[HIGH COURT OF AUSTRALIA.]

PIONEER EXPRESS PROPRIETARY LIMITED AND ANOTHER . . . . . } PLAINTIFFS;

AND

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

EDMUND T. LENNON PROPRIETARY LIMITED PLAINTIFF;

AND

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

EDMUND T. LENNON PROPRIETARY LIMITED PLAINTIFF;

AND

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

Constitutional Law (Cth.)—Freedom of inter-State trade commerce and intercourse—State statute—Validity—Imposition of charges on basis of tare weight of vehicle and mileage—"Reasonable charge" for use of roads—Power to make—Ascertainment—No formula laid down—Unregistered motor vehicle—Driving on State roads—Prohibition—Registration for six months or twelve months—Application to vehicles used exclusively for purposes of inter-State trade—Amending regulations—The Constitution (63 & 64 *Vict. c.* 12), *s.* 92—*Road Traffic Act* 1934-1955 (*S.A.*)—*Road and Railway Transport Act* 1930-1956 (*S.A.*), *ss.* 27*f* *to* 27*q*—*Road Traffic Act Regulations* (*S.A.*), *regs.* 41, 42, *as amended.*

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SYDNEY, *Aug.* 14, 15; *Sept.* 30.

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

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Under the *Road Traffic Act* 1934-1955 (S.A.) and regulations made thereunder motor vehicles driven on roads in South Australia must be registered. An option is given to register for six or for twelve months. The fees to be paid upon registration of commercial vehicles are calculated upon weight and horse-power and amount to large sums. Motor vehicles owned by a resident of any of the other States or of the Territories of the Commonwealth are exempted except motor vehicles the unladen weight of which is two and one-half tons or more and trailers the unladen weight of which is one ton or more. In *Nilson* v. *State of South Australia* (1955) 93 C.L.R. 292, this exception was held to be invalid in so far as it purported to apply to vehicles engaged in inter-State trade commerce and intercourse but the provision was not repealed.

The Road and Railway Transport Act Amendment Act 1956 however introduced into the *Road and Railway Transport Act* 1930-1939 a series of provisions (ss. 27f to 27q) headed " Payment for use of roads by unregistered vehicles " ; the provisions defined an " unregistered commercial vehicle " as a motor vehicle the tare weight of which is two and one-half tons or more not being registered under the *Road Traffic Act* 1934-1955. The owner of such a vehicle driven on public roads must pay a charge at the rate per mile of one-twentieth of one penny for each complete hundred-weight of the tare weight of the vehicle ; the charge becomes due at the time of the use of the road by the vehicle. The moneys received are to be paid into a fund to be used solely for the maintenance of roads in South Australia. Regulations provide that such a vehicle in respect of which any charges due have not been paid may be stopped and detained until they are paid.

Held, that the new provisions were invalid in so far as they purported to apply to vehicles engaged in inter-State trade commerce and intercourse since they imposed charges incompatible with the freedom given by s. 92 of the Constitution.

By *Dixon* C.J., *McTiernan*, *Williams*, *Webb* and *Taylor* JJ., on the grounds that the charges were directed at vehicles engaged in inter-State trade and were discriminatory ; that the charges appear to be an inducement to register under provisions already declared invalid in respect of such vehicles rather than an attempt to recover the cost of the upkeep of highways by a just apportionment among users and that although the charges were levied on inter-State traders only they were to go to the upkeep of roads in South Australia generally.

By *Kitto* J. on the ground that any such charge was incompatible with the freedom of inter-State trade given by s. 92 of the Constitution.

DEMURRERS

Edmund T. Lennon Pty. Ltd. and Pioneer Express Pty. Ltd. and Pioneer Tourist Coaches Pty. Ltd. commenced suits in the High Court by statement of claim seeking declarations that ss. 27f, 27g, 27h and 27j to 27q of the *Road and Railway Transport Act* 1930-1956 (S.A.) were invalid and also seeking consequential injunctions.

The allegation in the statement of claim was that the plaintiff Edmund T. Lennon Pty. Ltd. carried on a business of a carrier by road for the carriage of goods for reward on inter-State journeys from Brisbane, Sydney and Melbourne to Adelaide and from Adelaide to each of those cities. The plaintiff alleged that each of its motor vehicles was operated in South Australia only for the purpose of carrying goods inter-State and that each of its said vehicles was registered and insured under and in accordance with the laws of New South Wales.

Pioneer Express Pty. Ltd. and Pioneer Tourist Coaches Pty. Ltd. alleged that each of the said companies carried on the business of a carrier of passengers by road and operated its said motor vehicles for the carriage of passengers for reward between South Australia and various places in Victoria and New South Wales. Such motor vehicles were not used for the carriage of passengers on any intra-State journeys within the State of South Australia. All the vehicles of the said company were registered and insured either in Victoria or New South Wales.

In each action the defendant demurred to the statement of claim.

Edmund T. Lennon Pty. Ltd. v. *State of South Australia,* no. 8 of 1957. During the course of argument in the above-mentioned matter the Court was informed that the grounds raised in this action were covered by the grounds taken in the above-mentioned matters. By consent therefore Case no. 8 of 1957 was struck out.

Further facts appear in the judgment of the Court hereunder.

Sir *Garfield Barwick* Q.C. (with him *G. D. Needham*), for the plaintiff Edmund T. Lennon Pty. Ltd. The insertion of ss. 27f to 27q in the *Road and Railway Transport Act* is an attempt indirectly to do what this Court said in *Nilson* v. *State of South Australia* (1) could not be done. The Act, as amended by s. 27f, has set up its own meaning of " unregistered " or " not registered ". The definition is a reference to vehicles which are not in fact registered under the *Road Traffic Act* 1934-1955 (S.A.) whether exempt or non-exempt. The amendment made by the insertion of ss. 27f to 27q virtually attempts to compel the plaintiff to register if it is going to make any substantial number of visits to the State. The situation in South Australia is that intra-State movement of vehicles attracts registration under a code for registration which is available and enforceable. Inter-State vehicles under the exemption, apart from this statute, may move in if their owner does not reside in

(1) (1955) 93 C.L.R. 292.

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South Australia, and they need not be registered. Therefore, substantially the class of vehicles which will be caught by the amendment are those vehicles which are moving inter-State. The amendment requires them to pay a charge from the moment they begin to move from another State into South Australia. It is disclosed at the outset as a charge on the actual inter-State movement. The class would include those who are exclusively engaged, and those who are casually engaged, in inter-State movement. From the foregoing there is apparent a differential treatment between the intra-State movement and the inter-State movement. If it be said that one can get out of the discrimination by registering then one is in the realm of a case like *Attorney-General (N.S.W.)* v. *Homebush Flour Mills Ltd.* (1). The definition of an unregistered commercial vehicle linked with s. 27g is an attempt to replace the amendment that was dealt with in *Nilson's Case* (2), but to attach a slightly different consequence, that is to pay a charge as under that section. It is applicable to all roads, and is a sum arbitrarily fixed by Parliament, and is unrelated to the value of anything provided by the State to the person required to pay the charge. This plaintiff adopts, with respect, the views expressed by *Kitto* J. and *Taylor* J. in *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [*No.* 2] (3). The impost cannot be regarded as a recompense for services rendered, e.g., repair or maintenance; something done to make the road more useful to the operator; something in the nature of a *quid pro quo*. If one puts the alternative view founded on the *dicta* in *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [*No.* 2] (4) this statute would not satisfy those requirements. In the circumstances the impost is really a penalty for not registering. *Nilson* v. *State of South Australia* (2) said it could not whittle away the exemption. Another way of putting the matter is to be found in *Attorney-General (N.S.W.)* v. *Homebush Flour Mills Ltd.* (5). A disability is being laid on the inter-State operator really in order to enforce an obligation upon him which cannot be imposed directly. In any case and on any view the onus must be on the Crown to demonstrate the reasonableness of the charge within the ideas which are expressed in *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [*No.* 2] (4). That would mean that the defendant could not succeed against the plaintiff on demurrer. The plaintiff has an exemption, if it were resident outside the State, both under reg. 42 and under the Constitution. On the *ex facie* nature of the impost of necessity it is a burden; its *quantum* is not material.

(1) (1937) 56 C.L.R. 390.
(2) (1955) 93 C.L.R. 292.
(3) (1955) 93 C.L.R., at pp. 215-225, 236-245.
(4) (1955) 93 C.L.R. 127.
(5) (1937) 56 C.L.R., at p. 412.

C. I. Menhennitt Q.C. (with him *G. D. Needham*), for the plaintiff Pioneer Express Pty. Ltd. and another. These plaintiffs adopt in their entirety the submissions made by counsel in the immediately preceding case. All those submissions have equal application in the case of passenger vehicles as in the case of goods vehicles. No charge can be made in respect of the operation of inter-State vehicles on roads by reason of s. 92 of the Constitution. That conclusion follows from the decision in *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [*No.* 1] (1). The views expressed in *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [*No.* 2] (2), are adopted. The use of the roads cannot be denied to an inter-State carrier, and no charge can be made, whether it take the form of a privilege tax or a recompense for road maintenance: *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [*No.* 2] (3). There is a complete contrast between the position under the Commonwealth Constitution and the position under the Constitution of the United States of America. The express provision in s. 92 is the provision that produces the result that no charge can be made for either a privilege tax or recompense for maintenance. It is the absence of such an express provision which has enabled that distinction to be drawn under the latter Constitution and the implications which are drawn from the commerce power there. The roads are public highways and freedom under s. 92 requires that they be made available for use without any charge of any kind. If they are to be financed, as they must be, they are to be financed out of the general revenue and taxes of the States and not special taxes imposed on users of the roads. The whole notion of reasonableness is one that cannot be applied to road charges. It is not possible to decide who determines the reasonableness of the charge, or as to what matters are to be taken into account in determining the notion of reasonableness. What would be reasonable would vary according to a variety of relevant factors. The more the State neglected the roads the higher would be the charge. If reasonableness were a test other financial contributions by road transport operators by way of taxes and other imposts would have to be taken into account. The extent of that contribution could not be ascertained. If the notion of reasonableness were adopted one would have to have regard to the benefits to the community provided by road transport in providing movement of goods inter-State and

(1) (1954) 93 C.L.R. 1, particularly at p. 23.
(2) (1955) 93 C.L.R., at pp. 215, 222, 223, 225, 237, 240.
(3) (1955) 93 C.L.R., at pp. 225, 238, 239.

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the general economic position of the community. That is not capable of assessment and therefore precludes a proper assessment of a reasonable charge. The view of the majority in *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [*No.* 2] (1) turned on the conception that highways were a modern special type of construction; there is nothing in this case to show whether there are any such roads in South Australia, or the extent thereof. For those reasons, no charge which is related to the use of roads is permissible. Alternatively, even if some charges are permissible, this particular charge does not satisfy the tests enunciated in *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [*No.* 2] (1) to the effect that some charges were permissible, and it is therefore invalid. It is not a charge for recompense for wear and tear, but a charge for use. In *Armstrong* v. *State of Victoria* (2) an attempted distinction was drawn between a privilege tax and a recompense tax. It is akin to a privilege tax and therefore invalid. The charge is also invalid because it discriminates against inter-State trade. It has no operation to a vehicle that is confined to intra-State trade. The charge is a substitution for registration and, the fee having been paid, the person concerned would be entitled to registration without further fee. The Act is confined to inter-State operations although it does not cover every inter-State operation, because a vehicle might be registered in South Australia and then undertake an inter-State operation. That fact constitutes discrimination in the sense in which the Court said in *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [*No.* 2] (3) produces invalidity under s. 92. This Act makes a charge in respect of some inter-State traders not made in the case of intra-State traders *Armstrong* v. *State of Victoria* (4): The *quantum* of the charge is arbitrarily fixed as a permanent charge in the Act. It is essential that the matter in respect of which the charge is made should be revealed and a formula set out. The passages in *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [*No.* 2] (5); *Hughes & Vale Pty. Ltd.* v. *State of Queensland* (6) and *Armstrong* v. *State of Victoria* (7) all contemplate a formula, or the laying down of criteria and the determination of the charge by somebody constituted to do so. Without such a formula or such criteria it is impossible to decide, e.g. whether or not the capital cost of roads has or has not been included in the charge. The fact

(1) (1955) 93 C.L.R. 127.
(2) (1957) 99 C.L.R. 28.
(3) (1955) 93 C.L.R., at pp. 171, 172, 175, 176, 211.
(4) (1955) 93 C.L.R., at p. 286.
(5) (1955) 93 C.L.R., at pp. 176-178, 195, 211.
(6) (1955) 93 C.L.R. 247.
(7) (1955) 93 C.L.R. 264, at pp. 284, 286.

that the charge is permanent prevents it being related to the cost of maintenance and complying with constitutional necessities. This Act could not become invalid—it is either valid or invalid from the outset as was indicated in *Australian Textiles Pty. Ltd.* v. *The Commonwealth* (1). This particular charge fails to comply with the tests that have been indicated in that there is a charge for all roads and not for relevant highways. A provision which covers all roads including private roads is not adopting the conception at all; but is rather treating all roads as being used and is not considering what special maintenance is required in relation to special roads. The tests of the majority in *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [*No.* 2] (2) contemplated that the charge would vary from one class of road to other classes of roads; not necessarily for each separate road, but that each class or category of road would be dealt with in accordance with the maintenance involved. The fact that the charge is a uniform charge irrespective of the type or nature of the construction of the particular road is a characteristic which also destroys this provision. This is an indirect attempt to enforce the registration provisions already pronounced invalid in *Nilson* v. *State of South Australia* (3). If the charge can be justified as reasonable the onus is upon the Crown to establish reasonableness. Alternatively, if that were not so then they are burdens and the imposition of those burdens is invalid, and the demurrer has proceeded on that basis.

R. R. St. C. Chamberlain Q.C. and *D. I. Menzies* Q.C. (with them *W. A. N. Wells*), for the defendants in each case.

R. R. St. C. Chamberlain Q.C. The Act in question represents a studied attempt to come within the precise *dicta* of the majority of the Court in *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [*No.* 2] (4). It is conceded that the Act provides a different form of treatment for inter-State transportation being one of the two respects in which this case is distinguishable from *Armstrong* v. *State of Victoria* (5). That is a perfectly legitimate proceeding so long as the Act does not differentiate against the inter-State vehicle. In order to ensure that they are no worse off when compared with people operating within the State, the inter-State hauliers are given the option to register. A *dictum* on the flat rate charge is to be found in *Aero Mayflower Transit Co.* v. *Georgia Public Service Commission* (6). The only practical way in which the State could

(1) (1945) 71 C.L.R. 161, at p. 180.
(2) (1955) 93 C.L.R. 127.
(3) (1955) 93 C.L.R. 292.
(4) (1955) 93 C.L.R., at p. 175.
(5) (1957) 99 C.L.R. 28.
(6) (1935) 295 U.S. 285 [79 Law. Ed. 1439].

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make a charge appropriate to inter-State vehicles without disrupting its whole system, is by some such process. If the legislature is conceded the right to impose something in the nature of a ton-mile charge then it must be conceded the right to do it in a practical way. By reason of the special legal difficulties or the special legal problems created by s. 92 the legislature is entitled to set up a special method of dealing with it. As long as it does not discriminate against inter-State trade, the fact that the Act deals with it in a separate category is beside the point. As to formula, persons who allege that the fee is unreasonable may do so in their pleadings but neither of the plaintiffs has done so. The onus is upon those who allege invalidity. If the invalidity ultimately depends on a question of fact then the people who rely on those facts must allege them and prove them. The approach is to allege that on its face the Act is an infringement of s. 92: see *Nilson* v. *State of South Australia* (1); *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [*No.* 2] (2) and *Hughes & Vale Pty. Ltd.* v. *State of Queensland* (3). Cases where invalidity can be made to depend upon the question of fact include *Sloan* v. *Pollard* (4); *Jenkins* v. *The Commonwealth* (5); *Australian Communist Party* v. *The Commonwealth* (6) and *Stenhouse* v. *Coleman* (7). All that the respondent needs to do is to produce the legislation and assert that it, prima facie, has the character attributed to it, and ask the Court in the absence of evidence to the contrary to trust the legislature as the American authorities have done. For practical purposes it is quite impossible to devise a formula. Inter-State transport must be made to pay its way, or to contribute towards paying its way: *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [*No.* 2] (2). The only way in which that end can be achieved is by doing what has been done in the United States: see *National Labor Relations Board* v. *Mexia Textile Mills Inc.* (8); *South Carolina State Highway Dept.* v. *Barnwell Bros. Inc.* (9) and *Clark* v. *Paul Gray Inc.* (10). The expression " a charge for the use of " is similar to the language used in the United States cases. There can be no doubt as to the destination of the fees charged; they are to be used solely for the maintenance of the highways. The State as a whole is put to the expense of maintaining roads and is put to extra expense in maintaining roads by reason of the damage done to them by inter-State traffic, therefore the State,

(1) (1955) 93 C.L.R. 292.
(2) (1955) 93 C.L.R. 127.
(3) (1955) 93 C.L.R. 247.
(4) (1947) 75 C.L.R. 445.
(5) (1947) 74 C.L.R. 400.
(6) (1951) 83 C.L.R. 1, at p. 201.
(7) (1944) 69 C.L.R. 457, at p. 469.
(8) (1950) 339 U.S. 561 [94 Law Ed. 1067].
(9) (1938) 303 U.S. 177 [82 Law. Ed. 734].
(10) (1939) 306 U.S. 583 [83 Law. Ed. 1001.]

by one form or another is entitled to contribution. A practical difficulty is that a vehicle making an inter-State journey traverses a lot of different highways. The supplying of daily information presents no difficulty to the hauliers. The charge is based upon the nature and extent of the use of the road. Inter-State transportation bears no greater burden than internal transport. The collection involves no substantial interference with the journey. Any provision considered objectionable can, under s. 27q, be severed from the Act. Ever since there has been road transport to any extent the Americans have been coping with this problem and have had a great deal of experience in dealing with it. The onus is on the people who assert invalidity to prove it by one process or another, by the terms of the Act, by judicial knowledge, or by proved facts. If anyone relies on a fact in an assertion that a State Act is invalid, he should prove it: see *Hendrick* v. *Maryland* (1); *Invels* v. *Morf* (2) and *Clark* v. *Paul Gray Inc.* (3).

D. I. Menzies Q.C. The Act falls within the decision that has been given. The plaintiffs have avoided the real task that they should have undertaken had they wished to prove invalidity. It would have been impossible to have brought this matter before the Court in this way had the plaintiffs done the one thing that was necessary for them to do to establish the invalidity of the Act, namely to allege that the charge was not a reasonable charge for the use they make of the South Australian highways. That failure is destructive of their statement of claim. The legislation proceeds upon certain well-founded assumptions of the sort that forms the basis of what was said by the five members of the Court in *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [*No.* 2] (4); *Hughes & Vale Pty. Ltd.* v. *State of Queensland* (5) and *Armstrong* v. *State of Victoria* (6). Those assumptions are: (i) that the passage of heavy vehicles upon roads does cause special wear and tear—so the Act is concerned with nothing more than the use by those vehicles of the public roads of South Australia; (ii) that there is a definite relation between the use of the roads and the wear and tear that is caused to the roads; and (iii) that it is the duty of the State to maintain its roads. An assumption of the Act is that those who cause special damage to the roads by the use of heavy vehicles on them may be called upon to make some subvention towards the cost of their maintenance. It does not go beyond that. There is no precise relationship established between a particular road and a

(1) (1915) 235 U.S. 610, at p. 623 [59 Law. Ed. 385, at p. 391].
(2) (1937) 300 U.S. 290, at p. 294 [81 Law. Ed. 653, at p. 657]
(3) (1939) 306 U.S., at p. 598 [83 Law. Ed. 1001].
(4) (1955) 93 C.L.R. 127.
(5) (1955) 93 C.L.R. 247.
(6) (1955) 93 C.L.R. 264.

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particular vehicle. That relationship is entirely unnecessary. The charge the statute imposes does depend upon and is measured by the actual use made of the road. It is not so much a payment for services rendered as a compensation to be paid for a use of highways which inevitably causes damage to those highways—to make good damage which is done: *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* (*No.* 2] (1). A reasonable charge for use and damage to roads is not an unconstitutional burden. The charges in relation to inter-State trade are not higher than they are with regard to intra-State trade. A person who uses his vehicle for the purposes of inter-State trade exclusively, has the choice of either registering and paying the registration fee or choosing not to register and to pay the charges imposed by the Act. The provisions relating to registration were dealt with in *Nilson* v. *State of South Australia* (2). The provisions of the State Act relating to the registration of motor vehicles were not held to be invalid, they stand except to the extent that they must be read down to accommodate them to s. 92. The extent to which they must be read down is that they must not be understood as imposing an obligation upon a person who carries on an inter-State business only, to register and to pay the fees the Act provides for. Thus an inter-State trader is in a better position than an intra-State trader. As to enforcing the charge by seizure the proper construction of the Act is that it would be an entirely irregular exercise of the power of seizure if a vehicle were seized until after the lapse of the fourteen days from the end of the month. It is in conformity with the earlier decisions of this Court, particularly *Armstrong* v. *State of Victoria* (3), that for a charge of this sort to be valid it must be precise. It is not necessary that the determination of charges together with directions as to the way in which calculations should be made should be committed to an outside body. The legislature has made a real effort to approximate the charge it is making to the use and damage that the vehicles make of and to the road. The onus is upon a person who asserts unconstitutionality to produce all the facts necessary to prove it. The plaintiffs' statement of claim does not show sufficient to warrant or to demand the conclusion that the statute is unconstitutional. The legislation is valid.

Sir Garfield Barwick Q.C., in reply.

C. I. Menhennitt Q.C., in reply.

Cur. adv. vult.

(1) (1955) 93 C.L.R., at p. 211.
(2) (1955) 93 C.L.R. 292.
(3) (1955) 93 C.L.R. 264.

The following written judgments were delivered:

DIXON C.J., MCTIERNAN, WILLIAMS AND WEBB JJ. In these two actions brought in the original jurisdiction of this Court against the State of South Australia the plaintiffs seek relief against the application to them of provisions introduced into the *Road and Railway Transport Act* 1930-1939 (S.A.) by s. 4 of the *Road and Railway Transport Act Amendment Act* 1956 (No. 22 of 1956). The plaintiff in the first action carries on the business of a carrier of goods by road. The plaintiffs in the second action operate motor vehicles for the carriage of passengers for reward. In each action the plaintiffs claim to own vehicles which are exclusively employed in inter-State commerce. The purpose of the actions is to obtain declarations of right and injunctions whereby the plaintiffs would be protected from the operation, with reference to such vehicles, of the provisions introduced into the Act by s. 4 of No. 22 of 1956. In each action the defendants demurred to the statement of claim. The demurrers were argued together.

The place which the amendments made by s. 4 take will be best seen by a chronological account of the recent legislation in South Australia by which inter-State carriage of goods and passengers by road has been directly affected. The *Road Traffic Act* 1934-1954 (S.A.) contains a provision of a general character forbidding any person to drive any motor vehicle on any road unless that vehicle has been registered under Pt. II of that Act (s. 7). To obtain registration the owner of a motor vehicle must apply to the Registrar and he must pay a fee (s. 8 (1)). The fee is calculated in accordance with a scale prescribed in the Act (s. 9). An option is given to register for six or twelve months but if a period of six months is chosen the fee for that period is fifty-two and one-half per cent of the fee for the whole period of twelve months. See ss. 8 (2) and 9 (6b). The fees are heavy and increase according to a graduated table as the weight of the vehicle and the horse-power of the engine increase, the fees being calculated by a formula based on weight and horse-power. A separate graduated table of fees is prescribed for commercial vehicles and the application of that table means a very substantial annual tax for heavy transport vehicles (s. 9). But among the powers to make regulations conferred upon the Governor in Council there is a power to provide for the exemption from the obligation to register motor vehicles coming from other States. The power to provide for exemption, however, is limited to vehicles owned by persons resident outside the State of South Australia who are temporarily in the State (s. 61 (1) XII). Up to 31st January 1955, regulations made under this power existed

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providing an exemption for a motor vehicle if owned by a resident of any other State or of one of the Territories of Australia. A distinction was made between Tasmania and the mainland States and between the Capital Territory and other Territories, but although the distinction called for separate clauses in the regulations, it is not material for any present purpose. In the result there were exemptions for every State and Territory. See *Road Traffic Act Regulations* 1951, regs. 41 and 42. But, unfortunately as it turned out, a regulation was afterwards made which qualified the policy carried out by this exemption. That regulation, which was made on 23rd December 1954 and took effect on 31st January 1955, amended regs. 41 and 42 by adding to each of them a proviso to the effect that after 31st January 1955 the regulations should not apply (i) to a motor vehicle (not being a trailer) the unladen weight of which is two and one-half tons or more; or (ii) to a trailer (not being a caravan) the unladen weight of which is one ton or more. The result of these provisos was to bring every commercial motor vehicle the unladen weight of which was two and one-half tons or more within the main provision with the result that a commercial vehicle coming from another State was required to register and pay the registration fee either every six months or annually. The validity of this provision of State law was attacked successfully by a plaintiff suing on behalf of himself and a number of persons carrying on the business of carriers of goods by road: *Nilson* v. *State of South Australia* (1). In the judgment of *Dixon* C.J., *McTiernan* and *Webb* JJ. in that case the following passage occurs (2): "The plaintiff's case is that this amounts to a tax upon inter-State transportation which is inconsistent with the freedom of trade commerce and intercourse among the States guaranteed by s. 92. It is difficult to see what other character it can bear. The roads cannot be used unless the vehicle is registered and the vehicle cannot be registered unless the imposition is paid. Before a commercial motor vehicle carrying goods from another State can enter South Australia the owner must register it and pay the large fee or tax. The registration will enable him to use South Australian roads for six months if he pays fifty-two and one-half per cent of the yearly fee. But he may not need to use them again or he may intend to use them only intermittently. The decision of the question is covered by the reasons given in *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [*No.* 2] (3) which should be read as part of this judgment. There is no attempt made here to impose a charge for the use of the roads

(1) (1955) 93 C.L.R. 292.
(2) (1955) 93 C.L.R., at p. 303.
(3) (1955) 93 C.L.R. 127.

measured according to mileage or ton-mileage or in any other way reflecting the service or advantage which the owner of the motor vehicle actually obtained from South Australian roads or the burden he placed upon them or his contribution to their deterioration. Like the *Motor Vehicles (Taxation) Act* 1951 (N.S.W.) it simply imposes a tax burdening transportation." That judgment was pronounced on 9th June 1955. On 8th November 1956 the *Road and Railway Transport Act Amendment Act* 1956 was assented to and it was proclaimed to commence on 1st February 1957. Section 4 introduced into the *Road and Railway Transport Act* 1930-1939 some new provisions under the heading " *Payment for use of roads by unregistered vehicles* ". The provisions are ss. 27f to 27q. These are the provisions attacked in the present proceedings. When they are read it becomes quite clear that the legislature enacted them in order to occupy that part of the field which was left vacant so to speak by the judgment of this Court in *Nilson's Case* (1). By s. 27f (1) the words " unregistered commercial vehicle " are defined. They are defined to mean a motor vehicle the tare weight of which is two and one-half tons or more and which is not registered under the *Road Traffic Act* 1934-1955. Tare weight means the weight of the vehicle without load, passengers, fuel, oil or tools. The central provision is then made by s. 27g (1). It is that if an unregistered commercial vehicle is driven on public roads in South Australia the owner of that vehicle should pay to the board a charge for the use of those roads at the rate per mile of one-twentieth of a penny for each complete hundredweight of the tare weight of the vehicle. Now for all substantial purposes it is clear that only those vehicles which enjoy the benefit of the exemption given by regs. 41 and 42 of the *Road Traffic Act Regulations* 1951 can come within the definition of " unregistered commercial vehicle ". It is important to bear in mind what it was in the regulation of 23rd December 1954, coming into operation on 31st January 1955, that the Court held invalid. The invalidated provision consisted in the proviso taking motor vehicles out of the benefit of the exemption when they had an unloaded weight of two and one-half tons or more. It is thus quite plain that the purpose of s. 27g (1) is to bring under liability to the charge it imposes motor vehicles of the same description as the invalid proviso brought within the obligation to register. The result is that the owner of such a vehicle is presented with an option either of registering his vehicle annually or six-monthly and paying the fee, or of paying the charge imposed by s. 27g (1) for

(1) (1955) 93 C.L.R. 292.

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the use of the roads. During the argument the position was graphically described by Mr. *Chamberlain* of counsel for South Australia as giving the inter-State carrier the option of making payment for each journey or of obtaining a season ticket.

Section 27g (2) provides that every such charge shall become due at the time of the use of the road by the vehicle and if not then paid should be paid as provided in s. 27j. Section 27j requires the owner of an unregistered commercial vehicle to make a return within fourteen days after the end of each month in which he has driven his vehicle in South Australia. The return must consist of a record prescribed under s. 27h which must show all journeys taken on public roads in South Australia by the vehicle and certain particulars of the journey. The precise form of the record appears in the schedule to the regulations of 17th January 1957, proclaimed to come into operation on 1st February 1957. Under s. 27g (3) the charge payable under s. 27g (1) becomes a debt due to the Transport Control Board by the owner of the vehicle. It is recoverable by the board by action in a local court or by complaint in a court of summary jurisdiction or by the order of a court of summary jurisdiction made in proceedings for an offence under the Act (s. 27g (3)). Section 27k empowers the board to make an arrangement in writing with the owner of an unregistered commercial vehicle as to the time and place and manner of paying the charge and the records to be kept and the delivery of the records to the board. This simply enables the board to relieve the carriers of the direct obligations by making some more convenient arrangement. There are evidentiary provisions in the Act which for the purposes in hand may be put on one side and certain penal provisions which also are not material for present purposes. In addition there is a power to make regulations. Under this power regulations were made on 17th January 1957 which, among other things, purport to enable an inspector or other officer of the board or police officer to stop and detain an unregistered commercial vehicle in respect of which any charges due under the Act are not paid, and to detain it until they are paid.

It will be seen that the provisions introduced by s. 4 of the amending Act are in substance applicable only to carriers of goods or persons whose vehicles are not registered in South Australia because they are registered in some other State or Territory and the owner of the vehicle is resident outside South Australia. It is true that it may be possible theoretically to imagine a case where a vehicle may be unregistered and therefore come within the provision although it is not engaged in inter-State trade, but it must be a rare case and one hardly likely to arise in fact. Plainly enough the

Act is in truth directed at vehicles registered in other States but coming into South Australia in the course of inter-State trade.

The plaintiffs base their case on the ground that the charge is a tax upon inter-State trade. The imposition, however, is defended upon the ground that it comes within the conception which certain members of this Court attempted to describe in *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [*No.* 2] (1), that is to say the conception that a proper recompense to the State for the actual use made of the roads considered as a physical facility provided by the State may be consistent with the freedom of inter-State trade commerce and intercourse. At the time when the demurrers were argued the judgment of the Court in *Armstrong* v. *State of Victoria* (2) had not been delivered. In that case the facts were investigated at a trial on evidence and in that important respect, if in no other, the proceeding differed from the present case. Here the Court is limited to the consideration of the Act and the allegations made in the statements of claim demurred to. In the enactment now before us there is no attempt to deal with the problem of the use which heavy commercial traffic considered as a whole makes of South Australian roads and of the wear and tear involved. The statute is confined in its operation to a limited class of heavy commercial vehicles, a class chosen because they are engaged in inter-State trade and belong to owners who reside out of South Australia and who have registered their vehicles in some other State or Territory. If the enactment was confined to vehicles registered in another State it would mean that it would be concerned exclusively with the inter-State transportation of goods or people. But it covers vehicles registered in the Territories. It is true that s. 92 does not in its terms apply to trade commerce and intercourse between States and Territories. But by the *Northern Territory* (*Administration*) *Act* 1910-1949, s. 10, it is provided that trade commerce and intercourse between that Territory and the States whether by means of internal carriage or ocean navigation shall be absolutely free. Although the validity of this provision has been impugned and is yet to be decided*, we can for the purposes of this case assume that it is effective to place traffic between the Northern Territory and South Australia in the same situation as traffic between a neighbouring State and South Australia. But even without that assumption, ss. 27f to 27q must be regarded as adopting as one criterion of their operation a differentiation of inter-State traffic from intra-State traffic. It

(1) (1955) 93 C.L.R. 127.
(2) (1957) 99 C.L.R. 28.

* [Ed. note. *Lamshed* v. *Lake*: The decision is reported at p. 132 of this volume.]

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cannot matter that the differentiation also puts the traffic between a Territory and the State on the side of inter-State traffic.

Section 27g (1) describes the imposition as a charge for the use of the public roads in South Australia. There is little or nothing in the use of this expression to bring the charge into relation with the wear and tear upon the roads or their upkeep. But the charge is at a rate per mile, a rate of one-twentieth of a penny per hundredweight of the tare weight of the vehicle. Further the moneys received by the board are to be paid into the Highways Fund and are to be used solely for the maintenance of the roads (s. 271). But, except for these qualifications, all that appears is a charge at a fixed but unexplained rate against heavy commercial vehicles if they belong to an owner resident out of South Australia and are not registered in South Australia. The plaintiffs have not framed their pleadings with a view to raise any issue of fact as to the relation of the rate of a penny a hundredweight of tare weight to the wear and tear upon the roads or the cost of upkeep. But the plaintiffs point to the fact that it is a flat rate per hundredweight capable of amounting into to a very considerable sum per journey, that the manner in which it is arrived at is not disclosed, that it affects roads in all parts of a State of huge area where the economic and physical characteristics are highly diversified. It applies as well on the West Australian border as between Mt. Gambier and Hamilton. It is obviously not related to the upkeep of those roads which are commonly used by inter-State carriers or by border trade. The charge looks like an inducement to register rather than an attempt to recover the cost of the upkeep of highways by a just apportionment among users. The history of the matter indicates that it is no accident that it should wear that appearance.

The burden on vehicles of heavy tare weight regularly travelling over long journeys in South Australia in the course of inter-State trade may be very high indeed. And the charge is differential. In short the charge has few of the characteristics which would entitle it to consideration as an attempt to recover from traffic using the roads the cost of their upkeep. Enough has been said to show this is hardly within the conception upon which the Court's decision in *Armstrong's Case* (1) is based and upon which the *dicta of* the Judges in *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [*No.* 2] (2) proceeded. We shall not elaborate now upon the explanation of that conception which is given in the judgments in those cases. We shall simply repeat a passage from what *Dixon* C.J.

(1) (1957) 99 C.L.R. 28. (2) (1955) 93 C.L.R. 127.

said in *Armstrong's Case* (1). It is as follows :—" . . . it is evident that such a charge must not go outside or beyond the limitations which are necessarily implied in that conception of its nature which forms its justification. That conception is that if the charge is no more than a fair recompense for the actual use made of the highway having regard, not only to the wear and tear to which every use of it contributes, but to the costs of maintenance and upkeep, its imposition may not be incompatible with the freedom guaranteed by s. 92. As the cases in the United States suggest, it is not possible consistently with s. 92 to impose a tax on a man in respect of his right to engage in the inter-State carriage of goods or people. It is another thing, however, to require him to pay for the actual use he makes of the road. Again, to impose the capital costs of road construction upon the traffic would not seem consistent with s. 92. Traffic is a constant flow and the regularly recurring charges of maintaining a surface for it to run upon may be recoverable from the flowing traffic without any derogation of the freedom of movement; but any contribution to capital expenditure goes altogether outside such a principle. The charge moreover must be a genuine attempt to cover or recover the costs of upkeep. It may of course be arrived at by a pre-estimate; and an *ex post facto* discovery of error in the pre-estimate will not necessarily mean that the pre-estimate was not genuine. When in respect of the amount of the charge it is said that it must be reasonable that means reasonable in relation to its nature and purpose. If a ton mileage rate is in question it must be reasonable as a proportionate contribution made by the description of vehicle by reference to which the contribution is fixed, that is to say a proportionate contribution to the recovery of those costs of upkeep the bearing of which by the traffic cannot be said to impair the freedom of inter-State transport. Obviously a State cannot single out inter-State transport from transport generally for a particular charge. The places where a journey begins or ends have no bearing on the justness of a compensatory charge made for using the road." (2) In the case of the statute under consideration in *Armstrong's Case* (1) the State of Victoria chose to treat the roads of Victoria as a whole and to take into account the heavier part of the commercial traffic they bore, subject to certain special exceptions, and to do this without distinguishing between traffic crossing the border or any part of it and other traffic. A ton-mileage charge was fixed for using roads, whether it be by inter-State traffic or intra-State traffic. In the

(1) (1957) 99 C.L.R. 28.

(2) (1957) 99 C.L.R., at pp. 46-47.

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South Australian provision no attempt is made to fix a charge which ought fairly to be borne by the heavy commercial traffic considered as a whole and then to distribute it over the integers of that traffic, whether in proportion to the use made of the roads or to the weight and nature of the integers or to any other relevant characteristic. The amendments in effect pick out that part of heavy commercial inter-State traffic which comes from other States or Territories, and the charge is levied upon it to the exclusion of all other traffic. The answer is made that the traffic subjected to the charge may elect to register and thus avoid it. But that answer is far from giving the charge a character consistent with s. 92. On the contrary it suggests that the charge is imposed with a view of driving the traffic to register and pay the very registration fees held to be an inadmissible tax when levied upon vehicles engaged exclusively in inter-State trade. The contention that the charge may bear less hardly on some than the registration fees is not only fallacious, it is irrelevant. It may bear more hardly on others. But it is irrelevant because the charge remains discriminatory.

It is unnecessary to go further. The enactment now in question ignores the cautions given in the judgments of the Justices who in *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [*No.* 2] (1) supported the view that consistently with s. 92 some charge might be levied to cover the upkeep of the roads which are used by traffic notwithstanding that inter-State traffic be included. Prima facie, therefore, the imposition made by ss. 27f to 27q of the *Road and Railway Transport Act* 1930-1956 is not within the conception of a charge which is consistent with the freedom guaranteed by s. 92. The defendants do not, even if they could, set up any matter which would displace this prima facie conclusion as to the character of ss. 27f to 27q. They simply demur to the plaintiff's pleading. In the result, as nothing justifying the charge appears, the provisions must be treated as incapable of reaching inter-State traffic. Accordingly the demurrers should be overruled.

KITTO J. The opinion I have expressed in earlier cases on the subject of charges for the use of roads in the course of inter-State journeys would require the overruling of the demurrers. I need not here re-state the reasons which have led me to that opinion. It is, of course, a minority opinion, but as the members of the Court who have taken a different view are satisfied that the demurrers cannot be upheld even on the conception which they have accepted

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

of freedom of inter-State trade, commerce, and intercourse, I do not find it necessary to say more than that I concur in the order proposed.

TAYLOR J. In the second of these suits the plaintiff company, which operates motor vehicles upon the roads of South Australia and other States in the course of inter-State trade and commerce, seeks a declaration that a number of the provisions of the *Road and Railway Transport Act* 1930-1956 (S.A.) are invalid, or, alternatively, that those provisions are inapplicable to its vehicles whilst they are being driven on public roads in South Australia in the course of or for the purposes of inter-State trade commerce and intercourse. Similar declarations are sought with respect to the regulations made under the Act, and, in particular, with respect to regs. 1, 2, 3, 4, 5, and 6.

The statutory provisions which are impugned were introduced by the *Road and Railway Transport Act Amendment Act* 1956, which came into operation on 1st February 1957, and they relate to the imposition of road charges upon the owners of " unregistered commercial vehicles " which expression, in the singular, is defined to mean a motor vehicle the tare weight of which is two and one-half tons or more, and which is not registered under the *Road Traffic Act* 1934-1955. It is conceded that the plaintiff's vehicles are vehicles in this category and it is of some importance to appreciate the reason for and the significance of this fact before proceeding to examine the legislation in question.

Section 7 of the *Road Traffic Act* provides that no person shall drive any motor vehicle on any road unless that vehicle has been registered under Pt. II of the Act and unless the registration thereof is for the time being in force. The prohibition erected by this section is subject to some minor exceptions but they are of no materiality so far as this case is concerned. Provision is made by s. 8 for the making of applications for registration and for the payment of prescribed fees and, by sub-s. (2) of that section, it is provided that upon application duly made and payment of the fee as required by sub-s. (1) the registrar shall register the motor vehicle in the register of motor vehicles for a period of either six or twelve months, at the option of the person applying for registration, and shall assign a number to the vehicles. Annual registration fees for vehicles are prescribed by s. 9 and these are calculated by reference to the " power-weight " (P.W.) of a vehicle, that is, the figure ascertained " by adding the weight in hundredweights of the vehicle to the horsepower calculated as " thereinafter mentioned. From sub-s. (4)

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of s. 9 it appears that the registration fees for commercial motor vehicles range from £6 for vehicles whose P.W. does not exceed twenty-five to £59 for vehicles whose P.W. is more than one hundred and twenty-five but does not exceed one hundred and thirty. For each additional five P.W. an additional amount of £3 is payable and it appears that the registration fee for a vehicle of the type used by the plaintiff would be, approximately, £120. It will be observed that, in terms, these provisions apply without distinction to all commercial vehicles whether engaged in inter-State trade and commerce or not. But in *Nilson* v. *State of South Australia* (1) this Court held unanimously that they could not apply to vehicles used exclusively in and for the purposes of inter-State trade commerce or intercourse. The consequence of this decision is that as long as such vehicles are operated on the public roads of South Australia exclusively in the course of such trade commerce or intercourse there is no legal requirement that they shall be registered under the *Road Traffic Act* and, in general, it is in this class of traffic that " unregistered commercial vehicles ", within the meaning of the *Road and Railway Transport Act* are to be found using such roads.

The *Road and Railway Transport Act Amendment Act* 1956 added a number of sections—namely ss. 27f to 27q inclusive—to the principal Act. Section 27f defines the expression " unregistered commercial vehicle " in the manner already indicated and the ensuing section provides that if an unregistered commercial vehicle is driven on public roads in South Australia the owner of that vehicle shall pay to the Transport Control Board a charge for the use of those roads at the rate per mile of one-twentieth of a penny for each complete hundredweight of the tare weight of the vehicle. Such charges are to become due at the time of the use of the road by the vehicle and provision is made for the recovery of such fees by action in specified courts. Later sections require the keeping of records and the making of returns and prescribe requirements with respect to other subsidiary matters and, by s. 27q, power is conferred to make regulations with respect to specified matters. Finally it should not be overlooked that s. 27l provides that all money received by the board in payment of charges shall be paid into the Highways' Fund and shall be used solely for the maintenance of roads.

It will be seen from what has been said that two sets of legislation touching the problem in hand are in operation in South Australia.

(1) (1955) 93 C.L.R. 292.

The first, consisting of the *Road Traffic Act* applies generally to motor vehicles other than those engaged exclusively in inter-State trade and the other, consisting of ss. 27f to 27q of the *Road and Railway Transport Act* 1930-1956, applies, in fact though not in terms, only to those vehicles which are operated exclusively in the course of inter-State trade and commerce and which have a tare weight of two and one-half tons or more and are not registered under the *Road Traffic Act*. In general terms this means, of course, that intra-State traffic is subject to the imposts specified in the *Road Traffic Act* whilst the *Road and Railway Transport Act* purports to impose other and different charges upon inter-State traffic. It was, however, suggested that, for all practical purposes, there is no discrimination between the two classes of traffic since the legislation leaves it open to operators of vehicles engaged in inter-State trade and commerce to adopt the alternative of paying the appropriate fees under the *Road Traffic Act* and of securing registration under that Act. But when it is seen that it would be quite impossible to forecast, in relation to the journeys of any unregistered commercial vehicle in any year, whether charges at the rate specified by the *Road and Railway Transport Act* would aggregate a greater or lesser sum than the fees payable upon registration under the *Road Traffic Act*, it becomes apparent that the claim that an operator is free to select the more advantageous basis for the payment of fees cannot be supported. It may be true, however, that the owner of such a vehicle may register it and, thereby, put himself on a parity with persons who are bound to register under that Act but the existence of an option to do this—if in fact one exists as the law stands at present—is of no consequence unless the charges imposed by the *Road and Railway Transport Act* are unconstitutional and, of course, if this is so, the existence of such an option cannot avail the defendant. The fact that the persons affected by that Act may escape the operation of its provisions by submitting to the imposition of another charge and, indeed, one which this Court has already ruled cannot be imposed upon inter-State traffic, does not constitute any answer to the plaintiff's claims.

This being so the material question for our decision is whether the charges imposed by the *Road and Railway Transport Act* may lawfully be exacted from persons operating vehicles upon South Australian roads exclusively in the course of inter-State trade and commerce. To this question a short answer may, I think, be made. Despite a cleavage of opinion in this Court concerning the question whether road charges of any kind may be imposed in respect of

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vehicles so operated the judgments of the majority have emphasised that there are, at the least, broad limits to the right to levy such charges. The question has been discussed recently in *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [*No.* 2] (1) and *Armstrong* v. *State of Victoria* (2) and it is unnecessary to repeat in detail what was then said. It is of some importance, however, to refer to one matter which was adverted to in those cases and which, in the present case, seems to assume vital significance. In the former case the joint judgment expressed the view that " if a charge is imposed as a real attempt to fix a reasonable recompense or compensation for the use of the highway and for a contribution to the wear and tear which the vehicle may be expected to make it will be sustained as consistent with the freedom s. 92 confers upon transportation as a form of inter-State commerce. But if the charge is imposed on the inter-State operation itself then it must be made to appear that it is such an attempt. That it is so must be evident from its nature and character " (3). Their Honours who delivered this judgment then went on to say " Prima facie it will present that appearance if it is based on the nature and extent of the use made of the roads (as for example if it is a mileage or ton-mileage charge or the like); if the proceeds are devoted to the repair, upkeep, maintenance and depreciation of relevant highways, if inter-State transportation bears no greater burden than the internal transport of the State and if the collection of the exaction involves no sub-substantial interference with the journey. The absence of one or all of these *indicia* need not necessarily prove fatal, but in the presence of them the conclusion would naturally be reached that the charge was truly compensatory " (4). The specification of these *indicia* commended itself both to *Williams* J. and *Fullagar* J. in *Armstrong's Case* (2) and it will be observed that all are to be found on the face of this legislation except that it does not appear that inter-State transportation will bear " no greater burden than the internal transport of the State ". On the contrary there appears, in the place of such an assurance, the very real probability that regular or frequent use on South Australian roads of vehicles engaged in inter-State transportation would result in the attraction of a heavier burden. But, however this may be, it is apparent that the effect of the legislation is to impose a special charge in relation to vehicles engaged in inter-State transportation and to deal with vehicles so engaged on a basis which may well result in the imposition of a heavier burden in relation to them than in relation to

(1) (1955) 93 C.L.R. 127.
(2) (1957) 99 C.L.R. 28.
(3) (1955) 93 C.L.R., at p. 175.
(4) (1955) 93 C.L.R., at pp. 175, 176.

corresponding vehicles operating within the State. The passage quoted above, in pointing out that the absence of one or, indeed, all of the specified *indicia* need not necessarily prove fatal, recognises that these *indicia* are not an exclusive test of validity and that challenged legislation may be supported by other features or combinations of other features, or possibly by evidence, capable of indicating that the charges imposed conform to a concept of "reasonableness" or "fairness". But in the present case no evidence was given and the legislation presents no other feature capable of compensating for or justifying the absence of parity between intra- and inter-State transportation. In these circumstances it is, it seems to me, impossible to regard the statutory charges as constitutionally permissible or the legislation which imposes them as capable of valid application to vehicles engaged in inter-State trade commerce and intercourse.

The only other observation which I wish to make in the case is that, in the absence of evidence from which it might have been possible to infer that the statutory charges are reasonable as to quantum, I should have found it difficult to reach a conclusion favourable to the defendants. I have already adverted briefly to the difficulty which appears to me to confront the Court in cases of this character where no such evidence is given and I mention it again, not for the purpose of enlarging upon it, but only because it does not appear to me to have been resolved by the views expressed by the members of the Court in *Armstrong's Case* (1).

For the reasons which I have given I am of opinion that the provisions of the *Road and Railway Transport Act Amendment Act* 1956 which purport to impose charges for the use of the public roads of South Australia and the provisions which are incidental to the imposition of such charges do not apply to the vehicles of the plaintiff so long as they are used exclusively in and for the purposes of inter-State trade commerce or intercourse and that the defendants' demurrer should be overruled.

This suit raised for our consideration wider questions than were raised in the earlier suit (No. 8 of 1957) between the same parties and that suit should now, by consent, be struck out.

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In this suit the plaintiffs seek relief similar to that sought in the suit already discussed and, for the reasons already given, a similar order should be made.

(1) (1957) 99 C.L.R. 28.

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Pioneer Express Pty. Ltd. and Another v. *State of South Australia and Others* (*No.* 7 *of* 1957).

Demurrer overruled. The defendants to pay the costs of the demurrer.

Edmund T. Lennon Pty. Ltd. v. *State of South Australia and Others* (*No.* 8 *of* 1957).

Action struck out. No order as to costs.

Edmund T. Lennon Pty. Ltd. v. *State of South Australia and Others* (*No.* 31 *of* 1957).

Demurrer overruled. The defendants to pay the costs of the demurrer.

Solicitors for the plaintiffs Pioneer Express Pty. Ltd. and the Pioneer Tourist Coaches Pty. Ltd., *Whitehead, Ferranti & Green*, agents for *Alexander Grant, Dickson & King*, Melbourne.

Solicitors for the plaintiff Edmund T. Lennon Pty. Ltd., *Higgins, de Greenlaw & Sisley*.

Solicitor for the defendants in each case, *F. P. McRae*, Crown Solicitor for New South Wales, agent for *R. R. St. C. Chamberlain*, Crown Solicitor for South Australia.

J. B.