[HIGH COURT OF AUSTRALIA.]

O. GILPIN LIMITED . . . . . APPELLANT;
DEFENDANT,

AND

THE COMMISSIONER FOR ROAD TRANSPORT AND TRAMWAYS (NEW SOUTH WALES) . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM A COURT OF PETTY SESSIONS OF NEW SOUTH WALES.

H. C. OF A. 1934-1935.

SYDNEY, *Nov.* 21, 23, 26, 1934.

MELBOURNE, *Mar.* 11, 1935.

Gavan Duffy C.J., 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"—Trader's motor lorry engaged on inter-State journey—Goods of trader transported from its warehouse to its shops in another State for purposes of sale—Imposition of charge—Validity of State Act—The Constitution (63 & 64 *Vict. c.* 12), *secs.* 90, 92—*State Transport* (*Co-ordination*) *Act* 1931 (*N.S.W.*) (*No.* 32 *of* 1931)*, *secs.* 3, 37.

High Court—Appeal from State inferior Court—Judgment "final and conclusive"—Jurisdiction—Interpretation of the Constitution—Judiciary Act 1903-1933 (*No.* 6 *of* 1903—*No.* 65 *of* 1933), *secs.* 30, 39—*Small Debts Recovery Act* 1912 (*N.S.W.*) (*No.* 33 of 1912), *sec.* 17*.

Goods belonging to a company were conveyed, in a motor vehicle owned by the company, from its warehouse in Melbourne, Victoria, to its branch shops in certain towns in New South Wales, for the purposes of sale. The vehicle

* The *State Transport* (*Co-ordination*) *Act* 1931 (N.S.W.), entitled "An Act to provide for the improvement and for the co-ordination of means of and facilities for locomotion and transport; to constitute a Board of Commissioners for that purpose; to amend the *Government Railways Acts*, 1912-1930, and certain other Acts; and for purposes connected therewith," provided:—Sec. 3:—"(1) In this Act, unless the context or subject matter otherwise indicates or requires,—'Operate' means carry or offer to carry passengers or goods for hire or for any consideration or in the course of any trade or business whatsoever. 'Public motor vehicle' means a motor vehicle (as hereinbefore defined)—(i) used or let or intended to be used or let for the

H. C. OF A. 1934-1935.

O. GILPIN LTD. v. COMMISSIONER FOR ROAD TRANSPORT AND TRAMWAYS (N.S.W.).

was not licensed under the *State Transport (Co-ordination) Act* 1931 (N.S.W.), nor had an exemption from the requirement of being licensed been granted. A charge, calculated at the rate of threepence per ton of the weight of the vehicle loaded to capacity for each mile from the State border to the shop most distant therefrom, was imposed upon the company by the Commissioner under sec. 37 of the Act. The Act provided that it should be read and construed so as not to exceed the legislative power of the State.

Held, by *Gavan Duffy* C.J., *Rich*, *Evatt* and *McTiernan* JJ. (*Starke* and *Dixon* JJ. dissenting), that the provisions of the *State Transport (Co-ordination) Act* 1931, and the charge imposed under sec. 37, did not contravene sec. 92 of the Constitution as interfering with the freedom of trade, commerce and intercourse among the States.

Willard v. *Rawson*, (1933) 48 C.L.R. 316, and *R.* v. *Vizzard*; *Ex parte Hill*, (1933) 50 C.L.R. 30, applied.

Held, also, that the charge made under sec. 37 was not a customs duty and, therefore, did not infringe sec. 90 of the Constitution.

An action, under the *Small Debts Recovery Act* 1912 (N.S.W.), was brought against the company, in a Court of Petty Sessions, to recover the charge imposed under sec. 37 of the *State Transport (Co-ordination) Act* 1931.

Held that as the matter involved an interpretation of the Constitution the High Court had jurisdiction to hear an appeal from the decision of the Court of Petty Sessions.

conveyance of passengers or of goods for hire or for any consideration or in the course of any trade or business whatsoever, or (ii) plying or travelling or standing in a public street for or in hire or in the course of any trade or business whatsoever. . . . (2) This Act 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." 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 license, 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 exemption from the requirement of being licensed granted under section nineteen or a permit granted under section twenty-two of this Act. (2) Any person who operates or uses or causes or permits to be operated or used a motor vehicle for the carriage or delivery of his goods (other than goods that are not intended for sale whether immediately or ultimately) or of goods sold by him shall be deemed to be thereby operating a public motor vehicle within the meaning of this Act and such vehicle shall be deemed to be a public motor vehicle." Sec. 14 (1): "Every person desiring to operate a public motor vehicle of which he is the owner 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." Sec. 18 :—"(4) The board may, in any license for a public motor vehicle to be issued under this Act that authorises the holder to carry passengers or passengers and goods in the vehicle, impose a condition that the licensee shall pay to them (in addition to any other sums payable under the following sub-section and any other provision of this Act), for each and every passenger carried by the public motor vehicle along a public street a sum not exceeding one penny for each mile or part thereof of his journey or (where

APPEAL from a Court of Petty Sessions of New South Wales.

O. Gilpin Ltd., a company incorporated in the State of Victoria, carried on the business of a manufacturer and warehouseman, and was the proprietor of a large number of retail stores extending into New South Wales. The company was sued by the Commissioner for Road Transport and Tramways, a body corporate under and by virtue of the *Transport (Division of Functions) Act* 1932 (N.S.W.), upon a default summons, issued under the *Small Debts Recovery Act* 1912 (N.S.W.), in the Court of Petty Sessions at Albury, New South Wales, for a charge of £10 imposed upon the company by the Commissioner pursuant to sec. 37 of the *State Transport (Co-ordination) Act* 1931 (N.S.W.). The company transported its goods, in its own motor vehicles, from its warehouse at East Malvern, Melbourne, Victoria, into New South Wales for delivery to, and sale in, its retail stores in New South Wales. On the particular occasion referred to in the summons goods, packed in baskets, were conveyed on a motor-lorry, with a trailer attached, owned by the company, from the company's warehouse at East Malvern, *via* Albury, and delivered, for the purposes of sale, at the company's shops at Henty, Wagga Wagga, and Junee, in New South Wales. Junee is situate one hundred miles distant from the border town of Albury. Throughout the journey the vehicles were exclusively used for the transportation of the company's goods from East Malvern to its shops in New South Wales, in fulfilment of orders previously lodged by the managers of those shops. The vehicles unladen weighed nearly four tons, and they were capable of carrying a load of four tons. In respect of the

that sum is less than the following sum) a sum not exceeding one penny for each section or part thereof included in his journey and for such purposes the word 'section' means a part of the route of the vehicle in respect of which a separate charge may for the time being be made against a passenger. The board may determine that the sums to be paid to it under this sub-section may be less than the sums hereinbefore mentioned and may be differently ascertained in respect of different licenses. (5) The board may, in any license for a public motor vehicle to be issued under this Act that authorises 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 the preceding sub-section and 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 licenses 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

H. C. OF A. 1934-1935.

O. GILPIN LTD. v. COMMISSIONER FOR ROAD TRANSPORT AND TRAMWAYS (N.S.W.).

journey the Commissioner imposed upon the company an obligation to pay the sum of £10 calculated at the rate of 3d. per ton per mile within New South Wales, upon eight tons, the aggregate of the weight of the vehicles and of the load they were capable of carrying. The vehicles, which the Commissioner claimed were public motor vehicles, were registered under the *Motor Car Act* 1930 (Vict.), and also under the *Motor Traffic Act* 1909-1930 (N.S.W.), but were not licensed under the *State Transport (Co-ordination) Act* 1931 (N.S.W.) by the State Transport Co-ordination Board, and the company had had not been granted a certificate of exemption under the Act from the requirement that the vehicles should be so licensed. The charge of £10 was made by the Commissioner under sec. 37 of the *State Transport (Co-ordination) Act* 1931, upon the footing that on the occasion in question the vehicles were operated in contravention of the Act. The company contended that as the vehicles on this journey were engaged in inter-State trade the provisions of secs. 12 (2) and 37 of the Act, in so far as they sought to interfere with trade as conducted by the company, contravened the provisions of secs. 90 and 92 of the Constitution, and contended further that it did not " operate " a " public motor vehicle " within the meaning of secs. 14 (1) and (3) of the Act.

The Court overruled those contentions and gave a verdict for the amount claimed.

The High Court granted to the company special leave to appeal from that decision, without prejudice to any objection that no appeal lay or that the High Court had not jurisdiction to entertain it.

The appeal now came on for hearing.

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 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 (which mileage may be ascertained for such purposes as prescribed by the regulations or as determined by the board), 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 subsection 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 license. 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 license or as determined by the board." 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." Sec. 26 :—" (1) There shall be kept in the Treasury a fund to

Latham K.C. and *Eager* (with them *Spender*), for the appellant. The only defence raised was that the provisions of the *State Transport (Co-ordination) Act* 1931 (N.S.W.) conflicted with the provisions of the Constitution. Therefore the case involved an interpretation of the Constitution.

[DIXON J. referred to *The Commonwealth* v. *Limerick Steamship Co. and Kidman* (1).]

Judgments in actions under the *Small Debts Recovery Act* 1912 (N.S.W.) are "final and conclusive"; therefore special leave to appeal to this Court was rightly granted under sec. 39 (2) (*c*) of the *Judiciary Act* 1903-1933.

[DIXON J. referred to sec. 38A of the *Judiciary Act* 1903-1933, and *Troy* v. *Wrigglesworth* (2).]

The whole defence was based on the interpretation of the Constitution. The issue between the parties could not be determined without invoking Federal jurisdiction; therefore it was not purely a State matter (*Roberts* v. *Ahern* (3); *Baxter* v. *Commissioners of Taxation (N.S.W.)* (4); *Miller* v. *Haweis* (5); *Troy* v. *Wrigglesworth* (6); *H. V. McKay Pty. Ltd.* v. *Hunt* (7); *Hume* v. *Palmer* (8)).

[STARKE J. referred to *Lorenzo* v. *Carey* (9).]

Sec. 37 of the *State Transport (Co-ordination) Act* 1931, is not a licensing section, nor is it a section for the regulation of roads or control of traffic; it is simply a taxing section. Under it the Board may impose a tax of any amount it pleases, subject to the maximum,

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. . . . (6) For the purposes of the co-ordination of the facilities for transportation of passengers or goods, the board, with the approval of the Minister, may make from time to time, any payments out of the said fund as subsidies in respect of any public motor vehicles used for providing feeder services to railways or tramways. (7) The board, with the approval of the Minister, may make from time to time any payments out of the said fund to the Government Railways Fund, established under the *Government Railways Act*, 1912-1930, or to the general fund of any transport trust, and moneys so

(1) (1924) 35 C.L.R. 69.
(2) (1919) 26 C.L.R. 305.
(3) (1904) 1 C.L.R. 406.
(4) (1907) 4 C.L.R. 1087, at pp. 1136-1138.
(5) (1907) 5 C.L.R. 89.
(6) (1919) 26 C.L.R., at p. 309.
(7) (1926) 38 C.L.R. 308.
(8) (1926) 38 C.L.R. 441.
(9) (1921) 29 C.L.R. 243.

H. C. OF A. 1934-1935.

O. GILPIN LTD. v. COMMISSIONER FOR ROAD TRANSPORT AND TRAMWAYS (N.S.W.).

upon all vehicles which, as here, are used only for inter-State journeys in connection with the owner's business. Although several sections of the Act were considered by the Court in *R.* v. *Vizzard*; *Ex parte Hill* (1), a consideration of sec. 37 was not necessary for a decision in that case, nor was it considered with the degree of particularity required for this case. It is possible under sec. 15 of the Act for licences to be granted subject to such conditions as would operate to defeat the provisions of the Constitution.

[STARKE J. referred to *James* v. *Cowan* (2).]

The "public interest" in sec. 17 refers only to the interest of the public of New South Wales. This is not in accord with the spirit and intent of sec. 92 of the Constitution. The charge imposed under sec. 37 is a tax on the act of transporting goods; it is a tax on transport and is a tax on the goods themselves. The amount so charged must perforce be added to the price or recovered from the purchaser in the same way as a customs tax. It is a payment for the privilege of doing business by using vehicles for the transportation of goods. A charge, at the same rate, is made whether the vehicle be empty or full; therefore it has no relation to the wear and tear of the roads. Transportation of goods from one State to another State is "trade, commerce and intercourse among the States" within the meaning of sec. 92 of the Constitution. The fact that the Act authorizes a mileage rate shows that the charge made is a tax on transport. The States are prevented by sec. 92

paid shall form part of the fund into which they are paid. (8) Subject to this Act, the moneys in the State Transport (Co-ordination) Fund may be applied to the purposes for which they are appropriated by Parliament. (9) Section forty-six of the *Constitution Act*, 1902, shall apply in respect of any such appropriation." 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 . . . . 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." Sec. 37:—"(1) If any person operates any public motor vehicle in contravention of this Act the board may impose upon him an obligation to pay to them on demand such sums as the board determines, but such sums shall not exceed the sums that could have been made payable to the board under sub-sections four and five of section eighteen had the person operating the vehicle been the holder of a license to operate it and had the board imposed therein the conditions provided by such sub-sections. (2) This section shall not relieve such person or any other person from the penalties for the offence."

The *Small Debts Recovery Act* 1912 (N.S.W.), by sec. 17, provides: "All judgments and orders of a court of petty sessions shall be final and conclusive."

(1) (1933) 50 C.L.R. 30.

(2) (1932) A.C. 542; 47 C.L.R. 386.

of the Constitution from legislating in any way so as to interfere with inter-State commerce (*W. & A. McArthur Ltd.* v. *Queensland* (1)). The Court, in *R.* v. *Vizzard*; *Ex parte Hill* (2), expressly declined to overrule *McArthur's Case* (1). The moneys collected under the Act are paid into the general revenue of the State; therefore the charge is a tax. Discrimination cannot be the test of the validity of the statute.

[DIXON J. referred to *Fox* v. *Robbins* (3).]

The Act, and the regulations thereunder, purport to empower the Transport Board to impose a tax upon all vehicles carrying goods inter-State for business purposes. The Act directly operates to impose a burden upon inter-State transport because it is transport. The fact that the charge is also imposed on intra-State trade is immaterial (*James* v. *Cowan* (4)). The Act also confers upon the Board an unlimited power, subject only to the maximum of tax, to differentiate between inter-State and intra-State transport. The Act applies to inter-State transport directly and immediately because it is transport in its character as transport. The foundation of the obligation is the actual movement of the goods in transport. An Act which purports to vest those powers in a State administration or authority contravenes sec. 92 of the Constitution. The charge authorized by sec. 37 is not incidental to the issue of a licence. A power to tax, as distinct from a power to make a charge for services or facilities provided, is a power to destroy the subject matter (*D'Emden* v. *Pedder* (5); *Federated Engine-Drivers and Firemen's Association of Australasia* v. *Broken Hill Pty. Co. Ltd.* (6)). Having regard to secs. 102 and 104 of the Constitution, sec. 92 of the Constitution operates to prevent a State from discriminating in favour of its own citizens as against citizens of other States (see *W. & A. McArthur Ltd.* v. *Queensland* (1)). Sec. 92 does not prohibit State legislation, it operates to prevent the imposition of a tax upon inter-State trade or commerce (*Willard* v. *Rawson* (7)). A charge imposed under sec. 37 of the *State Transport (Co-ordination) Act* is not a charge made in relation to services rendered, nor is a

(1) (1920) 28 C.L.R. 530.
(2) (1933) 50 C.L.R. 30.
(3) (1909) 8 C.L.R. 115.
(4) (1932) A.C. 542; 47 C.L.R. 386.
(5) (1904) 1 C.L.R. 91.
(6) (1911) 12 C.L.R. 398.
(7) (1933) 48 C.L.R. 316, at p. 325.

H. C. OF A. 1934-1935.

O. GILPIN LTD. v. COMMISSIONER FOR ROAD TRANSPORT AND TRAMWAYS (N.S.W.).

licence granted upon payment. It is a tax on inter-State commerce for the benefit of the people of New South Wales, and therefore infringes sec. 92 (*W. & A. McArthur Ltd.* v. *Queensland* (1)). Matters affecting inter-State trade upon which a State may legislate are shown in *McArthur's Case* (2); *Roughley* v. *New South Wales*; *Ex parte Beavis* (3); *Ex parte Nelson* [*No.* 1] (4); *Willard* v. *Rawson* (5), and *R.* v. *Vizzard*; *Ex parte Hill* (6). Mere physical movement of commodities does not constitute trade and commerce. It is a compound; it consists of acts by persons in relation to goods.

[EVATT J. referred to *New South Wales* v. *The Commonwealth* (*Wheat Case*) (7).]

The decision in *Ex parte Nelson* [*No.* 1] (4) rested upon the view that the subject matter of the statute there under consideration was protection against disease, not trade and commerce; therefore sec. 92 did not apply. Regard must be had to the object and scope, the pith and substance, of the State statute (*Roughley* v. *New South Wales*; *Ex parte Beavis* (3); *Willard* v. *Rawson* (5)). The *State Transport* (*Co-ordination*) *Act* is directed essentially to transportation. Inter-State trade and commerce is transportation. In *Willard* v. *Rawson* (5) the tax was required to be paid irrespective of the volume of work and mileage done; here the tax imposed is based on the carrying capacity of the vehicle used and mileage. Here the fees charged are not merely incidental to a licensing system, but are charged independently of the existence of a licence. This, and the exhorbitant fees charged, indicate that the object of the Act is either to collect revenue, which is not appropriated to the construction or maintenance of roads, or to impose a very heavy licence fee in order to prohibit or restrict transport.

[STARKE J. The point of *Willard* v. *Rawson* (5) is that the statute there under consideration was regarded as a regulation of motor cars and not trade.

[DIXON J. I regarded it as both.]

(1) (1920) 28 C.L.R., at p. 545.
(2) (1920) 28 C.L.R. 530.
(3) (1928) 42 C.L.R. 162.
(4) (1928) 42 C.L.R. 209.
(5) (1933) 48 C.L.R. 316.
(6) (1933) 50 C.L.R. 30.
(7) (1915) 20 C.L.R. 54, at p. 100.

The operation of sec. 37 is invalid whether considered in the light of the majority judgment or of the minority judgments in previous decisions of the Court on sec. 92 of the Constitution. The *State Transport* (*Co-ordination*) *Act* is different in every one of the relevant characteristics or attributes mentioned by *Evatt* J. in *Willard* v. *Rawson* (1). The decision in *R.* v. *Vizzard*; *Ex parte Hill* (2) was directed to sec. 12 (1) of the *State Transport* (*Co-ordination*) *Act*; no argument was based upon sec. 37. The judgments in that case are confined to a consideration of the propriety of a licensing system as a means of attempting to co-ordinate transport in a State. The Court did not consider the conditions of a particular licence, or sec. 37 which operates in the absence of a licence. The validity of State legislation which attempts to co-ordinate transport by prohibited means is not saved by the fact that the general objective is within the power of the State, nor can its validity be tested by a consideration of whether it may or may not confer a benefit upon inter-State trade and commerce. The principle which emerges from the judgments of the majority of the Court in *Vizzard's Case* (2) is that sec. 92 forbids any State legislation in respect of trade, commerce and intercourse the direct, real or primary object of which is to prohibit, prevent, hinder or restrict inter-State trade, commerce and intercourse.

[DIXON J. Does that not involve a restriction on the meaning of trade, commerce and intercourse ?]

Yes. Sec. 92 forbids State legislation in respect of inter-State trade and commerce which operates, immediately or directly, to restrict, regulate, fetter or control it (*Peanut Board* v. *Rockhampton Harbour Board* (3)). The evidence here shows that the Act has had the effect of reducing or restricting inter-State trade and commerce (*Vizzard's Case* (4)). Even though an Act may be directed against trade generally, it infringes sec. 92 if it includes inter-State trade (*James* v. *Cowan* (5)). Sec. 37 is directed against trade for the purpose of suppressing long commercial journeys by motor vehicles, thus imposing restrictions on inter-State trade and com-

(1) (1933) 48 C.L.R., at p. 337.
(2) (1933) 50 C.L.R. 30.
(3) (1933) 48 C.L.R. 266, at p. 274.
(4) (1933) 50 C.L.R., at p. 77.
(5) (1932) A.C. 542; 47 C.L.R. 386.

H. C. OF A. 1934-1935.

O. GILPIN LTD. v. COMMISSIONER FOR ROAD TRANSPORT AND TRAMWAYS (N.S.W.).

merce (*James* v. *Cowan* (1)). Sec. 92 applies to legislation, not to actions of persons. The validity of a statute is determined by the authority it purports to confer, not by what has been done under the statute. *James* v. *Cowan* (2) decides that State legislation which prohibits or restricts inter-State trade is not saved by any view that the legislation is for the public good, or the good of the State. The *State Transport (Co-ordination) Act* infringes also the customs power of the Commonwealth contained in sec. 90 of the Constitution. The charge imposed under sec. 37 is a tax on goods (*The Commonwealth and Commonwealth Oil Refineries Ltd.* v. *South Australia* (3)). The method adopted of assessing the amount payable is immaterial. It is a duty of customs placed upon the entry of goods into New South Wales (*R.* v. *Sutton* (4)). The fact that the impost applies to intra-State trade as well as to inter-State trade is beside the point.

[Reference was made to secs. 3, 12, 14, 15, 17-19, 25, 26 and 37-39 of the *State Transport (Co-ordination) Act* 1931, and regs. 8-11 and 13 made thereunder.]

Bradley K.C. (with him *Leaver*), for the respondent. An appeal in this matter is not competent. At the date of the hearing before the magistrate the validity of the *State Transport (Co-ordination) Act* had already been determined in *R.* v. *Vizzard; Ex parte Hill* (5); therefore no question arose as to the interpretation of the Constitution, and the Court did not otherwise exercise Federal jurisdiction (*Miller* v. *Haweis* (6); *Hume* v. *Palmer* (7), and *The Commonwealth* v. *Limerick Steamship Co. and Kidman* (8)).

[STARKE J. referred to *Lorenzo* v. *Carey* (9).

[DIXON J. referred to *Booth* v. *Shelmerdine Bros. Pty. Ltd.* (10) and *Baxter* v. *Commissioners of Taxation (N.S.W.)* (11).]

The *State Transport (Co-ordination) Act* is within the powers of the Legislature of New South Wales, (*a*) so far as it affects subjects

(1) (1932) A.C., at p. 558; 47 C.L.R., at p. 396.
(2) (1932) A.C. 542; 47 C.L.R. 386.
(3) (1926) 38 C.L.R. 408.
(4) (1908) 5 C.L.R. 789.
(5) (1933) 50 C.L.R. 30.
(6) (1907) 5 C.L.R. 89.
(7) (1926) 38 C.L.R. 441.
(8) (1924) 35 C.L.R. 69, at pp. 117, 118.
(9) (1921) 29 C.L.R., at pp. 251, 252.
(10) (1924) V.L.R. 276; 46 A.L.T. 8.
(11) (1907) 4 C.L.R. 1087.

of that State within its borders, and (*b*) so far as the circumstances or facts of this case are concerned. The principles involved in this case are to a large extent covered by the decision in *Willard* v. *Rawson* (1). An examination of the Act shows that it is concerned with two things, (*a*) the use of roads within the State, and (*b*) the adequacy of existing transport facilities within the State. Moneys received pursuant to the Act are paid into a fund common to all the various services of the State relating to transport. The real and primary object of the Act is the co-ordination and protection of transport facilities within the State. All the provisions of the Act relevant to this case were referred to in argument, and considered by the Court, in *Vizzard's Case* (2). The Court there decided that the Act was valid. So far as sec. 92 of the Constitution is concerned it is immaterial that the goods here in question were owned by the appellant. Sec. 37 of the State Act is merely an alternative method of dealing with the fee that has to be paid or the expenses that have to be borne by a person who desires to operate a public vehicle on roads within New South Wales. The decisions in *Willard* v. *Rawson* (1) and *R.* v. *Vizzard*; *Ex parte Hill* (2) should be followed in this case.

Eager, in reply.

Cur. adv. vult.

The following written judgments were delivered :— Mar. 11, 1935.

GAVAN DUFFY C.J. In my opinion this case is governed by the decisions in *Willard* v. *Rawson* (1) and *R.* v. *Vizzard*; *Ex parte Hill* (2).

The appeal should be dismissed.

RICH J. I have had the opportunity of reading the judgment prepared by my brothers *Evatt* and *McTiernan* and agree with it.

STARKE J. The appellant carries on the business of a manufacturer and warehouseman, and is the proprietor of a large number of retail stores. It transports its goods, in motor vehicles, from its warehouse in Melbourne, Victoria, into New South Wales, for

(1) (1933) 48 C.L.R. 316. (2) (1933) 50 C.L.R., at p. 33.

H. C. OF A. 1934-1935.

O. GILPIN LTD. v. COMMISSIONER FOR ROAD TRANSPORT AND TRAMWAYS (N.S.W.).

Starke J.

delivery to and sale in its retail stores in New South Wales. It was sued in the Court of Petty Sessions at Albury by the Commissioner for Road Transport and Tramways for a charge imposed upon it pursuant to sec. 37 of the *State Transport (Co-ordination) Act*, No. 32 of 1931, of New South Wales. The section provides: "(1) If any person operates any public motor vehicle in contravention of this Act the board may impose upon him an obligation to pay to them on demand such sums as the board determines, but such sums shall not exceed the sums that could have been made payable to the board under sub-sections four and five of section eighteen had the person operating the vehicle been the holder of a license to operate it and had the board imposed therein the conditions provided by such sub-sections."

Admittedly the appellant had operated its motor vehicles in New South Wales without a licence as required by the Act, and therefore in contravention of the Act. Admittedly also the charge sued for was imposed by the Commissioner in accordance with the provisions of sec. 37. Judgment was given by the Court of Petty Sessions, constituted by a police magistrate, for the Commissioner, for the amount claimed. Special leave was granted by this Court to appeal to it against this judgment, and the appeal now falls for determination.

It is objected that the appeal is incompetent. But, despite the decision of the Judicial Committee in *Webb* v. *Outrim* (1), the objection cannot be sustained. The case involved the interpretation of the Constitution, and therefore an exercise of federal jurisdiction. Consequently it was competent for this Court to grant special leave to appeal (*Judiciary Act* 1903-1933, secs. 30 and 39; *Baxter* v. *Commissioners of Taxation (N.S.W.)* (2); *Lorenzo* v. *Carey* (3); *Commonwealth* v. *Limerick Steamship Co. and Kidman* (4); *Miller* v. *Haweis* (5); *Troy* v. *Wrigglesworth* (6); *H. V. McKay Pty. Ltd.* v. *Hunt* (7); *Hume* v. *Palmer* (8)).

The judgment has been attacked upon two grounds:—

(1) That the provisions of sec. 37 of the *State Transport (Co-ordination) Act* 1931 contravene the provisions of sec. 92 of the Constitution.

(1) (1907) A.C. 81.
(2) (1907) 4 C.L.R., at p. 1141.
(3) (1921) 29 C.L.R. 243.
(4) (1924) 35 C.L.R. 69.
(5) (1907) 5 C.L.R. 89.
(6) (1919) 26 C.L.R. 305.
(7) (1926) 38 C.L.R. 308.
(8) (1926) 38 C.L.R. 441.

The section does, as it appears to me, contravene the provisions of the Constitution. It enables the Board to impose burdens directly and immediately upon the transport or movement of passengers and goods in motor vehicles, whether engaged in domestic or inter-State, or other trade and commerce. Indeed, such transport or movement is the foundation of liability.

R. v. *Vizzard*; *Ex parte Hill* (1) and *Willard* v. *Rawson* (2), are relied upon. In *R.* v. *Vizzard*; *Ex parte Hill* (1) a majority of this Court were of opinion that the Act—or rather, sec. 12 and the licensing sections—did not contravene the provisions of the Constitution, but they declined to overrule the propositions of law established by this Court in *McArthur's Case* (3), and considered the Act "on the hypothesis that those propositions correctly expressed the law." If, however, those propositions are the law, and bind this Court, then it appears to me, and for reasons which I sufficiently expressed in *R.* v. *Vizzard*; *Ex parte Hill* (4), that the provisions of sec. 37 of the *State Transport* (*Co-ordination*) *Act* 1931, do contravene the Constitution, and the Act, to that extent, at any rate, is invalid. *Willard* v. *Rawson* (2) rests, as I said in *Vizzard's Case* (5), upon the interpretation given to the Act in question there. It was, as construed, what may be called a traffic law as distinguished from a law burdening inter-State transport by means of taxes, duties or licence. Indeed, as my brother *Dixon* pointed out in *Vizzard's Case* (6), there is much in the reasoning of *Willard* v. *Rawson* (2) to support the conclusion that the *State Transport* (*Co-ordination*) *Act* 1931, of New South Wales, contravenes sec. 92 of the Constitution.

(2) That the provisions of sec. 37 of the *State Transport* (*Co-ordination*) *Act* 1931, are an infringement of the customs power contained in sec. 90 of the Constitution: "On the imposition of uniform duties of customs the power of the Parliament to impose duties of customs and of excise, and to grant bounties on the production or export of goods, shall become exclusive." The obligation imposed under sec. 37, however, is not a duty upon the importation or

(1) (1933) 50 C.L.R. 30.
(2) (1933) 48 C.L.R. 316.
(3) (1920) 28 C.L.R. 530.
(4) (1933) 50 C.L.R., at pp. 52-56.
(5) (1933) 50 C.L.R., at p. 55.
(6) (1933) 50 C.L.R., at p. 67.

H. C. OF A. 1934-1935.

O. GILPIN LTD. v. COMMISSIONER FOR ROAD TRANSPORT AND TRAMWAYS (N.S.W.).

exportation of goods. It is not a customs duty (*Vacuum Oil Co. Pty. Ltd.* v. *Queensland* (1)).

In my opinion the appeal should be allowed and the judgment below discharged.

DIXON J. The appellant, a company incorporated in the State of Victoria, conducts a chain of retail stores extending into New South Wales. Goods required by its stores in New South Wales are carried by the company's own motor lorries from a depot in Melbourne. On the particular occasion that has been taken as a test of the liability incurred under the New South Wales *State Transport (Co-ordination) Act* 1931, by reason of such a course of transportation, a motor lorry and trailer took goods packed in baskets from the depot in Melbourne through Albury and delivered them at the company's places of business at Henty, Wagga and Junee in New South Wales. The vehicles unladen weighed nearly four tons and they were capable of carrying a load of four tons. From the border town of Albury to Junee is a hundred miles. Throughout the journey the vehicles carried nothing but goods of the company brought from Melbourne to supply the company's shops in New South Wales. In respect of the journey the respondent Transport Board has purported to impose upon the company an obligation to pay a sum of £10, which, by the order under appeal, it has recovered as a civil debt. The sum is calculated at the rate of threepence a ton a mile upon eight tons, the aggregate of the weight of the vehicles and of the load they were capable of carrying.

A number of provisions in the Act combines to produce the result that no one may use a motor vehicle or an aircraft to carry passengers or goods for hire or other reward or in the course of any trade or business or for the carriage or delivery of his own goods, except goods not intended for immediate or ultimate sale, unless he obtains a licence authorizing its use for the particular route and purpose. The licence may impose a condition that sums of money shall be paid to the Board in respect of passengers and of goods carried. The amount is left to the discretion of the Board within maximum limits. For the carriage of goods the maximum is a sum calculated

(1) (1934) 51 C.L.R. 108.

at the rate for each mile travelled of threepence per ton of the aggregate weight of the vehicle unladen and of the weight of loading the vehicle is capable of carrying (whether such weight is carried or not). The money goes to a fund in the New South Wales Treasury called the "Transport (Co-ordination) Fund." Out of the fund, which is under the control of the Board, are taken salaries and other costs of administering the Act, subsidies in respect of public motor vehicles used for providing feeder services to Government railways or tramways and payments to the Government Railways Fund. If a vehicle is operated in contravention of the Act, that is, if it is used for the carriage of passengers or goods without a licence or an exemption, a heavy penalty is incurred. But the person who operates it is also liable to the imposition upon him of an obligation to pay such sums as the Board determines, not exceeding the sums that might have been imposed as a condition of a licence, if he had obtained one. (See sec. 3, definitions of "Motor Vehicle" and "operate"; 12 (1) and (2), 14, 15, 17 (1) and (2) (*a*) and (*b*), 18 (4) and (5), 26 (3), (5), (6) and (7), 36 and 37.)

The company's motor-lorry and trailer were not licensed under the Act, and the imposition of £10 was made by the Board upon the footing that on the occasion in question the vehicles were operated in contravention of the Act. The company, on the other hand, claims that the carriage of its goods involved no contravention of the Act, which expressly provides that it shall be read and construed so as not to exceed the legislative power of the State. It claims that to prohibit, except under a discretionary licence, the use of motor vehicles for the transportation of goods although upon a journey that is inter-State would be an impairment of the freedom conferred by sec. 92 of the Constitution upon trade, commerce and intercourse among the States. But the company asserts that a violation of that freedom even more flagrant would be committed if an owner of goods were obliged to contribute to the State Treasury as a consequence of his carrying them in New South Wales by motor vehicle in the course of inter-State transportation for commercial ends.

The conditions upon which the imposition of the obligation depends, are prescribed by statutory provisions which must be

H. C. OF A. 1934-1935.

O. GILPIN LTD. v. COMMISSIONER FOR ROAD TRANSPORT AND TRAMWAYS (N.S.W.).

Dixon J.

considered together. The conditions of liability which appear from an examination of these provisions may be briefly stated. The obligation arises when (*a*) goods are carried by motor vehicle, and (*b*) the goods are intended for sale, either at once or at some future time, if (*c*) the State Board determines the amount of the imposition and (*d*) that amount does not exceed a sum calculated upon the distance travelled in New South Wales and the size and capacity of the vehicle.

Independently of any decided case, I am clearly of opinion that to allow these provisions to apply to the carriage of goods in a course of transportation from another State would be inconsistent with the absolute freedom of trade, commerce and intercourse among the States.

Any act or transaction for which protection is claimed under sec. 92 must be a part of trade, commerce or intercourse among the States, that is to say, it must be something done as preparatory to, or in the course of, or as a result of, inter-State movement of persons and things or inter-State communication. There can be no doubt that the use of motor vehicles for the carriage of goods from one State to another for the purpose of sale fulfils this requirement. But it does not follow from the possession of this character that the act of transportation is entirely free from Government control. The question whether sec. 92 applies to a given case involves one or more of several considerations which are susceptible of separate examination. First, the nature and operation of the interference or of the exertion of power complained of, must be considered in order to determine whether it amounts to a restriction of or burden upon the acts or transactions for which immunity is claimed as part of inter-State trade, commerce and intercourse. Second, the nature of the acts or transactions found to be restricted or burdened must be examined in order to ascertain whether they are part of inter-State trade, commerce, or intercourse. Third, the nature and incidence of the restriction or burden must be examined in order to determine whether it belongs to that class freedom from which is secured by sec. 92. For acts or transactions which in fact occur in the course of inter-State trade may be restrained or burdened in consequence of the intervention by the State in the

affairs of the citizen for causes which have no relation or relevance to trade, commerce and intercourse among the States. The expression "trade, commerce, and intercourse among the States" describes a section of social activity by reference to special characteristics. The freedom it gives plainly relates to those characteristics. It is only where they are present that the activity is to be absolutely free. It appears to me to be natural to understand a freedom that is so given as referring to restrictions or burdens imposed in virtue of those characteristics upon the presence of which the grant of immunity is based. It is, perhaps, upon some such reasoning that the interpretation of sec. 92 proceeds which confines it to discriminatory laws, that is to forbidding discrimination against inter-State transactions in favour of domestic trade. But that interpretation overlooks the fact that a restriction conditioned on any one of the characteristics which are connoted by the description "trade commerce and intercourse among the States" discriminates against such transactions in favour of transactions from which that characteristic is absent. There is no reason why the freedom should be limited to restrictions based upon the inter-State character of the activity so described. Its character of trade or intercourse is just as essential to the description. "Free" must at least mean free of a restriction or burden placed upon an act because it is commerce, or trade, or intercourse, or because it involves movement into or out of the State. By this I mean that the application of the restriction or burden to the act cannot be made the consequence of that act's being of a commercial or trading character, or of its involving intercourse between two places, or of its involving movement of persons or things into or out of the State.

Very many of the difficulties which have been felt as to a logical application of the words "absolutely free" to inter-State trade, commerce and intercourse, disappear, I think, if it is recognized that it is a freedom from restrictions or burdens which have reference to one or other of the distinguishing features which form the basis of the immunity. Thus a deserting husband might be arrested under a law of a State notwithstanding that his destination lay over the border. But if the State law made his liability to arrest depend not on the fact of desertion but upon his attempting to

H. C. OF A. 1934-1935.

O. GILPIN LTD. v. COMMISSIONER FOR ROAD TRANSPORT AND TRAMWAYS (N.S.W.).

Dixon J.

leave the State, I should think that sec. 92 would invalidate it. In the first case, his inter-State journey might be interrupted but only as a consequence produced by a law which had no reference to any aspect of trade, commerce and intercourse among the States. In the other case, the State boundary is adopted by the law as the limit of the deserting husband's movement; the inter-State character of his flight is made the reason for his detention.

A law of a State forbidding the mixing of straw chaff with hay chaff would be perfectly good even if such a mixture were desired or required for an inter-State commercial dealing; but, if the law simply penalized the sale of such a mixture, it could not extend to sales made for delivery across the inter-State boundary. The first law applies independently of any quality which goes to constitute inter-State trade, the second depends for its application upon an essential ingredient of commerce, sale.

Under a State Income Tax Act taxation clearly might be levied on income derived exclusively from a business of inter-State carrying, because the criterion of the liability does not relate to any of the ingredients of inter-State commerce. But a tax on consignment notes might well be considered incapable of application to contracts of inter-State carriage, on the ground that it made commercial transportation between two places the ground of liability.

Further, it is not every regulation of commerce or of movement that involves a restriction or burden constituting an impairment of freedom. Traffic regulations affecting the lighting and speed of vehicles, tolls for the use of a bridge, prohibition of fraudulent descriptions upon goods, and provisions for the safe carriage of dangerous things, supply examples.

But, given an act or transaction which falls within the conception of trade, commerce, or intercourse among the States and a restriction or burden operating upon that act or transaction, it appears to me that it must be an infringement upon the absolute freedom guaranteed by sec. 92 unless the restriction or burden 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."

Now, in the present case, the application of the statutory provision authorizing the imposition of the burden is the consequence of the act's being of a commercial or trading character and of its involving intercourse between two places. It is imposed in virtue of the nature of the transaction as a transportation of goods for sale and of the use of a motor vehicle for the purpose. Its amount is calculated in reference to the distance covered in New South Wales.

The meaning of this interpretation of sec. 92 may be further illustrated by the facts of the cases which have come up for decision in this Court, and by a statement of how, in my opinion, the test it affords would apply to them.

In *Fox* v. *Robbins* (1), the State law, which prescribed for a wine licence authorizing the sale of wine made from fruit grown in any other State a licence fee higher than the fee for the licence authorizing the sale of its own wine, would infringe upon sec. 92 because the criterion of its application is the inter-State character of the matter it affected, which, properly considered, was the introduction of wine or fruit produced in another State, and that is inter-State trade. The case may be said to illustrate also the operation of sec. 92 in forbidding indirect restrictions or burdens alike with direct if they apply in virtue of a characteristic which is essential to inter-State trade.

In *R.* v. *Smithers*; *Ex parte Benson* (2), the State enactment, which made it an offence for a person to enter the State within three years of his conviction in another State of an offence for which the punishment provided was more than a year's imprisonment, imposed a restriction upon entry itself, and, therefore, adopted as the ground of its application all the characteristics which make movement between two places inter-State intercourse.

In *New South Wales* v. *The Commonwealth* (*Wheat Case*) (3), the expropriation of wheat was not made dependent upon any of the characteristics that go to constitute either trade, commerce or intercourse, or upon any element that is inter-State. In this sense the wheat was taken on the basis of property and property only. But the provisions nullifying contracts did adopt as criteria of their

(1) (1909) 8 C.L.R. 115.
(2) (1912) 16 C.L.R. 99.
(3) (1915) 20 C.L.R. 54.

H. C. OF A. 1934-1935.

O. GILPIN LTD. v. COMMISSIONER FOR ROAD TRANSPORT AND TRAMWAYS (N.S.W.).

Dixon J.

operation essential elements both of commerce and of movement of commodities, although not necessarily of inter-State movement. The correctness of the decision upholding these provisions is, therefore, in my opinion, questionable.

In *Foggitt, Jones & Co.* v. *New South Wales* (1) and in *Duncan* v. *Queensland* (2) (*Meat Cases*), the requirement that stock and meat should be held and should be kept for the disposal of the British Government and the prohibition of sale, delivery and shipment and exportation took necessary ingredients of trade, of movement of commodities and, as I think, of inter-State trade also, and, in my opinion, they have rightly been considered void.

In *W. & A. McArthur Ltd.* v. *Queensland* (3), the State enactment, which prohibited the sale of commodities at prices above those fixed by the Government, took an essential quality of commerce as the very subject of restriction. Such a control could not extend to inter-State commerce. The actual decision of the Court held that the State law governed transactions which, perhaps, ought to have enjoyed immunity, because the restriction on the sale of the commodity within the State may have operated to obstruct exportation from the neighbouring State for sale.

In *The Commonwealth and Commonwealth Oil Refineries Ltd.* v. *South Australia* (4), the tax upon the sale of motor spirit was levied upon the importer and thus distinguished introduction into the State as a ground of the burden.

In *James* v. *South Australia* (5), the State legislation itself prescribed the maximum amount of dried fruit that might be sold within Australia, and thus by reference to sale restrained disposal of fruit out of a State into the remaining five States.

In *Ex parte Nelson* [*No.* 1] (6), the State legislation authorized the Executive to prohibit the importation of stock from another State or country where there was reason to believe any infectious or contagious disease in stock existed. The legislation selected the very act of importation from another State for prohibition. It is immaterial that it did so in order that the introduction of disease might thus be prevented. The absolute character of the freedom bestowed

(1) (1916) 21 C.L.R. 357.
(2) (1916) 22 C.L.R. 556.
(3) (1920) 28 C.L.R. 530.
(4) (1926) 38 C.L.R. 408.
(5) (1927) 40 C.L.R. 1.
(6) (1928) 42 C.L.R. 209.

on inter-State commerce and intercourse does not admit of exceptions. All power of the State to derogate from that freedom is withdrawn. But, once in New South Wales, articles of commerce may be dealt with by any law relating to disease or any other subject which does not take for a criterion of its operation either the commercial character of a transaction relating to it or a transportation or movement between two places. A law which does take such a criterion cannot include inter-State commerce or movement.

In *Roughley* v. *New South Wales*; *Ex parte Beavis* (1), the legislation regulating produce agents affected those selling produce which their clients sent to Sydney from other States to be marketed. Selling such produce on behalf of the clients may be taken to be an act or course of conduct within the ambit of the legislative power of the Commonwealth over trade and commerce among the States. But its inter-State character is obtained, not from the nature of the agent's function, but from the course of his client's trade. Accordingly, in determining whether an agent was entitled to immunity from the regulation of this part of his business, it is necessary to consider, not the commercial characteristics of the sales he effected, because those sales were not, if regarded alone, themselves inter-State trade, but its operation upon the dealings with the principal. If the effect produced on the principal's dealings was burdensome or restrictive of his marketing, the law could not, in my judgment, stand. Otherwise it could. In effect, a majority of this Court held that it imposed no burden or restraint on his dealings and was good.

In *James* v. *Cowan* (2), by executive act dried fruit was seized in an attempt to expropriate it under a State enactment. It was so seized in order to ensure that dried fruit beyond a given quantity or proportion was not marketed in Australia. Such an exercise of the power of compulsory acquisition involved an attempt to restrain the sale of a commodity into other States, that is, it attempted to restrict such a transaction by reference to the very characteristics bringing it within the description of inter-State trade. Accordingly the attempt was inconsistent with sec. 92.

(1) (1928) 42 C.L.R. 162.
(2) (1930) 43 C.L.R. 386; (1932) A.C. 542; 47 C.L.R. 386.

H. C. OF A. 1934-1935.

O. GILPIN LTD. v. COMMISSIONER FOR ROAD TRANSPORT AND TRAMWAYS (N.S.W.).

Dixon J.

In *Peanut Board* v. *Rockhampton Harbour Board* (1), the question was whether a compulsory system of collective marketing established under statute could operate to prevent a grower exporting his commodity to another State. Because the plan meant an intervention between the producer and the consumer of the commodity in order to provide the producer with an exclusive means of marketing his produce and thus assumed complete control of the disposal of the commodity by or on the part of the grower, the basis of the control exercised was an essential characteristic of trade, commerce and intercourse, namely, marketing. Upon this view it was, as I think rightly, held to be inconsistent with the freedom of inter-State trade.

In *Willard* v. *Rawson* (2), a State enactment forbidding the use of motor vehicles upon public highways, except upon conditions which included a substantial payment to the Treasury, was considered by a majority of the Court validly to apply to the use of motor trucks for the purpose of inter-State transportation of goods. The correctness of this decision depends, in my view, upon the true answer to the enquiry whether the exaction fell upon inter-State transportation in virtue of a feature essential to its character. My own answer to the question was that, because the material provision of the law was a prohibition of the use of a means of transport unless a licence fee was paid, it imposed a pecuniary burden by reference to conduct which itself forms part of commerce and intercourse, including that between the States (3).

In *R.* v. *Vizzard*; *Ex parte Hill* (4), the very statute was in question which governs this case. Carriers for reward, who conveyed merchandise between a place in Victoria and a place in New South Wales, were convicted under sec. 12 of operating in New South Wales a public motor vehicle which was neither licensed by the Board nor exempt. The majority of the Court upheld the conviction, being of opinion that no impairment was involved of the freedom of trade, commerce and intercourse among the States. In dissenting from that conclusion, I relied upon prior decisions of this Court to which it appeared to me altogether opposed. But, apart from all authority,

(1) (1933) 48 C.L.R. 266.
(2) (1933) 48 C.L.R. 316.
(3) (1933) 48 C.L.R., at p. 331.
(4) (1933) 50 C.L.R. 30.

in my opinion, the provision then in question could not apply to the carriers because it prohibited by reference to the very characteristics of commercial intercourse a usual method of carrying on trade, including inter-State trade.

In *Vacuum Oil Co. Pty. Ltd.* v. *Queensland* (1), the State enactment was interpreted as throwing upon the first person who, after petrol reached the State, held it for sale or sold it, the burden of buying a prescribed proportion of industrial power alcohol. It thus imposed a burden upon the importer of petrol from another State in his character of importer. It therefore selected as a ground of liability an essential quality of inter-State trade and, accordingly, infringed upon the freedom preserved by sec. 92.

In *Tasmania* v. *Victoria* (2), the Victorian prohibition of the importation of Tasmanian potatoes was complete, and, although based upon an opinion that a potato disease might be introduced from Tasmania, it could not but invade the freedom of trade between the States inasmuch as it denied entry of a commodity.

Trade, commerce and intercourse among the States is an expression which describes the activities of individuals. The object of sec. 92 is to enable individuals to conduct their commercial dealings and their personal intercourse with one another independently of State boundaries. The constitutional provision is not based on mere economic considerations. I am unable to agree with the view that trade, commerce and intercourse should, in applying sec. 92, be regarded as a whole and not distributively. The Constitution is dealing with a governmental power. It is not easy to appreciate the meaning of a guarantee of freedom of trade and intercourse unless it gives protection to the individual against interference in his commercial relations and movements. Nor can I share the view that the protection is against none but direct interference with inter-State trade, commerce and intercourse. I do agree that it prevents only burdens or restrictions which apply to conduct or action as trade, commerce or intercourse, or because of its inter-State character. But such a burden or restriction may be indirect in its operation. However circuitous or disguised it may be, once it

(1) (1934) 51 C.L.R. 108.

(2) *Ante*, p. 157.

H. C. OF A. 1934-1935.

O. GILPIN LTD. v. COMMISSIONER FOR ROAD TRANSPORT AND TRAMWAYS (N.S.W.).

Dixon J.

appears that such a burden or restriction is attempted, it is discovered to be an infringement upon the freedom preserved by sec. 92.

As the majority of the Court take the view that sec. 92 does not apply to the present case, it is not important for me to consider how the decision in *R.* v. *Vizzard*; *Ex parte Hill* (1) applies to the particular provision now in question. But it does appear to me that the judgments of the majority do not advert to the particular liability with which this case is concerned and to the special considerations arising from the facts that it is imposed, not on a carrier, but on the trader and in respect of the transportation of his own goods when they are intended for the market and that it is a liability in the nature of a tax. I cannot reconcile the decision with my understanding of the reasons upon which the previous decisions of the Court proceeded, and I do not gather that the majority of the Court regarded their conclusion as based on that reasoning. It is because of these facts that I have thought it desirable to consider the present case independently of authority. In doing so, I have assumed that the Commonwealth is bound by sec. 92. While I recognize the strength of the considerations which led to the decision to the contrary, I have never felt satisfied that they sufficed to raise a necessary implication limiting the application of the provision to the States. Although quite prepared to follow the decision of the Court in *James* v. *The Commonwealth* (2), that the Commonwealth is not bound, I have not in this or previous cases based any affirmative reasoning upon it.

In my opinion the appeal should be allowed.

EVATT AND MCTIERNAN JJ. In our opinion this case is governed by the decisions in *Willard* v. *Rawson* (3) and *R.* v. *Vizzard*; *Ex parte Hill* (1).

In the course of his judgment in the latter case, *Rich* J. made the following observations with respect to the *State Transport (Co-ordination) Act* 1931, of New South Wales:—

> "Its long title describes it as an Act to provide for the improvement and for the co-ordination of means and facilities for locomotion and transport, and to constitute a Board of Commissioners for that purpose. It is directed to secure an ordered system of public transportation in which the integers

(1) (1933) 50 C.L.R. 30.
(2) (1928) 41 C.L.R. 442.
(3) (1933) 48 C.L.R. 316.

(not the least important of which are State railways) do not engage in mutual slaughter by irrational competition. As part of the means to this end it sets up a licensing system for motor vehicles which act as common carriers or which otherwise engage in the carriage of goods. The grounds upon which a licence may be granted or withheld are concerned with the public need for such transport, the suitability of routes, the mutual relation of the proposed service with other services and other matters which attend the co-ordination of a random system of transport. . . . The operation of the Act in no way depends upon the inter-State character of his " (i.e., the operator's) " journey; it applies uniformly to transport in New South Wales and does not concern itself with the difference between inter-State and intra-State traffic. I should think that a law of this character which did differentiate between the two kinds of traffic might well be held directly to restrain inter-State trade. The fact that it does not so differentiate does not establish that its operation is indirect or consequential. But the question whether it is direct or indirect must be determined by a consideration of the nature of the statute and the character of the act or transaction which it affects. The statute professes to be, and in fact is, an attempt not to suppress but to regulate transportation and to do so in such a way as to help rather than to retard or obstruct the movement of commercial goods throughout New South Wales. It takes a broad view of what does in the long run facilitate and help commercial transportation, and adopts the assumption that a superabundance of means of transport to-day followed by a consequential insufficiency or inappropriateness to-morrow cannot aid but must hamper trade, commerce, and intercourse. The acts or transactions with which the statute is concerned, and upon which it operates, are not actual commercial dealings, the actual transfer of goods from one place to another and the actual movement of individuals. No one is required, not to go here or there, not to send his goods here or there, not to make this or that bargain or not to engage in this or that communication. The material parts of the statute deal with vehicles in a double sense. The motor cars or trucks are the instruments—the vehicles for accomplishing these ends. No one can doubt their importance as means to trade, commerce, and intercourse inter-State or intra-State, but they are aids or implements to effect the thing, they are not the thing itself " (1).

In our opinion, the above observations truly describe the legislation which is again attacked on this appeal.

Absolute freedom of trade, commerce and intercourse among the States does not mean that a resident of one State possesses the right to transport goods or travel to a place in another State in whatever vehicle or by whatever route or at whatever time or at whatever speed he may choose. And a law which imposes a limitation upon his choice is not necessarily inconsistent with sec. 92 of the Constitution.

(1) (1933) 50 C.L.R., at pp. 50, 51.

H. C. OF A. 1934-1935.

O. GILPIN LTD. v. COMMISSIONER FOR ROAD TRANSPORT AND TRAMWAYS (N.S.W.).

Evatt J. McTiernan J.

In our opinion sec. 37 of the Act is an essential part of the licensing system established by the Act and it does not seem to us to be material to affix a name to the monetary obligation which the Board may impose under sec. 37. Moreover, even if the obligation is a tax properly so called, it must be remembered that the State of New South Wales into whose revenues the moneys are paid has provided out of its public funds facilities, including roads, upon which motor vehicles operate, and the tax may fairly be regarded as a charge in aid of the provision of such facilities (*Willard* v. *Rawson* (1)).

The preliminary objection, that the Court has no jurisdiction to hear this appeal, must, consistently with the authorities, be determined against the respondent. (See, e.g., *Hume* v. *Palmer* (2).)

It is also established that sec. 90 of the Constitution is not infringed by such a provision as sec. 37.

The appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for the appellant, *Norton Smith & Co.*

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

J. B.

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

(2) (1926) 38 C.L.R. 441.