Testators' Family Maintenance Acts purported to give the Court such a power, it was inconsistent with the *Bankruptcy Act*, and that the latter prevailed (section 109 of the Constitution).

Stanley J.[2] rejected both submissions on two grounds. The first ground (as far as the real estate of the testator was concerned) was that a will is an instrument, and by section 43 of the *Real Property Acts*, 1861-1946, an instrument is not effectual to vest any estate or interest in the land until it is registered (no such steps had been taken). Accordingly, the real estate had not vested in the beneficiary, nor through her in the Official Receiver.

The second ground of His Honour's decision was that even assuming any right to any of the property is vested in the Official Receiver, he gets no better right than the bankrupt had in the property, namely, a right to such property if the Supreme Court of Queensland exercising its jurisdiction under the *Testators' Family Maintenance Acts* did not deprive her of that right.

So far as concerns the first ground, *Holt* v. *The Deputy Federal Commissioner of Land Tax (N.S.W.)*,[3] which may possibly have affected His Honour's decision (on that ground only), was not referred to.

M.B.H.

CONSTITUTIONAL LAW

Most of the numerous important judgments delivered during the year on constitutional law were concerned with interpretation of the Federal Constitution, particularly in relation to the legislative powers of the Federal Parliament.

Defence Power.

The extent of the defence power (Constitution, section 51 (vi)), in the immediate post-war period again came up for consideration by the High Court in *Hume* v. *Higgins*,[4] *R.* v. *Foster*;[5] *Wagner* v. *Gall*,[5] and *Collins* v. *Hunter*.[5] The last three of these cases made history—most welcome history to student and practitioner alike—in that a single consolidated judgment, expressing the unanimous opinion of six judges, was delivered in respect of all three. This judgment demonstrated unmistakeably that the rate of diminution of the extent of the defence power rapidly accelerates as the termination of hostilities recedes further into the past. Although Williams J. was able to say in *Hume* v. *Higgins*,[6] in which the war-time *National Security* (*Economic Organisation*) *Regulations*, as extended by the *Defence* (*Transitional Provisions*) *Act*, 1946, were held to be still valid in 1947, that "the Executive must be accorded a wide latitude of discretion in determining when that period [*i.e.*, the period of transition from war to peace] has come to an end," the Court was satisfied in the three later cases that that period had come to an end in 1949 so far as the continuing *Women's Employment Regulations*, *Liquid Fuel Regulations*, and *National Security* (*War Service Moratorium*) *Regulations* 30A-30AF were concerned, and those Regulations were declared no longer valid. The Court followed the principles expressed by it in earlier cases on the extent of the defence power in the post-war

2. *Re Crowley*, [1949] St. R. Qd. 189.
3. (1914) 17 C.L.R. 720.
4. 78 C.L.R. 116; [1949] A.L.R. 273.
5. [1949] A.L.R. 493.

period : "The Court must see with reasonable clearness how it is incidental to the defence power to prolong the operation of a war measure dealing with a subject otherwise falling within the exclusive province of the States."[7]

Civil Conscription in relation to the provision of Medical and Dental Services.

The effect of the provision inserted in the Constitution as section 51 (xxiiiA) by amendment in 1946, authorising the Federal Parliament to make laws with respect to "the provision of maternity allowances, widows' pensions, child endowment, unemployment, pharmaceutical, sickness and hospital benefits, medical and dental services (but not so as to authorise any form of civil conscription), benefits to students and family allowances," was considered in *British Medical Association* v. *The Commonwealth.*[8] The B.M.A. sought a declaration of invalidity in respect of the *Pharmaceutical Benefits Act*, 1947-1949, which established a scheme under which all persons were to be supplied with medicines free on presentation to a pharmaceutical chemist of a prescription written by a medical practitioner on a prescribed form, the chemist's charges being paid by the Commonwealth. Argument centred chiefly on section 7A of the Act, which provided that a medical practitioner was not, on pain of a fine, to write a prescription otherwise than on a prescribed form unless requested by the patient not to use the form. The Court held first of all that paragraph xxiiiA authorises only provision *by the Commonwealth* of the various social services mentioned in it, and does not authorise any law requiring the States or any persons to provide them. But on this construction the Act was a valid law for the provision by the Commonwealth of pharmaceutical and sickness benefits.

It was on the precise effect of the parenthetical prohibition of any form of civil conscription that the greatest difficulty was met. The Court held by a majority, Dixon and McTiernan JJ. dissenting, that civil conscription means simply any form of compulsion to perform any work or service or to perform it in any particular manner. Latham C.J. took the view that the prohibition of civil conscription applied equally in respect of all the matters mentioned in paragraph xxiiiA before the parentheses, but Rich, Dixon, McTiernan and Williams JJ. held on the contrary that it applied only in respect of the provision of medical and dental services. Now the *Pharmaceutical Benefits Act* was not a law for the provision of medical or dental services, but Rich, Williams and Webb JJ. held that in so far as any law made under any of the other heads in paragraph xxiiiA contemplated the performance of some incidental medical or dental service, the prohibition prevented such performance being made compulsory. Those three judges thus reached the same position as Latham C.J. so far as the effect of the prohibition on section 7A of the Act was concerned. For section 7A required medical practitioners to perform a medical service, namely, the writing of prescriptions, in a particular manner. It is true that the section did not *directly* compel medical practitioners to write prescriptions on the prescribed form in that they could lawfully decline to write any at all unless asked by their patients not to use the form, but the likely result of such an attitude would be that they would cease to have any patients.

6. 78 C.L.R. at 139.
7. [1949] A.L.R. at 500.
8. [1949] A.L.R. 865.

This was regarded by the Court as constituting a practical compulsion which was as much civil conscription as any direct form of compulsion. Section 7A was accordingly held to be invalid.

The Commonwealth's Power with respect to Sedition.

Although the Federal Parliament has no general power to legislate with respect to crime, it can, by virtue of its power under section 51 (xxxix) of the Constitution to make laws with respect to matters incidental to the execution of any power vested by the Constitution in any Federal authority, create offences in relation to matters falling properly within the Federal sphere. The power of the Federal Parliament to legislate for the punishment of sedition was considered by the High Court in two cases concerning public statements made by members of the Communist Party : *Burns* v. *Ransley*[9] and *R.* v. *Sharkey*.[10] The particular question before the Court was the validity of sections 24A, 24B and 24D of the *Crimes Act*, 1914-1941, under which both of the persons mentioned were convicted of the offence of uttering seditious words. The offence is constituted by uttering words expressive of any of the following intentions :—

"(*a*) to bring the Sovereign into hatred or contempt ;

(*b*) to excite disaffection against the Sovereign or the Government or constitution of the United Kingdom or against either House of the Parliament of the United Kingdom ;

(*c*) to excite disaffection against the Government or Constitution of any of the King's Dominions ;

(*d*) to excite disaffection against the Government or Constitution of the Commonwealth or against either House of the Parliament of the Commonwealth ;

(*e*) to excite disaffection against the connexion of the King's Dominions under the Crown ;

(*f*) to excite His Majesty's subjects to attempt to procure the alteration otherwise than by lawful means of any matter in the Commonwealth established by law of the Commonwealth ; or

(*g*) to promote feelings of ill-will and hostility between different classes of His Majesty's subjects so as to endanger the peace order or good government of the Commonwealth."

The Court held that the sections referred to were all within the power of the Federal Parliament, Dixon J. dissenting as to paragraph (*g*). In the opinion of the Court the Federal Parliament could not make purely political criticism of members of the Government or of governmental institutions an offence, since that would be contrary to the basic principles of democratic government implicit in the Constitution, and in the Court's opinion the provisions of the *Crimes Act* referred to did not extend to political criticism. The power to preserve governmental institutions from violent subversion, and even from incitements to subversive antagonism which may not be manifested by any overt acts of violence or of resistance to governmental authority, is necessarily incidental to the business of government, and therefore included in section 51 (xxxix) of the Constitution. There can be no doubt of the correctness of this

9. [1948] A.L.R. 817.
10. [1949] A.L.R. 828.

view, but the dividing line between political criticism and excitement to disaffection may be unhappily blurred, as is well illustrated by the dissenting opinions of Dixon and McTiernan JJ. in *Burns' Case*, and of Dixon J. in *Sharkey's Case*, that the words in question were not expressive of any seditious intention. So far as the provisions relating to the Constitutions of the other parts of the Empire and to the relationship between the various parts of the Empire are concerned, these are supported by the external affairs power (Constitution, section 51 (xxix)). Paragraph (*g*) is valid when understood as limited to the preservation of the peace, order and good government of the Commonwealth with respect to matters within the constitutional competence of Federal authorities (Latham C.J., Webb J., and *semble* Rich J.), or when understood as referring to the Commonwealth not as a geographical area but as a body politic (Williams J., and *semble* McTiernan J.).

Freedom of Interstate Trade, Commerce, and Intercourse. Banking.

The most important decision of the year from the governmental point of view was that of the Privy Council in *The Commonwealth* v. *Bank of New South Wales*.[11] This was an appeal by the Commonwealth from the decision of the High Court[12] that certain vital sections of the *Banking Act*, 1947, were invalid, the object of that Act being the nationalisation of the privately operated banks in Australia. Although the Privy Council held that it had no jurisdiction to hear the appeal as it was brought before it (see *infra*), it did express an opinion on the substance of the case in order, as it said, to save lengthy re-argument in the event of the necessary preliminaries being complied with and the case again coming before it, and also because the appellants' case was based on a misapprehension of two judgments given by the Board itself on the effect of section 92 of the Constitution: *James* v. *Cowan*[13] and *James* v. *The Commonwealth*.[14]

In the first place, the Board held that banking is one of the activities comprised in "trade, commerce, and intercourse" within the meaning of section 92, and therefore protected by that section in its interstate aspects. This ruling disposed of the argument on which Latham C.J. and McTiernan J. had held the main provisions of the Act to be valid. The Board went on to express the view of section 92 which had been taken by Isaacs J. in *James* v. *Cowan*[15] and followed by the majority of the judges of the High Court in several later cases, that the section provides a guarantee of *individual rights*, rights to freedom in interstate trade, commerce, and intercourse. The Board emphatically rejected the opposing view which had been put by Evatt J. in *R.* v. *Vizzard*[16] and strenuously argued by him as Attorney-General in this case, that section 92 provides no guarantee of the rights of individual traders, but merely a guarantee that interstate trade and commerce considered as an entity irrespective of the persons who engage in it, whether private or governmental, shall remain free from governmental restriction. This latter view was rejected as being contrary to the *James Cases*, as being unreal and unpractical, and as being quite inapplicable to "intercourse" which must include individual movement across State borders.

11. [1949] 2 All E.R. 755; [1949] A.L.R. 925.
12. (1948) 76 C.L.R. 1.
13. [1932] A.C. 542.
14. [1936] A.C. 578.
15. (1930) 43 C.L.R. 386.
16. (1933) 50 C.L.R. 30.

The Privy Council, while admitting that in the labyrinth of decided cases on section 92 there was no golden thread, said that two general propositions were established[17]: (*a*) "regulation of trade, commerce, and intercourse among the States is compatible with its absolute freedom"; (*b*) "section 92 is violated only when a legislative or executive act operates to restrict such trade, commerce, and intercourse directly and immediately as distinct from creating some indirect or consequential impediment which may fairly be regarded as remote." The Board went on to approve of the distinction drawn by Latham C.J. in the *Milk Case*[18] and the *Airlines Case*[19] between laws "directed against" or prohibitory of interstate trade, commerce, and intercourse, on the one hand, and laws regulatory of the manner in which it is conducted, on the other hand. Just where the line is to be drawn between these two classes of laws, or between direct and indirect impediments to interstate trade, commerce, and intercourse, are questions which must remain fruitful of controversy and litigation, as their Lordships were well aware. "The problem to be solved will often be not so much legal as political, social, or economic; yet it must be solved by a court of law."[20]

The Privy Council set at rest doubts which had been expressed in some cases by holding that *regulation* of trade, commerce, and intercourse may properly take the form of denying certain activities to persons by age or circumstances unfit to perform them, or excluding the passage of things liable to injure the citizens of a State. Once again, in the application of the principle questions of fact and degree are involved, and the connection between the law and a proper object of regulation must not be too remote, as it was, for example, in the Privy Council's opinion, upholding the decision of the High Court, in the *Potato Case*.[21]

Applying these principles to section 46 of the *Banking Act*, the key section of the Act, prohibiting the private banks from carrying on business, the Board held that, as a direct prohibition of the conduct of interstate banking by the banks concerned, it was a violation of section 92 and consequently invalid.

Up to this point the judgment would seem to finally deny the possibility of any Australian Parliament, whether State or Federal, being able to nationalise or create a Government monopoly of any industry in any direct manner. But the Board made a very important and somewhat extraordinary reservation. "Their Lordships do not intend to lay it down that in no circumstances could the exclusion of competition so as to create a monopoly either in a State or Commonwealth agency or in some other body be justified. Every case must be judged on its own facts and in its own setting of time and circumstance, and it may be that in regard to some economic activities and at some stage of social development it might be maintained that prohibition with a view to State monopoly was the only practical and reasonable manner of regulation, and that interstate trade, commerce and intercourse thus prohibited and thus monopolised remained absolutely free."[22] Their Lordships attempted no further explanation or elaboration of this important reservation. They made no suggestions as to the considerations which ought to be taken into account in deciding to what kinds of activities

17. [1949] 2 All E.R. at 771; [1949] A.L.R. at 945.
18. (1939) 62 C.L.R. 116 at 127.
19. (1945) 71 C.L.R. 29 at 61.
20. [1949] 2 All E.R. at 772; [1949] A.L.R. at 945.
21. (1935) 52 C.L.R. 157.
22. [1949] 2 All E.R. at 772; [1949] A.L.R. at 945.

or at what stage of development the principle could be brought into operation. It seems to be essentially a political question. It may be that the Board intended by that ***dictum*** to justify the monopoly long exercised by the Post Office and perhaps by State railways. One practical effect of the reservation may be to justify any judge in continuing to dissent from decisions of the Privy Council and the High Court holding government monopolies or semi-monopolies invalid, because he could always say that in his opinion the measures in question provided the only practical and reasonable means of regulating interstate trade, commerce and intercourse.

"Inter Se Questions" and the High Court's Certificate for Appeal to the Privy Council.

The judgment of the Privy Council in *The Commonwealth* v. *Bank of N.S.W.* is important also because of the interpretation given therein to section 74 of the Constitution, which prohibits appeals to the Privy Council from High Court decisions on questions as to the limits *inter se* of the constitutional powers of the Commonwealth and those of a State or States, or as to the limits *inter se* of the constitutional powers of any two or more States, unless a certificate is obtained from the High Court authorising the appeal. In this case the Commonwealth sought to limit the appeal solely to the question of the effect of section 92, which does not involve any "*inter se* question." Certain "*inter se* questions" were raised in the original proceedings before the High Court, some of which were decided in favour of the Commonwealth, and some of which were not decisively answered one way or the other. It was clear, however, that the relief sought by the Commonwealth on appeal, *viz.*, the reversal of the decision as to the invalidity of section 46 of the *Banking Act* as being contrary to section 92 of the Constitution, could be granted only on the basis that the "*inter se* questions" were determined in the Commonwealth's favour, because otherwise section 46 would be invalid even if not contrary to section 92. In the opinion of the Board, this brought section 74 into operation and rendered the Board incompetent to hear the appeal, though for reasons expressed earlier it did in fact give judgment on the merits of the case. The High Court's certificate must therefore be obtained whenever the relief sought on appeal cannot be granted without the determination of an "*inter se* question," that is to say, whenever the subject matter of the appeal involves an "*inter se* question" which was decided by the High Court *in favour* of the appellant, or whenever the subject matter of the appeal involves an "*inter se* question" which was not actually decided by the High Court at all. The inclusion of this second type of case within the ambit of section 74 led the Board to disapprove of the decision of the majority of the High Court in *Baxter* v. *Commissioners of Taxation (N.S.W.)*[23] on the meaning of the word "decision" in section 74, since the effect of the Privy Council's judgment is to bring the section into operation in some cases even though the High Court has made no real decision on an "*inter se* question" at all. Of course, where the High Court decides *against* a party on an "*inter se* question" and on some other question, that party is quite entitled to accept the decision on the "*inter se* question" and to limit his appeal to the other matter, and in that case no certificate from the High Court is required, since the Privy Council can grant the necessary relief without determining the *inter se* question.

23. (1907) 4 C.L.R. 1087.

The Board also held that in any case where the High Court's certificate is a necessary pre-requisite to an appeal to the Privy Council, no leave is required of the Privy Council if the certificate is granted, even if questions other than "*inter se* questions" will have to be determined.

Excise Duties.

An important decision on the financial powers of the States under the Federal Constitution was given in *Parton* v. *The Milk Board.*[24] This decision sets at rest doubts which had arisen out of a number of earlier cases as to the precise scope of excise duties, which by section 90 of the Constitution fall exclusively within the province of the Commonwealth. The Court held, Latham C.J. and McTiernan J. dissenting, that excise duties are not limited to taxes levied on producers and manufacturers of goods, but include taxes levied at any stage between production and consumption, provided they are levied in respect of production. "The production or manufacture of an article will be taxed whenever a tax is imposed in respect of some dealing with the article by way of sale or distribution at *any* stage of its existence, provided that it is expected and intended that the taxpayer will not bear the ultimate incidence of the tax himself but will indemnify himself by passing it on to the purchaser or consumer."[25] It is now settled, therefore, that all sales taxes are excise duties, and therefore cannot be imposed by a State. The immediate effect of the decision was to render invalid a popular method of financing the operations of State marketing boards, by a levy on distributors calculated according to the amount of goods distributed by them.

Public Corporations and the Shield of the Crown.

Outside the sphere of the Federal Constitution reference may be made to a decision of the Court of Appeal which is of considerable importance in view of the growing number of public corporations engaged in commercial operations : *Tamlin* v. *Hannaford.*[26] The relationship of a public corporation to the Crown and its relationship to the general public may be clearly set forth in the legislation which creates it or gives it powers and functions. But in many cases the Act contains no express provision either making the corporation an agent or servant of the Crown or making it independent of the Crown. The Court of Appeal held that in such a case the presumption is that it is *not* under the shield of the Crown, at any rate if it is a commercial corporation, and this presumption is not rebutted by the fact that the corporation comes under the control of the Executive Government. It was accordingly held that the British Transport Commission was not entitled to the immunities of the Crown under the *Rent Restriction Acts*, in spite of the considerable control over its operations given to the Minister for Transport. With this case may be compared the case of *Victorian Railways Commissioner* v. *Herbert*,[27] in which the Victorian Full Court reached a similar conclusion concerning the Victorian Railways Commissioner and the *Landlord and Tenant Act*, 1948. No reliance was placed in this case on any presumption such as that propounded in

24. [1950] A.L.R. 55.
25. Rich and Williams JJ. at 64.
26. [1950] 1 K.B. 18.
27. [1949] A.L.R. 440

Tamlin v. *Hannaford,* but it was emphasised that a public authority might represent the Crown for some purposes but not for others, depending on the wording of the legislation applicable to it.

R.A.

CONTRACT

Gaming and Wagering

The most outstanding development in the realm of contract in 1949 was the decision of the House of Lords in *Hill v. William Hill (Park Lane) Ltd.*[28]—outstanding because it overruled certain decisions which had stood for many years and on which a regular practice had been based. The House of Lords held, by a four to three majority, that a promise to pay a lost bet in consideration of the winner refraining from taking some action which might be disadvantageous to the loser, *e.g.*, reporting him to an appropriate authority with a view to having him posted as a defaulter, is unenforceable. The decision of the Court of Appeal in *Hyams* v. *Stuart King*[29] was thereby overruled and Fletcher Moulton L.J.'s vigorous dissenting judgment in that case upheld.

The decision of the House of Lords was based on the second part of the first paragraph of section 18 of the *Gaming Act,* 1845,[30] which states, after the avoidance of all agreements by way of gaming or wagering, that "no suit shall be brought or maintained in any court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager . . ." The decision in *Hyams* v. *Stuart King* had been based on the view that this was a purely procedural provision adding nothing to the substance of the first part of the paragraph, so that a promise to pay a lost bet would be enforceable if some new consideration was provided, since the promise would then cease to be merely part of a wagering contract and become incorporated in an entirely new contract. The majority of the Lords, however, took the view that full effect must be given to this second part of the first paragraph of section 18, and that it was immaterial what new consideration was provided if the promise was still in fact a promise to pay the money lost on the wager. Their Lordships recognised that a promise by the loser of a bet made in consideration of a promise by the winner not to report his default is not necessarily unenforceable. The question turns on whether the loser's promise is or is not really a promise to pay the bet, and that is a question of fact to be determined according to the circumstances of each particular case.

Their Lordships also overruled, on the same grounds, an older case, *Bubb* v. *Yelverton,*[31] in which a bond given to betting creditors in order to prevent them from taking steps to have the debtor posted as a defaulter was held valid. A promise given under seal is therefore in no better case than a promise supported by consideration if it remains a promise to pay money lost on a wager. It must be remembered, of course, that *Hill's Case* has no application in Queensland to bets made with licensed bookmakers on the course, which are fully valid contracts by virtue of the *Racing Regulation Amendment Act of* 1930, section 22, provided that the conditions laid down in that section are satisfied.

28. [1949] A.C. 530.
29. [1908] 2 K.B. 696.
30. (Qld.) *Gaming Act of* 1850, section 8.
31. (1870) L.R. 9 Eq. 471.