

[HIGH COURT OF AUSTRALIA.]

DICKENS APPELLANT ;
INFORMANT,

AND

MULHOLLAND RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF
VICTORIA.

Motor Omnibus—Licensing—“Plying for hire”—Meaning of—Transport club—
Person engaged to carry and collect fares from members in motor omnibus—
Motor Omnibus Act 1924 (Vict.) (No. 3378), secs. 4, 13—Motor Omnibus Act
1925 (Vict.) (No. 3439), sec. 2—Motor Omnibus Act 1927 (Vict.) (No. 3555),
sec. 2.

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The *Motor Omnibus Act* 1924 (Vict.), by sec. 13 (1), provides that “any person plying for hire with any motor omnibus and the owner of such motor omnibus permitting or concerned in plying for hire therewith who contravenes or fails to comply with any of the provisions of this Act . . . shall be guilty of an offence against this Act.”

Knox C.J.,
Isaacs, Rich
and Starke J.J.

The defendant, being the owner of a motor omnibus as defined in sec. 2 of the *Motor Omnibus Act* 1925 (Vict.), entered into a contract with a “transport club” to provide a designated motor vehicle for the exclusive purpose of conveying members of the club between Reservoir and Melbourne along a defined route, and was to receive £20 a week for performing his obligations under the contract. The defendant as driver was required to collect a fare from each member using the vehicle and to hand the fares so collected to the secretary of the club. Only members of the club were permitted to be driven in the vehicle, and the driver was to require production from each passenger of his certificate of membership of the club. In compliance with the terms of the contract the defendant conveyed a member of the club along a portion of the above-mentioned route and collected the fare from him. The vehicle was not licensed as required by the *Motor Omnibus Acts*.

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*Held*, upon these facts, that the defendant was “plying for hire” within the meaning of sec. 13 (1) of the *Motor Omnibus Act* 1924 and was rightly convicted of plying for hire with a motor omnibus without the same being duly licensed under the *Motor Omnibus Acts* 1924 and 1925.

Decision of the Supreme Court of Victoria (Full Court): *Dickens v. Mulholland*, (1929) V.L.R. 55, reversed.

#### APPEAL from the Supreme Court of Victoria.

An information laid by Matthew J. Dickens against Frederick Mulholland, alleging that the defendant on 25th June 1928 at Melbourne did ply for hire with a motor omnibus without the same being duly licensed by the licensing authority under the *Motor Omnibus Acts* (Vict.) as a hackney carriage contrary to the provisions of such Acts, came on for hearing before the Court of Petty Sessions at Melbourne on 1st August, when the Court reserved its decision.

Evidence was given on behalf of the informant that on 25th June 1928 one John Duffy boarded in Fitzroy the defendant’s omnibus, which the defendant was himself driving, and at the request of the defendant produced his certificate of membership of the Preston Transport Club; that at the time there were nine passengers in the vehicle, which had seating accommodation for approximately twenty; that he travelled to the intersection of Bourke and Swanston Streets, Melbourne; that he paid twopence as fare, and that the words “Preston Transport Club” were painted on the side of the bus. The defendant gave evidence that he was the owner and driver of the vehicle in question; that he was driving the vehicle under a contract with the Preston Transport Club; that he was paid £20 per week in accordance with the terms of that agreement; that all transport fees collected by him on the vehicle from members of the Club were paid by him to the secretary of the Club each evening, and that the actual money collected from the witness Duffy was paid by him to the secretary of the Club in accordance with the terms of the said agreement; that certificates of membership were produced by all members of the Club; that no person was permitted to enter the motor vehicle without production of his certificate of membership of the Club; that the words “Preston Transport Club” and “Members only” were on both sides of the bus, and that officers of the Club frequently came on to the motor vehicle for the purpose of checking members’ certificates.



Under the contract above referred to, the defendant was employed by the "Preston Transport Club" to provide a designated motor vehicle "for the exclusive purpose of conveying members of the Club between Reservoir and Melbourne" along a defined route, to drive the motor vehicle along the said route "for ten and eleven round-trips on weeks days and ten round-trips on "Sundays at the times and in accordance with the orders and directions of the committee of the Club." The Club agreed to "pay to the contractor" (the defendant) "for providing and driving the motor vehicle . . . and performing his other obligations under this agreement the sum of £20 per week," with power in the contractor to substitute some other vehicle for that in question in certain circumstances. It was also provided that "the contractor shall whilst driving the motor vehicle on any trip under this agreement take from any point to any point along the said route at such stopping-places as the committee may direct any member of the Club desiring to enter the motor vehicle provided there is accommodation left for such member in the motor vehicle"; that "the contractor or the driver of the said motor vehicle shall on behalf and in the name of the Club collect from each member of the Club who shall use the said motor vehicle such transport fees and in such manner as the committee of the Club shall from time to time prescribe and shall at the end of each day hand to the secretary of the Club all fees so collected," that "no person other than a member of the Club shall be permitted by the contractor or the driver . . . to enter or remain upon the motor vehicle while the same is engaged in traversing the said route under this agreement"; and that "the contractor as the driver shall require of all persons entering or remaining on the motor vehicle whilst in the course of transporting members of the Club production of his certificate of membership of the Club and if any person fails to produce such certificate on demand the contractor or driver shall request him to leave the motor vehicle and if he refuses to do so shall take his name and address and report the matter to the committee of the Club."

In the rules of the Club it was stated to be an "unincorporated members club," that it was formed "to enable its members to provide transport for themselves between Reservoir and Melbourne";

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H. C. OF A. that the "members" should be "such persons as shall agree to  
1929. become members thereof upon its inception . . . and such  
~ other persons as shall be appointed members thereof by the  
DICKENS committee"; that "members of the Club shall be entitled to all  
v. the rights and privileges of membership including the right to  
MULHOL- transport by any vehicles engaged by the Club upon payment to  
LAND. the Club of such transport fees as may from time to time be fixed  
by the committee." The only payment to be made by a member  
to the funds of the Club under the rules were the "transport fees"  
fixed by the committee, that is to say, the fares payable under a  
by-law when using the motor omnibus in respect of the particular  
trip for which he was carried, and under another by-law, which  
provided that a subscription of 1s. a quarter should be paid by each  
member.

The Court of Petty Sessions, on 15th August 1928, convicted the defendant of "plying for hire" under the information above referred to and fined him £20 with £10 10s. costs; and the defendant obtained an order nisi to review the conviction and order. The order nisi came on for hearing before *Macfarlan J.*, who referred it to the Full Court of the Supreme Court of Victoria. The Full Court (*Irvine C.J.*, *Mann* and *Macfarlan JJ.*), by a majority (*Irvine C.J.* dissenting), made the order absolute and set aside the conviction. The majority of the Court held that the acts of the defendant did not amount to a "plying for hire" within the meaning of sec. 13 (1) of the *Motor Omnibus Act* 1924; *Irvine C.J.* being of opinion that the defendant's acts did amount to a "plying for hire" within that provision:—*Dickens v. Mulholland* (1).

From the decision of the Full Court the informant now, by special leave, appealed to the High Court.

*Ham K.C.* (with him *Campbell*), for the appellant. The acts of the defendant amounted to a "plying for hire" within the meaning of sec. 13 (1) of the *Motor Omnibus Act* 1924. There is no dispute that this vehicle was a motor omnibus as defined in sec. 2 of the *Motor Omnibus Act* 1925 (Vict.), and the only question for



determination is, was the defendant "plying for hire" within the meaning of sec. 13 (1) of the Act of 1924? [Counsel was stopped.]

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*D. Claude Robertson*, for the respondent. This case raises the question whether the principle in *Graff v. Evans* (1) relating to a sale of liquor to club members is applicable to the facts of this case. The defendant was carrying only members of the transport club, and this could not be construed as "plying for hire." Unless there is a general solicitation of the public the hiring does not come within the purview of the Act. There must be something in the nature of a holding out to members of the public that they may be carried if they wish. [Counsel referred to *Sales v. Lake* (2); *Montgomery v. Park* (3); *Armstrong v. Ogle* (4); *Leonard v. Western Services Ltd.* (5); *Greyhound Motors Ltd. v. Lambert* (6); *Halsbury's Laws of England*, vol. IV., p. 407.]

KNOX C.J. I agree with the learned Chief Justice of the Supreme Court in upholding the decision of the Police Magistrate that on the facts of this case the proper conclusion was that the defendant was "plying for hire." The appeal will be allowed.

ISAACS, RICH AND STARKE JJ. agreed.

*Appeal allowed. Order nisi discharged with costs. Order of Supreme Court set aside with costs. The appellant to pay the costs of this appeal pursuant to the order giving leave to appeal.*

Solicitors for the appellant, *H. E. Elliott & Co.*

Solicitor for the respondent, *William J. Fullerton.*

H. D. W.

(1) (1882) 8 Q.B.D. 373.

(2) (1922) 1 K.B. 553, at pp. 557, 558.

(3) (1926) V.L.R. 534; 48 A.L.T. 96.

(4) (1926) 2 K.B. 438, at pp. 447, 448.

(5) (1927) 1 K.B. 702, at p. 708.

(6) (1928) 1 K.B. 322, at p. 326.