RECENT CASES

THE DRIED FRUITS CASE.

JAMES v. *THE COMMONWEALTH.*

The Privy Council decision in *James* v. *Commonwealth*, a resumé of which was sent from London on July 17, is merely the latest act of a long series of conflicts, extending over almost 10 years, between the Plaintiff and the Governments of South Australia and the Commonwealth.

These conflicts arose out of the economic position of the dried fruits industry. This position is set out briefly in the Privy Council decision in the previous case of *James* v. *Cowan*.[1] The production of dried fruits, which for all relevant purposes means dried currants, sultanas and lexias (a species of raisin) is an industry of chief importance in South Australia, Victoria and, to a less extent, Western Australia. The fruit having been grown, prepared, dried, pressed and packed, finds a market in its native State, in the other States of Australia, and in New Zealand and in London. The production is much greater than the consumption in Australia. About 15 per cent. of the total production of Australia and no more can be consumed in Australia; the surplus has to be exported elsewhere. Unlimited competition, therefore, in Australia would naturally injure the Australian grower by depriving him of the advantage of a protected market, and leaving him mainly dependent upon obtaining for his exports out of the Commonwealth the world price. In 1924 the Commonwealth and the producing States concerned had recourse to legislation to deal with the question of marketing dried fruits. The Commonwealth passed the Dried Fruits Export Control Act 1924, in October, 1924. Under that Act the Minister had power through a system of licensing to control the export of dried fruits from the Commonwealth, and a Dried Fruits Control Board was constituted which had power to control the fruit so brought under licence.

This Act, however, only related to export from the Commonwealth. Dealings with dried fruits in the States were left to the State legislatures.

Both Victoria and South Australia passed Dried Fruits Acts in 1924. The South Australian Act was assented to on December 24, 1924. The Act constituted a Dried Fruits Board of five members, three of whom were to be appointed by growers, the other two being official members.

The Plaintiff, Frederick Alexander James, processes and distributes at Berri in South Australia dried fruits, mainly currants, sultanas and lexias, some of which are grown by himself, the rest being purchased from other growers.

During December, 1926, and January, 1927, he had entered into contracts with various purchasers in other States for the sale and delivery of such fruits, amounting in all to about 370 tons. He had these fruits at Berri.

1. [1932] A.C. at 549-50. 47 C.L.R. 386.

Section 20 (1) of the South Australian Dried Fruits Act 1924 provided: "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." James' fruit was seized by the Board, and his whole business was brought to a standstill. He therefore brought an action in the High Court against the State of South Australia and the Dried Fruits Board of South Australia claiming (*inter alia*), that Section 20 of the Act was invalid as being in contravention of Section 92 of the Commonwealth Constitution. The relevant words of Section 92 are: "On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free." A demurrer was entered by the Defendants. On the hearing of this demurrer[2] begun at Melbourne 30th May, 1927, the whole Court decided that Section 20 authorized the Board to make determinations limiting the quantity of dried fruits which might be marketed within the Commonwealth, and so was obnoxious to Section 92.

As the State was thus held unable to prevent James from marketing his fruit in other States, the Federal Government passed the Dried Fruits Act 1928 which came into operation on 10th September, 1928. The effect on James of Regulations made under this Act was that he could engage in inter-State trade only under licence issued by the Dried Fruits Board of South Australia, a condition of the issue of which would be that he must export not less than a certain declared percentage of all fruit grown or otherwise acquired by him.

James challenged this Act—*James* v. *Commonwealth of Australia & others.*[3]

The Court held on the hearing of a demurrer that Section 92 did not affect the legislative power of the Commonwealth. (The Court held however, that the Regulations made under the Act were invalid as being obnoxious to Section 99 of the Constitution which forbids the Commonwealth to give preference to one State over another.)

As the Federal Act also had thus failed to restrain James, the State of South Australia made another attempt, acting again, as in *James* v. *South Australia,* under the South Australian Dried Fruits Act 1924, but this time under Sections 28 and 29 thereof. Section 28 provide: "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, etc."

2. *James* v. *South Australia,* 40 C.L.R. 1.
3. (1928) 41 C.L.R. 442.

The Minister, the Hon. John Cowan, therefore, took all the formal steps necessary, and James' fruit was compulsorily acquired.

James brought an action in the High Court to prevent this. The hearing was begun on June 18, 1929—*James* v. *Cowan*.[4]

In the primary hearing Starke J. decided that the case was governed by the Wheat case (*N.S.W.* v. *Commonwealth*),[5] which decided that a State Act making goods the absolute property of the Crown did not violate Section 92. Accordingly he gave judgment for the Commonwealth. This decision was upheld on appeal by the Full Court of the High Court (Isaacs, J., dissenting, distinguished the Wheat case on the ground that the Act in that case had appropriated the property without reference, express or implied, to inter-State trade and commerce, whereas in James' case both parties were agreed that the purpose of the Act was to prevent inter-State trade in the surplus fruit).

From this decision James appealed to the Privy Council. The hearing began on 25th April, 1932—*James* v. *Cowan*.[6] Judgment was delivered June 21, 1932.

The appeal was upheld, on the ground that the exercise of the Minister's powers for the purpose of forcing the surplus fruit off the Australian market was invalid as restricting the absolute freedom of inter-State trade.

Thus the State was finally held unable to control James' trade.

The Commonwealth, therefore, resorted again to the Act, which had been held in *James* v. *Commonwealth* in 1928 (*supra*) not to contravene Section 92. (Alterations had since been made in the regulations to prevent their violating Section 99).

Under this Act, the Commonwealth seized some of James' fruit in transit, and prevented his getting carriage for the rest of it.

James brought an action in the High Court seeking relief against the operation of the Dried Fruits Act 1928-35 and of the regulations thereunder. The Commonwealth demurred. The hearing began 16th May, 1935. Judgment was delivered June 11—*James* v. *Commonwealth*.[7] The main question was whether the Commonwealth Parliament was affected by Section 92. If it was, the Act would be invalid under the Privy Council decision in *James* v. *Cowan* (*supra*).

The Full Court, Rich, Starke, Dixon, Evatt and McTiernan JJ., held that Section 92 did not bind the Commonwealth, following the opinion given by the majority in McArthur's case,[8] approved in *James* v. *Commonwealth* (1928) (*supra*), and followed in *Huddart, Parker* v. *Commonwealth*[9] and *Meakes* v. *Dignan*.[10]

Dixon J., however, gave as his individual opinion that he had never felt satisfied with the considerations which led to the decision of the point in McArthur's case, and Evatt and McTiernan JJ. were definitely of opinion that the Commonwealth was bound by Section 92.

4. 43 C.L.R. 386.
5. (1915) 20 C.L.R. 54.
6. [1932] A.C. 542.
7. (1935) 52 C.L.R. 570.
8. (1920) 28 C.L.R. 530.
9. (1931) 44 C.L.R. 492.
10. (1931) 46 C.L.R. 73.

The demurrer was allowed.

From this decision James appealed to the Privy Council. His appeal was upheld.

Mr. James therefore triumphs.

The complete text of the judgment, giving their Lordships' reasons for the decision, is not yet available, so that its full effect upon the interpretation of the Constitution is still a matter for surmise.

R. J. DAVERN WRIGHT, M.A., LL.B.

(This case will be reported in 55 C.L.R. 1.—Ed.)

THE DEFENCE OF ACT OF STRANGER TO THE RULE IN *RYLANDS* v. *FLETCHER*.

NORTH-WESTERN UTILITIES LTD. v. LONDON GUARANTEE AND ACCIDENT CO. LTD. & OTHERS [*1936*] *A.C. 108.*

The appellants in this case were a public utility company, supplying gas, under a statutory franchise, to consumers in the city of Edmonton. The Corona Hotel, owned and insured by the respondents respectively, was destroyed by fire caused by the ignition of gas, which, escaping from the defendants' main, adjacent to the hotel, had percolated through the soil into the hotel basement. The Court found that the gas escaped through a fractured joint in the main, and that the break was caused by the displacement of soil thereunder by workmen of the city of Edmonton in constructing a storm sewer. Lord Wright delivered the judgment in the case, which was heard on appeal from the Supreme Court of Alberta.

The action was brought (i) for permitting gas, a dangerous substance, to escape; (ii) for breach of a statutory duty; (iii) for negligence in that the appellants either knew, or ought to have known, what work the city was doing, and failed to take, as they could and should have done, all proper precautions to prevent the escape of the dangerous gas which they were carrying in their mains. The appellants' real defence was that the damage was caused by the act of the city, for which they were not responsible, and could not control, and that they were guilty of no negligence in the matter.

Now, the appellant was subject to a statutory duty "to locate and construct" its gasworks "so as not to endanger the public health or safety." Their Lordships held that this could not apply to acts done or omissions occurring, such as the alleged negligence in this case, in the maintenance of the said works, that although they were, therefore, disposed to give the appellants the benefit of the statutory doubt, and to hold the duty owed to the respondents, in these circumstances, one of reasonable care, yet they went on to say that the duty owed could be no higher than that fastened on them by the rule of strict liability enunciated in *Rylands* v. *Fletcher*. Thus, although the case could well have been decided on the single issue—were the appellants