# REPORTS OF CASES

DETERMINED IN THE

# HIGH COURT OF AUSTRALIA

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[HIGH COURT OF AUSTRALIA.]

HOSPITAL PROVIDENT FUND PROPRIETARY LIMITED AND ANOTHER . } PLAINTIFFS ;

AND

THE STATE OF VICTORIA AND OTHERS . DEFENDANTS.

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THE FAMILY HOSPITAL BENEFITS OF AUSTRALIA PROPRIETARY LIMITED AND ANOTHER . . . . } PLAINTIFFS ;

AND

THE STATE OF VICTORIA AND OTHERS DEFENDANTS.

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MELBOURNE, 1952, *Sept.* 30 ; *Oct.* 1-3.

1953, *March* 11.

Dixon C.J., McTiernan, Williams, Webb, Fullagar, Kitto and Taylor JJ.

*Constitutional Law* (*Cth.*)—*Freedom of inter-State trade, commerce and intercourse—Hospital benefits, &c., business—State statute—Validity—Severability—Control of benefit associations carrying on business in Victoria—Necessity for registration within six months of commencement of Act—Requirements as to contents of rules of associations registered under Act—Registrar to register associations where in compliance with requirements of Act—Appeal to Minister from refusal by Registrar to register—Winding up of existing associations not registered within prescribed time—Companies carrying on hospital benefit business in Victoria with branches in other States—Receipt of contributions and payment of benefits not confined to Victoria—Offices, staff, &c., maintained in other States—Movement of servants between States—Transmission of documents and communications between States—Transmission of funds between States—The Constitution* (63 & 64 *Vict. c.* 12), *s.* 92—*Benefit Associations Act* 1951 (*Vict.*) (*No.* 5577)—*Acts Interpretation Act* 1930 (*Vict.*) (*No.* 3930), *s.* 2—*Benefit Associations Regulations* 1951 (*Vict.*).

The *Benefit Associations Act* 1951 (Vict.) provides that an association as therein defined, may not carry on certain types of business, unless registered within six months from the date of commencement of the Act (s. 3). As conditions precedent to registration the rules of the association were required to contain, *inter alia*, provisions relating to investment of funds, accounting,

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audit and the proportion of contributions which were to be paid to the trust fund (s. 6 (1) ). The Act provides for very stringent limitations which must be imposed by the rules of an association on the amounts of benefits to be provided (s. 6 (2) ). The Act provides that the Registrar shall register the association if he is of opinion that the requirements of the Act and regulations as to registration have been complied with, otherwise he is to refuse registration (s. 10 (1) ); and gives the applicant to whom registration has been refused a right of appeal to the Minister (s. 10 (2) ). In default of registration within the prescribed time, provision is made for the winding up of any association existing at the commencement of the Act and, after the discharge of its debts and obligations, for the distribution of the proceeds of realisation among the contributors (s. 26 (2) ).

Two companies, which were associations, as defined by the Act, were denied registration under it. Each company was incorporated in the State of Victoria but alleged that it carried on certain inter-State activities, e.g., moneys were payable and paid by the company from its office in one State to contributors in other States or for accommodation and maintenance in hospitals in other States; sums were payable and paid by contributors in one State to the company at its office in another State; the company maintained offices, staffs, equipment and funds in other States; servants and agents of the company travelled frequently from one State to another on business of the company; documents and communications connected with the business of the company were constantly being transmitted by post and otherwise from one State to another; and funds were transmitted from one State to another.

*Held*, by *Dixon* C.J., *McTiernan*, *Webb*, *Fullagar*, *Kitto* and *Taylor* JJ. (*Williams* J. dissenting), that the Act applied validly to the companies and did not contravene s. 92: by *Dixon* C.J., *McTiernan*, *Fullagar*, *Kitto* and *Taylor* JJ. on the ground that the business carried on by the companies was not itself inter-State commerce and the effect of the Act on any inter-State activities engaged in by the companies was a mere indirect and accidental result of the Act; by *Webb* J., on the ground that although the companies might invoke the protection of s. 92, yet if the provisions of ss. 6 (2) and 3 of the Act were restrictive and not regulatory, by virtue of s. 2 of the *Acts Interpretation Act* 1930 (Vict.) they were to be read down as limited to intra-State transactions.

*United States* v. *South-Eastern Underwriters Association*, (1944) 322 U.S. 533 [88 Law. Ed. 1440] discussed.

DEMURRER.

The Hospital Provident Fund Proprietary Limited, a company incorporated in the State of Victoria and registered as a foreign company in the States of New South Wales, South Australia and Tasmania joined with Cyril Cohen a shareholder and director in the company as plaintiffs in the first action. In the second action the plaintiffs were the Family Hospital Benefits of Australia

Proprietary Limited, a company incorporated in the State of Victoria and registered as a foreign company in the States of New South Wales, South Australia and Tasmania and William Percival Sayce, a shareholder and director thereof. In each action the defendants were the State of Victoria, the Honourable Keith Dodgshun, who was the Minister of the Crown in the State of Victoria entitled to exercise the powers given to the Minister by the *Benefit Associations Act* 1951, and Daniel Joseph McArdle who, as the Registrar of Friendly Societies of Victoria, was the person entitled to exercise the powers of the Registrar under the said Act.

The statements of claim were not materially different, and the following is taken from the statement of claim of the Hospital Provident Fund Pty. Ltd. :

The plaintiffs claimed : 4. At the time when the *Benefit Associations Act* 1951 (Vict.) came into operation, viz., 7th November 1951 and for a considerable time prior thereto and since the said date the plaintiff company has carried on the business of entering into contracts whereby in respect of each such contract in consideration of a payment or periodical payments to it by the person contracting with it (hereinafter called " the contributor ") the plaintiff company contracted to make certain payments on a scale set out in the contract to or for the contributor in respect of periods of accommodation and maintenance in hospital of the contributor and of members of his family or his dependants as specified in each such contract.

5. (*a*) The contracts by the plaintiff company at the dates referred to were very numerous and included—

(i) Contracts made in Victoria with contributors resident in Victoria in respect whereof payments by contributors were and are payable to the plaintiff company at its office in Victoria and sums payable by the plaintiff company were and are payable from the office of the plaintiff company in Victoria to the contributor at any address anywhere in Australia, or for accommodation and maintenance at a hospital anywhere in Australia.

(ii) Contracts made with contributors resident in Australia but out of Victoria including a large number of contributors resident in the Riverina area and other areas of the State of New South Wales and in the Mount Gambier area and other areas of the State of South Australia in respect whereof the place of making the contract would be either in Victoria or at the place of residence of such contributor according to the circumstances of each case but in respect whereof payments by contributors were and are payable to the plaintiff company at its office in Victoria and sums payable by the plaintiff

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company were and are payable from the office of the plaintiff company in Victoria to the contributor at any address anywhere in Australia or for accommodation and maintenance at a hospital anywhere in Australia.

(iii) Contracts made in New South Wales with contributors resident in New South Wales in respect whereof payments by contributors were and are payable to the plaintiff company at its office in New South Wales and sums payable by the plaintiff company were and are payable from the New South Wales office of the plaintiff in New South Wales to the contributor at any address anywhere in Australia or for accommodation and maintenance at a hospital anywhere in Australia.

(iv) Contracts made with contributors resident in Victoria in respect whereof the place of making the contract would be either in New South Wales or Victoria but in respect whereof payments by contributors were and are payable from the office of the plaintiff company in New South Wales and sums payable by the plaintiff company were and are payable from the office of the plaintiff company in New South Wales to the contributor at any address anywhere in Australia or for accommodation and maintenance at a hospital anywhere in Australia.

(*b*) For the purpose of carrying on business as aforesaid the plaintiff company maintained offices and staffs in Victoria South Australia and New South Wales employed servants and agents in each of the said States and elsewhere provided equipment and motor cars in each of the said States for the purpose of the conduct of the said business including business conducted across State boundaries and maintained funds in the States of Victoria South Australia and New South Wales for the purpose of meeting claims by contributors as aforesaid and meeting the liabilities and commitments of the plaintiff company.

(*c*) For the purpose of carrying on business of the plaintiff company and as an essential part of its activities the directors and servants and agents of the plaintiff company travelled frequently from the States of Victoria and New South Wales to the other States referred to and from those other States into Victoria and New South Wales or one or other of the said States and in the conduct of the plaintiff company's business in addition to the foregoing there was as a necessary part thereof the transmission and conveyance among the said States by internal carriage or ocean navigation of a large number of documents of various kinds.

(*d*) The funds maintained as aforesaid in the States of Victoria and New South Wales were at all times available to meet and from time to time have been used to meet claims and liabilities in the

States of South Australia Victoria and New South Wales if the funds in any one of these States were at any time insufficient to satisfy claims and demands in the State in which the claim or demand arose.

6. By the provisions of the *Benefit Associations Act* 1951 to which the Royal assent was given on and which came into operation on 7th November 1951 (to the full terms whereof the plaintiffs ask leave to refer and to treat as incorporated herein) it was provided in substance and so far as material hereto in respect of any association to which the said Act applied and defined in the said Act, viz.—

" ' Association ' means any person or body of persons (corporate or unincorporate) undertaking or carrying on sickness hospital medical or funeral benefit business in Victoria " (which definition included the plaintiff company):

1. That no such association should continue to carry on sickness hospital medical or funeral benefit business as therein defined, viz :—

" ' Sickness hospital medical or funeral benefit business ' means—

(*a*) sickness benefit business (that is to say) the provision for the relief or maintenance in sickness or other infirmity bodily or mental of contributors or other persons for whom or on whose behalf contributions are made;

(*b*) hospital benefit business (that is to say) the provision for payments in respect of—

(i) periods of accommodation and maintenance in hospitals of contributors or other persons for whom or on whose behalf contributions are made; or

(ii) surgical therapeutic or other medical treatment in hospitals of contributors or other persons for whom or on whose behalf contributions are made;

(*c*) medical benefit business (that is to say) the provision (by means of any arrangement made by an association with any legally qualified medical practitioner or pharmaceutical chemist registered under the Medical Acts) of or the reimbursement in whole or in part of moneys expended for medical attendance and medicines for contributors or other persons for whom or on whose behalf contributions are made; or

(*d*) funeral benefit business (that is to say) the provision for contributors or other persons for whom or on whose behalf contributions are made of funeral and burial or cremation services (with or without any other services or benefits connected therewith) or of the costs and expenses of such funeral and burial or cremation services or other such services or benefits connected therewith."

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for a period of not more than six months after the commencement of the said Act without being registered under the said Act.

2. That where any such association was at the commencement of the said Act carrying on any of the said business and that association was not registered as aforesaid within the said period, the Minister should order the said association to be wound up and thereupon—

(*a*) All property real or personal and all powers authorities immunities rights obligations and duties which immediately before the date of such order were vested in exerciseable by or imposed upon the association or the governing body of such association or any other body or person on behalf of the association shall by virtue of and without further or other authority than this Act be transferred to vested in exerciseable by imposed upon and executed by the Registrar ;

(*b*) the Registrar shall realize upon such property and after discharging the debts and obligations of the association (other than debts and obligations to contributors) and making provisions for the costs and expenses of the winding up of the association distribute the moneys remaining in his hands among contributors according to the amounts of their respective contributions.

7. (*a*) The said Act contained provisions as therein appearing relating to applications for and the registration of associations as therein defined by the Registrar and that if the Registrar refused registration, the applicant should have a right of appeal as therein provided to the Minister and that the decision of the Minister should be final and conclusive.

(*b*) By regulations purporting to be made under the said Act by the Governor of Victoria in Council on the 15th day of January 1952 and published in the Victorian *Gazette* of the same date (to the full terms of which regulations so far as material the plaintiff asks leave to refer and to treat as incorporated herein) further provisions in respect of registration were thereby enacted including in reg. 9 thereof a sub-regulation as follows :—

"(3) If the Registrar, after consultation with the Government Statist, is of the opinion that the payments required under the Rules of the Association to be made by contributors is excessive in the light of the proportion of each contribution required to be paid to the Trustees of the appropriate Benefits Trust Fund he shall refuse to register the association."

8. (*a*) (i) The plaintiff company applied for registration under the Act.

(ii) On the sixth day of May 1952 the said application was rejected by the Registrar.

(*b*) On the seventh day of May 1952 the Minister notified the plaintiff in substance that the said period of six months having elapsed he would not receive any appeal, and

(*c*) On the eighth day of May 1952 in purported exercise of his power under the said Act ordered the plaintiff company to be wound up.

9. By reasons of the matters hereinbefore appearing the defendants threaten to prevent the continued conduct of and to destroy the business of the plaintiff company including the inter-State trade commerce and intercourse of the plaintiff company and to confiscate the assets thereof and distribute the capital thereof to the said contributors and to confiscate and destroy without compensation the share of the second-named plaintiff in the capital and undistributed income thereof.

10. The plaintiffs say that the said Act and each and every provision thereof and the regulations made thereunder is and are void and inoperative by reason of the operation of s. 92 of the Constitution of the Commonwealth of Australia.

And the plaintiffs claim :—

(*a*) A declaration that the said Act and each and every section thereof and the regulations made thereunder and each and all of them is and are invalid.

(*b*) A declaration that the said Act and regulations is and are invalid and inoperative so far as it and they applies or apply to the inter-State operations of the plaintiff company and as to the scope of the operation of the said Act and regulations accordingly.

(*c*) An injunction restraining the defendants their servants and agents from proceeding with the purported winding up of the plaintiff company.

(*d*) Damages.

(*e*) Such further or other relief as to the Court may seem fit.

In each case the defendants demurred to the statement of claim on the ground that s. 92 of the Constitution of the Commonwealth of Australia did not operate to invalidate the whole or any part of the *Benefit Associations Act* 1951.

At the hearing the Commonwealth of Australia applied for and was granted leave to intervene.

*M. J. Ashkanasy* Q.C. (with him *A. R. Samuel*), for the plaintiffs in both cases. The plaintiffs are carrying on inter-State trade and commerce. [He referred to *Commonwealth* v. *Bank of New South*

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*Wales* (1), *Bank of New South Wales* v. *Commonwealth*, per *Rich* and *Williams* JJ. (2); per *Starke* J. (3); *United States* v. *South-Eastern Underwriters Association* (4); *R.* v. *Connare*; *Ex parte Wawn* (5).]

[FULLAGAR J. Carrying on business in more than one State is not the same as carrying on inter-State business, in the constitutional sense.]

The view in *W. & A. McArthur Ltd.* v. *Queensland* (6), per *Knox* C.J., *Isaacs* and *Starke* JJ. is that all the incidentals of trade and commerce which would narrow to "trade and commerce" under par. (i.) of s. 51 also obtain protection under s. 92. The legislation under consideration in *Home Benefits Pty. Ltd.* v. *Crafter* (7) escaped the operation of s. 92 because it merely regulated an "incident" of retail selling. It is not the mere winding up but the fact that the winding up precludes the possibility ever of complying with the registration requirements; and if the registration requirements can possibly be regarded as merely regulatory the winding up would transform what might otherwise merely be an incident of the regulation into an absolute and complete prohibition.

*H. A. Winneke* Q.C., Solicitor-General for the State of Victoria (with him *G. A. Pape*), for the defendants in both cases. If the Act is bad in its impact on inter-State transactions, we do not contend that it is severable. The subject matter of the Act is fair and honest dealing in this class of business. There is nothing to prohibit people from carrying on this class of business, provided that they register. It is difficult to say that this is not trade or commerce.

[FULLAGAR J. You do not think that any distinction could be drawn between banking and insurance?]

Having regard to the view of the Privy Council in *Commonwealth* v. *Bank of New South Wales* (8), the answer must be in the negative. This legislation is directed not to any inter-State element, and if it does in fact have an impact on inter-State contracts, then it is not because this legislation legislates for anything inter-State. [He referred to *O. Gilpin Ltd.* v. *Commissioner for Road Transport and Tramways* (*N.S.W.*), per *Dixon* J. (9).]

The effect on inter-State trade is merely consequential. [He referred to the *Money Lenders Act* 1928 (Vict.), s. 6 (1) (*a*); the

(1) (1950) A.C. 235, at pp. 302, 303, 305; (1949) 79 C.L.R. 497, at pp. 632, 633, 635.
(2) (1948) 76 C.L.R. 1, at p. 284.
(3) (1948) 76 C.L.R., at p. 306.
(4) (1944) 322 U.S. 533 [88 Law Ed. 1440].
(5) (1939) 61 C.L.R. 596.
(6) (1920) 28 C.L.R. 530, at p. 549.
(7) (1939) 61 C.L.R. 701.
(8) (1950) A.C. 235; (1949) 79 C.L.R. 497.
(9) (1935) 52 C.L.R. 189, at p. 206.

*Firearms Act* 1928 (Vict.); *Hartley* v. *Walsh*, per *Latham* C.J. (1); per *Rich* J. (2); per *Evatt* J. (3); *Roughley* v. *New South Wales*, per *Knox* C.J. (4); per *Higgins* J. (5).] If the interference with inter-State business is direct and not merely consequential then the interference is mere regulation and not prohibition. A qualified right to registration is not incompatible with regulation. See *McCarter* v. *Brodie*, per *Latham* C.J. (6). The provision for winding up in s. 26 of the Act is no more than a sanction or penalty for failure to comply with the registration provisions.

[WILLIAMS J. What is the distinction between the *Banking Case* (7) where the businesses of the banks were to be acquired and this case where the businesses of these bodies are to be wound up? In each case their businesses are destroyed totally, both inter-State and intra-State.]

In the *Banking Case* (7), there was the creation of a monopoly, outside of which business could not legally be carried on. The business could not be carried on by regulation, as in the present case. The fact that business is carried on in more than one State is of no importance in deciding whether the business is inter-State.

[WEBB J. How do you distinguish it from the *Banking Case* (7)?]

The constant movements of credits, bills of exchange, &c., are different from the business carried on in this case. The very make up of the banking business makes it essentially a business across State lines.

*P. D. Phillips* Q.C. (with him *C. I. Menhennitt*), for the intervenor, the Commonwealth of Australia. We do not put it that because this legislation is an exercise of the police power, it escapes s. 92, but that, being an exercise of the police power, it is of a nature and form which escapes invalidation under s. 92. Contracts are not inter-State commerce. They are a mere means of carrying on the commerce. You cannot tell whether the commerce is inter-State merely by discovering that there are some elements of an inter-State nature in the contract. It is the commerce that must be inter-State. [He referred to *Paul* v. *Virginia* (8); *Hooper* v. *California* (9); *United States* v. *South-Eastern Underwriters Association*, per *Black* J. (10); *Polish National Alliance of the United States*

(1) (1937) 57 C.L.R. 372, at p. 383.
(2) (1937) 57 C.L.R., at p. 386.
(3) (1937) 57 C.L.R., at p. 392.
(4) (1928) 42 C.L.R. 162, at pp. 177, 179, 181.
(5) (1928) 42 C.L.R., at pp. 193, 199.
(6) (1950) 80 C.L.R. 432, at p. 452.
(7) (1948) 76 C.L.R. 1; (1950) A.C. 235; (1949) 79 C.L.R. 497.
(8) (1869) 75 U.S. 168 [19 Law. Ed. 357].
(9) (1895) 155 U.S. 648 [39 Law. Ed. 297].
(10) (1944) 322 U.S., at p. 541 [88 Law. Ed., at p. 1450].

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*of North America* v. *National Labour Relations Board* (1)]. The Act is valid because it is mere regulation.

[DIXON C.J. What distinction do you suggest can be pursued to distinguish regulation from prohibition ?]

Regulatory interferences are those which are not, on the very face of them, directed to stopping the activity, but rather to conditioning it, as conditioning is understood, on the political, economic and social ideas in the community and recognized as permissible conditioning as opposed to complete destruction. [He referred to *Engel* v. *O'Malley*, per *Holmes* J. (2).]

[DIXON C.J. referred to *R.* v. *Northumberland Compensation Appeal Tribunal*; *Ex parte Shaw* (3), *Lee* v. *Showmen's Guild of Great Britain*, per *Denning* L.J. (4); *Barnard* v. *National Dock Labour Board* (5).]

[WILLIAMS J. referred to *Weinberger* v. *Inglis* (6).]

*M. J. Ashkanasy* Q.C., in reply. The Act is not merely regulatory of inter-State commerce. It amounts to prohibition. [He referred to *Bank of New South Wales* v. *Commonwealth*, per *Dixon* J. (7).]

*Cur. adv. vult.*

March 11, 1953.

The following written judgments were delivered :—

DIXON C.J. In each of the two actions now before us on demurrer to the respective statements of claim the foundation for the relief claimed must be discovered in the operation of s. 92 of the Constitution to protect from the provisions of the *Benefit Associations Act* 1951 (Vict.) businesses of the kind carried on by the companies which are plaintiffs in so far as such businesses have an inter-State character. The question for our determination is, I think, whether s. 92 has any such operation.

There is no substantial distinction between the positions of the two plaintiff companies, and it is better to speak in terms of one of them. The case of the Hospital Provident Fund Pty. Ltd. stands first, and it will be enough to refer to that case. We must take the facts as alleged in the statement of claim.

Before the date when the statute came into operation, namely 7th November 1951, the company had carried on the business of contracting to provide hospital benefits. In consideration of a payment, or of periodical payments, made by a contributor the

(1) (1944) 322 U.S. 643 [88 Law. Ed. 1509].
(2) (1911) 219 U.S. 128, at pp. 138, 139 [55 Law. Ed. 128, at pp. 136, 137].
(3) (1952) 1 K.B. 338.
(4) (1952) 2 Q.B. 329, at p. 346.
(5) (1952) 2 All E.R. 424.
(6) (1919) A.C. 606.
(7) (1948) 76 C.L.R., at p. 389.

company contracted with him to make payments to him or on his behalf according to a given scale in respect of periods during which he or members of his family or his dependants might be accommodated and maintained in hospital. The company was incorporated in Victoria but it was registered in the States of New South Wales, South Australia and Tasmania as a company incorporated out of those respective States.

The claim to the protection of s. 92 against the operation of the Victorian statute rests upon allegations to the following effect. The company maintained offices and office staff and employed servants and agents not only in Victoria but also in New South Wales and South Australia. It also maintained equipment and motor cars in these States. The purpose of this was " to conduct the said business including business conducted across State boundaries ". Funds were maintained in the same three States for the purpose of meeting claims by contributors and the liabilities and commitments of the company. The contracts made by the company with contributors involved a liability in the company to pay claims at any address of the contributor in Australia and for maintenance and accommodation at any hospital in any part of Australia. Sometimes the claims would be payable from the office in Victoria notwithstanding that the contributor resided in New South Wales or South Australia. In other cases contributors residing in New South Wales and in South Australia would receive payment from the company's offices in those respective States. *E converso* contributions from contributors residing in New South Wales and in South Australia might be payable to the company in those respective States or in Victoria. The meetings of the directors took place in Victoria. But, for the purpose of carrying on the company's business it was necessary for directors and servants and agents of the company to travel from one to another of these three States. Funds in Victoria and New South Wales, when necessary, were transmitted to meet claims, not only between these States but to South Australia.

The *Benefit Associations Act* 1951 (Vict.) is, according to its long title, an Act to provide for the registration of sickness, hospital, medical and funeral benefit associations. There are some curious features about the statute. For example, although its provisions seem only appropriate to incorporated or unincorporated bodies of persons and are expressed to apply to " associations ", the word " association " is defined to mean not only a body of persons, but also any person, undertaking or carrying on sickness, hospital, medical or funeral benefit business in Victoria. Then there are some anomalies in the provisions which apply if the Registrar

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refuses registration of an association of the defined description which is carrying on business at the commencement of the Act. Such an association cannot carry on business unless it obtains registration within six months: s. 3 (1). If the Registrar refuses registration, as he did in the case of the plaintiff company, an appeal from his refusal lies to the Minister: s. 10. But there is nothing to fix the time for applying or for the Registrar's refusal or to extend the six months pending an appeal. As a consequence the company in the present case had lost its appeal, though whose fault it was is a matter of dispute. Another anomaly comes from the form which a provision takes for winding up in the event of failure to obtain registration. It is s. 26 (2), and it requires the Minister to order the winding up of an association carrying on sickness, hospital, medical or funeral benefit business, if within six months of the commencement of the Act it is not registered. The provision is cast in a form which, if it is to receive its literal meaning, appears to vest all property of the body in the Registrar, even if it is a vast undertaking in which the sickness, hospital, medical or funeral benefit business is only a subordinate incident, and to require the Registrar, after discharging debts and obligations, to distribute the net proceeds of realization among the contributors. Perhaps such a reading of the provision is so incredible that a literal interpretation cannot be sustained.

In mentioning these curious features at the outset I do so for the purpose of putting them aside as matters which, whatever else may be said about them, do not appear to me to affect the question whether the restrictions and requirements of the legislation involve an interference with the freedom of inter-State trade commerce and intercourse from which under s. 92 the plaintiffs can claim protection. That question depends on what is restricted and what is required, and on the character of the restrictions and requirements.

The leading provision of the Act is s. 3, sub-s. (1) of which provides that sickness, hospital, medical or funeral benefit business shall not be undertaken or carried on except by an association registered under the Act. There is a proviso allowing associations carrying on such businesses at the commencement of the Act to go on for not more than six months without being so registered.

The four sub-divisions of business covered by the expression "sickness, hospital, medical or funeral benefit business" are the subject of elaborate definitions in s. 2. Sickness benefit business is the provision for the relief or maintenance in sickness or other infirmity, bodily or mental, of contributors or other persons for whom or on whose behalf contributions are made. Hospital benefit business is the provision for payments in respect of periods

of accommodation and maintenance or surgical therapeutic or other medical treatment, in hospitals, of contributors or other persons for whom or on whose behalf contributions are made. Medical benefit business is the provision of, or the reimbursement in whole or in part of, moneys expended for medical attendance and medicines for contributors or other persons for whom or on whose behalf contributions are made. The provision is made by means of some arrangement by the association with a legally qualified medical practitioner or pharmaceutical chemist. Funeral benefit business is the provision for contributors (or other persons for whom or on whose behalf contributions are made) of funeral and burial or cremation services or of the costs and expenses thereof, with or without any other services or benefits connected therewith or the costs and expenses of the latter services.

An association may be registered to undertake all or any of these businesses: s. 3 (2). Certain bodies are exempt from the necessity of registration. They are friendly societies registered under the *Friendly Societies Acts* (Vict.), associations carrying on life insurance business, if registered under the *Life Insurance Act* 1945-1950 (Cth.), trade unions registered under the *Trade Unions Act* 1928 (Vict.), registered organizations under the *Conciliation and Arbitration Act* 1904-1950 and any association (not carrying on funeral business) declared exempt by order in council. An association seeking registration must have rules which provide for the establishment and maintenance of separate benefit trust funds for sickness benefit business, hospital benefit business, medical benefit business and funeral benefit business (s. 6 (1) (*a*) ). The rules must give the control of each benefit trust fund to not less than three trustees, one of whom must be nominated by the Registrar (s. 6 (1) (*b*) ). Provisions must also be contained in the rules in respect of the terms under which persons may become contributors, the nature of the benefits and the extent to which they will be available after payment of contributions has ceased, the proportion of each contribution of a contributor which is to be paid to the trustees of each benefit trust fund of the association and in respect of certain matters relating to investment, accounting and audit. The rules must also contain the forms of agreement approved by the Registrar to be made between the association and contributors for the respective kinds of benefits (s. 6 (1) ). Limitations of what may be thought a stringent kind must be imposed by the rules on the amounts of the benefits to be provided. The benefit for sickness may not exceed £3 a week; for hospital accommodation &c. £5 5s. 0d. a week a person; for surgical and medical treatment £21 in any year; for funeral burial or cremation services £30 or

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in the case of a child £10. There are other provisions which the rules must contain, but enough has been said to show the general character of the requirements.

An application for registration must state a number of particulars and be accompanied by a report from an approved actuary, giving the proportion of each contribution by a contributor paid to the trustees of each benefit trust fund of the association, and stating that in his opinion such proportion together with other moneys to be paid into the fund is adequate to provide the benefits to contributors and others provided for in the rules, and giving the information calculations and reasons on which his opinion is based (s. 5 (1) and s. 8). If the Registrar is of opinion that the application, the rules and the report comply with the requirements of the Act he is to register the association; otherwise he is to refuse registration: (s. 10 (1)). Regulations have been made under a power given by s. 25 of the Act, and reg. 9 requires the Registrar to refuse if after consultation with the Government Statist he is of opinion that the proportion of contributions and the amount of other moneys are inadequate to provide the benefits. It is not easy to reconcile this with s. 10, but the validity or invalidity of the regulation cannot affect the question whether the company is protected by s. 92 of the Constitution from the operation of the Act.

In deciding that question it is necessary to begin with an understanding of the relation to inter-State trade commerce and intercourse of the kind of business which the statute undertakes to control.

The essence of the business from the point of view of the persons engaged in it is the making of contracts involving on the one hand the receipt of money and on the other hand the payment of money on the occurrence of certain contingencies. From the point of view of the statute no doubt it is the character of the contingencies that forms the distinguishing and important feature of the business. But neither the character of the contingencies nor the character of the monetary side of the contract could bring the transaction within the conception of inter-State trade commerce or intercourse. For a company to contract with a man that, in consideration of the latter making payments to it at any given place, the company will in a specified contingency make a payment to him at some other place is not to engage in inter-State commerce. Neither the making of the contract nor the performance of the contract by either side involves any step or dealing which of itself forms part of inter-State commerce even if a State line runs between the two places. If it is found necessary or convenient by either party to communicate with the other across a boundary between two

States in the course of making the contract, that is an accidental feature which cannot make it an inter-State contract, although the sending of the communication itself will, of course, form an act of inter-State commerce or intercourse. In the same way, if either party finds it necessary to transmit money across such a boundary, so that he may make a payment in pursuance of the obligation of the contract, the transmission of the money will be an act of inter-State commerce, but that will not make the performance of the contract an inter-State transaction.

Neither the contract nor its performance contemplates or of its nature involves the movement from one place to another of things tangible or intangible, and certainly not from a place in one State to a place in another.

Again the contingencies against which the contract provides have nothing of the character of inter-State commerce or intercourse. To fall sick, to be treated in a hospital, to receive medical attendance or medicines, or to be buried, are not acts or things done or suffered as a part of inter-State commerce or intercourse. This is true even if the sickness develops on an inter-State journey, or the medical attendant comes across the border, or the burial is in another State from that in which death took place. For these are accidental features of the particular case and give the contingency no different character.

What the company says brings the business within the protection of s. 92 consists in part in the repeated occurrence of these accidental features in the course of its business and in part in the manner in which it conducts what may, I think, be not incorrectly called its internal affairs, that is to say, the communications between its offices in different States, the transmission of funds and the movements of its directors servants and agents. Now it would not be difficult to conceive of these inter-State elements growing to such dimensions as to form an essential part of the conduct of the business although it consisted in making and performing the intra-State contracts described. In that case they might thus give a particular enterprise, or a number of such enterprises, a character which would bring them under a possible exercise of the legislative power of the Commonwealth conferred by s. 51 (i.) (commerce) independently of the power conferred by s. 51 (xiv.) of the Constitution (insurance). It is in this way that the business of insurance has at length fallen under the Commerce power of Congress in the United States: *United States* v. *South-Eastern Underwriters Association* (1); *Polish National Alliance of the United*

(1) (1944) 322 U.S. 533 [88 Law. Ed. 1440].

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*States of North America* v. *National Labour Relations Board* (1). But it is because insurance business is based in the United States upon the use of communications and the financial organization and other facilities forming part of inter-State commerce that it falls under the power and not because of the nature of insurance. This is well brought out in the opinion of *Stone* C.J. (2) whose dissent turned not so much upon the application of the commerce power as upon the inapplicability, as he thought, of the Sherman Act. The Chief Justice did not dissent in the *Polish National Alliance Case* (1) from the opinion of the Court, which was delivered by *Frankfurter* J. The opinion includes the following passages which illustrate the distinctions which I think must be made in considering whether the operation of the Victorian Act on the business with which it deals interferes with the freedom of inter-State commerce.

"The long series of insurance cases that have come to this Court for more than seventy-five years, from *Paul* v. *Virginia* (3) to *New York Life Insurance Co.* v. *Deer Lodge County* (4), have invariably involved some exercise of state power resisted, in most instances, on the claim that it was impliedly forbidden by the Commerce Clause. Such was the context in which this Court decided again and again that the making of a contract of insurance is not inter-State commerce and that, since the business of insurance is in effect merely a congeries of contracts, the States may, for taxing and diverse other purposes, regulate the making of such contracts and the insurance business free from the limitations imposed upon state action by the Commerce Clause. Constitutional questions that look alike often are altogether different and call for different answers because they bring into play different provisions of the Constitution or different exertions of power under it." (5). "We have, therefore, now presented for the first time not an exercise of state but of national power in relation to the insurance business. And so the ultimate question is whether, in view of the relation between the activities of the insurance business before us and the operation of economic forces across state lines, the Constitution denies to Congress the power to say that the interplay of the insurance business and those economic forces is such that its power 'to regulate Commerce . . . among the several States' carries with it the power to regulate the conduct here regulated by relevant legislation" (6).

(1) (1944) 322 U.S. 643 [88 Law Ed. 1509].
(2) (1944) 322 U.S., at pp. 567-572 [88 Law. Ed., at pp. 1465-1468].
(3) (1869) 75 U.S. 168 [19 Law. Ed. 357].
(4) (1913) 231 U.S. 495 [58 Law. Ed. 332].
(5) (1944) 322 U.S., at pp. 648, 649 [88 Law. Ed., at p. 1515].
(6) (1944) 322 U.S., at p. 649 [88 Law. Ed., at pp. 1515, 1516].

The *Benefit Associations Act* 1951 concerns itself only with the persons or bodies whose registration it requires in so far as they undertake or carry on the four descriptions of " benefit business " with which the Act deals. The legislation is not concerned with any of the incidents or accidents of the plaintiff company's business which by nature are capable of taking on the character of inter-State commerce or intercourse. It fixes entirely on the character of the benefits which the association to be registered contracts to provide. It is because of their character that it proceeds to impose conditional prohibitions and controls. That character is essentially independent of inter-State commerce and intercourse. The conditions imposed and the controls directed go only to the description and amount of the benefit, the provisions of the contract, and matters affecting the sufficiency and securing of the funds and the reliability of the association in providing the benefits. The legislation selects as a ground for the operation or application of none of its provisions any fact matter or thing which forms a transaction of inter-State trade or an essential attribute of the conception.

When in the *Commonwealth* v. *Bank of New South Wales* (1) their Lordships of the Privy Council lay it down as a general proposition that s. 92 is violated only when a legislative or executive act operates to restrict inter-State trade commerce and intercourse directly and immediately as distinguished from creating some indirect or consequential impediment which may fairly be regarded as remote, the kind of distinction upon which this case appears to me to turn is suggested.

If a law takes a fact or an event or a thing itself forming part of trade commerce or intercourse, or forming an essential attribute of that conception, essential in the sense that without it you cannot bring into being that particular example of trade commerce or intercourse among the States, and the law proceeds, by reference thereto or in consequence thereof, to impose a restriction, a burden or a liability, then that appears to me to be direct or immediate in its operation or application to inter-State trade commerce and intercourse, and, if it creates a real prejudice or impediment to inter-State transactions, it will accordingly be a law impairing the freedom which s. 92 says shall exist. But if the fact or event or thing with reference to which or in consequence of which the law imposes its restriction or burden or liability is in itself no part of inter-State trade and commerce and supplies no element or attribute essential to the conception, then the fact that some secondary effect or consequence upon trade or commerce is produced

(1) (1950) A.C. 235, at p. 310; (1949) 79 C.L.R. 497, at p. 639.

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is not enough for the purposes of s. 92. *R.* v. *Smithers*; *Ex parte Benson* (1) supplies a simple illustration. A State cannot say that a man shall not cross the border and enter if he has been convicted of serious crime in another State, or, for that matter, cross the border and leave if he has been convicted of serious crime in his home State. But either State can imprison him as a punishment for an offence for any term the law may prescribe, and yet that is an effectual way of preventing inter-State movement. The first is direct in the sense I have described, the second is not. The illustration is simple, but it is true that it is not close to the present case. Here, however, all the inter-State movement or communication upon the interruption of which the statement of claim insists is not stopped because the statute applies to it or operates upon it or upon anything without which it cannot take place. It is not a necessary part of the business to which the law refers. It is not a thing contemplated by the Act. If it be stopped, it is stopped because the plaintiff company can no longer carry on business consistently with the law of Victoria and must be wound up. The reason why the plaintiff company cannot carry on business and must be wound up is simply because the Victorian statute has undertaken to control the business of contracting to provide the four kinds of social benefits with which the Act deals when it is done for contributions of money.

The ground, from which the supposed interferences with the transmission of funds, the exchange of communications and the movement of individuals flow consequentially, stands apart from these things, which are only the accidents or incidents of the particular business. They are incidents of that business because the association avails itself of inter-State commercial facilities or services, financial and otherwise, for the purpose of furthering its benefit business. So may every manufacturing business, every merchandizing business, every export business, indeed every friendly society or trade union.

Contrast this with the business of banking which was directly prohibited by s. 46 of the *Banking Act* 1947. From its essential nature banking meant the conduct of business from one place to another, and, once it was decided that banking formed part of trade and commerce, a conclusion that appeared to me to be inevitable, you had a direct prohibition of the conduct of a part of trade and commerce across State lines. To my mind the considerations which I set out in the *Banking Case* (2) form not an analogy but a contrast to the present case. In the transmission of money

(1) (1912) 16 C.L.R. 99.

(2) (1948) 76 C.L.R., at pp. 379, 382.

and credit banking appears to me to take the same essential place in one aspect of inter-State trade as the carriage of goods by sea or of passengers by air do in other aspects. It is between these things that the comparison should be made. "The business of banking, consisting of the creation and transfer of credit, the making of loans, the purchase and disposal of investments and other kindred activities, is a part of the trade, commerce and intercourse of a modern society and, in so far as it is carried on by means of inter-State transactions, is within the ambit of s. 92." per Lord *Porter* for the Privy Council in *Commonwealth* v. *Bank of N.S.W.* (1).

For the foregoing reasons I regard the *Benefit Associations Act* 1951 as applying validly to the plaintiffs in the present cases and as not inconsistent with s. 92 of the Constitution.

I think that the demurrer in each of the two actions should be allowed.

McTIERNAN J. The *Benefit Associations Act* 1951 (Vict.) and the regulations made under this Act provide for the control within Victoria of the provision of sickness, hospital, medical and funeral benefits. These are benefits which friendly societies and trade unions have for many years provided for members and their dependants. Friendly societies legislation commenced in the United Kingdom at the end of the eighteenth century. The objects of such legislation are the better management of such associations and the better security of their funds. Such societies are associations within the meaning of the *Benefit Associations Act*, but if registered under the *Friendly Societies Acts* of Victoria are relieved by the Act from the obligation to register under it. "Friendly Societies are voluntary associations formed for the purpose of raising, by subscriptions of the members, funds out of which advances may be made for the mutual relief and the maintenance of the members, their wives, or children, in sickness, infancy, old age, or infirmity": *Halsbury's Laws of England*, 2nd ed., vol. 15, p. 294. It is a traditional function of a trade union to provide similar benefits. Trade unions which are registered under the *Trade Unions Act* of Victoria are also relieved by the *Benefit Associations Act* from registration under its provisions. The object of the *Benefit Associations Act* is to bring benefit associations which are not registered friendly societies or registered trade unions under control similar to that imposed upon registered friendly societies. The means for imposing the control is registration. The Act

(1) (1950) A.C., at p. 303; (1949) 79 C.L.R., at p. 632.

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authorises the Government to dispense with the obligation to register any association not engaged in the funeral benefit business. By reason of constitutional necessity, relief from the obligation to register under the Act is granted to workers' organizations registered under the *Conciliation and Arbitration Act* 1904-1950 and life insurance companies registered under the *Life Insurance Act* 1945-1950 (Cth.). With all these exceptions, the *Benefit Associations Act* prevents any person or body of persons, unless registered under its provisions, from undertaking or carrying on in Victoria sickness hospital medical or funeral benefit business. Such business is built upon contracts which stipulate for benefit in the form of monetary payments in the event of sickness, the need for hospital treatment, the expenditure of money for medical attention or pharmaceutical goods, or the need for funeral services. In the last case only the Act contemplates that the benefit may take the form of the supply of goods and services, but there is no evidence of any inter-State business constituted by the supply of such goods and services.

It is argued for the plaintiffs that the subject matter of the Act is comparable with insurance and that the benefit associations to which the Act applies become engaged in inter-State commerce by negotiating and executing contracts with contributors in other States. The argument is founded upon the case of *United States* v. *South-Eastern Underwriters Association* (1), in which the Supreme Court of the United States, in 1944, by a majority, decided that Congress has power under the Commerce Clause to regulate inter-State insurance. The Chief Justice and Mr. Justice *Frankfurter* dissented.

There is no separate insurance power in the Constitution of the United States as there is in the Australian Constitution.

The Supreme Court in the case of *Paul* v. *Virginia* (2), decided in 1869, laid down that insurance is not commerce. This decision was sustained in many cases which are all cited by the Chief Justice in the case of the *South-Eastern Underwriters' Association* (1). The Supreme Court said in *Paul* v. *Virginia* (2) that " issuing a policy of insurance is not a transaction of commerce ". The Court decided that a State Act regulating insurance did not offend against the Commerce Clause. In so far as there is any resemblance between the restriction arising from the Commerce Clause and s. 92 of the Australian Constitution this decision is contrary to the argument that the *Benefit Associations Act* violates s. 92.

(1) (1944) 322 U.S. 533 [88 Law. Ed. 1440].

(2) (1869) 75 U.S. 168 [19 Law. Ed. 357].

The last of the long line of cases in which the Supreme Court decided that insurance is not commerce is *New York Life Insurance Co.* v. *Deer Lodge County* (1). This case was decided in 1913. There the Supreme Court very definitely said that insurance is not commerce. It is said in the judgment of the Court, " Contracts of insurance are not commerce at all, neither state nor inter-state " (2).

This was an established doctrine in the United States when the Australian Constitution was adopted. The insertion in the Constitution of an express power to make laws with respect to insurance would be a natural consequence of this doctrine. However the framers of the Australian Constitution did not expressly include insurance in the subject matter of s. 92. The references in the section to the imposition of customs duties and to such means of trade and commerce as internal carriage and ocean navigation would make s. 92 a strange context in which to mention insurance. Yet the argument for the plaintiffs is that " trade, commerce, and intercourse " include insurance. The phrase " whether by means of internal carriage or ocean navigation " suggests that the framers of the Constitution were aware of the debate in *Gibbons* v. *Ogden* (3), as to whether navigation is inter-State commerce. The power to legislate on the subject matter of trade and commerce is by s. 98 of the Australian Constitution expressly extended to navigation. It may be presumed that the framers of the Constitution knew of *Gibbons* v. *Ogden* (3) and of such cases as *Paul* v. *Virginia* (4). Having regard to the words of s. 92 it would be a surprising result if insurance itself is an activity the freedom of which is guaranteed by the section.

In the insurance cases from *Paul* v. *Virginia* (4) down to *New York Life Insurance Co.* v. *Deer Lodge County* (1) State Acts dealing with insurance were impeached. The ground of the attack was that each Act in question offended against the Commerce Clause. The attack failed in each case because the Supreme Court held that insurance is not commerce and consequently the Act did not offend against the Commerce Clause.

The decision of the majority in the case of the *South-Eastern Underwriters Association* (5) marks a new departure. In reference to *Paul* v. *Virginia* (4) Mr. Justice *Black* said : " Today, however, we are asked to apply this reasoning, not to uphold another state

(1) (1913) 231 U.S. 495 [58 Law. Ed. 332].
(2) (1913) 231 U.S., at p. 510 [58 Law. Ed., at p. 338].
(3) (1824) 9 Wheat. 1 [6 Law. Ed. 23].
(4) (1869) 75 U.S. 168 [19 Law. Ed. 357].
(5) (1944) 322 U.S., at p. 545 [88 Law. Ed., at p. 1452].

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law, but to strike down an Act of Congress which was intended to regulate certain aspects of the methods by which interstate insurance companies do business; and, in so doing, to narrow the scope of the federal power to regulate the activities of a great business carried on back and forth across state lines" (1). However, in relation to a contract of insurance, Mr. Justice *Black* said this: "We may grant that a contract of insurance, considered as a thing apart from negotiation and execution, does not itself constitute interstate commerce." (2).

The Chief Justice, in whose opinion Mr. Justice *Frankfurter* concurred, adhered to the settled doctrine that insurance is not commerce and that an inter-State contract of insurance is not inter-State commerce.

The Supreme Court in *New York Life Insurance Co.* v. *Deer Lodge County* (3) affirmed that correspondence across State lines is not sufficient to make the transaction about which the correspondence takes place inter-State commerce. The Supreme Court said this: "Nor, again, does the use of the mails determine anything. Certainly not that which takes place before and after the transaction between the plaintiff and its agents in secret or in regulation of their relations. But put agents to one side and suppose the insurance company and the applicant negotiating or consummating a contract. That they may live in different states and hence use the mails for their communications does not give character to what they do; cannot make a personal contract the transportation of commodities from one state to another, to paraphrase *Paul* v. *Virginia* (4). Such might be incidents of a sale of real estate (certainly nothing can be more immobile). Its transfer may be negotiated through the mails and completed by the transmission of the consideration and the instrument of transfer also through the mails" (5).

The Chief Justice in the case of the *South-Eastern Underwriters Association* (6) said that an Act of inter-State commerce may be incidental to the business of writing and performing contracts of insurance but the formation of the contracts is not inter-State commerce. The Chief Justice referred to inter-State contracts of insurance. He said: "If an insurance company in New York executes and delivers, either in that state or another, a policy

(1) (1944) 322 U.S., at p. 545 [88 Law. Ed., at pp. 1452, 1453].
(2) (1944) 322 U.S., at pp. 546, 547 [88 Law. Ed., at p. 1454].
(3) (1913) 231 U.S. 495 [58 Law. Ed. 332].
(4) (1869) 75 U.S. 168 [19 Law. Ed. 357].
(5) (1913) 231 U.S., at pp. 509, 510 [58 Law. Ed., at p. 338].
(6) (1944) 322 U.S. 533 [88 Law. Ed. 1440].

insuring the owner of a building in New Jersey against loss by fire, no act of interstate commerce has occurred. True, if the owner comes to New York to procure the insurance or after delivery in New York carries the policy to New Jersey, or the company sends it there by mail or messenger, such would be acts of interstate commerce. Similarly if the owner pays the premiums by mail to the company in New York, or the company's New Jersey agent sends the premiums to New York, or the company in New York sends money to New Jersey on the occurrence of the loss insured against, acts of interstate commerce would occur. But the power of the Congress to regulate them is derived, not from its authority to regulate the business of insurance, but from its power to regulate interstate communication and transportation. And such incidental use of the facilities of interstate commerce does not render the insurance business itself interstate commerce. Nor is the nature of a single insurance transaction or a few such transactions not involving interstate commerce altered in that regard merely because their number is multiplied. The power of Congress to regulate interstate communication and transportation incidental to the insurance business is not any more or any less because the number of insurance transactions is great or small. The Congressional power to regulate does not extend to the formation and performance of insurance contracts save only as the latter may affect communication and transportation which are interstate commerce or may otherwise be found by Congress to affect transactions of interstate commerce " (1).

It is important to notice another passage in the judgment of the Chief Justice: " But since trade in articles of commerce is not the subject matter of contracts of insurance, it is evident that not only is the writing of insurance policies not interstate commerce but there is little scope for their use in restraining competition in the marketing of goods and services in or affecting the commerce. The contract of insurance makes no stiplulation for the sale or delivery of commodities in interstate commerce or for any other interstate transaction. It provides only for the payment of a sum of money in the event of the loss insured against and it is no necessary consequence of the alleged restraints on competition in fixing premiums, that interstate commerce will be restrained " (2).

I should think that the terms " articles of commerce " and " commodities " were intended by the Chief Justice to apply to anything that may be the subject of inter-State commerce.

(1) (1944) 322 U.S., at pp. 567, 568 [88 Law. Ed., at pp. 1465, 1466].

(2) (1944) 322 U.S., at p. 571 [88 Law. Ed. at p. 1467].

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Judged by the criteria set forth by the Chief Justice, the contracts written by benefit associations with contributors are not commerce or instrumentalities of commerce. It cannot be a violation of s. 92 to control the business of writing such contracts whether local or inter-State.

The Act makes no direct interference with any inter-State activity that takes place before or after the writing of the benefit business. The cessation of these activities may follow from the operation of the Act. It is merely an indirect result and does not bring the Act within s. 92.

Mr. Justice *Frankfurter* said in the case of the *Polish National Alliance of the United States of North America* v. *National Labor Relations Board*: "The long series of insurance cases that have come to this Court for more than seventy-five years, from *Paul* v. *Virginia* (1), to *New York Life Insurance Co.* v. *Deer Lodge County* (2), have invariably involved some exercise of state power resisted, in most instances, on the claim that it was impliedly forbidden by the Commerce Clause. Such was the context in which this Court decided again and again that the making of a contract of insurance is not interstate commerce and that, since the business of insurance is in effect merely a congeries of contracts, the States may, for taxing and diverse other purposes, regulate the making of such contracts and the insurance business free from the limitations imposed upon state action by the Commerce Clause. Constitutional questions that look alike often are altogether different and call for different answers because they bring into play different provisions of the Constitution or different exertions of power under it. Thus, federal regulation does not preclude state taxation and state taxation does not preclude federal regulation" (3).

The question whether a power to make laws with respect to trade and commerce among the States supports any exercise of legislative power brings into play provisions of the Constitution which do not apply when the question is whether an Act offends against s. 92. The latter question turns upon the meaning and effect of this constitutional restriction: *Carter* v. *Potato Marketing Board* (4). Where legislation is attacked for want of power, not for a violation of s. 92, its validity turns not only upon the meaning and scope of the subject matter of the power but also upon the question of what are the incidental powers.

(1) (1869) 75 U.S. 168 [19 Law. Ed. 357].
(2) (1913) 231 U.S. 495 [58 Law. Ed. 332].
(3) (1944) 322 U.S. 643, at pp. 648, 649 [88 Law. Ed. 1509, at p. 1515].
(4) (1951) 84 C.L.R. 460.

The case of the *South-Eastern Underwriters Association* (1) confirmed the power of Congress to regulate insurance under the Commerce Clause. In my opinion it is not a satisfactory authority upon which to decide that the present Act offends against s. 92.

I agree that the demurrers should be allowed.

WILLIAMS J. These are two demurrers which have been heard together to statements of claim filed by two companies incorporated in Victoria. In each statement of claim there is also joined an individual plaintiff who is alleged to be a shareholder and director of the company, but no reliance was, or I should think could be, placed by the plaintiffs on these additional joinders. The question at issue on the demurrers is whether the *Benefit Associations Act* 1951 (Vict.), which came into force on 7th November, 1951, is invalid because it offends against s. 92 of the Constitution. Each of the plaintiff companies is engaged in carrying on business in the forms of insurance to which the Act relates, that is the business of insuring persons for what the Act calls sickness, hospital, medical and funeral benefits. The plaintiffs allege in their statement of claim, and these allegations must be taken to be true for the purposes of the demurrers, that they are carrying on these businesses across State lines, not only in Victoria but also in other States as well, and that they are therefore engaged in trade, commerce and intercourse among the States within the meaning of s. 92. The allegations in the statements of claim, and particularly the allegations that for the purposes of carrying out the contracts of insurance it is necessary to transmit funds, carry on correspondence and transmit documents, and send officers of the company across State borders, are, in my opinion, sufficient to prove that these businesses are inter-State in character. It is established by the *Banking Case* (2), that in a modern community traffic in intangibles is just as much trade and commerce as traffic in tangibles. Where that traffic is carried on across State lines it becomes trade and commerce among the States within the meaning of s. 92. In *United States* v. *South-Eastern Underwriters Association* (1), the Supreme Court of the United States held that insurers carrying on the business of insurance in more States than one were carrying on inter-State commerce. That case and the subsequent cases in the United States to the same effect cited by the present Chief Justice in the *Banking Case* (3) were applied by this Court in the latter case

(1) (1944) 322 U.S. 533 [88 Law. Ed. 1440].

(2) (1948) 76 C.L.R. 1; (1950) A.C. 235; (1949) 79 C.L.R. 497.

(3) (1948) 76 C.L.R., at p. 382.

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by analogy in deciding that the business of banking was trade and commerce and that where such business was carried on by a bank in more States than one the bank was engaged in trade and commerce among the States. Accordingly, the Act under discussion deals with a subject of trade and commerce, including in the case of individuals and corporations carrying on such business across State lines, inter-State trade and commerce.

By s. 2, the Act defines "Association" to mean any person or body of persons (corporate or unincorporate) undertaking or carrying on sickness, hospital, medical or funeral benefit business in Victoria. Section 3 (1) provides that such businesses shall not be undertaken or carried on except by an association registered under the Act. The Act recognises that there could be individuals or corporations carrying on such businesses when it came into force, and the same sub-section provides that any association which, at the commencement of the Act, is carrying on any of such businesses may, subject to the Act, continue to undertake and carry on that business for a period of not more than six months after the commencement of the Act without the association being so registered. The Act provides that an association may be registered under the Act to undertake and carry on all or some of such businesses and provides for the exemption from the provisions of the Act of certain societies and associations registered under other Acts and any association, other than an association carrying on funeral benefit business which is declared by an order of the Governor-in-Council to be exempt from the provisions of the Act. The Act provides penalties for carrying on any of these businesses without being registered under the Act. Section 26 (2) (*a*) provides that where an association is at the commencement of the Act carrying on any of such businesses, and that association is not registered under the Act within a period of six months after its commencement, the Minister shall order such association to be wound up and thereupon all the property &c. of the association shall be vested in the Registrar and the Registrar shall realise upon the property and, after discharging the debts and obligations of the association (other than debts and obligations to contributors) and making provision for the costs and expenses of the winding up of the association, distribute the moneys remaining in his hands among contributors, according to the amounts of their respective contributions. The Act contains elaborate provisions concerning the contents of an application for registration, the provisions which must be contained in the rules of every association registered under the Act, the establishment and the maintenance of separate benefit

trust funds for each business and the report of an approved actuary which must accompany an application for registration.

Section 25 of the Act provides that the Governor-in-Council may make regulations for or with respect to a number of matters which include—(*a*) the registration of associations under the Act; (*b*) the payment of proportions of contributions into the benefit trust funds of associations; (*f*) prescribing forms to be used under the Act; and (*g*) generally any matter or thing which by the Act is required or permitted to be prescribed, or which is necessary or expedient to be prescribed for carrying the Act into effect. The Act provides that some matters must be prescribed by regulation as a condition of the operation of some of its provisions and also provides for the addition by regulation of other requirements to those included in the Act. Section 5 (1) provides that the application for registration must be in the prescribed form. Section 5 (2), after setting out a number of matters which must be included in the application for registration, concludes:—(*i*) such other particulars as are prescribed. Section 6 (1), after setting out a number of provisions which must be included in the rules, also concludes:—(*i*) such other matters as are prescribed. Section 8, after setting out what the report of an approved actuary shall include, also concludes:—(*c*) such other particulars as are prescribed.

No regulations were, in fact, made under the Act until 16th January, 1952. Existing associations had, therefore, only three and a half months within which to become registered. If they were not registered by 7th May 1952, they were required by s. 26 (2) (*a*) to be wound up and their property distributed as therein mentioned.

The Act, in my opinion, operates upon inter-State trade and commerce in the forms of insurance to which it relates. It directly, and not remotely or incidentally, restricts this inter-State trade for it provides that it shall not be undertaken or carried on in Victoria, except by associations which are registered under the Act. Its operation is not limited to associations carrying on purely intra-State business. It applies to individuals and corporations residing or incorporated in Victoria carrying on business which extends into other States and to individuals and corporations residing or incorporated in other States carrying on business which extends into Victoria. Accordingly, the Act, consistently with the principles laid down by the Privy Council in the *Banking Case* (1), can only be an Act which does not offend against s. 92 if it is an

(1) (1950) A.C. 235; (1949) 79 C.L.R. 497.

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Act which in its true character is regulatory of the forms of insurance business to which it applies. Their Lordships said that in determining whether an enactment is regulatory or something more 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". They also said that in certain circumstances regulation which prohibits some persons from engaging in certain forms of trade and commerce, that is partial prohibition, or even regulation which confers a monopoly on one person does not necessarily mean that the legislation has passed beyond the realm of regulation and become directly restrictive of trade and commerce. I gathered from these remarks that the extent to which different forms of trade and commerce can be regulated depends upon the circumstances of each particular case, and came to the conclusion in *McCarter* v. *Brodie* (1), that the judgment of the Privy Council was not inconsistent with the view expressed in the transport cases that economic conditions justified State legislation regulating competition between land transport by rail and road, both of passengers and goods, so far as such competition arose out of competing facilities provided by the States themselves. These cases appear to me to fall into a particular category and to have no application to forms of trade and commerce which only require regulation of the manner in which they should be carried on and do not require that the number of individuals who wish to participate should be restricted. In the case of an insurance business there seems to be no reason why everyone wishing to participate should not be entitled to do so provided he can comply with regulations, the purpose of which is to safeguard the interests of the insured. Regulations of this kind would have to be adequately supervised and it would be incidental to their effective operation to require that all such persons should be registered. But a system of registration could not be used so as to confer on some and deny to others able to conform to such regulations the right to carry on business. Such a system would go beyond the realm of regulation and become restrictive of the right of individuals to engage in trade, commerce and intercourse among the States guaranteed by s. 92. The *Benefit Associations Act* undoubtedly contains a number of provisions which may fairly be described as regulatory. Provisions such as those requiring the establishment and maintenance of benefit funds and the payment of a sufficient proportion of the contributions to those funds to ensure that claims upon the funds shall be met, are all provisions appropriate to regulate the

(1) (1950) 80 C.L.R. 432.

proper administration and carrying on of such businesses. The requirement that individuals and corporations carrying on such businesses shall be registered would also be regulatory, provided all the individuals and corporations who desire to engage in such businesses and are prepared to conform to such provisions have a legal right to be registered.

Section 10 gives the applicant a right to be registered if, in the opinion of the Registrar—(1) the application for registration as an association ; (2) the rules or proposed rules of the association ; and (3) the report of an approved actuary comply with the requirements of the Act and the regulations. Section 10 (2) gives an applicant, whose registration is refused, the right " within the prescribed time and in the prescribed manner " to appeal to the Minister whose decision is final and conclusive. There is nothing in this section which appears to me to deprive an applicant of his common law right to apply to the Court for a mandamus if the Registrar refuses to register a proper application. The right to registration is not left to the discretion of the Registrar. The section requires that, if its provisions are satisfied, the Registrar shall register the association. The section refers to the opinion of the Registrar, but the opinion which the Registrar forms must be a proper opinion in law and if the applicant for registration has made a proper application and the Registrar has refused registration, the Court could in the exercise of its discretion grant a mandamus compelling him to register the applicant : *Reg.* v. *Tidd Pratt* (1) ; *Reg.* v. *Brabrook* (2). The circumstance that the Act provides for an appeal to the Minister, which is simply an appeal from one administrative officer to a higher administrative officer, would not supply a reason why the Court should not do so. The right to apply for a mandamus is not taken away by the Act, and it is only where there is an alternative remedy at law which is not less convenient, beneficial, and effective that the Court will, as a general rule, in the exercise of its discretion, refuse the writ. *Halsbury, Laws of England*, 2nd ed., vol. 9, p. 773. In *Reg.* v. *Leicester Guardians*, *Phillimore* J. said " where there is a remedium juris, the Court will not in its discretion grant a writ of mandamus ; but where there is no remedium juris, no other way in which the Courts can act, then it is the duty of the Court to grant a mandamus " (3).

In the case of persons or corporations not already carrying on one of the prescribed businesses, there does not appear to be anything in s. 10 which would make the Act offend against s. 92 of

(1) (1865) 6 B. & S. 672 [122 E.R. 1343].
(2) (1893) 69 L.T. (N.S.) 718.
(3) (1899) 2 Q.B. 632, at p. 640.

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the Constitution for it must be assumed that the Governor-in-Council would in due course prescribe the necessary form of application to enable an applicant to apply for registration. But the position is different in the case of associations already engaged in one of the specified businesses when the Act came into force. These associations must achieve registration within the following six months. Otherwise they must be wound up. There is nothing in the Act fixing the time within which regulations prescribing the form of application must be made. There is nothing in the Act requring that regulations authorized by ss. 5 (2) (*i*), 6 (1) (*i*) and 8 (*c*) adding further particulars to those provided by the Act must be made in sufficient time to enable these applicants to comply with them. There is nothing in the Act requiring the Registrar to grant or refuse the application within the six months, or to refuse it in sufficient time to enable such applicants in the event of refusal to apply for a mandamus or for their appeals to be heard and determined by the Minister. The Act does not contain appropriate safeguards to ensure that these applicants should have a proper opportunity to comply with its provisions and become registered within six months.

Section 2 of the *Acts Interpretation Act* 1930 (Vict.) provides that every Act shall be read and construed subject to the Commonwealth of Australia Constitution and so as not to exceed the legislative power of Victoria to the intent that where any enactment thereof would, but for this Act, have been construed as being in excess of that power, it shall nevertheless be a valid enactment to the extent to which it is not in excess of that power. This section raises similar problems of construction to those raised by ss. 15A and 46 (*b*) of the *Acts Interpretation Act* 1901-1950 (Cth.). The Court has discussed the meaning of the Federal sections in many cases. *Pidoto* v. *Victoria* (1); *The Banking Case* (2) and cases there cited. They require the Court to read down an Act, so far as it is possible to do so by construction, so that it will operate to the full extent to which it is capable of constitutional validity. In practice the Court has done this by severing invalid clauses which are capable of severance from the rest of the Act or by giving the Act as a whole a distributive operation with respect to those parts of the subject matter which are within power. But this is impossible where the effect of severing some of the sections or giving the Act a distributive operation would be to change the whole character of the Act and cause it to operate "differently upon the persons, matters or things falling under it or in some

(1) (1943) 68 C.L.R. 87.

(2) (1948) 76 C.L.R., at pp. 369-374.

other way would produce a different result " per the present Chief Justice in the *Banking Case* (1).

It is impossible, in my opinion, to read down the provisions of the *Benefit Associations Act* so as to safeguard the rights of existing associations unless s. 3 (1) can be given a distributive operation and confined to new associations. But the sub-section is not capable of being construed in this way and to attempt to do so would be to give the Act as a whole a completely different operation to that intended by the Legislature. It is evident that the Legislature did not intend that the specified businesses should be carried on partly by registered associations bound by its provisions and partly by unregistered associations subject to no regulation at all. Even if s. 26 (2) (*a*) could be severed from the rest of the Act existing associations would not be safeguarded because s. 3 (1) makes it unlawful for them to carry on business without being registered after the lapse of six months and the Act provides no means by which registration could be obtained after this time. Nor can the Act be read down so as to operate only with respect to associations engaged in intra-State business. The definition of association applies to any person or body of persons undertaking or carrying on one of the specified businesses in Victoria. It also provides that these businesses shall not be undertaken or carried on in Victoria except by an association registered under the Act. It is impossible to confine these provisions to intra-State trade without altering the whole operation of the Act. In its application to every association carrying on business in Victoria and its requirements that all such associations should be registered and have rules which comply with the Act, the Act embodies an inseverable scheme for the regulation of the carrying on of such businesses in Victoria, whether the associations are engaged in purely intra-State business or in purely inter-State business or in a combination of such businesses. The whole efficacy of the Act would be destroyed if its control of all such businesses was not complete.

For these reasons I would overrule the demurrers and I find it unnecessary to consider the other grounds upon which it was contended that the Act offended against s. 92. I shall however add, in reference to s. 6 (2) (*a*) of the Act that, while I think as at present advised, the Victorian Parliament, in order to avoid some social evil such as gambling or malingering, might be able to place limits upon the amount of sickness, hospital, medical, and funeral benefits that associations could provide without exceeding

(1) (1948) 76 C.L.R. at p. 371.

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the bounds of regulation, limitations of amounts which are palpably insufficient under modern conditions to provide reasonable cover for the events insured against would go beyond the bounds of regulation and become a burden on inter-State trade. I shall also venture to add that, if the Act is to be amended, the provisions of s. 26 (2) (*a*) (ii) require urgent attention because at present they are obscure and appear to provide for the total confiscation of shareholders' funds and it is difficult to believe that Parliament could have intended this.

WEBB J. The facts and relevant statutory provisions are set out in the judgment of the Chief Justice.

If by Commonwealth or State legislation the liabilities that an ordinary trading company might undertake in the course of its business were restricted to a specified amount that legislation might well be contrary to s. 92 of the Commonwealth Constitution and invalid, so far as regards inter-State transactions, unless the legislation were shown to be regulatory and not restrictive of trade or commerce.

Now the plaintiff companies may have some inter-State transactions. At all events their operations across State boundaries as alleged in the statements of claim are not so limited as to disentitle them to the right to invoke the protection of s. 92 in any case.

But are the provisions of the *Benefit Associations Act* 1951 (Vict.) limiting the value of benefits that may be contracted for regulatory and not restrictive? As regards friendly societies something could be said in support of the view that a limitation of benefits is regulatory. It appears that a limitation has long been imposed in England on the operations of friendly societies, and that it is now imposed on their operations in Queensland and in Victoria. The reason may be found in the necessity to protect friendly societies against themselves, having regard to the composition of their membership, not only against unwise commitments, but also against malingering. But as regards ordinary trading companies, even if the provisions of s. 6 (2) of the *Benefit Associations Act* 1951 limiting benefits to certain amounts are restrictive and not regulatory, still the Act is to be read subject to s. 2 of the *Acts Interpretation Act* 1930 (Vict.). By s. 2 of that Act it is provided :— "Every Act, whether passed before or after the commencement of this Act, shall be read and construed subject to the Commonwealth of Australia Constitution Act, and so as not to exceed the legislative power of the Parliament of Victoria, to the intent that where any enactment thereof would, but for this Act, have been construed

as being in excess of that power, it shall nevertheless be a valid enactment to the extent to which it is not in excess of that power ".

As to the proper construction of such provisions see *Reg.* v. *Wilkinson*; *Ex parte Brazell, Garlick and Coy* (1).

In effect s. 3 operates as if there were included in the legislation attacked here a provision that it does not apply to inter-State transactions.

The effect of this provision is to restrict the operation of the *Benefit Associations Act* to intra-State transactions if the Act is not merely regulatory, as there is no indication to the contrary in the *Benefit Associations Act* itself: there is no scheme of the Act which requires that it should be read as including inter-State transactions if it is not regulatory but restrictive of trade.

Then reading down the *Benefit Associations Act* so as to limit it to intra-State transactions, it is, I think impossible to hold that its provisions are invalid as being contrary to s. 92. It does not then conflict with s. 92: it operates wholly outside the field covered by s. 92. It is true that the inter-State operations of the plaintiff companies come to an end with their winding up; but so do the operations of other companies that are wound up under State laws. Other companies cannot resist winding up on the ground of their inter-State operations, and there appears to be no reason for making an exception of the plaintiff companies. It would be remarkable if a State could not terminate the existence of a body of its own creation simply because that body happened to have inter-State transactions, no matter how expedient such termination might be because of the companies' transactions generally and without any special regard to its inter-State operations. Section 92 does not ensure that companies that have an inter-State trade will also have an indefinite existence.

I think then that the *Benefit Associations Act* as so read down is wholly valid. We are not concerned with its construction and its operation apart from s. 92. Within the limits of its jurisdiction the State is at liberty to enact any absurd provision it thinks fit, even s. 26 (2). Section 92 is not a shield against such enactments.

I would allow the demurrers.

FULLAGAR J. Each of these cases comes before the Court on demurrer to a statement of claim. In each action the plaintiffs claim a declaration that the *Benefit Associations Act* 1951 (Vict.) and the regulations made thereunder are invalid, or alternatively

(1) (1952) 85 C.L.R. 467, at p. 485.

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a declaration that the Act and Regulations are "invalid and inoperative so far as they apply to the inter-State operations of the plaintiff company". The claim is based on s. 92 of the Constitution of the Commonwealth.

The business of each of the plaintiff companies is described in its statement of claim as "the business of entering into contracts whereby . . . in consideration of a payment or periodical payments to it by the person contracting with it (called 'the contributor') the company contracts to make certain payments on a scale set out in the contract to or for the contributor in respect of periods of accommodation and maintenance in hospital of the contributor and of members of his family or his dependants as specified in each such contract". What is provided is, in effect, a form of insurance against sickness or accident. The business carried on is a "hospital benefit business" within the meaning of the *Benefit Associations Act*, and the company is, in each case, an "Association" within the meaning of the Act. The Act deals also with associations carrying on "sickness benefit business", "medical benefit business" and "funeral benefit business"—terms which are defined in the Act, but which more or less explain themselves.

In the view which I hold it is not necessary to examine the provisions of the Act in detail. The central provision is contained in s. 3 (1), which is in the following terms:—"Sickness hospital medical or funeral benefit business shall not be undertaken or carried on except by an association registered under this Act: Provided that any association which at the commencement of this Act is carrying on sickness hospital medical or funeral benefit business may subject to this Act continue to undertake and carry on that business for a period of not more than six months after the commencement of this Act without being so registered." Certain classes of associations are exempted, but neither of the plaintiff companies is within any of the exempted classes. The Act then provides that the Registrar of Friendly Societies under the *Friendly Societies Acts* is to be the Registrar for the purposes of the Act, and provides for the making of applications to him for registration. It prescribes the information which must accompany the application and requires that the rules of the applicant association must provide for certain specified matters. The application must be accompanied by a report of an approved actuary. Then comes s. 10, which is in the following terms:—"(1) If in the opinion of the Registrar the application for registration as an association the rules or proposed rules of the association and the report by an approved actuary comply with the requirements of this Act and

the regulations the Registrar shall register such association; but if in the opinion of the Registrar such requirements are not complied with the Registrar shall refuse registration. (2) If the Registrar refuses registration the applicant for registration may within the prescribed time and in the prescribed manner appeal to the Minister against such refusal and the decision of the Minister in the matter shall be final and conclusive." The remaining provisions of the Act are concerned for the most part with requirements which are to be observed by associations carrying on business. Section 26 (2) provides that, where any association is carrying on a benefit business at the commencement of the Act and is not registered within six months after the commencement of the Act, the Minister shall order it to be wound up. The consequences of a winding up are then prescribed. It should be noted that the Act bears marks of haste in its drafting, and the Solicitor-General was disposed to concede that—theoretically at any rate—s. 26 could have a very drastic confiscatory effect which is not likely to have been intended. It may also be noted that the validity of some of the Regulations is very doubtful apart altogether from any constitutional question.

The Act came into force on 7th November 1951. Each of the plaintiff companies had been carrying on its business for some time before the commencement of the Act. Each applied for registration under the Act, and each application was refused. These actions were thereupon commenced.

Each company alleges in its statement of claim that it was and is engaged in inter-State commerce within the meaning of s. 92. The facts by reference to which it supports this allegation may be summarised as follows :—

1. Moneys are payable and paid by the company from its office in one State to contributors in other States or for accommodation and maintenance in hospitals in other States.

2. Sums are payable and paid by contributors in one State to the company at its office in another State.

3. The company, being incorporated in Victoria and having its registered office in Victoria, not only carries on business in Victoria but maintains offices, staffs, equipment and funds, in other States.

4. Servants and agents of the company travel frequently from one State to another on business of the company.

5. Documents and communications of various kinds connected with the business of the company are constantly being transmitted by post and otherwise from one State to another.

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6. In the case of one company, there are two directors, one of whom resides in Victoria and the other in New South Wales, and directors' meetings are held from time to time in both States.

In so far as either company carries on business in other States, the Act is not concerned with it. It is the carrying on of business in Victoria without being registered that is prohibited. For the rest, it may be conceded that the sending of documents and cheques from State to State, the travelling of the company's servants and agents from State to State, and the like activities, are acts possessing the character of inter-State commerce or intercourse, and are, as such, within the protection of s. 92. The Victorian Act, however, is in no way concerned with these activities as such, and it by no means follows that that Act is invalid or that it does not operate with full force and effect upon both companies.

It is not, I think, universally true to say that, where the effect of legislation upon inter-State commerce or intercourse is indirect, the legislation does not contravene s. 92; see e.g., *Vacuum Oil Co. Pty. Ltd.* v. *Queensland* (1), and cf. *Fox* v. *Robbins* (2). "However circuitous or disguised it may be", per *Dixon* J. in *O. Gilpin Ltd.* v. *Commissioner for Road Transport and Tramways (N.S.W.)* (3) the effect of legislation in imposing restraints or burdens on acts of inter-State commerce or intercourse may reveal that legislation as an attempt to contravene s. 92. But one thing, I think, is well established. Legislation, which imposes restraints upon conduct without reference or regard to acts of inter-State commerce or intercourse, will not be held to be struck by s. 92 merely because it involves the accidental consequence that acts of inter-State commerce or intercourse, which have previously taken place, will or may cease. An Act which requires an importer of petrol from New South Wales into Queensland to mix it with power alcohol produced in Queensland before he sells it is struck by s. 92, although the effect of the legislation on the protected act of inter-State commerce—the importation of the petrol—could hardly be described as "direct". But (to take a familiar example) the validity of an Act under which a person convicted of a crime is sentenced to imprisonment for five years is not affected, nor is its application restricted, by reason of the fact that that person has been in the habit of making frequent inter-State journeys and will be prevented from making such journeys for five years. An example of a slightly different nature and possibly more apposite to the present case is one taken by *Latham* C.J. in *Australian Communist Party*

(1) (1934) 51 C.L.R. 108; (1935) 51 C.L.R. 677.

(2) (1909) 8 C.L.R. 115.

(3) (1935) 52 C.L.R. 189, at p. 211.

v. *Commonwealth* (1): a Victorian law requiring medical practitioners to possess certain qualifications and to be registered does not contravene s. 92 because it may operate to prevent a New South Wales surgeon from crossing the border to perform an operation in Victoria. The *Communist Party Case* (2) itself provides another good example. The plaintiffs relied on s. 92. The majority of the Court did not find it necessary to consider the argument based on that section, but it could never have been held that the *Communist Party Dissolution Act* 1950 (Cth.) was invalid merely because the termination of the existence of the organisation would remove the occasion for inter-State journeyings and communications which had been habitually made by its officials. The cessation of such journeyings and communications would have been the merest accidental consequence of legislation which had no concern with, and no bearing upon, inter-State commerce or intercourse. This was the view taken by *Latham* C.J., who was the only justice who had occasion to consider the question.

The present cases, in my opinion, fall within the principle which I have been examining. The *Benefit Associations Act* 1951, in so far as it affects inter-State journeyings and communications of the plaintiff companies and their officers, and payments made by a person in one State to a person in another, does so only as an accidental consequence of provisions which are in no way concerned with inter-State commerce or intercourse. It may be said to affect such journeyings and communications and payments, because the companies, if they cannot or do not comply with the Act, may be wound up and cease to exist. The occasion for the making of such journeyings and communications and payments will thus disappear, but this will be the merest by-product of legislation which does not really relate to such matters at all.

The case might be different if it could be maintained that the business carried on by the companies, or a part thereof, *itself* possessed the character of inter-State commerce or intercourse. It was argued that it did possess that character, and that the case therefore fell within the authority of the *Banking Case* (3). But the argument cannot, in my opinion, be sustained. In the *Banking Case* (3) as I understand it, it was held by a majority of this Court and by the Privy Council that a large part of the business of banking as carried on by the large banking corporations in Australia, possessed, as part of its very essence, the character of commerce among the States. The main features which were regarded as

(1) (1951) 83 C.L.R. 1, at p. 169.
(2) (1951) 83 C.L.R. 1.
(3) (1948) 76 C.L.R. 1; (1950) A.C. 235; (1949) 79 C.L.R. 497.

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giving it that character are stated in slightly different terms by *Dixon* J. (1) and by *Rich* and *Williams* JJ. (2) Not the least important would seem to be the last of the features mentioned by *Dixon* J.—" the furtherance of commercial dealings by inter-State traders in goods by performing an indispensable part in such transactions " (1). There is indeed a close analogy in relevant respects between the business of banking and the business of the physical transportation of goods. In each case the person who carries on the business is not only himself engaged in commerce but is playing an " indispensable part " in the commerce of others. And, when he engages in an inter-State transaction, that transaction is not only itself inter-State commerce but is an essential instrument in the inter-State commerce of others. Because a large part of the business of banking was found to possess the essential character of inter-State commerce, a prohibition of private banking was *pro tanto* a prohibition of private inter-State commerce. Such a prohibition could not stand consistently with s. 92.

The business carried on by the two plaintiff companies appears to me to possess none of the characteristics which in the *Banking Case* (3) attracted the protection of s. 92. *Rich* and *Williams* JJ. said : " In our opinion a banker who carries on business in more than one State is engaged in trade, commerce and intercourse among the States " (4). But this must be taken as referring specially to a banker and as being said in the light of the evidence as to the nature of a banker's business in Australia. For it is very clear that a person may carry on business in every State of the Commonwealth and yet never engage in an act of inter-State commerce. Each of the plaintiff companies appears to carry on business in more than one State, but that, of itself, means nothing that is relevant for the purposes of s. 92. The fact that directors of one company reside in different States and meet sometimes in the one and sometimes in the other can in no way affect the nature of the business carried on by that company. The facts that the company in one State makes contracts with persons in other States and receives " contributions " from persons in other States, that it makes payments from its office in one State to persons in other States, that its servants and agents travel from one State to another on the company's affairs, that documents and communications are transmitted from one State to another—these things, severally or in combination, do not mean that the business in which the company is engaged or any part of that business possesses the

(1) (1948) 76 C.L.R., at p. 380.
(2) (1948) 76 C.L.R., at p. 287.
(3) (1948) 76 C.L.R. 1.
(4) (1948) 76 C.L.R., at p. 284.

character of inter-State commerce. The business in which the company is engaged is the making of contracts to pay money on the occurrence of certain contingencies. No part of such a business can be said to possess any essential characteristic which brings it within the category of inter-State commerce, even though, in the course of it, journeyings and communications between the States take place. Such journeyings and communications may themselves, as I have said, command the protection of s. 92, but they are mere incidents or accidents of a business which has not itself the character of inter-State commerce and cannot be brought within the principle of the *Banking Case* (1).

The conclusion which I have reached is not affected by the decision in *United States* v. *South-Eastern Underwriters Association* (2) (cf. *Polish National Alliance of the United States of North America* v. *National Labor Relations Board* (3)). That case does indeed carry the plaintiffs one essential step in their argument, since it decides that to carry on a business of insurance is to engage in commerce. And the first paragraph of the headnote, if read without explanation or qualification, might be regarded as taking them the second necessary step, for it reads: "A fire insurance company which conducts a substantial part of its business transactions across state lines is engaged in commerce among the several States, and subject to regulation by Congress under the Commerce Clause" (2A). But for the first proposition the plaintiffs do not need any further authority than the *Banking Case* (4). And the first paragraph of the headnote must be read in the light of the facts of the case and the questions which actually arose in it.

In *Paul* v. *Virginia* (5) the State of Virginia had enacted a statute which has some similarity to the Victorian statute now under consideration. It provided that no insurance company not incorporated under the laws of Virginia should carry on its business within Virginia without previously obtaining a licence for that purpose, and that it should not receive such a licence until it had deposited certain securities with the Treasurer of the State. The validity of the statute was attacked on the ground that it invaded the "commerce power" of Congress under the Constitution. The argument was rejected on the extremely broad ground that "issuing a policy of insurance is not a transaction of commerce" (6). The Court added that policies issued by the insurers who were attacking

(1) (1948) 76 C.L.R. 1.
(2) (1944) 322 U.S. 533 [88 Law. Ed. 1440].
(2A) (1944) 322 U.S. 533.
(3) (1944) 322 U.S. 643 [88 Law. Ed. 1509].
(4) (1948) 76 C.L.R. 1; (1950) A.C. 235; (1949) 79 C.L.R. 497.
(5) (1869) 75 U.S. 168 [19 Law. Ed. 357].
(6) (1869) 75 U.S., at p. 183 [19 Law. Ed., at p. 361].

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the statute " do not constitute a part of the commerce between the States any more than a contract for the purchase and sale of goods in Virginia by a citizen of New York whilst in Virginia would constitute a portion of such commerce " (1). It is to be observed, and I think it is important to observe, that a denial of the first of the two propositions thus enunciated would not necessarily involve the falsity of the second. The broad generalisation made in *Paul* v. *Virginia* (2) was " repeated or relied upon " in a large number of later cases in which State legislation was attacked. In *New York Life Insurance Co.* v. *Deer Lodge County*, *McKenna* J., delivering the opinion of the Court said : " The decision of the cases is that contracts of insurance are not commerce at all, neither state nor interstate " (3).

In *United States* v. *South-Eastern Underwriters Association* (4) it was not State legislation but an Act of Congress, the Sherman Anti-Trust Act, that came in question. That Act declared illegal " every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States ". The conspiracies charge consisted of a continuing agreement and concert of action effectuated through the S.E.U.A. in six States. " The conspirators not only fixed premium rates and agents' commissions, but employed boycotts together with other types of coercion and intimidation to force non-member insurance companies into the conspiracies, and to compel persons who needed insurance to buy only from S.E.U.A. members on S.E.U.A. terms. Companies not members of S.E.U.A. were cut off from the opportunity to reinsure their risks, and their services and facilities were disparaged ; independent sales agencies who defiantly represented non-S.E.U.A. companies were punished by a withdrawal of the right to represent members of S.E.U.A. ; and persons needing insurance who purchased from non-S.E.U.A. companies were threatened with boycotts and withdrawal of all patronage. The two conspiracies were effectively policed by inspection and rating " (?) " in five of the six states, together with local boards of insurance agents in certain cities of all six States " (5). The association demurred on the ground that " the business of fire insurance is not commerce ". The demurrer was sustained by the District Court, but the decision of that Court was reversed by the Supreme Court. *Black* J. delivered the opinion of the Court. *Stone* C.J., *Frankfurter* J. and *Jackson* J. dissented.

(1) (1869) 75 U.S., at p. 183 [19 Law. Ed., at p. 361].
(2) (1869) 75 U.S. 168 [19 Law. Ed. 357].
(3) (1913) 231 U.S. 495, at p. 510 [58 Law. Ed. 332, at p. 338].
(4) (1944) 322 U.S. 533 [88 Law. Ed. 1440].
(5) (1944) 322 U.S., at pp. 535, 536 [88 Law. Ed., at p. 1447].

I do not think it necessary, for present purposes, to discuss at length the judgments or the interesting questions which they raise. Such matters as the question of the effect of the decision upon State powers as previously held to subsist (an effect which *Jackson* J. appears to have considered much more drastic than *Black* J.) are questions which do not directly arise under our Constitution. It is sufficient, I think, to say two things. The first is that the analysis by *Stone* C.J. of insurance transactions which involve the doing of acts in more than one State or the passage across State borders of persons or things is an analysis which I would not regard as necessarily inconsistent with anything in the opinion of the Court as expressed by *Black* J. The second relates to the general effect of the decision. The majority view undoubtedly rejects the broad generalisation that "insurance is not commerce". That generalisation could not, I think, as I have said, be accepted consistently with the decisions of this Court and of the Privy Council in the *Banking Case* (1). For the rest, and so far as any question arising in the present case is concerned, I am clearly of opinion that the case is no authority for the proposition that the business carried on by the plaintiff companies or any part of it possesses the character of inter-State commerce in the sense in which part of the business of banking in Australia has been held to possess that character. It does involve the doing of acts which, considered in themselves, do possess that character. The steps necessary in the organisation of a "conspiracy" covering activities in more than one State were also acts of that character. And, when once it was held that the business, in relation to which those steps were taken, was "commerce", it followed that the taking of those steps was a subject matter with which Congress could deal under the commerce power. So far as it is relevant to the present cases, I do not think that the *South-Eastern Underwriters Case* (2) should be taken as deciding more than that. So regarded, it is perfectly consistent with the view which I take of this case.

In my opinion, the demurrers should be allowed.

KITTO J. In each of these cases, I am of opinion that the demurrer should be allowed. I concur in the judgment of the Chief Justice.

TAYLOR J. In these suits, which were heard together, the plaintiffs seek declarations that the *Benefit Associations Act* 1951

(1) (1948) 76 C.L.R. 1; (1950) A.C. 235; (1949) 79 C.L.R. 497.

(2) (1944) 322 U.S. 533 [88 Law. Ed. 1440].

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(Vict.) and each and every section thereof and the regulations made thereunder and each and all of them is and are invalid. Alternatively, the plaintiffs seek a declaration that the Act and regulations is and are invalid and inoperative so far as it and they applies or apply to the inter-State operations of the plaintiff company. The defendants contend that the Act and the regulations are a valid and effective exercise of the legislative powers of the Parliament of the State and have full force and effect within that State contending that s. 92 of the Commonwealth Constitution does not operate to invalidate the whole or any part of the Act or the regulations made thereunder.

The Act, which came into operation on 7th November, 1951, makes comprehensive provision for the registration and supervision of associations which undertake or carry on sickness, hospital, medical or funeral benefit business. By s. 3, it is provided that business of this description shall not be undertaken or carried on except by an association registered under the Act, but this prohibition is subject to the proviso that any association which was carrying on any such business at the commencement of the Act may continue to undertake and carry on that business for a period of not more than six months after the commencement of the Act without being so registered. Section 10, which deals with the functions of the Registrar in relation to registration, provides that if, in his opinion, the application for registration as an association, the rules or proposed rules of the association and the report by an approved actuary comply with the requirements of the Act and the regulations, the Registrar shall register such association; but if, in the opinion of the Registrar, such requirements are not complied with, the Registrar shall refuse registration. The requirements of the Act with respect to the rules of any such association are set out with particularity in s. 6 of the Act, but in view of the conclusion to which I have come, it is unnecessary to refer to them or to the provisions of that section in detail.

The attack on the Act was based on the contention that it infringes the provisions of s. 92 of the Commonwealth Constitution. The plaintiffs, it was claimed, each carried on a business, an *integral* part of each of which constituted trade and commerce among the States, but since the argument took place on demurrer, there were no facts before the Court other than those admitted on the pleadings for the purpose of the argument. The facts relevant to this submission are contained in par. 5 of each statement of claim and, upon the allegations therein contained, some of the interested parties contended that the plaintiffs were not engaged in trade or

commerce between the States and, indeed, were prepared to assert that neither of them was engaged in trade or commerce at all in the sense in which those expressions are used in s. 92. The latter proposition is, in my view, unsupportable, but the former can only be resolved by an examination of the facts admitted on the pleadings.

The plaintiffs' claim that the admitted facts establish that they are engaged in the business of entering into so-called benefit contracts, that their respective businesses are carried on not only in Victoria but also in other States of the Commonwealth, that obligations to make periodical payments are undertaken by contributors and that large numbers of contributors resident outside Victoria and New South Wales have outside those States undertaken to make payments in those States. Similarly, it is said, the plaintiffs have undertaken to make from Victoria and New South Wales payments to contributors in other States. The plaintiffs, in these circumstances, claim that, at all material times, each of them has, without regard to State boundaries, carried on a business extending throughout a number of States of the Commonwealth, and that for the purpose of and in the course of carrying on their respective businesses they have conducted a substantial number of transactions across State borders. According to the plaintiffs' contentions there is no distinction in principle between the facts of these cases and those relied upon in the *Bank of New South Wales* v. *Commonwealth* (1) to establish that the business of banking, as carried on by the plaintiffs in that case, constituted trade or commerce and fell within the ambit of s. 92.

There seems to be little doubt that in the course of their respective businesses the plaintiffs did, in fact, engage in activities which are entitled to the immunities, whatever they may be, provided by s. 92. I refer particularly to the transmission of moneys and documents from one State to another and the receipt in Victoria of moneys from other States. But the question whether the legislation under consideration infringes s. 92 is not concluded by this consideration alone, for a business which on no sound view itself forms part of inter-State trade, commerce or intercourse, may well have recourse, on occasions, to activities which fall within that category. Indeed, a particular business itself may wear two or even more aspects. For instance, a company operating retail stores in one State of the Commonwealth would not ordinarily, in the course of that business, carry on trade commerce or intercourse among the States but, in the course of its purchasing activities for the purpose of acquiring stock-in-trade, it may very well enter

(1) (1948) 76 C.L.R. 1.

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that field. This circumstance alone, however, would not provide any foundation for the contention that with respect to all of its trading activities it would be entitled to "absolute freedom" under s. 92. No doubt it will frequently be difficult to determine whether the inter-State trade of a particular business is so much an integral part of the business carried on as to invest the whole business with the character of inter-State trade, or so as to render any restriction on its intra-State activities a *direct* interference with its trade or commerce among the States. But it seems clear that in circumstances such as those referred to in the illustration which I have given, restrictions imposed on the retail trading activities within the State would not, in the absence of special grounds for concluding to the contrary, constitute a direct burden upon or interference with the company's inter-State trade.

Examination of what may loosely be called the inter-State activities of the plaintiffs shows that they fall into two main categories. The first consists of those activities described in general terms in sub-paragraphs 5 (*b*) and (*c*) of each statement of claim. These paragraphs allege that for the purpose of carrying on their respective businesses the plaintiffs maintained offices and staffs in Victoria, South Australia and New South Wales and provided equipment and motor cars in each of the said States for the purpose of the conduct of the said business, including business conducted across State boundaries, and maintained funds in the States of Victoria, South Australia and New South Wales for the purpose of meeting claims by contributors and meeting the liabilities and commitments of the plaintiffs respectively. They further allege that for the purpose of carrying on their respective businesses and as an essential part of their activities the directors, servants and agents of each of the plaintiff associations travelled frequently from the States of Victoria and New South Wales to other States and from those other States into Victoria and New South Wales and that there was, as a necessary part of the plaintiffs' respective businesses, the transmission and conveyance among the said States by internal carriage or ocean navigation of a large number of documents of various kinds. These activities are said to have been necessary for what might be called the internal management of the plaintiffs' businesses and for the co-ordination of their affairs. No doubt many of these particular activities are themselves entitled to the protection of s. 92 but to say that because such activities took place in the course of and for the purpose of carrying on the plaintiffs' businesses those businesses themselves form part of

inter-State trade and commerce, is, in my view, completely erroneous. No doubt a company carrying on intra-State business in each of several States would find it necessary to engage in such activities but it would by no means follow from this that the company's business, as distinct from some of its particular activities, would form part of inter-State trade, commerce and intercourse. In such a case a law prohibiting its inter-State activities would, no doubt, infringe s. 92, but a State law prohibiting the carrying on in that State of the intra-State business of the company would not infringe s. 92, though doubtless it would result in a cessation of the business activities between that State and other States in which it might be carrying on business. In my opinion, there is nothing in sub-pars. 5 (*b*) and (*c*) of the statements of claim to found a contention by the plaintiffs that their respective businesses as distinct from the activities therein referred to, are entitled to any protection under s. 92.

If the plaintiffs are entitled to any such protection for their respective businesses the foundation for it must, I think, be found in the allegations contained in pars. 5 (*a*) (i), (ii), (iii) and (iv). It is apparently true that in some cases contributors resident outside Victoria undertook to pay their contributions to the associations at their respective offices in that State and that others, resident outside New South Wales, undertook to pay their contributions to the associations at their respective offices in New South Wales. Further, it seems, the associations undertook to pay benefits to contributors either from the Victorian or New South Wales office and in all cases to make such payments to the contributor at any address anywhere in Australia or for accommodation and maintenance at a hospital anywhere in Australia. The place of payment in any particular case would, of course, ultimately be determined by the presence or residence of the contributor in some particular place at the time of the occurrence of the relevant contingency. Perhaps the case of the plaintiff associations would be no weaker in principle if there were no allegations of fact other than those contained in paragraph 5 (*a*) (i), for even in the cases therein referred to, i.e. "contracts made in Victoria with contributors resident in Victoria in respect whereof all payments by the contributors were and are payable to the plaintiff company at its office in Victoria, and sums payable by the plaintiff company were and are payable from the office of the plaintiff company in Victoria to the contributor at any address anywhere in Australia or for accommodation and maintenance at a hospital anywhere in Australia", the associations may very well be required, in some

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circumstances, to make payments in other States. Evidence that this was so in a substantial number of cases might, no doubt, disclose that the company engaged in a substantial number of transactions across State borders, each of which would, by virtue of s. 92, be immune from direct interference, but, nevertheless, this circumstance would not invest the business of the associations with the character of trade, commerce and intercourse among the States. Possibly, it may be more correct to say that such activities are not, as in the case of the transmission of money or credit in the case of banking, an integral part of sickness, hospital, medical and funeral benefit business. On such evidence, I would have no doubt that a State law prohibiting or restricting in any State the carrying on of such sickness, hospital, medical or funeral benefit business could not be said directly to interfere with any form of inter-State trade, commerce or intercourse. It may be true that any such prohibition or restriction would result in making such inter-State activities unnecessary or diminishing the need for them. But such a result can, on my view, be regarded only as an indirect result of the legislation. I am further of the opinion that the allegations contained in par. 5 (*a*) (ii), (iii) and (iv) add nothing to the plaintiffs' case. They may disclose that the plaintiffs did engage in what I have referred to as inter-State activities, but, in my view, the prohibition contained in s. 3 of the Act does not operate directly to impede or prohibit these activities.

The views which I have expressed are not, I think, inconsistent with the decision of the Supreme Court of the United States in *United States* v. *South-Eastern Underwriters Association* (1) to which we were referred during the course of argument. In that case *Black* J. in delivering the opinion of the Court referred to a number of activities judicially recognised as constituting part of inter-State commerce and said: " These activities having already been held to constitute interstate commerce, and persons engaged in them therefore having been held subject to federal regulation, it would indeed be difficult now to hold that no activities of any insurance company can ever constitute interstate commerce so as to make it subject to such regulation;—activities which, as part of the conduct of a legitimate and useful commercial enterprise, may embrace integrated operations in many states and involve the transmission of great quantities of money, documents, and communications across dozens of state lines " (2). But though this proposition may be thought to have justified an exercise of legislative power by Congress it does not follow that every activity of every insurance

(1) (1944) 322 U.S. 533 [88 Law. Ed. 1440].

(2) (1944) 322 U.S., at p. 550 [88 Law. Ed., at p. 1456].

company, or, indeed, that the respective businesses of the plaintiffs, in their entirety, form part of inter-State trade and commerce or that in the Commonwealth every activity of such a business is within the protection of s. 92. For it is one thing to say that a company engages in activities which form part of inter-State trade, commerce and intercourse, and another to say that in every case the entire business of such a company forms part of such trade, commerce and intercourse. It is true that whilst conceding that " a contract of insurance, considered as a thing apart from negotiation and execution, does not itself constitute interstate commerce " (1), *Black* J. was firmly of the opinion that the Court was not " powerless to examine the entire transaction, of which that contract is a part, in order to determine whether there may be a chain of events which becomes inter-State commerce " (2). " Only," he said, " by treating the Congressional power over commerce among the states as a 'technical legal conception' rather than as a 'practical one, drawn from the course of business' could such a conclusion be reached. *Swift & Co.* v. *United States* (3). In short, a nationwide business is not deprived of its interstate character merely because it is built upon sales contracts which are local in nature " (2). The views were, however, expressed upon an examination of facts relating to insurance business generally in the United States and which were vastly different from those disclosed by the pleadings in this case. But, even so, his Honour went on to say : " It is settled that, for Constitutional purposes, certain activities of a business may be intrastate and therefore subject to state control, while other activities of the same business may be interstate and therefore subject to federal regulation. And there is a wide range of business and other activities which, though subject to federal regulation, are so intimately related to local welfare that, in the absence of Congressional action, they may be regulated or taxed by the States " (4). Further, it is noteworthy that the decision in this case did not prevent the Supreme Court, when deciding *Robertson* v. *California* (5)—and independently of the operation of the McCarran Act which, subsequently to the decision in *United States* v. *South-Eastern Underwriters Association* (6) declared that the continued regulation and taxation by the several States of the business of insurance is in the public interest

(1) (1944) 322 U.S., at pp. 546, 547 [88 Law. Ed., at p. 1454].
(2) (1944) 322 U.S., at p. 547 [88 Law. Ed., at p. 1454].
(3) (1905) 196 U.S. 375, at p. 398 [49 Law. Ed., 518, at p. 525].
(4) (1944) 322 U.S., at p. 548 [88 Law. Ed., at p. 1454].
(5) (1946) 328 U.S. 440 [90 Law. Ed. 1366].
(6) (1944) 322 U.S. 533 [88 Law. Ed. 1440].

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and provided that the business of insurance and every person engaged therein should be subject to the laws of the several States which relate to the regulation or taxation of such business—from upholding a State enactment constituting it a misdemeanour for any person, except one appropriately licensed under State legislation to act "as agent for a non-admitted insurer in the transaction of insurance business" within the State.

In the circumstances and for the reasons which I have given, I am of the opinion that the demurrer in each action should be allowed.

Before parting with the case, I should add that s. 26 (2) appears to have been framed in ignorance that some, at least, of the benefit associations in existence at the time the Act came into force were limited companies with share capital and shareholders and, it seems to me, the very drastic effects which, upon one construction of that section would follow, could not possibly have been intended.

*Demurrer allowed.*

Solicitor for the plaintiffs in both actions, *J. W. Sackville.*

Solicitor for the defendants in both actions, *Frank G. Menzies*, Crown Solicitor for the State of Victoria.

Solicitor for the intervenor, *D. D. Bell*, Crown Solicitor for the Commonwealth of Australia.

R. D. B.