[HIGH COURT OF AUSTRALIA.]

HUGHES AND VALE PROPRIETARY LIMITED AND ANOTHER . . . . . } PLAINTIFFS;

AND

THE STATE OF NEW SOUTH WALES AND OTHERS . . . . . } DEFENDANTS.

[No. 2].

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MELBOURNE, *Feb.* 23, 24, 25, 28; *March* 1, 2; *June* 9.

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

Constitutional Law (Cth.)—Freedom of inter-State trade commerce and intercourse—State Statute—Validity—Prohibition of public vehicles operating in the course and for the purposes of inter-State trade on State roads without licence—Application for licence to be refused if official satisfied as to certain vaguely expressed matters—Conditions applicable to licence if granted—"Reasonable charge" for use of roads—Impermissible matters to be taken into account in fixing—Whether power to make any charge for use of roads—Imposition of tax on vehicles at time of application for registration and at time of each renewal—Offence to drive etc. vehicle on public street without paying tax—Applicability to vehicles used exclusively for the purposes of inter-State trade etc.—The Constitution (63 & 64 *Vict. c.* 12), *s.* 92—*State Transport (Co-ordination) Act* 1931-1954 (*No.* 32 *of* 1931—*No.* 48 *of* 1954) (*N.S.W.*), *s.* 3 (3), *Third Schedule—Motor Vehicles Taxation Management Act* 1949-1951 (*No.* 34 *of* 1949—*No.* 57 *of* 1951) (*N.S.W.*), *ss.* 4, 5, 6—*Motor Vehicles (Taxation) Act* 1951 (*No.* 56 *of* 1951) (*N.S.W.*), *s.* 2.

Section 12 of the *State Transport (Co-ordination) Act* 1931-1954 (N.S.W.) provides that no person shall operate a public motor vehicle in the course and for the purposes of inter-State trade unless such vehicle is licensed under the Act. A "public motor vehicle" is defined by s. 3 as meaning, *inter alia*, a motor vehicle used in the course of any trade or business. Section 17 relates to the granting of licences, the licensing authority being the Commissioner for Motor Transport. Sub-section (4) provides that the commissioner may refuse the application if satisfied that (a) the applicant is not a fit and proper person to hold the licence; or (b) the vehicle is not properly constructed or adequately equipped or is otherwise unfit or unsuitable for the licence; or (c) the operation of the vehicle, if the licence were granted, would create or intensify conditions giving rise to—(i) unreasonable damage to the roads; or (ii) danger to persons or vehicles using the roads; or (iii) unreasonable

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interference with other traffic on the roads. Sub-section (4A) provides that, except as provided in sub-s. (4) of the section, the commissioner shall grant the application. Sub-section (2) provides that the commissioner may determine what terms and conditions (being terms and conditions of a regulatory character) shall be applicable to or with respect to a licence, including the use of such motor vehicle as to whether passengers only or goods only or goods of a specified class or description only shall be thereby conveyed and as to the circumstances in which and the days and times on which such conveyance may be made or may not be made (including the limiting of the number of passengers or the quantity, weight or bulk of the goods that may be carried on the vehicle). The proviso to sub-s. (4A) provides that where the commissioner grants an application he may, in addition to any conditions imposed under sub-s. (2), impose conditions necessary for the preservation of public safety, the regulation of traffic and the preservation and maintenance of the roads and the use and enjoyment by the public of the roads. Section 22 provides for the issue of a permit to operate the vehicle for a specified journey pending the decision of the commissioner whether or not to grant an application for a licence. He may refuse to issue the permit if satisfied that the operation of a vehicle, if the permit were granted, would create or intensify conditions giving rise to (i) unreasonable damage to the roads; or (ii) danger to persons or vehicles using the roads; or (iii) unreasonable interference with other traffic on the roads; otherwise he must grant the permit. If he grants a permit he may impose any conditions he could have imposed if such permit were a licence.

Held that the licensing provisions of the Act were invalid as infringing s. 92 of the Constitution.

Hughes & Vale Pty. Ltd. v. *State of New South Wales* [*No.* 1] (1955) A.C. 241; (1954) 93 C.L.R. 1, referred to.

Section 18 of the Act provides that every licence shall be subject to a condition that the holder in respect of each journey pay to the commissioner a reasonable charge for the use by the vehicle of public streets over which it travels and for an appropriate part of the cost of administration of the Act. The amount charged was to be assessed on a scale to be laid down from time to time by the commissioner who was to take into account and not to exceed a scale to be recommended by an advisory committee set up by the Act. Both the committee and the commissioner in determining the scale were required to have regard to all relevant matters including the cost of construction and maintenance of roads, the depreciation and obsolescence of roads, the necessity or desirability for the widening or re-construction of roads, the wear and tear caused by vehicles of different weights, types, sizes and speeds, the moneys available for the purpose of construction, maintenance, widening and re-construction of roads from sources other than charges imposed pursuant to sub-s. (4) of the section, and the amount expended or proposed to be expended from the Country Main Roads Fund established under the *Main Roads Act* 1924-1954. The scale was to be applied equally to all persons in respect of all public motor vehicles of the same description or weight passing over the

same route and under the same circumstances but the charge payable was not to exceed the corresponding charge payable by vehicles of the same description and weight engaged in intra-State trade passing over the same route and under the same circumstances. The *Motor Vehicles Taxation Management Act* 1949-1951 (N.S.W.), with which is to be read and construed the *Motor Vehicles (Taxation) Act* 1951 (N.S.W.), provides for the imposition of tax on motor vehicles at the time of application for registration and at the time of each renewal thereof. The owner of any unregistered vehicle or of any registered vehicle on which tax due has not been paid, who uses or drives the vehicle or permits it to be used or driven on a public street is liable to a penalty. Under the Acts, tax is calculated on the unladen weight of the vehicle and in the case of a heavy vehicle amounts to a considerable sum. Vehicles using oil fuel are taxable at double rates.

Held that s. 18 of the *State Transport (Co-ordination) Act* 1931-1954 was invalid and that the *Motor Vehicles Taxation Management Act* 1949-1951 and the *Motor Vehicles (Taxation) Act* 1951 could not validly apply in respect of vehicles used exclusively in or for the purposes of inter-State trade commerce or intercourse.

Per Dixon C.J., *McTiernan*, *Williams*, *Webb* and *Fullagar* JJ. The States may make a fair and reasonable charge for the use made of roads by vehicles engaged in inter-State trade etc. *Per Kitto* J. The States may make no charge for the use made of roads by such vehicles. *Per Taylor* J. In cases where by reason of their weight and construction such vehicles are calculated to work destruction of such a nature to such roads that they ought not to be on them at all the States may validly prohibit the use of such roads by such vehicles. In these cases it is legitimate for the States as a condition of relaxing such prohibition to stipulate for the payment of a charge. In all other cases, however, the States may make no charge for the use of the roads by such vehicles.

DEMURRER.

On 22nd December 1954 Hughes & Vale Pty. Ltd. and Keith Flynn commenced an action in the High Court of Australia against the State of New South Wales, the Honourable Ernest Wetherell, the Commissioner for Motor Transport, the Commissioner for Main Roads and John William Goodsell.

The plaintiffs' statement of claim was as follows :—1. The first named plaintiff is a company duly incorporated under the laws of the State of New South Wales, and is entitled to sue in and by its corporate name. 2. The defendant, the Honourable Ernest Wetherell, is the Minister for Transport of the State of New South Wales, and, as such, is the Minister responsible for the administration of the *State Transport (Co-ordination) Act* 1931-1954. 3. The defendant, the Commissioner for Motor Transport, is a body corporate, and is the body charged with the administration of the

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above-mentioned Act. 4. The defendant, the Commissioner for Main Roads, is a body corporate, and, with the defendants the Commissioner for Motor Transport and John William Goodsell, is a member of the Advisory Committee constituted by s. 18 (5c) of the said Act. 5. The first-named plaintiff carries on business as a carrier of goods by road, and operates the public motor vehicles of which it is the owner on journeys from Sydney, in the State of New South Wales, to Brisbane, Melbourne, and Adelaide in the States of Queensland, Victoria, and South Australia, respectively, and from each of the said cities to any one or more of the others. The said plaintiff does not operate its said vehicles for the carriage of goods on intra-State journeys in any of the said States. 6. The second-named plaintiff carries on business as a carrier of goods by road and operates the public motor vehicle of which he is the owner on journeys from Sydney, in the State of New South Wales, to Brisbane, Melbourne, and Adelaide in the States of Queensland, Victoria, and South Australia, respectively, and from each of the said cities to any one or more of the others. The said plaintiff does not operate his said vehicle for the carriage of goods on intra-State journeys in any of the said States. 7. This cause is one within the original jurisdiction of this Honourable Court, in that it involves the interpretation of the Constitution of the Commonwealth of Australia.

The plaintiffs' claim :—1. A declaration that the *State Transport (Co-ordination) Act* 1931-1954 is beyond the powers of the Parliament of New South Wales and is invalid. 2. A declaration that s. 3 (3) and the Third Schedule of the *State Transport (Co-ordination) Act* 1931-1954 is beyond the powers of the Parliament of New South Wales and is invalid. 3. A declaration that ss. 12, 13, 14, 15, 16, 17, 18, 19, 21, 22, 28, 37, and 38A, are beyond the powers of the Parliament of New South Wales and are invalid. 4. A declaration that the following sections as deemed to be amended by s. 3 (3) and the Third Schedule of the said Act, viz. : 12, 16, 17, 18, 22, 28, 37, 38A and the following sections of the said Act, viz. ss. 13, 14, 15, and 21 are beyond the powers of the Parliament of New South Wales and are invalid. 5. A declaration that the *Motor Vehicles (Taxation) Act* 1951 is beyond the powers of the Parliament of New South Wales and is invalid. 6. A declaration that the *Motor Vehicles Taxation Management Act* 1949-1951 is beyond the powers of the Parliament of New South Wales and is invalid.

By their defence delivered on 18th January 1955 the defendants pleaded as follows :—

The defendants in answer to the whole of the statement of claim say as follows :—(a) That the roads and streets within the State of

New South Wales over which the plaintiffs and other persons engaged in like businesses travel are different from the roads and streets existing at the time of the establishment of the Commonwealth and at the time of the imposition of uniform duties of customs and excise in respect of some of the methods of construction, some of the surfaces thereof and, in many cases, the precise routes followed. (b) That since the establishment of the Commonwealth and the imposition of uniform duties of customs and excise, considerable sums of money have been expended in respect of the said roads and streets by the State of New South Wales and by authorities and local governing bodies of such State from the Consolidated Revenue Fund, the Main Roads Funds, loan funds, Commonwealth grants and otherwise for the resumption of land for such roads and streets, for the construction, re-construction, widening, and strengthening of roads, streets, bridges, and culverts, and for the surfacing and maintenance of such roads and streets. (c) That from time to time in the future further considerable sums of money will be required to be expended for the said purposes.

On 25th January 1955 the plaintiffs demurred to the defence on the following grounds :—1. The *State Transport* (*Co-ordination*) *Act* 1931-1954 is beyond the powers of the Parliament of New South Wales and is invalid. 2. Section 3 (3) and the Third Schedule of the said Act are beyond the powers of the Parliament of New South Wales and are invalid. 3. Sections 12, 13, 14, 15, 16, 17, 18, 19, 21, 22, 28, 37, and 38A are beyond the powers of the Parliament of New South Wales and are invalid. 4. The following sections as deemed to be amended by s. 3 (3) and the Third Schedule of the said Act, viz. : 12, 16, 17, 18, 22, 28, 37, and 38A and the following sections of the said Act, viz. : 13, 14, 15, and 21 are beyond the powers of the Parliament of New South Wales and are invalid. 5. The *Motor Vehicles* (*Taxation*) *Act* 1951 is beyond the powers of the Parliament of New South Wales and is invalid. 6. The *Motor Vehicles Taxation Management Act* 1949-1951 is beyond the powers of the Parliament of New South Wales and is invalid.

J. D. Holmes Q.C. (with him *G. D. Needham*), for the plaintiffs. We object to leave being granted to other States to intervene. The Privy Council treats interveners as parties : see *Attorney-General for Ontario* v. *Israel Winner* (1). In that case the plaintiff company, which would have been the natural appellant, was not even represented in the Privy Council. In *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [*No.* 1] (2) the view was taken on the

(1) (1954) A.C. 541, at pp. 547, 551, 554, 556, 557, 558, 561.

(2) (1955) A.C. 241 ; (1954) 93 C.L.R. 1.

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application for special leave that the interveners in this Court were parties in the Privy Council. Section 12 of the *State Transport (Co-ordination) Act* 1931-1952 as amended by the *State Transport (Co-ordination) Amendment Act* 1954 is a simple prohibition upon operating a vehicle in the course of or for the purpose of inter-State trade without a licence. Section 17 (2) states the matters to which the commissioner is to have regard when he is considering an application for a licence. If he is not satisfied on any of the matters in s. 17 (4) he may refuse the licence. Otherwise, under sub-s. (4A) he must grant the licence. Under s. 18 (11), if circumstances alter in any way, he can vary the licence, and under s. 22 he can grant a permit, having regard to some more limited matters than in s. 17 (3), for a particular journey, but only while there is an application for a licence on the file. Conditions may be imposed on the operator in the licence. Those are described in ss. 15, 17 (2), 17 (4A), 18 (4) and in the subsequent sub-paragraphs. Section 12 is the critical provision. Unless the other provisions relax that into a provision of the appropriate regulatory character, the case is no different from the case considered in *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [*No.* 1] (1). The commissioner may refuse an application if he is satisfied that the applicant is not a fit and proper person to hold the licence. In forming that decision he is to have regard to the matters set out in s. 17 (3) (c)—the character, suitability and fitness of the applicant to hold the licence. That is not regulatory in the sense that has been stated in the cases, because it leaves to the official power to go beyond permissible regulation. There is no test or formula to which the official must conform in forming a judgment. No guide is given, either in sub-ss. (3) (c) or (4) (a) as to the limits of the matters stated for his consideration. If there are characteristics under which, on some scheme of permissible regulation, the State could disqualify an individual from holding a licence, then there should be discernible on the face of the legislation what that condition or quality is so as to test whether the legislature has gone beyond the limits of its power. At least some test, sufficiently confined should be stated whereby the Court can test whether the legislature has gone beyond the limits of its power. A man may have a bad character from one point of view but not such as to disqualify him from engaging in inter-State trade. The applicant for a licence need not be the prospective driver. It might be a company or a firm. By reason of the fact that not merely vehicles in the course of inter-State trade use the roads it would be possible for the commissioner to consider that the

(1) (1955) A.C. 241; (1954) 93 C.L.R. 1.

granting of any licences in respect of vehicles intended to be so operated would intensify the conditions referred to in s. 17 (4) (c). [He referred to *McCarter* v. *Brodie* (1); *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [*No.* 1] (2).] These authorities contemplate that the rules upon which inter-State trade can be regulated consistently with the freedom guaranteed by s. 92 should appear in the statute. Section 17 (4) is deficient in this regard. The Privy Council in the *Hughes & Vale Case* [*No.* 1] (3) does not suggest that there can be wholesale prohibition of vehicles operating in inter-State trade but that vehicles which are to operate in inter-State trade in certain localitities or over certain routes may be limited as to number or types on grounds of public safety. Section 17 (4) goes on a much wider basis than that. The argument put on s. 17 (4) covers both s. 18 (11) and s. 22. Section 17 (2) deals with the conditions which may be attached to a licence. The expression " being terms and conditions of a regulatory character " presents difficulties of construction. If it is to be taken in its literal meaning, it includes conditions which, though of a regulatory character, are still a burden upon the trade. They might be regulatory in the sense of being regulations, but yet exceed that form of regulation which is permissible. The first condition " as to whether passengers only or goods only " will be conveyed makes no point of the appropriateness of the vehicle for the carriage of goods or of passengers. It is left completely within the discretion of the commissioner. The next condition " as to whether goods of a specified class or description only " will be conveyed leaves the way open for a policy of discrimination to be imposed on persons who engage in inter-State trade by forbidding or permitting the carriage of particular goods or classes of goods. Precisely the same result would be achieved as in the *Hughes & Vale Case* [*No.* 1] (4) was sought to be achieved by the imposition of different rates of mileage charges. The next condition " as to the circumstances in which and the days and times on which such conveyance may be made " is open to the same criticism as also is the condition " including the limiting of the number of passengers or the quantity, weight or bulk of the goods that may be carried on the vehicle." The load could be restricted, whatever the vehicle is capable of carrying and travel restricted to one day a week. Under s. 17 (4A) power is given to impose conditions necessary for the preservation of public safety. There are already New South Wales' Acts dealing with traffic and

(1) (1950) 80 C.L.R. 432, at p. 467, 468, 498, 499.
(2) (1955) A.C. 241, at pp. 300, 303; (1954) 93 C.L.R. 1, at pp. 26, 29.
(3) (1955) A.C. 241, at pp. 306-307; (1954) 93 C.L.R., at pp. 32-33.
(4) (1955) A.C. 241; (1954) 93 C.L.R. 1.

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with questions of public safety. It may be that special questions of public safety may arise with respect to large vehicles, necessitating further regulation of such vehicles, but such regulation should appear in the legislation. The same may be said of the expression, "regulation of traffic", and again "use and enjoyment by the public of the roads." Section 15, which in terms authorizes the issue of a licence for a particular route or for a particular area, having regard to the rest of the Act, can be read as authorizing the issue of a licence with a condition restricting the operation of the vehicle to a particular route or a particular area, or restricting it in the sense of prohibiting it from going into a particular area or along a particular route. This section suffers from the same vice as s. 17 (2), in that no conditions are prescribed limiting the discretion of the official or marking out the manner in which that discretion may be exercised so as to confine it within permissible limits. Section 18 (4) deals with the conditions under which levies may be made upon the operation of a vehicle in inter-State trade. It calls the condition a "reasonable charge" for the use of the road and for administration. That is destroyed by what follows. Sub-section (5A) (a) shows that the charge is unrelated to the use of the road. If an intra-State trader carries cement free of a mileage charge from Albury to Sydney, then the inter-State trader carrying cement from Victoria over the same route from Albury to Sydney is free of the charge. That takes this so-called reasonable charge for the use of the roads into the same position as before, where it was simply an instrument of the policy of favouring Government railways or some goods as against others. The same considerations apply in respect of par. (b). The maximum which may be charged the inter-State trader is now related to the maximum which is payable, having regard to the goods carried, by the intra-State trader, so that if the latter is charged a lower fee, because the State favours the goods he is carrying or the railways are not interested in carrying them, the inter-State trader must be charged the lower fee. Section 18 (5E) directs the committee recommending the charges to have regard to all relevant matters including the construction as well as maintenance of roads, the widening of roads and the loan moneys available from various sources. The committee is not told how it should treat any of these particular matters, and whether or not those matters, even if treated in any particular way, would lead to what is a reasonable charge for the use of the road is a matter which is left much too widely. Alternatively no charge at all may be made for the use of public roads as opposed to turnpike roads. Once a road is open to the public, it is there to be used by the public.

That follows from the dedication of the road. [He referred to *Glasgow Corporation* v. *Barclay, Curle & Co. Ltd.* (1).] At common law before 1900 the public had the right to pass over the highway. Section 92 gave the right to all citizens of Australia to pass over the highways in the course of inter-State travel or inter-State trade. A turnpike road may be only open on payment of a fee, because it has not been dedicated to the public. [He referred to *Attorney-General for Ontario* v. *Israel Winner* (2).] In any event no charge can be made simply against traders as users of the highway. This Act only charges traders for using the highway. The weight of the vehicle, the damage it may do to the road, may be precisely the same, but if the journey is in the course of trade, the charge is levied, not otherwise. Section 14 (3) provides that the application shall be accompanied by the prescribed fee. There is no limit as to what the prescribed fee may be and, whatever the prescribed fee may be in amount or to what purpose it may be put, or might have been put before the *State Transport (Co-ordination) Amendment Act* 1954, it is now clearly a tax because it is not for purposes of administration of the Act. Section 18 (4) provides that the charge by way of condition in the licence is for the use of the roads and for the appropriate part of the cost of the administration of the Act. The prescribed fee under s. 14 (3) therefore has nothing to do with administration. It is merely a tax on persons applying to operate vehicles in inter-State trade into or out of New South Wales ; and, therefore, a tax on inter-State trade. Regulation can include prohibition. [He referred to *Melbourne Corporation* v. *Barry* (3).] The tax charged under the *Motor Vehicles (Taxation) Act* 1951 with which is to be read the *Motor Vehicles Taxation Management Act* 1949-1951 is not simply a registration fee. It is a tax on the movement of all motor vehicles including motor vehicles in trade coming into New South Wales from other States and going out of New South Wales into other States in common with movement entirely within New South Wales. Tax is not payable if a vehicle is not used on the roads. [He referred to *Willard* v. *Rawson* (4).]

M. F. Hardie Q.C. and *R. Else-Mitchell* (with them *K. J. Holland*), for the defendants.

M. F. Hardie Q.C. The form of licensing provided by the *State Transport (Co-ordination) Act* 1931-1952 as amended by the *State*

(1) (1923) 93 L.J.P.C. 1.
(2) (1954) A.C. 541, at pp. 576, 577, 579.
(3) (1922) 31 C.L.R. 174, at pp. 199, 200.
(4) (1933) 48 C.L.R. 316, at pp. 324, 325, 327, 330, 331, 338, 339.

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Transport (Co-ordination) Amendment Act 1954 is a permissible form of regulation. [He referred to *The Commonwealth* v. *Bank of N.S.W.* (1); *McCarter* v. *Brodie* (2); *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [*No.* 1] (3); *Australian National Airways Pty. Ltd.* v. *The Commonwealth* (4); *Willard* v. *Rawson* (5).] Having regard to the complexity of the inter-State transport industry, the legislature should not be required to specify, by Act of Parliament, the matters disentitling an applicant to a licence. [He referred to *Hazeldon* v. *McAra* (6); *President etc. of the Shire of Tungamah* v. *Merrett* (7); *Attorney-General* v. *Magrath* (8).] Ultimately a decision must be made whether an applicant is a fit and proper person to be granted a licence. The persons administering the Acts are best qualified to make the decision. Under s. 17 (4) (b) a licence can be refused if the authority is satisfied that the vehicle is unfit or unsuitable for the licence. A vehicle may be properly constructed and adequately equipped, but lack of repair may make it unfit for a licence. The meaning of " unfitness " is illustrated in *Reg.* v. *Australian Stevedoring Industry Board*; *Ex parte Melbourne Stevedoring Co. Pty. Ltd.* (9). Section 17 (4) (c) is related to s. 17 (3) (b). The words " proposed public vehicular traffic " in sub-s. (3) (b) throw light on the words " create or intensify " in sub-s. (4) (c). Parliament is directing the authority to consider the condition of the roads and their suitability to carry not only the stress and strain of the particular vehicle for which a licence is being sought but other vehicles for which a licence has been obtained or for which it is reasonable to anticipate that a licence will be sought in the future. The word " intensify ", used in sub-s. (4) (c) is apt to express this idea. There is no validity in the argument that a decision by the commissioner to grant a licence means that he has already decided that there would be no risk of the creation or intensification of conditions of the nature referred to in sub-s. (4) (c). It would only be justifiable if words of sub-s. (4) were read as being equivalent to " the commissioner shall refuse etc.". The question of damage to roads, danger to persons and vehicles using them and unusual interference with other traffic on the roads changes from day to day, depending upon climatic

(1) (1950) A.C. 235, at pp. 311, 312; (1949) 79 C.L.R. 497, at p. 641.
(2) (1950) 80 C.L.R. 432, at pp. 461, 482.
(3) (1953) 87 C.L.R. 49, at p. 86; (1955) A.C. 241, at pp. 293, 297, 298, 303, 307; (1954) 93 C.L.R. 1, at pp. 20, 23, 24, 29, 33.
(4) (1945) 71 C.L.R. 29, at pp. 94-96.
(5) (1933) 48 C.L.R. 316, at p. 325.
(6) (1948) N.Z.L.R. 1087, at pp. 1097, 1109.
(7) (1912) 15 C.L.R. 407, at pp. 414, 422.
(8) (1907) 7 S.R. (N.S.W.) 851, at pp. 852, 853, 857; 24 W.N. 212.
(9) (1953) 88 C.L.R. 100, at p. 120.

conditions, floods, fires and matters of that nature. It could never be solved by saying in advance what conditions would justify the commissioner in refusing a licence. The matters dealt with in sub-s. (4) (c) are matters which have been raised in decisions of this Court as relevant matters for the States to deal with in the regulation of transport. The Federal Parliament could, by exercising its power to legislate on inter-State trade and commerce bring into existence an administrative tribunal which would have full and effective powers to give effect to rights of individuals under s. 92 of the Constitution. [He referred to *Riverina Transport Pty. Ltd.* v. *Victoria* (1).] If the Court was of opinion that any portion of s. 17 (4) was invalid it could be severed from the remainder of the Act. A licence would then have to be granted in every case. In the regulations published in the New South Wales Government *Gazette* on 28th January 1955 the prescribed particulars referred to in s. 14 (2) of the Act are prescribed by reference to a form contained in the schedule to the amended regulations. The regulations show the sort of information sought to be obtained from an applicant for the purpose of deciding whether he is a fit and proper person. There are a number of questions asked as to the proposed use of the vehicle, the route on which it is intended to operate, the day and times of the proposed journey, the purposes for which the vehicle is intended to be used, the place where goods and/or passengers are to be picked up, the place where goods and/or passengers are to be delivered or set down, whether it is proposed to carry goods or passengers from any place within the State of New South Wales to any other place within that State, whether it is proposed to operate the vehicle solely on inter-State journeys or solely on journeys within the State or on both types of journey. If it is intended to operate the vehicle on both types of journey particulars are to be furnished indicating the extent to which it is proposed to operate the vehicle inter-State and within the State, on what premises the vehicle will usually be garaged, and what steps will be taken to avoid danger to other traffic when the vehicle is left unattended or stationary. The matters set out in s. 17 (3) are matters which the commissioner has to consider both when deciding whether or not he will grant a licence and in deciding whether or not he will impose conditions, and in the latter event in making a decision as to what conditions he should impose. In imposing conditions, he is restricted by what appears in sub-s. (3). Section 17 (2) does not infringe s. 92, because the terms and conditions which can be imposed are limited to those of a regulatory

(1) (1937) 57 C.L.R. 327, at p. 352.

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character. In a statute such as this, with the history this statute has had, there is no doubt as to what the phrase " terms and conditions of a regulatory character " means. It means terms and conditions of a character which are regulatory within the meaning of s. 92. The power conferred by s. 17 (4A) to impose conditions is a valid power. The matters enumerated are the sort of matters which have often been said to be matters which are essentially involved in the concept of regulation. Section 15 (1) on its true construction in the form it took before the recent amendment, is not concerned with conferring a power to impose conditions, but with the form and contents of a licence. It states the authority that may be conferred by a licence. If an operator desires to undertake only one or two journeys, he will apply for a licence. While his application is pending he will be entitled to a permit unless there are road or traffic considerations which require its refusal under s. 22 (2) of the Acts. There is no obligation on an inter-State operator to pay any fee with an application for a licence. The regulations do not prescribe any fee under s. 14 (3) of the Act. The Court should construe s. 14 (3) as giving a power to prescribe a fee that is in some way related to the administrative work involved in dealing with applications for licences. The plaintiffs have no *locus standi* to complain about s. 14 (3) because no fee has been prescribed. A reasonable charge may be made for the use of roads. [He referred to *Willard* v. *Rawson* (1); *O. Gilpin Ltd.* v. *Commissioner for Road Transport & Tramways (N.S.W.)* (2); *McCarter* v. *Brodie* (3); *Hughes & Vale Pty. Ltd.* v. *State of New South Wales [No. 1]* (4).] Section 18 of the Act is valid. The provisos to sub-s. (5A) are designed to bring about the result that where a vehicle used by an intra-State operator is entitled to an exemption from charges or charges at a low rate, the inter-State operator operating in similar circumstances is similarly entitled. It is implicit in s. 18 that the charge to be imposed is a reasonable charge for using the roads. If it is a reasonable charge there is no chance of it being used as an instrument of Government policy or for the purpose of diverting traffic to the railways. What is a reasonable charge is a matter for the Court in the last instance. In America it has been settled for many years that a charge of this nature, though limited to commercial users, is valid. In determining a reasonable charge, the advisory committee would, and the commissioner would, in

(1) (1933) 48 C.L.R. 316, at pp. 323, 324, 327, 333.
(2) (1935) 52 C.L.R. 189, at p. 206.
(3) (1950) 80 C.L.R., at pp. 476, 478, 497, 500.
(4) (1953) 87 C.L.R., at p. 80; (1955) A.C. 241, at p. 281; (1954) 93 C.L.R. 1, at p. 3.

acting on its recommendations, have to pay regard to the fact that there were private users who made substantial use of the highways, from whom no revenue by way of mileage charges was received directly. In effect, a notional contribution to the expenditure would have to be made by those private users. Inter-State users must pay their way by making a reasonable payment for the facilities and benefits they obtain from New South Wales roads, and laws generally. They have the right to challenge that. If they pay a charge, under protest, their redress is to sue for recovery on the ground that their legal obligation as created by s. 18 (4) was to pay a reasonable charge and the commissioner has used his powers to exact more than a reasonable charge. The same sort of considerations apply to the tax under the *Motor Vehicles (Taxation) Act* as to the charge made under the 1954 amendment to the *State Transport Co-ordination Act*. The State is entitled to impose a charge, a lump sum, if necessary, on any vehicle which uses the roads of New South Wales. Parliament is entitled to impose a charge on vehicles based upon mileage and weight as long as it appears from the legislation that the charge is made for the purpose of road construction or maintenance, and the amounts fixed bear some relationship to the benefit that the operator obtains from the facilities in New South Wales, or from the damage that is done to the roads. If the same taxation was imposed under the Act on the diesel user as on the petrol user the latter could complain that he had already paid a substantial amount to the State through the Commonwealth for the use of the road, and therefore, that he should not be charged the same amount as the former. The provision is essential in order to preserve some basis of equality of burden and sacrifice, operating as between commercial operators who use petrol-driven vehicles and operators who use diesel-driven vehicles. It does not in any way destroy the validity of the legislation. State legislation may impose or authorize the imposition of a charge on persons engaged in inter-State trade by reason of their use in the course of such trade, of State-provided facilities, such as roads, bridges, ferries, aerodromes, harbour and port facilities, or by reason of such facilities being available for their use. [He referred to *Willard* v. *Rawson* (1); *O. Gilpin Ltd.* v. *Commissioner for Road Transport & Tramways (N.S.W.)* (2); *McCarter* v. *Brodie* (3); *Hughes & Vale Pty. Ltd.* v. *State of New South Wales [No. 1]* (4); *Bank of New South Wales* v. *The Commonwealth* (5).] In the American cases it

(1) (1933) 48 C.L.R. 316, at pp. 323, 324, 327, 328, 333, 334.
(2) (1935) 52 C.L.R. 189, at pp. 206, 214.
(3) (1950) 80 C.L.R. 432, at pp. 476, 478, 497, 500.
( ) (1953) 87 C.L.R., at p. 80.
( ) (1948) 76 C.L.R. 1, at p. 386.

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appears that the challenge to this sort of legislation has almost invariably proceeded on the question of whether the charge was a reasonable one. Under the Commonwealth Constitution, if it is a reasonable charge, it is saved ; but if it is not a reasonable charge, it is not necessarily destroyed. A charge does not infringe s. 92 unless it constitutes a real burden directly imposed upon inter-State trade as such. [He referred to *Wragg* v. *State of New South Wales* (1).] If the charge imposed or authorized is reasonable in amount, it can never constitute a real burden on inter-State trade, and therefore, in that event, no question of infringement of s. 92 can arise. Whether the charge constitutes a burden directly imposed upon inter-State trade as such, depends primarily upon the legal as distinct from the economic effect and operation of the statute. [He referred to *Wragg* v. *State of New South Wales* (2).] If the charge imposed conforms with the above propositions it is immaterial to its validity that the legislation denies to the inter-State trader the use of the State-provided facilities except on terms that he pays the charges. [He referred to *Harvard Law Review* (1940), vol. 53, at pp. 1253, 1271 et seq. "State Tax Barriers to Inter-State Trade" by *W. B. Lockhart.*] No section of the Constitution, other than s. 92, could have any effect upon the power of the States to impose taxation for the purpose of building and maintaining roads. The fact that people are inter-State traders does not exempt them from the operation of ordinary revenue laws of the States. It is very difficult to draw the line between the two extreme views. Either the States have complete power to tax users of roads with no limitations or they have no power at all. The *Motor Vehicles* (*Taxation*) *Act* is legislation imposing charges on persons engaged in inter-State trade by reason of facilities provided by the State being available for their use. It imposes a flat charge based upon the weight of the vehicle. All money raised by the Act is to be used for the purpose of roads. The tax is not related to the movement of the vehicle ; or calculated in reference to the movement of the vehicle. It is true that a person would not normally want to register in New South Wales and pay taxation under this Act unless he intended to use the roads of New South Wales. But the use of the roads in New South Wales is not made a criterion of the operation of the law in the present case. A State has a constitutional right to impose upon users (including inter-State users) of State highways a reasonable charge as compensation for the use thereof and/or defray the expense of regulating such use. A reasonable fee imposed for the purposes permitted

(1) (1953) 88 C.L.R. 353, at pp. 3[illegible] et seq.

(2) (1953) 88 C.L.R., at pp. 387, 397.

is not a direct burden on inter-State commerce. [He referred to *Hendrick* v. *Maryland* (1); *Michigan Public Utilities Commission* v. *Duke* (2); *McCarroll* v. *Dixie Greyhound Lines Inc.* (3).] State regulation of the use of highways may include as part of such regulation the imposition of reasonable fees for such use. [He referred to *Hicklin* v. *Coney* (4); *Interstate Transit Inc.* v. *Lindsey* (5); *Clark* v. *Poor* (6).] The power to impose the charge may be delegated to an authority. [He referred to *Sprout* v. *South Bend* (7).] The charge must appear to have been levied for the purposes permitted and to bear some reasonable relation to such purposes. [He referred to *Sprout* v. *South Bend* (7); *Dixie Ohio Express Co.* v. *State Revenue Commission of Georgia* (8); *Carley & Hamilton Inc.* v. *Snook* (9); *Interstate Transit Inc.* v. *Lindsey* (5).] If the charge appears to have been levied for the purposes permitted and/or is calculated according to a formula which appears to bear some reasonable relation to those purposes, the onus is on the party impugning the validity of the charge to show that an unreasonable amount is charged for those purposes. [He referred to *Hendrick* v. *Maryland* (1); *Dixie Ohio Express Co.* v. *State Revenue Commission of Georgia* (8); *Ingels* v. *Morf* (10).] It is not sufficient to show invalidity to attack the formula for calculating the charge; it must be shown that the amount arrived at under the formula is unreasonable having regard to the permitted purposes. [He referred to *Capitol Greyhound Lines* v. *Brice* (11).] The charge must not operate to discriminate against inter-State operators. [He referred to *Interstate Transit Inc.* v. *Lindsey* (5).] But there is no discrimination merely because an inter-State operator is differently treated from an intra-State operator if the difference relates to the degree of destructive effects of his operations. [He referred to *Aero Mayflower Transit Co.* v. *Board of Railroad Commissioners* (12).] The fact that a vehicle is engaged exclusively in inter-State commerce does not excuse it from liability. [He referred to *Sprout* v. *South Bend* (7); *Aero Mayflower Transit Co.* v. *Board of Railroad Commissioners* (12).] In relating the charge to the purposes permitted, the State is not required to show that the

(1) (1915) 235 U.S. 610 [59 Law. Ed. 385].
(2) (1925) 266 U.S. 570 [69 Law. Ed. 445].
(3) (1940) 309 U.S. 176 [84 Law. Ed. 683].
(4) (1933) 290 U.S. 169 [78 Law. Ed. 247].
(5) (1931) 283 U.S. 183 [75 Law. Ed. 953].
(6) (1927) 274 U.S. 554 [71 Law. Ed. 1199].
(7) (1928) 277 U.S. 163 [72 Law. Ed. 833].
(8) (1939) 306 U.S. 72 [83 Law. Ed. 495].
(9) (1930) 281 U.S. 66 [74 Law. Ed. 704].
(10) (1937) 300 U.S. 290 [81 Law. Ed. 653].
(11) (1950) 339 U.S. 542 [94 Law. Ed. 1053].
(12) (1947) 332 U.S. 495 [92 Law. Ed. 99].

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relation of the charge to the costs occasioned to it by the particular operator or class of operator has been computed with mathematical precision. [He referred to *Clark* v. *Paul Gray Inc.* (1).] Different charges may be levied for different classes of vehicle. [He referred to *Clark* v. *Paul Gray Inc.* (1).] Commercial users of vehicles may be singled out as a special class for special charges not payable by private users. [He referred to *Continental Baking Co.* v. *Woodring* (2); *Clark* v. *Poor* (3); *Aero Mayflower Transit Co.* v. *Board of Railroad Commissioners* (4); *Kane* v. *New Jersey* (5).] A special fee may be levied for increased administration and policing costs occasioned to the State by a special type of vehicle in addition to a separate fee charged against the same vehicle for use of the highway. [He referred to *Clark* v. *Paul Gray Inc.* (1).] It is not material to the validity of a tax imposed for the purposes permitted that the State also imposes and collects vehicle registration and licence fees and a gallonage tax on gasoline purchased in the State for like purposes. [He referred to *Aero Mayflower Transit Co.* v. *Board of Railroad Commissioners* (4).] It is not material to the validity of charges imposed by a State for the permitted purposes that the State receives Federal aid for State road construction. [He referred to *Aero Mayflower Transit Co.* v. *Board of Railroad Commissioners* (4).] A charge is not invalid because the proceeds are or may be spent on roads not used by the payer. [He referred to *Dixie Ohio Express Co.* v. *State Revenue Commission of Georgia* (6).] If the manner in which the charge is levied identifies it as charged for the privilege of using State highways it is immaterial that part of the fees collected are not dedicated directly to highway maintenance. [He referred to *Morf* v. *Bingaman* (7).] If it appears from the legislation that the tax or charge is levied for permitted purposes, the fact that the revenue thereby arising is not allocated directly and exclusively for highway maintenance policing and administration, or that the revenue wholly passes into a general fund, does not render the tax or charge invalid. [He referred to *Aero Mayflower Transit Co.* v. *Board of Railroad Commissioners* (4).] In exacting fees for the use of highways the State may (a) classify vehicles according to character of the traffic and the burden it imposes on the State; [He referred to *Clark* v. *Paul Gray Inc.* (1)]; (b) graduate the fees according to horse-power

(1) (1939) 306 U.S. 583 [83 Law. Ed. 1001].
(2) (1932) 286 U.S. 352 [76 Law. Ed. 1155].
(3) (1927) 274 U.S. 554 [71 Law. Ed. 1199].
(4) (1947) 332 U.S. 495 [92 Law. Ed. 99].
(5) (1916) 242 U.S. 160 [61 Law. Ed. 222].
(6) (1939) 306 U.S. 72 [83 Law. Ed. 495].
(7) (1936) 298 U.S. 407 [80 Law. Ed. 1245].

[He referred to *Hendrick* v. *Maryland* (1); *Kane* v. *New Jersey* (2)]; (c) impose a flat fee without regard to mileage [He referred to *Clark* v. *Paul Gray Inc.* (3); *Morf* v. *Bingaman* (4); *Aero Mayflower Transit Co.* v. *Georgia Public Service Commission* (5)]; (d) impose a mileage fee on inter-State operators (even though the charge on intra-State operators is based on gross receipts). [He referred to *Interstate Busses Corp.* v. *Blodgett* (6); *Kane* v. *New Jersey* (2)]; (e) graduate the fees according to number and capacity of vehicles of an operator used in inter-State journeys passing through the State [He referred to *Clark* v. *Poor* (7)]; (f) base the fee on carrying capacity [He referred to *Hicklin* v. *Coney* (8)]; (g) base the fee on capacity and weight [He referred to *Dixie Ohio Express Co.* v. *State Revenue Commission of Georgia* (9)]; (h) base the fee on gross ton mileage [He referred to *Continental Baking Co.* v. *Woodring* (10)]; (i) impose more than one form of tax [He referred to *Aero Mayflower Transit Co.* v. *Board of Railroad Commissioners* (11); *Interstate Busses Corp.* v. *Blodgett* (6); *Dixie Ohio Express Co.* v. *State Revenue Commission of Georgia* (9)]; (j) base the fee on fair market value of vehicle. [He referred to *Capitol Greyhound Lines* v. *Brice* (12).]

R. Else-Mitchell. The Privy Council has decided in *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [*No.* 1] (13) that a licensing system under which some persons may be excluded, either by the licensing authority or because they cannot conform to the objective facts which have to be determined by the licensing authority, may still be a regulatory system. [He referred to *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [*No.* 1] (14).] A trader may be excluded from the conduct of trade by personal disabilities such as bankruptcy, lunacy and infancy. The categories will vary with the trade and with the character of the activity that the individual wishes to pursue. Exclusion may also ensue by the determination of a licensing authority in respect of some matter which is germane

(1) (1915) 235 U.S. 610 [59 Law. Ed. 385].
(2) (1916) 242 U.S. 160 [61 Law. Ed. 222].
(3) (1939) 306 U.S. 583 [83 Law. Ed. 1001].
(4) (1936) 298 U.S. 407 [80 Law. Ed. 1245].
(5) (1935) 295 U.S. 285 [79 Law. Ed. 1439].
(6) (1928) 276 U.S. 245 [72 Law. Ed. 551].
(7) (1927) 274 U.S. 554 [71 Law. Ed. 1199].
(8) (1933) 290 U.S. 169 [78 Law. Ed. 247].
(9) (1939) 306 U.S. 72 [83 Law. Ed. 495].
(10) (1932) 286 U.S. 352 [76 Law. Ed. 1155].
(11) (1947) 332 U.S. 495 [92 Law. Ed. 99].
(12) (1950) 339 U.S. 542 [94 Law. Ed. 1053].
(13) (1955) A.C. 241; (1954) 93 C.L.R. 1.
(14) (1955) A.C., at p. 307; (1954) 93 C.L.R., at p. 33].

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to the conduct of the trade. That basis of exclusion leads to a consideration of whether the process of exclusion may be worked by an administrative determination or whether it must be by a determination by a judicial tribunal. It is submitted that it may be by an administrative determination. The way in which the courts have faced the problem of correcting exercises of administrative discretion is illustrated by *Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corporation* (1). In *Wilcox Mofflin Ltd.* v. *State of New South Wales* (2) *Dixon*, *McTiernan* and *Fullagar* JJ. expressed the view that mandamus to hear and determine was sufficient where discretion was exercised against the subject without reasons being advanced. The matters which the *State Transport (Co-ordination) Act* 1931-1954 embraces and which are specified in s. 17 (4) are matters which in accordance with common concepts can be fairly regarded as regulatory of the trade or commerce involved in the pursuit of those operations.

H. A. Winneke Q.C., Solicitor-General for the State of Victoria (with him *J. E. Starke*), for the State of Victoria intervening. Power to impose a reasonable charge for the use of the road is compatible with the immunity conferred by s. 92 because a charge of that nature does not constitute a real burden on the trade or a real deterrent to the inter-State trader. [He referred to the *Transport Regulation (Amendment) Act* 1954 (Vict.).] The *Motor Vehicles (Taxation) Act* 1951 (N.S.W.) and the *Motor Vehicles Taxation Management Act* 1949-1951 (N.S.W.) are of the same general quality and character as the registration and charge provisions contained in the *Motor Car Act* 1951 (Vict.). Those provisions, which had been contained in the *Motor Car Act* 1928 (Vict.), were held to be valid in *Willard* v. *Rawson* (3).

D. I. Menzies Q.C. (with him *K. A. Aickin*), for the State of Queensland, intervening. A State may establish a discretionary licensing or permit system under which certain persons may or must be refused licences and so excluded from inter-State transport. As part of that licensing system a State may impose conditions upon a licensed operator. The constitutional limitation upon the power to refuse a licence or permit or to impose conditions is that the discretion to do so must be limited to or confined within the ambit constituted by those matters which should properly be regarded as regulatory

(1) (1948) 1 K.B. 223, at pp. 228, 229.

(2) (1952) 85 C.L.R. 488, at pp. 521, 522.

(3) (1933) 48 C.L.R. 316.

of road transport. The fitness of the operator, the suitability of the vehicle, the condition of the roads, the maintenance and preservation of the roads and the safety and convenience of those who use them are all within that ambit. Generality or ambiguity in expression in regard to these matters is immaterial on the question of constitutional validity unless it goes to the extent of taking them outside that ambit. A State may impose a reasonable charge upon licensed inter-State operators for use of the State roads.

R. Else-Mitchell for the State of Western Australia, intervening. I adopt the arguments of the other interveners. [He referred to the *State Transport Co-ordination Amendment Act* 1954 (*W.A.*).]

J. D. Holmes Q.C., in reply. The decisions of the United States courts on questions of the powers of States over inter-State commerce are of no real assistance in determining the point in issue here : see *R.* v. *Vizzard*; *Ex parte Hill* (1); *Field Peas Marketing Board (Tas.)* v. *Clements & Marshall Pty. Ltd.* (2). The following comments on the United States decisions on inter-State motor vehicle taxation are, therefore, tendered merely to ensure fullness of treatment. Inter-State motor transportation for hire is a business which is different from other inter-State businesses because it involves the use of State highways which are easements belonging to the public of the State. These highways are subject to the sovereignty of each of the several States and " their use for purposes of gain is special and extraordinary, which, generally at least, the legislature may prohibit or condition as it sees fit " : *Stephenson* v. *Binford* (3). The sovereignty of the States, however, yields to the Federal Constitution in two respects. Citizens of other States are entitled to the same privileges enjoyed by the citizens of any State and Congress has the power to " regulate " all travel across State lines. Under the expansive interpretation of the commerce clause by the United States Supreme Court, Congress may not only regulate the use of a State's highways, but may actually grant franchises for such use. There are two spheres of State action in which the inter-State carrier may be affected, (1) it may be subjected to reasonable police regulation for local purposes and (2) it may be subjected to certain kinds of taxes, including those designed to meet the cost of police supervision. In the field of taxation it should be noted that there are three phases with respect to impingement upon inter-State carriers, (1) taxes beyond the power of the State to impose;

(1) (1933) 50 C.L.R. 30, at pp. 69, 70.
(2) (1948) 76 C.L.R. 414, at pp. 427, 428.
(3) (1932) 287 U.S. 251 [77 Law. Ed. 288].

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[He referred to *Meyer* v. *Wells, Fargo & Co.* (1).] (2) taxes within the power of the State to impose, (3) taxes affecting inter-State commerce indirectly, within the power of the State until Congress " occupies the field ". [He referred to *California* v. *Thompson* (2).] In considering the validity of State taxation on inter-State movement, at least as far as inter-State carriers for hire are affected, it should be noted that Congress has acted in two respects. (1) Section 302 (b), Pt. II *Interstate Commerce Act* (54 Stat. 919) provides that " Nothing in this chapter shall be construed to affect the powers of taxation of the several States or to authorize a motor carrier to do an intrastate business on the highways of any State, or to interfere with the exclusive exercise by each State of the power of regulation of intrastate commerce by motor carriers on the highways thereof." (2) The action of the Interstate Commerce Commission, under its statutory authority, in specifying the details and routes to be followed by inter-State carriers may be considered as a limitation of the privileges which such carriers enjoy in the use of State highways to such a degree that the propriety of the view that a State tax should be judged by the value of a general privilege to use that State's highways, rather than with reference to the specific use enjoyed, may be subject to careful re-examination. *Hendrick* v. *Maryland* (3) held that a State may charge persons engaged in inter-State commerce for road use so long as such charges were reasonable and were fixed according to some uniform, fair and practical standard, since, if they met this standard there would be no burden on inter-State commerce. *Kane* v. *New Jersey* (4) held valid a similar charge even though it imposed a full annual fee on a non-resident driving through the State in one day and even though the fees collected might result in a surplus over regulation and inspection expense. In *Clark* v. *Poor* (5) a sum in addition to the licence fee was charged for highway use but was not entirely used therefor. The court upheld the tax and said that, if the tax was assessed for a prior purpose, the use to which the proceeds were put was immaterial. *Interstate Busses Corp.* v. *Blodgett* (6) dealt with a tax of one cent per mile for highway use, proceeds to go to highway maintenance, but levied only on inter-State carriers. A different tax was assessed on intra-State operators. The law was upheld against the contention that it was an attempt to regulate

(1) (1912) 223 U.S. 298 [56 Law. Ed. 445].
(2) (1941) 313 U.S. 109 [85 Law. Ed. 1219].
(3) (1915) 235 U.S. 610 [59 Law. Ed. 385].
(4) (1916) 242 U.S. 160 [61 Law. Ed. 222].
(5) (1927) 274 U.S. 554 [71 Law. Ed. 1199].
(6) (1928) 276 U.S. 245 [72 Law. Ed. 551].

inter-State commerce or at least to discriminate against it. The court held that factual proof of a disproportionate economic burden was not made, nor was it shown that no reasonable relationship existed between the charge and the value of the privilege granted. *Sprout* v. *South Bend* (1) held invalid a seat fee ordinance as applied to an inter-State carrier because the charge was unrelated to the cost incurred or value of use of streets and there was no requirement that the funds were to be applied for street maintenance or construction. *Interstate Transit Inc.* v. *Lindsey* (2) involved a flat fee on inter-State buses which was held invalid because it was not shown to be levied only for use of highways nor the proceeds allocated for highway purposes. The court further pointed out that there was no relationship between the tax formula and the degree of use. *Continental Baking Co.* v. *Woodring* (3) sustained a gross ton-mile assessment on a private carrier moving in inter-State commerce on the theory that there was a relationship between the levy and the use. *Hicklin* v. *Coney* (4) resulted in a finding of validity for a licence tax on private contract carriers graduated by truck size and weight on the presumption that the charge was for use of the roads. *Aero Mayflower Transit Co.* v. *Georgia Public Service Commission* (5) held that a moderate licence fee of the same amount from all carriers for upkeep of highways, regardless of the extent of the actual use, was proper. It was said that all received the same privilege and if one carrier did not use it as much as others that was his own business. In *Morf* v. *Bingaman* (6) the court held that a caravan licensee could not complain if the fees collected from him were not allocated to highways. In *Ingels* v. *Morf* (7) the court held that a caravan fee was so far in excess of cost of facilities or regulation that inter-State commerce was unduly burdened. *Dixie Ohio Express Co.* v. *State Revenue Commission of Georgia* (8) embraced a challenge on the ground that the inter-State carrier did not use the roads toward the upkeep of which the taxes were expended. The court found that it was immaterial how the State chose to use the proceeds. *Clark* v. *Paul Gray Inc.* (9) considered another caravan statute and found the classification reasonable and the fee not disproportionate to the cost of administration and policing.

(1) (1928) 277 U.S. 163 [72 Law. Ed. 833].
(2) (1931) 283 U.S. 183 [75 Law. Ed. 953].
(3) (1932) 286 U.S. 352 [76 Law. Ed. 1155].
(4) (1933) 290 U.S. 169 [78 Law. Ed. 247].
(5) (1935) 295 U.S. 285 [79 Law. Ed. 1439].
(6) (1936) 298 U.S. 407 [80 Law. Ed. 1245].
(7) (1937) 300 U.S. 290 [81 Law. Ed. 653].
(8) (1939) 306 U.S. 72 [83 Law. Ed. 495].
(9) (1939) 306 U.S. 583 [83 Law. Ed. 1001].

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McCarroll v. *Dixie Greyhound Lines Inc.* (1) rejected a gasoline tax on all fuel in the tank of an inter-State bus because it bore no relationship to use of the highways in the taxing State. *Aero Mayflower Transit Co.* v. *Board of Railroad Commissioners* (2) upheld a tax on an inter-State carrier for use of highways despite the fact that the proceeds therefrom were not specifically allocated for such purpose. The charge was for the privilege, not the use and it was immaterial what use the State made of the proceeds. *Capitol Greyhound Lines* v. *Brice* (3) involved a tax based on percentage of value of the vehicle which became due, not annually, but at the time of first registration and upon each subsequent transfer of title. The majority refused to evaluate the relationship of the tax incidence to the objective to be attained thereby and cast upon Congress the burden of such examination. It pointed out that the *Motor Carrier Act* was a declaration by Congress that nothing in that Act was to be construed as affecting State tax powers and noted that carriers under the Act were required to keep accounts of State taxes for road use. The chief point of the dissent was that " reason precludes the notion that a tax for a privilege may disregard the absence of a ' nexus ' between privilege and tax." The dissenters pointed out that in no prior case had the court upheld a tax formula bearing no reasonable relationship to the privilege of road use and emphasized that not only is the tax base irrelevant but the incidence also lacked relevance to privilege of use. A review of United States motor vehicle tax cases leads to the conclusion that the Supreme Court has recognized that the motor vehicle in inter-State commerce must, like other instrumentalities so engaged, " pay its way ". It has also recognized, in principle, that taxes on motor vehicles which are in excess of fair compensation for the privilege of using State roads may be declared invalid if the taxpayer can establish such fact by competent proof, but unless a taxpayer can meet the burden of proof as to unfair and excessive amount of tax, the court will not look very closely at the form of particular State taxes because it thinks that Congress should act to clear up the situation. In the field of property taxation on inter-State carrier property, apportionment was early established as a prerequisite for validity of State taxation of rolling stock. [He referred to *Pullman's Palace Car Co.* v. *Commonwealth of Pennsylvania* (4).] Both mileage and average number of vehicles have been held to be proper bases for determining proportions. Unapportioned gross receipts taxes have

(1) (1940) 309 U.S. 176 [84 Law. Ed. 683].
(2) (1947) 332 U.S. 495 [92 Law. Ed. 99].
(3) (1950) 339 U.S. 542 [94 Law. Ed. 1053].
(4) (1891) 141 U.S. 18 [35 Law. Ed. 613].

been held invalid as well as capital stock taxes of the same purport. [He referred to *Northwest Airlines Inc.* v. *Minnesota* (1), per *Stone* J. (2).] Proper apportionment will result in sustaining of the tax even though it affects inter-State commerce. [He referred to *Central Greyhound Lines Inc.* v. *Mealey* (3).] But apportionment will not save a tax when the entire business to be charged is solely inter-State commerce. [He referred to *Spector Motor Service Inc.* v. *O'Connor* (4).] The theory that a domiciliary State might tax air or water carrier property *in toto*, has recently been shaken by *Ott* v. *Mississippi Valley Barge Line Co.* (5) and *Standard Oil* v. *Peck* (6). The former case permitted a non-domiciliary State to place an apportioned tax on barges moving in inter-State commerce while the latter case struck down a non-apportioned tax on boats in inter-State commerce by the domiciliary State. The situation that obtains at present can be summed up by pointing out that prior to 1938 a tax impinging in any way upon inter-State commerce would have been struck down. [He referred to *Puget Sound Stevedoring Co.* v. *Tax Commission* (7); *Fisher's Blend Station Inc.* v. *Tax Commission* (8).] Starting in 1938, however, the court decided a series of cases which indicated that a gross receipts tax on inter-State commerce fairly apportioned, would be sustained. [He referred to *Gwin, White & Prince, Inc.* v. *Henneford* (9); *McGoldrick* v. *Berwind-White Coal Mining Co.* (10).] In 1947 the court, at least apparently, reversed the trend which it had been following since 1938. [He referred to *Joseph* v. *Carter & Weekes Stevedoring Co.* (11).] The point of law which was rendered indeterminate by the fluctuation in the United States Supreme Court pronouncements was this: May a State validly measure tax liability of an inter-State business by an allocated proportion of the gross proceeds of such business? Until 1951, the question would probably have been answered in the affirmative. In that year, however, the court held that a tax on the privilege of doing business computed at a non-discriminatory rate on a proportion of net income reasonably attributable to local business activities was invalid in any case

(1) (1944) 322 U.S. 292 [88 Law. Ed. 1283.]
(2) (1944) 322 U.S., at pp. 308 et seq. [88 Law. Ed., at p. 1293].
(3) (1948) 334 U.S. 653 [92 Law. Ed. 1633].
(4) (1951) 340 U.S. 602 [95 Law. Ed. 573].
(5) (1949) 336 U.S. 169 [93 Law. Ed. 585].
(6) (1952) 342 U.S. 382 [96 Law. Ed. 427].
(7) (1937) 302 U.S. 90 [82 Law. Ed. 68].
(8) (1936) 297 U.S. 650 [80 Law. Ed. 956].
(9) (1939) 305 U.S. 434 [83 Law. Ed. 272].
(10) (1940) 309 U.S. 33 [84 Law. Ed. 565].
(11) (1947) 330 U.S. 422 [91 Law. Ed. 993].

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where the business consisted solely of inter-State commerce. [He referred to *Spector Motor Service Inc.* v. *O'Connor* (1).]

Cur. adv. vult.

The following written judgments were delivered :—

DIXON C.J., MCTIERNAN AND WEBB JJ. This suit comes before us upon a plaintiffs' demurrer to the defence which the defendants answer, as they are entitled to do, by contending that in any case the plaintiffs' statement of claim is bad in substance. The relief sought by the statement of claim consists in declarations of right concerning the validity of certain statutes of New South Wales. After the decision of the Privy Council in *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [*No.* 1] (2) had been given on 17th November last year the Parliament of New South Wales passed the *State Transport* (*Co-ordination*) *Amendment Act* 1954 (No. 48). It was assented to on 16th December 1954. Their Lordships had decided that the licensing provisions of the *State Transport* (*Co-ordination*) *Act* 1931-1951 (N.S.W.), considered apart from s. 3 (2) of that Act (a severability provision) were invalid as contravening s. 92 of the Constitution but that in view of s. 3 (2) the provisions of the Act were not invalid in so far as they applied to intra-State transport. Accordingly a declaration was made that the provisions of the Act requiring application to be made for a licence, and all provisions consequent thereon, were inapplicable to the plaintiff company while operating its vehicles in the course and for the purposes of inter-State trade or to the vehicles while so operated. An object of the *Amendment Act* of 1954 was to introduce a new set of provisions applicable to persons operating vehicles in the course and for the purposes of inter-State trade and the vehicles while so operated and expressly to confine the application of the former provisions to intra-State transportation. The same plaintiff company, with an individual as co-plaintiff, now sues for a declaration that the new provisions, or the more material of them, are invalid. But the plaintiffs also seek declarations that the *Motor Vehicles* (*Taxation*) *Act* 1951 (N.S.W.) and the *Motor Vehicles Taxation Management Act* 1949-1951 (N.S.W.) are invalid. The suit is brought against the State of New South Wales but the Minister for Transport, the Commissioners for Motor Transport and for Main Roads and a member of an advisory committee to be mentioned are named as co-defendants.

(1) (1951) 340 U.S. 602 [95 Law. Ed. 573].

(2) (1955) A.C. 241; (1954) 93 C.L.R. 1.

In the case of all three Acts the contention of the plaintiffs is that their provisions are inconsistent with s. 92 of the Constitution. So far as the facts are concerned both plaintiffs support their claim to the declarations of invalidity sought by the briefest and simplest allegations. The plaintiff company Hughes & Vale Pty. Ltd. pleads that it carries on business as a carrier of goods by road and operates various public motor vehicles, of which it is owner, on journeys from Sydney to Brisbane, Melbourne and Adelaide, and from each of those cities to any one or more of the others and that it does not operate its said vehicles for the carriage of goods on intra-State journeys in any of such States. The individual plaintiff, Flynn, except that he speaks of a single motor vehicle of which he says he is the owner, pleads his allegations in the same form and with reference to the same cities. That the statutes impugned interfere with or burden the plaintiffs in their inter-State operations as carriers of goods is treated as an evident legal consequence of the provisions of the statutes : it is not made the subject of any allegations of fact.

The defence, to which the plaintiffs have demurred, denies none of the allegations of fact contained in the statement of claim. For some reason which has not become clear it makes certain allegations of fact concerning what has happened with reference to the roads of New South Wales since the establishment of the Commonwealth and the imposition of uniform duties of customs : such roads are different from the roads existing at those times, different in construction, in surfacing and sometimes in route ; considerable sums of money have been spent in connection with them since then for resumption of land, construction, widening, bridge-making and so on ; the money has been spent by the State, by State and local governing authorities out of revenue, out of various funds and out of Commonwealth grants. During the argument of the demurrer no particular point was made of these allegations. The decision of the case certainly does not turn upon them. Nor does anything turn upon the distinction between the two plaintiffs. The validity of *Motor Vehicles Taxation* legislation does not in any way depend upon that of the *State Transport* (*Co-ordination*) *Act* and, notwithstanding the fact that a charge, which the plaintiffs characterize as a tax on inter-State transportation, is imposed by the latter Act, few of the considerations governing the validity of the two pieces of legislation are common to both.

It is convenient to deal first with the *State Transport* (*Co-ordination*) *Act* 1931-1952 as amended by the Act of 1954 (No. 48). The amendments made by the latter Act in consequence of the decision

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of the Privy Council take an unusual form. The pivotal section of the *State Transport (Co-ordination) Act* is s. 12 (1); for it prohibits the operation of a public motor vehicle unless licensed under the Act. By definition (s. 3) a motor vehicle used for the conveyance of passengers or goods for hire or for any consideration or in the course of any trade or business whatsoever is a public motor vehicle. You " operate " a vehicle when you carry or offer to carry passengers or goods for hire or for any consideration or in the course of any trade or business whatsoever (s. 3). The *Amendment Act* of 1954 begins by limiting the prohibition contained in s. 12 (1) to the operation of vehicles " in the course of and for the purposes of intra-State trade ". Having done this and made some other amendments of which it is not at this point necessary to speak, the *Amendment Act* proceeds to enact a great number of provisions, by way of amendment, limiting their application " to or in respect of any person operating or intending to operate a public motor vehicle in the course of and for the purposes of inter-State trade, and to or in respect of a public motor vehicle so operated ". Section 4 of the amending Act inserted at the end of s. 3 of the old Act a new sub-section which provided that for the purposes of the application of the Act to or in respect of any such person or vehicle the Act should be deemed to be amended in the manner set out in the third schedule. The amendments, which are very extensive, consist chiefly in the omission of sub-sections and the substitution or addition of certain new sub-sections. The result is that there is one text of the Act to be read for the purpose of the application of the Act to persons and vehicles operating in the course and for the purposes of inter-State trade and another text for the purpose of its application, in effect, to persons and vehicles operating in the course of and for the purposes of intra-State trade, to which the old s. 12 (1) is now limited. The double condition " in the course of and for the purposes of ", is taken from the language of the declaration made by the Privy Council. There, however, it was used to exclude from the application of the legislation an undoubted field within which the plaintiff fell. But nothing turns here upon the difference, if any be intended, between the expression " for the purposes of " and the expression " in the course of ", which alone is employed by s. 3 in the definitions of " public motor vehicle " and of " operate ". The general notion of the new text, as it is to be read in relation to persons and vehicles operating in the course of and for the purposes of inter-State trade is to soften down the provisions governing the grant of a licence and the fixation of the pecuniary impositions in the hope that the whole may be regarded

judicially as conceding enough to inter-State carriers of goods by road to warrant the Court's pronouncing that form of inter-State commerce now to be absolutely free within the meaning of s. 92. A discrimination is, of course, involved between inter-State and intra-State movement of goods, but it is designed to favour the former. In dealing with the validity of the provisions it will seldom be necessary to refer to the text which relates to intra-State transport: references will be to the text enacted for inter-State transport.

Section 12 (1) remains the pivotal provision in the effect which the legislation produces upon the operation of public motor vehicles in the course and for the purposes of inter-State trade. Except for the introduction of those words it is left almost in the same form. It makes it an offence for any person to operate a public motor vehicle in the course and for the purposes of inter-State trade unless such vehicle is licensed under the Act by the defendant, the Commissioner for Motor Transport, for operation as aforesaid and unless that person is the holder of such a licence. It is to be noted that the licence must be one to operate a motor vehicle in inter-State trade and that there is a general prohibition against the operation of a motor vehicle in inter-State trade from the application of which a person is removed only by possession of a licence, that is to say by possession of a licence of that description.

There is an exception made by the proviso; the prohibition is not to apply to a motor vehicle that is being operated under and in accordance with a permit granted under s. 22. The exception is of little importance for present purposes. Section 22 enables the Commissioner for Road Transport to grant to a man who has applied under s. 12 a permit, pending consideration of the application. The permit is one for the operation of the public motor vehicle for a journey to be specified in the permit. The commissioner may refuse the permit if satisfied that the operation of the vehicle, if the permit were granted, would create or intensify conditions giving rise to—(i) unreasonable damage to the roads; (ii) danger to persons or vehicles using the roads; or (iii) unreasonable interference with other traffic on the roads. Otherwise the commissioner must grant the permit but he may impose any condition he could impose if it were a licence. In particular there is to be a condition as to payment of a pecuniary charge, the nature of which will be discussed in its application to licences.

The use in s. 12 (1) of the expressions "operate" and "public motor vehicle" brings under the prohibition contained in that subsection the carrying of goods by motor vehicle in the course of a

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trade or business of any kind. Sub-section (2) of s. 12 deals with this aspect of the prohibition and possibly extends it. The sub-section provides that a person is deemed to be operating a public motor vehicle within the meaning of the Act if he operates or uses or causes to be operated or used a motor vehicle for the carriage or delivery of his goods or of goods sold by him. In the case of his own goods the sub-section does not apply if he can show that they were not intended for sale. It will be seen that the necessity of obtaining a licence is by no means limited to the carrying trade. It includes every trader who uses a motor vehicle to move his goods across the border for a commercial purpose. Indeed he need not be a trader. A farmer who takes his own produce or beasts in his own truck to an adjoining State to sell them would doubtless be covered. Apparently a single journey may be involved that is never repeated. But the licence, if granted, has a year's duration and unless surrendered in the meantime expires on the anniversary of the date upon which it is issued : s. 16. A vehicle for which a licence is sought must comply with the provisions of the *Motor Traffic Act* 1909-1954 (N.S.W.) and the regulations thereunder requiring registration. The licence does not take the place of registration : s. 14 (1). There seems to be no provision of New South Wales law exempting cars registered in another State from the obligation of registration in New South Wales, although reg. 34 of the *Motor Traffic Regulations* exempts such cars from the necessity of exhibiting a number-plate of that State and reg. 31 makes it unnecessary for the driver if licensed in another State to obtain a New South Wales driving licence. Apparently this is thought to be enough and the law is administered on the footing that a car visiting from another State in which it is registered is not called upon to register in New South Wales ; but it may be another question whether, for an example, a Victorian transport vehicle seeking a licence under the *State Transport (Co-ordination) Act* could obtain one without first registering under the *Motor Traffic Acts.* When an application is made to the Commissioner for Road Transport for a licence the particulars of such registration must be given, the application must contain a description of the vehicle, it must state the maximum weight of the goods to be carried and the route or routes upon which it is intended that the vehicle shall operate : s. 14. The licence may authorize the vehicle to operate only upon routes or roads which it specifies or within a specified area or district or upon any route or road or within any area or district other than the route, road, area or district, if any, specified in the licence : s. 15.

The provisions so far described, if they stood alone, could not, of course, now be considered compatible with the freedom assured by s. 92 to inter-State trade commerce and intercourse, nor did those responsible for the *Amendment Act* think otherwise. But these provisions do not stand alone. The exercise of the commissioner's power to refuse a licence, and perhaps of his power to attach conditions to its grant, is not left unlimited and uncontrolled. Section 17 contains provisions which limit the exercise of his power and give directions as to what he shall consider. It is in virtue of these provisions, or not at all, that the statutory denial of the right to carry goods by motor vehicle between New South Wales and other States without the commissioner's licence can be sustained as involving no impairment of inter-State trade commerce and intercourse. The first sub-section of s. 17 remains unamended but applies to inter-State carriage. It enacts that every licence shall be subject to the performance and observance by the licensee of the provisions of certain instruments which are to be conditions of the licence. There are the Act and the regulations, but that is not important. Of more importance are the provisions contained in or attaching to the licence itself. That will include the specification by the commissioner of the route or roads or area or district which he allows. Then the second sub-section confers upon the commissioner a power to " determine what terms and conditions (being terms and conditions of a regulatory character) shall be applicable to or with respect to a licence ". The sub-section goes on " including the use of such motor vehicle as to " certain things which it mentions. First there is whether passengers only are to be conveyed or goods only or goods of a specified class or description. Then there are the circumstances in which and the days and times on which such conveyance may be made or may not be made, and, by a bracketed clause, that is to include the limiting of the number of the passengers or the quantity, weight or bulk of the goods that may be carried on the vehicle. It will be seen that some of these things, particularly the restriction on the class and description of goods to be carried, may go to the heart of commercial transport between States by road and unless the word " regulatory " produces very drastic limitations upon the express description of the power may be used in a manner restricting the freedom of the trade. The third sub-section lists under four headings some things which " in dealing with an application for a licence the Commissioner of Motor Transport shall have regard to ". The provision has an appearance of importance that is unreal. For the fourth sub-section gives in somewhat different language another list of matters as affording

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grounds for refusing the licence and the fifth sub-section says that except as provided in the fourth the commissioner shall grant the application. It follows that the commissioner's " having regard to " the categories of the third sub-section can be of no effect except as an aid in deciding the grounds set out in the fourth sub-section or in determining the conditions to which the licence is to be subject if he grants one.

Sub-section (4) provides that the Commissioner for Road Transport may refuse the application if satisfied of one of the things set out in certain lettered paragraphs. By par. (a) the wide ground is given that the applicant is not a fit and proper person to hold the licence. It is to be kept steadily in view that the licence is one to " operate " the vehicle. The man who " operates " the vehicle may, of course, drive it, but if so he will need a driver's licence under the *Motor Traffic Act* in order to do so. But, as the definition of " operate " shows, and sub-s. (2) of s. 12 strikingly illustrates, it is the carrying of passengers or goods for reward or in the course of trade or business that must be licensed and that may be done by a principal whose vehicles are driven by his servants or agents and who indeed may, like the first-named plaintiff, be an incorporated company. The licence, however, relates to a single vehicle. The vehicle may be one of a fleet of vehicles in an extensive carrying business. It may perhaps be one of a number of lorries or vans employed by a proprietor of a chain store business of the description of that of *O. Gilpin Ltd.* v. *Commissioner for Taxation (N.S.W.)* (1), and *O. Gilpin Ltd.* v. *Commissioner for Road Transport & Tramways* (2). It may be a van of a retail tradesman carrying on business and making deliveries in border towns. The expression " fit and proper person " is of course familiar enough as traditional words when used with reference to offices and perhaps vocations. But their very purpose is to give the widest scope for judgment and indeed for rejection. " Fit " (or " *idoneus* ") with respect to an office is said to involve three things, honesty knowledge and ability: " honesty to execute it truly, without malice affection or partiality; knowledge to know what he ought duly to do; and ability as well in estate as in body, that he may intend and execute his office, when need is, diligently, and not for impotency or poverty neglect it "—*Coke*. When the question was whether a man was a fit and proper person to hold a licence for the sale of liquor it was considered that it ought not to be confined to an inquiry into his character and that it would be unwise to attempt any definition of the matters which

(1) (1940) 64 C.L.R. 169, at pp. 174, 175.

(2) (1935) 52 C.L.R. 189.

may legitimately be inquired into ; each case must depend upon its own circumstances : *R.* v. *Hyde Justices* (1). In another such case it was decided that if in the view of the justices the security of tenure enjoyed by the proposed licensee in the premises was insufficient, that was a good ground for holding that he was not a fit and proper person to be the holder of the licence : *R.* v. *Holborn Licensing Justices* ; *Ex parte Stratford Catering Co. Ltd.* (2). It is evident that under par. (a) of sub-s. (4) the commissioner is invested with an authority to accept or reject an applicant the exercise of which depends on no certain or definite criteria and which in truth involves a very wide discretion. If guidance is sought in that paragraph of sub-s. (3) which more or less corresponds, namely par. (c), nothing more definite will be found. What under par. (c) the commissioner is required to have regard to is " the character, suitability and fitness of the applicant to hold the licence applied for ".

Paragraph (b) of sub-s. (4) enables the commissioner to refuse the application if satisfied that the vehicle is not properly constructed or adequately equipped or is otherwise unfit or unsuitable for the licence. Of this little need be said. To stop the use of a particular vehicle because it is unsafe or is inadequate for the load to be carried or is insufficiently furnished with the equipment necessary or usual in the case of such a vehicle or such a use of it as is proposed does not mean a derogation from the freedom of inter-State trade assured by s. 92. But there can be seen in the language of par. (b) the same tendency to vagueness and imprecision, and possibly it may be a question whether under its terms the commissioner might not go beyond what is consistent with s. 92.

Paragraph (c) on its face seems to be concerned with damage to roads, danger to other persons and vehicles and obstructing or impeding other traffic on the road, subjects which of course may be regulated without necessarily detracting from freedom of inter-State trade. But again it is expressed in vague and elusive terms. An examination of the paragraph at once discloses that it allows the widest latitude and goes beyond any reasonable regulation of these subjects. It provides that the commissioner may refuse the application if satisfied that the operation of the vehicle, if the licence were granted, would create or intensify conditions giving rise to (i) unreasonable damage to the roads, or (ii) danger to persons or vehicles using the roads, or (iii) unreasonable interference with other traffic on the roads. The expression " create or intensify conditions

(1) (1912) 1 K.B. 645, at p. 664. (2) (1926) 42 T.L.R. 778.

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giving rise to " involves the most indefinite standard. The additional wear or tear on the roads, risk to users of the roads or interference with other traffic caused by the operation of a lorry might be very small indeed, yet it would be enough to satisfy the formula. It is plain enough that sub-s. (4) puts the commissioner in almost complete command of the fate of any application. Without assuming that he would be influenced by any consideration that could not be brought within some possible application of the very general language of sub-s. (4), it is impossible to say that the execution of his functions under that sub-section would result in alleviating or mitigating the operation of s. 12 to such an extent and in such a way that the prohibition contained in the section would work no interference with the freedom of trade commerce and intercourse between the States. But in any case the grounds for the refusal of a licence would rarely prove to be practically examinable in a court of law. If the unsuccessful applicant for a licence sought a writ of mandamus, it would only be by a chance that he could show that the discretion had been exercised on some ground outside the limits, so difficult of ascertainment, of sub-s. (4) of s. 17. From a practical point of view persons desirous of operating motor vehicles in the course of and for the purposes of inter-State trade would have no effectual remedy if licences were refused notwithstanding that sub-s. (4A) says that except as provided in sub-s. (4) the commissioner shall grant the application.

But even when the commissioner grants a licence, his powers of imposing conditions places the use which the operator may make of the vehicle almost completely under the commissioner's authority. The power to prescribe the route, the road, the area or the district where a vehicle may be operated has already been mentioned. So has the power given by s. 17 (2) to determine the terms and conditions applicable to a licence. But in addition to conditions imposed under these powers further conditions may be attached to a licence in virtue of a power given to the commissioner by s. 17 (4A). Under this sub-section he may impose conditions necessary for the preservation of public safety, the regulation of traffic and the preservation and maintenance of the roads and the use and enjoyment by the public of the roads. The bracketed words appearing in sub-s. (2) requiring that the conditions should be of a regulatory character are not repeated.

When the foregoing powers of prescribing routes etc. and attaching terms and conditions to the licence are combined, it is apparent that the commissioner is invested with an extremely wide discretion. It may well mean in any given case that although a licence is granted,

it emerges in a form which does not enable the licensee to employ his vehicle in the inter-State trade or transaction which he had contemplated or undertaken.

The result of the amending legislation contained in Act No. 48 of 1954 is to forbid the use of motor vehicles for the carriage of goods in the course of trade between New South Wales and another State except by the licence of an administrative agency of New South Wales whose only duty to allow it is in practical effect unenforceable and in any case does not arise unless the agency does not regard any of a number of very wide indefinite and sometimes intangible objections as existing and if and when it arises it is not a duty to licence the use of the vehicle as asked but only subject to any conditions (falling within certain very wide descriptions) which the agency may choose to impose, conditions which may or may not be consistent with the inter-State trade or transaction in view.

It is difficult to understand how it could be affirmed that, while governed by statutory provisions of such a kind, the inter-State transport by road is free. Indeed the plight of the person who desires to transport goods, whether for hire or as an incident of his own trade, by motor vehicle into or out of New South Wales is, in a practical point of view, very little, if at all, better under the amendments than it was before the decision of the Privy Council that the *State Transport (Co-ordination) Act* 1931-1951 was inapplicable to the inter-State movement of goods by motor vehicle.

Section 12 (1) and the other provisions introduced into the *State Transport (Co-ordination) Act* by the schedule to Act No. 48 of 1954 must be declared void, at all events in their relation to the carriage of goods. It has been thought needless to refer to the inter-State carriage of passengers in the discussion of this case; for it is not a matter in which the plaintiffs have alleged any interest, it is not in question in the suit and references to it would only add another complication.

An attempt was made to support the validity of the provisions as a regulation of the inter-State carriage of goods by motor vehicle involving no real impairment of the freedom of inter-State movement. The argument seemed to depend more on giving a meaning to the word "regulation" than upon giving effect to s. 92. It is a word which has naturally been employed in the repeated attempts that have been made in this Court to explain that the freedom which is postulated by s. 92 for inter-State trade commerce and intercourse is freedom enjoyed in an ordered society where the relations between man and man and government and man are determined by law. The word has of course an important place in the judgments of the

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Privy Council in *The Commonwealth* v. *Bank of New South Wales* (1) and in *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [*No.* 1] (2).

The assumption made by s. 92 is that, unless hampered or obstructed by legislative or executive interference, the people of Australia will engage in trade commerce and intercourse from one State to another. But that very assumption means that they will enter upon transactions and activities which are based upon the law and for the most part carried out under the superintendence and direction of the law. It is, for example, self-evident that the existence of a law of contract, property, tort, status, capacity, and the like forms an anterior assumption made by s. 92. No doubt it is an illustration that does not touch this case. What is more in point, however, is that the assumption made by s. 92 covers the general field of public law. Clearly enough the fact that a particular transaction takes place in the course of inter-State trade or forms part of inter-State trade is not enough to exclude the persons engaging in it from the operation of the provisions of public and private law which otherwise would apply. The point at which such laws must stop is when they involve a prohibition, restriction, impediment or burden which prevents, obstructs or prejudices the dealing across the border, or the inter-State passage interchange or whatever it may be. The burden or obstruction must be real: it will not be enough to discover some theoretical or speculative transgression over a metaphysical boundary of an area of immunity plotted from logic independently of reality. But no real detraction from the freedom of inter-State trade can be suffered by submitting to directions for the orderly and proper conduct of commercial dealings or other transactions or activities, at all events if the directions are both relevant and reasonable and place inter-State transactions under no greater disadvantage than that borne by transactions confined to the State.

In conception the distinction is clear between laws interfering with the freedom to effect the very transaction or to carry out the very activity which constitutes inter-State trade commerce or intercourse and laws imposing upon those engaged in such transactions or activities rules of proper conduct or other restraints so that it is done in a due and orderly manner without invading the rights or prejudicing the interests of others and, where a use is made of services or privileges enjoyed as of common right, without abusing them or disregarding the just claims of the public as

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

(2) (1955) A.C. 241; (1954) 93 C.L.R. 1.

represented by the State to any recompense or reparation that ought in fairness to be made. Clear as the distinction may be in conception, it may often be difficult to apply in the great variety of practical situations that arise in our complicated economic and governmental system. But it is natural to employ the word " regulate " in any attempt to describe the distinction: for to speak of regulating the conduct of the given class of trade or commerce and say that regulation is not necessarily inconsistent with freedom to carry it on, states more briefly and more aptly the distinction that exists than perhaps can be done by the use of any other word. It is, however, significant that in the judgment delivered by Lord *Porter* on behalf of the Board in *The Commonwealth* v. *Bank of New South Wales* (1) his Lordship speaks of an enactment being either " regulatory or something more " and " being essentially regulatory in character " and of the question being " whether in its true character it is regulatory ". The word " regulate " is anything but a term of fixed legal import: it may indeed be used not inappropriately to describe widely different conceptions. Nothing perhaps is more striking than the entirely different meanings that have been placed upon the legislative power of the Congress of the United States—" To *regulate* commerce with foreign Nations, and among the several States, and with the Indian tribes "—and upon the legislative power of the Parliament of Canada conferred by the words—" The *regulation* of trade and commerce ". It is the conception or distinction, not the word, that must be elucidated and applied. But as the word has been used so much in this connection not only in this Court but in the Privy Council it may be as well to recall that when it is used in authorizing ordinances or by-laws the first step to take in determining its effect is to ascertain precisely what is the subject to be regulated. As *Isaacs* J. said in *President &c. of the Shire of Tungamah* v. *Merrett* (2): " Regulation may include prohibition. It depends on what is to be regulated. The regulation of a subject-matter involves the continued existence of that subject matter, but is not inconsistent with an entire prohibition of some of its occasional incidents " (3). Where the word is used with reference to such a case as the present it would seem that the thing to be " regulated " must be understood as being inter-State transportation of goods by motor vehicle. That at all events is the thing to be left free. Probably in s. 17 (2) of the statute the bracketed words " (being terms and conditions of a regulatory character) " have no more, and perhaps even less,

(1) (1950) A.C., at pp. 310, 313; (1949) 79 C.L.R., at pp. 639, 642.
(2) (1912) 15 C.L.R. 407.
(3) (1912) 15 C.L.R. 407, at p. 423.

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effect than if " subject to s. 92 of the Constitution " had been written. At all events a difficulty exists in placing upon the word " regulatory " any definite or certain meaning, if the meaning is sought within the four corners of the statute. It is perhaps desirable to repeat from the judgment of *Isaacs* J. in *James* v. *Cowan* (1) the warning which the use in argument of a paraphrase by *Griffith* C.J. of s. 92 drew from him. The passage begins with a quotation from the opinion of Lord *Halsbury* L.C. in the *Gresham Life Assurance Society* v. *Bishop* (2): " ' I deprecate a construction which passes by the actual words and seeks to limit the words by what is supposed to be something equivalent to the language used by the Legislature.' I would say for myself that a paraphrase is especially dangerous in the case of a Constitution. In my opinion it would under the best of circumstances be unfortunate to adopt that or any other supposed verbal equivalent for the words of the Commonwealth Constitution itself " (3).

In most questions concerning the consistency with s. 92 of laws which in some way affect the conduct of any description of transaction or activity occurring in the course of inter-State trade commerce or intercourse there is nothing better calculated to open the way to a true solution than to distinguish between on the one hand the features of the transaction or activity in virtue of which it falls within the category of trade commerce and intercourse among the States and on the other hand those features which are not essential to the conception even if in some form or other they are found invariably to occur in such a transaction or activity.

The initial difficulty in reconciling the *State Transport (Co-ordination) Act* with s. 92 is that its cardinal provision (s. 12) goes to the very essence of the inter-State transaction and forbids it, that is unless licensed. This would not be fatal if other provisions so modified its effect as to make it sufficiently certain that a licence could be obtained by anyone proposing to carry goods into or out of New South Wales by motor vehicle unless there existed particular grounds for denying his right to do so which were consistent with s. 92. For the time being the question may be put aside whether the grounds must exist in objective fact or it is enough that they exist in the opinion of an administrative licensing authority. It may be remarked, however, that to leave it to the opinion of an administrative authority must reduce the certainty that a denial of a carrier's or trader's right to transport goods by motor vehicle into or out of the State will be based on grounds that are not only

(1) (1930) 43 C.L.R. 386, at p. 417.
(2) (1902) A.C. 287.
(3) (1902) A.C. 287, at p. 291.

founded on fact but are legitimate. But it is not a convenient point at which to develop this topic. The matter in hand is the contrast between the central or essential attributes of an inter-State transaction such as those which s. 12 has chosen for conditional or defeasible prohibition, and the incidents of the transaction which do not necessarily give it the character of trade commerce or intercourse or of an inter-State transaction. Of the latter it is easy to give examples. The hours during which a journey is made, what equipment should be carried for emergency or for handling or securing the goods, the axle-weight or the wheel-weight of the laden vehicle, the relief on a long journey the driver should have, the height or width of the load, the number and position of lights to show the width or the overhang, the crowding of vehicles upon a given route incapable of carrying so many and the means and method of limiting the traffic, the relations within New South Wales of the carrier to the consignor and consignee, the records to be kept and documents to be used, the receipt, safe carriage and delivery of goods, all these and no doubt countless other things form or may form incidents of inter-State transportation which, even if inseparable concomitants, do not give the transaction its essential character of inter-State trade.

Laws for the government of such incidents "regulate" the inter-State transportation of goods by motor vehicle and are likely to be consistent with the freedom of trade commerce and intercourse among the States. But it is not necessarily so; for a law which under the guise of regulating an incident of inter-State transport by road creates a real obstruction or impediment to carrying it on does impair the freedom which s. 92 guarantees. For example, a regulation of the hours during which certain goods may be carried upon the Hume Highway or be brought into Sydney or Melbourne may fix times and periods that make the use of motor vehicles for the purpose practically impossible. Such absurdly low limits might be prescribed for an axle-load or wheel-load that no heavy lifts would be permissible.

There is no difficulty in seeing how in many ways the regulation of inter-State carrying by road may be pressed to the point of stopping or obstructing the thing itself. But this is perhaps nothing more than an illustration of what was said in *Grannall* v. *Marrickville Margarine Pty. Ltd.* (1), viz. that it would be rash to deny antecedently that any legislative step that may be imagined could not in some circumstances form part of some device by which the imposition of a restriction upon inter-State commerce might be

(1) (1955) 93 C.L.R. 55.

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accomplished. On the other side it may be equally difficult to deny the possibility in some circumstances that may conceivably arise of measures, which generally speaking might seem to be inconsistent with freedom of inter-State trade, being found in particular conditions to involve no real invasion of freedom. It is a judicial necessity to acknowledge such possibilities lest, should they arise, the law should appear to have been laid down in a way which excluded them from future consideration. But to acknowledge the existence of such possibilities is one thing: it is another to pronounce valid in advance any statute which can be framed consistently with the necessarily vague terms employed to describe the possibility imagined. Much of the argument here in support of the *Amendment Act* 1954 appeared to claim that the reservations contained in passages appearing in the judgment of their Lordships in *The Commonwealth* v. *Bank of New South Wales* (1) and in that in *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [*No.* 1] (2) involved some such affirmative pronouncement covering the present enactment. It is enough to say that the *Amendment Act* in its application to the actual circumstances of inter-State road transportation is remote from anything these passages suppose or have in view. Further, the passages relied upon are obviously framed with care to avoid the very use of them that the argument attempts to make.

One contention advanced in support of the validity of s. 12 and s. 17 took the ground that a licensing system might be a mere regulation of some form of inter-State trade although it committed to an administrative officer a more or less discretionary power to withhold a licence from an applicant on grounds which were personal to the latter and that it was not necessary that it should subject the officer's judgment to judicial review.

To answer this argument it is enough to go from the general to the particular and look at the actual piece of legislation the validity of which is under attack. Of course it is not every conditional prohibition of an operation of inter-State trade that impairs freedom. But you have here a conditional prohibition that extends over the entire field. It operates on everybody unless he fulfils the condition. For it to be valid, the conditions fulfilment of which displaces the prohibition must be such that the apparent restriction upon inter-State trade turns out to be nothing but a means of regulating or directing the conduct of the trade without impairing the freedom to carry it on. Reasons have already been given for

(1) (1950) A.C. 235, at pp. 311-313; (1949) 79 C.L.R., at pp. 640-642.

(2) (1955) A.C., at p. 307; (1954) 93 C.L.R., at p. 33.

the view that the provisions of the *Amendment Act* 1954 contain nothing which would make it possible to describe the total effect as a mere regulation by which true freedom to engage in transportation between New South Wales and other States is not impaired.

It is perhaps desirable to add an observation about the question whether it would make any difference if the refusal of the licensing authority were thrown completely open to judicial review by some statutory procedure. It was suggested, and with much reason, that the difference between the opinion or decision of a judge and that of an administrative officer upon such matters as s. 17, considered with the other provisions of the Act, leaves to the Commissioner for Motor Transport, could not mean the difference between freedom of inter-State transportation by road and an unconstitutional restriction upon it. But that is because there is a general prohibition of such transport which can be avoided only by obtaining a licence the refusal of which does not depend upon considerations all of which are defined with sufficient particularity, precision and intelligibility to make it possible to pronounce the prohibition of unlicensed transport to be nothing but a regulation of that description of inter-State trade involving no inconsistency with its freedom. If the refusal of a licence was possible, for example, only on the ground of some definite disqualification, failure to comply with some clearly prescribed requirement, the occurrence of some particular contingencies defined with reasonable certainty or the existence of some special conditions of an ascertained description involving the public interest, it then might be not unimportant if the existence in fact of any such ground and its sufficiency in law were questions laid open for determination in the ordinary courts of justice. This is so, simply because under the rigid federal Constitution of the Commonwealth a provision is not valid if it would operate to withdraw from the courts of law, and so ultimately from this Court, the decision of any question as to the consistency of a statute or an executive act with the Constitution. So far as facts are concerned, the point is covered by the succinct statement of *Williams* J.: " it is clear to my mind that it is the duty of the Court in every constitutional case to be satisfied of every fact the existence of which is necessary in law to provide a constitutional basis for the legislation." : *Australian Communist Party* v. *Commonwealth* (1). It is unnecessary to add that the correctness of the legal basis upon which the operation of the legislation depends likewise must be for the determination of the Court. If legislation is framed so that its consistency with s. 92 would depend upon the opinion of an adminis-

(1) (1951) 83 C.L.R. 1, at p. 222.

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trative officer as to fact or law it cannot be upheld. The removal of this possible ground of objection cannot therefore be treated as necessarily immaterial. At the same time it is not a matter upon which the invalidity of the *Amendment Act* 1954 (No. 48) depends; moreover it could only prove of practical importance in the case of provisions much nearer to the boundary separating regulation compatible with freedom of inter-State trade from an administrative control inconsistent with such freedom. Indeed it may be said that it could matter only in the case of provisions conceived with sufficient moderation to be valid unless the apparent conclusiveness of the opinion or judgment of the administrative agency took them too far.

The real difficulty which confronts a legislature reluctant to relinquish the policy of imposing an administrative control upon the use of motor vehicles for transporting goods (from one State to another as well as within the State) is to find a sufficiently extensive field within which consistently with s. 92 the control may be maintained by investing the administrative agency with discretionary powers. But now that it has been put beyond doubt that the carriage of goods by motor vehicle among the States, whether for reward or in the course of a man's own trade or business, must be as free from governmental prohibition, restriction, impediment or burden as any other transaction of inter-State trade, an attempt to maintain any wide area of discretionary control cannot be expected to succeed. Yet there are some points at which the existence of an administrative discretion to exclude a person or a vehicle from carrying goods upon an inter-State highway may be consistent with s. 92. One example is suggested by the passage in the judgment of the Privy Council in *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [*No.* 1] (1) in the course of which Lord *Morton* said: "Their Lordships can imagine circumstances in which it might be necessary, e.g. on grounds of public safety, to limit the number of vehicles or the number of vehicles of certain types in certain localities or over certain routes, with the result that some applicants might be unable to obtain licences" (2). Probably it would be necessary to define with some particularity the factual conditions in which such a power became exercisable but once it arose there seems to be no inconsistency with s. 92 in leaving to the discretion of the administrative agency the actual means of giving effect to the necessity of controlling the volume of the specific description of traffic. The analogy is the fixing of priorities for journeys when the facilities are overtaxed.

(1) (1955) A.C. 241; (1954) 93 C.L.R. 1.

(2) (1955) A.C., at pp. 306, 307; (1954) 93 C.L.R., at pp. 32-33.

Again, although there cannot be a wide area of subjects the control of which can rest simply on discretion, there must be many matters of objective fact which can be left to the ascertainment or judgment of an administrative agency. A perusal of Ordinances 30C and 30D will suggest many illustrations. But when all is said and done the doctrine that the freedom of inter-State transportation is, if one may give to *Burke's* phrase a somewhat ignoble application, a " moral regulated liberty " cannot be exploited in such a way as to continue even in a modified form the kind of administrative control formerly exercised.

The conclusion that s. 12, coupled with s. 17, as they result from the *Amendment Act* 1954, are bad makes it unnecessary to give any independent consideration to the validity of s. 18 (4) to (6) which must fall with those provisions. It is, however, undesirable to refrain from expressing a view upon this important subject.

These sub-sections of s. 18 require that every licence should be subject to a condition that the licensee pay certain charges for which the sub-sections make provision. It is because they are payable under a condition of the licence that the invalidity of the licensing provisions necessarily destroys the sub-sections relating to the charges. The requirement that the licence should be subject to such a condition is to take effect, as sub-s. (4) states, " after the first determination by the Commissioner for Motor Transport of the rate or scale of rates of charge has been notified pursuant to sub-s. (5F) ". The charges, which are payable in respect of each journey, are to be assessed according to the rate or scale of rates of charge so notified. The holder of the licence must pay the charge in respect of a journey before it commences. The Commissioner for Motor Transport thereupon is to issue to him a receipt containing particulars of the journey and the charge paid : sub-s. (5). The commissioner must determine from time to time the scale or rates of charge but there is an advisory committee consisting of himself, the Commissioner for Main Roads and the Under Secretary of the Treasury or, in the absence of any of the three members, of a departmental officer whom he appoints in his place : sub-ss. (5B) and (5C). The advisory committee is to recommend the rate or scale of rates of charge and the determination of the Commissioner for Motor Transport cannot go above the recommendation : sub-s. (5B). Before making a recommendation the advisory committee must give interested persons an opportunity of making representations to it in writing : sub-s. (5D). The rate or scale of rates of charge may be on the basis of a mileage rate varying with the description or weight of the vehicle, laden or unladen : sub-s. (5B). The

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advisory committee and the commissioner are expressly directed by sub-s. (5E) to " have regard to " a variety of considerations in recommending and determining the rate or scale of rates. The considerations are stated as follows—" all relevant matters including the cost of construction and maintenance of roads, the depreciation and obsolescence of roads, the necessity or desirability for the widening or reconstruction of roads, the wear and tear caused by vehicles of different weights, types, sizes and speeds, the moneys available for the purpose of construction, maintenance, widening and reconstruction of roads from sources other than charges imposed pursuant to sub-s. (4) of this section and the amount expended or proposed to be expended from the Country Main Roads Fund established under the *Main Roads Act* 1924-1954." Bridges are included under the word " roads ". It may be not unfair to say that in effect in fixing the rates these administrative agencies must consider the existing policy of the State with respect to the construction of roads within its boundaries as an entirety, the moneys available from every other source to carry it out, and the effect of various descriptions of vehicles in wear and tear of roadways. This is a wide charter and may well be thought to go far beyond a function of fixing a reasonable charge for the use by the licensee of the particular roads in New South Wales that he traverses on his inter-State journey. Yet the words of sub-s. (4) describing the nature of the condition to which the licence is to be subject are—" a condition that the holder shall in respect of each journey pay to the Commissioner for Motor Transport a reasonable charge for the use by the vehicle of public streets over which it travels on such journey and for an appropriate part of the cost of administration of this Act." It was suggested in argument that these were the overriding words to which the other sub-sections must give way, both as a matter of construction and, if they went beyond constitutional limits, even by severance. The result would be that in the case of every journey a question of fact would arise as to what is a reasonable charge for the use of the streets traversed. What an issue to submit to a court! And yet whenever it was sought to recover the charge from a licensee, he might call upon the court to try it. The suggestion is entirely inconsistent with the meaning of the provisions as well as being impracticable. Sub-section (5) says specifically that the amount payable in respect of such charge shall be assessed on the rate or scale of rates thereinafter referred to and the amount so assessed shall be paid by the holder of the licence. Sub-section (5F) provides that the rate or scale of rates of charge when determined by the Commissioner for Road Transport shall be notified in the

Gazette and that the rates or scale so notified shall be adopted as the basis for calculating amounts under sub-s. (4) of the section until varied by a subsequent notification. Sub-section (6) provides that the sums payable to the commissioner under sub-ss. (4) and (5) shall be paid to the prescribed persons on his behalf and shall constitute a debt due to him and recoverable from the licensee. It is plain that the words of sub-s. (4) which are relied upon do no more than describe the character attached legislatively to the charge which is the subject of the condition of the licence. The liability and its ascertainment depend on the sub-sections that follow sub-s. (4). These sub-sections do anything but show that for any purpose of s. 92 the exaction answers the description given by sub-s. (4).

What the provisions of sub-ss. (4), (5), (5B), (5E), (5F) and (6) do in substance is to arm an administrative agency with an authority to place upon inter-State journeys for the transportation of goods an imposition or impositions unlimited in amount and fixed upon considerations restricted only by a sense of relevancy in the agency. At the same time the agency is directed to take into account not only the needs of the State in relation to the development, construction and maintenance of the roads of the State but the resources available to meet those needs. No doubt the administrative agency might so use its authority that the rate or rates fixed would not go beyond a reasonable recompense to the State for any actual use made of its roads. But if full weight were given to the factors specifically mentioned the result might well be a tax upon commerce which may, accordingly as the authority is exercised, be a real and substantial burden thereon. To confer such a power seems prima facie not to be consistent with s. 92. It is said, however, that its character is shown by the provisions of ss. 25 and 26, the result of which is that the charges levied on inter-State journeys after deductions for the costs of administering the Act go into the Country Main Roads Fund and that a part of the charges levied on intra-State transportation is likewise paid into that fund. It is a part proportioned so as to represent what would be raised therefrom if the charges were the same as the inter-State charges, the rest of such charges being paid as theretofore into the State Transport (Co-ordination) Fund. Expenditure from the Country Main Roads Fund is governed by s. 21 of the *Main Roads Act* 1924-1954 but is of course always subject to the legislative power of the Parliament of New South Wales. It is needless to enter into the details of the provision. It is enough to say that, apart from administration expenses, the application of the fund is restricted substantially to the service of loans connected with road construction and the like

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and expenditure having some relation with roads in New South Wales, their construction, re-construction, maintenance and repair, the acquisition of land and machinery for such purpose and so on. These provisions do of course show that the levies do not go into the general revenue of the State. But the purposes are very wide, not merely geographically but in description. They certainly do not show any necessary connection with the use made by inter-State traders at large of the roads of the State, still less with that made by any individual obtaining a licence. Such a restriction of purpose could scarcely suffice to change the character of the imposition.

One curious feature of s. 18 (4)-(6) remains to be questioned. So far the matter has been dealt with as if the rate or scale of rates took unqualified effect. But that is not so. Sub-section (5A), which begins by requiring uniformity of application of the rate or scale of rates, contains a proviso which has the purpose of restricting the charge to be levied on an inter-State journey by reference to the amount levied on an intra-State journey in like conditions. If in the case of public motor vehicles of the same description or of the same weight engaged in intra-State trade and passing over the same route and under the same circumstances there is no charge, then a vehicle upon an inter-State journey pays none. And in no case is the charge in respect of an inter-State journey to exceed the charge imposed in respect of public motor vehicles engaged in intra-State trade over the same route and under the same circumstances. There may be some uncertainty as to what is precisely meant by the identities required and how they could be established but that no doubt would be resolved in some practical way. But the rather strange result is that the maximum charges are fixed according to intra-State rates and these are the product of the old system where burdens might be placed on the traffic for reasons quite outside the considerations more specifically mentioned in sub-s. (5E). However the same considerations might be regarded by the advisory committee or commissioner as falling within the description of " all relevant matters ". If so it includes competition with State railways, a thing that clearly may be a consideration in fixing the intra-State charge which may provide the maximum inter-State rate. It may be noted that feeder services to the railways are exempted : sub-s. (9) (a). But perhaps in spite of such indications and of the retention of the word " Co-ordination " in the title of the statute it is proper to suppose that all such purposes are now to be excluded in the case of inter-State transportation. Upon this assumption sub-s. (5A) may be regarded as neither doing nor implying more than to ensure that the amount of the charge

must never exceed the burden placed on intra-State vehicles in comparable conditions (independently of the basis of that burden) and that the charge must, whenever necessary, be cut down accordingly.

The provisions of s. 18 (4)-(6) present a problem which hitherto has not received consideration in this Court untrammelled by the conceptions held to be erroneous by the Privy Council in *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [*No.* 1] (1). It is the problem of saying how far if at all and on what grounds a pecuniary levy can be made directly upon inter-State transportation by road and yet leave that form of trade commerce and intercourse absolutely free.

It seems to be clear enough that the question cannot be treated on the simple basis that the highways are premises of the State and that it can charge what it likes to those who wish to be admitted to their use. It is not on the basis of property that the State can deal with the use of the highways. Nor can they be regarded as a utility or a facility or a service, like the railways or the supply of electricity gas or water, which the State provides or supplies for reward to those who choose to use them. If the State could deal with the roads on the basis of property there seems to be no reason why it should not exclude whom it thought fit, at all events short of making an actual discrimination against inter-State commerce. The roads of a State form one of the established every-day means of carrying on trade commerce and intercourse. Just as s. 92 assumed the existence of an ordered society governed by law in which the freedom that it guaranteed to inter-State trade would be enjoyed, so one of its basal assumptions was that the ordinary means of carrying on trade commerce and intercourse among the States would continue, that is until in the due course of progress they fell into obsolescence and were superseded by new means. The assumption must certainly be taken to cover the existence of the highways, even if the responsibility of providing them might rest upon the States. A highway, having come into existence, is there for use, according to the ordinary laws of the State, by the subjects of the Crown without distinction whence in Australia they come. For it was part of the purpose of s. 92 to make that distinction impossible in such a matter. In this basal prior assumption of s. 92 may be discerned the reason why the special ground upon which *Williams* J. (2) placed the *Transport Cases* was not found

(1) (1955) A.C. 241 ; (1954) 93 C.L.R. 1.

(2) (1950) 80 C.L.R., at p. 477.

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capable of sustaining them. Compare *McCarter* v. *Brodie* (1) with *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [*No.* 1] (2).

But whilst it is not possible to justify the imposition of a charge for the use of the roads on the basis of property, if it includes inter-State commerce, there are other grounds which make it possible to reconcile with the freedom postulated by s. 92 the exaction from commerce using the roads, whether the journey be inter-State or not, of some special contribution to their maintenance and upkeep in relief of the general revenues of the State drawn from the public at large. The American phrase is that inter-State commerce must pay its way. It is but a constitutional aphorism, but it serves to bring home the point that in a modern community the exercise of any trade and the conduct of any business must involve all sorts of fiscal liabilities from which, in reason, inter-State trade or business should have no immunity. Those who pay them are not unfree, they merely pay the price of freedom. Just as any commercial pursuit or activity must conform with the laws affecting its incidents, notwithstanding that it may form part of inter-State commerce, so it must discharge the fiscal liabilities which state law attaches to those incidents. No-one, for example, would say that s. 92 gave a depot or terminal of an inter-State air service or road transport business immunity from rates or land tax. The aphorism, however, does not tell you where the application of this principle stops, even under the American doctrine which allows more latitude than our s. 92 can admit. " The appealing phrase that ' interstate business must pay its way ' can be invoked only when we know what the ' way ' is for which interstate business must pay."—per *Frankfurter* J., *Braniff Airways* v. *Nebraska State Board* (3). Needless to say, the principle has no application if there is a discrimination against inter-State commerce, if it is placed under any disadvantage in face of the State's internal commerce. The principle has no application to impositions the purpose of which is not to recoup the State or supply the means of providing the services, or a relevant service, of government, but to give effect to some social or economic policy, as for example to deprive road transport of an advantage in competing with railways.

A distinction of much importance must be maintained between impositions upon things which are only incidental to or consequential upon carrying on the activity, as for instance a tax on the occupation of premises, a " pay roll " tax, a profits tax, and impositions upon

(1) (1950) 80 C.L.R., at p. 477.
(2) (1955) A.C., at p. 305; (1954) 93 C.L.R., at p. 31.
(3) (1954) 347 U.S. 590, at p. 607 [98 Law. Ed. 967, at p. 981].

the thing itself. To exempt a business from the former because it has an inter-State character might go beyond preserving freedom of inter-State trade and amount to a privilege—" . . . to require that inter-State trade shall be protected from the ordinary incidents of competitive business is to give—not an immunity from interference, but a specially privileged position "—per *Mann* J., *Melbourne Harbour Trust Commissioners* v. *Colonial Sugar Refining Co. Ltd.* (1). But in the present case s. 18 (4)-(6) authorizes the imposition of a charge on the very thing itself, and according to American doctrine, and *a fortiori* under s. 92, that requires a more definite foundation. " To justify the exaction by a state of a money payment burdening inter-State commerce, it must affirmatively appear that it is demanded as reimbursement for the expense of providing facilities, or of enforcing regulations of the commerce which are within its constitutional power."—*Stone* C.J. for the Court, *Ingels* v. *Morf* (2). The doctrine that a reasonable recompense for providing facilities could not be an unconstitutional burden on inter-State commerce appears to have been developed in the United States in cases in which wharfage charges were attacked. A wharf is of course a rather particular improvement in a harbour offering a special facility. The doctrine was applied first to the use of roads by automobiles some forty years ago. Strange as it may seem to us now motor roads were regarded likewise as a special provision. Maryland was the State concerned and she had built a system of improved roads to meet, as the Supreme Court said, the insistent demands for better facilities that in recent years had been made by the ever-increasing number of those who own such vehicles and to accommodate the growing traffic. Maryland adopted a registration system and charged what now seems a very small fee. It was upheld. The court said : " In view of the many decisions of this court there can be no serious doubt that where a state at its own expense furnishes special facilities for the use of those engaged in commerce, interstate as well as domestic, it may exact compensation therefor. The amount of the charges and the method of collection are primarily for determination by the state itself ; and so long as they are reasonable and are fixed according to some uniform, fair, and practical standard, they constitute no burden on interstate commerce "—*Hendrick* v. *Maryland* (3). Since then there has been a considerable growth of case law upon the subject. In the main it develops and applies the somewhat vague test which

(1) (1926) V.L.R. 140, at p. 149.
(2) (1937) 300 U.S. 290, at p. 294 (81 Law. Ed. 653, at p. 658].
(3) (1915) 235 U.S. 610, at pp. 623-624 [59 Law. Ed. 385, at p. 391].

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the foregoing passage suggests. Its chief use for us must be to bring out the many difficulties that are inherent in the attempt to reconcile the necessity of preserving inter-State transportation from detrimental burdening with the exercise by the States of a power to levy charges in order to recompense or recoup the State for the use made of its services and facilities. It also supplies a store of experience in the interaction of State fiscal laws and inter-State transportation and a rich variety of illustrations of legislative expedients dealing with that subject. The principal decisions of the Supreme Court are collected in the dissenting judgment of *Frankfurter* J. in *Capitol Greyhound Lines* v. *Brice* (1).

The result may be briefly stated thus. The foundation for sustaining a tax or charge as a condition of using the State highways is that they were constructed and are maintained at the cost of the State and that the administration of the traffic laws which is essential for their effective use is done at the State expense. The imposition must therefore represent a fair compensation or recompense for providing the roads and the services which are used in the transportation in the course of inter-State business. To be a fair charge it must be related in some way to the use made of the highways and the wear and tear involved. It must be sharply distinguished from an exaction for the privilege of carrying on a transaction of inter-State trade, and if the proceeds are devoted to highway purposes and there is no unfavourable treatment of inter-State traders as compared with those whose operations are confined within the State, these considerations will tend to show that the exaction is in truth compensatory. But when the levy is directly on inter-State transportation as such, which is the case here, the State " must justify it as a means of securing compensation for the road use which the State affords and for which it may exact a return . . . This requirement is not a close accounting responsibility, however, for the States are free to exercise a loose judgment in fixing a *quid pro quo*. Thus, tax formulas dependent on actual use of the State's highways satisfy the constitutional test, without more, since they reflect an obvious relationship between what is demanded and what is given by the State. Taxes based on miles or ton-miles have encountered no difficulty here "—per *Frankfurter* J. (2). Other means than mileage or ton-mileage have been adopted to show a relation between the use made of the roads and the wear and tear inflicted and have been sustained. Finally, the decision of the

(1) (1950) 339 U.S. 542, at pp. 550 et seq. [94 Law. Ed. 1053, at pp. 1059 et seq.].

(2) (1950) 339 U.S., at p. 550 [94 Law. Ed., at p. 1059].

court in *Capitol Greyhound Lines* v. *Brice* (1) seems to be that the ultimate test is the reasonableness or excessiveness of the charge.

Useful as a consideration of the American law is it must be steadily borne in mind that it is the product of a constitutional situation which is unlike ours. Its ultimate source is the traditional view that the commerce power of Congress is exclusive in respect of all matters which by nature have a national operation or significance but that the States retain a power to regulate matters local in character, although they may thereby regulate inter-State commerce. It seemed but a consequence of this division that, while the States might not tax inter-State commerce as it flowed through the nation because to place a burden upon it was the equivalent of regulating the subject, yet the States might tax the property of those engaged in it and make exactions with respect to matters of local concern such as the use of wharves, roads etc. : cf. *Leloup* v. *Port of Mobile* (2). The rules governing exactions from inter-State transportation are in effect the result of the adjustment of these competing principles in their application to that subject. It will be seen at once that s. 92 replaces all such doctrine with its unqualified declaration that trade commerce and intercourse must be free. It is true that at times it has seemed that United States doctrine had shifted closer to s. 92, as for example in the general formulation contained in *Freeman* v. *Hewit* (3). But the approximation proves more apparent than real. In *Michigan-Wisconsin Pipe Line Co.* v. *Calvert* (4) the validity of a State tax challenged as inconsistent with the commerce power was said to depend on considerations of constitutional policy having reference to the substantial effects actual or potential of the particular tax in suppressing or burdening unduly the commerce, a test that gives too wide a latitude to be applicable under s. 92. For the purpose of that provision it may perhaps be said with some confidence that if a charge is imposed as a real attempt to fix a reasonable recompense or compensation for the use of the highway and for a contribution to the wear and tear which the vehicle may be expected to make it will be sustained as consistent with the freedom s. 92 confers upon transportation as a form of inter-State commerce. But if the charge is imposed on the inter-State operation itself then it must be made to appear that it is such an attempt. That it is so must be evident from its nature and character. Prima facie it will present that appearance if it is based on the nature and extent of the use made of the roads (as

(1) (1950) 339 U.S. 542 [94 Law. Ed. 1053].
(2) (1888) 127 U.S. 640, at pp. 648-649 [32 Law. Ed. 311, at p. 314].
(3) (1947) 329 U.S. 249, at p. 252 [91 Law. Ed. 265, at pp. 271, 272].
(4) (1954) 347 U.S. 157, at p. 164 [98 Law. Ed. 583, at p. 590].

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for example if it is a mileage or ton-mileage charge or the like); if the proceeds are devoted to the repair, upkeep, maintenance and depreciation of relevant highways, if inter-State transportation bears no greater burden than the internal transport of the State and if the collection of the exaction involves no substantial interference with the journey. The absence of one or all of these *indicia* need not necessarily prove fatal, but in the presence of them the conclusion would naturally be reached that the charge was truly compensatory.

The expression " a reasonable compensation or recompense " is convenient but vague. The standard of " reasonableness " can only lie in the severity with which it bears on traffic and such evidence of extravagance in its assessment as come from general considerations. In speaking of " relevant highways " it is intended to mark the importance of recognizing the size of Australian States, as distinguished from most American States. It is for the use of certain roads that it is supposed the recompense is made, and not for the use of roads of an entirely different character many hundreds of miles away. It may of course be immaterial, if the charge is based on average costs of road care, repair and maintenance, which may well give a lower rate than if it were based on the costs in connection with the highway used. It does not seem logical to include the capital cost of new highways or other capital expenditure in the costs taken as the basis of the computation. It is another matter with recurring expenditure incident to the provision and maintenance of roads. The judgment whether the charge is consistent with the freedom of inter-State trade must be made upon a consideration of the statutory instrument or instruments by and under which it is imposed. The fault with s. 18 (4)-(6) is that these provisions confer an authority which *ex facie* gives no assurance that the charge imposed under it will conform with what amount to constitutional necessities. It is needless to consider whether this necessarily means that the sub-sections are wholly void, so that it would be unnecessary to wait to see what is done under them. For in any case, they fall with the licensing provisions.

All that is conceded to the State by what has been said is authority to exact a compensatory payment for the use of the highways notwithstanding that it is a use in the course of inter-State trade. To concede so much may appear to spell a departure from the principle that no tax or pecuniary burden can be imposed upon inter-State commerce as such. No tax or impost whatever can be laid upon the entry of goods or people into a State from another State or upon the passing of goods or people out of a State into

another State. No part of the operation of s. 92 is less open to dispute than this. The purpose of the attempt to tax may be simply to raise revenue to carry on the services of the State and there may be no purpose of reducing the flow of commodities or of people across the border. But that cannot matter. Nor can it matter that the State needs the revenue in order to provide or maintain some or all of the services of government which those engaged in inter-State trade enjoy in common with all others who find themselves within the State. Indeed it can make no difference if the revenue which a tax falling upon inter-State commerce produces is segregated and is expended in maintaining some part of the service of government which is of special advantage to the particular trade taxed. For example the cost to a State of enforcing the law against the pillaging of cargo cannot be raised by a tax upon goods discharged from inter-State ships. Another example is a tax upon the transport of goods or passengers by road in order to meet the cost of enforcing the traffic laws. Such a tax would not seem consistent with s. 92, if the journeys are across State boundaries, however much benefit inter-State traffic might derive for the enforcement of such laws.

But very different considerations arise when the State demands payment in respect of the use of a physical thing which the State provides although under no legal obligation to provide it. No one would doubt that, if coal is discharged from inter-State colliers through handling equipment and bins established by the State, the State may impose a proper charge by way of recompense or remuneration. But a State may build a wharf which inter-State ships cannot well do otherwise than use. Yet it seems undeniable that the State can require the ships to pay wharfage provided the wharfage charge is genuinely fixed as a fair and reasonable compensation for the use of the wharf. Government aerodromes constructed and equipped for traffic by air may be indispensable to inter-State aerial navigation; but because charges are levied for the use of them no one would say that air navigation among the States is not free. The fact is that we find nothing inconsistent with our conception of complete freedom of inter-State trade in the exaction, for the use of physical things like the foregoing, of a pecuniary charge, if in truth it is no more than a reward, remuneration or recompense. But when an exaction is compulsory, it must possess characteristics which distinguish it from a mere tax, falling upon inter-State trade. It is for this reason that the relation which the amount of the exaction bears to the actual use of the facility should appear, and that there should not be evidences of an attempt to

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achieve objects that go beyond the recovery of fair compensation for the actual use made of the facility. We are accustomed to the levy of charges for the use of such things as have been given as examples, coal-handling equipment, wharves and aerodromes, and accordingly we see in it nothing incongruous with freedom of trade. We are not accustomed to charges being made for the use of ordinary bridges ; but it would strike few minds that there was any impairment of freedom of inter-State trade in placing a toll upon the use of some great bridge erected as a major engineering work, like that over Sydney Harbour. Must a highway be treated by the State for the purposes of s. 92 as in a different category from wharves, bridges, aerodromes and special constructional works which inter-State trade uses ? A modern highway is in fact a constructional work of a very substantial character indeed. It cannot be distinguished from the facilities that have been mentioned either in cost, the technical and engineering skill it demands or the general purpose it serves. It is an engineering work of a major description designed to carry heavy motor vehicles between distant places. There is little exaggeration in saying that its association with the highways of the nineteenth century is a matter of history rather than of practical identity or resemblance. But highways have in Australia a very different history from wharves and analogous constructional works. At the time when s. 92 was enacted, with very few, if any, exceptions, the highways of Australia were available without charge for the use of all persons as of right. It has not always been so in England. Even before the period of statutory tolls it was competent for the Crown to grant a franchise to take tolls over a road in consideration of the grantee keeping the road in repair : see *Lord Pelham* v. *Pickersgill* (1). Then of course there came the long history of turnpike roads governed by turnpike trusts constituted by statute. Is it an anterior assumption of s. 92 that, the roads of a State whatever form they take, must be available without charge to all kinds of inter-State traffic ? Is such an assumption part and parcel of the freedom which the provision guarantees ? To give an affirmative answer to this question implies that in reference to inter-State commerce the law, that is to say the State law, conferring upon the subjects of the Crown a right of free passage over highways is unchangeable. There seems to be no constitutional reason why this should be so. What is essential for the purpose of securing the freedom of inter-State transportation by road is that no pecuniary burden should be placed upon it which goes beyond a proper recompense to the State for the actual use made of the physical

(1) (1787) 1 T.R. 660 [99 E.R. 1306].

facilities provided in the shape of a highway. The difficulties are very great in defining this conception. But the conception appears to be based on a real distinction between remuneration for the provision of a specific physical service of which particular use is made and a burden placed upon inter-State transportation in aid of the general expenditure of the State. It seems necessary to draw the distinction and ultimately to attempt to work out the conception so as to allow of a charge compatible with real freedom because it is no more than a fair recompense for a specific facility provided by the State and used for the purpose of his business by the inter-State trader.

In considering the validity of an exaction by a State from inter-State motor traffic the Supreme Court of the United States examines the incidence of other taxation by the State which is said to burden the same traffic. The same course may be found by this Court to be necessary when the question is whether if all the impositions took effect the State would have succeeded in placing directly upon the relevant form of trade commerce and intercourse a real burden inconsistent with the freedom assured by s. 92. Thus the complaint of the plaintiffs against the *Motor Vehicles Taxation* legislation might have been treated as bearing upon the validity of the provisions of s. 18 (4)-(6) of the *State Transport (Co-ordination) Act* as amended by the schedule of No. 48 of 1954. But, as it is, it now becomes necessary to consider as an independent question, the valid application of the *Motor Vehicles (Taxation) Act* 1951 and the *Motor Vehicles Taxation Management Act* 1949-1951 to vehicles transporting goods between New South Wales and other States.

The *Management Act* provides for the levying and collection of the tax: the *Taxation Act* imposes the tax and declares the rates. Section 4 of the *Management Act* read with the definitions and with s. 5 of Act No. 48 of 1954, provides that tax at such rates as may be fixed by or under any Act, (referring of course to a *Motor Vehicles Taxation Act*) shall be paid to the Commissioner for Motor Transport in respect of every motor vehicle at the time of application for registration under the *Motor Traffic Acts* and at the time of each renewal of registration of that motor vehicle, and that the tax shall be so paid by the person in whose name the application is made. There is a penalty for failure to pay the tax. Section 5 provides that the owner of a motor vehicle which, not being exempted, is not registered or upon which, though registered, the tax is not paid shall, in effect, be liable to a penalty as well as the tax, if he uses or drives the vehicle or causes or permits or suffers it to be used or driven upon any public street. Section 6 provides that if it is so

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driven it may be seized. Section 7 gives certain exemptions that are not material and confers a power upon the commissioner to grant certain other exemptions. The commissioner is given a power to determine what tax is payable and to alter, vary or rescind his determination and to refund the whole or portion of the tax: ss. 8 and 9. Before the registration expires the person registered may apply to the commissioner to cancel the registration and if he cancels it the commissioner may in his discretion and subject to conditions grant such person a refund of tax calculated at the rate of one-twelfth of a year's tax for every complete month of the unexpired period: ss. 11 and 18. The tax is a debt due to the Crown: s. 13. Section 3 contains definitions of various terms, some of which are material less to the *Management Act* than to the *Taxation Act*, which is to be read with the *Management Act*. The words "motor vehicle" are, however, important words in the latter Act. They cover all vehicles, except those used on tramways or railways, that are propelled upon any public street by, in effect, any mechanical power.

The *Taxation Act*, by s. 2, imposes motor vehicle tax in accordance with the *Management Act* upon motor vehicles at the rates set out in, or the sums ascertained in accordance with, a schedule. The schedule is divided into parts the first of which relates to yearly registrations, the second to registrations for three months and the third to registrations for periods other than a year or three months. The first part distinguishes between vehicles which have pneumatic tyres on all wheels and those which have not. It begins with motor cars, which means motor vehicles constructed to be used principally for the carrying of persons not including either an omnibus or a motor cycle. For a motor vehicle there is a tax of 3s. 4d. per half cwt. of its weight. Next comes a motor omnibus. Its tax is 5s. 1d. per half cwt. of its weight. Thirdly comes a motor vehicle which is not a motor car as defined, a motor omnibus or a motor cycle. The category of course is concerned principally with lorries and other vehicles that carry goods. The tax is calculated according to rates set out in a table, which depend on the weight of the vehicle. There is a graduated scale beginning with vehicles not exceeding five cwt. and going up by steps of five cwt. to vehicles exceeding 140 cwt. The tax rises steeply. For example a vehicle exceeding five cwt. but not exceeding ten cwt. pays £2 15s. 0d., one weighing from forty cwt. to forty-five cwt. £21 5s. 0d., one from eighty cwt. to eighty-five cwt. £56 5s. 0d., one from 120 cwt. to 125 cwt. £87 10s. 0d., while those exceeding 140 cwt. pay £99 plus £3 15s. 0d., for every extra five cwt. or part thereof. If a

motor vehicle has non-pneumatic tyres on any of its wheels it pays twenty-five per cent more than it would have done had all its tyres been pneumatic. A primary producer pays only ninety per cent of the tax otherwise payable on his tractor, motor lorry or trailer and on his tractor the tax is not to exceed £28 11s. 0d. There is a limitation of £31 14s. 6d. on the tax payable on other tractors and another limitation granted in the interest of mining in the Western Division of the State. But if any vehicle has a compression ignition engine it must pay twice the tax it otherwise would pay. Doubtless this is because the fuel used is not petrol and has not borne any contribution to the trust account under s. 5 of the *Commonwealth Aid Roads Act* 1950. Under s. 10 (1) (a) and s. 20 (1) (a) of the *Main Roads Act* 1924-1954 twenty per cent and eighty per cent of what substantially forms the proceeds of the motor vehicles tax go respectively to the County of Cumberland Main Roads Fund and the Country Main Roads Fund.

The character of motor vehicles tax and its incidence upon the use of motor vehicles to transport goods from and to New South Wales into and out of other States is such that the plaintiffs say it cannot apply to the exclusive use in New South Wales of motor vehicles in that form of inter-State trade. An examination of the nature and incidence of the tax seems to make this conclusion unavoidable. Take first the case of an operator whose centre of business is in another State, let us say in Brisbane, and who sends his vehicle into New South Wales, the vehicle being registered in Queensland. He is confronted with the necessity of registering for some period and paying tax referable to the period he chooses. The reason is that his vehicles travel over the New South Wales roads on an inter-State journey. The amount of the tax will depend upon the weight of the vehicle. The journey may be but a short distance across the border or it may be to Sydney. If it is a single journey which he does not propose to repeat his calculation of the period of registration will not be easy. If he does propose to repeat it with some regularity, there will nevertheless be inevitable intervals of some duration when the vehicle will not be in New South Wales. If on the other hand the operator belongs to New South Wales, his registration will necessarily be annual although he may have his vehicle across the border for long periods and off the roads altogether for substantial intervals.

The fact is that in neither case has the tax any definite relationship to the use of the roads. This is perhaps the principal but it is not the only difficulty in the way of sustaining the tax as a compensatory charge made for the use of the roads as a facility provided

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by the State. The relation between the various rates of tax is evidently not based on the amount of use which the vehicles make or are likely to make of the roads. It may perhaps be said that the table of amounts of tax payable in respect of motor vehicles which are neither motor cars, omnibuses nor motor cycles reflects the damage done to the roads by heavy vehicles, and that the increased tax imposed on vehicles whose tyres are not pneumatic confirms the inference that that is its rationale. But the rates are not necessarily the result of that consideration alone and it is evident that the scale tends to the prejudice of the carriage of goods by road. The exemptions give effect to policies which disregard the effect on the roads of the particular description of vehicle. It is true that the proceeds of the tax go into road funds but on the other hand not only is there no definite relation between the tax and the amount of use made of highways by the vehicle, but there is nothing on the face of the Act to show a relation between the amounts of the tax and any attempt at fixing a due proportion of the recurrent expenditure of the State upon the facility provided and used. The validity of the legislation therefore cannot be upheld on the ground that it is an attempt to levy a fair and reasonable charge for the use made of the highway by vehicles which are employed in inter-State commerce. Indeed it would not be unnatural to look for a constitutional justification of the tax on the entirely inconsistent ground that it is not a charge upon the commercial use of vehicles at all. In other words, it might seem more reasonable to characterize the tax as one levied on the mere ownership of motor vehicles, a tax based on property as such. In the case of a piece of property which can have only one use and that transport, for example a use in the carriage of goods by road, that is not perhaps a basis for validity which it is easy to make out. But, be that as it may, the truth is that the incidence of the tax, though in terms it is levied on " motor vehicles ", is upon their use. It is a condition of registration without which they cannot be used on roads of the State. The definition itself of motor vehicle depends on propulsion in the streets. The tax operates immediately upon the use of a motor vehicle for the carriage of goods in inter-State commerce and imposes a substantial burden. Section 92 therefore protects a person whose use of the vehicle is in inter-State commerce from the imposition of the tax. But it would seem that there is no such protection if the vehicle is used at all in New South Wales except in the course of inter-State commerce. The case made by the plaintiffs in their pleading is restricted to the use of vehicles in inter-State commerce and the only title to relief they disclose is against the application

to the vehicles which they use only for that purpose. The case does not raise for consideration any question as to the operation of the legislation upon vehicles not so used. The legislation is capable of a distributive application and no question arises upon this demurrer as to the effect, if any, that may be produced upon the general operation of the Acts by the conclusion that they cannot apply to vehicles used exclusively in inter-State trade.

The demurrer should be allowed and judgment in the action should be given for the plaintiffs, the relief being declarations (1) that s. 3 (3) and the Third Schedule of the *State Transport (Co-ordination) Amendment Act* 1954 (No. 48 of 1954) is invalid and (2) that the *Motor Vehicles Taxation Management Act* 1949-1951 and the *Motor Vehicles (Taxation) Act* 1951 cannot validly apply in respect of vehicles used exclusively in inter-State trade.

ADDENDUM.

McTIERNAN J. I desire to add some brief observations for myself to the joint judgments to which I am a party in these cases.

The reasons which I gave for my decision in *Willard* v. *Rawson* (1); *R.* v. *Vizzard*; *Ex parte Hill* (2) and in each of the other *Transport Cases*, including *McCarter* v. *Brodie* (3) and *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [*No.* 1] (4), show that for many years I have held the view that consistently with s. 92, the States might exercise, with reference to inter-State transport by motor vehicles, a legislative power of a wider or more ample scope than that which we are to-day holding they do possess. Now, however, the views expressed by me in the above-mentioned *Transport Cases*, have been found not to be acceptable in the Privy Council (*Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [*No.* 1] (5)) and it has become incumbent upon me to work out as best I may the results and implications of the contrary views which commended themselves to their Lordships.

In the joint judgments to which I am a party there is stated, as I believe adequately, with respect to the particular problems these cases raise, what appears to be the true operation of the views which in the past I had found myself unable to share. But perhaps I may be permitted to say that I remain personally far from convinced that the result is one which the framers of s. 92 either intended or foresaw.

(1) (1933) 48 C.L.R. 316.
(2) (1933) 50 C.L.R. 30.
(3) (1950) 80 C.L.R. 432.
(4) (1953) 87 C.L.R. 49.
(5) (1955) A.C. 241; (1954) 93 C.L.R. 1.

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WILLIAMS J. The purpose of this action is to impeach the constitutional validity of three Acts of the New South Wales Parliament: (1) the *State Transport (Co-ordination) Amendment Act* 1954, or, alternatively, certain of its sections; (2) the *Motor Vehicles (Taxation) Act* 1951; (3) the *Motor Vehicles Taxation Management Act* 1949-1951. The Acts are all impeached as offending against s. 92 of the Constitution.

The first of these Acts attempts to meet the situation with respect to the inter-State carriage of passengers and goods created by the decision of the Privy Council in *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [*No.* 1] (1). In that decision the Privy Council overruled the long line of cases in this Court known as the *Transport Cases* commencing with *Vizzard's Case* (2) and ending with the case then under appeal and held that the appellant was entitled to a declaration that the provisions of the *State Transport (Co-ordination) Act* 1931-1951 requiring application to be made for a licence and all provisions consequential thereon were inapplicable to the appellant while operating its vehicles in the course of and for the purposes of inter-State trade or to the vehicles while so operated. The Act of 1954 amends the principal Act by inserting at the end of s. 3 a new sub-section providing that for the purposes of the principal Act to or in respect of any person operating or intending to operate a public motor vehicle in the course and for the purposes of inter-State trade and to or in respect of a public motor vehicle so operated the provisions of the Act shall be deemed to be amended in the manner set out in the third schedule to the Act.

The provisions of this schedule have been referred to at length in other judgments and I shall not repeat them in full. I shall simply refer to the more important provisions. It may be divided into two main parts, one relating to the issue of licences and permits and the other relating to the making of a charge for the use by the vehicle of the public roads over which it travels. Section 12 (1) provides that any person who operates a public motor vehicle in the course of and for the purposes of inter-State trade without a licence or a permit shall be guilty of an offence against the Act. Section 17 relates to the granting of licences, the licensing authority being the Commissioner for Motor Transport. Sub-section (4) provides that the commissioner may refuse the application if satisfied that (a) the applicant is not a fit and proper person to hold the licence; or (b) the vehicle is not properly constructed or adequately equipped or is otherwise unfit or unsuitable for the

(1) (1955) A.C. 241; (1954) 93 C.L.R. 1.

(2) (1933) 50 C.L.R. 30.

licence; or (c) the operation of the vehicle, if the licence were granted, would create or intensify conditions giving rise to—(i) unreasonable damage to the roads; or (ii) danger to persons or vehicles using the roads; or (iii) unreasonable interference with other traffic on the roads. Sub-section (4A) provides that, except as provided in sub-s. (4) of this section, the commissioner shall grant the application. Sub-section (2) provides that the commissioner may determine what terms and conditions (being terms and conditions of a regulatory character) shall be applicable to or with respect to a licence, including the use of such motor vehicle as to whether passengers only or goods only or goods of a specified class or description only shall be thereby conveyed and as to the circumstances in which and the days and times on which such conveyance may be made or may not be made (including the limiting of the number of passengers or the quantity, weight or bulk of the goods that may be carried on the vehicle). The proviso to sub-s. (4A) provides that where the commissioner grants an application he may, in addition to any conditions imposed under sub-s. (2), impose conditions necessary for the preservation of public safety, the regulation of traffic and the preservation and maintenance of the roads and the use and enjoyment by the public of the roads. Section 22 provides for the issue of a permit to operate the vehicle for a specified journey pending the decision of the commissioner whether or not to grant an application for a licence. He may refuse to issue the permit if satisfied that the operation of a vehicle, if the permit were granted, would create or intensify conditions giving rise to (i) unreasonable damage to the roads, or (ii) danger to persons or vehicles using the roads; or (iii) unreasonable interference with other traffic on the roads, otherwise he must grant the permit. If he grants a permit he may impose any conditions he could have imposed if such permit were a licence.

Section 18, sub-ss. (4)-(5F) provide for the imposition and payment of what is described as a reasonable charge for the use by the vehicle of the public roads over which it travels on a journey and for an appropriate part of the cost of administration of the Act. Every licence for a public motor vehicle shall after the first determination by the commissioner of the rate or scale of rates of charge has been notified in the *Gazette* be subject to a condition that the holder shall in respect of each journey pay this charge to the commissioner. There are elaborate provisions providing for the manner in which the rate or scale of rates of charge is to be determined. They provide for the setting up of an advisory committee to make a recommendation on the subject to the commissioner after giving

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any persons interested an opportunity to make representations in writing to the committee. Section (5E) provides that the advisory committee in making its recommendation and the commissioner in making his determination shall have regard to all relevant matters including the cost of construction and maintenance of roads, the depreciation and obsolescence of roads, the necessity or desirability for the widening or re-construction of roads, the wear and tear caused by vehicles of different weights, types, sizes and speeds, the moneys available for the purpose of construction, maintenance, widening and re-construction of roads from sources other than charges imposed pursuant to sub-s. (4), and the amount expended or proposed to be expended from the Country Main Roads Fund established under the *Main Roads Act* 1924-1954.

The question on the threshold is whether, as a result of the Privy Council decision, it lies within State legislative power to enact a legislative scheme of this character in relation to inter-State traffic. It seems to follow from their Lordships' judgment that, apart from the question of the extent, if at all, to which inter-State carriers can be made to contribute towards the cost of the upkeep, policing and administration of the roads, the fact that the States construct and maintain the roads, and therefore provide the facility, does not give them any particular control over the facility when the question arises whether the legislation or some executive act of a State relating to the facility offends against s. 92. The question must be determined by examining the legislation or executive act in the light of the three general principles that have been enunciated for this purpose : (1) that the trade and commerce protected by s. 92 is a personal right attaching to the individual and not to the goods and that is a right of passing from one State to another, of transporting goods from one State to another, and dealing with them in another State ; (2) that the regulation of trade and commerce among the States is compatible with its absolute freedom ; (3) that s. 92 is violated only where legislation or an executive act operates to restrict such trade and commerce directly and immediately as distinct from creating some indirect and consequential impediment which may fairly be regarded as remote. I conceive that regulation of trade and commerce among the States can only be compatible with its absolute freedom where the regulation has the effect, not of preventing or unduly restricting or burdening the carrying on of the trade, but merely of controlling its operations in those respects in which it is desirable that it should be controlled so that it may be conducted in an orderly and proper manner in the public interest. This means that every person who desires to do so and can conform

to the regulations must be allowed to engage in the particular trade unless there are some special circumstances peculiar to it which justify the exclusion of particular persons from participating in it. Various circumstances were suggested in argument by which it was sought to justify the exclusion of certain persons from becoming inter-State carriers of passengers or goods. I think that some persons, for instance infants, lunatics, bankrupts, and possibly persons convicted of certain offences might be justifiably excluded. But s. 17, sub-s. (4) (a) does not attempt to specify any particular classes of persons ; it seeks to authorize the commissioner to refuse to grant a licence if satisfied that the applicant is not a fit and proper person to hold a licence. It may be that a discretion of a limited character could be conferred on the commissioner to refuse to grant licences to particular classes of persons but par. (a) confers a discretion on the commissioner which is altogether too wide. It misconceives the nature of the regulatory legislation which may be compatible with s. 92. To be valid, the legislation itself must contain the regulation. A person cannot be deprived of his personal right to participate in the trade of carrying persons or goods inter-State because some executive officer thinks that he is not a fit and proper person to do so. The classes of persons to be excluded must appear from the legislation itself. The legislation could provide that persons in these classes should be excluded absolutely, or could give the commissioner a discretion to refuse a licence to persons in these classes. But the legislation must specify the classes so that their composition can be examined by the Court and a decision reached whether there are reasons for excluding such classes compatible with s. 92.

In considering what system of licensing would be valid, the nature of the right given by s. 92 must not be overlooked. In the *Bank Case* (1) their Lordships said : " It is true, as has been said more than once in the High Court, that s. 92 does not create any new juristic rights, but it does give the citizen of State or Commonwealth, as the case may be, the right to ignore, and if necessary, to call upon the judicial power to help him to resist, legislative or executive action which offends against the section " (2). If the commissioner can be authorized to refuse to grant a licence because he is satisfied that an applicant is not a fit and proper person to engage in the inter-State carriage of passengers or goods a court would not have complete power to help a person who was wrongly excluded. Its power would be of a very limited nature. It would be confined to inquiring whether the commissioner had exercised his discretion

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

(2) (1950) A.C., at p. 305 ; (1949) 79 C.L.R., at p. 635.

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bona fide for the purposes for which it was conferred. If the court was satisfied that the commissioner had failed to do so it could grant a mandamus directing him to exercise his duty according to law. But beyond this the court could not inquire, because the legislation would confer on the commissioner the power to decide whether the applicant is or is not in fact a fit and proper person to hold a licence. The right of any person to engage in the trade would depend, not on facts sufficient in law to justify his exclusion, but on the opinion of an executive officer that such facts existed. It would not place the individual in a proper position to call upon the judicial power to help him to resist executive action which offends against s. 92. It would not allow the court to intervene fully and effectively on his behalf.

It necessarily follows from the decision of the Privy Council that the regulation of the inter-State carriage of passengers or goods by road which is compatible with s. 92 cannot be very extensive. It must be mainly confined to laws and executive acts relating to the safe use of the roads and to the care and preservation of the roads. The safe use of the roads depends primarily on adequate rules controlling the movement of vehicles on the roads, such as rules relating to the efficiency of the driver, keeping to the left, overtaking, speed, use of lights, sounding horns etc. Such rules would obviously require to be rules which applied uniformly to all traffic on the roads whether intra-State or inter-State and would properly be included, as indeed they are, in a code of regulations relating to traffic generally. The proper construction and equipment of vehicles for the various forms of carriage for which they are used whether passengers or goods is also important on the question of safety. The States must have power to limit, within reason, the length, width, height and weight of vehicles, loaded and unloaded, which may use the roads, and to require that their mechanical efficiency should be adequate, and that the loads they carry should be properly secured. The States must have power to prevent the roads suffering excessive wear and tear from being used by vehicles which they are not built to carry. Consequently, the matters referred to in s. 17 (4), pars. (b) and (c) are matters which may properly be made the subject of regulation but these provisions are subject to the same criticism as that levelled against par. (a). That is to say, they do not specify, even in general terms, the manner in which vehicles should be constructed or equipped, but leave the whole question of what constitutes proper construction and equipment to the commissioner and confer on him the even wider and more undefined discretion to decide to refuse a licence because the vehicle, although

properly constructed and equipped, is otherwise unfit or unsuitable for a licence. Regulations designed to ensure that vehicles are properly constructed and equipped for the carriage of passengers or goods should specify at least the general nature of the construction and equipment that is required. The same criticism can be levelled at par. (c). The roads are not classified according to their suitability to carry traffic, and the kinds of vehicles that should be allowed to operate on each class of road specified. The paragraph does not prescribe any facts from which the suitability or unsuitability of a proposed route for a particular vehicle can be deduced. It leaves it to the discretion of the commissioner to determine whether in his opinion a proposed route is or is not, for certain reasons, suitable for the purpose. Paragraphs (a), (b) and (c) confer on the commissioner a discretion to refuse a licence if he is satisfied that he should not grant a licence for any of the reasons specified in these paragraphs. This is an extremely wide discretion. It authorizes him to interfere to an excessive extent with the freedom of the individual to engage in the trade in question. These three paragraphs, in my opinion, offend against s. 92 and are invalid.

There is no way in which they can be read down so as not to infringe the section. Assuming they are severable, the commissioner is left in the position that he is bound to grant the licence whenever one is applied for, but he may attach the conditions authorized by sub-s. (2) of s. 17 and the proviso to sub-s. (4A) if these provisions are valid. But are they ? The power to impose conditions falls into two categories : (1) the power to impose terms and conditions (being terms and conditions of a regulatory character) which is contained in sub-s. (2) : (2) the power to impose the conditions referred to in the proviso to sub-s. (4A). The Act, of course, provides in s. 3, sub-s. (2) that it shall be read and construed so as not to exceed the legislative power of the State to the intent that where any enactment thereof would, but for this sub-section, have been construed as being in excess of that power, it shall nevertheless be a valid enactment to the extent to which it is not in excess of that power. The terms and conditions referred to in sub-s. (2), in the light of this provision, can be construed as intended to be confined to terms and conditions of a regulatory character compatible with s. 92. If the commissioner had been limited by the sub-section to framing terms and conditions of a general nature applicable to all licences, the sub-section might have been construed as a delegation of legislative power to the commissioner and the terms and conditions he enacted could have been examined to see

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if they were regulations compatible with s. 92. But the sub-section authorizes him to attach different terms and conditions to each licence and therefore to exercise an executive discretion in each case. It enlarges even further the extent to which the freedom of the individual to participate in the trade is made subject to executive discretion. The provisions of the proviso to sub-s. (4A) are not in their character so open to challenge because they authorize the imposition of conditions prima facie of a regulatory character. In any event, these provisions could be similarly read down under s. 3 (2). But it does not appear to me to be compatible with s. 92 to make each individual subject to the imposition of specific conditions even of this nature. The terms and conditions which may be compatible with s. 92 are terms and conditions which regulate a trade generally and to which all persons engaged in the trade are equally subject. They are compatible with s. 92 because they are regulations made for the orderly and proper conduct of the trade by all those engaged in it. Every trader benefits from such a state of affairs. But to authorize the commissioner to regulate the conduct of a particular person engaging in the trade in a special manner would be to authorize the commissioner to discriminate between traders and such discriminating treatment, to which the trade generally was not subjected, could not be other than burdensome to the individual. No sufficient attention appears to have been paid to the remarks of *Dixon* C.J. in *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [*No.* 1] (1) where he refers to the use of a system of licensing to ensure that motor vehicles used for the conveyance of passengers or goods for reward conform with specified conditions affecting the safety and efficiency of the service offered and do not injure the highways by excessive weight or immoderate use or interfere with the use of the highways by other traffic. He then said: "For myself I do not know why a uniform law for the organization and the regular conduct of motor traffic or a uniform law prescribing conditions for the business of carrying by road should be regarded as necessarily impairing the freedom of inter-State trade commerce and intercourse" (2).

Since I am of opinion that the licensing provisions contained in the Third Schedule fail, it is strictly unnecessary to express an opinion whether the provisions of s. 18 (4)-(5F) offend against s. 92. But the Court is invaded with applications to have the new *Transport Acts* of the States invalidated, and the question whether a State which constructs and maintains a road can make a charge for the use of the road by inter-State traders will have to be decided,

(1) (1953) 87 C.L.R. 49.

(2) (1953) 87 C.L.R., at p. 69.

so I shall now state my views on this point. A State is not legally bound to provide or maintain a road, but, if it does, s. 92 fastens its tentacles upon it and the State loses a large part of its sovereignty over it. The inter-State trader obtains all the immunity from State laws with respect to the use of the facility that s. 92 can confer. The inter-State movement must be left free, although that freedom may be restricted by regulations relating to its conduct. In such circumstances it may seem at first sight to be illogical that a State can charge the inter-State carrier for the use of the road. But it would seem that it can. This Court has so held on numerous occasions: *Willard* v. *Rawson* (1); *Gilpin's Case* (2); *McCarter* v. *Brodie* (3); *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [*No.* 1] (4).

To-day the roads are mainly used by fast-moving motor traffic and modern roads which are necessary to accommodate such traffic, complete as they must be with an adequate pavement, bridges, culverts and other components, are expensive undertakings to construct and maintain. The traffic on such roads must be carefully regulated in the interests of safety. Such regulation requires that the necessary rules should be enacted to control the identification and movement of the vehicles on the roads, that the necessary aids for this purpose such as traffic lights and various signs beside or on the roads should be installed, and that the roads should be adequately policed to ensure that the traffic laws are obeyed. By constructing and maintaining such roads and providing such incidentals the States provide an organized facility for modern trade commerce and intercourse by land. If the Commonwealth or a State provides aerodromes and all the incidental services necessary to make air traffic feasible and safe it provides an organized facility for trade commerce and intercourse by air. If the Commonwealth or a State dredges harbours, builds wharves and provides aids to navigation it provides an organized facility for trade commerce and intercourse by sea. Section 92 provides that trade commerce and intercourse among the States shall be absolutely free. But there is nothing in the Constitution, or in s. 92 in particular, which requires the Commonwealth or a State to provide any such facilities. Section 92 assumes, no doubt, that Australia will move with the times and that means of communication between the States appropriate to modern conditions will be constructed, organized and maintained. In this respect I can see no reason why s. 92 should not apply in the

(1) (1933) 48 C.L.R., at pp. 323, 327, 328, 333, 334.
(2) (1935) 52 C.L.R., at p. 206.
(3) (1950) 80 C.L.R. 432, at pp. 476, 478, 497, 500.
(4) (1953) 87 C.L.R. 49, at p. 102.

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same way to all these facilities. They are all provided for use by the public and must therefore be made available to those members of the public who wish to use them for the purposes of inter-State trade commerce or intercourse. The right of the Commonwealth or a State to control their use is to make such regulations relating to their use as are compatible with s. 92. The instant question is whether the Commonwealth or a State can charge such members of the public for their use. I can find nothing in the judgment of the Privy Council to suggest that they cannot. Their Lordships have held that a State has not an absolute discretion to decide who shall and who shall not use its roads for inter-State purposes. They have not decided that a State has not a wide power to regulate the use of its roads so long as the roads are open for use by all persons who can comply with the regulations. And they have not decided that such regulations cannot include a reasonable charge for the use of the roads. A person who wishes to engage in inter-State trade commerce or intercourse is necessarily put to expense in order to achieve his purpose. A person wishing to engage in the trade of carrying passengers or goods by road must purchase or otherwise acquire the necessary motor vehicles to do so. He must pay for the petrol and oil that such vehicles consume and for their maintenance and he must incur a variety of other incidental expenses. The trader must incur this expenditure in order to carry on his trade. But all this expenditure would be useless unless the States provided the necessary road facilities. The trader enjoys the use of these facilities in common with other users of the roads, whereas the vehicles which he operates upon them are his own private property. But the existence of the necessary road facilities is as essential to the success of his undertaking as the acquisition and upkeep of the necessary vehicles.

Section 92 does not say that a person is entitled to engage in inter-State trade commerce or intercourse free from expense. It assumes that such a person will incur such expenditure as is necessary to achieve his purpose. If the Commonwealth or a State provides a facility which he requires to use for that purpose there is, in my opinion, nothing in the section which says that the Commonwealth or a State shall not include in the regulation of that facility a charge that provides a reasonable compensation for its use. Of all the public works undertaken by the Commonwealth or States to provide the necessary modern facilities for trade commerce and intercourse the construction and maintenance of the roads is probably the most costly. A reasonable charge to compensate the Commonwealth or a State for the benefit that is conferred

on the trader, be it in relation to traffic on land or in the air or by sea, whether it be called a tax, a levy or a charge or otherwise labelled, is not in truth a tax on the inter-State operation but compensation for the provision of facilities without which the operation could not be carried on at all. Attempts were made to draw a distinction between the provision of a road and the provision of facilities for traffic by sea or air. It was even sought to draw a distinction between the provision of a road so far as it passed over dry land and the provision of bridges by means of which it spanned intersecting streams. It was not seriously contended that a member of the public who wished to use an aerodrome or wharf provided by the Commonwealth or a State could not be charged a reasonable fee for its use. Nor was it seriously contended that a State could not impose a reasonable toll as a condition of passing over a bridge. But it was contended that roads are in a special position, mainly because, as I understand the argument, at the date of the Constitution in 1901 the roads of the States were public roads over which all members of the public were entitled to pass and repass in person or with vehicles free of charge. Be that as it may, the Constitution leaves to the State complete power to legislate with respect to their roads, except in so far as they are deprived of that power by s. 92. It cannot be said that there is anything new in the principle that it is reasonable that those who use the roads should contribute to their maintenance. This principle lies at the root of the grant of " tolls thorough " at common law and of the legislation creating turn-pike roads in England. Commencing in the sixteenth century and continuing into the eighteenth century the English Parliament authorized the setting up of " tolls thorough " on the main highways in ever-increasing numbers, the consideration moving to the public for the exaction of the charge being an obligation to keep the road in repair : *Truman* v. *Walgham* (1) ; *Lord Pelham* v. *Pickersgill* (2) ; *English Local Government : The Story of the King's Highway, S. and B. Webb*, C. 7. Tolls levied upon the users of bridges and other public facilities such as markets were equally common. A toll is valid although the power to levy the toll is to make a reasonable charge and what is reasonable will vary from time to time with the changing value of money : *Lawrence* v. *Hitch* (3).

Accordingly it is really not illogical at all that a State can charge an inter-State carrier for the use of a road it constructs and maintains. If it is a detriment to a carrier to have to pay the charge, it is offset, so long as the charge is reasonable, by the benefit the

(1) (1766) 2 Wils. K.B. 296 [95 E.R. 820].
(2) (1787) 1 T.R. 660 [99 E.R. 1306].
(3) (1868) L.R. 3 Q.B. 521.

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carrier derives from the existence of the road. In my opinion a State is free to make such a charge as will, having regard to the benefit the carrier derives from the facility, not be an undue burden on him; and a charge will not be burdensome providing, looking at the matter broadly, the benefit flowing from the provision of the facility more than outweighs the burden flowing from the imposition of the outgoing. In the passage from the judgment of *Fullagar* J., which received their Lordships' approval, his Honour clearly contemplates that a reasonable charge for the use of a facility provided by the State would be valid. His remarks in *McCarter* v. *Brodie* (1) refer to the provision of bridges and aerodromes, but I would think that they are equally applicable in principle to the provision of a road. His Honour said: "It would not be possible *a priori* to draw a dividing line between that which would really be a charge for a facility provided and that which would really be a deterrent to trade, but the distinction, if it ever had to be drawn, would be real and clear, and nobody need worry about it in advance" (2). With the greatest respect to his Honour, now that the worry is upon us, the problem does not appear to me to be at all easy of solution. In the course of the argument we were referred to several cases in the Supreme Court of the United States where somewhat similar problems have arisen and have been solved, not always in the same way. But there is no s. 92 in the United States Constitution, however close the resemblance may be between the problems that arise under the section and those that arise from the fact that the commerce power in the United States Constitution has been held to give Congress exclusive power over inter-State commerce. It does not appear to me that a charge could be imposed which would not enter the deterrent field which was more than a reasonable charge for the use of the road over which the vehicle, having regard to its size and weight and other characteristics, intends to travel and it appears that the charge to be reasonable would have to be based mainly upon the extent of the wear and tear the road would be likely to suffer from the projected journey. All traffic, light or heavy, presumably causes some wear and tear to the roads, but presumably also the heavier the vehicle the more wear and tear that is caused to the roads. It is for the cost of this extra wear and tear, if any, that it would be reasonable to charge. It is probably not susceptible of any precise calculation. But an approximation should be possible. The onus would be on the plaintiff to prove that the charge was unreasonable and the court would be disinclined, I should think, to upset any charge that was reasonable

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

(2) (1950) 80 C.L.R., at p. 497.

on its face and supported, if challenged, by a calculation based on some appropriate formula. The charge could also include a reasonable contribution towards the cost of administering the Act and of policing the roads in the interests of law and order. The formula provided by sub-s. (5E) contains a number of ingredients not included in the above remarks. The formula could not include an item relating to the cost of constructing new roads, although it could contain an item relating to the cost of widening and re-constructing old roads where some additional width or a strengthened pavement was required to carry the ever-growing amount of traffic and the ever-increasing size and weight of vehicles using the roads. But the formula should be primarily based on the cost of keeping existing roads in repair because the charge is in effect in the nature of a revenue charge made as a contribution towards meeting revenue outgoings and not a capital charge made as a contribution towards capital expenditure incurred in making new roads. If the charge is in fact a reasonable charge it matters not whether the moneys so raised are paid into funds used for the maintenance or policing of the roads or the administration of the Act or for other purposes. In that respect I adhere to the opinion expressed in *McCarter* v. *Brodie* (1). It was contended that sub-ss. (5B)-(5F) could be severed from the rest of the sub-sections relating to the imposition of the charge so that s. 18 (4) would simply authorize the commissioner to make a reasonable charge for the use by the vehicle of the public streets over which it travelled. But I think it would be impossible to do this. Sub-section (4) contains an express provision that the charge shall only be made after the first determination by the commissioner of the rate or scale of rates of charge has been notified pursuant to sub-s. (5F). Sub-section (5) is the provision which imposes the liability to pay the charge and it provides that the amount payable in respect of such charge for any journey shall be assessed on the rate or scale of rates of charge thereinafter referred to. The determination of the rate or scale of rates of charge therefore is made a condition precedent to the operation of both these sub-sections. The Court is not a legislative body. It can only give effect to a reading down section like s. 3 (2) to the extent to which the Act can be read down by construction. The Court has stated its approach to this problem on many occasions. It is sufficient to refer to the judgment of the present Chief Justice in the *Bank Case* (2). Applying the principles there stated to the present case, it seems to me to be impossible to read down s. 18

(1) (1950) 80 C.L.R., at p. 478. (2) (1948) 76 C.L.R. 1, at p. 371.

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sub-ss. (4) and (5F) in the manner suggested and all these provisions are also, in my opinion, invalid.

The plaintiffs are therefore entitled to succeed in their attack upon the constitutional validity of the *State Transport (Co-ordination) Amendment Act* 1954.

There remains for consideration the question whether the *Motor Vehicles Taxation Management Act* 1949-1951 and the *Motor Vehicles (Taxation) Act* 1951 offend against s. 92. The two Acts must be read and construed together (the *Taxation Act*, s. 1, sub-s. (2)). Section 4 of the *Management Act* provides for the imposition of tax on motor vehicles at the time of application for their registration and at the time of each renewal of the registration of the vehicle. Accordingly no tax is payable unless an application is made for the registration or renewal of the registration of a vehicle. But the Act also provides that the owner of any motor vehicle which (not being a motor vehicle exempted from registration) is not registered or which being registered is liable to tax but upon which the prescribed tax, though due and payable, has not been paid, who uses or drives the vehicle or suffers it to be used or driven upon a public street shall be liable to a penalty not exceeding fifty pounds. The *Taxation Act* imposes a motor vehicle tax upon motor vehicles (other than those exempted) at the rates set out in or the sums ascertained in accordance with the schedule to the Act. It provides that the tax shall be paid in respect of every motor vehicle the registration or the renewal of registration of which takes effect after the commencement of the Act. Under the schedule the tax is calculated on the unladen weight of the vehicle (plus certain accessories). Additional tax is exacted where the motor vehicle has non-pneumatic tyres on all or any of its wheels. Motor vehicles with compression ignition engines pay tax at double rates (this is because they use oil fuel on which, unlike petrol, no tax is payable). The tax on the registration of heavy vehicles for twelve months is considerable. A motor vehicle with a compression ignition engine weighing seven tons pays an annual tax of £198. If registration is required for lesser periods than twelve months the rates are proportionately reduced. The tax is therefore imposed at a flat rate. It is not imposed unless the owner of the vehicle wants to use or drive it along the public streets of the State. Except on country properties, however, there would not be any sense in owning a motor vehicle unless it was so used or driven. The amount of the tax is not calculated upon the distance the vehicle is driven along the roads. It is imposed so that the vehicle may be lawfully used or driven on the public streets for a certain period. It is therefore necessary for

any motor vehicle moving along a public street in New South Wales in order to cross the border in or out of New South Wales to be registered and pay the tax. Otherwise it is liable to be seized and forfeited (*Management Act*, s. 6). The tax is imposed directly upon the movement of vehicles and therefore upon the movement of vehicles in inter-State trade commerce or intercourse. On the other hand the payment of the tax authorizes the owner of the vehicle to drive it anywhere along the public streets of New South Wales during the period for which the motor vehicle is registered. The same problem in relation to s. 92 arises with respect to the tax as that which arises with respect to a mileage tax, that is to say whether the tax, having regard to the benefit the inter-State carrier derives from its payment, is an undue burden upon him. By registering the vehicle and paying the tax the owner acquires the right to use the organized road system of New South Wales as a whole, provided his right to use that system is not limited by other Acts. But it seems inevitable that this right in the case of heavy motor vehicles will be limited to roads which are adequately constructed to carry such vehicles without undue wear and tear. In any event carriers engaged in inter-State trade would only want to use a part of the State system. The owners of motor vehicles engaged in inter-State trade would therefore be taxed in order to provide for the upkeep of roads from which they would derive no benefit. The burden of the tax would therefore be bound to exceed the benefit the owner of the vehicle would derive from paying it. No doubt a State can require all motor vehicles to register, so that they may be readily identified, unless it is prepared to accept for this purpose registration in another State, and can make a charge to meet the expenses of registration, but such a charge which would be justifiable would, I conceive, have to be a small one. If a motor vehicle is driven along a public street of a State for any purpose other than an inter-State journey, however short the distance, or engages in intra-State trade in the course of an inter-State journey, the tax would have to be paid. The plaintiffs allege, and this allegation must be taken to be admitted for the purposes of the demurrer, that they do not operate their vehicles for the carriage of goods in intra-State journeys in any of the States. This is an anaemic allegation if it is intended to mean that the plaintiffs do not drive their vehicles on the public streets of New South Wales for any purpose other than the inter-State carriage of goods. But the question of principle, whether the tax can be imposed in respect of vehicles which are not otherwise driven, has been argued and, in my opinion, the answer must be in the negative. The tax in

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such a case must not exceed a reasonable charge for the use of the roads over which the vehicle is authorized to travel. But the Acts under discussion are capable of having a distributive operation and it is sufficient to say that they have no application to motor vehicles which are not used or driven on the public streets of New South Wales otherwise than in the course of and for the purpose of inter-State journeys.

For these reasons I agree with the proposed order.

FULLAGAR J. This case comes before the Court on demurrer to the defence in an action commenced in this Court by Hughes & Vale Pty. Ltd. and Keith Flynn against the State of New South Wales and certain other defendants. Each of the plaintiffs carries on a business which consists in the inter-State carriage of goods by motor vehicles for reward. Neither plaintiff operates any vehicle for the carriage of goods on intra-State journeys. The object of the action is to obtain a declaration of the invalidity of certain amendments of the *State Transport (Co-ordination) Act* 1931-1952 (N.S.W.) made by the *State Transport (Co-ordination) Amendment Act* 1954. The plaintiffs also attack the *Motor Vehicles Taxation Management Act* 1949-1951 (N.S.W.) and the *Motor Vehicles (Taxation) Act* 1951 (N.S.W.). The demurrer has been treated throughout as raising for decision the question of the validity of the statutory provisions challenged. The attack in each case is based on s. 92 of the Constitution of the Commonwealth. It is convenient to deal first with the amendments of the *State Transport (Co-ordination) Act*. I will refer to the relevant Acts as the *Transport Act* 1931-1952 and the *Transport Act* 1954.

On 17th November 1954 in *Hughes & Vale Pty. Ltd.* v. *State of New South Wales [No. 1]* (1) to which I will refer as the *Hughes & Vale Case [No. 1]* (1), the Privy Council, reversing a majority decision of this Court (2) held that certain provisions of the *Transport Act* 1931-1951, so far as they purported to apply to persons or vehicles engaged in the inter-State carriage of goods, infringed s. 92 of the Constitution and were therefore invalid. The section primarily affected by this decision, and the section which is the keystone of the whole structure set up by the Act, is s. 12. That section makes it an offence to operate a public motor vehicle or (subject to certain exceptions) to use a motor vehicle for the carriage of goods sold or intended for sale unless the operator or user is the holder of a licence issued under the Act. Later provisions of the

(1) (1955) A.C. 241; (1954) 93 C.L.R. 1.

(2) (1953) 87 C.L.R. 49.

Act set up a licensing system, prescribing the manner in which licences may be obtained, the conditions on which they may be obtained, and so on. The more important of these are set out in the judgment of their Lordships, and it will be sufficient here to state briefly their purport. Section 14 provides that every person who desires to operate a public motor vehicle shall apply for a licence for such vehicle under the Act and that the application shall contain " particulars " as to a number of specified matters. Section 15 provides that a licence for a public motor vehicle may be limited in respect of route, road, area or district. Section 17 provides that every licence shall be subject to the performance and observance by the licensee of the provisions of the Act and of regulations made under the Act, and also of any " provisions contained in or attaching to " the licence. In dealing with any application for a licence the licensing authority is required to have regard to a number of specified matters, but it may grant or refuse a licence at its discretion. Section 18 (4) provides that a licence to carry goods or goods and passengers may be made subject to a condition that the licensee shall pay to the licensing authority sums to be " ascertained " by the licensing authority on the basis of mileage travelled or on any other basis which may be prescribed by regulations made under the Act. Provision is also made for temporary " permits ", but no importance attaches, I think, to these.

In the *Hughes & Vale Case* [*No.* 1] (1) their Lordships approved the view which had been maintained always by the present Chief Justice and *Starke* J. and more recently by other members of this Court. In *R.* v. *Vizzard*: *Ex parte Hill* (2), *Dixon* J. (as he then was), speaking of the very Act which was in question in the *Hughes & Vale Case* [*No.* 1] (1) had said : " If s. 92 does not protect it, the transportation of goods and persons in the course of inter-State commerce by an ordinary means is stopped, except in so far as an agency of the State thinks fit to permit it and even then it is liable to a pecuniary impost " (3). And his Honour had expressed his view of such legislation in the following terms :—" To say that the State of New South Wales can forbid so much of the transportation of merchandise by motor vehicle between a place in Victoria and another in New South Wales as lies within its territorial jurisdiction is to affirm a proposition, which, in my opinion, is flatly opposed to the constitutional declaration that trade, commerce, and intercourse among the States, whether by means of internal carriage or

(1) (1955) A.C. 241 ; (1954) 93 C.L.R. 1.
(2) (1933) 50 C.L.R. 30.
(3) (1933) 50 C.L.R., at p. 62.

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ocean navigation, shall be absolutely free " (1). That is the view which must now be accepted.

On 16th December 1954 the *Transport Act* 1954 (Act No. 48 of 1954) came into force. The obvious purpose of this Act was to establish a system of control of the inter-State transportation of goods and passengers which should not be obnoxious to s. 92, but the method adopted is surprising. For it consists of a series of amendments of the Act of 1931-1952 which apply only in respect of inter-State carriage, the pre-existing provisions being left standing *in toto* so far as intra-State carriage is concerned. It is necessary to examine these new provisions, which are now challenged as infringing s. 92.

The new scheme relating to inter-State transportation hinges on a new s. 12 (1), which provides that "Any person who operates a public motor vehicle in the course and for the purposes of inter-State trade shall, unless such vehicle is licenced under this Act by the Commissioner for Motor Transport for operation as aforesaid, and unless he is the holder of such licence, be guilty of an offence against this Act." If this provision stood alone, its invalidity would be obvious, but succeeding provisions are designed with a view to saving the situation by introducing, in relation to inter-State commerce, certain relaxations and modifications of the principal Act with respect to the obtaining of licences, the conditions which may be attached to licences, and the money payments which may be exacted from licensees. Section 14, which provides that applications for licences, accompanied by certain particulars, must be made, is left to apply unaltered, and so is s. 15, which provides that licences may be limited in respect of route, road, area or district. Alterations of little or no importance are made in s. 16. It is on the alterations made in s. 17 that the question in the case really turns. Those made in s. 18 are also important, but these require separate consideration.

Sub-section (1) of s. 17, which provides that every licence under the Act shall be subject to the performance and observance by the licensee of the provisions of the Act and of the regulations and of any provisions contained in or attaching to the licence, is left standing as of general application. Five new sub-sections then replace, so far as inter-State traders are concerned, sub-ss. (2), (3) and (4). The effect of these is stated in the judgment of the Chief Justice, and I need not set them out in full. They involve, in my opinion, an infringement of s. 92 hardly, if at all, less clear than the

(1) (1933) 50 C.L.R., at p. 62.

infringement involved in the provisions in question in *McCarter* v. *Brodie* (1) and the *Hughes & Vale Case* [*No.* 1] (2). They appear indeed to be based on a complete misconception of the grounds on which those provisions, so far as they purported to apply to inter-State trade, commerce or intercourse, were held invalid by a minority of this Court and by the Privy Council. Section 92 requires the preservation of a real freedom for trade commerce and intercourse among the States. The freedom permitted by the Act of 1954 is altogether illusory.

In each of the two earlier cases the challenged Act made it an offence to operate a motor vehicle for the carriage of goods or passengers for reward without a licence, and then proceeded to set up an authority to which was entrusted a discretionary power to grant or refuse a licence to an applicant. In *McCarter* v. *Brodie* (1) which was a Victorian case, the ultimate power of decision was vested in the Governor in Council, so that in no circumstances whatever could a decision to refuse a licence be challenged in any way. In the *Hughes & Vale Case* [*No.* 1] (2) the New South Wales statute gave the power of decision to a licensing authority constituted for the purpose, and the discretion to grant or refuse was in terms unfettered. A refusal might have been challenged on the ground that the authority had not acted in good faith or had proceeded on some irrelevant ground, but, for all practical purposes, the discretion was absolute. It was natural that the " absolute " character of the discretion should be referred to and emphasized, as it was, in the minority judgments which were ultimately upheld, because it was conceived that this feature made the case an extremely clear one. But it is idle to suppose that the matter can be cured by a mere limitation of the discretion, and all that the new s. 17 even purports to do is to impose limitations of very vague and dubious import on the discretion.

Here we begin with a provision that inter-State commerce of an everyday kind shall not be carried on without a licence. This is a plain and direct denial of freedom in any intelligible sense, and the provision must be held void unless we find in another part of the enactment that a licence is obtainable as of right either unconditionally or subject only to ascertained and defined conditions which do not derogate from freedom within the meaning of s. 92. In fact we find nothing of the kind.

The new sub-ss. (3), (4) and (4A) of s. 17 deal with the discretion of the licensing authority to grant or refuse a licence, and the new

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

(2) (1955) A.C. 241 ; (1954) 93 C.L.R. 1.

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sub-ss. (2) and (4A) with the conditions which may be attached to a licence, if a licence is granted. Sub-section (3) provides that the authority " shall have regard to " the four matters specified. The old sub-s. (3), which still applies with respect to intra-State commerce, enumerates seven matters to which regard must be had. Four of these are substantially reproduced in the new sub-section. The three which are omitted may be said to be concerned with the co-ordination of all forms of transport, including transport by rail or tram. The four which are substantially retained are concerned, broadly speaking, with (a) the suitability of the route or road, (b) the condition and suitability of the roads to be traversed, (c) the character, suitability and fitness of the applicant, and (d) the construction, equipment, suitability and fitness of the vehicle. Sub-section (4) provides that the authority may refuse a licence if satisfied that : " (a) the applicant is not a fit and proper person to hold the licence ; or (b) the vehicle is not properly constructed or adequately equipped or is otherwise unfit or unsuitable for the licence ; or (c) the operation of the vehicle, if the licence were granted, would create or intensify conditions giving rise to—(i) unreasonable damage to the roads ; or (ii) danger to persons or vehicles using the roads ; or (iii) unreasonable interference with other traffic on the roads." Then sub-s. (4A) provides that, except as provided in sub-s. (4), the authority shall grant the licence.

Sub-sections (3), (4) and (4A) create in combination a seemingly anomalous position, because the grounds on which a licence may be refused under sub-s. (4) by no means exactly correspond with the matters to which the authority is required by sub-s. (3) to have regard in deciding whether a licence is to be granted or not. The apparent difficulty could perhaps be overcome by interpreting the expressions used in sub-s. (4) by reference to the language of sub-s. (3). But, however this may be, sub-s. (4) does anything but prescribe standards. Obviously it leaves a very wide area of discretion to the licensing authority in the matter of granting or refusing a licence. If a licence is refused, the applicant has no effective means of redress. The permitted grounds of refusal are expressed in very general terms, and are wide and elastic in the extreme. An applicant for mandamus would have to establish that no reasonable person could form an opinion adverse to him on any of the grounds mentioned. His practical position, when sub-ss. (3) and (4) are read together, is that he is forbidden to engage in a normal class of inter-State commerce unless it is thought by the licensing authority that he is a " suitable " person to engage in inter-State commerce of that kind, that the roads which he proposes to use are " suitable ",

that the route which he proposes to take is " suitable ", and that his vehicle is " suitable ".

But, even if everything is " suitable ", and it is thought that he ought to be permitted to engage in his proposed inter-State commerce, stringent conditions may be attached to his licence. These are provided for in sub-s. (2) and in the latter part of sub-s. (4A). Breach of any condition is an offence (sub-s. (5)), and may lead to cancellation of the licence (s. 21). Under sub-s. (2) the conditions that may be imposed are conditions of a "regulatory character", " including " the use of the motor vehicle as to whether passengers only or goods only or goods of a specified class or description only may be carried, and as to the circumstances, days and times on which they may or may not be carried, or limiting the number of passengers or the quantity, weight or bulk of goods to be carried." Under sub-s. (4A) the conditions that may be imposed are conditions " necessary for the preservation of public safety, the regulation of traffic and the preservation and maintenance of the roads and the use and enjoyment by the public of the roads." What is " necessary " is, of course, very largely—almost entirely—a matter of discretion. The expression " of a regulatory character ", which occurs in sub-s. (2) but not in sub-s. (4A), may be put on one side for the moment. I will refer to those words later. It is sufficient to say at the moment that, without going outside the scope of the matters specifically mentioned in the two sub-sections, conditions could obviously be imposed which would be drastically restrictive, and even practically destructive, of the freedom of the licensee to engage in inter-State commerce. The power to attach conditions to licences could indeed be used, as the powers of the Victorian Transport Regulation Board were in fact used in the *Riverina Case* (1) to discriminate between inter-State carriers and intra-State carriers to the disadvantage of the former. It is quite true that s. 17 (1) gives a power, in terms unlimited, to attach conditions to any licence issued for intra-State carriage, whereas the corresponding power with respect to licences for inter-State carriage is in terms limited. But the licensing authority is quite at liberty to attach highly burdensome conditions to licences for inter-State carriage, while attaching relatively favourable conditions, or no conditions at all, to licences for intra-State carriage.

It is quite impossible, in my opinion, to distinguish the system set up by the Act of 1954 for the licensing of persons and vehicles to engage in inter-State commerce from the system which was held invalid in the *Hughes & Vale Case* [*No.* 1] (2). A very large element

(1) (1937) 57 C.L.R. 327.

(2) (1955) A.C. 241 ; (1954) 93 C.L.R. 1.

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of discretion is reposed in the authority charged with the consideration of applications for licences. It cannot be seriously contended that the discretion is subject to any effective review by any court. And, even if a licence is granted, it may be made subject to conditions practically destructive of freedom in any real sense. The whole system is glaringly inconsistent with s. 92 of the Constitution. So far as the new s. 12 (1) is concerned, no question of severability, or of the effect of s. 3 (2), arises. Section 12 (1) relates only to inter-State commerce, and it is simply void. The new s. 37 (1) is void for the same reason. The remaining provisions introduced by the Act of 1954 cannot operate effectively without s. 12 (1), and they also are without force or effect. Those provisions of the principal Act, which still purport to apply in respect of persons or vehicles engaged in inter-State commerce, are invalid so far as they purport so to apply.

What has been said is sufficient to dispose of the case so far as it is concerned with the *Transport Acts*. It seems desirable, however, to make certain general observations, and also to refer briefly (although it is not necessary to do so for the actual decision of the case) to the new sub-sections introduced by the Act of 1954 into s. 18 of the principal Act.

The words " regulate ", " regulation ", and " regulatory ", were much canvassed in the course of argument, and the word " regulatory " is actually used in the new s. 17 (2), as if it had some sort of magical force. The words are convenient enough, and it would, of course, be quite legitimate to use them even if they had not been used by their Lordships in the *Banking Case* (1) and in the *Hughes & Vale Case* [*No.* 1] (2). But it is plain from the framing of the Act of 1954 that they have been misunderstood, and that it is necessary to examine their significance.

The words in question were by no means used for the first time in connection with s. 92 when their Lordships used them in the *Banking Case* (1). For example, in *R.* v. *Vizzard* ; *Ex parte Hill* (3), *Starke* J. said that " the burdening of inter-State transport by means of taxes, duties or imposts, or impeding regulating or controlling it by the requirement of licences, is obnoxious to the provisions of s. 92 " (4). The important words in that passage are, of course, " by the requirement of licences ". If control by means of a discretionary licensing system is properly described as " regulating ", then clearly it cannot now be stated as a general proposition that a " regulatory "

(1) (1950) A.C. 235 ; (1949) 79 C.L.R. 497.
(2) (1955) A.C. 241 ; (1954) 93 C.L.R. 1.
(3) (1933) 50 C.L.R. 30.
(4) (1933) 50 C.L.R., at p. 56.

law does not offend against s. 92. But the sense in which the word is used by their Lordships in the two recent cases is narrower than that which it bears in the judgment of *Starke* J. In this narrower sense it excludes control by means of a prohibition subject to a licensing system, though their Lordships have envisaged, as I envisaged in *McCarter* v. *Brodie* (1) the possibility of a valid licensing system. (This passage is quoted by their Lordships in the *Hughes & Vale Case* [*No.* 1] (2)). The possibility is probably remote, for reasons which I gave. It is very important to remember that in the *Banking Case* (3) their Lordships said that in that case " no question of regulatory legislation can fairly be said to arise ". The same is plainly true of the *Hughes & Vale Case* [*No.* 1] (4) and I think that it is equally true of the present case.

It should be clearly understood that the word " regulatory " does not *mean* " consistent with the freedom given by s. 92 ". If that were the *meaning* of the word, it would be a mere question-begging epithet. It should also be clearly understood that its use by their Lordships does not involve the implication of a proviso in s. 92. Section 92 does not say, and does not mean, that inter-State commerce shall be absolutely free, provided that it may be regulated even though its regulation interferes with its freedom. The word " regulatory " is in truth no more than a conveniently descriptive word denoting a kind of law which will generally, though not necessarily, be found to be consistent with freedom under s. 92. But the question, whenever a person engaged in inter-State commerce claims immunity from a law and invokes s. 92, will always be whether that law interferes with or impairs the freedom of that commerce. Can it be fairly said, as a matter of commonsense, that it impedes or restricts him or places a burden upon him in respect of the commercial activity in which he is engaged ? With regard to the general question involved, I have more than once expressed my respectful agreement with the judgment of the present Chief Justice in *Gilpin's Case* (5).

With regard to the question of what laws are to be regarded as " regulatory ", I merely refer to what I said in *McCarter* v. *Brodie* (6) where I gave a number of examples of permissible " regulation ". I would, however, repeat, and emphasize, that the reason why such laws as I instanced do not contravene s. 92 is that no sensible person would say that any of them impeded or restricted or burdened

(1) (1950) 80 C.L.R., at p. 499.
(2) (1955) A.C., at p. 301 ; (1954) 93 C.L.R., at p. 28.
(3) (1950) A.C., at p. 313 ; (1949) 79 C.L.R., at p. 642.
(4) (1955) A.C. 241 ; (1954) 93 C.L.R. 1.
(5) (1935) 52 C.L.R., at pp. 204-207.
(6) (1950) 80 C.L.R., at pp. 494-496.

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the carrying on of trade or commerce by the person affected. As a matter of commonsense, one immediately says that they leave his trade and commerce as free as it was before they were enacted. They fulfil the ultimate test propounded by *Dixon* J. in *Gilpin's Case* (1) because they do not interfere with any activity which itself constitutes trade or commerce or intercourse. Although they are, of course, in a sense " regulatory " of trade or commerce, their essential characteristic is that they control not a trading or commercial activity itself as such, but the manner of doing something which is merely incidental to the actual trading or commercial activity. I pointed out that even controls *of this kind* can, of course, be used to impede or restrict or burden the trading or commercial activity itself: see *McCarter* v. *Brodie* (2). If they are so used, s. 92 is transgressed.

One other observation should be made, and that is with regard to what does *not* constitute " regulation ". A law does not " regulate " in any relevant sense if it leaves the conditions on which trade or commerce may be carried on to be determined *ad hoc* by some person or body nominated for the purpose. The reason lies in what I have just pointed out, viz. that even a power to impose conditions of a character which is " regulatory " may be used so as to transgress s. 92. For this reason, the draftsman of the Act of 1954 was, in my opinion, quite wrong in supposing (as he presumably did) that the validity of the new s. 17 (2) was assured by providing that the terms and conditions which might be imposed by the licensing authority should be " of a regulatory character ". I refer in this connection to an important passage in the judgment of *Dixon* J. in *McCarter* v. *Brodie* (3) in the course of which he quotes from the judgment of *Isaacs* J. in *Country Roads Board* v. *Neale Ads Pty. Ltd.* (4). *Isaacs* J. said: " The body entrusted with the power to regulate must in some sufficient way mark out whatever limits of prohibition are to exist. That is to say, legal rights otherwise existing are not to be cut down at the discretion of some individual or individuals, but must be dealt with *by the law* " (5). (The italics are mine). The Parliament of New South Wales may be said to be permitted by s. 92 to make " regulatory " laws, but it does not make a regulatory law if it leaves to " some individual or individuals " a discretion to impose conditions on any relaxation of a prohibition.

In the view which I take of this case it is not necessary to refer to the new sub-sections which the Act of 1954 introduces into s. 18

(1) (1935) 52 C.L.R. 189.
(2) (1950) 80 C.L.R., at pp. 496-497.
(3) (1950) 80 C.L.R., at pp. 467-468.
(4) (1930) 43 C.L.R. 126.
(5) (1930) 43 C.L.R., at p. 139.

of the principal Act. I think, however, that it is desirable to mention them, because they provide, in my opinion, a further reason for holding that s. 12 is invalid. The old sub-ss. (4) and (5) of s. 18 (which still remain applicable in respect of intra-State carriage) provide that a condition *may* be imposed in any licence that the licensee shall pay what is in effect a tax in respect of passengers and goods carried. The amount is to be ascertained by the licensing authority. In the case of passengers it is not to exceed one penny per passenger for each mile or " section " of journey. In the case of goods it is not to exceed threepence per ton for each mile of journey, the relevant weight being the weight of the vehicle together with the weight which it is capable of carrying. The Act of 1954 substitutes for these two sub-sections eight new sub-sections as applicable exclusively in respect of inter-State carriage. It is not necessary to set these out. It is provided that every licence (i.e. every inter-State licence) *shall* be subject to a condition that the holder shall, in respect of each journey, pay " a reasonable charge for the use by the vehicle of the public streets over which it travels on such journey, and for an appropriate part of the cost of administration of this Act ". The amount is to be paid before the commencement of the journey. A rate or scale of charges is to be determined by the licensing authority, but the rate or scale is not to exceed what is recommended by an " advisory committee " consisting of three persons who are nominated. No such charge is to be payable when vehicles of the same description or weight engaged in intra-State trade and passing over the same route and under the same circumstances are not subject to charges imposed under the old sub-s. (4) or the old sub-s. (5). And in any case the charge is not to exceed the charge imposed by virtue of any condition imposed under the old sub-s. (4) or the old sub-s. (5) in respect of vehicles engaged in intra-State trade over the same route and under the same circumstances. There is a later provision which requires the proceeds of the charge to be paid into the Main Roads Fund constituted under the *Main Roads Act* 1924-1954.

These provisions cannot, in my opinion, be supported. They single out the inter-State carrier of goods or passengers, and place upon him an impost or burden which is not placed upon intra-State carriers and is not placed upon any other user of the roads. It is quite true that imposts (which do not purport to be made with reference to the use of roads) may be laid upon intra-State carriers under the old sub-ss. (4) and (5). It is also true that, unless such imposts are laid upon intra-State carriers, the charge for use of the roads cannot be imposed upon inter-State carriers, and that the

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charge for use of the roads cannot exceed the amount payable by intra-State carriers "over the same route and under the same circumstances". But, even if we make the very doubtful assumption that the limitation is practically workable, the fact remains that a special charge is levied on inter-State carriers which is not levied on any other user of the roads.

For the above reasons I am of opinion that the attack made by the plaintiffs on the *Transport Act* 1931-1952, as amended by the *Transport Act* 1954, succeeds. Before leaving those Acts, however, I think I ought to state in general terms the view which I have formed with regard to the legitimacy of such "charges" as those which the new provisions of s. 18 purport to authorize.

I begin by thinking that, in its relation to the inter-State carriage of goods and passengers and to inter-State travel generally, the freedom which s. 92 protects is a freedom to come and go. No legislative or executive impediment may lawfully be placed in the way of my coming and going. Generally speaking, nobody is entitled to say whether I shall come and go between States or not, to impose conditions on my coming and going, or to exact a price for my coming or going. And this freedom is guaranteed to me for the whole of my inter-State journey, whether it be from Albury to Wodonga or from Cairns to Fremantle.

It is no denial—it is not really even a qualification—of this freedom that I should be required, in the course of my coming and going, to observe, in every State through which I pass, all laws of general application, and to observe not merely those which relate to my conduct generally but those which relate to my conduct as a traveller. My ship must observe the *Navigation (Collision) Regulations*. My aeroplane must obey the *Air Navigation Regulations*. My motor car must carry lights at night, and must not travel on the wrong side of the road. If I disobey such rules, s. 92 will be of no more help to me than if I commit murder or larceny on the way, and it would be folly for me to say that any such rule impedes me in any way in my coming and going.

Nor is it any denial or qualification of this freedom to come and go to say that nobody is bound affirmatively to facilitate my coming and going or to supply me with the means of coming or going. Nobody is bound to provide for me a ship or an aeroplane or a motor car. Nor is anybody bound to provide for me a wharf or an aerodrome or a parking station. If a government or a governmental instrumentality does provide any of these things, it is clearly entitled to make at least a reasonable charge for the use thereof, and the making of such a charge cannot be said to interfere with my

freedom to come and go: cf. *Melbourne Harbour Trust Commissioners* v. *Colonial Sugar Refining Co. Ltd.* (1). This, however, is, of course, subject to the proviso that the charges made do not involve any discrimination against me as an inter-State trader or traveller. If they do, they assume at once a different aspect, and can no longer be regarded as *merely* charges for a service rendered. They impose a special burden on me as an inter-State trader or traveller, and they do therefore interfere with my freedom to come and go.

The new sub-sections of s. 18 are obviously based on the assumption that public roads in a State stand on the same footing as a wharf or an aerodrome or a parking station, and that they constitute a " facility " owned by the State, and made available by the State for the use of the inter-State trader and others. This assumption is not really warranted. It may be true that the soil of all or most of the public highways in every State is vested in the State, but it is not by virtue of its ownership of the soil that the State has control of the public highways within its borders. It has that control by virtue of its Constitution. And that control, like all its other powers, is subject to the Constitution of the Commonwealth, which includes s. 92. When s. 92 speaks of trade commerce and intercourse " whether by means of internal carriage or ocean navigation ", it must be taken as contemplating movement among the States by any of the normal means of communication. Although long journeys by road were uncommon in 1900, those normal means would obviously include the Queen's highway. It is of the essence of a public highway that it is a means of coming and going as of right, and coming and going by any public highway was and is one of the activities protected, as such, by s. 92. The ownership of the soil of the highway matters nothing: the protection is the same whether the soil be vested in the Crown or in a municipal corporation or in a private person. It may be that the State could do what any other owner of the soil, after dedication and acceptance, could not do, and could deprive a particular road of its character as a public highway, but, so long as a public highway remains a public highway, it is quite clear to my mind that a State, in relation to inter-State travel, cannot, consistently with s. 92, make a charge for its use as a highway or impose any other burden or impediment in respect of its use merely because it is a public highway.

There is, however, another aspect of the matter. Large, fast moving, and often very heavy, road vehicles provide to-day, in

(1) (1926) V.L.R. 140.

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Europe, America and Australia, a normal and necessary means for the transportation of goods and passengers. Such vehicles require, for their safe, efficient and economical use, roads of considerable width, and of a hardness and durability beyond what was achieved by John McAdam. Because such roads serve, directly or indirectly, the needs of the community as a whole, it is the natural function of Governments to provide and maintain them. That function has been assumed in Australia by the States, acting directly or through a statutory instrumentality, as one of their constitutional functions, though large sums have been paid to the States by the Commonwealth for assistance in the performance of this function under a series of Commonwealth Acts, of which the latest is the *Commonwealth Aid Roads Act* 1950.

Such roads, as I have said, serve directly or indirectly the needs of the community as a whole. But, because the users of vehicles generally, and of public motor vehicles in particular, stand in a special and direct relation to such roads, and may be said to derive a special and direct benefit from them, it seems not unreasonable that they should be called upon to make a special contribution to their maintenance over and above their general contribution as taxpayers of State and Commonwealth. Among those who so use those roads are persons who use those roads exclusively for the inter-State carriage of goods or passengers. Does s. 92 mean that such persons must be exempt from making any contribution towards the maintenance of the roads which they use ? I do not think it does. It does not appear to me to be inconsistent with anything I have said above to say that such persons may be called upon to make a contribution towards the cost of maintaining something from which they may fairly be regarded as deriving a benefit over and above that which is derived by the community as a whole. In making such a contribution they are not really paying a price for their coming and going. They are paying a price for something which makes their coming and going safer, easier, or more convenient than it would be if the highways which they use were allowed to fall into disrepair or decay. So regarded, the exaction of a contribution towards the maintenance of the highways of a State does not appear to me, necessarily and of its very nature, to offend against s. 92. Such a view derives support, I think, from the view taken in a considerable number of cases in the United States, although, as has often been pointed out, there is no s. 92 in the Constitution of the United States, and the question of the validity of such charges arises there in connection with a constitutional doctrine which has not been adopted here.

Serious difficulties in respect of both quantification and incidence may attend the fixing of a contribution which will be valid, although the learned Solicitor-General for Victoria stated in another case that the difficulties were in fact less than might be supposed. It is perhaps unwise to attempt to anticipate these. Two things, however, may be said. Any such charge, to be valid, must not discriminate against inter-State traffic, and some real connection—some relation of *quid pro quo*—must appear between the charge and the maintenance of the roads. Subject to those two points, I think that a fair degree of latitude must be allowed in prescribing the incidence of a charge, and that practical considerations attending the collection of a charge must be borne in mind in considering its validity.

I turn now to another subject. The plaintiffs also attack the validity of the *Motor Vehicles Taxation Management Act* 1949-1951 (N.S.W.) and the *Motor Vehicles* (*Taxation*) *Act* 1951 (N.S.W.). The latter Act imposes a tax at specified rates, payable in accordance with the provisions of the former Act, upon motor vehicles. It will be convenient to refer to the former Act as the *Management Act* and to the latter Act as the *Taxation Act*.

The *Management Act* by s. 3 defines the term " motor vehicle " as meaning, in effect, any vehicle propelled upon a public road by mechanical means. Other definitions have the effect of dividing " motor vehicles " into four classes—the " motor car ", the " motor cycle ", the " motor lorry " and the " motor omnibus ". The motor cycle is not relevant for present purposes. A " motor car " is a motor vehicle (other than a motor omnibus) constructed to be used principally for the carriage of persons. A " motor omnibus " is (according to a definition inserted by Act No. 57 of 1951) a motor vehicle (not being a taxi-cab) plying for hire for the conveyance of passengers at separate fares or seating more than eight adult persons and used for the conveyance of passengers for hire or for any consideration or in the course of any trade or business. A " motor lorry " is a motor vehicle (not being a motor cycle or a tractor or a trailer) constructed to be used principally for the carriage of goods or materials used in a trade or for use in any work other than the conveyance of persons.

Section 4 of the Act provides that tax at such rates as may be fixed by or under any Act shall be paid in respect of every motor vehicle at the time of application for the registration of the motor vehicle and at the time of each application for renewal of registration. The tax is to be paid by " the person in whose name the application is made ". Registration of motor vehicles is required by the *Motor*

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Traffic Act 1909-1954 and the *Transport Act* 1930-1953, a fee being payable on registration under either of those Acts. Renewal of registration with payment of the prescribed fee is required annually. Section 5 of the *Management Act* provides that the owner of any motor vehicle which is not registered or upon which the appropriate tax has not been paid, who uses or drives the vehicle, or causes or permits or suffers it to be used or driven, on any public road shall be liable to a penalty not exceeding fifty pounds. Section 6 provides that any unregistered motor vehicle which is used or driven on a public street may be seized by any authorized officer. After seizure an order that the vehicle be forfeited to Her Majesty may be made by a stipendiary magistrate unless the owner satisfies the court that there has been no attempt to evade registration. Section 7 provides for a number of exemptions from taxation, and for a number of cases in which the commissioner is empowered to grant total or partial exemption from tax. None of these appear to be material in the present case. Sections 11 and 12 provide for cancellation of registration and refund of a proportionate amount of the tax paid in certain cases. Section 13 provides that the amount of any tax imposed on a motor vehicle may be recovered before a court of Petty Sessions as a debt due to Her Majesty. Section 8 gives to the Commissioner for Motor Transport certain powers for the purpose of determining whether any tax or additional tax is payable on a motor vehicle and, if so, the amount thereof, and sub-s. (3) of that section gives to the commissioner an apparently general power to determine whether any tax or additional tax is payable on any motor vehicle and, if so, the amount thereof. The remaining provisions of the *Management Act* are of an ancillary or machinery nature.

The *Taxation Act*, which is to be read and construed with the *Management Act*, provides, by s. 2, that there shall be charged, levied, collected and paid for the use of Her Majesty, under the provisions of the *Management Act* motor vehicle tax upon motor vehicles at the rates set out in the schedule to the Act. Section 3 provides that, for the purposes of the Act, the weight of a motor vehicle is to be taken to be the weight of the vehicle laden with the usual accessories, fuel, etc., but otherwise unladen.

Part I of the schedule sets out the rates of tax where registration or renewal of registration is effected for a period of one year. In considering the effect of the schedule it is necessary to bear in mind the definitions contained in the *Management Act*. The schedule first prescribes the rate of tax for motor vehicles which have pneumatic tyres on all wheels, and then provides that a motor vehicle

which has non-pneumatic tyres on all or any of its wheels shall pay tax at the rate prescribed for pneumatic-tyred vehicles plus twenty-five per cent. For pneumatic-tyred vehicles the rates are (1) for a " motor car " 3s. 4d. per half cwt., (2) for a " motor omnibus " 5s. 1d. per half cwt. and (3) for a " motor cycle ", if it has no side-car, £1 7s. 0d., and, if it has a side-car, £2 7s. 6d. In this way the schedule deals with three of the four classes of " motor vehicle " envisaged by the *Management Act*. It will be remembered that the " motor car " and the " motor omnibus " are by definition, to use a general term, passenger vehicles. The schedule deals in a different way with " any motor vehicle not being a motor car, a motor omnibus or a motor cycle ", i.e. with any vehicle which is a " motor lorry ". A " motor lorry " is by definition, to use a general term, a goods-carrying vehicle. For motor lorries, or goods-carrying vehicles, the schedule adopts a fairly steeply graded scale of amounts, the tax rising with each additional five cwt. of the vehicle's weight. A two-ton truck will pay £17 0s. 0d., a three-ton truck £36 15s. 0d., a four-ton truck £52 10s. 0d., a five-ton truck £68 0s. 0d., a six-ton truck £83 10s. 0d., and a seven-ton truck £99 0s. 0d. In the case of all four classes of motor vehicle the tax is doubled if the vehicle is fitted with a compression ignition engine. Thus a four-ton " diesel " vehicle would pay £105, and a five-ton " diesel " vehicle £136. The schedule provides for proportionate reductions where registration or renewal of registration is effected for a period of less than a year.

The question whether the tax imposed by the *Taxation Act* in accordance with the *Management Act* involves such a burden on inter-State commerce and intercourse as is forbidden by s. 92 seems to me to be a difficult one. Certain things seem clear enough. If the tax were imposed on, or in respect of, movement of vehicles between States, it would obviously be invalid, and it would make no difference if the same tax were imposed on, or in respect of, movement of vehicles within the State. On the other hand, there would seem to be no reason for holding invalid a tax on vehicles, say, owned by residents of the State or connected in some other more or less permanent way with the State. I should not think that the validity of such a tax would be necessarily affected or limited by the fact that some of the vehicles so taxed were used in inter-State trade, though the position might well be different if there were any differential treatment, avowed or concealed, of such vehicles. Again, the view must, I think, be accepted that a State may—at any rate within certain limits—impose a non-discriminatory charge or contribution for the maintenance of roads. But the

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tax under consideration is none of these things. On the one hand, it is, as it purports to be, a tax *on* motor vehicles and not on their movement as such, but, on the other hand, it is not limited by reference to any connection with the State, and it is in no sense a charge imposed by reference to the use of roads, although it is forbidden that a vehicle shall be used on a road unless the tax in respect of it has been paid. The position actually created is that a vehicle cannot be used on a road in New South Wales unless it is registered under the *Motor Traffic Act* or the *Transport Act*, and it cannot be so registered unless the tax is paid.

It may well be that there is no constitutional objection to a provision requiring the registration of motor vehicles, including motor vehicles which are originally registered in other States and enter New South Wales from other States. Again, it may well be that the requirement of registration will not be invalidated by the mere fact that a uniform fee is made payable on registration: all States require payment of a fee on registration, and, unless some affirmative reason appeared for regarding it as a real burden or impediment on inter-State trade, the exaction of a fee as a mere incident of registration may be said not to offend against s. 92: cf. *Willard* v. *Rawson* (1). But the exaction imposed by the *Management Act* and the *Taxation Act* cannot be regarded as a mere incident of registration regarded as an object in itself. What is imposed by those Acts is a real and very substantial tax on motor vehicles. The levying of a pecuniary impost is the end in view, and the impost is made payable on registration only because that is a convenient means of ensuring its collection. When we look at the actual operation of the legislation in relation to commerce, we cannot, I think, avoid saying that it does impose a real and direct burden on the carrying on of commerce in a particular way. And, if that is so, it cannot, consistently with s. 92, operate in respect of the carrying on of inter-State commerce.

It is true that the tax in question is not imposed on or in respect of any activity which possesses the characteristics of trade, commerce or intercourse. Generally speaking, it will fall on the owner of a chattel, and it may be said without material inaccuracy, that it will be payable by him by virtue of his ownership. But this is not, I think, enough to take it outside the scope of s. 92. It is, in form and in substance, a tax on a chattel, in the same sense as a land tax is a tax on land. But the particular chattel in question is a chattel the very *raison d'être* of which is that it may serve as an instrument of trade commerce and intercourse. It is one of the

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

normal everyday instruments of trade commerce and intercourse. And the Acts forbid it to be used in New South Wales, unless the tax is paid, in the performance of its only useful function. Of such a restriction or burden, so far as it affects inter-State trade commerce and intercourse it cannot, I think, be said that it " is imposed in virtue of or in reference to none of the essential qualities which are connoted by the description ' trade, commerce, and intercourse among the States ' " (per *Dixon* J. in *Gilpin's Case* (1)). I say nothing as to what the position might be if the character of the tax were altered so as to make it simply a tax on motor vehicles owned by persons resident in New South Wales, or so as to exempt motor vehicles entering from another State in some such terms as those used in s. 4 (7) of the *Motor Car Act* 1928 (Vict.) before the amendment of 1930 which was the subject of argument in *Willard* v. *Rawson* (2).

I agree with the order proposed.

KITTO J. I have had the privilege of reading the judgment of the Chief Justice, *McTiernan* and *Webb* JJ. in this case, and I agree with their Honours in their reasons for holding that the provisions of ss. 12 and 17 of the *State Transport (Co-ordination) Act* 1931-1952 (N.S.W.), as amended by s. 4 of the Act No. 48 of 1954 for the purposes of their application to a person operating a public motor vehicle in the course and for the purposes of inter-State trade, commerce or intercourse, are obnoxious to s. 92 of the Constitution.

I am also of opinion, however, for reasons which I shall state, that the provisions of s. 18 as so amended and the provisions of the *Motor Vehicles (Taxation) Act* 1951 (N.S.W.) and the *Motor Vehicles Taxation Management Act* 1949-1951 (N.S.W.) are obnoxious to s. 92, in so far as they would affect the use of motor vehicles in the course of inter-State trade, commerce, or intercourse. Section 18 attempts to subject every licence issued under the Act for a public motor vehicle to a condition that the holder shall in respect of each journey pay a charge which it describes (though without sufficient justification) as a reasonable charge for the use by the vehicle of public streets over which it travels on such journey. Because of its form, the section must fall together with ss. 12 and 17 ; but in my opinion it offends against s. 92 in its substance also, even if it be true that the imposition of a charge wearing the aspect of a reasonable recompense or compensation for the relevant use of the roads would leave the freedom of inter-State trade, commerce, and intercourse undiminished. If I were to accept this proposition

(1) (1935) 52 C.L.R., at p. 206. (2) (1933) 48 C.L.R. 316.

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I should agree in the reasons given by the Chief Justice, *McTiernan* and *Webb* JJ. for the conclusion they have stated on this point. As to the motor vehicles tax, it will suffice to say by way of description of the legislation that payment of the tax is required to be made at the time of application for registration of a motor vehicle, and that if the owner of a motor vehicle which is not registered, or upon which the tax though due and payable has not been paid, uses or drives the vehicle or causes or permits or suffers it to be used or driven upon a public street, he is made liable to a penalty and the vehicle is made liable to seizure. With respect to this tax, again I should share the opinion of the Chief Justice, *McTiernan* and *Webb* JJ., even if I thought that an appearance of some reasonable relation between the amount of the tax payable by an individual and his use of the roads might prevent a conflict with s. 92.

But, after much consideration, I have reached the conclusion that, for a more far-reaching reason, s. 18 and the motor vehicles tax legislation cannot stand with s. 92 in relation to the use of the roads for inter-State travel. Neither in reason nor upon authority have I found it possible to reconcile the freedom which s. 92 decrees for trade, commerce, and intercourse among the States with the existence in a State legislature of a power to make a compulsory levy upon an individual as a condition, or by reason, of his traversing the roads of the State in the course of an inter-State journey. Despite misgivings which are natural in the circumstances, I have formed a firm opinion to this effect, and I shall state as briefly as I can the considerations which have led me to it. In the course of doing so I shall have to cover some familiar ground.

In *Wilcox Mofflin Ltd.* v. *State of New South Wales* (1), I ventured to describe as the riddle of s. 92 the question which the expression " absolutely free " appears to me necessarily to present : absolutely free from what ? Freedom is a negative attribute, consisting in an exemption or immunity from some form of restraint, obstruction or burdensome condition ; but the section leaves the nature of the particular freedom it establishes to be inferred from the character of the instrument by which it is given and the characteristics of the classes of activities to which it is expressed as attached. The most difficult of the many problems which arise under s. 92 are, I think, those which require for their solution an attempt to define this freedom so as to be able to compare the operation of a challenged law with that from which the section intends to set inter-State trade, commerce, and intercourse absolutely free.

(1) (1952) 85 C.L.R. 488, at p. 539.

I take it to be clear that the exemption conferred is from the adverse operation of some kind of laws. That which calls forth an appeal to the protection of s. 92 may, of course, be an act of the Executive Government, or, conceivably, an act of some private person; but even in such a case all that s. 92 can do is to deprive of efficacy a provision of the law which, if there were no s. 92, could be relied upon as giving legal validity or protection to an act otherwise unlawful. Whether the operation of a given law is adverse is, of course, a practical question.

In form the section decrees freedom for certain abstractions. Its application is necessarily to ensure a freedom for individuals. It is a freedom, however, which is to exist within, and not beyond, an area marked out by the words trade, commerce, and intercourse among the States. Each of the words trade, commerce, and intercourse describes by a class designation courses of conduct which possess certain characteristics. The phrase "among the States" narrows each of these classes by prescribing a further characteristic. The scope of the freedom is therefore limited by reference to the characteristics which a course of conduct must possess in order to be inter-State trade, or inter-State commerce, or inter-State intercourse. It seems clearly to follow that a law cannot be obnoxious to the freedom unless it fixes upon such a characteristic of a given course of conduct and makes it a criterion of its application. In other words, it must attempt an invasion of the defined field of immunity. It is in this sense that the proposition must be understood that, for the purpose of deciding how a given provision stands in relation to s. 92, it is the direct and not the remote operation of the provision which is to be considered. This branch of the subject was fully developed by *Dixon* J. in his dissenting judgments in *Willard* v. *Rawson* (1) and *O. Gilpin Ltd.* v. *Commissioner for Road Transport & Tramways (N.S.W.)* (2), which must now, I think, be accepted as correctly expounding the section: see also *Hospital Provident Fund Pty. Ltd.* v. *State of Victoria* (3).

But, as has often been said, it cannot be that s. 92 intends to exempt inter-State trade, commerce, and intercourse from the operation, even the direct operation, of all laws. It follows from the very nature of the Constitution itself, as an instrument providing for the government of a community organized under a legal system, that s. 92 regards these things as forms of activity which are regulated by laws directed to ensuring that a member of the community who participates in any of them shall not thereby unduly

(1) (1933) 48 C.L.R., at pp. 331, 332.
(2) (1935) 52 C.L.R., at pp. 204-211.
(3) (1953) 87 C.L.R. 1, at p. 17.

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prejudice the pursuit by any other member of his own lawful interests. The freedom is therefore not an exemption from the obligation of laws which insist upon standards of competence, of conduct or of equipment, or which gives or provides for general or particular directions as to the manner of participation in a form of inter-State trade, commerce, or intercourse. The distinction between laws which may thus operate within the area of the freedom and those laws which the freedom itself excludes is one which, though real enough, is not brought out sufficiently for all occasions by contrasting any two descriptive titles. The two ideas may often be conveyed sufficiently for practical purposes by using such words as restriction, obstacle, deterrent or burden on the one hand and regulation on the other. But one yields at one's peril to the temptation to endow any of these words with the conclusiveness of a shibboleth. The real value of the word " regulation " as an aid in the expression of the relevant idea is not diminished by a warning against its use as a protective label for a law which in point of reasoning is outside the class of laws by which s. 92 assumes that inter-State trade, commerce, and intercourse will be governed while remaining nevertheless absolutely free. Moreover the intended significance of " regulation " is not always sufficiently brought out when the word is used in contrast with " burden ". A law which requires road users to halt at certain intersections, or to refrain from overtaking if to do so means crossing a double line in the middle of the roadway, entails some degree of burden on those who must obey it. In general it is a small one, but, if a burden is to be regarded as no burden in the relevant sense because it is considered to be small, the word has no utility in considering a constitutional provision which insists upon absolute freedom and will not be fobbed off with near-freedom. Yet it would be generally agreed that laws such as I have mentioned, notwithstanding the burden they involve, afford clear illustrations of the kind of regulation which s. 92 not only allows but pre-supposes. Laws fall within this category which are of the kind by which an individual's latitude of conduct is circumscribed in the interests of fitting him into a neighbourhood—a society, membership of which entails, because of its nature, acts and forebearances on the part of each by which room is allowed for the reasonable enjoyment by each other of his own position in the same society. There is no difficulty in seeing that the existence of laws of that kind is assumed by s. 92.

But when we turn to consider a law which provides, not that restrictions shall apply to some individuals for the sake of others

so that their possibly conflicting interests may be mutually adjusted, but that whenever any of them proposes to engage, or has engaged, in a particular form of activity he shall make a payment of money into the public funds, it seems to me that we have moved into a different field altogether. To tell an individual that, though in a particular activity he observes all the restraints and takes all the steps which the fullest protection of the interests of his fellows is considered to require, the very fact of his performing that activity at all is to bring upon him a liability to contribute to the common purse is, as I think, to meet him outside the field of regulated conduct in an ordered society and, in effect, to deny flatly that he may enter it as of right. A law which does this is one which has a direct, adverse operation upon the activity, even considered as an activity regulated by law. If the activity is one of trade, commerce, or intercourse among the States, it seems to me that the operation of the law is a clear example of the kind from which s. 92 ordains that every individual shall be free.

In the particular case of a law imposing a charge for the use of the roads in the course of inter-State trade, the reasoning which is used to support a contrary conclusion, if I understand it aright, is somewhat as follows. (1) The community provides the roads. (2) The trader derives a benefit from using them for the purposes of his trade, and in the course of doing so he contributes to the general wear and tear upon them. (3) It is involved in the concept of trade as an activity conducted in the setting of a modern society that a trader should pay for advantages which he derives for his trade at the expense of others. (4) It is, therefore, not only fair, but also within the notion of that kind of regulation which s. 92 assumes, that the trader should be required by law to make a payment towards the upkeep of the roads. (5) As to the amount which might be considered reasonable, and even as to the broad considerations to which regard should be had in fixing it, much difference of opinion is possible, and anything like an accurate calculation is in the nature of things impracticable ; but this does not matter, because proposition (4) does not require that the amount to be made payable shall be reasonable ; it is true so long as one can perceive from the terms of the legislation that the amount will have some reasonable degree of relevance to the trader's use of the roads.

I have not found it possible to accept this reasoning. It is true, of course, that, if a trader wishes to use other people's property or to have their services applied to his purposes, he must come to terms with them, and that that usually means that he must make a payment of money. Moreover, this is frequently so where the

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property is the government's and the services are those of public servants, as in the case of State-owned railways. But the exaction of a charge for a permitted use of property or for services rendered at request is compatible with s. 92, not because it has something to do with regulation, but because the grant of freedom gives no right to take people's property or require their services without their consent. It is to be remembered that the nature of a modern society, which is the very thing relied upon for the truth of proposition (3), ensures to a trader many advantages provided at the cost of the community, for which he, like everyone else, may contribute in the form of direct and indirect taxes, but in return for which he makes no specific payment. The whole apparatus of government exists and works for the benefit and protection of all who are within its borders. The police force, the courts of law, and the prison and hospital administrations are amongst the most obvious; and the truth is that directly or indirectly a trader who enters a State becomes thereby one of the beneficiaries of a long list of governmental provisions which are made for the general well-being of the people and at the general expense of the community. To make a charge for the use, even by a trader, of any such provision is, to my mind, remote from regulation in the relevant sense of the word. It has nothing whatever to do with keeping people within due bounds in the interests of the harmonious and efficient working of society. Neither a charge for a use of a particular piece of property considered as a subject of ownership nor a charge for personal services specifically availed of by the trader needs any reconciliation with s. 92. But I am unable to see that a charge which is not of either of these kinds, and is imposed by reason of the very fact of proceeding on an inter-State journey, can be anything but an infringement of the freedom of inter-State travel.

That a charge for a use of the public roads is not for personal services rendered specifically to each user is obvious; and that it is not to be considered as the price of permission to make use of property no one, I suppose, would contend since the Privy Council's decision in *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [*No.* 1] (1). But what is contended is that there is a relevant distinction between charging for the use of the roads considered as property and charging for the use of the roads considered as facilities. The distinction suggested seems to be that the former is based upon the rights of ownership which a State is precluded by s. 92 from insisting upon with respect to its public roads, while the latter is based upon the work done in maintaining the roads in a

(1) (1955) A.C. 241; (1954) 93 C.L.R. 1.

condition which facilitates travel. It is not entirely clear to me whether the bearing of this distinction is considered to be upon a charge by way of recouping a proportion of the expenditure incurred in bringing the roads to the condition in which the person charged finds them at the time of his travel, or is upon a charge by way of providing a proportion of the expenditure which is likely to be incurred if and when the wear and tear to which that person contributes by his travel is made good. But it is put broadly that a charge for the use of the roads is a charge for a facility provided, and that in that fact sufficient reason is to be found for holding that no conflict with s. 92 is involved.

By way of illustration it was said in argument that surely the freedom conferred by s. 92 creates no exemption from charges made for the use of airfields by aircraft operators who are compelled by law to use them, or from the toll which is charged to vehicular traffic using the Sydney Harbour bridge; and that as the landing grounds and the bridge are facilities provided for travel, and roads are also facilities provided for travel, the same conclusion should be reached in the case of charges for the use of the roads. But I do not think it is correct to say, as this argument assumes, that if charges for the use of airfields and the bridge are compatible with the freedom of inter-State travel the reason is that these things are facilities. In my opinion the reason must be that they are the property of the Commonwealth and the State respectively, and that there is nothing in s. 92 to preclude the Commonwealth and State legislatures from exercising a power to deny access to them, either altogether or in default of payment. The compulsion to use airfields for which payment is required must depend for its reconciliation with s. 92 upon the regulatory character of the law which creates it. No doubt the quantum of the charge to which the compulsion commits the aircraft operator is relevant in determining whether the law has that character, but the power to make the charge depends itself upon the existence in the charging authority of a power of exclusion. There is no compulsion to use the Sydney Harbour bridge, and from the time of its erection it has been kept by statute, the *Sydney Harbour Bridge (Administration) Act* 1932 (N.S.W.), in a special category as a self-contained income-producing asset of the Crown. There is in this fact, I think, a real point of distinction between, on the one hand, the Sydney Harbour bridge (and the few others to which in the past similar considerations have applied) and, on the other hand, the innumerable bridges and culverts which have been incorporated into the road system of the country and therefore are covered, just as surely as the rest of

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that system, by the freedom which s. 92 gives to inter-State trade, commerce, and intercourse " by means of internal carriage ".

I see nothing significant for present purposes in conceding to a road or to any other physical thing the character of a facility. If it is agreed that s. 92 precludes a State from relying upon the public ownership of roads as a ground for closing them to inter-State travellers, it can hardly be maintained that the section leaves room for a State, having put the roads into such condition as it sees fit, to rely upon their quality, or the desirability of maintaining their quality, as a ground for closing them to inter-State travellers. The truth, I think, is that what the Privy Council's decision in *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [*No.* 1] (1) denies in relation to the States is, not merely that ownership of the soil in roads enables a restriction to be placed upon their use without infringing s. 92, but that there is no consideration which can reconcile with s. 92 an attempt, otherwise than by way of true regulation, to exclude inter-State travellers either absolutely or conditionally from the use of a public road. The fact that a facility is provided by the roads was not overlooked by their Lordships. Reference was made in the judgment to the fact that the Chief Justice had not regarded the responsibility of the State for " the provision and maintenance of facilities for the carriage of goods and passengers by rail and road " as justifying the decisions in the *Transport Cases* in principle, but had regarded it as a distinguishing feature the recognition of which would confine the actual decision in *McCarter* v. *Brodie* (2) within limits which enabled him to accept it without its wider implications in other fields ; and their Lordships proceeded to reject even this view as being too limited. If the provision of the facility consisting of road surfaces will not sustain a simple closure of the roads to inter-State traffic, I do not understand how it can sustain a closure of them to inter-State traffic except upon terms of paying a sum of money. Toll bars on public roads have not been unknown, even in Australia ; but that a toll bar may be set up on a public road against (*inter alia*) inter-State traffic by the authority of a legislature which is constitutionally disabled both from closing the road to inter-State traffic and from taxing inter-State traffic, is a proposition which seems to me to be self-contradictory.

If you can impose a money charge upon a trader because of his use of the roads and still say that trade is free, I am completely unable to see why you cannot impose a charge for all the benefits

(1) (1955) A.C. 241 ; (1954) 93 C.L.R. 1.

(2) (1950) 80 C.L.R. 432.

provided by the State and utilized by the trader, and say that even so trade remains free. Yet no one ventures to go so far, for to do so would be to say that despite s. 92 inter-State trade may be directly taxed, and it would require no little hardihood to assert that " free " does not at least mean free from taxes upon the very activities which are the subject of the freedom. If the fact that the roads are a facility provided for travellers was not enough to distinguish the *Transport Cases* from other cases decided under s. 92, how can it be enough to distinguish a charge for the use of roads from other exactions, made by law in aid of public funds, which are not payments for particular services rendered to individual persons ? It may be said that it can be enough, provided that the charge is given a resemblance to payments for such particular services by being proportioned to the use actually made of the roads by the person who is made liable. This answer would seem to me to place too much weight upon a circumstance which only distinguishes one kind of tax from others. A charge for the use of roads, however careful may be the attempt to relate it to the actual use had, is really not, I think, in the same class as a charge for a specific service, such (for example) as a traveller may receive from a ferryman. The public roads are, in their nature, for the use of all and sundry, and are to be considered so for the purposes of s. 92, as the Privy Council has decided. They are part of the general equipment of the community ; and it seems to me that if you take the cost of providing something which is thrown open to general use by the public at large, and divide it up amongst those who in fact are found availing themselves of it, and then say that each apportioned part is the cost of a particular service, you obliterate the distinction between a general work of government and a particular service rendered to an individual. A general facility is not a lot of particular facilities, and a compulsory charge towards the cost of providing it appears to me to be indistinguishable from a tax. It is *a fortiori* where, the " facility " in question being a specially prepared road surface constructed by the State for such reasons as seem to it to be good (including, for example, reasons of defence), the person who is subjected to the charge uses it whether he wants it or not, for the simple reason that the only choice open to him is between using it and staying at home. But if it is not a tax it can only be explained, as I see the matter, as imposed in assertion of a power which would authorize a total exclusion from the roads of all those upon whom the charge is laid ; and to say that seems to me enough to condemn it under s. 92.

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I cannot help feeling that the "facility" aspect of the roads makes an appeal to a sense of fairness which has no relevance in the application of s. 92. Of course the roads cost a great deal to construct and to maintain, and, of course, heavy traffic and fast-moving traffic must be responsible for a substantial addition to the wear and tear upon them which would in any case be caused by the forces of nature and by lighter and slower traffic. If s. 92 provided only that inter-State trade, commerce, and intercourse should be free from unjust impositions and restrictions, or that the freedom it confers, whatever it be, might be had at a reasonable price, few would deny the abstract proposition (whatever difficulty might be experienced in trying to give it a satisfactory concrete application) that consistently with the section a charge for the use of the roads which was reasonable in fact, or perhaps reasonable in principle, might be exacted even from inter-State users. But unfairness quite clearly is not a necessary feature of the burdens from which the section creates immunity, and the relevant freedom is given, once for all, and not made available for purchase. The section is uncomprising in its decree, and its severe demand is not open to mitigation by reference to the just and equitable.

I should add a word as to the view to which I have come in regard to the much debated case of *Willard* v. *Rawson* (1). The judgments of *Evatt* and *McTiernan* JJ. must, I think, be put on one side as having proceeded upon a view of s. 92 which the more recent decisions of the Privy Council have made untenable. *Rich* J. directed his attention to the question whether the tax there in question (which he described as a fee upon registration) was a direct, immediate or intended burden upon inter-State trade, commerce, and intercourse as distinguished from one which was consequential, mediate or remote; and his answer that the burden was merely consequential was based upon the view that the tax was imposed, not upon trade, commerce, or intercourse as such, but upon motor vehicles. If his Honour had been willing to concede that, being a tax upon the *use* of motor vehicles on public streets, it was a burden imposed in reference to one of the essential characteristics of a form of inter-State intercourse, he must necessarily have given the opposite answer to the question. *Starke* J., after adverting to some considerations which he apparently regarded as tending in favour of the validity of the tax, adopted as "the real answer" the view that the requirement that fees be paid was attached as a reasonable adjunct to the main provisions of the Act, just as were (in his Honour's opinion) the registration and licensing

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

requirements, the main provisions being considered as directed to the protection of the State highways and those who used them. The licensing provisions have since been shown not to be of this character. The registration provisions are no doubt (in the main at least) consistent with s. 92 as being in aid of the regulation of the traffic, even in the narrowest sense of regulation. If the tax in question had been really a registration fee, in the sense of a payment for the work of officers of the State in putting the registration through, perhaps it would have been valid. But in fact it was of a totally different character; it was simply a tax upon a form of travel, the payment of it being made a condition precedent to the right to use the public streets. When this is acknowledged it becomes impossible, in my opinion, to withhold agreement with *Dixon* J.'s dissenting judgment.

The whole matter seems to me to come down to this. A State law imposing a compulsory levy upon an individual by reference to his use of something belonging to or provided by the State must necessarily depend upon the existence in the State legislature of one of two powers: either a power to exclude that individual from that use, or a power to tax him upon that use. That s. 92 prevents the taxation of inter-State trade, commerce, and intercourse, is obvious. That it prevents the exclusion of individuals from the use of the public roads in the course of inter-State trade, commerce, or intercourse, except by a law which is regulatory in the relevant sense of that word, the Privy Council has conclusively laid down. That the notion of regulation extends to the imposition of a pecuniary charge upon a class of individuals for using something from the use of which the legislature concerned has no power to exclude that class is a proposition for which I find no support, either in anything the Privy Council has said or in the conception itself as I understand it.

For the reasons I have endeavoured to state, I feel obliged to dissent from the view which appeals to a majority of the Court in regard to charges for the use of roads.

TAYLOR J. In this suit the plaintiffs, who are the owners of public motor vehicles which they operate exclusively for the purpose of carrying goods between capital cities in New South Wales and certain of the other States of the Commonwealth, seek declarations that the *State Transport (Co-ordination) Act* 1931-1954 is, or alternatively, that certain of its provisions are, beyond the powers of the Parliament of New South Wales. Additionally, the plaintiffs

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seek declarations that the *Motor Vehicles (Taxation) Act* 1951, and the *Motor Vehicles Taxation Management Act* 1949-1951, are invalid.

The suit is the immediate aftermath of the *State Transport (Co-ordination) Amendment Act* 1954, which was enacted to deal with the situation which arose after the declaration by the Judicial Committee of the Privy Council that those provisions of the *State Transport (Co-ordination) Act* 1931-1951 which required application to be made for a licence, and all provisions consequential thereon, were inapplicable to the appellant whilst operating its vehicles in the course of and for the purpose of inter-State trade, or to the vehicles while so operated. The method of amendment which was adopted by the New South Wales legislature was to make special provision for the case of persons and vehicles engaged in trade, commerce and intercourse among the States and to allow the existing legislation to continue to operate according to its tenor with respect to persons and public motor vehicles engaged in intra-State trade. Extensive references to the statutory provisions as they stood immediately before the amending Act are unnecessary for these are to be found in the report in this Court of *Hughes & Vale Pty. Ltd.* v. *State of New South Wales [No. 1]* (1) and also in the report of the proceedings before the Judicial Committee (2). It is not out of place, however, to commence consideration of this case with the following observations concerning the substance of the legislation as it stood when the last-mentioned decision was given and, indeed, as it still operates with respect to persons and vehicles engaged in intra-State trade.

(1) The *State Transport (Co-ordination) Act* 1931-1951 applied without distinction to persons engaged in the carriage of passengers or goods for hire by means of public motor vehicles as defined by that Act.

(2) With certain immaterial exceptions it was unlawful to operate a public motor vehicle for either of these purposes unless it was licensed under the Act.

(3) The Act provided that a licence for a public motor vehicle might authorize the vehicle for which it was granted to operate only upon specified routes or roads or within specified areas.

(4) Every licence issued under the Act was to be subject to the performance and observance by the licensee of all conditions specified in the licence.

(5) The licensing authority was empowered, in any licence for a public motor vehicle authorizing the holder to carry goods, to

(1) (1953) 87 C.L.R. 49.

(2) (1955) A.C. 241 ; (1954) 93 C.L.R. 1.

impose a condition that the licensee should pay such sums as should be ascertained as the licensing authority should determine. It was within the power of the licensing authority to determine that the sum of sums so to be paid might be differently ascertained in respect of different licences and might be ascertained on the basis of mileage travelled or in any other method or according to any other basis or system that might be prescribed by regulations made under the Act, provided however that the sum or sums should not exceed an amount calculated at the rate of threepence per ton or part thereof of the aggregate of the weight of the vehicle unladen and of the weight of loading the vehicle was capable of carrying for each mile or part thereof travelled by the vehicle.

(6) Provision was made for the establishment of a fund to be called the State Transport (Co-ordination) Fund into which all amounts payable to the licensing authority pursuant to the conditions of any licence should be paid. The licensing authority, with the approval of the Colonial Treasurer, was authorized to make from time to time any payments out of the fund to the Country Main Roads Fund, established under the *Main Roads Act* 1924-1950, the Government Railways Fund, established under the *Government Railways Act* 1912-1951, or to the general fund of any transport trust.

(7) The statute invested the licensing authority with the power, at its discretion, to grant or refuse any application for a licence.

As appears from these brief observations the licensing authority was invested with a wide and uncontrolled discretion. Applications for licences, whether in relation to the intra-State or inter-State carriage of goods, might have been rejected at the discretion of the licensing authority. Further, the power to determine what, if any, charges should be paid by a successful applicant was of such a nature as to permit of different charges being made to different licensees whether the goods were of the same character or not or to be carried over the same route or not. The admitted facts in *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [*No.* 1] (1) left little room for speculation as to the purpose for which these provisions had been designed and, what is more important, illustrated quite clearly the essential object of the legislation. In that case it was common ground that the discretionary licensing system and the wide power of determining what, if any, fees or charges should be paid by successful applicants for licences had been used directly to prevent or hinder competition with the New South Wales

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Government Railways in an attempt to " co-ordinate " or " rationalize " different forms of transport within the State. Licences known as " non-competitive " licences were issued which authorized the operation of specified public motor vehicles on or in routes, roads or areas within the State on journeys none of which, for a distance exceeding fifty miles, was competitive with the railways or tramways. In respect of any journey which was wholly or partly competitive with the railways or tramways the licensee was subjected to a condition that he should pay to the licensing authority for the full competitive distance threepence per ton, or part thereof, of the aggregate of the weight of the vehicle unladen and of the weight of loading the vehicle was capable of carrying for each and every mile or part thereof travelled by the specified vehicle along a public street. At a later stage some qualification of the latter condition was made and licences and permits were issued providing for differential rates of charges for goods of different descriptions. With respect to the carriage of certain classes of goods, permits were issued exempting the holder from payment of any charges under the Act. With respect to other classes road permits were issued on payment of charges as prescribed under the Act and, with respect to others, permits were declined " at times that rail trucks and other services were reasonably available ". These, among other circumstances, induced the Judicial Committee to observe, in the statement of the facts of the case, that in granting licences to the appellant under the provisions of the Act the authorities had imposed certain mileage charges and that " it is unnecessary to describe these charges in detail, but it is not in doubt that the object of these charges was to protect the railways in New South Wales from competition, as part of a system for ' co-ordinating transport ' " (1).

The decision of their Lordships is clear authority for the proposition that the licensing system which had been erected by the *State Transport (Co-ordination) Act* 1931-1951, invaded the " freedom " conferred by s. 92 of the Commonwealth Constitution on those persons engaged in the carriage of goods on journeys extending from a point in one State to a point in another and that the Act could not validly operate with respect to such persons or to vehicles so employed. Moreover, it is apparent that the right to impose charges upon persons so engaged in the manner indicated presented a further obstacle to the maintenance of the Act as a valid piece of legislation. Accordingly the purpose of the 1954 amending Act was to deal with the significant gaps produced by the declaration

(1) (1955) A.C., at pp. 247, 248; (1954) 93 C.L.R., at pp. 7-8.

that the provisions of the Act requiring application to be made for a licence, and all provisions consequential thereon, were inapplicable to the appellant while operating its vehicles in the course of and for the purpose of inter-State trade, or to the vehicles while so operated.

The *State Transport (Co-ordination) Amendment Act* 1954 attempted to deal with each of these problems. By s. 4 (2) (a) it was declared that for the purposes of the application of the Act to or in respect of any person operating or intending to operate a public motor vehicle in the course and for the purposes of inter-State trade, and to or in respect of a public motor vehicle so operated, the provisions of the Act should be deemed to be amended in the manner set out in the third schedule to the Act. Thereafter a third schedule, containing a number of amendments was introduced. The leading provisions of these amendments relate to the licensing of vehicles intended for " operation " in the inter-State carriage of goods, to the determination and recovery from licensees of charges or fees in respect of the operation of such vehicles and to the appropriation of the revenue resulting from the imposition and collection of such charges. The terms of the relevant provisions of the Act in its amended form are of such importance in the case that I have set them out hereunder :

" 14. (1) Every person desiring to operate a public motor vehicle shall in addition to any license or registration which by law he is required to hold or effect, apply to the board or to the prescribed person or authority for a license for such vehicle under this Act. (2) The application for a license shall be made in the prescribed form and manner and shall contain the following particulars :— (a) the route or routes upon which it is intended that the vehicle sought to be licensed shall operate ; (b) a description of the vehicle in respect of which the application is made ; (c) the number of passengers or maximum weight of goods proposed to be carried on such vehicle ; (d) particulars of the registration of such vehicle under the *Motor Traffic Act* 1909-1930, and the *Transport Act* 1930, or in the case of an aircraft, particulars of the certificate of registration and the certificate of airworthiness issued under the Air Navigation Regulations ; (e) particulars of any license issued in respect of such vehicle under the *Local Government Act* 1919, or the ordinances thereunder ; (f) such other particulars as are prescribed.

15. (1) A license for a public motor vehicle other than an aircraft may authorise the vehicle for which it is granted to operate only upon the routes or roads specified in the license or only within any area or district therein specified or referred to or may authorise

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the vehicle for which it is granted to operate on any route or road or within any area or district other than the route, road, area, or district, if any, specified or referred to in the license.

17. (1) Every license under this Act shall be subject to the performance and observance by the licensee of the provisions of this Act and the regulations that may relate to the license or to the public motor vehicle in respect of which it is issued, and of the provisions contained in or attaching to the license, and all such provisions shall be conditions of the license. (2) The Commissioner for Motor Transport may determine what terms and conditions (being terms and conditions of a regulatory character) shall be applicable to or with respect to a license, including the use of such motor vehicle as to whether passengers only or goods only or goods of a specified class or description only shall be thereby conveyed and as to the circumstances in which and the days and times on which such conveyance may be made or may not be made (including the limiting of the number of passengers or the quantity, weight or bulk of the goods that may be carried on the vehicle).

(3) In dealing with an application for a license the Commissioner for Motor Transport shall have regard to—(a) the suitability of the route or road on which a service may be provided under the license; (b) the condition and suitability of the roads to be traversed with regard to their capacity to carry proposed public vehicular traffic—(i) without unreasonable damage to such roads; or (ii) without creating or intensifying conditions endangering the safety of persons or vehicles using such roads; or (iii) without creating or intensifying conditions which interfere with the reasonable use of such roads by other traffic; (c) the character, suitability and fitness of the applicant to hold the license applied for; (d) the construction and equipment of the vehicle and its fitness and suitability for a license: Provided that a registration of the motor vehicle under any other Act of the State may be accepted as sufficient evidence of fitness and suitability of the vehicle.

(4) The Commissioner for Motor Transport may refuse the application if satisfied that—(a) the applicant is not a fit and proper person to hold the license; or (b) the vehicle is not properly constructed or adequately equipped or is otherwise unfit or unsuitable for the license; or (c) the operation of the vehicle, if the license were granted, would create or intensify conditions giving rise to—(i) unreasonable damage to the roads; or (ii) danger to persons or vehicles using the roads; or (iii) unreasonable interference with other traffic on the roads. (4A) Except as provided

in subsection four of this section the Commissioner for Motor Transport shall grant the application.

18. (4) Every license for a public motor vehicle issued under this Act shall, after the first determination, by the commissioner for Motor Transport of the rate or scale of rates of charge has been notified pursuant to subsection (5F) of this section, be subject to a condition that the holder shall in respect of each journey pay to the Commissioner for Motor Transport a reasonable charge for the use by the vehicle of public streets over which it travels on such journey and for an appropriate part of the cost of administration of this Act. (5) The amount payable in respect of such charge for any journey shall be assessed on the rate or scale of rates of charge hereinafter referred to and the amount so assessed shall be paid by the holder of the license before the commencement of the journey and the Commissioner for Motor Transport shall on payment thereof issue to the holder a receipt containing particulars of the journey and the charge paid. (5A) The rate or scale of rates of charge shall be applied equally to all persons in respect of all public motor vehicles of the same description or weight passing over the same route and under the same circumstances: Provided however that—(a) no such charge shall be payable when public motor vehicles of the same description or weight engaged in intra-State trade and passing over the same route and under the same circumstances are not subject to charges imposed pursuant to subsection four or subsection five of section eighteen of this Act (the amendments thereto effected by the *State Transport (Co-ordination) Amendment Act* 1954, being disregarded), and (b) in no case shall such charge exceed the charge imposed under or by virtue of any condition imposed pursuant to subsection four or subsection five of section eighteen of this Act (the amendments thereto effected by the *State Transport (Co-ordination) Amendment Act* 1954, being disregarded) in respect of public motor vehicles engaged in intra-State trade over the same route and under the same circumstances. (5B) The rate or a scale of rates of charge shall be determined from time to time by the Commissioner for Motor Transport. The first determination shall be made as soon as practicable after the commencement of this subsection and a determination shall be made in each subsequent period of twelve months. The rate or scale of rates of charge so determined may be on the basis of a mileage rate varying with the description or weight of the vehicle and such weight may be calculated either on the basis of the laden or unladen weight of the vehicle.

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Before making any determination of the rate or scale of rates of charge the Commissioner for Motor Transport shall take into account the recommendation of the Advisory Committee referred to in subsection (5c) of this section and the rate or scale of rates of charge so determined shall not exceed the respective rate or scale of rates of charge recommended by the Advisory Committee. (5c) There shall be an Advisory Committee consisting of the Commissioner for Motor Transport, the Commissioner for Main Roads, and the Under Secretary, the Treasury.

Where a member is unable to attend any meeting of the Advisory Committee he may appoint an officer of his Department to attend in his place, and the officer so appointed shall have all the powers and authorities of a member.

(5d) The Advisory Committee shall before making a recommendation give public notice of its intention so to do and shall fix a date before which any persons interested, including representative associations of operators of public motor vehicles, may make representations in writing to the Advisory Committee. The Advisory Committee shall not be bounded by legal forms and procedures and may inform itself in such manner as it thinks fit but before making a recommendation it shall consider all written representations which may be made to it as aforesaid. (5e) The Advisory Committee in making its recommendation and the Commissioner for Motor Transport in making his determination of the rate or scale of rates of charge shall have regard to all relevant matters including the cost of construction and maintenance of roads, the depreciation and obsolescence of roads, the necessity or desirability for the widening or reconstruction of roads, the wear and tear caused by vehicles of different weights, types, sizes and speeds, the moneys available for the purpose of construction, maintenance, widening and reconstruction of roads from sources other than charges imposed pursuant to subsection four of this section, and the amount expended or proposed to be expended from the Country Main Roads Fund established under the *Main Roads Act* 1924-1954. (5f) The rate or scale of rates of charge when determined by the Commissioner for Motor Transport shall be notified in the *Gazette*.

The rate or scale of rates of charge so notified shall be adopted as the basis for calculating amounts under subsection four of this section until varied by a subsequent notification.

26. (1) There shall be kept in the Treasury a fund to be called the State Transport (Co-ordination) Fund. (2) There shall be placed to the credit of the said fund any moneys appropriated by

Parliament for the purposes of this Act, and the moneys directed by this or any other Act to be paid into such fund. (3) All moneys in the fund shall be vested in and expended by the board in accordance with this or any other Act. (4) The provisions of the *Audit Act* 1902, as amended by subsequent Acts shall, with such modifications as may be made by regulations under this Act, apply to the fund and to the board and to all officers. (5) Out of the said fund there shall be paid the salaries and other costs of the administration of this Act, including any contribution under any Act in respect of superannuation of any commissioner or officer. (6) Any moneys in the fund which are the proceeds of charges paid pursuant to subsection four of section eighteen or section twenty-two of this Act shall, subject to subsection five of this section, be applied in making payments to the Country Main Roads Fund established under the *Main Roads Act* 1924-1954, and for no other purpose. (7A) Whenever any amount is paid to the Country Main Roads Fund established under the *Main Roads Act* 1924-1954, pursuant to this section, as amended in the manner set forth in the Third Schedule to this Act, the Commissioner for Motor Transport shall, subject to subsection five of this section, also pay the prescribed amount to that Fund out of the moneys in the State Transport (Co-ordination) Fund that are not the proceeds of charges paid pursuant to subsection four of section eighteen as amended in the manner set forth in that schedule.

The prescribed amount shall be an amount equivalent to that which would have been payable in respect of motor vehicles engaged in intra-State trade had the rate or scale of rates of charge determined in respect of motor vehicles engaged in inter-State trade been applicable to motor vehicles engaged in intra-State trade."

It is perhaps convenient at this stage to remark that it is an offence for a person to " operate " a public motor vehicle in the course and for the purposes of inter-State trade unless the vehicle is licensed under the Act and unless such person is the holder of a licence. " Operate " is defined to mean " carry or offer to carry passengers or goods for hire or for any consideration or in the course of any trade or business whatsoever ".

It will be observed from a perusal of the new legislation that its terms, in form at least, purport to confine the discretion of the licensing authority within specified limits. Under the Act as amended the commissioner may refuse an application for a licence only if he is satisfied of some one or more of the matters specified in sub-s. (4) of s. 17. But by virtue of sub-s. (1) of that section every licence under the Act is subject to the performance and

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observance by the licensee of the conditions of his licence. These conditions may be such as are determined by the commissioner and may, *inter alia*, limit the use of the vehicle to the carriage of passengers only, or goods only, or to the carriage of goods of a specified class or description only, or may relate to " the circumstances in which and the days and times on which " goods and passengers may be conveyed. Again, every licence for a public motor vehicle issued under the Act is subject to a condition that the holder shall in respect of each journey pay to the commissioner " a reasonable charge " for the use by the vehicle of public streets over which it travels on such journey and for an appropriate part of the cost of administration of the Act (s. 18 (4)). The expression " reasonable charge ", in this context, raises difficulties of its own and these are by no means resolved by a consideration of the succeeding subsections which provide the method whereby a rate or scale of charges is to be fixed. In particular it should be observed that the rate or scale of charges is ultimately to be determined by the commissioner though they are not to exceed the respective " rate or scale of rates of charge " recommended by an advisory committee consisting of the commissioner, the Commissioner for Main Roads and the Under-Secretary of the Treasury. Nor in the case of any particular licensee is any charge actually made to exceed the charge payable " in respect of public motor vehicles engaged in intra-State trade over the same route and under the same circumstances ". No charge at all is payable by any such licensee when public motor vehicles of the same description or weight engaged in intra-State trade and passing over the same route and under the same circumstances are not subject to charges under the Act in its unamended form. No doubt the latter provisions were introduced to avoid any suggestion that the effect of the amending Act was to subject inter-State trade to any burden over and above that imposed upon intra-State traffic, but the immediate result is that if the " reasonable charge " determined by the commissioner should equal or exceed the maximum charges imposed in relation to intra-State traffic, inter-State traffic will find itself, with respect to charges, in precisely the same position as if the old Act applied to it. Licensees would incur the same charges when competing with the railways—and these might vary in amount according to the class or description of goods carried—and would be free of them when engaged in " non-competitive " journeys. This circumstance adds greatly to the initial difficulty in understanding the use of the expression " reasonable charge " in this context.

Consideration of sub-s. (5E) of s. 18, which specifies particular matters to which, in addition to " all relevant matters ", the advisory committee is to have regard in making its recommendation is of no assistance to the defendants' case. Indeed, whilst the sub-section specifies some matters which may possibly be thought to be relevant to a determination of what may be called a reasonable charge for the use of public roads, an examination of its terms as a whole is sufficient to dispose of the notion that every or, indeed, any recommended rate or scale of rates of charges would necessarily conform to any concept of a reasonable charge for such a user. A great deal of criticism concerning the matters to be taken into consideration and the generality with which they are expressed might be advanced, but it is sufficient perhaps to point to the fact that one of the specified factors is " the moneys available for the purpose of construction, maintenance, widening and reconstruction of roads from sources other than charges imposed pursuant to sub-section (4) of this section, and the amount expended or proposed to be expended from the Country Main Roads Fund established under the *Main Roads Act* 1924-1954 ". What will be available for expenditure from that fund will, in some measure at least, depend upon the charges imposed upon intra-State traffic under s. 18 of the Act in its unamended form and upon the extent to which those charges, when received, are or will be, in the discretion of the commissioner, paid to that fund rather than to any of the other funds or bodies to which, pursuant to that section, payments may be made. A result of taking into consideration the factor in question may well be to burden inter-State traffic, or some part only of it, with a proportion of costs to which some intra-State users and, indeed, all road users not engaged in the carriage of passengers or goods, make no contribution at all pursuant to the *State Transport (Co-ordination) Act*. In these circumstances I feel that adherence to the directions contained in sub-s. (5E) cannot fail to produce anything but a recommendation of an " unreasonable " scale of charges, for, although it may, perhaps, be said that it is possible to fix a reasonable rate for A and yet charge B less and C nothing at all, how can the rate fixed for A be regarded as a " reasonable " charge for the use of the roads when one of the factors taken into consideration in fixing that rate is the amount available for the purposes of road construction and maintenance, and B, because he is carrying goods of a class or description which the railways do not particularly wish to carry, makes but a small contribution for that purpose, and C, because he is not in competition with the railways at all makes no contribution, whilst charges paid by other

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operators in intra-State trade may have been substantially devoted to other purposes ? The distortion which such a factor must produce if it is employed to assist in determining what is a " reasonable " charge for the use by any vehicle of the public streets over which it travels on any particular journey is further emphasized when it is remembered that vehicles engaged in inter-State transport use but a comparatively small proportion of the thousands of miles of public roads in the State and the section requires the charge to be assessed having regard to the funds available for the construction and maintenance of roads generally. It is, I think, unnecessary to elaborate on the other objectionable features of the sub-section, but I cannot fail to observe that the direction to the committee to have regard " to all relevant matters " must itself present a major difficulty in the way of the defendants. This particular direction, in effect, leaves the committee free to form their own opinion as to what are " relevant matters " and entirely precludes this Court from examining the ambit of the discretion which is given to the committee in recommending such charges.

The foregoing observations are sufficient to show that even if the contention that a State may make " reasonable charges " for the use of its roads by vehicles engaged in trade commerce and intercourse among the States be accepted, it would not sustain the provisions of the Act under attack. But in view of the fact that there is also a challenge to the *Motor Vehicles (Taxation) Act* 1951 and the *Motor Vehicles Taxation Management Act* 1949-1951 and also to the somewhat different transport legislation of other States, it is desirable that the broad contention should be further examined before proceeding to a consideration of the effect of the decision, previously referred to, of the Judicial Committee. I should observe, however, that this somewhat lengthy discussion on this point tends to obscure the other objections raised in support of the contention that the *State Transport (Co-ordination) Act* 1931-1954 is invalid and to these a further reference will be made.

The contention that such charges may be imposed by law as a condition of the use of public roads by vehicles engaged in inter-State trade and commerce, primarily, treats the public roads of the State as State-owned facilities which may be made available or withheld at pleasure and then proceeds to assert that, in these circumstances, the levying of a " reasonable charge " as a condition precedent to their use is quite consistent with the provisions of s. 92. There is, in my view, considerable confusion in this contention. If the public roads of the State should be regarded, exclusively, as State-owned and State-provided facilities which may be made

available or withheld at will then it would, I should think, be within the competence of the State to make charges for their use and it might matter little whether the charges made for their use were reasonable or unreasonable. But such a conception in relation to the use of public roads by inter-State transport appears to me to be fundamentally opposed to the stipulation that " trade commerce and intercourse among the States, *whether by way of internal carriage* or ocean navigation, shall be absolutely free ". The plain fact is that the public roads of the State are not facilities the use of which may be withheld at will—or except upon payment of a charge to be assessed at the discretion of a licensing authority—without impairing the freedom of inter-State trade of the character under consideration. If this be so then what virtue is achieved by limiting the charges which are sought to be levied to those which are said to be " reasonable " ? By whatever name the charge is designated it remains in essence a tax payable for the use of the roads and, by the legislation in question, it is imposed as a condition precedent to the use of the roads by vehicles engaged in inter-State trade and commerce. To succeed in establishing that the direct imposition of such a charge on inter-State trade does not impair the freedom guaranteed by s. 92 it would be necessary for the defendants to maintain successfully that, consistently with that freedom, inter-State trade may be directly subjected to imposts and taxes as long as they are " reasonable ". Such a proposition is, of course, untenable. In passing I should observe that even if this were not so an examination of the terms of s. 18 makes it abundantly clear that the word " reasonable " appearing in sub-s. (4) thereof is nothing more or less than an ineffective tag. The charges which a licensee will become bound to pay will be those determined from time to time by the commissioner after consideration of the recommendation of the advisory committee. This is, I think, the obvious effect of the statutory provisions in spite of the contention advanced by the defendants that the question whether any charge so determined is unreasonable may always be litigated by a dissatisfied licensee.

The contention that the State may lawfully make such charges was, however, put in what, apparently, was thought to be an alternative form. It was suggested that the operators of public vehicles engaged exclusively in inter-State trade may, consistently with s. 92, be required to make some special contribution to the expenditure necessarily involved in the construction and maintenance, or, in the maintenance, of such roads. The imposition of such a liability, to the extent of what is termed reasonable compensation

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for excessive wear and tear or excessive damage to roads by heavy traffic, would not, it is said, impair the freedom guaranteed by s. 92. The imposition of such a liability, it is contended, would not impair that freedom for to deny the State the right to make such charges would place inter-State transport operators in a specially privileged position and go much further than merely preserve their constitutional freedom. The basis of the contention, however, that the imposition of such charges would not constitute an unlawful burden upon inter-State trade really rests upon the circumstance that the State has adopted the policy of raising, at least, some portion of its revenue for the purpose of road construction and maintenance by means of special imposts upon those, or some of those, who operate vehicles on the public roads. From this state of affairs is derived the conception that those upon whom the imposts fall are merely paying, in some measure, for facilities provided for and made available to them by the State. Accordingly, it is contended, such imposts, when levied as a condition of the use of the roads by the operators of vehicles engaged in inter-State trade, are merely charges for facilities provided and, since those operators receive money's worth in return for payment of the charges, they are not subjected to any unconstitutional burden. The fallacy of this line of reasoning is, I think, made clear by a brief reference to the manner in which the public revenues of the State may be raised. The expense of undertaking such maintenance of the public roads as is undertaken is ultimately a charge on the public revenues of the State and, subject to any relevant constitutional limitation or prohibition, the State may raise its revenues as it wishes. It may impose special taxes to meet particular classes of expenditure and the incidence of those taxes may fall on particular persons or groups of persons. It may, for instance, impose a special tax on those who use the State railway system to assist in meeting the working costs of that system. Or, on the other hand, it may impose taxes for that purpose on the residents of areas served by the railway system or, indeed, it may impose special taxes for this purpose in any one of a great variety of ways. Again, the expenditure involved in the construction or maintenance of public roads may be provided for by special taxes on those who operate vehicles upon the roads, or on other classes of persons who are thought to obtain special benefits from their use, or, on the other hand, by a specific appropriation from a tax for general purposes levied throughout the State. Now, if the latter course were adopted, a requirement that operators of vehicles coming into the State from other States should, *as a condition precedent to the continuance of their*

inter-State journeys, pay a special tax by way of contribution to the expense of road construction or maintenance would clearly appear as an infringement of s. 92. Such an impost would strike at the very heart of s. 92. But, as a matter of government policy, it has been the practice to impose special charges or taxes for the use of vehicles on the public roads of the State and that circumstance is seized upon to found the contention that the imposition of charges of a similar nature on inter-State road traffic, provided that such charges are reasonable, or compensatory only, does not constitute any real burden on inter-State trade and therefore is compatible with s. 92. As I have already indicated I have great difficulty in giving any real meaning to the words " reasonable " and " compensatory " in this contention, or in understanding why, if the State may lawfully levy charges or taxes of this nature, its authority should, or ought to be, restricted by either of these conceptions. It is clear, of course, that the State may raise its revenues by the imposition of taxes for either general or special purposes, and it may levy such taxes generally throughout the State or upon or in relation to such particular persons or classes of persons as it designates. Its revenue, however raised, will be expended on the public purposes of the State and taxpayers from whom it has been raised may always, broadly, be said to have made a payment for services or facilities received, or to be received, or for the carrying out of public works which they, as members of the community, or of some special class, enjoy or will enjoy. Perhaps this conception is more readily recognizable when a tax is levied for a special purpose upon those persons whose special benefit it is thought the purpose will serve. But whatever course is adopted the power to levy imposts or taxes is subject to the constitutional limitation which arises from the terms of s. 92 and it seems clear to me that any impost or tax, or so-called charge, whether levied upon a limited class for special purposes or by way of contribution to a tax for general purposes, which is made payable as a condition of engaging in or carrying on inter-State trade, must offend against s. 92.

There is, however, one observation which I wish to make and which may perhaps be regarded as, though I do not see it as, a qualification of this view. I should have thought that it is competent for a State to exclude from its roads those vehicles which, by reason of their weight or construction, are calculated to work such destruction to the roads that they ought not to be there at all. To prohibit the operation of such vehicles on the roads would not be to prohibit the owner thereof from engaging in inter-State trade, but merely from engaging in that class of trade with a vehicle

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of that character. Cases in which vehicles may be excluded altogether from the roads may, perhaps, arise only on rare occasions, though it is possible that the use of a vehicle may, for special reasons, be prohibited on some particular roads though not on others. The concluding observation which I wish to make concerns vehicles which may find their way into one of these categories for, it seems to me, if it be permissible to prohibit the use of such vehicles then the prohibition may lawfully be relaxed upon terms. That is to say, I see no reason why in such cases payment of a stipulated charge should not be made a condition of the relaxation of the prohibition. But I am unable to perceive that, in any other circumstance, charges may legitimately be levied in respect of vehicles engaged in inter-State trade.

I should, perhaps, add before concluding the discussion on this point that the general notion that the public roads of the State constitute facilities provided exclusively by the State for the vehicles which use them presents a quite incomplete conception of the part that the construction and maintenance of such roads play in the life of the State. As was pressed upon us by the defendants there is, of course, considerable truth in the view that persons engaged in commercial transport operations make a special use of them, but they do so only as instruments by which the needs of the community are served. The work of constructing and maintaining public roads is essential to the development of the country generally and in the wider—and very real—sense those works are undertaken for the benefit and use of the community generally.

With these observations in mind it is convenient to consider the effect of the decision of the Judicial Committee. In the first place it affirmed the proposition that regulation of trade, commerce and intercourse among the States is compatible with its absolute freedom. But this statement of principle immediately raises the problem of what is meant by the expression " regulation " for used in this context it can be understood only as a convenient word to describe that form of direction or control of physical operations which, though operating directly upon inter-State trade, yet leaves it, in the language of s. 92, absolutely free. Practical considerations suggest many rules of conduct which may properly be regarded as regulatory in this sense, but the same considerations also disclose the impossibility of formulating any general criterion fixing the boundary line in all cases between what is and what is not " regulation ". But, as at present advised, there is, I should think, one common feature in all so-called regulatory rules. They do not purport to control or regulate inter-State trade or commerce

as such; on the contrary they relate to some activity by means of which the particular form of inter-State trade under consideration is carried on. In the present case the particular activity involved is the operation of motor vehicles in the course of that trade and many examples are to be found of rules which may properly be regarded as regulatory of such an activity. A number are to be found in the passage in the reasons of *Fullagar* J. in *McCarter* v. *Brodie* (1) which was quoted by their Lordships of the Judicial Committee (2). In general, these examples relate to the regulation of vehicular traffic on the roads in the strictest sense. But, in addition to rules of this kind, the Judicial Committee observed that: "Their Lordships can imagine circumstances in which it might be necessary, e.g. on grounds of public safety, to limit the number of vehicles or the number of vehicles of certain types in certain localities or over certain routes, with the result that some applicants might be unable to obtain licences" (3). The examples given by *Fullagar* J. in *McCarter* v. *Brodie* (1), are readily recognizable as examples of restrictions which leave the absolute freedom of trade and commerce unimpaired whether they be regarded as rules relating to the use of the highways generally or to their use by any particular person. Alone they do not exclude any person from the use of the highways. Of the same type are rules which prescribe minimum conditions of roadworthiness for vehicles the owners of which desire to use them upon the roads. Such rules may directly result in the imposition of a conditional prohibition upon particular individuals, yet, nevertheless, may be regarded as "regulatory". Features of another kind arise when a third class of rules comes to be considered. Practical considerations suggest that rules prescribing, for instance, that only persons holding certificates of competency shall pilot aeroplanes cannot be regarded as an infringement of the freedom guaranteed by s. 92. Rules forbidding unqualified persons from driving motor vehicles on a public highway give rise to similar considerations, but they may well result in the exclusion of individuals from particular forms of inter-State trade and commerce among the States. Yet, nevertheless, such rules do not invade the individual freedom guaranteed by s. 92. This same class of rules may deal with circumstances such as age or mental capacity and may, in some instances, result in the imposition of a prohibition which is permanent and cannot be overcome by the

(1) (1950) 80 C.L.R., at pp. 495, 496.
(2) (1955) A.C., at p. 297; (1954) 93 C.L.R., at p. 24.
(3) (1955) A.C., at pp. 306, 307; (1954) 93 C.L.R., at pp. 32-33.

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attainment of a prescribed standard of proficiency or capacity. Yet, again, practical considerations make it clear that such rules do not impair the freedom of any individual. In each of these classes of rules there is a common feature. They spring from considerations directly concerned with the safety of traffic on the roads and their object is sought to be achieved by the regulation of the conduct of individuals in relation to an activity which may, in some circumstances, constitute an essential element in the carrying on of trade and commerce among the States. Such rules may, of course, result in partial prohibition or prohibition *sub modo*. But although the further class of rules envisaged as a possibility by the Judicial Committee, put as it is on grounds of public safety, appears to spring from the considerations upon which traffic rules generally are based the formulation of rules in this category would, or at least might, give rise to very different results. The same reasons may be thought to lead both to the exclusion from road traffic of a mechanically dangerous vehicle and to the prescription of a limit on the number of vehicles which may be used on any particular road or roads. But the owner of a dangerous vehicle may equip himself with a roadworthy vehicle and, subject to doing this, be free to engage in inter-State trade. On the other hand, the owner of a roadworthy vehicle may, under a rule of the latter class, be excluded indefinitely from inter-State trade simply because existing road users are already operating a specified number of vehicles over portions of an inter-State route or routes. Indeed, a rule of that class might well operate to exclude entirely from the roads of one State motor traffic originating in another State, or, under the legislation under review in this case, in the exclusion from inter-State trade of all vehicles registered in New South Wales in the interests of the operators of motor vehicles engaged in intra-State trade in New South Wales. And, indeed, this might be done notwithstanding the fact that any number of vehicles may use the roads so long as they do not engage in the carriage of goods or passengers.

It is, I should think, possible now to say that the vital provisions of the Act under review go far beyond any conception of what may properly be regarded as "regulation" of the traffic concerned. In the first place s. 17 (2), in spite of the words contained in parenthesis, purports to authorize the imposition of conditions which travel far beyond this limit. Such conditions may include conditions limiting the use of the licensed vehicle for the carriage of goods of a specified class or description or concerning the circumstances in which goods and passengers may be conveyed. These provisions

purport to authorize the imposition of conditions which, for purposes quite unrelated to the regulation of traffic as such, would, at the discretion of the commissioner, substantially exclude licensees from inter-State trade and commerce. Secondly, the grounds upon which the commissioner may refuse an application for a licence clearly indicate that sub-s. (4) of s. 17 may operate far beyond the bounds of " regulation ". If the commissioner is satisfied that the applicant is not a fit and proper person to hold a licence he may refuse the application. This means no more and no less than that the application may be refused if the commissioner is satisfied that the applicant is not a fit and proper person to engage in such trade. I confess that even if I were able to comprehend the qualities which constitute fitness or propriety in this connection I would still be unable to see how such a provision could ever be relevant to the regulation of motor traffic on public roads or how it could be said to leave unimpaired the freedom guaranteed by s. 92. Moreover, other grounds of refusal, namely, that the operation of the vehicle would create or intensify conditions giving rise to unreasonable damage to the roads or danger to persons or vehicles using the roads or unreasonable interference with other traffic on the roads, are expressed in terms so wide as to include matters not relevant to the regulation of motor traffic on the roads. Although these provisions may in some respects be based upon conceptions of public safety, they fail to define with any degree of precision the limits of the commissioner's discretion and it is, therefore, impossible for this Court, on any view of the matter, to say that his discretion is appropriately confined. Much of the language employed represents an unfortunate choice if it was intended so to confine the commissioner's discretion for it is obvious that, although their Lordships of the Judicial Committee were able to imagine circumstances in which it might be necessary to limit the number of vehicles or the number of vehicles of certain types in certain localities or over certain routes, those circumstances by no means exist simply where " the operation of the vehicle would create or intensify conditions giving rise to unreasonable damage to the roads or damage to persons or vehicles using the roads or unreasonable interference with other traffic on the roads ".

Finally, the provisions of the Act which purport to impose charges as a condition of the use of vehicles " in the course of and for the purposes of inter-State trade " are, for reasons which are apparent from what has already been said, clearly invalid. In the result, therefore, I am of the opinion that the licensing system erected by the Act of 1954 is one which, at every point, infringes

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s. 92, and the provisions of s. 3 (2) are incapable of saving any part of the legislation upon which it depends.

Much of what I have already said concerning the authority of the State to impose charges for the use of public roads applies with equal force in considering the *Motor Vehicles (Taxation) Act* 1951 and the *Motor Vehicles Taxation Management Act* 1949-1951 and were it not for the decision in *Willard* v. *Rawson* (1) it would have been sufficient to dispose of this aspect of the matter by saying that it follows that those Acts cannot validly operate with respect to vehicles engaged *exclusively* in inter-State trade and commerce. But by the decision referred to the validity of a Victorian statute—the *Motor Car Act* 1928-1930—in terms not essentially dissimilar to those of the *Motor Vehicles (Taxation) Act*, was affirmed. In general, however, the reasons of the majority of the Court in that case, which were analyzed by *Dixon* J. (as he then was) in *R.* v. *Vizzard*; *Ex parte Hill* (2), are now, at least, of doubtful validity. Their Lordships of the Judicial Committee were not invited to review *Willard* v. *Rawson* (1) in *Hughes & Vale Pty. Ltd.* v. *State of New South Wales [No. 1]* (3) but it is clear from their later observations in that case that they were of the opinion that the conception that the railways and roads formed facilities for the carriage of goods *for the provision and maintenance of which the State is responsible* was not a factor capable of limiting the application of the principles laid down in *McCarter* v. *Brodie* (4) to cases of inter-State transport. I take this to mean that the conception is inadequate to justify the creation of a power, exercisable at the discretion of a licensing authority, to deny the use of the public roads of the State to the operator of a motor vehicle engaged in inter-State trade. If this be so, it is also inadequate to justify a power to deny the use of such roads in the case of such a vehicle except subject to the payment of an impost prescribed by the legislature. The prohibition upon the use of the roads by inter-State operators which is the result of the Acts under consideration in this case must now be taken to be direct and immediate, notwithstanding the view entertained by *Rich* J. in *Willard* v. *Rawson* (1) that the burden imposed by the Act under consideration in that case was "consequential, mediate or indirect, and not . . . a direct, immediate or intended burden or restraint imposed upon trade, commerce or intercourse among the States" (5). The conditional prohibition on the use of the roads which that Act erected

(1) (1933) 48 C.L.R. 316.
(2) (1933) 50 C.L.R., at pp. 67-71.
(3) (1955) A.C., at p. 283; (1954) 93 C.L.R., at p. 10.
(4) (1950) 80 C.L.R. 432.
(5) (1933) 48 C.L.R., at p. 324.

may not have been thought to have been devised with the intention of impeding or burdening trade and commerce among the States, but the Act directly operated to prohibit the movement of such vehicles in the course of inter-State trade and permitted it only upon payment of the charges imposed. The view entertained by *Starke* J. that the charges imposed could properly be regarded as " a reasonable adjunct to the main provisions of the Acts " (1) and that they took the colour or character of registration or licence fees from these provisions was not entirely shared by the rest of the Court and is not open in this case. The *Motor Vehicles (Taxation) Act* 1951 is expressed to be " An Act to impose certain taxation upon motor vehicles, tractors and trailers " and expressly imposes a motor vehicle tax in accordance with the scheduled rates. But even if the imposts were not expressly declared to be taxes there can be no doubt upon a consideration of the imposts themselves and the circumstances of their imposition that this is their true character. The ground upon which *Evatt* J. considered that the Act should be upheld is no longer of any validity (2). I do not understand the observations of *Fullagar* J. in *McCarter* v. *Brodie* (3) as giving approval, as was suggested in argument, to the reasoning in *Willard* v. *Rawson* (4). Rather they indicate that, upon the views taken in that case of the character and effect of the Act in question, the decision was by no means an obstacle to the opinions formed and expressed by him concerning the Victorian *Transport Regulation Act*. Nor do I think that the adoption by the Judicial Committee of certain observations of the same learned Justice in *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [*No.* 1] (5)—containing as they do statements concerning the authority of a State or of the Commonwealth to make a charge for the use of " trading facilities ", such as bridges and aerodromes—carries with it any suggestion that charges of any kind may, consistently with s. 92, be made for the use of public roads by vehicles engaged in inter-State trade.

For the reasons given I agree with the order proposed by the Chief Justice.

June 9.

Plaintiffs' demurrer to the defence allowed. Judgment in the suit entered for the plaintiffs with costs. Declare that s. 3 (3) *and the Third Schedule of the State Transport (Co-ordination) Amendment Act* 1954 (*No.* 48 *of* 1954) (*N.S.W.*) *is invalid. Declare that the Motor Vehicles*

(1) (1933) 48 C.L.R., at p. 328.
(2) (1933) 48 C.L.R., at p. 337.
(3) (1950) 80 C.L.R. at p. 500.
(4) (1933) 48 C.L.R. 316.
(5) (1955) A.C., at pp. 298, 299; (1954) 93 C.L.R., at pp. 25, 26.

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Taxation Management Act 1949-1951 (*N.S.W.*) *and the Motor Vehicles* (*Taxation*) *Act* 1951 (*N.S.W.*) *cannot validly apply in respect of vehicles used exclusively in or for the purpose of inter-State trade commerce or intercourse.*

Solicitors for the plaintiffs, *Higgins, de Greenlaw & Co.*, Sydney, by *Henderson & Ball.*

Solicitor for the defendants, *F. P. McRae*, Crown Solicitor for the State of New South Wales, by *Thomas F. Mornane*, Crown Solicitor for the State of Victoria.

Solicitor for the State of Victoria intervening, *Thomas F. Mornane*, Crown Solicitor for the State of Victoria.

Solicitor for the State of Queensland intervening, *H. T. O'Driscoll*, Crown Solicitor for the State of Queensland, by *Thomas F. Mornane*, Crown Solicitor for the State of Victoria.

Solicitor for the State of Western Australia intervening, *R. V. Nevile*, Crown Solicitor for the State of Western Australia, by *Thomas F. Mornane*, Crown Solicitor for the State of Victoria.

R. D. B.