[HIGH COURT OF AUSTRALIA.]

DUNCAN . . . . . APPELLANT;
DEFENDANT,

AND

VIZZARD . . . . . RESPONDENT.
INFORMANT,

GREEN STAR TRADING COMPANY PROPRIETARY LIMITED . . . . . } APPELLANT;
DEFENDANT,

AND

VIZZARD . . . . . RESPONDENT.
INFORMANT,

ON REMOVAL FROM THE COURT OF CRIMINAL APPEAL OF NEW SOUTH WALES.

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SYDNEY, *June* 14, 17.

Rich, Starke, Dixon, Evatt and McTiernan JJ.

Constitutional Law—Freedom of trade, commerce and intercourse among the States—Regulation of facilities for transport—Licensing of public motor vehicles—Goods transported by motor lorry from consignor in one State to consignee in another State—Licence—Conditions—Validity—Competition with railways—The Constitution (63 & 64 *Vict. c.* 12), *sec.* 92—*State Transport (Co-ordination) Act* 1931 (*N.S.W.*) (*No.* 32 *of* 1931), *secs.* 12 (1), 17 (5), 18, 19, 28*.

A company transported goods for reward, by motor lorry, from a consignor in Melbourne, Victoria, to a consignee in a town in New South Wales situate

* The *State Transport (Co-ordination) Act* 1931 (N.S.W.) provides as follows:—By sec. 12 (1): "Any person who after a date appointed by the Governor and notified by proclamation published in the *Gazette* operates a public motor vehicle shall, unless such vehicle is licensed under this Act by the Board and unless he is the holder of such licence, be guilty of an offence against this Act: Provided that this sub-section shall not apply to a public motor vehicle that is being operated under and in accordance with an

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more than fifty miles from the border. The town was served by a railway. The company held a licence in respect of the lorry under the *State Transport (Co-ordination) Act* 1931 (N.S.W.). Upon the licence was indorsed :—"Special Conditions (Non-competitive licence). (1) The within-mentioned vehicle is authorized to operate as a goods motor vehicle on or in routes, roads, areas or districts within . . . New South Wales :—(*a*) on journeys none of which, for a distance exceeding fifty miles, is competitive with the railways or tramways. . . . (2) In respect of any journey which is wholly or partly competitive with the railways or tramways, the licensee shall pay . . . for the full competitive distance (in addition to any other sums payable under the . . . Act . . . and this licence or either of them) threepence per ton . . . of the weight of the vehicle" loaded to capacity "per mile travelled by the vehicle . . . along a public street. (3) Provided that the terms, conditions and authorities of or attached to this licence are complied with, the licensee and the driver . . . shall be exempt from the conditions mentioned in" sec. 18 (5) of the Act, "and unless the Commissioner otherwise determines, from the obligations imposed by regulations 9 and 10 under that Act in respect of any journey which is not, for a distance exceeding fifty miles competitive with the railways or tramways."

Held, by *Rich*, *Evatt* and *McTiernan* JJ. (*Starke* J. dissenting) that the provisions of sec. 92 of the Constitution were not infringed by the *State Transport (Co-ordination) Act*, or by the regulations thereunder, or by the administration of the Act as disclosed by the evidence and the terms of the licence; and, by *Dixon* J., that the decisions of the majority of the Court in *R.* v. *Vizzard*; *Ex parte Hill*, (1933) 50 C.L.R. 30, *O. Gilpin Ltd.* v. *Commissioner for Road Transport and Tramways* (*N.S.W.*), (1935) 52 C.L.R. 189, and *Bessell* v. *Dayman*, (1935) 52 C.L.R. 215, completely covered the question of the validity of the licences in the form issued.

exemption from the requirement of being licensed granted under section nineteen or a permit granted under section twenty-two of this Act." By sec. 17 :—"(1) Every licence 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 licence or to the public motor vehicle in respect of which it is issued, and of the provisions contained in or attaching to the licence, and all such provisions shall be conditions of the licence. . . . (5) If the holder of any licence of a public motor vehicle under this Act, or the owner of any public motor vehicle so licensed, fails to comply with or observe any of the terms or conditions of or attaching to such licence he shall be guilty of an offence against this Act." By sec. 18 (5) :—"The Board may, in any licence for a public motor vehicle to be issued under this Act that authorizes the holder to carry goods or goods and passengers in the vehicle, impose a condition that the licensee shall pay to them (and in addition to any other sums payable under . . . any other provision of this Act) such sums as shall be ascertained as the Board may determine. The Board may determine that the sum or sums so to be paid may be differently ascertained in respect of different licences and may be ascertained on the basis of mileage travelled as hereinafter mentioned or may be ascertained in any other method or according to any other basis or system that may be prescribed by regulation made under this Act: Provided that if the sum or sums so to be paid are to be ascertained according to mileage travelled they shall 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

Held, also, by *Rich*, *Dixon*, *Evatt* and *McTiernan* JJ., that the licence did not authorize the company to use its lorry for a journey which for a distance exceeding fifty miles was competitive with the railways, and, as the lorry was operated on a journey competitive with the railways in excess of fifty miles, the company offended against sec. 17 (5) and the driver offended against sec. 28 (1) (*c*) of the Act.

R. v. *Vizzard*; *Ex parte Hill*, (1933) 50 C.L.R. 30, *O. Gilpin Ltd.* v. *Commissioner for Road Transport and Tramways* (*N.S.W.*), (1935) 52 C.L.R. 189, and *Bessell* v. *Dayman*, (1935) 52 C.L.R. 215, applied.

CASES STATED removed from the Court of Criminal Appeal of New South Wales.

Eight cases were stated by the Chairman of the Court of Quarter Sessions, Wagga Wagga, for the opinion of the Supreme Court of New South Wales sitting as the Court of Criminal Appeal. They all related to the interpretation and administration of the *State Transport* (*Co-ordination*) *Act* 1931 (N.S.W.). In seven of the cases the Green Star Trading Co. Pty. Ltd., a company incorporated in Victoria, was prosecuted under sec. 17 (5) of the Act, which provides that if a licensee of a public motor vehicle fails to observe the conditions of his licence he shall be guilty of an offence. The other

weight of loading the vehicle is capable of carrying (whether such weight is carried or not) for each mile or part thereof travelled by the vehicle along a public street . . . and if the sum or sums so to be paid to the Board are not to be ascertained according to mileage travelled then the Board shall repay to the persons entitled thereto any moneys received by the Board under this sub-section in excess of the amount that would have been payable to the Board calculated on the mileage basis in the foregoing manner during the period of the licence. For the purposes of this proviso the weight of the vehicle unladen and the weight of loading the vehicle is capable of carrying shall be as mentioned in the licence or as determined by the Board." By sec. 18 (9) (*b*): "Where a public motor vehicle carrying passengers and/or goods ought not, in the opinion of the Board, to be subject to the condition mentioned in sub-section five of this section, by reason of the state of the roads travelled by the vehicle, or the transport facilities in the area served by the vehicle or for any other reason, the Board may, on such conditions as they think fit, exempt the licence for the public motor vehicle from having inserted therein the condition mentioned in the said sub-section." By sec. 19 (1): "The Board may grant exemption from the requirements to be licensed under this Act in respect of any public motor vehicle or class of public motor vehicles in such cases and under such conditions as they think fit." By sec. 22 (1):—"The Board may, on payment of the prescribed fees, issue permits, for such period as it thinks fit and subject to any conditions that may be prescribed or imposed by the Board, permitting the carrying on a motor vehicle of persons in or over specified districts or routes." By sec. 28:—"(1) No person shall drive or operate or cause or permit to be driven or operated as a public motor vehicle any motor vehicle . . . (*c*) on any occasion on which the same is not authorized by the licence issued in respect thereof to be so operated or driven, except in pursuance of a permit under this Act for that purpose or under an exemption granted or declared under this Act. (2) Any person contravening the provisions of this section shall be guilty of an offence against this Act."

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case was one in which Alexander Duncan of Carlton, Victoria, was charged under sec. 28 (1) (*c*) of the Act with having driven as a public motor vehicle a lorry owned by the company upon an occasion when the lorry was not authorized by the licence issued in respect thereof to be so driven, to wit, on a journey from Corowa, New South Wales, to Griffith, New South Wales. Upon this occasion petrol owned by the company was transported on one of its lorries driven by Duncan from Melbourne, Victoria, via Corowa, New South Wales, to Griffith, situate about 160 miles within New South Wales, and was there delivered to a customer in pursuance of a contract for sale and delivery entered into between the company and the customer, in Melbourne, which provided that delivery should be made by the company's own lorries. There was an indirect railway route from Corowa to Griffith, via Culcairn, and there was also a direct railway route to Griffith, via Narrandera, from the border town of Tocumwal, situate about thirty miles westerly from Corowa. Two of the cases against the company were in respect of journeys from Melbourne to Griffith. The other cases related to journeys from Melbourne to various towns in New South Wales situate considerably more than fifty miles from the border. In all except one of those cases the towns referred to were served from the point of entry into the State by an indirect railway route. In the remaining case there was a direct railway route from the point of entry, Albury, to Wagga Wagga, where the goods transported on that occasion were delivered. The goods so transported on these journeys consisted of general merchandise and, for the most part, were transported by the company for hire from consignors in Melbourne to consignees in the various towns in New South Wales. The goods did not come within the category of farm, orchard, garden, or dairy produce. Permits under the Act had not been granted in respect of any of the journeys. On the front of the licences issued under the Act in respect of the lorries appeared the following :—" This is to certify that . . . the vehicle described herein is hereby registered for use within the State of New South Wales as a motor lorry under the *Motor Traffic Act* 1909-1930, and licensed as a goods motor vehicle under the *State Transport (Co-ordination) Act* 1931, in the name of the above-mentioned person. This certificate of registration and

licence shall, unless sooner suspended or cancelled, and subject to compliance with the conditions set out herein, remain in force until the date shown." On the reverse side of the licences the following appeared :—" Special Conditions (Non-competitive licence). (1) The within-mentioned vehicle is authorized to operate as a goods motor vehicle on or in routes, roads, areas, or districts within the State of New South Wales :—(*a*) on journeys none of which, for a distance exceeding fifty miles, is competitive with the railways or tramways ; (*b*) when used solely for the transport of fresh fruit, vegetables, eggs or poultry from farm to market on journeys of any distance. (2) In respect of any journey which is wholly or partly competitive with the railways or tramways, the licensee shall pay to the Commissioner . . . for the full competitive distance (in addition to any other sums payable under the *State Transport (Co-ordination) Act* 1931, and this licence or either of them) :—threepence per ton, or part thereof, of the aggregate of the weight of the vehicle unladen and of the weight of loading the vehicle is capable of carrying for each and every mile, or part thereof, travelled by the . . . vehicle along a public street. (3) Provided that the terms, conditions and authorities of or attached to this licence are complied with, the licensee and the driver of the vehicle . . . and each of them, shall be exempt from the condition mentioned in sub-sec. 5 of sec. 18 of the . . . Act, and, unless the Commissioner otherwise determines, from the obligations imposed by regulations 9 and 10 under that Act in respect of any journey which is not, for a distance exceeding fifty miles, competitive with the railways or tramways, or of a journey of any distance when the vehicle . . . is used solely for the transport of fresh fruit, vegetables, eggs or poultry from farm to market." There was evidence that, as compared with transport by railways, transport by road was cheaper, quicker and more convenient. The magistrate convicted in each case. The defendants thereupon appealed to Quarter Sessions. In cases stated by the Chairman on 30th April 1935, questions substantially as follow were reserved for the opinion of the Court of Criminal Appeal :—

1. (*a*) Do the licences issued to the company under the *State Transport (Co-ordination) Act* 1931 authorize the vehicles

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mentioned in the licence, when not being used for the purposes mentioned in par. 1 (*b*) of the special conditions indorsed on the licence, to operate as goods motor vehicles only to the extent set out in par. 1 (*a*) of those conditions ? or (*b*) Does par. 2 of those conditions impliedly authorize the vehicles to operate on " any journeys which are wholly or partly competitive with the railways and tramways " ?

2. Were the respective journeys as disclosed by the evidence upon which the vehicles were engaged at the time of the offence " journeys " as stated in the information ?
3. If " Yes " to 2, were such journeys in law " wholly or partly competitive with railways or tramways " ?
4. Is the insertion in licences of reference to competition with the railways and tramways a valid exercise of the powers of the Commissioner ?
5. Is there any evidence of competition in fact with the railways and tramways for the whole or any portion of the respective journeys upon which the vehicles were engaged ?
6. Does the Act and/or the regulations thereunder, and/or the administration of the Act as disclosed by the evidence, and particularly by the terms of the licences, contravene sec. 90 of the Commonwealth Constitution in respect of the transactions or any of them which were being carried out by the defendants at the relevant times ?
7. Does the Act and/or the regulations thereunder and/or the administration of the Act as disclosed by the evidence and particularly by the terms of the licences contravene sec. 92 of the Commonwealth Constitution in respect of those transactions ?

Additional questions reserved in Duncan's case were substantially as follows :—

8. Does the issue of the permit as referred to in sec. 28 (1) of the Act validly authorize the operation of the vehicle on any journey not authorized by par. 1 of the special conditions ?
9. Has the Commissioner any legal power to issue a permit as referred to in sec. 28 (1) ?

10. Was the journey alleged in the information an "occasion" within the meaning of sec. 28 (1) (*c*) ?
11. If "Yes" to 10, is such an "occasion" only the complete journey, or does it refer to every part of the journey ?

On the ground that questions had arisen involving the interpretation of the Commonwealth Constitution, the cases were removed into the High Court on the application of the informant, Frederick William Vizzard, an officer of the Transport Department of New South Wales, who prosecuted on behalf of the Commissioner for Road Transport and Tramways of that State.

The matters now came on for hearing before the High Court.

Spender K.C. (with him *Holmes*), for the appellants. The special conditions under which the licences were issued, read as a whole, show that the licensee was entitled to travel over any route in New South Wales in excess of fifty miles in competition with the railways subject only to payment of the charge imposed by special condition number 2. Question 1 (*a*) in the case stated should be answered in the negative, and question 1 (*b*) in the affirmative. It is conceded that the answers to questions 2, 3, 4 and 5 is : Yes. As regards question 6, before this Court the appellants are bound ; the answer is, therefore in the negative. If the answer to question 1 (*a*) indicates that the appellants are limited to a distance of fifty miles in competition with the railways, the answer to question 7 should be : Yes. As regards question 8, if the permit is one which can be issued it is conceded that the answer is : Yes. The answer to question 9 is that the Commissioner has no power under sec. 28 (1) of the *State Transport* (*Co-ordination*) *Act* to issue a permit in relation to goods. It is conceded that the answer to question 10 should be in the affirmative. The appellants have not broken the terms of the licences. Under the third special condition the appellants were entitled to travel any distance at all, whether competitive with the railways or not, subject to an impost of threepence per mile for each mile in excess of fifty miles travelled in competition with the railways ; otherwise this special condition is meaningless. Having regard to the first and second special conditions, the appellant company is, under the third special condition, exempt from any impost in respect of a journey which does not exceed fifty miles

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competitive with the railways. If the licence means that the licensees are not allowed to travel more than fifty miles in the State of New South Wales in competition with the railways then that constitutes a direct prohibition upon the free passage of goods in the course of trade in inter-State transactions, and, therefore, is an infringement of sec. 92 of the Constitution. *R.* v. *Vizzard*; *Ex parte Hill* (1) and *O. Gilpin Ltd.* v. *Commissioner for Road Transport and Tramways (N.S.W.)* (2) are distinguishable. In those cases the Court was concerned only with the question whether in the circumstances there was an obligation to take out a licence under the *State Transport (Co-ordination) Act* 1931, and held that the taking out of a licence was not a hindrance or obstruction to inter-State trade, but, on the contrary, would make for the facilitation and co-ordination of transport. Here there is clearly a hindrance to the free passage of inter-State goods. By administrative acts, as shown by the terms of the licences and the evidence, a barrier to inter-State trade has been set up fifty miles from the border. It is no answer to say that the railways are available. Sec. 28 does not authorize the Commissioner to insist that a permit be obtained in respect of each particular journey in excess of fifty miles involving the carriage of goods subject to a condition that payment be made of an amount equal to threepence per ton per mile. There is no power in the Commissioner to grant a permit in respect of any particular journey, even where by the terms of the licence travel is limited to fifty miles. Here the licences were granted pursuant to the general application for licences contained in the second special condition. A penalty is involved; therefore the licences should be liberally construed. So construed they confer the right to travel any distance, whether fifty miles or more, in competition with the railways subject to a payment of threepence per ton per mile.

Weston K.C. and *Leaver*, for the respondent, were not called upon.

The following judgments were delivered:—

RICH J. In these cases the Green Star Trading Co. Pty. Ltd., which is incorporated in Victoria, is charged on seven informations for that, being the holder of licences in respect of certain motor

(1) (1933) 50 C.L.R. 30. (2) (1935) 52 C.L.R. 189.

vehicles, it did operate them respectively on specified journeys within the State of New South Wales but failed to observe a condition of the licences. Duncan was charged with driving one of these motor lorries on an occasion on which it was not authorized to be so driven, i.e., on one of the journeys in question. The defendants were convicted before the magistrate but appealed to Quarter Sessons at Wagga Wagga. The Chairman stated a case for the Court of Criminal Appeal of New South Wales, i.e., the Supreme Court. Two of the questions in the case stated related to the validity of the *State Transport (Co-ordination) Act* 1931. The sixth question is directed to sec. 90 of the Commonwealth Constitution and the seventh to sec. 92. On the application of the informant this Court removed the proceedings, under sec. 40 of the *Judiciary Act* 1903-1933, into this Court. The questions arising under the Constitution would not call for decision if any of the remaining questions were answered in favour of the defendants. They are therefore an integral part of the cause which must be decided for the purpose of disposing of the constitutional questions. Licences had been issued in respect of the motor lorries under the *State Transport (Co-ordination) Act* 1931. The journeys upon which the motor lorries were travelling commenced in Victoria, and within New South Wales they ran admittedly for more than fifty miles upon a route described as "competitive with the railways." The licences were what are called non-competitive licences. The first condition which they contain authorizes the operation of the vehicle upon journeys which are not competitive with the railways to a greater extent than a distance of fifty miles except in the case of journeys to market carrying fresh fruit, vegetables, eggs or poultry from a farm. This condition was not observed and the prosecutions are based upon that fact. The first question in the stated case is concerned with an argument that, notwithstanding the limitation upon the authority to operate expressed in the first condition, the second condition impliedly authorizes the vehicle to operate upon journeys which are "competitive with the railways" for an unrestricted distance subject, however, to a payment of threepence per ton per mile. This raises a question of construction upon two very clumsily drawn conditions. The effect of the term of the second condition is to

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direct the payment of threepence per ton per mile for the full distance of any journey that is "competitive with the railways." Notwithstanding the second condition, the third condition says in effect that, if the conditions of the licence are complied with, the licence of the driver of the vehicle shall be exempt from the condition mentioned in sec. 18 (5) of the Act and, subject to any determination of the Commissioner to the contrary, from clauses 9 and 10 of the regulations in respect of journeys which are not "for a distance exceeding fifty miles competitive with the railways." Sec. 18 (5) provides that the Board may in a licence impose a condition that the licensee shall pay to the Board sums to be ascertained in a manner to be determined by the Board not exceeding threepence a ton a mile. The exemption provided by the third condition from the obligation to pay sums not exceeding threepence a ton a mile under sec. 18 (5) if not more than fifty miles of the journey competes with the railways is relied upon as raising an implication that the second condition applies only to journeys competing with the railways which exceed fifty miles. From this construction of the second condition the deduction is made that it contemplates an authorized journey in competition with the railways beyond fifty miles in distance. Upon this footing it is said that the conditions of the licence authorize a journey of any distance in competition with the railways subject to the payment of threepence a ton a mile. This deduction or inference seems to me unwarranted. Conceding that the second condition does contemplate the possibility of a journey in competition with the railways exceeding fifty miles, it does not follow that such a journey is authorized. The authority is contained in the first condition. The second condition is concerned with the liability to a sum of money and there is no reason why it should not express a responsibility incurred by a journey which does not observe the authority. The answer to question 1 (*a*) must be: Yes, and to 1 (*b*): No. It is not contested that the answers to the 2nd, 3rd, 4th and 5th questions must be: Yes. The 6th and 7th questions which relate to the Constitution should be preceded by a consideration of the remaining questions. Question 8 inquires as to the effect of a permit. Sec. 28 of the Act prohibits the operation of a public motor vehicle on any occasion not authorized by the licence except

in pursuance of a permit or under an exemption. The effect of a permit is to remove anything done in actual pursuance of the permit from the prohibition contained in sec. 28. What the effect of the question is upon these questions has not so far been disclosed to me. Sec. 22, authorizing permits, is restricted to passenger vehicles. Question 9 asks: Has the Commissioner power to issue the permit? The Commissioner may grant a permit having effect under sec. 28 in relation to passengers if the power has been delegated to him under sec. 23. But neither of these questions calls for an answer. Question 10 must be answered: Yes. Question 11 appears to inquire whether if more than fifty miles is travelled in competition with the railways a permit is required for the whole journey or for the excess only. The distinction is without a difference because as soon as the fifty miles is exceeded the conditions of the licence are broken and then, and not before, the commission of the offence commences unless there is a permit allowing what otherwise would be an offence. In other words, the permit must be so expressed as to allow more than fifty miles to be travelled in competition with the railways in order to be useful to the licensee. There remain the constitutional questions, Nos. 6 and 7. It is conceded that the argument that the legislation contravenes sec. 90 of the Constitution is ruled against the defendants by *Gilpin's Case* (1). The 6th question must accordingly be answered: No. The 7th question asks whether the legislation, the regulations, or the administration thereof contravene sec. 92. It is not easy to see why this question should be considered open after the decisions in *R.* v. *Vizzard*; *Ex parte Hill* (2); *Gilpin's Case* (1); *Bessell* v. *Dayman* (3). But some ingenuity has been expended by counsel in an attempt, fruitless so far as I am concerned, to distinguish these cases on that ground that the conditions of the licence lead to an invasion of the freedom of inter-State trade. I can see no discrimination, direct or indirect, between intra-State and inter-State transportation; nothing but a co-ordination and rationalization of services accomplished according to a judgment of a discretionary character of an administrative board that fifty miles' irrational competition is a relatively harmless excess. This question

(1) (1935) 52 C.L.R. 189. (2) (1933) 50 C.L.R. 30.
(3) (1935) 52 C.L.R. 215.

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must be answered : No. The cases should be remitted to the Court of Quarter Sessions to be dealt with in accordance with the answers given to the questions hereunder. Costs should be paid by the defendants.

Questions 1 (*a*): Yes; 1 (*b*): No; 2, 3, 4, 5: Yes; 6, 7: No; 8, 9, 11: Require no answer; 10: Yes.

STARKE J. It would be idle for me to discuss any of the questions stated in these cases other than the seventh question, which is: Does the *State Transport* (*Co-ordination*) *Act* 1931 and/or the regulations thereunder and/or the administration of the Act as disclosed by the evidence and the exhibits and particularly by the terms of the licences issued contravene sec. 92 of the Commonwealth Constitution in respect of the transactions or any of them which were or was being carried out by the defendants at the relevant times? In *Vizzard's Case* (1) I expressed the opinion that the Act did contravene sec. 92 of the Constitution and to that opinion I adhere.

DIXON J. I agree in the judgment that *Rich* J. has delivered subject to two observations which I desire to add. In dealing with the questions arising under State law, we are following *Ex parte Walsh and Johnson*; *In re Yates* (2) and *Pirrie* v. *McFarlane* (3); see also *R.* v. *Carter*; *Ex parte Kisch* (4). The second observation is that I regard the decisions of the majority of this Court in *R.* v. *Vizzard*; *Ex parte Hill* (1), *O. Gilpin Ltd.* v. *Commissioner for Road Transport and Tramways* (*N.S.W.*) (5) and *Bessell* v. *Dayman* (6), from which I dissented, as completely covering the use made of its authority by the Transport Board in granting licences in the form before us.

EVATT J. These are eight cases stated by the Chairman of the Wagga Wagga Quarter Sessions for the opinion of the Supreme Court of New South Wales sitting as the Court of Criminal Appeal. They all relate to the interpretation and administration of the New South Wales *State Transport* (*Co-ordination*) *Act* 1931. They have

(1) (1933) 50 C.L.R. 30.
(2) (1925) 37 C.L.R. 36, at pp. 59, 75, 126, 130.
(3) (1925) 36 C.L.R. 170, and see p. 178.
(4) (1935) 52 C.L.R. 221, at p. 229.
(5) (1935) 52 C.L.R. 189.
(6) (1935) 52 C.L.R. 215.

been removed into this Court from the Supreme Court on the application of the informant, Vizzard, who is prosecuting on behalf of the Commissioner for Road Transport and Tramways for New South Wales. The ground upon which the orders of removal were made was that certain questions have arisen involving the interpretation of secs. 90 and 92 of the Commonwealth Constitution.

The seven prosecutions against the company are under sec. 17 (5), which provides that if a licensee of a public motor vehicle fails to observe the conditions of his licence he shall be guilty of an offence. Duncan was charged under sec. 28 (1) (*c*) of the *State Transport (Co-ordination) Act* 1931 with having driven as a public motor vehicle a lorry licensed by the company upon an occasion when the lorry was not authorized by the licence issued in respect thereof to be so driven. The facts were fully investigated by the magistrate, who convicted in each case. All the defendants thereupon appealed to Quarter Sessions, the Chairman stating the cases on April 30th, 1935.

The main question raised by the stated cases is whether the special conditions indorsed on the licence issued in respect of the lorries impliedly authorized the lorry to operate without being subject to the restrictions imposed by clause 1 of the special conditions.

In order to make the contention clear it is necessary to refer to certain provisions of the Act. By sec. 12 (1) no person may operate a public motor vehicle unless he holds a licence issued by the Board for such vehicle. A proviso to sec. 12 (1) prevents the sub-section from applying to a public motor vehicle "that is being operated under and in accordance with" an exemption (under sec. 19) from the requirement of being licensed, or a permit granted under sec. 22. Sec. 22 deals with permits to use motor vehicles for the carriage of passengers, and sec. 19 gives the Board a general power to exempt a public motor vehicle from the requirement of being licensed under conditions deemed fit by the Board.

Sec. 18 (1) imposes on the holder of every licence—unless exempted by the Act or the regulations—certain obligations in respect of public motor vehicles, such as keeping prescribed books and records, producing such books, and making and verifying returns. Sec. 18 (5), which is a key provision, authorizes the Board, in any licence for a public motor vehicle authorized to carry goods, to impose a

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condition that the licensee shall pay certain sums of money to be ascertained as determined by the Board. Where such sums fall to be determined according to the mileage travelled, a maximum rate is prescribed, and, where the sums are not ascertained according to mileage, refunds are to be made if there is an excess over the maximum payable on a mileage basis. By sec. 18 (9) (*b*) the Board is empowered to exempt the licence for any public motor vehicle from having inserted therein the condition mentioned in sec. 18 (5), and the Board has a discretion to grant the exemption upon such conditions as it thinks fit. The special conditions applicable to all public motor vehicles here in question are headed "Special Conditions (Non-competitive licence)." The heading itself tends to destroy the theory that the conditions themselves impliedly authorize the vehicle to operate competitively with the railways or tramways beyond the permitted distance of fifty miles.

Clause 1 of the special conditions gives the vehicle an authority to operate within the State of New South Wales, but only, so far as is relevant, "on journeys none of which, for a distance exceeding fifty miles is competitive with the railways or tramways."

Clause 2 then prescribes that in respect of any journey "which is wholly or partly competitive with the railways or tramways" the licensee shall pay for the full competitive distance threepence per ton or part thereof, calculated upon the footing of the maximum payments on a mileage basis, which the Board is authorized by sec. 18 (5) to impose.

Clause 3 of the special conditions adds a proviso that, if the terms and conditions of the licence are complied with, both the licensee and the driver of the vehicle

> "shall be exempt from the condition mentioned in sub-sec. 5 of sec. 18 . . . and, unless the Commissioner otherwise determines, from the obligation imposed by regulations 9 and 10 . . . *in respect of any journey which is not, for a distance exceeding fifty miles, competitive with the railways or tramways* or of a journey of any distance when the vehicle . . . is used solely for the transport of fresh fruit" &c. "from farm to market."

The italics are mine.

The verbiage of this clause may be subject to criticism, but its intendment and meaning are not in doubt. Its object is to grant an exemption from the payment authorized to be imposed by sec.

18 (5) of the Act, and actually imposed in respect of the full competitive distance by clause 2 of the special conditions. Clause 3, in its last sentence, describes itself as an "exemption." The exemption gives relief from the restrictions mentioned, but it is strictly coterminous with the authority to operate the vehicle granted by clause 1 of the special conditions. The vehicle is to be "exempt . . . in respect of any journey which is not, for a distance exceeding fifty miles, competitive with the railways or tramways." It is also to be "exempt . . . in respect . . . of a journey of any distance when the vehicle . . . is used solely for the transport of fresh fruit . . . from farm to market."

It is impossible to imply from these conditions any authority to drive or operate the vehicle on any journey which is, for more than fifty miles, competitive with the railways. On the contrary, the exemption granted by clause 3 may be said to offer an inducement to observe the main condition contained in clause 1 of the licence. The exemption from the money payment imposed by clause 2 of the special conditions is strictly conditioned by the observance of clause 1. The result is that, if the vehicle is operated on any journey which competes with the railways for a distance of (say) sixty miles, (1) the licensee fails to comply with the conditions of his licence and is guilty of an offence under sec. 17 (5) of the Act, (2) the driver is guilty of an offence under sec. 28 (1) (*c*) of the Act, (3) the exemption in clause 3 of the special conditions has no operation in respect of the particular journey, and (4) the licensee also becomes liable to pay to the Commissioner for the full competitive distance of sixty miles the charge of threepence per ton authorized by sec. 18 (5) and imposed by special condition 2.

That the interpretation contended for on behalf of the driver and the owner is without substance appears from the note inserted at the foot of the special conditions. It is as follows:—

> "Note: If applicant applies for and is granted a licence to operate on journeys which, for distances exceeding fifty miles, are competitive with the railways and/or tramways, conditions (1) and (3) will be deleted, and it will be necessary for the licensee to provide for the keeping of records, rendering of returns, furnishing of security and the paying of charges in accordance with sub-sections 1, 5 and 7 of sec. 18 . . . and the regulations thereunder."

H. C. OF A. 1935.

DUNCAN AND GREEN STAR TRADING CO. PTY. LTD. v. VIZZARD.

Evatt J.

Question 1 of the stated case should therefore be answered—1 (*a*): Yes; and 1 (*b*): No.

No dispute arises as to questions 2, 3, 4, 5, and 6, the defendants admitting that each of such questions must be answered in the sense adverse to them.

A question has been raised (Nos. 8 and 9) as to the power to issue a "permit" under sec. 28 (1), but this question has no real bearing upon the present case. As has been pointed out, a "permit" under sec. 22 relates to the carriage of passengers in motor vehicles, but the powers to grant an "exemption" are not so limited. The defendants' contention appears to be that, unless the Board has authority to grant permission to a licensee to operate the vehicle competitively with the railways for more than fifty miles, sec. 92 of the Constitution operates to invalidate the restrictions imposed by the Act and the licence in respect of journeys in New South Wales, which are the continuation of journeys within the State of Victoria. But the decisions of this Court in *Willard* v. *Rawson* (1), *R.* v. *Vizzard*; *Ex parte Hill* (2) and *O. Gilpin Ltd.* v. *Commissioner for Road Transport and Tramways* (*N.S.W.*) (3) are quite inconsistent with this argument. Those cases determine that the imposition of non-discriminatory limitations of choice as to the means and routes of land transport is not necessarily inconsistent with sec. 92, and that the New South Wales *State Transport* (*Co-ordination*) *Act* 1931 is valid.

It follows that question 7 of the stated case should be answered: No. It is admitted that question 10 must be answered: Yes. Question 11 does not arise directly, but it is reasonably plain that in sec. 28 (1) (*c*) the "occasion" which is referred to cannot be limited to the complete journey, and necessarily refers to every part of it.

The questions asked will be answered as follows:—

Duncan v. *Vizzard*.—1 (*a*): Yes; 1 (*b*): No; 2: Yes; 3: Yes; 4: Yes; 5: Yes; 6: No; 7: No; 10: Yes; questions 8, 9 and 11: No answer necessary.

(1) (1933) 48 C.L.R. 316. (2) (1933) 50 C.L.R. 30.
(3) (1935) 52 C.L.R. 189.

Green Star Trading Co. Pty. Ltd. v. *Vizzard* (seven cases).— 1 (*a*): Yes; 1 (*b*): No; 2: Yes; 3: Yes; 4: Yes; 5: Yes; 6: No; 7: No.

The cases stated will be remitted to the Court of Quarter Sessions at Wagga Wagga with the answers set out above.

McTIERNAN J. I also agree with the order proposed by *Rich* J. I have had the opportunity of reading the judgment prepared by *Evatt* J. and agree with it, also with the observations of *Dixon* J.

Questions answered as follows:—1 (*a*): *Yes*; 1 (*b*): *No*; 2, 3, 4, 5: *Yes*; 6, 7: *No*; 8, 9: *Answer unnecessary*; 10: *Yes*; 11: *Answer unnecessary*.

Solicitors for the appellants, *Lusher, Young & Stellway*, Wagga Wagga, by *C. Throsby Young*.

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

J. B.