[HIGH COURT OF AUSTRALIA.]

THE STATE OF TASMANIA AND ANOTHER PLAINTIFFS;

AND

THE STATE OF VICTORIA AND ANOTHER DEFENDANTS.

H. C. OF A. 1934-1935.

MELBOURNE, *Oct.* 12, 15, 16, 1934. *March* 6, 1935.

Gavan Duffy C.J., Rich, Starke, Dixon, Evatt and McTiernan JJ.

Constitutional Law—Freedom of trade, commerce and intercourse among the States—State Act authorizing proclamation prohibiting importation into Victoria of any vegetable likely to introduce disease—Proclamation prohibiting importation of Tasmanian potatoes—Validity—The Constitution (63 & 64 *Vict. c.* 12), *secs.* 92, 112—*Vegetation and Vine Diseases Act* 1928 (*Vict.*) (*No.* 3797), *sec.* 4.

High Court—Practice—Court equally divided—Authority of decision in subsequent cases.

Sec. 4 of the *Vegetation and Vine Diseases Act* 1928 (Vict.) empowers the Governor in Council of the State by proclamation to prohibit the importation, introduction or bringing into Victoria of any tree, plant or vegetable which is, in the opinion of the Governor in Council, likely to introduce any disease or insect into Victoria, and at any time to alter or revoke such proclamation. Sub-sec. 3 makes it an offence to bring into Victoria any vegetable contrary to any prohibition contained in any proclamation. The Governor in Council, by a proclamation which recited that in his opinion the introduction of potatoes from Tasmania was likely to introduce disease into Victoria, prohibited the importation, introduction or bringing into Victoria of potatoes from Tasmania. The State of Tasmania and the Attorney-General thereof brought an action in the High Court against the State of Victoria and the Minister for Agriculture of that State for a declaration that the proclamation was invalid. The State of Tasmania did not itself trade in potatoes with Victoria.

Held:—

(1) By *Gavan Duffy* C.J., *Rich*, *Dixon*, *Evatt* and *McTiernan* JJ., that (*a*) the action was properly brought by the Attorney-General of Tasmania; (*b*) the proclamation was invalid: by *Gavan Duffy* C.J., *Rich*, *Dixon*, *Evatt* and *McTiernan* JJ., because it contravened sec. 92 of the Constitution, and, by *Gavan Duffy* C.J., *Evatt* and *McTiernan* JJ., also because it was not authorized by sec. 4 of the *Vegetation and Vine Diseases Act*.

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(2) By *Starke* J., that (*a*) the *Vegetation and Vine Diseases Act* did not contravene sec. 92 of the Constitution, but the proclamation was invalid because it was not authorized by the Act; (*b*) the action was properly brought by the Attorney-General of Tasmania in so far as it alleged a contravention of the Constitution, but not in so far as it alleged that the proclamation was not authorized by sec. 4 of the Act.

Held, further, that the proclamation was not on inspection law within the meaning of sec. 112 of the Constitution.

Per Rich and *Dixon* JJ.: A decision given on an equal division of opinion in the High Court is not a precedent binding on the Court in subsequent cases.

Ex parte Nelson [*No.* 1], (1928) 42 C.L.R. 209, discussed.

DEMURRER.

The State of Tasmania brought an action against the State of Victoria and the Hon. John Allan, Minister for Agriculture for the State of Victoria. The Attorney-General for the State of Tasmania was subsequently added as a plaintiff.

The statement of claim was substantially as follows:—

1. Prior to October 1932 trade in potatoes had been carried on between growers and merchants in the State of Tasmania and merchants in the State of Victoria, whereby potatoes grown in Tasmania were from time to time imported into Victoria for consumption in Victoria.

2. By a proclamation purporting to be made pursuant to the *Vegetation and Vine Diseases Act* 1928 (Vict.) on 31st October 1932 by the Governor in Council of the State of Victoria and published in the Victorian *Government Gazette* on 2nd November 1932 the importation, introduction and bringing into Victoria of potatoes from Tasmania was absolutely prohibited.

3. By reason of the proclamation the growers and merchants in Tasmania and others have been prevented from importing, introducing or bringing any potatoes from Tasmania into Victoria, and the trade in potatoes has ceased, whereby the growers and merchants in Tasmania and the plaintiff suffered injury and damage.

4. The *Vegetation and Vine Diseases Act* and sec. 4 thereof are *ultra vires* the Parliament of Victoria and invalid.

5. Upon its proper interpretation sec. 4 (1) does not authorize the making of the proclamation.

6. The proclamation is unauthorized by law and is invalid.

7. The proclamation is not in respect of an actual menace of the introduction of disease into Victoria and/or is not limited to the protection of the State of Victoria from disease but extends to all potatoes from Tasmania whether diseased or not. Particulars.—(*a*) Such disease was already in Victoria. (*b*) The soil and climatic conditions in Victoria are not suitable for such disease or for its development. (*c*) Such disease was not "likely to be introduced into Victoria if the said potatoes were brought into Victoria." (*d*) The introduction of such disease into Victoria could be amply and fully guarded against by inspection and restriction without absolute prohibition of all importation from Tasmania. (*e*) Such disease (i.) is not harmful to potatoes as such; (ii.) does not affect yield or market value; (iii.) is not contagious; (iv.) is not a danger or menace to potatoes or to the potato industry. (*f*) Potatoes grown or held in Tasmania, if introduced from Tasmania into Victoria, could not or could not reasonably be regarded on account of such disease or at all as a menace or potential source of danger to Victorian potatoes or to the Victorian potato industry, or as likely to introduce such disease into Victoria.

8. The goods the subject matter of the proclamation are goods in commerce and the prohibition of their entry into Victoria is a restriction of inter-State trade and commerce and contrary to sec. 92 of the Constitution.

The plaintiffs claimed:—

A. A declaration—

(i.) that the *Vegetation and Vine Diseases Act* 1928 (No. 3797) of the State of Victoria was *ultra vires* the Parliament of Victoria, and was invalid;

(ii.) alternatively that sec. 4 (1) of the said Act was *ultra vires* the Parliament of Victoria and was invalid;

(iii.) that the said proclamation made by the Governor in Council of the State of Victoria on 31st October 1932 was invalid and of no force and effect.

B. An injunction to restrain the defendants and their servants and agents from enforcing or putting into operation the said Act and/or sec. 4 thereof and/or the said proclamation.

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The defendants demurred to par. 7 of the statement of claim on the ground that par. 7 was irrelevant to and did not support any claim of the plaintiff. The defendants also demurred to the whole of the statement of claim on the grounds (1) that sec. 4 (1) of the *Vegetation and Vine Diseases Act* 1928 was *intra vires* the Parliament of Victoria, and (2) that the proclamation referred to in the statement of claim was authorized by sec. 4 (1). The defendants further said that the proclamation was as follows:— "Whereas by the *Vegetation and Vine Diseases Act* 1928, it is, among other things, provided that the Governor in Council, by proclamation in the *Government Gazette*, may, either absolutely, or subject to any regulations, prohibit the importation, introduction, or bringing into Victoria of any tree, plant, or vegetable which is, in the opinion of the Governor in Council, likely to introduce any disease or insect into Victoria: And whereas in the opinion of the Governor in Council the introduction of potatoes from Tasmania is likely to introduce disease into Victoria; Now therefore I, the Lieutenant-Governor of the State of Victoria, in the Commonwealth of Australia, by and with the advice of the Executive Council of the said State, do by this proclamation absolutely prohibit the importation, introduction or bringing into Victoria of potatoes from Tasmania."

By their defence the defendants admitted that prior to July 1927 trade in potatoes had been carried on between growers and merchants in the State of Tasmania and merchants in the State of Victoria whereby potatoes grown in Tasmania were from time to time imported into Victoria for consumption in Victoria, but save as aforesaid, denied each and every allegation contained in par. 1 of the statement of claim. In substance the defendants admitted par. 2 of the statement of claim but did not admit the allegations in pars. 3 to 8 thereof.

The State of New South Wales was given leave to intervene.

Wilbur Ham K.C. (with him *Tait*), for the plaintiffs. The proclamation absolutely prohibited the introduction of Tasmanian potatoes into Victoria. This was an interference with freedom

of inter-State trade. The proclamation is directly aimed at inter-State trade in potatoes. It does not consider whether the potatoes prohibited are in fact deleterious or not and it was apparently intended that the prohibition should stand for an indefinite future time. The *Vegetation and Vine Diseases Act* requires that the proclamation should have been directed to particular consignments of vegetables which were likely to introduce disease to other vegetables in Victoria. The language of the Act does not permit a general proclamation of the kind here made. A proclamation cannot be based upon a mere dread of something that may happen in the future. The Act does not authorize a total prohibition for all time of trade in the specified commodities.

[DIXON J. referred to *The Vera Cruz* [*No.* 2] (1).]

Ex parte Nelson [*No.* 1] (2) is distinguishable from the present case. There is a broad distinction between keeping things within a State to ascertain whether they are dangerous or not and prohibiting the goods from entering into the State at all. When goods have entered a State they are subject to the local law, and if they are found to be dangerous they may be destroyed under legislation authorizing the destruction of dangerous goods (*W. & A. McArthur Ltd.* v. *Queensland* (3); *Ex parte Nelson* [*No.* 1] (4)). After the establishment of inter-State free trade, the States may establish inspection at the boundaries. There may be an implied right to exclude, but that right is limited to things which are in fact inspected. This does not permit a general prohibition of the commodities of one State by the laws of another State (*R.* v. *Vizzard*; *Ex parte Hill* (5)). There was no reason in fact for making the proclamation, which is aimed at all inter-State trade in a particular commodity for all time. This Act and proclamation are very far removed from quarantine. Either the proclamation is not authorized, or, if it is, then the Act is *ultra vires*. In *Ex parte Nelson* [*No.* 1] (6) the interference with inter-State trade was merely incidental. It cannot be said that the effect upon inter-State trade was merely incidental in the present case. A State cannot legislate with respect to goods

(1) (1884) 9 P.D. 96.
(2) (1928) 42 C.L.R. 209.
(3) (1921) 28 C.L.R. 530, at p. 551.
(4) (1928) 42 C.L.R., at pp. 244, 247, 252, 253.
(5) (1933) 50 C.L.R. 30, at pp. 54, 55.
(6) (1928) 42 C.L.R., at pp. 218, 219.

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which are the subject of inter-State trade before the goods get to the border, or before they get into the State in question. The proclamation is outside the power of the Act because it prohibits the importation of potatoes. The Governor in Council has to be satisfied that the thing itself will introduce disease (*James* v. *Cowan* (1)). *Ex parte Nelson* [*No.* 1] (2) should be reconsidered by the Court. That case was wrongly decided. As it was decided only by a statutory majority, this Court should not now hesitate to reconsider it.

[DIXON J. referred to *Beamish* v. *Beamish* (3).]

The opinion of the House of Lords is binding because of its legislative power. Its opinion can be altered only by legislation. The Court of Appeal is not bound by a previous equal division of opinion. The judgment operates *inter partes* only and not as a precedent. The method provided by the *Judiciary Act* 1903-1927, sec. 23, is merely a method of arriving at a decision *inter partes*.

[EVATT J. referred to *Colonial Sugar Refining Co.* v. *Attorney-General for the Commonwealth* (4).]

There is a distinction between legislating with regard to inter-State commerce and with regard to goods which are found within the territory (*Asbell* v. *Kansas* (5)).

[STARKE J. referred to *Willoughby* on *The Constitution of the United States*, 2nd ed. (1929) vol. II., p. 1013, sec. 602.]

Duncan v. *Queensland* (6) shows that the prohibition has to be limited to something which is in itself dangerous. [Counsel referred to *Ex parte Nelson* [*No.* 1] (7).] The Attorney-General for Tasmania is the proper person to claim a declaration (*Attorney-General for New South Wales* v. *Brewery Employees' Union of New South Wales* (*Union Label Case*) (8) ; *The Commonwealth* v. *Australian Commonwealth Shipping Board* (9)).

Fullagar K.C. and *Herring*, for the State of Victoria. The State of Tasmania has no right or interest in this litigation and is not the

(1) (1932) A.C. 542, at pp. 558, 559 ; 47 C.L.R., at pp. 396, 397.
(2) (1928) 42 C.L.R. 209.
(3) (1861) 9 H.L.C. 274 ; 11 E.R. 735.
(4) (1912) 15 C.L.R. 183.
(5) (1908) 209 U.S. 251, at p. 256.
(6) (1916) 22 C.L.R. 556, at pp. 596, 597.
(7) (1928) 42 C.L.R., at pp. 244, 247, 248, 251, 253.
(8) (1908) 6 C.L.R. 469, at pp. 499, 500.
(9) (1927) 39 C.L.R. 1.

proper plaintiff. No right of the State has been infringed and there is no right of the Crown in the right of the State of Tasmania which has been infringed in any way. No question of territorial integrity is raised. The only matter raised is one of private interest. *Attorney-General for New South Wales* v. *Brewery Employees' Union of New South Wales* (*Union Label Case*) (1) is distinguishable. The Attorney-General was plaintiff by relation and the brewery companies were also plaintiffs. The true function of sec. 92 is to confer immunity on any individuals engaged on inter-State trade (*James* v. *Cowan* (2); *Peanut Board* v. *Rockhampton Harbour Board* (3); *Pennsylvania* v. *West Virginia* (4)). The State never engaged in inter-State trade at all. So far as there was any trade it was in the hands of individual traders. In the *Union Label Case* (5) the State of New South Wales by its Attorney-General claimed to have the exclusive right to the labels in question. The true meaning of sec. 92 is that it gives rights to individuals, who are the proper parties to conduct the litigation.

[DIXON J. referred to *Emperor of Austria* v. *Day & Kossuth* (6).]

That case is distinguishable, as there the rights of the whole community were infringed. *The Commonwealth* v. *Queensland* (7) is analogous to this case. There is only one case in which one State has sued another State, namely, *South Australia* v. *Victoria* (*State Boundaries Case*) (8). This would be a great extension of any previous decisions (*The Commonwealth* v. *New South Wales* (9)). In the last two cases it was put as a question of jurisdiction. The exclusion of potatoes cannot be a wrong to Tasmania. It can be a wrong to certain persons only in Tasmania. To give a right of action to a State there must be an injury to the State as a State. The Commonwealth might sue: sec. 92 does not apply to it and it could sue as custodian of the right of freedom of inter-State trade (*New South Wales* v. *The Commonwealth* (*Wheat Case*) (10); *The Commonwealth and Commonwealth Oil Refineries Ltd.* v. *South Australia* (11); *Attorney-General and Spalding Rural District Council* v. *Garner* (12)). The proclamation is authorized by the

(1) (1908) 6 C.L.R., at pp. 499, 500, 520, 548, 549, 557, 558.
(2) (1932) A.C. 542; 47 C.L.R. 386.
(3) (1933) 48 C.L.R. 266, at p. 287.
(4) (1923) 262 U.S. 553.
(5) (1908) 6 C.L.R. 469.
(6) (1861) 3 DeG. F. & J. 217; 45 E.R. 861.
(7) (1920) 29 C.L.R. 1.
(8) (1911) 12 C.L.R. 667; (1914) 18 C.L.R. 115.
(9) (1923) 32 C.L.R. 200.
(10) (1915) 20 C.L.R. 54.
(11) (1926) 38 C.L.R. 408.
(12) (1907) 2 K.B. 480, at pp. 486, 487.

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Act and the Act is not affected by sec. 92 of the Constitution. Under sec. 4 the period of prohibition is immaterial. The case is governed by *Ex parte Nelson* [*No.* 1] (1), and that case should not be disturbed. *Ex parte Nelson* [*No.* 1] (1) is strongly supported by *James* v. *Cowan* (2). The ultimate purpose of the legislation is the protection of Victorian vegetation and vines against disease, just as the aim of the legislation considered in *Ex parte Nelson* [*No.* 1] (1) was the protection of the flocks and herds in New South Wales, while in *James* v. *Cowan* (3) the ultimate aim of the legislation was interference with trade and commerce. The principle stated in *Ex parte Nelson* [*No.* 1] (1) was considered in *Peanut Board* v. *Rockhampton Harbour Board* (4). Unless the object of the act is trade it would not infringe sec. 92. *Ex parte Nelson* [*No.* 1] (1) was approved in *Peanut Board* v. *Rockhampton Harbour Board* (5); *R.* v. *Vizzard*; *Ex parte Hill* (6). These cases should be followed by this Court (*The Vera Cruz* [*No.* 2] (7); *Sheddon* v. *Goodrich* (8)). It is the decision of the Court which makes a binding precedent (*Hart* v. *Riversdale Mill Co.* (9); *Usher's Wiltshire Brewery Ltd.* v. *Bruce* (10). The dicta there rely on *Beamish* v. *Beamish* (11)).

[DIXON J. referred to *Hobson* v. *Sir W. C. Leng & Co.* (12) and *London Street Tramways Co.* v. *London County Council* (13).]

The position of this Court is more analogous to the position of the House of Lords than to the Court of Appeal. In a large class of case this Court is the final Court of appeal by virtue of sec. 74 of the Constitution, and in any case there is an appeal to the Privy Council by special leave only (*Daily Telegraph Newspaper Co.* v. *McLaughlin* (14)). *Ex parte Nelson* [*No.* 1] (1) is a necessary corollary to *W. & A. McArthur Ltd.* v. *Queensland* (15). It is not possible to reduce sec. 92 to any single formula which will fit all cases. The true character of sec. 92 is not that it is a restriction upon State legislative powers, but that it confers immunity upon

(1) (1928) 42 C.L.R. 209.
(2) (1932) A.C., at pp. 558, 559; 47 C.L.R., at pp. 396, 397.
(3) (1932) A.C. 542; 47 C.L.R. 386.
(4) (1933) 48 C.L.R., at pp. 266, 275, 276, 283-285, 300, 303, 304, 312.
(5) (1933) 48 C.L.R., at p. 312.
(6) (1933) 50 C.L.R., at pp. 91-93, 99.
(7) (1884) 9 P.D., at p. 98.
(8) (1803) 8 Ves. Jun. 481, at p. 497; 32 E.R. 441, at p. 447.
(9) (1928) 1 K.B. 176, at pp. 188, 189.
(10) (1915) A.C. 433, at pp. 444, 469.
(11) (1861) 9 H.L.C. 274; 11 E.R. 735.
(12) (1914) 3 K.B. 1245.
(13) (1898) A.C. 375.
(14) (1904) 1 C.L.R. 479, at p. 480.
(15) (1920) 28 C.L.R. 530.

particular citizens of the community. The only way of adequately excluding a dangerous commodity is by excluding that commodity altogether. Even American cases do not go to the extent to which the plaintiff seeks to go in this case (*Pennsylvania* v. *West Virginia* (1)).

Latham K.C. (with him *Nicholas*), for the State of New South Wales, intervening. Sec. 4 (1) of the *Vegetation and Vine Diseases Act* 1928 is *intra vires* the Parliament of Victoria. There is a distinction between State laws affecting health and disease and other laws relating to inter-State commerce. The terms of the Constitution show that a State Parliament may validly legislate upon subjects affecting health so as to exclude persons, animals and things at the point of entry into the State without infringing sec. 92 of the Constitution. The question to determine is what is the subject matter of the relevant provision as discoverable from its terms. This Victorian Act was innocently conceived in 1896 and, therefore, had no hostile intent to sec. 92 (*James* v. *Cowan* (2) ; *R.* v. *Vizzard* ; *Ex parte Hill* (3)). The test is to look at the subject matter of the Act, which is the prevention of the introduction into Victoria of disease or the spreading of disease in relation to vegetation. Under sec. 51, the power to legislate with respect to trade and commerce with other countries and among the States in sub-sec. (I.) is distinct from the power in sub-sec. (IX.) to legislate with respect to quarantine. Any operation of the quarantine powers must operate as an interference with what may be an inter-State movement of persons or things. If quarantine is limited to overseas quarantine, the result of such limitation would be that there are no quarantine powers in respect of the States at all. Sec. 51 (XVIII.) gives the Commonwealth power to legislate with regard to patents. This power giving one person a monopoly of sale must in some way affect both inter-State and intra-State sales. Prima facie the powers conferred on the Federal Parliament are paramount though concurrent with the States and not exclusive. The fact that

(1) (1923) 262 U.S. 553. (2) (1932) A.C. 542 ; 47 C.L.R. 386.
(3) (1933) 50 C.L.R. 30.

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quarantine appears in sec. 51 and not in sec. 52 starts with the view that it is concurrent and not exclusive. Sec. 107 saves the power of the State Parliaments. Secs. 52, 69 and 90 include the only exclusive powers of the Commonwealth. The Victorian Act is, in effect, an inspection law. Sec. 112 provides for the continuance of the inspection laws of a State. The States have concurrent power with the Commonwealth to legislate upon inter-State or foreign trade and commerce until the Commonwealth itself legislates. The effect of sec. 112 is to allow the State to impose charges on imports but the State is not to use the power to make a profit. The Constitution has endeavoured to control the police powers which might interfere with freedom of inter-State trade. *Ex parte Nelson* [*No.* 1] (1) ought not to be overruled. The present case can be decided without reconsidering any other decisions.

Wilbur Ham K.C., in reply. The plaintiffs are competent to litigate the question raised in the action (*Attorney-General for New South Wales* v. *Brewery Employees' Union of New South Wales* (*Union Label Case*) (2)). The present proclamation is aimed at Tasmania and at Tasmania alone. It injuriously affects a large proportion of the inhabitants, and the Attorney-General of that State can complain (*The Commonwealth* v. *Queensland* (3) ; *Emperor of Austria* v. *Day & Kossuth* (4)). If the provision giving the Governor in Council power to prohibit is bad, then the whole Act is void and is not severable (*Acts Interpretation Act* 1904-1930, sec. 2). Although the States are not excluded from exercising quarantine powers, that can only be effected after inspection and this is not an inspection Act.

Herring, by leave, referred to *Turner* v. *Sykes* (5) on the proper construction of the proclamation.

Cur. adv. vult.

(1) (1928) 42 C.L.R. 209.
(2) (1908) 6 C.L.R., at pp. 551, 552, 553, 557.
(3) (1920) 29 C.L.R., at pp. 11, 12.
(4) (1861) 3 DeG. F. & J., at pp. 233, 250, 251 ; 45 E.R., at pp. 868, 874, 875.
(5) (1903) 29 V.L.R. 18 ; 24 A.L.T. 235.

The following written judgments were delivered :—

GAVAN DUFFY C.J., EVATT AND MCTIERNAN JJ. The Attorney-General of the State of Tasmania and the State of Tasmania as plaintiffs are claiming a declaration against the State of Victoria that a proclamation of 31st October 1932 purporting to be made pursuant to the *Vegetation and Vine Diseases Act* 1928 is *ultra vires* the said Act ; and also that, so far as such proclamation is *intra vires* the Act, the latter is *ultra vires* the Parliament of Victoria by reason of sec. 92 of the Commonwealth Constitution. To the whole of the statement of claim the defendants have demurred.

The relevant section of the Act of 1928 is sec. 4 (1), which provides that the Governor in Council " may either absolutely or subject to any regulations prohibit the importation . . . into Victoria . . . of any tree plant or vegetable which is in the opinion of the Governor in Council likely to introduce any disease or insect into Victoria."

The proclamation of 31st October 1932, after reciting the above section of the Act, purports to " absolutely prohibit the importation . . . into Victoria . . . of potatoes from Tasmania."

It is clear that the proclamation proceeds upon the assumption that " potatoes *from Tasmania* " may be described as a plant or vegetable within the meaning of sec. 4 (1), in other words, that the prohibition authorized may lawfully be directed not only against a plant or vegetable as such but against such plant or vegetable classified by reference to its last place of export. In our opinion there is no warrant for this assumption. Sec. 4 (1) authorizes the Governor in Council to exclude from Victoria all potatoes or even particular consignments of potatoes but there is no authority to exclude potatoes which are not otherwise described than as being " from Tasmania."

In order to justify a proclamation, the Governor in Council must be of opinion that the potatoes are likely to introduce some specific disease and the proclamation must specify the disease. Here no specific disease is mentioned, and not the potatoes but the importation is declared likely to introduce disease (see sec. 3 of the statute).

The above reasoning would be sufficient to show that the proclamation travels outside the boundaries fixed by the statute. But the

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original jurisdiction of this Court is invoked because the plaintiffs make a broader attack upon the proclamation and contend that, so far as it is authorized by the terms of sec. 4 (1), the latter sub-section is itself invalid because inconsistent with sec. 92 of the Commonwealth Constitution.

It was contended on behalf of the defendants that neither the plaintiff State nor the plaintiff Attorney-General could successfully obtain relief upon such a footing inasmuch as the defendants do not, by enforcing the proclamation within Victoria, "invade" or "usurp" any of the territorial powers of the State of Tasmania. In our opinion such an objection should not prevail. The enforcement of the Constitution does not operate only negatively so as to prevent or protect intrusions upon the constitutional authority of the States and the Commonwealth. In certain respects, it confers new and important rights. So far as sec. 92 is concerned, we think that the Attorney-General of a State is entitled to obtain appropriate relief before this Court exercising its original jurisdiction whenever another State of the Commonwealth, acting through its legislative or executive organs, prevents or endeavours to prevent the citizens of the former State from marketing their goods within the territory of the latter.

We are also of opinion that, in the present case, the plaintiffs have made out their case under sec. 92 of the Constitution. The effect of the proclamation is nothing less than to terminate for an indefinite period that species of trade among the States which consists in the marketing by Tasmanians of their potatoes within the State of Victoria. Further, such marketing is absolutely prohibited, however free from disease particular consignments or all consignments of potatoes may be and however the marketing operations are conducted. The sole justification for this absolute prohibition is the opinion of the Executive Council that "potatoes from Tasmania" are likely to introduce a disease. In the present case it is neither necessary nor desirable to mark out the precise degree to which a State may lawfully protect its citizens against the introduction of disease, but, certainly, the relation between the introduction of potatoes from Tasmania into the State of Victoria and the spread of any disease

in the latter is, on the face of the Act and the proclamation, far too remote and attenuated to warrant the absolute prohibition imposed.

Chief reliance is placed by the defendants upon three matters; first, the reasoning of the Privy Council in *James* v. *Cowan* (1); second, the decision of this Court in *Ex parte Nelson* [*No.* 1] (2); and, third, the recognition in sec. 112 of the Constitution of the validity of " the inspection laws of the State."

(1) Lord *Atkin's* observations in *James* v. *Cowan* (3) are expressed as dealing with " the power of acquisition " of goods within a State rather than the power of prohibiting their entry into the State. In the case of goods within a State, including, no doubt, goods which have been introduced, the power of acquisition may be used by the State as a protective measure " against famine or disease and the like " or it may be used in order " to place restrictions on inter-State commerce." In the latter case sec. 92 will be infringed, in the former case, it will not. It is clear that these observations do not warrant the inference that the Privy Council intended to declare that a State Parliament was empowered to prohibit the importation of all goods from other States of the Commonwealth merely upon the ground that the Executive Government of the former State suspected that such goods or some of them might spread disease.

(2) We consider that the decision in *Ex parte Nelson* [*No.* 1] (2) is distinguishable from the present case. Although the terms of the *Stock Act* of New South Wales might have warranted more drastic action, the actual proclamation which was there held to be offended against, operated to forbid the introduction into New South Wales of cattle from a part of Queensland " unless compliance were made with certain stated conditions as to dipping the cattle, obtaining permits to travel and certificates showing full descriptions and brands from Queensland inspectors of stock, sealing of trucks, &c." (4). In other words, the State merely prescribed a method by which the particular trade between Queensland and New South Wales should be carried on. It refrained from imposing an absolute prohibition. Further the Executive Government's discretion was more limited than in the case of the present Victorian Act because, under the New

(1) (1932) A.C., at pp. 558, 559; 47 C.L.R., at pp. 396, 397.
(2) (1928) 42 C.L.R. 209.
(3) (1932) A.C. 542; 47 C.L.R. 386.
(4) (1928) 42 C.L.R., at p. 211.

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South Wales Act, there could be neither prohibition nor regulation unless there was " reason to believe " that a disease in stock existed in the State of origin.

(3) We consider that the enactment embodied in the proclamation attacked in this case cannot be described as an " inspection law." Indeed, as particular (*d*) of par. 7 of the statement of claim states, one of the grievances of the present plaintiffs is the absence of any inspection of Tasmanian potatoes, it being admitted for the purposes of the demurrer that the introduction of disease " could be amply and fully guarded against by such inspection without absolute prohibition." It is quite clear that, as no provision whatever is made for the inspection of the potatoes either in Tasmania or in Victoria, the absolute prohibition of their importation is, in no sense, an inspection law.

We are of opinion that the demurrer of the defendants should be overruled.

RICH J. The State of Tasmania and its Attorney-General complain of the proclamation dated 31st October 1932 made by the Governor in Council of the State of Victoria under the provisions of the *Vegetation and Vine Diseases Act* 1928 prohibiting the importation, introduction or bringing into Victoria of potatoes from Tasmania. The Act, which reproduces provisions before the establishment of the Commonwealth, empowers the Governor in Council by proclamation published in the *Government Gazette* either absolutely or subject to any regulations to prohibit the importation, introduction or bringing into Victoria of any tree, plant or vegetable likely to introduce any disease or insect into Victoria. The proclamation recites, in terms which deviate from the Act that, in the opinion of the Governor in Council, the introduction of potatoes from Tasmania is likely to introduce disease into Victoria. It proceeds, therefore, absolutely to prohibit the importation, introduction or bringing into Victoria of potatoes from Tasmania. The action is brought by the Crown in right of Tasmania and its Attorney-General on the ground that by this proclamation the State of Victoria is denying the citizens of Tasmania a right which they enjoy under sec. 92 of the Constitution to the free conduct with Victoria of trade and commerce in potatoes.

It is further contended that the proclamation does not fulfil the requirements of the State Act, and, apart from sec. 92, is not a valid exercise of the power which the State law purports to give. The State of Victoria demurs to the statement of claim which, besides alleging the bare facts I have stated, contains allegations, supported by particulars which include subordinate allegations of fact, that the proclamation is not in respect of an actual menace of the introduction of disease into Victoria and is not limited to the protection of the State of Victoria from disease but extends to all potatoes from Tasmania whether diseased or not. The first ground logically of demurrer is that the plaintiffs, the State of Tasmania and the Attorney-General, have no *locus standi* to sue for a declaration of right or other relief against the operation of the proclamation. In my opinion this contention is ill-founded. Sec. 92 of the Constitution operates to forbid a State to exercise the powers of government so as to prevent or restrain trade with another or other States. Inter-State trade is the consequence of the exercise of commercial freedom by the people of one State with the people of another. The right to conduct such a trade is a concern of the public. The public of Tasmania enjoy as of a common right the protection secured by sec. 92 of the Constitution against impediments in trading with Victoria. In the assertion of that common right the Crown in right of Tasmania proceeding through its Attorney-General properly represents them. In a matter of public right the Attorney-General sues on behalf of the public. There is no reason why his right to do so should be confined to matters of exclusively domestic concern. On the contrary there is every reason in a Federal system that this principle should be applied to allow him to maintain proceedings to vindicate the rights conferred upon his public by a provision of the Constitution. Other considerations may well apply where no constitutional question is involved and the disability or disadvantage to its citizens of which a State complains is said to involve an excess of power conferred only by State law. The second argument relied upon by the plaintiff is of this character. The question need not be pursued, because, in my opinion, the proclamation does constitute a violation of sec. 92. I have stated on more than one occasion

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what, in my opinion, is the test of infringement upon sec. 92 (*James* v. *Cowan* (1); *Peanut Board Case* (2); *Willard* v. *Rawson* (3); *R.* v. *Vizzard*; *Ex parte Hill* (4)). I again repeat it: "What sec. 92 forbids is government action (State action) in respect of trade, commerce, and intercourse when it operates to restrict, regulate, fetter or control it, and to do this immediately and directly as distinct from giving rise to some consequential impediment" (4). No doubt it must be often difficult to decide whether the adverse effect upon inter-State commerce which a State law may produce is consequential or amounts to an immediate and direct restriction or control. Indeed this has been made very evident by the differences of opinion in, as well as by the inherent difficulties of, such cases as those I have cited. But in the present case I cannot feel that there is any difficulty in the application of the test to which I adhere. The State law challenged is the result of the proclamation and the Act. The very words of the proclamation prohibit importation. They express a total prohibition of inter-State trade in Tasmanian potatoes. They have no other operation than to penalize inter-State commerce in a whole commodity. They operate on nothing else but the act constituting importation. Nothing could be more direct or immediate in its operation. It may be perfectly true that in so dealing with inter-State commerce the State was actuated by no other consideration than the likelihood of the introduction of potato disease into Victoria. But this amounts to no more than the motive of the legislation. The legislation does not regulate acts and conduct of those who deal in Victoria with potatoes and prescribe how potatoes are to be treated. If it did so, then, although it produced some effect on the manner in which inter-State trade was conducted, the case might be like *Willard* v. *Rawson* (5) in which the Act regulated motor traffic within Victoria but in doing so required a licence and imposed a fee which was said to amount to a burden that included inter-State transportation in its incidence, or like *R.* v. *Vizzard*; *Ex parte Hill* (6) in which the statute regulated transportation throughout New South Wales under what I described as "a scheme which allows complete freedom to go or to send from

(1) (1930) 43 C.L.R. 386, at p. 425.
(2) (1933) 48 C.L.R., at pp. 274, 275.
(3) (1933) 48 C.L.R., at p. 322.
(4) (1934) 50 C.L.R., at p. 49.
(5) (1933) 48 C.L.R. 316.
(6) (1933) 50 C.L.R. 30.

one place to another but in the process of co-ordinating the means and of rationalizing the facilities, denies a completely unregulated choice of means " (1). The State law is not concerned at all with operations conducted within Victoria in relation to potatoes. It does not deal with acts or conduct irrespective of their inter-State character. Discrimination is not absent. The law hits directly at the act of inter-State importation. It operates at the border upon the act of entering and takes the origin of the goods of another State as its criterion and it does nothing else. There is, in my opinion, no room for an argument that its effect upon inter-State commerce is consequential. To be consequential a thing must be a consequence of something else, but there is nothing in this proclamation except the consequence it prescribes to inter-State commerce. Whether the decision of this Court in *Ex parte Nelson* [*No.* 1] (2) is consistent with this view is a matter which I do not feel called upon to consider. It is a matter which depends in the main on the character ascribed to the provisions of the New South Wales *Stock Act*. The decision was given upon an equal division of opinion in the Court and is not a precedent which according to the rule adopted by the Court of Appeal in England is binding upon the Court in subsequent cases.

In my opinion the demurrer should be overruled.

STARKE J. The statement of claim in this action seeks a declaration that the *Vegetation and Vine Diseases Act* 1928 of Victoria (No. 3797), or, alternatively, sec. 4 (1) of that Act, is invalid; that a proclamation of 31st October 1932 purporting to have been made under the Act, &c., prohibiting the importation, introduction or bringing into Victoria of potatoes from Tasmania, is invalid; and an injunction restraining the enforcement of the Act and proclamation. The defendants have demurred to the statement of claim. The Act, by sec. 4 (1), provides: " The Governor in Council by proclamation in the *Government Gazette* may either absolutely or subject to any regulations prohibit the importation introduction or bringing into Victoria or any portion of Victoria specified in such proclamation of any tree plant or vegetable which is in the opinion

(1) (1933) 50 C.L.R. at p. 51.

(2) (1928) 42 C.L.R. 209.

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of the Governor in Council likely to introduce any disease or insect into Victoria or any portion of Victoria." A disease means (see sec. 3) any disease affecting trees, plants or vegetables and which the Governor in Council from time to time by proclamation in the *Government Gazette* declares to be a disease within the meaning of the Act, and whether or not caused by or consisting of the presence of insects or fungus. An insect means (sec. 3) any insect whatever which the Governor in Council from time to time by proclamation in the *Government Gazette* declares to be an insect within the meaning of the Act, and includes any such insect in whatever stage of existence the same may be.

The proclamation of 31st October 1932 recites the provision of sec. 4 (1) above set forth, and that in the opinion of the Governor in Council the introduction of potatoes from Tasmania is likely to introduce disease into Victoria, and then absolutely prohibits the importation, introduction or bringing into Victoria of potatoes from Tasmania. Neither the proclamation itself nor the pleadings refer to any specific disease or insect proclaimed by the Governor in Council. But we were informed by the learned counsel who appeared for the State of Victoria that such proclamations do exist. The principal proclamation of diseases is, I think, to be found in the *Government Gazette* for 1916, p. 4316, and it seems to be kept on foot by the provisions of the *Acts Enumeration and Revision Act* 1928, sec. 2.

Several matters fall for determination on the demurrer. But on the threshold is the question whether the action is competent at the suit of the plaintiffs. " The first condition of any litigation in a Court of justice is that there should be a competent plaintiff, i.e., a person who has a direct material interest in the determination of the question sought to be decided " (*Union Label Case* (1)). The State of Tasmania and the Attorney-General of that State assert the invalidity of the *Vegetation and Vine Diseases Act* on the ground that it contravenes the provisions of sec. 92 of the Constitution: " trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free." The State of Tasmania does not itself trade in potatoes with

(1) (1908) 6 C.L.R., at p. 491.

Victoria, but prior to the month of October 1932 trade in potatoes had been carried on between growers and merchants in the State of Tasmania and merchants in the State of Victoria, whereby potatoes grown in Tasmania were from time to time imported into Victoria for consumption in Victoria. The State of Tasmania has, in my opinion, an interest, apart from that of the individuals affected by the *Vegetation and Vine Diseases Act*. Its complaint is that the Victorian Act impinges upon the relations of the States and their people established by the Constitution and to the detriment of the State of Tasmania and its people as a whole. Such an interest is "immediate and recognized by law" (*Union Label Case* (1); *Pennsylvania* v. *West Virginia* (2)). The question whether the *Vegetation and Vine Diseases Act* 1928 contravenes sec. 92 of the Constitution is therefore competently raised at the suit of the plaintiffs.

But whether an Act does contravene the section depends upon its terms, its object, and its effect; the Act, as I said in the *Peanut Board Case* (3), must be scrutinized in its entirety and its real object, true character, and real effect gathered from its terms. This appears to me much the same thing as saying that in whatever language a statute may be framed, its object and effect are determined by its natural and reasonable operation. "If," as the Judicial Committee observed in *James* v. *Cowan* (4), "the real object of arming the Minister with . . . power . . . is to enable him to place restrictions on inter-State commerce as opposed to a real object of taking preventive measures against famine or disease and the like, the legislation is as invalid as if the Legislature itself had imposed the commercial restrictions." It is one thing, however, for a State to prohibit, regulate, or burden inter-State trade, and it is quite another for it to exclude from its limits persons, animals or plants actually diseased or that by reason of their condition are likely to introduce disease into the State. It is not easy to say what merely affects or influences inter-State commerce, and what regulates, controls or burdens it. The States have power under their Constitutions to prevent persons, animals or plants suffering from infectious

(1) (1908) 6 C.L.R. 469.
(2) (1893) 262 U.S. 592, at pp. 692, 693.
(3) (1923) 48 C.L.R., at p. 283.
(4) (1932) A.C., at p. 558; 47 C.L.R., at p. 396.

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and contagious diseases from entering their territories, unless sec. 92 of the Constitution inhibits the exercise of that power. The Act must of course have a real and substantial relation to the avowed object, and so must the means devised for attaining it. It is for the Courts to determine this question, and also whether the Act by its natural and reasonable operation impairs or contravenes the rights secured by the Constitution. But, in my opinion, the exclusion from a State of diseased persons, animals or plants is for the purpose of protecting the State and its people. It is not, in any legitimate sense of the term, an interference with the freedom of inter-State trade or a violation of any right secured or protected by the Constitution. *Nelson's Case* (1) was, I think, rightly decided, though there are a few words in the judgment of the majority of the Justices in that case which, in my opinion, are open to criticism. It is not for the Courts to consider whether the motive or policy of an Act is to aid or promote trade. The question is whether it operates to interfere with the freedom of inter-State trade, commerce and intercourse.

It was contended during the argument that sec. 112 of the Constitution supports the view I have taken. It certainly recognizes the rights of the States to pass inspection laws, and to make them effective. But inspection laws cannot be made a pretext for interference with the freedom of inter-State trade, commerce and intercourse. That would annihilate the provisions of sec. 92. And, in any case, the *Vegetation and Vine Diseases Act* of 1928 is not an inspection law.

Turning now to that Act, the object of Part I., and particularly of sec. 4 (1) of that Part, is the exclusion from Victoria of trees, plants and vegetables likely to introduce diseases and noxious insects into Victoria. Its primary and only purpose is the exclusion of trees, plants and vegetables likely to affect vegetation in Victoria. It has nothing to do with trade or transport as such. The means devised for attaining the object of the Act is the authority given to the Governor in Council to issue proclamations prohibiting the introduction into Victoria of any tree, plant or vegetable which in his opinion is likely to introduce disease or noxious insects into

(1) (1928) 42 C.L.R. 209.

Victoria. Such an authority has a real and substantial relation to the object of the Act. In my opinion, an Act in these terms, and having the object and employing the means mentioned, does not, for the reasons already set out, contravene the provisions of sec. 92. And this, I think, is the only conclusion consistent with the decision of this Court in *Nelson's Case* (1) and *Willard* v. *Rawson* (2), and with certain of the observations of the Judicial Committee in *James* v. *Cowan* (3). Any other view would, I think, endanger the States. And if sec. 92 is applicable to the legislation of the Commonwealth as well as to that of the States, as some of the Justices of this Court hold, the danger to the States is even more apparent. (Cf. *R.* v. *Vizzard*; *Ex parte Hill* (4)). It is rather a futile answer to say that the States can deal with diseased persons and things within their own territories: the harm may have been done before the States discover the disease or can act. If the Constitution be explicit, the Constitution must prevail. But unless it be so explicit, the Courts may well regard the consequences of a construction which denies the States power to protect themselves and their people from the introduction of disease into their territories. It was said, however, that an Act in these terms might be abused. But the possibility of abuse cannot affect the validity of the Act. And an allegation that an Act is in fact abused is referable to the validity of the proclamation purporting to have been made under it, and not to the validity of the Act itself.

There remains for consideration the validity of the proclamation of 31st October 1932 purporting to have been made under the Act in question here. In *James* v. *South Australia* (5), it was said by this Court that sec. 92 is an inhibition addressed to the Parliaments of the States preventing them from legislating so as to interfere with the freedom prescribed by that section. If an Act, however, enables a Minister or other authority to place restrictions upon inter-State trade, "the legislation is as invalid as if the legislature itself had imposed the commercial restrictions" (*James* v. *Cowan* (6)). An Act may be so framed

(1) (1928) 42 C.L.R. 209.
(2) (1933) 48 C.L.R. 316.
(3) (1932) A.C. 542; 47 C.L.R. 386.
(4) (1933) 50 C.L.R. 30.
(5) (1927) 40 C.L.R., at p. 41.
(6) (1932) A.C., at p. 558; 47 C.L.R., at p. 396.

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that such a purpose is apparent from a consideration of its terms and its operation. But if an Act does not contravene the provisions of sec. 92, then the validity of proclamations or acts purporting to have been made or done pursuant to its terms depends upon the authority conferred by the Act. The question in such a case is the proper construction of the power, and the inhibition contained in sec. 92 is irrelevant. The *Vegetation and Vine Diseases Act* 1928 does not, as it appears to me, contravene sec. 92. But it is contended that the proclamation exceeds the powers granted to the Governor in Council by the Act. Under the Act, a disease or insect is such as has been proclaimed (sec. 3). But the proclamation does not refer to any disease or insect that has been proclaimed. It recites that the introduction of potatoes from Tasmania into Victoria is, in the opinion of the Governor in Council, likely to introduce disease into Victoria, but it does not specify the disease, or limit it to any proclaimed disease. Such a proclamation is not, I think, contemplated or warranted by the powers conferred upon the Governor in Council by the Act.

But is the action, so far as it claims a declaration that the proclamation is invalid, competent at the suit of the State of Tasmania and its Attorney-General? In my opinion the State cannot, for this purpose, rely upon the contravention of the constitutional provision contained in sec. 92, or any other constitutional provision. Apart from the provisions of sec. 92, or some other constitutional provisions, the right of one State to attack the legislation or the executive acts of another State cannot be conceded. The State of Tasmania does not itself trade in potatoes. It alleges no facts that suggest any interference with its trade, or any proprietary or other right or interest. It has, consequently, no proper title to institute the suit claiming a declaration that the proclamation is invalid. It does not follow that the growers and merchants of Tasmania whose commodities are affected by the proclamation would not be entitled to maintain an action for trespass, or a suit seeking a declaration of the invalidity of the proclamation if these goods were seized. But I cannot accede to the view that the State itself has any such right.

The result, in my judgment, is that the demurrer should be allowed.

DIXON J. The chief question raised for our decision is whether the absolute prohibition which has been laid by the State of Victoria upon the importation into Victoria of potatoes from Tasmania infringes upon sec. 92 of the Constitution, which declares that trade, commerce, and intercourse among the States whether by internal carriage or ocean navigation shall be absolutely free. The prohibition is imposed under sec. 4 of the Victorian *Vegetation and Vine Diseases Act* 1928, which empowers the Governor in Council of the State by proclamation to prohibit the importation, introduction or bringing into Victoria of any tree, plant or vegetable which is, in the opinion of the Governor in Council, likely to introduce any disease or insect into Victoria, and at any time to alter or revoke such proclamation. By a proclamation made two years ago, which remains unrevoked, the Governor in Council, after reciting that in his opinion the introduction of potatoes from Tasmania was likely to introduce disease into Victoria, prohibited the importation, introduction or bringing into Victoria of potatoes from Tasmania. It is declared an offence to bring into Victoria any vegetable contrary to any prohibition contained in any proclamation (sec. 4 (3)). The entry of potatoes from Tasmania is thus forbidden by statutory enactment and the entire trade between Tasmania and Victoria in Tasmanian potatoes is suppressed by State law.

I should have thought that there was nothing further to be said. The Constitution says that trade between Tasmania and Victoria shall be free and the State of Victoria says that a commodity produced in Tasmania shall not come in. If the words of sec. 92 have any meaning, they affirm a proposition which the Victorian proclamation explicitly denies. But, in *Ex parte Nelson* [*No.* 1] (1), the validity of the New South Wales *Stock Act* 1901, authorizing the conditional exclusion from that State of cattle seeking entry from parts of Queensland proclaimed as infected with disease, was upheld by the decision of *Knox* C.J., *Gavan Duffy* and *Starke* JJ. against the opinion of *Isaacs*, *Higgins* and *Powers* JJ. It is needless to enter into the precise provisions of that statute which, however, were not absolute and were much less drastic than those of the Victorian *Vegetation and Vine Diseases Act*. What must be considered is the

(1) (1928) 42 C.L.R. 209.

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reasoning of the judgment which prevailed. Their Honors say (1):— "In a measure it must be conceded that the *Stock Act* of New South Wales does regulate the free flow of inter-State trade and commerce in stock. If there is reason to believe that any infectious or contagious disease in stock exists, the stock may be stopped at the borders of New South Wales, and if it enters it may in some cases be destroyed. The seeming conflict may be resolved, in our opinion, by considering the true nature and character of the legislation in the particular instance under discussion. The grounds and design of the legislation, and the primary matter dealt with, its object and scope, must always be determined in order to ascertain the class of subject to which it really belongs; and any merely incidental effect it may have over other matters does not alter the character of the law (see *Lefroy, Canada's Federal System*, pp. 210 *et seq.*, summarizing the effect of *Russell* v. *The Queen* (2) and *Attorney-General for Ontario* v. *Reciprocal Insurers* (3)). The *Stock Act of New South Wales* is not in itself a regulation of inter-State commerce, though it controls in some degree the conduct and liability of those engaged in the commerce (cf. *Judson* on *Inter-State Commerce*, 2nd ed., sec. 33, p. 50). In truth, the object and scope of the provisions are to protect the large flocks and herds of New South Wales against contagious and infectious diseases, such as tick and Texas fever: looked at in their true light, they are aids to and not restrictions upon the freedom of inter-State commerce. They are a lawful exercise of the constitutional power of the State."

I find myself unable to regard this mode of reasoning as relevant to sec. 92. It assumes that, because the legislation relates to disease in cattle, it cannot relate to trade in cattle. It appears to me quite plain that the statute stopped inter-State trade in cattle as a measure of precaution against the spread of disease. When a State by legislation forbids importation from another State of an ordinary commodity, it is difficult to understand what are the further considerations which must be inquired into under the description "grounds and design of the legislation, the primary matter dealt with, its object and scope" (4). If these words mean no more than

(1) (1928) 42 C.L.R., at pp. 218, 219.
(2) (1882) 7 App. Cas., 829, at pp. 838-840.
(3) (1924) A.C. 328, at p. 337.
(4) (1928) 42 C.L.R., at p. 218.

that it is always necessary to see what the law does to inter-State trade, this must at once be conceded as a truism. But the answer is that what the law does to inter-State trade is to prohibit importation of a commodity from another State. If the words mean that it is always necessary to ascertain why it does it, the answer is that the terms of sec. 92 admit of no excuses or justifications for abrogating the freedom of trade in a commodity. The purpose of examining the grounds and design of the legislation, the primary matter dealt with, its object and scope is described in their Honors' judgment as "in order to ascertain the class of subject to which it really belongs" (1). But sec. 92 is not concerned with a classification of subjects of legislative power. The cases cited by their Honors relate to the entirely different problem of reconciling the overlapping classification of powers contained in secs. 91 and 92 of the *British North America Act*. The legislative power of the States is not defined according to subject matter. The old undefined mass of plenary power belonging to the Parliament of the Colony which became a State is, by sec. 107, continued, unless it is by the Constitution vested in the Parliament of the Commonwealth, or withdrawn from the Parliament of the State. Sec. 92 withdraws from the Parliament of the State any power to detract from the absolute freedom of trade, commerce and intercourse between the States. Whatever purpose may be disclosed by State legislation, to whatever head it might be referred in a classification of subject matter, it may not restrict this freedom. Whether it does restrict it must depend upon the character of the acts or forbearances which it forbids, the incidence of the burdens it imposes and the criteria it prescribes for the legal duties it creates. What possible doubt can there be that, when it forbids the introduction into the State of a commodity produced in another State, it does restrict freedom of trade between the States? To rely upon the passage in the judgment delivered by Lord *Atkin* in *James* v. *Cowan* (2), in which he refers to the object of the legislation and of the Minister, appears to me to convert grounds for invalidating what, considered alone, would or might be lawful, into grounds for validating what, *ex facie*, is *ultra vires*. His Lordship referred to a power to acquire compulsorily dried fruit,

(1) (1928) 42 C.L.R., at p. 218.

(2) (1932) A.C., at pp. 558, 559.

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a power which of its own nature involved no necessary derogation from the legal freedom of trade. The power was conferred subject to sec. 92. But when the Minister, in whom the power was vested, exercised it, he did so with the object and effect of controlling the trader's freedom to sell into another State. His Lordship said: —"If the real object of arming the Minister with the power of acquisition is to enable him to place restrictions on inter-State commerce, as opposed to a real object of taking preventive measures against famine or disease and the like, the legislation is as invalid as if the Legislature itself had imposed the commercial restrictions. The Constitution is not to be mocked by substituting executive for legislative interference with freedom. But, in the present case, the Courts are not faced with the problem of construing an Act of the Legislature which contains no reference to sec. 92. In this case the powers given to the Minister are expressly conditioned as subject to the section. Sec. 28 appears to mean that the Minister may acquire compulsorily so that he does not interfere with the absolute freedom of trade among the States and acquires for the purposes of the Act. Thus the only question in this case appears to be whether the Minister did exercise his powers so as to restrict the absolute freedom of inter-State trade. It may be conceded that, even with powers granted in this form, if the Minister exercised them for a primary object which was not directed to trade or commerce, but to such matters as defence against the enemy, prevention of famine, disease and the like, he would not be open to attack because incidentally inter-State trade was affected" (1).

The first part of this passage is concerned with a proposition, which had been advanced, to the effect that expropriation, from its very nature, never could be an invasion of the freedom of trade. The answer given by Lord *Atkin* to that proposition is, as I understand it, that the very object of the enactment authorizing compulsory acquisition may be to enable the Minister to control trade by the exercise of the power. That is to say, an intention may be found in the statute that the power of expropriation should be used, to take the case then in hand, so as to prevent or to punish departure from some administrative orders restrictive of inter-State trade.

(1) (1932) A.C., at pp. 558, 559 ; 47 C.L.R., at pp. 396, 397.

The second part of the passage deals with the purported exercise of the power of acquisition. It commences by conceding that even with powers granted in this form, i.e., powers of compulsory acquisition subject to sec. 92, they would be well exercised if the primary purpose was not directed to trade or commerce but to matters enumerated, including disease, although the exercise produced an incidental effect on trade or commerce. The Ministerial power there in question is altogether of another order from the power to forbid the entry of commercial goods from one State into another. The latter is a power to prohibit the doing of the very thing which constitutes trade and commerce. The former power in relation to trade and commerce may be said to be indifferent. It is capable of a use which will affect trade and commerce. It is capable of many uses which will not. If it is used for purposes other than the control of trade and commerce, incidental, that is, consequential, effects on commerce will not vitiate its exercise. It is a strange mode of reasoning to conclude that, because in such a case the existence of the forbidden purpose will make the executive act *ultra vires* whereas its absence and the presence of another purpose, such as the suppression of disease, will leave the executive act *intra vires*, therefore, a legislative act which restricts importation may be validated if its purpose is beneficent. For the reasons I have given, I am unable to adopt the reasoning of the judgment which prevailed in *Ex parte Nelson [No. 1]* (1). I prefer the reasoning of *Isaacs* and *Higgins* JJ.

As the Court was equally divided the case is not, I think, a binding authority. Where the members of a Court are equally divided in opinion some expedient must be adopted for disposing of the case. In the common law Courts at Westminster, a practice arose of the junior Judge withdrawing his judgment. But when the division occurred on the return of a rule nisi, more often the rule was allowed to lapse. Upon appeals to the Divisional Court in England, it has been established after some fluctuation of practice that, in an equally divided Court of two Judges, the appeal must fail (*Poulton* v. *Moore* (2); *Metropolitan Water Board* v. *Johnson & Co.* (3);

(1) (1928) 42 C.L.R. 209.
(2) (1913) 83 L.J. K.B. 875, at p. 884; (1915) 1 K.B. 400, at pp. 415-416.
(3) (1913) 3 K.B. 900, at p. 904.

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Flannagan v. *Shaw* (1)). And this appears to be the course pursued in the Court of Appeal in England (cf. *Stumm* v. *Dixon* (2)).

In this Court the expedient to be adopted in such a case for pronouncing upon the rights of the litigants has been prescribed by sec. 23 (2) (*a*) and (*b*) of the *Judiciary Act* 1903-1933 as follows: "If the Court is equally divided in opinion—(*a*) in the case where a decision of a Justice of the High Court (whether acting as a Justice of the High Court or in some other capacity), or of a Supreme Court of a State or a Judge thereof, is called in question by appeal or otherwise, the decision appealed from shall be affirmed; and (*b*) in any other case, the opinion of the Chief Justice, or if he is absent the opinion of the Senior Justice present, shall prevail." But whether under this provision, the judgment of a Supreme Court, or of a Judge of this Court, is left unreversed or unimpaired, or in matters where no such judgment is called in question, the judgment of the Chief Justice or the senior puisne Justice present prevails, the decision so arrived at does not, in my opinion, become a precedent which in this Court has authority. Courts other than the House of Lords do not regard a decision which they pronounce as a result of an equal division of opinion as binding authorities. In *The Vera Cruz* [*No.* 2] (3) *Brett* M.R. referred to—"the question whether any Court is bound by a decision of its own, which decision was grounded on the fact that the members of the Court present were equally divided," and said:—"It was the custom for each of the Courts in Westminister Hall to hold itself bound by a previous decision of itself or of a Court of co-ordinate jurisdiction. But there is no statute or common law rule by which one Court is bound to abide by the decision of another of equal rank, it does so simply from what may be called the comity among judges. In the same way there is no common law or statutory rule to oblige a Court to bow to its own decisions, it does so again on the grounds of judicial comity. But when a Court is equally divided this comity does not exist, for there is no authority of the Court as such, and those who follow must choose one of the two adverse opinions. And if the books are examined I have no doubt it would be found, if authority there be,

(1) (1920) 3 K.B. 96, at pp. 107 and 108.
(2) (1889) 22 Q.B.D. 529.
(3) (1884) 9 P.D. 96, at p. 98.

that when a Court is equally divided, if the case comes before it again, it will exercise an independent opinion and abide by one of the two views. The case may be different as regards the House of Lords, since it is the ultimate court of appeal, for if it is otherwise there exists an uncertainty as to the law." This doctrine was repeated in *Hobson* v. *Sir W. C. Leng & Co.* (1), and is followed by the Supreme Court of Canada (*Stanstead Election Case* (2)). The House of Lords, as is well known, adopted an opposite rule (*Beamish* v. *Beamish* (3) ; *London Street Tramways Co.* v. *London County Council* (4) ; *Inland Revenue Commissioners* v. *Walker* (5)). But this appears to be a consequence of the special view which the House took of the conclusiveness and finality of its rulings (see *Pollock, First Book of Jurisprudence*, 6th ed. (1929) c. VI., pp. 334-341).

For these reasons I am at liberty to act upon my own view of the matter unfettered by the decision pronounced in *Ex parte Nelson* [*No.* 1] (6).

In my opinion, sec. 92 invalidates the Victorian embargo upon the introduction of potatoes from Tasmania. So far from thinking that sec. 112 of the Constitution affords a foundation for an inference that the freedom guaranteed by sec. 92 is not to be considered impaired by a prohibition of inter-State importation if actuated by a desire to prevent the spread of disease in the animal or vegetable kingdom, I regard it as confirming the opposite view. Sec. 112 is as follows : " After uniform duties of customs have been imposed, a State may levy on imports or exports, or on goods passing into or out of the State, such charges as may be necessary for executing the inspection laws of the State ; but the net produce of all charges so levied shall be for the use of the Commonwealth ; and any such inspection laws may be annulled by the Parliament of the Commonwealth." It confers an express and special power upon the States to levy charges for the execution of their inspection laws. The purpose of doing so is to enable the States to do what otherwise sec. 92 and, perhaps, sec. 90 would or might prevent. It is true that it is expressed in terms which imply that the power to make inspection laws is retained by the States. The precise limits of the expression

(1) (1914) 3 K.B. 1245, at p. 1248.
(2) (1891) 20 Can. S.C.R. 12.
(3) (1861) 9 H.L.C. 274 ; 11 E.R. 735.
(4) (1898) A.C. 375.
(5) (1915) A.C. 509.
(6) (1928) 42 C.L.R. 209.

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"inspection laws" may be difficult to define. But, at least, such laws are concerned with the ascertainment of the actual state or condition of goods and if exclusion from inter-State trade may follow from the discovery of a noxious, defective or undesirable condition that exclusion must result from the execution of the inspection law. Further, sec. 112 probably should be understood as an express reservation of power to make an inspection law which, otherwise, would be withdrawn by sec. 92. By the express terms of sec. 112, the power of the State to make inspection laws is placed under the control of the Parliament of the Commonwealth, which may annul them. It is absurd to suppose that, although the power reserved to a State to make inspection laws in reference to goods passing into and out of the State is so conditioned, it retains a power entirely uncontrolled to forbid absolutely the importation of a commodity from another State because the State Executive expresses the opinion that a vegetable disease may be introduced if importation is allowed. It is apparent that if this were competent to the States few primary products would be safe from exclusion; for few or none are immune from liability to some disease capable of spreading. Indeed, the numerous embargoes which of late the States have placed upon the produce of one another's soil, sometimes mutual, illustrate the inroads upon the constitutional guarantee of complete freedom of trade which such a doctrine allows.

For these reasons I think the proclamation of the State of Victoria complained of should be held to be void.

This conclusion does not, however, dispose of the demurrer. For counsel for the State of Victoria contended that neither the State of Tasmania nor its Attorney-General had any *locus standi* to sue for relief against its operation. It is an ordinary function of the Attorney-General, whose office it is to represent the Crown in Courts of Justice, to sue for the protection of any public advantage enjoyed under the law as of common right. "It is a principle well established in British law that when a corporation or public authority clothed with statutory powers exceeds them by some act which tends in its own nature to interfere with public rights and so to injure the public, the Attorney-General for the community in which the cause of complaint arises may institute proceedings in the Courts of that

community, with or without a relator, according to circumstances, to protect the public interests, although there may be no evidence of actual injury to the public " (per *O'Connor* J., *Attorney-General for New South Wales* v. *Brewery Employees Union of New South Wales* (*Union Label Case*) (1)). In the same way, when an injury threatened by acts done in this country to the public of a foreign country is of a kind which may be restrained by a Court of equity, the Sovereign of that country may sue in our Court to protect the interests of his subjects. " I take it to be now well settled . . . that a foreign Sovereign may sue in the Courts of this country and that he may sue in this Court on behalf of his subjects " (per *Turner* L.J., *Emperor of Austria* v. *Day & Kossuth* (2)). The question which arose in *Attorney-General for New South Wales* v. *Brewery Employees Union of New South Wales* (*Union Label Case*) (3) was whether the Attorney-General of a State could sue the Commonwealth to protect the public of the State from the execution of an invalid Act of the Commonwealth Parliament, an enactment which fell within the exclusive power of the States. In reference to this question, *O'Connor* J. said :—" In a unitary form of government, as there is only one community and one public which the Attorney-General represents, the question which has now been raised cannot arise. It is impossible, therefore, that there can be any decision either in England or in any of the Australian Colonies before Federation exactly in point. But it seems to me that in the working out of the Federal system established by the Australian Constitution an extension of the principle is essential. The Constitution recognizes that in respect of the exercise of State powers each State is under the Crown an independent and autonomous community. Similarly the States must recognize that in respect of the exercise of Commonwealth powers all State boundaries disappear and there is but one community, the people of the Commonwealth. The proper representative in Court of each of these communities is its Attorney-General. That principle is, in substance, recognized by secs. 61 and 62 of the *Judiciary Act* 1903, enacted by virtue of sec. 78 of the Constitution, which provides that suits on behalf of the

(1) (1908) 6 C.L.R., at pp. 550, 551.
(2) (1861) 3 DeG. F. & J. 217, at pp. 252, 253 ; 45 E.R., at p. 875.
(3) (1908) 6 C.L.R. 469.

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Commonwealth may be brought in the name of the Attorney-General of the Commonwealth, and suits on behalf of the State may be brought in the name of the Attorney-General of the State. Where, therefore, the complaint is, not that the State or the Commonwealth as legal entities, but that the people generally of either State or Commonwealth have been injuriously affected by some illegal exercise of State or Commonwealth power, as the case may be, it would seem to follow that the Commonwealth Court must recognize the State Attorney-General as being entitled to represent the State in any claim for relief against an illegal act so affecting the people of the State " (1). The principle thus expressed appears to be equally applicable to the infringement by one State of a provision in the Constitution under which some advantage is secured for the enjoyment by the people of another State as of public right.

The Constitution determines the mutual relations of States considered not only as governments but sometimes also as communities. Sec. 92, in my opinion, guarantees to the members of the Tasmanian community as such considered collectively a freedom to carry on trade with the communities of other States. This is a public advantage enjoyed by them as of common right which the Attorney-General may suitably protect by proceedings in his name. In such proceedings, he acts as the proper officer of the Crown, which is the real representative of the public. The Crown in right of a State is described in many parts of the Constitution as a " State " and this is so in sec. 75 (iv.) of the Constitution which confers original jurisdiction upon this Court in all matters between States. In my opinion, this Court has jurisdiction to entertain the present action which is properly constituted and to give relief by way of declaration of right.

Judgment for plaintiffs on the demurrer with costs of the argument of the demurrer.

Solicitor for the plaintiffs, *A. Banks-Smith*, Crown Solicitor for Tasmania.

Solicitor for the defendant, *F. G. Menzies*, Crown Solicitor for Victoria.

Solicitor for the State of New South Wales, *J. E. Clark*, Crown Solicitor for New South Wales.

H. D. W.

(1) (1908) 6 C.L.R., at p. 552.