[HIGH COURT OF AUSTRALIA.]

FERGUSSON . . . . . INFORMANT;

AND

STEVENSON . . . . . DEFENDANT.

ON REMOVAL FROM A COURT OF PETTY SESSIONS OF NEW SOUTH WALES.

H. C. OF A. 1951.

SYDNEY, *July*, 9, 10.

MELBOURNE, *Oct.* 3.

Dixon, McTiernan, Williams, Webb, Fullagar and Kitto JJ.

Constitutional Law—Freedom of trade, commerce and intercourse among the States—State Act—Possession of "protected" fauna, including skins, prohibited—Skins legally bought in one State forwarded to another State for sorting and shipment overseas—"Possession" in latter State—Information—Removal into High Court—Dismissal—The Constitution (63 & 64 *Vict. c.* 12), *s.* 92—*Judiciary Act* 1903-1950 (*No.* 6 *of* 1903—*No.* 80 *of* 1950), *s.* 40—*Fauna Protection Act* 1948 (*N.S.W.*) (*No.* 47 *of* 1948), *ss.* 4, 19 (1), (5)*.

Inter-State trade and commerce protected by s. 92 of the Constitution includes the transport of goods from one State to the ports of export of another State for the purpose of shipment abroad.

The defendant, the manager of B., was charged at Sydney under s. 19 (1) of the *Fauna Protection Act* 1948 (N.S.W.) that he knowingly had in his possession protected fauna, viz., certain kangaroo and wallaroo skins which

* Section 19 (1) (5) of the *Fauna Protection Act* 1948 (N.S.W.) provides:—"(1) Any person who knowingly buys, sells, offers or consigns for sale, or has in his possession, house, or control, any protected fauna at any time shall be liable to a penalty not exceeding five pounds for each of such fauna in respect of which such offence has been committed. The provisions of this sub-section shall apply whether such fauna was killed, taken, or bought in or received from any State or territory of the Commonwealth, or the Dominion of New Zealand, or elsewhere: Provided that the Minister may by license, under conditions therein specified, permit the importation of any such fauna: Provided also that the Governor may by proclamation exempt under conditions specified in such proclamation any fauna from such provisions. (5) This section shall be read and construed subject to the Commonwealth of Australia Constitution Act, and so as not to exceed the legislative power of the State to the intent that where any provision of this section, or the application thereof to any person or circumstance is held invalid the remainder of this section, and the application of such provision to other persons or circumstances shall not be affected."

H. C. OF A. 1951.

FERGUSSON v. STEVENSON.

had been bought by C. in Brisbane and consigned to B. in Sydney where they were to be sorted and exported overseas. The matter was removed into the High Court in pursuance of s. 40 of the *Judiciary Act* 1903-1950.

Held, by the whole Court, that the information should be dismissed.

By *Dixon*, *Williams*, *Webb*, *Fullagar* and *Kitto* JJ. on the ground that the transaction, including the possession, fell within the protection of s. 92 of the Constitution and that it was therefore impossible that s. 19 (1) of the *Fauna Protection Act* 1948 (N.S.W.) would make the possession of the skins an offence.

By *McTiernan* J. on the ground that the subject skins were not " protected fauna " within the meaning of s. 19 (1) of the Act, because the fauna from which the skins were stripped were outside New South Wales and therefore not " protected " by the Act.

REMOVAL under s. 40 of the *Judiciary Act* 1903-1950.

Upon an information taken out under s. 19 (1) of the *Fauna Protection Act* 1948 (N.S.W.) by Donald George Fergusson, detective senior constable of police, William Scott Stevenson was charged at the Central Court of Petty Sessions, Sydney, that on 30th March 1951, at Sydney, he did knowingly have in his possession protected fauna, namely, certain grey kangaroo skins, red kangaroo skins and wallaroo skins, contrary to the Act.

The defendant pleaded not guilty.

He was the Australian manager and a director of Booth & Co. (England) Ltd., an English company which had been carrying on business in Sydney since 1890, buying skins in Australia and forwarding them by ship from Sydney to two firms in the United States of America. The profit or remuneration of Booth & Co. (England) Ltd. was derived from a combined buying commission and packing charge expressed at so many pence per pound. In Brisbane, Queensland, S. Cooper Pty. Ltd., a company which carried on the business of a wool, skin, hide and tallow merchant, bought skins from various brokers and consigned them to the warehouse of Booth & Co. (England) Ltd. at Sydney, for which the first-mentioned company charged a buying and a packing commission. The skins were received at the warehouse and there sorted according to quality, size, weight and type. Bales of each type, of which there were some thirty, were made up for shipment to the United States of America, where the skins were tanned and ultimately furnished the material for shoe uppers.

The information was in respect of 1,318 skins which were bought in Brisbane by S. Cooper Pty. Ltd., ostensibly as principal, from various pastoral and rural agency firms, and were forwarded in

four bundles from Brisbane by road transport to, and were delivered at, the warehouse of Booth & Co. (England) Ltd. in Sydney not earlier than 14th March 1951. S. Cooper Pty. Ltd. sent to Booth & Co. (England) Ltd. an invoice showing details as to the cost of the skins and the commission and packing charges, and drew upon that company in Sydney for the amount of the invoice.

After the taking of evidence had concluded the matter was, on the motion of the Attorney-General for New South Wales, removed, under s. 40 of the *Judiciary Act* 1903-1950, into the High Court.

The relevant statutory provisions are sufficiently set forth in the judgments hereunder.

M. F. Hardie K.C. and *J. W. Smyth*, for the informant.

M. F. Hardie K.C. The skins were merely acquired in various States and brought to Sydney with a view to putting them into a condition suitable to be exported to customers in the United States of America. They were not sold to anybody in Sydney. The transactions were in essence transactions between, and trade from, Australia to America. There was not any inter-State element involved in the trade. The physical movement of the skins from Queensland to New South Wales was not in itself sufficient to attract the protection of s. 92 of the Constitution, the relationship between the American principals and Booth & Co. (England) Ltd. being that of principal and agent, and the relationship between that company and S. Cooper Pty. Ltd. being that of agent and sub-agent. Unless the State authorities are able to enforce s. 19 of the *Fauna Protection Act* 1948 (N.S.W.) in relation to skins of native animals, irrespective of their source, the whole administration of the Act so far as it relates to preventing mass destruction would be rendered futile. The skins are important because they are both the inducement and material evidence. Skins and furs used for the purpose of manufacture become articles of commerce and would cease to be fauna within the meaning of that word as defined in the Act. The legislation is directed towards things which the Parliament of New South Wales regards as being not suitable to be articles of commerce in the ordinary sense. It is important that there is a power in the Minister to examine a matter and decide whether, on the facts of a particular case, he ought to grant the necessary licence to allow the skins concerned to enter New South Wales from another State. Section 19 is essentially a penal section. Its function is to enable the Act to be policed and enforced. To ensure that our native animals

H. C. OF A. 1951.

FERGUSSON v. STEVENSON.

and birds be not killed, the State authorities must be able to deprive other people in New South Wales of some economic motive or incentive to kill them and to trade in their skins, hides and carcases. Section 19 (1) should not be read as a separate section, apart altogether from everything else in the Act. It is part of the scheme established by the Act to protect, mainly, native animals and birds, and is clearly within the competence of the State Parliament. To deprive in an incidental way some particular person of a right he would otherwise have to engage in trade in those articles as between one State and another State is not an infringement of s. 92. Section 27 of the Act is important. That provision was made in relation to legislation for the issue of licences to people to deal in fauna generally, or to deal in the skins of fauna, and a person holding such a licence who acquires skins in the course of business carried on pursuant to the licence would have a defence to proceedings under s. 19. A provision such as s. 19 (1) must, to be effective, apply to animals and birds irrespective of where they were killed or taken (*Whitehead* v. *Smithers* (1); *Price* v. *Bradley* (2); *Guyer* v. *The Queen* (3)). State Parliaments have the right to deny to people generally the right to trade in certain particular commodities, things or creatures, such as noxious drugs and pornographic literature (*The Commonwealth* v. *Bank of New South Wales* (4)). In construing s. 92 there should be taken into account the fact that States are left with power to legislate on topics such as the preservation of the native animal and bird life, and that States are to be permitted to deal with that problem in a manner similar to the manner in which it had been dealt with by the English Parliament during the years prior to federation. The implications and the consequences of applying s. 92 to a topic of legislation of the nature now under consideration are very serious. It is very likely that the legislation of the various States would cease to be effective and would fail if s. 92 forbids it. What occurred in this case was incidental to the regulation of animal and bird life. The legislation is not directed to trade, and in so far as it does have an effect on trade it is a regulation only, or is an incidental effect (*R.* v. *Connare*; *Ex parte Waun* (5); *Ex parte Nelson* (*No.* 1) (6); *Home Benefits Pty. Ltd.* v. *Crafter* (7)). Animals native to Australia are not, normally, suitable for trade, and it is competent for State Parliaments to provide by statute

(1) (1877) 2 C.P.D. 553, at p. 556.
(2) (1885) 16 Q.B.D. 148, at pp. 150, 151.
(3) (1889) 23 Q.B.D. 100, at pp. 106, 118.
(4) (1949) 79 C.L.R. 497, at p. 641.
(5) (1939) 61 C.L.R. 596, at pp. 616-618, 621, 622, 629, 631.
(6) (1928) 42 C.L.R. 209.
(7) (1939) 61 C.L.R. 701, at p. 710.

that the skins of such animals shall not be made the subject of trade. Section 19 (1) of the Act is a valid provision; no portion of it infringes s. 92, therefore sub-s. (5) of s. 19 does not come into operation. That sub-section was inserted for more abundant caution, and is not evidence that sub-s. (1) of s. 19 infringes s. 92. In *Graham* v. *Paterson* (1) it was held that a reading-down clause had the effect of saving the validity of the prices legislation there under consideration irrespective of what appeared in s. 92.

J. W. Smyth. Once it appears, as it does from the Act, that protected fauna not only includes a live animal but also its skin or any part of it, then immediately that particular fauna which was alive left an unprotected area and went into a protected area it would become protected fauna within the meaning of the Act. Regard must be had to the purpose behind, or the intention of the legislation. In pursuance of its purpose or intention the New South Wales legislation has plainly endeavoured to make the possession of the skins of protected fauna an offence irrespective of where those skins might have come from. The object of the Act has nothing to do in any way with trade or commerce, but only the protection of mammals and similar fauna which are to be protected in a particular way in accordance with the provisions of s. 19 (1), and which in no way conflicts with s. 92.

A. R. Taylor K.C. (with him *K. A. Ferguson* K.C. and *J. K. Manning*), for the defendant. It is not disputed that the *Fauna Protection Act* 1948 (N.S.W.) is an Act intended for the protection and preservation of fauna in New South Wales. The scheme of the Act, so far as it operates domestically, is that protection is afforded to the living animal, not to the skin, and if a kangaroo is unprotected in, say, the Western Division of New South Wales, he is, although protected in the other parts of the State, unprotected in that part for all of the purposes of the Act. The skin of fauna taken or killed in that part would not become protected in any other part of the State. The test must be whether the live animal which was killed was one to which protection was afforded because if it were not such an animal then the skin never became a protected fauna itself. It is apparent that the legislature never intended a penalty to attach to any person for having skins in his possession, the skins of protected fauna in cases where the animals had been lawfully taken or killed in accordance with the Act. The word " fauna " is not used in the second paragraph of s. 19 (1)

(1) (1950) 81 C.L.R. 1.

H. C. OF A. 1951.

FERGUSSON v. STEVENSON.

in the sense in which it is used in the definition section. That second paragraph goes further than the live animal and is intended to deal with an animal which was never a protected animal in New South Wales. Where a person is charged with having skins in his possession, those skins being protected fauna because of the elongated definition of the expression, the prosecution must show that the skin is a protected fauna. In such a case the skin must be the skin of a protected fauna unless it is the skin of an animal which when it was alive was a protected animal. Skins are not referred to at all in the schedule. When the Act speaks of protected fauna, it speaks of the skins of fauna which were protected in their lifetime. When the Act speaks of unprotected fauna, that is, skins, the Act speaks of skins of fauna which were not protected in the locality where the fauna were taken or killed. On the evidence it is clear that Booth & Co. (England) Ltd. was engaged in inter-State trade; whether the company bought as principal or as agent is immaterial. The position is exactly the reverse of the position in *Vacuum Oil Co. Pty. Ltd.* v. *Queensland* (1). As in that case the subject transaction is trade between Queensland and overseas, and the sorting of the skins in Sydney is itself part of inter-State trade as was the filling of drums with oil in Sydney: see (2). Upon it being established that the skins came into the defendant's possession in the course of an inter-State transaction, then it follows that that was inter-State trade and commerce within the meaning of s. 92. The Act shows a complete discrimination against skins from other States because whereas in New South Wales if the animal is taken or killed locally a person may have a skin in his possession, if the skin is from another State an offence is committed from the first moment it comes into possession. The provisions of s. 19 (1) apply, whether or not the fauna was taken lawfully in the State of Queensland. It is a prohibition against bringing the fauna into New South Wales, not a provision intended to enable the Act to be policed. The only way to determine whether the operation of an Act in itself in its effect or impact on inter-State trade is remote, must be by examining the Act itself (*The Commonwealth* v. *Bank of New South Wales* (3)). This Act is expressly directed to goods which may be the subject of inter-State trade. Its impact is immediate the moment the fauna enter New South Wales, and it is calculated, if it be valid, to bring all inter-State trade in these commodities

(1) (1934) 51 C.L.R. 108.
(2) (1934) 51 C.L.R., at pp. 121, 128, 129, 132, 138.
(3) (1949) 79 C.L.R. 497; (1950) A.C. 235.

to a standstill. There were very special reasons in *R.* v. *Connare*; *Ex parte Wawn* (1) and *R.* v. *Martin*; *Ex parte Wawn* (2); and it might well be said that all the members of the Court eventually took the view that the sale of foreign lottery tickets in New South Wales was no real part of trade, commerce or intercourse at all: see (3) and (4). The legislation under consideration in *Home Benefits Pty. Ltd.* v. *Crafter* (5) was purely regulatory and did not render inter-State trade unfree: see (6). But the Act now under consideration affects the trade itself. The English cases referred to on behalf of the informant were not concerned with any provision like s. 92. The Act, by the second paragraph of s. 19 (1), directly and immediately precludes inter-State trade in skins such as the subject skins. That second paragraph and the provision for forfeiture and penalty bar and exclude inter-State trade just as directly as an expressed prohibition against importation or exportation. In the application of the Act to skins and hides brought from other States, the Act discriminates because it permits trade and contemplates trade in skins and hides of animals lawfully killed in New South Wales, but absolutely prohibits trade in cases where the skins are taken from animals lawfully killed elsewhere. It is quite obvious from the two different laws, with respect to skins obtained in New South Wales and to skins obtained elsewhere, that unless the latter is capable of being supported as a separate law entirely by itself, it is not capable of being justified at all, there not being anything in the Act itself in its application to New South Wales capable of supporting the provision made with respect to skins from other States, because the provisions of s. 19 (2), as applied to inter-State skins, cannot operate to protect fauna in New South Wales at all. It cannot operate to protect fauna because the skins come to New South Wales after the animals have been killed. There is nothing in the Act that suggests that the trade is sought to be excluded because it is immoral, improper, or wrong; so that the subject of the trade was *extra commercium*. The only scope for the application of s. 19 (1) in relation to skins from other States is that once they have entered New South Wales in the way of inter-State trade or commerce, if sub-s. (5) were applied to sub-s. (1) of s. 19, in so far as sub-s. (1) of s. 19 applies to skins from other States, one would have to say that s. 19 (1) could only apply in

(1) (1939) 61 C.L.R. 596.
(2) (1939) 62 C.L.R. 457.
(3) (1939) 61 C.L.R., at pp. 616, 628, 631.
(4) (1939) 62 C.L.R., at pp. 461, 462.
(5) (1939) 61 C.L.R. 701.
(6) (1939) 61 C.L.R., at pp. 710, 712, 718, 722, 724.

H. C. OF A. 1951.

FERGUSSON v. STEVENSON.

the case of skins coming into New South Wales, otherwise it would be in the course of trade, commerce, or intercourse.

[DIXON J. referred to *R.* v. *Connare*; *Ex parte Wawn* (1).]

As consideration must be given to the facts and circumstances of every case, it is impossible by any method of "surgery", or any form of "plastic surgery" to read down s. 19 in order to give it a meaning in relation to skins bought, sold, offered or consigned for sale or in a person's possession in a case where those skins had come into New South Wales in the course of trade, commerce or intercourse.

M. F. Hardie K.C., in reply. The New South Wales legislature has not completely banned the importation into New South Wales of fauna, that is, live animals or the skins of animals. The licensing provision in the Act is one which will be administered in accordance with the general scheme of the Act. That is, not equivalent to a complete prohibition (*McCarter* v. *Brodie* (2)). In construing s. 19 and determining its relationship to s. 92 of the Constitution it should be remembered that the offence of a person having a skin in his possession is not because the skin is something that is normally made a subject of buying and selling, but because it is evidence that an animal has been killed. Similar legislation is to be found in the *Game Act* 1928 (Vict.), s. 9 (2), (3), the *Game (Koala) Protection Act* 1938 (Vict.) and the *Animals and Birds Protection Act* 1919-1938 (S.A.), s. 14 (1) (*c*), (2), (3). The subject skins were never the subject matter of trade and commerce between the States; or, alternatively, if they were, they had ceased to be the subject of trade and commerce between the States on the date on which the offence was alleged to have been committed, namely, 30th March 1951. The skins were bought in Brisbane by S. Cooper Pty. Ltd. as agent for and on behalf of Booth & Co. (England) Ltd. The purchases were solely intra-State transactions when they were made from the various vendors in Brisbane. There was not any inter-State trade in those skins. Section 19 would not in any way impede either the making or the performance of the agency agreement. On the facts *Vacuum Oil Pty. Ltd.* v. *Queensland* (3) is distinguishable from this case. That decision does not establish that a person engages in inter-State trade and commerce by taking goods from one capital city to another capital city to be sorted and then sent from that last-mentioned capital

(1) (1939) 61 C.L.R., at p. 618.
(2) (1950) 80 C.L.R. 432, at pp. 452, 475.
(3) (1934) 51 C.L.R., at pp. 109-111.

city to a place outside Australia. If s. 92 applies at all to this case to narrow down the operation of s. 19 (1), it only applies up to the period when the skins reached the principal in Sydney. As from that point of time s. 19 (1) was free to operate on the skins and the defendant was properly charged. On that view of the matter, s. 19 (5) is effective to limit or postpone the operation of the Act to any point of time at which the goods ceased to have any inter-State aspect (*Graham* v. *Paterson* (1), see also *Ex parte Beath*; *Re Phillipson* (2)).

A. R. Taylor K.C., by leave. The licensing provisions of the Act are arbitrary and therefore bad (*James* v. *Commonwealth of Australia* (3)).

Cur. adv. vult.

Oct. 3.

The following written judgments were delivered :—

DIXON, WILLIAMS, WEBB, FULLAGAR AND KITTO JJ. This matter is before us as a cause removed into the High Court in pursuance of s. 40 of the *Judiciary Act* 1903-1950. That section provides that any cause or part of a cause arising under the Constitution or involving its interpretation which is pending in any court of a State may be removed into the High Court under an order of the High Court. The making of the order is discretionary if a party makes the application, but the section provides that the order shall be made as of course upon motion in open court by or on behalf of the Attorney-General of the Commonwealth or the Attorney-General of a State. In the present case the Attorney-General of New South Wales moved for the order. The provision of the Constitution involved is s. 92.

The cause was pending in the Central Court of Petty Sessions holden at Sydney. It was a charge upon information under s. 19 (1) of the *Fauna Protection Act* 1948 (N.S.W.). The information charged the defendant William Scott Stevenson for that on 30th March 1951 he did knowingly have in his possession protected fauna, to wit certain skins. The skins were particularized, erroneously as it happened, but in fact there were 756 grey kangaroo skins, 373 red kangaroo skins and 189 wallaroo skins to which the information intended to refer, making 1,318 skins in all.

The defendant had pleaded not guilty to the information in the Court of Petty Sessions and all the evidence had been heard before the Attorney-General of New South Wales moved for the removal

(1) (1950) 81 C.L.R., at p. 16.
(2) (1932) 49 W.N. (N.S.W.) 76.
(3) (1936) A.C. 579; 55 C.L.R. 1.

H. C. OF A. 1951.

FERGUSSON v. STEVENSON.

Dixon J. Williams J. Webb J. Fullagar J. Kitto J.

of the cause. The facts appear from the depositions and the exhibits. The defendant is the Australian manager and a director of an English company named Booth & Co. (England) Ltd., which has been carrying on business in Sydney for many years. Booth & Co. (England) Ltd. buy skins in Australia and ship them from Sydney to Surpass Leather Co. of Philadelphia and Richard Young Company of Boston. The company's profit or remuneration is obtained from a combined buying commission and packing charge expressed as so many pence per pound. In Brisbane S. Cooper Pty. Ltd., who are wool, skin, hide and tallow merchants, buy skins and consign them to Booth & Co. (England) Ltd. For doing so they charge a buying and a packing commission. The latter company has a warehouse in Sydney where the skins are sorted according to quality, size, weight and type. Bales of each type, of which there are some thirty, are made up for shipment to America, where the skins are tanned and ultimately furnish the material for shoe uppers. The 1,318 skins the subject of the charge were bought in Brisbane by S. Cooper Pty. Ltd. from various pastoral and rural agency houses. S. Cooper Pty. Ltd. bought as ostensible principals and they consigned the skins in four bundles from Brisbane by road transport to Booth & Co. (England) Ltd. in Sydney, to whom they were delivered. The former company sent to the latter an invoice showing the cost of the skins and the commission and packing charges and drew upon the latter in Sydney for the amount of the invoice.

The four bundles of skins were received by Booth & Co. (England) Ltd. in Sydney not earlier than 14th March 1951. The possession which is made the subject of the charge was thus acquired. The possession in the ordinary legal sense was that of the company, which might more appropriately have been made the defendant. In s. 19 (4) of the *Fauna Protection Act* 1948 there is a definition of " possession " which is intended to extend the conception, but it is not clear why it was supposed that the manager as distinguished from the company had such a possession. However, no point was made of the distinction between the manager and the company and we may ignore it for the purposes of our decision.

Section 19 (1) of the Act provides that any person who knowingly buys, sells, offers or consigns for sale or has in his possession, house or control any protected fauna at any time shall be liable to a penalty not exceeding five pounds for each of such fauna in respect of which such offence has been committed. By s. 4 the word " fauna " means any mammal or bird and " mammal " means any mammal, whether native, introduced or imported and includes

among other things the skin or any part of any such mammal. There is an exception, which does not concern the case, of domestic mammals and rats and mice. Section 19 (1) applies only to protected fauna and that expression has a very artificial definition. It means any fauna not mentioned in the first schedule to the Act. That schedule mentions the dingo, the ferret, the fox, the flying fox, the hare and the rabbit and adds, in respect of certain districts, the wombat. All other mammals are protected fauna. It is in this way that s. 19 (1) embraces kangaroos and wallaroos and, by virtue of the definition of mammal, kangaroo and wallaroo skins.

There might be much reason for construing s. 19 (1) as relating only to animals and the skins of animals taken in New South Wales but for an express provision which follows so much of s. 19 (1) as has already been quoted. The sub-section goes on to say that its provisions shall apply whether such fauna was killed, taken or bought in or received from any State or Territory of the Commonwealth or the Dominion of New Zealand or elsewhere. This paragraph is followed by two provisoes. The first of them authorizes the Minister by licence, under conditions therein specified, to permit the importation of any such fauna. The second proviso empowers the Governor in Council by proclamation to exempt, under conditions specified in such proclamation, any fauna from the provisions of the sub-section. Animals and the skins of animals coming from other States were thus brought explicitly within the protection of s. 19 (1). This necessarily meant that the sub-section, if construed according to its terms, would cover buying and selling and possessing and controlling skins in the course of inter-State dealings with skins and of the inter-State movement of skins. Whether for this reason or by reason of more general apprehensions, s. 19 concludes with a direction to read the section subject to the Constitution, a direction of a kind now only too familiar. The provision which forms sub-s. (5) of s. 19 is as follows :—" This section shall be read and construed subject to the Commonwealth of Australia Constitution Act, and so as not to exceed the legislative power of the State to the intent that where any provision of this section, or the application thereof to any person or circumstance is held invalid the remainder of this section, and the application of such provision to other persons or circumstances shall not be affected."

This provision may operate to reduce what would otherwise be a question of the constitutional validity of sub-s. (1) to the formal position of a question of the construction or interpretation of a

H. C. OF A. 1951.

FERGUSSON v. STEVENSON.

Dixon J. Williams J. Webb J. Fullagar J. Kitto J.

State statute, though there are two points to be noted in that connection. One point is that sub-s. (5) appears to be addressed rather to severance than construction. Section 15A of the *Acts Interpretation Act* 1901-1950 of the Commonwealth, from which much of the language of s. 19 (5) of the *Fauna Protection Act* 1948 is mediately or immediately derived, is framed entirely in terms of construction and the intent of that provision is expressed to be that where but for the provision an enactment would have been construed as being in excess of the legislative power, it shall nevertheless be a valid enactment to the extent to which it is not in excess of that power. But s. 19 (5), in formulating its intent, expresses the condition to be that a provision of the section is held invalid or that some application of a provision is held invalid. Then, so it would seem, when a provision, or some application of a provision has been held invalid the remainder of the provision is to be severed and other applications of the provision are to be distinguished and they are not to be affected.

The other point is that, on the assumption that so much of the second paragraph of s. 19 (1) as applies the prohibitions of the sub-section to fauna (including in that expression skins the subject of commerce outside New South Wales) bought in or received from any State would impinge upon s. 92, it is not quite easy to see how a residual operation or application could be found to which it might validly be confined by construction or internal severance.

But whether sub-s. (5) of s. 19 does or does not transform the issue of law from one of constitutional validity to one of statutory construction, the issue must depend ultimately for its decision upon s. 92 of the Constitution. The matter before us therefore remains a cause involving the interpretation of the Constitution and so removable under s. 40 of the *Judiciary Act* 1903-1950.

The defendant's answer to the charge contained in the information is that he had no possession of the skins except a possession which resulted from receiving the skins in fulfilment of a transaction of trade and commerce between New South Wales and Queensland the freedom of which is protected by s. 92. That the possession of the skins was the immediate result of a transaction of inter-State trade and commerce upon the facts cannot be doubted. Upon the instructions of Booth & Co. (England) Ltd., for whom the defendant stands in this proceeding, the skins were bought in Brisbane and consigned to the company in Sydney where they were duly received, the delivery by the inter-State carrier giving rise to the possession made the subject of the charge.

A suggestion was made that such a transaction is not within the protection of s. 92 because the purpose of receiving the skins in Sydney was to ship them abroad. As an observation of fact, it may be remarked that the purpose of sorting them in Sydney according to size, weight, type and quality, involves a substantial commercial operation. But in any case the suggestion is without any foundation.

Inter-State trade and commerce protected by s. 92 must include the transport of goods from one State to the ports of export of another for the purpose of shipment abroad. Let it be supposed that s. 19 (1) applies to kangaroo skins as subjects of commerce. On that footing it includes a definite, if not a specific, restriction upon transactions of inter-State commerce. Reading " skins of protected animals " instead of the word " fauna ", the sub-section makes it an offence for a person knowingly to buy or to sell or to have in his possession the skin of a protected animal killed, taken, or bought in or received from any State of the Commonwealth. No doubt in s. 19 (1) the expression " protected fauna ", if the name of a species of animal does not appear in the first schedule, applies to animals of that species belonging to other States, although it is true that in the Act indications do appear of an intention to classify fauna as unprotected, and correspondingly as protected, by reference to localities in New South Wales, as well as by reference to seasons and to licences depending upon the legislative and administrative action of that State. But, giving to the expression " protected fauna " in s. 19 (1) a meaning which describes only the species of animal, the result is that it forbids acts indispensably connected with the introduction into New South Wales from another State of a commodity, namely, skins, which form an ordinary subject of commerce in that other State. In the present instance, the skins, as appears from a certificate given by S. Cooper Pty. Ltd., were legally taken in Queensland and legally bought there. In Queensland there is a Fauna Protection Act of 1937, 1 Geo. VI., No. 22, but it leaves it to the Governor in Council to declare to what fauna the Act shall extend and apply: s. 4 (1) (i). The removal from the State of the fauna to which it does apply is dealt with by s. 27, but we are not concerned with that because there is no question that the taking of the skins in Queensland was lawful. It is said that the State of New South Wales, in the exercise of its legislative power, has adopted a policy of protecting the animals and birds indigenous to Australia and of preserving them from any danger of extinction and that for the fuller effectuation of that policy and for its more complete enforcement the State is

H. C. OF A. 1951.

FERGUSSON v. STEVENSON.

Dixon J. Williams J. Webb J. Fullagar J. Kitto J.

entitled to suppress all dealing in the skins and feathers of such animals and birds and to make it an offence even to possess a skin or feather of any animal or bird of the species. Apart from other considerations, to have one law for the skin of an animal killed in New South Wales and another for the skin of the like animal if killed in another State would, it was suggested, expose the provisions for safeguarding the fauna of New South Wales to ready evasion and make proof often almost impossible. But if otherwise the transaction forbidden by s. 19 (1) falls within s. 92 this can hardly be a reason for excluding it.

The consideration, however, upon which the argument of the State perhaps chiefly relied was found in the character and purpose of the law, a law for the protection and preservation of fauna, providing, to that end, for the exclusion of the protected birds and animals and their feathers and skins from the subjects of ownership and possession and of commercial or other dealing. Section 92 cannot, it was urged, be supposed to give to any inter-State transaction freedom from the prohibitions contained in a law of such a character. In giving reasons for rejecting this argument, which invokes the general character, purpose and policy of the law as giving its prohibitions a consistency with the freedom of trade, commerce and intercourse which s. 92 assures, it is not desirable to go further than the particular legislative provisions in question as they would apply to the facts of the case, and it is desirable to begin by pointing out that some elements which in the long history of the discussions of s. 92 have sometimes been mentioned do not exist in the present case.

To negative their existence is not to imply that their presence in the case would be decisive or even important or relevant, but it serves at once to clear the ground and to define the scope of our actual decision. The first thing to negative is the existence in Australia of any universally or generally accepted understanding of what are or should be legitimate articles of commerce which excludes kangaroo skins. The attitude towards the killing of kangaroos necessarily varies in different parts of Australia between at the one extreme protecting kangaroos almost altogether and at the other treating them as pests. Then in the next place this is not a case in which the law of the State in which the goods have been produced or obtained and put into the course of commercial dealing and bought has put the goods *extra commercium* or made unlawful any step in obtaining them or in the commercial dealing with them which has resulted in their importation into New South Wales. Again, the prohibition in New South Wales is not

based upon the ground that the goods are harmful to the health or the morals or the minds of the people of New South Wales or that to make them available as articles of commerce exposes the authorities or the general public to any dangers, as, for example, might be the case with weapons or poisons or other dangerous things. Finally it is not a case in which any claim can be made that the law in question is regulatory in its character or operation. The law does not undertake to control the incidents of transactions forming part of trade and commerce among the States or to prescribe particular conditions with which those engaging in such transactions must conform.

To turn to the positive reasons for saying that the present case falls within the protection of s. 92 is to take up a few very simple propositions. The first paragraph of s. 19 (1) prohibits dealings with goods, dealings which, so far as material to the case, are either themselves essentially commercial or else are or may be indispensable consequences of a transaction of trade and commerce. The second paragraph draws under the prohibition inter-State transactions. The skins are according to the law and practice of Queensland ordinary articles of commerce. In the language of the judgment delivered by Lord *Porter* for the Privy Council in the *Banking Case* (1): ". . . it is the direct and immediate result of the Act to restrict the freedom of trade commerce and intercourse among the States". The transaction in which the defendant's company engaged was essentially one of inter-State trade and the possession which the informant makes the ground of the prosecution was an inseparable concomitant or consequence of that transaction.

It is difficult to see how in these circumstances the protection, which s. 92 gives in guaranteeing the absolute freedom of trade commerce and intercourse among the States, could be denied to the transaction and to the possession of the goods on the part of the defendant's company which ensued therefrom. It is therefore impossible that s. 19 (1) of the *Fauna Protection Act* should make the possession of the goods which the company or the defendant on its behalf obtained an offence, and it matters not whether this result is produced by the direct operation of s. 92 or by the indirect operation of that constitutional provision through sub-s. (5) of s. 19.

The information should therefore be dismissed. The informant must pay the taxed costs of the defendant of the proceedings

(1) (1950) A.C. 235, at p. 312; (1949) 79 C.L.R. 497, at p. 641.

H. C. OF A. 1951.

FERGUSSON v. STEVENSON.

in this Court, including the costs of the application for removal. The informant should pay the costs of the defendant of the proceedings in the Court of Petty Sessions before the order for removal, which costs are fixed at seventy-five guineas.

McTIERNAN J. The defendant has been tried summarily in a State Court of Petty Sessions upon an information alleging that he broke sub-s. (1) of s. 19 of the *Fauna Protection Act* 1948 of New South Wales, by knowingly having protected fauna in his possession. At the trial the question whether this section is in conflict with s. 92 of the Commonwealth Constitution was raised on the defendant's behalf and, before the case was determined, the proceedings were removed to this Court under s. 40 of the *Judiciary Act* 1903-1950 upon the application of the Attorney-General of New South Wales. The case has become, therefore, a cause in the original jurisdiction of this Court. The issue whether the defendant is guilty of the alleged offence has to be decided by this Court according to the evidence and admissions in the depositions taken in the Court of Petty Sessions. No further evidence was adduced in the cause. The charge relates to bundles of skins of kangaroos and wallaroos.

The evidence raises the inference that the skins were stripped from kangaroos and wallaroos which were fauna of Queensland and were killed in that State. There is no evidence to rebut this inference.

The skins were in the warehouse at Sydney of Booth & Co. (England) Ltd., of which the defendant is a director and the Australian manager. This company buys, grades and exports kangaroo skins and other skins to two corporations in America, which conduct tanneries. The defendant described these corporations as his company's principals. It buys skins in all the States of the Commonwealth. The skins are bought in order to be graded by it and then exported to its foreign principals. It had the skins with which this case is concerned in its warehouse for these purposes. The skins were bought on account of the defendant's company at public auction in Queensland by a company carrying on business in that State. The company consigned the skins to the defendant's company and they were transported directly to its warehouse at Sydney.

The defendant does not dispute the allegation that the skins were knowingly in his possession, although strictly the facts may establish that they were in the possession of his company.

The defendant disputes the allegation that the skins are " protected fauna " within the meaning of sub-s. (1) of s. 19. The prosecutor relies upon the definitions in s. 4 of " bird ", " mammal " and " fauna " to make the words " protected fauna " apply to the skins.

The defendant contends that if the offence of knowingly having " protected fauna " in possession was committed by receiving the skins into the warehouse, sub-s. (1) of s. 19 restricts the freedom of inter-State trade and commerce and is contrary to s. 92 of the Constitution. The prosecutor, on the other hand, contends that the facts establish that the skins went into the warehouse in the course of the company's foreign trade and commerce with its American principals, and were never, in fact, the subject of trade, commerce and intercourse among the States.

It is clear from the terms of the definitions of " bird ", " mammal " and " fauna ", which are in s. 4, that in the Act the word " fauna " applies to the skin of any mammal which is " fauna " for the purposes of the Act, unless the context or subject matter otherwise requires. Subject to this condition, the word " fauna " may apply to the skin of a kangaroo or a wallaroo because either is a " mammal " according to the definition of this word in s. 4.

The defendant disputes that the words " protected fauna " can have any application to the skin of any fauna. This term " protected fauna " is defined in s. 4 to mean " any fauna not mentioned in the First Schedule to this Act ". Section 4 gives to such fauna the name " Scheduled fauna ".

The Act divides fauna into " protected fauna " and " Scheduled fauna ". All fauna in the former category are protected directly by the Act, it reserves a power to the Minister to declare an " open season " in respect of such fauna : as to fauna in the latter category, the Act declares such fauna to be unprotected while it reserves to the Minister the power to declare a " close season ".

The First Schedule contains a column of the names of birds and mammals that come into the category of " Scheduled fauna " and another column of localities. Sub-section (1) of s. 15 says : " The fauna specified in the first column of the First Schedule to this Act shall in respect of the locality set opposite thereto in the second column of such Schedule be unprotected fauna ". In most cases the locality which is mentioned in that way is the State of New South Wales and in the other cases the locality is a locality within the State. Sub-section (2) of s. 15 gives the Minister power to alter the Schedule. The sub-section provides that he may add the names of any fauna and says that he may do this " for any

H. C. OF A. 1951.

FERGUSSON v. STEVENSON.

McTiernan J.

particular locality " or " for the whole State ". It is also provided in the sub-section that the Minister may remove the names of any fauna from the Schedule and says that he may do this in respect of " any particular locality " or " the whole State ". The Minister may, under sub-s. (1) of s. 16 declare a " close season " for the protection of any " Scheduled fauna ". This sub-section says that the declaration may refer to " the whole State " or to " any specified locality ". Sub-section (2) of s. 16 makes it an offence to infringe upon the protection given by the declaration. It seems that any fauna protected in this way is not strictly " protected fauna " because it belongs to the other category " Scheduled fauna ".

There is no list of names of birds or mammals or of localities, as in the case of " unprotected fauna " to limit the application of the term " protected fauna ". The ascertainment of the state of any fauna, that is, whether protected or unprotected, is done by reference to the First Schedule. The bird or mammal must, of course, be within the statutory meaning of fauna. It cannot be protected fauna unless its name is omitted from the First Schedule, but if its name is mentioned and a particular locality within New South Wales is set opposite its name, then it is protected fauna as regards the rest of the State. The largest locality within which the Act declares any fauna to be unprotected is New South Wales. That is also the largest locality which sub-s. (2) of s. 15 empowers the Minister to substitute for a locality mentioned in the First Schedule and in respect of which sub-s. (1) of s. 15 empowers the Minister to make a declaration of a close season for the protection of any scheduled fauna. The localities mentioned in the First Schedule and described in sub-s. (2) of s. 15 and sub-s. (1) of s. 16 are the whole of New South Wales or particular localities within its territory. No bird or mammal, even if it answers to the statutory definition of " fauna " and is known by a name mentioned in the First Schedule is made by the Act " unprotected fauna " unless it is within the territory of New South Wales. It follows that a bird or mammal is not " protected fauna " if it is not within the territory of New South Wales, even if it answers to the statutory description of " fauna ", and it is immaterial that the name of the bird or mammal is not mentioned in the First Schedule or is mentioned in respect of a smaller locality than the State.

The Act by s. 17 provides that all " protected fauna " until taken or killed shall be deemed to be the property of the Crown. The taking or killing of " protected fauna " is regulated by s. 18. This

section gives the Minister power to declare an open season and makes it an offence to take or kill or do other things to the hurt of any " protected fauna " except during an open season declared with respect to it or to exceed the conditions imposed by the declaration.

Section 19 applies to acts that would be done subsequent to the taking or killing of " protected fauna ". In this section the legislature has taken measures against such acts as the buying or selling of " protected fauna " and knowingly having it in possession. The defendant is charged with the last of these offences. It is obvious that the feathers or skin of a bird or mammal could be the subject of the various acts to which sub-s. (1), s. 19, applies. The statutory definition of bird and of mammal has the effect of making the term " protected fauna " apply to the skin of any bird or mammal in this category. Section 4 intends that these definitions should have that effect on the construction of sub-s. (1) of s. 19 unless its context or subject matter otherwise requires. This condition, excluding the statutory definitions is not fulfilled in the case of sub-s. (1) of s. 19. The extension made by s. 4 of the meaning of " bird " and " mammal " gives a corresponding extension to the meaning of " protected fauna " in sub-s. (1) of s. 19. The result is that the sub-section applies to any act thereby made an offence which is done with the feathers or skin of any " protected fauna ". The declared purpose of the Act is to make provisions for the protection and preservation of fauna. The curbing of commercial dealings with their feathers and skins serves this purpose. The contention made for the defendant that the words " protected fauna " in sub-s. (1) of s. 19 apply to nothing but the fauna themselves should be rejected. The proviso to sub-s. (2), it may be added, shows that the legislature intended the words to include the skin of any " protected fauna ".

The other branch of the defendant's contention as to the meaning of the words " protected fauna " in sub-s. (1) of s. 19 was that even if they extend to the feathers and skins of " protected fauna " they do not apply to the skins with which this case is concerned. This contention is based on the fact that the skins were taken from the carcases of kangaroos and wallaroos which were the fauna of Queensland and had been killed in that State. The prosecutor meets this contention with the second paragraph of sub-s. (1) of s. 19. It says " The provisions of this sub-section shall apply whether such fauna was killed, taken, or bought in or received from any State or territory of the Commonwealth, or the Dominion

H. C. OF A. 1951.

FERGUSSON v. STEVENSON.

McTiernan J.

of New Zealand, or elsewhere ". The question whether this paragraph meets the contention depends upon the meaning of " such fauna ". These words refer back to " protected fauna." This paragraph does not purport to alter the construction of the words " protected fauna " in sub-s. (1). It does not say that any fauna which was killed, taken or bought in or received from the territories mentioned shall be deemed to be " protected fauna ". What the paragraph says in effect is that it shall be an offence to do any of the acts, forbidden by the sub-section, in respect to " protected fauna " although it was killed, taken, or bought in or received from any of the places which are mentioned.

The words " protected fauna ", upon their true construction, do not apply to any fauna except the fauna of New South Wales. The paragraph refers to acts done to " protected fauna " only. If " protected fauna " is a category of the fauna of New South Wales and includes no fauna beyond its boundaries, the supposition underlying the paragraph is that the acts to which it refers were done after the removal of a bird or mammal, which is " protected fauna ", beyond the boundaries of New South Wales, and such bird or mammal or its feathers or skin, as the case may be, afterwards becomes the subject of a dealing in New South Wales which is contrary to sub-s. (1) of s. 19.

The effect of the definitions in s. 4 of " mammal " and " fauna " is that the skin of a " mammal " comes under the description of " protected fauna " if the mammal belongs to that category. The skin of a " mammal " which is not " protected fauna " cannot fall under that description. A kangaroo or mammal is " protected fauna " in New South Wales but not beyond its borders. The skins to which the case relates were cut from the carcases of kangaroos and wallaroos, which, on account of the territorial limits to the application of the term " protected fauna " were not such fauna.

The result is that the second paragraph of sub-s. (1) of s. 19 fails to bring the present case within the sub-section. Whatever was the aim of the legislature in enacting the paragraph it has not extended the application of the sub-section beyond what is " protected fauna " according to the intention of the Act. For the reasons which have been given, the skins to which this case relates, in my opinion, are not " protected fauna ". On this ground I should dismiss the information. In the view which I take of the construction of sub-s. (1) of s. 19 and the meaning and application of the words " protected fauna ", it is unnecessary to enter upon the question whether this sub-section is contrary to s. 92 of the Commonwealth Constitution.

The information should be dismissed and the prosecutor should pay the costs in this Court and in the Court of Petty Sessions.

Information dismissed. Informant to pay the taxed costs of the defendant of the proceedings in this Court including the costs of the application for removal. Informant to pay the costs of the defendant of the proceedings in the Court of Petty Sessions before the making of the order for removal, which costs are fixed at seventy-five guineas.

Solicitor for the informant, *F. P. McRae*, Crown Solicitor for New South Wales.

Solicitors for the defendant, *J. Stuart Thom* & Co.

J. B.