

An action was instituted in the High Court by Foggitt, Jones & Co. Ltd., a company incorporated in Queensland, against the State

H. C. OF A. of New South Wales, the Attorney-General of that State, and the
 1916. Chief Commissioner of Railways and Tramways of that State,
 FOGGITT, wherein the plaintiffs claimed, *inter alia*, an injunction restraining
 JONES & CO. the defendants and each of them from interfering with or impeding
 LTD. in any way whatsoever or from attempting to interfere with or
 STATE OF impede in any way the right of the plaintiffs to purchase pigs in the
 NEW SOUTH WALES. State of New South Wales and take the same into the State of
 Queensland. The plaintiffs now moved for an interim injunction
 in the same terms.

It appeared that the plaintiffs, who carried on the business of ham and bacon curers and provision manufacturers and distributors, owned 243 pigs in New South Wales which they wished to take into the State of Queensland; that the Attorney-General of New South Wales claimed the right to prevent the plaintiffs from taking their pigs to Queensland; and that the Commissioner of Railways, acting on the instructions of the Attorney-General, refused to supply trucks to enable the pigs to be carried to the border of New South Wales and Queensland.

There was no evidence of any order in writing under sec. 5 (2) of the *Meat Supply for Imperial Uses Act* 1915.

By consent the motion for an injunction was turned into a motion for a decree.

Knox K.C. (with him *Delohery* and *Carlos*), for the plaintiffs. Sec. 5 (1) of the *Meat Supply for Imperial Uses Act* 1915 is an interference with inter-State trade, and is therefore an infringement of sec. 92 of the Constitution. Sec. 92 secures to every owner of goods, as long as he is the owner, the right to transport them from one State to another without interference by law: *State of New South Wales v. The Commonwealth* (1). [Counsel was stopped.]

Campbell K.C. (with him *Browne*), for the respondents. The distinction between commerce and the objects of commerce must be borne in mind. What is complained of here is not so much an interference with inter-State commerce as an act assuming to control the whole of a commodity in the State some of which may become the subject of inter-State commerce. It is not every interference

(1) 20 C.L.R., 54, at pp. 68, 79, 95, 100, 105.

with inter-State commerce which offends against sec. 92. The words "absolutely free" must have some limitation, and an Act does not offend against sec. 92 unless it expressly forbids or restrains inter-State commerce: *Per Gavan Duffy J. in State of New South Wales v. The Commonwealth* (1). In that case the *Wheat Acquisition Act 1914* was held not to infringe sec. 92, but one of its objects certainly was to affect inter-State commerce in wheat. There is no distinction in principle between that Act and sec. 5 (1) of the *Meat Supply for Imperial Uses Act*. The effect of the last-mentioned Act is to deprive the owners of pigs of their property in them. The owners are to be only nominally the owners. The whole of the pigs in the State are appropriated to the Crown, and all dealing with them is stopped. The object of the Act is that the Government may at any time acquire the pigs. The Act amounts practically to an expropriation with deferred compensation. Apart from sec. 92 of the Constitution sec. 5 (1) is a legitimate exercise of the legislative power of the State, and the mere fact that one consequence of it is to affect inter-State commerce by retaining within the State a commodity which might be a subject of inter-State commerce is not an infringement of sec. 92 of the Constitution. If sec. 5 (1) stops short of expropriation it at any rate divests the owner of the ordinary attributes of ownership and keeps the stock in local limits with the object that the State may, as it has a right to do, expropriate them. There is no difference between what sec. 5 (1) does and giving the owner of stock notice of expropriation at the moment he proposes to transport them to another State.

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Leverrier K.C. (with him *Bavin*), for the Commonwealth intervening. There is no intermediate position between the goods being the property of the Crown and being the property of the original owners. Until the ownership is taken out of the original owners and put into the Crown an interference with the transport of the stock to another State is an infringement of sec. 92 of the Constitution.

[GAVAN DUFFY J. If this Act is one to facilitate the acquisition of stock at a reasonable price, and the object of sec. 5 (1) is to

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collect and control stock so as to make it available for such acquisition, does the fact that the effect of sec. 5 (1) is to prevent the transport of such stock to another State make the section invalid under sec. 92 of the Constitution ?]

If the necessary consequence of the Act is substantially to interfere with inter-State trade it is an infringement of sec. 92.

Knox K.C., in reply.

GRIFFITH C.J. The point raised in this case is a short one, but is one of considerable importance. The plaintiffs, who are a joint stock company carrying on the business of bacon manufacturers in Queensland, are the owners of pigs in New South Wales, which they desire to take over the border to Queensland to be there converted into bacon. The Attorney-General of New South Wales claims the right to prevent the plaintiffs from doing so, and the Chief Commissioner of Railways, obeying his instructions, has refused to supply trucks to enable the pigs to be carried to the border. The suit is for an injunction to restrain the defendants from preventing, interfering with or impeding the plaintiffs' right to remove their pigs from New South Wales to Queensland. The more convenient form of order, if the plaintiffs are entitled to any, would be a declaration that the State of New South Wales and the Attorney-General are not entitled to prevent the plaintiffs from removing their own stock across the border from New South Wales to Queensland.

The plaintiffs rest their case upon sec. 92 of the Constitution, which declares that on the happening of an event long since past trade, commerce and intercourse among the States shall be absolutely free. In *State of New South Wales v. The Commonwealth* (1) this Court held that those words import the right of every owner of chattels in the Commonwealth to remove them across the border from one State to another without interference. The defendants rely upon the New South Wales *Meat Supply for Imperial Uses Act* 1915. That Act is in effect an Act to prevent the export of stock from New South Wales, although it is not so called. By sec. 5 (1) it

declares that "all stock"—which term is defined to mean "cattle, sheep, and pigs, the meat whereof is intended for export or may be made available for export"—"and meat in any place in New South Wales are and have become and shall remain subject to this Act, and shall be held for the purposes of and shall be kept for the disposal of His Majesty's Imperial Government in aid of the supplies for His Majesty's armies in the present war." It does not say by whom the stock and meat are to be held, whether by the owners of it or by the Government. It was not suggested that they are impressed with a trust. Apparently they are to be retained in New South Wales, that is to say, are not to be exported by the owners. The same section goes on to authorize the Government to acquire any stock and meat to be mentioned in an Order in Council, in which case the stock and meat are to become the property of His Majesty—apparently in right of New South Wales—and the property of the owners is to be converted into a right to compensation, that is, an immediate right to the value of the stock or meat so taken. The Government have taken no steps to acquire the plaintiffs' pigs, but propose that the plaintiffs shall keep them in New South Wales at their own risk for an indefinite time, and shall not sell them to other subjects of His Majesty in other States or themselves remove them into another State.

It is suggested that this Act may be considered as operating to create a provisional or inchoate expropriation of the stock. But it cannot be so construed, for upon an expropriation of property all rights to the property pass to the Government. If it is not expropriation, the rights of disposition remain in the owner. Amongst those rights one is specially guaranteed to him by sec. 92 of the Constitution, namely, the right to use the property for the purpose of commerce and intercourse between one State and another without interference. It is impossible to accept the notion of an interference with the right of removal across the border which is not an interference with the freedom of intercourse. It cannot be both an interference and not an interference. If it is an interference, it is forbidden by sec. 92.

In my opinion, therefore, the action of the Government comes exactly within sec. 92, and so far as the Act of Parliament can be

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considered as authorizing that action it is invalid under the Constitution. That is sufficient to dispose of the matter.

It was agreed that the motion for an injunction should be treated as a motion for a decree. I think there should be a declaration that the Government of New South Wales and the Attorney-General are not entitled to prevent the plaintiffs from exporting their own stock from New South Wales to Queensland.

BARTON J. The provision of the Act with which we are concerned in this application is sec. 5, the first clause of which declares that "all stock and meat in any place in New South Wales are and have become and shall remain subject to this Act, and shall be held for the purposes of and shall be kept for the disposal of His Majesty's Imperial Government in aid of the supplies for His Majesty's armies in the present war." The second clause is: "Forthwith upon the making of an order in writing under the hand of the Minister, or the Under Secretary to the Minister, all stock and meat mentioned in such order shall cease to be the property of the then owner or owners thereof, and shall become and remain the absolute property of His Majesty," &c. It is contended that the first clause of that section is an infraction of sec. 92 of the Constitution. I have expressed my opinion of the meaning of sec. 92 in the *Wheat Case* (1). It is clear that if we follow the unimpeached decision in that case—and for that purpose I take all the judgments given by the members of the Court—the second clause of sec. 5 is unexceptionable. It is in effect such an enactment as this Court held to be valid in the *Wheat Case*. The question really arises upon the first clause of sec. 5 and anything in the Act which is essentially dependent upon it.

Where the section says that all stock anywhere in New South Wales "shall be held for the purposes of and shall be kept for the disposal of" the Imperial Government, it means that the stock shall be kept in New South Wales. That means, in other words, that the stock shall not be transported across the border by the owners, and the first clause does not transfer the property in the stock from the owners. That expropriation could only have been effected by action under the second clause of the section, and no such action is shown

(1) 20 C.L.R., 54, at p. 79.

by the respondents. It is clear, therefore, that owners are prohibited, while still owners, from using the right to transport their property across the border into another State—a right which there is no word in the *Wheat Case* (1) to impair. The right is conserved by sec. 92 of the Constitution, and its renewed assertion by us is necessary if we maintain the decision in the *Wheat Case*. It is impossible to uphold the reasoning upon which the judgments in that case proceeded without holding that the action taken under the sole authority of sec. 5 (1) is a direct and flagrant infraction of sec. 92.

Something has been said in argument about criticizing this Act of the State Parliament. I have no criticism to pass upon it. The supply of meat to His Majesty's armies in the present war is a highly laudable object. On that there can be no difference of opinion. Whether sec. 5 (1) would have been free of the constitutional objection that has prevailed had it been an enactment of the Federal Parliament is not a question that need trouble us now. The Court is concerned solely with the validity of that provision as enacted by the Parliament of New South Wales.

I agree with the declaration proposed.

ISAACS J. read the following judgment :—

In this case the parties have agreed upon two things. First, that the motion shall be regarded as the trial—the domicile of the plaintiff company being regarded, as it must be, as immaterial, and the plaintiff admitting that the pigs were in the State of New South Wales when the Act was passed, if that fact be material.

The second point of agreement is important. The plaintiffs claim that the defendants prevent, and claim to prevent, them from sending their stock out of New South Wales, unless so permitted by the Government. The defendants admit that they have in fact prevented, and intend to prevent, the plaintiffs from doing so, and the defendants raise no contention as to whether the specific method referred to amounts to a prevention or not. Prevention in fact being conceded, the defendants contend that it is lawful by reason of a State Statute, namely, the *Meat Supply for Imperial*

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Uses Act 1915 (No. 6 of 1915), and the whole question turns on the construction and validity of that Act. If the Act properly construed does not extend to authorize the State Government to interfere with the passage of stock from one State to another, the attempted justification of course fails. If, however, the Act does, on its true interpretation, purport to forbid the private owners of stock from selling their stock to residents of other States, or from forwarding them or driving them across the borders, then it assumes to lay down rules of conduct to control acts of the owner in relation to, and thereby to regulate, inter-State commerce. So construed, the Act now under consideration does precisely what the *Wheat Acquisition Act* 1914 (No. 27 of 1914) stopped short of doing. That Act, besides enabling the Government to acquire wheat for itself, went on by secs. 8 and 9 to interfere with contracts that were limited in their operation to New South Wales. The present Act specifically directs its attention to the act of exporting stock and meat, the provisions which have merely local application being merely ancillary to the main purpose. First of all by sec. 3 and then by sec. 6 it makes the Act paramount over all contracts or agreements whether oral or written. If the Act applies to a case like the present, it is a direct interference with inter-State contracts. And similarly with other sections. A distinction was attempted by Mr. *Campbell* to be drawn in this way. He said, in effect, as I understand him, that all the State Parliament has attempted to do is to create some right in the Crown, short, it is true, of absolute ownership, but in the nature of expropriation, sufficient to enable the State to detain the stock in New South Wales so as to preserve and effectuate that right. But what is that right in law? It is undefined and undefinable. How would a Court declare or enforce it? The argument proceeded as if the State Parliament had, so to speak, dedicated all exportable stock to the Imperial Government. That is, it had dedicated, not its own property, but the property of others, to the laudable purpose of war provisions. Dedication of another person's property without his consent does not create a right against the owner known to the law. Unless it is a bare right of detention pending consideration whether a transfer of ownership shall be created under sub-sec. 2 of sec. 5 by making a Ministerial order, it is not susceptible of

legal description. But has any State the power, in view of sec. 92 of the Constitution, to detain property in course of inter-State transit, for such a purpose. I am not, of course, speaking of detention for crime or to carry out any admitted power of the State, and not having the object, direct or indirect, of affecting inter-State trade, as for instance, temporary detention undertaken as the initial step in an intended purchase. I asked Mr. *Campbell* if the present detention was so undertaken. He said no, but that if the simple power of detention was declared to be unlawful the Government would probably purchase. Detention in order directly or indirectly to prevent or regulate commercial operations between the States, however carefully it is phrased and however meritorious may be the impelling motive, is to my mind in open conflict with sec. 92 of the Constitution. That section makes Australia one indivisible country for the purposes of commerce and intercourse between Australians. It is beyond the power of any State Parliament, or even of the Commonwealth Parliament, by any regulation of trade and commerce to impair that fundamental provision.

I agree that the claim of the State Government must be denied and the prevention declared unlawful.

GAVAN DUFFY J. I am not sorry that the other members of the Court have felt themselves at liberty to say that the plaintiffs are entitled to a declaration. I regret that, for the reasons stated during the argument, I am left in a state of doubt as to whether they are so entitled.

RICH J. In my opinion the pith and substance of this Act is to keep stock and chattels referred to in secs. 6 and 16 under the control of the Government of New South Wales. It would follow that owners would be prevented from doing with their stock and chattels what the Constitution secures that they may do. I agree with the result at which the majority of the Court has arrived.

*Declaration that the State of New South Wales
and the Attorney-General are not authorized
to prevent, interfere with or impede the*

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export by the plaintiffs of their stock from New South Wales to Queensland. Reserve further consideration. Inquiry as to damages. Defendants to pay costs of action and of motion.

Solicitor for the plaintiffs, *T. J. Purcell*.

Solicitor for the defendants, *J. V. Tillett*, Crown Solicitor for New South Wales.

Solicitor for the interveners, *Gordon H. Castle*, Commonwealth Crown Solicitor.

B. L.

[HIGH COURT OF AUSTRALIA.]

R. S. HOWARD & SONS LIMITED. . . . APPELLANTS;
DEFENDANTS,

AND

BRUNTON AND OTHERS RESPONDENTS.
PLAINTIFFS,

ON APPEAL FROM THE SUPREME COURT OF
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H. C. OF A. *Contract—Validity—Contract declared by Statute to be void—Contract rescinded before passing of Act—Contract for rescission—Retrospective legislation—Wheat Acquisition Act 1914 (N.S.W.) (No. 27 of 1914), sec. 8.*
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SYDNEY,
April 3, 4.

Griffith C.J.,
Barton, Isaacs,
Gavan Duffy
and Rich JJ.

Practice—Supreme Court of New South Wales—Costs—Issues—Verdict—Judgment non obstante veredicto—Common Law Procedure Act 1899 (N.S.W.) (No. 21 of 1899), sec. 164.

Sec. 8 of the *Wheat Acquisition Act 1914* (N.S.W.) provides that “(1) Every contract made in the State of New South Wales prior to the passing of this Act, so far as it relates to the sale of New South Wales 1914-15 wheat to be