[HIGH COURT OF AUSTRALIA.]

THE MILK BOARD (NEW SOUTH WALES) . PLAINTIFF;

AND

METROPOLITAN CREAM PTY. LTD. . . DEFENDANT.

ON REMOVAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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MELBOURNE, *May* 10, 11; *June* 7; *July* 25.

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

Constitutional Law—Freedom of inter-State trade—State marketing legislation—Expropriation of milk from another State—The Constitution (63 & 64 *Vict. c.* 12) *sec.* 92—*Milk Act* 1931-1936 (*N.S.W.*) (*No.* 59 *of* 1931—*No.* 49 *of* 1936), *sec.* 26.

Milk produced in Victoria and supplied for use in a milk-distributing district constituted under the *Milk Act* 1931-1936 (N.S.W.) is subject to the provisions of that Act and therefore cannot be sold within such a district except in accordance with the marketing scheme provided by the Act.

The Act, so construed, does not contravene sec. 92 of the Constitution.

So *held* by *Latham* C.J., *Rich*, *Evatt* and *McTiernan* JJ. (*Starke* J. dissenting).

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

James v. *The Commonwealth*, (1936) A.C. 578; 55 C.L.R. 1, referred to.

CAUSE removed to High Court.

The Milk Board, incorporated under sec. 12 of the *Milk Act* 1931-1936 of New South Wales, brought an action in the Supreme Court of that State against Metropolitan Cream Pty. Ltd., a company incorporated in New South Wales, which for some time had been and still was regularly receiving at its place of business in the metropolitan milk-distributing district of Sydney cream supplied to it for consumption or use within that district. The plaintiff claimed that, by proclamation made pursuant to sec. 26 of the

Milk Act, the cream so supplied to the defendant at Sydney had become absolutely vested in and the property of the board. The defendant contended that the *Milk Act* was contrary to the provisions of sec. 92 of the Constitution and refused to recognize the plaintiff's title, and, contrary to the plaintiff's directions and instructions, regularly sold and dealt with the cream as its own property, claiming that its ownership had not been transferred to the plaintiff under the Act. The board sought an injunction restraining the defendant from selling, without its consent, milk and cream within the district. The board moved for an interlocutory injunction before the Supreme Court of New South Wales, and, upon application made to the High Court, the suit and the motion for the injunction were removed into that court under sec. 40 of the *Judiciary Act* 1903-1937. The motion was heard before the Full Court of the High Court, the parties consenting to the motion being treated as the trial of the action.

Maughan K.C. (with him *Meares*), for the plaintiff. The crucial facts of this action are that cream has been supplied in the metropolitan district of Sydney by the defendant company in contravention of the *Milk Act*, and the defendant company intends to continue supplying milk as aforesaid in contravention of the Act. The defendant's affidavit shows that the cream supplied comes from Victoria and seeks to justify its action by relying on sec. 92 of the Constitution.

Hardie, for the defendant, stated the defences to the action as follows :—On the true construction of the Act :—(1) (*a*) None of the provisions applies to milk produced outside New South Wales ; (*b*) in any event, vesting or marketing sections of the Act do not apply to milk produced outside New South Wales. (2) (*a*) None of the provisions of the Act applies to milk which is or has been the subject of inter-State trade ; (*b*) in any event, the marketing or vesting sections do not apply to milk which is or has been the subject of inter-State trade. (3) (*a*) On the true construction of sec. 26 of the *Milk Act*, the only milk which vests in the board is milk supplied to and accepted by the board pursuant to sec. 27 of the

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Act; (*b*) if under sec. 26 of the *Milk Act* all milk supplied for consumption vests in the board, then the board is under a statutory obligation to accept delivery of milk and pay compensation for it. The board is not in any way willing to accept and buy milk, and therefore is not entitled to any equitable relief. (4) The court will not grant an injunction, because the milk in question has not any special value.

Maughan K.C. The aims of the *Milk Act* are the complete regulation and control of milk distribution in Sydney and its suburbs for (*a*) hygienic purposes, (*b*) social purposes, (*c*) economic purposes, that is, fixation of prices. The Act applies to all milk intended to be used or distributed in the metropolitan district (secs. 3, 4, 24, 25). The Act applies to milk produced in Victoria only when the milk arrives within an area proclaimed under the Act. [He referred to secs. 25, 30-36, 38, 39, 41, 76 of the Act; *Peanut Board* v. *Rockhampton Harbour Board* (1); *Hartley* v. *Walsh* (2).] Sec. 92 of the Constitution does not apply to this Act (*Hartley* v. *Walsh* (2)). This is a health Act: See sec. 25 (*c*). The provisions of the Act cover cleanliness of dairies and stores; the objective of the Act is to safeguard health. Price-fixing is equally important from this point of view because (*a*) there is an intention to give cheap clean milk for consumption, and (*b*) higher prices enable dairies to keep hygienic appliances. These objectives are carried out by (*a*) a complete regulation of the dairying industry, and (*b*) vesting all milk supplied for consumption or use in the board. As to the first of the defences.—The Act applies to all milk, wherever produced, supplied for consumption or use in a proclaimed area. The *Milk Act* is a local Act relating to consumption and use in the area and has nothing to do with the production of the milk. As to the second defence.—Consideration of sub-sec. 3 of sec. 1 of the Act shows that its true function is that one should find the ordinary meaning of the words in the section and, if it is found to be partially invalid, then the invalid portions should be severed (*R.* v. *Vizzard*; *Ex parte Hill* (3); *Hartley* v. *Walsh* (4); *Matthews* v.

(1) (1933) 48 C.L.R. 266.
(2) (1937) 57 C.L.R. 372.
(3) (1933) 50 C.L.R. 30, at pp. 75, 91, 94.
(4) (1937) 57 C.L.R., at p. 377.

Chicory Marketing Board (Vict.) (1)). *James* v. *The Commonwealth* (2) has been interpreted by the High Court in *Hartley* v. *Walsh* (3). This statute is a bona-fide regulation of the quality and standard of milk, although it includes a marketing scheme. Sec. 23 (1) of the *Milk Act* is not affected by sec. 92 (*Crothers* v. *Sheil* (4); *Attorney-General (N.S.W.)* v. *Homebush Flour Mills Ltd.* (5); *Roughley* v. *New South Wales*; *Ex parte Beavis* (6)). This Act is within the competence of the State Parliament. As to the third defence, there is no evidence at all that the board has refused to buy the milk. As to the fourth defence, an injunction should be given at large and within the equity jurisdiction of New South Wales. Injunction of this type is repeatedly given to safeguard statutory rights and enforce statutory duties.

Hardie, for the defendant. As to defence 1.—In substance the Act is marketing legislation designed for the purpose of creating distributing districts in New South Wales for consuming districts in the same State, regulating and controlling the supply of milk until it reaches the consumer in the distributing district. It is not intended to deal with all milk consumed in a consuming district, but only milk consumed which comes from a distributing district (secs. 6, 22, 23, 26, 27, 28). Sec. 22 must be read subject to sec. 6. If the milk is not expropriated, whatever other remedy the Milk Board possesses as to enforcing the Act, injunction does not lie. As to defence 2.—Either the Act as a whole is bad and *Crothers* v. *Sheil* (7) is wrongly decided, or, alternatively, none of the provisions of the Act applies to milk while it is the subject matter of inter-State trade and commerce; alternatively, the vesting provisions of the Act do not apply to milk while it is the subject matter of inter-State trade and commerce. The *Dairies Supervision Act* 1901, the *Pure Food Act* 1908 and regulations thereunder are all health provisions providing for the supervision of dairies, &c., and the content of milk. *Crothers* v. *Sheil* (7) should not be held to be binding and should be reconsidered. At the time that case was decided the present trade in

(1) (1938) 60 C.L.R. 263, at p. 275.
(2) (1936) A.C. 578; 55 C.L.R. 1.
(3) (1937) 57 C.L.R., at pp. 378, 379, 382, 386, 391, 393.
(4) (1933) 49 C.L.R. 399, at pp. 407, 408.
(5) (1937) 56 C.L.R. 390, at pp. 399, 408.
(6) (1928) 42 C.L.R. 162.
(7) (1933) 49 C.L.R. 399.

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milk from Victoria to New South Wales was not even conceived. [He referred to *Vacuum Oil Co. Pty. Ltd.* v. *Queensland* (1); *Tasmania* v. *Victoria* (2).] As to the third defence, assuming that the vesting provisions of the *Milk Act* apply to all milk wherever produced, the board is bound to pay compensation.

[EVATT J. referred to *Delaney* v. *Great Western Milling Co. Ltd.* (3).]

If an injunction goes, there should be some term put upon the plaintiff as to compensation. As to the fourth defence, there is no evidence that the chattels the subject matter of the suit have any special value (*Kerr* on *Injunctions*, 6th ed. (1927), at pp. 611-612; *Halsbury's Laws of England*, 2nd ed., vol. 18, pp. 93, 94, par. 129).

Maughan K.C., in reply. Expropriation takes place at a certain point of time, when milk is supplied for consumption in metropolitan milk-distributing districts. It does not prevent sales or contracts of sale. As to defence 1, if the Act does not apply to all milk, a number of sections would be nugatory; those sections are secs. 4, 22, 26, 27, 28, 30. Sec. 26 (3) gives rise to a statutory debt for others than dairymen; dairymen are provided for by sec. 28. The intention of the legislature was to control all milk, wherever produced, be it outside or inside the producing districts. As to defence 2, if the defendant is right, all marketing legislation goes by the board (*Peanut Board* v. *Rockhampton Harbour Board* (4)). As to defence 4, the plaintiff is entitled to an absolute injunction.

Cur. adv. vult.

June 7. THE COURT (*Starke* J. dissenting) pronounced the order which appears hereunder and intimated that reasons for judgment would be delivered at a later date.

July 25. The following written judgments were delivered :—

LATHAM C.J. The Milk Board, the plaintiff in these proceedings, was established under the *Milk Act* 1931-1936 of New South Wales. The board claims that milk or cream brought from Victoria into

(1) (1934) 51 C.L.R. 108, at pp. 126, 127, 132-135.
(2) (1935) 52 C.L.R. 157, at p. 181.
(3) (1916) 22 C.L.R. 150.
(4) (1933) 48 C.L.R. 266.

the metropolitan milk-distributing district of Sydney for the defendant to sell for consumption or use in Sydney has become the property of the board under the Act. The defendant has been selling, within the district but without the consent of the board, 600 gallons of Victorian cream every week. The board seeks an injunction restraining the defendant from selling, without its consent, milk and cream within the district. (Milk under the Act includes cream.) The plaintiff moved for an interlocutory injunction before the Supreme Court of New South Wales. Upon application made to this court the suit and the motion for the injunction were removed into the High Court under sec. 40 of the *Judiciary Act* 1903-1937. The motion is now before this court, and the parties have consented to treating the motion as the trial of the action.

The defendant contends that the *Milk Act* is invalid because it infringes sec. 92 of the Constitution of the Commonwealth, which provides that " trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free." The defendant has an alternative argument that the Act upon its true construction does not apply to milk brought from other States for sale in the milk-distributing district or to any inter-State dealing in milk. I propose to deal first with the constitutional point upon the assumption that the Act applies to all milk irrespective of its origin and to all sales of milk in the distributing district.

The defendant's contentions with respect to the effect of sec. 92 of the Constitution may be stated as follows :—

(1) The Act is a collective marketing Act embodying " a compulsory marketing scheme entirely restrictive of any freedom of action on the part of the producers." It is therefore invalid (*Peanut Board* v. *Rockhampton Harbour Board* (1), cited and approved in *James* v. *The Commonwealth* (2)).

(2) The Act is an Act which expropriates property, and the expropriation is made for the purpose of controlling trade, including inter-State trade, and is therefore invalid according to the rules laid down in *James* v. *Cowan* (3).

(1) (1933) 48 C.L.R. 266.
(2) (1936) A.C., at p. 623 ; 55 C.L.R. at p. 52
(3) (1932) A.C. 542 ; 47 C.L.R. 386.

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(3) The Act is a price-fixing Act and therefore, it is argued, is a statute which controls the sale of milk brought from other States and prohibits any such sale unless in accordance with the Act. It is, therefore, inconsistent with sec. 92. Reliance is placed upon *The Commonwealth and Commonwealth Oil Refineries Ltd.* v. *South Australia* (1) and upon *Vacuum Oil Co. Pty. Ltd.* v. *Queensland* (2) —the latter of which cases is approved in *James* v. *The Commonwealth* (3).

(4) It is true that the Act contains provisions relating to hygienic conditions in the production of milk and cream and to the qualities, standards and grades thereof, but it is urged that either these fall with the whole Act, or, if they are severable from the Act and valid, these provisions do not (on the facts proved) entitle the plaintiff to interfere in any manner with the defendant's trade in milk brought from other States. The quality of the defendant's milk is not challenged. The defendant is prepared to concede that if it were of inferior quality the board could prevent the sale of it under the Act or under other statutes relating to food standards.

(5) It is admitted that in *Crothers* v. *Sheil* (4) it was held that the *Milk Act* did not contravene the provisions of sec. 92. But it is pointed out that in that case the court evidently considered that inter-State trade in milk was not a real but an imaginary trade, and that the existence of such a trade could not be considered as within the limits of reasonable anticipation: See *Crothers* v. *Sheil* (5). It is now clear that such trade is a very real thing. The defendant is conducting a substantial inter-State trade in milk between Victoria and Sydney.

For the reasons stated, it is said, the case falls precisely within what *Isaacs* J. described as a most obvious infringement of sec. 92 when, in *Duncan* v. *Queensland* (6), he said: "The moment the State says 'You may keep but shall not sell your merchantable goods, not because they are deleterious, but because they are not,' then trade and commerce are directly prohibited; and though this

(1) (1926) 38 C.L.R. 408.
(2) (1934) 51 C.L.R. 108.
(3) (1936) A.C., at p. 631; 55 C.L.R., at p. 59: See also (1936) A.C., at p. 623; 55 C.L.R., at p. 52.
(4) (1933) 49 C.L.R. 399.
(5) (1933) 49 C.L.R., at pp. 409, 410.
(6) (1916) 22 C.L.R. 556, at p. 621.

is still perfectly competent to the State so far as relates to its purely internal trade, it is, in my clear opinion, invalid if sec. 92 is to have any operation at all—as to inter-State trade." It is said that subsequent decisions of this court and of the Judicial Committee of the Privy Council do not diminish either the accuracy or the force of this statement. The defendant concedes that the Act may possibly establish a *cordon sanitaire* around Sydney, but denies that the Act can establish a *cordon économique*. This Act allows a board to give a monopoly of the sale of milk in Sydney to New South Wales producers. These producers (it is argued) may be arbitrarily selected by the board. They alone will be permitted to earn a living by producing and selling milk. The position is the same as to both wholesale and retail vendors of milk. If the New South Wales Parliament can create an effective monopoly in Sydney trade for New South Wales suppliers of this commodity, it can, it is submitted, create similar monopolies in this and other commodities in other cities, and all other State Parliaments can do the same thing. It is said that, if sec. 92 does not protect inter-State trade from the imposition of such restrictive systems, then the section might as well be struck out of the Constitution.

Not long ago I should have regarded such a case as quite unanswerable on the basis of decisions of this court, and should have thought that nearly every point was well taken, whatever the consequences might have been in limiting the powers of parliaments to give effect to economic policy. The established opinion was that the Constitution said in sec. 92 that part of the economic life of Australia, namely, inter-State trade and commerce, was to be absolutely free. The Constitution did not say from what it was to be free, and therefore the section could only mean that it was to be free of all control whatever, by some or by all authority. But freedom of inter-State trade and commerce from all legislative control would mean mere confusion—indeed, trade and commerce, subject to no applicable law, could not be recognized as trade and commerce. The very subject matter would disappear, because trade and commerce at least involves intelligible and ordered transactions. Intelligibility and order in such transactions mean law of some kind derived from some source. But a view that absolute freedom of inter-State

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trade and commerce meant absolute freedom from all law would have deprived sec. 51 (i) of the Constitution of all meaning. Under sec. 51 (i) the Commonwealth Parliament has power to make laws with respect to trade and commerce among the States. Thus the problem presented by the insertion of sec. 92 into the Constitution was met in *W. & A. McArthur Ltd.* v. *Queensland* (1) by holding that sec. 92 was directed only to the States and that it imposed no prohibition or limitation upon the Commonwealth Parliament, which, therefore, was capable of legislating under sec. 51 (i) without being subject to the restriction imposed by sec. 92.

But this view created grave difficulties. In truth it left inter-State trade and commerce subject only to a few Federal statutes. Many questions were left unanswered. Did the common law of contract apply ? Where was the law to be found which dealt with contractual capacity of persons, the validity of contracts, performance, discharge, and many other matters ? Was it to be found in the law of New South Wales, Victoria, and other States ? If so, how could it be said that inter-State trade and commerce was free from regulation by any State law ? If such law was not to be found in the law of the several States, where could it be found ? No laws made under sec. 51 of the Constitution applied to such matters as those which I have mentioned. Did the various State Sale of Goods Acts apply ? Did carriers' Acts, transport and traffic Acts apply ? The decision in *McArthur's Case* (1) solved the difficulty of the coexistence in the same constitutional document of sec. 51 (i) (power to legislate with respect to inter-State trade and commerce) and sec. 92 (such trade and commerce to be absolutely free). But it created, or at least left outstanding and unsolved, many other difficulties. The difficulties involved in reaching any reasonable interpretation of sec. 92 had been well illustrated before *McArthur's Case* (1) by the *Wheat Case* (*New South Wales* v. *The Commonwealth* (2)), *Foggitt Jones & Co. Ltd.* v. *New South Wales* (3) and *Duncan* v. *Queensland* (4). Since the decision in *McArthur's Case* (1), and notwithstanding that decision, other cases showed how difficult it was to obtain any general agreement upon the meaning

(1) (1920) 28 C.L.R. 530.
(2) (1915) 20 C.L.R. 54.
(3) (1916) 21 C.L.R. 357.
(4) (1916) 22 C.L.R. 556.

and application of sec. 92. Instances may be found in *Roughley* v. *New South Wales*; *Ex parte Beavis* (1), *Ex parte Nelson* [*No.* 1] (2), and other cases which are referred to in *James* v. *The Commonwealth* (3).

I have tried to indicate the nature of the problem which sec. 92 raises. Trade and commerce involves orderly dealing. If no law applies to it, it ceases to exist in so far as it involves rights and obligations of the parties to trading and commercial transactions. If any sensible meaning is to be given to sec. 92, the words " absolutely free " simply cannot be interpreted as meaning that inter-State trade and commerce is to be exempt from all law. The view that sec. 92 means that such trade and commerce is free from State law creates the difficulties which I have stated. I add a reference to the important consideration that sec. 92 is a prohibition which is expressed in general terms and which is not in terms limited to State authorities.

The only solution of the problem, therefore, is to hold that " free " means free from some kind of legislative control, but not free from all kinds of legislative control, and then to define what kind of control can be regarded as consistent with freedom in inter-State trade and commerce. This solution was adopted in *James* v. *The Commonwealth* (4). It is, I think, useless to disguise the fact that this answer to the problem means that the freedom which is protected by sec. 92 is not absolute freedom, but is limited or conditioned freedom. It is said in *James* v. *The Commonwealth* (4) that the freedom which is protected by sec. 92 is the kind of freedom referred to when one speaks of freedom of speech, of which it is said: " Free speech does not mean free speech; it means speech hedged in by all the laws against defamation, blasphemy, sedition and so forth; it means freedom governed by law as was pointed out in *McArthur's Case* (5) " (6); it means freedom " limited by well-known rules of law " (7). The problem which then arises is that of determining what rules of law can be applied by parliaments to inter-State trade and commerce so that such trade and commerce can still be

(1) (1928) 42 C.L.R. 162.
(2) (1928) 42 C.L.R. 209.
(3) (1936) A.C., at pp. 620 et seq.; 55 C.L.R., at pp. 49 et seq.
(4) (1936) A.C. 578; 55 C.L.R. 1.
(5) (1920) 28 C.L.R. 530.
(6) (1936) A.C., at p. 627; 55 C.L.R. at p. 56.
(7) 1936) A.C., at p. 626; 55 C.L.R., at p. 54.

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described in some sense as free. From a general point of view the significance of the decision in *James* v. *The Commonwealth* (1) may be shown by considering a proposition in which *Dixon* J. summed up the prior authorities: "The words 'absolutely free' admit of no qualification, but they are used with reference to governmental control and exclude all such control; trade, commerce, and intercourse among the States are made up of acts, transactions and conduct which, considered as trade, commerce and intercourse, are free of all [State] governmental control whatever (Cf. *McArthur's Case* (2))" (*Peanut Board* v. *Rockhampton Harbour Board* (3)). This is a proposition as to the meaning of "free" which *James* v. *The Commonwealth* (1) denies. In *James* v. *The Commonwealth* (1) the Privy Council held, not only that sec. 92 applied to the Commonwealth as well as to the States, but also that it did not exempt inter-State trade and commerce from all governmental control by either Commonwealth or State. Inter-State trade and commerce is by virtue of sec. 92 free, but "free" means "governed by law." There are great and obvious difficulties in applying such a conception in the solution of what must be dealt with by a court as legal problems. If inter-State trade and commerce can be governed by any law which a parliament chooses to enact, such trade and commerce is no more free than any other potential subject matter of legislation. Thus, there must be some criterion which will make it possible to distinguish between laws which may properly govern such trade and commerce and other laws which, apart from sec. 92, could have governed it, but which sec. 92 prohibits. *James* v. *The Commonwealth* (1), which it is the duty of this court to follow, tells us that the application of laws of the first class will still leave inter-State trade and commerce free.

The solution of the problem which *James* v. *The Commonwealth* (1) supplies is to define the freedom protected by sec. 92 as being "freedom as at the frontier" (4). The difficulties in applying this conception are alleviated by explicit statements in the judgment (5) that certain statutes do not conflict with sec. 92 and that certain

(1) (1936) A.C. 578; 55 C.L.R. 1.
(2) (1920) 28 C.L.R. at pp. 550, 551 and 558.
(3) (1933) 48 C.L.R., at p. 287.
(4) (1936) A.C., at pp. 627-630; 55 C.L.R., at pp. 55-58.
(5) (1936) A.C., at pp. 625-7; 55 C.L.R., at pp. 54, 55, 57.

decisions, as interpreted in the judgment (1), are consistent with the true meaning of sec. 92. I thankfully accept these aids to interpretation.

I have endeavoured, in *Riverina Transport Pty. Ltd.* v. *Victoria* (2), *Hartley* v. *Walsh* (3), *Home Benefits Pty. Ltd. and Household Helps Pty. Ltd.* v. *Crafter* (4) and *R.* v. *Connare*; *Ex parte Wawn* (5), to utilize this assistance in our task in this court. One proposition which I regard as established is that simple legislative prohibition (Federal or State), as distinct from regulation, of inter-State trade and commerce is invalid. Further, a law which is "directed against" inter-State trade and commerce is invalid. Such a law does not regulate such trade, it merely prevents it. But a law prescribing rules as to the manner in which trade (including transport) is to be conducted is not a mere prohibition and may be valid in its application to inter-State trade notwithstanding sec. 92. *R.* v. *Vizzard*; *Ex parte Hill* (6) is an outstanding example of this class of case. Thus, sec. 92 may possibly not prevent a control of trade (similar to that of transport in *Vizzard's Case* (6)) which is directed towards the co-ordination and improvement of services which produce and supply goods for the use of the public. In any such system of control the interests of producers, of middlemen, and of consumers will all be affected. The present case raises the question whether such a system of control of production, transport and marketing (wholesale and retail) is possible in Australia, or whether sec. 92 makes such a system impossible in all cases in relation to inter-State trade and commerce, and therefore, in practice, impossible in relation to any trade and commerce in some commodities. In order to answer this question in the present case it is necessary to state in greater detail the provisions of the *Milk Act*.

Sec. 4 of the Act defines milk as follows: "'Milk' includes cream, and refers only to milk or cream which is sold or to be sold for consumption or use within any milk-distributing district." "Milk-distributing district" means a milk-distributing district

(1) (1936) A.C., at pp. 616-625; 55 C.L.R., at pp. 46-53, 59.
(2) (1937) 57 C.L.R. 327.
(3) (1937) 57 C.L.R. 372.
(4) (1939) 61 C.L.R. 701.
(5) (1939) 61 C.L.R. 596.
(6) (1933) 50 C.L.R. 30.

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established under the Act. "Milk vendor" is defined so as to include any person who sells milk in a milk-distributing district. By sec. 6 it is provided that the Act shall apply to every milk-producing district and to every milk-distributing district established under the Act, and the section defines by reference to schedules a metropolitan milk-distributing district and a producing district for that distributing district. Part II. of the Act deals with the constitution of the Milk Board.

Sec. 22 provides that the board is charged with the regulation and control of the supply of milk within milk-distributing districts. Under sec. 23 the board may determine the minimum prices which may be paid to a dairyman for milk, and may fix prices to be paid for collection, treatment, distribution, &c., of milk, may fix different minimum prices to be paid to dairymen according to grade, quality, &c., and may fix maximum wholesale and retail prices. Sec. 24 enables the board, with the approval of the Minister, to regulate and control the method, &c., of supply, collection and treatment of milk within any producing district or at any milk store: See sec. 4 for definition of "milk store." Under this section also the board may, with ministerial approval, regulate the number of persons who may treat, distribute or sell milk within any distributing sub-district. Sec. 25 provides that the board may issue certificates to dairymen or milk vendors specifying the grade or grades of milk which they are authorized to supply, &c., or sell. This section also enables the board to enter and inspect dairy premises and milk stores, to prohibit the use for human consumption of any unwholesome form of milk, to take samples of milk and to regulate areas of distribution. Under this section also the board may conduct research into milk and the products and by-products of milk.

Sec. 26 is the expropriation section. It provides that, from a day to be appointed by proclamation, milk supplied for consumption or use within the metropolitan milk-distributing district shall become absolutely vested in and become the property of the board free of all mortgages, charges, &c. The rights and interests of every person in such milk are converted into a claim for payment therefor. Sub-sec. 5 of this section provides that no such proclamation shall apply to milk produced and retailed by a "dairyman" on his own behalf.

Secs. 27 and 28 provide for delivery of milk by " dairymen " to the board and for payment to " dairymen." " Dairyman " is defined by sec. 4 as meaning the occupier of dairy premises, and " dairy premises " are defined in such a way as to include any land or premises used for the production of milk which is sold or to be sold for consumption or use within the milk-distributing district. In my opinion the effect of sec. 6, which confines the application of the Act to districts established under the Act, is that only persons within such districts are dairymen within the meaning of the Act. A person who in another State produces milk for consumption or use within a distributing district established under the New South Wales Act is not a " dairyman " to whom the provisions of the Act apply. For example, the provisions of sec. 28 requiring " dairymen " to deliver milk to the board, subject to fixation of quantity by the board, and provisions authorizing control of dairymen or creating offences by dairymen, are not applicable to persons in other States: See secs. 25 (*c*), (*d*), (*f*), (*g*), (*h*), 76 (*a*), (*b*), (*c*). If a person who produces milk in another State cannot be a " dairyman," then, although under sec. 26 his milk may be expropriated and he may be entitled to be paid therefor, the provisions relating to payment to " dairymen " contained in sec. 28 cannot be applied in his case.

Sec. 30 is described in the margin as relating to contracts for sale of milk, but its scope is in fact wider. The section purports to avoid every contract which is made in or outside of New South Wales, whether before or after publication of the proclamation, so far as it relates to milk which is the subject of the proclamation, so far as the contract is not completed by delivery. It is not necessary in this case to consider the meaning, the extent of application or the validity of this section.

Sec. 76 enables the board to make by-laws prescribing grades for milk, methods of production, treatment, storage, distribution and sale of milk, maximum temperatures at which milk is to be kept at any and every stage from its production to its delivery to a purchaser for consumption, requiring milk to be sold in prescribed containers, providing means of cleansing and sterilizing cans, vessels, &c., providing for the inspection of dairy premises and milk stores, and for many other matters relating to the industry of producing, treating, handling, and selling milk.

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Thus, the Act, in relation to milk to which it applies, aims at giving to the board as complete control of the milk as is possible from its origin to its destination.

I now propose to deal with the objections to the validity of the Act which the defendant bases upon sec. 92 of the Constitution. In dealing with this part of the case I repeat that I assume that the Act applies to all milk brought into the Sydney milk-distributing district for consumption or use therein, notwithstanding that the milk may be brought from another State or that it may be supplied to the vendor in Sydney under a contract which is an inter-State transaction.

(1) It is true that the Act is a collective marketing Act. In the *Peanut Board Case* (1) it was said that such an Act "controls directly the commercial dealing in peanuts by the grower and aims at, and would, apart from sec. 92, accomplish, the complete destruction of his freedom of commercial disposition of his product" (per *Rich* J. (2)). The learned justice proceeded to say: "Part of this freedom is guaranteed by sec. 92." It was therefore held that the marketing Act which was there in question, and the Order in Council made under the Act, were ineffective to prevent the grower from disposing of his products in inter-State trade and commerce, and that the expropriation section (corresponding to sec. 26 of the *Milk Act*) did not give any title to the Peanut Board.

It should be noted, however, that the description of the Act considered in the *Peanut Board Case* (1) was accepted by the majority of the court as constituting a sufficient and complete description of the Act. *Rich* J. says:—"Compulsory acquisition is resorted to as a measure towards ensuring that the whole crop grown in Queensland is available for collective marketing by the central authority. The case is not one in which a State seeks to acquire the total production of something it requires for itself and its citizens" (3). Here a distinction is suggested between an Act which merely organizes the marketing of a product and an Act which organizes such marketing and also provides for the satisfaction of the needs of the people of a State in relation to that product. The

(1) (1933) 48 C.L.R. 266. (2) (1933) 48 C.L.R., at p. 277.
(3) (1933) 48 C.L.R., at p. 276.

Milk Act is an Act which makes provision relating to the satisfaction of such needs.

It is true that the decision in the *Peanut Board Case* (1) was approved in *James* v. *The Commonwealth* (2), but it is important to consider carefully the precise words in which this approval was expressed. They were as follows :—" The producers of the peanuts, it was held, were prevented by the Act from engaging in inter-State and other trade in the commodity. The Act embodied, so the majority of the court held, a compulsory marketing scheme, entirely restrictive of any freedom of action on the part of the producers ; it involved a compulsory regulation and control of all trade, domestic, inter-State and foreign ; on the basis of that view, the principles laid down by this board were applied by the court " (3).

It will be seen, therefore, that the decision was approved upon the basis of the construction of the Act as involving, but apparently as involving only, a compulsory marketing scheme of the character described. It has not hitherto been necessary to consider the full effect of the words quoted. For example, in *Matthews* v. *Chicory Marketing Board (Vict.)* (4) there were provisions in the Act which excluded any conflict with sec. 92, and it was possible to distinguish the *Peanut Board Case* (1) upon that ground. In the present case, however, the question is, I think, squarely raised whether it is possible for a State parliament, operating within its territorial limitations, to introduce what *James* v. *The Commonwealth* (2) describes as compulsory regulation and control of all trade, including inter-State trade.

In seeking to answer this question it must be conceded, I think, that what is said in *James* v. *The Commonwealth* (2) with respect to the *Peanut Board Case* (1) strongly suggests a negative answer to this question. But I find it impossible to reconcile such an answer with statements which appear elsewhere in the judgment. In particular the Privy Council quotes as being correct reasoning the following statement from the judgment of my brother *Evatt* in *Vizzard's Case* (5) :—" Sec. 92 does not guarantee that, in each and every part of a transaction which includes the inter-State carriage

(1) (1933) 48 C.L.R. 266.
(2) (1936) A.C. 578 ; 55 C.L.R. 1.
(3) (1936) A.C., at p. 623 ; 55 C.L.R., at p. 520.
(4) (1938) 60 C.L.R. 263.
(5) (1933) 50 C.L.R., at p. 94.

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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 " : See *James* v. *The Commonwealth* (1).

The reconciliation of the apparent difference between the statements to which I have referred is, in my opinion, to be found in the proposition that a State parliament is not necessarily and as of course prohibited from controlling the sale of any commodity within its borders by the imposition of a collective marketing scheme, but that such a scheme would be invalid if it is shown that it is " directed wholly or partially against inter-State trade in the goods " (See *James* v. *The Commonwealth* (2)) in the sense that the " real object " of the Act is to make it possible to place restrictions on inter-State commerce (3). In my opinion, in spite of what might appear to be a contrary view expressed in the comment upon the *Peanut Board Case* (4) which I have quoted, the view of their Lordships of the Privy Council was that a State parliament could enact and provide for the administration of a compulsory marketing scheme so long as it was not directed against inter-State trade and was not merely a prohibition as distinct from a regulation of such trade. Upon this ground I am of opinion that the objection with which I am now dealing fails.

(2) The *Milk Act* is an Act which expropriates property, and that expropriation is made for the purpose of controlling trade, and, upon the construction of the Act which I am assuming to be correct, inter-State trade is included in the trade to be controlled. The answer to the objection based upon this argument is substantially identical with the answer made to the first argument of the plaintiff. In *James* v. *The Commonwealth* (5) the decision in *James* v. *Cowan* (6) is explained, and the result is that sec. 92 invalidates only such

(1) (1936) A.C., at pp. 621, 622 ; 55 C.L.R., at pp. 50, 51.
(2) (1936) A.C., at p. 630 ; 55 C.L.R., at p. 59.
(3) (1936) A.C., at pp. 622, 623 ; 55 C.L.R., at p. 51.
(4) (1933) 48 C.L.R. 266.
(5) (1936) A.C. 578 ; 55 C.L.R. 1.
(6) (1932) A.C. 542 ; 47 C.L.R. 386.

expropriations as are shown to be directed against inter-State trade and commerce in the sense that the real object in creating the power of acquisition was to make it possible to place restrictions upon such trade and commerce (*James* v. *The Commonwealth* (1)). It is important to observe that in *James* v. *The Commonwealth* (2) the case of *James* v. *Cowan* (3) is regarded as a case "*simply*" of a restriction or prohibition of export from State to State. Such a description of the dried-fruits-control scheme may be novel to some, but it is clearly upon this basis that *James* v. *Cowan* (3) is fitted into the intellectual framework of *James* v. *The Commonwealth* (4). But such a description does not apply to a collective-marketing Act which endeavours to provide means for obtaining what is thought to be a proper price for producers and for preventing consumers from being charged what are thought to be excessive prices. Such a statute is not *simply* an Act which restricts or prohibits export from State to State.

In the present case there is nothing to show that the Act is directed against inter-State trade or that the real object of the Act is to interfere with inter-State trade, and therefore, in my opinion, the second argument fails.

(3) It is true that the Act is a price-fixing Act, and, if it applies to inter-State transactions, it fixes prices at which milk from another State may be sold in Sydney and the price at which it may be resold in Sydney: See the *Vacuum Oil Case* (5). That case is mentioned in *James* v. *The Commonwealth* (6), where, however, the decision is not accurately stated. It was not held in that case that the burden upon sales of petrol in Queensland was "a sort of tax or impost." The contrary was held. But it was held that the provisions relating to the first sale of petrol in Queensland contravened sec. 92 of the Constitution, though they it did not contravene sec. 90 as a State-imposed excise duty.

But, after *James* v. *The Commonwealth* (4), it is not, in my opinion, possible to hold that a general State price-fixing Act applying to

(1) (1936) A.C., at pp. 622, 623; 55 C.L.R., at pp. 51, 52, 59.
(2) (1936) A.C., at p. 623; 55 C.L.R., at p. 52.
(3) (1932) A.C. 542; 47 C.L.R. 386.
(4) (1936) A.C. 578; 55 C.L.R. 1.
(5) (1934) 51 C.L.R. 108.
(6) (1936) A.C., at pp. 623, 624; 55 C.L.R., at p. 52.

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sales in inter-State trade and commerce is invalid for the reason that it fixes prices in the case of such sales. *McArthur's Case* (1) did so decide, but *McArthur's Case* (1) must be regarded as overruled by *James* v. *The Commonwealth* (2), not only in so far as it decided that sec. 92 did not bind the Commonwealth, but also in so far as it decided that a State parliament could not provide for the fixing of prices in relation to inter-State sales. In *James* v. *The Commonwealth* (2) *McArthur's Case* (1) is criticized in the statement, "In truth the decision deprived Queensland of its sovereign right to regulate its internal prices" (3). The decision in *McArthur's Case* (1) did not deprive a State of the right to regulate prices in intra-State transactions. It did not limit that right in any manner. Thus, the passage which I have quoted means that *McArthur's Case* (1) (wrongly, as I read the passage) deprived the State of a right to regulate prices in inter-State transactions. In my opinion it must now be held that, so far as sec. 92 is concerned, a State price-fixing Act applying (as a matter of construction) to trade and commerce in general may validly apply to inter-State trade and commerce if it is not shown to be directed against such trade and commerce.

(4) The provisions of the Act empowering the board to secure hygienic conditions in the production and sale of milk are, I think, plainly valid. The fact that the enforcement of such provisions may and will affect inter-State trade and commerce does not necessarily invalidate them (*Hartley* v. *Walsh* (4)). If, however, it were shown that such provisions, though expressed in relation to hygienic conditions, &c., were really directed not to that subject but to the suppression or prohibition of inter-State trade and commerce, then the position would be different.

(5) In *Crothers* v. *Sheil* (5) it was held that the *Milk Act* did not contravene sec. 92. It is true that when that decision was given it was not contemplated that there might be a real inter-State trade in milk, and that it is now clear that there can be, and in fact is, a substantial trade in such milk. But after the examination of the substantial question which I have just made it is sufficient to say

(1) (1920) 28 C.L.R. 530.
(2) (1936) A.C. 578; 55 C.L.R. 1.
(3) (1936) A.C., at p. 620; 55 C.L.R., at p. 49.
(4) (1937) 57 C.L.R. 372.
(5) (1933) 49 C.L.R. 399.

that I am of opinion that the decision in *Crothers* v. *Sheil* (1) should be regarded as decisive against the defendant in this case.

Thus, in my opinion, *James* v. *The Commonwealth* (2) makes it possible to uphold the validity of the Act not only as to the expropriation provisions which it contains, but also as a whole. A court should always take the view, if it is fairly open, that an Act of parliament is valid rather than that it is invalid. Upon the authority of *James* v. *The Commonwealth* (2), though I admit to some difficulty in understanding all the reasoning upon which some of the statements in the case are founded, I reach the conclusion that the Act is valid in its application to all milk, including milk sent from other States, supplied for consumption and use in the metropolitan milk district of Sydney. From this statement I except sec. 30, which it is not necessary to consider in this case.

I come now to the second principal contention of the defendant, namely, that upon its true construction the Act does not apply to milk brought from other States or to any milk which is the subject of inter-State trade and commerce. Perhaps logically this question should have been treated first, but I thought it desirable to deal in the first place with the more important question which arises. If this second contention of the defendant is right, the Act does not apply to the milk which the defendant has been selling and the plaintiff is not entitled to the injunction sought.

Sec. 6, it is true, limits the application of the Act to districts in New South Wales which are proclaimed. But sec. 26 vests in the board all milk supplied to milk-distributing districts for consumption or use and requires the board to pay for such milk. The milk in question is supplied by a producer in Melbourne to the defendant in Sydney. But it is none the less supplied for the purpose of being consumed or otherwise used in the metropolitan milk-distributing district. Accordingly, in my opinion, the expropriation provision contained in sec. 26 applies to it.

Thus the milk with which the plaintiff has been dealing and with which the plaintiff proposes to deal was or will become the property of the board, and the defendant, therefore, is not entitled to deal with it without the consent of the board. Under sec. 25 and sec. 36

(1) (1933) 49 C.L.R. 399. (2) (1936) A.C. 578; 55 C.L.R. 1.

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the defendant cannot sell milk as defined in sec. 4, that is, milk sold or to be sold for consumption or use in the proclaimed district, without a certificate of registration issued by the board. But such milk vests in the board irrespective of the fact that the person to whom it is supplied within the district may not be registered as a milk vendor, so that he cannot sell it on behalf of the board.

A further argument was raised by the defendant to the effect that on the true construction of secs. 26 and 27 no milk vested in the board unless it was milk which had been accepted by the board pursuant to sec. 27. Sec. 27 provides for delivery of milk by dairymen to the board. It was said that the board had not accepted delivery of the defendant's milk and that therefore the milk had not been acquired by the board.

In my opinion there is no foundation for this argument. All the milk referred to in sec. 26 becomes vested in the board, and under sec. 26 (3) the board is bound to pay for the milk. But the milk vests whether the board performs its duty of paying for it or not. If the supplier of the milk is a dairyman, sec. 28 applies and the dairyman should be paid as provided by that section. The defendant, however, is not a dairyman, but he is entitled to be paid for milk which, because it is supplied for consumption or use within the district, becomes the property of the board under sec. 26. Mr. *Maughan* for the plaintiff expressly admitted that the plaintiff was bound to pay for the milk. In my opinion any injunction granted by this court should clearly conserve the right of the defendant to be paid for the milk the sale of which the plaintiff wishes to prevent unless it be sold with the plaintiff's consent.

Finally, the defendant contended that an injunction should not be granted because it was not shown that the milk in question had any special value. Reference was made to the principle that, in general, specific performance will not be granted in the case of a contract for the sale of goods unless the goods are of special beauty, rarity, or utility, and the same principle, it was pointed out, applies in the case of an application for an injunction: See *Halsbury, Laws of England*, 2nd ed., vol. 18, p. 94. The general principle, however, is that, where damages provide an adequate remedy, the court will not interfere by injunction. Ordinarily, in the case of contracts

for the disposition of chattels, damages are an adequate remedy, but, where for any reason damages would not be an adequate remedy, the court may interfere by injunction. In the present case damages would not be an adequate remedy, because the action of the defendant attacks the whole system which the Milk Board is appointed to manage and to make effective. Accordingly, in my opinion, this objection fails.

It was suggested in argument that the board might arbitrarily refuse to issue to the defendant company a certificate of registration as a milk vendor and so might prevent it from carrying on business, the board acting really, though perhaps not ostensibly, upon the ground that the company was selling milk brought from another State. No question as to the issue of a certificate arises in the present proceedings. I will therefore only say first, that it should not, in the absence of evidence, be presumed that the board will not act bona fide, and secondly, that sec. 37 of the Act sets out the grounds upon which the board may act in refusing to issue a certificate.

Thus, in my opinion, an order should be made for an injunction as claimed, but the injunction should be expressed to be without prejudice to the defendant's claim for payment under the *Milk Act*.

The plaintiff was anxious to obtain an early decision, and, accordingly, an order was made that the case be heard early in the Melbourne sittings in May so as to prevent delay until the court sat in Sydney at the end of July. As a condition of this concession the plaintiff undertook to pay to the defendant the amount by which the costs were increased by reason of the action being heard in Melbourne rather than in Sydney. The object of such orders is to make it possible for a party actually to pay such increased costs by providing the necessary money. Accordingly, in my opinion, there should be an order for payment of such costs by the plaintiff to the defendant, and such costs should not be set off against other costs payable by the defendant to the plaintiff. Subject to this provision, the defendant should pay the costs of the action including the costs of proceedings in this court.

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RICH J. The subject matter in this case has been exhaustively treated in the judgments of the other members of this court, and I shall not attempt to analyse or dissect the judgments given since the decision of the Privy Council in *James* v. *The Commonwealth* (1). I am content to say that the provisions of the Act so far as they are relevant to this case do not contravene sec. 92 of the Constitution, and I adhere to the decision in *Crothers* v. *Sheil* (2).

I agree with the order proposed by the Chief Justice.

STARKE J. This cause was commenced in the Supreme Court of New South Wales in Equity but was removed to this court pursuant to sec. 40 of the *Judiciary Act*. The proceeding now before this court is a motion, which the parties have agreed to treat as the trial of the cause, for an injunction restraining the defendant or its servants and agents from selling, offering for sale, delivering for sale or otherwise dealing with milk or cream supplied to it for consumption or use within the metropolitan milk-distributing district established under the *Milk Act* 1931-1936 and for ancillary relief. The plaintiff claims that the milk is vested in it and is its property pursuant to the provisions of the *Milk Act*, whilst the defendant contends that on its true construction the milk is not so vested and, if the Act does so vest or purport to vest the milk, then it contravenes the provisions of sec. 92 of the Constitution, which provides that trade and commerce among the States shall be absolutely free.

The facts are not in dispute. The defendant purchases cream in the State of Victoria which is shipped or railed to it in Sydney, New South Wales, where delivery is taken, and the great bulk of it is sold to registered retail shopkeepers in the metropolitan milk-distributing district already mentioned.

The *Milk Act* according to its preamble is an Act to provide for the regulation and control of the supply and distribution of milk for consumption or use in the metropolitan milk-distributing district comprising certain areas in and around the city of Sydney and for some other purposes which it is unnecessary to set forth. It establishes a Milk Board—the plaintiff in this action. It describes in the schedule an area which is the producing district for the

(1) (1936) A.C. 578; 55 C.L.R. 1. (2) (1933) 49 C.L.R. 399.

metropolitan milk-distribution district which is also described in the schedule. Apparently the producing district so described would be the normal source of milk supply for the city of Sydney and the distributing district would be the area in which milk is sold or distributed to consumers and users thereof. It charges the board with the regulation, control and distribution of milk within the metropolitan milk-distributing district. And by sec. 26 it is enacted :— "From and after a day to be appointed by the Governor . . . milk supplied for consumption or use within the metropolitan milk-distributing district . . . shall become absolutely vested in and be the property of the board. . . . From and after the day so appointed such milk shall become the absolute property of the board freed from all mortgages, charges, liens, pledges, interests, and trusts affecting the same, and the rights and interests of every person in such milk shall thereupon be taken to be converted into a claim for payment therefor." Milk includes cream and refers only to milk or cream which is sold or to be sold for consumption or use within any milk-distributing district. The 5th March 1932 was the day appointed for the purposes of sec. 26.

Milk supplied for consumption or use includes in its ordinary signification milk made available or provided for consumption or use within the district mentioned in the Act. Prima facie the cream which came into the possession of the defendant for the purposes of its business, namely, selling to shopkeepers in the metropolitan district, was milk within the meaning of sec. 26. But the main argument for the defendant, on the construction of the section, was that in the context it meant milk supplied from the producing district for the metropolitan milk-distributing district of Sydney. Thus, in sec. 6 it is provided that the Act applies to every producing district and every milk-distributing district established under the Act. And the board may determine the quantity of milk per week which may be supplied to and accepted by the board in any producing district. Again, sec. 28 provides that all milk delivered to the board shall be delivered in the name of the dairyman producing the same. A dairyman (sec. 4) is the occupier of any dairy premises, and dairy premises mean land or premises used for or in connection with stalling, grazing, feeding or milking cattle for the purpose of

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producing milk sold or to be sold for consumption or use within any milk-distributing district. Further, in the section dealing with payment for milk vested in the board the Act provides (sec. 28) that the board shall, out of the proceeds of the milk disposed of by it, make provision for expenditure incurred by it and subject to the Act make payments to each dairyman in respect of the milk delivered by him an amount calculated at the rate of the minimum price or prices fixed pursuant to sec. 23 and shall distribute among such dairymen in proportion to the quantity of milk delivered by each of them so much of the balance, if any, of such proceeds as the board may determine to be available for the purpose. There are no express provisions dealing with payments to persons other than dairymen occupying dairy premises, which, I think, means within the producing district, but there is no prohibition upon payments to such other persons, and the board has funds out of which such payments could be made.

Notwithstanding the provisions mentioned, the composite expression " milk supplied for consumption or use within the metropolitan milk-distributing district " cannot be limited in the manner suggested. In its ordinary signification the expression refers to any milk so supplied and is necessary to carry into effect the general purpose of the Act. Thus, as already seen, the board is charged with the regulation and control of the supply and distribution of milk in the producing and distributing districts established under the Act; it can fix the maximum prices at which milk may be sold by retail; it can register milk vendors, and no person can carry on business as a milk vendor unless he is authorized to do so under a certificate of registration. It may engage in wholesale or retail distribution of milk on its own behalf; it has wide powers in connection with the acquisition of milk undertakings and most extensive powers for regulating and controlling the production, supply, quality and condition of milk: See secs. 22, 23 (2) (*d*), 36, 38, 68-74, 75, 76.

The other contention on the part of the defendant, that the provisions of sec. 26 of the Act so construed contravene the provisions of sec. 92 of the Constitution, must therefore be considered. The Act must be scrutinized in its entirety: its true character and its effect ascertained from its language (*Peanut Board* v. *Rockhampton*

Harbour Board (1); *Home Benefits Pty. Ltd. and Household Helps Pty. Ltd.* v. *Crafter* (2); *R.* v. *Connare*; *Ex parte Wawn* (3)).

The general purpose of the Act is, as already mentioned, to regulate and control the milk supply of Sydney. The board may regulate the supply of milk in quantity (sec. 27); it may fix prices (sec. 23); it may inspect and supervise dairies and prohibit the use for human consumption of milk which appears deleterious to health or unwholesome (sec. 25); it may, in effect, license persons who may carry on business as dairymen or milk vendors (secs. 36, 37); it may carry on research and investigation relating to milk and milk products and generally devise and initiate methods in connection with the production, distribution and sale of milk and so forth (sec. 39). Consequently it is argued that the true nature and character of the Act is not a restriction of trade at the frontier of the State but a marketing law or a law providing for the stabilization or regulation of the internal prices of milk in New South Wales—a sovereign right, which I suppose means a plenary power of the States (*James* v. *The Commonwealth* (4))—and also for procuring standards of quality, grade and condition of milk in the interests of the health of the citizens of Sydney (*Crothers* v. *Sheil* (5); *Hartley* v. *Walsh* (6); *Home Benefits Pty. Ltd. and Household Helps Pty. Ltd.* v. *Crafter* (2) and *R.* v. *Connare*; *Ex parte Wawn* (3)).

But to achieve these ends the Act compulsorily acquires the milk of every person (subject to the exceptions provided for in secs. 26 (5) and 27 (2)) who supplies milk for consumption or use in the metropolitan milk-distributing district of Sydney and vests it in the board and puts its sale and disposal wholly within the authority of the board. It is entirely restrictive of any freedom of action on the part of the producers who so supply milk and operates to prevent them engaging their milk in any trade whatever. In my opinion the decision of this court in *Peanut Board* v. *Rockhampton Harbour Board* (1) holds that such a law is in contravention of sec. 92 of the Constitution. Even in *R.* v. *Vizzard*; *Ex parte Hill* (7) a passage may be found which, to my mind, is equally clear. "The section"

(1) (1933) 48 C.L.R. 266.
(2) (1939) 61 C.L.R. 701.
(3) (1939) 61 C.L.R. 596.
(4) (1936) A.C., at p. 620; 55 C.L.R., at p. 49.
(5) (1933) 49 C.L.R. 399.
(6) (1937) 57 C.L.R. 372.
(7) (1933) 50 C.L.R., at p. 87.

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(92), "if read as a whole, postulates the free flow of goods inter-State, so that goods produced in any State may be freely marketed in every other State, and so that nothing can lawfully be done to obstruct or prevent such marketing. The section may be infringed by hostile action within the State of origin of the goods, as was attempted to be done in the dried fruits legislation of South Australia, or at the border by means of prohibitions upon exit or entry, or by laws preventing or prohibiting sale or exchange within that State to the markets of which the commodities are destined. The declaration of sec. 92 covers goods which are consigned to the market as well as goods which have been already sold, and are in the course of delivery, in this sense, that consignment and delivery, being part of commercial intercourse, cannot be prevented or obstructed by State legislation." *Crothers* v. *Sheil* (1) was relied upon as a decision of this court that the *Milk Act* did not contravene the section. The transaction in question there involved no element of inter-State trade. *Rich* J. so disposed of the matter in these words: "It is sufficient to say that even if an actual transaction of inter-State commerce is found to be impeded by the *Milk Act* so that the freedom of inter-State trade is impaired sec. 92 will prevail over the *Milk Act*, but it is clear that merely because it cannot be foretold that such a state of things is impossible the whole of the relevant provisions of the *Milk Act* do not collapse" (2). *Dixon* and *McTiernan* JJ. agreed. The *Peanut Board Case* (3) was not even referred to, if the report of the case be accurate. *Crothers* v. *Sheil* (1) is no authority for the wide generalization contained in its headnote. *Hartley* v. *Walsh* (4) seems at variance both with the *Peanut Board Case* (3) and with the passage cited from *Vizzard's Case* (5). It appears to me to have been wrongly decided, and I think that I am still bound to adhere to the reasoning of the majority of this court in the *Peanut Board Case* (3), in which I concurred and which has the sanction, I think, of the Judicial Committee in *James* v. *The Commonwealth* (6) and does not yet seem to have been overruled in this court.

(1) (1933) 49 C.L.R. 399.
(2) (1933) 49 C.L.R., at p. 409
(3) (1933) 48 C.L.R. 266.
(4) (1937) 57 C.L.R. 372.
(5) (1933) 50 C.L.R. 30.
(6) (1936) A.C., at p. 623; 55 C.L.R., at p. 52.

The provisions of sec. 1 (3) of the *Milk Act*, I should add, protect it from annihilation but exclude from its operation any interference or control of trade and commerce obnoxious to the provisions of sec. 92 : Cf. *Roughley* v. *New South Wales* ; *Ex parte Beavis* (1) ; *R.* v. *Vizzard* ; *Ex parte Hill* (2).

The Constitution, we have been told, must not be mocked (*James* v. *Cowan* (3)), but judicial decisions are rapidly destroying the effectiveness of the guarantee contained in sec. 92 of the Constitution that trade and commerce among the States shall be absolutely free. Transport may be licensed ; prices may be controlled ; trade in goods among the States may be regulated by laws directed towards procuring standards of quality, condition or grade of articles of commerce and now we are called upon to declare that the States may compulsorily acquire commodities for like purposes and thus prevent or hinder all trade in such commodities among the States.

In my opinion the injunction sought should be refused and the cause dismissed.

EVATT J. By order made on 28th April last, this action, which was then pending in the Supreme Court of New South Wales in its equitable jurisdiction was removed to this court in pursuance of the power contained in sec. 40 of the *Judiciary Act*, it having appeared that the cause involved a question as to the interpretation of the Commonwealth Constitution.

The plaintiff is the Milk Board incorporated by sec. 12 of the New South Wales *Milk Act* 1931-1936, and the defendant is a New South Wales company which for some time past has been and still is regularly receiving at its place of business in the metropolitan milk-distributing district of Sydney cream supplied to it for consumption and use within that district. In the suit the plaintiff claimed that by proclamation made pursuant to sec. 26 of the *Milk Act* the cream so supplied to the defendant at Sydney had become " absolutely vested in and . . . the property of the board " ; but the defendant has refused to recognize the title of the plaintiff, and, contrary to the plaintiff's directions and instructions, has regularly

(1) (1928) 42 C.L.R., at pp. 207, 208.
(2) (1933) 50 C.L.R., at p. 56.
(3) (1932) A.C., at p. 558; 47 C.L.R., at p. 396.

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sold and dealt with the cream as its own property. It is plain, and indeed admitted, that the defendant intends to continue to deal with the cream as its own. But it contends that its ownership has not been transferred to the plaintiff under the Act.

This contention of the defendant is based on two separate arguments: (1) that all the cream which it is selling is produced in the State of Victoria and the *Milk Act* 1931-1936, or at least the expropriation section thereof, (sec. 26), has no application to milk (which, by statute, includes cream) produced outside the metropolitan producing district or alternatively no application to milk produced outside New South Wales; (2) that, if, upon its true construction, sec. 26 of the *Milk Act* can be applied to the defendant's cream, the Act is, at least to the extent of such application, void and inoperative because of sec. 92 of the Commonwealth Constitution providing for freedom of inter-State trade and commerce.

I. This court has jurisdiction.

Although the cause involves questions which do not, as well as questions which do, depend upon the interpretation of the Commonwealth Constitution, the jurisdiction of this court extends to the whole cause. The cases show that full jurisdiction is deemed to be attracted because of the constitutional question, and because of the practical inconvenience, if not impossibility, of assigning portions of the cause to different tribunals, with the further complication of a separate appeal to this court from State courts if they were required to dispose of the non-constitutional issues. Some of the cases in which the principle is stated are referred to in *Duncan and Green Star Trading Co. Pty. Ltd.* v. *Vizzard* (1); and I have collected further references in the recent case of *Hopper* v. *Egg and Egg Pulp Marketing Board (Vict.)* (2).

Submitting to jurisdiction, both parties to the cause have agreed to treat the plaintiff's application for an interlocutory injunction as if it were the trial of the cause, and the evidence admitted in the Supreme Court has been accepted as the evidence upon the trial of the present cause.

II. In order to determine the main question—whether the New South Wales *Milk Act* 1931-1936, and particularly sec. 26 thereof,

(1) (1935) 53 C.L.R. 493. (2) (1939) 61 C.L.R. 665.

applies to the defendant's cream, an analysis of the statutory scheme is required. The main object of the Act is the organization and regulation of the supply and distribution of milk for consumption within Sydney, the most thickly populated metropolis in Australia. It has been in operation for nearly seven years. Sec. 6 gives power to establish other milk-distributing districts within New South Wales, but the power has been exercised only in relation to the industrial centre of Newcastle. These are the only two milk-distributing districts in the State. The selection of Sydney by the statute, and of Newcastle by executive action of the Governor, shows that the scheme of control was intended to safeguard the consumers of milk in the two largest cities of the State. A close examination of the statute shows that such consumers were to be protected in two important respects : first, by ensuring purity, quality and reliability in the milk and cream—an absolute essential of health, particularly in the case of children ; and second by preventing their exploitation in the shape of unreasonable prices. Under the Act, the interests of dairymen are also protected, for they are guaranteed a reasonable reward for providing so necessary a commodity.

An elaborate organization has been established under the Act. The board is charged " with the regulation and control of the supply and distribution of milk " within the Sydney and Newcastle distributing districts (sec. 22). The board determines minimum prices which may be paid to dairymen for milk (sec. 23 (1)) and fixes maximum prices on wholesale and retail sales (sec. 23 (2) (*c*) and (*d*)). To the two milk-*distributing* districts of Sydney and Newcastle there has been assigned only one milk-*producing* district, the boundaries of which extend along the coast from north of Newcastle to Bateman's Bay, south of Sydney. This producing area runs inland, but does not reach the Great Dividing Range at any point. A glance at the map and the lines of communication will show that the delimitation of this production area is connected not only with its milk-productive capacity, but (through the convenient distances and better facilities for transport and inspection) with the necessity of guaranteeing, each day and every day, supplies of fresh milk of the best grade and quality. Consequently, the greater part of the area of New South Wales is not included in the production area.

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The board is empowered, subject to the approval of the Minister, to control the conditions of supply, collection and treatment of milk not only throughout the producing district, but at any milk store within the distributing districts (sec. 24 (1) (*a*)). With similar approval, the board may also regulate (1) the number of milk stores at which milk may be treated, deposited, or stored in any producing district (sec. 24 (1) (*b*)) and (2) the number of persons who may treat, deposit, store, distribute or sell milk within any defined part of each distributing district (sec. 24 (1) (*c*)). The board is empowered to issue certificates as to the grades of milk which may be supplied or sold; and in the case of certificates which authorize the sale of milk as the product of tuberculin-tested cows, certificates as to freedom from tubercle must be obtained from responsible authorities (sec. 25 (*a*)). The board has wide powers over research in relation to milk (sec. 25 (*b*)), and it may make by-laws prescribing grades and classes of milk, prescribing the methods to be followed in the production, collection, treatment, carriage, deposit, storage, distribution and sale of milk, prescribing the maximum temperature at which milk is to be kept "*at any and every stage from its production to its delivery to a purchaser for consumption*" (sec. 76 (1) (*a*), (*b*) and (*c*)). The board may require milk to be sold in prescribed containers with prescribed labels and has authority over the cleansing and sterilizing of cans, vessels, utensils, appliances and equipment used for containing milk from the point of production to the point of ultimate sale (sec. 76 (1) (*d*) and (*f*)). The board may control how milk which does not conform to standard shall be dealt with (sec. 76 (1) (*i*)). Apart from its wide powers in these directions, the board is under a statutory duty to devise and initiate improved methods of producing, collecting, treating, delivering and distributing milk (including the distribution of milk in sealed containers) (sec. 39 (*b*)). It is required to initiate means to prevent "wasteful, unnecessary or unhygienic" agencies methods and practices in connection with the production, carriage, distribution or sale of milk (sec. 39 (*c*)). Further, the board is required to establish grades of milk "including a grade of milk suitable for the use of infants" (sec. 39 (*f*)).

Then comes the expropriation provision, sec. 26, which directs that, from a day to be appointed, "milk supplied for consumption

or use within the metropolitan milk-distributing district . . . shall become absolutely vested in and be the property of the board." Thereupon, milk so supplied becomes the absolute property of the board, free from all mortgages and charges and the rights and interests of every person in the milk is taken to be converted into a claim for payment therefor (sec. 26 (3)).

Any restriction in the application of sec. 26 would seem to be unjustified. Its language is unqualified. Further, the main object of the Act is to bring into the hands of one central controlling authority all milk distributed for consumption or use in Sydney or Newcastle. The Act goes very much further than the prior legislation as to dairies supervision, public health and pure foods : cf. sec. 5. It proceeds upon the footing that it is notoriously difficult to enforce such Acts effectively throughout a large metropolis if thousands of agencies and vendors are subjected to casual and infrequent inspection and an occasional prosecution. In order better to secure purity and quality, the State has preferred to commit to one responsible administrative board complete control of the product. As a result there should be universal and undeviating conformity to the standards of quality and purity required.

For the reasons already mentioned, it is clear that, as a general rule, the milk supplied to Sydney and Newcastle will be produced in the producing district allocated thereto. The defendant contends that if milk is produced either outside the State of New South Wales, or within New South Wales, but outside the producing district, it may be brought for consumption or use into the Sydney or Newcastle distributing districts, without being subjected to the expropriation power in sec. 26. If this argument is right, it must be because the general words in sec. 26 (1) are by the addition of the words I shall bracket, to be restricted to " milk (*the product of the producing district of the metropolitan distributing district*) supplied for consumption or use within the metropolitan milk-distributing district." By parity of reasoning it should follow (and the defendant contended for this also) that the requirement that a " milk vendor " shall be registered (sec. 36 (1)) applies only to milk which is the product of the producing district assigned to Sydney and Newcastle.

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The defendant's main contention should be rejected. Sec. 26 (1) contains one qualification and one only, viz., that the milk to be expropriated is milk " supplied for consumption or use " within the Sydney district. No additional qualification should be added. Otherwise the anomalous position would be that the further the milk travels on its journey to Sydney or Newcastle, the less is it subject to control although the need of control is obviously greater. Sec. 22 charges the board with " the regulation and control of the supply and distribution of milk within the metropolitan milk-distributing district." The legislature has decided that this authority and mandate can only be effectively discharged through the method of expropriation.

The defendant argues that the machinery for enabling the board to obtain possession of the expropriated milk contemplates action by the board within the producing district, and that no specific method is laid down for compensating those who bring milk into the milk-distributing districts from outside the producing district. Certainly the general expectation that there would be few, if any, supplies of milk or cream from other States to Sydney is evidenced by the decision in *Crothers* v. *Sheil* (1). It is also evidenced by the admitted fact that from the commencement of the statute in 1932 until a comparatively recent date, there has been no attempt to supply to Sydney milk produced in other States owing, no doubt, to the fact that, because of the distances involved, the freshness of the milk cannot be ensured.

But it does not follow that, if milk or cream from outside the producing district is supplied for consumption in Sydney, it escapes the operation of sec. 26 of the Act: no doubt the clarification of the method of compensation is a matter which the legislature will consider, now that several difficulties of interpretation have been brought to light. But I am of opinion that it would be " subversive to the whole scheme " if milk were " granted an immunity from its operation " merely because it comes from a greater distance: Cf. *Hartley* v. *Walsh* (2). On this point, I think that the observations of Lord *Atkin* in *Gallagher* v. *Lynn* (3) are of importance.

(1) (1933) 49 C.L.R. 399.
(2) (1937) 57 C.L.R., at p. 393.
(3) (1937) A.C. 863, at pp. 868, 869.

III. The constitutional objection remains to be dealt with. It is here that the defendant invokes sec. 1 (3) (which is a " salvage " interpretation clause) in order to suggest that a restricted application should be given to sec. 26 ; so that milk from other States would or might escape from the operation of the legislative scheme. In modern legislation, some such provision as sec. 1 (3) is merely common form. The primary duty of the court is to consider the intended scope of the statutory scheme apart from sec 1 (3) ; " it is only *after* a decision that invalidity attaches to some portion of the statute that any attempt has to be made " (scil., to read down the statute) " by separating the valid from the invalid portion of the statute, and so preserving the former " (*R.* v. *Vizzard* ; *Ex parte Hill* (1)).

The defendant's constitutional objection is that, in relation to its business, expropriation of cream supplied for consumption in Sydney imposes burden and possible loss. In short, the argument is :—" We are buying Victorian milk and desire to sell it in New South Wales. No legislative scheme, whatever its character or object, can lawfully interfere with our right to remain owner of the milk and to sell it, as, when and how we choose."

This argument is quite fallacious. The idea that the States must never trespass in any way upon the domain of inter-State trade was finally exploded in *James* v. *The Commonwealth* (2) : Cf. *R.* v. *Vizzard* ; *Ex parte Hill* (3). The States have a legislative power in relation to inter-State trade which is concurrent with that of the Commonwealth. Sec. 92 postulates the right to market commodities inter-State ; and by it, Commonwealth and State are both " forbidden to pass legislation or to grant executive powers of a certain kind " (*James* v. *Cowan* (4)). In this way, inter-State marketing of goods, and inter-State journeys are given a special constitutional protection. But, just as a State may pass a law as to husband and wife which will have the effect of preventing a husband from leaving a State until he makes provision for the maintenance of his family, so it may enact schemes for improving the quality and ensuring the purity of its primary products although one of the consequences may be to prevent local and inter-State dealing in inferior or unhealthy

(1) (1933) 50 C.L.R., at p. 75.
(2) (1936) A.C. 578 ; 55 C.L.R. 1.
(3) (1933) 50 C.L.R., at p. 91.
(4) (1932) A.C., at p. 560 ; 47 C.L.R., at p. 398.

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products (*Hartley* v. *Walsh* (1)). A State may pass laws upon gambling which will prevent the purchase by its citizens of tickets in lotteries conducted outside the State (e.g., in other States)—it may for the protection of its citizens require commodities imported from other States to submit to inspection and treatment although a particular importer may be delayed or damaged (*Ex parte Nelson* [*No.* 1] (2) ; *R.* v. *Connare* ; *Ex parte Wawn* (3) ; it may expropriate commodities within its borders (*Wheat Case* (4)) although as a result individual traders, dealing inter-State with the commodity, may have their businesses disturbed.

All these cases illustrate the principle that " it is impossible to accept the theory that, in applying sec. 92, one need not look past the mere operation of the State law upon the inter-State trader, traveller or carrier and that one should disregard the nature and character of the State law which is impugned " (*R.* v. *Vizzard*; *Ex parte Hill* (5)). This is not, e.g., because the law of husband and wife and legislation as to pure foods, gambling, quarantine, health, hygiene and property generally are exceptions to be carved out of sec. 92 ; but because, in applying sec. 92, one must " ascertain the relationship between the State enactment and that 'trade, commerce, and intercourse among the States,' which alone is given constitutional protection " (6). The fact that a legislative scheme of a State will have a direct and even disastrous effect upon the inter-State marketing business of certain individuals does not invalidate the scheme, providing its main objects and purposes are disparate from trade, commerce and intercourse and the scheme is not being administered for the purpose of restricting inter-State marketing. Sec. 92 is simply not addressed to the carrying out of such legislation. If it were otherwise, no legislative authority in Australia could protect the people against evils which have little, if any, relationship to marketing at all. Even in the United States, where the central legislature's authority has been regarded as exclusive, the States have exercised powers of the character illustrated, so long as they are not aimed against trade or inter-State

(1) (1937) 57 C.L.R. 372.
(2) (1928) 42 C.L.R., 209.
(3) (1939) 61 C.L.R. 596.
(4) (1915) 20 C.L.R. 54.
(5) (1933) 50 C.L.R., at p. 80.
(6) (1933) 50 C.L.R., at p. 79.

trade. Sec. 92 lays down the rule of inter-State free trade, not the rule of *laissez-faire*.

Thus, sec. 92 prevents the authority of the Commonwealth or State from being exercised for the purpose of restricting trade, including inter-State trade, e.g., in the prohibitions and restrictions of marketing enacted in the Commonwealth *Dried Fruits Act* 1928-1935 (*James* v. *The Commonwealth* (1)). Those prohibitions and restrictions were directed against the marketing of commodities, and had no other aim or purpose. The judgment of Lord *Wright* shows that the question is always whether the State (or Commonwealth) *legislation* strikes at the trade freedom of the frontier, not whether an individual trader can show that his business is necessarily interfered with by the operation of the legislation. Whether the legislation is contrary to sec. 92 is, in substance, a question of degree and a question of fact, and this usually involves a close examination of the purpose and scheme which the legislation embodies.

An excellent illustration of this principle is provided by the expropriation cases. In the *Wheat Case* (2) the New South Wales *Wheat Acquisition Act*, authorizing expropriation of all wheat in that State, was deemed lawful, and it is plain from Lord *Atkin's* judgment in *James* v. *Cowan* (3) that the actual decision in the *Wheat Case* (2) is to be regarded as correct. On the other hand, the expropriations considered in *James* v. *Cowan* (3) were deemed unlawful because the facts showed that they were devised for the very purpose of preventing the plaintiff from dealing with his dried fruits except in conformity to a quota scheme which was directed solely to restrict and prohibit marketing (including inter-State marketing).

In expropriation cases, the crucial question is: What is the object of the expropriation? If the object is to prohibit or limit trade, including trade among the States, sec. 92 forbids it. If the object is otherwise, sec. 92 has nothing to say about the matter. The State has a general power to expropriate all properties within its borders; so long as the power is not exercised so as to interfere with the trade freedom of the border, it cannot be questioned.

(1) (1936) A.C., at p. 633; 55 C.L.R., at p. 61.
(2) (1915) 20 C.L.R. 54.
(3) (1932) A.C. 542; 47 C.L.R. 386.

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The *Peanut Case* (1) is another illustration of the principle. In that case there was compulsory acquisition of a commodity, and this court found as a fact that the purpose of the acquisition was to prevent trading in the commodity: "It is interposing in the course of trade in the 'commodity' an organization established for the purpose of carrying out one of the functions of trade" (per *Rich* J. (2)). In *James* v. *The Commonwealth* (3) the *Peanut Case* (1) was referred to. The decision is regarded as supportable upon the basis of a finding of fact that "in truth the expropriation is directed wholly or partially against inter-State trade in the goods, that is, against selling them out of the State" (4). My own view of the *Peanut Case* (1) was that the question involved was in substance one of fact (5); but that any interference with the right to sell was a mere incident of an attempt by the State to socialize or nationalize for a very long period of years the industry of producing peanuts. My opinion was then, and is still, that sec. 92 does not prevent a State from socializing any one of its industries of production, converting the reward to the producer from a chance of selling at a good or a bad price to a proportionate share in the proceeds arising from State control of the industry.

In the present case, also, the defendant complains of the expropriation of its cream. Although it will receive compensation for the cream, its business activities will be interfered with. But, as has been pointed out, this is a necessary consequence of every expropriation, valid or invalid, and it occurred on a large scale in connection with the *Wheat Acquisition Act* passed by the State of New South Wales in 1914.

The principles applied in cases like *Ex parte Nelson* [*No.* 1] (6), *Roughley's Case* (7), *R.* v. *Vizzard*; *Ex parte Hill* (8), *Hartley* v. *Walsh* (9) and the recent case of *R.* v. *Connare*; *Ex parte Wawn* (10) should result in a decision affirming the validity of the present scheme.

(1) (1932) 48 C.L.R. 266.
(2) (1933) 48 C.L.R., at p. 276.
(3) (1936) A.C., at pp. 623, 630; 55 C.L.R., at pp. 52, 59.
(4) (1936) A.C., at p. 630; 55 C L.R., at p. 59.
(5) (1933) 48 C.L.R., at p. 304.
(6) (1928) 42 C.L.R. 209.
(7) (1928) 42 C.L.R. 162.
(8) (1933) 50 C.L.R. 30.
(9) (1937) 57 C.L.R. 372.
(10) (1939) 61 C.L.R. 596.

The object of the scheme embodied in the *Milk Act* is to give the consumers of milk and cream in Sydney and Newcastle adequate protection in respect of the quality and purity of milk and cream. It is for that purpose, not for the purpose of restricting marketing, that all milk supplied for use or consumption within those districts, whether produced in New South Wales or elsewhere, is canalized and taken into the ownership and exclusive control of the board with a view to its release to the consumer by selected channels which will ensure the protection of the public. Though the Privy Council was dealing with a different problem, there is a sufficient analogy between this case and *Gallagher* v. *Lynn* (1) to apply to the *Milk Act* of New South Wales the words of Lord *Atkin*, viz., " the true nature and character of the Act, its pith and substance, is that it is an Act to protect the health of the inhabitants of Northern Ireland ; and in those circumstances, though it may incidentally affect trade with County Donegal, it is not passed ' in respect of ' trade, and is therefore not subject to attack on that ground."

It is true that, in order to protect both the producer and the consumer, there are provisions in the Act designed to prevent profiteering. It is established by the judgment of Lord *Wright* in *James* v. *The Commonwealth* (2) that undiscriminatory fixation of the prices of commodities within its borders (including commodities produced in other States) does not necessarily involve on the part of the State any infringement of sec. 92 ; and the reasoning to the contrary in *McArthur's Case* (3) is finally rejected. If it is found that the object of such fixation of prices is to prohibit or limit inter-State trade, sec. 92 will no doubt be infringed. In the present case, there is no evidence which could possibly support such a finding.

There being no valid objection to the legislation by reason of its including certain price restrictions, the decision in this case should favour the State as in *Hartley* v. *Walsh* (4). There, and in the *Wheat Case* (5), the incidental effect upon inter-State trade of the statutory scheme did not invalidate it.

It should be added that the precise point as to sec. 92 was decided by this court in *Crothers* v. *Sheil* (6). Moreover, the objection

(1) (1937) A.C., at p. 870.
(2) (1936) A.C. 578 ; 55 C.L.R. 1.
(3) (1920) 28 C.L.R. 530.
(4) (1937) 57 C.L.R. 372.
(5) (1915) 20 C.L.R. 54.
(6) (1933) 49 C.L.R. 399.

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there, as here, was to the constitutional validity of sec. 26 of the *Milk Act*. The objection was overruled. Further consideration confirms the correctness of the decision, which in any event should be loyally followed by this court.

In *Crothers* v. *Sheil* (1) it was pointed out that the possibility of inter-State marketing of milk was very small. The possibility has eventuated, but it is to be noted that from a quantitive point of view, the defendant's business of introducing milk from Victoria is quite insignificant. Although the decisions of the United States Supreme Court are not necessarily apposite—there the powers of the State legislatures are far more restricted than in Australia—a passage from the very recent judgment of *Roberts* J. in *Milk Control Board* v. *Eisenberg Farm Products* (2) is, I think, of some relevance. There the statutory scheme interfered, to some extent, with the inter-State *export* of milk from the State.

"If," said *Roberts* J., "dealers conducting receiving stations in various localities in Pennsylvania were free to ignore the requirements of the statute on the ground that all or a part of the milk they purchase is destined for another State, the uniform operation of the statute locally would be crippled, and might be impracticable. Only a small fraction of the milk produced by farmers in Pennsylvania is shipped out of the Commonwealth. There is, therefore, a comparatively large field remotely affecting, and wholly unrelated to inter-State commerce within which the statute operates. These considerations, we think, justify the conclusion that the effect of the law on inter-State commerce is incidental, and not forbidden by the Constitution, in the absence of regulation by Congress" (3).

In the result, *Crothers* v. *Sheil* (4) is a controlling decision in relation to the point based on sec. 92 of the Constitution. The defendant is only asked to submit, and he must submit, to a scheme which is within State power because of the functions and purposes it serves. So far as the scheme authorizes the fixation of prices of milk and cream, *James* v. *The Commonwealth* (5) shows that it is not opposed to sec. 92. But, in the main, the scheme relates not so much to

(1) (1933) 49 C.L.R. 399.
(2) (1939) 83 Law. Ed. (U.S.) (Advance Opinions) 495.
(3) (1939) 83 Law. Ed. (U.S.) (Advance Opinions), at p. 498.
(4) (1933) 49 C.L.R. 399.
(5) (1936) A.C. 578; 55 C.L.R. 1.

trade as to the accomplishment of purposes closely analogous to those described in cases like *Ex parte Nelson* [*No.* 1] (1) and *Hartley* v. *Walsh* (2).

IV. It is established that the defendant is dealing regularly and systematically with the board's property as its own, and that, unless restrained by the court's order, it will continue to do so. The plaintiff concedes that, in respect of the milk expropriated, the defendant is entitled to be paid or compensated. Clearly the plaintiff has no adequate remedy at law for the multitude of conversions of its property; further the plaintiff is greatly hindered in carrying out its statutory mandate to control the milk supply of Sydney and Newcastle. It is a case where an injunction should be granted.

An order should be made that (without prejudice to the defendant's claim for payment under sec. 26 (3) of the *Milk Act*) the defendant be restrained from selling, offering for sale, delivering for sale or otherwise dealing with milk or cream supplied to it for consumption or use within the metropolitan milk-distributing district without the consent of the plaintiff.

Upon the order for removal to this court, the plaintiff undertook to pay to the defendant any amount by which the costs of the defendant were increased by reason of the action being heard in Melbourne instead of at Sydney. This apart, there is no reason whatever why the defendant should not bear the whole cost of the proceedings, including the proceedings before the Supreme Court. For some considerable time it has succeeded in defying the authority of the board, evading the terms of the statute, and in delaying the decision of this court on the constitutional point; which in any event was settled by *Crothers* v. *Sheil* (3), decided some six or seven years ago.

McTIERNAN J. I agree that there should be an order for an injunction as claimed by the plaintiff, but without prejudice to the defendant's right to compensation under sec. 26 (3).

The question whether the defendant has been violating the plaintiff's right of property in the cream which the defendant has

(1) (1928) 42 C.L.R. 209. (2) (1937) 57 C.L.R. 372.
(3) (1933) 49 C.L.R. 399.

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been receiving at its place of business at Waverley by dealing with the cream without the plaintiff's consent depends in the first place upon the question whether sec. 26 of the *Milk Act* 1931-1936 applies to such cream. By sec. 4 the word " milk " is deemed to include cream and is expressed to refer only to milk which is sold or to be sold for consumption or use within any milk-distributing district.

Sec. 26 (1) provides that, after a day to be appointed by the Governor and notified by proclamation in the *Gazette*, milk supplied for consumption or use within the metropolitan milk-distributing district or milk-distributing sub-district thereof specified in the proclamation shall become absolutely vested in and be the property of the board. It is shown that the cream which the plaintiff claims to be its property was produced in Victoria and was consigned to the defendant's place of business at Waverley for sale in Sydney. It answers to the description of cream supplied for consumption or use within the metropolitan district, and it was received by the defendant since the day appointed by the Governor pursuant to sec. 26 (1).

The cream in question falls within the words of the sub-section. Prima facie, therefore, when it was dealt with by the defendant it was the property of the plaintiff and the defendant's rights and interests in it were converted by sec. 26 (3) into a claim for compensation. It is contended on behalf of the defendant that, as the cream is the product of Victoria, it is outside the scope and operation of sec. 26, either because this section does not upon its true construction apply to the product of another State or, if it does in terms, the defendant's cream is saved from its operation by sec. 92 of the Commonwealth Constitution.

The contention that sec. 26 does not apply to the product of another State is not without force, because of the difficulty of applying secs. 27 and 28 (which relate to the delivery of milk to the plaintiff and the payment for milk delivered to it) to milk which is not produced in the milk-producing district for the metropolitan district. Moreover, it is obviously impossible to apply a number of important provisions of the Act which regulate the conduct of business to businesses beyond the territorial limits of New South Wales. But

the opposing considerations are that sec. 26 (1) applies in express terms to milk supplied for consumption or use within the metropolitan district; and the operation of these provisions is not expressly conditioned by the place of production of the milk. Nor are the provisions made by sec. 26 (3) with respect to compensation for expropriation of the product limited to milk produced in any particular district. Further, the Act does not expressly prohibit milk from being received in the metropolitan district for consumption or use in it which is not the product of the producing district appointed for the metropolitan distributing district. The object of the Act is to control all milk for use or consumption in the metropolitan district, and it would be destructive of the plan of the Act to imply a limitation on sec. 26 restricting its scope and operation to the milk supplied for consumption or use in the metropolitan district which is the product of a particular area. I agree, therefore, in the conclusion that the defendant's cream was subject to sec. 26 and became the property of the plaintiff.

It may well be that the legislature selected as the producing district for the metropolitan distributing district the areas from which the latter had been customarily supplied with the milk or beyond which it was not assumed that milk would be brought to it. The possibility that milk would be brought in substantial quantities to Sydney from places outside its milk-producing district, at any rate from another State, was regarded perhaps as remote. But the occurrence of the possibility has raised not only the question of the true construction of sec. 26 but, as the cream was consigned from Victoria, the further question whether sec. 26 can consistently with sec. 92 of the Constitution apply to the defendant's cream. The latter question is to be answered by applying the criterion which was propounded and explained in *James* v. *The Commonwealth* (1): "The true criterion seems to be that what is meant is freedom as at the frontier or, to use the words of sec. 112, in respect of 'goods passing into or out of the State.'" It is recognized that the conception of freedom involved in sec. 92 is violated by a compulsory acquisition of goods, "if in truth the expropriation is directed wholly

(1) (1936) A.C., at p. 630; 55 C.L.R., at p. 58.

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or partially against inter-State trade in the goods, that is, against selling them out of the State" (*James* v. *The Commonwealth* (1))—See *James* v. *Cowan* (2) ; *Peanut Board Case* (3).

The present case is rather the converse of these cases : the expropriation is made by the State into which the goods have been consigned. The inquiry then is whether, in accordance with the principle decided in the *Vacuum Oil Case* (4) (which was approved in *James* v. *The Commonwealth* (5)), where a special burden was imposed on goods simply because they were not the product of Queensland, the *Milk Act* operated upon all milk and cream arriving in New South Wales for consumption or use in the metropolitan milk-distributing district simply because milk and cream is consigned from other States for consumption or use in Sydney and the rest of the area constituting the above-mentioned district. If that is the object of the expropriation, there is a violation of the conception of freedom involved in sec. 92 that "the people of Australia were to be free to trade with each other and to pass to and fro among the States, without any burden, hindrance or restriction based merely on the fact that they were not members of the same State" (*James* v. *The Commonwealth* (6)). It is clear that the *Milk Act* does not profess to expropriate in order to hinder or burden the passing of milk, and the other products which the word "milk" is expressed to include, from other States ; and there is no ground for the contention that any such burden or hindrance is imposed under the disguise of expropriation. The Act replaces an individualist economy by a collectivist one for the distribution of milk within the area containing the most densely populated part of the State ; and all that can be presumed is that the substitution was deemed by the legislature to be an expedient one for reasons only of health, hygiene, efficiency and the economic benefit of farmers in the milk-producing districts. I agree, therefore, that the operation of sec. 26 is not inconsistent with sec. 92 of the Constitution. This view has already been expressed in *Crothers* v. *Sheil* (7).

(1) (1936) A.C., at p. 630 ; 55 C.L.R., at p. 59.
(2) (1932) A.C. 542 ; 47 C.L.R. 386.
(3) (1933) 48 C.L.R. 266.
(4) (1934) 51 C.L.R. 108.
(5) (1936) A.C. 578 ; 55 C.L.R. 1.
(6) (1936) A.C., at p. 630 ; 55 C.L.R., at p. 58.
(7) (1933) 49 C.L.R. 399.

Order that without prejudice to the defendant's claim for payment under sec. 26 (3) *of the* Milk Act 1931, *the defendant be restrained from selling, offering for sale, delivering for sale or otherwise dealing with milk or cream supplied to it for consumption or use within the metropolitan milk-distributing district without the consent of the plaintiff. Defendant to pay plaintiff's costs of the action and of all proceedings therein but plaintiff to pay to defendant the amount by which the defendant's costs have been increased by reason of the case being heard at Melbourne instead of at Sydney. Stay for seven days from* 25*th July* 1939.

Solicitors for the plaintiff, *Allen, Allen & Hemsley.*

Solicitor for the defendant, *E. A. Cleary & Co.*

H. D. W.