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it necessary to deal with the constitutional question raised or with any of the other grounds relied upon by the applicants.

In my opinion the answer to the question should be in the negative.

Question answered in the negative.

Solicitors for the applicant Companies, *Derham & Derham.*

Solicitors for the respondent the Amalgamated Engineering Union, *Maurice Blackburn & Co.*

H. D. W.

[HIGH COURT OF AUSTRALIA.]

JAMES . . . . . PLAINTIFF;

AGAINST

THE COMMONWEALTH OF AUSTRALIA AND OTHERS . . . . . } DEFENDANTS.

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SYDNEY, *Nov.* 29; *Dec.* 12.

KNOX C.J., HIGGINS, POWERS AND STARKE JJ.

Constitutional Law—Freedom of inter-State trade and commerce—Licences to be granted by "prescribed authority" of four States—No "prescribed authority" for two States—Limitation of quantity of dried fruits which may be carried from one State into another State—Discrimination—Preference given to one State over another State—Regulations ultra vires—Use by Commonwealth of State instrumentalities—The Constitution (63 & 64 *Vict. c.* 12), *secs.* 92, 99, 117—*Dried Fruits Act* 1928 (*No.* 11 *of* 1928)—*Dried Fruits Acts* 1924-1927 (*S.A.*) (*No.* 1657—*No.* 1835)—*Dried Fruits* (*Inter-State Trade*) *Regulations* 1928 (*Statutory Rules* 1928, *No.* 91).

The validity of a Federal Act or of regulations made thereunder cannot be attacked on the ground of interference with freedom of inter-State trade and commerce: sec. 92 of the Constitution protects inter-State trade against State interference, but does not affect the legislative power of the Commonwealth.

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

The *Dried Fruits Act* 1928 provides that dried fruits shall not be delivered for carriage or carried from one State into another State unless a licence has been issued under the Act permitting such carriage, and "prescribed authorities" are the only persons authorized by the Act to issue such licences. By virtue of sec. 9 of the *Acts Interpretation Act* 1904 "prescribed" means prescribed by the Act or by regulations made under it. No prescription of any authorities is made by the Act, but clause 2 of the *Dried Fruits (Inter-State Trade) Regulations* 1928 states that "'prescribed authority' means the Dried Fruits Board of the State of Victoria, New South Wales, South Australia or Western Australia, as the case may be, constituted by the Dried Fruits Acts of the respective States." No authority is prescribed for the State of Queensland or the State of Tasmania. By clause 4 of the Regulations licences can only be obtained from the prescribed authority of the State in which the dried fruits are delivered for carriage into another State.

Held, that the *Dried Fruits Act* 1928 does not give preference to one State over another State, but that the Regulations made thereunder do and are therefore invalid as being obnoxious to sec. 99 of the Constitution.

DEMURRER.

Frederick Alexander James brought an action in the High Court against the Commonwealth of Australia and H. C. Brown, William Newman Twiss, the Adelaide Steamship Co. Ltd. and Howard Smith Ltd., in which the statement of claim was substantially as follows :—

1. The plaintiff is a fruit merchant residing and carrying on business at Berri in the State of South Australia and has carried on the like business at Berri and formerly at Adelaide in the said State for a considerable number of years.

2. The defendant Brown is and was at all times material the secretary of the Department of Markets of the Commonwealth of Australia, the Department of the Commonwealth which administers an Act of the Parliament of the Commonwealth of Australia, No. 11 of 1928, entitled the *Dried Fruits Act* 1928, and hereinafter referred to as the Commonwealth *Dried Fruits Act* 1928.

3. The defendant Twiss is and was at all times material the secretary of the Dried Fruits Board of South Australia, a Board constituted by and referred to in the Acts of the Parliament of South Australia entitled the *Dried Fruits Act* 1924 *to* 1927 and hereinafter referred to as the South Australian *Dried Fruits Act*. The said Board is a "prescribed authority" constituted by and referred to in the Regulations made under the Commonwealth *Dried Fruits Act* 1928.

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4. The defendants the Adelaide Steamship Co. Ltd. and Howard Smith Ltd. are incorporated companies carrying on business as common carriers from, to and in the State of South Australia and elsewhere.

5. The plaintiff has since about the year 1922 devoted most of his time and attention to dealing in dried fruits (within the meaning ascribed to those words by the Commonwealth *Dried Fruits Act* 1928), and in connection with such dealing in such dried fruits has dried fruit grown on his orchards at Berri, purchased large quantities of such dried fruits from other growers at Berri and surrounding districts, cleaned, graded, processed and packed such dried fruits so grown or acquired by him as aforesaid and sold such dried fruits principally to persons resident in the States of the Commonwealth and partly to persons resident in England. Most of the dried fruit so packed and sold by the plaintiff as aforesaid were sold with his registered mark "Trevarno" attached; and his said dried fruits sold under such brand had become known to the plaintiff's purchasers in South Australia and in other States as indicating the plaintiff's dried fruits grown and processed in South Australia and all the plaintiff's dried fruits had in fact acquired a good reputation in the various States of the Commonwealth.

6. At the commencement of the year 1927 the plaintiff had established a large business as a dealer in such dried fruits, and there was a strong demand and a large sale for his said dried fruits in the States of New South Wales, Victoria, Western Australia and South Australia.

7. Towards the end of 1927 and at the beginning of 1928 the plaintiff made, in the usual and ordinary course of his business, contracts for the forward sales of dried fruits (within the meaning aforesaid) to merchants residing in the various States of the Commonwealth. Under the terms of all of the said contracts of sale of such dried fruits to merchants in the States of the Commonwealth (other than the State of South Australia) the plaintiff was under a duty, in order properly to fulfil the contracts and each of them according to the tenor thereof, to deliver the dried fruit at the times mentioned in the contracts "f.o.b. Port Adelaide," and not otherwise.

8. Until the end of October 1928 the plaintiff was allowed to deliver without interference or hindrance by the defendants or any of them or at all, in fulfilment or partial fulfilment of the said contracts, dried fruits at the times and on the terms specified in the contracts referred to in par. 7 hereof.

9. On or about 7th September 1928 the plaintiff received from the defendant Brown, as secretary of the Department of Markets, a letter dated 4th September 1928, notifying the plaintiff that in May 1928 the Commonwealth Parliament passed the said Commonwealth *Dried Fruits Act* 1928 to provide for the restriction of inter-State trading in dried currants, dried sultanas and dried lexias, and notifying the plaintiff that the Regulations made under the said Commonwealth *Dried Fruits Act* 1928 (entitled the *Dried Fruits* (*Inter-State Trade*) *Regulations*) would come into operation on Monday 18th September 1928, and further notifying the plaintiff that he could engage in inter-State trade only under licence issued by a prescribed authority, namely, in the case of the plaintiff, the Dried Fruit Board of the State of South Australia, and further notifying the plaintiff that it would be a condition of the licence that the plaintiff must comply with the export quota requirements, meaning thereby that the plaintiff would have to export to parts beyond Australia not less than a certain declared percentage of his total crop (whether grown or otherwise acquired by the plaintiff). Brown, in the said letter, further threatened to prosecute the plaintiff or any other person who after 10th September 1928 delivered for carriage or who carried any dried fruits from a place in one State to a place in Australia beyond the State in which the delivery was made or the carriage began, unless the plaintiff or such other person held a licence so to do. Enclosed with the letter from Brown were a copy of the Commonwealth *Dried Fruits Act* 1928, a copy of the *Dried Fruits* (*Inter-State Trade*) *Regulations* 1928 and a form of application for an owner's licence to trade inter-State.

10. The *Dried Fruits* (*Inter-State Trade*) *Regulations* did in fact come into operation on 10th September 1928.

11. On or about 13th September 1928 the plaintiff received from the defendant Twiss, the secretary for the time being of the said Dried Fruit Board of South Australia, a letter dated 11th September

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1928, notifying the plaintiff of the decision of the Minister of Markets for the Commonwealth Government (the Minister to whom the administration of the said Commonwealth *Dried Fruits Act* was committed) that owners of dried fruit (within the meaning aforesaid) could not obtain licences to consign or deliver such dried fruit from one State in Australia to another State in Australia unless such owners had exported beyond Australia during the year 1928, not less than the following proportions of the dried fruits owned by them: currants, 57½ per centum; sultanas, 75 per centum; lexias, 70 per centum. The plaintiff had, as the defendants well knew and as the defendant Twiss stated in the letter dated 11th September 1928, sold a greater proportion of his dried fruit in Australia than that purported to be allowed to be sold in Australia by the said Minister of Markets and Migration.

12. Under the provisions of the Commonwealth *Dried Fruits Act* 1928 and the Regulations made thereunder the plaintiff as the owner or person having possession or custody of dried fruits is forbidden, under penalty of a fine of £100 or imprisonment for six months, to deliver any dried fruits to any person for carriage into or through another State to a place in Australia beyond South Australia unless and until he applies to the Dried Fruit Board of South Australia (being a prescribed authority under the said Regulations) for, and obtained, an owner's licence under the said Act and Regulations. The said Dried Fruit Board is empowered by the Regulations if it thinks fit to grant on the application of an owner of such dried fruits an owner's licence in accordance with Form B in the Schedule to the Regulations, but the Regulations provide that if such owner's licence is granted by the Dried Fruit Board of South Australia it shall be granted upon and subject to the conditions set out in the said Regulations. The conditions of the said licence (if granted) include: (1) that the licensee shall market outside the Commonwealth such percentage of the output of dried fruits produced in any particular year as the Minister, on the recommendation of the prescribed authority, from time to time determines; (2) that the licensee shall give security to that prescribed authority, on or before the expiration of seven days after the date of the licence, in the form of a deposit, bank guarantee, government bonds or inscribed

stock or otherwise and in such amount as the Minister approves, for compliance with the terms and conditions of the licence; (3) that the licensee shall affix in a prominent position on one end of the package containing the dried fruits to which the licence relates, (i.) the number of the consignment delivered to a carrier for carriage inter-State, (ii.) the initial letter of the name of the State from which the dried fruits are to be carried, and (iii.) the number of the licence and the year to which the licence relates, in letters and figures which shall not be less than one-half inch in height; and (4) that the licensee shall, within such period as the prescribed authority specifies, furnish or produce the licence and such documents and particulars in relation to any dried fruits in his possession or custody as the prescribed authority specifies. The said Regulations provide that any person guilty of any contravention of the Regulations or of any condition of any licence issued thereunder shall be liable to a penalty not exceeding a fine of fifty pounds or imprisonment for six months.

13. Under the provisions of the said Commonwealth *Dried Fruits Act* 1928 and the Regulations made thereunder a person is forbidden under penalty of a fine of £100 or imprisonment for six months to carry any dried fruits from a place in one State into or through another State to a place in Australia beyond the State in which the carriage begins unless and until a carrier's licence is applied for to, and obtained from, the Dried Fruit Board of South Australia or other prescribed authority mentioned in the said Regulations. A "carrier" is defined by the Regulations to mean a person who carries dried fruits from a place in one State into or through another State to a place in Australia beyond the State in which the carriage begins. The said carrier's licence (if granted) is granted on such conditions as are set out in the said Regulations, and the Regulations provide the like penalties for contravention by a carrier of the Regulations or any condition of the carrier's licence as in the case for contravention of the Regulations by an owner of dried fruit, or any of the conditions of any owner's licence, which penalties are set out at the commencement of par. 13 hereof.

14. Sec. 3, sub-sec. 3, of the Commonwealth *Dried Fruits Act* 1928 provides that any dried fruits which have been, or are in

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process of being, carried in contravention of the Act, shall be forfeited to the King.

15. The plaintiff did not in fact apply for or obtain a licence under the Commonwealth *Dried Fruits Act* 1928 and/or the said Regulations made thereunder and was advised that, if he applied for a licence thereunder, it would be refused.

16. The defendants the Adelaide Steamship Co. Ltd. and Howard Smith Ltd. and also the Commissioner of the South Australian Railways and other carriers have, since the said *Dried Fruits (Inter-State Trade) Regulations* have come into operation, refused to carry the plaintiff's dried fruits (within the meaning aforesaid), and the defendant the Adelaide Steamship Co. Ltd. has, through one of its responsible officers, one Puddy, intimated that it will continue to refuse to carry the plaintiff's said dried fruit from South Australia to one of the other States of the Commonwealth unless and until the plaintiff obtains an owner's licence under the provisions of the Commonwealth *Dried Fruits Act* 1928 and the Regulations made thereunder, and the defendants the Adelaide Steamship Co. Ltd. and Howard Smith Ltd. and also the Commissioner of the South Australian Railways and other carriers will continue to refuse to carry the plaintiff's dried fruit from South Australia to any of the other States of the Commonwealth unless and until the plaintiff obtains an owner's licence as aforesaid. There are no other practical means by which the plaintiff can have his dried fruits carried pursuant to the plaintiff's said contracts of sale from South Australia to one of the other States of Australia or by which he can deliver his dried fruits in accordance with the terms of his said inter-State contracts or at all.

17. Prior to the said *Dried Fruits (Inter-State Trade) Regulations* coming into operation as aforesaid the plaintiff was able to ship and shipped his dried fruits from South Australia to the other States of Australia and the defendant the Adelaide Steamship Co. Ltd., the defendant Howard Smith Ltd., the Commissioner of the South Australian Railways and all other carriers accepted for carriage and carried the plaintiff's dried fruits without objection.

18. The defendants the Adelaide Steamship Co. Ltd. and Howard Smith Ltd., the Commissioners of the South Australian Railways

and other carriers have by reason of a fear of incurring the penalty of a fine of £100, or imprisonment for six months provided by sec. 3 of the Commonwealth *Dried Fruits Act* 1928, for a contravention of the said sec. 3, sub-sec. 1, of the Act, taken out carrier's licences under the Commonwealth *Dried Fruits Act* 1928 and the Regulations made thereunder, and they and each of them by reason of a fear of incurring the penalty of a fine of £50 or imprisonment for six months provided by reg. 12 of the said *Dried Fruits (Inter-State Trade) Regulations* for a contravention of any of the said Regulations or of any conditions of their respective carrier's licences issued thereunder now, and for no other reason whatsoever, refuse to carry the plaintiff's dried fruits (within the meaning aforesaid) from South Australia to any of the other States of the Commonwealth.

19. The plaintiff fears that unless restrained by the declaration, order or injunction of this Honourable Court the defendants the Commonwealth (or the Attorney-General thereof) or Brown or Twiss or other the Minister or officer of the Commonwealth to whom the administration of the Act and Regulations is for the time being committed will put into operation (further than they or any of them have already done) against the plaintiff the Commonwealth *Dried Fruits Act* 1928 and the Regulations made thereunder, whereby the plaintiff will be subjected to the heavy penalties already referred to and other heavy penalties provided for by the Commonwealth *Dried Fruits Act* 1928 and the Regulations made thereunder, and further that they or some one or more of them will seize the plaintiff's dried fruits if carried in contravention of the Act and the same shall thereupon be forfeited to the King.

20. The said Dried Fruit Board of South Australia has, in alleged pursuance of sec. 20 of the South Australian *Dried Fruits Acts* 1924-1927, made determinations which, if valid, in effect forbid the plaintiff from selling within the State of South Australia a greater quantity than 5 per centum of the plaintiff's dried fruits (within the meaning aforesaid).

21. By reason of the premises the plaintiff's whole business as a dealer in dried fruits has been, or is in danger of being, destroyed and the plaintiff is daily suffering heavy pecuniary loss. He is unable further to fulfil his said inter-State contracts, and some of the

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merchants to whom he has sold fruit as aforesaid are threatening to and will, in fact, cancel their respective contracts and claim damages from the plaintiff by reason of his failure further to deliver dried fruits to them in accordance with the terms of their respective contracts. The plaintiff is unable to realize on his stocks of dried fruit or to enter into any forward contracts for the sale of 1929 season's dried fruit, as he would in fact now do but for the Commonwealth *Dried Fruits Act* 1928 and/or the Regulations made thereunder and/or the acts of the defendants and each of them.

The plaintiff claimed :—

(1) The following declarations : (A) That the *Dried Fruits Act* 1928 (No. 11 of 1928) of the Parliament of the Commonwealth of Australia contravenes sec. 92 and/or sec. 99 of the Commonwealth of Australia Constitution and is invalid ; (B) that secs. 3 (1) (*a*), 3 (1) (*b*), 3 (2), 3 (3), 3 (4) and 3 (5), and each of them respectively, and all other sections of the said *Dried Fruits Act* 1928 which are auxiliary to such sections, contravene the said sec. 92 and/or sec. 99 of the said Commonwealth of Australia Constitution and are invalid ; (C) that the *Dried Fruits (Inter-State Trade) Regulations* made under the said Act No. 11 of 1928 on the 29th day of August 1928, which said Regulations came into operation on the 10th day of September 1928, contravene sec. 92 and/or sec. 99 of the Commonwealth of Australia Constitution and are invalid ; (D) that regs. 3 (1), 3 (2), 4 (*a*), 4 (*b*), 4 (*c*), 4 (*d*), 4 (*e*), 5 (1), 5 (2), 7 (1), 7 (2), 8, 11 (1), 11 (2), 11 (3) and 12 of the said *Dried Fruits (Inter-State Trade) Regulations* contravene sec. 92 and/or sec. 99 of the said Commonwealth of Australia Constitution and are invalid ; (E) that none of the defendants are entitled to require the plaintiff to apply for and obtain an " owner's licence " under the said Act No. 11 of 1928 before delivering any " dried fruits " (within the meaning ascribed to those words by the Act No. 11 of 1928) to any person for carriage into or through another State or place in Australia beyond the State in which the delivery is made ; (F) that the defendant shipping companies and all other shipping companies and

other carriers (within the meaning ascribed to that word by the said *Dried Fruits* (*Inter-State Trade*) *Regulations*) should be ordered by this Honourable Court to carry the plaintiff's dried fruits (within the meaning as aforesaid) without requiring him to take out an "owner's licence" under the said Act No. 11 of 1928 as aforesaid.

(2) The following orders: (A) an order to restrain the defendants and each of them, their respective agents and servants from further requiring the plaintiff to take out an "owner's licence" under the said Act No. 11 of 1928; (B) an order directing the said defendant shipping companies and each of them respectively as common carriers to carry upon their ordinary and usual terms and conditions and without regard to the provisions of the said Act No. 11 of 1928 and the Regulations made thereunder all dried fruits delivered to them and each of them respectively for carriage from any of the States of Australia to any of the other States of Australia; (C) an order to restrain the defendants and each of them respectively from further interfering directly or indirectly with the plaintiff's business and in particular to restrain the defendants from interfering with and preventing directly or indirectly the plaintiff from fulfilling his contracts for the sale of his dried fruits (within the meaning aforesaid) to merchants in the other States of the Commonwealth of Australia and from delivering his said dried fruits in pursuance of his said contracts.

(3) Damages.

(4) Such further or other relief as the Court may see fit to grant.

The defendants the Commonwealth of Australia and H. C. Brown demurred to the whole of the statement of claim on the ground that the facts alleged did not show any cause of action. A ground in law for the demurrer was that the *Dried Fruits Act* 1928 and the *Dried Fruits* (*Inter-State Trade*) *Regulations* 1928 made by Statutory Rules 1928, No. 91, were valid laws of the Commonwealth of Australia and that the acts which the defendants were alleged to have done were authorized by the said Act and Regulations.

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In a defence filed by the defendants they admitted the allegations contained in pars. 1, 2, 3, 4, 10 and 14 of the statement of claim, the *Dried Fruits Act* 1928, the *Dried Fruits (Inter-State Trade) Regulations* made by Statutory Rules 1928, No. 91, and also the letters referred to in pars. 9 and 11 of the statement of claim, but did not admit any of the other allegations made by the plaintiff.

Cleland K.C. and *K. L. Ward*, for the plaintiff. The effect of the *Dried Fruits Act* 1928 is that it prohibits owners of dried fruits from delivering such fruits to any other person for carriage into another State, and also prohibits any person from carrying dried fruit into another State without a licence being held by both owner and carrier. If an owner is licensed under the Act, he is only allowed to transport his dried fruits subject to compliance with certain terms and conditions. This is a direct interference with the absolute freedom of inter-State trade as contemplated by sec. 92 of the Constitution of the Commonwealth. The "prescribed authority" by whom licences under the Act and Regulations are to be issued is the Dried Fruits Board of the State of Victoria, New South Wales, South Australia or Western Australia as the case may be, constituted by the Dried Fruits Acts of the respective States. No control of inter-State carriage has been reserved to itself by the Commonwealth either by the Act or by the Regulations: it is entirely handed over to the Dried Fruits Boards which were created and, unless inconsistent with Commonwealth law, still are governed by the laws of their respective States. The Commonwealth has no voice in the granting or refusing of licences: these matters are within the discretion of the State Boards. The only power which appears to be reserved to the Commonwealth is the power to determine on the recommendation of any one of the Boards how much dried fruit shall be exported from that particular State. It is not competent for the Commonwealth Legislature to authorize, either directly or indirectly, a State authority as such, which is, and remains, subject to State legislative control to do in its discretion what the Imperial Parliament has declared by sec. 92 of the Constitution that the State itself shall not do at all (*Attorney-General*

for Ontario v. *Reciprocal Insurers* (1)). The Act and Regulations also contravene sec. 99 of the Constitution of the Commonwealth. Under the Regulations the Dried Fruits Boards of the four States named have power to determine what dried fruits shall go from such States to any other State. This in itself is a power of discrimination. There being no " prescribed authority " for the State of Queensland or of Tasmania, those States have no voice in the matter. It depends entirely upon the Boards of the four States named in the Regulations as to what quantity of dried fruits, if any at all, is imported into Queensland or into Tasmania. An " owner " of dried fruits in Queensland or Tasmania is unable to obtain a licence under the Act, and is thus prevented from exporting his dried fruits to other States. This is a discrimination or preference granted to one State over another State in a pronounced form. The Regulations also offend against sec. 117 of the Constitution. [Counsel also referred to *Cameron* v. *Deputy Federal Commissioner of Taxation* (2).]

Brissenden K.C. (with him *J. R. Nield*), for the defendants. The plaintiff has not alleged any facts which would bring the matter within the rule in *The King* v. *Barger* (3). The view of the minority of the Court in that case as regards the *Excise Tariff* 1906 (No. 16 of 1906) should be applied to the *Dried Fruits Act* 1928. It has not been shown that dried fruits are produced in Queensland or in Tasmania. Assuming the non-production of dried fruits in those two States, it is not a preference or a discrimination on the part of the Commonwealth to provide for trade that does exist and not to provide for trade that does not exist.

[KNOX C.J. referred to *Colonial Sugar Co.* v. *Irving* (4).]

There is no allegation that preference has in fact been given. The object of sec. 99 of the Constitution of the Commonwealth is to deal with existing things and not with non-existing things. The plaintiff was not in any way affected by the absence of a " prescribed authority " in Queensland or Tasmania. Uniformity of conditions imposed under the Act and Regulations is assured by the fact that although they are recommended by the various " prescribed

(1) (1924) A.C. 328.
(2) (1923) 32 C.L.R. 68.
(3) (1908) 6 C.L.R. 41.
(4) (1903) S.R. (Q.) 261, at p. 276.

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authorities" the Federal Minister alone has power to make them. The Act makes no reference to individual States: it applies equally to all parts of Australia. Taking the facts which must be assumed together with the Regulations as framed there has been no preference by law. [Counsel was stopped from arguing in respect of sec. 117 of the Constitution.]

Cleland K.C., in reply. Under sec. 3 (2) of the Act each State authority can refuse a licence to any applicant altogether. Whether there is a preference depends upon the language used and not upon the facts to which it is applied.

Cur. adv. vult.

Dec. 12. The following written judgments were delivered:—

KNOX C.J. AND POWERS J. The plaintiff claims a declaration that the *Dried Fruits Act* 1928 (No. 11 of 1928), and particularly sec. 3 of that Act, is invalid as being in contravention of the provisions of sec. 92 and/or sec. 99 of the Constitution. He claims also that the Regulations made under that Act are invalid for the same reason. The defendants the Commonwealth and H. C. Brown demur on the ground that the Act and Regulations are valid laws of the Commonwealth, and the only question is whether these laws are or are not valid. Sec. 3 of the Act is in the words following:—"(1) Except as provided by the Regulations—(*a*) the owner or person having possession or custody of dried fruits shall not deliver any dried fruits to any person for carriage into or through another State to a place in Australia beyond the State in which the delivery is made; and (*b*) a person shall not carry any dried fruits from a place in one State into or through another State to a place in Australia beyond the State in which the carriage begins—unless in either case, a licence has been issued under this Act permitting that carriage of those dried fruits and except in accordance with the licence so issued. Penalty: One hundred pounds or imprisonment for six months. (2) Prescribed authorities may issue licences, for such period and upon such terms and conditions as are prescribed, permitting the carriage of dried fruits from a place in one State to a place in Australia beyond that State. (3) Any dried fruits which have been,

or are in process of being, carried in contravention of this Act, shall be forfeited to the King. (4) A prescribed authority may require any person to give security, in such form and to such amounts as are approved by the Minister, for compliance by the person with the terms and conditions of any licence issued to him under this Act. (5) Where the Minister on report by a prescribed authority is satisfied that any person to whom a licence has been issued under this section has contravened or failed to comply with any term or condition of the licence, the Minister may cancel the licence, and the licence shall thereupon cease to be of any force or effect." Sec. 4 provides for the production of any licence issued under the Act and for the furnishing of returns and production of documents. Sec. 5 empowers the Governor-General to make Regulations.

In *James* v. *South Australia* (1) this Court held, following the decision in *W. & A. McArthur Ltd.* v. *Queensland* (2) that the declaration contained in sec. 92 of the Constitution was no more than an inhibition addressed to the Parliaments of the States preventing them from legislating so as to interfere with the freedom prescribed by that section. And in *McArthur's Case* the majority of the Court expressly held that the true office of sec. 92 was to protect inter-State trade against State interference and not to affect the legislative power of the Commonwealth. It is clear from these decisions that sec. 92 affords no ground for an attack on the validity of the Act in question —a Federal Act—or of the Regulations made thereunder. But the plaintiff relies also on sec. 99 of the Constitution, which provides that the Commonwealth shall not, by any law or regulation of trade, commerce or revenue, give preference to any one State or any part thereof over any other State or any part thereof. In *Barger's Case* (3) our brother *Isaacs* pointed out that the prohibition contained in this section is the same in purport and effect as that contained in sec. 51 (II.) of the Constitution "but so as not to discriminate between States," and that discrimination between localities means that because one man or his property is in one locality, then, regardless of any other circumstance, he or it is to be treated

(1) (1927) 40 C.L.R. 1. (2) (1920) 28 C.L.R. 530.
(3) (1908) 6 C.L.R. 41.

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differently from the man or similar property in another locality. (See also *Cameron's Case* (1).) Accepting this interpretation of the meaning and effect of sec. 99 of the Constitution, we can find nothing in the Act now under discussion which gives preference to one State over another State. The provisions of the Act are general and apply equally to the transport of dried fruits from any one State to any other State, without discrimination of any kind. There is no provision in the Act which distinguishes between dried fruits in Queensland and similar fruits in South Australia, or exempts the owner of dried fruits in whatever State they may be from the restriction imposed on their transport to any other State. The attack on the validity of the Act therefore fails. But the Act provides that dried fruits shall not be delivered for carriage or carried from one State into another State unless a licence has been issued under the Act permitting such carriage, and "prescribed authorities" are the only persons authorized by the Act to issue such licences. "Prescribed" means "prescribed by the Act, or by Regulations made under the Act." (*Acts Interpretation Act* 1904, sec. 9) The Act contains no prescription of any authorities, but clause 2 of the Regulations provides as follows: "'Prescribed authority' means the Dried Fruits Board of the State of Victoria, New South Wales, South Australia, or Western Australia, as the case may be, constituted by the Dried Fruits Acts of the respective States." No authority is prescribed for the State of Queensland or the State of Tasmania. By clause 4 of the Regulations licences can only be obtained from the prescribed authority of the State in which the dried fruits are delivered for carriage into another State. It follows that the owner of dried fruits held in Queensland or Tasmania is precluded by the Regulations from obtaining a licence to deliver such fruit for carriage to another State, because and only because the property which he wishes to deliver is in Queensland or Tasmania, and the Act forbids delivery without a licence of dried fruits held in Queensland or Tasmania equally with those held in any other State. The Regulations, therefore, while affording to the owner of dried fruits held in any of the four other States—Victoria, New South Wales, South Australia or Western

(1) (1923) 32 C.L.R. 68.

Australia—means of obtaining a licence and thus lawfully delivering his goods for carriage to a State other than that in which they are held, deny to the holder of dried fruits in Queensland or Tasmania the opportunity of obtaining a similar licence on any conditions. The mere fact that the dried fruits are held in the State of Queensland or the State of Tasmania prevents the owner from obtaining a licence which he might have obtained had his fruit been held in one of the other four States. In our opinion this affords a clear instance of discrimination between States or of a preference to one State over another State.

For these reasons we are of opinion that the Regulations in their existing form are obnoxious to the provisions of sec. 99 of the Constitution and that the demurrer should be overruled.

HIGGINS J. In this case there is a demurrer by the Commonwealth and Brown (secretary of the Commonwealth Department of Markets) to the statement of claim. The plaintiff is a fruit grower and dealer, and seeks a declaration that the Commonwealth *Dried Fruits Act* 1928 contravenes sec. 92 and /or sec. 99 of the Constitution, and a similar declaration as to certain regulations made under the Act. No objection has been taken as to the form of the action or as to the right of the plaintiff to sue. These defendants (there are other defendants) demur to the whole of the statement of claim on the ground that the facts alleged do not show any cause of action; but the argument of these defendants has been confined to the specific ground stated thus: "A ground in law for the said demurrer is that the *Dried Fruits Act* 1928 and the *Dried Fruits (Inter-State Trade) Regulations* 1928 made by Statutory Rules 1928, No. 91, are valid laws of the Commonwealth of Australia and that the acts which the said defendants are alleged to have done are authorized by the said Act and Regulations." The parties in their argument treat the Regulations as well as the Act as if fully before the Court; and the question is, does the Act, or do the Regulations, contravene sec. 92 or sec. 99 of the Constitution? Sec. 117 has also been referred to, but we have intimated our opinion that that section relates to discrimination on the basis of residence; and there is no such discrimination here.

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Counsel for the plaintiff relies, in the first place, on sec. 92 of the Constitution, which enacts 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." But it has been decided by the majority of this Court in *McArthur's Case* (1)—though, I thought, unnecessarily—that sec. 92 is an inhibition on the States and not on the Commonwealth, in view particularly of the power of the Commonwealth Parliament under sec. 51 (I.) to make laws, "subject to this Constitution" with respect to trade and commerce with other countries and among the States. Mr. *Cleland* desired to challenge this decision, but, as the Chief Justice pointed out, we are not sitting as a Full Bench of seven Judges. Under the circumstances, we have to treat this Act of the Commonwealth as not obnoxious to sec. 92.

Another point taken by the plaintiff is that the Commonwealth Parliament has no power to delegate its functions under sec. 51 (I.) to any Board or person, and in particular to a State Board. By sec. 3 of the Act it is enacted: "Except as provided by the Regulations (*a*) the owner or person having possession or custody of dried fruits shall not deliver any dried fruits to any person for carriage into or through another State to a place in Australia beyond the State in which the delivery is made; . . . unless . . . a licence has been issued under this Act permitting that carriage of those dried fruits and except in accordance with the licence so issued." Then it is enacted that "prescribed authorities" may issue licences for such period and upon such terms and conditions as are prescribed permitting such carriage. There are also provisions for forfeiture, for security, for cancellation of licence, for production of licence, for returns, &c. By sec. 5 the Governor-General is empowered to make regulations prescribing matters for carrying out or giving effect to the Act, and in particular for "(*a*) prescribing the conditions (which may include conditions as to the export from Australia of dried fruits by or on behalf of the person applying for a licence) upon which licences may be issued," &c.

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

On 29th August 1928 the Governor-General made regulations under the Act to come into operation on 10th September 1928. The writ in this action was issued on 12th November 1928. By reg. 4, the prescribed authority of the State *in which the dried fruits are delivered* to any person for carriage into or through another State to a place in Australia beyond the State in which delivery is made, may grant an owner's licence in a certain form, "subject to the following conditions" (which need not be set out for the purposes of this statement), and by reg. 2 "prescribed authority" means the Dried Fruits Board of the State of Victoria, of New South Wales, of South Australia, or of Western Australia. These Boards are constituted by Acts of the said States; but it will be noticed, in passing, that there is no such Board mentioned as a prescribed authority for Queensland or for Tasmania. I understand that there are no such Boards created by the Legislatures of Queensland or of Tasmania. The result is that any Queensland or Tasmanian dried fruits are subject to the rigid prohibition of sec. 3 of the Act —that except as provided by the Regulations, an owner of dried fruits is forbidden to deliver dried fruits for carriage into another State, unless a licence has been issued permitting that carriage of those dried fruits. The result is that Queensland or Tasmanian dried fruits cannot be delivered for such carriage at all; for, under reg. 4, the prescribed authority that can grant a licence must be a prescribed authority *of the State in which the dried fruits are delivered* for such carriage. Queensland dried fruits cannot be the subject of a licence granted by the New South Wales Board, or by the Victorian, the South Australian or the Western Australian Board.

Now, I do not feel any difficulty as to the power of the Commonwealth Parliament, in making a law as to trade and commerce between the States, to delegate powers of granting the licences to specified persons or specified State officers or specified State Boards. It has been long settled by the decisions of the Privy Council in a series of cases, decisions which might almost be regarded as a confirmation of the charters of liberty for the Dominions, that the Legislatures created by the Imperial Parliament are not mere delegates, but, within the bounds of the subjects committed to them, have powers as plenary and as ample as the Imperial Parliament possesses; and that

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whatever the delegate of the Legislature prescribes is, if rightly considered, a prescription of the Legislature (*R.* v. *Burah* (1); *Hodge* v. *The Queen* (2); *Powell* v. *Apollo Candle Co.* (3)). If, therefore, the result of this case depended on the point of power to delegate as stated, I should have no doubt that it would be our duty to allow the demurrer. There are many State functionaries who are selected by the Commonwealth to carry out Commonwealth functions—including State magistrates, State policemen, State taxation officers; and I know of no principle that forbids such delegation.

But the whole of the Act and the whole of the Regulations have now to be considered to see whether they offend against sec. 99 of the Constitution: "The Commonwealth shall not, by any law or regulation of trade, commerce, or revenue, give preference to one State or any part thereof over another State or any part thereof." Even if the word "regulation" has a broader meaning than a regulation under the powers conferred by an Act, it includes it: the section includes any rule intended by the Commonwealth to impose duties on persons with regard to trade, commerce or revenue. Here we find in reg. 4 that Queensland dried fruit may not be exported to another State at all, whereas New South Wales dried fruit may be exported to Queensland or any of the other four States, if the owner obtains a licence. Is not this a preference to New South Wales as between New South Wales and Queensland?

Probably at this point I ought to refer to my remarks made on the subject of discrimination in *The King* v. *Barger* (4). Counsel for the Commission has relied on them, and justifiably; for, although I was one of the minority in that case, and the majority of the Court found that there was, in the *Excise Tariff Act*, a discrimination in taxation such as offended against sec. 51 (II.) of the Constitution, there was not any condemnation of the principles which I stated. The section we have here to deal with (sec. 99) uses the word "preference," not "discrimination," but as one cannot conceive of any preference without discrimination, my remarks are quite relevant to this case. After twenty years, I adhere to what I there said. I said that to offend against sec. 51 (II.) it is Parliament,

(1) (1878) 3 App. Cas. 889.
(2) (1883) 9 App. Cas. 117.
(3) (1885) 10 App. Cas. 282.
(4) (1908) 6 C.L.R., at pp. 130-133.

an Act of Parliament, that must discriminate. I said that "Parliament does not discriminate between States when it applies the same rule to all the States . . . Parliament may not discriminate between States; but the facts may, and often must: *Colonial Sugar Refining Co.* v. *Irving* (1)." We were dealing with an *Excise Tariff Act* which imposed (alleged) excise duties but prescribed a remission of the duties to any manufacturer whose wages conditions (a) were declared fair and reasonable by Parliament, or (b) were in accordance with an industrial award, or (c) were in accordance with an industrial agreement filed, or (d) were declared to be fair and reasonable by the President of the Arbitration Court. I went on to say, however, that under that Act "*these alternative means for getting exemption are open to all manufacturers everywhere.*" But in the present case that cannot be said, for the only means of getting exemption—by applying for a licence to one of the four State Boards—is not open to those interested in Queensland or Tasmanian dried fruit. My remarks, therefore, in *The King* v. *Barger* (2), do not help the defendant: they support the view that there is discrimination in this case. I find also a passage at p. 132 which favours the view hereinafter expressed, that the Act may be valid although the exercise of his powers by the Governor-General, this power to make regulations, may be invalid:—"When a power is created which, by its terms, allows a thing to be done either in a lawful or an unlawful way the power is not unlawful; but the exercise of the power will be valid or invalid according as it follows the lawful or the unlawful courses: *Griffith* v. *Pownall* (3); *Slark* v. *Dakyns* (4)." I regret to have to refer to my own language at such length; but it is due to counsel citing it that I should explain the relation between that language and the present discussion.

It is not an answer to say, even if it is the fact, that Queensland or Tasmania does not produce dried fruits, and that this regulation makes no real difference to these States. We cannot take judicial notice of such a fact; nor can we assume a limit to the possibilities of a State's trade or commerce under the changing conditions of science and invention. My point is, if there should be any dried

(1) (1906) A.C. 360.
(2) (1908) 6 C.L.R., at pp. 130-133.
(3) (1843) 13 Sim. 393.
(4) (1874) L.R. 10 Ch. 35.

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fruit produced in Queensland or Tasmania it cannot be delivered for carriage to other States at all, whereas dried fruits produced in other States can be delivered under a licence obtained from the Board of the delivering State. But it must be recognized that the preference, if it is a preference, is created not by the Act but by the Regulations. The Act is, in this respect, perfectly valid; for it may be obeyed without violating sec. 99 as to preference between States. But I do not see how reg. 4, with the definition of "prescribed authority" in sec. 2, can be obeyed without preference. The flaw, if it is a flaw, in the Regulations, could easily be avoided; for it has been explained in *Colonial Sugar Refining Co.* v. *Irving* (1) that where the rule laid down is general, applicable to all the States alike, but it is found to operate unequally in the several States, not from anything done by the Commonwealth Parliament, but from the inequality in the conditions existing in (in that case in the laws imposed by) the States themselves—the rule is invalid—the Commonwealth Parliament has not been guilty of discrimination or preference between States.

In my opinion reg. 4, with the definition of "prescribed authority" in reg. 2, creates a preference. But the Act being in itself valid, and prohibiting delivery from one State to another without a licence, while the regulation is invalid because the provision for a licence gives preference to one State over another, what is the result? Is the prohibition in the Act operative against the plaintiff in its absolute, unconditional form, as the plaintiff has no licence? This question raises, in another form, the difficult subject discussed in *Owners of s.s. Kalibia* v. *Wilson* (2). In that case, it happens that I did not agree with the majority as to the test of separability of valid and invalid provisions in an Act; but our views on the subject were merely *obiter*, not binding as law (3); and I do not think that our views would differ in the result in application to the present case. It is our duty to give effect to the intention of Parliament up to the point at which Parliament infringes the Constitution; but if it is clear that Parliament did not intend to impose an absolute, unconditional prohibition without a provision for relaxation thereof,

(1) (1906) A.C., at p. 367.
(2) (1910) 11 C.L.R. 689.
(3) (1910) 11 C.L.R., see pp. 696, 700, 717-718.

we must give effect to that intention. Now, Parliament certainly meant by sec. 3 of the Act, that there should be some exception to the prohibition—"Except as provided by the Regulations" The object of the Act (whether wise or unwise is not our business) was obviously to sustain the price of dried fruits in Australia by insisting that a certain proportion of the dried fruit shall be exported to foreign countries; the prohibition of delivery from one State to another would not have been enacted by Parliament *simpliciter*; and we have no right to treat the prohibition as applying to a case in which, by reason of the unlawful regulation, no valid licence can be obtained. This means that the plaintiff is not subject to the absolute, unconditional prohibition, and that the defendants' demurrer must *pro tanto* be overruled.

In my opinion, therefore, reg. 4 (with the definition of prescribed authority in reg. 2), must be treated as invalid. We should so declare, and to that extent overrule the demurrer.

STARKE J. This demurrer raises questions as to the validity of the *Dried Fruits Act* 1928 (No. 11 of 1928), enacted by the Parliament of the Commonwealth, and the Regulations of 1928 (No. 91) made thereunder.

First, it was argued that the Act and Regulations contravene the provisions of sec. 92 of the Constitution, declaring that trade, commerce and intercourse among the States shall be absolutely free. This argument is disposed of in this Court by the opinions expressed by a majority of the members of the Court in *McArthur's Case* (1) and by the decision in *James' Case* (2).

Next, it was argued that the Commonwealth could not invest State organs, namely Dried Fruit Boards, constituted under the laws of the States, with functions that involved an interference with inter-State trade. The Parliament of the Commonwealth has, however, an authority as plenary and as ample, within its legislative sphere, as the Imperial Parliament in the plenitude of its power possessed or could bestow (*Hodge* v. *The Queen* (3); *Powell* v. *Apollo Candle Co.* (4)). In my opinion, the Commonwealth may select

(1) (1920) 28 C.L.R. 530.
(2) (1927) 40 C.L.R. 1.
(3) (1883) 9 App. Cas. 117.
(4) (1885) 10 App. Cas. 282.

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its own agents or licensing authorities—whether persons resident in a State, or bodies incorporated by a State, or administrative bodies constituted under a State law. It is unnecessary to consider how far the Commonwealth could compel such administrative bodies as those last mentioned to administer the Commonwealth laws, for in this case the Dried Fruit Boards are functioning under the Commonwealth law without objection.

Finally, it was contended that the *Dried Fruits Act* and the Regulations contravene secs. 99 and 117 of the Constitution. The provision of sec. 117 was only faintly pressed, and is inapplicable in this case, for no disability or discrimination is based upon residence in any State. The provision of sec. 99 requires consideration. That section prescribes that the Commonwealth shall not by any law or regulation of trade, commerce or revenue give preference to one State or any part thereof over another State or any part thereof. Parliament cannot discriminate between States, or prefer one State over another. And, as I said in *Cameron's Case* (1), if a law is not applicable to all States alike, then it operates unequally between the States, and discriminates as a law between them. It is clear that the *Dried Fruits Act* 1928 itself does not discriminate between States, or prefer one over another: as a law, it treats all alike. Thus sec. 3 enacts that except as provided by the Regulations, owners or persons having possession or custody of dried fruits in any State shall not deliver such fruits to any person for carriage inter-State, and that persons shall not carry such fruit inter-State without a licence issued under the Act, and then only in accordance with such licence. The Regulations framed under the Act, however, enable the issue of licences in the States of Victoria, New South Wales, South Australia and Western Australia, but not in the States of Queensland and Tasmania. The Regulations do not prohibit the issue of licences in the latter States, but simply omit to make provision for their issue. The Governor-General might make such provision at any time. But the fact remains that he has not done so, and, unless and until he does so, the Regulations discriminate as a law in the issue of licences between the States of Victoria, New South Wales, South Australia and Western Australia

(1) (1923) 32 C.L.R., at p. 80.

on the one hand, and the States of Queensland and Tasmania on the other hand, and do not as a law treat all the States alike.

The demurrer should, therefore, be overruled.

Demurrer overruled.

Solicitors for the plaintiff, *Edmunds, Jessop & Ward*, Adelaide, by *Dawson, Waldron, Edwards & Nicholls.*

Solicitor for the defendants, *W. H. Sharwood*, Crown Solicitor for the Commonwealth.

J. B.

[HIGH COURT OF AUSTRALIA.]

BLYTH . . . . . APPELLANT;
INFORMANT,

AND

HUDSON . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

Motor Omnibus—Licensing—Definition of "motor omnibus"—"Carrying passengers for reward at separate and distinct fares"—Offence—Owner of vehicle operating on road—Vehicle not licensed as motor omnibus—Owner employed for lump sum for journey—Fares collected by employers—Motor Omnibus (Urban and Country) Act 1927 (*Vict.*) (*No.* 3570), *secs.* 3, 31, 40.

The definition of "motor omnibus" in sec. 3 of the *Motor Omnibus (Urban and Country) Act* 1927 (Vict.) may be satisfied although the reward at separate and distinct fares for each passenger is not paid to a person who is an "owner" of the vehicle.

The defendant, who was the owner of a motor vehicle which was not licensed under the *Motor Omnibus (Urban and Country) Act* 1927 (Vict.), was charged