[HIGH COURT OF AUSTRALIA.]

NILSON . . . . . PLAINTIFF;

AND

THE STATE OF SOUTH AUSTRALIA AND OTHERS . . . . . DEFENDANTS.

H. C. OF A. 1955.

MELBOURNE, *May* 10, 11, 12; *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 Statute—Prohibition on driving of unregistered motor vehicles on State roads—Payment of heavy fee based on weight and horse-power of vehicle at time of application for registration—Registration for six months or twelve months—Application to vehicles used exclusively for purposes of inter-State trade—Exemption by regulation of vehicles owned by residents of and registered in other mainland States—Amending regulation removing exemption in case of vehicles weighing two and one-half tons or more unladen—Validity—The Constitution (63 & 64 *Vict. c.* 12), *s.* 92—*Road Traffic Act* 1934-1954 (*No.* 2183 *of* 1934—*No.* 48 *of* 1954) (*S.A.*), *ss.* 7 (1) (2) (3), 8 (1) (2), 9 (4)—*Acts Interpretation Act* 1915-1949 (*No.* 1215 *of* 1915—*No.* 58 *of* 1949) (*S.A.*), *s.* 22*a*—*Road Traffic Act Regulations* 1951 (*S.A.*), *reg.* 42 *as amended by Variation of Road Traffic Act Regulations* 1951 *made on* 23*rd December* 1954, *reg.* 2.

Section 7 of the *Road Traffic Act* 1934-1954 (S.A.) provides that no person shall drive a motor vehicle on any road unless the vehicle is registered under Pt. II of the Act. Section 8 provides that at the time of making application for registration a fee calculated in accordance with s. 9 shall be paid to the Registrar of Motor Vehicles who shall register the vehicle for a period of either six or twelve months at the option of the applicant. In the event of the former period being chosen s. 9 (6b) provides that the fee shall be fifty-two and one-half per cent of the fee payable for twelve months. Under s. 9 (1) the registration fee for a vehicle is calculated by a formula based on the weight of the vehicle and the horse-power of the engine. Section 9 (4) provides for a separate graduated table of fees applicable to vehicles constructed or adapted solely or mainly for the carriage of goods called commercial motor vehicles. Under s. 9 (6a) the fee payable in respect of a vehicle propelled by a compression ignition engine is double the amount otherwise payable. Up to 31st January 1955 reg. 42 of the *Road Traffic Act Regulations* 1951 had provided that a vehicle owned by a resident of one of the five mainland States if insured and registered under the laws of the State or Territory might be driven in South Australia without registration so long as certain conditions were

observed. By reg. 2 of regulations under the Act taking effect on 31st January 1955 it was provided that the exemptive provision should not apply to motor vehicles the unladen weight of which was two and one-half tons or more. The plaintiff represented himself and other owners of commercial motor vehicles registered in States other than South Australia but used on South Australian roads in the course and for the purposes of inter-State trade only.

Held that the fee payable on registration was a tax on inter-State trade etc. which was inconsistent with s. 92 of the Constitution. For that reason reg. 2 of the amending regulations was void in so far as it related to vehicles registered in other States as distinct from Territories and ss. 7 (1) (2) (3), 8 (1) (2) and 9 (4) could not apply to the vehicles of the plaintiff and those he represented while such vehicles were used exclusively in or for the purposes of inter-State trade etc. although otherwise, by reason of s. 22a of the *Acts Interpretation Act* 1915-1949 (S.A.) the sections were operative. In view of the fact that under the above sections registration could not be disentangled from payment of the fee it was unnecessary to consider whether registration alone would in the circumstances be inconsistent with s. 92.

Willard v. *Rawson* (1933) 48 C.L.R. 316 distinguished; *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [*No.* 2] (1955) 93 C.L.R. 127, applied.

Per Dixon C.J., *McTiernan*, *Webb* and *Kitto* JJ.: In so far as the decision in *Willard* v. *Rawson* (1933) 48 C.L.R. 316 is not to be accounted for by a conception of the operation of s. 92 no longer open it depends simply upon a characterization of the legislation there in question.

CASE STATED.

Arthur Edward Nilson, suing on behalf of himself and of various persons firms and companies named in a schedule to the writ, commenced an action on 15th March 1955 in the High Court of Australia against the State of South Australia, the Honourable Norman Lane Jude, James David Morrissy and the Honourable Thomas Playford.

On 7th April 1955 the parties concurred, pursuant to O. 35 of the *High Court Rules*, in stating the following case for the opinion of a Full Court :—

The facts are as follow :—

1. The plaintiff and each of the persons firms and companies whom he represents owns commercial motor vehicles registered in States other than the State of South Australia, and uses such vehicles in the business referred to in par. 2 hereof.

2. The plaintiff and each of the persons firms and companies carry on business as a carrier of goods by road, and uses the commercial motor vehicles of which each is the owner on journeys to or from Adelaide from or to as the case may be Melbourne, Sydney

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or Brisbane. On some of the said journeys goods are carried to or from Adelaide through the States of Victoria and New South Wales from or to Brisbane.

3. Neither the plaintiff nor any such persons firms and companies uses its said commercial motor vehicles for the carriage of goods on intra-State journeys in the State of South Australia.

4. The defendant the Honourable Norman Lane Jude is the Minister of Roads for the State of South Australia. As such Minister he is responsible for the administration of Pts. IV, V and VII of the *Road Traffic Act* 1934-1954 (S.A.) only.

5. The defendant the Honourable Thomas Playford is the Treasurer and Attorney-General for the said State. As Treasurer he is responsible for the administration of Pts. I, IIA, III and VI of the said Act only.

6. The defendant James David Morrissy is the Registrar for Motor Vehicles for the said State.

7. The roads usually used by inter-State transport are " main roads " within the meaning of the *Highways Act* 1926-1954 (S.A.) and these roads cannot carry present day traffic both intra- and inter-State without continuous supervision, maintenance, re-designing and re-construction.

8. Without such supervision, maintenance, re-designing and reconstruction the wear and tear to the roads which carry inter-State traffic would cause marked deterioration therein to an extent which would greatly raise the cost of maintenance and repair of vehicles using the same and ultimately render the business of carrying goods by road inter-State impracticable.

9. In the State of South Australia the carrying out of such work, and the providing of local authorities with funds for road works is the responsibility of, and is at all times effected by, the Highways and Local Government Department under the administration of the second defendant.

10. All amounts received from licence fees and registration fees under Pt. II of the *Road Traffic Act* 1934-1954 and from licence fees under Pt. III of the said Act, not less frequently than every three months are required to be, and are, paid into the Highways Fund in pursuance of s. 31 of the *Highways Act* 1926-1954.

11. The moneys standing to the credit of the said Highways Fund are required to be, and are, paid applied or laid out in and for the purposes set forth in s. 32 (1) of the said *Highways Act* and for no other purposes.

12. None of the moneys received as aforesaid in pursuance of Pts. II and III of the said *Road Traffic Act* and paid into the Highways Fund have for at least three years immediately prior to these

proceedings been allocated to the purposes set forth in s. 32 (1) (*f*) of the *Highways Act*.

13. For at least three years immediately prior to these proceedings the annual amount spent on main roads (including the main roads mentioned in par. 7 hereof) has greatly exceeded the annual amount received into the said Highways Fund from registration and licence fees as prescribed in par. 10 hereof.

14. The relief claimed by the statement of claim herein is as follows :—(1) A declaration that the *Road Traffic Act* 1934-1954 is beyond the powers of the Parliament of South Australia and is invalid. (2) A declaration that ss. 7, 8, 9, 18, 25, 29, 30, 31, 61, 63 and 70b of the said Act are beyond the powers of the said Parliament and are invalid, or alternatively, do not apply to the plaintiff or to the persons firms and companies whom he represents, when they are using their commercial motor vehicles in the course and for the purposes of inter-State trade or to their vehicles when so used. (3) A declaration that regs. 41, 32, 43 and 103 made under the said Act are beyond the powers of the said Parliament and are invalid, or alternatively, do not apply to the plaintiff or to the persons, firms and companies whom he represents when they are using their vehicles in the course and for the purposes of inter-State trade, or to their vehicles when so used.

The opinion of a Full Court is requested upon the following questions of law :—(a) Are any and if so, which of the allegations of fact in pars. 7 to 13 inclusive relevant to the determination of the validity of the legislation referred to in the statement of claim or any part of it ? (b) If yes to question (a), would the plaintiff be entitled to any, and if so which of the declarations sought in the statement of claim ? (c) If no to question (a), is the plaintiff entitled to any, and if so which of the declarations sought in the statement of claim ?

Pioneer Tourist Coaches Pty. Ltd. v. *State of South Australia* (1) was argued with the present case.

P. D. Phillips Q.C. (with him *C. I. Menhennitt*), for Pioneer Tourist Coaches Pty. Ltd. A State may not tax inter-State trade —or impose a tax for the privilege of being permitted to engage in inter-State trade, or for the privilege of performing essential acts in inter-State trade. Such a tax is not made valid because the funds arising from it are allocated to some particular purpose and, in particular, to the maintenance of roads. The *Road Traffic Act* 1934-1954 (S.A.), ss. 7 et seq. does impose a tax for the privilege of

(1) (1955) 93 C.L.R. 307.

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performing essential acts in inter-State trade and, therefore, is invalid. In *Willard* v. *Rawson* (1) the *Motor Car Act* 1928-1930 (Vict.) which was in its nature indistinguishable from the *Road Traffic Act* 1934-1954 (S.A.) was upheld by *Rich* J. (2) on the ground that the impact of the Act on inter-State trade was indirect. It is submitted that any tax or fee assessed on an essential element of inter-State trade is direct so far as the test of direct or indirect impact is now of use. [He referred to *O. Gilpin Ltd.* v. *Commissioner for Road Transport & Tramways (N.S.W.)* (3); *Hospital Provident Fund Pty. Ltd.* v. *State of Victoria* (4).] *Starke* J. in *Willard* v. *Rawson* (5) upheld the validity of the law on the ground that it was regulatory and disposed of the tax as an ancillary incident of a legitimate form of regulation. It is submitted that a tax, *stricto sensu* can never be regulatory of inter-State trade. *Starke* J. referred to the fact that the money was used for the purpose of building roads only as throwing light on the substance or character of the Act itself. That is no longer a permissible approach to the problems presented by s. 92. *Evatt* J. in *Willard* v. *Rawson* (6) upheld the law on the ground that it was not directed against entry into the State. That test is no longer a valid one. *McTiernan* J. in *Willard* v. *Rawson* (7) upheld the law on a wider view of the real object test than is now open having regard to *The Commonwealth* v. *Bank of New South Wales* (8). In *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [*No.* 1] (9) the Privy Council approved the rejection of the reasons which might have justified the *Transport Cases*. It is submitted that *Willard* v. *Rawson* (1) is no longer a binding authority. [He referred to *Willard* v. *Rawson* (10).] A State may not tax to provide for a service. It is impossible for the purpose of validity to draw a line between services which are immediately and directly related to movement on the road and services which are not so related. The tax may appear to be more of a burden when the services are more remote and less of a burden when the services are direct. The test is not that a law is valid if the burden is not very heavy and invalid if the burden is heavy. The test is whether it is a burden at all. For that purpose it is irrelevant to consider how closely related the services are to movement on the road. It is not contended that a State may not require a specific payment for a specific service.

(1) (1933) 48 C.L.R. 316.
(2) (1933) 48 C.L.R., at pp. 320 et seq.
(3) (1935) 52 C.L.R. 189, at p. 206.
(4) (1953) 87 C.L.R. 1, at p. 17.
(5) (1933) 48 C.L.R., at pp. 325 et seq.
(6) (1933) 48 C.L.R., at p. 335.
(7) (1933) 48 C.L.R., at pp. 338, 339.
(8) (1950) A.C. 235; (1949) 79 C.L.R. 497.
(9) (1955) A.C., at pp. 294-296; (1954) 93 C.L.R. 1, at pp. 21-23.
(10) (1933) 48 C.L.R., at pp. 330 et seq.

This is analagous to the case of a citizen paying a train fare for an inter-State journey. The essence of the toll turnpike road or bridge or ferry was that a distinctive charge was made for the service, which the individual could elect to take in addition to his normal common law right to proceed along the highway, which had to be maintained by a statutory authority. It was an addition to the basic right provided by the community. Under s. 9 (4) of the *Road Traffic Act* 1934-1954 (S.A.) the tax payable varies only with weight and horse-power of the vehicle. It is independent of mileage. To impose a charge or price on the Australian citizen who moves over the boundary into another State is really to discriminate against the inter-State movement itself. A State can justify the requirement of registration of unregistered vehicles as a legitimate regulation of traffic operations, either because it is an effective method of enforcing what is clearly regulation for the safety of vehicles or because the proper recording of ownership and identification is itself a regulatory step which the State is entitled to take. But if, because of the combined effect of a law of another State and the constitutional duty to give it full operation in South Australia, all the things the regulation could do for South Australia have already been done and are operating with full legal effect in South Australia, a requirement that the things shall be done again in South Australia cannot be justified as regulatory. It is superimposing a burden that does not achieve any result. What is at issue here is a tax and not a charge. [He referred to *Matthews* v. *Chicory Marketing Board (Vict.)* (1); *Parton* v. *Milk Board (Vict.)* (2); *Melbourne Harbour Trust Commissioners* v. *Colonial Sugar Refining Co. Ltd.* (3).] The reason for requiring the second registration is not genuinely to facilitate regulation, but to call into existence a taxable event. It is the nature rather than the degree of the imposition which attracts s. 92. The citizens' freedom is denied when legal duties are added which otherwise he would not have to obey. That is the essence of the problem. But some legal duties may be imposed upon him. It is not how onerous the legal duty is but what is the character of the legal duty. Can it be justified as a legal duty arising from a regulatory law ? If so, notwithstanding that it is a legal duty and therefore prima facie a denial of his freedom, it is justified by s. 92. If, on the other hand, it cannot be justified in that way, then it stands as a legal obligation of which previously he was free. It is to that extent a negation of his freedom. Registration is made the occasion for policing compulsory insurance.

(1) (1938) 60 C.L.R. 263, at pp. 271, 289 et seq., 304.

(2) (1949) 80 C.L.R. 229, at pp. 250, 251, 258, 259.

(3) (1926) V.L.R. 140, at pp. 148, 149.

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It is not necessary for the purpose of effecting compulsory insurance because it is disregarded for vehicles of less than two and one-half tons unladen weight. Moreover, in Victoria and New South Wales, registration will not be permitted unless the vehicle is insured and the insurance will not be satisfactory unless it contains a cover in, *inter alia*, the State of South Australia. Tasmania is in a slightly different category which is the explanation of why reg. 41 deals with Tasmania and reg. 42 with the other States.

J. D. Holmes Q.C. (with him *G. D. Needham*), for the plaintiff Nilson. Section 7 of the *Road Traffic Act* 1934-1954 (S.A.) is a direct prohibition of an essential step in inter-State trade and, unless relaxed so as to be reduced to a mere regulation, it cannot validly operate upon the plaintiff. Except that it uses the term "registration", and not the word "licence", it is precisely in point with s. 12 of the *State Transport (Co-ordination) Act* 1931-1952 (N.S.W.) which was held invalid in *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [*No.* 1] (1). Accepting *Willard* v. *Rawson* (2) as correct in point of interpretation of the Act considered, a different result would follow here in point of interpretation of this Act. The sums required to be paid under s. 9 are taxes, and the majority took the view that a tax, in these circumstances, was invalid. The fee is varied not in relation to the using by the vehicle of the road, but in relation to the type of vehicle used. The fee differs according to the fuel which is used. Different fees are charged according to the use to which the vehicle is put. [He referred to *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [*No.* 1] (3).] The Privy Council rejected the view that the responsibility of the States for railways and roads as facilities for the carriage of goods provided a ground for deciding the *Transport Cases* on a different principle from that which had been established in the other cases on s. 92. In *Willard* v. *Rawson* (2) the majority relied on lack of discrimination and the subject matter test. The former is, since *James* v. *The Commonwealth* (4), not of substance and the latter, since *The Commonwealth* v. *Bank of New South Wales* (5) and *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [*No.* 1] (1) is no longer a test. If revocation of the dedication of a highway as a public highway is permitted, an otherwise normal use of the highway is denied to traffic as and when it comes to the border. That is a clear breach of s. 92. If the State wished to lay

(1) (1955) A.C. 241; (1954) 93 C.L.R. 1.
(2) (1933) 48 C.L.R. 316.
(3) (1955) A.C., at pp. 301, 303, 304, 305; (1954) 93 C.L.R. 1, at pp. 27, 29, 30.
(4) (1936) A.C. 578; 55 C.L.R. 1.
(5) (1950) A.C. 235; 79 C.L.R. 497.

down turnpike roads it could but in order to charge for them it could not dedicate them to the public.

[DIXON C.J. referred to *Hammerton* v. *Dysart* (1), per Lord *Parker of Waddington* (2).].

[He referred to *Henry Butt & Co.* v. *Weston-Super-Mare Urban Council* (3); *Halsbury's Laws of England*, 2nd ed., vol. 16, at pp. 185, 186.] The common law position, as discussed in those authorities, is the position which in this country is protected by s. 92. We adopt generally the argument put on behalf of Pioneer Tourist Coaches Pty. Ltd.

R. R. St. C. Chamberlain Q.C. (with him *W. A. N. Wells*), for the defendants in both actions. We put the following propositions :— 1. The subject matter with which the *Road Traffic Act* 1934-1954 deals is not inter-State trade commerce or intercourse. It does not deal with commerce or the commercial use of vehicles. It is a police and revenue measure. 2. The Act does not possess the character of an interference with freedom of trade. 3. Section 92 guarantees freedom of inter-State trade, but not of everything that is precedent or ancillary to inter-State trade. The Act deals with matters which may be ancillary to inter-State trade but are not inter-State trade. 4. Any effect its operation may have on inter-State trade is consequential and indirect. Its effect on inter-State trade is not a necessary legal effect but an ulterior economic effect. 5. The liability which the Act creates to pay fees does not arise in virtue of a transaction of inter-State trade, but in virtue of the ownership of a motor vehicle which is driven on a road in South Australia. 6. The registration provisions are regulatory in that they do no more than provide for a contribution to the maintenance of traffic control and roads essential to trade. 7. The fact that the registration requirement arises by reason of a vehicle crossing the border is irrelevant. That merely means that it and the person driving it and those responsible for it being driven have come within the jurisdiction of the State law. *Willard* v. *Rawson* (4) governs the present cases. It was correctly decided and in any event should be followed on the principle of *stare decisis*. The exception from the exemption in South Australia depends entirely on *unladen weight* and in no way on the use to which the vehicle is put. The only distinction between the South Australian legislative scheme and that upheld in *Willard* v. *Rawson* (4) is thus in favour of the validity of the former. *Willard* v. *Rawson* (4) has the support of four of the five judges in the case itself, of

(1) (1916) 1 A.C. 57.
(2) (1916) 1 A.C., at pp. 78 et seq.
(3) (1922) 1 A.C. 340, *in arguendo*, at p. 343.
(4) (1933) 48 C.L.R. 316.

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Williams J. in *McCarter* v. *Brodie* (1), of *Fullagar* J. (2) in the same case and of *Kitto* J. in *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [*No.* 1] (3). It was reaffirmed by *Starke* J., dissenting, in *R.* v. *Vizzard*; *Ex parte Hill* (4) and distinguished by *Dixon* J. from the *Transport Cases* overruled in *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [*No.* 1] (5). It was not criticized in *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [*No.* 1] (6). The *Road Traffic Act* 1934-1954 (S.A.) can be upheld as a charge for a *facility* owned and maintained by the State. That is quite a different thing from saying that the fact that the State owns the roads provides a reason for saying that it can at discretion forbid their use to traffic operating in inter-State trade. Such a prohibition would be a clear breach of s. 92. If a State law purported to say that no goods in the course of inter-State trade might be carried over a bridge or punt on an inter-State highway that would be a breach of s. 92 as clearly as if it said the same thing in relation to its roads. The roads are the property of the Queen, they are controlled and maintained by the State whether the facility is a road or an aerodrome or a bridge or a wharf the question under s. 92 is whether the State law operates as a direct burden on inter-State trade or not. Their Lordships in *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [*No.* 1] (6) accede to and adopt the proposition that a State may make a charge for the use of facilities—and the same reasoning applies exactly to the use of the roads. As a matter of regulating trade a State may properly charge for the use of a bridge, because the erection and maintenance of it costs money. The same may be said of a road. There is no allegation in the present cases by the plaintiffs that the charge is unreasonable in fact. State legislation may interfere with something antecedent to and essential to inter-State trade, but not with the trade itself. "The fact thing or event" on which the Act operates is the driving of a motor vehicle, which although it may be a *sine qua non* to inter-State trade is not inter-State trade itself. [He referred to *Hospital Provident Fund Pty. Ltd.* v. *State of Victoria* (7); *Grannall* v. *Marrickville Margarine Ltd.* (8).] The legal effect of legislation cannot be determined by looking at the legislation of another State. The only possible way in which registration in another State could be relevant would be in a case where the s. 92 attack was based on an allegation that prima facie valid laws were being used so as to create a direct interference. If two States agreed to impose

(1) (1950) 80 C.L.R. 432, at p. 476.
(2) (1950) 80 C.L.R., at pp. 487, 499.
(3) (1953) 87 C.L.R. 49, at p. 102.
(4) (1933) 50 C.L.R. 30.
(5) (1953) 87 C.L.R. 49, at p. 69.
(6) (1955) A.C. 241; (1954) 93 C.L.R. 1.
(7) (1953) 87 C.L.R. 1, at pp. 17-18.
(8) (1955) 93 C.L.R. 55.

fees which between them were intended to have, and in fact had the effect of preventing inter-State trade, both laws might be invalid. On any other basis the consideration of registration in another State leads to absurdities. Residence is irrelevant. The Constitution takes no account of residence, and in any case an owner may reside in State A and ply his vehicles between States B and C. Registration elsewhere does not help the State of South Australia either to police its traffic or to maintain its roads—and it is entirely irrelevant: see Article "State Barriers to Interstate Trade", 53 *Harvard Law Review*, 1253, at pp. 1267-1270. If the charge is a burden (1) it is not imposed on any part of the acts or transactions covered by the legislation by virtue of a characteristic which forms part of trade, commerce and intercourse between the States; (2) it does not "refer" to any of "the distinguishing features which form the basis of the immunity". (3) If it is a burden on or hindering of a person being the owner of a car in South Australia, it hinders or prevents something at a stage prior to its being trade, commerce or intercourse. If the charge is a burden it is regulatory and not prohibitory of inter-State trade. It is not a tax but in the nature of a reasonable charge for facilities provided by the State and used by persons who drive cars therein. [He referred to *McCarter* v. *Brodie* (1); *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [*No.* 1] (2).] The object of the regulations is to facilitate inter-State traffic generally, including tourist traffic, and the object of the exemption of heavy vehicles is to secure some contribution from vehicles which do the greatest damage to the roads. The exception from the general exemption relates to vehicles entirely by weight and not, as in *Willard* v. *Rawson* (3), to their commercial use. The fact that Parliament has conferred power to make a total exemption or a partial exemption does not affect the validity of the Act. If no exemptions at all had been made the Act would have been valid for the reasons already elaborated, and would have applied fully to inter-State transport. That position cannot be weakened by making a partial exemption. Compulsory insurance is a commonly accepted protection to the public of the State. It does not touch inter-State trade as such or offer any direct impediment to it. Legislation dealing with it is regulatory and not prohibitory.

P. D. Phillips Q.C., in reply.

J. D. Holmes Q.C., in reply.

Cur. adv. vult.

(1) (1950) 80 C.L.R., at p. 476.
(2) (1953) 87 C.L.R., at pp. 68, 69.
(3) (1933) 48 C.L.R. 316.

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The following written judgments were delivered :—

DIXON C.J., McTIERNAN* AND WEBB JJ. This is a special case stated by the parties for the opinion of the Court. The suit in which it is stated was instituted in this Court against the State of South Australia, the Attorney-General, the Minister of Roads and the Registrar of Motor Vehicles of that State. The plaintiff sues on behalf of himself and a number of persons firms and companies whom he names all of whom carry on business as carriers of goods by road. The object of the suit is to obtain declarations of right relieving the plaintiff and the parties whom he represents of the application of certain provisions of the *Road Traffic Act* 1934-1954 (S.A.). The plaintiff says that the provisions cannot apply to them consistently with s. 92 of the Constitution. They own " commercial motor vehicles ", as the Act calls motor lorries and the like, and these vehicles are registered under the motor car legislation of other States. The plaintiff and each of the parties whom he represents carries on business as a carrier of goods by road by means of the commercial motor vehicles he owns. They carry goods between Adelaide and Melbourne, Sydney or Brisbane. None of the vehicles is used for the carriage of goods upon an intra-State journey. The *Road Traffic Act* provides that no person shall drive any motor vehicle on any road unless that vehicle has been registered under Pt. II of the Act : s. 7. An application to register a motor vehicle must be made to the defendant registrar by or on behalf of the owner and at the time of application a fee calculated as provided in the Act must be paid : s. 8 (1). The period of registration is, at the option of the applicant, either six or twelve months and if six months is chosen the fee is fifty-two and a one-half per cent of the fee for twelve months : ss. 8 (2), 9 (6b) and 16 (2). The registration fees are calculated by a formula based on the weight of the vehicle and the horse-power of the engine determined in a manner prescribed by the statute : s. 9 (1). As this " power-weight " increases the rate payable advances according to a graduated table. There is a separate graduated table for commercial motor vehicles : s. 9 (4). The result is to impose a very substantial tax which for large transport vehicles may amount to a heavy annual charge. The Act confers power on the Governor in Council to make regulations providing for the exemption of registration of motor vehicles owned by persons resident outside the State of South Australia and temporarily in the State : s. 61 (1) (xii). Under this power the *Road Traffic Act Regulations* 1951, as in force up to 31st January 1955, had provided that a motor vehicle owned by a resident of any of the five mainland States or of the Capital Territory, if

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

insured and registered under the laws of the State or Territory, might be driven in South Australia without registration so long as certain conditions were observed: reg. 42. The conditions to be observed are not material nor is the distinction between the mainland States and Tasmania. A separate provision was made as to Tasmania and the other Territories: reg. 41. Had the first-mentioned provision remained in force the plaintiff and those whom he represents would not have been obliged to register their vehicles in South Australia and pay the charges thereon. But by a regulation made on 23rd December 1954 taking effect on 31st January 1955 it was provided that the exemptive provision should not apply to a motor vehicle the unladen weight of which is two and a half tons or more. This, however, brought the commercial motor vehicles in question within the operation of ss. 7, 8 and 9, requiring registration and payment of the fee or charge. The plaintiff's case is that this amounts to a tax upon inter-State transportation which is inconsistent with the freedom of trade commerce and intercourse among the States guaranteed by s. 92.

It is difficult to see what other character it can bear. The roads cannot be used unless the vehicle is registered and the vehicle cannot be registered unless the imposition is paid. Before a commercial motor vehicle carrying goods from another State can enter South Australia the owner must register it and pay the large fee or tax. The registration will enable him to use South Australian roads for six months if he pays fifty-two and one-half per cent of the yearly fee. But he may not need to use them again or he may intend to use them only intermittently. The decision of the question is covered by the reasons given in *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [*No.* 2] (1) which should be read as part of this judgment.

There is no attempt made here to impose a charge for the use of the roads measured according to mileage or ton-mileage or in any other way reflecting the service or advantage which the owner of the motor vehicle actually obtained from South Australian roads or the burden he placed upon them or his contribution to their deterioration. Like the *Motor Vehicles* (*Taxation*) *Act* 1951 (N.S.W.) it simply imposes a tax burdening transportation. It is said for the State that it is inconsistent with the decision of the Court in *Willard* v. *Rawson* (2) to hold that, by reason of s. 92, the tax cannot apply to commercial motor vehicles entering South Australia from other States. That decision was elaborately examined during the argument not without reference to the views which *Dixon* C.J.

(1) (1955) 93 C.L.R. 127.

(2) (1933) 48 C.L.R. 316.

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expressed about it in the period that intervened before *R.* v. *Vizzard*; *Ex parte Hill* (1) and the subsequent *Transport Cases* were overruled in *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [*No.* 1] (2) (see *R.* v. *Vizzard*; *Ex parte Hill* (3); *O. Gilpin Ltd.* v. *Commissioner for Road Transport & Tramways* (*N.S.W.*) (4); *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [*No.* 1] (5)). All that *Dixon* C.J. finds it necessary to say now is that the decision of the majority of the Court, in so far as it is not to be accounted for by an adherence to a conception of the operation of s. 92 which is no longer open, appears to depend simply upon a characterization of the legislative provision there in question, a characterization in which he found himself at the time unable to agree: see *O. Gilpin Ltd.* v. *Commissioner for Road Transport & Tramways* (*N.S.W.*) (4) and *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [*No.* 1] (5). We certainly are not prepared to give the same characterization to the provision now in question.

Section 22a of the *Acts Interpretation Act* 1915-1949 (S.A.) contains a "severability provision" which prevents the foregoing conclusion from operating to invalidate ss. 7 (1), 8 and 9 (4). It means only that motor vehicles which are exclusively engaged in inter-State transportation need not pay the fee and register under ss. 8 and 9 (4). There is no need to consider whether the system of registration stripped of the necessity of paying the fee could operate upon such motor vehicles; for upon the terms of ss. 8 (1) and (2) and 9 (6b) registration cannot be disentangled from payment of the fee. They are provisions which in combination are altogether inapplicable to the vehicles in question of the plaintiff and those he represents. Had this particular severance been legitimate, the considerations governing the decision of the case of *Armstrong* v. *State of Victoria* (6) might be found to be relevant. Indeed the view which may be more properly taken of this case is that s. 92 simply operates to invalidate the regulation made on 23rd December 1954 so far as it purports to amend reg. 42. Until that regulation came into purported operation the law of South Australia relating to registration and payments of the fee did not so far as appears invade s. 92 in relation to commercial motor vehicles entering South Australia from another State. It was therefore the making of this amending regulation which was ultra vires.

In *Hughes & Vale Pty. Ltd.* v. *State of Queensland* (7) and in *Armstrong* v. *State of Victoria* (6) questions were raised as to the relevance of certain facts and circumstances. Analogous questions

(1) (1933) 50 C.L.R. 30.
(2) (1955) A.C. 241; (1954) 93 C.L.R. 1.
(3) (1933) 50 C.L.R. 30, at p. 70.
(4) (1935) 52 C.L.R. 189, at p. 210.
(5) (1953) 87 C.L.R. 49, at p. 69.
(6) (1955) 93 C.L.R. 264.
(7) (1955) 93 C.L.R. 247.

are raised by the special case in the present proceeding. As in those cases the facts relied upon are largely matters of public general knowledge or opinion and in any case incapable of giving to the provisions impugned here a valid operation they would or could not otherwise possess.

In answer to the questions in the special case it is enough to declare that so long as the commercial motor vehicles mentioned in the special case are used exclusively in or for the purposes of inter-State trade commerce or intercourse among the States the plaintiff and the persons firms and companies on whose behalf he sues or any of them and the drivers of such vehicles are not within the operation of ss. 7 (1), (2) and (3), 8 (1) and (2) and 9 (4) of the *Road Traffic Act* 1934-1954 (S.A.) and that cl. 2 of the regulations under that Act made on 23rd December 1954 is void except in so far as it relates to Territories.

WILLIAMS J. The decision of this Court in *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [*No.* 2] (1) and in particular the reasons given for holding that the provisions of the *Motor Vehicles Taxation Management Act* 1949-1951 (N.S.W.) and the *Motor Vehicles* (*Taxation*) *Act* 1951 (N.S.W.), which correspond to the provisions of the *Road Traffic Act* 1934-1954 (S.A.) under attack, offend against s. 92, and are inapplicable to motor vehicles engaged exclusively in inter-State trade, commerce and intercourse, must lead inevitably to the conclusion that the proposed order in the present case is right. I agree with this proposed order. In the course of the argument Mr. *Chamberlain* for the State of South Australia referred, amongst other favourable references to *Willard* v. *Rawson* (2), to the one I made in *McCarter* v. *Brodie* (3) where I said I thought it was clear that that case was rightly decided. But that remark was made whilst I still believed that I was entitled to think that the fact that a State provided a facility for inter-State trade, commerce and intercourse such as a road gave the State an interest in the road of a proprietary nature and authorized it to exercise very wide powers of control over the use of the road without impaling itself on s. 92. But now I am no longer entitled so to think, judicially at any rate, whatever my personal opinion may continue to be ; and with that disentitlement, my previous approval of *Willard* v. *Rawson* (2) must, I fear, melt into thin air " and like the baseless fabrick of this vision . . . dissolve ; and . . . leave not a rack behind ".

(1) (1955) 93 C.L.R. 127.
(2) (1933) 48 C.L.R. 316.
(3) (1950) 80 C.L.R. 432, at p. 476.

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FULLAGAR J. I agree with the order proposed. I think the case is covered by the reasons which I gave in *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [*No.* 2] (1) in relation to the *Motor Vehicles Taxation Management Act* 1949-1951 (N.S.W.) and the *Motor Vehicles* (*Taxation*) *Act* 1951 (N.S.W.).

KITTO J. I adhere to the opinion I have expressed as to charges in the case of *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [*No.* 2] (1), but otherwise I agree with the judgment which the Chief Justice has delivered.

TAYLOR J. In this matter questions similar to those raised in *Pioneer Tourist Coaches Pty. Ltd.* v. *State of South Australia* (2) were raised by special case in relation to the use of South Australian roads by vehicles engaged in the carriage of goods exclusively in the course of inter-State journeys.

For the reasons given in that case I agree that the questions raised by the special case in this matter should be answered as proposed.

In answer to the questions submitted by the special case declare that so long as the commercial motor vehicles mentioned in the special case are used exclusively in or for the purposes of inter-State trade commerce or intercourse among the States the plaintiff and the persons firms and companies on whose behalf he sues or any of them and the drivers of such vehicles are not within the operation of ss. 7 (1), (2) *and* (3), 8 (1) *and* (2) *and* 9 (4) *of the Road Traffic Act* 1934-1954 (*S.A.*) *and that cl.* 2 *of the regulations under that Act made on* 23*rd December* 1954 *is invalid except in so far as it relates to Territories.*

The costs of the special case to be paid by the defendants.

Solicitors for the plaintiff, *Higgins, de Greenlaw & Co.*, Sydney, by *Henderson & Ball.*

Solicitor for the defendants, *R. R. St. C. Chamberlain*, Crown Solicitor for the State of South Australia.

R. D. B.

(1) (1955) 93 C.L.R. 127.

(2) (1955) 93 C.L.R. 307.