LEGAL LANDMARKS, 1954-1955.
CONSTITUTIONAL AND ADMINISTRATIVE LAW

Federal Commerce Power.

An important decision on the scope of the Federal Parliament's power to make laws with respect to interstate and overseas trade and commerce (Constitution s.51(i)) was made by the High Court in *O'Sullivan v. Noarlunga Meat Ltd.*[1] The case arose out of the prosecution of the defendant company for a breach of a provision of a South Australian Act regulating the slaughter of stock for export as chilled or frozen meat. The company had admittedly not complied with the Act, but its defence was that it was lawfully operating under the provisions of the (Commonwealth) Commerce (Meat Export) Regulations, made under the Customs Act, and that the State law was inconsistent with these regulations and therefore invalid. The Customs Act authorises the making of regulations for prescribing "the conditions of preparation or manufacture for export of any articles used for food or drink by man," and the Regulations mentioned provided in great detail for the siting and structure and care of all premises used for slaughter of stock for export as meat.

Webb J. and Taylor J. held that there was no inconsistency between the State Act and the Commonwealth Regulations, and therefore they did not feel obliged to consider the validity of the Regulations. But Fullagar J. (Dixon C.J. and Kitto J. concurring) decided that there was an inconsistency, and so was bound to consider the question of Commonwealth power. He held in favour of the validity of the Regulations. McTiernan J. found no inconsistency, but also expressed the view that the Regulations were valid, for reasons similar to, though not identical with, those of Fullagar J.

So it is now apparent that the Federal commerce power is not confined to acts done in the actual course of overseas trade and commerce, but extends to acts of production anterior to export. This opens up a considerable field for Federal legislation. If the Federal Parliament can directly regulate production for export, then it follows from the *Airlines Case*[2] that it can establish its own agencies to engage in production for export

(1) [1955] A.L.R. 82.

2. *Australian National Airways Pty. Ltd. v. The Commonwealth* (1945) 71 C.L.R. 29.

in competition with private enterprise. Furthermore, the decision, though concerned with production for export, must be equally applicable to production for interstate trade—with this important qualification, of course, that the Commonwealth power is limited by s.92.

The decision in the case, and the citation of American authorities in the judgments, prompt speculation, as Fullagar J. admitted, as to how far Commonwealth control can validly extend into the field of production. The U.S. Supreme Court has permitted extensive Federal control over production without distinguishing between production for intrastate trade and production for interstate or overseas trade, so long as there is some sort of connexion between the process of production and interstate or overseas trade in some of the product. In a highly developed industrial and commercial community this connexion is not hard to show.

Fullagar J., however, emphasised that "slaughter for export" was a definite objective conception in the meat trade: it was a process recognisable and distinguishable throughout from slaughter for the Australian home market—and it was so treated in the Commonwealth Regulations. Such a distinction may not be possible in the production of other commodities. So far as interstate trade is concerned, it would probably be more difficult to distinguish production for such purposes from production for intrastate purposes than to distinguish production for overseas trade from production for the general Australian market. If the Federal power to regulate production for overseas or interstate trade is to be confined to those cases where the process of production for overseas or interstate trade has an industrial existence clearly distinct from production for intrastate purposes, then it probably does not go very far, and the *Noarlunga Case* will be seen in time to involve no startling departure from accepted doctrine.

Dixon C.J.'s concurrence with Fullagar J. in this case must be considered in the light of his statement in *Wragg v. New South Wales*:[3] "The distinction which is drawn between interstate trade and the domestic trade of a State for the purpose of the power conferred upon the Parliament by s.51 (i) to make laws with respect to trade and commerce with other countries and among the States may well be considered artificial and un-

3. (1953) 88 C.L.R. 353 at 385-6, Dixon C.J. was in effect repeating what he had said in *R. v. Burgess, ex parte Henry* (1936) 55 C.L.R. 608 at 672.

suitable to modern times. But it is a distinction adopted by the Constitution and it must be observed however much interdependence may now exist between the two divisions of trade and commerce which the Constitution thus distinguishes. A legislative power, however, with respect to any subject matter contains within itself authority over whatever is incidental to the subject matter of the power and enables the legislature to include within laws made in pursuance of the power provisions which can only be justified as ancillary or incidental. But even in the application of this principle to the grant of legislative power made by s.51(i) the distinction which the Constitution makes between the two branches of trade and commerce must be maintained. Its existence makes impossible any operation of the incidental power which would obliterate the distinction."[4]

Judicial Power of the Commonwealth

The High Court threw a spanner into the works of Australian bankruptcy administration, and in the process gave an important decision on the difficult concept of Commonwealth judicial power, in *R. v. Davison*.[5] The Court (Dixon C.J., McTiernan, Fullagar, Kitto and Taylor JJ., Webb J. dissenting) held that sequestration orders made by registrars and deputy registrars of bankruptcy courts on voluntary petitions by debtors were void, because such orders were judicial acts falling within the scope of the judicial power of the Commonwealth delimited in Chapter III of the Constitution and therefore capable of being done only by Federal courts consisting of judges appointed for life or by State courts invested with federal jurisdiction under s.77(iii) of the Constitution.[6]

The decision is a further manifestation of the constitutional tangle which began with the decision of the High Court in *Le Mesurier v. Connor*[7] that the Federal Parliament, in the exercise of its power to invest State courts with federal jurisdiction (as in bankruptcy), could not make a Commonwealth officer (like a Registrar in Bankruptcy) a functionary of a State court. Consequent upon this decision the Bankruptcy Act was amended to provide that registrars and their deputies should

4. For a more extensive dicussion of the *Noarlunga Case*, see my article, *Recent Trends in the Federal Commerce Power and Section 92*, Part 1, 29 A.L.J. 99.
5. (1954) 90 C.L.R. 353.
6. *Waterside Workers' Federation of Australia v. J. W. Alexander Ltd.* (1918) 25 C.L.R. 434.
7. (1929) 42 C.L.R. 481.

not be officers of the court, but "shall be controlled by the Court and shall have such duties as the Attorney-General directs or as are prescribed." This device was held not to infringe State autonomy in *Bond v. George A. Bond & Co. Ltd.*.[8] but in *R. v. Davison* it boomeranged and was directly responsible for one of the regular powers of registrars, that of making voluntary sequestration orders, being held to be invalidly conferred upon them.

The starting point for discussion of what is meant by judicial power in the Constitution has almost invariably been the dictum of Griffith C.J. in *Huddart Parker & Co. Pty. Ltd. v. Moorehead*:[9] "I am of opinion that the words 'judicial power' as used in s.71 of the Constitution mean the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action." Consistently with this dictum it has generally been said that the judicial power of the Commonwealth necessarily involves the determination of a controversy between parties. If that was so then the act of a bankruptcy registrar in making a voluntary sequestration order could not be a judicial act, since there was no dispute between parties.

However, that was not the view taken by the majority of the Court in *R. v. Davison*. Pointing out that many proceedings falling within the jurisdiction of British courts involve no *lis inter partes*, they said that the character of an act may be determined by the *process* which is prescribed for its being done. In this case the order which registrars were empowered to make was of a kind characteristic of the courts. Futhermore the primary power of making such orders was given to a court, the registrar's power being secondary or derivative: the registrar became "the substitute for the judge," and his order was in the form of and took effect as an order of the Court. Hence it was a judicial act.

The decision sets up an additional obstacle for Commonwealth authorities to surmount when conferring powers on administrative officers.

8. (1930) 44 C.L.R. 1.
9. (1909) 8 C.L.R. at 357.

Freedom of Interstate Trade, Commerce, and Intercourse: Interstate Transport.

After a lull in the previous year, litigation involving s.92 of the Constitution reached new peaks in the last twelve months. A good deal of it was touched off by the decision of the Privy Council in *Hughes & Vale Pty. Ltd. v. New South Wales* (No.1.)[10]

So far as the immediate practical effect of this decision was concerned, it was a case of vital importance to all Australian governments and to a considerable sector of private industrial enterprise. The elaborate systems of regulation of commercial road transport which had been developed by the five mainland States and operated by them for many years with the approval of the High Court (given in the long series of decisions known as the *Transport Cases*) were held to be invalid infringements of the freedom of interstate trade and commerce guaranteed by s.92. But so far as general doctrine relating to s.92 was concerned, the decision added little that was new. The decision itself would not have been necessary if Dixon C.J., when the case was before the High Court, had been prepared to follow his personal opinion, as expressed in this case and in the dissenting judgments in earlier *Transport Cases*, and join with Fullagar, Kitto and Taylor JJ. in overruling the earlier cases. His refusal to do so gave a four-to-three majority in favour of upholding the earlier cases.

The Privy Council accepted the responsibilty which the Chief Justice declined, but vindicated his "personal opinion" by expressly adopting it, along with the views expressed in the dissenting judgments of Dixon C.J. and Fullagar J. in the immediately preceding transport case, *McCarter v. Brodie*.[11] Since the Privy Council's judgment in the *Banks Case*,[12] when s.92 clearly emerged as a guarantee of freedom to the individual in the field of interstate trade and commerce, it had become increasingly evident that the reasoning on which the *Transport Cases* had been based was becoming more and more difficult to maintain, and so it was perhaps hardly suprising that the Privy Council should now choose simply to adopt the words of Dixon C.J. and Fullagar J. rather than attempt a new exposition of s.92 in their own words.

10. [1954] A.L.R. 1069; [1954] 3 W.L.R. 824.
11. (1950) 80 C.L.R.432.
12. *The Commonwealth v. Bank of New South Wales* 1950 A.C.235; 79 C.L.R. 497.

The decision would seem to finally exclude all constitutional possibility of licensing schemes in the field of interstate trade and commerce based on unlimited or extremely wide discretions in the hands of the licensing authority as was the case with the road transport schemes, however worthy may be the objects of the schemes. The Privy Council accepted Dixon C.J.'s dictum in *McCarter v. Brodie* that "the object or purpose of an Act challenged as contrary to s.92 is to be ascertained from what is enacted and consists in the necessary legal effect of the law itself and not in its ulterior effect socially or economically." It is recognised that *some* degree of regulation of interstate trade and commerce is consistent with s.92. The nearest approach to a formula for testing the validity of such regulation would seem to be that propounded by Fullagar J. in *McCarter v. Brodie*, when he said that measures of regulation would be valid if "they cannot fairly be said to impose a burden on a trader or deter him from trading." Whether the familiar figure of the "reasonable man" is adequately equipped to deal with the complex governmental problems which must arise in this sphere is a matter on which some doubt may be felt.

The Privy Council did deem it necessary to make one important reservation. They said that a discretionary licensing system would not necessarily be contrary to s.92. For example, they said, it may be proper to limit the number of vehicles which may use certain routes in the interest of public safety, though the discretion must not be exercisable on grounds other than those which may properly be regarded as *regulatory* of trade and commerce. It may be open to question how this reservation squares with the general proposition, stated above, that the ulterior social or economic effect of a law is irrelevant in relation to s.92.

Since the laws held invalid by the Privy Council were designed both to protect State railways from undue (i.e. in the eyes of Government) competition by road transport and to raise revenue for the costly business of providing and maintaining roads, the State Governments hastened to salvage what they could of their schemes by enacting new legislation, which was promptly challenged by the road transport operators. The main ensuing case was *Hughes & Vale Pty. Ltd. v. New South Wales (No.2)*.[13]

The State Transport (Co-ordination) Amendment Act 1954 (N.S.W.) re-established an annual licensing scheme for

13. [1955] A.L.R. 525.

interstate commercial transport vehicles, but in doing so attempted to meet the Privy Council's judgment by prescribing in some detail the grounds on which the licensing authority might refuse a license. Space does not here permit any examination of those grounds in detail, but all the members of the High Court agreed that many of them were too vague and still allowed too wide a discretion to the authority, going beyond reasonable regulation, especially the provisions that a license might be refused if the Commissioner was satisfied that the applicant was "not a fit and proper person," or that the operation of the vehicle would "create or intensify conditions giving rise to" unreasonable damage to the roads or danger to persons or roads or unreasonable interference with other traffic. The provisions, in the words of Dixon C.J., McTiernan and Webb JJ., "put the Commissioner in almost complete command of the fate of any application."

Dixon C.J., McTiernan and Webb JJ. summed up the Act as forbidding the use of vehicles for interstate trade "except by the license of an adminstrative agency of New South Wales whose only duty to allow it is in practical effect unenforceable and in any case does not arise unless the agency does not regard any of a number of very wide indefinite and sometimes intangible objections as existing and if and when it arises it is not a duty to license the use of the vehicle as asked but only subject to any conditions (falling within certain very wide descriptions) which the agency may choose to impose, conditions which may or may not be consistent with the interstate trade or transaction in view." The result for the interstate operator was little better than under the earlier legislation, and the new Act was likewise held invalid.

It is clear therefore that the High Court will not uphold a licensing scheme for any aspect of interstate trade, commerce, or intercourse unless the grounds on which a license may be refused are set forth with much greater particularity and definition than is often the case with governmental licensing schemes, and even then, of course, the grounds laid down must themselves be consistent with s.92. Williams J., indeed, went so far as to say that the regulation of interstate transport "must be mainly confined to laws and executive acts relating to the safe use of the roads and to the care and preservation of the roads." And Dixon C.J., McTiernan and Webb JJ. said that "for the time being the question may be put aside whether the grounds must exist in objective fact or it is enough that they exist in the opinion of an administrative licensing authority."

There was another vitally important aspect of the second *Hughes & Vale Case*. The State Transport (Co-ordination) Amendment Act 1954 also provided for the fixing of a scale of pecuniary charges which operators would have to pay for individual journeys. In addition two other Acts, the Motor Vehicles (Taxation) Act 1951 and the Motor Vehicles Taxation Management Act 1949-1951, provided for the raising of revenue from motor vehicle owners, by way of a tax payable in respect of every vehicle at the time of initial registration and of every subsequent periodical renewal of registration (a scheme embodying standard practice throughout Australia). The validity of these charges was challenged.

On this question there was some difference of opinion among the members of the High Court, though all agreed that the particular legislation was invalid. The majority took the view that the State was entitled to demand from road users a *reasonable* contribution towards the maintenance of the roads, so long as there was no discrimination against interstate traders or travellers. But the charges must be related in some way to the actual use of the roads made by the individual interstate operator or vehicle—Dixon C.J., McTiernan and Webb JJ. instanced a tax based on mileage or ton-mileage. It was obvious that the taxes payable on registration bore no relation whatever to the use which the vehicle might make of the roads. The provisions governing the rates of charges for individual journeys in the Transport Co-ordination Act were also held to be so worded as not to ensure that the rates when fixed would conform to the required principle. It was emphasised that the registration tax provisions were held invalid only so far as they applied to vehicles used *solely* in interstate trade, commerce, or intercourse. As Dixon C.J., McTiernan and Webb JJ. said, "there is no such protection if the vehicle is used at all in New South Wales except in the course of interstate commerce."

The rational basis of the right of the State to charge at all for use of the roads by interstate operators gave their Honours some trouble. The basis is not State ownership of the roads (which was the ground on which Williams J. had upheld the validity of transport regulation schemes in *McCarter v. Brodie*). Section 92, it was said, assumed the existence of roads which interstate traders and travellers were to be free to use. The State is not bound to build roads, nor is it bound to maintain them. But if it does maintain them it can rightly ask those who contribute to their wear and tear to pay maintenance

service. However, so it was said, the State cannot make a charge for the provision of *new* roads. Kitto J. and Taylor J. accepted the full logic of the proposition that s.92 assumed the existence of roads by asserting that the State could charge neither for the provision of new roads nor for the maintenance of existing roads, a conclusion which Governments would no doubt find very startling.

If this is the constitutional position of State-provided roads, what of other facilities for interstate trade and commerce which the State may provide, such as railways, wharves, harbours, airfields? Williams J. could see no difference in this context between roads and other facilities. It would seem to follow that in his view the State could no more exclude interstate traders from the use of these facilities which it chose to provide than it could exclude interstate traders from its roads. If this is so another big field for the operation of s.92 is opened up. Fullagar J. on the other hand, expressly denied that roads were in the same position as wharves, airfields etc. And Kitto J. said: "Neither a charge for use of a particular piece of property considered as a subject of ownership nor a charge for personal services specifically availed of by the trader needs any reconciliation with s.92." Dixon C.J., McTiernan and Webb JJ. in their joint judgment appeared to agree that the roads were in a special position, but they said that any charges which the State might make for use of physical things provided by it (to interstate traders) must be "no more than a reward, remuneration or recompense." The extent to which s.92 restricts the freedom of Governments to run their railways and wharves and airfields, etc., as they see fit is therefore somewhat uncertain.

So far as the roads are concerned, however, it is clear that the States must devise a new system of financing their upkeep, so far as interstate transport is concerned. They have been invited by the Chief Justice to base their charges on mileage or ton-mileage, a system which seems fair enough, but whether it is administratively practicable is another matter. So far as a system of licensing of interstate vehicles or services is concerned, the States are greatly restricted, and certainly it would seem that they must abandon all attempts to bolster up the railways at the expense of road transport.

A number of other cases concerned with interstate transport were decided by the High Court immediately following

the decision in *Hughes & Vale Pty. Ltd. v. New South Wales* (No. 2). The Queensland amending Act which was passed after the first *Hughes & Vale Case* provided for the licensing of interstate carrying *services*, as distinct from *vehicles*. But the Court regarded the distinction as one of form rather than substance, and held that the Act suffered from the same fatal defects as the New South Wales Act: *Hughes & Vale Pty. Ltd. v. Queensland*.[14]

Legislation which requires vehicles to be registered and imposes a tax on registration usually also prohibits the driving of any unregistered vehicle. In *Nilson v. South Australia*[15] and *Pioneer Tourist Coaches Pty. Ltd. v. South Australia*[16] this was held to be covered by the decision in the second *Hughes & Vale Case* and therefore to be invalid so far as it applied to vehicles used solely in interstate trade.

In *Armstrong v. Victoria*[17] the Victorian transport control legislation was held invalid. The scheme of this legislation was somewhat different from that of New South Wales and Queensland. It involved the necessity for a permit for every interstate journey, to be obtained from an adminstrative authority the limits of whose discretion were more clearly defined than in the case of the legislation of the other two States. It was nevertheless likewise held invalid. The following observations by Dixon C.J., McTiernan and Webb JJ. are worth noting: "This does not mean that there can never be a discretion reposed in any regulating authority to give directions in relation to particular cases. What it means is that a general administrative control involving the exercise of a discretion with respect to each integer of the particular variety of interstate transport separately and as an individual case is at variance with the general conception of the kind of regulation which is consistent with freedom. Moreover it necessarily involves a delay on each occasion when a permit is sought and consideration is given to the particular circumstances. It is a control which even if in its actual exercise it be sufficiently uniform, yet is exerted by a machinery which is hardly consistent with the free flow of the traffic."

A very different and quite novel point arose for consideration by the High Court in *Antill Ranger & Co. Pty. Ltd.*

14. [1955] A.L.R. 594.
15. [1955] A.L.R. 616.
16. [1955] A.L.R. 621.
17. [1955] A.L.R. 628.

v. Commissioner for Road Transport (N.S.W.)[18] and *Deacon v. Grimshaw.*[19] Immediately after the Privy Council's decision in *Hughes & Vale Pty. Ltd. v. New South Wales (No.1)* the New South Wales Parliament passed the State Transport Co-ordination (Barring of Claims and Remedies) Act 1952. This Act purported to bar all legal claims which might otherwise have arisen out of the invalidity of the transport legislation, e.g. claims for repayment of charges paid under protest (the *Antill Ranger Case*) or actions for trespass by seizure of an unlicensed interstate transport vehicle by a State officer (*Deacon v. Grimshaw.*)

The High Court recognised that the purpose of this measure was not merely to protect the State Treasury from the severe blow of having to refund large sums of money now held to have been unlawfully extracted from road transport operators. It would clearly be very difficult or impossible to devise a scheme for the adjustment of financial interests consequent upon the Privy Council's decision which would do justice to all. Carriers would undoubtedly in many cases have passed on the burden of the State transport charges in the form of increased rates of charge to their customers. Furthermore, it is a basic principle of the law that no right of action exists against the State (or Crown) without its consent, whether expressed in the form of legislation or a Royal fiat to a petition of right (though Fullagar J. pointed out that in matters of federal jurisdiction the power of a State to determine whether any action might be brought against it was limited by s.58 of the Judiciary Act). On the other hand, it was clear that if the State could prevent any remedy being pursued against it in such circumstances as these cases, the protection given to interstate traders by s.92 would be illusory.

It was therefore held unanimously that the Act was invalid. As Dixon C.J., McTiernan, Williams, Webb, Kitto, and Taylor JJ. said in their joint judgment in the *Antill Ranger Case*, "It seems implicit in the declaration of freedom of interstate trade that the protection shall endure, that is to say, that if a governmental interference could not possess the justification of the anterior authority of the law because it invaded the freedom guaranteed, then it could not, as such, be given a complete ex post facto justification."

18. [1955] A.L.R. 605.
19. [1955] A.L.R. 611.

Freedom of Interstate Trade and Commerce: What is Interstate Trade and Commerce?

The Transport Cases discussed above were concerned with the question, what is meant by the words "absolutely free" in s.92? In the past twelve months the High Court has also been concerned with the question, what is meant by "trade, commerce, and intercourse among the States" in s.92? What sorts of activities fall within the concept of interstate trade and commerce? Some important answers have recently been given to this question, and it rather seems as if the High Court, while tending to enlarge the concept of the freedom which s.92 affords to interstate traders, is at the same time drawing more narrowly the limits of the category of persons who answer that description.

In *Grannall v. Marrickville Margarine Pty. Ltd.*[20] the defendant company was prosecuted for the offence of making margarine without a license from the Minister of Agriculture as required by the Dairy Industry Act 1915-1951 (N.S.W.). The Minister had an absolute discretion to grant or refuse licenses, and all licenses had to be subject to a condition limiting the quantity of margarine which the holder might manufacture during the year. The Act also imposed a limit on the total quantity which might be manufactured by all licensees each year.

Since there can be no interstate trade in margarine unless margarine can be brought into existence, the company argued, citing the *Hughes & Vale Case*, that to invest a Minister with discretion to determine whether any or how much margarine should be made and by whom it should be made constituted an impediment to the freedom of interstate trade and commerce. The Court unanimously held, however, that although production may be a sine qua non to interstate trade, it is neither part of interstate trade nor an essential attribute of it. Therefore the restriction involved in the Act was not a restriction on interstate trade, and so was valid. The Court was at pains to point out that the area of the protection to interstate trade given by s.92 was not the same as the area of Commonwealth legislative power with respect to interstate trade under s.51(i).[21] The power to make laws with respect to a subject matter carries with it power to make laws with respect to all matters incidental or ancillary to the subject matter. No such concept is applicable to s.92.

20. [1955] A.L.R. 331.
21. See *O'Sullivan v. Noarlunga Meat Ltd.*, discussed above.

What makes the decision in the *Margarine Case* of particular interest is that the Court accepted that the policy of the Act was to keep down the consumption of margarine as a means of encouraging the consumption of butter. So the Act might be said to be admittedly designed to restrict trade in margarine, including, of course, interstate trade. But the Court said that this made no difference, even if the Act was expressly to acknowledge its evident policy, or even if it could be shown that there was a preconcert among the six States (as there no doubt was) to give effect to the same policy by enacting similar legislation about the same period (1939-1940).

The *Margarine Case* emphasises the necessity for an "inseparable connexion" between the commercial movement of things or persons from one State to another and acts done before such movement is begun in order that those acts should qualify for the protection of s.92. Since production is seen to be normally outside this protection, a vast industrial field is open to government regulation and presumably also to government monopoly.[22]

Grannall v. C. Geo Kellaway & Sons Pty. Ltd.[23] was concerned with acts done *after* the movement of goods interstate. So it falls into the same category as *Wragg v. New South Wales*,[24] *W. & A. McArthur Ltd. v. Queensland*,[25] *Williams v. Metropolitan and Export Abattoirs Board*,[26] *The Commonwealth v. South Australia (C.O.R. Case)*.[27] *Vacuum Oil Pty. Ltd. v. Queensland*,[28] *Ferguson v. Stevenson*,[29] and *Fox v. Robbins*.[30] In all these cases the question was whether legislation operating on acts done in relation to goods which had been moved from one State to another in the course of trade was invalid as contravening s.92. In *Kellaway's Case* a commission agent in Sydney was prosecuted for an offence against the Farm Produce Agents Act 1926-1952. in that he charged, in respect of a sale in Sydney of apples consigned to him by a grower in Tasmania, commission at a rate higher than the maximum prescribed under the Act. The case thus covered much

22. For a more extensive discussion of the *Margarine Case*, and of the next case here reviewed, see my article, *Recent Trends in the Federal Commerce Power and Section 92*, Part II 29 A.L.J. 276.
23. [1955] A.L.R. 213.
24. (1953) 88 C.L.R. 353.
25. (1920) 28 C.L.R. 530.
26. (1953) 89 C.L.R. 66.
27. (1926) 38 C.L.R. 408.
28. (1934) 51 C.L.R. 108.
29. (1951) 84 C.L.R. 421.
30. (1909) 8 C.L.R. 115.

the same ground as *Roughley v. New South Wales*,[31] where the legislation was held valid, but the High Court declined to treat that case as authoritative because of the diversity of the judges' reasoning and because much of that reasoning was inconsistent with later authorities on s.92.

The particular apples were sent to the agent for sale in response to an offer made by the agent to the grower to sell on commission any apples sent to him. The agent argued that his services were part of a transaction of interstate trade and were therefore entitled to the protection of s.92, and that the legislation limiting his charges was an infringement of s.92. The Court unanimously held that the sale was not part of interstate trade and that his services in selling did not therefore fall within the ambit of s.92. As it did not appear that the grower's freedom to sell interstate was impaired in any way by limitations on agents' commissions, the legislation was held valid.

The Court took the view that interstate trade in the apples continued until they were unloaded at Sydney, and perhaps until actually stored awaiting disposal. "But the first sale of a commodity after importation usually is a separate distinct and subsequent transaction." In the absence of any evidence as to particular arrangements for discharge of the fruit from the ship and for sale which might provide an "inseparable connexion" between the sale and the interstate transportation, the Court held that there was no such inseparable connexion.

The decision is not suprising in view of *Wragg's Case*,[32] where it was held that the general price-fixing laws of New South Wales did not infringe s.92 in their application to the sale in Sydney of Tasmanian potatoes by New South Wales importers because the sales were not part of any interstate transaction. There is one point of distinction between the sales in *Wragg's Case* and the sale in *Kellaway's Case*: in the former the sellers (importers) had themselves bought the potatoes from the Tamanian growers, while in the latter the seller merely acted as agent for the grower. *Wragg's Case* itself was consistent with and was decided on the authority of *McArthur's Case*,[33] as carefully explained by Taylor J., giving the principal judgment in *Wragg's Case*.

31. (1928) 42 C.L.R. 162.
32. (1953) 88 C.L.R. 353.
33. (1920) 28 C.L.R. 530.

But how is one to reconcile these cases with the *C.O.R. Case*[34] and the *Vacuum Oil Case*?[35] In those cases the High Court struck down as contrary to s.92 legislation which operated on the first sales of petrol after its importation into the State—in the one case a tax on sales and in the other the imposition of an obligation to purchase locally produced power alcohol in quantities proportionate to the quantity of petrol sold. In *Wragg's Case* Dixon C.J. drew a distinction between a trader's "legal" capacity to import (or export) and his "economic" capacity, saying that s.92 was relevant only to the former. But the point of the *C.O.R. Case* and the *Vacuum Oil Case* appears to be simply that the legislation directly interfered in a practical business sense with the plaintiffs' freedom to conduct their interstate trade. So too might price-fixing or other legislation operating on sales of imported goods. This was indeed admitted by the Court in *Kellaway's Case*: to say that sales of imported fruit are part of the domestic trade of the State, the Court said, "does not mean that legislation, if so framed as to impede or prejudice the sale of the fruit might not impair the grower's or consignor's freedom to engage in or conduct interstate commerce." The true question would seem to be simply whether the legislation has a direct effect of imposing a real burden on the interstate trade, and if that is so it is not helpful to consider whether the sale is itself part of interstate trade or not. However, the decision in *Kellaway's Case* that the sales were not part of interstate trade enabled the Court to hold that the agent was not engaged in interstate trade when he sold the fruit. It would therefore appear that agents as a class may find it difficult to so organise their business as to enjoy the benefits of s.92.

So it seems from the *Margarine Case* and *Kellaway's Case* that the limits of interstate trade and commerce for s.92 purposes are being drawn tightly both at the stage before interstate movement begins and at the stage after it ends. Another recent case to which reference might be made in this context is *Hughes v. Tasmania*,[36] where it was held that a carrier engaged by Hobart importers of mainland fruit to take delivery of the fruit in Northern Tasmanian ports and carry it to Hobart was not thereby engaged in interstate trade, and therefore could claim no immunity from State transport legislation.

34. (1926) 38 C.L.R. 408.
35. (1934) 51 C.L.R. 108. Cf. also *Fox v. Robbins* (1909) 8 C.L.R. 115.
36. [1955] A.L.R. 624.

Judicial Control of Administrative Authorities: Actions for Declarations.

In *Roberts v. Hopwood*[37] the House of Lords held that the statutory power of a local governing authority to pay its employees such wages as it thought fit did not give it an unlimited discretion: in particular, it could not lawfully pursue a social policy of paying an abnormally high rate of minimum wage or of paying women at the same rate as men. The case is usually regarded as the high water mark of judicial control of what appears on its face to be an unlimited discretionary power. In more recent times, especially since the last war—in the United Kingdom at least—the judicial tendency seems to have been to allow administrative authorities a wider discretion, and little has been heard of *Roberts v. Hopwood* in the Courts. (No doubt another reason for this is the exaggerated polemics delivered against the "socialistic" notions of the local authority concerned by some of their Lordships, in terms which sound hopelessly out-moded to contemporary ears.)

But that the spirit of *Roberts v. Hopwood* is by no means dead is shown by the decision of the Court of Appeal in *Prescott v. Birmingham Corporation*.[38] The Birmingham Corporation, acting under statutory authority to charge such fares on its buses "as it should think fit," decided as a matter of policy to carry certain classes of aged persons free. The consent of the licensing authority under the Road Traffic Acts was granted to this scheme, subject to the corporation paying to the transport fund each year a sum from the general rate fund equivalent to the estimated cost of the scheme to the transport undertaking. This action was then brought by a ratepayer for a declaration of invalidity of the scheme.

The Court of Appeal held that the scheme went beyond anything which could reasonably be regarded as authorised by the discretionary power of fixing fares: the Corporation had misapprehended the nature and scope of its discretion. If this decision marks a turn in the tide of judicial supervision of administrative discretions back towards increased control, then it is a very important decision. However, it is open to question whether this was a good case for judicial intervention, just as one may feel about *Roberts v. Hopwood*. When a political body, responsible in periodical elections to the general body of local citizens, is given discretionary governmental powers which are

37. [1925] A.C. 578.
38. [1954] 3 W.L.R. 990; [1954] 3 All E.R. 698.

prima facie absolute, one may well think that the intention of Parliament was to leave control of the use of such powers to the ordinary political processes. The Court of Appeal read into the legislation the principle that the transport undertaking should be run as a business venture, though it was constrained to admit that considerations of profit should not exclude all other considerations. In these days when public transport is very widely in both Britain and Australia a function of local government, and when it almost inevitably becomes a vehicle for governmental policies quite alien to private commercial enterprise, one may well feel that a court of law is an inappropriate authority for supervision.

Apart from these considerations (which it is recognised may be controversial) an important factor leading to the decision in the case was the view taken by the Court that a local authority, though not a *trustee* for the ratepayers, owes "an analogous fiduciary duty" in the application of the funds acquired from rates. This is a consideration which would not be applicable to most other kinds of administrative authorities, and so it may be that the Court of Appeal would not be prepared to go so far in controlling the exercise of wide discretionary powers vested in other kinds of authorities.

The action for a declaration was seen to be a very useful remedy for the plaintiff in *Prescott's Case*. Other recent cases, e.g. *Barnard v. National Dock Labour Board*[39] have shown the elasticity of this remedy as a means of checking abuses or excesses of power by administrative authorities of all kinds. The limits of the remedy, however, were unmistakably demonstrated in *Healy v. Minister of Health*.[40]

The plaintiff, who was a shoemaker at a mental hospital, claimed that he was a mental health officer within the terms of the National Health Service (Superannuation) Regulations, and so was entitled to more favourable terms of superannuation that would otherwise be the case. The Regulations provided that any question as to the rights or liabilities of an officer or of a person claiming to be treated as such was to be determined by the Minister. The Minister had determined against the plaintiff, who now brought this action for a declaration that he *was* a mental health officer.

39. [1953] 2 Q.B. 18.
40. [1955] 1 Q.B. 221.

The Court of Appeal discussed the action on the ground that the plaintiff was really seeking to use the declaration remedy as an appeal from the Minister's determination. In order to grant the relief sought, the Court would have to hear the case afresh. The Regulations provided that the Minister was the authority to determine questions of the kind in issue and no provision was made for appeal from him. So unless the plaintiff claimed and established that the Minister acted without jurisdiction or that there was some irregularity or breach of the principles of natural justice, or some other recognised ground of relief, his action was not soundly based.

The action for a declaration of rights, then, however elastic it may be, is not to be used as a medium of general appeal against administrative decisions.

*ROSS ANDERSON.**

* M.A. (Oxford) LL.B. (Western Australia); Chief Lecturer in Law in the University of Queensland; contributing author of *Essays on the Australian Constitution.*

CONTRACT

Gaming and Wagering Contracts.

The statute law relating to gaming and wagering contracts was practically all repealed and replaced by certain provisions of the *Racing and Betting Act* of 1954, especially s.139. So far as contract law is concerned the Act is in the main a consolidating measure and makes no substantial changes.

The Gaming Act of 1850 s.8 is replaced by s.139(1)(i), (iii)(a) and (b) of the new Act. The Racing Regulation Amendment Act of 1930 s.22 is replaced by s.139(3). The Suppression of Gambling Act of 1895 s.33 is replaced by s.139(1)(ii).

A new provision is that in s.139(1)(iii)(c), expressly providing that no action shall be brought to recover money lent or advanced for the purpose of gaming or wagering. This gives statutory authority to the rule in *Carlton Hall Club v. Laurence*[1] that loans made knowingly for the purpose of gaming are irrecoverable. It also settles the doubts as to whether action could be brought to recover money lent for the purpose of making non-gaming wages which though not illegal were not enforceable contracts by virtue of the Gaming Act of 1850 s.8.[2] The new provision would also seem to overrule those cases in which it has been held that money lent for the purpose of gaming abroad could be recovered if it was recoverable by the law of the country where the gaming took place.[3]

The Mercantile Act of 1867 s.43, which attaches a taint of illegality to securities given for gaming debts or for repayment of money lent for gaming purposes, is not affected by the new Act. But one curious omission from the new Act is any reference to securities given in respect of bets made with bookmakers lawfully operating on a course. The Racing Regulation Amendment Act of 1930 s.22, which made such bets enforceable contracts, expressly exempted securities given in respect thereof from the operation of the Mercantile Act s.43. Although bets made in similar circumstances (and in licensed off-course premises) are also enforceable contracts under the new Act, no

1. [1929] 2 K.B. 153.
2. See Cheshire & Fifoot: *Law of Contract*, 3rd edn. pp. 274-5.
3. E.g. *Quarrier v. Colston* (1842) 1 Ph.147; *Saxby v. Fulton* [1909] 2 KB 208; *Societe Anonyme des Grands Etablissements, etc. v. Baumgart* (1927) 96 L.J.K.B. 789, 43 T.L.R. 278.