in the interests of the people of Australia and not for private profit ; (b) the taking over by the Commonwealth Bank of the banking business in Australia

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of private banks and the acquisition on just terms of property used in that business; (c) the prohibition of the carrying on of banking in Australia by private banks.

A statement of objects in an Act can operate like a preamble " as a key to open the meaning of the makers of an Act and the mischiefs it was intended to remedy,"—*Halsbury's Laws* (2nd ed.), vol. 31, p. 461—but in the end the objects of the Act must be ascertained from its actual operation and effect.

Considerable care has been taken to leave to the sole and uncontrolled discretion of the Treasurer the determination of the extent to which the relevant provisions of the Act shall be applied to the private banks enumerated in the First Schedule. The Act is therefore capable of a complete or partial operation depending on the extent to which the Treasurer chooses to exercise his discretion. It is not an Act the necessary operation and effect of which will be to transfer the banking business of every one of these banks to the Commonwealth Bank and to prohibit them all from carrying on banking business in Australia. Further the operation of the Act is restricted to prohibiting the corporations at present carrying on the business of banking in Australia for private profit from further carrying on such business, and to the transfer of their businesses to the Commonwealth Bank, so that its operation is not as wide as its objects indicate. But as the Banking Act 1945 prohibits persons other than corporations carrying on banking business in Australia and corporations from carrying on such business without a licence the objects of the Act can be achieved by refusing any further licences. The complete operation of the Act will therefore have the effect in every practical sense of changing the present banking structure of Australia from one in which the Commonwealth Bank of Australia acts as a central bank and is in competition with the private banks in the general banking business into one in which the whole of this general banking business shall be conducted by the Commonwealth Bank subject only to such competition as may be provided by State Banks. This purpose could be achieved either by the Commonwealth Bank taking over the businesses of the private banks voluntarily or by compulsion, or possibly by the private banks being prohibited from carrying on business which would force those seeking banking facilities to go to the Commonwealth Bank or partly by one or other of these means.

The Act therefore contains provisions by which the business of the private banks at present carrying on business in Australia may be acquired by the Commonwealth Bank and by which the carrying on of the business of banking in Australia by these banks may be prohibited. Two methods are provided by which the business of a private bank may be acquired by the Commonwealth Bank. The first method, which is confined to the banks incorporated in Australia, is contained in divisions 2 and 3 of Part IV of the Act, and combines provisions for the voluntary or compulsory acquisition of the shares of these banks situated or deemed by law to be situated in Australia with provisions for the compulsory transfer of their management, direction and control from the directors appointed in accordance with their Memoranda and Articles of Association or other constating instruments (hereinafter called regulations) to directors appointed by the Governor of the Commonwealth Bank with the approval of the Treasurer. The second method which can be applied to all the plaintiff banks is contained in division 4 of Part IV, and provides for the voluntary or compulsory taking over of their businesses in Australia by the Commonwealth Bank. The business is taken over by the Commonwealth Bank acquiring all the assets of the private bank which are situated in Australia at the date of acquisition and assets which relate to banking transactions and become Australian assets after that date; and discharging the private

bank from all liabilities which are situated in Australia at the date of the acquisition and all liabilities which relate to banking transactions and become Australian liabilities after that date, and by transferring these liabilities to the Commonwealth Bank.

The Act embodies, but with important variations, two methods which are now well recognised by which one company may absorb the business of another—that is to say by the former company purchasing the assets and undertaking to discharge the liabilities of the latter, or the former company acquiring all or substantially all or at least sufficient shares in the capital of the latter to obtain a controlling interest, that is to say at least sufficient shares to pass a special resolution. But the important distinction between these methods of absorption and those provided by the Act is that where shares are acquired the nominees of the Commonwealth Bank are placed in the management, direction and control of the business and affairs of the private bank not by the Commonwealth Bank exercising its rights as a shareholder but by the Act: and that in the case of the acquisition of assets the private bank is discharged from its contractual liabilities and the rights of its creditors compulsorily novated to rights against the Commonwealth Bank.

The Act confers on the Treasurer the sole right to decide in his absolute discretion whether either and if so which method of acquisition shall be applied to each of the Australian private banks and the time of application, whether and when the businesses of each of the private banks incorporated in the United Kingdom and elsewhere shall be taken over, and whether there shall be simultaneous applications of the provisions of the Act to one or more or all of the banks or whether the Act shall be applied to the banks one by one. Obviously the transfer of the businesses in Australia of the plaintiff banks to the Commonwealth Bank is a task of great magnitude, and may explain the presence in the Act of the method of acquisition provided for by divisions 2 and 3 of Part IV, because by this method the separate business of each of the Australian banks can be continued as a mere adjunct of the Commonwealth Bank for as short or as long a period as the Treasurer thinks fit. But it is plainly intended that the business of each of these Banks may at some convenient future time be taken over by the Commonwealth Bank, and sec. 19 (b) therefore authorises the directors nominated by the Governor of the Commonwealth Bank to dispose of the business in Australia of each bank to the Commonwealth Bank with the approval of the Treasurer. Further it would seem that the provisions of division 4 of Part IV may be applied to a private bank incorporated in Australia after it has already been subjected to the provisions of divisions 2 and 3 of that Part. Indeed, unless this is done, the employees have no statutory rights to become employees of the Commonwealth Bank. Ultimately the Commonwealth Bank can acquire the businesses of all the private banks.

But sec. 51 (xxxi) of the Constitution requires that laws for the acquisition of property shall provide for the acquisition on just terms. The requirement applies whether the law authorises the Commonwealth or some person or corporation to acquire the property: *McClintock v. The Commonwealth*, 1947 A.L.R. 530: *Jenkins v. The Commonwealth*, 74 C.L.R. 400. Sec. 15 of the Act therefore provides that:—"The Commonwealth Bank shall pay fair and reasonable compensation in respect of the acquisition of shares by the Commonwealth Bank under section thirteen of this Act," and sec. 25 that—"The Commonwealth Bank shall pay fair and reasonable compensation in respect of the acquisition of property by the Commonwealth Bank under the last preceding section" (i.e., under section twenty-four). Part V provides for the constitution of a new Federal Court of Claims, and Part VI for the determination of claims for compensation in respect of the acquisition of shares and assets by that Court and not in any other manner.

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Part VIII gives a statutory right to persons employed by an Australian private bank to continue to be employed by that bank after the date upon which shares in that bank have become vested in the Commonwealth Bank, and a statutory right to persons employed by a private bank the business of which is taken over by the Commonwealth Bank to be employed by the Commonwealth Bank.

Sec. 56 provides that upon the taking over of the business of a private bank by the Commonwealth Bank, the Commonwealth Bank shall be substituted for the private bank as a party to all instruments under which any money may be payable or property transferable to or by a private bank.

Sec. 61 provides that the Commonwealth guarantees the payment of all compensation payable by the Commonwealth Bank under the Act.

Prior to the Act, each of the plaintiff banks was carrying on business under the authority of sec. 8 of the Banking Act 1945. This authority could only be revoked if the Governor-General was satisfied that the Bank had ceased to carry on banking business in Australia. Sec. 46 (1) of the Act provides that " notwithstanding anything contained in any other law or in any charter or other instrument, a private bank shall not, after the commencement of this Act, carry on banking business in Australia except as required by this section." The existing authorities of the plaintiff banks are therefore revoked, and sec. 46 makes it unlawful for them to carry on business except to the extent provided by the later sub-sections. In the meantime each bank, however, difficult it might be for it to maintain its business in such circumstances, is nevertheless required by sub-sec. 2 to carry on business in Australia indefinitely and to provide any facility or service provided by it in the course of its banking business on 15th August, 1947. Each bank, except a bank the business of which has been taken over by another private bank between this date and the date of the Act, must continue to carry on business until (1) its business is taken over by the Commonwealth Bank (sub-sec. 3) ; or (2) the Treasurer by notice published in the Gazette and given in writing to a private bank, requires it to cease upon a date stated in the notice carrying on banking business in Australia (sub-sections 4 to 8).

It will be convenient at this stage to refer to sec. 6 of the Act. This section conveys an intimation to the Court that it is the intention of Parliament that every provision of the Act shall operate to the full extent to which it can operate consistently with the Constitution. It intimates that the true meaning of each provision is first to be ascertained in the context of the whole Act. Unless this meaning is inconsistent with the Constitution, the provision is to have this meaning and operate accordingly although every other provision of the Act should be totally inconsistent with the Constitution and wholly invalid. If any provision of the Act is inconsistent with the Constitution, it is nevertheless to operate to the full extent to which it can operate consistently with the Constitution. But the Court is not a legislative but a judicial body. It cannot legislate ; that is the function of Parliament. It can only read down a provision which is in excess of power so that it will have an operation consistent with the Constitution where the provision contains independent portions within power which are severable, or the provision is capable of operating in a distributive manner in respect of each and every part of the subject matter and its operation can be confined to those parts which are within power, *Pidoto v. Victoria*, 68 C.L.R., 87. When each provision which is inconsistent with the Constitution has been examined and if possible read down so as to have a residue of consistency, or if this is impossible rejected, the Act is to be regarded as an Act consisting of those provisions which are consistent with the

Constitution still having their original meaning and of the above residues, and this collation is to be the Banking Act 1947, notwithstanding that what is left of the Act may result in the Act having a different effect in substance from the true meaning of the Act as a whole.

When the Act is construed in the light of the several objects set out in sec. 3, particularly the third object, and of this remarkable manifestation of parliamentary intention, it becomes clear that sec. 46 is intended to have an operation independent of the validity of any other provisions of the Act. The Act therefore authorises the Treasurer in his absolute discretion and in his own time to determine the banking business in Australia of each of the plaintiffs with compensation by causing the Commonwealth Bank to take over its business, or to close down its business without any compensation, or to compel it to carry on business indefinitely. The Act can only be completely valid if the Commonwealth Parliament can pass laws (1) prohibiting any banking business other than the business carried on by State banks being carried on in Australia; (2) compelling any person engaged in the business of banking to carry on that business indefinitely; (3) compelling any person who has a contract with a bank carrying on business in Australia to novate that contract into a contract with another bank carrying on business in Australia; (4) altering the regulations of any corporation formed under the laws of any State carrying on the business of banking in Australia, and taking the management, direction and control of its business and affairs out of the hands of the directors appointed by the shareholders and placing them in the hands of the nominees of another bank; (5) authorising any bank carrying on business in Australia compulsorily to acquire shares in any other bank carrying on business in Australia; (6) authorising any bank in Australia compulsorily to acquire the business of any other bank carrying on business in Australia.

The defendants contend that the Act is authorised by the powers, separately or in conjunction, of the Commonwealth Parliament to make laws, subject to the Constitution, for the peace, order and good government of the Commonwealth with respect to the subject matters enumerated in sec. 51, placita (xiii), (xx), (xxxi), and (xxxix). The text of these placita is as follows:—

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

The defendants submit that a Federal law is authorised by the Constitution if it is relevant to, that is to say if it touches and concerns, a specific matter on which the Commonwealth Parliament has power to legislate, and that it is wrong to inquire whether the law is in its pith and substance or true nature and character a law on one or more of the specific matters of Federal legislative powers or is a law on a matter not transferred by the Constitution to the Commonwealth Parliament and therefore exclusively vested in the States. The test of pith and substance or true nature and character of the law was first used by the Privy Council in order to decide whether a law was a law upon one of the classes of subjects over which

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the Canadian Parliament has exclusive power under sec. 91 or the Parliaments of the Provinces exclusive power under sec. 92 of the Canadian Constitution. And in the recent case of *Prafulla Kumar Mukherjee v. Bank of Commerce* 74 Ind. Ap. 23, where the same test was applied to the Government of India Act 1935, there were three lists of powers, a federal legislative list with respect to which the federal legislature had exclusive powers, a provincial list with respect to which the provincial legislatures had exclusive powers, and a concurrent list with respect to which the federal and provincial legislatures had concurrent powers. But there is in the judgment of the Privy Council the specific statement that the same test is to be applied however the powers are distributed between the parliaments in a federal system. In *Gallagher v. Lynn*, 1937 A.C. 863 at p. 870, Lord Atkin said :—

> " These questions affecting limitation on the legislative powers of subordinate parliaments or the distribution of powers between parliaments in a federal system are now familiar, and I do not propose to cite the whole range of authority which has largely arisen in discussion of the powers of Canadian Parliaments. It is well established that you are to look at the " true nature and character of the legislation " : *Russell v. The Queen* 7 App. Cas. 829 " the pith and substance of the legislation." If, on the view of the statute as a whole, you find that the substance of the legislation is within the express powers, then it is not invalidated if incidentally it affects matters which are outside the authorized field. The legislation must not under the guise of dealing with one matter in fact encroach upon the forbidden field."

The cases have been argued at great length and with great care on behalf of the plaintiffs and of the defendants. We only propose to deal with some of the more outstanding questions that have arisen because, after careful consideration, we have reached the following conclusions :—(1) that on the true construction of placita (xiii), (xx), (xxxi) and (xxxix) of sec. 51 of the Constitution none of the material provisions of the Act is authorised by these placita ; (2) that on any construction, secs. 13, 14, 17 to 21 inclusive, and 24 are not authorised by these placita ; (3) that if placitum (xxxi) is wide enough to authorise the acquisition of the shares or the taking over of the businesses, the acquisitions fail because the Act does not provide just terms ; (4) that the Act in all its material sections is contrary to clause 5 (9) of the Financial Agreement and to sec. 92 of the Constitution. We shall proceed shortly to explain our reasons for reaching these conclusions.

The complete validity of the Act must rest on the power of the Commonwealth Parliament to select one person or corporation and confer on that person or corporation the sole right to carry on the whole of the banking business in Australia other than the business carried on by State banks. The conferment of such a privilege on one bank must be a partial exercise of a power to prohibit all persons and corporations except State banks carrying on this business. The corporation selected in the Act is the Commonwealth Bank, but it would be equally within power to select one of the private banks. The defendants contend that this power of selection is conferred by pl. (xiii) or alternatively by pl. (xx) of sec. 51 of the Constitution. The only decision on pl. (xx) is *Huddart Parker v. Moorehead* 8 C.L.R. 330. Very conflicting views of the meaning of this placitum were there expressed. But there was agreement that the placitum does not authorise the Commonwealth Parliament to create corporations but relates to legislation with respect to corporations as existing entities. For the purposes of private international law, each of the States of Australia is regarded as a foreign country in the Courts of another State, so that bodies incorporated in one State are just as much foreign corporations in another State as bodies incorporated abroad. The

language of the placitum indicates an intention to give the Commonwealth Parliament power to make laws from time to time with respect to the conditions, subject to the performance of which, corporations of all kinds created beyond Australia and trading and financial corporations incorporated in Australia should be entitled to carry on business throughout Australia or in any part thereof. It was contended that the power was sufficiently wide to enable the Commonwealth Parliament to prohibit such corporations carrying on business at all in Australia. But the power operates on such corporations as existing entities, and we think that it would be inconsistent with a power to legislate depending on such a basis, particularly where corporations formed within the limits of the Commonwealth are subject to the power to the same extent as foreign corporations, to construe the power as wide enough to authorise the Commonwealth Parliament simply to prohibit one or more or all of such corporations carrying on business in Australia at all. It was also contended that the placitum would authorise the Commonwealth Parliament to legislate directly to alter the regulations of such corporations, but since the power is with respect to existing corporations and the regulations are part of their formation such legislation would be beyond power. All that the Commonwealth Parliament could do would be to impose conditions appropriate to the carrying on of a particular class of business which might require corporations engaged in the business to alter their regulations in accordance with the law of the place of their incorporation so as to be in a position to comply with the conditions.

But it is unnecessary to pursue the meaning of the power because we are of opinion that it does not apply to corporations whether created abroad or within Australia engaged in the business of banking. Placitum (xiii) contains an express exclusion of State banks from this head of power. It was held in the *Melbourne Corporation v. The Commonwealth* 74 C.L.R. 31 that State banking means banks constituted and controlled by States. The ordinary way to constitute such banks would be to incorporate them. Such banks would be trading or financial corporations formed within the limits of the Commonwealth. If pl. (xx) was intended to apply to banks, the Commonwealth Parliament would thereby acquire legislative powers over State banks from which it is expressly excluded by pl. (xiii). It was contended that the placita could be reconciled by implying an exclusion of State banks from pl. (xx), but to do this would require the insertion at the end of this placitum of some such words as " other than trading or financial corporations formed within the limits of the Commonwealth which are banks constituted and controlled by States the business of which does not extend beyond the limits of the States concerned." We can find no justification for such an implication, and in our opinion the placita can only be reconciled by applying the maxim *generalia specialibus non derogant*, and by regarding corporations which are banks as placed in the separate category expressly provided for by pl. (xiii) and therefore as corporations outside the generality of the classes of corporations referred to in pl. (xx).

The crucial matter is therefore to determine the meaning of pl. (xiii). It authorises the Commonwealth Parliament to make laws with respect to (1) Banking other than State banking; (2) State banking extending beyond the limits of the State concerned; (3) The incorporation of banks; and (4) The issue of paper money. It thus contains four legislative powers. It is clear, of course, that in a Constitution there may be considerable overlapping in the various heads of legislative power and in the sub-heads contained in any head, but we can see no reason why a Constitution, like any other statute or document, should not be subject to the general rule that every clause should be construed with reference to the context of the other clauses of the Act, so as, so far as possible, to make a

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consistent enactment of the whole statute and to give a meaning if possible to every part thereof: *Lampleigh v. Norton* 22 Q.B.D. 452 at p. 459; *Canada Sugar Refining Co. v Reg.*, 1898 A.C. 735 at p. 741; *Lewis v. Bell*, 1940 Ch. 345 at p. 348. Accordingly when placitum (xiii) gives a power to legislate with respect to banking and a further power to legislate with respect to the incorporation of banks, the framers of the Constitution could not have intended by the word "banking" to authorise laws with respect to the incorporation of banks. The origin of the placitum is sec. 91 (15) of the British North America Act 1867, which gives the Canadian Parliament exclusive legislative authority over "banking, the incorporation of banks, and the issue of paper money." The additional words "other than State banking, also State banking extending beyond the limits of the State concerned" have been incorporated in the placitum. In *Tennant v. Union Bank of Canada* 1894 A.C. 31 at p. 46 Lord Watson in delivering the judgment of the Privy Council said that banking is "an expression which is wide enough to embrace every transaction coming within the legitimate business of a banker." This definition has been repeated in two recent judgments of the Privy Council: *A.G. for Canada v. A.G. for Quebec* 1947 A.C. 33 at pp. 41, 42; *A.G. for Alberta v. A.G. for Canada* 1947 A.C. 503 at p. 517. It would seem therefore that Lord Watson had taken the view that the words "incorporation of banks" authorised laws relating to the existence of banks as corporate bodies while the word "banking" authorised laws relating to the conduct of banking business. The word "banking" had been given this meaning by Lord Watson when sec. 91 (15) of the Canadian Constitution was adopted with amendments in the Australian Constitution. The amendments strengthen the view that the word was intended to have this meaning in pl. (xiii) because the only power of the Commonwealth Parliament over State banking is over State banking extending beyond the limits of the State concerned. It has no power over the creation or regulations or winding up of State banks. It can only make laws with respect to the banking transactions which they carry on beyond the limits of their own State. The meaning given to the word "banking" by Lord Watson is accordingly consistent with the meaning which the word must have where it occurs in the expression "State banking extending beyond the limits of the State concerned." Laws with respect to banking are not therefore laws which deal with the incorporation, regulation and winding up of banks, but are laws with respect to the conduct of the business carried on by banks.

It was contended that a power to make such laws was wide enough to authorise laws selecting the persons or bodies to engage in the conduct of such business. But the Commonwealth Parliament has the same power over the conduct by State banks of interstate business as it has over the conduct by other banks of their business whether intra-state or interstate. If therefore the power is wide enough to authorise the selection of banks other than State banks which alone may be allowed to carry on intra and interstate business, it must also be wide enough to authorise the selection of the State banks which alone may be allowed to carry on interstate business. But the Commonwealth Parliament cannot suppress State banks, and it would be most unreasonable to construe the latter power as a power to authorise some State banks to conduct business beyond the limits of their own States to the exclusion of others and to prohibit all State banks from having branches or even agencies anywhere beyond the limits of their own States, either within or without Australia, or even from having dealings with one another. The use of the word "extending" assumes and implies that State banks can lawfully extend and continue to extend their businesses beyond the limits of their own States. The power must be a power to regulate the conduct of the interstate busi-

ness of such banks. This power over this portion of State banking is of the same quality as the power over the conduct of all banking business by other banks. The latter power is not therefore a power to prohibit all or some corporations other than State banks engaging in the business of banking, but a wide power to regulate the conduct of banking business. In *A.G. for Ontario v. A.G. for the Dominion* [1896] A.C. 348 at p. 363, Lord Watson said in reference to the power in sec. 91 of the Canadian Constitution to regulate trade and commerce that :—

> "A power to regulate, naturally, if not necessarily, assumes unless it is enlarged by the context, the conservation of the thing which is to be the subject of regulation."

He cited a passage in the judgment of Lord Davey in *Municipal Corporation of the City of Toronto v. Virgo*—" Their Lordships think there is marked distinction to be drawn between the prohibition or prevention of a trade and the regulation or governance of it, and indeed a power to regulate and govern seems to imply the continued existence of that which is to be regulated or governed."

For these reasons we are of opinion that sec. 46 (1) and sub-sections (4) to (8) are not authorised by pl. (xiii), and are totally inconsistent with the Constitution and incapable of being read down in accordance with sec. 6, and are therefore wholly invalid. Sections 13 and 24 are attempted exercises of the power conferred on the Commonwealth Parliament by pl. (xxxi) to make laws for the acquisition of property. But property can only be acquired under this power for any purpose in respect of which the Commonwealth Parliament has power to make laws. Laws providing for the compulsory acquisition of shares in one bank by another bank and for the compulsory taking over of the business of one bank by another bank are not in any sense a purpose of a law with respect to the conduct of banking business. Sections 13 and 24 are therefore also wholly invalid. Sections 14 and 17 to 21 inclusive are, for reasons more particularly stated hereafter, laws which attempt to alter the regulations of bodies incorporated under State legislation and are not laws with respect to the conduct of banking business by such bodies but are company laws. Pl. (xiii) authorises the Commonwealth Parliament to make laws with respect to the incorporation of banks. This power would probably authorise sec. 6 of the Banking Act 1945 which provides that only corporations shall carry on banking business in Australia, and would also probably authorise a law for the incorporation of a particular bank. But the word used is " banks " and not the words " bank or banks " and the phrase " a law with respect to the incorporation of banks " in its ordinary signification would appear to point rather to a power to make a general law governing the incorporation, regulations, and winding up of banks. The banking power in the Australian Constitution is not, like the banking power in the Canadian Constitution, an exclusive power. It is a concurrent power. Unless the Commonwealth Parliament legislates with respect to the incorporation of banks, banks, like other bodies, can be incorporated under State laws. If the Commonwealth wishes to legislate with respect to the incorporation of banks and to occupy this legislative field, its legislation will prevail over State legislation by virtue of sec. 109 of the Constitution. Persons desirous of engaging in the business of banking in Australia would then have to be incorporated under federal law. But such a power would not authorise laws altering the regulations of bodies incorporated under State laws. Sections 17 to 21 inclusive are therefore also wholly invalid. Section 46 (2) may be regarded from two aspects. Regarded as a law incidental to the taking over of the business of a plaintiff bank by the Commonwealth Bank and intended to preserve that business in the meantime it might be valid. But when the law for the taking over of the business fails,

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sec. 46 (2) must fail also. Regarded as an independent law sec. 46 (2) must fail because a power to make laws with respect to the conduct of the business of banking would not authorise a law compelling a person or corporation already engaged in the business of banking to continue to carry on that business indefinitely any more than it would authorise a law compelling a person or corporation to commence to carry on that business. Laws with respect to the conduct of the business of banking are laws which operate on persons and corporations while engaged in that business.

We shall now discuss the validity of the Act on the basis that, contrary to our opinion, the Commonwealth Parliament can under its power to make laws with respect to banking prohibit any person or corporation from carrying on the business of banking, and therefore select one or more banks and grant to it or them a monopoly of this business in Australia other than the business carried on by State banks. On this construction of the power the Commonwealth Parliament must also have power to prohibit State banks doing any business beyond the limits of their own States, and therefore power to authorise some State banks to do business and to deny to others the right to carry on business beyond such limits either anywhere or as prescribed. On this construction, subject to the questions that arise with respect to sec. 92 of the Constitution and the contentions of the States, section 46 (1) and (4) to (8) would be valid. But because a law may be made giving a monopoly to the Commonwealth Bank, it does not follow that laws may also be made giving the Commonwealth Bank power compulsorily to acquire shares in other banks whilst they are still permitted to carry on banking business, or compulsorily to acquire their businesses, or authorising the Governor of the Commonwealth Bank to appoint his nominees as directors of such banks to direct, manage and control their business and otherwise to alter their regulations.

Questions immediately arise with respect to the validity of (1) sections 13 and 14; (2) division 3 of Part IV; (3) section 24 of the Act. We shall proceed to deal with these questions.

Questions (1) and (2). Section 13 (1), (2) and (3) authorise the Treasurer to give a notice which will have the effect of vesting the Australian shares in an Australian private bank in the Commonwealth Bank upon a date specified in the notice. This is a law with respect to the acquisition of property. Such a law can only be valid provided that (a) the acquisition is on just terms, and (b) it is for a purpose in respect of which the Commonwealth Parliament has power to make laws. The regulations of all the Australian private banks contain provisions authorising the directors in the exercise of their discretion to refuse to register any transfer of shares. The regulations of two of these banks prohibit a corporation becoming a member. The nature of the property in a share was described by Lord Russell of Killowen in *Inland Revenue Commissioners v. Crossman*, [1937] A.C. 26 at p. 66 as follows:—

> "A share in a limited company is a property the nature of which has been accurately expounded by Farwell, J. in *Borland's Trustee v. Steel.* It is the interest of a person in the company, that interest being composed of rights and obligations which are defined by the Companies Act and by the memorandum and articles of association of the company. A sale of a share is a sale of the interest so defined, and the subject matter of the sale is effectively vested in the purchaser by the entry of his name in the register of members. It may be that owing to provisions in the articles of association the subject matter of the sale cannot be effectively vested in the purchaser because the directors refuse to and cannot be compelled to register the purchaser as shareholder.

> The purchaser could then secure the benefit of the sale by the registered shareholder becoming a trustee for him of the rights with an indemnity in respect of the obligations. In the case of the sale of such a share the risk of a refusal to register might well be reflected in a smaller price being obtainable than would have been obtained had there been no such risk. The share was property with that risk as one of its incidents."

Unless a person who acquires a share in a company becomes registered as the holder of that share he does not become a member of the company, or as it is sometimes said does not become the legal owner of the share in the sense that he is entitled directly to exercise the rights conferred and is subject directly to the obligations imposed upon the members of a company by the regulations. Until he is registered he is only the equitable owner of the shares in the sense that the vendor who is registered is under certain fiduciary duties towards him, e.g. to exercise his vote and to dispose of any dividends as the purchaser shall direct. The word " vest " when used with reference to the acquisition of property in shares would not, if it stood alone, be sufficient to make the person who acquired the shares more than the equitable owner with a right to apply to be registered as a member, if he was eligible for membership under the regulations, and thereby become the legal owner of the shares. A law under pl. (xxxi) can only authorise the Commonwealth Bank to acquire the property in the shares which the member of the company has power to dispose of under its regulations, that is to say the equitable title to the shares and the same right that a purchaser of the shares who duly presented a transfer for registration would have to become a member of the company. But it is obvious that the risk would be great that the directors of the Australian private banks would refuse to register the Commonwealth Bank as a member, even where the regulations authorised corporations to become members. Section 14, which applies not only to shares compulsorily acquired under sec. 13 but also to shares voluntarily purchased under sec. 12, therefore reinforces these sections and overrides the regulations of the company by providing that the Commonwealth Bank shall become a member of the company, although the directors refuse to consent and although the regulations provide that a corporation shall not become a member of the company. Section 14 also authorises the Commonwealth Bank to transfer any such shares to any person and provides that the regulations of the company shall also be overridden in a similar manner in favour of such person. We do not think that the section is authorised by pl. (xxxix). In *Attorney-General for the Commonwealth of Australia v. Colonial Sugar Refining Co. Ltd.* [1914] A.C. 237 at p. 256, Viscount Haldane, L.C., in delivering judgment of the Privy Council, said that the words of this placitum " do not seem . . . to do more than cover matters which are incidents in the exercise of some actually existing power conferred by statute or by the common law." In *Commonwealth v. New South Wales* 33 C.L.R. 1, it was held that it was not incidental to the compulsory acquisition of land under the Lands Acquisition Act 1906 to require the Registrar-General of New South Wales to register a copy of the Governor-General's notification as if it were a duly executed instrument of transfer under the Real Property Act, N.S.W. It was pointed out that the Commonwealth law itself gave a complete statutory title to the land independently of State law and the Commonwealth could rely on that title if it wished ; but that if the Commonwealth wished to be registered as the proprietor of the land under the Real Property Act, it must comply with the conditions imposed by State law. That case does not appear to have much bearing on the present case, because the Court was there dealing with the acquisition of tangible property, whereas a share is intangible property consisting of legal rights and obligations, and it can not be incidental to

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the acquisition of such property to alter its very nature by providing that it should have proprietary rights extraneous to those comprised in the chose in action at the date of acquisition. So far as the case has any bearing, it supports the view that the Commonwealth could not become a member of an Australian bank otherwise than in accordance with the regulations of that bank.

To be valid therefore sec. 14 must be a law with respect to banking. It was urged that the Commonwealth Bank by virtue of its right to vote at general meetings and in particular to participate in the election of directors would exercise some control over the management of the business of the private bank of which it was a member. But such control would be remote. The real control of the business of a company resides in the directors. *Gramophone & Typewriter Ltd. v. Stanley* [1908] 2 K.B. 89 ; *Quin & Axtens Ltd. v. Salmon* [1909] A.C. 442 ; *Scott v. Scott* [1943] 1 All E.R. 582. Sec. 14 is therefore supplemented by division 3 of Part IV which substitutes the nominees of the Governor of the Commonwealth Bank as directors of the company in lieu of the directors elected by the shareholders and confers on the new directors wide powers not given to the directors by the regulations of the company. In an attempt to make secs. 13 and 14 and division 3 laws with respect to banking within the meaning of pl. (xiii) sec. 9 provides that :—

> " The powers specified in divisions 2 and 3 of this Part are conferred for the purpose of facilitating the control by the Commonwealth Bank of the banking business in Australia of private banks and for the purpose of furthering the expansion of the banking business of the Commonwealth Bank."

But an acquisition of shares in one company by another company is simply an investment by the latter company of part of its funds in the capital of the former company. It does not in any real sense facilitate control by the latter company of the business of the former company or expand the business of the new shareholder. Division 3 would no doubt facilitate control by the Commonwealth Bank of the business in Australia of private banks. It would give the Commonwealth Bank complete control of the business of any Australian bank to which the division may be applied. It is a control in perpetuity because the nominee directors remain in office although the Commonwealth Bank may have disposed of all its shares in the Australian bank. Shareholders and other persons having proprietary interests in the Australian shares which are acquired by the Commonwealth Bank at the same time as it obtains such control and whose interests are then converted into claims for compensation would not be affected by such change of control, but the holders of ex-Australian shares might be gravely prejudiced by the change and particularly by the power conferred by the division on the new directors nominated by the Commonwealth Bank to dispose of the business in Australia to that bank. The rights of such shareholders would only be converted into claims for compensation if and when their shares became Australian shares. Since this might never happen and such conversion might never take place, the value of their shares might depend upon the consideration for which the business will be disposed of to the Commonwealth Bank.

In *R. v. Registrar of Titles* 20 C.L.R. 379 at p. 392 and in *Commonwealth v. New South Wales* (supra) at p. 55, Isaacs, J. said that an acquisition under pl. (xxxi) includes both voluntary and compulsory acquisitions. An agreement freely entered into between parties truly at arms length for a voluntary acquisition would contain intrinsic evidence that the acquisition was on just terms, but it would be difficult to describe an agreement made by the directors of an Australian private bank nominated by the Commonwealth Bank for the sale of the business to the latter bank as a voluntary sale. A sale under s. 19 (1) (b) might be made

to the Commonwealth Bank by the latter bank acting under s. 38 of the Commonwealth Bank Act 1945 or under s. 22 of the Banking Act 1947. In each case the sale would have to be approved of by the Treasurer on behalf of both the vendor and the purchaser companies, and this supervision of both parties would not be conducive to complete freedom of contract. We are prepared to accept the submission of the defendants that there is nothing in ss. 10 and 19 (3) to relieve the nominee directors from the ordinary fiduciary obligation of directors with respect to property under their control. But it is an established principle of Equity that a trustee should never be placed in a position where his duty and his interest conflict, and such directors in their dealings with the bank by which they were nominated would plainly be placed in this position. A sale by them of the business of an Australian private bank to the Commonwealth Bank would not necessarily be a sale on just terms. We are of opinion that division 3 of Part IV coupled with ss. 13, 14 and 46 is intended to provide a method by which the Commonwealth Bank may control for a period and then acquire the business of each Australian private bank as a going concern at an appropriate time. Section 19 (1) (b) is therefore in its true nature and character legislation for the acquisition of property by the Commonwealth Bank and must provide just terms for the acquisition, otherwise it is invalid. For the reasons already given, we are of opinion that just terms are not provided, so that sec. 19 (1) (b) does not comply with pl. (xxxi) and is invalid. If it is struck out, division 3 remains as a law for the management and control of the Australian private banks being placed in the hands of directors nominated by the Commonwealth Bank. Such legislation might be valid as an intermediate step towards the final absorption of the businesses of the Australian private banks by the monopolistic bank. But the power to legislate with respect to banking in its widest meaning could not justify a law placing the nominees of one bank, whether an agent of the Commonwealth or not, permanently in the management and control of the business of another bank. In our opinion therefore secs. 17 to 20 of division 3 are invalid.

We are also of opinion that sec. 14 and division 3 of Part IV are beyond the constitutional powers of the Commonwealth Parliament on the ground that they are in their true nature and character legislation altering the regulations of bodies incorporated under State laws, but the power to legislate on this subject resides in the States. It might be a law with respect to banking to provide that bodies incorporated under State laws desirous of engaging in the business of banking should include in their regulations certain provisions which were reasonably required to safeguard the interests of their depositors and other creditors as a condition of such bodies being authorised to carry on the business of banking. It would be a law with respect to the incorporation of banks to make a general law regulating the incorporation of all persons desirous of carrying on the business of banking and requiring that they should be incorporated under this law. But a law which seeks directly to alter the regulations of a body incorporated under State law simply because it is carrying on the business of banking is not a law with respect to banking, but a law with respect to the capacities and internal organisation of corporations, that is to say a law on a matter exclusively within the sphere of State legislative power. If such laws are authorised by the Constitution it must follow that if any body incorporated under State laws is engaged in any business in respect of which the Commonwealth Parliament can legislate, e.g. in trade and commerce among the States, the Commonwealth Parliament can make a law leaving that corporate body with the shell of its name and incorporation under State law but substituting a completely new set of regulations for its regulations made in conformity with that law.

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There is also, we think, a further objection to secs. 13 and 14, namely, that to give to the Commonwealth Bank a power compulsorily to acquire shares in another bank is not a purpose in respect of which the Commonwealth Parliament has power to make laws within the meaning of pl. (xxxi). The Commonwealth Bank was first established by the Commonwealth Bank Act 1911 which provided that the bank should be a body corporate with perpetual succession and a common seal and with power to hold land and to sue and to be sued in its corporate name. This Act, after having been amended on several occasions, was repealed and replaced by the Commonwealth Bank Act 1945 which preserves and continues the corporate identity and existence of the Bank. But there have never been any corporators. The word " incorporation " in pl. (xiii) must be given its ordinary meaning at the date of the Constitution. In English law it has always been of the essence of the legal conception of a corporation that there should be a person in the case of a corporation sole or persons in the case of a corporation aggregate to be incorporated. It would seem therefore that the incorporation of the Commonwealth Bank must rest on pl. (xxxix) and that the validity of the incorporation, which has not been challenged, must depend on similar principles as those enunciated in *McCulloch v. Maryland* 4 Wheaton 315. It may be that as Griffith, C.J. said in *Heiner v. Scott* 19 C.L.R. 381 at p. 393 :—

> " Probably the true effect of the Act (that is the Commonwealth Bank Act 1911) is a declaration that the Commonwealth may itself carry on the business of banking under the name of the ' Commonwealth of Australia.' "

His Honour then assumed that the power to incorporate banks in pl. (xiii) was sufficient to establish the legal existence of the corporation. But it is unnecessary to pursue the point because on either view the purpose in respect of which the Commonwealth Parliament has power to make a law is the incorporation of the bank. This law might confer upon the bank such ancillary powers of investment and of engaging in other businesses as it is usual to confer on banks to enable them to carry out their banking functions and compete with other banks. But these ancillary powers are not in our opinion purposes in respect of which the Parliament has power to make laws within the meaning of pl. (xxxi). This placitum enables the Commonwealth Parliament to make a law for the acquisition of property on just terms whenever the acquisition of property forms part of the effective exercise of any of its legislative purposes. The only legislative purpose in the present cases is the incorporation of the Commonwealth Bank. The bank must have banking chambers and the necessary furniture, stationery and other equipment to carry on business and a law might be made for the compulsory acquisition of the real and personal property necessary for this purpose. But a power to invest the funds of the bank in shares in other companies including other banks would not make the investment of these funds a legislative purpose of the Commonwealth. If it were a purpose, the Commonwealth Parliament could, by conferring investment powers upon any body which it could lawfully incorporate by a law made under sec. 51 of the Constitution, confer power on the corporation compulsorily to acquire shares in any company in which it was authorised to invest. By conferring a power to invest in land Parliament could authorise the corporation compulsorily to acquire vast areas of land not required to carry on its business. During the argument we were referred to the practice of banks in other countries in carrying on the business of executors and trustees as ancillary to the business of banking. If such a practice spread to Australia, it would be lawful for the Commonwealth Parliament to empower the Commonwealth Bank to engage in such a business. If such a power were a purpose of the Commonwealth it would be within the authority of the Commonwealth Parliament to make a law for the compulsory

acquisition by the Commonwealth Bank of the businesses of all the trustee companies and thereby make the Commonwealth Bank the sole corporation carrying on the business of executor and trustee in Australia. These illustrations are sufficient to show that such powers are in no sense purposes within the meaning of pl. (xxxi). The purpose of a law made with respect to the incorporation of a bank is to incorporate the bank and to equip it with the necessary property to carry on the business of banking. The object of including powers in its charter to invest its funds and carry on certain businesses is to define some of the ancillary activities in which the corporation may engage in the course of carrying on this business. But they are not legislative purposes of the Commonwealth. For these reasons we are of opinion that secs. 13 and 14 and division 3 of Part IV are not authorised by pl. (xiii), (xxxi) or (xxxix) and are wholly invalid.

Question (3). Section 24 provides for the compulsory taking over of the business of any or all of the private banks by the Commonwealth Bank. The taking over consists in the acquisition by the Commonwealth Bank of all the assets of the private bank and the discharge of the private bank from all its liabilities and the assumption of these liabilities by the Commonwealth Bank. The assets only can be property within the meaning of pl. (xxxi). The liabilities are not property within its meaning. It was contended that a law for the assumption of the liabilities simultaneously with the acquisition of the assets of a business would be justified under pl. (xxxi) on the ground that just terms would require that the owner of a business who was deprived of the assets should at the same time be relieved from the liabilities associated with the assets. This contention, if carried to its logical conclusion, would mean that where the amount of the liabilities exceeded the value of the assets, the owner would not only lose his business but would become indebted to the acquirer for the difference between the amount of the liabilities and the value of the assets. If the contention is sound, we can see no logical reason why it would not also be just, upon the acquisition of premises in which the business of a boarding house is being carried on or even the acquisition of a dwelling house, for the law to discharge the owner from the tradesmen's debts and reduce the amount of compensation accordingly. It is not unusual where a business is purchased for the contract to provide that the purchaser shall discharge the liabilities of the business. But such a term rests on the agreement of the parties. The purchaser in effect agrees at the request of the vendor to apply part of the purchase money in paying some of the latter's debts. But just terms require that the legislation shall provide for the payment to the owner of the business of the full equivalent in money for the value of the assets of which he is deprived. He and not the acquirer should be given the discretion to decide whether or not the latter should undertake the discharge of the liabilities of the business on his behalf. The draughtsman of the Act appears to have recognised the difficulty of bringing a law for the assumption of liabilities as an incident of the taking over of a business within the scope of pl. (xxxi), because sec. 25 provides that the Commonwealth Bank shall pay fair and reasonable compensation in respect of the acquisition of property under sec. 24, and sec. 42 refers to the compensation payable in respect of the acquisition under sec. 24 of the Act of the assets of a private bank. These sections do not therefore expressly provide for the deduction of the amount of the liabilities from which the private bank is discharged from the value of the assets, and the defendants were content to submit that it was for the Court to decide to what extent the fact that the private bank had been discharged from its liabilities should be taken into account in assessing the compensation payable in respect of the acquisition of the assets. Unless this discharge

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is taken into account the amount of compensation payable in respect of the acquisition of shares would be determined on a different basis to the compensation for the taking over of a business because in the former case the liabilities would be taken into account in assessing the compensation and in the latter they would not. We have no doubt that it was the intention of Parliament that the amount of the liabilities should be deducted from the value of the assets and that the balance should be the sum payable for compensation. The presence of the words " in respect of " in secs. 25 and 42, the words " fair and reasonable " in sec. 25 and the reference in section 42 to the taking over of the business, indicating that the terms of the taking over are to be taken into consideration, suffice in our opinion to enable the Court to give effect to this intention. But there is then the paradox that if the liabilities are to be taken into account, the Act does not provide just terms because it does not provide for the payment to the private bank of the full equivalent in money for the value of the assets taken. The private bank is placed in the same position as it would be if the liabilities were secured on the assets and it was merely the owner of the equity of redemption.

The explanation of the paradox is that pl. (xxxi) does not authorise the taking over of a business, at any rate in the manner provided in the Act. The reason why the Act provides for the discharge of the private bank from its liabilities and the assumption of these liabilities by the Commonwealth Bank is that the liabilities consist substantially of the indebtedness of the private bank to its customers whose accounts are in credit. The assets of the private bank also consist substantially of the indebtedness to it of its customers whose accounts are overdrawn. One of the several objects of the Act is to expand the business of the Commonwealth Bank. This object would be advanced as the customers of each private bank became customers of the Commonwealth Bank. The Act therefore seeks compulsorily to transfer the accounts of all the customers of the private banks to the Commonwealth Bank. The Commonwealth Bank would only need the other assets of a private bank, consisting substantially of the bank buildings and their contents and the services of its staff, if the Commonwealth Bank is able to obtain this new business. The transfer of all these accounts is effected by sec. 56 of the Act which provides for the novation of all the contracts with the private banks into contracts with the Commonwealth Bank whether moneys are payable under these contracts by or to the private bank. The accounts of the customers with the private banks become accounts with the Commonwealth Bank whether the accounts are in credit or overdrawn. The section substitutes the name of the Commonwealth Bank for that of the private bank as a party to every contract existing between the private bank and a third person, so that the contract becomes a contract between the Commonwealth Bank and that person in lieu of the contract between the private bank and that person.

In every case the Act operates to discharge one contract and to substitute a new one. The customers of the private bank are given no option of doing without a bank account or choosing a new bank from those then carrying on business. They are recruited as customers of the Commonwealth Bank. The customers include States which have accounts with private banks. It is true that sec. 58 provides that nothing in the Act shall require a State or person, being a customer of a private bank the business of which in Australia has been taken over by the Commonwealth Bank under this Act, to continue as a customer of the Commonwealth Bank. But if a person can be compelled to become a customer of a bank he can be compelled to remain a customer. The only nexus with the business of banking is that one of the parties to the original contract is a private bank. Because

of this nexus selected members of the public are compelled to make a contract with another bank. In *A.G. for Canada v. A.G. for Quebec* (supra) at p. 44 Lord Porter said :—

> "The relation between banker and customer who pays money into the bank is stated in words which have ever since been accepted in *Foley v. Hill* (1848) 2 H.L. Cas. 28, as " the ordinary relation of debtor and creditor, with a super-added obligation arising out of the custom of bankers to honour their customer's drafts." No question of possession of or property in the deposit arises. The obligation is mutuum not commodatum. Once the deposit is made there remains only a debt due from the banker to the customer."

If this nexus be sufficient, the mere existence of a bank must afford a justification for a law compelling persons to lend their money to a bank or borrow from a bank and otherwise to enter into such contracts with that bank as the Commonwealth Parliament thinks fit. But the banking power on its widest construction is a power to select the persons or corporations who are to engage in the business of banking and to regulate the conduct of that business between such selected bankers and those members who choose to become their customers. A person does not reach the threshold of the power until he starts to bring about the relationship of banker and customer with a particular bank. Until then, he is beyond its scope. A law which seeks to force a person into this relationship is a law with respect to this person's liberty to enter into such contracts as he thinks fit. Such a law is beyond the scope of any of the enumerated specific subjects of legislative power conferred upon the Commonwealth Parliament by the Constitution and is therefore a law which continues within the exclusive powers of the States. For these reasons we are of opinion that the provisions of secs. 24 and 56 with respect to the discharge of a private bank from its liabilities and the assumption of those liabilities by the Commonwealth Bank are totally inconsistent with the Constitution and incapable of being read down under sec. 6 and wholly invalid. We are also of opinion that the acquisition of the assets and the taking over of the staffs of the private banks are so interlocked with the assumption of these liabilities by the Commonwealth Bank that the whole of the provisions for the taking over of the business of a private bank in the manner provided by the Act form part of one inseverable scheme, and that the whole of secs. 24 and 56 are invalid. For similar reasons sec. 22 sub-sections (8) (b) and (d) are invalid.

Sections 13 and 24 are laws for the compulsory acquisition of property. They must therefore comply with the conditions of pl. (xxxi). One of these conditions is that these laws shall provide just terms for the acquisition of the shares and assets. Shares in an Australian private bank are divided into two classes by sec. 13. (1) Australian shares which presumably comprise all the shares on the Australian registers of these banks. (2) All other shares which presumably comprise all the shares on the registers of these banks outside Australia. Any of these shares which become Australian shares after the date on which the Australian shares are vested in the Commonwealth Bank become vested in that Bank upon the date upon which they become Australian shares. It was contended on a number of grounds that the Act does not contain just terms for the acquisition of the shares under sec. 13 or the taking over of the businesses under sec. 24, but we need only refer to two which affect both methods of acquisition—(1) that the Act provides that the compensation shall be assessed by the Federal Court of Claims and in no other manner, and that this infringes sec. 75 (iii) of the Constitution which provides that in all matters in which the Commonwealth or a person suing or being sued on behalf of the Commonwealth is a party the High Court shall

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have original jurisdiction; (2) that the Act does not contain just terms because it does not authorise the Federal Court of Claims to award interest on the compensation moneys from the date of the acquisition of the shares or the taking over of the businesses as the case may be.

Ground (1). The Commonwealth Bank was first incorporated by the Commonwealth Bank Act 1911. It was financed in its early stages by loans made out of consolidated revenue. It has never had any corporators. The original incorporation of the bank has been continued by the Commonwealth Bank Act 1945 which is the Act at present in force. It has important functions, duties and powers under this Act and the Banking Act 1945. Both acts were assented to on the same date. Sec. 11 of the Commonwealth Bank Act provides that the Commonwealth Bank shall act as a central bank. By sec. 13 (a) the Bank is empowered to regulate the note issue in accordance with Part VII. of the Act. Sec. 12 provides that the Bank shall, in so far as the Commonwealth requires it to do so, act as banker and financial agent of the Commonwealth. Part IV. provides that the Bank shall carry on a general banking business. The Bank has a Rural Credits Department (Part VIII.), Mortgage Bank Department (Part IX.) and Industrial Finance Department (Part X.). One-half of the net profits arising from the carrying on of the business of central banking and general banking are paid each year into the National Debt Sinking Fund. Otherwise the net profits are retained by the Bank. The Bank has important functions under the Banking Act 1945. It controls the payment of moneys into and out of the special accounts by the private banks (secs. 20 and 21), the mobilisation of foreign currency (sec. 23), advances and investments by banks (secs. 27 and 28), and with the approval of the Treasurer may make regulations for the control of interest rates payable to or by banks or to or by other persons in the course of any banking business carried on by them and discount rates charged by banks or by any other persons in the course of any banking business carried on by them (sec. 39). Sec. 8 of the Commonwealth Bank Act 1945 provides that it shall be the duty of the Commonwealth Bank within the limits of its powers, to pursue a monetary and banking policy directed to the greatest advantage of the people of Australia, and to exercise its powers under this Act and the Banking Act, 1945 in such a manner as, in the opinion of the Bank, will best contribute to (a) the stability of the currency of Australia; (b) the maintenance of full employment in Australia; and (c) the economic prosperity and welfare of the people of Australia. Sec. 25 provides that the Bank shall be managed by the Governor. But the Governor is subject to the provisions of sec. 9. This section provides that (1) The Bank shall, from time to time, inform the Treasurer of its monetary and banking policy; (2) In the event of any difference of opinion between the Bank and the Government as to whether the monetary and banking policy of the Bank is directed to the greatest advantage of the people of Australia, the Treasurer and the Bank shall endeavour to reach agreement; (3) If the Treasurer and the Bank are unable to reach agreement, the Treasurer may inform the Bank that the Government accepts responsibility for the adoption by the Bank of a policy in accordance with the opinion of the Government and will take such action (if any) within its powers as the Government considers to be necessary by reason of the adoption of that policy; (4) The Bank shall then give effect to that policy. The ultimate control of the monetary and banking policy of the Bank is therefore vested in the Treasurer. The Governor of the Bank has wide powers of management. But all these powers are vested in him for the purpose of carrying into effect the monetary and banking policy of the Government. The Governor of the Bank is in an analogous position to the Treasurer as that of a general manager of a company to the board of directors. The control of the note issue is plainly a governmental function. Other functions

such as the control of the special accounts, advances, investments and discount rates could be the function of an independent central bank but are plainly made by secs. 8 and 9 governmental functions. Section 7 provides that the Bank may sue and be sued in its corporate name. Section 10 provides that the Commonwealth shall be responsible for the payment of all moneys due by the Bank but nothing in this section shall authorise any creditor or other person claiming against the Bank to sue the Commonwealth in respect of his claim. Persons who have claims against the bank may therefore, and in view of sec. 10 probably must, sue the Bank and not the Commonwealth as the principal, and the Bank may sue persons against whom it has claims as the principal. But it is not unusual for a statute to provide that a corporate body which is an agent of the executive shall be the party to sue and be sued in respect of the functions it is performing on behalf of the Crown. If such a body is sued the question arises whether it is an agent of the Crown and entitled to claim the prerogatives, privileges and immunities of the Crown. There is a valuable collection of the authorities on this point in the judgment of Jordan C.J. in *Skinner v. Commissioner for Railways* 37 S.R. (N.S.W.) 261 at pp. 269, 270. To these authorities may be added three later decisions of the Court of Appeal in *Minister of Supply v. British Thomson Houston Co. Ltd.* [1943] K.B. 478 ; *Minister of Health v. Bellotti* [1944] K.B. 298 ; and *Tyne Improvement Commissioners v. Armement Anversois Societe Anonyme* [1947] 2 All E.R. 363 ; and three later decisions of this Court—*Grain Elevators Board v. Dunmunkle Corp.* 73 C.L.R. 70 ; *Chaff and Hay Acquisition Committee v. Hemphill and Sons Pty. Ltd.* 74 C.L.R. 375 ; and *Rural Bank of N.S.W. v. Shire of Bland* [1947] A.L.R. 413. The three decisions of the Court of Appeal show that an Act may make a person or corporation the principal for the purpose of suing or being sued by members of the public although that person or corporation is an agent of the Crown. The problem whether a corporation is an independent entity or an agent of the Crown must be resolved by a consideration of the purpose and effect of the particular Act by which the statutory body is established and of any other Acts which relate to its corporate functions, duties and powers. A corporation may be an agent of the Crown for some purposes and an independent entity for other purposes. In *Heiner v. Scott* (supra) at page 400, Isaacs, J., Gavan Duffy, J. and Rich, J. said :—

> "We do not think the Act (that is the Commonwealth Bank Act 1911) constitutes the bank universally the agent of the Commonwealth in the sense necessary to make all its acts the acts of the Commonwealth itself, in other words sovereign acts."

But the Court was there concerned with the question whether the Queensland Stamp Act, which imposed a stamp duty on every inland bill of exchange payable on demand (including a cheque on a banker), was an interference with the efficiency of an instrumentality of the Commonwealth, and therefore impliedly forbidden by the rule (since exploded) laid down by this Court in *D'Emden v. Pedder.* To come within the rule the appellant had to establish that the carrying on of the ordinary business of banking by the Commonwealth Bank was an exercise of the executive power of the Commonwealth. The remarks of Their Honours, and similar remarks by Griffith, C.J. at page 393 were on this question. In the present case it is a different problem. The problem is simply whether the Commonwealth Bank is an agent of the Commonwealth or an independent entity, and it can be an agent of the Commonwealth whether or not it is performing governmental functions in the strict sense. Taking into account the provisions of the Commonwealth Bank Act 1945 and the Banking Act 1945 already mentioned, we are of opinion that the Commonwealth Bank is an agent of the Commonwealth. The absence of any

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corporators is the first significant circumstance. This points to an intention on behalf of the Commonwealth to transmute a part of itself into the outward form of a corporation as a convenient means of carrying on a Commonwealth activity. The Commonwealth therefore created the bank to act as its banker and financial agent and carry on the business of banking. In the course of time the bank has become more and more identified with the Commonwealth. Since 1945 it has been subject to government control and has been performing several functions which are governmental functions. Section 183 of the Commonwealth Bank Act 1945 provides that the property, income and operations of the bank and of the Savings Bank shall not be liable, and shall be deemed never to have been liable, to income tax or land tax under any law of the Commonwealth, or to taxation under any law of a State to which the Commonwealth is not subject. This section could only be valid with respect to State law if the bank is an agent of the Commonwealth. Even if the bank is not an agent of the Commonwealth for all purposes it is in our opinion clearly the agent of the Commonwealth for the purpose of the Banking Act 1947. The Act handcuffs the bank to the Treasurer. It is not the Governor of the Commonwealth Bank but the Treasurer who decides whether and when to acquire the shares or to take over the business of one or more or all of the private banks incorporated in Australia or the business of one or more or all of the private banks incorporated elsewhere, so that the Commonwealth Bank is completely subject to the dictation of the Treasurer in these matters. Even where the Act confers some initiative on the Commonwealth Bank or its nominees as in secs. 18, 19 (b) and (c), 22 (5) of the Act, 40 (2) and 44 (1), this initiative can only be exercised subject to the approval of the Treasurer. Such subjugation is quite inconsistent with the bank being an independent entity.

The next question is whether a proceeding against the Commonwealth Bank for compensation under the Act is a matter in which a person is being sued on behalf of the Commonwealth within the meaning of sec. 75 (iii) of the Constitution. The choice is between holding that a person being sued on behalf of the Commonwealth is limited to a person who is appointed as a nominal defendant to represent the Commonwealth or that a person is being sued on behalf of the Commonwealth where that person was acting as its agent in the transaction out of which the claim arose. It was usual in Australia before federation for the States to have Acts providing for the appointment of a nominal defendant to be sued on behalf of the Crown. But there was never any Act so far as we know providing for the appointment of a person as a nominal plaintiff to sue on behalf of the Crown. Such an appointment would have been quite unnecessary because the Crown has always had the right to sue in its own courts. The words were given the wider construction by Starke J. in the unreported case of *War Service Homes Commissioner v. Kirkpatrick and Others*, and we are of opinion that His Honour was right. The decision is in line with that of Phillimore J. in *Graham v. Public Works Commissioners* [1901] 2 K.B. 781, and the three recent decisions of the Court of Appeal already cited. Proceedings for compensation under the Act are therefore matters in which a person, that is the Commonwealth Bank, is being sued on behalf of the Commonwealth, so that this Court has original jurisdiction under the Constitution of which it cannot be deprived by the Act. The provisions in divisions 1 and 2 of Part VI that the compensation shall be determined by the Federal Court of Claims and not in any other manner are therefore invalid to the extent to which they prevent claims for compensation being brought in this Court.

The next question is whether the provisions of divisions 1 and 2 can be read down so as to confer on the Federal Court of Claims a jurisdiction under the Act

concurrent with the jurisdiction of this Court under the Constitution but exclusive of the jurisdiction of any other Court. It was contended that the Act could be construed as giving a claimant for compensation who failed to make an agreement with the Commonwealth Bank a right to elect either to issue a writ in this Court claiming compensation or to proceed in accordance with the Act and have the compensation determined by the Federal Court of Claims. But we find it impossible to reconcile a right to claim compensation in this Court with divisions 1 and 2. These divisions can only operate on the basis that the Federal Court of Claims has an exclusive jurisdiction. For instance, sec. 44 provides that unless the Commonwealth Bank is required by the private bank to refer its offer of compensation to that Court within a specified time the offer shall be deemed to have been accepted by the private bank. There are also the provisions of secs. 40 and 45 which make a determination of the amount of the compensation by that Court a condition precedent to the liability of the Commonwealth Bank to pay compensation. To reconcile the Act with sec. 75 (iii) of the Constitution, divisions 1 and 2 must therefore be struck out of the Act altogether. Sections 15 and 25 would then be the only sections left relating to compensation. If these sections could be construed as intended to create a right of action independent of the particular manner of enforcing it prescribed by divisions 1 and 2, just terms would be provided because a shareholder or private bank could bring an action claiming compensation in any competent Court. But the view that the sections are intended to create independent rights is full of difficulty. In the case of taking over a business there would only be one large amount to be assessed. Even then an action based on sec. 25 could be brought in the Supreme Court of a State under the Judiciary Act 1903-1946 sec. 39 (2) or in the Federal Court of Claims or in this Court. In the case of claims arising out of the acquisition of shares, some of the amounts claimed might be small and actions based on sec. 15 might also be brought under sec. 39 (2) of the Judiciary Act in the inferior Courts of the States. It could hardly have been intended that the Act should operate so as to give rise to such a multiplicity of actions in so many Courts. The failure of divisions 1 and 2 cannot impart to secs. 15 and 25 any greater effect than they were intended to have if these divisions had been valid. When the whole of the provisions of the Act relating to compensation are considered, we do not think that the sections were intended to give a right of action other than a right to have the compensation determined in accordance with divisions 1 and 2 and not in any other manner. In other words the sections are introductory only to the operative provisions which follow. For these reasons we are of opinion that the provisions of the Act for the acquisition of the shares and the taking over of the businesses fail because the Act does not contain any valid provisions for the payment of compensation.

Even if this opinion is erroneous, and there is no constitutional objection to the Act providing that compensation shall be determined by the Federal Court of Claims and in no other manner, there is the second ground that just terms are not provided because that Court has no power to award interest. It is empowered to determine the amount of compensation payable in respect of the acquisition of the shares [sec. 40 (1)] and of the assets (sec. 42). In these sections compensation means no doubt the same thing as fair and reasonable compensation in secs. 15 and 25. We have already expressed the opinion that a federal law for the acquisition of income producing property must, in order to provide just terms, empower the tribunal which is to assess the compensation to award interest from the date the acquirer enters into possession, so that, if the law provides for the assessment of "compensation," this word, read in the light of constitutional requirement, should be construed as including such a power in its content, *The Commonwealth v. Huon*

Transport Pty. Ltd. 70 C.L.R. 293, *Marine Board of Launceston v. Minister of State for the Navy* 70 C.L.R. 518. The same opinion has recently been expressed by the Supreme Court of the United States in *United States v. Thayer West Point Hotel Co.* 329 U.S. 585. But this opinion has not been adopted by the majority of this Court, who appear to think that we are bound by *Swift & Co. v. The Board of Trade* [1925] A.C. 520, and the very recent case of *Newport Borough Council v. Monmouth Shire County Council* [1947] A.C. 520, to hold that, whatever may be the view in the United States, the word " compensation " in English law does not connote more than the payment of the equivalent in money of the capital value of the property taken. Accordingly, before interest can be awarded, the Act must so authorise the tribunal charged with the duty of determining the compensation expressly or by implication. The Act does not give an express right to the Federal Court of Claims to award interest, and we do not think that the insertion of the words " fair and reasonable " before the word " compensation " in secs. 15 and 25 would be thought sufficient by a majority of this Court, to create a right by implication. There is, however, an exception to the rule in Swift's Case, which does appear to have the approval of a majority of this Court. The exception is where there is a compulsory purchase of property of such a nature that, if it had been purchased under a contract, the Court of Equity could have decreed specific performance. By analogy to the general equitable rule under which a purchaser who takes possession is charged with interest on his purchase money from that date until it is paid, the Court in assessing compensation can, in the absence of a statutory prohibition, order the payment of interest on the amount awarded from the date that the compulsory purchaser entered into possession. The point was taken that this power to award interest is dependent upon the tribunal which is assessing the compensation being a Court invested with equitable jurisdiction. But in *Inglewood Pulp & Paper Co. v New Brunswick Electric Power Commission* [1928] A.C. 492, where interest was awarded on this principle, the tribunal was a Judge of the Supreme Court of New Brunswick sitting as an arbitrator. He refused to award interest. The relevant statute allowed an appeal upon any question of law or fact to the Appeal Division of the Supreme Court. There was an appeal and the Appeal Division allowed the interest refused by the arbitrator. The Privy Council upheld the Court of Appeal. In *Monmouth County Council v. Newport Corporation* the tribunal was also an arbitrator and not a Court invested with equitable jurisdiction. But the case was not disposed of on that ground. In the Court of Appeal 175 L.T. 293 at p. 303 Lord Greene said :—

> "on behalf of the County Council it was argued that interest could be awarded on the principle on which it is awarded by courts of equity against purchasers who have gone into possession. This argument, in our opinion, cannot be supported. There is no analogy between a statutory transfer of an area from one authority to another (a thing which cannot be carried out contractually) and a contract of sale and purchase or a compulsory purchase under, for example, the Land Clauses Act."

It would seem therefore that the power to award interest does not depend on the tribunal being a Court invested with equitable jurisdiction but on the kind of property acquired. But it is by no means certain that there is the requisite analogy between the relevant provisions of the Act and the terms of a contract for the voluntary purchase of shares or of a business which would be capable of being specifically enforced. Provisions that a purchaser should be registered as a member of a company despite the articles of association, and that the vendor of a business should be discharged from his liabilities could have no place in a voluntary contract. The assessment of compensation in respect of either form of acquisition is likely to

be prolonged. Shareholders deprived of their shares and banks deprived of their businesses will have lost the right to retain possession of income producing assets in the meantime. Just terms will not, therefore, be provided unless the Federal Court of Claims can award interest. In *Johnston Fear & Kingham v. Commonwealth* 67 C.L.R. 314 at p. 334, Williams, J. said and we now repeat that " terms to be just should be clear and not obscure." The draughtsman of the Act must be presumed to have been aware of the conflict of opinion in this Court with respect to the power of a tribunal to award interest, so that, to clarify the position and to ensure just terms, the Act should have expressly empowered that Court to award interest.

It was contended for the States that the Act is invalid because it infringes clause 5 (9) of the Financial Agreement, Section 105A (5) of the Constitution provides that this agreement and any variation thereof shall be binding upon the Commonwealth and the States parties thereto notwithstanding anything contained in this Constitution or the Constitution of the several States or in any law of the Parliament of the Commonwealth or of any State. The history of the agreement appears in *New South Wales v. The Commonwealth* 46 C.L.R. 155. In that case at p. 186 Starke, J. said that the agreement " is part of the organic law of the Commonwealth. It can only be varied or rescinded by the parties thereto. Nothing in the Constitution or the Constitutions of the States can effect it or prevent its operation. It creates rights and duties as between the Commonwealth and the States upon and in respect of which the judicial power of the Commonwealth can be exerted." The agreement sets up an Australian Loan Council consisting of the representatives of the Commonwealth (the Prime Minister or a Minister nominated by him in writing) and of the States (the Premier or a Minister nominated by him in writing) to regulate *inter alia* the annual borrowings of the Commonwealth and the States. Clauses 4, 5 and 6 relate to the future borrowings of Commonwealth and States. Clause 4 (1) provides, so far as material, that except in cases where the Loan Council has decided that money shall be borrowed by a State, the Commonwealth shall, subject to the decisions of the Loan Council and *subject also to clauses 5 and 6 of this agreement,* arrange for all borrowings for or on behalf of the Commonwealth or any State. Clause 4 (4) provides, so far as material, that moneys shall not be borrowed by the Commonwealth or any State otherwise than in accordance with this agreement. Clause 5 relates to borrowing by the States and clause 6 to borrowing by the Commonwealth. Clause 5 (1) to (8) gives the States the right, subject to any maximum limits decided upon by the Loan Council from time to time for interest brokerage discount and other charges, to borrow moneys within the State from authorities, bodies, funds or institutions (including savings banks) constituted or established under Commonwealth or State law or practice and from the public by counter sales of securities and to use any public moneys of the State which are available under the laws of the State. Clause 6 (1) to (6) gives the Commonwealth a similar right to borrow moneys within the Commonwealth and to use any public moneys of the Commonwealth which are available under the laws of the Commonwealth. Clause 5 (9) provides that, notwithstanding anything contained in this agreement, any State may use for temporary purposes any public moneys of the State which are available under the laws of the State, *or may, subject to maximum limits (if any) decided upon by the Loan Council from time to time for interest, brokerage, discount and other charges, borrow money for temporary purposes by way of overdraft or fixed, special or other deposit, and the provisions of this agreement other than this sub-clause shall not apply to such moneys.* Clause 6 (7) contains similar provisions in favour of the Commonwealth. Clauses 5 and 6 therefore confer upon the States and Commonwealth respectively limited powers of borrowing money on their own behalf which do not require the approval of the Loan Council, although the Loan

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Council can fix maximum limits for interest brokerage discount and other charges. These powers fall into the two classes, namely borrowings authorised by clause 5 (1) to (8) and clause 6 (1) to (6) and those authorised by clause 5 (9) and clause 6 (7). It was contended that clauses 5 (9) and 6 (7) were not intended to create contractual rights and obligations, but were in the nature of saving clauses inserted in the agreement to make it clear that it was intended to except from its operation the practice of the States and of the Commonwealth of using for temporary purposes any public moneys which were available and of borrowing money by way of overdraft or fixed, special or other deposit. We accept the opinion already expressed by the Chief Justice and Williams, J., in *Melbourne Corporation v. The Commonwealth* (*supra*) that clause 5 (9) [and it necessarily follows clause 6 (7)] create positive rights and obligations flowing from the Agreement. It necessarily follows from clause 4 (4) that the whole of the rights of the Commonwealth and of the States to borrow are included in the agreement and that no such rights exist outside the agreement. There would be a clear breach of clause 4 (4) if the States or the Commonwealth borrowed moneys by way of overdraft in excess of the maximum limits decided upon by the Loan Council for interest and other charges. Clauses 5 (9) and 6 (7) create rights to borrow for temporary purposes by way of overdraft or fixed, special or other deposit and impose obligations on the exercise of these rights. The introductory words " notwithstanding anything contained in this agreement " cannot have been intended to except clauses 5 (9) and 6 (7) from the agreement altogether, because the sub-clauses conclude by providing that " the provisions of this agreement other than this sub-clause shall not apply to such moneys." The function of the introductory and concluding words is to make it clear that the rights and obligations of the States and Commonwealth with respect to the kinds of borrowings for temporary purposes described in the sub-clauses are wholly contained in these sub-clauses. In *Stirling v. Maitland* 5 B. & S. 840 at p. 852, Cockburn, C.J., said :—

> " I look on the law to be that, if a party enters into an arrangement which can only take effect by the continuance of a certain existing state of circumstances, there is an implied engagement on his part that he shall do nothing of his own motion to put an end to that state of circumstances, under which alone the arrangement can be operative. I agree that if the company had come to an end by some independent circumstance, not created by the defendants themselves, it might very well be that the covenant would not have the effect contended for ; but if it is put an end to by their own voluntary act, that is a breach of covenant for which the plaintiff may sue."

The proposition has been applied in many subsequent cases. Two recent cases are *Southern Foundries* (*1926*) *Ltd. v. Shirlaw* [1940] A.C. 701, and *Greenhalgh v. Mallard* [1943] 2 All. E.R. 234. In Shirlaw's case Lord Atkin said at page 707 :—

> " That proposition in my opinion is well established law. Personally, I should not so much base the law on an implied term, as on a positive rule of the law of contract that conduct of either promisor or promisee which can be said to amount to himself " of his own motion " bringing about the impossibility of performance is in itself a breach."

The proposition is, in our opinion, directly applicable to clauses 5 (9) and 6 (7) of the Financial Agreement. A contract is construed by reference to the state of facts existing at the date when it is entered into. At the date of the Financial Agreement there was a chain of banks carrying on general banking business in Australia and the intention of clauses 5 (9) and 6 (7) was plainly to give the States

and the Commonwealth the right to borrow moneys on overdraft from these banks. That right can only continue to exist in any real sense so long as that banking structure is not destroyed by either the States or the Commonwealth. Compliance with the proposition in *Stirling v. Maitland* therefore requires that neither the States nor the Commonwealth should of their own volition put an end to that state of circumstances. The Banking Act 1947 violates the proposition.

If the matter rested in contract the Act would be a grave breach of the agreement by the Commonwealth, *Magrath v. The Commonwealth* 69 C.L.R. 156. But the agreement derives overriding statutory force from sec. 105A of the Constitution. It binds the Commonwealth notwithstanding anything contained in the Constitution. Any exercise of legislative power under sec. 51 which is inconsistent with the agreement is to that extent invalid. There is evidence that borrowings for temporary purposes by the States have in recent years been financed by the issue of Treasury bills, and that the practice of borrowing money on overdraft from the private banks is now in abeyance. But the rights created by clause 5 (9) cannot be destroyed by disuse. Section 105A (4) provides that the agreement may be varied or rescinded by the parties thereto. Unless and until clause 5 (9) is so varied or rescinded, these rights must continue to have the same force and effect as they had at the date the agreement was made. The proposition in *Stirling v. Maitland* is directly infringed by sec. 46 (1) and (4) to (8) of the Act. It is indirectly but equally infringed by secs. 13 and 14, division 3 of Part IV and sec. 24 of the Act. All these provisions of the Act are therefore invalid. In view of this conclusion it is unnecessary to deal with the other contentions of the States and we express no opinion upon them.

Sec. 92 provides, so far as material, that trade commerce and intercourse among the States whether by means of internal carriage or ocean navigation shall be absolutely free. We adhere to the opinion already expressed by Rich J. in *Peanut Board v. Rockhampton Harbour Board* 48 C.L.R. 266 at p. 277, and Williams J. in *A.N.A. v. Commonwealth* 71 C.L.R. 29 at pp. 107 and 110 that the freedom guaranteed by sec. 92 is a personal right attaching to the individual. The same opinion has been expressed by several Judges of this Court; see for instance O'Connor J. in *Fox v. Robbins* 8 C.L.R. 115 at pp. 126, 127; Higgins J. in the same case at p. 131; Isaacs J. In *R. v. Smithers* 16 C.L.R. 99 at p. 113, in *James v. South Australia* 40 C.L.R. 1 at p. 32, and particularly in *James v. Cowan* 43 C.L.R. 386 at pp. 418, 419 (a judgment described by Lord Atkin in delivering the judgment of the Privy Council on appeal [1932] A.C. at p. 561 as a convincing judgment). In that case at p. 418 Isaacs J. referring to the expropriation of goods by a State, said :—

> "The question is, how has the personal right of trading interstate by the former owner been interfered with? That is a personal right not a property right."

In the *Peanut* Case at p. 288 Dixon J. said :—

> "The provisions operate directly upon the individual grower's liberty of disposing of the peanuts he produces for sale."

In *O. Gilpin Ltd. v. Commissioner for Road Transport and Tramways* 52 C.L.R. 189 at p. 211, Dixon J. said :—

> "Trade, commerce and intercourse among the States is an expression which describes the activities of individuals. The object of sec. 92 is to enable individuals to conduct their commercial dealings and their personal intercourse with one another independently of State boundaries."

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In *James v. Commonwealth* [1936] A.C. 578 at p. 614 Lord Wright, in delivering the judgment of the Privy Council, said :—

> "Section 92 may seem to be a constitutional guarantee of rights, analogous to the guarantee of religious freedom in sec. 116, or of equal rights of all residents in all States in sec. 117."

At p. 631 he referred to sec. 92 as "the declaration of a guaranteed right." It is to be noted that His Lordship groups with sec. 92 secs. 116 and 117, that the provision in sec. 116 that no religious test shall be required as a qualification for any office or public trust under the Commonwealth is an express personal guarantee, and that sec. 117 is also an express personal guarantee. His Lordship would appear therefore also to have been of opinion that the freedom guaranteed by sec. 92 is a personal right.

In our opinion a banker who carries on business in more than one State is engaged in trade, commerce and intercourse among the States. It was said by Willes J. in *Harris v. Amery*, L.R. 1 C.P. 148 at p. 154, in a passage cited by Jessel M.R. in *Smith v. Anderson*, 15 Ch. Div. 247 at p. 259, that banking is not strictly a trade. Presumably that was because His Lordship considered that trade consisted of trafficking in goods, that is to say the buying and selling and exchange of goods. But in a modern community it is clear, we think, that traffic in intangibles is just as much trade and commerce as traffic in tangibles. In *Brandao v. Barnett & Ors.*, 12 Cl. & Fin. 786 at p. 808 Lord Campbell said that :—

> "There is no finding that the exchequer bills . . . were in the possession of the defendants in the course of their trade as bankers."

In *Foley v. Hill* (*supra*) at pp. 43, 44, Lord Brougham made several references to a banker as a person carrying on a trade. He said that the trade of a banker consisted of using the money which he received from his customers as his own and trading with it. In *Forget v. Baxter* 1900 A.C. 467 at p. 475 Sir Henry Strong, in delivering the judgment of the Privy Council, said, in reference to the business of stockbrokers :—

> "It cannot be doubted . . . that the purchases and sales of shares by the appellants . . . in the ordinary course of that business were operations of commerce."

The same view has recently been expressed by Frankfurter J. in the Supreme Court of the United States in *Freeman v. Hewitt* 91 L. Ed. (Adv. Op.) 205 at p. 211. In reference to a sale by a broker to a purchaser in one State of securities owned by a person in another State he said :—

> "Of course this is an interstate sale. And constitutionally it is commerce no less and no different because the subject was pieces of paper . . . rather than machines."

In the *Bank of India v. Wilson*, L.R. 3 Ex. Div. 108, cited in *McArthur's Case*, 28 C.L.R. 530 at p. 547, it was held that both a bank and a telegraph company were carrying on a trade within the meaning of the Acts relating to inhabited houses. At page 120 Pollock B. referred to the meaning of trade as including that of :—

> "An occupation ; particular employment whether manual or mercantile, distinguished from the liberal arts or learned professions."

The same view of the meaning of trade was expressed by Sutherland J. in *Atlantic Cleaners & Dyers v. United States* 286 U.S. 427 at p. 436. He cited the *Bank of India v. Wilson* and also a statement by Mr. Justice Story to the same

effect. In *Aristoc Ltd. v. Rysta Ltd.* [1945] A.C. 68 at p. 102, Lord Wright said, in a passage cited by Rich J. in *A.N.A. v. The Commonwealth* (*supra*) at p. 71 :—

> " ' Trade ' is a very wide term ; it is one of the oldest and commonest words in the English language. Its great width of meaning and application can be seen by referring to the heading in the Oxford English Dictionary. But it must always be read in its context."

The power of Congress under the Constitution of the United States is to regulate commerce with foreign nations and among the several States. It was held in *Paul v. Virginia* 8 Wall 168 at p. 183 and several subsequent cases that issuing a policy of insurance was not a transaction of commerce, but in *United States v. South Eastern Underwriters Association* 322 U.S. 533 these cases were overruled and it was held that the business of insurance when conducted across State lines is part of interstate commerce. A number of definitions of the meaning of banking were handed in during the argument of which the definition of a bank in the Imperial Dictionary cited in Russell on Banker and Customer in Australia, 3rd Edition, 1935 p. 52, is short and precise :—

> "Bank.—An establishment which trades in money ; an establishment for the deposit, custody and issue of money, as also for granting loans, discounting bills and facilitating the transmission of remittances from one place to another ; a company or association carrying on such business."

In re *Shields' Estate* [1901] I.R. 1. Ch. 172 at p. 198, Fitzgibbon L.J. said, in a passage cited with approval by Isaacs J. in *Commissioners of the State Savings Bank of Victoria v. Permewan, Wright & Co. Ltd.* 19 C.L.R. 457 at p. 471 :—

> " In my opinion, the essence of the trade, business, or calling of a banker, is not primarily or essentially to be found in the mode in which he disposes of the money which is deposited with him, but in the mode in which he receives the money of others. If he keeps open shop for the receipt of money from all who choose to deposit it with him ; if his business is to trade for profit in money deposited with him for that purpose, he answers the description of a banker."

In *Punjab Co-operative Bank Ltd., Amritsar v. Commissioner of Income Tax, Lahore* 1940 A.C. 1055 at p. 1072, Viscount Maugham, in delivering the judgment of the Privy Council, said :—

> " In the ordinary case of a bank, the business consists in its essence of dealing with money and credit."

It seems to be clear that in *Citizens Insurance Co. of Canada v. Parsons* L.R. 7 App. Cas. 96, the Privy Council would have considered banking to be within the regulation of trade and commerce, that is within Class 2 of sec. 91 of the British North America Act, if banking had not been specifically mentioned in Class 15 of that section. The powers of the Canadian Parliament in relation to the regulation of trade and commerce and in relation to banking are each powers over the whole subject matter. The first power is not, like the corresponding power in sec. 51 (1) of the Australian Constitution, confined to trade and commerce with other countries and among the provinces. There is therefore a reason why particular aspects of trade and commerce over which it was intended that the Commonwealth Parliament should have power irrespective of their overseas or interstate character should be specifically enumerated. This may explain the presence of the specific powers with respect to insurance and trade marks, in addition to the power with respect to banking, in sec. 51 of the Australian Constitution. These powers do not appear in sec. 91 of the Canadian Constitution,

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but they have been held in certain aspects to be within the trade and commerce power. *A.G. for Canada v. A.G. for Alberta* 1916 A.C. 588, *A.G. for Ontario v. A.G. for Canada* 1937 A.C. 405. There is no reason therefore why laws with respect to banking, insurance and trade marks should not be trade, commerce and intercourse within the meaning of sec. 92 simply because they are specifically enumerated in sec. 51 and may not fall, so far as they are trade and commerce with other countries and among the States, within sec. 51 (1). But it was contended that interstate banking was not trade, commerce and intercourse within the meaning of sec. 92 because that section contains the words " whether by means of internal carriage or ocean navigation." It was submitted that these words indicated that the section was confined to trade and commerce in the sense of traffic in goods because only goods could be carried by land or sea. This construction of the section really seeks to read the word " whether " as " if " or " provided." The submission was discussed and disposed of in the joint judgment of Knox C.J., Isaacs J. and Starke J. in *McArthur's* case 28 C.L.R. 530 at pp. 549-550 and there is nothing in the subsequent cases to throw any doubt on the correctness of the views there expressed. In *R. v. Smithers* (*supra*) at p. 118 Higgins J. said :—

> "It is curious that the section seems to overlook the possibility that a man may walk across the border into another State, as well as be carried " by internal carriage or ocean navigation," but these words must be merely meant to exhaust all kinds of carriage, if there be carriage. If not, they qualify the words " trade " and " commerce " as well ; and a State might, then, impose a duty on, or obstruct the passage of, cattle driven over the border : a result which would be absurd."

All the plaintiff banks except The Ballarat Banking Co. Ltd. and The Brisbane Permanent Building & Banking Co. Ltd. are engaged in transactions of interstate banking. Those transactions consist principally of (a) the collection and negotiation of interstate bills of exchange, cheques and promissory notes ; (b) the transfer of funds interstate ; (c) the establishment of interstate credits ; (d) the issue and negotiation of travellers' cheques. These transactions seldom involve any movement of money between States in the sense of the physical transfer of bank notes or coin from one State to another. The transactions are usually financed through accounts which the banks keep in each State with the Commonwealth Bank known as exchange settlement accounts. The effect of the payment of a cheque drawn by A on his bank in Sydney in favour of B in Melbourne is that A's deposit account is reduced or his loan account increased, B's deposit account is increased or his loan account reduced, the exchange settlement account of A's bank is reduced, and the exchange settlement account of B's bank is increased. But the same legal results flow from the transaction as though the amount debited to the payer and credited to the payee had been sent from Sydney to Melbourne in the form of notes or coin. This appears clearly from the recent decision by the Privy Council in *Trinidad Lake Asphalt Operating Co. v. Commissioners of Income Tax for Trinidad* [1945] A.C. p. 1. In that case a resident in the United States owed money to a company in Trinidad in which he was a shareholder. The company became indebted to him for a dividend of the like amount. It was agreed that the one debt should be set off against the other, and the transaction was effected by each party making corresponding entries. It was held that there was an actual payment and receipt of the indebtedness on either side, and therefore a transmission of revenue from Trinidad to the United States. At pp. 10 and 11 Lord Wright said :—

"Was there, then, such a transmission? No actual money passed. If the dividend had been transmitted by a banker's draft sent by the appellant to Barber it could not have been questioned that the dividend had been transmitted, but the two companies might do their own banking transactions between themselves and dispense with the intervention of banking facilities. The transaction involved the sending to Barber by the appellant, and receipt by Barber from the appellant, of the dividend. This was effected by the agreement that payment should be made by cancellation of the debt for goods supplied. This method had been mutually agreed before the dividend was declared. The agreement was carried out by each party making corresponding entries in its books. These were not merely book-keeping entries. They represented the actual receipt of the dividend by Barber, and the actual payment of it by the appellant to Barber, and concurrently, the actual receipt by the appellant from Barber of payment of his debt for goods supplied . . . There is actual, not merely notional or constructive payment of the indebtedness on either side. . . Since 1902 the transmission of funds has become still more divorced in the minds of business men, and even of lawyers, from the idea of any material embodiment. No document is necessary. Two companies separated by the ocean may orally agree over the wireless telephone that the debt of one may be set against a debt of the other and both cancelled. The only evidence or material embodiment of the transaction may consist of entries in the books on each side made in pursuance of their agreement, but what has happened is, if so intended, equivalent to a receipt of money, in Lord Lindley's words, and a receipt of anything by a person who is at a distance from the sender involves a transmission."

In *James v. Commonwealth* Lord Wright said that the freedom guaranteed by sec. 92 is :—

"freedom as at the frontier or, to use the words of sec. 112, in respect of goods passing into or out of the State."

His Lordship then proceeded to explain what that meant and at page 631 said :—

"as a matter of actual language freedom in sec. 92 must be somehow limited and the only limitation which emerges from the context and which can logically and realistically be applied, is freedom at what is the crucial point in interstate trade, i.e., at the state barrier."

His Lordship was discussing an Act which prohibited the plaintiff entirely without a licence or if a licence was granted partially from delivering dried fruits for carriage into or through another State to a place in Australia beyond the State in which the delivery was made, and his remarks, like the remarks in any other judgment, must be read in the light of the particular facts. We do not understand His Lordship to mean that sec. 92 only protects the actual passage of goods or persons from one State into another. Sec. 92 refers to trade commerce and intercourse among the States. A contract for the sale of goods by A to B to be delivered in Melbourne is just as much a transaction of trade and commerce among the States whether A's goods are sent from Sydney to Melbourne subsequently to the contract or A has a supply of the goods available in Melbourne and makes the delivery out of these goods. A contract between A in Sydney and B in Melbourne, by which A agrees to deliver goods to B in Sydney in exchange for goods to be delivered by B to A in Melbourne is a transaction of trade and commerce among the States.

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Where a bank has a fund in the form of an exchange settlement account in Melbourne available to make a payment to B in Victoria on behalf of A in Sydney the transfer of credit from A to B is just as much an interstate transaction as it would be if actual money was sent from Sydney to Melbourne to make the payment. To carry out such transactions something tangible for instance documents, or intangible for instance telegraphic messages, must cross State boundaries and such documents or messages are essential elements of the transaction and make it one of trade and commerce among the States. It is true that in a modern community, as the evidence in the present cases proves and as Lord Wright pointed out in the *Trinidad Case*, the principal means of payment and exchange is not legal tender in the shape of notes and coin but bank credit or bank money as it has been called, and that payment by bank money is a matter of book entries involving a debit in one bank to the account of the debtor and a credit in the same or another bank to the account of the payer. But, as Duff C.J. said *In re Reference Alberta Statutes* 1938 Canadian S.C.R. 100 at p. 116, money as commonly understood is not necessarily legal tender. Any medium which by practice fulfils the function of money and which everybody will accept in payment of a debt is money in the ordinary sense of the word even although it may not be legal tender. The banks are engaged in moving money or its equivalent bank credit about intrastate and interstate for reward whether the movement is effected by the transfer of actual money in the shape of notes or coin from one place to another, or by means of cheques or other documents or telegraphic transfers and subsequent debits and credits in customers' accounts. In *Huddart Parker v. Moorehead* (supra), at pp. 405-406, Isaacs J. said :—

> "the increase in the formation of corporations for all kinds of business enterprises, commercial, industrial and financial, is one of the most notable characteristics of modern life. They are incorporated in one State and can take the capacity to trade in all, *and the freedom of interstate trade introduced by the Constitution increased the likelihood of their doing so.*"

(The words italicised must refer to sec. 92.) It is evident that His Honour thought that all the corporations he mentioned, commercial, industrial and financial, would, if they were carrying on business in more States than one, be engaged in trade, commerce and intercourse among the States within the meaning of sec. 92. In our opinion the plaintiff banks other than the two mentioned are in their interstate business engaged in such trade, commerce and intercourse.

Section 46 (4) authorises the Treasurer to give a notice which will have the effect of prohibiting a private bank carrying on any further banking business after the period fixed in the notice has expired. It will then be unlawful for the bank to carry on the business of banking either intra or inter state. Divisions 2 and 3 of Part IV. and sec. 24 have the same effect. They operate after an interval or immediately to strip the banks of their undertakings and thereby deprive them of their power to carry on the business of banking either intra or inter state. From our reading of the cases, and particularly the two decisions of the Privy Council, we understand that legislation Commonwealth or State infringes 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.

We also understand that discrimination is not the test and that such legislation may infringe the section although it operates in restraint both of intra and inter state trade. In the *Peanut Case* at p. 275 Rich J. pointed out that the reasons given by the Privy Council in *James v. Cowan* :—

"make it quite plain that compulsory acquisition may directly operate to interfere with the freedom of interstate commerce."

The question is in each case one of fact. Section 92 invalidates the infringing legislation and gives to the person or corporation aggrieved the right to treat the legislation as null and void and to sue for a declaration to this effect. It also gives such person or corporation the right to treat any other person or corporation as a wrongdoer whose conduct would only be justified if the legislation were valid. If the legislation operates directly to hinder burden or prevent all trade both intrastate and interstate, the question arises whether the legislation can be read down so that it can operate with respect to intrastate trade although it is invalid with respect to interstate trade. Section 46 (4 to 8) of the Banking Act 1947 is legislation which in fact operates directly to prevent the private banks continuing to carry on either intrastate or interstate trade. It is therefore legislation which infringes sec. 92. But it is not legislation which is capable of being severed in its operation. The notice authorised by the section is an inseverable notice which can have one effect only, namely to make it unlawful for a private bank to carry on banking business in Australia at all. It is impossible without resort to legislation to convert such a notice into a notice which will only make it unlawful for a private bank to carry on intrastate business. The acquisition of the undertaking of a private bank is in a similar position. The assets and liabilities and staff of the bank are completely taken over by the Commonwealth Bank, and no means are provided by which the private bank could be left with those assets and liabilities employed in the interstate business and sufficient staff to carry on this business, and the balance of the assets and liabilities and staff could be taken over by the Commonwealth Bank. Two of the private banks are doing no interstate business and the interstate business of the other private banks only amounts to about 10 per cent. of their banking business in Australia. It was therefore contended that the amount of interstate business included in a total prohibition of the banking business in Australia of a private bank would be relatively insignificant so that the prohibition of interstate business would be a mere incidental and indirect and remote consequence of the total prohibition. But with these two exceptions the interstate business of each of the private banks is substantial, the Act operates directly on this business, and the operation of the Act cannot be converted from a direct to an incidental operation by a mere calculation of percentages. The present percentage of 10 per cent. is higher than the corresponding percentage in *Vacuum Oil Co. v. Queensland* 51 C.L.R. 108.

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 contended, sec. 92 does not confer a personal right on individuals to engage in trade and commerce among the States. The defendants contended that sec. 92 is not concerned with the right of an owner of goods to sell them out of the State, and therefore is not concerned with the ownership of such goods prior to, at the time of, or subsequent to the passage of the goods across State boundaries. Accordingly the Commonwealth and State Parliaments legislating within their constitutional powers can select the individuals who are to engage in interstate trade. But they must not place any hindrance, burden or restriction on the free passage of the goods of such individuals across State boundaries. It was claimed that this contention is supported by the decision of this Court in the *State of New South Wales and Another v. The Commonwealth and Others* (*The Wheat Case*), 20 C.L.R. 54. In that case the Wheat Acquisition Act 1914 (N.S.W.) authorised the Governor by notification published in the *Gazette* to declare that any wheat therein described or referred to

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was acquired by His Majesty and that upon such publication the wheat acquired should become the absolute property of His Majesty and the rights and interests of every person in the wheat at the date of such publication should be converted into a claim for compensation. The Act constituted a Board which was authorised on behalf of the Government to sell or dispose of any wheat acquired under the Act at such times, at such prices and on such terms of payment as might be thought fit. Some of the wheat acquired under the Act had been sold to purchasers in Victoria and it was contended that to acquire this wheat would contravene sec. 92, but the contention failed. At page 68 Griffith C.J. said that sec. 92, so far as it relates to commerce, might be paraphrased thus :—

> "every owner of goods shall be at liberty to make such contracts for the transportation of goods from one State to another as he thinks fit without interference by law. It follows that as soon as he ceases to be the owner of goods the section ceases to have any operation so far as those goods are concerned. When the wheat in New South Wales became the property of His Majesty, the Sovereign, as the new owner, had the exclusive right of disposing of it. If the Government desired to export it to another State they were free to do so. Whether they did or did not, their power of disposition was not interfered with."

The comment on this case by Lord Wright in *James v. Commonwealth* was that it had never been expressly overruled which can hardly be said to be an approval of the case. If it was rightly decided it must be on the ground stated by Lord Atkin in *James v. Cowan* (*supra*) at pages 558, 559, that legislation which has for its primary object such matters as defence against an enemy, prevention of famine, disease and the like, is directed primarily to such matters and does not infringe sec. 92 because incidentally interstate trade is affected. The acquisition by the Commonwealth Bank of the business of one bank or the businesses of a number of banks or even of all the banks carrying on the business of banking in Australia would not come within the instances given by Lord Atkin. There is no suggestion that the private banks are carrying on business in a way that is a menace to the common welfare. On the contrary, sec. 11 of the Act imposes on the Commonwealth Bank a duty to carry on in the future the business of banking in the same manner as it is at present being carried on by the private banks. The defendants' contention appears to us to be substantially in line with the view of sec. 92 expressed by Griffith C.J. in the passage cited. But in *James v. Cowan* Lord Atkin said that their Lordships would not be prepared to assent to it stated in the simple form which commended itself to Griffith C.J. It is plain from *James v. Cowan* that the cases in which the Commonwealth or the States can exercise their powers of acquisition so as to deprive an owner of his right to sell his goods interstate are limited. It would seem that Lord Wright found some difficulty in justifying the instances given by Lord Atkin. Such legislation would seem to be based on the principle that in cases of grave emergency the maxim *salus populi est suprema lex* can override sec. 92, a point which the Privy Council, in *James v. The Commonwealth*, treated as reserved until it arose, and which was not upheld by this Court in *Gratwick v. Johnson* 70 C.L.R. 1.

It is clear to us that Lord Wright thought that the *Peanut Case* was rightly decided. At page 623 he said :—

> "*James v. Cowan* was followed and applied by the High Court (Evatt J., dissenting) in *Peanut Board v. Rockhampton Harbour Board*, 48 C.L.R. 266, in which the *Wheat Case* was distinguished. The producers of the peanuts, it

was held, were prevented by the Act from engaging in interstate and other trade in the commodity. The Act embodied, so the majority of the Court held, a compulsory marketing scheme entirely restrictive of any freedom of action on the part of the producers; it involved a compulsory regulation and control of all trade, domestic, interstate and foreign; on the basis of that view, the principles laid down by this Board were applied by the Court."

At page 630 he said :—

"But it has become clear from the various decisions already cited that such burdens and hindrances may take divers forms, and indeed appear under various disguises. One form may be a compulsory acquisition of goods, as in *James v. Cowan* or the *Peanut Case*, if in truth the expropriation is directed wholly or partially against interstate trade in the goods, that is, against selling them out of the State."

In *James v. Cowan* the plaintiff's goods were acquired to prevent him exercising his personal right to sell them interstate. In the *Peanut Case* the peanuts were acquired to deprive each individual grower of his personal right to sell his peanuts intrastate or interstate. The Peanut Board was selected by the Queensland Parliament as the sole body entitled to engage in interstate trade in peanuts, just as the Banking Act 1947 authorises the Treasurer to select the Commonwealth Bank as the sole body entitled to engage in interstate trade in banking. In *James v. The Commonwealth* the individual owners of dried fruits, including the plaintiff in South Australia were entirely prohibited without a licence or if a licence was granted partially prohibited from selling their goods out of the State. In the case of *James v. Cowan* the executive act of the Minister and in the two later cases the legislation infringed sec. 92, because individuals were deprived of their personal rights guaranteed to them by sec. 92. The plaintiffs would not have had any *locus standi* to maintain the actions if their personal rights had not been infringed. Admittedly freedom of intercourse among the States means that individuals are to be free to pass from State to State, and it would be strange if freedom of trade and commerce does not mean that individuals are to be free to engage in interstate trade when freedom of intercourse means that individuals are to be free to pass from State to State.

The contention under discussion is in our opinion opposed to the recent decision of this Court in *Australian National Airlines v. The Commonwealth* 71 C.L.R. 29. The legislation there in question operated directly to prohibit any persons engaging in the business of carrying passengers and goods by air for reward across State lines and to grant a monopoly of this business to the Australian National Airlines Commission. Such carriage was held to be trade and commerce among the States within the meaning of sec. 92. Some members of the Court, including Williams, J., expressed the opinion that the Commonwealth Parliament could, in the exercise of the legislative power conferred by sec. 51 (i) to make laws with respect to trade and commerce among the States, select the persons or corporations to engage in any activity of trade and commerce among the States, and could therefore grant a monopoly of the interstate carriage of persons and goods to the Commission. It seemed to Williams, J., that this necessarily followed from the decision of this Court in *Huddart Parker Ltd. & Another v. The Commonwealth & Another* 44 C.L.R. 492. In that case it was held that legislation which required shipowners and stevedores in certain ports to give preference in employment in loading and unloading ships engaged in interstate and overseas trade to members of the Waterside Workers' Federation of Australia was a valid exercise of the trade and commerce power. No question of sec. 92 arose in that case. In the first place it was

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then assumed that the section did not bind the Commonwealth. In the second place the Transport Workers legislation there in question did not infringe the section. The section does not invalidate legislation regulating the operations of interstate trade. There is no suggestion that sections such as secs. 27 and 39 of the Banking Act 1945 which regulate the trade of banking infringe sec. 92. The section invalidates legislation which deprives individuals of their freedom to trade in more States than one. There was nothing in the Transport Workers legislation to prevent wharf labourers passing from one State to another and seeking work in as many States as they liked. There was also nothing in the legislation to prevent shipowners sailing their ships from any ports in one State to any ports in another State. But in the *Australian National Airways Case*, in spite of the opinion that sec. 51 (i) standing alone would authorise the Commonwealth Parliament to create a monopoly in interstate carriage by air, the Court was unanimously of opinion that legislation for that purpose infringed sec. 92. The only difference between the legislation in the *Australian National Airways Case* and the material provisions of the Banking Act 1947 is that the earlier legislation was directed wholly against persons other than the Commission engaging in interstate trade, whereas the present legislation is directed only partially against the private banks engaging in interstate trade. But the intention in each case is to create a monopoly, in the earlier case in interstate trade, and in the present cases in both intrastate and interstate trade, and sec. 92 is, for the reasons already given, infringed in each case. The difference between the two Acts is explained by the difference in the ambit of the trade and commerce power and that of the banking power, the former being limited to trade and commerce among the States and the latter extending to all banking either intra or inter state. It would be quite impossible for any bank engaged in interstate business not to be also engaged in intrastate business, so that if legislation which operates directly but indiscriminately to prevent a bank doing any business in Australia does not infringe sec. 92 in its operation upon interstate trade, it would seem to follow that legislation based on pl. (xiii) and other placita of similar ambit, for instance (xiv) and (xx), would not be subject to sec. 92. But we agree with respect with the opinion of Isaacs, J., in *Huddart Parker v. Moorehead* already cited that legislation under pl. (xx) is subject to sec. 92, and it necessarily follows that legislation under pl. (xiii), if banking be trade and commerce, as in our opinion it is, must also be subject to the section. As we have already said, two of the plaintiff banks are not at present engaged in interstate banking, but an Act which operates directly to prevent an individual ever engaging in interstate trade must be void whether he is at the moment engaged in such trade or not. It may be that he would not have a sufficient interest to challenge the Act until he desired to engage in such trade. But it is unnecessary to pursue this point because the two banks in question are entitled to succeed on other grounds.

We have not yet referred to secs. 59 and 60 of the Act. These sections state that their purpose is to assist the operation of the provisions of the Act. The only provisions of the Act which could require the assistance of these highly punitive sections are those relating to the compulsory acquisition of the shares and the business of the private banks. They could not form part of any scheme of voluntary bargaining. They are therefore incidental to and inseverably bound up with the operation of provisions which we have already held to be invalid and as such are in our opinion also invalid.

For these reasons we would give judgment for the plaintiffs in all five actions. In the actions by the eight private banks incorporated in Australia and by the

States of Victoria, South Australia and Western Australia we would declare that secs. 13, 14, 17 to 21 inclusive, 22 (8) (b) and (d), 24, 56, 59 and 60 and Parts VI and VII of the Banking Act 1947 are invalid with consequential relief. In the action by the three private banks incorporated in the United Kingdom we would declare that secs. 22 (8) (b) and (d), 24, 56, 59 and 60 and Parts VI and VII of the Act are invalid with consequential relief.

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Motions to this Court for interlocutory injunctions in each of five actions which the parties agreed to treat as a trial of the action and which by order of 15th January, 1948, were directed to be so treated and heard together upon affidavits filed in the said actions and upon such further affidavits or evidence as the Court or a Justice might allow. And it was also directed, pursuant to the Judiciary Act 1903-1947, that the cases be argued before the Full Court and that all questions involved in or arising upon the trials be referred for the consideration of the Full Court.

The plaintiffs in one action are banking companies incorporated in Australia whose names are set forth in the First Schedule, Part I, to the Banking Act 1947 and individuals in representative capacities; in another action the plaintiffs are banking companies incorporated in the United Kingdom but carrying on business in Australia whose names are set forth in the First Schedule, Part II, and individuals in representative capacities and the other three actions are brought by the States of Victoria, South Australia, and Western Australia respectively.

In each action the plaintiffs claim a declaration that the Banking Act 1947 is beyond the powers of the Parliament of the Commonwealth, contrary to the Constitution, and void, and alternatively that various sections of the Act are void for the same reasons and ancillary relief is also claimed.

The objects of the Act are stated in Sec. 3 and envisage apparently the nationalisation of banking in Australia. England, it was said, had nationalised the Bank of England (9 & 10 Geo. 6, c. 27), the Coal Industry (9 & 10 Geo. 6, c. 59) and the States might have nationalised banking within the limits of their territories.

But the Parliament of the Commonwealth is not omnipotent as is the English Parliament nor has it a general authority to make laws for the peace, order and good government of the Commonwealth in the like manner as the States have to make laws for the peace, order, and good government of their several territories. The Constitution enumerates the powers of the Commonwealth and within the framework of those powers must be found the authority of the Commonwealth to enact the Banking Act 1947.

The main features of that Act are the provisions made for the acquisition by agreement of shares in banking companies incorporated in Australia or in the United Kingdom, the compulsory acquisition of shares in banks incorporated in Australia, the management of banks incorporated in Australia, the acquisition by agreement of the business of the banking companies set out in the First Schedule to the Act whether incorporated in Australia, United Kingdom, or elsewhere, the compulsory acquisition of the business in Australia of those banks and the provisions prohibiting the banks from carrying on business in Australia.

Subject to the Constitution (see Sec. 51) the Parliament of the Commonwealth has power to make laws for the peace, order, and good government of the Commonwealth with respect to :—

The acquisition of property on just terms from any State or person for any purpose in respect of which The Parliament has power to make laws [Sec. 51 (xxxi)].

Banking, other than State banking ; also State banking extending beyond the limits of the State concerned, the incorporation of banks, and the issue of paper money [Sec. 51 (xiii)].

Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth [Sec. 51 (xx)].

Matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth [Sec. 51 (xxxix)].

The constitutional validity of the Banking Act 1947 was referred to these powers.

The commerce power was not called in aid (cf. *Toronto Electric Commissioners v. Snider*, [1925] A.C. 396, at p. 409).

Unlike the trade and commerce power conferred upon the Parliament of Canada by the British North America Act 1867, the power is limited to trade and commerce with other countries and among the States. And it was also said that banking was not trade or commerce, a contention that, incidentally, denied that the Banking Act 1947 in any way infringed the constitutional guarantee that trade, commerce, and intercourse among the States should be absolutely free (Constitution Sec. 92).

The Constitution is an instrument of government in general terms, and, as Higgins J. said in *Attorney-General for New South Wales v. Brewery Employés' Union of New South Wales*, 6 C.L.R. 469, at p. 611 :—

> "although we are to interpret the words of the Constitution on the same principles of interpretation as we apply to any ordinary law, these very principles of interpretation compel us to take into account the nature and scope of the Act that we are interpreting—to remember that *it is a Constitution, a mechanism under which laws are to be made, and not a mere Act which declares what the law is to be.*"

The Constitution must not, therefore, be cut down by " a narrow and technical construction " but given a " large and liberal interpretation." (See *Edwards v. Attorney-General for Canada*, [1930] A.C. 124, at pp. 136-7 ; *British Coal Corporation v. The King*, [1935] A.C. 500, at p. 518).

The legislative power of the Parliament of the Commonwealth is not, however, to make laws for the peace, order, and good government of Australia but to make laws with respect to enumerated subjects but, within the appointed limits the Parliament is supreme. Its powers also are subject to all the limitations imposed by the Constitution. Those limitations may be found in the federal system itself (*Melbourne Corporation v. The Commonwealth*, 74 C.L.R. 31), or in some express provision of the Constitution such as Sec. 92.

The extent of the constitutional powers relied upon in support of the Banking Act 1947 must now be examined in the light of these considerations and of judicial dicisions.

THE ACQUISITION POWER.

Upon this power is founded the main sections of the Banking Act 1947. It is this power, and no other, that authorises the acquisition of property though the acquisition must be for a purpose in respect of which the Parliament has power to make laws (See *Johnston Fear & Kingham & The Offset Printing Co. Pty. Ltd. v. The Commonwealth*, 67 C.L.R. 314, at pp. 317-8, 325).

The acquisition power is, however, large and extensive for property is " *nomen generalissimum* and extends to every species of valuable right and interest including real and personal property " (See *Minister of State for the Army v. Dalziel*, 68 C.L.R. 261 ; and cf. *Australasian United Steam Navigation Co. Ltd. v. The Shipping Control Board*, 71 C.L.R. 508). And under this power I see no objection to the acquisition of a business being carried on—a going concern, to use an expression of business (cf. *Governments Stock and other Securities Investment Co. v. Manila Railway Co.*, [1897] A.C. 81, at p. 86 ; *Palmer's Company Precedents, Part I, 14th edtn., p. 459*). But the power is not, in itself, wide enough to include the taking over of liabilities. Vendors and purchasers provide in their agreements how and in what manner the liabilities of a going concern are to be discharged. It appears to me, however, that the incidental power [Constitution Sec. 51 (xxxix)], which is not a limitation or restriction but rather an enlargement of power, warrants legislation providing how and in what manner the liabilities of a going concern taken over should be discharged. The incidental power is not limited to such measures without which the granted power would fail but covers all appropriate means conducive or adapted to the end to be accomplished (cf. *Legal Tender Case*, 110 U.S. 421, at pp. 440-1). Provisions for the discharge of the liabilities of a going concern are not, I venture to think, essential to the justice of the terms provided for the acquisition of the concern. And it is not the constitutional requirement of " just terms " that authorises the taking over of liabilities. Liabilities might be discharged out of the moneys obtained for the concern.

An obligation, however, is imposed upon the Parliament to provide " just terms " for the acquisition of property. But the obligation to provide such terms, it is now recognised in this Court, is " a legislative function . . . and the Constitution does not mean to deprive the legislature of all discretion in the matter " (*McClintock v. The Commonwealth*, 75 C.L.R. 1, at p. 24). The law must not be so unreasonable as to terms that it cannot find justification in the minds of reasonable men. " Just terms " do not require a disregard of the interests of the public or of the Commonwealth (See *Grace Bros. Pty. Ltd. v. The Commonwealth*, 72 C.L.R. 269, at p. 291).

Ultimately, it is the function of the Courts to determine whether " just terms " have or have not been provided.

And " just terms " require that a party whose property is acquired shall have the pecuniary equivalent of the property acquired (*Australian Apple and Pear Marketing Board v. Tonking*, 66 C.L.R. 77, at p. 85 ; *Johnston Fear & Kingham & The Offset Printing Co. Pty. Ltd. v. The Commonwealth* (*supra*), at pp. 323, 324, 327). Thus the Judicial Committee have said in respect of a claim for compensation payable to the owner of land resumed that the party, whose property is acquired, is entitled to receive the sum which a prudent purchaser would have been willing to give for the property sooner than fail to obtain it (*Pastoral Finance Association Ltd. v. The Minister*, [1914] A.C. 1083).

> " The ascertainment of value is not controlled by artificial rules. It is not a matter of formulas, but there must be a reasonable judgment having its basis in a proper consideration of all relevant facts.".

(cf. *Standard Oil Co. v. Southern Pacific Co.*, 268 U.S. 146, at p. 156). " Just terms " may well be provided by means of a pool but whether " just terms " have been provided by that method depends upon the character of the pool provided (cf. *Nelungaloo Pty. Ltd. v. The Commonwealth*, 54 A.L.R. 145, at p. 165). Again, in considering the justice of the terms provided, the method of ascertaining the value of the property acquired may be considered. A party whose property

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is compulsorily acquired is entitled to a fair ascertainment of its value and not an arbitrary fixation by the authority acquiring the property (*Johnston Fear & Kingham & The Offset Printing Co. Pty. Ltd. v. The Commonwealth* (*supra*) ; *McClintock v. The Commonwealth* (*supra*) at pp. 25-26). And, further, it has been said in this Court that " just terms . . . involve, as a matter of elementary fairness, the payment . . . of interest " on the ascertained value of the property until payment (*The Commonwealth v. Huon Transport Pty. Ltd.*, 70 C.L.R. 293, at pp. 306-7). Scrutton L.J., in his dissenting judgment, said in *Swift & Co. v. Board of Trade*, 93 L.J. K.B. 529, at pp. 534-5 ; 40 T.L.R. 424, at p. 429, " the owner of property seized does not receive full compensation if he loses the property in one year and only receives the value of the property at the time of loss five years afterwards."

Doubtless, under the acquisition power, the Parliament can provide for payment of interest on unpaid compensation, but it is, in all cases, a matter of construction of the particular legislation whether it has done so and if not whether " just terms " have been provided.

Next the acquisition must be for a purpose in respect of which the Parliament has power to make laws. The only powers relied upon in support of the Banking Act 1947 were the banking power [Sec. 51 (xiii)] and the foreign corporations and trading or financial corporations power [Sec. 51 (xx)], coupled with the incidental power [Sec. 51 (xxxix)].

THE BANKING POWER.

It relates, of course, to the business of bankers but it was said that the power implied the continued existence of the activity and was indeed but a power to regulate and govern it (cf. *Municipal Corporation of City of Toronto v. Virgo*, [1896] A.C. 88). The form of the section was relied upon in support of this view. State banking is excluded from the power. This means the business of banking engaged in by a State as banker and not the transactions of a State as the customer of a bank (*Melbourne Corporation v. The Commonwealth* 74 C.L.R. 31). The banking power, however, also extends to State banking beyond the limits of the State concerned. These words, it was said, imply the continued existence of interstate activities on the part of a State bank which the Parliament of the Commonwealth may regulate and govern but cannot suppress. The word " also," it was suggested, relates that construction of the power over interstate transactions back to the subject of banking itself in the constitutional power.

Again, it was also suggested that the express power to incorporate banks contained in the constitutional power as an extension or addition to the banking power, indicated that the incorporation of banks is not included within the subject of banking. And this supported the view that the banking power was a power to regulate and govern banking and not to suppress it.

But I am unable to accede to this construction of the Constitution.

State banking is excluded from the banking power but States have no power to legislate with respect to transactions in banking extending beyond the limits of the State concerned. It was a special case and the power is therefore conferred upon the national or federal Parliament.

But this limited power over State banking does not control or in any way restrict the banking power, rather it extends that power.

The express power to incorporate banks was adopted, I should think, from the British North America Act 1867, Sec. 91 (15). In the Constitution of the United States no power in express terms is given to Congress to incorporate banks

yet such a power was deduced by inference or implication from the Constitution (*McCulloch v. Maryland* 4 Wheat 316). Possibly it was to avoid the necessity of such inferences or implications that the express power was inserted both in the Canadian and Australian Constitutions.

Abundans cautela non nocet.

In any case the power does not control or restrict the banking power.

Subject to the Constitution, including the limitation in the banking power itself, the banking power extends over the entire subject. It is plenary and Parliament may embrace within its legislation whatever is necessary or appropriate to a complete and effective banking system. The power, as I have already said, " extends not only to those regulations which aid, foster, and protect banking and the choice of persons engaging in it: it also embraces the making of rules which prohibit it " (*Melbourne Corporation v. The Commonwealth* (supra), at p. 69 and cases there cited).

In the recent decisions, *Attorney-General for Alberta v. Attorney-General for Canada*, [1939] A.C. 117, [1938] Can. S.R. 100, and *Attorney-General for Alberta v. Attorney-General for Canada*, [1947] A.C. 503, in which Alberta social credit legislation was considered, the question was whether the legislation was invalid. In the former case an Act respecting the taxation of banks was declared invalid in the Privy Council because it was part of a legislative plan to prevent the operation within the Province of those banking institutions which were carrying on business under the authority of the Parliament of Canada. In short, the legislation was inconsistent with the Dominion legislation which prevailed.

But in the Supreme Court of Canada the Social Credit Act which was the basis of the plan was also declared invalid because it was legislation in relation to banking which was exclusively assigned to the Parliament of Canada under the British North America Act 1867. The Judicial Committee did not deal with this Act for reasons stated in the report of the case in [1939] A.C. 117, at pp. 127-8.

In the latter case the Judicial Committee declared the Alberta Bill of Rights Act, which provided for loans involving an expansion of credit, invalid because it was legislation in relation to banking exclusively assigned to the Dominion Parliament. " Legislation which aims at restricting (credit) or controlling this practice must," said Simon, L.C., " be beyond the powers of a provincial legislature."

It was said that this decision does not necessarily require the banking power in the British North America Act to support it for the general power of the Dominion (Act Sec. 91) to make laws for the peace, order, and good government of Canada in relation to all matters not coming within the classes of subjects exclusively assigned to the Legislatures of the Provinces equally supports it. That may be true, but the Judicial Committee rested its decision upon the banking power and not upon the general power. And the reasoning is an exposition of the banking power.

Still, legislation under the acquisition power must have some real connection with and afford some reasonable and substantial basis for the conclusion that it is for a purpose in respect of which the Parliament has power to make laws, for example, in the present case that the legislation has a real and substantial connection with banking (*Victoria v. The Commonwealth*, 66 C.L.R. 488, at p. 508; *Reid v. Sinderberry : Reid v. McGrath*, 68 C.L.R. 504, at pp. 515-6; *Australian Woollen Mills Ltd. v. The Commonwealth*, 69 C.L.R. 476, at pp. 490-1).

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"These questions affecting limitation on the legislative powers of subordinate parliaments . . . in a federal system are now familiar. . . . It is well established that you are to look at the "true nature and character of the legislation" . . . "the pith and substance of the legislation." If, on the view of the Statute as a whole, you find that the substance of the legislation is within the express powers, then it is not invalidated if incidentally it affects matters which are outside the authorised field. The legislation must not under the guise of dealing with one matter in fact encroach upon the forbidden field." (*Gallagher v. Lynn*, [1937] A.C. 863, at p. 870.)

FOREIGN CORPORATIONS AND TRADING OR FINANCIAL CORPORATIONS POWER.

This provision of the Constitution, Sec. 51 (xx) does not give any power to incorporate companies (*Huddart Parker & Co. Proprietary Ltd. v. Moorehead; Appleton v. Moorehead*, 8 C.L.R. 330). Isaacs J. was of opinion that it gave to the Commonwealth Parliament power to regulate the conduct of the corporations in their transactions with or as affecting the public (See p. 395). Higgins J. regarded it as a power to legislate with respect to corporations as corporations.

The capacities and faculties of these corporations are unalterable by the Commonwealth (ibid p. 395). The power is, as are all the powers granted by Sec. 51, subject to the Constitution.

It is an independent power complete in itself, and, in my opinion, the power authorises the Commonwealth to govern and regulate the operations of these companies, but would not authorise the suppression of all such corporations or the nationalisation of their activities. Thus, the carrying on business in Australia by these corporations might be prohibited absolutely or except upon certain conditions and the exercise of their powers in Australia might be regulated and so forth. Moreover, the Constitution must be construed as one whole document (*James v. Commonwealth of Australia*, [1936] A.C. 578, at p. 613) and it may well be that this corporation power is confined to corporations that are not within the banking power.

Be this as it may, this power does not, I think, support the Banking Act 1947. The banking power is the appropriate power and the one upon which reliance must be placed. It is unnecessary, therefore, to refer again to this corporation power.

LIMITATIONS UPON POWER.

The limitations upon federal constitutional power, which have been relied upon in this case, may now be examined.

THE STATES.

"The federal character of the Australian Constitution," I said, in *Melbourne Corporation v. The Commonwealth* (supra), at p. 70, "carries implications of its own . . . the government of Australia is a dual system based upon a separation of organs and powers. The maintenance of the States and their powers is as much the object of the Constitution as the maintenance of the Commonwealth and its powers. Therefore it is beyond the power of either to abolish or destroy the other." Neither Federal nor State governments "may destroy the other nor curtail in any substantial manner the exercise of its powers" or "obviously interfere with one another's operations."

Three of the States contend that the Banking Act 1947 curtails their constitutional powers in a substantial manner and interferes with the exercise of those powers. But I shall return later on to this contention.

FREEDOM OF TRADE.

Trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free.

So sec. 92 of the Constitution prescribes; but judicial decisions have much weakened its operation.

It is now settled, I think, after some fluctuation in opinion, that Sec. 92 is an inhibition addressed to the Parliaments of the Commonwealth and the States preventing them from legislating so as to interfere with the freedom prescribed by the section. It gives no rights to the citizens of the Commonwealth except the right to ignore and if necessary to procure the assistance of the judicial power in resisting any such legislation (*James v. South Australia*, 40 C.L.R. 1, at p. 31; *James v. The Commonwealth*, 62 C.L.R. 339, at pp. 361-2; *James v. Commonwealth of Australia*, [1936] A.C. 578). Still the freedom is not limited " to freedom from legislative control: it equally includes executive control " (*James v. Commonwealth of Australia*, [1936] A.C. 578, at p. 628). But, doubtless, the expression trade, commerce, and intercourse :—

> " describes the activities of individuals. The object of sec. 92 is to enable individuals to conduct their commercial dealings and their personal intercourse with one another independently of State boundaries."

(*O. Gilpin Ltd. v. Commissioner of Road Transport and Tramways, New South Wales*, 52 C.L.R. 189, at p. 211). It was said, however, that Sec. 92 relates only to the passage of goods or visible tangible things and persons across the borders of the States, and is wholly inapplicable to intangible things or commercial intercourse across State borders. And it was claimed that the addition of the words " whether by means of internal carriage or ocean navigation " in Sec. 92 supported this view. And so, also, it was claimed that the opinion of the Judicial Committee in *James v. The Commonwealth of Australia* (*supra*) was based upon this assumption.

But I am unable to agree with the argument.

Trade, commerce, and intercourse among the States includes, in my opinion, not only the sale of tangibles but also of intangibles by a person in one State to a person in another State and also the transportation from one State to another of goods or persons and commercial intercourse whether by air, telegraph, telephone, wireless, or other means. This, I think, accords with the view taken in the United States of America under the power in the American Constitution to regulate commerce with foreign nations and among the several States and with the Indian tribes. The word " intercourse " in Sec. 92 is as applicable to commercial intercourse as to personal intercourse. Indeed, in the basic case in the United States, *Gibbons v. Ogden*, 9 Wheat 1, at pp. 189-90, Marshall C.J. said :—

> " Commerce, undoubtedly, is traffic, but it is something more; it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse."

It may be that the word " intercourse " found its way into Sec. 92 of the Australian Constitution through some such source.

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James v. Cowan, 1932 A.C. 542 dealt with the nature of the freedom prescribed by Sec. 92, but not with the subject of that freedom.

And the addition of the words " whether by means of internal carriage or ocean navigation " are " not descriptive or limiting ; they are to prevent limitation" (*W. & A. McArthur Ltd. v. State of Queensland*, 28 C.L.R. 530, at p. 550).

The decisions of the United States Courts are not authoritative upon the interpretation of the Australian Constitution. Thus the power given to Congress to regulate commerce has repeatedly been declared, as to those subjects which require a general system of uniformity of regulation, to be exclusive. In other matters, admitting of diversity of treatment according to the special requirements of local conditions, the States may act within their respective jurisdictions until Congress sees fit to act ; and, when Congress does act, the exercise of its authority overrides all conflicting State legislation (*The Minnesota Rate Cases : Simpson v. Shepard*, 230 U.S. 352, at pp. 399-400).

No such doctrine exists in Australia. The powers of the Commonwealth and the States within the limits of their constitutional powers are concurrent but when the law of a State is inconsistent with a law of the Commonwealth the latter prevails (Constitution Sec. 109) (*James v. Commonwealth of Australia*, [1936] A.C. 528, at p. 611). Still, what is " commerce " has been thoroughly explored in the United States of America and what is trade and commerce under the Australian Constitution are indistinguishable descriptions of the same thing. And before " commerce " can be interstate it must be " commerce."

Much light is thrown upon the whole subject in the judgments of the Supreme Court of the United States and by text writers and others upon the commerce power in the Constitution of the United States [See, for instance, Willoughby on the Constitution of the United States, 2nd Edn., Vol. 2, pp. 721-77 ; Willis on Constitutional Law pp. 281-304 ; Judson 1912, 2 Edn., The Law of Interstate Commerce ; Prentice & Egan 1898, The Commerce Clause of the Federal Constitution ; Constitution of United States (Annotated) to January, 1938, compiled pursuant to resolutions of the Senate and the House of Representatives].

The extent of the commerce power in the United States is well illustrated in a recent case before the Supreme Court of the United States (*United States v. South-Eastern Underwriters Association*, 322 U.S. 533). The question was whether the business of entering into contracts in one State insuring against the risk of loss by fire of property in others was in itself interstate commerce. There were numerous decisions of the Court that insurance was not commerce. But these decisions were overruled. The majority of the learned Justices accepted the general description of " commerce " given by Marshall, C.J., in *Gibbons v. Ogden* (*supra*). And even those Justices who did not agree with the disposal of the case made by the majority of the Court, in view of the prior decisions of the Court, agree that the business in question in that case did constitute " commerce."

Thus Frankfurter, J. (at p. 583) :—

> "The relations of the insurance business to national commerce and finance . . . afford constitutional authority for appropriate regulation by Congress of the business of insurance."

and Jackson, J. (at pp. 585-8) :—

> "The doctrine that insurance business is not commerce always has been criticised as unrealistic, illogical and inconsistent with other decisions. . . .

As a *matter of fact*, modern insurance business, as usually conducted, is commerce ; and where it is conducted across state lines, it is *in fact* interstate commerce. In contemplation of law, however, insurance has acquired an established doctrinal status not based on present-day facts. For constitutional purposes a fiction has been established, and long acted upon by the Court, the States, and the Congress, that insurance is not commerce."

Stone, C.J., was more cautious (at p. 567) :—

"The numerous and unvarying decisions of this Court . . . have never denied that acts of interstate commerce may be incidental to the business of writing and performing contracts of insurance, or that those incidental acts are subject to the commerce power. Our decisions on this subject have uniformly rested on the ground that the formation of an insurance contract, even though it insures against risk of loss to property located in other States or moving in interstate commerce is not interstate commerce, and that although the incidents of interstate communication and transportation which often attend the formation and performance of an insurance contract are interstate commerce, they do not serve to render the business of insurance itself interstate commerce."

In *Nathan v. Louisiana*, 8 Howard 73, the Supreme Court of the United States held that a person engaged in buying and selling foreign bills of exchange was not engaged in " commerce " but in supplying instruments of commerce and that a State tax on his business was not an infringement of the constitutional power of Congress to regulate " commerce."

Despite this authority the decision in the *Insurance Case* suggests that in the United States the business of banking as usually conducted would now be regarded as commerce or as involving acts or transactions in commerce which if conducted across State lines would be interstate commerce. Prentice & Egan (*supra*), p. 48, comments upon the case :—

"To say that an interstate bill of exchange is merely evidence of the transfer of title to personal property located in another State is not only to ignore the fact that money as a circulating medium, is essential to all commerce."

It is true that in the Australian Constitution the trade and commerce power, the banking power, and the insurance power are separately enumerated but that does not exclude banking and insurance from the inhibition of Sec. 92 that trade, commerce, and intercourse among the States shall be absolutely free if the business of banking and insurance conducted across State lines be trade, commerce, or commercial intercourse. Among their multifarious functions bankers finance the sale and purchase of goods and of commerce in general and they also issue, buy, sell, and discount bills, often against mercantile documents, transmit moneys, and provide credits and engage in commercial intercourse. Such transactions and acts, if conducted across State lines, fall within the general description of trade, commerce, and intercourse among the States, already stated. It is not every transaction and act of bankers that belongs to interstate trade but in Australia bankers do a considerable business across State lines. It would be " unrealistic and illogical " to deny the character of interstate commerce to business so conducted.

And it is that trade, commerce, and intercourse that Sec. 92 requires shall be " absolutely free." But that means " freedom as at the frontier " or in other words across State boundaries. It must be free from all restraints, hindrances, obstructions, interferences, and devices of every kind employed to interfere with

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that freedom. Those restraints, hindrances, and interferences may take many forms such as customs and border duties, prohibitions of every kind, compulsory acquisitions of property directed against interstate trade, compulsory marketing schemes entirely restrictive of freedom of action on the part of producers and the elimination of the business of interstate transportation as such in favour of a State undertaking and so forth [*James v. Cowan* (*supra*) ; *James v. The Commonwealth* (*supra*) ; *Peanut Board v. Rockhampton Harbour Board*, 48 C.L.R. 266 ; *Australian National Airways Pty. Ltd. v. The Commonwealth*, 71 C.L.R. 29].

The actual restraint or burden may operate while the property is still in the State of origin [*James v. The Commonwealth* (*supra*)]. " In every case," it was said in *James v. The Commonwealth of Australia* (*supra*), at p. 631, " it must be a question of fact whether there is an interference with this freedom of passage." But the question of fact is, like some other matters of fact in the law, for the Court, and not for the jury. The difficulties that arise in the application of Sec. 92 to legislative and executive action arise, I think, at this point. *James v. The Commonwealth of Australia* (*supra*), at p. 619 denied that the freedom prescribed by Sec. 92 was :—

> "freedom from all governmental control extending over the whole of any transaction which is treated as having the characteristic of interstate commerce."

and substituted " freedom as at the frontier " as the true criterion (*ibid* at p. 630).

In *O. Gilpin Ltd. v. Commissioner for Road Transport and 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.' "

It is not therefore :—

> "every regulation of commerce or of movement that involves a restriction or burden constituting an impairment of freedom. Traffic regulations affecting the lighting and speed of vehicles, tolls for the use of a bridge, prohibition of fraudulent descriptions upon goods, and provisions for the safe carriage of dangerous things, supply examples."

(cf. *Home Benefits Pty. Ltd. and Household Helps Pty. Ltd. v. Crafter*, 61 C.L.R. 701 ; *R. v. Connell ; ex parte Wawn*, 61 C.L.R. 596 ; *R. v. Martin ; ex parte Wawn*, 62 C.L.R. 457).

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 (*R. v. Vizzard ; ex parte Hill*, 50 C.L.R. 30 ; *O. Gilpin Ltd. v. Commissioner of Road Transport*, 52 C.L.R. 189 ; *Bessell v. Dayman*, 52 C.L.R. 215 ; *Duncan and Green Star Trading Co. Pty. v. Vizzard*, 53 C.L.R. 493 ; *Riverina Transport Pty. Ltd. v. Victoria*, 57 C.L.R. 327 ; and *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* (*supra*) ; *Peanut Board v. Rockhampton Harbour Board* (*supra*) ; *Milk Board Case* (*supra*), at p. 153]. Or perhaps to express the matter more shortly that legislative or executive action is obnoxious to Sec. 92 if it restrains or interferes with the freedom of trade and commerce among the States in some real and substantial manner. But the freedom guaranteed by Sec. 92 is not an unrestricted privilege to engage in business or to conduct it as one pleases. Unfortunately this generalisation has led to many opposite conclusions of " fact " in this Court. On the one hand it is claimed that the *Peanut Case* (*supra*) has the approval of the Judicial Committee and on the other that the transport cases have that approval.

Neither claim is, I think, beyond question. The passage *James v. The Commonwealth* (*supra*), at p. 623, is guarded and not a clear and definite approval and in *Gratwick v. Johnson*, 70 C.L.R. 1, at p. 17-19 will be found my reasons for thinking that the Judicial Committee did not express approval or disapproval of the actual decisions in the transport cases.

Nelson's Case (*supra*) may be compared with *Tasmania v. Victoria*, 52 C.L.R. 157, and the *Peanut Board* and the *Air Line Cases* (*supra*), with *Hartley v. Walsh*, 57 C.L.R. 372, and the *Milk Board Case* (*supra*).

The Transport Cases, including *Willard v. Rawson*, 48 C.L.R. 316, are applications of this generalisation. But if all the States legislated or acted in like manner then freedom of interstate transportation would be greatly hampered. I think the Transport Cases were wrongly decided, they were not mere traffic regulations as I regard *Willard's Case* but a burden imposed directly and immediately upon the transport or movement of passengers and goods whether engaged in domestic, interstate, or other trade and commerce.

THE BANKING ACT 1947.

Turning now to the Banking Act 1947. Part I of the First Schedule sets out the names of eight banks incorporated in Australia, which I shall refer to as the Australian banks, Part II, three banks incorporated in the United Kingdom which I shall refer to as the English Banks, and Part III, three banks incorporated elsewhere which I shall refer to as the foreign banks. These banks, often in Australia called " the trading banks," are referred to in the Banking Act as private banks though the Australian and English banks, at all events, are public or chartered companies. And these banks have carried on the banking business of Australia for many years, one, at least, I believe, for more than one hundred years.

In 1911 the Commonwealth Bank was established by the Act 1911 No. 18 and it was authorised to carry on, and has from its establishment carried on, *inter alia*, a general business of banking. But it is now governed by the Commonwealth Bank Act 1945 (1945 No. 13).

The Banking Act 1947 makes provision for :—

(1) The purchase or acquisition by agreement of all or any of the shares in the Australian and English banks by the Commonwealth Bank subject to the approval of the Treasurer.

(2) The compulsory acquisition of Australian shares in Australian banks.

Sec. 13 (1). Where the Treasurer is satisfied that the majority in number of the shares in an Australian private bank are Australian shares, the Treasurer may, by notice . . . declare that, upon a date specified . . . the shares in that bank which are Australian shares . . . shall be vested in the Commonwealth Bank.

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" Australian shares " means shares situated, or deemed by law to be situated, in Australia.

All other shares in that Australian bank which become Australian shares are vested in the Commonwealth Bank upon the date upon which they become Australian shares.

(3) The Management of Australian Banks.—Upon the date specified as already mentioned the directors of the Australian bank in relation to which the notice was given, cease, by force of the Act, to hold office and the Governor of the Commonwealth Bank may with the approval of the Treasurer appoint directors in their stead. Directors so appointed have full power to manage, direct and control the business and affairs of the Australian bank of which they are directors and, in particular, have power to :—

(*a*) declare dividends ;

(*b*) dispose of the business in Australia of that Australian bank to the Commonwealth Bank.

(*c*) dispose of all or any of the other business of that Australian bank.

Further the Commonwealth Bank is for all purposes the holder of the shares which have been purchased or acquired under the Act and shall be a member of that Australian bank in respect of those shares.

(4) The taking over by agreement with the Commonwealth Bank of the business in Australia of any of the Australian, English or foreign banks mentioned in the Schedule.

(5) The compulsory taking over by the Commonwealth Bank of the business in Australia of any Australian, English or foreign bank already mentioned which has not made an agreement for the taking over of its business.

And provisions are made for taking over Australian assets and liabilities, vesting assets, novating liabilities and discharging the bank taken over from its obligation in respect of those liabilities.

" Australian assets " means assets situated, or deemed by law to be situated, in Australia, and " Australian liabilities " means liabilities situated, or deemed by law to be situated, in Australia.

(6) Compensation for property compulsorily acquired and the setting up of a Federal Court of Claims with jurisdiction to hear and determine claims for compensation under the Act.

The Commonwealth Bank, the Act provides, shall pay fair and reasonable compensation in respect of the acquisition of shares by the Commonwealth Bank (sec. 15).

The Commonwealth Bank, the Act also provides, shall pay fair and reasonable compensation in respect of the acquisition or taking over by the Commonwealth of the business in Australia of any bank (sec. 25).

(7) Prohibition of the carrying on of banking business in Australia by the Australian, English or foreign banks.

Notwithstanding anything contained in any other law, or in any charter or other instrument, a private bank shall not, after the commencement of this Act, carry on banking business in Australia except as required by the Act (sec. 46).

But the Act requires each bank to carry on until the Treasurer by notice requires it to cease carrying on banking business in Australia.

(8) Protection and continuation in employment by the Commonwealth Bank of the staff of banks taken over pursuant to the Act.

(9) And there is a declaration of legislative intent with respect to the divisibility or separability of the provisions of the Act (sec. 6).

It provides a rule of construction that the legislature intended the provisions of the Act to be divisible.

But it is not, as has been said, an inexorable command and the presumption may be :—

> "overcome by considerations which make evident the inseparability of its provisions or the clear probability that the invalid part being eliminated the legislature would not have been satisfied with what remains. The presumption in favour of separability does not authorise the Court to give the Statute an effect altogether different from that sought by the measure viewed as a whole."

(*R. v. Poole*, 61 C.L.R. 634 ; cf. *Williams v. Standard Oil Co. of Louisiana*, 278 U.S. 235, at p. 242 ; *Railroad Retirement Board v. Alton Railway Co.*, 295 U.S. 330, at p. 361 ; *Carter v. Carter Coal Co.*, 298 U.S. 238, at pp. 312, 334 ; *Attorney-General for Alberta v. Attorney-General for Canada*, [1947] A.C. 503, at p. 519-520).

The several objects of the Act and the purpose of the powers in Division 2 & 3 of Part IV of the Act are stated in Secs. 3 & 9 and are designed, I suppose, to relate the provisions of the Act to some constitutional power. In the end, however, these provisions must find constitutional warrant in some one or more of the enumerated powers conferred upon the Parliament of the Commonwealth by the Constitution. And that warrant is found, so it is contended, in the acquisition power and the banking power together or separately and the incidental power.

ACQUISITION OF SHARES.

The authority to acquire shares and to take over businesses of the trading banks by agreement raises no difficulties. The Act confers upon the Commonwealth Bank the capacity so to acquire shares and to take over businesses and there is nothing to prevent the proprietors or owners agreeing to sell if they so desire upon agreed terms. But the purchaser—the Commonwealth Bank—can, in such cases, stand in no better position than any other purchaser ; it must take what the proprietor or owner has and be subject to the Memorandum and Articles of Association or other regulations of the banking company. A compulsory purchase authorised under the Constitution stands in a somewhat different position for no provisions in the regulations of the company prohibiting or restricting alienation can prevail against the statutory authority. Still, in my opinion, such a purchase does not in itself entitle the purchaser to ignore all the regulations of the banking company. The right the purchaser acquires is a share in the capital of the company freed from all trusts, mortgages, charges, liens, interests, and other obligations affecting those shares [Sec. 13 (5)], and the incidental rights to be exercised in accordance with the regulations of the company.

The complete title to the shares is acquired upon the vesting thereof in the Commonwealth (cf. The *Commonwealth v. New South Wales*, 33 C.L.R. 1, at p. 27-28). And the Act vests the shares in the Commonwealth Bank but, in my opinion,

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the regulations of the banking companies govern the right of the Commonwealth Bank or its nominees to go upon the Share Register as members: if they desire the advantages of registration by the banking company then they must comply with the regulations of the company governing registration [cf. *The Commonwealth v. New South Wales* (*supra*)]. Thus, if authority were given to directors enabling them for instance to refuse any transferee of whom they did not approve, then ordinarily the Courts would not interfere with the exercise of their discretion unless the authority were exercised capriciously and wantonly. In short, the Parliament of the Commonwealth cannot, under the banking power, ignore the internal structure and regulations of the trading banks and shape that structure and those regulations as it pleases. Legislation of that character would relate to companies or corporations, as Higgins J. might have said, and not to banking [cf. *Huddart Parker & Co. Proprietary Ltd. v. Moorehead; Appleton v. Moorehead* (*supra*)].

Consequently Sec. 14 of the Banking Act 1947 is not a valid exercise of power.

Still the compulsory acquisition of shares and of the businesses in Australia of the trading banks, including inter State banking, is within the plenary powers of Parliament under the acquisition, banking and incidental powers, but only if the purpose of the acquisition is banking, that just terms are provided for the acquisition and that trade, commerce and intercourse among the States is absolutely free. The purpose of the acquisition of the shares is to facilitate the control by the Commonwealth Bank of the banking business in Australia of the banking companies and for the purpose of furthering the expansion of the banking business of the Commonwealth. It was pointed out that the acquisition of the shares in a company was one method of acquiring the business or the control of the business of that company. Under the Banking Act, however, it is to be noticed that the acquisition of shares in the Australian banks may be piecemeal. Shareholders in the Australian banks are not bankers and shareholding cannot be described as banking though it does enable those holding shares in banks to exercise, through their holdings, subject to the regulations of the banks, some control over their operations. Nationalisation and control of Australian banking was, it was said, the aim of the provisions relating to the acquisition of shares and other property, but that control was already established under the Banking Act of 1945. Therefore the real aim and object of the Act, it was contended, is not for any purpose of banking but for the purpose of acquiring for the Commonwealth the profitable business of selected Australian banks. The provisions for the management of the banks, the astounding penalties imposed by such sections as 24 (8), 46 (8), 59 and 60, and the case of *Melbourne Corporation v. The Commonwealth*, 74 C.L.R. 1, were referred to in support of this view. Doubtless the Court must ascertain the purpose of the acquisition, but that purpose must be discovered from the words of the Act and any relevant surrounding circumstances and not by any other means. The argument has something of truth in it, but I put it on one side partly because the Court properly assumes the integrity of the legislative body and presumes in favour of the validity of legislation until its violation of the Constitution is clearly established and partly because of the provisions for compensation contained in the Act.

JUST TERMS.

And that leads to the inquiry whether "just terms" are provided in the Banking Act 1947 for the acquisition of shares in the Australian banks. It was contended that the Act makes no provision for interest from the date of acquisition to the date of payment. It would not be just that the Commonwealth Bank or

any other body should at one and the same time enjoy the benefits flowing from the acquisition of the shares, for instance, of profits earned in the business and those flowing from unpaid compensation moneys. And yet it is plain, I think, in an acquisition under the Banking Act 1947 that some considerable time must elapse in this case between the acquisition of the shares and the assessment of compensation. It is clear, I think, that the acquisition power in the Constitution enables the Parliament to make provision for interest. That such a provision is just there can be no doubt. But what is provided is that the bank shall pay fair and reasonable compensation in respect of the acquisition of shares by the Commonwealth Bank. The compensation is given in respect of the acquisition of the shares. Interest cannot be allowed as compensation. There is nothing in the Act to attach an allowance of interest to it (*Swift & Co. v. Board of Trade*, [1925] A.C. 520 ; *Newport Borough Council v. Monmouthshire Borough Council*, [1947] A.C. 520, at pp. 561-563 ; *cf. Marine Board of Launceston v. Minister of State for the Navy*, 70 C.L.R. 518).

The equitable principle stated in *International Railway Co. v. Niagara Parks Commission*, [1941] A.C. 328, has no bearing upon the present case, for specific performance would be an inappropriate remedy in the circumstances of the case [cf. *Marine Board of Launceston v. Minister of State for the Navy* (supra), at p. 529).

This question has been considered in America and " just compensation " has there " a constitutional connotation." It entitles the property owner to receive interest from the date of the taking to the date of payment as part of his just compensation. However, as Lord Sumner remarked in *Swift's Case* (supra) the law of other countries has no bearing on the case. Ordinarily, even in the United States, provision for payment of interest must be " affirmative, clear cut and unambiguous." It is not enough that the terms might be construed to include interest (*United States v. Thayer-West Point Hotel Co.*, 329 U.S. 585). " Just terms " in the present case require that a right to interest should be given and not some merely discretionary authority to award interest.

I should add that the Court of Claims established under the Banking Act 1947 is given jurisdiction to hear and determine claims for compensation arising under the Act. It has no jurisdiction other than that conferred upon it by the Act ; it has no inherent or equitable jurisdiction ; it has no jurisdiction to award interest.

Consequently, " just terms " have not been provided by the Banking Act 1947 for the acquisition of shares in the Australian banks and the provision for their acquisition are therefore invalid.

It was also said that " just terms " had not been provided because no provision was made for shareholders' costs in asserting their claims for compensation before the Court of Claims. But that is not a matter affecting justice as a term of acquisition and is no breach of the acquisition power.

And here it is convenient to dispose of an argument presented by the States that the Act does not provide " just terms " for the acquisition of shares or the businesses in Australia of the trading banks. It was said that the banks are possessed of assets of the value of many millions of pounds which the Commonwealth acquires but must provide the full pecuniary value thereof as compensation for the owners. And that the Commonwealth can only discharge that obligation by means of loans, the issue of Treasury bonds or of paper money by the Commonwealth Bank or out of the assets acquired. But this must involve further inflation of a depreciating currency and a ruinous fall in the value of money. These economic considerations are not, I think, matters that concern the Court or which it can

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consider. The Court cannot investigate the value of the lawful currency of Australia. The Commonwealth Bank, as any other body, may discharge its obligations in lawful currency. If it does so that is a good discharge of its obligations. Doubtless, a depreciated or depreciating currency entails great hardships but the Court cannot alter, amend, or mitigate the law relating to the currency. The argument is untenable.

MANAGEMENT OF PRIVATE BANKS.

The provisions for the management of the Australian banks and their relation to the provision of Sec. 13 for the acquisition of shares in those banks next fall for consideration.

Upon the notice given under Sec. 13 and the vesting of shares pursuant to the section, the directors of the Australian banks affected by the notice cease to hold office ; new directors may be appointed by the Governor of the Commonwealth Bank, with the approval of the Treasurer, in their place notwithstanding any lack of qualification and the directors so appointed have full power to manage, direct, and control the business and affairs of the Australian banks of which they are directors and in particular have power to declare dividends, dispose of the business in Australia of that bank to the Commonwealth Bank and to dispose of all or any of the other business of that Australian Bank. The scheme is a connected whole which cannot, notwithstanding Sec. 6 of the Act, be severed. The presumption of severability established by that section is overcome by the evident inseparability of the provisions themselves. The invalidity of Sec. 13 relating to the acquisition of shares brings down the provisions relating to the management of private banks but the invalidity of the provisions for the management of private banks would likewise bring down the provisions relating to the acquisition of shares.

Ordinarily those holding shares may, through and by means of their shareholdings, remove directors and appoint others in their place. But that flows from their rights and voting power incident to the ownership of the shares and the regulations of the particular company. Here the directors are removed and others appointed in their place compulsorily without any exercise of shareholding rights. But, as I said before, the constitutional powers with respect to the acquisition of property, and banking and the incidental power together or separately do not authorise the Parliament of the Commonwealth to ignore the internal structure and organisation of the trading banks and shape that structure as it pleases.

Shares may be acquired by agreement or compulsorily and if so the rights attaching to those shares may be exercised in accordance with the regulations of the bank. It is another matter, however, when those rights are not exercised but the Parliament removes directors, appoints new directors in their places and gives them full control of the business. In my opinion, that is not a law with respect to banking but a law with respect to the internal structure and organisation of corporations or banks, which is a matter for regulation by the incorporating authority.

But if these provisions can be supported under the constitutional powers already mentioned, then they raise in another form the question whether " just terms " have been provided for the acquisition of property of the Australian banks. The substance of the matter is, as already appears, that the directors of Australian banks are removed from office and control is given to directors appointed by the Governor of the Commonwealth Bank with the approval of the Treasurer with power to dispose of the business in Australia of any Australian bank to the Common-

wealth Bank. Further the directors appointed pursuant to the Act are also authorised " to dispose of all or any of the other business of that Australian " bank.

In my opinion, these provisions constitute an acquisition or attempted acquisition of the property of Australian banks. By this means, Australian banks and their shareholders are deprived of any bargaining power through their own directorate and the Commonwealth Bank may acquire the business in Australia of any Australian bank upon terms agreed between the directors appointed under the Act and the Commonwealth Bank. And " all or any of the other business of that Australian " bank may be disposed of by the directors appointed under the Act at amounts or values fixed by themselves. But, in my opinion, the Australian banks and their shareholders are entitled to a fair ascertainment of the value of their property and not an arbitrary fixation by the authority disposing of or acquiring that property.

In my opinion, the provisions of Part IV, Division 3, Management of Private Banks are invalid because " just terms " of acquisition have not been provided in accordance with the constitutional requirement.

TAKING OVER OF BUSINESSES.

The provisions for taking over the business of the Australian, English and foreign banks in Part IV, Division 4, fall here for consideration.

Postponing for the moment any observations upon the provisions of sec. 22, especially sub-sec. (8), and sec. 23, I come to sec. 24, which provides for the taking over in Australia of the business of the banks just mentioned.

Standing alone, I should be prepared to say, as already indicated, that the acquisition and banking powers and the incidental power conferred upon the Parliament by the Constitution authorise it to legislate for the acquisition and taking over as a going concern the businesses in Australia of banking companies and of all or any assets and liabilities in connection with such businesses. But I am unable to agree that these powers enable the Parliament to legislate so as to effect a novation of the obligations and contracts of the banking companies with their creditors. Legislation that the Commonwealth Bank shall pay, satisfy and discharge all the liabilities of the banking companies, indemnify and keep them harmless in respect of such liabilities is one thing but legislation that the banking companies shall be discharged from those liabilities and that they shall become the liabilities of the Commonwealth Bank or of any other institution is another. Yet, that is precisely the effect of sec. 24, sub-secs. (5) and (7).

The constitutional powers of the Parliament do not enable it to convert the creditors of the banking companies into creditors of the Commonwealth Bank or any other institution and create the relationship between them of creditor and debtor. And the provisions with respect to the liabilities of the banking companies cannot, I think, be severed from the rest of the section. And those constitutional powers also require that legislation for the acquisition of property shall provide " just terms." As in the case of provision for the acquisition of shares in Australian banks so in the case of taking over the business in Australia of the banks, already mentioned, no provision is made for the payment of interest from the date of acquisition of the business to the date of payment. A profit earning business or concern is taken over and vested in the Commonwealth Bank. It is not just that the Commonwealth Bank or any other institution should at one and the same time enjoy the benefits flowing from possession of the property taken over and those flowing from possession of purchase or compensation money.

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A strange provision is found in Sec. 23 of the Banking Act 1947. Where an agreement has been made by any private bank under Sec. 22 relief is given from tax upon incomes or profits but if no agreement has been made then the banking companies which have not agreed are not relieved from tax upon incomes or profits. It obviously was passed for the purpose of putting pressure upon the banking companies. It was not suggested, during the long argument of this case, that it involved any contravention of the constitutional provision requiring " just terms " in respect of the acquisition of property. Therefore, I pass it by.

" Just terms " have not been provided for the taking over of the businesses of the Australian, English and foreign banks. For these various reasons the provisions of Sec. 24 of the Banking Act 1947 fail and are invalid.

Here, I would add, in relation to Sec. 22 of the Act, that I see no objection to an agreement between the Australian, English and foreign banks and the Commonwealth Bank for the acquisition of the business of any of those banks as a going concern, but I do not think that ss. (8) (b) & (d) can novate the liabilities of the banks without the agreement of creditors as ss. (8) (b) & (d) provide.

COMPENSATION.

Another attack has been made upon the validity of the Banking Act 1947 connected with the Federal Court of Claims and the assessment of compensation.

The Constitution, Sec. 75, provides that in all matters in which the Commonwealth or a person suing or being sued on behalf of the Commonwealth is a party the High Court shall have original jurisdiction. The jurisdiction so conferred upon the High Court cannot be taken away or withdrawn by the Parliament. It is a constitutional provision in the same position as the provision contained in Sec. 75 (v) in relation to mandamus, prohibition and injunction (see *The Tramways Case (No.* 1), 18 C.L.R. 54).

The compensation under the Banking Act 1947 is payable by the Commonwealth Bank (see secs. 15 and 25, Part VI, Divisions 1 and 2). And it is argued that the Commonwealth Bank is but an agency or instrumentality of the Commonwealth and consequently that the High Court has original jurisdiction in any claim for compensation against the Bank because that would be a matter in which the Commonwealth was a party or the Bank was being sued as a party on behalf of the Commonwealth. Consequently, it is said that the Banking Act 1947 is invalid in attempting to withdraw that jurisdiction and providing that claims for compensation shall be determined and ascertained by the Federal Court of Claims and in no other manner.

In 1925 in an unreported case the question was whether the War Service Homes Commissioner, a body corporate established under the War Service Homes Act, was a party suing on behalf of the Commonwealth. I held that he was, because he was but an agency or instrumentality of the Commonwealth (*War Service Homes Commissioner v. Kirkpatrick & Others*—unreported). The fact that the Commissioner was a body corporate did not prevent him being an agent or instrumentality of the Commonwealth (*Repatriation Commissioner v. Kirkland* 32 C.L.R. 1, at p. 15). And the fact that the Commonwealth was not a party on record did not exclude the original jurisdiction conferred upon this Court by Sec. 75 (iii) in matters in which a person suing or being sued on behalf of the Commonwealth was a party. I adhere to the view I took in *Kirkpatrick's Case.*

Considerable light is thrown, as Higgins J. said in *The King v. Murray and Cormie ; Ex parte The Commonwealth* 22 C.L.R. 437, at p. 467, upon Sec. 75 (iii) by the Constitution of the United States and decisions given in relation to its provisions. Under that Constitution judicial power extends, *inter alia*, to " controversies to which the United States shall be a party." The United States may not be sued in the courts of that country without its consent. That position is met in Australia by the provisions of the Judiciary Act 1903-1946 (*Baume v. The Commonwealth* 4 C.L.R. 97 ; *Pitcher v. Federal Capital Commission* 41 C.L.R. 385). But in cases in which the United States can be sued " the question whether the United States is in legal effect a party to the controversy is not always determined by the fact that it is not named as a party on record, but by the effect of the judgment or decree which can be rendered " [see *Constitution of the United States (Annotated)* published pursuant to resolutions of the Senate and House of Representatives at p. 478].

It was, no doubt, because of certain American decisions, said Higgins J., that in Sec. 75 (iii) of the Australian Constitution the words were added " or a person suing or being sued on behalf of the Commonwealth " [*The King v. Murray and Cormie ; Ex parte The Commonwealth* (supra), at p. 468].

And, in my opinion, if the Commonwealth Bank be an agency or instrumentality of the Commonwealth in relation to its functions and in particular in relation to the acquisitions the subject of the legislative provisions in the Banking Act 1947, then the original jurisdiction of this Court in respect of claims for compensation is established and cannot be taken away as the Banking Act 1947 enacts. That it is such an agency or instrumentality is manifest, I think, from the Commonwealth Bank Act 1945 (No. 13 of 1945), the Banking Act 1945 (No. 14 of 1945) and the Banking Act. 1947.

In 1911 " a Commonwealth Bank, to be called the Commonwealth Bank of Australia," was established without corporators (Act No. 18 of 1911). Its existence is continued by the Commonwealth Bank Act 1945, Sec. 7. It is managed by a Governor appointed by the Commonwealth government and its monetary and banking policy is subject to political and governmental direction.

The capital of the bank was twenty million pounds provided in part out of moneys provided by the Commonwealth (See Act No. 15 of 1924, Sec. 5). But its capital is now governed by the Commonwealth Bank Act 1945. That of the General Banking Division is the aggregate of sums provided from the capital and reserve fund of the Commonwealth Bank and other sums transferred from the General Banking reserve fund and from profits transferred from the General Banking Division to capital account. One half of those net profits is payable to the National Debt Sinking Fund. The property, income and operation of the Bank are not liable and shall be deemed never to have been liable to income tax or land tax under any law of the Commonwealth or to taxation under any law of a State to which the Commonwealth is not subject (Commonwealth Bank Act 1945, Sec. 183). Many other functions are also exercised by the Commonwealth Bank under that Act with respect to rural credits, mortgages and industrial finance.

But I shall not go into all the details of the powers and functions of the Bank which may be found at large in the Acts, already mentioned, for what I have said is enough, I think, to establish that the Commonwealth Bank is an agency or instrumentality of the Commonwealth.

The provision in the Banking Act 1947 giving the Federal Court of Claims exclusive jurisdiction in respect of claims for compensation cannot, therefore,

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operate to oust the jurisdiction of the High Court under Sec. 75 (iii) of the Constitution. The consequence is that the whole of the provisions of the Act for the assessment of compensation in respect of the acquisition of shares and assets are invalid for the presumption of severability is overcome by the nature of the provision itself.

Compensation is to be assessed by the Federal Court of Claims and not in any other manner. The Court cannot re-write that provision and give it an effect entirely different, namely, that compensation may be assessed by the High Court. And the invalidity of the provision for the assessment of compensation necessarily, in my opinion, brings down in its train the provisions for the acquisition of shares in Australian banks and the taking over of the business of the banking corporations mentioned in the Act for there is then no provision under which the compensation provided for in secs. 15 and 25 can be assessed. The Act is explicit that the compensation shall be assessed by the Federal Court of Claims and in no other manner.

PROHIBITION OF THE CARRYING ON OF BANKING BUSINESS

The provisions of Part VII of the Banking Act 1947 also require consideration.

Those provisions prohibit the carrying on of banking business in Australia by any of the Australian, English and foreign banks mentioned in the Schedule.

The question is whether those provisions contravene the constitutional requirement of Sec. 92 that trade, commerce and intercourse among the States shall be absolutely free.

It appears to me that the provisions are so connected and linked up with the provisions for the acquisition of shares of the businesses of private banks that they necessarily fall with those provisions. The presumption of severability raised by Sec. 6 of the Act is overcome, to my mind, by considerations and consequences that make evident their inseparability. They are in their nature ancillary to the acquisition of the shares and businesses of the banks dealt with in earlier sections of the Act. And putting into operation the provisions of Part VII of the Act would reduce to chaos the trade and commerce of Australia unless the businesses of the banks were compulsorily acquired or the banks under pressure agreed to make them over to the Commonwealth.

A Court is not required to attribute such an intention to Parliament if another construction is open.

Let it be assumed, however, that the provisions of Part VII are severable from the other provisions of the Act. Then the Australian, English and foreign banks are prohibited from carrying on banking business in Australia except as required in Part VII. And those banks are required to carry on until the Treasurer gives notice requiring them to cease. The notice may be given to all or any one or more of the banks. Already, I have expressed the opinion that the business of banking as usually conducted is part of the trade and commerce of Australia and when conducted across State lines forms part of trade, commerce and intercourse among the States. The Banking Act 1947 prohibits all such business on the part of the banks, domestic, interstate, and foreign. And it is not possible to divide the business of banking into compartments ; it is one whole and nation-wide.

Yet the Banking Act 1947 prohibits the whole of that business irrespective of " such matters as defence ; . . . prevention of famine, disease and the like " reserved for consideration in *James v. Cowan* (supra) at p. 559. " The object of Sec. 92, is ",

as I said in the case of *Australian National Airways Ltd. v. The Commonwealth* (supra) at p. 72, " 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. That, I think, is inconsistent with the provisions of Sec. 92 of the Constitution, and with the reasons of their Lordships of the Judicial Committee in *James v. Cowan* (supra), *James v. The Commonwealth of Australia* (supra), and of this Court in *Peanut Board v. Rockhampton Harbour Board* (supra) and the *Australian National Airways Ltd. v. The Commonwealth* (supra).

Incidentally, the provision of Part VII of the Banking Act 1947 standing alone and severed from the other provisions of the Act would result in the banks and their shareholders being deprived of their property without any compensation whatever. That also tends to support the view I have that Part VII cannot be severed from the provisions of the Act relating to the acquisition of shares and the businesses of the banking companies.

Part VII of the Banking Act 1947 is invalid and, in my opinion, brings down in its train the connected or linked provisions relating to the acquisition of shares and the businesses of the banking companies.

PROTECTION OF STAFF.

The invalidity of the various provisions of the Banking Act of 1947, already mentioned, render the provisions of Part VIII of the Banking Act 1947 inoperative and it is unnecessary therefore, to further consider them.

GENERAL.

The provisions of Part IX, General, likewise become inoperative but Secs. 59-62 necessarily fall with the provisions of the Act which are invalid.

THE STATES.

All that remains for consideration is the contention of the States that the Banking Act of 1947 curtails in a substantial manner the exercise by them of their constitutional powers and functions and also contravenes the provisions of the Financial Agreement scheduled to the Financial Agreement Act 1944 (No. 46 of 1944) which obtain constitutional force under an amendment to the constitution now appearing in Sec. 105A of that instrument.

In my opinion, the contentions are untenable.

If the Parliament of the Commonwealth has power to enact the Banking Act of 1947 no constitutional power or function of a State is curtailed or impeded. The Sates can, through their own banks, provide their own financial facilities or resort to the general banking system otherwise established. The *Melbourne Corporation Case* (supra) is distinguishable because there the States were subjected to a particular direction.

The Financial Agreement Act contemplates the borrowings by the States from various institutions, including banks, and gives some flexibility in the working of that agreement. But that it imposes any constitutional restriction upon the Commonwealth to maintain financial institutions as they existed at the time of the agreement and so to keep them that the States should not be hindered or inconvenienced in their arrangements with financial institutions is a hopeless construction, I think, of the agreement and hopeless also, I think, as a business arrangement.

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Summarising my conclusions the following provisions of the Banking Act 1947 are invalid :—

Part IV, Division 2 except in so far as it provides for the acquisition of shares by agreement.

Part IV, Division 3 the Management of banks is wholly invalid.

Part IV, Division 4 Taking over of businesses of banks is invalid except so far as it provides for the acquisition of such businesses by agreement.

Part VI, Assessment of compensation is wholly invalid.

Part VII is wholly invalid.

Part VIII, Protection of rights of persons employed by private banks is inoperative.

Part IX is inoperative except in so far as the provisions thereof can be applied to the acquisition of shares or businesses by agreement and in any case Secs. 59, 60 and 62 are invalid.

Declarations should be made accordingly and ancillary relief granted by way of injunction.

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The purpose of all of these five actions is to obtain a decision that the Banking Act 1947 or its more material provisions are unconstitutional and void. " Unconstitutional " means beyond the powers which the Constitution affirmatively grants to the Commonwealth Parliament or contrary to the restrictions or limitations which the Constitution imposes upon them.

The Banking Act 1947 is an enactment of sixty-two sections conferring a variety of powers, sometimes upon the Treasurer, sometimes upon the Governor of the Commonwealth Bank, and sometimes upon the Commonwealth Bank itself, and containing a number of auxiliary and ancillary provisions and provisions dealing with matters consequential upon the exercise of one or other or all of the powers. The Act is evidently the product of much ingenuity and resource upon the part of those who drew it. The result is a measure of anything but a simple description, one that seems rather to exploit the possible uses of Federal power than to try to exclude any constitutional questions except such as arise necessarily from the character of the banking power or from the presence of sec. 92 in the Constitution and are therefore inseparable from any pursuit of the end in view.

It is usual in dealing with the constitutional validity of a statute to begin with some account of the manner in which it is constructed and what it provides, in order to show its relation to legislative power and what are the constitutional questions to which its nature and characteristics give rise. But to do this adequately with respect to the Banking Act 1947 would mean a prolonged examina-

tion, not simply of its general plan, but of the nature and specific features of a number of powers and of their interaction, both necessary and possible, and, what is worse, of the combinations in which they might conceivably be called into use. I shall therefore do no more than state at this point the chief objects pursued by the main parts of the Act and, when I come to deal with particular questions of validity turning upon the character of specific provisions, I shall then describe them so far as may seem necessary. Otherwise I shall assume that the text of the statute when studied has, or will have, told its own somewhat intricate story. The principal objects to which the provisions of the Act are addressed may be indicated briefly. In the first place, its application is confined to a list of what it calls " private banks," an expression meaning the corporations or companies carrying on banking. The list comprises all the institutions carrying on business in Australia which are commonly called trading banks. These private banks, as the Act calls them, are divided into those incorporated in Australia, those incorporated in the United Kingdom and those incorporated elsewhere. The Commonwealth Bank is authorised to purchase by agreement shares in a bank incorporated in Australia or in the United Kingdom. The Treasurer must approve. Shares in an Australian bank so purchased are, by force of the Act and in spite of anything the articles of association may say, vested in the Commonwealth Bank, which thereupon becomes a member of the company. This is the first operative provision (secs. 12 : 14 : 10). Next, the Treasurer is enabled to publish a notice in respect of any bank incorporated in Australia that on a named date the shares situated in Australia shall vest in the Commonwealth Bank. The consequences are twofold. On the expiry of the notice shares then on the Australian register, or afterwards coming upon it, vest in the Commonwealth Bank which, as before, becomes a member of the company, notwithstanding the articles of association. At the same time the directors are removed and nominees of the Governor of the Commonwealth Bank, approved by the Treasurer, take the place of the directors and assume all the powers of the company (secs. 13 : 14 : 10 : 17–19). In the third place, provision is made for the purchase by the Commonwealth Bank by agreement or, in default of agreement, compulsorily, of the business in Australia of any private bank. The acquisition is the consequence of a notice by the Treasurer, upon whose discretion the exercise of the power depends. The acquisition of the business in Australia includes assets and liabilities which have or afterwards obtain a situation in Australia. The transfer of non-Australian assets may be required. A private bank is prohibited from carrying on banking business in Australia when its business is thus acquired [secs. 22 : 24 : 46 (1)–(3)]. Fourthly, the Treasurer is armed with a discretionary power to forbid a private bank from carrying on banking business, a power that is independent of any acquisition of assets or shares. Fifthly, a provision is made for compensation for the acquisition of shares or assets (secs. 15 : 25 : 37–41 : 42–45). A Court of Claims is set up with exclusive jurisdiction over claims for compensation [secs. 26–36 : 40 (2) and (5) : 42]. Seventhly, there are elaborate provisions respecting the staff of banks whose business or shares are acquired, the general purport of which is to continue the officers in the employment of the Commonwealth Bank without prejudicing the rights accruing to them in their former service (secs. 47—55).

A governing consideration is an examination of the validity of the provisions by which the purposes indicated by the foregoing summary are worked out must be that the powers are all conferred in terms which insure that each of them is exercisable independently of every other power and that each of them is exercisable against any one bank to the exclusion of other banks. At the same time, each

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power may be exercised simultaneously against all the Australian banks and, except for the acquisition of shares and concomitant replacement of directors, against all the English banks. Again, the powers of prohibiting the carrying on of banking business, of acquiring shares and displacing directors and of taking over the business may, as I think, be exercised cumulatively in relation to a private bank or one or more of these powers may be exercised and not the others. Further, the Act does not concern itself with any question of time. It contains nothing which would make it impossible to put all the powers into execution against all the banks at once or to defer doing so indefinitely or to allow any interval to elapse between dealing with different banks or using different powers against one bank. It will be seen therefore that for a court that must consider the powers which the Act describes and not any intention as to their use that may be entertained on the part of the Executive it is not enough that a power conferred by the Act, exercisable by itself, would find support in the Constitution. Its validity must also be examined on the footing that it is exercised in combination with others. And *e converso* it would not be enough if the conclusion were that, by a simultaneous use of certain of the powers given by the Act, a government monopoly of banking might be set up and an orderly transition from the present system accomplished, and that such a thing might be within power. It would still be necessary to consider the validity of the provisions on the footing that the powers were exercised separately and banks were dealt with piecemeal.

The Act cannot be supported simply on the footing that it is one to accomplish the immediate setting up of a governmental monopoly in banking and otherwise to do no more than to provide for matters incidental to that purpose, that is to say, to provide the means by which an object of such a character might be effected and the dislocation and disturbance that might otherwise attend the change avoided. For in point of law the provisions of the Act, if valid, would make other courses possible and authorise the pursuit of other ends.

Of the foregoing considerations the last is more material to the justification of the provisions of the Act under sec. 51 (xiii) of the Constitution ; but, for my part, it is not upon that paragraph that my decision depends. Speaking generally, however, they are considerations which must in different ways affect the question of the constitutionality of this or that provision of the Act.

The attack upon the validity of the Act is supported by contentions which are of two descriptions. Some of them are so fundamental, that if sound, they would annihilate the Act independently of its detailed structure. Others depend upon the manner in which the Act is constructed, and some of these involve a question of the operation of sec. 6, which declares an intention that the provisions of the Act shall be separable. I have formed the conclusion, for various reasons, the greater number of which may be thought to be of the second description, that certain cardinal provisions of the Act cannot be upheld as valid, namely sec. 13 (3) and (4), secs. 17-19, sec. 24, secs. 39 and 40, secs. 42-44, and sec. 46 (4) - (8). The source of their invalidity lies in sec. 51 (xxxi) or sec. 92 of the Constitution. I shall set out with some fullness the reasoning by which I have been led to adopt this conclusion, and I shall explain the consequences upon some other provisions. The result of my opinion is the failure of the more essential parts of the Act, as distinguished from incidental or subsidiary provisions. In these circumstances any expression of my opinion on the many contentions raised which do not enter into the grounds of the conclusion I have just stated can form no part of my ratio decidendi. I shall therefore not embark upon any full examination of these contentions ; but I think that, before

taking up the matters which govern my ultimate decision, I should say something about certain of the more basal grounds upon which the plaintiffs impeached the Act and why I have not accepted them.

Although sec. 51 (xx) of the Constitution was relied upon by the Commonwealth as an alternative source of power in itself sufficient to sustain much of the Act, it is evident that the legislation primarily rests upon paragraph (xiii) of sec. 51, combined, of course, with paragraph (xxxi) to sustain the expropriation of shares or assets, and with secs. 71 : 77 (1) : 78 and 79 to sustain the erection of a Court of Claims. The sufficiency of sec. 51 (xiii) for this purpose is denied, and if the denial were well founded, the Act could only be supported by the very widest interpretation of paragraph (xx). The considerations advanced for a limited construction of paragraph (xiii) are of two sorts. There are general considerations found in the nature of the subject matter, banking, and in the place it takes in the social and commercial organisation of the community. Then there are particular considerations arising from the context, that is to say from what the paragraph is expressed to cover besides the form of the exception, and the terms employed. Banking describes a well understood activity which in one form or another has been found in modern times to be indispensable to the needs of any highly organized western community. It is not a business or operation that calls for suppression or restriction. Support, guidance, regulation, and superintendence might be necessary. But it would be contrary to common sense to suppose that banking would be the subject of total prohibition. Then, beginning thus, the argument goes on to maintain that banking depends on a consensual relation between banker and customer. That is its essence, so it was contended. Such were the general considerations adduced. Upon the terms of the paragraph itself a number of points was made. First the word is " banking " not " banks "—the activity, not the bodies carrying it on—a word, it was said, descriptive of a continuing activity to be governed, not stopped. " State banking " too suggests continuity ; " extending " necessarily implies a continuing subject, proper for recurrent regulation. A second point was that the very idea of excepting " State banking " implied an assumption that it would exist as part of a system of banks. A third point was that the addition of " the incorporation of banks " and the use of the word " also " showed clearly that the word " banking " does not describe a legislative subject-matter extending to the incorporation of the banks that carry on the activity. Accordingly " banking " is not used as the name of a wide field of legislation extending from the establishment of the bodies to act as bankers to the suppression of all but government banking. Rather it refers to the exercise of a trade or business to be regulated. Then reliance was placed upon the addition to the power of the subject of the " issue of paper money," governed likewise by the word " also." The deduction drawn from this was that banking was conceived as depending on the relation of banker and customer and therefore as not necessarily extending to the issue of bank notes.

From all this the conclusion was drawn that the legislative power over banking is, so to speak, to govern the thing " *salvâ rei substantiâ*," and does not authorize the suppression of banking, either totally or with the exception of government banking. Another conclusion drawn was that banking depends on a consensual relation and, further, that the transactions are between subject and subject as distinguished from government and subject. I shall not go into the applications which were made of these propositions in order to show that the provisions of the Act relating to the acquisition of shares, the replacement of directors, the acquisition of assets, the taking over of liabilities, and the prohibition of the carrying on of banking business fell outside the power. It will suffice to say that, according to the

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contention, nothing but a power to suppress banking completely would authorise the bestowal upon the Treasurer of an unlimited and possibly arbitrary discretion to close any or all trading banks ; that the compulsory transfer to the Commonwealth Bank of liabilities to customers and of their accounts is inconsistent with the consensual character ascribed to the relation of banker and customer and so is the provision as to trading banks carrying on business pending acquisition.

It must be acknowledged that the cumulative weight is considerable of the matters upon which reliance is placed as evidence that the banking power is not a wide one. I do not know that the weight is diminished by the history of the paragraph, which seems to have been taken, save for a reference to State banking, from sec. 91 (15) of the British North America Act, 1867. It may be suspected that not much consideration was given to the material expressions borrowed. The form of the Canadian clause was doubtless in part the result of the experience of the neighbouring Union. Under the American Constitution the power to incorporate banks had been founded upon implication. The issue of paper money was there a contemporaneous question, one which was agitated for some years after 1867. It well may be that the framers of the Australian Constitution instinctively assumed that banking would not form a subject of prohibition, that it would be carried on by trading banks and that the relation of banker and customer would remain consensual. The assumption perhaps accounts for the form and content of paragraph (xiii). But the assumptions made in framing a power and the restrictive intentions which it expresses or embodies are two very different things.

To my mind the argument is answered by the principles of constitutional interpretation which this Court adopted early in its history and from which, I believe, it has never intentionally departed.

They are well expressed in a passage from the judgment of O'Connor, J., in the *Jumbunna Case*, 6 C.L.R. 309, at pp. 367-8, which I shall quote :—

> ". . . where it becomes a question of construing words used in conferring a power of that kind on the Commonwealth Parliament, it must always be remembered that we are interpreting a Constitution broad and general in its terms, intended to apply to the varying conditions which the development of our community must involve.
>
> For that reason, where the question is whether the Constitution has used an expression in the wider or in the narrower sense, the Court should, in my opinion, always lean to the broader interpretation unless there is something in the context or in the rest of the Constitution to indicate that the narrower interpretation will best carry out its object and purpose."

The foundation of these principles is expressed by Higgins, J., in *Attorney-General of N.S.W. v. Brewery Employees' Union of N.S.W.*, 6 C.L.R. 469, at pp. 611-12, where he says :—

> ". . . although we are to interpret the words of the Constitution on the same principles of interpretation as we apply to any ordinary law, these very principles compel us to take into account the nature and scope of the Act that we are interpreting—to remember that it is a Constitution, a mechanism under which laws are to be made, and not a mere Act which declares what the law is to be."

His Honour proceeds to quote from Story, *Commentaries* (2nd ed.), sec. 455 :—

> "While then we may well resort to the meaning of single words to assist our inquiries we should never forget that it is an instrument of Government that we are to construe."

The purpose of the enumeration of powers in sec. 51 is not to define or delimit the description of law that the Parliament may make upon any of the subjects assigned to it. Speaking generally, the legislative power so given is plenary in its quality. The purpose of the enumeration is to name a subject for the purpose of assigning it to that power. The names or descriptions employed are usually of the briefest kind. It is true that certain powers do involve a description amounting almost to a formal definition: examples are paragraphs (iii): (xxiv) and (xxv): (xxxv): (xxxvii): (xxxviii) and (xxxix). But more often they are the most general names of general topics.

To borrow the words of Gray, J., delivering the opinion of the Supreme Court in *Juilliard v. Greenman*, (1884) 110 U.S. 421, at p. 439 : 28 L. Ed. 204, at p. 211 :—

> ". . . The Constitution . . . by apt words of designation or general description marks the outlines of the powers granted to the national legislature; but it does not undertake with the precision and detail of a code of laws to enumerate the subdivisions of these powers or to specify all the means by which they may be carried into execution."

The power with respect to banking seems to me a plain example of the designation of a broad subject without any indication of the means by which it is to be dealt with or of the existence of limits upon the description of laws to be made with respect thereto. To say that it is not a question of what limits there may be upon the description of legislation but of the definition of the subject to which they may be addressed, and that continuance is an attribute of the subject, is not, I think, a satisfactory answer. For the question is whether there should be extracted from the word " banking " and its content an intention that, among other things, it should continue, that it should remain consensual, or that it should be a matter between subject and subject. Such an intention narrows the definition of the subject in a way which reduces the area, not of relevance, but rather of legislative discretion or policy. Of course " banking " describes an activity which is carried on and in that sense continues. But no one would feel that it was anything but an ordinary use of the word to say that a statute declaring that banking should no longer be carried on was a law about banking. It is as easy to explain the addition of the words " also . . . the incorporation of banks and the issue of paper money " as made to remove any doubt and to insure that those subjects were included as to infer an actual intention that " banking " should have a restrictive or narrow construction.

For the reasons I have indicated, I am unable to accept the view that the word " banking " should have ascribed to it anything but the wide meaning and flexible application of a general expression designating, as a subject of legislative power, a matter forming part of the commercial, economic, and social organization of the community. I see no sufficient reason for importing into it any of the three limitations suggested, viz. (1) confining the power to laws for the governance of a continuing activity, to something that does not go beyond regulation, (2) the limitation of the conception of banking to transactions entirely consensual, and (3) to transactions between subject and subject.

While I reject this view, it does not follow that I am prepared to say that all that the Banking Act 1947 contains can be supported under the legislative power with respect to banking conferred by paragraph (xiii) of sec. 51, that is, of course, aided as to acquisition by paragraph (xxxi) and as to the Court of Claims by Chapter III of the Constitution. To give an example, there are peculiar difficulties with respect to the acquisition of shares, if sec. 13 (2), (3) and (4) and sec. 14 (1) are severed from the general plan and considered on their own basis. Again, with respect to more than one provision arguments were advanced that depend upon the supposed

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possibility of its applying to distinct businesses or transactions outside banking or to effect purposes said to be irrelevant to the banking power upon any construction that might be placed upon it. But these contentions I find it unnecessary to examine. Indeed, in the course of the elaborate argument, which covered a wide field and dealt piecemeal with the whole Act, very many points were made and contentions advanced that I am relieved from even mentioning by the conclusion I have reached.

While I reject the limitations it was sought to place upon paragraph (xiii), I shall not attempt to state affirmatively what is the extent of the power it confers. To give an inclusive and exclusive definition of such a conception as banking is almost impossible. Dr. Walter Leaf begins his little book on the subject by saying that it is quite impossible ; that the theory and practice of banking have varied from age to age and still vary from country to country. He does, however, bring himself to give a definition of English banking and defines a bank in terms of its deposit business, saying that a bank is a person or corporation which holds itself out to receive from the public deposits payable on demand by cheque. It will be noticed that here the emphasis is not upon the economic function fulfilled, but upon the description of business done, or, if it is preferred, of the service performed. Whatever may be the indispensable characteristics of banking, it seems probable that, for the purpose of paragraph (xiii), they should be sought rather in the relations between banks and those who use them than in a more abstract consideration of the true economic nature of the contribution made by banking to the monetary system and public finance of a country by banks. It is, however, enough for me to say that I do not adopt the reading of paragraph (xiii) contended for, and that I find no ground for holding that if the Act must rest upon that power, and upon paragraph (xxxi) in its application to paragraph (xiii), it would fail in all its substantial provisions because of the insufficiency of paragraph (xiii) to support it.

I turn to another contention which, if valid, would annihilate all the substantial parts of the Act. It is that the statute is invalid because its operation will produce an undue interference with the administration of State Government. This attack was supported by the States who are plaintiffs : South Australia, Western Australia, and Victoria. In an able argument counsel for Victoria took as an example the constitutional and statutory provisions of that State governing the course of financial administration. A consolidated public revenue and appropriation therefrom by law are required by the Constitution. The Audit Act provides for the payment of moneys forming part of the public revenue into banking accounts by all officers receiving such moneys. Under a contract between Victoria and the trading banks they provide banking facilities for the State to keep its public accounts and they allow interest on balances. The public account is fed by receivers of revenue and collectors of imposts and their receipts amount to £55m. per annum. The accounts of receivers number some 300 and of collectors some 400. Further, to enable Victorian State servants to carry on particular departments or operations for which they are responsible, 700 advance accounts exist. These figures were given for the purpose of emphasising the importance of the part played by the private banks in the State's financial administration. Counsel maintained that the operation of the Banking Act 1947 was calculated to defeat the course of administration pursued by the States with respect to the receipt and disbursement of money and to close to the States all banking facilities except such as might be provided by the Commonwealth Bank. This, it was said, amounted to an undue interference with or substantial curtailment of the performance by a State of its functions of government. Such an interference or curtailment, counsel contended, was invalid,

even although it was attempted by a law which in point of subject matter might otherwise be connected with Federal power and even although the law did not discriminate against the States. It constrains the States to submit their funds to a Commonwealth agency, The Commonwealth Bank. Sec. 11 (a) was treated as illusory and no safeguard. A specific point was made of the operation of sec. 24 (5) and of sec. 46 (4) respectively. One transfers the States' credits at the trading banks to the Commonwealth Bank without the States' consent; the other would disable the State from operating by cheques upon the States' funds lying at the trading bank. It was said that the Banking Act 1947 was as much an attempt to control the States in reference to the use of banks in the administration of public moneys and public finance as was sec. 48 of the Banking Act 1945, held void in *Melbourne Corporation v. the Commonwealth*, (1947) 74 C.L.R. 31.

No doubt, from the point of view of the States, no distinction can be seen between the effect which sec. 48 of the earlier Act was calculated to produce upon the performance of State functions and that which would result from the exercise of the Treasurer's powers under the Banking Act 1947. In some ways, indeed, the position of the States might seem worse under the later Act. For it might be possible to set up and use State banks as part of the banking system that now exists in a way which might not be practicable if there were no trading banks. But a question whether the Commonwealth has gone beyond power by interfering with State functions cannot be determined by reference only to the consequences upon the States which federal legislation in fact produces. Enactments of quite different descriptions may result in the same embarrassments to the States.

Sec. 48 of the Act of 1945 dealt specifically with the use by the States of the existing banking system. The Act of 1947 contains powers under which the existing banking system may be terminated and replaced by a government system. To forbid trading banks to bank for the States and to abolish trading banks are two different things, and the validity of a law for the one purpose must depend on different considerations from those governing the validity of a law for the other purpose. It is only by confining attention to the similarity of the consequences to the States that it may seem that the test of validity ought to be the same.

I do not propose to discuss again the grounds upon which we based the decision that sec. 48 of the 1945 Act is invalid. They are stated in the report of the *Melbourne Corporation v. The Commonwealth*, 74 C.L.R. 31, and further discussion will make them no clearer. Indeed, I should have thought that the root principle was made clear enough in the passages in *West's Case*, (1937) 56 C.L.R. 657, at pp. 681-3, 687, 698-9, directing attention to it and that for the rest it was but a question of the specific application of the principle. The reason why I am unable to accept the argument advanced for the States under this head appears from a passage, part of which I shall repeat, from my reasons in the *Melbourne Corporation case*, 74 C.L.R. 31, at p. 84 :—

> "At bottom the principle upon which the States become subject to Commonwealth laws is that when a State avails itself of any part of the established organisation of the Australian community it must take it as it finds it. Except in so far as under its legislative power it may be able to alter the legal system, a State must accept the general legal system as it is established. If there be a monopoly in banking lawfully established by the Commonwealth, the State must put up with it.
>
> But it is the contrary of this principle to attempt to isolate the State from the general system, deny it the choice of the machinery the system provides, and so place it under a particular disability."

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It is necessary for the purpose of the argument of the States to assume that the validity of the main provisions of the Act could be made out were it not for the effect it would produce upon the States. For otherwise there would be no point in it. That means, however, that, but for the position of the States, the question how and by what agencies banking may be carried on would be within the province of the Commonwealth Parliament. Once that question is settled for the whole community, the banking system which results is that which must serve the banking needs of the entire country.

It is open to the States, at all events in contemplation of law, under the exception of State banking, to provide for their own needs. But even if that were not so, the States would be bound to take the banking system as any general law, made in the exercise of federal power, left it. Just as when the federal Government desires to use or take advantage of anything the nature or character of which is determined by an exercise of the exclusive power of the State, it must take it as it finds it, so the States, when they avail themselves of services or facilities regulated or determined by federal law, must accept it as part of the system enjoyed by the whole community. Such things are a consequence of the distribution of powers and stand apart altogether from some exercise of legislative power which singles out the States or which operates specially to impede them in their functions. Sec. 48 of the Act of 1945 discriminated against States and in that way singled out the States in order to curtail their freedom in using the general banking system. No doubt without discrimination laws applying to States may operate against them in such a way that it must be beyond federal power to enact them. That is perhaps shown by the discussion in *New York v. U.S.* (1946) 326 U.S. 572, 90 L. Ed. 326. But it is a question which lies outside such a case as the present where the law relates to the form to be taken by part of the established organization of the community affecting all alike. The variety of ways in which, as the Act is constructed, the powers might be exercised make a reservation necessary. Conceivably it might be possible to employ some of the powers, sec. 46 (4) - (8) for example, for the purpose of requiring a bank, which upon compliance would be left untouched, to cease to transact State Government business. If such a use of them were made the principle of the Melbourne Corporation case would be encountered. But such an hypothesis, arising as it does only upon the form of the powers, does not go to the validity of the Act generally.

For the reasons I have stated, I think the attack upon the substance of the enactment as an invasion of State functions fails.

Somewhat analogous considerations appear to me to affect another independent ground taken for impugning the Act, a ground to which I next turn. It is based upon the Financial Agreement of 1927 (reprinted in consolidated form in Commonwealth Statutes 1944, p. 169). Sec. 105A of the Constitution gives the Financial Agreement paramountcy. By it the States submitted to the control of the Loan Council with respect to public borrowing. But the practice of borrowing upon overdraft for temporary purposes had been followed and had been found necessary in the ordinary course of the administration of government finances. By clause 5 (9) (a clause with which clause 6 (7) corresponds in the case of the Commonwealth) it is provided that a State may, amongst other things, borrow money for a temporary purpose by way of overdraft or fixed or other special deposit. This, it is contended, secures to the States a right as against the Commonwealth to borrow money on overdraft for temporary purposes and imports the existence of banks and a system of banking. Accordingly, it is said, the Commonwealth may not defeat the right by abolishing the system. Reliance is placed upon the judgments of Latham, C.J., and Williams,

J., in *Melbourne Corporation v. The Commonwealth*, 1947 74 C.L.R. 31 at pp. 62-63 and 101, as showing that the States obtained by means of the clause a constitutional right to go to a private banker for an overdraft without the consent of anyone. That being established, so counsel contend, it makes no difference whether the impairment or denial of the right takes the form of a prohibition upon a bank doing business for a State without the consent of the Commonwealth Treasurer, as under sec. 48 of the Banking Act 1945, or a prohibition upon a trading bank doing business at all, as under sec. 46 of the Banking Act 1947, or a total destruction of the private banks.

The argument depends upon the interpretation of the Financial Agreement and the effect to be ascribed to it. I think that the argument imports into the agreement more than was intended by the parties to it. The agreement doubtless assumes a banking system to which the States, and for that matter the Commonwealth, might resort to borrow by way of overdraft. But I do not think that it implies, much less expresses, anything as to the form the system is to take. If the clause confers upon the States any constitutional right, as against the Commonwealth, to borrow by way of overdraft, I should put it no higher than a right to seek an overdraft from whatever banking institutions are from time to time provided or permitted by law and are conducting banking business.

Two further grounds of attack were made which, if sound, while they would not affect sec. 46 (4) (8) unless held inseverable, would otherwise bring down all that matters of the Act. They both depend upon the requirement of sec. 51 (xxxi) that compulsory acquisition must be upon just terms. The first of them arises from the failure of the Banking Act 1947 to indicate in any way the source of the compensation moneys, which, it is said, must amount to £100m. at least if all the banks are to be compensated. The Financial Agreement makes the consent of the Loan Council necessary for it to be done by borrowing and an examination was made by counsel of other resources lawfully open with a view of showing that nothing but an expansion of the note issue or an equivalent expansion of credit would make payment of the compensation possible. This, it was argued, would mean a considerable depreciation of the money in which compensation was paid. The value of the assets would be estimated as at a time before the depreciation and the monetary expression of the compensation would at once be deprived of its value. I do not think that it is an answer to this argument to fall back upon the nominalistic principle, according to which English law disregards all fluctuations in the " value " of money expressing or measuring an obligation. We are concerned with just terms of acquisition and if it were true that the terms of acquisition necessarily involved the valuation of assets in terms of money which would lose its value as a result of the very transaction involved in compensating the owners, I should have thought the constitutional requirement had not been fulfilled. It seems to me that the scope of the nominalistic principle of our law does not go beyond questions concerning the discharge of obligations expressed in money. The money of account measuring an obligation, because it is the money denominated, is conclusively identified by the nominalistic principle with the money which at the time of payment suffices to discharge an obligation of the stated amount, or to ascertain it for the purpose of discharge, without any regard to changes in exchange value or purchasing power. Just terms do not mean that compensation must necessarily stand at one end as an obligation fixed in monetary expression so that all that need be inquired into is what money at the other end will discharge an obligation so expressed. That is to separate the steps by which just terms are afforded ; indeed, in strict logic it means that justice is satisfied by the assessment of an

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amount independently of the question whether the actual payment is commensurate with the deprivation suffered.

Nor do I think that it is correct to say that courts cannot inquire into such matters. There are few, if any, questions of fact that courts cannot undertake to inquire into. In fact, it may be said that under the maxim *res judicata pro veritate accipitur* courts have an advantage over other seekers after truth. For by their judgment they can reduce to legal certainty questions to which no other conclusive answer can be given. In the *Banco de Portugal v. Waterlow & Sons Ltd.*, [1932] A.C. 452, an example is to be found of a judicial inquiry into the effect of an increased issue of notes.

But to support the conclusion that a statute providing for compensation does not afford just terms because an assessment of compensation would necessarily be followed by a discharge of the compensation in depreciated money, it surely is not enough to suggest as a matter of argument that, because of the existing condition of statute law, no course is legally open but to increase the note issue, and then to appeal to common knowledge as to the effect upon the " value " of money. It would, I should imagine, be necessary completely to satisfy a court of the legal, factual and economic considerations which made it inevitable that the very transaction involved a substantial depreciation of the money in which, as at an anterior time, compensation was to be expressed, so substantial as to violate any conception of the justice of the terms. In my opinion no sufficient foundation has been established for the support of the argument.

The second ground upon which the statute was impeached for failure to provide just terms of acquisition as required by sec. 51 (xxxi) is that the Court of Claims is unable to award interest upon the compensation, or to give costs. Once an award of compensation has been made the judgment or order of the Court will carry interest calculated from the date when it is pronounced. But it is contended that, as the Act is drawn, the amount assessed as compensation cannot include or carry interest calculated from the date of acquisition upon the value of the assets acquired. Upon this footing it is claimed that, over a very long period, the Commonwealth Bank may be left in possession both of the business of a private bank and of the purchase money. For it need pay nothing on account of compensation before the amount is assessed. Thus the profits of the business would belong to the Commonwealth Bank, and yet, so it is said, no liability for interest in the meantime is imposed and none can be imposed by the Court of Claims. Thus, it is asserted, there is a failure to provide just terms and all the provisions for compulsory acquisition must fail. The jurisdiction of the Court of Claims is simply "to hear and determine claims for compensation" (sec. 33 [1]). When shares are acquired or businesses taken over, the right given is simply to compensation of fair compensation (secs. 15, 25, 40, 42, 44). In *Swift & Co. v. Board of Trade*, [1925] A.C. 520, the House of Lords made it clear that compensation and interest upon the value of the property acquired from the date of possession are two different things. A bare right to compensation does not imply interest in the meantime. Where the principles of equity apply to a compulsory acquisition, as they do when a notice to treat is given in respect of land and the acquiring authority enters into possession, these principles may give interest on unpaid " purchase money," that is compensation, even if unascertained. But that is because the relation of vendor and purchaser is established and specific performance might be decreed. A difference exists, however, between compensation for the loss of property and interest as compensation for the time occupied in assessing the loss. That is pointed out by Lord Cave, L.C., and by Lord Sumner, [1925] A.C., at pp. 533 and 548.

But under the Fifth Amendment of the Constitution of the United States, which provides that private property shall not be taken for public use without just compensation :

> "it has consistently been held that the Fifth Amendment's reference to " just compensation " entitles the property-owner to receive interest from the date of the taking to the date of payment as part of his just compensation." —*United States v. Thayer-West Point Hotel Co.*, (1947) 329 U.S. 585, at p. 588, 91 L. Ed. 521 at p. 525.

Nevertheless, in the United States the word " compensation " has no prima facie meaning that covers interest. The fact that " just compensation " includes interest in the eminent domain setting does not necessarily mean that the term must be given the same scope in other situations,

> ". . . in the absence of constitutional connotation just compensation is not a term of art so far as interest is concerned"—*ibid*, 329 U.S. at p. 589, 91 L. Ed. at p. 526.

The contention on the part of the plaintiffs is that in our sec. 51 (xxxi) " just terms," like " just compensation " in the United States Constitution, imposes a requirement that cannot be fulfilled unless interest is given upon compensation from the date when possession is taken by the acquiring authority until compensation is actually paid. But, at the same time, it is contended that in conformity with the view taken in the House of Lords and with the natural meaning of the word " compensation," the right to compensation given by the Banking Act 1947 and the jurisdiction conferred to determine claims for compensation does not authorize an allowance of interest. It was suggested for the Commonwealth that the dilemma thus constructed was not complete, because the acquisitions authorized by the Act would fall within the cognizance of a Court of Equity as transactions in respect of which relief by way of specific performance might be given. But the answer made to this suggestion seems to be correct, namely that first the Court of Claims has no equitable jurisdiction, secondly the instantaneous acquisition of property and immediate vesting of a right to compensation obtainable by prescribed steps leaves no room for the remedy of specific performance, and thirdly that the case would not be within the competence of a jurisdiction in equity. In this court the questions how far interest can be given as or upon " compensation " and what is the bearing of sec. 51 (xxxi) upon statutory provisions for " compensation " and " recompense " in that connection are matters that have been much discussed, and varying opinions have been adopted. It is enough to refer to the consideration of the subject in *The Commonwealth v. Huon Transport*, 70 C.L.R. 293 : 303-5 : 307-311 : 315 : 323-329 : 333-338 ; *Minister of State for the Navy v. Rae*, 70 C.L.R. 339 at p. 348-9 ; *Marine Board of Launceston v. Minister of State for the Navy*, 70 C.L.R. 518 ; and *Grace Bros. v. The Commonwealth*, 74 C.L.R. 269 : 281-3 : 286 : 293 : 296 : 300.

I shall not repeat the views I expressed in those cases. In the United States the answer that would be given to the argument advanced for the plaintiffs is that in the setting in which the word " compensation " occurs in the Banking Act 1947, it has a " constitutional connotation " : if, therefore, justice demands interest in the circumstances, the word covers it. There is much to be said for making the same answer here under sec. 51 (xxxi). But on the whole, in view of the less flexible meaning of which, in English law, judging from the decision in *Swift's Case*, [1925] A.C. 520, the word seems capable, I prefer the answer which I suggested in the *Huon Transport Company's case*, 70 C.L.R. 293, at p. 326. The passage is as follows :—

> " Our Constitution, when it refers to " just terms," is placing a qualification on the legislative power it bestows to acquire property compulsorily. But it is,

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I think, difficult to say that it makes it necessary for the legislature to give more than the full content of " compensation," as compensation is understood in English law, and we know from the House of Lords that a right to interest on the amount payable for the thing is not always or necessarily included. Section 51 (xxxi) has not the effect of transferring into our Constitution the Fifth Amendment, nor all the glosses placed upon it."

On either view, however, the argument fails.

The further point is made that the terms are unjust because the Court of Claims cannot award costs. I am not altogether satisfied that an award of costs is beyond the powers of the Court. But in any case I cannot think that such an omission would bring the statute into necessary conflict with sec. 51 (xxxi).

From these more general grounds of attack upon the Banking Act 1947 as a whole, or upon the substantive or operative parts of it, I shall now pass to the consideration in detail of some grave difficulties which three sets of provisions respectively raise. They are contained in (1) Part IV, Divisions 2 and 3; (2) Part VI, Divisions 1 and 2; and (3) Part VII. I shall deal in that order with the provisions in question.

In Divisions 2 and 3 of Part IV of the Banking Act 1947 elaborate provision is made enabling the Treasurer to set in motion machinery for vesting in the Commonwealth Bank the Australian shares of an Australian banking company, for displacing the directors in favour of nominees of the Commonwealth Bank, and for entrusting the latter with the entire conduct and management of the company, including the disposal of its business. From these provisions and from the possible uses in relation to them of sec. 22, sec. 46 (4) - (8) and secs. 43 and 44, a pattern of powers results which may fairly be described as intricate. It is aimed at enabling the Commonwealth Bank by means of nominees to assume control of the business of an Australian bank without necessarily invoking the power of compulsorily acquiring the business, which would mean an assessment of the compensation for the whole undertaking. The exercise of these powers would necessitate dealing directly with the shareholders as such, some, presumptively the greater number, by acquiring their shares and compensating them, others perhaps as contributories in an ultimate liquidation.

I have formed the opinion that the provisions are bad because they would enable the Treasurer and the Commonwealth Bank to defeat the constitutional requirement imposed by sec. 51 (xxxi) that the acquisition of property shall only be upon just terms. This conclusion, the grounds for which I shall now state, would, if it were not for sec. 6, affect with invalidity not only Division 3, but also the more important of the provisions of Division 2. For an examination of the provisions of the two divisions shows that they form an inter-connected plan in which the compulsory acquisition of shares is necessarily accompanied by the replacement of the directors with nominees. But sec. 6 must be applied, and out of its application some further questions arise with which I must afterwards deal. In stating why I think that these provisions amount to a law for the acquisition of the property comprised in the business of a bank against which the Treasurer may direct them, I shall begin by describing the effect of the provisions.

They relate only to an Australian private bank, an expression which by definition means one of the bodies corporate named in the First Schedule: sec. 5. A condition of the operation of the provisions upon such a banking company is that the Treasurer is of opinion that a majority of the shares is situated in Australia: sec. 13 (1) and sec. 5. In fact the very great majority of the shares of each of the

Australian private banks is at the present time upon the Australian share register and therefore situated in Australia, a proportion ranging from 75% in the case of the Bank of New South Wales to the whole in the case of the Bank of Adelaide, the Ballarat Banking Co. Ltd., and the Brisbane Permanent Building and Banking Co. Ltd. But one curious feature of the Banking Act 1947 is that it is so drawn that not only may any of the powers it is expressed to confer be exercised singly and moreover in relation to one bank alone, but they are of indefinite duration, so that the time when any one of them is called into operation may be indefinitely postponed. In point of law, therefore, whatever may be the intention of the Executive as to the time and manner of the exercise of the powers, the present state of facts cannot control any question of the operation and validity of the statute. It is not perhaps a matter of much importance because, although the opinion of the Treasurer that a majority of shares is situated in Australia is not examinable, it is hard to suppose that he would form such an opinion erroneously. Being satisfied of the fact, he may publish a notice in the Gazette vesting in the Commonwealth Bank all the Australian shares in the Australian private bank as from a specified date. Any date may be chosen, neither a minimum nor a maximum length of notice is prescribed. In any case the Treasurer may from time to time amend his notice by naming a later date : sec. 13 (1) and (2). When the date arrives all the Australian shares are, by force of the Act, to be vested in the Commonwealth Bank : sec. 13 (3). Further, the Commonwealth Bank is to become the shareholder for all purposes and is to be a member of the banking company, notwithstanding any provisions in that company's articles or charter : sec. 14 (1) and sec. 10. It has been pointed out that before the notice takes effect it may have ceased to be true that a majority of shares is situated in Australia and that nevertheless the notice would operate to vest such shares, if any, as continued to be situated here.

But, again, that does not seem to me to be of much importance. On the other hand, a provision is made for the possibility of shares that are situated out of Australia, when the notice takes effect, afterwards obtaining an Australian situation. Upon that happening the shares at once vest in the Commonwealth Bank. Upon the vesting of shares the Commonwealth Bank becomes the shareholder and a member of the company in respect of the shares, notwithstanding any provisions of the articles of association or charter : sec. 14 (1) and sec. 10. Compensation is, of course, to be paid for the shares that vest in the Commonwealth Bank : sec. 15 and secs. 37-40.

The directors and officers of a private bank are required under heavy penalty, to do and join in doing all acts or things necessary or convenient to do for or in relation to the acquisition under the Act of any shares in a private bank : sec. 60 (1) (b). This doubtless would cover the placing of the Commonwealth Bank on the share register. The provision overruling the articles in the foregoing respects would be not unimportant practically because all the private banks have articles restricting or qualifying the right of transfer, either by interposing the discretion of the directors or by limiting the number of shares that one member may hold or, in the case of the Bank of New South Wales, by confining membership to natural persons.

Another provision that would be necessary if the private bank in which the shares are acquired is to carry on business as a separate entity, is sec. 21, which purports to exclude the operation of so much of the State Company law as attaches consequences to the number of members falling below a specified figure, e.g., the liability of the continuing members after six months to the debts of the company and the liability of the company to winding up, which under Victorian law arises when the number of members falls below five. Upon the day the gazetted notice

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has fixed for the vesting of the shares the directors of the company go out of office, receiving compensation: sec. 17. Thereupon the Governor of the Commonwealth Bank, with the approval of the Treasurer, appoints directors in their place, including a Chairman: sec. 18. They hold office notwithstanding any lack of qualification or any disqualification: sec. 18 (2). But they are removable by the Governor of the Commonwealth Bank with the approval of the Treasurer: sec. 33 (4) of the Acts Interpretation Act 1901-1941. In the directors so appointed is placed full power to manage, direct, and control the business and affairs of the private banking company: sec. 19 (1). The exercise of any such power is to be in their sole discretion: it is not to be subject to any qualification, restriction, or condition provided by or under any law, charter, or other instrument relating to the exercise of the powers of the directors of the private banking company: sec. 19 (3). There is some dispute as to the extent of this exclusion, that is to say whether it excludes the principles or rules of law and equity which control directors in the exercise of their powers or only written enactments and provisions of the company's charter or articles. It is a point of small moment, I should think. For, in any case, a very full statutory discretion is given to the nominee directors in the exercise of statutory powers as wide as, and perhaps even wider than, the company's corporate powers. Short of dishonesty it is difficult to see on what ground they could be controlled. But perhaps the words "or other instrument" make it proper to understand the exclusion as operating only upon what may be called the *lex scripta* of the company and not upon the *lex non scripta*, though the distinction must in some respect be difficult to maintain. Theoretically it may remain necessary that they should remember the shareholders and the creditors in making their decisions, but practically they would be a body of administrators appointed by and removable by the Treasurer and the Governor of the Commonwealth Bank in combination and designated for a provisional task which, humanly speaking, they could hardly be expected to consider otherwise than as one to be executed in furtherance of governmental policy. The wide general power with which the nominee directors are invested is followed by a particular statement of three specific powers, viz. (a) to declare dividends; (b) to dispose of the business in Australia of the Australian private bank to the Commonwealth Bank; (c) to dispose of all or any other business of the Australian private bank. As the general power invests the nominee directors with what seems to be the full capacity of the banking company to which they are appointed, the particular powers probably add nothing; but apparently they are, as so often, mentioned specially to avoid any doubt. It will be noticed that a combination of the second and third of the powers would cover the disposal to the Commonwealth Bank of the entire business of the private banking company both within and beyond Australia. Further, if any of the Australian private banking companies should develop an additional and separate business falling outside the conception of banking, as it is suggested they might do in some events arising from the operation of the Act, then, unless the powers were read down artificially, they would cover that business. The nominee directors would, I think, be subject to sec. 22 so that, if a notice were given to the private banking company inviting it to make an agreement with the Commonwealth Bank for the taking over by the latter of the business of the former, the nominee directors might comply with it within the specified time or might, by failing so to agree, deprive the shareholders of the taxation benefits which under sec. 23 ensue from agreeing. An argument to the contrary was based on the apparent incongruity of sec. 22 (8) (c) and (d) and of sec. 22 (7) with the words of sec. 19 (1) (b) "the business in Australia." But exactly the same words occur in sec. 22 (1) and (5) to which sec. 22 (8) is epexegetical. Further, sub-para. (c) of sec. 19 (1) covers a provision under sec. 22 (7), even if the

general power is not enough. There seems to me to be no incompatibility between the direction in sec. 19 (2) requiring the approval of the Treasurer after a recommendation of the Governor of the Commonwealth Bank and that in sec. 22 (5) requiring the approval of the Treasurer. The latter is of general application and includes all banks, English as well as Australian, and is concerned with the purchaser's side. Any other view of the relation of sec. 19 (1) (b) and (c) would exclude secs. 23 and 49 *et seq.* from an agreement made thereunder. The nominee directors might also be encouraged to make an agreement by a notice under sec. 46 (4) to cease carrying on banking business. Further, under sec. 43 (1) the nominee directors might agree on the compensation for the taking over of the business or under sec. 44 (3) they might fail to require the Commonwealth Bank to refer the claim to the Court of Claims and conclude the private banking company by a course of inaction which, assuming the provision to be valid, causes the Commonwealth Bank's offer to be deemed to have been accepted.

From the foregoing account of the material provisions of Divisions 2 and 3 of Part IV and the relation thereto of secs. 22, 46 (4) and 43 (1) and 44 (3), it will be seen that a notice by the Treasurer under sec. 13 (1) operates to set in motion a process which expropriates the shares localised in Australia and at the same time displaces the authority over the affairs of the company, not only of the directors chosen by the shareholders but of the shareholders themselves. It places all the property and all the activities of the company under the supreme control of the nominees of the Treasurer and the Bank and leaves them in entire control indefinitely with complete powers of disposition and complete power to bind the company as to the recompense it will receive for its assets. The corporate entity of the company remains and in it the legal property in the assets continues to reside. Shareholders are entitled to dividends if the nominees see fit to declare any. In a winding up, if there be one, shareholders remain entitled to participate as contributories. But in all other respects the beneficial enjoyment and control of the undertaking has been placed in the hands of agents of the Commonwealth, or of the Commonwealth Bank if the distinction is insisted on and in this matter can be clearly maintained. The purpose of removing the directors appointed by the shareholders and replacing them with nominees of the Treasurer and of the Governor of the Bank is that agents of the Commonwealth may take command of the undertaking of the banking company and carry it on in the public, as opposed to private, interests pending decisions, in which they will play a part, concerning the acquisition of the assets by or their disposal to the Commonwealth Bank, the settling of the amount of compensation or the purchase price, and the transfer of the staff. The purposes of the whole operation authorised by Division 3 appear to me to be public. No doubt there is no interference with the ultimate right of the shareholders as contributories in a winding up to receive as a component of the distributable surplus so much profit as may have been earned under the regime of the nominees and as they have not chosen to distribute as dividend. But that and the legal conceptions involved in the continuance of the corporate existence of the banking company as the repository of the title to the undertaking is all that is left. In other words the undertaking is taken into the hands of agents of the Commonwealth so that it may be carried on, as it is conceived, in the public interest. The company and its shareholders are in a real sense, although not formally, stripped of the possession and control of the entire undertaking. The profits which may arise from it in the hands of the Commonwealth's agents are still to be accounted for and in some form they will be represented in what the shareholders receive. But the effective deprivation of the company and its shareholders of the reality of proprietorship is the same. It must be

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remembered that complete dispositive power accompanies the control of the assets which pass to the nominees. It is as if an intending purchaser were enabled to put a receiver in possession of an estate and also to take a power of sale in the receiver's name, remaining however accountable, until he pays the purchase money, for the rents and profits, which nevertheless he may apply towards the upkeep of the property and, subject thereto, accumulate.

Upon consideration I have reached the conclusion that this is but a circuitous device to acquire indirectly the substance of a proprietary interest without at once providing the just terms guaranteed by sec. 51 (xxxi) of the Constitution when that is done.

I take the *Minister of State v. Dalziel*, (1944) 68 C.L.R. 261, to mean that sec. 51 (xxxi) is not to be confined pedantically to the taking of title by the Commonwealth to some specific estate or interest in land recognised at law or in equity and to some specific form of property in a chattel or chose in action similarly recognised, but that it extends to innominate and anomalous interests and includes the assumption and indefinite continuance of exclusive possession and control for the purposes of the Commonwealth of any subject of property. Sec. 51 (xxxi) serves a double purpose. It provides the Commonwealth Parliament with a legislative power of acquiring property : at the same time as a condition upon the exercise of the power it provides the individual, or the State, affected with a protection against governmental interferences with his proprietary rights without just recompense. In both aspects consistency with the principles upon which constitutional provisions are interpreted and applied demands that the paragraph should be given as full and flexible an operation as will cover the objects it was designed to effect. Moreover, when a constitution undertakes to forbid or restrain some legislative course, there can be no prohibition to which it is more proper to apply the principle embodied in the maxim *quando aliquid prohibetur, prohibetur et omne per quod devenitur ad illud.* In requiring just terms sec. 51 (xxxi) fetters the legislative power by forbidding laws with respect to acquisition on any terms that are not just.

In my opinion the provisions of sec. 13 (1) and sec. 17 : 18 : 19 amount to an indirect means of doing what the paragraph does not allow.

It may be true that a probability amounting nearly to a certainty exists that if a notice under sec. 13 (1) takes effect at least a majority of shares in the banking company against which the provision is employed will vest in the Commonwealth Bank. But unless all the shares so vest, interests will remain outstanding in the other shareholders which are sufficient to exclude the answer that substantially the undertaking passes to the Bank as shareholder under sec. 13 (3) and therefore that what is done under secs. 17-19 does not matter. Nor is this point met, as it appears to me, by saying that once the nominee directors are established in office they may close the share registers abroad and place the shares upon the Australian register and so give the shares a situation in Australia, in consequence of which they will vest in the Commonwealth Bank pursuant to sec. 13 (4). The nominees are not compelled to do so and they may prefer not to do it. At all events until they do so there will be outstanding interests that make it useless for the Commonwealth to attempt to " lift the veil " which the distinct personality of the private bank as a corporation places between the shareholders and the ownership of the undertaking. The foregoing examination of secs. 13 (1) : 17 : 18 and 19 is concerned with their operation in placing agents of the Commonwealth or of the Commonwealth Bank in control of the undertaking and arming them with powers. From that point of view I think they amount to an attempt to defeat the operation of sec. 51 (xxxi). But the powers of disposition given by sec. 19 are themselves open to independent

attack under sec. 51 (xxxi). They are exercisable in favour of the Commonwealth Bank. When they are so exercised the Commonwealth Bank will acquire the Australian business of the private banking company in respect of which sec. 13 (1) has been invoked of perhaps the whole undertaking of that company. It will do so on terms agreed between the nominees whom the Governor of the Commonwealth Bank has appointed with the approval of the Treasurer. Further, if the Treasurer gives a notice under sec. 22 (1) and, whether before or after that notice, the nominees are appointed in consequence of a notice given under sec. 13 (1), the nominees may make an agreement under sec. 22 (5), or they may suffer an acquisition under sec. 24 (4) and agree on the compensation under sec. 43 (2), or fail to request a reference to the Court of Claims under sec. 44 (3) and so accept the offer of the Commonwealth Bank. I cannot see how the powers of the nominees under sec. 19 can be reduced by any process of interpretation based on sec. 6 so as to avoid all or any of these positions.

In my opinion each of them involves a conflict with sec. 51 (xxxi).

In each case the amount payable by the Commonwealth Bank for the assets of the private bank is left to the judgment of the nominees of the Commonwealth Bank. However high may be the level to which their legal duty may be raised, even if they be treated as full fiduciaries for the creditors and shareholders, it is all left to their judgment. In every case the acquisition by the Commonwealth Bank should, in my opinion, be regarded as on the side of the company an involuntary disposition. For it would, I think, be quite wrong for the purposes of sec. 51 (xxxi) to separate out the steps by which it is accomplished and exclude from consideration the compulsory superseding of the company's directors chosen by the shareholders and the substitution of nominees of the Treasurer and the Governor. The fact that these officers may be free to act according to their own discretion in disposing of the company's assets or in binding it to an amount of purchase money as compensation, appears to me to be nothing to the point. They are not agents appointed by the company. Any relation of agency on behalf of the company is compulsory and the work of statute. Their appointment would have been against the authentic will of the company. In substance they are agents of the Commonwealth armed by statute with power to bind the company. I think that the powers conferred by sec. 19 involve a conflict with sec. 51 (xxxi).

An argument was advanced to the effect that sec. 19 (1) (b) and (c) might be held bad and severed from the rest of the section and from Division 3. This contention must encounter the difficulty that the general words of sec. 19 necessarily enable the nominees to dispose of the assets of the private bank and the further difficulty that it is under them that the nominees would bind the private bank to an amount of compensation. No doubt sub-sec. (2) of sec. 19 provides a cogent argument against the doing under the general words of the very thing mentioned in paragraphs (b) and (c) of sub-sec. (1). But those paragraphs relate to disposing of the business in Australia and the business elsewhere as going concerns.

I cannot see how by any manipulation the general power in sec. 19 (1) can be so reduced as to include no power of disposing of any assets to the Commonwealth Bank or any other organ of the Commonwealth and no power of agreeing upon purchase money pursuant to sec. 22 or binding the private bank in respect of compensation under secs. 43 and 44.

Further, if sec. 19 were eliminated by some application of sec. 6, the nominees would still be directors and enjoy whatever powers the constating instruments of the particular company gave its directors. These, in the case of most of the Australian banks, are of the widest description.

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It appears to me to follow that sec. 18 must also be treated as bad and as it is quite impossible to treat the removal of the directors under sec. 17 as independent of their replacement by nominees under sec. 18, sec. 17 must fall also. The fate of sec. 20 is doubtless immaterial but obviously it cannot survive the invalidity of secs. 17-19.

A curious and difficult question then arises concerning the operation of sec. 6 in respect of sec. 13. It is a question which turns in some measure upon the source of the positive power which, independently of the limitation expressed by the requirement of just terms, would support Division 2 and 3.

So far I have discussed the validity of Division 3 upon the assumption that, but for a conflict with that requirement, it would or might amount to an exercise of the legislative power of the Commonwealth. Division 2 contains in sec. 13 an acquisition of property, namely shares, which of course must be supported under sec. 51 (xxxi) or not at all. But sec. 51 (xxxi) is itself dependent upon other legislative powers, in the sense that the acquisition upon just terms " with respect to which " it authorises the making of laws must be for a purpose " in respect of which " the Parliament has power to make laws. Now, if the provisions of sec. 13 and secs. 17-19 had not been in conflict with the requirement of just terms or any other similar general limitation or check upon legislative power and their validity had depended only upon their falling under some head of affirmative power, I think that I should have felt no great difficulty. For, if it were possible to take them together and consider them as forming an entire plan, coherent and connected, then I think that, having regard to the interpretation of sec. 51 (xiii) I have adopted, I would hold that together sec. 13 and secs. 17-19 were enacted for the purpose of that power and were therefore justified by sec. 51 (xiii) and (xxxi) in combination. The reason for such a conclusion is that the provisions appear to be directed to establish a control of a banking business or businesses by, in effect, government nominees and as a concomitant of that control to acquire the Australian shares in the bank affected. The same notice on its gazettal under sec. 13 (1) accomplishes at one blow a double purpose. It displaces the directors and thus removes all control by the agents of the shareholders, and for that matter all control by the shareholders themselves ; at the same time it vests the Australian shares in the Commonwealth Bank. The purpose of so vesting the shares cannot be to give control through the voting strength they confer. For under secs. 17-19 all control by the shareholders and their chosen directors ceases. The nominees take charge and shareholding ceases to carry with it any means of affecting the management of the business or the choice of those whose responsibility it is. A shareholder from then on has no more significant place than a debenture-holder, if a place as significant. The Australian Banks are, as the heading of Part 1 of the First Schedule indicates, all incorporated in Australia, some under the law of one State, some under the law of another. It is not clear to me why sec. 13 (1) was framed so as to require that the Treasurer should be satisfied that a majority of the shares are situated in Australia before he exercised the power it gives him. But I suppose it was felt that the acquisition of a majority of shares gave moral support for the steps prescribed by secs. 17-19. Perhaps also it facilitated the transition and led to less disturbance among investors. Constitutionally it does not seem to matter whether the Australian shares taken were a minority or whether no shares at all were taken. The reason could not have been in order that through a majority of shares control of the business of the company might be obtained. For in the first place a majority would not give control or even influence over the conduct of the business having regard to the articles or charter of most of the Australian Banks and, what is

decisive, control was given by secs. 17-19 and in a manner inconsistent with the possession of shares or membership continuing to have a bearing upon any such question. But the acquisition of the Australian shares in a bank to which secs. 17-19 is applied would be a natural corollary and would form a relevant part of the plan, the whole of which would form a purpose for which laws could be made under paragraph (xiii) of sec. 51, and so under paragraph (xxxi). What is material is that the basis of the plan is the control effected by secs. 17-19. That gives not only the foundation upon which the plan is based in point of purpose, but also that upon which it is justified as an exercise of affirmative constitutional power, by which I mean legislative power considered for the moment independently of just terms. Conclude, however, that secs. 17-19 are void as conflicting with just terms, as in my opinion they do. Then what becomes of the plan as an integral part of which sec. 13 derived its constitutional support ? Plainly it disappears. Sec. 13 stands as a mere acquisition of shares. It loses its place and its purpose as a concomitant of a change of control over the undertaking and must assume a new character. If it can be supported now as directed to an end within sec. 51 (xiii) and therefore one for which the legislative power of acquisition may be exercised, it must be in virtue of this new character. The relevance of a bare acquisition of shares to a power to make laws with respect to banking and for the acquisition of property for that purpose was sought in more than one possible relation. Influence upon policy : information as to policy : investment : these were some of them. I am not disposed to deny that in some circumstances these purposes may suffice to bring an acquisition of bank shares under this power. But in all cases where it is sought to connect with a legislative power a measure which lies at the circumference of the subject or can at best be only incidental to it, the end or purpose of the provision, if discernible, will give the key. Here it is only by shutting out Division 3 from view that it could be supposed that any of the suggested purposes was contemplated by Division 2. In its full setting to ascribe to sec. 13 the purpose of providing the Commonwealth Bank with a suitable investment for its funds would be absurd. No less absurd would it be to attribute a purpose of placing it in the position of a shareholder in order to acquire information, to vote at meetings, or to influence the directors. The truth is that in its context there was only one real ground upon which sec. 13 was relevant to the power and that ground has failed with the context. Can sec. 6 not only require that provisions, although *primâ facie* interdependent, should be construed as divisible and be separated accordingly, but also supply a new scope and object to the separated provision, a new purpose or relevance or, in other words, place it upon a fresh constitutional basis ? It is to this question that I referred when I said there arose concerning the operation of sec. 6 in respect of sec. 13 a curious and difficult question. My answer to it is that if sec. 13 is to be segregated from secs. 17-19 in obedience to sec. 6, it still remains necessary to refer it to the same constitutional basis of power. It is not open to ascribe fresh purposes to it, find another possible relevance to the subject. To do so would mean giving the provision a new operation for the purpose of saving it. It will be necessary to discuss a similar question more fully at a later point in this judgment where it is more convenient to deal with it. In the meantime, it is enough to say that sec. 6 makes the fact that it would receive a different operation not inconsistent with severance : but that is altogether another thing. In my opinion sec. 13 (3) was not enacted either to enable the Commonwealth Bank to vote at meetings, or to receive or obtain the information to which a shareholder is entitled about the business of the company or otherwise to influence the conduct of the business by the directorate chosen by the shareholders. Nor was it enacted to provide an investment for the Commonwealth Bank. It was enacted as part of a plan aimed at the immediate

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control and ultimate absorption of the business and has no other constitutional purpose relevant to power. It must therefore fail with the plan. To place sec. 13 (3) on any other basis would amount to " transforming it into one to which the Legislature has not given its assent," to use the words of Duff, J., in delivering the reasons of the Privy Council in *Attorney-General for Ontario v. Reciprocal Insurers*, [1934] A.C. 328, at p. 346.

I am of opinion that sec. 13 is void and, of course, sec. 14 (except so far as it relates to shares purchased), sec. 15 and sec. 16 have no basis but sec. 13. It follows that Part IV, Division 2, except sec. 12 and so much of sec. 14 as relates to it, is invalid. I shall not stop to consider what remains of sec. 14, for it hardly arises for separate consideration.

I shall proceed to deal with the validity of Part VI, Divisions 1 and 2, as they are affected by sec. 75 (iii) of the Constitution and, as part of the same matter, I shall go on to consider what consequences ensue from a conflict between those Divisions and sec. 75 (iii).

The Court of Claims is erected by Part V as a superior court of record in which is vested part of the judicial power of the Commonwealth. The Parliament has created it pursuant to sec. 71 of the Constitution and has defined its jurisdiction pursuant to sec. 77. The jurisdiction of the Court is to hear and determine claims for compensation under the Act [sec. 33 (1) of the Banking Act 1947], a jurisdiction which covers, not only the ascertainment of the amount of compensation in respect of the shares or assets acquired, but the determination of the question who are entitled to be paid as interested parties [cf. sec. 40 (4) - (8) and sec. 38 (1) of the Banking Act 1947].

Both the ascertainment of the amount of, and the decision of the title to, compensation are thus treated as matters to be dealt with under the judicial power; and, whatever views may be held about the necessity of so treating the former of these two questions, there can be no doubt that the latter forms a claim of right which constitutionally cannot be determined conclusively without recourse to the judicial power.

The power to define the jurisdiction of a federal court which is given by sec. 77 (1) of the Constitution is confined to the nine matters of original jurisdiction enumerated in secs. 75 and 76. There can be no doubt, however, that claims for compensation are covered by the enumerated matters. The nine matters are not mutually exclusive categories and any given claim of right may fall within more than one of them. If a claim for compensation is not within sec. 75 (iii) as a matter in which the Commonwealth or a person being sued on behalf of the Commonwealth is a party, and that in the view I take is one of the cardinal questions in this part of the case, it would at least be a matter arising under a law made by the Parliament, namely under the acquisition provisions of the Banking Act 1947. But it is an aim of Part VI to confine to the Court of Claims the entire jurisdiction to determine claims for compensation under the Act and much care and, indeed, ingenuity have been expended to secure that object. Sec. 77 (ii) contemplates laws defining the extent to which the jurisdiction of a federal Court shall be exclusive, but it is careful to limit the power to make such a law so that the Parliament may exclude only the jurisdiction of State Courts and not the jurisdiction of other federal Courts. In the absence of any power positively to exclude the jurisdiction of other federal Courts, which in effect means the High Court, for there is no other relevant federal Court, the Act has been drafted with a view first to give claims for compensation a character placing them outside the descriptions of matters mentioned in sec. 75, which confers

original jurisdiction on the High Court, and second to provide a procedure for making and settling claims which will ensure that they do not get into the High Court. What is relied upon as placing claims for compensation outside the jurisdiction conferred by sec. 75 (iii) upon the High Court is that the liability to pay compensation is imposed upon the Commonwealth Bank in the first instance and not upon the Commonwealth itself, which is made liable only as a guarantor [secs. 15 : 25 : 40 (7) : 45 of the Banking Act 1947 in combination and sec. 61].

The procedure which, if valid, would, in the case of claims for compensation for the acquisition of assets, operate to ensure that the claims could not be put forward in the High Court, is prescribed by secs. 43 and 44. These provisions are governed by sec. 42, which says that compensation in respect of the acquisition of assets shall be ascertained in no other manner. The effect of secs. 43 and 44 is, in default of agreement, to require the private bank to make a claim in writing to the Commonwealth Bank in response to which the latter must serve a notice specifying the amount of compensation which it is prepared to pay. Then, unless within two months the private bank requires the Commonwealth Bank to refer the claim to the Court of Claims, the private bank is deemed to have accepted the offer and compensation will be payable to the private bank by the Commonwealth Bank according to the tenor of the notice. When the Commonwealth Bank is required to refer the claim to the Court of Claims it is to forward the claim to that Court which must determine the compensation it thinks fair and reasonable. When the acquisition is of shares another procedure is provided, but the curial part of it is less specific. A compensation register is to be made up by the Commonwealth Bank from the share register of the private bank. Persons claiming interests not shown for the time being by the compensation register may, within two months of acquisition, give a notice and then the persons entitled to payment of compensation in respect of the acquisition of the shares affected must be determined by the Court and not in any other manner. If a person claiming an interest who is not on the compensation register has failed to give a notice he is not to be entitled to compensation except in pursuance of an order of the Court of Claims. If no notice is given in respect of any shares the person on the compensation register is to receive the compensation. But in every case the amount of compensation must, unless agreed upon, be determined by the Court of Claims and not in any other manner (secs. 38 : 39 and 40). It is in this way that an expropriated bank or shareholder must proceed for the recovery of the compensation for which it is constitutionally necessary to provide, if the power to make laws with respect to the acquisition of property on just terms is to be validly exercised. The acquisition is accomplished not by the Commonwealth Bank, but by the Treasurer as the responsible Minister. His notice under sec. 13 (1) or sec. 22 (1) divests the shares or assets and vests them in the Commonwealth Bank as a separate juristic person [sec. 13 (3) and (4) and secs. 24 (2), (4) and (6)].

The principal liability for compensation is imposed upon the Commonwealth Bank. That liability in default of agreement can be quantified and enforced in the Court of Claims and not otherwise. The liability of the Commonwealth considered as another legal entity may be ultimate, but it is to be secondary only. The question is whether this arrangement of the constitutionally indispensable responsibility for compensation can place the claim of the expropriated bank or shareholder outside the jurisdiction conferred by the Constitution upon the High Court in all matters in which the Commonwealth or a person sued on behalf of the Commonwealth is a party. As it is beyond the power of the Parliament to withdraw any matter from

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the jurisdiction conferred by sec. 75 an enactment in so far as it attempts to do so must be invalid. The question stated depends primarily upon the interpretation of sec. 75 (iii). What is covered by the expression "The Commonwealth"? What is contemplated by the words "a person suing or being sued on behalf of the Commonwealth"? By the use of these expressions does the third paragraph of sec. 75 intend to give a jurisdiction confined to matters in which the Crown exercising (through the Governor-General) the Executive power of the Commonwealth is itself a party, whether suing or sued in the name of the King or by the Attorney-General or some other officer or nominal party authorised for the purpose as a matter of procedure? Or, on the other hand, does the paragraph intend to place within the jurisdiction of the High Court all matters in which a claim of right is made by or against any part of the central government of the country in its executive department including the corporate and other agencies by which it is administered? Are the words "person suing or being sued on behalf of the Commonwealth" meant to cover not merely procedural representatives but also officers and agencies (whether corporate or not) of the Commonwealth suing or sued as such in respect of causes of action enforceable by or against them in their official or governmental capacity?

It appears to me to be much more a question of what the jurisdiction was intended to embrace than a matter depending upon the characterisation of the Commonwealth Bank as an agency of the Crown enjoying, as such, the Crown's privileges and immunities. It is true, of course, as a matter of logic that whatever meaning may be attached to sec. 75 (iii) its application to a claim against the Commonwealth Bank must depend on the relation found to exist between that corporation and the Executive Government of the Commonwealth. But that is not the same thing as inquiring whether the corporate entity is established for the use and service of the Crown, so that, for example, its occupation of property, if not that of the Crown itself, is for the behoof of the Crown, or so that those whom it employs are the servants of the Crown for whose torts the corporation is not responsible as the master, or so that debts due to the corporation are to be preferred in an administration of assets to which the common law rules of priority apply. Our familiarity with questions of this kind will naturally lead us to find an analogy in them and to seek for assistance in the formulas applied and in the considerations relied upon in the ever lengthening line of cases dealing with such questions. But beyond mentioning *Metropolitan Meat Industry Board v. Sheedy*, [1927] A.C. 899 P.C.; *City of Halifax v. Halifax Harbour Commissioners*, [1935] Can. S.C.R. 215; *Skinner v. Commissioner for Railways*, [1937] S.R. N.S.W. 261, at pp. 269-270, for the discussions and citations they contain, I shall not pursue the analogy. Such questions depend in the end upon the intention ascribed to the legislature establishing the corporate agency. It is within the province of the legislature to say whether the body it forms shall or shall not be suable for the torts of the persons employed in its work: to say whether it is or is not to enjoy this or that immunity or privilege of the Crown. It is true that the text of an enactment seldom contains any statement of intention, express or implied, upon the matter and that the solution is, more often than not, found in what the legislature has done in erecting the body, furnishing it with powers and subjecting it to control But the question here depends upon the meaning and operation of an unalterable constitutional provision which the intention of the legislature cannot affect. Once the meaning and scope of the constitutional provision is ascertained its application depends on the legal situation, as it exists, of the corporate entity said to form part of, or an agency of, the central government. But, perhaps, before discussing the meaning of sec. 75 (iii), it is better to state shortly what is the position of the Commonwealth Bank. It took its

existence from secs. 5 and 6 of the Commonwealth Bank Act 1911, which stated simply that a Commonwealth Bank to be called the Commonwealth Bank of Australia was thereby established, and that the Bank should be a body corporate with perpetual succession and a common seal and might hold land and might sue and be sued in its corporate name. Now it is governed by the Commonwealth Bank Act 1945 (No. 13), but that Act preserves the Bank and continues it in existence so that its corporate identity shall not be affected (sec. 7). There is a Governor of the Bank and a Deputy Governor, who are appointed by the Governor-General in Council. The Bank is managed by the Governor and he directs what duties the Deputy-Governor shall perform (secs. 23, 25 and 26). An Advisory Council is set up to advise the Governor with respect to the monetary and banking policy of the Bank and with respect to such other matters as the Governor may refer to it. The Advisory Council consists of the Secretary to the Treasury, the Deputy-Governor, two other representatives of the Treasury appointed by the Governor-General in Council, and two officers of the Bank appointed by the Treasurer on the recommendation of the Governor (sec. 29). The Bank's officers are organised as a Commonwealth Bank Service to which appointments are made by " the Bank " (Part XIII). By sec. 8 it is declared that it shall be the duty of the Commonwealth Bank, within the limits of its powers, to pursue a monetary and a banking policy directed to the greatest advantage of the people of Australia and to exercise its powers under the Commonwealth Bank Act 1945 (No. 13) and the Banking Act 1945 (No. 14) in such manner as in the opinion of the Bank will best contribute to (a) the stability of the currency of Australia ; (b) the maintenance of full employment in Australia ; and (c) the economic prosperity and welfare of the people of Australia. By sec. 9 the Bank is required from time to time to inform the Treasurer of its monetary and banking policy. If there is difference of opinion between the Bank and the Government as to whether that policy is directed to the greatest advantage of the people of Australia the Treasurer and the Bank must endeavour to reach agreement ; but if they do not, then the Treasurer may inform the Bank that the Government accepts responsibility for the adoption by the Bank of a policy in accordance with the opinion of the Government, whereupon the Bank must give effect to that policy. The functions of the Bank cover a wide field. It is the Central Bank and financial agent of the Government (Part III). It prints, issues, and controls the notes which form the currency of the country for any denomination above two shillings and are of course expressed in the name of the Commonwealth and made legal tender throughout Australia (Part VII). It carries on general banking business. Distinct divisions of the Bank are established and treated almost as separate entities with their own capital funds and accounts . Thus there is a Rural Credits Department to make advances in connection with the production and marketing of primary produce (Part VIII) ; a Mortgage Bank Department to make loans upon the security of land used for agricultural or pastoral pursuits to those engaged in primary production (Part IX) ; and an Industrial Finance Department to lend money and give assistance and advice for the establishment and development of industrial undertakings, particularly small undertakings (Part X). The General Banking Division is, moreover, charged with the function of lending money at the lowest practicable rates of interest to individuals and building societies for the erection and purchase of homes and for the discharge of mortgages on homes.

There is an express declaration that the Commonwealth Bank shall not be liable to federal land or income tax or to any State taxation to which the Commonwealth is not subject (sec. 183). Under the bankruptcy law there is no preference to Crown debts in virtue of the prerogative and, except for land and income tax,

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the Crown has no statutory rank above ordinary creditors; but sec. 187 of the Commonwealth Bank Act 1945 gives a preference to the Commonwealth Bank in the winding up of other Banks.

The powers of regulation and control of monetary policy and affairs taken by the Banking Act 1945 (No. 14) are for the most part vested in the Commonwealth Bank. It exercises the function of stepping in to protect depositors if there is reason to fear the failure of a trading bank (Part II, Division 2): of directing the amount of the increase in assets of a trading bank that must be lodged with the Commonwealth Bank as a special account (Part II, Division 3): of acquiring compulsorily from trading banks excess balances of foreign currency (Part II, Division 4): of acquiring gold and of licensing the sale or export of gold (Part IV): of regulating interest rates charged by banks (Part V): and of making recommendations to the Treasurer as to the exercise of his power to allow or disallow an amalgamation of banks or a reconstruction (sec. 51).

Although the Commonwealth Bank is declared to be a body corporate there are no corporators. I see no reason to doubt the constitutional power of the federal parliament, for a purpose within its competence, to create a juristic person without identifying an individual or a group of natural persons with it as the living constituent or constituents of the corporation. In other legal systems an abstraction or even an inanimate physical thing has been made an artificial person as the object of rights and duties. The legislative powers of the Commonwealth, while limited in point of subject matter, do not confine the legislature to the use of existing or customary legal concepts or devices, that is, except in so far as a given subject matter may be defined in terms of existing legal conceptions, as perhaps in some respects may be the case in, for example, paragraphs (ii), (xii), (xiv), (xvi), (xvii), (xviii), (xxiv), and (xxv) of sec. 51. The matter was considered to some extent in *Heiner v. Scott*, (1914) 19 C.L.R. 381 : 21 A.L.R. 102, where Griffith, C.J., said :—

> "I pass by the question whether in the nature of things it is competent for the Commonwealth Parliament to declare such an abstraction dissociated from any material persons shall be regarded as a corporation ; and will assume that it is, and that the Bank is a real entity cognisable by law. Probably the true effect of the Act is a declaration that the Commonwealth may itself carry on the business of banking under the name of the Commonwealth Bank of Australia."

Isaacs, J., speaking for himself and Gavan Duffy and Rich, J.J., said :—

> "We do not think the Act constitutes the Bank universally the agent of the Commonwealth in the sense necessary to make all its acts the acts of the Commonwealth itself ; in other words sovereign acts. In respect of sub-sec. (e) of sec. 7 [cf. sec. 17 (2) and sec. 13 (b) of the present Act] its personality is kept distinct from that of the Commonwealth. In respect of some of its functions and obligations it may or may not be identified with the Commonwealth—a matter for possible future consideration."

Both in respect of its powers or its purposes and its executive control the Commonwealth Bank was then differently constituted. But the difficult conception of an organ sometimes acting as part of the Commonwealth and sometimes not is to be explained less by the manner in which the Commonwealth Bank was constituted than by the conditions the learned judge had in mind as necessary or sufficient to give immunity to the operations of a federal governmental agency. It is indeed an illustration of the difference in the legal purposes for which an examina-

tion of the relation between a governmental agency and the executive government may be necessary and of the fallacy of supposing that the question lies in the characterisation of the agency rather than in determining the scope and operation of the principle, or the meaning and extent of the category, the application of which is in controversy.

Here the attributes of the Commonwealth Bank as an agency of the Federal Government, though unusual, are clear enough. If it is to be compendiously described, it is an organized service of government given a separate legal personality, in virtue of which it owns property, incurs duties and obligations, and enjoys rights, set up as the banking and monetary authority of the country and charged with the functions of currency control, central banking, exchange control, and ordinary general banking, together with some superadded responsibilities of providing financial aid to production and industry, and placed under the administrative direction and authority of its chief officer, to whom is given a greater degree of independence than the permanent head of a department, but who is bound ultimately to carry out the policy prescribed by his responsible Minister.

The matter comes back to the question whether such an organ is within the scope of the expression " the Commonwealth or a person sued on behalf of the Commonwealth." The " Commonwealth " means the central Government of the country. It is perhaps strictly correct to say that it means the Crown in right of the Commonwealth. But it must be borne in mind that the dual system of government, which is of the essence of federation, involves a legal recognition of the distinct existence of the component polities. It would be difficult otherwise to accomplish a distribution among them of defined powers and authorities by means of a supreme law enforceable by the courts.

The Constitution sweeps aside the difficulties which might be thought to arise in a federation from the traditional distinction between, on the one hand the position of the Sovereign as the representative of the State in a monarchy, and the other hand the State as a legal person in other forms of government (see per Cairns, L.J., in *U.S.A. v. Wagner*, (1867) L.R. 2 Ch. 582 at pp. 593-4) and goes directly to the conceptions of ordinary life. From beginning to end it treats the Commonwealth and the States as organizations or institutions of government possessing distinct individualities. Formally they may not be juristic persons, but they are conceived as politically organized bodies having mutual legal relations and amenable to the jurisdiction of courts upon which the responsibility of enforcing the Constitution rests. It is from this point of view that the interpretation of sec. 75 must be approached. Moreover, the nature of the instrument in which the provision is found is not to be ignored. It is devoted, even in the judiciary chapter, to broad propositions in the field of government and it is hardly likely to concern itself with peculiarities of procedure. The purpose of sec. 75 (iii) obviously was to ensure that the political organization called into existence under the name of the Commonwealth and armed with enumerated powers and authorities, limited by definition, fell in every way within a jurisdiction in which it could be impleaded and which it could invoke.

Sec. 75 (iii) cannot be read without sec. 75 (v) which, it is apparent, was written into the instrument to make it constitutionally certain that there would be a jurisdiction capable of restraining officers of the Commonwealth from exceeding federal power. There is the strongest presumption that in using the expression " or person suing or being sued on behalf of the Commonwealth " the framers of the Constitution were not concerned with the Attorney-General or any other officer by or through whom the Crown might come or be brought into court. In Sec. 75 (iv),

referring to the States as parties, there is no concern on this procedural topic. But what they were concerned with was amenability to the jurisdiction of persons in whom causes of action were vested, or against whom causes of action lay, but in their official capacity only and as agencies or emanations of the Commonwealth. This view is completely confirmed by the history of the provision, which explains, if indeed it does not illuminate,. the whole matter. The source of sec. 75 lies in Article III, sec. 2 of the Constitution of the United States. So much of Article III as supplied the basis of paragraph (iii) of sec. 75 runs :—

> " The judicial power shall extend to . . . controversies to which the United States shall be a party."

The doctrine that a sovereign government cannot be impleaded without its own consent had a firm hold in America and was applied at once to the United States itself. Moreover, by what to us may seem a paradox, the procedure by way of petition of right was rejected as belonging only to a monarchical, and not to a republican, form of government. It was necessary that the consent to suit should be granted by an enactment of the legislative organ of government. As Congress made no general law conferring rights of suit against the United States outside the Court of Claims, the question whether a cause of action put in suit amounted to a controversy to which the United States was a party usually presented itself as a claim that no action lay, made by the defendant or party impleaded, or perhaps made on the intervention of the U.S. Attorney-General. In consequence of the Eleventh Amendment corresponding questions arose as to what amounts to a suit against a State. It is perhaps a somewhat striking illustration of the difference in the British outlook upon government immunity from suit, that this Court treated sec. 75 as involving a liability on the part of the States to suit and for reasons which would apply equally to the Commonwealth: *Commonwealth v. N.S.W.*, (1923) 32 C.L.R. 200; *cf. Werrin v. Commonwealth*, (1938) 59 C.L.R. 150: 213–216; 165–168. In the United States the general doctrine that the servant or agent of the executive government is personally liable and may be sued in respect of any act or omission on his part not justified by law and that the directions or authorization of the Government afford him no protection was treated as a correlative of the immunity of the United States from suit, sufficiently mitigating the harshness of the operation of the doctrine of immunity. But naturally this gave rise to a readiness to admit proceedings against officers and agencies of the United States in respect of claims in which they had little or no personal interest but in which the United States was deeply interested as the party really affected. A celebrated case was that in which the Arlington estate was recovered in ejectment by General Robert E. Lee's son claiming as devisee of his grandfather, G. W. P. Custis. The United States claimed the land, which formed the national cemetery, under a title consisting of a tax sale certificate, held in the event to be void. Notwithstanding a suggestion filed by the Attorney-General alleging that the land was held, occupied, and possessed by the United States, ejectment was successfully maintained against the officers controlling the land, the United States not being a party upon the record. Four of the justices took the view that once it was made to appear, by the interposition of the Attorney-General, that the possession and occupation was that of the United States and the defendants named on the record held only as officers of the United States, it was not competent for the Court to proceed to judgment in what was in truth a proceeding against the United States. Five took the view that as the United States could not be joined and as its title was void, the defendants in actual occupation could not resist the action on the ground of the official capacity in which they held: *U.S. v. Lee*, (1882) 106 U.S. 196, 27 L. Ed. 171. In *Osborn v.*

Bank of U.S., (1824) 9 Wheat. 738 at p. 857, 6 L. Ed. 204, at 232, Marshall, C.J., had said, after referring to " controversies to which the United States is a party " —

> " It may, we think, be laid down as a rule which admits of no exception, that in all cases where jurisdiction depends upon the party it is the party on the record."

But to this proposition experience showed that it was hardly possible to adhere : see *Minnesota v. Hitchcock*, (1901) 185 U.S. 373 at 386 : 46 L. Ed. 954, at 962. Thus suits to restrain the Secretary of the Interior from acting in a particular way in the execution of his office have been held to be suits against the United States : *Oregon v. Hitchcock*, 202 U.S. 60 : 50 L. Ed. 935 : *Naganab v. Hitchcock*, 202 U.S. 473 : 50 L. Ed. 1115. And so have suits against officers of the United States to restrain the use by them in the course of their duties of articles belonging to the United States alleged to be infringement of patents : *Belknap v. Schild*, 161 U.S. 10 : 40 L. Ed. 599 : *International Supply Co. v. Bruce*, 194 U.S. 601 : 48 L. Ed. 1134. But it is clear that great difficulty has been experienced by the Courts in America in maintaining a distinction between cases in which the suit is against the official in respect of acts for which he is himself responsible to the plaintiff and those in which it is sought to affect the interests of the United States by suing him in his official capacity. The distinction must rest upon the conception that, although in both cases the cause of action is necessarily against the officer or agent who is the defendant on the record and therefore depends upon actual or threatened wrongful acts or omissions on his part, in the one case the complaint is against him personally while in the other he " represents " the government. Where the defendant on the record denying jurisdiction was not an individual but an incorporated agency of the United States, or of a State, the question of its amenability to suit wore a double aspect. Is the agency of such a character as to share in the immunity of the United States or of the State ? Had the legislature made it suable and waived the immunity ?

It is not to be expected that in the practical decision of cases these two questions would be kept clearly separate. But now it is definitely laid down that it is not enough that a corporate agency has been created by Congress for the execution of some governmental purpose or power, even if the usual authority to sue and be sued in the corporate name is omitted : congressional intention must be interpreted in the light of congressional policy, seen in a course of legislation which is uniformly against denying to the citizens a remedy against such an agency, and also in the light of contemporary opinion: *Keifer v. Reconstruction Finance Corporation*, (1938) 306 U.S. 381, at pp. 388-391 : 83 L. Ed. 784, at p. 790. But the courts seem to have assumed that a corporate agency set up by statute may be so much a department of government that, unless a positive indication of a contrary intention is found, it shares in the immunity : see Annotation, 83 L. Ed. at pp. 796-7.

From all this it is apparent that when the framers of the Commonwealth Constitution took up the study of the Constitution of the United States with a view to modelling upon it the new Australian instrument of Government, and reached the clause in question, the first difficulty they must have encountered was to say how stood suits against officers and agents of the United States. We may be permitted to know as a matter of history that what is now sec. 75 (iii) appeared in its present form in the draft Constitution presented at the Convention of 1891 and that before it so emerged it had gone through the hands of Sir Samuel Griffith who had before him the report of the Judiciary Committee over which Mr. Justice Inglis Clark presided.

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Anyone who takes Article III of the American Constitution and acquaints himself with the difficulties that arose under it and the manner in which they were dealt with by the Supreme Court and Congress and then compares it with Chapter III. of our Constitution will at once see that the text of the latter is the outcome of much knowledge of the judicial exegesis by which judicial power of the United States has been defined. The addition of the words " or a person suing or being sued on behalf of the Commonwealth " appear appropriate to ensure that the jurisdiction over matters in which the Commonwealth is a party should not be limited to cases in which the Commonwealth is a party on the record and to ensure that on the contrary it covered officers and agencies of the Government sued or suing in their official or governmental capacity such as those whose position had been the cause of so much trouble in the United States. The idea of the immunity of the Commonwealth was probably rejected altogether (cf. *Commonwealth v. N.S.W.*, (1923) 32 C.L.R. 200), but, in any event, sec. 78 was introduced enabling the Parliament to confer rights of suit; and there could be little doubt that the Commonwealth would have no such privilege. The framers of the Constitution, concerned as they would be with giving a sufficiently wide jurisdiction, could not but perceive the possible limiting effect of the American case law. At all events, the purpose of providing a jurisdiction which might be invoked by or against the Commonwealth could not, in modern times, be adequately attained and secured against colourable evasion, unless it was expressed so as to cover the enforcement of actionable rights and liabilities of officers and agencies in their official and governmental capacity, when in substance they formed part of or represented the Commonwealth.

It may be true that the restrictive interpretation or application of the conception of the " United States " arose in America from the fact that to widen it would be to enlarge an unjust immunity or privilege. Indeed, Frankfurter, J., for the Court in Keifer's case (306 U.S. 381 at p. 388 : 83 L. Ed. 784 at p. 788), speaking of the principle that the United States could not be sued without the consent of Congress, said : " But because the doctrine gives the Government a privileged position, it has been appropriately confined. Therefore, the Government does not become the conduit of its immunity in suits against its agents or instrumentalities merely because they do its work." But however it may be explained, the result held a lesson for the Australian Constitution makers.

There is no reason to treat the words in question as anything but an endeavour to ensure that, for the purposes of the jurisdiction, the conception of the Commonwealth included the agents and instrumentalities of the Commonwealth suing or being sued in their official or governmental capacity and so " on behalf of the Commonwealth." In my opinion so understood the provision covers the Commonwealth Bank as a corporate agency of the Commonwealth, appointed, as it has been, to take over the assets of the private banks and correspondingly to meet the claim for compensation for the acquisition. That it is so appears to me inevitably to follow from the description of its nature and function that I have already given. Much support for this conclusion is contained in one well known opinion in the Supreme Court of the United States to which I shall give a reference. It is the judgment of Story, J., in *Briscoe v. Bank of Kentucky*, (1837) 11 Peters 257 at pp. 342-5 : 9 L. Ed. 709 at pp. 742-4. The persuasive authority of that great lawyer's view may be lessened by the fact that he was a dissentient, but this part of his opinion appears to me to be convincing and is much in point. It is to be remembered that the majority decision has been held to mark the beginning of a period of

deviation from the broad interpretation established by Marshall, C.J.: see Willoughby, 2nd Edn., Vol. 1, p. 134; Wright, *Growth of American Constitutional Law*, pp. 51 and 61.

For these reasons I think that the jurisdiction which the Constitution gives to the High Court embraces claims for compensation for the acquisition of shares pursuant to sec. 13 or of assets pursuant to sec. 24, notwithstanding that the primary liability to pay compensation is imposed on the Commonwealth Bank and only the secondary liability on the Commonwealth by name.

I have dealt with the effect of sec. 75 (iii) somewhat fully because the consequences upon the Act of the conclusion I have adopted that a claim for compensation falls within the jurisdiction bestowed on this Court by that provision are in my opinion far-reaching. This arises from the fact that under the Constitution any provisions for the acquisition of property must be void unless they are accompanied by a valid provision affording just terms and from the further fact that for some reason the Act is most explicit in making the ascertainment of compensation dependent exclusively either upon agreement or upon proceedings in the Court of Claims. A provision making compensation, in default of agreement, exclusively dependent upon the judgment of the Court of Claims cannot be valid when the Constitution places a claim for such compensation within the jurisdiction of the High Court and, unless the chain of consequences which is thus set up is interrupted at some point by severance, it must mean that the acquisition provisions are destroyed by the invalidation of the compensation provisions constituting the just terms constitutionally indispensable to valid acquisition.

Whether there can be a severance and at what point of the relevant provisions of the Act depends upon the legal operation of sec. 6 of the Act and its application to the structure of the portions of the Act that are in question. Whether one provision of an enactment may survive the invalidation of another is a matter sometimes controlled by the Constitution, as for example if an attempt were made to authorise the acquisition of property without validly providing just terms, or, in a law imposing taxation, to deal with some other matter or to create a federal court consisting of judges appointed for a term of years or otherwise than by the Governor-General in Council. But if the possibility of severance is not negatived or controlled by the Constitution, it becomes a question of interpretation how far the invalidity extends beyond what in itself is obnoxious to the Constitution, that is to say how far the invalidity extends into apparently connected provisions which would not of themselves necessarily be invalid. For this reason, no doubt, sec. 6 is framed as a statement of intention and not as a command addressed to the Court. The question of interpretation is whether, after the extent to which the intended operation of the enactment is invalid has been ascertained, it is nevertheless the expressed will of the Legislature that the whole or any part of the rest of the intended operation of the enactment should take effect by itself as a law of the Commonwealth. In so stating the question I have preferred to speak of the two parts of the intended operation of the statute rather than of portions of its provisions capable and incapable of valid enactment. The latter way of stating the matter suggests that the problem is one of separating clauses or expressions. But more often than not, when a statute or statutory instrument goes beyond the Constitution the question for the Court is whether a provision too widely or generally expressed should be confined in its operation to so much of the subject it is capable of covering as is constitutionally competent to the Legislature, or, as it is sometimes said, whether the general words are to be read and applied distributively: see *Jenkins v. Commonwealth*, (1947) 74 C.L.R. 400 at p. 403; *Dawson v. Common-*

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wealth, (1946) 73 C.L.R. 157 at pp. 178: 181-2: 186: *Australian National Airways v. Commonwealth*, (1946) 71 C.L.R. 29; *Fraser Henliens Pty. Ltd. v. Cody*, 70 C.L.R. 100; *Shrimpton v. Commonwealth*, 69 C.L.R. 613, 628-630; *R. v. Poole, ex p. Henry*, (1939) 61 C.L.R. at pp. 650-2, and the authorities cited in these cases.

In many jurisdictions where legislation is subject to the doctrine of *ultra vires*, statutory provisions are found governing the principle to be applied in deciding the extent to which the invalidity of part of an enactment or of its intended operation affects the remainder. In the absence of such a provision the rule is that legislation which by a general collective expression covers objects some of which are and some of which are not within the scope of the power of the Legislature, the whole must be considered bad. For although the test is one of intention, it cannot be presumed that Parliament gave its assent to a partial operation of its enactment. Thus unless Parliament has said otherwise, a uniform general rule including persons or matters some of which are outside the competence of the Legislature must fall as a whole because there is no warrant for the introduction of unexpressed exceptions and limitations and only thus could the provision be given the more restricted operation. Further, if the invalid portion consists in or contains provisos, qualifications, exceptions, or conditions affecting the operation of the other provisions severance is impossible. In the same way the invalidity of a clause which would operate by way of relief, compensation or alleviation brings down the provisions to which it has this relation. All these matters were considered to be incompatible with the supposition that the provisions were meant to receive an independent or distributive operation or, at all events, they were thought to tend too strongly against such an assumption. It was not to be assumed that connected or associated provisions were enacted as separate expressions of the will of the Legislature. No severance could be effected unless an inference that the provisions are not to be inter-dependent can be positively drawn from the nature of the provisions, from the manner in which they are expressed or from the fact that they independently affect the persons or things within power in the same way and with the same results as if the full intended operation of the legislation had been valid. See per Isaacs, J., in *R. v. Commonwealth Court of Conciliation and Arbitration ex parte Wybrow & Co.*, (1910) 16 A.L.R. 373 at pp. 392-3: 11 C.L.R. 1, at pp. 53-5; and in *Roughley v. N.S.W.*, 42 C.L.R. 162, at pp. 186-7; and *per curiam* in *Newcastle & Hunter River S.S. Co. v. Commonwealth*, (1921) 29 C.L.R. 357: 369-70: see too *Vacuum Oil Co. v. Commonwealth No. 2*, (1934) 51 C.L.R. 677.

The practice of introducing what are called "severability clauses" into legislation became common in the United States, where much consideration has been given to their operation and effect. See particularly *Williams v. Standard Oil Co. of Louisiana*, (1929) 278 U.S. 235: 73 L. Ed. U.S. 187; *Utah Power & Light Co. v. Pfost*, 286 U.S. 165: 184: 76 L. Ed. 1040: 1048: *Addison v. Holly Hill Fruits Products*, 322 U.S. 607: 618-9: 86 L. Ed. 1488: 1497: *Railroad Retirement Board v. Alton Railway Co.*, (1931) 295 U.S. 333: 361: 79 L. Ed. 1468: 1482: *Carter v. Carter Coal Co.*, (1936) 298 U.S. 238: 312: 80 L. Ed. 1160: 1189: and the Annotation to Williams' case at 73 L. Ed. 287, and an article by Robert L. Stern, 31 Harvard L.R. 76.

The effect of such clauses is to reverse the presumption that a statute is to operate as a whole, so that the intention of the Legislature is to be taken *prima facie* to be that the enactment should be divisible and that any parts found constitutionally unobjectionable should be carried into effect independently of those which fail. To displace the application of this new presumption to any given

situation arising under the statute by reason of the invalidation of part, it must sufficiently appear that the invalid provision forms part of an inseparable context. The general provision contained in sec. 15A of the Acts Interpretation Act 1901-1941 produces this effect, as does sec. 46 (b), which similarly deals with severance in subordinate legislation.

But in applying sec. 15A and sec. 46 (b) the Courts have insisted that a provision, though in itself unojectionable constitutionally, must share the fate of so much of the statute, regulation or order as if found to be invalid, once it appears that the rejection of the invalid part would mean that the otherwise unobjectionable provision would operate differently upon the persons, matters, or things falling under it or in some other way would produce a different result. This consideration supplies a strong logical ground for holding provisions to be inseverable, whether the *primâ facie* presumption be in favour or against severability. It is important where there is no statutory clause like sec. 15A and it is important in using sec. 15A. For the inference in such a case is strong that provisions so associated form an entire law and that no legislative intention existed that anything less should operate as a law.

Further, where severance would produce a result upon the persons and matters affected different from that which the entire enactment would have produced upon them, had it been valid, it might be said with justice that unless the legislature had specifically assented to that result, contingently on the failure of its primary intent, it could not amount to a law. The purpose of sec. 6 is to carry further in the case of the Banking Act 1947 the rule that provisions are to be considered severable and general words distributable. After some study of paragraph (a) of sec. 6, I remain unable to perceive clearly how it extends the rule established by the decisions under sec. 15A. The fact that it is not a general law governing all statutes but is a particular provision of the Banking Act itself doubtless strengthens its effect. The Court has gone very far as a result of sec. 15A and in spite of the difference in form of paragraph (a) of sec. 6, I doubt whether the paragraph in any way extends the operation of the rule of construction as we have applied it. Paragraph (c) of sec. 6, however, is a very distinct extension of the doctrine of the Court. At first sight it may seem to express the somewhat disconcerting intention that the Court, having ascertained at what points the Act as passed offends against the Constitution, should then undertake the task of re-framing it from the fragments that might remain. But a closer examination of the paragraph shows that it does not attempt an inadmissible delegation to the Court of the legislative task of making a new law from the constitutionally unobjectionable parts of the old. The point at which the paragraph applies is in effect when it is found how much of the Act is necessarily inconsistent with the Constitution. Then, if it appears that the Act, with those parts excised, would have a different effect in substance, the paragraph declares that that consideration shall not be enough in itself to displace the application of the directions or statement of intention contained in sec. 15A or in paragraph (a) of sec. 6. It does not assume to require the Court to give to any provision a different meaning or even operation from that which it possesses as it stands in the statute read as a whole. What it is concerned with is the consequences which the same immediate operation resulting from the fixed meaning of the Act will produce upon acts, matters, and things it covers. Sec. 6 (c) may be said to express an intention that, however much amputation and excision may be necessary, what is left of the Act shall be law, but it does not say that it shall be submitted to plastic surgery. In any case sec. 6 is a declaration of intention that provides a guide in ascertaining whether

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any given provision is, according to the true meaning of the enactment, conditional upon the valid operation of another. But in the nature of things it cannot be more than a guide. In the end the extent to which any part of the enactment held to be bad is inoperative must depend upon the real intention of the Legislature in relation to the particular situation resulting from the invalidity found to exist.

The manner in which the Act is constructed creates peculiar difficulties in relation to the place of the intended exclusive authority of the Court of Claims over claims for compensation. It is convenient first to take compensation in respect of the acquisition of assets which is governed by Division 2 of Part VI.

The very definite and emphatic statement in sec. 42 that the compensation payable in respect of the acquisition under sec. 24 of the assets of a private bank shall be ascertained in accordance with that Division and in no other manner expresses a positive intention of excluding all other procedures. Sec. 45 is then expressed so as to impose a duty upon the Commonwealth Bank to pay the compensation assessed by the Court of Claims at the same time giving a discharge to all concerned upon payment. Sec. 43 (1) and (2) deal with the possibility of an agreement being made as to compensation. Then sec. 43 (3) and (4) and sec. 44 provide for the course to be taken in the absence of agreement. As will be seen from sub-sec. 3 of sec. 44, that course is devised so as to make it impossible for the private bank to escape the Court of Claims, except at the expense of having imputed to it an agreement in the terms proposed by the Commonwealth Bank and approved by the Treasurer. It was suggested on the part of the Commonwealth that if sec. 42 were held invalid as in conflict with sec. 75 (iii) a notional severance of Division 2 might be effected after subsec. (2) of sec. 43. The suggestion was that at that point the claimant should be treated as entitled to invoke the jurisdiction of the High Court instead of proceeding under sub-sec. (3) to make a claim in writing to the Commonwealth. The difference between such a mode of severance and simply excising Division 2 altogether is not appreciable. For all it does is to leave the sub-sections authorising agreement and their only effect is to place a condition upon the freedom to agree which would otherwise exist, a condition that the Treasurer must approve. The objection to the suggestion is that it is plainly inconsistent with sec. 42 and with the real meaning of sec. 43. It is not a removal of an invalid provision but a re-shaping of the provision in the hope of validating it. Sec. 42 not only provides that compensation shall not be ascertained in any other manner, but it also provides imperatively that it shall be ascertained in accordance with the Division. No excision will reconcile such a provision with sec. 75 (iii). To introduce the alternative of proceeding under sec. 75 (iii), it would be necessary completely to re-write sec. 42 with a consequent change of the policy and operation of the Division. The truth is that the draftsman determined that he would state exhaustively how claims were to be dealt with so that no alternative choice should be left open. He therefore expressed his intention in a form and with a completeness and definitiveness that give neither place nor means for the application of the general intention in favour of severance. For the Commonwealth it was also contended that all sec. 75 (iii) could require is that an exception, so to speak, from Division 2 be made in favour of the jurisdiction of the High Court. In that I cannot agree. To write such an exception into the Division is impossible. That would be to amend, not sever, the provision. I think that Division 2 is void with the exception of sec. 43 (1) & (2). But the chief argument of the Commonwealth upon this matter was that Division 2 might be notionally deleted from the Act, because, if that were done, sec. 25 would then confer a sufficient general right to compensation recoverable by suit in the ordinary courts.

To my mind this argument gives a new meaning, and a new immediate operation to sec. 25. That section as it stands in the Act must be read with Division 2 and, so read, does not mean to invest the private banks with a cause of action by which they may recover compensation. It is a general declaration of the obligation of the Commonwealth Bank to pay compensation in the manner thereinafter provided. It is the subsequent provisions which give the right, and the only right the private bank is to have is that of obtaining compensation by agreement [whether actual or imputed under sec. 44 (3)], or by reference to the Court of Claims under sec. 44 (5). To find in sec. 25 the creation of an actionable right is to ignore the fact that Division 2 clearly shows that it has no such meaning. To change the meaning of sec. 25 by re-interpreting its language is just as inadmissible as a rewriting of its text. Some suggestion was made that once a provision was pronouced *ultra vires* you ignored its existence and its terms for the purpose of interpreting the rest of the Act. In this way you were to proceed to attach a meaning to sec. 25 only after you had eliminated Division 2, not only from the Act, but from judicial consideration. But it is quite wrong to suppose that you construe the valid portions of an Act as if the invalid portions do not exist. The latter are as much an expression of the intention of the Legislature as the former. You should first obtain the meaning of every part of the instrument containing the complete expression of the will of the Legislature by reading and construing the whole. Only then do you proceed to decide whether the Legislature has gone beyond its powers. Construed as an integral part of the whole Act, sec. 25 amounts to no more than a general statement for the purpose of making it clear that the acquisition of the assets by the Commonwealth Bank is in the character of a purchaser liable to pay compensation. In this way it is introductory to the provisions of Division 2. We are not here dealing with a gift in a will of property to a legatee definitively made over to him and then subjected to a superadded direction controlling the extent of his enjoyment and the devolution of the interest. Doctrines such as govern the consequences upon such a gift of the invalidity of the superadded directions have no place whatever in the construction of an Act of Parliament. Nor could they have any application to a connected series of provisions dealing with a liability to compensation and the exclusive method of ascertaining and enforcing it. If any analogy is to be sought elsewhere in the law it might well be in the many authorities which say that when an enactment creates an obligation and specifies the remedy or the procedure to be pursued, it means that ordinary proceedings are not open.

But again, the truth is that the emphatic proposition in sec. 42 that compensation is to be ascertained in no other manner than according to Division 2 governs the meaning and effect of sec. 25 and makes it impossible to substitute a new and alternative meaning for sec. 25. In short to do so would produce a different law from that to which the Legislature gave its assent.

Sec. 6 (c) authorizes a severance notwithstanding that what remains may then have a different effect. But it does not, and indeed, without an unconstitutional delegation of legislative power to the judiciary it could not, say that when a new meaning producing a new operation is indispensable to the validity of a provision that meaning shall be assigned with a view to saving it. By " effect " as used in sec. 6, I do not undertand the paragraph to mean a change in the immediate operation of a provision. There is, I think, a wide difference between giving a provision a new meaning resulting in the creation of rights, duties, powers, capacities or immunities of a kind uncontemplated by the Legislature and the removal of other provisions, which if valid, would or might have produced indirect

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or consequential effects upon the enjoyment of rights, duties, powers, capacities or immunities independently created by the clause to be severed from the invalid provision. Paragraph (c) of sec. 6, in speaking of a different effect doubtless refers to the latter case. The terms of the paragraph do not support the idea that a different effect may be given by attaching a new meaning to the clause it is sought to sever in order that it should survive.

I am therefore of opinion that the provisions of the Act relating to compensation for the acquisition of assets are ineffectual. It follows that sec. 24 of the Act is void.

It is unnecessary after the foregoing discussion to say very much about the provisions governing the compensation for the compulsory acquisition of shares. I have already discussed them in relation to sec. 51 (xxxi) of the Constitution. They are not precisely the same but they contain the same vice as the provisions relating to compensation for assets. Indeed, in some respects it is exhibited even more strikingly. For sec. 40 deals in separate subsections: (a) with the compensation payable to persons whose names the Commonwealth Bank has placed on the compensation register when no other claim has been notified with respect to the same shares; (b) with the claims of persons whose names have not been placed upon the compensation register but who have given notice of a claim to an interest in the shares acquired; (c) with the amount of compensation payable in respect of shares where such claims have been notified and the amount payable to each person. As to each of these matters sec. 40 states emphatically that it shall be determined by the Court of Claims and in no other manner. Sec. 40 (7) excludes all claims by persons not on the compensation register who have not notified them under sec. 39, unless under an order made by the Court of Claims. It is apparent that unless a claimant is upon the compensation register he must establish his claim in the Court of Claims and by no other procedure may he do so. It is impossible to desert the whole of Division 1 of Part VI and attribute to shareholders and persons interested in shares a statutory cause of action for the recovery of compensation independently of the compensation register and of notice. Yet it is only on such a footing that sec. 40 can be treated as a divisible provision the invalidity of which does not affect the acquisition provisions. Sec. 15 corresponds in the case of shares to sec. 25. It does not mean to give an actionable right to compensation. Read as part of the Act its meaning is that the Commonwealth Bank shall pay compensation in respect of the acquisition of shares in the manner afterwards prescribed. A different meaning cannot be placed upon it because sec. 40 is invalid.

I am therefore of opinion that sec. 40 is invalid and that provisions for the compulsory acquisition of shares must fall with it. That means that at all events sec. 13 (3), (4) and (5) must be ineffectual.

An examination of Division 2 of Part IV will show that the invalidity of sec. 13 (3) and (4) involves the invalidity of the consequential provisions contained in sec. 14 (1) (except perhaps in its application to acquisition by agreement), sec. 15 and sec. 16 (with the like exception). Sec. 14 (2) cannot be supported for many reasons. A similar examination of sec. 24 will show that no case can be made for saving any of its subsections from the fate of subsections (2), (4) and (6).

At this point it is desirable to combine the conclusions I have just expressed with those I stated with respect to the conflict of provisions contained in Part IV, Divisions 2 and 3, with the requirement of just terms of acquisition imposed by sec. 51 (xxxi) of the Constitution. The result of the combination is that except for sec. 12 and the possibility of sec. 14 (1) and sec. 16 being valid in their application to a voluntary acquisition under sec. 12, the whole of Division 2, Part IV, is invalid

and Division 3 is invalid. Sec. 24 is invalid. Part IV of course fails. It also follows that Sec. 46 (3) fails. I should, perhaps, say that the reference in subsection (3) of sec. 46 to a private bank taking over another private bank is for the purpose of a particular absorption, one that has been effected, and it can be neglected.

Sec. 46 (4)–(8) contain a power of prohibiting banking which, on the face of the subsections, shows no apparent dependence upon the acquisition provisions of the Act.

I shall therefore now pass to a consideration of the validity of sec. 46.

Part VII of the Banking Act 1947, which consists only of sec. 46, is entitled " prohibition of the carrying on of banking business by private banks." The Part applies to all private banks whether incorporated in Australia, in the United Kingdom, or elsewhere. The section is constructed upon a curious plan. It begins by a general prohibition laid on all private banks against carrying on banking business in Australia ; but the prohibition is followed by the words " except as required by this section " [sub-sec. (1)]. Next, there immediately follows a command laid on every private bank, " subject to this section," to carry on banking business in Australia [sub-sec. (2)]. Then follow two alternative provisions directed to prescribing how the obligation to carry on banking business shall terminate. One alternative consists in sub-sec. (3) which provides in effect that the obligation to carry on shall not apply to a private bank after its business has been taken over by the Commonwealth Bank. That refers to a taking over by agreement pursuant to sec. 22 (5) or compulsorily under sec. 24 (2). The other alternative is contained in sub-secs. (4) to (8). These provisions empower the Treasurer, by a notice, to require a private bank to cease upon a date he specifies to carry on banking business in Australia. The period of the notice must not in the first instance be more than two months, but the Treasurer may by an amendment of his notice extend the time. Sub-sec. (8) then expressly forbids the private bank after the date or amended date specified to carry on banking business in Australia. It will be noticed that sub-sec. (8) expresses a particular prohibition which might have been thought to be contained in the general prohibition of sub-sec. (1). The first of the two alternatives to which sub-sec. (2) is subject and which therefore, so to speak, take up the general prohibition, is almost nullified by the invalidation of sec. 24. But of course the nullification is not complete because the alternative covers the contingency of a voluntary agreement under sec. 22 (5) as well as compulsory acquisition under sec. 24. Upon the view I have already expressed, that sec. 24 is invalid as one of the consequences of the conflict of Division 2 of Part VI with sec. 75 (iii) of the Constitution, sub-sec. (2) of sec. 46 will prevent sub-sec. (1) from taking effect unless either an agreement is made under sec. 22 (5) or a notice is given under sub-sec. (4) of sec. 46. In the latter event, however, on the expiry of the notice, or amended notice, as the case may be, sub-sec. (8) will operate specifically upon the private bank concerned. The expiry of the notice results under sub-sec. (4) in a prohibition which may be included in the expression in sub-sec. (2) " subject to this section." If so it is a contingency which, as a matter of words, might release the operation of sub-sec. (2) and so bring into operation sub-sec. (1), but apparently it is intended in such a case that sub-sec.(8) shall be the source of the prohibition, and not sub-sec.(1). It is not, I think, a matter of any importance because it is exactly the same " law " whether a notice under sub-sec. (4) brings into play sub-sec. (1) or sub-sec. (8) or both. It is a law which enables the Treasurer by a notice or notices to make it a penal offence for any or all private banks to carry on the business of banking in Australia after a given date or dates. The grounds upon which the Treasurer is to proceed in deciding whether and when he will give any and what notices are not defined or in any way limited.

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As in my opinion the provisions for the acquisition of shares in and of the assets of a private bank are ineffective, a question at once arises whether this conclusion does not also involve the validity of sec. 46 (4)–(8) [and of sec. 46 (1) if and so far as it takes effect by the use of sec. 46 (4)]. This question depends upon the declaration contained in sec. 6 of a legislative intention that all provisions of the Act other than those found to be inconsistent with the Constitution shall operate to the full extent they may under the Constitution and that such intention shall have effect notwithstanding it may result in the Act having a different effect in substance from that it would otherwise have produced. To isolate sec. 46 (4)–(8) and give them an operation quite independent of the compulsory acquisition provisions would, indeed, give the enactment a different effect in substance from that which, it may be supposed, was contemplated. For it would enable the Treasurer to close any or all of the private banks, but not to take over the businesses. Extraordinary confusion and disturbance, if not worse, would no doubt be caused by the use by itself of such a power to close up even one large bank, to say nothing of the result if it were applied at the same time to all.

But it must be remembered that, as sec. 46 is drawn, even although the whole Act were upheld as valid, it would nevertheless be open to the Treasurer to invoke the power which sub-secs. (4)–(8) purport to give him.

It may be assumed that it was outside the contemplation of anybody that the private banks should be closed, not only without compensation, but without any arrangement in respect of the bank officers and staff and without any provision for continuance of the customers' accounts and without any other transitional arrangements. Yet it is a thing that sec. 46 on its terms unmistakably permits. In these circumstances I am of opinion that sec. 6 should be put into effect and that sec. 46 (4)–(8) [and sub-sec. (1) if and so far as dependent on sub-sec. (4)] if otherwise valid should accordingly be considered severable.

But so considered these provisions must be regarded as standing alone and that means as bare authorities to the Treasurer by a notice or notices given whenever and for whatever reason he thinks fit to stop any private bank or all private banks from carrying on banking business within the Commonwealth. So regarded the provisions at once provoke the question whether they are consistent with the constitutional guarantee of the freedom of interstate trade, commerce, and intercourse.

In considering this question it may not be unimportant to notice the widely varying applications of which the power conferred by sec. 46 (4)–(8) is capable. It may be used to close one bank, which may be large or small. That may or may not be followed by the closing of another or others. If it is, the intervals of time may be short or, on the contrary, may be spread over years. The purpose for closing one bank may be entirely different from those for which another is closed. On the other hand, by notices given about the same time, the Treasurer may close all the private banks upon one day. This, coupled with the operation of sec. 7 of the Banking Act 1945, would mean that all banking would be forbidden except by the Commonwealth Bank and the State Banks.

Now, the existing system of private banking maintains an Australia-wide business upon which its whole structure rests. It sustains with respect to the transfer of money or bank credit the greater part of the commerce of the country. Branches and agencies of the various private banks are distributed over the Commonwealth and there are few towns or centres in which one or more of them is not represented. The volume of the banking transactions which cross State lines is, of course, widely different with different banks, and that is said to be true also

of the proportion which in number or value interstate transactions over a period bear to the whole business done. But the total quantity for all banks is very large, although the proportion in money is said to be but ten per cent. of the amount involved in all transactions. If it matters it appears that there are constant changes in the funds made available in the various States, the excess of advances over deposits in one State being supplied or supported by resources in other States. In the daily course of business the private banks (with two minor exceptions) regularly transfer funds among the States, establish credits across State boundaries, and collect cheques, bills of exchange, and promissory notes drawn and lodged in one State and payable in another, and of course they negotiate such instruments. There have been placed before the Court elaborate descriptions of the many different kinds of interstate transactions the private banks carry out, considered both from the bank's side and from the customer's side, that is as an essential part of his commercial dealings. But it is enough here to say that, as common knowledge might suggest, this material confirms in detail what seem to be the essential conclusions. These are that the business of the private banks necessarily includes—(a) the constant interstate transmission of funds and transfer of credit; (b) constant business communication, and intercourse among the States; (c) the regular use for the purposes of interstate transactions of instruments of credit and of title to goods and their interstate transmission; (d) the integration of interstate banking transactions with the entire business of the bank to form a system spreading over the Commonwealth without regard to State lines; (e) the furtherance of commercial dealings by interstate traders in goods by performing an indispensable part in such transactions.

The first question for decision is whether the trade, commerce, and intercourse to which sec. 92 gives freedom covers matters of the foregoing description. It is said that the protection sec. 92 provides extends to the transfer from one State to another of nothing but commodities and persons. Intangibles are said not to be covered. In my opinion this is an unwarranted limitation upon a constitutional provision that was intended to guarantee freedom from restriction to a broad category of interchange, converse and dealings between States in the affairs of life.

It was part of the purpose of sec. 92 to remove from the possibility of legislative and governmental restriction activities conducted across State boundaries and to do so rather because of their interstate character than of any special claim to immunity from interference that particular activities might have except their interstate character. To say figuratively that the purpose was to enable Australians to disregard State boundaries and not simply to give an immunity from interference to buying, selling and journeying makes clear the point, even if the statement may be inadequate and open to objection otherwise. Those who introduced sec. 92 into the Australian Constitution did so in the full light of American experience. In sec. 51 (1) they coupled the word " trade " with the word " commerce," which stood alone in the United States Constitution to define the subject matter of the power of Congress to regulate commerce with foreign nations and among the several States. Not content with the expression " trade and commerce " for the purposes of sec. 92, they there added the word " intercourse."

It has been said that " trade " strictly means the buying and selling of goods. That, however, is a specialised meaning of the word. The present primary meaning is much wider, covering as it does the pursuit of a calling or handicraft, and its history emphasises rather use, regularity, and course of conduct, than concern with commodities. " Intercourse " was doubtless added because of the view, now no longer open in the United States, that commerce might not extend to intercourse that

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was not concerned with business profit or pecuniary gain and because of the degree to which the right of the citizen to access to every constituent part of the Union had been rested on implication. I cannot think that the essential content of the expression " trade commerce and intercourse " in sec. 92 is any less than is included in the conception of commerce in the modern American view of the commerce power. I am not speaking of the spread of that power over an immense field of activities that are incident to commerce. It is the central conception expressed in the word to which I refer. It covers intangibles as well as the movement of goods and persons. The supply of gas and the transmission of electric current may be considered only an obvious extension of the movement of physical goods. But it covers communication. The telegraph, the telephone, the wireless may be the means employed. It includes broadcasting and, no doubt, it will take in television. In principle there is no reason to exclude visual signals. The conception covers, in the United States, the business of press agencies and the transmission of all intelligence, whether for gain or not. Transportation, traffic, movement, transfer, interchange, communication, are words which perhaps together embrace an idea which is dominant in the conception of what the commerce clause requires. But to confine the subject matter to physical things and persons would be quite out of keeping with all modern developments. The essential attributes which belong to the conception should determine the field of human activities to which it applies. To place among the essential attributes the requirement that there should be goods for sale or delivery or a man upon a journey, is to mistake the particular for the general, the concrete example for the abstract definition, and to yield to habits of thought inherited from a more primitive organisation of society.

The words " trade, commerce, and intercourse " are not naturally susceptible of such a reactionary interpretation. The very manner in which they are combined would carry, even to a mind unfamiliar with their background, an intention to include all forms and variety of interstate transaction whether by way of commercial dealing or of personal converse or passage. An understanding of what lies behind the choice of expression confirms the natural impression produced by the language itself. In the long history of the interpretation of the commerce clause in the United States tendencies have been disclosed from time to time to deny the inclusion within it of transactions which relate only to the payment of moneys, such as insurance (*Paul v. Virginia*, (1869) 8 Wall. 168 : 19 L. Ed. 357) or as interstate bills of exchange considered as subjects of intrastate sale (*Nathan v. Louisiana*, (1850) 8 Howard 73 : 12 L. Ed. 991). But these tendencies have been considered anomalous : *cf.* Willoughby, *Constitution of the United States*, 2nd Edn., par. 441, pp. 744-6 and par. 435, p. 741 ; Willis, *Constitutional Law*, pp. 284-5, and now the basis of such a distinction has been swept away : *U.S. v. South Eastern Underwriters' Association*, (1944) 322 U.S. 533 : 88 L. Ed. 1440 : *Polish National Alliance v. N.L.R.B.*, 322 U.S. 648 : 88 L. Ed. 1509 : *Prudential Insurance Co. v. Benjamin*, (1946) 328 U.S. 408 : 90 L. Ed. 1342 ; *Robertson v. California*, (1946) 328 U.S. 440 : 90 L. Ed. 1366 ; *Freeman v. Hewit*, (1947) 329 U.S. 249 : 258-9 : 91 L. Ed. 265 : 275. So far from *Engel v. O'Malley*, (1910) 219 U.S. 128 : 55 L. Ed. 128, containing anything to the contrary I think that a close reading of the judgment of Holmes, J. (particularly at pp. 138-139 of 219 U.S.) will show that he clearly implies an opinion that the transmission of money by a bank from one State to another is interstate commerce.

In my opinion a large part of the business of banking, if transacted across State lines, involves trade, commerce, and intercourse among the States. The presence in the Constitution of sec. 51 (xiii) affords no reason for treating the trade

and commerce power conferred by sec. 51 (i) as inappropriate to banking transactions if they are carried out with other countries or among the States. Sec. 51 (xiii) was placed in the Constitution because it was desired that the subject of banking as a whole should fall under federal legislative authority: not because it was considered that so much of banking as involved transactions with other countries or among the States could not fall under sec. 51 (i).

Again, I am unable to see that the parenthesis in sec. 92 of the words " whether by means of internal carriage or ocean navigation " militates against the conclusion that transactions in intangibles are covered by the provision. These are words of extension, not of restriction. Their purpose would be expressed if they were written " although by ocean navigation and not by internal transport " or " by land or sea."

The contention made that what is commonly called a transmission of money or credit by a bank involves no movement, no interchange, nothing occurring across State lines, but merely the reduction of credit in one place and an increase in another, seems to substitute an analysis—and one of doubtful adequacy—belonging to monetary theory for the common understanding of the course business takes and the complexion which the law places upon it. But for myself I should think that if these interdependent and significant phenomena occurred in different States, involving, as they must, communication between the States, it would be enough. Nor do I see that it is anything to the point to consider the function of banking in providing and regulating the medium of exchange chiefly employed in the Anglo-American world, bank money or credit. That is a consequence of the relation of banker and customer. But whether, from the standpoint of the fulfilment of that vital economic function, the banking transactions that are important as interstate trade, commerce, and intercourse are regarded as falling under the category of cause, of result, or of accompanying circumstance, nevertheless, as between the parties to them, they continue to possess the characteristics which give them the complexion of trade, commerce, and intercourse among the States.

For the reasons I have stated, the subject matter of the prohibition authorised by sec. 46 (4)-(8) of the Banking Act 1947 appears to me to be comprised within sec. 92 so far as the business consists of interstate transactions.

The operation of sec. 46 (8) (or sec. 46 (1)), when the power given by sec. 46 (4) is exercised in relation to all private banks, is to suppress all banking except that carried on by the Commonwealth Bank or by State banks. There is, of course, no discrimination between interstate business and intrastate business. The whole business, intrastate, interstate, and foreign, is prohibited. But the prohibition directly imposed upon the conduct of any banking business, except under Government, is direct and the direct prohibition includes in its operation all interstate banking business.

In *James v. The Commonwealth*, [1936] A.C. 578 : 630-613 : 55 C.L.R. 1 : 58-59, to which we have all given close and repeated study, the test laid down for the application of the constitutional guarantee of freedom contained in sec. 92 amounts to freedom of what constitutes trade, commerce, and intercourse to pass from one State to another. It is described as freedom as at the frontier or border, the crucial point in interstate trade. But that freedom may be impaired by a prohibition, restriction, or burden, the application of which is not at the border but at some prior or subsequent stage in the course of interstate trade, commerce, and intercourse. This is explained by reference to cases arising in this Court which include the following examples :—(1) a legislative declaration by a State that stock

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and meat in a State are to be held for the purposes of and kept for disposal of the Crown in aid of supplies for the armed forces (21 C.L.R. 357 : 22 C.L.R. 586 ; cf. [1936] A.C. at p. 618) ; (2) a State statute and an order thereunder the combined effect of which was to fix a proportion or quota of a product and forbid the marketing in Australia of any greater quantity ; 10 C.L.R. 1 : 43 C.L.R. 386 : 47 C.L.R. 386 : [1932] A.C. 542 : cf. [1936] A.C. at p. 622 ; (3) the expropriation under the same statute of parcels of the product in the hands of a producer so as to prevent him selling them in defiance of the quota fixed (*ibidem*) ; (4) a State scheme for the compulsory marketing of a product, acquiring the product, restricting freedom of action on the part of producers and involving the compulsory regulation and control of all trade, domestic, interstate, and foreign (51 C.L.R. 108 : cf. [1936] A.C. at p. 623) ; (5) the imposition by a State on an importer of petrol of an obligation to buy locally a proportion of power alcohol, petrol which is not produced in Australia, being imported into the State sometimes directly from abroad and sometimes immediately from another State (51 C.L.R. 108 : cf. [1936] A.C. at p. 623) ; (6) a State law requiring payment of a higher licence fee for a licence to sell wine from another State than for a licence to sell wine produced in the State concerned (8 C.L.R. 115 : cf. [1936] A.C. at p. 616).

Thus freedom as at State boundaries has no narrower meaning than that there shall not be imposed prohibitions, restrictions, and burdens preventing, impeding, or prejudicing the passing from State to State of what amounts to trade, commerce, and intercourse. Lord Wright evidently regarded this as an application of the word " free " that was limited by context and subject matter. Yet I think that a ready assent to the limitation would have been given by all the judges who have sat in this Court, notwithstanding that from the beginning they have given such diverse effects to sec. 92. Indeed, I believe that each would have claimed that the proposition was the point from which he began. Perhaps Isaacs, C.J., would have amended it by adding the word " control " ; an unfortunate word of such wide and ambiguous import that it has been taken to mean something weaker than " restraint," something equivalent to " regulation." So to understand it amid the *copia verborum* and vigor of expression Isaacs, C.J., was accustomed to employ where his opinion was strong is natural enough. But it is perhaps worth remark that no actual decision or order given or made applying sec. 92 to the facts of a case seems to be based on any very extended meaning of the notion of restraint or burden or, for that matter, on a wide or distributive interpretation of " trade, commerce, and intercourse." This, I imagine, is the explanation of Lord Wright's apparent hesitation to express any greater disagreement with the actual decision in *McArthur Ltd. v. Queensland*, 28 C.L.R. 530, than is involved in describing it as a doubtful exception to the statement that their Lordships' construction of sec. 92 is not inconsistent with any decided case [1936] A.C. at p. 613. What, as it seems to me, the judgment in *James v. The Commonwealth*, [1936] A.C. 578, has corrected is the error of applying the conception of freedom where there was no real burden upon and no real obstruction to passing from one State to another or dealing across State lines and in addition the failure to recognise that regulation of trade, commerce, and intercourse is compatible with freedom of interstate passage or converse.

The view that what is preserved by sec. 92 is freedom as at the frontier might suggest that the protection is against obstructions, burdens, or disadvantages which operate against interstate transactions in a special manner because, whether in form or in substance, there is a differential treatment of domestic and interstate transactions, or because what is done has a greater significance or importance for

interstate commerce. To limit sec. 92 to freedom from laws discriminating against interstate commerce was an interpretation which at one time proved attractive and it has strong support. But that cause was lost at an early stage of the struggle which expediency has so long sustained with such varying fortune against the apparently inflexible terms in which the framers of the Constitution chose to express a policy regarded, it is said, as basal to the federation. It seems now to be rejected of all men. Barton, J., said as early as *Duncan's case*, (1916) 22 C.L.R. 556, at p. 585 : 22 A.L.R. 465, at p. 477, that if the restriction of interstate trade is included in the direct operation of an Act the fact that intrastate trade is also more or less affected does not diminish the restriction and that if the State legislature could make a burden apply alike to all the people of Australia as well as the people of the State, still the considerations affecting the case would not differ. The decision of the Privy Council in *James v. Cowan*, [1932] A.C. 542, at p. 555, is quite inconsistent with the doctrine, and in *James v. The Commonwealth*, [1936] A.C. at p. 628, Lord Wright rejected it. He said " An Act may contravene sec. 92 though it operates in restriction both of intrastate and of interstate trade." In the United States another step has recently been taken which brings the American doctrine whereby the commerce clause operates to confer a freedom against State restriction even closer to the operation given to sec. 92. The opinion in which the step is taken deals also with discrimination. It is that of Frankfurter, J., for the Court in *Freeman v. Hewit*, (1946) 329 U.S. 241, at p. 252 : 91 L. Ed. 265, at p. 271. His Honour said :—

> " In two recent cases we applied the principle that the Commerce Clause was not merely an authorization to Congress to enact laws for the protection and encouragement of commerce among the States, but by its own force created an area of trade free from interference by the States. In short, the Commerce Clause even without implementing legislation by Congress is a limitation upon the power of the States. . . . In so deciding we reaffirmed, upon fullest consideration, the course of adjudication unbroken through the Nation's history. This limitation on State power . . . does not merely forbid a State to single out interstate commerce for hostile action. A State is also precluded from taking any action which may fairly be deemed to have the effect of impeding the free flow of trade between States. It is immaterial that local commerce is subjected to a similar encumbrance. It may commend itself to a State to encourage a pastoral instead of an industrial society. That is its concern and its privilege. But to compare a State's treatment of its local trade with the exertion of its authority against commerce in the national domain is to compare incomparables."

It would be surprising if the Australian express enactment were less effective and narrower than the American implication which it was intended, as a positive provision, to replace. No doubt a law that applied only to interstate trade might be seen to impose a burden upon it, while if it had applied uniformly over the whole field of trade it might have worn the appearance of a mere regulation. But that is another matter.

To describe the characteristics necessary to render a law obnoxious to sec. 92 there has been much use of figurative expressions. It has been said that the law must be " pointed at " interstate commerce, " directed against it," " inimical to " it, " hostile to it," or " antagonistic to it," or that it must " hit at " interstate commerce. I have never been certain what these expressions connote when so used. Indeed, sometimes the question whether a law does or does not impair the freedom

of interstate commerce seems to be brought down to a choice between a dyslogistic and a eulogistic epithet to describe the same legislative provision.

The expressions that I have mentioned, however, appear capable of three meanings. They may mean that the law must discriminate against interstate commerce. If so, they lay down an erroneous test. They may mean that the application of the law to interstate commerce must be direct and its operation prejudicial, whether or not the law also includes intrastate commerce. If so, the expressions add nothing in explanation or elucidation of sec. 92 ; indeed, their use but tends to confuse the question. Thirdly, they may mean that there must appear an actuating purpose on the part of the legislature to injure interstate commerce. If so, it is the doctrine of which Isaacs, C.J., said that it imported the necessity of a legislative *mens rea*. With that description it may be dismissed from consideration. But once it appears that trade, commerce, and intercourse among the States is a concept within which fall 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.

I cannot see how to close up every bank but a government bank leaves interstate banking free.

It has appeared to me that to say that a given branch of interstate commerce can be carried on only by government, so that it may be under governmental control, is inconsistent with the proposition, which I understand to be established, that interstate trade shall be free of governmental prohibitions, restrictions, and burdens whether they be legislative or executive in character.

To take the volume or flow of interstate banking business independently of the freedom of private banks to transact it, and make the inquiry whether the law closing them has a purpose or a necessary tendency to reduce the volume or flow is, I think, to raise an irrelevant consideration. It is, moreover, a consideration of an economic and not a legal character. But it is one that has no basis of fact. For, so far as it is possible to speak confidently of hypothetical events, to close the private banks, not taking over their businesses as going concerns, but abruptly terminating them, must interrupt the flow of interstate business and cause its total suspension. Not only that, but it would cause a dislocation the recovery from which would not be likely to be rapid. It would be impossible to say whether and when the volume had been restored and to assess its quantitative relation to the volume of the business that otherwise would have been done. It is an irrelevant consideration, because sec. 92 treats interstate traffic and intercourse, not as a mere economic phenomenon, but as an activity, and as such sets it free for people to engage in. Juristically it is doubtless true that sec. 92 does not confer private rights upon individuals : at all events so I decided in *James v. Commonwealth*, (1936) 62 C.L.R. 339, at pp. 361-2. It may perhaps also be true that its purpose is not the protection of the individual trader. But it assumes that without governmental interference trade, commerce, and intercourse would be carried on by the people of Australia across State lines, and its purpose is to disable the governments from preventing or hampering that activity.

It appears plainly, as I think, from the passage in *James v. The Commonwealth*, [1936] A.C. at p. 623, that in the opinion of their Lordships a compulsory marketing scheme under a Government board restricting the freedom of action of producers and compulsorily regulating and controlling all trade in a commodity, whether intrastate, interstate, or overseas, involved an impairment of the freedom of inter-

state trade. From this conclusion more than one consequence follows. In the first place, it means that the transfer of the marketing of the commodity, that is to say, of the whole trade in the commodity, from the ordinary channels used by individuals to a Government board is an interference with freedom of interstate trade. Next, it necessarily follows that a consideration of the question whether this will or will not influence the volume of traffic across the border in the commodity is beside the point. Again, it is inconsistent with the view that a measure may be good because its purpose or object is to increase the volume or value of a trade, including trade with other States, considered apart from the freedom of people to engage in the trade. For the object of the marketing scheme in question was to increase the sales of the commodity and the returns to the producer. Lastly, their Lordships' view of such a marketing scheme does not appear to give room for the contention that sec. 92 leaves it always open to the legislatures to determine by whom operations of interstate trade may lawfully be conducted.

No doubt sec. 92 leaves open the regulation of trade and commerce, at all events until regulation is pressed to the point of impairing true freedom of interstate commerce. And there can be even less doubt that a regulation of some other subject will not collide with sec. 92 simply because interstate trade or commerce may be affected consequentially and indirectly. The freedom of interstate commerce and intercourse which sec. 92 assures supposes an ordered society where the mutual relations of man and man and man and government are regulated by law.

But there has not been worked out a logical distinction between the restrictions and burdens which may not be imposed upon interstate commerce and the directions which may be given for the orderly and proper conduct of commerce. It is this which I think accounts more than any other consideration arising from sec. 92 for the widely divergent conclusions that have been reached as to the application of the provision in specific cases. I am aware that it has been said that in sec. 92 " trade, commerce, and intercourse " have now been interpreted as meaning something less than " trade and commerce " mean in sec. 51 (i) and " free " as meaning " subject to reasonable restrictions " and " absolutely " as meaning " subject to qualifications." But be that as it may, it nevertheless remains undeniable that all trade and commerce must be conducted subject to law and this means compliance with a multitude of regulatory directions. I do not, for example, desire to cast any doubt upon the validity of laws directly regulating banking in the interests of security, reliability, efficiency, uniformity of practice and so on.

But my decision upon sec. 92 is confined to its effect upon sec. 46 (4)-(8), which authorise a direct and absolute prohibition. No such questions, therefore, arise. Nor am I concerned with the effect of sec. 92 in relation to expropriation. That, I think, turns on another and different set of considerations. As a test of the validity of prohibition of carrying on a trade it was said that surely consistently with sec. 92 a law might be made providing that no bankrupt, no soldier, no person under 25, no barrister, should engage in commerce. The examples seem to me to throw no light upon a complete prohibition of a branch of commerce excluding everyone from it except a government undertaking. Some of the examples relate to capacity, others to the incidents of a profession. The personal incompetence, under the law, of classes of people by reason of status or the like to trade stands apart altogether from restraints or restrictions upon interstate commerce. They are but examples of special positions in which, in an ordered community, the law of persons may place individuals. The law of persons and of status, like the law of property, of contract, and of tort, is assumed by a guarantee of freedom of inter-

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state trade. Sec. 46 (4)-(8) stand, in the view I have formed of the validity of secs. 13, 17-19, and 24, as bare prohibitions of so much of banking as forms part of trade, commerce, and intercourse, excepting only government banks. These sub-sections are, therefore, in my opinion, in conflict with sec. 92.

It was contended that this did not spell total invalidity for the sub-sections in question but that by construction of law, interstate banking might simply be withdrawn from their operation. This, it was claimed, is a proper effect of sec. 6.

Speaking generally, the operation of sec. 92 is to give immunity from an enactment applying generally to commerce rather than to destroy the enactment. But that is on the ground that the enactment, as more often than not is the case, has a distributive application to all transactions falling within its terms. In this case, however, sec. 46 (4)-(8) deal with a business as an entirety. There is one notice in the case of each bank. It must be expressed to apply to a business considered as a unit or entirety. Sub-sec. (8), and if it is in point sub-sec. (1), then forbid the carrying on of any such business. I cannot see how, even with the aid of sec. 6, any intention can be discovered to deal piecemeal with component parts of the business or, to state it more accurately, with descriptions of transactions by which the business is made up.

The notice required by sub-sec. (4) could not be moulded to that end consistently with the sub-section. The purpose is to close up a bank's business, not to dismember it.

I am therefore of opinion that sec. 46 (4)-(8) are void and that, if and so far as sec. 46 (1) would otherwise take effect in consequence of a notice under sec. 46 (4), it also is void.

I have said nothing about sec. 59 and, having regard to the conclusions I have reached, there is little to be said about it. It expresses its own purpose in its opening words " So far as is necessary for the purpose of facilitating or assisting the operation of any of the provisions of the Act." This purpose ceases to have any significance when it is decided that sec. 46 (4)-(8) and substantially the whole of Part IV, Divisions 2 and 3, and sec. 24 are invalid. Sec. 60 is *a fortiori*. Part V, dealing with the Court of Claims, becomes otiose. Part VI, dealing with compensation, is substantially bad, and Part VIII ceases to have an effective existence, even if theoretically sec. 6 may save the validity of some sub-sections contained in it. Sec. 46 ceases to have any effect because sub-sec. (1) is dependent on sub-sec. (3) or upon sub-sec. (8). Counsel for the plaintiffs at the end of his reply asked that the court should not pronounce an order finally without allowing the parties to speak to the form of relief after delivering the reasons of the members of the court for judgment and to this course the Commonwealth had no objection. I shall therefore not now formulate definitely the relief which I should be in favour of granting.

I think that it is neither necessary nor desirable to examine every provision of the Act without regard to its real bearing upon the validity of provisions that really matter or upon the interest which entitles the plaintiffs to sue and to say whether each such provision is independently valid, if sec. 6 makes it severable, or whether in spite of sec. 6 it is inseverable or on its own terms its operation fails.

I am disposed to think that it would be enough if the declaration of right were confined to what I would regard as the pivotal sections of those which I consider bad together with some of the more important of those obviously sharing the same fate.

I would continue the interlocutory injunction contained in the orders of 15th December, 1947, and make it permanent. It would, I think, be enough to declare

invalid secs. 13 : Part IV, Division 2 (except in relation to voluntary purchase) : Division 3 : sec. 24 : Part VI : secs. 46 : 59 and 60 and for the rest to reserve liberty to apply. The plaintiffs should have the costs of the suits.

As I am the sixth member of the Court to state his opinion, I do so as briefly as possible.

The primary question is the interpretation of sec. 51 (xiii) of the Constitution of the Commonwealth.

The conclusion on this question which I think is required by settled principles governing the interpretation of the Constitution and the statements of authority bearing upon the interpretation of section 51 (xiii) in particular, is that this provision is a grant of plenary legislative power which extends to the whole subject of banking, that is the economic activity described by that name, and all its adjuncts, subject to the reservation made in regard to State banking, that is banking by a State-owned bank.

The reservation may make it necessary to imply limitations upon the powers to legislate with respect to " State banking extending beyond the limits of the State concerned " in order to preserve the immunity given to State banking which does not extend beyond State limits. The limitations might be implied from the connection between State banking beyond and State banking within the legislative powers. But such limitations could not logically apply to the powers to legislate with respect to " banking other than State banking." Even if the word " extending " imports survival, that is, it is not merely descriptive of the part of State banking placed under the control of the national Parliament, it would not follow that the power granted to legislate with respect to banking conducted by banks which are not owned by any State is any less than plenary power.

This plenary power is of course subject to anything in the Constitution restricting the powers of the Parliament.

The term " banking " is a statement in outline of the subject matter of the power. It must be given an ample not a narrow meaning.

The grant of power to legislate with respect to banking naturally extends to such matters as the ownership and management of banks and the control of banks and banking. The purposes in respect of which Parliament has power to make laws include the limitation of the number of banks, the selection of banks to carry on banking, the licensing of banks, the prohibition of the carrying on of banking by any bank, the conversion of private ownership or management of any bank into public ownership or management. These observations, of course, do not apply to State-owned banks. If Parliament should seek to accomplish any of these purposes by the acquisition of property from any person, the acquisition could not be made under sec. 51 (xiii) : it could be validly made only under sec. 51 (xxxi) : it would not be valid unless it was made upon just terms. It would also be a condition of the validity of the acquisition that it was made for a purpose in respect of which the Parliament has power to make laws. If the acquisition is an appropriate means of effectuating or furthering any of the abovementioned purposes it would satisfy that condition.

It follows from this interpretation of sec. 51 (xiii) that a law which prohibits any bank from carrying on banking is a law with respect to banking. The motive of Parliament, if that could be ascertained, for enacting the law is irrelevant to the question whether or not the law is within this legislative power. If, however, the prohibition were made to depend upon some condition, the law might not be a law

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with respect to banking. The question whether or not it would be a law of this description would be tested by considering its effect and operation. The provisions of sec. 46 relating to prohibition contain no such condition. Sec. 46 (1) is a law with respect to banking. Secs. 46 (2) and (3) are constitutionally justified by the plenary nature and extent of the power vested by sec. 51 (xiii) in Parliament. Sec. 46 (4) is also constitutionally justified by sec. 51 (xxxi). The Parliament has power to make a law prohibiting any bank from carrying on banking. It can confer power upon the Treasurer to accomplish any object within its legislative power. That is an attribute of plenary legislative power. In sec. 46 (4) Parliament has not purported to confer upon the Treasurer power to do anything which Parliament has not the power to accomplish. The extent of the powers conferred depends upon the interpretation of the Banking Act. Sec. 46 (4) is in substance a law with respect to banking.

Sec. 51 (xiii), aided if necessary by sec. 51 (xxxix), supports the establishment of the Commonwealth Bank.

Sections 12 and 13 of the Banking Act 1947 provide respectively for the purchase and compulsory acquisition by the Commonwealth Bank of shares in a " private bank." The validity of either of these sections is not to be finally tested by the principle whether the acquisition of shares by the Commonwealth Bank is necessary for or incidental to the carrying on of its banking business. To determine their validity finally by that test is to overlook sec. 51 (xxxi) of the Constitution. This grant of legislative power extends to the making of a law with respect to the acquisition by the Commonwealth Bank of shares (because they are " property ") on just terms from any shareholder in a " private bank " for any purpose in respect of which the Parliament has power to make laws. Such purposes are obviously wider than the purposes of any bank. The public control of the banking business of a " private " bank is a purpose in respect of which the Parliament has power under sec. 51 (xiii) of the Constitution to make laws. It is within the discretion of the Parliament to select any appropriate authority, for example the Treasurer or the Commonwealth Bank, as the agency to exercise such control. The acquisition of shares in a " private bank " by the Commonwealth Bank is an appropriate means of initiating and extending control by the Commonwealth Bank of the banking business of the private bank. Consequently the acquisition is warranted by sec. 51 (xxxi) : but it is necessary that the acquisition should be on just terms.

The Parliament has power under sec. 51 (xxxi), (xxxix) and (xiii) to enact the provisions of secs. 12, 13 and 14 (1). Sec. 14 (1) is necessary to make the acquisition effective for the purpose which constitutionally justifies it.

Sec. 14 (2) purports to confer upon the Commonwealth Bank a right to transfer any acquired share. This right is not incident to the shares in all the companies. The power of the Parliament under sec. 51 (xxxi) is to acquire shares with the incidents only which attach to them under the constitutions of the companies respectively. It is not within the powers of Parliament to add a right to the bundle of rights which constitute an acquired share. But subject to this principle, the Parliament can authorise the Commonwealth Bank to transfer an acquired share to a nominee to hold the share for it and to act for it as a member of the company. Sec. 14 (2) is justified by sec. 51 (xiii) but not by sec. 51 (xxxi).

The acquisition of the business of a " private bank " by the Commonwealth Bank is, in my opinion, an integral part of the plan for the management of the " private bank " devised in sections 17-20 of the Banking Act 1947. Their effect is as follows. The directors appointed under the Constitution of the company are compulsorily

retired; power is conferred upon the Governor of the Commonwealth Bank to appoint directors in their place; these directors are given "full power to manage, direct and control the business and affairs of the bank" and in particular to dispose of the business of the bank to the Commonwealth Bank. The purposes for which these powers are conferred are declared to be "facilitating the control by the Commonwealth Bank of the banking business in Australia of private banks" and "furthering the expansion of the banking business of the Commonwealth Bank." Any dispositive powers over the assets of the "private bank," which the statutory directors would derive from their general statutory powers or the particular power to dispose of the business of the bank, could hardly be exercised for the purpose of furthering the expansion of the Commonwealth Bank in any way other than by disposing of the assets or the business of the "private bank" to the Commonwealth Bank. This is not to say that it is necessarily a scheme to enable the Commonwealth Bank to get assets of a "private bank" or its business at less than value. Sec. 19 (3) would not relieve the statutory directors of any fiduciary obligations which would arise from the circumstances. But I cannot agree that an acquisition by the Commonwealth Bank of any property from a "private bank" by the machinery devised in these sections of the Act is within the conception of acquisition upon just terms. I think that, in order to come up to that standard, independent approval of the terms of sale would be necessary. Sections 17-20 are, in my opinion, invalid for the above reasons.

But I do not deny that the conversion of the management of "private banks" into management by directors appointed by an appropriate public authority is a purpose in respect of which the Parliament has power under sec. 51 (xiii) to make laws.

Sec. 21 is, in my opinion, a law with respect to banking.

The taking over of the business of a "private bank" by the Commonwealth Bank involves the acquisition by the latter Bank of the assets used in the business and the taking over of the liabilities. None of the "private banks" carries on any business in Australia other than the business of banking or services incidental to it. The Parliament has power to convert the ownership and management of any "private bank" from private to public ownership and control; and to expand and strengthen the Commonwealth Bank. The taking over of the business of "private banks" is a means which is logically appropriate to accomplish those objects. It follows that the Parliament has power under sec. 51 (xxxi) to make a law for the acquisition of the assets on just terms from the "private bank" by the Commonwealth Bank. The liabilities of the business of the "private bank" are not property of the bank. Section 22 (8) (b) and (d) and sec. 24 (5) and (7), which make liabilities of the "private bank" liabilities of the Commonwealth Bank and discharge the "private bank" from those liabilities are laws with respect to banking and are authorised by sec. 51 (xiii). It may be that those provisions could be justified on the ground that they are incidental to the execution by Parliament of its legislative power to acquire the assets. Provisions somewhat analogous to sec. 22 (8) (b) and (d) are to be found in the laws passed by the Legislature of the United States of America: see United States Code 1946 Edition, Title 12, Banks & Banking. Secs. 34 and 34 (a) of that Statute prescribe what is the effect of the consolidation of banks on the property and choses in action of a bank consolidating with another bank.

If the Court of Claims is validly given exclusive jurisdiction to determine claims for compensation against the Commonwealth Bank under sections 15 and 25 respectively, then, subject to the questions about interest and costs, there could be no doubt that the compulsory acquisition of shares under sec. 13 and of property

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under sec. 24 would be on just terms. The concessions in respect of taxation made by sec. 23 are limited to voluntary purchases. But that cannot alter the result that compulsory acquisition is on just terms if any bank whose property is compulsorily taken is entitled to recover fair and reasonable compensation in respect of the acquisition. The provisions of the Act giving exclusive jurisdiction to the Court of Claims raise questions under sec. 75 (iii) of the Constitution. These questions are whether a claim against the Commonwealth Bank for compensation under sec. 15 or sec. 25 is a matter in which the Commonwealth or a person sued on behalf of the Commonwealth is a party. I agree with the opinion of the Chief Justice on these questions.

It is within the legislative power to incorporate a bank and make it an agency to carry on banking for the executive government, the Crown being in effect the banker, or to give the bank authority to carry on banking on its own behalf, the corporation being the banker. In my opinion the Commonwealth Parliament has followed the latter course. Sec. 11 says that the Commonwealth Bank shall act as a central bank. A central bank is not necessarily a branch of the executive government. Sec. 12 provides that the Commonwealth Bank " shall in so far as the Commonwealth requires it to do so, act as banker and financial agent of the Commonwealth." It is common practice even for a privately owned bank to be the banker and financial agent of a government. Sec. 17 provides that the Commonwealth Bank shall carry on general banking business. The Crown is not the banker of the customers of the Commonwealth Bank. The Bank has a Note Issue Department, Part VII. The privilege of issuing notes is one also which might be granted to a privately owned bank. Sec. 43 provides that the notes shall be legal tender. This character could be given to notes issued by a privately owned bank. None of these circumstances could justify the conclusion that the Commonwealth Bank is a branch of any Commonwealth department. The provisions of Part V, relating to the management of the Commonwealth Bank, are strong to show that it is not a corporation under the Crown. Indeed sec. 9 takes it for granted that the Commonwealth Bank is not a branch of a department of State of the Commonwealth and accordingly provides a means for surmounting a crisis resulting from the general independence of the executive government which the Bank has under the Commonwealth Bank Act.

In regard to the questions of interest and costs, I am of the same opinion as the Chief Justice.

It follows that the Banking Act 1947 contains valid and effective provisions for the enforcement of the liability imposed upon the Commonwealth Bank by secs. 15 and 25 and that any acquisition, either of shares in a " private bank " or of its property by the Commonwealth, would be " on just terms."

I agree with the Chief Justice that sec. 24 (8) is not justified by any grant of legislative power to the Parliament.

The arguments for the plaintiffs that the Banking Act 1947 is an unconstitutional interference with the rights reserved to the States by the Constitution are answered by the statement of principle in the judgment of Dixon J. in the *Melbourne Corporation Case*, 74 C.L.R. 84. The Banking Act 1947 is a general Act in the sense that the alterations which its operation would make in the present legal framework of banking would affect the States and everyone else in the same way. In this way its operation differs from that of sec. 48 of the Banking Act which was declared in the above case to be invalid.

The Banking Act 1947 is not inconsistent with the Financial Agreement. There is no express stipulation in the agreement that the system of banking existing at the time it was made should not be altered by either Federal or State legislation and it is, in my opinion, impossible to imply such a stipulation from the terms of the agreement.

I am of opinion that the Banking Act 1947 does not violate sec. 92 of the Constitution. On this question I agree entirely with the reasons of the Chief Justice and respectfully adopt them. If the principles laid down in *James v. The Commonwealth*, 55 C.L.R. 1, are applied, I think that the argument for the plaintiffs on this question must be rejected.

Sec. 51 of the Constitution makes trade and commerce on the one hand and banking on the other hand different heads of power. If banking is trade and commerce as plaintiffs' counsel argued, the Commonwealth could create a bank under sec. 51 (1) to operate within the territorial limits mentioned in this provision. Compare *Australian National Airways v. The Commonwealth*, 71 C.L.R. 29. Sec. 51 (1) would give power to the Parliament to control banks operating across State lines and interstate banking and do other things in respect of banks and banking which counsel for the plaintiffs argued could not be done under sec. 51 (xiii). They argued that this placitum does not give power to Parliament to create a bank, and that the source of this authority is sec. 51 (xxxix).

Banking is not, in my opinion, trade, commerce or intercourse. Banks provide aids to these activities but banking itself is not one of these things. It is not the buying, selling, bartering or exchange of any commodity, or transportation or communication. Sec. 92 would of course nullify any legislative restriction on banking depending for its operation on the relation of any banking transaction to trade, commerce and intercourse among the States.

To say that credit is transmitted across a State border is to speak figuratively. Credit is not a commodity or a physical thing. It is not like a message sent by wire or by wireless which could be intercepted. A banker resorts to the post office or other means of communication between the States. If that circumstance attracts the application of sec. 92, then any business which is spread over State lines could claim the protection of sec. 92 against both State and Federal legislation. Sec. 92 binds the Commonwealth and the States. 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; another example is legislation providing for bank holidays; this might be bad for interference with the freedom of trade, commerce and intercourse among the States on those days.

I think that the only declaration which should be made now is that sections 17 to 20 inclusive and sec. 24 (8) of the Banking Act are invalid.

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No. 33

ORDER IN THE CASE OF BANK OF NEW SOUTH WALES AND OTHERS v THE COMMONWEALTH OF AUSTRALIA AND OTHERS.

THIS ACTION (No. 42 of 1947) which was commenced by writ of summons issued out of the New South Wales Registry of this Court on the 28th day of November 1947 coming on for trial before this Court pursuant to the Order made on the 15th day of January 1948 by His Honour Mr. Justice Dixon under the provisions of Section 18 of the Judiciary Act 1903–1947 on the 9th, 10th, 11th, 12th, 16th, 17th, 18th, 19th, 20th, 23rd, 24th, 25th, 26th, and 27th days of February 1948, and the 1st, 2nd, 3rd, 4th, 5th, 8th, 9th, 10th, 11th, 12th, 15th, 16th, 17th, 18th, 19th, 22nd, 23rd, 24th, 25th, and 31st days of March 1948, and the 1st and 2nd day of April 1948, at Melbourne in the State of Victoria and on the 13th, 14th, 15th days of April 1948 at Sydney in the State of New South Wales UPON READING the documents numbered 1 to 31 comprised in the transcript record of the proceedings herein and in certain other actions numbered in the New South Wales Registry of this Court respectively 43, 44, 47 and 48 of 1947 AND UPON HEARING Mr. G. E. Barwick of King's Counsel and Dr. E. G. Coppel of King's Counsel with whom were Mr. A. D. G. Adam of Counsel, Mr. R. M. Eggleston of Counsel, Mr. R. Ashburner of Counsel and Mr. B. B. Riley of Counsel for the plaintiffs and Dr. H. V. Evatt of King's Counsel (the Attorney-General of the Commonwealth of Australia) with whom were Professor K. H. Bailey of Counsel (the Solicitor-General of the Commonwealth of Australia) and Mr. C. A. Weston of King's Counsel, Mr. J. D. Holmes of Counsel and Mr. D. G. Benjafield of Counsel for the defendants THIS COURT DID on the 15th day of April 1948 order that the action do stand for judgment AND the action standing in the list for judgment at Sydney this day THIS COURT DOTH DECLARE that the following provisions of the Banking Act 1947 of the Commonwealth of Australia are invalid namely – Division 2 of Part IV, except in so far as it relates to the voluntary acquisition of shares and without prejudice to the question whether sub-sec. (1) of sec. 14 is valid in relation thereto AND Division 3 of Part IV AND sections 24, 25, 37 to 45 inclusive, 46, 59 and 60 AND THIS COURT DOTH ORDER as follows : –

(A) That the Defendant the Treasurer and any Minister of the Defendant the Commonwealth of Australia or any member of the Executive Council for the time being acting or purporting to act for or on behalf of the Treasurer of the Commonwealth of Australia be restrained from publishing or causing or permitting to be published any notice pursuant to sub-section (1) of section 13 of the Banking Act 1947 ;

(B) That the Defendant Hugh Traill Armitage and every other person for the time being entitled by law or purporting to exercise the powers of the Governor of the Commonwealth Bank of Australia be restrained from appointing or purporting to appoint any person a director of any of the Plaintiff companies ;

(C) that the Defendant the Treasurer and any Minister of the Defendant the Commonwealth of Australia or any member of the Executive Council for the time being acting or purporting to act for or on behalf of the Treasurer of the Commonwealth of Australia be restrained from giving or causing or permitting to be given any notice pursuant to sub-section (1) of section 22 of the Banking Act 1947 ;

(D) that the Defendant the Commonwealth Bank of Australia its officers and servants be restrained from requiring any of the plaintiff companies to

take any action pursuant to sub-section (8) of section 24 of the Banking Act 1947 ;

(E) that the Defendant the Treasurer and any Minister of the Defendant the Commonwealth of Australia or any member of the Executive Council for the time being acting or purporting to act for or on behalf of the Treasurer of the Commonwealth of Australia be restrained from publishing or causing or permitting to be published in the Commonwealth Gazette any notice pursuant to sub-section (4) of section 46 of the Banking Act 1947 ; and

(F) that the Defendant Hugh Traill Armitage and every other person for the time being entitled by law or purporting to exercise the powers of the Governor of the Commonwealth Bank of Australia be restrained from authorising any person to act under section 59 of the Banking Act 1947.

AND THIS COURT DOTH ALSO ORDER that the costs of the Plaintiffs of this action including reserved costs if any be taxed by the proper officer of this Court and when so taxed and allowed be paid by the Defendants to the Plaintiffs.

BY THE COURT,

(L. S.) J. G. HARDMAN,
Principal Registrar.

No. 34
Order in the Case of Bank of Australasia and Others v. The Commonwealth of Australia and Others, 11th August 1948.

No. 34

ORDER IN THE CASE OF BANK OF AUSTRALASIA AND OTHERS v. THE COMMONWEALTH OF AUSTRALIA AND OTHERS.

THIS ACTION (No. 43 of 1947) which was commenced by writ of summons issued out of the New South Wales Registry of this Court on the 28th day of November 1947 coming on for trial before this Court pursuant to the Order made on the 15th day of January 1948 by His Honour Mr. Justice Dixon under the provisions of sec. 18 of the Judiciary Act 1903-1947 on the 9th, 10th, 11th, 12th, 16th, 17th, 18th, 19th, 20th, 23rd, 24th, 25th, 26th, and 27th days of February 1948, and the 1st, 2nd, 3rd, 4th, 5th, 8th, 9th, 10th, 11th, 12th, 15th, 16th, 17th, 18th, 19th, 22nd, 23rd, 24th, 25th and 31st days of March, 1948, and the 1st and 2nd days of April 1948 at Melbourne in the State of Victoria and on the 13th, 14th and 15th days of April 1948 at Sydney in the State of New South Wales. UPON READING the documents numbered 1 to 31 comprised in the transcript record of the proceedings herein and in certain other actions numbered in the New South Wales Registry of this Court respectively 42, 44, 47 and 48 of 1947 AND UPON HEARING Mr. F. W. Kitto of King's Counsel and Mr. A. R. Taylor of King's Counsel with whom were Mr. A. Dean of King's Counsel, Mr. Stanley Lewis of Counsel, Mr. J. A. Spicer of Counsel and Mr. T. W. Smith of Counsel for the plaintiffs and Dr. H. V. Evatt of King's Counsel (the Attorney-General of the Commonwealth of Australia) with whom were Professor K. H. Bailey of Counsel (the Solicitor-General of the Commonwealth of Australia), Mr. H. H. Mason of King's Counsel and Mr. B. P. Macfarlan of Counsel for the defendants THIS COURT DID on the 15th day of April 1948 order that the action do stand for judgment AND the action standing in the list for judgment at Sydney this day THIS COURT DOTH DECLARE that the following provisions of the Banking Act 1947 of the Commonwealth of Australia are invalid namely—sections 24, 25, 37 to 45 inclusive, 46, 59 and 60 AND THIS COURT DOTH ORDER as follows :—

(A) That the Defendant the Treasurer and any Minister of the Defendant the Commonwealth of Australia or any member of the Executive Council for the time being acting or purporting to act for or on behalf of the Treasurer of the Commonwealth of Australia be restrained from giving or causing or permitting to be given any notice pursuant to sub-section (1) of section 22 of the Banking Act 1947 ;

(B) that the Defendant the Commonwealth Bank of Australia its officers and servants be restrained from requiring any of the plaintiff companies to take any action pursuant to sub-section (8) of section 24 of the Banking Act 1947 ;

(C) that the Defendant the Treasurer and any Ministers of the Defendant the Commonwealth of Australia or any member of the Executive Council for the time being acting or purporting to act for or on behalf of the Treasurer of the Commonwealth of Australia be restrained from publishing or causing or permitting to be published in the Commonwealth Gazette any notice pursuant to sub-section (4) of section 46 of the Banking Act 1947 ; and

(D) that the Defendant Hugh Traill Armitage and every other person for the time being entitled by law or purporting to exercise the powers of the Governor of the Commonwealth Bank of Australia be restrained from authorising any person to act under section 59 of the Banking Act 1947.

AND THIS COURT DOTH ALSO ORDER that the costs of the Plaintiffs of this action including reserved costs if any be taxed by the proper officer of this Court and when so taxed and allowed be paid by the Defendants to the Plaintiffs.

BY THE COURT,

J. G. HARDMAN,
Principal Registrar.

No. 34
Order in the Case of Bank of Australasia and Others *v.* The Commonwealth of Australia and Others, 11th August 1948, *continued.*

No. 35
Order in the Case of the State of Victoria and Anor. *v.* The Commonwealth of Australia and Others, 11th August 1948.

No. 35

ORDER IN THE CASE OF THE STATE OF VICTORIA AND ANOTHER v. THE COMMONWEALTH OF AUSTRALIA AND OTHERS.

THIS ACTION (No. 44 of 1947) which was commenced by writ of summons issued out of the New South Wales Registry of this Court on the 28th day of November 1947 coming on for trial before this Court pursuant to the Order made on the 15th day of January 1948 by His Honour Mr. Justice Dixon under the provisions of section 18 of the Judiciary Act, 1903–1947 on the 9th, 10th, 11th, 12th, 16th, 17th, 18th, 19th, 20th, 23rd, 24th, 25th, 26th and 27th days of February, 1948, and the 1st, 2nd, 3rd, 4th, 5th, 8th, 9th, 10th, 11th, 12th, 15th, 16th, 17th, 18th, 19th, 22nd, 23rd, 24th, 25th and 31st days of March, 1948, and the 1st and 2nd days of April, 1948 at Melbourne in the State of Victoria and on the 13th, 14th and 15th days of April, 1948 at Sydney in the State of New South Wales UPON READING the documents numbered 1 to 31 comprised in the transcript record of the proceedings herein and in certain other actions numbered in the New South Wales Registry of this Court respectively 42, 43, 47 and 48 of 1947, AND UPON HEARING Mr. E. H. Hudson of King's Counsel with whom was Mr. D. I. Menzies of Counsel for the plaintiffs and Dr. H. V. Evatt of King's Counsel (the Attorney-General of the Commonwealth of Australia) with whom were Professor K. H. Bailey of Counsel (the Solicitor-General of the Commonwealth of Australia) Mr. Tait of King's Counsel and Mr. G. Gowans of Counsel for the defendants THIS COURT did on the 15th day of April 1948 order that the action do stand for judgment AND the action standing in the list for judgment at Sydney this day THIS COURT DOTH DECLARE that the following provisions of the Banking Act 1947 of the Commonwealth of Australia are invalid namely—Division 2 of Part IV, except in so far as it relates to the voluntary acquisition of shares and without prejudice to the question whether sub-section (1) of section 14 is valid in relation thereto AND Division 3 of Part IV and sections 24, 25, 37 to 45 inclusive, 46, 59 and 60 AND THIS COURT DOTH ORDER as follows :—

(A) That the Defendant the Treasurer and any Minister of the defendant the Commonwealth of Australia or any member of the Executive Council for the time being acting or purporting to act for or on behalf of the Treasurer of the Commonwealth of Australia be restrained from publishing or causing or permitting to be published any notice pursuant to sub-section (1) of section 13 of the Banking Act, 1947 ;

(B) that the Defendant Hugh Traill Armitage and every other person for the time being entitled by law or purporting to exercise the powers of the Governor of the Commonwealth Bank of Australia be restrained from appointing or purporting to appoint any person a director of any of the Plaintiff companies ;

(C) that the Defendant the Treasurer and any Minister of the defendant the Commonwealth of Australia or any member of the Executive Council for the time being acting or purporting to act for or on behalf of the Treasurer of the Commonwealth of Australia be restrained from giving or causing or permitting to be given any notice pursuant to sub-section (1) of section 22 of the Banking Act, 1947 ;

(D) that the Defendant the Commonwealth Bank of Australia its officers and servants be restrained from requiring any of the plaintiff companies to

take any action pursuant to sub-section (8) of section 24 of the Banking Act, 1947 ;

(E) that the Defendant the Treasurer and any Minister of the defendant the Commonwealth of Australia or any member of the Executive Council for the time being acting or purporting to act for or on behalf of the Treasurer of the Commonwealth of Australia be restrained from publishing or causing or permitting to be published in the Commonwealth Gazette any notice pursuant to sub-section (4) of section 46 of the Banking Act, 1947 ; and

(F) that the Defendant Hugh Traill Armitage and every other person for the time being entitled by law or purporting to exercise the powers of the Governor of the Commonwealth Bank of Australia be restrained from authorising any person to act under section 59 of the Banking Act, 1947.

AND THIS COURT DOTH ALSO ORDER that the costs of the Plaintiffs of this action including reserved costs if any be taxed by the proper officer of this Court and when so taxed and allowed be paid by the Defendants to the Plaintiffs.

BY THE COURT,

J. G. HARDMAN,
Principal Registrar.

No. 36
Order in the Case of the State of South Australia and Anor. *v.* The Commonwealth of Australia and Others, 11th August 1948.

No. 36

ORDER IN THE CASE OF THE STATE OF SOUTH AUSTRALIA AND ANOTHER v. THE COMMONWEALTH OF AUSTRALIA AND OTHERS.

THIS ACTION which was commenced by writ of summons issued out of the South Australia Registry of this Court on the 28th day of November 1947 in action No. 16 of 1947 now No. 47 of 1947 in the New South Wales Registry coming on for trial before this Court pursuant to the Order made on the 15th day of January 1948 by His Honour Mr. Justice Dixon under the provisions of Section 18 of the Judiciary Act 1903-1947 on the 9th, 10th, 11th, 12th, 16th, 17th, 18th, 19th, 20th, 23rd, 24th, 25th, 26th and 27th days of February, 1948, and the 1st, 2nd, 3rd, 4th, 5th, 8th, 9th, 10th, 11th, 12th, 15th, 16th, 17th, 18th, 19th, 22nd, 23rd, 24th, 25th, and 31st days of March, 1948, and the 1st and 2nd days of April, 1948 at Melbourne in the State of Victoria and on the 13th, 14th and 15th days of April, 1948 at Sydney in the State of New South Wales UPON READING the documents numbered 1 to 31 comprised in the transcript record of the proceedings herein and in certain other actions numbered in the New South Wales Registry of this Court respectively 42, 43, 44 and 48 of 1947 AND UPON HEARING Mr. A. J. Hannan of King's Counsel with whom was Mr. K. J. Healy of Counsel for the plaintiffs and Dr. H. V. Evatt of King's Counsel (the Attorney-General of the Commonwealth of Australia) with whom were Professor K. H. Bailey of Counsel (the Solicitor-General of the Commonwealth of Australia), Mr. P. D. Phillips of King's Counsel and Mr. C. I. Menhennitt of Counsel for the defendants THIS COURT did on the 15th day of April, 1948 order that the action do stand for judgment AND the action standing in the list for judgment at Sydney this day THIS COURT DOTH DECLARE that the following provisions of the Banking Act 1947 of the Commonwealth of Australia are invalid namely—Division 2 of Part IV, except in so far as it relates to the voluntary acquisition of shares and without prejudice to the question whether sub-section (1) of section 14 is valid in relation thereto AND Division 3 of Part IV, Sections 24, 25, 37 to 45 inclusive, 46, 59 and 60 AND THIS COURT DOTH ORDER as follows :—

(A) That the Defendant the Treasurer and any Minister of the defendant the Commonwealth of Australia or any member of the Executive Council for the time being acting or purporting to act for or on behalf of the Treasurer of the Commonwealth of Australia be restrained from publishing or causing or permitting to be published any notice pursuant to sub-section (1) of section 13 of the Banking Act 1947 ;

(B) that the Defendant Hugh Traill Armitage and every other person for the time being entitled by law or purporting to exercise the powers of the Governor of the Commonwealth Bank of Australia be restrained from appointing or purporting to appoint any person a director of any of the Plaintiff companies;

(C) that the Defendant the Treasurer and any Minister of the defendant the Commonwealth of Australia or any member of the Executive Council for the time being acting or purporting to act for or on behalf of the Treasurer of the Commonwealth of Australia be restrained from giving or causing or permitting to be given any notice pursuant to sub-section (1) of section 22 of the Banking Act 1947 ;

(D) that the Defendant the Commonwealth Bank of Australia its officers and servants be restrained from requiring any of the plaintiff companies to

take any action pursuant to sub-section (8) of section 24 of the Banking Act 1947 ;

(E) that the Defendant the Treasurer and any Minister of the defendant the Commonwealth of Australia or any member of the Executive Council for the time being acting or purporting to act for or on behalf of the Treasurer of the Commonwealth of Australia be restrained from publishing or causing or permitting to be published in the Commonwealth Gazette any notice pursuant to sub-section (4) of section 46 of the Banking Act 1947 ; and

(F) that the Defendant Hugh Traill Armitage and every other person for the time being entitled by law or purporting to exercise the powers of the Governor of the Commonwealth Bank of Australia be restrained from authorising any person to act under section 59 of the Banking Act 1947.

No. 36 Order in the Case of the State of South Australia and Anor. *v.* The Commonwealth of Australia and Others, 11th August 1948, *continued.*

AND THIS COURT DOTH ALSO ORDER that the costs of the Plaintiffs of this action including reserved costs if any be taxed by the proper officer of this Court and when so taxed and allowed be paid by the Defendants to the Plaintiffs.

BY THE COURT,

J. G. HARDMAN,
Principal Registrar

No. 37
Order in the Case of the State of Western Australia and Anor. *v.* The Commonwealth of Australia and Others, 11th August 1948.

No. 37

ORDER IN THE CASE OF THE STATE OF WESTERN AUSTRALIA AND ANOTHER v. THE COMMONWEALTH OF AUSTRALIA AND OTHERS.

THIS ACTION which was commenced by writ of summons issued out of the Western Australia Registry of this Court on the 28th day of November 1947 in action No. 1 of 1947 (Now No. 48 of 1947 in the New South Wales Registry) coming on for trial before this Court pursuant to the Order made on the 15th day of January 1948 by His Honour Mr. Justice Dixon under the provisions of section 18 of the Judiciary Act 1903–1947 on the 9th, 10th, 11th, 12th, 16th, 17th, 18th, 19th, 20th, 23rd, 24th, 25th, 26th and 27th days of February, 1948, and the 1st, 2nd, 3rd, 4th, 5th, 8th, 9th, 10th, 11th, 12th, 15th, 16th, 17th, 18th, 19th, 22nd, 23rd, 24th, 25th and 31st days of March, 1948, and the 1st and 2nd days of April, 1948 at Melbourne in the State of Victoria and on the 13th, 14th and 15th days of April, 1948 at Sydney in the State of New South Wales UPON READING the documents numbered 1 to 31 comprised in the transcript record of the proceedings herein and in certain other actions numbered in the New South Wales Registry of this Court respectively, 42, 43, 44 and 47 of 1947 AND UPON HEARING Mr. A. J. Hannan of King's Counsel with whom was Mr. K. J. Healey of Counsel for the plaintiffs and Dr. H. V. Evatt of King's Counsel (the Attorney-General of the Commonwealth of Australia) with whom were Professor K. H. Bailey of Counsel (the Solicitor-General of the Commonwealth of Australia) Mr. P. D. Phillips of King's Counsel and Mr. C. I. Menhennitt of Counsel for the defendants THIS COURT did on the 15th day of April 1948 order that the action do stand for judgment AND the action standing in the list for judgment at Sydney this day THIS COURT DOTH DECLARE that the following provisions of the Banking Act 1947 of the Commonwealth of Australia are invalid namely—Division 2 of Part IV, except in so far as it relates to the voluntary acquisition of shares and without prejudice to the question whether sub-section (1) of section 14 is valid in relation thereto AND Division 3 of Part IV, sections 24, 25, 37 to 45 inclusive, 46, 59 and 60.

AND THIS COURT DOTH ORDER as follows:—

(A) That the Defendant the Treasurer and any Minister of the defendant the Commonwealth of Australia or any member of the Executive Council for the time being acting or purporting to act for or on behalf of the Treasurer of the Commonwealth of Australia be restrained from publishing or causing or permitting to be published any notice pursuant to sub-section (1) of section 13 of the Banking Act 1947;

(B) that the Defendant Hugh Traill Armitage and every other person for the time being entitled by law or purporting to exercise the powers of the Governor of the Commonwealth Bank of Australia be restrained from appointing or purporting to appoint any person a director of any of the Plaintiff companies;

(C) that the Defendant the Treasurer and any Minister of the defendant the Commonwealth of Australia or any member of the Executive Council for the time being acting or purporting to act for or on behalf of the Treasurer of the Commonwealth of Australia be restrained from giving or causing or permitting to be given any notice pursuant to sub-section (1) of section 22 of the Banking Act 1947;

(D) that the Defendant the Commonwealth Bank of Australia its officers and servants be restrained from requiring any of the Plaintiff companies to take any action pursuant to sub-section (8) of section 24 of the Banking Act 1947 ;

(E) that the Defendant the Treasurer and any Minister of the defendant the Commonwealth of Australia or any member of the Executive Council for the time being acting or purporting to act for or on behalf of the Treasurer of the Commonwealth of Australia be restrained from publishing or causing or permitting to be published in the Commonwealth Gazette any notice pursuant to sub-section (4) of section 46 of the Banking Act 1947 ; and

(F) that the Defendant Hugh Traill Armitage and every other person for the time being entitled by law or purporting to exercise the powers of the Governor of the Commonwealth Bank of Australia be restrained from authorising any person to act under section 59 of the Banking Act 1947.

AND THIS COURT DOTH ALSO ORDER that the costs of the Plaintiffs of this action including reserved costs if any be taxed by the proper officer of this Court and when so taxed and allowed be paid by the Defendants to the Plaintiffs.

BY THE COURT,

J. G. HARDMAN (L.S.),
Principal Registrar.

In the Privy Council.

No. 38 Order in Council granting special leave to the appellants to appeal to His Majesty in Council 26th November 1948.

No. 38.

ORDER IN COUNCIL GRANTING SPECIAL LEAVE TO THE APPELLANTS TO APPEAL TO HIS MAJESTY IN COUNCIL.

At the Court at Buckingham Palace the 26th day of November, 1948. Present The King's Most Excellent Majesty, Lord President, Lord Chamberlain, Mr. Isaacs, Mr. Strauss.

WHEREAS there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 10th day of November 1948 in the words following, viz. :—

" WHEREAS by virtue of His late Majesty King Edward the Seventh's Order in Council of the 18th day of October 1909 there was referred unto this Committee the matter of five Appeals from the High Court of Australia (1) 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 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 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) and 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 and (2) between the same Appellants and The Bank of Australasia, The Union Bank of Australia Limited, and The English Scottish and Australian Bank Limited (Plaintiffs) Respondents and (3) between the same Appellants and The State of Victoria and The Attorney-General of the said State (Plaintiffs) Respondents and (4) between the same Appellants and The State of South Australia and the Attorney-

No. 38
Order in Council granting special leave to the appellants to appeal to His Majesty in Council, 26th November 1948. *Cont.*

General of the said State (Plaintiffs) Respondents and (5) between the same Appellants and The State of Western Australia and the Attorney-General of the said State (Plaintiffs) Respondents and likewise the humble Petitions of the Appellants setting forth: that the Petitioners desire special leave to appeal from Orders dated the 11th August 1948 of the Full High Court of Australia (exercising its original jurisdiction) in so far as such Orders give effect to the Judgments of the majority of the Judges (Rich, Starke, Dixon and Williams JJ.; Latham C.J. and McTiernan J. dissenting) that certain provisions in the Banking Act 1947 (No. 57 of 1947 thereinafter called "the Act") offend against section 92 of the Australian Constitution: that the Act makes provision by means of which the business of banking in Australia may be nationalised and the Commonwealth Bank of Australia may together with State banks gradually replace the existing private banks: that the Petitioners are the Defendants in five actions commenced on the 28th November 1947 to challenge the constitutional validity of the Act: that the main Respondents are the banks incorporated in Australia and carrying on business in Australia whose names are set out in Part I of the First Schedule of the Act: that substantially the same relief by way of declarations and injunctions was claimed in each action and therefore by consent the Court on motions for interlocutory injunctions ordered that the motions in all five actions should be heard together by the Full Court and that the motions should be treated as the trials of the actions: that the provisions of the Act for prohibiting the carrying on of the business of banking in Australia by the private banks are contained in section 46: that by a majority the Court declared that section 46 (among other sections) of the Act was invalid and in consequence it was ordered that the Defendants or one or other of them be restrained from taking action under certain sections including section 46 (4): that the Petitioners submit that the conclusion of the majority of the Court is erroneous: that the right of Your Majesty in Council to grant special leave to appeal from the High Court has been limited by section 74 of the Constitution only in respect of decisions upon questions arising as to "the limits inter se of the constitutional powers of the Commonwealth and those of any State or States" and no such question arises in respect of this Petition: And humbly praying Your Majesty in Council to grant the Petitioners special leave to appeal from the Orders of the High Court dated the 11th August 1948 in so far as such Orders declare that section 46 of the Banking Act 1947 is invalid and grant an injunction on the basis of this declaration and that the Appeals may be consolidated and heard at an early date and for further or other relief:

"THE LORDS OF THE COMMITTEE in obedience to His late Majesty's said Order in Council have taken the humble Petitions into consideration and having heard Counsel in support thereof and in opposition thereto Their Lordships do this day agree humbly to report to Your Majesty as their opinion (1) that leave to enter and prosecute their Appeals against the Orders of the High Court of Australia dated the 11th day of August 1948 in so far as such Orders declare that section 46 of the Banking Act 1947 is invalid and grant an injunction on the basis of that declaration ought to be granted to the Petitioners upon the footing that at the hearing of the Appeals (*a*) it shall be reserved to the Respondents to raise as a preliminary point the plea that the Appeal does not lie without a certificate of the High Court of Australia and (*b*) if this preliminary point shall be decided against the Respondents they shall be at liberty to raise all such constitutional points as they think fit and (2) that the several Appeals ought to be consolidated:

In the Privy Council.

No. 38 Order in Council granting special leave to the appellants to appeal to His Majesty in Council, 26th November 1948. *Cont.*

"And Their Lordships do further report to Your Majesty that the authenticated copy under seal of the Record produced by the Petitioners upon the hearing of the Petitions ought to be accepted (subject to any objection that may be taken thereto by the Respondents) as the Record proper to be laid before Your Majesty on the hearing of the Appeal."

HIS MAJESTY having taken the said Report into consideration was pleased by and with the advice of His Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed obeyed and carried into execution.

Whereof the Governor-General or Officer administering the Government of the Commonwealth of Australia for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

E. C. E. LEADBITTER.

No. 55 of 1948.

IN THE PRIVY COUNCIL

ON APPEAL

FROM THE HIGH COURT OF AUSTRALIA

Between

THE COMMONWEALTH OF AUSTRALIA AND OTHERS (defendants) (*Appellants in each appeal*)

AND

BANK OF NEW SOUTH WALES AND OTHERS (Plaintiffs) (*Respondents in the first appeal.*)

AND BETWEEN

SAME

and

THE BANK OF AUSTRALASIA AND OTHERS (Plaintiffs) (*Respondents in the second appeal.*)

and Between

SAME

and

THE STATE OF VICTORIA AND ANOTHER (Plaintiffs) (*Respondents in the third appeal.*)

and Between

SAME

and

THE STATE OF SOUTH AUSTRALIA AND ANOTHER (Plaintiffs) (*Respondents in the fourth appeal.*)

and Between

SAME

and

THE STATE OF WESTERN AUSTRALIA AND ANOTHER (Plaintiffs) (*Respondents in the fifth appeal.*)

RECORD OF PROCEEDINGS

Coward, Chance & Co.,
Stevenson House,
155, Fenchurch St., E.C.3.
Solicitors for the Appellants.

Linklaters & Paines,
Austin Friars House,
6, Austin Friars, London, E.C.2.
Solicitors for the Respondents in the first appeal.

Farrer & Co.,
66, Lincoln's Inn Fields,
London, W.C.2.
Solicitors for the Respondents The Bank of Australasia.

Bircham & Co.,
Winchester House,
100, Old Broad Street,
London, E.C.2.
Solicitors for the Respondents The Union Bank of Australia, Limited.

Slaughter & May,
18, Austin Friars, London, E.C.2.
Solicitors for the Respondents The English Scottish and Australian Bank Limited.

Freshfields,
1, Bank Buildings,
Princes Street, London, E.C.2.
Solicitors for the Respondent States.