[HIGH COURT OF AUSTRALIA.]

ROUGHLEY AND OTHERS . . . . PLAINTIFFS;

AGAINST

THE STATE OF NEW SOUTH WALES AND ANOTHER . . . . DEFENDANTS.

EX PARTE BEAVIS.

H. C. OF A. 1928.

SYDNEY, *Mar.* 28, 29.

MELBOURNE, *Oct.* 22.

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

Constitutional Law—Inter-State trade and commerce—Freedom—Agent for principal in another State—Legislative power of States—Power of State to regulate business of agent—Construction of State statute—Inter-State or intra-State trade—Intention of State legislature—The Constitution (63 & 64 *Vict. c.* 12), *secs.* 92, 107—*Farm Produce Agents Act* 1926 (*N.S.W.*) (*No.* 7 *of* 1926), *secs.* 5, 12-15, 23.*

Certain farm produce agents carrying on business in Sydney sell farm produce in the State of New South Wales forwarded to them in Sydney from principals residing in other States, under agreements which provided that in consideration that the principals forwarded farm produce to the agents in Sydney the agents should sell and dispose of the same to the best advantage and remit to the principals the proceeds of sale less certain agreed charges and remuneration.

* The *Farm Produce Agents Act* 1926 (N.S.W.) (which is entitled "An Act to provide for the registration and regulation of farm produce agents; to prohibit certain practices and to regulate in certain respects the sale and disposal of farm produce; . . . and for purposes connected therewith"), by sec. 2 defines "farm produce agent" as meaning "any person who, as an agent for others, whether on commission or for or in expectation of any fee, gain, or reward, whether alone or in connection with any other business, exercises or carries on the business or advertises or notifies that he exercises or carries on the business of selling farm produce, . . . but does not include a person being a licensed auctioneer, conducting a clearing out sale of the vendors own farm produce on the vendors property, or a person employed merely as a clerk or servant or any banking company or any society registered under the *Co-operation, Community Settlement, and Credit Act* 1923, whose objects include the disposal of the agricultural products of its members or other persons."

Held, by *Knox* C.J., *Isaacs*, *Higgins*, *Gavan Duffy* and *Powers* JJ. (*Starke* J. dissenting), that the provisions of the *Farm Produce Agents Act* 1926 (N.S.W.) were not obnoxious to the provisions of sec. 92 of the Constitution.

H. C. OF A. 1928.

ROUGHLEY v. NEW SOUTH WALES.

EX PARTE BEAVIS.

DEMURRER to a statement of claim in an action in the High Court, and rule nisi for writ of prohibition removed from the Supreme Court of New South Wales.

Roughley's Case.—William Garfield Roughley and Walter Matthew Musgrove, suing on behalf of and for the benefit of inter-State farm produce agents, and Leslie James Jenkins and Henry William Frederick Rogers, suing on behalf of and for the benefit of general farm produce agents, all such agents being members of the New South Wales Fruit and Vegetable Agents and Merchants Association, brought an action in the High Court against the State of New South Wales and Harold Victor Campbell Thorby, the Minister of Agriculture for that State, in which the statement of claim was substantially as follows :—

1. All the plaintiffs are members of a voluntary association of persons known as the New South Wales Fruit and Vegetable Agents and Merchants Association, which Association consists of those who from time to time sell at Sydney in the State of New South Wales farm produce, including vegetables, potatoes and other edible roots and tubers, fruit, eggs and poultry on behalf of and as agents

By sec. 5 it is provided that "Any person who acts as or carries on or advertises or notifies that he acts as or carries on the business of a farm produce agent, unless he is the holder of a licence, shall be guilty of an offence against this Act." By sec. 12 it is provided that "Any person (not being the holder of a licence) who (*a*) acts as or carries on or advertises or notifies that he acts as or carries on business as a farm produce agent . . . shall be liable to a penalty not exceeding one hundred pounds." By sec. 13 it is provided that "(1) The registrar or any person authorized by him may at any time inspect any books, accounts, registers, documents or writings in the custody or control of any farm produce agent relating to his business as such farm produce agent, and may take notes, copies or extracts thereof or therefrom. (2) Any person who obstructs the registrar, or any person so authorized, and any farm produce agent or servant of a farm produce agent who refuses to produce such books, accounts, registers, documents or writings or to answer any question relating to such books or accounts or to any farm produce received by the farm produce agent or who wilfully gives any untruthful answer to any such questions shall be guilty of an offence. (3) The registrar may communicate to any client of the farm produce agent a report of the result of such inspection so far as it directly concerns such client." By sec. 14 it is provided that "Every farm produce agent within seven days after the sale or other disposal of any farm produce shall render to the person on whose behalf such sale or disposal was made, an account in writing of such sale or disposal." By sec. 15 it is provided that "(1) All moneys received by

H. C. OF A. 1928.

ROUGHLEY v. NEW SOUTH WALES.

EX PARTE BEAVIS.

for various growers of such farm produce. The Association consists of inter-State farm produce agents and general farm produce agents.

2. Some of the members of the Association, including the plaintiffs Roughley and Musgrove (hereinafter called inter-State agents), act solely as agents for the sale of farm produce grown, and on behalf of principals resident, in States of the Commonwealth other than the State of New South Wales. All such members have the same interest in the subject-matter of this cause as the plaintiffs Roughley and Musgrove, who sue herein on behalf of and for the benefit of the said inter-State agents.

3. Other members of the said Association, including the plaintiffs Jenkins and Rogers (hereinafter called general agents) act as agents for the sale of farm produce grown, and on behalf of principals resident, in all the States of the Commonwealth, including the State of New South Wales. All such members have the same interest in the subject matter of this cause as the said plaintiffs, who sue herein on behalf of and for the benefit of the said members.

4. Where reference is made in the statement of claim to inter-State agents such reference means and includes the plaintiffs Roughley and Musgrove, suing on behalf of and for the benefit of inter-State farm produce agents members of the said Association, and where

a farm produce agent in respect of the sale of any farm produce over and above such sum as he has paid or advanced to the person from whom he has received the produce shall forthwith upon the receipt thereof by him be paid by him into a bank, to a trust account, and therein retained until disbursed as hereinafter mentioned. (2) Such farm produce agent shall be entitled to draw against such trust account in payment of (*a*) the expenses, commission, and other charges of or incidental to such sale or disposal; and (*b*) any moneys owing to such farm produce agent by the person on whose behalf the sale or disposal was carried out. (3) Every farm produce agent shall, within fourteen days after the sale of any farm produce pay to the person on whose behalf the sale was carried out or as such person may direct the amount due to such person in respect of the sale. (4) Every farm produce agent shall, within fourteen days after a trust account is opened by him in accordance with this section, notify the registrar in writing of the name of the trust account and the name and situation of the bank . . . . (5) A farm produce agent shall if required by the registrar produce the bank pass book relating to the trust account showing the state of the trust account at the date when such production is required." By sec. 23 it is provided that "A farm produce agent shall not be entitled to sue for or recover any fees, charges, commission, reward, or other remuneration for or in respect of the sale or disposal of any farm produce unless (*a*) he is the holder of a licence; and (*b*) such remuneration is not in excess of such fees and charges as may from time to time be prescribed."

reference is made to general agents such reference means and includes the plaintiffs Jenkins and Rogers suing on behalf of and for the benefit of general farm produce agents members of the said Association.

5. The inter-State agents sell farm produce at Sydney in pursuance of agreements between them and their principals which provide that in consideration that the principals forward to the inter-State agents the farm produce from the respective States outside New South Wales to Sydney New South Wales the said agents agree to sell and dispose of the same to the best advantage and remit the proceeds of sale less certain agreed agency charges and remuneration to the said principals. The agreements are signed by the principals in the State outside New South Wales where they reside and the farm produce is subsequently consigned from such State and sent to the inter-State agents in Sydney, who arrange for the unloading of the farm produce and who then proceed to sell the same in accordance with their said agreements. The farm produce remains the property of the said principals until sold in Sydney by the agents.

6. The facts set out in the preceding paragraph also describe the transactions between the general agents and their principals where the latter reside and their farm produce is grown in States of the Commonwealth outside the State of New South Wales. A substantial portion of the business of the general agents consists of such inter-State transactions.

7. Approximately 50 per cent of the farm produce sold in Sydney by the inter-State agents and general agents consists of farm produce grown outside the State of New South Wales, and despatched to the said agents for sale in New South Wales on account of growers resident in States of the Commonwealth outside New South Wales.

8. Both inter-State agents and general agents sell the farm produce on its arrival in Sydney from the other States to purchasers in the Sydney market in the original packages and cases in which such farm produce is despatched from the other States.

9. The defendants, purporting to act under the New South Wales *Farm Produce Agents Act* 1926 (No. 7 of 1926), are compelling and

H. C. OF A. 1928.

ROUGHLEY v. NEW SOUTH WALES.

EX PARTE BEAVIS.

threatening and intending to compel the inter-State agents, by prosecution and otherwise, (a) to become and/or remain licensed under the said Act as farm produce agents; (b) to comply with the provisions of sec. 13 of the said Act and regulations thereunder by keeping and producing for inspection by authorized officers and servants of the defendants books, accounts and writings of such agents relating solely to the transactions between such agents and their principals in the States of the Commonwealth outside New South Wales and to the sales made on account of such principals; (c) to comply with the provisions of secs. 14 and 15 of the said Act relating to the written advice of sales, the opening and disbursement of a trust account and the time of forwarding proceeds of sale to the principals and growers resident in the States of the Commonwealth outside the State of New South Wales; (d) to comply with the provisions of sec. 23 of the said Act and the regulations made thereunder by limiting their remuneration and charges for and in respect of the sale and disposal by them of farm produce on account of their principals, notwithstanding that the agreements between such agents and their principals provide for remuneration and charges in excess of those allowed under the said regulations and notwithstanding that the said principals and agents are both ready and willing to carry out the terms of their agreements in such respect.

10. The defendants are also compelling and threatening and intending to compel, by prosecution and otherwise, the general agents to do the acts set out in clauses (b), (c) and (d) of the preceding paragraph in respect of the transactions between such general agents and their principals in the States of the Commonwealth other than the State of New South Wales.

11. By reason of the matters referred to in pars. 9 and 10 of the statement of claim both inter-State and general agents are being hindered and impeded in the carrying out of their agency agreements with their principals in the States of the Commonwealth other than the State of New South Wales.

12. Both inter-State and general agents desire and intend to carry out and obtain the benefit of their agreements with their principals in respect of the inter-State business, notwithstanding

the acts of the defendants referred to in pars. 9 and 10 of the statement of claim, but the defendants threaten and intend by prosecution and threats of prosecution and otherwise to prevent the fulfilment of such agreements and the transaction of such business except in accordance with the provisions of the New South Wales *Farm Produce Agents Act* and the regulations made thereunder.

13. The plaintiffs fear that unless restrained by the declaration, order and injunction of this honourable Court the defendants will put and continue to put the said Act and regulations into operation against the inter-State and general agents, whereby the said agents will be subjected to heavy penalties and their business and dealings with their principals in States of the Commonwealth other than the State of New South Wales in respect of the sale and disposal of farm produce grown in such States and forwarded to Sydney will be hampered and destroyed.

The plaintiffs claimed :—

(1) A declaration (*a*) that the New South Wales *Farm Produce Agents Act* 1926, and especially secs. 12, 13, 14, 15 and 23, and the regulations made thereunder are beyond the powers of the New South Wales Parliament so far as they purport (i.) to regulate, control, restrict and/or prohibit the sale and disposal in New South Wales of farm produce grown in other States of the Commonwealth, (ii.) to regulate and control the right of the plaintiffs to carry out the agreements described in pars. 5 and 6 of the statement of claim and to restrict the right of the plaintiffs to enter into similar agreements ; (*b*), alternatively, that the said Act does not operate or apply to the inter-State transactions of the plaintiffs or so as to regulate or control the matters and rights referred to in the last preceding claim.

(2) The following orders : (*a*) an order to restrain the defendants from acting in the manner described in pars. 9, 10 and 12 of the statement of claim, and (*b*) an order that the defendants pay the plaintiffs' costs of this suit.

The defendants demurred to the whole of the statement of claim on the ground that it was bad in substance. The grounds

H. C. OF A. 1928.

ROUGHLEY v. NEW SOUTH WALES.

EX PARTE BEAVIS.

in law for the demurrer were (*inter alia*) (1) that the plaintiffs are not nor is either of them entitled to sue for the declarations and orders asked for in the prayer to the statement of claim; (2) that the New South Wales *Farm Produce Agents Act* 1926 and the regulations made thereunder are within the powers of the Parliament of New South Wales; (3) that the said Act does apply to the inter-State transactions of the plaintiffs as described in the statement of claim; (4) that the acts of the defendants alleged in pars. 9 and 10 of the statement of claim do not hinder and impede the plaintiffs as alleged in pars. 11 and 12 of the statement of claim; (5) that the statement of claim discloses no ground for the relief prayed or any of it; (6) that the statement of claim discloses no ground on which the plaintiffs are entitled to an injunction; (7) that the *Farm Produce Agents Act* does not purport to authorize any act which would violate sec. 92 of the Constitution and that no such act is alleged in the statement of claim; (8) that the statement of claim discloses no cause of action cognizable in this Court.

Beavis's Case.—Alfred Beavis, a member of the firm of Rule & Beavis, farm produce agents, licensed under the provisions of the *Farm Produce Agents Act* 1926, and carrying on business at the New South Wales Fruit Exchange, Sydney, was charged before a Stipendiary Magistrate on 21st November 1927, on the information of Charles Ernest Edwards, a detective-sergeant of police, with refusing to produce to an inspector under the Act the books of account, &c., relating to the firm's business as farm produce agents when required to do so under authority of sec. 13 of the Act. Evidence was given that the inspector visited the office of the firm on two occasions, and on both occasions Beavis refused to produce the books, &c., in question on the ground that the firm was engaged in inter-State trade only and therefore the inspector had no right to inspect any books, &c., relating to such trade, which was a matter for the Commonwealth Parliament only. The magistrate convicted Beavis, who thereupon obtained from the Supreme Court of New South Wales a rule nisi for a writ of prohibition directed to the magistrate and Edwards, restraining them from proceeding further with the conviction. On an application that the

rule nisi be made absolute *Davidson* J., being of the opinion that a question arose as to the limits *inter se* of the constitutional powers of the Commonwealth and the State of New South Wales, proceeded no further with the matter, which thereupon became automatically removed to the High Court by virtue of the provisions of sec. 40A of the *Judiciary Act*, and now came on for hearing.

As the demurrer in *Roughley's Case* involved the validity of the *Farm Produce Agents Act* 1926, that case came on for argument first.

Brissenden K.C. (with him *Delohery* and *Nicholas*), for the defendants, in support of the demurrer. Transactions such as are disclosed in this case, of an agent in a State for the sale of goods which are consigned to that State for sale, are within the control of the State legislature. Sec. 92 of the Constitution was not intended to extend to incidents of inter-State trade and commerce which relate to the dealing with the goods after the inter-State transportation has ceased. The sole duty of the plaintiffs lies within New South Wales, and is to bring about the relationship of buyer and seller between a purchaser resident in New South Wales and a vendor resident in another State in respect of goods produced in that other State, and the transactions involved in the performance of that duty do not form part of inter-State trade and commerce within the meaning of sec. 92 (*Cooley's Constitutional Limitations*, 8th ed., vol. II., p. 1332; *Hopkins* v. *United States* (1)). *Hopkins's Case* was discussed with approval by this Court in *Federated Amalgamated Government Railway and Tramway Service Association* v. *New South Wales Railway Traffic Employees Association* (2). In *Ficklen* v. *Shelby County* (3) the facts were almost exactly the same as in this case, and there the transactions of the commission agents were held not to be inter-State commerce. The same line should be drawn in the present case as in the decisions of the United States Courts just referred to. If goods are brought to New South Wales for purpose of sale they are, until sale, in inter-State trade, but the means by which they are to be sold and the matters of form attending the contracts are within the jurisdiction of the New

(1) (1898) 171 U.S. 578.
(2) (1906) 4 C.L.R. 488, at pp. 541-543.
(3) (1892) 145 U.S. 1.

H. C. OF A. 1928.

ROUGHLEY v. NEW SOUTH WALES.

EX PARTE BEAVIS.

South Wales Legislature (*W. & A. McArthur Ltd.* v. *Queensland* (1)). The words "absolutely free" in sec. 92 of the Constitution only mean absolutely free from something in the nature of imposts or duties or burdens of the nature of customs duties imposed by a Parliament. By regulating an agent it does not follow that a State legislature creates or authorizes an interference with actual inter-State transactions. Trading through agents is only an alternative method, not one which must be adopted, of conducting inter-State trade, and a State may regulate that method.

H. V. Evatt (with him *McKell*), for the plaintiffs. The real question is whether the trade described in the statement of claim is inter-State trade. The trade described consists of four separable elements: (a) a contract between a producer in a State other than New South Wales and an agent in New South Wales; (b) actual transit from the producer to the agent in New South Wales; (c) the sale by the agent, and (d) the accounting by the agent to the producer for the proceeds of sale. Those elements together constitute a cycle of trade by which growers of farm produce in other States are enabled to sell their produce in the Sydney market. It is a system of trade, and is trade, commerce and intercourse among the States within the meaning of sec. 92 of the Constitution. The *Farm Produce Agents Act* 1926 attacks all except the second of those elements. The test is: is the State attacking the trade either by regulating the agents or on insisting on certain prices for the goods, or is it affecting it in some relevant way? Even though the State legislation is for the purpose of ensuring that inter-State trade shall be conducted honestly, it constitutes an interference with the freedom of that trade and violates the provisions of sec. 92. The validity of the Act must be determined by looking at the scheme which was in the mind of the Legislature as expressed in the regulations under the Act, and discovering whether the Act affects trade and commerce in so substantial or so direct a way that it is a law with respect to it. A State may, as a law of health, prevent bad fruit being sold, but that would be a law of health, and not a law with respect to trade.

(1) (1920) 28 C.L.R. 530, at pp. 550-553.

[STARKE J. The essential part of inter-State trade and commerce is the movement of goods across the border: how does the *Farm Produce Agents Act* interfere with it ?]

Trade among the States is not completely covered by the test of movement across the borders. It can be shown by consideration of some of the cases that the transactions in this case between the agent and the grower are, in the circumstances, portion of inter-State trade, and in arriving at this view the decision in *Hopkins* v. *United States* (1) does not present an insurmountable obstacle. *Hopkins's Case* has no application to the Commonwealth Constitution. Further, in that case the agreement was between agents only, and had no relation to any agreement between an agent in one State and a grower in another State. A law directed to the preservation of property which is used or being used in inter-State trade (e.g., trucks) is a law with respect to inter-State trade. Once the concept of trade and commerce among the States is taken, it cannot be limited to the mere relationship between a vendor in one State and a purchaser in another State. Between them is (*inter alia*) the actual carriage of the goods from State to State. If the inter-State movement does not end until the sale of the goods, the services of the agent and his relationship to his principal in the other State are inter-State commerce. The contractual relationship between the agent and the grower in this case is as much a part of inter-State trade as the employment of seamen on the ships carrying the goods from one State to another, and the Commonwealth Parliament can legislate with respect to such relationship (*Australian Steamships Ltd.* v. *Malcolm* (2)). The dealings between an agent and his principal under the contract are an accessory method to initiate and effectuate the actual movement of farm produce from one State to another. The co-operation of principal and agent is necessary for the carrying out of inter-State trade (*McArthur's Case* (3)). Trade and commerce between States consist of transactions and it must follow that there are more than one person concerned in the act. If that is so, the transaction by which a grower takes his goods to another State and sells them there is part of inter-State

(1) (1898) 171 U.S. 578.
(2) (1914) 19 C.L.R. 298, at p. 331.
(3) (1920) 28 C.L.R., at p. 549.

H. C. OF A. 1928.

ROUGHLEY v. NEW SOUTH WALES.

EX PARTE BEAVIS.

trade. So where a grower brings his goods from another State and sells them in New South Wales, his acts are acts of inter-State trade. If the grower employs an agent to take the goods to market in New South Wales the agent's act of taking them there is part of inter-State trade and commerce. It follows that the carrying out of an agreement to do something which is necessary to sell the goods in New South Wales is an act of trade and commerce between States. Further, if the grower agrees that the agent shall receive certain remuneration for his services, that remuneration cannot be lessened by any State Act. The transaction of inter-State trade does not end with the sale of the goods: it includes the remitting of the proceeds to the grower. The matter of remuneration, whether it be for the principal or for the agent, is a part of inter-State trade. It may be that it is within the powers of a State to require that a carter of inter-State goods (*inter alia*) be licensed. The remuneration for doing the carting of a grower is something quite different, and it is not lawful for a State to say that for doing the carrying the remuneration shall be some less sum. The test can always be found in what the contract is between the person who does a particular act of inter-State trade and the owner of the goods. Even assuming that a State can insist on an agent being licensed it cannot insist that whatever the agent's agreement with his principal may be he must not pay over the proceeds until a certain time. When goods are brought from one State to another for purposes of sale the inter-State transaction does not end with the sale (*Commonwealth and Commonwealth Oil Refineries Ltd.* v. *South Australia* (1); *Leisy* v. *Hardin* (2); *Committee of Direction of Fruit Marketing* v. *Collins* (3)). Any arrangement between an owner of goods and any person to carry out any part of inter-State trade is outside the powers of a State to regulate.

[HIGGINS J. referred to *Pirrie* v. *McFarlane* (4).

[STARKE J. Provisions for the protection of trade cannot be said to interfere with the freedom of inter-State trade.]

Such provisions may be regarded as protection from one point of view, but as a hindrance if they interfere with the contractual

(1) (1926) 38 C.L.R. 408, at p. 430.
(2) (1890) 135 U.S. 100.
(3) (1925) 36 C.L.R. 410.
(4) (1925) 36 C.L.R. 170.

rights of persons engaged in inter-State trade. The only test which is applicable as to whether a State has any power to legislate is: is the transaction one of inter-State trade and commerce? If it is, then the State cannot interfere with it either by assisting or hindering it (*McArthur's Case* (1)). The test of benefit or hindrance gives rise to all sorts of difficulties (*Shafer* v. *Farmers Grain Co.* (2); *Real Silk Hosiery Mills* v. *City of Portland* (3)). The arrangement attacked in *Hopkins* v. *United States* (4) was a voluntary one between agents and was not, as here, the case of a State attempting to regulate inter-State trade.

[ISAACS J. *Hopkins's Case* (4) was distinguished in *United Leather Workers* v. *Herkert* (5).]

On the construction of the *Farm Produce Agents Act* 1926 there is no indication in the whole of the Act that it was intended by the New South Wales Legislature to pass legislation for the benefit of producers outside New South Wales, and the Act should be construed as relating only to farm produce produced and sold within New South Wales (*McArthur's Case* (6); *Committee of Direction of Fruit Marketing* v. *Collins* (7)).

Brissenden K.C., in reply. The central idea of trade, commerce and intercourse among the States is the movement of persons or things—the movement or transportation of persons or things from one State to another; and unless it can be found that the incidental and connected methods are essential for that movement, and deal with matters in connection with it, they are part of trade, commerce and intercourse among the States (*McArthur's Case* (8)). Whether a particular act comes within the definition of inter-State trade in *McArthur's Case* as being essential to the transportation of goods may be ascertained by referring to *Ware & Leland* v. *Mobile County* (9); *Williston* on *Law of Contracts*, vol. III., p. 3088; *United Leather Workers* v. *Herkert* (10).

Cur. adv. vult.

(1) (1920) 28 C.L.R., at pp. 550-551.
(2) (1925) 268 U.S. 189.
(3) (1925) 268 U.S. 325.
(4) (1898) 171 U.S. 578.
(5) (1924) 265 U.S. 457.
(6) (1920) 28 C.L.R., at pp. 558-559.
(7) (1925) 36 C.L.R., at p. 426.
(8) (1920) 28 C.L.R., at p. 549.
(9) (1908) 209 U.S. 405, at p. 412.
(10) (1924) 265 U.S., at p. 470.

H. C. OF A. 1928.

ROUGHLEY v. NEW SOUTH WALES.

EX PARTE BEAVIS.

At the conclusion of the argument in *Roughley's Case, H. V. Evatt* (with him *McKell*), for the applicant, and *Brissenden* K.C. (with him *Delohery* and *Nicholas*), for the respondents, informed the Court that they did not desire to add anything to the arguments advanced in *Roughley's Case.*

Cur. adv. vult.

Oct. 22.

The following written judgments were delivered :—

KNOX C.J. *Roughley's Case.*—The question raised by the demurrer in this case is, in substance, whether the statement of claim discloses a cause of action on the part of the plaintiffs. Two of the plaintiffs sue on behalf and for the benefit of persons described as inter-State farm produce agents, members of the New South Wales Fruit and Vegetable Agents and Merchants Association, and the other two plaintiffs sue on behalf and for the benefit of persons described as general farm produce agents, members of the same Association. The statement of claim alleges that the Association consists of those who from time to time sell at Sydney in the State of New South Wales farm produce on behalf of and as agents for various growers of such produce. Some of the members act solely as agents for the sale of farm produce grown in other States of the Commonwealth on behalf of persons resident in such other States. Other members act as agents for the sale of produce grown in all the States, including New South Wales, on behalf of persons resident in all such States. The course of the business carried on by the plaintiffs is stated in the statement of claim as follows :—" 5. The inter-State agents sell farm produce at Sydney in pursuance of agreements between them and their principals which provide that in consideration that the principals forward to the inter-State agents the farm produce from the respective States outside New South Wales to Sydney New South Wales the said agents agree to sell and dispose of the same to the best advantage and remit the proceeds of sale less certain agreed agency charges and remuneration to the said principals. The agreements are signed by the principals in the State outside New South Wales where they reside and the farm produce is subsequently consigned from such State and sent to the inter-State agents in Sydney, who arrange

for the unloading of the farm produce and who then proceed to sell the same in accordance with their said agreements. The farm produce remains the property of the said principals until sold in Sydney by the agents. 6. The facts set out in the preceding paragraph also describe the transactions between the general agents and their principals where the latter reside and their farm produce is grown in States of the Commonwealth outside the State of New South Wales. A substantial portion of the business of the general agents consists of such inter State transactions. . . . 8. Both inter-State agents and general agents sell the farm produce on its arrival in Sydney from the other States to purchasers in the Sydney market in the original packages and cases in which such farm produce is despatched from the other States."

The plaintiffs allege that the defendants, purporting to act under the New South Wales *Farm Produce Agents Act* (No. 7 of 1926), are threatening and intending to compel the inter-State agents and the general agents in respect of transactions between them and their principals in States other than New South Wales by prosecution and otherwise to comply with the provisions of secs. 5, 12, 13, 14, 15 and 23 of that Act and with the regulations made thereunder. They complain that by reason of such conduct on the part of the defendants the inter-State and general agents are being hindered and impeded in the carrying out of their agency agreements with their principals in the States other than New South Wales, that they desire to carry out such agreements but the defendants threaten and intend by prosecution or otherwise to prevent the fulfilment of such agreements and the transaction of such business except in accordance with the provisions of the Act and regulations above referred to. The relief claimed is: (1) A declaration that the Act above referred to and especially secs. 12, 13, 14, 15 and 23 thereof and the regulations made thereunder are beyond the powers of the New South Wales Parliament so far as they purport (a) to regulate, control, restrict or prohibit the sale and disposal in New South Wales of farm produce grown in other States, (b) to regulate and control the right of the plaintiffs to carry out the agreements described in the statement of claim and to restrict their right to enter into similar agreements; (2), alternatively, a declaration that the Act

H. C. OF A. 1928.

ROUGHLEY v. NEW SOUTH WALES.

EX PARTE BEAVIS.

KNOX C.J.

does not apply to the inter-State transactions of the plaintiffs, and (3) an injunction to restrain the defendants from acting in the manner complained of in the statement of claim. It will be observed that the statement of claim contains no allegation that the producers or consignors of farm produce grown in States other than New South Wales are in any way hindered or impeded in the transportation of such produce to Sydney or in its sale there, or that the Act operates in any way to the detriment or prejudice of such producers or consignors. The sole complaint is that the agents are subjected to certain restrictions in carrying on of *their* business. It follows that, unless the business carried on by the agents as described in the statement of claim is itself "trade, commerce or intercourse among the States," the statement of claim contains no allegation of any interference, actual or threatened, with such trade, commerce or intercourse.

The provisions the validity of which is specifically challenged may be summarized as follows, namely:—Sec. 5 provides that any person who acts as or carries on or holds himself out as carrying on the business of a farm produce agent unless he is the holder of a licence shall be guilty of an offence against the Act, and sec. 12 imposes a penalty not exceeding £100 for any such offence. Sec. 2 provides that the expression "farm produce agent" *means* "any person who, as an agent for others, whether on commission or for or in expectation of any fee, gain, or reward, whether alone or in connection with any other business, exercises or carries on the business or advertises or notifies that he exercises or carries on the business of selling farm produce or of a broker or factor of farm produce, but does not include a person being a licensed auctioneer, conducting a clearing out sale of the vendors own farm produce on the vendors property, or a person employed merely as a clerk or servant or any banking company or any society registered under the *Co-operation, Community Settlement, and Credit Act* 1923, whose objects include the disposal of the agricultural products of its members or other persons." Sec. 13 confers on the Registrar or any person authorized by him power to inspect the books, accounts, or writings in the custody or control of any farm produce agent relating to his business and to take extracts or copies therefrom and

provides penalties for obstruction or refusal to produce books, &c., or to answer questions relating thereto. The Registrar is also authorized to communicate to any client the result of the inspection so far as it directly concerns such client. Sec. 14 provides that an account in writing of every sale or disposal of farm produce shall be rendered by the agent to the principal within seven days. Sec. 15, sub-sec. 1, provides for payment by the agent into a bank to a trust account of all moneys received by him of any sale less certain specified deduction. Sub-sec. 2 authorizes the agent to draw against such trust account in payment of certain charges and expenses, and sub-sec. 3 requires payment to the principal within fourteen days after sale of the amount due to him. Sec. 23 provides that a farm produce agent shall not be entitled to sue for or recover any remuneration unless he is the holder of a licence and such remuneration is not in excess of the fees and charges that may be prescribed.

It is manifest from the provisions of the Act that its sole object is to ensure, as far as may be practicable, honest dealing on the part of persons described as farm produce agents towards their principals and to prevent the owners of farm produce, whether resident in New South Wales or in other States, from being defrauded by persons who carry on the business of selling farm produce. The Act imposes no restrictions on the right of the parties to agree to any terms or conditions of employment, though it prevents the agent from recovering by action any remuneration in excess of that prescribed. With the exception of sec. 22, which provides that a seller of farm produce who knowingly misrepresents it to be of a particular description, origin, grade or quality shall be guilty of an offence, the Act contains no command addressed to the owner or producer of the commodities and imposes no restraint on his right to transport them into New South Wales and sell them there. The employment by him of an unlicensed agent is not made an offence on his part, and the provisions of the Act differ not at all in principle from those of State Acts generally in force requiring auctioneers to be licensed. If the Act now under discussion be beyond the powers of the Parliament of a State, then it must follow that all State Acts requiring auctioneers to be licensed and placing other restrictions

H. C. OF A. 1928.

ROUGHLEY v. NEW SOUTH WALES.

EX PARTE BEAVIS.

KNOX C.J.

on sales by auction are open to the same objection. An auctioneer is an agent employed to sell property on behalf of his principals by a particular method. If the contention of the plaintiffs in this case be correct, a person selling by auction in one State goods consigned to him for sale from another State may disregard with impunity all the restrictions imposed by State law on the sale of goods by auction. Similarly, a person may sell poisons consigned to him from another State for sale on behalf of the principal in that State free from any restrictions imposed by the law of the State in which the sale is made. The provisions of the Act—with the exception of sec. 22, the validity of which was not challenged—impose no obligation or restriction on a person who is acting as the servant of the owner or consignor of the produce, but are directed exclusively to persons exercising or carrying on in New South Wales the business of selling farm produce which has been delivered to them in that State for sale on commission or for remuneration in some other form for such persons as may choose to employ them for that purpose. If sec. 5 of the Act be expanded by substituting for the words "farm produce agent" the definition of that expression contained in sec. 2, it runs as follows: "Any person who, as an agent for others, whether on commission or for or in expectation of any fee, gain, or reward, whether alone or in conjunction with any other business, *exercises or carries on the business or advertises or notifies that he exercises or carries on the business of selling farm produce or of a broker or factor of farm produce*, . . . unless he is the holder of a licence, shall be guilty of an offence against this Act."

In the statement of claim the plaintiffs describe the business carried on by them in New South Wales as that of from time to time selling in New South Wales farm produce on behalf of and as agents for "various growers" of such farm produce, and the allegations in par. 5 of the statement of claim show clearly that they do not act as servants of the producers, and that the business which each of them carries on is his own business of commission agent and not the business of the grower by whom the produce is consigned. In determining whether this Act in its application to the plaintiffs is obnoxious to the provisions of sec. 92 of the Constitution, the question for consideration is whether the Act regarded

from that point of view detracts from the freedom of trade or commerce among the States. If the opinion which I have expressed as to the construction of the Act be correct it places no obstacle in the way of the producer sending produce from another State into New South Wales or selling it there. Nor does it purport to prohibit such a producer from employing any person he may choose upon any terms that may be agreed on to act for him in the sale of such produce. It may well be that the Parliament of New South Wales is prevented by sec. 92 of the Constitution from either prohibiting the owner of goods produced in another State or the servant of such an owner bringing such goods into New South Wales or selling them there, and from imposing conditions on the exercise of his right to do so. But it does not follow that a State law regulating the conduct of auctioneers or commission agents carrying on their business in New South Wales, or requiring them to be licensed, or prescribing rules for the regulation of traffic in the streets of its towns is rendered inoperative by that section whenever the auctioneer, or agent, or carrier is in fact dealing with goods consigned from another State for sale in New South Wales. What is forbidden by sec. 92 is any State law which obstructs or restricts the freedom of trade or commerce among the States. A law may control in some degree the conduct and liability of persons engaged in inter-State commerce without being itself a regulation of inter-State commerce (*Judson* on *Inter-State Commerce*, 2nd ed., p. 50); and a person whose business consists wholly or in part of affording facilities for the transaction of inter-State commerce is not necessarily engaged in inter-State commerce so as to prevent the regulation by State legislation of his conduct in connection with that business. The expression " trade and commerce " is no wider in its meaning than the word " commerce " used in the Constitution of the United States, which has ever since the decision in *Gibbons* v. *Ogden* (1) been construed as including all commercial traffic and intercourse and as extending to the persons who conduct such commerce as well as to the means and instrumentalities used (*Cooley* v. *Wardens of Port of Philadelphia* (2)); and, although the Constitution of the United States contains no express provision corresponding to sec. 92 of our

(1) (1824) 22 U.S. 1. (2) (1851) 53 U.S. 299.

H. C. OF A. 1928.

ROUGHLEY v. NEW SOUTH WALES.

EX PARTE BEAVIS.

KNOX C.J.

Constitution, it has been construed by the Supreme Court of the United States as if it contained such a provision. As was said by *Fuller* C.J. in *United States* v. *E. C. Knight Co.* (1), "the power of Congress to regulate commerce among the several States is also exclusive. The Constitution does not provide that inter-State commerce shall be free, but, by the grant of this exclusive power to regulate it, it was left free except as Congress might impose restraints." If this statement of the position in the United States be correct, there is no substantial difference between our Constitution and that of the United States in respect of the freedom of trade and commerce among the States from interference by State legislation. In *Hopkins* v. *United States* (2) the question for decision was whether the Act of Congress commonly spoken of as the Anti-Trust Act was infringed by a combination among members of an association carrying on the business of buying and selling live-stock on commission. It was admitted that most of the purchases and sales effected by them were of live-stock sent from other States, that they were employed by letter from the owners of the live-stock in other States, and that they sent agents to other States to solicit business and advanced money to the live-stock owners. The decision of the Supreme Court was that the defendants were not guilty of any violation of the Act because they were not engaged in inter-State commerce. In delivering the unanimous opinion of the Court, *Peckham* J. said (3) "the selling of an article at its destination, which has been sent from another State, while it may be regarded as an inter-State sale and one which the importer was entitled to make, yet the services of the individual employed at the place where the article is sold, are not so connected with the subject sold as to make them a portion of inter-State commerce, and a combination in regard to the amount to be charged for such service is not, therefore, a combination in restraint of that trade or commerce. Granting that the cattle themselves, because coming from another State, are articles of inter-State commerce, yet it does not therefore follow that before their sale all persons performing services in any

(1) (1895) 156 U.S. 1, at p. 11.
(2) (1898) 171 U.S. 578.
(3) (1898) 171 U.S., at pp. 590, 591.

way connected with them are themselves engaged in that commerce, or that their agreements among each other relative to the compensation to be charged for their services are void as agreements made in restraint of inter-State trade. The commission agent in selling the cattle for their owner simply aids him in finding a market; but the facilities thus afforded the owner by the agent are not of such a nature as to thereby make that agent an individual engaged in inter-State commerce, nor is his agreement with others engaged in the same business as to the terms upon which they would provide these facilities, rendered void as a contract in restraint of that commerce." The observation of *Marshall* C.J. in *Brown* v. *Maryland* (1) that a State might lawfully impose a tax on an auctioneer's licence was referred to with approval, and it was said (2):—" But in all the cases which have come to this Court there is not one which has denied the distinction between a regulation which directly affects and embarrasses inter-State trade or commerce, and one which is nothing more than a charge for a local facility provided for the transaction of such commerce. On the contrary, the cases already cited show the existence of the distinction and the validity of a charge for the use of the facility." Moreover, the Court expressed the opinion that a member of the New York Produce Exchange to whom a cargo of grain was consigned from a western State to be sold was not engaged in inter-State commerce when he performed the service of selling the article on its arrival in New York and transmitting the proceeds of sale less his commission. In the view which I take of the meaning and operation of the *Farm Produce Agents Act* 1926 this decision is precisely in point in this case. It is, of course, not binding on this Court, but it shows that in the United States a business of the kind carried on by the plaintiffs in this action would not be regarded as included in the expression " commerce among the several States." I respectfully adopt the reasons given in support of that decision as supporting the conclusion that the provisions of the *Farm Produce Agents Act* 1926 as applied to the plaintiffs do not restrict the freedom of trade, commerce or intercourse among the States and

(1) (1827) 25 U.S. 419.

(2) (1898) 171 U.S., at p. 597.

H. C. OF A. 1928.

ROUGHLEY v. NEW SOUTH WALES.

EX PARTE BEAVIS.

KNOX C.J.

are therefore not obnoxious to the provisions of sec. 92 of the Constitution.

In my opinion the demurrer should be upheld.

Beavis's Case.—For the reasons which I have stated in *Roughley's Case* I am of opinion that the rule nisi for prohibition should be discharged.

ISAACS J. *Roughley's Case.*—The plaintiffs are and act as farm produce agents within the meaning of the New South Wales *Farm Produce Agents Act* 1926 (No. 7 of 1926). The defendants' demurrer admits the facts alleged in the statement of claim, and raises contentions reducible to two, namely, the right of the plaintiffs to sue, and the validity of the Act so far as it affects them.

On the argument the first point was not contested, and, in my opinion, it is beyond contest. First, as to the subject matter, some of the plaintiffs do inter-State trade only and some do both inter-State and intra-State trade. The inter-State trade arises in this way:—Growers of farm produce in the other States forward it to the plaintiffs in New South Wales for immediate sale in the Sydney market, in the original packages and cases in which the produce is despatched from the other States. That process unqualified is inter-State trade. Consequently, on the ground of inter-State trade alone, the plaintiffs have a *locus standi* in Federal original jurisdiction. But also, if the relevant provisions of the Act are inseparable as to inter-State and intra-State trade, the agents, even though engaged in purely intra-State trade, would have a right to sue, since the question as to sec. 92 arises under the Constitution, and the interpretation of the Constitution is involved. So far, then, as subject matter is concerned, the facts are sufficient. Then it is alleged, and for present purposes admitted, that the defendants are compelling and threatening and intending to compel by prosecution and otherwise, all the agents to comply with the Act and regulations. So that the principle of *Dyson* v. *Attorney-General* (1) and *Burghes* v. *Attorney-General* (2) applies. It is, in effect, the well-known principle to which I referred in *Brisbane City Council*

(1) (1911) 1 K.B. 410.

(2) (1912) 1 Ch. 173.

v. *Attorney-General for Queensland* (1), and adopted by the Privy Council in the same case (*Attorney-General for Queensland* v. *Brisbane City Council* (2)). With regard to the statute itself I think it is plain that, unless it can upon interpretation (*Macleod* v. *Attorney-General for New South Wales* (3)) be read so as to limit its operation to intra-State trade, the sections involved in this case being inseparable as to the two classes of trade must fall altogether. They are secs. 5 and 12 and the sections dependent upon them. Sec. 5 says : " Any person who *acts as* or *carries on* or advertises or notifies that he acts as or carries on *the business* of a farm produce agent, unless he is the holder of a licence, shall be guilty of an offence against this Act." Sec. 12 declares that " Any person (not being the holder of a licence) who (*a*) *acts as* or *carries on* or advertises or notifies that he acts as or carries on business as a farm produce agent . . . shall be liable to a penalty not exceeding one hundred pounds." A licence costs £1, and so for every annual renewal. A bond in the prescribed form is required for £500 from some insurance company. A " farm produce agent " is defined to mean any person who, as an agent for others, (*inter alia*) " exercises or carries on the business . . . of selling farm produce." Secs. 5 and 12 strike at a person who " acts as " a farm produce agent, and also at a person who " carries on the business of " a farm produce agent. The statute draws a distinction between " acts as " and " carries on the business of." A man may " act as " a solicitor or a doctor, even though not carrying on those professions. The words include every person who conducts himself in New South Wales territory as a farm produce agent, wheresoever in the world the relation of principal and agent has been constituted, and whether his conduct consists in a single isolated act, or a single act in New South Wales not isolated, but one act in a business series, or intended to be one in a business series, occurring wholly in New South Wales or partly occurring in one State and partly in another.

It is urged in support of the Act that all it does is to require a " capacity " or a " status " to be an agent. No doubt the power to require any person in the territory to have a stipulated capacity to do any act is primarily within the legislative power of a State

(1) (1908) 5 C.L.R. 695, at pp. 734-735.
(2) (1909) A.C. 582, at p. 596 ; 8 C.L.R. 767, at pp. 778-779.
(3) (1891) A.C. 455.

H. C. OF A. 1928.

ROUGHLEY v. NEW SOUTH WALES.

EX PARTE BEAVIS.

Isaacs J.

under its own Constitution. For instance, a certain educational capacity might be enacted to enable any man to contract, and a penalty might be enacted if any person not having that capacity should enter into an agreement as a contract. But, in the presence of sec. 92 of the Commonwealth Constitution, is that power still universally exercisable by a State Parliament? Assuredly not as to principals in an inter-State transaction. The State may, if it pleases, say "We will not enforce such a bargain," and then the bargain would be unenforceable by State law, or at all, unless the Commonwealth Parliament provided a remedy. But the State, while at liberty to refrain from assisting or enforcing such a bargain, could not penalize the making of it, or make it the subject of a direct tax, or require a licence—which is the State's permission—before the owner of goods sells them inter-State. That would be attempting to regulate the very *act* of inter-State trade. Nor, for the same reason, could a State forbid its citizens the "capacity" to purchase inter-State unless licensed, at any cost and under any conditions of punishment or otherwise the State thinks fit—for there is no limit if the power exists. Consequently, "capacity" and "status" cannot be the discrimen or the test. The only test is: Is what is done an attempted regulation of inter-State trade and commerce? We have only to envisage what happens under the facts predicated in this case to get an instant answer. A producer in Queensland sends pine-apples, not only to other States of the Commonwealth but also to Sydney to an agent there, to receive and sell them forthwith to Sydney merchants. Forbid the agent, and the trade in New South Wales disappears, for the principal cannot be present everywhere at once. Prescribe a licence for the agent, and the trade is regulated, because what in actual fact is an indispensable means of transacting it, is interfered with. Nor is it an answer to say the inter-State transaction is not interfered with, but only the contractual relation between principal and agent. Secs. 5 and 12 make no mention of the creation of that contractual relation. Merely to make a contract of agency would be no offence under the Act, even if it could validly be made an offence. But the statute interposes its conditional prohibition at the exact point where a person acting as agent for the seller proceeds to create the

legal relation with the buyer. Lord *Lyndhurst* L.C. in *Pattison* v. *Mills* (1), in delivering the judgment of the House of Lords, said: "If I, residing in England, send down my agent to Scotland, and he makes contracts for me there, it is the same as if I myself went there and made them." Now, suppose a Sydney produce agent makes the agency contract in another State where his "capacity" to do so is unimpaired and where the relationship is lawfully and effectively created, is he at liberty, notwithstanding the Act, to carry out that bargain in inter-State sales in New South Wales by "acting" as a farm produce agent, or is he committing an offence by selling inter-State without the State's permission? And again, suppose a Victorian agent contracts in Melbourne to sell farm produce in Sydney for a Victorian grower, is a Victorian agent, having an amplitude of legal "capacity" in his own State, an offender for coming over the border and without licence selling his principal's goods inter-State? It was suggested that there was a difficulty as to auctioneers. There is a possible distinction as to auctioneers. In *Brown* v. *Maryland* (2) *Marshall* C.J. referred to the sale by using auctioneers as making the sale in "a peculiar way." There are circumstances which differentiate auction sales from ordinary sales, as by collecting a crowd, loud public announcements, and there is a considerable history behind the occupation which might or might not sustain a State statute on that subject. But that is quite immaterial here. All agency is forbidden in the nature of farm produce agency, except as prescribed. Therefore, agency as a part, and in many cases an essential part, of inter-State trade is included. That is patently an infringement of sec. 92.

Now, sec. 92, as its own plain words require, and as the authority of this Court at present stands, withdraws from the Parliaments of the States the power to legislate so as to prevent the absolute freedom of inter-State trade. Any infringement of sec. 92 must be *ultra vires*, and therefore invalid.

I desire to make this position quite clear. In *James* v. *South Australia* (3), as recently as June last year, this Court declared the meaning and effect of sec. 92. No one doubted that it prohibited

(1) (1828) 1 Dow & Cl. 342, at p. 363.

(2) (1827) 25 U.S., at p 443.

(3) (1927) 40 C.L.R. 1.

H. C. OF A. 1928.

ROUGHLEY v. NEW SOUTH WALES.

EX PARTE BEAVIS.

Isaacs J.

State action in derogation of inter-State free trade. My brother *Powers* and I thought that prohibition extended to all forms of State interference. The majority (*Gavan Duffy* J., *Rich* J. and *Starke* J.) thought it was confined to State legislative action. There is this passage in my learned brothers' joint judgment (1): "Sec. 92 was defined in *McArthur's Case* (2) as applying only to the States, and we think it is 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.*" Nothing could more clearly express the opinion that this power of the State Parliament, existing before Federation, had in the words of sec. 107 of the Constitution been "withdrawn from the Parliament of the State." In respect of that power, therefore, the State Constitution (sec. 106) and the powers of the State Parliaments (sec. 107) must be considered as not including it. That particular power is, therefore, now as much outside the State Constitution as Customs and Excise, and any State legislation assuming to legislate inter-State trade is invalid, and, if it also regulates any subject which is within State legislative authority, must be dealt with in the ordinary way for the purpose of ascertaining its legality.

Nothing is better settled than that an enactment in general terms and so inseparably including all cognate matters, cannot be held good as to some and bad as to others (*Owners of s.s. Kalibia* v. *Wilson* (3); *Spalding & Bros.* v. *Edwards* (4); *McArthur's Case* (5)). The test is that stated in *McArthur's Case* on p. 559, namely, "Where the State Act does not by express words or necessary implication make" (1) "the restriction on intra-State trade" (2) "dependent or conditional on" (3) "the effective restriction of both inter-State and intra-State trade, it should be held to operate on intra-State trade." That test, which is founded on the *Kalibia Case* and the case on which it rests, *Macleod's Case* (6), adopts some words from the celebrated case of *Warren* v. *Charlestown* (7), namely, "dependent" and "conditions." The position is thus

(1) (1927) 40 C.L.R., at p. 41.
(2) (1920) 28 C.L.R. 530.
(3) (1910) 11 C.L.R. 689.
(4) (1923) 262 U.S. 66, at p. 69.
(5) (1920) 28 C.L.R., at p. 552.
(6) (1891) A.C. 455.
(7) (1854) 2 Gray (Mass.) 84, at p. 99.

stated in *Newcastle and Hunter River Steamship Co.* v. *Attorney-General for the Commonwealth* (1) :—" The decision in the *Kalibia Case* (2) proceeded on the footing that the inclusion in one collective expression in an Act of Parliament of objects as to some of which the enactment was invalid, operated to invalidate the whole enactment because it did not appear that Parliament *would* have imposed the rule as to some only of the class if the whole class could not be affected. The whole enactment was declared invalid in that case because it was impossible to ascertain an intention that some only of the class designated by the collective expression should be affected if the others were not." That is the latest expression of the Full Court of the relevant rule, and is the opinion of all the Justices of the Court except myself. I was then absent, but I entirely concur in it.

As, notwithstanding this, some doubt may be thought to exist arising out of *McArthur's Case* (3), I venture on a matter of so much importance to make my views quite clear as to what was held in that case. The test stated as above obviously means that if on a proper construction of the State Act the Legislature has restricted the two classes of trade acts, inter-State and intra-State, independently and separately, so that it intended the one to stand whether the other stood or not, the intra-State restrictions can operate. But if dependent or conditional as the restrictions must be if bound up in the one word or expression, that is, by necessary implication, so that the restrictions cannot be separated in the expression of the legislative will, the whole enactment must fall. In *Commonwealth and Commonwealth Oil Refineries Ltd.* v. *South Australia* (4) my brother *Starke*, as late as 1926, in language which I entirely adopt as showing the proper rule to be applied in accordance with *McArthur's Case*, says :—" The question whether the South Australian Act contravenes sec. 92 necessarily depends upon the construction and operation of that Act. Its provisions undoubtedly extend to motor spirit brought into South Australia from other States. It may be brought into the State for the purpose of sale, or purchased or obtained outside the State for delivery within the State. In either case the transactions may constitute acts in inter-State trade (see *W. & A. McArthur*

(1) (1921) 29 C.L.R. 357, at pp. 369-370.
(2) (1910) 11 C.L.R. 689.
(3) (1920) 28 C.L.R. 530.
(4) (1926) 38 C.L.R., at p. 440.

H. C. OF A. 1928.

ROUGHLEY v. NEW SOUTH WALES.

EX PARTE BEAVIS.

Isaacs J.

Ltd. v. *Queensland* (1)). At some time, no doubt, a commodity must pass beyond the range of inter-State trade and commerce which sec. 92 protects, and come completely under the power and control of the States, but it is not necessary to define that point in this case, because the South Australian Act covers both inter-State and intra-State acts and transactions in language that is indivisible. Consequently, in my opinion, secs. 2, 4 and 7 contravene the provisions of sec. 92 of the Constitution. The result of all these contraventions of the Constitution is that the *Taxation (Motor Spirit Vendors) Act* 1925 of South Australia must be declared invalid." This test of invalidity, be it observed, has nothing to do with the Federal Constitution. *It is wholly dependent on the State Constitution.* The same test would be applied—that is " dependent or conditional "—if instead of inter-State trade it were a merchant shipping regulation forbidden by Imperial law, or an attempted regulation of sales in another State. The test is for the purpose of ascertaining the *intention* of the State Legislature, not its *powers*. Its constitutional powers are assumed to have been ascertained and relevantly defined before the test is applied. In *McArthur's Case* (2) the result of the test was to regard the Act, rightly or wrongly, as dealing with the two classes of trade in a separable manner, and therefore the four classes of trade transactions were validly affected or not, according as they fell within the one class or the other. In every case it is ultimately as to this question of construction of the particular enactment, and a determination of whether on that construction the Act is operative or not, as a matter of *State law* and *not Federal law*.

I am not here concerned whether in *McArthur's Case* (3) the statute was rightly or wrongly interpreted; that is, as to whether its provisions were properly separable, so as to disregard the bad and enforce the good. That is merely the application of the principle to a particular case. Assume, for the sake of argument, the *Kalibia* principle, repeated in that case in the passage quoted from p. 559, was wrongly applied, that would not justify us in shipwrecking for

(1) (1920) 28 C.L.R., at pp. 540, 559 *et seq.*

(2) (1920) 28 C.L.R., at p. 559.

(3) (1920) 28 C.L.R. 530.

all future time the principle itself, which is clear enough. It is a settled principle from which English Courts have never departed, and which, as I have stated, this Court has since recognized. Some instances I gave in the *Kalibia Case* (1). Three others I shall now cite which, to my mind, are to be implicitly followed. Others would be useless. In the *Initiative and Referendum Act Case* (2) there occurs a most valuable—I should say doubly valuable—passage. The question was whether the Provisional Act of Manitoba was *ultra vires*. Some of its provisions were found to be outside the powers of the Legislature. It was sought to maintain its validity wholly, and if not, then partly, and the *Colonial Laws Validity Act*, sec. 2, was also relied on. But Viscount *Haldane*, speaking for a very strong Board, said :—" The offending provisions are in their Lordships' view so interwoven into the scheme that they are not severable. *The Colonial Laws Validity Act* 1865, *therefore*, which was invoked in the course of the argument, does not assist the appellants." The next case is that of the *Attorney-General for Ontario* v. *Reciprocal Insurers* (3), where *Duff* J. for the Judicial Committee, after saying that the Dominion statute under consideration, assuming its validity if limited to aliens, would have been valid, yet said that the statute, " being general in its terms, is in their Lordships' opinion invalid in its entirety. . . . The language of the clause in question cannot be so read as to effect by construction such a limitation of its scope. Such a result could only be accomplished by introducing qualifying phrases, indeed, by re-writing the clause and transforming it into *one to which the Legislature has not given its assent.*" These last words (which I italicize) show that the question of separability of the New South Wales Act is not dependent on the Federal Constitution, but on the State Constitution only. The third case is *Attorney-General for Manitoba* v. *Attorney-General for Canada* (4). There an Act provided for transactions, some of which were within the legislative power, and others not. After pointing out that a Court could not make the required partition, Lord *Haldane* said :—" If the statute is *ultra vires* as regards the first class of cases, it has to be pronounced to be *ultra vires*

(1) (1910) 11 C.L.R., at p. 713.
(2) (1919) A.C. 935, at pp. 944-945.
(3) (1924) A.C. 328, at p. 346.
(4) (1925) A.C. 561, at p. 568.

H. C. OF A. 1928.

ROUGHLEY v. NEW SOUTH WALES.

EX PARTE BEAVIS.

Isaacs J.

altogether. Their Lordships agree with *Duff* J. . . . that if the Act is inoperative as regards brokers, agents and others, *it is not possible for any Court to presume that the Legislature intended to pass it in what may prove to be a highly truncated form.*"

If, therefore, having reached that point, I found lawful and unlawful subjects wrapped up in the same undistinguishable expression, I should conform to the principle laid down, not only by other British Courts of great eminence, but also by the supreme tribunal—for us—of the Empire.

To induce the Court to hold the statute valid, even if it assumed to regulate inter-State trade, there was in this case the usual suggestion of possible evils left uncorrected. But the answer is appropriately given in *Tyson & Brother* v. *Banton* (1), more fully dealt with in my judgment in *Ex parte Nelson* [*No.* 1] (2). I shall here simply quote one sentence: "But the difficulty or even the impossibility of thus dealing with the evils, if that should be conceded, constitutes no warrant for suppressing them by means precluded by the Constitution." A municipality might, with equal force, complain of the unredressed evils of unrestrained intercourse with a neighbouring municipality. The answer to that is the State Parliament has that function. And here the Commonwealth Parliament has ample as well as paramount power to regulate all inter-State trade operations. The Australian people may, if they will, thus avert any suggested evils without introducing those that interested single State policies would almost certainly create. And in America, where there is nothing in the Constitution in the nature of an express prohibition, such as we have in sec. 92 in Australia, the Supreme Court of the United States, in one of its most recent judgments, has determined the question now before us as I have stated it. In *Di Santo* v. *Pennsylvania* (3), in January 1927, the Court, by a majority of six to three, held that a State law requiring persons who engage within the State in the sale of steamship tickets to or from foreign countries, to procure a licence by giving proof of moral character, paying a small fee and filing a bond as security against fraud or misrepresentation, is a direct burden on foreign commerce,

(1) (1927) 273 U.S. 418, at p. 445. (2) *Post*, 209.
(3) (1927) 273 U.S. 34.

contravening the commerce clause of the Constitution, and cannot be sustained as a proper exercise of the State police power to prevent possible fraud. I have with elaboration expressed in my judgment in *Ex parte Nelson* [*No.* 1] (1) the view taken in America of the implied exclusive force of the commerce power, and the implied exception on that otherwise exclusive force, in consequence of the necessities in the opinion of the Court arising to maintain the State police power. I have shown that *Holmes* J., in his dissenting judgment in *Tyson & Brother* v. *Banton* (2), sought to uphold the State Act on the ground that there was no " express prohibition " in the Constitution. *Brandeis* J. concurred. These two learned Judges also dissented in *Di Santo's Case* (3), on the ground that on principles extracted from American cases the implied prohibition extends only to " direct " burdens on inter-State commerce, and that the case in hand was not a " direct " burden. Obviously those learned Judges would probably have agreed with the majority had there been in America a section corresponding to sec. 92 of our Constitution. And I may add that the implication of exclusive power applies in America as much to inter-State commerce as to foreign commerce. (See, for instance, *Crandall* v. *State of Nevada* (4).) *Di Santo's Case*, being a decision as to invalidity even where no express prohibition exists, is an *a fortiori* case here. Therefore, the relevant sections of the Act would be invalid so far as they extended to inter-State trade. The language, however, is incapable of separation so as to eliminate inter-State trade and leave local trade. Secs. 5 and 12 and their ancillary sections would in that case fall entirely.

But there is nothing in the Act which absolutely requires that result. Reading the Act to the full up to the limits of the State jurisdiction, there is a presumption that it did not intend to transgress those limits, whether of physical boundaries or constitutional frontiers (*Attorney-General for Ontario* v. *Reciprocal Insurers* (5)), and so the Act may be, and, in my opinion, should be, left to stand unimpaired, but only as to all purely intra-State transactions of the kind specified.

(1) *Post*, 209.
(2) (1927) 273 U.S., at p. 446.
(3) (1927) 273 U.S. 34.
(4) (1867) 73 U.S. 35, at p. 42.
(5) (1924) A.C., at p. 345, ll. 10 to 13.

H. C. OF A. 1928.

ROUGHLEY v. NEW SOUTH WALES.

EX PARTE BEAVIS.

Higgins J.

HIGGINS J. *Beavis's Case.*—I take the case of *Ex parte Beavis* first, because it presents the main issue in a less complicated form, and will explain my attitude in *Roughley's Case* and in *Ex parte Nelson* [*No.* 1] (1).

This is an application made by a farm produce agent for a prohibition directed to the informant and the magistrate to restrain them from further proceeding in respect of the conviction of the applicant. The conviction was for refusing to produce books and accounts as demanded by an authorized officer under the New South Wales *Farm Produce Agents Act* 1926; and the applicant contends that the provision in that Act for compulsory inspection is invalid by reason of sec. 92 of the Constitution. The applicant relies on the fact that he does not handle any New South Wales produce but only produce from Queensland, Victoria and Tasmania —inter-State produce.

Counsel for the applicant has, I think, sufficiently shown that under the analogous Constitution of the United States the impeached provision would be treated as valid if it is not inconsistent with some Federal Act; but, in my opinion, this fact is not at all conclusive on the subject. Firstly and lastly, we are to find the true meaning and effect of our own Constitution; although the United States cases may usefully be examined for purposes of comparison and of suggestion.

Under our Constitution not only has the Federal Parliament express power to make laws with respect to trade and commerce among the States (sec. 51), and exclusive power to impose customs duties (sec. 90), but there is a special provision in sec. 92 (which is not to be found in the Constitution of the United States) that trade, commerce and intercourse between the States shall be "absolutely free." The effect of these words has been much discussed. Perhaps, as the section is placed among sections dealing with customs duties, and as it contains in itself a clause which specifically deals with customs duties (on goods which had been imported into a State before uniform duties, and subsequently moved to another State), the object, or one of the objects, was to show that customs duties were not the only restrictions on trade forbidden: but whether this

(1) *Post*, 209.

is the true view of the meaning of the words or not, I am of opinion that this Act, controlling and regulating the conduct of men carrying on business in New South Wales—here as farm produce agents—is within the power of the State Legislature under sec. 107 of the Constitution.

The key to the solution of the problem is to be found, I think, in reading sec. 107, as well as secs. 106 and 108, with sec. 92. Both sections of the Constitution are equally to be obeyed. We are to construe the Constitution as one whole document on the ordinary principles of the Courts, "so as to reconcile the respective powers they" (the sections) "contain and give effect to all of them" (*Citizens Insurance Co. of Canada* v. *Parsons* (1). Under sec. 107 the power of the State Legislature to make laws shall, "unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth." Now, the power to make laws with regard to customs duties has been withdrawn from the States and exclusively vested in the Commonwealth Parliament (sec. 90); but not the power to make laws with respect to the status and conduct of agents and other persons who carry on business in New South Wales. It is true that if a State law validly made under this latter power should be inconsistent with a Commonwealth law made under the trade and commerce power or any other power, the Commonwealth law must prevail (sec. 109); but it is not here alleged that this State law requiring the production of books and accounts for inspection is inconsistent with any Commonwealth law. The Federal Parliament has not passed any law on the subject of the conduct of agents engaged in the inter-State business of their principals; and that whole field is left open for the action of the State Legislature. But the State Legislature is subjected to another veto by sec. 92: it must not make a law which infringes the provision that trade, commerce and intercourse among the States shall be "absolutely free." Freedom is really a negative idea: I take it as meaning that there shall be no restraint, no obstruction, no control of trade, &c., between the States. This cannot mean, if we are to give due effect to sec. 107, that State laws which merely affect

(1) (1881) 7 App. Cas. 96.

H. C. OF A. 1928.

ROUGHLEY v. NEW SOUTH WALES.

EX PARTE BEAVIS.

Higgins J.

such trade indirectly are vetoed; for all legislative action of the State must affect inter-State commerce. State laws for public works, for public order, for police, for roads, for railways, for finance, even for education or morality, must, more or less, have an influence on inter-State commerce. A State law for a minimum wage for carters and drivers, if applicable to those who bring inter-State produce from the wharves to the stores, must, in some degree, tend to affect inter-State commerce; does sec. 92 forbid such a law? If the argument for the applicant is right a provision such as that contained in reg. 15—that an inspector may direct the destruction or carting away by a farm produce agent of farm produce—is invalid; and the agent may claim to be *solutus legibus* as to keeping in the market-place or in his stores bananas which have become rotten. If the argument is right, the carters and drivers of inter-State produce could not be bound to keep their side of the road or to obey the regulations made for traffic in the Sydney streets. If the argument is right, a produce agent in New South Wales cannot be compelled to pay New South Wales income tax so far as the income is derived from the sale of produce that comes to him from another State. In my opinion, sec. 107, when fairly read with sec. 92 of the Constitution, prevents such an absurd result.

Apart from American cases, therefore, I should come to the conclusion that upon the true interpretation of the words of our own Constitution, and in order to give full effect to sec. 92 and sec. 107, the restraint or hindrance of inter-State commerce which is forbidden by sec. 92 must mean direct restraint or hindrance. But, when the long series of American cases is examined, it is remarkable to find a strong confirmation of this distinction between direct and indirect restraint. Counsel on behalf of the State has referred us to the case of *Ficklen* v. *Shelby County* (1). The State of Tennessee imposed a tax on brokers doing business within the State. One of the brokers concerned made all his sales on behalf of principals in other States; the other most of his sales. It was held that if the tax could be said to affect inter-State commerce in any way, it did so incidentally, and so remotely as not to amount to a regulation of such commerce. By the United States Constitution

(1) (1892) 145 U.S. 1.

one of the powers committed to the Federal Congress is " to regulate commerce with foreign nations, and among the several States " (art. 1, sec. 8). As *Fuller* C.J. said, speaking for the Federal Supreme Court (1): " No doubt can be entertained of the right of a State legislature to tax trades, professions and occupations " (where the State Constitution does not forbid it); " and where a resident citizen engages in general business subject to a particular tax the fact that the business done chances to consist, for the time being, wholly or partially in negotiating sales between resident and non-resident merchants, of goods situated in another State, does not necessarily involve the taxation of inter-State commerce, forbidden by the Constitution." In *Wiggins Ferry Co.* v. *East St. Louis* (2) it was held that municipal corporations " may impose a licence tax on the keepers of ferries, although their boats ply between landings lying in two different States, and the Act by which this exaction is authorized will not be held to be a regulation of commerce." So in *Maine* v. *Grand Trunk Railway Co.* (3) a tax on railroads operating in the State, to be determined by the amount of its gross transportation receipts, was held to be constitutional: if it (the tax) can be said to affect inter-State commerce in any way, it is incidentally and so remotely as not to amount to a regulation of such commerce. In *Oregon-Washington Railroad and Navigation Co.* v. *State of Washington* (4) it was stated that, " in the absence of any action taken by Congress on the subject matter, it is well settled that a State in the exercise of its police power may establish quarantines against human beings or animals or plants, the coming in of which may expose the inhabitants or the stock or the trees, plants or growing crops to disease, injury or destruction thereby, and this in spite of the fact that such quarantines necessarily *affect* inter-State commerce." But in that case the Court held, in full consistency with the principle stated, that an Act of Congress, according to its true interpretation as found by the Court, did cover the whole subject, and left no liberty to the State to establish such quarantines. The State " may exercise its police power until Congress has by affirmative legislation occupied the field " (5). The case of *Hopkins* v. *United States* (6),

(1) (1892) 145 U.S., at p. 21.
(2) (1882) 107 U.S. 365, at p. 374.
(3) (1891) 142 U.S. 217.
(4) (1926) 270 U.S. 87, at p. 93.
(5) (1926) 270 U.S., at p. 101.
(6) (1898) 171 U.S. 578.

H. C. OF A. 1928.

ROUGHLEY v. NEW SOUTH WALES.

EX PARTE BEAVIS.

Higgins J.

though it does not deal with State legislation, illustrates the position from another aspect. It was an action brought by the United States for the dissolution of a State stock-exchange combination under the Anti-Trust Act. But as the Anti-Trust Act—a Federal Act—related only, and could relate only, to inter-State and foreign commerce, the question had to be determined whether the business of the members of the Exchange was inter-State commerce. The Court held it was not—each member worked for his own profit—and if a cattle owner of Nebraska took them to Kansas and employed one of the association to sell them on commission, that member of the association, in conducting the sale for his principal, is not engaged in inter-State commerce (1); so that if the members agreed not to render services for less than a certain sum the agreement was not a restraint on inter-State commerce. The contract condemned by the Anti-Trust Act was one whose "direct and immediate effect" was a restraint on inter-State commerce, and it was not sufficient to show that the contract of the brokers increased or might increase the total cost of marketing—as an indirect effect. The agents of the members, when soliciting the various owners of stock for business were not themselves engaged in inter-State commerce. In the same way the Sydney agents of Queensland principals are not carrying on inter-State business—the inter-State business is the business of their principals; and a New South Wales Act which regulates the conduct of the agents does not directly restrain inter-State commerce. The same doctrine was laid down in the more recent case of *Addyston Pipe and Steel Co.* v. *United States* (2): "The plain language of the grant to Congress of power to regulate commerce among the several States includes power to legislate upon the subject of those contracts in respect to inter-State or foreign commerce which *directly* affect and regulate that commerce" (3). The Supreme Court of the United States accepted and adopted the words of *Fuller* C.J. (4):—"The regulation of commerce applies to the subjects of commerce and not to matters of internal police. Contracts to buy, sell or exchange goods to be transported among the several States, the transportation and its instrumentalities, and articles

(1) (1898) 171 U.S., at p. 588.
(2) (1899) 175 U.S. 211.
(3) (1899) 175 U.S., at p. 234.
(4) (1899) 175 U.S., at p. 239.

bought, sold or exchanged for the purposes of such transit among the States, or put in the way of transit, may be regulated " by Congress, " but this is because they form part of inter-State commerce." There has been no case cited deciding that the conduct of agents within a State, even when their principals are doing inter-State business, cannot be regulated by the State Legislature. Of course the nature of the State Act has to be closely examined so as to make sure that, under the pretence of regulating the conduct of agents in the State, the State Legislature is not in truth and in substance legislating in restraint of inter-State commerce (see *Attorney-General for Quebec* v. *Queen Insurance Co.* (1); but Dr. *Evatt*, for the applicant, has admitted, in answer to my question, that he does not contend in this case that there is any such make-believe.

As for the recent case of *Di Santo* v. *Pennsylvania* (2), it does not, in my opinion, affect the conclusion which we should reach in this case. There a State Act requiring a licence for persons engaging within the State in the sale of steamship tickets, the purpose being to prevent frauds on citizens bringing out their friends, was held to be unconstitutional and void. One cannot but be impressed by the powerful dissenting opinions of *Holmes*, *Brandeis* and *Stone* JJ., who thought that even under the peculiar American doctrine the Act was a legitimate exercise of the " police power " of the State; but it is not for me to presume to decide between the majority of the Supreme Court and the minority. It is sufficient to point out that in that case the licence was imposed directly on those who were engaged in making contracts for transportation from and to foreign countries; whereas in the case before us the produce agents have nothing to do with contracts for transportation at all. There, the agents were engaged in making contracts for foreign commerce; here, the agents are not, or for inter-State commerce (*Hopkins* v. *United States* (3)). Moreover, in Australia we have to apply a specific provision of the Constitution (sec. 92), not to apply the subtle refinements of the doctrine as to " police power."

But the frequent reference to " police power " in these American cases leads one to consider afresh the meaning of the remarkable

(1) (1878) 3 App. Cas. 1090. (2) (1927) 273 U.S. 34.
(3) (1898) 171 U.S. 578.

H. C. OF A. 1928.

ROUGHLEY v. NEW SOUTH WALES.

EX PARTE BEAVIS.

Higgins J.

words of sec. 92 of our Constitution, that trade, commerce and intercourse among the States shall be "absolutely free." There is no mention in the United States Constitution of "police power." But it early became the judicial doctrine in the United States that the power of Congress over trade and commerce with foreign nations and among the States was exclusive; and that the silence of Congress was equivalent to a positive declaration of freedom of that commerce. Then a qualification had to be grafted on to the doctrine of silent prohibition—that it does not prohibit health and quarantine laws of a State. The grafted qualification is summarily spoken of as the "police power" of the State. But from the nature of the case, the distinction became very subtle and the decisions very confusing; and sec. 92 was meant, in my opinion, to simplify the position for Australia. All power to legislate as to inter-State commerce—that is, to legislate "with respect to" inter-State commerce—on the subject of inter-State commerce—was taken away from the States by sec. 92. Apart from sec. 92, the power to legislate in restraint of inter-State commerce (subject to the provisions of sec. 109 as to inconsistency with Federal law) would have remained; for, under our Constitution, the power conferred on our Federal Parliament is not exclusive. On this point I think that the view taken by the late Dr. *Kerr*, in his book *The Law of the Australian Constitution* is right. Our Constitution expressly states what powers conferred on the Federal Parliament are exclusive, and we have no right to add to the list: *Expressio unius est exclusio alterius.* Sec. 52 makes the power of the Federal Parliament *exclusive* as to the seat of Government, as to Federal departments, and as to "other matters *declared by this Constitution* to be within the *exclusive* power of the Parliament"; and sec. 90 makes the power to impose duties of customs *exclusive* (see sec. 111). In other words, although the concurrent power of the States to legislate as to inter-State commerce still remains, it cannot be exercised in such a way as to restrict, burden or hamper inter-State commerce. For the purposes of inter-State commerce and intercourse the boundary-line between the States is to be ignored—Australia is to be treated as one country for such purposes; any Act which forbids the entry of goods in commerce from one State to another is invalid; but when the goods have entered the second

State they become subject to the legislation of the State applicable to such goods or traffic within its borders.

If this view of the position is correct, it simplifies enormously our problems; and it confirms the opinion that there is nothing in the Constitution to invalidate this Act so far as it compels any produce agent to submit his books, &c., for inspection. Such an action does not restrict, burden or hamper the entry of goods or persons from one State into another or trade or commerce among the States; and so long as it does not do so, the State legislation within sec. 107 is valid (subject always to sec. 109). As I have said, a mere incidental, indirect effect on inter-State commerce is not enough to invalidate the Act: to invalidate the Act it must be shown that it is direct legislation against the passage from one State into another. By direct legislation I mean legislation "with respect to" (sec. 51), on the subject of, inter-State commerce—it must be pointed directly at the act of entry, in course of commerce, into the second State (*R.* v. *Smithers*; *Ex parte Benson* (1)). When powers of legislation are distributed according to subject between different law-making bodies, Lord *Watson* said some words (*Attorney-General for Ontario* v. *Attorney-General of Quebec* (2); *Lefroy* on *Canada's Federal System*, p. 213) which seem to suggest a good test for ascertaining the true nature of any statute: "That which it" (the Act) "accomplished, and that which is its main object to accomplish, is the object of the statute" (as distinguished from the motives which influence the Legislature). I have expressed my own views on this matter in *Huddart, Parker & Co. Pty. Ltd. and Appleton* v. *Moorehead* (3) (and see *Russell* v. *The Queen* (4)). In *Russell's Case* the *Temperance Act* of Canada was upheld, although the Provincial Legislature of New Brunswick had the exclusive right to legislate as to "property and civil rights" (secs. 91 and 92 of the *British North America Act*). A man had been convicted of selling intoxicating liquors contrary to the provisions of the *Temperance Act*; and yet he held a licence under a New Brunswick law to sell. It was held that the *Temperance Act*, "though it might interfere with the sale or use of an article included in a licence granted under sub-sec. 9" of the Provincial Act "is not

(1) (1912) 16 C.L.R. 99, at p. 118.
(2) (1903) A.C. 39.
(3) (1909) 8 C.L.R. 330, at pp. 409-414.
(4) (1882) 7 App. Cas. 829, at p. 839.

H. C. OF A. 1928.

ROUGHLEY v. NEW SOUTH WALES.

EX PARTE BEAVIS.

Higgins J.

in itself legislation upon or within the subject of that sub-section" (1). "What" the Canadian "Parliament is dealing with in legislation of this kind is not a matter in relation to property and its rights, but one relating to public order and safety. That is the primary matter dealt with, and though incidentally the free use of things in which men may have property is interfered with, that incidental interference does not alter *the character of the law*. Upon the same considerations, the Act in question cannot be regarded as legislation in relation to civil rights. . . . Few, if any, laws could be made by" the Canadian "Parliament for the peace, order, and good government of Canada which did not in some incidental way affect property or civil rights; and it could not have been intended, when assuring to the provinces exclusive legislative authority on the subjects of property and civil rights, to exclude the Parliament from the exercise of this general power whenever any such incidental interference would result from it. The true nature and character of the legislation in the particular instance under discussion must always be determined, in order to ascertain the class of subject to which it really belongs." This case has frequently been cited in subsequent cases before the Judicial Committee of the Privy Council; and the passages which I have cited have never had any doubt cast upon them, although in *Toronto Electric Commissioners* v. *Snider* (2) the assumption that the Canadian Parliament had a general power to make the *Temperance Act* "for the peace, order, and good government of Canada" has been condemned. Therefore, the Act of New South Wales, whose object is to regulate the status and conduct of agents in that State, whether they are handling the produce of other States or not, cannot be treated as an Act regulating inter-State trade, or as an Act prohibited by sec. 92 of our Constitution.

The effect of sec. 92 has been discussed elaborately in previous cases in our Court (*New South Wales* v. *Commonwealth* (3); *Foggitt, Jones & Co.* v. *New South Wales* (4); *Duncan* v. *Queensland* (5); *W. & A. McArthur Ltd.* v. *Queensland* (6)). In the last case, I concurred with the majority in finding the Queensland Act to be

(1) (1882) 7 App. Cas., at p. 838-839.
(2) (1925) A.C. 396.
(3) (1915) 20 C.L.R. 54.
(4) (1916) 21 C.L.R. 357.
(5) (1916) 22 C.L.R. 556.
(6) (1920) 28 C.L.R. 530.

invalid—for it interfered as to prices in inter-State contracts, and it seemed to me to be obviously and directly a restraint on inter-State commerce; it purported to make it unlawful for any trader, whether as principal or agent, to sell or agree to sell or offer for sale any commodity at a price higher than the declared price (declared under the Queensland Act). But some perplexity has arisen in my mind from certain remarks made by three of my learned colleagues purporting to condemn *Duncan's Case* (1). In *Duncan's Case* five members of the Court, as against two, declared the State law to be valid—substantially because it was merely a law " with respect to " property, and not directly with respect to trade and commerce between States; and even if the law as to property *indirectly* affected inter-State commerce the fact did not make the law invalid. The whole machinery of the Act was directed to the expropriation of the goods for the benefit of the British Government during the stress of war, including the provision prohibiting sales of cattle without the consent of the Colonial Secretary. *Griffith* C.J., *Gavan Duffy, Powers, Rich* JJ. and myself (five justices) concurred in the decision of *Duncan's Case*; and in the argument of *McArthur's Case* (2) it was not suggested that *Duncan's Case* was wrong. Yet, to my surprise, when the judgments were published, it turned out that the joint judgment of *Knox* C.J., *Isaacs* and *Starke* JJ. condemned *Duncan's Case*.

But the difference of opinion which has appeared as to *Duncan's Case* (1) is really as to a particular Act, not as to the principle—did the Act purport to restrain inter-State commerce? It had been decided in the *Wheat Case* (*New South Wales* v. *Commonwealth*) (3) that the State Act did not violate the Constitution where the Act made the wheat the actual property of the King; whereas in *Duncan's Case* this full consummation was not yet reached—the stock had been earmarked for the King should he want it; and the owners were forbidden to exercise, in the meantime, their normal right as owners of property to alienate it. The true solution of the position seemed to me to lie in this consideration: that the State Act was a law as to property and the rights of property—not a law

(1) (1916) 22 C.L.R. 556. (2) (1920) 28 C.L.R. 530.
(3) (1915) 20 C.L.R. 54.

H. C. OF A. 1928.

ROUGHLEY v. NEW SOUTH WALES.

EX PARTE BEAVIS.

Higgins J.

directly aimed at inter-State traffic at all—not a law on the subject of trade or commerce between the States—not a law "with respect to" inter-State commerce (see sec. 51 of the Constitution). That it did, or might, affect inter-State commerce indirectly or incidentally was conceded.

I cannot but adhere to the position taken by the Chief Justice of the United States, that "the States are without power to *directly* burden inter-State commerce" (*Rosenberger* v. *Pacific Express Co.* (1)).

I am of opinion that the rule nisi for prohibition should be discharged.

Roughley's Case.—This is a demurrer to a statement of claim which prays for a declaration that the *Farm Produce Agents Act* 1926 and regulations made thereunder are (so far as they relate to inter-State produce) beyond the power of the New South Wales Legislature; and for an injunction. This is the same Act as is the subject of the discussion in *Ex parte Beavis.* The action is a representative action by some such agents on behalf of all the New South Wales farm produce agents who sell, wholly or partially, produce from other States. No objection has been taken to the form of the action; but the plaintiffs have taken a wider range for their attack on the Act—they attack not only the provisions for the inspection of books &c. (sec. 13), but also many other provisions in the Act and the regulations made thereunder.

Counsel for the plaintiffs has conveniently summed up his objections as being, in substance, the provisions for compulsory licence (secs. 3, 12, 23), compulsory inspection of books &c. (sec. 13), compulsory trust account for the principal (sec. 15), prompt account of sales and prompt payment (sec. 14), compulsory maximum for remuneration (secs. 23, 32). It is also argued for the plaintiffs that State laws for quarantine are invalid—that the power conferred on the Federal Parliament to make laws with respect to quarantine is exclusive in that Parliament; and that certain of the provisions of the State Act are inconsistent with provisions of the Federal Act as to quarantine, and therefore invalid under sec. 109 of the Constitution.

(1) (1916) 241 U.S. 48, at p. 50.

I have already stated in my judgment in *Ex parte Beavis* my reasons for thinking that the provision of the State Act for compulsory inspection is not a contravention of sec. 92 of the Constitution; and the same reasoning applies to the objections now before us. All these provisions are provisions on the subject of the status and conduct of produce agents doing business in New South Wales, whether they deal with inter-State produce or not. They are not provisions on the subject of inter-State commerce—not provisions "with respect to" inter-State commerce. They may affect incidentally, indirectly inter-State commerce; that is not, as I have tried to show, a restraint of inter-State commerce; so far, indeed, as one can see, they tend even to aid inter-State commerce and to make Sydney or New South Wales a desirable place for producers in another State to use for a market. They certainly do not directly restrict or burden or hamper inter-State commerce. According to the cases which I have cited in *Ex parte Beavis*, the relation of the produce agent to his principal in another State is not in itself inter-State commerce—the inter-State commerce is between the vendor in (say) Queensland and the purchaser in New South Wales. Under sec. 107 of the Constitution the State retains its full powers to make laws unless the power is by the Constitution exclusively vested in the Parliament of the State, and the status and conduct of persons doing business as agents in New South Wales are a subject which has not been withdrawn from the State or exclusively vested in the Parliament of the Commonwealth. The only power withdrawn by the Constitution is the power to restrict or burden or hamper inter-State commerce directly; and then sec. 109 has the effect of making any State law, otherwise valid, yield to any Federal law "to the extent of inconsistency." I am therefore of opinion that the State Act and regulations are valid not only as to compulsory inspection, but as to compulsory licence, compulsory trust accounts, speedy account sales and payment, and as to the maximum remuneration to be charged by produce agents in New South Wales.

I am of opinion that the demurrer should be allowed so far as regards the effect of sec. 92 of the Constitution.

H. C. OF A. 1928.

ROUGHLEY v. NEW SOUTH WALES.

EX PARTE BEAVIS.

Gavan Duffy J.

GAVAN DUFFY J. In *McArthur's Case* (1) I had the misfortune to differ from the rest of the Court, but it must, of course, now govern us in applying the provisions of sec. 92 of the Constitution. The Chief Justice and my brother *Starke* were members of that Court, and I assume that they adhere to the judgment in which they then participated. I therefore think that, in the present case, I am at liberty to hold with the Chief Justice that the statutory provisions which are attacked are not in contravention of sec. 92 of the Constitution, and also to hold with my brother *Starke* that in any event they are valid with respect to domestic as opposed to inter-State trade and commerce, and that the parties were in fact engaged in such domestic trade and commerce.

POWERS J. *Roughley's Case.*—I agree, for the reasons given in the judgment of my brother *Higgins* in this case, that the demurrer should be allowed so far as regards the effect of sec. 92 of the Constitution.

Beavis's Case.—I agree, for the reasons given in the judgment of my brother *Higgins* in this case, that the rule nisi for prohibition should be discharged.

STARKE J. In March 1926 the Parliament of New South Wales enacted the *Farm Produce Agents Act* 1926. By that Act (sec. 5) "any person who acts as or carries on or advertises or notifies that he acts as or carries on the business of a farm produce agent, unless he is the holder of a licence," is "guilty of an offence" against the Act. A farm produce agent means (sec. 2) "any person who, as an agent for others, whether on commission for or in expectation of any fee, gain, or reward, whether alone or in connection with any other business, exercises or carries on the business or advertises or notifies that he exercises or carries on the business of selling farm produce or of a broker or factor of farm produce, but does not include" certain classes of persons immaterial to this case. Farm produce means vegetables, potatoes and other edible roots and tubers, fruit, eggs, poultry, and such other articles or classes of articles as may by proclamation by the Governor be declared to be farm

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

produce. Provision is made for obtaining licences, for fees to be paid, and for bonds to be given (sec. 19). Provision is also made for agents giving to their principals an account in writing of sales on their behalf, for agents keeping a trust account into which all moneys received from the sale of farm produce shall be paid, and for inspection of their books (secs. 13, 14, 15). Any agent who refuses to produce his books relating to any farm produce is guilty of an offence, and various other offences are also created by the Act (see secs. 12 and 13). Power is given to the Governor to make regulations for various purposes, including the prescription of the maximum fees that may be charged by agents for their services (sec. 32).

Prima facie, such an Act is within the competence of the Parliament of New South Wales. But it is contended that the Act infringes the provisions of sec. 92 of the Constitution, declaring that " on the imposition of uniform duties of customs, trade, commerce, and intercourse among the States . . . shall be absolutely free." Any prohibition by a State of inter-State sales of commodities, either absolutely or subject to conditions imposed by a State law, is a contravention of sec. 92 (*McArthur's Case* (1); *Commonwealth and Commonwealth Oil Refineries Ltd.* v. *South Australia* (2); *James* v. *South Australia* (3)). Equally obnoxious, in my opinion, to the requirements of sec. 92 is the burdening of inter-State sales or transactions by means of taxes, duties or licence fees. And it is immaterial, to my mind, that the legislation of a State does not discriminate between persons engaged in domestic trade and those engaged in inter-State trade but requires all persons engaging in the same description of trade whether of a domestic or an inter-State character, to be licensed, for the Constitution requires that commerce among the States shall be absolutely free. (Cf. *Robbins* v. *Shelby Taxing District* (4); *Brennan* v. *Titusville* (5); *Norfolk and Western Railway Co.* v. *Sims* (6).)

Turning now to the *Farm Produce Agents Act*. The provision of sec. 5 that any " person who acts as or carries on the business of a farm produce agent " is guilty of an offence " unless he is the holder

(1) (1920) 28 C.L.R. 530.
(2) (1926) 38 C.L.R. 408.
(3) (1927) 40 C.L.R. 1.
(4) (1887) 120 U.S. 489.
(5) (1894) 153 U.S. 289.
(6) (1903) 191 U.S. 441.

H. C. OF A. 1928.

ROUGHLEY v. NEW SOUTH WALES.

EX PARTE BEAVIS.

Starke J.

of a licence," is perfectly general: it applies, in my opinion, to all persons in New South Wales who carry on such a business, whether they are engaged in domestic or intra-State transactions, or in inter-State transactions, or in both. So far as it applies to farm produce agents engaging in inter-State transactions, the Act is, in my opinion, obnoxious to the provisions of sec. 92. Such guidance as we can obtain from the American cases seems to accord with this view. Thus in *Stockard* v. *Morgan* (1) it is said by the Supreme Court of the United States:—"Although it is said in the opinion of the State Court herein that the thing taxed is the occupation of merchandise brokerage, and not the business of those employing the brokers, yet we have seen from the cases already cited that when the tax is applied to an individual within the State selling the goods of his principal who is a non-resident of the State, it is in effect a tax upon inter-State commerce, and that fact is not in anywise altered by calling the tax one upon the individual residing within the State while acting as the agent of a non-resident principal. The tax remains one upon inter-State commerce, under whatever name it may be designated." Cases such as *Hopkins* v. *United States* (2), *Ficklen* v. *Shelby County* (3), *Blumenstock Brothers Advertising Agency* v. *Curtis Publishing Co.* (4), do not conflict with this doctrine: they will all be found, upon careful examination, to depend upon the view that the transaction involved was antecedent or subsequent to inter-State commerce or that a licence was to do a general business involving both domestic and inter-State trade.

What, however, is the result in the cases before this Court? On the one hand, it is said that the *Farm Produce Agents Act* is wholly invalid because the good and the bad provisions are wrapped up in the same expression (*Kalibia Case* (5); *Newcastle and Hunter River Steamship Co.* v. *Attorney-General for the Commonwealth* (6); *Petrol Case* (7)); on the other, that in determining whether a State Act purporting to place restrictions on trade generally, without express words of distinction, is wholly invalid, the proper rule to apply is that "where the State Act does not

(1) (1902) 185 U.S. 27, at p. 37.
(2) (1898) 171 U.S. 578.
(3) (1892) 145 U.S. 1.
(4) (1920) 252 U.S. 436.
(5) (1910) 11 C.L.R. 689.
(6) (1921) 29 C.L.R. 357.
(7) (1926) 38 C.L.R. 408.

by express words or necessary implication make the restriction on intra-State trade dependent or conditional on the effective restriction of both inter-State and intra-State trade, it should be held to operate on intra-State trade" (*McArthur's Case* (1)). Both propositions illustrate, I think, a broader test enunciated by *Shaw* C.J. in *Warren* v. *Charlestown* (2), namely, that if constitutional and unconstitutional provisions contained in the same Act are so mutually connected with and dependent on each other as conditions, considerations or compensations for each other, all the provisions which are thus dependent, conditional or connected, fall together. (See also *Pollock* v. *Farmers Loan and Trust Co.* (3) and *Whybrow's Case* (4)). If we apply this test to the *Farm Produce Agents Act*, and ask: "Is the regulation of intra-State or domestic trade in New South Wales so mutually connected with and dependent upon the regulation of inter-State trade as a condition consideration or compensation that the whole Act must fail, and the local trade go unregulated?" then it must be remembered, in answering that question, that the Parliament has no authority to repeal laws passed by the States within the limits of their constitutional powers, though various sections of the Constitution may render those laws inoperative, wholly or in part (cf. secs. 92, 109). In view of this consideration, I prefer to decide the constitutional question raised in this case by sec. 92, according to the rule adopted in *McArthur's Case* for interpreting the State Act there involved, rather than that adopted in the *Kalibia Case* (5) and in *Newcastle and Hunter River Steamship Co.* v. *Attorney-General for the Commonwealth* (6), where the Acts in question involved an excess of power on the part of the Commonwealth. The subject matter and the nature of the legislation must be considered, and also the constitutional provision which the Legislature infringes or exceeds. The State Act in this case is not such that the restriction upon intra-State business is expressly made dependent or conditional upon the

(1) (1920) 28 C.L.R., at p. 559.
(2) (1854) 2 Gray 84.
(3) (1895) 158 U.S. 601.
(4) (1910) 11 C.L.R. 1, at pp. 54-55.
(5) (1910) 11 C.L.R. 689.
(6) (1921) 29 C.L.R. 357.

H. C. OF A. 1928.

ROUGHLEY v. NEW SOUTH WALES.

EX PARTE BEAVIS.

Starke J.

effective restriction of both intra-State and inter-State trade. Nor is the subject matter of the legislation such that any implication should be made to that effect: indeed, the State Act should be construed so as to uphold it as far as possible rather than to defeat it (cf. *James* v. *South Australia* (1)). Therefore, in my opinion, the State Act should be held to operate—as was the State Act in *McArthur's Case* (2)—on the intra-State or domestic business of farm produce agents in New South Wales.

All that remains for consideration is the judgment that should be pronounced in these cases. In *Roughley's Case* it is quite consistent with the allegations in the statement of claim that the only business or commerce in which the agents were engaged was internal and domestic: that the goods were not in transit, and had reached their destination in New South Wales. The allegation is that, pursuant to agreements, the agents sold farm produce at Sydney in New South Wales forwarded to them for sale there from other States (cf. *Emert* v. *Missouri* (3); *American Steel and Wire Co.* v. *Speed* (4); *Petrol Case* (5)). The case alleged as to agents dealing with farm produce generally, that is, with farm produce grown in New South Wales or forwarded from other States, is in a worse position, for even if the transactions as to produce forwarded from other States constituted transactions in inter-State trade, still the allegation is that they conduct an intra-State or domestic business as well, and would therefore, if my view be right, require a licence for that business pursuant to the Act. Consequently, in my opinion, the demurrer to this action should be allowed. In *Beavis's Case*, the defendant was charged with refusing to produce his books, accounts and writings, contrary to the provisions of the *Farm Produce Agents Act* 1926, and he was convicted of that offence. In my opinion the conviction should be affirmed, for the evidence shows that he sold, in New South Wales, goods consigned to him from other States, and it is a reasonable inference from that evidence that he was engaged in internal and domestic and not in inter-State trade—that the goods were not in transit and had

(1) (1927) 40 C.L.R., at p. 37.
(2) (1920) 28 C.L.R. 530.
(3) (1895) 156 U.S. 296, at p. 311.
(4) (1904) 192 U.S. 500, at pp. 518-519.
(5) (1926) 38 C.L.R., at p. 428.

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

H. C. OF A. 1928.

ROUGHLEY v. NEW SOUTH WALES.

EX PARTE BEAVIS.

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.

H. C. OF A. 1928.

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,