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"with one of the objects mentioned in sec. 80. I think that that is the reason the Court's sanction is required—that the Court may see that it will in some reasonably substantial way do what it purports to do."

In *In re Gippsland and Northern Co-operative Selling Co. Ltd.*, (1914) V.L.R. 503, the Full Court (A'Beckett, A.-C.J., Hodges and Cussen, JJ.) went a long way in confirming a resolution which enabled the company to carry on a very different business from that described in the original memorandum; but in *In re Cobden and District Cheese and Butter Factory Co. Ltd.*, (1916) V.L.R. 421 (F.C.), Hodges, J. (at p. 423), said of *The Gippsland and Northern Co.'s Case*, that "the order of the Full Court as drawn up in that case goes beyond what the Court intended. The Court meant only to sanction insurance in connection with the subject-matter of the ordinary business of the company, not to give the company power to engage in insurance business generally." And Cussen, J., said—"I agree that the order as drawn up goes further than the Court intended."

In the *Cobden Butter Factory Case* (cited above) the special resolution was passed unanimously, and there was no opposition to the petition; but quite a number of alterations or modifications were made to the proposed new clauses on the ground that, as they stood, they would enable the company to carry on quite a different business from its original business—see, for example, clause (e) (p. 421), which was in very general terms, altered—(e), p. 424—so as to read, "To purchase acquire or lease and carry on any other business (including its property and liabilities) which is substantially similar to the business of this company;" and clause (k) (p. 422), which is—"To undertake all kinds of agency business," and is altered so as to read—(i), p. 425—"To undertake all such kinds of agency business as may be connected with the business of the company." And see *In re Foster and District Co-operative Butter Factory Ltd.*, (1917) V.L.R. 5. The special resolution was passed unanimously, and there was no opposition to the petition. Clause 18, p. 7—"To carry on the business of general storekeepers (in all its branches) and general traders" was altered so as to read—[clause 18, p. 9]—"To carry on the business of general storekeepers in all branches with the company's members customers and suppliers, and in connection with any other business of the company." Clause 20, p. 7—"To carry on and transact every kind of agency business" was altered (clause 20, p. 9) to—"To carry on and transact all such kinds of agency business as are connected with the business of the company." Clause 23, p. 7—"To engage in the business of general carriers and forwarding agents," &c., in very general terms, was limited (p. 9, clause 23) to the business of general carriers "in connection with the handling of farm and dairy produce or

any of the products dealt with or treated by the company." And compare clauses 24, 25 and 27, at p. 7, with the corresponding clauses 24, 25 and 26, at p. 10, where similar limitations were placed upon the clauses as passed by the special resolution.

It seems to me that these cases establish, first, that in applications under sec. 17 (1) (d) the question whether the business the subject-matter of the special resolution is a business which "under existing circumstances may conveniently or advantageously be combined with the business of the company" is a question for the Court to determine; and secondly, that in determining that question it is necessary to consider what relation the proposed new business bears to, or what connection it has with, the business of the company as described in the memorandum. In the present case the proposed new business is (as I have said) totally dissimilar from and entirely foreign to the business of the Company as described in the memorandum, and I am of opinion that the former cannot conveniently or advantageously be combined with the latter.

For these reasons I am of opinion that the petition should be dismissed.

*Petition dismissed.*

[Solicitors for petitioner, J. M. Smith and Emmer-ton.] W. P.

## High Court of Australia.

FULL COURT—(Isaacs, A.-C.J., Gavan Duffy, Powers, Rich and Starke, JJ.) (Melbourne.)	} May 30, 31; June 1, Aug. 22.
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**JAMES, Plaintiff v. THE STATE OF SOUTH AUSTRALIA and Another, Defendants.**

*Constitutional law — Dried fruits — Marketing of— Statute controlling — Dried Fruits Board—Determination of — Restricting grower's output—Compulsory acquisition—Validity of legislation—"Dried Fruits Acts" (South Australia) (Nos. 1657.\* 1702, 1759)—The Constitution, sec. 92 — "Judiciary Act 1903-1920," sec. 30.*

\* "Dried Fruits Act 1924" (No. 1657) (South Australia)—

Sec. 19. The Board shall also 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.

Sec. 20 (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; and

A matter is one "arising under the Constitution or involving its interpretation," and thus within the original jurisdiction of the High Court under the "Judiciary Act," section 30, if it is a matter in which a right, title, privilege or immunity is claimed under the Constitution, or which presents necessarily and directly, and not incidentally, an issue upon its interpretation.

The jurisdiction of the Court to declare a Statute to be in contravention of the Constitution can be invoked only when that becomes necessary for securing the rights of a party against unwarranted exercise of legislative power.

By the "Dried Fruits Act 1924" (South Australia) a Board was constituted with power to enter into contracts with Boards appointed under similar legislation in force in other Australian States for concerted action in the marketing of dried fruits produced in Australia, and with power to determine where and in what quantities the output of dried fruits produced in any particular year was to be marketed, and with power, "subject to section 92 of the Constitution," to purchase or compulsorily acquire, on behalf of His Majesty, dried fruits. The Board made a determination, the effect of which was to prohibit growers in South Australia from marketing their produce in interstate or other trade in Australia beyond the proportions mentioned in the determination, and the Minister for Agriculture, purporting to exercise powers under the Act, made orders authorising the Board to acquire on his behalf large quantities of dried fruit the property of a South Australian grower, and the fruit was subsequently seized by the Board's officers. Some of it was seized after the expiry of the term for which the Act was in operation.

In an action by the grower against the State of South Australia and the Board for a declaration that the Dried Fruits Acts were invalid, an injunction and damages for trespass.—

*Held.*—(a) That the question of the validity or otherwise of the provisions authorising the Board's determinations, and authorising the compulsory acquisition of the fruit, raised issues directly involving the interpretation and application of section 92 of the Constitution, and was therefore within the original jurisdiction of the High Court.

(b) That the provisions purporting to authorise the Board's determination, and the determination thereunder were in contravention of section 92, and invalid with regard to interstate trade.

(c) That the provisions for compulsory acquisition and seizure of fruit, being expressly subject to sec-

(b) by sending by post to each grower or dealer affected or likely to be affected by the determination at his address as registered with the Board a letter containing particulars of the determination.

Sec. 28 (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 purchase by agreement or 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 or of which the Board constituted under that Act has accepted the control for the purposes of that Act or which are included in any contract referred to in section 18 of that Act . . .

(2) The Minister may authorise the Board to acquire on his behalf any dried fruits which this Act empowers him to acquire.

(3) Any dried fruits acquired pursuant to this Act may be sold by the Minister in such manner as he thinks fit.

29 (1) The Minister by order in writing or the Board when authorised . . . such order being served upon any person being the owner of or having the control or disposal of any dried fruits described or referred to in the order may declare that such fruits are acquired by His Majesty.

tion 92, were valid, and sufficient to warrant a seizure of fruit under circumstances not involving interference with interstate trade.

(d) That, on the facts as pleaded (Isaacs, A.-C.J., and Powers, J., dissenting), the seizures of fruit, not amounting to an interference with interstate trade, were authorised in so far as they occurred prior to the expiration of the Act.

*Per* Gavan Duffy, Rich and Starke, JJ.—Section 92 of the Constitution is an inhibition addressed to the Parliaments of the States, preventing them from legislating so as to interfere with the freedom of interstate trade. It gives no rights to citizens, save the right to ignore any such legislation and to invoke the judicial power to resist it. A claim in respect of the seizure of fruit by the Board's officers after the expiry of the "Dried Fruits Act," therefore, involved no question under the Constitution, and was not within the original jurisdiction of the Court.

*Per* Isaacs, A.-C.J., and Powers, J.—Though section 92 is not directed against the acts of individuals, it prohibits all forms of State action obstructing interstate trade, or authorising individuals to commit such obstruction, and the seizure after the expiry of the Statute, being the act of a State agent asserting State power, the claim for redress arose under the Constitution, and was within the original jurisdiction.

The question whether an action is within the original jurisdiction of the High Court may be raised by demurrer to the Statement of Claim.

#### DEMURRER.

Frederick Alexander James brought an action in the High Court against the State of South Australia and the Dried Fruits Board of South Australia. The plaintiff was a grower of and dealer in dried fruits, carrying on business at Berri, South Australia, and engaged in grading and packing such fruits and selling them to purchasers in other Australian States. He alleged that he had entered into contracts for the sale and delivery of fruit to purchasers in New South Wales and other States, and that for the purpose of fulfilling those contracts he had quantities of dried fruits stored in packing-sheds. The Dried Fruits Board of South Australia during 1926 made various determinations, by which the proportion of the output of currants, sultanas and lexias produced by each grower in 1926 which might be marketed in the Commonwealth was not to exceed 15 per cent. for currants and sultanas, and 30 per cent. for lexias. At the instance of the Board, summonses were issued against the plaintiff, charging him with selling fruits in excess of the limits so fixed, and this action was commenced while the summonses were still pending. Orders were made by the Minister for Agriculture, purporting to be made under sec. 28 (2) of the "Dried Fruits Act" (No. 1657), authorising the Board to acquire large quantities of the plaintiff's fruit, and the fruit was subsequently seized by officers of the Board. The plaintiff in his Statement of Claim alleged these facts, and contended, by par. 23 thereof—

(a) That the several Dried Fruits Acts contravened sec. 92 of the Constitution and were invalid.

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(b) Alternatively, that sec. 19 (b), 19 (f), 20, 28 and 29 of Act No. 1657, as amended, were in contravention of sec. 92 and were invalid.

(c) Alternatively, that the orders and declarations under which the fruit was seized were unauthorised by the Dried Fruits Acts of South Australia.

(d) That the acts of the officers constituted trespasses.

The plaintiff sought declarations accordingly and an injunction and £5000 damages.

By demurrer the defendants averred that the contentions set out in paragraphs 23 (a) and 23 (b) of the Statement of Claim and the averments founding them were bad in substance, that the contention set out in paragraph 23 (d), so far as incidental to paragraphs 23 (a) and 25 (b), and the averments founding them were bad in substance, and not within the original jurisdiction of the Court, and that the Statement of Claim contained no averment of fact to support the claim that sec. 19 (b) and 19 (f) of Act No. 1657 were invalid. In the demurrer the following points were stated for argument:—

1. That the Statement of Claim disclosed no ground for any of the relief claimed.

2. That it was not alleged that the fruit was the subject of interstate trade or commerce.

3. That none of the State Acts infringed sec. 92 of the Constitution.

4. That the State Acts did not purport to authorise any violation of sec. 92.

5. That any excess of authority by the defendants did not involve matter arising under the Commonwealth Constitution or its interpretation.

6. That the allegations did not disclose any excess of authority.

In their defence the defendants (*inter alia*) objected that the High Court had no jurisdiction to determine the plaintiff's claims.

*Sir Edward Mitchell, K.C., and K. L. Ward* for the plaintiff.—The acts complained of amount to a series of trespasses. As to those acts done after 31st March, 1927, when the Act expired, there is no State Statute to support them, and therefore no question for this Court. As to the acts prior to 31st March, either they were unauthorised by the Statute; or, if the Statute purported to authorise them, it is invalid. In so far as sec. 28 purports to authorise them, the provisions of that section are expressly subject to sec. 92 of the Constitution; but they are part of the larger enactment—particularly that contained in secs. 19 and 20, which are not expressly subject to sec. 92, and the powers purported to be given by sec. 28 fall with them. That the exercise of the right of Royal expropriation is not a contravention of sec. 92 appears from *The Commonwealth v. State of New South Wales (Wheat Acquisition Case)*, 21 A.L.R. 128. But a State cannot use the power to expropriate goods for an ancillary purpose such as that of sustaining

provisions which, if merely upheld by a penalty, would be contrary to sec. 92. That is what has been done here in respect of secs. 19 and 20—*Attorney-General for Ontario v. Reciprocal Insurers*, (1924) A.C. 328; *Hammer v. Dagenhart*, 247 U.S. 251.

*Owen Dixon, K.C., and Menzies* for the defendants.—The State Statute attempts to do nothing contrary to sec. 92. The only question is whether the acts done are authorised by that Statute. There is no question arising under the Constitution nor involving its interpretation. The defendants are justified by the Statute, and the only question is whether these acts come within it. There is no constitutional question, for sec. 92 does not confer individual rights. It delimits the power of the State Parliament. The Statute does not purport to confer any power at variance with sec. 92. If some act based on a construction of the Statute alleged to be at variance with sec. 92 were in issue, this Court might have to consider sec. 92; but not in this case. The pleadings do not allege any breach of sec. 92. In *Ex parte Walsh and Johnson*, (1926) A.L.R. 46, 37 C.L.R. 36, there was a direct appeal to the Constitution. The test is whether the matter or claim of right necessitates a consideration of the meaning of the Constitution. In order that the Constitution should be involved there must arise the necessity for interpreting it, because of the parties advancing rival views on the subject—*H. V. McKay Ltd. v. Hunt*, (1926) A.L.R. 393. The plaintiff merely uses sec. 92 to cut down the positive words of the enactment. This Statement of Claim discloses no cause of action cognisable in the original jurisdiction of this Court. The only heading to which it is referable is that the interpretation of the Constitution is involved. The State Statute gives a general power of expropriation, but not any such power as transgresses sec. 92. That a matter may incidentally require the ascertainment of the meaning of the Constitution is not sufficient for jurisdiction. It must be a case where the parties depend for their rights on the meaning to be given to the Constitution. As to some of the goods seized, all that is averred is that the plaintiff had made contracts for interstate trade, and that he had in his shed goods capable of being appropriated and intended to be appropriated to that interstate trade. The expropriation of such goods would not necessarily be an interference with interstate trade—*Gulf of Colorado and Santa Fe Railway v. Texas*, 204 U.S. 403. Mere intention will not cause goods to be the subject of interstate commerce. Nor will any collection of the goods into a depot do so, till the transit commences—*Hughes Bros. Timber Company v. State of Minnesota*, 71 Lawyers Ed. U.S. (15th Dec., 1926), p. 214. As interstate commerce consists of acts, not things, the seizure of the goods in question is not necessarily an interference with that commerce—*The Commonwealth v. State of New South Wales (Wheat Acquisition Case)*, 21 A.L.R. 128, at pp. 135, 139.

*Ham, K.C., and Menzies, for the State of Victoria, intervening by leave, adopted the argument of Owen Dixon, K.C.*

*Sir Edward Mitchell, K.C., in reply.*—This Court has original jurisdiction, because, in dealing with the cause of action alleged, it must determine rights of the parties depending on the interpretation of the Constitution—"Judiciary Act," secs. 2, 30. The facts alleged indicate that interstate trade is being interfered with. Assuming the State Statute to be valid because of being expressly subject to sec. 92, the declarations and the seizure are not authorised by the Act, because they are an interference with interstate trade, and therefore expressly excluded from the enactment, and they are contrary to sec. 92. This Court has therefore jurisdiction—*W. and A. McArthur Limited v. State of Queensland*, 27 A.L.R. 130. The question whether an Act has to be read down so as not to infringe the Constitution is always cognisable in this Court. The purpose of the State Statute is contrary to sec. 92, and the various sections cannot be severed. That Statute is directed to combining with Victorian legislation in gaining control of interstate commerce—*Committee of Direction of Fruit Marketing v. Collins*, 36 C.L.R. 410, 31 A.L.R. 322; "Dried Fruits Act 1924" (Victoria) (No. 3380), sec. 4. This concerted legislative action is a use of the power of expropriation as a substitute for a penalty, not for the purpose merely of a transfer of the property.

*Cur. adv. vult.*

The following judgments were given:—

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 this Court to adjudicate upon it under the power conferred by the Parliament in sec. 30 of the "Judiciary Act 1903-1910," when an Australian citizen complains that, contrary to sec. 92 of the Constitution declaring interstate 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 interstate 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

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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 on 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 interstate 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.

For several years the plaintiff has 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 interstate contracts to sell and deliver

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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. 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, viz., 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, 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 interstate business; (2) compulsorily "acquired" by the forcible taking of his dried fruits required for filling his interstate contracts, and in some cases expressly specifying those marked "I.S.C." or "Required for Interstate Contracts;" (3) prosecuted him for making interstate 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 interstate 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 interstate 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 me impossible of acceptance. At every point of the plaintiff's interstate 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 interstate trade and fulfilment of interstate 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 interstate freedom of trade, it is difficult to imagine what would be. That the defendants are discriminating against interstate trade is clear. Paragraph 16 of the Statement of Claim says—"Neither of the defendants have made any similar orders nor authorised 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 of London v. Cox*, L.R. 2 H.L. 239 at p. 261, in a passage quoted at length by Lord Chancellor Herschell in *British South Africa Company v. Companhia de Mocambique*, (1893) A.C. 602, at pp. 621-622, and approved by the House of Lords. In the Divisional Court—(1892) 2 Q.B. 358, at pages 370-1—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—"But there is a large 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 of no consequence. In *Spooner v. Juddow*, 6 Moore P.C. 257, at pp. 278-279, 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 (1) 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 interstate 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 interstate trade is a purely Federal constitutional right, so far limiting the State constitutional power. Section 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 *W. and A. McArthur Limited v. State of Queensland*, 28 C.L.R. 530, 27 A.L.R. 130.

That this case, as to a very material portion of it at least, involves the interpretation of the Commonwealth Constitution, seems to me 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 interstate 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, 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 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. Section 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 those 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 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 supplemented 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. Section 20 is not verbally excluded from sec. 92 of the Constitution, and it stands on its own basis as a cause of complaint. Section 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 or 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 and (b) by sending by post," &c. Section 31, as amended, was as follows:—"If any of the following persons that is to say (a) any grower (b) any dealer (c) any person being the owner or occupier or person in charge of any packing-shed

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"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 £500."

In the year 1926 the Board, acting under sec. 20, made three determinations, fixing the maximum proportions of currants, sultanas and lexiass 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 determinations 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*, 28 C.L.R. 530, is clear and definite authority (particularly at p. 543) 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 Waite, C.J., in *Railroad Company v. Mississippi*, 102 U.S. 135 at p. 140, the constitutional question "forms an ingredient of the original cause," it is within the judicial power. See also *Brooks*, 276 U.S. at p. 432. 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 (supra)*, and I 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. The Attorney-General*, (1891) A.C. 455; and lastly, if that be also necessary, and only if necessary, we interpret and apply the Federal Constitution—*McArthur's Case (supra)*.

Confining ourselves in the first instance to the language of the instructions—section and determination—the central word is "marketing." The determination of the Board is to regulate "marketing," as to (1) "where," 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*, 6 Moore P.C. 381 and 398. "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), sec. 20, and 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 situated 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 specialised 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 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 term "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, viz., "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 'commercial activities 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 it 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 recognised canon of interpretation, namely, that a Legislature is presumed, in the absence of express 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*, (1901) A.C. 446. The British Parliament, by its grant of a Constitution to South Australia, might have authorised 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 v. Attorney-General*, (1891) A.C. 455, 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*, L.R. 6 H.L. 265 at p. 277, "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-section (1) 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 intrastate, what is meant by "the concerted action in the marketing of 'dried fruits produced in Australia," 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 intrastate 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 intrastate trade. Its natural construction, apart from all constitutional



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considerations, is unlimited as to space. *Macleod's Case (supra)*, while restricting penalisation 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 interstate trade. No commercial man, and the determination is intended for commercial men, would for a moment think that it was intended to affect a 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 Board. The result, then, is that certain acts of trade and commerce in South Australia are so far penalised if they are directed either to forbidden intrastate or interstate 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 interstate 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 authorised by compulsory acquisition orders and directions purporting to have been made and given under sec. 28. Section 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 interference with

interstate 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 authorising 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 interstate trade at all, in the way already described. Up to the end of the first period, roughly over 230,000lb. weight of fruit were seized; after that period, over 650,000lb. 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 "Interstate Contracts." These acts, like the personal prosecution, gave an undeniable interstate character to the acts complained of all through. See by way of analogy *Western Union Company v. Foster*, 247 U.S. 105 at p. 114; and *Frick v. Pennsylvania*, 268 U.S. 473 at p. 495.

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 interstate 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 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 interstate 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 Council v. Attorney-General for Queensland*, 5 A.L.R. at p. 734, 6 C.L.R. at p. 778; *Dyson v. Attorney-General*, (1912) 1 Ch. 158; and *Wigg v. Attorney-General of the Irish Free State*, 43 T.L.R. at p. 159. 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 Company v. Los Angeles*, (1912) 227 U.S. 278. That case arose under the Fourteenth Amendment, which 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 unauthorised 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 (p. 282) 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 14th 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 authorised "by the State, and were therefore not repugnant to "the State Constitution." On page 284 the Chief Justice proceeds 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 summarised on pages 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 enquiry 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 State officer in virtue of State power in 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 authorised 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 authorising it. In any case, there cannot be such a

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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 organised 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 Company v. Akron*, 240 U.S. 462; and *Fidelity Company v. Tafoya*, 270 U.S. 426 at p. 434—is so cogent and so apposite that there seems scarcely room for another opinion. It would, indeed, be both an absurd and an alarming doctrine that would concede to Australian interstate 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 direct—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 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*, 28 C.L.R. 530, 27 A.L.R. 130. 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 interstate trade from legislative interference. It extended to the exclusion of all State interference. Otherwise, interstate trade could not be "absolutely free." *McArthur's Case* (*supra*) accordingly in various passages indicates the entire prohibition of all forms and kinds of State action in derogation of interstate trade. (a) At p. 545 it is said—"In our Constitution, sec. 92 was designed to insure 'that interstate 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.'" (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 interstate 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 interstate 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 interstate 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 the individual right to be protected against all forms of State action amounting to, or authorising 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 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*, 29 C.L.R. 243 at 252, 27 A.L.R. 225 at page 228. 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 consequences of holding contrary to the view we have expressed. We mean that the defendant State could ride off on an assumption, which the 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 it 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*, 20 C.L.R. 54, 21 A.L.R. 128. 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 interstate trade or interstate 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*, 28 C.L.R. at p. 551, 27 A.L.R. 130. Here, as shown, the purpose for which the goods were seized

was direct interference with interstate trade, and interstate contracts not only influenced the governmental action, but formed its criterion. In *Municipal Council of Sydney v. Campbell*, (1925) A.C. 338 at p. 343, Duff, J., speaking for the Judicial Committee, said—"A body such as the Municipal Council of Sydney, authorised 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 Courts will interfere." As Lord Loreburn said in *Marquess Clanricarde v. Congested Districts Board*, 79 J.P. 481—"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 his interstate trade, and not for any general State purpose independent of the direct object mentioned. This case, therefore, is the antithesis of the *Wheat Case* (*supra*).

*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 *respondet 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 authorised the act complained of, and the individual acting without

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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 authorisation—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 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 unauthorised 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 interstate 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 8th 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 these Acts are invalid because they contravene the provisions of sec. 92 of the Constitution. The "Dried Fruits Acts 1924-1925" continued in operation only until the 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 Act 1926," but the continuation in operation of those Acts has not been proclaimed under the authority of the 1926 Act, and therefore they have not been in operation since the 31st March, 1927. On discovering the true fact the plaintiff amended his Statement of Claim. The consideration of his posi-

tion with the respect to the acts of the defendants alleged to have taken place after the 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 Act 1924-5" (Victoria), "Dried Fruits Act 1924-5" (South Australia). The legislation of the States should be construed so as to uphold it rather than defeat it; to keep it within the legislative powers of the Parliament of the States rather than beyond them—*The Commonwealth v. State of New South Wales (The Wheat Case)*, 20 C.L.R. 96, 21 A.L.R. 128. 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 providing 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 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 follow:—"Sec. 19. The Board "shall have power in its absolute discretion from "time to time (a) 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 for 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 interstate 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*, 6 C.L.R. 469, 14 A.L.R. 565.

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 quantities 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 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 authorises 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 the 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 interstate or other trade in Australia beyond the proportion mentioned. Such a prohibition contravenes sec. 92 of the Constitution, as expounded in *W. and A. McArthur Limited v. State of Queensland*, 28 C.L.R. 530 at 550, 27 A.L.R. 130—"The prohibition by a State Legislature of interstate sales of commodities, either absolutely or subject to conditions imposed by a State law, is . . . a direct contravention of sec. 92 of the Constitution"—*ibid* p. 555.

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 granted by the Commonwealth pursuant to the "Dried Fruits Export Control Act" of the Commonwealth. *The Wheat Case*, 20 C.L.R. 54, 21 A.L.R. 128, 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 authorised 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 provisions 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 sec. 92 of the Commonwealth 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 authorised 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 authorised 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 authorised 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

THE KING v. JOYCE. Ex parte MEREDITH.

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 the 31st March, 1927, raise no question on the Constitution or involving its interpretation. The defendants' acts are rightly stated as trespasses, and the causes of action are not founded on the Constitution, but upon the plaintiff's possessory rights in his dried fruits. We say that those 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. Section 92 was defined in *McArthur's Case* 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 the section. It gives no rights 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 defendants cannot justify these 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 the 31st March, 1927, and not otherwise; that the demurrer should be overruled in so far as it relates to the cause of action 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 allowed in part.*

[Solicitors—For the plaintiff, Madden, Butler, Elder and Graham; for the defendants, F. G. Menzies, Crown Solicitor, for A. J. Hannan, Crown Solicitor.]

S. K. H.

## Supreme Court.

FULL COURT—(Cussen, Mann } Aug. 24, 29.  
and Lowe, JJ.) }

### THE KING v. JOYCE. Ex parte MEREDITH.

*County Court—Jurisdiction—Prohibition—Joinder of causes of action—Husband and wife—Co-plaintiffs in action for negligence—Injuries to wife—Special damage suffered by husband—Whether joinder permissible—"County Court Act 1915" (No. 2692), sec. 54.*

A husband and wife joined as plaintiffs in an action in the County Court to recover damages, the wife claiming for injuries suffered by her in a street collision, and the husband to recover consequential expenses incurred by him and damages for loss of the comfort and society of his wife. A verdict was given for each of the plaintiffs, and judgment was entered thereon.

On an application by the defendant for a writ of prohibition against further proceedings on the judgment, on the ground that the Court had no jurisdiction to try the action because of the improper joinder of these causes of action,—

*Held*, that the provisions of section 54 of the "County Court Act 1915," relating to joinder of causes of action, were merely procedural, and that prohibition should not issue, even if those provisions had not been observed.

Judgment of Irvine, C.J., affirmed.

### APPEAL.

In the County Court at Melbourne an action was brought by John Joyce and his wife, Ethel Josephine Joyce, against Claude A. Meredith, in which the plaintiffs claimed £249 damages for negligence in driving a motor-cycle in Young Street, Frankston, on 12th February, 1927, by reason of which the motor-cycle collided with the female plaintiff and caused her personal injuries, and the plaintiff John Joyce incurred loss and expense, and lost the comfort and society of his wife. Further particulars were delivered in which it appeared that the plaintiff, John Joyce, claimed £75, including medical expenses, and his co-plaintiff claimed £174.

The action came on for hearing before Judge Moule and a jury on 16th May, when, pursuant to previous notice, Counsel for the defendant appeared and objected that there was a misjoinder, in that the causes of action were distinct. The objection was overruled, and the jury found a verdict for the plaintiff John Joyce for £50, of which £20 was stated to