

[HIGH COURT OF AUSTRALIA.]

SHEPHERD PLAINTIFF ;

AND

THE STATE OF NEW SOUTH WALES DEFENDANT.

Interpretation—Statute—“ Person ”—Deemed to include “ Bodies politic ”—State of New South Wales—Whether a “ person ” within the meaning of word used in statute concerned with protection of officers of State etc. acting under statutory authority—Interpretation Act of 1897 (N.S.W.), s. 21—Transport (Division of Functions) Act 1932-1956 (No. 31 of 1932—No. 16 of 1956) (N.S.W.), s. 27.

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Section 21 of the *Interpretation Act of 1897* (N.S.W.) provides that in all Acts unless the contrary intention appears the word “ person ” shall include “ bodies politic and corporate ”. Section 27 of the *Transport (Division of Functions) Act 1932-1956* 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. 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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Held, that the word “ person ” in s. 27 did not include the State of New South Wales.

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In an action in the High Court in which George William Shepherd was plaintiff and the State of New South Wales was defendant the parties pursuant to O. 35, r. 1 of the Rules of Court concurred in stating a case, substantially as follows, for the opinion of a Full Court :—1. The plaintiff is and was at all material times a road transport contractor residing at 481 Beach Road Beaumaris in the State of Victoria. 2. The defendant is and was at all material times a State of the Commonwealth of Australia. 3. At all material times the plaintiff was the owner and operator of certain commercial goods vehicles which were being operated by him on the dates set out hereinafter in connexion with his trade of a road transport contractor in carrying goods for reward between places in Victoria and places in New South Wales and on return journeys from places in New South Wales to places in Victoria. 4. At or about the respective times hereinafter mentioned in the schedule hereto the plaintiff paid to the Superintendent of Motor Transport the several sums of money mentioned in the said schedule totalling in all the sum of £12,073 9s. 2d. in respect of permits to operate such commercial goods vehicles within the State of New South Wales in the course of and for the purpose of inter-State trade namely for the purpose of carrying goods for reward between places in Victoria and places in New South Wales and on return journeys from places in New South Wales to places in Victoria. Such permits were issued in purported pursuance of the *State Transport (Co-ordination) Act* 1931-1952 or of licences issued under that Act to the plaintiff and the said sums were paid by the Superintendent of Motor Transport into the *State Transport Co-ordination Fund*, the fund established by s. 26 of the *State Transport (Co-ordination) Act*. 5. On 12th September 1955 the plaintiff issued out of this Honourable Court a writ of summons claiming the recovery of the sum of £12,555 15s. 2d. which sum includes the sums specified in the schedule hereto. 6. In the said proceedings the plaintiff by his statement of claim delivered with the writ alleged that the said sums were moneys unlawfully and improperly demanded and levied under colour of office by the Superintendent of Motor Transport and were paid under protest and duress by the plaintiff. 7. By its defence delivered 6th January 1956 the defendant while not admitting the said allegation pleaded in par. 4 thereof that the alleged cause of action did not accrue within one year before action brought in accordance with the provisions of the *Transport (Division of Functions) Act* 1932-1952 and in particular s. 27 thereof. 8. On 13th September 1956 the Royal Assent was given to Act No. 16

of 1956 of New South Wales. 9. The plaintiff contends that:— (a) the *Transport (Division of Functions) Act* 1932-1952 and in particular s. 27 thereof is inapplicable to this section or alternatively by reason of s. 92 of the Constitution; (b) the *Transport (Division of Functions) Act* 1932-1956 in so far as the defendant relies thereon and to the extent to which it contains an amendment of the *Transport (Division of Functions) Act* 1932-1952 is inapplicable to this action or alternatively is invalid by reason of s. 92 of the Constitution. 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? [Then followed a list of payments made by the plaintiff to the defendant between 22nd November 1952 and 10th September 1954.]

The case was argued together with *Edmund T. Lennon Pty. Ltd. v. Commissioner for Road Transport* (1) and *Barton v. Commissioner for Motor Transport* (2) and the argument appears in the report of the latter case.

Dr. E. G. Coppel Q.C. and P. H. N. Opas, for the plaintiff.

R. Else-Mitchell Q.C. and D. S. Hicks, for the defendant.

Cur. adv. vult.

The following written judgments were delivered :—

DIXON C.J. We have before us a case stated by the parties for the opinion of the Full Court on certain questions of law arising in an action brought in this Court by a resident of Victoria against the State of New South Wales. The purpose of the action is to recover certain moneys paid to the transport authority for the time being in New South Wales as under the *State Transport (Coordination) Act* 1931-1952 or in respect of licences issued in purported pursuance to that Act. The moneys were paid between 22nd

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November 1952 and 10th September 1954. They were paid in respect of permits to operate commercial goods vehicles within the State of New South Wales in the course of and for the purposes of inter-State trade, namely for the purpose of carrying goods for reward between places in Victoria and places in New South Wales and on return journeys from places in New South Wales to places in Victoria.

As in *Barton v. Commissioner for Motor Transport* (1), a case argued together with the present case stated, the questions to be considered arise from the reliance by the defendant upon s. 27 of the *Transport (Division of Functions) Act* 1932-1956. In my reasons in *Barton v. Commissioner for Motor Transport* (1) I have discussed s. 27, both in its original form as enacted by s. 2 (1) (b) of Act No. 46 of 1940 and as amended by s. 5 of Act No. 16 of 1956. It is unnecessary to do more in the present case than to refer to this discussion and to add the following.

Inasmuch as the moneys sought to be recovered in this action were paid before the enactment of the second part of s. 27 added by s. 5 of Act No. 16 of 1956, that part of s. 27 cannot validly operate to prevent the recovery of the moneys. The defendant in the present case is the State of New South Wales. It is impossible for the first part of s. 27, that is to say the part enacted by s. 2 (b) of Act No. 46 of 1940, to apply to this defendant unless the word "person" is capable of including the State of New South Wales. It appears to me quite obvious on reading that part that it was not intended to cover the State itself. The protection is for authorities of the State and officers.

From the foregoing it follows that the questions for the opinion of the Court must be answered thus :

(1) By reason of s. 92 of the Constitution 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 such causes of action accrued before 13th 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 recovering against the defendant in this action if this action is otherwise maintainable.

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

WEBB J. This a special case stated under O. 35, r. 1 of the *Rules* of the High Court.

The plaintiff was the operator of commercial goods vehicles carrying goods for reward between places in Victoria and places in New South Wales and on return journeys. The plaintiff paid to the Superintendent of Motor Transport sums totalling £12,073 9s. 2d. in respect of permits to operate such vehicles. These permits were issued under the *State Transport (Co-ordination) Act* 1931-1952 or licences issued under that Act. The first payment was made on 22nd November 1952 and the last on 10th September 1954. The plaintiff contends that s. 27 of the *Transport (Division of Functions) Act*, with or without the amendment in 1956, is inapplicable to this action or is invalid by reason of s. 92.

The questions for the opinion of the Court are the same as those set out in *Barton v. Commissioner for Motor Transport* (1) and I would answer them in the same way and for the same reasons, adding that I respectfully share the view of the Chief Justice that the word "person" in s. 27 as enacted in 1940 does not include the State of New South Wales.

FULLAGAR J. This is a special case stated by the parties in pursuance of O. 35, r. 1, of the *Rules* of the High Court. The questions asked are identical with those asked by the case stated in *Barton v. Commissioner for Motor Transport* (1). Whereas, however, the action in *Barton's Case* (1) was brought in the Supreme Court of New South Wales against the statutory corporation constituted under the *Transport (Division of Functions) Act* 1932-1956, the action in the present case was brought in this Court against the State of New South Wales. The plaintiff is a resident of Victoria, and the action is a "matter between a State and a resident of another State" within the meaning of s. 75 (iv.) of the Constitution. The right to proceed against the State is given by s. 58 of the *Judiciary Act* 1903-1955 (Cth.), which was enacted under the power given to the Parliament by s. 78 of the Constitution.

This case may be dealt with very shortly. No constitutional question appears to me to arise, for the reason that, neither in its amended nor in its unamended form, has s. 27 of the *Transport (Division of Functions) Amendment Act* any application to the State of New South Wales as a defendant in an action. The general question whether the Crown can take advantage of a statute of

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limitation—as to which see *Rustomjee v. The Queen* (1) and *Fisher v. The Queen* (2)—does not arise. The statute here is a special statute applying only in favour of specified persons. The State is not, of course, one of the commissioners appointed under the Act, and, if it is to be brought within the terms of the section at all, it must be because it falls within the expression “any person”. It is impossible, in my opinion, to maintain that the State falls within that expression.

It is provided by s. 21 of the *Interpretation Act* of 1897 (N.S.W.) that in all Acts, unless the contrary intention appears, the word “person” shall include “bodies politic and corporate”. It is unnecessary to consider what meaning (if any) is to be attached to the expression “body politic”, because it seems to me obvious on its face that s. 27 is not concerned with the protection of the State from action or suit. It is concerned with the protection of officers and servants of the State and persons, corporate or individual, acting or purporting to act under statutory authority. It need only be added that s. 28, which was introduced into the Act at the same time as s. 27, and which is also “protective” in character, requires notice before action to be delivered or left “at the office of such commissioner or person”. This provision is plainly inappropriate to the Crown, and shows conclusively that the Crown was not within the contemplation of the legislature when it enacted ss. 27 and 28.

It is unnecessary to answer question 1 or question 2 in the case stated. Question 3 should be answered: No.

KITTO J. I agree in the judgment of the Chief Justice and have nothing to add.

TAYLOR J. I agree that the word “person” in s. 27 of the *Transport (Division of Functions) Act* 1932-1956 does not comprehend the State of New South Wales and, accordingly, that the third question raised by the case stated should be answered in the negative.

Questions in the special case stated to be answered as follows:—

- (1) *By reason of s. 92 of the Constitution 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*

(1) (1875) 1 Q.B.D. 487.

(2) (1901) 26 V.L.R. 460, 781.

arising as a result of the operation of s. 92 of the Constitution on the provisions of the State Transport (Co-ordination) Acts.

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- (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 recovering against the defendant in this action if this action is otherwise maintainable.*

Costs of the special case to be paid by the defendant.

Solicitors for the plaintiff, *Lester & Pearn.*

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.