[HIGH COURT OF AUSTRALIA.]

GENDERS . . . . . APPELLANT,
PLAINTIFF,

AND

AJAX INSURANCE COMPANY LIMITED . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1950.

SYDNEY, *Nov.* 10, 13, 20.

Dixon, McTiernan, Williams, Webb and Kitto JJ.

Insurance—Accident—Third party—Motor vehicles—Trader's plate—Judgment against insured by third party—Proceedings conducted by insurer—Action by insured on policy—Vehicle owned by Commonwealth—Liability to third party risks—Defence—"Owner"—"Owned"—Demurrer—Motor Vehicles (Third Party Insurance) Act 1942 (*N.S.W.*) (*No.* 15 *of* 1942), *s.* 5.

In an action brought by an insured against an insurer to recover the amount of an indemnity for the risk insured against the policy declared upon was one issued for the purposes of the *Motor Vehicles (Third Party Insurance) Act* 1942 (N.S.W.) in relation to any motor vehicle to which a specified trader's plate was affixed. It was alleged that the defendant had failed to pay an amount due under the policy in respect of damage suffered by the plaintiff as the result of a judgment recovered against him by a third party who had been injured by the vehicle in question to which the specified trader's plate had been affixed. The defendant's third plea, after setting out the policy in full, alleged that the vehicle was owned by the Commonwealth of Australia. The plaintiff demurred to this plea.

Held, that the compulsory insurance provisions of the *Motor Vehicles (Third Party Insurance) Act* 1942, governed the plaintiff in relation to the motor vehicle which, although the property of the Commonwealth, bore the specified trader's plate, and called upon him to insure. The policy, therefore, included the risk and he was entitled to recover upon it.

Helme v. *Fox* (1948) 49 S.R. (N.S.W.) 60; 65 W.N. 250, disapproved.

The meaning of the words "owner" and "owned" as used in the *Motor Vehicles (Third Party Insurance) Act* 1942 (N.S.W.), discussed.

The High Court will not allow to be advanced a contention which depends only on a verbal point of pleading which has been raised for the first time on the hearing of an appeal in that Court and which would have been removed by amendment if the contention had been made in due time.

Decision of the Supreme Court of New South Wales (Full Court): *Genders* v. *Ajax Insurance Co. Ltd.* (1950) 50 S.R. (N.S.W.) 280; 67 W.N. 187, reversed.

APPEAL from the Supreme Court of New South Wales.

Basil William Genders, who carried on business as a garage proprietor at Lithgow, New South Wales, brought an action in the Supreme Court of New South Wales against Ajax Insurance Co. Ltd. to recover the sum of £2,000.

It was alleged in the declaration that by a policy of insurance bearing date 31st December 1947, made by the defendant company, after reciting that Genders had made application and paid a premium for the issue by the company of a third party policy for the purposes of the *Motor Vehicles* (*Third Party Insurance*) *Act* 1942 (N.S.W.) in relation to any motor vehicle to which trader's plate AO29 was affixed with or without the authority of Genders, the company thereby agreed that during the period therein mentioned the company would insure Genders and any other person who drove that motor vehicle against all liability incurred by Genders in respect of the death or bodily injury to any person caused by or arising out of the use of that motor vehicle and after the making of the policy and while it was in force liability was incurred by Genders in respect of the death of one James Martin Dowd caused by or arising out of the use of a motor vehicle to which was affixed trader's plate AO29 and judgments were recovered against Genders in actions brought by one Thelma Muriel Dowd in respect of the death of James Martin Dowd and the company had not paid Genders the amount of those judgments nor the costs and expenses reasonably incurred by him in defending those actions.

For a third plea the defendant company set forth at length the policy referred to in the declaration. It was stated in the policy that premium had been paid only for the use of motor trade vehicles, being (a) motor vehicles, other than motor cycles, to which a trader's plate is affixed; (b) motor cycles to which a trader's plate is affixed; and (c) motor breakdown ambulance. The company further said that at the time Genders incurred the liability mentioned in the declaration, and at all material times, the motor vehicle mentioned in the declaration was owned by the Commonwealth of Australia within the meaning of the *Motor Vehicles* (*Third Party Insurance*) *Act* 1942.

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For a second replication, Genders, as to the third plea, said that the company ought not to be admitted to say that at the time of the incurring by him of the liability and at all material times the motor vehicle mentioned in the declaration was owned by the Commonwealth of Australia within the meaning of the Act, because after the use of the motor vehicle to which was attached the trader's plate whereby liability was incurred by Genders as mentioned in the declaration Genders made a claim wherein the company was notified of all the material facts and particularly that the death of Dowd had been caused by or arose out of the use of that motor vehicle, and thereupon after a demand had been made against Genders by Thelma Muriel Dowd the company pursuant to s. 18 of the Act took over the conduct of the proceedings which were thereupon taken and represented to Genders that he was entitled to be indemnified by the company in respect of that liability pursuant to the policy. Thereupon the company instructed its solicitor who briefed counsel to appear for Genders' driver at a coronial inquiry held in respect of the death of Dowd, and, thereafter instructed its solicitor to defend the said actions brought by Mrs. Dowd. The company's solicitor accordingly entered appearances on behalf of Genders, filed pleas and was duly served with notices of trial of those actions. The company well knew that Dowd met his death whilst riding as a pillion passenger on a motor cycle being driven by one Ernest Anthony Baxter when the motor cycle came into collision with the said motor vehicle in circumstances which indicated that Baxter was a tortfeasor liable in respect of any damages which Mrs. Dowd either jointly with Genders or otherwise and was a person from whom contribution might have been recovered. The company also well knew that the Government Insurance Office of New South Wales was the authorized insurer, within the meaning of the Act, of Baxter and following the death of Baxter in the accident was the proper person to be sued for contribution in respect of the liability, yet the company did not seek to join the Government Insurance Office as a third party to those actions, nor did it within three months after the accident give notice of intention to make a claim against the Government Insurance Office. After a period of three months had expired from the date of the accident the company, shortly before the date of the hearing of the actions, informed Genders that he was not covered by the policy of insurance and that it would no longer continue the defence of those actions. Thereupon Genders instructed his solicitors to defend the actions. An application was made to the Supreme Court by Genders to

preserve his rights of contribution against the Government Insurance Office for leave to give notice of intention to make a claim against the Government Insurance Office for contribution pursuant to s. 15 (2) (b) (ii) of the Act, and in the same application sought leave to join the Government Insurance Office as a third party to the actions for the purpose of recovering contribution or complete indemnity from the Government Insurance Office. The application was heard before *Maxwell* J., who in his judgment gave leave to Genders to serve the notice upon the Government Insurance Office but refused to permit it to be made a third party in the actions because of the imminence of the hearing thereof. His Honour said that such leave would have been given had an application been made at an earlier time, as it was a proper case to join a third party. Genders was ordered to pay the costs of the application and he incurred costs and expenses on his own part. He was hindered in his defence of the actions and lost the benefit of having the Government Insurance Office joined as a third party and by reason of the conduct and said representations of the company he suffered the damages referred to. Genders said he was ready to verify the facts stated above and prayed judgment if the company ought to be admitted against its own conduct and representations to allege that at the time of the incurring by Genders of the said liability and at all material times the motor vehicle mentioned in the declaration was owned by the Commonwealth of Australia within the meaning of the Act.

Genders also demurred to the company's third plea on the grounds, *inter alia*, (i) that it confessed but did not avoid the declaration to which it was pleaded; (ii) that the Commonwealth of Australia was not the owner of the said motor vehicle within the meaning of the Act; and (iii) that he was the owner of that motor vehicle within the meaning of the Act.

The company (*a*) denied each and every one of the allegations made by Genders in his replication and prayed judgment that it might be permitted to say that at the times mentioned the motor vehicle was owned by the Commonwealth of Australia within the meaning of the Act; (*b*) said that its third plea was good in substance; and (*c*) demurred to Genders' second replication to the company's third plea on the grounds, *inter alia*, (i) that it confessed but did not avoid the plea to which it was pleaded; and (ii) that it did not set up any representation as to the facts alleged in the plea to which it was pleaded.

The Supreme Court ordered that judgment be entered for the company on the demurrer to its third plea, and for the company

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on the cross-demurrer to Genders' second replication (*Genders* v. *Ajax Insurance Co. Ltd.* (1)).

From that decision Genders appealed, by leave, to the High Court.

The relevant statutory provisions are sufficiently set forth in the judgment hereunder.

N. A. Jenkyn K.C. (with him *C. Begg*), for the appellant. The respondent exercised the right to conduct and control, *qua* the then defendant, the present appellant, the litigation brought under the *Compensation to Relatives Act* 1897-1946 (N.S.W.) by the widow of the deceased Dowd. That right was enforceable by the respondent only if it recognized (a) that the policy was a validly subsisting policy; (b) that the death of the deceased was caused by or arose out of the use of the particular motor vehicle and was covered by the policy; and (c) that the respondent accepted its liability to indemnify the appellant, the then defendant, pursuant to the policy. Having so exercised that right the respondent's purported disclaimer of responsibility was too late. The respondent was estopped from raising any fact by way of disclaimer of liability, including the allegation that the motor vehicle was owned by the Commonwealth—that is to say, on the assumption that such a fact would ordinarily debar the plaintiff from recovering—(*Hansen* v. *Marco Engineering (Aust.) Pty. Ltd.* (2); *Grundt* v. *Great Boulder Pty. Gold Mines Ltd.* (3); *Franklin* v. *Manufacturers Mutual Insurance Ltd.* (4); *Discount & Finance Ltd.* v. *Gehrig's N.S.W. Wines Ltd.* (5); *Yorkshire Insurance Co.* v. *Craine* (6); *Canada and Dominion Sugar Co. Ltd.* v. *Canadian National (West Indies) Steamships Ltd.* (7); *Simon* v. *Anglo-American Telegraph Co.* (8); *Williston* on *Contracts*, revised edition, vol. v., p. 206; Lord *Wright's Legal Essays and Addresses*, pp. 214, 426) The appellant suffered detriment by having the conduct of the litigation taken out of his hands and also by the failure of the respondent to take certain necessary steps in that litigation occasioning loss to the appellant. The *Motor Vehicles (Third Party Insurance) Act* 1942, has for its object the ensuring that any person who receives bodily injury or the dependants of any person who is killed arising out of the use of a motor vehicle in New South Wales shall receive the fruits of any verdict obtained

(1) (1950) 50 S.R. (N.S.W.) 280; 67 W.N. 187.
(2) (1948) V.L.R. 198.
(3) (1937) 59 C.L.R. 641, at p. 674.
(4) (1935) 36 S.R. (N.S.W.) 76, at p. 82; 53 W.N. 17.
(5) (1940) 40 S.R. (N.S.W.) 598, at p. 602; 57 W.N. 226.
(6) (1922) A.C. 541.
(7) (1947) A.C. 46, at p. 54.
(8) (1879) 5 Q.B.D. 188, at p. 202.

in respect of the negligent driving of such vehicle. The legislature seeks to enforce compulsory insurance not by directly requiring all motor vehicles to be insured but by making it an offence for any person to drive a motor vehicle in respect of which a third-party policy does not exist. Liabilities are imposed by the Act on the " owner and/or driver ". The word " owner " is expressly defined. The Act is concerned not with " owners " as such, that is to say, people in whom the property in the motor vehicle is vested, but with those ordinarily controlling the motor vehicle upon public highways, e.g., (i) a motor trader operating under a trader's plate, (ii) the registered owner, or (iii) if unregistered, the person entitled to the immediate possession of the vehicle. Throughout the Act the words " owner " and " owned " are used with a corresponding meaning. The words " owned by the Commonwealth " in the Act should be construed as meaning " of which the Commonwealth is the owner as defined by this Act ". To construe those words as meaning the property of the Commonwealth would lead to absurd results. As in *Helme* v. *Fox* (1), a private person could drive a motor vehicle in connection with his own business and escape the obligation of insuring the motor vehicle merely because the property in that vehicle belonged to the Commonwealth, or a motor vehicle the property of the Commonwealth which came into the possession of a motor trader, or garage or service station proprietor, e.g., for repairs or otherwise, would not be covered by a trader's plate policy although the motor vehicle was being driven in the course of the trader's business. As the only motor vehicles exempted by the Act are motor vehicles owned by, or on behalf of, the Commonwealth, it follows that motor vehicles which are being used by the Commonwealth in connection with Commonwealth affairs but which are not owned by the Commonwealth, fall within the provisions of the Act. If they were not insured as required by the Act then the Commonwealth could not be sued by the injured party. He would be required to sue the nominal defendant under the Act. The above interpretation of the words " owned by the Commonwealth " is supported by reference to the general purpose and intention of the Act and also by s. 33 and s. 45 (2) (a) (i). The Act is not concerned with the question: Who is the legal owner of the motor vehicle? Right through the Act the word " owner " and the word " owned " are used as synonymous terms and there is not any reason for construing " owned by the Commonwealth " in any different way. To do so would result in the purpose of the Act being thwarted rather than assisted.

(1) (1948) 49 S.R. (N.S.W.) 60; 65 W.N. 250.

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J. W. Smyth, for the respondent. If the plain ordinary meaning of the word " owned " be given to that word as used in the definition of the expression " motor vehicle " in s. 5 of the *Motor Vehicles (Third Party Insurance) Act* 1942, then the appellant's argument that " owned " means " of which the Commonwealth of Australia is the owner within the meaning of the Act ", or " of which the Commonwealth of Australia is entitled to the immediate possession ", would fail. The definition of " motor vehicle " in s. 5 is exclusive; it does not in terms include motor vehicles owned by the Commonwealth. The legislature limited the meaning of the word " owner " so as to give it an exclusive meaning but did not so limit the word " owned ". The context or subject matter to which the defined word must yield is the context or subject matter of the operative or enacting parts of the Act. A definition clause itself has not any context or subject matter. It is not permissible to treat one part of a definition clause as in itself changing the plain words of another part of the same clause. There is not in the Act, or the regulations thereunder, any context or subject matter which requires any departure from, or alteration in, the defined meaning of the expression " motor vehicle ". The Act does not show any intention on the part of the legislature that provision should be made in respect of every case of death or injury except in the case of a stolen Commonwealth car. The Act itself works through the motor vehicle and the owner only comes in incidentally and merely as the object of the insurance. At the threshold it excludes Commonwealth owned motor vehicles, whatever that may mean. It is nothing to the point to say that there are other cases which would not be covered—that is a matter for the legislature. " The " motor vehicle must mean the same as " a " motor vehicle. If " motor vehicle " means a " motor vehicle " within the first part of the definition of that expression, then an absurdity would arise in definition (b) (ii) of the definition of the word " owner "—there must be read in " other than a motor vehicle to which the Commonwealth is entitled to immediate possession ". Reading back into the earlier part of the definition of the word " owner " excludes in a case of trader's plate a motor vehicle to which the Commonwealth is entitled to immediate possession. It does not mean " possession in fact ". There is not any allegation in the declaration that the appellant was entitled to immediate possession. On the contrary the demurrer admits the allegation in the plea that the motor vehicle was owned by the Commonwealth within the meaning of the Act. The appeal should be dismissed whatever the word " owned " may mean. A policy of insurance must,

pursuant to s. 10 (1) (c), be in the prescribed form. It cannot contain any term, condition or warranty not contained in the prescribed form. To comply with s. 10 (1) (b) (i) it must insure the "owner" which cannot include the Commonwealth. Therefore, to insure the Commonwealth would not be a "third party policy" under the Act, as the policy would not comply with the requirements of the Act: see s. 5—definition of "third party policy". The words in the regulations and schedules have the same meaning as the same words in the Act. The expression "motor vehicles" in the form has no context or subject matter to require it to be construed otherwise than in accordance with the definition. Therefore the policy issued in respect of a trader's plate excludes Commonwealth owned motor vehicles. In s. 8 (1) (b) reference is made to "insurance of the motor vehicle".

Cur. adv. vult.

Nov. 20.

THE COURT delivered the following written judgment:—

This is an appeal from a decision of the Supreme Court of New South Wales given upon two demurrers. The first is a demurrer to the third plea to the declaration and the second demurrer is to a replication to the third plea. The action is brought by an insured against an insurer to recover the amount of an indemnity for the risk insured against. The policy declared upon is one issued for the purposes of the *Motor Vehicles (Third Party Insurance) Act* 1942 in relation to any motor vehicle to which a specified trader's plate is affixed, whether with or without the authority of the owner. The declaration alleges in effect that the plaintiff incurred a liability in respect of the death of a third party caused by or arising out of the use of a certain motor vehicle to which was affixed the trader's plate specified in the policy and that judgments were recovered against the plaintiff in actions brought in respect of the death of such third party. By the plea demurred to the defendant set out the policy of insurance declared upon and then averred that at all material times the certain motor vehicle in the declaration mentioned was owned by the Commonwealth of Australia within the meaning of the *Motor Vehicles (Third Party Insurance) Act* 1942. The substantial purpose of this plea and of the demurrer to it appears to have been to raise the question whether the fact that the motor vehicle was owned by the Commonwealth of Australia took the case outside the third party risks against which the policy of insurance insured the plaintiff. That is the question which the Supreme Court decided, and the decision,

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following *Helme* v. *Fox* (1), was that because the general property in the motor vehicle was alleged to be in the Commonwealth of Australia the case fell outside the *Motor Vehicles* (*Third Party Insurance*) *Act* 1942 and the policy effected in pursuance of its provisions.

The policy of insurance set out in the plea is in the form provided by the *Motor Vehicles* (*Third Party Insurance*) *Regulations* 1943, Schedule "B." That schedule provides that where the policy applies to motor vehicles to which a trader's plate is affixed there should be inserted the words "Any motor vehicle to which trader's plate No..... is affixed whether with or without the authority of the owner". The policy set out in the plea complies with this direction, gives the plaintiff's trade description as the name and address of the owner and proceeds to insure the owner and any other person who drives the motor vehicle, whether with or without the authority of the owner, against all liability incurred by the owner and/or the driver in respect of the death of or bodily injury to any person caused by or arising out of the use of the motor vehicle. It is unnecessary to state the exceptions or the qualifications. On the face of the policy it is expressed sufficiently widely to cover the liability incurred by the plaintiff in connection with the motor vehicle to which his trader's plate is affixed whether the motor vehicle is or is not owned by the Commonwealth and whether the case otherwise does or does not fall within the compulsory insurance provisions of the *Motor Vehicles* (*Third Party Insurance*) *Act* 1942. But as it is in the form prescribed by the regulations it has been assumed that it must bear the same meaning as the scheduled form. Clause 22 of the regulations provides that the schedules thereto shall form part of the regulations, and clause 3 (1) that, unless the contrary intention appears, the words used in the regulations shall have the same meanings as those assigned to them in the Act. Accordingly, the defendant contends that where in the policy the words "motor vehicle" are used they must bear the meaning given to that expression in the *Motor Vehicles* (*Third Party Insurance*) *Act* 1942. Section 5 contains the definition of the words "motor vehicle". The definition begins by stating that the expression means in effect a category of mechanically propelled vehicles. The second paragraph of the definition provides that the expression "motor vehicle" does not include any motor vehicle which is owned by the Commonwealth of Australia or by any person or body of persons representing the Commonwealth of Australia. In *Helme* v. *Fox* (1) the Supreme Court of New

(1) (1948) 49 S.R. (N.S.W.) 60; 65 W.N. 250.

South Wales decided that in this paragraph the word " owned " referred to the general property in the vehicle. Accordingly, wherever the expression " motor vehicle " occurred in the Act, assuming the definition clause to apply, the provisions of the Act have no application to a motor vehicle the general property in which resided in the Commonwealth. In that case such a vehicle had been hired by the Commonwealth to one Ferris, who thus became entitled to its immediate possession. The vehicle was not insured. Ferris became liable to the plaintiff for bodily injury, and the plaintiff applied under s. 30 for an extension of time to enable him to give notice with a view to asserting liability against the nominal defendant appointed under s. 29 of the Act. As the Commonwealth was entitled to the property in the motor vehicle, it was held not to be a motor vehicle within the definition and therefore to fall outside the provisions.

The present case is not exactly the same, but depends upon like considerations. Here the liability has been incurred by a garage proprietor to whom a trader's plate has been issued. He has incurred the liability presumably because a car belonging to the Commonwealth has been driven by his servant or, at all events, by some person for whom he is responsible, either at common law or by the statute, and at the time it had affixed to it his trader's plate.

The substantial question for our decision is whether this view of the exclusion of vehicles owned by the Commonwealth from the definition of " motor vehicle " is correct. Essentially the question depends upon the meaning in that part of the definition of the word " owned ". There is no definition in the Act of the word " owned ", but there is a definition of the word " owner ". It is framed so as to make alternative categories of persons liable. The definition of " owner " provides that when used with reference to a motor vehicle that word shall mean—" (a) in a case where a trader's plate is affixed to the motor vehicle—the trader to whom such trader's plate is in issue ". The second paragraph, (b), relates to any other case. That is to say, it applies only when it is not a case where a trader's plate is affixed to the motor vehicle. Paragraph (b) provides that in any other case the expression means—" (i) where the motor vehicle is registered—the person in whose name the motor vehicle is registered except where such person has sold or ceased to have possession of the motor vehicle within the meaning of section twenty-one of this Act; (ii) where the motor vehicle is unregistered, or where the motor vehicle is registered but the person in whose name the motor vehicle is registered

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has sold or ceased to have possession of the motor vehicle within the meaning of section twenty-one of this Act—any person who solely or jointly or in common with any other person is entitled to the immediate possession of the motor vehicle ". If the meaning of the word " owned " in the paragraph excluding motor vehicles owned by the Commonwealth is controlled by this definition of the word " owner ", the exclusion would depend, not on the Commonwealth having the general property in the motor vehicle, but on the fact that the person who, for the given case, fills the definition of " owner " is or is not the Commonwealth. As this is a case where a trader's plate is affixed to the motor vehicle, the person who fills the position of " owner " is the trader to whom such trader's plate is in issue, who is the plaintiff. The Commonwealth would therefore not fill the description of owner and the motor vehicle *pro hac vice* would not fall within the exclusion.

A trader's plate is issued in pursuance of clause 34 of the *Motor Traffic Regulations*. By s. 6 (1) (c) (v) of the *Motor Traffic Act* 1909, as amended, any person who, unless exempted by the regulations, drives or causes or permits to be driven upon any public street a motor vehicle which is not registered is guilty of an offence against that Act. Regulation 34 (b) provides that persons are exempted from s. 6 (1) (c) (v) of the Act in respect of any motor vehicle to which is affixed a trader's plate issued and used as prescribed. Regulation 35 provides for the issue of a trader's plate to a manufacturer, repairer of or dealer in motor vehicles, and reg. 37 states the conditions that must be observed in its use.

The policy of the *Motor Vehicles (Third Party Insurance) Act* 1942 is to protect those who suffer bodily injury or the relatives of those who suffer death caused by or arising out of the use of motor vehicles. The claims of such persons were exposed to the danger that the person liable might not be insured against third party risks and to the risk, in a case in which he was insured, of the insurance moneys not being applied to discharge the liability. There was also the difficulty that sometimes arose of the claimant being unable to identify the car causing the injury or death. The Act was designed to protect those suffering injury or the relatives of persons killed from the defeat of their claims through these causes. The Act requires that motor vehicles shall be insured so that an indemnity exists against any liability incurred by the owner or driver in respect of the death of or bodily injury to any person caused by or arising out of the use of the motor vehicle. It establishes a presumption that the person who, at the time of the occurrence giving rise to the proceedings, was the driver of the

motor car was the agent of the owner acting within the scope of his authority (s. 16). It sets up a nominal defendant who may be sued by the person injured or by the relatives of the person killed where the motor vehicle is uninsured or where the identity of the motor vehicle cannot be established. The Act does not directly impose upon the " owner " of a motor vehicle, whether in a defined sense or in any general sense, an obligation to effect the insurance. What it does is by s. 7 to provide that any person who uses or causes or permits or suffers any other person to use an uninsured motor vehicle upon a public street shall be guilty of an offence, and by s. 8 to provide that registration or renewal of registration of a motor vehicle is not to be granted unless a certificate is produced showing that a third party risk policy exists and that a trader's plate is not to be issued unless there is lodged a certificate that such a policy exists in relation to any motor vehicle to which such trader's plate is affixed. By s. 10, however, the nature of the policy of insurance is stated. Where the policy is issued in relation to a particular motor vehicle the policy must insure the owner of the vehicle mentioned in the policy and any other person who at any time drives the motor vehicle against all liability incurred by the owner or that person in respect of the death of or bodily injury to any person caused by or arising out of the use of the motor vehicle. Where the policy is issued in relation to motor vehicles to which a trader's plate is affixed it must insure the trader and any other person who at any time drives a motor vehicle to which the trader's plate is affixed, whether with or without authority, against all liability incurred by that trader and that person in respect of the death of or bodily injury to any person caused by or arising out of the use of the motor vehicle.

Putting aside the case of motor vehicles owned by the Commonwealth, it will be seen that the plan of the Act is to take the person who is or ought to be liable to the third party and provide for the insurance of that liability or, failing its insurance, for the creation of a substitutional liability in the nominal defendant.

Upon the facts of *Helme* v. *Fox* (1), and upon the facts of the present case, there is no reason in point of policy why the liability undoubtedly incurred in the one case by Ferris and in the other case by the present plaintiff to a third party should not be within the principle or policy of compulsory insurance. The relationship of the Commonwealth to the motor vehicle was, so to speak, accidental to that liability. It involved the Commonwealth in no liability and the Commonwealth's general ownership

(1) (1948) 49 S.R. (N.S.W.) 60; 65 W.N. 250.

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of the vehicle implied no constitutional or other protection to Ferris or to the present plaintiff from the liability at common law or otherwise incurred to the third party.

Section 3 of the *Motor Vehicles (Third Party Insurance) Act* 1942 provides that the Act shall be read and construed subject to the Commonwealth Constitution and so as not to exceed the legislative power of the State and proceeds to lay down a rule of interpretation of a not unfamiliar kind for the constitutional safety of the Act. It is not difficult to see that the object, not only of this provision, but of the exclusion of motor vehicles owned by the Commonwealth from the definition of " motor vehicle ", is based upon a desire to abstain from attempting to impose any obligation under State law upon the Commonwealth. It is evident, moreover, that the Commonwealth could be relied upon to discharge any liability incurred by it in connection with the use of a motor vehicle and therefore that it stood altogether outside one of the chief reasons for enacting the compulsory insurance provisions of the *Motor Vehicles (Third Party Insurance) Act* 1942. The general intention to be seen in the Act is to give to the Commonwealth of Australia a protection from its provisions because the Commonwealth ought not to be included within them. But that would mean that wherever otherwise the Commonwealth in its character as owner would be subjected to the operation of the Act, its character of owner should remove the motor vehicle from the provisions of the Act. If the definition of the word " owner " may properly be used to control the word " owned " in the paragraph of the definition of " motor vehicle " which excludes vehicles owned by the Commonwealth, then the Act works harmoniously. Where the Commonwealth satisfies the description of owner as defined, then in that character it is excluded from the provisions which would otherwise operate. Wherever any other person or body satisfies the description, then that person or body remains liable under the Act, notwithstanding that in some other sense the Commonwealth is the owner. The definition of " owner " is so constructed that it is not possible for some individual to fulfil the description of owner as defined and at the same time for the Commonwealth of Australia to fulfil that description.

In the present case, for instance, the plaintiff is the trader to whom the trader's plate is issued. That very fact excludes the operation of so much of the definition of " owner " as is contained in par. (b) within which possibly the Commonwealth might otherwise fall. It excludes the possibility because the paragraph operates only " in any other case ". On the contrary construction, however,

to that which has been adopted, the mere fact that the general property of a vehicle is vested in the Commonwealth excludes the motor vehicle from the Act altogether so that no-one, whether he be trader or hirer or other person using the motor vehicle, can fall within the provisions of the said Act. So far as the rationale of the provisions goes, everything points to the word " owned " being used in the sense of " owner " as defined.

There are, however, formal difficulties in so construing the Act. In the first place, it is not the word " owned " but " owner " that is defined. In the next place, the words " motor vehicle " occur in the definition of the word " owner " and it is said that by the very definition of the words " motor vehicle " the vehicles owned by the Commonwealth are antecedently excluded.

As to the first point, it is to be noticed that in s. 11 of the Act the words " owner " and " owned " are used without discrimination. In sub-s. (1) of s. 11 the expression " motor vehicle owned by any State, including the State of New South Wales ", is used. In sub-s. (2) the expression is " Where the owner of a motor vehicle is a person or body of persons representing the State ". It is apparent that the difference is accidental and the words are intended to be co-extensive in their application. To refuse to allow the word " owned " to be controlled by the definition of " owner " where other considerations point so strongly to a correspondence of meaning would be pedantic. There is a great deal more to be said for the second point. But in the end it depends upon the view that before the definition of the word " owner " is construed and applied the definition of the words " motor vehicle " must be taken as already established; that is to say, the reference to a motor vehicle in relation to which the word " owner " is defined must be taken to be a motor vehicle which by force of the precedent definition does not include one owned by the Commonwealth. Consideration of the definition clause shows that the draftsman intended the two definitions to be read together. He perhaps overlooked the fact that in the definition of the words " motor vehicle " he used the word " owned " and in the definition of the word " owner " he used the words " motor vehicle ". But it is proper to read the two definitions in combination and to construe them together. If that is done there is no reason why he should not be understood, where he uses the words " owned by the Commonwealth " in the definition of " motor vehicle " to be referring to that kind of ownership which he is proceeding to define. Quite consistently with this view, where he uses the words " motor vehicle " in the definition of the word " owner " he may be understood as meaning all the

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categories of mechanically propelled vehicles which he has enumerated. If the definitions are construed in this way the consequence will be avoided of leaving uncovered by insurance the liability to third parties of persons in the situation of the plaintiff, namely those using a Commonwealth car with a trader's plate affixed, and of persons in the position of Ferris, namely those who have hired for a period a car from the Commonwealth, and of other persons, who, though not connected with the Commonwealth, cause bodily injury or death while using a Commonwealth car. The consideration does no violence to any canon of interpretation and it appears to give effect to the true meaning and to the policy of the Act as ascertained from a study of both definitions together with the body of the Act. It is said that the difficulty arises from the fact that Commonwealth cars are not registered under the *Motor Traffic Act* 1909. We were not referred to any express regulation which excepted them from the operation of s. 6 of the *Motor Traffic Act*. It was stated at the bar that they were not registered as a result of an arrangement based upon either comity or constitutional considerations. In *Helme* v. *Fox* (1) it appears that the motor vehicle was not insured and no doubt, apart from the plaintiff's insurance, the motor vehicle in the present case was not insured. It was for that reason that the plaintiff in *Helme* v. *Fox* (1) resorted to s. 30 of the Act. The plaintiff in the present case, however, is seeking to enforce an insurance expressed widely enough to cover his liability. Moreover, sub-s. (2) of s. 5 provides that in the application of any provisions of the Act to and in respect of motor vehicles to which a trader's plate is affixed, the reference in such expression to the owner shall be construed as a reference to " trader ", and a reference in the third party policy in relation to that motor vehicle shall be construed as a reference to the third-party policy in relation to motor vehicles to which the trader's plate is affixed.

For the foregoing reasons the conclusion appears proper that in relation to the motor vehicle bearing the plaintiff's trader's plate the compulsory insurance provisions of the *Motor Vehicles (Third Party Insurance) Act* governed the plaintiff and called upon him to insure. The policy, therefore, included the risk and the plaintiff is entitled to recover upon it, subject to any other defences which may exist. The consequence of this view is that the decisions of the Full Court in *Helme* v. *Fox* (1) and in the present case are wrong.

(1) (1948) 49 S.R. (N.S.W.) 60; 65 W.N. 250.

A point of pleading, however, was taken before this Court. The point was to the effect that in the plea demurred to the averment was that the motor cycle was owned by the Commonwealth of Australia within the meaning of the *Motor Vehicles (Third Party Insurance) Act* 1942. It was argued that whatever meaning be assigned to the word " owned " in that Act, the averment amounted to an allegation that the facts satisfied that meaning. Our conclusion is that the plaintiff satisfied the expression " owner " under par. (a) of the definition and accordingly the Commonwealth did not satisfy that definition, and the fact that it was entitled to the general property in the car is irrelevant. In the Supreme Court the whole case was treated, and no doubt rightly so, on the footing that the defendant was relying on the Commonwealth being entitled to the general property in the car, notwithstanding that the plaintiff was a bailee. If the defendant's averment is treated with great strictness, once the interpretation we have adopted is placed upon the word " owned ", it follows that the defendant is alleging that a trader's plate issued to the Commonwealth was affixed to the motor vehicle, a position which was confessed to be absurd. The pleading is not in a satisfactory form, and if this point had been taken before the Full Court an amendment would have been made so that the demurrer could determine the substantial question in the case. It would not be proper for this Court at this stage to allow the defendant to advance a contention depending only on a verbal point which would have been removed if the contention had been made in due time.

The appeal should be allowed and judgment in demurrer should be entered for the plaintiff on the third plea. As the replication is to the third plea, it becomes unnecessary to deal with the demurrer to the replication.

Appeal allowed with costs. Order of Supreme Court discharged. In lieu thereof judgment for the plaintiff in demurrer upon the third plea with costs of both demurrers.

Solicitors for the appellant, *Hunt & Hunt.*
Solicitors for the respondent, *Bartier, Perry & Purcell.*

J. B.