[HIGH COURT OF AUSTRALIA.]

WILLARD . . . . . APPELLANT;
DEFENDANT,

AND

RAWSON . . . . . RESPONDENT.
INFORMANT,

H. C. OF A. 1933.

MELBOURNE, *March* 2, 3.

SYDNEY, *April* 20.

Rich, Starke, Dixon, Evatt and McTiernan JJ.

Constitutional Law—Trade, commerce, and intercourse among the States—Motor car—Registration—State Act requiring motor cars to be registered—Car used on inter-State business only—The Constitution (63 & 64 *Vict. c.* 12) *sec.* 92—*Motor Car Act* 1928-1930 (*Vict.*) (*No.* 3741—*No.* 3901), *sec.* 4*.

The respondent laid an information against the appellant under sec. 4 of the *Motor Car Act* 1928-1930 (Vict.), alleging that the appellant was the driver of a motor car which was used on a public highway without being registered. The appellant was a carrier residing in New South Wales and was the owner of a motor truck registered in that State, but not registered in Victoria. At the time in question the appellant was using the truck for the purpose of carrying goods from a town in New South Wales to Melbourne. There were no goods in the truck which were being carried from any place in Victoria to any other place in Victoria, and the appellant had never used the truck save for the purpose of carrying goods for hire from places in New South Wales to places in Victoria or from places in Victoria to places in New South Wales.

Held, by *Rich*, *Starke*, *Evatt* and *McTiernan* JJ. (*Dixon* J. dissenting), that sec. 4 of the *Motor Car Act* did not infringe sec. 92 of the Constitution, and the appellant was rightly convicted.

* The relevant provisions of sec. 4 of the *Motor Car Act* 1928 (Vict.), as amended by the *Motor Car Act* 1930, are as follows:—"(1) Every motor car . . . shall be registered by the Chief Commissioner who shall keep a register and shall assign a separate identifying number to every motor car . . . so registered and shall enter in the register every such number and such other particulars as are required by this Act or the regulations thereunder. . . . (3) A fee as provided for in the Second Schedule shall be paid to the Chief Commissioner on the registration of or the renewal of the registration of a motor car . . . No registration shall have any force or effect after the expiration of twelve months from the date of such registration or renewal. The horse-power of a motor car for the purposes of the said Schedule shall be determined as provided in the said Schedule . . . (4) If a motor car is used on a public highway without being registered . . . the person driving

ORDER to Review.

Olaf Edwin Rawson laid an information in the Court of Petty Sessions at Seymour in the State of Victoria against Ernest William Willard alleging that the defendant on 28th July 1932 at Seymour in the State of Victoria was the driver of a motor car which was used on a public highway, to wit, the Hume Highway, without being registered. It appeared from the evidence that Willard was a carrier residing in the State of New South Wales and was the owner of a motor truck registered in that State. The truck was not registered in the State of Victoria. On 28th July 1932 the defendant was using this truck for the purpose of carrying goods from Finley in New South Wales to Melbourne. There were no goods in the truck which were being carried from any place in Victoria to any other place in Victoria. The defendant had never used the truck for the purpose of carrying passengers for hire in Victoria, and had never used it for carrying goods for hire from any place in Victoria to any other place in Victoria, and had used it only for the purpose of carrying goods for hire from places in New South Wales to places in Victoria, or from places in Victoria to places in New South Wales. The defendant contended that sec. 4 of the *Motor Car Act* 1928-1930 (Vict.) did not apply to him as he was engaged exclusively in inter-State trade; and that if sec. 4 did apply to persons engaged in inter-State trade, then it was to that extent unconstitutional and invalid as being contrary to sec. 92 of the Constitution. The defendant was convicted of an offence under sec. 4 (4) of the *Motor Car Act*, and he now appealed, by way of order to review, from this decision to the High Court.

Fullagar (with him *Garran*), for the appellant, to move the order absolute. The case raises questions under sec. 92 of the Constitution.

the car shall be guilty of an offence under this Act. . . . (7) (*a*) This section shall not apply to a motor car (other than a motor car which is used in Victoria for carrying passengers for hire or goods for hire or in the course of trade)—(i.) which is owned by a person resident in another State; (ii.) which is temporarily in Victoria; (iii.) which is registered in such other State; and (iv.) on which the number allotted to the motor car in such other State is exhibited. (*b*) If the driver of such a motor car is licensed in the State where the motor car is registered—(i.) the provisions of this section shall not apply to such driver; and (ii.) such driver shall not be deemed to be guilty of any offence under section six of this Act (as amended by the *Motor Car Act* 1930) in respect of—driving a motor car upon a public highway without being licensed for the purpose; or any failure to produce a licence referred to in that section if he produces the licence issued to him in such other State."

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The sections of the *Motor Car Acts* concerned are sec. 4 (1), (4), (7) of the Act of 1928 and secs. 4 (1) and 5 (*e*) of the Act of 1930, relating to the registration of motor cars. The Second Schedule of the Act of 1928 is also material. Sub-secs. 1 and 7 of sec. 4 are an infraction of sec. 92 of the Constitution (*W. & A. McArthur Ltd.* v. *Queensland* (1)). The passage through Victoria is impeded by this legislation. It differs from legislation concerning licences to drive and the carrying of tail lights, head lights, &c. Its object is not merely to keep a record of cars or to keep watch over the activities of their owners. The registration fee is not computed according to the mileage run on the roads. The fee is destined to go to the Country Roads Board (*Country Roads Act* 1928, sec. 38 (*d*), and *Country Roads Board Fund Act* 1932 (*No.* 2)). The object of the legislation is to obviate competition with the State railways. It is not suggested that there is any discrimination. The ordinary private car used in this manner is not touched by the Act. Only commercial vehicles so used must register. The purpose is not to maintain the highways. The rate charged is a flat rate. [Counsel referred to *Sprout* v. *South Bend* (2).]

Wilbur Ham K.C. (with him *C. Gavan Duffy*), for the respondent, to show cause. The test to apply is to consider what is the main purpose and object of the Act. The fact that inter-State traffic is indirectly affected does not result in an infraction of sec. 92 of the Constitution. The criterion is: Do the sections impeached purport to restrict inter-State traffic as such ? (*Roughley* v. *New South Wales*; *Ex parte Beavis* (3); *James* v. *Cowan* (4).) The restriction must be direct and not indirect. In considering the effect of the *Motor Car Acts* they must be read with the *Country Roads Act* 1928. The registration fee is a charge for a service rendered. The so-called flat rate is the most convenient and practicable form of rate, and is entirely reasonable. There is no intention, direct or indirect, to restrict inter-State traffic, and that is shown by the absence of any discrimination. All that sec. 4 (7) does is to narrow a previously existing exemption

(1) (1920) 28 C.L.R. 530, at p. 546.
(2) (1928) 277 U.S. 163, at pp. 168, 169; 72 Law. Ed. 833.
(3) (1928) 42 C.L.R. 162, at p. 195.
(4) (1930) 43 C.L.R. 386, at pp. 392, 423, 424.

(*Attorney-General for Ontario* v. *Reciprocal Insurers* (1); *Wiggins Ferry Co.* v. *East St. Louis* (2)).

Fullagar, in reply. This legislation operates directly to impose a pecuniary impost on the operations of inter-State trade and traffic. It is irrelevant to ask what is the destination of the registration fees (*Gloucester Ferry Co.* v. *Pennsylvania* (3); *Harman* v. *Chicago* (4)). Regulating motor cars as things differs from regulating the conduct of persons who use motor cars or who are engaged in trade in which they are used (*Ex parte Nelson* [*No.* 1] (5); the Constitution, sec. 104).

Cur. adv. vult.

April 20.

The following written judgments were delivered :—

RICH J. This is an appeal from a conviction under sec. 4 (4) of the *Motor Car Act* 1928 as amended by the *Motor Car Act* 1930. Before the Court of Petty Sessions from which the appeal comes, a defence was raised based upon sec. 92 of the Constitution. The matter, therefore, became one of Federal jurisdiction (*Troy* v. *Wrigglesworth* (6)). Sub-sec. 4 of sec. 4 provides, *inter alia*, that if a motor car is used on a public highway without being registered, the person driving the car shall be guilty of an offence under the Act. Before it was amended by the Act of 1930, sub-sec. 7 excluded the application of any part of the section to a motor car owned by a person resident in another State which was temporarily in Victoria, if the motor car was registered in such other State and the number allotted to the motor car in that State was exhibited thereon. The appellant was convicted, under sub-sec. 4, of using his motor car upon a public highway without being registered. He resided at Finley in New South Wales and carried on business as a carrier. On the occasion in question he was using his car—a motor truck—to transport goods for hire upon a continuous journey from Finley to Melbourne. His car was registered in New South Wales and exhibited its New South Wales number, but it was not registered in

(1) (1924) A.C. 328, at p. 337.
(2) (1882) 107 U.S. 365, at p. 374.
(3) (1885) 114 U.S. 196.
(4) (1893) 147 U.S. 396.
(5) (1928) 42 C.L.R. 209, at pp. 231-234.
(6) (1919) 26 C.L.R. 305.

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Victoria. He would not have been liable to conviction before the amendments of 1930, but by the amendments of the *Motor Car Act* 1930 the following sub-section is substituted for sub-sec. 7 of sec. 4 of the Act of 1928:—"(7) (*a*) This section shall not apply to a motor car (other than a motor car which is used in Victoria for carrying passengers for hire or goods for hire or in the course of trade)—(i.) which is owned by a person resident in another State; (ii.) which is temporarily in Victoria; (iii.) which is registered in such other State; and (iv.) on which the number allotted to the motor car in such other State is exhibited. (*b*) If the driver of such a motor car is licensed in the State where the motor car is registered —(i.) the provisions of this section shall not apply to such driver; and (ii.) such driver shall not be deemed to be guilty of any offence under section six of this Act (as amended by the *Motor Car Act* 1930) in respect of—driving a motor car upon a public highway without being licensed for the purpose; or any failure to produce a licence referred to in that section if he produces the licence issued to him in such other State." The appellant contends that, in so far as this provision would operate to require him to obtain Victorian registration and pay the Victorian registration fee before he could carry goods for hire in the exercise of his occupation as a carrier upon an inter-State journey from a place in New South Wales to a place in Victoria, it is in conflict with sec. 92 of the Commonwealth Constitution and either should receive a restricted construction or be held void. Sub-sec. 1 of sec. 4 requires that every motor car shall be registered by the Chief Commissioner of Police, who shall keep a register and assign a separate identifying number to every motor car, and shall enter in the register every such number and such other particulars as are required by the Act or the regulations thereunder. Sub-sec. 3 enacts that a fee as provided in a Schedule to the statute shall be paid to the Chief Commissioner on the registration or the renewal of the registration of the motor car. It further provides that no registration shall have any force or effect after the expiration of twelve months from the date of such registration or renewal. The Schedule prescribes fees by no means nominal or unsubstantial which are calculated by reference to the horse-power of the engine and the weight of the motor car considered in combination.

Sec. 38 of the *Country Roads Act* 1928 provides that the fees collected under this provision after the deduction of the expenses of collection shall be paid to an account in the Treasury called the Country Roads Board Fund. This fund is devoted to various charges, including interest, incurred by the Country Roads Board, and bears the cost of constructing and maintaining roads in Victoria. What is a main road is determined by the Board. Speaking generally, other roads are constructed and maintained in Victoria by and at the cost of local government bodies. The provisions of sec. 4 of the *Motor Car Act* stand as part of an elaborate scheme of motor car regulation. The statute is intituled : " To consolidate the law regulating the use of motor cars." It does not deal with motor omnibuses as such, whether metropolitan, urban or country, which are the subject of further elaborate provisions contained in the *Motor Omnibus Act*. The Act in question is directed rather at the control of motor traffic, and contains provisions not only for identifying motor-propelled vehicles of every sort, drivers and owners, but for preventing dangerous driving, destruction of the roads and bridges, the emission of noises, smoke and smell, for regulating the lighting of cars, the character of tyres, the carriage of excessive weights and restraining the intoxication of drivers. It provides what shall be the duty of a driver in the case of accidents, and deals with other incidental matters. Except in so far as differentiation may be found in the present sub-sec. 7 of sec. 4, the Act as amended by that of 1930 contains nothing but uniform provisions operating without regard to any distinction between Victorian and inter-State traffic. Properly considered, sub-sec. 7 is merely an exemption from a uniform provision and operates to limit the exception to what I may call uncommercial uses of the cars of residents of other States. I do not think it can be regarded as converting the otherwise uniform requirements of registration and payment of a fee into a discriminatory provision, discriminating either between commerce generally and other uses of motor vehicles or between inter-State and intra-State commerce and intercourse. Sec. 92 of the Constitution declares the absolute freedom of trade, commerce and intercourse among the States, whether by means of internal carriage or ocean

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navigation. This case again raises the question to which, so far, no final answer has been given: Freedom from what?

In *James* v. *Cowan* (1) I ventured to deduce a formula from decided cases. I said: "The decisions I have cited appeared to show that what is forbidden by sec. 92 is State legislation in respect of trade and commerce when it operates to restrict, regulate, fetter or control it, and to do this immediately or directly as distinct from giving rise to some consequential impediment." I have explained more at large in *Peanut Board* v. *Rockhampton Harbour Board* (2) the effect of the decision in the Privy Council in relation to the view I had adopted. For present purposes it is enough to say that I adhere to the same formula, which I consider is a brief but correct statement of the result of those cases decided in this Court the authority of which has neither been explicitly denied nor tacitly ignored in later pronouncements. The question whether the prohibition extends beyond legislation to Government action in general is of no importance in this case. The difficult task remains of applying it to the State enactment now impugned. In this task I think real assistance is derived from decisions of the Supreme Court of the United States upon analogous but not identical problems arising under the Constitution of that country out of similar legislation relating to motor traffic. Care must, of course, be exercised to avoid the error of supposing that the implied or presumed exclusion of State legislative power from the subject of inter-State commerce upon which the Federal power operates in the United States is the same as the absolute freedom guaranteed by the express provision of the Australian Constitution to trade, commerce and intercourse among the States. The doctrine of the United States that the failure of Congress to legislate in respect of acts or transactions forming part of inter-State commerce amounts to an expression of its will that no legislation in respect of these acts and transactions shall restrict such commerce makes the power of Congress practically exclusive, and produces a very similar position to that which in the Commonwealth results from sec. 92; but it is not the same, as is exemplified by the doctrine, to us somewhat puzzling in its indefiniteness, that State laws which are measures of police may be allowed

(1) (1930) 43 C.L.R., at p. 425. (2) *Ante*, 266.

incidentally to control intercourse and commerce. It may be true that sec. 92 was introduced into the Commonwealth Constitution in the expectation of removing the difficulties which appeared to arise from the doctrines evolved under the American instrument of government which inspired our Constitution-makers. Nevertheless, the question on such matters so nearly approaches the question whether State action in respect of trade and commerce operating to produce a restriction, restraint or burden upon it, does so immediately or directly or merely as a remote consequence, that the decisions of the Supreme Court of the United States on the former question cannot but elucidate the latter. In *Hendrick* v. *Maryland* (1) it was held that the States were free to prescribe uniform regulations for public safety and order with reference to the use upon their highways of motor vehicles operating in inter-State commerce, and for that purpose the States might require registration of the vehicles, licensing of the drivers and payment of reasonable fees calculated upon the horse-power of the engine. In the opinion of the Court, delivered by *McReynolds* J., it is said :—" In view of the many decisions of this Court there can be no serious doubt that where a State at its own expense furnishes special facilities for the use of those engaged in commerce, inter-State as well as domestic, it may exact compensation therefor. The amount of the charges and the method of collection are primarily for determination by the State itself ; and so long as they are reasonable and are fixed according to some uniform, fair and practical standard they constitute no burden on inter-State commerce " (2). In *Continental Baking Co.* v. *Woodring* (3) it was held that reasonable regulations of the use of highways, not discriminating against the inter-State commerce which they affected, do not amount to the imposition of an unconstitutional burden upon it, and that because motor vehicles are so likely to destroy the highways themselves and to expose the public to such constant and serious dangers they may properly be treated as a special class. In the judgment of *Hughes* C.J. (4) are collected a number of decisions which expound and illustrate these

(1) (1914) 235 U.S. 610 ; 59 Law Ed. 385.

(2) (1914) 235 U.S., at pp. 623, 624 ; 59 Law. Ed., at p. 391.

(3) (1932) 286 U.S. 352 ; 76 Law. Ed. 1155.

(4) (1932) 286 U.S., at p. 366 ; 76 Law. Ed., at p. 1163.

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doctrines. In the present case it is important to observe that the statute is not concerned with trade, commerce or intercourse as such. It is concerned with motor vehicles considered as machines, integers of traffic, users of the highway and potential sources of danger and annoyance to the public. From the point of view of the legislation it is an accident that they provide an implement of commerce and a means of conveyance over long distances. It is true that these qualities are inherent in the very purpose and character of many of the vehicles, but it is not in that aspect that they are dealt with. Again, it is important to notice that the licence fee levied upon them, although taken into the revenues of the central Government, is appropriated for expenditure by a body which provides services upon which they may run and repairs to the damage which they do. All these considerations satisfy me that I am justified in treating the burden which may be put upon inter-State commerce and intercourse as the result of the levy of a fee upon registration as consequential, mediate or indirect, and not as a direct, immediate or intended burden or restraint imposed upon trade, commerce or intercourse among the States. In arriving at this conclusion I have been influenced by the uniform or non-discriminatory character of the legislation only in so far as it tends to negative any direct dealing by the State with inter-State trade, commerce and intercourse. I intend in no way to depart from the doctrine of *McArthur's Case* (1), which is that, when State legislation attempts to restrain commercial dealings of a description wide enough to embrace inter-State operations, it is void to the extent to which it would affect acts, conduct or transactions, part of trade, commerce and intercourse among the States.

For these reasons I am of opinion that the statute involves no conflict with sec. 92, and is not invalid and requires no constrictive construction.

The appeal should be dismissed with costs.

STARKE J. An information was laid by Rawson against Willard for that he, contrary to the provisions of sec. 4 of the *Motor Car Acts* 1928-1930 of the State of Victoria, was on 28th July 1932 at Seymour

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

in the State of Victoria the driver of a motor car which was used on a public highway, to wit, the Hume Highway, without being registered. Willard was convicted, and he now appeals to this Court on the ground that the relevant provisions of the *Motor Car Acts* 1928-1930 contravene the provisions of sec. 92 of the Constitution and are therefore invalid.

It appeared from the evidence that Willard was a carrier residing in the State of New South Wales, and the owner of a motor truck registered in New South Wales. In his business as a carrier he conveyed goods, for reward to him, from New South Wales into Victoria, and on 28th July he was in Victoria on a public highway carrying goods between New South Wales and Victoria. The *Motor Car Acts* 1928-1930 require that every motor car (which includes a motor truck) shall be registered in the manner prescribed by the Acts, and that the registration shall be annually renewed. A fee is payable upon registration and upon renewal, as provided in the Schedule. But the provision does not apply to a motor car (other than a motor car which is used in Victoria for carrying passengers for hire or goods for hire or in the course of trade) (1) which is owned by a person resident in another State, (2) which is temporarily in Victoria, (3) which is registered in such other State, and (4) on which the number allotted to the motor car in such other State is exhibited. Willard, however, used his car for carrying goods for reward or hire, and in the course of trade, and it therefore does not fall within the exemption.

Transport is no doubt an essential element of inter-State trade, and the burdening of inter-State transport by means of taxes, duties or licence fees is clearly obnoxious to sec. 92 of the Constitution. Therefore it is said that the provision of the *Motor Car Acts* requiring the registration of motor cars engaged in inter-State transportation and the payment of a fee upon such registration, is necessarily a contravention of the Constitution. In *Peanut Board* v. *Rockhampton Harbour Board* (1) I stated the principles upon which I apprehend that we must now proceed for the determination of the question whether in any particular instance the provisions of sec. 92 have been contravened, and I have nothing to add to that opinion. The constitutional right of the States to regulate motor vehicles and traffic upon

(1) *Ante*, 266.

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State roads and highways cannot be denied. Some regulation is necessary for the safety of the public and the maintenance of the roads and highways, and, though such regulations may incidentally affect inter-State transportation, the provisions of sec. 92 are not contravened by virtue of that fact merely—any more than they are by a quarantine law imposed for the welfare of the public (*Ex parte Nelson* [*No.* 1] (1); *McArthur's Case* (2)). Indeed, this view receives support from the observations of the Judicial Committee in *James* v. *Cowan* (3):—"If the real object of arming the Minister with the power of acquisition is to enable him to place restrictions on inter-State commerce, as opposed to a real object of taking preventive measures against famine or disease and the like, the legislation is as invalid as if the Legislature itself had imposed the commercial restrictions. . . . It may be conceded that, even with the powers granted in this form, if the Minister exercised them for a primary object which was not directed to trade or commerce, but to such matters as defence against the enemy, prevention of famine, disease and the like, he would not be open to attack because incidentally inter-State trade was affected." The character of the *Motor Car Acts* must therefore be examined.

I should mention that the *Acts Interpretation Act* 1930 of Victoria (No. 3930) provides that every Act of the State shall be read and construed subject to the Commonwealth Constitution, and so as not to exceed the legislative power of the Parliament of Victoria, to the intent that where any enactment would, but for this Act, have been construed as being in excess of that power, it shall nevertheless be a valid enactment to the extent to which it is not in excess of that power. The Act operates as a legislative declaration that if valid and invalid provisions are found in an Act, however interwoven, no provision within the power of Parliament shall fail by reason of such conjunction, but the enactment shall operate on so much of its subject matter as Parliament might lawfully have dealt with. (See *Newcastle and Hunter River Steamship Co.* v. *Attorney-General for the Commonwealth* (4).)

(1) (1928) 42 C.L.R. 209.
(2) (1920) 28 C.L.R., at pp. 550-551.
(3) (1932) A.C. 542, at pp. 558, 559; 47 C.L.R. 386, at pp. 396, 397.
(4) (1921) 29 C.L.R. 357.

The *Motor Car Acts* 1928-1930 may well be described as Acts to regulate motor cars. The main provisions regulate, and (sec. 18) confer powers upon the Governor in Council to regulate:—1. The width, height and weight of motor cars and the loads carried (sec. 13). 2. The use of the roads and highways for heavy motor vehicles, and those likely to damage them (secs. 11 and 19). 3. Speed limits (secs. 10, 13, and 14). 4. Nuisances, such as excessive smoke, noise or smell (sec. 14). 5. Lights and warning devices, such as lamps, bells and horns (secs. 15, 16). Such provisions regulate the use of the highways of the State by motor cars for the protection thereof and the safety of the public. Absolute freedom cannot mean that the public are free to use the highways just as they please —indeed, if they were, transportation would be seriously impeded and might ultimately be destroyed. Regulations such as those already indicated are in truth restrictions upon licence and improper action, they are aids to transport and in no wise hinder or impose burdens upon the absolute freedom of inter-State trade, commerce and intercourse. They are not in contravention of sec. 92 of the Constitution.

The sections of the Acts requiring the registration of cars (sec. 4), the licensing of drivers (sec. 6), and identification marks (Act of 1930, No. 3901, sec. 6), and imposing penalties (sec. 4), are all ancillary to these main provisions: they are necessary for the purposes of supervision and enforcement of the Acts, and so are valid for the same reasons as support those provisions.

Lastly, there are provisions prescribing fees for registration of cars and the licensing of drivers (secs. 4, 6). The necessary effect of these provisions, so it is claimed, is to impose a levy or tax upon inter-State trade, and so determine the object, true character and effect of the Acts. But they are not discriminatory levies, nor imposed upon inter-State trade as such. I agree that the cases show that this test is not decisive, but it is undoubtedly an element which must be considered in ascertaining the object, character and effect of the Acts. Again, the Acts are not mere revenue measures: valuable facilities are afforded by the State to those engaged in trade, commerce and intercourse in the construction and maintenance of its highways and roads. Funds must be provided if roads and

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highways are to be constructed and maintained. The *Country Roads Acts* 1928 and 1932 indicate how these funds are provided and raised, partly by Government grants and partly by fees (see sec. 38). Indeed, we find that the fees under the *Motor Car Acts* (other than fees for motor drivers' licences) and the penalties are appropriated for the construction and maintenance of roads under the authority of the Country Roads Board (see sec. 38 and the *Country Roads Board Fund Act* 1932 (*No.* 2) (No. 4086), sec. 2). But the real answer, I think, to the contention, is that the requirement that fees be paid is attached as a reasonable adjunct to the main provisions of the Acts—just as are the registration and licensing requirements themselves. If the necessary effect of the Act, or its object, or character—whichever word or phrase is preferred—as gathered from the words used, is to protect the State highways and those who use them, how does a provision imposing a fee as an appropriate method of aiding that purpose, obtain a different character, aspect or effect ? It takes its colour, its character, and its effect from the Acts, and aids, protects or hinders trade, commerce and intercourse as much or as little as the main provisions themselves. In my opinion, therefore, the provisions prescribing registration fees and licence fees do not infringe the Constitution.

It is perhaps interesting to note that the Supreme Court of the United States has reached the same conclusion under the Constitution of the United States. But that Constitution has no such section as sec. 92 of the Australian Constitution. Congress under the Constitution of the United States has power to regulate commerce with foreign nations and among the several States and with the Indian tribes, and that power, according to the decisions of the Supreme Court, is exclusive. Such commerce is, therefore, free from State restrictions. But it is not so far exclusive as to preclude State legislation on matters local in their nature or operation or intended to be mere aids to commerce, for which special regulation can more effectively provide under what is called the police power. The United States decisions are not a safe guide to the construction of the Australian Constitution, but those sufficiently interested will find the subject discussed and the decisions collected in *Willoughby* on *The Constitution of the United States*, 2nd ed. (1929), p. 1021, to

which may be added *Prentice, Federal Power over Carriers and Corporations* (1907), pp. 116-121; *Cooley, Constitutional Limitations*, 7th ed. (1903), pp. 687, 688, and the cases of *Hodge Drive-It-Yourself Co.* v. *Cincinnati* (1) and *Continental Baking Co.* v. *Woodring* (2).

The order nisi should be discharged and this appeal dismissed.

DIXON J. The question in this case is whether the driver of a motor truck, which has not been registered under the *Motor Car Acts* of Victoria, is guilty of an offence against the law of that State when it is used on a public highway in Victoria solely in the course of carrying goods for reward from a place in New South Wales to a place in Victoria. Sec. 4 of the *Motor Car Act* 1928, as amended by sec. 5 of the *Motor Car Act* 1930, contains a general requirement that motor vehicles shall be registered with the Chief Commissioner of Police and that the registration shall be annually renewed. An annual licence fee must be paid upon registration and renewal. The amount of the fee is fixed by reference to the horse-power and weight of the motor vehicle. For the motor truck in question the yearly registration fee would be a little more than £20. Sub-sec. 4 of sec. 4 makes the driver of a motor car guilty of an offence if it is used on a public highway without being registered. The general requirement of registration is qualified by the express exclusion from the operation of sec. 4 of any motor car (other than a motor car which is used in Victoria for carrying passengers for hire, or goods for hire, or in the course of trade) which is owned by a resident of another State, is temporarily in Victoria, is registered in the other State and exhibits a number allotted to it in that other State.

In the present case the facts must be taken to be that the motor truck was at the relevant time used exclusively in carrying goods for hire between Finley in New South Wales and Melbourne. It was owned by a person resident in New South Wales, was temporarily in Victoria, was registered in New South Wales and exhibited the number there allotted to it. It was, however, outside the express exemption because it was used in Victoria for carrying goods for hire in the course of the inter-State journey from Finley to Melbourne.

(1) (1932) 284 U.S. 335. (2) (1932) 286 U.S. 352.

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But sec. 2 of the *Acts Interpretation Act* 1930 (No. 3930) now requires that enactments of the Victorian Legislature shall be read and construed subject to the Commonwealth Constitution, and sec. 92 of that Constitution provides that trade, commerce and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free. Thus the question is whether the Victorian statute can be allowed an operation which would forbid the use of a motor vehicle upon a Victorian road for the purpose of carrying goods in the course of inter-State transport unless the vehicle were registered and the registration fee paid.

In considering this question, I do not think we should depart from the meaning placed upon sec. 92 by the decision of this Court in *McArthur's Case* (1), the authority of which is anything but impaired by the judgment of the Privy Council in *James* v. *Cowan* (2). That meaning requires the complete abandonment of the opinion that the provision does no more than free commerce and intercourse among the States from disabilities and disadvantages not equally borne by the domestic trade of a State. It follows from the decision that a burden or restriction is none the less unconstitutional although it is placed uniformly upon inter-State and intra-State transactions falling within the description trade, commerce and intercourse. Except, perhaps, in the conditions prescribed for the exemption of cars owned by residents of other States, the Victorian statute disregards the distinction between intra-State trade and inter-State trade, commerce and intercourse in imposing the requirement of registration and payment of a registration fee which is uniform and general. But this absence of discrimination is of no importance if the enactment includes in its operation inter-State transactions and impairs the freedom of trade, commerce and intercourse alike between the States and within the State. Now the particular act or conduct forbidden by the material part of sec. 4 of the Victorian *Motor Car Acts* is the use of motor vehicles upon public highways, unless conditions which include a substantial payment to the revenue have first been complied with. The acts or conduct so forbidden necessarily include the use upon the public highway of such vehicles for the purpose of inter-State transportation. The

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

(2) (1932) A.C. 542; 47 C.L.R. 386.

prohibition thus of its own nature applies to all occasions on which a motor vehicle is used upon a highway as a means of inter-State transit or transport. It, therefore, affects an actual operation of inter-State commerce and intercourse. But, perhaps, it is not every conditional prohibition of an operation of inter-State trade that impairs its freedom. The nature of the conditions will determine whether it is a burden or restriction upon the act, conduct or transaction considered as part of trade, commerce and intercourse. In this instance the critical condition is the exaction of a contribution to the revenue. Prima facie the imposition of a licence fee as a condition of carrying out an operation of inter-State commerce is in flat opposition to sec. 92. But several answers are relied upon to this prima facie position.

First, it is said that the provision does not operate directly or immediately to burden an operation or transaction of inter-State commerce, but only indirectly, mediately or consequentially, and that sec. 92 secures trade, commerce and intercourse from direct or immediate interferences only. There is no difficulty in apprehending the distinction between a law imposing a duty to act or to forbear in reference to or in consequence of an event or thing which is itself part of trade, commerce or intercourse, and a law imposing a duty to act or forbear in reference to or in consequence of some event or thing which is not itself part of trade, commerce or intercourse, but the regulation of which, nevertheless, produces some physical, economic, or social effect upon trade, commerce and intercourse. The operation of the first may aptly be described as direct, and, of the second, as indirect or consequential. In this sense a tax upon bills of lading measured by the freight charged might be considered to impose a direct, while a tax upon the income of shipping companies might be considered to produce but a consequential, burden upon inter-State trade. If the test to be applied is whether the State law, if valid, would itself control or operate upon or in reference to conduct which is part of inter-State commerce or intercourse, I think the answer in this case must be that it would do so. The material provision of the law is a prohibition of the use of a means of transport unless a licence fee is paid. This imposes a pecuniary burden by reference to conduct which itself forms part of commerce and

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intercourse including that between the States. I do not understand that any other *discrimen* is intended by the descriptions direct and indirect, immediate and mediate or consequential. But if they are used to connote some other distinction, I am unable to acknowledge its existence. It appears to me that no more appropriate application could be made of the maxim *quando aliquid prohibetur, prohibetur et omne per quod devenitur ad illud* than to attempts to infringe upon a constitutional immunity conferred in the absolute terms of sec. 92.

Next, it is said that a consideration of the scope, object and purpose of the challenged law supplies the true criterion of its repugnance to or compatibility with sec. 92. If the legislation contained in the *Motor Car Acts*, when considered as a whole, must be assigned to a category, it would, perhaps, be properly described as a law with respect to the ownership and the use of motor cars and the regulation of motor traffic. Accordingly, it is contended that the legislation does not "deal with" trade, commerce and intercourse as such: that its purpose is not to control, fetter, restrain, or burden it. It may be conceded that the provisions of the Act regulating motor traffic, prescribing the duties and responsibility of owners and drivers and even requiring the owner to register the description and particulars of his car and obtain a number, do not impair the freedom of commerce. But it appears to me that the nature and effect of the requirements that a fee shall be paid as a condition of registration and that, without such registration, the car shall not be used on a highway, cannot be affected by the circumstance that they occur in legislation dealing with and regulating motor cars generally. The question is not whether the legislation falls within a head of power and is a law with respect to a particular subject matter. Nor whether in one aspect it could be referred to one head of power and in another to another head of power, but simply whether, if valid, it would be inconsistent with the absolute freedom of trade, commerce and intercourse between the States. For this purpose it would appear to be necessary to examine only the meaning and application of so much of the enactment as is material to the imposition of the burden and to the ascertainment of its nature and incidence.

A third contention is that the registration fee is charged as a compensation to the State for the service supplied by the State to motor traffic in providing highways. By sec. 38 of the *Country Roads Act* 1928 it is provided that an account shall be kept in the Treasury called "The Country Roads Board Fund" and to the credit of that account shall be placed various moneys including "all fees and fines less the cost of collection paid under the *Motor Car Act* 1928." The fund is applicable substantially to the payment of certain interest charges, to the cost of maintaining main roads and the payment of liabilities under the *Country Roads Act*. Main roads are highways which in the opinion of the Country Roads Board are of sufficient importance to be declared main roads.

The doctrine now prevailing in the United States, where the commerce power of Congress is treated in substance as exclusive, is that, as the highways are public property, the use of them even for purposes of inter-State commerce may be regulated by the States with a view of securing safety, convenience, and order, and of conserving them and maintaining them in repair. The regulation may include licensing and the exaction of a contribution to the upkeep of the highways, and, as primarily they are meant for private use, those who conduct upon them the business of carrying goods or passengers for hire, even upon inter-State journeys, may be required to pay an additional or special contribution to the cost of constructing and maintaining them. If these charges are reasonable, and neither the regulations nor the charges discriminate against inter-State commercial intercourse, "requirements of this sort are clearly within the authority of the State, which may demand compensation for the special facilities it has provided and regulate the use of its highways to promote the public safety. Reasonable regulations to that end are valid as to intra-State traffic and, where there is no discrimination against the inter-State commerce which may be affected, do not impose an unconstitutional burden upon that commerce. Motor vehicles may properly be treated as a special class, because their movement over the highways, as this Court has said, 'is attended by constant and serious dangers to the public, and is also abnormally destructive to the ways themselves.' *Hendrick* v. *Maryland* (1)"

(1) (1914) 235 U.S., at p. 622; 59 Law. Ed., at p. 390.

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—per *Hughes* C.J. in *Continental Baking Co.* v. *Woodring* (1). (See also *Clark* v. *Poor* (2); *Bush Co.* v. *Maloy* (3); *Buck* v. *Kuykendall* (4); *Sprout* v. *South Bend* (5).) This doctrine is not, in my opinion, appropriate to the interpretation and application of sec. 92 of the Commonwealth Constitution. It may be assumed that one purpose of introducing into the Constitution of the Commonwealth an express guarantee of the freedom of inter-State trade was to avoid the intricate and uncertain implications which in the United States the doctrine of the quasi-exclusiveness of the commerce power appears to involve. Under the express provision of the Australian Constitution, the validity of an enactment depends upon the answer to the question: Does it leave trade, commerce and intercourse absolutely free? If a statute fixes a charge for a convenience or service provided by the State or an agency of the State, and imposes it upon those who choose to avail themselves of the service or convenience, the freedom of commerce may well be considered unimpaired, although liability to the charge is incurred in inter-State as well as intra-State transactions. But in such a case, the imposition assumes the character of remuneration or consideration charged in respect of an advantage sought and received. In the present case, the registration fee is imposed as a tax, and I cannot see that the revenue provision contained in the *Country Roads Act* appropriating it to a particular account in the Treasury or to the discharge of special expenditure alters its character.

For these reasons I am of opinion that it should be decided that sec. 4 of the Victorian *Motor Car Acts* does not operate to forbid the use of a car exclusively in inter-State transportation without registration and payment of the registration fee. I think we should allow the appeal and make absolute the order nisi.

EVATT J. In the case of *Peanut Board* v. *Rockhampton Harbour Board* (6), judgment in which is also being delivered to-day, I have had occasion to refer to some of the established principles for applying

(1) (1932) 286 U.S. 352, at p. 365; 76 Law. Ed. 1155, at p. 1163.
(2) (1927) 274 U.S. 554; 71 Law. Ed. 966.
(3) (1925) 267 U.S. 317; 69 Law. Ed. 627.
(4) (1925) 267 U.S. 307; 69 Law. Ed. 623.
(5) (1928) 277 U.S. 163; 72 Law. Ed. 833.
(6) *Ante*, 266.

sec. 92 of the Commonwealth Constitution. Those principles so far as they concern the present case are :—

(1) The absence from the impugned State law of actual discrimination against inter-State commerce, does not, of itself, save the law from successful attack under sec. 92.

(2) But the absence from the impugned State legislation of any discrimination against inter-State trade may be an important factor as tending to negative any definite relationship between the protected inter-State trade and the State law and as tending to support a conclusion that sec. 92 has not been infringed.

(3) In order to establish an infringement of sec. 92, it is not sufficient to show that persons who engage in inter-State commerce are adversely affected in certain respects by the necessary operation of the State legislation.

(4) To invalidate the State Act, it must be shown that it is legislation "pointed directly at the act of entry, in course of commerce, into the second State." This is the principle laid down by *Higgins* J. in *Roughley* v. *New South Wales* (1), and, I think, also recognized by Lord *Atkin* in *James* v. *Cowan* (2).

It remains to apply these principles to the present case.

The Victorian *Motor Car Act* 1928, as amended by the *Motor Car Act* 1930, is the State legislation which is now attacked by the appellant. He was convicted before a police magistrate of being the driver of a motor car which was used on a public highway in Victoria, such car not being registered under the Victorian Act. The offence was created by sec. 4 (4) of the *Motor Car Act* 1928.

One ground of the order nisi is that the relevant provisions of sec. 4 (4) do not, on their true construction, apply to the appellant nor to the motor car he was driving at the time of the alleged offence. But it was admitted during the hearing of the appeal that the alleged non-applicability arises solely from sec. 92 of the Constitution. This admission was properly made, because it is abundantly clear from sec. 5 (*e*) of the *Motor Car Act* 1930 that the Act of 1928 would, but for the constitutional objection raised, apply to the appellant,

(1) (1928) 42 C.L.R., at p. 199. (2) (1932) A.C. 542; 47 C.L.R. 386.

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although he came from the State of New South Wales, and to the car he was driving, although it was registered within New South Wales.

The argument on the constitutional question is that the appellant was admittedly engaged in inter-State commerce when the alleged offence was committed; that the act of a person in so driving and using a motor car cannot be punished by a statute of a State; and that the attempt in sec. 4 to compel registration and taxation of motor vehicles operates as an infringement of sec. 92 because it imposes a tax upon and in respect to motor vehicles whilst they are in actual use in the course of inter-State commerce.

The appellant proved that his car was registered and licensed under the New South Wales *Motor Traffic Act* 1909-1930, and the New South Wales *State Transport (Co-ordination) Act* 1931. But, as appears from the New South Wales certificate itself, such registration and licence were "for use within the State of New South Wales." The relevance of the proof is therefore not clear. The real argument of the appellant involves the assertion that, because his car is used solely to conduct inter-State transport, he need not register it either in New South Wales or in Victoria, although he makes an extensive use of the roads of both States.

It is not disputed that the relevant provisions of the *Motor Car Act* of Victoria are uniform and general in character, and impose no special disadvantage upon vehicles used or intended to be used in inter-State trade. This absence of discrimination does not conclude the matter in favour of the State, but it is a circumstance which must be reckoned with in ascertaining the true character, nature and object of the State legislation.

What is the precise effect upon inter-State trade and commerce of the Act of the State of Victoria? It is to compel persons, if engaged in Victoria in such commerce by means of motor vehicles, to register them with the Victorian Chief Commissioner of Police and to pay to him the fee provided for in the Second Schedule of the Act. It cannot be denied that such an inter-State trader is, by the Act, forced to go to the trouble of registering his vehicle once every twelve months, and to pay a small tax to the State of Victoria,

which has the responsibility of constructing, controlling and maintaining all its public roads, including those used in inter-State transit. The appellant himself supplies an example of the manner in which the Act operates, necessarily and directly if only occasionally, upon New South Wales residents using vehicles in Victoria but solely for the purposes of inter-State trade.

The real nature and character of the Victorian legislation is, for purposes of revenue and police, to impose an annual tax upon the owners of motor vehicles using the roads of the State, and to carry out a scheme for their registration. The motor vehicle is a means of carrying on inter-State traffic in goods, but it is not itself a portion of inter-State trade. The State Act declares that the vehicle must be registered and a tax paid with respect to it, but this is not because it has been, or is being, or will be, used in inter-State commerce. The tax is not imposed upon, nor does it bear any relation to, the inter-State journey of the vehicle; still less is the tax referable to any inter-State commercial transactions in which the vehicle may be employed for the purposes of carriage of goods. As the charge imposed is an annual charge, the owner pays the same amount to the revenue whether he uses the Victorian roads on every day of the year, or upon one occasion only. There is no connection between the quantum of the tax and the extent of user of the roads by the motor vehicle, or the extent of inter-State traffic in which it is employed.

I conclude that the Victorian Act is not "pointed directly at the act of entry, in course of commerce, into the second State," and does not deal with or concern itself with trade or commerce, still less with inter-State trade or commerce. It happens that the inter-State trader has to meet an annual tax for the use of all Victorian roads, but he does not meet it in his capacity of trader at all. The Victorian statute does not place any burden or obstacle or disadvantage upon inter-State commerce and intercourse as such, and is not inconsistent with sec. 92.

The appeal should be dismissed.

McTIERNAN J. The facts upon which the appeal arises and the provisions of the *Motor Car Acts* 1928-1930 need not be repeated in detail. The question in the present case is whether there is a conflict between sec. 92 of the Constitution of the Commonwealth

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and sec. 4 of the *Motor Car Act* 1928, as amended by the *Motor Car Act* 1930, in so far as these provisions assume to make it unlawful for a person to drive a motor vehicle in Victoria which is being used for transporting goods from one State to another in the manner in which the appellant's vehicle was being employed without registering such vehicle and paying the fee prescribed by sec. 4 of the Act of 1928.

In *Peanut Board* v. *Rockhampton Harbour Board* (1), I quoted certain passages from the judgment of the Judicial Committee in *James* v. *Cowan* (2), and from the judgment of *Rich* J. in this Court in the same case, which contain the test for deciding the present question. These passages are as follows :—" If the real object of arming the Minister with the power of acquisition is to enable him to place restrictions on inter-State commerce, as opposed to a real object of taking preventive measures against famine or disease and the like, the legislation is as invalid as if the Legislature itself had imposed the commercial restrictions " (3). " It may be conceded that, even with powers granted in this form, if the Minister exercised them for a primary object which was not directed to trade or commerce, but to such matters as defence against the enemy, prevention of famine, disease and the like, he would not be open to attack because incidentally inter-State trade was affected " (4). " The decisions I have cited appeared to show that what is forbidden by sec. 92 is State legislation in respect of trade and commerce when it operates to restrict, regulate, fetter or control it, and to do this immediately or directly as distinct from giving rise to some consequential impediment " (5).

An examination of the provisions of the *Motor Car Acts* 1928-1930 clearly shows, in my opinion, that the primary object or real object of the Legislature is not directed to trade or commerce or intercourse, but to the control and supervision of motor traffic in Victoria. The object of sec. 5 (*e*) of the *Motor Car Act* 1930, which repeals sub-sec. 7 of sec. 4 of the Act of 1928 and substitutes for it a new sub-section is not, in my opinion, to discriminate against motor cars which are

(1) *Ante*, 266.
(2) (1932) A.C. 542 ; 47 C.L.R. 386.
(3) (1932) A.C., at p. 558 ; 47 C.L.R., at p. 396.
(4) (1932) A.C., at pp. 558, 559 ; 47 C.L.R., at pp. 396, 397.
(5) (1930) 43 C.L.R., at p. 425.

owned by persons resident in other States and are being temporarily used in Victoria, because they are being used for carrying passengers for hire or goods for hire or in the course of trade. The object of that new sub-section is rather to substitute a limited exemption from the obligation to register and pay the fee prescribed to be paid on registration, for the more general exemption granted by sub-sec. 7 of sec. 4 of the *Motor Car Act* of 1928 to motor vehicles owned by residents of other States which were temporarily in Victoria. But that exemption was not unconditional. It was a condition of the exemption that the vehicle should display while in Victoria the number allotted to it in the State in which it was registered. Sub-sec. 3 of sec. 4, it is true, requires a fee to be paid upon the registration of a vehicle. But this sub-section is, in my opinion, no more directed to trade or commerce than the provisions of sec. 4 with respect to registration or the display of the registration number. The fee does not, in my opinion, assume the character of a tax or impost on trade and commerce, when it is required to be paid on the registration of a motor vehicle which is driven in Victoria in the course of a journey from or to another State in the course of trade, commerce or intercourse. The act of trade for which a motor vehicle is being used in Victoria, when it is carrying goods on a journey from another State, is only incidentally affected by sec. 4. Instances of State laws which may incidentally affect trade but are not directed to trade, and for that reason are not in conflict with sec. 92, are given by *Higgins* J. in the course of his judgment in *Roughley's Case* (1). He said :—" But the State Legislature is subjected to another veto by sec. 92 : it must not make a law which infringes the provision that trade, commerce and intercourse among the States shall be ' absolutely free.' Freedom is really a negative idea : I take it as meaning that there shall be no restraint, no obstruction, no control of trade, &c., between the States. This cannot mean, if we are to give due effect to sec. 107, that State laws which merely affect such trade indirectly are vetoed ; for all legislative action of the State must affect inter-State commerce. State laws for public works, for public order, for police, for roads, for railways, for finance, even for education or morality, must,

(1) (1928) 42 C.L.R., at pp. 193, 194.

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more or less, have an influence on inter-State commerce. A State law for a minimum wage for carters and drivers, if applicable to those who bring inter-State produce from the wharves to the stores, must, in some degree, tend to affect inter-State commerce; does sec. 92 forbid such a law? If the argument for the applicant is right, a provision such as that contained in reg. 15—that an inspector may direct the destruction or carting away by a farm produce agent of farm produce—is invalid; and the agent may claim to be *solutus legibus* as to keeping in the market-place or in his stores bananas which have become rotten. If the argument is right, the carters and drivers of inter-State produce could not be bound to keep their side of the road or to obey the regulations made for traffic in the Sydney streets. If the argument is right, a produce agent in New South Wales cannot be compelled to pay New South Wales income tax so far as the income is derived from the sale of produce that comes to him from another State. In my opinion, sec. 107, when fairly read with sec. 92 of the Constitution, prevents such an absurd result."

Sec. 4 of the *Motor Car Acts* 1928-1930, therefore, validly operates to make unlawful the act of the appellant in driving his motor vehicle in Victoria, on the occasion in respect of which he was convicted, without registering it as required by sec. 4.

The conviction was right and the appeal should be dismissed.

Appeal dismissed. Order nisi discharged with costs.

Solicitors for the appellant, *Alexander Grant, Dickson & Pearce.*

Solicitor for the respondent, *Menzies,* Crown Solicitor for Victoria.

H. D. W.