HIGH COURT OF AUSTRALIA

Grannall

Vs.

Marrickville Margarine Pty. Ltd.

(Dixon C.J.(1), McTiernan(1), Webb(1), Fullagar(2) and Kitto(1) JJ.)

3 March 1955

DIXON C.J., McTIERNAN, WEBB AND KITTO JJ.

This case stated involves the of New South Wales. That provision deals with a substance called table margarine which is, of course, not a product of the dairy industry but is on the contrary a substitute for butter. Section 22A (1) (b) provides that no person shall manufacture or prepare table margarine unless he holds a table margarine licence. Margarine is table margarine if it is not cooking margarine and it is cooking margarine if ninety per cent or more by weight of the fat and oil it contains consists of beef or mutton fat. That is the effect of the statutory definitions in s. 2 (1). The authority from whom a licence must be obtained is the Minister of Agriculture and he may at his discretion grant or refuse a licence: s. 22A (2) and (3). If he grants a licence for table margarine it must contain a condition limiting the quantity which during the currency of the licence its holder may manufacture or prepare. Licences are annual and expire on 30th June of each year, though they may be renewed. There is a limit upon the aggregate quantity of table margarine for which licences may be granted in respect of a year. The maximum amounts respectively specified in the various licences granted for a period of twelve months must not in the aggregate exceed 2,500 tons: s. 22A (6) (c) The holder of a licence is entitled to have it renewed at the end of a year unless he has broken its conditions or he has been convicted of an offence under the Act, in which latter event the licence may be cancelled at any time. Thereupon the Minister may grant a new licence to someone else for the quantity covered by the cancelled licence or allocate the quantity among the holders of existing licences by increasing their maximum quantities proportionately: s. 22A (7). The reason for limiting the production of table margarine is not stated by the Act but it is of course evident that it is lest the Australian market for butter should be prejudiced by the competition of margarine. (at p71)

2. The defendant company does not hold a licence from the Minister of Agriculture but nevertheless it has manufactured table margarine. For doing so an information was laid against the company in the Court of Petty Sessions but was removed here under s. 40 of the Judiciary Act 1903-1950. In answer to the information the company sets up s. 92 of the Constitution and says that s. 22A (1) (b) forms an inseparable part of a statutory attempt to restrict the freedom of inter-State commerce in margarine. (at p71)

3. The Act contains a "severability clause" in a familiar form: s. 2 (2). "The effect of such clauses is to reverse the presumption that a statute is to operate as a whole, so that the intention of the legislature is to be taken prima facie to be that the enactment should be divisible and that any parts found constitutionally unobjectionable should be carried into effect independently of those which fail": Bank of New South Wales v. The Commonwealth (1948) 76 CLR, at p 371 . (at p71)

4. The foregoing discloses a very simple position which, if there be nothing found in matters as yet unstated which will basally alter its character and operation, involves no invasion or restriction of the freedom of inter-State commerce. It deals entirely with the liberty of persons in New South Wales to bring a given commodity into existence by operations in that State and its validity presumptively stands unaffected by other provisions of the Act. A person may not bring the commodity into existence unless licensed and if licensed he may bring into existence no greater quantity than is mentioned in the licence. The right or liberty which is thus restricted forms no part of the freedom of the individual to engage in activities conducted across State boundaries, that is to say the freedom which s. 92 gives to transportation, movement, transfer, interchange and communication between one State and another and to all other forms and variety of inter-State transaction whether by way of commercial dealing or of personal converse or passage: Bank of New South Wales v. The Commonwealth (1948) 76 CLR, at pp 381, 382 . No doubt goods are the subject matter of the freedom to sell and deliver or transport across State borders and if, by reason of legislative restrictions, goods of a given description do not come into existence and are not imported into Australia, there is to that extent no subject matter. It is of course obvious that without goods there can be no inter-State or any other trade in goods. In that sense manufacture or production within, or importation into, the Commonwealth is an essential preliminary condition to trade and commerce between the States in merchandise. But that does not make manufacture production or importation trade and commerce among the States. It is no reason for extending the freedom which s. 92 confers upon trade and commerce among the States to something which precedes it and is outside the freedom conferred. (at p72)

5. It is a commonplace that s. 92 assumes the existence of an ordered society governed by law in which commodities are bought and sold and the movement of persons and things takes place and that it undertakes in such a society to secure the freedom of no more than inter-State dealing, movement, interchange, passage etc. These assumptions are made by s. 92 but their fulfilment is not the subject of the constitutional guarantee of freedom which s. 92 gives. It would therefore seem to be a very simple case unless the character and operation of the provisions contained in s. 22A as it is stated above are fundamentally changed by what appears from a full examination of the Act in relation to the facts. A full examination of the Act does of course give a more complete understanding of the policy of the legislature and of the detailed provisions by which it is worked out. It supplies a context in which the provisions for licensing and limiting the manufacture of table margarine take their proper place. Nor is it by any means barren of that sort of material which in the past we have seen applied so often forensically, and sometimes even judicially, to distemper provisions of a statute with a colour or complexion that is supposed to show that they do or do not, as the case may be, infringe s. 92, whatever achromatically they may appear plainly to do. (at p72)

6. But when the entire statute has been examined, when the tendency of its undeniable aims and their bearing upon validity have been fully canvassed, when the plan of the statute, its order of ideas and the provisions of which it is made up have been turned this way and that, and when every experiment with them has been made, it comes back in the end to the simple position stated. In other words, the complaint of the defendant company remains a complaint against a restriction upon the production of table margarine, not against a restriction on inter-State trade. What begins as a restriction upon the production of the commodity remains a restriction on production, the validity of which rests upon an independent foundation. No latent characteristics are brought forth, no secondary meaning and application are affixed to it, amounting to an impairment of the freedom of inter-State commerce. (at p72)

7. The Dairy Industry Act 1915-1951 as it now stands is an agglomerate statute consisting of the

original Act and the amendments and additions made to it by five subsequent enactments. From the beginning the artificial definition of "dairy produce" has included margarine as well as milk, cream, butter, cheese and other products of milk: s. 2 (1). The first purpose of the Act was to require the registration of premises if they were to be used in the preparation or manufacture of dairy produce in this extended sense (ss. 4 and 5), and to provide for the inspection of the place (ss. 9 and 10), for the grading and testing of cream and butter (ss. 12 to 16), for regulating the basis of payment by factories for cream (ss. 11 and 25 (1)) and, in the case of margarine, for establishing safeguards against confusion with butter and against poorness of ingredients (ss. 17 to 22). In 1938 provisions were added the purpose of which is to allow of the refusal of registration of premises for a dairy produce factory if, after considering the report of an advisory committee which is bound to take various matters into account, the Minister in the exercise of his discretion is satisfied it is in the best interests of the dairying industry in New South Wales to refuse the application for registration. But this provision does not extend to an applicant who produces cream or milk himself and uses the premises solely to manufacture therefrom butter or cheese: ss. 5A and 5B. The provision, of course, extends to premises for the manufacture of margarine. One provision of the original Act forbids the exportation of margarine from New South Wales unless it is submitted first for examination, a certificate is obtained that the margarine has been prepared in accordance with the Act, and the package is branded as prescribed: s. 21. Export from New South Wales necessarily includes delivery into another State and accordingly there may be some doubt as to the validity to that extent of this section. But it is clearly severable; indeed probably it would be read distributively as a result of the severability clause, if it were considered constitutionally incapable of applying to inter-State trade. The section can have no bearing upon the validity of s. 22A (1) (b). (at p73)

8. Section 22A was introduced into the Act in 1940 as one of a catena of provisions dealing with the manufacture of margarine. The provisions constitute ss. 22A, 22B, 22C and 22D. They have no particular place in the plan of the Act as it previously stood. Except that they rely upon the definitions, the sections might just as well have been enacted as a separate statute. They form a coherent set of provisions. The fact that under the Act as it stood premises must be registered if they are to be used for the manufacture of margarine appears to be ignored and s. 22A (1) imposes the separate necessity of a licence to the manufacturer in which the premises are specified. A licence is required not only for the manufacture or preparation of table margarine (sub-s. (1) (b)) but also for that of cooking margarine (sub-s. (1) (a)) and manufacture or preparation on any premises other than those specified is forbidden (sub-s. (1) (c)). When a condition is imposed in the licence it is an offence to manufacture or prepare the commodity in contravention of the condition; and it will be remembered that a condition that must be inserted is one limiting the quantity to be manufactured or prepared (sub-ss. (1) (d) and (6) (a)). What is the difference, if any, between the manufacture and preparation of margarine does not appear from the Act or the case stated. Section 22B relaxes the requirement, which would result from the definitions, that margarine manufactured under a licence for cooking margarine should contain beef or mutton fat in a quantity of not less than ninety per cent by weight of the total quantity of fat and oil contained in such margarine. It provides that the holder of a cooking margarine licence may manufacture in lumps of not less than fourteen pounds margarine which contains beef or mutton fat in a quantity of between seventy-five and ninety per cent by weight of the total quantity of fat and oil contained in such margarine. But the manufacture must be for sale only to prescribed persons and the margarine must be packed and sold in lumps of not less than fourteen pounds and sold only to such persons. (at p74)

9. It may be said that the evident object of this provision is to allow of the manufacture of margarine for the fulfilment of certain local requirements which might serve for limited purposes as a substitute for butter but so to restrict the form in which, and the persons to whom, the product may

be sold that it will not be marketed in any way that will compete with butter. It seems that no person or classes of persons were ever prescribed for the purposes of this provision, but that perhaps does not weaken whatever argument may be based on the inclusion of the section in the Act. Let it be granted, however, or assumed that the policy or object of the provision is correctly imputed. It may be that it is ineffective in the face of s. 92 to make unlawful the sale of the margarine manufactured under the section in an inter-State transaction to persons not prescribed or in lumps of less than fourteen pounds weight. That is a question that some day might be raised by the holder of a licence for cooking margarine for judicial consideration. If it is ever raised for consideration it will, or at all events ought to be, found to depend rather on the operation with reference to inter-State trade of the restrictions which the section imposes than upon its policy or purpose. But it is difficult to see how the provision or its purpose can bear upon the validity of s. 22A (1) (b). It is in s. 22C, or not at all, that the defendant company must find the effective materials for giving a new or different colour or complexion to s. 22A and more specifically to sub-s. (1) (b) of that section. Section 22C is an overriding provision enabling the Minister to grant a special permit for the manufacture or preparation of table margarine for export from Australia. He is empowered to do this notwithstanding anything in the Act or in any licence issued under the Act, but he has a full discretion to grant or refuse an application for a permit. The applicant must hold a licence. The special permit remains in force for the period specified therein and while it is in force the holder may manufacture or prepare table margarine for export in accordance with the terms and conditions of the permit. The special permit, which may be cancelled for breach of condition, must contain such conditions as the Minister thinks necessary to ensure that none of the margarine manufactured or prepared thereunder shall be sold or distributed within the Commonwealth of Australia. Breach of condition is an offence (sub-s. (3)). (at p75)

10. Now it needs no argument to show that a condition against sale or distribution within the Commonwealth includes selling or distributing from New South Wales into another State. When, therefore, sub-s. (3) of s. 22C makes contravention of a condition an offence it purports to penalize, among other things, the sale from New South Wales into another State of a commodity which it assumes has been brought into existence. To this extent at all events s. 22C may well be considered to infringe upon the freedom of inter-State trade established by s. 92. This may be true too of the tenor of the condition itself and of the sanction for breach thereof constituted by the cancellation of the special permit. It is not difficult to suppose that under the doctrines affecting the severance of invalid from valid statutory provisions which it has been the object of "severability clauses" to exclude and to reverse, the invalidity of part of the operation of the provisions in question, viz. sub-s. (2) (a) and sub-s. (3) in its application thereto, might have been regarded as infecting the whole of s. 22C and a question might have existed as to the presumed dependence thereon of s. 22A itself. But clauses of the description of s. 2 (2) were designed to prevent such a result: see the authorities collected in Fraser Henleins Pty. Ltd. v. Cody [1945] HCA 49; (1945) 70 CLR 100, at p 127 and in Bank of New South Wales v. The Commonwealth (1948) 76 CLR, at pp 369, 370 . As to such provisions "it can at least be said of them that they establish a presumption in favour of the independence, one from another, of the various provisions of an enactment, to which effect should be given unless some positive indication of interdependence appears from the text, context, content or subject matter of the provisions": Fraser Henleins Pty. Ltd. v. Cody (1945) 70 CLR, at p 127 . Even if it were considered that the whole of sub-s. (2) (a) of s. 22C fell because it could not extend to inter-State transactions and it were further considered that sub-s. (1) could not survive the separation of sub-s. (2) (a), no ground exists for discovering in the statute an affirmative intention that s. 22A should have no operation unless s. 22C proved valid and operative. It is to be noted that sub-s. (2) of s. 2 was enacted in the same amending Act as ss. 22A to 22D and it is sufficiently

apparent that the purpose was to effect a severance, if need be, between s. 22A (1) and other provisions then introduced. (at p76)

11. Plainly to limit the production of margarine was the paramount object of the legislature in enacting ss. 22A to 22D. The motive for this is not avowed in the statute but no one doubts that it was done so that the sale of butter on the home market should be prejudiced as little as may be by the competition of margarine. It would not matter if the legislation did acknowledge expressly that this was the reason for licensing the manufacture of the commodity. It would remain true that the restriction imposed by s. 22A was not upon the freedom of trading in the commodity among the States but upon bringing it into existence. For that reason, too, it would be of no moment if it were shown that there was a preconcert between the States and not a mere emulation when New South Wales enacted the provisions in question in November 1940, Queensland enacted analogous provisions in Act 3 Geo. VI No. 22 in December 1939, Victoria Act No. 4741 in September 1940, South Australia Act No. 35 of 1940 in November 1940, and Western Australia Act No. 36 of 1940 in December 1940. (at p76)

12. Section 22C, consistently with the policy of relieving butter from the competition of margarine in Australia, allows of a special concession to a manufacturer who desires to export the product of his industry. But this is an exceptional or "special" provision of a subordinate character. The dominant principle, from the operation of which it provides a special exception, is the restriction of the manufacture of margarine. It is not possible to turn the provisions about and make sub-s. 2 (a) of s. 22C the main provision expressing the dominant principle as a restriction of trade in margarine brought into existence and the limitation of the amount to be manufactured for home consumption which s. 22A (1) imposes as nothing but an ancillary, subordinate and dependent attempt to support the restriction on trade. Such a view of the statute is inconsistent with its form, with its intention and with its operation. (at p76)

13. Nothing which has been said above implies that under the power conferred by s. 51 (i.) of the Constitution to make laws with respect to trade and commerce with other countries and among the States legislation of the Commonwealth Parliament can never reach or touch production. In the first place, the power is to legislate with respect to trade and commerce. The words "with respect to" ought never be neglected in considering the extent of a legislative power conferred by s. 51 or s. 52. For what they require is a relevance to or connection with the subject assigned to the Commonwealth Parliament, a conception very different from those which have been employed in the exposition of s. 92. In the next place, every legislative power carries with it authority to legislate in relation to acts, matters and things the control of which is found necessary to effectuate its main purpose, and thus carries with it power to make laws governing or affecting many matters that are incidental or ancillary to the subject matter. But this principle is entirely foreign to such a provision as s. 92 whether the doctrine be regarded as a constitutional consequence of the common law principle expressed in the maxim quando lex aliquid alicui concedit conceditur et id sine quo res ipsa valere non potest or of the direct incorporation into our constitutional law of a principle founded upon implication and formulated by the adoption of the famous words of Marshall C.J. in M'Culloch v. Maryland (1819) 4 Wheat 316 (4 Law Ed 579) : "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional" (1819) 4 Wheat, at p 421 (4 Law Ed, at p 605) . The idea that because the freedom of trade, commerce and intercourse among the States is assured by the Constitution, all matters that are incidental or ancillary to such trade, commerce and intercourse are in the same way protected from interference or control is quite fallacious. (at p77)

14. In the United States of America the difficulty of saying categorically and without qualification that manufacture or production can never fall within the legislative power has been clearly perceived, although only after a long attempt to apply early dogmatic assertions of a total denial of such a possibility. Perhaps the view now accepted in the Supreme Court of the United States may go too far, but it is expressed in Mandeville Island Farms Inc. v. American Crystal Sugar Co. [1948] USSC 74; (1948) 334 US 219 (92 Law Ed 1328) . Speaking for the majority of the Court Rutledge J. says: "The artificial and mechanical separation of 'production' and 'manufacturing' from 'commerce', without regard to their economic continuity, the effects of the former two upon the latter, and the varying methods by which the several processes are organized, related and carried on in different industries or indeed within a single industry, no longer suffices to put either production or manufacturing and refining processes beyond reach of Congress authority" (1948) 334 US, at p 229 (92 Law Ed, at p 1336) . (at p78)

15. Whether activities which include production may be the subject of valid legislation under s. 51 (i.) must depend on the nature of the business or trade and upon the character of the legislation. Again nothing that has been said means that by circuitous means or concealed design legislation may impair the freedom of inter-State trade, commerce and intercourse although if the impairment were achieved by overt or direct means it would be invalid. It has been repeatedly said that there is no provision of the Constitution to which the maxim quando aliquid prohibetur, prohibetur et omne per quod devenitur ad illud could be more appropriately applied than to the constitutional guarantee given by s. 92. But in applying this doctrine it is necessary first to see steadily what freedom is the subject of impairment, detraction or restriction. If some fact or event or thing which itself forms part of trade, commerce or intercourse or forms an essential attribute of that conception (essential in the sense that without it you cannot bring into being that particular example of trade, commerce or intercourse among the States) is made the subject of the operation of a law which by reference to it or in consequence of it imposes some restriction or burden or liability, it does not matter how circuitously it is done or how deviously or covertly. It will be considered sufficiently direct or immediate in its operation or application to inter-State trade, commerce and intercourse. Provided the prejudice is real or the impediment to inter-State transactions is appreciable, it will infringe upon s. 92: see Hospital Provident Fund Pty. Ltd. v. State of Victoria [1953] HCA 8; (1953) 87 CLR 1 . But generally speaking, it will be quite otherwise if the thing with reference to or in consequence of which the law operates or which it restricts or burdens is no part of inter-State trade and commerce and in itself supplies no element or attribute essential to the conception. It will not be enough that it affects something which, because it is a sine qua non to the existence of some subject of the freedom which s. 92 guarantees, has a consequential effect on what might otherwise have been done in inter-State trade. (at p78)

16. It is said that, because the purpose, motive or object with which the present legislation was passed is or may be that margarine shall not be sold to consumers who otherwise might buy butter and because such consumers might buy in inter-State trade or from or through wholesalers or retailers who buy margarine in inter-State trade, it necessarily follows that there is a direct interference with inter-State trade. This involves a confusion between the operation of the law and motives of the legislature. If the State legislature enacts what is prima facie within its power, why should it matter that the legislators advert to a particular consequence and desire it to occur? Does it matter that but for such advertence or desire the legislation would not be passed? If not, what difference does it make if the further inference is warranted that it was only in order to achieve the fulfilment of this desire that the statute was passed? Surely the answer to all three of these successive questions is, no. Nor can it matter whether the purpose or motive is inferred from circumstance or from the statute or, indeed, is stated therein in terms. (at p79)

17. Two tendencies have grown manifest of late. One is to press the operation of s. 92 beyond the subject matter of trade, commerce and intercourse among the States so that it denies to the legislatures of this country the power to impose any prohibition, restriction or burden if its consequences could be seen in what was done or not done in the course of inter-State commerce. The other is to seek to extend the freedom which s. 92 guarantees to trade, commerce and intercourse among the States to antecedent or subsequent transactions on the plea that they are incidental, ancillary or conducive to inter-State transactions or necessarily consequential upon them. There is in truth nothing to justify such notions which would go far to exclude legislative power the existence of which has never been doubted. The defendant company's argument in the present case would, for example, appear to mean that there could be no effective prohibition of the importation of goods into Australia if they were merchandise intended to be bought and sold in inter-State trade. A customs tariff could not effectively be used to restrict importation if its purpose and operation were to prevent the dutiable goods going into inter-State trade. Indeed consistently with the argument, if it possessed any foundation, it is not easy to see how the Bank Notes Tax Act 1910, which taxed the bank notes issued by trading banks out of existence, could be justified. For it accomplished the purpose of forcing them out of circulation whether in inter-State or intra-State commerce. (at p79)

18. It is said that a prohibition or restriction of manufacture may, according to circumstances, be used to interfere with inter-State commerce. This is the kind of general proposition which no one would lightly undertake to deny. Indeed it would be rash to deny antecedently that any legislative step that may be imagined could not in some circumstances not hitherto foreseen form part of some device by which the imposition of a restriction upon inter-State commerce might be accomplished. But wide generalities are really meaningless and are neither substitutes nor solvents for concrete cases. And the present is a concrete case. It is one which includes no relevant restriction upon trade, commerce and intercourse among the States. (at p80)

19. The answer to both questions in the case stated is, No. (at p80)

FULLAGAR J. The terms of the relevant legislation are set out in the judgment of the other members of the Court, and it is unnecessary for me to state them again. (at p80)

2. I agree that s. 22A of the Dairy Industry Act 1915-1951 (N.S.W.) is a wholly valid enactment, to which full effect must be given according to its tenor. It is not, in my opinion, touched or affected in any way by s. 92 of the Constitution. (at p80)

3. I do not think that the real question in this case is correctly stated (as it was stated in the interesting argument of the Solicitor-General for Victoria, intervening by leave) by asking whether s. 22A has a "direct", as distinct from a merely "remote" or "consequential" effect upon inter-State trade or commerce. The word "free" in s. 92 requires, of course, analysis and exposition, but in all the most recent cases the tendency has been to make a direct (and, to my mind, the correct) approach to the particular problem by reference to the very terms of s. 92 itself. I was attempting to state this approach when I said in Hughes & Vale Pty. Ltd. v. State of New South Wales (No. 1) [1953] HCA 14; (1953) 87 CLR 49 : - "The two questions which always arise when s. 92 is invoked are (1) whether the acts for which immunity is claimed possess the character of inter-State trade, commerce, or intercourse, and (2) whether the law from which immunity is claimed possesses, so far as it affects those acts, the character of an interference with freedom" (1953) 87 CLR, at pp 97-98 . If, of course, the first question is answered in the negative, the second does not require an answer. This approach is very well-illustrated in The Commonwealth v. Bank of New South Wales

(1950) AC 237; (1949) 79 CLR 497 . In that case both questions were very seriously in controversy, though the first might well have been thought to be much the more difficult question of the two. The first question was ultimately answered by saying that the carrying on of banking business in Australia did possess the character of inter-State commerce. The second question then arose. Since what was authorized by s. 46 of the Banking Act 1947 was a prohibition of the carrying on of a banking business, the second question also called for, and received, an affirmative answer, which led inevitably to the overruling of R. v. Vizzard; ex parte Hill [1933] HCA 62[1933] HCA 62; ; (1933) 50 CLR 30 and the cases which followed and applied it. With the Banking Case (1950) AC 237 (1949) 79 CLR 497 may be contrasted the later case of Hospital Provident Fund Pty. Ltd. v. State of Victoria [1953] HCA 8; (1953) 87 CLR 1 There the activity for which the plaintiff company claimed protection was the carrying on of what was in substance an insurance business. This business was held not to possess the character of inter-State commerce, and the second question therefore did not arise. If it had arisen, it would seem that it must have been answered in favour of the company. But, as it was, it did not arise, and it was quite immaterial that, as an incident of its business, the company's officers engaged in communications and journeyings between one State and another. The activity for which the protection of s. 92 was claimed did not consist of these journeyings and communications as such, but of the carrying on of a business, and the carrying on of that business was not inter-State commerce. One other example may be taken as illustrative of the class of case where the real controversy revolves round the second the question. In Fergusson v. Stevenson [1951] HCA 49; ; (1951) 84 Clr 421 a company named Booth & Co. (England) Ltd. transported kangaroo skins purchased on its behalf in Brisbane to Sydney, where they were sorted and exported overseas. Clearly the company was engaged in inter-State trade or commerce. But did the Fauna Protection Act 1948 (N.S.W) interfere with the freedom of that trade ? The relevant provision of the Act forbade any person to have in his possession in New South Wales, inter alia, any kangaroo skin. It did not in terms forbid the importation of kangaroo skins from Queensland into New South Wales, which would, of course, have been an obvious interference with freedom of trade. But the company's inter-State trade could not practically or effectively be carried on without some person in New South Wales having possession of skins, if only for a brief period. It was accordingly held that the law from which immunity was claimed did possess the character of an interference with freedom of trade, and that s. 92 gave immunity. (at p81)

4. If the present case is approached in the same way, it seems to me clear enough. The activity for which immunity is claimed is the manufacture of margarine. Is is impossible to say that this activity possesses the character of inter-State trade or commerce, and that is the end of the case, just as the same consideration was the end of the case in Graham v. Paterson [1950] HCA 9; (1950) 81 CLR 1 . (at p82)

5. In order to bring the present case within the protection of s. 92, it was necessary for the defendant to put forward a conception of inter-State trade and commerce which, as my brethren have observed, has been put forward in several recent cases but has never been accepted. The substance of that view seems to be that operations such as production or manufacture are immune from legislative interference so long as it is possible that the producer or manufacturer may dispose of his product in inter-State trade, or at least if he intends to dispose of it in inter-State trade. I agree with what the Chief Justice and McTiernan, Webb and Kitto JJ. have said on this subject. There is no decision which gives any countenance to such a view. Section 92 protects only activities which themselves possess the character of inter-State trade, commerce, or intercourse. (at p82)

6. I have not attempted to form any opinion as to the validity or effect of s. 22C of the Act. If the common law doctrine of severability had been applicable to the case, it might have been necessary

to do so. But s. 2 (2), which was introduced by the same Act which introduced ss. 22A, 22B, 22C and 22D, makes it plain, in my opinion, that the validity and operation of s. 22A cannot be affected by any vice which may possibly be some day in a concrete case discovered in s. 22C. (at p82)

7. The questions in the case stated should, in my opinion, be answered - (1) No: (2) No. (at p82)

ORDER

Question 1 in the case stated answered - No.

Question 2 - No.

The defendant to pay the costs of the case stated.

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