MR. JUSTICE FRANKFURTER: A TRIBUTE FROM AUSTRALIA

THE RIGHT HONOURABLE SIR OWEN DIXON†

THIS salutation to Mr. Justice Felix Frankfurter comes from an Australian judge who stands deeply in his debt. It is a debt under which a high intelligence and a generous heart has placed the writer by the constant encouragement and support which friendship gives and by the lively communication of the products of a great mind and a lofty spirit.

In return the Australian can do little but acknowledge his obligation and, by way of tribute, offer a lawyer's statement of why it is that the work of Frankfurter has a peculiar importance in the constitutional law of Australia and how it came about that his interest in that Commonwealth was aroused.

Australia is a large continent and until, in the first year of the twentieth century, a federal union was formed, it was divided into six separate colonies each enjoying its own unitary form of government under a democratic bicameral system. Some ten years before some of the leaders in these independent colonies had turned their thoughts towards uniting the six colonies into one federal Commonwealth. With such thoughts in their minds it became certain that they must consider American federalism as providing the pattern which they might agree to follow. Some of them, perhaps not very many at that time, began to make a study of the constitutional law of the United States. During the decade that followed, a draft constitution was produced and agreed upon which adopted American federalism as its basis. Strange, however, as it may seem to Americans, it was not the federalism as it was perfected in 1791 by the adoption of the Bill of Rights, but that of the Constitution of the United States as it had stood immediately before that date. To British colonies at the end of the Victorian era guarantees of personal liberty seemed unnecessary. An exception was made in the case of religious freedom¹ and of expropriation without just terms.² But for the rest there were no constitutional guarantees of individual rights. In other respects, however, what was done was to make a combination of the British parliamentary system of responsible government with federalism on the general pattern of the original Constitution of the United States.

It has meant of course that to Australians no small part of the constitutional law of the United States must be of first importance. Accordingly lawyers

†G.C.M.G., Chief Justice of the High Court of Australia.

1. AUSTR. CONST. § 116.

2. *Id.* § 51(xxxi).

whose work calls for any consideration of Australian constitutional questions cannot neglect the decisions of the Supreme Court of the United States.

The High Court of Australia was set up in 1903 and from the beginning the opinions of the Justices of the Supreme Court were frequently cited and discussed. One of the earliest subjects of controversy was the question of reciprocal state and commonwealth immunities and that of course opened up the whole field of *McCulloch v. Maryland*,³ *Veazie Bank v. Fenno*,⁴ *Collector v. Day*⁵ and *South Carolina v. United States*.⁶

In the year 1914 one of the Judges of the High Court of Australia visited the United States and at Harvard met two future Justices of the Supreme Court—Louis D. Brandeis and Felix Frankfurter. He was H. B. Higgins who was appointed in 1906 and died in office in 1929. For the first thirteen years of that period he devoted much of his time and energy to the work of industrial arbitration and in that field gained a fame spreading beyond the limits of the Commonwealth. With both Brandeis and Frankfurter he maintained a correspondence after his return to Australia. In 1924 he again visited the United States and again met them. It is evident that a friendship sprang up between Frankfurter and Higgins and there can be little doubt that as a result Higgins obtained a much livelier and more informed understanding of the course of decision in the Supreme Court during those years than he could obtain from a reading in Melbourne of the reports of the opinions given in Washington. It happened that Higgins, long before he met Frankfurter, had in the High Court of Australia stood out against the course taken by that Court in adopting the extreme doctrine of state and federal reciprocal immunity. On the federal side he had refused to acknowledge not merely the applicability of Marshall's doctrine to the Commonwealth Constitution but even the soundness in point of law of the doctrine itself. Higgins died long before the decision in *Graves v. New York*⁷ but it would have formed for him a source of great satisfaction. For he had never relinquished his opposition to the full doctrine of intergovernmental immunity and at length, about eighteen years before that decision, he had formed one member of a court which had renounced for Australia the doctrine, which the same court as earlier constituted had espoused, of the reciprocal immunity of government agencies or instrumentalities.⁸ It would have delighted him to find this decision referred to in the concurring opinion of Frankfurter but even more to read in that opinion the statement—"All these doctrines of intergovernmental immunity have until recently been moving in the realm of what Lincoln called 'pernicious abstractions'."⁹

Had there never been a meeting between Frankfurter and Higgins one may be sure that the work of the former would have commanded attention in the

3. 17 U.S. (4 Wheat.) 316 (1819).

4. 75 U.S. (8 Wall.) 533 (1869).

5. 78 U.S. (11 Wall.) 113 (1871).

6. 199 U.S. 437 (1905).

7. 306 U.S. 466 (1939).

8. See *D'Emden v. Pedder*, 1 Commw. L.R. 91 (Austr. 1904).

9. 306 U.S. at 490.

Australian High Court. In the same way one may be sure that in what Lord Evershed, the Master of the Rolls, has recently called "his extraordinary intellectual energy"¹⁰ Frankfurter would have taken into his wide survey of legal affairs the constitutional developments in Australia. But it is not unimportant that they met and that they met when they did. For it meant that Frankfurter's writings were referred to in Australia long before he became a member of the Supreme Court and his name became not unfamiliar to those arguing constitutional cases in the High Court. Indeed it is probable that the curiosity of Australian constitutional lawyers about the Supreme Court was first really aroused by the publication of *The Business of the Supreme Court* by Frankfurter and Landis when that work appeared in 1927. It is a book which found its way into the hands of most of the Judges of the High Court as well as of some of the counsel habitually appearing in such cases.

It was natural when Frankfurter reached the Bench for men to turn with special interest to his opinions. The very subject matter of *Graves v. New York* attracted the attention of Australian constitutional lawyers. The course pursued some eighteen years before by the High Court in overthrowing earlier doctrine had called forth some rather acrid criticisms, particularly among those who supported the interests of States. What Frankfurter said had a special relevance. For it amounted so to speak to retrospective justification of some of the grounds taken by the judges who cast aside the old doctrine derived from the earlier American cases and at the same time it suggested the true nature of the respective implications which set limits to interference by states with the exercise of federal functions and vice versa.

As time passed an increasing number of Australians visited Washington. No one can be more generous than Frankfurter in making time for those whom he is asked to see and as a result a quite extraordinary number of lawyers in Australia may say that they know him personally. They range from men holding the highest offices of State to men conducting practices at the Bar. The high quality of his writings, judicial and extra-judicial, would in any case have caught the attention of students of constitutional law in Australia, to say nothing of its other votaries, both judges and counsel. One may be sure that they would go to his opinions as specially significant expositions of law. It must be borne in mind that the authority of the decisions of the Supreme Court in the High Court of Australia is merely persuasive. It is not imperative and always the degree of persuasiveness possessed by persuasive authority is intrinsic. Frankfurter's opinions are written in no ordinary style and it is particularly true in his case that to know the man is to read with additional perception the adroit phrases, the epithets charged with calculated implication and even the significant ellipses, all of which often combine to form the expression of a very closely reasoned argument.

Of course the cases that commanded the greatest attention were those that most nearly touched Australian problems. As it happened the war brought an

10. Evershed, *The Impact of Statute on the Law of England*, 42 BRITISH ACADEMY PROCEEDINGS 253 (1956).

unexpected difficulty with reference to the guarantee of the free exercise of a religion.¹¹ Jehovah's Witnesses were regarded by the authorities as obstructing the war effort and were dealt with accordingly. In answer they placed their reliance upon the constitutional denial to the Commonwealth of power to make laws for prohibiting the free exercise of any religion. The decision of the High Court¹² was given while the judgment of the Supreme Court in the *Gobitis* case still stood.¹³ The Australian case involved other questions, but the whole Court took the view that the Commonwealth Parliament was not restrained from making laws prohibiting the advocacy of doctrines or principles which, though advocated in pursuance of religious conviction, were prejudicial to the prosecution of the war in which the Commonwealth was engaged.

The opinion which Frankfurter wrote for the Court in the *Gobitis* case was of course much canvassed during the argument before the High Court and there is much indeed in the Australian judgments inconsistent with any view but that taken in that majority opinion. But before the final report of the decision of the High Court was published *West Virginia Bd. of Educ. v. Barnette*¹⁴ had been decided, and a terse but unrelenting reference to that case was added by Starke J., to the report of his judgment.

To an Australian it seems a pity that Frankfurter had no opportunity (such was the timing) of adding to his dissenting opinion some extracts from the reasons of the High Court, that is assuming that he deemed them auxiliaries worthy of enlisting in support of his view.

The Commonwealth Constitution includes a full faith and credit clause¹⁵ and accordingly the two cases of *Williams v. North Carolina* have taken their place in Australia as part of the esoteric writings wherein is held the key to that constitutional puzzle.¹⁶ Fullagar J., now of the High Court of Australia but formerly a judge of the Supreme Court of Victoria, wrote in the latter capacity the judgment in *Harris v. Harris*.¹⁷ It is a judgment that has proved of wide interest. This is not the place to discuss the case, a thing that has been done by Professor Erwin Griswold.¹⁸ The case is referred to here because it provides another example of the importance which judges in Australia attach to an opinion of Frankfurter. Fullagar J., notes that in the first *Williams* case there were left open the questions of the reality of the domicile in Nevada, the possible effect of residence in the jurisdiction where the decree was granted and the power of the Court of North Carolina to refuse full faith and credit to the decree of Nevada because, contrary to the finding made by the Court of the

11. AUSTR. CONST. § 116.

12. *Adelaide Co. of Jehovah's Witnesses, Inc. v. Commonwealth*, 67 Commw. L.R. 116 (Austr. 1943).

13. *Minersville School Dist. v. Gobitis*, 310 U.S. 586 (1940).

14. 319 U.S. 624 (1943).

15. AUSTR. CONST. § 118.

16. 317 U.S. 287 (1942); 325 U.S. 226 (1945).

17. [1947] Vict. L.R. 44 (Austr. 1946).

18. Griswold, *Divorce Jurisdiction and Recognition of Divorce Decrees—A Comparative Study*, 25 AUSTR. L.J. 248, 261-62 (1951).

latter state, the Court of North Carolina found that no domicile existed.¹⁹ He then proceeds—"Although the important questions mentioned were expressly left open by *Williams v. North Carolina*, a careful reader of the judgments might, I think, not unreasonably have prophesied that, if and when those questions demanded determination, they would be determined in favour of the validity of the decrees. But it seems to be the contrary view that has ultimately found acceptance."²⁰ He turns finally to the statement of Frankfurter—"In short, the decree of divorce is a conclusive adjudication of everything except the jurisdictional facts upon which it is founded, and domicile is a jurisdictional fact."²¹ Again—"To permit the necessary finding of domicile by one State to foreclose all States in the protection of their social institutions would be intolerable."²²

You will see Frankfurter's name again and again in the reports of the constitutional decisions of the High Court. When you find in judicial writings repeated reliance upon the words of a contemporary judge, especially of another country, you may safely infer that his opinions tend to throw new light in dark places and to comfort other judicial wayfarers by giving apt and reassuring pointers to a true deliverance.

Sometimes there has been more than mere quotation; Frankfurter's view of the working of principle in some respect has been treated as confirmatory of specific reasoning adopted in the High Court. Some mention has already been made of *Graves v. New York*. In two cases of great importance in Australia the High Court decided that Commonwealth legislation affecting banking was ultra vires. In the first a provision that without the consent of the federal Treasurer no bank should conduct any banking business for a State was held void as a discriminatory interference with a State which the legislative power with respect to banking did not justify.²³ In this decision the several judgments delivered in the High Court made much use of *Graves v. New York* and of the opinion of Frankfurter in the Saratoga Springs case.²⁴

The principles to which this decision gave effect were not those of the abandoned doctrine of mutual noninterference. Some attempt to mark the distinction had been made years before.²⁵ But the opinion of Frankfurter in the Saratoga Springs case was welcomed as a timely exposition of the whole subject. The views he expressed both on that occasion and in *Graves v. New York* have accordingly been much considered in the High Court. That fact may be seen reflected in the citations of the two opinions which the Judges of the High Court make in the reasons which they severally delivered. These reasons went over ground that in the United States would not be regarded as

19. [1947] Vict. L.R. at 52.

20. *Id.* at 53.

21. *Id.* at 54.

22. *Ibid.*

23. *Melbourne Corp. v. Commonwealth*, 74 Commw. L.R. 31 (Austr. 1947).

24. *New York v. United States*, 326 U.S. 572 (1946).

25. *West v. Commissioner*, 56 Commw. L.R. 657, 681-82 (Austr. 1937).

unfamiliar. One point, however, was included the mention of which may have proved of unexpected importance. It consisted in the difference between on the one hand a uniform law establishing, for example, a government banking system which all, including the States, must use, and on the other hand a law specially regulating banking by the States. After the decision had been given, the Commonwealth Parliament, perhaps noting this distinction, enacted a law for the nationalization of banking. Its validity was immediately attacked and the attack resulted in one of the major decisions in Australian constitutional law.²⁶ The field of controversy was a wide one, but one objection found fatal to the validity of the legislation was that it offended against a provision peculiar to the Commonwealth Constitution which declares that trade, commerce and intercourse among the States shall be absolutely free.²⁷ An attempt was made to answer the objection on the ground, among others, that banking did not form part of interstate commerce. As may be supposed such an answer immediately brought into the forefront of the battle the opinion written by Frankfurter for the Supreme Court in *Polish Nat'l Alliance v. NLRB*²⁸ and the opinions written in *United States v. South-Eastern Underwriters Ass'n*.²⁹ The whole question of *Paul v. Virginia* and the place of intangibles in the commerce clause was drawn in question.³⁰ The Court came down heavily on the side of the intangibles and ruled that banking across state borders was within the protection of the Australian guarantee of freedom of interstate commerce. Moreover there was much canvassing of the degree of similarity of this guarantee to the analogous protection from state action which commerce enjoys in the United States. In *Freeman v. Hewit* Frankfurter writing for the Court describes it thus: "This limitation on State power, as the *Morgan* case so well illustrates, does not merely forbid a State to single out interstate commerce for hostile action. A State is also precluded from taking any action which may fairly be deemed to have the effect of impeding the free flow of trade between States. It is immaterial that local commerce is subjected to a similar encumbrance. It may commend itself to a State to encourage a pastoral instead of an industrial society. That is its concern and its privilege. But to compare a State's treatment of its local trade with the exertion of its authority against commerce in the national domain is to compare incomparables. These principles of limitation on State power apply to all State policy no matter what State interest gives rise to its legislation."³¹ More than once this description has been cited in Australia for the purpose of attempting to show how close the Australian express guarantee of the freedom of interstate commerce is to the constitutional protection worked out in the United States. It was cited in the great Banking Case.³²

26. *Bank v. Commonwealth*, 76 Commw. L.R. 1 (Austr. 1948).

27. AUSTR. CONST. § 92.

28. 322 U.S. 643 (1944).

29. 322 U.S. 533 (1944).

30. 75 U.S. (8 Wall.) 168 (1868).

31. 329 U.S. 249, 252 (1946).

32. *Bank v. Commonwealth*, 76 Commw. L.R. 1 (Austr. 1948).

The effect which the Australian guarantee of freedom of interstate commerce has on transport by road has been a fruitful source of controversy, but at length it has been established that no restrictions can be placed upon the carrier if they be more than regulatory of the traffic. In working out such a conception constant recourse has been had to the decisions of the Supreme Court. So far as they are against the validity of any particular restriction or money charge they are generally considered as indicating that, a fortiori, such a thing must be invalid in Australia. But you cannot reason *e contra*.

In all this not only has the formulation by Frankfurter in *Freeman v. Hewit* of the basal American principle played a part but, the controversy having more recently moved to the question whether interstate hauliers may be included in any form of mileage or other charge for using the roads of a State, great importance has been attached to his dissenting judgment in *Capitol Greyhound Lines v. Brice*.³³

The warning given by Frankfurter in *Freeman v. Hewit* that some aspects of the questions raised by pecuniary impositions affecting interstate commerce are beyond the limits of judicial process has not passed unnoticed in the High Court. Moreover when in *Braniff Airways v. Nebraska State Bd.*³⁴ Frankfurter repeated the warning and spoke of the action of Congress being required, he necessarily brought out a special difficulty for Australia. For the constitutional declaration of the absolute freedom of interstate commerce binds the Commonwealth as much as the States and therefore restricts the federal legislative power with respect to commerce. Indeed it may be said that the Australian position is just as it would be in the United States had Congress, instead of regulating commerce, positively enacted in broad terms that trade, commerce and intercourse among the states should be absolutely free.

It will therefore be seen that the observations in these opinions of Frankfurter concerning pecuniary charges in connexion with roads and airways contain implications for Australia which must add to the inherent significance they possess in their country of origin.

The choice of examples of the use made in Australia of Frankfurter's judicial writings is a wide one; there are many pages in the law reports besides those that have been mentioned which bear some citation from his work. It would be a pleasing exercise to multiply examples but it would do no more than add needless confirmation to the knowledge that his name holds a definite place in the legal annals of Australia.

It will doubtless have been noted that what may be considered distinctly Australian problems have arisen out of the adoption of much of American federalism. It is a significant thing that in these distinctly Australian problems assistance has been sought and found in Frankfurter's judicial writings. This has been done in dealing with questions arising in a section of the real world

33. 339 U.S. 542, 548 (1950). See *Hughes and Vale Proprietary, Ltd. v. New South Wales* (No. 2), 93 Commw. L.R. 127 (Austr. 1955).

34. *Braniff Airways, Inc. v. Nebraska State Bd. of Equalization*, 347 U.S. 590, 606-07 (1954) (dissenting opinion).

of affairs. It is a section by no means the same in significance as that in and for which Frankfurter's great judicial and academical work has been done specifically. Yet it is worth notice that Australia takes into account, in the determination of its own more serious problems of constitutional government, what Frankfurter has thought and written. For it not only adds another testimony to his greatness as a lawyer but means too, what those who know him never doubt, namely that he is a publicist in whose thought no division between law and practical affairs has ever been allowed. With his wide and lively interest in men and things it could not be otherwise.

The friends of Mr. Justice Frankfurter in Australia are by no means all lawyers. Many Australians whose work lies outside the law have met him and come to know him. This no doubt has been the result of the great width of his sympathies, his very real interest in what men do and think and his natural friendliness. His great qualities of mind and heart combined as they are with a deep and extensive understanding of world affairs have carried his fame into many parts of the world. In Australia he commands the high regard of all constitutional lawyers. Those Australians who have studied his work and obtained that intimate knowledge of the man which friendship gives, place him among the great men of the time.