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and fully argued by counsel for both parties, I do not propose to put the parties to the expense of a special case.

[His Honor then dealt with the facts of the case and awarded to the claimants £945 in respect of the water taken, and in addition the value of the land taken.]

Solicitors for the claimants, *Symon, Browne, Symon & Povey.*

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

B. L.

[HIGH COURT OF AUSTRALIA.]

W. & A. McARTHUR LIMITED . . . PLAINTIFF;

AGAINST

THE STATE OF QUEENSLAND AND OTHERS DEFENDANTS.

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MELBOURNE, *Oct.* 5-8, 11-14.

SYDNEY, *Nov.* 29.

Knox C.J., Isaacs, Higgins, Gavan Duffy, Rich and Starke JJ.

Constitutional Law—Powers of Parliament of State—Freedom of inter-State trade and commerce—Validity of State legislation—Prohibition of sales of goods above certain price—The Constitution (63 & 64 *Vict. c.* 12), *secs.* 51 (I.), 92—*Profiteering Prevention Act* 1920 (*Qd.*) (10 *Geo. V. No.* 33), *secs.* 3, 12.

The *Profiteering Prevention Act of* 1920 (Qd.) provides, by sec. 12 (1), that it shall be unlawful for any trader whether as principal or agent to sell or agree to sell or offer for sale any commodity at a price higher than a price declared in the Queensland *Government Gazette*; and, by sec. 3, defines "trader" as including "the agent" of any person carrying on the business of selling any commodities.

The plaintiff, a Sydney company, had its travellers in Queensland, and they sold calicoes, &c., at a price higher than the declared price for delivery in Queensland.

Held, by *Knox* C.J., *Isaacs, Higgins, Rich* and *Starke* JJ. (*Gavan Duffy* J. dissenting), that so far as regards the sales by the travellers of goods stipulated

to come from Sydney the Queensland Act was invalid as being in conflict with sec. 92 of the Constitution.

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Held, by *Knox* C.J., *Isaacs*, *Rich* and *Starke* JJ. (*Higgins* and *Gavan Duffy* JJ. dissenting), that *Duncan* v. *State of Queensland*, 22 C.L.R., 556, was wrongly decided, and *Foggitt, Jones & Co.* v. *State of New South Wales*, 21 C.L.R., 357, had been rightly decided.

Per Higgins J.: The *Profiteering Prevention Act* is a direct interference with trade; in *Duncan* v. *State of Queensland* the legislation was as to property, the new owner being left free to trade as he liked.

DEMURRER.

An action was brought in the High Court by W. & A. McArthur Ltd. against the State of Queensland, the Minister of the Crown of the State of Queensland for the time being charged with the administration of the Queensland *Profiteering Prevention Act of* 1920, and Thomas Arthur Ferry, Commissioner of Prices under that Act.

The statement of claim was as follows :—

1. The plaintiff is a company duly incorporated at law and resident and registered in New South Wales as a foreign company, its registered office being at No. 79 York Street, Sydney, in the said State.

2. The plaintiff Company at its aforesaid registered office carries on the business of softgoods warehousemen selling woollen goods, blankets, sheeting, millinery and all kinds of textile materials suitable for the apparel and use of men, women and children.

3. The plaintiff Company is not resident in Queensland and has no warehouse in Queensland, and holds no stocks of goods of any description in Queensland.

4. On 11th March 1920 the Parliament of Queensland passed the *Profiteering Prevention Act of* 1920.

5. On 10th July 1920 the defendant Thomas Arthur Ferry, purporting to act under the powers conferred upon him by the aforesaid Act, made a notification fixing the maximum prices at which calico, sheeting and men's felt hats could be sold in the State of Queensland, which said notification was published in the Queensland *Government Gazette* on 17th July 1920, and is in the words and figures following :—" The *Profiteering Prevention Act of* 1920.—Prices Notification (No. 26) made by the Commissioner of Prices.—In pursuance of the provisions of the *Profiteering Prevention Act of*

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1920, I, Thomas Arthur Ferry, the Commissioner of Prices appointed under the said Act, do hereby fix and declare that the following shall be the respective maximum prices at which the commodities mentioned in the schedule hereto may be sold. In respect of such sales in all parts of the State, except the Petty Sessions of Brisbane, the actual cost of transportation from the place of purchase to the place of sale may be added to such respective prices. —Given under my hand this 15th July 1920.—T. A. Ferry, Commissioner of Prices. Schedule.—Wholesale Traders.—The maximum price at which calico, sheeting, or sheets, of all descriptions, may be sold by a wholesale trader shall not exceed twenty-two and one-half per centum on the actual cost of the calico, sheeting, or sheets to the wholesale trader delivered into such wholesale trader's warehouse. The maximum price at which men's felt hats may be sold by a wholesale trader shall not exceed twenty-two and one-half per centum on the actual cost of the hat to the wholesale trader delivered into such wholesale trader's warehouse." [The other parts of the schedule are not material.]

7. The plaintiff Company has in New South Wales stocks of woollen goods, blankets, sheetings, millinery and all kinds of textile materials and including (*inter alia*) calico sheeting, sheets and men's felt hats.

8. The plaintiff Company employs its travellers or agents in the State of Queensland for the purpose of selling its said goods there, and such travellers or agents there offer goods of the said descriptions for sale to persons in the said State for delivery in Queensland.

9. The said travellers or agents as agents for the plaintiff also obtain from persons in Queensland offers to purchase goods of the said descriptions for delivery in Queensland, and the said travellers or agents forward to the plaintiff such offers and the plaintiff in Sydney accepts the same and despatches the goods to the said persons in Queensland to supply the said offers.

10. The said travellers or agents also as agents for the plaintiff agree in Queensland to sell goods of the said descriptions to such persons in Queensland for delivery in Queensland.

11. The said travellers or agents as agents for the plaintiff also agree in Queensland to sell goods of the said descriptions to persons

in Queensland, the goods to be despatched from the plaintiff's warehouse in Sydney and to be delivered by plaintiff to purchasers in Queensland.

12. In each case mentioned in pars. 8 to 11 the price is in excess of that prescribed in the proclamation.

13. In each case the plaintiff supplies goods in performance of the contract of sale from stocks held in Sydney.

14. The plaintiff Company desires and intends to continue to offer for sale and to agree to sell and to sell in such State articles of the descriptions covered by the said notification.

15. The prices which the plaintiff Company desires and intends to charge purchasers in Queensland of the said goods are in excess of the maximum prices declared by such notification.

16. The said goods in par. 13 mentioned which the plaintiff has sold and sells and desires and intends to continue to sell have been and will continue to be sold and supplied and forwarded to purchasers in Queensland in the manner and from the stocks as described in pars. 8, 9, 10 and 11 hereof.

17. The defendants threaten and intend to prevent the plaintiff's travellers and agents from acting as in pars. 8, 9, 10 and 11 hereof by enforcing the Queensland *Profiteering Prevention Act of* 1920 against and by prosecuting the said travellers and agents in respect of such action.

18. The plaintiff Company fears that unless restrained by the declaration, order or injunction of this Honorable Court the defendants will put the aforesaid Act and the notifications made thereunder into operation against the said travellers or agents in respect of their acting as aforesaid whereby the plaintiff Company, its travellers or agents will be subjected to heavy penalties and the plaintiff's trade with Queensland will be hampered and destroyed.

The plaintiff therefore claims :—

(1) That it may be declared that the Queensland *Profiteering Prevention Act of* 1920 is beyond the powers of the Queensland Parliament.

(2) Or alternatively that it may be declared that secs. 12, 13, 14, 25, 29 and sub-secs. 3 and 5 of sec. 31 of the Queensland *Profiteering*

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Prevention Act of 1920 are beyond the powers of the Queensland Parliament.

(3) Alternatively to the first and second claims, that it may be declared that no part of the Queensland *Profiteering Prevention Act* of 1920 applies to sales of commodities by the plaintiff Company or its agents in Queensland when such sales form part of inter-State trade or commerce.

(4) That it may be declared that the Prices Notification No. 26 of 15th July 1920 made by the defendant Thomas Arthur Ferry as Commissioner of Prices under the Queensland *Profiteering Prevention Act of* 1920 and published in the Queensland *Government Gazette* on 17th July 1920 is beyond the powers of the Queensland Parliament or the said defendant Thomas Arthur Ferry.

(5) Alternatively to the fourth claim, that it may be declared that the said notification does not apply to sales by the plaintiff Company or its travellers or agents in Queensland when such sales form part of inter-State trade or commerce.

(6) That it may be declared that the said notification does not apply to goods sold by the plaintiff to purchasers in Queensland in the manner and under the circumstances described in pars. 3, 4, 5, 6 and 7 of the statement of claim.

(7) That the defendants may be restrained by the order or injunction of this Honorable Court from preventing the plaintiff Company selling goods to purchasers in Queensland at prices higher than the prices permitted by the said notification where such sales are made in the manner and under the circumstances described in pars. 3, 4, 5, 6 and 7 of the statement of claim.

(8) That the defendants may be ordered to pay the plaintiff's costs of this suit.

The defendants demurred to each and all of the matters pleaded in the statement of claim, and stated that a matter intended to be argued was that the Queensland *Profiteering Prevention Act of* 1920 covers the transactions set out in the statement of claim and is valid.

Sir Edward Mitchell K.C. (with him *E. M. Mitchell*), for the plaintiff. An action will lie for a declaration that the *Profiteering*

Prevention Act of 1920 is invalid so far as regards the transactions in question, for if the Act is invalid it is an unlawful attempt to prevent the plaintiff from trading; and in addition there is an admission by the defendants of an intention to prosecute persons who take part in Queensland in those transactions (*Welsbach Light Co. of Australasia* v. *Commonwealth of Australia* (1); *Dyson* v. *Attorney-General* (2)).

[KNOX C.J. referred to *Attorney-General for the Commonwealth* v. *Colonial Sugar Refining Co.* (3).

[STARKE J. referred to *In re Clay*; *Clay* v. *Booth* (4).]

If the *Profiteering Prevention Act* has the effect of penalizing any of the transactions in question here, it is contrary to sec. 92 of the Constitution, and to that extent invalid, or, in other words, the Act should be construed as not applying to such transactions. That section is not limited to the mere passage of goods across the border, but it makes inter-State trade absolutely free from its inception until its completion—that is, in the case of a sale of goods then outside Queensland to a purchaser in Queensland until delivery of the goods in Queensland. (See *Fox* v. *Robbins* (5); *R.* v. *Smithers*; *Ex parte Benson* (6); *New South Wales* v. *The Commonwealth* (7); *Foggitt, Jones & Co.* v. *New South Wales* (8).) *Duncan* v. *Queensland* (9) is not inconsistent with the view that a provision like that in sec. 12 (1) (*a*) of the *Profiteering Prevention Act*, if applied to inter-State trade, is invalid. The decision in that case was based by the majority of the Court on the ground that the *Meat Supply for Imperial Uses Act of* 1914 (Qd.) created a special kind of interest in the State Government on behalf of the Imperial Government, and the majority also held that sec. 92 would cover such a case as the present. Sec. 92 is not confined to pecuniary imposts, but prohibits all kinds of restrictions whatever. That is shown by the use of the word "intercourse," and by the fact that sec. 113 would be unnecessary if sec. 92 were confined to pecuniary imposts. Sec. 92 limits the powers conferred upon the Commonwealth Parliament

(1) 22 C.L.R., 268, at p. 282.
(2) (1911) 1 K.B., 410.
(3) (1914) A.C., 237; 17 C.L.R., 644.
(4) (1919) 1 Ch., 66.
(5) 8 C.L.R., 115, at p. 122.
(6) 16 C.L.R., 99.
(7) 20 C.L.R., 54, at pp. 77, 95, 100, 107.
(8) 21 C.L.R., 357.
(9) 22 C.L.R., 556.

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by sec. 51 (I.) as well as the powers of the States. The power given by sec. 51 (I.) may be used in aid of inter-State trade but not to hamper it. [Counsel also referred to *Brown* v. *Maryland* (1) and *Rosenberger* v. *Pacific Express Co.* (2).] As to the interpretation of the *Profiteering Prevention Act*, if it applies only to intra-State transactions, or if the word " trader " is limited to persons carrying on business in Queensland, that is sufficient to free the plaintiff.

Ryan K.C., *Latham* and *Owen Dixon*, for the defendants. The *Profiteering Prevention Act* makes unlawful certain acts done in Queensland, and in certain circumstances may affect contracts of an inter-State character. Sec. 12 must be read as limited to acts and omissions in Queensland. The territorial limitation should be applied to the acts or omissions which are the subject matter of the particular prohibition, and therefore should not be applied to the definition of " trader." The Act therefore covers the case of a person who is outside Queensland and comes within the definition of a " trader " and who has an agent in Queensland who does any of the prohibited acts. That agent is liable; and so is his principal, if he at any time thereafter comes into Queensland. Each of the four cases mentioned in the statement of claim therefore comes within the Act. The power of a State to legislate as to trade and commerce with other States remains under sec. 107 of the Constitution, for the power given by sec. 51 (I.) to the Parliament of the Commonwealth to legislate as to trade and commerce between the States is not made exclusive. The only question is whether that power has been withdrawn from the States by sec. 92. That section does not mean that inter-State trade and commerce is remitted to the realm of absence of law. There must be a source of law with regard to it, and sec. 92 should be read to mean that inter-State commerce shall be free as such from any restriction or impediment placed upon it in its character of—that is, by reason of the fact that it is—inter-State commerce. The State boundaries or the passing from one State to another must not be taken as a discrimen. Sec. 92 binds both Commonwealth and States (*Fox* v. *Robbins* (3)).

(1) 12 Wheat., 419. (2) 241 U.S., 48.
(3) 8 C.L.R., at p. 128.

Whatever it means, any other law which is inconsistent with it is invalid, whether it be a Commonwealth law or a State law or a municipal by-law. It is not a prohibition of legislation, but is a positive enactment of law. There is nothing in sec. 92 to suggest that it is a limitation on the powers of the States only, and where other sections are intended to bind either the Commonwealth alone or the States alone or both, it is made plain, *e.g.*, secs. 99, 100, 114, 115, 116. Although sec. 92 has the effect of preventing Commonwealth or State legislation inconsistent with it, it is not directed to legislation but simply declares a paramount law. So that any legislation which if passed by a State would by reason of sec. 92 be invalid would also be invalid if passed by the Commonwealth Parliament. A transaction of sale is not commerce; it is a part of a contract. Inter-State commerce must be subject to the law of contract, and in order that the *Profiteering Prevention Act* may be held to be invalid by reason of sec. 92, a line must be drawn between that class of legislation and legislation on the subject of contracts generally, *e.g.*, the *Statute of Frauds*. [Counsel referred to *Fox* v. *Robbins* (1); *R.* v. *Smithers*; *Ex parte Benson* (2).] In *New South Wales* v. *The Commonwealth* (3) it was held that a State might by legislation expropriate private property within the State, and that it was immaterial that at the time of expropriation the property was engaged in inter-State commerce. So in *Duncan* v. *Queensland* (4) it was held that a State might legislate so as to affect inter-State trade without there being an interference with inter-State trade within sec. 92. Commerce in sec. 92 means transport of goods. Sec. 92 cannot refer to contracts, for contracts draw their whole existence from law.

[STARKE J. referred to *International Text-Book Co.* v. *Pigg* (5).]

The ground of the decision in *New South Wales* v. *The Commonwealth* (3) is that a State has power to legislate as to the incidents of property. The Act in this case is legislation as to the incidents of contracts of sale. It is in general terms and does not hit at inter-State contracts at all. The Constitution itself supports the

(1) 8 C.L.R., at pp. 122, 126, 128.
(2) 16 C.L.R., at pp 108, 113.
(3) 20 C.L.R., 54.
(4) 22 C.L.R., 556.
(5) 217 U.S., 91.

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proposition that sec. 92 prohibits both the Commonwealth and the States from imposing any pecuniary imposts upon the act of passing over the border between two States. Sec. 92 is one of a group of sections headed "Finance and trade." The only power in the Commonwealth Parliament to impose customs duties is contained in sec. 51 (II.), and sec. 90 provides that on the imposition of uniform customs duties that power shall be exclusive. There is nothing in the Constitution apart from sec. 92 which prevents the Commonwealth Parliament imposing customs duties which are not uniform, and sec. 92 may be read as meaning that upon the imposition of uniform customs duties those duties are to remain thenceforward uniform. The power of the States to impose customs duties having been taken away by sec. 90, sec. 92 is essentially a limit on the Commonwealth power. It must be confined to pecuniary imposts in order that scope may be given to sec. 51 (I.). That sec. 92 is so confined is borne out by the proviso, without which the Commonwealth could not have enacted a similar provision. If sec. 92 is read as limited to pecuniary imposts by the Commonwealth, then sec. 98 is consistent with it. On the other hand, if sec. 92 be read as including in the things which are to be absolutely free all the incidentals and means of trade and commerce, it is difficult to read secs. 98 and 92 together, whether sec. 92 applies to both Commonwealth and States or to the Commonwealth alone. If it were necessary to enact, as in sec. 98, that the power to make laws as to trade and commerce extends to navigation and shipping, then the terms "trade and commerce" in sec. 92 cannot include navigation and shipping. It is suggested that sec. 99 does away with the power of the Commonwealth to impose border duties; but it does not prevent the Commonwealth imposing a uniform system of border duties. What prevents that is sec. 92. Sec. 99 is a limit on the powers conferred by sec. 51 (I.). It has nothing to do with sec. 92, but is consistent with sec. 92 applying to the Commonwealth. Sec. 112 assumes a power in the States to make inspection laws; and such a power includes a power to exclude goods and to destroy them if they do not comply with the inspection laws. That makes it impossible to construe sec. 92 as meaning that the States are prohibited from excluding from one State goods which come from

another State. The words "whether by means of internal carriage or ocean navigation" are words of restriction, and indicate that the intention was to deal only with movement from one State to another. The immunity is one from any restrictions conditioned upon the inter-State nature of the transaction, which would include at least immunity from pecuniary imposts. The arguments for the plaintiff come down to this, that sec. 92 secures immunity from all laws emanating from one particular source, whereas the true view of the section is that it secures immunity from all restrictions of a particular kind. [Counsel also referred to *Farey* v. *Burvett* (1); *Schollenberger* v. *Pennsylvania* (2); *Gibbons* v. *Ogden* (3); *Mobile County* v. *Kimball* (4); *Australian Steamships Ltd.* v. *Malcolm* (5).] There is no English case to the effect that a declaration of right can be claimed in anticipation of a prosecution under a statute.

Mitchell K.C., in reply, referred to *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (6); *Toronto Municipal Corporation* v. *Virgo* (7); *Farey* v. *Burvett* (8).

Cur. adv. vult.

Nov 29.

The following written judgments were delivered:—

KNOX C.J., ISAACS AND STARKE JJ. On 11th March 1920 the Parliament of Queensland passed the *Profiteering Prevention Act of* 1920. Sec. 12 provides by sub-sec. 1 as follows: "It is unlawful for any trader, whether as principal or agent or whether by himself or by an agent, (*a*) to sell or agree to sell or offer for sale any commodity at a price higher than the declared price." Sub-sec. 2 enacts that a wholesale trader offending is liable to a penalty not exceeding £1,000 or imprisonment not exceeding twelve months, or to both such penalty and imprisonment. Further, sub-sec. 3 enacts that in case of conviction the Court adjudicating shall also award compensation to the purchaser for loss and inconvenience. "Trader" is defined by sec. 3 as "any person carrying on the

(1) 21 C.L.R., 433.
(2) 171 U.S., 1.
(3) 9 Wheat., 1.
(4) 102 U.S., 691.
(5) 19 C.L.R., 298.
(6) (1896) A.C., 348.
(7) (1896) A.C., 88.
(8) 21 C.L.R., at p. 440.

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business of selling any commodities," and the section declares that the term includes the agent of any such person. In the *Government Gazette* of 17th July 1920 there was notified by the Commissioner of Prices under the Act his declaration of the maximum prices at which calico, sheeting or sheets of all descriptions might be sold by a wholesale trader.

The plaintiff is a Sydney company carrying on the business of softgoods warehousemen, holding its stocks—which include calico, sheeting and sheets—in Sydney, and having neither warehouse nor any stocks in Queensland. Its business in the latter State is done in the first place by means of travellers who visit traders there and act for the plaintiff in the following ways: (1) they offer for sale goods of the descriptions sold by the plaintiff, to be delivered in Queensland; (2) they obtain offers to purchase goods of the descriptions sold by the plaintiff, and forward the offers to the plaintiff in Sydney, where they are accepted, and the goods are in fact despatched to the purchasers in Queensland; (3) they make agreements to sell goods of that description to be delivered in Queensland; and (4) they make agreements to sell goods of that description, stipulating that the goods are to be despatched from the plaintiff's warehouse in Sydney and delivered by plaintiff to purchasers in Queensland. All the several methods have been pursued since the Act was passed and the *Gazette* notification published, and at prices for calico, sheeting and sheets higher than the price declared by the Commissioner; and, unless prevented, the plaintiff Company intends to continue its established course of business. In this action the Company claims to restrain the State of Queensland, the Minister administering the Act and the Commissioner of Prices from instituting threatened prosecutions against its travellers and from enforcing the provisions of the Act in respect of the various classes of transactions mentioned.

The plaintiff's case is in protection of its civil rights, and is primarily founded on its rights as a resident in New South Wales, secured, as it claims, by sec. 92 of the Australian Constitution, to engage by its agents in inter-State trade and commerce with residents of Queensland, uncontrolled by the provisions of sec. 12 of the State Act. The Company contends that all the methods followed by its

travellers constitute inter-State trade and commerce, and are protected by sec. 92 of the Constitution. It also contends that the Act does not, on its true construction, apply to those transactions, or at all events to some of them. And lastly it contends that the terms of the Commissioner's declaration of prices do not include the case of a trader having no warehouse in Queensland.

It is desirable to consider these contentions in inverse order, because if it were found, plainly and apart from the provisions of the Federal Constitution, that none of the methods pursued by the plaintiff were struck at by the Act together with the gazetted declaration, no occasion would have arisen for considering the constitutional question at all. The defendants have demurred to the statement of claim on the ground that it discloses no cause of action.

The declaration of prices is certainly not artistically worded, but, when read with the Act and its substance considered, it appears on the whole to cover, to the same extent as the Act, the case of a wholesale trader who sells in Queensland whether his warehouse is situate in that State or elsewhere. With respect to the Act, the word "trader" is, as defined, and used in sec. 12, sufficient, on recognized principles of interpretation where constitutional prohibitions are not involved, to include the case of a trader resident in another State provided the act complained of is done in Queensland. The cases referred to in *Russell on Crimes and Misdemeanours*, 7th ed., vol. I., at pp. 52 to 57, illustrate the general principle appropriate to such legislation. The context and general tenor of the Act favour the application of the principle to the plaintiff in this case, as a matter of construction apart from the question arising under the Constitution. So far as to persons affected.

Next, as to transactions affected. The expressions "sell," "agree to sell" and "offer for sale" point respectively to a sale in Queensland, an agreement made in Queensland for a sale, and the offering in Queensland of goods for sale. But, if the persons affected include persons who are residents of other States, then sales, agreements for sale and offers for sale, though taking place in Queensland, must include sales, agreements for sale and offers for sale of goods to citizens of other States, whereby the goods are to be forwarded to other States for the benefit of the people there. Consequently,

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in that event, the prohibition of the statute extends to penalizing transactions for the supply of commodities from Queensland to other States. The third question in this connection is as to the commodities affected. The Act is not very distinct as to whether it is intended to apply only to commodities which at the time of making the contract of sale, or the offer for sale, are situate in Queensland. If that is so, then of course the plaintiff is clear of the Act. Some of the provisions of the statute certainly look that way. For instance, sec. 9, which specifies the circumstances which the Legislature has required the Commissioner of Prices to consider—so far as there are any specified—indicates that the Act is to be worked entirely from the standpoint of Queensland. It is the requirements of Queensland, the demand in Queensland, the market conditions of Queensland, which are to govern the prices at which even merchants in New South Wales, Victoria or any other State are to be compelled to sell or abstain from selling altogether. The cost to them in their respective States, the market conditions there, the fairness of their prices, having regard to their own local conditions, are apparently of no concern in relation to this Act. This certainly operates very much in favour of saying that the Act was not intended to affect merchants in other States selling their goods in Queensland, because one does not assume unfairness on the part of the Legislature. But, on the other hand, there are no words so restricting the Act, and, indeed, if the Act were so intended merely to operate in respect of goods locally situated in Queensland when the particular acts struck at took place, it would exclude all sales and agreements of sale and offers for sale of goods not yet in existence, as coal to be excavated, or butter or clothing or boots to be manufactured. That would be so great a futility that it cannot be reasonably entertained. The ultimate result of these considerations is that the Queensland statute appears to be intended to penalize the sales, agreements of sale and offers for sale in Queensland by merchants in other States of goods for the use of the people of Queensland, unless they sell or offer their goods on terms regulated by Queensland conditions. This policy is carried out in the gazetted declaration, by allowing the cost of transportation from the vendor's warehouse to the purchaser to

be added to the otherwise fixed price, only in the case of "sales in all parts of the State, except the Petty Sessions of Brisbane." This is a clear discrimination in favour of sales in Queensland, but its effect, while not overlooked, is passed by as unnecessary to deal with.

This being on the whole the interpretation of the Act apart from constitutional restrictions, it is necessary to consider the effect of sec. 92 of the Constitution. That section, therefore, must be interpreted by the Court for one of two purposes. If it be found that that section does not forbid a State Parliament restricting inter-State trade and commerce by such a provision as sec. 12 of the Act, then the last mentioned section interpreted by the ordinary relevant rules of construction should be taken to apply, and to apply validly, to the transactions now under consideration. But if, on the other hand, sec. 92 of the Constitution does forbid a State Parliament restricting or fettering inter-State trade and commerce by such a provision as sec. 12 of the Act, then, assuming the transactions referred to or any one of them to be inter-State trade and commerce, one of two results must follow : either the Court will regard the State Act as excluding any intended breach of the constitutional restriction, or will treat as invalid sec. 12 so far at all events as it offends against sec. 92 of the Constitution.

In case of alleged conflict between a State Act and sec. 92 of the Constitution, the questions for consideration may be thus expressed : —(1) Does the State Act, read without reference to any provision of the Federal Constitution, purport to restrict trade and commerce generally, *i.e.* inter-State as well as intra-State ? (2) If yes to (1), does the Constitution prevent the apparent restriction of inter-State trade ? (3) If yes to (2), does the State Act nevertheless validly operate on intra-State trade ?

Section 92.—Sec. 92 is in these terms : "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 not, and cannot, be denied by the defendants that sec. 92, whatever it means, binds the State of Queensland to leave the plaintiff's inter-State commerce with Queenslanders "absolutely free" ; but, say the defendants, that

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does not prevent the State from passing a law rendering the plaintiff liable to fine and imprisonment merely because it engages in that commerce on terms voluntarily and mutually agreed on, but at a price higher than that dictated by the State. The punishment is incurred, not because incidentally in the course of engaging in inter-State commerce some State law made on an entirely different subject is infringed, but because the State insists on the inter-State commerce itself, unconnected with any other subject, being conducted not according to the free will of the respective citizens of Queensland and New South Wales but according to the limitations imposed on it by the State of Queensland. If not so conducted, it must be abstained from altogether, under pain of fine and imprisonment. Nevertheless, say the defendants, they have left that trade "absolutely free" within the meaning of sec. 92. Can it be said that a State, when it penalizes persons engaging in inter-State trade and commerce by fine and imprisonment if it is carried on contrary to restrictions directly prescribed, at the same time leaves it "absolutely free"? Such a contention is as untenable as the argument advanced in this case that the State, though it were entirely to forbid the entry of all goods from other States, would nevertheless leave inter-State trade and commerce "absolutely free" within the meaning of sec. 92.

The decision of this Court in *Duncan's Case* (1) was naturally the corner-stone of that contention. In that case it was held, for various reasons, that the State of Queensland, without completely divesting the owners of their property in cattle, could validly prohibit them—citizens of Queensland—from supplying the needs of New South Wales by selling the cattle to their fellow Australians there, the statutory prohibition needing no better foundation than the mere will of the Parliament of Queensland, legislating for the peace, order and good government of that State alone. This was held to be perfectly consistent with leaving inter-State trade, commerce and intercourse "absolutely free." By parity of decision, it is urged the same view should be held of the Act of 1920. It is argued that the doctrine applied in that case should be extended to support a statute of Queensland which goes beyond its own citizens, which penalizes

(1) 22 C.L.R., 556.

with fine and imprisonment merchants of New South Wales, should they ever venture to set foot in Queensland, if they send travellers simply to exhibit goods for sale in Queensland, except on terms dictated by the State of Queensland. It matters not that the purchasers in Queensland send their orders to New South Wales, that the contract is a New South Wales contract, that the goods sold are New South Wales goods, that they are despatched from New South Wales consigned to the Queensland purchaser to become his on arrival in Queensland; if only the New South Wales merchant, in making the contract in his own State, by there accepting a Queensland offer obtained by solicitation of his agent in that State, departs from the restriction imposed by the Queensland Act, whatever the circumstances of his own State may be, he is guilty of an offence under the Act, and he, and his travellers, if caught in Queensland, may be fined £1,000 and imprisoned for twelve months. This also is urged as quite consistent with the absolute freedom of inter-State trade. If such a contention could be upheld, it would, in our opinion, render sec. 92 practically useless. It would be idle in such an event to say that border duties and State bounties are abolished—that would be purely nominal. If the goods themselves can be prohibited, if commercial dealings between the States can be restricted to dealings on the basis of such prices as the State fixes to suit its own special conditions, then there is no practical freedom even from border duties and bounties. It is the old inter-colonial trade war perpetuated in an outwardly different form. Victoria, for instance, might fix prices for cattle which would admirably suit Victorian graziers and place a severe disadvantage on graziers in New South Wales desiring to sell cattle in Victoria; and the prices so fixed could be so arranged as to have the same practical effect as either a customs duty or a bounty, according to the aspect from which it is regarded. In our Constitution, sec. 92 was designed to ensure that inter-State trade and commerce should be national and beyond controversy. The arguments, however, which are now advanced to cut down the natural meaning of sec. 92 relate to (*a*) the extent of the subject matter of the section, viz. "trade, commerce, and intercourse"; (*b*) the nature of the absolute freedom predicated of it; and (*c*) the authority which is restrained by the

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section from violating the absolute freedom declared. We shall examine these in order.

(*a*) *Trade, Commerce, and Intercourse among the States.*—This, it will be seen, is the key of the whole position. Once determine what is comprised in "trade, commerce, and intercourse," then, as the "absolute freedom" extends to the *whole* of it, many of the suggested difficulties vanish on the instant. It stands to reason that if "trade, commerce, and intercourse" embrace not only the act of transporting goods and persons across the border of adjacent States but the whole transaction of exchange and travel between States, the protection of sec. 92 is as applicable to the initial and the final steps as to the one single intermediate step which takes place at the very boundary. And further, if that is so, it at once disposes, not only of the notion that inter-State trade and commerce are recognized only at the border, but also of the contention as to the nature of the freedom postulated, because inter-colonial contracts were never subject within State boundaries to pecuniary imposts of the nature of customs duties. One view insisted on by the defendants was, however, that "trade, commerce, and intercourse among the States" was confined to the mere act of transportation of goods across the border, and a grudging assent was given to personal passage from one State to another independent of trade and commerce. This attitude was necessary preparatory to the contention as to the meaning of "absolutely free." We have therefore to examine the matter. The terms "trade, commerce, and intercourse" are not terms of art. They are expressions of fact, they are terms of common knowledge, as well known to laymen as to lawyers, and better understood in detail by traders and commercial men than by Judges. But as Judges we are taken to know and do in fact in this instance know the general import of the words. The particular instances that may fall within the ambit of the expression depend upon the varying phases and development of trade, commerce and intercourse itself. Aviation and wireless telephony have lately added to the list of instances, but the essential character of the class remains the same. "Trade and commerce" between different countries—we leave out for the present the word "intercourse"—has never been confined to the mere act of transportation

of merchandise over the frontier. That the words include that act is, of course, a truism. But that they go far beyond it is a fact quite as undoubted. All the commercial arrangements of which transportation is the direct and necessary result form part of "trade and commerce." The mutual communings, the negotiations, verbal and by correspondence, the bargain, the transport and the delivery are all, but not exclusively, parts of that class of relations between mankind which the world calls "trade and commerce." We shall confine ourselves to the narrowest references possible in view of the arguments addressed to us. Judicial expositions of the term "trade and commerce" (unless specially defined for the purpose of a particular statute) are naturally founded on the general understanding of the people among whom the Judges live. English jurisprudence has not often called for judicial pronouncements on the subject, but some there are. It will be sufficient for the present purpose to refer to two. The first is *Bank of India* v. *Wilson* (1), where some passages occur having considerable bearing on the present discussion from more than one standpoint. *Kelly* C.B. said (2):— "We are bound to put a large and liberal construction upon any provisions in any Act of Parliament, where the construction proposed to be put upon it is in favour of the *trade and commerce* of the country. Undoubtedly, if we are to take the terms 'for the purposes of trade' as relating only to the business of buying and selling, no one can say that there is any buying or selling in carrying on the business of a telegraph company. It was never the intention of the Legislature so to limit the meaning of the word 'trade.' It is not only the literal meaning of the word which is to be regarded. In literature of all descriptions, both in prose and verse, we find that the word 'trade' is often used in a much more extensive signification than to indicate *merely the operation or occupation of buying and selling.* Why are we so to limit it in a case of this nature? I cannot feel any doubt but that really the object of the Legislature was to protect the commercial business of the country." And it was held by a majority of the Court, *Kelly* C.B. and *Pollock* B., that a telegraph company was carrying on a trade, not because an Act so defined its business, but in the broader signification of the word. The second

(1) 3 Ex. D., 108. (2) 3 Ex. D., at p. 113.

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case is *Commissioners of Taxation* v. *Kirk* (1), where Lord *Davey*, for the Privy Council, says: "*The word 'trade' no doubt primarily means traffic by way of sale or exchange or commercial dealing.*" And then says that it "may have a larger meaning." The addition of the phrase "among the States" excludes purely domestic trade and commerce, but does not alter the nature of the operations which constitute "trade and commerce" wherever it takes place. The argument that "trade and commerce among the States" was limited to mere transportation of goods over the border would, if sound, necessarily limit similarly "trade and commerce with other countries." The views expressed in the cases just cited are, as we have said, merely statements of the accepted meaning of English words, and are fully borne out by the way in which the words "trade and commerce" have been constantly used. For instance, see *Reeves's History of the English Law* (1814), 3rd ed., vol. II., pp. 392 *et seqq.*, and the references he gives to English legislation, going back to *Magna Charta* in its protection under various Kings of foreign merchants. One of the confirmations of the *Charta* will be presently referred to. In America, where the definition of "trade and commerce" has come more often within the function of the Court, the meaning of the phrase as a fact of life has received repeated attention. We leave aside various collateral doctrines as to how long the incompetency of State legislation to affect the subjects of inter-State commerce lasts. They are beside the present inquiry. We look only to the meaning attached to the words—ordinary English words—meaning the same in point of essentials to an American merchant, lawyer or writer as to an English merchant, lawyer or writer. In *Welton* v. *Missouri* (2) *Field* J., speaking for the Court, said:—"*Commerce is a term of the largest import.* It comprehends intercourse for the purposes of trade in any and all its forms, including the transportation, purchase, sale and exchange of commodities between the citizens of our country and the citizens or subjects of other countries, and between the citizens of different States." In the very recent case of *Public Utilities Commission* v. *Landon* (3) the Court said: "Inter-State commerce is a practical conception and

(1) (1900) A.C., 588, at p. 592. (2) 91 U.S., 275, at p. 280.
(3) 249 U.S., 236, at p. 245.

what falls within it must be determined upon consideration of established facts and known commercial methods."

It is therefore impossible to limit the "trade and commerce" either "among the States" or "with other countries" to the mere act of transportation over the territorial frontier. The notion of a person or a thing, tangible or intangible, moving in some way from one State to another is no doubt a necessary part of the concept of "trade, commerce, and intercourse among the States." But all the commercial dealings and all the accessory methods in fact adopted by Australians to initiate, continue and effectuate the movement of persons and things from State to State are also parts of the concept, because they are essential for accomplishing the acknowledged end. Commercial transactions are multiform, and each transaction that is said to be inter-State must be judged of by its substantial nature in order to ascertain whether and how far it is or is not of the character predicated. A given transaction which taken by itself would be domestic, as, for instance, transport between two points within a State, may in a particular instance be of an inter-State nature by reason of its association as part of a larger integer, having as a whole the distinctive character of commerce between States. On the other hand, a transaction which is inherently of an inter-State character, as passage of goods between two States, is none the less inter-State because a contract out of which it arises is itself a domestic contract. The mode of fulfilment of the contract may be optional, one mode being intra-State and the other (the one assumedly adopted) being by inter-State movement, and in that case the inter-State movement remains inter-State whatever the impelling motive may be. The meaning of the expression "trade and commerce among the States" must be the same, in sec. 51 (I.) and sec. 92, and in both must embrace all that is ordinarily comprised within the term "trade and commerce" when taking place "among the States."

With respect to "intercourse," it is only necessary to add that this word, as in *Smithers's Case* (1), includes non-commercial intercourse. We should not omit to notice one argument founded on the words in sec. 92 "whether by means of internal carriage or ocean

(1) 16 C.L.R., at p. 113.

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navigation." The point made for the defendants was that these words indicated a limitation to "transportation." But the argument proves too much. It would exclude every person and article not carried. In the first place, the words are not descriptive or limiting; they are to prevent limitation. The word is not "if" but "whether," and the phrase referred to means that however the trade, commerce and intercourse passes among the States, whether wholly within the continent of Australia or by way of the sea, the absolute freedom predicated shall be maintained. Such a provision is only natural in such circumstances. It is like the expression "as well by land as by water" in *Magna Charta* respecting the freedom of foreign merchants to trade in the Realm, or like the expression "full freedom and intercourse of trade and navigation" in the Act of Union between England and Scotland. To treat those words as words of limitation cutting down the very nature of trade, commerce and intercourse, would not only reverse their office, but would overlook the fact that even transportation of goods inter-State does not begin or cease at the border. Coal sent from New South Wales to Victoria may be destined for merchants in the interior of the latter State, and manufactures of Victoria may be destined for (say) Goulburn. Is the protection as minute as the contention suggests?

(*b*) *Absolutely free.*—The primary meaning of these words used as they are with reference to governmental control, is that the subject matter of which they are predicated is to be "absolutely free" from all governmental control by every governmental authority to whom the command contained in the section is addressed. The expression "absolutely free" naturally means "free" *as* "trade, commerce, and intercourse," and does not extend beyond the subject matter spoken of. It is not said of "goods" or "persons," but of the *acts* which constitute "trade, commerce, and intercourse." In the *Wheat Case* (1) *Isaacs* J. observed that trade, commerce and intercourse consist of acts not things. "Absolute freedom" in respect of "trade, commerce, and intercourse," does not connote privilege to break all other laws. Liberty is not equivalent to anarchy or licence. Though there is "absolute freedom" in every

(1) 20 C.L.R., at p. 100.

Victorian to cross into New South Wales and mingle with his fellow Australians there without the least hindrance or condition on the part of the State of New South Wales, it is his "intercourse" only which is unfettered, not the man himself under all circumstances. If the man, while in New South Wales, steals or cheats or begs, or injures persons or property, or disturbs the public peace, or is in such a condition as to constitute a danger to his fellows—matters wholly distinct from "intercourse"—he is as amenable to the laws of the State *on those subjects*, so far as they are unaffected by sec. 109 of the Constitution, as any permanent resident of the State. If he brings goods into the State, he is free to do so, and to pass through the State with them (say) to Queensland, equally without hindrance or condition by State law, so far as regards the passage through. But if, for instance, the goods are dangerous, as gunpowder or wild cattle or a mad dog, or are stolen or offensive, he cannot deny his obligation to submit in respect of them to whatever laws are in force in the State on those subjects. The constitutional freedom predicated begins and ends with respect to the act of "trade, commerce, and intercourse." The position is well illustrated by *Story* in his work on the Constitution, 5th ed., vol. II., at p. 635, where he deals with the provision in the American Constitution that "Congress shall make no law abridging the freedom of speech or of the press." He points out this was not intended to allow a man to say what he pleased without responsibility. He has no right to injure others or to destroy the rights of the State. That would imperil civil society. It means simply that "every man shall have a right to speak, write, and print his opinions upon any subject whatever, *without any prior restraint*, so always that he does not injure any other person in his rights, person, property, or reputation; and so always that he does not thereby disturb the public peace, or attempt to subvert the government." Similarly here. The State cannot, in our opinion, either by laws directly and openly applying to trade and commerce, or by laws creating discrimination, which is the same thing (see per *White* J. in *Pullman* v. *Kansas* (1)), impose a prior restraint on "trade, commerce, and intercourse among the States." It need hardly be said that a restraint is prior, though the

(1) 216 U.S., 56, at p. 65.

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penalty is subsequent, for the fear of punishment or other consequence must deter. And the State cannot enact that prior restraint on inter-State trade, commerce and intercourse, whether it attacks inter-State trade, commerce and intercourse alone, or in company with its own domestic trade and commerce. The subjects are distinct, and the State cannot annul the protection given by sec. 92 by mingling the subject matter beyond its control with matter lawfully under its control. If authority were needed for this proposition, it exists in the case of *Macleod* v. *Attorney-General for New South Wales* (1). That case has been cited on many occasions, and for several purposes, and the generality of its language in some respects has been discussed. But on the point to which we now refer there can be no doubt whatever. It is as to the effect of including in a general term in a statute some matters which there is no jurisdiction in the Legislature to regulate. The Act unquestionably dealt with New South Wales bigamists, and that was right enough, just as Queensland has here dealt with domestic trade and commerce. But the question in *Macleod's Case* was whether the Act also dealt with foreign bigamy, which New South Wales had no right to penalize. Lord *Halsbury* L.C. said (1): "If the wider construction had been applied to the statute, and it was supposed *that it was intended thereby to comprehend cases so wide as those insisted on at the Bar, it would have been beyond the jurisdiction of the Colony to enact such a law.*" The words there were general, as here, and embraced in their literal meaning both New South Wales and foreign bigamy, but it was no answer to say that foreign bigamy was not struck at simply because it was *foreign*. If included, it was struck at, and that would have been beyond the power of the Legislature. So here, if inter-State commerce is comprehended in the enactment, the State has infringed the restriction declared by sec. 92 as to that subject matter, because it would be struck at as trade and commerce. But ordinary domestic laws not directed to trade and commerce are under its own control—though in some cases subject to overriding legislation of the Commonwealth. By those ordinary domestic laws, it is quite competent to the State—apart from some other restriction on its powers—to enact what it pleases as to the

(1) (1891) A.C., 455, at p. 458.

consequences of any personal conduct or any condition of property independent of the relation of person or property to trade and commerce, which is in fact inter-State. Much was said as to the law of contract. It was urged with a great deal of earnestness that the State must be permitted to enact laws on contract or else the subject of inter-State trade and commerce must go unregulated. But the Commonwealth Parliament has power under sec. 51 (I.), as will be seen, to make laws with respect to inter-State trade and commerce, and this power is wide enough to cover all necessary regulation of that subject matter. Moreover, the law of contract as such does not concern itself with any special subject of contract. It relates to the essential characteristics of contract in general, such as capacity, offer, acceptance, consideration, form, performance, mistake, rescission, discharge, waiver and so on. As to all these and similar things the State is free. But where an enactment says "no matter what the form of the contract, no matter how competent the persons, how desirable the commodity, how honest the transaction, how unchallengeable on any ordinary ground anyone and anything connected with the matter may be, yet the parties shall not be free to arrange their own price for this particular commodity," that is not a branch of the law of civil contract, but a branch of the law of trade. The Supreme Court of America had very much the same question to consider in 1915 in *Rosenberger's Case* (1), and the question was similarly dealt with on general principles of reasoning, at p. 52, in the very clear judgment delivered by *White* C.J., to which we simply refer.

The defendants also pressed the point that "absolutely free" meant only free from "pecuniary imposts." To insert by implication into sec. 92 after the words "absolutely free" an expression equivalent to "from pecuniary imposts only" would, in our opinion, be an interference with the express provisions of the Constitution and opposed to the decision in *Amalgamated Society of Engineers* v. *Adelaide Steamship Co.* (2). In *Duncan's Case* (3) that contention was rejected by five out of seven members of the Court —see per *Griffith* C.J. (at pp. 572-573), *Barton* J. (at p. 589), *Isaacs* J. (at p. 618), *Higgins* J. (at p. 630) and *Powers* J. (at

(1) 241 U.S., 48. (2) 28 C.L.R., 129. (3) 22 C.L.R., 556.

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p. 644). No opinion on this point was expressed by the other members of the Court. Apart from those expressions of opinion —for they were dicta only, though very distinct and reasoned dicta —the matter appears to us transparently plain even approaching it as *res nova*. The critical words are "absolutely free" without any immediate verbal limitation. Whatever limitation exists must arise from the nature of the subject matter, and the context. The subject matter we have already dealt with, and have shown that no suggestion of anarchy or licence can properly be used to restrain the force of the words "absolutely free." The context is said to indicate the phrase "from pecuniary imposts only." How? Because it is said that in sec. 90 reference is made to "duties of customs and of excise." But one answer is that as sec. 92 is intended at all events to include a prohibition to the States, that section was not needed to prevent the imposition of State customs and excise duties because sec. 90 had already made them impossible. What other "pecuniary impost" would be possible was asked during the course of the argument, but the only instance suggested was that workers engaged in moving goods at the border might be required to have a licence. Another answer to the argument is that bounties are, equally with customs and excise duties, referred to in sec. 90. They must, therefore, if the argument is at all sound, be equally included in sec. 92. But they are not "imposts," and so that word would not be suitable in any case. But most of all it must be remembered that laws imposing duties of customs have from time immemorial included provisions for prohibiting imports altogether. And when sec. 90 declared that on the imposition of uniform duties of customs, that is, by the Commonwealth Parliament, the States' power of imposing duties of customs should cease, it meant that their power of prohibiting the entry of goods whether from abroad or from another State should cease. The words "absolutely free" in sec. 92 cannot, therefore, be confined to pecuniary exactions or customs laws, but in order to have any substantial effect must, unless some better reason be found, have their natural meaning of absolute freedom from every sort of impediment or control by the States with respect to trade, commerce and intercourse between them, considered as trade, commerce and intercourse. This was

most definitely stated by *Griffith* C.J. in the *Wheat Case* (1). In *Duncan's Case* (2) the decision of *Griffith* C.J., *Higgins* J. and *Powers* J. rested in the main, if not wholly, on the proposition that the Act then under consideration effected an expropriation *pro tanto*, and that consequently the case was governed by the decision in the *Wheat Case*. If that be taken as the ground of their decision the real question decided was as to the true construction of the Queensland Act, and the decision is therefore no authority as to the effect of the language used in the State Act now under consideration. But in that case the Act contained a provision independent of that which was relied on as amounting to an expropriation, namely, a provision prohibiting any sale of cattle without the consent of the Colonial Secretary, and this provision is in substance indistinguishable from a provision prohibiting any sale above a declared price. *Gavan Duffy* and *Rich* JJ. were of opinion that the prohibition was not directed against inter-State trade, commerce or intercourse, but against any dealing that might prejudice the King's option to take what he needed for his army, and that therefore the Act did not restrain inter-State trade, commerce or intercourse as such. This seems to us to make the validity of the Act dependent on the fact that the prohibition against sale was incidental or preparatory to expropriation, and to rest the decision on the authority of the *Wheat Case*. But in the *Wheat Case* a complete change of ownership was immediately effected by the Act, and the new owner was left free to deal with the wheat as he pleased.

The prohibition by a State Legislature of inter-State sales of commodities either absolutely or subject to conditions imposed by State law is, in our opinion, a direct contravention of sec. 92 of the Constitution, and the freedom guaranteed by that section is so fundamental a provision of the Constitution that it is not permissible for a majority of a Full Bench of this Court in full agreement as to constitutional principle and interpretation to follow the decision in *Duncan's Case* (2) if in their opinion it is wrong in law. Especially is that so in this instance in view of the previous decision of this Court in *Foggitt, Jones & Co.'s Case* (3). To profess to distinguish it

(1) 20 C.L.R., at p. 66. (2) 22 C.L.R., 556.
(3) 21 C.L.R., 357.

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would create a real inconsistency. It would leave standing two decisions that are not really reconcilable. It would embarrass both Commonwealth and States with respect to their constitutional position in relation to inter-State trade, commerce and intercourse. It would make the validity or invalidity of State legislation depend on whether a particular form of words had been used. One case would say it is unlawful for a State to declare that "the owner of goods shall not sell them inter-State," while the other case would say it is lawful for a State to declare that "goods shall not be saleable by the owner" or that "the owner of goods shall be incapable of selling them." The only course open to us is to say that, having regard to the provisions of sec. 92 of the Constitution, *Duncan's Case* (1) was not, in our opinion, rightly decided, and that the Constitution was correctly interpreted in the case of *Foggitt, Jones & Co.* (2).

(*c*) *Is the Commonwealth bound by section* 92?—The present case has involved a closer examination of this question than any previous occasion upon which the Court has considered it. The result has been to convince us, notwithstanding dicta in previous cases, that the true office of sec. 92 is to protect inter-State trade against State interference, and not to affect the legislative power of the Commonwealth. Inter-State trade is by other sections guarded against all possible Commonwealth action which could intentionally give an advantage to any State over another. The trade and commerce power in sec. 51 (I.) is not there qualified. But the taxation power in sec. 51 (II.) is accompanied with a provision against discrimination between States and parts of States. Pl. III., giving legislative power with respect to bounties, requires uniformity. The references in sec. 88 and other sections to customs duties indicate that they must be uniform. Sec. 99 forbids preferences. These provisions ensure that border duties or other pecuniary imposts or encouragements or any legislative contrivances tending to destroy the commercial equality of opportunity between the States are forbidden so far as the Commonwealth Parliament is concerned. Moreover, these provisions would all be largely, and in some instances entirely, unnecessary if sec. 92 were directed at the Commonwealth. They

(1) 22 C.L.R., 556. (2) 21 C.L.R., 357.

are, however, essential because, when sec. 92 is attentively read in its setting, it is not difficult to trace the line of thought running through the group of sections of which it forms a part. Chapter IV. is headed "Finance and trade." The earlier sections of that chapter are concerned with the Commonwealth and with transfers from the public service of the State to that of the Commonwealth. Then comes a cluster of provisions designed to place the control of the foreign and inter-State trade and commerce of Australia ultimately in the hands of the Commonwealth as representing the whole nation; and to remove that trade and commerce from the hands of the States, whose jealousies and local policies had occasioned so much antagonism and inconvenience, and whose inability from the nature of the subject to deal severally with inter-State transactions in their entirety was a legal truism (*cf. Cohen* v. *South-Eastern Railway Co.* (1)). It was recognized that, pending the enactment of uniform Commonwealth customs duties, the State duties had to continue and with these duties the various prohibitions and restrictions which formed part of the same policy and the same laws. The States were left free even to enact any laws on those subjects they pleased, subject to certain restrictions as to bounties, until Commonwealth duties were imposed. Nevertheless, the Constitution (sec. 86) placed the interim administration of those laws and of the bounty laws in Commonwealth hands. The Commonwealth was in this domain a mere collector and administrator of State laws, and after paying its own expenses maintained a book-keeping system. Sec. 90 provided that when the Commonwealth enacted its uniform customs duties the States' power to pass customs, excise and bounties laws ceased. Now, up to that time no Commonwealth restriction on inter-State trade could possibly have been in contemplation. The financial provisions looking to the solvency of the States in the book-keeping period entirely precluded any idea of Commonwealth disturbance of the situation before uniform duties were established. Up to that time the only restrictions on inter-State trade were those of the States. And to those sec. 92 was and is directed. Its meaning is that from the moment the Commonwealth assumed legislative control on a national basis of the

(1) 2 Ex. D., 253.

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customs, all State interference with inter-State trade and commerce should for ever cease, and for that purpose Australia should be one country. It would have been idle to say that from that time Commonwealth interference should cease, because, according to the contemplation of the Constitution, it had never begun ; and not only would sec. 92 be useless for that purpose, but it would be mischievous. Although the provisions quoted are sufficient to guard the States from improper disturbance of natural commerce by Commonwealth legislation, sec. 92, if it applied to the Commonwealth, would, in our opinion, practically nullify sec. 51 (I.) altogether, and render impossible such measures as the *Australian Industries Preservation Act*, the *Secret Commissions Act*, the *Sea-Carriage of Goods Act*, and exclusive provisions in the *Post and Telegraph Act*, so far as they relate to inter-State transactions. This result would ensue in the case of the Commonwealth, whether sec. 92 were read as a prohibition *simpliciter*, or as involving the *discrimen* suggested that the restriction is not to be conditioned upon the " circumstance of passing from one State into another " (per *Griffith* C.J. in *Duncan's Case* (1)). As that is the only condition on which the affirmative power in sec. 51 (I.) is exerciseable, it follows that sec. 92 would be a simple negation of sec. 51 (I.).

One observation made by the Privy Council in the *Colonial Sugar Refining Co.'s Case* (2), and repeated in *John Deere Plow Co.* v. *Wharton* (3), is very pertinent to sec. 92. Quoting from the latter case, the passage runs thus : " If there is at points obscurity in language, this may be taken to be due, not to uncertainty about general principle, but to that difficulty in obtaining ready agreement about phrases which attends the drafting of legislative measures by large assemblages."

The Effect of including inter-State Regulations in a State Act.— Assuming, as we have decided, that sec. 92 prevents any effective restriction being imposed on inter-State trade by a State Legislature, the question remains whether a State Act purporting to place restrictions on trade generally without express words of distinction, can be treated as effectively restricting intra-State trade. This

(1) 22 C.L.R., at p. 574. (2) (1914) A.C., at p. 254; 17 C.L.R., at p. 653.
(3) (1915) A.C., 330, at p. 338.

question must depend on the terms of the State Act, and in our opinion the proper rule to apply in determining it is that where the State Act does not by express words or necessary implication make the restriction on intra-State trade dependent or conditional on the effective restriction of both inter-State and intra-State trade, it should be held to operate on intra-State trade.

We then have to consider whether any of the four methods of transacting business above detailed are outside the operation of the Act, because they are of an inter-State character. The first and third of these methods do not necessarily involve any act done outside Queensland or any transaction of an inter-State character. The goods offered for sale or agreed to be sold are not stated to be either by express stipulation or necessary implication supplied from New South Wales, or anywhere outside Queensland. A contract of sale if effected or the delivery of goods agreed to be sold might, at the option of the vendor, for all that appears, be consummated entirely within the State of Queensland. If so, it is impossible to say these transactions are of an inter-State character. A situation having considerable resemblance to this arises in provisions found in England and other parts of the Empire for service of writs out of the jurisdiction where breaches of contract take place within the jurisdiction. In *Comber* v. *Leyland* (1) a defendant abroad contracted to sell goods sent to him and remit the proceeds to England by bills, and he sold the goods and kept the proceeds. It was held that since his contract could all be performed abroad, no writ could be issued in England for service abroad. The first and third methods, as alleged, are consistent with either domestic or inter-State character. If the vendor elects to supply the goods from New South Wales, the actual movement of the goods from State to State would, of course, be inter-State trade and commerce; and would be protected accordingly. But the "offer for sale" and the "agreement for sale" would not be changed in character, and they are all we are concerned with as to the two methods mentioned. As to the second method, the traveller in Queensland does an act by which he aids or abets or becomes knowingly concerned in the making of a contract in New South

(1) (1898) A.C., 524.

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Wales which, if done in Queensland, would be an offence under sec. 12. By the terms of sec. 29 (7) he is deemed to have committed the offence itself, and is punishable accordingly. Now, the thing done outside Queensland which is imputed to the traveller, namely, a contract made according to the second method, is similar to the first and third methods; that is, it is a contract for goods which neither by the expressed terms of the contract nor by its implications are necessarily deliverable from any State but Queensland, and, therefore, is not shown to be an inter-State transaction. The offence, consequently, as far as appears is one relating to purely domestic trade. The fourth method, according to the criterion of inter-State trade, commerce and intercourse above stated, is distinctly an inter-State transaction.

For the reasons stated, the plaintiff fails as to the first three methods and succeeds as to the fourth.

HIGGINS J. The defence in this case admits in effect all the allegations of the statement of claim, and says that the claim—for declaration and injunction—is "bad in law." This pleading would cover an argument that the statement of claim discloses no cause of action; but such an argument has not been attempted by the defendants. If the Queensland Act and proclamation apply to the travellers of the plaintiff, it is the desire of all parties, as I understand, to have it declared whether the Act is valid or invalid. I confess, however, that I find it hard to see the cause of action. The case of *Dyson* v. *Attorney-General* (1) goes a long way, especially in its later phases, but not nearly so far as this case. I know of no cause of action arising out of the mere fact of prosecution, actual or threatened, unless it is alleged to be malicious; and then the person prosecuted must be the plaintiff. On the proceedings for a penalty against a traveller for the plaintiff, the point as to the constitutionality of the Act would be open to the traveller, and every other point that has been here raised. There is no analogy to proceedings in equity to restrain proceedings at law, where the ground used to be that the Court of law was not competent to entertain equitable doctrines. I think that I ought to express this doubt, as the matter will probably have to be some day further considered.

(1) (1911) 1 K.B., 410; (1912) 1 Ch., 158.

On the construction of the Act and the proclamation, I concur in the opinion that, if they are valid, the travellers of the plaintiff in Queensland are liable to a pecuniary penalty or imprisonment, under sec. 12.

What, then, is the effect of the Constitution on the Queensland Act? The meaning of our Constitution must be found in its own words; the Constitution of the United States does not contain our sec. 92, or our sec. 107. Under sec. 107 "every power of the Parliament of a Colony which . . . becomes 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 power to regulate inter-State trade, to make "laws" with respect to it, is vested in the Commonwealth Parliament by sec. 51 (I.); but it is not expressed to be "exclusively" vested: contrast sec. 52. Yet the power of the State Parliament to make a law restricting inter-State trade is, in my opinion, clearly "withdrawn" from the Parliament of the State by sec. 92, as from the time that uniform duties of customs were imposed. The 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." Whatever the doubt as to these words applying to restrict the powers of the Federal Parliament under sec. 51 (I.), there can be no doubt that they operate as a restraint on the State Parliament. "Free," in the context, means "exempt from restrictions in regard to trade" (*Oxford Dictionary*, sub "Free"). Already, under sec. 90, the States were deprived of power to impose duties of customs or of excise, or to grant certain bounties, and all the State laws imposing such duties or offering such bounties, ceased to have effect; but there still remained other restrictions made by the States as against States, and a power to make such restrictions, and it was to meet such restrictions that sec. 92 was inserted. For instance, South Australia absolutely prohibited the introduction of grapes from Victoria. This prohibition was originally owing to the danger of phylloxera, but the Act continued after the danger had ceased. Tasmania had an Act prohibiting the importation of fruit plants or other products

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packed in grass, straw, &c., if calculated to introduce into Tasmania the Queensland cattle tick (*Contagious Diseases* (*Cattle*) *Act* 1896). Queensland, in its turn, had an Act prohibiting the introduction of any plant, &c., likely to introduce any insect fungus or disease (*Diseases in Plants Act of* 1896, sec. 4). These and other such restrictions were terminated by sec. 92, and future restrictions of a similar character on trade, commerce or intercourse were forbidden. Sec. 91 is really an exception to the provision of sec. 90 as to bounties, and, when sec. 91 is seen in this aspect, sec. 92 appears in its true character, as extending the application of the principle contained in sec. 90—no more inter-State imposts (sec. 90); no more State restrictions of any kind, present or future, on inter-State trade or intercourse (sec. 92). There is not, to my mind, any ground whatever for confining sec. 92 to State imposts; for State imposts had been already dealt with in sec. 90.

The words of sec. 92 have, of course, to be read with sec. 112, which recognizes the validity of State inspection laws; and with sec. 113, which makes an exception as to intoxicating liquors passing into a State or remaining there for use, &c.; but these sections do not affect the position in this case. Nor does sec. 92 prevent the application of the State laws as to health, morals, &c., after the goods which have passed into the State have ceased to be the subject of inter-State commerce.

It is not strictly necessary, according to my view, to determine whether sec. 92 prohibits the Commonwealth Parliament as well as the State Parliament from restricting inter-State trade. But the point has been argued at much length, and, as our opinion on the subject must have a reaction on the main decision, I think it well to state my view. On the first reading of sec. 92, the generality of the words—"trade, commerce, and intercourse among the States . . . shall be absolutely free"—might seem to indicate that inter-State trade was to be free from all restrictions, whether State or Federal. Such a conclusion would leave an awkward gap in the Constitution; for it would mean that no authority in Australia, whether State or Commonwealth, could regulate any abuses of inter-State trade: but the fact that such a conclusion would be awkward is not by itself conclusive that there is not such a gap. It is to be

noticed, however, that sec. 92 follows two sections which impose or deal with prohibitions laid on States—as to customs, excise, bounties; and that the words "absolutely free" can reasonably be referred to a desire to prohibit State restrictions of all other kinds—especially such as I have instanced in the South Australian, Tasmanian and Queensland Acts. "Absolutely" does not mean "universally"; nor, when taken with "free," does it necessarily mean free from both Federal and State law-making powers; it may well mean "completely" as to the State power of restriction, the State power having been already partially taken away (as to border duties) by sec. 90. But, finally, it is our duty to give such construction to sec. 92 as will reconcile it with the other parts of the Constitution; and, if we are not to treat part of sec. 51 (I.) as nugatory, we are forced to treat sec. 92 as not denying to the Federal Parliament the power to make laws "with respect to trade and commerce . . . among the States." Of course, that power is "subject to this Constitution"; but the question is, does sec. 92 forbid the Federal Parliament to make such laws. We must not assume it. The restraints on the Federal Parliament in the exercise of this power are found, not in sec. 92, but elsewhere in the Constitution; for that Parliament must not discriminate between States in its taxation (sec. 51 (II.)), its bounties must be uniform (sec. 51 (III.)), its trade, commerce and revenue laws must not give preference (sec. 99); and as to intercourse see sec. 117.

I am of opinion that this Act of Queensland is invalid so far as it imposes a penalty on travellers in Queensland of a New South Wales firm, for selling, agreeing to sell or offering for sale goods to be sent from the firm's warehouse in Sydney. The same conclusion has been reached under the United States Constitution in the series of cases known as the *Drummer Cases* (*Robbins* v. *Shelby County* (1)). It is also clear that in the United States such a State law is invalid even though by its terms it applied equally to commerce within the State; discrimination in favour of State residents or State commerce is not necessary to be shown (*State Freight Tax Case* (2); *Robbins* v. *Shelby County*). This conclusion against the Queensland

(1) 120 U.S., 489.

(2) 82 U.S. (15 Wall.), 232.

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Act does not strike me as being in the least inconsistent with the *Wheat Case* (1) or with *Duncan* v. *Queensland* (2). As one who was not a party to the decision in the former case, I may be allowed to say that, even if I were not bound by the decision, I should regard it as perfectly sound, so far as regards that part of it which establishes the validity of the New South Wales Act impugned in the case. The decision in *Duncan's Case* is equally binding on us, and is, in my opinion, equally sound, although I cannot personally adopt all the reasons given. Counsel for the plaintiff here urged that it is distinguishable, and it clearly is. The State can make laws with respect to property and its ownership; the Commonwealth can make laws with respect to inter-State commerce; and a State law with respect to property and its ownership is valid except so far as it is inconsistent with—repugnant to—some valid Federal law (sec. 109). But in the present case the State Act is directly aimed at commerce, including inter-State commerce, forbidding sales except at certain maximum rates (sec. 12); whereas in the former cases the Act transferred ownership in goods, contingently or with qualifications, from A to B—from the stockowner to the Imperial Government. In the former cases the Acts were not with respect to commerce at all, although indirectly they may have affected inter-State commerce, as all changes in property may. In the present case, the Queensland Parliament, as to property which is vendible and persons who are competent to sell, forbids any sale except at certain maximum prices; in the former cases, the wheat or the stock was merely ear-marked and appropriated to the British Government, or as it should desire. The prohibition against sale contained in sec. 7 of the *Meat Supply for Imperial Uses Act of* 1914, discussed in *Duncan's Case*, was in aid of the ear-marking of the existing stock for the British Government; as if the words were "B is to have a first call on A's stock; therefore A must not sell to anyone else than B. But B can sell as he chooses." In short, sec. 7 (1) merely prohibited A from selling property which had passed (or would pass in certain contingencies) to B. It enforced a right of property; it did not prohibit sale on the

(1) 20 C.L.R., 54. (2) 22 C.L.R., 556.

part of the true owner. The line is fine, as in all these cases; but it is clear. The British Government was to have unrestricted power of sale, and its sub-purchasers would have unrestricted power to sell, inter-State or intra-State. In making this statement I do not rely merely on the principle that the words "all persons" in sec. 7 did not affect the King unless expressly named; but on the fact that by the express words of the Act the King was to have full power to dispose of any of the stock at will—for every contract was to be void "which may have the effect of prejudicing His Majesty in the *full and unrestricted* use, control, and *disposal* of any stock or meat (whether the same is or is not actually appropriated to His Majesty by an order made under this Act)" (sec. 7 (2)).

Much of the difficulty of these cases would, I think, be avoided if we keep steadily in view the fact that we have to determine in each case what is the *subject* of the legislation—what subject is the Act "with respect to" what it effects—not what things or operations it may indirectly *affect*. As stated lately by the Chief Justice of the United States, it is an elementary proposition that "the States are without power to *directly* burden inter-State commerce, and that commodities moving in such commerce only become subject to the control of the States or to the power on their part to *directly* burden after the termination of the inter-State movement" (*Rosenberger* v. *Pacific Express Co.* (1)).

GAVAN DUFFY J. Sec. 51 (I.) of the Constitution enables the Federal Parliament, subject to the Constitution, to make laws with respect to trade and commerce among the States. In my opinion the expression "trade and commerce among the States" means the exchange of commodities by way of sale or barter between the citizens of different States, and embraces every act necessary to accomplish that purpose, including the transport of commodities from one State to another.

Sec. 90 runs as follows:—"On the imposition of uniform duties of customs the power of the Parliament to impose duties of customs and of excise, and to grant bounties on the production or export of goods, shall become exclusive. On the imposition of uniform

(1) 241 U.S., at p. 50.

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duties of customs all laws of the several States imposing duties of customs or of excise, or offering bounties on the production or export of goods, shall cease to have effect; but any grant of or agreement for any such bounty lawfully made by or under the authority of the Government of any State shall be taken to be good if made before the thirtieth day of June, one thousand eight hundred and ninety-eight, and not otherwise."

If sec. 92 did not exist, the result of sec. 90 would be that on the imposition of uniform duties of customs existing State tariffs would disappear, but thereafter the Federal Parliament might impose any restriction on inter-State trade and commerce which was permissible under sec. 51, and a State Parliament under the powers reserved to it by sec. 107 might impose any restriction which it could theretofore have imposed other than a duty of customs or excise provided that such restriction was not inconsistent with a law of the Commonwealth within the meaning of sec. 109. What is the effect of sec. 92 on this state of things? It runs as follows:—"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. But notwithstanding anything in this Constitution, goods imported before the imposition of uniform duties of customs into any State, or into any Colony which, whilst the goods remain therein, becomes a State, shall, on thence passing into another State within two years after the imposition of such duties, be liable to any duty chargeable on the importation of such goods into the Commonwealth, less any duty paid in respect of the goods on their importation." The language of the section though in form affirmative is said in fact to prohibit any interference with the freedom which it prescribes, and we are asked to determine two questions:—(1) To what Legislature or Legislatures does the prohibition extend? (2) What is the exact nature of the freedom which it vindicates? In answer to the first question I would say that the language of the section clearly controls both the powers conferred on the Federal Parliament and those reserved to State Parliaments. In the circumstances which I have stated, I can imagine no language more appropriate for the purpose of limiting

the legislative powers of both classes of Legislature, or less appropriate for the purpose of limiting those of one class only. The freedom which the section confers, it establishes in a sphere beyond all Commonwealth or State powers by making it part of the Constitution. It is said that we should hold that the powers of the Federal Parliament are not affected by sec. 92 because, if they were so affected, the power expressly given to that Parliament to legislate with respect to trade and commerce among the States would be gone, and no authority in Australia, Federal or State, could regulate any abuse of inter-State trade. This alarming conclusion is arrived at thus. Sec. 92 forbids any interference with inter-State trade and commerce, and *ex hypothesi* applies to State Parliaments. If it also applies to the Federal Parliament, that Parliament cannot exercise any of the legislative powers granted by sec. 51 (II.), and the result is that there is no legislative authority, Federal or State, which can control inter-State trade and commerce. It would be deplorable that the suggested consequences should follow from an interpretation which gives their natural meaning to the words of sec. 92, but that would not justify us in forgetting that we are Judges and imagining that we are legislators. If the words of sec. 92 in their natural meaning were found to be inconsistent with sec. 51 we might be forced to seek for some means of avoiding the apparent antinomy. But no such dilemma can arise here, whatever be the meaning of sec. 92, if its provisions are part of the Constitution, because the power to legislate under sec. 51 is subject to the Constitution. The vice in the suggested argument lies in assuming that sec. 92 forbids every interference with inter-State trade and commerce; and this brings me to a consideration of the second question, namely, what is the exact nature of the freedom which the section vindicates? There are few epithets in the English language which extend over a larger area of meaning than the word "free" or vary more with the object qualified. The word "free" is often used to qualify the word "trade," and sometimes, though not so often, to qualify the word "commerce." When used with respect to trade and commerce among Sovereign States it ordinarily means no more than unrestricted by tariff or customs duties; it more

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rarely means free from all artificial restrictions or restraints conditioned on the international character of the trade or commerce; but freedom of trade and commerce never means freedom from regulation or control, or complete immunity from municipal law with respect to the acts which constitute such trade or commerce. No civilized nation has ever tolerated a trade or commerce, whether foreign or domestic, which was not subject to regulation and control both with respect to the method of carrying it on, and the general conduct of those who carried it on. It could not be contended that a treaty guaranteeing freedom of trade and commerce between two nations would enable the subjects of each, while carrying on such trade and commerce within the territory of the other, to ignore either the municipal laws regulating the general conduct of individuals within the State, or those prescribing the general conditions applicable to trade or commerce within the State. All that could be demanded under such a treaty would be equality of trading rights for the subjects of each nation in the territory of the other. I see no reason for attributing to the word "free" in sec. 92 any larger meaning than that which it naturally bears in the collocation in which it is there used. Indeed, to do so would immediately create an inconsistency between sec. 92 and sec. 51 (I.), for it would leave no room for the operation of the latter. Sec. 92 does not divide, it consolidates; it does not create two streams flowing through the State side by side, yet distinct and separate like the waters of two newly met rivers; it preserves the even flow of Australian trade throughout the Commonwealth by preventing discrimination against inter-State as compared with intra-State operations just as sec. 117 preserves the solidarity of Australian citizenship by preventing injurious discrimination between the residents of different States. Under sec. 51 (I.) Parliament has complete dominion over a free inter-State trade and commerce subject to this, that it must not by any law or regulation of trade or commerce give preference to one State or any part thereof over another State or any part thereof (sec. 99), nor abridge the right of a State or of the residents therein to the reasonable use of the waters or rivers for conservation or irrigation (sec. 100); but because the trade and commerce are to remain free, Parliament must not fetter the acts which constitute

such trade or commerce by any restriction or restraint conditioned on the fact that such trade or commerce is carried on between States. Whether a restriction or restraint is so conditioned is in every case a question of fact. A prohibition of or an impost on the import or export of a commodity would clearly be such a restraint, so also would be any injurious discrimination against foreign as compared with domestic products. In the *Wheat Case* (1) the New South Wales Legislature had prohibited the export of wheat and by the same statute had expropriated the wheat, and we held that those who no longer owned the wheat could not complain that any restriction was put upon its export. In *Duncan's Case* (2) the Queensland Legislature had prohibited the export of stock or meat, and we held that it was justified in doing so because the object of the statute was to expropriate such stock and meat as might be thought necessary and suitable for the needs of the King's army, and meantime to keep the whole mass *in statu quo* and subject to his accruing needs. In the present case the Parliament of the State of Queensland has not endeavoured to obstruct or burden the passage of any commodity into or out of its territory, nor, in my opinion, has it discriminated against inter-State trade or commerce. The enactment complained of is therefore not forbidden by sec. 92, and as it is not inconsistent with any law of the Commonwealth within the meaning of sec. 109, no question arises under that section.

It follows from what I have said that the State of Queensland is entitled to our judgment.

RICH J. I have had the advantage of perusing the judgment of my learned brothers the Chief Justice and *Isaacs* and *Starke*, and, agreeing with that judgment on all points, I should, but for one circumstance, have contented myself with simply stating my concurrence; but the circumstance that I am departing from my judgment in *Duncan's Case* (2) makes it proper for me to say why I do so. In *Duncan's Case* the judgment in which I took part was founded substantially, so far as I am concerned, on what I considered the "real object" of the Act. But for that, my judgment would have been the other way, in accordance with the view I had

(1) 20 C.L.R., 54. (2) 22 C.L.R., 556.

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already expressed in *Foggitt, Jones & Co.* v. *New South Wales* (1). In *McCawley* v. *The King* (2) I had to reconsider what was meant by the " object " of an Act. At p. 65 I stated, in conjunction with my brother *Isaacs*, the conclusion I then came to on that subject by the light of the opinions of Sir *Roundell Palmer* and Sir *Robert Collier*, and of judicial opinions referred to on the page mentioned. That conclusion was that " the object " of an Act is to be gathered from its necessary effect, and not from some purpose or motive which the Legislature may be supposed to have had. That conclusion was at the root of my judgment in *McCawley's Case*, and is opposed to the view which had been acted on by me previously in *Duncan's Case*. My later view has met with the approval of the Privy Council in *McCawley's Case* (3). It necessarily follows that, since I agree with the judgment of the Chief Justice and *Isaacs* and *Starke* JJ. in every other respect, my judgment in *Duncan's Case* presents no obstacle, and I join with them in their judgment.

Demurrer overruled as to matters mentioned in par. 11 *of the statement of claim and allowed as to the matters mentioned in pars.* 8, 9 *and* 10. *Defendants to pay the costs.*

Solicitors for the plaintiff, *Sly & Russell.*

Solicitor for the defendants, *W. F Webb*, Crown Solicitor for Queensland.

B. L.

(1) 21 C.L.R., 357. (2) 26 C.L.R., 9.
(3) (1920) A.C., 691; 28 C.L.R., 106.