[HIGH COURT OF AUSTRALIA.]

FIELD PEAS MARKETING BOARD (TASMANIA) AND ANOTHER . . . } APPELLANTS;
DEFENDANTS,

AND

CLEMENTS AND MARSHALL PROPRIETARY LIMITED . . . . . } RESPONDENT.
PLAINTIFF,

H. C. OF A. 1947-1948.

MELBOURNE, 1947. *Sept.* 30; *Oct.* 1-3, 6.

SYDNEY, 1948. *August*, 18.

Latham C.J., Starke, Dixon and McTiernan JJ.

High Court—Appeal—Procedure—Question affecting constitutional powers of Commonwealth—Court constituted by four Justices—Court equally divided—Judiciary Act 1903-1947 (*No.* 6 *of* 1903—*No.* 52 *of* 1947), *s.* 23.

Constitutional Law—Freedom of inter-State trade, commerce and intercourse—Marketing of primary products—Marketing board constituted under State Act—Commodity divested from growers and vested in board as owner—Contracts for sale of commodity declared void—Provision that nothing in the legislation should interfere with operation of s. 92 *of Commonwealth Constitution—Legislation contravening s.* 92—*Extent of invalidity—Marketing of Primary Products Act* 1945-1947 (9 & 10 *Geo. VI. No.* 41—11 *Geo. VI.* No. 20) (*Tas.*)—*Marketing of Primary Products* (*Field Peas*) *Act* 1946-1947 (10 *Geo. VI. No.* 35—11 *Geo. VI. No.* 12) (*Tas.*).

On an appeal to the Full Court of the High Court by the defendants from the decision of *Williams* J. in *Clements and Marshall Pty. Ltd.* v. *Field Peas Marketing Board* (*Tas.*) (*Ante*, p. 401) granting the plaintiff company an interlocutory injunction, the parties proposed that the appeal be treated as the trial of the action. The Court, which was constituted by four Justices, was equally divided in opinion as to the effect of s. 92 of the Commonwealth Constitution on the Tasmanian legislation which was challenged by the plaintiff.

Latham C.J. and *McTiernan* J. were of opinion that, as a decision on the question raised as to s. 92 in relation to State legislation might inferentially affect the constitutional powers of the Commonwealth, the proper course, in view of s. 23 (1) of the *Judiciary Act* 1903-1947, which requires that " a Full Court consisting of less than all the Justices shall not give a decision on a

question affecting the constitutional powers of the Commonwealth, unless at least three Justices concur in the decision," was to refrain from giving a decision on the question; the Court was not bound to act upon the proposal of the parties that the proceeding be treated as the trial of the action; it should be treated simply as an appeal from *Williams* J., and, as such, it should be dismissed. *Starke* J. was of opinion that the cause should be remitted to the primary Judge. *Dixon* J. held that the provisions of the *Marketing of Primary Products* (*Field Peas*) *Act* 1946-1947 (Tas.) were contrary to s. 92 of the Constitution and for that reason the decision of *Williams* J. was right.

It was ordered, accordingly, that the appeal be dismissed.

Per Starke J.: *Semble*, the decision in *Peanut Board* v. *Rockhampton Harbour Board*, (1933) 48 C.L.R. 266, covered the legislation challenged in the present case and *Matthews* v. *Chicory Marketing Board* (*Vict.*), (1938) 60 C.L.R. 263, was distinguishable.

APPEAL from *Williams* J.

This was an appeal to the Full Court of the High Court by the defendants from the decision of *Williams* J. in *Clements and Marshall Pty. Ltd.* v. *Field Peas Marketing Board* (*Tas.*) (1). The appeal first came before the Full Court in Melbourne on 2nd June 1947, but the Court did not proceed with the hearing, being of opinion that the Commonwealth and other States should be afforded an opportunity of intervening. It was subsequently directed that the appeal be heard in Sydney, but, although it was listed for hearing there, it did not come on, and ultimately it came on for hearing in Melbourne. At the commencement of the hearing, the Court was constituted by five Justices, but *Rich* J. was obliged by indisposition to withdraw, and the hearing continued before the other four Justices.

Coppel K.C. and *Pape*, for the appellants.

Reynolds K.C., *Winneke* and *Eggleston*, for the respondent.

P. D. Phillips K.C. and *Menhennitt*, for the Commonwealth (intervening).

Dean K.C. and *Pape*, for the States of New South Wales, Victoria, Queensland and Western Australia (intervening).

Barwick K.C. and *K. J. Healy*, for the State of South Australia (intervening).

Cur. adv. vult.

(1) *Ante*, p. 401.

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1948. August 18.

The following written judgments were delivered :—

LATHAM C.J. This is an appeal from a decision of *Williams* J. granting an interlocutory injunction. When they were before *Williams* J. the parties were not willing to treat the motion for an injunction as the trial of the action. When they came before the Full Court in the appeal they were willing to do so. Owing to the unfortunate indisposition of a member of the Court after the hearing of the appeal had begun, the hearing was continued before four Justices and judgment was reserved. When the Court learned that it was to hear a full argument upon s. 92 in *Bank of New South Wales* v. *The Commonwealth* (1) delivery of the judgment was delayed in the hope that the argument and decision in that case—in which judgment has just been given—would be of assistance in the consideration of the effect of s. 92 of the Commonwealth Constitution in relation to compulsory marketing legislation. In the result the decision given in the *Banking Case* (1) does not govern the question in this case.

The Court is not bound to act upon the proposal that the motion should be treated as the trial of the action, but can deal with the appeal as it came before the Full Court, simply as an appeal from *Williams* J. The Court is equally divided in opinion. In a case which did not involve any question affecting the constitutional powers of the Commonwealth the result would be that the decision of *Williams* J. would be affirmed, and the appeal would be dismissed : *Judiciary Act* 1903-1947, s. 23 (2) (*a*). It may be suggested, however, that the present case is governed by s. 23 (1), which is in the following terms :—" A Full Court consisting of less than all the Justices shall not give a decision on a question affecting the constitutional powers of the Commonwealth, unless at least three Justices concur in the decision." This case involves a question of the interpretation of s. 92 of the Commonwealth Constitution. The Commonwealth is not a party to the action, but the decision with respect to this question may inferentially affect the constitutional powers of the Commonwealth. There is a distinction between the decision upon a question in a case and a decision, judgment, decree, order or sentence in the case itself : see *Baxter* v. *Commissioners of Taxation* (*N.S.W.*) (2). In that case it was held that " a decision of the High Court upon any question " as to limits *inter se* of constitutional powers of Commonwealth and State meant, not the judgment in the case (3) but, as *Isaacs* J. said, " what the

(1) (1948) 76 C.L.R. 1.
(2) (1907) 4 C.L.R. 1087, at pp. 1116, 1151.
(3) (1907) 4 C.L.R., at p. 1116.

Court decides to be the law with regard to that question; what it holds to be the proper answer to that particular question" (1). Section 92 binds both the Commonwealth and the States and in some cases a decision upon the interpretation of s. 92 may therefore be a decision upon a question affecting the constitutional powers of the Commonwealth. Three Justices do not concur in a decision upon this question and therefore it appears to me that a proper course to pursue is to abstain from giving a decision upon it, with the result that the judgment of *Williams* J. should remain and the appeal should be dismissed. My brother *Starke* is of opinion that the case should be remitted to *Williams* J. All the other members of the Court agree in the result that the appeal should be dismissed. The interlocutory injunction therefore stands. The appellants should pay the costs of the appeal, including, in accordance with the undertaking given by the appellants when an order was made for hearing in Sydney instead of in Melbourne, any amount whereby the costs were increased by reason of such order.

STARKE J. This appeal from an interlocutory injunction restraining the Field Peas Marketing Board of the State of Tasmania, its servants and agents until the trial of the action or further order from in any way preventing, obstructing or hindering the performance of certain contracts was, upon the appeal coming on, treated, at the request of the parties, as the trial of the action.

That procedure, irregular as it was, might have proved satisfactory if one of the Justices had not become indisposed and reduced the sitting members of the Court to four. Now, unfortunately, the Justices who heard the case are, I understand, divided in opinion. And the question is what course should be pursued in the interests of the public and the parties.

As at present advised the case of *Peanut Board* v. *Rockhampton Harbour Board* (2) appears to me to govern this case and the case of *Matthews* v. *Chicory Marketing Board* (*Vict.*) (3) is, I think, distinguishable. But it is not perhaps of any practical importance to the respondent whether the decision be that the *Marketing of Primary Products Act* 1945 (9 and 10 Geo. VI., No. 41) and the *Marketing of Primary Products* (*Field Peas*) *Act* 1946-1947 (10 Geo. VI., No. 35 and 11 Geo. VI., No. 12) interfere with trade, commerce and intercourse among the States contrary to the provisions of s. 92 of the Constitution or that s. 19 (3) of the Act (9 and 10 Geo. VI., No. 4), prescribing that " nothing in this Act . . .

(1) (1907) 4 C.L.R., at p. 1151.
(2) (1933) 48 C.L.R. 266.
(3) (1938) 60 C.L.R. 263.

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shall in any way interfere with the free operation of section ninety-two of the Commonwealth Constitution," removes from the operation of the Marketing Acts any field peas that the respondent desires to engage in inter-State trade.

On the whole the better course is to remit the cause to the primary judge, who will then dispose of it, or state the case for the Full Bench of which he himself can then be a member.

DIXON J. In this suit a company carrying on business in Devonport, Tasmania, as a merchant seeks relief against the operation of the *Marketing of Primary Products* (*Field Peas*) *Act* 1946, which is incorporated with the *Marketing of Primary Products Act* 1945. The latter is a more general statute of the Tasmanian legislature enacted, as its long title says, to " provide for the constitution of boards for the marketing of certain classes of primary products and for matters incidental thereto." The former, passed about a year later, deals with a particular product and is entitled " an Act to make provision for the constitution of a board for marketing field peas and for matters incidental thereto." The asserted right to relief rests on s. 92 of the Commonwealth Constitution.

The subject of the *Field Peas Act*, as for shortness it may be called, is the mature dried seeds of the field pea plant, including blue peas and maple or grey peas (s. 2). It has been part of the business of the plaintiff company to make contracts with growers of such peas for the purchase of large quantities and, having so covered itself, to make contracts of sale with merchants in other States for peas to be shipped to those States. This business was interrupted or adversely affected by the erection by the Commonwealth, during the war, of a Field Peas Board, under the *National Security* (*Field Peas Acquisition*) *Regulations*. That Board, by an acquisition order, took the field peas from the growers, paying them compensation consisting in the dividends from a marketing pool. The regulations, however, were not continued by the *Defence* (*Transitional Provisions*) *Act* 1946. When it became known that they would be allowed to come to an end, the State Parliament intervened with the *Field Peas Act*. That Act set up a State board constituted like the expiring Federal board, but called the Field Peas Marketing Board. The more general Act, the *Marketing of Primary Products Act* 1946, contained provisions for the establishment of a marketing board, for any product within a wide description, at the instance of producers, the board being elected by them. The *Field Peas Act*, while not availing itself of the machinery for the setting up of the board, incorporated the earlier Act so that the powers and

functions it assigned to boards would attach to the Field Peas Marketing Board, and so that other ancillary provisions would apply, including certain authorities vested in the Governor. One of these authorities enabled the Governor by a proclamation to declare that the commodity should be divested from the growers and be vested in the Board whose absolute property it should become.

A proclamation was made on 23rd January 1947 pursuant to this power declaring that all field peas should be divested from the producers and become vested in the Field Peas Marketing Board and that upon any field peas coming into existence before 30th June 1947 they should become vested in and be the absolute property of the Board. In the meantime the plaintiff company had revived its business of contracting for the purchase of field peas from the growers and for the sale of peas to merchants in other States.

Field peas are harvested, it is said, in February, March and April. During the previous winter and spring, that is, in 1946, the company made many contracts with growers for the delivery of peas to be produced by them. In November, December and January the company made contracts with buyers in most of the other States for the sale and shipment to them of quantities of peas. The revival of the business, apparently, was due to the belief or hope that the Federal regulations would expire. But the resales were made after the State legislation had been passed. Both sets of contracts were, of course, by description and not of specific goods. But the description in the growers' contracts restricted the goods, for the most part, to the products of particular farms. The growers' contracts were for delivery in Tasmania; the company resold, however, on terms involving consignment for inter-State carriage.

Upon an application to *Williams* J. for an interlocutory injunction, the affidavits disclosed that the Board had taken steps with a view to prevent the growers delivering peas and the company from shipping them. His Honour made an order restraining the Field Peas Marketing Board, its servants and agents, until the hearing of the suit or until further order, from in any way obstructing or hindering the performance of the two sets of contracts.

From that order the Board and the State of Tasmania appealed. Although before his Honour the parties had declined to treat the application for the interlocutory injunction as the hearing of the suit, upon the opening of the appeal it was announced that they had now agreed that the appeal should be so treated. The course thus pursued by the parties was unsatisfactory. For *Williams* J.,

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although holding that s. 92 had been invaded, had based his order upon the balance of convenience. Had he been asked to give final judgment doubtless he would have referred the constitutional question to the Full Court and taken part in its determination. Moreover, if the appeal became the hearing, on its very terms the order appealed from became spent. However, the Court made little or no show of resistance but proceeded to listen to an argument upon the substantive question of the validity of the legislation upon field peas.

Our judgment has been deferred so that we might have the advantage of hearing first the argument upon s. 92 in the case of *Bank of New South Wales* v. *The Commonwealth* (1), a course which I think has proved of some assistance. But in the end the question seems to me to come down to the particular character of the legislation and its bearing upon the trade in Tasmanian field peas. It is, I think, wise to begin with an understanding of the nature of that trade and the directions in which it flows, apart from control. It is a trade in a seasonal crop grown in Tasmania for export from that State. There is some consumption in Tasmania, though very much the greater part of the product goes out of the State. But there is a market abroad as well as in Australia. The prices obtainable overseas were, at the times material to this case, better than those fixed in Australia. It was hoped by the Board to sell no more than half the crop in Australia and to find buyers for the rest overseas. But merchants such as the plaintiff company might prefer to buy for the inter-State trade.

There is not much information upon the matter in the materials before us, but it would seem that the Board would tend to seek a market abroad, while, without some such control as that established by the legislation, merchants would buy from the growers rather for the inter-State trade. Of course, if shipping were freely available, and there were no controls, it may be supposed that the disparity between prices for overseas export and for the Australian trade would disappear.

The legislation describes the place the Board is intended to take as an authority governing the marketing of the commodity. Section 5 (1) of the *Field Peas Act* says that it shall be the duty of the Board to do all such acts and things as may be necessary for the purpose of making provision for the orderly marketing of field peas produced in this State during the continuance of the Act. Originally the Act was to expire on 30th June 1947, but it was extended to 30th June 1948 (s. 8 as amended by 11 Geo. VI., No. 12, s. 2). That

(1) (1948) 76 C.L.R. 1.

is to say, the legislation was devised to deal with one season's crop and then extended to deal with the next season's crop.

To enable the Board to perform this duty, s. 5 goes on (*a*) to arm it with the powers and functions belonging to a board under the more general Act, and (*b*) to extend the vesting provisions of that Act, as applied to field peas, so that they include peas covered by contracts made before the establishment of the Board and so that any field peas covered by a contract made since 1st July 1946 would vest in the Board and the contract would be avoided.

Wide powers are derived by the Board from the more general enactment; they are ample for the carrying out of its duties and functions. Two perhaps should be more particularly mentioned. One is to provide, so far as practicable, the commodity for consumption in Tasmania and for its supply during any period of shortage to those places within Tasmania wherein a shortage is experienced (s. 21 (1) (*c*)). The principle inspiring this provision must be natural, not to say instinctive, in any State. But it is hardly that which s. 92 embodies. However, it has no importance in relation to field peas. The other power to be mentioned is one to make such arrangements as the Board deems necessary with regard to sales of the commodity for export or for consignment to other States or countries (s. 21 (1) (*d*)). It is, of course, evident that the choice between selling field peas to other States and selling them to other countries will depend upon the determination of the Board.

Prima facie, the proclamation vesting field peas, existing or coming into existence, in the Board would operate so as to vest in it all peas. But s. 19 (1) and (2) which provide for the proclamation and the vesting are followed by a third sub-section which contains these words: "Nothing in this Act and no proclamation or agreement made under this Act with any Government or persons shall in any way interfere with the free operation of s. 92 of the Commonwealth Constitution." It will be noticed that, though the provision occurs in what may be called the vesting section, it is expressed as a proviso to the whole Act. It is, of course, obvious that nothing in the Tasmanian legislation could interfere with the "free operation" of any provision of the Constitution. It may therefore be said that s. 19 (3) amounts to no more than an acknowledgment of a constitutional truth. But clearly its purpose goes beyond that. The purpose must, I imagine, be to make it clear that, in so far as any part of the Act might otherwise impair, or authorize what amounts to an impairment of, freedom of trade or commerce among the States, an intention to avoid or except that operation shall be

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ascribed to it. Probably the sub-section could not be construed as making the wide but definite exceptions expressed in the provision which, in *Matthews* v. *Chicory Marketing Board* (*Vict.*) (1), *Starke* J. described as leaving the producers and the commodity free to pass the frontiers of the States and to engage and be engaged in inter-State trade without any hindrance or restriction so far as the Act is concerned.

I agree in the view which his Honour expressed concerning such legislation if it had stood alone without this saving clause and I think that it applies even more clearly to the field peas legislation. *Starke* J. said (2) :—" It is settled, I think, by authority that these provisions, standing alone, involve a contravention of s. 92 of the Constitution. It would be a compulsory marketing scheme entirely restrictive of any freedom of action on the part of producers in trade, domestic, inter-State or foreign (*James* v. *Cowan* (3) ; *Peanut Board* v. *Rockhampton Harbour Board* (4))."

But before stating my reasons for the view that, apart from any saving clause, the field peas legislation would encounter s. 92, it is necessary to say how the saving clause in fact affects the case.

I take it as saying that if the compulsory acquisition of field peas, or the grant to the Board of any power, or the use of the power, detracts from the freedom of trade, commerce and intercourse among the States, it shall not have that operation.

Now, in the field peas legislation, the necessary operation of the acquisition and of the marketing powers is to deprive growers and purchasers of peas of all part in trade in peas and at the same time to invest the statutory body with the power of conducting the whole trade and of determining how far the peas shall go into inter-State trade as opposed to overseas trade. To attempt to exclude from the operation of such a legislative scheme either a physical part of the commodity because, so to speak, it is found to be devoted to inter-State trade or a use of the Board's powers which would adversely affect inter-State trade appears to me to be impossible. The whole thing is a single statutory machine for the purpose of conducting what is predominantly an export trade from the State. Looked at quantitatively, which perhaps is the same as looking at it from the point of view of the importing or consuming States, the question is between inter-State and foreign trade. The Tasmanian legislation says to the buyers in other States : " You may not deal freely with the growers and merchants and obtain in the free course of trade what you can to supply to your consumers.

(1) (1938) 60 C.L.R. 263, at p. 283.
(2) (1938) 60 C.L.R., at p. 283.
(3) (1932) A.C. 542 ; 47 C.L.R. 386.
(4) (1933) 48 C.L.R. 266.

You must come to a statutory authority and it will decide what peas you can import into your State." Looked at from the point of view of Tasmanian commercial dealing, the Board is to undertake for the growers in combination and to the exclusion of other agencies of a commercial character, the marketing of the crop inter-State and overseas and so far as it matters intra-State, distributing the net proceeds among the producers.

The statutory machine which does this work must, as it seems to me, break down or suspend its operations altogether, if it is denied the right to deal with field peas which are to be put into inter-State trade or to exercise its powers in favour of overseas trade to the disadvantage of inter-State trade. The saving clause in s. 19 (3) accordingly seems to me to make only a notional and not a practical difference. The notional difference is between the destruction of the plan by the overriding force of s. 92 and the failure of the plan because of the operation of s. 19 (3) in excluding any application of the plan that would result in the impairment of freedom of inter-State trade or enable the Board to impair it. That State legislation of this kind dealing with a commodity predominantly sold as an export from a State necessarily involves an invasion of the freedom which s. 92 constitutionally preserves is a proposition which I remain unable to doubt. The subject of the legislation is the marketing of the commodity, which means trade in the commodity. The freedom of interchange between States is the essence of s. 92. In relation to goods it means a freedom from prohibitions, restrictions and burdens upon the transfer of the goods from one State to another. But freedom " as at the border," freedom of passage across State lines, means a freedom from restrictions and burdens operating against transference from one State to another at whatever point the burden or restriction is imposed. It may be before or after the actual movement from one State to another. It may be in the State in which the trade originates or in that where it terminates. It may be a prior restraint or a subsequent burden : *James* v. *The Commonwealth* (1).

The field peas legislation enters at the earliest stage upon the control of all trade in the product. As the commodity comes into being the Board takes the fullest command of its disposal that compulsory acquisition and statutory authority can give. But, as the title to the Act says, it is for the marketing of field peas. Acquisition is only a device to secure that end. It is to ensure, so far as may be, that no peas shall escape into the market, but that all that Tasmania produces shall pass through the statutory Board. All

(1) (1936) A.C. 578, at pp. 630-631 ; 55 C.L.R. 1, at pp. 58, 59.

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sales by growers are domestic, inter-State or overseas. The distribution of the commodity among these three sections of trade is to be the work of the statutory body. As is shown by the conditions prevailing in the season to which at first the Act was limited, the very purpose was to secure that a greater quantity of peas was held for the more profitable overseas market instead of going through what were considered the less profitable channels of free commerce into inter-State trade.

There is in my opinion a complete negation of freedom of trade in peas from one State to another. All freedom to market his product is denied to the producer: all trade is taken into statutory control; the purpose is to provide an exclusive method of disposing of the commodity and to make any form of inter-State and oversea trade in the commodity impossible unless by or with the consent of the Board; and the primary purpose is to obtain the advantage of overseas markets at the expense of inter-State trade.

In *James* v. *Cowan* (1) the quota system there condemned as contrary to s. 92 consisted in fixing a percentage of dried fruits that might be sold in Australia so that the rest might be driven into markets abroad. The purpose was to keep up the Australian domestic price of dried fruits. A system was devised by which the benefit of the enhanced domestic price might be shared by all growers.

South Australia could not, as it was held, forbid by law the sale in excess of the percentage or quota of dried fruit produced in that State, because to do so must involve a restriction of sales into other States as well as sales for consumption in South Australia (2). Nor could she expropriate dried fruit to insure that it was not in excess of the quota (3). In the Tasmanian plan for field peas, the purpose is to prefer overseas sales to inter-State sales, but for an opposite reason. No quota is fixed. For it is the Board and not the grower who will dispose of the commodity and the necessity of the mechanism of a quota is obviated. But, in principle, I cannot see why the Tasmanian legislation can walk round s. 92 any more successfully than did the South Australian.

Our decision in *Peanut Board* v. *Rockhampton Harbour Board* (4) was an application, as we thought, of the reasoning of the Privy Council decision. *W. & A. McArthur Ltd.* v. *Queensland* (5) still stood intact and it is true that some of us, myself in particular, thought it proper to treat the exposition of principle in that case

(1) (1932) A.C. 542; 47 C.L.R. 386.
(2) (1932) A.C., at p. 555; 47 C.L.R., at p. 394.
(3) (1932) A.C., at p. 559; 47 C.L.R., at p. 397.
(4) (1933) 48 C.L.R. 266.
(5) (1920) 28 C.L.R. 530.

as governing us. But in retrospect I cannot see that it made much, if any, difference: *James* v. *Cowan* (1) seems to me to go the full distance required.

In *James* v. *The Commonwealth* (2) Lord *Wright*, after saying that *James* v. *Cowan* (1) was followed and applied by the High Court in the *Peanut Board Case* (3), proceeds:—"The producers of the peanuts, it was held, were prevented by the Act from engaging in inter-State and other trade in the commodity. The Act embodied, so the majority of the Court held, a compulsory marketing scheme, entirely restrictive of any freedom of action on the part of the producers; it involved a compulsory regulation and control of all trade, domestic, inter-State and foreign; on the basis of that view, the principles laid down by this Board were applied by the Court."

That description of the legislation seems to me to fit the *Field Peas Act* in combination with the provisions it incorporates. Indeed it may be said to understate its operation upon inter-State trade in peas.

In *Andrews* v. *Howell* (4) I expressed my personal view that the regulation which there vested apples and pears in the Commonwealth Board could not validly operate on a sale of apples and pears in one State for delivery into another, though I doubted if the attack on the regulations as contrary to s. 92 was consistent with the decision in *Milk Board (N.S.W.)* v. *Metropolitan Cream Pty. Ltd.* (5). *Starke* J. considered that the regulations in *Andrews* v. *Howell* (6) were not obnoxious to s. 92 because the expropriation of apples and pears was not directed wholly or partially against inter-State trade, that is selling them out of any State, but to the better disposal of the commodities in local as well as other markets, if possible. That is, of course, by reason of the war. It is because of these purposes that the *Milk Board Case* (5) was relevant in *Andrews* v. *Howell* (7). That too is the view taken by *McTiernan* J. (8).

In these purposes there is no analogy in the present case, in which the statute is wholly concerned with marketing as a matter of commerce. But it is perhaps desirable to add in reference to *Andrews* v. *Howell* (7) that the considerations applicable to a State pooling of commodities are not the same as those applicable to an Australia-wide pool, when the question is whether it is obnoxious

(1) (1932) A.C. 542; 47 C.L.R. 386.
(2) (1936) A.C., at p. 623; 55 C.L.R., at p. 52.
(3) (1933) 48 C.L.R. 266.
(4) (1941) 65 C.L.R. 255, at p. 281.
(5) (1939) 62 C.L.R. 116.
(6) (1941) 65 C.L.R., at p. 274.
(7) (1941) 65 C.L.R. 255.
(8) (1941) 65 C.L.R., at p. 288.

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to s. 92. A State pooling of any commodity exported from the State is necessarily directed wholly or in part to trade across the boundaries of the State concerned and that includes export to the other States as well as to other countries. An Australia-wide pool is concerned with export to other countries and Australian domestic trade independently of State boundaries. The manner in which Australian domestic trade is affected by the pool may or may not be considered to involve an invasion of the freedom of inter-State trade. But the considerations will not be the same for the pool cannot be " pointed at " inter-State trade in the same way as a State pool must be.

In this Court we have availed ourselves from time to time of the assistance we have found in the analogy supplied by the applications the Supreme Court of the United States has made of the doctrine of the quasi-exclusiveness of the commerce power of Congress. That doctrine is stated in a passage from the opinion of *Stone* C.J. for the Court in *Southern Pacific Co.* v. *Arizona* (1) which I shall quote, omitting the late Chief Justice's citations of authority for his propositions. *Stone* C.J. said :—" Although the commerce clause conferred on the national government power to regulate commerce, its possession of the power does not exclude all state power of regulation. Ever since *Wilson* v. *Black Bird Creek Marsh Co.* (2) and *Cooley* v. *Port Wardens* (3) it has been recognized that, in the absence of conflicting legislation by Congress, there is a residuum of power in the state to make laws governing matters of local concern which nevertheless in some measure affect interstate commerce or even, to some extent, regulate it. . . . Thus the states may regulate matters which, because of their number and diversity, may never be adequately dealt with by Congress. . . . When the regulation of matters of local concern is local in character and effect, and its impact on the national commerce does not seriously interfere with its operation, and the consequent incentive to deal with them nationally is slight, such regulation has been generally held to be within state authority. . . . But ever since *Gibbons* v. *Ogden* (4) the states have not been deemed to have authority to impede substantially the free flow of commerce from state to state, or to regulate those phases of the national commerce which, because of the need of national uniformity, demand that

(1) (1945) 325 U.S. 761, at pp. 766-769 [89 Law. Ed. 1915, at pp. 1923, 1925].
(2) (1829) 27 U.S. 245 [7 Law. Ed. 412].
(3) (1851) 53 U.S. 299 [13 Law. Ed. 996].
(4) (1824) 22 U.S. 1 [6 Law. Ed. 23].

their regulation, if any, be prescribed by a single authority. . . . Whether or not this long recognized distribution of power between the national and the state governments is predicated upon the implications of the commerce clause itself . . . or upon the presumed intention of Congress, where Congress has not spoken . . . the result is the same. In the application of these principles some enactments may be found to be plainly within and others plainly without state power. But between these extremes lies the infinite variety of cases, in which regulation of local matters may also operate as a regulation of commerce, in which reconciliation of the conflicting claims of state and national power is to be attained only by some appraisal and accommodation of the competing demands of the state and national interests involved. . . . For a hundred years it has been accepted constitutional doctrine that the commerce clause, without the aid of Congressional legislation, thus affords some protection from state legislation inimical to the national commerce, and that in such cases, where Congress has not acted, this Court, and not the state legislature, is under the commerce clause the final arbiter between the competing demands of state and national interests. . . . Congress has undoubted power to redefine the distribution of power over interstate commerce. It may either permit the states to regulate the commerce in a manner which would otherwise not be permissible. . . or exclude state regulation even of matters of peculiarly local concern which nevertheless affect inter-State commerce." The danger of these analogies lies in the fact that s. 92 is an express constitutional provision declaring that inter-State commerce shall be free. The last sentence of the passage cited refers to the possibility of Congress excluding State regulation even upon matters of local concern. Suppose that, in the United States, Congress, undeterred by our experience, were to enact a general law in the terms of s. 92. It is clear to my mind that it would amount to an express declaration excluding State regulation of commerce notwithstanding that it is of local concern. The condition upon which the American doctrine depends is that Congress has not acted. Its action, if it took the form of s. 92, would replace the implication of " a recognized abstract principle . . . in the absence of action by Congress . . . that the state legislation is invalid if it unduly burdens that commerce in matters where uniformity is necessary—necessary in the constitutional sense of useful in accomplishing a permitted purpose " (*Morgan* v. *Virginia* (1)). It would replace it with an

(1) (1946) 328 U.S. 373, at p. 377 [90 Law. Ed. 1317, at p. 1322].

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express declaration of the unconditional freedom of inter-State commerce. But while this shows that American decisions upholding State legislation must be a fallacious guide, cases in which State legislation is held bad under the commerce power may be of assistance. For clearly the application of s. 92 should be *a fortiori*.

One decision, however, in spite of the fact that State legislation was upheld by the United States Supreme Court, has so much similarity to the present case that it does deserve some consideration. It is *Parker* v. *Brown* (1). There a Californian legislative scheme establishing a control of raisins was in question. Very compendiously stated, the plan put in operation involved the delivery of raisins to stations provided by a committee for grading, the free sale of only twenty per cent of the growers' raisins, and the placing of the other eighty per cent in a surplus pool. Out of this fifty per cent of the crop was placed in a stabilization pool administered by the committee, which marketed the raisins and made advances to the growers. The validity of this statutory scheme was attacked on a number of grounds, including inconsistency with the commerce clause. Two tests were applied by the court in considering this ground: "the mechanical test sometimes applied by the Court in determining when interstate commerce begins with respect to a commodity grown or manufactured within a state and then sold and shipped out of it"; and the test of the power of the State to deal with matters of local concern, though the regulation in some measure may affect inter-State commerce. On either test the statutory scheme was held constitutional. I shall not say more about the second of these two tests than that a perusal of the opinion will show that the court proceeded upon broad grounds of policy which I should think no one would say governed the application of s. 92.

As to the "mechanical test," the court proceeded upon the footing that however drastically a regulation might affect inter-State commerce, it "is nevertheless not prohibited by the Commerce Clause where the regulation is imposed before any operation of interstate commerce occurs. Applying that test, the regulation here controls the disposition, including the sale and purchase, of raisins before they are processed and packed preparatory to interstate sale and shipment. The regulation is thus applied to transactions wholly intrastate before the raisins are ready for shipment in interstate commerce" (2).

(1) (1943) 317 U.S. 341 [87 Law. Ed. 315].

(2) (1943) 317 U.S., at p. 361 [87 Law. Ed., at p. 332].

This ground suggests that because the field peas are intercepted before they can go into inter-State commerce the course of inter-State commerce is unhindered or free.

This view cannot in my opinion be accepted as applicable to s. 92. It is contrary to the very point made by Lord *Wright* in *James* v. *The Commonwealth* (1) that the impairment of freedom may be at any stage. It is evident that the whole device of expropriating a commodity and vesting it in a marketing board is to intercept commerce and stop domestic or inter-State or foreign trade, as the case may be, or all three. The Californian scheme for raisins is, moreover, plainly contrary to *James* v. *Cowan* (2). However, another question is suggested by the "mechanical test," and one about which I have had some doubt. It is whether really the plaintiff company has a *locus standi* to complain. The company's transactions with the growers were not in themselves of an inter-State character. Nor did they give title to, or a contractual right to, specific goods. It is only the contracts of resale with merchants that in themselves are inter-State transactions. Can the company maintain a suit for the relief it seeks on the ground of threatened interference with its inter-State trade? On the whole I think it can. We should, for the purpose of s. 92, regard the company's position not from the point of view of the legal character of the right to goods the contracts give or to the geographical point at which delivery in fulfilment of the contracts may be effected. We should consider the commercial significance of transactions and whether they form an integral part of a continuous flow or course of trade, which, apart from theoretical legal possibilities, must commercially involve transfer from one State to another.

Thus considered, I think the plaintiff company's interest in inter-State trade in field peas from grower to consumer entitles it to complain.

If this proceeding is to be considered an appeal, I think it should be dismissed with costs.

If, however, we are to entertain it as an irregular hearing of the suit, by the Full Court, I think that we should declare that the *Field Peas Act* did not operate to invalidate the plaintiff company's contracts with producers for the sale and delivery to the company of field peas or to divest the peas from the growers so contracting or to prevent the growers delivering the peas to the plaintiff company in pursuance of its contracts. With that declaration the suit should stand over for further consideration before a single justice.

(1) (1936) A.C. 578, at pp. 630, 631; 55 C.L.R. 1, at pp. 58, 59.

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

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McTIERNAN J. I agree with the reasons for judgment of the Chief Justice. In my opinion the appeal should be dismissed.

Appeal dismissed with costs including any costs incurred by the respondent by reason of the order directing hearing of the appeal in Sydney instead of in Melbourne.

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E. F. H.