

*Privy Council Appeal No. 5 of 1956*

**The Commissioner for Motor Transport** - - - - - *Appellant*

v.

**Antill Ranger & Company Pty. Ltd.** - - - - - *Respondent*

*and*

**The State of New South Wales, and others** - - - - - *Appellants*

v.

**Edmund T. Lennon Pty. Ltd.** - - - - - *Respondent*

*(consolidated appeals)*

FROM

**THE HIGH COURT OF AUSTRALIA**

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE  
OF THE PRIVY COUNCIL, DELIVERED THE 10TH JULY, 1956

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*Present at the Hearing :*

VISCOUNT SIMONDS

LORD OAKSEY

LORD RADCLIFFE

LORD TUCKER

LORD COHEN

*[Delivered by VISCOUNT SIMONDS]*

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These consolidated appeals raise a question of novelty and importance in regard to the operation and effect of section 92 of the Commonwealth of Australia Constitution, but having heard full argument on behalf of the appellants their Lordships have no doubt that the conclusions of the High Court are right and their reasons unimpeachable.

Section 92 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.

In *Hughes & Vale Proprietary Ltd. v. State of New South Wales and others* [1955] A.C. 241 their Lordships decided that the provisions of the State Transport (Co-ordination) Act, 1931-1951, of the State of New South Wales (sometimes called "the principal Act") which required application to be made for a licence and all provisions consequential thereon, in so far as they purported to apply to, and to the operators of, public motor vehicles operated in the course of and for the purposes of inter-State trade were invalid as contravening section 92. The effect of that decision was that charges which under the Act had been imposed upon and collected from the respondents had been unlawfully imposed and collected. The respondents accordingly commenced proceedings for the recovery of the sums so paid by them and for the purpose of these appeals it is to be assumed for the reasons elaborated in the judgment of the High Court that they would have had a good cause of action

but for the Act to which reference is next made. It is not material to the result but may be observed that the respondents in the first of the consolidated appeals commenced proceedings before that Act was passed.

The State Transport Co-ordination (Barring of Claims and Remedies) Act, 1954 (which will be referred to as "the Barring Act"), upon which the appellants rely, enacted so far as material as follows :

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 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 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 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.

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.

There can be no doubt that this Act, if it is valid, is a complete answer to the respondents' claims. It is invalid only if it is struck by section 92 of the Constitution. This is the issue, and their Lordships concur in the unanimous opinion of the High Court that section 92 precludes the appellants from relying on it.

It was conceded by the appellants that the validity of the relevant provisions of the Barring Act would have been no greater and no less if they had been contained in the principal Act itself. Neither prospectively nor retrospectively (to use the words of Fullagar, J.) can a State law make lawful that which the Constitution says is unlawful. A simple test thus appears to be afforded. For if a Statute enacted that charges in respect of inter-State trade should be imposed and that, if they were held to be illegally imposed and collected, they should nevertheless be retained, such an enactment could not be challenged if the illegality of the charge rested only on the then existing State law. As their Lordships were often reminded in the course of the argument, the State is sovereign within its own territory. But it is otherwise if the illegality

arises out of a provision of the Constitution itself. Then the question is whether the statutory immunity accorded to illegal acts is not as offensive to the Constitution as the illegal acts themselves, and, applied to the present circumstances, that question is whether, if the imposition of charges in respect of inter-State trade is invalid as an offence against section 92, it is not equally an offence to deny the right to recover them after they have been unlawfully exacted.

It appears to their Lordships that to this question there can be only one answer. It cannot be too strongly emphasised or too often repeated that in the words of the High Court the immunity given by section 92 to trade, commerce and intercourse cannot be transient or illusory. Yet how fugitive would that protection be if effect were given to the argument of the appellants in this case. A trader desiring to engage in inter-State trade and confronted with the provisions of an Act which appear to him to deprive him of the freedom guaranteed by the Constitution may well be content to conform to its requirements, to accept the necessity of applying for licences and to submit, though it may be under protest, to pecuniary exactions in order that he may be able to carry on his business. But he may do so in the firm conviction that he can test the legality of the statutory requirements in a Court of law and recover sums of money unlawfully exacted. And let it be supposed that he is right and that those sums were unlawfully exacted and that he can avail himself of the constitutional freedom afforded by section 92. What is his situation if then he finds himself by a later provision of the same Act or by a subsequent Act once more subjected to the same exactions? The burden on his trade remains just what it was: the freedom of his trade has been in the same degree impaired. In letter and in spirit section 92 is in the same measure defeated.

The appellants called in aid the well-known passage from the judgment of Dixon, J. (as he then was) in *James v. The Commonwealth* 62 C.L.R. at 361, which was echoed in the judgment of the Board in the *Bank Case* [1950] A.C. at p. 305, to the effect that juristically section 92 does not confer private rights upon individuals. But it is a transparent misuse of this proposition to proceed to the further proposition that a trader, who but for the Barring Act would have a right enforceable at common law, cannot plead that a defence raised under that Act is precluded by the section. In such a case the trader does precisely what this Board has said he may do. He invokes the judicial power to help him resist legislative action which offends against the section. He assumedly has a common law right to recover money unlawfully exacted and he demurs to a plea founded on a statute which offends against section 92. The demurrer must prevail.

The same argument was advanced in a somewhat different form by counsel who urged that the effect of the Barring Act was not to impose a burden on trade but only (as their Lordships understood the argument) to interfere with a right of property, viz., the right to sue for money had and received, which accrued after the trading operation was concluded. In this form the argument has no greater validity. It has become a truism that section 92 protects the subject only from legislation which takes as its criterion of operation an act of trade or commerce or an essential attribute of trade or commerce. This is a proposition couched in necessarily vague and general terms. To exclude from its scope an enactment whose only object is to validate an exaction which the section renders unlawful would in their Lordships' opinion be a mockery of the spirit of the Constitution.

Their Lordships do not think it desirable to deal at greater length with these appeals, important as are the issues they raise, because they agree so fully with the judgments immediately under review and with that of Fullagar, J., in *Deacon v. Grimshaw* which is reported in 93 C.L.R. at p. 104.

Their Lordships will accordingly humbly advise Her Majesty that these appeals should be dismissed. The appellants will pay the respondents' costs of the appeals.

In the Privy Council

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THE COMMISSIONER FOR MOTOR  
TRANSPORT

v.

ANTILL RANGER & COMPANY PTY. LTD.

*and*

THE STATE OF NEW SOUTH WALES,  
AND OTHERS

v.

EDMUND T. LENNON PTY. LTD.

*(consolidated appeals)*

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DELIVERED BY VISCOUNT SIMONDS

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