[HIGH COURT OF AUSTRALIA.]

HUGHES . . . . . PLAINTIFF;

AND

THE STATE OF TASMANIA AND ANOTHER DEFENDANTS.

H. C. OF A. 1955.

MELBOURNE, *March* 2, 3; *June* 9.

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

Constitutional Law (Cth.)—Freedom of inter-State trade commerce and intercourse—State Statutes—Validity—Public vehicle licensing system—Licences limited to areas—Necessity for permit to travel outside area—Imposition of charges on basis of tareweight of vehicle and mileage—Goods purchased in mainland States by Hobart merchants—Shipment by sellers to Launceston, Burnie or Beauty Point—Application of Acts to carrier transporting goods therefrom to buyers in Hobart—The Constitution (63 & 64 *Vict. c.* 12), *s.* 92—*Traffic Act* 1925-1954 (*No.* 38 *of* 1925—*No.* 5 *of* 1954) (*Tas.*), *ss.* 14, 15, 17, 20 (2) 11, 20A (1) (4)—*Transport Act* 1938-1953 (*No.* 70 *of* 1938—*No.* 73 *of* 1953) (*Tas.*), *s.* 14.

Merchants, carrying on business in Hobart, Tasmania, bought fruit from sellers in mainland States. The course of trade was for sellers to ship the fruit f.o.b. the port of shipment to either Devonport, Burnie or Beauty Point, consigning it sometimes to the buyer by his name and sometimes to H. as consignee. The contracts did not impose any duty on the vendors to deliver the fruit in Hobart. The buyers employed H. as their agent both in his capacity of shipping agent and carrier. In his former capacity he received the consignments and cleared them by payment of the shipping freight, wharfage and inspection charges. In his capacity of carrier he carried the fruit in his lorries to the buyers in Hobart. His lorries never carried any goods having a different origin. Under the provisions of the *Transport Act* 1938-1953 (Tas.) and the *Traffic Act* 1925-1954 (Tas.) and regulations made thereunder it was necessary for H. to obtain a permit from the Transport Commission in order to carry the goods to Hobart. The conditions of the permit required him to pay a charge calculated according to a formula based on the tareweight of the vehicle and the mileage. H. contended that he was engaged in inter-State commerce in carrying the fruit and consequently that the Acts did not apply to him while so engaged.

Held that H. obtained no protection under s. 92 from the incidence of these provisions of State law by reason of the fact that he was serving the interests of inter-State traders in particular journeys. There was no interference in

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the performance of a service essential to the completion of the inter-State journey. The fact that he served the ends of inter-State traders on particular journeys was not sufficient to protect him from the incidents of the business of carrying under Tasmanian law.

CASE STATED.

In an action commenced in the High Court of Australia by Raymond Maurice Hughes against the State of Tasmania and the Transport Commission the parties on 17th February 1955 concurred in stating a special case for the opinion of a Full Court, pursuant to the *High Court Rules*, O. 35. The material portions of the case were as follow :—

1. The plaintiff is and was at all material times a shipping agent and carrier who carries on business at No. 61 Paterson Street, Launceston, Tasmania. 2. The defendant the Transport Commission is a body corporate constituted by the *Transport Act* 1938-1953 (Tas.) for the purpose of co-ordinating, regulating and controlling transport in Tasmania and in relation to privately owned road transport services—(a) exercises the powers and functions conferred on it directly by ss. 9 and 15 of the *Transport Act* 1938-1953, (b) exercises by virtue of ss. 9 (1) (vii) (b), 10, and 14 of the *Transport Act* 1938-1953 the powers and functions conferred on the Commissioner of Police and the Transport Committee by the *Traffic Act* 1925-1954 and its amendments including those relating to :— (i) the issue under ss. 15, 16, 17 and 58 of the *Traffic Act* 1925-1954 of public vehicle licences (including the limitation of such licences to apply only in respect of specified traffic areas and the imposition of sundry conditions in respect thereof). (ii) The grant and issue under ss. 20 and 58 of the *Traffic Act* 1925-1954 of permits to the holder of a licence in respect of a public vehicle authorizing such holder to use such vehicle for any specified service outside the traffic area in respect of which the vehicle is licensed. (iii) The imposition or indorsement under s. 20A of the *Traffic Act* 1925 (inserted by the *Traffic Act* 1953) on a public vehicle licence issued under s. 15 or a permit under s. 20 of a condition that the holder of the licence or permit shall pay to the commission in addition to any sum fee or charge payable under any other provision of the Act such sum or sums to be ascertained as the commission may determine. (iv) The exemption under s. 20B of the *Traffic Act* 1925-1954 (inserted by the *Traffic Act* 1953) of public vehicles from the operation of s. 20A of that Act. 3. (a) On 18th December 1953 the defendant commission determined pursuant to s. 20A of the *Traffic Act* 1925-1954 (inserted by the *Traffic Act* 1953) that

in every case (other than certain special cases) in which a goods-carrying vehicle is used outside the area for which it is licensed the issue of a permit for such purpose under s. 20 of the *Traffic Act* 1925-1954 should be subject to payment of a sum calculated at a rate of .4 of a penny per hundredweight or part thereof of the vehicle unladen for each mile or part thereof over which goods are carried in the vehicle. (b) The said rate determined by the defendant commission was approved by the Governor on 21st December 1953 and notified by the defendant commission in the Tasmanian Government *Gazette* on 23rd December 1953. 4. Pursuant to ss. 58 (1) iii and 30 (1) xviii of the *Traffic Act* 1925-1954, traffic areas have been prescribed by reg. 67 and appendix VI to the *Traffic Regulations* so that:— Hobart is situate in area 1, Launceston is situate in area 3, Devonport is situate in area 5, and Burnie is situate in area 6. 5. (a) The plaintiff is the owner of five motor lorries which he uses in the course of his business as a carrier. (b) On 5th August 1953 the defendant commission pursuant to s. 15 of the *Traffic Act* 1925-1954, and regs. 37 and 40 made thereunder issued to the plaintiff a public vehicle licence known as a " cart licence " to remain in force until 30th June 1956 in respect of each of the five lorries owned by the plaintiff (each such lorry being a " cart " as defined by s. 3 of the *Traffic Act* 1925-1954). (c) Each " cart licence " issued to the plaintiff was pursuant to s. 15 (6) of the *Traffic Act* 1925-1954 issued only in respect of one traffic area, namely traffic area No. 3 prescribed by reg. 67 and appendix VI to the *Traffic Regulations* as including " the Municipalities (sic) of Launceston, St. Leonards, George Town, King Island, Beaconsfield, Lilydale, Longford and Westbury ". 6. (a) The plaintiff carries on the business of shipping agent and carrier in the course of which he receives from various merchants in the States of South Australia, Victoria, New South Wales and Queensland at the ports of Burnie, Devonport and Launceston in Tasmania fruit which has been sold by the said merchants to merchants in Hobart and is received by the plaintiff for the purpose of his clearing the same at the said ports and carrying it to the purchasers thereof at Hobart in Tasmania to wit, Henry & Co., A. H. Stanton, Wise & Stirling Pty. Ltd., Stokes & Hammond Pty. Ltd. and A. P. Lovell who together constitute the Wholesale Fruit Merchants Association of Tasmania. Each of the said Hobart merchants carries on business as a fruit vendor and imports from other Australian States each year substantial quantities of fruit. The plaintiff has contracted with the said Hobart merchants to carry all their inter-State fruit imports from Burnie, Devonport and Launceston to Hobart by means of his motor lorries above referred to. (b) The terms of

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sale of the said fruit to the Hobart merchants are f.o.b. the port of shipment (in South Australia, Victoria, New South Wales and Queensland) and payment after delivery on weekly or monthly statements rendered to the Hobart merchants. (c) The said fruit is shipped by the merchants in South Australia, Victoria, New South Wales and Queensland or by their agents to Beauty Point, Burnie or Devonport on the terms that freight is payable at these ports. The said fruit is consigned either to the Hobart merchants or to the plaintiff. Each bill of lading shows either a Hobart merchant or the plaintiff as consignee but all bills of lading are sent by the mainland merchants or their agents to the plaintiff to enable him to clear the fruit at the said ports and transport it to Hobart. (d) The plaintiff receives each bill of lading covering a consignment of the said fruit to Beauty Point (the port for Launceston), Burnie or Devonport and clears the fruit by payment of the shipping freight, wharfage and inspection charges and carries it to Hobart in one of his said lorries to the Hobart merchant who has purchased the fruit. For the purpose of carrying the fruit to Hobart he is required by the defendant commission as stated in par. 7 (a) hereof to apply for an " out-of-area permit " authorizing him to use one of his said lorries outside traffic area No. 3 for the purpose of carrying the fruit to Hobart and to pay the relevant charge for such permit claimed by the defendant commission as stated in par. 7 hereof. (e) The plaintiff renders a statement of account to the Hobart merchant to whom he has transported fruit purchased by such merchant as aforesaid. The statement of account covers the shipping freight, wharfage and inspection charges and " out-of-area permit fees " paid by the plaintiff and includes the plaintiff's own charge for his services as a carrier and shipping agent. 7. (a) The defendant commission has since 23rd December 1953, pursuant to s. 20A of the *Traffic Act* 1925-1954 and the said determination made thereunder required the plaintiff in respect of the carriage beyond area 3 of fruit imported from other States to its final destination within the State of Tasmania to apply for permits under s. 20 of the *Traffic Act* 1925-1954 and has upon the issue of such permits charged amounts calculated in accordance with the said determination but subject to a rebate of fifty per cent allowed by the defendant commission. When the freight consists of fruit and/or vegetables imported from other States, a rebate of fifty per cent in fees is granted. Should any of the plaintiff's vehicles be used together with trailer, registered number WRT 283 attached, and such trailer is loaded, then a further fee is required to be added to the fee accordingly in respect of the particular vehicle. 8. (a) The purpose

of the defendant commission in the imposition of the said charges in respect of " out-of-area permits " is to prevent the plaintiff by means of road transport from competing with railways operated by the commission in the carriage of the said fruit except upon payment of the said charges. (b) The general purpose of the imposition of the said charges is as stated in the defendant commission's annual report for the year ended 30th June 1952, an extract from which is as follows :—" Early in 1951/52 the commission gave consideration to the relationship between railway rates and out-of-area permit fees. The overall increase in railway rates from 1939/40 to the 30th June 1951, was approximately eighty-seven per cent. During the same period the increase in road transport rates was about fifty per cent. There was no increase in the maximum goods permit fee of 0.25d. per unit in that period. In other words, over the eleven year period, the relationship between the permit fee and railway freight rates was not maintained, with the result that the permit fee was not sufficient to prevent road transport directly competing with the railways for the transport of higher valued commodities over long distances. In 1939/40 the permit fees represented such a large proportion of the railway freight as to make competition over the longer distances impracticable. As railway rates increased, the relative cost of permit fees decreased. It should be remembered that road transport does not compete with the railways for low valued commodities, but only for goods carrying reasonably high rates. The Government of Tasmania has approved expenditure on railway regeneration since the war in excess of £4 million. The commission considered that it would be foolish to spend such a large sum only to let road transport take the cream of the traffic. Road competition with the railways over the large distances means :—(a) a deterioration in the railway financial position ; (b) a waste of manpower ; (c) extra traffic on the roads, increasing accident risk ; (d) increased cost of road maintenance. It was, therefore, decided to increase maximum goods permit fees by sixty per cent from 0.25d. to 0.40d. per unit of the product of the unladen weight of the vehicle in hundredweights and the length of the journey in miles. The effect of the increased permit charges, which came into operation on 1st October 1951, may be seen in the increase in revenue from goods permit fees from £32,292 in 1950/51 to £59,926 in 1951/52."

11. The questions of law for the opinion of the Court are :—(a) Whether the plaintiff's vehicles whilst carrying fruit in the circumstances stated herein are being operated in the course of and for the purposes of trade, commerce or intercourse among the States within

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the meaning of s. 92 of the Commonwealth Constitution. (b) Whether the provisions of the *Transport Act* 1938-1953 and the *Traffic Act* 1925-1954, the regulations made thereunder and the administrative determination made by the defendant commission thereunder hereinbefore mentioned so far as they affect the plaintiff in the circumstances herein stated whilst operating his said motor vehicles contravene s. 92 of the Commonwealth Constitution and are inapplicable to the plaintiff whilst so operating his vehicles.

J. D. Holmes Q.C. (with him *H. S. Baker*), for the plaintiff. Under s. 58 of the *Traffic Act* 1925-1954 (Tas.), as affected by s. 33 of the *Transport Act* 1938-1953 (Tas.), there is a complete prohibition of trade in Tasmania by motor vehicle. It is subject to a discretionary licensing system which may not and need not, in point of power, be relaxed at all. Such a system, apart from immaterial details, is similar to that set up by the *State Transport (Co-ordination) Act* 1931-1952 (N.S.W.) declared invalid in *Hughes & Vale Pty. Ltd.* v. *State of New South Wales [No. 1]* (1). In order to ascertain whether the freedom guaranteed by s. 92 is applicable, the whole transaction from beginning to end must be looked at. [He referred to *Reg.* v. *Wilkinson*; *Ex parte Brazell, Garlick & Coy* (2); *Fergusson* v. *Stevenson* (3).] These Acts prohibit the plaintiff from completing the final step in inter-State trade. The inter-State transaction is not complete until the goods have been delivered. The journey from the wharf to the purchaser is an essential step in the transaction. The journey of the plaintiff's motor vehicle is not an inter-State journey. It obtains the protection of s. 92 from its accessory character. The movement of the vehicle within the State is part of trade and commerce. [He referred to *Wragg* v. *State of New South Wales* (4).] The operation of s. 58 is direct upon the carrier. It is equally direct in its operation upon the consignor of the goods. [He referred to *The Commonwealth* v. *Bank of New South Wales* (5); *Roughley* v. *New South Wales*; *Ex parte Beavis* (6); *James* v. *The Commonwealth* (7).]

S. C. Burbury Q.C. (with him *J. H. Dobson*), for the State of Tasmania. The business of road transport is trade and commerce as an end in itself and its title to immunity under s. 92 must be

(1) (1955) A.C. 241; (1954) 93 C.L.R. 1.
(2) (1952) 85 C.L.R. 467, at pp. 480, 483.
(3) (1951) 84 C.L.R. 421, at p. 435.
(4) (1953) 88 C.L.R. 353, at pp. 387, 397.
(5) (1950) A.C.235, at p. 302; (1949) 79 C.L.R. 497, at p. 632.
(6) (1928) 42 C.L.R. 162, at pp. 184, 185.
(7) (1936) A.C. 578, at pp. 620-621, 633; 55 C.L.R. 1, at pp. 49, 50, 61.

derived directly from inter-State acts of road transport. [He referred to *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [*No.* 1] (1); *McCarter* v. *Brodie* (2); *Australian National Airways Pty. Ltd.* v. *The Commonwealth* (3); *O. Gilpin Ltd.* v. *Commissioner for Road Transport & Tramways* (*N.S.W.*) (4).] The immunity conferred by s. 92 attaches to the individual in relation to his acts of inter-State road transport and not to the goods he carries. [He referred to *James* v. *Cowan* (5); *Australian National Airways Pty. Ltd.* v. *The Commonwealth* (6); *Bank of New South Wales* v. *The Commonwealth* (7).] To bring a road transport business within the immunity conferred by s. 92 the inter-State element must be found in the movement of vehicles across a State border. The test propounded in *James* v. *The Commonwealth* (8) of free passage of goods across the border, if applied to a road transport business, involves free passage of vehicles across the border. [He referred to *Australian National Airways Pty. Ltd.* v. *The Commonwealth* (9); *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [*No.* 1] (10).] The plaintiff is seeking to bring within the immunity conferred by s. 92 a business activity which is not inter-State commerce but at its highest is only incidental to inter-State commerce. [He referred to *Wragg* v. *State of New South Wales* (11); *Wilcox Mofflin Ltd.* v. *State of New South Wales* (12); *Reg.* v. *Wilkinson*; *Ex parte Brazell, Garlick & Coy* (13); *R.* v. *Burgess*; *Ex parte Henry* (14); *Hospital Provident Fund Pty. Ltd.* v. *State of Victoria* (15).] *W. & A. McArthur Ltd.* v. *State of Queensland* (16) is no longer good law having regard to *James* v. *The Commonwealth* (17). The Federal commerce power in the United States is much wider than the conception of inter-State trade and commerce for the purpose of s. 92. In the following cases, where the facts were not unlike those existing here, it was held that intra-State acts of transport were not within the Federal commerce power. [He referred to *New York Ex Rel. Pennsylvania Railroad Co.* v. *Knight* (18); *United States* v. *Yellow Cab Co.* (19).]

(1) (1953) 87 C.L.R. 49, at pp. 68, 96, 97.
(2) (1950) 80 C.L.R. 432, at pp. 488-490.
(3) (1945) 71 C.L.R. 29, at pp. 71, 106, 107.
(4) (1935) 52 C.L.R. 189, at p. 204.
(5) (1930) 43 C.L.R. 386, at pp. 418, 419.
(6) (1945) 71 C.L.R., at p. 107.
(7) (1948) 76 C.L.R., at pp. 283, 284, 380.
(8) (1936) A.C. 578; 55 C.L.R. 1.
(9) (1945) 71 C.L.R., at pp. 56, 57, 90, 106.
(10) (1953) 87 C.L.R., at p. 98.
(11) (1953) 88 C.L.R. 353, at pp. 385, 386.
(12) (1952) 85 C.L.R. 488, at pp. 518, 519.
(13) (1952) 85 C.L.R. 467, at p. 480.
(14) (1936) 55 C.L.R. 608, at pp. 628, 629.
(15) (1953) 87 C.L.R. 1.
(16) (1920) 28 C.L.R. 530, at p. 549.
(17) (1936) A.C., at pp. 620, 621, 625, 628, 629; 55 C.L.R., at pp. 49, 50, 53, 54, 56, 57.
(18) (1904) 192 U.S. 21, at pp. 26, 28 [48 Law.Ed. 325, at pp. 327, 328.]
(19) (1947) 332 U.S. 218, at pp. 228-231 [91 Law. Ed. 2010, at pp. 2018-2021].

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Dr. *E. G. Coppel* Q.C. (with him *R. K. Fullagar*), for the Transport Commission. The plaintiff may be treated for the purposes of this action as a carrier who carries on business exclusively within the State of Tasmania. By reg. 42, dealing with conditions affecting licences the plaintiff is made akin to a common carrier within the area covered by the licence. The fee relates only to journeys from one area within Tasmania to another. The present problem is not solved by the conclusions reached in the *Transport Cases* because in every one of those cases there was a vehicle crossing a State border. A person who seeks to show that a statute which is valid in its application to intra-State trade does not apply to him or cannot validly apply to him, can only succeed insofar as he shows that he is engaged in some form of inter-State trade and that that inter-State trade is directly burdened, or restricted, or prohibited, by or under the provisions of the legislation. [He referred to *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [*No.* 1] (1).] Section 92 protects the trade and commerce of individuals, but only those individuals who conduct an inter-State trade which is prejudicially affected can claim its protection. [He referred to *McCarter* v. *Brodie* (2); *Wilcox Mofflin Ltd.* v. *State of New South Wales* (3); *Crothers* v. *Sheil* (4); *Andrews* v. *Howell* (5).] In *Fergusson* v. *Stevenson* (6), Stevenson was a direct party to an inter-State sale of goods. In *Reg.* v. *Wilkinson*; *Ex parte Brazell, Garlick & Coy* (7) the parties claiming the protection of s. 92 were each directly participating in inter-State trade. The plaintiff here is not engaged in inter-State trade.

H. A. Winneke Q.C., Solicitor-General for the State of Victoria (with him *R. Else-Mitchell*), for the States of Victoria, New South Wales, Queensland, South Australia and Western Australia, intervening by leave. The plaintiff is not carrying on operations which form part of inter-State trade and commerce. [He referred to *Roughley* v. *New South Wales*; *Ex parte Beavis* (8).] Any impact that this legislation has upon inter-State trade and commerce is not a direct or immediate impact within the meaning of s. 92. [He referred to *O. Gilpin Ltd.* v. *Commissioner for Road Transport & Tramways* (*N.S.W.*) (9); *Williams* v. *Metropolitan & Export Abattoirs Board* (10).] The plaintiff is attempting to extend the

(1) (1953) 87 C.L.R., at pp. 84, 97.
(2) (1950) 80 C.L.R., at p. 497.
(3) (1952) 85 C.L.R., at p. 532.
(4) (1933) 49 C.L.R. 399, at pp. 408, 409.
(5) (1941) 65 C.L.R. 255, at pp. 263, 264, 279.
(6) (1951) 84 C.L.R. 421.
(7) (1952) 85 C.L.R. 467.
(8) (1928) 42 C.L.R., at pp. 176-178.
(9) (1935) 52 C.L.R., at p. 209.
(10) (1953) 89 C.L.R. 66, at pp. 73-75.

immunity granted by s. 92 by adopting and using arguments which are only appropriate to a consideration of the extent of the legislative power conferred by s. 51 (i.) of the Constitution.

J. D. Holmes Q.C., in reply. On the facts it was an essential part of the transaction that the fruit should be taken to Hobart from the northern ports of Tasmania. That course of business had been going on since 1948. The plaintiff performed that essential step. In point of parties he was the only party who could bring this action because the merchants were not themselves carriers and the Act does not apply directly to them. The only person on whom it operates is the person engaged in transport.

Cur. adv. vult.

June 9.

The following written judgments were delivered :—

DIXON C.J., MCTIERNAN*, WILLIAMS, WEBB AND TAYLOR JJ. This is a special case stated by the parties pursuant to O. 35, r. 1, submitting certain questions for the opinion of the Court. The plaintiff in the action is a shipping agent and carrier whose place of business is in Launceston. He complains that the Transport Commission purporting to act under the combined effect of the *Transport Act* 1938-1953 and the *Traffic Act* 1925-1954 of Tasmania has placed upon his business a burden which, as he contends, amounts to a violation of s. 92 of the Constitution. The burden consists in the exaction of fees or charges in respect of five lorries in which he carries fruit to Hobart from the ship's side at Devonport, Burnie or Beauty Point.

Certain merchants carrying on business in Hobart buy fruit from sellers in South Australia, Victoria, New South Wales and Queensland. It would seem that the course of trade is for the sellers of the fruit to ship it from those States to one of the three ports or places of discharge mentioned, consigning it sometimes to the buyer by his name and sometimes to the plaintiff as consignee. The buyers of the fruit in Hobart employ the services of the plaintiff as their agent both in his capacity of shipping agent and carrier. In his capacity of shipping agent he receives the consignments of fruit and clears them by payment of the shipping freight, wharfage and inspection charges. The fruit is loaded in his lorries and in his capacity of carrier he carries it to the buyers in Hobart. Under certain provisions of the *Traffic Act* and *Transport Act*, in order to do this he must obtain a permit from the Transport Commission. The conditions of the permit require him to pay a charge which is calculated according to a formula depending upon the tareweight

* See *addendum* (1955) 93 C.L.R., at p. 183.

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of the vehicle and the mileage. The plaintiff maintains that he carries the fruit in the course of inter-State trade and that the levy in question cannot be exacted from him consistently with s. 92.

To explain the nature of the charge levied, some explanation is required of the legislation under which it is imposed. Under the *Traffic Act* the Governor-in-Council is authorized by regulations to prescribe traffic areas, routes and other local divisions of the State. A purpose of such a regulation is to define the limits within which what are called " public vehicles " may operate : s. 30 (1) xviii. The expression " public vehicle " means, among other things, a vehicle used for the conveyance of goods or merchandise or things for hire or for any consideration and it includes a " cart ". The word " cart " has a special definition which makes it mean a vehicle used for the conveyance of goods, merchandise or things for any consideration, with certain exceptions that are not material : s. 3 (1). The plaintiff's lorries are " carts " within this definition.

It appears that regulations have been made dividing Tasmania into traffic areas. Hobart is situated in area 1, Launceston and Beauty Point are situated in area 3, Devonport is situated in area 5 and Burnie is situated in area 6. A motor vehicle cannot be driven upon a public street without a licence : s. 14. The licence must be issued by the Transport Commission : s. 15 of the *Traffic Act* and s. 14 of the *Transport Act*. The licence may be limited to apply only in respect of a specified route, area, city, town or place and licences in respect of carts may be issued only in respect of one traffic area : s. 15 (5) and (6) of the *Traffic Act*. The licence of a public vehicle expires at the end of three years : s. 15 (11). The commission upon issuing a licence may impose such conditions and restrictions as the commission may think necessary or desirable : s. 17. The commission may grant and issue permits subject to any conditions that may be prescribed to the holder of a licence in respect of a public vehicle authorizing such holder to use the vehicle for any specified service outside the traffic area or route in which the vehicle is licensed : s. 20 (2) ii. The commission may impose in or indorse on a licence or a permit so granted or issued a condition that the holder of the licence or permit shall pay to the commission in addition to any sum fee or charge payable under the provisions of the Act such sum or sums as shall be ascertained as the commission determines : s. 20A (1). If the commission determines that the sum or sums to be paid by a person in respect of a public vehicle (being a goods-carrying vehicle) is or are to be calculated on the basis of the mileage travelled, the sum or sums to be paid shall comprise an amount calculated at such rates as the commission

may determine but not exceeding certain limits, the material part of which is a maximum rate of a half-penny per hundredweight of the weight of the vehicle unladen for each mile or part thereof: s. 20A (4). By reg. 47 (3) of the *Traffic Regulations* made under the *Traffic Act* the conditions on which a permit may be issued in respect of a public vehicle include a requirement that the vehicle shall be used only for such purposes and for the carriage of such goods as may be specified in the permit.

Exercising the powers derived from the provisions mentioned, the commission issued to the plaintiff in respect of each of his five lorries a cart licence in respect of traffic area No. 3, in which Launceston is situated where his business is carried on. His journeys to Hobart therefore required a permit called "an out-of-area permit". Upon the issue of the out-of-area permits amounts were calculated in accordance with a determination made by the commission. The determination prescribed 0.4d., multiplied by the hundredweights of his vehicles per mile, less, however, in the case of fruit or vegetables imported from other States, a rebate of fifty per cent. It is of this charge that the plaintiff complains. His case is that he is engaged in carrying fruit imported from other States upon portion of a continuous course of transit by sea and land from the seller to the buyer and that accordingly he is engaged in inter-State commerce upon which no such impost as that in question can be levied. It is, of course, clear enough that his journey to Hobart from Beauty Point, Burnie or Devonport, as the case may be, is an intra-State journey. If he obtains any protection under s. 92 from the charge it must be because his journey is accessory to the principal inter-State transaction consisting in the purchase, consignment and carriage of the fruit from the port of shipment in some other State to Hobart.

The contracts made by the purchasers in Hobart with their vendors in other States do not appear to impose upon the vendors any duty to deliver the fruit in Hobart. It would seem that the terms of the contracts require the vendors to ship the fruit to one or other of the three Tasmanian ports mentioned, consigning it either in the name of the purchaser as consignee or in the name of the plaintiff as the shipping agent of the purchaser. The "inter-State journey", therefore, for which the contract of sale provides terminates with the discharge of the fruit from the ship. It is open to the purchaser on the arrival of the fruit at the port to which it is consigned to deal with it then as he thinks fit. It is, however, part of the regular course of trade to bring the fruit from the ship's side to Hobart. As it is a customary course of trade it is perhaps not

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of vital importance that the actual contractual arrangements of the parties to the sale do not require the continuation of the journey to Hobart. Nevertheless, the whole of the duties or functions which the plaintiff performs are confined to Tasmania. It is conceded that on any given journey carrying the fruit from the ship's side to Hobart the plaintiff's lorries do not carry any goods having a different origin. But, if it matters, his lorries are open to other uses and are not necessarily devoted to the exclusive purpose of carrying fruit on the journeys to Hobart.

It is clear, therefore, that any inter-State character that may be possessed by the plaintiff's activities as a carrier are not obtained from the nature of his functions but from the course of his clients' trade. If he has any immunity from the imposition of the charges upon the out-of-area permit it is not by virtue of anything except his principal's course of business. The question is not whether the charges are burdensome to the principal's inter-State trade. The foundation of the plaintiff's complaint is that the charges constitute a burden upon an inter-State transaction which the plaintiff carries out. That inter-State transaction, however, must consist simply in the loading and discharge of the lorries and the journey. Regarded in this way his claim for the protection of s. 92 is seen to be untenable. He is not prevented from performing the service to the inter-State trader. There is no interference in the performance of a service which is essential to the completion of the inter-State journey. It is simply one of the requirements of the State of Tasmania which regulate the business of carrying in Tasmania. The fact that he is serving the ends of inter-State traders in particular journeys cannot suffice to protect him from one of the incidents of that business under State law.

The case stated submits two questions the first of which asks whether the plaintiff's vehicles whilst carrying fruit in the circumstances so stated are being operated in the course of and for the purposes of trade commerce or intercourse among the States within the meaning of s. 92. Since the vehicles are performing a service for a person who is engaged in an inter-State transaction it might produce misunderstanding if a simple negative were used to answer this question. It should be answered that the plaintiff is not so operating his vehicles as to obtain any immunity from the application of the *Traffic Act* and the *Transport Act*. The second question asks whether the provisions of the *Transport Act* and the *Traffic Act* and the regulations and the administrative determination of the commission so far as they affect the plaintiff whilst operating his vehicles contravene s. 92 and are inapplicable to the plaintiff

while so operating. This question should be answered—No. Otherwise the cause should be remitted for determination by a single justice in the original jurisdiction. The plaintiff should pay the costs of the special case.

FULLAGAR J. The facts of this case and the effect of the relevant Tasmanian legislation have already been stated. That legislation sets up an elaborate licensing system, and it is clear, I think, in the light of the decision in the *Hughes & Vale Case* [*No.* 1] (1) that its main provisions are invalidated by s. 92 in so far (if at all) as they purport to apply to persons or vehicles engaged in inter-State trade or commerce. The immunity given by s. 92, however, applies only to activities which themselves possess the character of inter-State trade or commerce. The activities for which the plaintiff claims immunity do not possess that character. They consist simply in the carriage of goods from one place in Tasmania to another place in Tasmania. It may be true that that carriage represents a service rendered in the course of the carrying out of an inter-State transaction which consists in the sale and delivery of fruit. But to that transaction the plaintiff is a complete stranger. He can claim protection only for what he himself does, and what he himself does begins and ends in Tasmania, and lies outside the scope of s. 92.

I agree that the questions asked by the case stated should be answered—(a) No : (b) No.

KITTO J. I agree that the special case does not disclose the existence of any inter-State trade, commerce or intercourse of the plaintiff. It does disclose, however, a course of inter-State intercourse on the part of the merchants who buy fruit in other States and there have it consigned on a journey the destination of which is Hobart. In engaging the plaintiff to transport the fruit from a port in northern Tasmania to Hobart, the merchants are adopting a means for completing their act of inter-State transportation. The legislation which is attacked in this action affects the merchants in two ways : first, the merchants are deprived of the plaintiff's services for the purposes of their inter-State transportation of fruit except upon payment of a charge ; and, secondly, the merchants themselves will be guilty of an offence if they procure the plaintiff to carry their fruit, in the course of their inter-State transportation, in contravention of the legislation.

Neither of these effects, however, is a detraction from the freedom which s. 92 preserves. The first is merely a practical consequence

(1) (1955) A.C. 241 ; (1954) 93 C.L.R. 1.

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to the merchants of what the relevant legislation does to the plaintiff. The second, which results from an operation of the general criminal law in conjunction with the relevant legislation, is a direct operation upon the merchants but is not a direct operation upon their inter-State intercourse. It leaves that free, operating as it does in reference only to an event which is not essential to its occurrence: *Hospital Provident Fund Pty. Ltd.* v. *State of Victoria* (1).

I agree that the order should be as stated by the Chief Justice.

Question (*a*) *submitted by par.* 11 *of the special case answered that the plaintiff is not so operating his vehicles as to obtain any immunity from the application of the Traffic Act* 1925-1953 *and the Transport Act* 1938-1954 *of Tasmania.*

Question (*b*) *submitted by par.* 11 *answered*: *No. Plaintiff to pay the costs of the special case. Otherwise cause remitted to be dealt with by a justice in the original jurisdiction.*

Solicitors for the plaintiff, *Crisp & Wright*, Hobart, by *Rylah & Rylah.*

Solicitor for the defendant, the State of Tasmania, *D. M. Chambers*, Crown Solicitor for the State of Tasmania.

Solicitor for the defendant, the Transport Commission, *J. H. Dobson*, Hobart, by *Moule, Hamilton & Derham.*

Solicitor for the State of Victoria intervening, *Thomas F. Mornane*, Crown Solicitor for the State of Victoria.

Solicitor for the State of New South Wales intervening, *F. P. McRae*, Crown Solicitor for the State of New South Wales, by *Thomas F. Mornane*, Crown Solicitor for the State of Victoria.

Solicitor for the State of Queensland intervening, *H. T. O'Driscoll*, Crown Solicitor for the State of Queensland, by *Thomas F. Mornane*, Crown Solicitor for the State of Victoria.

Solicitor for the State of South Australia intervening, *R. R. St.C. Chamberlain*, Crown Solicitor for the State of South Australia, by *Thomas F. Mornane*, Crown Solicitor for the State of Victoria.

Solicitor for the State of Western Australia intervening, *R. V. Nevile*, Crown Solicitor for the State of Western Australia, by *Thomas F. Mornane*, Crown Solicitor for the State of Victoria.

R. D. B.

(1) (1953) 87 C.L.R., at p. 17.