Appl Bonney v Macintosh [1981] TasR 381
Cons Corporate Affairs Commission v Bain (1991) 55 ACrimR 73
Cons North Eastern Dairy Co v Dairy Industry Authority of NSW (1975) 134 CLR 559
Discd Parton v Milk Board (Vic) (1949) 80 CLR 229
Appl Milk Board of NSW v Metropolitan Cream Pty Ltd (1939) 62 CLR 116
Appl Hopper v Egg & Egg Pulp Marketing Board (Vic) (1939) 61 CLR 665
Appl Hartley v Walsh (1937) 57 CLR 372

[HIGH COURT OF AUSTRALIA.]

CROTHERS . . . . . APPELLANT;
INFORMANT,

AND

SHEIL . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY.

Aug. 4, 8, 31.

Rich, Dixon, Evatt and McTiernan JJ.

Evidence—Milk for consumption or use in specified area—Sale to retailer—Knowledge of vendor—Inference—Milk Act 1931 (*N.S.W.*) (*No.* 59 *of* 1931), *secs.* 26 (1)*, 27 (1), (3)*.

Justices—Information—Defect in substance or in form—Defect curable by amendment—Failure to lay information in name of Milk Board—Laid by authorized person in own name—Milk Act 1931 (*N.S.W.*) (*No.* 59 *of* 1931), *sec.* 80 (1)*—*Justices Act* 1902 (*N.S.W.*) (*No.* 27 *of* 1902), *sec.* 65*.

Constitutional Law—Interference with inter-State trade—Compulsory vesting in Milk Board of milk produced for consumption or use within specified area—Possible remote effect of expropriation—Milk Act 1931 (*N.S.W.*) (*No.* 59 *of* 1931), *secs.* 26 (1), (3)*—*The Constitution* (63 & 64 *Vict. c.* 12), *sec.* 92.

Constitutional Law—Duties of excise—Deductions from proceeds of milk compulsorily acquired—Administrative expenses payable out of deductions—Milk Act 1931 (*N.S.W.*) (*No.* 59 *of* 1931), *secs.* 23 (1)*, 26 (1), (3)*, 28 (2)*—*The Constitution* (63 & 64 *Vict. c.* 12), *sec.* 90.

On the hearing of an information laid against the respondent, alleging that he had sold milk for consumption or use in the metropolitan milk distributing district to a person other than the Milk Board in contravention of sec. 27 (3)

* The *Milk Act* 1931 (N.S.W.) provides, by sec. 23 (1), as follows: "As soon as practicable after its appointment and thereafter from time to time as the Board may deem necessary or desirable, the Board shall determine, after inquiry to be held in the manner prescribed by regulations, the minimum price or prices which may be paid to a dairyman for milk." By sec. 26: "(1) From and after a day to be appointed by the Governor and notified by proclamation published in the *Gazette*, milk supplied for consumption or use within the metropolitan milk distributing district . . . shall become absolutely vested in and be the property of the Board . . . (3) From and after the day so appointed such milk shall become the absolute property of

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of the *Milk Act* 1931 (N.S.W.), evidence was given that the respondent was a registered dairyman and was authorized by the Board to supply raw milk for consumption or use within any milk distributing district; that it was subsequently notified, by proclamation, that all milk supplied for consumption or use within the metropolitan milk distributing district should become absolutely vested in and be the property of the Board; that, thereafter, the respondent sold large quantities of milk daily to W. Bros., whose employee collected it from the respondent's dairy situate outside the district; and that W. Bros., who carried on the business of selling milk by retail within the district, bought the milk for consumption or use within the district in the ordinary course of their business. There was no direct evidence that the respondent knew anything about W. Bros. other than that they purchased milk from him, and that he had said that if he were convicted he would stop sending his milk to Sydney immediately.

Held, that the evidence supported the inference that the respondent supplied the milk with the knowledge and belief that it was intended for consumption in the metropolitan milk distributing district, and that, therefore, he was properly convicted of the offence charged.

Decision of the Supreme Court of New South Wales (Full Court): *Sheil* v. *Crothers*, (1933) 33 S.R. (N.S.W.) 229; 50 W.N. (N.S.W.) 72, reversed on this point.

The information was signed by the appellant who was described therein as "an officer in the service of the Milk Board duly authorized to prosecute herein."

Held, that the omission to lay the information in the name of the Milk Board, as required by sec. 80 (1) of the *Milk Act* 1931, was a defect which might be cured by amendment under sec. 65 of the *Justices Act* 1902 (N.S.W.).

Decision of the Supreme Court affirmed on this point.

Held, also, that the scheme of compulsory acquisition of milk under sec. 26 of the *Milk Act* 1931 does not contravene the provisions of sec. 92 of the Constitution as to the freedom of inter-State trade.

Held, further, that the provisions of the *Milk Act* 1931 generally and the provisions of secs. 23 (1), 26 (1), (3), and 28 (2) in particular, do not contain a scheme which involves the imposition of a duty of excise contrary to sec. 90 of the Constitution.

Lower Mainland Dairy Products Sales Adjustment Committee v. *Crystal Dairy, Ltd.*, (1933) A.C. 168, distinguished.

the Board, freed from all mortgages, charges, liens, pledges, interests, and trusts affecting the same, and the rights and interests of every person in such milk shall thereupon be taken to be converted into a claim for payment therefor . . . (5) No such proclamation shall apply to milk produced and retailed directly by a dairyman on his own behalf." By sec. 27: "(1) Upon and after the date of the publication of any proclamation under section twenty-six of this Act, all milk supplied for consumption within the milk distributing district . . . specified in the proclamation shall be delivered by the dairyman producing the same to the Board in accordance with the provisions of this section . . . (3) On and from the date of the publication of

APPEAL from the Supreme Court of New South Wales.

Thomas Murray Sheil, of "Carnarvon," Camden, New South Wales, dairyman, was charged by information laid under sec. 27 of the *Milk Act* 1931 (N.S.W.) that on 26th September 1932 at Camden, he "being a dairyman, did supply milk for consumption or use in the Metropolitan Milk Distributing District" established under the Act "to John Woulfe carrying on business with others under the style or name of Woulfe Brothers; such milk not being milk produced and retailed directly by the said Thomas Murray Sheil on his own behalf" contrary to the provisions of the *Milk Act*. The information was signed by one William Victor Crothers, who was described therein as "an officer in the service of the Milk Board duly authorized to prosecute herein."

At the hearing before the magistrate a copy of the *Government Gazette*, No. 20, of 16th February 1932, was put in evidence wherein it was notified by proclamation for public information, in accordance with sec. 80 of the *Milk Act*, that Crothers, amongst others, was "authorized by the Milk Board to take any information, complaint or other legal proceedings under the *Milk Act*, 1931, in the name of the Milk Board." Also admitted in evidence was a copy of the *Government Gazette*, No. 30, of 4th March 1932, wherein it was notified by proclamation made pursuant to the provisions of sec. 26 of the Act, that after 5th March 1932 milk supplied for consumption or use within the Metropolitan Milk Distributing District should become absolutely vested in and be the property of the Milk Board. The evidence disclosed that Sheil was, on 25th August 1932, registered under the *Milk Act* as a dairyman, and was authorized by the Milk Board to supply raw milk and cream for consumption or use within

any proclamation under section twenty-six . . . any dairyman who, except to the extent provided in subsection five of that section, supplies, sells, or delivers milk for consumption or use in the milk distributing district . . . specified in the proclamation to a person other than the Board, and every person other than the Board who buys or receives such milk from a dairyman, shall be guilty of an offence and liable on summary conviction to a penalty not exceeding twenty pounds." By sec. 28 (2): "The Board shall, out of the proceeds of milk disposed of by the Board under this Act, make provision for expenditure incurred in the treatment, carriage, distribution, and sale of milk, the costs, charges, and expenses of the administration by the Board of this Act, and any amounts necessary to repay advances made to, and to provide a sinking fund in respect of any loan raised by the Board, and interest on any such advance or loan; and subject to this Act shall make payments to each dairyman in respect of the milk delivered by him on the

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any milk distributing district until the end of 1932. In September 1932 Sheil sold the milk produced at his dairy, about 120 gallons per day, to Messrs. Woulfe Bros., whose employee called at Sheil's dairy with a motor lorry to collect it. Woulfe Bros., whose distributing premises were situate at Marrickville, a suburb of Sydney, within the Metropolitan Milk Distributing District, conducted a business of selling milk by retail to customers within that district. The milk sold was delivered from carts in the ordinary way. There was no direct evidence that Sheil knew anything about Woulfe Bros. except that they bought milk from him. Evidence was given by an officer of the Milk Board that Sheil had previously supplied milk to the agent of the Milk Board at Camden but recently had ceased to do so; and that in answer to the question: "Do you know that it is an offence for you to send your milk direct to Sydney and not to the Milk Board's agent?" put by the officer to Sheil, the latter replied: "No, I claim differently . . . I have got nothing to hide. I am admitting to you that I sell this milk to Woulfe Brothers, and I will do so in Court, and Woulfe Brothers will admit buying it. If the Milk Board get a judgment against me I will stop sending my milk to Sydney immediately, but I will not supply to the Milk Board's agent; I would rather go out of business first." No evidence was given by or on behalf of Sheil. The magistrate overruled an objection made by counsel who appeared for Sheil that the information should have been laid in the name of the Milk Board as required by sec. 80 of the *Milk Act*, and held, *inter alia*, that the information was within sec. 80 by reason, *inter alia*, of Crothers' authority to prosecute as contained in the *Government Gazette* of 16th February

basis of the minimum price or prices notified in relation thereto." By sec. 80 (1): "Any information, complaint, or other legal proceeding under this Act may be taken in the name of the Milk Board by the secretary or by any other officer authorized by the Board in that behalf either generally or in any particular case."

The *Justices Act* 1902 (N.S.W.) provides, by sec. 65, as follows:—"(1) No objection shall be taken or allowed to any information, complaint, summons, or warrant in respect of — (*a*) any alleged defect therein in substance or in form; or (*b*) any variance between any information, complaint, summons, or warrant and the evidence adduced in support of the information or complaint at the hearing. . . . (3) Where any such defect or variance appears to the Justice or Justices present and acting at the hearing to be such that the defendant has been thereby deceived or misled such Justice or Justices may upon such terms as he or they may think fit adjourn the hearing of the case to some future day."

1932; (2) that the *Milk Act* 1931 was not *ultra vires* the Commonwealth Constitution (*sic*); (3) that the evidence adduced by Crothers established that the milk was supplied for consumption or use in the Metropolitan Milk Distributing District within the meaning of the Act; and that (4) the certificate of registration issued by the Milk Board to Sheil on 25th August 1932 was no answer to the charge. Sheil was convicted and fined.

An appeal by him to the Supreme Court by way of case stated was referred by *Street* J. to the Full Court. The question for the opinion of the Court was whether the determinations of the magistrate were erroneous in point of law. The Full Court, by majority, held that although the information was not laid in the name of the Milk Board as required by sec. 80 of the *Milk Act*, that was a mere formality which might be cured by amendment under sec. 65 of the *Justices Act* 1902-1931 (N.S.W.), but, by majority, allowed the appeal on the ground that as there was no evidence that Sheil knew for what purpose, or where, the milk was to be used, the evidence failed to establish the offence charged: *Sheil* v. *Crothers* (1).

From this decision Crothers now, by special leave, appealed to the High Court.

Maughan K.C. (with him *Bradley*), for the appellant. The evidence showed that the respondent, a registered dairyman, had, for a long period, handed over the whole of his output of milk to persons who together carried on the business of a milk vendor within the Metropolitan Milk Distributing District established under the *Milk Act* 1931. In such circumstances it is a proper inference to draw that the respondent knew that the milk so handed over by him was "milk supplied for consumption or use within the metropolitan milk distributing district" within the meaning of secs. 26 and 27 of the Act.

[He was stopped.]

Watt K.C. (with him *Dignam*), for the respondent. There is no proof before the Court that the respondent "supplied milk for consumption or use within the metropolitan milk distributing district."

(1) (1933) 33 S.R. (N.S.W.) 229; 50 W.N. (N.S.W.) 72.

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The milk was supplied, that is sold, by the respondent at his dairy at Camden, which is not within such district. It is not shown that the milk was sold by the respondent " for consumption or use " in that district, or that the respondent knew that the milk was or was intended to be so sold by the purchasers thereof. There is no evidence that the respondent knew where the business premises of the purchasers are situate. All the facts alleged in the information must be proved. The onus of proof is upon the informant. Strict proof is necessary to sustain the charge, mere inference, suspicion or suggestion is insufficient (*Houston* v. *Wittner's Pty. Ltd.* (1)). If the respondent had been charged as an accessory to an offence by the purchaser the evidence would have been insufficient (*Bowker* v. *Woodroffe* (2)). No general principle of law can be laid down in this case, therefore the special leave to appeal from the decision of the Full Court should be rescinded (*Schiffmann* v. *The King* (3)).

[DIXON J. When special leave was granted that factor was considered but it was felt that the circumstances here were typical of those in which the provisions of these sections would require to be construed.]

As required by sec. 80 of the *Milk Act* 1931, the information should have been laid " in the name of the Milk Board " (*Christie* v. *Permewan, Wright & Co.* (4)). The information was wrongly laid, therefore a conviction should not have been recorded (*Martin* v. *Pridgeon* (5) ; *Soden* v. *Cray* (6) ; *Reg.* v. *Brickhall* (7)). In view of the provisions of sec. 80 the provisions of sec. 4 of the *Fines and Penalties Act* 1901 (N.S.W.) do not apply.

[MCTIERNAN J. referred to *Gilmour* v. *Bastian* (8).

[DIXON J. referred to *White* v. *Phipps* (9).]

The omitting to lay the information " in the name of the Milk Board " cannot be cured by an amendment under sec. 65 of the *Justices Act* 1902 (*Ex parte Cunliffe* (10) ; *Paley* on *Summary Convictions*, 9th ed. (1926), p. 166).

(1) (1928) 41 C.L.R. 107.
(2) (1928) 1 K.B. 217.
(3) (1910) 11 C.L.R. 255
(4) (1904) 1 C.L.R. 693.
(5) (1859) 28 L.J. (M.C.) 179.
(6) (1862) 7 L.T. (N.S.) 324.
(7) (1864) 33 L.J. (M.C.) 156.
(8) (1917) 24 C.L.R. 14.
(9) (1932) 32 S.R. (N.S.W.) 448; 49 W.N. (N.S.W.) 169.
(10) (1871) 10 S.C.R. (N.S.W.) 250.

[RICH J. Here the defect was not one of substance but one of form only.]

This aspect is covered by *Christie* v. *Permewan, Wright & Co.* (1); *Oxford Tramway Co.* v. *Sankey* (2); see also *Masters* v. *Fraser* (3)). Although the appellant may be an officer authorized by the Milk Board to perform certain specified duties, an information showing the appellant and not the Board as the informant is bad, and an amendment should not be allowed (*Reg.* v. *Templeton, Ex parte England* (4); *Holden* v. *Moran* (5)). A defendant might be prejudiced in his efforts to obtain redress if defects of this nature in an information were allowed to be amended. The matter does not come within sec. 65 or sec. 78 of the *Justices Act*. The Court has no power to amend an information so as to substitute a new informant in lieu of the informant appearing in the information (*Burns & Wright* v. *Farrell* (6)). Although aware of the defect the appellant did not apply to the magistrate for an amendment of the information, and it is now too late for such an application or amendment. The deductions authorized by sec. 28 of the *Milk Act* amount to excise duty; therefore the Act is *ultra vires* the Parliament of New South Wales by virtue of sec. 90 of the Constitution. Deductions made to meet expenses incurred by the Milk Board constitute a tax on the persons concerned (*Lower Mainland Dairy Products Sales Adjustment Committee* v. *Crystal Dairy, Ltd.* (7); see also *Commonwealth* v. *South Australia* (8); and *John Fairfax & Sons Ltd.* v. *New South Wales* (9)). The *Milk Act* also offends against the provisions of sec. 92 of the Constitution. The Act adversely affects the freedom of the inter-State trade in condensed milk, by-products, &c., manufactured from the milk supplied by dairymen for "use in the metropolitan milk distributing district." "Use" necessarily includes "manufacture."

Maughan K.C., in reply, was limited by the Court to the question of sufficiency of evidence.

Cur. adv. vult.

(1) (1904) 1 C.L.R. 693.
(2) (1890) 6 T.L.R. 151.
(3) (1901) 85 L.T.R. 611.
(4) (1877) 3 V.L.R. (L.) 305.
(5) (1895) 1 A.L.R. 117.
(6) (1921) V.L.R. 205; 42 A.L.T. 175.
(7) (1933) A.C. 168.
(8) (1926) 38 C.L.R. 408.
(9) (1927) 39 C.L.R. 139.

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Aug. 31.

The following written judgments were delivered :—

RICH J. The relevant facts are that the respondent occupies dairy premises at Camden, and is a dairyman registered under the *Milk Act* 1931, sec. 36. Woulfe Bros. are milk vendors at Marrickville within the metropolitan milk distributing district who distribute milk to their customers in the ordinary way by means of milk carts. The respondent supplied Woulfe Bros. with about 120 gallons of milk a day, of which they took delivery at the respondent's dairy. Respondent was prosecuted under sec. 27 (3) of the *Milk Act* for that being a dairyman he did supply milk for consumption or use in the metropolitan milk distributing district to Woulfe Bros. He was convicted of this offence, but on appeal by way of case stated the majority of the Full Court consisting of *James* and *Davidson* JJ., *Street* C.J. dissenting, held that there was no or no sufficient evidence that the milk was supplied for consumption or use in the metropolitan district. Sec. 26 (1) vests all milk supplied for consumption within the metropolitan distributing district in the Board and sec. 27 (1) requires that all milk supplied within that district shall be delivered by the dairyman producing the same to the Board. Sub-sec. 3, under which the information is laid, makes it an offence for a dairyman to supply sell or deliver milk for consumption or use in the milk distributing district to a person other than the Board unless the dairyman acts as his own retailer. The reference to supplying milk for consumption or use in the milk distributing district is not very clear. But we have not to consider the meaning of the expression in secs. 26 (1) and 27 (1), where it describes the milk which vests in the Board. I do not think it can be denied that under sec. 27 (3) milk is supplied for consumption in the milk distributing district when it is sold and delivered by the dairyman to a buyer who he knows or believes will retail it in that district. In the present case I think the evidence supports the inference that the respondent did supply milk with this knowledge or belief. According to the evidence the respondent spoke of his course of business as sending his milk to Sydney. He stood in a continuous business relation with Woulfe Bros. In the ordinary course of affairs people standing in such a relation to one another do know in a general way the character of each other's businesses. Woulfe Bros. were carrying

on business openly as retailers in and from Marrickville. All this provided circumstantial evidence from which the magistrate was entitled in the absence of any evidence from the respondent to conclude that he knew that his milk was distributed in Sydney for consumption. On this point I agree with the judgment of *Street* C.J., and am unable to agree with that of *Davidson* J., with whom *James* J. concurred. But Mr. *Watt*, on behalf of the respondent, has attempted to support the order of the Full Court upon further grounds. Upon the first of these the majority of the Full Court, consisting of *Street* C.J. and *Davidson* J. was against him. Sec. 80 of the *Milk Act* says that any information under the Act may be taken in the name of the Milk Board by the Secretary or by any other officer authorized by the Board in that behalf either generally or in any particular case. The information is expressed to be laid by the appellant "an officer in the service of the Milk Board duly authorized to prosecute herein." Mr. *Watt* says that sec. 80 is not only enabling but prescribes exhaustively how proceedings may be taken and that the information does not comply with it. It is true that the information does not comply with it but I find it unnecessary to decide whether it is an exhaustive statement of the mode of prosecution. The appellant was the proper officer to lay the information on behalf of the Board and the information shows that he did so prosecute. Where the information fails to comply with sec. 80 is that the appellant exercised his authority in his own name and not in the name of his principal the Board. This, in my opinion, is a defect in the information, and is healed by sec. 65 of the *Justices Act* 1902. I cannot agree with Mr. *Watt's* contention that the information is not defective in substance or in form and that all that is wrong is that the informant has no *locus standi*. When sec. 80 of the *Milk Act* is looked at with the information what appears is that the right person has proceeded by an appropriate information and in the information has proceeded expressly on behalf of his principal but has drawn up the information in his own but not in his principal's name. We are not unfamiliar in the case of powers of attorney with authorities exerciseable in the principal's name and authorities exerciseable in the attorney's name on his constituent's behalf. If an attorney professing to act on his constituent's

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behalf did so in the wrong name I should call this an error or defect in the form of exercise of the power. Mr. *Watt* relied upon two further grounds which do not appear to have been dealt with in the Full Court. He contended that the provisions of the *Milk Act*, particularly secs. 23 (1), 26 (1) and (3), and 28 (2) contain a scheme which involved the imposition of a duty of excise contrary to sec. 90 of the Constitution. The suggestion is that because the proceeds of the milk vested in the Board under the compulsory acquisition from the dairyman are required to bear the costs charges and expenses of the administration of the Act and the other charges mentioned in sub-sec. 2 of sec. 28, there is a levy in the nature of a tax made upon the supply of milk. The decision of the Privy Council in *Lower Mainland Dairy Products Sales Adjustment Committee* v. *Crystal Dairy, Ltd.* (1) was relied upon. In my opinion there is no substance in the argument. The provisions of the *Milk Act* do not exact any pecuniary payment from the dairy farmer. They do not impose any liability in respect of the ownership, transfer, sale or production of goods. They merely contain a scheme for the compulsory acquisition of milk and the payment of the price or compensation to be borne by the proceeds arising from the resale by the Board. The fact that these proceeds are subject to deductions would not convert the scheme into one for taxation. I should perhaps interpose by way of reservation that I am not to be taken as deciding that the minimum prices fixed by the Board are not payable although the fund described in sec. 28 (2) prove insufficient. In the *Lower Mainland Dairy Products Sales Adjustment Committee* v. *Crystal Dairy, Ltd. Case* (1), there was an actual levy of a money sum upon the producers of milk who sold it in a liquid form; here there is no tax and no duty of excise. Mr. *Watt* next relied upon sec. 92 of the Constitution. The argument was that the expropriation of milk supplied for consumption or use in the metropolitan milk distributing district might offend against sec. 92 by preventing the performance of some imaginary contract for the sale and delivery of milk into another State if the contract contemplated some treatment of the milk in Sydney before it was finally despatched to the other State. It was said that such a treatment might amount to

(1) (1933) A.C. 168.

use within the metropolitan milk distributing district and thus bring the milk within the ambit of sec. 26 (1). In my opinion this argument completely fails. It first presupposes a fictitious and most unlikely transaction. It further supposes it is of such a nature as to amount to inter-State trade and commerce from its initial stages and then seeks by giving a wide construction to the section to annihilate the whole scheme contained in the provisions. It is sufficient to say that even if an actual transaction of inter-State commerce is found to be impeded by the *Milk Act* so that the freedom of inter-State trade is impaired sec. 92 will prevail over the *Milk Act*, but it is clear that merely because it cannot be foretold that such a state of things is impossible the whole of the relevant provisions of the *Milk Act* do not collapse.

For these reasons I think the appeal should be allowed.

DIXON J. I concur in the judgment delivered by *Rich* J.

EVATT J. One of the points raised for the respondent to this appeal is that sec. 26 of the *Milk Act* 1931 is invalid because of its inconsistency with the guarantee of sec. 92 of the Commonwealth Constitution that trade among the States shall be absolutely free. It is suggested that, as a result of the judgment of the majority of this Court in the recent *Peanut Case* (1), a State cannot lawfully undertake a system of compulsory acquisition for the purpose of pooling and selling the products of the growers, because it is always possible that some grower may desire to sell his products inter-State.

In the present case, it is conceivable that some very optimistic milk producer may wish to sell inter-State. But the machinery of compulsory vesting in the Board (sec. 26), disposal thereof by the Board (sec. 28) and payment to the grower of the proceeds less expenses (sec. 28) must effectually prevent him from so selling.

The answer to the argument based on sec. 92 is that expropriation by the Board proceeds only in relation to "milk supplied for consumption or use within the metropolitan milk distributing district or . . . sub-district thereof." As a consequence, there is an exclusion by the statutory definition itself of that very element of

(1) (1933) 48 C.L.R. 266.

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inter-State transport which is the essential feature of the concept of trade "among" the States. It is only after and so far as the possibility of inter-State transport has been removed from each transaction, that the products come within the range of the compulsory acquisition.

One other possibility was envisaged, that a producer might consign his milk for (*a*) treatment within the metropolitan area, and (*b*) export, in its altered form, to another State. If such a case is within the purview of sec. 26, so that the milk would be divested from the producer (as to which I express no opinion), the chance of subsequent inter-State transport of the milk in its altered form seems to me to be so remote from the primary transaction that it cannot convert the latter into a transaction of inter-State commerce.

I am therefore of opinion that sec. 92 does not invalidate the scheme of compulsory acquisition of milk under sec. 26 of the *Milk Act*.

Upon the other aspects of the case I concur with the judgment of my brother *Rich*, and agree with him that the appeal should be allowed.

McTIERNAN J. In my opinion the appeal should be allowed. I agree with the judgment of my brother *Rich*.

Appeal allowed. Order of the Supreme Court set aside. Question asked by case stated answered No. Costs in this Court to be paid by the appellant in accordance with the order granting leave. No order as to costs in the Supreme Court.

Solicitor for the appellant, *J. E. Clark*, Crown Solicitor for New South Wales.

Solicitors for the respondent, *J. J. Carroll & Son*.

J. B.