Appl
Greutner v Everard; Sloman v Rowarth (1960) 103 CLR 177
Ovrt
Hughes & Vale Pty Ltd v New South Wales (No1) (1954) 93 CLR 1
Disod
Hughes & Vale Pty Ltd v New South Wales (1953) 87 CLR 49

[HIGH COURT OF AUSTRALIA.]

McCARTER AND ANOTHER . . . . APPELLANTS;
DEFENDANTS,

AND

BRODIE . . . . . RESPONDENT.
INFORMANT,

H. C. OF A. 1950.

MELBOURNE, *March* 6-10; *June* 8.

Latham C.J., Dixon, McTiernan Williams, Webb and Fullagar JJ.

Constitutional Law—Freedom of trade, commerce and intercourse among the States—Prohibition—Regulation—Validity of State Act—Commercial vehicles prohibited from operating on State highways unless licences obtained and fees paid—Licences subject to discretion of Crown—The Constitution (63 & 64 *Vict. c.* 12), *s.* 92—*Transport Regulation Acts* 1933-1947 (*No.* 4198—*No.* 5220) (*Vict.*), *Part II.**

The *Transport Regulation Acts* 1933-1947 (Vict.), Part II., provided that a commercial goods vehicle should not operate on any public highway unless licensed in accordance with the Act. The Transport Regulation Board was empowered to grant such licences, and it was provided that in granting or refusing licences the Board should have regard to the interests of the public generally and should take into consideration the advantages of the service proposed to be provided, its convenience to the public, the adequacy of the existing transportation, the effect on it of the service proposed to be provided, the condition of relevant roads and the character, qualifications and financial stability of the applicant. It was also provided that no decision of the Board granting or refusing a licence should have any force or effect until reviewed by the Governor in Council and the Governor in Council might approve or disapprove the decision of the Board or make any determination in the matter which the Board might have made. A fee was payable, that under the original Act being such as was determined by the Board but not exceeding £5 annually;

* The *Transport Regulation Acts* (Vict.) include (among others not here material) the *Transport Regulation Act* 1932 (No. 4100) (under which the Transport Board is constituted and which otherwise is not here material), the *Transport Regulation Act* 1933 (No. 4198) and the following Acts by which the 1933 Act is amended: *Transport Regulation Act* 1935 (No. 4298), *Transport Regulation Act* 1939 (No. 4663) and *Transport Regulation (Licences and Fees) Act* 1947 (No. 5220). For convenience the Act of 1933, as amended, is referred to above as the *Transport Regulation Act* 1933-1947.

but in 1947 it was provided that the fee should be £1 plus a further fee calculated at an annual rate determined from time to time by relation to the load capacity of the vehicle in respect of which the licence was sought.

Held, by *Latham* C.J., *McTiernan*, *Williams* and *Webb* JJ. (*Dixon* and *Fullagar* JJ. dissenting), following *Riverina Transport Pty. Ltd.* v. *Victoria*, (1937) 57 C.L.R. 327, that the Act did not contravene s. 92 of the Constitution.

R. v. *Vizzard*; *Ex parte Hill*, (1933) 50 C.L.R. 30, applied.

Commonwealth v. *Bank of New South Wales*, (1949) 79 C.L.R. 497, considered.

APPEALS from a Court of Petty Sessions of Victoria.

In a court of petty sessions of Victoria, constituted by a stipendiary magistrate, informations laid by Andrew James Brodie charged that Francis Clemes McCarter and Reginald Alfred Gough were respectively the owner and the driver "of a commercial goods vehicle which operated on a public highway without the said commercial goods vehicle being licensed as a commercial goods vehicle under Part II. of the *Transport Regulation Act* 1933" (Vict.), contrary to s. 45 of that Act. The informations were heard together. It appeared that the vehicle in question (a motor truck), which was owned by McCarter, was intercepted on a Victorian highway when it was being driven by Gough; it was carrying a load of beer from South Australia through Victoria to New South Wales. The vehicle was not licensed under the Act above mentioned, nor did it have a permit under the Act for the journey. There was evidence that McCarter had said that he had applied for a licence but it had been refused; and that he had been advised by counsel that he did not require a licence for the vehicle. It did not appear on what grounds the licence had been refused. It was submitted on behalf of the defendants that "the relevant provisions of the *Transport Regulation Act* 1933 did not on their true construction apply to the defendants nor to the motor truck in question and . . . that if they did so apply they were unconstitutional and contravened s. 92 of the Commonwealth Constitution."

The magistrate convicted the defendants.

From this decision the defendants appealed by way of order to review to the High Court under s. 73 of the Constitution on the basis that the magistrate was called on to exercise Federal jurisdiction because of the defence based on s. 92 of the Constitution.

G. Gowans K.C. (with him *P. H. Opas*), for the appellants. In *Riverina Transport Pty. Ltd.* v. *Victoria* (1) it was held that the *Transport Regulation Act* 1933 (Vict.), as amended in 1935, did not

(1) (1937) 57 C.L.R. 327: See pp. 340, 347, 352, 364-366, 369.

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contravene s. 92 of the Constitution; but that case can no longer be regarded as authority. The Act has since been amended in material respects; in its present form it does offend s. 92. Even if the amendments are not material in this regard, the decision should not be followed; it is based on *R.* v. *Vizzard*; *Ex parte Hill* (1), which is inconsistent with the decision in *James* v. *The Commonwealth* (2), and with the reasons of the Privy Council in *Commonwealth* v. *Bank of New South Wales* (*Banking Case*) (3). It is true that in the case last mentioned (4) the Privy Council said that *Vizzard's Case* " may be reconciled " with *James* v. *Cowan* (5), but this cannot mean any more than that the decisions may possibly be reconciled by someone. It cannot be taken as approval of *Vizzard's Case*; when one looks at the whole of the Privy Council's judgment in the *Banking Case* it is apparent that the views expressed are inconsistent with the reasons in *Vizzard's Case*. The following tests of the operation of s. 92, which were the basis of *Vizzard's Case*, are all rejected in the *Banking Case*:—(1) Freedom is not guaranteed to individuals by s. 92. (2) Inter-State trade is free so long as the volume of trade between States remains the same after as before interference with individual traders. (3) The real object of a statute can be ascertained otherwise than by relation to its necessary effect. (4) Only the passage of goods is protected by s. 92. (5) It is only at the frontier that the stipulated freedom can be impaired. (6) If legislation prohibits both inter-State and intra-State activities, it does not offend s. 92. The view taken by some members of the Court in *Vizzard's Case* that transport is not itself trade but is merely an instrument of trade had already been rejected in *Australian National Airways Pty. Ltd.* v. *The Commonwealth* (6), which was approved by the Privy Council in the *Banking Case*. *Vizzard's Case* is thus deprived of its foundation, and it must be regarded as no longer authoritative. [He referred to *Vizzard's Case* (7); *O. Gilpin Ltd.* v. *Commissioner for Road Transport and Tramways* (*N.S.W.*) (8).] The effect of the *Banking Case* is, firstly, that s. 92 is concerned only with direct and immediate restrictions of trade &c. An Act which effects only an indirect and consequential impairment of trade so that it may fairly be regarded as remote from trade does not offend the section. Secondly, an Act which allows trade to continue while prescribing rules as to

(1) (1933) 50 C.L.R. 30.
(2) (1936) A.C. 578; 55 C.L.R. 1.
(3) (1950) A.C. 235; 79 C.L.R. 497.
(4) (1950) A.C., at p. 309; 79 C.L.R., at p. 638.
(5) (1932) A.C. 542; 47 C.L.R. 386.
(6) (1945) 71 C.L.R. 29: See pp. 57, 70, 71, 82, 106, 107.
(7) (1933) 50 C.L.R., at pp. 46-48, 49-52, 71 et seq., 82, 87, 101.
(8) (1935) 52 C.L.R. 189, at pp. 204-206, 213.

the manner in which it is to be conducted, and nothing more, does not offend ; that is to say, so long as it is merely regulatory and not prohibitory. The " pith and substance " test, among others, may be applied in determining whether an Act is regulatory. An Act which burdens inter-State trade as does the Act now challenged is not valid ; it is not merely regulatory. An Act which sets up a licensing system so that it prohibits inter-State trade either entirely if there is no licence or partially if there is a licence is bad (*James* v. *The Commonwealth* (1)). The licensing system set up by the *Transport Regulation Act* has all the material features of the system which the Privy Council held to be invalid in *James* v. *The Commonwealth*. In that case the Privy Council did not approve the decision in *Vizzard's Case*. The passage which has frequently been taken as expressing such approval does not deal with anything more than a criticism in the judgment of *Evatt* J. of *W. & A. McArthur Ltd.* v. *Queensland* (2).

[DIXON J. referred to *Interstate Oil Pipe Line* v. *Stone* (3) ; *H. P. Hood & Sons* v. *Du Mond* (4).]

A licensing system which permits the refusal of a licence to an inter-State trader is not valid ; if it merely prescribes conditions on which he may continue to carry on trade, it may be good. That is subject to what the Privy Council said in the *Banking Case* as to the power of a State to exclude persons on grounds of fitness, to protect the safety of its own citizens. This seems to be confined to physical safety. At any rate it does not relate to what may be called the economic safety of the State. It is one thing to say that s. 92 permits legislation which is directed solely to the safety of persons using the roads ; it is another to say that the whole system of transport may be controlled for the purpose of excluding competition. An Act which is designed to exclude competition in transport, merely on the basis of bringing about order because it is inefficient to allow too many services, is not a valid regulation of transport under s. 92. Where, as in this case, the Act gives a discretion—which, if not " unlimited," has no clearly defined limits—to refuse licences to persons engaged in inter-State trade, it is bad. The reference in the *Banking Case* to the possibility of a monopoly being valid is not directed to affairs as they exist at present ; it merely suggests a possibility in the future. [He referred to the *Airways Case* (5).] The licence fees imposed by the *Transport Regulation Act* constitute a tax which, so far as inter-State trade is concerned,

(1) (1936) A.C. 578 ; 55 C.L.R. 1.
(2) (1920) 28 C.L.R. 530.
(3) (1949) 337 U.S. 662 [93 Law. Ed. 1613].
(4) (1949) 336 U.S. 525 [93 Law. Ed. 865].
(5) (1945) 71 C.L.R., at pp. 59, 60, 72, 77-79, 107, 108, 110.

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is not permitted by s. 92. Such a fee, it is submitted, must be regarded as a burden by way of a tax unless it appears from the Act that it is no more than a charge for the use of the roads. That is the way in which the matter has been approached in the United States; it is in that way that the question has arisen whether the sum imposed can be regarded as a reasonable charge for the use of the roads; if not, it is a tax which is not permitted. [He referred to *Aero Mayflower Transit Co.* v. *Board of Railroad Commissioners of Montana* (1); *Crutcher* v. *Kentucky* (2); *Buck* v. *Kuykendall* (3); *G. Bush & Sons Co.* v. *Maloy* (4); *Sprout* v. *City of South Bend* (5); *Interstate Transit Inc.* v. *Lindsey* (6).] See also, as to the distinction between a tax and a charge for services, *Parton* v. *Milk Board (Vict.)* (7); *Commonwealth and Commonwealth Oil Refineries* v. *South Australia* (8). The fees have been substantially increased by amendment of the Act since the date of the *Riverina Transport Case* (9), and cannot be regarded as a charge for the use of the roads. It is submitted, therefore, that the *Transport Regulation Act* is invalid in the following respects: (1) In so far as it authorizes at discretion the prohibition of inter-State trade unless with the consent of the State, it imposes a direct and immediate restriction on inter-State trade; (2) in so far as it authorizes at discretion the imposition of conditions limiting the routes or areas in which operations may be carried out, or such other conditions as the Board thinks proper, it goes beyond the regulation of the manner of conducting trade; (3) in so far as it authorizes a tax on inter-State trade, it imposes a direct and immediate burden on it. If it is invalid in any of these respects, s. 45, under which the appellants were convicted, cannot stand, and the convictions should be set aside.

D. I. Menzies K.C. (with him *G. A. Pape*), for the respondent. The argument for the appellants would not affect only the *Transport Cases*; it would mean that almost every decision of this Court in which an Act has been held not to offend s. 92 was wrong. Such cases as *Milk Board (N.S.W.)* v. *Metropolitan Cream Pty. Ltd.* (10) and *Hartley* v. *Walsh* (11) could not stand. The market-

(1) (1947) 332 U.S. 495 [92 Law. Ed. 99].
(2) (1891) 141 U.S. 47 [35 Law. Ed. 649].
(3) (1925) 267 U.S. 307, at p. 315 [69 Law. Ed. 623, at p. 626].
(4) (1925) 267 U.S. 317 [69 Law. Ed. 627].
(5) (1928) 277 U.S. 163, at pp. 170, 171 [72 Law. Ed. 833, at p. 837].
(6) (1931) 283 U.S. 183, at pp. 185-190 [75 Law. Ed. 953, at pp. 965-971].
(7) (1949) 80 C.L.R. 229.
(8) (1926) 38 C.L.R. 408.
(9) (1937) 57 C.L.R. 327.
(10) (1939) 62 C.L.R. 116.
(11) (1937) 57 C.L.R. 372.

ing legislation of the States would be invalid, and price control also, it would seem. Much legislation of the Commonwealth, too, would be invalidated. The Privy Council had the opportunity of saying in the *Banking Case* that the decisions which are now challenged were wrong, but it did not do so. On the contrary, it said that *Vizzard's Case* may be reconciled with *James* v. *Cowan*. This Court should not overrule its own decisions in the cases now in question unless the reasoning of the Privy Council in the *Banking Case* shows them to be manifestly wrong; this, it is submitted, it does not show. The propositions rejected by the Privy Council were put in argument, but they were not supported by the decisions of this Court, and there is no suggestion in the judgment of the Board that in rejecting those propositions it was correcting the High Court. As to the tests enumerated in the argument for the appellants, it is true that some reliance on them is to be found in judgments of individual members of the Court, but their rejection does not mean that the decisions cannot be sustained. The argument for the appellants suggests that in the view of the Privy Council any Act which has a direct, as distinct from a remote, effect on inter-State trade is bad; that where there is a direct effect, the question whether the Act is regulatory does not arise. This is not so. The position is that, if the effect is merely remote, the Act is good, and no further question is necessary. If the effect is direct, the Act may still be good if it is merely regulatory. Section 46 of the *Banking Act* was a direct and immediate prohibition; it was not regulatory. It therefore failed under the two branches of the test; but it was tested in both respects. [He referred to *Peanut Board* v. *Rockhampton Harbour Board* (1), per *Rich* J.; *Gallagher* v. *Lynn* (2).] The Board's approval in the *Banking Case* of the passage in the judgment of *Latham* C.J. in the *Airways Case* (3) in which he referred to what he had said in the *Milk Board Case* (4) is important as an indication of the kind of legislation which is to be regarded as regulatory. It is clear that the Board attached a wide meaning to the word "regulation." The judgment of the Board shows that under a system of regulation individuals may be excluded from inter-State trade; they may be excluded down to the point where only one is left. The suggestion of the Board that in some circumstances a monopoly may be valid can be justified only if monopoly is a manner of regulation. The

(1) (1933) 48 C.L.R. 266, at p. 274.
(2) (1937) A.C. 863, at pp. 867, 869, 870.
(3) (1945) 71 C.L.R., at p. 61.
(4) (1939) 62 C.L.R. 116.

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judgment supports these propositions as to " regulation " :—(1) The Board used the word in the sense used by *Latham* C.J. in the *Milk Board Case* ; it includes regulation of the kind found in the *Transport Cases*, of which *Vizzard's Case* is a clear example. (2) Regulation may prohibit participation in inter-State trade to the point of monopoly. (3) It may exclude trade in particular objects by particular persons. The setting in which *Vizzard's Case* was argued was that, if the Court would not reconsider and overrule *McArthur's Case* (1), it must be accepted that s. 92 " precludes the Parliaments of the States from in any way regulating or controlling " inter-State trade, &c. (2). The attack made on the New South Wales Act in *Vizzard's Case* was that it regulated inter-State trade, and the Act was defended on the ground that any interference with inter-State trade was of an incidental character which was not prohibited by *McArthur's Case*. Much of what was said in the judgments was directed to rejecting arguments founded on *McArthur's Case* ; if what was said does not seem appropriate now, it does not follow that the decision itself is bad. The basis of the decision can be re-stated in the light of what is said in the *Banking Case* ; the challenged legislation is permissible regulation. [He referred to *Vizzard's Case* (3).] The judgment in *James* v. *The Commonwealth* (4) shows that the approval of *Vizzard's Case* was not so restricted as the appellants contend. [He referred to *Gilpin's Case* (5).] In *James* v. *Cowan* (6) the Board recognized that legislation which substantially interferes with inter-State trade and with the conduct of persons in that trade, going to the extent of preventing their participation in it, may be valid in certain circumstances ; that the interference may properly be regarded as merely incidental. The section of the Act there in question which was held invalid, s. 20, is not comparable with ss. 26, 28, of the *Transport Regulation Act*. It would be impossible to say that the Act is invalid because some persons who desire to conduct inter-State transport are prevented from doing so. At most the inter-State operator could say that he is not bound to have a licence under the Act, or, if he is granted a licence expressed to be subject to conditions which offend s. 92, that he is at liberty to disregard the conditions. The Act requires the Board to state its reasons for refusing a licence ; it says that a licence must be subject to certain conditions and may be subject to others. The general operation of the Act is, not that

(1) (1920) 28 C.L.R. 530.
(2) (1920) 28 C.L.R., at p. 546.
(3) (1933) 50 C.L.R., at pp. 47-49, 54-56, 59, 60, 67, 71 et seq., 82, 92.
(4) (1936) A.C., at p. 629 ; 55 C.L.R., at p. 57.
(5) (1935) 52 C.L.R., at pp. 204, 206, 211.
(6) (1932) A.C. 542 ; 47 C.L.R. 386.

licences shall be refused, but that they shall be granted. In *James* v. *The Commonwealth* the effect of the challenged provision was that a person should not take fruit beyond the border of his State without a licence. That is very different from an Act which does no more than say that the movement of commercial vehicles on a public highway within a State requires a licence. The Privy Council, having the *Transport Cases* before it in *James* v. *The Commonwealth*, accepted them as correct. The way in which it dealt with *McArthur's Case* and with the view of that case which *Isaacs* J. expressed in *Roughley* v. *New South Wales* (1) shows that the Board preferred the contrary view taken in the *Transport Cases*. That is the view that has been accepted in this Court. [He referred to *Home Benefits Pty. Ltd.* v. *Crafter* (2).] The *Riverina Transport Case* (3) is the first transport case decided after *James* v. *The Commonwealth*; the conclusion was that the earlier transport cases and their consideration in *James* v. *The Commonwealth* left the matter no longer open, but one that had been authoritatively settled. The respondent adopts that view. *Gratwick* v. *Johnson* (4) contains nothing inconsistent with this view; nor does the *Airways Case* (5). The basis on which the *Transport Cases* should now be accepted is that there is a permissible regulation of inter-State trade; it is a regulation of inter-State trade, not merely a regulation of individuals, and it is possible that certain persons may be excluded. It is not correct to say that regulation of trade merely provides a method of control of the doing of acts by those who participate; that anyone can participate if he conforms with certain standards. The subject regulated is trade, not merely persons engaged in trade. As to the amendments of the *Transport Regulation Act* since the *Riverina Transport Case*, s. 28 (2), as it now stands, may be referred to, although the appellants do not rely on it or, at all events, have not shown what invalidating effect it could have on the Act. It permits the Board to impose as a condition of a licence maximum and minimum rates to be charged for the carriage of goods. If the condition offends s. 92, one view may be that the licence is free of the condition. If the correct view is that the Act is invalid in providing for such a condition, it does not affect the validity of the rest of the Act. It is submitted, however, that the condition is valid; it is merely a price-fixing provision, and it does not offend s. 92. As to the licence fees, it

(1) (1928) 42 C.L.R. 162.
(2) (1939) 61 C.L.R. 701, at pp. 717, 718.
(3) (1937) 57 C.L.R. 327.
(4) (1945) 70 C.L.R. 1: See pp. 12-14, 16, 17, 18, 19, 20-22.
(5) (1945) 71 C.L.R. 29: See pp. 229, 231, 238, 239, 283, 290, 291, 295, 305, 311, 383-385, 389, 390.

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is submitted that the matter is concluded by the *Riverina Transport Case*; the amendment makes no difference in principle. The American cases do not go so far as the appellants suggest. [He referred to the *Harvard Law Review*, vol. 63, p. 143.]

P. D. Phillips K.C. (with him *C. I. Menhennitt*), for the Commonwealth (intervening by leave). It is not correct that the *Transport Regulation Act* confers an unlimited discretion on the Board. The Act defines the conditions to which the Board is to have regard, and it may be required to give its reasons in writing. Thus, it can be ascertained whether its decision did or did not depend on considerations which the Act makes relevant. It is not to the point to say that the legal machinery for keeping the Board within the discretion may not be adequate. That does not alter the nature of the Act, the nature of the power given or the functions or duties imposed. That the discretion is not unlimited appears from *Nicholson* v. *Victorian Railways Commissioners* (1). As to the Governor in Council, it should be assumed that the Governor in Council will act in accordance with the will of Parliament. However, if the Act is to fail merely because of the introduction of the Governor in Council into the matter, it is a point with which the Commonwealth is not greatly concerned. The Commonwealth adopts the submission of the respondent that the true view of "regulation," according to the Privy Council in the *Banking Case*, is not that it is merely a regulation of persons engaged in trade. The passages in the judgment which refer to individual rights in relation to s. 92 and to the litigant, James, having vindicated his freedom are not inconsistent with this view. All that is meant is that the individual can rely on the Constitution to give him the benefit of escape from an invalid law. It does not follow that s. 92 necessarily considers individuals and the individual "right" to trade. The judgment does not support the appellants in the view that freedom of trade means no prohibition of any kind on the traders. No support is got from the rejection of the argument that s. 92 is concerned only with the volume of trade regarded quantitatively. In the judgment of *Isaacs* J. in *James* v. *Cowan* (2) there are some observations which seem to support what may be called the "individual rights conception" of s. 92. In part he was insisting that there was a right in a person, not in goods; for the rest he did not say any more than the Privy Council has said in the *Banking Case*. The Commonwealth also adopts the respondent's argument that, in the view of

(1) (1935) V.L.R. 51, at pp. 59, 65; 52 C.L.R. 383, at pp. 383, 391, 393, 397.

(2) (1930) 43 C.L.R. 386.

the Privy Council, if an Act is regulatory, it is valid notwithstanding that its effect is direct. The inquiry whether an Act is or is not valid as being regulatory is not concluded by showing that it is directly restrictive of some individual trader. On the other hand, if it is indirect in its effect on trade or on a trader, the inquiry is concluded. The reference to monopoly shows that an Act which is directly restrictive of traders may be valid as being regulatory. The Act in *James* v. *The Commonwealth* was not regulatory because its operation and effect were to restrict the trade as a whole. Likewise as to *James* v. *Cowan* ; and that is the reason why that decision may be reconciled with *Vizzard's Case*—because the Act in the latter case was regulatory. In *Gratwick* v. *Johnson* (1) there was a simple prohibition of travelling inter-State ; but it does not follow that provisions could not have been drafted by reference to defence which by way of regulation would have excluded particular persons. According to the Privy Council, the pith and substance of an Act is, or may be, relevant in considering whether it is regulatory. That is different from considering the operation of the Act on the individual. It cannot be said that merely because an Act says that no-one may do such-and-such without a licence, it cannot be regulatory, it must be prohibitory. The argument of the appellants puts the matter of regulation at its lowest—that it is only directed to physical safety. The American cases do not help on this question ; the American States have no power to pass Acts which are regulatory of inter-State trade. An Act may fail in the United States for the very reason that will make it valid here. The only assistance that might be got is that, if an Act is valid there, an especially strong case can be made for its validity here. [He referred to *Freeman* v. *Hewit* (2) ; *Bradley* v. *Public Utilities Commission of Ohio* (3) ; *Joseph* v. *Carter & Weekes* ; *Joseph* v. *John Clark & Son* (4).] The American cases have not quite the effect, in the matter of licence fees, suggested by the appellants. If a fee is a charge for services rendered, it is, of course, valid ; but the question still remains whether as a tax it is of a kind which is not permissible. The way in which this matter is to be determined is indicated in the annotation to *Interstate Transit Co.* v. *Lindsey* (5). However, if the fees here amount to the imposition of a privilege tax on inter-State trade, the only result could be to invalidate the provision of the Act relating to fees either wholly or in relation to

(1) (1945) 70 C.L.R. 1.
(2) (1947) 329 U.S. 249 [91 Law. Ed. 265].
(3) (1933) 289 U.S. 92 [77 Law. Ed. 1058].
(4) (1947) 330 U.S. 422 [91 Law. Ed. 993].
(5) (1931) 283 U.S. 186 [75 Law. Ed. 969].

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inter-State operators; it would not invalidate the whole Act. If s. 26 of the Act contains something which offends s. 92, but is otherwise truly regulatory, it will not be wholly invalid, nor will it necessarily be wholly inapplicable to inter-State operators. Regard must be had to the *Acts Interpretation Act* 1930 (Vict.).

M. F. Hardie K.C. (with him *J. R. Kerr*), for the States of New South Wales and Queensland (intervening by leave). If the legislation now challenged is invalid, it would seem that the similar legislation in New South Wales and Queensland must fail too. The result of the failure of this type of legislation would be that a large and gradually increasing field of transport could not be effectively regulated by the States. If the legislation is in part invalid (that is, as to inter-State transport), there will be serious difficulties in policing the remaining valid provisions; there would be room for evasion by persons claiming to be inter-State operators. It is desired to adopt the arguments which have been put on behalf of the respondent and the Commonwealth and to submit that no reason has been shown for departing from the decision in the *Riverina Transport Case*. Approval of this decision may be gathered from the judgments of the Privy Council. It will be recalled that the Board refused special leave to appeal in two of the transport cases. The judgment of the Board may be construed as an intimation or direction that questions under s. 92 are to be decided on evidence. There is no suggestion, however, that existing conditions should be re-opened on questions of fact; and, so far as conditions of transport in the States are concerned, evidence is not needed. The discretionary nature of the licence provided for by the New South Wales Act was clearly before the Court in *Vizzard's Case* (1). See also *Bessell* v. *Dayman* (2). The *Airways Case* (3) does not make it necessary to say that the *Transport Cases* should not now be followed. The regulation held invalid in that case gave an unlimited discretion, thus differing from the legislation now in question. It is significant also that the regulation dealt solely with inter-State aviation. The two tests put by the Privy Council in the *Banking Case* are independent or cumulative in the sense that s. 92 is not infringed if the effect of the Act is remote or incidental or if it is regulatory; if the effect is direct, it must still be considered whether it is regulatory or not. The indications of the way in which it is to be decided whether an Act is regulatory have already been put

(1) (1933) 50 C.L.R. 30: See pp. 50, 53, 58, 65, 73.
(2) (1935) 52 C.L.R. 215, at p. 219.
(3) (1945) 71 C.L.R. 29: See pp. 60, 61, 88-90, 108, 109.

by other counsel. What it is desired to stress is that they show that the Privy Council used the word " regulation " in a sense which may be said to be somewhat elastic in comparison with the sense indicated in the cases relating to by-laws. [He referred to *Melbourne Corporation* v. *Barry* (1); *Country Roads Board* v. *Neal Ads Pty. Ltd.* (2); *Swan Hill Corporation* v. *Bradbury* (3); *Slattery* v. *Naylor* (4); *Hazeldon* v. *McAra* (5).] On the question whether an Act is regulatory, the Privy Council in the *Banking Case* does not say that it is in all cases immaterial whether the Act deals with both inter-State and intra-State trade or only with the former. What was said was that it was irrelevant in that case that the prohibition extended to both those classes of activities. It is submitted that in the present case this feature is not irrelevant and is of importance. A licensing system such as is established by the *Transport Regulation Act* is one of the recognized modern methods of regulation, a method particularly appropriate and effective when—as is the case here—the activity or industry concerned is such that it would be impracticable to incorporate in legislation all the conditions necessary or desirable in the public interest. Legislation could not effectively meet the constantly changing problems of transport. A licensing system enables a review of the position from time to time. Instances of discretionary licensing systems—although no question of s. 92 was involved—are to be found in *Stenhouse* v. *Coleman* (6); *Wertheim* v. *The Commonwealth* (7). As to licence fees, it is submitted that the amendment of the Act makes no material difference and that the correct view of the Act is that there is no tax as distinct from a proper charge for services. [He referred to *Gilpin's Case* (8).]

G. Gowans K.C., in reply. The argument for the respondent and the interveners has resulted in no very clear statement of what is meant by regulation. However, what appears to be meant in speaking of an Act relating to trade as regulatory is that it is of the class which " co-ordinates " trade. It is further contended that an Act may be regulatory even though it operates directly and immediately to restrict trade. These contentions do not give effect to the decisions in the *James Cases* or the views of the Board in the *Banking Case*. The legislation in each of the *James Cases* was

(1) (1922) 31 C.L.R. 174.
(2) (1930) 43 C.L.R. 126.
(3) (1937) 56 C.L.R. 746.
(4) (1888) 13 App. Cas. 446, at p. 449.
(5) (1948) N.Z.L.R. 1087, at pp. 1096, 1097, 1107, 1109.
(6) (1944) 69 C.L.R. 457: See pp. 467, 472, 475.
(7) (1945) 69 C.L.R. 601: See pp. 605, 611, 612.
(8) (1935) 52 C.L.R., at pp. 202, 213, 214.

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" co-ordinating " ; nevertheless it was bad. In so far as it suggests that the dried-fruits legislation was bad because it was restrictive in that it cut off from the volume of trade some part of it, the argument for the Commonwealth seems a thinly disguised form of the old argument that validity under s. 92 is to be tested by reference to the total volume of inter-State trade. The legislation was bad because it was directly restrictive of the individual trader. [He referred to *James* v. *Cowan* (1).] In the *Banking Case*, in dealing with *James* v. *The Commonwealth*, the Board applied, not the test of regulation, but that of direct restriction. The fact that an Act is regulatory in character may assist the decision of the question whether there is a direct and immediate, or merely a remote or consequential, restriction, but it does not determine the matter. *McCartney's Case* (2) shows that the discretion of the Board under the Act now challenged is not unlimited ; but, looked at in the light of that case, the Act leaves such a wide discretion that it might be impossible to say whether in the exercise of the discretion the Board was doing anything in the way of permissible regulation of inter-State transport. The discretion is so wide that it leaves room for the Board to exclude persons merely on the basis that they would compete with others engaged in land transport. No principle of severability can be applied, as suggested on behalf of the Commonwealth, to cut down s. 26 of the Act so that considerations which would apply to an intra-State applicant for a licence may be regarded as not applying to an inter-State applicant. [He referred to *Huddart Parker Ltd.* v. *The Commonwealth* (3).] Sections 23, 24, 26 and 28 are so interlocked that, if they to some extent offend s. 92 of the Constitution, they must wholly fail. As to s. 34 the submission is that it empowers the exaction of a fee which is not necessarily related to the use of the roads. It is a tax which offends s. 92. The result, it has been contended, is that s. 34 is severable so that it does not affect ss. 23 and 24 of the Act. Again, the matter is not one of severability. The position is that the obligation to take out a licence is discharged so long as a person cannot satisfy it except by paying an unlawful tax.

Cur. adv. vult.

The following written judgments were delivered :—

June 8.

LATHAM C.J. The appellants F. C. McCarter and R. A. Gough were convicted on 12th October 1949 of offences against the provisions of the *Transport Regulation Act* 1933 (Vict.), s. 45. McCarter

(1) (1930) 43 C.L.R., at pp. 389-391, 405.

(2) (1935) 52 C.L.R., at p. 383.

(3) (1931) 44 C.L.R. 492, at p. 513.

was charged for that on 2nd August 1949 at South Merbein in Victoria he was the owner of a commercial goods vehicle which operated on a public highway without the said vehicle being licensed as a commercial goods vehicle under Part II. of the *Transport Regulation Act* 1933. Gough was charged with driving an unlicensed vehicle in breach of the Act. I deal with the case in relation to the appellant McCarter because no separate consideration is required of the case of Gough. Section 45 of the Act provides, *inter alia*, that the owner of any commercial goods vehicle which operates on any public highway and is not licensed as such under Part II. of the Act shall be guilty of an offence. It was proved that the appellant was the owner of a commercial goods vehicle, that the vehicle operated on a public highway in Victoria and that it was not licensed under the Act. Accordingly if the Act applied to the appellant he was guilty of the offence charged. The appellant had applied for a licence under the Act and his application had been refused. The Act does not give any person a right to obtain a licence. The issue of licences is within the discretion of the Transport Regulation Board except in certain cases specified in s. 22. The appellant's defence was that on 2nd August his driver Gough was engaged in transporting beer from South Australia through the north-west corner of Victoria to New South Wales. Both McCarter and Gough were therefore engaged in inter-State trade and commerce. They contended that the Act was not valid in its application to such trade and commerce because s. 92 of the Constitution provided that "trade, commerce and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free." The reply to this defence was that the Act had been held to be valid in *Riverina Transport Pty. Ltd.* v. *Victoria* (1). The appellant contends in answer to this reply that the case cited was based upon the decision *R.* v. *Vizzard*; *Ex parte Hill* (2), and that the authority of both the *Riverina Transport Case* and of *Vizzard's Case* has been destroyed by the decision of the Privy Council in the case of *The Commonwealth* v. *The Bank of New South Wales* (3) (the *Banking Case*). That case, it is said, withdraws such approval as was given by the Privy Council to *Vizzard's Case* in *James* v. *The Commonwealth* (4), and, further, stated principles which destroyed the basis of the decisions in the *Riverina Transport Case* and *Vizzard's Case*.

The Court is therefore asked in this case to overrule *Vizzard's Case*; the *Riverina Transport Case*; *O. Gilpin* v. *Commissioner*

(1) (1937) 57 C.L.R. 327.
(2) (1933) 50 C.L.R. 30.
(3) (1949) 79 C.L.R. 497.
(4) (1936) A.C. 578; 55 C.L.R. 1.

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of Road Transport (1); *Bessell* v. *Dayman* (2); and *Duncan and Green Star Trading Co.* v. *Vizzard* (3) (the three last-mentioned cases were based upon *Vizzard's Case*). The argument for the appellant also suggested that *Willard* v. *Rawson* (4) was possibly wrongly decided and certainly that *Hartley* v. *Walsh* (5) and *Milk Board* v. *Metropolitan Cream Pty. Ltd.* (6) were also wrongly decided. Indeed in this case the Court is asked to hold that most of the decisions of the Court in relation to s. 92 were wrong and that minority judgments throughout have been right.

There was a further argument for the appellant which should be mentioned at the outset. It was contended that the *Transport Regulation Act* 1933 had, since the *Riverina Transport Case* held that it was valid, been amended in relevant particulars.

The Act contains a detailed scheme of transport regulation under a Transport Regulation Board which was established by the *Transport Regulation Act* 1932. Section 5 of the 1933 Act provides that "'commercial goods vehicle' means any motor car within the meaning of the Motor Car Acts which is used or intended to be used for carrying goods for hire or reward or in the course of trade." The word "operate" means, in the case of a commercial goods vehicle, "carry goods for hire or reward or in the course of trade." It is therefore quite plain that the Act is intended to deal with trade and the use of vehicles in trade. There is a prohibition of the operation of commercial goods vehicles on any public highway unless the vehicle is licensed under the Act—s. 23. The Board has power to grant a licence (s. 24) and the application for a licence must contain certain particulars (s. 25), namely—"(*a*) The routes or area upon or in which it is intended that the commercial goods vehicle is to operate; (*b*) A description of the vehicle in respect of which the application is made; (*c*) The classes of goods proposed to be carried; and (*d*) Such other particulars relevant to the subject-matter of the said application as are prescribed".

Section 26 provides:—"Before granting or refusing to grant any such licence the Board shall have regard primarily to the interests of the public generally including those of persons requiring as well as those of persons providing facilities for the transport of goods and without restricting the generality of the foregoing requirement shall take into consideration—(*a*) the advantages of the service proposed to be provided and the convenience which would be afforded to the public by the provision of such service; (*b*) the

(1) (1935) 52 C.L.R. 189.
(2) (1935) 52 C.L.R. 215.
(3) (1935) 53 C.L.R. 493.
(4) (1933) 48 C.L.R. 316.
(5) (1937) 57 C.L.R. 372.
(6) (1939) 62 C.L.R. 116.

existing transportation service for the carriage of goods upon the routes or within the area proposed to be served in relation to—(i) its present adequacy and probabilities of improvement to meet all reasonable public demands; and (ii) the effect upon such existing service of the service proposed to be provided; (*c*) the benefit to any particular district or districts or to the residents thereof which would be afforded by the service proposed to be provided; (*d*) the condition of the roads to be included in any proposed route or area; and (*e*) the character qualifications and financial stability of the applicant."

Section 27 provides that, subject to the provisions of the Act (e.g. s. 22) " the Board may grant the application (with or without variation) or may refuse to grant the application, and subject to this Part the decision of the Board shall be final and without appeal." Section 28 provides for certain conditions of licences relating to the fit and serviceable condition of the vehicle, limits of weight and speed, limitation of hours of driving, observance of industrial awards as to wages and conditions of labour. Section 28 further provides that, subject to the provisions of s. 22, the Board may attach to a commercial goods vehicle licence all or any of the following conditions, namely—" (*a*) A condition that the vehicle shall operate only upon specified routes or in a specified area; (*b*) A condition that prescribed records relating to the operation of the vehicle under the licence shall be kept; and (*c*) Such other conditions appropriate to the service to be provided by the vehicle as the Board thinks proper to impose in the public interest."

The period of the licence is four years—s. 30 as amended by Act No. 5220.

The 1933 Act, s. 37, provided for a right of appeal to the Supreme Court if a licence were refused. Act No. 4298, however, abolished this right and provided (s. 4) that decisions of the Board granting or refusing to grant licences should not have any force or effect until they were reviewed by the Governor in Council, who could approve or disapprove such decisions or make another decision. Section 38 of the Act provides that the Victorian Railways Commissioners may, notwithstanding the provisions of the Act as to the necessity for obtaining licences, with the consent of the Governor in Council operate on public highways commercial passenger vehicles and commercial goods vehicles on such routes or in such areas and subject to such conditions as the Governor in Council thinks fit, but that before such a consent is given consideration must be given to a recommendation of the Transport Regulation Board. The fee payable for a licence for a commercial goods

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vehicle under the 1933 Act (s. 34) was such fee as was determined by the Board, but not exceeding £5 annually, or 5s. annually for vehicles referred to in s. 22. An amendment was made by Act No. 5220, s. 7, providing that the fee for a licence for a commercial goods vehicle should be £1 and a further fee calculated at an annual rate determined from time to time by the Board based on the load capacity of the vehicle ascertained as prescribed but not exceeding five shillings per hundredweight of load capacity. Section 7 also provides that the fees received by the Board shall be paid into the Transport Regulation Fund out of which is paid the cost of administration of the *Transport Regulation Acts*, cost of re-imbursement of expenses of municipal councils in administering the Acts, cost of certain transport improvements, any surplus to go to consolidated revenue, which is to make good deficits, if any, in the fund. There is no evidence as to the amount of the fund or as to the amount of the charges upon it—which must vary from year to year.

These two amendments—(1) affecting the right of appeal to a court, and (2) increasing the fees for licences and allocating the proceeds—do not in my opinion really affect the character of the Act, which embodies a general control of road transport based upon considerations affecting, not only traffic on the roads, but also the provision of necessary services along particular routes and in particular areas, the exclusion of services deemed to be unnecessary or undesirable, and involving a consideration of the interests of the railways as being another form of transport with which road transport should be co-ordinated in the general interests of the community. The Act as amended remains essentially a transport regulation Act dealing with trade and commerce and applying to inter-State trade and commerce. The amendments made since 1933 do not in my opinion affect its substantial character in any relevant respect.

The contention for the appellant is that inter-State trade and commerce cannot be controlled by a law of this character. It is conceded that the decisions in *R.* v. *Vizzard* and the *Riverina Transport Case* are decisive against the appellant, but it is argued that those cases and the other transport cases to which reference has been made, namely *Gilpin's Case*, *Bessell* v. *Dayman*, *Duncan and Green Star Trading Co.* v. *Vizzard*, and possibly *Willard* v. *Rawson*, should be overruled.

In *James* v. *The Commonwealth* (1) the Privy Council referred to some of the reasoning of *Evatt* J. in *Vizzard's Case*. It was said (2): —"The elaborate judgment of *Evatt* J. in that case is of great

(1) (1936) A.C. 578; 55 C.L.R. 1. (2) (1936) 55 C.L.R., at p. 50.

importance. It is impossible to quote here at length from it; one short passage may be extracted (1)—'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' . . . If this reasoning, which in *Vizzard's Case* (2) was primarily applied to the States, as it seems to be, is correct, then in principle it applies *mutatis mutandis* to the Commonwealth's powers under sec. 51 (i) . . . .".

In the *Riverina Transport Case* and other cases this passage was treated as an approval of the quoted statement. As far as transport is concerned, it will be seen that it denies that s. 92 gives persons "a right to ignore State transport regulations" and to choose how, when and where each of them will transport commodities. In other passages in *James* v. *The Commonwealth* the Privy Council referred to a number of Federal and State statutes which applied to transactions of various kinds in inter-State trade, commerce, or intercourse, and stated that their provisions did not infringe s. 92. These statutes included the *Post and Telegraph Act* 1901-1923, the *Wireless Telegraphy Act* 1905, the *Secret Commissions Act* 1905, the *Commerce (Trade Description) Act* 1905-1933, the *Australian Industries Preservation Act* 1906-1930, the *Sea Carriage of Goods Act* 1924, and the *Transport Workers Act* 1928-1929 (see (3)). As to State statutes which apply to inter-State transactions, the Privy Council in the first place rejected the argument (which was stated at p. 24) that if a law imposed any burden upon anything which formed part of trade and commerce *as trade and commerce*, that is, by reason of any of the characteristics which made it trade or commerce, the legislation was a breach of s. 92. It was said (4):—"Nor is help to be derived from speaking of freedom of trade as trade: as well speak of freedom of speech as speech. Every step in the series of operations which constitute the particular transaction, is an act of trade; and control under the State law of any of these steps must be an interference with its freedom as trade."

Their Lordships proceeded to say that among the State Acts which can validly be applied to inter-State trade are *Sale of Goods*

(1) (1933) 50 C.L.R., at p. 94.
(2) (1933) 50 C.L.R. 30.
(3) (1936) 55 C.L.R., at pp. 54, 55.
(4) (1936) 55 C.L.R., at p. 57.

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Acts and *Bills of Exchange Acts*. If a transaction "involves sea, railway or motor carriage, relevant Acts operate on it; it is subject to executive or legislative measures of State or Commonwealth dealing with wharfs or warehouses or transport workers. It must be so subject. Otherwise the absurd result would follow that the inter-State operation of trade would be immune from the laws of either State, of the State of origin equally with the other State. There would thus be in every State a class of dealings and acts entirely immune from the general law of the State, though only distinguishable from other like dealings and acts by the fact that they are parts of an inter-State transaction."

Accordingly in *James* v. *The Commonwealth* the Privy Council plainly recognized that there might be valid State laws controlling transport and, in particular, controlling motor carriage. The question which had to be determined was which of such laws were to be held invalid and which of such laws could properly be held to be valid. The answer to this question given in *James* v. *The Commonwealth* was that laws which dealt with the movement of goods were invalid if they were inconsistent with the conception of "freedom from customs duties, imposts, border prohibitions and restrictions of every kind: the people of Australia were to be free to trade with each other and to pass to and fro among the States without any burden, hindrance or restriction based merely on the fact that they were not members of the same State" (1).

It is now contended that in the *Banking Case* the Privy Council has so expounded these statements of principle that it should now be held that any law with respect to inter-State trade, commerce, or intercourse which imposes any "burden" upon it is necessarily invalid.

The particular reference made in the *Banking Case* to *Vizzard's Case* (2) recites the approval in *James* v. *The Commonwealth* of the reasoning of *Evatt* J. in that case. Their Lordships, however, go on to say that it does not appear that the whole of that learned judge's reasoning received the considered approval of the Board and that the facts in relation both to subject matter and to manner of restriction or interference are so widely different in the two cases (that is *Vizzard's Case* and the *Banking Case*) that it is difficult to apply to one case all that was said in the other. Reference is made to the statement in *James* v. *Cowan* that their Lordships were in accord with the convincing judgment delivered by *Isaacs* J. in the High Court, and it is said that it would not be easy to reconcile

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

(2) (1950) A.C., at p. 309; 79 C.L.R., at p. 638.

all that was said by *Evatt* J. in the one case with all that was said by *Isaacs* J. in the other, though it is stated that the decisions in *James* v. *Cowan* and in *Vizzards Case* may be reconciled. In my opinion it cannot fairly be said that this means that the decision in one case was wrong and in the other case was right.

In my opinion this passage states what was always plain, namely that what was approved in the judgment of *Evatt* J. in *Vizzard's Case* was only the passage quoted, which is described as reasoning, but which, in my opinion, rather states conclusions reached as the result of reasoning. The significance of that approval in the present case is to be found in the specific reference to State regulation of transport. The present case is a case about transport, and not about some other subject. What is pointed out in the *Banking Case* is that an approval of a particular statement of the law made in relation to the passage of commodities cannot be, as it were, lifted out and mechanically applied to questions relating to banking. It is necessary, their Lordships say, to consider the subject matter and the manner of restriction or interference of which complaint is made. Accordingly I regard the reference made to *Vizzard's Case* in the *Banking Case* as amounting to a warning that general statements made with reference to a particular subject matter ought not to be extended so as to be applied to another subject matter irrespective of distinctions between those matters and without reference to the particular form of legislation in each case. In other words, a decision under s. 92 with respect to transport ought not to be applied in relation to banking without regard to the limitations mentioned.

It is further argued for the appellant, however, that the reasoning of their Lordships in the *Banking Case* destroyed the basis of the decisions in *Vizzard's Case* and in the other transport cases. The Privy Council in the *Banking Case* corrected certain misunderstandings of prior decisions upon which the appellants in the *Banking Case* had based their argument. But those misunderstandings were not attributed to this Court and they were not, in my opinion, the ground of the decisions in this Court which were attacked by the present appellant. The relation of s. 92 to individual rights was expressly mentioned. No case has been decided upon the basis that s. 92 was irrelevant to individual rights. It has been pointed out in this Court that, as was stated by the Privy Council in the reasons for judgment in the *Banking Case* (1), s. 92 does not create any new rights in an individual but that where it operates it has the effect of invalidating legislation which otherwise might

(1) (1950) A.C., at p. 288; 79 C.L.R., at p. 618.

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have prevented an individual from asserting a particular right or defending himself against a particular claim: see, e.g. *Riverina Transport Case* (1) and *James* v. *The Commonwealth* (2). It follows from this view as to the nature of s. 92 that, as was stated in the *Banking Case* (3), the application of s. 92 does not involve calculations as to the actual present or possible future effect (which would almost necessarily vary from time to time) upon the total volume of inter-State trade. The difficulties of applying such a criterion are obvious. The statements in *Vizzard's Case* that it was not shown that the volume of inter-State trade was or would be diminished by the statute were replies to the contrary allegation made by those who challenged the statute.

The Board and the Governor in Council have a discretion to grant or to refuse any application for a licence. But this discretion is not an unlimited and arbitrary discretion as was held to be the case in *Gratwick* v. *Johnson* (4) and the *Airways Case* (5). This Court has already expressly held with respect to this *Transport Regulation Act* that "the ambit of the discretion of the Board . . . is governed by the general scope and object of the enactment": *Victorian Railways Commissioners* v. *McCartney* (6), where there is a summary of the matters which "the Board is required to take into consideration" under s. 26 of the Act. I see no reason for assuming that the administrative authorities will act in disregard of the express provisions of the Act. Subject to this qualification as to the nature of the discretion vested in the Board I agree with the view of the character of the *Transport Regulation Act* which has been submitted on behalf of the appellants. The Act requires a person to hold a licence before he can operate a commercial goods vehicle upon the highways of the State. It applies to such a person even though he is engaged in inter-State trade and commerce. No person has a right to obtain a licence. It can be granted or refused at discretion —though, as I have said, that discretion is not unlimited and arbitrary in character. If a licence is granted the licensee is subject to many conditions which control the manner in which he is allowed to carry on his business. The appellants then say that the result is that their activities in inter-State trade and commerce are subject to a burden or restriction imposed by State law by reference to the characteristics of those activities as trade and commerce, and I agree also with this proposition. It is argued that therefore the law is invalid, so that inter-State operators are entitled to ignore all the

(1) (1937) 57 C.L.R., at pp. 341, 342.
(2) (1939) 62 C.L.R., at p. 362.
(3) (1950) A.C., at p. 288; 79 C.L.R., at p. 618.
(4) (1945) 70 C.L.R. 1.
(5) (1945) 71 C.L.R. 29.
(6) (1935) 52 C.L.R. 383, at p. 391: see also pp. 394, 395, 396.

provisions of the Act, though intra-State operators are bound by them.

The fact that everybody is not entitled as of right to obtain a licence is enough, it is argued, to make the law invalid. It follows that it is beyond the power of any Parliament in Australia merely to place a limit upon the number of vehicles using the highways. Further, the conditions attached to a licence as to routes, areas to be served, conditions of work &c., are also said to be elements which make the law totally invalid as far as inter-State trade is concerned because they impose burdens upon it.

The appellant really adopts and relies upon the decision as to the meaning of " absolutely free " in s. 92 in *W. & A. McArthur Ltd.* v. *Queensland* (1). The decision in *McArthur's Case* that s. 92 did not bind the Commonwealth was overruled in *James* v. *The Commonwealth*. But the other doctrine of *McArthur's Case* has been relied upon in dissenting judgments in all the transport cases and in other cases relating to s. 92. That doctrine was that the words " absolutely free " had a " 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). This proposition (with now the substitution for the words " by the States " of the words " by either the Commonwealth or the States ") has been re-stated from time to time and it is now contended that it has been finally established as good law by the *Banking Case*. The proposition was repeated in *Peanut Board* v. *Rockhampton Harbour Board* (3) in the following terms :—" The words ' absolutely free ' admit of no qualification, but they are used with reference to governmental control and exclude all such control ; trade, commerce and intercourse among the States are made up of acts, transactions and conduct which, considered as trade, commerce and intercourse, are free of all State governmental control whatever (cf. *McArthur's Case* (4))." See also *Vizzard's Case* (5), where it was said in a dissenting judgment that *McArthur's Case* showed that " 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." See also *Gilpin's Case* (6).

In my opinion the authority of *McArthur's Case* as to both of the propositions stated was destroyed by the decision in *James* v.

(1) (1920) 28 C.L.R. 530.
(2) (1920) 28 C.L.R., at p. 554.
(3) (1933) 48 C.L.R. 266, at p. 287.
(4) (1920) 28 C.L.R., at pp. 550, 551, 558.
(5) (1933) 50 C.L.R., at p. 56.
(6) (1935) 52 C.L.R. 189, at pp. 201, 205, 211.

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The Commonwealth, and it has not been restored by the *Banking Case*. The analysis of the decisions of this Court which was made in *James* v. *The Commonwealth* leads up to a consideration of whether the rule in *McArthur's Case*, which had been held in this Court to apply only to the States, should be accepted, and it was clearly held that it should not be accepted. Their Lordships gave many examples of laws which imposed conditions upon inter-State trade and commerce which were held to be valid and their Lordships specifically rejected the view (1) that those laws were invalid because they applied to inter-State trade and commerce considered "as trade and commerce." It was pointed out that control under State law of any of the steps in inter-State trade "must be an interference with its freedom as trade." Nevertheless many specified State laws to which reference has already been made were expressly held to be valid notwithstanding s. 92. The decision in *McArthur's Case* that the price-fixing law of Queensland was invalid *in its application to inter-State transactions* was expressly disapproved by the Privy Council in the observation that the decision in *McArthur's Case* deprived the State of its sovereign power of fixing prices (2). Their Lordships (3) rejected "the theory" of *McArthur's Case* as to the nature of the freedom protected by s. 92.

The application of the principle for which the appellant contends would, now that it has been finally determined that s. 92 applies to the Commonwealth as well as to the States, remove inter-State trade and commerce from legal control under any law (Federal or State) that imposed what could be described as a burden or restriction upon it. It has already been shown that many laws, Federal and State, are applicable to inter-State trade and commerce. Trade and commerce are unintelligible as conceptions and impossible as facts if there are no laws applying to trading and commercial transactions: see *Milk Board Case* (4). Any other view would reduce s. 51 (i.) of the Constitution, which gives power to make laws with respect to inter-State trade and commerce, to a nullity, except in the case of facultative laws such as laws granting bonuses or bounties. Another example may be given. The Commonwealth Parliament has power to make laws with respect to quarantine: Constitution, s. 51 (ix.). The proposition for which the appellant contends would make it impossible to pass any valid legislation under this power which attempted to prevent the movement of things or persons inter-State, because the essence of quarantine law

(1) (1936) A.C. 578; 55 C.L.R., at p. 57.
(2) (1936) A.C. 578; 55 C.L.R., at p. 49.
(3) (1936) A.C. 578; 55 C.L.R., at p. 60.
(4) (1939) 62 C.L.R. 116, at p. 125.

is that the actual movement of persons or transportation of things, e.g. animals and plants, is restricted or altogether prohibited. Such a law would be made in respect of the movement or transportation itself and any such law would be invalid according to the test laid down in *McArthur's Case*, unless indeed the suggestion were adopted which appears in *McArthur's Case* (1), that laws on other subjects than inter-State trade or commerce might restrict or prohibit inter-State trade and commerce, notwithstanding s. 92. But the essential character of s. 92 is that, whatever it means, it imposes a limitation upon all law-making power: *Gratwick* v. *Johnson* (2). No law is to prevent inter-State trade and commerce from being absolutely free. It is not material to ask whether the law can be described as a law upon crime or bankruptcy or health or sanitation or the exercise of a particular occupation. If the law does in fact interfere with the freedom protected by s. 92 it must be invalid, whether or not it can be described as a law which is not itself a law upon trade and commerce.

It is true that in all arguments upon s. 92 certain concessions are made by those who contend that s. 92 invalidates a law. One concession is that they do not argue, for example, that criminals cannot be imprisoned because imprisonment would interfere with their travelling inter-State or conducting inter-State business. Other concessions are that of course it is not argued that traffic regulations must not be obeyed, that motor cars travelling inter-State need not carry lights or observe the rule of the road or have their brakes in order or observe directions as to the non-user of certain roads or limitations of weight in respect of bridges and the like. If the general principle is that no law may impose a restriction or burden upon inter-State trade—that it is to be free from all governmental control—then laws with respect to the matters mentioned simply become incomprehensible exceptions. But these concessions are not, in my opinion, supported by any argument which shows that the admissions made are consistent with the arguments submitted. All the laws to which I have referred are laws which in fact impose restrictions upon inter-State movement or inter-State trade and commerce. This is true of the simplest rule of the road.

There is no authority for the proposition that the courts are authorized to inquire whether such restrictions are "reasonable" or not in order to determine whether they become "burdens" so as to infringe s. 92. It is not for a court to determine, to take some

(1) (1920) 28 C.L.R., at p. 551.

(2) (1945) 70 C.L.R. 1, at pp. 11, 17, 20.

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examples, whether a *Sale of Goods Act*, a *Bills of Exchange Act*, an Act relating to the control of wharves and warehouses, an Act requiring fruit to be prepared in a particular way before it is sold or animals to be killed in licensed abattoirs before the meat can be sold, are reasonable or not. The *Transport Regulation Act* deals directly with transportation in trade, which is itself trade and commerce: *Australian National Airways* v. *The Commonwealth* (1). The Act imposes restrictions upon persons engaged in such transportation and prevents those persons doing as they please. Without control of transport on the roads, chaos would result. There would be the same result if inter-State transport were free from control and intra-State transport were subject to control. There is in my opinion no authority for the proposition that such restrictions will be valid if, in the opinion of a court, they are "reasonable" but not otherwise. There are many laws relating to highways. It is contended primarily that there can be no control of the persons who use the highways in inter-State transport by permitting only licensed persons to use them, but there is a reluctant admission that if the licence fee is "reasonable" it may be permissible to impose it. The roads of the State of Victoria have cost many millions of pounds; the railways of the State have cost many millions of pounds. It would be a most difficult task to determine what is a reasonable charge for the use of all or some of the roads by a particular motor truck or private motor car or some other vehicle. If a court is at liberty to inquire into such matters I do not see why the railway fares and freights between Victoria and all other States should not be held to be invalid unless it can be shown that they are "reasonable." Similarly the toll on the Sydney bridge, which is part of a highway used by inter-State traffic, might be held to be inconsistent with s. 92 unless a court was of opinion that it was reasonable. It is obvious that the determination of such matters as the amounts of licence fees, freights and fares, of conditions of road traffic and rail traffic, must depend upon considerations of policy which cannot be determined by a court. If the question is asked what would be a reasonable fee for a licence for a large truck or a small truck or a private motor car, or if it is asked how far it would be "reasonable" to limit motor traffic by reason of the financial obligations of the State in relation to the railways, or how much should motor traffic be required to contribute to general revenue to help to pay for roads &c., it would be quite impossible for a court to answer the questions. Any answer would depend upon the policy to be applied, e.g. whether the town should be

(1) (1945) 71 C.L.R. 29.

favoured as against the country or the railways as against the roads or the producers as against the distributors. In my opinion there is no authority for the proposition that it is left to a court to determine whether particular laws with respect to inter-State trade are "reasonable" or not.

The principle for which the appellant contends would necessarily result in overruling such cases as *Hartley* v. *Walsh* (1), where a law was upheld which required that dried fruits should not be sold until they had been treated in registered packing houses, and *Milk Board* v. *Metropolitan Cream Pty. Ltd.* (2) upholding the validity of a system of control of the sale of milk which was directed towards securing hygienic treatment and distribution of milk. Indeed the adoption of the principle for which the appellant contends would involve the overruling of almost every case in which legislation has been upheld by this Court against an objection based upon s. 92.

I proceed to consider more in detail whether the principles laid down by the Privy Council in the three cases of *James* v. *Cowan*, *James* v. *The Commonwealth* and the *Banking Case* should lead to a reconsideration of the principles which have been applied by this Court from the time of *Vizzard's Case* to that of the *Milk Board Case*.

In *James* v. *Cowan* the precise question was whether a Minister had used a statutory power in accordance with the provisions of the statute. Section 28 of the South Australian *Dried Fruits Act* 1924 provided that "Subject to sec. 92 of the Commonwealth of Australia Constitution Act and for the purposes of this Act or of any contract made by the Board, the Minister may on behalf of His Majesty purchase by agreement or acquire compulsorily any dried fruits in South Australia. . . ." It was found as a fact that the Minister had used this power for the purpose of forcing surplus dried fruit off the Australian market. Their Lordships said (3) that "'To force the surplus fruit off the Australian market' appears necessarily to involve two decisions: first, the fixing of a limited amount for Australian consumption (a necessary element in the conception of a 'surplus'); secondly, the prevention of the sale of the balance of the output in Australia." It was found as a fact that the Minister exercised his powers for the express purpose of preventing the sale of the plaintiff's fruit inter-State. There was no difficulty therefore in holding that the section (expressed to be subject to s. 92) did not authorize such an exercise of the power. The conclusion which was drawn in this Court from the decision

(1) (1937) 57 C.L.R. 372.
(2) (1939) 62 C.L.R. 116.
(3) (1932) A.C. 559.

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in *James* v. *Cowan* was that if legislation was " directed against " inter-State trade and commerce it was invalid, but that inter-State trade and commerce might be regulated and controlled by some laws. This conclusion was based upon the further statement in *James* v. *Cowan* which was in the following terms :—" 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 " (1). If a power of acquisition were used for these latter objects (as to famine, disease, &c.) it would as effectively interfere with inter-State trade and commerce as in the prohibited case (prevention of inter-State trade). The individual owner of the fruit would be deprived of his fruit in every case. There would be no possibility that he could sell it inter-State. Thus *James* v. *Cowan* did not decide that all laws which restricted the power of an individual to deal with his goods in inter-State trade were invalid.

James v. *The Commonwealth* (2) decided that the Commonwealth as well as the States was bound by s. 92. In that case a further exposition of s. 92 was given by the Privy Council. That case overruled *McArthur's Case* on both points which were there decided. The effect of *McArthur's Case* was summarized by *Gavan Duffy* C.J. in the following terms in *R.* v. *Vizzard*; *Ex parte Hill* (3) :— This Court in *McArthur's Case* " 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." In *James* v. *The Commonwealth* both of these propositions were rejected. There is no dispute that proposition No. (1) was rejected. As to proposition No. (2), that also was rejected. If it had not been rejected the position would have been that no Parliament in Australia could " in any way regulate or control trade, commerce and intercourse among the States." In *James* v. *The Commonwealth* (4) this result is expressly stated as one of the reasons for rejecting " the theory expounded in *McArthur's Case*." In *McArthur's Case* the view of the Court was that s. 92, as construed by the Court, must be held not to bind the Commonwealth because otherwise inter-State trade and commerce would be free from all law, with the result that

(1) (1932) A.C., at pp. 558, 559.
(2) (1936) A.C. 578 ; 55 C.L.R. 1.
(3) (1933) 50 C.L.R., at p. 46.
(4) (1936) 55 C.L.R., at p. 60.

s. 51 (i.) would be a nullity. The Privy Council rejected the doctrine that s. 92 meant that inter-State trade and commerce was free from law—either Federal or State. As it was put in *James* v. *The Commonwealth* (1), if the theory enunciated in *McArthur's Case* failed, the only substantial argument for the respondent's contention (as to s. 92 not binding the Commonwealth) failed. Accordingly in *James* v. *The Commonwealth* it was held that inter-State trade and commerce could be controlled and regulated by law and that such control and regulation was not necessarily inconsistent with s. 92, provided, to use the words of *James* v. *Cowan*, that "it was not directed against" such trade and commerce.

In the *Transport Cases*, in *Home Benefits Pty. Ltd.* v. *Crafter* (2), *Hartley* v. *Walsh* (3), and *Milk Board* v. *Metropolitan Cream Pty. Ltd.* (4), this Court endeavoured to apply what were understood to be the principles laid down in *James* v. *Cowan* and *James* v. *The Commonwealth*. In these cases it was held that inter-State trade and commerce could be regulated by law consistently with s. 92 but that a mere prohibition of such trade and commerce was inconsistent with s. 92. This principle was applied in the *Milk Board Case* and repeated in *Australian National Airways* v. *The Commonwealth* (5), in the following words quoted in the *Banking Case* from a judgment of the Chief Justice in the *Airways Case* (6) :—"I venture to repeat what I said in the former case (viz. the *Milk Case* (7)): 'One proposition which I regard as established is that simple legislative prohibition (Federal or State), as distinct from regulation, of interstate trade and commerce is invalid. Further, a law which is "directed against" interstate 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 interstate trade, notwithstanding s. 92'."

This quotation follows an express statement that regulation of trade, commerce and intercourse among the States is compatible with absolute freedom and that s. 92 is violated only when a legislative or executive act operates to restrict such trade, commerce and intercourse directly and immediately, as distinct from creating some indirect or consequential impediment which may fairly be regarded as remote. Thus the Privy Council in the *Banking Case* expressly rejected the proposition that s. 92 precluded Parliaments

(1) (1936) 55 C.L.R., at p. 60.
(2) (1935) 61 C.L.R. 701.
(3) (1937) 57 C.L.R. 372.
(4) (1935) 62 C.L.R. 116.
(5) (1945) 71 C.L.R. 29.
(6) (1949) 79 C.L.R., at p. 640.
(7) (1939) 62 C.L.R. 116, at p. 127.

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(Commonwealth or State) from in any way regulating or controlling inter-State trade and commerce, and a statement of the law was selected for approval which defined the relevant criterion as the distinction between regulation which was permitted, and prohibition, which was not permitted.

The result is that s. 92 does not mean that inter-State trade and commerce is to be free from control by law. In a passage to which I have just referred their Lordships held that if laws have only an indirect effect in relation to inter-State trade and commerce they are not invalidated by s. 92. This proposition deals with the case of the man who is convicted of an offence and is imprisoned and other similar cases. The laws which are permitted as being consistent with s. 92 include not only laws which have only an indirect effect upon inter-State trade and commerce, but also laws which have a direct effect and operation upon that trade and commerce. For example, any laws which can validly be enacted under the power given to the Commonwealth Parliament under s. 51 (i.) to make laws with respect to trade and commerce among the States must have a direct operation in relation to trade and commerce. How then can a distinction be drawn between laws having such a direct operation which are permitted by s. 92 and those which are not so permitted? The answer is to be found in the distinction between regulation and prohibition. This is the distinction which was applied in the *Home Benefits Case*, the *Milk Board Case* and the *Australian National Airways Case* and this is the distinction, as already stated, which has now been expressly adopted by the Privy Council as the relevant criterion.

In the *Banking Case* their Lordships conclude their judgment by stating that it will sometimes be difficult to determine in a particular case whether a law exceeds the limits of regulation and transgresses into prohibition and the conclusion of the Privy Council is summarized in the following words:—" . . . it appears to their Lordships that, if these two tests are applied: first, whether the effect of the Act is in a particular respect direct or remote; and, secondly, whether in its true character it is regulatory, the area of dispute may be considerably narrower" (1). Therefore the questions which are to be asked are these:—Is the effect of a challenged Act in relation to inter-State trade and commerce direct or remote? If it is remote no question in relation to s. 92 arises. Next, where the effect of the Act is direct, is the Act in its true character regulatory and not merely prohibitive? If it is truly regulatory and not prohibitive it will not be invalidated by s. 92.

(1) (1950) A.C., at p. 313; 79 C.L.R., at p. 642.

The question, therefore, is whether the *Transport Regulation Acts* of Victoria are regulatory or prohibitive. The Acts are entirely different from, for example, the Act which was considered in *James* v. *The Commonwealth*, a statute which was enacted upon the then accepted basis that s. 92 did not bind the Commonwealth. The Act specifically penalized the transport of fruit inter-State without a licence. In the sense of *James* v. *Cowan* it was held to be "directed against" inter-State trade. It was obvious that if the Commonwealth was bound by s. 92 such an Act was an infringement of that section. The present *Transport Regulation Act* is a carefully designed extensive system of transport control. Perhaps the most common method of regulating trade is by a licensing system, e.g. in the case of intoxicating liquor, drugs, slaughtering of stock, dealing in marine stores &c. In each case some authority has the duty of determining whether an application for a licence shall be granted or refused. Such licences are generally subject to conditions relating to the manner of carrying on the trade and these conditions frequently involve the payment of a fee. It is such a system which the *Transport Regulation Act* applies. The Act has all the characteristics of a system of regulation. The words of *Gavan Duffy* C.J. in *Vizzard's Case* (1), with respect to a substantially identical Act, in my opinion apply precisely to the present Act:—" . . . the intention of the Legislature was . . . 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 in my opinion is what the Act does. It is a system of regulation and is valid.

It has, however, been particularly objected that a power to regulate trade and commerce does not include a power to exclude any person from operations in trade and commerce. But it is obvious that any regulation which imposes conditions upon activities of individuals must exclude from those activities persons who are not prepared, or who are not able for any reason, to satisfy those conditions. In other words all regulation involves some degree of prohibition and, further, all regulation operates upon persons. Laws apply to persons, not to things, and what is called regulation of a subject matter must be a system of regulating the conduct of persons. The argument that a power to make laws regulating and controlling inter-State trade and commerce does not authorize the exclusion of any person from such trade and commerce is met, not only by the general considerations which have just been

(1) (1933) 50 C.L.R., at p. 47.

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mentioned, but also by the express decision of the Privy Council in the *Banking Case* :—" . . . regulation of trade may clearly take the form of denying certain activities to persons by age or circumstances unfit to perform them or of excluding from passage across the frontier of a State creatures or things calculated to injure its citizens " (1). It must be a question of policy for Parliament to determine what creatures or things or courses of action are to be regarded as " calculated to injure the citizens " of a State.

Finally, reference was made to certain cases decided in the United States of America and it was contended that these authorities supported the view that the legislation challenged in this case is invalid. With respect to American authorities on this subject the following comments may be made. The Constitution of the United States does not contain any such provision as s. 92. The problems which arise from the presence of s. 92 in the Commonwealth Constitution do not arise in the United States in anything like the same way. The power of Congress is a power to make laws to regulate commerce with foreign nations and among the several States and with the Indian tribes. There has been much variation of opinion in the Supreme Court of the United States with respect to the character and limits of this power. Originally it was held to be a concurrent power. Later it was held to be an exclusive power —see *Willis*, *Constitutional Law*, (1938) pp. 307 et seq. It was the prevailing view that *Gibbons* v. *Ogden* (2) decided that " The States may not in any manner directly interfere with or attempt the regulation of commerce between the States by whatever agency that commerce may be carried on " : see *Willoughby* on the *Constitution of the United States*, (1929) 2nd ed., vol. 2, at p. 763, so stating the effect of *Gibbons* v. *Ogden* (2). This proposition is rejected, with respect to the Commonwealth Constitution, in *James* v. *The Commonwealth* and in the *Banking Case*. Later, however, it was held that the States were at liberty to regulate local matters, and that the power of Congress was exclusive only in relation to matters which were considered (by the Supreme Court) to require treatment upon a national scale. No such doctrine has ever been suggested or applied in Australia. There was much conflict of opinion in the United States as to the position where Congress had been silent in relation to a particular matter : *Willis*, p. 308. On the one hand it could be contended that the silence of Congress upon a matter meant that Congress intended that the States were to be free to legislate with respect to that matter. On the other hand, it was

(1) (1950) A.C., at p. 312 ; 79 C.L.R., at p. 641.

(2) (1824) 9 Wheat. 168.

sometimes argued that the silence of Congress meant that it was the intention of Congress that that subject matter should be free from any regulation. No such principles have ever been adopted in Australia. In the United States there is a doctrine of the police power of the States which permits some degree of local regulation of inter-State trade and commerce. This doctrine finds many difficulties in its application and has never been part of the law of Australia. In the United States it has been decided that the States may impose " reasonable " fees for licences in the case of road traffic. No such doctrine has hitherto been applied in Australia for the purpose of limiting legislative power in relation to trade and commerce. Reference has already been made to the difficulties of applying such a criterion of validity.

The *Banking Case* has, in my opinion, finally decided that laws directly operating upon persons engaging in inter-State trade and commerce are not infringements of s. 92 if they are what can fairly be described as " regulation." If, however, they are laws which directly deal with the subject matter of trade and commerce and exceed regulation and pass into prohibition they are invalid. The *Transport Regulation Acts* of Victoria are, in my opinion, truly described as Regulation Acts.

In my opinion the appeals should be dismissed.

DIXON J. At the time when *R.* v. *Vizzard*; *Ex parte Hill* (1) was decided I found myself unable to accept the conclusion that was reached. But what was worse, I was conscious of a failure on my part to refer the conclusion to any interpretation of s. 92 of which I could obtain a clear grasp. To my cast of mind it seemed to introduce an incoherence into the application or operation of s. 92. On the question of the valid operation upon inter-State traffic of legislation of the same general character as that with which the case dealt, the decision became, of course, a decisive precedent and it was followed. Indeed, as I think, it was somewhat extended. The cases are *O. Gilpin Ltd.* v. *Commissioner for Road Transport and Tramways (N.S.W.)* (2), *Duncan and Green Star Trading Co. Pty. Ltd.* v. *Vizzard* (3) and *Riverina Transport Pty. Ltd.* v. *Victoria* (4). Together these cases are often conveniently described as the *Transport Cases*.

That last mentioned (the *Riverina Transport Case* (4)) presented a state of facts which I took some trouble to state because, though I did not say so, it appeared to me to provide a *reductio ad absurdum*.

(1) (1933) 50 C.L.R. 30.
(2) (1935) 52 C.L.R. 189.
(3) (1935) 53 C.L.R. 493.
(4) (1937) 57 C.L.R. 327.

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But I said :—" The decisions in those cases appear to me completely to establish the validity of legislation taking substantially the same form as the Victorian Transport Regulation Acts. In particular they decide that the prohibition of carrying goods by motor vehicle, except under licence, involves no impairment of the freedom of trade, commerce and intercourse among the States, although carriage of goods upon a journey across the border is included and although there is a full discretion to grant or withhold a licence. I remain quite unable to agree in that conclusion, but I should have thought that it covered the present case and that the elements relied upon by the plaintiff could make no difference. It is better that I should not attempt any restatement for myself of the principles upon which the decisions rest. Probably my grasp of those principles is imperfect and, as a rule, it is neither safe nor useful for a mind that denies the correctness of reasoning to proceed to expound its meaning and implications" (1).

In the *Airlines Case* (2), however, it became necessary to form a conclusion as to the *ratio decidendi* of the *Transport Cases*. For it was claimed that the business of providing inter-State carriage of men and things was not itself part of trade commerce and intercourse between the States, although subject to the commerce power as something incidental thereto. The conclusion I formed I stated in this passage :—" After a full study of the *Transport Cases* I have come to the conclusion that they do not decide this proposition. In the pragmatical solution which those cases gave to a problem which they approach as a complex the essential features of the legislation were examined for the purpose of determining its practical operation upon inter-State commerce and intercourse regarded as a sum of activities ; to see whether it obstructed, restricted, retarded or impaired, not some operations of commerce considered separately or in isolation, but the commerce between New South Wales and Victoria considered as a whole. The legislation was, in effect, treated as part of an attempt to make the internal transport of the State a planned structure, a framework within which the freedom guaranteed by s. 92 subsisted and even by which that freedom was secured. The reasons given for the solution necessarily comprised much that was really directed to denying that in the character and operation of the legislation factors or features could be found to which s. 92 was inimical. It is, I think, in the course of this demonstration that, among other things, any adverse effect upon the flow of trade is excluded and the relation in fact which transport has to trade in goods is emphasised. It is to be

(1) (1937) 57 C.L.R., at p. 362. (2) (1943) 71 C.L.R. 29.

noticed that it is not the business of inter-State carrying but motor trucks themselves which *Rich* J. describes as aids or implements to commerce and intercourse but not the thing itself. The decision was, I think, based upon a combination of all the considerations mentioned in the passage, negative and positive, particularly the fact that it was the undifferentiated road transport of the State that was regulated on a non-discriminatory basis " (1). The passage was preceded by an attempt to bring together the points which *Rich* J. had made in his judgment in *Vizzard's Case* which *Evatt* J. and *McTiernan* J. had said truly described the legislation under consideration in *Gilpin's Case*.

For my part I adhere to the explanation of the reasoning in the *Transport Cases* which on that occasion I gave, ending as it does in the passage I have set out. But it is an explanation which places the decisions upon certain conceptions or preconceptions the validity of which I was never prepared to admit.

In the cases now before us the appellants assert that they are, or they at least include, the very conceptions which in the *Banking Case* (2) the judgment of the Privy Council has condemned as unsound. On that ground the appellants say that this Court ought no longer to feel bound by the authority of the *Transport Cases* but should reconsider them.

I do not think that there is any room for doubting that their Lordships have rejected as erroneous three propositions that have often been put forward. The first is " that sec. 92 of the Constitution does not guarantee the freedom of individuals." The second is " that, if the same volume of trade flowed from State to State before as after the interference with the individual trader . . . then the freedom of trade among the States remained unimpaired." The third relates to the relevance of absence of discrimination. As I understand it their Lordships have rejected the theory that because a law applies alike to inter-State commerce and to the domestic commerce of a State, it may escape objection notwithstanding that it prohibits restricts or burdens inter-State commerce.

I shall not stop to examine or explain the contraries of these propositions or to state how they should be understood to apply. They have been much canvassed and there ought to be no difficulty in understanding them. All that is important for present purposes is that in face of the pronouncement of the Privy Council the propositions themselves are no longer tenable.

There are two further matters settled by the decision of their Lordships that are relevant to the basis upon which the *Transport*

(1) (1943) 71 C.L.R., at p. 90.

(2) (1950) A.C. 235; 79 C.L.R. 497.

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Cases appear to me to rest. One is that the object or purpose of an Act challenged as contrary to s. 92 is to be ascertained from what is enacted and consists in the necessary legal effect of the law itself and not in its ulterior effect socially or economically. The other is that the question what is the pith and substance of the impugned law, though possibly of help in considering whether it is nothing but a regulation of a class of transactions forming part of trade and commerce, is beside the point when the law amounts to a prohibition or the question of regulation cannot fairly arise. Now I think that every one of these five errors will be found to have a place in what in the passage I have quoted I ventured to call the pragmatical solution which the *Transport Cases* gave to a problem they approached as a complex.

Trade and commerce was treated as a sum of activities. The inter-State commercial activities of the individual and his right to engage in them were ignored. Inter-State commerce as a whole was considered and the adverse effect upon the total flow was treated as the test or at all events a test. Great importance was attached to the absence from the Act of discrimination against inter-State trade. The purpose imputed to the Act of making a planned structure of the internal transport of the State was taken into account as another element weighing in favour of the valid operation of the Act upon inter-State carriage. But that purpose was a matter of supposed policy which as it was thought it was the design of the Act to carry out: not the legal effect of the enacted provisions. The use of the idea expressed by the words " pith and substance " may not appear so clearly; but I think that underlying much of what is said in the judgments in the *Transport Cases* is a view of the Act which treated the restriction on the carriage of goods by road as a means of effecting a main purpose of distributing the traffic between road and rail in a " rationalized " manner.

To these elements one other was added; one not the subject of consideration by the Privy Council. That element is the distinction taken between on the one hand motor vehicles as integers of traffic and on the other hand the trade of carrying by motor vehicle as part of commerce. It is a distinction that I have never understood. The statutes dealt with the commercial use of motor vehicles and not with motor vehicles as such or at rest so to speak. There are tendencies in the *Transport Cases* to thrust the carriage of goods and persons towards the circumference of the conception of commerce, but in the *Airlines Case* (1), it was shown that it must lie at or near the centre. The combination of ideas upon which, according to my

(1) (1945) 71 C.L.R. 29.

view, the *Transport Cases* are based, consists therefore of no element which can survive. Five of them have been destroyed by the judgment of the Privy Council. The sixth would not suffice as a separate reason and is unsustainable. I am therefore of opinion that we should no longer regard ourselves as bound by the authority of the *Transport Cases*.

It remains to consider whether those decisions can be supported on independent grounds. Now upon this subject it is enough to say that I have had the advantage of reading the judgment of *Fullagar* J. and entirely agree with it. But perhaps there are two or three observations that it may be better for me to add. The first is to say that my own judgment in *R.* v. *Vizzard*; *Ex parte Hill* (1), expresses reasons for dissenting which I have not seen any cause to regret and by which I abide. The second is to remark that what I wrote in the case of *O. Gilpin Ltd.* (2) may be nothing but an illustration of the observation made by their Lordships concerning "the way in which the human mind tries and vainly tries, to give to a particular subject matter a higher degree of definition than it will admit." I took the hazardous course of attempting to state a general theory of s. 92 derived from purely logical considerations because it then seemed I was dealing only with a chapter that had ended. On re-reading the judgment I notice that it is not particularly addressed, as perhaps it ought to have been, to the *Transport Cases*, but I see not much in it greatly inconsistent with their Lordships' judgment and some things which I respectfully think that judgment confirms. The third matter to which I wish to refer is the question whether the Victorian *Transport Regulation Acts* can possibly be treated as no more than a regulation of the carriage of goods by motor vehicle by road. I state the question in that way because when the judgment of the Privy Council speaks of an enactment being no more than regulatory I understand that to mean regulatory of some description of transactions of trade and commerce. The distinction between regulating a subject and restricting or prohibiting the subject is of course a familiar one. It appears to me quite impossible to describe a statute like the Victorian *Transport Regulation Acts* as no more than regulation of the commercial carriage of goods by road involving no impairment of the freedom of trade commerce and intercourse among the States. It is perhaps enough to quote the following statement by *Isaacs* J. in a by-law case (*Country Roads Board* v. *Neale Ads Pty. Ltd.* (3)):—"The power of regulation may, and almost necessarily does, involve some restriction

(1) (1933) 50 C.L.R. 30.
(2) (1935) 52 C.L.R. 189.
(3) (1930) 43 C.L.R. 126, at p. 139.

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or prohibition. The body entrusted with the power to regulate must in some sufficient way mark out whatever limits of prohibition are to exist. That is to say, legal rights otherwise existing are not to be cut down at the discretion of some individual or individuals, but must be dealt with by the law. And they are not properly dealt with in that case by first exercising the power of prohibition which is not conferred. But where the by-law itself prohibits, and in the absence of a written consent prohibits completely, the consent if refused simply leaves the by-law to operate without it, and if given satisfies the provision of the by-law by a factum which excludes the given case from its operation." See further *Swan Hill Corporation* v. *Bradbury* (1).

The facts of the present case simply are that a carrier seeks to carry beer from South Australia through Victoria into New South Wales. The Victorian Act forbids it unless the Victorian Executive Government in the exercise of an uncontrollable discretion sees fit to grant a licence upon considering a decision of the Transport Board upon an application by the carrier for a licence. That appears to me to impair the carrier's guaranteed freedom to engage in inter-State trade and not simply to regulate his trade.

I am of opinion that the appeals should be allowed with costs and the convictions quashed.

McTIERNAN J. I concur in the reasons for judgment of the Chief Justice.

The crucial question emerging from the argument on the grounds depending on s. 92 of the Constitution is whether *Vizzard's Case* (2) should be overruled. It is the crucial question because no material distinction can be made between the Act there upheld and the present Act which would justify a decision opposite to the decision in *Vizzard's Case*, if that decision is not overruled. Counsel for the appellants argued that the decision in *Vizzard's Case* fails to secure to inter-State transportation the freedom guaranteed to inter-State trade, commerce and intercourse. The argument is founded upon the reasons of the Judicial Committee for deciding that s. 46 of the *Banking Act* 1947 offended against s. 92. Counsel for the States of Victoria, New South Wales, Queensland and the Commonwealth relied upon those reasons to defend the decision in *Vizzard's Case* and the Act attacked in the present case. In the course of their reasons the Judicial Committee said that the decisions in *James* v. *Cowan* (3) and in *Vizzard's Case* (4) may be reconciled. This state-

(1) (1937) 56 C.L.R. 746, at p. 762.
(2) (1933) 50 C.L.R. 30.
(3) (1932) A.C. 542; 47 C.L.R. 386.
(4) (1933) 50 C.L.R. 30.

ment is a strong obstacle to the attack on the latter decision but a great help to its defence. The former case is of unimpeachable authority. The value of the statement of the Judicial Committee to the defence of *Vizzard's Case* depends upon this fact. In view of the possibility of this reconciliation, *Vizzard's Case* cannot be manifestly wrong, supposing it is not right. The statement of the Judicial Committee is not an express approval of the decision. It may be a tacit approval of the conclusion but not of all the reasons. The conclusion could not have been reached on grounds as broad as the propositions enunciated by the Judicial Committee because *McArthur's Case* left a very attenuated and uncertain residue of legislative power to the States. The Act upheld in *Vizzard's Case* was a State Act. The statement that the case may be reconciled with *James* v. *Cowan* is a strong prop to the decision in *Vizzard's Case*, whatever may be said of the reasons upon which the Act was upheld.

The *Transport Acts* of all the States depend for protection against an attack based upon s. 92 upon the conclusion in *Vizzard's Case* that the Act there in question is not inconsistent with s. 92. The statement of the Judicial Committee conveys no suggestion that these Acts are in jeopardy. It is more than a neutral proposition in a controversy about the consistency of such Acts with s. 92. If the decision in *Vizzard's Case* deprived inter-State transportation of its constitutional freedom, it could not possibly be reconciled with *James* v. *Cowan*. The authoritative statement that the two decisions may be reconciled tells strongly in favour of the decision in *Vizzard's Case*. This statement is not a mere theoretical speculation. If the statement be taken in conjunction with the proposition which the Judicial Committee enunciated about the ambit of s. 92 and what class of Acts it allows and forbids, the statement provides solid ground for the view that the Act upheld in *Vizzard's Case* is in general an Act of the class which could not be condemned. I presume that the Judicial Committee contemplated that the reconciliation would be attempted by applying the propositions they were laying down for determining whether a legislative or executive Act offends against s. 92. *James* v. *Cowan* is right because it went the way required by those propositions. The admission of the possibility of reconciling the two decisions makes it reasonable to infer that the Judicial Committee entertained the view that the propositions they enunciated would not spell death to the decision in *Vizzard's Case* and the State *Transport Acts* known to depend upon it. The reconciliation which is contemplated is one which could only be

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reached by observing and applying "the distinction between restrictions which are regulatory and do not offend against s. 92 and those which are something more than regulatory and do so offend." The statement that *Vizzard's Case* may be reconciled with *James* v. *Cowan* impliedly assigns the restrictions imposed by the Act in *Vizzard's Case* to the former category: at least that statement precludes the view that those restrictions might have been regarded as belonging to the latter category.

It is clear that in *James* v. *The Commonwealth* (1) the Judicial Committee approved of that part of the reasoning of *Evatt* J. in *Vizzard's Case* which is quoted by Lord *Wright*. The passage which is quoted must be regarded as defining a field in which s. 92 does not prohibit a State or the Commonwealth from legislating. The position under s. 92 of an owner of commodities which are the subject of an inter-State transaction involving inter-State carriage is the subject of the passage. What is said is that s. 92 does not guarantee him "a right to ignore State transport or marketing regulations." It is not possible, in my opinion, to endorse this passage and reject the conclusion that the Act in question in the case did not offend against s. 92. The Judicial Committee said that it would not be easy to reconcile all that was said by *Evatt* J. in *Vizzard's Case* with what *Isaacs* J. said in *James* v. *Cowan*. However if the passage which Lord *Wright* quoted from the reasons of *Evatt* J. is irreconcilable with anything that was said by *Isaacs* J. approval by the Judicial Committee of that specific passage makes it authoritative. When *James* v. *Cowan* was decided by this Court, *McArthur's Case* was more authoritative than when *Vizzard's Case* was decided. It seems that *Evatt* J. proceeded upon that view. In *Vizzard's Case* I thought that the Act there in question could be brought within the qualifications which *Nelson's Case* (*No.* 1) (2) and *Roughley's Case* (3) appeared to me put upon the doctrine laid down in *McArthur's Case*. In my opinion *Vizzard's Case* should not be overruled.

The explanation of the ambit of s. 92 given by the Judicial Committee and the propositions which they have laid down for determining whether an Act offends against s. 92 do not demonstrate that the decision in *Vizzard's Case* is wrong in its result. It is necessary to apply the more authoritative explanation and propositions of the Judicial Committee rather than any part of the reasoning in *Vizzard's Case* of which the Judicial Committee has not expressly approved to determine whether the present Act

(1) (1936) A.C. 578; 55 C.L.R. 1.
(2) (1928) 42 C.L.R. 209.
(3) (1928) 42 C.L.R. 162.

offends against s. 92. The Act regulates motor transport on the public highways in Victoria by restricting to the holders of licences granted in accordance with the provisions of the Act the right to operate for hire motor vehicles used or intended for the carriage of passengers or goods in the course of trade. The vesting of an executive agency established by statute with authority to grant or refuse licences to operate such motor vehicles is a form of regulation of motor transport. Under this system of regulating this economic activity the restrictions which are imposed are that nobody may operate a motor vehicle on the highways unless he has a licence and any person who is refused a licence or has not been granted a licence is prohibited from doing so. The terms " trade, commerce, and intercourse " comprise motor transport which is thus restricted. If these restrictions are " regulatory " they do not offend against s. 92. If on the other hand they are " something more than regulatory " they do offend against s. 92. The Judicial Committee gave their authority to two " general propostions". These are :—" (1) that regulation of trade, commerce and intercourse among the States is compatible with its absolute freedom, and (2) that s. 92 is violated only when a legislative or executive act operates to restrict such trade, commerce and intercourse directly and immediately as distinct from creating some indirect or consequential impediment which may fairly be regarded as remote." Their Lordships added the following observation :— " In the application of these general propositions, in determining whether an enactment is regulatory or something more, or whether a restriction is direct or only remote or incidental, there cannot fail to be differences of opinion. The problem to be solved will often be not so much legal as political, social, or economic, yet it must be solved by a court of law." Applying the propositions and rules which are formulated by the Judicial Committee for determining whether s. 92 is violated by a legislative Act to the present Act, I think that the correct conclusion is that the Act does not violate the section.

The Act operates to restrict interstate trade, commerce and intercourse to some degree. I think that the proper view of the Act, having regard to the nature of the subject matter and the economic problem which it was passed to solve is that the restrictions which it imposes on trade, commerce and intercourse are not direct and immediate but are indirect and consequential. The restrictions are essentially regulatory and do not offend against s. 92.

The appeals should be dismissed.

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WILLIAMS J. The appellant McCarter, who is an interstate carrier of goods, was convicted and fined under the provisions of s. 45 of the *Transport Regulation Act* 1933 (Vict.) as the owner of a commercial goods vehicle which operated on a Victorian public highway without a licence under this Act in the course of carrying goods from South Australia through Victoria into New South Wales. The appellant Gough was convicted as the driver of the vehicle. They contend that no such licence was necessary because the Victorian *Transport Regulation Acts* infringe s. 92 of the Constitution and are invalid unless they can be read down under s. 2 of the *Acts Interpretation Act* 1930 (Vic.) so as not to apply to interstate trade and commerce, in which case this journey would be beyond their operation. The question for decision therefore is whether the *Transport Regulation Acts* (Vict.), at least in relation to interstate trade and commerce, infringe s. 92. If they do not the appellants were rightly convicted.

These Acts, except the *Transport Regulation* (*Licences and Fees*) *Act* 1947, are the very Acts which were considered by this Court and held to be valid in *Riverina Transport Pty. Ltd.* v. *Victoria* (1). This case was the culmination of a line of cases commencing with *R.* v. *Vizzard*; *Ex parte Hill* (2); and followed by *O. Gilpin Ltd.* v. *Commissioner of Road Transport & Tramways* (3); *Bessell* v. *Dayman* (4); and *Duncan & Green Star Trading Co. Pty. Ltd.* v. *Vizzard* (5). These cases were discussed and accepted by this Court as correct but distinguished in *Australian National Airways Pty. Ltd.* v. *The Commonwealth* [*No.* 1]. (6). They are now attacked on the ground that the reasons in the judgment of the Privy Council in *Commonwealth* v. *Bank of New South Wales* (7) show that they were decided upon a misapprehension of the true meaning of s. 92. Of these cases *R.* v. *Vizzard*; *Ex parte Hill* (2) must be considered the most important because this case, and in particular the reasoning of *Evatt* J., was picked out for special mention by the Privy Council in *James* v. *The Commonwealth* (8). It was also mentioned in the latest judgment of the Privy Council. The reasoning of *Evatt* J. in *Vizzard's Case* is based to a considerable extent on the ground that s. 92 does not protect the freedom of individuals to engage in inter-State trade and commerce among the States but only protects the free passage of the goods themselves across State borders and s. 92 is not infringed provided the volume

(1) (1937) 57 C.L.R. 327.
(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) (1945) 71 C.L.R. 29.
(7) (1949) 79 C.L.R. 497.
(8) (1936) A.C. 578, at pp. 621, 622; 55 C.L.R. 1, at pp. 50, 51.

of trade which flows from State to State is not affected. In the *Bank Case* in this Court, this view is explained in the joint judgment of *Rich* J. and myself in the following passage: "The defendants contended that s. 92 is not concerned with the right of an owner of goods to sell them out of the State, and therefore is not concerned with the ownership of such goods prior to, at the time of, or subsequent to, the passage of the goods across State boundaries. Accordingly the Commonwealth and State Parliaments legislating within their constitutional powers can select the individuals who are to engage in inter-State trade. But they must not place any hindrance, burden or restriction on the free passage of the goods of such individuals across State boundaries" (1). The opinion of *Isaacs* J. in *James* v. *Cowan* (2) that the freedom guaranteed by s. 92 is a personal right attaching to the individual and not attaching to the goods, in spite of the fact that Lord *Atkin* in this case on appeal (3) had said, in delivering the judgment of the Privy Council, that their Lordships were in accord with the convincing judgment of *Isaacs* J., was rejected. It has always seemed to me, as I have already stated in the *Australian National Airways Case* [*No.* 1] (4), and *Clement & Marshall Pty. Ltd.* v. *Field Peas Marketing Board* (5), that the opinion of *Isaacs* J. was right in the sense, as stated by the Privy Council in the *Bank Case* (6) that though s. 92 did "not create any new juristic rights, it does give the citizen of State or Commonwealth, as the case may be, the right to ignore, and, if necessary, to call upon the judicial power to help him to resist legislative or executive action which offends against the section," and that the line of cases under discussion could not be supported on this ground. The law is stated to the same effect in the joint judgment of *Rich* J. and myself in this Court in the *Bank Case* (7). This ground was relied upon to support the legislation held to be invalid in the *Australian National Airways Case* [*No.* 1] because that legislation was careful to provide for the monopoly in favour of the Australian National Air Lines Commission only becoming and remaining absolute when and so long as the airlines operated by this Commission were able to carry the whole of the inter-State traffic in persons and goods. Accordingly it appeared to me to be necessary to reconcile this line of cases with the opinion of *Isaacs* J. before the Australian National Airways could succeed in the action. It was not a matter of avoiding these cases by some dexterity. It was a matter

(1) (1948) 76 C.L.R. 1, at p. 291.
(2) (1930) 43 C.L.R. 386, at p. 418.
(3) (1932) A.C. 542, at p. 561.
(4) (1945) 71 C.L.R., at pp. 107-110.
(5) (1947) 76 C.L.R. 401, at p. 409.
(6) (1950) A.C. 235, at p. 305; 79 C.L.R., at p. 635.
(7) (1948) 76 C.L.R., at p. 290.

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of attempting to reconcile the approval of the judgment of *Isaacs* J. by the Privy Council in *James* v. *Cowan* with the passage from the judgment of *Evatt* J. in *Vizzard's Case* cited by the Privy Council in *James* v. *The Commonwealth*. This led to the reasoning which appears in the *Australian National Airways Case* [*No.* 1] (1), which seems to me to be the only way in which to effect a reconciliation.

The judgment of the Privy Council in the *Bank Case* has thrown new light on the solution of the problems presented by s. 92. In particular it has corrected the misapprehensions which have arisen with respect to its own two previous judgments. The Privy Council has to my mind made it plain that the freedom of trade and commerce and intercourse protected by s. 92 is the freedom of the individual to engage in trade and commerce and pass freely among the States. But freedom of trade, commerce and intercourse in a community regulated by law presupposes some degree of restriction upon the individual and their Lordships said: "(1) that regulation of trade and commerce and intercourse among the States is compatible with its absolute freedom and (2) that s. 92 is violated only when a legislative or executive act operates to restrict such trade, commerce and intercourse directly and immediately as distinct from creating some indirect or consequential impediment which may fairly be regarded as remote." Of *Vizzard's Case* they said that it does not appear to them that the whole of *Evatt* J's. reasoning received the considered approval of the Board; "the decisions in *James* v. *Cowan* and in *Vizzard's Case* may be reconciled: it would not be easy to reconcile all that was said by *Evatt* J. in the one case with all that was said by *Isaacs* J. in the other." I assume that regulation of trade, commerce and intercourse among the States is compatible with its absolute freedom, although any regulation necessarily involves some interference with the freedom of the individual, because it is necessary to read the Constitution as a whole and such legislation falls within the power of the Commonwealth Parliament to legislate with respect to trade and commerce among the States under s. 51, par. (i.) of the Constitution and within the power of the States to legislate with respect to both intra- and inter-State trade and commerce reserved to them by s. 107 of the Constitution (subject of course to s. 109 of the Constitution in the case of inter-State trade and commerce).

The *Australian National Airways Case*, which was expressly approved of by the Privy Council, is a clear decision that the business of carrying passengers and goods for reward among the

(1) (1945) 71 C.L.R., at pp. 108-110.

States is part of trade and commerce among the States. Section 23 of the Victorian *Transport Regulation Act* 1933 provides that a commercial goods vehicle shall not operate on any public highway unless such vehicle is licensed in accordance with this Part. Section 27 provides that, subject to the provisions of this Part, the Board may grant the application (with or without variation) or may refuse to grant the application, and subject to this Part, the decision of the Board shall be final and without appeal. The Part referred to in these sections is Part II. of the Act headed—Regulation of Motor Transport. Section 37 of the Act of 1933 gave an aggrieved person a right of appeal on law or fact to the Supreme Court but this section was repealed by s. 4 of the *Transport Regulation Act* 1935, and a new s. 37 substituted providing that no decision of the Board granting or refusing to grant a licence or revoking or suspending any such licence should have any force or effect until such decision is reviewed by the Governor in Council. The Act of 1935 also repealed the words in s. 27 (1) " and subject to this part the decision of the board shall be final and without appeal." The effect of s. 23 is to prohibit a carrier of goods from operating his vehicle upon the public roads of Victoria without a licence. The Board, subject to review by the Governor in Council, has an absolute discretion whether to issue a licence or not. Carriers have no right to a licence, so that the Victorian *Transport Regulation Acts* directly and not remotely restrict their right to engage in a form of inter-State trade, and this restriction is therefore one which can only escape the operation of s. 92 if it forms a part of legislation which is essentially regulatory in character.

It was contended for the appellant that the form of regulation intended by the Privy Council was regulation which prescribed certain conditions relevant to the orderly carrying on of the trade with which all who desired to engage in that trade were bound to comply but which preserved an equal right in every individual to engage in the trade subject to such compliance. In other words it was contended that regulation did not include prohibition. The regulation of a trade necessarily implies its continuance and no law which absolutely prohibits the carrying on of a trade could be a form of regulation. But the power to regulate has often been held to include partial prohibition where such prohibition is reasonably necessary for effective regulation. Their Lordships said that they did not intend to lay it down that in no circumstances could the exclusion of competition so as to create a monopoly either in a State or Commonwealth agency or in some other body be justified. Each case must be judged on its own facts and in its own setting

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of time and circumstance. Their Lordships also said that they must "add, what, but for this argument so strenuously urged, they would have thought it unnecessary to add, that the regulation of trade may clearly take the form of denying certain activities to persons by age or circumstances unfit to perform them, or of excluding from passage across the frontier of a State creatures or things calculated to injure its citizens." It appears to me that the Privy Council must have contemplated that an enactment could be regulatory and nothing more although it placed restrictions upon the right of individuals to engage in inter-State trade where such restrictions were reasonably necessary for its effective regulation. Their Lordships reiterate the view already expressed in *James* v. *The Commonwealth* that the question is one of fact and add that in determining whether an enactment is regulatory or something more or whether a restriction is direct or only remote or incidental, the problem to be solved will often be not so much legal as political, social and economic.

There can be no doubt that the regulation of a trade includes the enactment of all conditions reasonably necessary for its safety and preservation, and of the imposition of reasonable charges for the administration of its regulation, so that a State could enact all legislation reasonably required for the safety, maintenance and preservation of the public roads and could make a reasonable charge for their use. It is clear, I think, that *Willard* v. *Rawson* (1), which goes thus far and no further, was rightly decided. But the Victorian *Transport Regulation Acts*, and the corresponding Acts in New South Wales and South Australia, upheld in the line of cases under discussion, go further. These Acts are intended to prevent undue competition with the State railways by road transport. Accordingly s. 26 of the Victorian *Transport Regulation Act* provides that before granting or refusing to grant a licence the Board shall have regard primarily to the interests of the public generally including those of persons requiring as well as those of persons providing facilities for the transport of goods, and without restricting the generality of the foregoing require that they shall take into consideration *inter alia* the existing transportation service for the carriage of goods upon the roads and within the area proposed to be served in relation to its present adequacy and probabilities of improvement to meet all reasonable public demands and the effect upon such existing services of the service proposed to be provided.

I have given careful consideration to the submissions of counsel for the appellants, but I am not satisfied, after carefully examining

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

the reasoning of the Privy Council in the *Bank Case*, that the cases under discussion were wrongly decided, and I am not prepared to overrule them. They have been acted on in the States and have no doubt exerted a strong influence upon their policies in relation to their railways and roads. In my opinion they ought not to be re-opened in this Court without the greatest hesitation. The Acts do regulate competition between land transport by rail and road, both of passengers and goods, but only so far as such competition arises out of competing facilities provided by the States themselves. In this respect the Acts differ fundamentally from the legislation held to be invalid in the *Australian National Airways Case* and the *Bank Case*, for there the effect of the legislation was simply to prohibit competition with the government airlines in the one case and the government banks on the other. The *Transport Regulation Acts* do not prevent individuals carrying on the business of land transport among the States without a licence. But they do prevent individuals plying their vehicles on the public roads of the States without a licence. They proceed on the broad principle that the interests of the State require the regulation of the whole service of land transport wherever it is conducted upon the public roads. I am of opinion that a State must have a wide power to regulate the use of the facilities which it provides for trade and commerce, so that the public funds invested in such facilities, in this case the railways, shall not be jeopardised by undue competition brought about solely by the provision of another facility by the State. It is a question of fact whether such Acts are, as they profess to be, regulatory or something more, and the solution of this question raises social and economic problems. The competition could be destroyed, as *Evatt* J. pointed out in *Vizzard's Case* (1), by the State adopting the simple if drastic expedient of destroying the roads so as to compel all traders and travellers to use the railways. The same result could be achieved by allowing the roads to fall into a sufficient state of disrepair. Another way would be for a State to stop the roads short of the boundary and sell a strip of land along its frontiers with other States to private individuals. It has not yet been suggested that the freedom guaranteed by s. 92 is violated if a private individual refuses to allow an inter-State trader or traveller to pass over his land. By building and maintaining State highways States provide means of competition with their own railways, and I can find nothing in the judgment of the Privy Council which leads me to alter the opinion expressed in the *Australian National*

(1) (1933) 50 C.L.R., at p. 82.

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Airways Case [*No.* 1] (1) that "it is simply an exercise of the sovereign rights of the States to co-ordinate traffic by rail or road, and to confine the use of roads to particular persons and vehicles. If the choice of these persons and vehicles has no relation to their passage across the border, but the legislation operates without discrimination with respect to all persons and vehicles desirous of using the roads, such legislation is not aimed or directed at inter-State commerce but at regulating, maintaining and co-ordinating a number of utilities for trade, commerce, and intercourse, State and inter-State, provided by the State."

It was also contended that the licence fee not exceeding 5s. per cwt. of load capacity in the case of a commercial goods vehicle imposed by the new s. 34 introduced by s. 7 of the *Transport Regulation* (*Licences and Fees*) *Act* 1947 violated s. 92 because it imposed a tax on trade and commerce among the States. But there is no evidence that this fee is other than a reasonable charge for the expenses incurred in the administration of the Acts and the maintenance of the roads which the licensee is authorized to use. The section provides that the fees shall be paid into a fund to be established and kept by the Treasury and known as a Transport Regulation Fund. This fund may be used to pay for expenses other than those incurred in the administration of the Act and the maintenance of the roads, but if the fee is a reasonable charge for these services, it is, in my opinion, immaterial that the State uses the moneys for some other purpose: cf. *Aero Mayflower Transit Co.* v. *Board of Railroad Commissioners* (2).

I would dismiss the appeals.

WEBB J. Whether a Commonwealth or State statute or executive act infringes s. 92 of the Commonwealth Constitution is in every case a question of fact (*James* v. *The Commonwealth* (3); *Commonwealth* v. *Bank of New South Wales* (4)). In *Riverina Transport Pty. Ltd.* v. *Victoria* (5) the legislation now attacked was held not to be an infringement of s. 92. There has been no material change in this legislation. The *Riverina Case* applied *R.* v. *Vizzard*; *Ex parte Hill* (6), in which legislation somewhat similar was held not to infringe s. 92. This legislation provides for the co-ordination of road and rail transport and may be administered so as to bring about a rationalisation of transport engaged in both inter-State

(1) (1945) 71 C.L.R., at p. 109.
(2) (1947) 332 U.S. 495 [92 Law. Ed. 99].
(3) (1936) A.C. 578, at p. 631; 55 C.L.R. 1.
(4) (1949) 79 C.L.R., at pp. 637, 638.
(5) (1935) 57 C.L.R. 327.
(6) (1933) 50 C.L.R. 30.

and intra-State trade, commerce and intercourse. Provision is made for the issue of licences where certain conditions are complied with e.g., to insure that the drivers of motor vehicles are competent and responsible, and that the vehicles are in good order. Licences could be withheld on the ground that over-crowding of the roads would otherwise result. The legislation also makes provision for road charges which appear to me to be based on the extent of use of the roads, or of the right of use, but the fund into which these charges are paid is not required to be wholly applied to road purposes. But a licence may also be withheld if that is deemed desirable in the public interests. This power can be exercised to restrict competition between road carriers and the State-owned railways.

Whether the co-ordination or rationalisation of motor transport in inter-State trade, commerce and intercourse infringes s. 92 depends firstly upon whether its effect is direct, or only remote. Since the decision of this Court in *Australian National Airways Pty. Ltd.* v. *The Commonwealth* [*No.* 1] (1) it must be assumed that transport for reward is itself trade and commerce, and not merely something incidental thereto which can be dealt with by legislation or executive action without directly affecting such trade or commerce. The co-ordination and rationalisation of such transport has, I think, a direct effect, i.e. an effect on trade and commerce as trade and commerce. But if it is still essentially regulatory, and not prohibitive or restrictive, it is not an infringement of s. 92. It was submitted for the appellants that it cannot be found to be essentially regulatory, because of the reasoning of the Judicial Committee of the Privy Council in the *Banking Case* ; and particularly because of their Lordships' observations on *Vizzard's Case.* In the *James Case* (2) Lord *Wright* in delivering the judgment of the Judicial Committee observed that the reasoning of *Evatt* J. in *Vizzard's Case* seemed to be correct. But it did not appear to their Lordships in the *Banking Case* that the whole of the reasoning of *Evatt* J. received the considered approval of the Judicial Committee in the *James Case.* Their Lordships said that even if it did receive that approval, still it did not follow that the judgment of this Court in the *Banking Case* could not be maintained ; and further that the facts, both in relation to subject matter and to manner of restriction or interference, were so widely different in the two cases that it was difficult to apply to one case all that was said in the other. It may be that this latter observation could be taken to apply to the difference between *Vizzard's Case* and the *Banking Case.* Their Lordships, after noting that in *James* v. *Cowan* (3) Lord

(1) (1945) 71 C.L.R. 29.
(2) (1936) A.C., at p. 622 ; 55 C.L.R. 1.
(3) (1932) A.C. 542, at p. 561 ; 47 C.L.R. 386, at p. 387.

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Atkin said the Judicial Committee found themselves in accord with the convincing judgment of *Isaacs* J., proceeded to say :— "The decisions in *James* v. *Cowan* and in *Vizzard's Case* may be reconciled : it would not be easy to reconcile all that was said by *Evatt* J. in the one case with all that was said by *Isaacs* J. in the other."

As the facts in these two last-mentioned cases were also widely different it may be that their Lordships did not refer to the reasoning of *Isaacs* J. and *Evatt* J. in applying s. 92 to the facts of the respective cases, but to their reasoning on s. 92 independently of the facts. Therefore I do not think that because of what their Lordships said as to the reasoning of *Evatt* J. in *Vizzard's Case* we should regard that case as wrongly decided. Nor can I find in the reasoning of their Lordships in the *Banking Case*, anything from which it necessarily follows that their Lordships thought that the decision in *Vizzard's Case* was wrong. Their Lordships say (1) :—"But it seems that two general propositions may be accepted : (1) that regulation of trade, commerce and intercourse among the States is compatible with its absolute freedom, and (2) that s. 92 is violated only when a legislative or executive act operates to restrict such trade, commerce and intercourse directly and immediately as distinct from creating some indirect or consequential impediment which may fairly be regarded as remote.

In the application of these general propositions, in determining whether an enactment is regulatory or something more, or whether a restriction is direct or only remote or incidental, there cannot fail to be differences of opinion. The problem to be solved will often be not so much legal as political, social or economic, yet it must be solved by a court of law. . . .

Difficult as the application of these general propositions must be in the infinite variety of situations that in peace or in war confront a nation, it appears to their Lordships that this further guidance may be given."

Their Lordships then refer to the following passage in the judgment of *Latham* C.J. in the *Airways Case* [*No.* 1] (2) :—" '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 (in-

(1) (1950) A.C., at pp. 309, 310 ; 79 C.L.R., at pp. 639, 640.

(2) (1945) 71 C.L.R., at p. 61.

cluding transport) is to be conducted is not a mere prohibition and may be valid in its application to inter-State trade, notwithstanding s. 92'."

Their Lordships expressed their agreement with this passage and then referred to a further passage in the judgment of *Latham* C.J. as one that no doubt had led his Honour to a correct decision in the *Airways Case* (1):—"In the present case the Act is directed against all competition with the inter-State services of the Commission. The exclusion of other services . . . are themselves inter-State services. . . . The exclusion of competition with the Commission is not a system of regulation and is, in my opinion, a violation of s. 92."

On this passage their Lordships observed (2):—"*Mutatis mutandis* these words may be applied to the Act now impugned, for it is an irrelevant factor that the prohibition prohibits inter-State and intra-State activities at the same time."

So also it might appear that these words of *Latham* C.J. could be applied to this legislation. But their Lordships continued (3):—"Yet about this, as about every other proposition in this field, a reservation must be made. For their Lordships do not intend to lay it down that in no circumstances could the exclusion of competition so as to create a monopoly either in a State or Commonwealth agency or in some other body be justified. Every case must be judged on its own facts and in its own setting of time and circumstances, and it may be in regard to some economic activities and at some stage of social development it might be maintained that prohibition with a view to State monopoly was the only practical and reasonable manner of regulation, and that inter-State trade, commerce and intercourse thus prohibited and thus monopolised remained absolutely free."

If economic activities at some stage of social development could justify legislation giving a monopoly as being essentially regulatory, legislation short of that might be essentially regulatory in circumstances not so exceptional, e.g., legislation to co-ordinate and rationalise motor transport to protect State railways against competition.

At the end of their reasons their Lordships say (4):—" . . . if these two tests are applied: first, whether the effect of the Act is in a particular respect direct or remote; and, secondly, whether

(1) (1945) 71 C.L.R., at p. 61.
(2) (1950) A.C., at p. 309; 79 C.L.R., at p. 640.
(3) (1950) A.C., at pp. 309, 310; 79 C.L.R., at pp. 640, 641.
(4) (1950) A.C., at p. 311; 79 C.L.R., at p. 642.

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in its true character it is regulatory, the area of dispute may be considerably narrower. It is beyond hope that it should be eliminated."

The provisions of legislation of this kind directed to securing safety, e.g. by requiring drivers to be competent, vehicles to be in good order, traffic rules to be observed, limiting the number of vehicles to the capacity of the roads, and providing for the upkeep of the roads by imposing reasonable charges for their use, have, I think, only a remote effect on inter-State trade, commerce and intercourse, and so are not an infringement of s. 92. In the present case there is no evidence that the moneys collected by way of fees under the Act are not used to meet administration expenses of the Transport Regulation Board and for the improvement of transport facilities. But provisions to co-ordinate or rationalise transport have a direct effect, and, without the authority of *Vizzard's Case*, I would not find it easy to sustain, as essentially regulatory, legislation of a State designed to protect its railways against the competition of road carriers engaged in inter-State trade and commerce. That would appear to me to subordinate to the economic and financial interests of the State the rights of Australians generally, including the residents of the particular State, to the freedom guaranteed by s. 92. As to this I have not overlooked the reasoning of *Williams* J. in the *Airways Case* [*No.* 1] (1) based on the State ownership of the roads as well as of the railways. But when the State dedicates its roads to public use, I am unable to see why the protection afforded by s. 92 should not extend to transport on them.

A State has the right to avoid placing, or to remove or lighten a burden on its citizens of high taxes, fares and freights to maintain the State railways in competition with road carriers, by restricting the number of road carriers and thereby reducing the competition of intra-State trade, and, according to *Vizzard's Case* by restricting the number of inter-State road carriers and reducing competition in inter-State trade. How this can be regarded as essentially regulatory and not prohibitive or restrictive of inter-State trade, commerce or intercourse it is difficult to see. But although *Vizzard's Case* may have been weakened I do not think that has been disposed of as an authority by observations of the Judicial Committee in the *Banking Case*.

I would dismiss the appeals because of *Vizzard's Case* and the *Riverina Case*.

(1) (1945) 71 C.L.R., at p. 108.

FULLAGAR J. The appellants were charged before a Court of Petty Sessions at Mildura for that they were respectively the owner and driver of " a commercial goods vehicle which operated on a public highway without the said commercial goods vehicle being licensed as a commercial goods vehicle under Part II. of the *Transport Regulation Act* 1933 contrary to s. 45 of " that Act. They were convicted and fined, and now appeal by way of order to review to this Court. The Act alleged to have been contravened is an Act of the Parliament of the State of Victoria, but the defence in each case was based on s. 92 of the Constitution. The Court of Petty Sessions was therefore called upon to exercise Federal jurisdiction, and an appeal lies to this Court under s. 73 of the Constitution.

The first *Transport Regulation Act* was passed in 1932, but it did little more than provide for the constitution and incorporation of a body to be known as the Transport Regulation Board. The main operative Act is the Act of 1933. This Act by s. 5 defines " commercial goods vehicle " as " any motor car within the meaning of the *Motor Car Acts* which is used or intended to be used for carrying goods for hire or reward or in the course of trade." The same section defines " operate" (in the case of a commercial goods vehicle) as meaning " carry goods for hire or reward or in the course of trade." Section 23 provides that a commercial goods vehicle shall not operate on any public highway (which means, of course, any public highway in Victoria) unless such vehicle is licensed in accordance with the Act, and the complement of s. 23 is s. 45, under which the charges in the present case were laid. Section 45, so far as material, provides that the driver and the owner of any commercial goods vehicle which (a) operates on any public highway, and (b) is not licensed as such under the Act, shall be severally guilty of an offence against the Act.

Section 24 provides that the Transport Regulation Board may, on the application of the owner of a commercial goods vehicle, grant in respect of such vehicle a commercial goods vehicle licence. Section 25 provides for applications for licences (which must state, *inter alia*, the route or area of proposed operation and the class or classes of goods proposed to be carried) and for the hearing of any person who may object to the granting of a licence to an applicant. Section 26 provides that before granting or refusing a licence the Board shall have regard primarily to the interests of the public generally, including those who require as well as those who provide facilities for the transport of goods. In particular the Board is to take into consideration (a) the advantages of the

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proposed service to the public; (b) any already existing service, its adequacy and the probable effect upon it of the proposed service; (c) the benefit to the residents of any particular district of the proposed service; (d) the condition of the roads in the proposed route or area; and (e) the character, qualifications and financial stability of the applicant. Section 27 provides that the Board may grant the application with or without variation or may refuse to grant the application. Subject to s. 37 (which will be referred to in a moment) the decision of the Board is to be final and without appeal. Section 28 provides that every licence shall be subject to the condition that the vehicle shall be maintained in a fit and serviceable condition and that certain laws as to weight of load and speed and wages and hours of work shall be observed. It also provides that the Board may impose certain other conditions on any licence granted, including such conditions appropriate to the service as the Board thinks proper to impose in the public interest. Section 30 provides that a licence shall be granted for a period of not less than two years and not more than three years, and s. 31 provides for the renewal of licences. Section 34 provides for payment of a licence fee not exceeding £5 annually.

Section 37 of the Act of 1933 provided for an "appeal" to the Supreme Court from any decision of the Board granting or refusing to grant a licence. This section was invoked by the Victorian Railways Commissioners in a case which came ultimately before this Court in *McCartney* v. *Victorian Railways Commissioners* (1). It was repealed by the *Transport Regulation Act* 1935, which substituted a provision that no decision of the Board either granting or refusing a licence should be of any force or effect until it had been reviewed by the Governor in Council. The Governor in Council was given power within six months of the Board giving a decision to approve or disapprove that decision or to make any determination which the Board might have made. The effect of this provision is that no person may operate a commercial goods vehicle on a public highway in Victoria except with the approval of the Crown in right of the State of Victoria, which may grant or withhold approval at its absolute discretion. That discretion is not subject even to the limited measure of control afforded by the often practically unsatisfactory remedy of mandamus to hear and determine according to law.

Apart from the substitution of a new s. 37, the Acts of 1932 and 1933 had been amended in various respects before the charges now in question were laid. Perhaps the most important of these

(1) (1935) 52 C.L.R. 283.

was that which is contained in s. 7 of the *Transport Regulation (Licences and Fees) Act* 1947. This repealed the old s. 34 and substituted a new section, which provides for an annual licence fee of £1 plus an annual fee based on the load capacity of the vehicle, and not exceeding 5s. per hundredweight. A very much more substantial licence fee thus became chargeable. Some reliance was placed on this and other amendments for the purpose of distinguishing the present case from certain cases which have been decided by this Court. I do not, however, regard either this or any other of the amendments made as material for the purposes of this case or as affording any ground for distinguishing those cases.

The facts of the present case were not in dispute. The appellant McCarter was the owner of a motor truck which on 2nd August 1949 was being driven by his servant, the appellant Gough, along the Sturt Highway near South Merbein, in the extreme north-west of Victoria. The vehicle was in the course of an inter-State journey, being bound from Adelaide in the State of South Australia to Cootamundra in the State of New South Wales, with a load of 640 dozen bottles of beer. The whole of the beer, which was the product of the Springfield Brewery in Adelaide, was loaded in Adelaide for delivery in Cootamundra. It constituted the whole of the load : no other cargo was being carried. The distance from Adelaide to Cootamundra by road is about 650 miles. The road on which the journey was being made crosses the north-west corner of the State of Victoria and lies for a distance of about seventy-three miles in the State of Victoria. It is not altogether clear on the evidence whether McCarter was carrying the beer under a contract of carriage with the Springfield Brewery or whether he had bought it from the brewery for re-sale to customers in Cootamundra. The managing director of the brewery company said that his company looked to McCarter for payment of the price of the beer, but McCarter was directed as to the customers to whom the beer was to be delivered in Cootamundra. It is perhaps regrettable that more care was not taken to elucidate the exact legal relation subsisting between the brewery, McCarter and the Cootamundra customers, although in the view which I take nothing in this case turns on that relation. It seems clear that the vehicle in question was carrying goods either for hire or reward or in the course of McCarter's trade, so that at the material time it was a commercial goods vehicle operating on a public highway within the meaning of the *Transport Regulation Acts*, and it was not licensed as a commercial goods vehicle. It seems clear also that the vehicle was at the material time engaged

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in the commercial carriage of goods from a place in South Australia to a place in New South Wales, and that it was engaged in nothing else in the sense that the sole reason for its presence on the Victorian highway lay in the fact that it was carrying those goods between those places on a normal and convenient route.

The argument for the appellants is in its essence extremely simple. They say that s. 92 of the Constitution declares that trade and commerce by (*inter alia*) internal carriage among the States shall be absolutely free. They were engaged at the relevant time in an essential operation of inter-State commerce, that is to say, in the internal carriage of goods from South Australia for delivery to buyers in New South Wales. They were doing no other thing that is relevant. If a State law prohibits them absolutely from doing that thing, it denies to them the very freedom which s. 92 gives. If it prohibits them from doing that thing without a licence which may be refused at absolute discretion, there is equally a denial of that very freedom. The State law must give way to the superior authority of s. 92, with which it is inconsistent. It is not necessarily invalid *in toto*, but at least it must, in accordance with s. 2 of the Victorian *Acts Interpretation Act* 1930, be construed as excluding from its operation the conduct of the appellants which was the subject of the charges against them.

The success or failure of the appellants' argument is far from depending entirely on its merits, because there is authority against it, and decided cases are never to be overruled lightly. But it is convenient to consider it on its merits for a moment before proceeding. I am bound to say that, in my opinion, there is clearly no valid answer to it. It may have been suggested at one time, but the view has never, I think, been seriously entertained, that s. 92 does no more than prevent the imposition of customs duties at State borders. It is clearly established that it goes much further than that. On any view it could hardly be held that a mere prohibition of the exportation or importation of goods generally or of any particular goods from one State to another was outside the scope of s. 92 : cf. *Tasmania* v. *Victoria* (1), in which *Dixon* J. said : "The Constitution says that trade between Victoria and Tasmania shall be free, and Victoria says that a commodity produced in Tasmania shall not come in. If the words of s. 92 have any meaning, they affirm a proposition which the Victorian proclamation specifically denies." It is impossible, to my mind, to distinguish such a case from a mere prohibition of " internal carriage " of goods either generally or by means of a particular

(1) (1935) 52 C.L.R. 157.

kind of vehicle unobjectionable in itself. Nor is the character of such a prohibition changed in any relevant respect by making it subject to the granting of discretionary exemptions or "licences" by the Crown or by some person or body of persons. I would add only two observations at this stage. In the first place, it is well settled—at least since *James* v. *Cowan* (1)—that s. 92 protects inter-State trade against violation of its freedom not only by laws which deal merely or specially with inter-State trade but by laws which deal indiscriminately with intra-State and inter-State trade or with trade generally. In the second place, the contention of the appellants does not assert and, of course, need not assert, that s. 92 affords to him who is engaged in inter-State trade, commerce or intercourse complete immunity from all laws. It will be necessary to return to these matters later.

I have said that there is authority against the argument of the appellants. The authority is to be found in a series of six cases decided by this Court, and commonly grouped together under the name of the "*Transport Cases.*" Those cases are *R.* v. *Vizzard*; *Ex parte Hill* (2); *O. Gilpin Ltd.* v. *Commissioner for Road Transport & Tramways (N.S.W.)* (3); *Bessell* v. *Dayman* (4); *Duncan and Green Star Trading Co.* v. *Vizzard* (5); and *Riverina Transport Pty. Ltd.* v. *Victoria* (6). Actually the cases which are commonly called the "*Transport Cases*" include an earlier case of *Willard* v. *Rawson* (7). But, for reasons which I will indicate briefly later, I do not regard *Willard* v. *Rawson* as militating against the present argument of the appellants. Indeed, the reasoning of the judgments delivered in that case tends strongly, in my opinion, against the decisions in the six later cases and in favour of the appellants in the present case. The most important case is *R.* v. *Vizzard*; *Ex parte Hill.* I think that the doctrine of that case was actually extended in *Gilpin's Case.* But the cases after *R.* v. *Vizzard* were really governed by the decision in that case, and that case is unquestionably the central authority. It was the "*fons et origo.*"

Now I feel no doubt that, if *R.* v. *Vizzard* is now to be regarded as a binding authority, the appellants here must fail. The statute in question in that case was an Act of the Parliament of New South Wales. It differed in many matters of detail from the Victorian *Transport Regulation Act* 1933, but the essential features which were challenged as contradicting s. 92 were the very same features which are now challenged in the Victorian Act. I also feel no

(1) (1932) A.C. 542; 47 C.L.R. 386.
(2) (1933) 50 C.L.R. 30.
(3) (1935) 52 C.L.R. 189.
(4) (1935) 52 C.L.R. 215.
(5) (1936) 53 C.L.R. 493.
(6) (1937) 57 C.L.R. 327.
(7) (1933) 48 C.L.R. 316.

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doubt that, unless good reason to the contrary is shown, one should adhere to the policy of following decided cases whether one agrees with them or not. But there is a third point on which also I feel no doubt, and that is that the most recent pronouncement of the Privy Council, which is to be found in *Commonwealth* v. *Bank of N.S.W.* (1) (the *Banking Case*), not merely compels a reconsideration of *R.* v. *Vizzard*, but indicates that the decision in that case cannot be regarded as sound. This view is fortified by certain other considerations which I shall mention later. Before considering what their Lordships said, it is necessary, I think, to examine briefly the basis of the decision in *R.* v. *Vizzard*.

I think it reasonably clear that the decision in *R.* v. *Vizzard* rested fundamentally on three conceptions, the judgments of the majority differing somewhat in the stress laid upon each.

The first conception was, I think, that the function of transporting goods from State to State is not a thing which is itself comprehended within the expression "trade and commerce" in s. 92. It is merely an incident of trade and commerce, a means by which trade and commerce are carried on. Two extremely important consequences seem to follow if this view is accepted. It would seem, in the first place, to follow that the man whose livelihood consists in carrying goods from seller to buyer or otherwise for reward is not engaged in trade or in commerce within the meaning of the Constitution, and so is not protected in respect of his inter-State operations by s. 92. As *Dixon* J. said in the *Riverina Case* (2), "One important step in the reasoning is the adoption of the view that the use of motor vehicles for the carriage of goods from one State to another, though an incident of trade, commerce and intercourse among the States, is not in itself within the protection of s. 92." The second important consequence is this. There was a good deal of authority for the view that s. 92 protects against "direct" interference with inter-State trade or commerce as such, but not against "indirect" or "remote" or "incidental" or "consequential" restraints or interferences. Now, if the transportation of goods is merely an "incident" or an "instrument" or a "means" of trade and commerce, then, in so far as an interference with the transportation of goods may be said to impinge upon the trade of a trader whose goods are being carried, the interference may properly be regarded as merely indirect or remote and as permitted by s. 92. (Cf. *Gilpin's Case* (3), where a trader was transporting his own goods in the course of

(1) (1949) 79 C.L.R. 497.
(2) (1937) 57 C.L.R., at p. 363.
(3) (1935) 52 C.L.R. 189.

his own trade.) So, in *R.* v. *Vizzard* (1), *Gavan Duffy* C.J. draws the distinction between "direct" and "indirect" effects upon trade and commerce (2), and the distinction between "interfering with trade, commerce and intercourse and interfering with the methods by which they are carried on." So *Rich* J. (3) refers to action which operates to restrict trade and commerce "immediately and directly as distinct from giving rise to some consequential impediment," and clearly takes, as one foundation for his conclusion that the Act in question affected trade and commerce only indirectly, his view that "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." In some of the American cases cited by *McTiernan* J. the distinction is drawn (though, I think, for a different purpose) between commerce and the "instruments" or "vehicles" of commerce, although *McTiernan* J. himself took the view that transportation of goods for reward *was* trade and commerce (4).

The two other fundamental conceptions upon which *R.* v. *Vizzard* rested are, as their Lordships pointed out in the *Banking Case*, closely "linked" together. Each is in a sense complementary of the other, and both seem to rest on the view that the words "trade and commerce" in s. 92 have reference to the totality of trade and commerce subsisting at any given moment between any two States. The first is that s. 92 does not operate to protect an individual trader, and the second is that, so long as the totality or volume of trade may remain unaffected by a statute, that statute does not infringe s. 92. So *Gavan Duffy* C.J. in *R.* v. *Vizzard* (2), said :—"For anything disclosed by the evidence, this Act 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." (Yet Mr. Hill, the applicant, was prohibited from engaging in the carrying of goods by motor vehicle unless he could obtain a licence which might be refused at discretion.) So *Rich* J. (5) speaks of the Act as regulating transportation "in such a way as to help rather than obstruct the movement of commercial goods" and "to facilitate and help commercial transportation." *Evatt* J. (6) said :—"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

(1) (1933) 50 C.L.R., at p. 47.
(2) (1933) 50 C.L.R., at p. 48.
(3) (1933) 50 C.L.R., at p. 49.
(4) (1933) 50 C.L.R., at p. 98.
(5) (1933) 50 C.L.R., at p. 51.
(6) (1933) 50 C.L.R., at p. 77.

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the passage of persons and the flow of commodities to and from the State." If the "flow" was not reduced, it did not matter that Mr. Hill was not allowed to swim in it.

The above considerations were, in my opinion, clearly at the bottom of the reasoning of the majority in *R.* v. *Vizzard*, though more or less weight was doubtless attached to each by different Justices. In the argument before us an attempt was made to support *R.* v. *Vizzard* on another ground, but this may be postponed for the moment.

Before approaching what their Lordships said in the *Banking Case*, one or two general comments on the conceptions to which effect was given in *R.* v. *Vizzard* may be made. In the first place, the first conception—that the transportation of goods (or passengers) by vehicle for reward is not itself trade and commerce—was clearly rejected by this Court in *Australian National Airways Pty. Ltd.* v. *Commonwealth* [*No.*1] (1) (the *Airlines Case*). *Latham* C.J. indeed thought that the *Transport Cases* did not really give any countenance to such a view.

Secondly, while the opinion of Lord *Wright* in *James* v. *Commonwealth* (2) has been discussed in this Court on a number of occasions, notably in the *Riverina Case* (3), and it has been thought by some that *R.* v. *Vizzard* there received the approval of their Lordships, it should not be overlooked that one aspect of the actual decision in *James* v. *Commonwealth* cannot be reconciled with *R.* v. *Vizzard*. *James* v. *Commonwealth* decided two things. The first thing it decided was that s. 92 bound the Commonwealth equally with the States. This was so much the more conspicuous, and so much the more strenuously argued, of the two things decided, that it is perhaps understandable that one should be inclined to overlook the other. But there was another point no less clearly the subject of actual decision, and that was that a particular section of a Commonwealth Act of Parliament was invalid because it was inconsistent with s. 92. The section in question was s. 3 of the *Dried Fruits Act* 1928-1935. That section provided:—"Except as provided by the Regulations—(a) the owner or person having possession or custody of dried fruits shall not deliver any dried fruits to any person for carriage into or through another State to a place in Australia beyond the State in which the delivery is made: and (b) 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

(1) (1949) 71 C.L.R. 29.
(2) (1936) A.C. 578; 55 C.L.R. 1.
(3) (1937) 57 C.L.R. 327.

—unless he is the holder of a licence then in force, issued under this Act, authorising 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." Penalties were provided. It was further provided that "prescribed authorities may issue licences for such periods and upon such terms as are prescribed." Regulations were made under the Act, which, if s. 92 bound the Commonwealth, were in conflict with *James* v. *South Australia* (1). But James did not merely challenge the regulations. He challenged *the Act*. And *the Act* was distinctly and expressly held by their Lordships to be invalid. Lord *Wright* (2) said :—" The Act and the Regulations either *prohibit entirely, if there is no licence*, or, if a licence is granted, partially prohibit, inter-State trade." The italicised words (the italics are mine) obviously refer to the effect of the Act, and the words which follow to the combined effect of the Act and the regulations. The validity or invalidity of regulations made under the Act could not possibly, of course, affect the validity of the Act itself. And the Act was held invalid. The substance of the Act was exactly and precisely the same as the substance of the Victorian *Transport Regulation Act* 1933. I cannot myself see any valid distinction between the two cases. It is true, of course, that the Commonwealth Act applied to inter-State carrying only, whereas the Victorian Act applies both to inter-State carrying and to intra-State carrying. But, as I have already said, it was settled by *James* v. *Cowan*, if not before, that an Act which would be wholly invalidated by s. 92 if it applied only to inter-State trade will not be saved, so far as inter-State trade is concerned, by the fact that it applies both to inter-State trade and to intra-State trade. Lord *Porter* in the *Banking Case* (3) said :— ". . . it is an irrelevant factor that the prohibition prohibits inter-State and intra-State activities at the same time."

Thirdly, *R.* v. *Vizzard* seems to me to be contrary to the general views expressed at length by *Isaacs* J. in his dissenting judgment in *James* v. *Cowan* (4). It is sufficient to refer, without actual quotation, to his Honour's repeated and emphatic insistence on the absolute discretion given to the Board by the statute in that case, on the protection by s. 92 of James as an individual trader, on the proposition that trade consists of acts, and on the further proposition that what matters, from the point of view of s. 92, is not the purpose or intention or motive which actuated the enactment of a statute but the effect of the statute on those acts of the indi-

(1) (1927) 40 C.L.R. 1.
(2) (1936) A.C., at p. 633.
(3) (1949) 79 C.L.R., at p. 640.
(4) (1930) 43 C.L.R. 386.

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vidual which constitute his trade. It is to be remembered that Lord *Atkin*, giving the reasons of the Privy Council for allowing the appeal in *James* v. *Cowan* (1), said that their Lordships "find themselves in accord with the convincing judgment delivered by *Isaacs* J." Finally, the doctrine of *R.* v. *Vizzard* was always strongly resisted by *Starke* and *Dixon* JJ., and it has never, I think, commanded general assent.

Now, it is true that in *James* v. *Commonwealth* (2) there are passages which suggest that *R.* v. *Vizzard* is accepted as a sound decision. Lord *Wright* (3) said that the construction of s. 92 which their Lordships adopted was, in the opinion of their Lordships, "not inconsistent with any decided case with the doubtful exception of *McArthur's Case* (4)." And (5), after referring to the "great importance" of the "elaborate" judgment of *Evatt* J. in *R.* v. *Vizzard*, he proceeded to quote the following passage (6) :— "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."

I do not myself think that the extremely wide proposition denied by *Evatt* J. has ever been seriously asserted by anybody, even in *McArthur's Case*. I would certainly not assert it. In any case, there are two things to be said. The first is that anything that was said in *James* v. *Commonwealth* must be read in the light of the inconsistency (which I have already pointed out) between the actual decision in that case and the decision in *R.* v. *Vizzard*. The second is that anything so said must also be read in the light of the *Banking Case*. There was clearly nothing binding on the Judicial Committee in anything that was said in *James* v. *Commonwealth* about *R.* v. *Vizzard*, and I do not think for one moment that their Lordships in the *Banking Case* regarded *James* v. *Commonwealth* as expressing final and considered approval of *R.* v. *Vizzard*.

It is clear that the doctrine of *R.* v. *Vizzard* and the last two of the three propositions on which I consider that it was really founded, had been strongly pressed upon their Lordships in the *Banking*

(2) (1932) A.C. 542, at p. 561 ; 47 C.L.R. 386, at p. 387.
(2) (1936) A.C. 578 ; 55 C.L.R. 1.
(3) (1936) A.C., at p. 631.
(4) (1920) 28 C.L.R. 530.
(5) (1936) A.C., at pp. 621, 622.
(6) (1933) 50 C.L.R., at p. 94.

Case. The actual decision in that case was that no appeal lay from the High Court to the Privy Council by reason of the application of s. 74 of the Constitution to the special circumstances of the case. But it is established that, if the only question involved in the *Banking Case* had been the question arising under s. 92, the Judicial Committee would have had jurisdiction: that body is not prevented by s. 74 from pronouncing with final authority upon a question under s. 92. And, the matter having been very fully argued, and it appearing that a large part of the appellants' argument was based upon a misapprehension of the effect of *James* v. *Cowan* and *James* v. *Commonwealth*, their Lordships were at pains to correct the misapprehension. The correction of the misapprehension seems to me to have involved a very clear and explicit denial of the whole basis of *R.* v. *Vizzard*. The declaration of the law thus made, although not essential to the actual decision in the case, appears to me in the very exceptional circumstances to carry the full force and the final authority of an actual decision by the highest tribunal in our system. Lord *Porter* (1) after referring to *James* v. *Cowan* and *James* v. *Commonwealth*, dealt with the points which are most material in connection with *R.* v. *Vizzard*. The passage should be quoted in full. It is as follows :—

"The necessary implications of these decisions are important. First may be mentioned an argument strenuously maintained on this appeal that s. 92 of the Constitution does not guarantee the freedom of individuals. Yet James was an individual, and James vindicated his freedom in hard-won fights. Clearly there is here a misconception. It is true, as has been said more than once in the High Court, that s. 92 does not create any new juristic rights, but it does give the citizen of State or Commonwealth, as the case may be, the right to ignore, and, if necessary, to call upon the judicial power to help him to resist legislative or executive action which offends against the section. And this is just what James successfully did.

"Linked with the contention last discussed was another which their Lordships do not find it easy to formulate. It was urged that, if the same volume of trade flowed from State to State before as after the interference with the individual trader and, it might be, the forcible acquisition of his goods, then the freedom of trade among the States remained unimpaired. In the first place, this view seems to be in direct conflict with the decisions in the *James Cases*; for *there the section was infringed though it was not the passage of dried fruit in general, but the passage of the dried fruit*

(1) (1950) A.C., at p. 305; 79 C.L.R., at p. 635.

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of James, from State to State that was impeded. Secondly, the test of total volume is unreal and unpractical, for it is unpredictable whether by interference with the individual flow the total volume will be affected, and it is incalculable what might have been the total volume but for the individual interference. Thirdly, whether or not it might be possible, if trade and commerce stood alone, to give some meaning to this concept of freedom, in s. 92 ' trade and commerce ' are joined with ' intercourse,' and it has not been suggested what freedom of intercourse among the States is protected except the freedom of an individual citizen of one State to cross its frontier into another State or to have such dealings with citizens of another State as his lawful occasions may require."

This passage seems to me completely to destroy the whole basis of *R.* v. *Vizzard*, the only foundation discoverable from the reasons of the majority as that on which it was rested. But Lord *Porter* went further. In a passage which seems to me to govern affirmatively the present case, His Lordship said (1):—" The bearing of those decisions with their implications upon the present appeal is manifest. Let it be admitted, let it, indeed, be emphatically asserted, that the impact of s. 92 upon any legislative or executive action must depend upon the facts of the case. Yet it would be a strange anomaly if a grower of fruit could successfully challenge an unqualified power to interfere with his liberty to dispose of his produce at his will by an inter-State or intra-State transaction, but a banker could be prohibited altogether from carrying on his business both inter-State and intra-State and against the prohibition would invoke s. 92 in vain. In their Lordships' opinion there is no justification for such an anomaly. On the contrary, the considerations which led the Board to the conclusion that s. 20 of the South Australian *Dried Fruits Act* 1924 offended against s. 92 of the Constitution lead them to a similar conclusion in regard to s. 46 of the *Banking Act* 1947. It is no answer that under the compulsion of s. 11 of the Act the Commonwealth Bank will provide the banking facilities that the community may require, nor, if anyone dared so to prophesy, that the volume of banking would be the same. Nor is it relevant that the prohibition affects the intra-State transactions of a private bank as well as its inter-State transactions; so also in the *James Cases* there was no discrimination; his fruit, for whatever market destined, was liable to be the subject of a ' determination '."

A person whose business is the transportation of goods cannot be in a different position from a banker, unless indeed a person

(1) (1950) A.C., at pp. 305, 306; 79 C.L.R., at pp. 635, 636.

whose business is banking is, while a person whose business is the transportation of goods is not, engaged in trade and commerce, and that view has, as I have said, been decisively rejected by this Court.

The only other passage in the *Banking Case* to which I need refer specifically is the passage (1) in which their Lordships consider the references made by Lord *Wright* in *James* v. *Commonwealth* to *R.* v. *Vizzard*. This passage need not be set out. It conveys to my mind that their Lordships felt a difficulty in reconciling *R.* v. *Vizzard* with *James* v. *Cowan*, and considered it impossible to reconcile all that was said by *Evatt* J. in the one case with all that was said by *Isaacs* J. in the other. I have already called attention to what I regard as the conspicuous features of the judgment of *Isaacs* J., and expressed my opinion that *R.* v. *Vizzard* represents a complete denial of his reasoning.

I am of opinion that *R.* v. *Vizzard* is irreconcilable with the law as propounded in the *Banking Case*. I have still, however, to consider an argument put before us in support of *R.* v. *Vizzard*, the major premiss of which argument is not only consistent with, but supported by, the *Banking Case*. The major premiss is, in the words of their Lordships, that "*regulation* of trade commerce and intercourse among the States is compatible with its absolute freedom." And the minor premiss is that the *Transport Regulation Acts* of the State of Victoria are merely regulatory of trade and commerce, including trade and commerce among the States.

The distinction between what is merely permitted regulation and what is a true interference with freedom of trade and commerce must often, as their Lordships observed, present a problem of great difficulty, though it does not, in my opinion, present any real difficulty in the present case. We may begin by taking a few examples, confining our attention to the subject matter of transportation, which is now under consideration. The requirements of the *Motor Car Acts* of Victoria afford very good examples of what is clearly permissible. Every motor car must be registered: we may note in passing that there is no discretionary power to refuse registration. A fee, which is not on the face of it unreasonable, must be paid on registration. Every motor car must carry lamps of a specified kind in front and at the rear, and in the hours of darkness these lamps must be alight if the car is being driven on a road. Every motor car must carry a warning device, such as a horn. A motor car must not be driven at a speed or in a manner which is dangerous to the public having regard to all the cir-

(1) (1950) A.C., at p. 307; 79 C.L.R., at p. 637.

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cumstances of the case. Other legislation of the State—Parliamentary or subordinate—prescribes other rules. In certain localities a motor car must not be driven at more than a certain specified speed. The weight of the load which may be carried by a motor car on a public highway is limited. The driver of a motor car must keep to the left in driving along a highway. He must not overtake another vehicle on a curve in the road which is marked by a double line in the centre. He must observe certain "rules of the road" at intersections: for example, the vehicle on the right has the right of way.

Such examples might be multiplied indefinitely. Nobody would doubt that the application of such rules to an inter-State trader will not infringe s. 92. And clearly in such matters of regulation a very wide range of discretion must be allowed to the legislative body. When we ask why such rules do not infringe s. 92, I think that commonsense suggests a fairly clear and satisfactory answer. The reason is that they cannot fairly be said to impose a burden on a trader or deter him from trading: it would be foolish, for example, to suggest that my freedom to trade between Melbourne and Albury is impaired or hindered by laws which require me to keep to the left of the road and not drive in a manner dangerous to the public.

Of course, even rules of the *kind* which I have taken as examples could be made to operate as a burden or deterrent in a high degree. Let me take an example. The town of Wangaratta is in Victoria, some fifty miles by road from the border between Victoria and New South Wales. It is on the Hume Highway, which is the busy main highway between Melbourne and Sydney. A law which provided that a motor car should not travel on that highway at greater speeds than thirty miles per hour within the limits of towns and sixty miles per hour outside towns would not impede or interfere with the trade of persons carrying goods for reward between Melbourne and Sydney: their trade would remain "free." But let me suppose a law that no person should drive a motor car between Wangaratta and the border at a speed exceeding one mile per hour. We should instantly say that such a law interfered with the freedom of inter-State trade. It would operate as a burden and a deterrent to the trader by making the journey economically impossible. The examples which I have taken seem clear. On which side of the line a particular case falls will, of course, be a question of fact. It may be a difficult question in some cases, but it does not seem to me likely that any very difficult question will arise

within the sphere of practical politics. The real, and truly baffling, difficulties of s. 92 seem to me to lie outside the field of transportation. Within that field the very nature of the subject matter seems to lend itself to the application of a quite simple test, which will rarely, if ever, be productive of any real difficulty. When difficulty does arise, it will be the kind of difficulty with which lawyers are constantly called upon to deal in a great variety of cases.

The question is sometimes raised whether a State—or the Commonwealth for that matter, since the Commonwealth is equally bound by s. 92—can, consistently with s. 92, make a charge for the use of trading facilities, such as bridges and aerodromes, provided by it. The answer is that of course it can. The great bridge over Sydney Harbour was erected at huge expense to facilitate trade commerce and intercourse between all places north of the Harbour and all places south of the Harbour. The collection of a toll for the use of the bridge is no barrier or burden or deterrent to traders who, in its absence, would have to take a longer or less convenient or more expensive route. The toll is no hindrance to anybody's freedom, so long as it remains reasonable, but it could, of course, be converted into a hindrance to the freedom of trade. If the bridge authority really wanted to hamper anybody's trade, it could easily raise the amount of the toll to an amount which would be prohibitive or deterrent. It would not be possible *a priori* to draw a dividing line between that which would really be a charge for a facility provided and that which would really be a deterrent to trade, but the distinction, if it ever had to be drawn, would be real and clear, and nobody need worry about it in advance. Nothing but futile exaggeration of the difficulties of s. 92 can result from an insistence on imagining border-line cases which are excessively unlikely to arise in practice. If we are ever actually called upon to say whether a money exaction is really a charge for a facility provided or really a burden on somebody's freedom to conduct a trade or business or engage in intercourse, human affairs are such that we are unlikely to experience any very serious difficulty in making a decision.

It is clear enough that such provisions as I have been considering are properly regarded as regulatory in character, and therefore within the category which their Lordships have held to involve no violation of s. 92. It should be emphasised that they are to be examined from the point of view of every individual engaged in trade commerce or intercourse, because s. 92 protects the trade commerce and intercourse of the famous Mr. James and every

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other individual. As to what is *not* regulatory in the relevant sense, one thing at least is clear. Prohibition is not regulation. Lord *Porter* (1), after quoting from the judgment of the learned Chief Justice of this Court in *Australian National Airways Pty. Ltd.* v. *Commonwealth* (2), said " simple prohibition is not regulation."

It is quite impossible, in my opinion, to distinguish the present case from the case of a simple prohibition. If I cannot lawfully prohibit altogether, I cannot lawfully prohibit subject to an absolute discretion on my part to exempt from the prohibition. The reservation of the discretion to exempt by the grant of a licence does not alter the true character of what I am doing. This was, indeed, as I have pointed out, one of the two things that were really decided in *James* v. *Commonwealth* (3), though it was naturally treated as more or less self-evident, and the contrary view does not seem to have been very seriously argued. Such cases as *Melbourne Corporation* v. *Barry* (4), and *Swan Hill Corporation* v. *Bradbury* (5), do not, of course, afford exact parallels to such cases as the present, because they turn primarily on the meaning of the word " regulate " in a statute, but they are, in my opinion, precisely in point, since one thing that they make plain is that, if a legislative body cannot lawfully prohibit altogether, it cannot lawfully prohibit subject to an administrative discretion to exempt from the prohibition. It is quite true to say that regulation may involve partial prohibition, but it is quite untrue to say that total prohibition subject to discretionary exemption or " licensing " is merely partial prohibition within the meaning of that proposition.

The truth is that it is possible to regard such legislation as regulatory with respect to trade and commerce if, but not unless, we regard s. 92 as referring not to the trading and commercial activities of individuals but to a totality or general volume or flow of trading and commercial activities. A simple prohibition, or a prohibition subject to discretionary exemption, of the trade of an individual may be regarded as regulatory of the general flow or volume of trade. It cannot possibly be regarded as regulatory of the trade of the individual who is simply not allowed to carry on his trade at all. The view that s. 92 does not protect an individual trader but has regard only to a general volume of inter-State trade could hardly have been more emphatically rejected by the Privy Council, and it must now, I would think, plainly be

(1) (1950) A.C., at p. 309 ; 79 C.L.R., at p. 640.
(2) (1945) 71 C.L.R., at p. 61.
(3) (1936) A.C. 578 ; 55 C.L.R. 1.
(4) (1922) 31 C.L.R. 174.
(5) (1937) 56 C.L.R. 746.

regarded as unsound. And, without it, the view that the Victorian *Transport Regulation Act* is merely regulatory, so far as it affects inter-State trade and commerce, cannot stand.

It was argued before us that the regulation of public transport vehicles in respect of such matters as safe maintenance and so on could not be efficiently undertaken without a system of inspection and licensing. The same difficulty was felt by municipalities in connection with their building by-laws by reason of such decisions as *Swan Hill Corporation* v. *Bradbury* (1), but very little ingenuity was required to overcome the difficulty. The modern Victorian building by-law requires the issue of a permit or licence to commence building, but it also provides that, if plans and specifications comply with the specific requirements of the by-law, the intending builder is entitled, as of right, to the issue of the licence or permit. The legal right, so given, is, of course, enforceable by mandamus to issue the licence or permit. Such a law differs vitally from a prohibition subject to obtaining a licence which may be granted or withheld at discretion. The only reason why such a system would not be regarded as satisfactory in such legislation as that now under consideration is that such legislation is not really concerned—or at any rate is by no means solely concerned—with the safety of public transport. It is concerned very largely with restricting the development, in competition with existing railways, of modern and convenient methods of transport, and one of its supposed advantages is that the discretion to withhold licences can be used to protect the trade of one State at the expense of another. It is, for example, obviously within the sphere of practical politics that it should be thought in Melbourne that Cootamundra ought to drink Victorian beer and not South Australian beer. The protection of the industries of one State against those of another State was, of course, one of the primary things which s. 92 was designed to prevent, but, if the legislation now in question is valid, effect can easily be given to such an opinion without anybody knowing anything about it. I mention these matters only by the way and as serving to emphasise the essential vice of the legislation.

It only remains, I think, to refer briefly to *Willard* v. *Rawson* (2). I have already expressed my opinion that that case, unlike *R.* v. *Vizzard*, can, in my opinion, be supported consistently with what is said by their Lordships in the *Banking Case*. In *Willard* v. *Rawson* the relevant legislation was contained in s. 4 of the Victorian

(1) (1937) 56 C.L.R. 746.

(2) (1933) 48 C.L.R. 316.

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Motor Car Act 1928 as amended by the *Motor Car Act* 1930. That section required every motor car to be registered under an indentifying number. On registration a fee was to be paid. The amount of the fee payable depended on the weight and horse-power of the vehicle. A person who drove on a public highway in Victoria a motor car which was not registered under the Act was guilty of an offence. Sub-section (7) (a) provided:—"This section shall not apply to a motor car (other than a motor car which is used in Victoria for carrying passengers for hire or goods for hire or in the course of trade)—(i) which is owned by a person resident in another State; (ii) which is temporarily in Victoria; (iii) which is registered in such other State; and (iv) on which the number allotted to the motor car in such other State is exhibited." The effect of this provision was that, if four conditions were fulfilled, a motor car registered in another State was not required to be registered in Victoria before travelling on a Victorian highway, *unless* it was a vehicle used for carrying passengers or goods for hire or in the course of trade, in which case registration was required. It was held that the requirement of registration, which involved, of course, payment of the prescribed fee, did not contradict s. 92. I think, with respect, that the essential reasons underlying the decision are correctly stated by *Dixon* J. in *R.* v. *Vizzard*; *Ex parte Hill* (1). To put it very shortly, the fee was not a tax but rather in the nature of a reasonable charge for facilities provided by the State and used by persons who drove motor cars in Victoria, it did not deal with trade and commerce as such, and, if it could be said to have any burdensome effect on inter-State trade and commerce, that effect was merely indirect and consequential. So understood, I think that there is no great difficulty in regarding *Willard* v. *Rawson* as an example of "regulatory" legislation. It would not, of course, affect my opinion in the present case if I thought otherwise of *Willard* v. *Rawson*, but I have thought it proper to express my view of that case.

I have advisedly refrained from discussing in this judgment a number of American authorities which have been cited from time to time in this Court in cases arising under s. 92, although I have given a good deal of consideration to a number of them. The Constitution of the United States contains no such provision as our s. 92, and I have thought it sufficient to refer only to decisions of this Court and of the Privy Council. I may add, however, that the American decisions suggest strongly to my mind that, if Congress were to enact a law in the terms of s. 92 of our Constitution, a State

(1) (1933) 50 C.L.R., at pp. 67, 68.

Act such as the Victorian *Transport Regulation Act* would have no chance of surviving a challenge in the Supreme Court.

In my opinion, the appeals should be allowed, and the convictions quashed.

Appeals dismissed with costs.

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E. F. H.