reached their destination in New South Wales for the purpose of being there sold.

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Demurrer allowed with costs. Rule nisi discharged with costs.

Solicitors for the plaintiffs and for the applicant, *R. D. Meagher, Sproule & Co.*

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

J. B.

[HIGH COURT OF AUSTRALIA.]

EX PARTE NELSON [No. 1].

ON REMOVAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *March* 29, 30; *April* 2.

MELBOURNE, *Oct.* 22.

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

Constitutional Law—Trade and commerce—Powers of Commonwealth and State—Freedom of inter-State trade and commerce—Prohibition or regulation of importation of stock from another State—Customs and quarantine—Inconsistency of laws—State legislation—Commonwealth legislation—The Constitution (63 & 64 *Vict.* c. 12), *secs.* 51 (I.), (IX.), 90, 92, 106-109, 112, 117—*Quarantine Act* 1908-1924 (*No.* 3 *of* 1908—*No.* 30 *of* 1924), *secs.* 2A, 87—*Stock Act* 1901 (*N.S.W.*) (*No.* 27 *of* 1901), *secs.* 143, 154, 155, 158 (*j*).

The *Stock Act* 1901 (N.S.W.), by sec. 143, defines the word "stock" as meaning "cattle, sheep, goats, swine, dogs," &c., and the words "imported stock" as meaning "all stock arriving by land or by sea from any place whatsoever." Sec. 154 is as follows: "Notwithstanding anything herein contained, the Governor may, by proclamation in the *Gazette*, restrict, or absolutely prohibit, for any specified time, the importation or introduction of any stock, fodder, or fittings, from any other State or from any colony or country in which there is reason to believe any infectious or contagious disease in stock exists." Sec. 158 provides: "If any person . . . (*j*) does not when required give an inspector full information with respect to any imported stock,

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fodder, fittings, or effects, . . . then every such person shall be liable to imprisonment for any period not exceeding six months, or to a fine not exceeding two hundred pounds."

Informations were laid against the defendant charging him with having (1) unlawfully introduced certain stock by land into New South Wales from Queensland contrary to the provisions of sec. 154 of the *Stock Act* 1901 and proclamations thereunder, and (2) failed to give full information with respect to imported stock when required by an inspector under authority of sec. 158 (*j*) of the Act. He was convicted on both informations. The proclamations referred to prohibited or restricted for a period of three years the importation or introduction of stock into New South Wales from Queensland, coming from a specified district in which there was reason to believe infectious or contagious disease in stock existed. Applications by the defendant that rules nisi for writs of prohibition directed to the magistrate and the informants be made absolute having been removed from the Supreme Court to the High Court,

Held, by *Knox* C.J., *Gavan Duffy* and *Starke* JJ. (*Isaacs*, *Higgins* and *Powers* JJ. dissenting), that sec. 154 of the *Stock Act* 1901 does not violate the provision in sec. 92 of the Constitution that trade, commerce and intercourse among the States shall be absolutely free; and, by *Knox* C.J., *Gavan Duffy*, *Powers* and *Starke* JJ. (*Higgins* J. dissenting), that sec. 158 (*j*) does not violate such provision.

W. & A. McArthur Ltd. v. *State of Queensland*, (1920) 28 C.L.R. 530, applied.

By *Knox* C.J., *Higgins*, *Gavan Duffy* and *Starke* JJ.: Secs. 154 and 158 (*j*) of the *Stock Act* 1901 are not inconsistent with the Commonwealth power as to quarantine or with the legislation of the Commonwealth thereunder, and are therefore not affected by sec. 109 of the Constitution; nor do they violate the provisions of sec. 90 of the Constitution vesting the exclusive power of imposing duties of customs in the Commonwealth Parliament.

Per Isaacs J.: Sec. 158 (*j*) had, in this case, been applied to obtain evidence in aid of and to enforce the unlawful purpose of sec. 154 and the regulations thereunder.

Per Higgins J.: Sec. 158 (*j*) violates sec. 92 of the Constitution as it imposes a burden on people who cross the border because they cross it.

Held, that the rules nisi for prohibition should be discharged in both cases.

RULES nisi for writs of prohibition removed from the Supreme Court of New South Wales.

Oscar Ernest Edward Couch, an inspector of stock appointed under the *Stock Act* 1901 (N.S.W.), laid an information against George Nelson, alleging that on 5th September 1927, near Sunnyside, in the State of New South Wales, the defendant did not, when so requested by the informant, give to the latter full information

with respect to 221 head of imported cattle as required by the *Stock Act* 1901, sec. 158 (*j*). A second information against Nelson was laid by Samuel Rutherford Scott, an inspector of stock appointed under the Act, alleging that on 4th September 1997, near Jennings, in the State of New South Wales, the defendant unlawfully introduced 221 head of cattle by land into the said State from a portion of the State of Queensland described in Schedule S of a proclamation published in the New South Wales *Government Gazette* of 15th August 1924, made in pursuance of sec. 154 of the *Stock Act* 1901 and renewed from time to time, contrary to the said Act and proclamations made thereunder. The proclamation published in the *Government Gazette* of 15th August 1924 prohibited, for a period of twelve months, the introduction by land of any cattle from that portion of Queensland described in Schedule S of the proclamation unless compliance were made with certain stated conditions as to dipping the cattle, obtaining permits to travel and certificates showing full descriptions and brands from Queensland inspectors of stock, sealing of trucks, &c. The prohibition and conditions were renewed by a second proclamation on 14th August 1925 for a further period of three years. The cattle referred to had been consigned from Cooyar and Bell, places in Queensland situate within the area described in Schedule S, and were in the charge of Nelson in transit by land to Homebush, New South Wales, for the purpose of sale. The informations came on for hearing at the Court of Petty Sessions, Tenterfield, on 13th December 1927, when the Stipendiary Magistrate convicted the defendant upon both charges.

Nelson obtained rules nisi from the Supreme Court for a writ of prohibition directed to the magistrate and the informants to restrain them from further proceeding with the informations and convictions on the grounds (*inter alia*) that the actions of the informants were interferences with inter-State trade within the meaning of sec. 92 of the Commonwealth Constitution and that the State Act was a law of quarantine which was exclusively a power of the Commonwealth, and that sec. 154 of the *Stock Act* 1901 was inconsistent with Commonwealth legislation dealing with the subject, and therefore void.

As the matters involved questions as to the limits *inter se* of the constitutional powers of the Commonwealth and the State of New

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South Wales, the Supreme Court, on an application for the rules nisi to be made absolute, refrained from adjudicating upon them, having regard to secs. 38A and 40A of the *Judiciary Act*, and the matters were removed to the High Court and now came on for hearing.

The two applications were argued together.

The other material facts are stated in the judgments hereunder.

H. V. Evatt (with him *Dwyer*), for the applicant. Sec. 154 of the *Stock Act* 1901 infringes sec. 92 of the Constitution in that it imposes a burden on trade, commerce and intercourse among the States. It means, if valid, that the New South Wales Legislature can validly say that no cattle at all can be brought into New South Wales for the purposes of sale in inter-State trade, if there is reason to believe that there is a disease in stock in the State from which the cattle come. The section is not based on any existence of disease in fact in the State; it is not based on whether or not the cattle are diseased at the border. The cattle in question were the subjects of inter-State trade and any restrictions on such trade, whether the restrictions take the form of delaying it or stopping it altogether, are contrary to the provisions of sec. 92 of the Constitution that such trade should be "absolutely free." Sec. 154 clearly restricts the free flow of inter-State trade. The exception indicated in *W. & A. McArthur Ltd.* v. *Queensland* (1) does not go to the extent of saying that prohibition of the entrance into a State of animals which are perfectly healthy should be allowable. The exceptional type of case mentioned in that case at pp. 550-551, applies to general laws applying to all goods of a particular kind wherever they are in New South Wales. Sec. 154 is unlimited as to time, and is too wide to come within the power which *McArthur's Case* says exists. Sec. 154 does not subject Queensland cattle to the same laws as apply to New South Wales cattle. It makes a special law with regard to cattle in Queensland which necessarily excludes cattle in New South Wales; they are put in a distinct category, not under the same laws, and in fact it prevents them coming under the same laws. It is also a law with respect to quarantine. Under sec. 69 of the Constitution all matters that were

(1) (1920) 28 C.L.R. 530, at p. 551.

within the quarantine authority of the States became transferred to the Commonwealth. The *Quarantine Act* 1908-1920 is not limited to acts of quarantine of goods, &c., coming into the Commonwealth. Although a proclamation under sec. 2A (1) of the *Quarantine Act* has not yet issued, the sole question is whether legislation enacted by the Commonwealth Parliament has shown an intention to occupy the field, and by sec. 87 (1) (*v*) of that Act, as amended by sec. 4 of the *Quarantine Act* 1924, the Commonwealth Legislature has clearly shown its intention to be the sole authority to deal with this matter. Pars. (*c*), (*e*), (*f*) and (*g*) of sub-sec. 1 of sec. 13 of the *Quarantine Act* 1908-1920, as and where amended by the Act of 1924, are inconsistent with sec. 154 of the *Stock Act* 1901. The fact that power is given to one person by a Commonwealth Act to do a certain thing is, in the circumstances, inconsistent, within the meaning of sec. 109 of the Constitution, with a State Act giving the same power to other persons.

[ISAACS J. referred to *Oregon-Washington Railroad and Navigation Co.* v. *Washington* (1).]

Inconsistency really applies no matter which law is prior in time. The Governor-General must be the sole judge as to whether he is to exercise the powers given by sec. 13 of the *Quarantine Act*, and it is inconsistent with such provision of law that other persons should be able to do the same thing under sec. 154 of the New South Wales *Stock Act* (*Joseph* v. *Colonial Treasurer* (*N.S.W.*) (2)). The effect of *R.* v. *Smithers*; *Ex parte Benson* (3), is that a State law will survive an attack under sec. 92 of the Constitution if it can be shown that the State law is one merely of inspection; but, short of that, all State law dealing with trade and commerce among the States, at any rate interfering with it, is bad (*W. & A. McArthur Ltd.* v. *Queensland* (4); *Railroad Co.* v. *Husen* (5); *Asbell* v. *Kansas* (6)). "Quarantine" in the Constitution covers all the matters exercised by the Commonwealth Parliament in the *Quarantine Act*.

[ISAACS J. referred to *Encyclopædia of the Laws of England*, 2nd ed., vol. XII., p. 154, *sub* "Quarantine"; *Chitty's Statutes*, 6th ed., vol. I., p. 347, *sub* "Animals."]

(1) (1926) 270 U.S. 87.
(2) (1918) 25 C.L.R. 32.
(3) (1912) 16 C.L.R. 99.
(4) (1920) 28 C.L.R. 530.
(5) (1877) 95 U.S. 465, at p. 473.
(6) (1908) 209 U.S. 251, at p. 254

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It includes the measures taken for the prevention of the spread through the community of diseases whether internal or external (*Quick and Garran's Annotated Constitution of the Australian Commonwealth*, pp. 567, 568). Sec. 154 of the *Stock Act* 1901 is invalid as being in conflict with the exclusive power of the Commonwealth in respect to customs. A law relating to the importation of goods including a law prohibiting such importation into the Commonwealth is a customs law (*R.* v. *Sutton* (1)). If sec. 154 is bad as applying to stock coming from abroad the portion dealing with the introduction of stock from other States cannot be severed, and consequently must be bad also. As to the inconsistency between sec. 154 and the quarantine legislation of the Commonwealth the test is taken from *Union Steamship Co. of New Zealand* v. *Commonwealth* (2) and from *Clyde Engineering Co.* v. *Cowburn* (3), the principle being that there should not be a meticulous inquiry as to whether if all the conditions were gathered together in one Act they could be observed or complied with. The conviction under sec. 154 is bad on the ground also that the proclamation treats the State of Queensland as being divisible into parts. The section does not contemplate that such a division should be made. It refers to the whole State; therefore the proclamation must refer to the State as a whole. The conviction under sec. 158 (*j*) of the *Stock Act* is bad. That section creates a hindrance to inter-State commerce because in its operation it enables an inspector to search out facts as to importation. If sec. 154 falls, sec. 158 (*j*) falls with it as being ancillary to it.

Brissenden K.C. (with him *Nicholas* and *J. R. Nield*), for the respondents. The applicant's last point was dealt with in *City of New York* v. *Miln* (4) (referred to in *Quick and Garran*, at p. 526), where it was held that such a power was a police power and not a commerce power. As to the interpretation of sec. 154, the section by itself does nothing at all, and takes no operation except by reason of regulations made under it (*Pirrie* v. *McFarlane* (5)). Sec. 154 is

(1) (1908) 5 C.L.R. 789.
(2) (1925) 36 C.L.R. 130, at pp. 147-150.
(3) (1926) 37 C.L.R. 466, at pp. 489, 490, 524.
(4) (1837) 36 U.S. 102.
(5) (1925) 36 C.L.R. 170.

a valid exercise of the power of a State to exclude from that State anything which is harmful to that State or its inhabitants. The section is only intended to give the Governor power to prohibit the importation or introduction of stock, &c., from a State, colony or country, in which there is reason to believe any infectious or contagious disease in stock exists. The Court should confine itself to the question of what was done under the section, and not to what might be done. The section means that a restriction may be placed on stock by which infection may be conveyed to stock within the State. The Governor is to make such proclamation as is warranted by reason of disease in another State (*Duncan* v. *Queensland* (1)). If the State law is really not designed for the purpose of regulating inter-State trade, but is aimed at keeping out dangerous stock for the protection of its citizens, it is not in conflict with sec. 92 of the Constitution (*Kimmish* v. *Ball* (2); *Rasmussen* v. *Idaho* (3); *Reid* v. *Colorado* (4)). The framers of sec. 92 intended, with regard to animals which in no sense can be said to be merchantable articles, that a State should have power to take whatever steps it thought fit to protect itself from those animals. In order to determine the nature of the State statute it must be judged by the actual operation.

[HIGGINS J. referred to clause 10 of the proclamation.]

That clause empowers an inspector who requires further information to prohibit the introduction of stock for such time as may be necessary for the purpose of obtaining the information or making inquiries, and is good under the inspection power preserved by sec. 112 of the Constitution. The proclamation is authorized by sec. 155 of the *Stock Act* as well as by sec. 154. There is nothing in the proclamation which reasonably can be said to be unnecessary for the purpose, which is the exclusion of disease from New New South Wales (*Sligh* v. *Kirkwood* (5)). The New South Wales *Stock Act* comes within the principles established in that case at p. 59. It was never the intention of the drafters of the Constitution that the words " absolutely free " in sec. 92 should impose on the States a burden that no State, which has any power of self-government at

(1) (1916) 22 C.L.R. 556, at pp. 596, 597.
(2) (1889) 129 U.S. 217.
(3) (1901) 181 U.S. 198, at p. 201.
(4) (1902) 187 U.S. 137, at p. 146.
(5) (1915) 237 U.S. 52.

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all, should be called upon to bear, namely, that they should be the garbage heap for their neighbours. Inter-State trade and commerce must consist of articles which could be sold and paid for within the limits of the law. Cattle afflicted with tick are not merchantable in New South Wales (*Stock Diseases Act* 1923 (N.S.W.)). Sec. 112 of the Constitution must be read with sec. 92. An inspection law would be useless unless it enabled goods to be kept out if they did not comply with the provisions of the law (*Patapsco Guano Co.* v. *North Carolina* (1)). Sec. 154 of the *Stock Act* is a means for the ascertainment of the quality of the cattle brought into New South Wales. Interference by a State with commerce is allowed for purposes necessary for inspection. Goods must, of necessity, be delayed during the course of inspection, and a State must be able to prevent the importation or introduction of goods which do not pass the test of inspection.

[HIGGINS J. referred to *Foster* v. *Master, &c., of New Orleans* (2).]

Sec. 154 of the *Stock Act* is part of the general law of New South Wales and is in accord with *McArthur's Case* (3). [Counsel also referred to *Shafer* v. *Farmers Grain Co.* (4); *Corn Products Refining Co.* v. *Eddy* (5).]

H. V. Evatt, in reply. It is fallacious to commence consideration of this question by saying what the power of the State is. The State has power in a general way to regulate the entry of persons. The reasons of *Isaacs* and *Higgins* JJ. in *R.* v. *Smithers* (6) should be accepted. By reason of sec. 92 of the Constitution border duties cannot be imposed by a State; it cannot impose customs law, and sec. 154 of the *Stock Act* is practically a customs law. A State's power is limited to the passing of general laws applying to all persons, goods or animals within the State. As to "absolutely free," the Court cannot look at the restriction and say whether it is reasonable or too wide or too narrow (*Amalgamated Society of Engineers* v. *Adelaide Steamship Co.* (7)).

Cur. adv. vult.

(1) (1898) 171 U.S. 345, at p. 354.
(2) (1876) 94 U.S. 246.
(3) (1920) 28 C.L.R., at p. 551.
(4) (1925) 268 U.S. 189.
(5) (1919) 249 U.S. 427.
(6) (1912) 16 C.L.R., at pp. 111-119.
(7) (1920) 28 C.L.R. 129.

The following written judgments were delivered :—

KNOX C.J., GAVAN DUFFY AND STARKE JJ. The defendant was charged under the *Stock Act* 1901 of New South Wales that he unlawfully offended against Part IV. of the Act in that he did introduce by land into the State of New South Wales from Queensland certain cattle, contrary to sec. 154 of the Act and a proclamation made thereunder ; and also that he did not, when required by a stock inspector, give full information with respect to certain imported cattle, contrary to the provisions of sec. 158 (*j*). It was not disputed that the defendant did or omitted the acts complained of, and the argument presented to this Court was that Part IV. of the *Stock Act* conflicted or was inconsistent with certain legislation of the Commonwealth, namely, the *Quarantine Acts*, and was to the extent of the inconsistency invalidated by sec. 109 of the Constitution, or violated the provisions of sec. 90 of the Constitution, vesting the exclusive power of imposing duties of customs in the Parliament of the Commonwealth, or the provisions of sec. 92 of the Constitution.

The *Stock Act*, Part IV., under which the charges were laid, prohibits or regulates the introduction of cattle into New South Wales on account of real or supposed disease, and is what would be described as a quarantine law. The Act is within the constitutional competence of the State of New South Wales, for quarantine is a matter over which the States have concurrent power with the Commonwealth (cf. sec. 51 (IX.) and secs. 107, 108)—subject to the provision of the Constitution (sec. 109) that when a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail and the former shall to the extent of the inconsistency be invalid. In the present case there is no conflict or inconsistency. In the *Commonwealth Quarantine Act* 1908-1924, sec. 2A, are found these provisions :—(1) " Whenever the Governor-General is satisfied that an emergency exists which makes it necessary to do so, he may, by proclamation, declare that any or all measures of quarantine prescribed by or under any State Act shall, for such period as is specified in the proclamation, cease to have effect, and such measure shall thereupon cease to have effect accordingly. (2) The Governor-General may at any time revoke or vary any such proclamation."

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Knox C.J. Gavan Duffy J. Starke J.

The Federal law does not expressly purport to abrogate the State quarantine laws, but recognizes that they may exist and that "the safeguards which they create and the regulations which they impose" are capable of taking effect side by side with the Federal law.

The argument based on the exclusive power of the Parliament over customs may be summarily dealt with: the *Stock Act* of New South Wales does not impinge upon the customs power of the Commonwealth.

The argument based upon sec. 92 of the Constitution, prescribing that "trade, commerce, and intercourse among the States . . . shall be absolutely free," is, however, one of considerable delicacy, and demands careful consideration. The establishment of freedom of trade between the States is perhaps the most notable achievement of the Constitution: yet it would be a strange result, if that achievement had stripped the States of power to protect their citizens from the dangers of infectious and contagious diseases, however such dangers may arise. In a measure it must be conceded that the *Stock Act* of New South Wales does regulate the free flow of inter-State trade and commerce in stock. If there is reason to believe that any infectious or contagious disease in stock exists, the stock may be stopped at the borders of New South Wales, and if it enters it may in some cases be destroyed. The seeming conflict may be resolved, in our opinion, by considering the true nature and character of the legislation in the particular instance under discussion. The grounds and design of the legislation, and the primary matter dealt with, its object and scope, must always be determined in order to ascertain the class of subject to which it really belongs; and any merely incidental effect it may have over other matters does not alter the character of the law (see *Lefroy, Canada's Federal System*, pp. 210 *et seq.*, summarizing the effect of *Russell* v. *The Queen* (1) and *Attorney-General for Ontario* v. *Reciprocal Insurers* (2). The *Stock Act* of New South Wales is not in itself a regulation of inter-State commerce, though it controls in some degree the conduct and liability of those engaged in the commerce (cf. *Judson on Inter-State Commerce*, 2nd ed., sec. 33, p. 50). In truth, the object and scope of the provisions are to protect the large flocks and herds of

(1) (1882) 7 App. Cas. 829, at pp. 838-840. (2) (1924) A.C. 328, at p. 337.

New South Wales against contagious and infectious diseases, such as tick and Texas fever: looked at in their true light, they are aids to and not restrictions upon the freedom of inter-State commerce. They are a lawful exercise of the constitutional power of the State.

There are passages in *W. & A. McArthur Ltd.* v. *Queensland* (1) which in our opinion support this view:—"'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. . . . If" a person "brings goods into the State, he is free to do so, and to pass through the State with them . . . equally without hindrance or condition" imposed "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." It was insisted however, in the argument before us that, though a person becomes amenable to the State law as to mad dogs, for instance, or as to animals suffering from infectious or contagious disease, the moment he crosses the border-line of the State, yet no power under the Constitution, other than a Commonwealth law, can prevent him crossing the border-line with a mad dog, or with animals suffering from infectious or contagious disease. It is not easy to discern why the penalizing of an act done within the State in the course of inter-State commerce should be consistent with the provisions of sec. 92, and the penalizing of such an act done in crossing the State boundary should be inconsistent with them, if in each case there is territorial jurisdiction in the State Parliament; and it is satisfactory to know that the learned Justices of the Supreme Court of the United States have in a long series of decisions upheld the validity of the State quarantine laws under the American Constitution (see *Willoughby* on the *Constitutional Law of the United States* (1910), vol. II., sec. 314, p. 674).

The result of the opinion we have expressed is that the convictions of the defendant Nelson should be affirmed.

(1) (1920) 28 C.L.R., at pp. 550-551.

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Isaacs J.

ISAACS J. Sec. 92 of the Commonwealth Constitution, as part of the organic law of Australia, enacts that "Trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be *absolutely free.*" "Absolutely free," as determined by this Court, means "absolutely free" from State legislative interference. Sec. 154 of the New South Wales *Stock Act* 1901, as amended, says that the State Executive may by proclamation "restrict, or *absolutely prohibit,*" that trade and commerce and intercourse in respect of "stock," as defined by the Act, both by land and sea. It is gravely argued on behalf of the State, and this Court is seriously asked to hold, that these two provisions, which to the ordinary mind are in obvious polaric opposition, are nevertheless legally reconcilable with each other.

The situation vividly calls to mind the observation quoted and adopted by *Willes* L.C.J. in *Hervey* v. *Aston* (1), that "if this question were propounded to the best natural understanding unprejudiced by the learning of the law, the only doubt would be how this could come to be a question at all." It seems like burning daylight to state the reasons for one's inability to accede to the proposition. Nevertheless, the general importance of the subject, the ability with which it was argued on both sides, respect for differing views, and the dignity of the governmental authorities concerned, and also the public fact of the present functioning of the Constitutional Commission, make it desirable to state these reasons clearly.

The State Act is as plain and unequivocal in its terms as the Constitution. It reads almost as an open defiance: to the constitutional command "absolutely free," it responds with the counter-command "absolutely prohibit." No conflict could be more acute or aggressive: "free" leaves an open road; "prohibit" erects an impassable barrier. As to "absolutely," definition can scarcely make it more clear or emphatic. In *In re Pickworth*; *Snaith* v. *Parkinson* (2), *Rigby* L.J. says:—"What is the meaning of the word 'absolutely'? If an independent meaning can be given to it, it must be 'unconditionally'." And this applies to both Constitution and statute. The words of the State Act are: "The Governor may, by proclamation, . . . restrict, or absolutely prohibit, for any specified

(1) (1738) Willes 83, at p. 88.

(2) (1899) 1 Ch. 642, at p. 651.

time, the importation or introduction of any stock, fodder, or fittings, from any other State or from any colony or country in which there is reason to believe any infectious or contagious disease in stock exists." The statutory definition of "stock" in sec. 143 leaves it practically illimitable as to animals. A proclamation issued under that section in fact prohibited and restricted for a period of three years from 14th August 1925 the importation or introduction of stock, &c., into New South Wales from Queensland, coming from a designated district.

For merely driving the cattle over the border into New South Wales from Queensland, contrary to the proclamation, the appellant, a drover, has been arrested, locked up for several hours, convicted and fined £50, ordered to pay £33 11s. 4d. costs, and in default ordered six months' imprisonment with hard labour in Tamworth Gaol. Seeing that the offence was simply coming into New South Wales with the cattle—which were healthy—the appellant naturally asks in amazement: "Is this consistent with inter-State trade being absolutely free from State legislative interference?" The State answers: "Yes." For that position, apart from the more or less consolatory assurance of Colonel Lovelace that "Stone walls do not a prison make, Nor iron bars a cage," authority there is none. As a matter, however, that is too realistic to be settled by poetic phrases, it is important for two reasons to draw attention to the condition of the cattle. One reason is in order to understand to what extent the constitutional contention of the State power is pressed. The other reason is the necessity of considering the validity of a second conviction of the appellant, at the same time, but under sec. 158 (*j*). The second conviction was for not giving full information when required as to the cattle referred to.

Now, it is to be observed in the first place that the information and the conviction were both for not giving full information as to "imported stock," and for nothing else. The expression "imported stock," by sec. 143, means (not "includes") "all stock arriving by land or by sea from any place whatsoever." The information that was sought was as to where the cattle came from and the name and address of the owner. It was not a refusal of inspection, and so had nothing to do with any inspection law. In fact, inspection of

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Isaacs J.

the cattle was fully had, and they were found to be free from disease, as far as inspection could determine. Sec. 153 depends on examination and subsequent reports of the result of that examination. Until that is done, sec. 153 cannot operate further. The facts show very distinctly that the informations and convictions as to sec. 158 (*j*) were solely in aid of the breach of sec. 154 and the regulations thereunder, and were in assertion of the unrestricted power to exclude the stock of other Australian States. There was no suggestion of actual infection, or of any action or contemplated action under sec. 153. Sec. 153 obviously assumes that the stock were *lawfully* imported originally, and this is quite inconsistent with the proceedings actually instituted under sec. 154.

Official witnesses for the prosecution gave evidence as to the apparent condition of the animals on inspection, and as far as certification went, Mr. Wilson, the Assistant Stock Inspector for the State, said:—"I examined them closely. They appeared free from disease, judging by outward appearances. Only by the permit I knew that the Queensland authorities had passed the whole of the cattle free from disease." The permits put in by consent show that only two days before the cattle were seen by Mr. Wilson, they were certified as to 154 head by the Queensland inspector at Cooyar to be "clean and healthy," and could be travelled or removed to Wallangarra, which is on the border. The same appears to be the effect of the certificate of the Queensland inspector at Bell, respecting the remainder. There is no word of evidence that any of the cattle were unhealthy or infected, although, as the New South Wales Chief Veterinary Surgeon said, "the method of inspection is a manual one." That gentleman also admitted a certificate was given by the Queensland inspector at Cooyar that the 154 head had been dipped there. So that the two propositions, both under sec. 154 and sec. 158 (*j*) were in respect of cattle simply moving over the border, and not found or even believed to be infected.

On this appeal Dr. *Evatt* contended that sec. 154, on which plainly the whole matter ultimately rests, is invalid; and he relied on four separate grounds. They were (1) sec. 92 of the Constitution; (2) quarantine exclusive in the Commonwealth; (3) inconsistency

between the State Act and the Commonwealth *Quarantine Act* 1920; and (4) customs regulations exclusive, and sec. 154 inseparable.

Since, on the very face of the position, the first ground is fatal to sec. 154, and therefore to sec. 158 (*j*), as an aid to the former section, it is superfluous to consider the others. Before examining in detail the reasons offered for escaping the clear declaration of sec. 92, it is well to approach the question on its affirmative side.

Sec. 154, it cannot be doubted, strikes *eo nomine*, and therefore directly and openly, at inter-State trade, commerce and intercourse. Its expressed subject matter in part, namely, the restriction or absolute prohibition of goods passing into a State from another State—the act of "introduction"—is the most characteristic element of inter-State trade and commerce. It is true the Legislature in the exercise of its discretion has prescribed a form of procedure —proclamation—to be followed by the Executive. It is true also that the Legislature in further exercise of discretion has required certain conditions to be observed. But all that is immaterial. Form is nothing to the point. Conditions that discretion can alter or abolish are equally irrelevant. A "specified time" may be anything from a day to fifty years. "Stock" means any animals which the Executive chooses to call stock. "Infectious or contagious diseases" means any disease which the Executive so denominates. *The actual existence of disease is not essential.* It is sufficient if the Executive thinks it has "reason to believe" that some disease which it chooses to consider infectious or contagious exists, not in the cattle but somewhere in the State they come from. The "disease," real or imaginary, may be located or thought to be located, in one part of the State prescribed, and the stock may never have been nearer that part than one thousand miles; the "disease" may be one affecting dogs, and yet be a legislative reason for excluding cattle. In short, the section is a thinly disguised but complete assumption of unfettered legislative power over inter-State trade, precisely as that existed before Federation, when, as to legislative and executive action, the colonies were foreign countries relatively to each other, and when the word "Australia" was a mere geographical expression, and an Australian entering any

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colony other than his own was regarded as a stranger and might be called upon to leave his goods behind him or pay a tax for the privilege of bringing them with him.

If sec. 154 is valid, no substantial change has been effected by sec. 92. And yet, as every schoolboy knows (to use a familiar expression), without the guarantee it alone gives, Federation would not have been accomplished. *It withdraws from the States what would otherwise have been a concurrent power.* This I have more fully expressed in *Roughley* v. *New South Wales* (1). Sec. 92 is couched in terms that entrust its enforcement to the Courts, whose duty is limited to adherence to the words of the section, and not to the States according to their several notions of policy and welfare. Considerations of policy and welfare, as to whether any given statutory provision would advance or retard the inter-State commerce of the nation, are not excluded by the Constitution, but these, as always affecting necessarily more than one, and sometimes all, of the States, are placed in the sole and impartial hands of the general constitutional tribunal of all the States, namely, the Commonwealth Parliament, and are not left to any State to judge for itself as to the beneficial or prejudicial effect of the law on inter-State commerce, and least of all to any Court.

If, however, sec. 154 is still a possible State enactment, there are no visible limits to the State power. No valid legal reason could be assigned why for "stock" there might not be substituted "all goods whatsoever." Hides, milk, wheat, fruit, wearing apparel, furniture, and, in short, almost every article of commerce, could be treated as a *possible* vehicle of infection or contagion of the goods themselves. Sec. 154 has not stopped there. The Queensland authorities in this case say that the cattle are healthy and may be travelled to the border. The New South Wales authorities say, not that that is not true but that it may not be true, and, in any event, the State Executive says so. If the State legislative discretion can go so far, it has no limits that a Court can draw. A penalty is now the price of admission. The animals may be destroyed, or they may be consumed as healthy, but the penalty is required. And, finally, inasmuch as sec. 92 places human intercourse on the

(1) *Ante*, 162.

same footing as trade and commerce, the power of the State Legislature must by parity of reasoning extend to *persons* quite as far as it does to goods, so far as that section is concerned. A resident of Wodonga or of Wallangarra or of Perth, or, indeed, all Victorians or all Queenslanders or all Western Australians, could on that basis be "absolutely prohibited" for ten or twenty years or more, from entering New South Wales, simply because the State Executive considered there was "reason to believe" an outbreak of measles had occurred at Warrnambool, Cloncurry or Broome. Yet, urges the State in this case, such legislation would still leave intercourse between New South Wales and its neighbours "absolutely free." No Court could limit such a power. Once concede its existence, the Court must accept without question as to bona fides or motives the Sovereign's action, whether by advice of His legislative or His ministerial advisers.

The one concrete question is: Has the State Parliament in passing sec. 154 left inter-State trade and commerce absolutely free? The State contends that it has, for various reasons which ingenuity and perhaps the pressure of necessity have collected, and which have to be weighed and considered. For all or some of those reasons the State's contention, which in the last analysis is really the same idea couched in a variety of forms, is, and needs must be, this: that "absolutely" does not mean absolutely, and "free" does not mean free. "Absolutely," it is said, means "conditionally" or "provisionally" or "partially" or "subject to exceptions" or "unless the State in its own adverse interests or for its own single purpose thinks fit to restrict or prohibit." "Free," it is said, includes partial or total prevention, and may be accompanied with fine, penalty and punishment. The contention sounds like an aspersion on the English language. It has neither logic nor etymology to support it. It is opposed to the general understanding of the words. There is not a syllable in the Constitution or elsewhere that countenances it. If it were possible, then by force of the *lex talionis* sec. 92 would speedily find itself between the hammer and the anvil in six diverging policies, and would before long be battered out of recognition. For there is nothing whatever in the Constitution that draws any distinction

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with respect to sec. 92 between the State's legislative power in respect to health or fraud or morals or agriculture or internal trade or labour questions, or any other of the myriad unnamed but included subjects contained in its own Constitution. If it has the power of exclusion at its own unchallengeable will in respect of imaginary ticks in cattle, it surely has the same power of exclusion for the general welfare of those within its territory. The welfare of a people is not confined to protection from the possibility of disease in cattle. In a greater degree it consists in protection from human disease and human vice, often productive of physical disease or worse, and protection from everything which the accredited representatives of the people consider inimical to its present happiness or future progress, even in relation to the trade or industrial competition of its neighbours. No Court can, consistently with British precedent, embark on such an inquiry, or place in pre-eminence any of the departments of social economy, or choose which is the most important, or say which is deserving of exception from the express and precise words of sec. 92 of the Constitution, and which is not. This Court has formally renounced that unauthorized and hopeless task, but in this case has been virtually asked to resume it. The Court has shown in *McArthur's Case* (1) why sec. 92 on ordinary principles of construction could not apply to the Commonwealth. If it did, then, as there pointed out, sec. 51 (I.) would as regards inter-State trade have no operation whatever. As the Commonwealth Parliament could only regulate inter-State trade and commerce *as such*, it would follow that, if sec. 92 applied at all to the Commonwealth Parliament, that body could find nothing in the subject to operate on. And, as by hypothesis the State was at all events forbidden to restrict or prohibit it *as such*, the subject must needs go unregulated, except by the State Parliaments, and then only on a general and undiscriminating basis in each State, but with most assuredly different regulations in adjoining States. For that reason, *McArthur's Case* determined that the *application* of sec. 92 must, on recognized principles of construction, be limited to the States. As to interpretation, that is, as to *the meaning of its words*, when so applied, *McArthur's Case* did not leave the matter doubtful. Not once, but repeatedly, it declared that Australia

(1) (1920) 28 C.L.R. 530.

knew but one legislative authority on the subject of inter-State trade and commerce. Notably, and in terms of what would seem to be beyond all charges of ambiguity, it says of sec. 92: "Its meaning is that from the moment the Commonwealth assumed legislative control on a national basis of the customs, *all State interference* with inter-State trade and commerce *should for ever cease, and for that purpose Australia should be one country*" (1).

There are, on the broad question of national control of inter-State trade and commerce, some singularly apposite American judgments which run in the same direction, with even less constitutional direction. To go no further back than 1923, in *Pennsylvania* v. *West Virginia* (2), in the majority opinion, quoting from an earlier case with approval, we find this:—"We have said that 'in matters of foreign and inter-State commerce there are no State lines.' In such commerce, instead of the States, a *new power* appears and a *new welfare*, a welfare which transcends that of any State. But let us rather say it is constituted of the welfare of *all the States*, and that of each State is made the greater by a division of its resources, natural and created, with every other State, and those of every other State with it. This was the purpose, as it is the result, of the inter-State commerce clause of the Constitution of the United States. If there is to be a turning backward it must be done by the authority of another instrumentality than a Court." Notwithstanding these commanding considerations, which appear to leave no loophole for reasonable doubt, arguments have been advanced which have now to be reviewed, and which, it is claimed, justify our receding from the natural force of the extremely plain words of sec. 92. These arguments are reducible eventually to four grounds: (1) American decisions; (2) health requirements; (3) inspection laws; (4) prohibition and restraint are consistent with absolute freedom. To these should be added a further suggestion made during the argument, namely, (5) "introduction" is consummated only within New South Wales and therefore the State legislation is outside sec. 92 of the Constitution. I take leave to say, in advance, that whatever plausibility may at first sight appear from any of these reasons for departing from the natural meaning of sec. 92, it is always

(1) (1920) 28 C.L.R., at pp. 557-558. (2) (1923) 262 U.S. 553, at p. 599.

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dispelled by the inherent and insistent force of the words "absolutely free," and still the error comes back and demands admission, sometimes in a new dress, but always the same error. *Naturam expellas furca, tamen usque recurret.*

Naturally our starting-point for constitutional interpretation is *Amalgamated Society of Engineers* v. *Adelaide Steamship Co.* (1). That case affirms the duty of the Court simply to interpret the Constitution as it stands, and not to reshape it on grounds *either of necessity or expediency,* not to refashion it by means of implied prohibitions and restraints and qualifications that are not found in the *words* of the instrument on ordinary principles of construction, but originate in the judicial notion of what would be desirable or reasonable for political or social reasons. At p. 150 it adopts Lord *Loreburn's* words: "If the text is explicit the text is conclusive, alike in what it directs and what it forbids." That pronouncement was but the reaffirmation of the rule stated by *Tindal* L.C.J. for the Judges and adopted by the House of Lords in the *Sussex Peerage Case* (2). The learned Chief Justice said: "If the words of the statute are in themselves *precise and unambiguous,* then no more can be necessary than to expound those words in their natural and ordinary sense." It is extremely instructive as well as satisfying to observe that in some of the most recent judgments of the Supreme Court of the United States the same standard of construction as that followed in the *Engineers' Case* has now been applied. One of these is *Weaver* v. *Palmer Bros. Co.* (3), where it is said by the majority of the Court that "the constitutional guaranties may not be made to yield to mere convenience." Another case is *Tyson & Brother* v. *Banton* (4). That case held that a State enactment transgressed the due process of law clauses of the fifth and fourteenth amendments; and therefore the decision is not directly pertinent to our Constitution. But for general principles of construction it is greatly in point, and one judgment in particular almost seems to foreshadow a recasting in methods of approach. The majority judgment, after referring to fraudulent practices, the existence or apprehension of which was suggested in argument, says (5):—"But the difficulty

(1) (1920) 28 C.L.R. 129.
(2) (1844) 11 Cl. & Fin. 85, at p. 143.
(3) (1926) 270 U.S. 402, at p. 415.
(4) (1927) 273 U.S. 418.
(5) (1927) 273 U.S., at p. 445.

or even the impossibility of thus dealing with the evils, if that should be conceded, constitutes no warrant for suppressing them by methods precluded by the Constitution. Such subversions are not only illegitimate but are fraught with the danger that, having begun on the ground of necessity, they will continue on the score of expediency, and, finally, as a mere matter of course. Constitutional principles, applied *as they are written*, it *must be assumed, operate justly and wisely as a general thing*, and *they may not be remoulded by lawmakers or Judges to save exceptional cases of inconvenience, hardship or injustice.*" Those words are in strict accord with the line of reasoning in the *Engineers' Case* (1), and might well have been written in anticipation of the present case. The dissenting Justices (all of whose judgments are well worth reading), questioned, not the principle, but its application. Particularly would I quote some of the words of *Holmes* J. where, after referring to the " police power " as an " apologetic phrase," he says (2) :—" I do not believe in such apologies. I think the proper course is to recognize that a State legislature can do whatever it sees fit to do *unless it is restrained by some express provision in the Constitution* of the United States or of the State, and that Courts should be careful not to extend such prohibitions beyond their obvious meaning by reading into them *conceptions of public policy that the particular Court may happen to entertain.*" That, which as a statement of principle is not at all out of harmony with the majority opinion, is in direct line with the *Engineers' Case* and the British decision which it quotes and on which it is founded. If the learned Justice had found an express provision, such as we have now before us, it is quite evident he would have been among the majority. To the word " extend " in the passage quoted, it is obvious that there may with equal accuracy be added the words " or abridge " ; and then it applies exactly in this case. In the Australian Constitution the text of sec. 92 is more explicit—indeed the dictionary might be ransacked in vain to find an expression more emphatically clear than " absolutely free." The word " free," if used alone, and with respect to the individual's rights in relation to his fellows, has in certain collocations the necessary connotation that A's right must end where B's right begins,

(1) (1920) 28 C.L.R. 129.

(2) 1926) 273 U.S., at p. 446.

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and that in an organized society governed by law which a common consent can alter, rights, and consequently freedom, are relative terms. Otherwise it would be synonymous with "anarchy." But in the collocation found in sec. 92 no such considerations can arise. The "absolute freedom" predicated is not freedom in relation to individuals, nor is it freedom in relation to all law-making authority: it is "absolute freedom" in relation to one particular law-making power—the State—*totally excluding that authority from the subject but, apart from that, leaving it untouched as to all other subjects*, and leaving another law-making authority—the Commonwealth Parliament—free as to the subject specified. The mutuality of rights and freedom implied in the ordinary sense of freedom in relation to fellow-citizens is out of the question in sec. 92. If any word could preclude the notion of the freedom being qualified or conditional or relative, none could be selected more apt than "absolutely."

All State regulation made on the subject named is made *ultra vires*. But full power of regulation and control of that subject resides in the Commonwealth Parliament by virtue of sec. 51 (I.), as if Australia were a unitary country. Taking, then, the *Engineers' Case* (1) as a guide, we have to test each of the five grounds advanced by asking how do they prove that the Constitution in its text either shows that enforcing sec. 154 of the Act still leaves inter-State trade and commerce absolutely free, or elsewhere qualifies to the necessary extent its own text in sec. 92. That inquiry will be applied to each ground in order.

1. *American Decisions.*—At the threshold of this particular ground there stands what one would naturally think an instant and insuperable answer. It is *that in the text of the American Constitution there is no provision whatever corresponding to sec. 92 of the Australian Constitution.* How, in view of that potent fact, any American decisions can be even a persuasive authority to cut down the words of sec. 92, it is difficult—or more properly, impossible—to understand. On some questions, as already seen, American decisions are valuable. So far as they lay down general legal principles of construction, so far as they illustrate the nature of inter-State trade, its essential characteristics and incidents, and how it stands related

(1) (1920) 28 C.L.R. 129.

in fact to other events and circumstances of society, their assistance is respectfully and gladly welcomed as an influential and weighty contribution to subjects common to both countries. Moreover, the broad connotation of the national power over inter-State trade, as found in sec. 51 (I.) of our own Constitution, receives brilliant exposition in many of the cases decided in the United States, because the words, the subject matter and the relevant facts of life are in many material respects identical. But the moment we come to sec. 92 of our Constitution a divergence occurs. Instead of being useful aids, they may easily become misleading guides, and this because *sec. 92 was a conscious, explicit and unqualified departure from the actual terms of the American Constitution.* It may be that what is held to be *not permitted* to the States in America is similarly beyond their power in Australia, but in view of sec. 92 it is obvious that decisions holding certain legislation *competent* to States in America are irrelevant here. It was just because the American decisions upon the relative powers of the State legislatures with respect to inter-State trade and commerce left the question *at that point* so unsettled and indeterminate that the distinct and definite provision of sec. 92 was adopted.

The relevant decisions, of which *Cooley* v. *Board of Wardens of Port of Philadelphia* (1) is the prototype, began with an implied doctrine of the exclusive power of Congress to regulate inter-State trade, even when Congress is silent, an implication that the commerce power, corresponding to sec. 51 (I.) of the Australian Constitution, required that " commerce between the States shall be free and unobstructed " (see, for instance, *Cleveland &c. Railway Co.* v. *Illinois* (2)). Nevertheless, qualifications and distinctions were gradually introduced to modify the primary strictness of the implication. The case just referred to offers illustrations. The Court has expressly said it does not assume to trace " the line which separates the province of Federal authority, over the regulation of commerce, from the powers reserved to the States " (*Kidd* v. *Pearson* (3)), in 1888, only three years before the Commonwealth Bill of 1891. This followed the explicit statement of *Waite* C.J. in *Hall*

(1) (1851) 53 U.S. 299, at 319.
(2) (1900) 177 U.S. 514.
(3) (1888) 128 U.S. 1, at p. 16.

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v. *DeCuir* (1), where he said no arbitrary line could be drawn, and that as Judges not infrequently differ in reasons, even when they concur in result, it was far better that "a matter of such delicacy" should be settled in each particular case for itself. We find in *Kidd* v. *Pearson* (2) distinctions, for example, between "direct" and "indirect" interference; but the exact connotation of the word "indirect" is left in doubt. We also find a salient, so to speak, of State legislative power, protruding without express warrant into the domain of primarily exclusive national power, on the ground of health requirements and fraud, and other grounds included in what is conveniently but vaguely termed the police power. This salient, however, is indeterminate in extent, and is subject in each instance to considerations of what the Court thinks reasonableness, such as in period of exclusion or otherwise, and of what the Court holds to be legitimate or illegitimate articles of trade as being affected or not affected by disease or dishonesty. We can find a decision turning on whether the protection of game had reference to the preservation of food supply.

In *Prentice and Egan's* work on the *Commerce Clause of the Federal Constitution*, published in 1898, the winding course of the American decisions was traced up to that time. At p. 188 it was said, speaking of the line of demarcation, "the line which marks this distinction is, in many cases, exceedingly difficult to trace." It devotes a section to trying to distinguish between "regulation" and "restriction." At that and two following pages are found references to various decisions, and a statement showing that the *gist* is whether the State Act "prevents the free exchange of lawful articles of commerce between the States." And then another statement that the States may lay no "burden" whatever, for that amounts to "regulation"; while on the other hand it is frequently said, observe the authors, that in matters which are "auxiliary to commerce," or which "may be used in aid of commerce," the powers of the States, in the absence of Federal action, are unimpaired. Such cases were well known at the time both of the Commonwealth Bill of 1891 and of the Convention that framed the present Australian

(1) (1877) 95 U.S. 485, at p. 488. (2) (1888) 128 U.S. 1.

Constitution. They include *County of Mobile* v. *Kimball* (1), *Cardwell* v. *American Bridge Co.* (2) and *Leisy* v. *Hardin* (3). *Baker's Annotated Constitution of the United States* (1891), at p. 35, pars. 124 and 126, quoted authorities on the same lines. *Prentice and Egan*, on p. 190, said: "In some instances the distinction thus suggested has been carried in its application to a very considerable extent, and regulations which appear to act directly upon commerce have been sustained on the ground that their action imposed no burden." This, which is apparent from the cases, was, of course, mere judicial groping, very often on political territory, to find some plausible reason for allowing a State to regulate a subject judicially, and only judicially, declared by a major proposition to be exclusively national. The Court was merely trying to limit its self-adopted rule. These references, naturally far from exhaustive, are sufficient to indicate how dangerous it must have appeared, both to the earlier Convention which devised the Bill of 1891 and to the later Convention which framed our present Constitution, to leave the essential question of inter-State trade in the nebulous condition plainly resulting from American precedent, and in which the defendant in this case contends it is in Australia. They also demonstrate how hopeless is the endeavour to control the severe simplicity of the words "absolutely free" in sec. 92 by something not found in the Constitution itself, but merely by trying to tread in the footprints of the United States Supreme Court in interpreting the American Constitution. The course pursued by the American Courts according to *Willoughby* on the *Constitutional Law of the United States*, vol. II., writing in 1910, is (p. 665) "that the Federal Court will examine a State police regulation not only with reference to the fact whether or not it amounts to a direct regulation of inter-State commerce, but whether its provisions are in themselves sufficiently *reasonable, practicable, and just,* as to furnish *an excuse and justification* for the incidental interference with inter-State commerce which their enforcement will necessitate." And I venture to say that every one of the reasons advanced in this case to escape the plain words of sec. 92 fall within that proposition, which is wholly foreign to our Constitution

(1) (1880) 102 U.S. 691, at p. 697. (2) (1885) 113 U.S. 205, at p. 210.
(3) (1889) 135 U.S. 100, at p. 120.

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and to the recognized functions of our Courts, and contrary to the decision in the *Engineers' Case* (1).

The effort of the United States Court throughout, arising from the absence of any specific direction in the Constitution, is well expressed by *Brandeis* and *Holmes* JJ. in *Di Santo* v. *Pennsylvania* (2) in these words: "The delicate adjustment of conflicting claims of the Federal Government and the States to regulate commerce." That adjustment our Constitution did not leave to Judges, but as additional guarantee took it into its own hands by adding sec. 92 as a complement to sec. 51 (I.), thereby making *the Commonwealth power exclusive.* If the words of the Commonwealth Constitution be adhered to, there is no possibility of any irregular, indecisive and changing line of demarcation such as the American decisions present on the particular question with which we are immediately concerned. How fully is felt in America itself the difficulty of delineating any clear frontier in this region of the law may be appreciated by perusing an able article by Professor *Biklé* in the *Harvard Law Review*, vol. XLI., p. 200. The Australian Constitution, on the other hand, for the full assurance of those who were asked to accept it, and whose minds and hearts were set on complete national unity upon this subject, has drawn a straight, undeviating, Euclidian line. *There is no frontier line for this Court to draw: we have simply to follow the one laid down by the organic law.*

All that remains for the Court is to construe every State Act that is called in question, and to say whether on ordinary construction the legislation *crosses that constitutional frontier line.* Does the State Act assume to regulate, either avowedly, as in the present case, or by *necessary operation*, as in less overt instances, the subject of inter-State trade, commerce and intercourse? (*Attorney-General for Ontario* v. *Reciprocal Insurers* (3); *Toronto Electric Commissioners* v. *Snider* (4).) If it does, sec. 92 invalidates it. *On that subject* State legislative regulations are not legally possible for any reason or for any purpose, however benevolent. We cannot draw any distinction as to legality between State Acts which regulate the forbidden subject matter "directly" and those which do it "indirectly." What one

(1) (1920) 28 C.L.R. 129.
(2) (1927) 273 U.S. 34, at p. 42.
(3) (1924) A.C., at p. 339.
(4) (1925) A.C. 396, at p. 406.

must not do directly, it is not lawful to do indirectly (per Lord *Halsbury* in *Madden* v. *Nelson and Fort Sheppard Railway Co.* (1) and per Lord *Macnaghten* in *Bradley* v. *Carritt* (2)). Nor can we draw any distinctions between health and fraud as sources of power, and all other inherent subjects of State jurisdiction. Nor have we to reconcile two apparently conflicting sections, as secs. 91 and 92 in the Canadian Constitution, which allot in general terms various subject matters exclusively to two different legislative authorities, and which may therefore require " aspects " and " purposes " of any specific Act to be ascertained in order to discover to which category it more properly belongs (*Hodge* v. *The Queen* (3), *Attorney-General for Ontario* v. *Reciprocal Insurers* (4) and *Toronto Electric Commissioners* v. *Snider* (5)).

What this Court must do in a case like the present, while recognizing that the Act falls clearly within the State legislative authority as far as its subject matter is concerned, according to the State Constitution *as it existed before Federation*, is to discover whether it leaves or does not leave inter-State trade " absolutely free," judging of that by " the necessary effect " of the enactment (see *McCawley* v. *The King* (6), *Attorney-General for Ontario* v. *Reciprocal Insurers* (7) and *Toronto Electric Commissioners* v. *Snider* (8)), and interpreting the Constitution according to the natural meaning of the words " absolutely free " (*Engineers' Case* (9)). If it does not, it necessarily violates sec. 92 of the Constitution, no matter what the policy or motives of the legislation may be, whether it is thought by those who passed it, and still less by the Court, to be beneficial or inimical to inter-State trade. It is not uninteresting to notice, in passing, how closely the more recent decisions of America are, in the process of adjustment, now approximating to the standard above postulated. In *Di Santo's Case* (10) the Court says of State legislation directly regulating inter-State trade, " such legislation cannot be sustained as an exertion of the police power of the State to prevent possible fraud "—citing approvingly an earlier case. In the

(1) (1899) A.C. 626, at pp. 627-628.
(2) (1903) A.C. 253, at p. 261.
(3) (1883) 9 App. Cas., 117, at p. 130.
(4) (1924) A.C., at p. 341.
(5) (1925) A.C. 396.
(6) (1918) 26 C.L.R. 9, at p. 65; (1920) 28 C.L.R. 106, at p. 120.
(7) (1924) A.C., at p. 339.
(8) (1925) A.C., at p. 407.
(9) (1920) 28 C.L.R., at p. 152.
(10) (1927) 273 U.S., at p. 37.

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same volume is another case, decided also in January 1927, *Inter-State Busses Corporation* v. *Holyoke Street Railway Co.* (1), where the Court said of a State Act: "If as applied it *directly* interferes with or burdens appellant's inter-State commerce, it cannot be sustained *regardless of the purpose for which it was passed.*" (See also *Public Utilities Commission of Rhode Island* v. *Attleboro Steam and Electric Co.* (2).)

American decisions, then, may be laid aside so far at all events as they are supposed to lend any support to the State's contention.

2. *Health.*—This ground is largely coloured by American precedent. But that, for a plain reason, is, as stated, a misleading source. The judicial power that created the general implied prohibition also found its own qualifications of the implication. The authority that creates may mould and remould. That power this Court in the *Engineers' Case* (3) has disclaimed as a usurpation. It would be a dangerous usurpation, because in essence political. If we could admit "health" to be a legitimate ground of exception from the unqualified language of sec. 92, we could find no halting-place. *Sligh* v. *Kirkwood* (4) in the most convincing manner demonstrates that point so far as America is concerned, and the judgment of *Holmes* J. in *Tyson* v. *Banton* (5) confirms it. It was sought during the argument to put forward *McArthur's Case* (6) as sanctioning State health regulations of inter-State commerce. Surely this was an argument of desperation. It needs no deep scrutiny of that case to show how it is instinct with the very opposite opinion. The only sanction it gave to State legislation was on subjects *other than inter-State trade, commerce and intercourse.* At p. 545 it is said: "In our Constitution, sec. 92 was designed to ensure that inter-State trade and commerce should be *national and beyond controversy.*" At p. 550 the judgment proceeded to consider the nature of the absolute freedom predicated. It laid down that trade, commerce and intercourse consist of "acts" and not "things"; and that "absolute freedom" as to *those acts* does not connote freedom as to other acts—that is, as to acts not being acts of trade, commerce and intercourse. It emphasizes the

(1) (1927) 273 U.S. 45, at p. 50.
(2) (1927) 273 U.S. 83, at p. 90.
(3) (1920) 28 C.L.R. 129.
(4) (1915) 237 U.S. 52.
(5) (1927) 273 U.S., at pp. 445, 446.
(6) (1920) 28 C.L.R. 530.

right of a resident of one Australian State to enter every other State and mingle with his fellow Australians " without the least hindrance or condition on the part of the State he entered. But in answer to an argument of the defendant States, the judgment went on to say that if " while in New South Wales " (which was typified as the State entered) he there committed a breach of the local law *on other subjects*, he was as amenable to that law " *as any permanent resident of the State*," notwithstanding his right of original entry and notwithstanding any inter-State trade he might be engaged in. " If, for instance," says the judgment, " 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." At p. 552 it is decisively said :—" 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 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*." At pp. 557-558 occurs the conclusive passage quoted earlier in this judgment. Nothing, therefore, can be more certain than that *McArthur's Case* (1) is altogether inconsistent with any notion of exceptions to the words " absolutely free " in relation to State interference with inter-State trade. It took pains to show the contrary : but it also took pains to show that sec. 92 was not a charter of disobedience with respect to State laws *on other subjects* than that protected by sec. 92. Engaging in inter-State commerce does not give a safe conduct to commit every crime in the calendar. A man, while engaged in inter-State trade, cannot therefore with impunity commit bigamy, rape or murder, or sell his goods under

(1) (1920) 28 C.L.R. 530.

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false pretences, or pass false money, or assault the person he is trading with or become a public nuisance, contrary to whatever local law *on those subjects* is in force. But though *McArthur's Case* (1) makes it perfectly clear that inter-State operations are not a sanctuary for crime, it certainly is not a legitimate deduction from that, that liability to punishment for the crimes mentioned is an exception to the inviolability of inter-State trade from State regulation. Being a totally different subject, and it being assumed that all interference with acts of inter-State trade is excluded from the operation of the enactment, the word "exception" is out of place. The objection confuses the legal operation of the statute with the effect of the circumstances produced by the statute. For instance, a man is engaged in inter-State trade and one day commits an assault. A State Act imposes imprisonment upon him. His inter-State trade stops—not by force of the Act, but by force of the circumstances resulting from his conduct. No one can truly say that the *Act* interferes with inter-State trade. If the passage referred to in *McArthur's Case* liberates the State from obedience to sec. 92 in respect of health, it must also for consistency's sake liberate it in respect of all possible injuries to persons or property, all disturbances of the public peace, all goods thought to be dangerous or offensive for any reason, and by parity of reasoning in respect of contracts, and indeed of every subject of legislation within the Commonwealth. Perhaps too much time has been spent on this phase, but the importance of the subject atones for the weakness of the contention dealt with.

The "health" doctrine was further pressed on another ground. The notion, not seldom seen in American decisions, of goods likely to affect health not being legitimate subjects of commerce, and therefore outside sec. 92, was urged. To begin with, that notion is contrary to plain fact. If all goods unless irreproachable in condition are to be pronounced *extra commercium*, an utterly new conception of trade and commerce, unknown to business men, will have been arbitrarily created. The illegitimacy of goods in commerce has in some American cases been extended to such as are in themselves perfect but have fraudulent or misleading labels. That conception

(1) (1920) 28 C.L.R. 530.

could not be accepted here. If applied to persons, it would mean that there cannot in law be intercourse between a healthy and an unhealthy person. But again the argument proves too much. If traffic in goods that may or even would affect the health of animals or human beings are outside sec. 92, they are also outside sec. 51 (i.), and the Commonwealth Parliament would be without power to say a word about them.

At this point, since the nature of inter-State commerce is in question, American decisions are not without importance. In 1926 *Taft* C.J. delivered the unanimous judgment of the Court in *Thornton* v. *United States* (1). The case arose out of a prosecution for interfering with and assaulting Federal officers carrying out their duties under Federal laws. One of those laws was an Act in 1903 whereby the Secretary of Agriculture was authorized and directed from time to time to make regulations concerning the exportation and transportation of live-stock from any place within the United States where he *had reason to believe* a contagious cattle disease existed, into and through any other State or territory as he might deem necessary. Other Acts were Quarantine Acts. Under the regulations the Federal officers were acting by supervising the dipping for tick, &c. State officers actually dipped, once the cattle were in the State, and they did so under State laws relating to the dipping of all cattle in the country. The learned Chief Justice (2) distinctly stated that the passage of diseased cattle from one State to another "is inter-State commerce." He continues: "Not until suitable inspection by the Federal authorities and treatment prescribed for dipping of the cattle could the cattle be certainly rid of the ticks and splenetic fever and prevented from being a dangerous source of contagion in the State into which they were going." There was one further objection which should be noted. It was argued that though transporting cattle from one State to another is inter-State commerce, yet that merely permitting them to range across the State line without being transported or driven, was not. That was overruled, the Court saying: "It is intercourse between States made possible by the failure of owners to restrict their ranging

(1) (1926) 271 U.S. 414.

(2) (1926) 271 U.S., at p. 424.

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and is due, therefore, to the will of their owners" (1). That *Federal legislative power*, perfectly simple and effective when wielded by this lawful hand, has been assumed here by the State itself notwithstanding sec. 92, which forbids it.

3. *Inspection Laws.*—It was urged that sec. 112, by expressly permitting a State to levy, on "goods passing into" that State, charges necessary for executing its "inspection laws," by necessary implication recognized the power of the State to legislate so as to forbid the introduction of goods from other States. That implication, so far from being necessary, is impossible. The clause assumes the existence of what are called "inspection laws." It assumes that the act of inspection costs money, and that it is fair to make goods thought to require inspection bear the actual cost, and nothing more. If any surplus exists, the Commonwealth and not the State is to receive it; and the Parliament may, if it thinks fit, annul the inspection laws. There is nothing to support, and there is very much to displace, the idea that the Constitution intended by sec. 112 to give power to the State to exclude the goods altogether in any case whatever. It does not say so, and in view of sec. 92 it would need to say so very distinctly. If "inspection laws" are to be taken to include power of exclusion, it must have that meaning as to "imports and exports"—that is, exclusion of imports from its own territory and the retention of exports within its own territory. That would nullify sec. 52 (II.) as to customs and excise when read with secs. 69 and 90. But the words "imports and exports" imply that the goods are lawfully imported or exported, and the words "goods passing into or out of the State" imply that the goods lawfully pass into and out of the State. If the Commonwealth law forbade their introduction, sec. 112 would have no application to them; the whole section as a necessary implication shows that, except to the extent expressly enunciated by some section of the Constitution, the State has no power whatever over the acts of importation into, exportation from, or the passing into or out of the State, from or into another State. Sec. 113 has the same implication.

(1) (1926) 271 U.S., at p. 425.

But, further, what are "inspection laws"? The expression must be interpreted by its Australian connotation when the Constitution was passed, and not by what American decisions with varying standards have from time to time applied to that term. It is extremely useful, and indeed convincing, if one wishes to ascertain the inapplicability of American cases to this specific term, to read the judgment of *Blatchford* J. for the whole Court in *Turner* v. *Maryland* (1). The meaning attributed to the expression "inspection laws" was founded on the actual laws existing in the American colonies in 1789 and prior to and since that date. In short, it depended on the scope of what the American people before the foundation of Australia regarded as and called "inspection laws," even though the article dealt with was not itself in fact required to be "inspected." Again, in the case of *People* v. *Compagnie Générale Transatlantique* (2), the Court says that inspection is something accomplished by examining the thing or applying to it some crucial test. But "when testimony or evidence is to be taken and examined, it is not inspection in any sense whatever." On the other hand, in *Di Santo's Case* (3), *Brandeis* and *Holmes* JJ. said: "The licensing and supervision of dealers in steamship tickets is in essence an inspection law." True, the judgment was a dissenting one, but it was concurred in by *Stone* J., also dissenting. And the proposition mentioned was not directly controverted by the Court. The dissenting judgment defended the Act as being an inspection law, and as not placing any direct burden on commerce. It appears impossible to attach to the "inspection laws" of Australia the same connotation. Evidently, however, even the dissenting Justices would have held the so-called "inspection law" invalid if it had directly impeded or prohibited inter-State commerce. The majority held the law had, because, whatever else it did, it "by its necessary operation directly interferes with or burdens foreign commerce . . . regardless of the purpose with which it was passed" (4). American precedent, therefore, as to this, is beside the question, except so far as it is adverse to the State's contention. It is unnecessary, in the present case, to define the term "inspection law": it is sufficient to

(1) (1882) 107 U.S. 38, at pp. 39 *et seqq.*
(2) (1882) 107 U.S. 59, at p. 62.
(3) (1927) 273 U.S., at p. 39.
(4) (1927) 273 U.S., at p. 37.

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say that sec. 154 of the State Act is entirely outside the constitutional conception of an " inspection " law found in sec. 112.

4. *Prohibition and Restraint in relation to Absolute Freedom under Sec.* 92.—This has been incidentally, but with almost sufficient fulness, dealt with already. The " absolute freedom " predicated by sec. 92 is, as above stated, not the absolute freedom of the individual from the regulation of his conduct, even as to inter-State trade. He is as fully under the regulative control as to that subject by the Commonwealth Parliament under sec. 51 (I.) as if sec. 92 had never existed. Nor has he absolute freedom by sec. 92 in respect of any acts of conduct other than inter-State trade, commerce and intercourse. *McArthur's Case* (1) states that fully. All that sec. 92 guarantees is total immunity from any regulation (a) of those specified acts of conduct, (b) by the State.

Sec. 92, as explained, makes an exclusive legislative jurisdiction in that domain of Australian life. It follows that any legislative constraint whatsoever on those subjects *by the State* is a derogation of the guaranteed immunity. Those considerations would have to remain in the discretion of the grantor of the power or in that of any other authority to whom it is entrusted. And so here in the sphere of inter-State trade, any regulation of the subject by the State legislature is a restraint of action forbidden by sec. 92. The State cannot, on the principle of doing evil that good may come, transgress the clear prohibition in sec. 92. It can no more do that on the ground of the ultimate welfare of the people of the State or the Commonwealth, than could a schoolmaster, forbidden to punish his scholars, inflict corporal punishment on them on the plea that they will become better men. If a legislative authority is forbidden to pass a law inflicting the punishment of death, an enactment providing for capital punishment would not be saved on the ground that upon the whole it made human life safer. In that sphere, the Commonwealth only is the legislative regulator. As to other departments, sec. 92 is silent, and the State is unfettered unless a fetter is elsewhere imposed. But it may be repeated, and it cannot be too often repeated, that there is no room for interposing qualifications in the exclusion of the State from the designated

(1) (1920) 28 C.L.R. 530.

subject matter. The concept will not permit it. Whatever restraints and prohibitions are legally possible are entrusted by the Constitution to the Commonwealth Parliament, as alone competent to speak impartially for the people of Australia as a whole, and to hold the balance evenly between the States.

5. *Introduction a mere Intra-State Offence.*—It is somewhat difficult to analyse this suggestion without employing a term which instantly negatives it. As far as I can understand it, it is that as the offence created by sec. 154 can only be consummated on New South Wales soil, it is necessarily domestic, and so within the competence of the State Parliament to enact. Prior to Federation the point would have been indisputable. Of course, the local law could have prohibited the introduction of men or women or animals from any outside territory. And equally, of course, the offence could have been consummated only within New South Wales. But the act would have been an offence only because the local Legislature had jurisdiction to make it so, that is, jurisdiction over the subject matter of entering. An instance is afforded by *Peninsular and Oriental Steam Navigation Co.* v. *Kingston* (1), where the Commonwealth Parliament, being competent, as the Lord Chancellor said, to legislate on "trade and commerce" and "navigation," made the composite act of "*coming into* an Australian port with the seals broken" and having broken them abroad, an offence. But suppose the Commonwealth Parliament had been prohibited from interfering with foreign commerce and navigation, could the enactment have stood on the mere ground that the act was consummated only in Australian territory? The clear distinction between a right to enter territory and rights when within territory is shown by *Musgrove* v. *Chun Teeong Toy* (2). To accede to the suggestion would work havoc with the Constitution. The "introduction" of goods from one State to another necessarily begins in the first State and is only complete in the other. It is, however, at every point an "act" of inter-State commerce, and if that subject is to be protected at all, it must be protected as an "act" from terminus to terminus. Only *after* that "act" is completed and done with, and *then for some reason independently of*

(1) (1903) A.C. 471.

(2) (1891) A.C. 272.

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that "*act*," can the State domestic law operate. But that law does not operate by merely penalizing the "protected act," but by prescribing something—some act or some forbearance—subsequent to and irrespective of the act of introduction, and something which is not part of the act of inter-State trade, and therefore it does not conflict with sec. 92. If a law of New South Wales enacts that any person in that State found there in possession of diseased cattle is subject to penalty unless he destroys them, the mere fact that he is engaged in inter-State commerce casts no protecting shield over him or them. Such a law does not directly, and I assume that from its undiscriminating terms, it does not indirectly, operate on inter-State commerce. It does not operate on *commerce* at all. It applies, it is assumed, merely to circumstances of possession of certain cattle confined to New South Wales. But to forbid the "introduction into the State" of goods from other States operates directly, and, if necessary, solely on inter-State trade, and applies to circumstances beginning in another State and forming with the entry into New South Wales a continuous "act" of inter-State commerce. If that is permissible, then on the other side of the border it may be made an offence to attempt to introduce any goods therefrom into New South Wales. Any such attempt would necessarily take place in Queensland. So easily could sec. 92 be erased. Even in the absence of that distinct provision, such a law would be invalid in America (see *Western Union Telegraph Co.* v. *Brown* (1)). And as there can be no distinction between State powers, except so far as made by its own Constitution, a tax could be imposed on either side on the same line of reasoning. The suggestion, if adopted by the Court, would practically undermine the foundations of the Constitution.

Sec. 158 (*j*).—It only remains to be added that the prosecution under sec. 158 (*j*) must share the same fate as that under sec. 154. Sec. 158 is one of a fasciculus of secs. 143 to 160 inclusive, bound up together as a special code under the heading "Imported Stock." That expression, as already stated, is defined as "all stock arriving by land or by sea from any place whatsoever." "Arriving," of course, means arriving in New South Wales. Sec. 158 (*j*) is, I repeat, a mere appendage to the main provisions. Sec. 154 is the only

(1) (1914) 234 U.S. 542.

section to which, in the admitted circumstances of this case as already narrated, the provisions of sec. 158 (*j*) were sought to be, or could in any reasonable sense have been, applied. Assuming, therefore, that in other circumstances sec. 158 (*j*) could be validly enforced, it was in this case applied to obtain evidence in aid of, and in order to enforce the unlawful purpose of sec. 154, and therefore the conviction is bad and should be set aside.

HIGGINS J. This case turns on the effect of sec. 92 of the Constitution, the section which we have discussed in *Roughley* v. *New South Wales* and *Ex parte Beavis* (1). There were three informations and three convictions of a drover of cattle from Queensland into New South Wales; and the Full Court of New South Wales, to whom *James* J. referred the orders nisi for prohibition, having found one (alleged) offence not proved, and the two others proved (under sec. 154 and sec. 158 (*j*) of the New South Wales *Stock Act* 1901 respectively), the two orders nisi are automatically removed to this Court, by virtue of sec. 40A (1) of the *Judiciary Act* 1903-1910.

The State Act that has to be considered in this case is the *Stock Act* 1901. Both the sections infringed appear in Part IV. of the Act, which part deals expressly with "imported stock"; and by sec. 143 "'imported' stock means all stock arriving by land or by sea from any place whatsoever"—that is to say, arriving in New South Wales. The stock—221 head of cattle—arrived in New South Wales by land, from Queensland, for the purpose of being sold at the Homebush market near Sydney.

The words of sec. 154 are:—"Notwithstanding anything hereinbefore contained, the Governor may, by proclamation in the *Gazette*, restrict, or absolutely prohibit, for any specified time, the importation or introduction of any stock, fodder, or fittings, from any other State or from any colony or country in which there is reason to believe any infectious or contagious disease in stock exists." A proclamation was issued annually for twelve months, each time by publication in the *Gazette*, as to stock, &c., being imported or introduced into this State (New South Wales) by land or sea from the State of Queensland; and, by clause 11 of the proclamation, it

(1) *Ante*, 162.

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was provided: "Except as hereinafter in this proclamation provided, no . . . cattle . . . shall be introduced by land into this State from that portion of Queensland described in Schedule S." The cattle in this case came from the territory described in Schedule S. According to clause 13, cattle from that territory, if they have received their last treatment at Helidon (Queensland) and otherwise complied with certain Queensland regulations, may be admitted at Wallangarra (on the border) on certain conditions—that seven days' notice be given to the New South Wales inspector at Wallangarra with full particulars, that the cattle shall travel in trucks disinfected to the satisfaction of a Queensland inspector, &c., before being loaded, that the inspector, &c., shall indorse the permit, that they shall be trucked within twenty-four hours of treatment at Helidon and if free from infection be twice dipped, that they shall be accompanied by a certificate showing full description and brands signed by the Helidon inspector, that the first dipping at Wallangarra shall take place not less than five nor more than fourteen days after dipping at Helidon, that they shall be admitted only for immediate slaughter at the place to which consigned. There are also provisions applicable to all stock from Queensland, whether from the Schedule S territory or not, forbidding the introduction of stock, except at certain named crossing-places (Wallangarra is one of them), for yarding of stock and inspection and treatment by an inspector, for dipping of stock, &c. (clauses 2 to 10).

Now, assuming—the assumption seems to be doubtful—that this proclamation is such as was contemplated by sec. 154, the question is: Is sec. 154 with—or without—this proclamation valid in face of sec. 92 of the Constitution? The section and the proclamation are pointed directly at the introduction of the cattle over the boundary line between the States. The section and the proclamation are aimed straight at the importation or introduction of commodities for the purpose of trade and commerce: they restrict, burden, impede the introduction of the stock from Queensland into New South Wales; and, in my opinion, they therefore offend against sec. 92 of the Constitution, which prescribes that "trade, commerce, and intercourse among the States . . . shall be absolutely free."

The position was very different under the *Farm Produce Agents Act* 1926 (N.S.W.). There, the State law merely regulated the status and conduct of persons acting as produce agents in New South Wales. The relation of such agents to their principals, even if their principals are in other States, is not in itself inter-State commerce; the rules which prescribed the conduct of all vendors in the local market-places were not rules directly bearing on inter-State trade, although they incidentally might affect it, favourably or unfavourably; the subject of the legislation was not inter-State trade.

It does not in the least follow from this view that the State of New South Wales cannot protect its stock or its people from infectious or contagious diseases. Those powers are still preserved to the State Legislature by sec. 107 of the Constitution. The power of that Legislature remains, not having been exclusively vested in the Commonwealth Parliament or withdrawn from the State Legislature; and the fact that the stock have been introduced into New South Wales from Queensland does not prevent such precautionary or other Acts against the spread of disease or the consumption of unwholesome food as the Legislature may see fit to impose. The point is that the boundary-line between the States cannot be taken as the *discrimen* for the rule sought to be imposed, although it has to be taken as the *discrimen* in determining whether the New South Wales Act applies, as no State has jurisdiction beyond its own boundaries (*Macleod* v. *Attorney-General for New South Wales* (1)).

It is well worthy of notice that this sec. 154, in this Act of 1901 passed after the Commonwealth Constitution came into force, is copied *verbatim* from the *Imported Stock Act of* 1871—an Act passed at a time when the Constitution was not in existence and when there was no sec. 92 to prohibit laws in restraint of inter-State commerce. But sec. 154 has inserted the words "from any State," as the Constitution provided for "States." The Act of 1871 recited: "Whereas it is expedient to prevent the introduction into or spreading within the *colony* of all infectious or contagious diseases to which cattle or sheep are or may be subject and for that purpose to regulate and control the *importation* and introduction of

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

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all cattle and sheep and to ensure their destruction in certain cases." So that, unquestionably, each Act—the Act of 1871 as well as the Act of 1901—was aimed at the restriction of importation. But under the Act of 1871 the expression "imported stock" meant (unless the contrary appeared) "all stock arriving by sea not the produce of the Australian colonies" (sec. 1); whereas under the Act of 1901, the expression means (unless the contrary appears) "all stock arriving in New South Wales *by land or by sea from any place whatsoever*" (sec. 143). The explanation of the words at the beginning of sec. 10 of the Act of 1871 which have been repeated in sec. 154 of the Act of 1901 was, no doubt, to make it clear that sec. 10 was to apply to stock introduced by land from other colonies or States even if they were Australian produce. There can be no doubt, therefore, that sec. 154 of the Act of 1901 as well as sec. 10 of the Act of 1871 was meant to restrict the importation in course of commerce of stock from other States; and such a restriction is the very thing that sec. 92 of the Constitution forbids. Such, at least, is my opinion, as I have explained in *Ex parte Beavis* (1). From 1901 onwards, State boundaries are obliterated as to the movement of goods in commerce; although State boundaries have to be regarded in determining the applicability of State laws for the prevention of disease, &c.

I am, therefore, of opinion that the rule nisi for prohibition should be made absolute in the proceedings relating to the offence charged under sec. 154 of the *Stock Act* 1901 (N.S.W.).

The question as to sec. 158 (*j*) is not so simple, to my mind. The Act in that section says that if any person "does not when required give an inspector full information with respect to any imported stock, fodder, fittings, or effects" every such person shall be liable to imprisonment or fine. There is here no restriction or prohibition as to crossing the border; but there is a burden placed on those people who cross the border, because they cross it. The clause is confined to *imported* stock; so that the duty is imposed on a drover in respect of the act of importing. The burden may be greater or less, according to circumstances; but if it is a burden at all it is forbidden. In my opinion the order nisi for prohibition should be made absolute in these proceedings also.

(1) *Ante*, 162.

Counsel for Nelson have relied, not only on sec. 92 of the Constitution, but on the arguments: (1) that sec. 154 as a law of quarantine is beyond the powers of the State—that the Commonwealth power under sec. 51 (IX.) is exclusive; (2) that sec. 154 is inconsistent with the legislation of the Commonwealth in the *Quarantine Act* 1908-1924, and (3) that sec. 154 is really a law as to customs, and therefore within the power of the Commonwealth exclusively. From my point of view, as I regard the section as invalid by reason of sec. 92 of the Constitution, it may be unnecessary to give an opinion on these other grounds. But the subject has been closely argued; and, to prevent any misunderstanding of my attitude, I venture to say that I agree with the Chief Justice, *Gavan Duffy* and *Starke* JJ. that the section is not invalid on any of those grounds. In my judgment in *Ex parte Beavis* (1) I have given my reasons for thinking that the Commonwealth power under sec. 51 to make quarantine laws is not an exclusive power—that the States can make quarantine laws as before Federation, but with these qualifications: (1) that the State quarantine laws are invalid if and so far as they contravene sec. 92, and (2) that the State laws, if they are inconsistent with any valid Commonwealth law, are invalid to the extent of the inconsistency (sec. 109). I have carefully considered the section of the Commonwealth *Quarantine Act* to which Dr. *Evatt* has referred us as involving inconsistency, and I cannot find therein any inconsistency. Nor do I regard any silence on a subject within the powers of the Commonwealth as any indication that there is to be no interference by the State on that subject. Nor can I regard sec. 154 as being a customs law for the purposes of sec. 92 of the Constitution, and as therefore being beyond the competence of the State Legislature.

POWERS J. I agree with my brothers *Isaacs* and *Higgins* that the conviction against Nelson for importing the cattle in question from Queensland into New South Wales should be set aside and, therefore, that the order for the rule nisi should be made absolute.

The facts of the case and the material sections of the State Act and of the Constitution to be considered have been fully set out in

(1) *Ante*, 162.

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the reasons for judgments just delivered; and it would be useless to repeat them at length. Shortly, Nelson was a drover who imported cattle from Queensland into New South Wales on the way to the Homebush Sale Yards near Sydney, New South Wales, for sale. The magistrate who convicted Nelson found (*inter alia*) that the cattle in question were introduced into the State of New South Wales from the State of Queensland by the defendant; and that the said cattle were consigned from Cooyar and Bell, Queensland, and were in transit to Homebush in the State of New South Wales for the purpose of sale. Nelson was therefore engaged in inter-State trade or commerce at the time he imported the cattle into New South Wales, and he claimed that no State law could legally prevent him from bringing the cattle in question into New South Wales consigned for sale at Homebush, near Sydney. He was, however, prosecuted under sec. 154 of the *Stock Act* 1901 (No. 27 of 1901)—a State Act—for introducing into the State of New South Wales from the portion of Queensland described in a certain proclamation as schedules, certain cattle, to wit, about 220 bullocks and one cow. The Act in question was the *Stock Act* of New South Wales, No. 27 of 1901, the material provisions of which are fully set out in the judgment of my brother *Higgins*. The words of the particular section in question (sec. 154) are: "Notwithstanding anything herein contained, the Governor may by proclamation in the *Gazette* restrict, or absolutely prohibit, for any specified time, the importation or introduction of any stock, fodder, or fittings from any other State or from any colony or country in which there is reason to believe any infectious or contagious disease in stock exists." A proclamation issued under that section prohibited and restricted for a period of three years the importation of stock into New South Wales from Queensland coming from a "designated district" in any part of which there was reason to believe any infectious or contagious disease in stock existed.

The appellant claimed that the Parliament of New South Wales could not legally pass such an Act because it directly interfered with his right to carry on inter-State trade and commerce free from interference from any State law. He claimed that right because the Constitution, by sec. 92, declared in the clearest of language that "on the imposition of uniform duties of customs, trade, commerce,

and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free." The State Act in as clear language declares that the Governor of the State of New South Wales may, by proclamation, *restrict, or absolutely prohibit* for *any* specified time the importation of any stock, &c., from any other State or from any colony or country in which there is reason to believe any infectious or contagious disease in stock exists. The State Act and the Constitution are inconsistent, and the provision in the Constitution must prevail.

The right to bring cattle, the subject of inter-State trade, from one State into another is preserved by the Constitution (sec. 92), and that right cannot be restricted, prohibited or hindered by any State law made in respect of or directly affecting inter-State trade or commerce, however desirable or necessary the State Parliament may think that such an Act is at the time. It is contended that a State can still prohibit the importation of any cattle " coming from a district where the State authorities have reason to believe disease in cattle is prevalent." No such condition is contained in sec. 92 or in any other section of the Constitution, and until the *Engineers' Case* (1) and *McArthur's Case* (2) are overruled by this Court I do not feel justified in implying such a power in the States, however desirable it would be to prevent such cattle entering into a State. The cases referred to are opposed to implying such a power in the Constitution, especially as sec. 92, in express words, is in my opinion an absolute prohibition of any such power—by declaring that inter-State trade and commerce shall be absolutely free. The State may, however, by general domestic laws, once persons, cattle or goods enter or are brought into a State—whether they are or are not at the time the subject of inter-State trade, commerce or intercourse—protect its people in the way mentioned in *McArthur's Case* to which I refer later on. The " interpretation " given to sec. 92 by this Court was given in *McArthur's Case* (3) in the following words : " Its meaning is that from the moment the Commonwealth assumed legislative control on a national basis of the Customs, all State interference with inter-State trade and commerce should for

(1) (1920) 28 C.L.R. 129. (2) (1920) 28 C.L.R. 530.
(3) (1920) 28 C.L.R., at pp. 557-558.

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ever cease, and for that purpose Australia should be one country." I feel bound by that interpretation, read with the subsequent words referring to the powers of the State to protect itself after persons, stock or goods once enter or are brought into a State—even if they are engaged in or are the subject of inter-State trade. In their joint judgment in *McArthur's Case Knox* C.J., *Isaacs* and *Starke* JJ. said (1) :—" 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 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.'" Further on in the same judgment it was said (2) :—" 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 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." This Court has also recognized in previous cases that sec. 92 must be read with sec. 51 (I.) giving express power to the Commonwealth Parliament to deal with " trade and commerce with other countries and among the States," and that the section must also be read with

(1) (1920) 28 C.L.R., at p. 551. (2) (1920) 28 C.L.R., at p. 552.

secs. 106, 107, 108, 112 and 113 of the Constitution. The law in question here is a law dealing directly with inter-State trade and commerce, and is a law directly affecting and preventing inter-State trade and commerce between the States of Queensland and New South Wales. As I hold that sec. 154 of the State Act referred to is inconsistent with sec. 92 of the Constitution, and therefore invalid, I do not propose to deal with the other questions raised, especially as they have been fully dealt with by my brothers *Isaacs* and *Higgins*.

I therefore hold that the conviction of Nelson for importing the cattle in question in the circumstances from Queensland into New South Wales, while the cattle were the subject of inter-State trade, should be set aside, and that the rule nisi should therefore be made absolute.

In the other case Nelson was convicted under sec. 158 (*j*) of the same Act, namely, the *Stock Act* 1901, for refusing to answer questions put to him by an inspector of stock. The charge in the information was that he (Nelson) did not, when required by this informant (Couch), give this informant, an inspector as aforesaid, full information with respect to certain imported stock, to wit, 221 head of cattle. The cattle in question were the cattle referred to in the information laid against Nelson by Scott, imported from Queensland and on the way to the Homebush Sale Yards in New South Wales for sale. The cattle were admittedly the subject of inter-State trade and commerce. The cattle were at the time aforesaid in the State of New South Wales, about six miles from the border, on their way to the Homebush Sale Yards. The question to be decided in this case is whether an inspector of stock can legally require the information sought in this case from a person in charge of cattle found in New South Wales if they are imported cattle on the way from Queensland to a recognized place of sale in New South Wales, and whether the person in charge of such cattle can be legally fined if he refuses on demand to give to a New South Wales inspector of stock information in his power about the cattle.

Nelson claims that the conviction ought to be quashed on the ground that the Act under which he was convicted was *ultra vires* of the Constitution because it interfered with and hampered trade and

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intercourse between the States, and was therefore contrary to sec. 92 of the Constitution. Sec. 92 provides 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." That section must not, as this Court has held in other cases, be read as the only section in the Constitution, but must be read with secs. 51 (I.), 106, 107, 108, 112 and other sections contained therein. The State of New South Wales, however, has authority under the powers given to, and retained by, the State by the Constitution to make general domestic laws which may indirectly affect inter-State trade, *including quarantine laws* (until the exclusive power to make such laws is vested in the Commonwealth), provided such laws are not inconsistent with Federal quarantine laws *and also inspection* laws and other general laws as to stock found in the State, and by any such Act to require persons in charge of stock found in the State—whether engaged in inter-State commerce or not—to allow inspection of all cattle in New South Wales, and also to give information demanded by an inspector. The power of the State to make laws in respect to the inspection of imported goods and to charge fees for such inspection—apart from sec. 107 of the Constitution—is expressly recognized by the Constitution itself by sec. 112. It declares : " After uniform duties of customs have been imposed, a State may levy on imports or exports, or on goods passing into or out of the State, such charges as may be necessary for executing the inspection laws of the State ; but the net produce of all charges so levied shall be for the use of the Commonwealth ; and any such inspection laws may be annulled by the Parliament of the Commonwealth." The State has made laws as to inspection of imported cattle and other general domestic laws affecting stock. Part IV. of the *Stock Act* deals not only with prohibiting

importation of cattle (sec. 154) but also with inspection and quarantine and other matters directly affecting imported stock; sec. 146 deals with quarantine stations; secs. 147 and 148 deal with inspectors of stock; secs. 151 and 152 deal with quarantine; sec. 153 deals with inspection of cattle found in New South Wales; sec. 155 authorizes the making of general regulations for carrying out the provisions of Part IV. of the Act, including regulations for defining the powers and duties of inspectors of stock &c., for the management and protection of quarantine stations, for fixing the fees and expenses chargeable for the inspection, transport, keeping and disinfection of stock, for the inspection and disinfection of all stock &c.; sec. 158 deals with penalties not only for importing stock but also for refusing to give inspectors of stock information with respect to imported stock, for hindering inspectors of stock in the execution of their duty, for offences against quarantine laws &c.

In this case I am satisfied from the evidence that the information demanded by the inspector of stock was not demanded by the inspector to assist in preventing the importation of cattle into New South Wales, but to allow inspection of cattle which I hold were legally imported into New South Wales and found seven miles from the border. All he had to do was to satisfy himself, as an inspector, that they were free from disease. The cattle had in fact been imported by Nelson before the questions were asked, and he was fined for that importation, not for the subsequent introduction into New South Wales after dipping. The information in question was demanded to enable the inspector to carry out his duties as an inspector of stock found in the State and to prevent, if possible, cattle with infectious diseases passing through districts in New South Wales before treatment—to prevent the spread of the disease. The first question asked of Nelson was whether he had a "permit." He replied that he had not one. If he had had a permit, that would have satisfied the inspector that the cattle were free of infectious diseases, and he would not have demanded further inspection or information or have interfered in any way with the work of proceeding with the cattle to Sydney. Finding that Nelson did not hold a permit to prove that the cattle were free from infectious disease, the inspector decided to fully inspect the cattle, required further

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information, and insisted (in accordance with the instructions of the Stock Department) on the cattle—coming as they did from a suspected "cattle tick" district—being dipped at the nearest place, that being the only recognized method of properly freeing cattle from "tick." After redipping they were finally inspected and examined closely. Once satisfied by redipping and a final inspection that the cattle were not infected with any infectious disease, no further steps were taken by him—as an inspector—to prevent the cattle from proceeding on the way to Sydney for sale. It is true that the cattle in question had been dipped in Queensland two days before they arrived at the border, but that was not recognized as sufficient coming from a tick-infested district. The witness Henry said:—"Immediately the tick is on the beast it is infected. . . . As a rule symptoms would not be shown under seven or ten days after the pathogenetic tick got on the beast. . . . I know that the 157 head loaded at Bell were certified by him as being free from tick. We are not prepared to take that certificate as a sufficient guarantee for us. We do not regard that certificate as sufficient for cattle from that country." The country referred to is the infected districts referred to previously.

I have already held in Scott's Case that the action of the State through the Stock Department, in hindering and hampering the importation into New South Wales was illegal.

The Court has not, however, to decide in this case whether the steps taken by the Department after the inquiries and inspection were made, namely, in arresting Nelson and ordering the cattle to be taken back into Queensland, redipping the cattle there, &c., were or were not legal. The question the Court has to decide in this case is whether Nelson refused to give to an inspector of stock the information which an inspector finding cattle in New South Wales could legally require him to give, apart from any action the Department or the inspector took, on instructions from the Department, after that demand was made. The information demanded was not required to convict Nelson of importing the cattle, because the inquiries were continued and the action referred to was taken by the inspector after Nelson had given his name and had been identified as the man in charge of the cattle in New South

Wales and in Queensland. The information was demanded after the cattle had entered into New South Wales. An offence against the Act was committed by Nelson in refusing to give the information demanded. The offence of importing cattle and the offence of refusing information are separate offences. Further, I do not see how the *Stock Act* authorizing an inspector to demand information about cattle found in New South Wales—or an inspector demanding under the authority of the Act the information in question—interfered with or burdened inter-State trade or commerce even if the cattle were, as in this case, in transit from Queensland to New South Wales for sale.

I hold that the conviction was right and that the order for the rule nisi should be discharged.

Rules nisi discharged with costs.

Solicitor for the applicant, *E. R. Abigail.*

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

J. B.