[HIGH COURT OF AUSTRALIA.]

THE PEANUT BOARD . . . . . APPELLANT;
PLAINTIFF,

AND

THE ROCKHAMPTON HARBOUR BOARD . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

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SYDNEY, *Nov.* 23-25, 1932; *April* 20, 1933.

Gavan Duffy C.J., Rich, Starke, Dixon, Evatt and McTiernan JJ.

Constitutional Law—Freedom of inter-State trade and commerce—Marketing board—Compulsory acquisition of produce—Producers prevented from engaging in inter-State trade—The Constitution (63 & 64 *Vict. c.* 12), *sec.* 92—*Primary Producers' Organization and Marketing Act* 1926-1930 (*Q.*) (17 *Geo. V. No.* 20—21 *Geo. V. No.* 22), *sec.* 9.

Sec. 9 of the *Primary Producers' Organization and Marketing Act* 1926-1930 (Q.) enacts that, upon petition of fifty growers, the Governor in Council may, by Order in Council, declare that any product of the soil of Queensland is a commodity under and for the purposes of the Act, constitute a board in relation to the commodity so declared, extend the provisions of the Act with or without modification to the commodity, the board and all persons, things and matters concerned, and declare that the commodity shall, forthwith or on a date to be fixed by the Order, be divested from the growers thereof and shall be vested in and become the property of the board as owner.

An Order in Council applying the Act with some modifications ordered and declared that all peanuts the produce of the soil of Queensland produced or to be produced for sale for a period of ten years as from the date of the Order were a commodity within the meaning of the Act and that the whole of the commodity at the time of the making of the Order and all of the commodity that should be produced during the subsistence of the Order should forthwith be divested from the growers and become vested in and be the property of the Peanut Board. The Act and the Order in Council provided for the sale of the

peanuts by the board, empowered the board to conduct the marketing of the peanuts in Queensland and abroad, and required the board to account to the growers for the proceeds.

Held, by *Gavan Duffy* C.J., *Rich*, *Starke*, *Dixon* and *McTiernan* JJ. (*Evatt* J. dissenting), that the provisions of the Act as applied by the Order in Council contravened sec. 92 of the Constitution, and the Act and the Order in Council were therefore ineffectual to prevent growers of peanuts from disposing of them in inter-State trade.

James v. *Cowan*, (1932) A.C. 542; 47 C.L.R. 386, applied.

Per Evatt J.:—Sec. 92 was not contravened, because there was no evidence, upon the face of the Act or Order in Council, or otherwise, (1) that the scheme of expropriation was devised for the purpose of restricting inter-State sales of Queensland-grown peanuts, or (2) that it had any such effect. The one purpose of the scheme was to secure efficient and advantageous marketing, irrespective of the geographical situation of the market.

Held, also, by the whole Court, that sec. 9 extended to commodities produced subsequently to the making of the Order in Council, and, therefore, the Order was not open to objection on the ground that it purported to affect peanuts not in existence, and persons not yet growers at the date of the making of the Order.

Decision of the Supreme Court of Queensland (*Webb* J.): *Peanut Board* v. *Rockhampton Harbour Board*, (1932) S.R. (Q.) 252, affirmed.

APPEAL from the Supreme Court of Queensland.

In May 1932 the appellant, the Peanut Board, constituted by an Order in Council under the *Primary Producers' Organization and Marketing Act* 1926 (Q.), commenced an action in the Supreme Court of Queensland against the respondent, the Rockhampton Harbour Board, constituted under the *Harbour Boards Act* 1892-1928 (Q.) and the *Rockhampton Harbour Board Act* 1895-1917 (Q.), alleging that about April and May 1932 certain persons without the authority of the plaintiff, and without any lawful authority, conveyed to and deposited upon Deepwater Wharf, owned and controlled by the defendant, about 3,000 bags of peanuts, vested in the plaintiff by virtue of the provisions of the *Primary Producers' Organization and Marketing Act* 1926-1930 (Q.), and an Order in Council made thereunder,which the defendant refused to deliver up to the plaintiff or allow to be removed from such wharf. The plaintiff claimed a declaration that the peanuts in question were the property of the plaintiff and an order for delivery up of the same by the defendant

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to the plaintiff, and ancillary relief. By its defence the defendant alleged that the peanuts in question had been received by it in the ordinary course of business. It admitted that they were still in its possession and that it had refused to deliver them up to the plaintiff, but justified such refusal on the ground of unpaid harbour dues. The defendant also alleged that all the peanuts in question were conveyed to and delivered at the wharf by the growers and owners thereof for exportation and carriage to Sydney, New South Wales; and it claimed that, in so far as the provisions of the *Primary Producers' Organization and Marketing Act* 1926-1930 purported to authorize the plaintiff to prevent the exportation and carriage of the said peanuts from the State of Queensland into the State of New South Wales or any other State of the Commonwealth, they constituted an interference with inter-State trade and commerce and were invalid as being an infringement of sec. 92 of the Constitution.

The Order in Council referred to above was made on 28th August 1930 in exercise of a power purported to have been conferred by sec. 9 of the *Primary Producers' Organization and Marketing Act* 1926 (Q.). By the Order in Council the Governor in Council ordered and declared that all peanuts the produce of the soil within any part of the State of Queensland, and produced or to be produced for sale for a period of ten years as from the date of the Order in Council, were a commodity within the meaning of the Act, and that the whole of the said commodity at the time of the making of the Order in Council and all of the commodity that should be produced during the subsistence of such Order should forthwith upon the making of the Order be divested from the growers and become vested in and be the property of the Peanut Board.

At the hearing of the action before *Webb* J. evidence was tendered showing that the peanuts in question had been grown within the State of Queensland after the date of the Order in Council, and that they had been deposited on the wharf by or on behalf of the growers to be transported to other States in the Commonwealth for purposes of sale. It was shown also that prior to the date of the Order in Council peanuts had been exported from Rockhampton, and other parts of Queensland, to other parts of the Commonwealth, principally Sydney, and elsewhere. *Webb* J. nonsuited the plaintiff. His

Honor found as a fact that the peanuts were within the description of the commodity which the Order in Council purported to vest in the plaintiff, but he held (1) that sec. 9 (2) of the *Primary Producers' Organization and Marketing Act* did not, on its proper construction, authorize the Governor in Council to divest growers of a commodity and vest it in a board unless both the grower and the commodity were in existence; and (2) that having regard to their scope the *Primary Producers' Organization and Marketing Act* and the Order in Council thereunder of 28th August 1930 contravened the provisions of sec. 92 of the Constitution: *Peanut Board* v. *Rockhampton Harbour Board* (1).

From this decision the Peanut Board now appealed to the High Court.

The States of New South Wales, Victoria, Queensland and South Australia obtained leave to intervene.

E. M. Mitchell K.C. (with him *Macrossan*), for the appellant. The clause in the Order in Council which operates to divest from the growers and to vest in the board not only peanuts in existence at the date of such order but also peanuts still to come into existence, is authorized by the provisions of the *Primary Producers' Organization and Marketing Act* 1926-1930 (Q.). This is shown by the fact that "commodity" is defined by the Act as including dairy produce, such as butter and cheese, which comes into existence by continuous process. Such a power is necessary for the proper working of the provisions of the Act relating to acquisition. The Legislature intended that as a board could be appointed under the Act for a limited or unlimited period the power of acquisition should be coextensive with the term for which the particular board was appointed, whatever the length of such term might be. Sub-sec. 2 of sec. 9 of the Act refers to one point of time only, and not to the successive divesting of growers as they come into existence. On the same principle as a lien is given over future crops, so was a board, when constituted, meant to be the owner of the particular commodity both present and future. Neither the provisions of the *Primary Producers' Organization and Marketing Act*, nor those of the Order in

(1) (1932) S.R. (Q.) 252.

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Council made thereunder, infringe the provisions of sec. 92 of the Constitution. The test to be applied for the purpose is: What is the real object of the Act in question, that is to say, what does the Act accomplish or what is it intended to accomplish? (*New South Wales* v. *The Commonwealth* (*Wheat Case*) (1); *W. & A. McArthur Ltd.* v. *Queensland* (2).) The real and only object of the Act here in question is the better organization of the industry concerned by means which include co-operation of ownership and co-operation of marketing for the best interests and welfare of those engaged in such industry, and by such better organization to secure quicker and better financial returns to those associated therewith. The commodity can be the subject of inter-State trade just as much after as before the coming into operation of the Act, the only difference being that after the Act the inter-State trade is conducted by a person or body who may not be the person or body who otherwise would have conducted such trade. There is nothing in the Act to prevent the whole product from being disposed of on the Australian market if the board thinks fit. The objects of the Act are not to restrict but to facilitate inter-State trade. The fact that inter-State trade is incidentally affected does not render the provision invalid: its invalidity depends upon whether its operation upon inter-State trade was intended and direct (*James* v. *Cowan* (3); *Ex parte Nelson* [*No.* 1] (4)). Unless the legislation in question is directed against inter-State trade as such, it is not open to objection. The length of the period during which the industry is to be controlled is immaterial; indeed, the longer the period the less possibility is there of a conflict with the provisions of sec. 92 of the Constitution; as, for example, if an industry were nationalized, in which case trade other than by the State would be prohibited (*Kidd* v. *Pearson* (5)). The State has power to say who shall or who shall not conduct a business within the State. Although State legislation restricting inter-State trade is forbidden, a State may, by legislation, regulate such trade (*Foggitt, Jones & Co.* v. *New South Wales* (6); *Roughley* v. *New South Wales*; *Ex parte Beavis* (7)). If the legislation in question is not directed

(1) (1915) 20 C.L.R. 54.
(2) (1920) 28 C.L.R. 530, at pp. 569, 570.
(3) (1932) A.C. 542, at p. 558; 47 C.L.R. 386, at p. 396.
(4) (1928) 42 C.L.R. 209.
(5) (1888) 128 U.S. 1; 32 Law. Ed. 346.
(6) (1916) 21 C.L.R. 357.
(7) (1928) 42 C.L.R. 162.

to restrict inter-State trade as such but leaves such trade thoroughly open, there is no offence against sec. 92 (*Wheat Case* (1); *W. & A. McArthur Ltd.* v. *Queensland* (2); *James* v. *Cowan* (3)). *James* v. *Cowan* (4) was decided on the special facts found in that case, and is, therefore, not applicable. *McArthur's Case*, did not deal with organization. A general acquisition, being antecedent to inter-State trade, does not constitute an interference with such trade. If it is possible to construe the power of acquisition as being primarily directed to the upholding of the industry by way of convenience in finance antecedent to sale, sec. 92 of the Constitution is not infringed merely because incidental operations of trade and commerce may ultimately be affected.

[DIXON J. referred to *R.* v. *Smithers*; *Ex parte Benson* (5).]

A mere change of ownership is not an interference with inter-State trade.

[EVATT J. referred to the *Wheat Case* (6).]

The view expressed by *Starke* J. in *James* v. *Cowan* (7) that it was legitimate for a State to acquire the product of an industry so that the industry might be maintained and preserved was not qualified by the Privy Council on the appeal (*James* v. *Cowan* (4)). This case is governed by the *Wheat Case* (8), which is still in operation and remains unaffected by the decision of the Privy Council in *James* v. *Cowan*. State legislation enacted with the object of improving trade and commerce is not a restriction upon trade and commerce, and is a valid exercise of the legislative power of the State (*Roughley* v. *New South Wales* (9); *Ex parte Nelson* [*No.* 1] (10)).

Fullagar, for the interveners. The interveners adopt the argument addressed to the Court on behalf of the appellant. The *Wheat Case* (1) is not, nor was it intended to be, overruled by the decision of the Privy Council in *James* v. *Cowan* (4). The decision of the Privy Council in the latter case was influenced by facts which were peculiar to that case, and which, in the opinion of their Lordships, necessarily

(1) (1915) 20 C.L.R. 54.
(2) (1920) 28 C.L.R. 530.
(3) (1930) 43 C.L.R. 386, at pp. 391, 424.
(4) (1932) A.C. 542; 47 C.L.R. 386.
(5) (1912) 16 C.L.R. 99.
(6) (1915) 20 C.L.R., at pp. 66 *et seqq.*
(7) (1930) 43 C.L.R., at p. 393.
(8) (1915) 20 C.L.R., at pp. 66, 67.
(9) (1928) 42 C.L.R. 162.
(10) (1928) 42 C.L.R. 209.

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constituted an interference with inter-State trade. The view taken by the Privy Council in *James* v. *Cowan* (1) of sec. 28 of the *Dried Fruits Act* (S.A.) was conditioned on and bound up with the view their Lordships took of sec. 20 of that Act. Sec. 92 of the Constitution does not confer rights *in personam*: it is merely an inhibition addressed to the Parliaments of the States (*James* v. *South Australia* (2)). The section only deals with trade and commerce as such. The tests as to whether a State enactment infringes sec. 92 are: What is the real object of the legislation, or what is its pith and substance, or what is the real subject matter of the legislation; is the consequence direct, or indirect, or remote?

Macgregor, for the respondent. Even if on the facts the matter does not come within "trade and commerce," it does come within "intercourse," that is, as involving the right of the growers to send the goods across the water for trade in another State. The Order in Council, whereunder the peanuts in question were acquired, was *ultra vires* the Governor in Council. The whole of the *Primary Producers' Organization and Marketing Act* is limited by the definition of the word "commodity." Under the Act "commodity" includes any product of the soil of Queensland. "Product" means what has been produced—not what may be produced—from the soil. "Commodity" refers to goods actually in existence. The Act as framed does not authorize the acquisition in advance of the various commodities to be produced over a period of years as the Order in Council purports to do. In order to accomplish the object desired by the appellant an Order in Council should be made not less frequently than annually. The *Primary Producers' Organization and Marketing Act* 1926 was enacted for the purpose of overcoming the difficulties raised in *Committee of Direction of Fruit Marketing* v. *Collins* (3). The intention of the Legislature was directed beyond intra-State trade; on the Act itself the intention was to deal with inter-State trade. The Act was intended to be a "trade" Act, and, with the Order in Council, an Act relating to trade in peanuts. The language, and operation, of the Act, particularly secs. 14 and

(1) (1932) A.C. 542; 47 C.L.R. 386. (2) (1927) 40 C.L.R. 1, at p. 41.
(3) (1925) 36 C.L.R. 410.

15, bring the matter directly within the decision in *James* v. *Cowan* (1). By the operation of those sections the growers, and others interested in the industry, other than the appellant Board, are prevented from engaging in inter-State trade, which constitutes an interference with such trade within the meaning of sec. 92 of the Constitution. The judgment of the Privy Council in *James* v. *Cowan* (2) shows that the words "absolutely free" in sec. 92 should be given a wide meaning, and that subjects of inter-State trade and commerce should be free of the right of expropriation by a State.

Macrossan, in reply. The object of the Act was to organize the various industries and to improve the facilities for marketing the produce concerned. Sec. 20 of the Act expressly excludes any interference with inter-State trade. There is a distinction between the *Primary Producers' Organization and Marketing Act* and the Act under consideration in *James* v. *Cowan* (1). The Privy Council did not decide anything as to the validity of the powers of expropriation but only as to the exercise of the power. The expropriation of the peanuts by the board was a step necessary to enable the board to deal in the commodity in order to secure better organization and improved methods of financing the industry. Inter-State trade in peanuts is still being carried on, the only difference being that it is carried on by the board and not by the growers as formerly. The word "commodity" is used in a generic sense.

Cur. adv. vult.

The following written judgments were delivered :—

April 20, 1933.

RICH J. This appeal from a judgment of *Webb* J. granting a nonsuit in an action by the appellant against the respondent raises a question as to the construction of the *Primary Producers' Organization and Marketing Act* 1926-1930, and another question as to its constitutional efficacy to give title to the appellant in respect of the goods the subject of the action. The appellant claims under an Order in Council made under sec. 9 of the statutes declaring (clauses 1 and 3) all peanuts grown in Queensland "produced or to be

(1) (1932) A.C. 542 ; 47 C.L.R. 386.
(2) (1932) A.C., at pp. 558, 559 ; 47 C.L.R., at pp. 396, 397.

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produced for sale for a period of ten years " to be a " commodity," and divesting the whole of the commodity from the growers and vesting it in the appellant board. The peanuts the subject of the action were found in the possession of the respondent whilst in the course of inter-State transit. They were peanuts grown in Queensland for sale and produced after the commencement of the Order in Council. *Webb* J. held that the appellant board was not entitled to the property in the peanuts for two reasons, viz., (1) because the statutes properly construed did not empower the Governor in Council to divest, *de futuro*, non-existing peanuts and vest them without any new intervening act in the board, and (2) because upon the whole scope of the statutes and the Order in Council these instruments amounted to an attempt to deprive peanut growers of that absolute freedom to engage in inter-State commerce with their product which is guaranteed by sec. 92 of the Constitution.

I am not disposed to agree with the first ground given by the learned Judge. Although the language in which the enactment is framed may be somewhat clumsy, I think it intended to include future goods within the " commodity " both for the purposes of control and of acquisition, and enabled the Governor in Council to vest such future goods in the board prospectively as and when they should answer the description as existing things.

But, notwithstanding the notorious difficulties of sec. 92 of the Constitution, I have reached a clear conclusion that the second ground of the decision is right. In *James* v. *Cowan* (1) I said: " 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." A careful examination of the decision of the Privy Council in that case (*James* v. *Cowan* (2)) has left me with the impression that this general proposition, with the substitution of State action for legislation, is a correct statement of the effect of the decisions by which we remain bound in this Court. Before the decision of the Privy Council it was necessary, in applying this general proposition, to treat any process of compulsory acquisition

(1) (1930) 43 C.L.R., at p. 425. (2) (1932) A.C. 542; 47 C.L.R. 386.

as producing not a direct obstruction of inter-State commerce, not an immediate impairment of its freedom, but as operating upon it only indirectly and producing no more than a consequential impediment. That at least was, in my opinion, the logical result of the decision of this Court in the *Wheat Case* (1) as collected from the judgments of the majority of the Judges. It appeared 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" (*James* v. *Cowan* (2)). But now the reasons given in the Privy Council (3), in reversing our decision in that case, make it quite plain that compulsory acquisition may directly operate to interfere with the freedom of inter-State commerce. In *James* v. *Cowan* (4) I stated that the inferences drawn by the learned primary Judge as to the purpose, intention or motive of the Minister in substance attributed "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 binding force of the authority which, in my opinion, overcame the formidable character of this argument, has now been dissolved.

It therefore remains only to consider whether the operative instruments affecting to deal with peanuts do or do not interfere with the freedom of inter-State trade. This should be done weighing compulsory acquisition as a matter perhaps characterizing the enactments, but not of necessity determining their effect. The feature which at once challenges attention is that these instruments provide a means of marketing. They are concerned with establishing a compulsory pool through which growers producing peanuts for

(1) (1915) 20 C.L.R. 54.
(2) (1930) 43 C.L.R., at p. 425.
(3) (1932) A.C. 542; 47 C.L.R. 386.
(4) (1930) 43 C.L.R., at p. 422.

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sale must dispose of their product for distribution and receive their reward. The pith and substance of the enactments is the establishment of collective sale and distribution of the proceeds of the total crop and the concomitant abolition of the grower's freedom to dispose of his product voluntarily in the course of trade and commerce, whether foreign, inter-State or intra-State. Sec. 15 of the Act of 1926 provides that " all the commodity " shall be delivered by the growers to the marketing board, and that " all the commodity " so delivered shall be deemed to have been delivered to the board for sale by the board, " who shall account to the growers thereof for the proceeds thereof after making all lawful deductions therefrom for expenses and outgoings and deductions of all kinds in consequence of such delivery and sale or otherwise under these Acts " (sec. 15 (1), (2), as modified by the Order in Council). Sub-sec. 3 of sec. 15 penalizes the sale or delivery of any of the " commodity " to, or the purchase or the receipt of any of the " commodity " from, any person except the board. These provisions operate even although the Governor in Council does not resort to compulsory acquisition. It was said by Mr. *Mitchell* that the provisions authorizing the borrowing of money constituted the chief purpose of the compulsory acquisition. If this means that the control of the marketing of peanuts is a subordinate or consequential purpose of the instruments, I cannot agree. The ability to borrow upon the whole crop may afford an advantage, if not an incentive, in the concentration of the " commodity " in the hands of one marketing authority. But the weight attached to supposed advantages arising from the policy adopted in these enactments is not material. What is material is whether the scope and object of the enactments as gathered from their contents are to deal with trade and commerce including inter-State trade and commerce. In examining this question one cannot fail to observe that compulsory acquisition is resorted to as a measure towards ensuring that the whole crop grown in Queensland is available for collective marketing by the central authority. The case is not one in which a State seeks to acquire the total production of something it requires for itself and its citizens. It is interposing in the course of trade in the " commodity " an organization established for the purpose of carrying out one of the functions of trade.

In my opinion the enactment controls directly the commercial dealing in peanuts by the grower and aims at, and would, apart from sec. 92 accomplish, the complete destruction of his freedom of commercial disposition of his product. Part of this freedom is guaranteed by sec. 92. Accordingly the *Primary Producers' Organization and Marketing Act* 1926-1930 and the Order in Council thereunder are ineffectual to prevent the grower of peanuts from disposing of them in inter-State trade and commerce and the appellant Board had no title to the peanuts the subject matter of this action.

The appeal should be dismissed.

The Chief Justice wishes me to say that he agrees with me in thinking that the judgment of the Privy Council in *James* v. *Cowan* (1) governs this case, and that the appeal should be dismissed.

STARKE J. Under the *Primary Producers' Organization and Marketing Act* 1926-1930 of the State of Queensland, authority is given to the Governor in Council, upon petition of fifty growers, to declare that any grain, cereal, fruit, vegetable, or other product of the soil in Queensland, or arrowroot or any dairy produce (including butter and cheese) or eggs, or any article of commerce prepared other than by any process of manufacture from the produce of agricultural or other rural occupation in Queensland, is a commodity under and for the purposes of the Act (sec. 9 (1)). By the same Act, the Governor in Council was authorized, if so requested in the petition, to constitute a board in relation to the commodity so declared, and extend the provisions of the Act, either wholly or with all such modifications thereof or additions thereto as were deemed by him necessary to meet the particular circumstances, to such commodity, and the board so constituted and all persons, things and matters concerned. He was also authorized to provide and declare that the commodity should forthwith upon the making of the Order or on and from a date to be fixed by such Order or upon the fulfilment of such conditions as are therein mentioned be divested from the growers thereof and become vested in and be the property of the board

(1) (1932) A.C. 542; 47 C.L.R. 386

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as the owners thereof, and to make such further provision as would enable the board effectively to obtain possession of the commodity as such owners and to deal with the same as might be deemed necessary or expedient in order to give full effect to the objects and purposes for which the board was constituted (secs. 9 (2), 11).

The Governor in Council, by an Order in Council dated 28th August 1930, declared that all peanuts the produce of the soil within any part of the State of Queensland, and produced or to be produced for sale, for a period of ten years, as from the date of the Order, were and should be a commodity under and for the purposes of the Act. The same Order constituted the Peanut Board, and the provisions of the Act were extended to such commodity and the board so constituted and all persons, things and matters concerned, with certain modifications or additions. The whole of the commodity at the time of the making of the Order in Council and all and every part of such commodity produced during the subsistence of the Order in Council were upon the making of the Order in Council divested from the growers thereof and vested in and became the property of the board as the owner thereof.

The effect of the Act and the Order in Council was to confer upon the board various powers and authorities. It empowered it to sell or arrange for the sale of the commodity, and to do all matters and things necessary in that behalf, and particularly to arrange for financial accommodation, provide the commodity for consumption in Australia, and make arrangements with regard to sales of the commodity for export or for consignment to other countries or States (Act, sec. 14; Order in Council, clause 4). It might also make levies with the approval of the Minister administering the Act (sec. 29). Growers might be required to make returns showing the quantity of the commodity grown or held by them (sec. 25). The commodity, it was provided, should be delivered by the growers to the board and be deemed to have been delivered to the board for sale by the board on behalf of the growers thereof. And any person who sells or delivers any of the commodity to or buys or receives any of the commodity from any person other than the board is liable to a penalty (sec. 15). The board was required to make payments to each grower of the commodity delivered to the board

in respect of the commodity delivered by him on the basis of the net proceeds of sale of all the commodity of the same quality or standard delivered to and sold by the board. But the board's decision is made final as to the quality or standard of the commodity, the method of determining deductions, freight and other charges, and all expenditure incurred in and about the marketing of the commodity (sec. 18).

In May 1932 the Peanut Board commenced an action in the Supreme Court of Queensland against the Rockhampton Harbour Board, the harbour authority at Rockhampton, alleging that about April and May 1932 certain persons, without the authority of the Peanut Board and without any lawful authority, conveyed to and deposited upon the wharves or in the sheds of the harbour authority about 3,000 bags of peanuts, part of the commodity of peanuts vested in the board, which the harbour authority refused to deliver up to the board or allow to be removed from its wharves or sheds. The board claimed a declaration that the peanuts were the property of the board, and an order for delivery up of the same to the board, and ancillary relief. The action was tried before *Webb* J., who nonsuited the board. The learned Judge found as a fact that the peanuts claimed were within the description of the commodity (peanuts) which the Order in Council (clause 1) purported to vest in the board. But he held that sec. 9 (2) of the Act did not, on its proper construction, authorize the Governor in Council to divest growers of a commodity and vest it in the board unless both the grower and the commodity were in existence. "The Order in Council of 28th August, 1930, paragraph 3," said the learned Judge, "proceeds on the assumption that the divesting from the growers and the vesting in the plaintiff board of the ownership of the commodity for ten years—i.e., until the 28th August, 1940—could be made to take effect as from the date of the Order in Council—that is, 28th August, 1930, before the greater part of the commodity was in existence, and, indeed, in many cases before the growers were in existence as growers, or even, it may be in some cases, before they were born. I think, then, that the Order in Council has failed to specify a proper time for the divesting of that part of the commodity that was not in existence when it was made—it is common ground

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that the peanuts in question were not in existence at that date—and that until a proper time is provided by an amending Order in Council, which can be made under sub-sec. 8 of sec. 9, the growers of such part of the commodity are at liberty to dispose of it as their property" (1). But I am unable to accept this construction of the Act. The Act describes, in sec. 9 (1), the kind of product that may be declared a commodity, but it does not require the product to be existing or specific. It clearly extends to products that come into existence during the operation of the Order in Council. And it is a commodity so described that the Governor in Council is authorized to vest forthwith in the board. The Order, during its continuance, is always speaking, and operates to vest the commodity, in existence or when it comes into existence, in the board (cf. *Holroyd* v. *Marshall* (2)).

The learned Judge also held that, if his construction of the Act were erroneous, the Act contravened the provisions of sec. 92 of the Constitution and was therefore void.

The constitutional power of a State compulsorily to acquire, with or without compensation, all property within its territorial limits, is undoubted. The Commonwealth power is not so ample: it may acquire property on just terms from any State or person in respect of which the Parliament has power to make laws (Constitution, sec. 51, pl. xxxi.). The power of a State to acquire property as the public safety, necessity, convenience, or welfare demands is uncontrolled, subject to any overriding provision of the Constitution. It is this authority in the States that is at the root of the *Wheat Case* (3)—which, we are assured, is "transparently right" (*James* v. *Cowan* (4)). So it is not unimportant to understand the principle upon which that case rests.

Isaacs J., in *Duncan* v. *Queensland* (5), said:—"The point made was this: if ownership is transferred from one man to another, then it is only the new owner who can henceforth claim the rights of inter-State trade under sec. 92; the former owner, having no property whatever, has nothing on which sec. 92 can operate. In *Foggitt, Jones & Co.'s Case* (6), that well considered principle was

(1) (1932) S.R. (Q.), at pp. 268, 269.
(2) (1862) 10 H.L.C. 191; 11 E.R. 999.
(3) (1915) 20 C.L.R. 54.
(4) (1930) 43 C.L.R., at p. 415.
(5) (1916) 22 C.L.R. 556, at pp. 616, 617.
(6) (1916) 21 C.L.R. 357.

applied, and the man who was allowed to retain his general ownership was held to be protected in his right to sell inter-State what he had, free from State prohibition." In *James* v. *Cowan* (1) the same learned Judge said:—"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' . . . 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" (2). "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*. . . . 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 trade as it pleases with the goods" (3). These expositions of the *Wheat Case* (4) are not, I think, consistent with one another. And it is interesting, in view of these expositions, to recall the title of the *Wheat Acquisition Act* 1914 of New South Wales: "An Act to enable the Government to compulsorily acquire wheat in New South Wales; to provide for compensation for wheat so acquired, and for its sale and distribution; to provide for varying or cancelling certain contracts for the sale and delivery of wheat; and for purposes consequent thereon or incidental thereto." The Act was passed during the War, and, though it nowhere so declares, I suppose we may assume that it was passed as a War measure for the assistance of the Allies and the protection of the citizens of New South Wales. But in effect and operation, whatever its motive, the Act deprived the owners of

(1) (1930) 43 C.L.R. 386.
(2) (1930) 43 C.L.R., at p. 415.
(3) (1930) 43 C.L.R., at pp. 418, 419.
(4) (1915) 20 C.L.R. 54.

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their wheat and prevented them from engaging it in trade and commerce, whether domestic, inter-State or foreign.

A restriction or prevention of trade and commerce generally does not exclude the operation of sec. 92 (*W. & A. McArthur Ltd.* v. *Queensland* (1)). The Judicial Committee has now thrown light upon the matter in the reasons for the advice tendered by their Lordships in *James* v. *Cowan* (2). The validity of the acquisitions in that case, however, depended upon a legislative provision giving to a Minister power to acquire compulsorily on behalf of His Majesty certain commodities " subject to section 92 of the *Commonwealth of Australia Constitution Act* and for the purposes of this Act." This is made plain by their Lordships in the following passage (3):— " But, in the present case, the Courts are not faced with the problem of construing an Act of the Legislature which contains no reference to sec. 92. In this case the powers given to the Minister are expressly conditioned as subject to the section. Sec. 28 appears to mean that the Minister may acquire compulsorily so that he does not interfere with the absolute freedom of trade among the States and acquires for the purposes of the Act. Thus the only question in this case appears to be whether the Minister did exercise his powers so as to restrict the absolute freedom of inter-State trade. It may be conceded that, even with powers granted in this form, if the Minister exercised them for a primary object which was not directed to trade or commerce, but to such matters as defence against the enemy, prevention of famine, disease and the like, he would not be open to attack because incidentally inter-State trade was affected. But, in the present case, it appears to their Lordships . . . that the direct object of the exercise of the powers was to interfere with inter-State trade." Now in that case the consumption of dried fruits in Australia was not sufficient to absorb the output, and the object of the acquisition was to force the surplus fruit off the Australian market. The domestic trade and the inter-State trade were not decreased in volume ; indeed the whole policy of the Act was to increase that trade, if possible, and enable producers to share in it and avoid what were assumed to be, in the circumstances of

(1) (1920) 28 C.L.R., at p. 558.
(2) (1932) A.C. 542 ; 47 C.L.R. 386.
(3) (1932) A.C., at pp. 558, 559 ; 47 C.L.R., at pp. 396, 397.

the dried fruits industry, the evils of competitive trade. Their Lordships were aware of this aspect of the question, but nevertheless held that the compulsory acquisition by the Minister was a restriction upon the absolute freedom of trade among the States, and so beyond the authority conferred upon him by the section. In the present case, the authority of the Governor in Council is not expressly conditioned, in sec. 9 (2), as it was in *James* v. *Cowan* (1). But that makes no difference, for the power of acquisition conferred cannot violate the provision of sec. 92 of the Constitution. And their Lordships (2) made some observations upon the *Wheat Case* (3) and the provisions of sec. 92 itself :—" *Starke* J. appears to have decided this part of the case by reference to the decision of *Griffith* C.J. in . . . the *Wheat Case*. This is based on the view that sec. 92 does not affect powers of acquisition, which, it is said, merely change the ownership, and do not regulate the disposition of goods by the owner. In substance it means that the Crown becomes the owner, and the Crown can do what it pleases with its own, dispose of it inter-State or not as it chooses. . . . Their Lordships would not be prepared to assent to it stated in the simple form which commended itself to *Griffith* C.J. If the real object of arming the Minister with the power of acquisition is to enable him to place restrictions on inter-State commerce, as opposed to a real object of taking preventive measures against famine or disease and the like, the legislation is as invalid as if the Legislature itself had imposed the commercial restrictions."

The *Wheat Case* (3) may be " transparently right," but these observations make it clear, I think, that the various reasons assigned for the decision cannot be relied upon. The true principle, as I understand their Lordships, is that the legislation must be scrutinized in its entirety, and its real object, true character, and real effect—its pith and substance—in the particular instance under discussion, must be determined. But that object, &c., are of course gathered from the provisions of the legislation itself. Any merely incidental effect it may have over other matters does not alter the character of the legislation. This conclusion seems in line with principles

(1) (1932) A.C. 542 ; 47 C.L.R. 386.
(2) (1932) A.C., at p. 558 ; 47 C.L.R., at p. 396.
(3) (1915) 20 C.L.R. 54.

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established by their Lordships upon the construction of the *British North America Act*, the Canadian Constitution (*Russell* v. *The Queen* (1), distinguished in *Toronto Electric Commissioners* v. *Snider* (2); *Great West Saddlery Co.* v. *The King* (3); *Attorney-General for Ontario* v. *Reciprocal Insurers* (4); *Union Colliery Co. of British Columbia* v. *Bryden* (5); *Lefroy, Canada's Federal System*, cc. xx. and xxi.). I am aware that the Canadian cases were contests involving the distribution of powers between the Dominion and the Provinces, and that the object of the legislation was looked at to see whether the particular enactment fell under the Dominion or Provincial power, but the test of the object or character of legislation is one method of determining what in effect the legislation does enact. (See *Duncan's Case* (6).) Thus, if an Act authorizes expropriation by the State of property *simpliciter*, as in the *Wheat Case* (7), then its object, as gathered from its words (for there is no other context), is ascribed to an exercise of the power of acquisition for the public safety, necessity, convenience or welfare—e.g., defence against the enemy, prevention of famine, disease, and the like—and its incidental or indirect effect upon inter-State trade cannot affect its validity. But it may be found, if I understand their Lordships aright, that the Executive Government or its officers are misusing the power for the purpose of interfering with the freedom of inter-State trade; if so, their acts are then invalid, not because they are contravening the provisions of sec. 92, for that section, as this Court has said, is directed to legislative restrictions (*James* v. *South Australia* (8)), but because they are acting beyond the authority conferred upon them by the legislation in question. Again, if an Act authorizes expropriation by the State of property, and contains provisions placing restrictions, or enabling restrictions to be placed, upon trade and commerce generally, thereby including inter-State trade, or upon inter-State trade alone, then the object of the Act is upon the face of it in contravention of the provisions of sec. 92 as to inter-State trade, and is so far invalid. Any restriction placed by the Executive Government or its officers upon inter-State trade under such an Act must, if the Act be invalid, be likewise invalid.

(1) (1882) 7 App. Cas. 829, at p. 839.
(2) (1925) A.C. 396.
(3) (1921) 2 A.C. 91, at p. 117.
(4) (1924) A.C. 328, at p. 337.
(5) (1899) A.C. 580, at p. 587.
(6) (1916) 22 C.L.R., at pp. 623, 624.
(7) (1915) 20 C.L.R. 54.
(8) (1927) 40 C.L.R., at p. 41.

It remains to apply these principles to the Act now in question, the *Primary Producers' Organization and Marketing Act* 1926-1930 of the State of Queensland, and the Order in Council made thereunder.

The policy of the Act is doubtless to preserve and protect primary producers in Queensland, but the method adopted for achieving that policy, as gathered from the words of the Act itself, is the compulsory regulation and control of all trade, domestic, inter-State and foreign. The volume of trade is not restricted, but the producers are restricted, and are prevented from engaging in inter-State and other trade in peanuts. Their peanuts are compulsorily taken from them for that purpose, pooled, and the disposal thereof placed in the hands and under the control of the board. It is a compulsory marketing scheme, entirely restrictive of any freedom of action on the part of the producers. The Act confers the power of acquisition with the object of placing restrictions on all trade, domestic, inter-State and foreign, and, following the decision of His Majesty in Council in *James* v. *Cowan* (1), I think the Act operates in contravention of sec. 92 of the Constitution, and so far as it does so is necessarily void.

The result is, in my opinion, that the decision of *Webb* J. was right and should be affirmed.

DIXON J. The Order in Council constituting the Peanut Board and the statutory provisions which apply as a result of its adoption purport to establish for a period of ten years a complete control of the disposal of peanuts grown in Queensland. The board is erected and it is armed with all necessary powers to conduct the marketing of peanuts grown for sale. It consists of an official and four elective members chosen biennially by persons who, during the previous twelve months, have been engaged in producing peanuts. All peanuts produced for sale are to become the property of the board as and when they come into existence. The grower must deliver his peanuts, unshelled, to the board or to its authorized agents when, where, and in the manner directed. To sell or deliver to any other person peanuts produced for sale is to commit an offence. It is an offence to buy or receive such peanuts from anybody other

(1) (1932) A.C. 542; 47 C.L.R. 386.

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than the board. But the board may except from these prohibitions sales by small growers or sales direct to local consumers or to retail vendors and other sales, purchases or receipts sanctioned by regulation or approved by the Minister of the Crown administering the enactments. The grower may not, without the board's consent, remove from his premises peanuts grown for sale except for delivery to the board or its agents. When peanuts are delivered to the board it must be done in the name of the grower, who is to receive a certificate in respect of his peanuts. The board may make an advance to him on account of his deliveries and, for that and other purposes, the Board is given extensive powers of borrowing money upon the security of the commodity. Peanuts delivered to the board are to be deemed to have been delivered to the board for sale by the board, which is to account to the growers for the proceeds after making all lawful deductions for expenses incurred. Out of the proceeds of peanuts disposed of by the board each grower of peanuts delivered to it is to receive payments on the basis of the net proceeds of sale of all the commodity of the same standard and quality delivered to the board during some prescribed period and of the proportion so delivered by that grower during the period.

The importation of peanuts into Australia has, since 1921, been subject to a customs duty. A market in the southern States would naturally be sought for peanuts grown in the warmer climate of central and northern Queensland, and it appears that in 1930 and in 1931 considerable quantities of peanuts, presumably under the board's authority, were shipped from Rockhampton to Sydney, Melbourne, Adelaide and Fremantle as well as to Brisbane.

In the existing state of authority this compulsory system of collective marketing should, in my opinion, be held inconsistent with sec. 92 of the Commonwealth Constitution. It has been decided that the Commonwealth is impliedly excluded from the operation of sec. 92 (*James* v. *The Commonwealth* (1)), and, therefore, no reason is supplied by secs. 51 (i), 98, 99, or 100 for supposing that the immunity given to inter-State commerce is confined to interferences of any particular description. Restraints and impediments are forbidden although they do not discriminate between inter-State and

(1) (1928) 41 C.L.R. 442.

intra-State commerce, but affect trade, commerce and intercourse uniformly. It is enough that a restriction is attempted upon trade generally; it need not be conditioned on the fact that such trade is carried on between States or deals with inter-State commerce as such. Where an attempted restraint upon trade touches inter-State trade it is ineffectual. (*W. & A. McArthur Ltd.* v. *Queensland* (1).) The words "absolutely free" admit of no qualification, but they are used with reference to governmental control and exclude all such control; trade, commerce and intercourse among the States are made up of acts, transactions and conduct which, considered as trade, commerce and intercourse, are free of all State governmental control whatever (cf. *McArthur's Case* (2)). Such a control may be attempted by means of the compulsory purchase or acquisition of commodities, and the doctrine is erroneous that because sec. 92 in protecting an owner's freedom to dispose of his goods by an inter-State transaction does not prevent the transfer of the property to a new owner with the same freedom of disposition, a deprivation of property in goods, which are or may become the subject of inter-State commerce, cannot conflict with that provision (*James* v. *Cowan* (3)). The protection conferred by sec. 92 is not a mere incident of property but is enjoyed by the individual, who may not be deprived of his goods in order to prevent his exercising his freedom of trade among the States (cf. *James* v. *Cowan* (4), per *Isaacs* J., whose judgment was described by the Privy Council as "convincing").

The subject with which the Queensland provisions governing the disposal of peanuts deal is, in my opinion, part of trade and commerce in that commodity. It relates to no question of war, famine, pestilence, or other emergency. The commodity is acquired by the State for the needs neither of the Government nor of its citizens. Although peanuts are taken without ostensible reference to inter-State trade, as distinguished from intra-State trade or from commerce generally, the State in acquiring them does not "deal with property on the basis of property" independently of trade and commerce (cf. *James* v. *Cowan* (5)). It takes them because it

(1) (1920) 28 C.L.R. 530.
(2) (1920) 28 C.L.R., at pp. 550, 551, 558.
(3) (1932) A.C. 542; 47 C.L.R. 386.
(4) (1930) 43 C.L.R., at pp. 418, 419.
(5) (1930) 43 C.L.R., at p. 416, *per Isaacs* J.

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intervenes between the producer and the consumer of peanuts in order to provide the producer with an exclusive means of marketing his produce. It assumes complete control of the disposal of the commodity by or on the part of the grower. It compels every grower to dispose of his peanuts to the statutory board in order that it may conduct the marketing of the commodity as a whole in the interests of the growers collectively, and it acquires the property in the peanuts as and when they come into existence in order to insure that the grower producing them for sale shall not exercise his former freedom of selling them by an ordinary transaction of commerce whether intra-State or inter-State. If directness of operation, purpose and subject matter be tests of infringement upon sec. 92, these requirements are fulfilled. The provisions operate directly upon the individual grower's liberty of disposing of the peanuts he produces for sale; the object, as disclosed by the statutory instruments themselves, is to substitute another mode of realization and to compel its adoption; the subject dealt with is commercial dealing in a commodity, and restraint is both aimed at and, apart from sec. 92, achieved.

Since *McArthur's Case* (1), if inter-State trade is affected, it is immaterial that the restraint is imposed upon commerce in general without discrimination and without particular reference to inter-State transactions.

I think that the Order in Council could not operate to deprive the grower of peanuts of his liberty to dispose of them in inter-State commerce, and, accordingly, that the board was not entitled to the peanuts claimed from the respondent.

I think the appeal should be dismissed.

EVATT J. This is an appeal from the judgment of Mr. Justice *Webb* of the Supreme Court of Queensland. The appellant is the Peanut Board constituted by an Order in Council dated August 28th, 1930, made in pursuance of the *Primary Producers' Organization and Marketing Act* of 1926 of the State of Queensland. The respondent is the Rockhampton Harbour Board, also incorporated under an Act of the Legislature of Queensland.

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

The appellant commenced the present action in the Supreme Court in order to have its ownership of certain peanuts declared, and ancillary relief granted. *Webb* J. decided in favour of the respondent and entered judgment of nonsuit in its favour upon two distinct grounds, namely, (1) that the Order in Council which purported to vest in the Peanut Board the ownership of the peanuts in question, is *ultra vires* the *Primary Producers' Organization and Marketing Act*, and (2) that even if the Order in Council is *intra vires* the State Act, both the Order and the Act itself are void, as being inconsistent with sec. 92 of the Commonwealth Constitution, which provides that trade, commerce and intercourse among the States of the Commonwealth shall be absolutely free. In reaching this second conclusion *Webb* J. relied, as did the respondent before us, almost entirely upon certain inferences drawn from the recent judgment of the Judicial Committee of the Privy Council in *James* v. *Cowan* (1).

The constitutional point is of great importance, and four of the States of the Commonwealth were granted leave to intervene in the appeal.

It is admitted by the respondent that it cannot support any of the defences originally relied upon before *Webb* J. except the two I have set out.

It is convenient therefore to turn at once to the main provisions of the Queensland *Primary Producers' Organization and Marketing Act*. This Act sets up a Council of Agriculture, the membership of which is recruited from amongst the members of the Commodity and Marketing Boards (sec. 4 (1)). Its functions, described in sec. 7, are to co-operate with the Agricultural Department of the Executive Government of Queensland, local producers' associations and other approved bodies and persons, in developing the rural industries and advising upon all matters pertaining to the furtherance of the interests of the primary producers. The council is empowered (sec. 8) to register local associations of primary producers, and the duties of such associations are to take the initiative in rural matters, and "to support and assist the council and boards in their efforts to promote the general prosperity of primary producers" (sec. 8 (5) (iv.)). By sec. 29, a board is empowered, subject to certain

(1) (1932) A.C. 542; 47 C.L.R. 386.

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conditions, to make a levy in respect of the commodity for which the board is constituted; the levy is for the purpose of meeting administrative expenses of the board, and the growers of the particular commodity may be assisted by the board's insuring against pests, fire, hail or flood.

By sec. 9 (1) the Governor in Council is empowered, if requested to do so by a petition signed by fifty growers, to declare by Order in Council that any product of the soil in Queensland shall be a commodity for the purposes of the Act; and, by the same sub-section, the Governor in Council is empowered (1) to constitute a board in relation to the commodity so declared and (2) to extend the provisions of the Act, modified as thought fit, to the particular commodity and all persons, things or matters concerned.

By sec. 9 (2) it is provided that the petition of the growers may request that the board shall acquire the commodity as the owners thereof; and that in such cases the Governor in Council may, by Order in Council, declare "that the commodity shall forthwith, upon the making of such Order or on and from a date to be fixed by such Order or upon the fulfilment of such conditions as are therein mentioned, be divested from the growers thereof and become vested in and be the property of the board as the owners thereof."

Notice of intention to make an Order in Council under sec. 9 (1) or sec. 9 (2) must be published at least thirty days before the making of the Order and fifty growers may demand a poll. No Order can be made if less than sixty per cent of the votes polled are in favour of the making of an Order, or, in most cases, if less than fifty per cent of the eligible persons have voted.

By sec. 11 (1) the Minister is directed, after the application of the Act to a commodity, to "appoint a board, of the prescribed number of elected representatives of the growers of the commodity," with the Director of Marketing as an additional member in cases where the board is the marketing board for the commodity.

By sec. 11 (2) the board "shall not be deemed to represent the Crown for any purposes whatsoever."

In the case of the Peanut Board, the Order in Council issued on August 28th, 1930. It was thereby declared:—

(1) That "all peanuts the produce of the soil within any part of the State of Queensland, and produced or to be produced

for sale for a period of ten years as from the date of this Order," should be a commodity under the Act. This part of the Order was clearly authorized by the first par. of sec. 9 (1), and it would also appear from sec. 9 (7) that the duration of an Order may, and indeed should, be part of it.

(2) That a board should be constituted, consisting of four elected representatives of the growers, and the Director of Marketing. This part of the Order was authorized by the fourth paragraph of sec. 9 (1).

(3) That " the whole of the said commodity at the time of the making of this Order in Council and all and every part of such commodity which shall be produced during the subsistence of this Order in Council shall forthwith upon the making of this Order in Council be divested from the growers thereof and become vested in and be the property of the board as the owners thereof."

Webb J. decided that the Order in Council was not authorized by sec. 9 (2) of the Act because it " failed to specify a proper time for the divesting of that part of the commodity that was not in existence when it was made—it is common ground that the peanuts in question were not in existence at that date—and that until a proper time is provided by an amending Order in Council, which can be made under sub-sec. 8 of sec. 9, the growers of such part of the commodity are at liberty to dispose of it as their property" (1).

It is clear enough (1) that the Statute does not require each individual specimen of the selected agricultural produce to be the subject matter of a separate Order in Council, for that would mean the promulgation of an Order in Council for every peanut grown; and (2) that sec. 9 (2) authorizes, and indeed looks to, an acquisition by a present Order in Council of a product, with the ownership passing from the grower at varying moments of time. And the difficulty raised consists solely of the failure of the Order in Council of 1930 to specify a time for " the divesting of that part of the commodity that was not in existence when it " (that is, the Order in Council) " was made."

(1) (1932) S.R. (Q.), at pp. 268, 269.

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It has already been pointed out that sec. 9 (2) provides that, by the Order in Council, the commodity may be divested from the growers not only "upon the making" of the Order in Council, or "on and from a date" fixed by the Order, but also "upon the fulfilment of such conditions as are therein mentioned."

Clause 1 of the Order in Council includes as part of the commodity under the Act "all peanuts . . . to be produced for sale for a period of ten years as from the date of this Order." As each peanut is produced for sale during the ten years period, it becomes a part of the commodity under the Act.

And I think it is quite reasonable to read the vesting portion (clause 3) of the Order in Council, as divesting future peanuts from their owners as and when they come into existence as products for sale during the period of ten years; in other words, the phrase in clause 3, "every part of such commodity which shall be produced during the subsistence of this Order in Council," itself states the condition which must be fulfilled, namely the fact of production for sale of each peanut. The fulfilment of the condition at once identifies part of the subject matter of acquisition, future peanuts, and fixes the time of divesting from the growers (and vesting in the board) so as to satisfy sec. 9 (2) of the Act.

If this view is accepted, it answers the difficulty of *Webb* J., and the further question discussed as to the supposed relation back of the board's title to the date of the Order in Council, does not call for discussion.

Upon the whole, therefore, I am satisfied that the Order in Council is not open to objection upon this first and somewhat narrow ground, and it becomes necessary to consider the second ground of the decision appealed from, that sec. 92 of the Commonwealth Constitution operates to prevent the Act and the Order in Council from divesting the peanuts from the growers and therefore the appellant board has no title whatever to the subject matter of the suit.

Assuming the validity of the Order in Council, we again turn to the terms of the Act to gather therefrom the functions committed to the appellant Board by the law of Queensland.

By sec. 14 it is empowered to "sell or arrange for the sale of the commodity and do all acts, matters, and things necessary or expedient

in that behalf." It may provide the commodity for consumption in Queensland, and may arrange for its consignment "to other countries or States."

By clause 4 of the Order in Council (introducing new sec. 14 into the scheme), the board is enabled to give security over all peanuts delivered to the board in respect of any advances made. This power is of importance. We have been informed by counsel that the board has frequently given security for advances made to it by banking institutions in order to cover payments made by it to the peanut growers.

By sec. 15 of the Act, as modified in relation to the appellant board by the Order in Council itself, the grower is bound to deliver the commodity to the board and upon the board devolves the duty of accounting to the growers for the proceeds of sale after making all lawful deductions therefrom. The board may not refuse acceptance of the commodity providing it conforms to the prescribed quality or standard (sec. 18 (1)), and upon the basis of such quality or standard the payments to the growers are determined (sec. 18 (2)). By sec. 19 (4) the board's advances to the individual growers are authorized.

The general nature of the scheme disclosed by the Act and Order in Council is to induce co-operation in an industry the maintenance of which is considered essential by the Queensland Parliament and Government. The initiative lies with the growers and compulsion is introduced only under conditions which ensure that the will of the majority shall be carried into effect. The entire product is pooled and then sold by an authority which is directly representative of the producers, but is assisted by a government expert. This system of pooling is well known in the States of Australia, and has been employed for many years. Without it, the individual grower may receive little reward for his labours, and may even be unable to continue producing at all. With it, however, the pooled product facilitates financing over a lengthy period, and the industry and those dependent upon it may be saved from disaster.

In the case of the Peanut Board there are three outstanding features of the scheme of control. One is the vesting of the commodity in the board as owner. As has been seen, this is not

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made an essential of every marketing board. The second feature is the period of control which in this special case extends over a period of ten years. This long period makes the scheme bear, very definitely, the aspect of a regulation of the industry itself, each person proposing to produce the commodity well knowing that his reward will be dependent upon an extended operation of the pooling system. The third feature is the complete absence from the scheme of any intention to discriminate against, or specially concern itself with, any inter-State trade in peanuts.

The question in this case is of far-reaching importance because various schemes of compulsory pooling of the products of an industry are, by now, thoroughly accepted throughout the Commonwealth. Of course if sec. 92 means that they can no longer be entered upon, so must it be. But I do not think it is the duty of this Court to regard them as an infringement of sec. 92, unless the infringement is clearly proved.

The broad question is whether the Parliaments of the States of the Commonwealth are by sec. 92 prevented from using compulsion in order to set up an efficient selling agency for the purpose of disposing of the pooled product of an industry.

It is unfortunate that the difficulty of the present case is greatly increased by reason of the conflicting nature of the decisions of this Court as to the meaning and application of sec. 92. No good purpose can be served by an elaborate discussion of all those cases, and I shall therefore confine my comment to those outstanding decisions of which the authority is not in question.

First of all, it is clear that there may be an infringement of sec. 92 by the legislative or executive authorities of a State, although its action takes the form of an attempt by State legislation to expropriate and seize goods. For this proposition authority is to be found in the recent decision of the Judicial Committee in *James* v. *Cowan* (1). Involved in it is the rejection of the unqualified proposition of *Griffith* C.J. in the *Wheat Case* (2) to the effect that because a law of a State " which deprives a man of the ownership of property does not interfere with his power of disposition while owner," a State law which merely transfers ownership of goods to the State itself can never constitute an infringement of sec. 92.

(1) (1932) A.C. 542 ; 47 C.L.R. 386. (2) (1915) 20 C.L.R., at p. 68.

Secondly, it is also decided that sec. 92 debars the legislative and executive authorities of a State from prohibiting traders from marketing within the Commonwealth of Australia more than a prescribed quantity of their goods. For such compulsion was attempted by the State of South Australia in sec. 20 of the *Dried Fruits Act* 1924 and the determinations purporting to be made thereunder; and this Court in *James* v. *South Australia* (1) and the Judicial Committee in *James* v. *Cowan* (2) regarded the attempt as an infringement of sec. 92.

The determinations challenged in those two cases sought to prevent both growers and traders from selling more than a prescribed quantity of fruit among the States other than South Australia. As Lord *Atkin* pointed out, "the prohibition of the sale of the surplus was against selling to any of the States" (3).

Thirdly, whilst State action which expressly relates to, and discriminates against, inter-State commerce is most readily detected as a breach of the constitutional guarantee of sec. 92, the absence of discrimination against inter-State commerce does not, by itself, protect the State's action from successful attack.

An illustration of the principle that the mere absence of discrimination against inter-State commerce does not save the legislation of a State from successful attack, is *James* v. *Cowan* (2) itself. There, a direct restriction was imposed indifferently upon both inter-State and intra-State trade. Before the JudicialCommittee, counsel for the State of South Australia contended that "the restriction imposed upon the powers of the State was . . . limited to interference with inter-State commerce 'as such.' Legislation which applied equally to commerce within the State, as well as to inter-State commerce, and was designed for the welfare of the State, was not affected by sec. 92" (4).

The Board decided that the South Australian determinations were "directed at inter-State commerce as such," and were therefore hit at by sec. 92.

But there is another principle which applies to sec. 92, and which, most certainly, was not rejected by the Privy Council in *James* v. *Cowan* (2). The absence of any discrimination by a State against

(1) (1927) 40 C.L.R. 1.
(2) (1932) A.C. 542; 47 C.L.R. 386.
(3) (1932) A.C., at p. 555; 47 C.L.R., at p. 394.
(4) (1932) A.C., at p. 555; 47 C.L.R., at p. 393.

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inter-State trade may prove to be an important factor in determining whether there has been any infringement of sec. 92. This principle is illustrated by the *Wheat Case* (1), where the State of New South Wales was held to have validly expropriated all the wheat within its borders, whether or not the wheat was the subject of a contract calling for its export to other States of the Commonwealth. The effect of this decision is thus referred to by *Isaacs* A.C.J. and *Powers* J. in *James* v. *South Australia* (2) :—

> "To prevent any possible misconception as to the relation of this case to the *Wheat Case* (1) :—In that 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. Otherwise the contrary would have been held. (And see *McArthur's Case* (3).) Here, as shown, the purpose for which the goods were seized was direct interference with inter-State trade, and inter-State contracts not only influenced the governmental action but formed its criterion."

In the *Wheat Case* (1) this Court held that the New South Wales *Wheat Acquisition Act* was valid although it necessarily affected inter-State commerce and there is nothing in Lord *Atkin's* judgment in *James* v. *Cowan* (4) which suggests that the decision (to which *Isaacs* J. was a party) was erroneous. There was no evidence upon the face of the New South Wales Act that the object of the acquisition was to place restrictions upon inter-State trade in wheat. There was evidence *aliunde*, and its general nature was clearly set forth in the judgment of the Inter-State Commissioners, that such an object was present to the Legislature and the Government of New South Wales. But there was no finding to that effect in this Court.

It would seem clear that, before making a finding that a State Act offends against sec. 92, the true nature and character of the State laws or regulations must be ascertained. The Commonwealth Constitution does not debar the States from legislating upon the ground that, by the operation of their legislation, inter-State commerce or those engaged in it may, or even must, be affected in certain ways. This is illustrated by the decision in the Victorian motor-vehicle registration case (*Willard* v. *Rawson* (5)) which is being pronounced by the Court with the present decision.

(1) (1915) 20 C.L.R. 54.
(2) (1927) 40 C.L.R., at p. 34.
(3) (1920) 28 C.L.R., at p. 551.
(4) (1932) A.C. 542 ; 47 C.L.R. 386.
(5) *Post*, 316.

The absence from the State law of differentiation against inter-State trade may tend to indicate that the law, regarded as a whole, bears so little relation to inter-State trade that the prohibition of sec. 92 is not being disobeyed. It was not possible to reach such a conclusion in *McArthur's Case* (1) because there it was held that a contract which contained a stipulation that goods were to be despatched from vendors in New South Wales to purchasers in Queensland, was *itself an integral part of trade among those two States* because it caused the flow of such trade (2). Upon that hypothesis or finding, it was determined that the contract price could not be regulated by the State of Queensland without restricting the flow of inter-State trade.

But *McArthur's Case* (1) also illustrates the necessity for discovering a sufficiently close nexus between the impugned State law and the inter-State traffic, before the law should be declared void by reason of sec. 92. A course of business by which goods were habitually forwarded from New South Wales to Queensland to fulfil contracts with Queensland purchasers, was not considered to be so connected with inter-State trade as to debar the Legislature of the State of Queensland from fixing the selling price, because in such instances there was "a contract for goods which neither by the expressed terms of the contract nor by its implications are necessarily deliverable from any State but Queensland, and, therefore, is not shown to be an inter-State transaction" (3).

I am of opinion that, before State legislation ought to be declared invalid as offending against sec. 92 of the Constitution, it should be apparent from the terms of the Act, or possibly *aliunde*, that some definite restriction upon commerce among the States is being imposed by the State. I do not think that it is sufficient to say even that such commerce is necessarily *affected* by the legislation because that only means that the extent of such commerce may either be diminished or increased by the action of the State authorities. In any given case it should not be difficult to show that the necessary intendment and result of the State action is an actual interference, restriction or prohibition of inter-State traffic by

(1) (1920) 28 C.L.R. 530. (2) (1920) 28 C.L.R., at pp. 559, 560.
(3) (1920) 28 C.L.R., at p. 560.

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way of sale or exchange. In the *Wheat Case* (1) such an object and result might possibly have been shown, but this Court made no finding to that effect. In *McArthur's Case* (2), on the very face of the Act, there was fixation of the sale price, necessarily causing interference with what was deemed to be an actual part of inter-State commerce. In *James* v. *South Australia* (3), there was a command by the State to traders and growers which allowed them to trade but restricted their right to sell their goods inter-State. In *James* v. *Cowan* (4) an individual grower who disobeyed such command, was dispossessed of his goods in pursuance of the State's policy of enforcing the invalid command; and this dispossession was sought to be justified under a section of the State Act which expressly forbade the use of the section for the purpose of restricting inter-State trade.

It is often stated, somewhat rhetorically, that, for the purposes of sec. 92, State boundaries are to be deemed non-existent, the Commonwealth is to be deemed a unitary State, and all the legislative authority of the States themselves is deemed automatically to disappear. Such a statement challenges analysis. In my opinion it requires great qualification and revision. For it is the assumption, rather of the continued existence than of the non-existence of the geographical boundaries between the States of the Commonwealth, which lies embedded in the words and the scheme of sec. 92. Those boundaries measure and determine whether any given trade and commerce is in truth "among the States," so as to acquire the guarantee of absolute freedom. Sec. 92 looks always to the passage of persons and commodities from within the territory of one State into that of another. Every student of Australian history is aware that a most significant clue to the principle of sec. 92 is to be gathered from the resolve of the people of the pre-Federation colonies to suppress those evils, so conspicuous at the colonial boundaries, which were at once summed up and condemned in the picturesque phrase, "the barbarism of borderism."

I consider that the most valuable method of approach to the problems raised by sec. 92 is indicated in the judgment delivered

(1) (1915) 20 C.L.R. 54.
(2) (1920) 28 C.L.R. 530.
(3) (1927) 40 C.L.R. 1.
(4) (1930) 43 C.L.R. 386; (1932) A.C. 542; 47 C.L.R. 386.

in *Roughley* v. *New South Wales* (1) by the late Mr. Justice *Higgins*. He said :—

"All power to legislate as to inter-State commerce—that is, to legislate 'with respect to' inter-State commerce—on the subject of inter-State commerce—was taken away from the States by sec. 92. Apart from sec. 92, the power to legislate in restraint of inter-State commerce (subject to the provisions of sec. 109 as to inconsistency with Federal law) would have remained; for under our Constitution, the power conferred on our Federal Parliament is not exclusive. On this point I think that the view taken by the late Dr. *Kerr*, in his book *The Law of the Australian Constitution*, is right. Our Constitution expressly states what powers conferred on the Federal Parliament are exclusive, and we have no right to add to the list: *Expressio unius est exclusio alterius*. Sec. 52 makes the power of the Federal Parliament *exclusive* as to the seat of Government, as to Federal departments, and as to 'other matters *declared by this Constitution* to be within the exclusive power of the Parliament'; and sec. 90 makes the power to impose duties of customs *exclusive* (see sec. 111). In other words, although the concurrent power of the States to legislate as to inter-State commerce still remains, it cannot be exercised in such a way as to restrict, burden or hamper inter-State commerce" (2).

And His Honor further said (3) :—

"If this view of the position is correct, it simplifies enormously our problems; and it confirms the opinion that there is nothing in the Constitution to invalidate this Act so far as it compels any produce agent to submit his books, &c., for inspection. Such an action does not restrict, burden or hamper the entry of goods or persons from one State into another or trade or commerce among the States; and so long as it does not do so, the State legislation within sec. 107 is valid (subject always to sec. 109). As I have said, a mere incidental, indirect effect upon inter-State commerce is not enough to invalidate the Act: to invalidate the Act it must be shown that it is direct legislation against the passage from one State into another. By direct legislation I mean legislation 'with respect to' (sec. 51), on the subject of, inter-State commerce—it must be pointed directly at the act of entry, in course of commerce, into the second State."

In this case there has been a very close re-examination by counsel of the principle to be adopted in applying sec. 92 of the Constitution; and in my opinion, the observations by *Higgins* J. (4) are in the fullest accord with the decisions which are still authoritative, especially the decision in *James* v. *Cowan* (5); for it there appeared that the legislation of the State of South Australia was "pointed directly at the act of entry, in course of commerce, into the second State."

(1) (1928) 42 C.L.R. 162.
(2) (1928) 42 C.L.R., at p. 198.
(3) (1928) 42 C.L.R., at p. 199.
(4) (1928) 42 C.L.R., at pp. 198, 199.
(5) (1932) A.C. 542; 47 C.L.R. 386.

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The attack by the respondent upon the present Act of the Parliament of Queensland is (1) that the Act, and Order in Council made under it, purport to forbid the grower from selling any of his product although it is, *ex hypothesi*, grown by him for the purpose of sale, and (2) that the acquisition of ownership by the board is but a further incident in the restraint or prohibition imposed upon the grower. From these conclusions it is sought to be deduced that the action of the State of Queensland is directed towards regulating trade in peanuts and its subject matter is that of trade, rather than that of industry. It is said, and with force, that the Order in Council operates so as to command the peanut grower, in the name of the State, not to dispose of any of his peanuts by sale, either within or without Queensland, and that this is no different in principle from the invalid determinations of the State of South Australia condemned in the two *James' Cases* (1). Those determinations prevented the grower from selling more than his quota anywhere within Australia. The Act and the Order in Council in the present case prevent the grower from selling any of his product, within Australia or without it.

There is, however, a great difference between the facts of the present case, and those in the two *James' Cases*. Sec. 20 and the quota determinations made under it were the basic features of both of those decisions. So far as sec. 28 was concerned, it was held to be "plain that the direct object of the exercise of the powers was to interfere with inter-State trade" (2). Lord *Atkin* also said: "In the result, therefore, one returns to the precise situation created by sec. 20 with its determination of where and in what quantities the fruit is to be marketed."

The vital defect of the State Executive action both in making the determinations and in acquiring James' fruit, lay in its systematic carrying out of a special trading scheme or policy, "to force the surplus fruit off the Australian market" (the finding of the learned trial Judge) which necessarily included "the prevention of the sale of the balance of the output in Australia" (per Lord *Atkin* (2)), including the States other than South Australia. Such scheme or

(1) (1928) 41 C.L.R. 442, and (1932) A.C. 542; 47 C.L.R. 386.

(2) (1932) A.C., at p. 559; 47 C.L.R., at p. 397.

policy was discoverable in secs. 20 and 28 themselves, the determinations under sec. 20 and in the evidence upon which the finding of the trial Judge was based.

The State apparatus was set up and put in motion, if one may again use certain phrases contained in Lord *Atkin's* judgment, so as to "place restrictions on inter-State commerce" (1), for the "prevention of the sale" inter-State of part of the growers output, and "to prevent persons in South Australia from selling more than the fixed quota in any of the Australian States" (2).

In the present case, there is no indication whatever in the Act, nor has any evidence been given which remotely suggests, that the object of Queensland is to carry out any policy or system of restricting hindering or obstructing the marketing of peanuts among the other States of the Commonwealth. On the contrary, there is no evidence whatever which points to the existence of any inter-State trade in peanuts at the time when the Order in Council was made. Dealing with this *Webb* J. said :—

> "Mr. *Macrossan* also contended that before the Order in Council could be held to be invalid as an infringement of sec. 92, it would be necessary for the defendant board to show that there was in fact inter-State trade in peanuts at the time the order was made. In my opinion, however, it is sufficient to show that there was a likelihood of such trade, and I think it has been very clearly established that there was such likelihood" (3).

The only evidence of the existence of actual inter-State trade in peanuts (which was tendered by the respondent) was the fact of certain consignments, by the Peanut Board itself, of peanuts to Sydney for sale. The Court is left without any evidence that the Peanut Board was constituted with the object of prohibiting, preventing or limiting inter-State commerce in the product. The real purpose of the action taken by Queensland was to set up for the growers themselves a representative selling authority or agency, with expert backing, in order to enable them to reap a greater benefit from the marketing of their product *in whatever locality a demand for it might arise.*

No doubt, co-operative marketing, when enforced by the compulsion of a minority of producers, can be described and

(1) (1932) A.C., at p. 558 ; 47 C.L.R., at p. 396.

(2) (1932) A.C., at p. 555 ; 47 C.L.R., at pp. 393, 394.

(3) (1932) S.R. (Q.), at p. 274.

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characterized as interference with freedom of trade. So it is, in the sense that the individual's complete liberty of action in respect of his method of sale will disappear. And it may be conceded that, but for the statutory scheme, some farmers might have desired, or been persuaded, to sell their products in States of the Commonwealth other than Queensland. In this sense a certain amount of trade "among the States" might, as a result of the Queensland scheme, not eventuate. But such a result would be, in my opinion, a mere incident in the scheme of organizing the selling agency, and in no way essential to its working.

That the State lends its powerful aid, commands pooling, and goes so far as to make the producers' body the owner of the crops grown during a long period of years, is not, in my opinion, sufficient to prove any forbidden hindrance to inter-State commerce. This conclusion is not reached because the board, as the new owner, is alone to be considered as possessing the implied guarantee of sec. 92, for that view, the so-called "magic of expropriation," is rejected by *James* v. *Cowan* (1), where *it sufficiently appeared that the real object of conferring ownership was to interfere with inter-State trade.* But the ownership by the board emphasizes that the marketing organization has been designed to stabilize and preserve the industry over a long period of years.

No one doubts that the State may "socialize" an industry to the extent of controlling those engaged in it, by requisitioning their products, and by rewarding them in any way thought just and fitting, whether under the name of wages, compensation or price. As Mr. Justice *Piddington* pointed out, when Chairman of the Inter-State Commission, it is incredible, and no one has yet been found who openly states his belief, that sec. 92 was intended to prevent the carrying into effect by the State of any approved programme of nationalization or socialization, although some effect upon inter-State commerce must be caused thereby. He said :—

> "When the Constitution was framed one of the great political parties in every State had, as is well known, for its avowed programme, 'The nationalization of the means of production, distribution, and exchange.' That expropriation upon payment of compensation is one recognized method of reaching this goal was taken for granted in *Slatyer* v. *Daily Telegraph* (2). Is it reasonable to suppose that in sec. 92 there is latent an indelible proscription against the

(1) (1932) A.C. 542 ; 47 C.L.R. 386. (2) (1908) 6 C.L.R. 1.

realization of this or any similar political creed by the electors in their Commonwealth Parliament so far as the power of the Commonwealth extends, or in their State Legislatures in respect of matters left to them ?" (p. 299).

It is argued and with great show of logic that a complete and absolute denial of the right of selling inter-State is a greater restriction upon the individual grower's liberty than is involved in a licence to sell inter-State up to a prescribed proportion of the output. But in the latter case, the State's action is obviously directed at inter-State trade for the purpose of restricting it; it has passed a law upon the topic of inter-State trade as such. In the former case, the State has conferred upon a selected authority the sole right of collecting and disposing of the product either as agent for the growers (where there is no expropriation) or in the legally superior character of statutory owner (in the case of a commodity board). The distinction is between (1) a prohibition imposed upon a grower, in his character as trader, or upon a trader himself, solely for the purpose of limiting and prohibiting marketing among the States, and (2) the application of compulsion to ensure marketing to the best advantage, *irrespective of the situation of the market*. In the latter case, the individual grower's proprietary right to sell his product is terminated solely for the purpose of substituting another and more efficient method of sale not concerned in any way with inter-State trade.

Webb J.'s decision upon the constitutional question is founded almost entirely upon the supposed analogy of *James* v. *Cowan* (1). But, the more it is examined, the more does *James* v. *Cowan* appear as a decision which illustrates a principle, but which ultimately turns upon the special facts of the case. It there appeared that the Commonwealth Parliament, acting together with the States producing dried fruits, combined for the sole purpose of limiting Australian sales. As it was decided that the Commonwealth authority should itself deal only with exports to places without the Commonwealth, the State's commands were necessarily directed against, and mainly concerned with, inter-State sales on the part of traders as well as growers. James was both trader and grower.

Here, the learned Judge's finding as to the object of the Queensland Act and Order in Council is, I think, substantially correct. "Briefly,

(1) (1932) A.C. 542; 47 C.L.R. 386.

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then," he says, "the real object of the Act is marketing—the complete control of the sales of the commodity by a board for the growers' benefit" (1).

I also entirely agree with his Honor's statement: "I take the law to be that, whatever may be the real object, if it is not to impose restrictions upon inter-State trade, commerce, or intercourse, sec. 92 is not contravened" (2).

The ultimate question may therefore be described as one of fact, but the facts of the present case are so typical that its decision will become binding in many other cases.

In the absence of any evidence, either upon the face of the Queensland Act or Order in Council, or otherwise, I do not think that it is possible to draw the necessary inference of fact (1) that the State's action and expropriation were devised for the purpose of restricting inter-State sales of Queensland-grown peanuts or (2) that they had any such effect or (3) that there ever was any inter-State trade engaged in, either by the growers of peanuts who are directly affected by the State action taken or by any person purchasing from the growers under contracts which stipulated for traffic among the States.

Whether it is possible to go behind an Act and the official documents proceeding from the Executive Government of a State, in order to prove that, despite the absence of any overt intent to restrict inter-State trade, such was the true intent, is a question which does not now call for consideration. In *James* v. *Cowan* (3) and *James* v. *South Australia* (4), the Act and the official determinations themselves sufficiently evidenced the purpose of the interference on the part of the State, so that the question I propound did not arise. But, in the present case, there is nothing in the Act or Order in Council, or in the evidence, to support an inference of fact that the State's purpose bore any relation to inter-State trade, either in the way of its restriction or encouragement.

That being so, the appeal should, in my opinion, be allowed, and judgment in the action should be entered in favour of the plaintiff.

(1) (1932) S.R. (Q.), at p. 274.
(2) (1932) S.R. (Q.), at p. 272.
(3) (1930) 43 C.L.R. 386; (1932) A.C. 542; 47 C.L.R. 386.
(4) (1927) 40 C.L.R. 1.

McTIERNAN J. The *Primary Producers' Organization and Marketing Acts* of Queensland which are relevant to this case empower the Governor in Council, upon the request of the prescribed number of growers of a commodity, to declare by Order in Council, that it is a commodity for the purposes of the Act and by the same or a subsequent Order in Council, to constitute a board in relation to the commodity (sec. 9 (1)). If the growers request that the board to be constituted shall acquire the commodity, the Governor in Council is empowered to provide by Order in Council, that the commodity shall be divested from the growers and vested in the board as the owners thereof (sec. 9 (2)). Pursuant to these provisions the Governor in Council ordered and declared by Order in Council of 28th August 1930, that all peanuts produced or to be produced in Queensland for sale during the ensuing period of ten years, are and shall be a commodity for the purposes of the Act; that a board be constituted in relation to the commodity; and "that the whole of the . . . commodity at the time of the making of the Order in Council and all and every part of such commodity which shall be produced during the subsistence of the Order in Council shall forthwith upon the making of this Order in Council be divested from the growers thereof and become vested in and be the property of the board as the owners thereof." An Order in Council under sec. 9 (2) may by that section be reinforced with such other provisions as will enable the board effectively to obtain possession of the commodity as owners and deal with it as may be deemed necessary or convenient to give full effect to the objects and purposes for which the board is constituted. The Peanut Board derived its name under sec. 11 (3) and its prospective period of life under sec. 9 (7). In the absence of any limitation of its functions the Peanut Board became a marketing board (sec. 9 (6)). As such it received the Director of Marketing as one of its members (sec. 11 (1)). He is an officer of the Government whose appointment is authorized by sec. 6 (1). The Order in Council itself provides that the board should consist, *inter alios*, of the Director of Marketing or a deputy to be appointed by the Minister charged with the administration of the Act.

Upon the establishment of the Peanut Board, growers became bound to deliver to it, in its character as a marketing board, the

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whole of their product and to make the delivery according to the board's directions (sec. 15 (1)) ; and any person who sold or delivered or bought or received any peanuts to or from any person other than the Peanut Board became liable to a penalty not exceeding £500. The rigour of these provisions may be mitigated to some degree under sec. 15 (4), which empowers the board to grant exemptions in certain cases. Pursuant to sec. 9 (1) the Order in Council constituting the Peanut Board modified the Act and added to it in some respects. For instance, it contained provisions relating to the power of the board to borrow money and added to sec. 15 of the Act a clause prohibiting a grower without the prior consent of the board from removing from his premises any peanuts which were grown or produced or prepared by him except for the purpose of delivering them to the board or its authorized agents. The Order in Council enacted a penalty not exceeding £500 for breach of this injunction. It should be noted that sec. 9 (9) of the Act provides that an Order in Council made under sec. 9 has the same effect as if it were enacted in the Act. Sec. 15 (2) of the Act was also amended. This sub-section, as modified by the Order in Council, provides that all peanuts delivered to the Peanut Board shall be deemed to have been delivered for sale by the board, and that it shall account to the growers for the proceeds thereof " after making all lawful deductions therefrom for expenses, outgoings and deductions of all kinds in consequence of such delivery and sale or otherwise under the Acts." The powers of the Peanut Board as a marketing board to deal with the commodity which the Act and Order in Council purported to vest in it and so completely bring under its control, are defined by sec. 14. This section provides, *inter alia*, that the marketing board may sell or arrange for the sale of the commodity over which it has control, and, in particular, as far as practicable, provide the commodity for consumption in Queensland, and for its supply during any period of shortage to those places within Queensland wherein a shortage is experienced, and make such arrangement as the board deems necessary with regard to sales of the commodity for export or consignment to other countries or States. Sec. 9 (2) provides that the acquisition of the commodity by the board is not to prejudice any inter-State contract for the sale of the commodity

made prior to the acquisition, and sec. 20 (3) exempts inter-State contracts from sub-secs. 1 and 2 of that section. These sub-sections in effect provide for the cancellation of every contract which is made in or outside of Queensland whether before or after the commodity is brought under the Act so far as it relates to the sale of the commodity for delivery in or out of Queensland.

The material features of the Act and Order in Council therefore appear to be :—1. The establishment of the Peanut Board, as a marketing board "in relation to peanuts." 2. The vesting of the "commodity" in the board as the owners. 3. The direction to the growers to deliver their product to the board. 4. The prohibition against any person other than the board selling, buying, delivering or receiving any of the "commodity." 5. The injunction to the grower not to remove any of the product from his premises except for the purpose of delivery to the board. 6. The stipulation that all peanuts are deemed to be delivered to the board for the purposes of sale. 7. The duty of the Peanut Board to sell the "commodity" and account to the growers for the proceeds. 8. The power of the Peanut Board to borrow on the security of the peanuts delivered to it and to make advances to the growers. 9. The particular provisions of sec. 14 which have been outlined as to the manner in which the Peanut Board may deal with the "commodity." 10. The provisions of secs. 9 and 20 relating to inter-State contracts. The major question for consideration is whether, assuming the Order in Council did purport to invest the consignment of peanuts in question in the appellant board, the provisions of the Act and Order in Council providing for the expropriation and disposal of the commodity are valid. In *James* v. *Cowan* (1) the Judicial Committee said it was unnecessary in that case to undertake the difficult task of defining the precise boundaries of the absolute freedom granted to inter-State commerce under sec. 92. But speaking of a statute arming the Executive with power to change the ownership of property the Judicial Committee said (2): "If the real object of arming the Minister with the power of acquisition is to enable him to place restrictions on inter-State commerce, as opposed to a real object

(1) (1932) A.C. 542 ; 47 C.L.R. 386.
(2) (1932) A.C., at p. 558 ; 47 C.L.R., at p. 396.

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of taking preventive measures against famine or disease and the like, the legislation is as invalid as if the Legislature itself had imposed the commercial restrictions." And, speaking of the validity under sec. 92 of certain Executive action that might be taken under a statute that expressly provided that the statute must be read subject to that section, the judgment continued (1): "It may be conceded that, even with powers granted in this form, if the Minister exercised them for a primary object which was not directed to trade or commerce, but to such matters as defence against the enemy, prevention of famine, disease and the like, he would not be open to attack because incidentally inter-State trade was affected." These quotations express a principle upon which this Court has from time to time proceeded in determining the question whether State legislation which was called in question violated sec. 92. That principle is, in my opinion, correctly expressed in the judgment of my brother *Rich* in *James* v. *Cowan* (2): "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." Since the Privy Council decision in *James* v. *Cowan* (3) it is clear that the question whether sec. 92 has been infringed is not eliminated by the presence, in the statute which is challenged, of a provision changing the ownership of goods or giving the Executive power to do so. The test, which I have mentioned, should be applied in that case also, notwithstanding that the statute expropriates or authorizes the expropriation of property. But to save misapprehension it should be noted that sec. 92 does not deprive the State of its power to legislate with respect to the appropriation of property. The problem referred to in argument which would be presented by legislation designedly framed so as to suppress the object of expropriation and doing no more than resuming property from the owners, may be reserved until it arises. Whether this event is likely to arise depends upon the probability of the enactment of

(1) (1932) A.C., at pp. 558, 559; 47 C.L.R., at pp. 396, 397.

(2) (1930) 43 C.L.R., at p. 425.

(3) (1932) A.C. 542; 47 C.L.R. 386.

legislation of the above-mentioned character. The test which I have mentioned is that whereby, in my opinion, the question of validity in the present case should be decided. That test is based upon the decisions of this Court on sec. 92, which are reviewed by *Rich* J. in *James* v. *Cowan* (1). His Honor participated in the hearing of all those cases. I content myself with adopting the statement of the test which I have quoted from that judgment, because I apprehend that the difficulties of State legislators and their draftsmen are likely to be enhanced by the unnecessary multiplication of statements made with the intention of conveying the same meaning, but varying in phraseology, as to the nature of the prohibition which sec. 92 imposes on their Parliaments. It is also the test which, I think, should be deduced from the observations of the Judicial Committee in *James* v. *Cowan* (2), which have already been quoted. The Judicial Committee observed that a statute with the "real object" described in the first quotation would be invalid. If the above-mentioned test were applied to the statute, it must also be held to be invalid. Moreover, if the test were applied to the Executive action taken for the "primary object" which is described in the second quotation, such action could not be held to be invalid "because incidentally inter-State trade was affected." The "real object" and the "primary object" have, I apprehend, the same meaning. It is that which Lord *Watson* ascribed to the term "the object of the Act." "In 1895, in the course of the argument on the *Canadian Liquor Case*, Lord *Watson*, after observing that there might be many objects of an Act, one behind the other, said:—'Which is the object of the Act? I should be inclined to take the view that that which it accomplished, and that which is its main object to accomplish, is the object of the statute; the others are mere motives to induce the Legislature to take means for the attainment of it' (Quoted in *Lefroy's Canada's Federal System*, p. 213)"—per *Isaacs* J. in the *Wheat Case* (3). In *Duncan's Case* (4), *Isaacs* J. said that the pith and substance of an Act is what it enacts and "its 'object' must equally be gathered from what it enacts." In

(1) (1930) 43 C.L.R., at p. 423.
(2) (1932) A.C. 542; 47 C.L.R. 386.
(3) (1915) 20 C.L.R., at p. 98.
(4) (1916) 22 C.L.R., at p. 623.

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McArthur's Case (1) *Rich* J. distinguished the object of an Act from the motive of the Legislature in passing it. "'The object' of an Act," he said, "is to be gathered from its necessary effect, and not from some purpose or motive which the Legislature may be supposed to have had." It is clear that the provisions of the Act and Order in Council in this case expropriating the commodity and regulating the control and sale of it do restrict, regulate, fetter and control trade and commerce including inter-State trade and commerce. But Mr. *Mitchell* contended that the real object was to assist the growers of peanuts by setting up a board which could borrow money on the security of the commodity and make advances to the growers who otherwise could not obtain financial assistance, and trade and commerce were therefore only incidentally affected. It is true that the Act and Order in Council contained provisions authorizing the Peanut Board to borrow money, which are well calculated to establish its credit as a borrower. It is conceivable that the growers may be thereby greatly benefited, but upon a consideration of the whole Act and the Order in Council, I think that the provisions of these measures which are attacked were enacted for a primary object directed to trade and commerce. Moreover, sec. 14 (3) read as part of the whole Act and Order in Council is not sufficient to justify the conclusion that the real object or the primary object was not directed to trade and commerce. Gathered from the effect which has been wrought by these provisions of the Act and Order in Council, their primary object or real object or pith and substance is, in my opinion, to constitute an authority for marketing peanuts, to vest in it as owner all peanuts produced in Queensland during the period for which it was to operate, to prevent all persons other than the board from buying or selling peanuts, to give it the exclusive right to engage in trade and commerce in peanuts whether inter-State, intra-State, or overseas, to make it unlawful for any other person to engage in this trade and commerce, to regulate the manner in which the board should conduct its business and to require it to account to the growers for the profits it derived from the sale of the commodity which it acquired

(1) (1920) 28 C.L.R., at p. 570.

from them. Adopting the words of *Barton* J. in *Fox* v. *Robbins* (1), it is, in my opinion, " impossible to reconcile the effect of the State legislation called in question with the maintenance in unhampered operation of this constitutional provision," that is sec. 92.

In the *Wheat Case* (2), where the validity of the *Wheat Acquisition Act* 1914, of New South Wales—an Act passed during the War—was tested, *Isaacs* J. said (at pp. 98, 99) :—" It must be remembered that the motive of the Legislature is immaterial. The question always is: What have they done? What is the effect of the legislation, or, if you like, the object at which it is aimed, judging of the object by what it enacts shall be done or left undone? . . . The pith and substance of this Act is the Government acquisition of all wheat in New South Wales with power to dispose of it to the public." His Honor concluded (at p. 100) that the object of the Act was " to acquire wheat to feed the citizens," that it did " not interfere directly or indirectly with trade or commerce," and that it did " 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*." In the present case the peanuts were, as I interpret the Act and Order in Council acquired by the board with the object of preventing the growers from trading in them and of enabling the board to do so. The reference in the judgment of *Isaacs* J. (3) to a State law with respect to bankruptcy may be taken to provide an instance of a consequential impediment resulting from the operation of a valid State Act. *Gavan Duffy* J., as he then was, said (4): " In truth, the Act is not primarily an interference with inter-State trade or commerce at all." *Rich* J. adopted this view of the Act (5). Other instances in which this test was relied upon are *Foggitt, Jones & Co.* v. *New South Wales* (6); *Duncan's Case* (7); *Roughley's Case* (8). In *Duncan's Case* (9), however, *Isaacs* J. drew attention to what would be a misuse of the " pith and substance " or " object " test.

(1) (1909) 8 C.L.R. 115, at p. 123.
(2) (1915) 20 C.L.R. 54.
(3) (1915) 20 C.L.R., at p. 100.
(4) (1915) 20 C.L.R., at p. 105.
(5) (1915) 20 C.L.R., at p. 111.
(6) (1916) 21 C.L.R., at p. 365, per *Rich* J.
(7) (1916) 22 C.L.R., at p. 580, per *Griffith* C.J., and at p. 586, per *Barton* J. (they disagreed, however, as to what was the object of the Act); at p. 632, per *Higgins* J., and at p. 641, per *Gavan Duffy* and *Rich* JJ.
(8) (1928) 42 C.L.R., at pp.199 and 201, per *Higgins* J.
(9) (1916) 22 C.L.R., at p. 623.

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The conclusion in this case of the minority who, *inter alios*, consisted of *Isaacs* J. was approved in *McArthur's Case* (1). Instances of a consequential impediment on inter-State trade arising from a law, the primary object of which is not directed to trade and commerce but to other matters, are given in *Duncan's Case* (2) and in *McArthur's Case* (3). In the former case *Isaacs* J. said (2):— "A citizen in his relation to the society in which he lives has many rights, duties and obligations. He may be viewed in many capacities, and it is impossible to draw exclusive lines of demarcation between the multitudinous aspects of the civic life. He owes, amongst other things, a duty of respect for the life and safety of others; he is bound not to rob or to defraud them; and he is subject to whatever laws the competent authority may impose upon him with respect to each of his obligations as a citizen. If, for instance, he has meat and wishes to sell it inter-State, he may sell it unhindered by the State, so far as trade and commerce is concerned; but, if it is poisoned meat, the meat may be seized, not because sale is directed to be prevented, but because an antecedent fact, viz., the existence of such meat in the hands of the owner, is a step towards endangering the lives of others. If he is a carrier he is free to pass across the border, but if he owes a debt to the Government or to a private individual his vehicle or his horse may be taken by legal process to satisfy his obligations to pay his debts. If he has committed a crime he himself may be taken to expiate it. If the State needs his property it may take it, and, at its will and tempered only by its sense of justice, may take it with or without compensation. But in those cases 'trade and commerce' are untouched; remotely and even necessarily they are affected, but this is the effect of maintaining social order as such and not of prohibiting or assuming to prohibit trade in any way." He continued: "But the moment the State says 'You may keep but shall not sell your merchantable goods, not because they are deleterious but because they are not,' then trade and commerce are directly prohibited; and though this is still perfectly competent to the State so far as relates to its purely

(1) (1920) 28 C.L.R. 530. (2) (1916) 22 C.L.R., at pp. 620 and 621.
(3) (1920) 28 C.L.R., at p. 551.

internal trade, it is, in my clear opinion, invalid if sec. 92 is to have any operation at all—as to inter-State trade." (See also *Roughley's Case* (1).)

The operations intended to be embraced by "trade and commerce" in sec. 92 are enumerated in *McArthur's Case* (2). In *Foggitt, Jones & Co.* v. *New South Wales* (3) *Griffith* C.J. said that sec. 92 specially guarantees to the owners of goods the right to use the property for the purpose of commerce. The true character of this right is further expounded in *Duncan's Case* (4) by *Barton* and *Isaacs* JJ. It has already been mentioned that the conclusion at which they arrived was approved by the Court in *McArthur's Case*. It is also referred to in the judgment of *Isaacs* J. in *James* v. *Cowan* (5), which was approved by the Privy Council. His Honor said:—"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,

(1) (1928) 42 C.L.R., at p. 194, per *Higgins* J.
(2) (1920) 28 C.L.R., at p. 547.
(3) (1916) 21 C.L.R., at p. 361.
(4) (1916) 22 C.L.R., at p. 602 and pp. 625-626 respectively.
(5) (1930) 43 C.L.R., at pp. 418, 419.

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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 trade as it pleases with the goods."

The proviso to sec. 9 (2) and sec. 20 (3) relating to inter-State contracts are clearly not sufficient to protect this constitutional right.

I am clearly of opinion that, for these reasons, the Peanut Board was not validly constituted, and that it could not assert any rights as an owner to the consignment of peanuts in question which in fact had been placed on the respondent's wharf for shipment to Sydney. The conclusion at which I have arrived on the constitutional question is sufficient to dispose of the appellant's claim to be the owner. But *Webb* J. also held that it was not entitled as owner to the consignment of peanuts in question under the terms of the Order in Council, because these peanuts had been produced after the Order in Council was made. I do not agree with his Honor in that conclusion. It is based on the view that the form in which an acquisition should be made under sec. 9 (2) is "divesting the commodity from the growers" and "vesting it in the board" and that this form could not be observed until the grower has a commodity vested in him, or in other words, until both grower and commodity are in existence. Difficulties in rejecting his Honor's view are occasioned by the language of sec. 9 (2) and by the use in other parts of the Act of certain words and phrases, which were relied upon by Mr. *Macgregor*, e.g., "product" in the definition of commodity, and "who have supplied their product to the board" in sec. 10A, and "the growers . . . engaged in the production of the commodity concerned and who have supplied their product to the board," which occurs elsewhere in the Act. But reverting to sec. 9 (2), it is obvious, I think, that upon the true interpretation of the Act, the word "commodity" in that section should be construed to mean the existing product and whatever quantities of it would be produced in the future. In this view the phrase "divested from the growers" should not be restricted to mean the divesting of present corporeal things: it should be construed as an integral part of the longer phrase "the commodity shall be divested from the growers and become vested in and be the property

of the board as owners." I think that, in that collocation, it was intended to affect not only the product in existence but the rights that would accrue to present and future growers in whatever quantities of it may be produced during the lifetime of the board. In this view of the section I think that the Order in Council should be held, if it were valid under the Federal Constitution, to have vested the ownership of the peanuts in question in the action in the Peanut Board.

The appeal should, in my opinion, be dismissed.

Appeal dismissed with costs.

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Solicitors for the defendant, *B. M. Lilley & Lilley*, Rockhampton, by *W. G. Parish.*

J. B.