[HIGH COURT OF AUSTRALIA.]

ANTILL RANGER & COMPANY PROPRIETARY LIMITED . . . . PLAINTIFF;

AND

COMMISSIONER FOR MOTOR TRANSPORT DEFENDANT.

DEACON . . . . . PLAINTIFF;

AND

GRIMSHAW . . . . . DEFENDANT.

EDMUND T. LENNON PROPRIETARY LIMITED . . . . . PLAINTIFF;

AND

THE STATE OF NEW SOUTH WALES AND OTHERS . . . . . DEFENDANTS.

Constitutional Law (Cth.)—Freedom of inter-State trade commerce and intercourse—State statute—Validity—Moneys collected in respect of operation of public motor vehicles in course of inter-State trade—Invalidity of statute authorizing collection—Payments made under protest—Claim to recover moneys so paid—Enactment by State of statute extinguishing causes of action and barring remedies—Validity—The Constitution (63 & 64 *Vict. c.* 12), *s.* 92—*State Transport (Co-ordination) Act* 1931-1952 (*No.* 32 *of* 1931—*No.* 24 *of* 1952) (*N.S.W.*), *ss.* 18 (4), (5), 37, 47—*State Transport Co-ordination (Barring of Claims and Remedies) Act* 1954 (*N.S.W.*), *ss.* 2, 3, 4—*Judiciary Act* 1903-1950 (*No.* 6 *of* 1903—*No.* 80 *of* 1950), *s.* 58.

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SYDNEY, *March* 24, 25, 28;

MELBOURNE, *June* 9.

Dixon C.J., McTiernan, Williams, Webb, Fullagar, Kitto and Taylor JJ.

Section 3 of the *State Transport Co-ordination (Barring of Claims and Remedies) Act* 1954, which purports to extinguish as against the State of New South Wales or its authorized officials every cause of action (a) for the recovery of any sum of money collected pursuant to s. 18 (4) or (5) or s. 37 of the *State*

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Transport (Co-ordination) Act 1931-1952 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 such Act or (b) for any act done in the execution of the *State Transport (Co-ordination) Act* in relation to the operation of any public motor vehicle in the course of inter-State trade, and s. 4 of such Act, which purports to bar any action suit claim or demand against such State or its authorized officials in respect of any of the matters referred to in s. 3 above-mentioned infringe s. 92 of the Constitution.

Per Fullagar J.: Section 4 of the *State Transport Co-ordination (Barring of Claims and Remedies) Act* 1954 is invalid in that it conflicts with a paramount law of the Commonwealth, namely s. 58 of the *Judiciary Act* 1903-1950, which provides that any person making a claim against a State, whether in contract or tort, in respect of a matter in which the High Court has or can have original jurisdiction conferred on it, may in respect of such claim bring a suit against the State in the Supreme Court of such State or in the High Court, if such Court has original jurisdiction in the matter.

Antill Ranger & Company Proprietary Limited v. *Commissioner for Motor Transport.*

ON REMOVAL under s. 40 of the *Judiciary Act* 1903-1950.

By writ of summons issued out of the Supreme Court of New South Wales on 23rd July 1954 and specially indorsed pursuant to the provisions of the *Common Law Procedure Act* 1899 (N.S.W.), s. 24, Antill Ranger & Co. Pty. Ltd. (hereinafter called the plaintiff) sued the Commissioner for Motor Transport (hereinafter called the defendant) to recover the sum of £39,955 16s. 5d. The special indorsement was in the following terms: "To money had and received by the defendant to the use of the plaintiff being sums paid under protest by the plaintiff to the defendant for charges demanded by the defendant in pursuance of the purported powers of the defendant under the *State Transport (Co-ordination) Act* 1931-1952". By its declaration filed on 13th December 1954 the plaintiff declared on the common *indebitatus* count for money had and received, and the defendant by his plea filed on 1st February 1955 replied that "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 ss. 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."

The plaintiff on the same date demurred to the plea and indicated that the matter of law intended to be argued was that the *State Transport Co-ordination (Barring of Claims and Remedies) Act* 1954 was invalid in that it infringed s. 92 of the Constitution of the Commonwealth and accordingly did not extinguish the plaintiff's cause of action. On the same date there was joinder in demurrer, and on 3rd February 1955 on the application of the Attorney-General of the State of New South Wales *Taylor* J. ordered pursuant to s. 40 of the *Judiciary Act* 1903-1950 that the demurrer in the action be removed into the High Court for argument before the Full Court.

Deacon v. *Grimshaw.*

SPECIAL CASE pursuant to O. 35, r. 1.

Lionel Frederick Deacon commenced an action in the High Court on 30th June 1952 against Henry Grimshaw arising out of the seizure by the defendant of the plaintiff's motor vehicle which was proceeding from Sydney in the State of New South Wales to Melbourne in the State of Victoria. The seizure complained of took place at Goulburn in the State of New South Wales. When the pleadings in the action were complete, the parties concurred in stating a special case pursuant to O. 35, r. 1. of the Rules of Court for the opinion of the Full Court. The special case was substantially as follows :—

1. The plaintiff was at all material times a resident of the State of Victoria. The defendant was at all material times a resident of the State of New South Wales.

2. On 12th June 1952 a Mark Diesel refrigerated pantechnicon a public motor vehicle as defined in the *State Transport (Co-ordination) Act* 1931-1951 (N.S.W.) and owned by the plaintiff was being operated in the carriage of margarine by a servant of the plaintiff on a journey from Sydney in the State of New South Wales to Melbourne in the State of Victoria.

3. At the time of the said operation the plaintiff held no licence or permit under the said Act entitling or purporting to entitle him to carry the goods in fact being carried on the said vehicle.

4. The defendant on the date in question was an officer of the Director of Transport and Highways of the State of New South Wales and at such time was an " authorized officer " within the meaning attributed thereto in s. 47 of the said Act.

5. On 12th June 1952 purporting to act in pursuance of s. 47 (2) of the said Act the defendant at Goulburn in the State of New South Wales seized and detained the said motor vehicle on the ground that

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no licence or permit for the carriage of the said margarine on the journey in question had been issued or granted.

6. On 20th June 1952 the plaintiff was permitted by or on behalf of the defendant to remove the said margarine from the said vehicle to another vehicle to enable it to be carried to Melbourne but the vehicle referred to in par. 2 hereof was still detained by the defendant.

7. On 30th June 1952 the writ herein was issued and the plaintiff obtained from *Fullagar* J. to serve the writ a notice of motion for an interlocutory injunction to restrain the defendant from detaining or holding in his possession the said motor vehicle until the hearing of the action or further order. The notice of motion was made returnable on 4th July 1952 at Melbourne.

8. On 2nd July 1952 the said motor vehicle was delivered to the plaintiff and the said notice of motion was by consent struck out.

9. On 2nd July 1952 on the information of Aubrey Frank Maxwell the plaintiff was charged on summons with an offence against the said Act namely that being the owner of the said vehicle it was operated without being licensed under the said Act.

10. On 27th August 1952 at the Court of Petty Sessions holden at Sydney the plaintiff was convicted of the said offence and fined £200 in default one year's imprisonment but on appeal to the High Court the appeal was upheld and such conviction and penalty were quashed on 2nd December 1954.

11. On 16th December 1954 Act No. 45 of 1954 of New South Wales being the *State Transport Co-ordination (Barring of Claims and Remedies) Act* 1954 came into force.

12. On 17th February 1955 the parties consented to the amendment of the defence delivered herein to enable the defendant to rely on the provisions of the last-mentioned Act.

13. [The pleadings were annexed. The amended defence which was here the relevant pleading provided by par. 11 :—" 11. In further answer to the whole statement of claim the defendant says : (a) that after the institution of this action the Parliament of the State of New South Wales passed into law an Act entitled the *State Transport Co-ordination (Barring of Claims and Remedies) Act* 1954 and (b) that the plaintiff's cause of action is an action for or in respect of an act, matter or thing done or purporting to have been done by him as an authorized officer acting or purporting to act in the execution of the *State Transport (Co-ordination) Act* 1931 as amended in relation to the operation of a public motor vehicle in the course of or for the purposes of inter-State trade, and by reason of the said matters the plaintiff's cause of action has been extinguished and the same cannot be continued."]

14. The question of law for the opinion of the Court is :—(i) Does par. 11 of the amended defence afford any defence to the plaintiff's claim herein ?

Edmund T. Lennon Proprietary Limited v. *State of New South Wales and others.*

In this case the plaintiff Edmund T. Lennon Pty. Ltd. sought certain declarations in relation to the *State Transport Co-ordination (Barring of Claims and Remedies) Act* 1954 against the defendants. The amended statement of claim and the declarations sought thereby were substantially as follows :—

4. The plaintiff carries and at all material times has 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.

5. The plaintiff was the owner at all material times of certain vehicles in respect of which it held licences under s. 12 of the *State Transport (Co-ordination) Act* 1931-1952 to operate the said motor vehicles as public motor vehicles within the meaning of the said Act.

6. The defendants the Minister and the Commissioner for Motor Transport have from time to time imposed upon and demanded of the plaintiff certain charges pursuant to the provisions of the said *State Transport (Co-ordination) Act* and regulations made thereunder in respect of the operation of the said motor vehicles when carrying goods from the State of New South Wales into the State of South Australia and from the State of South Australia into the State of New South Wales, the amount of such charge being calculated in respect of the distance travelled on public roads in New South Wales in the course of such operation, and the plaintiff paid such moneys involuntarily.

7. The plaintiff has been required at all material times by the defendants the Minister and the Superintendent of Transport in respect of the operation of its said motor vehicles when carrying goods on public roads in the State of New South Wales to pay the charges mentioned in par. 6 hereof.

8. The said *State Transport (Co-ordination) Act* 1931-1952 in so far as it purported to authorize the defendants the Minister and the Superintendent of Motor Transport to impose or require the payment of the said charges was and is invalid and 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 the imposition and collection of such charges was unlawful and unauthorized.

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9. The plaintiff has demanded of the defendants the Minister and the Superintendent of Motor Transport the repayment of the moneys so imposed levied or demanded by the said defendants upon and of it but the said defendants have refused and still refuse to pay the said moneys or any of them upon the grounds that the said moneys were collected and received in relation to the operation of a public motor vehicle in the course of and for the purposes of inter-State trade prior to 16th December 1954 and were collected pursuant to the provisions of sub-s. 4 and/or sub-s. 5 of s. 18 or s. 37 of the *State Transport (Co-ordination) Act* 1931-1952 and were collected on and pursuant to a condition imposed on the issue of a licence under the said *State Transport (Co-ordination) Act* 1931-1952 or of a permit under the said Act or of a document purporting to be a licence or permit under the said Act and are not repayable pursuant to the provisions of the *State Transport Co-ordination (Barring of Claims and Remedies) Act* 1954.

The plaintiff claimed the following declarations :—

1. That the *State Transport Co-ordination (Barring of Claims and Remedies) Act* 1954 is beyond the powers of the Parliament of the State of New South Wales and invalid in so far as the same would preclude the plaintiff from recovering from the defendants or some one or more of them such part of the moneys referred to in pars. 6 and 9 hereof as would otherwise be recoverable.

2. Alternatively, that ss. 2, 3 and 4 of the said Act are beyond the powers of the Parliament of the State of New South Wales and invalid in so far as the same would preclude the plaintiff from recovering from the defendants or some one or more of them such part of the moneys referred to in pars. 6 and 9 hereof as would otherwise be recoverable.

The defendants demurred to the whole of the statement of claim as amended upon the following grounds :—

1. That it discloses no cause of action.

2. The *State Transport Co-ordination (Barring of Claims and Remedies) Act* 1954 and every part thereof is a valid exercise of the legislative powers of the Parliament of the State of New South Wales.

3. Alternatively to 2, the provisions of the *State Transport Co-ordination (Barring of Claims and Remedies) Act* 1954, in so far as they apply to charges imposed and collected in respect of the operation of motor vehicles upon public roads in the State of New South Wales, one and each of them is a valid exercise of the legislative powers of the Parliament of the said State.

The substance of the relevant sections of the *State Transport Co-ordination (Barring of Claims and Remedies) Act* 1954, namely, ss. 2, 3 and 4, appears sufficiently from the judgments of the Court hereunder.

The three matters were heard together, and by arrangement counsel for the plaintiffs addressed the Court in turn before the defendants were heard.

B. P. Macfarlan Q.C. (with him *T. E. F. Hughes*), for the plaintiff Antill Ranger & Co. Pty. Ltd. A fair reading of Act No. 45 of 1954 shows that it works as follows: there have been journeys in the course of inter-State trade, moneys wrongly claimed under a statute have been paid in relation to those journeys, such moneys are presently recoverable and the Act seeks to make them irrecoverable. The destruction by the Act of the right of recovery of moneys so paid invades a freedom, such invasion being an interference with inter-State trade. The hypothesis of the Act is that the moneys have been wrongly collected and it seeks to prevent their recovery. Section 37 of the *State Transport (Co-ordination) Act* 1931-1952 (the Principal Act) authorizes the imposition of a burden when a journey has been completed. The present Act gives legislative authority to the Government to keep the money exacted after the completion of the inter-State journey. In *O. Gilpin Ltd.* v. *Commissioner for Road Transport & Tramways (N.S.W.)* (1) *Dixon* J. held that s. 37 was invalid. The whole of that judgment was approved by *Fullagar* J. in *Hughes & Vale Pty. Ltd.* v. *State of New South Wales [No. 1]* (2) and the test of infringement contained in it was adopted in the judgment in *Grannall* v. *Marrickville Margarine Pty. Ltd.* (3).

[DIXON C.J. That is all looking at a transaction yet to be undertaken.]

There is no difference in principle between that class of case and the present. *The Commonwealth and Commonwealth Oil Refineries Ltd.* v. *South Australia* (4) was in respect of a past transaction. The fact that it is a past transaction is beside the point if it is seen that a burden is imposed on a person in consequence of him having engaged in inter-State trade. If the result, whatever the form, is to impose a burden or disability on a person because he is engaged in inter-State trade, it is submitted s. 92 is infringed. *Gilpin's Case* (5) dealt with a past transaction. The present Act

(1) (1935) 52 C.L.R. 189, at p. 205.
(2) (1953) 87 C.L.R. 49, at pp. 94-95.
(3) (1955) 93 C.L.R 55.
(4) (1926) 38 C.L.R. 408.
(5) (1935) 52 C.L.R. 189.

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is invalid because it adopts as the criterion for its operation the fact that there has been an inter-State transaction. This is seen from ss. 2, 3, and 4 which select the inter-State transaction as a starting point and its operation on such inter-State transaction is direct. It is an irrelevant consideration that the Act speaks only as regards the past and has no future operation. The words " absolutely free " in s. 92 of the Constitution are deemed infringed (a) if inter-State trade is prevented *in limine* (b) if it is stopped during its course, but it has never been suggested either by this Court or by the Privy Council that it is only in these two instances that s. 92 is infringed. It is submitted that the authorities show that laws which operate on a completed inter-State transaction at any point of its course, or, indeed, before its inception or after its termination infringe s. 92. If the present provisions had formed part of the Principal Act when the Privy Council was considering the licensing provisions it could not have been maintained that they did not infringe s. 92. If these provisions would not have been valid in the Principal Act, they will not be valid if enacted subsequently but with reference to the same state of facts and events to which the Principal Act applied.

[DIXON C.J. This Act does not impose a present burden on inter-State trade as it presently exists.]

What s. 92 protects is the freedom of particular transactions and each particular transaction is entitled to the freedom. The freedom is a continuing one and if a subsequent tax or burden is placed on the transaction after completion the freedom is infringed. The concept of freedom is not concerned with future operations in inter-State trade, but with present ones, and confers an immunity in respect of present ones, of which immunity the trader may avail himself at any time when the imposition is sought to be made. [He referred to *The Commonwealth and Commonwealth Oil Refineries Ltd.* v. *South Australia* (1) and to *Vacuum Oil Co. Pty. Ltd.* v. *Queensland* (2).] [He referred to *The Commonwealth and Commonwealth Oil Refineries Ltd.* v. *South Australia* (3) ; the *Marrickville Margarine Case* (4) ; *Hospital Provident Fund Pty. Ltd.* v. *State of Victoria* (5) ; *Vacuum Oil Co. Pty. Ltd.* v. *Queensland* (6) ; *James* v. *The Commonwealth* (7).] The freedom being conferred on individual transactions does not grow less as time passes. Even though the operation of the present law were in respect of an intra-State transaction, if it is a circuitous, devious or covert way of imposing a burden

(1) (1926) 38 C.L.R. 408.
(2) (1934) 51 C.L.R. 108.
(3) (1926) 38 C.L.R. 408, at p. 423.
(4) (1955) 93 C.L.R. 55, at p. 71.
(5) (1953) 87 C.L.R. 1, at p. 36.
(6) (1934) 51 C.L.R. 108, at p. 128.
(7) (1936) 55 C.L.R. 1, at p. 59.

on the inter-State transaction, it still fails : *Wragg* v. *State of New South Wales* (1). [He referred also to *Williams* v. *Metropolitan & Export Abattoirs Board* (2).].

P. H. Opas, for the plaintiff Deacon, adopted the arguments on s. 92 advanced and to be advanced by the other plaintiffs. The passage of ss. 2, 3 and 4 of Act No. 45 of 1954 is beyond the power of the New South Wales legislature to enact as those sections are not laws for the peace, order and good government of New South Wales as authorized by s. 5 of the *Constitution Act* 1902 (N.S.W.). The Act cannot apply to a resident of Victoria and must be restricted to the territorial limits of New South Wales in its operation. The position in tort—as in the present action—differs from the position in contract. [He referred to *Delaney* v. *Great Western Milling Co. Ltd.* (3).]

[FULLAGAR J. This case does not touch the position. You rely on the law of New South Wales to sue, and it is said against you that another part of that law operates to prevent your action.]

The plaintiff does not rely on New South Wales law. This is a common law claim and it is submitted that the Commonwealth has a common law separate and distinct from the States. The plaintiff here does not sue in a New South Wales court, but in this Court under s. 75 (iv.) of the Constitution. The New South Wales legislature cannot by legislation prevent this Court from entertaining this action. Where an *ex post facto* Act purporting to destroy the vested right of an injured subject is passed, it must be looked at to ascertain whether it is for the peace, order and good government so to bar a claim, when there is on the statute book an Act placing the subject as against the Crown in the same position as subject against subject. [He referred to the *Claims against the Government and Crown Suits Act* 1912, ss. 3, 4.] Moneys collected without power cannot be retained. [He referred to *Cowan & Sons* v. *Lockyer* (4).] Section 2 of the present Act applies only to the disposal of moneys already collected, it cannot validate the collection but only their disposal. The legislature of New South Wales cannot take away from the plaintiff a vested right which he has sought to assert by action in this Court. So to do would be ousting s. 75 (iv.) of the Constitution. [He referred to *New Brunswick Rly. Co.* v. *British & French Trust Corporation* (5).] This plaintiff adopts the argument of the plaintiff in *Melbourne Corporation* v. *The Commonwealth* (6).

(1) (1953) 88 C.L.R. 353, at pp. 396, 397, 399.
(2) (1953) 89 C.L.R. 66, at pp. 75, 76.
(3) (1916) 22 C.L.R. 150, at pp. 166, 167.
(4) (1904) 1 C.L.R. 460, at pp. 463-465.
(5) (1939) A.C. 1, at p. 24.
(6) (1947) 74 C.L.R. 31, at pp. 34, 35.

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Sir *Garfield Barwick* Q.C. (with him *P. M. Woodward*), for the plaintiff Edmund T. Lennon Pty. Ltd. The plaintiff submits that the State is unable to remove all legal remedy for conduct by itself and its officials which by virtue of the Commonwealth Constitution it may not authorize or justify. That submission may be a narrow statement of a wider proposition that the State may not under any guise validate its own legislative acts which are beyond its competence or validate administrative acts done in pursuance of such invalid legislation. The wider proposition would deny a power to validate under any guise, and to remove all legal consequence from an administrative act done in pursuance of invalid legislation is a form of validation. If this general proposition be not true, then it seems that a general law purporting to remove legal consequence from these administrative acts could circumvent the constitutional limitation entirely. The submission may be tested by reference to s. 92 of the Constitution, not as a basis for the argument but as a convenient illustration, and the Court is asked to assume that ss. 3 and 4 of Act No. 45 of 1954 had been enacted initially with the *State Transport (Co-ordination) Act* 1931 but without the temporal words " before the commencement of this Act " in s. 3 (a). The new sections are taken and read with the Principal Act but their references to facts and circumstances are treated as references to the Principal Act in the form in which it was at the time of the application of the Act to those facts and circumstances. Thus, notionally, the Principal Act is treated as unrepealed in the form in which it was when the matters occurred. The result would be sections authorizing the licensing provisions and imposition of charges side by side with sections of the nature of ss. 3 and 4. The licensing provisions would work if operated by way of justification without acts otherwise tortious or giving rise to causes of action. When the statute is determined to be invalid the authority for the justification goes, and at the very moment when the act calling for justification or authority is done and for which reference is made to the licensing provisions for justification s. 3 would operate to take away all possibility of legal consequence to the doer for such act. The barring of the remedy strictly does not render the act lawful but it does erect a kind of *de facto* authority to do the act which by hypothesis the State had no legislative authority to authorize. Thus by putting the sections in question beside the licensing system in the Act, the State would provide in effect a justification for doing it. This demonstrates that there would be no power, not for the narrower reason that s. 3 would itself be any impediment—though it is put alternatively on that

narrow basis—but for the reason that it is an attempt to confer legislative authority to do that which, by hypothesis, the State has no power to authorize or justify. As the next step—the argument the Court is asked to assume the introduction into s. 3 as part of the Principal Act a date certain as to which the section would operate. By so introducing a time element the *de facto* authority granted to offending conduct by taking away the cause of action at the moment such conduct occurs is not affected. Finally, the fact that s. 3 is enacted not with the Principal Act but at a later stage does not make any difference. The Principal Act by the licensing provisions attempts to authorize the administrative Acts for which there was no legislative competence. Section 3, without the words " before the commencement of this Act " would cover past Acts and would work forward. The words " before the commencement of this Act " are not radical to the point of principle, but the considerations are the same at whatever point of time the State sought to deny legal consequence to an act which it could neither authorize or justify because of lack of constitutional competence. The State might place certain limitations upon the enforcement of a right of action, as to the time within which it must be enforced or the manner of enforcement, but it cannot deprive its invalid action of legal consequence. As a second basis of invalidity the plaintiff submits that the Act No. 45 of 1954 is itself an infringement of s. 92 and in this regard adopts the arguments of the plaintiff Antill Ranger & Co. Pty. Ltd. In so far as the section seizes upon the inter-State nature of the transaction as the significant reason for the loss of the cause of action or barring of the claim it cannot be said that its impact on the freedom is other than direct. The enactment impairs the freedom in two ways, first, it touches the particular transaction of the individual, secondly, by its very existence it acts as a deterrent to persons who have no inter-State transactions at the moment. To say that money wrongfully taken for licences may be retained is to discourage inter-State trade. The statute imposes a continuing burden upon a transaction which should have been continuously unburdened.

M. F. Hardie Q.C. (with him *R. Else-Mitchell* and *K. J. Holland*), for the defendants other than the defendant Grimshaw. The cause of action of the plaintiff Antill Ranger & Co. Pty. Ltd. is an ordinary civil cause of action based on common law and founded on an implied contract to repay money. It has no basis in the Constitution, nor any legal relationship thereto. The Act under attack is no different from any other statute extinguishing civil causes of

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action or barring remedies. The Act in the case of Antill Ranger & Co. Pty. Ltd. takes away the jurisdiction of the Supreme Court of New South Wales to entertain the action, and s. 92 can have no application to a statute affecting or limiting the jurisdiction of a State court. The decision of the Privy Council in *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [*No.* 1] (1) in no way determines the invalidity of the present Act nor does it suggest that such Act is invalid. The present Act does not restrict the plaintiffs' trade ; it does not operate on it at all, but only on the plaintiffs' causes of action and their remedies therefor. The reason for the Act under which the moneys were paid being unlawful is irrelevant. It is sufficient that the Act was unlawful for any reason. The reference in the present Act to inter-State trade serves only to identify the causes of action in reference to which the Act is intended to operate. Such reference identifies the persons who may have claims, and the causes of action extinguished are the ordinary civil causes of action which do not arise from any provision of the Constitution. The rights extinguished are not part of inter-State trade. They are not trade rights. An Act operating on a civil cause of action that arose whilst a person was engaging in inter-State trade, is not the trade itself, and even if the Act can be regarded as operating on the trade of the plaintiffs, it cannot be said to operate so as to restrict the plaintiffs' trade, commerce and intercourse. The present challenge is to an Act extinguishing a claim or barring a remedy, not to the Principal Act or anything done thereunder, and that Act coming into operation after the completion of the inter-State transaction cannot be said to restrict that trade. The restriction, if any, on the plaintiffs' trade arose out of the Principal Act. It is submitted that if the plaintiffs' trade suffered any impediment, that impediment was imposed at a particular point of time that preceded Act No. 45 of 1954. Section 92 does not prevent a State Parliament from providing time limits for bringing actions, nor from dealing with property within its borders. It is submitted the journeys were completed and the present Act does not operate on the plaintiffs as traders. On the authority of *The Commonwealth* v. *Bank of New South Wales* (2) the plaintiffs must show that the Act challenged restricts their freedom to engage in those operations. Any burden is not enough. It must be such a burden as will amount to a restriction : *McCarter* v. *Brodie* (3) ; *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [*No.* 1] (4) ; *Hospital Provident Fund Pty.*

(1) (1954) 93 C.L.R. 1.
(2) (1949) 79 C.L.R. 497.
(3) (1950) 80 C.L.R. 432, at pp. 496, 497.
(4) (1953) 87 C.L.R. 49, at p. 69.

Ltd. v. *State of Victoria* (1); *Williams* v. *Metropolitan & Export Abattoirs Board* (2). Any burden falling upon the plaintiffs as a result of the operation of the present Act is not such a burden as to amount to a restriction of trade. Here, before such a restriction can arise, the Act must operate upon the trade. The defendants submit that *Gilpin's Case* (3), *The Commonwealth and Commonwealth Oil Refineries Ltd.* v. *South Australia* (4), *Vacuum Oil Co. Pty. Ltd.* v. *Queensland* (5) do not support the plaintiffs. The case of *Grannall* v. *Marrickville Margarine Pty. Ltd.* (6) stresses that s. 92 is limited to those cases where the direct and immediate effect of the operation of the legislation impedes or restricts trade and commerce.

R. Else-Mitchell, for the defendant Grimshaw. This defendant adopts the submissions of the other defendants that the burden of the present Act is imposed in relation to past trade and does not affect any person's trading rights or capacities. This Act is in no different position from an Act expropriating goods which have been in the course of inter-State trade but where such trade has long since ceased and they are found as a common fund of property no longer having an inter-State character. The defendant concedes that if an Act were passed imposing a prospective liability in respect of a past transaction it would fall within the prohibition. But that is not the case here, there being no attempt to impose a prospective liability in the sense of requiring a future payment. The State can validly relieve officials of liability, civil or otherwise, from the consequences of acts done in their official capacity and it can relieve them entirely from actions being brought against them. As a matter of power the State could produce the result that the only action which would lie would be against the State itself. Such an action, if prosecuted to judgment, would be property in New South Wales and as a right of property it could be extinguished by some statutory discharge, expropriated, or in the last resort no appropriation of the necessary moneys to meet the liability could be made. When the stage of judgment is reached all previous remedies are merged and it must be looked at divorced from the circumstances out of which it arose. The State could thus validly channel all liability towards itself. For these reasons the defendant asks that the question in this action be answered in his favour.

(1) (1953) 87 C.L.R. 1, at p. 17.
(2) (1953) 89 C.L.R. 66, at p. 74.
(3) (1935) 52 C.L.R. 189.
(4) (1926) 38 C.L.R. 408.
(5) (1934) 51 C.L.R. 108.
(6) (1955) 93 C.L.R. 55.

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P. H. Opas, in reply. It is submitted that what a State legislature has not constitutional power to authorize, it similarly may not confirm, ratify or justify. The law of New South Wales is subject to s. 92 which, although it confers no new rights, enables the plaintiff to ignore the Act struck by it and that is the way in which s. 92 operates here.

Sir *Garfield Barwick* Q.C., in reply.

B. P. Macfarlan Q.C., in reply.

Cur. adv. vult.

June 9.

The following written judgments were delivered in each of the matters argued :—

Antill Ranger & Company Proprietary Limited v. *Commissioner for Motor Transport.*

DIXON C.J., MCTIERNAN, WILLIAMS, WEBB, KITTO and TAYLOR JJ. The question we are called upon to decide in this matter concerns the constitutional validity of Act No. 45 of 1954 of New South Wales, entitled the *State Transport Co-ordination (Barring of Claims and Remedies) Act* 1954, at all events in respect of part of its purported operation.

The nature of the proceeding before us determines the precise limits of the question. It is a demurrer to a plea. The demurrer has been removed from the Supreme Court into this Court under s. 40 of the *Judiciary Act* 1903-1950 on the application of the Attorney-General for New South Wales. The action was commenced in the Supreme Court on 23rd July 1954, that is before the decision of the Privy Council in *Hughes & Vale Pty. Ltd.* v. *New South Wales* [*No.* 1] (1), which was given on 17th November 1954 and before, as a consequence of that decision, Act No. 45 of 1954 was passed. It was in fact assented to on 16th December, the same date as the assent to No. 48 of 1954. The plaintiff had declared in the action three days earlier. The declaration consisted of a simple count for money had and received against the Superintendent of Motor Transport, a functionary whose name was altered by Act No. 48 of 1954, s. 5, to Commissioner for Motor Transport. On 1st February 1955 the defendant filed a single plea to the declaration. It is a plea by way of confession and avoidance. The material part of the plea avers that " 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*

(1) (1954) 93 C.L.R. 1.

(*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 ss. 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." The demurrer is to this plea.

The plea will be bad unless the allegations it contains afford an answer to every set of facts which would give a cause of action against the defendant in money had and received and so, if established, would support the plaintiff's declaration. What may be established to support the declaration may, however, be taken to be limited by the plaintiff's particulars and they were indorsed on the writ: see s. 24 of the *Common Law Procedure Act* 1899 (N.S.W.) O. XIII, r. 4 of the *Supreme Court Rules*. The particulars identify the sum it is sought to recover as moneys paid between 15th October 1952 and 31st May 1954 under protest by the plaintiff to the defendant for charges demanded in pursuance of the purported powers of the defendant under the *State Transport* (*Co-ordination*) *Act* 1931-1952. For the purpose of testing the sufficiency of the plea it is proper to suppose that the declaration will be supported, within the scope of these particulars, by a set of ultimate facts constituting a cause of action in money had and received which will be consistent with the allegations in the plea but otherwise least favourable to its validity. The plea alleges that the moneys it is sought to recover are moneys of the nature and character referred to in ss. 2, 3 and 4 of Act No. 45 of 1954 and of course it must be taken that in all respects they correspond with that description.

On the footing stated the question is whether constitutionally the Act can apply to the cause of action and so bar or extinguish it.

It is necessary to give, as briefly as may be, the substance of the three sections. Section 2 deals with the application of the moneys to which it relates. By s. 25 of the *State Transport* (*Co-ordination*) *Act* 1931-1952, called in Act No. 45 of 1954 the Principal Act, it was necessary that the amounts payable to the commissioner under s. 18 (4) and (5) and s. 37 of that Act, and fees payable for licences and permits thereunder, should be paid into the State Transport (Co-ordination) Fund. Section 26 of that Act authorized the disbursements from the Fund. What s. 2 of the Act now in question does is to provide that moneys dealt with under s. 26 shall be deemed to have been lawfully so dealt with. It is not part of the purpose of this provision to bar recovery from the persons who collected any such moneys by a person from whom they were

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collected if a cause of action otherwise existed in that person. The section may therefore be neglected except as supplying a description of which the plea avails itself to define, by reference, the character the moneys filled. To satisfy the description given in s. 2 the moneys must consist of sums collected received or recovered in relation to the operation of a public motor vehicle in the course of or for the purpose of inter-State trade before 16th December 1954 ; the moneys must have been collected etc. or purported to have been collected etc. either pursuant to s. 18 (4) and (5) or s. 37 or on the issue of a licence or permit under the Principal Act or of a document purporting to be such a licence or permit or pursuant to any condition imposed on the issue thereof. Section 18 (4) and (5) of the Principal Act deal with the imposition of a charge under a condition of a licence to carry passengers or goods ; s. 37 with the imposition of a charge upon public motor vehicles operated in contravention of the Act. Section 3 (a) of Act No. 45 of 1954 is really the provision upon which the plea depends. The description of the moneys with which it deals is precisely the same as that contained in s. 2 but it provides that 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 for the recovery of any of the sums of that description shall be extinguished. Section 4 so far as relevant provides that no action, suit, claim or demand shall lie or be brought or made or allowed or continued by or on behalf of any person 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 s. 3 (a). In terms s. 3 (a) and s. 4 would cover the plaintiff's case, as it appears upon the record, and would extinguish the plaintiff's cause of action and bar the plaintiff's remedy. The question is whether to allow it this operation is consistent with the Commonwealth Constitution and more particularly with s. 92. If it is not consistent with the Constitution then, by s. 1 (3), the Act is to be read as not covering the case. On this record it must be assumed for the purpose of the demurrer that 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 inter-State trade, whether collected as under s. 18 (4) or (5) or s. 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 unauthorized by any valid law, he would prevent the plaintiff carrying out transactions of inter-State transportation in which the vehicles were engaged. Since, on the facts assumed, s. 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 s. 92 to trade commerce and intercourse among the States.

The cause of action to which the plaintiff thus became entitled is not for infringement of some right given to him by s. 92. " Juristically it is doubtless true that s. 92 does not confer private rights upon individuals : at all events so I decided in *James* v. *The Commonwealth* (1). It may perhaps also be true that its purpose is not the protection of the individual trader. But it assumes that without governmental interference trade, commerce and intercourse would be carried on by the people of Australia across State lines, and its purpose is to disable the governments from preventing or hampering that activity."—per *Dixon* J. in *Bank of New South Wales* v. *The Commonwealth* (2). In delivering the judgment of the Privy Council in *The Commonwealth* v. *Bank of New South Wales* (3) Lord *Porter* said : " It is true, as has been said more than once in the High Court, that s. 92 does not create any new juristic rights, but it does give the citizen of State or Commonwealth, as the case may be, the right to ignore, and, if necessary, to call on the judicial power to help him to resist, legislative or executive action which offends against the section " (4). The plaintiff's cause of action is in this sense the consequence of s. 92, although it is given by the common law.

The taking of the money from the plaintiff was not merely against his will and wrongful. It was done in opposition to the constitutional guarantee of freedom the enjoyment of which he was asserting. The statute now in question does not give him some other remedy by which he may regain the money or obtain reparation. It does not impose a limitation of time or require affirmative proof of the justice of the claim. It simply extinguishes the liability altogether, not only the liability of the officers of the State but of the State itself. The effect is to leave the plaintiff in the same position as if the exaction of the tax or charge had been lawful under the Constitution. Is it competent to the State to legislate in such a

(1) (1939) 62 C.L.R., at pp. 361, 362.
(2) (1948) 76 C.L.R. 1, at p. 388.
(3) (1950) A.C. 235 ; (1949) 79 C.L.R. 497.
(4) (1950) A.C. 235, at p. 305 ; (1949) 79 C.L.R., at p. 635.

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way ? The answer must depend on s. 92. There is no due process clause in our Constitution. It is not a question of exceeding the limits of some affirmative power defined according to subject matter. It is a question of infringing upon a constitutional immunity.

The question is not an easy one. Obviously the denial of the plaintiff's right to repayment now of the money taken from it between October 1952 and May 1954 does not amount to an interference with its present freedom to enter upon or complete a transaction of trade or commerce that is in contemplation or in course of execution. But it does bring to nought the justifiable reliance which the plaintiff placed on s. 92 when the plaintiff protested, as it must be taken to have done, against payment of the money and sought to exercise the freedom of inter-State trade assured by the Constitution. On the other hand, if the *de facto* situation arising at the end of 1954 from the decision of the Privy Council in *Hughes & Vale Pty. Ltd.* v. *New South Wales* [*No.* 1] (1) is looked at as a whole and from the State's point of view, it might seem reasonable to bar claims to money that had been exacted under provisions which had been administered for so long a time as valid. It was not a simple situation. The claims to the repayment of money were doubtless numerous. Only those were enforceable as a matter of legal right which were in respect of involuntary payments. Those who had paid without protest or show of resistance and under no express or implied threat or the like could not recover. If the State was to stand on legal right, this meant an inquiry and investigation in every instance. The claimants might include persons whose payments had been made years ago, at any time in fact within six years. It might well be that the carriers who actually made the payments had more or less recouped themselves by increased freights. Considerations such as these might seem to give the matter a somewhat different aspect and distinguish it from a bare attempt to legislate so as to avoid the legal consequences of offending against the Constitution. The difficulty, however, of this view of the matter is that the statute extinguishes all claims alike. It 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. Every liability is covered which arose from the administrative enforcement of the unconstitutional provisions. In this very case the plaintiff had issued its writ long before the decision of the Privy Council.

(1) (1954) 93 C.L.R. 1.

However strongly payment might have been resisted by an inter-State trader and however great may have been the threatened duress which occasioned the payment, the statute would extinguish his right. It is for this reason that it seemed important to note exactly the assumptions of fact that on the state of the record must be made for the purposes of deciding the demurrer.

When s. 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 afterward confirm the Act, give it a legal justification and deny him all remedy ? It seems implicit in the declaration of freedom of inter-State 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 inter-State trade. Yet that is what is done by the statute now in question. It takes the operation of the vehicle in the course of inter-State 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 inter-State 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 inter-State 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 s. 92 is that legislation cannot impose a burden on inter-State 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 s. 92 to allow validity to such a statute. Section 3 cannot consistently with s. 92 operate to extinguish the plaintiff's supposed cause of action and s. 4 cannot operate to bar the remedy.

The demurrer should be allowed. Judgment in demurrer should be given for the plaintiff. The cause should be remitted to the Supreme Court to deal with according to law consistently with this judgment.

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FULLAGAR J. In considering this case I have 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 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 without a licence, 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.

I have not been able, however, to find any legal principle on which the Act of 1954 can be upheld, or to see any escape from the view that it is unconstitutional. It seems to me that, in the last analysis, this case is governed by the same considerations as those which have led to the decision in *Deacon* v. *Grimshaw* (1).

The plaintiff's action is for money had and received. There are several elements in its cause of action, any one or more of which it may fail ultimately to establish. What the Act says is that, if it does establish all those elements, it must nevertheless fail. The right asserted is a common law right, but an essential element in the cause of action is that the moneys in question were unlawfully exacted from it. If the unlawfulness of the exaction depended upon State law, the State could, of course, by statute make the exaction retrospectively lawful, or abolish the common law remedy in respect of the exaction. But the unlawfulness of the exaction

(1) *Infra*, p. 104.

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 s. 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 recognized 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 remedy. If it protects a common law right against State invasion, the State cannot make that protection ineffective by denying all remedy for State invasion.

So far as the State itself is concerned, it might be said that the State is sovereign within its own territory, and that no remedy can be pursued against it in the courts without its consent. As a general rule this is, of course, true, but, within the limited class of case to which s. 58 of the *Judiciary Act* 1903-1950 applies, the position is governed by that section, which is an exercise of the power given by s. 78 of the Constitution. A claim for repayment of moneys alleged to have been exacted in contravention of s. 92 is a matter arising under the Constitution or involving its interpretation. It is also a " claim in contract " within the meaning of s. 58 : see *Lorimer* v. *The Queen* (1) ; *Daly* v. *Victoria* (2). It seems to me that the general power of a State to say whether a remedy may be pursued against it in the courts or not is limited by s. 58, and, so far as such claims are concerned, is taken away. So far, therefore, as the State itself is concerned, s. 4 of the Act of 1954 is inconsistent with a paramount law of the Commonwealth.

I would add only one observation. If the Act did no more than limit the remedy, while leaving practically effective redress open to the plaintiff, I am disposed to think that it would not be inconsistent with the Constitution. It might, for example, provide that no person other than the State should be liable, or that all questions of liability should be determined by a special tribunal : cf. *Burrill* v. *Locomobile Co.* (3); *Anniston Manufacturing Co.* v. *Davis* (4). But s. 4 simply takes away all remedies against anybody, and no severance or reading down seems to me to be possible.

I agree with the order proposed.

(1) (1862) 1 W. & W. (L.) 244.
(2) (1920) 28 C.L.R. 395, at p. 399.
(3) (1922) 258 U.S. 34 [66 Law. Ed. 450].
(4) (1937) 301 U.S. 337 [81 Law. Ed. 1143].

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DIXON C.J. AND MCTIERNAN J. This case comes before us on materials that are not very satisfactory. But in substance its purpose is to obtain a decision upon the operation of s. 3 (b) of the *State Transport Co-ordination (Barring of Claims and Remedies) Act* 1954 (N.S.W.) (No. 45 of 1954) of New South Wales to bar a claim in tort, the tort consisting in the seizure of the plaintiff's motor vehicle because it was proceeding in the course of inter-State trade in disregard of the provisions of the *State Transport Co-ordination Act* 1931-1952 (N.S.W.). The reasons given in relation to s. 3 (a) of Act No. 45 of 1954 in *Antill Ranger & Co. Pty. Ltd.* v. *Commissioner for Motor Transport* and *Edmund T. Lennon Pty. Ltd.* v. *New South Wales*, cases which were argued with the present case, are applicable to s. 3 (b) which cannot constitutionally avail as a defence to such a claim. It is unnecessary to repeat what has been said in the judgments in those cases.

We have had the advantage of reading the judgment prepared by *Fullagar J.* and we agree in the reasons his Honour has given.

The question in the special case should be answered—No.

WILLIAMS J. I agree with the reasons for judgment of *Fullagar* J. and with the proposed order.

WEBB J. I would answer the question in the case "No" for the reasons given by *Fullagar* J. whose judgment I have had the advantage of perusing; and also for the reasons given in the joint judgment in *Antill Ranger & Co. Pty. Ltd.* v. *Commissioner for Motor Transport* (1).

FULLAGAR J. This case comes before the Full Court on an agreed statement of facts in an action commenced in the Court on 30th June 1952. The plaintiff is a resident of Victoria, and the defendant a resident of New South Wales, and the jurisdiction to entertain the action arises under s. 75 (iv.) of the Constitution. The plaintiff's claim arises out of an alleged trespass to chattels, and the question to be decided is whether the provisions of s. 3 (b) of the *State Transport Co-ordination (Barring of Claims and Remedies) Act* 1954 (N.S.W.) afford a defence to the action.

The plaintiff was at all material times the owner of a certain motor vehicle, which is described as a "refrigerated pantechnicon". On 12th June 1952 this vehicle, carrying a load of twelve tons of margarine, and driven by a servant of the plaintiff, left Sydney for

(1) *Ante*, p. 96.

Melbourne. The plaintiff held no licence or permit under the *State Transport (Co-ordination) Act* 1931-1952 (N.S.W.) in respect of the vehicle or in respect of its journey. On the assumption, therefore, that that Act was a valid enactment in so far as it applied in terms to inter-State commerce, both the plaintiff and his driver were committing offences under ss. 12 and 28 thereof. Section 47 (2) of the Act provides that an authorized officer may seize any motor vehicle in respect of which he suspects that an offence has been or is being committed against the Act, and may " detain the same pending investigation and legal proceedings ". The defendant was an " authorized officer " within the meaning of s. 47, and it may be assumed that he suspected in fact that an offence was being committed. When the plaintiff's vehicle reached Goulburn, he seized and detained it with its load of margarine. On 20th June the margarine was released and carried to Melbourne by another vehicle, but the vehicle which had been seized was detained until 2nd July. In the meantime this action had been commenced, and notice of motion for an interlocutory injunction had, by leave of a Justice, been served on the defendant with the writ. On the release of the vehicle the notice of motion was struck out.

On 17th November 1954 in *Hughes & Vale* v. *New South Wales [No. 1]* (1) the Privy Council, reversing the decision of a majority of this Court, held that certain provisions of the *State Transport (Co-ordination) Act* 1931-1952 were invalid is so far as they purported to apply to persons or vehicles engaged in inter-State commerce. On 16th December 1954 the *State Transport Co-ordination (Barring of Claims and Remedies) Act* 1954 came into force. Section 3 of this Act, so far as material, provides that any and every cause of action by any person against any person acting or purporting to act in the execution of the Principal Act . . . (b) for or in respect of any act matter or thing done or purporting to have been done by any person 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 extinguished. The defence in the action had been delivered on 22nd August 1952, but, after the passing of the Act of 1954, it was amended by consent so as to include a paragraph whereby the defendant relies on s. 3 (b) of that Act.

The pleadings in the action do not follow the course which one would have expected, and it seems to me to be necessary—or at least desirable—to begin by looking at the case apart altogether from the Act of 1954, and treating it as if it had been correctly

(1) (1954) 93 C.L.R. 1.

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pleaded and the action had taken its normal course in the absence of that Act. The plaintiff's claim is for infringement of a common law right, and he shows a prima facie cause of action if he alleges that his goods have been seized and detained. The plea to that claim is by way of confession and avoidance : the physical acts are admitted, but they are justified by reference to s. 47 (2) of the *Transport Act*. It is necessary for the defendant in his plea to allege (1) that he was an authorized officer within the meaning of s. 47 (2) of the Act, (2) that he suspected that an offence against the Act was being committed by the plaintiff or his driver, and (3) that the detention was made " pending investigation and legal proceedings ". The plaintiff may then, by his replication, traverse the three allegations of fact contained in the plea, and he will in any case allege that the vehicle at the relevant time was engaged exclusively in inter-State trade. To this last plea the defendant will demur on the ground that it affords no answer to the defence based on s. 47 (2). We may suppose the next step to be that the demurrer is set down for argument.

It seems to me that the demurrer must raise a question of considerable difficulty. It is clear that s. 47 (2) is not wholly invalid, but it is equally clear that s. 92 of the Constitution, as interpreted in the *Hughes & Vale Case* [*No.* 1] (1) requires s. 47 (2) to be " read down " in some way in accordance with s. 1 (3) (a) of the Act. But to what extent and in what way is its valid operation to be curtailed ? It must receive the maximum effect permitted by the Constitution. It seems to me that two possible qualifications may be read into it with a view to defining its constitutional effect. In the first place, it may be said that it is quite consistent with the decision in the *Hughes & Vale Case* [*No.* 1] (1) that an official should be empowered to intercept and seize a vehicle—even a vehicle in fact engaged at the time exclusively in inter-State commerce—and detain it until it can be ascertained whether an offence against the Act is being committed in respect of it. The substantive provisions of the Act are valid so far as they apply to intra-State carriage. It may be said that the power of the State Parliament extends to the prevention and detection, as well as to the punishment, of offences validly created, and that a general power of seizure and detention provides the only practicable means of prevention and detection. On this view the qualification required by s. 3 (2) would have to be attached to the words " offence against this Act " in s. 47 (2), and those words would have to be read as meaning " offence

(1) (1954) 93 C.L.R. 1.

created by this Act and committed otherwise than in the course of inter-State commerce." If the view that this is the only qualification to be imposed in order to satisfy s. 92 were accepted, it seems to me that the demurrer should be allowed and, if the allegations of fact in the defence have been traversed, the action will proceed to trial on the issues thus raised. It would be necessary then for the defendant to prove that he " suspected " that the vehicle was concerned in the commission of an offence constituted by some act done otherwise than in the course of inter-State trade. If it appeared that he knew that the vehicle was at the relevant time engaged exclusively in inter-State carriage, he would fail in his proof.

The alternative view is that s. 92 requires a further qualification of the literal terms of s. 47 (2) of the Act, and that a power to seize and detain pending investigation and legal proceedings cannot be validly given in respect of any vehicle in fact engaged at the time of seizure in inter-State carriage. This view is, in my opinion, the correct view. Although the maximum operation of s. 47 (2) consistent with s. 92 must be permitted, yet no operation of it can be permitted which has the effect of authorizing a real interference with the freedom of any person to engage in inter-State commerce. And it is difficult to imagine a clearer interference with that freedom than the actual seizure and detention for an indefinite period of a vehicle in fact engaged at the time of seizure exclusively in the carriage of goods or passengers from a place in one State to a place in another State. A statute of a State cannot, in my opinion, validly authorize such an interference. As Lord *Atkin* said in *James* v. *Cowan* (1) the Constitution is not to be mocked by substituting executive for legislative interference with freedom. The fact that the seizure and detention are authorized only on condition that a suspicion is entertained cannot alter the character of what is done. It does not follow that the State is deprived of all power of effectively " policing " the Act so far as it validly operates. On this view of the extent of the valid operation of s. 47 (2) the demurrer must be overruled, and, unless the facts alleged in the replication have been traversed, that is the end of the matter, and the plaintiff has only to prove his damages.

So far the matter has been considered apart altogether from s. 3 (b) of the Act of 1954. It has seemed desirable so to consider it, because only by so doing can the true nature of the plaintiff's cause of action, and the true effect of that sub-section, be fully understood. What is brought out is that the plaintiff's success in

(1) (1932) A.C. 542, at p. 558 ; (1932) 47 C.L.R. 386, at p. 396.

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the action depends on s. 92 of the Constitution. It is quite true, as counsel for the defendant urged, that s. 92 does not itself provide his cause of action: what he primarily asserts is not a constitutional or statutory right but a common law right. But the successful assertion of the right depends on s. 92. It is because, and only because, s. 92 destroys an otherwise perfectly good statutory defence that the common law right subsists so that effect must be given to it in the courts. It subsists and is effective because, and only because, s. 92 says that in the particular case it shall subsist and be effective. The plaintiff's cause of action may not arise from s. 92, but it is saved and preserved by s. 92.

This is the situation into which s. 3 (b) of the Act of 1954 steps, and, when once the nature of that situation is appreciated, it appears to me impossible to maintain that that sub-section affords a valid defence to the action. It says simply that the plaintiff's cause of action shall be extinguished. That means that a cause of action, which subsists and is effective because of the operation of s. 92, is no longer to subsist or be effective. This is to contradict s. 92. Section 3 (b) attempts, in effect, to do exactly the same thing as s. 47 (2) attempted to do. Section 47 (2) purported to provide prospectively a statutory defence to an action for trespass and detention of chattels. The defence fails because the trespass and detention infringe the freedom of inter-State commerce, which s. 92 preserves. Section 3 (b) purports to substitute *ex post facto* another statutory defence. This other defence must fail for the same reason. No State statute can justify either prospectively or *ex post facto* an act which is at once a wrong at common law and an invasion of an immunity given by the Constitution.

It was urged for the defendant that s. 3 (b) of the Act of 1954 had no relation to inter-State commerce and could not be said to restrict, impede or burden, any activity possessing the character of inter-State commerce. In a sense this is, of course, true: the sub-section has no prospective operation at all. But it is none the less, in my opinion, inconsistent with s. 92. For its direct effect is seen, when the position is analysed, to be to deprive persons, who were in the past engaged in inter-State commerce, of the protection of s. 92, which they would otherwise be entitled to invoke for their inter-State commercial activities.

The question submitted to this Court is whether par. 11 of the amended defence (which relies on s. 3 (b) of the Act of 1954) affords any defence to the plaintiff's claim in his action. This question should, in my opinion, be answered: No.

KITTO J. I entirely agree in the conclusion of my brother *Fullagar* and in his reasons.

In my opinion the argument addressed to us in support of the validity of s. 3 of the *State Transport Co-ordination (Barring of Claims and Remedies) Act* 1954 (N.S.W.) can hardly be regarded as much more than playing with words. No doubt it is often said, and with a sufficient approximation to accuracy for many occasions, that s. 92 denies operation to such laws only as directly obstruct, restrict, impede or burden inter-State trade, commerce or intercourse. The argument really depended upon extracting from these words and others of like import an implication that s. 92 cannot have anything to say to a law which was not in force at the time of the activity of inter-State trade, commerce or intercourse for the protection of which the section is invoked.

Such an attempt to limit the operation of s. 92 overlooks the fact that the section, expressed as a grant of freedom for classes of activities, is a grant of freedom to individuals in respect of such activities. Its meaning is therefore not fully stated by saying that it removes from each transaction of inter-State trade, commerce or intercourse, at its inception, such barriers as existing laws may purport to place in its way. It is from certain effects which laws would otherwise have upon persons that the section confers immunity. If a law adversely affects a person by reference to some transaction of his of inter-State trade, commerce or intercourse or some essential ingredient of such a transaction, and if it is not of a kind the operation of which the conceptions of the section assume, the question whether it was in force at the time of the inter-State activity, or came into force thereafter and with a purported *ex post facto* operation, is, to my mind, beside the point.

TAYLOR J. I agree substantially with the reasons given by *Fullagar* J. in this matter. The only point upon which I am inclined to differ from him is the precise extent to which s. 47 (2) of the *State Transport (Co-ordination) Act* 1931 should, in view of the decision of the Judicial Committee in *Hughes & Vale Pty. Ltd.* v. *State of New South Wales [No. 1]* (1), be held to be or to have been operative with respect to vehicles engaged in trade or commerce among the States. I am inclined to think that the first of the alternative views expressed by him on this point is the correct one but this difference can, in no way, affect the final conclusion. Accordingly I am of the opinion that the question raised by the case should be answered in the negative.

(1) (1954) 93 C.L.R. 1.

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DIXON C.J., MCTIERNAN, WILLIAMS, WEBB, KITTO AND TAYLOR JJ. The object of this action was to raise the same question as that decided in *Antill Ranger & Co. Pty. Ltd.* v. *Commissioner for Motor Transport.* The relief claimed, however, consists in declarations of right. The statement of claim has been demurred to and it is the demurrer that is before us. The pleading as it stood at the opening of the argument did not even allege that the payments made by the plaintiff were not voluntary payments and did not allege any facts sufficient to show that apart from Act No. 45 of 1954 the moneys would have been recoverable. However, the statement of claim was amended during the argument.

The substance of the matter is decided in *Antill Ranger & Co. Pty. Ltd.* v. *Commissioner of Motor Transport* and really the only question that remains in this case is whether, applying the decision to this case, the allegations in the pleading suffice to enable the plaintiff to obtain some form of relief. On the whole, there seems to be enough to sustain the pleading on demurrer and to justify declarations in the following form :—Declare that s. 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 (as amended) by reason of s. 92 of the Constitution the plaintiff was at the passing of that first-mentioned Act entitled as against any of the defendants for the recovery of moneys demanded of the plaintiff in purported pursuance of s. 18 (5) or s. 37 of the said *State Transport (Co-ordination) Act* 1931-1952 or of a condition imposed upon a licence or permit or demanded upon the issue of such a licence or permit. Declare that s. 4 does not validly operate to bar the remedy for the enforcement of any such cause of action.

The demurrer should be overruled and such a declaration made accordingly.

FULLAGAR J. This action seeks in effect a declaration that if the plaintiff chooses to bring an action against the defendants, and if the defendants or any of them choose to raise a particular defence, that particular defence must fail. Apart from very special circumstances, of which there is no suggestion here, no declaration of such a character ought, in my opinion, to be made. The only proper course is to leave the plaintiff to bring its action, to which there may be found to be other defences. However, in the present case

no objection that the action was misconceived was raised, and, if the demurrer is to be treated as properly raising the questions which were argued, then I am of opinion that it should be allowed for the reasons given in *Antill Ranger & Co. Pty. Ltd.* v. *Commissioner for Motor Transport* (1).

I agree with the order proposed.

Antill Ranger & Company Proprietary Limited v. *Commissioner of Motor Transport.*

Demurrer to the plea allowed. Judgment for the plaintiff in demurrer. Costs of the demurrer and other proceedings in this Court to be paid by the defendant. Cause remitted to the Supreme Court to be dealt with according to law consistently with this judgment.

Deacon v. *Grimshaw.*

Question submitted by par. 14 *of the special case answered—No. Costs of the special case to be paid by the defendant.*

Edmund T. Lennon Proprietary Limited v. *State of New South Wales and Others.*

Demurrer to the statement of claim overruled. Judgment in the suit for the plaintiff with costs. Declare that s. 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 s.* 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 s.* 18 (5) *or s.* 37 *of the said State Transport (Co-ordination) Act* 1931 *(or that Act as amended) or of a condition imposed upon a licence or permit or demanded upon the issue of such a licence or permit. Declare that s.* 4 *does not validly operate to bar the remedy for the enforcement of any such cause of action.*

(1) *Ante* p. 96.

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ANTILL RANGER & CO. PTY. LTD. v. COMMISSIONER FOR MOTOR TRANSPORT.

Antill Ranger & Company Proprietary Limited v. *Commissioner of Motor Transport.*

Solicitors for the plaintiffs, *Hughes, Hughes & Garvin*, Sydney.

Solicitor for the defendant, *F. P. McRae*, Crown Solicitor for the State of New South Wales.

Deacon v. *Grimshaw.*

Solicitor for the plaintiff, *A. J. McNamara*, Melbourne.

Solicitor for the defendant, *A. F. Maxwell*, Solicitor for Transport, New South Wales.

Edmund T. Lennon Proprietary Limited v. *State of New South Wales and Others.*

Solicitors for the plaintiff, *Lionel Dare & Reed & Martin*, Sydney.

Solicitor for the defendants, *F. P. McRae*, Crown Solicitor for the State of New South Wales.

R. A. H.