NOTES AND COMMENTS

CONSTITUTIONAL LAW—THE "AIRLINES CASE" AND S. 92.

The decision of the High Court in *Australian National Airways Pty. Ltd. v. The Commonwealth*[1] so far as it bears upon the interpretation of s. 92 of the Constitution may be summarized as follows: The Commonwealth Parliament by the Australian National Airlines Act 1945 set up the Australian National Airlines Commission and empowered it to operate inter-State air services for the transport of passengers and goods. Part IV. of the Act provided that as soon as the Commission had established "an adequate service" on any inter-State route, the licences granted under Regulation 79 of the Air Navigation Regulations to the operators of any other air services on the same route were to cease to have effect. Regulation 79 prohibited any person from carrying on an air service without a licence granted under it, so that the effect of these provisions was to give to the Commission a monopoly on any route where it established an adequate service. The High Court unanimously held that although s. 51 (i.) of the Constitution gave to the Commonwealth Parliament power to set up an inter-State air service operated by a Commonwealth instrumentality, yet Part IV. of the Act was invalid because it violated s. 92 of the Constitution. The Court further held that Regulation 79, which (as recently amended) conferred upon the Director-General of Civil Aviation an unfettered discretion whether or not to grant a licence, was itself invalidated by s. 92.

Section 92 of the Constitution provides *inter alia* that "trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free." To anyone other than an Australian Constitutional lawyer the terms of the section might well make the conclusions reached by the High Court in the *Airlines Case* seem inescapable. But in its relationship to earlier decisions of the High Court in such cases as *R. v. Vizzard*[2] and *Riverina Transport Pty. Ltd. v. Victoria*[3] the decision in the *Airlines Case* is of twofold significance.

In the first place, the decision disposes of the suggestion that the carriage of goods or passengers for reward is not itself trade, commerce or intercourse for the purposes of s. 92. In *Vizzard's Case* there are passages in the judgments of the majority which tend to support this suggestion. Thus, Gavan Duffy C.J. said that there might well be a distinction "between interfering with trade, commerce and intercourse and interfering with the methods by which they are carried on"; and Rich J. said that although the motor vehicles of an inter-State carrier were clearly of importance "as means to trade, commerce and intercourse" between the States, they were "aids or implements to effect the thing" and "not the thing itself." But in the *Airlines Case* all the judges were of opinion that the business of inter-State transportation is as much part of inter-State trade, commerce, and intercourse as are inter-State dealings in goods, and that it is consequently entitled to the same protection under s. 92. Latham C.J., Starke, Dixon and Williams JJ., all found persuasive authority for this view in decisions of the United States Supreme Court.

1. [1946] A.L.R. 1.
2. 50 C.L.R. 30.
3. 57 C.L.R. 327.

In the second place, the decision raises difficulties as to the precise basis on which *Vizzard's Case* and the analogous transport cases must be supposed to have been decided. In *Vizzard's Case* the High Court by a majority held that the New South Wales State Transport (Co-ordination) Act, which prohibited the operation of any vehicle for the purpose of carrying goods or passengers for reward, unless it had been licensed by an administrative authority, was valid even in its application to vehicles engaged in a transport service between New South Wales and another State. The principal ground for the decision appears to have been that the real purpose of the Act was not to interfere with inter-State trade but to co-ordinate and regulate transport throughout New South Wales; for example, one result of its operation would be to prevent uneconomic competition between road and rail transport. Evatt J. (as he then was), in the course of a judgment which was referred to with approval by the Privy Council in *James v. The Commonwealth*[4], said that it was impossible "to accept the theory that, in applying s. 92, one need not look past the mere operation of the State law upon the inter-State trader, traveller or carrier and that one should disregard the nature and character of the State law which is impugned." It seems, therefore, that the *Airlines Case* can be distinguished from *Vizzard's Case* only on the ground that whereas the predominant purpose of the New South Wales Transport Act was to ensure the maintenance of efficient and economic transport facilities throughout New South Wales, the predominant purpose of Part IV. of the Airlines Act was simply to exclude all operators of air services from every inter-State route where the Commonwealth Airlines Commission succeeded in establishing an adequate service; this exclusion was, in the words of Latham C.J., "quite independent of any consideration relating to safety, efficiency, airworthiness, etc., which otherwise might have been relied upon on the basis of an argument that the statute regulated such services in the sense of introducing regular and orderly control into what otherwise might be unregulated, disorderly, possibly foolishly competitive, and therefore inefficient services." Similarly, Regulation 79 was possibly invalid only because the discretion of the Director-General of Civil Aviation to refuse to issue a licence was not limited to cases where standards of airworthiness or efficiency were not complied with. But this suggested ground of distinction between the *Airlines Case* and *Vizzard's Case* was specifically approved by Latham C.J. only, although Starke and Dixon JJ. indicated that they considered the distinction a plausible one, assuming *Vizzard's Case* (in which they each dissented) to have been correctly decided. Williams J. said that, in his opinion, a decisive factor in *Vizzard's Case* was that the roads, whose use the Transport Act regulated, were owned by the State; his view is apparently that it is only where a Government regulates the use of facilities which it has itself provided, that its purpose in imposing any restriction upon inter-State trade and commerce may be taken into account in deciding whether s. 92 is infringed.[5] Rich J. made no reference to *Vizzard's Case* or to the other transport cases.

4. [1936] A.C. 578.
5. This is a substantially new explanation of *Vizzard's Case*, though a basis for it can be seen in the opinions of Gavan Duffy C.J. and McTiernan J.

In the face of such a diversity of judicial opinion, it is impossible to pronounce conclusively either what principles *Vizzard's Case* and the analogous cases must be taken to have enunciated, or even what is the precise ratio of the *Airlines Case* itself. But it is submitted that the existing authorities afford ample basis for the proposition that no governmental interference with the business of inter-State transportation will be valid, unless that interference is simply the indirect result of the operation of a legislative or executive scheme designed to achieve some purpose of positive benefit to the community. The decisions of the High Court in *Hartley* v. *Walsh*[6] and the *Milk Board Case*,[7] although they were concerned not with inter-State transportation but with inter-State commercial dealings in goods, lend weight to this submission. In those cases State legislation clearly restricting inter-State trade in goods was held valid apparently on the ground that its object was the protection of essential public interests. Whether this " purpose " or " characterisation " test is either logical or desirable is obviously too big a question for consideration in such a note as this. But it may be observed that the test has consistently been disapproved by Starke[8] and Dixon JJ.[9]; that in *James v. The Commonwealth* the Privy Council said that it was " certainly difficult to read into the express words of s. 92 an implied limitation based on public policy "; and that it might well be argued that no Court of Law should be called upon to decide whether an Act which prohibits the owners of private air services from competing with a Commonwealth airline is more or less related to the public welfare than an Act which allows a State Government to prevent inter-State motor transport operators from competing with its railways. However, it should be noted that the legislation and regulations dealt with in the *Airlines Case*, *Gratwick* v. *Johnson* (cited note [8]) and the *Potato Case* (cited note [9]) were aimed solely at inter-State activities. Perhaps the " real object " test of Vizzard is applicable only when the legislation deals with a wide field which includes inter-State activities.

H. R. NEWTON.

6. 57 C.L.R. 372.
7. *Milk Board v. Metropolitan Cream Company*, 62 C.L.R. 126.
8. e.g., *In the Milk Board Case* (*supra*), in *R. v. Vizzard* (*supra*), in the *Airlines Case* (*supra*) and in *Gratwick v. Johnson*, 70 C.L.R. 1.
9. e.g., *In the Potato Case*, 52 C.L.R. 157, in *Hartley v. Walsh* (*supra*), in *R. v. Vizzard* (*supra*), and in the *Riverina Transport Case* (*supra*).