Privy Council Appeal No. 40 *of* 1953

Hughes and Vale Proprietary Limited - - - *Appellant*

v.

The State of New South Wales and others - - - *Respondents*

AND

The Commonwealth of Australia and others - - - *Interveners*

FROM

THE HIGH COURT OF AUSTRALIA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED 17TH NOVEMBER, 1954

Present at the Hearing:

LORD OAKSEY
LORD MORTON OF HENRYTON
LORD REID
LORD TUCKER
LORD COHEN

[*Delivered by* LORD MORTON OF HENRYTON]

This is an appeal by special leave from a Judgment and Order of the High Court of Australia overruling by a majority (Sir Owen Dixon, C.J., McTiernan, Williams and Webb, JJ.—Fullagar, Kitto and Taylor, JJ. dissenting) a demurrer by the plaintiff (appellant) to the defence of the defendants (respondents). In overruling the appellant's demurrer the High Court held that the State Transport (Co-ordination) Act, 1931-1951 (hereafter referred to as "the Transport Act") was within the powers of the Parliament of the State of New South Wales and did not infringe section 92 of the Constitution of the Commonwealth of Australia.

The appellant, who carries on business as a motor carrier of general merchandise between Sydney in the State of New South Wales and Brisbane in the State of Queensland, brought the action claiming declarations that the Transport Act and certain charges levied thereunder were invalid. At the hearing of the appeal, however, the appellant sought only to obtain the declaration hereafter mentioned.

It is convenient to set out at once the most relevant sections of the Australian Constitution and of the Transport Act.

The Commonwealth of Australia Constitution Act, 1900:—

"S. 51. The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to:

(1) Trade and commerce with other countries, and among the States:

S. 92. On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free;

S. 107. Every power of the Parliament of a Colony which has become or becomes a State, shall unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be."

New South Wales State Transport (Co-ordination) Act, 1931-1952:—

"S. 3 (1) ....

'Motor vehicle' means any vehicle whatsoever propelled by mechanical means and includes a tractor or trailer and also includes aircraft, but does not include a vehicle used on a railway or tramway.

....

'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 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 subsection, 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.

S. 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 subsection 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.

S. 14 (1)—as amended by s. 7 of the Motor Traffic (Amendment) Act, 1951. Every person desiring to operate a public motor vehicle shall in addition to any license or registration which by law he is required to hold or effect, apply to the board or to the prescribed person or authority for a license for such vehicle under this Act.

(2) The application for a license shall be made in the prescribed form and manner and shall contain the following particulars:—

. . . .

(3) The application shall be accompanied by the prescribed fee.

(4) The prescribed fee shall be payable in respect of every renewal of any such license."

The "board" referred to in this and other sections was a board of four commissioners to be appointed by the Governor, in exercise of a power conferred by s. 4, and the section provided that the Board should

"subject to the control of the Minister, carry into effect the objects and purposes of the Act and discharge the duties powers and functions thereby conferred and imposed."

The Board was called the State Transport (Co-ordination) Board and it was the licensing authority. Its subsequent history is described as follows by Dixon C.J.

"This Board was superseded as long ago as 22nd March, 1932. Since then not a few statutory changes have taken place and now, after the field of transport administration and control has undergone more than one division, the powers and authorities conferred by the Act with

respect to road transport and probably aircraft have come to reside in an officer called the Director of Transport and Highways. He is constituted a corporation sole but in his natural capacity he is the chairman of a commission called the New South Wales Transport and Highways Commission, the functions of which seem to be rather to plan and recommend than to administer. As chairman moreover the Director has the privilege of submitting any decision of the Commission of which he disapproves to the Minister, who may then determine whether the decision is or is not to be carried into effect: see Act No. 10 of 1950, Sections 3, 4, 6 (4) and 8. In his corporate capacity the Director of Transport and Highways is the road transport authority of the State. But in the exercise and performance of the powers duties and functions conferred upon him as a result of the various statutes he is subject to the direction and control of the Minister: Act No. 15 of 1952, Section 3 (4). No purpose would be served by recounting the legislative steps by which the Director became the road transport authority. It is enough to mention the successive provisions from which the result ensues, which are:— No. 3 of 1932, Sections 9 (1) and 12 (2); No. 31 of 1932, Sections 5, 14 (1) and (2), and 20 (1) (*b*) and (2) (*c*); No. 10 of 1950, Sections 3, 6 and 8 (1) (*g*) and (2); No. 15 of 1952, Section 2, Section 3 considered with Section 4, Sections 5 (1), 11, 17 (1) (*a*) and (2) (*a*).

The duties and powers of the Directors of Transport and Highways do not extend in any way into the field of railway or tramway administration or transport by sea. Whatever 'co-ordinating' he does must be effected by his control of carriage by road. From a practical point of view air transport may be put aside, assuming his authority extends to it."

"S. 17 (1) Every license under this Act shall be subject to the performance and observance by the licensee of the provisions of this Act and the regulations that may relate to the license or to the public motor vehicle in respect of which it is issued, and of the provisions contained in or attaching to the license, and all such provisions shall be conditions of the license.

(2) The regulations may prescribe, or the board may determine in respect of any particular license, or of any class of licenses relating to any area, route, road, or district, or of any other class of licenses whatsoever, or generally what terms and conditions shall be applicable to or with respect to a license, including (but without in any way limiting the generality of the foregoing)—

(*a*) the fares, freights, or charges, or the maximum or minimum fares, freights, or charges to be made in respect of any services to be provided by means of the public motor vehicle referred to in the license;

(*b*) the use of such public motor vehicle as to whether passengers only or goods only or goods of a specified class or description only shall be thereby conveyed, and as to the circumstances in which such conveyance may be made or may not be made (including the limiting of the number of the passengers or the quantity, weight, or bulk of the goods that may be carried on the vehicle).

(3) In dealing with an application for a license the board shall consider all such matters as they may think necessary or desirable, and in particular (where applicable) shall have regard to—

(*a*) the suitability of the route or road on which a service may be provided under the license:

(*b*) the extent, if any, to which the needs of the proposed areas or districts, or any of them, are already adequately served;

(*c*) the extent to which the proposed service is necessary or desirable in the public interest;

(*d*) the needs of the district, area, or locality as a whole in relation to traffic, the elimination of unnecessary services, and the co-ordination of all forms of transport, including transport by rail or tram:

(*e*) the condition of the roads to be traversed with regard to their capacity to carry proposed public vehicular traffic without unreasonable damage to such roads ;

(*f*) the suitability and fitness of applicant to hold the license applied for ;

(*g*) the construction and equipment of the vehicle and its fitness and suitability for a license: Provided that the certificate of registration and the certificate of airworthiness of an aircraft issued under the Air Navigation Regulations or a registration of any motor vehicle other than aircraft under any other Act of the State may be accepted as sufficient evidence of suitability and fitness of the vehicle.

(4) The board shall have power to grant or refuse any application of any person for a license or in respect of any vehicle or of any area, route, road, or district.

(5) If the holder of any license 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 license he shall be guilty of an offence against this Act.

Sec. 18 ....

(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 subsection 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 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.

. . . .

(11) Where the Board at any time thinks it desirable that any of the terms, conditions, and authorities in respect of any license for a public motor vehicle should be varied during the currency thereof, or that any new term, condition or authority should be attached to any such license during its currency, they may, subject to this Act and the regulations, vary the same or attach thereto such term, condition or authority accordingly, and the terms, conditions and authorities as so varied or added to as the case may be shall thereafter be the terms, conditions and authorities of the license."

In granting licenses to the appellant under this section the authorities have imposed certain mileage charges. For reasons which will appear later, it is unnecessary to describe these charges in detail, but it is not in doubt that the object of these charges was to protect the railways in New South Wales from competition, as part of a system for "co-ordinating transport".

> S. 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.; (2) The board may from time to time vary or revoke any such exemption; (3) Any person who commits a breach of any condition imposed under this section shall be guilty of an offence against this Act.
>
> S. 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.
>
> (2) Any such permit may be revoked or varied at any time by the board.
>
> (3) Any person who commits a breach of any of the conditions of a permit 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 subsections four and five of section eighteen had the person operating the vehicle been the holder of a licence to operate it and had the board imposed therein the conditions provided by such subsections.
>
> (2) This section shall not relieve such person or any other person from the penalties for the offence.

Their Lordships find it unnecessary to travel in detail through the pleadings, for it is now clear that the first question which arises on this appeal is:—

> whether the licensing provisions of the Transport Act, considered apart from the provisions of section 3 (2) thereof, are invalid as contravening section 92 of the Constitution.

It was contended by counsel for the respondents that their Lordships should refrain from considering this question, and should apply the principle *stare decisis*, in view of a line of decisions of the High Court of Australia, referred to throughout the hearing as "the transport cases". Their Lordships are informed that this principle was relied on by the respondents at the hearing of the appellant's application for special leave to appeal, and that the Board then intimated that it would be open to the respondents to put forward the contention just stated, at the hearing of the appeal. Their Lordships have considered this contention, but have decided to reject it, for reasons which will appear later.

If the first question is answered in the affirmative, a second question will arise:—what is the effect of section 3 (2)?

The appellant contends that question (1) should be answered in the affirmative, adding that by reason of section 3 (2) the Transport Act may not be wholly invalid but its licensing provisions are inapplicable to the appellant while operating its vehicles in the course and for the purposes of inter-state trade, or to the vehicles while so operated. It claims a declaration to this effect. If their Lordships are of opinion that the appellant is entitled to the declaration claimed, no question will arise as to the validity of the imposition of the mileage charges already mentioned, since the appellant will not be bound to apply for a licence under the Act, and the charges are imposed on the granting of a licence.

The question whether the Transport Act does or does not contravene section 92 was considered by the High Court of Australia as long ago as 1933, in the case of *Rex* v. *Vizzard* 50 C.L.R. 30. That case was the second of the line of cases referred to as " the transport cases " and it gave rise to a marked difference of opinion in the High Court. By a majority of four to two, (Gavan Duffy, C.J., Rich, Evatt and McTiernan JJ.: Starke J. and Dixon J.—as he then was—dissenting) it was held that the Transport Act did not contravene section 92.

Their Lordships find it convenient to trace the history of the transport cases in some detail, first in view of the contention that the principle *stare decisis* should be applied in the present case, secondly because it has been suggested by counsel for the respondents that *Vizzard's* case was approved by the Board in *James* v. *The Commonwealth* [1936] A.C. 578, and thirdly because it is impossible fully to appreciate the judgments delivered in the High Court in the present case without a survey of the events leading up to those judgments.

The transport cases were preceded by the cases of *James* v. *South Australia* 40 C.L.R. 1 and *James* v. *Cowan* [1932] A.C. 542. These two cases are of great importance for the present purpose, and their Lordships will quote at once the summary of the facts and judgments in those cases which is to be found in the judgment of the Board in *Commonwealth of Australia* v. *Bank of New South Wales* (hereafter referred as " the Bank *case* ") [1950] A.C. 235 at pp. 303, 304: —

> "The facts in *James* v. *Cowan* can only be understood if they are read in conjunction with the earlier case of *James* v. *State of South Australia*. James carried on business in South Australia as a grower and producer of dried fruits and in the course of it sold his products outside that State. For reasons which have been many times stated in judgments of this Board and of the High Court and need not be repeated, the Commonwealth and certain of the States, including South Australia, had recourse to legislation to deal with the whole question of marketing dried fruits. In 1924 the South Australian legislature enacted the Dried Fruits Act. 1924. The material provisions of this Act are set out at large in the judgment of *James* v. *Cowan*. It is essential only to notice that the Act contained two sections, s. 20 and s. 28, each of which authorized an interference with the free disposal by the grower of his products, s. 20 by empowering the Dried Fruits Board, which was established under the Act, in its absolute discretion to determine where and in what quantities the output of dried fruits produced in any year should be marketed, and s. 28 (which was expressed to be subject to s. 92 of the Constitution) by empowering the Minister to purchase by agreement, or acquire compulsorily, any dried fruits in South Australia grown and dried in Australia subject to certain exceptions which need not be particularized.
>
> In the earlier case of *James* v. *State of South Australia* it was in the first place the validity of s. 20 of the Act and of determinations made under it that came in question, and it was held by the whole court (Isaacs, A.C.J., Gavan Duffy, Rich, Starke and Powers, JJ.) that that section, so far as it authorized a determination by the Board limiting the quantities of dried fruits which might be marketed within the Commonwealth, was obnoxious to s. 92. From the decision of the High Court no appeal was brought to this Board. But, s. 20 failing him, the Minister of Agriculture in South Australia sought to make use of his powers under s. 28. Once more James invoked s. 92 of the Constitution and in the case of *James* v. *Cowan* challenged the validity of the executive action taken under s. 28, and it was in this case when it came before the Board that the decision was given, which, as their Lordships think, goes far to determine the present case. For, as part of the *ratio decidendi* of the case and by no means *obiter* or by way of a historical narrative, the Board expressly affirmed the decision of the High Court in *James* v. *State*

of South Australia. The primary importance of the decision lies in this, that in regard to s. 20, Lord Atkin, delivering the opinion of the Board, said:—

> 'In the result, therefore, one returns to the precise situation created by s. 20 with its determination of where and in what quantities the fruit is to be marketed. Section 20 and the determinations are invalid, and for precisely the same reasons it appears to their Lordships inevitable that the exercise of the powers of the Minister, crediting him with the precise object and intention found by the High Court, were also invalid.'"

The first of the transport cases was *Willard* v. *Rawson* 48 C.L.R. 316. In that case the court by a majority (Dixon, J., dissenting) held that a law of the State of Victoria requiring every motor car to be registered by the Chief Commissioner on payment of a licence fee, and making it an offence to use an unregistered motor car on a public highway, did not infringe section 92. Their Lordships were not invited to review this case, which involved the consideration of an Act very different in its terms from the Act under consideration in the present case.

In *Vizzard's* case the High Court had to consider for the first time precisely the same question as is now before their Lordships—does the Transport Act contravene section 92 of the Constitution? Starke, J. and Dixon, J. would have answered this question in the affirmative, and delivered powerful dissenting judgments, relying *inter alia* on the two *James* cases, but they were outvoted, as has already been stated. Their Lordships will consider at a later stage the reasons on which the judgments of the majority were based, but one observation can be made at once. Their Lordships feel that the majority did not attach sufficient weight to the aspects of the two *James* cases which were emphasised, seventeen years later, in the passage just quoted from the judgment in the *Bank* case.

Next came the case of *O. Gilpin Ltd.* v. *Commissioner for Road Transport* 52 C.L.R. 189. The High Court held that the provisions of the Transport Act, and in particular a charge imposed under section 37 thereof, did not contravene section 92 of the Constitution. The majority followed its own decision in *Vizzard's* case, while Starke and Dixon, JJ., again dissented.

The result was the same in the next case, *Bessell* v. *Dayman* 52 C.L.R. 215. The Act under consideration was the Road and Railway Transport Act, 1930-1931, of South Australia, and it was held to be indistinguishable from the Transport Act.

Next came *Duncan and Green Star Trading Co.* v. *Vizzard* 53 C.L.R. 493, yet another case decided under the Transport Act. In that case the question in issue related primarily to a licence which had been issued to a consignor of goods by motor lorry from Melbourne to a town in New South Wales situate more than fifty miles from the border. It was held by Rich, Evatt and McTiernan, JJ., that the provisions of section 92 of the Constitution were not infringed by the Act or by the Regulations thereunder or by the administration of the Act as disclosed in the evidence and the terms of the licence. Starke, J. dissented but Dixon, J. felt bound to accept the majority decision, holding that the decisions of the majority of the Court in *Vizzard's* case, *Gilpin's* case and *Bessell* v. *Dayman* completely covered the question of the validity of the licence.

At this stage came the decision of the Board in *James* v. *The Commonwealth of Australia.* The effect of that case was to establish that section 92 of the Constitution binds the Parliament of the Commonwealth of Australia equally with the States. The Act under consideration was the Dried Fruits Act 1928-1935 of the Commonwealth Parliament and the Dried Fruits (Inter-State Trade) Regulations 1934, made pursuant thereto, and their Lordships first considered the wider constitutional question as to the effect of section 92.

Lord Wright, in delivering the judgment of the Board, stated the argument put forward " that there is such an antimony between section 51 and section 92 that they cannot both apply to the Commonwealth " and proceeded (at page 616) as follows:—

> " Before turning to the statute with the object of construing its language in order to settle the problem, it seems to be convenient to refer briefly to some of the decisions of the High Court and to the decision of the Judicial Committee in order to see if they support the theory that there is the complete antinomy or overlapping between the two sections which has been propounded. It will be remembered that these decisions deal with s. 92 as applied to the States, but they are helpful in seeking to ascertain what exactly s. 92 means."

In the course of its survey of cases the Board referred to *Vizzard's* case, and in particular to the judgment of Evatt J. and to a passage quoted from that judgment, in terms which, standing by themselves, might well be read as an approval of the decision in *Vizzard's* case and of the whole of Evatt J.'s judgment. Their Lordships cannot however so read the passage in question, having regard to the context. It occurs in a survey of certain cases for a particular purpose which had already been stated on page 616, and on page 625 the survey is described as being " inevitably brief and incomplete " and " undertaken simply in order to show that the propositions laid down in *McArthur's* case, which are the foundation of the respondent's argument that s. 92 does not bind the Commonwealth, were not merely novel when first enunciated, but have not been applied by the High Court in practice in subsequent decisions, though re-affirmed from time to time in dissenting judgments ". One passage from the judgment of Evatt J. in *Vizzard's* case was, however, undoubtedly approved by the Board in *James* v. *The Commonwealth*. That passage was in the following terms:—

> " Section 92 does not guarantee that, in each and every part of a transaction which includes the inter-State carriage of commodities, the owner of the commodities, together with his servant and agent and each and every independent contractor co-operating in the delivery and marketing of the commodities, and each of his servants and agents, possesses, until delivery and marketing are completed, a right to ignore State transport or marketing regulations, and to choose how, when and where each of them will transport and market the commodities."

In their Lordships' view it does not follow from the approval given to these observations that the Board considered how far " State transport or marketing regulations " could go without contravening section 92 of the Constitution. In the *Bank* case [1950] A.C. at p. 309 the Board referred to these observations of Evatt J. and observed:—

> " But it does not appear to their Lordships that the whole of that learned judge's reasoning received the considered approval of the Board " (i.e. of the Board in *James* v. *The Commonwealth*) " . . . In this connection it may be noted that in *James* v. *Cowan* their Lordships observed that they found themselves ' in accord with the convincing judgment delivered by Isaacs J. in the High Court.' The decisions in *James* v. *Cowan* and in *Vizzard's* case may be reconciled: it would not be easy to reconcile all that was said by Evatt J. in the one case with all that was said by Isaacs J. in the other."

From this passage it seems clear that the Board in the *Bank case* did not construe the judgment in *James* v. *The Commonwealth* as approving the decision in *Vizzard's* case; that they felt some doubt as to whether that decision could be reconciled with the decision in *James* v. *Cowan*; and that they certainly did not accept as correct all that was said by Evatt J. in *Vizzard's* case.

The Board's judgment in *James* v. *The Commonwealth* concluded:—

> " For these reasons their Lordships are of opinion that s. 92 binds the Commonwealth. On that footing it seems to follow necessarily that the Dried Fruits Act, 1928-35, must be held to be invalid. On

the interpretation of 'free' in s. 92, the Acts and the Regulations either prohibit entirely, if there is no licence, or if a licence is granted, partially prohibit inter-State trade. Indeed, the contrary was but faintly contended if the Commonwealth were held to be bound by the section. The conclusion of the matter is that in their Lordships' judgment s. 92 applies to the Commonwealth and that being so, the Dried Fruits Act and Regulations should be declared invalid as contravening s. 92."

After the decision in *James* v. *The Commonwealth* there came yet another of the series of transport cases, *Riverina Transport Pty. Ltd.* v. *The State of Victoria* (1937) 57 C.L.R. 327. The Victorian Act in question in that case, the Transport Regulation Act, 1933, as amended by the Transport Regulation Act, 1935 (Vict.), provided that a commercial goods vehicle should not operate on any public highway unless licenced in accordance with the Act. The Transport Regulation Board was empowered to grant such licences, and it was provided that in granting or refusing licences the Board should have regard to the interests of the public generally and should take into consideration the advantages of the service proposed to be provided and its convenience to the public, the adequacy of the existing transportation service and the effect on it of the service proposed to be provided, and the character, qualifications and financial stability of the applicant. It was further provided that no decision of the Board granting or refusing a licence should have any force or effect until reviewed by the Governor in Council, and that the Governor in Council might approve or disapprove the decision of the Board or make any determination in the matter which the Board might have made.

It is unnecessary for the present purpose to set out the facts of that case or the claims made by the plaintiff, who operated services for the carriage of goods between Melbourne and places in New South Wales. Suffice it to say that the validity of the Act in question was treated by all the members of the Court as established by the transport cases, and Latham, C.J. (at page 340) expressed the view that the Board in *James* v. *The Commonwealth* approved the decision in *Vizzard's* case and expressly approved the judgment of Evatt, J., therein. For the reasons already given their Lordships cannot accept this view.

Between the *Riverina* case and the *Bank* case came a case of great importance for the present purpose, decided in 1945, *Australian National Airways Ltd.* v. *The Commonwealth*, 71 C.L.R. 29. In that case, which was expressly approved in the *Bank* case, a Commonwealth Act conferring on a Commission a monopoly in respect of aerial services between States was held to infringe section 92, and a Commonwealth Regulation requiring a licence for an inter-State air service, and empowering an official in his uncontrolled discretion to grant or refuse a licence, was also held to infringe section 92.

Their Lordships now turn to the *Bank* case [1950] A.C. 235 which precedes in date the last of the transport cases *McCarter* v. *Brodie* (1950) 80 C.L.R. 432. In the *Bank* case the Board had to consider whether section 46 of a Commonwealth Act, the Banking Act of 1947, was invalid as offending against section 92 of the Constitution. Section 46 is set out in full in the report; in effect it prohibits the carrying on in Australia of the business of banking by private banks, while leaving untouched the Commonwealth and State Banks.

The reasoning of the judgment in the *Bank* case, coupled with the views of the Board on the effect of the three *James* cases and with the Board's approval of the decision in the *Airways* case, is of the utmost assistance to their Lordships in determining the present appeal.

In the *Bank* case, after referring to the cases of *James* v. *South Australia* and *James* v. *Cowan* in the terms already quoted, the Board continued as follows: —

> " Before further examining what is involved in this decision (i.e. the decision in *James* v. *Cowan*) their Lordships think it convenient to

note what was actually decided in the other of the two cases which have come before them. In *James* v. *The Commonwealth* it was a similar Act, but in this case an Act of the Commonwealth, that was under attack, and the substantial issue was whether the Commonwealth, as well as the States, was bound by s. 92. If it was bound, then the further question arose whether the Act in question was obnoxious, to s. 92. The decision of the Board was that the Commonwealth was bound by s. 92 and it is significant that the judgment thus proceeds at p. 633: 'For these reasons their Lordships are of opinion that s. 92 binds the Commonwealth. On that footing it seems to follow necessarily that the Dried Fruits Act, 1928-35, must be held to be invalid. On the interpretation of "free" in s. 92, the Acts and the Regulations either prohibit entirely, if there is no licence, or if a licence is granted, partially prohibit inter-State trade. Indeed, the contrary was but faintly contended, if the Commonwealth were held to be bound by the section.' There does not in fact appear to have been any ground for contending that, if the Act which was challenged in *James* v. *Cowan* was invalid, that challenged in *James* v. *The Commonwealth* could be valid.

It might well appear that these two decisions were a serious obstacle to the present appellants' case. Section 20 of the South Australian Act was invalid. It was general in its terms: it did not discriminate between inter-State and intra-State trade in dried fruits. But because it authorised a determination at the will of the Board, the effect of which would be to interfere with the freedom of the grower to dispose of his products to a buyer in another State, it was invalid. And for the same reason the Commonwealth Act fell.

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

Linked with the contention last discussed was another which their Lordships do not find it easy to formulate. It was urged that, if the same volume of trade flowed from State to State before as after the interference with the individual trader, and it might be, the forcible acquisition of his goods, then the freedom of trade among the States remained unimpaired. In the first place this view seems to be in direct conflict with the decisions in the *James* cases; for there the section was infringed though it was not the passage of dried fruit in general, but the passage of the dried fruit of James, from State to State that was impeded. Secondly, the test of total volume is unreal and unpractical, for it is unpredictable whether by interference with the individual flow the total volume will be affected and it is incalculable what might have been the total volume but for the individual interference. Thirdly, whether or not it might be possible, if trade and commerce stood alone, to give some meaning to this concept of freedom, in s. 92 'trade and commerce' are joined with 'intercourse' and it has not been suggested what freedom of intercourse among the States is protected except the freedom of an individual citizen of one State to cross its frontier into another State or to have such dealings with citizens of another State as his lawful occasions may require."

The Board went on to consider, and reject, certain arguments, based upon the *James* cases, which had been put forward by the then appellants in support of the validity of the Banking Act, 1947. Then there followed the observations upon *Vizzard's* case which have already been quoted in part.

The rest of the judgment in the *Bank* case is so important for the present purpose that it ought to be quoted in full:—

"Their Lordships have thought it proper to deal at considerable length with the earlier decisions of this Board because so much reliance was placed upon them by the appellants. It is, they think, clear that, far from assisting the appellants, these two decisions are, as the respondents have throughout contended, strongly against them.

In observing upon the *James* cases and their bearing upon the present case their Lordships noted that the Act now under consideration operated to restrict the freedom of inter-State trade commerce and intercourse not remotely or incidentally but directly. On this and on a cognate matter, the distinction between restrictions which are regulatory and do not offend against s. 92 and those which are something more than regulatory and do so offend, their Lordships think it proper to make certain further observations.

It is generally recognised that the expression 'free' in s. 92 though emphasised by the accompanying 'absolutely', yet must receive some qualification. It was, indeed, common ground in the present case that the conception of freedom of trade commerce and intercourse in a community regulated by law presupposes some degree of restriction on the individual. As long ago as 1916 in *Duncan* v. *The State of Queensland*, 22 C.L.R. at p. 573, Sir Samuel Griffiths C.J. said: 'But the word "free" does not mean *extra legem* any more than freedom means anarchy. We boast of being an absolutely free people but that does not mean that we are not subject to law', and through all the subsequent cases in which s. 92 has been discussed, the problem has been to define the qualification of that which in the Constitution is left unqualified. In this labyrinth there is no golden thread. But it seems that two general propositions may be accepted: (1) that regulation of trade commerce and intercourse among the States is compatible with its absolute freedom and (2) that s. 92 is violated only when a legislative or executive act operates to restrict such trade commerce and intercourse directly and immediately as distinct from creating some indirect or consequential impediment which may fairly be regarded as remote. In the application of these general propositions, in determining whether an enactment is regulatory or something more, or whether a restriction is direct or only remote or incidental, there cannot fail to be differences of opinion. The problem to be solved will often be not so much legal as political, social, or economic, yet it must be solved by a Court of Law. For where the dispute is, as here, not only between Commonwealth and citizen but between Commonwealth and intervening States on the one hand and citizens and States on the other, it is only the Court that can decide the issue. It is vain to invoke the voice of Parliament.

Difficult as the application of these general propositions must be in the infinite variety of situations that in peace or in war confront a nation, it apears to their Lordships that this further guidance may be given. In the recent case of *Australian National Airways Proprietary Ltd.* v. *The Commonwealth*, 71 C.L.R. 29, the learned Chief Justice at p. 61 used these words 'I venture to repeat what I said in the former case [viz. the "Milk Case", 62 C.L.R. 116 at p. 127]: One proposition which I regard as established is that simple legislative prohibition (Federal or State), as distinct from regulation, of inter-State trade and commerce is invalid. Further a law which is "directed against" inter-State trade and commerce is invalid. Such a law does not regulate such trade, it merely prevents it. But a law prescribing rules as to the manner in which trade (including transport) is to be conducted is not a mere prohibition and may be valid in its application to inter-State trade, notwithstanding s. 92'. With this statement which both repeats the general proposition and precisely states that simple prohibition is not regulation their Lordships agree. And it is, as they think, a test which must have led the Chief Justice to a

different conclusion in this case had he decided that the business of banking was within the ambit of s. 92. They do not doubt that it led him to a correct decision in the *Airways* case 71 C.L.R. 29 at p. 61. There he said: 'In the present case the Act is directed against all competition with the inter-State services of the Commission. The exclusion of other services is based simply upon the fact that the competing services are themselves inter-State services. . . . The exclusion of competition with the Commission is not a system of regulation and is in my opinion a violation of s. 92. . . .'. *Mutatis mutandis* these words may be applied to the Act now impugned, for it is an irrelevant factor that the prohibition prohibits inter-State and intra-State activities at the same time.

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

Nor can one further aspect of prohibition be ignored. It was urged by the appellants that prohibitory measures must be permissible, for otherwise lunatics, infants and bankrupts could without restraint embark upon inter-State trade, and diseased cattle or noxious drugs could freely be taken across State frontiers. Their Lordships must therefore add, what, but for this argument so strenuously urged, they would have thought it unnecessary to add, that regulation of trade may clearly take the form of denying certain activities to persons by age or circumstances unfit to perform them or of excluding from passage across the frontier of a State creatures or things calculated to injure its citizens. Here again a question of fact and degree is involved which is nowhere better exemplified than in the Potato case (*The State of Tasmania* v. *The State of Victoria*, 52 C.L.R. 157) where at pages 168-9 the following passage occurs in the judgment of Gavan Duffy C.J. and Evatt and McTiernan J.J.: 'In the present case it is neither necessary nor desirable to mark out the precise degree to which a State may lawfully protect its citizens against the introduction of disease, but, certainly, the relation between the introduction of potatoes from Tasmania into the State of Victoria and the spread of any disease into the latter is, on the face of the Act and the proclamation, far too remote and attenuated to warrant the absolute prohibition imposed'.

The same difficulty arises in applying the other discriminatory test, that between a restriction which is direct and one that is too remote. Yet the distinction is a real one and their Lordships have no doubt on which side of the boundary the present case falls. It is the direct and immediate result of the Act to restrict the freedom of trade commerce and intercourse among the States.

Their Lordships will not attempt to define this boundary. An analogous difficulty in one section of constitutional law, namely, in the determination of the question where legislative power resides, has led to the use of such phrases as 'pith and substance' in relation to a particular enactment. These phrases have found their way into the discussion of the present problem also and, as so used, are the subject of just criticism by the learned Chief Justice. They, no doubt, raise in convenient form an appropriate question in cases where the real issue is one of subject-matter, as when the point is

whether a particular piece of legislation is a law in respect of some subject within the permitted field. They may also serve a useful purpose in the process of deciding whether an enactment which works some interference with trade commerce and intercourse among the States is, nevertheless, untouched by s. 92 as being essentially regulatory in character. But where, as here, no question of regulatory legislation can fairly be said to arise, they do not help in solving the problems which s. 92 presents. Used as they have been to advance the argument of the appellants they but illustrate the way in which the human mind tries, and vainly tries, to give to a particular subject-matter a higher degree of definition than it will admit. In the field of constitutional law—and particularly in relation to a federal constitution—this is conspicuously true, and it applies equally to the use of the words 'direct' and 'remote' as to 'pith and substance'. But it appears to their Lordships that, if these two tests are applied: first, whether the effect of the Act is in a particular respect direct or remote: and secondly, whether in its true character it is regulatory, the area of dispute may be considerably narrower. It is beyond hope that it should be eliminated."

In the *Bank* case it was not necessary for the Board to express a concluded opinion as to whether *Vizzard's* case was or was not rightly decided, since the Banking Act 1947 differed widely in its terms from the Transport Act.

Their Lordships are however of opinion that the reasoning of the Board in the *Bank* case, coupled with the comments then made upon the *James* cases, cannot be reconciled with the reasoning of the majority of the High Court in *Vizzard's* case, and that the decision in the latter case cannot stand, unless the provisions of the Transport Act can be justified as being "regulatory" legislation. Each of these matters was fully discussed in the judgments of the minority in *McCarter* v. *Brodie* (supra), and their Lordships will turn at once to that case.

McCarter v. *Brodie* 80 C.L.R. 432 was decided by the High Court shortly after the publication of the judgment of the Board in the *Bank* case. The legislation under consideration was the Victorian Act which had already been held to be valid in the *Riverina* case. It was contended by counsel for McCarter that the reasoning of the majority in *Vizzard's* case was inconsistent with the views expressed by the Board in the *Bank* case and with the decision in the *Airways* case, approved in the *Bank* case. The majority of the Court, Latham C.J., McTiernan, Williams and Webb JJ. (Dixon and Fullagar J.J., dissenting), rejected this contention and affirmed the view expressed in the *Riverina* case that the Victorian Act did not contravene section 92 of the Constitution.

Dixon J. in his dissenting judgment referred to his explanation in the *Airways* case of the reasoning upon which the majority decisions in the transport cases were based, and continued as follows, with reference to the judgment of the Board in the *Bank* case—

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

I shall not stop to examine or explain the contraries of these propositions or to state how they should be understood to apply. They have been much canvassed and there ought to be no difficulty

in understanding them. All that is important for present purposes is that in face of the pronouncement of the Privy Council the propositions themselves are no longer tenable.

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

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

To these elements one other was added ; one not the subject of consideration by the Privy Council. That element is the distinction taken between on the one hand motor vehicles as integers of traffic and on the other hand the trade of carrying by motor vehicle as part of commerce. It is a distinction that I have never understood. The statutes dealt with the commercial use of motor vehicles and not with motor vehicles as such or at rest so to speak. There are tendencies in the *Transport* cases to thrust the carriage of goods and persons towards the circumference of the conception of commerce, but in the *Airlines* case, it was shown that it must lie at or near the centre. The combination of ideas upon which, according to my view, the *Transport* cases are based, consists therefore of no element which can survive. Five of them have been destroyed by the judgment of the Privy Council. The sixth would not suffice as a separate reason and is unsustainable. I am therefore of opinion that we should no longer regard ourselves as bound by the authority of the *Transport* cases.

It remains to consider whether those decisions can be supported on independent grounds. Now upon this subject it is enough to say that I have had the advantage of reading the judgment of Fullagar, J., and entirely agree with it."

Accepting as they do the views so clearly expressed by Dixon, J., their Lordships are of opinion that the six conceptions dealt with in this passage can no longer be regarded as sound. In their opinion it follows that if the validity of the Transport Act is to be established in the present case, it can only be upon the ground that the restrictions contained

therein are " regulatory " in the sense in which that word is used in the *Bank* case.

This point is dealt with by Fullagar, J., in his dissenting judgment in *McCarter* v. *Brodie*. Having reached the conclusion that the reasoning in *Vizzard's* case was irreconcilable with the law as propounded in the *Bank* case, he continued, 80 C.L.R. at page 495: —

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

The distinction between what is merely permitted regulation and what is a true interference with freedom of trade and commerce must often, as their Lordships observed, present a problem of great difficulty, though it does not, in my opinion, present any real difficulty in the present case. We may begin by taking a few examples, confining our attention to the subject matter of transportation, which is now under consideration. The requirements of the Motor Car Acts of Victoria afford very good examples of what is clearly permissible. Every motor car must be registered: we may note in passing that there is no discretionary power to refuse registration. A fee, which is not on the face of it unreasonable, must be paid on registration. Every motor car must carry lamps of a specified kind in front and at the rear, and in the hours of darkness these lamps must be alight if the car is being driven on a road. Every motor car must carry a warning device, such as a horn. A motor car must not be driven at a speed or in a manner which is dangerous to the public having regard to all the circumstances of the case. Other legislation of the State—Parliamentary or subordinate—prescribes other rules. In certain localities a motor car must not be driven at more than a certain specified speed. The weight of the load which may be carried by a motor car on a public highway is limited. The driver of a motor car must keep to the left in driving along a highway. He must not overtake another vehicle on a curve in the road which is marked by a double line in the centre. He must observe certain 'rules of the road' at intersections: for example, the vehicle on the right has the right of way.

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

Of course, even rules of the *kind* which I have taken as examples could be made to operate as a burden or deterrent in a high degree. Let me take an example. The town of Wangaratta is in Victoria, some fifty miles by road from the border between Victoria and New South Wales. It is on the Hume Highway, which is the busy main highway between Melbourne and Sydney. A law which provided that a motor car should not travel on that highway at greater speeds than thirty miles per hour within the limits of towns and sixty miles per hour outside towns would not impede or interfere with the trade of persons carrying goods for reward between Melbourne and

Sydney: their trade would remain "free". But let me suppose a law that no person should drive a motor car between Wangaratta and the border at a speed exceeding one mile per hour. We should instantly say that such a law interfered with the freedom of inter-State trade. It would operate as a burden and a deterrent to the trader by making the journey economically impossible. The examples which I have taken seem clear. On which side of the line a particular case falls will, of course, be a question of fact. It may be a difficult question in some cases, but it does not seem to me likely that any very difficult question will arise within the sphere of practical politics. The real, and truly baffling, difficulties of s. 92 seem to me to lie outside the field of transportation. Within that field the very nature of the subject matter seems to lend itself to the application of a quite simple test, which will rarely, if ever, be productive of any real difficulty. When difficulty does arise, it will be the kind of difficulty with which lawyers are constantly called upon to deal in a great variety of cases.

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

It is clear enough that such provisions as I have been considering are properly regarded as regulatory in character, and therefore within the category which their Lordships have held to involve no violation of s. 92. It should be emphasised that they are to be examined from the point of view of every individual engaged in trade commerce or intercourse, because s. 92 protects the trade commerce and intercourse of the famous Mr. James and every other individual. As to what is *not* regulatory in the relevant sense, one thing at least is clear. Prohibition is not regulatory. Lord Porter ([1950] A.C. at p. 309; 79 C.L.R. at p. 640) after quoting from the judgment of the learned Chief Justice of this Court in *Australian National Airways Pty. Ltd.* v. *Commonwealth* (1945) 71 C.L.R. at p. 61 said "simple prohibition is not regulation".

It is quite impossible, in my opinion, to distinguish the present case from the case of a simple prohibition. If I cannot lawfully prohibit altogether, I cannot lawfully prohibit subject to an absolute discretion on my part to exempt from the prohibition. The reservation of the discretion to exempt by the grant of a licence does not alter the true character of what I am doing. This was, indeed, as I have

pointed out, one of the two things that were really decided in *James* v. *Commonwealth* [1936] A.C. 578 ; 55 C.L.R. 1, though it was naturally treated as more or less self-evident, and the contrary view does not seem to have been very seriously argued. Such cases as *Melbourne Corporation* v. *Barry* ((1922) 31 C.L.R. 174) and *Swan Hill Corporation* v. *Bradbury* ((1937) 56 C.L.R. 746) do not, of course, afford exact parallels to such cases as the present, because they turn primarily on the meaning of the word " regulate " in a statute, but they are, in my opinion, precisely in point since one thing that they make plain is that, if a legislative body cannot lawfully prohibit altogether, it cannot lawfully prohibit subject to an administrative discretion to exempt from the prohibition. It is quite true to say that regulation may involve partial prohibition, but it is quite untrue to say that total prohibition subject to discretionary exemption or " licensing " is merely partial prohibition within the meaning of that proposition.

The truth is that it is possible to regard such legislation as regulatory with respect to trade and commerce if, but not unless, we regard s. 92 as referring not to the trading and commercial activities of individuals but to a totality or general volume or flow of trading and commercial activites. A simple prohibition, or a prohibition subject to discretionary exemption, of the trade of an individual may be regarded as regulatory of the general flow or volume of trade. It cannot possibly be regarded as regulatory of the trade of the individual who is simply not allowed to carry on his trade at all. The view that s. 92 does not protect an individual trader but has regard only to a general volume of inter-State trade could hardly have been more emphatically rejected by the Privy Council, and it must now, I would think, plainly be regarded as unsound. And, without it, the view that the Victorian Transport Regulation Act is merely regulatory, so far as it affects inter-State trade and commerce, cannot stand.

It was argued before us that the regulation of public transport vehicles in respect of such matters as safe maintenance and so on could not be efficiently undertaken without a system of inspection and licensing. The same difficulty was felt by municipalities in connection with their building by-laws by reason of such decisions as *Swan Hill Corporation* v. *Bradbury* (1937) 56 C.L.R. 746 but very little ingenuity was required to overcome the difficulty. The modern Victorian building by-law requires the issue of a permit or licence to commence building, but it also provides that, if plans and specifications comply with the specific requirements of the by-law, the intending builder is entitled, as of right, to the issue of the licence or permit. The legal right, so given, is, of course, enforceable by mandamus to issue the licence or permit. Such a law differs vitally from a prohibition subject to obtaining a licence which may be granted or withheld at discretion. The only reason why such a system would not be regarded as satisfactory in such legislation as that now under consideration is that such legislation is not really concerned—or at any rate is by no means solely concerned—with the safety of public transport. It is concerned very largely with restricting the development, in competition with existing railways, of modern and convenient methods of transport, and one of its supposed advantages is that the discretion to withhold licences can be used to protect the trade of one State at the expense of another. It is, for example, obviously within the sphere of practical politics that it should be thought in Melbourne that Cootamundra ought to drink Victorian beer and not South Australian beer. The protection of the industries of one State against those of another State was, of course, one of the primary things which s. 92 was designed to prevent, but if the legislation now in question is valid, effect can easily be given to such an opinion without anybody knowing anything about it. I mention these matters only by the way and as serving to emphasise the essential vice of the legislation."

Before expressing their views on the passage just quoted, which is equally applicable to the Transport Act now under consideration, their Lordships will state the events following on the decision in *McCarter* v. *Brodie.* McCarter sought leave to appeal to His Majesty in Council but leave was refused on the 8th December, 1950.

On 15th August, 1952, the present appellant delivered its amended Statement of Claim, and on 16th April, 1953, judgment was given in the High Court. Dixon C.J. expressed his personal opinion in the following trenchant passage: —

" My personal opinion has long been that, in the case of provisions of this description prohibiting transport unless licensed and authorizing the imposition of such a levy, the question must be answered that neither the prohibition nor the levy is consistent with Section 92.

Notwithstanding the failure of this conclusion to gain acceptance, the more immediate considerations which arise upon the very face of the statutory provisions, to say nothing of the levy and the conditions of the licence, still appear to me to make demands upon reason that are too insistent to admit of any other answer to the question whether trade commerce and intercourse is left absolutely free.

I take it as finally settled that the burdens and restrictions against which Section 92 protects interstate commerce are not only those which are imposed differentially upon interstate commerce or affect it in a special manner. Interstate commerce is protected also from restrictions and burdens which fall alike on commerce confined to a State and commerce crossing its borders. The carriage of merchandise from one State to another is not a thing incidental to interstate commerce but in the language used by Johnson, J., of navigation, in *Gibbons* v. *Ogden,* 1824, 22 U.S. 1, at p. 229: 6 Law Ed 23, at p. 78, is ' the very thing itself ; inseparable from it as vital motion is from vital existence '.

The carriage of goods by road, which forms a most important part of this very thing, is made the subject of heavy imposts and of a definite prohibition except in so far as a branch of the Executive Government of the State thinks fit to permit particular persons to carry goods by specified vehicles. No conditions are laid down by the fulfilment of which a man may become entitled to a licence. It lies entirely within the discretion of the Director of Transport and Highways acting under the direction of the Minister. The refusal of an application for a licence on grounds that are arbitrary or fanciful or that no man could regard as lying within the scope or policy of the legislation would not suffice, but the discretion otherwise is absolute and in no circumstances has anyone an enforceable title to a licence. To me these rather simple considerations appear decisive. In face of them I have not been able to see how it can be said that this branch of interstate trade is absolutely free.

It is not my purpose to enter upon an examination of the question either in principle or upon authority, excepting of course the authority of the decision in *McCarter* v. *Brodie* (1950) 80 C.L.R. 432. But I should perhaps say that to my mind the distinction appears both clear and wide between, on the one hand, such levies and such provisions prohibiting transportation without licence as the foregoing and on the other hand the regulation and registrations of motor traffic using the roads and the imposition of registration fees. In the same way the distinction is wide between such provisions and the use of a system of licensing to ensure that motor vehicles used for the conveyance of passengers or goods for reward conform with specified conditions affecting the safety and efficiency of the service offered and do not injure the highways by excessive weight or immoderate use or interfere with the use of the highways by other traffic. The validity of such laws must depend upon the question whether they impose a real burden or restriction upon interstate traffic.

For myself I do not know why a uniform law for the organization and the regular conduct of motor traffic or a uniform law prescribing conditions for the business of carrying by road should be regarded as necessarily impairing the freedom of interstate trade commerce and intercourse. The provision which in *Willard* v. *Rawson*, 1933, 48 C.L.R. 316, all the judges but myself upheld as valid did not appear to me to be of this character. It was a special provision affecting only motor cars registered in other States if used in Victoria for the carriage of goods. Motor cars if registered in another State were exempt from registration in Victoria and from the payment of the registration fee annually payable in that State. But the provision impugned specially withdrew this exemption if the vehicle was used to carry goods. Thus entry into Victoria of a New South Wales lorry carrying goods at once exposed it to the levy of what to a Victorian car would be an annual fee. This appeared to me to be a direct burden upon interstate trade. I am quite prepared to accept the view that my conclusion as to the character or characterisation of the provision was erroneous, but it has nothing to do either with the present case on the one hand or with a general regulation of transport on the other hand.

The decisions of this Court that the State Transport (Co-ordination) Act, 1931 (N.S.W.), and the legislation of other States *in pari materia* did not infringe s. 92 were based on grounds which, as it seemed to me, were no longer tenable in face of the reasons of the Privy Council in the *Banking* case [1950] A.C. 235 ; 79 C.L.R. 497. In *McCarter* v. *Brodie*, 1950, 80 C.L.R. 432, however, a majority of the Court decided that notwithstanding the decision of the Privy Council the transport cases should be followed. In the present case the Plaintiff asks us to re-consider the question thus decided in *McCarter* v. *Brodie*, 1950, 80 C.L.R. 432.

The strength of the considerations against refusing to follow that decision is very great. It is a recent decision of the Court dealing with the very question of the authority of the transport cases. It was fully considered and, whether many of the reasons and the conclusion of those cases are, as I think, or are not, at variance with the principles expounded in the *Banking* case [1950] A.C. 235, nothing has occurred since this Court decided *McCarter* v. *Brodie* *(supra)* adding to or altering the considerations then before the Court. These circumstances, in my opinion, make it right to decline to enter upon a reconsideration of *McCarter* v. *Brodie* *(supra)* unless independent reasons exist for overruling it which appear to be imperative.

I do not waver at all in my belief that the transport cases cannot be reconciled with principle or in the opinion that the grounds on which they were in fact decided have for the most part been expressly rejected in the judgment of the Privy Council in the *Banking* case, but I do not regard that as enough."

The learned Chief Justice then went on to give judgment against the appellant saying:—

"I believe, however, that I would regard it as an imperative judicial necessity to overrule *McCarter* v. *Brodie* if it appeared inevitable that the consequences of the decision would extend beyond the subject of commercial transport by road and would make it necessary to hold that over the whole area of interstate trade commerce and intercourse a power existed in every legislature to impose a prohibition subject to a licence to be granted or refused at the discretion of the Executive. At first sight it may seem that these consequences ought logically to ensue, if the decision is allowed to stand. Nevertheless, after a full re-examination of the transport cases in the light of the reasons of the majority of the Court in *McCarter* v. *Brodie* *(supra)*, I have come to the conclusion that the application of these cases may be confined to the particular conditions or considerations which arise

from the fact that the railways and the roads form facilities for the carriage of goods (and presumably of passengers) for the provision and maintenance of which the State is responsible."

It is clear from the foregoing that the Chief Justice did not regard the responsibility of the State for the provision and maintenance of facilities for the carriage of goods and passengers by rail and road as justifying the decision in the transport cases in principle. He merely regarded it as a distinguishing feature in this particular field, the recognition of which would confine the actual decision in *McCarter* v. *Brodie* within limits which enabled him to accept it without its wider implications in other fields.

Their Lordships do not feel able to take so limited a view of *McCarter* v. *Brodie*, more especially since that decision was largely based upon what they consider to be erroneous interpretations of passages in the judgment in the *Bank* case, and of references to *Vizzard's* case by the Board in *James* v. *The Commonwealth*.

McTiernan, Williams and Webb, JJ. adhered to the view which they had expressed in *McCarter* v. *Brodie* but Webb, J. said :—

" Nothing has occurred to cause me to change the opinion I formed in *McCarter* v. *Brodie, supra,* in the light of their Lordships' observations in *James* v. *Commonwealth, supra,* and the *Banking* case, *supra,* although without the guidance afforded by those observations as I understand them I would have come to a different conclusion, as appears plainly enough in what I said in *McCarter* v. *Brodie* (at p. 482), and which is now recalled by Fullagar and Kitto, JJ."

Fullagar J. adhered to the contrary view which he had expressed in *McCarter* v. *Brodie* and he was supported by very cogent judgments from Kitto and Taylor, JJ.

This historical survey has been long, but it fulfils three useful purposes. First, it shows the remarkable conflict of judicial opinion manifested in the transport cases themselves and arising at a later stage on the question how far the reasoning of the majority in the transport cases was affected by the reasoning of the Board in the *Bank* case. Secondly, it enables their Lordships to express their own view by borrowing language, upon which they cannot improve, from judgments of learned judges of the High Court. Thirdly, it shows what are the facts in the light of which the argument *stare decisis* must be considered.

The argument before their Lordships' Board turned chiefly upon the question whether or not the Transport Act could be regarded as being " regulatory " and therefore valid within the principles laid down in the *Bank* case. Counsel for the respondents (supported by counsel for the interveners) laid great stress on a passage in the judgment in that case, already quoted, which contains the sentence " Every case must be judged on its own facts and in its own setting of time and circumstances, and it may be that in regard to some economic activities and at some stage of social development it might be maintained that prohibition with a view to State monopoly was the only practical and reasonable manner of regulation, and that inter-State trade, commerce and intercourse thus prohibited and thus monopolised remained absolutely free."

Their Lordships will shortly make some brief observations upon this passage, but on the specific question before them whether or not the licensing provisions in the Transport Act contravene s. 92 of the constitution, they are entirely in agreement with the view of the minority of the High Court and with the observations, quoted above, made by the Chief Justice in expressing his " personal opinion." They would gratefully adopt as their own these observations and subject to a reservation about to be stated the passages already quoted from the judgments of Dixon, J. (as he then was) and Fullagar, J. in *McCarter* v. *Brodie*.

There are, however, some passages in the judgments of the Chief Justice and Fullagar, J. in *McCarter* v. *Brodie* which might be interpreted as necessarily condemning as invalid any licensing system under which

an inter-state trader who could comply with all the regulations validly prescribed by law might be refused a licence. Their Lordships can imagine circumstances in which it might be necessary, e.g. on grounds of public safety, to limit the number of vehicles or the number of vehicles of certain types in certain localities or over certain routes, with the result that some applicants might be unable to obtain licences. Such a system might well be justified as regulatory.

In this connection two passages from the judgment of Taylor, J. in the present case may be set out since they would seem to be couched in terms sufficiently wide to cover the kind of contingency envisaged above.

The first begins at line 46 on page 55 of the record and reads:—

> " For if the legislature itself may not, without infringing Section 92, assert a right, at its absolute discretion, to permit or prohibit banking, it is, to me, inconceivable that it may, without infringing Section 92, confer such a right upon a subordinate body. This, of course, is very far from saying that trade and commerce may not be made the subject of regulation either through the medium of a licensing system or otherwise; nor does it deny the proposition that regulation may include partial prohibition or prohibition *sub modo*."

The second begins at line 45 on page 56 where after quoting from the judgment of Latham, C.J., in *McCarter* v. *Brodie* he says:—

> " I understand from these and other relevant observations of his Honour that if the licensing authority had been invested with an unlimited and arbitrary discretion, a conclusion that the legislation infringed Section 92 would have been inevitable, for such legislation could not be regarded as regulatory. If this be so, legislation of this character must infringe Section 92 unless the discretion to refuse a licence is limited to or confined within the ambit constituted by those matters which should properly be regarded as regulatory of the trade or commerce concerned. For I can see no relevant distinction between an arbitrary discretion and one, which though not capable of being exercised on any grounds at all, authorises the licensing authority to travel outside the field of regulation. This is the very activity which is denied to the legislature itself and that being so, any enactment purporting to authorise a subordinate authority to do so must be invalid.
>
> In my opinion Section 17 of the Act under review in this case, even if it does not confer a complete and arbitrary authority to grant or refuse licences does confer an arbitrary authority to refuse licences on grounds other than those which may properly be regarded as regulatory of the trade or commerce concerned."

Their Lordships have thus adopted the unusual course of answering this important question, not in language of their own but in the language of Judges of the High Court of Australia. They do so for two reasons, first because they are in agreement with this language and see no reason to suppose that they can improve upon it; secondly because there is a very clear cut division of opinion in *McCarter* v. *Brodie*, and in the instant case, as to the effect, if any, of the judgment in the *Bank* case upon the decision in *Vizzard's* case, and their Lordships do not wish to leave any room for doubt, by any observations which they might make, that they agree with the views upon this point which have been expressed by the minority in each case.

As to the passage in the judgment of the Board in the *Bank* case upon which counsel for the respondents particularly relied, their Lordships accept without qualification everything that was said by the Board in the *Bank* case, but they are not aware of any circumstances in the present case giving rise to the situation contemplated in that passage. As the case was decided on demurrer, no evidence was given on either side at the hearing, although certain documents were annexed to the respondents' defence. Consequently no facts were proved which might have enabled the respondents to base an argument on the passage in question.

Their Lordships were asked to apply the maxim *stare decisis* and on that ground to refuse to disturb the decision in *Vizzard's* case which had stood since 1933, had frequently been followed and had been followed yet again in *McCarter* v. *Brodie* after the decision in the *Bank* case. Reliance was also placed upon the observations of the Board on *Vizzard's* case in *James* v. *The Commonwealth*. Their Lordships think it would be quite wrong to take this course, as the present appeal offered an opportunity to set at rest the remarkable conflict of judicial opinion already mentioned. They have already expressed their view that the decision in *Vizzard's* case has never been approved by the Board and they think it would be wrong to attach weight, for the present purpose, to the fact that leave to appeal has been refused in certain cases. They find it quite impossible to take any other course than to express their disagreement with the views of the majority in *Vizzard's* case.

The result is that the first question posed at the beginning of this judgment must be answered in the affirmative.

The second question, what is the effect of s. 3 (2) of the Transport Act, must now be considered. It was not suggested in argument that the provisions of the Act are invalid in so far as they apply to intra-state transport. In their Lordships' opinion the effect of s. 3 (2) is that the Act must be read and construed as the appellant suggests and the appellant is entitled to a declaration that the provisions of the Act requiring application to be made for a licence, and all provisions consequential thereon, are inapplicable to the appellant while operating its vehicles in the course and for the purposes of inter-State trade, or to the vehicles while so operated.

Their Lordships will humbly advise Her Majesty that the appeal should be allowed and a declaration made in the terms just stated.

The respondents must pay the appellant's costs here and in the High Court. There will be no order as to the costs of the interveners.

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In the Privy Council

HUGHES AND VALE PROPRIETARY LIMITED

v.

THE STATE OF NEW SOUTH WALES AND OTHERS

AND

THE COMMONWEALTH OF AUSTRALIA AND OTHERS

DELIVERED BY LORD MORTON OF HENRYTON

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