[HIGH COURT OF AUSTRALIA.]

DUNCAN AND OTHERS . . . . PLAINTIFFS;

AND

THE STATE OF QUEENSLAND AND ANOTHER . . . . . DEFENDANTS.

H. C. OF A. 1916.

MELBOURNE, *Sept.* 21, 22, 25-27, 29; *Oct.* 2-6, 9, 16, 25.

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

Constitutional Law—Powers of Parliament of State—Freedom of inter-State trade and commerce—Validity of State legislation—Goods to be held for public purpose—Prohibition of export—Qualification of rights of ownership—The Constitution (63 & 64 *Vict. c.* 12), *secs.* 51 (I.), 86, 88, 90, 92, 99, 107, 112, 113—*Meat Supply for Imperial Uses Act* 1914 (*Qd.*) (5 *Geo. V. No.* 2), *secs.* 4, 6, 7.

The Australian Constitution provides in sec. 92 that "trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free." This provision is not in all cases and necessarily violated by the Government of a State when it prevents the owner of a commodity ordinarily saleable from taking or sending it, in the course of trade, out of that State into another. Such a prevention is no violation of sec. 92 if it is effected by the State Government under the authority of legislation which, without actually expropriating the owner, expressly deprives him in respect of that commodity, whenever it is within the State, of rights ordinarily flowing from his ownership, such as the right of selling, or removing, or otherwise dealing with his commodity; provided that the statutory deprivation is a step towards an ultimate object the attainment of which is facilitated by, but might be lost without, the deprivation.

The *Meat Supply for Imperial Uses Act* 1914 (Qd.), which is entitled "An Act to Secure Supplies of Meat for the uses of His Majesty's Imperial Government during War, and for other purposes," by sec. 4 defines the term "Chief Secretary," when used in the Act, as "the Chief Secretary of Queensland (or other Minister of the Crown for the time being discharging the duties of his office), acting for and on behalf of the Government of Queensland and His Majesty's Imperial Government"; the word "stock" as meaning "cattle, sheep, and pigs, the meat whereof is intended for export or may be made available for export"; and the word "meat" as meaning "the flesh and all other edible parts of stock when killed which are intended for export," &c.

Sec. 6 is as follows :—"(1) It is hereby declared that all stock and meat in any place in Queensland 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. (2) Forthwith upon the making of an order in writing under the hand of the Chief Secretary, or the Under Secretary to the Chief Secretary, 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, . . . and all the title and property of the then owners thereof shall be changed into a right to receive payment of the value thereof . . . . (5) Any person who refuses to deliver or delays or obstructs or hinders the delivery of stock or meat mentioned or claimed to be mentioned in any such order . . . , shall be liable to a penalty not exceeding £1,000 and to be imprisoned for any period not exceeding one year." Sec. 7 is as follows :—"(1) All persons whosoever, including the owners, consignors, consignees, shippers, vendors, and purchasers of stock and meat, and each of their agents, attorneys, servants, and workmen, are hereby prohibited from selling, offering for sale, disposing of, forwarding, consigning, shipping, exporting, delivering, or in any manner whatsoever dealing with any stock or meat (whether the same is or is not actually appropriated to His Majesty by an order made under this Act), except only in pursuance of and under the directions and orders of the Chief Secretary. . . . (3) Any person who does any act or makes any omission contrary to the prohibition in sub-sec. 1 hereof mentioned . . . shall be liable to a penalty not exceeding £1,000 and to be imprisoned for any period not exceeding one year. . . ."

Held, by *Griffith* C.J. and *Higgins*, *Gavan Duffy*, *Powers* and *Rich* JJ. (*Barton* and *Isaacs* JJ. dissenting), that none of those provisions violated the provision in sec. 92 of the Constitution that trade, commerce and intercourse among the States shall be absolutely free, and therefore that the *Meat Supply for Imperial Uses Act* 1914 was *intra vires* the Parliament of Queensland, and authorized the Government of Queensland to prevent the owner of fat cattle from selling or dealing with them. The main object of the Act is to secure a certain food supply to the Imperial Government for its use in time of war, and the effect upon inter-State trade is incidental and does not render the legislation invalid.

Per Higgins J.—"Exported" in the Constitution and in the Queensland Act means exported overseas, not "passing from State to State." Sec. 92 of the Constitution means that, given an owner, or other person who has power to sell, and given an article which is not removed from the scope of commerce by the laws of the State, there is to be no obstruction or restriction at the boundary of the State.

Per Barton J. and *Isaacs* J. (dissenting) as follows :—

(1) Secs. 6 (1) and 7 (1) and (3) are invalid. The legislation does not transfer any fragment of ownership in the goods, but while leaving the

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owner's property intact (*a*) declares it inalienable as to any interest whatever except to the Imperial and Queensland Governments if they should ever desire to take the goods, and also (*b*) even in the absence of that desire prohibits the owner from removing his goods into any other State without the permission of the Queensland Government.

(2) The legislation is therefore a contravention of sec. 92 of the Constitution, which, among other things, guarantees to every Australian who owns goods the absolute freedom to sell and deliver them to another person in another State, and guarantees to every person in another State the like absolute freedom to purchase the goods and receive and pay for them.

(3) This absolute freedom of trade and commerce is not inconsistent with the power of the Commonwealth and of the State to enforce the ordinary duties of citizenship, for instance, by (*a*) seizing person or property for crime, or to pay debts, or destroy articles injurious to health and morals, or in any other way to satisfy justice; or (*b*) to actually expropriate property by which its ownership is transferred to another, who in turn becomes the owner.

New South Wales v. *The Commonwealth*, 20 C.L.R., 54, applied.

Foggitt, Jones & Co. v. *New South Wales*, 21 C.L.R., 357, overruled.

CASE STATED.

An action was brought in the High Court by Laura Duncan and Fitzroy Clarence Trotman, trustees of the will of William Duncan, deceased, and Laura Duncan, against the State of Queensland and John McEwan Hunter, the Minister for the Crown in the State of Queensland for the time being discharging the duties of the office of the Chief Secretary of the State of Queensland, claiming damages and other relief in respect of an alleged interference with the plaintiffs' free disposition of their cattle which they proposed to remove from Queensland to South Australia. The action came on for hearing before *Isaacs* J., who, during the course of the hearing, directed certain questions to be argued before the Full Court, and stated the following case :—

"1. This case came before me sitting alone in the original jurisdiction for trial. It stands part heard, and certain questions have arisen which I directed to be argued before a Full Court.

"2. It is admitted by the parties that the plaintiffs are residents of Queensland.

"3. It is admitted that the defendant Hunter was, at all times material, acting as Chief Secretary of Queensland.

"4. Certain facts are admitted, namely, that the plaintiffs were

at all times material possessed of an unfenced station called 'Mooraberrie,' and had a considerable number of cattle thereon, and were carrying on the ordinary business of stock owners in buying and selling and breeding cattle.

"5. From before the beginning of March 1915 to 19th May 1916 the plaintiffs had a considerable number of fat cattle and a considerable number of store cattle on the station.

"6. The defendants on 19th May refused to the plaintiffs the permission which they requested by letter of 16th May 1916 to send some of their fat cattle to South Australia for sale there, as the plaintiffs would have done but for that refusal.

"7. Higher prices would have been obtained in South Australia than could have been obtained in Queensland, and the plaintiffs by reason of selling in Queensland sustained pecuniary loss.

"8. The plaintiffs allege that they were prevented by the defendants from so sending their fat cattle out of Queensland in March and April 1916 by reason of official conduct evidenced by" certain letters and other documents.

"9. The plaintiffs in consequence of the defendants' official conduct aforesaid did not send their stores out of Queensland. If they had sent them to South Australia they would have received higher prices than were obtainable in Queensland, and they by reason of selling in Queensland sustained pecuniary loss.

"10. The defendants by their agent, a police constable, entered upon Mooraberrie Station and remained there a considerable time. While there, they assumed possession of the cattle, fats and stores, thereupon.

"11. It is alleged by the plaintiffs that during the time that the defendants maintained possession of the cattle the cattle were without necessary supervision and dispersed and some were lost and others deteriorated.

"12. Plaintiffs allege, and have given evidence, that they had, prior to the acts complained of, made a contract with a drover to drove 600 head of fat cattle in May to South Australia, and have in consequence of the deprivation of the cattle been compelled to pay a sum to the drover in satisfaction of his claim for damages for breach of the contract.

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"The following are the questions which were raised on the trial and which I have directed to be argued before a Full Court :—

"(1) Is the Queensland *Meat Supply for Imperial Uses Act* 1914 valid; and, if so, did it authorize the acts complained of?"

(The other questions and the arguments thereon are omitted from this report, as the High Court only dealt with the first question.)

Feez K.C. and *Mann* (with them *Douglas*), for the plaintiffs. Upon the decision in *Foggitt, Jones & Co.* v. *New South Wales* (1), secs. 6 (1) and 7 of the *Meat Supply for Imperial Uses Act* 1914 are invalid, and did not authorize the Government of Queensland to prevent the plaintiffs from sending their stock into South Australia. The suggested construction of sec. 92, that it only requires that trade, commerce and intercourse between the States shall be free from pecuniary imposts, does violence to the language of the section. It is inconceivable that, if that were the object of the Legislature, they should have used the word "free," seeing that the most obvious interference with freedom is prohibition. The position in which sec. 92 is found does not support that construction. If it is construed as a prohibition of any interference whatever by the States with inter-State trade, commerce and intercourse, then its position is quite proper. If it is limited to pecuniary imposts, then so far as they might be imposed by the Commonwealth the section is an appendage to sec. 51 (II.), and so far as they might be imposed by the States it is an appendage to sec. 107. "Trade and commerce" in sec. 92 have the same meaning as in sec. 51 (I.), and "intercourse" is put in the same position as "trade and commerce." It is a more striking abuse of language to say that the provision that intercourse between the States shall be free means only that such intercourse shall be free from pecuniary imposts upon individuals. The word "intercourse" includes everything that is included in the word "traffic." The suggested conflict between sec. 92 and sec. 51 (I.) does not arise with regard to "intercourse." One consequence of the narrower construction of sec. 92 is that its only effect is to put a limitation upon the power of the Commonwealth to place imposts upon inter-State trade and commerce, because the

(1) 21 C.L.R., 357.

power of the States to do it is expressly taken away by sec. 90. Sec. 112 is not a qualification upon sec. 92, but upon sec. 90. It provides that, notwithstanding that the States are forbidden to impose customs and excise duties, they may nevertheless impose import and export charges for a particular purpose provided that the proceeds are handed over to the Commonwealth.

[ISAACS J. referred to *Patapsco Guano Co.* v. *North Carolina Board of Agriculture* (1).]

Sec. 113 supports the view that sec. 92 is a prohibition against any interference whatever on the part of the States with inter-State trade, for there would have been no need for sec. 113 unless there were elsewhere such a prohibition. Sec. 113 recognizes that as by the Constitution the States were prohibited from interfering with imposts it might be contended that they were powerless to apply the general State laws as to liquor to imported liquor. Sec. 92 is limited to the power of the States, and does not prevent the Commonwealth from imposing customs duties under the power given by sec. 51 (I.). Sec. 92 need not be cut down in order to give a meaning to sec. 51 (I.). In enacting sec. 92 the Legislature must have intended that inter-State trade and commerce should be preserved and fostered, and in that view they enacted that inter-State trade and commerce should be free. But that preservation and fostering could not be obtained without such regulation as is directed to its real freedom, for example, the *Australian Industries Preservation Act* 1906-1910. Sec. 92 may be taken as saying that there shall be an open door on the State borders which shall be free. Any regulation imposed by the Commonwealth under sec. 51 (I.) must be of a nature to secure that freedom. It is for this Court then to say whether Commonwealth legislation falls within the power conferred by sec. 51 (I.) or within the prohibition of sec. 92—does it substantially interfere with inter-State traffic, or is it substantially for the preservation of that traffic? See *R.* v. *Barger* (2); *John Deere Plow Co.* v. *Wharton* (3); *New South Wales* v. *The Commonwealth* (4). The freedom secured by sec. 92 does not mean licence. If the power of the State to legislate as to crossing the State borders

(1) 171 U.S., 345.
(2) 6 C.L.R., 41.
(3) (1915) A.C., 330.
(4) 20 C.L.R., 54.

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is to be subject to the power of the Commonwealth Parliament to enact overriding legislation, the same difficulty arises as upon the construction contended for by the plaintiffs, but the question would then be as to the conflicting powers of the State and the Commonwealth. If sec. 92 is limited to a prohibition of pecuniary imposts, then the *Meat Supply for Imperial Uses Act* is invalid under sec. 109 of the Constitution, for it is inconsistent with sec. 112A of the *Customs Act* 1901-1910, which deals with the export of goods from one State to another, and was intended to cover the whole field of legislation upon that subject. Sec. 7 of the *Meat Supply for Imperial Uses Act* is, in form and substance, a prohibition of the export of cattle from Queensland to other States. Whether the object of the Act is to conserve all meat in Queensland for the use of His Majesty abroad, or for the use of the Government of the State, makes no difference as to its validity. The object being to keep cattle in Queensland, and that object being sought to be attained by prohibiting their export from Queensland, that prohibition cannot be said not to infringe sec. 92 because the Act is in a particular form and is based on some theory of the rights of property. Either what the Queensland Government has done is not authorized by the Act, or the Act is a violation of sec. 92 of the Constitution. It cannot be said that cattle in Queensland have by the Act been placed *in custodiâ legis*, for they have not ceased to be the property of the owners out of whose possession they are supposed to have been taken. [Counsel also referred to *R.* v. *Smithers*; *Ex parte Benson* (1); *Oklahoma* v. *Kansas Natural Gas Co.* (2); *R.* v. *Lord Leigh* (3).]

[ISAACS J. referred to *Gulf, Colorado and Santa Fé Railway Co.* v. *Hefley* (4); *Louisville and Nashville Railroad Co.* v. *F. W. Cook Brewing Co.* (5); *Rossi* v. *Pennsylvania* (6); *Adams Express Co.* v. *Kentucky* (7).]

Starke (with him *Gregory*), for the Commonwealth intervening. Sec. 92 of the Constitution is directed against governmental interference with or control of trade, commerce and intercourse among

(1) 16 C.L.R., 99.
(2) 221 U.S., 229.
(3) (1897) 1 Q.B., 132.
(4) 158 U.S., 98, at p. 104.
(5) 223 U.S., 70, at p. 81.
(6) 238 U.S., 62.
(7) 238 U.S., 190.

the States, and does not deal with the contracts or transactions of citizens. The section is a limitation upon the powers of the States to restrict inter-State trade. It does not apply to the Commonwealth, because sec. 51 (II.) and (III.) and sec. 99 contain the express limitations upon the powers of the Commonwealth; because any other interpretation would place the taxation of inter-State transactions in trade beyond the powers not only of the States but also of the Commonwealth, which would be unreasonable; and because the introduction of the word "intercourse" in sec. 92 makes it clear that the restriction extends over all travel and transportation amongst the States whether conducted for the purposes of trade or not, and yet the Commonwealth has no jurisdiction under the trade and commerce power as to intercourse which is not for the purposes of trade. The word "intercourse" was inserted in sec. 92 to give effect to the American doctrine which limits the powers of the States in the domain of foreign and inter-State trade. *Cf. Prentice and Egan's Commerce Clause of the Federal Constitution*, p. 44. Sec. 92 cannot be limited so as to prohibit fiscal or pecuniary burdens only. Such an interpretation is opposed to the grammatical meaning of the words. Chapter IV. of the Constitution, in which sec. 92 occurs, is not confined to fiscal or pecuniary burdens. Such an interpretation would also make sec. 92 practically unnecessary so far as the States are concerned, because the power of imposing customs and excise duties, which are the main fiscal burdens, is by secs. 86, 88 and 90 vested exclusively in the Commonwealth Parliament. The collocation of sec. 92 does not support such a construction. Sec. 112 does not aid the construction of sec. 92, for, whatever sec. 92 means, it would prohibit such charges as are mentioned in sec. 112; so that it was necessary expressly to authorize them. Sec. 98 reinforces sec. 92, and was probably framed, so far as State railways are concerned, to meet the American doctrine that State instrumentalities are free from federal control. Sec. 102 also reinforces sec. 92, but as to railway rates the determination is placed in the hands of a non-judicial body, namely, the Inter-State Commission. So also as to sec. 104. The proviso to sec. 92 is necessary whatever construction be put upon the main part of it. The section aims at trading equality between the citizens of

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the different States. Affirmatively sec. 92 prohibits any legislative or executive act of the States which would prevent the free exchange or movement of lawful articles of commerce between the States or the free movement of citizens from one State to another. This is a right secured and protected by the Constitution (*Crutcher* v. *Kentucky* (1); *Vance* v. *W. A. Vandercook Co.* [*No.* 1] (2)). The restriction operates as soon as subjects or operations of commerce are subjected to burdensome, conflicting or discriminating legislation. The question, what articles are legitimate subjects of trade and commercial intercourse, is determined by the general commercial usage of the world, and does not depend upon the declaration of any State (*Bowman* v. *Chicago and North-Western Railway Co.* (3)). The necessity of this rule is apparent. If Congress could regulate only those subjects which the States decided were proper subjects of federal regulation, the power of the States would be paramount to the power of Congress" (*Prentice and Egan's Commerce Clause of the Federal Constitution*, p. 49). A State therefore cannot refuse to permit any proper, *i.e.*, lawful, subject of commerce to enter or leave its territory: it cannot take away from the owner or possessor of an article of commerce the attributes of that ownership and possession, and so deprive him of the right to engage that article in inter-State or foreign commerce (*Prentice and Egan's Commerce Clause of the Federal Constitution*, pp. 192, 224; *Schollenberger* v. *Pennsylvania* (4); *Collins* v. *New Hampshire* (5); *Vance* v. *W. A. Vandercook Co.* [*No.* 1] (2); *Oklahoma* v. *Kansas Natural Gas Co.* (6); *Willoughby on the Constitution*, vol. II., p. 695). Regulation is not necessarily a burden upon inter-State commerce. There are many laws in aid of commerce which the States may enact under sec. 107 of the Constitution without infringing the provisions of sec. 92—*e.g.*, laws with respect to public health (inspection laws), public morals or public order, which in America are called "police laws." See *Willoughby on the Constitution*, vol. II., p. 670. The question whether a law does or does not infringe sec. 92 must always be one for the judicial body to

(1) 141 U.S., 47.
(2) 170 U.S., 438.
(3) 125 U.S., 465, at p. 501.
(4) 171 U.S., 1.
(5) 171 U.S., 30.
(6) 221 U.S., 229.

determine. The test is whether the legislative act may by its necessary operation be destructive of the rights secured by the Constitution (*Minnesota* v. *Barber* (1); *Brimmer* v. *Rebman* (2)). The *Wheat Case* (3) does not conflict with these principles. Although the States can compulsorily acquire the property of their citizens with or without compensation, yet the States cannot leave an article of commerce in the possession of their citizens and by lopping off some or all of the attributes of ownership destroy the right of their citizens to engage in inter-State commerce in that article. The power of regulating property and civil rights is in the States, but the right to engage in inter-State commerce is protected and secured by sec. 92 of the Constitution. *Kidd* v. *Pearson* (4) is based on the view that a prohibition of the manufacture of commodities does not impinge upon the domain of inter-State commerce. *Geer* v. *Connecticut* (5) is based on the view that wildfowl are not subjects of property in the citizens of the State. See *Willoughby on the Constitution*, vol. II., pp. 640, 676. [Counsel also referred to *Cooley on Taxation*, 3rd ed., vol. I., pp. 178-180; *Powell* v. *Pennsylvania* (6).]

[GRIFFITH C.J. referred to *Musgrove* v. *Chung Teeong Toy* (7).

[ISAACS J. referred to *Turner* v. *Maryland* (8); *Colonial Sugar Refining Co.* v. *Irving* (9); *Sioux Remedy Co.* v. *Cope* (10); *State Freight Tax Case* (11).]

Ryan (A.-G. for Queensland) and *Mitchell* K.C. (with them *Latham*), for the defendants. The Court should reconsider the decision in *Foggitt, Jones & Co.* v. *New South Wales* (12). In considering whether secs. 6 (1) and 7 of the *Meat Supply for Imperial Uses Act* are an infraction of sec. 92 of the Constitution, the circumstances existing at the time the Act was passed may be looked at in order to determine what is its nature (*Lukey* v. *Edmunds* (13)). The existing necessity to obtain supplies of meat for the army shows what was the intention of the Legislature. The

(1) 136 U.S., 313.
(2) 138 U.S., 78.
(3) 20 C.L.R., 54.
(4) 128 U.S., 1.
(5) 161 U.S., 519.
(6) 127 U.S., 678, at p. 683.
(7) (1891) A.C., 272.
(8) 107 U.S., 38.
(9) (1906) A.C., 360, at p. 367.
(10) 235 U.S., 197.
(11) 15 Wall., 232, at p. 276.
(12) 21 C.L.R., 357.
(13) 21 C.L.R., 336, at p. 343.

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effect of the Act was to remove stock and meat from commodities which might be the subjects of trade and commerce. The State might validly have taken the whole property in all the stock and meat in Queensland (*New South Wales* v. *The Commonwealth* (1)). It might equally take from the owner something less than all the rights of ownership. Whether sec. 6 (1) of the *Meat Supply for Imperial Uses Act* gives the Imperial Government an option of purchase or imposes a trust upon the owner, it has the effect of preventing stock and meat from being subjects of trade and commerce.

[ISAACS J. referred to *Benedict* v. *Pincus* (2); *Galveston, Harrisburg and San Antonio Railway Co.* v. *Texas* (3).]

The provision in sec. 92 of the Constitution that trade, commerce and intercourse between the States shall be absolutely free relates to freedom from anything in the nature of taxation, using that word in its largest sense. It does not operate as a prohibition against a State preventing goods or persons entering or departing from the State, unless and until the Commonwealth intervenes by a law which is inconsistent with, and therefore under sec. 109 of the Constitution overrides, the law of the State. Unless sec. 92 is limited to freedom from pecuniary imposts, sec. 112 cannot be read consistently with it, for sec. 112 assumes that a State has power to make inspection laws with regard to goods entering into or passing out from the State, and the State is not expressly given that power by the Constitution, and cannot have it if the freedom secured by sec. 92 includes freedom from all restrictions. See *Harrison Moore's Commonwealth of Australia*, 2nd ed., p. 565. Sec. 112 is necessary if sec. 92 is limited to the imposition of pecuniary imposts, because otherwise the States would have no power to levy charges on imports or exports. The power to enact inspection laws assumes a power to prevent the exportation and the importation of the goods which are the subject of those laws. That power the States had before federation, and it remains with them by virtue of sec. 107, for it is not taken away by sec. 92 if the latter section is confined to pecuniary imposts. Sec. 90 does not render sec. 92 unnecessary if it has this meaning, because sec. 92 was intended to bind the Commonwealth as well as

(1) 20 C.L.R., 54.
(2) 191 N.Y., 377.
(3) 210 U.S., 217, at p. 227.

the States. The effect of the American decisions is that the absence of power in the States to place duties on inter-State trade and commerce is put on the same grounds as in the case of any other kind of regulation or impediment. See *Quick and Garran's Australian Constitution*, p. 933; *R.* v. *Smithers*; *Ex parte Benson* (1). But the reasoning upon which those decisions are based can have no application to the Australian Constitution in view of sec. 107.

[ISAACS J. referred to *Philadelphia and Southern Steamship Co.* v. *Pennsylvania* (2).]

Sec. 7 (1) of the *Meat Supply for Imperial Uses Act* is a legislative withdrawal of goods from all commerce. The Act does not forbid the taking of cattle over the border as such.

[ISAACS J. referred to *Attorney-General of Manitoba* v. *Manitoba Licence Holders' Association* (3).]

The Act fixes cattle with the character of inalienability. It restricts the rights of property in a certain way. If the State can take away the whole of the rights of property, it can equally take away part of those rights and vest them in the Government. If before goods come into inter-State trade the State imposes upon them a restriction the *discrimen* of which is based on inter-State trade, different considerations arise. The main object of the Act being the supply of cattle for the Imperial army, the fact that incidentally it interferes with inter-State trade does not invalidate the Act. [Counsel also referred to *Quick and Garran's Australian Constitution*, p. 531; *Pennsylvania* v. *Wheeling and Belmont Bridge Co.* (4); *Kidd* v. *Pearson* (5); *Tucker on the United States Constitution*, vol. II., p. 547; *New South Wales* v. *The Commonwealth* (6); *St. Louis South-Western Railway Co.* v. *Arkansas* (7).]

The meaning of "free" in sec. 92 cannot be determined without ascertaining the matter in respect of which the freedom is to exist. That matter must be something in respect of which trade, commerce and intercourse can be "absolutely" free without raising any inconsistency between sec. 92 and other provisions of the Constitution, and without making other powers of the Parliament quite ineffective. If

(1) 16 C.L.R., 99, at p. 114.
(2) 122 U.S., 326, at p. 336.
(3) (1902) A.C., 73, at p. 80.
(4) 13 How., 518; 18 How., 421.
(5) 128 U.S., 1, at p. 18.
(6) 20 C.L.R., 54, at p. 98.
(7) 235 U.S., 350, at p. 362.

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"free" be given the meaning of "free from any pecuniary impositions or burdens" (which is at least a natural meaning having regard to the rest of sec. 92 and to the subject matter of the other sections among which sec. 92 is found), then (1) all the provisions of sec. 112 are consistent and appropriate; (2) the Commonwealth is left with large powers of legislation under secs. 51 (I.), 99 and 100; (3) the States are left with large powers of concurrent legislation under sec. 107 (which are implied by sec. 112) and also under sec. 102, subject to any overriding legislation of the Commonwealth (secs. 109, 102); (4) the Inter-State Commission has a reasonable scope of powers under sec. 101 with regard to laws made by the Commonwealth Parliament as to trade and commerce; and (5) such a construction allows full scope to be given to the word "absolute." No other suggested construction will fulfil those conditions in several material respects. The word "intercourse" is not inconsistent with that construction of sec. 92; the framers of the Constitution may be assumed to have had knowledge of the attempted imposition of pecuniary burdens upon persons entering or leaving a State. Nor is sec. 104 inconsistent with that interpretation; its provisions are referable to the provisions of secs. 98 and 102.

The fact that the Commonwealth Parliament has overriding powers of legislation prevents weight being given to the argument that it is improbable that the States should have been left free to impose restrictions other than pecuniary ones, at their discretion. The power to impose such restrictions is sometimes essential to preserve the people or industries of a State from contamination, infection or other detriment, but, if exercised in a way that is injurious to the Commonwealth as a whole or unfair to other States, the Commonwealth Parliament can interfere. If the word "free" were given the meaning of free from any restriction, whether pecuniary or not, then:—(1) It would be impossible to give to the word "absolutely" its ordinary and natural meaning without making sec. 92 inconsistent with sec. 112, which assumes that the States have power under sec. 107 to pass at least inspection laws in respect of goods "passing into and out of the State"—this difficulty would still exist even if sec. 92 were held not to apply to the Commonwealth. (2) The legislative powers of the Commonwealth Parliament under

sec. 51 (I.) as to inter-State trade and commerce would be illusory, unless, indeed, it were held that sec. 92 does not apply to the Commonwealth, a view which presents very great difficulties as to construction and as to consequences. Assuming sec. 92 does apply to the Commonwealth, the Parliament under sec. 51 (I.) could not legislate so as to impose restrictions on inter-State trade and is incapable of making it more free than "absolutely free." The Commonwealth Parliament's powers of legislation under secs. 98 and 99 as to inter-State trade and commerce would be very meagre, although limited fields of legislation may be suggested. The Inter-State Commission would practically have no powers as to laws made by the Commonwealth. (3) Assuming that sec. 92 applies to the Commonwealth, the powers of the Parliament to legislate under sec. 51 (VI.) as to defence would be unduly and most seriously restricted. The power of legislating as to defence is as much subject to the provisions of sec. 92 as is the power of legislating as to trade and commerce. (4) Finally, the limitations upon the words "absolutely free" which have been suggested by counsel for the appellants and for the Commonwealth would raise extraordinary difficulties as to some of which no test has been suggested in order to enable them to be determined. The suggestion that sec. 92 does not apply to the Commonwealth is inconsistent with the freedom referred to being "absolute," for the Commonwealth would have power to create any kind of border duties so long as they were uniform as regards all the States, and it would be absurd to say that trade between the States was absolutely free if duties imposed by the Commonwealth Parliament had to be paid when crossing the borders. The language of the proviso to sec. 92 clearly relates to the Commonwealth, and is therefore against that suggestion. If only the States were intended to be affected the change in language from sections like secs. 99, 100, 114, 115 and 116 is very marked and difficult of explanation.

[During argument reference was also made to *Fox* v. *Robbins* (1); *Sligh* v. *Kirkwood* (2); *Attorney-General for Canada* v. *Attorney-General for Alberta* (3); *London and South-Western Railway Co.* v. *Gomm* (4); *Bartemeyer* v. *Iowa* (5); *Minnesota Rate Cases* (6);

(1) 8 C.L.R., 115.
(2) 237 U.S., 52.
(3) (1916) 1 A.C., 588.
(4) 20 Ch. D., 562, at p. 581.
(5) 18 Wall., 129, at p. 137.
(6) 230 U.S., 352, at p. 398.

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Sevenoaks &c. Railway Co. v. *London, Chatham and Dover Railway Co.* (1); *Williams* v. *Howarth* (2); *Dicey's Conflict of Laws*, 2nd ed., p. 520; *MacDermott* v. *Corrie* (3); *The Zamora* (4); *Kansas* v. *Haskell* (5); *New York, ex rel. Silz*, v. *Hesterberg* (6); *Farey* v. *Burvett* (7); *Slattery* v. *Naylor* (8); *Widgee Shire Council* v. *Bonney* (9); *Kruse* v. *Johnson* (10); *Woodruff* v. *Parham* (11).]

Cur. adv. vult.

Oct 16. GRIFFITH C.J. The majority of the Court are of opinion that the *Meat Supply for Imperial Uses Act* 1914 is valid, and authorized the acts complained of. The reasons will be given later.

Oct. 25. The following judgments were read :—

GRIFFITH C.J. The plaintiffs claim damages and other relief in respect of an interference with their free disposition of cattle, of which they claim to be the owners, and which they proposed to remove from the State of Queensland, in one case to New South Wales, and in another to South Australia. It is not disputed that the proposed removals would have been operations of trade and commerce and intercourse between the States. The foundation of the action is that the interference complained of was unlawful as being in contravention of the provisions of sec. 92 of the Constitution, which declares that, from and after a day long since passed, "trade, commerce, and intercourse among the States shall be absolutely free." The defendants contend that this declaration of freedom, whatever else it means, extends only to freedom from interference by means of the imposition of fiscal burdens, and permits absolute prohibition of export and import. As a matter of words, it is difficult to see how an act absolutely prohibited can at the same time be absolutely free.

I think it necessary at the outset to repeat the warning against using the same word in two different senses in the same syllogism,

(1) 11 Ch. D., 625, at p. 635.
(2) (1905) A.C., 551.
(3) 17 C.L.R., 223, at p. 245.
(4) (1916) 2 A.C., 77, at p. 102.
(5) 172 Fed. Rep., 545, at p. 562.
(6) 211 U.S., 31, at p. 41.
(7) 21 C.L.R., 433.
(8) 13 App. Cas., 446, at p. 452.
(9) 4 C.L.R., 977.
(10) (1898) 2 Q.B., 91, at p. 99.
(11) 8 Wall., 123.

and also against first assuming that a question of construction can be solved by affixing a label to a subject matter, *e.g.*, "freedom," "ownership," "power of disposition," and then assuming the meaning of the label. These are familiar forms of *petitio principii*.

The first question referred to the Court is whether the Queensland *Meat Supply for Imperial Uses Act* 1914 is valid, and, if so, whether it authorized the acts complained of.

The first argument relied upon in support of the defendants' contention is based upon the collocation of sec. 92 of the Constitution, which, it is suggested, shows that its operation was intended to be limited as contended for. That section is one of a group of sections, 86 to 95, forming part of Chapter IV., which is headed "Finance and Trade." In construing them I apply the principles laid down in *Heydon's Case* (1). It is an important historical fact that one of the supposed great disadvantages of the pre-federation distribution of governmental powers in what is now the Commonwealth of Australia was the interference, both potential and actual, with freedom of intercourse among the States. This interference was mainly effected by means of customs duties imposed upon goods passing from one Colony into another, which in some cases were a source of revenue by no means negligible. It was, after long discussion, finally admitted that the continuance of such interference was incompatible with a federal union. But the power of interference was neither in theory nor in practice limited to duties of customs. It might be exercised by absolute prohibition of the entry of specified goods or persons or by imposing restrictive conditions upon either, and had in fact been so exercised. As a matter of legislative practice the prohibition of import and export has always been treated as a matter to be included in an Act regulating the customs.

Sec. 86 of the Constitution enacted that upon the establishment of the Commonwealth the collection and control of duties of customs and of excise and the control of the payment of bounties should pass to the Executive Government of the Commonwealth. Sec. 88 required that uniform duties of customs should be imposed within two years after the establishment of the Commonwealth.

(1) 3 Rep., 7*a*.

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In the meantime the laws of the States as to the imposition, though not the collection and control, of customs and excise duties remained in force, and might be altered by the State Legislatures. Sec. 90 provided that on the imposition of uniform duties of customs the power of the Commonwealth Parliament to impose duties of customs and excise and to grant bounties on production or export should become exclusive and the State laws in the subject shall cease to have effect. Sec. 92, following these sections, declared that on the imposition of uniform duties of customs by the Parliament trade, commerce and intercourse among the States should be "absolutely free." So far as regards the previous power of the States to restrict inter-State intercourse by imposing duties of customs this provision was unnecessary, since it was expressly denied by sec. 90. What, then, was the occasion for making it in its actual form? The occasion manifestly was that restraint of trade and intercourse by means of customs and excise duties was only one form of restraint, another well known form being absolute prohibition, and another the imposition of licence fees. If the territory of the Commonwealth was for all purposes of trade and intercourse to be regarded as a single undivided area it was desirable, if not necessary, to say so in plain language. It was hardly necessary to provide for the possibility of the Commonwealth Parliament proposing to re-establish the disadvantages arising from the old system of division into separate areas with separate legislative authorities, but even that possibility was dealt with by sec. 99, which provided that the Commonwealth would not by any regulation of trade, commerce or revenue give preference to one State over another State. The usual way in which such a preference had hitherto been obtained by one State over another had been by the imposition of border duties. *Primâ facie*, therefore, sec. 99 would operate to prevent the Commonwealth from reimposing such duties. Whether, in the face of the express denial of sec. 99, they could be supported under some other part of the Constitution is an interesting question which it will be soon enough to decide if and when it is proposed to impose them. An elaborate argument was addressed to us on the question whether sec. 92, whatever it means, binds the Commonwealth. As at present advised,

I cannot see any good reason for limiting its construction as contended for by Mr. *Starke*, but, as I have said, it is not necessary to decide the point, and I keep my mind open upon it. The possibility of a State endeavouring to bring about such a result was, however, a real one. The large words of sec. 92 were, therefore, necessary, and their meaning cannot be cut down to the extent contended for.

But the word "free" does not mean *extra legem*, any more than freedom means anarchy. We boast of being an absolutely free people, but that does not mean that we are not subject to law. I will return to this point later, and now pass to the defendants' next argument, which is based upon sec. 112 of the Constitution. That section permits a State to levy on imports and exports or on goods passing into or out of the State such charges as may be necessary to execute the inspection laws of the State, but so that the net produce of all charges so levied shall be for the use of the Commonwealth, and that any such inspection laws may be annulled by the Commonwealth Parliament. It is contended that this section shows that sec. 92 must be limited to fiscal restrictions. All that it shows is that, so far as it applies to fiscal restrictions, it is not to apply to the case of inspection laws, which on one construction of it might be within its terms. It, therefore, operates as an exception from or qualification of sec. 92. But, as observed by Lord *Wrenbury* in the case of *Horlock* v. *Best* (1), when a Statute provides that in certain events a certain result shall ensue it is plainly not enacting what is to result in other events.

A third and more weighty argument was based upon sec. 51, pl. I., of the Constitution, which provides that the Parliament shall "subject to the Constitution" have power to make laws for the peace, order and good government of the Commonwealth with respect to "trade and commerce among the States." These are the very words of sec. 92, and it is contended that they must be read subject to that section, which also is part of the Constitution. It is then pointed out that any law with respect to trade and commerce *must* diminish the freedom which a man would otherwise have to conduct trade and commerce at will, and must, therefore, be a

(1) (1916) 1 A.C., 486, at p. 525.

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restriction of the absolute freedom guaranteed by sec. 92. The argument sounds plausible, but it is in reality, like so many other of the arguments addressed to us on both sides, a *petitio principii*, for it assumes a particular meaning to be assigned to the word "free." If, however, that word is susceptible of meaning that trade and commerce between the States shall not be subject to legislative regulation, the two provisions of the Constitution would be in direct contradiction. In such a case it is a recognized rule of construction that they must, if possible, be so construed as to reconcile them. The addition of the word "intercourse" in sec. 92 to the words "trade and commerce" of sec. 51 (I.) shows that, although the two sections deal with the same subject matter, they deal with it in different aspects. In this connection sec. 107, which continues to the Parliaments of the States all powers not withdrawn from them by the Constitution, must also be considered. These powers include a power to legislate on the subject of inter-State trade and commerce so far as regards intra-State transactions. Subject to any paramount law of the Commonwealth, when all these provisions are read together, as they must be, I find no difficulty in reconciling them by holding, as I do hold, that the word "free" in sec. 92 means free from any restriction conditioned upon the circumstance of passing from one State into another, but in all other respects subject to the laws of the Commonwealth or the States, as the case may be, regulating the conduct of persons and their rights with respect to property within the jurisdiction of the Legislature which makes the law. This construction, which is that suggested by the collocation of the section in the Act, reconciles and gives full effect to all the provisions of the Constitution, and in my judgment it expresses the true meaning and the only meaning of sec. 92.

The question for determination then comes to be whether, eliminating the element of the proposed destination of the property sought to be removed, the disposition of it in the manner which the defendants prevented would have been a lawful disposition. For, if it would have been unlawful, no action would lie for damages for preventing it. What, therefore, is the right of the plaintiffs with respect to the cattle in question which has been infringed?

Sec. 92 does not confer, and does not purport to confer, any new right of property. This position is conceded in terms, but denied in substance, by the plaintiffs, as I shall show. If the word "free" does not mean *extra legem*, it means liberty of individual persons to do any such acts as the relevant law allows them to do. It assumes the existence of that liberty, and says that it shall not be interfered with on the ground that, if exercised, it will involve crossing a State border line. In other words, it does not create a new form of liberty, but prohibits certain restrictions upon a liberty assumed to be already existing. If the act itself is not permitted by the relevant law of the State, the element of crossing the border line in the course of doing it is quite irrelevant. In other words, an intention to pass from one State to another does not make lawful an act which would otherwise be unlawful, as, for instance, to drive wild cattle in daylight on to a bridge crossing the Murray River (if that act is prohibited by a State law). Any other doctrine would make strange incursions into the powers of the States to regulate their internal affairs.

The acts complained of by the defendants were done under the assumed authority of the *Meat Supply for Imperial Uses Act* 1914. The plaintiffs contend that that Act is not a valid exercise of the power of the Legislature of Queensland. It is necessary, therefore, to examine the Act and see what is its real character and effect. In doing so I again apply the rule in *Heydon's Case* (1). The occasion of passing the Act is in part shown by its title: "An Act to Secure Supplies of Meat for the uses of His Majesty's Imperial Government during War, and for other purposes." The Court is bound to take judicial notice of the War, and of the fact that an adequate supply of meat to the Forces is essential to the effectual prosecution of the War. It must also take judicial notice of the fact that the State of Queensland is one of the most important sources of meat supply in the Empire, and further that stock are bred for the purpose of the export of their flesh as meat in almost every part of its vast area, which is equal to the combined areas of the German and Austro-Hungarian Empires and the French Republic. Further it was a notorious fact in 1914 that large

(1) 3 Rep., 7*a*.

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quantities of frozen and chilled meat were exported oversea from Queensland to Europe.

The powers of the Legislature of Queensland extend to making laws for the peace, order and good government of that State in all cases whatsoever. In my judgment a law having for its object to make the stock bred in Queensland available for the food of the Imperial Forces is a law conducive to the good government of that State as part of the Empire. The Meat Supply Act purports to provide that the owners of stock the meat whereof is intended for export or may be made available for export, and the flesh of such stock when killed, shall be deprived of the right of free disposition as owners, and that their right of disposition shall only be exercised with the approval of the Chief Secretary, acting as well for the Government of Queensland as for the Imperial Government, with the object that the stock and meat shall be available for use, if and as required, as food for the Imperial Forces in the present war. To refer to the Act in detail: Sec. 4 declares that the term "Chief Secretary" when used in the Act means the Minister for the time being discharging the duties of that office acting for and on behalf of the Government of Queensland and His Majesty's Imperial Government. I listened with some surprise to an argument that it is impossible for a Minister of State of a dependency to act on behalf of the Imperial Government in that dependency. It is, of course, impossible for the State Legislature to confer on a State Minister authority to act on behalf of the Imperial Government without its consent, but I should have thought, and do think, that in time of a war in which the whole Empire is engaged the Imperial Government may invoke the help of any part of it, or the services of a Minister of any part, and that the State Legislatures may not only authorize the State officers to give the help asked for but enact any law which will render that help effective or more effective. In my opinion, then, the Chief Secretary, when assuming to take action under the Act, is to be treated as acting on behalf of the Imperial Government. It was finally objected that there was no evidence that he did so act. The objection is without foundation in fact, but if there was no evidence I think that the presumption

in favour of the authority of a person acting as a public officer could not find a more appropriate occasion for its application.

To proceed—sec. 6 declares (par. 1) that all stock and meat in Queensland "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 of His Majesty's armies in the present war." It then provides (par. 2) that upon the making of an order in writing by the Chief Secretary or his Under Secretary all stock and meat mentioned in the order shall become the property of His Majesty, and the property of the owners shall be changed into a right to receive payment of the value of the stock and meat taken. Heavy penalties are imposed for refusal or hindrance of delivery of stock or meat so taken. I pause to remark that the term "His Majesty" in par. 2 manifestly means His Majesty in the capacity of head of the Imperial Government, as mentioned in par. 1, and that the mention of the Under Secretary is a mere detail recognizing a well known practice of all government departments.

Sec. 7 provides as follows: "All persons whosoever, including the owners, consignors, consignees, shippers, vendors, and purchasers of stock and meat, and each of their agents, attorneys, servants, and workmen, are hereby prohibited from selling, offering for sale, disposing of, forwarding, consigning, shipping, exporting, delivering, or in any manner whatsoever dealing with any stock or meat (whether the same is or is not actually appropriated to His Majesty by an order made under this Act), except only in pursuance of and under the directions and orders of the Chief Secretary."

Heavy penalties are imposed for any infraction of this provision also.

What, then, is the effect of these provisions? and are they obnoxious to the provisions of sec. 92 of the Constitution?

In the first place, I am of opinion that the declaration that the stock and meat shall be held for the purposes of and shall be kept for the disposal of His Majesty's Imperial Government operates as a dedication of the stock and meat to public purposes. It is said that this is a form of dedication unknown to the common law. No doubt it is, and possibly a better word may be found to describe

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it. In the case of *The Parlement Belge* (1) Lord *Esher* M.R. used the word "destined" to denote a similar concept. I do not use the word "dedication" in the technical sense in which it is used in connection with the dedication of a highway or a park to public use, but in its proper etymological sense of a setting apart of a person or thing for some specified use. If the effect of the Act is to create an interest in property which was unknown to the common law, it is none the less within the competence of Parliament to do so. As *Jessel* M.R. said in *Sevenoaks &c. Railway Co.* v. *London, Chatham and Dover Railway Co.* (2): "An Act of Parliament has power to create interests which were unknown to the common law, and which could not be created between individuals by contract."

In my opinion the effect of the Act is to create in His Majesty in right of the Imperial Government a right of the nature of a special ownership or interest in the stock and meat which is inconsistent with its use for any other purposes, just as a dedication of a highway deprives the owner of the soil of the right of digging up and removing the soil. In this view, the plaintiffs are claiming damages for being prevented from exercising a right of dominion over property over which they had no such right of dominion as they claimed to exercise.

From another point of view I am of opinion that the Act may be regarded as placing the stock and meat *in custodiâ legis*, and the possessor in a position analogous to that of a receiver of property appointed by a Court of Justice, who, although he may himself be the owner of the property, is debarred from exercising any right of ownership except subject to the control of the Court. I cannot conceive of any objection to the validity of such a law. In this view also the plaintiffs' case fails.

In the third place, and apart altogether from the two grounds I have just stated, I am of opinion that the Act does not touch the subject of trade and commerce in the sense in which that term is used in sec. 92 of the Constitution.

It is not, and cannot be, denied that under the Constitution the States retain full and exclusive power to make laws with respect to the acquisition of property, real or personal, situated within

(1) 5 P.D., 197, at p. 210. (2) 11 Ch. D., 625, at pp. 635.

their territorial limits, the conditions of the use and enjoyment of such property, the capacity of the possessor or any other person to dispose of it, and the rights of succession to it. All these are usual incidents of property. But capacity of disposition does not of itself connote ownership, nor does ownership of itself necessarily connote capacity of disposition. In the jurisprudence of other countries provisions for depriving a person who is entitled to the whole beneficial interest in property of the capacity of free disposition are common, and they are not unknown in some parts of the British Dominions. An infant or an idiot may be the owner of property, but has no capacity of disposition. At present the age limit for capacity of disposition of property is in Australia twenty-one years, but it cannot be disputed that that age might be either raised or lowered by State law. Capacity of disposition is, therefore, only one of the usual incidents of the ownership of property, and it is as much subject to the laws of the country in which the property is situated as any other incident of ownership.

Another mode of limiting the right of disposition of property is by attaching the condition of inalienability or immobility to the property itself. Either mode is equally effective, so far as regards any claim of the possessor to be allowed to dispose of the property. The doctrine that particular property may be put *extra commercium* is a very old one, recognized by the Roman law. An interesting example is given by Lord *Shaw* of Dunfermline in the case of *Horlock* v. *Best* (1). The instance given is that of land in which a dead human body had been buried, and which thereupon became incapable of being the subject of any commercial dealing.

Trade and commerce consists of acts as applied to things. The concept of it, therefore, includes both a subject matter and an agent. To take an instance very often used in Roman jurisprudence, that of slaves—if the law allows living human beings to be bought and sold they are a subject matter of trade and commerce. But when the law no longer allows them to be bought and sold the term "trade and commerce" is no longer applicable to them. So, if the law forbade the sale of a child under the age of ten without the consent of the Praetor, or apart from the sale of his father or

(1) (1916) 1 A.C., at p. 514.

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mother, such children would only be the subject of trade and commerce upon those conditions. Similar restrictions could be applied to any other form of property.

The plain effect of the provisions of the Meat Supply Act which I have read is to qualify the general law as to the incidents of ownership of property with respect to stock and meat of the specified kind by depriving the owner of the capacity of free disposition, so that he has no power, except under the directions and orders of the Chief Secretary, to make any disposition of such stock or meat for any purposes whatever.

The plaintiffs contend that the Act is therefore invalid because, they say, its necessary effect is to render impracticable the employment of such stock and meat in inter-State trade, as, no doubt, it is. For, although the Act does not in terms forbid the passage of the stock and meat into another State (unless indeed the word "exporting" in sec. 7 bears that meaning—I think it does not—in which view, if it were obnoxious to sec. 92 of the Constitution, it would clearly be severable from the rest of the provisions of the section), it deprives the possessor of the capacity to move them from the place in which they are, without which movement they cannot pass into another State. Having regard to the area of the State of Queensland, the importance of the denial of this capacity is obvious. But this result is not that which it is the main object of the Act to accomplish, or, as Lord *Watson* said in *Union Colliery Co. of British Columbia* v. *Bryden* (1), is not the "pith and substance" of the Act, but a merely incidental consequence of its operation. The effect of the Act is that the stock and meat in question cannot under the law of Queensland become the subject matter of trade and commerce, since the possessors of them are denied by law any capacity to dispose of them at all. But its main object was to conserve the stock and meat for the use of the Imperial Forces.

In the fourth place I am of opinion that the Act is not obnoxious to sec. 92 of the Constitution, because it does not impose any restrictions upon export conditioned upon passing from one State into

(1) (1899) A.C., 580, at p. 587.

another, and is therefore, for the reasons I have given in an earlier part of this opinion, not within the terms of that section.

If sec. 92 is to receive the wide meaning contended for by the plaintiffs, it not only involves what is, in effect, a partial withdrawal from the States of their legislative power to control the law as to the disposition of any property which the owner may desire to employ in inter-State trade and commerce, but leaves that law stereotyped in the form in which it existed at the date of the establishment of the Commonwealth, without substituting any other legislative authority in place of the States. For it cannot be suggested that the Commonwealth power to make laws with respect to trade and commerce can override the State laws as to such matters as the following, amongst others: whether a particular trade may be lawfully carried on within the State, or whether a particular class of persons shall have capacity to dispose of property, or whether particular property shall be placed *extra commercium*. That such a result could have been contemplated is, to my mind, unthinkable.

The argument is hardly distinguishable from that which finds in the precept "Thou shalt not kill" an absolute prohibition of war, since war cannot be waged without involving the loss of human life. It is difficult to meet such arguments except by denying the interpretation sought to be put upon the language interpreted.

I am unable to distinguish the present case in principle from the decision of this Court in the *Wheat Case* (1). In that case the Court held that a Statute of New South Wales which had the effect of expropriating all the wheat in that State to the Government was not obnoxious to sec. 92, since the new owners, who alone had capacity to dispose of the wheat, could freely exercise that power by exporting it to another State or not, as they pleased. The judgment was based on the acquisition of the complete ownership. But, in truth, the only material incident of ownership then in question was the capacity of free disposition. If the only person who is capable of disposing of property is left free to dispose of it as he pleases, there is no interference with freedom of disposition.

The conclusion at which I have arrived is inconsistent with the

(1) 20 C.L.R., 54.

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decision of this Court in the case of *Foggitt, Jones & Co.* v. *New South Wales* (1), in which it was held that a Statute of New South Wales, not distinguishable in its terms from the Act now under consideration, did not authorize the Government of New South Wales to prevent the export of stock. That case was very briefly, and, I regret to say, insufficiently, argued and considered, on the last day of the Sydney Sittings. The section corresponding to sec. 7 of the Meat Supply Act was not referred to either in argument or in the judgments. It was not suggested that the stock were impressed with anything in the nature of a trust, or were placed *in custodiâ legis*. The arguments which now commend themselves to me as conclusive did not then find entrance to my mind. In my judgment that case was wrongly decided, and should be overruled.

The case presents itself to me as analogous to an action by a child of tender years against his nurse for not allowing him to go for a walk across the border between Queensland and New South Wales, or an action by an infant against his guardian for damages for preventing him from disposing of his property without the guardian's consent, with the difference that in this case the proposed disposition is forbidden by positive law.

For all these reasons I am of opinion that the Meat Supply Act is not obnoxious to sec. 92 of the Constitution and is valid, and that it authorized all the acts complained of which were committed before action brought.

Numerous American decisions were cited to us, but I have been unable to derive any assistance from them. They were all decisions upon the extent and operation of an artificial but accepted doctrine laid down by the Supreme Court to the effect that under the Constitution of the United States the power to regulate trade and commerce between the States is vested exclusively in Congress. That doctrine has no bearing upon the construction of the written Australian Constitution. But, as I pointed out during the argument, in none of these cases was it even suggested that a State cannot, with respect to things originating in the State, provide by law that they shall be incapable of being made the subjects of trade and commerce.

(1) 21 C.L.R., 357.

The question should, therefore, be answered in the affirmative.

BARTON J. The plaintiffs, as trustees and executors of the will of William Duncan, have for the last nine years held a station, stocked with cattle, called "Mooraberrie," in Western Queensland, near the border of South Australia. The plaintiff Laura Duncan is also entitled under the will to a share in the station and stock, and since the death of William Duncan, whose widow she is, has lived on and managed the station.

In May of this year the plaintiffs, who had made arrangements to forward 600 fat bullocks to Adelaide in South Australia for sale, sought from the defendant Hunter, as Acting Chief Secretary of the State, permission to send their bullocks from their run into South Australia for that purpose. The permission was refused; and the sale of the bullocks was thus prevented. It is sufficient for the moment to say of the request that it was made because the Government asserted a legal right to prevent the departure of stock. The Acting Chief Secretary informed the plaintiffs that no fat bullocks would be allowed to cross the border.

The defendants justify the conduct complained of under the provisions of a Queensland Statute, the *Meat Supply for Imperial Uses Act*, No. 2 of 1914. They contend that under its provisions no action lies for the matters of which complaint is made. The plaintiffs on the other hand say that the provisions on which the defendants rely are in breach of sec. 92 of the Constitution of the Commonwealth.

It therefore becomes necessary in the first instance to construe those provisions of the Queensland Statute under which the defendants attempt to justify their acts. It is well to point out at this stage that the defendants did not before action acquire the cattle as owners. They could have done this under sec. 6 (2), which is not in question in this case, for the action complained of is not an expropriation. The defence, therefore, which they might have asserted by acting under the last-named provision is not available to them. The enactments on which they necessarily rely are secs. 6 (1) and 7.

The presumption that a Statute was enacted in good faith

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for the purpose expressed in the title cannot control the final determination of the question whether it is not repugnant to the Constitution. There may be no purpose on the part of the Legislature to violate the provisions of that instrument, and yet a Statute enacted by it, under the forms of law, may by its necessary operation be destructive of rights granted or secured by the Constitution. In such case the Courts must sustain the supreme law of the land (here the Act 63 & 64 Vict. c. 12), by declaring the Statute unconstitutional and void (*Minnesota* v. *Barber* (1)).

What then are the natural and reasonable effect and the necessary operation of the provisions impeached?—*R.* v. *Barger* (2). It is not the whole Act that is challenged; only those portions which are said to be in denial or restriction of inter-State commerce.

Sec. 6 (1) declares that "all stock and meat *in any place in Queensland* 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." Sec. 7 (1), which is as applicable to the enforcement of sec. 6 (1) as of any other portion of the Act, provides as follows: "All persons whosoever, including the owners, consignors, consignees, shippers, vendors, and purchasers of stock and meat, and each of their agents, attorneys, servants, and workmen, are hereby prohibited from selling, offering for sale, disposing of, forwarding, consigning, shipping, exporting, delivering, or in any manner whatsoever dealing with any stock or meat (*whether the same is or is not actually appropriated to His Majesty by an order made under this Act*), except only in pursuance of and under the directions and orders of the Chief Secretary." Sub-secs. 2 and 3 are in aid of sub-sec. 1, and, like it, apply when the stock are not, as also when they are, actually appropriated to His Majesty, though an appropriation can only be made under sec. 6 (2), which does not apply to the present case.

Inasmuch as Queensland legislation applies only to that State, but does extend to the whole of it unless qualified, and inasmuch as sec. 6 (1) is expressly declared to apply to any place in Queensland, it would be idle to deny that the effect and operation of these

(1) 136 U.S., 313. (2) 6 C.L.R., 41.

provisions is to keep cattle from leaving Queensland, except in pursuance and under the directions and orders of the Chief Secretary. The prohibition of "forwarding, consigning, shipping, . . . or delivering" must include inter-State operations. It is true that sec. 4 defines the expression "Chief Secretary" as meaning "the Chief Secretary of Queensland (or other Minister of the Crown for the time being discharging the duties of his office), acting for and on behalf of the Government of Queensland and His Majesty's Imperial Government." Of course, so far as executive acts are concerned, it is the Queensland Government and no other that must exercise jurisdiction in that State (*Attorney-General for New South Wales* v. *Williams* (1)). I dismiss the contentions raised on this definition with the observation that it cannot affect the question whether the effect of the provisions quoted is to keep the live stock in Queensland at the will of the Chief Secretary, and therefore to prevent inter-State trade in them except at his will, and that although the ownership of them remains unchanged. For, by sec. 6 (2) it is made plain that until the making of an order thereunder by the Chief Secretary or his Under Secretary stock were not to cease to be the property of their then owners. Otherwise an order under that section would not be needed to divest them of their ownership. The impeached provisions are in no wise limited so as not to affect the removal of stock from State to State in the way of trade. It is urged that secs. 6 (1) and 7 are not to be interpreted as a direct restriction upon inter-State trade, because they apply generally to every place in Queensland and to all stock and meat therein; but their generality does not affect the case. If the restriction of, or the power to restrict, inter-State trade is included, as I think it plainly is, in the direct operation of the Act, the fact that intra-State trade is also more or less affected cannot diminish the restriction. In fact, if the Legislature of Queensland could make a burden on inter-State commerce apply alike to all the people of Australia as well as the people of that State—and, indeed, it has done so even now by placing bonds on a traffic by which at least the needs of a very large proportion of the inhabitants of the Commonwealth are largely supplied—still the considerations affecting the

(1) (1915) A.C., 573; 19 C.L.R., 343.

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case would not differ. The people of other States and the people of Queensland have equally a right to be protected against injury suffered by the enforcement of enactments of that State interfering with the freedom of commerce among the States; that is, if the interference is unconstitutional.

It is a fact so notorious as to be the proper subject of judicial notice that the inter-State traffic in Queensland cattle is, or at any rate was, up to the passage of this Act, of immense volume. In that State are bred and owned larger numbers of cattle than in any other of Australia, and in all the Eastern States—that is, in all the States save Western Australia—there was a great and constant market for its bullocks and the beef which they yield. It may be said with truth that in all those States every resident's table and every resident's pocket are affected by a restriction of the traffic, for its result must necessarily be to diminish the supply and raise the price of beef. Up to the passage of the Act now in question Queensland cattle came down in many thousands for sale. Large numbers of them came from the distant Gulf country, travelling, in many cases, over 1,000 miles. That great market is, as we see, closed in part. We are not told more; if secs. 6 (1) and 7 (1) are valid it can be closed altogether at the will of the Queensland Government, *malgré* the owners.

We are referred to the title of the Statute, namely, "An Act to Secure Supplies of Meat for the uses of His Majesty's Imperial Government during War, and for other purposes." But "if it bears upon commerce among the States so directly as to amount to a regulation in a relatively immediate way, it will not be saved by name or form" (*Galveston, Harrisburg and San Antonio Railway Co.* v. *Texas* (1). It is the effect that is the vital consideration, and that can only be ascertained from the substance of the enactment (*R.* v. *Barger* (2)). Then it is urged that the effect upon inter-State commerce is only incidental. That contention can in no wise be accepted. The restriction of inter-State commerce is no mere incident, but a factor of these provisions. (It is not a factor also in sec. 6 (2), under which no action was taken at any material time. There, interference with inter-State

(1) 210 U.S., 217, at p. 227. (2) 6 C.L.R., 41.

commerce would not be the necessary result. For the ownership and the dominion accompanying ownership would be changed.) In truth the provisions impeached would be futile in great measure if they did not include the stoppage of inter-State traffic in stock at the will of the Queensland Government through its Chief Secretary. Had the restriction been left out the Act would have been unchallengeable, but of poor effect indeed. The motive expressed in the title may, if the word be preferred, be called its ultimate object, but the main part of its immediate object is the withholding of cattle from transport into other States. If there had been no inter-State commerce in Queensland cattle, the supply of meat for the Imperial Government could have been secured by the mere acquisition of all or any of the live stock directly, or under some such enactment as sec. 6 (2) together with provision for taking possession of the stock after acquisition. But as the traffic existed and was great, its cessation could best be effected by such provisions as secs. 6 (1) and 7 (1).

Still, if the restrictions imposed are not infringements of the Constitution, neither the plaintiffs nor anyone else can complain.

Then is the Constitution infringed ? It is the supreme law of all the States (see covering sec. V.), and sec. 92 is therefore the law of Queensland, just as it is that of any other State. On its face it is unqualified. But the defendants seek to show that it is not infringed if the burden imposed on inter-State commerce is not a border tax. The words " absolutely free " are said to refer only to fiscal burdens ; and therefore the right is claimed for a State to restrict or even prohibit inter-State trade as it pleases so long as it abstains from placing on it any monetary charge. I am not of that opinion, but I think the learned Chief Justice interpreted the provision accurately when he said last year in the *Wheat Case* (1) that " Sec. 92 may, . . . *so far as it relates to commerce*, be paraphrased thus : Every owner of goods shall be at liberty to make such contracts for the transportation of goods from one State to another as he thinks fit without interference by law."

The narrower interpretation was sought to be supported by reference to other constitutional provisions.

(1) 20 C.L.R., 54, at p. 68.

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The first such argument is founded on sec. 51 (1). It is suggested that the last-mentioned sub-section cannot have any real effect unless the limitation applies; otherwise it would be rendered impotent as to trade "among the States." The powers given in sec. 51 (1) are expressed to be subject to the Constitution, and if as between the two there is to be a limitation it is to be sought rather with respect to the legislative authority of sec. 51 (1) than with respect to the absolute and unlimited terms of section 92. But I do not think it is correct to say that without the limitation of sec. 92 the commerce sub-section of sec. 51 would be impotent as to inter-State trade, for there would still be open to it in that regard the considerable field of laws facilitating inter-State commerce by way of helpful adjustment.

Sec. 112 was strongly relied on as showing that sec. 92 was confined to the prevention of fiscal burdens. Now, sec. 112 may still be given its full operation without imposing on sec. 92 the narrow meaning claimed. The latter section must on any construction *include* a prohibition of inter-State customs duties and the like, and sec. 112 to my mind plainly reads as authorizing the imposition by a State of certain charges which are not within the prohibition. Sec. 112 clearly recognizes State inspection laws as outside the prohibition. But if any attempt is made to convert them into instruments for the fettering of inter-State commerce, the deterrent provisoes that the net produce of inspection charges shall be for the use of the Commonwealth, and that the Parliament of the Commonwealth may annul such laws altogether, afford two effective safeguards. The truth is that, whether the charges are made on goods inspected as they pass into and out of the State or on goods inspected in any other part of the State, they are not taxes but merely compensation for services rendered. Speaking of the provision in the Constitution of the United States with which sec. 112 corresponds, *Marshall* C.J. said in *Gibbons* v. *Ogden* (1):—"The object of inspection laws, is to improve the quality of articles produced by the labour of a country; to fit them for exportation; or, it may be, for domestic use. They act upon the subject before it becomes an article of foreign commerce, or of

(1) 9 Wheat., 1, at p. 203.

commerce among the States." Such inspection being a proper subject of State legislation, sec. 112 merely makes it clear that the States may make charges for that service even at the ports and boundaries. That is merely a question of the most convenient place at which to perform the service. There were, at the time of the adoption of the Constitution of the United States, numerous laws of this class existent in the several States, and the judgment of *Blatchford* J., speaking for the Supreme Court in *Turner* v. *Maryland* (1), gives much useful information on the subject. There were similar laws in the Australian Colonies at the time of federation, and their number has probably increased since. Instances are to be found in the laws for the inspection and grading of butter, an operation usually conducted at the ports before shipment. The charges referred to in sec. 112 are those imposed for such a service. Neither the laws nor the charges for the service rendered are in any sense regulations of external or inter-State trade, though they may have some remote influence on the one or the other.

It was also argued that the place given to sec. 92 in Chapter IV., "Finance and Trade," was an indication that sec. 92 deals only with fiscal matters, but its inclusion of them is sufficient justification for the place it occupies. So that its place does not carry with it the implication that it relates only to such matters. Moreover, there is no other chapter in the Constitution to which it is more appropriate even on its widest construction, and none was pointed out.

A further argument was founded on the second paragraph of sec. 92. The operation of this paragraph has long been spent. Its language shows no more than that the first paragraph dealt with the subject of inter-State customs duties. But it by no means shows that it was aimed solely at such duties.

I come now to sec. 113, which appears to have received slight attention during the argument. It is of considerable importance in assisting us to arrive at the true construction of sec. 92.

When sec. 113, which obviously makes an exception to sec. 92 in the same chapter, is compared with what is called the *Wilson Act*, passed by the Congress of the United States in 1890 and entitled

(1) 107 U.S., 38, at p. 51.

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"An Act to limit the effect of the Regulations of Commerce between the States and with Foreign Countries in certain cases," it will be seen that the Australian section 113 and the American Act are in substance identical. Now it is important to consider the "effect" which the *Wilson Act* was to "limit," for unless there is a controlling context, which there is not, we shall presently see the effect of sec. 113 on the meaning of sec. 92. It is established by American cases too numerous and too well known to detail, that external and inter-State commerce being there regarded as a subject of national character, requiring uniformity of regulation, Congress alone can deal with such transportation; that its non-action is a declaration that such commerce "shall remain free from burdens imposed by State legislation. Otherwise there would be no protection against conflicting regulations of different States, each legislating in favour of its own citizens and products, and against those of other States." It is not to the purpose to inquire whether the American decisions in this matter are well founded. Congress has preserved the policy of non-interference with inter-State trade: hence the Supreme Court has consistently upheld the doctrine that no State can impose restrictions, whether fiscal or other, by legislation or otherwise, with the effect of substantially interfering with that commerce. So that the Supreme Court of the United States interprets the freedom of inter-State commerce, so far as State legislation would affect it, precisely as the learned Chief Justice interpreted sec. 92 in the *Wheat Case* (1). (Of course external commerce is constitutionally dealt with by the joint operation of secs. 90 and 51 (1). As to that we are not at present concerned. External commerce however was dealt with on lines consistent with the creation of one national authority in relation to the outside world; while inter-State commerce was made the subject of a charter which for the purposes of that commerce eliminates the very idea of State boundaries, and makes the people of the whole Commonwealth in their commercial and personal dealings with each other, "absolutely" one.) As *Taney* C.J. remarked in the *Licence Cases* (2): articles "universally admitted to be subjects of ownership and property . . . are therefore subjects of exchange, barter, and traffic, like any other commodity in which

(1) 20 C.L.R., at p. 68. (2) 5 How., 504, at p. 577.

a right of property exists." It would be absurd to say that the ordinary subjects of exchange and traffic are not subjects of inter-State as well as of intra-State commerce. It resulted, as *Day* J. put it in the case of *Crutcher* v. *Kentucky* (1), that "neither licences nor indirect taxation of any kind, nor any system of State regulation, can be imposed upon inter-State any more than upon foreign commerce; and that all acts of legislation producing any such result are, to that extent, unconstitutional and void."

Dealing still with the effect of sec. 113 on the construction of sec. 92, I point out that until the passage of the *Wilson Act* it was held by the Courts that inter-State commerce in intoxicating liquids could not be interfered with by a State any more than that in other saleable goods. But each State was no doubt entitled to regulate the sale in intra-State trade of one or the other class of articles when inter-State transport was ended, and they had become part of the common stock of the State. The Courts solved the difficulty as to the point at which inter-State transportation ended and State control began by holding that when goods transported were no longer in their original packages; when bulk had been broken for distribution; or when as to other articles such as live stock there was evidence that fresh commercial dealings with them had evinced the end of the period of transit; they had entered into the common stock of the State and were subject to its laws. Until then they were not thus subject; the result was that States which sought to deal stringently with the liquor traffic often found their efforts frustrated as to any portion of the transit which had not terminated, although the liquor had entered the State; and the *Wilson Act* was the resultant remedy. But this exception proved the rule, if that were necessary, and the doctrine to which I have adverted remains in full force as to every other article of inter-State commerce. In seeing therefore what was the intention of the Australian sec. 113, a provision, as I repeat, identical in substance with the *Wilson Act*, we see at the same time what was the extent of the immunity from interference which the Constitution granted by sec. 92. The exception was obviously upon a grant much larger than a mere grant of freedom from border charges. We see that the

(1) 141 U.S., 47.

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latter section was not limited to pecuniary charges, but gave as wide an immunity from State interference as had been given in the United States by the doctrine which the Courts engrafted on the trade and commerce power, that until its exercise on the national subject of inter-State commerce, no State could restrict or interfere with that commerce in any respect. Here we find the meaning of the words "absolutely free," which can only mean free in all respects.

On this subject some words of *Marshall* C.J. in *Brown* v. *Maryland* (1) are very relevant: "If it be a rule of interpretation to which all assent, that the exception of a particular thing from general words, proves that, in the opinion of the lawgiver, the thing excepted would be within the general clause had the exception not been made, we know no reason why this general rule should not be as applicable to the Constitution as to other instruments."

Of course the right is that of the owner of the goods. It is he who has the ultimate dominion over them, and so long as he has the ownership the section means that his dominion cannot be interfered with. To this extent the constitutional provision deals with property, for the simple reason that only with the will or consent of the owner can the right be exercised. To quote the learned Chief Justice again (*Wheat Case*, at p. 67): "The term 'commerce' assumes the existence of persons willing to engage in it, and who are *the owners of property* which is to be the subject of it."

But then, it is asked, if "absolutely free" means free in all respects, does it not mean licence and not merely liberty? In my view it means freedom to use this right as one is entitled to use any other right given to him by the Constitution. Therefore it cannot mean mere licence. When we speak of our freedom we speak of an "ordered liberty." That seems to me to be liberty controlled by law to the extent necessary to prevent injury to others, and that is the dominant reason of ordinary State and municipal regulations. For instance, a municipality may prohibit the driving of cattle through its streets during the hours of busy traffic. But because that is a proper exercise of power it does not follow that the authority is competent to interfere with the exercise of the

(1) 12 Wheat., 419, at p. 438.

right of inter-State transport of cattle during those other hours when they may be driven through the streets with the minimum of inconvenience, or so to reduce those hours, for instance, as to make the traffic nugatory. Sec. 107 preserves the powers of the State Parliaments so far as any such power is not exclusively vested in the Commonwealth or withdrawn from the State Parliament. But this is not to say that the right to interfere with inter-State commerce is conserved. For sec. 92, as I have already pointed out, is the supreme law of Queensland as of other States, and it denies such a right to any State, and probably also to the Commonwealth. There are no powers of a State which can legitimately be exercised to frustrate or destroy a right secured by the Constitution, any more than they can be used to produce the same effect upon a Statute validly passed by the Parliament of the Commonwealth.

Some discussion took place as to the occurrence of the word "intercourse." It need scarcely be pointed out that the framers of the Commonwealth Act necessarily had before them the Constitution of the United States and the judicial decisions upon it. They saw that the word "intercourse" was not used in the commerce power of Congress, but that the Courts had always construed the words to include all intercourse necessary to the conduct of commerce. They gave the words "trade" and "commerce" as so construed their place in sec. 51 (1); but in framing sec. 92 they evidently sought to include a larger right in that charter, namely, all such intercourse as might not be included in the words "trade" and "commerce." It is natural, and I think correct, to conclude that they gave this word its widest sense. It includes a right to all citizens to pass and repass and to communicate one with another from end to end of the Commonwealth, upon their lawful occasions, without restriction affecting that right as such. It means immunity from all restrictions except such as may be placed upon the rights of a free citizen to the extent necessary to guard against infringement of the rights of his neighbours.

Much argument was bestowed on the question whether sec. 92 binds the Commonwealth as well as the States. Mr. *Starke*, for the Commonwealth, urged the negative view, but, as at present

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advised, I consider the right conferred by the provision to be wholly independent of either the law-making or the executive power either of the Commonwealth or of any State. But the question does not call for decision in this case.

A suggestion was made that, inasmuch as most of the American decisions cited related only to State restrictions of goods entering from another State, there was nothing in them tending to deny the right of a State to interfere with the transportation of commodities from within it to a neighbouring State. That is not so. Many instances to the contrary are to be found. One such is the case of *Hall* v. *De Cuir* (1). Another is *Ohio Oil Co.* v. *Indiana* (2), where, at p. 205, the judgment mentions with approval that in *Corwin's Case*, a law of Indiana was held void by the Courts of that State as an interference with inter-State commerce, because it prohibited under penalty the conduction of natural gas beyond the State. A third is the case of *Reid* v. *Colorado* (3), where the Court said in the course of its judgment: "It is said that the defendant has a right under the Constitution to ship live stock from one State to another State. This will be conceded on all hands."

But more precise and more apposite than any of these is the case of *Oklahoma* v. *Kansas Natural Gas Co.* (4), where it was held that a Statute of Oklahoma, which purported to confine the transmission of the natural gas of Oklahoma to points within that State, was a violation of the Constitution as an interference with the freedom of inter-State commerce. The Court held that natural gas became a subject of commerce, and therefore of inter-State commerce, when the owner of the soil had so far captured it as to conduct it in pipes. The case is instructive not only by reason of its close relation in principle to that before us, but because of the striking applicability of the terms employed by the Court to the Queensland enactments on which reliance is placed. The State Attorney-General, who failed in the appeal, argued that the ruling principle of the Statute was "conservation, and not commerce"; and he contended that a State has the right to conserve its natural resources. The Court said in its judgment, delivered by *McKenna* J. (5):—"The

(1) 95 U.S., 485, at pp. 488-489.
(2) 177 U.S., 190.
(3) 187 U.S., 137, at p. 151.
(4) 221 U.S., 229.
(5) 221 U.S., at pp. 254, 255.

Oklahoma Statute . . . does not alone regulate the right of the reduction to possession of the gas, but when the right is exercised, when the gas becomes property, takes from it the attributes of property, the right to dispose of it . . . *The Statute of Oklahoma recognizes it to be a subject of intra-State commerce, but seeks to prohibit it from being the subject of inter-State commerce, and this is the purpose of its conservation.* . . . If the States have such a power a singular situation might result. Pennsylvania might keep its coal, the Northwest its timber, the mining States their minerals. And why may not the products of the field be brought within the principle ? . . . To what consequences does such power tend ? If one State has it, all States have it; embargo may be retaliated by embargo, and commerce will be halted at State lines. And yet we said that 'in matters of foreign and inter-State commerce there are no State lines.'" Further (1):—"At this late day it is not necessary to cite cases to show that the right to engage in inter-State commerce is not the gift of a State, and that it cannot be regulated or restrained by a State . . . The State through the Statute seeks in every way to accomplish these ends, and all the powers that a State is conceived to possess are exerted and all the limitations upon such powers are attempted to be circumvented."

It is difficult to conceive expressions more applicable than these to the present case.

The *Oklahoma Case*, which was decided in 1911, was followed by *Haskell* v. *Kansas Natural Gas Co.* (2), which also held that natural gas after severance, being a commodity which could be dealt in like other products of the earth, and which was therefore a legitimate subject of inter-State commerce, was not subject to any State legislation which could prohibit its being transported in inter-State commerce, and that the Act of Oklahoma was an unconstitutional interference with inter-State commerce, as held in the previous case.

In illustration of the two principles that a Statute must be judged not by its words alone, but by its effect and operation, and that an interference by a State with inter-State trade, under whatever disguise, is unconstitutional, I refer to the two cases of

(1) 221 U.S., at p. 260. (2) 224 U.S., 217.

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Schollenberger v. *Pennsylvania* (1) and *Collins* v. *New Hampshire* (2). In the first case it was held that an article recognized in practice or by law as an article of food and commerce could not be wholly excluded by the operation of a State law from introduction commercially into that State from another State where it was manufactured. In that case the manufacture of the article (oleomargarine) within the State was prohibited, and so was its sale. In the second case the State Statute simply prohibited the sale of the same article as a substitute for another (butter) unless it were coloured pink. As this condition would make it unsaleable, the Act was held to be a prohibition of sale. In that case the article was not manufactured within the State at all. It is thus apparent that in each case the article the sale of which was forbidden was not found within the prohibiting State unless it were introduced from some other State. It was held in each case that the State Statute operated as a prohibition of inter-State trade in the article. It was not seriously contended in either instance that the article would be injurious to the health of the people of the State if consumed therein. It is clear that in either case the transportation of such an article out of the State if produced within it could not have been prohibited or restricted without a violation of the Constitution. For the right of inter-State commerce is of course reciprocal.

In *Schollenberger's Case* (1) *Peckham* J., who delivered the judgment of the Court in both instances, said that the question whether the substance was an article of commerce (and, as I have shown, the right of inter-State commerce belongs to the ownership of such an article) must be determined by the Court "with reference to those facts which are so well and universally known that Courts will take notice of them without particular proof being adduced in regard to them, and also by reference to those dealings of the commercial world which are of like notoriety" (3). In this Queensland case some question was raised as to what is an article of inter-State commerce. The answer is supplied by this criterion. It cannot be doubted that live stock are within it, and inter-State commerce in them cannot be denied or even regulated by any State. An exception of course

(1) 171 U.S., 1. (2) 171 U.S., 30.
(3) 171 U.S., at p. 8.

is afforded by a State regulation of the introduction of any article, including a food product, "so as to insure purity of the article imported." But such power does not include the total exclusion of the article, unless it be in itself or in its condition dangerous, or injurious to health. *Peckham* J. (1) cited the case of *Railroad Co.* v. *Husen* (2), where the Court, "while conceding the right of the State to enact reasonable inspection laws to prevent the importation of diseased cattle, held the law of Missouri there under consideration to be invalid, because it prohibited absolutely the introduction of Texas cattle during the time named in the Act, even though they were perfectly healthy and sound. . . . The bad article may be prohibited, but not the pure and healthy one." It is impossible to contend that where the operation and effect of the Act is to prohibit the sending of the article of commerce out of the State, the prohibition is not in the same way an invalid attempt to regulate inter-State commerce. Of course fraud, deception, adulteration, disease, stand on different ground, and the State may deal with them by legislation with the *bonâ fide* object of preventing them. *Powell* v. *Pennsylvania* (3), a case which was cited to us, was distinguished by the Supreme Court on the ground that it did not involve rights arising under the commerce clause. In that respect it was said to resemble *Mugler* v. *Kansas* (4) and *Kidd* v. *Pearson* (5). In all such cases sale was prohibited as well as manufacture because of a public policy of the State adverse to the very production of the article. The public policy of Queensland is the very reverse, if we may judge of the importance of the breeding of cattle to that State by its notoriously huge extent. These cases are instances of prohibition of the internal liquor traffic of the State, or of some other article the production of which is deemed to be hurtful to people of the State. *Plumley* v. *Massachusetts* (6) was held not to be inconsistent with the rule, as it was "based entirely upon the theory of the right of a State to prevent deception and fraud in the sale of any article," and it was for "the fraud and deception contained in selling the article for what it was not, and in selling it so that it should appear to be another and a different article," that the right

(1) 171 U.S., at pp. 13, 14.
(2) 95 U.S., 465.
(3) 127 U.S., 678.
(4) 123 U.S., 623.
(5) 128 U.S., 1.
(6) 155 U.S., 461.

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of the State was upheld. The question of the right totally to prohibit the introduction from another State of the pure article "did not arise, and, of course, was not passed upon."

As I have said, the case of *Collins* v. *New Hampshire* (1) was decided at the same time and on the same principles. I have stated shortly the Act held to be invalid so far as it affected inter-State commerce. The Court said (2) that it was "in its practical effect prohibitory." The practical effect is the test. From the terms of the Act, we are to say how it will operate. It must be assumed to intend that operation (see *Minnesota* v. *Barber* (3)).

Regulations deemed desirable by the Legislature of a State for the good order of society and the welfare of its citizens cannot avail against the safeguard which the Constitution expressly established against restrictions of inter-State commerce. It is true that there are many things which are in themselves so injurious to life or health as to lose all benefit of protection as articles of commerce, and there are other things which, although in their normal state articles of commerce, are in such a condition as to lose that benefit for a similar reason. No one can deny the power of a State to exercise in respect of such things its guardianship of the health and safety of its people. There are many such articles. On this subject I adopt the remarks of *Taney* C.J. in the *Licence Cases* (4): "It must be remembered that disease, pestilence, and pauperism are not subjects of commerce, although sometimes among its attendant evils. They are not things to be regulated and trafficked in, but to be prevented, as far as human foresight or human means can guard against them."

It was contended that the enactments now challenged are within the State powers because they have placed cattle "*extra commercium*," outside the pale of commerce. There are two answers to this argument. The first is that to place a subject of commerce outside the pale of commerce, that is, to deny to the owner its use in trade, is not within the power of a State so far as the denial prevents its use in inter-State trade. The right goes with the ownership; it is secured to the owner by sec. 92. That is the meaning of the

(1) 171 U.S., 30.
(2) 171 U.S., at p. 33.
(3) 136 U.S., 313.
(4) 5 How., at p. 576.

Wheat Case (1), where it was held that the State of New South Wales, in acquiring the wheat, which it could constitutionally do, acquired the right of determining for itself as the owner whether it would transport the wheat outside New South Wales, or would retain it there. It was the ownership which had given the previous proprietors the right of inter-State trade, and the ownership had lawfully passed to the State, which necessarily had thenceforth the right to dispose of it in any way or to retain it, just as the previous owners had. If, then, a State, *not acquiring the ownership* of a subject of commerce (which is therefore a subject of inter-State commerce), assumes to deprive the owner of that right so definitely secured by the Constitution, the State is to that extent violating the Constitution, no matter whether it applies the term which I have quoted to the operation or not. The distinction upon which the action of the Legislature of New South Wales was held valid in the *Wheat Case* is the very distinction on which different action of that State was held unconstitutional in the case of *Foggitt, Jones & Co.* v. *New South Wales* (2). There the State had acted under sec. 5 (1) of a Meat Supply Act like that now in question. That provision corresponds exactly with sec. 6 (1) in the Queensland Act. This Court held that the provision relied on did not constitute any authority to the defendants for their action in preventing the transit of live stock of the plaintiffs into Queensland. If the *Wheat Case* is correct, and no doubt has been thrown upon it, then the case of *Foggitt, Jones & Co.* v. *New South Wales* is also correct, because it is the strongest implication from the decision in the former case that an interference with the exercise *by owners* of the right of inter-State commerce cannot be justified ; and that it is only when and because the right has passed to a new owner that the latter can exercise his own volition whether, having the right, he will exercise it or not. The principle of the *Wheat Case* rests on a good foundation. But the State right arrogated in this case, even if supported by a majority of this Court, rests, I firmly believe, on a foundation forbidden by the Constitution.

The fact is that the phrase *extra commercium* does not suffice to disguise an argument which was as a matter of course rejected in the

(1) 20 C.L.R., 54. (2) 21 C.L.R., 357.

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Oklahoma Case (1). That argument was that the ruling principle of the State Statute was "conservation, not commerce," and that such conservation was within the right of the State. But no right of a State is a valid pretext for interference with the right of the federated people. It cannot avail to break down that right, and sec. 107 gives it no shred of power to do so in face of the paramount command of sec. 92.

So far for the first answer to the argument that the goods have been placed *extra commercium*. The second answer is that whatever force that operation might have, it has not taken place. At the best the cattle did not cease to be subjects of some commerce, for they may be purchased by the State or, as is argued, by the Imperial Government. They therefore remain subjects of intra-State commerce. But an owner has the right to trade until the State withdraws it, so far as it lawfully can. If, then, its attempted withdrawal leaves that right of intra-State commerce subsisting even in part, what is the other right which it affects to withdraw in attempting to place the goods outside commerce? Plainly, the right of inter-State commerce, with which sec. 92 forbids it to tamper.

Then we are told that all that sec. 92 forbids is legislation "conditioned on the passage of goods from one State to another." It is difficult to grasp the precise meaning of this contention; but I take it that it means that secs. 6 (1) and 7 render the cattle immovable —that is to say, keep them where they are; and that this does not involve an interference with inter-State commerce, because it looks in another direction, into Queensland and not towards New South Wales or South Australia. Well, if I am looking in one direction I am looking away from some other; if I drive live stock to the north I am driving them away from the south. The old question remains, what is the effect and operation of the law? If its necessary effect is to deprive the owner of his constitutional right, it does not matter what phrase is applied to the process. If for instance, knowing that stock owners are in the habit of driving their cattle southwards all the way from North Queensland to Melbourne or Adelaide for sale, I attempt to force them to abandon that trade by commanding them to keep their cattle within Queensland, or to

(1) 221 U.S., 229.

drive them in a contrary direction to a port in the north of Queensland for the shipment of them or their meat, say, to India, my action may not be expressly conditioned on the passage of the stock from State to State. But who would venture to say that it is not, however laudable its motive, the deliberate and intentional prevention of inter-State trade? Hitherto, motives have not been allowed as excuses for violations of the Constitution: though, if the present decision be taken as a precedent, they may be in future.

Then it was argued that the operation of one or both of the sections impeached was analogous to the "dedication" of a highway or a park, although it is admitted not to be the same thing. But how is an enactment to be saved by such a name? If the cattle are not dedicated, how much does the mere term convey in this case? So, as to the contention that the cattle have been placed *in custodiâ legis*. That is a term well understood in regard to legal proceedings and their results; but what effect can its use have in preventing the plain construction of this Statute? I fail to see its applicability as conveying a legal effect overriding that construction. In spite of all these names the question still is whether the legislative action of a State, whatever name is applied to it, interferes with inter-State commerce in the sense that it forbids the transmission or receipt by the owner of the chattels or their value in goods or money when exchanged from State to State. If it does so, it is *pro tanto* repugnant to the Constitution. The question is still one of the necessary operation of the Statute. Any other principle will result in authorizing the production of the forbidden effect by the device of the skilful employment of evasive words.

I should mention that the defendants sought to sustain their position by resort to the case of *Geer* v. *Connecticut* (1). It was contended that, like the game the subject of that case, the cattle here were, by the effect of sec. 6 (1) and 7 (1), placed beyond the domain of commerce. But in the case cited the game were at the outset held to be at common law the common or collective property of the State, and could therefore be retained for the State or subjected at its will to laws imposing restrictive conditions as to sale and transport. That was the result of initial State ownership,

(1) 161 U.S., 519.

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and would have been the result as to these cattle if the State had acquired them by law before the acts complained of; but it is not the position of private property like the cattle of graziers so long as their ownership remains. That is not subject to the treatment to which game that was already State property was subjected by the law of Connecticut.

In principle the case cited resembles the *Wheat Case* (1), and it is therefore in marked distinction to the present case.

The right of free disposition is an incident of the ownership of property not, as argued, merely because the law of the country in which the property exists has said so. The real reason is that ownership cannot in the nature of things be absolute without that right. The law of the country—that is, the particular State—can take away or diminish that right to any extent not forbidden by the Federal Constitution. But it is just that attribute of ownership that sec. 92 conserves to all the extent necessary for the purpose of maintaining the freedom of inter-State trade, and with it the unity of the Australian people. And conserved as this attribute is to that necessary extent, it is beyond the touch of any State. To sanction what is attempted here is to yield to a palpable attack upon the right and the unity of which I have spoken, and against which it is my duty to defend the Constitution which guarantees the right.

Trade, as we know, is the operation of exchanging, selling or buying chattels for or with other chattels or money or its equivalent. It can only be undertaken, personally or through agents, in right of ownership. Where this operation is conducted between residents of different States the right to conduct it cannot be taken away or diminished by a State, because it is a federal right. The State can acquire, vest or divest the ownership, but whenever it does so, sec. 92 secures that the right still inheres in the ownership. Now this is a right belonging to every citizen of the Commonwealth wherever resident. Its exercise is conditioned by the ownership of the subject of trade, and by that alone. To interfere with it by a Statute of Queensland in respect of residents of that State is to affect prejudicially the rights of residents outside it, for as the trade

(1) 20 C.L.R., 54.

is reciprocal so must the right be. As the Imperial Statute which secures it has force throughout the Commonwealth, it is the right of that party to each operation of trade who lives outside, as well as of the party within, a particular State, and legislation by any State prejudicing that right is an abridgement of the immunity secured by the Constitution to both parties, the resident of that State as well as the resident elsewhere in the Commonwealth.

I quite agree, and have often stated my agreement, in the position that the decisions of the Supreme Court of the United States have no binding effect upon us as authorities. But when we find a body of such decisions upon questions which are in reality and in substance identical in the Constitutions of the United States and of Australia, then, to the extent to which the two coincide, the reasonable mind will attach great weight to the generally admirable reasoning of the jurists of that Court. For myself, I derive comfort from the knowledge that very eminent Judges have not disdained the help afforded by the reasoning of American Courts. As an instance, *Fry* J., as he then was, in giving his judgment in *Steel* v. *Dixon* (1), said: "In coming to that conclusion, as I do upon principle, I am much strengthened by the American authorities to which my attention has been called." I have endeavoured to come to my conclusions upon principle, and I acknowledge that in the process I also am much strengthened by the American authorities. When I hear that too much attention is being paid to such decisions I cannot help remembering that some of the most important conclusions of this Court, defining and safeguarding the Australian Constitution, were given upon much citation of them, and in memorable instances founded upon them. When I travel in a railway carriage I often find a fellow occupant who insists on excluding the fresh air. Future instances of such a dislike of ventilation will remind me strongly of the warning against the breath of American reason.

The case of *Macleod* v. *Attorney-General for New South Wales* (2) was referred to, and it was suggested that the obnoxious provision might possibly be construed on the principle of that decision so as to be free from the constitutional objection. My answer to this

(1) 17 Ch. D., 825, at p. 831. (2) (1891) A.C., 455.

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suggestion is that secs. 6 (1) and 7 (1), standing together, cannot be so "read down" as to deprive them of the interference with inter-State trade which vitiates them, without reducing them to futility. The reason is that if they were deprived of that factor they would lose their *raison d'être*. To leave them so that live stock might uninterruptedly pass from Queensland into other States would be to defeat the object of the sections. *Macleod's Case* was decided on the ground that the Act impeached could be "read down" so as to be within the powers of the Legislature of New South Wales, and at the same time retain a force and effect, not so large indeed as might have been the hope of its framers, but consistent with and as far as possible in furtherance of their purpose. The Act remained the same Act, but rather shrunken. This is not so with regard to the impeached provisions of the Queensland Meat Supply Act. There the process would reduce the offending provisions to an ambit quite inconsistent with the purpose of their framers.

A curious result of this process, if adopted, must not be overlooked. If the Queensland sections be construed so as to be *intra vires*, that can only be done by depriving them of their effect in obstructing inter-State commerce. Upon that construction they are not only futile *quoad hoc*, but the result is that the conduct of the defendants in relation to the plaintiffs' cattle up to the commencement of this suit becomes quite impossible to defend under the section, when reduced to validity. The defendants would therefore reject such a construction with emphasis, and the emphasis would be natural.

I should add that as the interference with the transit of the plaintiffs' fat cattle was avowedly committed under the alleged authority of certain Proclamations placed before us, which were issued in pursuance of a Statute (which by the way has no relation to meat supply for the Imperial Government) called the *Sugar Acquisition Act*, it is a question whether the defendants can truly assert that they acted under the authority of the Meat Supply Act, secs. 6 (1) and 7. But if they really did so, it seems clear that they did not use those sections otherwise than as an authority for the sole purpose of obstructing the passage of live stock from Queensland to or through other States. Interpreting the sections, apparently, as I do, they allowed the owners of such stock to move them as they chose

within that State ; for they did not assume to check any such movement save when the owners sought to take the fat stock into another State. At that point they interfered by refusing altogether to allow departure in the case of such stock. In the case of store stock they refused it except upon a guarantee of the return of the stock to Queensland within a limited time, under the security of a deposit of money. "And yet we have said," to quote *McKenna* J. again (1), "'in matters of foreign and inter-State commerce there are no State lines.'"

The decision of the present case, if followed hereafter, will be of grievous effect upon the future of the Commonwealth, for it tends to keep up the separation of its people upon State lines by imputing to the Constitution a meaning which I venture to say was never dreamed of by its framers ; a meaning which will probably result in the very dangers and dislocations which its provisions are intended, and, in my judgment, aptly framed, to prevent. If sec. 92 is not adequate to forbid the conduct complained of, it is difficult indeed to frame a provision which would have that effect.

To say that one regrets to differ from one's learned brethren is a formula that often begins a judgment. I end mine by expressing heavy sorrow that their decision is as it is.

My conclusion, however, is that secs. 6 (1) and 7 of the Queensland *Meat Supply for Imperial Uses Act* of 1914 prejudicially affect inter-State commerce, and that, to the extent to which that effect exists, they are *ultra vires* and invalid.

ISAACS J. This is one of the most important cases, if indeed it be not the most important of all the cases, that have ever occupied the attention of this Court. It concerns what I regard as one of the fundamental pacts of the Constitution under which we live, the absolute right of freedom of trade and intercourse between the States. The result of any decision as to that right is so momentous as to impose upon any Judge having to determine it as a permanent feature of the organic law of Australia an enormous weight of responsibility. That sense of responsibility, however, is naturally lightened by the reflection that, whatever decision we come to,

(1) 221 U.S., at p. 255.

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this is one of those instances which are still under our Constitution reviewable by the ultimate tribunal of the Empire. There is no question here of delimitation of powers as between the Commonwealth and the States; it is a question of the actual power of either, in view of the provision of sec. 92 of the Constitution. I may say at once that I am quite unable to concur in the conclusion arrived at by the majority of my learned brethren, which, I hope I may add without disrespect, is arrived at for reasons so divergent as to require separate examination at my hands.

The real question we are called upon to decide may be thus succinctly stated: "Is the constitutional declaration of inter-State freedom of trade a reality or a sham?" The Queensland *Meat Supply for Imperial Uses Act* has been pronounced valid notwithstanding that declaration, and even assuming that on the true construction of the State Act it authorizes all that is complained of. That pronouncement, which I must say at the outset is entirely irrespective of any question of war or Imperial interests, but is based on the right of any State at any time, in peace no less than during war, and to any extent it pleases, to nullify the provisions of sec. 92, necessarily reduces the Constitution, so far as it purports to guarantee to the people of Australia free trade between the States, to a worthless scrap of paper. I shall first state how the action arises, and what are the matters alleged by the plaintiffs.

1. *The Acts complained of.*—This case came before me in original jurisdiction, and having heard all the evidence, except upon the question of amount of damages, should that become material, I formulated in all eleven questions upon that evidence, for the consideration of the Full Bench.

The first of those questions runs thus: "Is the Queensland *Meat Supply for Imperial Uses Act* 1914 valid; and, if so, did it authorize the acts complained of?"

The majority determination is in the affirmative; and therefore it becomes unnecessary to answer the other questions because, whatever answers were given to them, the plaintiffs fail. Consequently, before the answer to the first question can be properly understood, the pleadings and some of the other questions showing what were the acts complained of as alleged by the plaintiffs must

be referred to. Briefly, for this purpose the acts complained of by the plaintiffs were that the Queensland Government instituted a system by which, although they allowed the holders of cattle to deal with them as they thought fit within the boundaries of Queensland, and allowed the needs of the people of Queensland to be satisfied to the full, even in priority to the requirements of the Imperial Government, stock was not allowed to be taken out of Queensland alive or dead without the authority of the Chief Secretary, whatever the necessities of the people in the other parts of Australia. Fat cattle were never allowed to cross the border under any circumstances, but store cattle were allowed to cross by permission, which was granted only if the owners signed a document stating that in consideration of the Government abstaining from acquiring them under the *Sugar Acquisition Act* 1915—a totally different Act from the Meat Act, and having no reference whatever to the Imperial Government—the owner undertook to return the cattle within six months and deposited a sum of money as security. Then the proper official would, in the terms of the authorized form, "permit their temporary removal across the border." On fulfilment of the undertaking to bring the cattle back the deposit was returned. Instructions were accordingly issued to the Government inspectors of stock. Knowing of this practice, the plaintiffs allege that they, to their pecuniary loss, were deterred and therefore prevented during March and April 1916 from sending some 300 cattle to another State. In May they formally requested permission to remove 600 fat cattle, intending, as they allege, to take them for the purposes of sale to South Australia, the population of which is largely dependent for its food supply upon Queensland meat, and higher prices absolutely and relatively prevail there. The permission was refused, and it is contended by the plaintiffs that in the circumstances the attitude of the Queensland Government, with all the force of the State behind it, constituted a real prevention which, as law-abiding citizens, the plaintiffs were not called upon to oppose with force, but may challenge in a Court of law.

The writ was subsequently issued on 23rd May, but the plaintiffs further say that the events subsequent to the issue of the writ are not only to be regarded in relation to damage, but as evidencing

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the character of the whole of the acts, that is, the conduct, on the part of the Queensland Government, and as showing in combination with the forms of permit, issued long before the action was commenced, that the Government was really proceeding in the main for local purposes, with the object of preferring the Queensland meat companies and Queensland trade, as opposed to other Australian interests. They say that, although to some extent Imperial interests might be served, they were subsidiary to the immediate object the Government had in view—namely, the monopolization by Queensland of the trade in cattle, including the supply to the Imperial Government subject always to the full supply of the inhabitants of Queensland. Besides the reference to the *Sugar Acquisition Act* in the form of permit, and the significant fact that the acquisition of the cattle in June was not under the Meat Supply Act, but under the Sugar Act—of local aspect only,—the plaintiffs adduced evidence, uncontradicted, with reference to a specific application made personally to the defendant Hunter, as Minister of the Crown, on behalf of the Australian Chilling and Freezing Co. Ltd. of New South Wales. That company had been freezing meat for the Imperial Government since March 1915, and the firm of W. J. Walker & Co. had been sending it on. The company is dependent for the supply to the Imperial Government upon Queensland supplies. The general manager, Mr. McAdam, accompanied by Mr. Howie, the London manager of Walker & Co., asked Mr. Hunter for permission to bring cattle over the border, offering any guarantee that might be demanded that the shipments should be for the Imperial Government only. This was refused, and no reason given. This, as is apparent, may have been greatly detrimental to Imperial interests.

The plaintiffs contend that in view of the circumstances the Court should, upon the whole evidence, infer that the acts complained of were not a *bonâ fide* exercise of the powers conferred by the Meat Supply Act whatever those powers might be. They argue that if the Meat Supply Act is to be regarded as a general regulation of trade all over Queensland—supposing that were a sufficient vindication of inter-State prohibition—it has not been followed, because the Government have confined their actual interferences to inter-State trade

only, and that the acts complained of were, in any case, a violation of the Constitution inasmuch as the obvious *discrimen* of the Queensland Government in their executive conduct was the crossing of the border. The plaintiffs contend that if the Act were pointed at such interferences only it would necessarily be bad, as going beyond the generality that is invoked to save it. The principle relied on by the plaintiffs in this regard is briefly adverted to in *R.* v. *Governor of Brixton Prison*; *Ex parte Sarno* (1).

It is necessary to refer to these details for two reasons. The first is, to make quite clear that the answer of the majority of the Court to the first question as sufficient to determine the whole case necessarily assumes that as to the facts the plaintiffs might succeed in establishing all they allege, and still the Meat Supply Act would justify what was done. The second reason is that it ought to be made perfectly plain, as it is in fact, that the justification set up by the State of Queensland does not rest upon the Imperial Government. The Imperial Government must not be treated as the stalking-horse for supporting what was done here. Imperial interests, which to the utmost extent of the law every loyal subject and certainly every member of His Majesty's Courts of law would endeavour to maintain in this crisis of our history, are not to be taken as the subject matter of our decision; for, if some Queensland meat company were substituted for the Imperial Government, the same reasoning would apply, and therefore the same conclusion would follow. I shall have occasion, in connection with another branch of this case, to show how it is manifest that the Imperial Government itself would apparently repel any attempt to fasten upon it the responsibility for what is here complained of.

This case, in addition to the inferences and other conclusions of fact, all of which by analogy to demurrer are assumed for the purposes of the decision of the majority to be in the plaintiffs' favour, raises pointedly and clearly two further questions, and two questions only—(1) the construction of the Queensland Meat Supply Act, and (2) its validity, if it is intended to prevent inter-State trade by authorizing what is claimed to be justified by its terms. These matters were dealt with very briefly, though completely, in the case of *Foggitt*,

(1) 32 T.L.R., 717.

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Jones & Co. v. *New South Wales* (1). The various reasons, however, now advanced for the contrary view compels an extended treatment of them.

2. *The Meat Supply for Imperial Uses Act* 1914.—This Act was passed on 12th August 1914, that is, eight days after the War began. It is declared to remain in force as long as the Governor thinks fit to proclaim its continuance. It declares its pre-eminence over all other Acts, rules, regulations, judgments and instruments whatsoever. It defines the Chief Secretary thus : " The Chief Secretary of Queensland (or other Minister of the Crown for the time being discharging the duties of his office), acting for and on behalf of the Government of Queensland and His Majesty's Imperial Government." I stop for a moment to observe that the definition does not include anyone but a Minister of the Crown. It excludes the idea of any subordinate officer such as the Under Secretary, and this is important when the second sub-section of sec. 6 is examined. Further, the reference to the Imperial Government cannot have reference to Governmental acts, and I agree with the argument that was presented, that there is no power in the Queensland Constitution by which the State Parliament may authorize the Chief Secretary as the delegate of the Imperial Government—and therefore in obedience to its instructions—to govern the people of Queensland. It was conceded, and I agree with the concession, that the Chief Secretary of Queensland could be the agent of the Imperial Government to purchase cattle, and at the request of the Imperial Government and in that sense on its behalf—though not as its agent in the true sense—to exercise whatever Governmental powers exist locally. The difference is fundamental, and omission to observe it does, in my opinion, lead to a wrong conclusion respecting the legal effect of the Act.

Then the Act defines the " stock " and the " meat " that are the subject matter of the enactment. It is sufficient to say that the only stock and meat dealt with by the Act directly are such as are either intended or available for export as meat. For this I shall use the word " exportable." And by " directly," I mean in the absence of any extension by proclamation under sec. 12.

(1) 21 C.L.R., 357.

Now, as to the effect of the Act, I reject all the suggested "analogies." In the first place, to quote the words of Lord *Halsbury* in *Gresham Life Assurance Society* v. *Bishop* (1), "the question in this case seems to me to depend upon the actual words used by the Legislature, and I deprecate a construction which passes by the actual words and seeks to limit the words by what is supposed to be something equivalent to the language used by the Legislature." *Tindal* L.C.J., in *Everett* v. *Wells* (2), said: "It is the duty . . . of all Courts to confine themselves to the words of the Legislature, nothing adding thereto, nothing diminishing." Other authorities having more specific reference to the point relating to the Constitution will be presently cited. But with that clear principle before us, I am unable to adopt any of the various equivalents that have been suggested. The one question on this branch is: *What is the necessary legal result of the very words used*? How do they cut down the common-law right of the owner of cattle to take them across the border and deal with them in another State as the law there existing allows him?

First, it is said there is "dedication"—for which, if the effect assumed has arisen, I would substitute "confiscation." Then it is suggested the cattle were placed *extra commercium* in the same way as land would be under Roman law when a dead body was buried in it, thereby depriving it entirely of the quality of a commercial object (see *Domat's Civil Law*, 2nd London ed., secs. 128, 129: Distinction of things that enter into commerce and things consecrated). Here, so far as sec. 6 extends, the commercial character of the article itself is recognized and carefully preserved: the Imperial Government, for instance, would, by agreement with the owner, purchase it; or the Queensland Government could compulsorily acquire it under the Act. If the cattle are placed by the Meat Supply Act entirely *extra commercium* and *dedicated* to the Imperial Government, subject only to the sole operation of that Act, then it is hard to see how the Queensland Government, wholly disregarding the Meat Act, and the dedication, and the non-commercial quality of the cattle, except so far as the Meat Supply Act allows, could validly take, as it did take, the plaintiffs' cattle as the ordinary full property of its citizens,

(1) (1902) A.C., 287, at pp. 290-291. (2) 2 Sco. N.R., 525, at p. 531.

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and take them under the *Sugar Acquisition Act* 1915, which is entirely independent of the Imperial Government, has relation solely to local objects and, if applicable to these cattle in which it is suggested the Imperial Government had an ownership or interest, would directly deprive that Government of all its ownership or interest and vest it in the Queensland Government for itself free from the Meat Supply Act, leaving the Imperial Government not even the right to make a money claim for damages in respect of its ownership or interest (sec. 7) but only the right under the Sugar Act to claim for the value of the commodity as fixed under that Act. In fact, a suggestion was made that the first sub-section of sec. 6 was equivalent to a transfer of some ownership or interest to the Imperial Government without payment, but obviously without any obligation to acquire the property, and without any limit of time within which to notify the owner that this undefined right of ownership was relinquished. No one has, however, suggested how that fragment of ownership of that interest can be described in English law. In the first place, I would say that I cannot attribute to the Imperial Government or to the Queensland Parliament an intention to transfer property without compensation, unless the very clearest words are used. It is not enough that the words should be capable of that inequitable construction—they must be unequivocal (*Commissioner of Public Works (Cape Colony)* v. *Logan* (1); *Maxwell on Statutes*, 5th ed., p. 461). It was urged that the acts complained of in preventing the cattle crossing the border without purchasing them were done at the request of the Imperial Government, and to prove this there were put in certain telegrams from the Agent-General. They are to be regarded as confidential, but it is no breach of that confidence to say that no such imputation can fairly be placed upon the Imperial Government. The telegram of 21st April 1915 shows that that Government contemplated not confiscation but purchase.

The legal effect of the first sub-section, to my mind, is this: It transfers nothing; but, while leaving the owner's property intact, ties it up, except in relation to the Imperial Government and the Queensland Government. Otherwise it is declared inalienable.

(1) (1903) A.C., 355, at p. 363.

The exercise of that incident of ownership, which is sometimes called *jus disponendi*, is restrained, except with reference to the two Governments. That is to say, trade and commerce are prohibited otherwise. Neither of these Governments is under any obligation to acquire a *jus in re* (see *The Odessa* (1)); to neither of them is given any property at all—all that is given to either of them, if anything is given, is the right to prevent a breach of sec. 6 (1). A "right" is not necessarily an "interest" (*Moul* v. *Groenings* (2)). If we regard the "right" as an "option," it is only an option to take the commodity in the way prescribed (see the latest authority, *Bull* v. *Attorney-General for New South Wales* (3), adopting the principle of *Doe d. Murray* v. *Bridges* (4) frequently followed). Apart from the right of specific performance an option is not "property" even in equity (*Central Deposit and Safe Co.* v. *Snider* (5)). But when we are regarding the meaning of "property" as distinguished from the right to trade, for the purpose of construing the Constitution, we should, I apprehend, adhere to the legal meanings of the terms, and not have recourse to doctrines of equity, which in essence operate on the conscience and only by analogy and fictionally for the purpose of jurisdiction treat rights as property in certain cases.

The sub-section is, in my opinion, simply a legislative *command* of a limited Legislature, and as such its force is confined to the territory —even apart from sec. 92 of the Constitution (*Cooke* v. *Charles A. Vogeler Co.* (6) and other cases. See *Maxwell on Statutes*, p. 230). Whatever rights either of the Governments could claim under the sub-section are based on the command. To be "kept for the disposal of the Imperial Government" cannot surely mean to allow the Imperial Government to take the property for nothing—pure confiscation without compensation. Sub-sec. 2 is inconsistent with such an interpretation. But, if not, then it either means to be followed up by action under sub-sec. 2, or it purports to leave the owner unable to dispose of the property elsewhere, but free to insist on any bargain he pleases with the Imperial Government if that Government desires to purchase in the ordinary way.

(1) (1916) 1 A.C., 145, at pp. 158-159.
(2) (1891) 2 Q.B., 443.
(3) (1916) 2 A.C., 564.
(4) 1 B. & Ad., 847, at p. 859.
(5) (1916) 1 A.C., 266, at p. 272.
(6) (1901) A.C., 102, at p. 107.

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I am of opinion sub-sec. 1 is one part of a settled scheme, of which sub-sec. 2 is also a necessary part, and that whatever rights the Imperial Government or the Queensland Government may have are confined to prevention from selling to anyone else while the cattle are in Queensland, and to a right while the cattle are in Queensland to appropriate them on the terms mentioned. The legislative directions cannot extend beyond the legislative territory of the State Parliament (see, for instance, *Commercial Cable Co.* v. *Attorney-General of Queensland* (1)). Sub-sec. 1 and sub-sec. 2 are, as I have said, coextensive in regard to territorial operation. But the command itself in sec. 6 (1)—and, in view of the main line of reasoning taken by the learned Chief Justice as to the *discrimen* of the Constitution, this is important—does not extend to forbid *locomotion* at all with respect to the stock or meat. Cattle may be moved from a station in the north where they are starving to one in the south where they may live, without contravening the sub-section. And, on the other hand, a sale of cattle without moving them a yard would be a contravention. And as locomotion from end to end of the vast State of Queensland, from the great cattle stations to Brisbane for example, is not forbidden—and, if it were, it would often defeat the declared object of the Statute—it follows that locomotion is not forbidden at all. It is transfer of ownership that is forbidden. Consequently, in my opinion, there is nothing in sec. 6 (1) to authorize any prevention of transit across the border to another State.

Then comes sec. 7. If we regard only the affirmative power contained in the Queensland Constitution, and erase from our minds the existence of the Federal Constitution and the significance of the terms it employs, the section might be construed to apply so as to forbid " export " to other States as well as abroad. Having regard to the Constitution, I doubt if that is now a proper *primâ facie* meaning to give to the word " export." But in any case, reading sec. 7 as a whole, the better construction is to regard the provision as confined to movement as part of a commercial transaction in breach of sec. 6 (1). It is not, in my opinion, a breach of sec. 7 to move starving stock from one part of Queensland to another, from the centre to the border. Such a construction is, in my view,

(1) (1912) A.C., 820, at p. 826.

not only not necessary on the language of the section but is unreasonable, oppressive and repugnant to the effective operation of the Statute. A penal section must be clear, and the penalty of £1,000 fine and a year's imprisonment for merely saving or assisting to save the life of starving stock is too shocking to accept in the absence of unequivocal words.

It has been contended, as a reason for reading sec. 6 and sec. 7 as a rigid prohibition against removing stock across the border, that another State might be less active in safeguarding Imperial interests than Queensland; that the laws of the other State might, for instance, permit the stock to be transferred. Indeed, the prevention complained of is based on the position that the laws of New South Wales and South Australia would permit of the sale of the cattle to another person. I may observe that that admission is one which confesses that sec. 6 (1) does not confer a right of property, for, if it did, the right must be recognized judicially even outside Queensland. But regarded as a preventative, the contention is to my mind inadmissible, both in fact and in law. In the first place, I recognize no gradations in devotion on the part of the States to the Imperial cause. Patriotism is equally fervent in every State. Defence, as such, is entrusted to the Commonwealth as representative of the whole Australian people, and by means of the defence power alone, to say nothing of its power over foreign trade, the Commonwealth may be relied on to serve the cause of Empire with as certain a hand and as warm a heart as any single State, and without fracturing the Constitution under which for mutual interchange, among other advantages, we have hitherto been supposed to live as an undivided people. Besides, an official system that permits the inhabitants of Queensland itself to be first served to the full, and then, and then only, conserves what remains for the Imperial Government, throwing upon the shoulders of the rest of Australia whatever sacrifice is involved, is not what I believe the people of Queensland themselves would dignify by the name of patriotism or devotion to the Empire.

As a mere matter of construction therefore, with a view to save the Act, if possible, on the principle of *Macleod* v. *Attorney-General*

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for New South Wales (1), I conclude the Meat Supply Act does not authorize the acts complained of, namely, preventing the owners from crossing their cattle into New South Wales and South Australia. Still less can it authorize what is assumed may have been on the facts an abuse of executive authority in the way contended for by the plaintiffs. If, however, it be correct as held by the majority of my learned brethren, and as I shall have to assume for the next branch of the case, that it does purport to authorize those acts, then, in my opinion, it is irretrievably invalid by reason of sec. 92 of the Commonwealth Constitution, which I now proceed to consider.

3. *Sec. 92 of the Constitution.*—The first paragraph of that section is short and emphatic. Its words are: "On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free." The universality of this essential covenant of the Constitution, beyond the power of Commonwealth and State alike to limit, has been more than once declared by this Court. The latest instance was *Foggitt, Jones & Co.* v. *New South Wales* (2), in May this year, and with respect to a precisely similar State Act passed by New South Wales. I cannot agree with the learned Chief Justice in his observation that that case was in any way hastily considered. One of the judgments was written—my own—and I refer to it at page 364 to show that the very matters now dealt with were argued and considered. The result was then thought to be, as indeed it is, the necessary conclusion from the most carefully considered judgment in the *Wheat Case* (3). I refer to the judgments of the Chief Justice at p. 68, of *Barton* J. at p. 80, of myself at pp. 99-100, of *Gavan Duffy* J. at p. 105, of *Powers* J. at p. 107, and of *Rich* J. at p. 111. The point made was this: if ownership is transferred from one man to another, then it is only the new owner who can henceforth claim the rights of inter-State trade under sec. 92; the former owner, having no property whatever, has nothing on which sec. 92 can operate. In *Foggitt, Jones & Co.'s Case* that well considered principle was applied, and the man who was allowed to retain his general ownership was held to be protected in his right

(1) (1891) A.C., 455. (2) 21 C.L.R., 357. (3) 20 C.L.R., 54.

to sell inter-State what he had, free from State prohibition. We have, however, in this case a decision that, notwithstanding the general property is admittedly resident in the plaintiffs, they are debarred from selling what they are conceded to have, and merely because the State law says they shall not. That obviously leaves sec. 92 a mere husk, a vain and empty form of words, the sport of each and every State. The States have it in their clear power under this decision to make themselves, as they were before federation, water-tight compartments for the purposes of trade. They may, it is held, forbid holders of stock to sell to anyone but a single individual named; that individual need not be resident in Queensland; it happens in this case to be the Imperial Government; it might as well for all legal effect be the American Government or a Queensland meat exporter. If the State can then forbid the export from Queensland of the commodity absolutely, it can do so conditionally, and that condition may be the payment of a sum of money —which in pre-federation days was called a tax. There is scarcely any limit to the State power of overcoming the fine-sounding words of sec. 92. Never was there a clearer instance of keeping the word of promise to the ear and breaking it to the hope.

In the Meat Supply Act there is a specific provision, sec. 12, which, as a precedent, may be copied into every similar Act, that by a proclamation of the Governor in Council the operation of the Act may be extended, "to any food-stuffs, commodities, goods, chattels, live stock, or things whatsoever." That is to say, an embargo may, at the will of the Queensland Executive, be laid on every commercial article in that State. Sugar, meat of all kinds, metals or any other article that Australians elsewhere are dependent upon for manufacture or consumption may be bottled up in that State, by a mere declaration that the *owners* shall hold them and not sell them except to Queensland companies, and, on the now assumed construction, shall not pass them out of the State without permission of the Chief Secretary. I am utterly unable to comprehend the reasoning by which this position is held to be consistent with inter-State trade, commerce and intercourse being "absolutely free." The decisions hitherto given have denied the possibility of such a situation.

One new point was raised in argument, and in my opinion it was

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the only one that ought to have given rise to a moment's serious consideration. I shall deal with that at once. "Absolutely free," it was contended, has reference to pecuniary burdens only. Reliance for this was placed principally on sec. 112, which expressly recognizes that independently of any specific authorization or reservation by the Constitution the State retains power to enact and execute "inspection laws" as in America; and sec. 112 does expressly authorize charges to be levied, which by the arguments it is assumed would be contrary to sec. 92. But such charges are forbidden by sec. 90, and "inspection laws," so long as they were confined to their true scope and character, were never regarded as regulations of inter-State trade and commerce. *Story on the Constitution*, sec. 1017 (5th ed., p. 739), says: "Inspection laws are not, strictly speaking, regulations of commerce, though they may have a remote and considerable influence on commerce." I refer to his reasoning in that connection, which is borne out by American cases cited in argument, and which it is unnecessary to dilate upon. As to sec. 51 (1), there is a very large field for legislation with respect to inter-State trade and commerce, for its regulation so as to preserve its freedom, to encourage and promote it, in entire accordance with sec. 92.

Further, when the group of sections 86 to 104 is examined, it will be found that freedom of inter-State trade is guarded against direct and indirect violation. Bounties by which a State could affect not only the external commerce of Australia, but also inter-State trade, by deflecting its course by means of production, are entirely withdrawn from the States—except as to metals, and by parliamentary permission. Railway rates of a State unduly discriminating in favour of goods from other States, and therefore artificially attracting trade, may, in certain circumstances, be annulled. So that it is not pecuniary burdens only that are struck at, but also pecuniary concessions so far as they disturb the fair course of inter-State trade. Sec. 113 operates strongly against the restriction.

This all points to the primary meaning of freedom of trade, spoken of in sec. 92, not being altered by the context to "pecuniary freedom" only. It means complete freedom of disposition; or, to

employ a term greatly used during the present discussion, unfettered *jus disponendi*. We have then to consider the force of sec. 92 with the words "absolutely free" unabridged.

Heydon's Case (1) is invoked. But, as I have pointed out at some length in *Lukey* v. *Edmonds* (2), *Heydon's Case* can never be invoked where there is no ambiguity. Of course the previous state of the law is necessarily to be borne in mind, but, apart from that, there are cited in *Lukey* v. *Edmonds* several cases of the highest authority apposite to the construction of a Statute, with the relevant passages quoted. I simply refer to that judgment, and incorporate it without repeating it. Here the words "absolutely free" are explicit. Trade, commerce and intercourse, whatever they include, among the States, and whether by internal carriage or ocean navigation, that is, either by land or sea, are to be "absolutely free"—which, I repeat, must mean free from interference by anyone, whether Legislature, executive or individual. Taking the words "absolutely free" to mean exactly what they say, the meaning of the section is, I think, beyond doubt. As to the meaning of trade and commerce, I may refer generally to the article on Commerce in *McCulloch's Commercial Dictionary* (1856) at pp. 380 *et seqq.*, *Encyclopædia of English Law* (2nd ed., vol. XIV., p. 171) under the heading "Trade," to the definition of Professor Langdell in the *Harvard Law Review*, vol. XVI., at p. 544, and *Addyston Pipe and Steel Co.* v. *United States* (3). But there is a late American case which contains a passage I should like to quote, of course not as an authority but as expressing the fully matured opinion of the Court after over a century and a quarter of experience and a vast multitude of causes calling for consideration of the matter. In *Kirmeyer* v. *Kansas* (4) the Court, referring to a recognized article of commerce, said: "The right to send it from one State to another and the act of doing so are inter-State commerce the regulation whereof has been committed to Congress; and a State law which denies such right or substantially interferes with or hampers the same is in conflict with the Constitution of the United States." I shall content myself with saying as to that case that the decision

(1) 3 Rep., 7*a*.
(2) 21 C.L.R., 336, at pp. 351-353.
(3) 175 U.S., 211, at p. 241.
(4) (1915) 236 U.S., 568, at p. 572.

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necessarily negatived the groundwork of the present defendants' argument.

The effect of sec. 92 of our Constitution may, sufficiently for the present purpose, be seen by an illustration. A man in one State has goods belonging to him which he wishes to sell; and in another State a man desires to buy those goods, and has money which he is ready to offer in exchange for them. Sec. 92 says that the man with the goods is to be absolutely free to sell and deliver his goods to his inter-State neighbour, unhindered by any interference of Commonwealth or State, and the other man is to be equally free to purchase those goods and receive them and pay for them. The States singly or combined cannot lawfully prevent the owner of the goods or the owner of the money from so acting in respect of what they possess. The substantive right of sale and purchase carries with it on recognized principles, and by direct force of the words "internal carriage or ocean navigation," all incidental rights, such as transportation by land or sea, of goods and the passage of individuals. It is no detraction from the right of trade and commerce that regulations are permitted which are laws of "police and order" (see *per* Lord *Macnaghten* in *Lecouturier* v. *Rey* (1)), and which, as that learned Lord says, are "not considered to have any extra-territorial effect." A citizen in his relation to the society in which he lives has many rights, duties and obligations. He may be viewed in many capacities, and it is impossible to draw exclusive lines of demarcation between the multitudinous aspects of the civic life. He owes, amongst other things, a duty of respect for the life and safety of others; he is bound not to rob or to defraud them; and he is subject to whatever laws the competent authority may impose upon him with respect to each of his obligations as a citizen. If, for instance, he has meat and wishes to sell it inter-State, he may sell it unhindered by the State, so far as trade and commerce is concerned; but, if it is poisoned meat, the meat may be seized, not because sale is directed to be prevented, but because an antecedent fact, viz., the existence of such meat in the hands of the owner, is a step towards endangering the lives of others. If he is a carrier he is free to pass across the border, but if he owes a debt to the

(1) (1910) A.C., 262, at p. 265.

Government or to a private individual his vehicle or his horse may be taken by legal process to satisfy his obligations to pay his debts. If he has committed a crime he himself may be taken to expiate it. If the State needs his property it may take it, and, at its will and tempered only by its sense of justice, may take it with or without compensation. But in those cases "trade and commerce" are untouched; remotely and even necessarily they are affected, but this is the effect of maintaining social order as such and not of prohibiting or assuming to prohibit trade in any way. It is on these grounds that inspection laws are not forbidden. But the moment the State says "You may keep but shall not sell your merchantable goods, not because they are deleterious but because they are not," then trade and commerce are directly prohibited; and though this is still perfectly competent to the State so far as relates to its purely internal trade, it is, in my clear opinion, invalid if sec. 92 is to have any operation at all—as to inter-State trade. I have put a clear case, because that is the exact position here. But it must not be understood that I think the State may directly prohibit the sale inter-State even of what, according to some standard it creates, it regards as deleterious goods. It may make the production or the possession of them in the State an offence, and it may seize them or punish the offender. But if it passes by its own territorial powers as they stand unabridged by the supreme law of Australia, and assumes to deal simply and directly with trade inter-State, it equally in my opinion offends against sec. 92.

And that is so, with whatever object the interference with trade as such takes place—the *thing* is prohibited, and the object is immaterial. Otherwise, a State needs only preface an Act with an object of internal concern, and every barrier of inter-State trade is valid. To give any person a monopoly, as has been done by sec. 6 (1), is, as Lord *Parker*, for the Privy Council, said in the course of the judgment in *Attorney-General of the Commonwealth* v. *Adelaide Steamship Co.* (1), "a derogation from the common right of freedom of trade." The whole of that judgment assists in the meaning of "freedom of trade," but the extract I have quoted shows very clearly that the monopoly given by sec. 6 (1) is *pro tanto* a derogation from

(1) (1913) A.C., 781, at p. 794; 18 C.L.R., 30, at p. 32.

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the freedom of trade. And so far as it extends to inter-State trade it is to my mind clear to demonstration that it is a violation of sec. 92.

No doubt, laying aside the Federal Constitution, the Queensland Parliament could prevent any man from leaving Queensland and from taking goods out of Queensland. And sec. 107 of the Constitution preserves all the former parliamentary powers, except such as are exclusive in the Federal Parliament and except such as are withdrawn from the States. Now, if inter-State trade is by sec. 92 declared henceforth to be "absolutely free," the power to fetter it is directly withdrawn from the States. And it must be remembered that the affirmative power of the Queensland Parliament can rise no higher than its State Constitution, and by sec. 106 that is declared to be "subject to the Commonwealth Constitution."

I take Lord *Selborne's* words in *R.* v. *Burah* (1) to apply exactly to this case, where it is said that in order to test the constitutional validity of subordinate legislation the only way a Court can act "is by looking to the terms of the instrument by which, *affirmatively*, the legislative powers were created, and by which, *negatively*, they are restricted. If what has been done is legislation, within the general scope of the affirmative words which give the power, and *if it violates no express condition or restriction by which that power is limited* (in which category would, of course, be included any Act of the Imperial Parliament at variance with it), it is not for any Court of Justice to inquire further, or to enlarge constructively those conditions or restrictions." That, I apprehend, is a clear decision of the highest authority that no such *discrimen* as, for instance, movement confined to crossing the border, can save a contravention. Besides, the practical reason of the matter forbids such a *discrimen* in the present instance. A resident in the middle of Queensland has as much right to trade with South Australia as a Queenslander living on the border. It cannot be that he can be prohibited from moving simply because of the locality of his occupation. Sec. 92 knows no such distinction, and the implied restriction is contrary to the canon Lord *Selborne* laid down. That principle has already been applied by the Judicial Committee to the Australian

(1) 3 App. Cas., 889, at p. 904.

Constitution in *Webb* v. *Outtrim* (1), in rejecting "implied prohibition"; and in *Attorney-General for the Commonwealth* v. *Colonial Sugar Refining Co.* (2), in seeking for the affirmative terms of power.

4. "*Pith and Substance*" *and* "*Object*" *of the State Act.*—At this point I must draw attention to a contention strongly insisted on at the bar, and accepted by some of my learned brethren. Unless its true meaning and application be clearly apprehended, it leads to a fatal error, but, once the point is grasped, all difficulty disappears. It has arisen more than once in argument in various cases, but it is necessary now to make its true meaning absolutely plain. I refer to the proposition that the "pith and substance" of the Meat Supply Act, or, in other words, its "object," is the internal regulation of property, a matter entirely within the reserved powers of the State, and therefore any provision it contains, direct or incidental, to prevent or prohibit inter-State trade to carry out the "object" of the Act, is no contravention of sec. 92 of the Constitution, even though such a prevention or prohibition *per se* would be unlawful as a violation of that section.

It cannot be denied that the "pith and substance" of an Act is what it in substance enacts, and its "object" must equally be gathered from what it enacts. This is universally recognized (*Attorney-General for Quebec* v. *Queen Insurance Co.* (3) and *Adams Express Co.* v. *Kentucky* (4)). Many Canadian cases decided by the Privy Council were cited where those terms were considered, and Acts were held good or bad according as they answered the test. But the distinction between those cases and the present is vital. The test of "pith and substance" and "object," though not incorrect to ascertain what the Act does in effect enact, is wholly inapplicable to such a case as this, once we have seen what the Statute enacts, to make its enactment lawful if that which is enacted is in itself in violation of sec. 92.

The Canadian cases were contests between two exclusive *affirmative powers*, and the "pith and substance" and the "object" of

(1) (1907) A.C., 81, at p. 91; 4 C.L.R., 356, at p. 361.
(2) (1914) A.C., 237; 17 C.L.R., 644.
(3) 3 App. Cas., 1090, at p. 1099.
(4) 238 U.S., 190.

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the Acts were looked at to see under which of these affirmative powers the particular enactment fell. If regarded from one aspect, it might fall under a Dominion power ; if from another, then under a Provincial power. That answers the " affirmative " test in Lord *Selborne's* canon in *R.* v. *Burah* (1). But none of those cases lend any support to the contention that if, for instance, any Canadian Statute, Dominion or Provincial, were to provide that goods the produce of a Province should not be admitted free into any other Province, contrary to the provision of sec. 121 of the *British North America Act,* those provisions would not be infringed if only the " object " of the Act were to carry out some regulation itself within the affirmative power of Province or Dominion.

I apprehend that *sec. 92 is not a competition between federal and State powers.* It is an exception from both, and so with whatever object the interference with trade as such takes place, either in a State Act under the general powers of the State or in a Commonwealth Act under one of the undoubted affirmative Commonwealth powers, the forbidden *thing* is done, and the object is immaterial. I endeavoured to make this clear in my judgment in the *Wheat Case.* I emphasized the point " that trade and commerce consists of acts not things " (2). I laid stress on the fact that in taking the *things* the State was not interfering with the acts of trading ; and even when it was arresting a man for theft, or compelling him to attend as a witness or a juryman, it was not the *act of commerce* that was prohibited (for any object whatever) but a totally different " act " was compelled or punished. But I regarded the *act of commerce* as something entirely beyond the State's power to prevent. And this point I still maintain. I certainly cannot accede to any doctrine that a legislative *mens rea* is necessary to constitute a contravention of an express constitutional prohibition.

In this connection the word " incidental " has been pressed greatly into service. It frequently covers much, but it has its appropriate limits. See, for instance, *Amalgamated Society of Railway Servants* v. *Osborne* (3) ; *Montreal Corporation* v. *Montreal Street Railway* (4) and *Barton* v. *Taylor* (5). It cannot cover an express prohibition

(1) 3 App. Cas., 889.
(2) 20 C.L.R., at p. 100.
(3) (1910) A.C., 87, at pp. 96-97.
(4) (1912) A.C., 333, at p. 345.
(5) 11 App. Cas., 197, at p. 207.

(*R.* v. *Burah*) ; and even apart from express prohibition, as I once ventured to express it, "though it may complement a given power it cannot supplement it." See also *Rossi* v. *Edinburgh Corporation* (1).

Suppose sec. 92 were a part of the Queensland Constitution, thereby cutting down in the same instrument the general power of regulating trade, how could it be maintained that inter-State trade could be forbidden as it is by the Meat Supply Act ? And the condition or restriction is none the less potent because it is found in the larger scheme of the federal compact. Much more should it be observed. For when a State forbids its own citizens to trade across the border it directly affects the interests of the other State, and not its own interests only. Inter-State trade, like an inter-State industrial dispute, is a subject which transcends the interests of any one State ; and one among the very objects of the Federal Constitution was to recognize that fact, and not leave it in the power of any State, by regarding its own trade interests adversely to those of its sister States, to cut off communication as Queensland has done on the assumption that the Act means what the State contends for.

There is, of course, nominally a concession that trade must be absolutely free ; but that concession is immediately cancelled by the contention that when the State says "We grant a monopoly of acquisition to A.B., and you must not take your property out of this State to another State where you might lawfully sell it to another person," it is not interfering with that freedom. The answer is contained in the well-known maxim *Quando aliquid prohibetur fieri ex directo, prohibetur et per obliquum.*

5. *Property Rights.*—There is, I apprehend, a dilemma from which I see no escape for the defendants. Either the right of freedom of trade is a property right, or it is not. If it is not, then the Queensland Parliament, in denying freedom of trade in exporting cattle, have not taken away any right of property, and the suggestion that the State has a right to regulate property is irelevant. On the other hand, if it is a right of property, then it is inevitable that sec. 92 of the Constitution protects that right of property even

(1) (1905) A.C., 21.

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as against the State. This would in ordinary circumstances suffice, but the magnitude of the subject, and the respect I unfeignedly feel for the opinion of those of my brethren who rest on the position I have indicated, have led me to pursue further the question of what is included in trade, commerce and intercourse. As to "intercourse," I repeat what I have said on a former occasion that "intercourse" goes beyond "trade and commerce," that is, beyond commercial intercourse. Its non-inclusion in sec. 51 (1), in sec. 98, or anywhere where trade and commerce among the States finds reference in the Constitution—except sec. 92 where it is declared to be absolutely free,—leads to the inevitable conclusion that individual freedom of movement from State to State is the constitutional right of Australians. It is obviously useless to argue in support of the Act that the owner himself could have created an adverse right in another to prevent him from selling his property. To do so would be an act of freedom. But to say that because freedom is preserved therefore the owner may be coerced into doing that which he has not done and objects to do is, to say the least, a *non sequitur*.

Finally, it must be remembered that, if the State Act is valid as dealing with property only and leaving nothing for inter-State trade and commerce to operate on, there is no cure for the matter by means of Commonwealth legislation under sec. 51 (1). The Commonwealth cannot alter property rights under that section; and any suggestion that the absence of Commonwealth legislation is material is a tacit assumption that the matter dealt with by the State is trade and commerce and not property. So far as "intercourse" exceeds commercial intercourse, of course the Commonwealth has no legislative power whatever.

If that is correct, it enables us to estimate at once the validity of one of the arguments advanced by the defendants and accepted by some, at least, of my learned brethren who compose the majority.

6. *Capacity.*—That argument is that the State Act has taken away the personal capacity of the owners of the cattle to sell their property. Again I respectfully observe that equivalents are false coin in construing any document. And I would further observe that the dilemma once more presents itself: for, if capacity is taken away by

the State Act, it is maintained by the paramount force of sec. 92; for the same considerations that make it an equivalent of the one make it an equivalent of the other. But, in truth, it is a misleading term in this relation. "Capacity" is a personal condition. To say a person is struck with incapacity means in law that he is placed in a special class who are rendered by law incapable of doing acts that are within the competence of the ordinary normal citizen. It is not the same as prohibiting a normal citizen from doing an act. It treats the act as lawful if done by the normal citizen; whereas the prohibition proper treats the act as an unlawful act if done by the normal citizen. The subject is dealt with by *Foote* in *Private International Law*, 4th ed., p. 68, where the distinction between incapacity and prohibition is insisted on. The consequences of the contention are alarming. I say nothing of the inextricable confusion that would arise in ordinary cases (see *Cooper* v. *Cooper* (1)), but confine myself to the constitutional aspect. If declaring a person incapable of selling goods across the border takes his trade out of the protection of sec. 92, then declaring him personally incapable of crossing the border would, as a clearer case of incapacity, deprive him of the individual right of associating with his fellow-countrymen in the adjoining State. A very slight advance in ingenuity would successfully declare him incapable of paying federal taxes, and I see no reason in law for denying this, if what is now contended for is sustainable.

In the result, though Australians have hitherto thought that their Constitution had placed inter-State trade on a basis broader than in Canada and more inviolable than in America (see *Quick and Garran on the Australian Constitution*, at p. 845), a belief to some extent at all events shared by this Court in prior cases and even by the Privy Council itself (see *Colonial Sugar Refining Co.* v. *Irving* (2)), it now appears that not only was that a widespread error, but that inter-State trade can exist only so far as the conflicting interests and desires of the several States will allow it.

I also cannot add the traditional judicial regret at inability to concur in the decision.

(1) 13 App. Cas., 88.

(2) (1906) A.C., 360, at p. 367, last line.

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[*Note.*—In *Rosenberger* v. *Pacific Express Co.* (1), which has since come to hand, *White* C.J., in delivering the unanimous opinion of the Court, says "the inter-State commerce which is subject to the control of Congress embraces the widest freedom, including as a matter of course the right to make all contracts having a proper relation to the subject."—*I.A.I.*]

HIGGINS J. The first question is as to the *Meat Supply for Imperial Uses Act* 1914—is it valid? To answer this question, one must find, first of all, what the Act does. Both questions are questions of mere construction—construction of the Act and of the Constitution. In answering, we are not concerned with the telegrams from the Agent-General, or with any argument as to abuse of executive authority or with anything done under the Sugar Act. What was done under the Sugar Act after writ issued is immaterial for the present problem; indeed, one can well understand how the Government was alarmed by the probable results of the decision which had just been given by this Court under an Act of New South Wales similar to this Meat Act (*Foggitt, Jones & Co.* v. *New South Wales* (2)).

The title of the Act is "An Act to Secure Supplies of Meat for the uses of His Majesty's Imperial Government during War, and for other purposes." It was assented to on 12th August 1914, a few days after the declaration of war. So far as material for the present purpose, the Act declares (sec. 6 (1)) that all stock and meat in any place in Queensland are and have become and shall remain subject to the 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"; and by sec. 6 (2) it is provided that, upon the making of an order by the Chief Secretary, all stock and meat mentioned in the order shall cease to be the property of the then owner and shall become the absolute property of His Majesty, and the owners and his servants and agents shall give possession to His Majesty. By sec. 7 (1) all persons, including the owners, consignors, consignees, shippers, vendors, and purchasers of stock and meat are prohibited

(1) 241 U.S., 48, at p. 52. (2) 21 C.L.R., 357.

from selling, disposing, or forwarding, consigning, shipping, exporting, delivering or in any manner dealing with any stock or meat (whether actually appropriated by order or not) except only in pursuance of and under the directions of the Chief Secretary.

It is obvious what the intention of the Legislature was. It wished to give the British Government the first right to the Queensland meat, for the supply of the armies—to give the British Government (at the least) what may fairly be called an option of purchase as to any Queensland meat; but the meat was not to become the property of the British Government until the Chief Secretary should order to that effect. In aid of this intention, sec. 7 makes it a misdemeanour for anyone to sell or dispose or consign, ship, export, deliver or deal with any meat (whether before or after the order appropriating); but, to prevent any local meat famine or inconvenience, the Chief Secretary was given power to relax the prohibition by his order.

Before the Act, most of the Queensland meat was exported overseas; now, it was to be exported for the British armies, so far as the British Government wanted it. "Exported" means in the Constitution and in this Act exported overseas, not "passing from State to State." There is not the slightest indication in the Act that it was aimed against inter-State trade in Australia, or that the aim was other than that which appears on the face of the Act—if, indeed, the aim of the King and Legislative Council and Legislative Assembly is examinable apart from the actual operation of the Act. But it is urged that the Act is invalid as offending against sec. 92 of the Constitution. Sec. 92 provides that "on the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free." It is contended for Queensland that sec. 92 forbids only the imposition of duties on traffic among the States; but I shall assume, for the present, that it forbids any obstruction whatever—at all events, any obstruction on the part of a State legislature. I shall assume also that sec. 92 applies to cattle on the hoof as well as to cattle that are carried by train or ship. "Free" as applied to commerce, I take to mean

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without obstruction or restriction; it does not mean that the subjects of commerce are not to be subject to the State law as to rights of property. That is to say, whoever has power as owner or mortgagee or otherwise (see sec. 4) to sell any specific cattle shall not be obstructed or hindered from sending them across the border of his State for sale or after sale. There is to be no obstruction or restriction because of State boundaries; State boundaries are to be forgotten for the purpose of trade, commerce or intercourse. Sec. 92 does not give any power of sale to those who have not got it by the laws of their State. If a mortgagee has a power of sale, he may sell across the boundary; if he has not such a power, sec. 92 does not give it. If under the laws of the State an owner under twenty-one or a married woman or a lunatic has no power to sell, sec. 92 does not give the power. If an owner of stock or other commodities has covenanted not to sell them, sec. 92 does not release him from his covenant; if he has given to somebody an option of purchase, that option is enforceable against him by action. In other words, trade among the States is to be "absolutely free" as to commodities which are vendible, on the part of those who are competent to sell within their own State. If this were not the meaning, a State could not, in a case of drought, distribute seed-wheat among its farmers with a condition annexed that it should not be eaten or milled or sold—the farmers would still be able to insist on a right to sell the wheat to farmers across the State borders. Given an owner, or other person who has power to sell, and given an article which is not removed from the scope of commerce by the laws of the State, there is to be no obstruction or restriction at the boundary of the State.

Now, to apply these principles to the Meat Supply Act. This Act (sec. 6) does not, until an order to that end is made by the Chief Secretary, divest the plaintiffs or the other owners of stock of the ownership. The Act could have so enacted, could have confiscated the stock and vested them in the British Government; and if it had done so, the plaintiffs could have no possible pretence for asserting a right to sell, either in Queensland or across the border. All that the Act has done as yet is to declare that the stock are to be "held"

for the purposes and " kept " for the disposal of the British Government. It is not necessary to say that sec. 6 confers on the British Government any interest in property before exercise of the option; it is enough to say that it deprives the owners, to a limited extent, of one of their rights—the right of alienation. The right conferred on the British Government is, no doubt, a novel kind of right; and there is a natural tendency amongst lawyers to struggle against a right which cannot be placed in any of the known legal categories. But we are dealing with an Act of a legislature, not with a contract *inter partes*; and, although parties cannot by contract create a novel kind of easement, a legislature which has power to deal with property can create any new qualifications of ownership that it thinks fit. In the present case, the Act in substance withdraws from the fasciculus of rights of ownership of the stock one of the rights—the right of alienation to any purchaser other than the British Government. It interferes with the rights of property, as in the *Wheat Case* (1); it does not obstruct or restrict trade or commerce among the States.

It has to be borne in mind that sec. 92, in forbidding obstructions or restrictions to commerce among the States, is not in any way paramount to sec. 107 of the same Constitution; both sections are to get full effect. Under sec. 107 every power of the Queensland Parliament—unless exclusively vested in the Commonwealth Parliament or unless withdrawn from the Queensland Parliament—is to " continue as at the establishment of the Commonwealth." Now, at the establishment of the Commonwealth the Queensland Legislature had power to take away all or any of the rights of ownership as to any subject matter of property; and this power has not been exclusively vested (or vested at all) in the Commonwealth Parliament, and has not been withdrawn from the Queensland Legislature; so that it must continue as in 1900. It is true that if a State law as to property should be inconsistent with a valid law of the Commonwealth Parliament, a law dealing with any of the subjects expressly entrusted to the Commonwealth Parliament, the State law would be invalid " to the extent of the inconsistency " (sec. 109). But there is no such Commonwealth law. It is true also that the power of the State Legislature to make laws obstructing

(1) 20 C.L.R., 54.

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or restricting commerce among the States is "withdrawn" from it; but the Act in question does not obstruct or restrict commerce among the States. It merely restricts the rights of property in cattle and other stock; it merely deals with a subject which pertains to the State Legislature—property and civil rights. Moreover, it is true that by expropriating commodities, the expropriated owner loses his right to sell, both within the State and outside the State; but the right to sell, both within the State and outside of the State, passes to the new owner. If it be said that the British Government is less likely to sell than the expropriated owner, what follows? Does the validity of the Act depend on the character of the new owner—or, in this case, of the proposed new owner? In my opinion our Parliaments—State and federal—can make valid laws on their appropriate subjects to the full extent of those subjects; and if the incidental effect of a State legislating as to property, or of the Commonwealth legislating as to taxation, were in the one case to reduce inter-State commerce, or in the other case to hamper the State in providing its revenue, such a fact would not render the legislation invalid. If the State in the exercise of its power to create, to destroy, to modify rights of ownership, should sequestrate a commodity in favour of a person who is not likely to sell across State boundaries, the law of the State is not thereby invalid. Rights of property, as *Paley* pointed out, are not natural rights; they are created by society. Wherever two legislatures operate over the same area, the operations of each must often react upon the operations of the other without either set of operations becoming invalid.

It has been suggested that sec. 7 (1) has the effect of preventing even a sale subject to the option of purchase, including such a sale to a purchaser in another State as well as such a sale to a purchaser in Queensland; and that sec. 7 (1) may be invalid to this extent even if sec. 6 (1) is valid. There are words in sec. 7 (2) which somewhat favour the view that the only sale or dealing which is affected by sec. 7 is a sale or dealing which tends to defeat the right of option in the British Government. But it is unnecessary to decide as to this view; for sec. 6 (1) gives to the British Government even more than a mere option. It declares that the stock "have become and shall remain *subject to this Act*" (that is, the whole Act), and "shall

be held for the purposes of and shall be kept for the disposal of His Majesty's Imperial Government"; and that on the order being made by the Chief Secretary the owner and his servants *shall give possession* to His Majesty. If the Queensland Legislature had power to confer on the British Government the privileges mentioned in sec. 6, it had power to make such legislation as it thought to be conducive to the making of those privileges effective; and if the stock could be sold subject to the option it would not be consistent with the provisions as to holding and keeping and giving possession to His Majesty.

By the industry of counsel—and, one may fairly claim, of the Bench—we have been led to consider a multitude of United States cases relating to the subjects discussed. I must again say that the first as well as the final task of the Court is to construe our own Constitution as it stands, and that it is dangerous to rely on decisions of the United States Courts under a different Constitution. On the subjects here in question, the danger is greater than usual; for the Courts of the United States have evolved a doctrine of "police powers"—a term not to be found in their Constitution—and under the influence of the 14th amendment have annexed to the doctrine some extremely subtle and ingenious refinements. These Courts are even forced by the course of the cases into the false position of deciding whether State legislation as to the method of carrying on inter-State business is or is not so "reasonable" as to be valid notwithstanding the exclusive right of the federal Congress to deal with inter-State business (*Houston and Texas Central Railroad Co.* v. *Mayes* (1)). For us in Australia the language of secs. 92 and 107 and cognate sections is to be our guide. But it is satisfactory to find that no case has been cited, either from the United States or from Canada, which, on examination, does not corroborate the principles to be derived from the words of our Constitution.

In *Kidd* v. *Pearson* (2) an Iowa Statute prohibiting the manufacture of intoxicating liquors was held to be valid although it certainly—as a necessary result—restricted inter-State traffic in

(1) 201 U.S., 321.

(2) 128 U.S., 1.

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such liquors. In *Smith* v. *Alabama* (1) an Alabama Statute forbidding engine-drivers to work engines for passengers or freight without examination or licence was held to be valid even as to inter-State trains. In *Hennington* v. *Georgia* (2) a Georgia Statute making it unlawful to run any freight train on Sundays within Georgia was held to be valid even as to inter-State trains until the federal Congress should pass legislation inconsistent with the State Statute. In *Sligh* v. *Kirkwood* (3) a State Statute forbidding the exportation of citrus trees was upheld although it affected inter-State commerce; "the mere fact that inter-State commerce is indirectly affected will not prevent the State from exercising its police power, at least until Congress, in the exercise of its supreme authority, regulates the subject" (4). In *Collins* v. *New Hampshire* (5) the State Legislature forbade the sale of oleomargarine unless it were coloured pink; and as such colouring prevented sales, the Statute was held invalid as to oleomargarine coming from another State; for the State which legislated had no power to dictate the mode of manufacture to other States, and the other States were entitled to send their manufacture into that State. Indeed, Congress had expressly by Statute recognized oleomargarine as a merchantable article.

In *Oklahoma* v. *Kansas Natural Gas Co.* (6) a Statute of Oklahoma was held to be invalid which prescribed that the natural gas found in that State should not be transmitted by pipes except to points within the State. But the reason is plainly given in the judgment —the State recognized the gas as property in full ownership, without any qualification of the ownership; and the Statute was aimed straight against transmission of the gas to other States, it discriminated against inter-State commerce; "the Statute of Oklahoma recognizes it" (the gas) "to be a subject of *intra-State* commerce, but seeks to prohibit it from being the subject of *inter-State* commerce, and this is the purpose of its conservation" (7).

In Canada, the Parliament of Canada has exclusive power to legislate as to trade and commerce, and a provincial Parliament has

(1) 124 U.S., 465.
(2) 163 U.S., 299.
(3) 237 U.S., 52.
(4) 237 U.S., at p. 61.
(5) 171 U.S., 30.
(6) 221 U.S., 229.
(7) 221 U.S., at p. 255.

exclusive power to legislate as to property and civil rights and as to tavern licences for raising revenue for provincial purposes; yet where a municipality under a provincial Act got a handsome revenue from such licences and a Canadian Temperance Act interfered with the traffic in liquor, and thereby prejudicially affected the revenue of the municipality, the Canadian Act was held to be valid (*Russell* v. *The Queen* (1)); and see *Hodge* v. *The Queen* (2); *Attorney-General for Canada* v. *Attorney-General for Alberta* (3). As the Judicial Committee of the Privy Council said, the Canadian Act might interfere with the objects and operation of provincial Acts provided that it was not itself legislation upon a *subject* assigned to the exclusive jurisdiction of the provincial Legislature (4). In *Attorney-General for Canada* v. *Attorney-General for Ontario* (5) Canada had exclusive power as to fisheries and Ontario as to property and civil rights; yet, although laws as to the seasons and the instruments for fishing might very seriously affect proprietary rights, might even practically confiscate property, the Canadian laws as to the seasons and the instruments were held to be valid. In *Cushing* v. *Dupuy* (6) it was held that the Canadian Parliament, having power to legislate as to insolvency, could by a law on *that subject* interfere with property and civil rights in a Province. This decision was followed in *Tennant* v. *Union Bank of Canada* (7). The case of *Attorney-General for Canada* v. *Attorney-General for Ontario* (5) has also a bearing on an argument which has been used before us, to the effect that if the State legislatures in Australia can modify rights of property in the manner of this Meat Supply Act, they may practically paralyze the functions of the Federal Parliament. Their Lordships said (8): "The supreme legislative power in relation to any subject matter is always capable of abuse, but it is not to be assumed that it will be improperly used; if it is, the only remedy is an appeal to those by whom the Legislature is elected." In other words, the ultimate guarantee of the success of our Constitution is to be found in the general good sense of our people.

My conclusion, therefore, is that as this Queensland Meat Supply

(1) 7 App. Cas., 829.
(2) 9 App. Cas., 117, at p. 130.
(3) (1916) 1 A.C., 588, at p. 595.
(4) 7 App. Cas., at p. 838.
(5) (1898) A.C., 700.
(6) 5 App. Cas., 409.
(7) (1894) A.C., 31.
(8) (1898) A.C., at p. 731.

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Act merely restricts the rights of ownership of stock in Queensland, as its actual operation is confined to the rights of alienation and of movement irrespective of State boundaries, as it does not place any obstruction or restriction on inter-State commerce, although it may incidentally affect it, the Act is a valid exercise of the State's power under sec. 107 of the Constitution.

Counsel for the State of Queensland has taken the point that sec. 92 of the Constitution, in prescribing that "trade, commerce, and intercourse among the States . . . shall be absolutely free," merely forbids obstructions and restrictions of inter-State trade of the nature of customs duties or other pecuniary charges. I cannot accept this contention. It is true that sec. 92 opens with the words "On the imposition of uniform duties of customs"; but these words fix the critical date on which the Constitution should be in full operation, and there are no other words that could so effectually fix the date: see also secs. 88, 89, 90, 93, 94, 95. Sec. 90 made the power of the Federal Parliament exclusive as to customs and excise duties on that date, and after that date the laws of the several States on the subject "ceased to have effect"; so that there was no need of sec. 92 for the mere purpose of ending State customs duties. The words "absolutely free," I take to mean that not only State customs duties were to cease (under sec. 90), but all State prohibitions of imports from other States—and there were such prohibitions (for instance, of grapes—long after the danger of phylloxera had ceased). Moreover, what is the meaning of the provision that "intercourse" among the States was to be "absolutely free," if the intention was merely to forbid customs duties &c. between the States? The use of the word "intercourse" shows that more was meant. No doubt, "intercourse" had been held in the United States to be included under "trade and commerce" in the power for Congress to regulate trade and commerce; but if something more was not meant by the word "intercourse" in sec. 92 than by the words "trade and commerce," why was "intercourse" used in sec. 92 and not in sec. 51 (I.)—which confers on our Federal Parliament the power to make laws with respect to "trade and commerce among the States"? It is to be observed that in another section, sec. 117, a limited provision as to intercourse among the

States came into force at the same time as the Constitution; whereas by sec. 92, on the date of the imposition of uniform customs duties, "intercourse" became "absolutely free." If this construction is right, the effect is very substantial. For a commercial traveller for a Melbourne firm who lives at Albury cannot be forbidden by a New South Wales Act to solicit customers in New South Wales; an Adelaide resident cannot be prevented by South Australian law from coming to Melbourne for the "Cup"; a schoolboy cannot be prevented from returning for his vacation to Brisbane from a Sydney school. It is urged that if sec. 92 be treated as applying to more than inter-State duties or charges, the Federal Parliament cannot make any laws as to inter-State trade, because the power in sec. 51 (I.) is expressly given "subject to this Constitution." But, in the first place, sec. 92 forbids only laws obstructing inter-State commerce; whereas laws may also be made facilitating or encouraging inter-State trade as well as obstructing it (sec. 102 is a qualification of the power to make such encouraging laws); and, in the second place, this argument tends strongly to support the view that sec. 92 was meant to be a restraint on the States and not on the Commonwealth Parliament. In the United States there is nothing to prevent Congress from imposing border duties between States—nothing in the Constitution to prevent it. But I concur with the Chief Justice in thinking that this matter should be left open. As for the argument based by counsel on sec. 112—that by assuming inspection laws to be valid, and by expressly conferring the power to impose inter-State inspection charges, the Convention did not mean by sec. 92 to do more than forbid inter-State duties—I cannot accept it. It seems to me to be a fundamental error to suppose that inspection laws necessarily connote any obstruction or restriction on inter-State movement. They *may* obstruct or restrict, and therefore the Federal Parliament has power to annul them; but inspection laws can be of many varieties; and in assuming that they *may* be valid sec. 112 does not exclude them from the operation of sec. 92, so far as they restrict inter-State commerce.

GAVAN DUFFY AND RICH JJ. The question for our determination is the validity of secs. 6 and 7 of an Act of the Queensland Parliament

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entitled the *Meat Supply for Imperial Uses Act* 1914. So far as they are relevant to the present case, they may be summarized as follows :—" Any stock in any place in Queensland may be expropriated, and in the meantime all stock in Queensland is to be and has become and remains subject to the Act, and shall be held for the purposes 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. All dealings of any sort with stock after the passing of the Act, except only in pursuance of and under the directions and orders of the Chief Secretary, are prohibited."

These provisions are said to be inconsistent with sec. 92 of the Constitution of the Commonwealth of Australia and therefore invalid. That section so far as it is relevant runs thus : " On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free." In the *Wheat Case* (*New South Wales* v. *The Commonwealth* (1)) a Court of six Judges determined that an Act of the Parliament of New South Wales expropriating all the wheat in New South Wales, and therefore wheat the subject matter of inter-State " trade and commerce," was not inconsistent with sec. 92 of the Constitution, though it necessarily interfered with the performance of contracts which were part of inter-State trade and commerce ; and this on the ground that it merely transferred the ownership of the commodity and left it free to be dealt with by the new owner in any way he chose. It might perhaps be thought that this reasoning applied to the present case. The Act of Parliament does not prevent stock from being the subject matter of inter-State trade and commerce, but merely makes the right to deal with it in that, as in every other, respect subject to the directions and orders of the Chief Secretary, and so in effect transfers such right to him. But a Court consisting of five of these six Judges in *Foggitt, Jones & Co. Ltd.* v. *New South Wales* (2) recently considered provisions of a New South Wales Act practically identical with secs. 6 and 7 of the Queensland *Meat Supply for Imperial Uses Act* 1914, and by a majority determined that they were inconsistent with sec. 92, and therefore invalid. We are invited

(1) 20 C.L.R., 54. (2) 21 C.L.R., 357.

to reconsider this decision, and it is eminently desirable that we should, if possible, establish some definite criterion by which it may be ascertained whether an antinomy exists between sec. 92 of the Constitution and any law which is said to be inconsistent with it. We were impressed by Mr. *Mitchell's* contention that sec. 92 applies only to the imposition of fiscal burdens, but in deference to the unanimous opinion of our brother Judges, the majority of whom were distinguished members of the Convention, we shall assume that it has a wider significance. We shall also assume that it extends to the enactments of State Parliaments so as to invalidate them when they are inconsistent with its provisions. What, then, is the meaning of the expression "trade, commerce, and intercourse among the States . . . shall be absolutely free"? The freedom prescribed by the section is absolute, that is to say, complete and unrestricted; but what is the area in which this absolute freedom is to operate? In the *Wheat Case* (1) it was assumed at the bar and on the bench that the section controlled both the Parliament of the Commonwealth and those of the States, and we there said (2): —"It is to be observed that sec. 51 (I.) of the Constitution enables Parliament to make laws for the peace, order, and good government of the Commonwealth with respect to 'trade and commerce with other countries, and among the States.' The words 'absolutely free' in sec. 92 must, therefore, be subject to some limitation so as to give them a meaning which is consistent with the existence of this legislative power, and the meaning when ascertained must be the same always and in all conceivable circumstances; it must apply equally when we are considering the right of the Commonwealth to legislate under sec. 51 (I.), and of the States to legislate under sec. 107." We then proceeded to consider other sections of the Constitution, and, having done so, said: "In view of all this it may perhaps be correct to say that no enactment of a State Parliament offends against sec. 92 unless it expressly forbids or restrains inter-State trade, commerce or intercourse." By this we did not mean to suggest that an Act of a State Parliament could not offend against sec. 92 unless it in so many words forbade or restrained "inter-State trade, commerce or intercourse," but that it could not do so unless

(1) 20 C.L.R., 54. (2) 20 C.L.R., at p. 104.

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the object of the enactment, as gathered from its terms, was to forbid or restrain it. During the argument our attention was drawn to certain other provisions of the Constitution which seemed to recognize the existence of legislative powers in the State Parliaments which render it necessary to limit the meaning of sec. 92 in the way suggested; for instance, sec. 112 recognizes the right of such Parliaments to make inspection laws with respect to commodities the subject of inter-State trade and therefore, it was said, to exclude them from the State. But it is more important to consider the legislative functions of the State Parliaments in gross. It is not permissible to whittle down a clear provision of the Constitution by an appeal to the exigency of the reserved powers of the States, but, if we find that the language of sec. 92 is amphibolous, it is permissible to consider such exigency for the purpose of ascertaining the area of freedom. The legislative power of Parliament must vary inversely with the extent of this area. If no restraint may be put upon acts which constitute "trade, commerce, and intercourse," or upon persons engaged therein, no Act of a State Parliament can stop a burglar flying from one State in order to sell his plunder in another, or exclude a trader seeking to introduce commodities physically or morally poisonous. In the words of our brother *Isaacs* in the *Wheat Case* (1), "If a man had contracted to carry a waggon-load of goods across the Murray on a certain day, it would . . . be an interference with inter-State trade and commerce to arrest the man for theft, or compel his attendance as a witness or a juryman, or to seize his horse and cart in bankruptcy or as a distress for rent." Common sense revolts at such a conclusion, and refuses to accept it. The Supreme Court of the United States, in construing the Constitution, has evolved a similar though not an identical dilemma, and we have been invited to follow that Court in the course it has taken to escape from it. The American Constitution contains no provision like that of sec. 92, but it bestows on Congress a power to deal with inter-State trade and commerce. The Supreme Court after much debate finally determined that this power was exclusive and that the States could not legislate for the direct control of inter-State commerce, but in a long series of decisions

(1) 20 C.L.R., at p. 99.

permitted a limited interference with inter-State trade and commerce by the exercise of what has been called the "police powers" of the State, and employed a vast store of acuteness, sagacity and rhetoric in establishing minute and even microscopic distinctions. We do not think we should stretch the Constitution on this Procrustean bed. Where we have borrowed the exact provisions of the American Constitution it is not amiss to seek their meaning in the utterances of the official interpreters of that Constitution, but to seek analogies in their disquisitions on provisions which we have not adopted is only to make "confusion worse confounded." The true solution of the difficulty seems to be this:—A single act or a series of acts may constitute trade, commerce or intercourse among the States, and may also constitute larceny, fraudulent or other unlawful dealing with property, or any one of the many subject matters of State Legislatures. In its quality of trade, commerce or intercourse it is *taboo* to the State Legislatures, in its other quality it is subject to their dominion, and the validity of their legislation must depend not on its field of operation, but on its object. Sec. 92 gives no legislative power, and takes away none except that of prohibiting or restraining inter-State trade, commerce or intercourse as such. We hold the Queensland Statute to be valid because we think its object is to expropriate such stock and meat as may be found necessary and suitable for the needs of the King's Army, and, in order that a sufficient supply may be attainable, to keep the whole mass of the commodity *in statu quo* and subject to the accruing needs of that army. The prohibition is not directed against inter-State trade, commerce or intercourse, but against any dealing that may prejudice the King's option to take what he needs for his army. Apart from sec. 92 the State Legislatures may intrude into the area of inter-State trade and commerce either with the specific intention of dealing with that subject matter, or in the course of legislating with respect to any other subject matter over which they have control. So far as it is consistent with Commonwealth legislation, their action will be valid, so far as it is inconsistent with such legislation it will be invalid. Under sec. 92, it will be invalid though not inconsistent with any Commonwealth legislation, if its real object, as expressed in its language, is to put any restraint whatever

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on the freedom of "trade, commerce, and intercourse among the States," but it will not be invalid if that be not its real object.

POWERS J. Eleven questions were submitted for argument before this Full Court. The first question was: Is the Queensland *Meat Supply for Imperial Uses Act* 1914 valid, and, if so, did it authorize the acts complained of? I understood that this Court was to consider only the facts set out in the case submitted to this Court, and not all the facts which it appears to me my brother *Isaacs*, who heard the case, referred to in the judgment just delivered. I have only considered the facts set out in that case, and only the facts prior to the issue of the writ in the action.

The acts referred to in question 1 are, I understand, only the acts referred to in pars. 6, 7, 8 and 9 of the case submitted on which the questions are asked, so far as they refer to the refusal of the Chief Secretary to allow fat cattle, subject to the Act, to be sent out of Queensland, and not to the acts complained of in pars. 10, 11 and 12 of that case. The acts complained of in pars. 10, 11 and 12 were done under the authority of the Queensland *Sugar Acquisition Act* 1915, referred to in question 2, not under the Queensland *Meat Supply for Imperial Uses Act* 1914, referred to later as the Queensland Meat Supply Act. The question whether the acts complained of in pars. 10, 11 and 12 were lawful depends on whether the Queensland *Sugar Acquisition Act* 1915 is valid, and, if so, whether it authorized the Proclamations of 12th November, 1915 and 1st June 1916. By Exhibit D inspectors were authorized to exercise a discretion in preventing dairy cattle crossing the border—that was not, in my opinion, authorized by the Act; but question 1, in my opinion, refers only to "fat cattle" fit for export.

For the purpose of this case it was agreed that if this Court holds that the Queensland Meat Supply Act is valid, and authorized the Chief Secretary for Queensland, acting under that Act, to prevent the plaintiffs from removing their cattle from the place where they were depasturing, even for the purpose of sending the fat cattle in question out of Queensland into one of the other States, no other question need be answered by this Court. I assume also that the

statement in par. 4 of the case, namely, that "the plaintiffs were *at all times material* . . . carrying on the ordinary business of stock owners in buying and selling and breeding cattle," refers only (after the date the Queensland Meat Supply Act came into operation) to carrying on the business in Queensland—by permission of the Chief Secretary of Queensland—so far as it refers to cattle declared to be subject to the Act.

The plaintiffs contend that the Queensland *Meat Supply for Imperial Uses Act* is invalid and unconstitutional on the ground that it is in conflict with sec. 92 of the Constitution, passed, it is contended, to prevent interference *in any way* by any State with trade, commerce or intercourse among the States. In considering whether the Act is valid or invalid, *Macleod* v. *Attorney-General for New South Wales* (1) should be followed. It was decided in that case that the words in question in the New South Wales *Criminal Law Amendment Act* 1883 (46 Vict. No. 17) "must be intended to apply to those actually within the jurisdiction of the Legislature, and consequently that there was no jurisdiction in the Colony" of New South Wales "to try the appellant for the offence of bigamy alleged to have been committed in the United States of America." This Court should, therefore, assume that Parliament only intended by the Act to deal with property and persons in Queensland and with matters within its jurisdiction, unless the contrary is clearly shown by the words used in the Act. If we follow *Macleod's Case* the Act is valid so far as it is applicable to persons resident in Queensland, and to property situate in Queensland, and to acts done by persons in Queensland—that is, as to all matters within the jurisdiction of the Legislature. Assuming that is so, the question is: Does the Queensland Meat Supply Act deal with matters with which Queensland, as a State, is prohibited by sec. 92 of the Constitution from dealing, and which are therefore beyond the jurisdiction of the Legislature?

Sec. 92 declares that "on the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free." The defendants contended that doubt as to the proper

(1) (1891) A.C., 455.

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interpretation of the words " absolutely free " in sec. 92 is necessarily caused because of sec. 51 (i.) giving the Commonwealth power to make laws with respect to inter-State trade and commerce, which includes a power to regulate the very trade and commerce referred to in sec. 92, and because of sec. 112, which gives the States a very qualified right to demand fees under inspection laws of the States on goods entering any State from another State. Secs. 99, 100 and 102 have also been referred to, to show that some qualification must be placed on the words " absolutely free " in sec. 92. The defendants further contended that sec. 92 could only be interpreted in one way so as to give full effect to the words " absolutely free " and make all parts of the Constitution consistent, namely, by qualifying the words and holding that the section *only* prohibited the State and the Commonwealth from imposing financial burdens or charges on persons or goods passing from one State to another. It was admitted that if that was the true construction the States retained the power to interfere with, or even to prohibit, inter-State trade in any way except by the imposition of border duties or other financial burdens. The learned Chief Justice and my brother *Higgins* have dealt very fully with these two contentions in the judgments just delivered.

Sec. 90 of the Constitution, as has been pointed out, prevented the States from continuing to interfere with or prohibit inter-State trade or commerce by duties of customs, bounties, &c.; so that sec. 92 was not necessary to prevent interference in that way. I agree that sec. 92 was not intended to make trade, commerce and intercourse among the States free from interference by means of the imposition of fiscal burdens only. Such an interpretation of the section would permit any State to pass legislation with the express purpose of prohibiting inter-State trade and commerce. Whether sec. 92 was intended to bind the Commonwealth as well as the States, it is not now necessary to decide. The acts complained of have been done by a State.

The Constitution must be read as a whole, and in my opinion the words " absolutely free " in sec. 92 mean free from any restriction not authorized by the Constitution itself—that is, by any express restriction contained in the Constitution, or by the lawful exercise of any power granted to the Commonwealth or retained by the

States. Whatever the true construction to be placed on sec. 92 may be, I hold that no State has the power to prevent trade and commerce among the States in marketable commodities which the owner in any one State is qualified to sell, and is at liberty to sell and dispose of, in that State. As my brother *Higgins* puts it (1): "Whoever has power . . . to sell any specific cattle shall not be obstructed or hindered" by any State "from sending them across the border of his State for sale or after sale. There is to be no obstruction or restriction because of State boundaries; State boundaries are to be forgotten for the purpose of" inter-State "trade, commerce or intercourse."

If all the acts authorized by the Queensland Government, and by the circulars and directions issued by the Chief Secretary and his Under Secretary *since* the passing of the Act, referred to by my brother *Isaacs*, could properly be used to show that the Act when passed was substantially an Act to prohibit inter-State trade, the answer of this Court to the first question would probably have been different.

The Government officials did notify to the plaintiffs that the fat cattle in question would not be allowed to cross the border of Queensland into another State, but all that was necessary *under the Act* was to notify the plaintiffs that the cattle were only held by them "for the purposes of and kept for the disposal of His Majesty's Imperial Government in aid of the supplies for His Majesty's armies in the present war" (sec. 6)—that His Majesty had the right to take the cattle whenever they were required for those purposes, and that they were prohibited by the "Act" from selling, or dealing with them, forwarding them, or sending them *from the place where they were depastured*, except by and under the directions and orders of the Chief Secretary for Queensland. It was also proved that the owners in Queensland of cattle subject to the Act were permitted in the year 1915 to sell, or deal with, or forward their cattle to any part of Queensland; and that the State Government did prevent cattle—including even dairy cattle which were not included in the Act—being sent across the State borders.

The Act in question may have been used for a wrong purpose, but this Court, in deciding whether the Act is valid, must ascertain

(1) *Ante*, p. 630.

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by reference to the words used in the Act itself what Parliament meant in passing the Act. As Lord *Brougham* said in *Fordyce* v. *Bridges* (1): "We must construe this Statute by what appears to have been the intention of the Legislature. But we must ascertain that intention from the words of the Statute, and not from any general inferences to be drawn from the nature of the objects dealt with by the Statute." Lord *Coleridge*, in *Pocock* v. *Pickering* (2), said: "In construing an Act of Parliament, our first business, I conceive, is to examine the words themselves which are used; and, if in these there be no ambiguity, it is seldom desirable to go further." Neither the abuse of a power nor its consequences, nor any purpose, or motive, or object of the Legislature, not found in the Act, can render the exercise of a legislative power illegal (*R.* v. *Barger* (3)). If the Act contained a proviso that the provisions of sec. 6 and sec. 7 (1), (2) and (3) were only to be used to prevent cattle being sent across the Queensland border into South Australia or New South Wales, this Court would, if it followed *Barger's Case*, be justified in holding that the Act was substantially passed to prevent inter-State trade in cattle and not to secure supplies for the Imperial troops, and holding that it was invalid.

It will not be denied that a State could place a tax of £10 on every head of cattle in the State. If it said *in the Act* that the tax would only be payable on cattle passing or being shipped from the State to another State, the Act would probably be held to be bad because on the face of it, in substance, it was not for "taxation," but in reality to prevent or restrict inter-State trade in cattle. If, however, the Act merely imposed a tax of £10 on all cattle, and declared that cattle could not be moved or sold by the persons owning them at the time the tax was imposed before payment of the tax, that would prevent inter-State trade in cattle without being a contravention of sec. 92. If any Government unfairly collected the tax only on cattle passing or being shipped to another State, I do not see how the Act could be held to be bad because on the face of it it was not passed to prevent inter-State trade.

Looking at the Act itself, I do not find any words in it which

(1) 1 H.L.C., 1, at p. 4.
(2) 18 Q.B., 789, at p. 797.
(3) 6 C.L.R., 41.

show that it is in substance anything more than an Act to secure supplies of Queensland meat for the uses of His Majesty's Imperial Government during the War, to declare the method of securing those supplies, and to provide for payment for any cattle required by His Majesty, with power to extend the operation of the Act to other food supplies and property in Queensland.

It was contended by the plaintiff: (*a*) that the Act was passed to prevent inter-State trade in Queensland cattle; (*b*) that that was the real object of the Act; (*c*) that that object was disclosed by the Act itself; and (*d*) that it was necessary to stop inter-State traffic in cattle to carry out the provisions of the Act. I do not find anything in the Act or in the surrounding circumstances to warrant such a conclusion. On the contrary, the Act was passed in August 1914, a few days after the declaration of war, after the receipt of important cablegrams from England (exhibits in the case). Even then, by sec. 2, the Act was only to come into force during such period as the Governor in Council declared from time to time. This Act, passed, so it is said, to prevent inter-State trade in cattle, was allowed to remain a dead letter for nearly six months; and it was only on the receipt of urgent cablegrams from the Imperial Government early in 1915 that a Proclamation, declaring the Act to be in force for six months, was published, namely, on 2nd February 1915. The necessity to continue to supply meat for His Majesty's Imperial troops has caused the periods for which the Act was to be in force to be extended from time to time.

Queensland, as the learned Chief Justice points out, is recognized as the principal cattle-producing State in the Commonwealth. As the Chief Justice pointed out, the meat-exporting companies in Queensland, at the time the Act was passed and for many years prior thereto, were exporting millions of pounds weight of meat to foreign countries, including Germany, Italy, Japan, Hong Kong, Philippine Islands and the United States. It is also well known that the States of New South Wales and South Australia (the two States adjoining Queensland) in 1913 and 1914 were exporting tinned or frozen meat to foreign countries. Parliament might well think that an Act, such as the Queensland Meat Supply Act in question, was necessary to prevent the export of meat from Queensland to foreign

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countries, and to secure the supplies for His Majesty's Imperial Forces only, during the War, for the benefit of Queensland and the Empire as a whole, and not to prevent fat cattle being sent across the Queensland border.

A similar Act was passed in the State of New South Wales (the next important cattle-producing State) in the month of February 1915, shortly after the date of the Queensland Proclamation. It appears to me that it is as unreasonable to say that that Act was passed to prevent inter-State trade in cattle with Queensland as to say that the Queensland Act was passed to prevent inter-State trade in cattle with New South Wales. If cattle had been taken across the border from Queensland into New South Wales the new owner in New South Wales would have found himself subject to a similar law in New South Wales.

It should also be remembered that the Act in question expressly prohibits owners of cattle subject to the Act exporting cattle or meat. The word "exporting" since federation has been used only with respect to exports beyond the Commonwealth. The State had the power to deal with exports at the date of the establishment of the Commonwealth. That power is not interfered with by sec. 92. That power continues in the State under the Constitution (sec. 107) subject to the power of the Federal Parliament to pass a law inconsistent with the State law, in which case the "law of the Commonwealth shall prevail" (sec. 109).

Assuming that I am correct in holding that the Queensland Meat Supply Act is valid so far as it applies to persons and property in Queensland, the only questions left for consideration are: (1) whether a State can, notwithstanding sec. 92, by any law prevent or prohibit residents in Queensland who own cattle at the time the law is passed from selling those cattle to anyone but His Majesty during the War, or during such time as Parliament deems fit, even if the person who owned them before the Act was passed desires to sell them to persons in another State; (2) whether that can be done by requiring the persons mentioned to hold them to the use of His Majesty's Imperial Government, and to keep them for his use pending an order to be made at any time making any or all of such cattle the absolute property of His Majesty; and in the meantime

to prohibit the removal or sale of the cattle from the place or places where they are being depastured (see interpretation clause) without the consent of the Chief Secretary for Queensland, acting for the Imperial Government and for the State Government. That depends on the two questions: (1) whether sec. 92 of the Constitution prevents a State exercising its right to make such laws as it thinks fit affecting the rights of property within its borders, if such a law incidentally prevents inter-State trade; and (2) whether this Act did lawfully prevent owners of cattle, at the date the Act was passed, dealing with fat cattle except with the consent of the Chief Secretary for Queensland acting for the Imperial Government and for the State of Queensland.

As to the first question—sec. 107 of the Constitution declares that "every power of the Parliament of a Colony which has become . . . a State, shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth." The Parliament of Queensland at the establishment of the Commonwealth had the power to authorize the Crown to acquire any property or any interest or right in property with or without paying compensation. It had the power to tax property or residents in the State to any extent it thought fit. It had the power to say who should or should not be qualified to hold real or personal estate in Queensland, and who should or should not be able to sell it. It had the power to say on what conditions property could be held or used, and it had the power to prevent any owner of cattle from removing cattle from his holding without the consent of an officer of the Government. None of those powers have been exclusively vested in the Parliament of the Commonwealth or withdrawn from the State, and I hold that those powers can still be exercised by the State even if the effect of the exercise of them does incidentally hinder or prevent some inter-State trade or commerce. The framers of the Constitution apparently did not anticipate, or think it necessary to prevent, the exercise of the sovereign powers of the State being used to the extent they have been in the direction of socialism or of the State acquisition and control of marketable commodities.

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This Court has already held in the *Wheat Case* (1) that the State of New South Wales could compulsorily acquire all the marketable wheat in New South Wales, although a large portion of it, prior to the compulsory acquisition, was admittedly intended for inter-State trade and commerce. The change of ownership did not prevent inter-State trade or commerce because the new owner (the State) did not wish to engage in inter-State trade or commerce. Inter-State trade was just as free to all owners of property who desired to engage in such trade or commerce and were capable of doing so.

The State of South Australia is dependent altogether on the State of New South Wales for its coal supply. Victoria is to a great extent also dependent on New South Wales for its coal. All the other States import some New South Wales coal, and the shipping companies (except in the State of Queensland) depend almost wholly on New South Wales coal. It is a marketable commodity, and the greater part of the coal raised in New South Wales is used for inter-State purposes. Yet the State of New South Wales can legislate as to all mines in the State. It could make labour conditions so oppressive that they would prevent the owners working the coal mines; it could order all employers to pay their employees £1 a day for six hours' work on six days in the week, and in that way prevent many of the mines being worked at all; it could tax all coal raised to such an extent that it would be unprofitable to work the mines. It is admitted that it could acquire all the mines, or all the coal as it is raised; and in all the ways mentioned prevent or interfere with inter-State trade without any contravention of sec. 92.

The power of a State to pass any legislation necessary to protect the health or safety of the people of the State has never been questioned, however seriously the exercise of the power may incidentally affect inter-State commerce, or even if it prohibits it.

In the United States the right to regulate inter-State trade is exclusively vested in Congress, but the United States Constitution does not contain any section similar to sec. 107 of the Australian Constitution. The power of the States to pass legislation to prevent the manufacture of goods intended for inter-State trade, and to prevent the sale of such goods if manufactured, has been upheld

(1) 20 C.L.R., 54.

by the United States Federal Courts in many of the cases referred to during the argument; but no cases have been quoted or referred to by my brothers *Barton* and *Isaacs* in their judgments in which the right of the State to pass any law affecting property *produced in the States* has ever been successfully challenged in the United States Federal Courts.

I do not see how sec. 92 is contravened by the State placing new qualifications or prohibitions on residents in the State, or on property in the State, so long as the property in the hands of the owners who are qualified to sell and deliver it inter-State is free from interference. Sec. 92 did not give to persons in all the States under twenty-one years of age, or to lunatics, a right to sell goods inter-State; if the laws in force in a State rendered them incapable of selling any property at that time, sec. 92 did not authorize them to sell inter-State. The State law, by disqualifying the persons mentioned, did not place any restriction on inter-State trade or commerce within the meaning of sec. 92; the State only exercised its power to deal with the rights to property.

The disqualifications mentioned here are caused by a State law which the State had power to pass. In the same way intercourse among the States can be prevented by the imprisonment of those who break State laws, by requiring the attendance of witnesses at Court, by locking up lunatics, by quarantining persons with infectious diseases, and in many other ways. State laws can incidentally prevent intercourse, trade and commerce being free for persons and goods by the exercise of powers expressly retained by the States under sec. 107 of the Constitution, and in that way only.

If the State can compulsorily acquire, or even confiscate property, which is admitted, I see no reason why a State cannot place limits on the rights of residents of a State to deal with real or personal property produced in the State; and/or suspend for any time it thinks fit, in the public interests, the power to sell any commodity produced in the State. For instance, a State could, in my opinion, prevent the sale of any female cattle in a State so as to secure a continuation of the supply of cattle for its people. That would prevent the sale of female cattle to persons in other States, but it would not, I think, be a contravention of sec. 92.

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Once it is conceded that the States retained the power to deal with the rights of property, the only question left is whether this Act, the Queensland Meat Supply Act, has disqualified the persons resident in Queensland owning cattle fit for export or which may be made available for export from selling or disposing, &c., of their cattle except in the way provided by the Act. I think it has done so very clearly by sec. 6 (1) and (2) and sec. 7 (1), (2) and (3). The capacity of disposition is one of the usual incidents of the ownership of property, and is subject to the laws of the State in which the property is situated. The Act deprives the owner of the right or capacity of free disposition. The Act sets aside or dedicates or places in trust for the public purposes—the defence of the State and Empire—the stock and meat referred to in the Act, and takes away the power of the then owner to sell except on the terms and conditions set out in the Act. The right of dominion over the property, except under the conditions set out in the Act, is taken away.

The sections were clearly intended to take away, and did take away, any right the then owner had to sell or move any cattle referred to in the Act, namely, fat cattle or cattle available for export in Queensland, except in accordance with the Act. The Act may, and apparently does, incidentally prevent inter-State trade in cattle to some extent, but that interference is incidental, and is caused by an Act the States can lawfully pass under the powers reserved to the States by sec. 107 of the Constitution, without contravening sec. 92.

For the reasons I have mentioned I agree that (1) sec. 92 does not confer any new right of property, but only prohibits the placing of any new restrictions by the States on persons lawfully engaged in inter-State trade, commerce or intercourse; (2) sec. 7 (1), (2) and (3) makes the act of removing the cattle in question from the plaintiffs' property, without the consent of the Chief Secretary, unlawful; (3) the acts which the plaintiffs proposed to do would have been unlawful if done without the consent of the Chief Secretary, and that consent was refused. No action would therefore lie for damage for preventing the removal of the cattle if the plaintiff was prevented from removing them under and in accordance with the provisions of the Queensland Meat Supply Act.

The decision of this Court in June last in *Foggitt, Jones & Co.* v. *New South Wales* (1), on the Act passed in New South Wales in February 1915, is inconsistent with the conclusion I have arrived at; but the Full Bench of seven Justices has been asked to reconsider that decision. Three of the five Justices who sat in that case, including the learned Chief Justice, have come to the conclusion that the decision in *Foggitt, Jones & Co.'s Case* was wrong. I have come to the same conclusion, and I concur in overruling the judgment in that case.

I recognize the possible effect of the interpretation placed on sec. 107. Many of the Commonwealth powers can be incidentally affected or even rendered inoperative by the sovereign power of the States to acquire property, or by the power of the States to modify or qualify the capacity of persons holding property, or to prevent the manufacture or sale of goods produced in the States. This Court has, however, to interpret the Constitution as it finds it. Lord *Blackburn* in *River Wear Commissioners* v. *Adamson* (2) said: "It is to be borne in mind that the office of the Judges is not to legislate, but to declare the expressed intention of the Legislature, even if that intention appears to the Court injudicious."

I hold that the Queensland *Meat Supply for Imperial Uses Act* 1914 is valid.

For all the reasons mentioned, I think the answer to question 1 is: Yes; the Act in question is valid, and it authorized the refusal before action brought of the application by the plaintiffs to take fat cattle from their station in Queensland to South Australia or anywhere else.

The first question answered in the affirmative.

Solicitors for the plaintiffs, *Fitzgerald & Walsh*, Brisbane, by *Dillon & Nichols.*

Solicitor for the defendants, *T. W. McCawley*, Crown Solicitor for Queensland.

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

B. L.

(1) 21 C.L.R., 357.

(2) 2 App. Cas., 743, at p. 764.