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26,1956

No. 5 of 1956.

# In the Privy Council.

UNIVERSITY OF LONDON  
L.C. 1.

## CONSOLIDATED APPEALS FROM THE HIGH COURT OF AUSTRALIA.

20 FEB 1957

ADVANCED  
STUDIES

46038

BETWEEN

THE COMMISSIONER FOR MOTOR TRANSPORT *Appellant*

AND

ANTILL RANGER & COMPANY PROPRIETARY  
LIMITED . . . . . *Respondent*

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AND BETWEEN

THE STATE OF NEW SOUTH WALES  
THE HONOURABLE ERNEST WETHERELL  
and  
THE COMMISSIONER FOR MOTOR TRANSPORT *Appellant*

AND

EDMUND T. LENNON PROPRIETARY LIMITED *Respondent.*

## Case for the Appellants.

RECORD.

1. These consolidated appeals are brought by special leave granted by Her Majesty by Order in Council dated 1st December 1955, from judgments of the High Court delivered on 9th June 1955 in two separate cases. The High Court in the first case upheld a demurrer by the first-named Respondent, who was Plaintiff, to a plea of the first-named Appellant, and in the second case overruled a demurrer by the first-named, second-named and third-named Appellants, who were Defendants, to an amended Statement of Claim by the second-named Respondents.

p. 24.  
pp. 15, 23.  
p. 5.  
p. 4.  
p. 20.  
p. 18.

2. The Appellants in both cases had relied upon a New South Wales statute entitled the State Transport Co-ordination (Barring of Claims and Remedies) Act, No. 45 of 1954 (hereinafter called "the Barring Act"). In the judgments appealed from the High Court held that the Barring Act was invalid on the ground that it contravened section 92 of the Commonwealth of Australia Constitution Act and that, therefore, the Barring Act afforded no answer to the claims of the respective Respondents. The question for decision in these appeals is whether the High Court was right in so holding.

pp. 8, 13, 21, 22.

3. Section 92 of the Commonwealth of Australia Constitution Act provides that—

“ . . . trade commerce and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free.”

4. The Barring Act came into force on 16th December 1954 and contains the following provisions :—

S. 1.—(1) . . .

(2) (a) This Act shall be read and construed with the State Transport (Co-ordination) Act, 1931, as amended by subsequent Acts, which Act as so amended is in this Act referred to as the Principal Act. 10

(b) A reference in any provision of this Act to “ the Principal Act ” shall, for the purpose of the application of that provision to any facts or circumstances, be construed as a reference to the State Transport (Co-ordination) Act, 1931, or to that Act as amended, in the form in which it was in force as at the time of such application.

(3) (a) This Act shall be read and construed subject to the Commonwealth of Australia Constitution Act, and so as not to exceed the legislative power of the State to the intent that where any provision of this Act or the application thereof to any person or circumstance is held invalid, the remainder of this Act and the application of such provision to other persons or circumstances shall not be affected. 20

(b) This subsection shall have effect notwithstanding that its operation may result in this Act having an effect different, or apparently different, in substance from the effect of the provisions contained in this Act in the form in which this Act was enacted.

S. 2. All sums collected, received or recovered in relation to the operation of any public motor vehicle in the course of or for the purposes of interstate trade before the commencement of this Act— 30

(a) which were or purported to have been collected, received or recovered pursuant to the provisions of subsection four or subsection five of section eighteen or section thirty-seven of the Principal Act ; or

(b) which were or purported to have been collected, received or recovered on, or pursuant to any condition imposed on, the issue of a license under the Principal Act or of a permit under the Principal Act or of any document purporting to be a license or a permit under the Principal Act, 40

and which have been dealt with under or in accordance with section twenty-six of the Principal Act for any of the purposes therein mentioned shall be deemed to have been lawfully so dealt with.

S. 3. Any and every cause of action, claim and demand whatsoever by any person whomsoever against Her Majesty or the State of New South Wales or any Minister or the Superintendent of Motor Transport or against any authority, officer or person acting or purporting to act in the execution of the Principal Act :

(a) for the recovery of any of the sums collected, received or recovered in relation to the operation of any public motor vehicle in the course of or for the purposes of interstate trade before the commencement of this Act—

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(i) which were or purported to have been collected, received or recovered pursuant to the provisions of subsection four or subsection five of section eighteen or section thirty-seven of the Principal Act ; or

(ii) which were or purported to have been collected, received or recovered on, or pursuant to any condition imposed on, the issue of a license under the Principal Act or of a permit under the Principal Act or of any document purporting to be a license or a permit under the Principal Act ; or

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(b) for or in respect of any act, matter or thing done or purporting to have been done before the commencement of this Act by any Minister or the Superintendent of Motor Transport or any authority, officer or person acting or purporting to act in the execution of the Principal Act in relation to the operation of any public motor vehicle in the course of or for the purposes of interstate trade

shall be and the same are hereby extinguished.

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S. 4. No action, suit, claim or demand whatsoever shall lie or be brought or made or allowed or continued by or on behalf of any person whomsoever against Her Majesty or the State of New South Wales or any Minister or the Superintendent of Motor Transport or against any authority, officer or person for the recovery of any of the sums referred to in paragraph (a) of section three of this Act or for or in respect of any act, matter or thing done or purporting to have been done as aforesaid.

S. 5. The provisions of this Act shall apply to proceedings pending at the commencement of this Act as well as to proceedings brought after the commencement of this Act.

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S. 6. Nothing in this Act shall affect the right, if any, of Hughes and Vale Pty. Limited to recover any of the sums referred to in paragraph (a) of section three of this Act paid by it after the seventh day of July, one thousand nine hundred and fifty-two.

(The Superintendent of Motor Transport referred to in the provisions of the Act quoted above is the name by which the Appellant, The Commissioner for Motor Transport, was then described.)

5. The State Transport (Co-ordination) Act, 1931, as amended (hereinafter referred to as the "Co-ordination Act") made provision for the licensing of persons operating motor vehicles for reward in the carrying

of passengers and goods and also made provision for the imposition of conditions in licenses issued under the Act requiring the licensee to pay certain mileage charges to the authority charged with the administration of the Act. These latter provisions were contained in subsections (4) and (5) of Section 18 and in Section 37 of the Co-ordination Act (which are the provisions mentioned in Section 2 (a) of the Barring Act) and were in the following terms :—

S. 18.—(4) The Board may, in any license for a public motor vehicle to be issued under this Act that authorises the holder to carry passengers or passengers and goods in the vehicle, impose a condition that the licensee shall pay to them (in addition to any other sums payable under the following subsection and any other provision of this Act), for each and every passenger carried by the public motor vehicle a sum not exceeding one penny for each mile or part thereof of his journey or (where that sum is less than the following sum) a sum not exceeding one penny for each section or part thereof included in his journey and for such purposes the word “ section ” means a part of the route of the vehicle in respect of which a separate charge may for the time being be made against a passenger. 10

The board may determine that the sums to be paid to it under this subsection may be less than the sums hereinbefore mentioned and may be differently ascertained in respect of different licenses. 20

(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. 30

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 (which mileage may be ascertained for such purpose 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. 40 50

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.

S. 37. 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 subsection four and five of section eighteen had the person operating the vehicle been the holder of a license to operate it and had the board imposed therein the conditions provided by such subsections.

10 (The " board " referred to in Sections 18 (4) and (5) and 37 was the State Transport (Co-ordination) Board, and is now replaced by the Appellant, The Commissioner for Motor Transport.)

6. In pursuance of these statutory provisions licenses had been issued to the Respondents and other interstate transport operators requiring payment of mileage charges in respect of the distance travelled by the vehicles of such operators on the roads of the State of New South Wales ; such charges were at the same rates as those prescribed in licenses issued under the said provisions to transport operators whose vehicles travelled wholly within the said State.

7. Prior to 17th November, 1954, the validity of the Co-ordination Act and similar legislation of other States of the Commonwealth had been upheld by the High Court in a number of cases. On 17th November, 1954, the Privy Council held that the licensing provisions of the Co-ordination Act could not validly apply to persons operating public motor vehicles in the course of and for the purposes of interstate trade on the ground that the requirement to be licensed infringed section 92 of the Constitution. No decision was given on the validity of the mileage charges and the Privy Council refrained from expressing any opinion thereon : *Hughes & Vale Pty. Ltd. v. New South Wales* [1955] A.C. 241 at p. 281.

8. Upon this decision being given the collection of mileage charges from interstate transport operators (including the Respondents) ceased at once but such charges were continued to be (and still are) collected from transport operators whose vehicles travel wholly within the State. Subsequently, namely, on 16th December, 1954, the Barring Act was passed into law.

9. The Appellant, The Commissioner for Motor Transport, is a body corporate and, by New South Wales statute, is deemed to be a statutory body representing the Crown and is charged with the administration of the Co-ordination Act. The Appellant, the Honourable Ernest Wetherell, was at the time of the suit the Minister of State for Transport of the State of New South Wales and as such was the Minister responsible for the administration of that Act.

10. Each of the Respondents is a company duly incorporated under the laws of New South Wales.

11. On 23rd July, 1954, the Respondent, Antill Ranger & Company Pty. Limited (hereinafter called Antill Ranger) instituted an action against the Superintendent of Motor Transport (now the Commissioner for Motor Transport) in the Supreme Court of New South Wales claiming the sum of £39,955.16.5 as moneys had and received being sums paid under protest for charges demanded under the Co-ordination Act. By its declaration, dated 13th December, 1954, the Plaintiff alleged only a single count of money payable by the Defendant to the Plaintiff for money received by the Defendant for the use of the Plaintiff. To this declaration the Defendant's plea, dated 1st February, 1955, set up the Barring Act and alleged that the moneys sued for were moneys of the nature and character referred to in Sections 2, 3 and 4 of that Act and that the moneys had been dealt with as in the Act mentioned, and that by virtue of the Act the Plaintiff's cause of action had been extinguished and its right to recover the moneys had been barred. On 1st February, 1955, the Plaintiff demurred to the plea, stating in the demurrer that it intended to argue that the Barring Act was invalid in that it infringed the provisions of Section 92 of the Constitution and accordingly did not extinguish the Plaintiff's cause of action. On the same date the Defendant joined in the demurrer. On the application of the Attorney-General for the State of New South Wales the demurrer was removed into the High Court by an Order of that Court dated 3rd February, 1955.

12. The demurrer was argued before the High Court (Dixon, C.J., McTiernan, Williams, Webb, Fullagar, Kitto and Taylor, JJ.) on 24th, 25th and 28th March, 1955, and on 9th June, 1955, the High Court allowed the demurrer and gave judgment for the Plaintiff thereon.

13. On 8th March, 1955, the Respondent, Edmund T. Lennon Pty. Limited (hereinafter called "Lennon"), commenced a suit in the High Court of Australia claiming declarations that the Barring Act, or alternatively Sections 2, 3 and 4 thereof, were beyond the powers of the Parliament of New South Wales and were invalid. In its amended Statement of Claim dated 16th March, 1955, the Plaintiff alleged that at all material times it carried on business as a carrier of general merchandise operating between Sydney in the State of New South Wales and Adelaide in the State of South Australia, and that—

(A) it was the owner of certain vehicles in respect of which it held licenses under the Co-ordination Act to operate the said vehicles as public motor vehicles within the meaning of the Co-ordination Act ;

(B) the Defendants had from time to time imposed upon and demanded of the Plaintiff and had required the Plaintiff to pay certain charges pursuant to the Co-ordination Act and the regulations made thereunder in respect of the operations of the said motor vehicles when carrying goods on public roads in the State of New South Wales in the course of journeys made between the said States and that the amount of such charges was calculated in respect of the distance travelled on the said public roads of New South Wales in the course of such journeys ;

(C) it had paid such charges involuntarily ;

(D) the Co-ordination Act in so far as it purported to authorise the Defendants to impose or require the payment of the said charges was invalid, beyond the powers of the Parliament of the State of New South Wales and contrary to the provisions of the Constitution of the Commonwealth of Australia and that the imposition and collection of such charges was unlawful and unauthorised ; and p. 19, l. 4.

(E) it had demanded from the Defendants the repayment of the moneys but that the Defendants had refused to repay the moneys upon the ground that, by virtue of the provisions of the Co-ordination Act, the said moneys were not repayable. p. 19, l. 11.

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14. On 17th March, 1955, the Defendants demurred to the whole of the Plaintiff's Statement of Claim on the grounds— p. 20.

(i) that it disclosed no cause of action ; p. 20, l. 16.

(ii) that the Barring Act and every part thereof was a valid exercise of the legislative powers of the Parliament of the State of New South Wales ; p. 20, l. 17.

(iii) that alternatively to (ii) the provisions of that Act, in so far as they apply to charges imposed and collected in respect of the operation of motor vehicles on public roads in the State of New South Wales, were a valid exercise of the legislative powers of the said Parliament. p. 20, l. 20.

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15. The demurrer was argued before the High Court (Dixon, C.J., McTiernan, Williams, Webb, Fullagar, Kitto and Taylor, JJ.) on 24th, 25th and 28th March, 1955, and by its judgment delivered on 9th June, 1955, the Court overruled the demurrer, gave judgment in the suit for the Plaintiff, and made the following declarations :— p. 23.

“ Declare that sec. 3 (a) of the State Transport Co-ordination (Barring of Claims and Remedies) Act, 1954 does not validly operate to extinguish any cause of action to which in consequence of the invalidity or inapplicability of the State Transport (Co-ordination) Act, 1931 (or that Act as amended) by reason of section 92 of the Constitution the Plaintiff was at the passing of the State Transport Co-ordination (Barring of Claims and Remedies) Act, 1954, entitled as against any of the Defendants for the recovery of moneys demanded of the Plaintiff in purported pursuance of section 18 (5) or section 37 of the said State Transport (Co-ordination) Act, 1931 (or that Act as amended) or of a condition imposed upon a license or permit or demanded upon the issue of such a license or permit. p. 23, l. 30.

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Declare that section 4 does not validly operate to bar the remedy for the enforcement of any such cause of action.”

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16. In *Lennon's* case the High Court held that the substance of the matter had been decided in *Antill Ranger's* case, which decision, when applied to the former case, entitled the Plaintiff to the declarations which the Court made. p. 21, l. 19.  
p. 22, l. 18.

17. The substance of the Appellants' case is summarised in these propositions :—

(i) Under the provisions of the New South Wales Constitution Act, 1855, the Parliament of New South Wales was empowered to make laws for the peace, welfare and good government of the State in all cases whatsoever.

(ii) Sections 106 and 107 of the Commonwealth Constitution provide that the New South Wales Constitution shall, subject to the Commonwealth Constitution, continue as at the establishment of the Commonwealth, and that every power of the Parliament of New South Wales shall, unless it is by the Commonwealth 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. 10

(iii) The Barring Act is within the legislative powers conferred on the Parliament of New South Wales by the Constitution of that State, whether the Act is regarded—

(A) as regulating the circumstances in which money demanded within the State without legal authority, and paid within the State whether voluntarily or involuntarily, shall, under the laws of the State, be recoverable by the payer ; or 20

(B) as regulating the exceptional position which arose within the State where money had been collected and spent for many years under the authority of legislation declared to be valid by the High Court of Australia, and that legislation had subsequently been declared to be invalid by the Privy Council ; or

(C) as in substance imposing a charge on transport operators for the use of the State roads over which their vehicles had travelled.

(iv) The power to enact such legislation has not been vested in the Parliament of the Commonwealth, exclusively or otherwise, by the Commonwealth Constitution. 30

(v) The power to enact such legislation has not been withdrawn from the Parliament of New South Wales by section 92 or by any other section of the Commonwealth Constitution.

(vi) The Barring Act is therefore a valid exercise of the powers of the Parliament of New South Wales.

18. These are the reasons for submitting that the power to enact the Barring Act has not been withdrawn by section 92 :—

(i) Section 92 does not require either expressly or by implication that the law of New South Wales shall give a right of action for damages in every case, or in any case, where the Plaintiff has suffered injury by reason of the infringement of that section. 40

(ii) Section 92 does not require either expressly or by implication that the law of New South Wales shall give a right of action in every case, or in any case, to recover money collected from the Plaintiff under the authority of a statute which infringes section 92.



(iii) Section 92 does not itself confer upon individuals any right of action for damages caused by legislative or executive acts which contravene the section ; it does not confer upon individuals a right to recover money collected under the authority of a statute which infringes section 92.

10 (iv) The Respondents' rights, before the Barring Act was passed, under the common law of New South Wales would have been the same whether their money had been collected by the State (A) without colour of law, or (B) in reliance on legislation which turned out to be invalid because it infringed section 92. As the Parliament of New South Wales would have the power to render the money irrecoverable in the first case, so it must have the power in the second case.

20 (v) It has been held that section 92 is violated only when a legislative or executive act operates to restrict interstate trade commerce and intercourse directly and immediately as distinct from creating some indirect or consequential impediment which may fairly be regarded as remote. It is submitted that the Barring Act does not operate to restrict interstate trade commerce or intercourse directly or immediately or at all. If it operates to restrict that trade at all, the impediment is no more than indirect or consequential.

30 (vi) The Respondents in the present cases are relying on common law causes of action. The basis of such causes of action is the invalidity of the demand under which the Respondents paid their money. For the purpose of the common law it is immaterial whether the demand was unlawful because the Act under which it was made infringed section 92, or whether it was unlawful for some other reason. The Barring Act, which deals with such causes of action, is therefore not affected by section 92. The Barring Act operates outside the field of protection guaranteed by section 92.

19. In *Antill Ranger's Case*, Dixon, C.J., McTiernan, Williams, Webb, Kitto and Taylor, J.J., delivered a joint Judgment. Following the judgment of Dixon, J., in *James v. Commonwealth (supra)*, the joint judgment accepted the proposition that section 92 did not confer private rights upon individuals, and that the infringement of that section did not give the Respondent any cause of action. It also pointed out that there was no due process clause in the Commonwealth Constitution. (Such a clause might operate to prevent a legislature from divesting a party of a cause of action.) The question, therefore, was whether section 92 (which did not itself give the Plaintiff any right of action) was infringed by the Act in question. Before answering that question the judgment stated that the Act did not amount to any interference with the Plaintiff's present freedom to enter upon or complete any transaction of trade or commerce. The judgment recognised that the decision of the Privy Council in *Hughes & Vale Pty. Ltd. v. New South Wales (supra)* had created a difficult administrative question, that the common law gave no right to recover payments made without protest, and that it might well be that the carriers who had made the payments "had more or less recouped themselves by

p. 8.  
p. 10, ll. 22-40.  
p. 10, l. 51.  
p. 11, l. 2.  
p. 11, l. 4.  
p. 11, ll. 12-29.

increased freights." The judgment appeared to recognise that the Parliament had legislative power to regulate this situation by a law producing an expeditious but just result. It held, however, that the Barring Act went too far in covering every case :—

p. 11, ll. 30-38.

" It (the Act) is not an attempt to clear up a difficult administrative situation or a prospect of litigation by substituting some other means of reaching an expeditious but just result . . .

However strongly payments might have been resisted by an interstate trader and however great may have been the threatened duress which occasioned the payment, the statute would extinguish his right." 10

The reasons for holding that the Act by so providing infringed section 92 are contained in the following passage of the judgment :—

p. 11, l. 44- .  
p. 12, l. 17.

" In protecting the freedom of individuals to trade across State lines it (s. 92) invalidates any law purporting to confer any anterior authority to stop him doing so. Can the State by its functionaries stop him without legal justification and immediately afterwards confirm the act, give it a legal justification and deny him all remedy? It seems implicit in the declaration of freedom of interstate trade that the protection shall endure, that is to say, that if a governmental interference could not possess the justification of the anterior authority of the law because it invaded the freedom guaranteed, then it could not, as such, be given a complete *ex post facto* justification . . . One of the effects of s. 92 is that legislation cannot impose a burden on interstate trade. If the executive authority takes his money and the legislature says it may keep it, that surely amounts to a burden." 20

20. It is respectfully submitted that the reasoning upon which the joint judgment is based is erroneous. It is not implicit in section 92 that an individual injured by an interference with his interstate trade shall have a right of action for the infringement of the section, and the High Court has so held. Neither is it implicit in the section that a person who has made a payment connected with interstate trade, of which the exaction was not legally justified, shall have a right of action to recover that payment, even if the payment was made under protest. The same reasoning which denies the individual a constitutional right under section 92 to recover damages for the infringement of the section, also denies him a constitutional right to recover such payments, even though exacted without legal authority and paid under protest. As section 92 does not give the individual any right of action, it follows that the Parliament of New South Wales, by denying him an action under the law of that State, has not infringed section 92. 40

21. It is no doubt true that the financial position of the Respondents as a result of the Barring Act is the same as if there had been a legal justification for exacting the payment. If there had been a legal justification the money would not have been recoverable. Equally under the Act the money is not recoverable. If the money had been paid without protest, then even if the Act had not been passed, the payer's financial

position under the law of New South Wales would also have been the same as if there had been a legal justification for exacting the payment: in neither event would the money have been recoverable. The unchanged law of New South Wales would not have been at variance in that case with section 92, and so the joint judgment appears to hold: neither is there any inconsistency between section 92 and an Act which denies a right of recovery where the money has been paid under protest. In truth a law which denies a right to recover a payment exacted without legal authority does not give, or purport to give, "a legal justification" to the  
 10 exaction of the payment. It is submitted that the joint judgment is erroneous in holding that because the Act under which the payments were made was invalid, so must be the law which makes those payments irrecoverable.

22. It is true again that the Respondents' financial position may be less favourable than if the Barring Act had not been passed. In that sense it may be said metaphorically that the Act has imposed a "burden" on the Respondents. The question still remains whether, as the joint judgment holds, the Act has imposed a "burden" on interstate trade in the sense of infringing the requirement that the trade shall be free. It is  
 20 respectfully submitted that the Act does not impose a "burden" on interstate trade in that the only relevant sense of the word.

23. It has been pointed out that the joint judgment in *Antill Ranger's Case* appears to distinguish between an Act which produces a "just result," and one which does not. While it is respectfully submitted that this is not a relevant criterion in considering the validity of the Act, the Appellants also submit that the Act does in fact produce a just result. The High Court have held by a majority in *Hughes & Vale Pty. Ltd. v. New South Wales* (No. 2) (1955) Argus L.R. 225, decided on 9th June, 1955, that the Parliament of New South Wales has and always has had power  
 30 to exact from persons engaged on interstate journeys a compensatory non-discriminatory charge for the use of the roads of New South Wales on such journeys. There is nothing in the present cases to suggest that the amount of the charges imposed upon the Respondents under the Co-ordination Act (though exacted without legal authority) could not have been validly authorised under a statute which did not link the charges with an invalid licensing system. Again it was reasonably certain (as the judgment recognises) that the carriers "had more or less recouped them-  
 selves by increased freights." In these circumstances justice did not require that the payments should be recoverable. p. 11, ll. 26-29. p. 11, l. 25.

40 24. Mr. Justice Fullagar delivered a separate judgment in which he p. 13. began by stating that he had been—

"very much pressed by the very exceptional circumstances which led to the enactment of the State Transport Co-ordination (Barring of Claims and Remedies) Act 1954. It is by no means a simple case of a State legislating to rid itself of a liability justly resting upon it. The moneys in question were exacted under legislation which was believed not without reason to be valid. Not only were the claims for repayment doubtless numerous, but most probably p. 13, ll. 8-31.

the payments were made in a great variety of circumstances. In some cases, no doubt, an action at common law for money had and received, would lie, while in other cases it would not. In many cases—perhaps in most—the charges paid would in fact have been ‘passed on’ by the carrier to his customer, so that the carrier suffered little or no real loss. On the other hand, many persons—perhaps after considerable expenditure on plant, etc.—must have been prevented or deterred altogether from carrying on a business which they were entitled to carry on, and most of these could have no redress at law. Others again had taken the risk of operating 10 without a license, and these (though a few may have escaped detection) had been prosecuted and punished. These again could have no redress at law. A further factor in the situation was that, although the charges actually imposed were invalid, the State could (as has now been held) have lawfully demanded *some* amounts by way of contribution to the maintenance of highways. In the face of a situation so complex and many sided it may well have seemed that to cut the knot and deny redress to all alike provided a solution which was not merely rational but, on the whole, fair enough.” 20

p. 13, ll. 32, 33.

Mr. Justice Fullagar stated, however, that he was unable—

“to find any legal principle on which the Act of 1954 can be upheld.”

He said :—

p. 14, ll. 3-8.

“No State law can make lawful, either prospectively or retrospectively, that which the Constitution says is unlawful. And that is what section 3 of the Act of 1954 in substance purports to do, when it says that every cause of action arising out of an exaction made unlawful by the Constitution shall be ‘extinguished.’ ”

25. It is respectfully submitted that the legal principle on which the 30 Act must be upheld is that the Parliament of New South Wales had plenary legislative powers, except in so far as the powers have been exclusively vested in the Commonwealth Parliament by the Commonwealth Constitution, or have been withdrawn from the Parliament of New South Wales by that Constitution, and that the power to pass the Act in question has not been vested in the Commonwealth Parliament and has not been withdrawn from the Parliament of New South Wales. It is further submitted that the Act does not make retrospectively lawful that which the Constitution declares to be unlawful. The Act does no more than deny 40 to the Respondents under the law of New South Wales a right of action to which the Respondents are not in any event entitled under the Constitution.

p. 13, ll. 25-28.

p. 13, ll. 32-34.

26. The Appellants point out that although Mr. Justice Fullagar referred to the power of the State to demand payment of moneys for the maintenance of highways, his Honour did not regard that power as having any bearing on the validity of the Barring Act. It is submitted that his Honour was in error in this approach and that he should have held that the Act could not be invalid except to the extent (if any) that the charges sought to be recovered exceeded any amount which the State could lawfully have demanded for the purpose mentioned. 50

27. The decision of the High Court in *Lennon's* case depends upon *Antill Ranger's* case having been correctly decided. If the Appellants' submissions that *Antill Ranger's* case is wrongly decided are upheld, it follows that the decision in *Lennon's* case cannot stand.

p. 23.  
p. 21, ll. 19-23.  
p. 22, ll. 17, 18.

28. The Appellants draw attention to the form of the declarations which the High Court made in *Lennon's* case. It is submitted that the form of these declarations gives point to the Appellants' contention that the Barring Act does not operate to restrict or burden the Respondents in their trade or trading activities but operates only upon their rights to sue to recover moneys paid by them. The Appellants contend that in formulating the appropriate relief in *Lennon's* case the Court found itself constrained to relate the Barring Act to section 92 by describing the causes of action which it purports to extinguish as "causes of action to which in consequence of the invalidity or inapplicability of the State Transport (Co-ordination) Act, 1931 (or that Act as amended) by reason of section 92 of the Constitution the Plaintiff was entitled . . ." The Appellants submit that the causes of action in the present cases arose from the common law; they were not conferred by section 92. The Barring Act deals solely with those causes of action and, in so doing, operates outside the field of protection guaranteed by section 92. The Appellants contend that the form in which the declarations are made itself points the distinction which the Appellants seek to draw and which the Appellants submit is correctly to be drawn in the present cases.

p. 23, l. 31-  
p. 24, l. 3.

29. The Appellants, therefore, submit that the decisions of the High Court are erroneous and ought to be reversed, that these appeals should be allowed and the orders of the High Court set aside, and in lieu thereof the demurrer of the Respondent in the first case should be overruled and the demurrer of the Appellants in the second case should be upheld, for the following among other—

pp. 15, 23.

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## REASONS

- (A) BECAUSE the Barring Act was a valid exercise of the power of the Parliament of New South Wales to make laws for the peace, welfare and good government of the State in all cases whatsoever.
- (B) BECAUSE the power to enact such a law has not been withdrawn from the Parliament of New South Wales by section 92 of the Commonwealth Constitution or by any other section of that Constitution.

B. MACKENNA.

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ANTHONY CRIPPS.

**In the Privy Council.**

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**CONSOLIDATED APPEALS**  
*from the High Court of Australia.*

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BETWEEN  
**THE COMMISSIONER FOR  
MOTOR TRANSPORT . . . . .** *Appellant*  
AND  
**ANTILL RANGER & COM-  
PANY PROPRIETARY  
LIMITED . . . . .** *Respondent*  
AND BETWEEN  
**THE STATE OF NEW  
SOUTH WALES and  
Others . . . . .** *Appellant*  
AND  
**EDMUND T. LENNON  
PROPRIETARY LIMITED** *Respondent.*

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**Case for the Appellants.**

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**LIGHT & FULTON,**  
24 John Street,  
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*Solicitors for the Appellants.*