LEGAL LANDMARKS 1952-1953.
CONSTITUTIONAL AND ADMINISTRATIVE LAW.

Defence Power.

In *Marcus Clark and Co. Ltd.* v. *Commonwealth*[1] the High Court was called upon to consider the validity of the *Defence Preparations Act* 1951 and of the *Capital Issues Regulations* made thereunder. The Act was passed to equip the Federal Government with power to deal, in the words of the preamble, with "a state of international emergency in which it is essential that preparations for defence should be immediately made to an extent, and with a degree of urgency, not hitherto necessary except in time of war." Although this state of emergency seems to have faded somewhat rapidly—the *Capital Issues Regulations* were the only regulations made under the Act—and although in any case the Act is due to expire at the end of 1953, the decision of the Court upholding the validity of both the Regulations and the Act is of the utmost importance in its bearing upon the general limits of the defence power.

The Act gave the Governor-General power to make regulations "for or in relation to defence preparations" with respect to almost any aspect of production, diversion and control of resources, and adjustment of the national economy generally. The extent of this regulation-making power was unparalleled in peace time and was matched only by the sweeping powers conferred on the Governor-General (and upheld by the High Court) during the last war by the *National Security Act*. The Regulations prohibited the raising of capital by companies and the borrowing of money by anybody upon security (beyond certain limits) except with the consent of the Treasurer. They were in fact substantially a continuation of regulations which had originated during the war under the *National Security Act* and had been kept in force since the war by the annual *Defence (Transitional Provisions) Acts*.

The history of the High Court's attitude to the defence power in the inter-war period of the twenties and thirties and in the period since the end of the last war amply shows that the Court was not prepared to allow any substantial accretion to Commonwealth power under the cloak of defence. And this attitude was maintained in the celebrated case of *Australian Communist Party* v. *Commonwealth*,[2] where the Court refused to accept the Federal Parliament's assessment either of the degree or nature of the national danger or of the necessary means of combating it, although the means adopted in the *Communist Party Dissolution Act* 1950 were recognised by the Court as being justifiable under the defence power in time of actual war.

1. [1952] A.L.R. 821.
2. (1951) 83 C.L.R. 1; *see* 1 U.Q.L.J. No. 3 p. 34.

In the *Capital Issues Case* Williams J. and Kitto J. remained entirely faithful to this attitude, taking the view that if the *Capital Issues Regulations* were valid under the *Defence Preparations Act*, so also would be all the economic regulations made under the *National Security Act* at the height of the war, and that this would involve a wholly unwarranted extension of the defence power in time of peace.

The majority (Dixon C.J., McTiernan J., Webb J., and Fullagar J.), however, held both the Act and the Regulations to be valid. The Act was held valid within the constitutional limits imposed by the *Acts Interpretation Act* 1901-1950, s. 15A. So far as the Regulations were concerned, the majority accepted as reasonable the statements in the preamble to the Act that the control and diversion of resources (including money) was necessary for defence preparation and regarded such action as just as relevant at a time of threatened war as at a time of actual war. The situation was distinguished from that in the *Communist Party Case* on the ground that the Regulations here, unlike the *Communist Party Dissolution Act*, provided an objective test by which the Court could determine the connection, or lack of connection, between the legislation or executive action and the defence of the country.

This is a perfectly sensible distinction, which is quite in harmony with the Court's established attitude of insisting on being the final arbiter of the relevance of legislation to the defence power (or any other head of Commonwealth power). It is not until we examine the objective test which the Regulations were taken to provide that the full significance of the judgment appears. The Treasurer was empowered to refuse his assent "for purposes of or in relation to defence preparations." "Defence preparations" were not defined in the Regulations, but they were taken by the Court to have the meaning ascribed to them in the lengthy preamble to the Act. Defence preparations were there stated to include "the expansion of the capacity of Australia to produce and manufacture goods, and to provide services . . . . generally for the purpose of enabling the economy of Australia to meet the probable demands upon it in the event of war," and it was further stated that these preparations "cannot be carried out without the diversion of certain of the resources of Australia (including money, materials and facilities) for use in, or in connection with, defence preparations." This definition is so broad that one is entitled to say that the only "objective" element in a decision as to the relevance to defence of any executive action under the Regulations is that the decision must be made by the Court itself. How the Court is to arrive at an informed decision is not apparent. It is a question which involves economics and politics of a high order.

There would be nothing extraordinary about this result if the High Court had in the past shown itself ready to examine and consider economic and political theories when determining the limits of Commonwealth power. But it has conspicuously not done so. The decision may suggest

that the Court will be more ready to do this in the future. It may equally suggest that the Court will use (or continue to use) economic and political slogans to justify decisions reached on uncritically accepted, and often inarticulate, premises. However, in either case, it may probably be said that the decision in the *Capital Issues Case* represents a more liberal attitude on the part of the Court to defence legislation in peace time than heretofore, thus exemplifying through judicial interpretation of the Constitution Professor K. C. Wheare's remark that "war, or the fear of war, is a great force for centralization."[3]

Freedom of Interstate Trade and Commerce.

Section 92 of the Federal Constitution[4] continues to provide its crop of litigation, but in the past year the fertilizer has changed from the organised marketing schemes which produced the fine crop reviewed in the last number of this Journal[5] to various other kinds of legislation. Two decisions of the High Court are specially worthy of note: *Hughes and Vale Pty. Ltd.* v. *New South Wales*[6] and *Wragg* v. *New South Wales.*[7]

Hughes and Vale Pty. Ltd. v. *New South Wales* adds another to the long list of "transport" cases, in which the High Court has consistently upheld the validity of State legislation designed to control, regulate, and co-ordinate commercial transport by land, and of which the last was *McCarter* v. *Brodie.*[8] The New South Wales *State Transport (Co-ordination) Act* 1931-1951, the validity of which was challenged in the *Hughes and Vale Case*, did not differ in essentials from the Victorian Act upheld in *McCarter* v. *Brodie*. It set up a controlling and licensing authority with extremely wide discretionary powers of levying charges and issuing and withholding licenses in respect of commercial road transport in New South Wales whether engaged on intra-state or interstate journeys. The Court was asked to reconsider and overrule *McCarter* v. *Brodie*, the significance of this request, apart from the possibility of further appeal to the Privy Council, being that one of the judges of the four-two majority in that case, Latham C.J., had in the meantime retired from the Bench, and that two new judges, Kitto J. and Taylor J., had been appointed.

McTiernan, Williams, and Webb JJ. held to the views expressed by them in *McCarter* v. *Brodie*, in favour of the validity of the legislation. Fullagar J. maintained his dissent and was joined by Kitto and Taylor JJ. The scales were turned by Dixon C.J. who, while adhering to his personal opinion that the legislation contravened s. 92, could not bring himself to depart from the principle of *stare decisis* in view of the fact that *McCarter* v. *Brodie* was such a recent decision. The last word will rest with the Privy Council which has done what it declined to do in *McCarter* v. *Brodie*, granted special leave to appeal from the High Court's decision.

3. Wheare: *Modern Constitutions*, p. 105.
4. "On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free."
5. *Ante* p. 60. 6. [1953] A.L.R. 333. 7. [1953] A.L.R. 583.
8. (1950) 80 C.L.R. 432; reviewed in 1 U.Q.L.J. No. 3 p. 46.

Wragg v. *New South Wales*[10] was concerned with the validity of State price-fixing legislation in its operation on goods imported from another State. The only other occasion on which the High Court has had to consider this question was in *W. and A. McArthur Ltd.* v. *Queensland*,[11] where it was held that the State could not validly fix the price of goods in certain types of sales involving interstate movement of the goods. In *James* v. *Commonwealth*[12] the Privy Council said that this decision "deprived Queensland of its sovereign right to regulate its internal prices," and it has commonly been thought that the disapproval evident in this statement meant that in the Privy Council's view (*obiter*) a State was free to regulate the prices of goods imported from other States without contravening s. 92.

In *Wragg's Case*, however, it was made clear that the High Court in *McArthur's Case* held invalid the regulation of prices in the case of only one particular type of "interstate" sale, viz., where the contract actually stipulates for despatch of the goods from one State for delivery in the other State where the price is regulated. In such a case the sale is clearly a transaction falling within the scope of interstate trade. It was pointed out in *Wragg's Case* that the High Court in *McArthur's Case* indeed specifically held that the mere fact that the goods which were delivered in performance of a contract of sale were delivered across a State border did *not* prevent the State where delivery was made from regulating the price, whether the contract was made in the price-fixing State or in another State, so long as the contract did not in terms require delivery of goods interstate. In such cases the Court held that the sales themselves (on which the price-control legislation operated) were not transactions of an interstate character.

The goods the subject of *Wragg's Case* were potatoes imported from Tasmania to Sydney and there sold ex wharf. The sales were subject to a general non-discriminatory price-fixing law. In the light of the analysis made of *McArthur's Case* the full bench of seven judges concluded that these sales were not in themselves interstate transactions and therefore did not attract the protection of s. 92. Any effect which the legislation might have on the interstate trade in Tasmanian potatoes was held, in consonance with the principles laid down by the Privy Council in *Commonwealth* v. *Bank of New South Wales*,[13] to be indirect and too remote.

The question of the validity of price-fixing in the case of sales which do belong to interstate trade, and of the authority of *McArthur's Case* on that issue, was expressly left open.

10. [1953] A.L.R. 583.
11. (1920) 28 C.L.R. 530.
12. [1936] A.C. 578.
13. [1950] A.C. 235; 79 C.L.R. 497.

Judicial Control of Administrative Discretions. Writ of Prohibition.

The unanimous decision of the High Court in *R.* v. *Australian Stevedoring Industry Board, ex parte Melbourne Stevedoring Co. Pty. Ltd.*[14] is of the utmost importance in the field of administrative law. Under the *Stevedoring Industry Act* 1949 (Cwth.), no person or company may employ waterside labour without being registered with the Stevedoring Industry Board. The Board has power under s. 23 (1) to cancel or suspend registration if, after such inquiry as it thinks fit, it is satisfied that an employer (*a*) is unfit to continue to be registered as an employer, (*b*) has acted in a manner whereby the proper performance of stevedoring operations has been interfered with, or (*c*) has committed an offence against the Act. To the administrative mind this power might well appear wide enough to give the Board a fairly free hand in controlling waterside employers. And so the Board seems to have thought. The High Court's decision, however, demonstrates the great elasticity of the prerogative writs and the reluctance of the Court to allow administrative authorities to escape from judicial control.

The Board's delegate in Melbourne notified the prosecuting company that he proposed to conduct an enquiry under s. 23 (1) for the purposes of determining (1) whether the company was unfit to continue to be registered as an employer, and (2) whether it had acted in a manner whereby the proper performance of stevedoring operations had been interfered with. The enquiry was opened and after evidence had been given both against and for the company it was adjourned. The company thereupon took these proceedings for a writ of prohibition to restrain any further conduct of the enquiry.

In spite of the evident discretion given to the Board as to the nature of the enquiry which might be held ("such enquiry as it thinks fit"), the Court had no hesitation in holding that the function was quasi-judicial in character, and therefore that prohibition was an appropriate remedy for excess of jurisdiction or failure to comply with the so-called basic principles of natural justice.

The main ground on which prohibition was sought was that on the evidence presented at the enquiry no facts had been disclosed which would in law justify the exercise of the power to cancel or suspend registration. Argument chiefly turned on the question whether any basis could be found for deciding that the company was unfit to continue to be registered as an employer. It is to be noted first of all that s. 23 (1) does not require the existence of "unfitness" as an objective fact as a pre-condition of deregistration. It merely says that the Board (or its Delegate) must "be satisfied" of unfitness. This is a very familiar formula for grants of administrative powers. It is quite clear, as the Court recognised, that in such cases no legal ground for attacking the

14. [1953] A.L.R. 461.

exercise of the power arises merely because the authority may come to an erroneous conclusion of fact or may proceed on the basis of meagre or unconvincing evidence.[15] But the Court held that as a matter of *law* the authority must apply the tests or principles laid down in the relevant legislation and no other. "That is to say the Board or its delegate must understand correctly the test provided or prescribed by s. 23 (1) and actually apply it. It is only when the Board or its delegate is satisfied of the existence of facts which do amount in point of law to what the section means by unfitness or by acting in a manner whereby the proper performance of stevedoring operations is interfered with that the Board or its delegate reaches a position where one or other of them may lawfully exercise the authority which s. 23 (1) purports to bestow."[16]

These principles led the Court to consider what was meant by unfitness as an employer. It appeared that the Board took the view that an employer ought to maintain adequate supervision over the men working for them (under a system whereby the gangs were allocated to employers by the Board) to ensure that men did not absent themselves without proper excuse and worked according to the laid down conditions. The complaints against the company in this case which were the subject of the enquiry were based on instances of alleged failure to discharge this obligation. Although the Act did not specify what qualities an employer must have or what duties he must carry out in order to remain "fit," the Court held that the obligation referred to above was not one which the Act contemplated, and that therefore the delegate was applying an entirely wrong test.

There was still one final difficulty in the way of granting prohibition to the company. Was it possible to say that the delegate was applying a wrong test at a stage when he had yet made no decision and the enquiry was still proceeding ? The Court held that all the circumstances pointed, not to the possibility of the delegate's exercising his power on a mere insufficiency of evidence (which would not give ground for prohibition), but to his having misconceived the true purpose of his function and to the "real likelihood or danger," therefore, of his making an order which would be in excess of his jurisdiction or powers. Prohibition was therefore a proper remedy at that stage. It is also interesting to note that an additional argument used by the Court in support of this conclusion was the presence in the Act of s. 52, which reads: "An order or direction of the Board shall not be challenged, appealed against, reviewed, quashed or called in question, or be subject to prohibition, mandamus or injunction, in any court on any account whatever." The Court recognised that there were some doubts and difficulties as to the validity and the

15. See *Little* v. *Commonwealth* (1947) 75 C.L.R. 94.
16. At p. 466. Cf. *Estate and Trust Agencies Ltd.* v. *Singapore Improvement Trust* [1937] A.C. 898; *Little* v. *Commonwealth* (1947) 75 C.L.R. 94 at 102-3; *R.* v. *Connell* (1944) 69 C.L.R. 407 at 432.

extent of the operation of this section,[17] but said that it was certainly intended to put obstacles in the way of challenging the Board's orders once they were made. This was accepted as a good reason for a liberal approach to the question of awarding prohibition at a stage before the decision is actually made.

Although one might well question whether the Court's view of the obligations of an employer was more "correct" than that of the Board, the decision clearly indicates that the present High Court is committed to a policy of close and strict supervision over the actions of administrative authorities, at least when they exercise powers which can be regarded as in some sense quasi-judicial. It may well give new vitality to Dicey's "rule of law." And if it leads to greater particularity in the considerations which legislatures may require or authorise to be taken into account in the exercise of administrative powers, that will be all to the good so far as the persons likely to be affected by the exercise of those powers are concerned.

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CONTRACT.

Offer and Acceptance: Display of Goods for Sale.

Is the display of goods for sale, with marked prices, an offer to sell or merely an invitation to customers to offer to buy? This much debated question has at last been settled by the Court of Appeal in favour of the latter interpretation: *Pharmaceutical Society of Great Britain* v. *Boots Cash Chemists (Southern) Ltd.*[1] It was held that in a self-service shop there was no contract until the shopkeeper accepted the customer's offer to buy the goods taken by him from the shelves.

Market Overt.

The *Sale of Goods Act of* 1896 (Qld.) contains no provision corresponding to s. 22 of the English *Sale of Goods Act* 1893, which incorporates the common law principle that a buyer of goods in market overt acquires a good title in spite of any defect in the seller's title provided he buys in good faith and without notice of the defect. In *Sorley* v. *Surawski*[2] the Full Court of the Supreme Court was asked to hold that despite this omission from the Queensland Act the common law principle was

17. See Anderson: *Parliament* v. *Court: the Effect of Legislative Attempts to Restrict the Control of Supreme Courts over Administrative Tribunals through the Prerogative Writs*, 1 U.Q.L.J. No. 2, p. 39.

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1. [1953] 1 Q.B. 401.

2. [1953] St. R. Qd. 110.