[HIGH COURT OF AUSTRALIA.]

THE QUEEN

AGAINST

WILKINSON AND ANOTHER;

Ex parte BRAZELL, GARLICK AND COY.

H. C. of A. 1951-1952.

Sydney, 1951, *Dec.* 3, 4.

Melbourne, 1952, *March* 7.

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

Constitutional Law (Cth.)—Freedom of inter-State trade and commerce—Marketing of primary products—Potatoes—Marketing Board constituted under State Act—Compulsory delivery to board—Exception—"In the course of trade or commerce between the States"—Potatoes sold by producer in State of production to agent of, and consigned to, firm in another State—Resale in that State—Knowledge of producer—The Constitution (63 & 64 *Vict. c.* 12), *s.* 92—*Marketing of Primary Products Act* 1927-1940 (*N.S.W.*) (*No.* 34 *of* 1927—*No.* 42 *of* 1940), *ss.* 3, 3A, 5 (8), 11 (1), (3)*.

Section 11 (3) of the *Marketing of Primary Products Act* 1927-1940 (N.S.W.) provides that every producer who, except in the course of trade or commerce between the States, sells or disposes of or delivers any commodity, in respect of which a board has been appointed, to a person other than the board, and every person other than the board who, except as aforesaid, buys, accepts, or receives any such commodity from a producer shall be guilty of an offence.

B., a producer of potatoes in New South Wales, at Dorrigo, agreed to sell some bags of potatoes to GC., buying agent for J., general produce merchants whose head office was at Jennings, on the New South Wales side of the border between that State and Queensland, and who carry on the business of purchasing and reselling potatoes in both States. The terms of the sale were

* Section 11 (3) of the *Marketing of Primary Products Act* 1927-1940 (N.S.W.) provides that :—"Every producer who except in the course of trade or commerce between the States or save as exempted by or under this Act, sells, disposes of or delivers any of the commodity in respect of which a board has, before or after the commencement of the Marketing of Primary Products (Amendment) Act, 1934, been appointed, to a person other than the board, and every person other than the board who, except or save as aforesaid, buys, accepts or receives any of such commodity from a producer, shall be guilty of an offence and liable on summary conviction to a penalty not exceeding one hundred pounds. This subsection shall not apply to such of the commodity as has been duly tendered to the board under this Act and the acceptance of which has been refused by the board."

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that the potatoes should be delivered on trucks at Dorrigo consigned to Queensland. The potatoes were loaded at Dorrigo railway station into a truck and consigned by GC. to J. at Wallangarra which is on the Queensland side of the border adjoining Jennings. The potatoes arrived at Wallangarra and were sold by J. to a purchaser in Queensland. B. was convicted of disposing, and GC. of receiving potatoes contrary to s. 11 (3) of the *Marketing of Primary Products Act* 1927-1940.

Held that B. and GC. were wrongly convicted, because the facts showed that the disposal and receiving made the subject of the informations were in the course of trade and commerce between the States, within the meaning of the exception in s. 11 (3).

PROHIBITION.

Upon an information laid by Rudolph Wilkinson, an officer of the Potato Marketing Board for New South Wales, Arthur Henry Brazell, of Ebor, New South Wales, was charged for that on or about 10th June 1950, at Dorrigo (N.S.W.) he did contrary to the provisions of the *Marketing of Primary Products Act* 1927-1940 (N.S.W.), and not having been exempted by or under that Act, dispose of certain potatoes otherwise than in the course of trade or commerce between the States to a person other than the said Potato Marketing Board, being a board duly appointed in respect thereof, which potatoes had not previously been tendered to and refused by that board, and had not been exempted by or under the Act and were not the subject of trade or commerce between the States.

Further informations were preferred by Wilkinson against Ernest Richard Garlick and Francis Clements Coy for receiving the subject potatoes from Brazell. By consent the three informations were heard together.

It was averred in the informations: (a) that the said potatoes were at the time of the offence a commodity to which the provisions of the *Marketing of Primary Products Act* 1927-1940 applied; (b) that the said potatoes were at the time of the offence a commodity mentioned and included in a proclamation made under that Act and dated 22nd September 1948, whereby the said potatoes had become and were at the time of the offence vested in the Potato Marketing Board; and, in respect of Garlick and Coy, (c) that Brazell was at the time of the offence a producer of such commodity within the meaning of the Act. Under the provisions of s. 33 (3) of the Act those averments were prima-facie evidence of the facts so averred.

Wilkinson gave evidence that he was present at the Dorrigo railway yards on 10th June 1950, when forty-eight bags of potatoes, the

property of Brazell, were delivered by that defendant to Coy, who together with Garlick was carrying on business under the name of Garlick, Coy & Co.; that Brazell told him, Wilkinson, that he had sold such potatoes to Garlick, Coy & Co., and that he had been paid for them by cheque, whereupon Coy said "we pay by cheque drawn on No. 2 account which is a trust account with J. E. Long & Co".

In evidence Brazell said that at a meeting held before 2nd June 1950, at Ebor, amongst the farmers, he asked the chairman of the Potato Marketing Board "was it legal or was it illegal to sell potatoes to an inter-State buyer?" and that "the chairman told me as farmers we were quite in our rights to sell them to an inter-State buyer. He said it was against the Constitution for the Board to interfere with free inter-State trade".

Brazell also said in evidence that he intended the destination of his potatoes to be Queensland; that he sold them in all good faith that they were going inter-State; that he had a right to sell them to an inter-State buyer; that he was within his rights in selling to Garlick, Coy & Co. who told him that they represented J. E. Long & Co. of Queensland; that when he took the potatoes off his farm at Ebor he intended to sell them to Garlick, Coy & Co.; and that the potatoes were seed potatoes and the board—through which all his potatoes had hitherto gone—refused to take them.

The firm of Garlick, Coy & Co. was authorized by J. E. Long & Co. to purchase potatoes on behalf of the latter firm, a commission being paid on purchases made, and it was then to consign potatoes to such places as it was directed. When quantities were ascertained it was given instructions as to the places to which it was to consign the potatoes. With one exception the potatoes were consigned to Queensland destinations such as Bundaberg, Ayr, Rockhampton, South Brisbane, Cairns, Wallangarra and other places. The subject potatoes were consigned to Wallangarra and were subsequently sold to purchasers in Queensland. Wallangarra is situate on the Queensland side of the border between that State and the State of New South Wales.

The firm of J. E. Long & Co., which carries on the business of a general produce merchant and shipping agent, has its head office and business premises at Jennings which is situate on the New South Wales side of the border and adjoins Wallangarra. The firm's cheque account is with a bank at Tenterfield, New South Wales. The railway terminal is at Wallangarra, and it is at the terminal that produce carried and to be carried by rail is handled. The Queensland railway department controls the administration

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of all railway activities at Wallangarra. Produce taken from New South Wales and other places to Wallangarra is distributed to the firm's customers in southern parts of Queensland.

The magistrate said the evidence established that it was no part of the contract of sale between Brazell and the defendants Garlick and Coy that the subject potatoes were to go to any ascertained buyer in New South Wales or in any other State other than Garlick and Coy, who were, as Brazell believed, acting as agents for J. E. Long & Co. It appeared that Brazell was only concerned with the sale of his potatoes and that when he received his money he had lost further interest in the potatoes. The evidence did not establish that at the time Garlick and Coy received the potatoes from Brazell, there was any contract in existence for the sale of the subject potatoes to any person in Queensland or any other State of the Commonwealth, nor did it establish that definite orders were held by J. E. Long & Co. for the supply of potatoes to ascertained inter-State buyers and that the potatoes purchased by Garlick and Coy were to fill any such orders. It was established, said the magistrate, that the subject potatoes were in existence when they were bagged about a week prior to 10th June 1950, and that at that time Brazell had no intention of selling those potatoes to any particular inter-State buyer, that he did not then require them for the purpose of trade or commerce between the States and that at that time the potatoes without doubt had become vested in the Potato Marketing Board of New South Wales.

The magistrate found the offences established and convicted the defendants.

The defendants were granted by *McTiernan* J. orders nisi for writs of prohibition to restrain the informant and the magistrate from further proceeding on those convictions.

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

G. E. Barwick K.C. (with him *K. S. Jacobs*), for the prosecutors. The facts show that the "disposal" was disposal in the course of trade or commerce between the States. Even though s. 11 (3) of the *Marketing of Primary Products Act* 1927-1940 (N.S.W.) is not adequate to afford full scope to s. 92 of the Constitution, it is sufficient to say that all the facts in the matter indicate that the prosecutors did not breach s. 11 (3), assuming it to be valid. Until the board declined to take potatoes from the prosecutor Brazell he had not sold potatoes outside the board. He was informed by the chairman of the board that he could sell them to an inter-State

buyer. The magistrate accepted the position that the potatoes did go on into Queensland. The disposal was in the course of trade or commerce between the States within the meaning of s. 11 (3). Assuming that that sub-section can have an operation independently of the divesting provisions in s. 5 (8), sub-s. (3) can be read as a substantive provision and part of the scheme to drive the product into the control of the board by merely preventing its disposal otherwise. The magistrate adopted the view that unless he could find an inter-State contract he was not satisfied the exception was made out. That was not a correct view.

[DIXON J. referred to *W. & A. McArthur Ltd.* v. *Queensland* (1).]

The exception in s. 11 (3) is not " except in performance of an inter-State contract ", the precise exception is " except in the course of trade or commerce between the States ". That is not necessarily the trade or commerce of the producer. The potatoes were purchased in New South Wales to fulfil orders received by the purchaser from Queensland. The vendor disposed of those potatoes in the course of inter-State trade, or " in the course of trade or commerce between the States " of New South Wales and Queensland. As to what constitutes inter-State trade was dealt with in *Carter* v. *Potato Marketing Board* (2), *Cam & Sons Pty. Ltd.* v. *The Chief Secretary* (*N.S.W.*) (3), *Clements and Marshall Pty. Ltd.* v. *Field Peas Marketing Board* (*Tas.*) (4), and *James* v. *Cowan* (5). For this purpose each transaction must be looked at as a course of conduct. In sub-s. (3) of s. 11 the existence of a proclamation vesting the commodity in the board is not a condition as it is in sub-s. (1) of that section. From that perhaps can stem the positions: (A) that s. 11 (3) is directed only to a situation where there has not been any proclamation vesting, as a matter of construction between the sections, that is that s. 11 (3) is part of an exclusive scheme in the Act. There are two separate marketing schemes (*Carter* v. *Potato Marketing Board* (2)). They are mutually exclusive schemes, one under which property is divested from the producer, and the other in which he not having been divested, attempt is made by penalty to drive the commodity into the control of the board by denying him the right to sell it to anyone else; and (B) that s. 11 (3) is exclusively directed to the situation where there is not any proclamation divesting the grower. The elements relied on to get that matter of construction are (i) the absence from s. 11 (3) of the reference to a proclamation vesting

(1) (1920) 28 C.L.R. 530.
(2) (1951) 84 C.L.R. 460.
(3) (1951) 84 C.L.R. 442.
(4) (1947) 76 C.L.R. 401, at pp. 409, 429.
(5) (1932) A.C. 542, at p. 558.

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—there is a notice of vesting in s. 11 (1); (ii) the way the commodity is described in the two sub-sections; and (iii) the verbs used in sub-s. (3) which are verbs much more appropriate to the disposal of property that is under control than to disposal of the board's property. Where there is a board without a vesting, the scheme of s. 11 (3) is an attempt to drive all the intra-State commodity into the hands of the board by preventing the producer from selling his own goods otherwise than to the board, and the second paragraph simply affords a means by which, where the board will not take what he offers, the man is free of the section.

It is obvious that sub-s. (2) of s. 11 deals with a case different from sub-s. (1), and it is submitted that sub-s. (3) deals with yet a different case. Sub-section (3) is inapt to be used where the property has been vested in the board. If the schemes were not mutually exclusive, that is that sub-s. (3) does not apply to cases which are covered by sub-s. (1), there would be the anomalous position of a case covered by both sub-sections, so that under sub-s. (1) there would be an offence of not delivering to the board, and under sub-s. (3) there would be an offence of delivering to someone other than the board. Under s. 11 (1) whether the commodity falls within the offence is ascertained by looking at the proviso to s. 5 (8), but sub-s. (3) of s. 11 has its own proviso. If it be right, as assumed, that sub-s. (3) of s. 11 not merely evidences a second scheme but also complements s. 5 (8) and s. 11 (1), it doubtless would be said against the prosecutors that it is in some way nothing to the point for them to get themselves out of the language of s. 11 (3) and say that they disposed of the potatoes in the course of inter-State trade or commerce. They must get themselves out of s. 5 (8) as well. Section 5 (8) would be invalid because the proviso is not wide enough, or, alternatively, because of the presence of ss. 3 and 3A and the form of the exception in s. 11 (3), the proviso to s. 5 (8) should be read as wide enough to preclude the vesting of any of the commodity until the producer has made his choice as to where he would sell the produce.

J. D. Holmes K.C. (with him *D. B. Hunter*), for the respondent Wilkinson. This case ought not to be before this Court. The order nisi is now supported on behalf of the prosecutors only upon grounds which, owing to a construction of the *Marketing of Primary Products Acts* 1927-1940 (N.S.W.), raise purely State questions unrelated to s. 92 or any other provisions of the Constitution. The matter has gone outside jurisdiction. It cannot be maintained before this Court without, as it were, the support of something Federal, either from a Federal Act or the Constitution. The facts

as found by the magistrate establish clearly that this was not a sale in the course of trade or commerce. There was nothing that pointed either to a course of dealing or an actual contract, a term of which was that the potatoes would go inter-State. The magistrate found that the subject potatoes could subsequently go without any breach of contract or breach of faith, and be disposed of to anybody anywhere in New South Wales. The disponor, who, in this case, is the commencement of putting the goods into inter-State trade, must be disposing to another person, either at the other end of the inter-State trade, or, if himself not at the other end, the agent in it. That is the only way that any meaning can be given to the words " in the course of " in s. 11 (3). It is a disposition in the course of trade or commerce between the States. It is not a disposition which may be part of a larger transaction, the whole of which is inter-State trade or commerce. The exception suggests a sale, disposition or delivery in the course of trade or commerce between the States. The acquisition of the potatoes by Long & Co. was not in the course of such trade or commerce. The transaction was a straightout sale by the producer in New South Wales to a person in New South Wales and had no bearing upon inter-State trade or commerce. The prosecutor Brazell knew nothing about the inter-State character of the ultimate purchaser of the potatoes, and there was not any evidence, so far as the prosecutors Garlick and Coy were concerned that the transaction with Brazell was a part of inter-State trade. There was nothing in the evidence that would justify the view, at the time they were disposed of by the producer and bought by Garlick and Coy, that the potatoes were to go inter-State. Nor does the evidence show that Long & Co. carried on business at Wallangarra, Queensland. Merely taking potatoes up to the border, which is all that the evidence shows, does not make an inter-State transaction. The findings of the magistrate were open to him as a reasonable man on the evidence, therefore this Court, on statutory prohibition, even though it might come to a different conclusion, would not set aside those findings (*Peck* v. *Adelaide Steamship Co. Ltd.* (1)).

[DIXON J. referred to *Grosglik* v. *Grant* (*No.* 2) (2), and *Wishart* v. *Fraser* (3).]

The Court does not interfere with the finding of the court below unless it is clear there has been an error in law (*Ex parte Godfrey* (4)). The ultimate disposition of the potatoes in Queensland was not a

(1) (1914) 18 C.L.R. 167, at pp. 183 et seq.
(2) (1947) 74 C.L.R. 355, at p. 356.
(3) (1941) 64 C.L.R. 470, at p. 480.
(4) (1857) Wilk. Aust. Mag., 7th ed.

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disposition in any way related to the purchase from Brazell or the despatching by Garlick and Coy. Mere intention on the part of the purchaser was not relevant. The facts establish that the transaction did not come within s. 11 (3). That sub-section operates whether or not there has been a vesting proclamation. Even where there has been a vesting proclamation it would be necessary to have sub-s. (3), or some such provision, because the vesting proclamation, assuming its validity, would operate at the point of time when the potatoes came into existence, and did not fall within the exceptions in s. 5 (8); all of which depends either upon the existence of contracts or the existence of an intention in the mind of the producer. Assuming that those intentions or contracts existed, then the vesting would not affect the potatoes. The intention of the producer might change, or the contract might be cancelled, so that although he, at the appropriate time, intended them for inter-State trade, at a later time, because his deal, or the price, went off, he did not any longer intend them for inter-State trade. Then the vesting provision would not pick them up, because they were excluded at the relevant point of time. The potatoes thus being no longer required for inter-State trade, must be sent to the board. Sub-section (3) is required as a necessary part of the scheme even though there is a proclamation in existence. In the absence of a proclamation sub-s. (3) is the second way of putting the potatoes into the board. Sub-sections (1) and (3) of s. 11 were considered in *Wilkinson* v. *Woods* (1).

G. Wallace K.C. (with him *R. Else-Mitchell*), for the States of New South Wales and Queensland, intervening by leave. The scheme of the Act shows that s. 11 (3) serves a dual purpose, in that it covers the period between the appointment of a board and a vesting proclamation, and it prevents any dealings during that period. It also must cover the case of a person who has been excepted from having his goods vested under s. 5 (8), because of his either acquiring or including the goods to be used for inter-State trade, and prevents him afterwards disposing of or dealing with those goods contrary to the basis upon which his goods were excepted from vesting. So if a producer claims, and can satisfy an appropriate person or tribunal that he bona fide intends to use his goods for inter-State trade, he has only two courses open to him thereafter, he can either leave his potatoes in the ground and permit them to deteriorate, or he can actually use them for inter-State trade. Once he uses the potatoes for any purpose other

(1) (1950) 51 S.R. (N.S.W.) 98; 68 W.N. 105.

than inter-State trade s. 11 (3) prevents him from so acting. The true meaning and intention of s. 11 (3) is that he can tender them to the board if he changes his mind, or deliver them up to the board. The magistrate found as a fact that the producer had no intention of selling to, and no requirement of those potatoes for any particular inter-State buyer. Nothing that Garlick and Coy did was to the point, because s. 92 of the Constitution does not protect a person who deals with the property of another person. At the relevant time that property was the board's property. The magistrate's finding is supported by clear evidence, therefore this Court will not review it. The Act in no way conflicts with s. 92 of the Constitution and is valid. Section 11 (3) covers the facts of each separate case. The findings of the magistrate and the facts of the case show that offences have been committed against s. 11 (3).

P. D. Phillips K.C. and *J. K. Manning*, for the Commonwealth, intervening by leave.

R. Else-Mitchell, for the respondent magistrate to admit service.

G. E. Barwick K.C., in reply. The magistrate was exercising Federal jurisdiction, and his judgment was about s. 92 of the Constitution and its application to the matter then under consideration. That attracted the jurisdiction of this Court on appeal. Once acquired, the course the matter took was immaterial, the Court had jurisdiction, and the form of the procedure was only a means of giving a full appeal to this Court, so that one is not troubled in this Court by the limitations which trouble the Supreme Court when dealing with either statutory or common law prohibitions or any other manner by which appeals proceed from a magistrate to the High Court. Section 11 (3) does not require a disponor to be a party to an inter-State transaction. It is sufficient if the transaction of the producer is a transaction in the course of trade or commerce, not his own, but if it is in the course of the stream or flow of inter-State trade or commerce it is enough. To construe s. 11 (3) as suggested on behalf of the respondent Wilkinson would render it invalid, because to forbid the sale of goods to an inter-State dealer for the purpose of inter-State dealings would infringe s. 92. A State cannot prevent the inter-State trade being fed by transactions which, of necessity, would be intra-State transactions if they were isolated and put by themselves (*Bank of New South*

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Wales v. *The Commonwealth* (1)). To forbid such "feeding" would constitute an infringement of s. 92 (*Clements and Marshall Pty. Ltd.* v. *Field Peas Marketing Board (Tas.)* (2)). Sections 3 and 3A of the Act give the words "except in the course of trade or commerce" in the proviso to s. 11 (3) a significance to satisfy the full demands of s. 92. The Court takes from the reading-down provisions an express intention to observe in the statute all the requirements of s. 92 (*Carter* v. *Potato Marketing Board* (3); *Cam & Sons Pty. Ltd.* v. *The Chief Secretary (N.S.W.)* (4)). Sections 3 and 3A should be read in their wider significance so as to satisfy the constitutional demand. So read they will gather in the subject transaction. If the respondent's view of the course of inter-State trade or commerce is right then it would be difficult to support a case like *Huddart Parker Ltd.* v. *The Commonwealth* (5). The exception in s. 11 (3) is not "in the course of his trade or commerce". Section 92 would require that the State would be unable to forbid the contract that feeds the inter-State transaction, otherwise the section would be meaningless because all inter-State trade could be prevented by expressly forbidding the disposal of commodities to persons who are themselves in the course of inter-State trade with respect to those commodities. Then if it be regarded from the point of view of the Commonwealth's power in s. 51 (i.) of the Constitution it narrows down the power of the Commonwealth.

[DIXON J. It is one thing to say that under s. 51 (i.) a transaction which is incidental to inter-State trade is within power although it is not inter-State trade. It may be within power—it is not necessary to deny that it is—but consistently with that it may not be within the immunity given by s. 92.]

A law which operates directly to prevent a producer from selling his products to a dealer for the purpose of his sending goods into another State falls precisely within the doctrine laid down in the *Banking Case* (6). It is not necessary that the law should be a law on inter-State trade or about it; the question is: Does it operate directly to lay a burden on inter-State trade? If the Act involves the prosecutor Brazell in a penalty, it is in breach of s. 92. Inter-State trade is not limited to inter-State contracts. In *Vacuum Oil Co. Pty. Ltd.* v. *Queensland* (7) the man concerned was not an inter-State trader at all; but there was an inter-State trade, which the law about the transaction burdened.

(1) (1948) 76 C.L.R. 1; on appeal, (1949) 79 C.L.R. 497.
(2) (1947) 76 C.L.R., at pp. 409, 429.
(3) (1951) 84 C.L.R. 460.
(4) (1951) 84 C.L.R. 442.
(5) (1931) 44 C.L.R. 492.
(6) (1949) 79 C.L.R. 497.
(7) (1934) 51 C.L.R. 108.

[DIXON J. The Vacuum Oil Co. Pty. Ltd. happened to be the first seller].

The words " except in the course of trade or commerce between the States " in s. 11 (3) should be construed as covering every transaction which would need the protection of the section. Read naturally, unaffected by any constitutional difficulty, to say that the producer did not dispose of the potatoes in the course of trade or commerce between the States is to do violence to the natural meaning of the words used in sub-s. (3). If that be wrong, and if in its natural meaning the section means every producer, except in the course of his trade or commerce, or except in the performance of inter-State contracts, disposes or delivers, is in breach, then unaided by any such section as s. 3, or any general presumption in favour of validity, the section must come down *pro tanto* because it contravenes s. 92. The trade is proved by the course of dealing. The magistrate was in error in identifying trade or commerce with inter-State contracts. There was a course of commercial dealing that necessarily involved the movement of the potatoes into Queensland, and they did go there. That is trade. The producer was trading inter-State because he stipulated that the potatoes were to go out of New South Wales. The inquiry under s. 92 is whether the law, by direct operation, lays a burden on inter-State trade.

[DIXON J. referred to *Currin* v. *Wallace* (1).]

The way in which probability of carriage to another State was sought to be proved in that case was different from the present case. This is a complete appeal. The facts are not disputed, and the only question is: what is the legal significance in the relevant sense? A law which lays such a burden on inter-State trade offends s. 92, and therefore its operation is invalid. There was nothing to warrant the conviction of the appellants. The practical way of reading s. 11 (3) is to read it as inappropriate to any case where the potatoes had not vested. The other extreme is that it applies only to vested potatoes and is entirely dependent upon s. 5 (8), and the central view is that in some way it could partake of both functions. If this prosecution depends, in the long run, upon the validity of s. 5 (8), then it is submitted that that section is invalid, because, in its proviso, it does not reflect the full protection which s. 92 would require. The proviso is similar to the proviso that was under consideration in *Matthews* v. *Chicory Marketing Board (Vict.)* (2) and is quite inadequate.

Cur. adv. vult.

(1) (1939) 306 U.S. 1, at pp. 9, 10 [83 Law Ed. 441].

(2) (1938) 60 C.L.R. 263.

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The following written judgments were delivered :—

DIXON, MCTIERNAN, FULLAGAR AND KITTO JJ. These are appeals from convictions by a Court of Petty Sessions exercising Federal jurisdiction. Federal jurisdiction was exercised because the defendants, among other defences, set up s. 92 of the Constitution as an answer to the prosecutions. There are three defendants, who are the appellants, and three informations. The informations were for offences under s. 11 (3) of the *Marketing of Primary Products Act* 1927-1940. The material part of that sub-section provides that every producer (an expression which by force of various definitions covers a grower of potatoes declared to be a commodity) who, except in the course of trade or commerce between the States sells or disposes of or delivers any commodity, in respect of which a board has been appointed, to a person other than the board, and every person other than the board who, except as aforesaid, buys accepts or receives any such commodity from a producer shall be guilty of an offence.

Potatoes have been declared a commodity and a board has been appointed with respect to them. The defendant Brazell grows potatoes near Dorrigo in New South Wales. The defendants Coy and Garlick are partners who carry on business at Dorrigo as produce agents. The offence of which Brazell was convicted was disposing of certain potatoes contrary to the sub-section. The offence of which Coy and Garlick were each convicted was receiving the same potatoes from Brazell, a producer, contrary to the sub-section. The offences were laid as taking place at Dorrigo on 10th June 1950.

All three defendants raise as one of their defences the exception in favour of inter-State trade and say that the disposal and receipt of the potatoes was in fact in the course of trade or commerce between the States. This defence arises primarily, of course, on the words of the State Act but, even if it is regarded as exclusively a matter of State law, it is a ground upon which the defendants may succeed in this appeal, notwithstanding that the appeal comes to this Court because of the Federal element which the defendants introduced into the case when in the Court of Petty Sessions they set up s. 92 of the Constitution.

The facts upon which the defence turns are simple. Coy and Garlick buy potatoes as agents for a firm called J. E. Long & Co., by whom Coy and Garlick are kept in funds. J. E. Long & Co. are produce merchants carrying on business on the border of New South Wales and Queensland. Their head office is at Jennings, which is the name of the New South Wales town adjoining Wallan-

garra situated on the Queensland side of the border. The towns are divided only by the political and municipal boundary. The railway terminal is in Wallangarra and it is at the terminal that produce carried or to be carried by rail is handled. Potatoes arriving from New South Wales are forwarded by rail to various Queensland centres, although of course it would be open to J. E. Long & Co. to send them to some place in New South Wales, and no doubt potatoes arriving from places of production in Queensland are forwarded to New South Wales centres. What is done, however, is probably very much influenced by a desire to obtain the protection of s. 92. According to the view we take of the facts material to the charges against the defendants what occurred is this.

Brazell had always delivered his potatoes to the board but he held a quantity of seed potatoes which the board would not take. He was aware that he might lawfully dispose of them in inter-State trade and he knew that Coy and Garlick's firm bought potatoes for Queensland. At some time in May 1950 Brazell verbally agreed with Garlick and Coy to sell about 48 bags of seed potatoes and to deliver the potatoes on trucks at Dorrigo. It was a term of the agreement that the potatoes should be consigned to a Queensland place of destination. In agreeing to buy the potatoes Coy and Garlick were acting for J. E. Long & Co. and this was disclosed to Brazell. Coy and Garlick obtained a railway truck or trucks and on 10th June 1950, Brazell brought the bags of potatoes on a lorry to the railway and under the superintendence or with the assistance of Coy proceeded to transfer them from the lorry to a railway truck. The consignment note was made out by Coy in the name of J. E. Long & Co. as consignors for conveyance of the potatoes to Wallangarra from Dorrigo consigned to J. E. Long & Co. as consignees. On the same day Coy paid Brazell by a cheque drawn upon the account put in funds by Long & Co. The potatoes arrived at Wallangarra where Long & Co. reconsigned them to railway stations in Queensland. While the potatoes were in process of loading at Dorrigo from the lorry to the railway truck an inspector of the board saw them and questioned Coy and Brazell, who maintained that what they were doing was lawful because the potatoes were going to Queensland.

The "disposal" of the potatoes charged against Brazell consisted in the sale and delivery of the potatoes. The "receiving" of the potatoes charged against Coy and Garlick consisted in taking delivery of the potatoes at Dorrigo when they were placed in the truck.

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Dixon J. McTiernan J. Fullagar J. Kitto J.

We think that the oral agreement for the sale of the potatoes made in May was an executory agreement to sell and that property in the potatoes did not pass until delivery. There was therefore no disposal of the potatoes within sub-s. (3) of s. 11 until they were removed from the lorry for transfer to the railway truck. Nor was there any " receiving " of the potatoes by Coy and Garlick until they were so removed.

In our opinion on the foregoing facts the disposal and the receiving made the subject of the informations were in the course of trade and commerce between the States, within the meaning of the exception in s. 11 (3). Under the agreement for the sale and purchase of the potatoes the agents buying were required to consign the potatoes to a railway station in Queensland, and they did so consign them. For the purpose of the exception the delivery of the potatoes from the lorry into the railway truck can bear only the aspect of an essential and integral, even if initial, step in the transportation of the potatoes to Queensland. Yet it is the very thing which forms the foundation of the charges of disposal and receiving.

For these reasons we think that the defendants made out an answer under the exception to the three informations for offences against s. 11 (3). It is unnecessary to consider the other points made in support of the appeals.

The appeals should be allowed with costs and the convictions set aside. The informations should be dismissed with costs in the Court of Petty Sessions, fixed at £10 10s. 0d. in each case.

WILLIAMS J. These are appeals by three persons each of whom was convicted of an offence under s. 11 (3) of the *Marketing of Primary Products Act* 1927-1940 (N.S.W.). This sub-section provides that " Every producer who except in the course of trade or commerce between the States or save as exempted by or under this Act, sells, disposes of or delivers any of the commodity in respect of which a board has, before or after the commencement of the *Marketing of Primary Products (Amendment) Act*, 1934, been appointed, to a person other than the board, and every person other than the board who, except or save as aforesaid, buys, accepts or receives any of such commodity from a producer, shall be guilty of an offence and liable on summary conviction to a penalty not exceeding one hundred pounds ". The first appellant, Brazell, is a producer of potatoes and he was convicted of disposing of a commodity, that is potatoes, in respect of which a board had been appointed to a person other than the board, which had not previously been tendered to and refused by the board, and had not been

exempted by or under the Act and were not the subject of trade or commerce between the States. The other two appellants, Garlick and Coy, were convicted of receiving this commodity from Brazell. The prosecutions were launched in respect of a transaction which occurred on 10th June 1950. It was proved that on that date potatoes were a commodity in respect of which a board had been appointed, namely the Potato Marketing Board. It was also proved that proclamations had been made under s. 5 (8) of the Act vesting in that board all potatoes other than those excepted by the proviso to that sub-section. The text of the proviso is as follows " Provided always (and without detracting from the generality of sections three and 3A of this Act) that such proclamation under this sub-section shall not affect any portion of such commodity as is the subject of trade or commerce between the States or as is required by the producers thereof for the purposes of trade or commerce between the States or intended by the producers thereof to be used for such trade or commerce ".

On 10th June 1950, Brazell sold 48 bags of potatoes to the firm of Garlick, Coy and Co., a Dorrigo firm, in which the partners were Garlick and Coy, which was acting as buying agent for the firm of J. E. Long & Co., general produce merchants and shipping agents. The head office of J. E. Long & Co. was at Jennings, which is on the New South Wales side of the border between New South Wales and Queensland. That firm carries on business, including the business of purchasing and reselling potatoes, both in New South Wales and Queensland. About a week before selling the potatoes Brazell, who understood that he was entitled to sell potatoes for inter-State trade, had asked Garlick, Coy and Co. whether the potatoes would be resold in Queensland and had been told that the potatoes would be resold there. Brazell took the potatoes to the Dorrigo railway station and unloaded them into a truck which was consigned by Garlick, Coy and Co. on behalf of J. E. Long & Co. from Dorrigo to J. E. Long & Co. at Wallangarra, which is on the Queensland side of the border. The truck went to Wallangarra and the potatoes were sold by J. E. Long & Co. to a purchaser at Stanthorpe in Queensland. Before purchasing the potatoes Mr. Coy had been told by his principals that the potatoes were being purchased for resale in Queensland.

The magistrate said that the potatoes were dug and were therefore in existence about a week prior to 10th June 1950, and that Brazell then had no intention of selling them to any particular inter-State buyer, that he did not then require them for the purpose of trade and commerce between the States and that at that time the

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potatoes without doubt had become vested in the board. This may be right. A proclamation vesting potatoes in the board was in force when the potatoes were dug, which is presumably when they became a commodity within the meaning of the Act. The proviso to s. 5 (8) would appear only to operate where at that moment of time the potatoes were the subject of trade or commerce between the States or were required by the producer thereof for the purposes of trade or commerce between the States or intended by the producers thereof to be used for such trade or commerce. The proviso is in a similar form to the proviso discussed in *Matthews* v. *Chicory Marketing Board (Vict.)* (1). It was there held that the proviso was sufficient to prevent the proclamation infringing s. 92 of the Constitution.

But it is irrelevant to these appeals to decide the validity of s. 5 (8) of the Act. The operation of s. 11 (3) does not depend upon the commodity having become vested in a board. The sub-section operates in relation to any commodity in respect of which a board has been appointed. A proclamation under s. 5 (8) may or may not be made. If it is not, the commodity must nevertheless be tendered to the board and s. 11 (2) (c) provides that subject to the Act the board may accept delivery of any of the commodity so tendered and the commodity so delivered to and accepted by the board shall be deemed to be absolutely vested in and to be the property of the board. It was contended that the appellants were entitled to succeed because s. 11 (3) only applies where there has been no proclamation vesting the commodity in the board and here there were proclamations. But the language of the sub-section is quite general, it is wide enough to cover the cases of proclamations and no proclamations, it is the sub-section which creates the offence, and, in my opinion, it applies to both cases. It has a residual operation where there is a proclamation. Commodities do not vest in the board under a proclamation which are required by the producers thereof for the purposes of trade or commerce between the States or required or intended by the producers thereof to be used for such trade or commerce. The producer might in the first instance require the commodity or intend to use it for this purpose but later change his mind. To avoid a breach of s. 11 (3) the producer would then have to tender the commodity to the board. If the board accepted it, the commodity would become vested in the board under s. 11 (2) (c). Something was said during the argument about the necessity of expanding the exception in s. 11 (3) so as to make its width correspond with the proviso in s. 5 (8). But there would

(1) (1938) 60 C.L.R. 263.

appear to be no warrant for this and so to do would probably defeat the intention of the legislature.

The first question that arises is whether the potatoes were not disposed of by Brazell and received by Garlick, Coy and Co. on behalf of J. E. Long & Co. in the course of trade or commerce between the States. If they were so disposed of and received, they came within the exception in s. 11 (3) and the appellants were wrongly convicted. The magistrate held that the transaction did not come within this exception. He said that the evidence did not establish that, at the time Garlick, Coy and Co. received the potatoes from Brazell, there was any contract in existence for the sale of those potatoes to any person in Queensland or any other State of the Commonwealth nor did it establish that definite orders were held by J. E. Long & Co. for the supply of potatoes to ascertained inter-State buyers and that the potatoes purchased by Garlick, Coy and Co. were purchased to fulfil any such orders. This was right but the exception is not as narrow as that. It was obviously inserted in the sub-section so as to exclude all inter-State trade and commerce, the freedom of which is guaranteed by s. 92 of the Constitution. It appears to me in the ordinary use of language to cover every sale, disposition and delivery which occurs in the course of a transaction which in fact proves to be an inter-State transaction. It may be, as the magistrate said, that, although the subject potatoes were consigned to Wallangarra, there was nothing to prevent them being redirected to any other destination. Presumably they could have been stopped en route and unloaded at some intermediate station in New South Wales between Dorrigo and Wallangarra and then resold and delivered to some purchaser in New South Wales. But this did not happen.

The sale by Brazell to J. E. Long & Co. was an intra-State sale but the potatoes went to Queensland and were resold there and delivered to a purchaser in Queensland. It was submitted to the magistrate that the transaction must be looked at as a whole and not split up into separate contracts of sale and resale. The magistrate rejected this submission. In doing so he fell into error. He should have regarded the transaction as a whole. On this basis the facts proved that the acts done by the appellants were done in the course of trade and commerce between the States. The facts brought the case within the reasoning of *Dixon* J. and myself in *Clements and Marshall Pty. Ltd.* v. *Field Peas Marketing Board (Tas.)* (1). In that case there were two sets of contracts, the first being contracts of sale by the producers to the dealers and the second

(1) (1947) 76 C.L.R. 401, at pp. 409, 420.

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contracts of resale by the dealers to buyers in other States. *Dixon* J. after pointing out that it was only the second set of contracts which in themselves were inter-State transactions, said "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" (1). I said "In my opinion a dealer in a State has a similar right under s. 92 to buy goods in that State for sale in another State to the right of the grower or manufacturer of goods in one State to sell them in another State . . . The fact that there are two sets of contracts, the one for sale and delivery in Tasmania by the growers to the plaintiff, and the other for the sale of the commodity by the plaintiff to purchasers in other States, is immaterial. In *James* v. *Cowan* (2), the dried fruits which the defendant was attempting to prevent the plaintiff selling in other States included fruit which he had grown himself or bought from others. In *James' Case* (3), Lord *Wright* said that 'in every case it must be a question of fact whether there is an interference with this freedom of passage' of goods from State to State. In my opinion each transaction must for this purpose be looked at as a whole" (4).

It was contended by Mr. *Holmes* that the exception in s. 11 (3) meant "in the course of the producer's trade or commerce between the States", so that the disposition by Brazell was outside the exception. But there are no words in the exception to limit it in this way.

A preliminary objection was taken by Mr. *Holmes* to the jurisdiction of this Court to entertain the appeals. It was contended that the appellants had been prosecuted and convicted under a State Act and that the only questions arising on the appeals related to the construction of that Act. The appeals were brought to this Court by way of orders nisi for statutory prohibition made under the *Justices Act* 1902-1947 (N.S.W.). But the appeals are full appeals on law and fact of the same nature as other appeals to the Court in its appellate jurisdiction: per *Dixon* J. in *Wishart* v. *Fraser* (5). Before the magistrate the question was raised whether the *Marketing of Primary Products Act* infringed s. 92 of the Constitution. This was a matter arising under the Constitution and involving its interpretation. It was a matter in which original jurisdiction has been conferred on this Court by s. 30 of the *Judiciary*

(1) (1947) 76 C.L.R., at p. 429.
(2) (1932) A.C. 542; 47 C.L.R. 386.
(3) (1936) A.C., at p. 631; 55 C.L.R., at p. 59.
(4) (1947) 76 C.L.R., at pp. 409, 410.
(5) 1941) 64 C.L.R. 470, at p. 480.

Act 1903-1950 pursuant to s. 76 of the Constitution. The magistrate decided that s. 92 was not infringed. In deciding this question he was exercising Federal jurisdiction within the meaning of s. 39 (2) of the *Judiciary Act*. Accordingly the appeals were properly brought to this Court, *Judiciary Act*, s. 39 (2) (*b*).

The appeals should be allowed and the convictions set aside. The orders nisi should be made absolute with costs to be paid by the informant Wilkinson.

WEBB J. Because of ss. 3 and 3A of the *Marketing of Primary Products Act* 1927-1940 (N.S.W.) I think that Act is wholly valid, and that the only question is as to the extent of its valid operation. By supplying definitions of words the legislature can alter their natural meaning, and on the same principle it can alter the natural meaning of combinations of words by providing that no matter what may be the natural meaning of, say, a section, the operation of the section shall be limited so as to be constitutional. In this way conflicts with s. 92 of the Commonwealth Constitution, and incidentally problems of construction, can be and are avoided, e.g., it is unnecessary to decide in this case whether the exceptions in s. 5 (8) are co-extensive with the requirements of s. 92 as they were thought to be by *Starke* J. in *Matthews* v. *Chicory Marketing Board* (*Vict.*) (1).

Once a commodity vests under this Act I think it remains vested for all purposes: there is no divesting. If then these potatoes vested under s. 5 (8) the convictions must be sustained. However, I think they did not vest. To hold that they did would be to affirm a legislative power to interfere with a grower selling his potatoes at his will in an inter-State or intra-State transaction. Such a power, whether exercised by way of compulsory acquisition, or by measures short of compulsory acquisition, infringes s. 92 (*The Commonwealth* v. *Bank of New South Wales* (2)). The grower, if he trades in potatoes, must be left at liberty to choose; but he is deprived of that liberty if his potatoes are taken from him, or out of his control, before he can decide how to dispose of them in the course of his business and according to its exigencies. The result may be that potatoes can be compulsorily acquired with certainty only while they are in the course of passing from one owner to another in an intra-State transaction, because the buyer when he becomes the owner may also have the protection of s. 92. There is nothing remarkable in this, as this New South Wales statute is, after all, nothing more than a trade and commerce measure

(1) (1938) 60 C.L.R. 263, at p. 283. (2) (1949) 79 C.L.R. 497, at pp. 635, 636.

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directed at marketing to the advantage of the citizens of New South Wales. It stands at no higher level. If any State or the Commonwealth ever finds it impossible to acquire by voluntary purchase the commodities it needs for the purposes of government a situation of emergency will, I suggest, arise to be relieved by compulsory acquisition, as in the case of famine, disease and the like, that is if *James* v. *Cowan* (1) per Lord *Atkin* continues to be regarded as wholly sound reasoning. At all events it can safely be said that s. 92 is not directed at making government impossible.

I think then that s. 92 prevented the vesting of these potatoes, so that s. 5 (8) had no operation on them because of ss. 3 and 3A.

But I also think that s. 11 (3) had no application to these potatoes. The appellant Brazell, the grower, appears to have made only one decision about their disposal, and that was to put them in the inter-State trade. Before selling them he inquired of the buying agents, the other two appellants, whether they would be sold in another State, and he was informed that they would be. The buying agents had already been told by their principals that potatoes purchased by them would be sold in Queensland. Then Brazell put the potatoes into a railway truck which was consigned with its contents to Queensland. The potatoes went to Queensland and were sold by the principals in that State. It may be that there was no binding stipulation that the potatoes would be sold in another State, and that they could have been resold in New South Wales without breach of agreement. But a legal nexus with inter-State trade, by a contract with the grower, is not required to secure the immunity given by s. 92 (*Field Peas Marketing Board (Tas.)* v. *Clements and Marshall Pty. Ltd.* (2)). I think then that the only reasonable conclusion from the evidence is that the potatoes were intended by Brazell to be put into the inter-State trade and that his intention was carried out, thus making s. 92 applicable.

I agree that the appeals are properly before this Court.

I would make the orders absolute in each case.

Order allowed in each appeal as follows: Appeal allowed with costs. Order absolute. Conviction set aside. In lieu thereof information dismissed with ten guineas costs.

Solicitors for the appellants, *Stuart & Cook*, Tenterfield, by *Teece, Hodgson & Ward*.

(1) (1932) A.C. 542, at p. 558.

(2) (1948) 76 C.L.R. 414.

Solicitors for the respondents, *Carruthers, Hunter & Co.*

Solicitor for the Commonwealth, intervening, *D. D. Bell*, Crown Solicitor for the Commonwealth.

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

Solicitor for Queensland, intervening, *H. T. O'Driscoll*, Crown Solicitor for Queensland.

J. B.