H. C. OF A. 1955.

TROBRIDGE v. HARDY.

Taylor J.

the cells where he was detained quite unjustifiably and in circumstances of great humiliation for a period of two hours before being admitted to bail—a course which could have been adopted at the outset if he was to be charged at all. In these circumstances the question is whether it should be inferred that the respondent was actuated by malice. The learned trial judge felt that no particular improper motive had been proved and went on to say that " none in fact is really more likely than that the defendant's conduct was induced by sheer over-officiousness and boorishness on his part ". But when the facts are examined it is seen that the respondent arrested the appellant when upon the proved facts he did not even suspect that the appellant had committed an offence and that he abused his authority in a manner which can only be accounted for by concluding that he was not actuated merely by a desire to serve the ends of justice. He was possessed of authority which, quite obviously, he used for the purpose of inflicting quite needless suffering and humiliation on the appellant. It is unnecessary to speculate why the respondent so used his authority for, whatever the reason, a desire to exercise his authority for its only legitimate purpose must have been entirely absent. In these circumstances a finding that the respondent was actuated by malice is not only possible but inevitable.

In the circumstances the appeal should be allowed and judgment entered for the appellant for the amount assessed by the learned trial judge.

Appeal allowed with costs. Discharge order of Supreme Court of Western Australia. In lieu thereof judgment for plaintiff in action for £527 17*s.* 0*d. with costs.*

Solicitors for the appellant, *Hardwick, Gibson & Gibson.*
Solicitor for the respondent, *K. W. Hatfield.*

F. T. P. B.

[PRIVY COUNCIL.]

COMMISSIONER FOR MOTOR TRANSPORT . APPELLANT ;
DEFENDANT,

AND

ANTILL RANGER & COMPANY PROPRIETARY LIMITED . . . . . } RESPONDENT.
PLAINTIFF,

STATE OF NEW SOUTH WALES AND OTHERS . . . . . } APPELLANTS ;
DEFENDANTS,

AND

EDMUND T. LENNON PROPRIETARY LIMITED . . . . . } RESPONDENT.
PLAINTIFF,

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—Claim to recover moneys so collected—Enactment of statute extinguishing causes of action and barring remedies—Validity—The Constitution (63 & 64 *Vict. c.* 12), *s.* 92—*State Transport Co-ordination* (*Barring of Claims and Remedies*) *Act* 1954 (*N.S.W.*), *ss.* 3, 4, 5.

The provisions of the *State Transport Co-ordination* (*Barring of Claims and Remedies*) *Act* 1954 which purport to extinguish causes of action and to bar claims in respect of moneys paid or acts done pursuant to the licensing provisions of the *State Transport* (*Co-ordination*) *Act* 1931-1952 in relation to the operation of public motor vehicles in the course or for the purpose of inter-State trade before the commencement of the former Act are invalid in that they contravene s. 92 of the Constitution.

Decision of the High Court of Australia ((1955) 93 C.L.R. 83), affirmed.

PRIVY COUNCIL
1956.
June 18, 19 ;
July 10.

Viscount Simonds, Lord Oaksey, Lord Radcliffe, Lord Tucker and Lord Cohen.

APPEALS from the High Court of Australia.

These were consolidated appeals, by special leave, from the decision of the High Court (*Antill Ranger & Co. Pty. Ltd.* v. *Commissioner for Motor Transport* (1)).

(1) (1955) 93 C.L.R. 83.

PRIVY COUNCIL 1956.

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

July 10

B. J. McKenna Q.C., *R. Else-Mitchell* Q.C. and *M. A. L. Cripps*, for the appellants.

Sir *Garfield Barwick* Q.C., *J. D. Holmes* Q.C., *R. A. Gatehouse* and *A. J. Rogers*, for the respondents.

Their Lordships took time to consider the advice which they would tender to Her Majesty.

VISCOUNT SIMONDS delivered the judgment of their Lordships as follows :—

These consolidated appeals raise a question of novelty and importance in regard to the operation and effect of s. 92 of the Commonwealth of Australia Constitution, but having heard full argument on behalf of the appellants their Lordships have no doubt that the conclusions of the High Court are right and their reasons unimpeachable.

Section 92 provides that, on the imposition of uniform duties of customs, trade, commerce and intercourse among the States whether by means of internal carriage or ocean navigation shall be absolutely free.

In *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* (1) their Lordships decided that the provisions of the *State Transport (Co-ordination) Act* 1931-1952 (N.S.W.) (sometimes called " the principal Act ") which required application to be made for a licence and all provisions consequential thereon, in so far as they purported to apply to, and to the operators of, public motor vehicles operated in the course of and for the purposes of inter-State trade were invalid as contravening s. 92. The effect of that decision was that charges which under the Act had been imposed upon and collected from the respondents had been unlawfully imposed and collected. The respondents accordingly commenced proceedings for the recovery of the sums so paid by them and for the purpose of these appeals it is to be assumed for the reasons elaborated in the judgment of the High Court that they would have had a good cause of action but for the Act to which reference is next made. It is not material to the result but may be observed that the respondents in the first of the consolidated appeals commenced proceedings before that Act was passed.

The *State Transport Co-ordination (Barring of Claims and Remedies) Act* 1954 (which will be referred to as " the *Barring Act* "), upon which the appellants rely, enacted so far as material as follows : " 3. Any and every cause of action, claim and demand

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

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—(a) for the recovery of any sums collected, received or recovered 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 this Act—(i) which were or purported to have been collected, received or recovered pursuant to the provisions of sub-s. (4) or sub-s. (5) of s. 18 or s. 37 of the Principal Act ; or (ii) which were or purported to have been collected, received or recovered on, or pursuant to any condition imposed on, the issue of a license under the Principal Act or of a permit under the Principal Act or of any document purporting to be a license or a permit under the Principal Act, or (b) for or in respect of any act, matter or thing done or purporting to have been done before the commencement of this Act by any Minister or the Superintendent of Motor Transport or any authority, officer or person acting or purporting to act 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 and the same are hereby extinguished.

4. No action, suit, claim or demand whatsoever shall lie or be brought or made or allowed or continued by or on behalf of 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 for the recovery of any of the sums referred to in par. (a) of s. 3 of this Act or for or in respect of any act, matter or thing done or purporting to have been done as aforesaid.

5. The provisions of this Act shall apply to proceedings pending at the commencement of this Act as well as to proceedings brought after the commencement of this Act."

There can be no doubt that this Act, if it is valid, is a complete answer to the respondents' claims. It is invalid only if it is struck by s. 92 of the Constitution. This is the issue, and their Lordships concur in the unanimous opinion of the High Court that s. 92 precludes the appellants from relying on it.

It was conceded by the appellants that the validity of the relevant provisions of the *Barring Act* would have been no greater and no less if they had been contained in the Principal Act itself. Neither prospectively nor retrospectively (to use the words of *Fullagar* J. (1)) can a State law make lawful that which the Constitution says is

(1) (1955) 93 C.L.R. 83, at p. 108.

PRIVY COUNCIL 1956. COMMISSIONER FOR MOTOR TRANSPORT v. ANTILL RANGER & CO. PTY. LTD.

unlawful. A simple test thus appears to be afforded. For if a statute enacted that charges in respect of inter-State trade should be imposed and that, if they were held to be illegally imposed and collected, they should nevertheless be retained, such an enactment could not be challenged if the illegality of the charge rested only on the then existing State law. As their Lordships were often reminded in the course of the argument, the State is sovereign within its own territory. But it is otherwise if the illegality arises out of a provision of the Constitution itself. Then the question is whether the statutory immunity accorded to illegal acts is not as offensive to the Constitution as the illegal acts themselves, and, applied to the present circumstances, that question is whether, if the imposition of charges in respect of inter-State trade is invalid as an offence against s. 92, it is not equally an offence to deny the right to recover them after they have been unlawfully exacted.

It appears to their Lordships that to this question there can be only one answer. It cannot be too strongly emphasized or too often repeated that in the words of the High Court the immunity given by s. 92 to trade, commerce and intercourse cannot be transient or illusory. Yet how fugitive would that protection be if effect were given to the argument of the appellants in this case. A trader desiring to engage in inter-State trade and confronted with the provisions of an Act which appear to him to deprive him of the freedom guaranteed by the Constitution may well be content to conform to its requirements, to accept the necessity of applying for licences and to submit, though it may be under protest, to pecuniary exactions in order that he may be able to carry on his business. But he may do so in the firm conviction that he can test the legality of the statutory requirements in a court of law and recover sums of money unlawfully exacted. And let it be supposed that he is right and that those sums were unlawfully exacted and that he can avail himself of the constitutional freedom afforded by s. 92. What is his situation if he then finds himself by a later provision of the same Act or by a subsequent Act once more subject to the same exactions ? The burden of his trade remains just what it was : the freedom of his trade has been in the same degree impaired. In letter and in spirit s. 92 is in the same measure defeated.

The appellants called in aid the well-known passage from the judgment of *Dixon* J. (as he then was) in *James* v. *The Commonwealth* (1), which was echoed in the judgment of the Board in *The*

(1) (1938) 62 C.L.R. 339, at p. 361.