[HIGH COURT OF AUSTRALIA.]

GRANNALL . . . . . INFORMANT;

AND

MARRICKVILLE MARGARINE PROPRIETARY LIMITED . . . . . DEFENDANT.

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1954, SYDNEY, *Dec.* 13-15;

1955, MELBOURNE, *March* 3.

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

Constitutional Law (Cth.)—Freedom of inter-State trade and commerce—Table margarine—Manufacture—Sale—Licence—State legislation—Validity—Severability—The Constitution (63 & 64 *Vict. c.* 12), *s.* 92—*Judiciary Act* 1903-1950, *s.* 18—*Dairy Industry Act* 1915-1951 (*N.S.W.*), *s.* 2 (2), 22A (1) (b).

Section 22A (1) (b) of the *Dairy Industry Act* 1915-1951 (N.S.W.) provides that no person shall manufacture or prepare table margarine unless he obtains a table margarine licence. Under s. 22A (2) and (3) the Minister of Agriculture is given authority to grant or refuse a licence at his discretion. If a licence is granted it must contain a condition limiting the quantity which may be manufactured during the currency of the licence and the aggregate quantity of table margarine respectively specified in the various licences must not exceed 2,500 tons in a period of twelve months: s. 22A (6) (c). The Act contains a severability clause. Although not stated by the Act it was not contested that the motive for limiting the production of table margarine is lest the Australian market for butter should be prejudiced by the competition of margarine.

In answer to an information laid against the company in the Court of Petty Sessions for not holding a licence from the Minister of Agriculture the company set up s. 92 of the Constitution saying that s. 22A (1) (b) forms an inseparable part of a statutory attempt to restrict the freedom of inter-State commerce in margarine. Under s. 40 of the *Judiciary Act* 1903-1950 the cause was removed into the High Court.

Held that s. 22A of the *Dairy Industry Act* 1915-1951 (N.S.W.) is a wholly valid enactment not affected in any way by s. 92 of the Constitution. Legislative restrictions or prohibitions upon the production or manufacture of goods, do not, in themselves, constitute an infringement of s. 92.

Merely because the primary motive of the legislation is that margarine shall not be sold to consumers who might otherwise buy butter, although

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they might buy in inter-State trade, or from or through those who do buy margarine in inter-State trade, it does not necessarily follow that there is a direct interference with inter-State trade. It does not matter whether the purpose or motive is inferred from circumstances or from the statute or, indeed, is stated therein in terms.

The distinction between s. 51 (i.) and s. 92 of the Constitution discussed.

Section 21 forbids the exportation of margarine from New South Wales unless certain conditions are complied with and therefore there may be some doubt as to its validity but it is clearly severable. Section 22B which, *inter alia*, makes it unlawful to sell cooking margarine to persons not therein prescribed may well be ineffective in the face of s. 92 but this could not bear on the validity of s. 22A (1) (b). Section 22C is an overriding provision enabling the Minister to grant a special permit for the manufacture of table margarine for export from Australia with a condition against sale or distribution within the Commonwealth. To the extent that this condition penalizes the sale of margarine from New South Wales into another State, s. 22C may well be considered to infringe s. 92, but again it is severable as it is clearly subordinate to the dominant principle of the restriction of the manufacture of margarine.

Per curiam : Section 92 of the Constitution will be infringed if some fact or event or thing which itself forms part of trade commerce or intercourse or forms an essential attribute of that conception (essential in the sense that without it you cannot bring into being that particular example of trade commerce or intercourse) is made the subject of the operation of a law, which by reference to it or in consequence of it imposes some restriction or burden or liability, no matter how circuitously it is done or how deviously or covertly.

CASE STATED.

At the request of the parties to a prosecution brought in the Court of Petty Sessions at Sydney, by one Grannall against Marrickville Margarine Pty. Ltd., *Kitto* J. stated a case pursuant to s. 18 of the *Judiciary Act* 1903-1950 substantially as follows :—

1. I have before me a cause formerly pending in the Central Court of Petty Sessions at Sydney in the State of New South Wales, which was removed into the High Court by an order of this court made on 1st October 1953.

2. The cause is a prosecution commenced by a summons calling upon the defendant to answer to an information laid by the above-named informant.

3. The charge against the defendant, which is a company registered and incorporated under the provisions of the *Companies Act* 1936 of New South Wales, is that on 3rd November 1952, at Marrickville in the said State it contravened the provisions of sub-s. (1) (b) of s. 22A of the *Dairy Industry Act* 1915-1951 (N.S.W.) in that not

then being the holder of a table margarine licence it did manufacture table margarine.

4. That sub-section, so far as material, provides that :—"After the expiration of one month from the commencement of the Dairy Industry (Amendment) Act 1940 . . . (b) no person shall manufacture . . . table margarine unless he holds a table margarine license." The expressions " table margarine " and " table margarine license " are defined in s. 2, and the Act contains provisions for the issue of table margarine licences. In this case, these expressions are used with their defined meanings.

5. The *Dairy Industry (Amendment) Act* 1940, commenced on 1st January 1941.

6. The *Dairy Industry Act* 1915-1951 provides in s. 2 (2) : " This 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 provision of this Act or the application thereof to any person or circumstance is held invalid the remainder of this Act and the application of such provision to other persons or circumstances shall not be affected."

7. On and before 3rd November 1952, the defendant was carrying on at premises known as 74 Edinburgh Road, Marrickville, in the said State, a business which included the manufacture of table margarine for sale.

8. On 3rd November 1952, the defendant manufactured a quantity of table margarine, not then being the holder of any table margarine licence.

9. The defendant's said business included at all material times the sale and delivery by the defendant of table margarine of its manufacture in substantial quantities to buyers in New South Wales and in substantial quantities to buyers in other States of the Commonwealth.

10. In the course of its business as carried on at all material times the defendant from time to time at its premises entered into contracts with buyers in States other than New South Wales for the sale and supply of table margarine by the defendant to such buyers, and some of such contracts required, by express or implied stipulation, the dispatch by the defendant of table margarine of its manufacture from its premises and the delivery thereof by the defendant to the buyers in those other States.

11. At all material times the defendant in manufacturing table margarine had an intention and purpose to devote and apply a substantial proportion of its total output of table margarine to the

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performance of contracts containing stipulations of the kind mentioned in the last preceding paragraph.

12. The material before me does not enable a finding to be made that the table margarine manufactured by the defendant on 3rd November 1952, or any of it, was manufactured specifically for sale, or was sold, to a buyer or buyers outside New South Wales; but it was manufactured in the ordinary course of the defendant's business and formed part of the total output as to which the defendant had the intention and purpose described in the last preceding paragraph of this case.

13. The defendant by its counsel, has informed me that it does not desire in this cause to rely upon any facts other than those hereinbefore stated.

14. Submissions made to me by counsel for the defendant raise questions which, at the request of the parties, I submit for the consideration of a Full Court pursuant to s. 18 of the *Judiciary Act* 1903-1950.

The questions submitted for the opinion of the Court were as follows: 1. Are the provisions of s. 22A (1) (b) of the *Dairy Industry Act* 1915-1951 (N.S.W.), notwithstanding s. 2 (2) of that Act, altogether void by reason of the provisions of s. 92 of the Constitution of the Commonwealth? 2. If not, do the facts stated in pars. 9, 10, 11 and 12 hereof entitle the defendant to have the charge dismissed on the ground that by reason of the provisions of s. 92 of the Constitution of the Commonwealth the provisions of s. 22A (1) (b) of the *Dairy Industry Act* 1915-1951 (N.S.W.) are void in so far as they would apply to the aforesaid manufacture by the defendant of table margarine on 3rd November 1952?

Further statutory provisions sufficiently appear in the judgments hereunder.

B. P. Macfarlan Q.C. (with Sir *Garfield Barwick* Q.C. and with them *A. Cameron Smith* and *E. G. Whitlam*), for the defendant. The impugned provisions of the *Dairy Industry Act* 1915-1951 (N.S.W.) relating to margarine do not do anything to regulate the manner of manufacture or, indeed, the manufacture, but are solely directed to controlling the amount or the quantity of table margarine which may be manufactured and, consequently, sold. Sections 5, 5A and 5B do throw important light upon the construction of the impugned provisions. If a person, an applicant, desires to register a dairy produce factory for the purpose of manufacturing butter, or cheese, or cream, or milk which he has produced then all that applies is s. 5 and application is made if the proposed

factory satisfies the conditions of cleanliness and hygiene to which that section refers, and the application shall be granted. But if the application is in respect of a dairy produce factory for the manufacture of any other form of dairy produce than butter or cheese then that application must be considered, first by the Advisory Committee, and secondly by the Minister in the light of the commercial and economic interests of the dairying industry, and if the application would be prejudicial to those interests the Minister may, under s. 5B (i), refuse it. The Minister is not obliged to grant a licence to any applicant; he has a complete discretion, he may grant only one licence, or he may grant many. But each licence shall specify within its terms the maximum amount which that licensee may manufacture. If the Minister decides that there shall be a number of licences and the maximum amount which each of those licensees may manufacture is, in the aggregate, 2,500 tons, the effect of s. 22A is that no licensee can increase his quota of manufacture nor can any further licence be granted. If the whole 2,500 tons is given by way of different quotas among different licensees, the quota of each licensee is frozen unless one of the existing licensees does not seek to renew his licence or goes out of manufacture. The quota of each licensee is frozen, notwithstanding that a particular licensee may not manufacture the whole of his quota or any part of it. What is significant in sub-s. (2) of s. 22C is, where this permit is granted, it is provided that every such permit shall contain such conditions as the Minister thinks necessary to ensure that this table margarine so manufactured does not go into inter-State trade. The group of sections 22A to 22D inclusive, inserted in 1940, is not in any way concerned with the purity or forms of manufacture of margarine; it is solely concerned with controlling the quantity which may be manufactured and the quantity which may be sold in Australia. The operation of the Act is concerned with the furtherance of the interests of the dairying industry and seeks to achieve that result by restricting the manufacture, sale and distribution of margarine in Australia. If that construction be correct, and even if the Act so construed operates wholly upon intra-State aspects of trade and commerce, yet nevertheless because of the declared object of the Act, its provisions contravene s. 92 of the Constitution. The purpose and intention for which the defendant carries on its business is manufacture for sale intra-State and inter-State. The manufacture of table margarine or the carrying on of a business of manufacturing table margarine for sale inter-State falls within the immunity of s. 92 of the Constitution. This Act, in its operation, strikes at that business

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in an essential attribute of it, namely the manufacture, and the manner in which it strikes is prohibitive, and it is therefore invalid. If the process of manufacture is itself not part of the inter-State trade and commerce nevertheless, in the circumstances of this case, interference with the manufacture constitutes an interference directly with the inter-State trade and commerce. Where the declared object of an Act is shown to be or is expressed to be the taking over or prohibition of the distribution of a commodity, then it cannot be argued that, having that declared object, the law does not operate directly (*Wragg* v. *State of New South Wales* (1)). The problem that the authorities put has to be resolved in the light of all the relevant circumstances of particular transactions which are claimed to be trade, commerce and intercourse among the States. The problem is of a business nature and the understanding of the circumstances being examined has to be from the business standpoint and in the light of their commercial significance. The meaning of the phrase " trade, commerce and intercourse " is not restricted to buying, selling and transportation. The conception of trade, commerce and intercourse within s. 92 is at least a broad one. It has to be measured as including all those activities and transactions which result in the transference of goods—tangibles and intangibles —across State lines, and it is not possible to lay down *a priori* any categorical or defined definition that is applicable to all cases of what is trade and commerce (*Bank of New South Wales* v. *The Commonwealth* (2) ; *United States* v. *South-Eastern Underwriters' Association* (3) ; *Polish National Alliance of United States of America* v. *National Labor Relations Board* (4)).

[DIXON C.J. referred to *Carter* v. *Potato Marketing Board* (5).]

That passage was written to answer an argument which, in effect, was that a person who is the owner of goods cannot be dispossessed of those goods nor can his possession of them be restricted until the point of time when he shall have made his election whether or not he put those goods into the intra-State trade or into the course of inter-State trade and commerce. In the circumstances of this case the manufacture of the goods is inseparably connected with the subsequent sale and delivery of the goods in inter-State trade and commerce. Remove the manufacture and the trade and commerce is removed. The two matters, namely, the commerce power and the immunity under s. 92 are governed by different considerations. If one must, as the authorities require, judge a particular

(1) (1953) 88 C.L.R. 353.
(2) (1948) 76 C.L.R. 1, at p. 380.
(3) (1944) 322 U.S. 533 [88 Law. Ed. 1440].
(4) (1944) 322 U.S. 643 [88 Law. Ed. 1509].
(5) (1951) 84 C.L.R. 460, at p. 485.

transaction from the business or commercial point of view having regard to the commercial rather than the legal significance, here where goods are manufactured for sale and with the intention of being sold and put into inter-State trade and commerce, it is that the manufacture is itself part of that inter-State trade and commerce. If the real significance to be attributed to any series of transactions depends upon their commercial significance then if the commercial or business significance of those matters is that what is being done is manufacturing for the purpose of inter-State trade and commerce and selling and delivering, that could and does involve that manufacture as part of it. If the contrary view put in *Matthews* v. *Chicory Marketing Board (Vict.)* (1) and *Hartley* v. *Walsh* (2) be right then it means that manufacture can never be a constituent element in inter-State trade and commerce. That view is not correct. One cannot define beforehand what are the limits of inter-State trade and commerce and an inquiry into the particular circumstances may show that manufacture is essentially one part of it. The contracts with the growers in *Clements & Marshall Pty. Ltd.* v. *Field Peas Marketing Board (Tas.)* (3) in Tasmania in themselves did not make any provision for the goods going across the border yet the contracts between the growers and the buyers in Devonport, Tasmania, were entitled to be said to fall within the immunity of s. 92, because the contemplation of the situation was that, if those goods went forward according to the terms of the particular contract —intra-State—and as intended, they would constitute a part of a transaction which was one involving the delivery of goods across a border and an inter-State trade transaction. The present inquiry for the Court must be whether that manufacture in the circumstances of trade, commerce and intercourse formed, in these present circumstances, part of it. What the Court is inquiring into is not manufacture isolated or manufacture alone, but manufacture as part of a broader scale of transactions which would, if carried to their conclusion, ultimately result in the passage of goods across the border. Whether manufacture can be part of inter-State trade and commerce was considered in *McNee* v. *Barrow Bros. Commission Agency Pty. Ltd.* (4). Manufacture will be part of inter-State trade and commerce where the manufacture is for the purpose of sale and delivery of those goods inter-State. Even if the highest view of " manufacture " as put be not accepted, the facts in par. 10 of the case stated show that the defendant from time to time enters into contracts for the sale and delivery across State lines of the products

(1) (1938) 60 C.L.R. 263.
(2) (1937) 57 C.L.R. 372.
(3) (1947) 76 C.L.R. 401.
(4) (1954) V.L.R. 1, at pp. 5, 6.

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of the margarine which it manufactures. Those circumstances are sufficient to justify the Court in holding that in this case the course of the defendant's trade, in its manufacture and in its contract to sell the products of its manufacture, was sufficient to make it part of inter-State trade and commerce. In these circumstances the manufacture, which is the making or the fashioning of the constituents to produce the finished commodity, is part of the inter-State trade. In any business or commercial sense it cannot be said that there could not be a business transaction as between two persons which involved the making, selling, delivering and buying of the goods. All four elements are well-known to business and commercial dealing, and are elements relevant to trade, to business, or to commerce, if they are found to be so grouped together in any set of circumstances, then there is trade and commerce to which s. 92 applies: *Clements & Marshall Pty. Ltd.* v. *Field Peas Marketing Board (Tas.)* (1); *Reg.* v. *Wilkinson*; *Ex parte Brazell, Garlick & Coy* (2); *Wilcox Mofflin Ltd.* v. *State of New South Wales* (3). The operation of this Act, s. 22A (1) (b) and the other sections which that incorporates, by imposing an arbitrary licensing system on the conduct of that trade and the right to conduct that trade, are necessarily invalid. If the sale and delivery of table margarine across the border is inter-State trade and commerce and the manufacture is not then the operation of this Act upon the processes of manufacture constitute an unfair burden and hindrance to the inter-State trade and commerce itself. If the Act is regarded as affecting inter-State trade and commerce only remotely, then it is in reality seeking to do, by disguise, what it cannot do directly (*Hospital Provident Fund Pty. Ltd.* v. *State of Victoria* (4)). That broad submission may be accepted if the Act operates only upon an intra-State aspect of the transaction, it is nevertheless invalid if it directly affects inter-State trade and commerce. As the object of the Act is expressed as being to hinder inter-State trade and commerce, its intra-State operation will not save it from being invalid.

[KITTO J. referred to *Vacuum Oil Co. Pty. Ltd.* v. *Queensland* (5).]

The New South Wales legislature is seeking to do indirectly what it cannot do directly (*James* v. *Cowan* (6); *Bank of New South Wales* v. *The Commonwealth* (7)). What this Act is intending to do and is declaring, is to say that at all costs table margarine is not to be allowed to go into inter-State trade or into intra-State trade

(1) (1947) 76 C.L.R., at pp. 409, 429.
(2) (1952) 85 C.L.R. 467, at pp. 483, 484.
(3) (1952) 85 C.L.R. 488, at pp. 519, 520.
(4) (1953) 87 C.L.R. 1, at p. 36.
(5) (1934) 51 C.L.R. 108.
(6) (1930) 43 C.L.R. 386; (1932) A.C. 542; (1932) 47 C.L.R. 386.
(7) (1948) 76 C.L.R. 1.

beyond a particular limit (*Wragg* v. *State of New South Wales* (1); *W. & A. McArthur Ltd.* v. *Queensland* (2)). Even though the operation of the interference is wholly outside inter-State trade and commerce itself, then if it operates on inter-State trade and commerce it is invalid. The whole of the margarine provisions brought in by the 1940 amendment would fail. Section 22c (1) (a) is expressed to operate in respect of any person who holds a licence. The licensing provision wholly fails. The severability provision is in similar form to those which have been considered by this Court in *Cam & Sons Pty. Ltd.* v. *Chief Secretary of New South Wales* (3) and *Fergusson* v. *Stevenson* (4) wherein the view of the Court was influenced by the circumstance that that severability clause appeared as part of the State Act itself. The Court in reaching those conclusions in those two cases, was not laying down a rule of law on construction because the same problem faced the Court in *Bank of New South Wales* v. *The Commonwealth* (5) where the Court had to consider the operation of s. 15A of the *Acts Interpretation Act* 1901, as amended, and s. 6 of the *Banking Act* 1947. The severability clause in that case was a wide one. The result in that case was reached by the construction adopted by the Court of the *Banking Act* 1947 (*Bank of New South Wales* v. *The Commonwealth* (6)). If the licensing provision of s. 22A (1) (b) is not wholly invalid it cannot apply to sales of margarine in inter-State trade. Section 22c (2) shows that the declared object of this Act in the way it operates, even if confined to s. 22A, is in reality to operate as a hindrance or restriction or burden upon the distribution of margarine (*Peanut Board* v. *Rockhampton Harbour Board* (7)).

H. A. Snelling Q.C. (Solicitor-General for New South Wales) (with him *R. Else-Mitchell*), for the informant. At the date the Constitution was enacted it was recognized in America and in Australia that production and manufacture were entirely distinct from trade and commerce. The fundamental object of the Act is to provide that only a certain amount of margarine shall come into existence in the Commonwealth. Its primary purpose is to ensure that the dairy industry shall not be subject, in its production of butter, to the competitive production of substantial quantities of margarine. What was done with the margarine when it came into existence is beside the point and outside the scope of the Act. The nature of the legislation is such that it does not directly affect the inter-State

(1) (1953) 88 C.L.R., at pp. 396, 397, 399.
(2) (1920) 28 C.L.R. 530.
(3) (1951) 84 C.L.R. 442.
(4) (1951) 84 C.L.R. 421.
(5) (1948) 76 C.L.R. 1.
(6) (1948) 76 C.L.R., at p. 390.
(7) (1933) 48 C.L.R. 266.

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trade within the meaning of the authorities. The under-mentioned cases are cases which deal with the meaning of trade and commerce, and they are not cases which can be distinguished on the basis of doctrine special to the Constitution of the United States of America. They consistently maintain that production and manufacture is not trade and commerce : *Kidd* v. *Pearson* (1) ; *United States* v. *E. C. Knight & Co.* (2) ; *Prentice and Egan* on the *Commerce Clause* (1898), p. 54 ; *Judson* : *The Law of Inter-State Commerce* (1912) (2nd ed.), p. 16 ; *Quick and Garran* : *The Annotated Constitution of the Australian Commonwealth* (1901), p. 518 ; *W. Harrison Moore* : *The Constitution of the Commonwealth of Australia* (2nd ed.) (1910), p. 550. The terms of the Constitution itself, such as s. 51 (iii.) referring to bounties on production, and s. 90 which refers to excise duties and bounties on production, draw the basic distinction. From *James* v. *The Commonwealth* (3) and *Bank of New South Wales* v. *The Commonwealth* (4) it is abundantly clear that in using " trade and commerce " and adding " intercourse " the Australian Constitution was intending to adopt the meaning which those words had been held to have. That distinction stood notwithstanding the purpose, or intention, or probability that the goods would move into inter-State trade so that there was the closest integration between the manufacture and trade and commerce, and notwithstanding that the parties by their contracts joined the two in the one contract. [He referred to *United Mine Workers of America* v. *Coronado Coal Co.* (5) ; *Oliver Iron Mining Co.* v. *Lord* (6) ; *Utah Power & Light Co.* v. *Pfost* (7) ; *Champlin Refining Co.* v. *Oklahoma Corporation Commission* (8) ; *Parker* v. *Brown* (9).] This is not a disguised attempt to interfere with inter-State trade ; see *Kerr* on *The Law of the Australian Constitution* (1925), p. 118. A contract, including the contractual arrangements in this case, cannot in any circumstances transform manufacture into trade and commerce. In no sense can the parties convert manufacture into trade and commerce. It is not until after the point of manufacture, which is the critical time for the operation of this Act, that some

(1) (1888) 128 U.S. 1, at pp. 15, 16, 17, 20, 22, 23 [32 Law. Ed. 346, at pp. 348, 349, 350, 351].
(2) (1895) 156 U.S. 1, at pp. 9, 12, 13, 16 [39 Law. Ed. 325, at pp. 328, 329, 330].
(3) (1936) A.C. 578 ; (1936) 55 C.L.R. 1.
(4) (1948) 76 C.L.R. 1.
(5) (1922) 259 U.S. 344, at pp. 407, 410 [66 Law. Ed. 975, at pp. 994, 995].
(6) (1923) 262 U.S. 172, at pp. 177-179 [67 Law. Ed. 929, at pp. 935, 936].
(7) (1932) 286 U.S. 165, at pp. 177-183 [76 Law. Ed. 1038, at pp. 1044-1047].
(8) (1932) 286 U.S. 210, at p. 235 [76 Law. Ed. 1062, at pp. 1078-1079].
(9) (1942) 317 U.S. 341, at pp. 360-362 [87 Law. Ed. 325, at pp. 331, 332].

portion in the nature of things could be selected by the defendant's employees and set aside within the company's premises for general purposes of inter-State sale, and it is not until after that that the defendant in respect of particular contracts and particular deliveries appropriates to the contract. At the point of impact of this legislation the goods have not gone into inter-State commerce. The process of importation begins upon the entrance of the articles into the export stream (*Empresa Siderurgica* v. *Merced County* (1)). The conclusion to which the United States Court has come in those cases where there were existing contracts to deliver inter-State, that the parties cannot by their contract alter intrinsic constitutional foundations, results in the situation that in no circumstances can manufacture become part of trade and commerce. If that submission is right, the dictum of *Sholl* J. in *McNee* v. *Barrow Bros. Commission Agency Pty. Ltd.* (2) would not be correct where he said he could envisage some circumstances where the pulping of eggs might become part of inter-State trade. The question of whether one part of the transaction was or was not an inseparable or inseverable part of inter-State trade was mentioned in *Wragg* v. *State of New South Wales* (3) : see also *Williams* v. *Metropolitan & Export Abattoirs Board* (4) and *Clements & Marshall Pty. Ltd.* v. *Field Peas Marketing Board (Tas.)* (5). In all walks of life the concept of manufacture and production is distinguished in parlance from that of trade and commerce. The cases in United States since 1936 have not resulted in any weakening of the distinction between manufacture and production and trade and commerce (*National Labor Relations Board* v. *Jones & Laughlin Steel Corporation* (6) ; *United States* v. *Darby* (7)). Section 22c (1) is an addendum to the basic scheme of the Act, that is a licensing system which will insure that no more than a certain quantity is produced, empowering the Minister, if he thinks fit, to permit something more to be manufactured for export, not under a licensing system, but under a different system of special permits. Subsection 2 (a) of s. 22c is not a provision in any sense directed against inter-State trade ; it is a provision intended to police and insure that the whole purpose and basis of the production is exportable. Its whole purpose has nothing to do with inter-State trade and thus differs fundamentally from *James* v. *The Commonwealth* (8) ; it is

(1) (1949) 337 U.S. 154 [93 Law. Ed. 1276].
(2) (1954) V.L.R. 1.
(3) (1953) 88 C.L.R., at p. 388.
(4) (1953) 89 C.L.R. 66.
(5) (1947) 76 C.L.R. 401.
(6) (1937) 301 U.S., at pp. 34, 36 [81 Law. Ed., at pp. 910, 911].
(7) (1941) 312 U.S. 100, at pp. 113, 119 [85 Law. Ed. 609, at pp. 616, 619, 620].
(8) (1936) A.C. 578 ; (1936) 55 C.L.R. 1.

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permitting the producer to bring into existence, giving him an exemption from the prohibition, for a particular purpose only. The provision is a policed one to insure that the antecedent condition for the production is not broken. The whole of s. 22c could be struck out without the slighest effect on the rest of the scheme, if necessary, but it retains its validity with the whole Act. The questions before the Court do not call for a decision on the validity of s. 22c. This is fundamentally different from *James* v. *Cowan* (1) in being a provision which, as a matter of law, has impact upon production and not upon inter-State distribution. There is not any trying to do indirectly what is not permitted to be done directly. The object of this Act is to prevent more than a certain quantity of margarine coming into existence in Australia. To prevent production is indirect, remote and incidental in its impact on inter-State trade.

[KITTO J. referred to *United Mine Workers of America* v. *Coronado Coal Co.* (2).

McTIERNAN J. referred to *Matthews* v. *Chicory Marketing Board (Vict.)* (3).]

Submissions on s. 22c (2) (a) are: (i) it does not disclose a disguised intention, or intention, to interfere with inter-State trade; its only purport is to perform the very minor task of insuring that the manufacturer keeps to his undertaking as to the basis upon which he was allowed to produce; (ii) it has no significance in exposing what may be regarded as a patent or latent intention of the New South Wales Government to interfere with inter-State trade; and (iii) it is purely a subsidiary provision to what is, in itself, a subsidiary provision which is by no means essential to the operation of the rest of the Act because the Minister may never consider it necessary to exercise his power. The paramount purpose of the Act is the protection of the dairying industry in New South Wales. The Court should, if it can, apply the reading-down section in the Act. The very arrangement of s. 22c shows that s. 22A and s. 22B constitute a self-contained scheme, and to that scheme there is an advantage added to the manufacturer. The operation of severance can be performed in several ways.

[DIXON C.J. referred to *Federal Commissioner of Taxation* v. *Munro* (4).]

The Privy Council in *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [*No.* 1] (5) considered the six points dealt with by the

(1) (1932) 47 C.L.R. 386; (1932) A.C. 542.
(2) (1922) 259 U.S., at p. 410 [66 Law. Ed., at p. 995].
(3) (1938) 60 C.L.R., at pp. 266, 276, 280.
(4) (1926) 38 C.L.R. 153.
(5) (1955) A.C. 241; (1954) 93 C.L.R. 1.

Chief Justice in *McCarter* v. *Brodie* (1) and expressed its complete agreement with them. The fourth of those points is relevant to the present appeal. The point having been expressly and definitely affirmed by the Privy Council, it must be taken as concluded and a test of relevance to a case like this.

H. A. Winneke Q.C. (Solicitor-General for Victoria) (with him *R. Else-Mitchell*), for the State of Victoria and the State of South Australia, intervening by leave. All the other States have legislation similar to the New South Wales Act. It is impossible to deny that the dominant motive, for this initial action on the part of the States was to preserve, so far as they were constitutionally able, what each regarded as one of its basic primary industries, the dairy farming industry. In Victoria for many years the legislation stood as part of the general health legislation, its purpose being to prevent the improper passing off of a butter substitute as butter itself. All the submissions made to the Court on behalf of the informant that the process of manufacture is not part of trade and commerce are adopted. The impact of this legislation upon inter-State trade and commerce is indirect or remote as distinct from being either direct or immediate. This legislation does have, at some stage of the process, an impact upon inter-State trade and commerce in margarine and it does not matter, for the purposes of this case, whether it be treated as a complete prohibition or as a partial prohibition on the manufacture of margarine. The real issue as to the validity of this legislation turns on whether the effect which it will have on inter-State trade and commerce is immediate and direct or consequential and indirect. This legislation is direct in its effect upon inter-State trade in this commodity. The activity which is selected by this legislation is the activity of manufacture itself. That activity is not itself a transaction of trade and commerce at all, let alone of inter-State trade and commerce. Conceding that the operation of the Act will or may at some stage of human activity have an effect upon inter-State trade in the commodity just as much as it will have an effect upon domestic trade in the commodity, that effect, when it gets to the stage of inter-State trade, is not immediate or direct, because the immediate effect of this legislation is simply to prohibit manufacture. A person in the position of the defendant cannot trade inter-State because he has not got the goods with which to trade ; they do not exist because of a general State law which operates in the State

(1) (1950) 80 C.L.R. 432.

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where he carries on business. In *James* v. *Cowan* (1) there was selected as the criterion something which itself was trade and commerce, namely the sale of goods. The general line of argument is supported by *Hospital Provident Fund Pty. Ltd.* v. *State of Victoria* (2); *Wragg* v. *State of New South Wales* (3) and *Wilcox Mofflin Ltd.* v. *State of New South Wales* (4). If the true view is that manufacture is not part of trade and commerce, the very thing which the defendant is trying to do in this case, is to extend the scope of the immunity of s. 92 to an antecedent condition, namely, the production of the goods. The effect of this type of legislation on inter-State trade is consequential because it is legislation which strikes at a stage which is applicable to conditions antecedent to the goods becoming the subject matter of inter-State trade and commerce. The form in which this legislation is set out really indicates its subsequent effect.

Sir *Garfield Barwick* Q.C., in reply. The Act is attempting, by the institution of a quota system, to control the amount of margarine which will be available for sale in Australia. The fact that there are parallel Acts in the other States does not tend against that conclusion. The view held in *Duncan* v. *Queensland* (5) and *State of New South Wales* v. *The Commonwealth* (6) that an acquisition could not have a direct effect on inter-State trade, because the reason a man did not trade in his goods inter-State after the acquisition was that he had not got them, prevailed up to the decision in *James* v. *Cowan* (1). The explanation of the change of view is shown in *Peanut Board* v. *Rockhampton Harbour Board* (7). Acquisition may operate directly upon inter-State trade. The defendant is not concerned to say that a prohibition of manufacture in every case must have a direct bearing, but he is concerned to say that a prohibition of manufacture *may* operate directly on inter-State trade. In the case of this Act, one finds an unmistakable trace that the whole point of the prohibition of the manufacture is to interfere with trade. The purpose is to prevent it being sold beyond a certain quota. The State of New South Wales is quite prepared to have as much margarine as is produced provided it is not sold beyond a certain quota in the Commonwealth of Australia. There is not any such limitation if the producer proposes to export the material from Australia. To strike at a point earlier than the

(1) (1932) A.C. 542; (1932) 47 C.L.R. 386.
(2) (1953) 87 C.L.R., at pp. 17, 18, 36-38.
(3) (1953) 88 C.L.R., at pp. 385-388.
(4) (1952) 85 C.L.R., at p. 519.
(5) (1916) 22 C.L.R. 556.
(6) (1915) 20 C.L.R. 54.
(7) (1933) 48 C.L.R., at pp. 274, 301.

beginning of inter-State trade may operate directly upon the trade (*Clements & Marshall Pty. Ltd.* v. *Field Peas Marketing Board (Tas.)* (1); *Fergusson* v. *Stevenson* (2); *Foggitt, Jones & Co. Ltd.* v. *New South Wales* (3)). The actual form of the legislation will not be conclusive. One will need to look to the substance, and one will find directness of application although the statute does not in terms refer to any of the inter-State activities of the persons affected. The acquisition that is bad is the acquisition that uses a means to achieve the end of control, and here there is another device which is used as a means of control, and its only purpose is to control the trade. There is not any other purpose to be found in the statute. What the words of the Act do achieve is to prohibit the sale of more than a certain quantity. The purpose of controlling the manufacture is to attempt to control the amount available for sale. It does not stop at a mere desire to prohibit all manufacture. If it is desired to determine whether the taking away has a direct operation on trade, one must have regard to whether the taking away is a means to some end. If the end be the interference with trade by means of controlling, then the acquisition is bad. Putting *Peanut Board* v. *Rockhampton Harbour Board* (4) and *James* v. *Cowan* (5) side by side, the conclusion from them in relation to acquisition is that acquisition as a means of controlling trade fails. In this case there is manufacture which is no more than an antecedent point in the inter-State trade. There is not any difference between the inability to get it and the inability to make it. Taking this statute in substance, it is designed to control the total amount of margarine which may circulate in trade in Australia so far as the State of New South Wales is making a contribution to it. Legislation which does not in terms operate upon an activity which is itself trade, or part of it, may nevertheless be invalid. The relevant test of validity is whether the legislation produces directly, in the sense of proximately and not remotely, an effect upon the individual's trade of the prohibitive kind. The relevant effect is not limited to a trade in being carried on by the individual, but extends to a trade in which he intends to engage (*Peanut Board* v. *Rockhampton Harbour Board* (6)). A law acquiring vendible goods may be held to produce a direct and not a remote inhibition on trade with the goods (*Peanut Case* (4)). A law preventing possession of vendible goods can be held to be producing a direct inhibition of trade (*Fergusson* v. *Stevenson* (2)). A law acquiring a vendible

(1) (1947) 76 C.L.R. 401.
(2) (1951) 84 C.L.R. 421.
(3) (1916) 21 C.L.R. 357.
(4) (1933) 48 C.L.R. 266.
(5) (1932) A.C. 542; (1932) 47 C.L.R. 386.
(6) (1933) 48 C.L.R., at p. 301.

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commodity in the hands of a grower can be held to produce a direct inhibition in the trade of a merchant who would buy from the grower (*Clements & Marshall Pty. Ltd.* v. *Field Peas Marketing Board (Tas.)* (1)). Where the law does not itself in terms refer to trade or trading in the commodity with respect to which it operates, the effect upon the trade which in fact works will be within the operation of the particular statute.

Cur. adv. vult.

March 3, 1955. The following written judgments were delivered :—

DIXON C.J., MCTIERNAN, WEBB AND KITTO JJ. This case stated involves the constitutional operation of s. 22A (1) (b) of the *Dairy Industry Act* 1915-1951 of New South Wales. That provision deals with a substance called table margarine which is, of course, not a product of the dairy industry but is on the contrary a substitute for butter. Section 22A (1) (b) provides that no person shall manufacture or prepare table margarine unless he holds a table margarine licence. Margarine is table margarine if it is not cooking margarine and it is cooking margarine if ninety per cent or more by weight of the fat and oil it contains consists of beef or mutton fat. That is the effect of the statutory definitions in s. 2 (1). The authority from whom a licence must be obtained is the Minister of Agriculture and he may at his discretion grant or refuse a licence : s. 22A (2) and (3). If he grants a licence for table margarine it must contain a condition limiting the quantity which during the currency of the licence its holder may manufacture or prepare. Licences are annual and expire on 30th June of each year, though they may be renewed. There is a limit upon the aggregate quantity of table margarine for which licences may be granted in respect of a year. The maximum amounts respectively specified in the various licences granted for a period of twelve months must not in the aggregate exceed 2,500 tons : s. 22A (6) (c) The holder of a licence is entitled to have it renewed at the end of a year unless he has broken its conditions or he has been convicted of an offence under the Act, in which latter event the licence may be cancelled at any time. Thereupon the Minister may grant a new licence to someone else for the quantity covered by the cancelled licence or allocate the quantity among the holders of existing licences by increasing their maximum quantities proportionately : s. 22A (7). The reason for limiting the production of table margarine is not stated by the Act but it is of course evident that it is lest the

(1) (1947) 76 C.L.R. 401.

Australian market for butter should be prejudiced by the competition of margarine.

The defendant company does not hold a licence from the Minister of Agriculture but nevertheless it has manufactured table margarine. For doing so an information was laid against the company in the Court of Petty Sessions but was removed here under s. 40 of the *Judiciary Act* 1903-1950. In answer to the information the company sets up s. 92 of the Constitution and says that s. 22A (1) (b) forms an inseparable part of a statutory attempt to restrict the freedom of inter-State commerce in margarine.

The Act contains a " severability clause " in a familiar form : s. 2 (2). " The effect of such clauses is to reverse the presumption that a statute is to operate as a whole, so that the intention of the legislature is to be taken prima facie to be that the enactment should be divisible and that any parts found constitutionally unobjectionable should be carried into effect independently of those which fail " : *Bank of New South Wales* v. *The Commonwealth* (1).

The foregoing discloses a very simple position which, if there be nothing found in matters as yet unstated which will basally alter its character and operation, involves no invasion or restriction of the freedom of inter-State commerce. It deals entirely with the liberty of persons in New South Wales to bring a given commodity into existence by operations in that State and its validity presumptively stands unaffected by other provisions of the Act. A person may not bring the commodity into existence unless licensed and if licensed he may bring into existence no greater quantity than is mentioned in the licence. The right or liberty which is thus restricted forms no part of the freedom of the individual to engage in activities conducted across State boundaries, that is to say the freedom which s. 92 gives to transportation, movement, transfer, interchange and communication between one State and another and to all other forms and variety of inter-State transaction whether by way of commercial dealing or of personal converse or passage : *Bank of New South Wales* v. *The Commonwealth* (2). No doubt goods are the subject matter of the freedom to sell and deliver or transport across State borders and if, by reason of legislative restrictions, goods of a given description do not come into existence and are not imported into Australia, there is to that extent no subject matter. It is of course obvious that without goods there can be no inter-State or any other trade in goods. In that sense manufacture or production within, or importation into, the Commonwealth is an essential preliminary condition to trade

(1) (1948) 76 C.L.R., at p. 371. (2) (1948) 76 C.L.R., at pp. 381, 382.

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and commerce between the States in merchandise. But that does not make manufacture production or importation trade and commerce among the States. It is no reason for extending the freedom which s. 92 confers upon trade and commerce among the States to something which precedes it and is outside the freedom conferred.

It is a commonplace that s. 92 assumes the existence of an ordered society governed by law in which commodities are bought and sold and the movement of persons and things takes place and that it undertakes in such a society to secure the freedom of no more than inter-State dealing, movement, interchange, passage etc. These assumptions are made by s. 92 but their fulfilment is not the subject of the constitutional guarantee of freedom which s. 92 gives. It would therefore seem to be a very simple case unless the character and operation of the provisions contained in s. 22A as it is stated above are fundamentally changed by what appears from a full examination of the Act in relation to the facts. A full examination of the Act does of course give a more complete understanding of the policy of the legislature and of the detailed provisions by which it is worked out. It supplies a context in which the provisions for licensing and limiting the manufacture of table margarine take their proper place. Nor is it by any means barren of that sort of material which in the past we have seen applied so often forensically, and sometimes even judicially, to distemper provisions of a statute with a colour or complexion that is supposed to show that they do or do not, as the case may be, infringe s. 92, whatever achromatically they may appear plainly to do.

But when the entire statute has been examined, when the tendency of its undeniable aims and their bearing upon validity have been fully canvassed, when the plan of the statute, its order of ideas and the provisions of which it is made up have been turned this way and that, and when every experiment with them has been made, it comes back in the end to the simple position stated. In other words, the complaint of the defendant company remains a complaint against a restriction upon the production of table margarine, not against a restriction on inter-State trade. What begins as a restriction upon the production of the commodity remains a restriction on production, the validity of which rests upon an independent foundation. No latent characteristics are brought forth, no secondary meaning and application are affixed to it, amounting to an impairment of the freedom of inter-State commerce.

The *Dairy Industry Act* 1915-1951 as it now stands is an agglomerate statute consisting of the original Act and the amendments and additions made to it by five subsequent enactments. From

the beginning the artificial definition of "dairy produce" has included margarine as well as milk, cream, butter, cheese and other products of milk: s. 2 (1). The first purpose of the Act was to require the registration of premises if they were to be used in the preparation or manufacture of dairy produce in this extended sense (ss. 4 and 5), and to provide for the inspection of the place (ss. 9 and 10), for the grading and testing of cream and butter (ss. 12 to 16), for regulating the basis of payment by factories for cream (ss. 11 and 25 (1)) and, in the case of margarine, for establishing safeguards against confusion with butter and against poorness of ingredients (ss. 17 to 22). In 1938 provisions were added the purpose of which is to allow of the refusal of registration of premises for a dairy produce factory if, after considering the report of an advisory committee which is bound to take various matters into account, the Minister in the exercise of his discretion is satisfied it is in the best interests of the dairying industry in New South Wales to refuse the application for registration. But this provision does not extend to an applicant who produces cream or milk himself and uses the premises solely to manufacture therefrom butter or cheese: ss. 5A and 5B. The provision, of course, extends to premises for the manufacture of margarine. One provision of the original Act forbids the exportation of margarine from New South Wales unless it is submitted first for examination, a certificate is obtained that the margarine has been prepared in accordance with the Act, and the package is branded as prescribed: s. 21. Export from New South Wales necessarily includes delivery into another State and accordingly there may be some doubt as to the validity to that extent of this section. But it is clearly severable; indeed probably it would be read distributively as a result of the severability clause, if it were considered constitutionally incapable of applying to inter-State trade. The section can have no bearing upon the validity of s. 22A (1) (b).

Section 22A was introduced into the Act in 1940 as one of a catena of provisions dealing with the manufacture of margarine. The provisions constitute ss. 22A, 22B, 22C and 22D. They have no particular place in the plan of the Act as it previously stood. Except that they rely upon the definitions, the sections might just as well have been enacted as a separate statute. They form a coherent set of provisions. The fact that under the Act as it stood premises must be registered if they are to be used for the manufacture of margarine appears to be ignored and s. 22A (1) imposes the separate necessity of a licence to the manufacturer in which the premises are specified. A licence is required not only for the manufacture

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or preparation of table margarine (sub-s. (1) (b)) but also for that of cooking margarine (sub-s. (1) (a)) and manufacture or preparation on any premises other than those specified is forbidden (sub-s. (1) (c)). When a condition is imposed in the licence it is an offence to manufacture or prepare the commodity in contravention of the condition ; and it will be remembered that a condition that must be inserted is one limiting the quantity to be manufactured or prepared (sub-ss. (1) (d) and (6) (a)). What is the difference, if any, between the manufacture and preparation of margarine does not appear from the Act or the case stated. Section 22B relaxes the requirement, which would result from the definitions, that margarine manufactured under a licence for cooking margarine should contain beef or mutton fat in a quantity of not less than ninety per cent by weight of the total quantity of fat and oil contained in such margarine. It provides that the holder of a cooking margarine licence may manufacture in lumps of not less than fourteen pounds margarine which contains beef or mutton fat in a quantity of between seventy-five and ninety per cent by weight of the total quantity of fat and oil contained in such margarine. But the manufacture must be for sale only to prescribed persons and the margarine must be packed and sold in lumps of not less than fourteen pounds and sold only to such persons.

It may be said that the evident object of this provision is to allow of the manufacture of margarine for the fulfilment of certain local requirements which might serve for limited purposes as a substitute for butter but so to restrict the form in which, and the persons to whom, the product may be sold that it will not be marketed in any way that will compete with butter. It seems that no person or classes of persons were ever prescribed for the purposes of this provision, but that perhaps does not weaken whatever argument may be based on the inclusion of the section in the Act. Let it be granted, however, or assumed that the policy or object of the provision is correctly imputed. It may be that it is ineffective in the face of s. 92 to make unlawful the sale of the margarine manufactured under the section in an inter-State transaction to persons not prescribed or in lumps of less than fourteen pounds weight. That is a question that some day might be raised by the holder of a licence for cooking margarine for judicial consideration. If it is ever raised for consideration it will, or at all events ought to be, found to depend rather on the operation with reference to inter-State trade of the restrictions which the section imposes than upon its policy or purpose. But it is difficult to see how the provision or its purpose can bear upon the validity of s. 22A (1) (b). It is in

s. 22c, or not at all, that the defendant company must find the effective materials for giving a new or different colour or complexion to s. 22A and more specifically to sub-s. (1) (b) of that section. Section 22c is an overriding provision enabling the Minister to grant a special permit for the manufacture or preparation of table margarine for export from Australia. He is empowered to do this notwithstanding anything in the Act or in any licence issued under the Act, but he has a full discretion to grant or refuse an application for a permit. The applicant must hold a licence. The special permit remains in force for the period specified therein and while it is in force the holder may manufacture or prepare table margarine for export in accordance with the terms and conditions of the permit. The special permit, which may be cancelled for breach of condition, must contain such conditions as the Minister thinks necessary to ensure that none of the margarine manufactured or prepared thereunder shall be sold or distributed within the Commonwealth of Australia. Breach of condition is an offence (sub-s. (3)).

Now it needs no argument to show that a condition against sale or distribution within the Commonwealth includes selling or distributing from New South Wales into another State. When, therefore, sub-s. (3) of s. 22c makes contravention of a condition an offence it purports to penalize, among other things, the sale from New South Wales into another State of a commodity which it assumes has been brought into existence. To this extent at all events s. 22c may well be considered to infringe upon the freedom of inter-State trade established by s. 92. This may be true too of the tenor of the condition itself and of the sanction for breach thereof constituted by the cancellation of the special permit. It is not difficult to suppose that under the doctrines affecting the severance of invalid from valid statutory provisions which it has been the object of " severability clauses " to exclude and to reverse, the invalidity of part of the operation of the provisions in question, viz. sub-s. (2) (a) and sub-s. (3) in its application thereto, might have been regarded as infecting the whole of s. 22c and a question might have existed as to the presumed dependence thereon of s. 22A itself. But clauses of the description of s. 2 (2) were designed to prevent such a result: see the authorities collected in *Fraser Henleins Pty. Ltd.* v. *Cody* (1) and in *Bank of New South Wales* v. *The Commonwealth* (2). As to such provisions " it can at least be said of them that they establish a presumption in favour of the independence, one from another, of the various provisions of an enactment, to which effect should be given unless some positive

(1) (1945) 70 C.L.R. 100, at p. 127. (2) (1948) 76 C.L.R., at pp. 369, 370.

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indication of interdependence appears from the text, context, content or subject matter of the provisions": *Fraser Henleins Pty. Ltd.* v. *Cody* (1). Even if it were considered that the whole of sub-s. (2) (a) of s. 22C fell because it could not extend to inter-State transactions and it were further considered that sub-s. (1) could not survive the separation of sub-s. (2) (a), no ground exists for discovering in the statute an affirmative intention that s. 22A should have no operation unless s. 22C proved valid and operative. It is to be noted that sub-s. (2) of s. 2 was enacted in the same amending Act as ss. 22A to 22D and it is sufficiently apparent that the purpose was to effect a severance, if need be, between s. 22A (1) and other provisions then introduced.

Plainly to limit the production of margarine was the paramount object of the legislature in enacting ss. 22A to 22D. The motive for this is not avowed in the statute but no one doubts that it was done so that the sale of butter on the home market should be prejudiced as little as may be by the competition of margarine. It would not matter if the legislation did acknowledge expressly that this was the reason for licensing the manufacture of the commodity. It would remain true that the restriction imposed by s. 22A was not upon the freedom of trading in the commodity among the States but upon bringing it into existence. For that reason, too, it would be of no moment if it were shown that there was a preconcert between the States and not a mere emulation when New South Wales enacted the provisions in question in November 1940, Queensland enacted analogous provisions in Act 3 Geo. VI No. 22 in December 1939, Victoria Act No. 4741 in September 1940, South Australia Act No. 35 of 1940 in November 1940, and Western Australia Act No. 36 of 1940 in December 1940.

Section 22C, consistently with the policy of relieving butter from the competition of margarine in Australia, allows of a special concession to a manufacturer who desires to export the product of his industry. But this is an exceptional or "special" provision of a subordinate character. The dominant principle, from the operation of which it provides a special exception, is the restriction of the manufacture of margarine. It is not possible to turn the provisions about and make sub-s. 2 (a) of s. 22C the main provision expressing the dominant principle as a restriction of trade in margarine brought into existence and the limitation of the amount to be manufactured for home consumption which s. 22A (1) imposes as nothing but an ancillary, subordinate and dependent attempt to support the restriction on trade. Such a view of the statute is inconsistent with its form, with its intention and with its operation.

(1) (1945) 70 C.L.R., at p. 127.

Nothing which has been said above implies that under the power conferred by s. 51 (i.) of the Constitution to make laws with respect to trade and commerce with other countries and among the States legislation of the Commonwealth Parliament can never reach or touch production. In the first place, the power is to legislate *with respect to* trade and commerce. The words "with respect to" ought never be neglected in considering the extent of a legislative power conferred by s. 51 or s. 52. For what they require is a relevance to or connection with the subject assigned to the Commonwealth Parliament, a conception very different from those which have been employed in the exposition of s. 92. In the next place, every legislative power carries with it authority to legislate in relation to acts, matters and things the control of which is found necessary to effectuate its main purpose, and thus carries with it power to make laws governing or affecting many matters that are incidental or ancillary to the subject matter. But this principle is entirely foreign to such a provision as s. 92 whether the doctrine be regarded as a constitutional consequence of the common law principle expressed in the maxim *quando lex aliquid alicui concedit conceditur et id sine quo res ipsa valere non potest* or of the direct incorporation into our constitutional law of a principle founded upon implication and formulated by the adoption of the famous words of *Marshall* C.J. in *M'Culloch* v. *Maryland* (1): "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional" (2). The idea that because the freedom of trade, commerce and intercourse among the States is assured by the Constitution, all matters that are incidental or ancillary to such trade, commerce and intercourse are in the same way protected from interference or control is quite fallacious.

In the United States of America the difficulty of saying categorically and without qualification that manufacture or production can never fall within the legislative power has been clearly perceived, although only after a long attempt to apply early dogmatic assertions of a total denial of such a possibility. Perhaps the view now accepted in the Supreme Court of the United States may go too far, but it is expressed in *Mandeville Island Farms Inc.* v. *American Crystal Sugar Co.* (3). Speaking for the majority of the Court *Rutledge* J. says: "The artificial and mechanical separation of 'production' and 'manufacturing' from 'commerce', without

(1) (1819) 4 Wheat. 316 [4 Law. Ed. 579].
(2) (1819) 4 Wheat., at p. 421 [4 Law. Ed., at p. 605].
(3) (1948) 334 U.S. 219 [92 Law. Ed. 1328].

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regard to their economic continuity, the effects of the former two upon the latter, and the varying methods by which the several processes are organized, related and carried on in different industries or indeed within a single industry, no longer suffices to put either production or manufacturing and refining processes beyond reach of Congress' authority " (1).

Whether activities which include production may be the subject of valid legislation under s. 51 (i.) must depend on the nature of the business or trade and upon the character of the legislation. Again nothing that has been said means that by circuitous means or concealed design legislation may impair the freedom of inter-State trade, commerce and intercourse although if the impairment were achieved by overt or direct means it would be invalid. It has been repeatedly said that there is no provision of the Constitution to which the maxim *quando aliquid prohibetur, prohibetur et omne per quod devenitur ad illud* could be more appropriately applied than to the constitutional guarantee given by s. 92. But in applying this doctrine it is necessary first to see steadily what freedom is the subject of impairment, detraction or restriction. If some fact or event or thing which itself forms part of trade, commerce or intercourse or forms an essential attribute of that conception (essential in the sense that without it you cannot bring into being that particular example of trade, commerce or intercourse among the States) is made the subject of the operation of a law which by reference to it or in consequence of it imposes some restriction or burden or liability, it does not matter how circuitously it is done or how deviously or covertly. It will be considered sufficiently direct or immediate in its operation or application to inter-State trade, commerce and intercourse. Provided the prejudice is real or the impediment to inter-State transactions is appreciable, it will infringe upon s. 92 : see *Hospital Provident Fund Pty. Ltd.* v. *State of Victoria* (2). But generally speaking, it will be quite otherwise if the thing with reference to or in consequence of which the law operates or which it restricts or burdens is no part of inter-State trade and commerce and in itself supplies no element or attribute essential to the conception. It will not be enough that it affects something which, because it is a *sine qua non* to the existence of some subject of the freedom which s. 92 guarantees, has a consequential effect on what might otherwise have been done in inter-State trade.

It is said that, because the purpose, motive or object with which the present legislation was passed is or may be that margarine shall

(1) (1948) 334 U.S., at p. 229 [92 Law. Ed., at p. 1336].

(2) (1953) 87 C.L.R. 1.

not be sold to consumers who otherwise might buy butter and because such consumers might buy in inter-State trade or from or through wholesalers or retailers who buy margarine in inter-State trade, it necessarily follows that there is a direct interference with inter-State trade. This involves a confusion between the operation of the law and motives of the legislature. If the State legislature enacts what is prima facie within its power, why should it matter that the legislators advert to a particular consequence and desire it to occur ? Does it matter that but for such advertence or desire the legislation would not be passed ? If not, what difference does it make if the further inference is warranted that it was only in order to achieve the fulfilment of this desire that the statute was passed ? Surely the answer to all three of these successive questions is, no. Nor can it matter whether the purpose or motive is inferred from circumstance or from the statute or, indeed, is stated therein in terms.

Two tendencies have grown manifest of late. One is to press the operation of s. 92 beyond the subject matter of trade, commerce and intercourse among the States so that it denies to the legislatures of this country the power to impose any prohibition, restriction or burden if its consequences could be seen in what was done or not done in the course of inter-State commerce. The other is to seek to extend the freedom which s. 92 guarantees to trade, commerce and intercourse among the States to antecedent or subsequent transactions on the plea that they are incidental, ancillary or conducive to inter-State transactions or necessarily consequential upon them. There is in truth nothing to justify such notions which would go far to exclude legislative power the existence of which has never been doubted. The defendant company's argument in the present case would, for example, appear to mean that there could be no effective prohibition of the importation of goods into Australia if they were merchandise intended to be bought and sold in inter-State trade. A customs tariff could not effectively be used to restrict importation if its purpose and operation were to prevent the dutiable goods going into inter-State trade. Indeed consistently with the argument, if it possessed any foundation, it is not easy to see how the *Bank Notes Tax Act* 1910, which taxed the bank notes issued by trading banks out of existence, could be justified. For it accomplished the purpose of forcing them out of circulation whether in inter-State or intra-State commerce.

It is said that a prohibition or restriction of manufacture may, according to circumstances, be used to interfere with inter-State commerce. This is the kind of general proposition which no one would lightly undertake to deny. Indeed it would be rash to deny

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antecedently that any legislative step that may be imagined could not in some circumstances not hitherto foreseen form part of some device by which the imposition of a restriction upon inter-State commerce might be accomplished. But wide generalities are really meaningless and are neither substitutes nor solvents for concrete cases. And the present is a concrete case. It is one which includes no relevant restriction upon trade, commerce and intercourse among the States.

The answer to both questions in the case stated is, No.

FULLAGAR J. The terms of the relevant legislation are set out in the judgment of the other members of the Court, and it is unnecessary for me to state them again.

I agree that s. 22A of the *Dairy Industry Act* 1915-1951 (N.S.W.) is a wholly valid enactment, to which full effect must be given according to its tenor. It is not, in my opinion, touched or affected in any way by s. 92 of the Constitution.

I do not think that the real question in this case is correctly stated (as it was stated in the interesting argument of the Solicitor-General for Victoria, intervening by leave) by asking whether s. 22A has a " direct ", as distinct from a merely " remote " or " consequential " effect upon inter-State trade or commerce. The word " free " in s. 92 requires, of course, analysis and exposition, but in all the most recent cases the tendency has been to make a direct (and, to my mind, the correct) approach to the particular problem by reference to the very terms of s. 92 itself. I was attempting to state this approach when I said in *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [*No.* 1] (1) :—" The two questions which always arise when s. 92 is invoked are (1) whether the acts for which immunity is claimed possess the character of inter-State trade, commerce, or intercourse, and (2) whether the law from which immunity is claimed possesses, so far as it affects those acts, the character of an interference with freedom " (2). If, of course, the first question is answered in the negative, the second does not require an answer. This approach is very well-illustrated in *The Commonwealth* v. *Bank of New South Wales* (3). In that case both questions were very seriously in controversy, though the first might well have been thought to be much the more difficult question of the two. The first question was ultimately answered by saying that the carrying on of banking business in Australia did possess the character of inter-State commerce. The second question then arose. Since

(1) (1953) 87 C.L.R. 49.
(2) (1953) 87 C.L.R., at pp. 97-98.
(3) (1950) A.C. 237; (1949) 79 C.L.R. 497.

what was authorized by s. 46 of the *Banking Act* 1947 was a prohibition of the carrying on of a banking business, the second question also called for, and received, an affirmative answer, which led inevitably to the overruling of *R.* v. *Vizzard*; *Ex parte Hill* (1) and the cases which followed and applied it. With the *Banking Case* (2) may be contrasted the later case of *Hospital Provident Fund Pty. Ltd.* v. *State of Victoria* (3). There the activity for which the plaintiff company claimed protection was the carrying on of what was in substance an insurance business. This business was held not to possess the character of inter-State commerce, and the second question therefore did not arise. If it had arisen, it would seem that it must have been answered in favour of the company. But, as it was, it did not arise, and it was quite immaterial that, as an incident of its business, the company's officers engaged in communications and journeyings between one State and another. The activity for which the protection of s. 92 was claimed did not consist of these journeyings and communications as such, but of the carrying on of a business, and the carrying on of that business was not inter-State commerce. One other example may be taken as illustrative of the class of case where the real controversy revolves round the second question. In *Fergusson* v. *Stevenson* (4) a company named Booth & Co. (England) Ltd. transported kangaroo skins purchased on its behalf in Brisbane to Sydney, where they were sorted and exported overseas. Clearly the company was engaged in inter-State trade or commerce. But did the *Fauna Protection Act* 1948 (N.S.W.) interfere with the freedom of that trade? The relevant provision of the Act forbade any person to have in his possession in New South Wales, *inter alia*, any kangaroo skin. It did not in terms forbid the importation of kangaroo skins from Queensland into New South Wales, which would, of course, have been an obvious interference with freedom of trade. But the company's inter-State trade could not practically or effectively be carried on without some person in New South Wales having possession of skins, if only for a brief period. It was accordingly held that the law from which immunity was claimed did possess the character of an interference with freedom of trade, and that s. 92 gave immunity.

If the present case is approached in the same way, it seems to me clear enough. The activity for which immunity is claimed is the manufacture of margarine. It is impossible to say that this activity

(1) (1933) 50 C.L.R. 30.
(2) (1950) A.C. 237; (1949) 79 C.L.R. 497.
(3) (1953) 87 C.L.R. 1.
(4) (1951) 84 C.L.R. 421.

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Fullagar J.

possesses the character of inter-State trade or commerce, and that is the end of the case, just as the same consideration was the end of the case in *Graham* v. *Paterson* (1).

In order to bring the present case within the protection of s. 92, it was necessary for the defendant to put forward a conception of inter-State trade and commerce which, as my brethren have observed, has been put forward in several recent cases but has never been accepted. The substance of that view seems to be that operations such as production or manufacture are immune from legislative interference so long as it is possible that the producer or manufacturer may dispose of his product in inter-State trade, or at least if he intends to dispose of it in inter-State trade. I agree with what the Chief Justice and *McTiernan*, *Webb* and *Kitto* JJ. have said on this subject. There is no decision which gives any countenance to such a view. Section 92 protects only activities which themselves possess the character of inter-State trade, commerce, or intercourse.

I have not attempted to form any opinion as to the validity or effect of s. 22C of the Act. If the common law doctrine of severability had been applicable to the case, it might have been necessary to do so. But s. 2 (2), which was introduced by the same Act which introduced ss. 22A, 22B, 22C and 22D, makes it plain, in my opinion, that the validity and operation of s. 22A cannot be affected by any vice which may possibly be some day in a concrete case discovered in s. 22C.

The questions in the case stated should, in my opinion, be answered—(1) No : (2) No.

Question 1 *in the case stated answered—No.*
Question 2*—No.*
The defendant to pay the costs of the case stated.

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

Solicitors for the respondent, *Walter Linton & Bennett.*

Solicitor for the State of Victoria, intervenant, *F. G. Menzies*, Crown Solicitor for Victoria.

Solicitor for the State of South Australia, intervenant, *R. R. St. C. Chamberlain*, Crown Solicitor for South Australia.

Solicitors for margarine manufacturers, observers, *Boyland, McClelland & Co.*

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

J. B.

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