[HIGH COURT OF AUSTRALIA.]

JAMES . . . . . APPELLANT;
PLAINTIFF,

AND

COWAN AND OTHERS . . . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE HIGH COURT (STARKE J.).

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MELBOURNE, 1929. *June* 18-20, *Sept.* 3-5, *Nov.* 7.

Starke J.

1930. *Feb.* 27-28, *Mar.* 3, 21.

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

Constitutional Laws—Freedom of inter-State trade and commerce—State Parliament—Statute—Compulsory acquisition of dried fruits—Whether interference with inter-State trade and commerce—Validity of State Act—The Constitution (63 & 64 *Vict. c.* 12), *sec.* 92—*Dried Fruits Acts* 1924-1927 (*S.A.*) (*No.* 1657—*No.* 1835), *secs.* 28, 29.

Held, by *Knox* C.J., *Gavan Duffy* and *Rich* JJ. (*Isaacs* J. dissenting), that sec. 28 of the *Dried Fruits Acts* 1924-1927 (S.A.) authorizes the compulsory acquisition of "any dried fruits in South Australia grown and dried in Australia," and does not violate the provisions of sec. 92 of the Constitution as being an interference with the freedom of "trade, commerce, and intercourse among the States."

State of New South Wales v. *The Commonwealth* (*The Wheat Case*), (1915) 20 C.L.R. 54, applied.

Decision of *Starke* J. affirmed.

APPEAL from *Starke* J.

The appellant, Frederick Alexander James, brought an action in the Supreme Court of South Australia against the respondents, The Hon. John Cowan, the Minister of Agriculture for South Australia, who was the Minister administering the *Dried Fruits Acts* 1924-1927 (S.A.), Gerald Albert William Pope, the deputy-chairman of the Dried Fruits Board of South Australia, Leslie Nattle Salter,

chairman of the Board, William Newman Twiss, secretary of the Board, Alfred George Carne and William Lennox Forsyth, officers of the Board, and the McCulloch Carrying Co., a carrying company employed by the Board to take possession of and remove the plaintiff's fruit. The action was brought for seizing the dried fruits of the appellant. The seizure was admitted, and justified under secs. 28 and 29 of the *Dried Fruits Acts* 1924-1927 of South Australia. All the formal steps required by secs. 28 and 29 of the *Dried Fruits Act* for the compulsory acquisition of the appellant's dried fruit were taken, and the two questions that emerged for determination were (1) whether the acquisitions were for the purposes of the Act, and, if so, (2) whether the acquisitions and seizures in any way contravened the provisions of sec. 92 of the Constitution.

From the statement of claim it appeared that the appellant resided at Berri in South Australia, where he carried on the business of a fruit-grower, fruit-packer and fruit-dealer, and in the conduct of such business he dried large quantities of fruit grown by him, and purchased large quantities of other dried fruits from other growers at Berri and the surrounding districts and processed and packed ready for sale such dried fruit grown and acquired by him into commercial " dried fruit " and sold the same in Victoria, New South Wales, Western Australia and Queensland and also in South Australia, in England and in markets for dried fruit in other parts of the world. The appellant also alleged that between December 1926 and May 1927 he had made divers contracts in writing for the sale and delivery from the State of South Australia, to various purchasers respectively residing and carrying on business in one or other of the Australian States other than South Australia, of large quantities of dried fruits, and that by such contracts he was legally bound to ship the dried fruits at the port or ports of South Australia specified in such contracts respectively at the times and in the manner stated therein to be forwarded to the other ports of the other Australian States specified in such contracts, and that, for the purpose of fulfilling these contracts and other contracts for the delivery of dried fruit to purchasers in South Australia and other contracts, he had purchased from other growers large quantities of dried fruit upon terms that he had to pay for such fruit at the times specified in such contracts ;

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and he alleged that by reason of the acts of the respondents in seizing his fruit he had been deprived of all fruit necessary for carrying on his business in the ordinary course.

The case came on for hearing in the Supreme Court of South Australia before *Napier* J., who held that it involved a question as to the limits *inter se* of the constitutional powers of the Commonwealth and those of the State of South Australia; and it was, therefore, removed to the High Court by force of the provisions of secs. 38A and 40A of the *Judiciary Act*. On a summons for directions taken out in the High Court, *Starke* J. made an order under sec. 40 of the *Judiciary Act* removing the cause into the High Court. Such order was made lest it should ultimately appear that the case was not automatically removed under sec. 40A of that Act.

The action was subsequently heard by *Starke* J.

Cleland K.C. and *K. L. Ward*, for the plaintiff.

Villeneuve Smith K.C., *Robert Menzies* K.C. and *Hannan*, for the defendants.

Cur. adv. vult.

Nov. 7, 1929.

STARKE J. delivered the following written judgment:—

This is an action against the defendants for seizing the dried fruits of the plaintiff. The seizure was admitted, and justified under secs. 28 and 29 of the *Dried Fruits Act* 1924 of South Australia. Sec. 28 provides that subject to sec. 92 of the Constitution, and for the purposes of the *Dried Fruits Act* or any contract made by the Dried Fruits Board constituted under the Act, the Minister of Agriculture may, on behalf of His Majesty, purchase by agreement or acquire compulsorily any dried fruits in South Australia grown and dried in South Australia, with certain exceptions immaterial to this case. Under sec. 29 the Minister may by order declare that dried fruits compulsorily acquired are acquired by His Majesty, and upon the service of the order all dried fruits described in the order cease to be the property of the then owner or owners, and become the absolute property of His Majesty, freed from any mortgage or other encumbrance thereon whatsoever, and the title

and property of such owner or owners is changed into a right to receive payment of the value thereof at the export price thereof. Provision is made for seizing and taking possession of dried fruits so acquired. All the formal steps required by these sections for the compulsory acquisition of the plaintiff's dried fruit appear to have been taken, and the questions that emerge for consideration are whether the acquisitions were for the purposes of the Act, and, if so, whether the acquisitions and seizures in any way contravened the provisions of sec. 92 of the Constitution.

As was said in *Municipal Council of Sydney* v. *Campbell* (1), "a body . . . authorized to take land compulsorily for specified purposes, will not be permitted to exercise its powers for different purposes," and "whether it does so or not is a question of fact." There is no difference in principle whether the subject of acquisition be land, or dried fruits, or other goods. So the primary question is: What are the purposes of the *Dried Fruits Act* for which compulsory acquisition is allowed? To some extent the purposes of the Act were indicated in *James* v. *State of South Australia* (2), but ultimately we must turn to the words of the Act itself. The consumption of dried fruits in Australia is not, it seems, sufficiently large to absorb the whole of the output in Australia, and, to maintain and preserve the industry of dried fruit production, it was considered necessary to regulate and control the marketing of such fruit. The Commonwealth and the fruit-growing States therefore passed legislation to carry out this object. A greater demand might be created for dried fruits in Australia, or the surplus output might be forced off the Australian market and its export overseas compelled. Several methods were authorized by the South Australian Act to achieve these ends. Thus, under sec. 19, the Board might purchase and sell all dried fruits, encourage the consumption of dried fruits, and fix maximum prices to be charged on the sale of dried fruits, whether wholesale or retail. Under sec. 20, the Board might determine where and in what proportions the output of dried fruits produced in any particular year was to be marketed. Doubts were entertained as to the constitutional validity of this method, and finally the section was held invalid in *James* v. *State of South Australia* by

(1) (1925) A.C. 338, at p. 343.

(2) (1927) 40 C.L.R. 1.

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reason of the provisions of sec. 92 of the Constitution. Under secs. 28 and 29, a third method was authorized—suggested, no doubt, by the *Wheat Case* (1)—namely, acquisition, by agreement or compulsorily. By this last method, the Government could obtain complete control of the dried fruit so acquired, and market it when, where, and in such quantities as it thought expedient. This was the method adopted in the present case. But I see nothing in the method contrary to the purposes of the Act: rather does it embody the very end that the Act by its provisions contemplated and intended. In the reply to the defence, various allegations are made concerning the object and intention of the acquisitions. Thus, it is alleged that the Minister and the Board knew or believed that the determinations of the Board as to the disposal of the dried fruits crop was invalid, and yet acquired the plaintiff's fruit with the object of giving effect to those invalid determinations. But the truth is, I think, that the Minister and the Board were doubtful of both the validity and the practical efficacy of the determinations, and resolved to regulate and control the marketing of dried fruits, and particularly the plaintiff's dried fruits, by another method sanctioned by the Act, namely, compulsory acquisition. They did not do it with the object or intention of bolstering up invalid determinations, or of punishing the plaintiff, or of benefiting particularly the members of the Australian Dried Fruits Association, or of obstructing, interfering with or preventing the plaintiff carrying on his business, whether domestic or inter-State, or of deterring or intimidating the plaintiff and others, or of obtaining the approval and support of the members of the Australian Dried Fruits Association, or with any like intent. As the consumption of dried fruits in Australia was not sufficient to absorb the output, the Government of the Commonwealth, the fruit-growing States, the Minister and the Board were convinced that the surplus would glut the Australian market and cause a fall in prices, which, it was supposed, would be detrimental to the progress and stability of the dried fruits industry, however beneficial it might be to the consumers of dried fruits. So, in pursuance of the scheme in which the Commonwealth and the fruit-growing States had joined, the Minister and the Board resolved to use the powers apparently

(1) (1915) 20 C.L.R. 54.

conferred upon them by legislation to prevent the evils feared, and to force the surplus fruit off the Australian market. And, if a grower would not fall in voluntarily with the scheme, then he must be compelled to do so, and the marketing and sale of his fruit regulated and controlled by some method allowed by the Act.

I pass now to the next question, namely, whether the compulsory acquisition of dried fruits for the purpose of regulating, controlling and marketing contravenes the provisions of sec. 92 of the Constitution. The introductory words to sec. 28 of the *Dried Fruits Act* expressly provide that the power of acquisition shall not be exercised so as to violate the provisions of sec. 92. But, independently of those introductory words, the provisions of sec. 92 itself inhibit the States from legislating so as to interfere with the freedom thereby prescribed. By force of those provisions the States cannot by legislation prohibit an owner from engaging his goods in inter-State trade and commerce. Nor can the States do indirectly what they cannot do directly. But in the *Wheat Case* (1) this Court unanimously held that an Act enabling the Governor of the State of New South Wales, by notification in the *Gazette*, to declare that any wheat therein described or referred to was acquired by His Majesty and that upon such publication the wheat should become the absolute property of His Majesty and the rights and interests of every person in the wheat at the date of the publication should be converted into a claim for compensation did not violate the provision of sec. 92 of the Constitution that trade, commerce and intercourse among the States should be absolutely free. And this was held to be so, even though some of the wheat involved in the particular case was the subject of inter-State movement and trade (see p. 56). *Griffith* C.J. said (2):—"The title to property is governed by State law, and, in general, the right of the owner to dispose of his property is also governed by State law. The right to control such disposition is limited by sec. 92 of the Constitution. But that section has nothing to say to the question of title. The duration of the power of disposition, which depends upon title, is coextensive with the duration of the title itself, and ceases with it. There cannot therefore be any conflict between the law of title and the law of disposition, and

(1) (1915) 20 C.L.R. 54.

(2) (1915) 20 C.L.R., at pp. 67-68.

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a law which deprives a man of the ownership of property does not interfere with his power of disposition while owner. Sec. 92 may, therefore, so far as it relates to commerce, be paraphrased thus: Every owner of goods shall be at liberty to make such contracts for the transportation of goods from one State to another as he thinks fit without interference by law. It follows that as soon as he ceases to be the owner of the goods the section ceases to have any operation so far as those goods are concerned." *Barton* J. and *Powers* J. were of the same opinion. (See also *W. A. McArthur* v. *State of Queensland* (1).) *Gavan Duffy* J. and *Rich* J. in the *Wheat Case* (2) took the view that no enactment of a State Parliament offends against sec. 92 unless it expressly forbids or restrains inter-State trade and commerce, or, as *Gavan Duffy* J. put it in *McArthur's Case*, unless the restriction or restraint is conditioned on the fact that such trade or commerce is carried on between the States. *Isaacs* J. in the *Wheat Case* said (3):— "When a State deals with property on the basis of property and regulates its ownership irrespective of any element of inter-State trade, there is no abridgment of absolute freedom of trade." If a State "proceeds to exercise its own lawful powers of legislation without reference in any way to and perfectly independently and irrespective of such inter-State operations, it is not an unlawful exercise of legislative power." Later, in *James* v. *State of South Australia* (4), *Isaacs* J. explained that in the *Wheat Case* the expropriation of wheat by the Government was held to be good because it appeared that it was made without reference to inter-State trade or inter-State contracts as a criterion or as influencing the operation of expropriation, and without discrimination. *Powers* J. concurred in this explanation. I think this approaches the view of *Gavan Duffy* J., but it appears to me, with all respect, to be in opposition to the reasons given by *Griffith* C.J. and by *Barton*, *Isaacs* and *Powers* JJ. in the *Wheat Case*, and also with the decision in *McArthur's Case*. In the *Wheat Case* the acquisition of the wheat necessarily restricted or interfered with the owner's ability to engage it in inter-State trade (see p. 56)), but according to the

(1) (1920) 28 C.L.R. 530.
(2) (1915) 20 C.L.R. 54.
(3) (1915) 20 C.L.R., at p. 100.
(4) (1927) 40 C.L.R. 1.

decision in that case the deprivation of the owner of his property in no wise infringed the provisions of sec. 92. And the Court, it should be remembered, was dealing, in the *Wheat Case* (1), not only with the particular acquisitions therein alleged, but also with the potential operation of the Act, that is, with acquisitions which might be made under its authority, e.g., acquisitions which contemplated and necessarily restricted the inter-State movement of wheat. Unless, therefore, the purpose of the *Dried Fruits Act*, namely, the regulation and control of the marketing of dried fruits, makes some vital distinction, the *Wheat Case* rules this case, whether the view taken by the majority of the Court of the operation of sec. 92 or that taken by my brothers *Gavan Duffy* and *Rich* be accepted as correct. The State regulated and changed the ownership of the plaintiff's dried fruits, and did not condition that regulation and change on the fact of inter-State trade or commerce : the ownership was changed for a purpose of the Act, namely, the purpose of controlling the marketing of dried fruits, so that the dried fruits industry might be maintained and preserved. The wisdom of this policy and its effect economically upon the Australian consumers are matters for the Legislature, and have no bearing upon any question which falls for decision by this Court. However, I see no distinction in principle between an acquisition by a legislative authority to maintain the Empire in time of war or to feed the people of a State, and an acquisition to maintain the industries of a State. In the *Wheat Case*, certainly, the power of acquisition was general, whereas in the present case it is confined to the purposes of the Act ; but in both cases the supply, the price and the marketing of the commodity are necessarily controlled and regulated. It appears to me, therefore, on the authority of the *Wheat Case*, that the acquisitions and seizures of the plaintiff's dried fruits were duly and lawfully made, under the provisions of the *Dried Fruits Act* of South Australia, and that this action must consequently be dismissed.

As this case will probably go further, it is perhaps desirable that I should assess the damages in case it is ultimately established that the plaintiff's right has been infringed. I do so on the basis that the whole of the acquisitions and seizures of the plaintiff's fruit are held

(1) (1915) 20 C.L.R. 54.

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to be unlawful. The heads under which damages are claimed are as follows:—(1) Loss of realizable value of fruit seized, £23,353 11s. 5d. The plaintiff, as I understood his counsel, admitted a deduction from the amount claimed of the sum paid under the acquisitions and an adjustment of charges to f.o.b. Port Adelaide, amounting to £15,568 6s. 7d. The defendants did not seriously contest the position that the plaintiff could have sold his fruit for £23,353 11s. 5d. if his actions had been uncontrolled. Consequently, I should award the difference, £7,785 4s. 10d. (2) Extra storage, extra wages, sundry expenses, loss of business and damage to goodwill. There was a good deal of disturbance to the plaintiff's business by the acquisition and seizures. His premises were used for storage purposes, his business methods and processes were slowed down and rendered more costly. He was put to expense in communicating with his customers and others, and he also lost custom, both among suppliers and purchasers, owing to the action of the defendants. But in connection with the loss of business it must be remembered that after the Federal *Dried Fruits Act* No. 11 of 1928 the plaintiff could only carry on business with a licence of the Federal authority. Further, the capital cost of erecting storage sheds should not be allowed. On the whole, I should award a lump sum of £1,000 for the various losses claimed under the items covered by this second head. (3) Carriers, nil. Expenses under this head were incurred by the plaintiff in anticipation of seizures by the defendants and to put his dried fruits beyond their reach. (4) Liability to purchasers and commission to brokers, £3,360. I see no reason to distrust the plaintiff's evidence as to the items under this head. I should, therefore, award the plaintiff a total sum of £12,145 4s. 10d. damages if it were held that the whole of the seizures of his dried fruits were wrongful and unauthorized. But, as in my opinion the acquisitions and seizures of the plaintiff's dried fruits were authorized by law, the action must be dismissed with costs, except the costs of and occasioned by the adjournment on 20th June 1929, which was due to the unreasonable conduct of the defendants.

From this decision the plaintiff now appealed to the Full Court of the High Court.

Cleland K.C. and *K. L. Ward*, for the appellant.

Clelland K.C. The power of acquisition conferred by sec. 28 of the *Dried Fruits Act* is limited to fruit which is the subject matter of intra-State trade and does not extend to anything else, and the defendants in order to justify the seizures made must show that they acted within the scope of that narrow authority. The purposes of the seizure were (1) to enforce a determination under sec. 20 of the Act that would be invalid by reason of *James* v. *State of South Australia* (1), (2) for the purpose of interfering with and controlling his sales in the Commonwealth and not merely in South Australia, and (3) to compel export of the appellant's fruit beyond the sea. The acquisitions were not made bona fide for the purposes of the Act but were directed against the appellant because he would not comply with the determinations of the Board. The purpose of the acquisition must be a lawful purpose, and if the purpose was only to compel the appellant to obey a determination of the Board which was not lawful it was not a good acquisition and was not within the authority of sec. 28. The repeated acquisitions were made only owing to the appellant flouting the determinations of the Board and for the purpose of enforcing those determinations, which were invalid. *The State of New South Wales* v. *The Commonwealth* (*The Wheat Case*) (2) has no application to the present case. That case decided that where the only act is to effect a change of ownership it does not interfere with trade and commerce, but the *Dried Fruits Act* is directed to trade and commerce entirely. It is an Act the main power of which is to control trade, and to effectuate that power it gives incidentally the ancillary power of acquisition. The power of acquisition can only be exercised by a State subject to the Commonwealth Constitution, like any other power that the State possesses. The power of acquisition under the *Wheat Acquisition Act* was absolutely general, whereas the power under sec. 28 of the *Dried Fruits Act* was expressed to be "for the purposes of this Act or of any contract made by the Board." The onus lies on the respondents of showing that they were acting within sec. 28. The evidence of the Minister was that the purpose of the acquisition of

(1) (1927) 40 C.L.R. 1. (2) (1915) 20 C.L.R. 54.

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the appellant's fruit was because he would not send a proportion of his fruit out of the Commonwealth. The respondents had no power to acquire the appellant's fruit, as far as sec. 28 was concerned, unless it was for some purpose of the Act; the only *de facto* exercise of the power of acquisition was to enforce the determination of the Board made under sec. 20 which this Court, in *James* v. *South Australia* (1), has held to be invalid. Although, if there had been only one act of acquiring all the appellant's fruit he would have been deprived of the power of complying with the determination of the Board, yet the more or less continuous acts of acquisition had as their object the purpose of coercing the appellant into compliance under the implied threat of further acquisition. If that is the effect of the acquisition it is an interference with the freedom of inter-State trade and commerce and opposed to sec. 92 of the Constitution. It is not competent for the State Parliament to prohibit all dried fruit in South Australia being the subject of inter-State trade. Therefore, if Parliament cannot say that directly, it cannot do so indirectly, and if it gives a power of acquisition which is limited to lawful purposes that power of acquisition cannot be used for an unlawful purpose that is forbidden by sec. 92 of the Constitution. In effect the fruit was acquired for the sole purpose of sec. 20 which has been held to be invalid, and, where a limited power of acquisition for a particular purpose is given, that purpose must be a valid one. The *Wheat Case* (2) proceeded on the basis that the Act there in question dealt with the title to property but not with its disposition. The reasons given in *James* v. *South Australia* in regard to the invalidity of sec. 20 and the determinations made under it, are directly applicable to the acquisition instead of determination under sec. 28. [Counsel also referred to *James* v. *South Australia* (3) and *W. & A. McArthur Ltd.* v. *State of Queensland* (4).]

K. L. Ward. If the statute deals only with proprietary rights it is unnecessary to apply sec. 92 of the Constitution, but if the statute is dealing with trade and commerce, the marketing of goods, sec. 92 must be applied (*W. & A. McArthur Ltd.* v. *State of Queensland* (5)).

(1) (1927) 40 C.L.R. 1.
(2) (1915) 20 C.L.R. 54.
(3) (1927) 40 C.L.R., at p. 39.
(4) (1920) 28 C.L.R. 530.
(5) (1920) 28 C.L.R., at p. 564.

[He also referred to the *Wheat Case* (1).] In *James* v. *South Australia* (2) the end to be achieved under sec. 20 was declared unlawful, and it is not permissible to attain an unlawful end by unlawful means, as is here attempted (*Attorney-General for Ontario* v. *Reciprocal Insurers* (3)). In that case an attempt to regulate purely State matters by what purported to be a criminal statute was held invalid. The object here was the same as that aimed at by sec. 20, not to acquire the fruit, but to regulate inter-State trade by forcing the fruit abroad.

F. Villeneuve Smith K.C., *Robert Menzies* K.C. and *A. J. Hannon*, for the respondent. The only question is whether the seizure was for the purposes of the Act, which are to be gathered by ascertaining its main object (see *Wheat Case* (4), quoting Lord *Watson's* observation in the course of the argument in the *Canadian Liquor Case* set out in *Lefroy's Canada's Federal System*, p. 213). The circumstances under consideration may be regarded for this purpose (*Eastman Photographic Materials Co.* v. *Comptroller-General of Patents, Designs, and Trade Marks* (5)). The evidence shows that the glut in the trade was the main circumstance. The onus of proving that the acquisition was not for the purposes of the Act is on the appellant: *Omnia præsumuntur rite esse acta.* The main purposes of the Act were the control and marketing of dried fruit. The proviso to sec. 28 (1) shows that the power was intended to be used whenever the Minister thought it desirable to export dried fruit overseas as an expedient for the better marketing of dried fruit. It was contemplated that the Minister would export overseas and that power should be given to him for that very purpose. Sec. 19 (*a*), (*b*), (*c*) and (*d*) are only specific purposes which the Minister could carry out by virtue of the powers conferred by sec. 28. All other powers in the Act except sec. 20 are merely administrative provisions, and sec. 20 instead of being aided by the exercise of the power is thereby rendered inoperative *qua* fruit seized under sec. 28. Sec. 20 is always silent when sec. 28 is speaking (*Ex parte Nelson* [*No.* 1] (6)).

(1) (1915) 20 C.L.R., at pp. 66, 68, 79, 106.
(2) (1927) 40 C.L.R. 1.
(3) (1924) A.C. 328.
(4) (1915) 20 C.L.R., at p. 98.
(5) (1898) A.C. 571, at p. 575.
(6) (1928) 42 C.L.R. 209.

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K. L. Ward, in reply. Sec. 28 only authorizes acquisition for those purposes which Parliament has actually expressed in the statute as being necessary for regulating the marketing of dried fruit, and does not authorize all acquisitions which the Minister may think necessary for regulating the marketing of dried fruit. As the acquisitions can only be for the specified purposes—and sec. 20 has ceased to be one of them—there is no purpose expressed in the Act which justifies an acquisition made for the purpose of "forcing the surplus fruit off the Australian market, or compelling a grower to do so when he would not do it voluntarily." Therefore the acquisitions are not authorized by sec. 28, because the respondents cannot point to any purpose of the Act for which such acquisitions were made. Even if the purposes for which acquisitions are authorized by sec. 28 include the general purpose, the general purpose can only be gathered from the specified purposes and cannot be larger than the sum total of the specified purposes; for the purpose of controlling marketing is a mere generic description, and the evidence proves, and it is so found by *Starke* J., that the purpose of the acquisition was to force the dried fruit off the Australian market. This is the purpose contained in sec. 20, and in no other part of the Act, but that is not a purpose of the Act because the section has altogether disappeared. Therefore, the Minister did not acquire for any purpose of the Act. The *Wheat Case* (1) has no application to the present case, because that case does not decide that a State can in all circumstances avoid the consequences of sec. 92 of the Constitution. If a statute is really a "marketing" or a "trade and commerce" Act, it is governed by sec. 92. The *Dried Fruits Act* is such an Act, and in so far as it authorizes acquisitions for marketing purposes it must be construed subject to sec. 92 and must be limited on construction to authorize only such acquisitions as do not interfere with freedom of inter-State trade. On the evidence the acquisitions were made to prevent disobedience to sec. 20 and to punish the appellant for having disobeyed sec. 20 in this sense, namely, to deprive him of the means of carrying on his business by taking his fruit away. The acquisitions were made to attain the same end as was attained

(1) (1915) 20 C.L.R. 54.

under sec. 20. That end was declared invalid. Therefore, the State cannot by employing valid means attain a forbidden end.

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Cur. adv. vult.

The following written judgments were delivered :—

Mar. 21, 1930.

KNOX C.J. AND GAVAN DUFFY J. This is an appeal from the judgment of *Starke* J. dismissing the action. We agree with the learned Judge both in the conclusion at which he arrived and in the reasons given by him in support of that conclusion, to which we cannot usefully add anything. In our opinion the appeal should be dismissed.

ISAACS J. The appellant James is a resident of South Australia, where he carries on the business of growing, drying and dealing in fruit, and in the course of his business selling his dried fruit in South Australia, in other States of the Commonwealth, and beyond Australia. At various dates from 7th March 1927 to 27th November 1927 dried fruits belonging to the appellant were forcibly seized and taken away from him by the respondents, and were disposed of by Cowan the respondent, or by his direction, in London. After allowing for the sums paid to him as compensation, as directed by the Act, and for certain adjustments, the seizures have caused him pecuniary loss representing the difference between the sums mentioned and the selling value of the property taken, such loss being assessed by my brother *Starke* at £12,145 4s. 10d., and not now challenged by either side. Prima facie there was a series of actionable trespasses and conversions for which the respondents are liable unless they can justify. The justification set up is the authority of the South Australian Act No. 1657, passed on 24th December 1924, and brought into operation by proclamation on 22nd January 1925. The Act is, by virtue of Act No. 1784, continued until 31st March 1930. Notwithstanding the expiry of the Act on the date mentioned, the issues raised by this appeal are of lasting and far-reaching significance, over and above their importance to the present appellant. The impelling reason for the seizures and partial confiscation was that the appellant insisted on exercising his

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legal rights to sell as best he could his dried fruits in South Australia and in other States of Australia. Admittedly it was to control him in this respect that the deprivation of property took place. The thesis maintained by the respondents is that it is within the power of a State Parliament, notwithstanding sec. 92 of the Federal Constitution declaring inter-State trade to be "absolutely free," to empower a State Minister to prevent private owners from carrying on inter-State trade to any extent he thinks fit, by expropriating any of the private owners' property actually engaged or intending to be engaged in inter-State trade. If after *Ex parte Nelson* [*No.* 2] (1) there is still any visible remnant of sec. 92 of the Federal Constitution, the thesis just stated, if sound, effectively removes it. But to complete the attempted justification in this case, one step further is necessary, namely, that the State Parliament did by its legislation mentioned—assuming it to be valid—confer the requisite authority. That, indeed, is logically the first point of inquiry, and to that question I shall first address myself, since if, as in my opinion is the case, the Act, on pure construction, gives no such authority, no constitutional question of any kind arises. The authority relied on by the respondents for the exercise of the power of expropriation was carefully formulated in writing during the argument by their learned counsel and handed to the Court for greater convenience and certainty. It is that "the power was intended to be used wherever the Minister thought it desirable to export overseas as an expedient for the better marketing of dried fruits." That is not found anywhere expressed, and in the circumstances a careful examination of the Act is necessary.

The Act.—The full title of the Act is "An Act to make better provision for the Marketing of Dried Fruits, and for other purposes." The enacting portion constitutes a "Dried Fruits Board" consisting of five members, three being representatives of the growers and two being official members. The Board has power to appoint officers such as inspectors and others "for the purposes of this Act" (sec. 17 (2)), and by the same sub-section provides for arming those officers carrying out "the purposes of this Act" with powers and duties that it is punishable to obstruct or resist. The Board, by

(1) (1929) 42 C.L.R. 258.

sec. 18, has power to levy a tax on all growers in South Australia to defray the expenses of "administering" the Act and of carrying out their duties and functions thereunder. This is supplemented by sec. 36, which provides that all expenses incurred "for the purposes of this Act" shall, so far as not provided for by the Act itself, be paid out of moneys to be provided by Parliament for the purpose. Two central sections confer on the Board powers of the fullest description within the limits assigned. Sec. 19 says: "The Board shall also have power *in its absolute discretion* from time to time (*a*) to make contracts with any person in respect to the purchase or sale of dried fruits produced in Australia; (*b*) to enter into contracts with Boards appointed under legislation in force in other States with *objects similar to those of this Act* for concerted action in the marketing of dried fruits produced in Australia and for purposes incidental thereto, and to carry out such contracts; (*c*) to open shops or depots for the sale of dried fruits, either wholesale or by retail; (*d*) to provide depots for the storage or distribution of dried fruits; (*e*) to fix the remuneration to be paid to dealers for the sale or distribution of dried fruits; (*f*) to fix the maximum prices to be charged on the sale of dried fruits, whether wholesale or by retail; and (*g*) by means of advertising or any other appropriate means, to encourage the consumption of dried fruits, and create a greater demand therefor." Sec. 20 says:—"(1) The Board shall also have power, *in its absolute discretion*, from time to time to determine where and in what respective quantities the output of dried fruits produced in any particular year is to be marketed, and to take whatever action the Board thinks proper for the purpose of enforcing such determination. (2) Notice of every such determination shall be given—(*a*) by public notice; and (*b*) by sending by post to each grower or dealer affected or likely to be affected by the determination, at his address as registered with the Board, a letter containing particulars of the determination." Subsequent sections, 21 to 27, are grouped under a heading, "Registration of Growers, Dealers, and Packing Sheds," and are obviously ancillary to secs. 19 and 20, principally to 20. Then come two sections, 28 and 29, grouped under the heading, "Minister may Purchase, or Compulsorily Acquire, Dried Fruits." The effect of sec. 28—the vital section in

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this case—I shall consider presently, only stopping now to say that the power of acquisition is conditioned to be "*for the purposes of this Act* or of any contract made by the Board." There follow some miscellaneous sections which, apart from sec. 36 above quoted, are for immediate purposes immaterial, except sec. 34, which declares that the Governor may make regulations for or with respect to "(*a*) the purchase, acquisition, sale, or marketing, or the arranging for the purchase, acquisition, sale, or marketing, of dried fruits;" and also (*b*) inspection, (*c*) branding and marketing of packages, (*d*) registration of growers, and (*g*) matters required or permitted by the Act to be prescribed, and "(*h*) generally, all matters and things necessary or convenient to be prescribed for carrying this Act into effect." It is of some importance to observe that by sec. 38 of the *Acts Interpretation Act* 1915 (No. 1215), all such regulations must be published in the *Gazette* and laid before Parliament, if in session, fourteen days after publication, and if not in session, then within fourteen days after the commencement of the next session. Either House may by resolution disallow a regulation.

It thus appears that—putting aside for the moment all considerations of conflict with the Commonwealth Constitution—the Act (that is, by its enacting provisions) contains and specifies an apparently complete code of authority and procedure for dealing with the question of "marketing of dried fruits," and constituting what the Legislature considers the "better provision for marketing" promised in the full title. Certain concrete purposes are plainly discernible in the enacting provisions. To avoid a glut locally, the Board has powers of stimulating local demand in South Australia in various ways, and, to the extent that the local demand in that State is in the Board's opinion insufficient to return remunerative prices to growers and dealers, it has upon construction power to prevent the surplus being sold either in that State or in any other State in Australia. But the Board cannot, apart from sec. 19, dispose of that surplus, and so sec. 28 is designed to enable the Minister not only to help the Board so far as it needs assistance in increasing local consumption, but also so far as the Board's determinations create a legal surplus which consistently with those determinations must not be sold by private owners in Australia.

That, for present purposes, sufficiently describes the scheme, so far as South Australia is concerned. The part the Minister is to play is ancillary to the determinations and policy of the Board, and, where thought necessary, is to render effective by responsible Government action the conclusions at which the Board arrives. The Ministerial part as designed by the Act is to assist and not to supersede the Board. The necessary connecting links so as to prevent inter-State trade are found in sec. 19 (*b*) and sec. 20. That part of the scheme is already declared invalid by this Court in *James* v. *South Australia* (1). If the scheme is to be regarded as an entire one, of which, as I think, the prevention of diversion to other States of the forbidden surplus of South Australian trade is an essential part, and without which there is now left only a " highly truncated " enactment (see *Attorney-General for Manitoba* v. *Attorney-General for Canada* (2)) which the State Parliament obviously would not have passed, then by State constitutional law the legislation is inoperative. When the heart has ceased to beat, it is difficult to imagine the creature as still living. In the view I take, it is not necessary, however, in this case to rest the decision on that annihilating principle. It has been decided in *James* v. *South Australia* (3) that " the legislation does not transcend the territorial jurisdiction of the Parliament of South Australia—it is confined to persons, property or acts within the territorial limits of South Australia." All the powers of the Board under secs. 19 and 20 and of the Minister under sec. 28 are therefore to be taken as strictly confined to exercise in South Australia. But acts done by the Board, though in South Australia, may effectually repress and stifle inter-State trade between that and another State of Australia, and they are manifestly intended to do so, if the Board thinks fit, both under sec. 19 (*b*) and sec. 20. Sec. 20 makes the discretion of the Board expressed by determination as to place and quantity of output of dried fruits *conclusive*, and *invests the Board with what, literally read, is unlimited power to* enforce its determination (though probably the power is confined to such enforcement as is provided for in the Act), and it *provides for notification of this determination to each grower and dealer*. That " determination " is then

(1) (1927) 40 C.L.R. 1.
(2) (1925) A.C. 561, at p. 568.
(3) (1927) 40 C.L.R., at p. 37.

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intended to be *the law* of South Australia as to those subjects. And by sec. 31 a breach of a determination involves a penalty up to £500. But though the Board is both by secs. 19 and 20 to have the powers therein specified "in its absolute discretion," sec. 34, as already mentioned, empowers the Governor—that is, the Governor in Council, or, in other words, the Government of the day—to make regulations as to those subjects. How far those provisions are to be harmonized, it is not now necessary to consider. But it is clear that the contention of the respondents is wholly indefensible. It is that outside and beyond the Board's "absolute discretion" notified to growers and binding them in their action at their peril, and any published regulations of the Governor in Council reviewable by either house of Parliament, there is a third unlimited power created by the Act and vested in the Minister, which is independent and supersessive of, and even repugnant to, the other two, because its exercise makes them incapable of operation. The suggested power is by common consent essential to support the respondents' justification. As stated, sec. 28 empowers the Minister to "acquire compulsorily" any dried fruits in South Australia, unless they are covered by a Commonwealth licence or Commonwealth control, or are, shortly speaking, to be exported abroad. But the power of compulsory acquisition is to be exercised subject to two expressed conditions, namely, (1) that it is subject to sec. 92 of the Commonwealth Constitution, and (2) that it is "for the purposes of this Act or of any contract made by the Board." No relevant "contract" was "made by the Board," and therefore we are confined in respect of justification to the condition "for the purposes of this Act." And further, the burden in this case lay on the respondents to particularize the purpose on which they relied.

My brother *Starke* has held, and both parties agree and have fought this appeal, on the basis that the "purpose" acted on was not to enforce or assist any statutory determination of the Board or any other statutory action of the Board or for any other purpose than to carry out a "scheme" as it is called—apparently inferred from a combined contemplation of Acts and regulations of the Commonwealth, and this and other States, and the opinions of the Minister and the Board and similar authorities elsewhere. "In

pursuance of the scheme," which I take to mean in supposed harmony with the combined general effect of varying enactments, regulations and determinations, " the Minister and the Board resolved to use the powers apparently conferred upon them by legislation to prevent the evils feared, *and to force the surplus fruit off the Australian market.*" That is, then, the " purpose " by which it is sought to justify the trespasses complained of. In plain terms, it is to prevent inter-State trade in the surplus fruit. I think it safer to adhere to the words of the learned primary Judge, since both parties accept the finding so far as correct. The " scheme " is nowhere expressly formulated, but is to be deduced by inference, as above stated. The " resolve " of the Minister and Board is nowhere recorded, nor is it to be found anywhere except in such a broad generalization of statutes and incidents as my learned brother has applied.

For instance, the expression " surplus fruit " leads to the inquiry as to what constitutes a " surplus " in South Australia. It is found, and was maintained in argument, that the Minister's purpose was not to bolster up the Board's determinations. They were illegal, and were studiously avoided by learned counsel for respondents. Obviously then, the " surplus " depended on nothing but some vague mental arbitrary estimate of the Minister, incapable of reduction to definite concrete statement. I entirely accept the accuracy of my learned brother's finding as to the actual " purpose " which is to be attributed to the Minister in the circumstances. Putting aside all the possibilities that are negatived in the judgment under appeal, and assuming there was some " purpose," nothing remains but that which has been formulated by my brother *Starke*. But where is such a " purpose " found in the Act ? Nowhere expressly. And as it would manifestly be just as invalid as sec. 20, why should it in any case be implied ? But there is a still deeper reason. Without any intimation of the " purpose " to the appellant, without affording him the means of judging whether he had the right to defend his property or not, with nothing but a tacit resolution to bring his trading operations into what their unbridled discretion considered a desirable state, they—the Minister and the Board—expropriated his property on terms that mean confiscating over £12,000, never disclosing the reason, and now, in the pressure of an action, setting

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up under the shelter of sec. 28 this supposed " resolution " as one of the purposes of the Act. The Ministerial action, relied on and defended as it is, is so opposed to British fair play and the common-sense demands of justice that nothing short of express and intractable words would induce me to accept it as sanctioned by Parliament. If it were there found expressly stated that, over and above the specific purposes to be read in the actual words of the Act, there was an additional and possibly clashing purpose consisting of investing the Minister with czar-like power, resting on his own secret unchallengeable conception of what inter-State trade was desirable in the public interests, and his own unascertainable will in that respect, to expropriate property without explanation and at certain loss to the individual, it would more than answer the description of " The New Despotism " so graphically stated by Lord *Hewart*. At p. 17 of his work he says :—" The new despotism . . . gives Parliament an anæsthetic. . . . It is to subordinate Parliament, to evade the Courts, and to render the will, or the caprice, of the Executive unfettered and supreme." And at p. 19 the Lord Chief Justice says :—" It is a strong thing to place the decision of a Minister, in a matter affecting the rights of individuals, beyond the possibility of review by the Courts of Law. And it is a strong thing to empower a Minister to modify, by his personal or departmental order, the provisions of a statute which has been enacted."

If the respondents are right, they have succeeded, by mere informal unrecorded and uncommunicated " resolve " of Minister and Board, in not only seriously affecting the rights of the appellant without the least opportunity to him to contest the " resolve," but they have for all we know overridden the formal determination of the Board, to which the Act requires obedience. That those determinations are invalid is nothing to the point for this purpose, which is to ascertain legislative intention. The point is : Did Parliament ever intend the Minister so to override such a determination if he thought fit, either by increasing or decreasing the quota, and so completely altering the situation ? Did Parliament intend, for example, that when the Board under sec. 19 (*b*) had made a contract with other States as to what course was to be pursued, the Minister by ukase, based on nothing but his private will, might entirely

depart from that, and penalize growers who were observing the inter-State arrangement? I am unable to accept the suggested interpretation of the Act. The whole of this mighty and unusual structure is built primarily and mainly on the title of the Act, and said to be supported to some extent by the proviso to sec. 28 (1) of the Act. In my opinion the title—even the full title—is not able to bear the burden. The task is to make the word "purposes" in sec. 28 include the Minister's unlimited discretion to determine how marketing, including in that term intra-State, inter-State and foreign trade and commerce, in "dried fruits," shall be carried on. "Dried fruits," it will be observed from the interpretation section, is a phrase that includes not merely currants, sultanas and lexias, but any other dried fruits that may be proclaimed as dried fruits "for the purposes of this Act." This goes beyond the Commonwealth legislation. He might mentally determine one way to-day and take all a man's fruit; he might next week, on a review of trade, alter his opinion and take another's; and then veer silently and secretly to a third view and expropriate the goods of a third who had entered into obligations on the basis of the first or second view. There is no limit possible. He could under the assumed power do of his unfettered volition all that might be done by regulation under sec. 34 (1), and more, and apparently even in defiance of any regulation.

But it is further said that the proviso to sec. 28 (1) "shows that the power was intended to be used wherever the Minister thought it desirable to export overseas as an expedient for the better marketing of dried fruits, and therefore the expression 'for the purposes of this Act' at least includes the main object of the Act, the control of marketing." I have there quoted more fully the written argument supplied by the learned counsel for the respondents. The first observation that needs to be made as to that argument is that the proviso referred to has relation to export not by the Minister but by private traders, and the only determination by the Minister as to exportation is as to goods to be *excluded* from the power of expropriation, by obtaining a licence for their exportation under the Commonwealth Act. The foundation of the whole contention is the word "marketing" in the title. That word is seized on, separated from its context, and erected into a "purpose" of the

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Act within the meaning of sec. 28. That, in my view, is legally impossible. The title is the label which the Legislature thinks most suitable to identify the contents of the depository of its will on the given subject. It is no part of its enactment as to the "purposes" of the Act, except as to its authoritative selection as a label. The title is no more part of the remedy designed to cope with the evil dealt with than is the label on a druggist's bottle part of the remedy for the malady intended to be cured. In case of doubt, it is a useful aid in identification by assisting to ascertain the general scope of the legislation and help the interpretation. If the operative words are ambiguous, it is often a great aid to construction to be sure of the general object of the statute. "The title may be looked at for aid in finding out the object" (*Salmon* v. *Duncombe* (1)). It may be used in interpreting the rest of the Act (*Justices of Middlesex* v. *The Queen* (2); *Vacher & Sons Ltd.* v. *London Society of Compositors* (3)). The significations of the words "object" and "purpose" are so various in different collocations and in relation to different aspects, that the utmost care is necessary to avoid slipping into egregious error. For instance, the "object" of a statute for one purpose may be properly defined as the end to which its provisions on their true construction appear to be directed. For another purpose it may properly be regarded simply as the legal effect produced by its operative provisions, as in this Act, sec. 19 (*b*). For example, an Act to raise taxation on inter-State contracts might in the more limited sense, when viewed apart from constitutional restrictions, be said to have for its object the raising of revenue. But from the constitutional standpoint the object might well be the repression of inter-State trade. As an illustration of the confusion arising through not observing the aspect, learned counsel for the respondents quoted and relied on my quotation from Lord *Watson* appearing on p. 98 of the *Wheat Case* (4). At that point, in my judgment, as the merest glance will show, I was dealing with the "object" of a State statute in its relation to the Federal Constitution —that is, as to *subject matter*—and was pointing out that what the State Act *did* by the relevant section, judging by its language,

(1) (1886) 11 App. Cas. 627, at p. 634.
(2) (1884) 9 App. Cas. 757, at p. 772.
(3) (1913) A.C. 107, at p. 128.
(4) (1915) 20 C.L.R. 54.

was to accomplish and to attempt to accomplish, nothing but acquisition of wheat. That was the sole subject matter of the section. That has nothing to do with the question involved in the first branch of the present case, which does not touch subject matter, but how an admitted subject matter is dealt with. That latter question was considered in *McCawley* v. *The King* (1). There the question was whether an Act in fact altered the Constitution, though not passed " with the object " (in the larger sense) of doing so. The opinion of Sir *Roundell Palmer* and Sir *Robert Collier* was quoted as stating that " It must be presumed that a legislative body intends that which is the necessary effect of its enactments; the *object*, the *purpose* and the *intention* of the enactment, is the same," &c. By the " necessary effect," it needs scarcely be said, those learned jurists meant the necessary *legal* effect, not the ulterior effect economically or socially. I think it may be accepted that the Privy Council on appeal regarded that view as correct (2). What was regarded as most material as the object by Lord *Watson* for his purposes, was rejected by Lord *Birkenhead* for the Judicial Committee for other purposes, and with complete harmony. Lord *Watson's* words are as relevant and potent on the second branch of this case as they are utterly irrelevant in this the first branch. This will be made even more apparent presently.

Now, looking at the title of the South Australian Act for the only legitimate purpose of construing the operative part of the statute, what do we find to assist us ? The title, I repeat, is " An Act to make better provision for the Marketing of Dried Fruits, and for other purposes." As to the " other purposes," we get no help from the title. With respect to " Marketing," the crucial words are " to make better provision " for the marketing. What that " better provision " is, we cannot learn, except by examining the operative part of the Act, where the better provision is " made." As to what " marketing " is, we have also to discover by examining the body of the Act. So far as I can see, there is nothing which countenances the unmeasured and irresponsible power of the Minister contended for. There is no doubt the Legislature of South Australia regarded the unregulated marketing of dried fruits as an evil to be

(1) (1918) 26 C.L.R. 9, at p. 65. (2) (1920) A.C. 691; 28 C.L.R. 106.

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met by legislation. If there were ambiguity in the legislation designed to meet the evil, the evil itself and the statement of that evil by the Legislature could be looked at so as to resolve the ambiguity (*Eastman Photographic Materials Co.* v. *Comptroller-General of Patents, Designs and Trade Marks* (1)). But, as Lord *Dunedin* said in *Equitable Life Assurance Society of the United States* v. *Reed* (2), " in all cases where something not *ipsa natura* unlawful is prohibited by statute, the words of prohibition must be taken as they stand; they must not be amplified in order to meet a supposed evil, or restricted in order to protect a natural freedom. In other words the evil that was to be checked can only be considered so far as is necessary for the interpretation of the words, *but must not be used for an independent determination of the scope of the remedy.*" The scope of the *remedy* is the all-important point here. It is not legitimate to strain language " in order to make it apply to a case to which it does not legitimately in its terms, apply, on account of the supposed intention of the Legislature and the theory that that supposed intention can only be effectually carried out by giving to the words a meaning which they do not naturally bear " (per Lord *Herschell* in *Kent County Council* v. *Lord Gerard* (3)).

The underlying fallacy in the respondents' contention is that it substitutes the purpose (abstract) of Parliament in legislating for the purpose (concrete) of the Act as passed. Frequently the phrase " the purpose of the Act " is employed to denote the general object sought to be achieved, the amelioration of the evil. An instance is found in *Hill* v. *East and West India Dock Co.* (4), per Lord *Cairns*, and *Attorney-General for Manitoba* v. *Attorney-General for Canada* (5), per Lord *Sumner* in a passage to which I shall revert. In that abstract sense " purpose " means no more than policy. An excellent illustration of the essential difference between the abstract purposes and the concrete purposes is to be found in the judgment of Lord *Sumner* in *Birkdale District Electric Supply Co.* v. *Corporation of Southport* (6), where the learned Lord says: " It may be the *policy* of the *Electric Lighting Acts* to get trading

(1) (1898) A.C., at p. 575.
(2) (1914) A.C. 587, at pp. 595-596.
(3) (1897) A.C. 633, at p. 639.
(4) (1884) 9 App. Cas. 448, at p. 455.
(5) (1929) A.C. 260, at p. 268.
(6) (1926) A.C. 355, at p. 373.

companies to take up and work Electric Lighting Orders in hope of gain, but I cannot see that it is in any part of the *direct purposes* of the Order, that money should be made or dividends distributed." (The italics are mine.) The analogous point here is that it is no part of the direct purposes of the Act that the Minister should have carte blanche control of inter-State trade. The " purposes of the Act " which justify compulsory acquisition are always direct purposes, that is, directly authorized. In *Lloyd* on *Compensation*, 6th ed., at p. 5, it is stated quite plainly, and as an axiomatic principle, that " The purposes of the special Act are those only which are pointed out by it." Such a purpose is what *Burton* J. in *Warburton* v. *Loveland* (1) terms a " declared purpose of the statute." While no doubt a more liberal exercise of discretion will be permitted to a public body than to a set of private individuals, yet it is always within the prescribed ambit. " *Whatever the Company has power to do, they may take the land for*," is the test laid down by *Jessel* M.R. in *Wilkinson* v. *Hull &c. Railway and Dock Co.* (2). Adapted to this case it is the proper test here. Whatever the Board has power to do, whatever, if anything, the Minister has power to do, the Minister may take the land for, so long as there is bona fides. You cannot challenge the Minister's bona fides on the ground of dishonesty at all—that, in my opinion, can never be imputed to the King's Executive. But if it is shown that the land is wanted only for some collateral purpose, as a fact, or that the alleged purpose is absurd as a reason for expropriation, there is then what is called want of bona fides, but what is really excess of power (see *Errington* v. *Metropolitan District Railway Co.* (3)). Property is never permitted to be expropriated except to carry out some specific purpose which the law authorizes to be carried out (see *Richmond* v. *North London Railway Co.* (4)). Indeed, the particular purpose is " an essential part of the description " of the property to be taken compulsorily (see per *Rigby* L.J. in *Donaldson* v. *Mayor &c. of South Shields* (5)). It would not only be without precedent, but contrary to well established rules of statutory interpretation, to evolve from the title

(1) (1828) 1 Hud. & B. 623, at p. 648.
(2) (1882) 20 Ch. D. 323, at p. 335.
(3) (1882) 19 Ch. D. 559, at p. 571.
(4) (1868) 3 Ch. App. 679, at p. 681.
(5) (1899) 79 L.T. 685, at pp. 690-691.

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of the Act the authority of the Minister to resolve as suggested and to make that resolve the legal basis for the operation of sec. 28.

The present Lord Chancellor (when *Sankey* J.) said of an Act under consideration in *R.* v. *Hammer* (1) what is very apt here: "The meaning of the words as used in the Act under discussion must be derived from a consideration of the words themselves, from a consideration of the place they occupy in the statute, and from a consideration of the statute as a whole." The words "to make better provision for marketing" do not naturally or even remotely comprise a power of arbitrarily and secretly resolving on a method of marketing; the place they occupy is one where no one would naturally expect to find such a power, and a consideration of the statute as a whole shows that such a power would be inconsistent with the declared and direct purposes of the Act. The repeated use of the expression "the purposes of this Act" in the sections above referred to is to my mind decisive against the existence of such a power and in favour of confining the phrase to the operative provisions of the statute. If such an unmeasured power was intended by Parliament, then, as Lord *Ellenborough* observed in *R.* v. *Skone* (2), "*Quod voluit non dixit.*" "We cannot," said Lord *Brougham* in *Crawford* v. *Spooner* (3), "fish out what possibly may have been the intention of the Legislature." We have simply to take its words and construe them to find its declared "purposes," and not add some imaginary purpose by way of supplement. The "particular purpose" authorized is always to be looked for, even though the power is given to public trustees (see per *Blackburn* J. in *Ayr Harbour Trustees* v. *Oswald* (4)). It may be expressed in general terms, but it must find embodiment in words capable at least of connoting such a purpose. And see per *Warrington* L.J. in *Taff Vale Railway* v. *Cardiff Railway* (5) and per *Bayley* J. in *Guthrie* v. *Fisk* (6). But it must be particularly clear where the exercise of the power of expropriation permits confiscation, complete or partial. It is a canon of construction that general or ambiguous words should not be used to take any legitimate and valuable rights without compensation

(1) (1923) 2 K.B. 786, at p. 791.
(2) (1805) 6 East 514, at p. 518; 102 E.R. 1384.
(3) (1846) 6 Moo. P.C.C. 1, at p. 9; 13 E.R. 582.
(4) (1883) 8 App. Cas. 623, at p. 634.
(5) (1917) 1 Ch. 299, at p. 310.
(6) (1824) 3 B. & C. 178, at p. 183; 107 E.R. 700.

if they are reasonably capable of being construed so as to avoid such a result consistently with the general purpose of the transaction (*Minister of Railways and Harbours of the Union of South Africa* v. *Simmer and Jack Pty. Mines Ltd.* (1); and see per Lord *Parmoor* in *Central Control Board (Liquor Traffic)* v. *Cannon Brewery Co.* (2)). And since the Legislature categorically set out the "purposes" in its enacting provisions, in respect of which, for the supposed public good, private rights might at the will of the Minister be sacrificed, it is not in accordance with the canon referred to that the area of sacrifice should be enlarged by what after all is a merely conjectural signification of the words in the title. To this may be added that since the expropriation involves a charge on the public revenue, it is additionally a reason for requiring great distinctness of language. See, for instance, *Mackay* v. *Attorney-General for British Columbia* (3).

It was urged for the respondents that the expression "for the purposes of this Act" in sec. 28 cannot be intended to cover the purposes of the Act as expressed in sec. 19 (*a*) and (*b*), because of the words "or of any contract made by the Board." In any case, too much reliance must not be placed on that phrase, because sec. 29 does not contain it, but limits its provisions to contracts under and for "the purposes of this Act," and it would be absurd to exclude a case of compulsory acquisition made for the purpose of a Board contract. And again it is quite plain that the expenses incurred by the Board in making contracts fall within the phrase "the purposes of this Act" in sec. 36, and therefore are not treated by the Legislature as altogether outside that expression. It is difficult to say precisely why the expression referred to should have been inserted in sec. 28 and omitted from sec. 29, but it is not doubtful to me that the making of a contract by the Board is by sec. 19 one of the purposes of the Act. Probably it was inserted for greater caution in sec. 28, lest a legal distinction should be drawn between the "purposes" of the Act and the "purposes" of a contract made by the Board. And once the "purposes," as distinct from the "making" of the contract, were included in sec. 28, they fell into

(1) (1918) A.C. 591, at p. 603.
(2) (1919) A.C. 744, at p. 760.
(3) (1922) 1 A.C. 457, at p. 461.

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the general phrase "the purposes of the Act," because they had then been made so by the operative part of the enactment. But one thing is very prominently evidenced by the insertion of the reference to the contract of the Board, namely, that the Legislature was extremely careful to *express* whatever it intended to justify as expropriation outside the usual effect of "purposes of the Act."

I ought not to pass by without notice one singular argument advanced by the respondents. It was that sub-sec. 3 of sec. 28 was a "purpose" that attracted the power of expropriation in sub-sec. 1. Sub-sec. 3 says: "Any dried fruits acquired *pursuant to this Act* may be sold by the Minister in such manner as he thinks fit." Clearly the sub-section cannot be regarded as a justification for *acquiring*. Before it can operate at all, the acquisition must be complete, and must have been made "pursuant to this Act," which means that it was for some permitted "purpose." And further, since, as stated, the decision of this Court is that all acts permitted by the statute are confined to the territorial limits of South Australia, it certainly could not justify—as a purpose—the Minister's resolve to sell in London. I therefore am very clearly of opinion that the admitted "purpose" in fact of the Minister said to be extracted from the title was not in law a purpose of the Act within the meaning of sec. 28. As I personally view this case, it would stop at this point.

It is, however, necessary for me to consider the second branch, which is: Assuming the disputed authority can be deduced from the Act independently of sec. 92 of the Federal Constitution, does the *Wheat Case* (1) support the validity of the statutory authority.

The Constitution.—I have now to assume that my construction of the Act is wrong, and that, properly interpreted, it is a State legislative attempt to control (*inter alia*) inter-State trade by enabling the Minister at his discretion to prevent inter-State trade in dried fruits by expropriating them at penal rates. The question then is this: "Is the legislation sanctioned by the decision in the *Wheat Case*?" It appears to me that that question must be answered very distinctly in the negative. It will be observed that this branch of the case, as argued, is less an examination of the Constitution than an examination of the *Wheat Case*, the purpose

(1) (1915) 20 C.L.R. 54.

being to see whether it is decisive of this case. The relevant portion of that decision was simply that a State Act did not violate sec. 92 of the Constitution by declaring that "the Governor may, by notification published in the *Gazette*, declare that any wheat therein described or referred to is acquired by His Majesty," and that "upon such publication the wheat shall become the absolute property of His Majesty." I omit immaterial ancillary provisions as to compensation, &c. There were sections cancelling contracts confined to inter-State trade, which are irrelevant. But the distinctive feature of the Act in that case was that it authorized expropriation of the property as such *simpliciter*, and did not expressly or implicitly refer to inter-State trade or commerce, either as a criterion of authority or as a description or attribute of the property to be acquired. It is obvious that such a decision leaves wholly untouched the question in the present case.

Here, by the assumption, we have a statute which is the very antithesis of the *Wheat Acquisition Act*. It makes the repression of inter-State trade the *causa causans* of the expropriation, which is only the *means* selected to carry out effectively the attempted control of the inter-State trade. The property compulsorily acquired after the elimination, first, of such dried fruits as are thought sufficient for local State consumption, and, next, of such as are to be the subject of export, is necessarily clothed with and identified by the attribute of property that would in the ordinary course of trade be used for the purpose of inter-State trade operations, and it is this property alone which is withdrawn from those operations by compulsory acquisition. But, while it is patently impossible to regard the "decision" itself as supporting the respondents' contention, reliance is placed on certain reasoning there found. This Court during argument has declined to reopen the decision. It was unanimous, and I venture to say was transparently right. But the reasons present no unanimity, nor even preponderance of any principle that concludes this controversy in favour of the respondents. The substance of the reasons of *Griffith* C.J. at pp. 66-67 is that *the statute was in general terms*, and should be construed as not extending to infringe sec. 92 of the Constitution, since it did not on its face appear to deal with matters protected by that section. In other words,

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it was not to be construed as attempting to control inter-State trade. The learned Chief Justice adds a paraphrase of sec. 92 which is greatly relied on, and indeed made the foundation of the respondents' contention. I shall come back to that presently as it merits special and close attention. But, in passing, I may say it would be a sorry tribute to the memory of the learned Chief Justice to impute to him an opinion that a law transferring ownership on terms that make the transfer a quasi-penal consequence for insisting on carrying on inter-State trade free from State interference, was not an infringement of sec. 92. The reasons of *Barton* J. were substantially the same as those of the Chief Justice. My own opinion is found at p. 100. I said : " The key to the matter lies, in my opinion, in the fact that *trade and commerce consists of acts not things*." That has been adopted in *McArthur's Case* (1). That principle, as will be seen, is, if still adhered to, decisive of this case. I went on in the *Wheat Case* (2) to say that " when a State deals with property on the basis of property and *regulates its ownership irrespective of any element of inter-State trade*, there is no abridgment of absolute freedom of trade. The State cannot know what contracts exist at a given moment, or what movement of property towards another State has begun, and if it proceeds to exercise its own lawful powers of legislation without reference in any way to and perfectly independently and irrespective of such inter-State operations, it is not an unlawful exercise of legislative power. *It cannot do indirectly what it cannot do directly*; but here it is not directly or indirectly interfering with commerce at all. It does no more than would be done if the property passed to an assignee under a bankruptcy law, or were retaken by the vendor under the State law of stoppage *in transitu*. When the State without reference to inter-State contracts as a criterion, or as influencing the operation of its enactment, proceeds to acquire wheat to feed its citizens, it merely changes ownership. It does not assume to govern the duties of the contracting parties to each other, or regulate in any way the interchange of goods belonging to the vendor." My brother *Gavan Duffy* said of the *Wheat Acquisition Act* (3) :— " It does no more than empower the King to acquire any or all of

(1) (1920) 28 C.L.R., at p. 550. (2) (1915) 20 C.L.R., at p. 100.
(3) (1915) 20 C.L.R., at p. 105.

the wheat in New South Wales, *and makes no distinction between grain the subject matter of inter-State trade and other grain.* . . . In truth, the Act is not primarily an interference with inter-State trade or commerce at all; it is an exercise of the legislative power declared by sec. 107 of the Constitution to remain in the Legislature of New South Wales for the purpose of managing its own internal affairs." *Powers* J. appears to rest his judgment on the Act being a mere general acquisition of property. *Rich* J. on this point says (1): "I . . . adopt what has been said by my brother *Gavan Duffy*."

The only thread common to the reasoning of all the judgments is that the Act was general and did not assume to control or regulate any inter-State operations. Reliance, however, was placed on the "paraphrase" of sec. 92 by *Griffith* C.J. (2). Yet it finds no concurrence of any other Justice except my late brother *Barton*, and it is not in any case part of the "decision" to which this Court has determined to adhere. Strictly speaking, what I have so far said determines in my opinion the second branch also against the respondents: that is, the *Wheat Case* is not an authority supporting their attempted justification. But it is not desirable that I should stop there. The reasoning should be more deeply examined. As Lord *Macnaghten* said for the Privy Council in *Mussummat Durga Choudhrain* v. *Jawahir Singh Choudhri* (3), "It is always dangerous to paraphrase an enactment." To this may be added the words of Lord *Halsbury* L.C. in *Gresham Life Assurance Society* v. *Bishop* (4): "I deprecate a construction which passes by the actual words and seeks to limit the words by what is supposed to be something equivalent to the language used by the Legislature." I would say for myself that a paraphrase is especially dangerous in the case of a Constitution. In my opinion it would under the best of circumstances be unfortunate to adopt that or any other supposed verbal equivalent for the words of the Commonwealth Constitution itself. What appears to me a decisive consideration for not adhering to the suggested paraphrase is that, with the deepest respect to the two learned Judges whose approval it bears, it is fundamentally fallacious. I shall quote it:—"Sec. 92 may, therefore, so far as it relates to

(1) (1915) 20 C.L.R., at p. 111.
(2) (1915) 20 C.L.R., at p. 68.
(3) (1890) L.R. 17 Ind. App. 122, at p. 127.
(4) (1902) A.C. 287, at p. 291.

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commerce, be paraphrased thus: Every owner of goods shall be at liberty to make such contracts for the transportation of goods from one State to another as he thinks fit without interference by law" (1). Then is added: "It follows that as soon as he ceases to be the owner of the goods the section ceases to have any operation so far as those goods are concerned."

Sec. 92 cannot be limited, in its relation to commerce, to contracts for transportation. That is comprehensively dealt with in *McArthur's Case* (2), and I now add a reference to *Dahnke-Walker Co.* v. *Bondurant* (3). That limitation seems, however, to have governed the conception by which the paraphrase is moulded. When once it is fully apprehended that commerce includes "intercourse for the purposes of trade in any and all its forms, including the transportation, purchase, sale and exchange of commodities," the true concept emerges. As already formulated, it consists of *acts*. But acts are attributes not of property but of persons. The right of inter-State trade and commerce protected by sec. 92 from State interference and regulation is *a personal right attaching to the individual and not attaching to the goods*. To think that there can be no infringement of sec. 92 when and in whatever circumstances a State expropriates property, is entirely to misconceive the nature of the situation. To say that on expropriation the new owner, the Government, is free to dispose of the property, and so the power of disposition of the property is not interfered with, is nothing to the point. The question is, how has the personal right of trading inter-State by the former owner been interfered with? That is a personal right, not a property right, and it is a right which no single State can give. The right of passing from one State to another, of transporting goods from one State to another and dealing with them in the second State cannot be conferred by either State solely. And so sec. 92 must be understood. The right is not an adjunct of the goods: it is the possession of the individual Australian, protected from State interference by sec. 92, and it is not a sufficient answer to him, when deprived of his goods in order to prevent him from exercising that right, that the new owner, the depriving State, can

(1) (1915) 20 C.L.R., at p. 68.
(2) (1920) 28 C.L.R., at pp. 548, 550.
(3) (1921) 257 U.S. 282, at pp. 290-291.

trade as it pleases with the goods. As well it might be said that to take a loaf of bread from A and give it to B does not affect A's personal right to eat, because B has the right, if he pleases, to eat the bread. The fallacy will become very evident if we imagine a State law, in order to reduce competition in government contracts, permitting a Minister to expropriate all plant and other property of contractors used or intended to be used for the service of the Federal Government. Or, if a State law as an avowed means of restricting Federal activities empowered a Minister to expropriate all vehicles and other property used for the purpose of conveying Federal Judges to Court or Federal Members of Parliament to Canberra. In each case it could with equal force be said that a mere change of ownership had taken place, and the new owner was free to use his property for the purposes needed, either inter-State trade or Federal service. There is no " magic " as Mr. *Cleland* said, about expropriation. That is to say, expropriation is not a separate subject of State power, it is simply part of the general mass of authority which is conferred in broad terms by the State Constitution. It stands, except for any express restrictions in the Federal Constitution, as to any specific subject, exactly in the same position as, for instance, taxation and crime. If the State can expropriate by way of compulsion to take a certain course, or as a penalty for avoiding it, the State can adopt any other form of penalty not expressly forbidden by the Constitution.

Some confusion is engendered by the argument that expropriation, whether general or on the basis of property, or as a means of enforcing a certain course of action, has the same " effect " if the property taken is in fact employed in inter-State trade. The fault lies in the use of the word " effect." If it be used in the same sense of business or economic effect, it is true ; but if it be used in the sense of legal effect of the statute permitting the acquisition, it is not true. I have quoted my own words from the *Wheat Case* (1) where it dealt with that aspect. But I may add what seems to me an apt illustration in the case of *Colonial Sugar Refining Co.* v. *Irving* (2), where the words of Lord *Davey* have considerable relevance. An Excise Act of the Commonwealth was said to be discriminating because the

(1) (1915) 20 C.L.R. 54.

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

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duties operated unequally in different States. The Privy Council, by Lord *Davey*, said: "The rule laid down by the Act is a general one, applicable to all the States alike, and the fact that it operates unequally in the several States arises *not from anything done by the Parliament*, but from the inequality of the duties imposed by the States themselves." The subject receives considerable illumination from the recent case of *Attorney-General for Manitoba* v. *Attorney-General for Canada* (1). The province of Manitoba passed legislation, and ultimately in a very general form, for the admitted purpose of protecting its residents from the danger of loss arising from investing their savings in enterprises ill-designed, ill-equipped and ill-conducted. The subject was not denied by the Privy Council to be "peculiarly within the domain of Provincial regulation" (2), that is, as we should say, within the ambit of State legislative power so far as its own Constitution is concerned. But the legislation insisted on every "person, firm or corporation," before selling shares there, getting the approval of a Provincial Board. This was, as construed, in derogation of the powers conferred by Dominion legislation on corporations formed under that legislation. There was no doubt about what was called the "objects" and the "purposes" of the Act being the protection of the trustful and tempted residents of Manitoba, in itself a purely Provincial object and purpose. But the Privy Council said that the "effect," that is, the legal effect, of the Act was to run counter to the Dominion Act. I need scarcely observe that an Act of Parliament cannot stand higher than a constitutional prohibition. And Viscount *Sumner* said (3): "This is not a *mere* case of fixing the conditions of local trade or of regulating the form or the formalities of the contracts, under which business is to be carried on within the Province, or of prescribing the restrictions under which property within the Province can be acquired, nor is it a *mere* matter of local police regulations, or local administration, or raising of local revenue, or a *mere* means of attaining some purely Provincial object." (I have italicized the word "mere.") ". . . Neither is the legislation . . . saved by the fact, that all kinds of companies are aimed at and that there is no special

(1) (1929) A.C. 260.

(2) (1929) A.C., at p. 265.

(3) (1929) A.C., at p. 268.

discrimination against Dominion companies." Then says Lord *Sumner* (1), in a sentence which is invaluable, not because the principle is new, but because it is there invested with the highest authority: "*The matter depends upon the effect of the legislation not upon the purpose.*" Speaking of the later legislation, Lord *Sumner* says it was doubtless passed in view of a case of *Lukey* v. *Ruthenian Farmers' Elevator Co.* (2), but it is open to the same objections, "for the object and effect are the same, and *it is not permissible to do indirectly what cannot be done directly.*" Those observations I regard as a confirmation of my quoted words in the *Wheat Case* (3), and as applying appropriately the rule laid down by Lord *Watson* that has been referred to. In *Lukey's Case* (4) *Duff* J. says: "Provinces exercising such authority" (that is, for the suppression and prevention of local evils) "must in doing so observe the constitutional limitations to which they are subject and not effect their objects by means of enactments which both in necessary result and in purpose constitute regulation of Dominion companies in the exercise of powers which belong to them as essential and characteristic." Now, if we substitute "inter-State trade" for "Dominion companies," the words quoted are most apposite. There is no doubt left in my mind that the State Parliament, on the assumption made, was at least indirectly doing what it is not empowered to do directly, and, indeed, by the very wording of the finding of my brother *Starke* and the authority claimed by the respondents, this is hardly controvertible.

This Court has held that sec. 20 of the *Dried Fruits Act* is invalid, and that the smallest fine for breach of a determination made under that section would be unlawful. Why, for precisely the same essential conduct on the part of the citizen, the failure to comply with the standard of trade arbitrarily fixed by the Minister, instead of that prescribed by the Board, a penalty of £12,500 can be lawfully inflicted, I am utterly at a loss to understand. If restraint is to be placed on inter-State trading, the Commonwealth Parliament can impose it, and then there would be some uniformity both of law and of administration. In my opinion the State cannot do this, and

(1) (1929) A.C., at p. 268.
(2) (1924) S.C.R. (Can.) 56.
(3) (1915) 20 C.L.R. 54.
(4) (1924) S.C.R. (Can.), at pp. 73, 74.

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the statutory authority, which for this purpose I assume, is invalid. The *Wheat Case* (1) is no authority to the contrary.

The appeal should be allowed and judgment entered for the appellant for the damages found and costs.

RICH J. In this case the inferences drawn by the learned primary Judge as to the purpose, intention or motive of the Minister were attacked, but I see no reason to disagree with them. But in substance I think they do attribute to the Minister an intention or desire to prevent the appellant's fruit being sold by him for consumption in Australia, and it may be conceded that this necessarily involves the purpose or desire that the fruit should not be sold in any of the five States which with South Australia make up the Commonwealth. This fact gives the appellant a basis for an argument which, apart from authority, would appear formidable—that the freedom of trade, commerce and intercourse between the States, which sec. 92 of the Constitution guarantees, had been impinged upon by the Minister's orders of compulsory acquisition.

The rhetorical affirmation of sec. 92 that trade, commerce and intercourse between the States shall be absolutely free has a terseness and elevation of style which doubtless befits the expression of a sentiment so inspiring. But inspiring sentiments are often vague and grandiloquence is sometimes obscure. If this declaration of liberty had not stopped short at the high-sounding words "absolutely free," the pith and force of its diction might have been sadly diminished. But even if it was impossible to define precisely what it was from which inter-State trade was to be free, either because a commonplace definition forms such a pedestrian conclusion or because it needs an exactness of conception seldom achieved where constitutions are projected, yet obmutescence was both unnecessary and unsafe. Some hint at least might have been dropped, some distant allusion made, from which the nature of the immunity intended could afterwards have been deduced by those whose lot it is to explain the elliptical and expound the unexpressed. As soon as the section was brought down from the lofty clouds whence constitutional precepts are fulminated and came to be applied to

(1) (1915) 20 C.L.R. 54.

the everyday practice of trade and commerce and the sordid intercourse of human affairs, the necessity of knowing and so determining precisely what impediments and hindrances were no longer to obstruct inter-State trade obliged this Court to attempt the impossible task of supplying an exclusive and inclusive definition of a conception to be discovered only in the silences of the Constitution. The evils from which sec. 92 meant to free inter-State trade were evidently particular. Universal freedom from all laws both natural and human was not in contemplation. It was plain that the Constitution was not dealing with the physical restraints which nature still inflicts on travellers who journey across this Continent. It was almost as clear that the Constitution was not conferring upon those engaged in inter-State commerce and intercourse a private right to immunity from hindrance at the hands of their fellow-citizens. No one could suppose that the consignee of goods shipped from another State could claim a constitutional right to damages from a shipowner who failed to deliver them or that a larcenous inter-State carrier committed not only a felony but an outrage upon the Constitution. Still less possible was it to believe that sec. 92 meant to free inter-State trade of all legal regulation whatever. The operation of the criminal law which is supposed to preserve property could scarcely have been excluded from inter-State trade. However much reliance in and before 1900 may have been placed upon the eighth commandment, sec. 92 can scarcely have been framed to put an absconding thief at his legal ease so long as his destination was over the boundary. Indeed, in *R.* v. *Smithers*; *Ex parte Benson* (1), this Court was so appalled by the contention that sec. 92 guaranteed freedom of inter-State movement to the criminal classes that it refused to hold that sec. 92 forbade one State in any circumstances to refuse admittance to another's convicted citizens. But, if inter-State trade is not to be free of all legal regulation, what kind of regulation is forbidden? At an early stage of the long controversy as to the true meaning of what sec. 92 omits to say, I joined with my brother *Gavan Duffy* in thinking that the immunity was confined to legal restrictions imposed upon trade and commerce in virtue of its inter-State character. The justification for this view, if any there be, is set out

(1) (1912) 16 C.L.R. 99.

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at length in *Duncan* v. *State of Queensland* (1). One demerit was found in this view which was sufficient to make it untenable, namely, a majority of the Court steadfastly refused to adhere to it. It must be confessed that it supplied a criterion which was difficult of application, but it may also be claimed that no criterion which is easier of application has hitherto been revealed. But with the progress of time and in spite of the fluctuations of mind and matter the Court has arrived at definite decisions which declare that some things are and some things are not impairments of the freedom guaranteed by sec. 92. It has been decided in *James* v. *South Australia* (2) that legislative restriction only is forbidden. In *W. & A. McArthur Ltd.* v. *Queensland* (3) a majority of the Judges said (whether *obiter* or as an essential part of their decision it is needless to discuss) that the State only was forbidden to interfere. Thus sec. 92 will do no more than nullify statutes of a State legislature which otherwise would operate to detract from such freedom. But not every statute comes within the category which operates to produce some effect upon inter-State trade. Commerce and intercourse consist of dealings and conduct. In *McArthur's Case* the Court decided that a State Act of Parliament which purported to restrain commercial dealings of a class extensive enough to include inter-State contracts was *pro tanto* void. It will be observed that the scope and operation of the statute itself displayed a purpose of placing a fetter upon commerce although it was inter-State. But in the last pronouncements of the Court (*Roughley* v. *State of New South Wales*; *Ex parte Beavis* (4); *Ex parte Nelson* [*No.* 1] (5)) the Court, as I understand the decisions, considered that a statute which was not directed at commerce as such was not nullified by sec. 92. After many years of exploration into the dark recesses of this subject I am content to take the decided cases as sailing directions upon which I may set some course, however unexpected may be the destination to which it brings me, and await with a patience not entirely hopeless the powerful beacon light of complete authoritative exposition from those who can speak with finality. In the meantime

(1) (1916) 22 C.L.R. 556, at pp. 640, 641.
(2) (1927) 40 C.L.R. 1.
(3) (1920) 28 C.L.R. 530.
(4) (1928) 42 C.L.R. 162.
(5) (1928) 42 C.L.R. 209.

I can only express my opinion that these decisions do suggest a working principle, and a principle which is all the more satisfactory because it accommodates itself to the decision of this Court in the *Wheat Case* (1), the application of which was so much canvassed in this case. The decisions I have cited appeared to show that what is forbidden by sec. 92 is State legislation in respect of trade and commerce when it operates to restrict, regulate, fetter or control it, and to do this immediately or directly as distinct from giving rise to some consequential impediment. The *Wheat Case* decided that a general law expropriating wheat in New South Wales effectually operated to transfer the property in wheat which was in course of inter-State transportation and wheat which was devoted to inter-State transactions. The reasoning of *Griffith* C.J., *Barton* J. and *Powers* J. was that a transfer, compulsory or otherwise, of the ownership in a chattel was not an impairment of the liberty to transact business inter-State. In substance *Isaacs* J. concurred with this view, as I read his judgment, although he qualified its statement by the condition that the State should deal with the property on the basis of property and regulate its ownership irrespective of any element of inter-State trade. I cannot think, however, that this qualification related to the purpose or motive of the Legislature. Apart from the nature of the inquiry which would be involved, it could scarcely be in doubt in the *Wheat Case* that the New South Wales Legislature was impelled to resort to compulsory acquisition as a means of controlling the wheat market because of the difficulty of applying other methods in view of sec. 92. It appears to me at bottom that the decision of the Court rested on the principle that legislation authorizing compulsory acquisition did not immediately or directly affect inter-State trade but did so only consequentially. If this view is right it goes a long distance to decide the present case. The State of South Australia undertook the control of the marketing of dried fruit and authorized the compulsory acquisition of parcels of such fruit in order that the entire crop should be disposed of according to its scheme. The exercise of the power by the acquisition of a particular parcel of fruit may operate consequentially to disable the owner from

(1) (1915) 20 C.L.R. 54.

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embarking upon or carrying out some contemplated or actual inter-State transaction, but it is not a law which operates directly upon inter-State commerce. The fact that the Minister by the exercise of the power prevents the sale of the fruit inter-State is therefore unimportant. The investigation into his motive or design is immaterial. It would, indeed, be strange if a power reposed in a person who forms part of the Executive were allowed or disallowed by the Federal Constitution according to the motive which actuated its exercise. If the view I take of the position of the relation which the *Wheat Case* (1) bears to *Roughley's Case* (2) and *Nelson's Case* [*No.* 1] (3) is correct, it is evident that the competence or incompetence of the Minister's order depends wholly upon the provision of the State legislation which gives him power, namely, sec. 28 of the *Dried Fruits Act* 1924 (S.A.). This provision is made subject to sec. 92 of the Constitution, but there is nothing in the nature of the power which the body of the section purports to confer which transcends sec. 92. A further condition of sec. 28 is expressed by the words " for the purposes of this Act or of any contract made by the Board." It is not easy to say precisely what is covered by these words, but, however narrow a view may be taken, I cannot think that the Minister went outside the scope of the section.

The appeal should be dismissed with costs.

Appeal dismissed.

Solicitors for the appellant, *Edmunds, Jessop & Ward.*

Solicitor for the respondents, *A. J. Hannan*, Crown Solicitor for South Australia.

H. D. W.

(1) (1915) 20 C.L.R. 54. (2) (1928) 42 C.L.R. 162.

(3) (1928) 42 C.L.R. 209.