[HIGH COURT OF AUSTRALIA.]

JAMES . . . . . PLAINTIFF;

AGAINST

THE COMMONWEALTH . . . . . DEFENDANT.

H. C. OF A. 1935.

MELBOURNE, *May* 16.

SYDNEY, *June* 11.

Rich, Starke, Dixon, Evatt and McTiernan JJ.

Constitutional Law (Cth.)—Freedom of inter-State trade and commerce—Commonwealth legislation—Interference with freedom of inter-State trade—Whether Commonwealth bound by sec. 92 *of Constitution—Previous litigation—Same question raised between same parties—The Constitution* (62 & 63 *Vict. c.* 12), *sec.* 92—*Dried Fruits Act* 1928-1935 (*No.* 11 *of* 1928—*No.* 5 *of* 1935).

The plaintiff, who carried on the business of selling dried fruit inter-State, brought an action against the Commonwealth for the purpose of having the *Dried Fruits Act* 1928-1935 declared invalid as being inconsistent with sec. 92 of the Constitution which, he claimed, bound the Commonwealth as well as the States. The defendant took out a summons to have the action dismissed as vexatious and oppressive on the ground that the question raised in the action had previously been litigated between the same parties in *James* v. *The Commonwealth*, (1928) 41 C.L.R. 442, and decided against the plaintiff. The defendant also demurred to the statement of claim.

Held:—

(1) That the action should not be dismissed as being vexatious and oppressive, as in the prior case the Court, although it ruled that sec. 92 did not bind the Commonwealth, decided the case in the plaintiff's favour on other grounds.

(2) That sec. 92 of the Constitution did not bind the Commonwealth: The rulings to that effect in previous decisions of the High Court should not be reconsidered, and the demurrer should therefore be allowed.

SUMMONS AND DEMURRER.

Frederick Alexander James brought an action in the High Court against the Commonwealth. The statement of claim was, in substance, as follows:—

1. The plaintiff is a fruit merchant residing at Adelaide in the State of South Australia and carrying on business at Adelaide

and Berri in the said State, and has carried on the like business at Adelaide and Berri for a number of years.

2. Since 1922 the plaintiff has devoted most of his time and attention to dealing in " dried fruits " (within the meaning ascribed to those words by an Act of the Commonwealth Parliament entitled the *Dried Fruits Act* 1928-1935) and in connection with, or in the course of, such dealing in such dried fruits, has grown and dried fruit on his orchard at Berri, purchased large quantities of dried fruits from other growers at Berri and surrounding districts, cleaned, graded, processed and packed dried fruits so grown or acquired by him, and sold the same partly in the Commonwealth and partly in England, Canada, New Zealand and elsewhere. Most of the dried fruit so sold by the plaintiff has been, and is, packed and sold with his registered brand " Trevarno " attached, and under that description; and his dried fruit sold under such brand has become known to purchasers as indicating the plaintiff's dried fruits, grown and processed in South Australia. All the plaintiff's dried fruits had at the time of the issue of this writ, in fact, acquired a good reputation, and he did, and does, a large business in and there has been, and still is, a strong demand and a large sale for the said dried fruits (*inter alia*) in New South Wales, Victoria, Western Australia and South Australia.

3. The Dried Fruits Board of South Australia is a board which was originally constituted by, or pursuant to, an Act of the Parliament of South Australia entitled the *Dried Fruits Act* 1924, which Act and the Acts amending the same have now been repealed and replaced by the South Australian *Dried Fruits Act* 1934 under which the Board is continued and the Board has at all times since August 1928 been a " prescribed authority " under, or pursuant to, the Commonwealth *Dried Fruits Act* 1928-1935 and regulations.

4. In 1928 the Parliament of the Commonwealth passed the *Dried Fruits Act* 1928 (No. 11) which Act was amended by the *Dried Fruits Act* 1933 (No. 59) and further amended by the *Dried Fruits Act* 1935 (No. 5) and the Act (No. 11 of 1928) as amended, is now known and cited as the *Dried Fruits Act* 1928-1935 and is herein referred to as " the Act." Regulations have from time to time been

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made by the Governor-General under the Act. The material regulations so made are the *Dried Fruits (Inter-State Trade) Regulations* (being Statutory Rules 1928, No. 91, as amended by Statutory Rules 1928, No. 135; 1930, No. 151; and 1931, No. 28), all of which regulations were repealed by the *Dried Fruits (Inter-State Trade) Regulations*, being Statutory Rules 1934, No. 40, made by the Governor-General on 4th April 1934. The last mentioned regulations have since been amended by Statutory Rules 1934, No. 164, and as amended comprise the whole of the material regulations now in force under or pursuant to the Act.

5. In April 1932 the plaintiff, in the course of his business, entered into a contract in writing for the sale to one Clarton of 80 Hunter Street, Sydney, in the State of New South Wales of 250 cases (each 70 lbs. net) of "Trevarno" brand dried fruits (being seeded raisins) at 6s. per dozen lbs. freight paid to Sydney in the State of New South Wales. In part performance of such contract the plaintiff, on or about 23rd September 1932, placed on board the s.s. *Time* at Port Adelaide aforesaid and forwarded, consigned to the said Clarton, 50 cases of seeded raisins.

6. On 5th October 1932 and before receipt by Clarton of the fruit mentioned in the last preceding paragraph some person unknown, acting on behalf and with the authority of the Commonwealth or its prescribed authority in New South Wales, unlawfully seized and took possession of the said 50 cases of the plaintiff's dried fruits and deprived the plaintiff thereof and converted the same to the use of the defendant. On or about 5th October 1932 the said authorized person posted or caused to be posted to the plaintiff the following notice namely:—

"Form F.

"Commonwealth of Australia.

"*Dried Fruits Act* 1928.

"Notice of Seizure.

"State of New South Wales.

"To F. A. James, Victoria Square, Adelaide.

"Take notice that 50 cases of dried fruits namely dried lexias branded EDC/S each containing 70 one pound packets consigned from Adelaide by A. H. Landseer ex s.s. *Time* which arrived at

Sydney on the 30th September 1932 have this day been seized as forfeited to His Majesty the King on account of a contravention of the *Dried Fruits Act* 1928 inasmuch as a licence had not been issued under the said Act permitting the carriage of the said dried fruits. Dated at Sydney this fifth day of October 1932. Sgd. (Signature illegible). Authorized person." At the foot of the notice was typed a copy of reg. 11 of the regulations, being Statutory Rules 1928, No. 91.

7. On 21st June 1932 the plaintiff, in the course of his business, entered into a contract in writing for the sale to Messrs. H. Hooper & Co. of Sydney of 100 cases (each containing 70 lbs.) 1932 crop, "Trevarno" dried fruits (being seeded raisins) at 6s. net per dozen lbs. f.o.b. Port Adelaide. In part performance of such contract the plaintiff on 1st October 1932 placed on board the s.s. *Milora* at Port Adelaide, and forwarded, consigned to the above-named H. Hooper & Co., 20 cases of seeded raisins.

8. On 10th October 1932 and before receipt by Hooper & Co. of the fruit mentioned in the last preceding paragraph, some person unknown, acting on behalf and with the authority of the defendant or its prescribed authority in New South Wales, unlawfully seized and took possession of the 20 cases of the plaintiff's dried fruits and deprived the plaintiff thereof and converted the same to the use of the defendant. On 10th October 1932 the authorized person posted or caused to be posted to the plaintiff a notice in the like form to that set out in par. 6 hereof.

9. The dried fruits, so seized as alleged in pars. 6 and 8 have never been returned to the plaintiff but were in fact sold and the proceeds of such sale retained by the defendant.

10. In consequence of the said seizures the plaintiff has suffered damage.

11. Since the passing of the Commonwealth *Dried Fruits Act* 1928 (No. 11) the Commonwealth Minister of State for Commerce has, from time to time, purported to fix or determine a percentage or proportion of the total output of dried fruits which each holder of a licence under the Act (or the Act as amended) is or shall be required, as a condition of his licence, to market outside the Commonwealth. The Minister has so purported to fix or determine as aforesaid

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pursuant to the Act and regulations. Notice of such fixing or determination has from time to time been given to the plaintiff and some notifications thereof have been published in the Commonwealth *Gazette*. The last determination so purported to have been made by the Minister is in the form and to the effect following:—*Dried Fruits Act* 1928-1933.—*Dried Fruits* (*Inter-State Trade*) *Regulations*.—Percentage of dried fruits to be exported from Australia.—Whereas by reg. 6 of the *Dried Fruits* (*Inter-State Trade*) *Regulations* it is prescribed that owners' licences shall be issued upon the following conditions (among others) :—(ii) That the licensee shall export from Australia or cause to be exported on his behalf, during the period for which his licence has been issued and during such further period as a prescribed authority considers necessary such percentage of the dried fruits produced in Australia during any specified periods which came into the possession or custody of the licensee prior to the date of issue of his licence or which came into the possession or custody of the licensee on and after the date of issue of this licence as is from time to time fixed by the Minister upon the report of a prescribed authority and notified in the *Gazette*. Now therefore I, Thomas Cornelius Brennan a member of the Executive Council acting for the Minister of State for Commerce and acting in pursuance of the said regulations and of a report of a prescribed authority do hereby fix the undermentioned percentages of dried fruits produced in Australia during the periods specified which come into the possession or custody of any licensee and are required to be exported by him or on his behalf in accordance with the above-mentioned conditions of his licences. Dried fruits produced in Australia during the period commenced on 1st January 1935 and ending on 31st December 1935: Per centum—currants $87\frac{1}{2}$, sultanas 90, lexias 75, prunes $66\frac{2}{3}$, peaches 70, pears 75. Dried fruits produced in Australia during the period commencing on 1st November 1934 and ending on 31st October 1935: Per centum—apricots 60, nectarines 60. Dated this twentieth day of February 1935.—Thos. C. Brennan. For the Minister of State for Commerce." The Minister intends that the said determination is still and should remain in force until altered by him.

12. Towards the end of 1934 and at the beginning of 1935 the plaintiff made, in the usual and ordinary course of his business, contracts for the forward sales of dried fruits (within the meaning aforesaid) to merchants residing in the various States of the Commonwealth. Many of the contracts stipulated for the sale of the plaintiff's dried fruits under the name of "Trevarno." Under the terms of the contracts of sale of such dried fruits to merchants in the States of the Commonwealth (other than the State of South Australia) the plaintiff was under a contractual duty, in order properly to fulfil and carry out the contracts, and each of them, according to the tenor thereof, to deliver the dried fruits therein respectively contracted to be sold by him out of his stocks in South Australia, at the times mentioned in the contracts, f.o.b. Port Adelaide, South Australia, and not otherwise, and most of the contracts required (and it is in accordance with the plaintiff's established business practice) that the plaintiff should receive payment for his dried fruits against the shipping documents. The plaintiff desires and intends to continue to offer for sale and to sell in the Commonwealth further quantities of dried fruits.

13. The Commonwealth *Dried Fruits Act* 1928-1935 and the regulations made thereunder purport to forbid the plaintiff, under pain of incurring the heavy penalties therein provided, from sending any fruit in fulfilment or partial fulfilment of the contracts referred to in par. 17 hereof unless and until he is the holder of a licence under the Act and regulations, by virtue of which he would become subject to compliance with all the terms and conditions of the licence. Such terms and conditions are set out in the regulations, and one of them purports to require that the plaintiff (if a licensee) would comply with the determination set out in par. 11 hereof.

14. In February, March and April 1935, the plaintiff tendered to Melbourne Steamship Co. Ltd., Adelaide Steamship Co. Ltd., McIlwraith McEacharn Ltd., Australian United Steam Navigation Ltd., Howard Smith & Co. Ltd. and other carriers quantities of dried fruits intended and appropriated by him for fulfilment or partial fulfilment of some of the contracts referred to in par. 17 hereof, but the shipping companies and other carriers refused and refuse to carry the plaintiff's dried fruits from South Australia to

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one of the other States of the Commonwealth unless and until the plaintiff holds a licence under the provisions of the Commonwealth *Dried Fruits Act* 1928-1935 and regulations, and the shipping companies and other carriers have informed the plaintiff that they must continue to refuse to carry the plaintiff's dried fruits from South Australia to the other States of the Commonwealth unless and until he obtains a licence as aforesaid. In an endeavour to send some of his dried fruit from South Australia to the other States of the Commonwealth the plaintiff has tendered same to the South Australian Railways Commissioner for carriage but was met with a like refusal on the said ground. There are no other practical means by which the plaintiff can send his dried fruits from South Australia to any of the other States of the Commonwealth, or by which he can deliver his dried fruits in accordance with the terms of his inter-State contracts or at all; and if there were any practical means available to the plaintiff he fears that the defendant or some prescribed authority or some person on behalf of one of them would seize his dried fruit and deprive him of it.

15. The said shipping companies and other carriers have, by reason of the fear of incurring penalties provided in the Commonwealth *Dried Fruits Act* 1928-1935, taken out licences under the Act and regulations and they, and each of them, by reason of the fear of incurring penalties provided for in the Act and regulations, now and for no other reason whatsoever, refuse to carry the plaintiff's dried fruits from South Australia to any of the other States of the Commonwealth.

16. The defendant has from time to time notified the shipping companies and other carriers that if they carry dried fruits tendered for carriage by any person, not being the holder of a current licence, they will incur such penalties and, from time to time, the defendant sends to such shipping companies and other carriers lists of persons who hold licences and whose fruit (and only whose fruit) may be carried without incurring such penalties. The Dried Fruits Board of South Australia as a prescribed authority under the regulations made under the Act, by its secretary and/or chairman and/or other officer has from time to time forbidden the shipping companies

and other carriers to carry the plaintiff's dried fruits, he not being the holder of a current licence under the Act.

17. The plaintiff contends that he should not be required to take out a licence and that the defendant has no power to, and should not, insist on his taking out a licence as a condition of his being allowed to send his dried fruits carried from South Australia to the other States of the Commonwealth and that the shipping companies and other carriers should not be required to refuse or decline to carry the plaintiff's dried fruits as aforesaid.

18. The plaintiff fears that, unless restrained by the declaration, order or injunction of this Honourable Court, the defendant or a prescribed authority or other the Minister or officer of the defendant will continue to act as aforesaid and prevent the plaintiff from carrying on his business and further that they or some one or more of them will seize and deprive the plaintiff of his dried fruits if carried from South Australia to any of the other States of the Commonwealth. The plaintiff's business as a dealer in dried fruits is being greatly interfered with and his dealings with merchants in other States of the Commonwealth is in danger of being destroyed and he is daily suffering heavy pecuniary loss. He is unable to further fulfil his inter-State contracts (mentioned in par. 12 hereof) and some of the merchants to whom he has sold fruit as aforesaid are threatening to, and will in fact, cancel their respective contracts and claim damages from the plaintiff by reason of his failure further to deliver dried fruits to them in accordance with their respective contracts. The plaintiff is unable to realize on his stocks of dried fruits or to enter into further contracts for the sale of 1935 season's dried fruits as he would in fact now do but for the Act and/or the regulations made thereunder and/or the acts of the defendant.

19. The plaintiff claims :—

(1) The following declarations :

(*a*) that the *Dried Fruits Act* 1928-1935 is beyond the powers of the Parliament of the Commonwealth of Australia and therefore invalid and of no effect ;

(*b*) that the *Dried Fruits Act* 1928-1935 of the Parliament of the Commonwealth of Australia or alternatively secs. 3 and 5 (*a*) thereof contravene sec. 92 of the Constitution and is invalid ;

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(c) that the regulations made under the said *Dried Fruits Act* 1928-1935 or some part or parts thereof contravene sec. 92 of the Constitution and are invalid;

(d) that it is not necessary for the plaintiff to be the holder of a licence under the Act before delivering any "dried fruits" (within the meaning ascribed to those words by the Act) to any person for carriage into or through another State or States of Australia beyond the State in which the delivery is made and that the plaintiff should be allowed to send his dried fruits from South Australia to the other States of the Commonwealth and that the shipping companies and other carriers should be allowed to carry the plaintiff's dried fruit without hindrance or obstruction by the defendant or anyone acting on behalf of the defendant or without the plaintiff being required to take out a licence under the Act and regulations as a condition of his being allowed so to do;

(e) that it is beyond the powers of the Governor-General to prescribe as conditions of the licences (the issue of which is provided for in the Act and regulations) the conditions set out in par. 6 of the regulations being Statutory Rules 1934, No. 40, as amended by par. 4 of the regulations being Statutory Rules 1934, No. 164;

(f) that the determination set out in par. 11 hereof is invalid; that it is not within the power of the Minister of Commerce to make such or similar determinations; and/or that licensees under the Act and regulations should not be required to comply therewith.

(2) The following orders:

(a) an order to restrain the defendant and/or the Dried Fruits Board of South Australia as a prescribed authority under the Act and regulations and each of them, their respective agents and servants, from further obstructing the plaintiff in the shipment or sending of his dried fruit from South Australia to the other States of the Commonwealth;

(b) an order to restrain the defendant from further interfering directly or indirectly with the plaintiff's business, and in

particular to restrain the defendant from interfering with and preventing (directly or indirectly) the plaintiff from fulfilling his contracts for the sale of his dried fruits from his stocks in South Australia to merchants in the other States of the Commonwealth of Australia and from delivering his dried fruits pursuant to his contracts.

(3) The following damages :

(*a*) under pars. 6 and 8 hereof, for the wrongful trespass to seizure and conversion of the plaintiff's dried fruit : Value of 50 cases each containing 70 lbs. seeded raisins, at 5s. 6d. per doz. lbs., £80 4s. 2d. ; bill of lading and stamp thereon, 1s. 7d. ; insurance, 4s. 9d. ; value of 20 cases, each containing 70 lbs. seeded raisins, at 6s. per doz. lbs., £35 ; bill of lading and stamp, 1s. 7d. ; cost of telegrams, letters and other incidentals including loss of time and expense as a result of such seizure, &c., £5—£120 12s. 1d. ;

(*b*) generally, for wrongful interference with the plaintiff's business.

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

The defendant demurred to the statement of claim and delivered a defence thereto.

The demurrer was substantially as follows :—

The defendant demurs to the whole of the statement of claim and says that the facts alleged therein do not show any cause of action. A ground in law for the demurrer is that the *Dried Fruits Act* 1928-1935 and the *Dried Fruits* (*Inter-State Trade*) *Regulations* made by Statutory Rules 1934 No. 40, as amended by Statutory Rules 1934 No. 164, are valid laws of the Commonwealth of Australia and that the acts which the defendant is alleged to have done were authorized by the said Act or regulations validly made thereunder.

By pars. 1 and 4 of its defence the defendant admitted pars. 1 and 4 of the statement of claim ; by pars. 2, 5 to 10 and 12 to 18 the defendant did not admit pars. 2, 5 to 10 and 12 to 18 of the statement of claim. Otherwise the defence was substantially as follows :—

3. The defendant admits that the Dried Fruits Board of South Australia constituted by the *Dried Fruits Act* of that State is a

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prescribed authority under the Commonwealth *Dried Fruits Act* 1928-1935. Save as aforesaid the defendant does not admit any of the allegations in par. 3 of the statement of claim.

11. The defendant admits that the Commonwealth Minister of State for Commerce has from time to time fixed in accordance with the regulations made under the Act the percentage of dried fruits produced in Australia during any specified year which is to be exported by a licensee during the period for which his licence has been issued and that on 20th February 1935 a determination was made in the terms set forth in par. 11 of the statement of claim. Save as aforesaid the defendant does not admit any of the allegations in the said paragraph contained.

19. The *Dried Fruits Act* 1928-1935 is a valid law of the Commonwealth of Australia.

20. The *Dried Fruits* (*Inter-State Trade*) *Regulations* (being Statutory Rules 1928 No. 91, as amended by Statutory Rules 1928 No. 135) were after such amendment and, as subsequently amended by Statutory Rules 1930 No. 151 and 1931 No. 28, a valid law of the Commonwealth of Australia until repealed by the *Dried Fruits* (*Inter-State Trade*) *Regulations* (being Statutory Rules 1934 No. 40).

21. The *Dried Fruits* (*Inter-State Trade*) *Regulations* (being Statutory Rules 1934 No. 40) and the said regulations, as amended by Statutory Rules 1934 No. 164, have at all times been and are a valid law of the Commonwealth of Australia.

22. The acts which the defendant is alleged to have done were authorized by the said Act and regulations.

23. In action No. 54 of 1928 in this Honorable Court brought by the plaintiff against the defendant and certain other persons the plaintiff claimed (*inter alia*) the following declarations :—

A. That the *Dried Fruits Act* 1928 (No. 11 of 1928) of the Parliament of the Commonwealth of Australia contravenes sec. 92 and/or sec. 99 of the Constitution and is invalid.

B. That secs. 3 (1) (*a*), 3 (1) (*b*), 3 (2), 3 (3), 3 (4) and 3 (5) and each of them respectively, and all other sections of the *Dried Fruits Act* 1928 which are auxiliary to such sections, contravene sec. 92 and/or sec. 99 of the Constitution and are invalid ;

C. That the *Dried Fruits* (*Inter-State Trade*) *Regulations* made under Act No. 11 of 1928 on 29th August 1928 (being Statutory Rules 1928 No. 91), which regulations came into operation on 10th September 1928, contravene sec. 92 and/or sec. 99 of the Constitution and are invalid.

D. That regs. 3 (1), 3 (2), 4 (*a*), 4 (*b*), 4 (*c*), 4 (*d*), 4 (*e*), 5 (1), 5 (2), 7 (1), 7 (2), 8, 11 (1), 11 (2), 11 (3) and 12 of the said *Dried Fruits* (*Inter-State Trade*) *Regulations* contravene sec. 92 and/or sec. 99 of the Constitution and are invalid.

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

25. The demurrer was heard in Sydney on 29th November 1928 before the Full Court consisting of *Knox* C.J., *Higgins*, *Powers* and *Starke* JJ. and judgment thereon was given on 12th December 1928. The reasons of their Honors will be found reported in *James* v. *The Commonwealth* (1). All their Honors, as appears from a perusal of the report, decided that neither the said Act nor the regulations were invalid as offending sec. 92 of the Constitution, and that whilst the Act was not invalid as offending sec. 99 of the Constitution, the regulations in their existing form did so offend by reason of the fact that whilst licences could be issued thereunder in the States of New South Wales, Victoria, South Australia and Western Australia, no licences could be issued in the States of Queensland and Tasmania, there being no prescribed authorities in the two last-mentioned States. The demurrer was accordingly overruled.

26. The amendments to the *Dried Fruits Act* 1928 by Act No. 59 of 1933 and by Act No. 5 of 1935, which are now embodied in the *Dried Fruits Act* 1928-1935, are not of a substantial character or of such a nature as to affect the validity of the said Act.

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

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27. The regulations referred to in pars. 20 and 21 hereof are substantially the same, so far as validity or invalidity is concerned, as those which were considered by this honourable Court in the said action, save and except that the vice found therein by their Honors as aforesaid has been eradicated.

28. By reason of the matters set forth in pars. 23 to 27 hereof the plaintiff ought not to be admitted to say that the said Act and/or the said regulations are invalid.

The defendant took out a summons for an order dismissing the action or striking out the statement of claim on the ground that the action was frivolous and vexatious and an abuse of the process of the Court in that the substantial questions raised therein had already been litigated between the parties and decided against the plaintiff. The summons was referred to the Full Court and the Court ordered that both the summons and the demurrer be heard together.

Latham K.C. (with him *Herring*), for the defendant. As to the summons, the same specific question as is now before the Court has previously been litigated between the same parties and has been determined in favour of the present defendant. The result of the previous litigation is reported in *James* v. *The Commonwealth* (1). The summons is under Order XLIV., r. 2, of the *High Court Rules*, and under the inherent jurisdiction of the Court to prevent an abuse of the process of the Court. Order XLIV., r. 2, of the *High Court Rules* corresponds with Order XXV., r. 4, of the English Rules. The Commonwealth *Dried Fruits Act* does not infringe sec. 92 of the Constitution. This action rests and depends on the very points which were decided adversely to the plaintiff in the former action. The authorities relating to the matter are conveniently collected in the *Annual Practice* in the notes to Order XXV., r. 4, at pp. 428 and 429 of the 1935 edition. There can be no appeal to this Court by way of overruling the previous decisions and the principle that there should be an end of litigation should be maintained (*Reichel* v. *Magrath* (2); *Stephenson* v. *Garnett* (3); *Hoystead* v. *Commissioner of Taxation* (4); *Broken Hill Municipal Council* v. *Broken Hill Proprietary Co.* (5); *Green* v. *Weatherill* (6)). The principle is the same whether

(1) (1928) 41 C.L.R. 442.
(2) (1889) 14 App. Cas. 665.
(3) (1898) 1 K.B. 677, at p. 680.
(4) (1926) A.C. 155, at pp. 165, 170.
(5) (1922) 30 C.L.R. 400.
(6) (1929) 2 Ch. 213, at p. 221.

the litigation is between private persons or whether one party is the Commonwealth. The plaintiff should not now be permitted to contend that sec. 92 of the Constitution binds the Commonwealth. The Commonwealth should not be vexed twice for the same cause of action. There should be an end to litigation, and where the matter has been litigated and determined between the same parties, one of those parties should not be permitted to raise the same question in any other Court.

As to the demurrer, the statement of claim alleges that the Commonwealth *Dried Fruits Act* is invalid because it is inconsistent with sec. 92 of the Constitution. This means that sec. 92 binds the Commonwealth. Such a contention is concluded against the plaintiff by *W. & A. McArthur Ltd.* v. *Queensland* (1), *James* v. *South Australia* (2), *James* v. *The Commonwealth* (3) and *R.* v. *Vizzard*; *Ex parte Hill* (4). The action should be struck out as an abuse of the process of the Court, or, alternatively, the demurrer should be upheld because the above cases show that sec. 92 does not bind the Commonwealth.

Ward (with him *Mollison*), for the plaintiff. The power to strike out is discretionary, and the Court should not exercise it without giving the plaintiff a further opportunity to be heard. The matter is not *res judicata* so far as the plaintiff is concerned (*Broken Hill Municipal Council* v. *Broken Hill Proprietary Co.* (5)). *Hoystead* v. *Commissioner of Taxation* (6) is distinguishable, as there the question was mostly one of status (*Inland Revenue Commissioners* v. *Sneath* (7)). The plaintiff relies upon a completely new set of facts. The Act has been amended in a material respect and the plaintiff is seeking the interpretation of a different section from the one that was previously before the Court. In *James* v. *The Commonwealth* (3) the Court did not consider the point at all. In *James* v. *Cowan* (8) the Privy Council said that there had been conflicting decisions in this Court and left the matter open, and, therefore, the discretion of the Court should not be exercised against the plaintiff.

(1) (1920) 28 C.L.R. 530.
(2) (1927) 40 C.L.R. 1.
(3) (1928) 41 C.L.R. 442.
(4) (1933) 50 C.L.R. 30.
(5) (1922) 30 C.L.R. 400.
(6) (1926) A.C. 155.
(7) (1932) 2 K.B. 362.
(8) (1932) A.C. 542; 47 C.L.R. 386.

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[Counsel referred to *Fox* v. *Robbins* (1); *R.* v. *Smithers*; *Ex parte Benson* (2); *New South Wales* v. *The Commonwealth* (3); *Duncan* v. *Queensland* (4); *R.* v. *Vizzard*; *Ex parte Hill* (5); *O. Gilpin Ltd.* v. *Commissioner for Road Transport and Tramways (N.S.W.)* (6).] If there is any conflict between sec. 51 and sec. 92, sec. 51 should be given a restricted operation.

Latham K.C., in reply.

Cur. adv. vult.

June 11. The following written judgments were delivered:—

RICH J. delivered separate judgments in the summons and in the demurrer as follows:—

The Summons.—This is an application to stay an action as an abuse of the process of the Court and as disclosing no reasonable cause of action. The action is brought to impugn the validity of the *Dried Fruits Act* 1928-1935. The present plaintiff brought the action which was decided under the title *James* v. *The Commonwealth* (7). He there attacked the validity of the legislation on the same ground, namely, inconsistency with sec. 92. His action succeeded on another ground. Although the Court ruled that he was wrong upon his first ground he is not estopped, because the decision passed in his favour. He could not appeal from the Court's ruling. It was so to speak a ruling in the air so far as he was concerned. It is now said, however, that he should not be allowed to re-litigate the question. According to his counsel litigation commenced with the intention of carrying the question of the validity of the *Dried Fruits Act* to the Privy Council. Its validity depends upon this Court's ruling that sec. 92 does not bind the Commonwealth. So far from thinking that he should not be allowed to litigate the question I think that he should be encouraged in his intention to obtain the decision of the Privy Council upon it. There is no reason whatever to be found in the course of his

(1) (1909) 8 C.L.R. 115, at p. 127.
(2) (1912) 16 C.L.R. 99, at p. 117.
(3) (1915) 20 C.L.R. 54, at pp. 66, 100, 101.
(4) (1916) 22 C.L.R. 556, at pp. 572, 588, 616, 624.
(5) (1933) 50 C.L.R. 30.
(6) *Ante*, p. 189.
(7) (1928) 41 C.L.R. 442.

previous litigation to make it improper on his part to do so. It is an extremely difficult and doubtful question, and even in this Court there is something to be said against the view, which I personally take, that we ought to consider it closed. It is perfectly open to the Privy Council, where indeed it was expressly reserved (*James* v. *Cowan* (1)). In my opinion it is not the plaintiff's action but the defendant's summons which lacks any reasonable foundation.

The summons should be dismissed with costs.

The Demurrer.—This is a demurrer to a statement of claim. The statement of claim seeks relief against the operation of the *Dried Fruits Act* 1928-1935 and of the regulations thereunder. Unless the Commonwealth Parliament is unaffected by sec. 92 of the Constitution this legislation would be invalidated by its provisions. So much appears to result from *James* v. *Cowan* (2). The fate of the demurrer depends upon the question therefore whether, when sec. 92 declares that inter-State trade shall be free, it means free of State governmental interference or free of State and Commonwealth governmental interferences. Although up to 1920 the members of this Court had expressed from time to time the view that sec. 92 operated to restrict Commonwealth and State legislative power alike, upon a review of the interpretation of the section which in that year the Court undertook in *McArthur's Case* (3), the majority of the members of the Court adopted the view that Commonwealth legislative power was not affected by the provisions of the section. Since that decision there has been no enthusiasm displayed by the members of the Court for the conclusion that sec. 92 does not bind the Commonwealth. Until the present case, however, the question has not been presented to the Court for definitive judicial decision. In *James* v. *The Commonwealth* (4), the Court pronounced upon the question and followed the opinion expressed in *McArthur's Case* (3). But it cannot be said that the decision of the question was necessary to the determination of the case. Two occasions have arisen since in which the question might have been, but was not, raised. The

(1) (1932) A.C., at p. 560; 47 C.L.R., at p. 398.
(2) (1932) A.C. 542; 47 C.L.R. 386.
(3) (1920) 28 C.L.R. 530.
(4) (1928) 41 C.L.R. 442.

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reason why the Court has not been called upon to deal definitively with the question is, no doubt, that the Commonwealth Parliament has not availed itself of the freedom from sec. 92 allowed to it by *McArthur's Case* (1), except in the legislation now under attack and possibly incidentally, and one may say accidentally, in the course of some other enactments. Indeed, in *Vizzard's Case* (2) the Commonwealth intervened with the object of securing an interpretation narrowing the freedom from State interference, and to that end boldly argued that the Commonwealth must be held bound on the terms of the provision notwithstanding *McArthur's Case* (1). The small value placed by the Commonwealth upon the judicial emancipation from sec. 92 which it enjoys under the *McArthur* decision (1) is a consideration which might weigh in a less serious question in deciding whether we should now give effect to the opinion expressed in 1920. But, subject to an appeal to the Privy Council, it is our responsibility to interpret this section of the Constitution. When the Court has adopted an interpretation and declared, it is highly undesirable that the Court should depart from it. The tendency of the Court to do so which *McArthur's Case* (1) so well illustrates has produced results which confirm the truth of this remark. In my opinion we should hold, quite independently of our individual opinions, that the Commonwealth is not bound by sec. 92. An appeal lies to the Privy Council without any certificate under sec. 74. The reasons given in the Privy Council in *James* v. *Cowan* (3), and perhaps more at length in the judgments of myself and *Dixon* J. in *Ex parte Nelson* [*No.* 2] (4), for the conclusion that sec. 92 raises no question *inter se* apply equally well to the case of the Commonwealth as to that of the State. The plaintiff in the present case can therefore carry the matter to the Privy Council. If their Lordships are willing to undertake the interpretation of sec. 92 in relation to any of the transport cases it will be satisfactory for them to pronounce upon this question also. In this Court it has even been found possible to disregard the question whether the Commonwealth is bound in deciding over what area of subject matter the freedom from State interference guaranteed by sec. 92 operates.

The demurrer should be allowed.

(1) (1920) 28 C.L.R. 530.
(2) (1933) 50 C.L.R. 30.
(3) (1932) A.C. 542; 47 C.L.R. 386.
(4) (1929) 42 C.L.R. 258.

STARKE J. The plaintiff in this action seeks a declaration against the Commonwealth that the *Dried Fruits Act* 1928-1935 and regulations made thereunder contravene the provisions of sec. 92 of the Constitution, and are therefore invalid. The action is competent, according to the decisions of this Court, under sec. 75 (III.) of the Constitution (*The Commonwealth* v. *New South Wales* (1); *Attorney-General* (*Vict.*) v. *The Commonwealth* (2); cf. *Monaco* v. *Mississippi* (3)). The Commonwealth issued a summons, seeking an order that the action be dismissed or the statement of claim struck out, and it also demurred to the statement of claim. The summons was founded upon the provisions of Order XVII., r. 30, and also upon the inherent jurisdiction of the Court.

The decision in *James* v. *The Commonwealth* (4) operated, it was suggested, as an estoppel of judgment against the plaintiff (*Hoystead* v. *Commissioner of Taxation* (5); *Broken Hill Proprietary Co.* v. *Broken Hill Municipal Council* (6)). But upon examination it will be found that these proceedings do not so operate; the Commonwealth there demurred to the statement of claim, but the demurrer was overruled, and by a consent order the Commonwealth was dismissed from the action.

A more formidable objection is that the statement of claim discloses no reasonable cause of action, having regard to the opinions and decisions of this Court in *W. & A. McArthur Ltd.* v. *Queensland* (7) and *James* v. *The Commonwealth* (4). In *McArthur's Case* (7) it was said that "the true office of sec. 92 is to protect inter-State trade against State interference, and not to affect the legislative power of the Commonwealth" (*Knox* C.J., *Isaacs* and *Starke* JJ. (8), *Higgins* J. (9), *Rich* J. (10)). If this proposition is accepted, the basis of the plaintiff's claim falls to the ground, and the statement of claim shows no reasonable cause of action. But in *James* v. *Cowan* (11) the Judicial Committee said that the question "will remain for them an open question." And in *R.* v. *Vizzard*; *Ex parte Hill* (12), *Gavan Duffy* C.J., *Evatt* and *McTiernan*

(1) (1923) 32 C.L.R. 200.
(2) *Ante*, p. 533.
(3) (1934) 292 U.S. 313; 78 Law. Ed. 1282.
(4) (1928) 41 C.L.R. 442.
(5) (1926) A.C. 155.
(6) (1926) A.C. 94.
(7) (1920) 28 C.L.R. 530.
(8) (1920) 28 C.L.R., at pp. 556-558.
(9) (1920) 28 C.L.R., at p. 562.
(10) (1920) 28 C.L.R., at p. 569.
(11) (1932) A.C. 542, at p. 560; 47 C.L.R., at p. 398.
(12) (1933) 50 C.L.R. 30.

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JJ. denied the proposition, despite the fact that *Evatt* J. had, in *Huddart Parker Ltd.* v. *The Commonwealth* (1), stated that the proposition was an accepted thesis. Again, in *O. Gilpin Ltd.* v. *Commissioner for Road Transport and Tramways (N.S.W.)* (2), *Dixon* J. stated that he was not satisfied that the proposition was correct, though prepared to act upon it. Long before these cases, various Justices had expressed opinions that sec. 92 bound the Commonwealth and the States alike, but the point was not, I think, the subject of argument until the year 1916, when, in *Duncan* v. *Queensland* (3), the Commonwealth submitted that the section was a limitation upon the powers of the States to restrict inter-State trade. The point was expressly reserved, though the Chief Justice and other Justices, as then advised, could see no sound reason for so limiting the construction of sec. 92. The arguments in that case are worth attention. The question was again argued in 1920 in *McArthur's Case* (4); and its reaction upon the proper interpretation of sec. 92 led in that case to "a closer examination of this question than any previous occasion upon which the Court" had "considered it," with the result that five Justices concurred in the proposition already stated. The summary power of dismissing the action and striking out the statement of claim in the present case should not, in these unusual circumstances, be exercised. The plaintiff should be allowed to pursue his action to a final decision, in this Court or elsewhere.

The demurrer remains for consideration. It was hardly denied that, having regard to the decision of the Judicial Committee in *James* v. *Cowan* (5), the provisions of the *Dried Fruits Act* 1928-1935 passed by the Commonwealth Parliament, and the regulations thereunder, contravened sec. 92 of the Constitution if the provisions of that section applied to the Commonwealth as well as to the States. It was suggested that the Court should reconsider *McArthur's Case* (4), and the proper interpretation of sec. 92 of the Constitution. It is, of course, open to this Court to reconsider its decisions (*Australian Agricultural Co.* v. *Federated Engine-Drivers and Firemen's Association of Australasia* (6); *The Tramways Case* [*No.* 1] (7);

(1) (1931) 44 C.L.R. 492, at p. 522.
(2) *Ante*, p. 189.
(3) (1916) 22 C.L.R. 556.
(4) (1920) 28 C.L.R. 530.
(5) (1932) A.C. 542; 47 C.L.R. 386.
(6) (1913) 17 C.L.R. 261, at pp. 274 et seq.
(7) (1914) 18 C.L.R. 54.

Amalgamated Society of Engineers v. *Adelaide Steamship Co.* (1); *McArthur's Case* (2); *Sexton* v. *Horton* (3)); and it has done so in exceptional cases, e.g., where decisions of the Court were in opposition to the principles laid down by the Judicial Committee, or to the decisions of the Court of Appeal, or to its own decisions. We heard a full argument, however, upon the proper construction of sec. 92 in *R.* v. *Vizzard*; *Ex parte Hill* (4), but the Court did not depart from the proposition established in *McArthur's Case* (2) despite the opinion to the contrary of the Chief Justice and *Evatt* and *McTiernan* JJ. No other result could or should be expected in the present case.

But there is another good reason for refusing to reopen *McArthur's Case* (2). Both the Commonwealth and the States, acting upon that case, have enacted legislation which, but for the decision, might be open to question. Some of this legislation is referred to in *McArthur's Case* (2). A more recent illustration is the *Dried Fruits Act* here under discussion. And there is other similar legislation. Further, collective marketing of goods and competition between railway and motor services have assumed national importance in Australia, and important decisions have been given in this Court upon legislation affecting such matters and the relation of sec. 92 to that legislation; *McArthur's Case* (2) is at the base of these decisions. Reconsideration of it could not be limited to the mere question whether sec. 92 extends to the Commonwealth, for the determination of that question must, as *Higgins* J. said in *McArthur's Case* (2), have a reaction upon the true meaning of sec. 92 and its limitation of legislative and other powers in Australia. The case has been acted upon for so long that this Court should now treat the law as settled. Its review should be undertaken, if undertaken at all, by the Judicial Committee.

The demurrer should therefore be allowed.

DIXON J. delivered separate judgments in the summons and in the demurrer as follows:—

The Summons.—This is a summons under Order XLIV., r. 2, to stay the plaintiff's action. The summons was referred to the

(1) (1920) 28 C.L.R. 129.
(2) (1920) 28 C.L.R. 530.
(3) (1926) 38 C.L.R. 240.
(4) (1933) 50 C.L.R. 30.

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Full Court in view of the fact that the defendant, the Commonwealth, had demurred to the statement of claim. The action is brought by a fruit merchant who desires to resist the operation of the legislation embodied in the *Dried Fruits Act* 1928-1935 of the Commonwealth and in the regulations thereunder. The substance of his case is that the legislation is inconsistent with sec. 92 of the Constitution and therefore void.

In 1928, the same plaintiff brought an action against the Commonwealth in which he complained, first, that the *Dried Fruits Act* 1928 and the regulations thereunder were inconsistent with sec. 92 of the Constitution and therefore invalid, and second, that the regulations were inconsistent with sec. 99 of the Constitution and therefore invalid. The Commonwealth demurred to the plaintiff's statement of claim in that action. The demurrer was overruled upon the ground that the regulations were contrary to sec. 99 and altogether void. The Court expressed the opinion however, and in that sense decided, that sec. 92 did not bind the Commonwealth and that for this reason the first ground of the plaintiff's attack upon the legislation failed. After the demurrer the action, so far as it affected the Commonwealth, was disposed of by an agreement between the parties, part of which was given effect to by a consent order dismissing the Commonwealth from the action. The order did not affect the plaintiff's rights which he now seeks to litigate. The proceedings upon the demurrer are reported (1).

The present action is instituted, as we are informed, with the view of carrying to the Privy Council the question whether sec. 92 binds the Commonwealth. The ruling of this Court that it does not bind the Commonwealth is open to very serious question, and it may be surmised that if the plaintiff had not won his case upon the second ground in 1928 he would or might have carried his first ground to the Privy Council in that litigation. It is said on the part of the Commonwealth in support of the application to stay this action that the plaintiff is seeking to re-litigate a question decided against him and therefore that his proceeding is an abuse of process and oppressive and should be stopped *in limine*. In one sense it is true that the question was decided against him. He submitted the contention

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

to the Court which announced an opinion that he was wrong; but that opinion was not translated into a decree or order and could not be, because upon an independent contention he succeeded. There was no judgment from which he could seek special leave to appeal, none which estopped him. We were informed that his counsel were not permitted to argue the question because it was considered to be covered by the opinion of the majority of the Court expressed in *McArthur's Case* (1). I am quite unable to understand why in these circumstances the plaintiff should not be permitted to prosecute the action. It appears to me a perfectly proper proceeding instituted for the object of obtaining a final decision upon the validity of legislation by the operation of which the plaintiff is aggrieved.

The summons should be dismissed with costs.

The Demurrer.—This is a demurrer to the plaintiff's statement of claim. The substantial question is whether the *Dried Fruits Act* 1928-1935 and the regulations thereunder infringe upon sec. 92 of the Constitution. It was not denied before us, although perhaps it was not conceded, that having regard to the decision of the Privy Council in *James* v. *Cowan* (2), the legislation would be inconsistent with sec. 92 if that provision bound the Commonwealth. For many years it was considered in this Court that sec. 92 did bind the Commonwealth (see *Fox* v. *Robbins* (1909) (3), per *Isaacs* J.; *R.* v. *Smithers*; *Ex parte Benson* (1912) (4), per *Isaacs* J.; *New South Wales* v. *The Commonwealth* (1915) (5), per *Griffith* C.J. (6), per *Barton* J. (7), per *Isaacs* J. (8), per *Gavan Duffy* J. (9); *Foggitt, Jones & Co.* v. *New South Wales* (1916) (10), per *Isaacs* J.; *Duncan* v. *Queensland* (1916) (11), per *Griffith* C.J. (12), per *Barton* J. (13), per *Isaacs* J. (14)). But, in *McArthur's Case* (1920) (15), per *Knox* C.J., *Isaacs* and *Starke* JJ. (16), and, per *Higgins* J. (17), the contrary view was expressed. The case related to legislation of

(1) (1920) 28 C.L.R. at pp. 556-558.
(2) (1932) A.C. 542; 47 C.L.R. 386.
(3) (1909) 8 C.L.R., at p. 128.
(4) (1912) 16 C.L.R., at p. 117.
(5) (1915) 20 C.L.R. 54.
(6) (1915) 20 C.L.R., at p. 66.
(7) (1915) 20 C.L.R., at p. 79.
(8) (1915) 20 C.L.R., at pp. 95, 100.
(9) (1915) 20 C.L.R., at p. 105.
(10) (1916) 21 C.L.R. 357, at p. 365.
(11) (1916) 22 C.L.R. 556.
(12) (1916) 22 C.L.R., at pp. 572, 573.
(13) (1916) 22 C.L.R., at pp. 593, 594.
(14) (1916) 22 C.L.R., at pp. 616 and 620.
(15) (1920) 28 C.L.R. 530.
(16) (1920) 28 C.L.R., at pp. 556-558.
(17) (1920) 28 C.L.R., at p. 563.

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a State, but the opinion was stated as part of the reasoning by which the Court arrived at an interpretation of sec. 92. In *James* v. *The Commonwealth* (1928) (1), the Court again expressed the opinion that the Commonwealth was not bound by sec. 92. As the Court decided the proceeding then before it on another ground, it may not have been necessary in strictness to pronounce upon the question; but, however that may be, the Court did in fact do so. In *Huddart Parker Ltd.* v. *The Commonwealth* (1931) (2), the validity of regulations under Commonwealth legislation was upheld, although if sec. 92 bound the Commonwealth they were open to attack under that provision; an attack which would have required very serious consideration. No such attack was made, and the case was decided upon the basis that sec. 92 ought not in this Court to be considered as binding the Commonwealth. The question was referred to by *Evatt* J. (3).

In *Victorian Stevedoring and General Contracting Co. Pty. Ltd. and Meakes* v. *Dignan* (1931) (4) similar regulations were upheld in the same way. In *R.* v. *Vizzard*; *Ex parte Hill* (1933) (5), *Gavan Duffy* C.J., *Evatt* and *McTiernan* JJ. expressed their disapproval of the view that sec. 92 did not affect the Commonwealth. In *O. Gilpin Ltd.* v. *Commissioner for Road Transport and Tramways (N.S.W.)* (6), I considered it desirable to express my own views upon the vexed question of the manner in which sec. 92 operates in reference to the States. Having done so, I ended my judgment with the following statement:—"It is because of these facts that I have thought it desirable to consider the present case independently of authority. In doing so, I have assumed that the Commonwealth is bound by sec. 92. While I recognize the strength of the considerations which led to the decision to the contrary, I have never felt satisfied that they sufficed to raise a necessary implication limiting the application of the provision to the States. Although quite prepared to follow the decision of the Court in *James* v. *The Commonwealth* (1), that the Commonwealth is not bound, I have not in this or previous cases based any affirmative reasoning upon it" (7).

(1) (1928) 41 C.L.R. 442.
(2) (1931) 44 C.L.R. 492.
(3) (1931) 44 C.L.R., at p. 522.
(4) (1931) 46 C.L.R. 73.
(5) (1933) 50 C.L.R. 30, at pp. 47, 88 and 98.
(6) *Ante*, p. 189.
(7) *Ante*, p. 212.

In deciding this demurrer, we are called upon to choose between the two views taken in these divergent authorities. It appears to me that the Court, as a Court, has twice declared the law to be that sec. 92 does not bind the Commonwealth, and has done so on occasions when its declaration, although not absolutely necessary for the decision of the case, was highly relevant to the matter in hand. Thereafter it twice acted as a Court upon the assumption, although almost *sub silentio*, that this declaration bound the Court to such a construction of sec. 92. Notwithstanding my individual opinion, which I stated in *Gilpin's Case* (1), I think the Court should treat the question as governed by the rulings to the contrary and hold that sec. 92 does not bind the Commonwealth.

Judgment upon the demurrer should be given for the defendant.

EVATT AND MCTIERNAN JJ. delivered separate judgments in the summons and in the demurrer as follows :—

The Summons.—This is an application to stay the action brought by the plaintiff in order to prevent the enforcement against him of certain Commonwealth legislation and regulations and determinations made pursuant thereof. The claim of the plaintiff is based upon the contention that the *Dried Fruits Acts* and regulations are inconsistent with sec. 92 of the Constitution. To the plaintiff's statement of claim the defendant Commonwealth has demurred, but it also contends that, by reason of the previous action between the same parties in the year 1928, the present action should be stayed altogether.

In the previous action, however, the plaintiff actually succeeded in having overruled the Commonwealth's demurrer to his then statement of claim, and the Court held that the regulations passed under the *Dried Fruits Act* then in force gave such a preference to one State over another State of the Commonwealth as was inconsistent with sec. 99 of the Constitution. And although the Court expressed the view that the Commonwealth Legislature was unaffected by the provisions of sec. 92, it appears from the judgment of *Higgins* J. (2), that, in the absence of a Full Bench of Justices, it was deemed undesirable to permit any reconsideration of the pronouncement in *McArthur's Case* (3) that the Commonwealth was not bound by sec. 92.

(1) *Ante*, p. 189.

(2) (1928) 41 C.L.R., at p. 458.

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

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The previous decision of the Court, therefore, in *James* v. *The Commonwealth* (1) does not estop the plaintiff from litigating the question whether sec. 92 invalidates the present legislation and regulations as to dried fruits, by means of which the Commonwealth is from time to time renewing and perfecting its control over the marketing of dried fruits, not only without, but also within, the Commonwealth.

As will appear from our judgment upon the demurrer to the statement of claim, a clear majority of the present Justices of the Court have expressed their individual opinions that the Commonwealth is bound by sec. 92, and the plaintiff is now desirous of obtaining a final decision upon that question from the Privy Council, which took occasion to announce in *James* v. *Cowan* (2) that, for it, the question whether the Commonwealth was bound by sec. 92, would remain an open question.

There is no reason whatever for staying the action and the summons instituted for that purpose should be dismissed with costs.

The Demurrer.—This is a demurrer to the statement of claim of a South Australian trader who alleges that the Commonwealth, acting under the *Dried Fruits Acts* and regulations, but contrary to sec. 92 of the Constitution, is preventing the marketing of the plaintiff's fruit in the other States of the Commonwealth. The plaintiff lends point to his general claim for relief by referring to the seizures set out in pars. 6 and 8 of the statement of claim, and also to his being prevented from disposing of his fruit in the other States, as alleged in par. 14.

At the time of the two seizures—October 5th and 10th, 1932—the Commonwealth legislation in force consisted of the *Dried Fruits Act*, No. 11 of 1928, and the regulations made in pursuance thereof (Statutory Rules, No. 91 of 1928, No. 135 of 1928, No. 151 of 1930, and No. 28 of 1931). This legal position was altered by the Act No. 5 of 1935, sec. 3 of which provided that any regulations made under the 1928 Act and any licences issued or action taken under such earlier regulations should be deemed as effectual as if the 1935 Act itself had been in force when the prior regulation was made.

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

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

Doubts appear to have arisen as to whether an owner carrying his own fruit inter-State infringes the Act (1928 Act, sec. 3 (1) (*a*) and 3 (1) (*b*)). It was also possible that questions might arise as to whether two licences had to be applied for under the 1928 Act (see sec. 3 (1)), and whether, in the case of an owner's licence, the Governor-General was empowered to fix the terms and conditions thereof.

At any rate, it is clear that, in October, 1932, by reason of the 1928 Act and regulations, construed by reference to sec. 3 of the 1935 Act, the owner of dried fruit was prevented from marketing any dried fruit inter-State, except upon the terms and conditions prescribed, such conditions including conditions as to the export of dried fruit from Australia by the applicant for a licence (secs. 3 (4), 3 (5), and 5 (*a*)). The fixing of the quota of fruits to be marketed outside Australia was an essential part of the Commonwealth system of control. Reg. 4 (*b*) of the main body of regulations (No. 91 of 1928), compelled the owner licensee to market outside the Commonwealth such percentage of the yearly output of dried fruits as the Minister determined from time to time. (See Form B of the Schedule to the regulations, and the later form prescribed by Statutory Rule No. 28 of 1931). The form of a Minister's determination appears in par. 11 of the statement of claim.

Therefore, at the time of the seizures mentioned in pars. 6 and 8 of the statement of claim, the plaintiff as an owner of dried fruits was unable to market such fruit in the other States of the Commonwealth without procuring a licence, and, if he did procure a licence, he was required to submit to a governmental determination as to the quantity of his fruit which was to be marketed overseas. In such a case, as was pointed out by Lord *Atkin* in *James* v. *Cowan* (1), the owner is prevented from selling inter-State more than a limited quantity of his goods. In the South Australian legislation discussed in *James* v. *Cowan* (1), the States' scheme of control was carried out in order to secure the " prevention of the sale " inter-State of " the balance of the output " (2), and so as to " prevent persons in South Australia from selling more than the fixed quota in any of the Australian States " (3).

(1) (1932) A.C. 542 ; 47 C.L.R. 386.
(2) (1932) A.C., at p. 559 ; 47 C.L.R., at p. 397.
(3) (1932) A.C., at p. 555 ; 47 C.L.R., at pp. 393, 394.

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It is clear that the object and effect of the Commonwealth's present system of control of dried fruit is substantially the same as that of the State of South Australia, which was held to be contrary to sec. 92. It may be noted that the introduction of carriers' licences by the *Dried Fruits Act* and regulations is no part of a scheme for facilitating and regulating transport. In the transport or carriage as such the Commonwealth is in no way interested, and they are dealt with merely as incidental to the main purpose—that of prohibiting and limiting the marketing of the fruit inter-State. This position existed at the time of the seizures mentioned in pars. 6 and 8 of the statement of claim, and also at the time referred to in par. 14 of the statement of claim, when the plaintiff's marketing inter-State was prevented. At the latter time, the regulations contained in Statutory Rules No. 40 and No. 164 of 1934 were in force. Reg. 6 (*b*) (ii.), as amended by reg. 4 of Statutory Rule No. 164 of 1934, and Form B of the schedule to the rules, show that the system of control is being rigidly maintained.

It is clear that the Commonwealth's legislative and executive authority is being used to enforce a definite policy of limiting and prohibiting the marketing of dried fruits in the various States of the Commonwealth. That policy constitutes an infringement of the rule of absolute free trade among the States which is stated in sec. 92 of the Constitution, and the plaintiff would therefore be entitled to relief unless the Commonwealth be immune from the operation of sec. 92. In our opinion there is no real ground for attributing to it any such immunity.

In the history of the Australian Constitution and of this Court, the first occasion when it was even suggested that the Commonwealth was *not* bound by sec. 92 was in September 1916, during the argument of the case of *Duncan* v. *Queensland* (1). There counsel contended that the Commonwealth was not bound "because any other interpretation would place the taxation of inter-State transactions in trade beyond the powers not only of the States but also of the Commonwealth, which would be unreasonable" (2).

At that time the argument met with scant success, *Isaacs* J., who had never underestimated the extent of Commonwealth authority

(1) (1916) 22 C.L.R. 556.

(2) (1916) 22 C.L.R., at p. 563.

in relation to that of the States, expressly declaring that under sec. 92 Australians were entitled freely to market their goods inter-State "*unhindered by any interference of Commonwealth or State*" (1). He also stated that sec. 92 was "one of the fundamental pacts of the Constitution under which we live" (2), and he remained quite unimpressed by the theory that if the Commonwealth were bound by sec. 92, it would become unable to legislate "with respect to" trade and commerce under sec. 51 (1). On the contrary, he considered that the Commonwealth, though bound by sec. 92, would still possess under sec. 51 (1) "a very large field for legislation with respect to inter-State trade and commerce" (3).

The argument advanced in *Duncan's Case* (4) involved a *petitio principii* because it assumed a very wide—indeed an absurdly wide—interpretation of sec. 92, and the precise interpretation of sec. 92 was the only question in dispute.

Prior to *Duncan's Case* (4) not a single Justice expressed a doubt as to the application of sec. 92 to the Commonwealth. In 1909 *Isaacs* J. declared that sec. 92 was "not capable of being modified or weakened in any degree by any Parliament, whether Commonwealth or State," and added that in this respect the Commonwealth Constitution differs from that of the United States (*Fox* v. *Robbins* (5)). Three years later, in 1912, the same Justice stated that the guarantee of inter-State freedom under sec. 92 was "an absolute prohibition on the Commonwealth and States alike" (*R.* v. *Smithers*; *Ex parte Benson* (6)).

During the war of 1914-1918, the continual exercise of its defence powers brought the legal authority of the Commonwealth into greater prominence. Yet in the *New South Wales* v. *The Commonwealth* (*Wheat Case*) (7), which was decided in March, 1915, no member of the Court considered that sec. 92 did not apply as a general rule of the Constitution. In that case, *Griffith* C.J. said that the provision was "equally binding upon the Commonwealth and the States" (8). *Barton* J. thought that the tenor of the command of sec. 92 prevented those entitled to its benefit from

(1) (1916) 22 C.L.R., at p. 620.
(2) (1916) 22 C.L.R., at p. 605.
(3) (1916) 22 C.L.R., at p. 618.
(4) (1916) 22 C.L.R. 556.
(5) (1909) 8 C.L.R., at p. 128.
(6) (1912) 16 C.L.R., at p. 117.
(7) (1915) 20 C.L.R. 54.
(8) (1915) 20 C.L.R., at p. 66.

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being interfered with " on the part of Commonwealth, or State, or any other authority or person " (1). *Isaacs* J. said : " That section, as I have stated in *Fox* v. *Robbins* (2) and *R.* v. *Smithers* (3) is an absolute limitation on the powers which either Commonwealth or States alike would otherwise have " (4). A similar view was expressed by *Gavan Duffy* J. (5).

Thus, until the war period, the application of sec. 92 to the Commonwealth as well as to the States had always been considered foundational to our Federal system.

The history of the Federal movement goes back much further than is generally supposed, a Committee of the Privy Council stating in its report in the year 1849 on a proposal to federate the then colonies :—

> " The division of New South Wales into two Colonies would further aggravate this inconvenience, if the change should lead to the introduction of three entirely distinct tariffs, and to the consequent necessity for imposing restrictions and securities on the import and export of goods between them. So great, indeed, would be the evil, and such the obstruction of the inter-Colonial trade, and so great the check to the development of the resources of each of these Colonies, that it seems to us necessary that there should be one tariff common to them all, *so that goods might be carried from the one into the other with the same absolute freedom as between any two adjacent counties in England*" (see *Grey, Colonial Policy of Lord John Russell's Administration* (1853), vol. I., p. 450). (Italics are ours.)

In their work on the Constitution *Quick* and *Garran* stated in reference to sec. 92 : " This mandate, in favour of the freedom of inter-State trade and commerce, is as binding on the Federal Parliament as on the States " (*Annotated 'Constitution,'* (1901), p. 945). The view of *Quick* and *Garran* accords with that of the Canadian constitutional writer, *A. H. F. Lefroy* (*Law Quarterly Review*, vol. 15, pp. 291, 292).

In the year 1920, however, this Court, although dealing with a case between a corporation and the State of Queensland, in which the Commonwealth did not even intervene, expressed the opinion, *Gavan Duffy* J. dissenting, that the Commonwealth was not bound by sec. 92. The Justices did not attempt to explain the earlier expressions of opinion in the contrary sense. The essence of the

(1) (1915) 20 C.L.R., at p. 79.
(2) (1909) 8 C.L.R. 115.
(3) (1912) 16 C.L.R. 99.
(4) (1915) 20 C.L.R., at p. 95.
(5) (1915) 20 C.L.R., at p. 105.

reasoning of the majority of the leading judgment (*Knox* C.J., *Isaacs* and *Starke* JJ. is as follows :

> " Sec. 92, if it applied to the Commonwealth, would, in our opinion, practically nullify sec. 51 (1) altogether, and render impossible such measures as the *Australian Industries Preservation Act*, the *Secret Commissions Act*, the *Sea-Carriage of Goods Act*, and exclusive provisions in the *Post and Telegraph Act*, so far as they relate to inter-State transactions " (1).

But it is clear that this reasoning rests upon the prior assumption that, upon its proper construction, sec. 92 will nullify all laws which regulate or control in any degree the manner in which either all trade and commerce or trade and commerce among the States is to be conducted or permitted. Yet, as *Gavan Duffy* J. pointed out,

> " no civilized nation has ever tolerated a trade or commerce, whether foreign or domestic, which was not subject to regulation and control both with respect to the method of carrying it on, and the general conduct of those who carried it on " (2).

In our opinion, it is not right to assume that such Acts of Parliament as were mentioned by *Knox* C.J., *Isaacs* and *Starke* JJ., although they operate *with respect to* trade and commerce among the States, would be " rendered impossible " if sec. 92 applied to the Commonwealth. The *Secret Commissions Act*, for instance, merely punishes corrupt conduct in relation to the procuring of inter-State contracts. It certainly regulates the conduct of persons in relation to contracts providing for the inter-State marketing of goods. But, in our opinion, such an Act does nothing to deny that absolute freedom of trade which is postulated by sec. 92.

The *Australian Industries Preservation Act* aims at repressing all attempts to monopolize inter-State trade where the public will be injured. How does such an Act necessarily interfere with the provisions of sec. 92 ?

The *Sea-Carriage of Goods Act* certainly regulates the relationship between consignor and carrier in the inter-State trade, but whether such an Act should be held to offend against sec. 92 would seem to depend upon the degree of relationship between mere transport and carriage on the one hand, and the inter-State marketing on the other, for, as Lord *Farrer* pointed out, though carriage, like agency and brokerage, is necessary for the operation of trade, it is a subsidiary element of it (*The State in its Relation to Trade, Farrer and*

(1) (1920) 28 C.L.R., at p. 558. (2) (1920) 28 C.L.R., at p. 568.

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Griffen, (1902) p. 29), much the same view being expressed recently by Sir *H. C. Gutteridge*, when he emphasized that buying and selling were the essential elements of international commerce, and carriage, like insurance and finance, was only ancillary to the main purpose of the interchange of goods (*British Year Book of International Law* (1933) p. 77).

The same comment applies to the monopolizing by the Commonwealth of the postal and telegraph services. They set up regulations which *affect* trade, including inter-State trade. We fail to see how they could be thought to infringe sec. 92.

We are not concerned to debate the actual decision of the Court in *McArthur's Case* (1), which may in some respects understate the full operation of sec. 92 (*Vacuum Oil Co. Pty. Ltd.* v. *Queensland* (2); *The Commonwealth and Commonwealth Oil Refineries Ltd.* v. *South Australia* (3)). We would suggest, however, that the setting up of a free-trade system between organized communities is in accordance with a well-known economic doctrine and that neither the words used in sec. 92, nor the underlying doctrine they embody, warrant such an interpretation as, first, resolves "trade, commerce and intercourse" into that infinite number of acts, transactions and operations which occur in the course of it, secondly, subtracts therefrom that number, also infinite, of acts, transactions and operations occurring in the course of "purely domestic" trade, and thirdly declares that the resulting remainder of the acts, transactions and operations cannot be controlled or regulated in any way. This reasoning led to the pronouncement that sec. 92 does not bind the Commonwealth, with the consequence that the latter could lawfully prohibit all inter-State marketing of goods and all inter-State travelling whatsoever! In our view, sec. 92 is not accorded its true significance if the words are analysed separately, considered in abstraction from the rest of the declaration, and the results of the analysis are subsequently synthesized.

Some of the difficulties of the reasoning of *McArthur's Case* (1) are illustrated by the subsequent decisions of this Court. These

(1) (1920) 28 C.L.R. 530. (2) (1934) 51 C.L.R. 108.
(3) (1926) 38 C.L.R. 408.

subsequent decisions were analysed by us in the case of *R.* v. *Vizzard*; *Ex parte Hill* (1). The precise situation of the Commonwealth however, did not fall to be considered in such cases, and in *James* v. *The Commonwealth* (2), decided in 1928, the Court did not consider it desirable to summon the Full Bench for the purpose of reconsidering whether the Commonwealth is bound (see per *Higgins* J. (3)).

It was under these circumstances that *Evatt* J. pointed out in *Huddart Parker Ltd.* v. *The Commonwealth* (4) that it was an "accepted thesis" that the Commonwealth Parliament was not bound by sec. 92. The Court was not requested to reconsider the question in *Huddart Parker's Case* (5), and all we need do is to point out that, if sec. 92 binds the Commonwealth, the Transport Regulations, held valid in *Huddart Parker's Case* (5), would not necessarily infringe sec. 92, any more than the Commonwealth Acts referred to in the passage from *McArthur's Case* (6). The illustrations of legislation given by *Evatt* J. in *R.* v. *Vizzard*; *Ex parte Hill* (7) show that it is not every regulation of the instruments and instrumentalities of inter-State trade which sec. 92 prohibits.

During the course of *Vizzard's Case* (8), the Commonwealth authorities appreciated that it was desirable that the relationship between it and sec. 92 should again be considered, particularly as the Privy Council had intimated in *James* v. *Cowan* (9) that the question whether the Commonwealth was bound by sec. 92 remained for them an open question. Upon the application of the Attorney-General for the Commonwealth, under sec. 40 of the *Judiciary Act*, this Court ordered the removal of the cause from the Supreme Court of New South Wales, and the State of Victoria also intervened. In the course of the hearing before us, the Commonwealth contended, through no less an authority than Sir *Robert Garran*, first, that the Commonwealth, like the States, was bound by sec. 92, and, second, that the State and Commonwealth Legislatures have concurrent authority to regulate

(1) (1933) 50 C.L.R., at pp. 78-80, 88-94, 100-101.
(2) (1928) 41 C.L.R. 442.
(3) (1928) 41 C.L.R., at p. 458.
(4) (1931) 44 C.L.R., at p. 522.
(5) (1931) 44 C.L.R. 492.
(6) (1920) 28 C.L.R. 530.
(7) (1933) 50 C.L.R., at pp. 81, 82.
(8) (1933) 50 C.L.R. 30.
(9) (1932) A.C. 542; 47 C.L.R. 386.

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inter-State trade and commerce, subject to Commonwealth supremacy under sec. 109 in the case of conflicting laws, and, third, that the regulation and co-ordination of transport facilities by a State did not constitute an infringement of sec. 92, where the State regulated all its transport facilities without discrimination against inter-State transport. *Gavan Duffy* C.J., *Evatt* and *McTiernan* JJ. thought that the first two propositions advanced on behalf of the Commonwealth were established as correct, and *Evatt* J. fully discussed the matter of the Commonwealth's supposed immunity from sec. 92 (1). It was thought undesirable, however, that a formal ruling should be given upon the casting vote of the Chief Justice (2). Since *Vizzard's Case* (3) was decided, *Dixon* J. has in *Gilpin's Case* (4) expressed himself as having " never felt satisfied " that the application of sec. 92 should be limited to the States.

We are definitely of opinion that sec. 92 lays down a general rule of economic freedom, and necessarily binds all parties and authorities within the Commonwealth, including the Commonwealth itself, because, as was pointed out by the Privy Council itself, it establishes a " system based on the absolute freedom of trade among the States " (*Colonial Sugar Refining Co.* v. *Irving* (5)). Further, a clear majority of the present members of the Bench is of opinion that the Commonwealth is bound by sec. 92. But it has been made quite clear to the Court during the argument that, whatever decision is given, the unsuccessful party will appeal for a final determination of the question before the Privy Council. The Court has also been informed that in the pending appeal of *Gilpin* it is intended to canvass the rulings of this Court in *Vizzard's Case* (3) and *Willard* v. *Rawson* (6), which two decisions were followed in *Gilpin's Case* (4). Until the Commonwealth Parliament intervenes by legislation under sec. 74 of the Constitution, the Privy Council will retain jurisdiction to deal with these constitutional issues. If the Privy Council determines to exercise this jurisdiction in *Gilpin's Case* (4), the question will arise there and in the present case whether sec. 92 forbids all regulation and control of the manner of conducting inter-State trade, and

(1) (1933) 50 C.L.R., at pp. 82-84.
(2) (1933) 50 C.L.R., at pp. 46-47.
(3) (1933) 50 C.L.R. 30.
(4) *Ante*, p. 189.
(5) (1906) A.C. 360, at p. 367.
(6) (1933) 48 C.L.R. 316.

whether the Commonwealth alone is to be exempted from the general system of absolute free trade which was always supposed to be a foundational provision of the Constitution, and the obtaining of which was one of the leading motives which led to the Federal union of the Australian colonies.

If the question were free of authority, we would disallow the demurrer on the ground that the Commonwealth has no legal authority to maintain its prohibitions and restrictions of the inter-State marketing of dried fruits. But we think that the two cases in which the majority of this Court stated that the Commonwealth may prohibit and restrict inter-State trade should be followed, particularly as Lord *Atkin* said that, for the Privy Council, the question remains an open one (*James* v. *Cowan* (1)).

Accordingly we agree that the demurrer should be allowed.

Demurrer allowed with costs. Summons dismissed with costs. Set off of costs.

Solicitors for the plaintiff, *Edmunds, Jessop, Ward & Ohlstrom.*

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

H. D. W.

(1) (1932) A.C., at p. 560; 47 C.L.R., at p. 398.