[HIGH COURT OF AUSTRALIA.]

HARTLEY AND OTHERS . . . . APPELLANTS;
DEFENDANTS,

AND

WALSH . . . . . RESPONDENT.
INFORMANT,

ON APPEAL FROM A COURT OF PETTY SESSIONS OF VICTORIA.

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MELBOURNE, *June* 4, 7.

SYDNEY, *July* 29.

Latham C.J., Rich, Dixon, Evatt and McTiernan JJ.

Constitutional Law—Freedom of inter-State trade and commerce—Dried fruit—Sale prohibited unless packed in registered packing shed—Excise duty—Contributions by packing sheds towards Act—The Constitution (63 & 64 *Vict. c.* 12), *secs.* 90, 92—*Dried Fruits Act* 1928 (*Vict.*) (*No.* 3670), *secs.* 18, 20—*Dried Fruits Regulations* (*Vict.*), *regs.* 22, 22A.

Regulations made under the *Dried Fruits Act* 1928 (Vict.) provided that no person should sell or buy any dried fruits unless they had been packed in a packing shed registered under the Act. Retail purchases, and, where the purpose was to have the fruits processed or packed in registered packing sheds, purchases by owners of registered packing sheds from other such owners or from growers, and by registered dealers from growers, were excepted. The regulations contained provisions relating to the construction, lighting, ventilation, cleansing, fumigating and spraying of packing sheds, prohibited the employment at such sheds of diseased persons, prescribed methods of grading, packing and describing dried fruits, and required that they be free from disease, decay and deterioration.

Held, by *Latham* C.J., *Rich*, *Evatt* and *McTiernan* JJ. (*Dixon* J. dissenting), that the regulations did not conflict with sec. 92 of the Constitution as interfering with the freedom of inter-State trade.

Sec. 18 of the *Dried Fruits Act* 1928 (Vict.) provided that towards the expenditure of the Victorian Dried Fruits Board in administering the Act there should be contributed in the case of every registered packing shed a sum to be determined in manner provided by the section.

Held, by *Latham* C.J., *Evatt* and *McTiernan* JJ., that this section was not *ultra vires* as imposing a duty of excise contrary to sec. 90 of the Constitution.

Crothers v. *Sheil*, (1933) 49 C.L.R. 399, applied.

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APPEALS, by way of order to review, from a Court of Petty Sessions of Victoria.

Thomas Walsh, an inspector under the *Dried Fruits Act* 1928 (Vict.), laid an information against Frank Hartley in the Court of Petty Sessions at Mildura, alleging that on 27th March 1937 at Mildura the defendant sold certain dried fruits, to wit, forty-eight sweat boxes of currants, which had not been packed in a registered packing shed, contrary to reg. 22 of the *Dried Fruits Regulations* 1936, made under the provisions of the *Dried Fruits Act*. The informant also laid similar informations against Alfred Edwards, Herbert Windsor Tickell and Charles Dennett.

The evidence showed that the defendants, who were growers of dried fruit, sold some of their produce to Frederick A. James, a South Australian packer of dried fruits and the proprietor of a packing shed in that State, that James bought the produce in Victoria for the purpose, apparently, of conveying it to his packing shed in South Australia, that the produce sold was "unprocessed" and had not been packed in a registered packing shed, and that James was not registered as a shed owner or dealer in Victoria. The police magistrate found as against each of the defendants that a sale in contravention of reg. 22 had been proved and that the regulations did not conflict with sec. 92 of the Constitution. The defendants were accordingly convicted of a breach of the regulations.

From these decisions the defendants appealed, by way of order nisi to review, to the High Court.

Ward, for the appellants. Reg. 22 places a restriction on a factory proprietor's acquiring unprocessed fruit from Victorian producers and thus interferes with the freedom of inter-State trade. In the administration of the Act there is a discrimination between the packing sheds in Victoria and in other States. *James* v. *The Commonwealth* (1) rejected the theory that every regulation or

(1) (1936) A.C. 578; 55 C.L.R. 1.

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statute constitutes a breach of sec. 92. The only test is whether the regulation in question operates so as to burden or hinder the passing of goods into and out of the State. If so, it contravenes sec. 92. Such a restriction may so operate whether goods are in transit or at the border or before or after crossing, and the restriction may be direct, apparent or disguised (*James* v. *The Commonwealth* (1)). It is a question of fact whether any regulation does so operate. Many health and sanitary regulations may be valid, but if they prohibit the sale of commodities they must necessarily restrict the freedom of trade. The regulation of sale may, but does not necessarily, so interfere. To decide the question of fact, it is necessary to interpret the language of the statute and regulation and ascertain the legal effect.

[McTIERNAN J.—Does the regulation "canalize" the trade ?]

A law which canalizes the flow of goods may be, but is not necessarily, valid. The expression "across the State borders" used in *James* v. *The Commonwealth* (2) is figurative and should be understood as explained in that case (3). State laws of health and sanitation should operate irrespective of movements of goods and should apply to the sale of goods. Laws which discriminate are invalid, but discrimination is not a necessary ingredient. If this is not so, a form of trade which would otherwise exist will be terminated. The levy imposed by sec. 18 of the *Dried Fruits Act* 1928 for the expenses of the board is really an excise duty and as such is *ultra vires* the State Parliament.

Wilbur Ham K.C. (with him *D. I. Menzies*), for the respondent. The contract between the defendants and James was wholly a Victorian contract and on the facts no question of inter-State trade arose. But, assuming that a question of interference with inter-State trade arose, if *James* v. *The Commonwealth* (4) adopted *R.* v. *Vizzard* ; *Ex parte Hill* (5) there is nothing in the regulation which affects detrimentally any trade at all, although it may affect a few traders. Independently of that the criterion is whether at the

(1) (1936) A.C., at pp. 630, 631 ; 55 C.L.R., at pp. 58, 59.
(2) (1936) A.C., at p. 627 ; 55 C.L.R., at p. 55.
(3) (1936) A.C., at p. 630; 55 C.L.R., at p. 58.
(4) (1936) A.C. 578 ; 55 C.L.R. 1.
(5) (1933) 50 C.L.R. 30.

border there is something such as the passing of goods. This regulation operates at the place of production. It limits the persons to whom the grower is entitled to deliver goods, and it does not check the flow of inter-State trade. It canalizes it. Sec. 18 of the *Dried Fruits Act* 1928 does not impose an excise duty and is valid (*Crothers* v. *Sheil* (1); *Turner* v. *Maryland* (2); *Peterswald* v. *Bartley* (3)).

Ward, in reply, referred to *O. Gilpin Ltd.* v. *Commissioner for Road Transport and Tramways (N.S.W.)* (4); *Peanut Board* v. *Rockhampton Harbour Board* (5); *Riverina Transport Pty. Ltd.* v. *Victoria* (6).

Cur. adv. vult.

July 29.

The following written judgments were delivered :—

LATHAM C.J. These are four appeals by way of order nisi to review the decisions of a magistrate convicting the appellants for a breach of reg. 22 of the *Dried Fruits Regulations* made under the Victorian *Dried Fruits Act* (No. 3670), sec. 20. The charge was that the defendants did, contrary to the regulations, sell certain dried fruits which said fruits had not been packed in a registered packing shed. The regulations, which were made on 21st September 1936, contain the following provisions :—

"22. No person shall sell or buy any dried fruits unless the dried fruits have been packed in a registered packing shed.

"22A. No person shall sell any dried fruits unless—(*a*) the dried fruits are packed and graded in accordance with these regulations; and (*b*) the dried fruits are packed in packages of the sizes, dimensions, and materials, and are branded in accordance with these regulations.

"Provided that the foregoing regulations 22 and 22A shall not apply—(*a*) to a sale by a grower of dried fruits produced by such grower to the owner of a registered packing shed for the purpose of being processed or packed, or to the purchase thereof by such

(1) (1933) 49 C.L.R. 399.
(2) (1882) 107 U.S. 38; 27 Law. Ed. 370.
(3) (1904) 1 C.L.R. 497, at pp. 506, 508, 510.
(4) (1935) 52 C.L.R. 189.
(5) (1933) 48 C.L.R. 266.
(6) *Ante*, p. 327.

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owner from such grower; (*b*) to a sale of dried fruits by the owner of one registered packing shed to the owner of another registered packing shed for the purpose of being processed or packed, or to the purchase thereof by such owner; (*c*) to a sale of dried fruits by a grower to a registered dealer for the purpose of being immediately sent to a registered packing shed for the purpose of being processed or packed, or to the purchase thereof by such dealer from such grower; (*d*) to retail purchases of dried fruits by customers from grocers, storekeepers, or other such retail sellers."

The evidence established that the defendants did sell dried fruits which had not been packed in a registered packing shed and that the transaction did not fall within any one of the four exemptions specified in the proviso to reg. 22A. The defendants contended first that the Act was invalid because it imposed an excise duty contrary to sec. 90 of the Constitution of the Commonwealth, and secondly that the regulations were invalid because they constituted an infringement of sec. 92 of the Constitution.

The contention that the Act imposes an excise duty depended upon sec. 18 of the Act, which provides that towards the expenditure of the Victorian Dried Fruits Board in carrying out the Act there shall be contributed in the case of every registered packing shed a sum determined by the board in accordance with the regulations and not exceeding an amount equal to 1/32 per penny per pound of the value of the dried fruits sold or forwarded for sale from the packing shed in the preceding year. This contribution is specifically provided as a contribution towards carrying out the Act and as a payment for services rendered and cannot, in my opinion, be regarded as a tax forbidden by sec. 90 of the Constitution. A similar charge was dealt with by this court in *Crothers* v. *Sheil* (1). In that case an Act dealing with the marketing of milk provided that the price of the milk should be paid to the suppliers with a deduction for charges incurred in the treatment, carriage, distribution and sale of the milk and for the costs, charges and expenses of the administration of the Act by the Milk Board. It was held that this provision for deductions did not " convert the scheme into one for taxation."

(1) (1933) 49 C.L.R. 399.

In view of this decision I do not see how it can be held that the charge made under the *Dried Fruits Act* is a contravention of sec. 90 of the Constitution.

The regulations provide that the dried fruits to which the regulations apply must be packed in sweat boxes branded in a specified manner and that before they have been processed in a packing shed they cannot be sold otherwise than to certain persons. The regulations permit sale of unprocessed fruits to the owner of a registered packing shed for the purpose of being processed or packed, or by the owner of one registered packing shed to the owner of another registered packing shed for that purpose, or to a registered dealer for the purpose of being sent immediately to a registered packing shed for that purpose. Further, the regulations do not apply to prohibit retail purchases by customers from retail sellers. In the cases under appeal all the defendants (who were not owners of registered packing sheds) sold unprocessed dried fruits to a person who was not the owner of a registered packing shed or a dealer and the transaction was not that of a retail purchase from a retail seller. Therefore the defendants were clearly guilty of the offences charged if the Act and the regulations are valid in their natural meaning.

Of course the validity of the Act or of the regulations cannot depend upon whether or not the sales made by the defendants in these particular cases were part of inter-State trade and commerce or not. But if the Act and regulations should be held to be valid except with regard to sales which are part of such trade and commerce, it would be important to consider whether the sales proved in these cases were sales of that description. The Victorian *Acts Interpretation Act* 1930, sec. 2, provides that the construction of all Acts is to be subject to the Constitution so that they are to be held to be valid to the extent to which they are not in excess of the legislative power of the Parliament of Victoria. It is necessary to consider the effect of this provision only in cases where the Act is in excess of legislative power. For the reasons which I propose to give, I am of opinion that the Act and regulations are valid in their application to all sales, whether they are part of inter-State trade and commerce or not. It is therefore not necessary for me to decide whether the sales in question contained any relevant inter-State element. I

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deal with the case upon the assumption that the sales in question were sales in the course of inter-State trade.

The first question which, in my opinion, it is necessary to consider is whether the Act can, in the light of what was said by the Privy Council in *James* v. *The Commonwealth* (1), be held to be valid.

The regulation under which the defendants were prosecuted was made under sec. 20 of the *Dried Fruits Act* 1928. This Act originally contained in sec. 5 a provision (since repealed) that subject to sec. 92 of the Commonwealth Constitution the Minister might compulsorily acquire any dried fruits in Victoria grown and dried in Australia not being dried fruits held for export under and in accordance with a valid and existing licence granted under the Commonwealth *Dried Fruits Control Act* 1924. This section of the Victorian Act was in all material particulars identical with sec. 28 of the South Australian *Dried Fruits Act* 1924. In *James* v. *Cowan* (2) it was held that "the exercise of powers" under that section by the Minister was "invalid." I understand this statement to mean that the act of the Minister in seizing the fruit of the plaintiff in that case was a trespass because it was not authorized by the statute upon which alone the Minister relied for his defence (See *James* v. *Cowan* (3)). I had understood that in *James* v. *Cowan* (4) the Privy Council had expressly abstained from founding their judgment upon what, in the words of *Isaacs* J., was described as the "annihilating principle" that the whole Act was invalid. Now, however, in *James* v. *The Commonwealth* (5) it has been stated by the Privy Council that the result of *James* v. *Cowan* (6) was that "*the State Act* which gave to the State powers of compulsory acquisition *and* the orders and seizures made under it, were invalid as contravening sec. 92." The whole Act is condemned as "tantamount to a prohibition of export." Thus it has now been explained that the whole Act was invalid. If this be so, then identical reasoning applies in the case of the Victorian Act and the whole of that Act has been invalid *ab initio*. The repeal of the offending section could not make the rest of the Act valid unless the rest of the Act

(1) (1936) A.C. 578; 55 C.L.R. 1.
(2) (1932) A.C. 542 (See pp. 551, 559); 47 C.L.R. 386 (See pp. 390, 397).
(3) (1932) A.C., at p. 548; 47 C.L.R., at p. 387.
(4) (1932) A.C. 542 (See p. 556); 47 C.L.R. 386 (See p. 394).
(5) (1936) A.C., at p. 622; 55 C.L.R., at p. 51.
(6) (1932) A.C. 542; 47 C.L.R. 386.

was re-enacted—and this has not been done. Thus, if what has been said in *James* v. *The Commonwealth* (1) is accepted in its literal significance, the whole of the Victorian Act is invalid. The result would be that sec. 20, which confers the power to make regulations, is invalid and that reg. 22, under which the appellants were convicted, was made without authority. If this view is right the appeal should succeed. I think the conclusion which I have stated follows from the actual words used by their Lordships in *James* v. *The Commonwealth* (1) in the passages cited. But I doubt whether the statements to which I have referred were made with express advertence to the particular question now under consideration. In *James* v. *Cowan* (2) itself their Lordships appear to me to have taken pains to avoid the conclusion that the whole Act was invalid and I therefore think that *James* v. *Cowan* (2) should be considered according to its own terms and not with the particular addition to the decision which was apparently made in *James* v. *The Commonwealth* (1). Thus sec. 20 should not be regarded as invalid by reason of the decision in *James* v *Cowan* (2).

In the next place it has been contended that the regulations operate to prevent, for example, a South Australian packer of dried fruits from carrying on his business of packing dried fruits in South Australia by purchasing dried fruits in Victoria for the purpose of treating them in his packing shed in South Australia. The owner of the South Australian packing shed plainly cannot obtain a Victorian licence for his shed in South Australia and he therefore is in a different position from that of any Victorian packer in relation to Victorian fruits. In my opinion, the business or occupation of packing fruits has no inter-State element in it. It is an operation carried on at a definite place and is begun and completed at that place. It is just like any other manufacturing or producing operation, and in itself it includes no inter-State element. Therefore, in my opinion, there is no substance in this particular argument.

The principal contention of the defendants can be well expressed in the statement contained in the judgment of *Knox* C.J., *Isaacs* and *Starke* JJ., in *W. & A. McArthur Ltd.* v. *Queensland* (3):

(1) (1936) A.C. 578; 55 C.L.R. 1. (2) (1932) A.C. 542; 47 C.L.R. 386.
(3) (1920) 28 C.L.R. 530, at p. 555.

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"The prohibition by a State legislature of inter-State sales of commodities either absolutely or subject to conditions imposed by State law is . . . a direct contravention of sec. 92 of the Constitution." If this statement, taken in its full generality, still expresses the true principle of law, then reg. 22 is clearly invalid, at least in its application to inter-State sales. In order to answer this question it is necessary first to examine certain other provisions contained in the regulations and next to consider the decision of the Privy Council in *James* v. *The Commonwealth* (1), which contains a binding exposition of the meaning of sec. 92.

Reg. 22 prohibits the sale of any dried fruits unless they have been packed in a registered packing shed. Packing sheds, in order to be registered under the Act, must obviously be sheds in Victoria. No person has a right to obtain registration as of course. Sec. 15 of the Act provides that new registrations may be refused if in the opinion of the Governor in Council there are in the relevant parts of Victoria sufficient packing sheds capable of dealing with the fruit produced in that part of Victoria. The regulations contain very stringent provisions relating to the construction, lighting, ventilation, cleansing, fumigating and spraying of packing sheds. Persons suffering from certain diseases cannot be employed in packing the fruit. There are regulations relating to the packing of fruit in clean, new and securely constructed cases of a particular description and size, and the cases are to bear the name and address of the owner or dealer or packer of the fruit, or his registered brand etc. It is required that the fruits shall be packed in a particular manner so that the outer layers are a true indication of the average grade of the contents of the container, and all fruit must be prepared from sound, naturally ripened fruit possessing the characteristic flavour of its kind. It is also provided that the fruit shall be thoroughly cured and free from all disease, decay, deterioration etc. These provisions are to be found in regs. 15, 16 and 17. Other regulations provide for the preparation, quality, size and colour of various kinds of dried fruits. It is therefore plain that the requirement that any unprocessed fruit shall not be sold except to a registered packing shed or for packing in a registered shed is directed to the objective of securing proper

(1) (1936) A.C. 578; 55 C.L.R. 1.

standards and quality in an important food substance. They deal with the subject of food standards with the object of protecting the health of the community and of protecting purchasers against receiving inferior goods as well as of maintaining the reputation of the products of the State. The States undoubtedly have general power to legislate upon matters of health, including food standards, and, prima facie, such legislation is valid. But a law which is a health law may nevertheless be also a regulation of trade. In fact very many health laws dealing with food do operate by regulating the sale of food. Such laws are very common and well known in relation to bread, fruit, milk, meat, butter, margarine and other food substances, as well as drugs. The question which arises in this case is whether a health regulation which operates by controlling sales, including inter-State sales, is an infringement of sec. 92 of the Constitution.

A law regulating the sale of commodities and prohibiting the sale of certain commodities unless prepared or treated in a certain way, even though the law is directed to the promotion of health, must be admitted to be a law with respect to trade and commerce. But sec. 92 does not prevent the making of laws with respect to inter-State trade and commerce. See *James* v. *The Commonwealth* (1), where transport and marketing laws made by a State Parliament are declared to be not necessarily inconsistent with sec. 92 and where it is stated that legislation of this character may be passed by the Commonwealth Parliament under sec. 51 (i.) of the Constitution, i.e., the trade and commerce power. As to such State legislation, the Privy Council quotes with approval a statement to this effect with reference to State laws from the judgment of *Evatt* J. in *R.* v. *Vizzard*; *Ex parte Hill* (2).

The regulation in question in this case is very different from the section of the Act considered in *James* v. *Cowan* (3). In that case the only effect of the legislation, so far as inter-State trade was concerned, was to restrict and limit. This was done in what was regarded as the interest of trade generally, but, so far as inter-State trade was concerned, the only effect of the quota system contained

(1) (1936) A.C., at pp. 621, 622; 55 C.L.R. at pp. 50, 51.
(2) (1933) 50 C.L.R., at p. 94.
(3) (1932) A.C. 542; 47 C.L.R. 386.

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in the Act was to prevent it or to reduce its volume. The regulation in question in this case is very different in character. It is a regulation of trade which is directed towards the promotion of all trade in dried fruits by insisting that they shall be properly treated before they are sold. The function of an Act in this regard may be compared with that of a traffic constable. He controls traffic by holding it up and letting it pass at intervals. Without such control traffic in any busy city would be in a state of chaos, and, indeed, could hardly exist. A similar function is performed in relation to foodstuffs by requiring as a condition of their sale that they shall be in a fit condition for sale and that they shall be so standardized that persons will know what they are getting. In *James* v. *Cowan* (1) their Lordships drew a distinction between legislation which was merely restrictive of inter-State trade and legislation which was directed to such objectives as the prevention of famine, disease and the like, and it was expressly stated that such legislation would not be obnoxious to sec. 92 " because incidentally inter-State trade was affected" (2). These passages were quoted with approval in *James* v. *The Commonwealth* (3). In the latter case the opinion of the Privy Council is clear that sec. 92 does not prevent the operation of " State laws of health and sanitation " (4).

There is thus in *James* v. *The Commonwealth* (5) a plain recognition of the possible validity, not only of State health and sanitary legislation, but also of State marketing legislation, as not being necessarily inconsistent with sec. 92 even though that legislation applies to inter-State trade. Where the marketing legislation in its relation to inter-State trade is merely and purely restrictive, as was the case in *James* v. *Cowan* (1), the law, whether Federal or State, would be invalid ; but where the marketing legislation controls and directs and regulates inter-State trade and, as in the present case, insists upon proper standards being preserved, such a law is not a mere restriction of " freedom at the frontier " and is therefore not rendered invalid by sec. 92.

(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) (1936) A.C., at pp. 622, 623 ; 55 C.L.R., at pp. 51, 52.
(4) (1936) A.C., at p. 625 ; 55 C.L.R., at p. 53.
(5) (1936) A.C. 578 ; 55 C.L.R. 1.

It may be observed that, if the Parliament of Victoria is unable to legislate to prevent the sale of inter-State dried fruit which is not fit or ready for consumption, the same proposition is true in the case of every State. Therefore the State of South Australia, for example, would not be able to prevent such sales. If the fruit was sold to purchasers in an inter-State transaction no South Australian legislation could penalize the transaction. Further, any similar Commonwealth legislation (limited, as it necessarily would be, to inter-State trade) would be invalid on the same ground. Accordingly there would be no means of preventing any food at all, however unfit for human consumption in fact, from being sold for human consumption if only the sale was part of inter-State trade. Further, if a doctrine of free first sale is involved in sec. 92 (See *The Commonwealth and Commonwealth Oil Refineries Ltd.* v. *South Australia* (1); *Vacuum Oil Co. Pty. Ltd.* v. *Queensland* (2)), then it would be impossible to prevent an inter-State purchaser from selling in his own State food or other products which were condemned as unfit for sale both by his own State and by the State from which he brought the goods. In my opinion, for the reasons stated, sec. 92 does not involve such consequences.

Thus I reach the conclusion that a State law which is shown by its own provisions to be a law directed towards procuring standards of quality, condition and grade of articles of commerce is not invalid in its application to inter-State trade. Such a law may have little or no actual effect upon inter-State trade. On the other hand, it may have a considerable effect upon such trade. In the present case one result of the law is that South Australian packers cannot lawfully buy unprocessed Victorian fruit for the purpose of treating and packing it in South Australia. If the Commonwealth Parliament took the view that such purchases ought to be permitted, it appears to me, as at present advised, though it is not necessary to decide the question for the purposes of this case, that Federal legislation could make such sales lawful either unconditionally or subject to such relevant conditions (for example, the sale being to or for an approved packing shed) as the Parliament thought proper to impose.

(1) (1926) 38 C.L.R. 408, at pp. 427 et seq.

(2) (1934) 51 C.L.R. 108, at pp. 127, 128, 133, 134, 141.

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Sec. 99 of the Constitution would prevent the Commonwealth Parliament from giving a preference to any State by such legislation, and sec. 109 would operate to exclude the application of the State law in relation to inter-State trade.

Thus the result is, in my opinion, that the regulation in question is a provision which is within the power of the State Parliament both as health or pure food legislation and as a regulation of trade, including inter-State trade, and that it is not invalid as restraining freedom at the frontier in the sense attributed to that term in the judgment of *James* v. *The Commonwealth* (1) read as a whole.

In my opinion the appeals should be dismissed.

RICH J. These are four appeals from convictions by a magistrate of an offence against State law. The appeals are brought direct to this court on the ground that the Constitution is involved. It is said that the convictions are made in contravention of sec. 92 of the Constitution because the transactions in which the defendants were engaged at the time of the alleged offence were those of inter-State commerce. Unless the defendants were free to offend against the provisions in question of the law of Victoria the freedom of trade and commerce would be impaired. The defendants are growers of currants, lexias and the like, which when dried become "dried fruits" within the meaning of the *Dried Fruits Act* 1928 (Vict.). That Act and its amendments regulate the industry of providing and marketing "dried fruits." Before "dried fruits" are distributed to the consumer here or abroad they must be "packed." The State legislature licenses the packing sheds which do this not unimportant work. The definition of "packing shed" in sec. 3 gives a description of the operation. For it defines "packing shed" to mean any building or erection in which dried fruits are stemmed, processed, graded, sorted or packed for the purposes of trade or sale. The licensing is done by a system of registration and of course the registered packing shed must be in Victoria. The defendants were minded to sell their dried fruits before packing to the proprietor of a South Australian packing shed. They entered into contracts of sale which placed an obligation upon them to deliver the fruits in

(1) (1936) A.C. 578; 55 C.L.R. 1.

South Australia, but the arrangement enabled the buyer at an abatement of price to take delivery himself at the orchard. This he did, but I am willing to suppose that the transaction was one of inter-State trade. The regulations made under the Victorian Acts include a provision that no person shall sell or buy any dried fruits unless the dried fruits have been packed in a registered packing shed (reg. 22). In respect of the transactions in question the defendants have been convicted of an offence against this clause. The question is whether it is valid or involves an infringement of sec. 92. It is one of a number of clauses contained in Part VII. of the amended regulations—a part headed "The maintenance and good order of the industry." The clauses are directed to the use of proper boxes, proper branding, the seeding of currants, the inspection of fruits packed or processed, the re-delivery of fruit by the packer to the grower by way of draw back, proper authentication of the receipt of fruit into a packing shed and the official authorisation of the removal of fruit from the packing shed. Immediately following reg. 22 is reg. 22A: "No person shall sell any dried fruits unless —(*a*) the dried fruits are packed and graded in accordance with these regulations; and (*b*) the dried fruits are packed in packages of the sizes, dimensions, and materials, and are branded in accordance with these regulations."

Both clauses are subject to one proviso which falls into four sub-heads. The proviso is as follows: "Provided that the foregoing regulations 22 and 22A shall not apply—(*a*) to a sale by a grower of dried fruits produced by such grower to the owner of a registered packing shed for the purpose of being processed or packed, or to the purchase thereof by such owner from such grower; (*b*) to a sale of dried fruits by the owner of one registered packing shed to the owner of another registered packing shed for the purpose of being processed or packed, or to the purchase thereof by such owner; (*c*) to a sale of dried fruits by a grower to a registered dealer for the purpose of being immediately sent to a registered packing shed for the purpose of being processed or packed, or to the purchase thereof by such dealer from such grower; (*d*) to retail purchases of dried fruits by customers from grocers, storekeepers, or other such retail sellers."

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The ground upon which the defendants say that reg. 22 offends against sec. 92 of the Constitution is that it operates, as they allege, to prevent growers selling dried fruits to packing sheds in South Australia and New South Wales. There is, of course, no sense in selling fruit which has been already packed by one shed to another shed. So they say that the regulation operates to restrict commerce in unpacked dried fruits to sales to Victorian packing sheds or dealers therefor. This appears to me to take a superficial view only of the character and effect of the regulation. Packed and unpacked dried fruits are not two descriptions of commodity, but two stages in the preparation of one commodity for sale and distribution. The purpose of the regulation is not to check transactions in dried fruits with other States or domestic or external trade in dried fruits. Its purpose is to secure quality and propriety in that trade. It says nothing about passage across the border and does not attempt to restrict it. It is true that the dried fruits must go through a Victorian packing shed but that is because it is considered necessary in the interests of Victorian industry to ensure purity, quality, reliability and attractive appearance in the form in which the dried fruits go into distribution and consumption. In *James* v. *The Commonwealth* (1) the Privy Council deal with a number of laws which in one point of view impose restrictions upon freedom of action in trade, commerce or intercourse which may be inter-State. Their Lordships refer to the monopoly given to the Post Office and say :—" As this provision applies to inter-State as well as intra-State correspondence, it is in one sense a limitation on freedom of intercourse, assuming that term to include correspondence, and it may thus be regarded as an interference with trade. Whether that be so or not, it is, however, a limitation notoriously existing in ordinary usage in all modern civilized communities ; it does not impede freedom of correspondence, but merely, as it were, canalizes its course, just as ' free speech ' is limited by well known rules of law. Very much the same is true of the *Wireless Telegraphy Act* 1905. Nor can it be fairly said that the *Secret Commissions Act* 1905 interferes with freedom of commerce in any sense in which that term is properly used. It forbids irrespective of any State boundary, objectionable trade practices

(1) (1936) A.C., at pp. 625, 626 ; 55 C.L.R., at pp. 54, 55.

in inter-State trade. It merely illustrates how the Commonwealth can make laws under sec. 51 (i.) with respect to inter-State trade and commerce without infringing sec. 92. The same is true of the *Commerce (Trade Descriptions) Act* 1905-1933, which is merely directed to a special form of falsification. The *Australian Industries Preservation Act* 1906-1930 is for the repression of destructive monopolies, and is aimed at preventing illegitimate methods of trading."

No doubt none of the statutory regulations cited in the passage relates to the treatment or preparation of commodities, but over a wide field they illustrate how legislation adopted *alio intuitu* may superficially appear to affect freedom of commerce although on a full consideration it clearly involves no invasion of the freedom guaranteed by sec. 92. In insisting that Victorian dried fruits shall go through a Victorian packing shed it may, in the phrase of Lord *Wright*, be said to " canalize its course," and the canal involves the treatment of what flows through it for the purpose of ensuring that it shall emerge in a state which shall damage neither the Victorian consumer nor the reputation of Victorian vegetable products in external markets. In my opinion sec. 92 does not invalidate reg. 22 of the Victorian *Dried Fruits Regulations* as amended, and the convictions were right.

The appeals should be dismissed with costs.

DIXON J. Each of the appellants was convicted upon an information charging him with selling dried fruits which had not been packed in a registered packing shed, contrary to a regulation made under the Victorian *Dried Fruits Acts*.

The sale in respect of which he was so convicted was made in Victoria to the proprietor of a packing shed situated in South Australia. The sellers were Victorian growers. The agreement to sell was in each case in writing and was expressed to require delivery at the buyer's shed in South Australia. But an arrangement was made that if the buyer carted the fruit himself from the seller's premises there should be a deduction from the price. In three of the four cases a pencil note of the deduction was made underneath the contract thus—" Less £1 per ton cartage." In fact the buyer

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did send lorries to the seller's premises and the fruit was taken away in the lorries. The agreements to sell were expressed as sales by description and not of specific goods. All parties knew and intended that dried fruit grown by the sellers in Victoria should, without going through a Victorian packing shed, be supplied to the buyer for the purpose of his packing it in South Australia. The express condition of the contracts required delivery in South Australia and I do not think that the arrangement by which the buyer was at liberty at a reduction of price to do the cartage takes the transaction out of the description inter-State trade. I think that in each case the transaction was one of inter-State commerce.

The regulation which the sales contravened was adopted on 21st September 1936 in substitution for one made in 1930. The new regulation forbids the sale or purchase of any dried fruits unless the dried fruits have been packed in a registered packing shed. The old regulation included a minor prohibition. But the new regulation adds four provisoes which operate by way of exception. The first excepts a sale by a grower of the dried fruit to the owner of a registered packing shed for the purpose of processing or packing. A registered packing shed means a packing shed registered and approved by the Victorian Dried Fruits Board, and, as sec. 15 of the *Dried Fruits Act* 1928 shows, such a shed is necessarily situated in Victoria. The second exception is of a sale of dried fruits by the owner of one registered packing shed to another for the purpose of processing or packing. The third is of a sale by a grower to a registered dealer for the purpose of immediate dispatch to a registered packing shed. The fourth proviso excepts from the prohibition retail purchases of dried fruits by customers from grocers, storekeepers and other such retail sellers. This operates only as an exemption of the retail customer. The grocer, storekeeper or other seller remains liable as an offender in respect of the sale. When the regulation is considered with its provisoes it is apparent that it would, if valid, confine the sale of dried fruit by the grower to packing sheds registered in Victoria, or to intermediate dealers for delivery to such sheds. The effect is to forbid the sale or delivery of Victorian dried fruit across the border to New South Wales and South Australian packers.

The purchase of unprocessed dried fruit for packing is an ordinary commercial transaction. The regulation itself recognizes that it is so. The sale and delivery of commodities remains, I imagine, at or near the centre of the conception of trade and commerce, although transportation now belongs to the circumference of trade, commerce and intercourse. The regulation deals specifically with sale. It restricts the class of buyers and does so upon a basis which excludes sale to other States.

In my opinion sec. 92 of the Constitution protects the parties to an inter-State sale from its operation. It is not a case of State law saying that a commodity shall not be sold or disposed of at all unless and until it is treated or prepared in some particular manner. Ordinary trade and commerce include the buying of raw material for treatment. It is difficult to suppose that, consistently with sec. 92, a State law could forbid the sale of greasy wool except to a scourer carrying on business in the State or the sale of wheat except to a miller in the State.

The regulation now in question was attacked on behalf of the appellants as a device to avert the consequences of the decision of the Privy Council in *James* v. *The Commonwealth* (1) and was defended on behalf of the respondent as a praiseworthy attempt to secure the purity, quality and proper condition of a product of the State of Victoria. The true purpose or policy inspiring the regulation appears to me to be beside the question. For it operates entirely to forbid inter-State trade between growers and packers in unpacked dried fruit and permits intra-State trade in that commodity.

In my opinion the appeals should be allowed and the convictions set aside.

Evatt J. These are appeals by a number of persons, each of whom was convicted for a breach of reg. 22, made under the *Dried Fruits Act* of the State of Victoria.

The evidence showed that F. A. James, the owner of a packing shed in South Australia, made contracts to purchase from the appellants certain dried fruits which had been dried upon their respective farms. At the date of the contracts, the dried fruits, then

(1) (1936) A.C. 578; 55 C.L.R. 1.

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in "sweat-boxes," were not fit for human consumption, because their chemical composition was still unstable.

The terms of the contracts need not be set out, because, whether or not there was a stipulation for delivery of the dried fruits to James in South Australia, it was the intention of all parties that James should immediately carry the fruit to his packing shed in South Australia. Therefore, it cannot be disputed that the individual acts connected with the making and performance of these particular contracts of sale, including the subsequent placing of the dried fruits upon James' lorries, were transactions containing an inter-State element, for it may be taken that the contracts of sale penalized by the regulations, whether strictly inter-State contracts or not, took place in the course of inter-State trade (*Vacuum Oil Co. Pty. Ltd.* v. *Queensland* (1)). But this only shows that the regulations affected, and necessarily controlled to some extent, inter-State as well as purely Victorian trade. And, as I pointed out in *R.* v. *Vizzard*; *Ex parte Hill* (2) in a passage subsequently quoted with approval by the Privy Council in *James* v. *The Commonwealth* (3),

> "sec. 92 does not guarantee that, in each and every part of a transaction which includes the inter-State carriage of commodities, the owner of the commodities, together with his servant and agent and each and every independent contractor co-operating in the delivery and marketing of the commodities, and each of his servants and agents, possesses, until delivery and marketing are completed, a right to ignore State transport or marketing regulations, and to choose how, when and where each of them will transport and market the commodities."

Reg. 22, the validity of which in relation to inter-State transactions is impugned by the appellants, makes it an offence to sell or buy dried fruits which have not been packed in a registered packing shed. Reg. 22A penalizes the sale of dried fruits unless they are packed, graded and branded in accordance with the regulations. But certain sales and purchases are exempted from penalty.

Although counsel for the appellants attached little significance to the point, it has been suggested that, although the convictions were for breach of reg. 22, the proviso to reg. 22A indicates the true nature and quality of reg. 22. It is clear that the proviso cannot be neglected. But it does not, as suggested, exhibit any hostile

(1) (1934) 51 C.L.R. 108.
(2) (1933) 50 C.L.R., at p. 94.
(3) (1936) A.C. at pp. 621, 622; 55 C.L.R., at pp. 50, 51.

discrimination against inter-State sales (*Riverina Transport Pty. Ltd.* v. *Victoria* (1)). Further, the only sales exempted from penalty by provisos *a*, *b* and *c* are sales made *for the very purpose of being processed or packed*. Proviso *d* exempts from penalty only the purchaser by retail, not the seller, obviously because all antecedent gaps in the possible chain of commercial disposal have already been closed up. The result is to prevent the disposal of dried fruits which are not properly packed, graded, handled and processed. In other words, the scheme of penalties is levied with the one object of securing proper packing and processing of all Victorian-grown dried fruit.

The nature of the compulsory scheme embodied in the regulations is plainly visible. It is to ensure that all dried fruits grown in Victoria shall be prepared, packed, graded and branded in registered packing sheds within the State before they are released for consumption, either within Victoria or elsewhere. By the operation of regs. 22 and 22A, growers, buyers and sellers are all compelled to submit to the rule that all Victorian dried fruits shall be prepared in a way which will protect the health of the consumer and, at the same time, by careful packing, handling and grading, tend to build up the reputation of the locally produced article, and so increase its sale and consumption. To this end, the system of processing at registered packing sheds is established. The sheds must be constructed so as to prevent any contamination of the dried fruits, sweat boxes must be properly cleansed and fumigated, the sheds must be managed so as to secure the best possible preparation of the dried fruits, and a careful system of inspection is set up, centred around the official supervision of the sheds. Further, the regulations provide for compulsory packing and branding with the name of the owner or dealer. Grading according to standard and uniformity of quality in each package are required. The dried fruits must be delivered to the packing sheds in approved sweat boxes, and treatment of the dried fruits at the shed must take place between fixed hours, outside which they may not even be delivered at the sheds. The whole "process" takes only a few hours, but its importance is sufficiently obvious. The purpose of the restrictions is to ensure that the quality

(1) *Ante*, p. 327.

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of the commodity shall be improved and perfected, and that the difference in quality between fruits shall be clearly ascertained, so that, by guaranteeing the consumer against both imposition and danger to health, the reputation of Victorian-grown fruits will be enhanced.

It is only as a necessary incident of the compulsory scheme that, by regs. 22 and 22A, buying and selling of dried fruits is restricted. The penalties attached by regs. 22 and 22A select the point of sale. But that is only because the prevention of the sale of unprocessed fruit is an essential part of the scheme, if it is to be made effective. It is true that the State of Victoria might have framed its regulations somewhat differently. It might have directly enacted that delivery at the registered packing sheds should be compulsory. But such regulation, in order to be effective, would necessarily have penalized delivery elsewhere than at a packing shed. The question whether the most obvious and convenient point—the point of sale—is selected for the imposition of the penalty for not conforming to the scheme, as is the case with most Health and Pure Foods Acts (See, for example, Victorian *Health Act* 1928, sec. 215), or whether the penalty is imposed by reference to the fact that there has been delivery other than at the specified place or in the specified condition is not material. The States have legislative power over inter-State as well as local sales (*James* v. *The Commonwealth* (1)). The only question is whether the particular regulation of sale interferes with " freedom as at the frontier."

The scheme of the regulations is to require an adequate preparation of the dried fruits as a preliminary to the sale thereof. What is adequate is for the State to determine, and here the State has said that treatment at a registered packing shed is essential. The only sales that are permitted are sales which ensure that such treatment will take place.

Learned counsel naturally emphasized that James, the purchaser in the cases under review, possesses an efficient packing shed in South Australia, and that the consumers, whether they are resident in South Australia, or Victoria, or elsewhere, would be sufficiently protected. But this is not the way to determine whether

(1) (1936) A.C. 578; 55 C.L.R. 1.

the present scheme can lawfully be applied to all Victorian-grown fruit. If Victorian growers are entitled to sell and deliver dried fruits which are not yet deemed to be in a proper state for consumption to a purchaser in another State merely because he will pack and prepare them efficiently, such growers must be equally entitled to sell the fruit in a similar condition, either to packers in another State who will not pack or prepare them adequately, or to consumers or dealers in another State who will not pack them at all. For, although the legislation of the other States of Australia may deal efficiently with the protection of the health of the consumer, and with the proper grading and preparation of the consumable product, it may deal with those matters neither efficiently nor at all.

Here, the State of Victoria, not for the purpose of restricting the sales of its dried fruits either within Victoria, or inter-State or overseas, but for the purpose of increasing such sales, chooses to insist that its product shall be above suspicion, in order to preserve its reputation with dealers and consumers wherever they may be. For this purpose, the State requires that the dried fruits shall be properly treated and packed at sheds where, in its opinion, the treatment and packing will be adequately carried out. The regulations apply, not only to purely Victorian sales, but to sales having an inter-State aspect or element and to sales having an overseas aspect or element. It would be subversive of the whole scheme if inter-State sales were granted an immunity from its operation.

It cannot be denied that, in the present regulations, the State of Victoria is to some extent exercising its legislative authority with a view to stimulating trade in dried fruits, domestic, inter-State and overseas, as well as in relation to industry, health and sanitation. But the principles stated in *Vizzard's Case* (1) and approved by the Privy Council (*James* v. *The Commonwealth* (2)) recognize that the legislative authority of the States in relation to inter-State trade is concurrent with that of the Commonwealth, and that much of the general reasoning of *McArthur's Case* (3) cannot be supported.

If it were shown that the authority of the State was being exercised in order to prevent the free passage of commodities from State to

(1) (1933) 50 C.L.R., at p. 94. (2) (1936) A.C. 578; 55 C.L.R. 1.
(3) (1920) 28 C.L.R. 530.

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State, the principle of *James* v. *Cowan* (1) would be applicable. But there is no evidence to support such a finding, and the magistrate has found to the contrary. Both in *James* v. *Cowan* (1) and *James* v. *The Commonwealth* (2) the courts denounced what was called a " quota " scheme for controlling marketing for it infringed sec. 92, either by directly penalizing sales across the border beyond the permitted amount or by expropriating a merchant's dried fruits because he refused to submit to such a scheme. The restrictions there imposed bear no resemblance to the regulations here in question, which interfere in no way with freedom as at the border. Both growers and dealers are at perfect liberty to sell or buy for delivery inter-State, subject to the condition that the commodity shall first be adequately treated and packed in Victoria. It was argued that, if the present regulations were valid, many other enactments of a State would have to be deemed valid, and several possible instances of State laws were referred to by way of analogy, e.g., a State law which simply prohibited all sales of Victorian-grown wheat to any purchaser, local or inter-State, unless and until such wheat had been gristed into flour within Victoria. But such an instance would involve a very different question to the one before us, because, as expressed, the law insisting upon local gristing would not relate to such matters as the storage, grading or preparation of wheat for sale, but would prohibit all trade in Victorian-grown wheat, whether domestic or inter-State.

For the appellants it was said that the present regulations prohibit inter-State trade in unpacked and unprocessed dried fruits. But such a generalization takes no account whatever of the purpose of the packing and processing, which is not to transform the dried fruits into a different saleable commodity, but only to improve its purity, quality, condition and merchantability as dried fruit. A similar generalization might be made in relation to every State law requiring that, before a commodity is released for general sale and consumption, it shall be put into consumable condition, and packed and graded according to declared standards. In such cases, it might equally be contended that there is a complete prohibition of inter-State (and local and overseas) sales of impure foods, of non-

(1) (1932) A.C. 542; 47 C.L.R. 386. (2) (1936) A.C. 578; 55 C.L.R. 1.

pasteurized milk, of unstamped silver, of unbranded poisons, of partly refined sugar, of ungraded fruit, of unpacked butter, or of uninspected butchers' meat. The general nature of the respective laws is sufficiently indicated by the illustrations given. And, as I illustrated in my judgment in *Vizzard's Case* (1), it is often impossible to leave out of account the scheme and purpose of legislation which is challenged as being contrary to sec. 92. In every civilized country, at any rate, it is agreed that incidental restrictions upon, and control of, the methods of trade are quite essential to its profitable conduct. As I stated in *Vizzard's Case* (2),

> "*Roughley's Case* (3) is entirely inconsistent with the notion that, by sec. 92, every person who is engaged, even solely, in inter-State trade is given an unconditional right to choose his own method of conducting that trade within the borders of each and every State. The case proceeds upon the contrary hypothesis that the State may prescribe general rules for the conduct of trade and business and to these rules all persons must conform without sec. 92 being in any way affected."

It is also erroneous to contend that, so long as an inter-State sale is contemplated or effected, sec. 92 confers an unqualified right to sell or purchase within the State of origin a consumable commodity in whatever condition it may be, and whatever may be the stage reached in the course of its being prepared, packed, processed and completed.

The present appellants also argued that the packing business of James in South Australia will be impeded by the present regulations, for all packing of Victorian dried fruits will have to be done in Victoria. The same argument, put in a slightly different form, was that there is discrimination between Victorian packing sheds and sheds outside Victoria. The argument, however put, overlooks two important facts. One is that sec. 92 does not guarantee the right to carry on a business in one State by purchasing consumable commodities from another, although, in the opinion of the second State, such commodities have not reached the stage of being fit or properly prepared for consumption. The second is that there is no discrimination against another State merely because one State chooses to secure that its scheme of compulsory packing, grading and branding under proper inspection shall be carried out within the State. In

(1) (1933) 50 C.L.R., at pp. 79, 80. (2) (1933) 50 C.L.R., at p. 91.
(3) (1928) 42 C.L.R. 162.

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truth, the State has no effective power to secure that it shall be carried out at all, except within its own borders. The exercise of sovereignty within territorial limits is not identical with discrimination against other territories.

Two other points should be noted. First, it was contended that, because the statute gave the board authority to collect a charge not greater than the sum which would be realized by a levy based on the output of the packing sheds, a duty of excise contrary to sec. 90 was imposed. Having regard to the decision in *Crothers* v. *Sheil* (1), it is very difficult to regard the charge as a duty of excise, more especially as the charge is not intended to be passed on to the consumer, but back to the grower. Even if the charge was a duty of excise, its invalidity would not affect the validity of the rest of the Act (See sec. 2 of the *Acts Interpretation Act* 1930 of the State of Victoria). Second, it was suggested that reg. 22 might penalize (*inter alia*) sales within Victoria of dried fruits grown and packed in States outside Victoria. But a perusal of the regulations makes it clear that, from first to last, they are dealing with dried fruits grown in Victoria. Victorian growers alone are represented on the board to which the administration of the Act and regulations has been committed.

Sec. 112 of the Commonwealth Constitution recognizes that "inspection laws" may be passed by a State legislature, and *Quick and Garran* said in 1901 :—

> "The inspection laws of a State are those laws which a State may enact in the exercise of its police powers, providing for the official view, survey, and examination of personal property, the subjects of commerce, in order to determine whether they are in a fit condition for sale according to the commercial usages of the world (*Foster* v. *Port Wardens* (2)). The examination extends to the quality, form, size, weight, and measurement of articles imported" (*The Annotated Constitution of the Commonwealth*—Commentaries, p. 943).

The decisions of the Privy Council in *James* v. *Cowan* (3) and *James* v. *The Commonwealth* (4) illustrate the fact that, in the application of sec. 92, it will seldom be necessary to call in aid the principles gradually evolved in the interpretation of the Constitution of the United States. There the powers of the individual States in

(1) (1933) 49 C.L.R. 399.
(2) (1876) 94 U.S. 246 ; 24 Law. Ed. 122.
(3) (1932) A.C. 542 ; 47 C.L.R. 386.
(4) (1936) A.C. 578 ; 55 C.L.R. 1.

relation to inter-State commerce are far more restricted than in Australia, where their powers are concurrent with those of the Commonwealth. But it is of significance that, even in the United States, laws of the general character now challenged would probably be regarded as valid inspection laws. Two short references may be given. First, Chief Justice *Marshall* in *Gibbons* v. *Ogden* (1) said that

> "the object of inspection laws is to improve the quality of articles produced by the labour of a country; to fit them for exportation; or, it may be, for domestic use. They act upon the subject before it becomes an article of foreign commerce or of commerce among the States, and prepare it for that purpose. They form a portion of that immense mass of legislation, which embraces everything within the territory of a State, not surrendered to the general government: all which can be most advantageously exercised by the States themselves."

Later, in the case of *Turner* v. *Maryland* (2), the concept of inspection laws was again examined, and many illustrations given of the kind of legislation which the court regarded as included within the category of such laws. So far as they go, these decisions of the Supreme Court of the United States support the conclusion that the present regulations are not inconsistent with sec. 92 of the Constitution.

The appeals should be dismissed.

McTIERNAN J. The principal question in each appeal is whether reg. 22 of the *Dried Fruits Regulations* of Victoria infringes sec. 92 of the Constitution. The regulations were made by the Governor in Council under the *Dried Fruits Acts* of the State. Reg. 22 prohibits, subject to the exceptions in the proviso to this regulation, the sale or purchase in Victoria of any dried fruits which have not been packed in a registered packing shed, that is, a packing shed in Victoria approved of and registered with the Dried Fruits Board of the State. The grower is by the regulation saved from the necessity of having the produce packed in a registered packing shed before he may lawfully sell. The proviso says, first, that he may sell his product to the owner of a registered packing shed for the purpose of being processed or packed; secondly, that the owner of one registered

(1) (1824) 22 U.S. 1, at p. 203; 6 Law. Ed. 23, at p. 72.

(2) (1882) 107 U.S. 38; 27 Law. Ed. 370

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packing shed may sell to another for either of the above-mentioned purposes; thirdly, that the grower may sell to a registered dealer for the purpose of immediate despatch to a registered packing shed for either of these purposes. The proviso also excepts the purchase by the owner of the packing shed or the dealer from the prohibition. The proviso lastly guards the retail customers from any liability to which they might presumably have been exposed because the dried fruits purchased by them had not been packed in a registered shed, a result which could have occurred only if antecedently to the purchase there had been an evasion of the prohibition. The effect of reg. 22 is to prohibit any sale or purchase of dried fruits which have not been packed in a shed under official supervision, but at the same time to authorize a limited trade in dried fruits which have not been prepared in this manner. But it saddles every sale made in the course of this limited trade with conditions keeping the trade in defined channels which lead to the registered packing sheds. These sheds are made the outlets for all dried fruit to the inter-State and intra-State markets. The appellants stress that the conditions upon which this trade in dried fruits is excepted from the prohibition can be fulfilled only by sales for delivery in Victoria. This is correct, because there are no registered packing sheds within the meaning of reg. 22 out of Victoria. The weight of this emphasis is displaced by the consideration that it is difficult to see how the regulation would not interfere with the freedom of inter-State trade, assuming that in its present form it has that effect, if another condition were added to the regulation excepting inter-State sales of dried fruits, provided only they were made for the purpose of processing or packing in a prescribed place outside the State. But does the emphasis which is placed on the omission to except inter-State sales of dried fruits, which have not been packed in a registered shed, involve the assumption that the State is forbidden by sec. 92 to extend the prohibition introduced by the regulation to sales of dried fruits entered into within its territorial limits in the course of inter-State trade? In my opinion the omission to except inter-State sales, conditionally or unconditionally, does not turn the present regulation into a violation of the freedom of inter-State trade guaranteed by sec. 92. The scope of this section is narrower than

the ambit of the legislative powers of the State with respect to trade and commerce, including inter-State trade and commerce, carried on within its boundaries (*James* v. *The Commonwealth* (1)).

It cannot be doubted that it is within the powers of a State to intervene in trade and commerce, whether inter-State or intra-State, carried on within its boundaries, by making a law prescribing the method in which goods sold within its boundaries should be prepared or treated or fixing the standard or quality of the goods. The intervention of a State in this manner is not necessarily inconsistent with the freedom of trade guaranteed by sec. 92.

Reg. 22 does not interfere with trade and commerce otherwise than by making it necessary that all dried fruits, whether sold for local consumption or for delivery in another State, should possess a particular standard or quality, that is, that they should have been packed in registered sheds which are under the supervision of the Victorian Government. The omission to make any exception, whether conditionally or unconditionally, of inter-State sales made in Victoria of fruit not possessing this standard or quality does not in itself vitiate the interference. The effect of the exceptions which have been made in the case of sales of dried fruits that have not already been packed in a registered shed is to " canalize " the trade in the commodity from the growers to the market through these sheds. The fruit emerges from the sheds as a commodity which, according to the standard imposed by Victorian law, has then become fit for sale in Victoria, whether sold in inter-State or intra-State trade. The regulation operates, it is true, to interfere with trade in dried fruits, but it is not a just assumption to make, that it is an open or disguised interference with the passage of dried fruits into or out of Victoria. The operation of the regulation is in no way inconsistent with the freedom of the border (*James* v. *The Commonwealth* (2)). It follows that reg. 22 is not within the scope of sec. 92 of the Constitution.

Another ground, upon which the appellants submitted that the Act and regulations are invalid, was that they operate to impose an excise duty on dried fruits, the power to levy a duty of excise

(1) (1936) A.C., at pp. 632, 633 ; 55 C.L.R., at pp. 60, 61.

(2) (1936) A.C., at pp. 630, 631 ; 55 C.L.R., at pp. 58, 59.

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being an exclusive power of the Commonwealth. I agree that there is no substance in this submission (See *Crothers* v. *Sheil* (1)).

It follows that the convictions were right. The appeals should be dismissed.

Appeals dismissed with costs.

Solicitor for the appellants, *R. M. Warner.*

Solicitor for the defendant, *F. G. Menzies*, Crown Solicitor for Victoria.

H. D. W.

[HIGH COURT OF AUSTRALIA.]

MILLER . . . . . APPELLANT
COMPLAINANT,

AND

HILTON . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

H. C. OF A. 1937. MELBOURNE, *May* 17, 18, 28. Latham C.J., Rich, Dixon and McTiernan JJ.

Road Transport—Controlled route—Unlawfully "causing" vehicle to be driven on route—Contract to deliver goods—Goods delivered by employee in employer's absence—No instructions given by employer—Road and Railway Transport Acts 1930 *and* 1931 (*S.A.*) (*Nos.* 1967 *and* 2020), *sec.* 14.

The defendant was charged with causing a motor vehicle to be driven on a controlled route contrary to sec. 14 of the *Road and Railway Transport Acts* 1930 *and* 1931 (S.A.). He had agreed with the vendor of a tractor to deliver it to the purchaser. When the tractor was ready for delivery the defendant was absent and had left his business in charge of his son. The vendor informed the son that the tractor was ready for delivery. The defendant had not given any instructions to his son about delivering the tractor, and the son was not

(1) (1933) 49 C.L.R. 399.