[HIGH COURT OF AUSTRALIA.]

GRANNALL . . . . . INFORMANT;

AND

C. GEO. KELLAWAY AND SONS PROPRIETARY LIMITED . . . . . DEFENDANT.

H. C. OF A. 1954-1955.

1954, SYDNEY, *March* 29, 30;

1955, SYDNEY, *March* 3.

Dixon C.J., Webb, Fullagar, Kitto and Taylor JJ.

Constitutional Law—Freedom of inter-State trade and commerce—Farm produce—Apples—Sale or disposal—Farm produce agent—Payment—Commission—Quantum—Statutory restriction—Inter-State commerce—Quaere, impairment of freedom—The Constitution (63 & 64 *Vict. c.* 12), *s.* 92—*Judiciary Act* 1903-1950, *ss.* 18, 40—*Farm Produce Agents Act* 1926-1952 (*N.S.W.*), *ss.* 2 (2), 23. *Agreement made in New South Wales—Payment thereunder—Document silent as to place—"Within New South Wales"—Statutory requirement—Interpretation Act of* 1897 (*N.S.W.*), *s.* 17.

Section 23 (1) of the *Farm Produce Agents Act* 1926-1952 (N.S.W.) provides that no produce agent shall charge, sue for or recover any commission or other remuneration—(a) for or in respect of the sale or disposal of farm produce except commission not exceeding the prescribed commission. As from 2nd January 1953, reg. 10 (1) (a) under the Act prescribed a commission of seven and one-half per cent of the price realized where the farm produce was fruit, as distinguished from vegetables and the like. Regulation 10 (2) prescribed certain services, acts or things for the purposes of s. 23 (1) (b) as those in respect of which fees, charges, commissions, rewards or other charges may be charged, sued for or recovered, a maximum being fixed, and including, *inter alia*, "stamps and stationery, 6d. per consignment" and "unloading, storing and handling fruit forwarded from other States, 1d. per case".

K., a company which carried on business in Sydney, as a farm produce agent as defined, was charged upon an information with having on 4th August 1953 contravened s. 23 of the Act and reg. 10 in that it charged commission for or in respect of 144 cases of apples consigned by D., a grower in Tasmania, in excess of the commission prescribed, the charge so made by K. being ten per cent. On 4th August 1953 K., pursuant to an admitted contract of agency, received the apples from D. Documents showed that K. sold the apples for £159 3s. 0d. and, *inter alia*, charged commission in the sum of £15 18s. 3d. By letter dated 17th July 1953, K. notified D. that, as shown in a circular, it had

been found necessary to increase the rate of commission to ten per cent on all consignments received on or after 31st July 1953. It did not appear whether there was any ground for supposing that the sale was inseparably connected with the inter-State transportation of the fruit so as to form part of the inter-State transaction.

Held that although the exact facts did not fully appear, there was not any ground for a conclusion that the restriction imposed by s. 23 (1) (a) of the Act and reg. 10 (1) (a) applied to an operation of the farm produce agent falling under the protection of s. 92 of the Constitution, or for a conclusion that the restriction was one that necessarily impaired the freedom, whether of D. or K., to carry on inter-State commerce.

Roughley v. *New South Wales*; *Ex parte Beavis* (1928) 42 C.L.R. 162, discussed.

The charge by K. was made to D. by means of account sales probably reflected in an accompanying cheque, and those documents were not operative without communication.

Held that as the communication was not made until delivery by the post of the missive in Tasmania, the essential element of the offence occurred outside New South Wales, and not within that State as required by s. 17 of the *Interpretation Act of* 1897 (N.S.W.), therefore the information should be dismissed.

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

Upon an information taken out under s. 23 of the *Farm Produce Agents Act* 1926-1952 (N.S.W.) by Brian Francis Grannall, Department of Agriculture, Sydney, New South Wales, C. Geo. Kellaway & Sons Pty. Ltd., a company duly registered under the *Companies Act* 1936 (N.S.W.), having its registered office at 22 Quay Street, Sydney, and being a farm produce agent within the meaning of the *Farm Produce Agents Act* 1926-1952, was charged at the Central Court of Petty Sessions, Sydney, that on or about 4th August 1953 it did contravene the provisions of that Act in that it did charge commission for or in respect of the sale or disposal of farm produce, to wit one hundred and forty-four cases of apples from one B. G. Direen, in excess of the commission prescribed, namely £15 18s. 3d. on gross proceeds of £159 3s. 0d., contrary to the Act.

The defendant company pleaded not guilty.

After evidence had been tendered on behalf of the informant the parties mutually made certain admissions as follow :—

1. That the defendant is a registered farm produce agent under the *Farm Produce Agents Act* 1926-1952, and carries on business at 22 Quay Street, Sydney.

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2. On 4th August 1953 the defendant received from Tasmania from B. G. Direen, a Tasmanian grower, one hundred and forty-four cases of apples.

3. The gross proceeds of the sale of such apples amounted to £159 3s. 0d. and the amount of commission charged thereon was £15 18s. 3d. and this amount was for commission only and did not include any amount for freight, handling, storage and stamps and stationery.

4. That a cheque for the sum of £85 6s. 3d. was forwarded to Mr. B. G. Direen in respect of the sale of the said apples; this amount being the net proceeds after handling, freight, charges for stamps and stationery and commission were deducted by the defendant.

5. That the one hundred and forty-four cases of apples were consigned to the defendant by B. G. Direen, a Tasmanian grower, pursuant to a contract of agency made by the acceptance by B. G. Direen in Tasmania of an offer despatched to him by post from Sydney to Tasmania by the defendant. By the terms of the contract the defendant was appointed the agent of B. G. Direen to receive, *inter alia*, apples consigned to it by him from Tasmania to Sydney, and to sell such apples on his behalf upon terms, *inter alia*, that the defendant should be paid a commission for such work as agent equal to ten per cent of the gross proceeds of sale of such apples.

6. In the course of its business, the defendant receives farm produce for sale and disposal as agent from growers and producers in New South Wales and other States of the Commonwealth, and the defendant conducts a substantial business of acting as agent for the receipt and disposal in Sydney of fruit and vegetables of inter-State origin consigned to it under contracts of agency made in the same manner as the contract with B. G. Direen and containing similar provisions.

In a letter dated 17th July 1953, the defendant company informed Mr. B. G. Direen of Lymington South, Tasmania, that "due to the greatly increased costs in the handling of farm produce and to an increase in rent of 83%, we have found it necessary, in common with other Agents, to increase the rate of commission to 10%, which is the rate that has been charged by all Agents in other States for many years past . . . All other charges will remain unaltered."

A letter dated 1st June 1953, similar in effect, was forwarded by the New South Wales Chamber of Fruit and Vegetables Industries

to " all fruit and vegetable growers in States other than New South Wales."

After the taking of evidence had concluded the matter was, on the application of the Attorney-General for New South Wales, removed under s. 40 of the *Judiciary Act* 1903-1950, into the High Court, the order for removal referring it to the Full Court pursuant to s. 18 of such Act.

Section 2 (2) of the *Farm Produce Agents Act* 1926-1952 provides that that Act " 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 enactment thereof would but for this section have been construed as being in excess of that power it shall nevertheless be a valid enactment to the extent to which it is not in excess of that power."

Further relevant statutory provisions are sufficiently set forth in the judgment hereunder.

H. A. R. Snelling Q.C. (Solicitor-General for New South Wales) (with him *R. Else-Mitchell*), for the informant. The question before the Court is the question as to the constitutional validity of s. 23 of the *Farm Produce Agents Act* 1926-1952 (N.S.W.). The defendant in this case asks this Court to reconsider its decision in *Roughley* v. *New South Wales*; *Ex parte Beavis* (1). The Supreme Court of New South Wales in *Ex parte Mason*; *Re Hager* (2) considered that decision. *Roughley's Case* (1) was based upon principles that are still well recognized, and on American authority which is still regarded as authoritative in America and which has been confirmed by recent American decisions. The decision in *Roughley's Case* (1) should be followed. This particular business is not an integral part of inter-State commerce; the provisions of the Act only, at most, indirectly affect inter-State commerce, and implicit reliance is made on the doctrine of the regulatory provisions (*Roughley's Case* (1)).

[DIXON C.J. referred to *Roughley's Case* (3) and *Panhandle Eastern Pipe Line Co.* v. *Michigan Public Service Commission* (4).]

The fact that a contract was made in another State does not mean that the business carried on here of disposing of farm produce is itself part of inter-State commerce. The work done under the contract and the whole basis of the contract is work to be done in Sydney in respect of selling to persons in Sydney this produce. The remission by the agent to the principal of money received is

(1) (1928) 42 C.L.R. 162.
(2) (1951) 51 S.R. (N.S.W.) 363; 68 W.N. 218.
(3) (1928) 42 C.L.R., at p. 208.
(4) (1951) 341 U.S. 329, at p. 339 [95 Law. Ed. 993, at p. 1002].

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an accidental or incidental feature. There are neither tangibles nor intangibles which are the subject of the farm produce agent's business as such except, finally, the accounts for the proceeds. When one looks at the totality of this agent's service and the characteristics of his work in payment, etc., then that is not an essential part, but merely a facility for the conduct of inter-State commerce, and this restriction of charge only indirectly affects inter-State commerce and, in any event, it falls well within the narrow recognized concepts of regulation. The American cases which were regarded as of importance in *Roughley's Case* (1) have been confirmed by more recent American cases, and, although not entirely exact in the absence of an express provision like s. 92 of the Constitution, produce a very analogous result. The confirming cases are *Hartford Accident & Indemnity Co.* v. *Illinois* (2) and *California* v. *Thompson* (3). Regulation is legislation where, for the good of the community, it regulates relations between various sections of the community. In so far as the impact of the law falls upon the business of a commission agent it does not restrict any essential feature of inter-State commerce. It is the conduct of the agent that is regulated. It is not in any way selecting or discriminating as regards inter-State commerce ; it is a general charge considered by the legislature as the maximum charge that might be made, in the interests not only of the producers but also of consumers.

[FULLAGAR J. referred to *W. & A. McArthur Ltd.* v. *Queensland* (4) and *Wragg* v. *New South Wales* (5).]

The Act now under consideration does not affect inter-State trade as such. The present case is not completely analagous with *Hospital Provident Fund Pty. Ltd.* v. *Victoria* (6) but there are many observations in that case on which the informant relies.

[DIXON C.J. referred to *Roughley's Case* (7).]

J. K. Manning Q.C. (with Sir *Garfield Barwick* Q.C., and with them *J. A. Melville*), for the defendant. The decision in *Roughley's Case* (1) upon which the informant relies is one which, in the light of subsequent decisions that have been given both in this Court and the Privy Council, now decides nothing. There are a number of assumptions throughout the various judgments in *Roughley's Case* (1) which today cannot be supported as being valid. Not only

(1) (1928) 42 C.L.R. 162.
(2) (1936) 298 U.S. 155, at pp. 157 et seq. [80 Law. Ed., at p. 1099].
(3) (1941) 313 U.S. 109, at pp. 111-113 [85 Law. Ed. 1219].
(4) (1920) 28 C.L.R. 530.
(5) (1953) 88 C.L.R. 353.
(6) (1953) 87 C.L.R. 1.
(7) (1928) 42 C.L.R., at p. 202.

in s. 23, but also in s. 29A the legislation aims at something quite apart from licensing and directly and expressly restricts the rights of parties to make the contracts that they would desire to make in the course of their trade. Section 29A is a restriction on the right to contract to purchase farm produce and, whether the producer is a local or an inter-State grower, it provides what is complementary to the provision in s. 23. These provisions go far beyond any system of regulating the conduct of the business of the farm produce agent. In respect of s. 23 and s. 29A there is imposed a prohibition upon contracts made either of the agency type or of the sale type. This being in the course of inter-State trade a prohibition on the rights of parties to contract in such an integral part of it is against s. 92 of the Constitution. If, as the defendant contends, this is a transaction in inter-State trade then s. 23 must be read down so that it has no application.

[DIXON C.J. referred to *Hartford Accident & Indemnity Co.* v. *Illinois* (1).]

By reason of the reading-down clause the Act is to be construed as intending to have an operation limited so as not to conflict with s. 92. So construed it does not apply to a transaction which forms part of inter-State trade. That is incapable of being read down. In general terms *W. & A. McArthur Ltd.* v. *Queensland* (2) is good law. The whole basis of the decision in *Wragg* v. *New South Wales* (3) was that the later sale was in the course of the domestic trade. On the admitted facts the defendant is a company which has a substantial business with inter-State merchants and in the course of that business, and as a matter of regular routine, it accepts appointments as agents for inter-State principals. If one participates in a transaction and that transaction is merely incidental to the grower's trade, then the transaction would not be inter-State trade itself, it would be merely incidental to it. But if the agent in fact participates in the transaction in such a way and in the course of a general trade which he himself is conducting, if the step which he takes involves the making of a contract as in this case, the receipt of the goods here, their sale and the transmission of the proceeds, that is something much more than merely incidental. The inter-State trade is the marketing of the apples, not merely their conveyance. In this case the marketing included the whole series of steps including the contract between the inter-State grower and his agent in New South Wales. The argument presented by

(1) (1936) 298 U.S. 155 [80 Law. Ed. 1099].
(2) (1920) 28 C.L.R. 530.
(3) (1953) 88 C.L.R. 353.

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Dr. *H. V. Evatt* in *Roughley's Case* (1) was completely accurate and is adopted by the defendant, particularly as regards the four elements referred to. If a seller and a buyer are engaged in inter-State trade it follows that every person who participates in any essential step in that trade as a contracting party is himself in inter-State trade, at least as regards that transaction. If the contracting parties regularly participate in transactions of the same nature as part of their ordinary business, they thereby to the extent of these transactions, carry on inter-State trade. That is supported by and necessarily follows from the decision in most of the more recent cases, and particularly in *Australian National Airways Pty. Ltd.* v. *The Commonwealth* (2) and *Bank of New South Wales* v. *The Commonwealth* (3). The mere buying and selling of the commodities is not to be regarded as the exclusive object of the power (*Australian National Airways Pty. Ltd.* v. *The Commonwealth* (4)). Transport people carry goods from place to place; they are not concerned in the trade in the sense of buying and selling. This agent is in a much stronger position—he is actually participating in the selling. In this case the agent is concerned with the following steps: (i) the making of contracts in other States, and with principals located in those other States, as a regular and consistent part of his business; (ii) the regular receipt of goods from his inter-State principals, as a part of the transaction of importation; (iii) the regular receipt of and dealing with any documents of title to those goods in the course of their importation; (iv) the regular sale of the goods so imported on behalf of his inter-State principals; (v) the regular transmission inter-State of the proceeds of sale of the goods; and (vi) in a general way, with the furtherance of dealings by inter-State traders by performing an indispensable part of the transactions. That summary of the extent of the participation in inter-State trade by an agent is not very different from the extent to which the banks participate in inter-State trade (*Bank of New South Wales* v. *The Commonwealth* (5)). *Wragg* v. *New South Wales* (6) supports the view now argued. There is not any marketing until the producer has sold his products. If in fact as part of the marketing by the Tasmanian producer a sale is made, that sale falls within the same principle as was laid down in *W. & A. McArthur Ltd.* v. *Queensland* (7) and is part of inter-State trade. If that were not so there would not have been any need for the argument in *Wragg's Case* (6).

(1) (1928) 42 C.L.R., at pp. 170-173.
(2) (1945) 71 C.L.R. 29.
(3) (1948) 76 C.L.R. 1.
(4) (1945) 71 C.L.R., at p. 82.
(5) (1948) 76 C.L.R., at p. 380.
(6) (1953) 88 C.L.R. 353.
(7) (1920) 28 C.L.R. 530.

Where the grower exports his products here for sale, so in the same way until that sale is made that trade is an inter-State trade, and the participation in it by an agent is a participation in inter-State trade. *Roughley's Case* (1) was referred to in *James* v. *Cowan* (2); *Peanut Board* v. *Rockhampton Harbour Board* (3); *Willard* v. *Rawson* (4); *R.* v. *Vizzard*; *Ex parte Hill* (5); *Vacuum Oil Co. Pty. Ltd.* v. *Queensland* (6); *Vacuum Oil Co. Pty. Ltd.* v. *Queensland* [*No.* 2] (7); *O. Gilpin Ltd.* v. *Commissioner for Road Transport and Tramways* (*N.S.W.*) (8); *James* v. *The Commonwealth* (9); *Broken Hill South Ltd.* v. *Commissioner of Taxation* (*N.S.W.*) (10); *McDonald* v. *Victoria* (11); *R.* v. *Connare*; *Ex parte Wawn* (12); *Hopper* v. *Egg & Egg Pulp Marketing Board* (*Vict.*) (13); *Milk Board* (*N.S.W.*) v. *Metropolitan Cream Pty. Ltd.* (14); *South Australia* v. *The Commonwealth* (15); *Carter* v. *Egg & Egg Pulp Marketing Board* (*Vict.*) (16); *Bank of New South Wales* v. *The Commonwealth* (17) and *McCarter* v. *Brodie* (18).

B. B. Riley was present on behalf of the Commonwealth.

H. A. R. Snelling Q.C., in reply.

Cur. adv. vult.

March 1955.

THE COURT delivered the following written judgment:—

This cause is before the Court pursuant to an order of removal made under s. 40 of the *Judiciary Act* 1903-1950. The court from which it is removed is the Court of Petty Sessions at Sydney. The proceeding is an information for a summary offence against s. 23 of the *Farm Produce Agents Act* 1926-1952 (N.S.W.). Before the order for removal was made the information had been heard upon evidence and the evidence had been concluded. The order for removal referred the cause to the Full Court pursuant to s. 18 of the *Judiciary Act* 1903-1950. The evidence consisted for the most part of some documents put in as exhibits and of mutual admissions made between the parties. The constitutional element which brought the cause within s. 40 of the *Judiciary Act* was supplied by s. 92 of the Constitution.

(1) (1928) 42 C.L.R. 162.
(2) (1930) 43 C.L.R. 386, at p. 424.
(3) (1933) 48 C.L.R. 266, at p. 270.
(4) (1933) 48 C.L.R. 316, at p. 318.
(5) (1933) 50 C.L.R. 30, at pp. 33-34, 55, 65, 88-92.
(6) (1934) 51 C.L.R. 108, at p. 114.
(7) (1935) 51 C.L.R. 677, at p. 682.
(8) (1935) 52 C.L.R. 189, at pp. 196, 209.
(9) (1936) 55 C.L.R. 1, at p. 13.
(10) (1937) 56 C.L.R. 337, at p. 349.
(11) (1937) 58 C.L.R. 146, at p. 152.
(12) (1939) 61 C.L.R. 596, at pp. 599, 614, 615.
(13) (1939) 61 C.L.R. 665, at p. 680.
(14) (1939) 62 C.L.R. 116, at p. 119.
(15) (1942) 65 C.L.R. 373, at p. 447.
(16) (1942) 66 C.L.R. 557, at p. 582.
(17) (1948) 76 C.L.R. 1, at p. 370.
(18) (1950) 80 C.L.R. 432, at p. 470.

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The defendant is a company registered under the *Companies Act* of New South Wales and carries on business as a farm produce agent within the definition of that occupation contained in s. 2 (1) of the *Farm Produce Agents Act* 1926-1952 (N.S.W.). Section 23 (1), which creates the offence in respect of which the information was laid, provides that no farm produce agent shall charge, sue for or recover any fees, charges, commission, reward or other remuneration —(a) for or in respect of the sale or disposal of farm produce except commission not exceeding the prescribed commission. A commission is prescribed by the regulations made under the Act. Regulation 10 which was given its present form as from 2nd January 1953 (1953, No. 1) prescribes a commission of seven and one-half per cent of the price realized where the farm produce is fruit, as distinguished from vegetables, potatoes and other edible roots or tubers. The information alleges that the defendant company on 4th August 1953 contravened s. 23 of the Act and reg. 10 in that it did charge commission for or in respect of the sale or disposal of farm produce, to wit 144 cases of apples consigned from one B. G. Direen, in excess of the commission prescribed. The information proceeds to give figures showing that the charge was ten per cent. Section 23 (1) (a) does not cover the whole ground of a farm produce agent's remuneration. The subject of the reward which par. (a) restricts is described by the words " for or in respect of the sale or disposal of farm produce ". Paragraphs (b) and (c) of sub-s. (1) of s. 23 go on to deal with further incidental work in connection with the sale or disposal of farm produce. These provisions cover fees, charges, commission, reward or other remuneration for or in respect of the performance or doing of any service, act or thing incidental to the sale or disposal of farm produce or in relation to any farm produce sold or disposed of by the farm produce agent or forwarded or delivered to or received by him for sale or disposal. Paragraph (b) provides that remuneration of this kind may not be charged, sued for or recovered, unless such service, act or thing is a service, act or thing prescribed as one in respect of which fees, charges, commission, reward or other remuneration may be charged, sued for or recovered. Then paragraph (c) of the same sub-section provides that the amount charged, sued for or recovered in respect of any service, act or thing so prescribed shall not be in excess of the fees, charges, commission, reward or other remuneration prescribed for such service, act or thing. Regulation 10 (2) prescribes certain services, acts or things, for the purposes of par. (b) of s. 23 (1), as those in respect of which fees, charges, commission, reward or other remuneration may be charged, sued for or recovered, and it fixes

the maximum remuneration for the services, acts or things so prescribed. The relevant items are " stamps and stationery 6d. per consignment " and " unloading, storing and handling fruit forwarded from other States 1d. per case ".

From the evidence, which is very scanty, it appears that Direen, whose address is given as Lymington South, Tasmania, caused to be consigned 144 cases of apples by a certain ship from some unspecified port in Tasmania to Sydney. From the documents it appears that there were shipping charges of £48 6s. 0d. and an amount of £9 described as representing charges made for bringing the goods from the place where grown to the port. Regulation 12 (1) requires every farm produce agent to keep a " Consignments Received and Account Sales Book ", and the defendant company did so. The material entries in this book, a copy of an account sales directed to Direen and certain admissions were put in evidence. These documents show that the defendant company sold the apples for £159 3s. 0d. and that deducted from that amount were : £48 6s. 0d. for shipping charges ; £9 for the Tasmanian charges ; 12s. for the handling charges ; 6d. for stamps and stationery and £15 18s. 3d. for commission. These deductions, which amount to £73 16s. 9d. are shown upon the account sales together with the balance, £85 6s. 3d. with the word " cheque " against it. Some more facts appear from the admissions : The defendant company is registered under the Act as a farm produce agent and it carries on business in Quay Street, Sydney. It " received " the 144 cases of apples on 4th August, the same date as that shewn in the account sales as if it were the date of realization. The amount of £15 18s. 3d. was for commission only and did not include any amount for freight, handling, storage, stamps and stationery.

Further, there is an admission that the 144 cases of apples were consigned to the defendant company pursuant to a contract of agency made by the acceptance by Direen in Tasmania of an offer despatched to him by post from Sydney to Tasmania by the defendant ; by the terms of the contract the defendant was appointed the agent of Direen to receive, *inter alia*, apples consigned to it by him from Tasmania to Sydney and to sell such apples on his behalf upon terms, *inter alia*, that the defendant should be paid a commission for such work as agent equal to ten per cent of the gross proceeds of sale of such apples. The documents to which this admission refers were put in evidence. They are two in number. One is from a body called the New South Wales Chamber of Fruit and Vegetable Industries. The other is a letter from the defendant to Direen dated 17th July 1953. It is assumed that the letter

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enclosed the circular. The circular states in effect that, although seven and one-half per cent has been the commission charged for over 100 years, it has been found insufficient to cover the selling costs since the war, that the members of the Chamber have been advised that they are free to make their own arrangements and that it has therefore been determined that as from 1st July 1953 the rate of commission charged by all members acting as agents for growers in States other than New South Wales will be ten per cent. The letter addressed to Direen states that because of the increased costs it has been found necessary to increase the rate of commission to ten per cent. The letter goes on: "This rate, therefore, will be charged by us on all consignments received on or after 31st July 1953. All other charges will remain unaltered." The letter ends with an assurance that close attention will be given to future business from Direen. The basis of the admission is that Direen, by consigning his apples to the defendant company after receipt of the letter, appointed it his agent on the terms the letter states.

On this footing the admission cannot be read as referring to a general contract of agency. It must be understood as describing an agency constituted on each occasion by a consignment of fruit to the defendant company.

The admissions include a general statement that in the course of its business the defendant company receives farm produce for sale and disposal as agent from growers and producers in New South Wales and other States and that it conducts a substantial business of acting as agent for the receipt and disposal in Sydney of fruit and vegetables of inter-State origin consigned to it under contracts of agency made in the same manner as the contract with Direen and containing similar provisions. No evidence was given of the course of business of farm produce agents or of the defendant company in particular. It does not appear under what arrangements fruit is discharged from the ship, where it is taken or how or at what point it is sold and delivered. It may have been assumed that the Court would know this, but the assumption is not well founded. Presumably the amount of twelve shillings calculated at one penny a case covers the cost of receiving the cases as the ship discharged. It will be borne in mind that in the regulations the services for which one penny per case is fixed are described as unloading, storing and handling fruit forwarded from other States. No doubt the ship's charges are all included in the £48 6s. 0d. and the word "unloading" in the item in the regulations can cover no more than the cost of receipt of the goods by or on behalf of the consignee at earliest from ship's tackle as the ship discharges. The commission, £15 18s. 3d.,

therefore, appears to be confined to the service involved in disposing of the fruit. It does not appear whether there is any ground for supposing that the sale is inseparably connected with the inter-State transportation of the fruit so as to form a part of the inter-State transaction. Such an inseparable connection is not inconceivable. But the first sale of a commodity after importation usually is a separate distinct and subsequent transaction. It may perhaps be surmised that charges which reg. 10 fixes as maxima are interrelated. The commission which is prescribed under the statutory description " for or in respect of the sale or disposal of farm produce ", the one penny per case prescribed for the additional services called " unloading, storing and handling " and the sixpence for stamps and stationery, may possibly have been fixed as aggregating a sufficient remuneration rather than each on its own basis as a proper valuation of the services it comprised. But again the evidence does not explain what in practice these items respectively cover or, if the surmise is correct, how they are interrelated. Yet these are not matters which can be safely ignored when the contention is that an act or transaction or series of acts or transactions occurring conceivably at, but more probably after, the final point of inter-State transportation has been reached enjoys the freedom of inter-State trade and that the attempt of the State to control such things invades s. 92.

The answer which the defendant company sets up to the information depends altogether upon the effect of s. 92 upon the operation of the provisions of s. 23 (1) (a) and of reg. 10. The contention is that these provisions cannot validly operate to make it an offence for a produce agent to charge, sue for or recover commission or other reward for or in respect of the sale or disposal of farm produce in excess of the prescribed commission of seven and one-half per cent or of any other rate on the ground that to limit the remuneration of the commission agent is to impose a restriction on his employment in an integral part of an inter-State commercial transaction.

The work of the farm produce agent by which he earns commission is treated by the contention as wearing two aspects which in combination or as alternatives give it the character of inter-State commerce freed by s. 92 from the kind of control complained of. First, as it is said, the agent directly engages for himself in inter-State trade by contracting with the grower in the other State to receive and sell his fruit and by performing the work in pursuance of his contract. Secondly, it is contended that in any case the work of the agent is incidental to the inter-State trade in which his principal the grower engages when he consigns the fruit to Sydney

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for sale in Sydney; as an incident it enjoys the freedom bestowed by s. 92 upon the principal transaction.

No attempt is made on behalf of the defendant company to impugn the validity of the Act generally as inconsistent with s. 92. The attack is almost confined to s. 23. Indeed s. 29A appears to be the only other provision involved and that only as in some way complementary to s. 23. But while the validity of the Act considered generally is conceded, for a proper understanding of the place which s. 23 (1) occupies the scope, purpose and character of its provisions must be regarded. The general purpose of the Act may be seen from the description which the long title contains, viz. an Act to provide for the registration and regulation of farm produce agents, to prohibit certain practices and to regulate in certain respects the sale and disposal of farm produce. It was first passed in 1926 but it has been much amended and s. 23 in the form in which it affects this case was actually introduced by Act No. 40 of 1952.

The chief provision of the Act forbids the carrying on of the business of a farm produce agent except by the holder of a licence. A register is established of licensed farm produce agents but unless a farm produce agent is disqualified on specific grounds stated by the Act he is entitled to be registered and receive a licence. He must, however, give a bond in a prescribed form to comply with the Act and in effect fulfil his duties to his principals. The chief disqualifications depend on being under age, on having been convicted of certain offences or judicially found to have committed a fraud, on bankruptcy or on making an assignment for the benefit of creditors under which less than ten shillings in the pound is paid (ss. 5-8). If the agent is a corporation it must remove persons so disqualified from its share register (s. 9). A licence may be revoked on grounds it is unnecessary to enumerate but which in the main are of a similar or analogous character. There is an appeal to a judge of the District Court from any refusal or cancellation of a licence (s. 11). The books of a farm produce agent are required to be open for inspection for the purpose of ascertaining whether any offence has been committed, and for a like purpose certain other powers of investigation may be exercised (ss. 13 and 13A). Within fourteen days after the sale or disposal of farm produce the agent must render account sales and pay his principal the amount of the purchase money less commission and other charges at the prescribed rate and any other out of pocket expenses properly payable by the principal and any amount owing by him to the agent (ss. 14 and 15). False accounts are penalized (s. 16). A farm produce agent may

not buy farm produce consigned or delivered to him or to any firm of which he is a member by a principal unless he previously obtains the consent in writing of the principal to such purchase (s. 18). There are certain other provisions directed at the proper conduct of the farm produce agent's business and to evidentiary matters which it is unnecessary to discuss. The argument for the defendant company treats s. 29A as of more importance for present purposes. That section provides that no person shall purchase any farm produce from the person by whom it was produced unless, at the time of the purchase or before delivery of the farm produce, whichever is the earlier, the price for which he purchases such farm produce has been definitely fixed and agreed to by his vendor at a sum of money certain and one which is not to be ascertained by reference to any other transaction. The purpose of this is to insure that the farmer who produces the fruit or vegetables, if the dealing is directly with him, shall have a sum certain stated in the bargain as the price upon which he can rely. The provision, so it is argued, seeks where there is a direct sale and purchase, including an inter-State transaction, to limit the competence of the parties to contract on whatever terms they find convenient, just as s. 23 (1) seeks to do where the transaction is one of agency entered into between the producer and an agent to whom he sends his fruit for sale.

Section 23 (1) itself does not in terms create an offence: it prescribes no penalty. It might perhaps be supposed that it did no more than ensure that remuneration of a kind or *quantum* outside or beyond what the regulations allowed was not chargeable, actionable or recoverable. But while no penalty is prescribed by s. 23, s. 30 provides that any person contravening any of the provisions of the Act shall, when no other penalty is expressly provided, be liable on conviction to a penalty not exceeding fifty pounds. It was not denied that this provision applied to s. 23 (1). It is to be noted that in its original form s. 23 simply provided that an agent should not " be entitled to sue for or recover " remuneration other than that prescribed.

No reason appears for doubting the view, which on behalf of the defendant was conceded, that, speaking in general terms, the provisions of the Act other than the two expressly attacked are not inconsistent with s. 92. It is so simply because, in requiring registration, exercising some control over the conduct of produce agents and authorizing a certain degree of supervision and inspection, no real impairment of freedom of trade is involved. In the form in which the Act stood before it was amended in 1932 an attack upon

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its validity before this Court failed : *Roughley* v. *New South Wales* (1). But that is not a very satisfactory authority and in any case the Act has been much amended since that date. It was by a majority of the Court that the then Act was held to be valid. It seems that *Knox* C.J., *Higgins* and *Powers* JJ. were of opinion that in no specific respect did the Act include any invasion or possible invasion of s. 92. The Act did not contain s. 2 (2), embodying the severability clause and that explains the wide survey of its provisions contained in the reasons. *Isaacs* J. and *Starke* J., however, were of opinion that much of the Act could not validly operate upon transactions of inter-State trade. Nevertheless *Isaacs* J. was of opinion that the Act could be read as excluding inter-State trade and *Starke* J. was of opinion that in the particular case no transaction of inter-State trade was disclosed by the pleading demurred to. *Gavan Duffy* J. in effect concurred upon the ground that he was relieved from applying the decision in *McArthur's Case* (2) from which he had dissented, because *Knox* C.J. and *Starke* J., who were in the majority in that case, now found themselves able, on the grounds already stated, to decide that the attack on the Act failed. In this state of opinion the decision could hardly provide a very satisfactory precedent upon the validity of the present legislation. But in any case much of the reasoning found, both in the majority and the minority judgments, departs from the interpretation and the mode of application of s. 92 which now are accepted and are established or illustrated by *Australian National Airways Pty. Ltd.* v. *The Commonwealth* (3) ; *Bank of New South Wales* v. *The Commonwealth* (4) ; *Cam & Sons Pty. Ltd.* v. *Chief Secretary of New South Wales* (5) ; *Carter* v. *Potato Marketing Board* (6) ; *Fergusson* v. *Stevenson* (7) ; *R.* v. *Wilkinson* ; *Ex parte Brazell, Garlick and Coy* (8) ; *Hospital Provident Fund Pty. Ltd.* v. *Victoria* (9) ; *Williams* v. *Metropolitan & Export Abattoirs Board* (10) and *Hughes & Vale Pty. Ltd.* v. *New South Wales* [*No.* 1] (11).

It will be seen that in the present case no very wide question is involved. To no small extent it depends upon what is actually done in the course of business and how the working of the challenged provision actually affects those steps which truly form part of inter-State trade. Unfortunately the exact facts, upon which

(1) (1928) 42 C.L.R. 162.
(2) (1920) 28 C.L.R. 530.
(3) (1945) 71 C.L.R. 29.
(4) (1948) 76 C.L.R. 1 (H.C.A.); (1950) A.C. 235; (1949) 79 C.L.R. 497 (P.C.).
(5) (1951) 84 C.L.R. 442.
(6) (1951) 84 C.L.R. 460.
(7) (1951) 84 C.L.R. 421.
(8) (1952) 85 C.L.R. 467.
(9) (1953) 87 C.L.R. 1.
(10) (1953) 89 C.L.R. 66, at pp. 73-76.
(11) (1955) A.C. 241 ; (1954) 93 C.L.R. 1.

important distinctions may turn, do not fully appear. It is clear, however, that it is in the interests of the grower who consigns the fruit that the restriction on the charges that may be made by farm produce agents are imposed. The purpose and prima facie operation of the limitation are to lessen or prevent any increase of the burden of cost which arises from his consigning his fruit for sale. It is his action in consigning from Tasmania the farm produce to New South Wales which produces the inter-State trade. If the agent in selling and disposing of the commodity or in performing any other services for him is engaged in inter-State trade it is in consequence of such a consignment. How then, it may fairly be asked, can a limitation upon the description of services for which charges may be made and of the amount to be charged operate to restrict the consignor in his inter-State trade ? If the answer is given that such a limitation may tend to reduce or destroy the grower's opportunity of obtaining the services which are indispensable to the transaction the question immediately arises whether in point of fact the limitations imposed do have any such tendency or effect. So far as appears there is no reason at all to suppose that any impediment or difficulty in carrying out the transaction comprising the consignment, transport and the sale or disposal of the fruit is experienced by the growers as a result of the limitation imposed upon the services that may be charged for and the amount of the charge. If, therefore, the challenged statutory provisions are bad under s. 92 it cannot be because they interfere with the grower's right to sell the fruit in inter-State commerce ; it must be because the farm produce agent himself engages in inter-State trade by undertaking the work of selling the fruit consigned to him and is entitled in his own right to the constitutional protection which the provision affords. But again a difficulty of fact arises. It does not appear that when the defendant company sold or disposed of Direen's apples the sale formed in fact part of the inter-State operation. Clearly enough when reg. 10 provides one penny a case as the charge for services of unloading, storing and handling fruit forwarded from other States it covers some services, viz. the unloading, which are part of the inter-State transit. Until the goods are unloaded they remain in inter-State trade, and they may continue in inter-State trade until they are actually stored awaiting disposal. But the sale of the fruit is almost certainly a transaction forming part of the domestic trade of the State. There is neither proof nor probability that the fruit had not come to rest, that the operation of inter-State trade was not over and that the sale was not a fresh

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transaction of an intra-State character. To say this does not mean that legislation, if so framed as to impede or prejudice the sale of the fruit, might not impair the grower's or consignor's freedom to engage in or conduct inter-State commerce. But it does mean that the agent's services at this point concern what in itself is an intra-State sale and not services which form part of or attend upon a transaction of inter-State trade. Yet it is for this service in the sale and disposal of the fruit that the commission is charged. There is not material before us to support the suggestion that, in the case of an inter-State consignment, an interdependence exists between the percentage commission prescribed and the other charges allowed. Nor is it made to appear that any part of the cost to the agent of unloading, storing and handling the fruit of his principal forwarded from another State is not covered by the charge of one penny per case and that it must be provided out of the percentage commission.

For the foregoing reasons there is no ground for a conclusion that the restriction imposed by s. 23 (1) (a) and reg. 10 (1) (a) applies to an operation of the farm produce agent falling under the protection of s. 92 or for a conclusion that the restriction is one that necessarily impairs the freedom, whether of Direen or of the defendant company, to carry on inter-State commerce.

The case made by the defendant company in reliance upon s. 92 therefore fails.

During the argument of the cause, however, a question was raised by *Kitto* J. which, upon consideration, appears to require the dismissal of the information. It is whether the evidence shows that the offence of charging more than seven and one-half per cent commission was committed by the defendant within New South Wales. This question depends on the meaning of the word "charge" in s. 23 (1) (a) and upon the application to that meaning of the rule that all offences are local and territorial. That rule is reinforced by s. 17 of the *Interpretation Act of* 1897 of New South Wales, which provides that all references to localities, jurisdictions and other matters and things shall, unless the contrary intention appears, be taken to relate to such localities, jurisdictions and other matters and things in and of New South Wales. It is not a question of the jurisdiction of the forum. Nor is it altogether a question of the territorial power of the legislature. For doubtless the acts or conduct of the defendant company in the present case include elements sufficiently connected with New South Wales to enable the legislature of that State to deal with them. But, just as the words in s. 23 (1) (a) "sue for" and "recover" must be understood

as " sue for or recover in New South Wales ", so must the word " charge " be interpreted as " charge within New South Wales ".

It appears from the facts already stated that an account sales was made out in New South Wales showing as a deduction the amount of the commission calculated at ten per cent. It is to be inferred that a cheque for the net amount was drawn and that this was directed to Direen at his address in Tasmania and was posted. The question is in effect whether the defendant company had committed the offence of charging Direen more than seven and one-half per cent before the communication reached its destination in Tasmania. If in the circumstances of this case the commission had not been " charged " until the charge was communicated to Direen, the offence was not committed in New South Wales. The word " charge " is no doubt a wide one capable of a flexible application. But it does seem in the context to convey the idea of a claim or demand or an effective imposition of a pecuniary burden, effective if not *de jure* at least *de facto*. Here if, for example, the cheque had been lost in the post Direen would not have been paid the net amount ; there would have been no demand or claim, no imposition effective *de facto*. It may be true that to impose the burden of the amount upon Direen no further overt acts of the defendant company remained. But the post was the chosen means of communication and if communication was necessary to complete the " charging ", the communication was not made when the letter was posted ; delivery of the letter was needed to complete it. "A letter is intended to act on the mind of the recipient, its action upon his mind takes place when it is received. It is like the case of the firing of a shot, or the throwing of a spear. If a shot is fired, or a spear thrown, from a place outside the boundary of a county into another county with intent to injure a person in that county, the offence is committed in the county within which the blow is given. So with a letter."—per *Field* J., *Reg.* v. *Rogers* (1) ; cf. *Rex* v. *Munton* (2). It may be that the meaning of the word " charge " can be satisfied in some circumstances without actual communication. A farm produce agent might, for example, be entitled by his relations with his principal to appropriate funds, to settle liabilities by entries in accounts kept for the benefit of both parties, or in some other way effectively to burden the principal with the amount without communication. But in the present case the " charge " was made not otherwise than by means of the account sales reflected in the accompanying cheque. These documents were not operative

(1) (1877) L.R. 3 Q.B.D. 28, at p. 34. (2) (1793) 1 Esp. 62 [170 E.R. 280].

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without communication. As the communication was not made until delivery by the post of the missive in Tasmania, the essential element of the offence occurred outside New South Wales.

It follows that the information should be dismissed.

Information dismissed. Informant to pay the costs of the hearing in the Court of Petty Sessions at Sydney. Otherwise no order as to costs.

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

Solicitors for the defendant, *R. C. Cathels & Co.*

Solicitor for the Commonwealth, as observer, *D. D. Bell*, Crown Solicitor for the Commonwealth.

J. B.