REPORTS OF CASES

DETERMINED IN THE

HIGH COURT OF AUSTRALIA

[HIGH COURT OF AUSTRALIA.]

GRATWICK . . . . . APPELLANT;
COMPLAINANT,

AND

JOHNSON . . . . . RESPONDENT.
DEFENDANT,

H. C. OF A. 1945.

SYDNEY, *April* 26, 27.

MELBOURNE, *May* 30.

Latham C.J., Rich, Starke, Dixon and McTiernan JJ.

Constitutional Law—Freedom of trade, commerce and intercourse among the States—Defence—National Security—Inter-State transport—Control, regulation and direction—Travel from one State to another State by rail or commercial passenger vehicle without permit, prohibited—Permit—Power of Director-General of Land Transport to grant or refuse—Order—Validity—The Constitution (63 & 64 *Vict. c.* 12), *ss.* 51 (*vi.*), 92—*National Security Act* 1939-1943 (*No.* 15 *of* 1939—*No.* 38 *of* 1943), *s.* 5—*National Security* (*Land Transport*) *Regulations* (*S.R.* 1944 *No.* 49), *regs.* 4, 7, 8—*Restriction of Interstate Passenger Transport Order*, *pars.* 3, 5, 6.

Paragraph 3 (*a*) of the *Restriction of Interstate Passenger Transport Order*, made under the *National Security* (*Land Transport*) *Regulations*, provided that no person should without a permit travel by rail or commercial passenger vehicle from any State in the Commonwealth to any other State therein. Paragraph 5 provided that the Director-General of Land Transport might grant or refuse any application for a permit.

Held that paragraph 3 (*a*) was a direct interference with the freedom of intercourse among the States conferred by s. 92 of the Constitution, and, therefore, was invalid.

James v. *The Commonwealth*, (1936) A.C. 578; 55 C.L.R. 1, discussed.

H. C. OF A. 1945.

GRATWICK v. JOHNSON.

APPEAL, by way of order nisi to review, from a Court of Petty Sessions of Western Australia.

Upon a complaint laid by Ernest Frederick Pether Gratwick, an Inquiry Officer of the Commonwealth Investigation Branch, Dulcie Johnson was charged in a Court of Petty Sessions, Perth, that on or about 2nd October 1944, between Cook in the State of South Australia and Kalgoorlie in the State of Western Australia, she was guilty of an offence against the *National Security Act* 1939-1943 in that she did contravene par. 3 of the *Restriction of Interstate Passenger Transport Order* made in pursuance of the *National Security* (*Land Transport*) *Regulations* made in pursuance of the said Act in that she did without a permit travel by rail from the State of South Australia to the State of Western Australia.

The *Restriction of Interstate Passenger Transport Order* provided, so far as material, as follows :—" 3. Except as otherwise provided in this Order no person shall without a permit travel by rail or by commercial passenger vehicle—(*a*) from any State in the Commonwealth to any other State therein ; (*b*) from any State in the Commonwealth to the Northern Territory ; (*c*) to or from any border station. 4. An application for a permit shall be in writing and contain in detail the reasons for such application . . . 5. The Director-General of Land Transport may grant or refuse any application for a permit. 6. (1) A permit may contain such terms and conditions as the Director-General of Land Transport may impose . . . 9. Nothing in this Order shall apply to any person travelling in uniform on defence duty and holding a ticket issued in pursuance of a defence voucher. 10. Notwithstanding anything contained in this Order the Director-General of Land Transport may from time to time direct that the prohibition contained in paragraph 3 of this Order shall not apply in relation to any railway system or to any part or parts of any railway system or to any road transport service."

It was proved that, for the purpose of visiting her fiancé, the defendant, on or about the material date, travelled by rail from Sydney to Perth by way of Broken Hill, Adelaide, Cook and Kalgoorlie without a permit under the *Restriction of Interstate Passenger Transport Order*, she having been informed upon inquiry that her reasons for travel were insufficient to warrant the granting of a permit.

The magistrate dismissed the complaint on the ground that par. 3 of the Order was incompatible with s. 92 of the Constitution and, therefore, was unconstitutional and invalid.

From that decision the complainant appealed to the High Court by way of an order nisi to review it.

The relevant statutory provisions and *National Security* (*Land Transport*) *Regulations* are sufficiently set forth in the judgment of the Chief Justice hereunder.

Spender K.C. (with him *Sugerman* K.C. and *Dignam*), for the appellant. The *National Security* (*Land Transport*) *Regulations* together with the *National Security* (*Shipping Co-ordination*) *Regulations* and reg. 15 of the *National Security* (*Food Control*) *Regulations* form a comprehensive scheme for the effective use of transport throughout the Commonwealth. The *Restriction of Interstate Passenger Transport Order* must be read with the *Land Transport Regulations* under which it was made. It would be competent under those Regulations, which are an exercise of the defence power, to make an order providing that no person shall, without the necessary permit, travel by rail or by commercial passenger vehicle on any journey in excess of some stipulated minimum distance. It is nothing to the point that the Order, by par. 3, chooses journeys inter-State as specifically necessary to regulate by way of requiring a permit, because of the fact that they are the main arterial railways and the main strategic railways of the country over which transportation must be effected. On the wording of the Regulations and of the Order, the Order is within the defence power. The Order is not a law directed against or preventing inter-State trade, commerce and intercourse. Its real object is an exercise of the defence power, which canalizes the intercourse, and, as such, only incidentally affects it. The regulation or canalizing of transport was referred to in *James* v. *The Commonwealth* (1) and *Andrews* v. *Howell* (2). If the real purpose of the legislation, regulation or order under consideration is directed to the defence of the Commonwealth and the more effective prosecution of the war, the fact that it may refer to or include a journey which is inter-State would none the less make that incidental to the exercise of the defence power and not within s. 92 of the Constitution. State boundaries were chosen in the Order because the problem was one of transport between the States and on the strategic railway lines used in inter-State transport, which has given rise to war-time difficulties. A statute, regulation or order only comes within s. 92 if it is directed against inter-State trade, commerce and intercourse as such. In determining whether

(1) (1936) A.C. 578, at p. 626; 55 C.L.R. 1, at p. 54.

(2) (1941) 65 C.L.R. 255, at pp. 263, 271, 287.

H. C. OF A. 1945. GRATWICK v. JOHNSON.

there has been any infringement of s. 92, regard must be had to all the circumstances (*Adelaide Company of Jehovah's Witnesses Inc.* v. *The Commonwealth* (1)). The Order does not operate as a control of railways, and was not made in exercise of the power conferred by placitum xxxii. of s. 51 of the Constitution, or under s. 64 of the *Defence Act*. The purpose is to control and regulate the transportation by public vehicles of all members of the travelling public. When the country is at war, there must be power to control transport generally on account of the possibility of its being urgently required for naval or military purposes. Intercourse among the States is still free within the meaning of s. 92. This type of regulation is indistinguishable from the matters under consideration in *R.* v. *Vizzard*; *Ex parte Hill* (2), *O. Gilpin Ltd.* v. *Commissioners for Road Transport and Tramways (N.S.W.)* (3), *Bessell* v. *Dayman* (4), *Duncan* v. *Vizzard* (5) and *Riverina Transport Pty. Ltd.* v. *Victoria* (6). The rules to be applied in determining whether or not s. 92 is infringed are succinctly stated in *James* v. *The Commonwealth* (7). Those rules were accepted by the Privy Council (8). Movement across the border is not prevented, but, if a traveller desires to proceed by one or other of two modes of transport, he must submit to some regulation. What would constitute a breach of s. 92 is indicated in *James* v. *The Commonwealth* (9).

[DIXON J. referred to *W. & A. McArthur Ltd.* v. *Queensland* (10).]

The Order is based fundamentally upon the need to conserve transport. The restriction, looking at the terms of the Order and the Regulations under which it was made, is not based simply upon the fact of inter-State passage, but upon that fact considered in the light of defence considerations and the wide-reaching import of such considerations. It follows from *James* v. *The Commonwealth* (11) that a regulation covering a general field which is within the power of the Commonwealth or a State is not an infringement of s. 92, although inter-State trade, or commerce, or intercourse may be indirectly affected, but the regulation is bad if it directly strikes at inter-State trade, commerce, or intercourse. In determining this question, regard should be had to the whole setting of the scheme which is sought to be achieved and under which the Order was made.

(1) (1943) 67 C.L.R. 116, at pp. 154, 155.
(2) (1933) 50 C.L.R. 30.
(3) (1935) 52 C.L.R. 189.
(4) (1935) 52 C.L.R. 215.
(5) (1935) 53 C.L.R. 493.
(6) (1937) 57 C.L.R. 327, at pp. 340, 352, 353, 357, 361, 363, 366, 371.
(7) (1936) A.C., at p. 594; 55 C.L.R., at p. 19.
(8) (1936) A.C., at pp. 622, 623; 55 C.L.R., at p. 51.
(9) (1936) A.C., at pp. 630, 631; 55 C.L.R., at p. 59.
(10) (1920) 28 C.L.R. 530, at p. 536.
(11) (1936) A.C. 578; 55 C.L.R. 1.

Any other approach would be unreal (*James* v. *Cowan* (1)). Consideration should be given to the real object of a statute, regulation or order and not merely to its operation (*R.* v. *Vizzard* ; *Ex parte Hill* (2))—See also *Milk Board* (*N.S.W.*) v. *Metropolitan Cream Pty. Ltd.* (3). The mere operation in any circumstances is not the decisive factor. The word " free " in s. 92 is not, in time of war, to be construed as involving a freedom so wide as to endanger the Constitution itself. Although s. 51 (vi.) is subject to s. 92, the word " free " in s. 92 must be given such a limited meaning as to enable society to protect itself against an enemy and so preserve the organism of government and the Constitution itself (*Andrews* v. *Howell* (4)). If, in time of war, the court is satisfied that what is being done is reasonably necessary for the purpose of prosecuting the war, there is not in that case an infringement of s. 92 (*Andrews* v. *Howell* (5)). In giving a correct interpretation to the Constitution, it is inconceivable that there is some field necessary to the defence of the country which is prohibited both to the States and the Commonwealth. The liberty predicated by s. 92 is not necessarily the same if the matter being dealt with is a trade and commerce power, a post and telegraph power, or a defence power ; it depends upon the nature of the power being dealt with and the time at which it is exercised. Section 92 must be read down in time of war so as to permit the doing of all such things as are obviously essential for the prosecution of a modern war. Although what was said by *Isaacs* J. in *Farey* v. *Burvett* (6) is wrong in law, the reasoning behind it has direct application in determining what, in relation to the exercise of the defence power in time of war, is an infringement of s. 92 : See *Andrews* v. *Howell* (7). In substance, in time of war the defence power is paramount (*Farey* v. *Burvett* (8)).

[DIXON J. referred to *Hirabayashi* v. *United States* (9).]

The Order now under consideration does not contain an absolute prohibition, as was the case in *R.* v. *Smithers* ; *Ex parte Benson* (10). The principles discussed in *Adelaide Company of Jehovah's Witnesses Inc.* v. *The Commonwealth* (11) apply with equal or stronger force to this case.

(1) (1932) A.C. 542 ; 47 C.L.R. 386.
(2) (1933) 50 C.L.R., at pp. 51, 77, 79, 80, 82, 92-94.
(3) (1939) 62 C.L.R. 116, at pp. 149-151.
(4) (1941) 65 C.L.R., at p. 263.
(5) (1941) 65 C.L.R., at p. 287.
(6) (1916) 21 C.L.R. 433, at pp. 453-456.
(7) (1941) 65 C.L.R., at pp. 263, 287.
(8) (1916) 21 C.L.R., at p. 454.
(9) (1943) 320 U.S. 81, at p. 101 ; [87 Law Ed. 1774.]
(10) (1912) 16 C.L.R. 99.
(11) (1943) 67 C.L.R., at pp. 129, 131, 132, 149, 150, 154, 157, 159, 160.

H. C. OF A. 1945. GRATWICK v. JOHNSON.

Maughan K.C. (with him *Barwick* K.C. and *Seaton*), for the respondent. Paragraph 3 of the *Restriction of Interstate Passenger Transport Order* has no connection whatever, in itself, with the defence of the Commonwealth or with the prosecution of the war. It is a prohibition against the carrying of passengers for reward from one State to another State either by rail or by commercial passenger vehicle, therefore it is concerned with intercourse between the States. It is a prohibition quite irrespective and regardless of the geographical position of the thing prohibited. The prohibition is a direct infringement of s. 92 of the Constitution. Paragraph 3 (*a*) has even less connection with the defence of the Commonwealth than had the regulations and conditions of approval respectively considered by the Court in *Adelaide Company of Jehovah's Witnesses Inc.* v. *The Commonwealth* (1) and *Shrimpton* v. *The Commonwealth* (2). Although it cannot be disputed that the Commonwealth Parliament and the Governor-General as its deputy have the right to make laws with regard to transport so far as concerns anything connected with the defence of the Commonwealth, that does not give them the power to make a statute, regulation or order in any terms whatsoever if the particular statute, regulation or order so made has no connection whatever with the defence of the Commonwealth, or the prosecution of the war. So long as such travelling would not interfere with the defence of the Commonwealth and the prosecution of the war, it would be quite wrong to prohibit people from travelling for pleasure or any other purpose lawful in itself. Upon the principles laid down in *James* v. *The Commonwealth* (3) and applied in *Milk Board (N.S.W.)* v. *Metropolitan Cream Pty. Ltd.* (4), the Order infringes s. 92. A regulation, or an order made under a regulation, cannot be made good by stating therein a necessary or desirable object if an examination reveals that that is not its purpose or object, or that it lacks the necessary nexus (*R.* v. *University of Sydney*; *Ex parte Drummond* (5)). The purpose or object of a statute must be gathered from its context looked at in the circumstances. The object of the *Restriction of Interstate Passenger Transport Order* is to prevent people from proceeding from one State to another State by the particular means of travel indicated. Here the result flowing from the Order is direct, whereas in *Riverina Transport Pty. Ltd.* v. *Victoria* (6) the result was indirect. Under the Order, the prohibition operates at the borders or "frontiers" of the States (*James* v. *The Commonwealth* (7)), and not merely within

(1) (1943) 67 C.L.R. 116.
(2) (1945) 69 C.L.R. 613.
(3) (1936) A.C. 578; 55 C.L.R. 1.
(4) (1939) 62 C.L.R. 116.
(5) (1943) 67 C.L.R. 95, at p. 102.
(6) (1937) 57 C.L.R. 327.
(7) (1936) A.C., at p. 630; 55 C.L.R., at p. 58.

a district far removed from those borders or frontiers as in *Milk Board (N.S.W.)* v. *Metropolitan Cream Pty. Ltd.* (1). Where a general law is passed by the Commonwealth or a State under its undoubted powers and that law in its operation indirectly interferes with intercourse among the States, it is not an infringement of s. 92 and, therefore, is valid (*R.* v. *Vizzard*; *Ex parte Hill* (2); *Riverina Transport Pty. Ltd.* v. *Victoria* (3); *Milk Board (N.S.W.)* v. *Metropolitan Cream Pty. Ltd.* (4)). Where, however, a law of the Commonwealth or a State directly forbids intercourse among the States, either absolutely or *sub modo*, it is bad as infringing s. 92 even if found in a Commonwealth or State scheme of regulation (*R.* v. *Smithers* (5); *R.* v. *Vizzard*; *Ex parte Hill* (6))—See also *Riverina Transport Pty. Ltd.* v. *Victoria* (7) and *Tasmania* v. *Victoria* (8). The provisions of par. 3 (*a*) of the Order are substantially the same as the provisions of s. 3 (1) (*b*) of the *Dried Fruits Act* 1928-1935, held in *James* v. *The Commonwealth* (9) to contravene s. 92. The words "subject to this Constitution" in s. 51 apply to all the placita. *James* v. *Cowan* (10) shows that s. 92 may be contravened other than by direct prohibition.

[STARKE J. referred to *O. Gilpin Ltd.* v. *Commissioner for Road Transport and Tramways (N.S.W.)* (11).

[DIXON J. referred to *R.* v. *Martin*; *Ex parte Wawn* (12).]

It is not a proper construction of the Constitution that in time of war the defence power conferred by s. 51 (vi.) is paramount and that the Commonwealth Parliament or its deputy can proceed to make regulations quite regardless of the restriction contained in s. 92. There is nothing in the evidence or in anything put before the Court in this case to show that a crisis has arisen entitling the Court to adopt the maxim *salus populi suprema lex* in such a way as to ignore what would ordinarily be the construction of the Constitution. The mere declaration and waging of war, serious though it be, does not constitute such a crisis. To "read down" s. 92 is to supersede that section. The Order may not be beyond the powers conferred by the *National Security (Land Transport) Regulations*, but it certainly is beyond the defence power. The Regulations are too wide because they cover more than the defence power authorizes.

(1) (1939) 62 C.L.R., at pp. 131, 132, 134, 138-143, 149.
(2) (1933) 50 C.L.R. 30.
(3) (1937) 57 C.L.R. 327.
(4) (1939) 62 C.L.R., at pp. 149, 153, 158.
(5) (1912) 16 C.L.R. 99.
(6) (1933) 50 C.L.R., at p. 49.
(7) (1937) 57 C.L.R., at pp. 343, 348, 357, 358, 366, 367, 369, 371.
(8) (1935) 52 C.L.R. 157.
(9) (1936) A.C. 578; 55 C.L.R. 1.
(10) (1932) A.C. 542; 47 C.L.R. 386.
(11) (1935) 52 C.L.R., at p. 211.
(12) (1939) 62 C.L.R. 457, at p. 462.

H. C. OF A. 1945. GRATWICK v. JOHNSON.

Spender K.C., in reply. Regulation 7, particularly sub-reg. (3) (*b*), (*d*) and (*f*), of the *Land Transport Regulations* shows that it was sought to deal with the equipment and rolling stock used in transport by striking, *inter alia*, at the persons who use that equipment and rolling stock. The Order is within the defence power. It is part of a comprehensive scheme designed for the purpose of giving effect to the *Land Transport Regulations*, and should be so construed. Its purpose is determined not only by what it does, but by what subject matter it deals with, the reason why it deals with it, and the reason why it deals with it in the manner therein shown. The scheme of priorities supposes there is not sufficient accommodation on the trains to meet all demands (*Andrews* v. *Howell* (1)). The fact that the Order does not expressly refer to the movement of defence force personnel, equipment and munitions has no bearing upon whether or not it is related to defence (*Victorian Chamber of Manufactures* v. *The Commonwealth* (*Women's Employment Regulations*) (2) ; *Pidoto* v. *Victoria* (3) ; *R.* v. *Commonwealth Court of Conciliation and Arbitration* ; *Ex parte Victoria* (4) ; *Reid* v. *Sinderberry* (5) ; *Stenhouse* v. *Coleman* (6) ; *Northern Pacific Railway Co.* v. *North Dakota* (7)).

Cur. adv. vult.

May 30.

The following written judgments were delivered :—

LATHAM C.J. Appeal by way of order nisi from an order of a stipendiary magistrate in Western Australia dismissing a complaint for an offence against the *National Security Act* 1939-1943. The respondent, Dulcie Johnson, was charged with contravening a provision of the *Restriction of Interstate Passenger Transport Order* made under the *National Security* (*Land Transport*) *Regulations* in that she did without a permit travel by rail from the State of South Australia to the State of Western Australia. The Order provided that, except as provided therein, no person should without a permit travel by rail from any State in the Commonwealth to any other State therein. It was proved that the respondent travelled by rail from New South Wales to Western Australia, without a permit, for the purpose of visiting her fiancé. The charge was dismissed upon the ground that the Order infringed s. 92 of the Constitution, which provides that, on the imposition of uniform duties of customs,

(1) (1941) 65 C.L.R., at p. 278.
(2) (1943) 67 C.L.R. 347, at pp. 375, 383, 400.
(3) (1943) 68 C.L.R. 87, at pp. 127, 128.
(4) (1944) 68 C.L.R. 485, at pp. 493, 500, 501.
(5) (1944) 68 C.L.R. 504, at pp. 512-514.
(6) (1944) 69 C.L.R. 457, at p. 463.
(7) (1919) 250 U.S. 135, at pp. 149, 150 [63 Law. Ed., at pp. 903-904].

trade, commerce and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free. An order nisi to review this decision was obtained upon the grounds that the magistrate was wrong in so deciding.

The *National Security Act* 1939-1943, s. 5, provides, *inter alia*, that the Governor-General may make regulations for securing the public safety and the defence of the Commonwealth and the territories of the Commonwealth, and for prescribing all matters which are necessary or convenient to be prescribed for the more effectual prosecution of any war in which His Majesty is or may be engaged. The *National Security* (*Land Transport*) *Regulations*, Statutory Rules 1944 No. 49, were made under the Act. Regulation 4 provides: "The objects of these Regulations are to secure, in the interests of the defence of the Commonwealth and the effectual prosecution of the war, the control by the Commonwealth of rail and road transport and for that purpose to provide that rail facilities, equipment and rolling stock and road services and vehicles shall be subject to control, regulation and direction, and these Regulations shall be administered and construed accordingly."

Regulation 7 (1) provides that: "The Minister shall have power and authority to control, regulate and direct the transport of goods and passengers by rail or road within the Commonwealth." Regulation 7 (2) provides that the power and authority conferred by reg. 7 (1) "shall extend to the control, regulation and direction of—(*a*) any railway or road transport service" and "(*d*) the carriage of passengers and goods by land generally." Regulation 7 (3) provides that the Minister shall have power and authority to control all rail and road transport services and to direct the order of priority to be accorded to the carriage of specified goods, classes of goods or passengers; to direct at what times and places and upon what terms and conditions and in what manner passengers shall be picked up for carriage by rail or road transport; and to direct on what terms and conditions contracts for the carriage of passengers and goods by such transport may be entered into.

Regulation 8 provides that: "The Minister shall have power to make such orders . . . and do all such other things as he thinks fit, for the purposes of these Regulations."

The *Restriction of Interstate Passenger Transport Order* was made under earlier corresponding provisions and was continued in force by Statutory Rules 1944 No. 49, reg. 3, as if made under those Regulations. Paragraph 2 of the Order defines "border station" as meaning and including Albury, Broken Hill, Casino, Mildura, &c., and such other places as the Director-General of Land Transport

H. C. OF A 1945.

GRATWICK v. JOHNSON.

Latham C.J.

may from time to time determine to be border stations for the purposes of the Order. "Permit" is defined as meaning permit issued pursuant to the Order.

Paragraph 3 provides:—"Except as otherwise provided in this Order no person shall without a permit travel by rail or by commercial passenger vehicle—(*a*) from any State in the Commonwealth to any other State therein; (*b*) from any State in the Commonwealth to the Northern Territory; (*c*) to or from any border station."

Paragraph 4 provides that an application for a permit shall be in writing, and shall contain in detail the reasons for the application, and par. 5 provides that the Director-General of Land Transport may grant or refuse any application for a permit. Paragraph 6 provides that a permit may contain such terms and conditions as the Director-General of Land Transport may impose. Paragraph 9 provides that a permit is not required for persons travelling on defence duty. They may travel without permits. But the provisions cannot be regarded as therefore only giving preference in inter-State travel to defence personnel. Provisions which only gave such preference might well be regarded as directed to the subject of defence. But par. 9 only excludes defence personnel from the application of the Order, leaving untouched the question of the validity of the other provisions requiring all other persons to obtain permits.

The form of application for a permit set forth in the schedule is entitled "Application for Priority Permit to Travel by Rail," and provides for a statement of the reasons by the applicant why the travel is deemed to be essential. The form of permit provided is an authority to travel within a specified time subject to existing railway by-laws and regulations. The conditions on the back of the permit refer to different priority orders ranging from 2 to 8, but there is no specification of any rules or principles in accordance with which an applicant is given one priority rather than another.

It has been argued for the appellant that the Order is valid because, first, it is authorized by the Regulations—a proposition which has not been contested; secondly, the Regulations are authorized by the *National Security Act*, inasmuch as the control of transport has an important relation to the defence of the Commonwealth; and, thirdly, the Order does not, it is argued, involve any infringement of s. 92 of the Constitution.

The subject of transport is most intimately connected with defence, and, in my opinion, the Commonwealth Parliament has, under s. 51 (vi.) (defence power) of the Constitution, very large powers of controlling transport in time of war. But, however extensive these

powers may be, they do not, in my opinion, exclude the application of s. 92. Even if the Regulations and the Order, apart from s. 92, are completely valid, they cannot be upheld if they are inconsistent with s. 92. All the legislative powers given to the Commonwealth Parliament by s. 51 of the Constitution are given expressly " subject to this Constitution." The defence power is no exception. Section 92 is a provision which introduces into the substantive law of both Commonwealth and States a provision that trade, commerce and intercourse among the States shall be absolutely free. No statute or regulation or order made under a statute, whether by the Commonwealth or by a State, can repeal or modify this provision. It is a constitutional prohibition which is a limitation upon all legislative power. I refer to what I have said with respect to this matter in *South Australia* v. *The Commonwealth* (*Uniform Taxation Case*) (1) and cf. *Adelaide Company of Jehovah's Witnesses Inc.* v. *The Commonwealth* (2), with reference to the prohibition of interfering with the free exercise of any religion contained in s. 116 of the Constitution. A provision in any law which is inconsistent with the freedom of trade, commerce and intercourse among the States which is protected by s. 92 must be held to be ineffectual and inoperative.

Counsel for the appellant disclaimed any contention that the power of the Commonwealth Parliament to legislate with respect to defence prevailed over s. 92, but he did submit an argument based on the ancient maxim *salus populi suprema lex*. I give some references to relatively recent allusions to this maxim: *R.* v. *Kidman* (3); *In re a Petition of Right* (4), overruled in *Attorney-General* v. *De Keyser's Royal Hotel Ltd.* (5); *Halsbury's Laws of England*, 2nd ed., vol. vi., p. 498; *James* v. *The Commonwealth* (6). Reference may also be made to the judgment of *Holmes* J. in *Moyer* v. *Peabody* (7).

The maxim *salus populi suprema lex* is sometimes only a statement of a principle which should guide legislators in determining whether they will make a particular law: See, for example, the discussion of the maxim in the *Encyclopaedia of the Laws of England*, 2nd ed. (1908), vol. ix., p. 102, under the heading "Legal Maxims". Presumably all laws made by parliaments are thought by their supporters to be justified by a concern for the welfare of the people. The maxim, so understood, is a wise political observation—not a legal criterion of constitutional validity. From a legal standpoint, the maxim really represents a doctrine of

(1) (1942) 65 C.L.R. 373, at pp. 408, 422, 426.
(2) (1943) 67 C.L.R. 116, at p. 123.
(3) (1915) 20 C.L.R. 425, at p. 435.
(4) (1915) 3 K.B. 649, at pp. 651, 652.
(5) (1920) A.C. 508, at pp. 524, 552, 565.
(6) (1936) A.C. 578, at p. 625; 55 C.L.R. 1, at p. 53.
(7) (1909) 212 U.S. 78; [53 Law. Ed. 410].

H. C. OF A. 1945.

GRATWICK v. JOHNSON.

Latham C.J.

political necessity which in time of crisis may justify extraordinary action—as, for example, under the royal prerogative in time of imminent national danger. But the royal prerogative is itself part of the common law. The view that *salus populi* can abrogate all law belongs to the world of war and revolution, not to that of law. The maxim, so understood, becomes indistinguishable from *silent leges inter arma*. If such a rule does find any place in the legal system of Australia, it can apply only in times of the gravest crisis and emergency, when the necessity of preserving the community and the lives of the people takes precedence over all other considerations. In such circumstances, ordinary laws are in fact and as a matter of necessity in abeyance. The present circumstances of Australia, fortunately, are such that no decision upon this question is necessary in this case, and I do not express an opinion upon the possible application of such a rule in other circumstances. I do, however, point out that the Commonwealth Constitution contains no special provision dealing with national emergency which enables the Commonwealth Parliament or the Commonwealth Government in effect to repeal the Constitution *pro tempore*, even to meet such an emergency. The Commonwealth Parliament does not possess residuary powers of general legislation for the peace, order and good government of Australia such as those which are vested in the Dominion Parliament under the *British North America Act* 1867, s. 91 (See *Fort Frances Pulp & Power Co. Ltd.* v. *Manitoba Free Press Co. Ltd.* (1)); nor is there any provision in the Commonwealth Constitution corresponding to s. 72 of Schedule IX. of the *Government of India Act* 1935, which recently received the consideration of the Judicial Committee of the Privy Council in *King-Emperor* v. *Benoari Lal Sarma* (2).

I proceed, therefore, to consider whether the challenged Order is inconsistent with s. 92 as infringing freedom of intercourse among the States, of which s. 92 is the guarantee.

The case against the Order can be put very simply:—Section 92 says that any person can travel between the States if he pleases. The Order says that no person may travel between the States unless a Commonwealth officer pleases. The Order explicitly makes transit and access for persons between the States dependent upon obtaining official permission, and therefore imposes a barrier to such transit and access, as distinguished from other travelling, because, and only because, it is inter-State. The Order would therefore appear to be what the magistrate described as "a direct negation of s. 92."

(1) (1923) A.C. 695.

(2) (1945) A.C. 14.

It is contended for the appellant, however, that s. 92 has been so interpreted in the courts that it cannot now rightly be held that the Order is invalid by reason of conflict with s. 92. It is argued that the Order is made in pursuance of the defence power, and is really directed to considerations of defence; that the restriction upon inter-State travel is only incidental; and that the Order is not directed against inter-State intercourse as such. It is argued that the approval in *James* v. *The Commonwealth* (1) of *R.* v. *Vizzard*; *Ex parte Hill* (2), together with the application of the principle of *Vizzard's Case* (2) in *Riverina Transport Pty. Ltd.* v. *Victoria* (3), shows that there may be laws which regulate, or, as it has been put, " canalize " inter-State transport and that such laws are not invalid by reason of s. 92.

I take *James* v. *The Commonwealth* (4) as being now the most useful starting point for any consideration of the meaning of s. 92. That decision is binding upon this Court, and it was given after an examination of the prior cases dealing with the matter. In that case, the Privy Council dealt with the problem arising from the co-existence in the Commonwealth Constitution of s. 51 (i.) and s. 92. Section 51 (i.) provides that the Commonwealth Parliament shall have power to make laws with respect to inter-State trade and commerce, while s. 92 provides that such trade and commerce shall be absolutely free. The power conferred by s. 51 is not an exclusive power—State Parliaments also have power to legislate with respect to inter-State trade and commerce (5). It is difficult, therefore, to hold that the word " free " in s. 92 relates to freedom from all legislative control and regulation. If s. 92 were interpreted in this sense, it would be impossible for any Parliament in Australia to make any law which applied to such trade and commerce. It cannot be supposed that any such impossible result was intended. Accordingly, the problem was that of reconciling some degree of legislative control with what was described as absolute freedom. The solution was discovered in drawing a distinction between laws of such a character that they did not interfere with the freedom which was guaranteed by s. 92 and other laws which did interfere with such freedom. Thus a distinction was drawn between a law directed against inter-State transport, or merely prohibiting inter-State transport on the one hand, and, on the other hand, a law which, though it incidentally affected inter-State transport, was not directed against it, but introduced a system of regulation which included

(1) (1936) A.C. 578; 55 C.L.R. 1.
(2) (1933) 50 C.L.R. 30.
(3) (1937) 57 C.L.R. 327.
(4) (1936) A.C. 578; 55 C.L.R. 1.
(5) (1936) A.C., at p. 611; 55 C.L.R., at p. 41.

H. C. OF A. 1945.

GRATWICK v. JOHNSON.

Latham C.J.

inter-State transport and which did not amount to a mere prohibition thereof. It was stated in *James* v. *The Commonwealth* (1) that certain reasoning of *Evatt* J. in *Vizzard's Case* (2) was correct. That reasoning admitted, notwithstanding s. 92, a large amount of legislative control even of inter-State carriage of commodities by State transport or marketing regulations. The same degree of control by the Commonwealth is allowable, because *James* v. *The Commonwealth* (3) decides that s. 92 applies in the same sense to both Commonwealth and States. But their Lordships proceeded to point out that the case would be different if, as was held in *James* v. *Cowan* (4), the real object of the challenged legislation was to enable restrictions to be placed on inter-State commerce. In that case, it was said by Lord *Atkin* (5) that even if powers were expressly granted subject to s. 92 (as in the statute then under consideration), they might rightly be used for a primary object which was not directed to trade and commerce, but, *inter alia*, to defence against the enemy, and that such an exercise of the power would not be open to attack "because incidentally inter-State trade was affected." These principles were applied in the *Riverina Case* (6), and in other cases which have since been decided in this Court. In *Home Benefits Pty. Ltd.* v. *Crafter* (7), I applied the distinction between a regulation and a mere prohibition of inter-State trade and commerce (8). In *Milk Board (N.S.W.)* v. *Metropolitan Cream Pty. Ltd.* (9), I endeavoured to state the principle of the decision in *James* v. *The Commonwealth* (3) in the following words:—"One proposition which I regard as established is that simple legislative prohibition (Federal or State), as distinct from regulation, of inter-State trade and commerce is invalid. Further, a law which is 'directed against' inter-State trade and commerce is invalid. Such a law does not regulate such trade, it merely prevents it. But a law prescribing rules as to the manner in which trade (including transport) is to be conducted is not a mere prohibition and may be valid in its application to inter-State trade notwithstanding s. 92" (10).

In the present case, the provision in the Order that no person shall without a permit travel by rail from any State in the Commonwealth to any other State therein is a mere prohibition of inter-State intercourse. It is in terms "directed against" such intercourse. The Order says to all persons: "You cannot travel inter-State

(1) (1936) A.C., at p. 621; 55 C.L.R., at p. 50.
(2) (1933) 50 C.L.R., at p. 94.
(3) (1936) A.C. 578; 55 C.L.R. 1.
(4) (1932) A.C. 542; 47 C.L.R. 386.
(5) (1932) A.C., at pp. 558, 559; 47 C.L.R., at pp. 396, 397.
(6) (1937) 57 C.L.R. 327.
(7) (1939) 61 C.L.R. 701.
(8) (1939) 61 C.L.R., at p. 711.
(9) (1939) 62 C.L.R. 116.
(10) (1939) 62 C.L.R., at p. 127.

unless I, the Director-General of Land Transport, allow you so to travel." The Order does not provide any general system of regulation of traffic or transport as in the *Vizzard* (1) and *Riverina Cases* (2) and other transport cases. There are no provisions in the Order which can be relied upon for the purpose of preventing the Director-General of Land Transport from exercising his powers in a completely arbitrary manner. No indication is given of the matters which he is to take into account in determining whether to grant or refuse a permit. It is true that the application for a permit must state the reasons for the journey, but the Director-General could consistently with all the provisions of the Order refuse a permit to a person on any ground whatever, or upon no ground. He might do it because he did not believe in a particular form of trade or commerce, or because he disapproved for any reason whatever the object of any proposed journey, which might be trading or commercial in character, or, as in the present case, with an entirely different object—a personal visit. In the recent case of *Shrimpton* v. *The Commonwealth* (3) it was possible, in my opinion, to find provisions in the regulations which were then under consideration which imposed a limitation upon what, in the absence of those provisions, would have been a completely arbitrary discretion not shown to be related to any purposes of defence. There are no such provisions in the Order in this case.

The reference to considerations of defence in the " objects clause " of the Regulations (reg. 4) does not provide an answer to these objections. Such a provision does not dispense with the necessity of examining the Regulations in order to determine their substantial character when a question of constitutional validity arises (*R.* v. *University of Sydney*; *Ex parte Drummond* (4)).

In my opinion, therefore, clause 3 (*a*) of the Order, under which the respondent was prosecuted, is invalid because it is inconsistent with s. 92 of the Constitution. The magistrate, therefore, rightly dismissed the charge, and the appeal should be dismissed.

Rich J. The respondent, who had travelled from the State of New South Wales to the State of Western Australia without a permit, was charged that " she did contravene " a provision—par. 3 of the *Restriction of Interstate Passenger Transport Order*—made pursuant to the *National Security* (*Land Transport*) *Regulations*. The charge was dismissed by the stipendiary magistrate, who held that par. 3 of the Order was incompatible with s. 92 of the Constitution and

(1) (1933) 50 C.L.R. 30.
(2) (1937) 57 C.L.R. 327.
(3) (1945) 69 C.L.R. 613.
(4) (1943) 67 C.L.R. 95.

H. C. OF A. 1945. GRATWICK v. JOHNSON. Rich J.

therefore unconstitutional and invalid. Against this decision the appellant obtained an order nisi to review which is the proceeding before us. Paragraph 3 of this Order provides, *inter alia* :—" Except as otherwise provided in this Order no person shall without a permit travel by rail or by commercial passenger vehicle—(*a*) from any State in the Commonwealth to any other State therein." It was contended on behalf of the appellant that " the real purpose of the Order was to effectuate defence, canalize and regulate transport." In support of this proposition, numerous decisions of this Court and the two decisions of the Privy Council were cited to us. I find it unnecessary to analyze these cases because I consider that the paragraph of the Order I have quoted is a direct and immediate invasion of the freedom guaranteed by s. 92 to which the defence power is subject (*James* v. *Cowan* (1)). No doubt cases may occur where the exigencies of war require the regulation of the transport of men and material. The facts, however, in the instant case show no such emergency. And the criterion of the application of s. 92 depends upon the facts of the particular case. The maxim *salus populi*, which was called in aid, was, in olden days, the basis of policies, but in these latter days has not the same overriding effect, especially in the case of a Constitution where the defence power is subject to s. 92. The Acts the subject of *Duncan* v. *Vizzard* (2) and of the *Riverina Transport Case* (3) did not raise questions analogous to the present case.

In my opinion par. 3 (*a*) of the Order imposes a direct restraint on the freedom conferred by s. 92. I consider that the decision of the stipendiary magistrate was right and that the rule nisi should be discharged.

STARKE J. The respondent was charged on complaint that she did without a permit travel by rail from the State of South Australia to the State of Western Australia contrary to an Order of the Land Transport Board, made pursuant to the *National Security* (*Land Transport*) *Regulations*: See Statutory Rules 1942 No. 149, as amended, and Statutory Rules 1944 No. 49, reg. 3 (2). The Order provided, so far as is material to this case, that no person should, without a permit issued pursuant to the Order, travel by rail or by commercial passenger vehicle from any State in the Commonwealth to any other State therein. The complaint was dismissed on the ground that the Order was invalid inasmuch as it contravened the provisions of s. 92 of the Constitution.

(1) (1930) 43 C.L.R. 386, at p. 425. (2) (1935) 53 C.L.R. 493.
(3) (1937) 57 C.L.R. 327.

The only question raised on this appeal is whether that decision was right. It is provided by s. 92 of the Constitution that trade, commerce and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free. The people of Australia are thus free to pass to and fro among the States without burden, hindrance or restriction and in *James* v. *The Commonwealth* (1) it is said that " in every case it must be a question of fact, whether there is an interference with this freedom of passage." *James* v. *Cowan* (2) and *James* v. *The Commonwealth* (3) in the Privy Council are authoritative decisions that the restriction imposed by the Order challenged in this case is such an interference, for no person may travel without a permit by rail or by commercial vehicle from State to State. But it is contended that the constitutional power to make laws with respect to defence and the National Security legislation warrant the Order and that decisions of this Court, which are collected in *R.* v. *Vizzard* (4) and *Riverina Transport Pty. Ltd.* v. *Victoria* (5) support the proposition. The constitutional power, however, is granted " subject to this Constitution " and, therefore, to the provisions of s. 92 which is a declaration of right guaranteed and protected by the Constitution (*James* v. *The Commonwealth* (6)). None of the cases referred to formulate " a precise and inflexible interpretation " of s. 92, but all, I think, recognize that " legislation ' pointed directly at the act of entry, in course of commerce, into the second State ' " contravenes the provisions of s. 92 : See *Willard* v. *Rawson* (7). And it follows that legislation pointed directly at the passing of people to and fro among the States also contravenes the provisions of s. 92. It is immaterial, as I understand the cases, that the object or purpose of the legislation, gathered from its provisions, is for the public safety or defence of the Commonwealth or any other legislative purpose if it be pointed directly at the right guaranteed and protected by the provisions of s. 92 of the Constitution. It does not follow that legislation which is not so pointed or that acts done pursuant to such legislation will not contravene the constitutional provision (See *James* v. *Cowan* (2) ; *Peanut Board* v. *Rockhampton Harbour Board* (8)), but it is enough in this case to say that the Order attacked is so pointed, and consequently is, to that extent, bad.

Upon the oft-repeated assertion in this Court that the Judicial Committee has approved of the decision in *R.* v. *Vizzard* (4) I would

(1) (1936) A.C., at p. 631 ; 55 C.L.R., at p. 59.
(2) (1932) A.C. 542 ; 47 C.L.R. 386.
(3) (1936) A.C. 578 ; 55 C.L.R. 1.
(4) (1933) 50 C.L.R. 30.
(5) (1937) 57 C.L.R. 327.
(6) (1936) A.C., at pp. 616, 631, 633.
(7) (1933) 48 C.L.R. 316, at p. 335.
(8) (1933) 48 C.L.R. 266.

H. C. OF A. 1945.

GRATWICK v. JOHNSON.

Starke J.

observe that their Lordships, in reference to that case, were dealing with "the conception enunciated in *McArthur's Case* (1) that 'free' means free from every sort of impediment or control by any organ of Government, legislature or executive to which s. 92 is addressed with respect to trade commerce and intercourse", that freedom is postulated as attaching to every step in the sequence of events from first to last (*James* v. *The Commonwealth* (2)). It is with that conception that their Lordships did not agree, but they did agree with this passage in *R.* v. *Vizzard* (3): "Section 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." And then their Lordships go on to formulate their own conception of the freedom guaranteed by s. 92, namely, "freedom as at the frontier or, to use the words of s. 112" (of the Constitution), "in respect of 'goods passing into or out of the State'" (*James* v. *The Commonwealth* (4)). And their Lordships add that "in every case it must be a question of fact, whether there is an interference with this freedom of passage" (5). It may be that their Lordships would have reached the same conclusion in *Vizzard's Case* (6) as was reached in this Court by a majority of its members, but, though approving of some of the reasoning in this Court, their Lordships did not expressly or necessarily say that they approved of the decision. Indeed, it would have been necessary, I should think, for their Lordships to have examined the relevant Acts and considered their operation upon inter-State trade before reaching such a decision. The fact that the Judicial Committee refused special leave to appeal in the cases of *O. Gilpin Ltd.* v. *Commissioner of Road Transport & Tramways (N.S.W.)* (7) and *Duncan and Green Star Trading Co. Pty. Ltd.* v. *Vizzard* (8) is also relied upon in support of the assertion that *R.* v. *Vizzard* (6) was approved in the Privy Council, but the fact is inconclusive, for their Lordships merely stated, according to the shorthand notes of the argument

(1) (1920) 28 C.L.R. 530.
(2) (1936) A.C., at pp. 620-622, 628; 55 C.L.R., at pp. 49-51, 56, 57.
(3) (1933) 50 C.L.R., at p. 94.
(4) (1936) A.C., at p. 630; 55 C.L.R., at p. 58.
(5) (1936) A.C., at p. 631; 55 C.L.R., at p. 59.
(6) (1933) 50 C.L.R. 30.
(7) (1935) 52 C.L.R. 189.
(8) (1935) 53 C.L.R. 493.

on the petition for special leave (which I have seen), that there was no sufficient ground for breaking in upon the general rule that the decisions of this Court were final and that no special reasons had been shown sufficient to bring the cases within the exception to the rule which would justify their Lordships in granting special leave to appeal.

The order nisi to review in this case should be discharged.

DIXON J. In questions concerning the application of s. 92 of the Constitution, I think that it has become desirable for the Court to avoid as far as possible the statement of general propositions and in each case to decide the matter, so far as may be, on the specific considerations or features which it presents. None of the many attempts that have been made to formulate principles or to expound the meaning and operation of the text has succeeded in giving the guidance in subsequent cases which their authors had hoped. What has been clear has not found acceptance and what has been accepted has yet to be made clear. But, if we proceed by applying on each occasion the general sense conveyed by the words of the Constitution, following always what we conceive to be the effect of the two decisions of the Privy Council, we may eventually find that, as nothing walks with aimless feet, we have pursued a course which ascertains and determines the operation of the provision more effectually than can be done by abstract reasoning and discussion.

In the case before us I think there is no difficulty.

For some reason, depending no doubt on practical administrative considerations, but nevertheless arguing an indifference to, if not a disdain of, the terms of s. 92, the *Restriction of Interstate Passenger Transport Order* chooses to make the fact that a journey by rail or by commercial passenger vehicle is to be made from any State in the Commonwealth to any other State the very reason for prohibiting it, unless a permit for it is granted by the Director-General of Land Transport. The Order is directed to the intending passenger. It does not profess to be concerned with priorities of travel upon transport facilities under excessive demand and it is certainly not confined to that matter. It does not, at all events so far as appears from its text or by evidence, depend in any degree for its practical operation or administration upon the movement of troops, munitions, war supplies, or any like considerations. It is simply based on the " inter-Stateness " of the journeys it assumes to control, or, in the case of the Northern Territory, to which a statutory provision in the same terms as s. 92 applies (s. 10 of the *Northern*

H. C. OF A 1945.

GRATWICK v. JOHNSON.

Dixon J.

Territory (*Administration*) *Act* 1910-1940), on the fact that the journey is to or from a State.

I cannot see how it can be said that such an Order leaves intercourse among the States by internal carriage absolutely free, as s. 92 expressly commands that it shall be.

The application of what Lord *Wright* describes as "the true criterion" of the operation of the section, viz.: "freedom as at the frontier", "passing into or out of the State" (*James* v. *The Commonwealth* (1)), seems quite fatal to the validity of the Order.

It was not disputed that legislation under the defence power is subject to s. 92. But it was suggested that s. 92 was itself susceptible of a different operation or application where matters of defence were concerned. The maxim *salus populi suprema lex* was even adduced. *Selden*, in his *Table Talk*, said, "There is not any thing in the world more abused than this sentence, *salus populi suprema lex esto*; for we apply it as if we ought to forsake the known law when it may be most for the advantage of the people, when it means no such thing. For first, 'tis not *salus populi suprema lex est*, but *esto*." In truth, that is the form in which *Cicero* gives it in the *De Legibus* (iii.: 3: 8).

It is going a long way to suggest that the imperative demands of national safety necessitate a general prohibition operating in every part of the continent of travelling without a permit by public conveyance, but only if it is a journey with its terminus *a quo* in one State and its terminus *ad quem* in another State. It is, of course, quite true that many things that may lawfully be done in the course of, in support of, or in consequence of, military operations and other matters attending the conduct of war may prejudice the enjoyment of what otherwise might be considered the right to proceed or carry goods from one State to another. But that is because s. 92 does not relate to the factual consequences which ensue from the actual conduct of war. Things of that sort, although done under the authority of government, are not opposed to s. 92. They do not take trade, commerce or intercourse among States or any of the essential factors forming such trade, commerce and intercourse and deal with them. The consequences or incidents to which the actual conduct of war in fact gives rise can scarcely be regarded as any more within the protection of s. 92 than if they flowed from enemy action. But these are considerations which have no relation to a general administrative order expressly detracting from the freedom guaranteed by s. 92. That appears to me to be the character which the *Restriction of Interstate Passenger Transport Order* bears.

(1) (1936) A.C., at p. 630; 55 C.L.R., at p. 58.

In my opinion the appeal should be dismissed with costs and the order nisi should be discharged.

McTIERNAN J. I agree that this appeal should be dismissed.

The *Restriction of Interstate Passenger Transport Order* rests upon the *National Security* (*Land Transport*) *Regulations*, Statutory Rules 1944 No. 49, particularly reg. 3 of those Regulations. These Regulations were made by the Governor-General in Council in pursuance of the powers in s. 5 of the *National Security Act* 1939-1943.

The Commonwealth is bound by s. 92 of the Constitution: *James* v. *The Commonwealth* (1). Section 5 of the *National Security Act* is an exercise of legislative power conferred by s. 51 of the Constitution: this grant of power is by this section made "subject to this Constitution," and these words draw in, among other provisions of the Constitution, s. 92. It follows that s. 5 and the delegation of the legislative power which it sanctions and in pursuance of which the above Order purports to be made are overridden by s. 92: Cf. *Jehovah's Witnesses' Case* (2). The Order is therefore open to challenge on the ground that it contravenes s. 92.

The present prosecution was made under clause 3 (*a*) of the Order. This sub-clause is not directed against an act which is subversive of the Constitution. Accordingly clause 3 (*a*) cannot be held to be outside the scope of s. 92 for the reasons which the Regulations and Order in the *Jehovah's Witnesses' Case* (2) were held not to be affected by s. 116 of the Constitution.

The present Order was made in circumstances of grave national peril, but it derives from no other legal source than an Act made under s. 51 of the Constitution. Whatever be the legal content of the maxim *salus populi suprema lex*, it is not the constitutional basis of the present Order and the maxim cannot therefore invest the Order with the force of a law superior to s. 92 of the Constitution.

Sub-clause 3 (*a*) of the *Restriction of Interstate Passenger Transport Order*, under which the respondent was prosecuted, purports to prohibit any person, not excepted by the Order, from travelling without the permission of the Director-General of Land Transport by rail or commercial motor vehicle from any State to any other State. These provisions restrain travel by either of the above means of transport merely because the journey to be undertaken is across a State border. The provisions are, in my opinion, a direct interference with freedom of intercourse between the States. The restraint imposed upon travel, is, I think, the same in substance

(1) (1936) A.C. 578; 55 C.L.R. 1. (2) (1943) 67 C.L.R. 116.

H. C. OF A. 1945.

GRATWICK v. JOHNSON.

McTiernan J.

as that which s. 3 (1) (*b*) of the *Dried Fruits Act* 1928-1935 imposed upon the transportation of dried fruits across the border. Section 3 (1) (*b*) of that Act was in these terms: "The owner or any other person shall not carry any dried fruits from a place in one State into or through another State to a place in Australia beyond the State in which the carriage begins, unless he is the holder of a licence then in force, issued under this Act, authorizing him so to deliver or carry such dried fruits, as the case may be, and the delivery or carriage is in accordance with the terms and conditions of that licence." That Act and the Regulations made under it were held in *James* v. *The Commonwealth* (1) to contravene s. 92.

Clause 3 (*a*) directly restrains freedom of intercourse between the States. It is not analogous either to the Act upheld in *Duncan* v. *Vizzard* (2), or to the Act upheld in the *Riverina Transport Case* (3). Neither of these Acts was directed against inter-State trade: such interference as either of the Acts caused to the flow of inter-State trade and commerce was merely incidental to or the indirect result of its operation. It follows also that the Order cannot be supported by what I said in *Andrews* v. *Howell* (4), because the direct object of the Order is to restrict inter-State intercourse.

In my opinion clause 3 (*a*) contravenes the constitutional guarantee of freedom of intercourse between the States and is invalid.

Appeal dismissed with costs. Order nisi discharged.

Solicitor for the appellant, *H. F. E. Whitlam*, Crown Solicitor for the Commonwealth.

Solicitors for the respondent, *L. D. Seaton & Co.*, Perth.

J. B.

(1) (1936) A.C. 578; 55 C.L.R. 1.
(2) (1935) 53 C.L.R. 493.
(3) (1937) 57 C.L.R. 327.
(4) (1941) 65 C.L.R., at p. 287.