[HIGH COURT OF AUSTRALIA.]

BARTON . . . . . PLAINTIFF;

AND

COMMISSIONER FOR MOTOR TRANSPORT DEFENDANT.

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MELBOURNE, *Feb.* 12, 13;

SYDNEY, *July* 11.

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

Constitutional Law (Cth.)—Freedom of inter-State trade, commerce and intercourse—State statute—Validity—Moneys collected under State Transport (Co-ordination) Act 1931-1951 *in respect of operation of public motor vehicles in course of inter-State trade—Invalidity of statute authorising collection—Claim to recover moneys so paid—Defence that action barred by reason of section providing that actions against a commissioner appointed under Transport (Division of Functions) Act* 1932-1952 *or against a person for "anything done" etc. under that Act or under some other Act conferring a power etc. on any such commissioner shall be commenced within one year of accrual—Whether defendant such a commissioner—Whether Act under which money paid such an "other Act"—Whether action for money had and received is for "anything done"—Retrospective amendment to section in* 1956 *so as to include actions for money had and received—Purported effect to bar recovery of moneys claimed as from date of enactment—Validity—Receipt of money on behalf of Crown by officer of Crown—Liability of officer in action for money had and received—The Constitution* (63 & 64 *Vict. c.* 12), *s.* 92—*State Transport (Co-ordination) Act* 1931-1951 (*No.* 32 *of* 1931—*No.* 57 *of* 1951) (*N.S.W.*)—*Transport (Division of Functions) Act* 1932-1956 (*No.* 31 *of* 1932—*No.* 16 *of* 1956) (*N.S.W.*), *s.* 27.

Section 27 of the *Transport (Division of Functions) Act* 1932-1952 (N.S.W.) provides that:—"All actions against any of the Commissioners appointed under this Act or against any person for anything done or omitted or purporting to have been done or omitted under this Act or under any other Act (whether passed before or after the commencement of this Act) which confers or imposes any power, authority, duty or function on any such Commissioner, or in the exercise or performance of any power, authority, duty or function conferred or imposed by any such Act, shall be commenced within one year after the act or omission complained of was committed or made." By s. 5 of the *Motor Traffic and Transport (Further Amendment) Act* 1956 (N.S.W.), s. 27 was amended by adding the following paragraph:—"The foregoing provisions of this section shall extend, and shall be deemed always to have extended, to an action for the recovery of moneys which have in fact been paid to or collected by any such Commissioner or person where such payment was made or purported

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to be made or such collection was effected or purported to be effected under the authority or purported authority of any Act whether or not such Act was valid or effectual to impose or authorise the imposition upon any person of an obligation to pay such moneys or to empower such Commissioner or first-mentioned person to receive or collect the same."

In an action by an inter-State transport operator claiming as money had and received sums of money paid on dates between 4th October 1951 and 12th June 1954 for permits issued in purported pursuance of the *State Transport (Co-ordination) Act* 1931-1951 as amended or of licences issued under that Act the defendant was the Commissioner for Motor Transport so designated by s. 5 (1) (a) of the *State Transport (Co-ordination) Amendment Act* 1954. The defendant pleaded that the action was barred by s. 27 of the *Transport (Division of Functions) Act* 1932-1952 as amended in 1956.

Held: (1) by *Dixon* C.J., *McTiernan*, *Webb* and *Kitto* JJ., *Fullagar* and *Taylor* JJ. dissenting, that the action was not barred by s. 27 of the *Transport (Division of Functions) Act* 1932-1952 because the Commissioner for Motor Transport was neither a commissioner appointed under that Act, but under the *Transport (Division of Functions) Amendment Act* 1952, a separate Act, nor a person who had acted under that Act or under any other Act fulfilling the description in s. 27, because he had acted under the *State Transport (Co-ordination) Act* 1931 as amended;

(2) by *Dixon* C.J., *McTiernan*, *Webb* and *Kitto* JJ., *Fullagar* and *Taylor* JJ. expressing no opinion, that similarly the action was not barred by the amendment to s. 27 introduced by s. 5 of the Act of 1956;

(3) by *Dixon* C.J., *McTiernan* and *Kitto* JJ., *Webb* J. dissenting, *Fullagar* and *Taylor* JJ. expressing no opinion, that the paragraph introduced by s. 5 of the *Motor Traffic and Transport (Further Amendment) Act* 1956 was invalid in its application to causes of action existing more than twelve months before 13th September 1956 for the recovery of involuntary payments demanded and obtained under colour of statutory provisions invalid under s. 92 of the Constitution for the reasons given in *Antill Ranger & Co. Pty. Ltd.* v. *Commissioner for Motor Transport* (1955) 93 C.L.R. 83; (1956) 94 C.L.R. 177; (3) by *Kitto* J., the remaining members of the Court expressing no opinion, that in the absence of special facts, the defendant having received the moneys as an officer of the Crown, would not be liable in an action for money had and received unless the action was treated conventionally as one against the Crown and it appearing by the case stated that it had been so treated, the action was not barred by s. 27 as amended in 1956 because the Crown did not fall within the application of that section.

CAUSE removed into High Court under s. 40 of the *Judiciary Act* 1903-1955.

In an action commenced in the Supreme Court of New South Wales in which Gordon Page Barton was plaintiff and the Commissioner for Motor Transport was defendant, the parties pursuant

to s. 55 of the *Common Law Procedure Act* 1899 (N.S.W.), concurred in stating the following special case for the decision of the Supreme Court:—1. The plaintiff is and was at all material times engaged in the carriage of goods by road for reward, and resides at 153 Cathedral Street Sydney. 2. The defendant is a body corporate constituted by s. 6 of the *Transport (Division of Functions) Further Amendment Act* 1952. 3. At all material times the plaintiff was the owner of and operated a public motor vehicle in his trade of carrying goods by road for reward from places in New South Wales to places in Queensland, Victoria, South Australia, Western Australia and from places in Queensland, Victoria, South Australia, Western Australia to places in New South Wales. 4. On or about the dates mentioned in the schedule hereto the plaintiff paid to the predecessors of the defendant the respective sums of money therein set out, amounting to the sum of £1,543 2s. 5d. for permits to operate the said public motor vehicle within the State of New South Wales exclusively, in the course and for the purposes of inter-State trade, as set out above. Such permits were issued by the predecessors of the defendant in purported pursuance of the *State Transport (Co-ordination) Act* 1931, as amended, or of licences issued to the plaintiff under that Act. 5. On 26th September 1956, the plaintiff issued out of the Supreme Court of New South Wales a writ of summons claiming against the defendant the sum above mentioned. The questions of law for the opinion of the Court are:—(1) Whether by reason of s. 92 of the Constitution, s. 27 of the *Transport (Division of Functions) Act* 1932-1956 is—(a) invalid, or (b) inapplicable to the said action of the plaintiff. (2) If question (1) (a) or (b) is answered in the affirmative, whether by reason of s. 92 of the Constitution, s. 27 of the *Transport (Division of Functions) Act* 1932-1952 is (a) invalid, or (b) inapplicable to the said action of the plaintiff. (3) Whether, if such moneys are otherwise recoverable the plaintiff is barred from the recovery thereof—(a) by virtue of s. 27 of the *Transport (Division of Functions) Act* 1932-1956, or (b) if (a) is answered in the negative by virtue of s. 27 of the *Transport (Division of Functions) Act* 1932-1952.

On 13th December 1956 the High Court ordered pursuant to s. 40 of the *Judiciary Act* 1903-1955 that the special case be removed into the High Court.

The case was argued together with the cases of *Shepherd* v. *State of New South Wales* (1) and *Edmund T. Lennon Pty. Ltd.* v. *Commissioner for Road Transport* (2).

(1) (1957) 97 C.L.R. 673.

(2) (1957) 97 C.L.R. 667.

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J. D. Holmes Q.C. (with him *G. D. Needham*), for the plaintiff Barton. Section 27 of the *Transport (Division of Functions) Act* 1932 did not cover the present action where the collection of the money was not under a power conferred or imposed by the statute, which was invalid. The section, it is submitted referred only to statutes which validly conferred or imposed powers. The amendment made to s. 27 by Act No. 16 of 1956, s. 5, would in its terms cover this action. It is submitted, however, that s. 5 is invalid so far as it extends to rights of action which arose under the *State Transport (Co-ordination) Act* in respect of the moneys sued for because at the date of enactment of the section the situation which then existed was that money was due and could be recovered against the commissioner for six years from the accrual of the right of action. The money was due in a common law action as a consequence of s. 92 of the Constitution. All moneys involved in these actions accrued due before 17th November 1954, the date of the decision of the Privy Council in *Hughes & Vale Pty. Ltd.* v. *State of New South Wales [No. 1]* (1). Consequently the effect of s. 5, whatever its form, is to bar the remedy and the section is invalid on the principles enunciated in *Antill Ranger & Co. Pty. Ltd.* v. *Commissioner for Motor Transport* (2). The amending Act is direct in its operation on these claims because it operates to prevent actions from being brought. The generality of the section is no different from the generality of a section which forbids all trade, intra-State or inter-State. It may be that a general law such as the *Statute of Limitations* which allows six years for the making of claims would not constitute a burden on inter-State trade. Whether a shorter period would or would not is a question of fact. It is submitted that this Court in the *Antill Ranger Case* (3) was referring to a prospective limitation of time. The action for money had and received necessarily involves the question whether the exaction was wrongful by reason of s. 92 of the Constitution and attracts federal jurisdiction. [He referred to *Antill Ranger & Co. Pty. Ltd.* v. *Commissioner for Motor Transport* (4).] The accrued right to pursue such a claim is a federal right which cannot be taken away by a State Act. Section 79 of the *Judiciary Act* in making provision for the application of State laws is to be interpreted as meaning only State laws which are otherwise valid. The effect of s. 41 of the *Judiciary Act* is that in the case of federal causes of action the High Court is to exercise its jurisdiction unaffected by limitations contained in State statutes.

(1) (1954) 93 C.L.R. 1.
(2) (1955) 93 C.L.R. 83; (1956) 94 C.L.R. 177.
(3) (1955) 93 C.L.R. 83, at pp. 99 et seq.
(4) (1955) 93 C.L.R. 83, at p. 103.

Dr. *E. G. Coppel* Q.C. (with him *P. H. N. Opas*), for the plaintiff Shepherd. There is a clear distinction between the purported exercise of a power validly conferred and the exercise of a power which never was conferred because the statute containing it was invalid. If the distinction is a sound one, authorities on the *Public Authorities Protection Act* 1893 (Imp.) afford no assistance here. If the present action is for something done under the *State Transport (Co-ordination) Act* that was not an Act which conferred any power or imposed any duty on a commissioner appointed under the *Transport (Division of Functions) Act*. All the payments made by the plaintiff were to the Superintendent of Motor Transport who is not a commissioner appointed under the *Transport (Division of Functions) Act*. This is not an action against a "person". That word is inappropriate to describe the State of New South Wales. Section 5 of Act No. 16 of 1956 does not enlarge the scope of s. 27 of the *Transport (Division of Functions) Act* 1932-1952 but does enlarge the causes of action to which it applied.

Sir *Garfield Barwick* Q.C. (with him *G. D. Needham*), for the plaintiff Edmund T. Lennon Pty. Ltd. We adopt the arguments which have been put. If s. 27 of the *Transport (Division of Functions) Act* 1932-1952 as amended by s. 5 of Act No. 16 of 1956 is read as providing that no action shall be commenced except within the given time and the action is one involving federal jurisdiction the section is invalid in the absence of a severability clause. A claim for money in circumstances such as the present is a matter within the Constitution and the right to adjudicate upon it is derived from the Constitution. A State statute cannot forbid a State court from exercising its federal jurisdiction or prevent a State court from entertaining an action involving such jurisdiction not brought within the specified time. The claim is a matter. [He referred to *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Barrett* (1).] It is part of the plaintiff's case in the action that s. 92 of the Constitution invalidated the statute in question and that thereupon an implied obligation to repay arose. Section 79 of the *Judiciary Act* deals with the actual exercise of the jurisdiction and not with laws which attempt to intercept the jurisdiction.

R. Else-Mitchell Q.C. (with him *D. S. Hicks*), for the defendant in each case. Section 27 of the *Transport (Division of Functions) Act* 1932-1952 did not present any of the vices of the *State Transport Co-ordination (Barring of Claims and Remedies) Act* 1954. The

(1) (1945) 70 C.L.R. 141, at pp. 150, 151.

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latter Act was directed specifically to causes of action possessed by inter-State transport operators. The American cases dealing with the question of an unreasonably short limitation depend on the due process clause. [He referred to *Wheeler* v. *Jackson* (1).] Section 92 of the Constitution does not have the effect of the due process clause. [He referred to *Commissioner for Motor Transport* v. *Antill Ranger & Co. Pty. Ltd.* (2).] The principle of limitation of actions against public authorities has long been accepted. Section 27 in its original form was adequate to cover a cause of action for money had and received arising from extortion in circumstances such as exist here. Section 27 extends to the authorities in question here, however named at the time at which each cause of action arose in respect of the extortion of charges purporting to have been made under the *State Transport (Co-ordination) Act*. There is no distinction between the purported exercise of a power validly conferred and the exercise of a power which was never conferred: see the cases on the *Public Authorities Protection Act* 1893, and *Waterhouse* v. *Keen* (3); *Midland Railway Co.* v. *Withington Local Board* (4); *Cree* v. *St. Pancras Vestry* (5); *Brocklebank Ltd.* v. *The King* (6); *R. & W. Paul Ltd.* v. *Wheat Commission* (7); *Bradford Corporation* v. *Myers* (8); *Griffiths* v. *Smith* (9). Section 27 as enacted in 1940 refers to actions against any of the commissioners "or against any person for anything done or omitted or purporting to have been done or omitted under this Act or under any other Act . . . which confers or imposes any power, authority, duty or function on any such Commissioner". The question then is whether the *State Transport (Co-ordination) Act* could be properly described in 1940 as an Act which conferred or imposed any power authority duty or function on the Commissioner for Road Transport and Tramways. The *State Transport (Co-ordination) Act* in 1940 was such an Act. Alternatively "Act" is to be read as including the plural and the exercise of power may take place under two Acts one conferring the power and the other vesting the power in the individual. [He referred to the *Transport (Division of Functions) Amendment Act* 1952, ss. 3 (3), 11, 17; the *Transport (Division of Functions) Further Amendment Act* 1952, ss. 3, 6 (2); the *State Transport (Co-ordination) Amendment Act* 1954, s. 5.] Under the *Interpretation Act of* 1897, s. 21, " person " is defined to include a " body politic ". [He referred to

(1) (1890) 137 U.S. 245 [24 Law. Ed. 659].
(2) (1956) 94 C.L.R. 177, at p. 181.
(3) (1825) 4 B. & C. 200 [107 E.R. 1033].
(4) (1883) 11 Q.B.D. 788.
(5) (1899) 1 Q.B. 693.
(6) (1925) 1 K.B. 52.
(7) (1937) A.C. 139.
(8) (1916) 1 A.C. 242.
(9) (1941) A.C. 170.

The Commonwealth v. *State of New South Wales* (1).] Section 5 of Act No. 16 of 1956 is valid. Section 92 of the Constitution does not purport to preserve causes of action indefinitely. In so far as the *Judiciary Act* invests State courts with federal jurisdiction it does so in the terms of ss. 79 and 80 of the Act. [He referred to *Cohen* v. *Cohen* (2); *Musgrave* v. *The Commonwealth* (3); *Huddart Parker Ltd.* v. *The Ship Mill Hill* (4).]

J. D. Holmes Q.C. in reply. [He referred to *Hazelton* v. *Potter* (5).]

Dr. *E. G. Coppel* Q.C., in reply.

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

Cur. adv. vult.

July 11.

The following written judgments were delivered:—

DIXON C.J. This special case was removed from the Supreme Court into this Court under s. 40 of the *Judiciary Act* 1903-1955. It was stated by the parties to an action. The purpose was to obtain the opinion of the Court upon certain questions concerning the operation of s. 27 of the *Transport* (*Division of Functions*) *Acts* 1932-1956, particularly having regard to s. 92 of the Constitution of the Commonwealth. Great economy in the statement of the facts has been practised but at least we know that the action was commenced on 26th September 1956 claiming sums of money paid on specified dates "to the predecessors of the defendant" for permits to operate a public motor vehicle "within the State of New South Wales exclusively" in the course and for the purpose of inter-State trade. The inter-State trade consisted in carrying goods by the motor vehicle from places in New South Wales to places in other States. The permits are stated to have been issued by the predecessors of the defendant in purported pursuance of the *State Transport* (*Co-ordination*) *Act* 1931, as amended, or of licences issued to the plaintiff under that Act. Although the case does not say so, it is safe to assume that the permits were of the description discussed in *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* (6). Of the moneys claimed, seventeen amounts were paid for permits on various dates between 4th October 1951 and 10th May 1952, both inclusive, and in the same way fourteen between 16th June 1952 and 15th October 1952 and nine between 26th January 1953 and

(1) (1923) 32 C.L.R. 200, at pp. 215, 216, 221.
(2) (1929) 42 C.L.R. 91, at pp. 99, 100.
(3) (1937) 57 C.L.R. 514, at pp. 531, 532, 543, 547, 551.
(4) (1950) 81 C.L.R. 502.
(5) (1907) 5 C.L.R. 445, at pp. 460, 465, 478.
(6) (1953) 87 C.L.R. 49, at pp. 64, 65.

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12th June 1954. It is or may be necessary to distinguish between these three periods because of the commencing dates of two statutes that affect the matter, as will afterwards appear. The first part of s. 27 of the *Transport* (*Division of Functions*) *Act* 1932, as amended, was placed in that Act by s. 2 (1) (b) of the *Transport* (*Division of Functions*) *Amendment Act* 1940 (No. 46 of 1940). It is as follows :— "All actions against any of the Commissioners appointed under this Act or against any person for anything done or omitted or purporting to have been done or omitted under this Act or under any other Act (whether passed before or after the commencement of this Act) which confers or imposes any power, authority, duty or function on any such Commissioner, or in the exercise or performance of any power, authority, duty or function conferred or imposed by any such Act, shall be commenced within one year after the act or omission complained of was committed or made."

After it was decided that ss. 3 and 4 of the *State Transport Co-ordination* (*Barring of Claims and Remedies*) *Act* 1954 (No. 45 of 1954) were invalid in *Antill Ranger & Co. Pty. Ltd.* v. *Commissioner for Motor Transport* (1), the *Motor Traffic and Transport* (*Further Amendment*) *Act* 1956 (No. 16 of 1956) was passed. Section 5 of that Act is as follows:—"The Transport (Division of Functions) Act 1932 as amended by subsequent Acts, is amended by inserting at the end of section twenty-seven the following new paragraph:— The foregoing provisions of this section shall extend, and shall be deemed always to have extended, to an action for the recovery of moneys which have in fact been paid to or collected by any such Commissioner or person where such payment was made or purported to be made or such collection was effected or purported to be effected under the authority or purported authority of any Act whether or not such Act was valid or effectual to impose or authorise the imposition upon any person of an obligation to pay such moneys or to empower such Commissioner or first-mentioned person to receive or collect the same."

It is convenient to deal at once with the position which this last clause occupies in the case. The assumption upon which it is framed will appear from inspection of its provisions or terms. It assumes that there is an action for the recovery of moneys from a commissioner or person who is within the description of the earlier provision. It assumes that the moneys were paid to him or collected by him, to state it briefly, as under some Act, and it assumes the possibility of that Act being invalid, at all events *pro tanto*. That, in its relevant application, means invalid under s. 92 of the Constitution.

(1) (1955) 93 C.L.R. 83 ; (1956) 94 C.L.R. 177.

It impliedly assumes too that the money would be recoverable in spite of the earlier part of s. 27. On these assumptions it bars the remedy after twelve months have elapsed from the time when the money was paid or collected. For that is the effect of the enlarged application it requires of the earlier part of s. 27. It does that whether or not the period has already elapsed before the date of the enactment of the amendment, which was 13th September 1956, and it does so whether or not an action has already been commenced for the recovery of the money.

Now, in its application to causes of action actually existing more than twelve months before 13th September 1956 for the recovery of involuntary payments demanded and obtained under colour of statutory provisions invalid *pro tanto* under s. 92 of the Constitution, that spells an attempt to bar such claims retrospectively, an attempt which is distinguishable only in form from that made by s. 3 of the *State Transport Co-ordination (Barring of Claims and Remedies) Act* 1954, or for that matter by s. 4 of that Act. The substance is the same. It attempts to bar absolutely the legal remedy to recover money already exacted in violation of the freedom assured by s. 92. It follows that in relation to a case like the present the second part of s. 27 introduced by s. 5 of the *Motor Traffic and Transport (Further Amendment) Act* 1956 (No. 16 of 1956) can have no operation, for the reasons given in *Antill Ranger & Co. Pty. Ltd.* v. *Commissioner for Motor Transport* (1). But the earlier part of s. 27 has been in force since 1940 and such operation as it would have upon the causes of action set up in the present case would be entirely prospective. No doubt it allows a very short time for asserting the cause of action by writ. That time is indeed shortened practically by s. 28, inserted at the same time as the earlier part of s. 27. For s. 28 requires one month's notice of action. It does not follow, however, that the earlier part of s. 27 is inconsistent with s. 92 of the Constitution. But before any question of the constitutional validity of its purported operation upon a case like this arises, it must appear that the case is one falling within its terms. Various reasons are given on behalf of the plaintiff for denying that the case is within its true meaning and operation. It is said, for example, that here we are dealing with moneys collected in pursuance of the express terms of a statute, viz. the *State Transport (Co-ordination) Acts*, that the Constitution denied to the express terms any valid operation upon the transaction in the course of which the moneys were exacted and that the officers, who must be supposed to have insisted on their payment, were simply acting on the basis that the Constitution

(1) (1955) 93 C.L.R. 83; (1956) 94 C.L.R. 177.

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allowed what in fact was an invasion of inter-State trade disallowed by the Constitution. Such a thing, it is said, is outside a protective measure of State law in the terms of s. 27. It is outside it both as a matter of actual meaning and of what might be briefly called the constitutional presumption which should be reflected in its interpretation. But there is a question antecedent to this argument. Can the language of the provision fit the case? The plaintiff says that on examination it will be seen that it cannot. If s. 27 as enacted by s. 2 (1) (b) of the *Transport* (*Division of Functions*) *Amendment Act* 1940 (No. 46 of 1940) is analysed it will be found that before an action falls within it a number of conditions must be satisfied. First it must be an action against a commissioner appointed under "this Act" or "a person". In each case the action must fit into one or more of certain alternative categories. Each of these categories relates to the character of a thing done or omitted or purporting to be done or omitted, "for" which the action is brought. These are the alternative categories. The thing must have been done or omitted, or it must purport to be done or omitted, (a) "under this Act", which means the *Transport* (*Division of Functions*) *Act* 1932, presumably as amended from time to time: or (b) under some other Act which confers or imposes any power, authority, duty or function on any "such" commissioner, i.e. a commissioner appointed under "this Act", viz. the *Transport* (*Division of Functions*) *Act* 1932, as amended from time to time: or (c) in the exercise or performance of a power, authority, duty or function conferred or imposed by "any such Act", i.e. an Act which confers or imposes any power, authority, duty or function on "any such Commissioner", viz. a commissioner appointed under the *Transport* (*Division of Functions*) *Act* 1932, as amended.

Now, for reasons which will appear from the account which follows of the legislation, it is clear enough—(i) that the defendant is not a commissioner "appointed under this Act": it is only as a "person" that the defendant can qualify, if at all, for the protection of the provision; (ii) that the Act under which the payment and collection of the money purported to take place was not the *Transport* (*Division of Functions*) *Act* 1932 as amended; and (iii) that the provisions setting out the powers, authorities, duties or functions in purported pursuance of which the money was collected is the *State Transport* (*Co-ordination*) *Act* 1931 as amended and no statutory provisions that piece of legislation contains operate of their own force to confer or impose any power, authority, duty or function upon any commissioner appointed under the *Transport* (*Division of Functions*) *Act* 1932 as amended. In fact the defendant, a

corporation, owes his corporate existence, not to the *Transport (Division of Functions) Act* 1932 as amended, but to a new *Transport (Division of Functions) Act*, namely the *Transport (Division of Functions) Amendment Act* 1952 (No. 15 of 1952) as amended by the *Transport (Division of Functions) Further Amendment Act* 1952 (No. 24 of 1952). I shall give reasons for the view that the earlier part of s. 27 does not, according to its terms, apply to this case. But as a first step it is necessary to show who is the defendant and on what legislation his liabilities and his powers, privileges and immunities rest. This can best be done by tracing his title (if that metaphor may be employed) back through the statutory forest out of which the question grows.

The defendant is the Commissioner for Motor Transport so designated by s. 5 (1) (a) of the *State Transport (Co-ordination) Amendment Act* 1954 (No. 48 of 1954). That section appears to have commenced on the day the Act was assented to, viz. 16th December 1954. The defendant is a body corporate reconstituted and renamed by s. 6 of the *Transport (Division of Functions) Further Amendment Act* 1952 (No. 24 of 1952) which was assented to on 13th October 1952 and commenced on 27th October 1952. By the last-mentioned Act the body corporate was renamed "The Superintendent of Motor Transport", a name the body corporate bore from 27th October 1952 to 16th December 1954. The continuity of the body corporate was not to be affected by the reconstitution and renaming that occurred on 27th October 1952 nor by the analogous process of 16th December 1954 (see Act No. 24 of 1952, s. 6 (3) and No. 48 of 1954, s. 5 (3) (c)). Before the corporation sole was renamed the Superintendent of Motor Transport the body had borne the name of Director of Transport and Highways. That name had been given to the corporation when it was brought into existence by the *Transport (Division of Functions) Amendment Act* 1952 (No. 15 of 1952) which was assented to on 17th April 1952 and commenced on 1st June 1952. Section 2 (1) of No. 15 of 1952 provided that the Department of Road Transport and Tramways should be divided into two departments, viz. the Department of Transport and Highways, which should be administered by the Director of Transport and Highways, and the Department of Government Tram and Omnibus Services, administered by the commissioner of that name. Section 3 (1) provided:—"For the purpose of the exercise and performance of the powers, authorities, duties and functions conferred and imposed upon him by this Act, and of the administration of the Department of Transport and Highways, the Director of Transport and Highways shall be a body corporate under the name

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of 'The Director of Transport and Highways'." Sub-section (3) of s. 3 provided :—" The Director of Transport and Highways shall exercise and perform the powers, authorities, duties and functions which, immediately before the commencement of this Act, were exercised and performed by The Commissioner for Road Transport and Tramways other than the powers, authorities, duties and functions conferred and imposed upon The Commissioner for Government Tram and Omnibus Services by or under sub-section three of section four of this Act." Section 11 provides:—" Upon the commencement of this Act, The Commissioner for Road Transport and Tramways shall cease to function, and the powers, authorities, duties and functions, including the power to recommend or concur in the making of regulations, conferred or imposed upon The Commissioner for Road Transport and Tramways by or under any Act shall be exercised and performed by The Director of Transport and Highways and The Commissioner for Government Tram and Omnibus Services under and in accordance with the provisions of this Act." Sub-section (7) of s. 12 provided :—"All debts due and moneys payable by and all claims liquidated and unliquidated recoverable against The Commissioner for Road Transport and Tramways shall be debts due and moneys payable by and claims recoverable against the body corporate constituted under this Act to exercise and perform the power, authority, duty or function under or in respect of which such debt became due, such money became payable, or such claim became recoverable."

The Director of Transport and Highways was established as an office (though it was not then incorporated) by s. 4 (1) of the *Transport and Highways Act* 1950 (No. 10 of 1950) an Act which, with the exception of two sections not presently material, was subsequently repealed by the *Transport* (*Division of Functions*) *Further Amendment Act* 1952 (No. 24 of 1952), s. 2 (1).

The Commissioner for Road Transport and Tramways mentioned in ss. 3 (3), 11 and 12 (7) of the *Transport* (*Division of Functions*) *Amendment Act* 1952 (No. 15 of 1952) obtained his authority from s. 20 of the *Transport* (*Division of Functions*) *Act* 1932 (No. 31 of 1932) as amended by s. 2 (1) (a) of the *Transport* (*Division of Functions*) *Amendment Act* 1940 (No. 46 of 1940). The material parts of this provision so amended read as follows :—" Section 20. In the construction and for the purposes of any Act, by-law, regulation, ordinance, or any other instrument or document whatsoever, of the same or a different kind or nature, any reference to, or to be read, deemed and taken to refer to the Board of Commissioners " (a term defined to mean the Transport Commissioners of New South

Wales constituted under the *Ministry of Transport Act* 1932 (No. 3 of 1932)) " shall be read deemed and taken to refer to . . . (b) the Commissioner for Road Transport and Tramways—where, and in so far as, such Act, by-law, regulation, ordinance, instrument or document relates to or in any way affects or concerns the Department of Road Transport and Tramways or the administration of that Department." Sub-section (1) (a) of s. 2 of the *Transport (Division of Functions) Amendment Act* 1940 (No. 46 of 1940), to which the provision last stated may chiefly be ascribed, also inserts in s. 20 a sub-s. (3) which is as follows:—" This section shall not be construed so as to prejudice or limit any privilege, protection or immunity which is, by the operation of any Act, had and enjoyed by or provided for any of the Commissioners appointed under this Act."

The *Ministry of Transport Act* 1932 (No. 3 of 1932), s. 9, provided, among other things, that the State Transport (Co-ordination) Board should cease to function and the duties, powers, authorities and functions conferred or imposed upon the board by or under any Act should be executed and performed by the Board of Commissioners appointed under the *Ministry of Transport Act* 1932. It was the *State Transport (Co-ordination) Act* 1931 which conferred or imposed upon the board duties, powers, authorities and functions.

It is in the (purported) exercise or performance of a power, authority, duty or function expressed by that Act to be conferred or imposed upon the board that the moneys sued for were collected and it was under that Act that the collection of the moneys was done or purported to be done.

Now from the foregoing it appears that the payments made before 1st June 1952 must be taken to have been made to the officers of the Commissioner for Road Transport and Tramways ; the payments made after 1st June 1952 and before 27th October 1952 to the officers of the Director of Transport and Highways; and the payments made after 27th October 1952 to officers of the Superintendent of Motor Transport, the defendant under a previous name.

It seems clear enough that the defendant, under the present or previous name, and the Director of Transport and Highways, if that be a different body, had their inception in the *Transport (Division of Functions) Amendment Act* 1952 (No. 15 of 1952). That Act, in spite of its title, consists, for the most part, of original and not amending provisions. It is not until s. 22 is reached in that Act that you find what in form are amending provisions. The sections which divide the old departments and set up the Director of Transport and Highways are all fresh substantive provisions operating upon, but otherwise independent of, prior statutory

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provisions. It is impossible to regard the relevant parts of this Act as amounting to amendments of the former *Transport* (*Division of Functions*) *Acts* or any of them, so that the defendant could be considered to be a commissioner appointed "under this Act" within the meaning of the earlier part of s. 27. In the same way it could not be treated as " this Act " for the purpose of deciding whether the action was for anything done or omitted or purporting to have been done or omitted " under this Act " within the meaning of s. 27. And for the like reason it is not an Act which confers or imposes any power or authority etc. on " any such Commissioner ". So too with the words " by any such Act ". It happens that s. 25 of Act No. 15 of 1952 contains an amendment of the *Transport* (*Division of Functions*) *Act* 1932 as amended but this circumstance does not derogate from the foregoing statement.

The final step is to inquire whether it is possible to treat the chain of legislation which resulted in the Director of Transport and Highways and the present defendant (however named) having powers etc. contained in the *State Transport* (*Co-ordination*) *Act* 1931 as amounting to acts conferring powers, etc. or imposing duties on " any such Commissioner ".

The answer to this question is that they cannot be so regarded. One obvious reason is that although there may be a chain unbroken perhaps in respect of liabilities, you cannot say that the Acts of 1952 and 1954 confer or impose any power, authority, duty or function on " any such Commissioner ", that is to say on a commissioner appointed under the former *Transport* (*Division of Functions*) *Acts*.

Section 17 (1) of Act No. 15 of 1952 is expressed in terms which follow s. 20 of Act No. 31 of 1932 as amended by s. 2 (1) (a) of Act No. 46 of 1940. It requires that in the construction and for the purposes of any Act, by-law, regulation, ordinance or any other instrument or document whatsoever . . . any reference to, or to be read, deemed and taken to refer to, the Commissioner for Road Transport and Tramways shall be read, deemed and taken to refer to (a) the Director of Transport and Highways—where, and in so far as, such Act etc. relates to or in any way affects or concerns the Department of Transport and Highways or the administration of that department.

The defendant is a corporation sole the continuity of which is apparently preserved under the corporation's two succeeding designations and the defendant may be assumed to be the same corporation as the Director of Transport and Highways mentioned in the foregoing sub-section, viz. s. 17 (1) of Act No. 15 of 1952.

The question arises whether this provision will suffice to convert s. 27 as enacted by s. 2 (1) (b) of No. 46 of 1940 into a protection of the defendant against the causes of action mentioned in the case stated.

First, can the words in s. 27 " actions against any of the Commissioners appointed under this Act " be read, in obedience to s. 17 above, as identifying the defendant? This can only be done by rejecting the descriptive words " appointed under this Act ". Yet in s. 27 itself these words seem to express part of its purpose and to be essential. Section 27 is speaking of officers *appointed under the Act* because its purpose is to give protection not to the State Treasury but to officers as individuals who execute functions under the Act. In any case the words of s. 17 do not appear apt to cover not a name but a description part of which consists in a reference to the appointment of the officer and the statutory source of the authority under which it is made. The words seem rather to relate to references to named corporate offices. But perhaps the inadequacy of s. 17 to carry forward " Commissioners appointed under this Act " is of little importance. For in any case the cause of action, if it is to be covered by s. 27, must be " for anything done or omitted " etc. (i) under that Act or, (ii) to state it shortly, under another Act which confers or imposes functions or duties on any such commissioner, or (iii) in the exercise or performance of functions or duties conferred or imposed by such an Act. Now, as the case stated itself says, the causes of action are for things done under the *State Transport (Co-ordination) Act*. That Act does not of its own legislative force impose or confer any such duty or function on the defendant, if the expression "any such Commissioner" in s. 27 be read, in obedience to s. 17 above, as referring to the Director of Transport and Highways under that or any of his succeeding designations. And, if it be suggested that s. 17 (*scil.* of No. 15 of 1952) includes the *State Transport (Co-ordination) Act* and bids you take up this process of reading references to one commissioner as references to the other and apply the process to references which may notionally be discovered in that Act, by means of s. 20 of Act No. 31 of 1932 as amended by s. 2 (1) (a) of No. 46 of 1940, the answer is that even so the power is conferred on such commissioner by the statutes that have this operation and not by the *State Transport (Co-ordination) Act*. The last-mentioned Act is the passive subject on which these Acts operate and its own legislative force is not changed. It is in other words patient of their operation and has no active legislative force of its own as imposing or conferring anything on "any such Commissioner" mentioned in those Acts.

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But the situation is somewhat different with the payments made in the period up to 1st June 1952. Those payments are taken to be made to the officers of the Commissioner for Road Transport and Tramways. That commissioner depends on s. 20 of the *Transport (Division of Functions) Act* 1932 as amended by the *Amendment Act* 1940 (No. 46 of 1940). It may be conceded that this provision, although in part enacted by No. 46 of 1940, is to be regarded as part of " this Act " within the meaning of those two words in s. 27. The reason why this may be conceded is that those two words should probably be taken to include not only " this Act " itself but also " this Act " as subsequently amended. (There does not, however, appear to be a provision in the law of New South Wale corresponding to s. 10A of the *Acts Interpretation Act* 1901-1950 of the Commonwealth.)

But it seems impossible to regard the things complained of by the plaintiff as done under " this Act " in any of its forms. The special case itself says that the permits were issued in purported pursuance of the *State Transport (Co-ordination) Act* 1931 as amended or of licences issued to the plaintiff under that Act. The things complained of clearly were done under that Act. It was of course " another Act ". But it was not an Act conferring or imposing a power, authority, duty or function " on any such Commissioner ". It follows too that it was not " any such Act " within the meaning of that expression in the phrase " or in the exercise or performance of any power, authority, duty or function conferred or imposed by any such Act ". The same is true concerning the exercise or performance of any function etc. in the later words in the part of s. 27 enacted in 1940.

It follows that, as to all three periods in which payments are alleged to have been made, s. 27 as then enacted on its own terms affords no answer to the action.

The questions in the special case should be answered as follows :— (1) By reason of s. 92 so much of s. 27 is invalid as is enacted by s. 5 of Act No. 16 of 1956 in so far as it applies to causes of action arising as a result of the operation of s. 92 of the Constitution on the provisions of the *State Transport (Co-ordination) Acts* at all events if they accrued before 13th September 1955, and is inapplicable to the plaintiff's action. (2) Section 27 as enacted by s. 2 (1) (b) of Act No. 46 of 1940 is inapplicable to the plaintiff's action. (3) The plaintiff is not barred by s. 27 from recovery in this action if the action is otherwise maintainable.

McTIERNAN J. I agree with the judgment and the reasons of the Chief Justice.

WEBB J. This is a special case stated under s. 55 of the *Common Law Procedure Act* 1899 (N.S.W.) and removed from the Supreme Court into this Court under s. 40 of the *Judiciary Act* 1903-1955.

The plaintiff Barton operated a public motor vehicle in his trade of carrying goods by road for reward from places in New South Wales to places in other States and from places in those States to places in New South Wales. Between 4th October 1951 and 12th June 1954 the plaintiff paid to the predecessors of the defendant sums totalling £1,543 2s. 5d. for permits to operate the public motor vehicle in the course of and for the purposes of inter-State trade. Such permits were issued by the defendant's predecessors in purported pursuance of the *State Transport (Co-ordination) Act* 1931 as amended, or of licences issued to the plaintiff under that Act.

Summarised, the questions of law are—(1) Whether by reason of s. 92 of the Constitution s. 27 of the *Transport (Division of Functions) Acts* as amended in 1956 is invalid or inapplicable to the action. If it is (2) whether s. 27 without that amendment is invalid or inapplicable; and (3) Whether even if such moneys are otherwise recoverable the plaintiff is barred from their recovery by s. 27 with or without that amendment.

Section 27 of the *Transport (Division of Functions) Act* 1932-1952 provides:—" All actions against any of the Commissioners appointed under this Act or against any person for anything done or omitted or purporting to have been done or omitted under this Act or under any other Act (whether passed before or after the commencement of this Act) which confers or imposes any power, authority, duty or function on any such Commissioner, or in the exercise or performance of any power, authority, duty or function conferred or imposed by any such Act, shall be commenced within one year after the act or omission complained of was committed or made."

Section 27 as set out above was added to the Act by s. 2 (1) (b) of Act No. 46 of 1940.

Section 27 was amended by s. 5 of Act No. 16 of 1956 by adding the following paragraph :—" The foregoing provisions of this section shall extend, and shall be deemed always to have extended, to an action for the recovery of moneys which have in fact been paid to or collected by any such Commissioner or person where such payment was made or purported to be made or such collection was effected or purported to be effected under the authority or purported authority of any Act whether or not such Act was valid or effectual to impose or authorise the imposition upon any person of an obligation to pay such moneys or to empower such Commissioner or first-mentioned person to receive or collect the same."

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State Parliaments can validly enact statutes of limitation of a general or of a restricted character, such as s. 27, even when the claims are rested on a federal statute or an Imperial statute, and even on the *Commonwealth of Australia Constitution Act.* The freedom that s. 92 ensures is not necessarily such as to render money claims resting on it sacrosanct, e.g., the profits made by inter-State road hauliers from using without payment the roads provided mainly at the expense of the general taxpayers and intra-State hauliers are yet to be held exempt from income tax. Further what the States can do prospectively they can also do retrospectively. Moreover State statutes of limitation, whether prospective or retrospective, apply even in courts exercising federal jurisdiction by reason of ss. 79 and 80 of the *Judiciary Act* 1903-1955. However, State legislation, like that declared invalid by this Court and by the Privy Council on appeal in *Commissioner for Motor Transport* v. *Antill Ranger & Co. Pty. Ltd.* (1) which on its face is expressly directed to interference with inter-State trade, commerce and intercourse is beyond the States' powers. But in that legislation there was an unqualified bar of the action and not a time limit on its institution, as under s. 27. Moreover, as pointed out by their Lordships (2), the only object of the legislation was to exclude from the scope of s. 92 an exaction which that section had rendered unlawful. It is true that in its retrospective operation under the 1956 amendment s. 27 operates as an absolute bar in effect. But it does so validly as regards claims not resting on s. 92, and there is no exemption of s. 92 claims stated or recognised by the law as a matter of policy or for any other reason. It is no answer to say that s. 27 in its retrospective operation does just that thing that the legislation declared invalid by the Privy Council had failed to do. The effect of s. 27 is not to be judged in the light of the Privy Council's decision on the other legislation, which was expressly directed at inter-State trade and nothing else. If it be said that the express application of s. 27 as amended in 1956 to moneys collected under an invalid statute or regulation points to s. 92, I think the answer is that a State statute or regulation could be invalid on the ground of extra-territoriality, although of course, that is not likely to be the case. I have in mind the case of hauliers in border towns who have trucks operating on both sides of the border which carry goods from places in each State to the railways in that State but not across the border, and who might be called upon in one State to pay for permits to carry goods in the adjoining State. Section 27 applies to future as well as to existing statutes and regulations.

(1) (1955) 93 C.L.R. 83; (1956) 94 C.L.R. 177.

(2) (1956) 94 C.L.R., at p. 181.

However for the reasons given by the Chief Justice I think that s. 27, with or without amendment, has no application to the things complained of by the plaintiff. Accordingly I would answer the questions in this special case by stating that s. 27 with or without amendment is not applicable to the plaintiff's action and that the plaintiff is not barred by s. 27 from recovering in the action if it is otherwise maintainable.

FULLAGAR J. We have before us a special case stated for the decision of the Supreme Court of New South Wales under s. 55 of the *Common Law Procedure Act* 1899 (N.S.W.). The case was stated in an action brought to recover from the defendant (who, as will be seen, is a statutory corporation sole) fees paid by the plaintiff for permits to operate commercial goods vehicles under the State legislation which, so far as it purported to apply to vehicles engaged in inter-State trade, was held invalid by the Privy Council in *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [*No.* 1] (1). The case has been removed into this Court by order made under s. 40 of the *Judiciary Act* 1903-1955 of the Commonwealth.

The case states that between 4th October 1951 and 12th June 1954 the plaintiff paid to the " predecessors " of the defendant sums totalling £1,543 for permits to operate his vehicles within the State of New South Wales exclusively in the course and for the purposes of inter-State trade. Such permits were issued by the predecessors of the defendant in purported pursuance of the *State Transport (Co-ordination) Act* 1931 as amended from time to time. The case does not set out the declaration in the action, but it is important to observe that the case is stated, and the argument has proceeded, on the footing that the plaintiff seeks to recover the sums paid by him as money had and received to the use of the plaintiff, the case being alleged to be of that class in which money has been " extorted " *colore offici* in reliance on the provisions of unconstitutional and invalid legislation. The case is stated on the assumption (which may or may not be well founded) that an action for money had and received resting on this basis could prima facie be maintained, and it asks in effect whether a particular statutory defence affords an answer to the plaintiff's claim. It should be added that the case also assumes that the statutory corporation, as distinct from the Crown, is the proper defendant in the action.

The enactment on which the defendant relies is s. 27 of the *Transport (Division of Functions) Act* of New South Wales. The first Act bearing that title was enacted in 1932. Section 27 was first

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

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introduced into the Act in 1940, its operation being made retrospective to the date of commencement of the Act of 1932. It was thus in force in its original form long before the making of any of the payments which the plaintiff seeks to recover. As originally enacted, it is in the following terms: "All actions against any of the Commissioners appointed under this Act or against any person for anything done or omitted or purporting to have been done or omitted under this Act or under any other Act (whether passed before or after the commencement of this Act) which confers or imposes any power, authority, duty or function on any such Commissioner, or in the exercise or performance of any power, authority, duty or function conferred or imposed by any such Act, shall be commenced within one year after the act or omission complained of was committed or made." Since the last of the payments in question was made on 12th June 1954, and the plaintiff's writ was not issued until 26th September 1956, it is clear that this provision, if valid and applicable to the case, would bar the whole of the plaintiff's claim.

On 13th September 1956 the *Motor Traffic and Transport (Further Amendment) Act* 1956 came into force. Section 5 of that Act "amended" s. 27 by inserting at the end thereof the following paragraph: "The foregoing provisions of this section shall extend, and shall be deemed always to have extended, to an action for the recovery of moneys which have in fact been paid to or collected by any such Commissioner or person where such payment was made or purported to be effected under the authority or purported authority of any Act whether or not such Act was valid or effectual to impose or authorise the imposition upon any person of an obligation to pay such moneys or to empower such Commissioner or first-mentioned person to receive or collect the same."

It will be observed that the amendment of s. 27 which was made in 1956 is expressed to be retrospective in operation. The plaintiff's case is one of many which have arisen out of the decision in the *Hughes & Vale Case* [*No.* 1] (1). The amendment of 1956 was doubtless designed to clear up possible doubts as to whether the section, as it originally stood, applied to cases where moneys had been demanded and paid under an Act subsequently held invalid. The two substantial questions raised by the case stated are (1) whether s. 27 as it stands after the amendment of 1956 is valid and applicable so as to bar the plaintiff's claim, and (2) if it is not, whether s. 27, with the amendment eliminated as invalid or inapplicable, is valid and applicable so as to bar the plaintiff's claim. The

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

questions are stated in that order in the case, but it is obviously convenient to deal first with s. 27 as it stood before the Act of 1956.

The first matter to be considered is whether s. 27, as it stood before 1956, is applicable in terms to the plaintiff's action. This involves three questions. The first is whether that action is an action against "any of the Commissioners appointed under this Act". It is brought against the Commissioner for Motor Transport, and, when s. 27 was introduced into the Act, there was no reference in the Act to a "Commissioner for Motor Transport". If, however, we trace the somewhat intricate history of the changes in official names and functions made between 1932 and 1954, it becomes apparent, I think, that the present "Commissioner for Motor Transport" is included in the "Commissioners appointed under this Act", who are referred to in s. 27.

The *Transport* (*Division of Functions*) *Act* 1932 provided by s. 3 that there should be a Ministry of Transport under the Minister of Transport, which should be divided into departments as follows: (a) the Department of Railways, to be administered by the Commissioner for Railways; (b) the Department of Road Transport and Tramways, to be administered by the Commissioner for Road Transport and Tramways; (c) the Department of Main Roads, to be administered by the Commissioner for Main Roads. The three commissioners were respectively incorporated by ss. 4, 5 and 6. It is to these three commissioners that s. 27, when enacted in 1940, referred.

This position appears to have subsisted until the *Transport* (*Division of Functions*) *Amendment Act* 1952 (No. 15 of 1952) was enacted. This Act, which was in operation only for a very short period, did not affect the Department of Railways or the Commissioner for Railways, but it sub-divided the Department of Road Transport and Tramways into two departments, viz. (1) the Department of Transport and Highways, which was to be administered by the Director of Transport and Highways, and (2) the Department of Government Tram and Omnibus Services, which was to be administered by the Commissioner for Government Tram and Omnibus Services. The Act divided between the Director of Transport and Highways and the Commissioner for Government Tram and Omnibus Services the functions of the Commissioner for Road Transport and Tramways, and by ss. 3 and 4 respectively incorporated the new director and the new commissioner. The functions relevant to the present case were conferred upon the Director of Transport and Highways. The Director of Transport and Highways

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was one of the defendants in the *Hughes & Vale Case* [*No.* 1] (1), the writ in which was issued after Act No. 15 of 1952 had come into force and before the next material Act, which was the *Transport* (*Division of Functions*) *Further Amendment Act* 1952 (No. 24 of 1952). This Act became law on 27th October 1952. In effect it substituted the Superintendent of Motor Transport for the Director of Transport and Highways. Finally, the *State Transport* (*Co-ordination*) *Amendment Act* 1954 (No. 48 of 1954), which came into force on 16th December 1954, by s. 5, substituted the Commissioner for Motor Transport for the Superintendent of Motor Transport. This Commissioner for Motor Transport was a defendant in the *Hughes & Vale Case* [*No.* 2] (2), in which the writ was issued on 22nd December 1954. He is also the defendant in the present case. This Act of 1954 contained the amendments of the *State Transport* (*Co-ordination*) *Act* which were made consequentially upon the decision in the *Hughes & Vale Case* [*No.* 1] (1), and which, so far as they affected inter-State trade, were in turn held invalid in the *Hughes & Vale Case* [*No.* 2] (2).

It is seen that the effect of each of the three Acts mentioned (the two Acts of 1952 and the Act of 1954) was to substitute, within the field with which the plaintiff's action is concerned, a new corporation sole with a new name for a pre-existing corporation sole. In each case, however, the substitution was, as a matter of form, effected not by way of amendment of the *Transport* (*Division of Functions*) *Act* 1932, but by new substantive enactment. Prima facie, therefore, there is difficulty in saying that the Director of Transport and Highways (Act No. 15 of 1952), the Superintendent of Motor Transport (Act No. 24 of 1952), or the Commissioner for Motor Transport (Act No. 48 of 1954), was a " Commissioner appointed under " the *Transport* (*Division of Functions*) *Act* 1932 or under that Act as amended from time to time. They were really appointed under separate specific enactments. The difficulty may be thought to be increased by the fact that two of the three officers in question are not called " commissioners " at all. The difficulty, however, seems to me to disappear when we look at provisions contained in each of the three specific enactments. Section 17 (1) of Act No. 15 of 1952 provides that, in the construction and for the purposes of any Act, any reference to the Commissioner for Road Transport and Tramways shall be deemed to refer to the Director of Transport and Highways in relation to matters which are the concern of that director, and to the Commissioner for Government Tram and Omnibus Services in relation to matters which are the concern of

(1) (1955) A.C. 241; (1954) 93 C.L.R. 1. (2) (1955) 93 C.L.R. 127.

that commissioner. The Commissioner for Road Transport and Tramways is one of the commissioners referred to in s. 27 of the *Transport* (*Division of Functions*) *Act*. The Director of Road Transport and Tramways must, therefore, be taken to be included among the "Commissioners" so referred to. Moreover, s. 17 (2) (b) of Act No. 15 of 1952 specifically provides that the new "Director" shall have (*inter alia*) all the "protections and immunities" previously enjoyed by the Commissioner for Road Transport and Tramways. These must include the protection or immunity given by s. 27 of the *Division of Functions Act*. Act No. 24 of 1952, by s. 6 (1), simply "reconstituted" under the new name of Superintendent of Motor Transport the body corporate previously known as the Director of Transport and Highways. Section 6 (2) contained a provision in terms similar to those of s. 17 (1) of Act No. 15 of 1952. Act No. 48 of 1954 simply renamed the body corporate known as the Superintendent of Motor Transport, calling it the Commissioner for Motor Transport. Section 5 (2) contained a provision in terms similar to those of s. 17 (1) of Act No. 15 of 1952. It follows clearly, in my opinion, that in s. 27 of the *Transport* (*Division of Functions*) *Act* 1932-1952 the words "any of the Commissioners appointed under this Act" must be taken as referring successively to, and including, the Commissioner for Road Transport and Tramways, the Director of Transport and Highways, the Superintendent of Motor Transport, and finally the Commissioner for Motor Transport, who is the defendant in the present action. The defendant might no doubt on any view have maintained that the case came within the words "or against any person" in s. 27, but the correct view, in my opinion, is that the action is against one of "the Commissioners appointed under this Act".

It being established that the action is against one of the commissioners appointed under the Act, the second question arises. That question is whether the action is an action "for anything done or purporting to have been done" within the meaning of s. 27. For the purposes of the case stated, the payments alleged to have been made by the plaintiff must be assumed to have been demanded and received "under" the *State Transport* (*Co-ordination*) *Act*. That Act contained the provisions which have been held, so far as they purport to apply to inter-State trade, to be invalid. But can an action for money had and received be described as an action "for something done" by the defendant? A good deal might be said in favour of a general negative answer to this question, but, so far as cases like the present are concerned, the answer must be in the affirmative. There is a long line of authority in England on the

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Public Authorities Protection Act 1893 (Imp.) and similar Acts ; and the cases uniformly decide that an action to recover money wrongfully demanded and received under colour of a statute is an action " for something done " by the person who demanded and received the money: see *Greenway* v. *Hurd* (1); *Waterhouse* v. *Keen* (2); *Selmes* v. *Judge* (3); *Midland Railway Co.* v. *Withington Local Board* (4); *Cree* v. *St. Pancras Vestry* (5); *Brocklebank Ltd.* v. *The King* (6) and *R. & W. Paul Ltd.* v. *Wheat Commission* (7). It was sought to distinguish these cases from the present case on the ground that in none of them was the money demanded and received under an invalid enactment. But the distinction cannot be supported. The cases all proceed on the footing that the making of the unlawful demand is a " thing done " within the meaning of the protecting Act, and it can make no difference whether the unlawfulness of the demand made under the statute arose from a misconstruction of the statute, from a misunderstanding of the facts, or from a mistaken belief that the statute had the force of law. In the earliest of the cases cited, *Greenway* v. *Hurd* (1), the statute under which the defendant acted had, although the defendant was not aware of it, in fact been repealed.

There is still, however, a third question to be answered before we can say that the case falls within the terms of s. 27 as it stood before the amendment of 1956. That question, for practical purposes, may be stated as being—Was the *State Transport (Co-ordination) Act*, under which the demands alleged to be illegal must be taken to have been made, " an Act which conferred or imposed any power, authority, duty or function on any such Commissioner " within the meaning of s. 27? In my opinion, it clearly was such an Act. It is necessary to look briefly once again at relevant legislation.

The original *State Transport (Co-ordination) Act* was enacted in 1931. It provided for the constitution and incorporation of a body to be known as the State Transport (Co-ordination) Board, consisting of four commissioners. The purposes of the creation of the board were stated as including " the co-ordination of the means of transport ". The whole administration of the licensing system set up by the Act was entrusted to the board. It was to the board that applications for licences had to be made (s. 14). In dealing with an application for a licence, the board was required to consider certain matters (s. 17). It was empowered to impose and collect

(1) (1792) 4 T.R. 553 [100 E.R. 1171].
(2) (1825) 4 B. & C. 200 [107 E.R. 1033].
(3) (1871) L.R. 6 Q.B. 724.
(4) (1883) 11 Q.B.D. 788.
(5) (1899) 1 Q.B. 693.
(6) (1925) 1 K.B. 52.
(7) (1937) A.C. 139.

fees in respect of licences (ss. 18 and 37) and to collect fees in respect of " permits " (s. 22). All moneys collected were to be paid into a fund to be called the State Transport (Co-ordination) Fund, which was to be vested in the board and applied by it for the purposes of the Act (ss. 25 and 26). It seems very clear that at this stage the *State Transport (Co-ordination) Act* conferred and imposed powers, authorities, duties and functions on the State Transport (Co-ordination) Board. The immediately relevant " function " is the collection of fees for permits, because it is, in effect, on the demand and receipt of fees for permits that the plaintiff's alleged cause of action is based.

So far the performance of the relevant functions is committed to the State Transport (Co-ordination) Board. But the effective life of that board was very short : see per *Dixon* C.J. in the *Hughes & Vale Case* (1), where the relevant legislation is briefly referred to. First, the *Ministry of Transport Act* 1932, which received assent on 22nd March 1932, set up a new body corporate entitled " The Transport Commissioners of New South Wales ". Section 9 of this Act provided that, as from its commencement, the State Transport (Co-ordination) Board should " cease to function ", and that its " duties, powers, authorities and functions " should be executed and performed by the new Board of Commissioners. Then came the *Transport (Division of Functions) Act* 1932, which received assent on 19th November 1932. Whereas the *Ministry of Transport Act* 1932 seems to have been designed to effect a centralisation of the control of transport, the *Transport (Division of Functions) Act* 1932 was apparently intended to achieve a degree of devolution of that control. The creation and incorporation by the later Act of the three new Commissioners ((a) for Railways, (b) for Road Transport and Tramways, (c) for Main Roads) has already been referred to. The Act referred to the Transport Commissioners of New South Wales as the Board of Commissioners. Section 14 provided that, upon the commencement of the Act, the Board of Commissioners constituted by the *Ministry of Transport Act* should " cease to function ", and its " powers, authorities, duties and functions " should be executed and performed by the three respective commissioners appointed under the new Act. As to the particular " powers, authorities, duties and functions " under the *State Transport (Co-ordination) Act* (which the Board of Commissioners had inherited from the State Transport (Co-ordination) Board), these devolved on the Commissioner of Road Transport and Tramways by virtue of s. 5 (3) of the Act, which provided that that commissioner should exercise and perform the " powers, authorities,

(1) (1953) 87 C.L.R. 49, at pp. 67, 75.

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duties and functions" which, immediately before the commencement of the Act, were exercised and performed by the Board of Commissioners in respect of road transport and tramways.

At this stage I would regard it as quite clear that the *State Transport (Co-ordination) Act* was an Act which conferred or imposed powers, authorities, duties and functions on one of the commissioners appointed under the *Transport (Division of Functions) Act*. It is to the *Co-ordination Act* that we must look in order to find out what the Commissioner's powers and functions are. It is quite true that we have to look at the *Division of Functions Act* before we know that it is on the commissioner that those powers and functions are conferred. But that cannot alter the fact that it was "under" the *Co-ordination Act* that the things complained of by the plaintiff were done, or the fact that that Act is an Act which has the effect of conferring powers and functions on the commissioner. To say that, because what was done was done by virtue of the combined operation of "This Act" (the *Division of Functions Act*) and "another Act" (the *Co-ordination Act*) therefore it was not done under either Act, seems to me to be a completely unreal and artificial view and to defeat the manifest intention of the legislature. It would deprive s. 27 of all practical effect.

The position created in 1932 did not change in any material respect. It is unnecessary to trace again the alterations made by the Acts of 1952 and 1954. It is enough to say that, as each new body corporate succeeded an old body corporate, continuity of function in all respects was preserved. In each case the rights and liabilities of the old body corporate were transferred to the new body corporate, and references in instruments were to be read as referring to, or including, the new body corporate: see ss. 12 (2) and (3) and 17 (1) and (2) of Act No. 15 of 1952, s. 6 (2) and (4) of Act No. 24 of 1952, and s. 5 (2) and (3) (b) and (d) of Act No. 48 of 1954.

For the reasons given, the plaintiff's action falls, in my opinion, within the terms of s. 27 of the *Transport (Division of Functions) Act* 1932-1952. The only remaining question is whether that section is open to successful attack on constitutional grounds. It is not suggested that s. 27 is wholly void. It is clear, in my opinion, that it is capable of valid operation over a very wide field. But the plaintiff's case rests ultimately on s. 92 of the Constitution, as invalidating, so far as they purport to apply to him, the statutory provisions under which the moneys were demanded and paid. The exaction, of which he complains, was unlawful because of s. 92, and for no other reason. To allow s. 27 to bar his recovery of the

money thus unlawfully exacted would, it is said, be to render ineffective the protection which a superior law accords to him. Section 27 cannot, consistently with s. 92 of the Constitution, be applied to his claim. The case, it is said, is covered by the decision of this Court and of the Privy Council in *Antill Ranger & Co. Pty. Ltd.* v. *Commissioner for Motor Transport* (1).

The State Act which was in question in the *Antill Ranger Case* (1) was a radically different enactment from that now in question. That Act was the *State Transport Co-ordination (Barring of Claims and Remedies) Act* 1954, which was passed immediately after, and obviously in consequence of, the decision of the Privy Council in the *Hughes & Vale Case [No. 1]* (2). Section 3 of that Act purported to extinguish all rights to recover any moneys demanded and paid under the legislation held in that case to be invalid. Section 4 purported to deny all remedies in respect of any moneys so demanded and paid. Of that Act the majority of this Court in a joint judgment said: "In protecting the freedom of individuals to trade across State lines it" (s. 92) "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" (3).

The passage quoted contains the whole reason for the decision in the *Antill Ranger Case* (1): my own view did not differ in any way from that of the majority. The passage is entirely inappropriate to the enactment in question in the present case. Section 27 is limited as to subject matter, but, within the field of that subject matter, is quite general in application. It has been in force since 1940—long before the decision of the Privy Council in *The Commonwealth* v. *Bank of New South Wales* (4), which first cast doubt on the validity of the earlier transport cases. It is simply a statute of limitation of a very ordinary and familiar kind, which substitutes, in the case of certain public authorities, a shorter period than that which is generally applicable to causes of action of the kind dealt with. The period cannot be said to be unreasonable. The position might have

(1) (1955) 93 C.L.R. 83; (1956) 94 C.L.R. 177.
(2) (1955) A.C. 241; (1954) 93 C.L.R. 1.
(3) (1955) 93 C.L.R., at p. 101.
(4) (1949) 79 C.L.R. 497.

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been different if the period fixed had been extremely short. If the period had been a day or a week, it might have been suggested that the practical and substantial effect of the section was to take away causes of action. But we were referred to a large number of statutes *in pari materia*, in some of which the period was shorter than one year, and I think it impossible to maintain that the period of one year is otherwise than reasonable.

To such an enactment s. 92 of the Constitution has, in my opinion, nothing to say. A person whose freedom to engage in inter-State trade has been infringed is entitled—and must be left entitled—to seek redress in the courts. But he must seek that redress within the framework of the system of substantive and adjective law under which he lives. If he seeks redress by way of an action for money had and received, he must establish what the common law requires to be established in order that an action for money had and received may be maintained: he cannot, for example, recover the amount of a merely voluntary payment: see the *Antill Ranger Case* (1). Nor, whatever form of redress he seeks, is he immune from the rules of procedure of the court in which he seeks redress. If, for example, security for costs is required in a court of first instance or a court of appeal, he must give security for costs. If the defendant pleads a statute of limitation appropriate to the remedy sought, his action will be barred: see again the *Antill Ranger Case* (1). Such law and rules as I have mentioned do not place a real burden upon him within the meaning of the cases on s. 92. To subject him to them is merely to place him in the same position as any other litigant, and s. 92 does not make him a specially privileged litigant. Section 27 does not, as the *Barring Act* considered in the *Antill Ranger Case* (2) did, deprive him of practically effective redress. As I have said, if a statute fixed an extremely short period for bringing an action, the position might well be different, but that would be because what was ostensibly a statute of limitation would be seen to be in substance something more and to have the real effect of depriving the plaintiff of practically effective redress.

For these reasons I am of opinion that s. 27, as it stood before 1956, barred the plaintiff's claim in the present action. The amendment made by Act No. 16 of 1956 was, in the view which I take, without practical effect, since the cases which it purports to bring within s. 27 were, at all times since its original enactment, within the scope of that section.

(1) (1955) 93 C.L.R., at p. 100.

(2) (1955) 93 C.L.R. 83; (1956) 94 C.L.R. 177.

The questions in the case stated should be answered:—1. It is valid and applicable to the plaintiff's claim. 2. It is unnecessary to answer this question. 3. (a) The plaintiff is so barred. (b) It is unnecessary to answer this question.

KITTO J. By a special case which has been removed into this Court under s. 40 of the *Judiciary Act* 1903-1955 (Cth.), the parties to an action pending in the Supreme Court of New South Wales seek the determination of three questions. The fact which they have agreed and upon which they submit the questions to the Court are few and may be briefly stated. The plaintiff is a carrier of goods by road, and the defendant is a body corporate constituted by s. 6 of the *Transport* (*Division of Functions*) *Further Amendment Act* 1952 (N.S.W.). The action is for the recovery of certain sums which, between 4th October 1951 and 12th June 1954, the plaintiff paid to persons or bodies described as predecessors of the defendant, for permits to operate public motor vehicles within the State of New South Wales in the course and for the purposes of inter-State trade. The permits were issued in purported pursuance of the *State Transport* (*Co-ordination*) *Act* 1931 as amended, or in pursuance of licences issued to the plaintiff under that Act. The decisions of the Privy Council and this Court in the first *Hughes & Vale Case* (1) established that the provisions which purported to make such permits necessary were invalid by reason of s. 92 of the Constitution.

The questions submitted all relate to the availability, as a defence to the action, of the provisions of s. 27 of the *Transport* (*Division of Functions*) *Act* 1932-1956 (N.S.W.), either in the form in which it was originally enacted by the *Transport* (*Division of Functions*) *Amendment Act* 1940 (N.S.W.) or with the addition made to it by the *Motor Traffic and Transport* (*Further Amendment*) *Act* 1956 (N.S.W.). The section consists of two paragraphs, the first being the provision enacted in 1940 and the second the addition made in 1956. They have been set out in the preceding judgments and I need not repeat them.

The first two questions in the special case, taken together, ask whether, by reason of s. 92 of the Constitution, s. 27, either in its original form or as amended, is invalid or inapplicable to the plaintiff's action; and the third question asks whether, if the moneys claimed are otherwise recoverable, the plaintiff is barred from recovering them by s. 27 in its original form or as amended in 1956. It seems to me to be clear that the addition made in 1956 cannot validly apply to the action. The latest of the causes of action relied

(1) (1955) A.C. 241; (1954) 93 C.L.R. 1; (1953) 87 C.L.R. 49.

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upon relates to a payment made on 12th June 1954. The 1956 Act was not assented to until 13th September 1956. To afford a defence to the action the addition which it made to s. 27 must have operated immediately upon its commencement as an absolute bar to the recovery of the moneys claimed; for no sensible distinction can be drawn between an absolute prohibiton and the imposition of a time limit after the stated time has expired. That an absolute bar to the recovery of moneys which have been paid for licences in such circumstances as are referred to in the special case is obnoxious to s. 92 has been decided by the Privy Council, affirming a decision of this Court, in *Commissioner for Motor Transport* v. *Antill Ranger & Co. Pty. Ltd.* (1).

Then as to the original provision of s. 27. I respectfully agree with the Chief Justice that the present action does not fall within the precise description of the actions for the commencement of which the provision sets a limit of time. But I think that there is another reason also for holding that the provision may have no application to this action, apart altogether from any consideration arising out of s. 92 of the Constitution. As I have said, the moneys which the plaintiff sues to recover were paid by him for permits issued under the *State Transport (Co-ordination) Act* 1931, as amended, or of licences issued to the plaintiff under that Act. The payees are described as "the predecessors of the defendant", an expression which admittedly refers to the officials who, at the respective times of the payments, were performing the functions which now belong to the defendant under the Act of 1931. The payments were made, therefore, to public officials who, in receiving them, were acting and were known to the plaintiff to be acting in their official capacities as collectors of such moneys on behalf of the Government. They were bound to account for such moneys to the Government, for s. 25 provided that all fees payable in respect of licences or permits under the Act should be paid into a special fund which, under s. 26, was to be kept in the Treasury and to be subject to the *Audit Act*. It is true that the moneys in the fund were vested in the same functionaries and were to be expended by them in accordance with statute (s. 26 (3)), but that does not affect the point that the plaintiff's moneys were collected on behalf of the Government.

It is said in *Halsbury's Laws of England*, 2nd ed., vol. 26, p. 265, par. 578 that if money has been paid, erroneously or otherwise, by a private individual to an officer of the Crown as such, it cannot

(1) (1956) 94 C.L.R. 177; (1955) 93 C.L.R. 83.

be recovered from him as money had and received. The authority cited is the case of *Whitbread* v. *Brooksbank* (1), in which Lord *Mansfield* C.J. said, with the concurrence of the rest of the judges of the King's Bench, that " an action for money had and received will not lie against an Excise officer for an overpayment ". A few years later, in *Greenway* v. *Hurd* (2) Lord *Kenyon* stated what he conceived to be the reason for the rule. He said, " This in principle is like the case of *Sadler* v. *Evans* (3), where it was held, that an action for money had and received against a known agent would not lie, but that the party must resort to the superior " (4). A case may no doubt be taken out of this principle by additional facts; but if no more is established against an official than that moneys which the Crown has claimed have been paid to him as the appropriate recipient of such moneys for the Crown, the principle applies so that any claim by the payer to recover the moneys must be a claim against the Crown and not against the official. This accords with the statement of the law, based on *Sadler* v. *Evans* (3) and *Greenway* v. *Hurd* (2), which is found in *Addison* on *Contracts*, 10th ed. (1903), pp. 329, 330: " If money be paid to a known agent for the use of his principal, an action for money had and received cannot be sustained against the agent if it appears that the principal has the least colour of right to the money; for the courts will not try the right of the principal to the money in an action against the agent. The agent having received the money on behalf of the principal, and for his use, is accountable to the latter for it . . . and the agent, whether he has paid over the money, or whether he has not, is answerable to the principal alone." In *Sadler* v. *Evans* (3) Lord *Mansfield* explained the view the judges took by saying: " They thought, the principles upon which actions for money had and received to the plaintiff's use are founded, did not apply to the circumstances of the present case. It is a liberal action, founded upon large principles of equity, where the defendant cannot conscientiously hold the money. The defence is any equity that will rebut the action. This money was paid to the known agent of Lady W. He is liable to her for it; whether he has actually paid it over to her, or not: he received it for her " (5). No doubt reasoning such as this was in Lord *Kenyon's* mind when he said, referring to the excise officer who was sued in *Greenway* v. *Hurd* (2). " If the defendant had not paid the money over, he would have

(1) (1774) 1 Cowp. 66, at p. 69 [98 E.R. 970, at p. 972].
(2) (1792) 4 T.R. 553 [100 E.R. 1171].
(3) (1766) 4 Burr. 1984 [98 E.R. 34].
(4) (1792) 4 T.R., at p. 555 [100 E.R., at p. 1172].
(5) (1766) 4 Burr., at p. 1986 [98 E.R., at p. 35].

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subjected himself to punishment; and it would be hard that he should also be punished by an action if he did pay it over" (1).

The questions before us must be considered on the facts appearing in the special case and on those facts alone. We are not told how the payments which the plaintiff seeks to recover came to be made. There is nothing to exclude the principle of law to which I have referred. The case therefore cannot be regarded as one in which, as in *Snowdon* v. *Davis* (2) and *Steele* v. *Williams* (3), the money has been obtained from the plaintiff by wrongful conduct for which the defendant is responsible, or as one in which the money has been paid to the defendant otherwise than for the use of the Crown. The meaning of the special case, clearly enough, is that the Crown was entitled by virtue of statutory provisions to have the payments made to it by the plaintiff unless the relevant provisions were prevented by s. 92 of the Constitution from applying to the case, and that the payments were made to the defendant or his "predecessors" by reason of a claim by the Crown that its right to insist upon them was not displaced by s. 92. For all that appears, therefore, the position of the defendant may be analogous to that which *Isaacs* J. described in relation to the Collector of Customs in *Sargood Bros.* v. *The Commonwealth* (4): "The money was handed to him, therefore, for the Crown . . . , and he was impliedly empowered by the plaintiffs to do with it what an officer in his position would be expected to do in the ordinary course of his duty, that is, pay it over to the Treasury, which we must assume he did in accordance with the *Audit Act* . . . . In the circumstances, the principles on which the action for money had and received is founded have no application to him, and he cannot be sued" (5). See also per *Higgins* J. (6); *Buchanan* v. *The Commonwealth* (7).

The hypothesis of the special case, as stated in the third question, is that the moneys sued for are recoverable unless the plaintiff is barred from the recovery thereof by s. 27. This hypothesis postulates one of two possible situations. Either there are facts, not stated in the special case, of such a kind that the defendant is himself liable to the plaintiff for the moneys notwithstanding the principle of law to which I have referred, or the Crown alone is liable and the defendant must be regarded as sued as representing the Crown. In the latter case the more appropriate procedure would have been that provided by the *Claims against the Government and Crown Suits Act* 1912 (N.S.W.). But there is nothing novel in an

(1) (1792) 4 T.R., at p. 555 [100 E.R., at p. 1172].
(2) (1808) 1 Taunt. 359 [127 E.R. 872].
(3) (1853) 8 Ex. 625 [155 E.R. 1502].
(4) (1910) 11 C.L.R. 258.
(5) (1910) 11 C.L.R., at p. 304.
(6) (1910) 11 C.L.R., at p. 310.
(7) (1913) 16 C.L.R. 315.

action against an official being treated conventionally as an action against the Crown; indeed that was done in one of the cases often cited in relation to the principle I have been discussing: *Campbell* v. *Hall* (1). There, the plaintiff sued a collector of duties to recover money which he complained had been unlawfully exacted, and the court, before dealing with the substantial questions that arose as to the lawfulness of the exaction, made it clear that they did so on the footing that the money, which was still in the hands of the defendant, "so continued with the privity and consent of His Majesty's Attorney-General, for the express purpose of trying the question as to the validity of imposing this duty".

If the special case had stated facts resulting in a liability on the part of the defendant as distinguished from a liability on the part of the Government, it would no doubt be correct to describe the action, on the authority of such cases as *Greenway* v. *Hurd* (2); *Waterhouse* v. *Keen* (3); *Selmes* v. *Judge* (4); *Midland Railway Co.* v. *Withington Local Board* (5) and *Cree* v. *St. Pancras Vestry* (6) as an action "for something done" under the *State Transport (Co-ordination) Act* 1931; and the only question remaining would be the question on which earlier in this judgment I have expressed my concurrence with the Chief Justice. But in the absence of anything in the special case to indicate that the parties have submitted their questions of law on the footing that there are facts resulting in a liability to be borne by the defendant himself and not simply a liability to be met out of Government funds, it seems to me that, because of the hypothesis that the moneys sued for are recoverable unless s. 27 prevents their recovery, the special case ought to be understood as implying that the parties are at one in treating the action as really an action against the Government of New South Wales. If that is the case, s. 27 cannot apply any more than it would apply to an action against a nominal defendant appointed under the *Claims Against the Government and Crown Suits Act*. If such a nominal defendant, relying upon the precise words of s. 27, should say that he is a "person", and that the action against him is for something done under such an Act as s. 27 refers to, the answer would have to be given that s. 27 protects individuals in respect of their own liabilities, its protection being, as the Court holds in *Shepherd* v. *State of New South Wales* (7), plainly inappropriate to the Crown. And it could make no difference if the nominal defendant happened to be not only a "person" but one of the

(1) (1774) 1 Cowp. 204 [98 E.R. 1045].
(2) (1792) 4 T.R. 553 [100 E.R. 1171].
(3) (1825) 4 B. & C. 200 [107 E.R. 1033].
(4) (1871) L.R. 6 Q.B. 724.
(5) (1883) 11 Q.B.D. 788.
(6) (1899) 1 Q.B. 693.
(7) (1957) 97 C.L.R. 673.

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commissioners appointed under the *Transport (Division of Functions) Act* 1932.

For these reasons, together with those stated by the Chief Justice, I am of opinion that the answers proposed by his Honour should be given.

TAYLOR J. The reasons published by *Fullagar* J. express my own views on the questions raised in this matter and I have nothing to add. Accordingly, I am of the opinion that the questions asked should be answered as proposed by him.

Questions in the special case answered as follows:—(1) *By reason of s.* 92 *so much of s.* 27 *is invalid as is enacted by s.* 5 *of Act No.* 16 *of* 1956 *in so far as it applies to causes of action arising as a result of the operation of s.* 92 *of the Constitution on the provisions of the State Transport (Co-ordination) Acts, and is inapplicable to the plaintiff's action. The foregoing answer is confined to causes of action accruing as in this case before* 13*th September* 1955. (2) *Section* 27 *as enacted by s.* 2 (1) (*b*) *of Act No.* 46 *of* 1940 *is inapplicable to the plaintiff's action.* (3) *The plaintiff is not barred by s.* 27 *from recovery in this action if the action is otherwise maintainable. Costs of the special case to be paid by the defendant.*

Solicitors for the plaintiff, *Higgins de Greenlaw & Sisley*, Sydney, by *Alexander Grant, Dickson & King.*

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

R. D. B.