[HIGH COURT OF AUSTRALIA.]

JAMES . . . . . PLAINTIFF;

AND

THE COMMONWEALTH . . . . . DEFENDANT.

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MELBOURNE, 1938, *Oct.* 25, 26, 28, 31; *Nov.* 2-4, 7. 1939, *April* 16.

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Constitutional Law (Cth.)—Tort—Liability of the Commonwealth under void Commonwealth legislation—Seizure of goods under invalid legislation—Interference with inter-State trade—Intentional harm—Procuring breach of duty by third persons—Just cause and excuse—Conversion—The Constitution (63 & 64 *Vict. c.* 12), *sec.* 92—*Judiciary Act* 1903-1937 (*No.* 6 *of* 1903—*No.* 5 *of* 1937), *sec.* 56.

Sale of Goods—Property, Passing of—F.o.b. sale.

The plaintiff sued the Commonwealth for damages for the loss which he suffered in his trade in dried fruit in consequence of the administration and enforcement of the *Dried Fruits Act* 1928-1935 and the *Dried Fruits (Inter-State Trade) Regulations*, legislation which was held invalid by the Privy Council in *James* v. *The Commonwealth*, (1936) A.C. 578; 55 C.L.R. 1. The plaintiff's claim fell into two main parts. The first and chief part was concerned with the general loss to his trade or business caused by the continual effect of the administration of the *Dried Fruits Act* and the regulations. The second part related to five specific seizures of parcels of dried fruit which the plaintiff had put in the course of inter-State transportation.

Held, as to the first part of the claim:—

(1) That it was no answer on the part of the defendant Commonwealth that the acts complained of were done by officers relying upon the void legislation for their authority; the Crown in right of the Commonwealth is liable for the tortious acts of its servants acting under its *de-facto* authority; the fact that such authority is given in purported pursuance of an *ultra-vires* statute confers no immunity; but (2) that the plaintiff failed to establish a cause of action, because—

(*a*) sec. 92 of the Constitution conferred no statutory cause of action; sec. 92 is not concerned with the private rights of individuals under the civil law, and it does not confer on every citizen a private right correlative with the duty placed on the State and Commonwealth Governments for breach of

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which an action lies; to determine whether a governmental act be wrongful the general law must be applied; sec. 92 does no more than nullify an alleged justification.

(*b*) without combination acts injurious to a man in his trade, even though impelled by a desire to injure him, do not of themselves confer a cause of action, if accomplished by means otherwise lawful; unless there be combination or conspiracy, the purpose of doing harm is not a sufficient or a material element in the cause of action; the mere fact, therefore, that the Commonwealth in the course of administering invalid regulations, without committing or threatening an illegality, procured shipowners and other carriers to refuse to carry the plaintiff's goods and thereby injured his trade did not suffice to give him a cause of action.

(*c*) an exercise by the Governor in Council of a supposed power to make regulations which the Parliament has purported to confer on the Executive cannot amount to the commission of a tort on the part of the Crown.

(*d*) though the principle of *Lumley* v. *Gye*, (1853) 2 E. & B. 216, applies equally to inducement to commit in respect of a particular person a breach of a general duty owed to the public as a whole, as to a specific contractual obligation owed to that person, and accordingly inducement or procurement without lawful justification of a common carrier to refuse in breach of his duty goods tendered to him for carriage would amount to an actionable wrong, nevertheless a bona-fide assertion as to the state of the law and an intention to resort to the courts cannot be considered a wrongful inducement or procurement simply because the legal position maintained was in fact ill founded; the Commonwealth incurs no liability in tort merely because A is induced to refuse performance of what turns out in fact to be a civil duty to B by an intimation made to A by officers of the Commonwealth that under Commonwealth law A is not merely absolved from performance of his duty but is forbidden under penalty from doing what would amount to performance and by doing it would expose himself to prosecution; provided that the officers act honestly in the purported execution of their duty to maintain and to enforce the laws of the Commonwealth and perhaps reasonably, as for instance, on the faith of a statute not yet held invalid.

As to the second part of the plaintiff's claim, viz., that in respect of the five counts of trover based on seizure and confiscation of specific consignments of dried fruit, the Commonwealth contended that in each case the property in the goods had passed to the buyer before seizure so that the goods seized and converted were not the goods of the plaintiff.

Held that this contention succeeded in one instance only and that the defendant Commonwealth was liable in trover for the other four seizures.

The seller in shipping a definite parcel of goods in performance of a contract for the sale by description of unascertained goods ascertains the goods and prima facie he appropriates them to the contract. The terms of the contract import the prior consent of the buyer to his doing so, and accordingly, if the appropriation is unconditional, the presumption is that the property should

pass without more. If he does not reserve the right of disposal of the goods, the delivery to the shipowner as a carrier for the purpose of transmission to the buyer is deemed an unconditional appropriation of the goods to the contract. But he may reserve the right of disposal until certain conditions are satisfied, and then, notwithstanding shipment, the property will not pass to the buyer until fulfilment of the conditions. If by the bill of lading the goods are deliverable to the seller's order, then he is deemed prima facie to have reserved the right of disposal.

In the execution of contracts for the sale of dried fruit on f.o.b. terms the plaintiff, the seller, shipped the goods under bills of lading or shipping receipts which acknowledged that the goods had been received for shipment to the port of destination, there the owner to take delivery, consigned to order; the plaintiff forwarded the bills of lading either to his bank or his agent for delivery to the buyer on payment or on presentation of a bill of exchange.

Held that the plaintiff had reserved the right of disposal of the goods and that the property did not pass before payment was made or provided for or the goods or the documents obtained by the buyer.

TRIAL OF CONSOLIDATED ACTIONS.

Frederick Alexander James brought against the Commonwealth two actions, which were consolidated. The plaintiff sought to recover damages from the Commonwealth for loss suffered in his trade in dried fruit in consequence of the administration and enforcement of the *Dried Fruits Act* 1928-1935 and the *Dried Fruits (Inter-State Trade) Regulations*, legislation which was held invalid by the Privy Council in *James* v. *The Commonwealth* (1). The facts appear in the judgment hereunder.

Ligertwood K.C. and *Ward*, for the plaintiff.

Wilbur Ham K.C., *Herring* K.C. and *Reynolds*, for the defendant.

Cur. adv. vult.

DIXON J. delivered the following written judgment :— 1939, April 16.

The chief purpose of these consolidated suits is to recover damages from the Commonwealth for the loss which the plaintiff says he suffered in his trade in dried fruit in consequence of the administration and enforcement of the *Dried Fruits Act* 1928-1935 and the *Dried Fruits (Inter-State Trade) Regulations*, legislation which was held invalid by the Privy Council (*James* v. *The Commonwealth* (1)).

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

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The plaintiff, however, does not confine his case to the recovery of damages occasioned by the maintenance and execution generally of the legislation by the Executive. His claim falls into two main parts. The first and chief part is concerned with the general loss to his trade or business caused by the continual effect of the administration of the *Dried Fruits Act* and the regulations. The second part relates to five specific seizures of parcels of dried fruit which the plaintiff had put in course of inter-State transportation.

The determination of the case is governed by matters for a complete understanding of which some account is necessary, not only of the growth of control of the dried-fruits industry, but also of the relations over many years of the plaintiff with the authorities seeking to exercise that control.

Until the passing of the South-Australian *Dried Fruits Act* 1924 (No. 1657) the production and marketing of dried fruit had not been regulated by or under statute. The plaintiff at that time was a fruit merchant, who owned a packing-shed at Berri in South Australia and who also grew vine fruits for drying. Some of the fruit that he packed and marketed he grew himself, and the rest he bought from other growers in the Berri district. He had a place of business in Adelaide, from which he sold dried fruit for the domestic market in South Australia and for the markets of other States and also for exportation to other countries. He had not begun packing fruit until the year 1921, but by 1925, the first year of State regulation, his business had become substantial. He says that 271 tons of dried fruit were packed in his shed and sold in that year. His packing-shed seems to have been efficiently conducted, and the appearance of his boxes and the cleanness and the even grade of the fruit contained in them gave his product some advantage upon a competitive market. In the dried-fruits industry the packing-house or shed plays an important part. The fruit is brought to it from the growers in what are called sweat boxes. The packer must classify it as it is received according to kind, colour and quality. A machine then stems and grades the fruit. Another by means of a fan cleans it by blowing out the stems and the dust and dirt. It is then packed in a proper manner according to its classification in suitably prepared cases or boxes. The grower might sell his fruit to a packing-house

outright or dispose of it on other terms to or through the packing-house, and of course packing on a co-operative or on a pooling system might be practised. But, one way or another, the packing-house has been the natural channel through which the proceeds of his fruit might be expected to reach the grower and the natural agency for marketing the commodity.

As the industry grew the production of dried fruits came greatly to exceed the demand for home consumption and the prices obtainable abroad were considered unremunerative. If no control over the marketing of dried fruit was exercised by legislation or by some combination among producers or traders, the domestic prices would naturally tend to fall to a parity with the export prices. It therefore became an object with those interested in the production of dried fruit to keep up the average price obtained for the total Australian crop of a season by taking means to prevent the offer for home consumption of a quantity so large that the domestic price would fall and at the same time to see that the benefit obtained by keeping up the price was shared ratably among all producers, whether the actual fruit produced by an individual should find its way to the local market or should be exported.

To effect these purposes it was necessary to fix the proportion of each season's crop which might be sold at home and the proportion which might be sold abroad. Further, it was necessary to ensure that the merchants should maintain those proportions in the quantities they placed upon the respective markets. This meant that some control should be exercised over the sale of dried fruit up to a point in the course of distribution and that of the total sales made for a year by every merchant concerned the required percentage should be sold for export. For some time an attempt had been made by voluntary organization to fix and maintain such a quota for export, but a number of persons engaged in the industry stood out. Among these was the plaintiff.

The enactment of the South-Australian *Dried Fruits Act* 1924 was part of a plan to which apparently the Commonwealth and the other three States producing dried fruits, New South Wales, Victoria and Western Australia, adhered. The plan included, first, the registration, inspection and control of packing-sheds and the certification

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of the commodity packed for the purpose of obtaining or maintaining the standard and quality of the article, second, the fixing of a quota or percentage for home consumption and a corresponding quota or percentage for exportation and the registration or licensing of dealers or merchants to ensure observance of the proportions, and third, the regulation of marketing abroad by licensing exportation subject to conditions laid down and enforced by an export-control board. Of these measures the third was undertaken by the Commonwealth. The Parliament passed the *Dried Fruits Export Control Act* 1924, which was proclaimed to commence on 6th February 1925, and the Governor-General in Council made the *Dried Fruits Export Control* (*Licences*) *Regulations*. The validity of this part of the scheme afterwards was in effect upheld in *Crowe* v. *The Commonwealth* (1).

The measures stated under the first and second heads were undertaken by the States, and, for the purpose of carrying them out, the Parliament of South Australia passed the *Dried Fruits Act* 1924, which with subsequent amendments is now consolidated as the *Dried Fruits Act* 1934 (No. 2181) (S.A.) (*South-Australian Statutes* 1837-1936, vol. 2, p. 462). The statute established a Dried Fruits Board, and similar boards were set up in the other three States. No person might in South Australia carry on business as a producer of dried fruits, that is, drying fruits whether of his own growth or not, as a dealer in dried fruits or as a packing-house proprietor, unless registered by the dried-fruits board of that State. To enable the board to fix quotas it was provided that it should have power in its absolute discretion from time to time to determine where and in what respective quantities the output of dried fruits produced in any particular year was to be marketed and it might act as it thought proper to enforce the determination (sec. 20). The Minister of Agriculture was to have power compulsorily to acquire dried fruit (sec. 28).

The plaintiff registered under the State Act as a dealer in, as well as a packer of, dried fruit. He did not, however, observe or continue to observe the quota but sold for consumption within the Commonwealth a greater proportion of the dried fruit he produced or acquired

(1) (1935) 54 C.L.R. 69.

than the determinations of the board allowed. For this he was prosecuted in 1926. In 1927 a number of seizures of his fruit was made upon the authority of the Minister.

In the meantime the plaintiff had brought a suit in this court impugning the validity of the provisions of the State legislation as detracting from the freedom of inter-State trade guaranteed by sec. 92 of the Commonwealth Constitution. The result was that on 22nd August 1927 the court declared that sec. 20, authorizing the determinations of the quota, involved an infringement of sec. 92 (*James* v. *South Australia* (1)). This meant that, subject to the exercise of any power of compulsory acquisition, the plaintiff was at liberty to sell dried fruit into other States without regard to the quotas or proportions fixed for trade within Australia or for trade overseas.

According to *W. & A. McArthur Ltd.* v. *Queensland* (2), the power of the Commonwealth Parliament to make laws with respect to trade and commerce with other countries and among the States was not restrained or affected by sec. 92. On this footing it was natural to turn to the Commonwealth Parliament when it was found that the quota could not be enforced upon inter-State trade by State legislation. Shortly after the decision invalidating the State provision, the Federal *Dried Fruits Act* 1928 was passed. This Act, which was assented to on 22nd May 1928, prohibited the transportation of dried fruit from one State to another (except as might be provided in regulations) unless the carrier or the owner, or other person delivering them for carriage, were each the holder of a licence. The owner was required to hold a licence authorizing him to deliver the fruit for inter-State transportation, and the carrier a licence authorizing him to carry the fruit, and the one was required to deliver and the other to carry it in accordance with the terms and conditions of his licence. The penalty stated for contravention of the provision was a fine of not more than £100 or imprisonment for not more than six months, and it was enacted that dried fruits carried in contravention of the statute should be forfeited to the Crown. The licences were to be issued by a prescribed authority, that is, an authority prescribed by regulation, and they might be

(1) (1927) 40 C.L.R. 1.

(2) (1920) 28 C.L.R. 530.

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issued for such periods and upon such terms and conditions as were prescribed.

Regulations expressed to commence on 10th September 1928 were made, and they named the dried-fruits boards of the four States mentioned as the prescribed authorities. As dried fruit was not produced in Tasmania and Queensland no prescribed authority was named for either of those States. But the failure to name one proved fatal to the regulations. The plaintiff at once attacked the validity of the Act and regulations by a suit in this court, and, though the Act was upheld, the regulations were condemned as giving a preference to the other four States over Queensland and Tasmania contrary to sec. 99 of the Constitution. This decision was given on 12th December 1928 (*James* v. *The Commonwealth* (1)), and new regulations were at once promulgated by the Governor-General in Council overcoming the objection. Under the title of *Dried Fruits* (*Inter-State Trade*) *Regulations* they remained supposedly in force as amended until a consolidated regulation under the same title was made by statutory rule 1934 No. 40 (*Commonwealth Statutory Rules* 1934, p. 610).

The terms and conditions of an owner's licence were prescribed in detail. Such a licence was to be indispensable to any person owning or having in his possession or custody dried fruits intended for delivery to any person for carriage into or through another State to a place in Australia beyond the State in which the delivery was made. The application for a licence must be made to the dried-fruits board of the State beyond which the fruit was to be carried, in the plaintiff's case that of South Australia. All licences expired on 31st December of the year of issue. Of the conditions of the owner's licence the most important was that he should observe the quota. That condition required the licensee to export from Australia such percentage of the dried fruits produced in Australia during a specified year which should come into his possession or custody as was from time to time fixed by the Minister of State for Commerce. In calculating the licensee's percentage for export, fruit already taken into account in applying the percentage to any other licensee was to be excepted. Less important conditions required the licensee

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

(1) to furnish monthly returns of the dried fruit acquired by him, of the dried fruit delivered for inter-State carriage, and that sold within the State, and of the quantity exported, (2) to give security if demanded, and (3) to place certain markings on the goods. A carrier's licence imposed one condition only, viz., that the licensee should not accept from any person delivery of any dried fruits for inter-State carriage unless that person was the holder of an owner's licence. Contravention of a condition in a licence, whether owner's or carrier's, was described as an offence punishable by a fine of not more than £50 or imprisonment for not more than six months.

By a clause of the regulations it was provided that a prescribed authority or a person authorized by a prescribed authority might seize any dried fruits forfeited to the Crown in pursuance of the Act. On his doing so, he was to give notice to the " owner " according to a form provided. The dried fruits so seized were to be deemed condemned and might be sold by the prescribed authority and the proceeds paid into the consolidated revenue fund of the Commonwealth.

So long as the Federal Act and regulations were treated as valid and enforceable they formed a complement to the legislation of the States ; that is to say, the latter covered intra-State trade in dried fruits and the former covered inter-State trade, so that the whole Australian trade was regulated by the same system of control. The plaintiff did not succeed in obtaining a decision that the Commonwealth *Dried Fruits Act* 1928-1935 and regulations were invalid until 17th July 1936 (*James* v. *The Commonwealth* (1)). In the meantime he had recovered damages (£12,145 4s. 10d.) from the South-Australian Government for the seizure of his fruit made under the authority of the State Minister of Agriculture in March to August 1927. On 3rd February 1928 he had begun a suit against the Crown in right of South Australia which was removed into this court and heard before *Starke* J., whose decision was given on 7th November 1929. After an appeal to the Full Court, whose decision was given on 21st March 1930, the plaintiff appealed to the Privy Council, who, by a decision given on 21st June 1932, held that the attempted

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

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compulsory acquisitions were invalid as an interference with inter-State trade and awarded him the damages which had been assessed contingently by *Starke* J. (*James* v. *Cowan* (1)).

Until the Federal *Dried Fruits Act* and regulations were declared void, the plan embodied in the State and Commonwealth enactments appears to have succeeded in the main in its purpose of preventing the sale for home consumption of more dried fruit than would command the higher prices sought and in the further purpose of distributing the benefit of such higher prices evenly among the producers. To achieve the latter purpose no special measures were needed. The prices which in a given season a registered packer or dealer would be prepared to pay growers or other sellers for the fruit he obtained from them would naturally be the reflection of the average price he got or expected to get from all the dried fruit which he resold for the season. In buying the fruit he would not discriminate in the prices he gave between fruit fated to be sold on the local market and fruit destined for export. Dried fruit was not earmarked for the respective markets. What a packer or dealer was bound to do was to observe the quota in disposing of the total quantity passing through his hands in a season and to sell it in the proportions fixed by the quota at the higher prices of the home market and the lower prices of the export market. But the success of the plan in this way depended on the manner in which the channels of distribution were organized. Neither State nor Federal authorities attempted to fix prices, and, perhaps, if it had not been for a further factor, the maintenance of the home consumption prices and of the quota might not have been successful. That factor was the extent to which the industry was organized by means of a voluntary association called the Australian Dried Fruits Association. The plaintiff was not a member of this association, and a number of independent dealers carried on business. But a high percentage, and an increasing percentage, of the fruit produced went through its organization.

The Australian Dried Fruits Association is a voluntary association of fruit growers in New South Wales, South Australia, Victoria and Western Australia which is said to have been in existence for some thirty or forty years. It is composed of branches in the various

(1) (1930) 43 C.L.R. 386; (1932) 47 C.L.R. 386; (1932) A.C. 542.

localities in Australia where dried fruits are produced. Each branch controls its own membership and constitution and is governed by a branch executive. But every branch sends representatives to a council for the district to which it belongs; the district councils send a representative to a State conference for the State in which the branches are situated; and the State conferences appoint representatives upon a Federal council. Representatives of affiliated packing companies may be admitted as members of district councils; and State conferences include the "agents" or "selling agents" of the association, who are certain merchants named specifically and incorporated in the organization, numbering about seventeen and for the most part carrying on business in and from the capital or chief cities.

The Federal council is composed of twenty-four members representing growers, of three representing the association's selling agents, and of the members of the board of management. The Federal council elects the board of management, a board of seven members by which the affairs of the association are administered. Its chairman and secretary are the chief executive officers.

The control which the association exercises or seeks to exercise over the marketing of dried fruit begins with the quality and appearance of the article, and this means the regulation of packing-houses.

An affiliated packing-house is not to pack the fruit of outsiders, and it is evident that, apart from the tendency of this rule to bring growers in as members, it operates to place in the hands of the association a means of insuring that the fruit is marketed through its organization and a means of distributing the proceeds on a local pooling system.

The fruit must be sold through the association's selling agents, and for home consumption they, in the main, sell to distributing agents who are registered with the association. The association is thus enabled to fix prices and ensure that the fixed price is not diminished by discounts and rebates beyond those which the association is prepared to allow. There is some difficulty in reconciling the text of the printed rules of the association with the discounts which according to the evidence it sanctions in practice. But it appears that the association's selling agents, who are remunerated by a

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commission, sell to the registered distributing agents, who are merchants or dealers, at list prices less nine per cent.

At the beginning of the season or year, which with vine fruits is reckoned from 1st March, a prices committee fixes, subject to subsequent modification, prices of dried fruit for home consumption. Three prices are given, a price per pound for a quantity of ten tons or more, a price per pound for a quantity of 100 boxes and a price per pound for a single box. In vine fruit the second price is a farthing, and the third price is a halfpenny, higher than the first. A distributing agent ordinarily buys in quantities of more than ten tons. When he sells he must charge the list price appropriate to the quantity. His selling price is thus always nine per cent higher than his buying price, and it is higher again by a farthing or a halfpenny if he sells in lots of 100 boxes or of single boxes respectively. He can give no discount to his buyer, except apparently if the buyer takes at least twenty tons, when according to a special provision the price may be discounted as much as five per cent.

The association's selling agents endeavour to adhere to the quota for domestic sale and export, a quota which in the absence of legislation the association used to fix for itself; but by means of a scheme of equalization the price at which they account to the growers, usually through the packing-houses, is based on the return for the kind and grade of fruit obtained by the combined home and foreign marketing of the crop. There is not a general pool, but each packing-shed or agency has its own pool from which the grower receives his ultimate dividend.

It is evident that by maintaining or attempting to maintain prices in this manner the association, if there were no legislative control, would provide merchants or dealers who stood out with an opportunity of obtaining dried fruit at a cost which reflected the average price at which the season's crop was expected to sell, that is, the average price computed by reference to the percentage exported and the percentage sold in Australia, and then of selling on the home market without regard to the quota the whole or the greater part of the dried fruit so obtained at or a little below the prices fixed by the association.

So long as every dealer or wholesale merchant is under the necessity of exporting or selling for export a proportion of his total stock of fruit for the season corresponding to the percentage adopted, the attempt to maintain fixed prices is not likely to be defeated by underselling. But it seems plain that the attempt could not succeed if any large stocks of fruit were available to independent dealers who were at liberty to sell them on the Australian market and were prepared to do so.

The association had not been able to obtain control of the sources of supply by enlisting all, or substantially all, growers as members loyally observing its rules, and it had not been able to gain the adherence of all dealers and packers. To give the fixed quota a legislative authority and to enforce its observance was, therefore, considered to be the only alternative.

From beginning to end the plaintiff claimed to be at liberty to sell dried fruit for delivery into other States without regard to the quota, a claim which was well founded, but, owing to the decisions of this court, was repressed by constituted authority from 10th September 1928, when the regulations came into force, until the claim was upheld by the Judicial Committee on 17th July 1936.

During that period the plaintiff was not prevented altogether from selling dried fruit into other States nor from selling it in quantities exceeding the percentage allowed by the quota for domestic sale. By one means or another he contrived, with varying degrees of success, to sell some dried fruit to customers in other States. The prices at which he sold his dried fruit upon the Australian market were, as I believe, usually fixed at a little less than those which the Australian Dried Fruits Association declared or was expected to declare. But a vigilant administration of the Commonwealth Act and regulations made it increasingly difficult for him to supply buyers in other States with dried fruit. Shipowners were continually kept alive to the duty which the regulations and the terms of a carrier's licence purported to impose upon them of refusing to accept dried fruit for inter-State carriage except from a person holding an owner's licence. The shipment of dried fruit was watched and the attention

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of the shipowner's servants was called if it was noticed that dried fruit was, or was to be, shipped or offered for shipment on behalf of anyone but the holder of an owner's licence. The ship, when this was done, refused to receive the consignment. It was thus made very difficult for the plaintiff to fulfil any contracts he might make with his customers in other States, and the use for that purpose of the regular shipping services to which he would otherwise look became almost out of the question. On five occasions during the period fruit which he did succeed in sending away was seized before it reached the hands of the buyers.

In two of the seasons included within the period, the plaintiff sought and obtained an owner's licence under the Commonwealth Act. He was granted a licence in April 1929 for that year, but he failed to observe the condition that he should sell for home consumption and export in accordance with the fixed percentages or quotas. He did not again seek a licence until March 1934. His application was approved, and a licence issued in May 1934 for that year. But again he did not observe the quota. In those two years his trade was naturally larger. His licence enabled him to sell and ship without hindrance.

The quantity of fruit which passed through his hands in 1928 was hardly more than ten per cent of that with which he had dealt in the previous year, but, apart from the effect of the State and Federal legislation, his trade of that particular year was prejudiced by the partial failure of the crop in the district owing to frosts and by seizures made in the prior year by the State and by all that was involved in the litigation in progress at that time.

The following statement shows the quantities of dried vine fruit, i.e., currants, sultanas and lexias, which in each year from 1926 to 1936 he obtained either by growing or by purchase and how much of it he sold on the South-Australian and how much on the inter-State market. The rest he exported or sold for export to other countries. There is some disparity in the figures given by different exhibits put in evidence and also oral statements. The statement, therefore, shows in some places maximum and minimum figures. But the uncertainty has no importance.

Year.	Amount dealt with by plaintiff. Tons	Sold in the Australian home market. Inter-State. Tons	Intra-State (S.A.) Tons
1926	455	233	
1927	730	230 delivered 420 contracted	
1928	76 or over	68 to 80	8
1929	425	220	42
1930	338 to 365	None	78
1931	350	5	109
1932	420 to 478	12½	205
1933	445 to 496	7	129
1934	604	108	167
1935	495 to 541	66 to 89	172
1936	188	19	133

The difference between the prices obtainable for export and those fixed by the Australian Dried Fruits Association for domestic consumption varied from year to year in respect of each of the three kinds of dried fruits. But over the nine years, beginning with 1928 and ending with 1936, the average differences were £17 9s. 2d. for currants, £20 18s. 6d. for sultanas and £10 13s. for lexias. In that period the output in Australia of dried vine fruits increased greatly, but there is so much fluctuation in the quantity produced from season to season owing to the many variable factors which affect production that little more can be deduced from the figures than that the industry must have been growing. The quantity sold for home consumption appears to have increased in the same period about 33 per cent. The percentage of the total output of dried vine fruits which fell under the control of the association increased from 83.8 per cent to 92.4 per cent in the same period. This means that, while in 1926 16.2 per cent of the season's crop was free from the control of that body, in 1936 7.6 per cent only was free.

A comparison of the statements put in evidence suggests, though it does not establish with certainty, that in the greater number of seasons covered by the period in question less dried fruit was in fact exported than the quotas required and that often the deficiency of exports and the corresponding excess of sales for home consumption were substantial.

If the plaintiff had been able to send dried fruit to other States by ordinary means of transport and without danger of seizure, he would have had no difficulty in selling large quantities to buyers in

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other States, that is, assuming that in all other respects the conditions remained the same. This assumption is of great importance. For, to my mind, it is clear that the demand for dried fruits which he would thus have been able to supply was the outcome of the system of control. If everybody had been able to sell and deliver dried fruit from one State into another without hindrance it is, in my opinion, impossible to suppose that it could have been sold at the same price or that the plaintiff would have found the same demand for his fruit. But, in the state of affairs that actually existed, there can be no doubt that the refusal and unwillingness of shipowners, railways and perhaps other carriers to transport his fruit when he was not licensed caused him to fail in the fulfilment of some inter-State orders which he did accept, to forgo the acceptance of a great many more, to refrain from seeking inter-State orders which he otherwise might have obtained, and to lose orders which otherwise might have been sent to him from other States.

The factor which operated in this way was that I have mentioned, viz., the difficulty of forwarding the dried fruit. The exposure to prosecution under the regulations as an unlicensed owner consigning dried fruit had, I think, little influence upon the plaintiff. The chief cause of shipowners and others refusing to carry the plaintiff's fruit was the mere existence of the Act and regulations. But the endeavours of the officers of the Dried Fruits Board of South Australia to see that the regulations were observed formed a secondary cause of some importance. They served not only to remind shipowners and railways that, as the law appeared to stand, they were liable as for an offence if they carried dried fruit from one State to another for an unlicensed owner, but also to keep them informed of the attempts on the part of the plaintiff, when unlicensed, to ship dried fruit. I do not think that shipowners were concerned with the possibility of dried fruit being seized while in their possession as carriers. What influenced them and, no doubt, other carriers, was that it would be a breach of the law, as they supposed, to carry the plaintiff's fruit.

The policing of the regulations by the South-Australian and other dried-fruits boards was not done independently of the Commonwealth Department of Markets and Commerce. When the Commonwealth regulations were adopted steps were taken by the Department of Markets, as the department concerned, to see that the regulations

were acted upon. Circulars, dated 4th September 1928, were sent by the department to dealers and others informing them that they must obtain owner's licences and to shipowners and, as I infer, to other carriers informing them of the provisions relating to carriers' licences. The department sent communications to the dried-fruits boards explaining the mode of administering the regulations and stating the course in a number of particulars which the boards were requested to follow.

When, in March 1929, the plaintiff's licence as an " owner " was granted, the application was dealt with by the Commonwealth Minister, and it was upon his approval that the licence was issued. That Minister also dealt with the question of security. The plaintiff's failure, as holder of the licence, to observe the quota was brought by the board to the attention of the Minister, and it appears to have been submitted for advice to the Commonwealth Crown Solicitor.

In a later part of this judgment the facts are stated relating to five seizures of the plaintiff's fruit made in 1932, 1935 and 1936. As will appear, the Commonwealth department directly sanctioned each of the seizures. The communications passing between the dried-fruits boards and the secretary of the Commonwealth department on these and two or three other occasions suggest that report, consultation, instruction and authorization were frequent. I think there is enough circumstantial evidence to warrant the inference that the secretary, who is the official head of the Commonwealth department, knew the course followed by the Dried Fruits Board of South Australia in policing the regulations, was kept acquainted with the facts ascertained by that board with respect to the plaintiff's attempts to ship or deliver fruit into other States, and approved of what was done by officers of the board. In not a few instances I believe that the approval of the Minister himself was obtained for particular steps. I state these facts as relevant to the contention made for the Commonwealth that the dried-fruits boards, and particularly that of South Australia, acted with no other authority from the Commonwealth than that which the void regulation attempted ineffectually to confer, so that the Commonwealth incurred no liability for any tortious acts of the boards.

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But, before proceeding to discuss the legal consequences of the facts I have set out, I shall interpolate some brief observations upon the extremely difficult question what loss the plaintiff suffered as a result of the obstacles placed in the way of his inter-State trade. That question, if ever it comes to be considered, must be affected very much by the opinion which should be formed as to what would have happened if there had been no such interference with the plaintiff's trade with other States. But, in considering what would have happened, it is manifest that a choice must be made between at least two hypotheses. One hypothesis is that the Commonwealth took no steps to control any merchant or carrier in relation to inter-State trade and, either because the Commonwealth Act and regulations had not been enacted, or because they were known to be void, or because the Commonwealth and the boards abstained from enforcing them, everyone felt himself free to buy and sell, to receive and deliver, dried fruit from one State to another. The second hypothesis is that the facts and conditions as they actually existed were unchanged in no respect except one, viz., that the plaintiff was allowed freely to trade among the States in dried fruit and that no carrier was dissuaded from carrying his fruit by any act done by or on behalf of the Commonwealth. In other words, the second assumption to be adopted is that, except the plaintiff, the producers and traders in dried fruit experienced the same measure of *de-facto* constraint and carried on their operations in the same way but the plaintiff suffered none of the interferences of which he complains.

The first hypothesis contemplates a condition of affairs during the period extending from 10th September 1928 to 17th July 1936, entirely imaginary, a condition in which there is, to my mind, no more reason to suppose that the plaintiff's business would have succeeded than that it would have failed. It is, I think, fallacious to ascribe to the hypothetical conditions to be assumed for that period some presumptive or probable similarity to the actual state of affairs obtaining after 17th July 1936, when the invalidity of the Federal legislation was declared. Under the influence of the legislation, while it was regarded as valid, the organization of the industry had grown and opinion had developed

in such a way as to make the negotiation of a voluntary system, if not comparatively easy, at all events practicable. But it may be desirable to state what happened after 17th July 1936, when the decision of the Privy Council became known. The facts are not set out very clearly or distinctly in the evidence, but, in any case, their importance is not enough to justify more than a brief treatment.

In 1935 for the first time there was formed an association of dealers independent of the Australian Dried Fruits Association. In September 1936 the Minister of Agriculture in South Australia called a meeting of dealers to consider the situation arising from the invalidity of the Commonwealth legislation. Negotiations went on which resulted in all dealers but the plaintiff and one other entering into agreements to maintain quotas, to make adjustments for the purpose and also to maintain the association price. Then an agreement was negotiated with the plaintiff by which he sold his packing-shed and undertaking to a company connected with the association for the sum of £20,000. A collateral condition of the sale was that the plaintiff should be appointed a dealer for the association. This was done, and the plaintiff thus came within the organization. The other dealer, who stood out, appears to have come to some arrangement. In this manner the system has been maintained by voluntary agreement.

It is evident that, in considering the hypothesis of all being free from the *de-facto* control actually exercised by the Commonwealth over inter-State trade in dried fruit, very different conclusions may be reached according to the supposition adopted as to the support of prices and quotas by voluntary agreement. If it is supposed that substantially the actual state of affairs brought about under the legislation would have obtained if it had not been passed or if from the first its invalidity had been acknowledged, because dealers, packers and growers other than the plaintiff and perhaps one or two others would have combined, then it may be conceded that prices and quotas might have been maintained sufficiently for the plaintiff to make a very profitable business of his inter-State trade. But the supposition might be pressed further. It might be supposed that the plaintiff himself was compelled or induced to come to terms. What would those terms have meant to

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him? It would be rash to infer that he would have been better off than if he had fallen in with the scheme from the beginning. On the other hand, if it be assumed that quotas and prices rested on nothing except State legislation and the organization of the association as it existed in 1929, then clearly, I think, inter-State selling would have forced down the prices almost to export parity. Whether at those prices and in such conditions the plaintiff would have conducted his business at a greater profit, or, indeed, at a profit at all, is simply a matter of conjecture. All that can be said about it is that the dried fruit from his packing-house was attractive and that he appears a sufficiently good business man to be likely to survive wherever others could live.

The plaintiff's counsel, who were not unmindful of the difficulties involved both in the measure and in the proof of damage, placed reliance upon the general presumption against a wrongdoer who is responsible for bringing about unlawfully any change in the conditions which ought to prevail and upon the suggestion that, if the Federal legislation had been out of the way, independent dealers and packers would not have been so foolish as to sell in competition until internal prices fell to export parity, but would have combined. They also led evidence in an attempt at providing some further foundation for the plaintiff's claim that he had been prevented from making very substantial profits. For some time during the consideration of the case I felt that, whatever might be my decision as to the existence of the cause of action upon which the plaintiff primarily relies, the better course might be for me contingently to assess damages which, in my opinion, the plaintiff should recover upon this or that assumption. But, after considering the materials in detail, I have come to the conclusion that more harm than good would result from my attempting to do so. I shall mention two only of the reasons for this conclusion. The first is that the views I have formed include so many considerations that affect damages, that it is better, if ultimately it is decided that the plaintiff is entitled to recover upon his chief or widest cause of action, that damages should be assessed as for the precise cause of action found to exist and with whatever help may be given as to the basis upon which they should be ascertained. The second reason is that, in such an

event, the plaintiff may be able to adduce more satisfactory evidence than he has done at the trial before me.

I have now said all that I think necessary upon the facts and circumstances of the plaintiff's general case. I have not distinguished in the foregoing statement between matters which were common ground and those which were the subject, in a greater or less degree, of dispute. I have attempted to bring together in a coherent statement the considerations of fact upon which I believe the determination of the matter must depend without entering into a discussion of disputed points concerning which my conclusion will sufficiently appear from the statement. I turn now to the legal considerations governing the liability of the Commonwealth.

The liability of the Commonwealth for tort may, I think, be treated for the purposes in hand as arising under Part IX. of the *Judiciary Act* 1903-1937: See *Musgrave* v. *The Commonwealth* (1); *Werrin* v *The Commonwealth* (2). The immunity of the Crown from liability for tort, to which sec. 56 seems to be directed, was in part founded, or explained, upon the principle that a servant of the Crown committing an actionable wrong became individually liable but could impose upon the Crown no vicarious responsibility. The maxim *rex non potest peccare* excluded the maxim *respondeat superior*. Under the void statute and regulations the dried-fruits boards of the States obtained no valid authority to act on behalf of the Commonwealth. Accordingly the Commonwealth maintains that no delictual liability fell upon it in consequence of the acts done by or under the authority of the dried-fruits boards or their officers. How far the quasi-legislative function exercised by the Governor in Council in promulgating the regulations can be regarded as a *de-facto* authorizing of the State boards to act on behalf of the Commonwealth for the purpose of civil liability may be open to doubt. This question may involve, in a new aspect, some of the considerations dealt with in *Victorian Stevedoring and General Contracting Co. Pty. Ltd. and Meakes* v. *Dignan* (3). But it is important to see that, once there is found a *de-facto* authority from the Crown in right of the Commonwealth within the scope of which an alleged tort is committed, the

(1) (1937) 57 C.L.R. 514, at pp. 533, 543, 546, 547, 550.
(2) (1938) 59 C.L.R. 150, at pp. 165-168.
(3) (1931) 46 C.L.R. 73.

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doctrine of *ultra vires* is not used to produce the same immunity as formerly arose from the incompetence of an officer at common law to bind the Crown by his tortious acts.

In the present case I am not disposed to give effect to this particular contention of the defendant Commonwealth, because I think that, throughout, the State boards acted with the full allowance of the Commonwealth Department of Commerce or of Marketing, and subject to its general direction. In the case of the five specific seizures I think that it should be inferred that an actual *de-facto* authority to make them was sufficiently communicated by the Commonwealth department to the State boards.

The question whether the plaintiff has a cause of action in conversion in respect of any of the five actual seizures of specific parcels of dried fruit is better considered separately, and I shall deal with it later in this judgment. In each case his right to recover depends, not on the lawfulness of the seizure, but upon the question whether he is the right person to sue, that is to say, upon the question whether he had parted with the property in the fruit before it was seized. For the seizure was undoubtedly wrongful against the true owner of the fruit, whoever he might be. I shall first consider the question whether, upon the facts I have stated, the plaintiff has a cause of action of a more general description entitling him to damages for interference in the conduct of his business owing to the manner in which the regulations were maintained and enforced. But, while it is convenient to consider the existence of such a cause of action as a distinct question apart from that of the Commonwealth's liability to the plaintiff in respect of specific seizures, it is necessary to remember that, as wrongful acts, the seizures of goods actual and threatened may conceivably form constituent elements in the more general cause of action for interference with the plaintiff's trade. For, to take an example, to do, or to threaten, some unlawful act against a carrier in order to induce him to refrain from accepting the plaintiff's goods for carriage and thus to hinder the plaintiff's trade to his loss or damage may give the plaintiff a cause of action. More sweeping propositions, however, form the foundation of the plaintiff's primary case.

To begin with, reliance was placed on sec. 92 of the Constitution as an independent source of liability. It was contended that the plaintiff enjoyed under this provision a right to conduct his inter-State trade without obstruction or impediment on the part of the Federal Government, and that this right had been invaded. The claim is that sec. 92 confers on every citizen a private right correlative with a duty placed upon the governments of the States and of the Commonwealth for breach of which an action of damages lies. In *James* v. *Cowan* (1) Lord *Atkin*, speaking for the Privy Council, remarked that the " Constitution is not to be mocked by substituting executive for legislative interference with freedom." This has been taken as meaning that the view cannot be sustained that sec. 92 is no more than an inhibition addressed to the parliaments of the States (and of the Commonwealth) preventing them from legislating so as to interfere with the freedom prescribed by the section, a proposition adopted by the majority of this court (*Gavan Duffy*, *Rich* and *Starke* JJ.) in *James* v. *South Australia* (2). It is not, however, necessarily inconsistent with the proposition of the same majority that the plaintiff must have failed if he had relied upon the acts of the defendants as giving him a right of action, not in trespass, but for damages for breach by the defendants of the provisions of sec. 92 of the Constitution. In the judgment of *Isaacs* and *Powers* JJ., who dissented from so much of the decision as favoured the State, the following statement appears :—" No doubt sec. 92 does not direct itself to *individuals* who, on their own authority, obstruct other individuals in inter-State commercial operations, and therefore it cannot be said to establish a universal right of protection. But it does operate to shut off all forms of State obstruction and to confer upon the individual a right to be protected against all form of *State action* amounting to, or authorizing anyone to commit, such obstruction " (3). In his judgment in *James* v. *Cowan* (4), a judgment which Lord *Atkin* described as " convincing," *Isaacs* J., in expressing his dissent from the view that sec. 92 did not prevent expropriation, described the right protected by sec. 92 as a personal right attaching to the individual

(1) (1932) 47 C.L.R., at p. 396; (1932) A.C., at p. 558.
(2) (1927) 40 C.L.R. 1, at p. 41.
(3) (1927) 40 C.L.R., at p. 32.
(4) (1930) 43 C.L.R. 386, at p. 418.

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and not attaching to the goods. He spoke of the right as the possession of the individual Australian protected from State interference by sec. 92. But it does not appear that his Honour was considering the question whether sec. 92 conferred upon the individual a private right, breach of which involves an action for damages. Standing in the Constitution as it does, the provision should not, I think, be construed as dealing with the private rights of individuals under the civil law. Although, in point of grammar, it is expressed in the affirmative, it amounts to a negative in universal terms denying power, authority and competence, denying them to governments. I do not think that sec. 92 affords the plaintiff a cause of action sounding in damages. It would be ridiculous to apply to the provisions of a Constitution any of the considerations disclosed by the authorities dealing with the spelling-out of statutory causes of action, authorities collected and discussed by *Jordan* C.J. in his judgments in *Martin* v. *Western District of the Australasian Coal and Shale Employees' Federation Workers' Industrial Union of Australia (Mining Department)* (1) and *Whittaker* v. *Rozelle Wood Products Ltd.* (2). Prima facie a constitution is concerned with the powers and functions of government and the restraints upon their exercise. There is, in my opinion, no sufficient reason to regard sec. 92 as including among its purposes the creation of private rights sounding in damages. It gives to all an immunity from the exercise of governmental power. But to find whether a governmental act be wrongful the general law must be applied. Sec. 92 will do no more than nullify an alleged justification. The plaintiff cannot, therefore, recover damages under sec. 92 independently of any tort by the Commonwealth.

But the plaintiff next asserted a sweeping proposition in the law of tort and made it the foundation of his general cause of action. It is laid down in the often quoted words of Lord *Holt* in *Keeble* v. *Hickeringill* (3), "He that hinders another in his trade or livelihood is liable to an action for so hindering him." The same proposition was

(1) (1939) 34 S.R. (N.S.W.) 593, at p. 596 et seq; 51 W.N. (N.S.W.) 203, at p. 204.

(2) (1936) S.R. (N.S.W.) 204, at p. 207 et seq; 53 W.N. (N.S.W.) 71, at p. 72.

(3) (1707) 11 East 574, n., at p. 575 [103 E.R. 1127, at p. 1128]; cp. Holt 14, 17, 19 [90 E.R. 906-908].

framed in more qualified and careful terms by *Hawkins* J. in his opinion in *Allen* v. *Flood* (1): "The wilful invader, without lawful cause or justification, of a man's right freely to carry on his calling commits a legal wrong; and that wrong, if followed by 'injury' caused thereby to him whose right is invaded, affords a legal ground of action." But, although the view that a principle to this effect existed was maintained by *Cave* J., *North* J., *Grantham* J. and *Lawrance* J. in opinions based upon a citation and discussion of cases the names of which have grown familiar to students, the opinion to the contrary given by *Wright* J. was, I think, accepted by the majority of the House, an opinion included by *Scrutton* L.J. among the four upon the subject of interference with a man's trade or vocation by combination, coercion or the like which he found personally most enlightening and accurate (*Ware and De Freville Ltd.* v. *Motor Trade Association* (2)). *Wright* J. (3) began by giving a negative answer to the question, "Does a plaintiff, by proving that a defendant has wilfully procured persons to refuse to make or renew contracts with the plaintiff in the way of his trade or employment, and that damage has directly resulted, prove any wrong or *injuria*?" In doing so he relied upon *Rogers* v. *Rajendro Dutt* (4), a case in which, as in the present, the interference complained of was the work of a government. Because during the Indian Mutiny the plaintiff, a tug-master, had demanded excessive charges for towing one of Her Majesty's ships up the Hooghli, pilots were instructed not to allow any ship under their charge to use the plaintiff's tug. The Privy Council held that no invasion of legal right was involved. *Wright* J. then went on to inquire whether it would make any difference if the defendant was actuated by a desire to harm the plaintiff. Having shown that generally an act which may be lawfully done does not become unlawful because it is done with such a motive or purpose, he goes on to dispose of the more particular question in a passage which at once refers to and briefly distinguishes or explains almost all the earlier decisions the citation of which might be looked for in such a judgment as the present. His Lordship said:—"Then, if there is no such general doctrine as that which

(1) (1898) A.C. 1, at p. 14.
(2) (1921) 3 K.B. 40, at p. 70.
(3) (1898) A.C., at p. 62.
(4) (1860) 13 Moo. P.C.C. 209 [15 E.R. 78].

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the respondents maintain, is there a limited doctrine of the same kind in relation to interference with a man's trade or employment? Beyond the important dicta of Lord *Holt* in *Keeble* v. *Hickeringill* (1), the authorities cited do not appear to be adequate to sustain the weight of such a proposition. If such were the law, it would be reasonable to suppose that it would long since have been established by recognized precedents of pleading, and by numerous cases dealing with a question of such frequent occurrence and affecting such varied and important interests, and by at least some cases affirming it after discussion of the grounds and limits of so anomalous and important an exception to the general rule. In fact, however, the authorities cited in support of it are, until *Temperton* v. *Russell* (2), no more than dicta, and, with the exception of Lord *Holt's* dicta in *Keeble* v. *Hickeringill* (1), they are indistinct and referable to other grounds, as was pointed out by *Bowen* L.J. in the *Mogul Case* (3), either violence or threat of violence, as in *Garret* v. *Taylor* (4) and *Tarleton* v. *M'Gawley* (5); or conspiracy and actual disturbance of trade, as in *Gregory* v. *Duke of Brunswick* (6); or obstruction in the use of the highway, or physical interference with trade, as in *Green* v. *London General Omnibus Co. Ltd.* (7); or slander of title, or nuisance, or other similar grounds. *Keeble* v. *Hickeringill* (1) itself cannot be said to have obtained recognition as establishing any general doctrine of law. Decided in the time of Queen Anne, and reported then, and more at large in 1809 (in the note to *Carrington* v. *Taylor* (8)), it must have been known to lawyers for nearly two centuries. Yet no reference to it is to be found in *Smith's Leading Cases* or in *Bullen and Leake's Precedents of Pleadings*. In *Buller's Nisi Prius* it is barely mentioned, and there, and in *Selwyn's Nisi Prius*, the dicta for which it is now cited are not mentioned at all" (9). It may be added that when, in *The Tubantia* (10), Lord *Merrivale* relied upon the same line of

(1) (1707) 11 East 574, n. [103 E.R. 1127].
(2) (1893) 1 Q.B. 715.
(3) (1889) 23 Q.B.D. 598, at pp. 611 et seq.
(4) (1620) Cro. Jac. 567 [79 E.R. 485].
(5) (1793) 1 Peake N.P.C. 270 [170 E.R. 153].
(6) (1843) 6 M. & G. 205, 953 [134 E.R. 866, 1178].
(7) (1859) 7 C.B.N.S. 290 [141 E.R. 828].
(8) (1809) 11 East 571 [103 E.R. 1126].
(9) (1898) A.C., at pp. 66, 67.
(10) (1924) P. 78, at pp. 92, 93.

cases, he was dealing with physical interference. Lord *Watson* said :—" There are, in my opinion, two grounds only upon which a person who procures the act of another can be made legally responsible for its consequences. In the first place, he will incur liability if he knowingly and for his own ends induces that other person to commit an actionable wrong. In the second place, when the act induced is within the right of the immediate actor, and is therefore not wrongful in so far as he is concerned, it may yet be to the detriment of a third party ; and in that case . . . the inducer may be held liable if he can be shown to have procured his object by the use of illegal means directed against that third party " (1). This passage was relied upon by *Lawrence* J. in *Davies* v. *Thomas* (2) and by *Peterson* J. in *Hodges* v. *Webb* (3) and by *Eve* J. in *Wolstenholme* v. *Ariss* (4). I think it represents the law as it is to be deduced from *Allen* v. *Flood* (5), *Ware and De Freville Ltd.* v. *Motor Trade Association* (6) and *Sorrell* v. *Smith* (7), considered in combination.

In *Ware and De Freville Ltd.* v. *Motor Trade Association* (8) *Atkin* L.J. pronounces firmly against the view that an interference must be justified as prima facie a legal wrong and insists that a plaintiff must succeed, if at all, by showing that the acts done or threatened to be done by the defendants are unlawful. Lord *Dunedin* expressed the same view in *Sorrell* v. *Smith* (9). It is true that in the opinions delivered in *Sorrell* v. *Smith* (7) there cannot be found a clear majority expressly excluding the possibility that a tort is committed when one person acting alone wilfully injures a man in his trade by means which, but for the fact that he is impelled by a desire so to injure the other, would not be unlawful. In the course of his judgment in *McKernan* v. *Fraser* (10) *Evatt* J. says :—" But the judgments of their Lordships did not set all controversy at rest. For instance, Sir *Frederick Pollock* commented that ' the vexed question whether there is any magic in " plurality " will never be settled until some powerful corporation (being, of course, only one person in law) does some of the things which (it is

(1) (1898) A.C., at p. 96.
(2) (1920) 1 Ch. 217.
(3) (1920) 2 Ch. 70, at p. 81.
(4) (1920) 2 Ch. 403, at p. 409.
(5) (1898) A.C. 1.
(6) (1921) 3 K.B. 40.
(7) (1925) A.C. 700.
(8) (1921) 3 K.B., at p. 79.
(9) (1925) A.C., at pp. 728, 729.
(10) (1931) 46 C.L.R. 343, at pp. 379, 380.

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still said by respectable authority) one person may do with impunity but two or more may not' (41 *Law Quarterly Review* 369). Viscount *Cave's* speech deliberately left such question open (1), and with Lord *Cave*, Lord *Atkinson* agreed. Lord *Buckmaster's* judgment was in agreement with the principles stated in that of Lord *Dunedin*. And the fifth member of the House, Lord *Sumner*, whilst restricting his opinion to the rather clear case under consideration, raised certain questions of profound interest, without fully indicating his own final judgment."

Perhaps the present case, where a government is concerned, more powerful than a corporation, is of the kind for which Sir *Frederick Pollock* looked. But in one respect the facts fall short of what is necessary. For it is, I think, quite clear that the motive or purpose which actuated the government and its officers was not that of harming or injuring the plaintiff. The purpose was simply to see that he conformed to the regulations and observed the quota. In any case, I think that unless there be combination or conspiracy, that is "plurality," the purpose of doing harm is not a sufficient or, indeed, a material element in the cause of action: See the first two propositions stated by *Evatt* J. (2); *Holdsworth's History of English Law*, vol. VIII., pp. 392-397; "Unlawful Molestation," by Dr. *G. C. Cheshire*, *Law Quarterly Review*, vol. 39 p. 193; and *The Law relating to Competitive Trading* (1938), by Miss *D. Knight Dix*, pp. 80, 81. It follows that the mere fact that the Commonwealth in the course of administering the invalid regulations, without committing or threatening an illegality, procured the shipowners and other carriers to refuse to carry the plaintiff's goods and thereby injured his trade, would not suffice to give him a cause of action. It is necessary that some unlawful or wrongful means should have been used or threatened. Then, did the course taken include any unlawful means or threat of unlawful means?

There is no proof that any express threat was made to any carrier that fruit, if delivered to him for transport, whether by sea or land, would be seized in his hands. Such a seizure would involve an unlawful invasion of his possession as bailee. But it may be right to infer that such a threat was impliedly held out. For it may be supposed

(1) (1925) A.C., at p. 713. (2) (1931) 46 C.L.R., at p. 380.

that it was well enough known that the Commonwealth assumed to possess a power of seizure and shipowners or their servants probably realized, though perhaps in a vague way, that the Commonwealth or the boards would or might take possession of James' fruit if it was dispatched inter-State. I feel sure, however, that the possibility of its being seized had no persuasive effect upon shipowners and carriers and did not influence them in refusing to carry the fruit. What influenced them was fear of prosecution under the regulations, the belief that it was contrary to the law to carry the fruit and the common desire not to come into conflict with a government department.

But the question remains whether the plaintiff may not have a cause of action founded upon the unlawfulness of the refusal induced by the Commonwealth to accept the plaintiff's fruit for carriage by sea, or, for that matter, by land. It was suggested on behalf of the plaintiff that the ships which otherwise might have carried the plaintiff's goods between the States were common carriers, and were therefore bound at law to accept the goods for carriage in the absence of some reasonable justification for refusing them. As the Act and regulations were void they could not, according to the contention, relieve the shipowners from a liability in tort for the refusal. The Commonwealth therefore, it was suggested, had been guilty of inducing a breach of duty and was liable on the principle which goes under the name of *Lumley* v. *Gye* (1). This ground of liability, although suggested during the opening by the plaintiff's counsel, was not during the hearing elaborated or developed by evidence or argument. But it requires consideration.

The common law imposed upon those professing certain occupations an obligation to give their services to whosoever might demand them. The innkeeper and the common carrier are conspicuous examples surviving into modern times of occupations governed by this doctrine. In *Lane* v. *Cotton* (2) *Holt* C.J. said :—" Wherever any subject takes upon himself a public trust for the benefit of the rest of his fellow-subjects, he is *eo ipso* bound to serve the subject in all the things that are within the reach and comprehension of such an office, under

(1) (1853) 2 E. & B. 216 [118 E.R. 749].

(2) (1702) 12 Mod. 472, at p. 484 [88 E.R. 1458, at pp. 1464, 1465].

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pain of an action against him. . . . If an innkeeper refuse to entertain a guest where his house is not full, an action will lie against him, and so against a carrier, if his horses be not loaded, and he refuses to take a packet proper to be sent by a carrier; and I have known such actions maintained, though the cases are not reported." The foundation of the obligation is the carrier's public profession of the business which he exercises. He is not bound to assume the character of a common carrier, but, if he does, he must not refuse the functions which belong to that occupation. It is left to him to define, by his own public profession or assumption of function, the extent of his business, that is, upon what journeys and by what means he undertakes the carriage of goods and what class or classes of goods he is prepared to carry. "A person may profess to carry a particular description of goods only, for instance, cattle or dry goods, in which case he could not be compelled to carry any other kind of goods; or he may limit his obligation to carrying from one place to another, as from Manchester to London, and then he would not be bound to carry to or from the intermediate places. Still, until he retracts, every individual (provided he tenders the money at the time, and there is room in the conveyance), has a right to call upon him to receive and carry goods according to his public profession" (per *Parke* B., *Johnson* v. *Midland Railway Co.* (1)). The holding out or profession of the character of common carrier may be expressed, or it may be, and usually is, implied by a course of business or other conduct. It is in every case a question of fact whether the character of a common carrier has been assumed. In considering that question an important matter is whether the carrier holds himself out as ready without discrimination to carry the goods of all persons who may choose to employ him or send him goods to be carried. If, instead of inviting all persons without discrimination to use his ships or vehicles, he reserves the right of choosing among them, independently of the suitability of their goods for his means of transportation and without regard to the room or space he has available, then he is not a common carrier. In *Belfast Ropework Co.* v. *Bushell* (2), *Bailhache* J. said: "For the

(1) (1849) 4 Ex. 367, at p. 373 [154 E.R. 1254, at p. 1257].

(2) (1918) 1 K.B. 210, at p. 215.

purposes of my present decision I fall back upon this question, Did the defendant, while inviting all and sundry to employ him, reserve to himself the right of accepting or rejecting their offers of goods for carriage whether his lorries were full or empty, being guided in his decision by the attractiveness or otherwise of the particular offer and not by his ability or inability to carry having regard to his other engagements ? " In *Leslie* on *Transport by Railway*, 2nd ed. (1928), pp. 13-14, there is an interesting note on the manner in which the right to discriminate may be reserved. In the present case no evidence was tendered to prove whether the owners of any and what ships trading between Adelaide and other Australian ports filled the character of common carriers. The regulations cover all carriers, and, in so far as the regulations themselves were relied upon as constituting an inducement or persuasion on the part of the Commonwealth to shipowners to refuse to carry the plaintiff's goods, they may be considered as addressed to the inter-State carrying trade at large, among whom it may be supposed that there must be some ships reserving no right of discriminating amongst cargo owners. But when the plaintiff places reliance upon specific instances of refusals to accept his dried fruit as freight, it appears to me to be more difficult to assume without evidence that any one of the ships so refusing professed to be a common carrier. Judicial notice may be taken of many matters of notorious fact in relation to the course of inter-State commerce, but it cannot be assumed that any particular shipowner or, indeed, shipowners generally, have not, by reserving the right to discriminate sought to avoid the assumption of the character of common carriers. It might be sufficient, therefore, to say, upon this head of alleged liability, that the plaintiff's proofs fail, that is, unless the regulations in themselves, including the form of carrier's licence amount to an inducement to the carrying trade at large, sufficient for the principle of *Lumley* v. *Gye* (1). As to this last qualification or exception it is, I think, enough to say that I am not prepared to hold that any exercise by the Governor in Council of a supposed power to make regulations which the Parliament has purported to confer upon the Executive can amount to a commission of a tort on the part of the Crown within the meaning of Part

(1) (1853) 2 E. & B. 216 [118 E.R. 749].

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IX. of the *Judiciary Act*. In a case involving so many other questions I shall forbear from entering into a discussion of the grounds for this statement. For even supposing that some of the ships to which, but for the regulations, the plaintiff might have delivered his fruit for carriage or to which he, in fact, did deliver his goods for carriage, were engaged in the business of common carriers, I still think that the plaintiff is not entitled to succeed under this head of the cause of action which he bases on interference with him in his trade. The principle to which *Lumley* v. *Gye* (1) is now referred is no doubt wide enough to include within its protection civil rights which exist independently of contract. It may be at once conceded that for a third party, without justification or excuse, knowingly to procure a common carrier to refuse in breach of his duty goods tendered to him for carriage would amount to an actionable wrong. In *Lumley* v. *Gye* (1) itself *Erle* J. adopted the view that, just as the procurement of a tort was itself a tort, so it was wrongful to procure the breach of a contractual duty, and that the liability involved a principle of which liability for procuring a breach of contract of hiring was only an example or illustration; a class of cases which he said "rests upon the principle that the procurement of the violation of the right is a cause of action" (2). In *Mogul Steamship Co.* v. *MacGregor Gow & Co.* (3) *Bowen* L.J. included among the things forbidden "the intentional procurement of a violation of individual rights, contractual or other, assuming always that there is no just cause for it." Lord *Macnaghten* in *Quinn* v. *Leathem* (4) placed *Lumley* v. *Gye* (1) upon "the ground that a violation of legal right committed knowingly is a cause of action." In more than one respect, however, the elements of the cause of action are ill defined. Sometimes malice is said to be an ingredient; but this seems to mean no more than that the defendant must have knowledge of the existence of the civil right or of the facts from which it arises and must act without lawful justification. What constitutes a lawful justification is a matter of some difficulty: See *Glamorgan Coal Co.* v. *South Wales Miners' Federation* (5); *Brimelow* v. *Casson* (6); *Winfield, Law of*

(1) (1853) 2 E. & B. 216 [118 E.R. 749].
(2) (1853) 2 E. & B., at p. 232 [118 E.R., at p. 755].
(3) (1889) 23 Q.B.D., at p. 614.
(4) (1901) A.C. 495, at p. 510.
(5) (1903) 2 K.B. 545, particularly at pp. 573, 575; (1905) A.C. 239.
(6) (1924) 1 Ch. 302.

Tort (1937), p. 624; *Salmond, Law of Torts*, 7th ed. (1928), by *Stallybrass*, sec. 159 (4), p. 634; *Harvard Law Review*, vol. 36, p. 663, particularly at pp. 677-686, 702; *Harvard Law Review*, vol. 39, p. 749; *Jenks, Digest of English Civil Law*, 3rd ed. (1938), sec. 983, note *b*. The question which appears to me to arise in the present case under the head of justification or excuse is whether the bona-fide execution of a law for the time being upheld as valid by the competent judicial power amounts to just cause or excuse notwithstanding that the law is afterwards found to be invalid.

Another matter of some obscurity is what amounts to a procurement or inducement for the purpose of the doctrine. Apparently inducement is to be distinguished from advice or persuasion. "On principle," says *Salmond*, 7th ed. (1928), sec. 159 (2), p. 633; 8th ed. (1934), sec. 101 (2), p. 391, "it is submitted that mere advice is not actionable: as when a parent advises his daughter to break an engagement of marriage, or a physician advises a patient to break a contract of service for his health's sake. There must be an inducement in the strict sense—that is to say, the intentional creation of some inducing cause or reason for the breach of contract; for example, to induce a servant to leave his employment by an offer of higher wages, or by a threat to inflict some harm upon him, legal or illegal, if he continues in it. To *induce* a breach of contract means to create a reason for breaking it; to *advise* a breach of contract is to point out the reasons which already exist. The former is certainly actionable; the latter has never been held to be so, and is probably innocent": See, further, *Findlay* v. *Blaylock* (1), where improper motive is made the test in the case of a parent persuading a child to break a promise of marriage. All the acts of which the plaintiff complains as amounting to an interference with his business must be considered in combination for the purpose of determining whether they amount to a wrongful procurement of a breach or breaches of the obligation of common carriers; but in considering them it must not be forgotten that sec. 3 (1) (*b*) of the *Dried Fruits Act* 1928-1935 purported to forbid carriage by any person of dried fruits except pursuant to the conditions of a licence.

(1) (1937) S.C. 21.

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I am quite unable to believe that an attempted enactment of the legislative organ of government can form any part of a wrongful act for which the Executive Government is liable under Part IX. of the *Judiciary Act*. The existence of the invalid statute may be regarded as a fact preliminary to and explanatory of the commission by the Executive of a tort, but it cannot, in my opinion, enter into the actual grounds of legal responsibility in tort. It must further be remembered that to constitute a cause of action procurement of a breach of duty must result in some actual breach of duty owing by the third party to the plaintiff. It is not enough that the defendant did all that would have been necessary to induce or procure the third party to break his duty, if he had been called upon to perform it. The duty to perform must have arisen and have been broken. This might be not without importance in the present case because, although not a few instances were proved of actual refusals to accept goods offered for sea-carriage, the greater part of the plaintiff's claim rested on his failure to accept or seek inter-State orders because he foresaw that he could not ship the goods. No evidence of the actual loss flowing from these specific refusals was adduced. It is true, however, that the measure of damages for procurement is not identical with the measure of damages appropriate to the breach of duty procured, and it appears that general damages may be awarded. In every instance where goods offered for inter-State carriage were refused by the carrier, the inducement consisted in a reminder that the plaintiff was not licensed and that under the Act and regulations, including the conditions prescribed for a carrier's licence, the carriage of his dried fruit was inhibited. Sometimes less was expressed or implied, but I do not think that any greater persuasion or inducement took place. There was, in other words, an appeal to the law as it was conceived to exist. The threat or inducement consisted in a tacit or implied intimation that the claims of the Government might be enforced by resort to legal process. I think it would be an extension of the principle upon which the procurement of breach of duty is made a tort to hold that it covers a mistaken assertion on the part of the Executive Government or its officers that under the law, as they understood it, it is the third party's duty to refrain from compliance with the

obligation upon which the plaintiff insists. The ground upon which I decide this part of the case against the plaintiff is that the Commonwealth incurs no liability for tort merely because A is induced to refuse performance of what turns out to be in fact a civil duty to B by an intimation made to A by the officers of the Commonwealth that, under the law of the Commonwealth, A is not merely absolved from the performance of the duty but is forbidden under penalties to do what would amount to performance and, by doing it, would expose himself to prosecution; provided that the officers act honestly in the purported execution of their duty to maintain and enforce the laws of the Commonwealth and, perhaps reasonably, as, for instance, on the faith of a statute not yet held to be invalid. Even if the plaintiff overcame the other difficulties I have mentioned, this ground would be fatal to his claim for wrongful procurement of breaches of duty by common carriers. I do not think that a bona-fide assertion as to the state of the law and an intention to resort to the courts made known to the third party can be considered a wrongful inducement or procurement. The situation is simply that the Executive, charged with the execution of the law, under a bona-fide mistake as to the state of the law, proposes to proceed by judicial process. The courts are established by and under the Constitution for the purpose, among others, of determining whether the Executive is or is not mistaken in its view of the law which it seeks to enforce against the individual, and judicial process is the appointed means for bringing the question up for decision. To treat a proposal or threat to institute proceedings as a wrongful procurement of a breach of duty is to ignore the fact that, assuming bona fides, the law always countenances resort to the courts, whether by criminal or civil process, as the proper means of determining any assertion of right. In all other cases of procurement to be found there has been an element of impropriety, or of reliance upon some power or influence independent of lawful authority. An intention to put the law in motion cannot be considered a wrongful procurement or inducement, simply because it turns out that the legal position maintained was ill founded.

For these reasons I am of opinion that the plaintiff has no cause of action at common law against the Commonwealth for wrongful

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interference with the plaintiff in the course of his trade by procuring carriers to refuse his dried fruit.

It remains to consider still another possible ground of liability for interfering with the plaintiff's trade. "Although there seems no authority on the point, it cannot be doubted," says Sir *John Salmond*, "that it is an actionable wrong intentionally to compel a person, by means of a threat of an illegal act, to do some act whereby loss accrues to him: for example, an action will doubtless lie at the suit of a trader who has been compelled to discontinue his business by means of threats of personal violence made against him by the defendant with that intention" (*Salmond, Law of Torts*, 9th ed. (1936), p. 633, sec. 154 (2)). It would be an illegal act to seize the plaintiff's dried fruit under colour of the regulations. Intentionally to compel the plaintiff to desist from selling his dried fruit by means of threats of seizure might, if followed by damage, amount to an actionable wrong. Every actual seizure made implied a threat to seize further shipments, even if the plaintiff could not establish other forms of threat, express or implied, to seize his goods. Apart altogether, therefore, from damages for conversion, it might be thought that a liability in a cause of action of the foregoing description fell upon the Commonwealth, because it had assumed the power and manifested an intention of seizing the plaintiff's goods if he shipped them. If the plaintiff made out a case of damage suffered because, in face of the seizures and of the threats of seizure, he felt it impossible to continue his inter-State trade, would not this amount to compelling him, by means of a threat of an illegal act, to forbear from trading and so to incur a loss?

Speaking generally, a short answer to this suggestion is that the plaintiff in fact was not influenced by the fear of seizure and it was not the threats supposed that operated to restrain his trading.

Upon the subject of seizures and threats of seizure, as a deterrent from trading inter-State, the case stands as follows. In his statement of claim, the plaintiff included among the means by which the Commonwealth interfered with his business seizure and threats of seizure. But, by his further particulars, the generality of this head of complaint was much restricted. He placed reliance upon the regulations themselves as part of the threats. Actual seizures,

however, the plaintiff confined to the specific instances sued on separately as conversions, viz., two seizures in October 1932, one in December 1935 and two in April 1936. He particularized instances of threats to take proceedings of a judicial nature against him, but he placed no reliance in the particulars upon any specific act or communication by or on behalf of the Commonwealth, outside the regulations, as a threat to seize dried fruits which he might ship. The fact of the matter is that the supposed power of seizure was exercised sparingly and with hesitation, as well as spasmodically. At two periods, and two only, did the Commonwealth department actually resort to it, viz., October 1932 and in the period at the end of 1935 and the beginning of 1936. The plaintiff was by no means appalled by the possibility or the prospect of the exercise of the supposed power of seizure. That did not compel him to refuse business or abstain from shipment. His difficulty lay in the refusal and unwillingness of the shipping companies to carry his goods. It is true that, in a letter written on learning of the seizure made on 9th December 1935, the plaintiff is found expressing himself as unable to fulfil further orders from the buyer concerned because the goods would be exposed to seizure. In dealing with the causes of action in conversion, it will be necessary to give the details of the transaction. It is enough for present purposes to say that the buyer was a firm called J. L. Irwin & Co. of Brisbane and that 200 boxes of sultanas were seized while on their way to Brisbane. Further orders which the firm had given, or was prepared to give, covered about 1,085 boxes of sultanas. On 18th December 1935 the plaintiff wrote to the firm thanking them for their orders, but stating that, owing, in effect, to the seizure of goods, he was unable to execute them. This might look as if in respect of the 1,085 boxes, a quantity which comprised his full stock for the time being of sultanas of that grade, the plaintiff might bring himself within the statement of Sir *John Salmond*. But the correspondence which ensued between the plaintiff and Irwin & Co. shows that, notwithstanding his gloom on 18th December, the plaintiff was able to sell the sultanas, a substantial portion going to Irwin & Co. themselves. In this portion the 268 boxes seized on 6th April 1936 were included. They were

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the last of the 1,085 boxes. The fact that they were seized before the buyer obtained actual delivery or control resulted in the loss to the plaintiff of the price or value of the 268 boxes, and it may be necessary to consider what is the consequence of this fact upon the cause of action now in question. But that may be deferred until the cause of action in trover has been dealt with. Apart from the reference to the seizure of 9th December 1935 as a reason for not filling the then pending orders of Irwin & Co. for the 1,085 boxes, there is no foundation in the evidence adduced for the conclusion that threat of seizure or prospect of seizure was a factor which affected any course of action the plaintiff took. Whenever he could obtain inter-State shipping space and ship dried fruit, he did so, and I do not think he would have been restrained by the existence of the provision for seizure or the likelihood of the exercise of the power it purported to give, if he had been able more frequently to ship his goods. The great difficulty with which he was confronted was the unwillingness of the shipowners to carry the dried fruit of an unlicensed owner. It is, I think, because the risk of the Commonwealth seizing played so little part in the course of the plaintiff's trade over the whole period from the promulgation of the regulations until the decision of the Privy Council in July 1936 that the plaintiff's particulars contain no instances of threats, express or implied, to seize, and refer only to the regulations.

For these reasons I am of opinion that, upon his chief or primary cause of general interference with his inter-State trading operations, the plaintiff fails.

The complaint of the plaintiff is not confined to general interference with his inter-State trading operations. To that claim he adds five counts of trover based upon the seizure and confiscation of five separate consignments of dried fruit which he had put in course of transit in order to perform contracts of sale which he had made with merchants in New South Wales or Queensland. In the last of these alleged conversions by the Commonwealth the goods were seized at the end of a journey overland upon which they were carried by the plaintiff's own servant for delivery at the buyer's warehouse. But, in the others, the goods were sent by sea from Port Adelaide

to some other port in the Commonwealth by a ship or ships carrying general cargo.

Sometimes the price fixed by the contract of sale or by the buyer's order was f.o.b., sometimes c.i.f., that is, expressly or in effect; but in either case the terms of sale or the course of dealing or practice meant that it was for the plaintiff to arrange for the sea-carriage of the goods to the port where the buyer required them; to ship the goods and obtain the bill of lading, or receipt for shipment, and an insurance against marine risks; to forward or arrange for the forwarding of the shipping documents so that the buyer or someone on his behalf might get delivery at the port of destination, and to draw upon the buyer for the price and charges.

Apart from the contention that the officers who seized the dried fruit were not the servants or agents of the Commonwealth acting within the scope of their authority, the chief answer made by the Commonwealth to the causes of action in conversion is that the property in the goods had passed to the buyer before seizure, so that the boxes of dried fruit seized and converted were not the goods of the plaintiff.

In transactions of such a description the final test of the time or stage when the transfer of property in the goods takes place is the intention of the parties or, more strictly, of the seller. The provisions of the English *Sale of Goods Act* 1893 were in force in all the States the law of which might be considered to govern the passing of property in any of the five cases (New South Wales, No. 1 of 1923; Victoria, No. 3694; Queensland, 60 Vict. No. 6; South Australia, No. 630 (1895)). That legislation expresses the rules or presumptions of law which had long guided the courts in determining when the property passed in goods shipped by a seller in fulfilment of a contract for the sale of unascertained goods to be forwarded to the buyer by sea. They are to be found in secs. 16, 18, rule 5, and 19 of the English Act. It is unnecessary to set them out textually.

The seller in shipping a definite parcel of goods in performance of a contract for the sale of unascertained goods by description ascertains the goods, and prima facie he appropriates them to the contract. The terms of the contract import the prior assent of the buyer to his doing so, and accordingly, if the appropriation is unconditional,

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the presumption is that he intended that the property should pass without more. If he does not reserve the right of disposal of the goods, as it is called, his delivery of the goods to the shipowner as a carrier for the purpose of transmission to the buyer is deemed an unconditional appropriation of the goods to the contract. But he may reserve the right of disposal until certain conditions are fulfilled, and then, notwithstanding shipment for transmission to the buyer, property in the goods will not pass to the buyer until fulfilment of the conditions. If by the bill of lading which the seller obtains from the shipowner the goods are deliverable to his order or that of his agent, then he is deemed prima facie to have reserved the right of disposal.

The older cases show the reason for this. Shipment is not a delivery to the buyer by the seller. It is delivery to a bailee, the shipowner or the master of the ship, for delivery to the person indicated by the bill of lading, the person for whom they are to be carried (*Wait* v. *Baker* (1); *Shepherd* v. *Harrison* (2)). It was for this reason that *Bramwell* B. expressed the view that the act of shipment is not completed until the giving of the bill of lading; because it remains uncertain on whose account the goods are shipped till the bill of lading is given and they are not shipped on the buyer's account till a bill is given by the terms of which the goods are deliverable to him (*Gabarron* v. *Kreeft* (3)). But the taking of a bill in which the goods are expressed to be deliverable to the seller is not incompatible with the passing of the property to the buyer; for he may act, although in his own name, as the agent of the buyer and he may by indorsing the bill of lading put the buyer in the same situation as if he were named therein: See *Van Casteel* v. *Booker* (4). "When the vendor on shipment takes the bill of lading to his own order, he has the power of absolutely disposing of the cargo, and may prevent the purchaser from ever asserting any right of property therein. . . . So, if the vendor deals with or claims to retain the bill of lading in order to secure the contract price, as when he sends forward the bill of lading with a bill of exchange attached, with directions that the bill of

(1) (1848) 2 Ex. 1, at p. 8 [154 E.R. 380, at p. 383].
(2) (1871) L.R. 5 H.L. 116, at p. 128.
(3) (1875) L.R. 10 Ex. 274, at p. 281.
(4) (1848) 2 Ex. 691, at pp. 708, 709 [154 E.R. 668, at p. 675].

lading is not to be delivered to the purchaser till acceptance or payment of the bill of exchange, the appropriation is not absolute, but, until acceptance of the draft, or payment, or tender of the price, is conditional only, and until such acceptance, or payment, or tender, the property in the goods does not pass to the purchaser " (per *Cotton* L.J. in *Mirabita* v. *Imperial Ottoman Bank* (1)).

In the course of an often quoted passage in *The Parchim* (2) Lord *Parker* says :—" The prima-facie presumption in such a case appears to be that the property is to pass only on the performance by the buyer of his part of the contract and not forthwith subject to the seller's lien. Inasmuch, however, as the object to be attained, namely, securing the contract price, may be attained by the seller merely reserving a lien, the inference that the property is to pass on the performance of a condition only is necessarily somewhat weak, and may be rebutted by the other circumstances of the case." But in *Stein Forbes & Co.* v. *County Tailoring Co.* (3) *Atkin* J., as he then was, said : " I doubt whether goods are appropriated unconditionally if the seller does not mean the buyer to have them unless he pays for them." A positive statement, which I imagine represented an almost daily application of the law, had been made by *Scrutton* J. in *Arnhold Karberg & Co.* v. *Blythe, Green, Jourdain & Co.* (4). Speaking of the judgments in *Mirabita* v. *Imperial Ottoman Bank* (5), he said :—" I understand the effect of those judgments to be that where the seller by taking the bill of lading in his own name or to his own order has reserved the *jus disponendi* or power of dealing with the goods, the property does not pass on shipment, but is vested in the vendor until he receives payment from the buyer in exchange for the documents of title. If the seller has taken the bill of lading in the purchaser's name, but retains it as security for the price, the property appears to vest on the buyer's tendering the price " (6). And later Lord *Roche*, as he now is, said : —" Ordinarily, although as Lord *Parker* said in *The Parchim* (7) . . . the presumption of the reservation of a right of disposal that is derived from the retention of documents until payment is made

(1) (1878) 3 Ex. D. 164, at p. 172.
(2) (1918) A.C., 157, at pp. 170, 171.
(3) (1916) 115 L.T. 215, at p. 216.
(4) (1915) 2 K.B. 379, at p. 387.
(5) (1878) 3 Ex. D. 164.
(6) (1915) 2 K.B., at p. 387.
(7) (1918) A.C. 157.

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is a presumption which may be rebutted, yet the general and natural conclusion from the retention of documents is that the right of disposal of the goods is thereby retained. That depends now upon statute. Rule 5 of sec. 18 of the *Sale of Goods Act* provides that where the contract is for the sale of unascertained goods the property passes upon unconditional appropriation to the contract. Sec. 19 says that where there is a contract for the sale of specific goods or where goods are subsequently appropriated to the contract, the seller may by the terms of the contract or appropriation reserve the right of disposal of the goods until certain conditions are fulfilled. That is a description of what is not an unconditional appropriation to the contract but a conditional appropriation; and ordinarily —and in my view this case falls within the ordinary rule—when documents are only to be handed over when payment is made that imports that a right of disposal is reserved" (*Eastwood and Holt* v. *Studer* (1)).

To the foregoing account of the general principles which must be applied in determining whether the property in the dried fruit seized had already passed from the plaintiff to his buyers, it is necessary to add an observation upon the form in which bills of lading may be issued. Bills of lading are often so filled in that, after mentioning the consignor or shipper by name as the person from whom the goods have been received, they express the obligation to deliver the goods at the port of discharge not as an obligation to deliver to a named or specified person but to deliver to order or to order or assigns.

Where in this way the goods are consigned to order without expressly stating whose order, the document operates to make the goods deliverable to the order of the consignor or to his order or assigns: See *Ellershaw* v. *Magniac* (2); *Van Casteel* v. *Booker* (3); *Shepherd* v. *Harrison* (4); cf. *Chamberlain* v. *Young* (5) and *North and South Insurance Corporation* v. *National Provincial Bank Ltd.* (6).

(1) (1926) 31 Com. Cas. 251, at p. 255.
(2) (1851) 6 Ex. 570, n., at pp. 571, 572 [155 E.R. 670, at pp. 671, 672].
(3) (1848) 2 Ex. at pp. 692, 698 and 707 [154 E.R. at pp. 669, 671 and 675].
(4) (1869) L.R. 4 Q.B. 196, at pp. 199, 207, 495; (1871) L.R. 5 H.L. 116, at pp. 128, 131.
(5) (1893) 2 Q.B. 206.
(6) (1936) 1 K.B. 328, at pp. 334, 335.

The bills of lading or shipping receipts by which the plaintiff consigned the goods seized were made out according to this practice, which is a very old one.

In three of the four cases where the goods seized were carried by sea the contract of carriage was expressed as an acknowledgment that the goods had been received to be forwarded to the port of delivery by a named ship or any other ship. That is to say, they were shipping receipts or "received for shipment" bills of lading and not "shipped" bills of lading. It does not appear to be completely settled whether the transfer of such documents is enough to transfer property in the goods while in the hands of the carrier: See *Diamond Alkali Export Corporation* v. *Fl. Bourgeois* (1); "*Marlborough Hill*" (*Ship*) v. *Cowan & Sons* (2).

Sec. 7 of the Commonwealth *Sea-Carriage of Goods Act* 1924 must have been aimed at giving to shipping receipts of this kind the same effect as shipped bills of lading, but the drafting is very obscure and its effectiveness may be doubted: Cf. New Zealand Act, No. 25 of 1922, sec. 3 (4). But, for the purpose of determining when under a sale of unascertained goods to be sent by sea the property passes to the buyer, it is the seller's intention as manifested by his conduct that must be considered rather than the legal effect upon the title to the goods of a transfer of the document expressing the contract of sea-carriage. The things to be looked at in connection with the document are, first, the name the seller has caused to be inserted as the person to whom or to whose order the goods are to be delivered at the end of the transit, and, next, how the document has been indorsed, forwarded and otherwise dealt with in fulfilment of the contract of sale. There is no reason to doubt that the same significance should be given to such matters whether the document is a shipping receipt or a shipped bill of lading. In dealing with the particular facts relating to each seizure, to which it is now necessary to turn, it must be steadily borne in mind that the intention of the seller is paramount, that is, assuming that the terms of the contract of sale leave it to him to make the appropriation.

The first seizure for which the plaintiff sues as a conversion was made in Sydney some time during the day of 5th October 1932.

(1) (1921) 3 K.B. 443.

(2) (1921) 1 A.C. 444.

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The seizure was made by a person authorized by the New South Wales Dried Fruits Board, a "prescribed authority"; but that board acted upon the express authority of the Commonwealth Minister of Commerce communicated by the secretary of the department. The goods seized consisted of fifty cases of dried lexias, white muscatel grapes. They had been discharged from the s.s. *Time* on 20th September on her arrival from Adelaide and had not been removed from the wharf. The value is agreed at £80 10s. 6d.

The lexias had been shipped in Adelaide by A. H. Landseer Ltd., shipping agents acting on the instructions of the plaintiff. They had been shipped in partial fulfilment of an order given some months before by a merchant named D. Clarton for 250 boxes of seeded raisins. The terms of the agreement to sell were that they should be packed in seventy 1-lb. cartons to the case at 6s. a dozen cartons, less three per cent; freight paid to Sydney, cash against shipping documents. There is some doubt whether the cartons were supplied by Clarton or by the plaintiff, though the original order contemplated that the former should supply his own cartons. The shipping receipt or bill of lading acknowledged the receipt of the goods for shipment from A. H. Landseer Ltd. to be forwarded by the s.s. *Time* or any other ship to Sydney and there the owner to take delivery; consigned to order; freight payable at Sydney.

A. H. Landseer Ltd. indorsed the shipping receipt in blank and handed it to the plaintiff. The evidence is by no means distinct as to how the plaintiff dealt with the document, but it would appear that he drew a bill of exchange for the price and cost of insurance and transmitted the bill of exchange, the shipping receipt and some form of insurance cover through a bank, for presentation to Clarton. Apparently Clarton on the morning of the seizure paid a cheque to the bank in respect of the draft and obtained the documents. Assuming that the goods had not already been seized, I think that the property in the goods clearly passed to Clarton at this point, if it had not already done so. The plaintiff confesses but seeks to avoid this conclusion. His contention is that the burden rests upon the defendant of proving that the property passed to Clarton on 5th October 1932 before the seizure was actually made and that the

evidence is as consistent with the seizure having been made before Clarton met the draft as afterwards. The burden of proving his title to the goods seized is placed by the law upon the plaintiff. It lies upon him from the beginning of the case to the end. By proving that he was entitled to the goods a short time before the seizure he gave evidence sufficient to support the issue but he did not throw the legal burden of proof over on to the other side. In the absence of further evidence or other circumstances, the conclusion that he was entitled to the goods at the moment of seizure would necessarily follow from the evidence, but as a conclusion of fact, not as a presumption of law. It is at best a presumption of fact by which as a matter of reasoning it is made unnecessary to prove from minute to minute the continuance of an existing state of things: Cf. *Thayer, Preliminary Treatise on Evidence* (1898), at p. 348. But, once it appears that the goods had been placed in the hands of a carrier for delivery to Clarton in fulfilment of a contract for sale, that they had arrived at their destination four days before and that in the ordinary course of dealing it might be expected that Clarton would have obtained the title to the goods, a conclusion based on the presumption of continuity becomes unreal. When it further appears that on the morning of the day of seizure the property had passed, want of proof exactly when the seizure took place seems to me to make it impossible to say affirmatively that the plaintiff was entitled to the goods at the time of seizure; the consequence being that the plaintiff fails to sustain finally the burden of proof laid upon him. In any case there is some ground for regarding the probability of the seizure having taken place after the payment as preponderating. Payment of the draft was made in the morning. A telephone conversation between the secretary of the department at Canberra and the secretary of the board at Sydney took place on 5th October before the seizure was finally resolved upon. Notice of the seizure was served upon Clarton as owner, whose address and connection with the goods were known some days before. Clarton's clerk at once said that the draft had been taken up already. A telegram from Clarton informing the plaintiff of the seizure was lodged at five minutes past four in the afternoon. An attempt was made on the part of Clarton to stop the cheque, and, on the ground that the

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officers of the New-South-Wales board expected the attempt to succeed, another notice of seizure was served on the plaintiff. Apparently some officer or officers formed the opinion then or at a later stage that the plaintiff was the owner of the goods. On 11th November 1932 the plaintiff refunded the payment to Clarton.

None of these circumstances appears to me to be opposed to the conclusion that the payment to the bank was made before the seizure. In my opinion the plaintiff has not in respect of this parcel established his cause of action in conversion.

No assignment of Clarton's right to sue for the seizure was obtained from him. I do not think that the rescission of the contract of sale implied in the repayment involved an implied assignment, nor could it, in my opinion, revest the goods in the plaintiff. They may have gone out of existence by 11th November, but in any case Clarton had at best a thing in action.

The second seizure complained of as a conversion took place five days later, that is, on 10th October 1932. This seizure also was made on the express authority of the Commonwealth Minister of Commerce communicated by the secretary of the department on the same occasion. It was carried out by an officer authorized by the New South Wales Dried Fruits Board as a prescribed authority. The goods seized were described in the notice of seizure as twenty cases of dried lexias. They were seized on the wharf where they had been discharged from the s.s. *Milora* on 7th October on her arrival from Adelaide. They had been shipped, consigned to Sydney, by A. H. Landseer Ltd. as agents for the plaintiff. The shipment was in part fulfilment of a contract with H. Hooper & Co. for the sale by the plaintiff of 100 cases each containing seventy 1-lb. packets of seeded raisins at 6s. per dozen net f.o.b. Port Adelaide, insurance under an open policy, terms net demand draft. The shipping receipt or bill of lading acknowledged shipment of the goods from A. H. Landseer Ltd. to be forwarded by the s.s. *Milora* or any other ship to Sydney and there the owner to take delivery; consigned to order; freight payable at Sydney. A. H. Landseer Ltd. indorsed the shipping receipt in blank and handed it to the plaintiff, who made out an invoice for the price, the cost of the bill of lading and stamp, and exchange, drew a bill of exchange upon

Hooper & Co. for the amount and lodged the shipping receipt, the invoice and probably some insurance certificate and the draft with a bank for presentation.

The goods were seized before presentation, and Hooper & Co. refused them, writing across the back of the draft " Documents not in order. Goods seized no licences attached," that is, no owner's licence under the *Dried Fruits* (*Inter-State Trade*) *Regulations*. On these facts I do not think the property in the goods had passed to Hooper & Co. before the seizure. In a f.o.b. contract " prima facie the property passes to the buyer upon shipment, but as in a c.i.f. contract the inference may be rebutted and the moment of the passing of the property postponed, as for instance where the seller deals with the bill of lading in such a manner as to show that he did not intend to appropriate the goods to the contract, or that he has reserved a right of disposal until performance of the contract terms of payment, whether they be payment in cash or by acceptance of a bill of exchange " (*Halsbury, Laws of England*, 2nd ed., vol. 29, p. 226).

Here, I think, the object of the plaintiff in dealing as he did with the shipping receipt or bill of lading was to secure payment of the price before he gave up the title to the goods, and this means a reservation of the *jus disponendi*. The bill of lading was taken, or put, in a condition in which delivery of the instrument might give title to the goods. But, though this is consistent with the absence of any intention to reserve control and disposition, there seems no reason to doubt that the understanding of the parties was that until payment the vendor should retain, and upon payment the purchaser should obtain, all the *indicia* of title and the title itself to the goods. I attach little or no weight to the plaintiff's request to Hooper & Co. that they should join him in his suit against the Commonwealth or to the assertion by which he backed it that ownership passed to them on shipment. Risk perhaps did, but ownership, in my opinion, did not.

The value of the goods is agreed at £35 1s. 7d., and, in my opinion, the plaintiff is entitled to recover this sum for conversion of the seeded muscatels or lexias.

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The third of the five seizures sued upon in conversion was made on 9th December 1935 in Melbourne by an officer authorized by the Victorian Dried Fruits Board, a "prescribed authority." The fruit seized consisted of 200 cases or boxes of plain sultanas which the plaintiff had caused to be shipped from Adelaide by the *Lutana*, which sailed on 26th or 27th November 1935 for Launceston. The sultanas had been ordered by J. L. Irwin & Co. of Brisbane, whose instructions were that fifty cases were to be consigned to Sydney and the remainder, 150 cases, to Brisbane.

As a means of evading the vigilance of the inspectors in Adelaide the plaintiff had on previous occasions adopted the expedient of shipping to Hobart or Launceston consignments of dried fruit by smaller ships trading from Adelaide to Tasmanian ports whence, under his instructions, they were reshipped to the port where they were required. J. L. Irwin & Co. had given the order on the footing that this course should be followed.

A. H. Landseer Ltd. obtained a shipping receipt acknowledging that the goods had been received from them to be forwarded by the *Lutana* or any other ship to Launceston and there the owner to take delivery; consigned to order; freight payable at Adelaide. A. H. Landseer Ltd. indorsed the shipping receipt or bill of lading in blank and handed it to shipping agents named Youngs (S.A.) Ltd., who had agencies throughout the Commonwealth. The precise instructions to them were not given in evidence, but it appears, at all events, that through their agents in Launceston and elsewhere they were to have the goods forwarded to Sydney and Brisbane. The shipping agent in Launceston reshipped them by the *Wareatea* to Melbourne, where they were unshipped and were seized on the wharf while in the possession or at the disposal of T. H. Young Pty. Ltd., who were the Melbourne agents of Youngs (S.A.) Ltd. and to whom the latter's Launceston agent had forwarded the goods. It does not appear exactly how the bill of lading of the *Wareatea* had been made out or dealt with, but the natural inference is that it was sent to T. H. Young Pty. Ltd. in such a form that they could obtain delivery in Melbourne. When J. L. Irwin & Co. had telegraphed their order for 200 cases of sultanas they had directed that the fifty cases for Sydney should be consigned to order and had added the words

"send bill," words which, as a subsequent letter showed, meant that the bill of lading for the fifty cases should be sent to their office in Brisbane.

The plaintiff drew upon J. L. Irwin & Co. in Brisbane for the price and charges, and on 10th December the bank in Brisbane informed them that they held a draft upon them but no shipping documents. J. L. Irwin & Co. did not accept the draft but wired suggesting an extension of the bill for thirty days. In the meantime the plaintiff had learned of the seizure and wrote to J. L. Irwin & Co. informing them and saying that it appeared that he was unable through the illegal acts of the Federal Government to get the goods through to them, that he had been notified by the bank that they had not accepted the draft and that he would leave the matter at that until the result was known of the proceedings then before the Privy Council (scil., *James* v. *The Commonwealth* (1), in the event decided 17th July 1936).

The seizure was the consequence of the officers of the South Australian Dried Fruits Board discovering about 29th November that the plaintiff had shipped 200 cases by the *Lutana* for Launceston. The secretary of that board wired the information to the secretary of the Commonwealth Department of Commerce. On Monday, 2nd December, he obtained an admission from the plaintiff that he had shipped the fruit, and he telephoned and telegraphed that information to the secretary of the Department of Commerce and in a letter confirming these communications said that he had sent them to enable the Department of Commerce to confiscate the consignment. When the seizure was made, the sultanas were taken to the King's warehouse of the Federal Customs Department, whence they were delivered to a purchaser who bought them for £286 from the Victorian Dried Fruits Board, which had advertised them as for sale. The proceeds of the sale were paid into the Consolidated Revenue Fund of the Commonwealth. There is no direct evidence that the Victorian Dried Fruits Board in authorizing the seizure acted at the instance of the secretary of the Commonwealth Department of Commerce, but I infer that it took the step upon his express instructions. Not only do the facts I have stated make it almost certain that the

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

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Victorian board was put in motion through or by him, but it appears that he or his department were actively directing the attempts made by the State boards to prevent and intercept shipments in contravention of the Federal regulations.

Upon the facts stated I do not think that the property in the sultanas should be held to have passed from the plaintiff to J. L. Irwin & Co. The latter believed, I think, that their order for sultanas would be fulfilled by the plaintiff giving instructions to Youngs (S.A.) Ltd. and to the plaintiff's bank which, in the case both of the consignment of fifty cases for Sydney and of the 150 cases for Brisbane would result in the bills of lading of the ships arriving in those ports being handed over to J. L. Irwin & Co. in Brisbane in exchange for their acceptance of the plaintiff's draft for the price and charges. If the transaction had been carried out in this manner, the proper conclusion would have been that it was not intended to transfer the property in the goods until the buyers accepted or paid the draft for the price. Possibly the actual instructions given by the plaintiff would have resulted as J. L. Irwin & Co. expected. But in the absence of evidence or, at all events, direct evidence of the instructions given to Youngs (S.A.) Ltd. or of those conveyed to T. H. Young Pty. Ltd. it is necessary to consider the effect of what was actually done.

The shipment of the goods at Port Adelaide in the *Lutana* left them under the plaintiff's dominion and control. In commissioning Youngs (S.A.) Ltd. to undertake the transhipment or reconsignment of the goods so that they would reach their respective destinations he was giving them an authority to act on his behalf, not on behalf of J. L. Irwin & Co. They held the *Lutana's* bill of lading, which he handed to them on his behalf, not on behalf of the buyers.

When at Launceston the goods were shipped aboard the *Wareatea* for Melbourne, it seems certain that the bill of lading was not made out in the name of or indorsed to J. L. Irwin & Co. The goods thus still remained under the control of the plaintiff's agents. It must be remembered that the transaction was not carried out according to a regular course of carriage but it was dependent upon the success of the plaintiff's stratagem for evading the *de-facto* control of the authorities. In all the circumstances I think the inference is that

no transfer of property was effected or intended before the seizure in Melbourne.

The value of the consignment of sultanas is fixed at £230 4s. 1d. In my opinion the plaintiff is entitled to recover this sum as damages for conversion.

The fourth seizure complained of as a conversion of the plaintiff's goods took place on 6th April 1936 in Sydney. The seizure was made by an officer authorized by the New South Wales Dried Fruits Board. On 30th March 1936 the secretary of the South Australian Dried Fruits Board had written to the secretary of the Department of Commerce reporting that the plaintiff had shipped by the *James Cook*, a vessel whose owners were not licensed under the regulations as carriers of dried fruit, 268 cases of sultanas consigned to Sydney. The letter ended: "My board recommends that the consignment be confiscated on arrival in Sydney, as in the case of the *Lutana* shipment in Melbourne in December last. I am forwarding a copy of this letter to the secretary of the New South Wales Dried Fruits Board in anticipation of your instructions to him."

This was the fruit seized. It seems unlikely that the New South Wales board acted independently and without the particular authority of the Commonwealth Department of Commerce.

The consignment was intended for J. L. Irwin & Co., who had instructed that it should be shipped to Brisbane on a through bill of lading if possible, that is, without transhipment. The *James Cook*, however, went no further than Sydney, where the goods were discharged and seized while upon the wharf. They were sold by the New South Wales Dried Fruits Board and the proceeds paid into the Commonwealth Consolidated Revenue Fund.

The consignment of the fruit by the plaintiff to J. L. Irwin & Co. was the third of three transactions which followed the seizure of the *Lutana* and *Wareatea* shipments in Melbourne.

On 27th December 1935 the plaintiff had written to J. L. Irwin & Co., Brisbane, to the effect that to get further supplies of dried fruit through to that firm was difficult because the Federal Government had frightened the shipping companies, who would not accept shipments, but that a company had a boat, in fact the *James Cook*, sailing on 2nd January for Sydney, and the plaintiff would endeavour

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to ship fifty cases by her to Sydney. J. L. Irwin & Co. thereupon wired asking the plaintiff also to ship by the same vessel 200 cases to Brisbane.

The plaintiff shipped 200 cases in all on bills of lading to Sydney. He sent the bills of lading and an invoice by post direct to J. L. Irwin & Co., Brisbane. He instructed Youngs Ltd., Sydney, by letter that he had shipped the sultanas on the instructions of Irwin & Co. and that the latter desired 150 boxes to be forwarded on the first available steamer to Brisbane and would give instructions for delivery of the other fifty boxes and no doubt hand Youngs Ltd. the bill of lading. The bills of lading did not arrive in Brisbane by the same mail as the letter of advice to Irwin & Co., and the answering letter, which the doubt as to their whereabouts drew from Irwin & Co., shows that they thought the shipping documents might either come through the bank in Brisbane or be sent to Youngs Ltd. in Sydney. The latter, of course, needed the bills of lading and inquired after them both from the plaintiff and from Irwin & Co. The sultanas were transhipped at Sydney and were delivered to Irwin & Co. in Brisbane without seizure.

The latter asked for another shipment, and by a ship called the *Abel Tasman* sailing on 1st February 1936 for Sydney the plaintiff consigned 150 cases for Sydney and 200 cases for Brisbane, again instructing Youngs Ltd., Sydney, that they were for Irwin & Co. and that 200 cases were to be transhipped to Brisbane and 150 cases delivered in Sydney at Irwin & Co.'s direction.

This time the plaintiff posted the bills of lading to Youngs Ltd., Sydney. In his letter of advice to J. L. Irwin & Co. he wrote:— "Bill of lading. To save time and so that there will be no delay I am posting the B/L direct to Messrs. Youngs Ltd., Sydney. I will draw on you in seven days time thus giving time for the shipment to arrive." Irwin & Co. wired an answer asking that the draft be made for thirty days, to which the plaintiff wrote that he was unable to give such a concession, his rule being demand draft. Irwin & Co. wired back that the draft would be honoured when presented and asked what further quantities the plaintiff had.

The plaintiff in the course of his reply said that he had, *inter alia*, 268 boxes of plain sultanas to ship. These Irwin & Co. agreed to

take by a ship which was expected to sail in the middle of March, in fact, the *James Cook* again. The plaintiff himself left Australia for Europe about 12th March. In response to an inquiry from the plaintiff's office on 23rd March, Irwin & Co. telegraphed instructions to ship the 268 boxes of sultanas on a through bill of lading to Brisbane. The *James Cook* did not in fact go further than Sydney, and the plaintiff's representatives shipped them for that port.

The bill of lading acknowledged that the goods were received for shipment by A. H. Landseer Ltd. on board the *James Cook* to be delivered at Sydney unto order or his, its or their assigns, freight charges to be paid by the owner of the goods at Adelaide. A. H. Landseer Ltd. indorsed the bill of lading in blank and handed it to the plaintiff's representative. By them it was sent by post to Youngs Ltd. with directions to forward the goods on to Irwin & Co., Brisbane, by the first available steamer, stating that the goods were shipped on their instructions. A letter of advice was sent to Irwin & Co., Brisbane, informing them that, as the *James Cook* went only to Sydney, the sultanas had been sent care of Youngs Ltd., Sydney, with a request to forward them on the first steamer. In their reply Irwin & Co. wrote :—" You do not state where the bill of lading is. Are you posting this direct to us or are you sending it to Youngs Ltd., Sydney ?" A draft for the price and charges was drawn and sent through a bank for presentation to Irwin & Co., but in fact the seizure took place before it was presented and instructions were sent to the bank for its withdrawal. On the shipment of the goods a marine insurance from Adelaide to Sydney was obtained in the plaintiff's name, probably through A. H. Landseer Ltd. under an open policy of the plaintiff. How the insurance slip was dealt with does not appear, but it seems likely that it was attached to the bill of lading and was sent to Youngs Ltd., Sydney. The value of the goods was agreed at £309 13s. 3d.

Upon the facts of this transaction I think there is much difficulty in determining when the property in the goods was meant to pass. The form in which the bill of lading was taken and the indorsement are consistent with the conclusion that the plaintiff retained the *jus disponendi* in the goods. They were clearly

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appropriated to the contract, but I do not think that the shipment was itself an unconditional appropriation. The difficulties experienced in transhipping goods had led the plaintiff, in effect, to place the entire control of the goods in the hands of Youngs Ltd., Sydney, and to authorize them to act upon instructions from the buyer. It may be said that for payment by the buyer the plaintiff was content to rely on J. L. Irwin & Co.'s personal credit. He made the draft payable seven days after sight to allow for the arrival of the goods in Brisbane. But, on the other hand, this course was taken as a matter of convenience because of the transhipment and the necessity of using a Sydney shipping agent for that purpose. It was a substitute for the practice under which ownership was transferred when the bill of lading was delivered up in exchange for acceptance of a draft or payment. It seems quite clear that neither party supposed that, if the goods were seized before they reached Brisbane, the loss would fall on the buyer, and this appears to me to be a material consideration. Sec. 18, rule 5 (2), of the *Sale of Goods Act* 1893 (Eng.) says that, where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee for the purpose of transmission to the buyer and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract. If these conditions are fulfilled, then, according to sub-rule 1 of the same rule, the result is that the property passes to the buyer. But, in common with other rules of the section, rule 5 is only a rule for ascertaining the intention of the parties unless a different intention appears. The real question is whether, looking at the manner in which the course of the particular transaction arose, prior practice, the expectation of the buyer that another course might have been followed and the manifest belief of both parties that seizure meant that the loss would fall on the plaintiff and the price would not be payable, an intention to the contrary should not be imputed. A difficulty is to fix on another point at which the property should pass. Did they intend it to pass on payment? That might take place before arrival and the goods might be seized on the wharf, though, no doubt, they hardly thought there would be much danger once they reached Brisbane. Receipt of the bill of lading would be

no better. Yet removal from the wharf could scarcely have been the condition contemplated. It is, I think, necessary to recognize that both parties regarded the transaction as necessarily outside the course of ordinary commercial dealing. But, up to the point when the goods would arrive in Sydney, the plaintiff proceeded in accordance with practice. At that point he looked to Youngs Ltd. to do what they should think proper for the purpose of getting the goods into the hands of the buyer. It is hardly conceivable that Youngs Ltd., a company forming part of an organization employed by James, were unaware that they had been invoked in the course of avoiding the dried-fruits boards. They were, no doubt, at liberty to act on the buyer's instructions. But they might not receive any instructions from him. I think that, on the whole, the proper inference is that there was no intention that the property in the goods should pass, at all events up to the time when Youngs Ltd. should, either by the manner in which they reshipped the goods and dealt with the bill of lading on reshipment, or by shipping the goods in accordance with special instructions from the buyer or otherwise, place the goods at the disposal or under the control of the buyer. So far as the parties adverted to the relation between payment of the price and ownership of the goods, they were actually concerned only with the fact that the price would not be payable if the goods were seized. There was, therefore, no intention to pass the property immediately on shipment, or at any earlier time than was usual or than the exigencies of the transaction might require. I think that the truth was that Youngs Ltd. were put in the place of the seller to carry out the work of reshipment, acting, just as the seller would, under the buyer's instructions, if he gave any. When the bill of lading was sent to them by the plaintiff's representative it was the plaintiff's bill of lading. The goods were conceived as still at the plaintiff's risk, the chief risk being that of seizure.

My conclusion is that, at the time of seizure, the property in the parcel of dried fruit had not passed from the plaintiff, who, therefore, is entitled to recover the value, £309 13s. 3d., in conversion.

The fifth case in which the plaintiff complains of a seizure of his goods is relatively simple.

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Campbell & Sutton Ltd., merchants, of Broken Hill in New South Wales, gave orders to the plaintiff for the delivery of dried fruit to them in Broken Hill from Berri in South Australia. The orders were fulfilled by the plaintiff sending the fruit on his own motor lorries. On 15th April 1936 they ordered 180 cases of dried fruit which they specified in a letter requesting the plaintiff to get it away as soon as possible by road from Berri. The cases were dispatched on 22nd April loaded on a lorry of the plaintiff. On 21st April the secretary of the South-Australian Dried Fruits Board had a conversation over the long-distance telephone with the secretary of the Federal Department of Commerce upon the subject of the plaintiff's consignment of dried fruit to Broken Hill, and, on 22nd April, he received a telegram from the secretary of the Department of Commerce telling him that, if the fruit could be definitely identified and no licence had been issued, the board, as a prescribed authority, should issue instructions to an inspector to seize the fruit immediately it crossed the border. The fruit on the plaintiff's lorry was accordingly seized at Broken Hill by an inspector authorized by the board as a prescribed authority. The officer wrote a receipt for the fruit upon the cart note held by the plaintiff's driver.

The value of the fruit, plus cartage to Broken Hill, is agreed at £303 6s. 8d.

In my opinion it is quite clear that the property had not passed to Campbell & Sutton Ltd., but remained with the plaintiff, and that the Commonwealth is responsible for the seizure. The plaintiff is entitled to recover in conversion upon this cause of action.

It is, I think, desirable that I should add some observations upon a question which would have arisen if I had held that the plaintiff had lost and Irwin & Co. had obtained property in the 268 boxes of sultanas which were seized on 6th April 1936. The purchase money was never paid, and I think that, even on the assumption that the property in the goods passed, the plaintiff could not have recovered it from J. L. Irwin & Co., the buyers. For I think that, having regard to the earlier seizure, to the correspondence between the parties and to the circumstances of the case, it would be necessary to imply a term or condition that, if the goods were seized before actual delivery into the hands of the buyer, the price would not be

payable. This means that the terms upon which the 268 boxes of sultanas were sold to J. L. Irwin & Co. made payment of the price dependent on the course taken by or on behalf of the Commonwealth and the officers of the dried-fruits boards. The 268 boxes seized formed part of the 1,085 boxes still in the hands of the plaintiff when he wrote to J. L. Irwin & Co. on 18th December 1935 expressing his inability to deliver them because of the seizures. The rest he sold nevertheless and succeeded in delivering it to the buyers. But, as the 268 boxes were seized and, under the implied term I have mentioned, the seizure would mean that the price became irrecoverable, the sale of the 268 boxes left the plaintiff in the same position as if, in deference to the seizure of 9th December 1935, he had altogether given up the idea of marketing the parcel. In other words, even assuming the property in the 268 boxes did pass to J. L. Irwin & Co., the sale did not give the plaintiff a clear right to a money sum which would preclude him from complaining that in the previous December he had lost the sale of the fruit owing to his fear of seizure. It would follow that, in respect of this parcel, by reason of its subsequent seizure and the plaintiff's loss of the price, it would be necessary to return to the question whether the plaintiff could recover on the ground of the threat of seizure of further consignments implied in the seizure of 9th December 1935. I think that such a threat was implied by the seizure of that date. The letter of 18th December 1935 is perhaps enough to support a finding that, for the moment, the plaintiff did defer to the threat. I do not think that it was long before he again began to look for means of transport. But, as a mere logical possibility, it might have been long enough to miss an opportunity which, if taken, would have resulted in the goods reaching the hands of J. L. Irwin & Co. It appears that James himself did not become aware of the seizure until on, or shortly before, 18th December and that, by 27th December 1935, he was once more looking for an opportunity of dispatching dried fruit to J. L. Irwin & Co. On that day he advises them of a boat, in fact the *James Cook*, leaving Adelaide on 3rd January 1936. In the event, as I have already stated, he sent 200 cases by this boat and another 150 by the *Abel Tasman*, which sailed on 1st February 1936, shipments which escaped seizure.

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If it could be presumed or inferred that the plaintiff forwent any opportunity of shipping fruit to J. L. Irwin & Co. (or for that matter to anyone else) owing to a fear produced by the seizure of 9th December that the goods would only be seized, then something might be said for awarding him the value, as at Adelaide, of the 268 cases of dried fruit as damages flowing from the threat implied in the seizure of 9th December 1935, notwithstanding that, or, perhaps, because, he could not recover in conversion, assuming the property in the fruit had passed to the buyer. But to presume or to infer such a thing would, in my opinion, be contrary to evident fact. For there was no ship in the interval by which dried fruit could be sent to J. L. Irwin & Co. If, on 18th December, he entertained a feeling that it was useless to ship fruit because it would be seized, the feeling passed very quickly indeed. If James, owing to such a feeling, paused in his attempts to send away his fruit, it was of no consequence, because he did not forgo any opportunity of shipping the goods but, on the contrary, availed himself of the next ship by which he could send them. But, as I think that the plaintiff is entitled to recover in conversion in respect of the 268 boxes seized on 6th April 1936, the alternative is for me only hypothetical.

The result of the views I have expressed is that the plaintiff is entitled to recover damages for the conversion of goods as follows :—

Seized 10th October 1932	£35	1	7
Seized 9th December 1935	£230	4	1
Seized 6th April 1936	£309	13	3
Seized 22nd April 1936	£303	6	8
	£878	5	7

Otherwise the plaintiff's claim fails.

I think the plaintiff is entitled to the general costs of the action, except the costs exclusively referable to the issues raised by pars. 1, 2, 3, 4 and 5 of the statement of claim, which should be borne by the plaintiff. The order of the Full Court of 25th February 1938 reserves the costs of the defendant's demurrers therein mentioned and of the order. I take the costs to be reserved for the Full Court and not for the judge at the trial, and I, therefore, do not deal with them.

Judgment for the plaintiff for £878 5*s.* 7*d. with costs, except costs exclusively referable to the issues raised by pars.* 1, 2, 3, 4 *and* 5 *of the statement of claim which shall be paid by the plaintiff. Costs to be taxed and set off. The money paid into court by the defendant to be paid out to the plaintiff. Direct that in taxing the costs exclusively referable to pars.* 1, 2, 3, 4 *and* 5 *of the statement of claim, no costs shall be disallowed on the ground that they might be considered referable to par.* 14.

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

Solicitor for the defendant, *H. F. E. Whitlam*, Commonwealth Crown Solicitor.

H. D. W.