Cons
A-G (NSW) v Cth Savings Bank of Aust 160 CLR 315
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James v Cowan (1932) 47 CLR 386
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Gerstan v MIMA (1999) 58 ALD 433
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REPORTS OF CASES

DETERMINED IN THE

HIGH COURT OF AUSTRALIA

1927-1928.

[HIGH COURT OF AUSTRALIA.]

JAMES . . . . . PLAINTIFF;

AGAINST

THE STATE OF SOUTH AUSTRALIA AND ANOTHER . . . . . } DEFENDANTS.

Constitutional Laws—Freedom of inter-State trade and commerce—State Parliament—Acts done by Government of State without authority of statute—Limitation of quantity of dried fruits which may be marketed in the Commonwealth—Compulsory acquisition of dried fruits—Jurisdiction of High Court—Original jurisdiction—Matters involving interpretation of the Constitution—Trespass committed by State—The Constitution (63 & 64 *Vict. c.* 12), *secs.* 76, 92—*Judiciary Act* 1903-1926 (*No.* 6 *of* 1903—*No.* 39 *of* 1926), *sec.* 30—*Dried Fruits Acts* 1924 *and* 1925 (*S.A.*) (*No.* 1657—*No.* 1702), *secs.* 19, 20, 26, 28, 29.*

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MELBOURNE, *May* 30, 31; *June* 1.

SYDNEY, *Aug.* 22.

Isaacs A.C.J., Gavan Duffy, Powers, Rich and Starke JJ.

* Sec. 19 of the *Dried Fruits Acts* 1924 *and* 1925 (S.A.) confers upon the Dried Fruits Board created by the Acts "power in its absolute discretion from time to time . . . (*b*) to enter into contracts with Boards appointed under legislation in force in other States with objects similar to those of this Act for concerted action in the marketing of dried fruits produced in Australia and for purposes incidental thereto, and to carry out such contracts," and "(*f*) to fix the maximum prices to be charged on the sale of dried fruits, whether wholesale or by retail." Sec. 20 provides that "(1) The Board shall also have power, in its absolute discretion, from time to time to determine where and in what respective quantities the output of dried fruits produced in any particular year is to be marketed, and to take whatever action the Board thinks proper for the purpose of enforcing such determination," &c. Sec. 26 provides that "The Board may, in its discretion, cancel the

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Held, by *Gavan Duffy*, *Rich* and *Starke* JJ. (*Isaacs* A.C.J. and *Powers* J. dissenting), that sec. 92 of the Constitution of the Commonwealth is no more than an inhibition addressed to the Parliaments of the States preventing them from legislating so as to interfere with the freedom prescribed by that section, and gives no right to the citizens of the Commonwealth except the right to ignore and, if necessary, to procure the assistance of the judicial power in resisting such legislation; and, consequently, that the High Court had no jurisdiction to entertain an action complaining of acquisitions and takings of the plaintiff's dried fruits after the *Dried Fruits Acts* 1924 *and* 1925, (S.A.) had ceased to operate, because his cause of action was founded upon his possessory rights and not upon the Constitution and because the defendants could not justify the acquisitions and takings by invoking the Constitution or any statute involving its interpretation.

Held, also, by the whole Court, (1) that sec. 20 of the *Dried Fruits Acts* 1924 *and* 1925 authorizes the Dried Fruits Board to determine the quantity of dried fruits produced in South Australia which may be marketed anywhere in the Commonwealth, and therefore, so far as it authorizes a determination by the Board limiting the quantity of dried fruits which may be marketed within the Commonwealth, that section is obnoxious to sec. 92 of the Constitution of the Commonwealth; (2) that sec. 28 of those Acts does not authorize an acquisition of dried fruits which would violate the provisions of sec. 92 of the Constitution of the Commonwealth; (3) that the question of the validity of determinations made pursuant to the *Dried Fruits Acts* fixing the quantity of dried fruits which might be marketed within the Commonwealth raised an issue directly involving the interpretation and application of sec. 92 of the Constitution, and (4) that the question of the validity of acquisitions of dried fruits pursuant to those Acts also raised an issue directly involving the interpretation of the Constitution; and (5) that an action raising those questions was, therefore, within the original jurisdiction of the High Court conferred by sec. 30 of the *Judiciary Act* 1903-1926.

DEMURRER.

Frederick Alexander James brought an action in the High Court against the State of South Australia and the Dried Fruits Board of

registration of any packing shed if a person registered in respect thereof is in the opinion of the Board deliberately contravening any determination of the Board with respect to any dried fruits in such packing shed or if, in the opinion of the Board, he persistently refuses to collaborate with the Board in regard to carrying out any direction or policy of the Board in pursuance of the object of this Act." Sec. 28 provides that "(1) Subject to section 92 of the Commonwealth of Australia Constitution Act and for the purposes of this Act or of any contract made by the Board, the Minister may on behalf of His Majesty . . . acquire compulsorily any dried fruits in South Australia grown and dried in Australia, not being dried fruits which are held for export under and in accordance with a valid and existing licence granted under the *Dried Fruits Export Control Act* 1924 of the Parliament of the Commonwealth. . . . (2) The Minister may authorize the Board to acquire on his behalf any dried fruits which this Act empowers him to acquire" &c. Sec. 29 provides for the mode of compulsory acquisition of dried fruits.

South Australia, in which the statement of claim as amended was substantially as follows :—

1. The defendant the Dried Fruits Board of South Australia is the Board constituted by and referred to in the Acts of Parliament of South Australia named respectively the *Dried Fruits Act* 1924 (No. 1657), the *Dried Fruits Act Amendment Act* 1925 (No. 1702) and the *Dried Fruits (Continuation of Operation) Act* 1926 (No. 1759).

2. The plaintiff has carried on business as a " grower " and " producer " of " dried fruits " under conditions that would come within those terms as defined in the said Acts of Parliament for about thirteen years and has also carried on the business of buying similar " dried fruits " from other growers and of processing (that is, cleaning, grading and packing) the dried fruits grown or acquired by him and then selling such fruits to persons resident in the other States of the Commonwealth for about six years, and was at all times material to this action a " grower " and " dealer " and the owner and occupier of a registered " packing shed " within the meaning of the said Acts at Berri, South Australia, and carried on his said business of growing and processing and distributing such " dried fruits " at or near such registered packing shed and other registered packing sheds at or near Berri aforesaid.

3. On divers dates between 28th December 1926 and 29th January 1927 the plaintiff entered into divers contracts in writing for the sale and delivery from the State of South Australia to divers purchasers residing and carrying on business in the State of New South Wales of about 147 tons dried sultanas and 43⅜ tons of dried currants. On divers dates between 6th December 1926 and 19th February 1927 the plaintiff made similar contracts for the similar sale and delivery from South Australia to purchasers residing and carrying on business in Victoria of 135 tons of dried fruits, to purchasers residing and carrying on business in Queensland of 20 tons of dried fruits, to purchasers residing and carrying on business in Western Australia of 24 tons of dried fruits. All the inter-State contracts as aforesaid required delivery by the plaintiff to the purchasers of the said dried fruits f.o.b. Port Adelaide at divers times, and were for sales of the plaintiff's said dried fruits, which

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had in fact acquired a good reputation in the various Australian States and were usually sold with the plaintiff's registered mark "Trevarno" attached.

4. In addition to such inter-State contracts the plaintiff had made contracts for sale on similar terms for delivery to purchasers residing in South Australia of about 74 tons of dried fruits.

5. For the purposes of fulfilling the contracts referred to in par. 3 hereof the plaintiff had at all times material to this action in his stores and packing shed at Berri aforesaid and in and about the said other registered packing sheds large quantities of "dried fruits" which he had bought on terms from other growers and partly paid for. The plaintiff had other large quantities of "dried fruits" which he had similarly purchased and partly paid for maturing for delivery and had also a quantity of "dried fruit" grown by the plaintiff to be delivered into the plaintiff's said packing shed or said other registered packing sheds to his order for treatment and then for despatch for the purpose of fulfilling the said contracts.

6. The defendant the Dried Fruits Board of South Australia from time to time during the year 1926 purporting to act under sec. 20 (1) of the said Act No. 1657 purported to make various determinations: the effect of the determinations was that no grower or dealer or other person being an owner or occupier or person in charge of any packing shed could sell dried fruits in the Commonwealth of Australia exceeding the following limits, namely, the limits set out in the the said determinations. The plaintiff and other dealers and such persons as aforesaid were notified of such determinations respectively.

7. On or about 10th September 1926 the secretary to the defendant Board—one Twiss—issued three summonses against the plaintiff for unlawfully selling "currants," "sultanas" and "lexias" respectively in excess of the limits mentioned in the said determinations of the Board, returnable on 23rd September 1926. Upon the return of such summonses they were on the application of the plaintiff adjourned and have been subsequently adjourned from time to time at the request of the defendant Board, and now stand adjourned pending the result of this action.

8. (a) On 8th March 1927 the plaintiff was served with an order purporting to be made by one Thomas Butterfield, the Minister of

Agriculture for the State of South Australia, being the Minister of the Crown to whom the administration of the said Acts is committed by His Excellency the Governor; such order purported to be made as in pursuance of the provisions of sec. 28 (2) of the said Act and by its terms authorized the defendant the Dried Fruits Board to acquire 40,016 pounds of the dried fruit referred to in par. 5 hereof. (b) On or about the said date the plaintiff was also served with a declaration signed by Mr. G. A. W. Pope, the deputy chairman of the defendant the Dried Fruits Board purporting to be in pursuance of sec. 29 (1) of the said Acts to the effect that the said dried fruits referred to in it were acquired by His Majesty the King. (c) On or about the said 8th March the plaintiff was also served with an authority signed by the said deputy chairman purporting to authorize one Alfred George Carne an officer of the Dried Fruits Board under sec. 29 (4) of the said *Dried Fruit Acts* to seize and take possession of the said dried fruit described in the said orders of the said Minister of Agriculture.

9. On or about 9th March 1927 the plaintiff was similarly served with a similar order by the said Minister of Agriculture and a similar declaration by the said deputy chairman and a similar authority to seize a further quantity of dried fruits by the said Alfred George Carne. The said Carne seized and took possession of the dried fruits referred to in this and the last paragraph.

10. The plaintiff warned the said Carne at the time of his taking possession of the said dried fruits previously referred to that he was committing acts of trespass. Subsequently to the plaintiff so warning the said Carne he served or caused to be served upon the plaintiff a number of documents purporting to be orders or declarations made by the Ministers of Agriculture for the time being under the provisions of sec. 29 of the said Acts declaring that the dried fruits described in the schedules to such documents respectively were acquired by His Majesty the King. After serving the said orders the said Carne took possession of the said dried fruits referred to in them as he had done on the previous occasions.

11. On or about 2nd May 1927 the said Carne served the plaintiff with a further series of notices signed by the Hon. John Cowan, who had since became Minister of Agriculture, dated 30th April 1927

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purporting to be made pursuant to the powers conferred by the said sec. 29 and declaring that the dried fruits described in the respective schedules thereto were acquired by His Majesty the King.

12. On or about the said 2nd May the said Carne also served the plaintiff with two notices one purporting to be signed by Leslie Nattle Salter, chairman of the Dried Fruits Board of the State of South Australia, and the other signed by the said John Cowan, Minister of Agriculture, and each of which authorized the said Carne an officer of the said defendant Board to seize and take possession of all the said dried fruits described or referred to in the said orders dated 30th April 1927 signed by the said Minister of Agriculture as aforesaid. After the delivery of such last two mentioned orders the said Carne proceeded to take possession of and remove portions of the fruit referred to in the said orders or declarations dated 30th April and also of portions of the fruit mentioned in the said orders and declarations referred to in various paragraphs hereof.

13. On or about 10th May 1927 the said Carne served the plaintiff with a series of orders or declarations purporting to be made by the said Hon. John Cowan as Minister of Agriculture declaring that the dried fruits described in the schedules thereunder were acquired by His Majesty the King; such fruits being described as being the parcels referred to in such orders respectively and described as being situate at the packing shed of one Allan Grenville Ireland of Cobdogla in the State of South Australia, a packing shed registered with the said Dried Fruits Board and being the property of the plaintiff. The said Ireland was in fact grading &c. this said fruit on the plaintiff's behalf.

14. At the time of serving the said orders or declarations referred to in the preceding paragraph the said Carne also served the plaintiff with two documents one signed by the said John Cowan as Minister of Agriculture and the other by the said Salter as chairman of the defendant Board purporting to authorize the said Carne to seize and take possession of all the dried fruits described or referred to in the said orders dated 9th May 1927 referred to in the preceding paragraph.

15. On or about the said 10th May the said Carne also served the plaintiff with three further orders or declarations signed by the said

Cowan as Minister of Agriculture purporting to be made under the said sec. 29 and purporting to declare that the dried fruits described in the schedules thereto at the plaintiff's said registered packing shed at Berri aforesaid were acquired by His Majesty the King.

16. On or about the said 10th May the said Carne also served the plaintiff with further orders purporting to be signed by the said Salter as chairman of the defendant Board and by the said Cowan as Minister of Agriculture, authorizing the said Carne to seize and take possession of all the dried fruits described or referred to in the said orders or declarations of 9th May signed by the said Minister of Agriculture.

17. In pursuance of the alleged authority the said Carne has from time to time purported to appropriate the said dried fruits referred to in the said orders or declarations at both the said packing sheds and has removed considerable quantities thereof.

18. Neither of the defendants has made any similar orders or authorized the seizure of any dried fruits of any of the other persons in South Australia who in fact carry on similar kinds of businesses to what the plaintiff does.

19. The plaintiff has been informed by the officers of the said defendant Board that he can export to England any of the fruit so acquired provided that he obtains from the Commonwealth Dried Fruits Control Board (being the Board constituted under the Commonwealth Act No. 40 of 1924) an export licence permitting him to do so. The plaintiff has from time to time obtained export licences from the said Commonwealth Control Board and has been permitted to export approximately 30 tons of the fruit so seized. The said Commonwealth Board will only permit the plaintiff to export a small proportion of the fruit so seized.

20. The plaintiff has notified the said Minister of Agriculture and the said defendant the Dried Fruits Board of South Australia that he requires the fruit so seized as aforesaid to be delivered to him for the purposes of fulfilling contracts with merchants residing in the States of New South Wales, Victoria, Queensland and Western Australia, but the said defendants have refused so to do and have continued and threaten and intend to continue—to go on acquiring all fruit as and when it is delivered into the plaintiff's said packing

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shed or into other registered packing sheds in South Australia to the plaintiff's order. Large quantities of the fruit seized as aforesaid have been specifically marked by the plaintiff as appropriated to fulfil certain of his said inter-State contracts.

21. On 10th May 1927 the said Minister by his officers acquired and removed from lorries at Berri aforesaid dried fruit belonging to the plaintiff which had been placed thereon for transit to merchants in Sydney in the State of New South Wales. The said fruit had not been the subject of notices purporting to acquire the same on behalf of His Majesty the King.

22. By reason of the premises the whole business of the plaintiff has been brought to a standstill. The plaintiff is under heavy liabilities for payment to growers for dried fruit which he had bought on the said contracts as aforesaid and is unable to forward such fruit to the aforesaid purchasers from the plaintiff in other States or in South Australia and his customers have been compelled to get their supplies of dried fruits from others. The plaintiff has also been put to serious expense by reason of the dislocation of his business and his packing sheds as aforesaid.

23. The plaintiff contends (a) that the said *Dried Fruits Acts* No. 1657 of 1924, No. 1702 of 1925 and No. 1759 of 1926, contravene sec. 92 of the Commonwealth Constitution and are invalid; (b) alternatively that secs. 19 (*b*), 19 (*f*), 20, 28 and 29 of the said Act No. 1657 as amended by the said Act No. 1759 and all other sections of the said Acts which are ancillary to such sections respectively are in contravention of the said sec. 92 and are invalid; (c) alternatively that the orders and/or declarations and/or authorities described in pars. 8, 9, 10, 11, 12, 13, 14, 15 and 16 hereof are not authorized by the provisions of any of the said *Dried Fruits Acts* of South Australia and are invalid; (d) that the acts of the said Carne purporting to act in pursuance of the said orders and/or declarations and/or authorities are unlawful and constitute trespasses by the defendants respectively.

23A. Alternatively the plaintiff says that the Governor of South Australia never did declare pursuant to the powers conferred upon him by sec. 2 of the said Act No. 1759 that the *Dried Fruits Acts* of 1924 and 1925 should continue in operation, and the plaintiff will

contend that all the said orders and/or declarations and/or authorities mentioned in pars. 8 to 16 inclusive and also the said acts of alleged trespass by taking possession of and removing the plaintiff's said dried fruits were not justifiable under the provisions of the said *Dried Fruits Acts* and were respectively invalid and acts of trespass; alternatively that such of the said orders and/or declarations and/or authorities as were made and/or served upon the plaintiff after 31st March 1927 and such of the said acts of taking possession of and/or removing the plaintiff's said dried fruits as took place after the said 31st March 1927 were respectively invalid and trespasses.

The plaintiff claimed :—

(1) The following declarations : (a) that the *Dried Fruits Acts* No. 1657 of 1924, No. 1702 of 1925 and No. 1759 of 1926 of the State of South Australia contravene sec. 92 of the Commonwealth Constitution and are invalid ; (b) alternatively that secs. 19 (*b*), 19 (*f*), 20, 28 and 29 of the said Act No. 1657 as amended by the said Act No. 1702 and continued by the said Act No. 1759 and all other sections which are ancillary to such sections are invalid as being in contravention of sec. 92 of the Commonwealth Constitution ; (c) alternatively that the orders and/or declarations and/or authorities described in pars. 8, 9, 10, 11, 12, 13, 14, 15 to 16 hereof are not authorized by the provisions of any of the said *Dried Fruits Acts* of South Australia and are invalid ; (d) that the acts of the said Carne purporting to act in pursuance of the said orders and/or declarations and/or authorities are unlawful and constitute trespasses by the defendants respectively.

(1A) Alternatively a declaration that the orders and/or declarations and/or authorities and the acts of seizing and removing the plaintiff's dried fruits referred to in such paragraphs were respectively invalid and trespasses.

(2) The following injunctions : (a) To restrain the defendants and each of them their respective agents and servants from issuing and/or serving on the plaintiff any further similar orders and/or declarations and/or authorities with respect to the " dried fruits " on the plaintiff and/or from in any

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other way interfering with the business of the plaintiff; (b) a mandatory order directing the said defendants respectively to deliver up to the plaintiff all such dried fruits seized by the said Carne as they still retain possession of or control over.

(3) £5,000 damages from the defendants jointly and/or severally for the wrongful acts of trespass and/or conversion by seizure and removal on their behalf by the said Carne of the plaintiff's said dried fruits.

(4) Such further or other relief as to the High Court may seem fit.

The defendants demurred to the statement of claim and the demurrer was as follows :—

1. The defendants say that the statement of claim is bad in substance.

2. The contentions set out in pars. 23 (a) and 23 (b) and the claims made in pars. 1 (a) and 1 (b) of the claim and the averments contained in the statement of claim upon which the same are founded are bad in substance.

3. The contention set out in par. 23 (d) so far as it is incidental to pars. 23 (a) and 23 (b) and that portion of the claim made in par. 1 (d) of the claim which is founded thereon and the averments contained in the statement of claim upon which the same are founded are bad in substance.

4. The contention set out in pars. 23 (c) and 23 (d) so far as par. 23 (d) is not incidental to pars. 23 (a) and 23 (b) and to claims made in respect thereof in pars. 1 (c) and 1 (d) of the claim and the averments contained in the statement of claim upon which the same are founded are bad in substance and do not come within any of the matters over which this Honourable Court has original jurisdiction.

5. The statement of claim contains no averment of fact in support of the claim contained in par. 1 (b) of the claim so far as it relates to secs. 19 (*b*) and 19 (*f*) of Act No. 1657.

The points stated for argument were (a) that the statement of claim discloses no ground for the relief claimed or any of it; (b) that it is not alleged in the statement of claim that the dried fruits the subject of any of the alleged acquisition orders were the subject of inter-State

trade or commerce; (c) none of the acts alleged infringes the provisions of sec. 92 of the Commonwealth Constitution; (d) the legislation attacked does not purport to authorize any act which would violate sec. 92 of the Commonwealth Constitution; (e) any excess of the authority lawfully possessed by the defendants even if actionable under the law of the States involves no matter arising under the Commonwealth Constitution or involving its interpretation; (f) the allegations in the statement of claim do not disclose any excess of such authority.

The defendants also filed a defence, par. 24 of which was as follows: "If and to the extent that the plaintiff's claims or any of them rest upon the contentions of law set out in pars. 23 (c) and 23 (d) (save in so far as par. 23 (d) is incidental to pars. 23 (a) and 23 (b)) the defendants will object that the High Court has no jurisdiction to hear or determine the same" &c. During the hearing of the demurrer the question raised by par. 24 of the defence was by consent submitted for the determination of the Court.

Sir Edward Mitchell K.C. (with him *Ward*), for the plaintiff. Sec. 19 (*b*) and (*f*) of the *Dried Fruits Acts* 1924 *and* 1925 authorize the Dried Fruits Board to do acts which would interfere with inter-State trade and therefore contravene sec. 92 of the Constitution of the Commonwealth. Sec. 19 (*f*) is a similar power to that which was held to be invalid in *W. & A. McArthur Ltd.* v. *Queensland* (1). Sec. 20 gives power to limit the quantity of dried fruits which may be marketed anywhere in the Commonwealth, and that is an infringement of sec. 92. Sec. 28 also confers a power which infringes sec. 92. The words "subject to sec. 92 of the Commonwealth of Australia Constitution" mean no more than that sec. 28, like the rest of the Act, is subject to sec. 92. The Legislature attempts to use the power of expropriation, not to get property which the Government wants, but as a means of making effective the provisions of the Acts which are intended to regulate the marketing of fruit in the other States. Even if sec. 28 might be valid if it stood alone, taken with the rest of Acts it is invalid. [Counsel referred to *New South Wales* v. *Commonwealth* (2); *Attorney-General for Ontario* v. *Reciprocal Insurers* (3).]

(1) (1920) 28 C.L.R. 530. (2) (1915) 20 C.L.R. 54. (3) (1924) A.C. 328.

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Owen Dixon K.C. (with him *Robert Menzies*), for the defendants. The demurrer takes up the position that the *Dried Fruits Acts* do not attempt to authorize anything which is contrary to sec. 92 of the Constitution of the Commonwealth. All that the plaintiff alleges has occurred is that the State has compulsorily acquired his dried fruits and that he has been prosecuted for violating a proclamation. So far as this action is based on a prosecution for something done in contravention of sec. 20 this Court should not interfere because of the prosecution. The question of the validity of determinations under sec. 20 can be determined on the hearing of the prosecution. As to sec. 28 and what has been done under it, no question of the validity of the legislation arises. The question is whether there was any justification under the State law for the orders made and the seizures under them. Unless the whole Act can be attacked so that not only because of what is in sec. 28 but because of what is in the rest of the Acts the whole can be brought down, this action will not lie. Sec. 92 does not confer rights upon individuals so as to enable an action to be brought alleging that certain acts done without legal justification under the laws of the State infringe sec. 92 and claiming a declaration of right. This Court's jurisdiction being limited to constitutional questions, if no such question can be found there is no jurisdiction to entertain the action and the demurrer should succeed. This action is one of trespass : the plaintiff says that the State law does not confer any authority upon the defendants to do the acts complained of. The meaning of the Constitution is not in question : the only question is whether certain facts bring the matter within the Constitution. That is not a matter involving the interpretation of the Constitution within the meaning of sec. 30 of the *Judiciary Act*. Sec. 92 is merely used in this action to cut down the positive words of the State statute. Sec. 28 of the *Dried Fruits Acts* is in terms which either do or do not cover what was done, and whether they do or do not cover those acts depends on the facts and the true meaning of the statute. The section purports to give a general power of expropriation subject to sec. 92 of the Constitution of the Commonwealth. It therefore does not give any power which sec. 92 prevents the State Parliament from giving. Sec. 92 is only a means of ascertaining the meaning of the State

statute, and a matter which requires the consideration of the Constitution as one of the steps in arriving at the meaning of the State statute is not a matter involving the interpretation of the Constitution. The parties here do not depend for their rights upon the interpretation of the Constitution, and in order to bring a case within sec. 30 of the *Judiciary Act* the validity or invalidity of the claim must depend upon the interpretation of the Constitution. No amount of intention, or allocation or appropriation to inter-State trade, on the part of the owner of goods can make them subjects of inter-State trade; the goods must have started on their journey (*Gulf, Colorado and Santa Fé Railway Co.* v. *Texas* (1); *Hughes Brothers Timber Co.* v. *Minnesota* (2)). [Counsel also referred to *New South Wales* v. *Commonwealth* (3).]

Ham K.C. and *Robert Menzies*, for the State of Victoria intervening, did not argue.

Sir Edward Mitchell K.C., in reply. This Court has jurisdiction to entertain this action. There is clearly a question of the interpretation of the Constitution involved. If that is so, this Court has power in its discretion to determine the whole of the matters raised in this action (see the Constitution, sec. 76 (I.); *Judiciary Act*, secs. 32, 40, 41, 42, 45). Even if the *Dried Fruits Acts* are held to be constitutional, yet if the consideration of that question depends upon the interpretation of the Constitution there is jurisdiction to hear the action. [Counsel also referred to *Committee of Direction of Fruit Marketing* v. *Collins* (4); *Hammer* v. *Dagenhart* (5).]

Cur. adv. vult.

Aug. 22.

The following written judgments were delivered :—

ISAACS A.C.J. AND POWERS J. Resolved into its ultimate form, the main and dominant question presenting itself in this case may be thus stated : it is whether a " matter " arises under the Commonwealth Constitution or involves its interpretation, so as to enable

(1) (1907) 204 U.S. 203.
(2) (1926) 272 U.S. 469.
(3) (1915) 20 C.L.R., at pp. 65, 95.
(4) (1925) 36 C.L.R. 410, at p. 416.
(5) (1918) 247 U.S. 251, at pp. 273, 275.

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this Court to adjudicate upon it under the power conferred by the Parliament in sec. 30 of the *Judiciary Act* 1903-1926, when an Australian citizen complains that contrary to sec. 92 of the Constitution, declaring inter-State trade to be "absolutely free," a State Executive has deliberately and systematically prevented him, and, still insisting on its right to do so, threatens to continue preventing him from carrying on his legitimate inter-State trade. Questions which may be called intermediate and of less comprehensive import arise, including the construction of State legislation and the constitutional effect of the State relying on its legislation to support its executive acts. But State legislation *per se* and unexecuted would not interfere with trade operations, and a private individual could not invoke the interposition of a Court merely because some impeachable enactment found its way into the Statute Book. It is only *action*—that is, either State Executive action, or else individual action resting on the *de facto* authority of the State, legislative or executive—which could offend against sec. 92 of the Constitution. State Executive action, however—that is, action by the State Executive with all the actual force of the political community behind it—if applied, may so offend, whether applied directly or indirectly, and whether based on the assumed authority of legislation under the State Constitution, or on the direct provisions of that Constitution, or of the inherent power, *de jure* or *de facto*, of the State Executive by virtue of its existence under that Constitution. As we view the whole position, we should not find it necessary on the merits to examine further than to ascertain whether in reality the State Executive had so acted towards the plaintiff as to obstruct, hamper, or interfere with his inter-State trade, in derogation from the absolute freedom predicated by sec. 92 of the Constitution. It is quite immaterial from our point of view whether, if that be so, the State does or does not set up a State enactment, and, if it does, whether that enactment is itself valid or invalid, for it can never be valid to sustain State action of the nature predicated. But contrary opinions are held which, though commanding respect, we are unable to share, and therefore, though the central question comes in the end to that we have stated, it is desirable to give primary attention to intermediate questions.

This action was instituted in this Court in its original jurisdiction by Frederick Alexander James, a resident of South Australia, against the State of South Australia and the Dried Fruits Board of that State. The statement of claim sets out the circumstances in respect of which the plaintiff seeks redress. Whether the Board is now in existence we do not consider. We direct our attention to the State as defendant. For present purposes what is averred in the statement of claim is to be accepted as true. On that basis the plaintiff contends that the defendant State has in various ways violated sec. 92 of the Commonwealth Constitution and has threatened to do so in future, and he asks this Court to protect him. The defendant State contends that, assuming all the plaintiff alleges is true, it has not infringed sec. 92, and that no case has been made out entitling this Court to determine the present controversy or any part of it. It says that all the plaintiff alleges does not arise under the Constitution or call for its interpretation. It will be convenient, therefore, at once to state without detailed narration the substance of the facts which in this proceeding are taken to be true.

The plaintiff has for several years carried on and, so far as not prevented by the defendant State, is still carrying on in South Australia the business of growing fruits, drying them, buying other dried fruits, and then selling all his dried fruits—with insignificant exceptions—to purchasers in other States, namely, New South Wales, Victoria and Western Australia. In the course of that business, and between 28th December 1926 and 19th February 1927, he entered into various inter-State contracts to sell and deliver dried fruits. The contracts are not set out; but it is stated, and we must accept the statement, that these sales were sales of part of the dried fruits he then acquired and delivery was contractually to be made by him to his purchasers f.o.b. at Port Adelaide, out of the said dried fruits. All that time, and for some little time afterwards, there were in existence three State statutes referring to dried fruits. Two of these, namely, No. 1657 of 1924 and No. 1702 of 1925, are material. The first is the principal statute, the second amends the first; and so the two may be treated as one enactment. Purporting for the most part to act under the authority of this legislation, both before and after its expiration, the State, according to the averments,

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acted in relation to the plaintiff in various ways, which may be classed as follows: (1) compulsorily "acquired," by the forcible taking from time to time in quick succession of, all the dried fruits which the plaintiff had in his packing shed or in the hands of his vendors or agents for the purpose of his inter-State business; (2) compulsorily "acquired," by the forcible taking of, his dried fruits required for filling his inter-State contracts, and in some cases, expressly specifying those marked "I.S.C." or "Required for Inter-State Contracts"; (3) prosecuted him for making inter-State sales in excess of the limits determined by the Board, the prosecutions being adjourned ultimately at the request of the Board pending the result of this action; (4) compulsorily "acquired" and forcibly removed at the plaintiff's packing shed dried fruits already actually placed on lorries for transit to merchants in Sydney, this "acquisition" being accomplished by the simple act of forcible seizure without any attempt at formal notice; (5) threatened, notwithstanding warnings and full knowledge that the plaintiff's dried fruits are the subject of inter-State trade, to continue taking them as before. The result of these acts is stated to be, and naturally is, that the plaintiff's whole business is brought to a standstill, and he has incurred liabilities and loss generally. The State says that all this raises no interference with the plaintiff's "absolute freedom" of inter-State trade, and no case for the original jurisdiction of this Court.

Viewing the connected series of acts in the light of ordinary human reason and experience, the State's contention appears to us impossible of acceptance. At every point of the plaintiff's inter-State trade—where he purchases, where he acquires and stores, and as fast as he acquires and stores, where he despatches in pursuance of contracts, when he begins to despatch, when he marks his goods for inter-State trade and fulfilment of inter-State contracts, and as fast as he does so—he is followed up, obstructed, deprived of the means of carrying on his trade, and sought to be punished for venturing to carry it on free from the restrictions with which the State authority has endeavoured to surround it. We unhesitatingly agree with the observation of Sir *Edward Mitchell* that if this series of acts, unexplained, is not an interference with inter-State freedom of trade, it is difficult to imagine what would be. That the defendants are

discriminating against inter-State trade is clear. Par. 18 of the statement of claim says :—" Neither of the defendants has made any similar orders or authorized the seizure of any dried fruits of any of the other persons in South Australia who in fact carry on similar kinds of businesses to what the plaintiff does."

The State, among other objections, has raised the formal contention that this case, either in its totality or as to any limited portion, is not a matter within the original jurisdiction of this Court. During the argument a question of considerable general importance was raised and debated, as to whether such a contention could be raised by demurrer. It is, we think, desirable to say a few words on this point. By Order XXIV., r. 1, of the Rules of this Court, it is prescribed that " Any party may demur to any pleading of the opposite party . . . on the ground that the facts alleged do not show any cause of action . . . *to which effect can be given by the Court* as against the party demurring." These words, in our opinion, aptly cover a case like the present, where it is to be determined whether, supposing the plaintiff has any cause of action at all, it is one " to which effect can be given by the Court." The rule so interpreted is in harmony with the law as enounced by *Willes* J. in advising the House of Lords in *Mayor &c. of London* v. *Cox* (1), in a passage quoted at length by Lord *Herschell* L.C. in *British South Africa Co.* v. *Companhia de Moçambique* (2), and approved by the House of Lords. In the Divisional Court (3) *Wright* J. (whose judgment was restored by the House of Lords) also quoted that passage, and added that the objection to the jurisdiction " could have been taken by demurrer to the statement of claim." In the Court of Appeal Lord *Esher* M.R., whose dissenting judgment was upheld, after speaking of cases where a dilatory plea to the jurisdiction of a Court having general jurisdiction is proper, says (4) : " But there is a larger objection to jurisdiction, which need not be pleaded, but which, if pleaded, is a plea in bar." And in support of that the learned Master of the Rolls quotes the passage from *Willes* J. already referred to. The simple truth is that as soon as it appears to the Court that it has no jurisdiction the mode in which that appears is

(1) (1867) L.R. 2 H.L. 239, at p. 261.
(2) (1893) A.C. 602, at pp. 621-622.
(3) (1892) 2 Q.B. 358, at pp. 370-371.
(4) (1892) 2 Q.B., at p. 403.

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of no consequence. In *Spooner* v. *Juddow* (1) Lord *Campbell* for the Judicial Committee first presumed that the defendant under the plea of "not guilty" would not have been able to adduce the facts ousting the Court's jurisdiction, yet, as the plaintiff in his case proved those facts, his Lordship proceeded: "Supposing, upon these facts, the Court had no jurisdiction to try the cause, was the Court to try it, and give judgment for the plaintiff, because the defendants had omitted to plead specially?" The question is no less cogent if the plaintiff sets out his facts in the statement of claim. We therefore cannot doubt that the demurrer in this case is a competent pleading to raise the question of the Court's jurisdiction.

Dealing first with that question, the only head under which our original jurisdiction can attach in this case is under sec. 30 of the *Judiciary Act* and sec. 76 (I.) of the Constitution, namely, a "matter arising under the Constitution or involving its interpretation." In our opinion this is a "matter" coming under both heads. *Story* in his *Constitution*, vol. II., sec. 1647, says: "Cases arising under the Constitution, as contradistinguished from those arising under the laws of the United States, are such as arise from the powers conferred, or privileges granted, or rights claimed, or protection secured, or prohibitions contained in the Constitution itself, independent of any particular statute enactment" (and see sec. 1641). The right to conduct inter-State business "absolutely free" from State interference is at once a right, a protection and a prohibition, referable directly to the Constitution itself, and therefore this matter arises under the Constitution. The common law right to trade generally is not a right free from State interference; on the contrary, it is, apart from the Commonwealth Constitution, entirely subject to State legislative control under the State Constitution. The "absolute freedom" guaranteed by sec. 92 against State molestation with inter-State trade is a purely Federal constitutional right, so far limiting the State constitutional power. Sec. 92 is thus a limitation, not simply of State legislative power, but of State constitutional power generally—that is, of *State power, however manifested.* That, it will be seen presently, was the opinion expressed in *McArthur's Case* (2).

(1) (1850) 6 Moo. P.C.C. 257, at pp. 278-279.

(2) (1920) 28 C.L.R. 530.

That this case, as to a very material portion of it at least, involves the interpretation of the Commonwealth Constitution, seems to us scarcely open to argument, either on principle or authority. The reason is that this case cannot, at all events entirely, be determined without construing and applying the Federal Constitution to the Constitution and law of the State and the facts alleged. The plaintiff's case challenges the conduct of the State in various ways. First, he says the legislation referred to was, at least to the extent necessary for this case, invalid, because in conflict with sec. 92 of the Constitution. Next, he says that, so far as the legislation is valid and is relied on to justify the State's conduct complained of, it fails because that conduct itself is an interference with the absolute freedom of inter-State trade protected by sec. 92 of the Constitution. Thirdly, he says, as to the conduct complained of which took place since the Acts expired, including the threats of continuance, that the State by its executive action apparently asserted, and still asserts, that under or by virtue of the State Constitution it is empowered to subject the plaintiff to the treatment he has suffered. Each position will be dealt with separately. The first position, attacking the validity of the legislation, concentrates on (1) sec. 28 and sec. 29 and (2) sec. 20. The second, which assumes legislative validity, consists of the events ending on 31st March 1927. The third consists of the subsequent events. We shall deal with each position in order.

1. *Invalidity of Legislation.*—The compulsory taking of property is justified under sec. 28 and sec. 29. Sec. 28 is introduced by the governing words: "Subject to sec. 92 of the Commonwealth of Australia Constitution Act," which we take to mean "subject to sec. 92 of the Constitution of the Commonwealth." Clearly those words strictly limit the powers contained in the section to powers that do not conflict with sec. 92 of the Commonwealth Constitution. It was contended that, notwithstanding these words, the subsequent words "and for the purposes of this Act" introduced all purposes of the Act, whether they violated sec. 92 or not. That might be said if the words were "but in any case for the purposes of the Act." The words actually used, however, are themselves limiting words; that is, the powers to be mentioned are not for any other purposes

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than those of the Act. But it is clear that, in the presence of the first introductory words, any purposes of the Act which violate sec. 92 of the Constitution are not to be supplanted or aided by sec. 28 or sec. 29. This part of the case, which is the first complaint under the first position, must therefore be determined against the plaintiff. The introductory words as to sec. 28 both exclude illegality in so far as sec. 92 of the Constitution is concerned, and exclude any necessity of interpreting sec. 92; and those words are not overcome by any later words.

The second complaint under the first position impeaches the validity of sec. 20 as the foundation of the determinations for breach of which the prosecutions were instituted. Sec. 20 is not verbally excluded from sec. 92 of the Constitution, and it stands on its own basis as a cause of complaint. Sec. 20, as amended, stood thus:— "(1) The Board shall also have power, in its absolute discretion, from time to time to determine *where* and *in what respective quantities* the output of dried fruits produced in any particular year is to be marketed, and to take whatever action the Board thinks proper for the purpose of enforcing such determination. (2) Notice of every such determination shall be given (*a*) by public notice; or (*b*) by sending by post," &c. Sec. 31, as amended, was as follows: "If any of the following persons, that is to say—(*a*) any grower; (*b*) any dealer; or (*c*) any person being the owner or occupier or person in charge of any packing shed, sells or otherwise disposes of any dried fruits contrary to any determination of the Board applying to such fruits and notified to him in manner prescribed, such person shall be liable to a penalty not exceeding five hundred pounds." In the year 1926 the Board, acting under sec. 20, made three determinations fixing the maximum proportions of currants, sultanas and lexias produced by growers, which might be "*marketed in the Commonwealth of Australia*," at 15, 20 and 20 per cent; 15, 30 and 30 per cent; and 30, 45 and 60 per cent—respectively. In September 1926 the Board summoned the plaintiff for exceeding the limits so prescribed, and three summonses, as already stated, await the decision of this Court as to the validity of the relevant sections. It was not contested at the Bar—the reason for this we are not concerned with—but it nevertheless has to be considered,

whether this matter, so far as it relates to the validity of sec. 20 or the validity of the determination of the Board under that section, is a matter within or outside the original jurisdiction of this Court. That is to say, whether it is or is not within the words of sec. 76 of the Constitution "a matter arising under the Constitution or involving its interpretation." *McArthur's Case* (1) is clear and definite authority for what we should think inherently plain, namely, that if *at any point* the interpretation of the Constitution becomes, in some event to be judicially determined, an issue necessary to the success of one side or the other, so that the "matter" in controversy may for one side or the other be incapable of determination without that interpretation, the "matter" falls within the original jurisdiction of this Court. If, to use the expression of *Harlan* J. in *Railroad Co.* v. *Mississippi* (2), the constitutional question "forms an ingredient of the original cause," it is within the judicial power (see also *Brooks* v. *United States* (3)). The question is an "ingredient" if in some event as the cause stands it is an issue, and that it is an issue in the circumstances just stated, we shall presently make clear. That this matter falls within the original jurisdiction of this Court, so far as to determine whether sec. 20 of the State Act conflicts with sec. 92 of the Constitution, appears transparent, and we proceed to consider whether such conflict exists.

The method of approach for this purpose of conflict is marked out by the case of *McArthur* (4), and we accordingly follow it. First, we examine the language of sec. 20 and the determinations, to ascertain its purport apart from any restraining considerations of Constitutions, either State or Federal; next, if necessary, we interpret, which includes its application, the State Constitution (*Macleod* v. *Attorney-General for New South Wales* (5)); and lastly, if that be also necessary, and only if necessary, we interpret and apply the Federal Constitution (*McArthur's Case*). Confining ourselves, in the first instance, to the language of the instruments—section and determination—the central word is "marketing." The determination of the Board is to regulate "marketing," as to (1) "where,"

(1) (1920) 28 C.L.R. 530, particularly at p. 543.
(2) (1880) 102 U.S. 135, at p. 141.
(3) (1925) 267 U.S. 432.
(4) (1920) 28 C.L.R. 530.
(5) (1891) A.C. 455.

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or (2) "in what respective quantities" the output of dried fruits may be "marketed." The word "marketed" in the determination must be given the same meaning as it has in the Act (*Richards* v. *Attorney-General of Jamaica* (1)). "Marketing" of dried fruits is indeed the central purpose of the Act, as may be seen by reference to its title, to sec. 19 (*b*), to sec. 20 and to sec. 34, sub-secs. 1 (*a*) and 1 (*c*). Other provisions are substantially ancillary to the control of "marketing." The true interpretation of the disputable words when all proper canons of interpretation are applied, is this:— "Marketed" means some commercial act done in South Australia, such as sale, consignment or otherwise, having the effect of supplying the economic demand for dried fruits in some markets. "Where" is universal. It refers to any place in the world where such demand exists. The relation of the two words in sec. 20 is comparable to the relation between firing a bullet from a gun of unlimited range in South Australia at a target situate anywhere. The remaining language of the section is not open to controversy. The construction of the first sub-section, then, is as follows:—The Board has power to determine in what market for dried fruits in the world, and in what respective quantities, dried fruits are to be marketed—that is, so sold, consigned or otherwise commercially dealt with *in South Australia* as to be thereby supplied to any market for dried fruits anywhere in the world, &c. The determination as an exercise of that power says that so marketing within the Commonwealth, the stated proportional quantities are not to be exceeded. In interpreting the word "marketed" we have not been unconscious of the danger the community runs of having its legislative measures designed for meeting new needs and circumstances of its progress and development frustrated by the comparative want of judicial acquaintance with the current coin of commercial intercourse. The mintage of commercial words and phrases is so rapid, new or specialized values are so frequently given to the verbal coin already in circulation, that Courts may easily fail to perceive the intended meaning of expressions in modern statutes. Parliament is in necessarily closer touch with the ordinary streams of commercial thought and modes of expression than is the Judiciary, and therefore

(1) (1848) 6 Moo. P.C.C. 381, at p. 398.

the full connotation of the word " marketed," as used in this connection, has given us much reason for consideration. But one thing is quite clear. The term " market" and, necessarily, its correlatives " marketing " and " marketed " have in recent years considerably expanded with the enlargement and adjustment of international commerce. Even since 1908, when the relevant volume of the *Oxford Dictionary* appeared, the literature of the subject shows a noticeable alteration in the connotation of the terms " market " and its cognate expressions. *Webster's Dictionary* (1923 and 1926), when contrasted with the *Oxford Dictionary* of 1908 and the *Webster* (say) of 1883, shows the great enlargement in the connotation of the word " market." From denoting the very limited locality itself where the mutual operations of buying and selling took place, it has come to bear also the world-wide conception as the recent *Webster* in the sixth meaning has it, " the economic extent of the commercial demand for commodities." The seventh meaning is also modern, namely, " opportunity for selling or buying of commodities, or the rate or price offered for them; *also*, the phase or course of commercial activity by which the exchange of commodities is effected." To a purchaser the terms " market " and " marketing " represent the field of opportunity and the exercise of commercial activity for *his* requirements. To the seller—which is the aspect with which we are presently concerned—they represent *his* opportunities and activities. For instance, a wool-sale in Melbourne, attended by American, French, German and Japanese buyers, is a " market " answering both descriptions. To the buyers it represents commercially, as well as locally, the Australian market—the selling market. To the sellers it represents commercially, that is, practically, the markets of the buyers—the buying market. The prices which the buyers are prepared to give are determined eventually by the demand conditions of the consumers on the commercial field occupied by the buyers—conditions of quantity, quality, style, price, &c., as well as circumstances of transport, storage, &c., relevant to that commercial field. Unaffected by any restricted canon of interpretation, the words " marketed " and " where " are universal in respect of locality. But there is one recognized canon of interpretation, namely, that a Legislature is presumed, in the absence of express

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statement or necessary implication to the contrary, to intend validity, and thereby to intend acting within the limits of its jurisdiction. Legislation of the British Parliament as to bigamy is primarily intended to cover a bigamous marriage by a British subject anywhere in the world (*Trial of Earl Russell* (1)). The British Parliament, by its grant of a Constitution to South Australia, might have authorized the Parliament of that State to legislate as widely. It is necessary, therefore, to examine and interpret the Constitution in order to ascertain whether it has done so. Interpretation of that Constitution being necessary, it is found that legislative jurisdiction is limited to South Australia. *Macleod's Case* (2) establishes the canon of construction that, there being no reason of express statement or implication to the contrary, the enactment should be read down to the extent, *and only to the extent*, necessary to its validity. Applying that canon, it is necessary and proper to read down " marketed " to commercial acts in South Australia only. Express limitation is out of the question. Necessary implication is, however, admissible. " Necessary implication," according to the opinion of Lord *Eldon*, adopted in *Hill* v. *Crook* (3), " means, not natural necessity, but so strong a probability of intention that an intention contrary to that which is imputed . . . cannot be supposed." When we come to consider the probability of the legislative intention to apply the word " where " outside South Australia, as well as inside, the strength of that intention is undeniable. Sub-sec. 2 of sec. 2 looks to corresponding legislation in Victoria, the competing State in dried fruits as defined. Renmark and Mildura are representative areas. If sec. 20 is confined to South Australian markets the first difficulty is, why trouble about Victoria ? What has one State to do with the purely internal trade arrangements of another State ? What does it matter to South Australia whether Victoria does or does not restrict the dried fruit trade between Mildura and Bendigo, so long as Mildura is free to trade outside Victoria ? Again, if the " marketing " contemplated by the Act is to places purely intra-State, what is meant by " concerted action in the marketing of dried fruits produced in Australia " (sec. 19 (*b*))

(1) (1901) A.C. 446. (2) (1891) A.C. 455.
(3) (1873) L.R. 6 H.L. 265, at p. 277.

—that is, produced *anywhere* in Australia? "Concerted action," which is entirely separate and distinct, and therefore necessarily unconnected, is an extraordinary phenomenon, which we are unable mentally to picture. "Simultaneous" action of the kind we could understand, but "concerted" action adds an element that is contradicted by hypothesis of mutual restriction to the one State. One might as well speak of concerted action on the part of the inhabitants of a street in taking their several morning baths or evening dinners. Then there is another peculiarity that finds no *raison d'être* in the assumption that the Act is confined to intra-State marketing. On that assumption, how can we account for the right of the dispossessed owner of dried fruits under sec. 28 to receive London price less adjustments? If sec. 20 necessarily leaves him entirely free to sell anywhere outside South Australia, why select London as the sole test of value? If, however, Australian trade is intended to be controllable, and London left free, or practically enforced and assisted by brands and labels, a good reason is shown for providing for London value. The presumption would be that compulsory taking was to ensure marketing in the London market, where that was not intended voluntarily. It is also a significant fact that sec. 20 is not preceded by the prefatory words of sec. 28 in respect of sec. 92 of the Federal Constitution. On the whole, the construction of sec. 20 of the statute seems to us overwhelmingly opposed to restricting it to control of intra-State trade. Its natural construction, apart from all constitutional considerations, is unlimited as to space. *Macleod's Case* (1), while restricting penalization to acts done within the jurisdiction, does not limit the area of the commercial effect of the acts struck at. Before Federation the State Parliaments could validly prohibit the sale of goods for, or their despatch to, any part of the Commonwealth, or India or Patagonia. Therefore, stopping at State law, the determinations which, properly construed, cover for the same reasons precisely the same ground as the section, so far as this case is concerned, are lawful restrictions on inter-State trade. No commercial man—and the determination is intended for commercial men—would for a moment think that it was intended to affect a

(1) (1891) A.C. 455.

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transaction by him actually entered into outside the limits of South Australia. It refers to the "output produced by each grower." But there is not in the Act or the determination any express limitation of "grower" to South Australia. Nevertheless, everyone would understand "grower" to be limited to South Australia in both instruments; and similarly as to the transactions necessary for "marketing." The words "in the Commonwealth of Australia" would mean to any commercial man, having regard to the context, that the "market" to be supplied was "in the Commonwealth of Australia." He would not unnecessarily attribute absurdity either to Parliament or to Board. The result, then, is that *certain acts of trade and commerce in South Australia* are so far penalized if they are *directed either to forbidden intra-State or inter-State trading.* This position reached, it at once, and without dispute, compels the interpretation and application of sec. 92 of the Constitution. The matter is consequently within the original jurisdiction of the Court. Exercising that jurisdiction, the result as to sec. 20 and its attendant determinations is that they are invalidated at least *pro tanto* in respect of the plaintiff's inter-State trade.

2. *State Executive acts under the Statute.*—The second position assumes the validity of the State statute in every respect, and therefore its insufficiency to justify even under State law the conduct of the State, but still claims the protection of sec. 92 of the Constitution in respect of the administrative acts complained of. The first branch, as we divided those acts, relates to the period ending 31st March 1927, when the statutes expired by reason of their self-limitation. As to this branch the acts impeached consist entirely of seizures of goods as authorized by compulsory acquisition orders and directions purporting to have been made and given under sec. 28. Sec. 28, as already stated, is prefaced by a limitation which guards it from infringing sec. 92 of the Constitution. But, granting that restriction, the State claims that the compulsory taking was within the authority of the section; the plaintiff denies that proposition. The test of the rival contentions is whether or not the acts complained of were interferences with inter-State trade. If they were, then of course the enactment supporting them must be *pro tanto* invalid. Whether they were or not depends again in the first place upon

the interpretation of the Constitution, sec. 92, and consequently the present " matter " as to this part of the controversy is equally within the original jurisdiction of the Court. In the exercise of that jurisdiction the law of sec. 92, properly interpreted, must be applied to the facts. It would be strange, indeed, if a State, relying on an enactment as authorizing compulsory taking, could escape Federal jurisdiction by failing to sustain its own construction of the statute, and thereby failing to establish the only justification it ever asserted. Further, in judging of the facts, that is, of the facts up to and including 31st March 1927, so as to ascertain their true quality and character, the subsequent events are very material, because they disclose a connected scheme to prevent the plaintiff engaging in inter-State trade at all, in the way already described. Up to the end of the first period, roughly over 230,000 lbs. weight of fruit were seized ; after that period, over 650,000 lbs. weight at least were taken. In the subsequent period, not only are the sources of his supply intercepted where possible, but accumulated stocks are taken piecemeal, and some of them taken specifically because they were marked " I.S.C." or " Required for Inter-State Contracts." These acts, like the personal prosecution, gave an undeniable inter-State character to the acts complained of all through. (See, by way of analogy, *Western Union Telegraph Co.* v. *Foster* (1) and *Frick* v. *Pennsylvania* (2).)

3. *State Executive acts under General Constitutional Power.*—The third position, however, which raises the main question very distinctly, might at first sight be thought to be so different in principle as not to attract the original judicial power of the Commonwealth. But on analysis the principle is found to be fundamentally the same. Where Executive conduct is complained of, as obstruction to freedom of inter-State trade, a State may deny the facts alleged and may in the event of their existence seek to justify them under a local Act ; and the alleged justification may be in turn disputed, first on mere construction of the statute, and next, if on construction it would justify the conduct complained of, then because of sec. 92. Now, it is clear from what has been already said that it is no ground of objection to Federal original jurisdiction that the State tribunals

(1) (1918) 247 U.S. 105, at p. 114. (2) (1925) 268 U.S. 473, at p 495.

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could determine (1) the existence of the facts and (2) the construction of the statute; and if either issue were found for the defendant, there would be no necessity to deal with the constitutional ground. It might as well be said the construction of the State Act was not involved because it might be found that the acts complained of were never committed. But that is involved as an issue raised, and in the same way is the interpretation of the Constitution involved as an issue before the Court, or an " ingredient " in the cause. The " matter "—assuming the State persisted in asserting its right to pursue the conduct complained of—could not repel the Commonwealth judicial power on the ground that the other issues were triable by State tribunals, and might, if decided in its favour, end the controversy. Similarly in the third position here. The State by demurring admits the facts and admits that the conduct complained of *was that of the Executive of the State itself*; and this involves necessarily a claim for immunity by the law of the State (in this part of the case, the Constitution, or some other statute not yet disclosed), and the State admits that it intends to pursue the same conduct in future, which is necessarily not a claim of lawlessness, but a claim directly under the State Constitution or some other undisclosed indirect authority. If a State takes up that attitude in relation to inter-State trade, and in fact brings into action the whole administrative forces of the State to compel submission, how can it say *in limine* that it is not the action of the State and that sec. 92 of the Constitution does not protect the plaintiff ? The threats are at once an assertion of right by State law to pursue the conduct in question and a challenge to test the matter (*Brisbane City Council* v. *Attorney-General for Queensland* (1); *Dyson* v. *Attorney-General* (2), and *Wigg* v. *Attorney-General of the Irish Free State* (3)). The analysed reasoning of the matter has been frequently stated by the Supreme Court of the United States, and what is there set out is as applicable to Australia as to America. Notably I may mention the case of *Home Telephone and Telegraph Co.* v. *Los Angeles* (4). That case arose under the Fourteenth Amendment, which

(1) (1908) 5 C.L.R. 695, at p. 734; (1909) 8 C.L.R. 767, at p. 778.
(2) (1912) 1 Ch. 158.
(3) (1927) 43 T.L.R. 457, at p. 459.
(4) (1912) 227 U.S. 278.

prohibits a State to deprive any person of life, liberty or property without due process of law. It was objected there (*inter alia*) that the unauthorized act of a State agent was not State action within the meaning of the Fourteenth Amendment and so the case did not arise under the Constitution of the United States. *White* C.J., delivering the judgment of the whole Court, reasoned the matter out in a way quite opposed to the present demurrer. He pointed out (1) the legal contention of the defendant " that where, in a given case, taking the facts averred to be true, the acts of State officials violated the Constitution of the United States and likewise because of the coincidence of a State constitutional prohibition were presumptively repugnant to the State Constitution, such acts could not be treated as *acts of the State* within the Fourteenth Amendment, and hence no power existed in a Federal Court to consider the subject until by final action of an appropriate State Court it was decided that such acts were authorized by the State and were therefore not repugnant to the State Constitution." The Chief Justice proceeds (2) to analyse some of the conceptions on which the proposition must rest. First, as he said, it would apply to the exercise of Federal judicial power under all circumstances. We have already pointed that out by analysing the position with regard to the earlier positions. Next, as *White* C.J. pointed out, it would paralyse Federal judicial action by compelling it to await State decisions. The third step is summarized on pp. 288 and 289, and we shall, in quoting the passage substitute " sec. 92 " for the " Fourteenth Amendment." With that substitution, the passage reads thus :—" Where a State officer under an assertion of power from the State is doing an act which could only be done upon the predicate that there was such power, the inquiry as to the repugnancy of the act to " sec. 92 " cannot be avoided by insisting that there is a want of power. That is to say, a State officer cannot on the one hand as a means of doing a wrong forbidden by " sec. 92 " proceed upon the assumption of the possession of State power and at the same time for the purpose of avoiding the application of the " section " deny the power and thus accomplish the wrong. To repeat, for the purpose of enforcing the rights guaranteed by the " section " when it is alleged that a

(1) (1912) 227 U.S., at p. 282. (2) (1912) 227 U.S., at p. 284.

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State officer in virtue of State power is doing an act which is permitted to be done prima facie would violate the " section, " *the subject must be tested by assuming that the officer possessed power* if the act be one which there would not be opportunity to perform but for the possession of some State authority." The rest of the judgment proceeds to recall the truth that the " State " means the political body by whatever instruments or in whatever modes its action may be taken. If a State Constitution places actual power and opportunity to do wrong in the hands of its Government or any subordinate official, it cannot *for this present purpose* deny that the acts complained of, being done by a person so placed in authority, were acts of the State itself. At one time it was thought that an employer was not liable for the negligence or fraud of his employee because he had not authorized either. But better reasoning has since prevailed; and its analogy is found here. Imagine, as was put during the argument, a State Government, quite apart from any statute, but entrusted with power by force of the State Constitution so that no official dares to disobey, placing a cordon of police along its border and forcibly preventing intercommunication of any kind with any other State, and claiming to have a right to do so, and to continue doing so: could it, with any show of reason, be said that a question whether sec. 92 had been violated had not arisen, and that this Court had no jurisdiction to afford redress by means of the original judicial power of the Commonwealth ? The guarantee of sec. 92 being against State interference, it matters not for the purposes of that section that the interference has behind it a supposed law authorizing it. In any case, there cannot be such a law, and the existence of some paper and ink purporting to be a law is nothing to the point. The material thing is that the organized force of the community called a State is repressing Australian national trade; and against this, as the Constitution by sec. 92 forbids such repression, the claim for redress both arises under the Constitution and involves its interpretation. The reasoning of *White* C.J., which has since been affirmed in other cases (*Cuyahoga Power Co.* v. *Akron* (1) and *Fidelity and Deposit Co.* v. *Tafoya* (2)), is so cogent and so apposite that there seems scarcely room for another opinion. It would indeed

(1) (1916) 240 U.S. 462.

(2) (1926) 270 U.S. 426, at p. 434.

be both an absurd and an alarming doctrine that would concede to Australian inter-State trade the protection of sec. 92 *against a State* where a State Executive claimed authority to interfere indirectly under the State Constitution—that is, through the medium of a State enactment—and yet would deny that protection if only the State Executive asserted the authority of the Constitution directly —that is, as the Government of the State. It would greatly impair the simplicity and the effectiveness of the Constitutional provision. In our opinion, where actual State interference is shown to exist, the prohibition of sec. 92 is contravened and its protection at once attracted by means of the Commonwealth judicial power. We do not think that there is any need to follow the serpentine considerations of whether the State interference is prima facie backed by invalid legislation, or whether some part of it is and other part is not, and therefore whether the systematic destruction of a business is to be split up as is sought to be done in this case. State power —actual and coercive power—has been exerted in open defiance of a plain Constitutional guarantee, and, in our view, that is enough. The contrary doctrine finds no foothold in sec. 92 or in *McArthur's Case* (1). That case, it must be remembered, was concerned directly with legislative interference only, because what was there done, and what was threatened to be done, was claimed to be supported by valid State legislation. Nevertheless, the reasoning of the Court was not confined to protecting inter-State trade from legislative interference. It extended to the exclusion of all State interference. Otherwise, inter-State trade could not be "absolutely free." *McArthur's Case* accordingly, in various passages, indicates the entire prohibition of all forms and kinds of State action in derogation of inter-State trade. (a) At p. 545 it is said: "In our Constitution, sec. 92 was designed to ensure that inter-State trade and commerce should be national and beyond controversy." (b) At p. 550 it is said:—"*Absolutely free.*—The primary meaning of these words used as they are with reference to governmental control, is that the subject matter of which they are predicated is to be 'absolutely free' from all governmental control by every governmental authority to whom the command contained in the section is addressed."

(1) (1920) 28 C.L.R. 530.

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(c) At p. 554: "The words 'absolutely free' in sec. 92 cannot, therefore, be confined to pecuniary exactions or customs laws, but in order to have any substantial effect must, unless some better reason be found, have their natural meaning of absolute freedom from every sort of impediment or control by the States with respect to trade, commerce and intercourse between them, considered as trade, commerce and intercourse." (d) At p. 556 it is said: "The true office of sec. 92 is to protect inter-State trade against *State interference*, and not to affect the legislative power of the Commonwealth." (e) At p. 557: "Its meaning is that from the moment the Commonwealth assumed legislative control on a national basis of the customs, *all State interference* with inter-State trade and commerce should for ever cease, and for that purpose Australia should be one country." No doubt sec. 92 does not direct itself to *individuals* who, on their own authority, obstruct other individuals in inter-State commercial operations, and therefore it cannot be said to establish a universal right of protection. But it does operate to shut off all forms of State obstruction and to confer upon the individual a right to be protected against all form of *State action* amounting to, or authorizing anyone to commit, such obstruction. The persistence of a State in maintaining its attitude of interference without any State legislation behind it, only seems to us to make the matter one more urgently calling for the vindication against the State itself of the guarantee of sec. 92. It cannot, of course, fail to be noticed how different the present considerations are from the cases relative to whether decisions of inferior Courts were in Federal jurisdiction or not, so as to attract the appellate power of this Court. There a decision having been arrived at, it could be at once determined whether the interpretation of the Constitution was involved or not. But here, as *White* C.J. says, all Federal jurisdiction based on the matter involving the interpretation of the Constitution would be paralysed if it be a good objection that certain primary questions have to be determined, and may be determined in a way rendering constitutional interpretation unnecessary, though if determined the other way, the constitutional interpretation would be essential. If, for instance, the State were to be set up in its defence some alleged

State constitutional right, or some other enactment as justification, there could be no doubt.

Obviously, also, this class of case is distinguished from the cases provided for in secs. 38A and 40A of the *Judiciary Act*. Those sections, which *ex facie* are intended to preserve the principle of sec. 74 of the Constitution, have been expounded on several occasions. It is sufficient to say that they take away from the Supreme Court of a State the jurisdiction it normally has, only when the " question " predicated both in sec. 74 of the Constitution and the quoted sections of the Act in fact arises for actual decision. The language of the legislation and its transparent purpose so indicate. Until that event arrives the State Court's jurisdiction is not taken away. Naturally, it does not follow that, merely because there is State jurisdiction in a given matter, there is not also Federal jurisdiction (see *Lorenzo* v. *Carey* (1)). In the present case, the " matter " as a controversy within original Federal jurisdiction already exists on the face of the statement of claim, the necessary circumstances existing to bring it within sec. 30 of the *Judiciary Act*. How widely the two classes of case differ in this respect may be seen by considering the result of confusing them. If, for instance, it were held that sec. 76 (II.) of the Constitution did not apply except where the constitutional " question " actually and necessarily presented itself for decision, then, as already mentioned, if only the facts were disputed, or if the authority of the State statute relied on were contested on its construction, there would be no " matter " falling within the constitutional category referred to—merely to pick up matters when so much had been decided would not satisfy the contents of sec. 76 (II.). The distinction thus appearing appears to us to make the view above presented with reference to the present case practically conclusive.

It may not be unimportant, though it forms no part of our reasoning, to observe that the formal defence as a whole contests the whole case, in fact and in law. It forms what seems to us an excellent practical illustration of what would be the consequence of holding contrary to the view we have expressed. We mean that the defendant State could ride off on an assumption, which the

(1) (1921) 29 C.L.R. 243, at p. 252.

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plaintiff could not remove, that it was unjustified by State law, and so escape Federal judicial investigation, and then proceed in the State Court to demonstrate, so far as possible, the impropriety of the assumption. For ourselves, we do not see how this Court, without at least holding the State to be without legal justification under State law, which is deciding the case, can allow the demurrer objecting to its so deciding, nor how, if it allows the demurrer, it has jurisdiction to determine whether the State is or is not justified under State law. Inconsistency obtrudes itself.

The Wheat Case.—To prevent any possible misconception as to the relation of this case to the *Wheat Case* (1):—In that case the expropriation of wheat by the Government was held to be good, because it appeared that it was made without reference to inter-State trade or inter-State contracts as a criterion or as influencing the operation of expropriation, and without discrimination. Otherwise the contrary would have been held. (And see *McArthur's Case* (2).) Here, as shown, the purpose for which the goods were seized was direct interference with inter-State trade, and inter-State contracts not only influenced the governmental action but formed its criterion. In *Municipal Council of Sydney* v. *Campbell* (3) *Duff* J., speaking for the Judicial Committee, said: "A body such as the Municipal Council of Sydney, authorized to take land compulsorily for specified purposes, will not be permitted to exercise its powers for different purposes, and if it attempts to do so, the Court will interfere. As Lord *Loreburn* said in *Marquess of Clanricarde* v. *Congested Districts Board* (4): 'Whether it does so or not is a question of fact.' Where the proceedings of the Council are attacked upon this ground, the party impeaching those proceedings must, of course, prove that the Council, though professing to exercise its powers for the statutory purpose, is in fact employing them in furtherance of some ulterior object." Here the Government of South Australia has made it perfectly plain, and without the slightest attempt at concealment, that it was expropriating the plaintiff's property to enforce sec. 20 of the Act, that is, to obstruct and prevent

(1) (1915) 20 C.L.R. 54.
(2) (1920) 28 C.L.R., at p. 551.
(3) (1925) A.C. 338, at p. 343.
(4) (1914) 79 J.P. 481.

his inter-State trade, and not for any general State purpose independent of the direct object mentioned. This case, therefore, is the antithesis of the *Wheat Case* (1).

Constitutional Result.—If it be assumed that, the dilemma above stated being disregarded, the demurrer is allowed as to any of the acts complained of, what is necessarily implied ? Either (1) that the State is legally responsible to make redress for the acts of the individuals committing them, or (2) that the State is not responsible at all. If the State is legally responsible to make compensation—and by assumption in the State Courts and by State law—that must be because *by law* the State was injuring the plaintiff by those individuals, and so comes within the principle *respondeat superior*. But if so, that *law* must be statutory, because it must *ex necessitate* be either the statute of the State Constitution or some statute made under it, as, for instance, the *Public Service Act*. That involves the legal implication that though statutory powers were exceeded, the State was purporting to act, and was generally acting, within them, just as it did while the Marketing Acts were in force. To attempt a constitutional distinction between those categories of statutes would, as it seems to us, be to

> " . . . distinguish and divide
> " A hair, 'twixt south and south-west side."

Either, then, on the assumption that the State is responsible at all in this case, the demurrer should be wholly allowed or wholly overruled.

The alternative assumption—complete absence of State responsibility for the acts of trespass since 31st March 1927—would be startling. It would mean that sec. 92 of the Constitution could never be enforced, because the State had not in law authorized the act complained of, and the individual acting without State authority was not within the ambit of the section. The most extreme optimism would be hard pressed to find a means to surmount the difficulty. Even the first assumption—State responsibility for actual authorization—that is, responsibility assumed to be under State law alone, presents a serious obstacle. If it be now decided that sec. 92 does not affect the case here, because not in issue in any

(1) (1915) 20 C.L.R. 54.

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way, then necessarily it would still be so in the State Court, and equally so in appeal to this Court. So that sec. 92 is shut out on every side. And there would be cut away all liability of a State whatsoever under the Federal Constitution in such a case. At common law the Crown is not liable for an unauthorized taking by an individual, and the view we reject would leave it entirely within the power of a State to deny all recourse to itself or even the individual for redress. The true position of the whole matter, however, seems to us, as we have said much earlier, so plain that only its serious consequences and our respect for the opposite opinion justify this elaborate exposition.

In our opinion, the demurrer should be entirely overruled.

GAVAN DUFFY, RICH AND STARKE JJ. The plaintiff has commenced an action against the defendants in the original jurisdiction of this Court. He filed a statement of claim alleging that he is a grower of and dealer in dried fruits engaged in inter-State trade. He claims that determinations of the Dried Fruits Board of South Australia as to the proportion of the output of currants, sultanas and lexias produced by the growers in the year 1926 which may be marketed in the Commonwealth are invalid and also that acquisitions made by the Government of South Australia on and between 5th March and 9th May of large quantities of dried fruits belonging to the plaintiff are invalid. The defendants demurred to this statement of claim and also raised an objection to the jurisdiction of the Court as to part of the plaintiff's claim. The plaintiff's contention is that the determinations and acquisitions already mentioned were made under and in pursuance of the *Dried Fruits Acts* 1924 *and* 1925 and that those Acts are invalid because they contravene the provisions of sec. 92 of the Constitution. The *Dried Fruits Acts* 1924 *and* 1925 continued in operation only until 31st March 1927, and, consequently, determinations or acquisitions made or effected after that date cannot be referred to those Acts. The plaintiff in his statement of claim wrongly assumed that the Acts of 1924 and 1925 had been continued in operation by the *Dried Fruits* (*Continuation of Operation*) *Act* of 1926; but the continuation in operation of these Acts has not been proclaimed

under the authority of the 1926 Act and therefore they have not been in operation since 31st March 1927. On discovering the true fact the plaintiff amended his statement of claim. The consideration of his position with respect to the acts of the defendants alleged to have taken place after 31st March 1927 may be postponed for the present.

It is necessary, in the first place, to consider the meaning of the South Australian legislation and how far the acts alleged by the plaintiff are warranted by the terms of that legislation. It appears to form part of a scheme, in which the Commonwealth and the States of Victoria and South Australia have joined, to regulate and control the marketing and sale of dried fruits. The Commonwealth regulates the export of dried fruits—the external trade of the Commonwealth (*Dried Fruits Export Control Act* 1924)—whilst the States by their legislation regulate or attempt to regulate the internal trade (*Dried Fruits Acts* 1924 *and* 1925 (Vict.); *Dried Fruits Acts* 1924 *and* 1925 (S.A.)). The legislation of the States should be construed so as to uphold it rather than defeat it; to keep it within the legislative power of the Parliament of the States rather than beyond them (*Wheat Case* (1)). Now, it is clear enough that the legislation does not transcend the territorial jurisdiction of the Parliament of South Australia—it is confined to persons, property or acts within the territorial limits of South Australia; but that does not advance us very far as regards the provisions of sec. 92 of the Constitution, for State legislation may deal with acts within its territorial limits and yet contravene the provisions of sec. 92 of the Constitution that trade, commerce and intercourse among the States shall be absolutely free.

The South Australian statute must now be examined in detail. It provides for the constitution of a Dried Fruits Board consisting of five persons—three representatives of the growers, that is, persons who produce dried fruits for sale or barter, and two official members, one of whom is to be chairman of the Board. It confers extensive powers upon the Board. Thus sec. 19 gives the Board power to make contracts in respect to the sale or purchase of dried fruits produced in Australia, to open shops for the sale of dried fruits, to

(1) (1915) 20 C.L.R., at p. 96.

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encourage the consumption of dried fruits and create a greater demand therefor. The validity of these powers, taken singly, was not challenged during the argument, but it was said that sub-secs. (*b*) and (*f*), taken either singly or together with various other provisions of the statute, notably secs. 20, 26, 28 and 29, were in contravention of sec. 92 of the Constitution. The sub-sections which were challenged enact as follows : Sec. 19—" The Board shall have power in its absolute discretion from time to time (*b*) to enter into contracts with Boards appointed under legislation in force in other States with objects similar to those of this Act for concerted action in the marketing of dried fruits produced in Australia and for purposes incidental thereto, and to carry out such contracts. . . . (*f*) to fix the maximum prices to be charged on the sale of dried fruits, whether wholesale or by retail." The plaintiff has not alleged in his statement of claim that the Board made any such contracts or fixed any such prices. In substance he alleges that he might be prejudiced in his inter-State trade if the powers conferred by the said sub-sections were exercised. So far, no right of the plaintiff is alleged to have been invaded under those sub-sections. The jurisdiction of the Court to declare a statute or parts of a statute in contravention of the Constitution can be invoked only when it is found necessary to secure and protect the rights of a party before it against unwarranted exercise of legislative power to his prejudice (*Attorney-General for New South Wales* v. *Brewery Employees Union of New South Wales* (1)).

Next, sec. 20 of the statute must be considered. It enacts that the Board shall have power in its absolute discretion from time to time to determine where and in what respective qualities the output of dried fruits produced in any particular year is to be marketed and to take whatever action it thinks proper for the purposes of enforcing such determination. The statement of claim alleges that the Board has exercised this power and, to take one instance, determined in August 1926 that the proportion of the output of currants, sultanas and lexias produced by each grower which may be marketed in the Commonwealth of Australia should not be more than the following: for currants 20 per cent, for sultanas 30 per cent, for lexias 60 per

(1) (1908) 6 C.L.R. 469.

cent. Such a determination undoubtedly affects and prejudices the right of the plaintiff to conduct his business as he thinks expedient. The first question therefore is whether the section authorizes the determination. On ordinary principles of construction the section must be confined to dried fruits produced within the territorial jurisdiction of South Australia, and it would be within the constitutional competence and authority of the Parliament of South Australia, subject to any overriding provisions of the Constitution, to control the marketing of dried fruits produced within its territory and to prohibit persons subject to its jurisdiction from marketing more than a certain proportion of such produce in the Commonwealth. The provisions of sec. 20 properly construed do, in our opinion, delegate that power to the Dried Fruits Board. The Act contemplates the concerted action of the Commonwealth and the States in the marketing and control of dried fruits to the fullest extent within the competence of the several authorities. If the powers in sec. 20 be confined to persons and dried fruits within the confines of South Australia, still as applied to those persons and to that subject matter the word " where " is without restriction or limitation of any kind and is applicable to places outside as well as to those within South Australia. Such a construction is consistent with the objects of the Act and does not transcend the territorial jurisdiction of South Australia. Consequently, the determination of the Dried Fruits Board is warranted by the provisions of sec. 20 of the Act. The effect, then, of this determination is to prohibit growers in South Australia from marketing their produce or engaging it in inter-State or other trade in Australia beyond the proposition mentioned. Such a prohibition contravenes sec. 92 of the Constitution as expounded in *McArthur's Case* (1): " The prohibition by a State Legislature of inter-State sales of commodities either absolutely or subject to conditions imposed by State law is . . . a direct contravention of sec. 92 of the Constitution " (2).

The provisions of secs. 28 and 29 next fall for consideration. They give authority to purchase by agreement or to acquire compulsorily on behalf of His Majesty any dried fruits in South Australia grown or dried in Australia which are not held for export under licences

(1) (1920) 28 C.L.R., at p. 550. (2) (1920) 28 C.L.R., at p. 555.

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granted by the Commonwealth pursuant to the *Dried Fruits Export Control Act* of the Commonwealth. The *Wheat Case* (1) is a binding and conclusive authority that such a law does not violate the provisions of sec. 92. It was pointed out, however, that the acquisition authorized by sec. 28 of the South Australian Act was an acquisition for the purposes of the Act or of any contract made by the Dried Fruits Board; and, consequently, it was argued that if any of those purposes were or might be in violation of the provision of sec. 92 the whole section must necessarily be invalid. We need not consider the effect of this limitation on the right of acquisition because sec. 28 conditions the power of acquisition by its opening words, "Subject to section 92 of the Commonwealth of Australia Constitution Act," in effect providing that the power of acquisition shall not be exercised so as to violate sec. 92 of the Constitution. Consequently, whatever the purposes of the Act may be, whether in violation of sec. 92 of the Constitution or not, the acquisition authorized by sec. 28 can never violate sec. 92, for it can operate only in accordance with, and not in violation of, the provisions of that section. An acquisition not within the Constitution is not authorized by sec. 28, but, in our opinion, the acquisitions effected in this case are strictly within the limitation imposed on the operation of sec. 28 and are therefore authorized by that section.

It remains only to consider the objection to the jurisdiction of this Court which was argued with the demurrer. This Court has original jurisdiction in all matters arising under the Constitution or involving its interpretation (*Judiciary Act*, sec. 30); and on that provision the jurisdiction of this Court is rested. Matters arising under the Constitution or involving its interpretation are those in which the right, title, privilege or immunity is claimed under that instrument, or matters which present necessarily and directly and not incidentally an issue upon its interpretation. It is quite clear that the interference alleged in par. 21 of the statement of claim and the compulsory acquisition of the plaintiff's dried fruits after the expiration of the *Dried Fruits Act* on 31st March 1927 raise no question on the Constitution or involving its interpretation. The defendants' acts are rightly stated as trespasses, and the causes

(1) (1915) 20 C.L.R. 54.

of action are not founded on the Constitution but upon the plaintiff's possessory rights in his dried fruits. We say that these acts of the defendants are rightly alleged as trespasses because we think the plaintiff must have failed if he had relied on those acts as giving him a right of action for damages for breach by the defendants of the provisions of sec. 92 of the Constitution. In our opinion, no such action would lie. Sec. 92 was defined in *McArthur's Case* (1) as applying only to the States, and we think that it is no more than an inhibition addressed to the Parliaments of the States preventing them from legislating so as to interfere with the freedom prescribed by that section. It gives no right to the citizens of the Commonwealth except the right to ignore, and, if necessary, to procure the assistance of the judicial power in resisting, any such legislation. The defendant cannot justify those trespasses by invoking the Constitution or any statute of South Australia, which involves the interpretation of sec. 92 or of any other section of the Constitution. So far as pleadings go, it is quite impossible to say that any provisions of the Constitution touch the case, and, to found jurisdiction, the facts alleged in the pleadings must distinctly and clearly raise the issue of constitutionality. Equally clear is it that the allegations in the pleadings relating to the determination fixing the proportion of the output of currants, sultanas and lexias which may be marketed in the Commonwealth, raise an issue directly involving the interpretation and application of sec. 92 of the Constitution, and therefore within the jurisdiction of this Court.

The allegations as to the validity of secs. 28 and 29 and the acquisitions of the plaintiff's dried fruits under those sections also in our opinion raise an issue directly affecting the interpretation of the Constitution; they raise the same question as was raised in the *Wheat Case* and the application of sec. 92 to a section somewhat differently framed. The result is that the objection as to the jurisdiction should be upheld in so far as it relates to the unlawful taking alleged in par. 21 of the statement of claim and to the compulsory acquisition of dried fruits after the expiration of the *Dried Fruits Act* on 31st March 1927, and not otherwise; that the demurrer should be overruled in so far as it relates to the cause of action

(1) (1920) 28 C.L.R. 530.

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based on the determinations fixing the proportion of the output of currants, sultanas and lexias produced by each grower in 1926 which may be marketed in the Commonwealth, and allowed as to all other causes of action in the pleadings mentioned within the jurisdiction of this Court.

Demurrer overruled so far as it relates to the cause of action based on the determinations fixing the proportion of the output of dried fruits produced by each grower in 1926 *which might be marketed in the Commonwealth. Demurrer otherwise allowed.*

Solicitors for the plaintiff, *Madden, Butler, Elder & Graham.*

Solicitor for the defendants, *A. J. Hannan,* Crown Solicitor for South Australia.

Solicitor for the intervener, *Frank G. Menzies,* Crown Solicitor for Victoria.

B. L.