

[HIGH COURT OF AUSTRALIA.]

WOODSTOCK CENTRAL DAIRY COM- }
 PANY LTD. } PLAINTIFFS;

AND

THE COMMONWEALTH AND THE COMP- }
 TROLLER GENERAL OF CUSTOMS } DEFENDANTS.

Commerce (Trade Descriptions) Act 1905 (No. 16 of 1905), secs. 3, 11 (1), 14, 17— H. C. OF A.
Application of trade description to goods intended for export—Regulations 1912.
requiring goods to be graded and marked—Validity of Regulations.

SYDNEY,

Aug. 13, 14,
19.Barton,
O'Connor and
Isaacs JJ.

The *Commerce (Trade Descriptions) Act 1905* does not authorize the making of regulations requiring goods intended for export to be graded by a Commonwealth officer, or to be marked by him in such a manner as to indicate the grade so fixed, or prohibiting the exportation of such goods unless they have been so graded and marked.

CASE Stated for the opinion of the Full Court.

In an action brought by the Woodstock Central Dairy Co. Ltd. against the Commonwealth and Nicholas Colston Lockyer, the Comptroller General of Customs, the parties concurred in stating the questions of law arising in the action in the form of a special case for the opinion of the Full Court as follows:—

“1. The plaintiff is a company duly incorporated under the provisions of the *Companies Act* of New South Wales and carries on the business of manufacturing and exporting butter.

“2. The defendant Nicholas Colston Lockyer is the Comptroller General of Customs and as such is the permanent head of the Customs and has the chief control of the Customs throughout the Commonwealth of Australia.

“3. The plaintiff has recently duly notified the defendants through their proper officer of its intention to export and has

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duly submitted for examination a certain five parcels of pure creamery butter to which have been applied by the plaintiff the words "Pure Creamery Butter, weight 56 lbs. nett, N.S.W., Australia," being a trade description of the character, and relating to the matters and applied in the manner prescribed by the *Commerce (Trade Descriptions) Act* 1905, which said description is not in any particular a false trade description within the meaning of the said Act, and the plaintiff desires to continue to manufacture and to export large quantities of butter with the same or a similar trade description.

"4. The defendants have claimed and still claim to be entitled, and intend, notwithstanding the objections of the plaintiff, and unless restrained by the order of this Honourable Court, to grade and place marks upon the said boxes of butter indicating such grade, and to grade and place marks indicating such grade upon other boxes of butter submitted for examination for export.

"5. The plaintiff believes and charges it as a fact that such grading and marking will have a prejudicial effect on the sale of the said butter, and that it will lose the profits it would otherwise obtain.

"6. The plaintiff submits that both such grading and such marking are illegal, and that the Regulations attached as an Exhibit hereto, and purporting to be made under the *Commerce (Trade Descriptions) Act*, so far as they purport to authorize the grading and marking of butter for export, are *ultra vires* of the said Act, and are invalid. The defendants submit that the said Regulations are *intra vires* of the said Act, and are valid, and that such grading and marking are legal, by virtue of the said Act and Regulations.

"7. The parties hereto have agreed that if the Court should be of opinion that the defendants are entitled to grade the said butter and to place marks upon the boxes containing the said butter indicating such grade this suit shall be dismissed and the plaintiff be ordered to pay the defendants' taxed costs of suit. If this Court is of opinion that the defendants are not entitled under the *Commerce (Trade Descriptions) Act* and regulations thereunder to grade such butter or that the defendants are not entitled under the said Act and regulations to place marks on the

boxes containing such butter, indicating such grade, then the defendants shall be restrained by the order of this Honourable Court from grading and/or marking under the said Act and regulations such butter and/or boxes as the case may be, and shall be ordered to pay the plaintiff's taxed costs of suit."

The material regulations are set out in the judgments hereunder.

Loxton K.C. (with him *Hammond*), for the plaintiffs. The *Commerce (Trade Descriptions) Act* 1905 does not authorize the setting up a system of grading of goods intended for export, and the prohibition of the export of goods unless they have been graded according to that system and marked accordingly. The word "grade" in the definition in sec. 3 of "trade description" refers to a system of grading commonly used in the trade or established by some Statute of a State. He referred to secs. 5, 11, 12, 14, 16, 17.

Blackett, for the defendants. The word "grade" in the definition of "trade description" points to something to be done by a responsible officer of the Government. It means an estimating of the quality of the goods by that officer. See *Dairy Industry Act* 1898 (New Zealand), secs. 18, 26, 28 (6); Regulations under that Act of 18th September 1898, regs. 14, 16, 23, 24; *Dairy Produce Act* 1904 (Queensland), secs. 2, 19, 20, 21, 26 (10). The Act impliedly authorizes regulations setting up a system of grading by Commonwealth officers.

Loxton K.C., in reply.

Cur. adv. vult.

The following judgments were read :—

BARTON J. The plaintiff company, desiring to export some butter, notified the Customs of their intention to do so, and submitted the goods for examination by the proper officer: *Commerce (Trade Descriptions) Act* 1905, secs. 5 and 6. The company had caused each package to be marked "Pure Creamery Butter, weight 56 lbs. nett, N.S.W., Australia." The defendants admit on the

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special case that this is "a trade description of the character, and relating to the matters and applied in the manner prescribed by the . . . Act . . . , which said description is not in any particular a false trade description within the meaning of the said Act."

The defendants claim a right under the Act and regulations to submit the butter to a process called grading and to indicate the grade by marks to be placed on the packages. To this the company object that the Regulations on which the claim is based, though they purport to be made under the authority of the Act, are *ultra vires* and invalid so far as they purport to authorize the grading and marking of butter for export by Government officers. The company therefore seek to have the defendants restrained from grading or marking the butter.

By sec. 3 of the Act, "trade description," in relation to any goods, means "any description, statement, indication, or suggestion, direct or indirect—

"(a) as to the nature, number, quantity, quality, purity, class, grade, measure, gauge, size, or weight of the goods; or

"(b) as to the country or place in or at which the goods were made or produced; or

"(c) as to the manufacturer or producer of the goods or the person by whom they were selected, packed, or in any way prepared for the market; or

"(d) as to the mode of manufacturing, producing, selecting, packing, or otherwise preparing the goods; or

"(e) as to the material or ingredients of which the goods are composed, or from which they are derived; or

"(f) as to the goods being the subject of an existing patent, privilege or copyright,

"and includes a Customs entry relating to goods; and any mark which according to the custom of the trade or common repute is commonly taken to be an indication of any of the above matters shall be deemed to be a trade description within the meaning of this Act."

So that a mark which by trade custom or common repute indicates a "grade" is to be taken to be a trade description.

By the same section "'False trade description' means a trade

description which, by reason of anything contained therein or omitted therefrom, is false or likely to mislead in a material respect as regards the goods to which it is applied, and includes every alteration of a trade description, whether by way of addition, effacement, or otherwise, which makes the description false or likely to mislead in a material respect."

Sec. 11 (1) provides that "The regulations may prohibit the exportation of any specified goods, unless there is applied to them a trade description of such character, relating to such matters, and applied in such manner, as is prescribed"—that is, prescribed by the regulations. This section applies to, *inter alia*, articles used for food—sec. 15.

It is made a penal offence knowingly to apply a false trade description to any goods intended or entered for export, or knowingly to export or enter for export any goods to which a false trade description is applied—sec. 12. The exportation of any goods to which a false trade description is applied is prohibited—sec. 13.

Sec. 14 is in these words: "Any goods intended for export which have been inspected in pursuance of this Act may in manner prescribed be marked with the prescribed trade description."

Sec. 17 empowers the Governor in Council to "make regulations not inconsistent with this Act prescribing all matters and things *required or permitted by this Act to be prescribed* or which are necessary and convenient to be prescribed for carrying out or giving effect to this Act," &c. I take the word "permitted" in that section to mean "authorized." Under sec. 17, a number of regulations have been made and promulgated. By regs. 10 and 11 the exportation of, *inter alia*, butter is prohibited unless there is applied to it a trade description in accordance with Parts III. and V. In Part III., reg. 13 provides that the trade description of butter must be indelibly impressed on the "covering" or case, and must be as prescribed by reg. 12, of which it is enough to say here that it requires a true description of the goods.

Turning to Part V. we find the regulations impeached in this case. They are as follows, so far as they refer to butter only:—

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Reg. 34: "All butter . . . submitted for examination for export shall be graded and marked."

Reg. 38: "In grading butter . . . the officer shall take into consideration the flavour and aroma, texture, and condition of the goods; and the maximum points to be awarded in respect of these qualities shall be as follow:—

"Flavour and aroma, 50 points.

"Texture, including body, grain, and moisture, 30 points.

"Condition, including colour, salting, packing, and covering, 20 points."

Reg. 35: "The officer shall grade butter as follows:—

"Superfine.—Pure creamery butter, graded at 95 to 100 points.

"First Grade.—Pure creamery butter, graded at 90 to 94 points.

"Second Grade.—Pure butter, graded at 83 to 89 points.

"Third Grade.—Pure butter, graded at 75 to 82 points.

"Pastry Butter.—Pure butter, graded at less than 75 points."

Reg. 40: "The officer shall apply to the outer covering of all butter . . . submitted for examination for export and graded at over 89 points or under 75 points an official grade mark as follows:—

"Butter . . . graded at 95 to 100 points—Superfine.

"Butter . . . graded at 90 to 94 points—First Grade.

"Butter graded at under 75 points—Pastry."

If then the four regulations last quoted are valid the Customs Department by its officer is entitled after inspecting to grade butter intended for export in the manner and according to the system there laid down, and then to mark it with the grade so ascertained. The Crown contends that this grade mark is part of the trade description of the goods, and until such a mark is applied to the butter, its exportation is not allowed.

The question for decision appears to me to depend on the construction of the definition of a trade description in sec. 3 of the Act. Of the subjects set forth in that section it is apparent that every one, unless "grade" is an exception, denotes some person, place, or method or thing existent and ascertainable by ordinary means at the time of description. In paragraph (a) the "grade" of the goods is associated with their nature, number, quality, quantity, purity, class, measure, gauge, size or weight. If we

eliminate "grade" for the moment, the purity or the quality of the goods as well as any other of the attributes in that paragraph, is something existent in the goods at the time they are submitted for export. Does grade then stand alone among the constituents of paragraph (a), to denote the result of a process undisclosed at the time of legislation and authorized to be invented or to be created by regulation, or is it like its fellows something that belongs to the goods as they come forward for export? Either of these things may be what the legislature intended. If it is the latter, the plaintiff company succeeds; if the former, judgment must be for the defendants.

I confess the context does not give me much help—however much others may derive from it. But grade may be indicated, and it seems truly, by "any mark which according to the custom of the trade or common repute is commonly taken to be an indication of *any* of the above matters" (the italics are mine); and that seems to point to the notion in the mind of the legislature that the grade of an article is among those things which, at the time of the passing of the Act, might be indicated by some mark which had acquired its meaning by custom or repute. That could not have been the case with regard to a system not yet in existence. But we know that the case might possibly have been such as to any of the things specified in sec. 3, and probably it was such as to many of them. That such marks have been used to denote attributes which are found in paragraph (a), to which the word in question belongs, is common knowledge. I take it then that "grade," as ordinarily used, is a word denoting a degree of quality; as "first rate," "second rate" and so on. And this is what one might expect it to mean in this section, since that is its ordinary every day meaning. Examining the rest of the section, I cannot find one expression or word that appears to be used in any other than its ordinary sense. There is nothing in the Act, the source of this regulation-making power, to show that this word is used with any artificial or technical meaning—if indeed it had any such alternative sense when the Act was passed. Is one, then, entitled to give this word, apparently one of a class, a meaning that would take it out of the rule of construction which applies to that class, and to say that this word is, for some reason not to

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be found in the scope or the words of the Act, to be understood in an artificial sense as denoting something intended to be created in the future? I cannot see my way to do that. Certainly the legislature may have employed it in a less usual, I might say an unusual sense. But one would have expected them to make that intention fairly clear if it had actuated them, for they know that it is not assumed that they mean to interfere, or to command others to interfere, with the property of citizens to a greater extent than is clearly indicated by the words that are printed. If a greater degree of interference was really intended, though not expressed, it is easy to supply the want by amendment. But we are not charged with the duty of making guesses at the meaning of the legislature.

I ought to make express mention of one argument which Mr. *Blacket* used. He urged that "grade" or "grading" had at the time when the Act was passed a well known meaning as an estimation of quality by a Government officer, arrived at by inspection and where necessary by analysis, and evidenced by a certificate or by a mark placed by the officer upon the goods. He pointed to two Statutes—the *Dairy Industry Act* 1898 (New Zealand) and the *Dairy Produce Act* 1904 (Queensland). The first of these Acts does not define "grading"; the second makes it mean "the classification of dairy produce according to quality." It is true that both of these Acts deal with "grading" as an operation to be performed in the future, presumably by an officer. But neither of them affects the question of construction which arises under the Federal Statute. That enactment nowhere speaks of the operation of "grading." It uses only the word "grade," and uses it in a collocation which tends to the conclusion that it prescribes a pre-existing condition, or degree of quality, of an article to be described in a kind of label. That does not appear to me to warrant the framing of regulations to compel an owner or a shipper, at the risk of serious loss, to submit his goods to a process which, in the absence of any clear indication in the Statute itself, I cannot conclude to have been contemplated by the legislature.

I am of opinion, therefore, that the defendants are not entitled under the Act and such of the Regulations as are valid to grade

the butter of the plaintiff company, or to place on the boxes containing the butter marks indicating any grade other than that to which such butter belonged at the time when it was submitted by the plaintiff company to the defendants through their officers for inspection and examination.

In the result, the plaintiff company are, in my opinion, entitled to judgment.

O'CONNOR J. The special case raises the very important question whether the Commonwealth Government are entitled to set up, under statutory regulations, an artificial standard of classification for butter, to direct their officer to grade it in accordance with that standard, and to prevent its export if not marked in the prescribed way as so graded. The standard set up by the regulations under consideration is purely artificial. They provide that certain points are to be allowed for flavour and aroma, certain points for texture, &c., and certain points for condition, including colour, &c., and they direct the grading to be in accordance with points allowed. But the points are to be allowed by a Customs officer, in accordance with his opinion. So that "grade" under the regulations, is classification by an artificial standard which depends entirely upon the opinion of a Customs officer.

The question for our decision is whether the *Commerce (Trade Descriptions) Act 1905* authorizes the making of those regulations. There is no doubt that the Commonwealth legislature has the power, if it thinks fit to exercise it, to establish a standard of grade on any basis it may choose, to be arrived at and applied by any method it may think fit, and may prohibit export of any goods not graded or marked accordingly.

The matter now raised for our consideration is whether the legislature has, in the *Commerce (Trade Descriptions) Act 1905*, exercised the power to the extent claimed. The onus rests upon the Commonwealth to establish that the legislature has so exercised the power, and for this reason. The exercise of the power abridges liberty in two directions. It takes away the liberty of the individual to export his goods in the manner he may think most profitable, and it interferes with the liberty of each State to

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establish a system of grading for its own products in accordance with the views of its legislature. Queensland has already exercised such a power, and it is open to any other State to enact a similar law. But if the power now claimed by the Commonwealth exists in this Act, it must follow, in accordance with sec. 109 of the Constitution, that anything in a State Act inconsistent with its exercise by the Commonwealth must give way. It is a well known principle of interpretation that a Statute will not be taken as intended to abridge the liberty of the subject unless the legislature has used plain language to express that intention. The same principle must, I think, be applied in considering whether the Commonwealth legislature has expressed an intention to exercise a power which, when once exercised, will necessarily restrict the liberty of State legislatures in regard to the same subject matter. It is therefore incumbent on the Commonwealth in this case to show that the legislature has used language from which it can be plainly inferred that it intended to confer on the Commonwealth Executive power to carry out the grading of produce as now contended.

Mr. *Blacket's* argument is that, although the power is not conferred by express words, it is to be found in the Act by reasonable implication from its sections, and he puts his case in this way. Authority is given by sec. 17 to make regulations "necessary and convenient to be prescribed for carrying out or giving effect to this Act." Section 11 (1) provides that "the regulations may prohibit the exportation of any specified goods, unless there is applied to them a trade description of such character, relating to such matters, and applied in such manner, as is prescribed.

Trade description is defined in sec. 3 to be "any description, statement, indication, or suggestion, direct or indirect as to," amongst other things, "the 'grade' of the goods."

The contention is that the use of the word "grade" in that connection impliedly carries with it an authority, not only to require an accurate description, statement or indication of any grading to which the goods may have been theretofore lawfully subjected, but also empowers the Government to set up its own standard of grading, to grade the goods accordingly and to mark them with its own grading as a condition of allowing them to be

exported. This Court has now to determine whether that contention is well founded.

A fundamental rule of interpretation is that the words of a Statute must *primâ facie* be read in their plain ordinary meaning. The only section of the Act which mentions "grading" is the definition section to which I have referred. The defendants' argument must therefore be that the use of the word "grade" in that section carries with it, when read with the rest of the Act, authority to make the grade as well as to insist upon an accurate description of any grade theretofore lawfully made and applied to goods.

Now what is the plain ordinary meaning of the words which the legislature has used? The word defined is itself merely a description—a "trade description"—the description of some existing quality, attribute or condition of the goods themselves. Sec. 12 provides that the grade at which the goods have been graded must be truly stated. Sec. 11 enables regulations to be made fixing the mode and form in which any grade, which *primâ facie* means any then existing grade, must be stated and applied before export can be permitted. Does the Act effect anything more? That interpretation, it seems to me, gives reasonable effect to every word used, read in its plain ordinary meaning. But the defendants' argument is that the word "grade" in sec. 3 carries with it something more than its plain ordinary meaning, that it must be read with a meaning wide enough to confer on the Commonwealth authority to fix and carry out its own method of grading and to make the marking of its own grade a condition precedent to the exporter's right to export his goods.

In determining whether there is any justification for adopting the latter meaning it may help to a conclusion if we consider what was the meaning of the word "grade" or "grading" at the time when the Act was passed. Mr. *Blackett* has not satisfied me that the word had acquired at that time the special and exclusive meaning of a "grade" or "grading" under a Government system. I do not think "grading" meant then, nor does it mean now, anything more than classification according to some artificial standard. The classification which constitutes a grade within the meaning of the Act may, it appears to me, be arrived at either by Government

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officials under statutory regulation, by an association which concerns itself with the exportation of certain classes of goods, or by the company or individual exporting the goods. A grade fixed and marked by any of these means is required by the Act to be correctly described by the exporter and correctly marked on the goods. To give that effect to the Act is, in my opinion, to give full value to the word "grade" as used in sec. 3 in accordance with its plain ordinary meaning at the time when the Act was passed. If there were anything in the Act itself, or in its legislative history, fairly to lead to the inference that the word has been used not in its ordinary sense, but with the expanded meaning for which the Commonwealth counsel have been contending, there would have been some foundation for the argument. But there is nothing to justify that inference, and under these circumstances the Court would not, in my opinion, be justified in departing from the plain ordinary meaning of the words used, particularly as the adoption of the extended meaning would result in that curtailing of the liberty of the subject in the carrying on of his business and in that nullifying of the power of the States to deal with their own products which, as I have pointed out, the Court will not hold to have been intended by the Commonwealth legislature unless that intention is to be clearly gathered from the language it has used. I have therefore come to the conclusion that the Act must be read according to the plain ordinary meaning of its language as authorizing the framing of by-laws relative to the true description of any grade lawfully existing with respect to any goods, but that it cannot be read as empowering the Commonwealth to set up and enforce any such system of grading as is embodied in the by-laws complained of. I therefore agree that the plaintiffs must succeed, and I concur in the form of order proposed.

ISAACS J. In this matter two things are to be borne in mind. The first is that it is common ground the Commonwealth Parliament has the amplest power to regulate the conditions under which goods may be exported, and therefore, if it thinks fit, may prohibit exportation unless they conform to any standard it has selected or authorized. The other is, that the single question raised on the present case is expressly limited by the parties to

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For instance we have not to consider how far such regulations as those challenged in this case would be valid if made under the wider powers contained in sec. 112 of the *Customs Act 1901-1910*. WOODSTOCK
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The question then is: Does the *Commerce Act 1905* of itself authorize the Executive to set up artificial standards of grading to which goods are to conform, if exported? v.
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I put aside certain arguments on both sides that were advanced in support of their respective positions. The possible abuse of power is no reason for cutting down the language of the legislature, particularly when the power is given to the Executive Government, because the Executive cannot be supposed to abuse any power with which it is entrusted, and because it is always controllable by the legislature without the need of fresh enactment, and simply in the ordinary course of parliamentary Government. Isaacs J.

Besides there is apparently no practicable method of carrying out provisions, requiring such careful and perhaps changing adaptation to commercial necessities, except by allowing the discretion of the Executive to mould the necessary working scheme not inconsistently with any specific directions which Parliament may choose to give. And numerous enactments establish that such wide powers are committed to the Executive.

On the other side, the desirability of doing what is claimed for the defendants is not in question; it is not a matter upon which a Court can express any opinion, or found a judgment.

The evil previously existing is, of course, a material circumstance, and the object of the Act as discoverable from the language is an aid towards its construction. But it is not enough that the purpose of a Statute would be served by a suggested power: it must on a fair interpretation of the language come, either by express words or by necessary implication, within the means directed or authorized to serve that purpose. And, giving the widest interpretation to secs. 11 and 17 of the *Commerce Act* that a broad reading of them to meet the evident intention of the Statute will fairly allow, I am unable to find a power to establish grades hitherto unknown.

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The Statute is directed, not to regulate processes of manufacture for import or export, but to control the question of the trade description of goods as imported or exported.

Trade descriptions are defined to mean any description, statement, indication, or suggestion direct or indirect as to a variety of matters. Those matters include nature, number, quantity, quality, purity, class, grade, measure, gauge, size, or weight of the goods, the country or place of production, the manufacturer or producer, the mode of manufacturing or producing the materials or ingredients, etc.

Trade descriptions are usually found to have been already applied to goods as imported, or about to be exported; and if so, they may be ascertained to be true or false. The Act imposes penalties for false trade descriptions either on exports or imports, and whether the falsity consists in a direct statement, or an indirect suggestion, whether it consists in a positive assertion or a silent suppression of some fact which makes the rest deceptive. And the absolute absence of all description, statement, indication, or suggestion, would obviously be outside these particular provisions. But besides this, the Statute enables regulations to be made against concealment, and so as to compel importers or exporters to actively state the facts whether they wish to do so or not, by seeing there is a trade description on the goods with respect to such matters as the Executive thinks material and of such character and affixed in such a manner as to prevent as far as possible any opportunity of future deception. All those things may be prescribed; and, if not obeyed, certain consequences follow.

In short, the Act insists that facts must not be perverted, and, if the regulations so require, must not be concealed, but must be plainly set out. But that is all beside the question of creating new standards of grading, which are new facts. If that may be done, new standards of every other attribute mentioned may be set up. New systems of measures, weight and quantity might be insisted on; classification might be made according to novel methods of preparation, selection or packing; and all this as regulation of trade descriptions. In my opinion, that is beyond the scope of this particular Act. Where grades exist—and grades are really degrees or subdivisions of quality—whether by State

Acts establishing them for domestic trade, or by private practice, or, in the case of imports coming from New Zealand, by reason of the law there existing, then grades, being a feature known and measurable by an existing standard, come within the terms of the Act. No. 1 grade of Queensland butter, for instance, is not necessarily the same as No. 1 grade of New Zealand butter. One can, in the cases suggested, determine whether the facts are falsified by description actually applied to the goods, or can insist upon the real fact being stated. The Queensland Act of 1904 has been referred to, and especially sec. 19. The legality of this Act, or its operative effect in view of the Constitution and Commonwealth legislation on the field relating to imports and exports, is not in question, has not been argued, and is immaterial to this case. Consequently, I offer no opinion whatever upon this debatable question. But if a system of grading has arisen the cause is not important even if it be by illegal compulsion in Australia, or by a foreign Act. It is nevertheless an existing fact affecting the trade in the article. It was suggested that the word "grade" stood in a totally different position from the other words and expressions in sec. 3, because it was said that the word "grade" had in 1905, when this Act was passed, acquired a specific meaning, indicating a Government standard arrived at by the opinion of an officer. The argument was that the officer's personal determination of the grade to which a given lot of butter or cheese ought to belong, and therefore did belong, was connoted in the very use of the word "grade." Therefore, it was contended, that is the meaning to be given to the word "grade" in this Act. But that is not so. First of all, under the regulations, the officer does not fix a standard; he inspects and examines and decides whether, in his opinion, the article ought to receive 50 marks for flavour and aroma, which is the maximum he is permitted to award, or what less number in respect of those attributes; and so on with texture and condition. He then finds the total number of marks out of the maximum 100 which belong to the goods. That is all the officer can determine. If short of the 100, the officer has no deciding power as to whether the butter is first grade or second grade or third grade, or any grade at all. That is discovered by reference to the arbitrarily fixed standard in reg.

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38. If, for instance, that regulation were to be altered, the grade of a particular class of butter might be changed although the officer awarded exactly the same number of marks. The central point for consideration is the power of the Executive to fix the grade, and thereby bring into existence a new fact corresponding and standing side by side with the already existing facts such as number, quality, quantity, purity, &c., enumerated in the section. The power to do this, if it exists at all, is necessarily a conferred power, and in the two Acts, the New Zealand Act of 1898 and the Queensland Act of 1904, the power was expressly conferred. So that "grading," so far as its meaning depends on statutory precedent, means a power of grading expressly conferred by Parliament. That would be, of course, fatal to the defendants' case.

The only reference to the subject in the *Commerce Act* 1905 is in sec. 3, and that confers no such express power. The solitary instance of mention of the word grade is as a noun, not as a verb. In other words the operation of grading is nowhere referred to. If however secs. 11 and 17 confer it as to "grade," they necessarily do so also as to every other incident and attribute mentioned in sec. 3 with the consequences I have mentioned, and if this is not so, then the power is not conferred by implication.

In my opinion this judgment should be entered for the plaintiffs.

Order accordingly.

Solicitor, for the plaintiffs, *David L. Aitken*.

Solicitor, for the defendants, *C. Powers*, Crown Solicitor for the Commonwealth.

B. L.