

# In the Privy Council

UNIVERSITY OF LONDON  
W.C.1

20 FEB 1957

ON APPEAL  
FROM THE HIGH COURT OF AUSTRALIA.

46039

BETWEEN

THE COMMISSIONER FOR MOTOR TRANSPORT  
(Defendant) . . . . . *Appellant*

AND

10 ANTILL RANGER & COMPANY PTY. LIMITED  
(Plaintiff) . . . . . *Respondent*

AND BETWEEN

THE STATE OF NEW SOUTH WALES, THE  
HONOURABLE ERNEST WETHERELL and  
THE COMMISSIONER FOR MOTOR  
TRANSPORT (Defendants) . . . . . *Appellants*

AND

EDMUND T. LENNON PTY. LIMITED (Plaintiff) . *Respondent.*

(Consolidated Appeals)

## Case for the Respondents

20 INTRODUCTORY.

RECORD.

1. These are appeals brought by special leave granted on the 1st December, 1955 from Judgments and Orders of the High Court of Australia which overruled a demurrer by the Defendants (Appellants) to the Statement of Claim of the Plaintiff (Respondent) Edmund T. Lennon Pty. Limited and upheld a demurrer by the Plaintiff (Respondent) Antill Ranger & Company Pty. Limited to a plea by the Defendant Commissioner for Motor Transport (one of the Appellants). In overruling the one demurrer and upholding the other the High Court of Australia held that the State Transport Co-ordination (Barring of Claims and Remedies) Act 1954 (hereinafter referred to as "the said Act") infringed section 92 of the Commonwealth of Australia Constitution which provides that:—

“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.”

2. On the grant of special leave it was directed that the two appeals be consolidated and be heard together on one printed case on each side.

3. The relevant provisions of the said Act are as follow :—

2. All sums collected, received or recovered in relation to the operation of any public motor vehicle in the course of or for the purpose of inter-state trade before the commencement of this Act—

(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

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(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,

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.

3. Any and every cause of action, claim or demand whatsoever 20 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 inter-state trade before the commencement of this Act—

(i) which were or purported to have been collected, received or recovered pursuant to the provisions of 30 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

(b) for or in respect of any act, matter or thing done or purporting to have been done before the commencement 40 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 inter-state trade,

shall be and the same are hereby extinguished.

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.

10 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.

4. The sums collected received or recovered in relation to the operation of public motor vehicles in the course of or for the purposes of inter-state trade referred to in section 2 of the said Act were collected received or recovered because of the supposed operation of (*inter alia*) sections 18 (5) and 37 of the State Transport (Co-ordination) Act 1931-1952. Those sections were ancillary to sections 12 and 17 of that Act whereby an absolute prohibition of the operation of public motor vehicles on the public highways of New South Wales was imposed subject to a discretionary  
20 licensing system administered by an official. Those sections so far as relevant to this case were as follow :—

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  
30 under section twenty-two of this Act.

(2) Any person who operates or uses or causes or permits to be operated or used a motor vehicle for the carriage or delivery of his goods (other than goods that are not intended for sale whether immediately or ultimately) or of goods sold by him shall be deemed to be thereby operating a public motor vehicle within the meaning of this Act and such vehicle shall be deemed to be a public motor vehicle.

In any prosecution the onus of establishing the exception that the goods are not intended for sale shall lie on the defendant.

40 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.

(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 10 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 : 20

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.

18.—(5) The board may, in any license for a public motor vehicle to be issued under this Act that authorises the holder to 30 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 40 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 three pence 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 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.

10 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 license to operate it and had the board imposed therein the conditions provided by such subsections.

20 (2) This section shall not relieve such person or any other person from the penalties for the offence.

5. The result of the lastly mentioned statutory provisions so far as relevant to the collection receipt or recovery of sums of money was that if a licence was granted it was in fact subject to the condition of the payment of a mileage charge in respect of distances travelled in competition with the Government railways. It was also a condition of the grant of a permit that such a mileage charge be paid by an operator.

30 6. The effect of the decision of Your Lordships' Board in *Hughes & Vale Pty. Limited v. New South Wales* (1955) A.C. 241 was that section 12 of the State Transport (Co-ordination) Act, 1931-1952, did not apply to owners of public motor vehicles operating such vehicles in the course and for the purposes of inter-state trade, and therefore did not authorise the imposition and collection of the said mileage charges.

7. The Writ of Summons in *Hughes & Vale Pty. Limited v. New South Wales* was issued out of the High Court of Australia on 7th July, 1952.

40 8. During the period commencing with the last mentioned date and ending with the decision of Your Lordships Board in the said case on 17th November, 1954, sums were paid to or collected by the Appellants in circumstances which, the Respondents allege, would, on general principles, entitle the Respondents to recovery of the said sums, there being in law no authority for the demand pursuant to which such sums were so paid or collected.

9. Both before 17th November, 1954, and after that date proceedings were commenced by a number of parties against the Appellants or some of them to recover sums of money which had been paid in respect of

mileage charges and for damages for seizure of vehicles by the Appellants or by some of them. Most of the claims for liquidated sums were brought by writ of summons issued out of the Supreme Court of New South Wales, and the respective plaintiffs, including the Respondent Antill Ranger & Company Pty. Limited declared in common money counts to which the Appellants pleaded the terms of sections 2, 3 and 4 in the following manner :

p. 4, ll. 11-19.

“ After the commencement of this action the Parliament of the State of New South Wales passed into law an Act known as the State Transport Co-ordination (Barring of Claims and Remedies) Act, 1954, and that the moneys sought to be recovered by the plaintiff in this action are moneys of the nature and character referred to in secs. 2, 3 and 4 of the said Act and that the said moneys were dealt with as in the said Act mentioned and the defendant further says that by virtue of the said Act the plaintiff's cause of action is extinguished and its right to recover the said moneys is barred.” 10

p. 5.

To this plea the plaintiff, Antill Ranger & Company Pty. Limited, demurred, which demurrer was removed into the High Court of Australia under the provisions of section 40 of the Judiciary Act, 1903-1950 on the application of the Attorney-General of New South Wales. 20

p. 7.

p. 16 ; pp. 18-19.

10. The Respondent Edmund T. Lennon Pty. Limited was the plaintiff in an action in the High Court of Australia commenced by writ of summons and statement of claim. The statement of claim sought declarations of right and the Defendants (the Appellants) demurred thereto.

p. 20.

11. On the record in both cases the High Court of Australia assumed (and in the Respondents respectful submission properly so) for the purpose of the demurrers that :—

p. 10, ll. 9-21.

“ The moneys sued for were moneys collected over the plaintiff's protest from the Plaintiff by the Defendant in relation to the operation of the Plaintiff's motor vehicles in the course of or for the purpose of interstate trade whether collected as under sec. 18 (4) or (5) or sec. 37 and that they were involuntary payments which the Defendant exacted from the Plaintiff *colore officii* under threats express or implied that by seizure of the vehicles or some other means unauthorised by any valid law he would prevent the Plaintiff carrying out transactions of interstate transportation in which the vehicles were engaged. Since on the facts assumed sec. 92 protected the plaintiff from any such exaction or seizure or the like, the Defendant was acting unlawfully and as an executive officer of the State, in violation of the freedom guaranteed by sec. 92 to trade commerce and intercourse among the States.” 30  
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(1955 A.L.R. p. 607.)

12. The Respondents respectfully adopt the reasons given by Their Honours in the High Court of Australia in giving judgment in each of these cases.

13. In particular the Respondents adopt as correctly stating the legal result the following passage from the joint judgment of Their Honours Dixon, C.J., McTiernan, Williams, Webb, Kitto and Taylor, JJ., as follows :—

10           “ When sec. 92 says that trade commerce and intercourse among the States shall be free, it gives an immunity from interference by governmental action that cannot be transient or illusory. In protecting the freedom of individuals to trade across State lines it 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. By the words ‘ as such ’ is meant that it cannot be given a justification *ex post facto* in virtue or by reason of its very nature as an interference with the freedom of interstate trade. Yet that is what is done by the statute now in question. It takes the operation of the vehicle in the course of interstate trade or for the purpose thereof. It takes the collection of the money under the purported authorities to which it refers, authorities *pro tanto* invalid because the vehicle was operating in the course of or for the purposes of interstate trade. It assumes that a cause of action thereupon arose. On that basis it extinguishes every cause of action so arising and bars the remedy. It leaves the interstate trader with no means of reparation and in exactly the same condition as he would occupy had there been an antecedent valid legal authority for the exaction. One of the effects of sec. 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. It would defeat sec. 92 to allow validity to such a statute.” (1955 A.L.R. 609.)

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The Respondents also adopt as correctly stating the legal result the following passage from the judgment of Fullagar, J. :—

40           “ But the unlawfulness of the exaction does not depend upon State law. It depends on the Constitution. No State law can make lawful, either prospectively or retrospectively, that which the Constitution says is unlawful. And that is what sec. 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.’ Section 3 deals with rights, which it extinguishes. Section 4 deals with remedies, which it denies. The technical distinction between rights and remedies is well recognised in English law, and is sometimes of practical importance. But I do not think that the distinction is of any significance here. If the Constitution preserves a common law right, it must be taken to preserve the appropriate common law

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p. 11, l. 42.

p. 12, l. 18.

p. 14, ll. 2-16.

remedy. If it protects a common law right against the State invasion, the State cannot make that protection ineffective by denying all remedy for State invasion." (1955 A.L.R. 610.)

14. The Respondents also respectfully submit that there is no significant difference between the imposition of a pecuniary impost exacted as the price of the State's non-interference with a trader's right to trade interstate, and the extinction of a trader's right to recover money which has been wrongly exacted anterior to the exercise of such right as the price of such non-interference.

15. The Respondents therefore submit that the appeals should be 10 dismissed with costs for the following, amongst other

### REASONS

- (1) THAT the decisions of the High Court of Australia were correct.
- (2) That the State Transport Co-ordination (Barring of Claims and Remedies) Act, 1954, infringes section 92 of the Commonwealth of Australia Constitution.
- (3) THAT the said Act imposes a burden on interstate trade commerce and intercourse.

G. E. BARWICK. 20

J. D. HOLMES.

T. E. F. HUGHES.

G. L. NEEDHAM.

**In the Privy Council.**

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**ON APPEAL**

*from the High Court of Australia.*

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BETWEEN

**THE COMMISSIONER FOR MOTOR  
TRANSPORT** (Defendant) . . . *Appellant*

AND

**ANTILL RANGER & COMPANY  
PTY. LIMITED** (Plaintiff) . . . *Respondent*

AND BETWEEN

**THE STATE OF NEW SOUTH  
WALES, THE HONOURABLE  
ERNEST WETHERELL and  
THE COMMISSIONER FOR  
MOTOR TRANSPORT**  
(Defendants) *Appellants*

AND

**EDMUND T. LENNON PTY.  
LIMITED** (Plaintiff) . . . *Respondent.*  
(Consolidated Appeals)

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**Case for the Respondents**

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