[HIGH COURT OF AUSTRALIA.]

THE KING

AGAINST

VIZZARD;

EX PARTE HILL.

H. C. OF A. 1933.

MELBOURNE, *Oct.* 3, 4, 5.

SYDNEY, *Dec.* 15.

Gavan Duffy C.J., Rich, Starke, Dixon, Evatt and McTiernan JJ.

Constitutional Law—Freedom of trade, commerce, and intercourse among the States—Regulation of facilities for transport—Licensing of public motor vehicles—Motor car engaged on inter-State journey—Validity of State Act—The Constitution (63 & 64 *Vict. c.* 12), *sec.* 92—*State Transport* (*Co-ordination*) *Act* 1931 (*N.S.W.*) (*No.* 32 *of* 1931)*, *secs.* 3, 12.

The appellant conveyed goods from Melbourne to Wagga Wagga in New South Wales in a motor lorry which was used exclusively in transporting goods from Melbourne to Wagga. The motor lorry was not licensed under the *State Transport* (*Co-ordination*) *Act* 1931 of New South Wales and had not been granted an exemption from the requirement that it should be so licensed. The appellant was charged under sec. 12 of that Act, which makes it an offence to operate in New South Wales a public motor vehicle which is neither licensed by the Board nor exempt. The Act also provided that it should be read and construed so as not to exceed the legislative power of the State.

* The *State Transport* (*Co-ordination*) *Act* 1931 of New South Wales, entitled "An Act to provide for the improvement and for the co-ordination of means of and facilities for locomotion and transport; to constitute a Board of Commissioners for that purpose; to amend the *Government Railways Acts*, 1912-1930, and certain other Acts; and for purposes connected therewith," provided:—

Sec. 3 (2) "This Act shall be read and construed so as not to exceed the legislative power of the State to the intent that where any enactment thereof would, but for this subsection, 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."

Sec. 12 (1) "Any person who after a date appointed by the Governor and notified by proclamation published in the *Gazette* operates a public motor vehicle shall, unless such vehicle is licensed under this Act by the board and unless he is the holder of such license, be guilty of an offence against this Act: Provided that this subsection shall not apply to a public

Held, by *Gavan Duffy* C.J., *Rich*, *Evatt* and *McTiernan* JJ. (*Starke* and *Dixon* JJ. dissenting), that the provisions of the *State Transport* (*Co-ordination*) *Act* did not contravene sec. 92 of the Constitution as interfering with the freedom of inter-State trade, commerce, and intercourse.

The question whether sec. 92 of the Constitution binds the Commonwealth discussed.

The question whether sec. 92 of the Constitution precludes the Parliaments of the States from in any way regulating or controlling, trade, commerce, and intercourse among the States discussed.

Observations on the tests to be applied in consideration of the question whether legislation of a State infringes the provision of sec. 92.

W. & A. McArthur Ltd. v. *State of Queensland*, (1920) 28 C.L.R. 530, considered.

James v. *Cowan*, (1932) A.C. 542; 47 C.L.R. 386, applied.

RULE NISI for prohibition.

Frederick William Vizzard, an officer of the Commissioner for Road Transport and Tramways, laid an information under sec. 12 of the *State Transport* (*Co-ordination*) *Act* 1931 (New South Wales) against Price Alexander Hill of Wagga Wagga in the State of New South Wales alleging that on 30th April 1933 the defendant was guilty of an offence against the *State Transport* (*Co-ordination*) *Act* 1931 in that he did at Wagga Wagga operate a public motor vehicle not then being licensed under the said Act by the Commissioner for Road Transport and Tramways and he the said defendant not then being the holder of a licence under the said Act in respect of the said public motor vehicle contrary to the Act or regulation in such case made and provided.

motor vehicle that is being operated under and in accordance with an exemption from the requirement of being licensed granted under section nineteen or a permit granted under section twenty-two of this Act."

Sec. 19. (1) "The board may grant exemption from the requirements to be licensed under this Act in respect of any public motor vehicle or class of public motor vehicles in such cases and under such conditions as they think fit.

(2) "The board may from time to time vary or revoke any such exemption."

Sec. 22. (1) "The board may, on payment of the prescribed fees, issue permits, for such period as it thinks fit and subject to any conditions that may be prescribed or imposed by the board, permitting the carrying on a motor vehicle of persons in or over specified districts or routes.

(2) "Any such permit may be revoked or varied at any time by the board.

(3) "Any person who commits a breach of any of the conditions of a permit shall be guilty of an offence against this Act."

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Price Alexander Hill and Alexander James Hill, trading under the name of A. J. Hill & Son at Wodonga in the State of Victoria, conducted a carrying business between Victorian and New South Wales towns and had branch offices at Albury and Wagga Wagga. On 30th April 1933 a motor lorry belonging to A. J. Hill & Son and bearing a Victorian number plate was stopped by a police constable in a public street at Wagga Wagga with a load of goods which had been conveyed from Melbourne via Albury and The Rock. The lorry was used exclusively to convey goods from Melbourne to Wagga Wagga. The vehicle was registered under the *Motor Car Act* 1930 (No. 3901) (Victoria) and also under the *Motor Traffic Act* 1909-1930 (New South Wales), but was not licensed under the *State Transport (Co-ordination) Act* 1931 of New South Wales, nor was Price Alexander Hill or Alexander James Hill the holder of a licence under the last mentioned Act for such vehicle.

The information was heard at Wagga Wagga by a Police Magistrate. The defendant pleaded not guilty and, in addition to a number of defences based on the insufficiency of the allegations in the information and the insufficiency of the evidence, contended that as the vehicle on the trip in question, was engaged in inter-State trade, the provisions of sec. 12 of the *State Transport (Co-ordination) Act* 1931 of New South Wales did not apply on the ground that that section was *ultra vires* by virtue of secs. 90 and 92 of the Commonwealth Constitution.

The Police Magistrate overruled these contentions and convicted the defendant who was fined £100 and 8s. costs, in default 201 days' imprisonment with hard labour.

Price Alexander Hill subsequently obtained a rule nisi from the Supreme Court of New South Wales directed to the informant and the Police Magistrate calling upon them to show cause why a writ of prohibition should not issue to restrain further proceedings upon the conviction. Subsequently upon the application by the Attorney-General for the Commonwealth under sec. 40 of the *Judiciary Act* 1903-1932 the High Court ordered that the matter be removed into the High Court, and leave to intervene was obtained by the Commonwealth and the State of Victoria.

The *State Transport* (*Co-ordination*) *Act* 1931 was amended by the *Transport* (*Division of Functions*) *Act* 1932, but the amendments are not material to this report.

Spender (with him *Holmes*), for the applicant. The evidence disclosed that this particular lorry was used exclusively to transfer goods from Melbourne to Wagga Wagga. The *State Transport* (*Co-ordination*) *Act* 1931 does not apply to anything more than purely intra-State transport. No offence has been disclosed by the appellant (*Willard* v. *Rawson* (1)). The Court should apply the "pith and substance" test and having determined that should refer the Act to the trade and commerce power and if it directly regulates transport should inquire whether it regulates inter-State transport. The Act applies to domestic transport only, but if it applies to inter-State transport it is in conflict with sec. 92 of the Constitution. The Act and the regulations made thereunder do not carry the matter further than this, that the Act deals with trade, intercourse, and commerce, and is a direct regulation of transport and as such is an infringement of sec. 92 of the Constitution. If the Act does not apply to anything more than domestic trade we have not infringed the Act; if it does, it infringes sec. 92 of the Constitution (*New South Wales* v. *The Commonwealth* [*No.* 3] (2); *Australian Railways Union* v. *Victorian Railways Commissioners* (3)). The Act is *ultra vires* because its subject matter is trade, commerce, and intercourse within the meaning of sec. 92 of the Constitution. The appellant is consequently entitled to succeed under *Willard* v. *Rawson*, and *Peanut Board* v. *Rockhampton Harbour Board* (4). The test in both those cases is—if you find that a statute deals with trade, commerce, and intercourse and if it deals with inter-State trade, commerce, and intercourse it is invalid, *i.e.*, if it *would* interfere with trade, commerce, and intercourse. Applying the test in *Willard* v. *Rawson* this Act is one that definitely regulates inter-State trade and commerce. The subject matter of this Act is a direct interference with trade and commerce (*Crutcher* v. *Kentucky* (5)). In *Roughley* v. *New South Wales*; *Ex parte Beavis* (6) the

(1) (1933) 48 C.L.R. 316.
(2) (1932) 46 C.L.R. 246.
(3) (1930) 44 C.L.R. 319, at p. 386.
(4) (1933) 48 C.L.R. 266.
(5) (1890) 141 U.S. 47, at pp. 56, 58, 61.
(6) (1928) 42 C.L.R. 162.

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Act was simply dealing with a domestic business which related to the exercise of a particular business in Sydney and the subject matter of the statute had nothing to do with inter-State trade and commerce (*Adams Express Co.* v. *New York* (1); *Sprout* v. *South Bend* (2)). The present Act cannot be held valid as an exercise of police power, as it is not an attempt at administrative regulation, but is directed only to the regulation of trade and commerce (*Buck* v. *Kuykendall* (3)). The police powers are such as refer to the health &c. of the citizens but do not go to the length of regulating the whole sphere of trade. This Act is aimed at regulating transport and the prevention of competition with State railways (*Bush Co.* v. *Maloy* (4)). Inter-State trade should be free to take any route it chooses (*W. & A. McArthur Ltd.* v. *State of Queensland* (5)). The United States decisions say that State legislation may deal with inter-State trade and commerce but only if it does so incidentally. Transportation from a place in one State to a place in another State comes within the description of trade and commerce (*Harvard Law Review* (1931), vol. 44, p. 530). In *W. & A. McArthur Ltd.* v. *State of Queensland* (6), the State purported to regulate trade in general terms. *Roughley* v. *New South Wales*; *Ex parte Beavis* (7) and *Ex parte Nelson* [*No.* 1] (8) applied *W. & A. McArthur Ltd.* v. *State of Queensland*. In *Ex parte Nelson* [*No.* 1] and *Roughley* v. *New South Wales*; *Ex parte Beavis* the Court was determining what was the subject matter of the legislation. In *Ex parte Nelson* [*No.* 1] the Court did consider the subject matter of the Act and the pith and substance of it. On the face of this Act it is a law in respect of trade generally. The control of the channels of trade in this respect constitutes a restriction on trade, commerce, and intercourse.

[EVATT J. referred to *Farnell* v. *Bowman* (9).]

This Act directly restricts and hinders inter-State transport and the rule nisi should be made absolute on that ground. There is no evidence before the Court that the appellant did operate the

(1) (1913) 232 U.S. 14, at pp. 16, 24, 25, 31.
(2) (1927) 277 U.S. 163, at p. 169.
(3) (1924) 267 U.S. 307, at pp. 314, 315.
(4) (1925) 267 U.S. 317.
(5) (1920) 28 C.L.R. 530, at p. 543.
(6) (1920) 28 C.L.R. 530.
(7) (1928) 42 C.L.R. 162.
(8) (1928) 42 C.L.R. 209.
(9) (1887) 12 App. Cas. 643.

truck in question on a public street in contravention of the Act (*Houston* v. *Wittner's Pty. Ltd.* (1)).

[Counsel also referred to the *State Transport (Co-ordination) Act* 1931, secs. 4, 8, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 24, 25, 26, 28, 29, 30, 37, 38, 40, 47, 49, and to the Regulations made under such Act; *Metropolitan Traffic Act* 1900, dealing with the ordinary regulation of traffic; *Motor Tax Management Act* 1914, providing for the assessing and taxing of motor cars; *Motor Traffic Act* 1909-1930; *Motor Vehicles Taxation Act* 1924-1926.]

Sir *Robert Garran* K.C. (with him *Nicholas*), for the Commonwealth intervening. The *State Transport (Co-ordination) Act* is valid. Two matters assume very great importance, one is the collective marketing of goods, and the other is the very large question which has arisen owing to the great growth of motor traffic, *i.e.*, the method of dealing with competition between roads and railways. The effect of the decisions since *W. & A. McArthur Ltd.* v. *State of Queensland* (2) is that sec. 92 of the Constitution binds the States and the States only, and prevents them from legislating in any way so as to interfere with inter-State commerce. *W. & A. McArthur Ltd.* v. *State of Queensland* (3) goes too far. The expression trade and commerce, in sec. 51 (I.) of the Constitution extends not only to the transport of goods but also to negotiations which go to the making of a contract which is the very foundation of inter-State commerce, which is just as much a part of trade and commerce as the other. The theory is that sec. 92 practically makes sec. 51 (I.) an exclusive power of the Commonwealth Parliament. There is no law relating to inter-State commerce. The law of contract covers both domestic and inter-State trade. The effect of this theory would be completely to interfere with State legislation. It is for this reason that *W. & A. McArthur Ltd.* v. *State of Queensland* is too wide. Within the limits to which sec. 92 should be confined it would bind the Commonwealth (*James* v. *Cowan* (4)). There is no satisfactory answer to the question—What law governs inter-State commerce? State Parliaments have concurrent power to

(1) (1928) 41 C.L.R. 107.
(2) (1920) 28 C.L.R. 530.
(3) (1920) 28 C.L.R., at pp. 552, 558.
(4) (1930) 43 C.L.R. 386, at pp. 424, 425.

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make laws with respect to inter-State commerce. Whatever power the State has to make laws with respect to inter-State commerce is not taken away from it by sec. 51 (I.). Laws within the scope of sec. 51 (I.) are not taken away from the legislative power of the State except so far as they come within the prohibition of sec. 92. The power given by sec. 51 (I.) is a concurrent power (*Roughley* v. *New South Wales*; *Ex parte Beavis* (1)). Sec. 92 was not a lawyer's clause at all. It is substantially in the same form as existed in the first draft of the Constitution suggested by *Parkes* in the Convention of 1891 (*Quick and Garran* on the *Australian Constitution* (1901), p. 125). The meaning of "free" must be gathered partly from the context and partly from the subject matter "free trade" (*Oxford Dictionary*). In this context "free" imports a free border.

The whole idea is directed to the conception of a fence of some kind at the border (*Duncan* v. *State of Queensland* (2)). That case is sound but the meaning of the word "restrictions" goes too far. There may be restrictions which are not a violation of free trade between the States. A reasonable toll on a Murray bridge, if imposed on all persons using the bridge would not be an interference with inter-State free trade. Sec. 92 aims at anything in the nature of a prohibition or that is directed to preventing people from crossing the border such as a customs or other pecuniary impost. Sec. 92 means that there shall be no border fence to interfere with inter-State trade. The impost need not be imposed at the border (*The Commonwealth and Commonwealth Oil Refineries Ltd.* v. *South Australia* (3)). The reasons upon which the cases go afford no reasonable ground for excluding contract from the operation of sec. 92. State legislation in respect of inter-State trade continues until it is superseded by Federal legislation. The general commercial law is State law. The expression "trade and commerce" is narrower in sec. 92 than in sec. 51 (I.), except so far as "intercourse" is wider than "trade and commerce." Sec. 92 binds the Commonwealth as well as the States. Although in secs. 51 and 92 "trade and commerce" mean precisely the same thing the sections do not cover the same ground. Sec. 92 is simply an affirmation that there

(1) (1928) 42 C.L.R. 162.
(2) (1916) 22 C.L.R. 556, at pp. 573, 574.
(3) (1926) 38 C.L.R. 408.

should be free trade between the States. " Free trade " is a political term used to convey a political idea, and does not mean the whole sphere of trade and commerce. If the words " absolutely free " are isolated, then there arises a philosophical speculation as to the meaning of " freedom " and " absolute " in the expression as applied to trade. Sec. 51 (I.) gives power to the Commonwealth Parliament to deal with trade and commerce and sec. 92 simply prevents the Commonwealth and the States from interfering with the freedom of trade whatever laws they make.

[DIXON J. referred to the *Act of Union* (1706), 5 Anne c. VIII., art. IV.

[EVATT J. referred to the Privy Council's Report on Federation between the Australian Colonies, made in 1850. This document refers to " absolute freedom " in regard to trade.]

The word " among " was substituted for the word " between." In *Fox* v. *Robbins* (1) and in *Rex* v. *Smithers*; *Ex parte Benson* (2), the words have been read in their natural meaning. In *Duncan* v. *State of Queensland* (3) *Isaacs* J. said that sec. 92 applied to both Federal and State authorities.

[DIXON J. referred to *Ex parte Nelson* [*No.* 2] (4).]

W. & A. McArthur Ltd. v. *State of Queensland* (5) is wrong and sec. 92 applies to both the Commonwealth and the States. Sec. 92 covers customs duties, any other kind of pecuniary imposts and prohibition of entry. Sec. 92 would prevent interference with leaving as well as entering States. " Free trade " means free in its political sense. *James* v. *Cowan* (6) decides that where the real object of expropriation is to prevent goods from crossing from one State to another that is a prohibition which amounts to a barrier and which is a violation of inter-State free trade. It is only when the real purpose of expropriation is to prevent inter-State free trade that the prohibition arises. If they were expropriated for the purpose of terminating trading in the goods in question it would not be an interference with trade. If the purpose of the Act is to erect a barrier to inter-State trade, then sec. 92 is infringed. If goods were expropriated to feed an army the expropriation would

(1) (1909) 8 C.L.R. 115, at p. 123.
(2) (1912) 16 C.L.R. 99, at p. 117.
(3) (1916) 22 C.L.R., at p. 624.
(4) (1929) 42 C.L.R. 258, at p. 270.
(5) (1920) 28 C.L.R. 530.
(6) (1932) A.C. 542; 47 C.L.R. 386.

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be good because it is not aimed at the exercise of trade. As regards the South Australian *Dried Fruits Acts*, until the goods are in some way set aside for inter-State trade the State can deal with them as it wants to. The only case in which James was interfered with was where he was trying to get goods out of the jurisdiction (*James* v. *Cowan* (1)). If there is no discrimination the Act may still be directed to inter-State free trade. Discrimination is not in itself a final test but is a circumstance to be taken into account (*James* v. *Cowan* (2)). *W. & A. McArthur Ltd.* v. *State of Queensland* (3) does not correctly state the position. Sec. 92 deals only with the hypothetical fence along the borders of the States. It is a question for decision on the facts of each case whether there is an interference with inter-State free trade. The States may expropriate for use but not for profit. *State of New South Wales* v. *The Commonwealth* (*Wheat Case*) (4) is distinguishable from *James* v. *Cowan* because it is necessary to look at the real object of the Act. *Peanut Board* v. *Rockhampton Harbour Board* (5) and *State of New South Wales* v. *The Commonwealth* (*Wheat Case*) are illustrations of the necessity for drawing a very fine line. *Peanut Board* v. *Rockhampton Harbour Board* may or may not have overruled *State of New South Wales* v. *The Commonwealth* (*Wheat Case*). It is possible to prevent the passing of diseased cattle over State boundaries (*Ex parte Nelson* [*No.* 1] (6)). As to the control of transport by the present Act. There are two modes of transport, the railways and the roads, the relations of which to one another have become of importance because of the great increase in motor traffic. The State could monopolise transport on the roads as it does on the railways, but subject to the inter-State trade and commerce clause. The State can make or close roads or charge tolls or it can license cars and base its charges on any ground it thinks fit. There is nothing in the Constitution to prevent the State from making those laws, and the Commonwealth could step in and make highways if there were not sufficient, and in the business of Federal legislation there is nothing to prevent the State dealing with this matter. The Commonwealth could only deal

(1) (1932) A.C., at p. 554; 47 C.L.R., at p. 392.
(2) (1932) A.C. 542; 47 C.L.R. 386.
(3) (1920) 28 C.L.R., at p. 546.
(4) (1915) 20 C.L.R. 54.
(5) (1933) 48 C.L.R. 266.
(6) (1928) 42 C.L.R. 209.

with the matter on the basis of inter-State traffic, and the natural method of dealing with the position is for the State to deal with it and for the Commonwealth to watch the freedom of inter-State free trade (*Harvard Law Review* (1931), vol. 44, p. 530—*Regulation of the Contract Motor Carrier under the Constitution*, at p. 562 (note 80)). The general purpose of the *State Transport* (*Co-ordination*) *Act* 1931 is, as appears from the title, for the improvement and co-ordination of means of and facilities for transport. The only discrimination that appears in the Act is between road and rail transport. If it were attempted to stop inter-State traffic under this Act that would be an interference with inter-State free trade. There is no intention in this Act to discriminate against a State or to impose any sort of barrier. There must be a direct as distinct from an indirect interference with inter-State free trade. The question is—Is the real object of the Act to interfere with inter-State free trade? As to severability, sec. 15A of the Federal *Acts Interpretation Act* provides for the severance of the good from the bad parts of an Act and the States have adopted that legislation, but the Court cannot be asked to dissect a statute so as to unravel an obnoxious Act. If the Court holds that anything has been done wrongly in this Act it is wholly bad and is not saved by the clause in the *Acts Interpretation Act*. *Willard* v. *Rawson* (1) is indistinguishable from the present case and is in conformity with the above remarks. As to the "pith and substance" rule, it is necessary to find the primary thing which the Act regulates and it is important to consider the real object in any Australian Act under the Constitution, where the mass of powers are retained by the States and some are handed over to the Commonwealth. The question has to be decided by reference to what is the real subject matter of the Act. Where it is a question whether the enactment comes within the special subject matters of sec. 51 the test is what is the real subject matter of the enactment, and where the question is whether under sec. 92 the enactment has a certain effect restraining inter-State trade, then the question is what is the effect of the enactment. The subject matter is the test in the first case, and the result that the Act attains is the test in the second case.

(1) (1933) 48 C.L.R. 316.

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Wilbur Ham K.C. and *Fullagar* K.C. (with them *Leaver*), for the respondent. Two aspects are to be considered, one if the Court feels itself open to review *W. & A. McArthur Ltd.* v. *State of Queensland* (1) and the other cases in line with it, and the other, if the Court does not do so. Apart from authority it is necessary to consider the actual test. Sec. 92 is primarily aimed at securing free trade within the Commonwealth. The fact that it is in the same part which deals with uniform duties and excise all point to the fact that one of the objects of the people in federating was to get away from border duties. Sec. 92 also covers prohibitory and discriminatory legislation impeding the entry of goods or persons from one State into another. On the face of it sec. 92 includes more than the imposition of pecuniary imposts as it deals with " trade, commerce, and intercourse." The requirement that intercourse shall be absolutely free points to something more than the imposition of pecuniary imposts (*James* v. *Cowan* (2)). That is confirmed if sec. 92 is compared with secs. 90, 95 and 99. Sec. 92 has to be read with sec. 107 which is very emphatic in its protection of State powers except where expressly taken away. Sec. 92 is not to be taken as destroying the legislative powers of the States except so far as necessary. The only reason for suggesting that the Commonwealth was not bound was the erroneous interpretation of the words " absolutely free " in sec. 92. Sec. 92 applies to both the Commonwealth and the States. It is the freedom of movement which is emphasized. In *W. & A. McArthur Ltd.* v. *State of Queensland* it was freedom of trade that was emphasized. The object of federation was that persons and goods should be free to move from State to State without any restriction on such movement. If *W. & A. McArthur Ltd.* v. *State of Queensland* is wrong, *Roughley* v. *New South Wales*; *Ex parte Beavis* (3) falls with it. If the Court comes to the conclusion that there is sufficient warrant to say that sec. 92 applies to the Commonwealth, then the test in *W. & A. McArthur Ltd.* v. *State of Queensland* is wrong. It may well be that sec. 92 does apply to the Commonwealth as well as to the States. If the Court decides in favour of this view such a decision

(1) (1920) 28 C.L.R. 530. (2) (1932) A.C. 542; 47 C.L.R. 386.
(3) (1928) 42 C.L.R. 162.

would be consistent with *Fox* v. *Robbins* (1); *Duncan* v. *State of Queensland* (2); *James* v. *South Australia* (3); *Ex parte Nelson* [*No.* 1] (4); *James* v. *Cowan* (5); *Peanut Board* v. *Rockhampton Harbour Board* (6) and *Willard* v. *Rawson* (7). *W. & A. McArthur Ltd.* v. *State of Queensland* (8) is in conflict with *Fox* v. *Robbins* (9); *Duncan* v. *State of Queensland* and *Willard* v. *Rawson*. Even if this Court is bound by *W. & A. McArthur Ltd.* v. *State of Queensland*, that case must be applied in the light of subsequent modifications. In *James* v. *Cowan*, the Privy Council agreed with the judgment of *Isaacs* J., but this does not mean that the Privy Council agrees with *W. & A. McArthur Ltd.* v. *State of Queensland*, because the Privy Council leaves open the question of the meaning of the words "absolutely free" and also the question whether sec. 92 applies to the Commonwealth. So far as the expressed agreement with the judgment of *Isaacs* J. is concerned, there is nothing to show that the Privy Council agrees with *W. & A. McArthur Ltd.* v. *State of Queensland* in full. The Act in *James* v. *Cowan* was directly aimed at restricting inter-State commerce. The Privy Council goes no further than the High Court did in *James* v. *South Australia*. Alternatively, the Court should follow *W. & A. McArthur Ltd.* v. *State of Queensland*, as explained in *Ex parte Nelson* [*No.* 1]; *James* v. *Cowan*; *Peanut Board* v. *Rockhampton Harbour Board* and *Willard* v. *Rawson*. The principle of those cases has been variously explained. Sec. 92 is not infringed unless the State Act is in respect of trade and commerce and is designed to fetter inter-State trade and not merely to affect it incidentally (*Willard* v. *Rawson* (10)) or unless pointed directly at the place of entry. If the Court is to be bound by *W. & A. McArthur Ltd.* v. *State of Queensland* it should also be bound by *Willard* v. *Rawson*. The Act must aim directly at inter-State trade and commerce to be contrary to sec. 92 (*James* v. *Cowan* (11); *Roughley* v. *New South Wales*; *Ex parte Beavis* (12);

(1) (1909) 8 C.L.R. 115.
(2) (1916) 22 C.L.R. 556.
(3) (1927) 40 C.L.R. 1.
(4) (1928) 42 C.L.R. 209.
(5) (1932) A.C. 542; 47 C.L.R. 386.
(6) (1933) 48 C.L.R. 266.
(7) (1933) 48 C.L.R. 316.
(8) (1920) 28 C.L.R. 530.
(9) (1909) 8 C.L.R. 115.
(10) (1933) 48 C.L.R., at pp. 320, 323, 328, 338.
(11) (1932) A.C., at p. 559; 47 C.L.R., at p. 397.
(12) (1928) 42 C.L.R., at pp. 193, 194, 199, 204.

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Peanut Board v. *Rockhampton Harbour Board* (1); *Ex parte Nelson* [*No.* 1] (2)). If the pith and substance of this Act is considered on these principles its pith and substance is to regulate motor transport in New South Wales. It is in the interests of transport that it should run efficiently. This is an Act to regulate transport *in* New South Wales and not transport *into* New South Wales. The Act only regulates motor transport while it is in New South Wales in common with all other transport (*Peanut Board* v. *Rockhampton Harbour Board* (3)). If the authorities under this Act were putting restrictions on inter-State trade such action would be illegal. This case falls directly within *Willard* v. *Rawson* (4) and is governed by it. Both in this case and in *Willard* v. *Rawson* the Acts are general in terms and are not aimed at inter-State trade. They both regulate trade in the State and not trade entering into the State. There is no reason for saying on the face of it—This Act is aimed at inter-State trade. It is an Act for regulating the domestic law of motor transport and, therefore, there is nothing to distinguish it from *Willard* v. *Rawson*.

Fullagar K.C. There are two aspects to *W. & A. McArthur Ltd.* v. *State of Queensland* (5), one is that the legislation might be hit by sec. 92 as it deals with both intra-State and inter-State trade, the other, that an Act which fixes prices in Queensland cannot affect inter-State freedom of trade. The proper view is that an Act fixing prices at which commodities may be sold is not obnoxious to sec. 92 as it leaves trade and commerce absolutely free. So legislation as to contracts, and gaming and wagering leaves trade and commerce absolutely free. If the Act is obnoxious to sec. 92 it is not because it operates to prevent persons trading in a particular way. The State in this case surveys the transport facilities that are available within its borders. It may see ruinous competition going on. It makes a survey of the whole system and if its power is used for any object affecting inter-State trade it is said that the Act falls to the ground. *James* v. *Cowan* (6) decided that sec. 92

(1) (1933) 48 C.L.R., at p. 284.
(2) (1928) 42 C.L.R., at pp. 218, 219.
(3) (1933) 48 C.L.R., at p. 285.
(4) (1933) 48 C.L.R. 316.
(5) (1920) 28 C.L.R. 530.
(6) (1932) A.C. 542; 47 C.L.R. 386.

did not apply to any legislation which dealt alike with domestic and inter-State trade and that sec. 92 applied only if inter-State trade was aimed at by the legislation. It is not necessary to bring an Act within sec. 92 that an express distinction should be drawn between domestic and inter-State trade in the legislation in question. *James* v. *Cowan* (1) decided no more than this — that if State legislation considered in the ordinary way is directed at inter-State trade and prohibits inter-State trade then it is struck by sec. 92. If you find an Act dealing with domestic and inter-State trade *primâ facie* that Act is not struck by sec. 92, but it is not necessary to bring a case within sec. 92 that there is a distinction drawn between domestic and inter-State trade. Also, if an Act properly construed is directed at inter-State trade and prohibits that trade, actual or potential, it is struck by sec. 92. *James* v. *Cowan* decided (*a*) with respect to enabling or empowering legislation, if the real object of that legislation is to enable interference with inter-State trade it is invalid and carries no legal consequences, (*b*) if the power itself is used to interfere with inter-State trade that exercise is invalid and carries no legal consequences. In the former case the legislation is bad, and in the latter the exercise is bad. *State of New South Wales* v. *The Commonwealth* (*Wheat Case*) (2) is still good. It is not affected by *James* v. *Cowan* (1), because the Privy Council held that the power conferred by the Act had been used for the purpose of interfering with inter-State trade (*James* v. *Cowan* (3)). An Act which deals equally with domestic and inter-State trade is *primâ facie* valid. *James* v. *Cowan* is not inconsistent with *W. & A. McArthur Ltd.* v. *State of Queensland* (4). The test is whether trade is rendered unfree. Sec. 10 of the *State Transport* (*Co-ordination*) *Act* 1931 shows that the object and purpose of the Act is not interference with the freedom of trade. It shows that the State is regulating and co-ordinating the traffic facilities available within it. Sec. 102 of the Constitution permits the States to take some powers to protect their railways and to some extent to discriminate in so doing. That view would not be necessary if an extended meaning were given to sec. 92.

(1) (1932) A.C. 542; 47 C.L.R. 386.
(2) (1915) 20 C.L.R. 54.
(3) (1932) A.C., at pp. 549, 555, 556; 47 C.L.R., at pp. 388, 393, 394.
(4) (1920) 28 C.L.R. 530.

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Bailey, for the State of Victoria, intervening. I adopt the arguments for the respondent and the Commonwealth. Sec. 92 interpreted in the light of its context and as free from authority should be construed more narrowly with regard to the words "absolutely free" than it has been since 1920. The correct way to interpret the meaning of the words "absolutely free" is to separate the phrases. The term "free trade" in itself refers not so much to conduct as to the movement of goods. Sec. 92 struck at financial advantages, prohibitions and discriminatory legislation against other States. The general category into which all those matters may be said to fall may be described as a differential treatment of domestic trade as against inter-State trade or *vice versâ*. Absolutely free trade means trade free from differential treatment and means freedom from differential treatment as between one State and another. Sec. 92 is in the middle of ten successive sections in which the fiscal *régime* of the new Commonwealth is prescribed, and this points to the narrower meaning of the words "free trade." Sec. 95 emphasizes this view and sec. 102 suggests a narrower meaning. Secs. 51 (I.), 92, 98 and 102 suggest that the States could create discriminations under the overriding power of the Commonwealth Parliament. In exercising the powers with regard to railways the Commonwealth can only interfere if the Inter-State Commission finds that the differentiations are unreasonable. Sec. 112 also suggests a narrower meaning for sec. 92 than free from all legislative interference because sec. 92 recognizes the inspection laws of the States. The American decisions suggest that the inspection laws must not be discriminatory (*Voight* v. *Wright* (1)). Sec. 112 recognizes the existence of the inspection laws and thereby negatives the view that the States are unable to make such laws.

[DIXON J. referred to *Foster* v. *Master, etc., of New Orleans* (2).]

Spender, in reply. *James* v. *Cowan* (3) does not say anything about prohibiting trade and adopts the test suggested by the respondent. If the legislation extends to inter-State trade that would be enough to bring it under sec. 92. The effect of *James* v.

(1) (1890) 141 U.S. 62.
(2) (1876) 94 U.S. 246.
(3) (1932) A.C. 542; 47 C.L.R. 386.

Cowan (1) is that the legislation armed the Minister or the board with power to strike at inter-State trade, and that is just as bad as legislation which interferes with such trade. If a minister or a board is armed with power to interfere with inter-State trade, the legislation granting such power would be invalid under sec. 92. This legislation directly strikes at transport and that includes both domestic and inter-State transport. The purpose of the Act was to hit at the business and the act of transport *in globo*. Where legislation gives into the hand of a particular board power to do an act which would conflict with sec. 92 the legislation is *ultra vires* (*James* v. *Cowan* (2); *James* v. *Cowan* (3)). Sec. 92 is to bear a broad construction because the Privy Council approves of the judgment of *Isaacs* J. but this must be limited to that part of the judgment which deals with the matter before the Privy Council. *W. & A. McArthur Ltd.* v. *State of Queensland* (4) is in no way cut down. The Court should not reconsider that case having regard to the cases in which it has been accepted. To give sec. 92 the restricted construction contended for is completely to recast the section. It cannot be limited to pecuniary imposts, discriminatory legislation and prohibitions as the respondent seeks to do. Trade must be untrammelled by legal restrictions. It is necessary to consider the real object of the legislation, and having ascertained that, it can be decided whether it comes within sec. 92.

[DIXON J. referred to *Pullman Co.* v. *Kansas* (5).]

The fact that there are no words in sec. 92 as to discrimination is a reason why sec. 92 should be given a wide reading. Sec. 102 deals with a specific difficulty and was designed to meet any difficulty in the matters referred to by an inquiry as to the facts. Sec. 113 was directed to protecting inter-State commerce (*Fox* v. *Robbins* (6); *Voight* v. *Wright* (7)).

Cur. adv. vult.

(1) (1932) A.C. 542; 47 C.L.R. 386.
(2) (1932) A.C., at pp. 555, 558, 559, 560; 47 C.L.R., at pp. 393, 396, 397, 398.
(3) (1930) 43 C.L.R., at p. 406.
(4) (1920) 28 C.L.R. 530.
(5) (1909) 216 U.S. 56.
(6) (1909) 8 C.L.R., at p. 124.
(7) (1890) 141 U.S. 62.

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GAVAN DUFFY C.J. Thirteen years ago this Court, in the case of *W. & A. McArthur Ltd.* v. *State of Queensland* (1), laid down the following propositions with respect to sec. 92 of the Constitution of the Commonwealth of Australia :—(1) The section in no way limits or restricts the legislative power of the Commonwealth. (2) The section precludes the Parliaments of the States from in any way regulating or controlling trade, commerce, and intercourse among the States. Since then members of this Court in various and varying judgments have attempted to explain or attenuate the second proposition but the validity of both propositions has remained without any formal challenge until the present case.

The Parliament of New South Wales passed an Act—*State Transport (Co-ordination) Act*, No. 32 of 1931, as amended by the *Transport (Division of Functions) Act*, No. 31 of 1932, intituled: " An Act to provide for the improvement and for the co-ordination of means of and facilities for locomotion and transport ; to constitute a Board of Commissioners for that purpose ; to amend the *Government Railways Acts* 1912-1930, and certain other Acts ; and for purposes connected therewith." It contained the following provisions :—Sec. 3 (2). " This Act shall be read and construed so as not to exceed the legislative power of the State to the intent that where any enactment thereof would, but for this subsection, 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." Sec. 12 (1). " Any person who after a date appointed by the Governor and notified by proclamation published in the *Gazette* operates a public motor vehicle shall, unless such vehicle is licensed under this Act by the board and unless he is the holder of such license, be guilty of an offence against this Act : Provided that this subsection shall not apply to a public motor vehicle that is being operated under and in accordance with an exemption from the requirement of being licensed granted under section nineteen or a permit granted under section twenty-two of this Act." Sec. 19 (1). " The board may grant exemption from the requirements to be licensed under this Act in respect of any public motor vehicle or class of public motor vehicles in such cases and under such conditions

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

as they think fit." The applicant used a motor car in the course of inter-State trade without having obtained either a licence or an exemption, and was convicted under sec. 12 (1). He is clearly within the words of this section, and the question for our consideration is whether he is removed from its operation by sec. 92 of the Constitution and sec. 3 (2) of the Act. In this case the Commonwealth and the State of Victoria obtained leave to intervene and on the hearing all parties were asked to discuss *McArthur's Case* (1). They did so and an elaborate argument was addressed to us on the true meaning of sec. 92. The result of our deliberations on this question have been unsatisfactory. It appears to be impossible to obtain a distinct ruling by a majority of the Court but my brothers *Evatt* and *McTiernan* and I are of opinion that neither of the propositions I have mentioned is justified by the language of sec. 92. We think, however, that it would be undesirable that their validity should be affected by the casting vote of the presiding Judge in an equally divided Court and having expressed our opinion, we pass on to consider the present case on the hypothesis that those propositions correctly expressed the law.

The cases cited by my brothers *Evatt* and *McTiernan* afford ample authority for the proposition that before determining that an Act of the legislature is forbidden by sec. 92 of the Constitution the Court must be able to say that the real intention of the legislature as expressed in the statute was to interfere with freedom of trade, commerce, and intercourse between the States. If the intention of the legislature is merely to deal with a subject within its own jurisdiction the fact that the enactment indirectly results in an interference with inter-State trade does not bring it within the prohibition implied in sec. 92. In this case I think that the intention of the Legislature was that stated in the title of the Act, namely to provide that transport within the State should be carried on in the most effective and economic manner and to co-ordinate the means for carrying on such transport so as to obtain the best available services. This being the intention, sec. 3 (2) provides against any unconstitutional exercise of the powers conferred by the Act and sec. 19 (1) enables anyone who because he is engaged in inter-State transport,

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

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or who should, for any other reason, be free of the provisions of the Act, to obtain an exemption from those provisions. In other words, the Act of Parliament recognizes that the State officials cannot distinguish persons operating motor cars who are subject to the laws of the State with respect to transport from those who are not so subject and inflicts a penalty not for travelling without a licence, but for travelling without either obtaining a licence or obtaining an exemption from the necessity for having a licence. Again, a distinction has been made between interfering with trade, commerce and intercourse and interfering with the methods by which they are carried on. No one would suggest that the State must furnish such roads or other conveniences as the inter-State traveller may desire, nor, I think, would any one suggest that the State must leave unaltered all conveniences for travelling which are already in existence. It has been said that the Legislature is not necessarily controlling or regulating inter-State trade when it prescribes the facilities it will offer for carrying on trade generally, though if, on examination, it appears that the object of the Legislature is really to prejudice inter-State trade, its enactment may be invalid.

Again, some of the Justices who were parties to the decision in *McArthur's Case* (1) have stated that what is forbidden by sec. 92 is any State law which obstructs or restricts the freedom of trade or commerce among the States and the law may control in some degree the conduct and liability of persons engaged in inter-State commerce. Now, for anything disclosed in the evidence, this Act of Parliament may on the whole benefit not only inter-State trade and commerce at large but even that part of inter-State trade and commerce which is carried on by the applicant. It is true that the obtaining of a licence and the payment of a licence fee cannot of themselves be regarded as beneficial to the licensee, but the rights acquired by and the other consequences which follow from the possession and exclusion of others from such possession may be of very great value to the licensee and his business.

On the whole, having regard to the liberal interpretation which the Justices who formulated the second proposition have chosen to put upon it, I feel at liberty to say that the conviction was right and the rule should be discharged.

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

RICH J. This case calls upon us once more to apply the vague language of sec. 92 of the Constitution. It arises upon a new aspect of the legislation relating to the use of roads, vehicles and railways—an aspect which could scarcely have struck the minds of those who resorted to the emphatic but uncertain terms of sec. 92. In *Peanut Board* v. *Rockhampton Harbour Board* (1) and in *Willard* v. *Rawson* (2) I stated or restated the interpretation of sec. 92 which I adopted and adhered to. I still consider that what sec. 92 forbids is government action (State action) in respect of trade, commerce, and intercourse when it operates to restrict, regulate, fetter or control it and to do this immediately and directly as distinct from giving rise to some consequential impediment. In so far as inter-State trade, commerce, and intercourse are included within the operation of such government action that action is rendered ineffectual by sec. 92. The question whether the Commonwealth is governed by sec. 92 does not arise in this case at any rate, directly, but as counsel for the Commonwealth, which intervened by leave, presented an argument which involved a return to the view that sec. 92 does apply to the Commonwealth I think it is right to say that the opposite conclusion has been adopted by this Court both in *McArthur's Case* (3) and in *James* v. *The Commonwealth* (4) and I do not think we ought to depart from those decisions. If they are wrong they can be set right in the Privy Council. In *Willard* v. *Rawson* (5) I said at the conclusion of my judgment "I intend in no way to depart from the doctrine of *McArthur's Case*, 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." I realize that there has been much difference of judicial opinion in the application of that decision and that in cases where State legislation has been upheld Judges who dissented from that conclusion have done so upon the grounds *inter alia* that it involved an inconsistency with the principle of *McArthur's Case*. But whether the majority of the Court reasoned well or ill from the major premise stated in *McArthur's Case* to

(1) (1933) 48 C.L.R., at pp. 274-275.
(2) (1933) 48 C.L.R., at p. 322.
(3) (1920) 28 C.L.R. 530.
(4) (1928) 41 C.L.R. 442.
(5) (1933) 48 C.L.R., at p. 324.

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their conclusion they did not, I think, intend to deny the validity of that premise. The difficulty is, I think, to enunciate any general interpretation of sec. 92 which, if precise, does not err in stating that which is not expressed in sec. 92, or if general, is not so wide as to admit of varying applications. *McArthur's Case* (1) denied the correctness of certain contentions as to the meaning of sec. 92, which has been put forward. It denied, for instance, that sec. 92 was limited to emancipating inter-State trade from differential or discriminatory laws. It denied that it was limited to freedom from pecuniary imposts and prohibitions of importation. It denied that trade between the States was limited to mere inter-State movement of persons or things and it explained how wide is the conception of inter-State trade. But it did not formulate a precise and inflexible interpretation of the words of the section. It did not profess to substitute a legal formula or legal formulæ expressed with technical exactness for the language of the section. This serves to explain the differences of opinion which have been experienced by this Court in the attempt to perform the extremely difficult task of deciding what State statutes have been and what have not been obnoxious to the provision. In the present case the statute is entitled *State Transport (Co-ordination) Act*. Its long title describes it as an Act to provide for the improvement and for the co-ordination of means and facilities for locomotion and transport, and to constitute a Board of Commissioners for that purpose. It is directed to secure an ordered system of public transportation in which the integers (not the least important of which are State railways) do not engage in mutual slaughter by irrational competition. As part of the means to this end it sets up a licensing system for motor vehicles which act as common carriers or which otherwise engage in the carriage of goods. The grounds upon which a licence may be granted or withheld are concerned with the public need for such transport, the suitability of routes, the mutual relation of the proposed service with other services and other matters which attend the co-ordination of a random system of transport. The appellant complains of a conviction for operating a public motor vehicle without a licence and he has proved that upon the occasion when he offended he was

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

performing an inter-State journey. The operation of the Act in no way depends upon the inter-State character of his journey: it applies uniformly to transport in New South Wales and does not concern itself with the difference between inter-State and intra-State traffic. I should think that a law of this character which did differentiate between the two kinds of traffic might well be held directly to restrain inter-State trade. The fact that it does not so differentiate does not establish that its operation is indirect or consequential. But the question whether it is direct or indirect must be determined by a consideration of the nature of the statute and the character of the act or transaction which it affects. The statute professes to be, and in fact is, an attempt not to suppress but to regulate transportation and to do so in such a way as to help rather than to retard or obstruct the movement of commercial goods throughout New South Wales. It takes a broad view of what does in the long run facilitate and help commercial transportation, and adopts the assumption that a superabundance of means of transport to-day followed by a consequential insufficiency or inappropriateness to-morrow cannot aid but must hamper trade, commerce, and intercourse. The acts or transactions with which the statute is concerned, and upon which it operates, are not actual commercial dealings, the actual transfer of goods from one place to another and the actual movement of individuals. No one is required, not to go here or there, not to send his goods here or there, not to make this or that bargain or not to engage in this or that communication. The material parts of the statute deal with vehicles in a double sense. The motor cars or trucks are the instruments—the vehicles for accomplishing these ends. No one can doubt their importance as means to trade, commerce, and intercourse inter-State or intra-State, but they are aids or implements to effect the thing, they are not the thing itself. The question which I have to ask myself is whether, in a scheme which allows complete freedom to go or to send from one place to another but in the process of co-ordinating the means and of rationalizing the facilities, denies a completely unregulated choice of means, a direct restraint upon or interference with trade, commerce, and intercourse is imposed. In answering this question I do not think one should concentrate on the individual to the

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exclusion of the position of other individuals. In modern social conditions the consideration expressed in the maxim *sic utere tuo ut alienum non laedas* cannot be confined to the occupation and use of property. A regulation of an incident of commerce which is calculated to guide the stream but not to obstruct it does not impose a direct restraint merely because it conditions the individual's exercise of rights which previously existed. Courts of justice ought not to be blind to realities. To concentrate upon the inhibition of which the present appellant complains, and upon the indisputable fact that it prevents him carrying goods in New South Wales in the course of a journey from a point outside that State to a point within it, is to lose sight of the fact that if all were permitted to carry goods where and how they liked there might soon be none who could provide any systematic means of carrying the constant stream of inter-State freight at all. The considerations in the present case which may be stated in favour of the view that the interference is direct are, no doubt, weighty, and, I hope, I have not overlooked any of them. But taking into account the fact that the statute deals only with the means of inter-State carriage, that the policy disclosed is to organise and co-ordinate all means of transportation, and that it is not open to the objection that it discriminates and looking at inter-State trade as a whole in which one integer is not to be considered to the exclusion of others I have come to the conclusion that any burden which the statute imposes on or any restriction which may result to inter-State trade or commerce is not sufficiently direct to render it obnoxious to sec. 92.

For these reasons I am of opinion that the rule *nisi* should be discharged.

STARKE J. This is a rule or order *nisi* for a writ of prohibition made by the Supreme Court of New South Wales and removed into this Court under sec. 40 of the *Judiciary Act* 1903-1932. Hill was charged with an offence against sec. 12 of the *State Transport (Co-ordination) Act* 1931 of New South Wales in that he did operate a public motor vehicle not then being licensed under the Act and he not being the holder of a licence under the Act in respect of the vehicle. It appears that the firm of which Hill was a member

operates motor vehicles and transports goods between Victoria and New South Wales, but that neither the vehicles nor the drivers of those vehicles are licensed as required by the provisions of the Act. Hill was convicted of the offence charged (see, as to evidence, sec. 44). The question for the consideration of the Court is whether that conviction can stand in view of the provisions of sec. 92 of the Constitution.

The *State Transport (Co-ordination) Act* 1931 is described in its preamble as "An Act to provide for . . . the co-ordination of means of and facilities for locomotion and transport." It provides for the appointment of a Board of Commissioners to carry into effect the objects and purposes of the Act (sec. 4). It prohibits any person operating a public motor vehicle unless the vehicle is licensed by the Board and unless he is the holder of such licence (sec. 12). A public motor vehicle means (sec. 3) a motor vehicle (as defined in the Act) "used or let or intended to be used or let for the conveyance of passengers or of goods for hire or for any consideration or in the course of any trade or business whatsoever," or "plying or travelling or standing in a public street for or in hire or in the course of any trade or business whatsoever." The Act also requires the licensing of any person who acts or carries on or advertises or notifies that he acts or carries on the business of an agent for persons operating a public motor vehicle &c. (sec. 20). It gives the Board wide discretionary powers as to the issue of licences. Routes areas or districts and terms and conditions may be prescribed, as may fares freights and charges and the use of the vehicle, whether as to passengers only or goods only or goods of a specified class or description only, and as to the circumstances in which conveyance may be made or may not be made, including the limiting of the number of passengers or the quantity weight or bulk of the goods that may be carried on the vehicle (secs. 15-17). The Board may impose conditions that the licensees make certain payments to it in respect of passengers or goods carried (sec. 18 (4), (5)). It may require any applicant for a licence to give reasonable security for due compliance with the conditions of the licence (sec. 18 (7)). A fund called the State Transport Co-ordination Fund is created (sec. 26 (1)), and to the credit of this fund are placed any moneys

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appropriated by Parliament and moneys directed by the Act or any other Act to be paid into such fund. Payments may be made out of the fund with the approval of the Minister as subsidies in respect of any feeder services to railways or tramways or to the Government Railways Fund (sec. 26 (6)), but otherwise the fund may be applied to the purposes for which they are appropriated by Parliament (sec. 26 (8)).

But the Constitution, sec. 92, provides that trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free. The State Act here in question assumes complete control of public motor transport. Its object is to co-ordinate the means and facilities of transport and possibly to protect the State railways from ruinous competition. It does not actually prohibit the transport of passengers or goods from one State to another, but it penalizes persons engaging in such transport, whether inter-State or domestic, unless the vehicle is licensed and the person operating it is the holder of such licence. The object and necessary effect of the Act is to regulate and control transport by motor vehicles, and persons are penalized for engaging in that transport without a licence in order to effect that object and no other. In my opinion such an Act is, according to the decisions of this Court, in contravention of the provisions of sec. 92 of the Constitution, in so far as it affects inter-State trade or commerce. The decision in *W. & A. McArthur Ltd.* v. *State of Queensland* (1) establishes, so far as this Court is concerned, four propositions: 1. The expression " trade and commerce " in sec. 92 of the Constitution includes all commercial dealings and accessory methods adopted to initiate continue and effectuate the movement of persons and things from State to State. It is not limited to the mere act of transportation over territorial frontiers (2). 2. The words " absolutely free " in sec. 92 cannot be confined to pecuniary enactments or customs laws, but must have their natural meaning of absolute freedom from every sort of impediment, regulation or control by the States with respect to trade, commerce, and intercourse between them (3). 3. A general restriction or prevention of

(1) (1920) 28 C.L.R. 530.
(2) (1920) 28 C.L.R., at p. 549.
(3) (1920) 28 C.L.R., at pp. 550-554.

trade and commerce, *e.g.* domestic inter-State and foreign trade, does not avoid the operation of sec. 92 (1). It is not essential that the restriction be discriminatory or be conditioned on the fact that such trade or commerce is carried on between the States. 4. The provision of sec. 92 does not affect the legislative power of the Commonwealth (2). It appears to me that the decision in *James* v. *Cowan* (3) supports the first and third propositions, and also the second proposition in so far as it asserts that sec. 92 cannot be confined to pecuniary enactments or customs laws. The cases of *The Commonwealth and Commonwealth Oil Refineries Ltd.* v. *South Australia* (4); *James* v. *South Australia* (5); *Roughley* v. *New South Wales*; *Ex parte Beavis* (6); *Ex parte Nelson* [*No.* 1] (7); *Peanut Board* v. *Rockhampton Harbour Board* (8); and *Willard* v. *Rawson* (9), are but illustrations of one or other of these four propositions, in various circumstances. It may be that the propositions were not always rightly applied, but that is no reason for disregarding them. In *Roughley's Case*, the majority of the Court rest upon a denial—as I understand the reasoning—that the farm produce agents there concerned were engaged in inter-State trade and commerce. In *Nelson's Case* there was an even division of opinion, but the decision rests upon a denial that a law restricting the introduction into New South Wales of stock from any country or State in which there was reason to believe any infectious or contagious disease in stock existed was a regulation of inter-State trade and commerce, though it controlled in some degree the conduct and liability of those engaged in the trade and commerce. *Willard* v. *Rawson* rests upon the interpretation given to the Act there in question; the object of the Act was not restrictive of trade but protective, and consequently the imposition of registration and licence fees was not in contravention of sec. 92. But the direct object and effect of the *State Transport (Co-ordination) Act* 1931 of the State of New South Wales, whatever the political motive may be, is to restrict, regulate and control transport, or the movement of

(1) (1920) 28 C.L.R., at pp. 551-552.
(2) (1920) 28 C.L.R., at pp. 556-558.
(3) (1932) A.C. 542; 47 C.L.R. 386.
(4) (1926) 38 C L.R. 408.
(5) (1927) 40 C.L.R. 1.
(6) (1928) 42 C.L.R. 162.
(7) (1928) 42 C.L.R. 209.
(8) (1933) 48 C.L.R. 266.
(9) (1933) 48 C.L.R. 316.

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passengers and goods in motor vehicles, whether engaged in domestic or inter-State trade and commerce. Transport is, as I said in *Willard's Case* (1), an essential element of trade and commerce, and the burdening of inter-State transport by means of taxes, duties or imposts, or impeding regulating or controlling it by the requirement of licences, is obnoxious to the provisions of sec. 92 as interpreted by this Court in *W. & A. McArthur Ltd.* v. *State of Queensland* (2).

The State Act, however, provides (sec. 3 (2)):—"This Act shall be read and construed so as not to exceed the legislative power of the State to the intent that where any enactment thereof would, but for this subsection, 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." This is a legislative declaration that the Act shall operate on so much of its subject matter as Parliament might lawfully have dealt with, and so as not to exceed the legislative power. (See *Newcastle and Hunter River Steamship Co.* v. *Attorney-General for the Commonwealth* (3).) It excludes, I think, from its operation any interference or control of trade and commerce obnoxious to the provision of sec. 92 of the Constitution. But, whether by reason of this sub-section or by the direct operation of sec. 92 itself, the conviction of Hill cannot stand, and as the parties have raised no objection in this case to the procedure by a rule or order *nisi* for a writ of prohibition, the rule should be made absolute.

DIXON J. A. J. Hill & Son, a firm of carriers, conveyed goods or merchandise from a depot in Swanston Street, Melbourne, in the State of Victoria to a depot in Wagga Wagga in the State of New South Wales. The articles were carried in a motor lorry which was used solely in transporting goods from Melbourne to Wagga Wagga. The motor lorry was registered under the *Motor Traffic Act* 1909-1915 of New South Wales, but was not licensed under the *State Transport (Co-ordination) Act* 1931-1932 by the State Transport Co-ordination Board, and had not been granted an exemption from the requirement

(1) (1933) 48 C.L.R., at p. 325. (2) (1920) 28 C.L.R. 530.
(3) (1921) 29 C.L.R. 357.

that it should be so licensed. It is an offence under sec. 12 of the Act to operate in New South Wales a public motor vehicle, which is neither licensed by the Board nor exempt. Any mechanically propelled vehicle is a motor vehicle unless used on a railway or a tramway and the expression includes aircraft. If a motor vehicle is used for the conveyance of passengers or of goods for hire or for any consideration or in the course of any trade or business whatsoever, it is a " public motor vehicle " ; and if it carries passengers or goods for hire or for any consideration or in the course of any trade or business whatsoever, it is " operated " (sec. 3 (1)).

The members of the firm were convicted under sec. 12, and, upon the facts stated, it is clear that its express terms were contravened. But the express terms of the section, in common with the rest of the statute, are restrained by the provision contained in sec. 3 (2), which requires that the Act shall be read and construed so as not to exceed the legislative power of the State to the intent that where any enactment thereof would, but for the sub-section, 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. It follows that no provision of the State enactment is meant to apply where to do so would amount to an invasion of the freedom secured to trade, commerce, and intercourse among the States by sec. 92 of the Commonwealth Constitution. Thus the question so raised for our decision is whether sec. 12 can operate to prohibit the use of a motor vehicle for the carriage of goods between a place in New South Wales and a place in another State, and, yet, leave trade, commerce, and intercourse by internal carriage absolutely free. The statute makes all carriage of goods for reward, or in the course of trade, unlawful if done by motor transport unless authorized by the Board either by licence or by exemption. The Board consists of a Chief Commissioner and three other Commissioners appointed by the Governor (sec. 4). The first duty imposed upon it was to report upon the steps to be taken to co-ordinate the services of the Railway Commissioners, the Commissioner of Road Transport, the Management Board appointed under the *Transport Act* 1930 and the Main Roads Board and to place the services under one body (sec. 10). Next, after its concern with these governmental agencies,

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the Board's most important duty appears to be the control of commercial transport by road and air. This control is given by the provisions which prohibit, except under licence or exemption, the carriage of passengers or goods by motor vehicle including aircraft, for reward or in the course of trade, the carriage in a motor vehicle of the proprietor's or driver's own goods unless they have not been sold and are not intended for sale by him, and the consignment or despatch of goods by motor vehicle (secs. 12 (1) and (2) and 13). The Board has complete authority to grant or refuse a licence (sec. 17 (4)). If a licence is granted, it may confine the vehicle to a specified route or routes or authorize it to operate anywhere except on specified routes (sec. 15 (1)). The licence may be subject to conditions relating to the tariff or charges and these conditions may fix either maximum or minimum or specified rates. The licence may be limited to the carriage of passengers or of goods or of particular descriptions of goods (secs. 17 (1) and (2) and 48 (8) (*a*)). Further, the licence may impose a condition that the licensee shall make payments to the Board. The amounts to be levied are in the discretion of the Board, but they may not exceed specified limits, which, however, are sufficiently high to be often prohibitive. In the case of passengers, the payments are calculated at a sum per passenger mile, not exceeding a penny, and, in the case of goods, or goods and passengers together, the sums may be ascertained in any manner, but the total burden must not exceed three pence per ton mile of the vehicle and freight (sec. 18 (4), (5) and (6)). An exemption from liability to these impositions may be granted if the route involves a journey of not more than twenty miles, or, in the case of goods, if the vehicle feeds the nearest practicable railway (sec. 18 (8) and (9)). The payments go to a fund, which may be applied in costs of administration, in subventions to the Government Railways Fund and to the general fund of a transport trust, and in subsidies to public motor vehicles used to provide feeder services to railways or tramways. The matters to be considered by the Board in refusing or granting an application for a licence include the extent to which the proposed service is necessary or desirable in the public interest, local needs, the elimination of unnecessary services and the co-ordination of all forms of transport

including that by rail and tram (sec. 17 (3) (*b*), (*c*) and (*d*)). Finally, the Board is given a discretionary power to grant exemptions from the obligation to obtain a licence (sec. 19 (1)).

The effect of these provisions is to suppress mechanical road transport for commercial purposes, except in cases where an agency of the State Government thinks fit to allow it. It is suppressed in virtue of its commercial character. The ground upon which the prohibition against operating the vehicle rests is that it carries passengers or goods for reward or otherwise in the course of trade. The discretion to licence it is exercisable upon considerations which may include the competition of State railways for the trade borne by mechanical road transport and must include the railway facilities existing. Finally, transportation may be taxed when it is licensed. If unaffected by sec. 92, the suppression is " pointed at " inter-State carriage as well as domestic carriage. It is true that the prohibition in sec. 12 does not differentiate between inter-State and intra-State transportation. But uniformity or absence of discrimination is not a criterion, and, even if it were, is scarcely a quality to be ascribed to provisions, which enable a government authority to discriminate between vehicles and routes upon any basis which it chooses.

In my opinion, it is inconsistent with the absolute freedom of trade, commerce, and intercourse between Victoria and New South Wales to allow the prohibition of sec. 12 to include the carriage of goods by road upon a continuous course of transportation between a place in Victoria and a place in New South Wales. There is, I think, no act or transaction which better answers the description trade, commerce, and intercourse between the States than the carriage of merchandise from a place in one State across the border to a place in a neighbouring State. It is at once commerce and intercourse, commercial intercourse. Movement of persons and things from one State to another is the very thing to which absolute freedom is given. It is not the mere act of crossing the border which must be unobstructed. " Among the States " means between any part of one State and any part of another. Between places situated in different States, from commencement to completion, the transfer of goods and the passage of persons alike are free.

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Before the establishment of the Commonwealth, the Parliament of New South Wales possessed a legislative power, which was plenary, and, except for the territorial limitation, unrestrained by reference to subject matter or otherwise. Among other encroachments upon that undefined mass of power made by the Federal Constitution, positive prohibitions were imposed upon any exercise which would produce specified effects, or amount to legislation of a particular description. Examples are contained in secs. 90, 114, 115, and 117 as well as sec. 92. Power to make such laws under any guise or for any purpose was withdrawn as effectually as if the disabling provision had from the beginning stood in the Colonial constitution as part of the grant of legislative power. Sec. 92 is not expressed in terms of restraint, but, whatever else it does, it disables the States from any exercise of legislative power inconsistent with the absolute freedom of trade, commerce, and intercourse among the States. These considerations, which lie on the surface, do not aid in determining what amounts to an inconsistency with that freedom, but they do appear to me to make it clear that the purpose which the State legislature had in view in making the law, its description and nature, and the category to which it may be referred in a classification of legislation, are beside the question. The State legislature can have no power which it may exercise so as to impair the freedom of inter-State commerce and intercourse. There are no competing powers to be reconciled. There is no defined area or specified subject of State legislative authority which is placed outside the range of the inhibition: no apparent or possible repugnancy between a specific grant of power and a specific restraint. Not only does the position appear to contain nothing to call for the application of the principles or methods by which the provisions of secs. 91 and 92 of the *British North America Act* 1867 have been harmonized, but it appears actually to be the converse case. Whatever be the end which the prohibition of carrying merchandise by motor vehicle, unless under licence, was designed to promote, as an end it, doubtless, is one to which the State legislature is entitled to address itself. But to whatever end it addresses itself, the State legislature may not adopt means which infringe upon the freedom of inter-State commerce and intercourse. When a restraint or prohibition is imposed upon

acts or conduct, which, from their very nature, form part of trade, commerce, or intercourse, the restraint or prohibition must be a derogation from the freedom of trade, commerce, and intercourse, and, therefore, cannot extend to inter-State transactions. Trade, commerce, and intercourse may suffer effects from the regulation or burdening of acts or things which are not in themselves part of trade, commerce, or intercourse. A law which apparently does no more, may, upon a full examination, prove to have an actual operation upon trade, commerce, and intercourse as distinguished from producing consequences of an economic, business, or other character which are prejudicial to it. Similarly, an administrative order may, upon a proper understanding of its application to the circumstances, turn out to be an attempt to control or restrain trade, commerce, or intercourse although, upon its surface, it may not appear to do so. Thus, in *James* v. *Cowan* (1), the State legislation gave to the Minister a power of compulsorily acquiring dried fruits for the purposes of the statute, but not so as to interfere with the freedom of inter-State trade. In delivering the opinion of the Privy Council, Lord *Atkin* said (2): "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." But their Lordships thought it was made plain that the direct object of the exercise of the powers was to interfere with inter-State trade. Distinctions in respect of scope, object, purpose, immediacy or indirectness of operation, and remoteness or proximity of effects may be material in such cases. But there appears to me to be no warrant for applying such considerations to statutory provisions which prescribe duties or impose liabilities or burdens by reference to acts or conduct which go to constitute trade, commerce, and intercourse including that of an inter-State character. The present law requires all persons, unless specially licensed by the State Government authority, to refrain from carrying out in New South Wales an ordinary transaction

(1) (1932) A.C. 542; 47 C.L.R. 386.
(2) (1932) A.C., at pp. 558-559; 47 C.L.R., at pp. 396-397.

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of commercial intercourse. It forbids it by reference to the exact characteristics of commercial intercourse. It is rendered unlawful because of these characteristics. It follows that when the commercial intercourse is between a place in another State and a place in New South Wales, then, the enactment purports to render acts of inter-State commerce and intercourse unlawful, and it does so by reference to the characteristics of commerce and intercourse. If sec. 92 does not protect it, the transportation of goods and persons in the course of inter-State commerce by an ordinary means is stopped, except in so far as an agency of the State thinks fit to permit it and even then it is liable to a pecuniary impost. To say that the State of New South Wales can forbid so much of the transportation of merchandise by motor vehicle between a place in Victoria and another in New South Wales as lies within its territorial jurisdiction is to affirm a proposition, which, in my opinion, is flatly opposed to the constitutional declaration that trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free.

The chief reason given in argument against this view depends upon a restrictive interpretation of the constitutional provision. It is said that the expressions in sec. 92 are composite, that it is a mistake to inquire what constitutes inter-State trade and insist upon freedom for what composes it, and that it should be understood in the same way as would a convention establishing free trade between independent countries. "Free trade" is defined in a dictionary of political economy as "that system of commercial policy which draws no distinction between domestic and foreign commodities, and, therefore, neither imposes additional burdens on the latter nor grants any special favours to the former" (Prof. *C. F. Bastable* in *Palgrave's Dictionary of Political Economy*, vol. II., p. 143). But it is not now, if it ever was, possible to construe sec. 92 as confined to giving immunity from restraints upon the introduction of commodities or the entry of persons into a State: For the legislation condemned as invalid in *James* v. *Cowan* (1) restrained exportation. The contention, however, is that what sec. 92 does is to establish mutual "free trade"

(1) (1932) A.C. 542; 47 C.L.R. 386.

between the States and that it does no more and so should be interpreted by reference to that economic doctrine. Accordingly, the freedom it confers is only from restrictions and burdens which are not also suffered by domestic trade. Attempts have often been made to induce this Court to interpret sec. 92 as preventing nothing but the differential treatment of inter-State commerce, whether inward or outward, the imposition of burdens not shared by domestic commerce. Except in *Duncan's Case* (1), they have always failed. Such a contention is inconsistent with the decision in *Foggitt Jones & Co.* v. *State of New South Wales* (2), with the judgments of *Barton* and *Isaacs* JJ. in *Duncan's Case*, which were upheld in *McArthur's Case* (3), with *James* v. *South Australia* (4) (where this Court dealt with sec. 20 of the *Dried Fruits Acts* 1924 and 1925 (South Australia) as a uniform restraint), and with *Peanut Board* v. *Rockhampton Harbour Board* (5). Further, it appears to me to be inconsistent with the opinion of the Judicial Committee in *James* v. *Cowan* (6) delivered by Lord *Atkin*. In that case, an argument had been advanced before the Judicial Committee that the power under sec. 20 of the *Dried Fruits Act* to determine where and in what quantities the output of dried fruit should be marketed, and the determinations under the power that only ten or fifteen per cent should be marketed within Australia, "did not affect inter-State trade as such, since it imposed upon it no restriction not imposed upon intra-State trade" (7); that in deciding how sec. 92 operated "the true test is whether what is complained of discriminates between intra-State trade and inter-State trade, and so interferes with inter-State trade as such" (7), and that, accordingly, the decision of this Court in *James* v. *South Australia* (8) was wrong (7). In reference to this argument, Lord *Atkin* said (9):—"It appears to their Lordships unnecessary to undertake the difficult task of defining the precise boundaries of the absolute freedom granted to inter-State commerce by sec. 92. In the present case they are clearly of opinion that sec. 20 and the

(1) (1916) 22 C.L.R. 556.
(2) (1916) 21 C.L.R. 357.
(3) (1920) 28 C.L.R. 530.
(4) (1927) 40 C.L.R. 1, at p. 39.
(5) (1933) 48 C.L.R. 266.
(6) (1932) A.C. 542; 47 C.L.R. 386.
(7) (1932) A.C., at p. 546.
(8) (1927) 40 C.L.R. 1.
(9) (1932) A.C., at p. 555; 47 C.L.R., at pp. 393-394.

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determinations made under it were directed at inter-State commerce as such. They were intended to prevent persons in South Australia from selling more than the fixed quota in any of the Australian States. The quota was fixed by reference to the needs of all the States; and the prohibition of the sale of the surplus was against selling to any of the States. As the determination said, 'The proportion which may be marketed in the Commonwealth of Australia shall not be more than' the prescribed proportion. If this leaves inter-State commerce 'absolutely free,' the constitutional charter might as well be torn up. Their Lordships have no hesitation in agreeing with the decision of the High Court on this point." By this passage I understand his Lordship to mean, not that the South Australian provision, or the determinations under it, imposed upon sales for export to another State a restraint not applied equally to sale for domestic consumption, for the section plainly forbade both alike, but that sale for delivery into another State suffered, although in common with sale for delivery or consumption within South Australia, a restriction imposed by reference to the very characteristics which were essential to its existence as inter-State trade. In the same way in *Attorney-General for Manitoba* v. *Attorney-General for Canada* (1), quoted by *Isaacs* J. in *James* v. *Cowan* (2), their Lordships entirely rejected absence of discrimination as an answer to the impairment of the status and capacities of Dominion companies which was produced by the Provincial enactment prohibiting the sale of shares issued by any company. Viscount *Sumner* (3) said:— "Neither is the legislation which is in question saved by the fact, that all kinds of companies are aimed at and that there is no special discrimination against Dominion companies. The matter depends upon the effect of the legislation not upon its purpose." If its provisions were not qualified by the requirement that they should be read subject to the Constitution, the *State Transport (Co-ordination) Act*, in my opinion, would deal with inter-State commerce as such: its suppression or restriction of the commerce by means of inter-State road transportation is accomplished simultaneously with the suppression or restriction of the like domestic commerce, but it

(1) (1929) A.C. 260.
(2) (1930) 43 C.L.R., at p. 420.
(3) (1929) A.C., at p. 268.

is done by reference to the essential characteristics upon which the existence of that commerce as inter-State trade depends. In any case under this statute, the absence of discrimination against inter-State trade in its general prohibitions does not necessarily mean that it will operate without such a discrimination. The very things, which the Board is required to consider in dealing with applications for licences, namely, public interest, local needs, the elimination of unnecessary services and the co-ordination of forms of transport, including that by railway, may lead it to a conclusion which works such a discrimination. Moreover, as its discretion to grant a licence or not is complete, there is nothing to prevent it granting a licence for routes which terminate within the New South Wales border and refusing a licence for any route which allows the border to be crossed. The statute itself makes it unlawful for any motor transport to proceed upon its journey into New South Wales after crossing the border. Whether or not discrimination against inter-State trade results from the manner in which licences are granted, that provision, in my judgment, involves an invasion of the freedom of inter-State commerce and intercourse.

I find nothing in *Roughley's Case* (1) which tends against this conclusion. The ground upon which the regulation of produce agents by a system of licensing was upheld by *Knox* C.J. was that their activities were not transactions of inter-State commerce in such a sense that freedom of trade, commerce, or intercourse was interfered with; by *Higgins* J., on the ground that the object of the statute being to regulate the status and conduct of agents in that State, whether handling the produce of another State or not, it did not restrict, burden or hamper the entry of goods or persons into the State or trade with another State; *Gavan Duffy* J., as he then was, appears to have followed the view of *Knox* C.J., and *Powers* J. concurred with *Higgins* J. *Isaacs* J. and *Starke* J. dissented. This decision may not apply consistently the judgment of *McArthur's Case* (2), as the minority thought, but, if so, the respect in which it fails to do so is in giving a narrower denotation to inter-State trade and resorting to a test of interference which takes into account the subject matter with which the State law deals and its scope and

(1) (1928) 42 C.L.R. 162.

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

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purpose. But there is nothing in this decision, or in these judgments, opposed to the main grounds upon which *McArthur's Case* (1) proceeds, namely, that sec. 92 frees inter-State trade from burdens and restrictions although they equally affect intra-State trade, and the expression "absolutely free" involves complete immunity from attempts to hinder or burden trade, commerce, and intercourse as such, if it is in fact inter-State. The expression more often used in the judgment of the Court in *McArthur's Case* is "control." This expression may be capable of a meaning which would include legislative directions for the proper conduct of trade not amounting to a burden or obstruction. The judgment also insists upon a wide connotation for "inter-State trade and commerce." It appears to me that it is the effect produced by the combination of these two considerations which made relevant the question whether the Commonwealth was bound by sec. 92, and that its relevance did not arise out of the question whether the immunity given by that provision is confined to burdens or restrictions imposed on commerce and intercourse in virtue of its inter-State character. The opinion expressed by the majority of the Court in *McArthur's Case* that the Commonwealth was not bound, whether necessary for the decision of that case or not, was afterwards translated into a definite decision: (*James* v. *The Commonwealth* (2)), which since has been acted upon in this Court; *Huddart Parker Ltd.* v. *The Commonwealth* (3). So far as we are concerned, we should treat it as settled. But when the view prevailed in this Court that the Commonwealth was bound by sec. 92, neither *Barton* J. nor *Isaacs* J., in *Duncan's Case* (4), found in that circumstance any obstacle to completely rejecting absence of discrimination as a final criterion of the consistency of a law with freedom of inter-State trade, and now, if I have correctly understood the judgment of Lord *Atkin* (5), the Privy Council has felt able to arrive at the same conclusion, without deciding that the Commonwealth is not bound. To my mind the conclusion that a burden or restraint imposed uniformly on inter-State and domestic trade is obnoxious to sec. 92, in so far as it burdens or restrains inter-State

(1) (1920) 28 C.L.R. 530.
(2) (1928) 41 C.L.R. 442.
(3) (1931) 44 C.L.R. 492
(4) (1916) 22 C.L.R. 556.
(5) (1932) A.C. 542; 47 C.L.R. 386.

commerce, necessarily destroys the validity of sec. 12 of the *State Transport (Co-ordination) Act*, unless it be read as applying only to intra-State transportation.

The contention was advanced, however, that the statute could be supported by means of the reasoning adopted by the Court in *Willard* v. *Rawson* (1). In my opinion that reasoning is absolutely fatal to the provisions of sec. 12 of the New South Wales statute. Both *Rich* J. and *McTiernan* J. adhered to and applied the test of consistency with sec. 92, which *Rich* J. formulated first in *James* v. *Cowan* (2), and, after the decision of the Privy Council in that case, elaborated in *Peanut Board* v. *Rockhampton Harbour Board* (3). According to his Honor's test, what is forbidden by sec. 92 is State action 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. In deciding that the Victorian statute, which dealt with traffic in general, survived this test, his Honor placed some reliance upon the analogy of American decisions upon enactments *in pari materiâ*, but the decisive reasons for his conclusion were expressed as follows (4):—"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

(1) (1933) 48 C.L.R. 316.
(2) (1930) 43 C.L.R. 386.
(3) (1933) 48 C.L.R. 266.
(4) (1933) 48 C.L.R., at p. 324.

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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 my opinion, the New South Wales statute is concerned with trade, commerce, and intercourse as such. It is not concerned with motor vehicles as machines, integers of traffic, users of the highway and potential sources of danger and annoyance to the public. Doubtless, these are matters not excluded from the Board's consideration in granting a licence. But, from the point of view of the legislation, the fact that they provide an implement of commerce and a means of conveyance over long distances is not an accident but the essential criterion of the application of the legislation. Further, the licence fees, which may be levied upon the grant of the licence, are measured by reference to the operation or earnings of the vehicles, and the money is used for anything but the purpose of providing a service for the licensee. So far as the United States cases are material, it appears from the latest of them that this statute would there be held void. In *Bradley* v. *Public Utilities Commission* (1), *Brandeis* J. says, in reference to *Stephenson* v. *Binford* (2):—"But there promotion of safety was merely an incident of the denial. Its purpose was to prevent competition deemed undesirable. The test employed was the adequacy of existing transportation facilities; and since the transportation in question was inter-State, denial of the certificate invaded the province of Congress." But, in my opinion, the principle upon which the United States' decisions proceed is quite inapplicable to sec. 92. That principle is that, although it is not competent for a State to regulate inter-State commerce, where Congress has left it unregulated, the State is precluded only by an actual exercise by Congress of the commerce power from enacting, for purposes within the province of the State, laws, which, while including inter-State commerce within their operation, do so only because it is reasonably necessary in order to effectuate the State object. Thus, in the United States, a State may impose upon motor vehicles, including those engaged exclusively in inter-State commerce, a charge as compensation for the use of the public highways which is a fair contribution to the cost of constructing

(1) (1933) 289 U.S. 92, at p. 95; 77 L.Ed. 1053, at p. 1056.
(2) (1932) 287 U.S. 251; 77 L.Ed. 288.

and maintaining them and of regulating traffic on them. But, to be valid, it must clearly appear that the character of the imposition is that of such a compensation. "As such a charge is a direct burden on inter-State commerce, the tax cannot be sustained unless it appears affirmatively, in some way, that it is levied only as compensation for use of the highways or to defray the expense of regulating motor traffic. This may be indicated by the nature of the imposition, such as a mileage tax directly proportioned to the use . . . or by the express allocation of the proceeds of the tax to highway purposes . . . or otherwise. Where it is shown that the tax is so imposed, it will be sustained unless the taxpayer shows that it bears no reasonable relation to the privilege of using the highways or is discriminatory. . . . But the mere fact that the tax falls upon one who uses the highway is not enough to give it presumptive validity" (*Inter-State Transit, Inc.*, v. *Lindsey* (1)). Similarly the State may impose an occupation tax, which includes persons engaged in inter-State as well as intra-State trade. But "the privilege of engaging in such commerce is one which a State cannot deny. . . . A State is equally inhibited from conditioning its exercise on the payment of an occupation tax" (*Sprout* v. *South Bend* (2)). Therefore, to be valid, it must clearly appear that it has no such purpose or effect. "In order that the fee or tax shall be valid, it must appear that it is imposed solely on account of the intra-State business; that the amount exacted is not increased because of the inter-State business done; that one engaged exclusively in inter-State commerce would not be subject to the imposition; and that the person taxed could discontinue the intra-State business without withdrawing also from the inter-State business" (*Sprout* v. *South Bend* (2)). To my mind, such a doctrine has no place in the interpretation of sec. 92. Indeed, that section may be regarded for the purposes of the doctrine as an express enactment, which, if made by Congress, would invalidate all State legislation interfering with trade and commerce. Further, it will be observed that the doctrine is not based upon any distinction between directness or indirectness of operation. If the required

(1) (1931) 283 U.S. 183, at p. 186; 75 L.Ed. 953, at pp. 965-968.
(2) (1928) 277 U.S. 163, at p. 171; 72 L.Ed. 833, at p. 837.

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conditions giving "presumptive validity" are satisfied, and there is nothing such as discrimination against inter-State trade to rebut it, a State law is permitted directly to affect trade which is inter-State.

In *Willard's Case* (1), *McTiernan* J. adopted a view similar to that of *Rich* J. He said (2):—"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." For the reasons I have given, this statute is directed to trade, commerce, and intercourse and not primarily to the control and supervision of motor traffic.

Starke J. applied the criterion which he formulated in the *Peanut Board's Case* (3). He considered (4) "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." His Honor continued (4), "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." This test certainly differs from that of *Rich* J. but perhaps only in latitude. Every consideration which was relied on in its application to the Victorian Act, which it sustained, is absent from that of New South Wales, which wears the aspect of a regulation of commerce, exhibits the colour of a restriction upon competition with State railways, and has the effect of suppressing inter-State road transport by motor vehicle.

Evatt J., adopting an expression of *Higgins* J., held that the Victorian Act was not "pointed directly at the act of entry, in course of commerce, into the second State" (5). This phrase, like

(1) (1933) 48 C.L.R. 316.
(2) (1933) 48 C.L.R., at p. 338.
(3) (1933) 48 C.L.R. 266.
(4) (1933) 48 C.L.R., at p. 328.
(5) (1933) 48 C.L.R., at p. 337.

most figurative expressions, needs some elucidation. I should have thought that it would be correct only of some burden or restriction imposed upon the actual introduction of commodities into the State. But, however this may be, it cannot be without significance that *Evatt* J. also relied upon the features in the Victorian law, which, in the New South Wales statute, are replaced by their opposites in character.

Finally, the authority given to the judgment of *Isaacs* J. in *James* v. *Cowan* (1) by the approval it received in the Privy Council (2) cannot be ignored. Their Lordships said (3) that they found themselves in accord with the convincing judgment delivered by *Isaacs* J. in the High Court. No doubt this does not necessarily amount to an adoption of everything that judgment contains, but it must mean that the main principles upon which it proceeded commend themselves to the Board. Those principles appear to me decisive in the present case.

For these reasons, I am of opinion that, whether the matter is considered more at large or is treated as governed exclusively by the judgments in *Willard* v. *Rawson* (4), sec. 12 of the *State Transport (Co-ordination) Act* 1931 cannot, and so does not, apply to the operation of a motor vehicle in the course of a continuous journey carrying goods from a place in another State to a place in New South Wales.

The conviction, therefore, should be quashed.

EVATT J. The present applicant, who carries on a carrying business, was convicted for having operated, at Wagga, in the State of New South Wales, a public motor vehicle which was not licensed under the New South Wales *State Transport (Co-ordination) Act* 1931, and in respect of which the applicant was not the holder of such a licence. He applied to the Supreme Court of New South Wales which made an order *nisi* for a statutory prohibition, which is an appropriate method of calling into question the legal correctness of the conviction. Before the hearing of the application to make absolute the order *nisi*, the Attorney-General of the Commonwealth

(1) (1930) 43 C.L.R. 386.
(2) (1932) A.C. 542; 47 C.L.R. 386.
(3) (1932) A.C., at p. 561; 47 C.L.R., at p. 398.
(4) (1933) 48 C.L.R. 316.

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applied to this Court for an order removing the cause into the High Court and, pursuant to sec. 40 of the *Judiciary Act*, the order was made.

Upon the hearing before us, the applicant's argument, except for one additional contention, was based upon the provisions of sec. 92 of the Commonwealth Constitution. The additional contention was that there was no evidence to prove that the applicant had himself "operated" the public vehicle mentioned in the information. It is quite true that such proof was not furnished by the evidence of a witness who deposed to statements made to him by the driver of the applicant's vehicle. In the circumstances, this evidence should not have been admitted at all. But the established rule in these cases is that the mere wrongful admission of evidence by the magistrate does not invalidate a conviction. In the present instance there was the clearest possible evidence that, at the times to which the conviction relates, the applicant himself both owned and was operating the particular vehicle, and was transporting goods in it for the purposes of his business. It follows that the conviction cannot be impeached upon this minor point.

It therefore becomes necessary to determine whether, by the overriding constitutional provision that "trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free," the New South Wales statute is deprived of legal effect in relation to any public vehicle which, though operated within New South Wales, is so operated in the course of an inter-State journey.

The *State Transport (Co-ordination) Act* 1931, provided, as its title asserts, "for the improvement and for the co-ordination of means of and facilities for locomotion and transport." A Board of four Commissioners is set up (sec. 4 (1)), and called "The State Transport (Co-ordination) Board" (sec. 4 (7)). The Board is required to furnish a report as to the steps which should be taken to co-ordinate the activities of the following services, namely, the Railway Commissioners, the transport trusts, Commissioner of Road Transport, the Management Board, and the Main Roads Board (sec. 10 (2)).

By the Act, every person desirous of operating a "public motor vehicle" owned by him, is required to apply to the Board or other

prescribed authority for "a license for such vehicle" under the Act (sec. 14 (1)). A motor vehicle is "public" if it is (1) used or let for the conveyance of passengers or of goods (*a*) for hire or (*b*) for any consideration or (*c*) in the course of any trade or business or (2) plying in a public street for hire or in the course of any trade or business (sec. 3 (1)). An application for a licence must contain full particulars as to the vehicle and its proposed routes of operation, and must be accompanied by the fee prescribed (sec. 14 (2)). In dealing with an application for a licence, a wide discretion is committed to the Board, but it is required to have regard to the suitability of the route or road of service, the extent of existing services, the elimination of unnecessary services, the needs of the district as a whole, the prevention of unreasonable damage to roads, the fitness of the applicant, the suitability of the vehicle, and, generally, the co-ordination of all forms of transport including rail and tram transport (sec. 17 (3)). The Board is expressly empowered to refuse any application for a licence (sec. 17 (4)). A licence may grant authority to operate the vehicle by reference to routes or areas (sec. 15 (1)). The holder of a licence is required to keep records of the services provided by his vehicle, to produce them, to make and verify returns, and to issue tickets or receipts in a prescribed form (sec. 18 (1)). The licence may impose a condition that the licensee make payments in respect of passengers or goods carried by the vehicle (sec. 18 (4) and (5)); but if a public motor vehicle is operated solely as a feeder for the carriage of goods by railway, no payment is to be required (sec. 18 (9) (*a*)). The amounts payable are to be placed in a special State fund (secs. 25, 26), from which the Board, with the approval of the Executive Government, may make payments or subsidies to feeder services (sec. 26 (6)).

There are machinery provisions inserted in the Act in order to ensure that unlicensed vehicles shall not operate and that, as and when licences are issued, their requirements shall be observed. One of these provisions is sec. 12 (1), which makes it an offence for any person who is not exempted to operate a public vehicle unless the vehicle is licensed under the Act and unless such person holds the licence. Sec. 12 (2) expressly applies the provisions of the Act to every person who operates a motor vehicle for the purpose of carrying

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his own goods to be marketed or of delivering goods already sold by him. It was under sec. 12 (1) that the present applicant was convicted.

The facts of the applicant's case can be stated shortly. His motor lorry was being used by his servant in a public street at Wagga, New South Wales, for the purpose of the carriage of goods. There was no evidence as to the ownership of the goods, but they were either intended for sale or were being delivered pursuant to a contract of sale. The applicant held no licence under the Act in respect of the motor lorry, but held a licence in respect of another vehicle engaged upon similar journeys. Upon official inquiry the applicant justified his operating without a licence by stating: "I have it on good authority that I am not compelled to license." It was proved by the driver of the lorry that the goods he was conveying had been loaded at Melbourne and that "the lorry is used exclusively to convey goods from Melbourne to Wagga."

This last phrase is fast becoming a formula. The suggestion is that some particular quality attaches to a vehicle because its owner is restricting its use "exclusively" to inter-State journeys. But no special constitutional significance attaches to this fact. For if the State of New South Wales is not debarred by sec. 92 from requiring a licence in respect of a motor vehicle which uses its roads in the course of one inter-State journey, neither can it be so debarred in the case of a vehicle which, being "exclusively engaged" upon such journeys, makes a more frequent or more regular, *i.e.*, a far greater, use of its roads. The attack upon the validity of the present legislation must necessarily involve the assertion that the States of Australia are powerless to organize or regulate the public utility or service of railroad and highway transport without being compelled to make or submit to a special exception in favour of each and every motor vehicle so far as its employment in the State is part of an inter-State journey.

Before the magistrate, the defendant gave no evidence to indicate what were the commercial dealings affecting the goods which were being carried upon his unlicensed motor lorry at the time of the alleged offence. For all that appears, the goods came from Sydney to Melbourne by sea and were carried from Melbourne to Wagga in

the lorry. It would be a curious perversion, even of sec. 92, if the delivery of goods from one point in a State to another point in the same State, the full regulation and control of which is—by universal consent—within the jurisdiction of the State Legislature, can be placed beyond its jurisdiction by a deliberate selection of some route of delivery which includes the crossing of State borders by a common carrier.

Reference may now be made to sec. 3 (2) of the Act, which provides :—

> "This Act shall be read and construed so as not to exceed the legislative power of the State to the intent that where any enactment thereof would, but for this subsection, 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."

This or an analogous formula is now to be found incorporated in many Commonwealth and State Acts (Compare the Commonwealth *Acts Interpretation Act*, sec. 15A ; Victorian *Acts Interpretation Act* 1930). In inserting such a formula, the various Parliaments are seeking to guard against the risk that some controlling constitutional provision will invalidate an important part of their enactments, and that the Courts will then refuse to enter upon the task of separating, and by separating saving, such part of their enactments as, considered by themselves, would be deemed valid. For instance, if, in the present case, the Court considered that sec. 12 (2) of the Act was invalid so far as it applied to the owner of goods carrying them upon an inter-State journey, sec. 3 (2) might still operate to preserve sec. 12 (1) in its application to common carriers. The result of such an application of sec. 3 (2) might be to uphold the present conviction because the applicant is a carrier, not an owner of goods.

It is clear, however, that sec. 3 (2) requires that, in the first instance, the statute should be considered quite independently of that sub-section ; it is only *after* a decision that invalidity attaches to some portion of the statute that any attempt has to be made to obey sec. 3 (2) by separating the valid from the invalid portion of the statute and so preserving the former. In the present case, it will appear that it is not necessary to invoke the rule laid down by sec. 3 (2).

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Construing the New South Wales statute apart from sec. 3 (2), the conclusion is that its Legislature intended to secure the regulation, control and co-ordination of the service of commercial transport upon the roads of the State. In a scheme so comprehensive and general in character, one does not expect to find exceptional treatment of certain services or of particular vehicles merely because they include or are used in the transport of goods outside the territories of the State. The business of a particular carrier is no less conducted within New South Wales because it is also conducted in Victoria or its operations are confined to inter-State journeys. And whether a particular vehicle is engaged solely, or partly, or not at all, in transport between one State and another is not a question which can easily be determined upon sight or summary inspection or interrogation. In the circumstances, it is reasonably plain that the New South Wales statute intends no differential treatment of a public vehicle by reason of its owner's general or particular course of business outside the State, or by reason of the nature of the commercial operations in the course of which the goods are being carried within the State. The Act proceeds upon the broad principle that the interests of the State call for the regulation of the whole service of land transport wherever it is conducted upon the roads of the State of New South Wales.

The general framework of the Act provides a striking contrast to sec. 28 of the South Australian *Dried Fruits Acts* 1924-1925, the provision which was interpreted by the Privy Council in *James* v. *Cowan* (1). Sec. 28 enacted that " subject to sec. 92 of the Commonwealth of Australia Constitution Act . . . the Minister may . . . acquire compulsorily any dried fruits in South Australia. . . ." Such conditional grant showed, upon its very face, that the South Australian Legislature regarded the power of expropriation as one which, but for the safeguard inserted, might be used to interfere with inter-State trade. The form of sec. 28 also showed the Legislature's intent that the power of expropriation should never be exercised so as to interfere with an individual owner's obligation or intention or right of selling goods inter-State. Not only did sec. 28 permit, it provoked, the inquiry whether the individual,

(1) (1932) A.C. 542; 47 C.L.R. 386.

James, whose goods were taken in purported pursuance of the section, was dispossessed by the State in order to carry out the prevailing policy of limiting inter-State sales of dried fruit. That policy, clearly evidenced by sec. 20 of the Act, by the determinations made thereunder, and by the trial Judge's express finding of fact, was designed for the specific purpose of limiting inter-State trade in dried fruits, and therefore constituted an obvious infringement of sec. 92 of the Commonwealth Constitution, as this Court held in *James* v. *South Australia* (1).

This was emphasized in Lord *Atkin's* judgment when the case came before the Privy Council. He indicated that the State's scheme of control was being carried out so as to "place restrictions on inter-State commerce" (2), for the "prevention of the sale" inter-State of "the balance of the output" (3), and in order to "prevent persons in South Australia from selling more than the fixed quota in any of the Australian States" (4). The action of the State Executive was deemed unlawful because it was "plain that the direct object of the exercise of the powers was to interfere with inter-State trade" (3). Accordingly, the Privy Council held that the expropriation of James was not authorized by sec. 28, because, contrary to the express condition of the section, it was effected as part of the fixed policy of preventing the sale inter-State of part of the commodity.

In the present case, however, it is impossible to reach the conclusion that the New South Wales statute was designed for the purpose of preventing, hindering, limiting or obstructing, trade, commerce or intercourse among the States. Further, there is no evidence that the Act has had the effect of reducing or restricting inter-State commerce or intercourse. So far as appears, its effect is, by providing a more orderly system of land transport, to facilitate and increase the passage of persons and the flow of commodities to and from the State. In *James* v. *Cowan* (5), the facts were quite otherwise, and it was clearly established that the direct purpose and

(1) (1927) 40 C.L.R. 1.
(2) (1932) A.C., at p. 558; 47 C.L.R., at p. 396.
(3) (1932) A.C., at p. 559; 47 C.L.R., at p. 397.
(4) (1932) A.C., at p. 555; 47 C.L.R., at pp. 393-394.
(5) (1932 A.C. 542; 47 C.L.R. 386.

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necessary effect of the State's intervention was to place a definite prohibition upon all inter-State trade in dried fruits beyond a permitted and defined limit.

But the applicant has one very plausible argument. "I do not suggest," he says, "that a trader is prevented by the Act from despatching his goods to or from New South Wales. He has at his disposal the elaborate transport service provided by the railway systems of the States, and there are many carriers who will contract to carry his goods upon licensed motor vehicles. But I am a carrier, and the Act prevents me from using this particular vehicle within the State of New South Wales. I admit that I have not applied for any licence, but I have dedicated this vehicle to the business of transporting goods from Melbourne to Wagga. I also admit that, considered as a whole, and in reference to every species of commercial goods, trade and commerce will not be diminished, and may even be increased by the New South Wales scheme of regulating the whole service of transport. But I have a constitutional right to use this lorry in New South Wales as and when I think fit, provided that I restrict its user to inter-State carrying."

This argument seizes upon the fact that, by the operation of the State scheme, some interference or impediment or punishment may be suffered by a person in respect of the very act of carrying commercial goods from State to State. The same argument was used by the unsuccessful appellant in *Willard* v. *Rawson* (1). There, too, the motor vehicle was used solely for the purpose of carrying goods for hire from places in New South Wales to places in Victoria, and from places in Victoria to places in New South Wales. The vehicle was not registered under the Victorian *Motor Car Act*, and this Court held that the provision requiring registration and the payment of a fee, and the provision punishing the driving of a car which was not so registered, were all unaffected by sec. 92 of the Constitution.

Now *Willard* v. *Rawson* (1) has been subjected to some criticism upon the ground that sec. 92 protects the inter-State trader and traveller as such, and that it is not material to inquire into the nature and character of the State law which in fact operates so as to "interfere with" or "burden" an individual's passage from State

(1) (1933) 48 C.L.R. 316.

to State; whether, for instance, the law is one with respect to motor vehicles or taxation or transport or some other topic within the general competence of the State Legislature. This criticism either misunderstands or affects to misunderstand the purpose of the inquiry it condemns. For it is quite impossible to deduce from the mere fact that a State law "interferes with" the passage of a person from State to State in the course of trade or intercourse, that the State Act constitutes an infringement of sec. 92. A trader proceeding inter-State with his goods may be arrested by State functionaries, brought before a Court and confined to a State gaol. In such a case, no one could suggest that the enforcement in due course of the ordinary criminal law of the State amounts to anything prohibited by sec. 92. So clear an illustration shows that the mere adverse operation of a State law upon particular persons whilst they are proceeding inter-State does not even suggest that the State law infringes sec. 92. Therefore, in applying sec. 92, it is often essential to ascertain the general character of the State enactment which is being enforced against the inter-State trader or traveller in order to ascertain the relationship between the State enactment and that "trade, commerce, and intercourse among the States," which alone is given constitutional protection. To take another illustration, no one disputes that the State Legislature may impose taxation upon persons resident within its own territories. Nothing is more clearly an "interference with" or "burden upon" an inter-State trader than an obligation to pay taxation upon an income derived solely from inter-State trade. Yet it would be impossible to hold, by reason of sec. 92, that persons engaged solely in commercial transactions of an inter-State character gain exemption from the operation of a State statute which imposes taxation upon the income of all its residents from whatever source derived.

Another illustration is *Willard* v. *Rawson* (1) itself. There the vehicle was taxed by the State of Victoria, but taxed in common with all other commercial vehicles using the roads of the State. Such taxation was considered by the inter-State trader to be a grievous "burden" upon his business. His refusal to pay the tax imposed in respect of his vehicle caused him trouble, inconvenience

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and delay. But sec. 92 gave him no immunity from having to register his vehicle and pay his tax, although the vehicle was employed solely in carrying his goods from State to State. Other examples may be given. No one could, I suppose, contend that the imposition of a toll upon all commercial vehicles using Sydney Harbour bridge, would, by sec. 92, be prevented from applying to vehicles crossing the bridge in the course of carrying goods from Sydney to Queensland. Could anyone contend that a city traffic by-law which permits the passage of cattle through its streets during certain hours only, does not, because it cannot, bind persons driving cattle from State to State in the course of trade? Many analogous illustrations may be given, and it must, I think, be taken that, although the law of the State may impose "burdens upon" and "interfere" with a person in respect of some act or movement in the course of his carrying on inter-State transactions or journeys, the State law cannot, on that account only, be adjudged inapplicable to him because inconsistent with sec. 92. It may, however, be conceded that the facts of an adverse or burdensome operation of a State statute upon an individual will often illustrate some necessary consequence of the statute and, in that way, will suggest the possibility that sec. 92 has been infringed. But it is impossible to accept the theory that, in applying sec. 92, one need not look past the mere operation of the State law upon the inter-State trader, traveller or carrier and that one should disregard the nature and character of the State law which is impugned.

It is now established that the application of sec. 92 is not confined to the prevention of hostile action at the State borders and that the section operates within the territories of a State. For instance, by sec. 92, a State is prohibited from imposing a tax in respect of the actual entry of goods into its territory; but the section also prohibits a tax upon the first sale in the State after the importation of the commodity, although that sale may take place at a point distant hundreds of miles from the border, and although a considerable interval of time may have elapsed since the border was crossed (*The Commonwealth and Commonwealth Oil Refineries Ltd.* v. *South Australia* (1)). But this consideration, that sec. 92 has effect wherever and whenever the State legislates against the freedom of

(1) (1926) 38 C.L.R. 408.

inter-State commerce and intercourse, also shows that if, as the present applicant argues, a common carrier derives an inalienable right from sec. 92 to project every one of his motor lorries upon the State's roads and use them there so long as he does so for the purpose of carrying goods from one State to another, sec. 92 must also secure to all carriers, traders and travellers, an immunity from obedience to very many State laws which are analogous in scope and object to the *State Transport (Co-ordination) Act* 1931. This position may be illustrated.

If a State, desiring to organize its port and harbour facilities with a view to more economical and efficient working, limits the number of permitted piers and wharves, or issues licences only to such a number of dock and wharf labourers as will be sufficient to perform all the work of loading and unloading required in the port, or itself monopolizes the service of transport from wharf to warehouse then, according to the applicant's argument, the scheme of organization could never be carried out without making a special exception or exemption to meet the case of any person, who is using the port in the course of the inter-State transport of goods. Although it would probably mean the breaking down of the State's scheme of regulating the port facilities, it is said that sec. 92 permits the inter-State trader to say, "Notwithstanding the State scheme, I choose to build and operate my own wharf as and when I think fit; the State cannot compel me to use one of the licensed wharves." And so also the contracting stevedore may say "I have a constitutional right to ignore the State's licensing system; I shall select any persons I like to go on to the State's wharves for the purpose of performing my contracts for the loading and unloading of goods." So also, a carrier who has contracted to complete the inter-State journey of goods from wharf to warehouse may say, "Sec. 92 enables me to defy the local transport laws which require persons taking commodities from the wharves of the State to the warehouses to use the service provided and controlled by the State itself."

For the berthing of a vessel carrying only commodities from other States, the unloading of the goods from the vessel, and their transport to their destination within the State are, and each act performed in the course of such operations is, as much a part of the inter-State

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transport of goods as is the land transport of commodities across the actual boundary line of the State.

But, in my opinion, it is erroneous to say that sec. 92 confers upon every inter-State trader and upon every person co-operating with him for the purpose of such trade, a legal right, available not only to himself but to his servants and agents, to construct and use any and every wharf, whether licensed or not under the State law, and to engage and employ wharf labour irrespective of the State's system of regulating and licensing that portion of its port industries. On the contrary, I think that a State does not infringe sec. 92 if, having no concern, interest or object in restricting or prohibiting trade between States, or commerce between States, or intercourse between States, it chooses to organize, regulate and co-ordinate those facilities and services which are provided and conducted within the State as instruments essential to all trade, commerce and intercourse, including inter-State trade, commerce and intercourse. Any given organization, regulation or co-ordination may infringe sec. 92 if it is proved that the State is really directing its authority against commerce or intercourse between itself and any other State, or between any two other States. But it is not enough to show that individual traders or travellers are incommoded or "burdened" in the course of their inter-State transactions or journeys by having to obey general State regulations which, in their particular application to individuals, may control and determine *the manner and method* of their trading or travelling. For instance, it cannot be said that sec. 92 necessarily prevents the State from monopolizing the service of land transport within its borders. Nor does sec. 92 necessarily prevent a State from ending all road transport within its borders by adopting the simple if drastic expedient of destroying the roads, though the direct result of such action would be to force all traders and travellers, including those trading or travelling inter-State, to use or contract to make use of, the State's own railway services.

The illustration of a State's being compelled to monopolize the whole service of road as well as rail transport is by no means far-fetched, for although the problem of co-ordinating land transport is world-wide in character, in Australia the problem is particularly

acute, because the very solvency of the States is wrapped up in the successful maintenance of their own governmental railway systems. As the Privy Council said many years ago in *Farnell* v. *Bowman* (1) :—

> "It must be borne in mind that the local Governments in the Colonies, as pioneers of improvements, are frequently obliged to embark in undertakings which in other countries are left to private enterprise, such, for instance, as the construction of railways, canals, and other works."

In New South Wales alone, to take one instance, over £140,000,000 of capital moneys are represented by the assets belonging to the existing State railway system, and the annual interest payment amounts to no less than £7,500,000. Indeed, the "financial responsibilities incurred by any State in connexion with the construction and maintenance of its railways" are given express recognition in sec. 102 of the Commonwealth Constitution. As *Griffith* C.J. said in *The Federated Amalgamated Government Railway and Tramway Service Association* v. *The New South Wales Railway Traffic Employes Association* (*Railway Servants' Case*) (2) :—

> "In each case the actual administration of the railways was entrusted to a body specially constituted under State law for the purpose, but the revenue from the railways was State revenue, and the obligations incurred by their managers were State obligations. It is a fact also that the ability of the Colonies to meet their financial obligations in respect of loans was largely dependent upon the successful and profitable employment of the railways."

Where the States have also expended large sums of money for the purpose of constructing and maintaining roads, the problem of "co-ordination" of the railway and road services becomes one of direct national concern. Thus the Transport Regulation Board of Victoria in making its statutory report under the Act of 1932, stated that the existing system of railway transport

> "is sustaining financial damage which is a national danger, directly so where the system is State-owned, or indirectly so through the effect on the financial position of banks, insurance companies, trustees, and other holders of railway securities where the system is privately owned."

The main argument for the present applicant necessarily turns upon some of the reasoning which was adopted in *McArthur's Case* (3). That reasoning we have now been invited to reconsider. In *McArthur's Case* it was decided that the *Profiteering Prevention Act* of 1920 of the State of Queensland, which fixed the Queensland

(1) (1887) 12 App. Cas., at p. 649. (2) (1906) 4 C.L.R. 488, at p. 535.
(3) (1920) 28 C.L.R. 530.

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prices of certain commodities, was invalid so far as it attempted to govern the terms of those contracts of sale which stipulated that goods delivered pursuant thereto should come from New South Wales to Queensland. The actual decision may be supportable upon a number of grounds but, in the course of the leading judgment, it was said that the words "absolutely free" in sec. 92 meant free "from all governmental control by every government authority to whom the command contained in the section is addressed" (1), that the words could not be confined to pecuniary exactions or customs laws, but

> "have their natural meaning of absolute freedom from every sort of impediment or control by the States with respect to trade, commerce and intercourse between them, considered as trade, commerce and intercourse" (2).

It was also said :—

> that the "true office of sec. 92 is to protect inter-State trade against State interference, and not to affect the legislative power of the Commonwealth" (3).

And it was stated :—

> that "all State interference with inter-State trade and commerce should for ever cease, and for that purpose Australia should be one country" (4).

It would appear that this judgment adopted two distinct principles, first, that all legislative power to regulate or control trade and commerce among the States was vested exclusively in the Commonwealth Parliament so that the Parliament of each State was powerless to regulate or control trade and commerce between itself and any other State; second, that the Commonwealth Parliament was not bound by the provisions of sec. 92. In *McArthur's Case* (5) the Commonwealth was not represented, but in the present case, Sir *Robert Garran*, in his valuable argument on behalf of the Commonwealth, which obtained leave to intervene in the proceedings, argued, (1) that the Commonwealth is as much bound by the provisions of sec. 92 as are the Parliaments of the States, and (2) that the State has legislative authority to regulate (*inter alia*), trade commerce and intercourse between itself and any other State of the Commonwealth.

From its position in the framework of the constitutional document, and from the general tenor of its command, it would seem plain

(1) (1920) 28 C.L.R., at p. 550.
(2) (1920) 28 C.L.R., at p. 554.
(3) (1920) 28 C.L.R., at p. 556.
(4) (1920) 28 C.L.R., at p. 558.
(5) (1920) 28 C.L.R. 530.

that sec. 92 was intended to bind the Commonwealth Parliament in the exercise of its legislative power, as well as the State Legislatures. Further, the supposed contradiction between the existence of legislative power in the Commonwealth under sec. 51 (I.) to pass laws with respect to inter-State trade and commerce, and the restriction in sec. 92 upon the manner of exercising such power, is more apparent than real. Even the appearance of contradiction seems to vanish so soon as it is observed that the word "intercourse" occurs in sec. 92 but does not appear in sec. 51 (I.). It is true that, since 1920, it has been an accepted thesis that the Commonwealth Parliament is not bound by sec. 92. Before 1920, the contrary view was accepted in this Court. If the Commonwealth is not bound, it must be entitled to erect customs barriers at State boundaries, providing it obeys sec. 99 of the Constitution and treats all States alike. In my opinion, the only possible ground for holding that the Commonwealth is not bound by sec. 92 is that sec. 92 forbids all legislative control and regulation of inter-State trade and commerce, and is therefore inconsistent with the power to legislate conferred upon the Commonwealth by sec. 51 (I.). If sec. 92 has no such operation, no reason is left for exempting the Commonwealth from obedience to the general declaration of sec. 92.

Does then sec. 92, as *McArthur's Case* (1) asserts, forbid the State Parliament from legislating in any way with respect to inter-State trade and matters affecting it? The line of reasoning adopted was, first, to define "trade, commerce, and intercourse," and then to assert that absolute freedom "extends to the *whole* of it" (2). It was considered that the terms are terms of common knowledge, better understood in detail, by traders than by judges. They were then defined to include

> "the mutual communings, the negotiations, verbal and by correspondence, the bargain, the transport and the delivery are all, but not exclusively, parts of that class of relations between mankind which the world calls 'trade and commerce'" (3).

This definition is extremely wide and it certainly seems rather to describe all matters "relating to" or "with respect to" trade and commerce, than trade and commerce itself.

(1) (1920) 28 C.L.R. 530. (2) (1920) 28 C.L.R., at p. 546.
(3) (1920) 28 C.L.R., at p. 547.

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The next step in the reasoning was to assert that the only effect of the phrase "among the States" in sec. 92 was to exclude

> "purely domestic trade and commerce, but does not alter the nature of the operations which constitute 'trade and commerce' wherever it takes place" (1).

I am of the opinion that the addition of the words "among the States" was for a much wider purpose and had a more far reaching effect than is conceded by this judgment. The framers of the Constitution employed the term "among" because of the grammatical difficulty attending the use of the word "between" to describe inter-State trade and intercourse, there being six Colonies or States. The predominant object of sec. 92 was to secure free trade and free intercourse among what had formerly been self-governing colonies and what were then to become States which should still possess very large powers of internal self-government. To assert freedom of trade between such organized communities was to lay down in formal expression a well-known economic doctrine and ideal, which was one of the chief motive forces of Federation. Neither the words used, nor the underlying doctrine they declare would seem to warrant an interpretation by which, first, "trade, commerce, and intercourse" is resolved into the infinite number of acts, transactions and operations which must occur in the course of it, secondly, from this infinite aggregation there is subtracted that infinite number of acts, transactions and operations into which "purely domestic" trade can similarly be resolved, and, thirdly, each and every one of the acts, transactions and operations, still infinite in number, which comprise the remainder, the States are rendered unable to touch or regulate in any way whatsoever. Such a test seems to be incapable of satisfactory application. The advance of a criminal towards the border of a State, considered by itself, is as much an "operation" or "act" of intercourse among the States, as the advance of an inter-State traveller from one train to another at a border town. The holding up of a vehicle travelling inter-State and the arrest of its driver because its speed endangers safety or its lights are defective may interfere as much with a "transaction" or "act" of inter-State trade as a decision of a State market authority to postpone the sale of goods simply because their place of origin is another State.

(1) (1920) 28 C.L.R., at p. 548.

The declaration of sec. 92 loses much of its significance if parts of it are analysed separately and the results of the analysis are subsequently put together again. The section, if read as a whole, postulates the free flow of goods inter-State, so that goods produced in any State may be freely marketed in every other State, and so that nothing can lawfully be done to obstruct or prevent such marketing. The section may be infringed by hostile action within the State of origin of the goods, as was attempted to be done in the Dried Fruits legislation of South Australia, or at the border by means of prohibitions upon exit or entry, or by laws preventing or prohibiting sale or exchange within that State to the markets of which the commodities are destined. The declaration of sec. 92 covers goods which are consigned to the market as well as goods which have been already sold, and are in the course of delivery, in this sense, that consignment and delivery, being part of commercial intercourse, cannot be prevented or obstructed by State legislation. But this does not necessarily mean that either the common or contract carrier, who is engaged in the business of transport, or the owner, if such there be, who himself carries his goods inter-State in order to sell or deliver, or the agent or servant who is the selected instrument for selling the commodities at the market place, or the person who acts as intermediary in receiving the proceeds of sale and remitting them to the owner in another State—are, each and all of them, at liberty to ignore the general laws of a State which regulate how and when and where goods must be carried, delivered, sold and accounted for.

Nor is this general position really affected by the use of the words in sec. 92 "whether by means of internal carriage or ocean navigation." It may be suggested that the specific reference to the two methods by which trade, commerce, and intercourse are conducted, is indicative of an intention that all the instruments of internal carriage are to be accorded the same protection as the subject "trade, commerce, and intercourse among the States." But the words have been inserted lest it should be thought that, if conducted by land as opposed to sea, or by sea as opposed to land, the general rule of freedom is to be altered. "Internal carriage" is the most general description of the way in which all inter-State trade,

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commerce, and intercourse by land must be conducted if it is to be conducted at all. Carriage is an instrument of trade, not trade itself. As has well been said :—

> "Buying and selling are the essential elements of international commerce. Carriage, insurance, and finance are after all only ancillary to the main purpose of the interchange of goods" (Dr. *H. C. Gutteridge* K.C. in *B. Y. International Law* (1933), at p. 77).

Despite the reasoning of the leading judgment in *McArthur's Case* (1), this Court should accede to Sir *Robert Garran's* argument that the Commonwealth's law-making authority upon the subject of inter-State trade and commerce is not exclusive of that of the State. Overwhelming importance attaches to the terms of sec. 107 of the Constitution, and to the fact that it is in sec. 52, not in sec. 51 of the Constitution, that the heads of the Commonwealth's *exclusive* power are set forth. The Constitution, if interpreted as a document, would seem to postulate that upon the topic of trade and commerce between itself and any other State, each State possesses a concurrent legislative power. In the exercise of such concurrent power, the State is, of course, subject to the provision in sec. 109 of the Constitution which makes valid Commonwealth laws prevail if they are inconsistent with those of the State. Like the Commonwealth, the State Parliaments are at liberty to enact laws which touch and concern inter-State trade, commerce, and intercourse, so long as such laws leave inter-State trade or commerce or intercourse absolutely free. And although this view is not consistent with much of the reasoning of, as distinct from the decision in, *McArthur's Case* it is in strict conformity with the subsequent decisions of this Court in *Nelson's Case* (2); *Roughley's Case* (3); and *Willard* v. *Rawson* (4).

In several respects *Roughley's Case* presents a close analogy to the present case. The headnote of the report is inadequate. It appears that, at the Sydney Produce Market, certain persons acted solely as agents for the sale of farm produce grown by their principals in other States of the Commonwealth. Sale through these inter-State agents was therefore the method of trade adopted by their principals. The latter consigned the farm produce to Sydney, and

(1) (1920) 28 C.L.R. 530.
(2) (1928) 42 C.L.R. 209.
(3) (1928) 42 C.L.R. 162.
(4) (1933) 48 C.L.R. 316.

subsequently received the net proceeds of sale from these inter-State agents. Until sold in Sydney, the produce remained the property of the grower, and the unloading and sale of the produce was entirely conducted by the inter-State agents. The farm produce was sold by the agents in the original packages and cases in which it was forwarded from the other States.

Upon this recognized method of conducting trade, the New South Wales statute, *The Farm Produce Agents Act* 1926, supervened. By its provisions, as interpreted by this Court, all farm and produce agents, including those employed solely as inter-State agents, were penalized unless they took out a licence. The licence could be refused upon certain specified grounds, including the commission of any offence under the *Farm Produce Agents Act* itself. Regulations were imposed for the inspection of books, for the method in which the agent should advise his principal as to sales, for the establishment of trust accounts, for the protection of such accounts, and for the regulation of the agents' fee or commission.

Isaacs J. and *Starke* J. thought that the reasoning of *McArthur's Case* (1) should be applied. Although their views were not accepted by the Court, it is of significance to observe what those views were. Thus, *Isaacs* J. said :—

> "A producer in Queensland sends pine-apples, not only to other States of the Commonwealth but also to Sydney to an agent there, to receive and sell them forthwith to Sydney merchants. Forbid the agent, and the trade in New South Wales disappears, for the principal cannot be present everywhere at once. Prescribe a licence for the agent, and the trade is regulated, because what in actual fact is an indispensable means of transacting it, is interfered with. Nor is it an answer to say the inter-State transaction is not interfered with, but only the contractual relation between principal and agent" (2).

The same learned Judge said also :—

> "For instance, a certain educational capacity might be enacted to enable any man to contract, and a penalty might be enacted if any person not having that capacity should enter into an agreement as a contract. But, in the presence of sec. 92 of the Commonwealth Constitution, is that power still universally exercisable by a State Parliament? Assuredly not as to principals in an inter-State transaction. The State may, if it pleases, say 'We will not enforce such a bargain,' and then the bargain would be unenforceable by State law, or at all, unless the Commonwealth Parliament provided a remedy. But the State, while at liberty to refrain from assisting or enforcing such a bargain, could not penalize the making of it, or make it the subject of a direct

(1) (1920) 28 C.L.R. 530. (2) (1928) 42 C.L.R., at p. 184.

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tax, or require a licence—which is the State's permission—before the owner of goods sells them inter-State. That would be attempting to regulate the very *act* of inter-State trade. Nor, for the same reason, could a State forbid its citizens the 'capacity' to purchase inter-State unless licensed, at any cost and under any conditions of punishment or otherwise the State thinks fit—for there is no limit if the power exists. Consequently, 'capacity' and 'status' cannot be the discrimen or the test. The only test is: Is what is done an attempted regulation of inter-State trade and commerce?" (1).

Reading down the Act so as to apply it to "purely intra-State transactions" (2), *Isaacs* J. thought that the validity of the Act could then, and only then, be sustained. *Starke* J. came to the same conclusion. He said:—

> "So far as it applies to farm produce agents engaging in inter-State transactions, the Act is, in my opinion, obnoxious to the provisions of sec. 92" (3).

And he concluded—

> "Therefore, in my opinion, the State Act should be held to operate—as was the State Act in *McArthur's Case* (4)—on the intra-State or domestic business of farm produce agents in New South Wales" (5).

The majority of the Court held that a State Act was not rendered invalid by sec. 92 although it laid down certain regulations which controlled those co-operating in the conduct of inter-State trade, and *Knox* C.J. who had been a party with *Isaacs* and *Starke* JJ. to the main judgment in *McArthur's Case*, also reached a different conclusion from that of *Isaacs* and *Starke* JJ., stating *inter alia* that

> "what is forbidden by sec. 92 is any State law which obstructs or restricts the freedom of trade or commerce among the States" (6).

The actual decision of the majority of the Court was that the New South Wales Act applied to all persons engaged in the business of selling farm produce, whether such produce came from within or without the State, and whether or not the agents were exclusively engaged in inter-State trade. It was considered that no part of the Act was rendered either invalid or inapplicable by reason of sec. 92 of the Constitution.

Now it is quite clear that the *Farm Produce Agents Act* of New South Wales, although a law with respect to the carrying on of a certain kind of business within New South Wales, was also a law which controlled and restricted in a definite way those engaged in trade and commerce, whether domestic or inter-State. The Act

(1) (1928) 42 C.L.R., at p. 184.
(2) (1928) 42 C.L.R., at p. 191.
(3) (1928) 42 C.L.R., at p. 206.
(4) (1920) 28 C.L.R. 530.
(5) (1928) 42 C.L.R., at p. 208.
(6) (1928) 42 C.L.R., at p. 179.

selected the class of persons who alone could lawfully conduct the business of selling primary produce consigned from other States, and, for all practical purposes, it cut down the pre-existing right of the inter-State trader to select his own selling agent. By the Act, his area of selection was restricted to licensed agents. The unlicensed agent was completely debarred from co-operating in the inter-State trade.

Therefore the decision in *Roughley's Case* (1) shows that it is not every regulation and control by the State of the methods of conducting inter-State commerce, which is forbidden by sec. 92. *Roughley's Case* is entirely inconsistent with the notion that, by sec. 92, every person who is engaged, even solely, in inter-State trade is given an unconditional right to choose his own method of conducting that trade within the borders of each and every State. The case proceeds upon the contrary hypothesis that the State may prescribe general rules for the conduct of trade and business and to these rules all persons must conform without sec. 92 being in any way affected. *Roughley's Case* is analogous to the present in that the unlicensed produce agent there corresponds to the unlicensed carrier here, and the inter-State owner of the farm produce there, corresponds to the owner of the commodities carried by the present applicant.

Nor is *Roughley's Case* in any way inconsistent with the decision of the Privy Council in *James* v. *Cowan* (2). No doubt *James* v. *Cowan* decides that it is possible for inter-State trade, commerce, and intercourse to be interfered with contrary to sec. 92, although the State law may also restrict purely domestic trade. But it also shows that the action of South Australia was held to be unlawful, not merely because it took certain action in relation to inter-State trade, but because its action was of a hostile character and carried out the predetermined State policy of limiting and prohibiting the marketing of dried fruits in the other States of the Commonwealth. *James* v. *Cowan nowhere suggests that the laws of the States must never trespass in any way upon the domain of inter-State trade.* By the Privy Council's close investigation of the marketing policy of South Australia, the judgment rather lends

(1) (1928) 42 C.L.R. 162.

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

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support to the view that the validity of State action depends upon whether the impugned State legislation or administration was directed against inter-State trade by fencing off the inter-State market.

The principle that the Parliaments of the States may legislate in relation to matters which relate to and concern and affect inter-State trade, commerce, and intercourse, so long as such legislation leaves trade, commerce, and intercourse among the States absolutely free, is therefore recognized by *Roughleys' Case* (1). Further, the various State *Sale of Goods Acts* which govern contracts whether or not they call for the delivery of goods from one State to another, are obvious illustrations of laws which deal (*inter alia*) with matters affecting inter-State trade and commerce but do not offend against sec. 92.

Moreover, as appears from *Nelson's Case* [*No.* 1] (2), even if State laws deal solely with matters persons or things connected with inter-State trade, nevertheless the laws may be found not to offend against sec. 92. It is difficult to see how any real impediment would be imposed upon commerce or intercourse among the States if, for instance, for purposes of statistics or perhaps of police, a State required certain particulars to be furnished by persons arriving from other States, or if persons passing into a State with cattle were required to cross the border at prescribed places. It is quite consistent with this view that in all such cases, and whether the State laws deal solely with inter-State trade and intercourse or with trade in general, it may be found possible to show that sec. 92 is being infringed, because the real purpose of State intervention is to destroy or limit inter-State trade or intercourse. For there is hardly any legislative or executive power of the State which is not capable of being used for a purpose forbidden by sec. 92.

There are many State laws which relate to, and concern, not only trade, commerce, and intercourse, but other subject matters. It is often of importance to examine the nature and character of all State laws which are challenged as being contrary to sec. 92 in order to ascertain and measure the relationship and degree of relationship between them and inter-State trade, commerce, and intercourse (*Nelson's Case* [*No.* 1] (2)). Absence of discrimination against inter-State trade and intercourse, and the presence of legislative purposes

(1) (1928) 42 C.L.R. 162.

(2) (1928) 42 C.L.R. 209.

other than the purpose of dealing with trade and commerce may tend to show that the State is not erecting barriers against, or placing embargoes upon, inter-State trade and intercourse. If a State law discriminates against inter-State trade and intercourse so as to prohibit it, it will be invalidated by sec. 92 (*Fox* v. *Robbins* (1)). And such discriminatory legislation may exist although, in form, the law is of general application. Thus a State may attempt to enact a general law fixing the price of commodities which, in fact, are produced in only one other State, the price operating so as to destroy all trade in such commodities between the States. Such discriminatory effect is, of course, provable by evidence. Sec. 92 also confers rights upon individuals in the sense that any person may invoke its aid in an appropriate case ; but it gives no constitutional right either to individuals engaged solely in the inter-State trade, or to individuals whilst they are so engaged, to determine for themselves the manner in which and the means by which, they will conduct their business or commerce in each State (*Roughley's Case* (2)). Nor are traders or carriers who are engaged solely in the inter-State trade entitled by virtue of sec. 92, so to dedicate and use their motor vehicles in inter-State trade as to procure an immunity from the operation of general State laws dealing with the taxation of motor vehicles (*Willard* v. *Rawson* (3)), or the regulation of the business of commercial transport within the State. But, if it is established that State laws which regulate transport or the vehicles used therefor or trade or business conducted within a State are designed for the express purpose of restricting or prohibiting inter-State trade and commerce, and have such effect, the State laws, by whatever name called, or with whatever subjects they deal, are inconsistent with sec. 92 (*James* v. *Cowan* (4)).

The New South Wales *State Transport* (*Co-ordination*) *Act* affects and relates to certain acts, things and matters which are intimately bound up with inter-State trade, commerce and intercourse. It controls and regulates the methods by which the services of commercial transport within New South Wales must be conducted. The main purpose of the Act is to secure a better and more economical

(1) (1909) 8 C.L.R. 115.
(2) (1928) 42 C.L.R. 162.
(3) (1933) 48 C.L.R. 316.
(4) (1932) A.C. 542 ; 47 C.L.R. 386.

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system of public transport by land within New South Wales, the scheme of organization being to compel co-operation between the transport services provided by the Government railways and road transport services. The statute seeks to secure better facilities for all trade and commerce and intercourse. For all practical purposes the State has already monopolized rail and tram transport, and it must be remembered that the railway systems of the States are themselves the main instrumentalities for conducting trade, commerce and intercourse among the States. There is no evidence in this case, either upon the face of the Act or otherwise, that the system of licensing public motor vehicles using New South Wales roads was intended to, or by administration had the effect of, disadvantaging, discriminating against, or even limiting, inter-State trade or commerce in any commodity.

Sec. 92 does not guarantee that, in each and every part of a transaction which includes the inter-State carriage of commodities, the owner of the commodities, together with his servant and agent and each and every independent contractor co-operating in the delivery and marketing of the commodities, and each of his servants and agents, possesses, until delivery and marketing are completed, a right to ignore State transport or marketing regulations, and to choose how, when and where each of them will transport and market the commodities.

One of the results of the contrary view, recently rejected by this Court in *Willard* v. *Rawson* (1), would be to exempt the inter-State carrier from the payment of motor vehicle taxation in either of two States, although he makes a very extensive use of the roads of both. The argument rejected in that case assumes that sec. 92 primarily protects persons, but its real object is to secure the free flow and passage and marketing of commodities among the States and to secure the right of passage of persons from State to State. Absolute freedom is ascribed to trade, to commerce and to intercourse, and is not ascribed to traders or to travellers, considered merely as individuals.

In the United States, for reasons which need not be examined, a doctrine was enunciated that inter-State trade and commerce is

(1) (1933) 48 C.L.R. 316.

exclusively a matter for Federal control and regulation, and that, as a consequence, any dealing with that subject by the State was regarded as a trespass upon the domain of Federal power. But, as time went on, exceptions had to be engrafted upon this principle in order to prevent chaotic and absurd results. But in Australia the situation is, or should be, entirely different. Upon the States, as well as the Commonwealth, has been conferred legislative power over the subject matter of inter-State trade and commerce. Commonwealth laws are given supremacy in the case of inconsistency, and the State, and, in my opinion, the Commonwealth also, should observe the general command laid down in sec. 92.

In the present case the question is whether it can truly be said: —"Before this Act was passed, trade and commerce in all commodities and the intercourse of persons between New South Wales and Victoria was absolutely free, but since this Act it has ceased to be absolutely free." All that has been shown is that owners of public vehicles may be refused a New South Wales vehicle licence, even if the vehicle is used upon inter-State journeys. But it has not been shown that a single vehicle so used has not been licensed upon application made. And, even if the present applicant had deigned to request a licence for his vehicle and his request had been refused, that would not prove an infringement of sec. 92.

The order *nisi* should be discharged.

McTIERNAN J. In my opinion, the order *nisi* for prohibition should be discharged. It is unnecessary to reiterate in detail the facts proved before the Magistrate or the provisions of the *State Transport (Co-ordination) Act* 1931 (Act No. 32 of 1931) as amended by Act No. 31 of 1932. The applicant attacked his conviction for an offence against sec. 12 of this Act on two grounds. (1) That the Magistrate was in error in finding that the evidence was sufficient to support the allegation that the applicant operated the vehicle on the relevant occasion. (2) That by force of sec. 92 of the Constitution of the Commonwealth and sec. 3 (2) of the *State Transport (Co-ordination) Act* he was not bound by the provisions of sec. 12 of this Act even if he did in fact "operate a public motor vehicle" in New South Wales in the circumstances which were proved before the

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Magistrate. In my opinion the first ground is untenable. It is sufficient to say that there was evidence upon which the Magistrate was entitled to find that the applicant did operate the motor vehicle on the occasion in question. I have nothing to add to the reasons, which have been given by my brother *Evatt*, for declining to quash the conviction on this ground.

The applicant's second ground of attack raises a question of great constitutional importance. It was contended on his behalf that, upon the true construction of sec. 92 of the Constitution, sec. 12 of the State statute is in excess of the legislative power of the State, if " any person " is read to include a person who " operates a public motor vehicle " within New South Wales in the course of an inter-State journey. The question, therefore, is what is the true construction of sec. 92 ? In *James* v. *Cowan* (1) the Judicial Committee said " It appears to their Lordships unnecessary to undertake the difficult task of defining the precise boundaries of the absolute freedom granted to inter-State commerce by sec. 92." Their Lordships added (2) " In the present case they are clearly of opinion that sec. 20 and the determinations made under it were directed at inter-State commerce as such. They were intended to prevent persons in South Australia from selling more than the fixed quota in any of the Australian States." The boundaries of the " absolute freedom " granted to inter-State commerce by sec. 92 do not appear to have been precisely defined in the judgments of this Court. Indeed, in *James* v. *Cowan* (3), *Isaacs* J., as he then was, issued a warning against making such a definition. He said (4): " I would say for myself that a paraphrase is especially dangerous in the case of a Constitution. In my opinion it would under the best of circumstances be unfortunate to adopt that or any other supposed verbal equivalent for the words of the Commonwealth Constitution itself." In *Huddart Parker Ltd.* v. *The Commonwealth* (5), *Dixon* J. drew attention to the course recommended by Viscount *Haldane* L.C. in *John Deere Plow Co.* v. *Wharton* (6), of confining decisions upon questions on constitutional interpretation

(1) (1932) A.C., at p. 555; 47 C.L.R., at p. 393.
(2) (1932) A.C., at p. 555; 47 C.L.R., at pp. 393-394
(3) (1930) 43 C.L.R. 386.
(4) (1930) 43 C.L.R., at p. 417.
(5) (1931) 44 C.L.R., at p. 514.
(6) (1915) A.C. 330, at p. 338.

to concrete questions and avoiding general definitions of expressions occurring in the Constitution. We were therefore treated to an elaborate argument by counsel as to the nature of the prohibition implied by sec. 92. The terms of this section are perhaps more characteristic of the platform than the draftsman's desk. The difficulty of measuring its terms exactly, so that nothing is added or subtracted is a perplexing one. The nature of a Constitution, as Chief Justice *Marshall* said in *M'Culloch* v. *State of Maryland* (1), " requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves." Sec. 92 appears to be deficient even according to that standard.

The applicant, however, relies mainly on certain propositions enunciated in *McArthur's Case* (2) and submits that they conclude the constitutional question in his favour. This case further decides that sec. 92 does not bind the Commonwealth. The propositions in *McArthur's Case* as to the nature of the prohibition which sec. 92 imposes upon the State Legislatures are stated in a number of ways. " *Absolutely free*—The primary meaning of these words used as they are with reference to governmental control, is that the subject matter of which they are predicated is to be ' absolutely free ' from all governmental control by every governmental authority to whom the command contained in the section is addressed. The expression ' absolutely free ' naturally means ' free ' *as* ' trade, commerce, and intercourse,' and does not extend beyond the subject matter spoken of. It is not said of ' goods ' or ' persons,' but of the *acts* which constitute ' trade, commerce, and intercourse ' " (3). " The State cannot, in our opinion, either by laws directly and openly applying to trade and commerce, or by laws creating discrimination, which is the same thing (see per *White* J. in *Pullman* v. *Kansas* (4)), impose a prior restraint on ' trade, commerce, and intercourse among the States ' " (5). " The words ' absolutely free ' in sec. 92 cannot, therefore, be confined to pecuniary exactions or customs laws, but in order to have any substantial effect must, unless some better reason be found, have their natural meaning of absolute

(1) (1819) 17 U.S.. 316, at p. 407; 4 L.Ed. 579, at p. 601.
(2) (1920) 28 C.L.R. 530.
(3) (1920) 28 C.L.R., at p. 550.
(4) (1909) 216 U.S. 56, at p. 65.
(5) (1920) 28 C.L.R., at p. 551.

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freedom from every sort of impediment or control by the States with respect to trade, commerce and intercourse between them, considered as trade, commerce and intercourse" (1). Sir *Robert Garran* who appeared for the Commonwealth, which intervened in these proceedings, attacked the proposition which these passages express as to the nature of the constitutional prohibition imposed by sec. 92 and the further proposition laid down by the case that the section does not bind the Commonwealth as well as the States. These propositions are not, I think, justified by the language of sec. 92. But as they should not now be overruled the present application must proceed upon the basis that they are right.

Trade, commerce and intercourse includes the carriage of passengers or goods for hire or in the course of any trade or business. The terms "operate" and "public motor vehicle" are defined in sec. 3 (1) of the *State Transport (Co-ordination) Act*. Sec. 12, therefore, unless it is read down by sec. 3 (2), affects both inter-State and domestic trade and commerce. Its effect is to regulate and control such trade and commerce to some degree. Although this is the effect of the section, the constitutional question is not, in my opinion, concluded in favour of the applicant by the proposition laid down in *McArthur's Case* (2) as to the nature of the constitutional prohibition implied by sec. 92. In a further passage in this case *Knox* C.J., *Isaacs* J. and *Starke* J. expressed their view as to the meaning of "absolute freedom" in respect of inter-State trade and commerce. They said (3) it "does not connote privilege to break all other laws. Liberty is not equivalent to anarchy or licence. Though there is 'absolute freedom' in every Victorian to cross into New South Wales and mingle with his fellow Australians there without the least hindrance or condition on the part of the State of New South Wales, it is his 'intercourse' only which is unfettered, not the man himself under all circumstances. If the man, while in New South Wales, steals or cheats or begs . . . or is in such a condition as to constitute a danger to his fellows—matters wholly distinct from 'intercourse'—he is as amenable to the laws of the State *on those subjects*, so far as they are unaffected by sec. 109 of the Constitution, as any permanent

(1) (1920) 28 C.L.R., at p. 554. (2) (1920) 28 C.L.R. 530.
(3) (1920) 28 C.L.R., at pp. 550-551.

resident of the State. If he brings goods into the State, he is free to do so, and to pass through the State with them (say) to Queensland, equally without hindrance or condition by State law, so far as regards the passage through. But if, for instance, the goods are dangerous, as gun-powder, or wild cattle or a mad dog, or are stolen or offensive, he cannot deny his obligation to submit in respect of them to whatever laws are in force in the State on those subjects. The constitutional freedom predicated begins and ends with respect to the act of 'trade, commerce, and intercourse.'" The principles expressed in this passage were applied by *Knox* C.J., *Gavan Duffy* J., as he then was, and *Starke* J. in *Ex parte Nelson* [*No.* 1] (1). In affirming that the *Stock Act* 1901 of New South Wales did not contravene sec. 92 their Honors said (2):—"In a measure it must be conceded that the *Stock Act* of New South Wales does regulate the free flow of inter-State trade and commerce in stock. . . . The seeming conflict may be resolved, in our opinion, by considering the true nature and character of the legislation in the particular instance under discussion. The grounds and design of the legislation, and the primary matter dealt with, its object and scope, must always be determined in order to ascertain the class of subject to which it really belongs; and any merely incidental effect it may have over other matters does not alter the character of the law. . . . The *Stock Act* of New South Wales is not in itself a regulation of inter-State commerce, though it controls in some degree the conduct and liability of those engaged in the commerce. . . . In truth, the object and scope of the provisions are to protect the large flocks and herds of New South Wales against contagious and infectious diseases, such as tick and Texas fever: looked at in their true light, they are aids to and not restrictions upon the freedom of inter-State commerce. They are a lawful exercise of the constitutional power of the State. There are passages in *W. & A. McArthur Ltd.* v. *Queensland* (3) which in our opinion support this view." Their Honors cited from the passages at pages 550-551, in which the meaning of "absolute freedom" in respect of inter-State commerce is explained. The decisions since *McArthur's Case* (4) have explained, perhaps

(1) (1928) 42 C.L.R. 209.
(2) (1928) 42 C.L.R., at pp. 218-219.
(3) (1920) 28 C.L.R., at pp. 550-551.
(4) (1920) 28 C.L.R. 530.

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liberalized the principles upon which the Court proceeded in that case in outlining the class of State laws which are untouched by sec. 92. These decisions are binding equally with *McArthur's Case* (1). In *Roughley's Case* (2) it was decided that the provisions of the *Farm Produce Agents Act* 1926 of New South Wales were not obnoxious to the provisions of sec. 92. *Knox* C.J. stated (3): "It is manifest from the provisions of the Act that its sole object is to ensure, as far as may be practicable, honest dealing on the part of persons described as farm produce agents towards their principals and to prevent the owners of farm produce, whether resident in New South Wales or in other States, from being defrauded by persons who carry on the business of selling farm produce." Continuing, the Chief Justice said (4):—"It may well be that the Parliament of New South Wales is prevented by sec. 92 of the Constitution from either prohibiting the owner of goods produced in another State or the servant of such an owner bringing such goods into New South Wales or selling them there, and from imposing conditions on the exercise of his right to do so. But it does not follow that a State law regulating the conduct of auctioneers or commission agents carrying on their business in New South Wales, or requiring them to be licensed, or prescribing rules for the regulation of traffic in the streets of its towns is rendered inoperative by that section whenever the auctioneer, or agent, or carrier is in fact dealing with goods consigned from another State for sale in New South Wales. What is forbidden by sec. 92 is any State law which obstructs or restricts the freedom of trade or commerce among the States. A law may control in some degree the conduct and liability of persons engaged in inter-State commerce without being itself a regulation of inter-State commerce (*Judson* on *Inter-State Commerce*, 2nd ed., p. 50); and a person whose business consists wholly or in part of affording facilities for the transaction of inter-State commerce is not necessarily engaged in inter-State commerce so as to prevent the regulation by State legislation of his conduct in connection with that business." *Higgins* J. said (5):—"But the State Legislature is subjected to another veto by sec. 92: it must not make a law

(1) (1920) 28 C.L.R. 530.
(2) (1928) 42 C.L.R. 162.
(3) (1928) 42 C.L.R., at p. 177.
(4) (1928) 42 C.L.R., at p. 179.
(5) (1928) 42 C.L.R., at pp. 193-194.

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 education or for morality, must, more or less, have an influence on inter-State commerce." In *Willard* v. *Rawson* (1) it was not questioned that the provisions of the *Motor Car Act* of Victoria there in question did by their operation affect inter-State trade and commerce. But the Court decided that the appellant was not excused by sec. 92 from obedience to them. This case was decided after *James* v. *Cowan* (2) and certain principles enunciated by the Judicial Committee were resorted to for the purpose of distinguishing between legislation which sec. 92 was intended to prohibit and legislation which the State Legislatures were left free to enact, although it affected trade and commerce. These principles were stated by Lord *Atkin* (3). His Lordship said:—"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 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."

These authorities, in my opinion, establish that the absolute test of invalidity under sec. 92 is not whether the provisions of the State statute in question have the effect of regulating, or controlling trade and commerce, including inter-State trade and commerce. Although no precise, or exact statement of the true nature of the prohibition

(1) (1933) 48 C.L.R. 316.
(2) (1932) A.C. 542; 47 C.L.R. 386.
(3) (1932) A.C., at pp. 558-559; 47 C.L.R., at pp. 396-397.

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emerges from the present state of the decisions, yet, they furnish clear guidance in an inquiry into the question whether the provisions of a State Act contravene sec. 92. An Act which discriminates against inter-State trade is invalid. An Act which affects inter-State and domestic trade indiscriminately is wholly bad unless severable, if it directly affects such trade or in other words affects it as trade. An Act affects trade directly which is passed with a real or primary object directed to trade of prohibiting, regulating, controlling, restricting or burdening trade as opposed to a real or primary object not directed to trade, which is within the acknowledged power of the Legislature to accomplish. The real or primary object of an Act is to be gathered from what it enacts. See *Peanut Board* v. *Rockhampton Harbour Board* (1), and cases there cited. When the real or primary object of an Act is not directed to trade and commerce, but trade and commerce are incidentally affected by the Act such an incidental effect does not render the Act void under sec. 92.

The Commonwealth and the States respectively may enact legislation in the same terms with respect to subjects within their legislative powers respectively. But it does not follow that each Parliament would be exercising a power of legislation with respect to the same subject. The Commonwealth, for example, may as a regulation of commerce enact that motor vehicles engaged in inter-State trade should be licensed. But an Act of a State Legislature in similar terms, with respect to all motor cars which are driven in its territory should not be described as a regulation of commerce as such. The tests, which have just been outlined and which should, in my opinion, be applied in the present inquiry as to the validity of sec. 12 really depend upon a recognition of the distinct powers of legislation reserved to the States by the Commonwealth Constitution. It remains to apply these tests to the provisions of the State Act now in question.

The *State Transport (Co-ordination) Act* is described by the preamble as " An Act to provide for the improvement and for the co-ordination of means of and facilities for locomotion and transport ; to constitute a Board of Commissioners for that purpose ; to amend the *Government Railways Acts* 1912-1930, and certain other Acts ; and for

(1) (1933) 48 C.L.R., at pp. 309-310.

purposes connected therewith." Sec. 4 empowers the Governor to appoint a Board to carry out objects and purposes which are substantially those stated in the preamble. The Board is directed by sec. 10 (2) to report to the Minister as to the steps, which they consider desirable to co-ordinate and unify the control of, the facilities and means for locomotion provided by various Governmental bodies namely the Railway Commissioners, constituted under the *Government Railways Acts* 1912-1930, the authorities constituted under the *Transport Act* 1930 for the control of tramways and road transport, and the Main Roads Board, constituted under the *Main Roads Act* 1924-1929. The Government Railways of New South Wales are practically a monopoly and were built out of money borrowed on the public credit. An examination of the Government Railways Acts shows the direct connection between the Government of the State and its railways and how closely interwoven are governmental and railway finance. The Transport Act provides for the creation of transport trusts for defined areas. These trusts are concerned with the supervision, regulation and co-ordination of all public transport and omnibus services in their respective areas. The powers of the Railways Commissioners in relation to tramways are transferred to these trusts. Another authority set up by the Act is the Commissioner of Road Transport. Part XV. of the Act vests the administration of the provisions of the Motor Traffic Act of the State relating to the registration of motor vehicles and the control and supervision of them in this authority. The Management Board is constituted to conduct transport services established by the trusts for the carriage of passengers. The Main Roads Board is a road construction authority. The *Main Roads Act* provides for the classification of the roads of the State. The cost of construction and maintenance is borne by special funds established by the *Main Roads Act*. These funds are built up by public moneys derived from sources mentioned in the Acts. The real or primary object of the provisions of the *State Transport (Co-ordination) Act* relating to the licensing of public motor vehicles which the applicant ignored, is not in my opinion, directed to trade and commerce at all. These provisions empower the State through its instrumentality, the State Transport (Co-ordination) Board, to limit, upon the principles

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laid down in the Act, the number of vehicles plying for hire on the roads of the State or using the roads in the course of any trade or business. That, in my opinion, is not a regulation of trade and commerce as such, although trade and commerce may be incidentally affected by it. The information directed to be furnished to the Board in an application for a licence and the particular matters, which the Board is directed to consider in dealing with the application, clearly show that the provisions attacked have a real and necessary connection with the objects and purposes which are declared in the preamble, and which are to be gathered from the enactment itself. An examination of the provisions of the Act and the Acts constituting the various public bodies whose activities and services it was passed to co-ordinate and improve shows that the real object of arming the Board with the powers of granting or refusing licences to persons desiring to operate public motor vehicles on the roads of New South Wales was to protect the utility of the public facilities for transport, to save the publicly owned railways of the State from the destructive effect of the uncontrolled or unrestricted use of the facilities for travelling provided by the State out of public moneys and to protect the public finances and the credit of the State. It is, in my opinion, within the legislative power reserved to the States to enact the provisions which are now in question and such provisions are not affected by sec. 92.

This Court, while recognizing the difference between the Australian and American Constitutions has frequently referred to the decisions of the Supreme Court of the United States which were given in cases where State legislation was attacked on the ground of conflict with the commerce clause of the American Constitution. This precedent encourages reference to some of these decisions. In *Sproles* v. *Binford* (1) the Supreme Court of the United States, in dealing with the provisions of a motor vehicle Act of the State of Texas said (2) :—"It is said that the exception was designed to favor transportation by railroad as against transportation by motor trucks. If this was the motive of the Legislature, it does not follow that the classification as made in this case would be invalid. The State has a vital interest in the appropriate utilization

(1) (1932) 286 U.S. 374 : 76 L.Ed. 1167.
(2) (1932) 286 U.S., at p. 394 ; 76 L.Ed., at p. 1182.

of the railroads which serve its people as well as in the proper maintenance of its highways as safe and convenient facilities. The State provides its highways and pays for their upkeep. Its people make railroad transportation possible by the payment of transportation charges. It cannot be said that the State is powerless to protect its highways from being subjected to excessive burdens when other means of transportation are available. The use of highways for truck transportation has its manifest convenience, but we perceive no constitutional ground for denying to the State the right to foster a fair distribution of traffic to the end that all necessary facilities should be maintained and that the public should not be inconvenienced by inordinate uses of its highways for purposes of gain." This statement applies with special force where the railways as well as the roads are built and maintained out of public funds and are owned and managed and controlled by the State. In *Frost* v. *Railroad Commission* (1) the " effect " of the State Act in question was " to offer a special privilege of using the public highways to the private carrier for compensation upon condition that he shall dedicate his property to the quasi-public use of public transportation." Mr. Justice *Sutherland* said (2), in delivering the opinion of the Court :—" It is very clear that the Act, as thus applied, is in no real sense a regulation of the use of the public highways. It is a regulation of the business of those who are engaged in using them. Its primary purpose evidently is to protect the business of those who are common carriers in fact by controlling competitive conditions. Protection or conservation of the highways is not involved." In my opinion, in view of the public ownership of the railways in New South Wales the opinion of Mr. Justice *Holmes* who dissented throws more light on the constitutional question arising in the present case. He said (3) :—" The point before us seems to me well within the legislative power. We all know what serious problems the automobile has introduced. The difficulties of keeping the streets reasonably clear for travel and for traffic are very great. If a State speaking through its Legislature should think that, in order to make its highways most useful, the business traffic upon them must be controlled, I suppose that no one would doubt

(1) (1926) 271 U.S. 583 ; 70 L.Ed. 1101.
(2) (1926) 271 U.S., at p. 591 ; 70 L.Ed., at p. 1104.
(3) (1926) 271 U.S., at p. 601 ; 70 L.Ed., at p. 1108.

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that it constitutionally could, as, I presume, most States or cities do, exercise some such control. The only question is how far it can go. I see nothing to prevent its going to the point of requiring a licence and bringing the whole business under the control of a railroad commission so far as to determine the number, character and conduct of transportation companies and so to prevent the streets from being made useless and dangerous by the number and lawlessness of those who seek to use them." In the State of New South Wales the uncontrolled use of the roads by an inordinate number of "public motor vehicles" is calculated to be dangerous to the efficiency of the railways and directly injurious to the interest of the State. Mr. Justice *Brandeis* concurred with Mr. Justice *Holmes*, and Mr. Justice *McReynolds* also dissented in a separate opinion in which he repeated in substance the views which he expressed as a dissentient in *Bush & Sons Co.* v. *Maloy* (1). In that case he made a noteworthy statement of the problem arising from the increase of motor vehicles in a State where the railways are not publicly owned. In *Louisville and Nashville Railroad Co.* v. *Kentucky* (2), the Court referred to the difference between State legislation affecting the instruments of commerce and legislation with respect to the commerce itself. In the course of its judgment the Court said :—"But little need be said in answer to the final contention of the plaintiff in error, that the assumption of a right to forbid the consolidation of parallel and competing lines is an interference with the power of Congress over inter-State commerce. The same remark may be made with respect to all police regulations of inter-State railways. All such regulations interfere indirectly, more or less, with commerce between the States, in the fact that they impose a burden upon the instruments of such commerce. . . . These are, however, like the taxes imposed upon railways and their rolling stock . . . but are still within the competency of the Legislature to impose . . . There are certain intimations in some of our opinions, which might perhaps lead to an inference that the police power cannot be exercised over a subject confined exclusively to Congress by the Federal Constitution. But while this is true with respect to the commerce itself, it is not true with respect to the instruments of such commerce." Finally

(1) (1925) 267 U.S. 317; 69 L.Ed. 627, at p. 629.
(2) (1895) 161 U.S. 677, at p. 701.

in *Missouri Pacific Railway Co.* v. *Larabee Flour Mills Co.* (1) the Court dealt with the power of the State over the vehicles of inter-State commerce. It quoted and approved the following statement from *Cleveland &c. Railway Co.* v. *Illinois* (2) :—" Few classes of cases have become more common of recent years than those wherein the police power of the State over the vehicles of inter-State commerce has been drawn in question. That such power exists and will be enforced, notwithstanding the constitutional authority of Congress to regulate such commerce, is evident from the large number of cases in which we have sustained the validity of local laws designed to secure the safety and comfort of passengers, employees, persons crossing railway tracks, and adjacent property owners, as well as other regulations intended for the public good." The Court then gave a digest of such cases.

For these reasons, I am of the opinion that the application to make absolute the order *nisi*, should be dismissed.

Rule nisi discharged.

Solicitor for the appellant, *C. Throsby Young*, agent for *Lusher, Young & Stellway* (Wagga Wagga).

Solicitor for the respondent, *F. W. Bretnall*, Solicitor for Transport.

Solicitor for the Commonwealth (intervening), *W. H. Sharwood*, Crown Solicitor for the Commonwealth.

Solicitor for the State of Victoria (intervening), *F. G. Menzies*, Crown Solicitor for Victoria.

H. D. W.

(1) (1909) 211 U.S. 612, at pp. 621, 622; 53 L.Ed. 352, at p. 360.

(2) (1900) 177 U.S. 514, at p. 516; 44 L.Ed. 868, at p. 869.