THE PRIVY COUNCIL, THE HIGH COURT AND SECTION 92.

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Any discussion of section 92 of the Commonwealth Constitution must now begin with the proposition of Dixon J. in *Gratwick v. Johnson* :[1] " In questions concerning the application of section 92 . . . I think it has become desirable for the Court to avoid as far as possible the statement of general propositions and in each case to decide the matter, so far as may be, on the specific considerations or features which it presents. None of the many attempts that have been made to formulate principles or to expound the meaning and operation of the text has succeeded in giving the guidance in subsequent cases which their authors had hoped. What has been clear has not found acceptance and what has been accepted has yet to be made clear." Notwithstanding this judicial pessimism, the temptation is irresistible to look for some scintilla of interior logic in the series of decisions on section 92, or at least to attempt to mark the points at which strict implication failed. It is suggested that a part of the explanation for the logical inconsistency in the cases can be found in the fact that the Judicial Committee of the Privy Council, in its two decisions concerning section 92, expressly approved two opinions of High Court Justices which are in principle inconsistent with each other. In *James v. Cowan*,[2] the Board said : " In the result their Lordships find themselves in accord with the convincing judgment delivered by Isaacs J. in the High Court " (sc. in the same case.) In *James v. The Commonwealth*,[3] their Lordships said : " The elaborate judgment of Evatt J. in " (*Vizzard's Case*[4]) " is of great importance. It is impossible to quote at length from it ; one short passage may be extracted " . . . They quoted a passage, and went on to say that the reasoning in *Vizzard's Case* " seems to be . . . correct."

In the *Peanut Board Case*,[5] Starke, Dixon and McTiernan JJ. emphasized the approval which the Privy Council had given to the opinion of Isaacs J. in *James v. Cowan* and quoted extensive passages from that opinion to support their decision that the legislation being considered was inconsistent with section 92. In *Vizzard's Case*,[6] Dixon J. said *inter alia* " the authority given to the judgment of Isaacs J., in *James v. Cowan*, by the approval it received in the Privy Council, cannot be ignored . . . No doubt this does not necessarily amount to an adoption of everything that judgment contains, but it must mean that the main principles upon which it proceeded commend themselves to the Board." This proposition has never been challenged either by the High Court or by the Judicial Committee itself. In *James v. The Commonwealth*,[7] the Judicial Committee refers to *James v. Cowan* but makes no reference to the content of the opinion of Isaacs J. in that case, though it does refer to its own previously expressed approval of that opinion. It cannot therefore be assumed that anything in *James v. The Common-*

1. (1945) 70 C.L.R. 1, at p. 19 ; [1945] A.L.R. 167.
2. [1932] A.C. 542, at p. 561.
3. [1936] A.C. 578, at pp. 621-2.
4. (1933) 50 C.L.R. 30, at p. 71 ; [1934] A.L.R. 16, at p. 28.
5. (1933) 48 C.L.R. 266, at pp. 281, 287, 313 ; [1933] A.L.R. 161, at pp. 164, 167, 175.
6. 50 C.L.R., at p. 71 ; [1934] A.L.R., at p. 23.
7. [1936] A.C., at pp. 622-3.

wealth either confirms or detracts from the formal authority of the opinion of Isaacs J.

In *Gratwick v. Johnson*,[8] Starke J. challenged "the oft-repeated assertion in this Court that the Judicial Committee has approved of the decision in *R. v. Vizzard.*" His Honour said that the Privy Council had disagreed with the basic conception of *McArthur's Case*[9] and had approved the particular passage from *Vizzard's Case* which they quoted. "It may be that their Lordships would have reached the same conclusion in *Vizzard's Case* as was reached in this Court by a majority of its members, but, though approving of some of the reasoning in this Court, their Lordships did not expressly or necessarily say that they approved of the decision." He said that the refusal of the Judicial Committee to grant special leave to appeal in subsequent transport control cases was inconclusive, since this was based upon "the general rule that the decisions of this Court were final." But in the *Airlines Case*,[10] Williams J. said, referring to the opinion delivered by Lord Wright in *James v. The Commonwealth*: "It is . . . evident that his Lordship considered that *Vizzard's Case* was correctly decided, that he accepted the general approach to section 92 and reasoning of Evatt J. in that case, and that he gave his express approval to the particular passage in the judgment of Evatt J. cited." It is suggested with respect that the principle of looking to the substance rather than the form applies even more in the case of judicial decisions that in the case of statutes, and that the dicta of Williams J. accord more with this principle than do those of Starke J.

We are left then with two opinions of the High Court both approved to an uncertain but considerable degree by the Privy Council. Those two opinions are basically inconsistent. This is not surprising, since Isaacs J. proceeded upon the general conception he had followed in *McArthur's Case*, whereas Evatt J. was in revolt from that conception. The inconsistency can be seen by juxtaposing key passages from the two opinions. Isaacs J. said in *James v. Cowan*:[11] "The right of inter-State trade and commerce protected by section 92 from State interference and regulation is *a personal right attaching to the individual and not attaching to the goods* . . . the question is, how has the personal right of trading inter-State by the former owner been interfered with? That is a personal right, not a property right, and it is a right which no single State can give . . . The right is not an adjunct of the goods: it is the possession of the individual Australian, protected from State interference by section 92." Evatt J. said in *Vizzard's Case*:[12] "The real object" (of section 92) "is to secure the free flow and passage and marketing of commodities among the States, and to secure the right of passage of persons from State to State. Absolute freedom is ascribed to trade, to commerce and to intercourse *and is not ascribed to traders or to travellers considered merely as individuals.*"[13] There is a complete opposition between the two conceptions. That of Isaacs J. is individualist in the most thoroughgoing

8. 70 C.L.R., at pp. 17-19; [1945] A.L.R., at pp. 172-3.
9. (1920) 28 C.L.R. 530: [1921] A.L.R. 130.
10. (1945) 71 C.L.R. 29, at p. 106; [1946] A.L.R., at p. 33.
11. (1930) 43 C.L.R. 386, at p. 418; [1930] A.L.R. 125, at p. 137. The italics are in the original report.
12. 50 C.L.R., at p. 94; [1934] A.L.R., at p. 38.
13. My italics.

sense. That of Evatt J. affirms what Isaacs J. denied—that the freedom attaches to goods or to an abstract totality of commerce and intercourse.

The implications of Isaacs J.'s dicta were not well illustrated by the facts of *James v. Cowan*, since the legislation there held invalid clearly restricted the volume of inter-State trade as well as affecting the rights of individuals. Indeed, it was by concentrating on the intention of the legislation in respect of trade in general that the Privy Council in *James v. Cowan* supplied the basis for the doctrines developed by Evatt J. in the *Peanut Board Case* and subsequent cases, in which he ignored the opinion of Isaacs J. in *James v. Cowan*. But the facts of *Vizzard's Case*, and the *Riverina Transport Case*[14] in which *Vizzard* was applied, illustrated very well the implications of Evatt J.'s views; in the former, complete prohibition on some individuals was contemplated as valid, and in the latter was expressly so held.

From 1933 to 1945, the conception of Evatt J. was dominant; that of Isaacs J. lived on in dissenting opinions of Starke and Dixon JJ.[15] But judicial time has its revenges. *Gratwick v. Johnson* is perhaps more a qualification of *Farey v. Burvett*[16] than of *Vizzard's Case*. But in the *Airlines Case*, the influence of Isaacs J's. conception is plainly to be seen: Williams J.[17] specially referred to the opinion of Isaacs J. in *James v. Cowan*, and to the fact that it was approved by the Privy Council in that case. Latham C.J. and Williams J. also referred to the opinion of Evatt J. in *Vizzard's Case*, but not to any of the passages from his opinion supporting the validity of Government transport monopolies. The *Airlines Case* seems to decide that prohibition of individual liberty to trade inter-State is at least *prima facie* inconsistent with section 92. The basic inconsistency between the reasoning of the *Airlines Case* and the reasoning of Evatt J. in *Vizzard's Case* can be seen by juxtaposing the following propositions. Starke J. said in the *Airlines Case*:[18] "The object of section 92 is to maintain freedom of inter-State competition—the open and not the closed door—absolute freedom of inter-State trade and commerce. An Act which is entirely restrictive of any freedom of action on the part of traders and which operates to prevent them engaging their commodities in any trade, inter- or *intra-State*,[19] is, in my opinion, necessarily obnoxious to section 92." Evatt J. said in *Vizzard's Case*:[20] "It cannot be said that section 92 necessarily prevents a State from monopolising the service of land transport within its borders." Perhaps a Hegelian would regard the *Airlines Case* as a synthesis, or the beginning of a synthesis, in a dialectic process, in which the idea of Isaacs J. is the thesis and that of Evatt J. the antithesis. Perhaps, however, if it is desired to bring philosophic affiliation proceedings on behalf of this brood of cases, the putative father is indicated by Dixon J. in the *Airlines Case*,[21] where he refers to the "pragmatical solution" sought by the Court in the transport cases.

14. (1937) 57 C.L.R. 237; [1937] A.L.R. 574.
15. In *Vizzard's Case, Hartley v. Walsh*, (1937) 57 C.L.R. 372; [1937] A.L.R. 480, and *Milk Board v. Metropolitan Cream Board*, (1939) 62 C.L.R. 116; [1939] A.L.R. 337.
16. (1916) 21 C.L.R. 433; [1916] A.L.R. 201.
17. 71 C.L.R., at pp. 107, 110; [1946] A.L.R., at p. 33.
18. 71 C.L.R., at p. 78; [1946] A.L.R., at p. 20.
19. My italics.
20. 50 C.L.R., at p. 82; [1934] A.L.R., at p. 33.
21. 71 C.L.R., at p. 90; [1946] A.L.R., at p. 25.