

CAMERON v. JAMES

in *James v. The Commonwealth of Australia*, [1936] A.C. at p. 614. The question does not arise on the present appeal whether legislation for the acquisition of property which forbade the allowance of interest could in any circumstances be just. The Court is here construing the meaning of the word "recompense" in sec. 67 of the Defence Act, on the supposition that the section provides just terms for the acquisition of all or any chattels to which it applies, "because the Constitution is the ultimate basis of title"—*per Isaacs, J.*, in *Commonwealth v. New South Wales* (*supra*) at p. 47 (29 A.L.R. 416). It is sufficient to say, therefore, that in the absence of a clear statutory prohibition it is proper to construe a word intended to provide just terms as including authority for the Court to allow interest where it considers that such an allowance is necessary to make the compensation adequate. Further, I can see no distinction between the necessity to award interest where there is delay in the payment of compensation for the acquisition of capital assets and where there is delay in payment for the acquisition of the temporary use of property. In each case the State remains entitled to the possession of the property whether it pays the compensation, if agreed upon, punctually or not, or, if the compensation is not agreed upon, however long the assessment may take.

For these reasons I am of opinion that the Court should allow the plaintiff simple interest at 4 per cent. payable on the amounts of compensation unpaid after the end of each month.

Judgment of Supreme Court varied by striking out, wherever appearing, the figures £3312 17s. 3d., and inserting in lieu thereof the figures £605. No order as to costs of appeal.

[Solicitors—For the appellant, H. F. E. Whitlam, Crown Solicitor; for the respondent, Rylah and Anderson for Page, Seager, Doyle, Crisp and Wright.]
W. P.

Supreme Court.

FULL COURT.—Herring, C.J., } Dec. 5, 6, 20,
Gavan Duffy, and Martin, J.J. } 1944.

CAMERON v. JAMES.

Justices — Courts of Petty Sessions—Information—Trifling offence — Dismissal of — entry in Court register — Estoppel—Res judicata — Proceedings not terminating in defendant's favour—Action for malicious prosecution and false imprisonment — Justices Act 1928 (No. 3708) sec. 72; Police Offences Act 1928 (No. 3749), secs. 25, 199.

When a Court of Petty Sessions, acting under sec. 72 of the Justices Act 1928, dismisses an information against a defendant, that dismissal implies that the offence charged was proved, and it is proper to record in the register that the information was dismissed under that section. In such a case the proceedings cannot be deemed to have terminated in the defendant's favour so as to enable him to maintain an action for malicious prosecution.

Where, immediately after the arrest of a defendant as a person "found offending" within the meaning of sec. 199 of the Police Offences Act 1928, an information is laid and the information is afterwards dismissed under sec. 72 of the Justices Act 1928, that dismissal does not operate to show that the defendant was unlawfully arrested.

APPEAL FROM COUNTY COURT.

A police constable named James arrested a woman named Cameron for using insulting words in a public place. In effecting this arrest, the constable was acting under the provisions of sec. 199 of the *Police Offences Act 1928*, which authorises the arrest of persons found offending against the provisions of sec. 25 of that Act. The woman was locked up, and shortly afterwards the constable laid against her an information charging her with the offence under sec. 25 of the Act. On the hearing of this information before a Court of Petty Sessions, the decision of the Court was entered in the register of convictions in the following form:—"Dismissed (under sec. 72 of the *Justices Act 1928*).". Section 72 deals with cases where the offence proved is only trifling.

Afterwards the woman as plaintiff brought in the County Court an action against the constable as defendant, in which she claimed damages both for false imprisonment and malicious prosecution. The jury found a verdict against the defendant on both claims, and judgment was entered for the plaintiff on both claims accordingly. The defendant appealed against that judgment in both of its aspects. Other facts appear in the judgments below.

Minogue, for the appellant James.—The dismissal of the information, taking the form that it did, involves a finding that the woman was guilty of using insulting words in a public place. Thus the proceedings in the Court of Petty Sessions have not terminated in the woman's favour, and therefore she cannot sue for damages for malicious prosecution. The dismissal operates also to show that the arrest of the woman as a person found offending was justified and lawful. The plaintiff cannot re-litigate in the County Court a point decided against her in the lower Court. *Stimac v. Nicol*, (1942) V.L.R. 66, [1942] A.L.R. 88. Here there is an estoppel by record. The plaintiff cannot show absence of reasonable and probable cause

for the prosecution. *Commonwealth Life Assurance Society v. Smith*, (1938) 59 C.L.R. 527; [1938] A.L.R. 258; *Herniman v. Smith*, [1938] A.C. 305, (1938) 1 All E.R. 1.

Dr. Coppel, for the respondent Cameron.—Sec. 83 (3) of the *Justices Act* 1928 shows that the record is not conclusive, and does not amount to *res judicata*. It is not conclusive justification of the arrest and imprisonment. When an information is heard on its merits, the decision must be a conviction or a dismissal, and that is the only part of the record which constitutes the order of the Court, any additions to that are not part of the record. The plaintiff was entitled to a certificate of dismissal without any addition referring to sec. 72 of the *Justices Act* 1928. *Ellis v. Hartley*, (1901) 27 V.L.R. 31, 7 A.L.R. 125. The order for dismissal is to be distinguished from the reasons for dismissal. *Williams v. May*, (1908) V.L.R. 605, 14 A.L.R. 504; *Phillips v. Evans*, (1896) 1 Q.B. 305; *Oaten v. Auty*, (1919) 2 K.B. 278. There can be no question of *res judicata* or of issue estoppel. *Falk v. Haugh*, (1935) 53 C.L.R. 153, 171, [1935] A.L.R. 255. It is immaterial how proceedings terminate in a defendant's favour provided that they do so terminate. *Winfield on Torts* (2nd ed.), p. 668; *Reed v. Hales*, (1872) 11 S.C.R. (N.S.W.) 317. The question of reasonable and probable cause is for the Judge, but the preliminary facts are for the jury. *Salmond on Torts* (9th ed.), p. 659.

Minogue in reply.

Cur. adv. vult.

GAVAN DUFFY, J., read the judgment of HERRING, C.J., and himself:—This was an action in which the plaintiff claimed damages both for false imprisonment and malicious prosecution. The jury found in her favour on both claims and judgment was entered accordingly.

The genesis of the proceedings was that the defendant, a police officer, arrested the plaintiff in the street following some conversation between them, and subsequently charged her with using insulting words in a public place contrary to the provisions of sec. 25 of the *Police Offences Act* 1928. The plaintiff thereupon brought an action claiming damages both for false imprisonment and malicious prosecution. The jury found a verdict against the defendant on both claims, and judgment was entered accordingly. It is against that judgment in both its aspects that the present appeal is brought.

Turning to the claim for false imprisonment: Sec. 199 of the *Police Offences Act* 1928 authorises the arrest of a person found using insulting words in a public place, and the defendant contends that the plaintiff was estopped from denying that he had so found her, because of the nature of the decision of the Court of Petty Sessions which heard the charge. The defences raised in the County Court are not set out in full in the appeal book, but the appeal was

argued before us on the basis that it was open to the defendant to rely on any estoppel that might exist as a result of the decision of the Court of Petty Sessions, which in fact dismissed the case but did so as an exercise of the powers given it by sec. 72 of the *Justices Act* 1928. To this two answers were made, first that there was no proper proof that the Court of Petty Sessions had acted under sec. 72, and secondly that a dismissal under that section did not raise any estoppel in the defendant's favour.

The plaintiff herself put in evidence without objection a certified extract from the register of the Court of Petty Sessions which contained in the column, "Decision, Memo of Conviction or Order," the following words, "Dismissed (under sec. 72 of the *Justices Act* 1928)." For the respondent it was contended that the words in brackets should be disregarded as they had been improperly placed on the register. Sec. 83 (2) of the *Justices Act* 1928 provides for the keeping of a register by the clerk of the minutes or memoranda of all the convictions and orders of such Court and of such other proceedings as are directed by any rule under this Act to be registered, and that he shall keep the same with such particulars and in such form as may be from time to time directed by a rule under this Act. The only rule made is one laying down the form which was actually used in this case. The reference in brackets to sec. 72 in the certified extract from the register was said not to come within anything here authorised. We cannot accept this contention. The provisions of sec. 72 being what they are we think a memorandum stating that the information was dismissed under sec. 72 of the *Justices Act* 1928 was a perfectly proper memorandum of the order in fact made by the Court of Petty Sessions. It was argued that the fact of sec. 88 (17) giving the defendant a right, when an information is dismissed to receive a certificate to that effect which would be a bar to all future proceedings for the same matter, added weight to the contention that the memorandum of the Court of Petty Sessions' order should have consisted of a bare statement of dismissal. We do not think this is so. It may be perfectly correct to note on the register that the information was dismissed under the provisions of sec. 72 and at the same time the defendant may be entitled to receive and use for the purposes therein set out, a certificate of dismissal under sec. 88 (17).

We think therefore the certificate should have been admitted even if objected to, as proof of the case that the Court of Petty Sessions acted under the provisions of sec. 72 since section 83 (3) makes the certified extract *prima facie* evidence of the matters entered therein. But in any event as the certificate was put in by the plaintiff herself without reservation, we do not think she is now entitled to be heard to say that it is not evidence of all matters entered therein.

The larger question is whether the fact that the Court of Petty Sessions acted under sec. 72 raises an estoppel against the plaintiff. Sec. 72 provides that in certain cases, if "the Court of Petty Sessions" thinks that though the charge is proved the offence "was of so trifling a nature that it is inexpedient to inflict any punishment or any other than a nominal punishment," it may take one of a number of courses including that of dismissing the information without proceeding to conviction. It is apparent then that if the Court acts under sec. 72 it must have found that the charge was proved, and a statement that an information has been dismissed under section 72 is therefore inferentially a statement that the charge has been proved.

Spencer Bower on Res Judicata (p. 104) states the legal principle thus: "Where the decision set up as a *res judicata* necessarily involves a judicial determination of some question of law or issue of fact, 'in the sense that the decision could not have been legitimately or rationally pronounced by the tribunal without at the same time, and in the same breath, so to speak, determining that question or issue in a particular way, such determination though not declared on the face of the recorded decision, is deemed to constitute an integral part of it as effectively as if it had been made so in express terms.'"

It is immaterial for the purposes of estoppel whether the decision relied on was in civil or criminal proceedings. Nice questions have it is true arisen concerning the admissibility and effect of evidence of convictions on indictment where in the subsequent proceedings the Crown was not a party, but in the present case the parties to the information and to the action in the County Court were the same and the statement which appears on page 35 of *Spencer Bower on Res Judicata* has full application. The statement runs: "For the purposes of estoppel, criminal decisions stand on precisely the same footing as any other judicial decision; that is to say, any conviction or acquittal of, or any judgment or order for or against, a party on an indictment, information, summons, or complaint, pronounced by a Court of competent jurisdiction, is conclusive in any subsequent proceedings between the same parties, in respect to the same offence, in any Court, civil or criminal." This accords with principle (and see *Kinnis v. Graves*, [1898] 78 L.T. 502, and *Bailey v. McCree and Son*, [1937] N.Z. L.R. 508).

The plaintiff in this case therefore was estopped from denying that she had used insulting words in a public place at the relevant time and place, and since there was no dispute that the words, whatever they were, were spoken to the constable, he had a right under sec. 199 of the *Police Offences Act 1928* to arrest the plaintiff and the judgment appealed against cannot stand.

As to the claim based on malicious prosecution it is well established, and in fact was not contested before us, that the plaintiff could not succeed unless she established that the proceedings ended in her favour. It is necessary, therefore, to enquire whether when the justices dismissed the information under sec. 72 of the *Justices Act 1928* they did so end.

In our opinion the proceedings, in the relevant sense ended not favourably but unfavourably for the respondent. Sec. 72 is not a happy example of legislation, and we would adopt the language of Darling, J., in *Oaten v. Auty*, [1919] 2 K.B. 278, at p. 282, where, speaking of similar English legislation, he said:—"The words [of the section] are unscientific, 'thoroughly illogical, and are merely a concession 'to the modern passion for calling things what they 'are not; for finding people guilty and at the same 'time trying to declare them not guilty.'" However, one thing is clear; in order for sec. 72 to operate the Court must be satisfied that the charge has been proved. In other words, as all the Judges were agreed in *Oaten v. Auty*, [1919] 2 K.B. 278, the Court in applying the section comes to a determination that the accused was guilty but nevertheless dismisses the information under the power given it.

The requirement that a plaintiff in an action for malicious prosecution must prove that the proceedings have ended in his favour appears to have run a somewhat obscure course in the Courts, but as it has been the subject of investigation in the High Court we shall confine ourselves to an examination of that decision. In *Commonwealth Life Assurance Society v. Smith*, [1938] 59 C.L.R. 527, [1938] A.L.R. 258, Rich, Dixon, Evatt, and McTiernan, J.J., delivered a joint judgment in which three reasons for the rule were stated as being found in the decided cases. (1) That otherwise the propriety of a conviction for crime might be drawn in question collaterally. This means in effect to prevent re-trial on the merits. (2) That it is an example of a general rule which prevents imputations in one proceeding against the justice of another proceeding already pending or of a judicial determination still standing. (3) The reason given by Cleasby, B., in *Johnson v. Emerson*, (1871) L.R. 6 Ex. 329, at p. 344, where he says enumerating the elements of the cause of action: "First, if the proceeding be really without foundation; and this must 'be evidenced by the proceedings having finally terminated in favour of the plaintiff." Starke, J., who gave a separate judgment, said that the authorities showed that the plaintiff must prove that the charge was false and groundless but that this was conclusively proved by the proceedings having ended in his favour.

There is nothing in the history of the rule thus expounded to encourage an argument that where a Court of Petty Sessions has found the charge proved but has exercised its power to nevertheless dismiss the

information, the proceedings should be held to have ended in favour of the defendant. On principle it would seem that the important matter in the determination of the proceedings is whether such determination established guilt or innocence, or at least whether its effect, great or small, went towards establishing innocence.

We therefore conclude, as we have already intimated, that the proceedings in the Court of Petty Sessions did not end in favour of the plaintiff and that judgment should have been for the defendant.

The appeal should therefore be allowed.

MARTIN, J., read the following judgment: The plaintiff brought an action for damages before a Judge and jury in a County Court against the defendant, a police constable, for false imprisonment and malicious prosecution and was given a verdict on both counts.

The action had its origin in events which occurred a considerable time before, when the defendant arrested the plaintiff for using insulting words in a public place. She was locked up, and a few days later charged before a Court of Petty Sessions with the offence.

The register of convictions, orders, and other proceedings of the Court of Petty Sessions in question, under the heading "Decision, Memo of Conviction or "Order" has an entry in these terms: "Dismissed" (under sec. 72 of the *Justices Act 1928*)."

Sec. 72 of the *Justices Act 1928* provides, *inter alia*, that when upon the hearing of a charge for an offence punishable on summary conviction the Court of Petty Sessions thinks that though the charge is proved the offence was in the particular case of so trifling a nature that it is inexpedient to inflict any punishment the Court without proceeding to conviction may dismiss the information.

In the County Court and before us, Counsel for the defendant contended that the order in the register necessarily means that the charge had been proved and, accordingly, the word "dismissed" there appearing did not have the significance which it usually has, that the defendant had a duty under sec. 199 of the *Police Offences Act 1928* to apprehend any person found offending against sec. 25 of that Act and that, consequently, since the event showed the plaintiff was guilty of the offence charged there could be no action for false imprisonment and, as the prosecution was not determined in her favour, there was no basis for the count of malicious prosecution. On behalf of the plaintiff it was urged before this Court that unless the entry in the register is conclusive of the fact that she was found guilty of the offence

charged against her it was a question for the jury, on the evidence led in the County Court, to determine whether defendant reasonably believed she was a person found offending, that such entry was in fact an acquittal made pursuant to the provisions of sec. 88 (17) of the *Justices Act 1928*, and that the words " (under sec. 72 of the *Justices Act 1928*) " were not part of the order made but merely an expression of the reasons for acquittal.

In *Davis v. Gell*, [1924] 35 C.L.R. 275, 31 A.L.R. 49 it was held that in an action for malicious prosecution the plaintiff must prove that he was innocent of the offence with which he was charged, because, the prosecution being groundless, there was no real cause for it and that such requirement of proof was not satisfied merely by showing that the proceedings had ended in favour of the plaintiff by the entry of a *nolle prosequi*.

Some years later the High Court departed from the principle there laid down and decided that the question of guilt or innocence of the plaintiff was not an issue in such an action but that the failure of the proceedings brought by the defendant, the absence of any reasonable cause, and malice are the grounds which are the basis of the action.

It was also held that "for the purpose of malicious prosecution, the law should consistently treat the question [of guilt or innocence] as disposed of in the criminal proceedings, the propriety of the conclusion of which ought not to be canvassed" (*Commonwealth Life Assurance Co. Ltd. v. Smith*), [1938] 59 C.L.R. 527 at p. 544. [1938] A.L.R. 264.

This appeal, therefore, so far as the count for malicious prosecution is concerned seems to depend on whether or not the entry in the register can be regarded as one which shows that the Police Court proceedings terminated in favour of the plaintiff.

Under sec. 88 (17) of the *Justices Act 1928* it is provided that the Court, if it dismisses an information, shall make an order of dismissal of the same and, on demand, shall give a certificate thereof to either party. The forms, authorised by sec. 6 of the Act, for such order and certificate appear as Nos. 60 and 61 respectively in the Second Schedule to the Act. In its operative part Form No. 60 reads "it appears" to this Court that the said (information or complaint) is not proved and the same is hereby dismissed," whereas Form No. 61 merely has: "This is to certify that an information (describing it) was this day considered by this Court and was dismissed." Under clause (15) of sec. 88—which deals with procedure following on conviction for an offence—provision is made for a minute or memorandum of the conviction to be made and, in certain cir-

cumstances, for the conviction or order to be drawn up in one of the forms (Nos. 55-59) in the Second Schedule. No provision is made in the forms or rules made under the Act for a memorandum of decision such as was made in this case.

In *Oaten v. Auty*, [1919] 2 K.B. 278, a case stated by justices and heard by a Divisional Court of five Judges, it appeared that in the register kept for the justices, under the heading "Minute of Adjudication" there was this entry, "Plea—not guilty. Offence 'proved, dismissed under the *Probation of Offenders Act*, inexpedient to punish." Objection was taken by the respondent (informant in the Court below) that the appellant had no right to appeal by way of case stated. It was argued there had been no "conviction, order, determination, or other proceeding" by the justices, within the meaning of the *Summary Jurisdiction Acts* which made the appellant a "person 'aggrieved'."

The *Probation of Offenders Act* 1907 (7 Edw. 7, c. 17), which in material particulars corresponds to sec. 72 of the *Justices Act* 1928, was much discussed and the Court came to the conclusion, for varying reasons, that though there had been no conviction there was a determination which made the appellant an aggrieved person and so one with a right of appeal. The learned Judges regarded the words of the *Probation of Offenders Act* as unscientific and thoroughly illogical.

Darling, J., said, [1919] 2 K.B. 278 at p. 283: "The order, it is true, dismisses the information, but that order depends upon a determination which in ordinary circumstances would amount to a conviction. The order follows the determination a part of the way but not the whole way. The whole resulted in no conviction as that word is used in the *Probation of Offenders Act* 1907," which Act "has allowed the justices to find all the facts that make a person 'guilty but to enter in their record that he is not guilty.'"

A. T. Lawrence, J., said, [1919] 2 K.B. 278 at pp. 286-7: "They neither convicted nor acquitted the appellant, and he is entitled, like every other subject, to have the offence dealt with to the end either by acquittal or conviction. . . . They had to determine whether the appellant was really guilty of a 'grave offence . . . and to say that, because they have chosen to add 'we dismissed the information,' no appeal lies, seems to me to look at the mere husk and omit to regard the actual substance of what has been done."

Avory, J., considered, [1919] 2 K.B. 279 at p. 289, that the words, "The Court may, without proceeding to conviction," meant, "The Court may, without proceeding to record the conviction." He went on

to point out that the word "conviction" had different meanings: "Sometimes it means an adjudication 'that a person has committed the offence charged against him; sometimes it means that, plus the judgment of the Court upon it' and he had no doubt the word in the Act in question was used in the latter of those senses.

Lush, J., differed from A. T. Lawrence, J., in that he thought the appellant had been both convicted and acquitted, and went on to say, [1919] 2 K.B. 278 at p. 290: "Upon the merits of the case the justices have 'convicted him. I can see no difference between 'saying 'offence proved' and saying 'we convict of 'the offence.'" Rule 5 of the *Summary Jurisdiction Rules* 1915 of the United Kingdom provides that when an information is dismissed under the *Probation of Offenders Act* the minute of adjudication entered in the register shall be "Dismissed (Bound Over) *P.O. Act*," but in Victoria, there is no corresponding rule. The meaning given the words "without proceeding to conviction" by Avory, J., in *Oaten v. Auty*, [1919] 2 K.B. 278 gives a logical and sensible reading of the section, but, whether that is the correct view to take or not, the judgments of A. T. Lawrence and Lush, J.J., in that case suggest that regard must be had to the substance of what was done and the substance is that the appellant was found guilty of the offence. Although some reliance was placed by some of the Judges on that part of the minute of adjudication which read "offence proved" I consider the memorandum here, "Dismissed (under sec. 72 of the *Justices Act* 1928)," is the equivalent of using the phrase "the charge is proved," and so the fact that the minute in *Oaten v. Auty*, [1919] 2 K.B. 278 had the words quoted does not differentiate it from the entry here.

Whatever view be taken of the judgments in *Oaten v. Auty*, [1919] 2 K.B. 278 it is clear that no member of the Court considered that the minute made indicated that the proceedings complained of terminated in favour of the appellant and, in my opinion, it would be shutting one's eyes to the facts and placing form before substance if the use of the word "dismissed" in the memorandum here were to lead the Court to hold that the proceedings of the Court of Petty Sessions, had terminated in favour of the plaintiff. It is a necessary part of the plaintiff's case in an action for malicious prosecution to show that the charge made against her terminated favourably for her, and I consider she has failed in such proof.

As I think the entry in the register of the clerk of Petty Sessions shows that the question whether or not the plaintiff used insulting words in a public place was determined against her it follows that she

also falls on the count of false imprisonment. The defendant was authorised by sec. 199 of the *Police Offences Act* to arrest any person found offending against any provision in Part II. of that Act. In this case the judgment, by reference to sec. 72 of the *Justices Act* 1928, showed the plaintiff had been guilty of what the Court considered a trivial offence, and she cannot, at a later stage, be heard to say she was not a person found offending. "It is not necessary, in considering the question of *res judicata*, that there should be an express finding in terms, if, when you look at the judgment and examine the issues raised before the Court, you see that the point came to be decided as a separate issue for decision, and was decided between the parties" (*Shoe Machinery Co. v. Cutlan*, [1896] 1 Ch. 667 at p. 670).

I agree that the appeal should be allowed.

Appeal allowed.

[Solicitors — For the appellant, F. G. Menzies, Crown Solicitor; for the respondent, H. A. Kra-kowski.]
W. P.

[See Rules of 1936 (No. 1), Form 2, column "Remarks,"]

High Court of Australia

FULL COURT — (Latham, C.J., Rich, Starke, Dixon and McTiernan, JJ.) (Sydney and Melbourne.)	}	April 26, 27; May 30.
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GRATWICK v. JOHNSON.

Constitutional law—Intercourse among States—Freedom of intercourse—Prohibition against interstate travel — Without official permit — Invalidity—National Security (Land Transport) Regulations—Restriction of Interstate Passenger Transport Order, par. 3 (a).

Under the National Security (Land Transport) Regulations, made under the National Security Act 1939-1943 in wartime, the Minister made an order which, by paragraph 3, declares—"Except as otherwise provided in this Order no person shall without a permit travel by rail or by commercial passenger vehicle (a) from any State in the Commonwealth to any other State therein. . ."

Held, that paragraph 3 (a) of the order imposes a direct restraint upon the freedom conferred by section 92 of the Commonwealth Constitution, and is invalid.

James v. The Commonwealth, [1936] A.C. 578, 55 C.L.R. 1, [1936] A.L.R. 333, followed.

APPEAL.

Ernest Frederick Pether Gratwick laid a complaint against Dulcie Johnson, charging the defendant with having travelled by rail from South Australia to Western Australia without a permit, in contravention of the Restriction of Interstate Passenger Transport Order, paragraph 3, made under the National Security (Land Transport) Regulations.

The complaint was heard at Perth on 8th February, before Mr. W. J. Wallwork, S.M. On 15th February the Magistrate dismissed the complaint, on the ground that paragraph 3 of the order was incompatible with sec. 92 of the Constitution and was invalid.

On the application of the complainant, an order *nisi* to review was granted.

Spender, K.C., Sugerman, K.C., and Dignam for the appellant:—

The order is authorised by the Regulations. It is not a law directed against sec. 92. It merely regulates transport, and its purpose in doing so is to effectuate defence. The restriction upon interstate travel is only incidental.

James v. The Commonwealth, [1936] A.C. at 626.

Andrews v. Howell, 65 C.L.R. 255 at 263, [1941] A.L.R. 186.

Adelaide Company of Jehovah's Witnesses v. The Commonwealth, 67 C.L.R. 116 at 154, [1943] A.L.R. 211.

James v. Cowan, 47 C.L.R. 386, [1932] A.L.R. 334.

Regulation 3 does not relate to the control of railways. It is important that strategic railway lines should be kept open for troops. The transport cases indicate that this species of control is within the defence power.

Riverina Transport Pty. Ltd. v. The Commonwealth, 57 C.L.R. 327, [1937] A.L.R. 374.

The King v. Vizzard, 50 C.L.R. 30, [1934] A.L.R. 16.

Section 92 is not to be construed so widely as to endanger the structure of the Commonwealth, and sec. 51 (vi.) contemplates the Commonwealth power to protect itself against an enemy and to preserve the Government itself.

They referred to—*Hirabashi v. United States*, (1943) 320 U.S. 81 at 107; *The King v. Smithers*, (1912) 16 C.L.R. 99, 19 A.L.R. 209.

Maughan, K.C., Barwick, K.C., and L. D. Seaton for the respondent.—The prohibition against travel is applicable whether the train has troops on board or not. The only test is that of passing from State to State without any relation to defence.

James v. The Commonwealth, 55 C.L.R. 1 at 58, [1936] A.L.R. 343.