HIGH COURT OF AUSTRALIA

Commonwealth Freighters Pty. Ltd.

Vs.

Sneddon

(Dixon C.J.(1), McTiernan(2), Fullagar(3), Kitto(4), Taylor(5), Menzies(6) and Windeyer(7) JJ.)

13 March 1959

DIXON C.J.

1. This appeal raises for consideration the question whether the Road Maintenance (Contribution) Act 1958 (N.S.W.) validly applies to commercial goods vehicles engaged in inter-State trade. The appeal comes directly from a conviction of the appellant by a court of petty sessions exercising federal jurisdiction. The conviction was for an offence against s. 10(1)(d) of the Act, a provision making it an offence for a person to fail to deliver to the Commissioner for Motor Transport a record which by the Act the appellant company was required to keep. Section 6 of the Act requires the owner of a commercial goods vehicle to keep (in or to the effect of a scheduled form) an accurate daily record of all journeys of the vehicle along public streets in New South Wales. This was the record the company failed to deliver. Section (5)(1) provides that the owner of every commercial goods vehicle shall pay to the Commissioner towards compensation for wear and tear caused thereby to public streets in New South Wales a charge at the rate prescribed in the first schedule to the Act. By sub-s. (2) it is provided that the charge shall become due at the time of the use of a public street; if it is not paid then it is to be paid and be recoverable as the Act provides. Sub-section (3) makes it a civil debt due to the Commissioner by the owner and recoverable in any court of competent jurisdiction. The rate prescribed by the first schedule is a mileage rate for every mile of public street along which the vehicle travels in New South Wales. It is one-third of a penny per ton of the sum of (a) the tare weight of the vehicle and (b) forty per centum of the load capacity of the vehicle. The purpose of the record which the owner is required by s. 6 to keep and by s. 10(1)(d) to deliver to the Commissioner is, plainly enough, to ensure that a proper accounting basis exists for the calculation and enforcement of the charge. Any motor vehicle and, if it has a trailer, the trailer is a commercial goods vehicle for the purpose of the charge if it is used or intended to be used for carrying goods for hire or reward or for any consideration or in the course of any trade or business: s. 3(1). The owner who is made liable is the person in whose name the vehicle is registered but it also includes the real owner and every joint owner or part owner, and a person using it under a hire purchase agreement but it excludes a vendor under a hire purchase agreement: s. 3(1). The tare weight and the load capacity of the vehicles which form basal integers for calculating the charge are elaborately defined. Prima facie they are governed by what is shown by the certificate of registration. In default of that directions are given for ascertaining the tare weight and the load capacity of a vehicle. But the Act does not apply at all with respect to any vehicle the load capacity of which (together with any trailer for the time being attached thereto) is not more than four tons. The answer upon which the appellant relies to the charge is that the vehicle for which no record was delivered to the Commissioner in pursuance of s. 10 (1)(d) was during the relevant period exclusively engaged in inter-State trade. That appears to have been the fact. (at p288)

2. There is in s.3(2) what is commonly called a severability provision but if the circumstance that

the vehicle was engaged in inter-State trade relieves the owner of liability to pay the charge in respect of the inter-State journeys, the respondent does not wish to contend that nevertheless the owner was bound to keep and return a record of the journeys. (at p288)

3. The question in the case therefore is whether the road charge imposed by the Act can include inter-State journeys without violating s. 92 of the Constitution. The charge imposed by the Road Maintenance (Contribution) Act 1958 (N.S.W.) is obviously based on that adopted by the Parliament of the State of Victoria by Pt.II of the Commercial Goods Vehicles Act 1955 (No.5921). The validity of that statute was sustained by a majority of this Court in Armstrong v. State of Victoria (No. 2) (1957) 99 CLR 28 In Hughes and Vale Pty. Ltd. v. State of New South Wales (No. 2) (1955) 93 CLR, at p 171, it was said in the judgment of McTiernan, Webb JJ. and myself that certain statutory provisions presented a problem which up to that time had not received consideration in this Court untrammelled by the conceptions held erroneous by the Privy Council in Hughes and Vale Pty. Ltd. v. State of New South Wales (No. 1) (1955) AC 241; (1954) 93 CLR 1 It was the problem of saying how far if at all and on what grounds a pecuniary levy can be made directly upon inter-State transportation by road and yet leave that form of trade commerce and intercourse absolutely free. In the judgment of McTiernan, Webb JJ. and myself which I have mentioned a tentative answer in general terms was given to this question and in Armstrong's Case (No. 2) [1957] HCA 55; (1957) 99 CLR 28 in a separate judgment I elaborated upon what was there said and applied it to the situation disclosed by the Victorian statutory provisions and the facts appearing in evidence in that case. In applying the doctrine which it is there sought to explain it is necessary to maintain some distinctions. In the first place there can be put aside as not relevant to the question the taxation of acts matters or things which do not in themselves form trade commerce or intercourse but yet may be incidental thereto or consequential thereon. Such taxation usually involves no infringement upon s. 92. Rates may be levied upon the premises occupied by a carrier carrying on an inter-State business; his profits may be taxed; so may his petrol. On the other side, to tax the inter-State operation will, if no more appear, be taken as an unconstitutional interference with it. "No tax or impost whatever can be laid upon the entry of goods or people into a State from another State or upon the passing of goods or people out of a State into another State. No part of the operation of s. 92 is less open to dispute than this. The purpose of the attempt to tax may be simply to raise revenue to carry on the services of the State and there may be no purpose of reducing the flow of commodities or of people across the border. But that cannot matter. Nor can it matter that the State needs the revenue in order to provide or maintain some or all of the services of government which those engaged in inter-State trade enjoy in common with all others who find themselves within the State. Indeed it can make no difference if the revenue which a tax falling upon inter-State commerce produces is segregated and is expended in maintaining some part of the service of government which is of special advantage to the particular trade taxed. For example the cost to a State of enforcing the law against the pillaging of cargo cannot be raised by a tax upon goods discharged from inter-State ships. Another example is a tax upon the transport of goods or passengers by road in order to meet the cost of enforcing the traffic laws. Such a tax would not seem consistent with s. 92, if the journeys are across State boundaries, however much benefit inter-State traffic might derive from the enforcement of such laws" (1955) 93 CLR, at pp 176, 177 (at p290)

4. What the decision of the majority of the Court in Armstrong's Case (No. 2) [1957] HCA 55; (1957) 99 C.L.R. 28 did was to sustain the view that a compulsory charge for the use by inter-State commerce of a physical thing which without a legal obligation the State provides for the purpose is compatible with the foregoing doctrine and that highways may properly be put in that category. The more obvious examples previously acknowledged, whether by judicial decision or common acquiescence, included wharves and shipping facilities, aerodromes, toll bridges, ferries and the

right to use constructional works as for example, railway running rights. The judgment from which the last quotation is taken asks, - "Is it an anterior assumption of s. 92 that, the roads of a State whatever form they take, must be available without charge to all kinds of inter-State traffic? Is such an assumption part and parcel of the freedom which the provision guarantees? To give an affirmative answer to this question implies that in reference to inter-State commerce the law, that is to say the State law, conferring upon the subjects of the Crown a right of free passage over highways is unchangeable. There seems to be no constitutional reason why this should be so. What is essential for the purpose of securing the freedom of inter-State transportation by road is that no pecuniary burden should be placed upon it which goes beyond a proper recompense to the State for the actual use made of the physical facilities provided in the shape of a highway. The difficulties are very great in defining this conception. But the conception appears to be based on a real distinction between remuneration for the provision of a specific physical service of which particular use is made and a burden placed upon inter-State transportation in aid of the general expenditure of the State. It seems necessary to draw the distinction and ultimately to attempt to work out the conception so as to allow of a charge compatible with real freedom because it is no more than a fair recompense for a specific facility provided by the State and used for the purpose of his business by the inter-State trader." (1955) 93 CLR, at pp 178,179 The difficulties to which this passage refers were by no means resolved by Pt. II of Act No. 5931 of the State of Victoria in which that State availed herself of the distinction. The statute did not show that there had been any examination or investigation of the costs of maintaining highways. It did not show that an attempt had been made to distinguish between the main arteries of inter-State goods traffic and other highways. It did not show on its face any reliance on facts, on attempts to ascertain facts, on estimations or on sources of information of any description in support of the characterization of the charge imposed as a payment to the Victorian Transport Regulation Board towards compensation for wear and tear caused by the commercial goods vehicle to public highways in Victoria: see s. 26 of Act No. 5931 (Vict.). Nor did it show on its face any reliance upon such things in support of the "reasonableness" of the rate. Speaking, of course in advance, concerning such questions the judgment of McTiernan, Webb JJ. and myself had said: "The expression 'a reasonable compensation or recompense' is convenient but vague. The standard of 'reasonableness' can only lie in the severity with which it bears on traffic and such evidence of extravagance in its assessment as come from general considerations. In speaking of 'relevant highways' it is intended to mark the importance of recognizing the size of Australian States, as distinguished from most American States. It is for the use of certain roads that it is supposed the recompense is made, and not for the use of roads of an entirely different character many hundreds of miles away. It may of course be immaterial, if the charge is based on average costs of road care, repair and maintenance, which may well give a lower rate than if it were based on the costs in connexion with the highway used. It does not seem logical to include the capital cost of new highways or other capital expenditure in the costs taken as the basis of the computation. It is another matter with recurring expenditure incident to the provision and maintenance of roads. The judgment whether the charge is consistent with the freedom of inter-State trade must be made upon a consideration of the statutory instrument or instruments by and under which it is imposed" (1955) 93 CLR, at p 176 (at p291)

5. When, in Armstrong's Case (No. 2) [1957] HCA 55; (1957) 99 CLR 28, an attack was made upon the consistency of the charge imposed by Pt. II with s. 92, the State of Victoria took the course of going into evidence to establish the thesis that the charge formed no more than a proper tonnage rate per mile compensating for the wear and tear of the highways traversed. In courts administering English law according to the principles which developed in a unitary system it must seem anomalous that the question whether a given statute operates or not should depend upon facts

proved in evidence. How facts are to be ascertained is of course a question distinct from their relevance. Highly inconvenient as it may be, it is true of some legislative powers limited by definition, whether according to subject matter, to purpose or otherwise, that the validity of the exercise of the power must sometimes depend on facts, facts which somehow must be ascertained by the court responsible for deciding the validity of the law. In Griffin v. Constantine [1954] HCA 80; (1954) 91 CLR 136, in order to decide the validity of the law there impugned some knowledge was necessary of the nature and history of methylated spirits but it was considered proper to look at books to obtain it. In Sloan v. Pollard (1947) 75 CLR 445, cf, at pp 468, 469 facts were shown about arrangements between this country and the United Kingdom which gave constitutional validity to an order. In Jenkins v. The Commonwealth [1947] HCA 41; (1947) 74 CLR 400 the validity of the statutory instruments was upheld on evidence as to the place of the mineral mica in electronic devices used in naval and military defence. There is no need to multiply examples. All that is necessary is to make the point that if a criterion of constitutional validity consists in matter of fact, the fact must be ascertained by the court as best it can, when the court is called upon to pronounce upon validity. It is not necessary to consider now whether it was necessary for the State of Victoria to take the course of adducing evidence in response to the challenge to the validity of the statute on the ground that the tonnage-mileage rate did not fulfil the conditions which would justify it as consistent with s. 92. But it is necessary to note that the State did so and in doing so showed on the one hand that certain objections were not well founded and on the other hand other difficulties were inherent in the situation. Of these other difficulties the more serious are referred to in the judgment of Taylor J.: Armstrong's Case (No. 2) (1957) 99 CLR, at pp 89-92. But from the discussion both by the minority and by the majority of the Court certain features emerged which the road charge possessed, features on which the decision in favour of its validity may be taken to depend. First and foremost, it was a charge at a rate per mile of the highway or highways travelled. Secondly, it applied uniformly irrespective of the nature of the journey as inter-State or intra-State. Thirdly, the charge was calculated by reference to the tare weight of the vehicle and a proportion of the load capacity. Fourthly, it did not apply to smaller vehicles which, except in special circumstances, would not be responsible for more than the wear and tear that a road authority might accept as the natural consequence of ordinary use. Fifthly, the charge did apply indifferently to the whole of every journey without any distinction between the kind of highways over which at various stages the vehicle might pass and to every class of road forming the route of inter-State journeys without distinction between the main highways and other classes of roads: but this in itself, so it was decided, did not form a specific objection to the rate. The view I took was that unless in relation to the more frequented inter-States routes the rate was excessive then the complaint ought not to be made that it was excessive in relation to other highways. Sixthly, there was no reason to suppose that the rate comprised or would yield any element representing capital cost. Seventhly, although the actual computation or estimation of the rate might be the result of a survey of the average cost of maintenance for all roads, that would not necessarily derogate from its fairness or reasonableness as a ton-mileage charge levied on heavier traffic likely to use predominantly main highways. Eightly, one feature existed that is represented by the following statement for which I was responsible: "The most serious objection to the validity of the charge lies in the fact that it is named in the statute as an unexplained figure. If calculations are made with reference to imaginary journeys to the New South Wales or South Australian border from Melbourne of vehicles of various axle weights and loading capacities, it will be found that there is no prima facie reason for suspecting that the incidence of the charge is harsh or prohibitory"(1957) 99 CLR, at p 49 (at p293)

6. Last and perhaps most important feature of all, the law required that all moneys received from the charge should be payable to a roads maintenance account and should not be applied otherwise than

upon the maintenance of public highways, an expression covering streets, roads, lanes, bridges, thoroughfares and other places open to and used by the public for passage with vehicles. (at p293)

7. This Court bears the ultimate responsibility of preserving the freedom of inter-State trade commerce and intercourse from encroachments and impairments and it would be unwise to view without misgiving the possibility of States, under cover of the judgments of the majority of the Court in Hughes and Vale Pty. Ltd. v. State of New South Wales (No. 2) [1955] HCA 28; (1955) 93 C.L.R. 127 and in Armstrong's Case (No. 2) [1957] HCA 55; (1957) 99 CLR 28, levying taxes involving an impairment of that freedom as those judgments seek to define it. In Armstrong's Case (No. 2) [1957] HCA 55; (1957) 99 CLR 28 I considered that, notwithstanding the unsatisfactory basis of the information upon which, in the circumstances I have summarized, the conclusion must rest, the realities of the case clearly were that a contributory charge had been levied for the maintenance of highways sufficiently uniform in its incidence, reasonably proportionate to the wear and tear involved and otherwise conforming with the tests accepted by a majority of the Judges for a charge consistent with true freedom in carrying on trade commerce and intercourse. Whether this involved too ready a response to what appeared truth in substance at the expense of a strictness of logical proofs or of demonstration of the fact it does not lie with me to say. But now we have before us a case in which one may perhaps be equally assured of the substance but in which the difficulties and uncertainties are increased. One not unimportant but I imagine completely gratuitous addition to the difficulties arises from the definition of the expression "public street". Beginning with words closely approximating to the Victorian definition of public highway, the New South Wales definition first drops the words "for passage with vehicles" and then adds the words "and includes any place at the time open to or used by the public on the payment of money or otherwise". Apparently the literal meaning of the words would cover a swimming pool, a zoo or a music bowl. The essential restriction of the use of the money collected to the maintenance of highways is accomplished by s. 9 which speaks unfortunately of public streets. Yet these two words are the subject of a definition literally going outside the scope of the maintenance of public highways for vehicles notwithstanding that under both decisions it is essential that the proceeds of the charge should be confined to that purpose. Section 9 provides that one-fifth of the proceeds of the charge shall be paid into the County of Cumberland Main Roads Fund and four-fifths into the Country Main Roads Fund. Expenditure from these respective funds is governed by ss. 12 and 21 of the Main Roads Act 1924-1954. If they are to be read with s. 9 of the Road Maintenance (Contribution) Act 1958 perhaps they sufficiently restrict the operation of the definition of "public streets" to remove the objection. But it is difficult to be sure that s. 9 was not meant to be paramount. The question which has been thus, as I think, gratuitously and probably inadvertently raised by the definition is a troublesome one but I think that it is obvious that the definition could at worst cause no more than a leak in the financial reservoir and that the directed flow would certainly be confined in substance to the maintenance of highways. The basal reason in the distinction upon which these cases rest is that the constant flow of traffic involves equally constant recurring charges to uphold the surface on which it continues to travel and that it is no impairment of its liberty so to travel if a charge is levied commensurate with the use and attrition for the purpose of upholding the surface. After all the question on this point is whether the purpose has been sufficiently safeguarded. The intent seems clear enough and the safeguard may be said to be adequate though not absolute. Looking at the remaining features of the present case it might be said that they ought to suffice mutatis mutandis to give the same assurance as was found enough in the case of the Victorian statute if it be possible to equate the conditions of New South Wales to those obtaining in Victoria. In point of fact one may reasonably assume that if the rate is fair and not excessive for Victoria it is not open to objection for New South Wales. But it is one thing to make such assumptions: it is another thing to satisfy oneself by a correct process of legal

reasoning that the New South Wales road charge should be sustained as consistent with the freedom to engage in trade commerce and intercourse with other States. Nevertheless it seems to me that on the materials before the Court the validity of the charge in its intended operation on inter-State journeys ought in point of law to be sustained. I think that it is right to begin with the presumption that to levy a compulsory contribution to the revenue of the State is a tax and if it is laid upon the transportation of goods from one State to another it is inconsistent with s. 92 of the Constitution. When, however, a scrutiny of the measure shows that it professes to be a contribution to the maintenance of the highway, that the application of the money raised is in substance and in purpose confined to the maintenance of highways, that it is a mileage rate calculated by reference to the use made of the highway, that it is computed by reference to weight and load capacity, that it is confined to heavier traffic, that it is uniform as between intra- and inter-State traffic, that in the absence of evidence or information to the contrary it did not carry on its face any impression of harshness, excessiveness or arbitrariness or disproportionateness to what had already been upheld in the case of Victoria, then all these raise a counter-presumption that the charge possesses a foundation bringing it within the doctrine explained and adopted in Armstrong's Case (No. 2) (1957) 99 CLR 28 by a majority of the Judges and foreshadowed in the judgments of the majority in Hughes and Vale Pty. Ltd. v. State of New South Wales (No. 2) [1955] HCA 28; (1955) 93 CLR 127 No material before the Court weakens or overturns that counter-presumption and we should act on it and uphold the validity of the application to inter-State journeys of the Road Maintenance (Contribution) Act 1958 (N.S.W.) in its material provisions. In my opinion the appeal should be dismissed. (at p296)

McTIERNAN J. I am of the same opinion as the Chief Justice, and agree that this appeal should be dismissed. (at p296)

FULLAGAR J. In this case I agree with the judgment of the Chief Justice, and I wish only to add one observation. (at p296)

2. I have never myself thought it strictly correct to speak of an exaction such as is imposed by the Commercial Goods Vehicles Act 1955 (Vict.) and the Road Maintenance (Contribution) Act 1958 (N.S.W.) as a charge for the use of facilities provided by a State. Persons travel as of right on a public highway, and it has seemed to me more correct to regard the kind of exaction permitted under the decision in Armstrong v. State of Victoria (No. 2) [1957] HCA 55; (1957) 99 CLR 28 as an exaction of a contribution towards expenditure necessitated by the activities of those who use public highways. It is so regarded both in the short title of the New South Wales Act and in the heading to Pt. II of the Victorian Act. I attempted to explain my view in Hughes and Vale Pty. Ltd. v. State of New South Wales (No. 2) (1955) 93 CLR, at pp 208-210, and it is unnecessary to repeat what I there said. I referred in the course of it to Melbourne Harbour Trust Commissioners v. Colonial Sugar Refining Co. Ltd. (1926) VLR 140 The distinction does not appear important in the present case, but I think it is much more than a mere matter of words. (at p296)

KITTO J. I am unable to see any reason for thinking that this appeal should succeed if it be assumed that the conclusion reached by the majority of the Court on the main question in Armstrong v. State of Victoria (No. 2) [1957] HCA 55; (1957) 99 C.L.R. 28 was correct. I therefore agree in dismissing the appeal. (at p296)

TAYLOR J. In Armstrong v. State of Victoria (No. 2) [1957] HCA 55; (1957) 99 CLR 28, I stated the reasons which lead me to the conclusion that the provisions of the Commercial Goods Vehicles Act 1955 (Vict.) could not validly apply to persons operating motor vehicles exclusively in the course of inter-State trade. It is as unnecessary as it would be futile to re-state these reasons but it is

desirable to refer shortly to three matters. The first is that I felt that the expression "reasonable" as a criterion for determining the validity of charges for or contributions to the maintenance of public roads was an abstract and not a practical concept. The second is that it seemed to me that, notwithstanding the use of this word, no common test had, theretofore, been agreed upon by a majority of the Court and, finally, I was of opinion that, if evidence of "reasonableness" was either necessary or permissible if any particular case, the evidence in Armstrong's Case (No. 2) [1957] HCA 55; (1957) 99 CLR 28 failed to establish that the charges made by the impugned Act were reasonable. These views did not, however, find favour with a majority of the Court which held that the imposition of the charges in question did not infringe the provisions of s. 92 of the Constitution. (at p297)

2. In the present case the Act in question is the Road Maintenance (Contribution) Act 1958 (N.S.W.) and the provisions of that Act are substantially similar to those of the Victorian Act already referred to. But they are quite unlike the material provisions of the Road and Railway Transport Act 1930-1956 (S.A.) which this Court held unanimously could not apply to vehicles used exclusively in and for the purposes of inter-State trade and commerce (Edmund T. Lennon Pty. Ltd. v. State of South Australia [1957] HCA 63; (1957) 99 CLR 227) I should, perhaps, mention that there are a few minor differences between the New South Wales Act and the Victorian Act but they do not appear to me to be of constitutional significance. However, it is contended, it does not follow simply because legislation in Victoria was held to represent "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" a vehicle "may be expected to make", or, because the charge imposed by such legislation was thought to be proved "reasonable" in relation to the maintenance of the roads of that State, that identical legislation in New South Wales which imposes a charge at the same rate must, necessarily, be held to be valid. To my mind there is much to be said for this proposition particularly when it is seen that the evidence in Armstrong's Case (No. 2) [1957] HCA 55; (1957) 99 C.L.R. 28 which was directed to the issue of reasonableness consisted of estimates and calculations based upon assumptions of fact concerning the number of registered motor vehicles in the State of Victoria, the mileages and ton mileages of various classes of those vehicles within the State, the mileage of public roads within the State and the annual cost of maintaining those roads. These and other factors relied upon in Armstrong's Case (No. 2) [1957] HCA 55; (1957) 99 CLR 28 were essentially Victorian in character and would not be relevant to a consideration of the "reasonableness" of a charge imposed by New South Wales legislation. Possibly with the same amount of surmise and conjecture calculations might be made on New South Wales data to justify the present charge but whether that could or could not be done does not appear in this case. The fact is that there is no evidence to show whether the charge is, in all the relevant circumstances, reasonable or not. (at p298)

3. The position is, therefore, that the validity of the Act must be considered in the absence of any evidence capable of establishing the reasonableness of the charge in question. To me, as I indicated in Armstrong's Case (No. 2) [1957] HCA 55; (1957) 99 C.L.R. 28 and Lennon's Case (1957) 99 CLR, at p 249 this presents a serious problem though, of course, in the latter case the charge was considerably greater than, and, for a number of reasons, not comparable with that imposed by the Victorian Act or by the Act now in question. But since a majority of the Court is now of opinion that the question of validity may be resolved by an examination of the form and character of the legislation itself and without evidence concerning the "reasonableness" of the charge in relation to the maintenance of New South Wales roads there is little more to be said. Upon that view it is, perhaps, sufficient for me to say that a comparison of the form and character of the Act now in question with that of the Act impugned in Armstrong's Case (No. 2) [1957] HCA 55; (1957) 99 CLR 28 fails to reveal any differences which occur to me as being of constitutional significance. (at

p298)

MENZIES J. The principal question in this appeal - which was heard simultaneously with Boland v. Sneddon - is whether the Road Maintenance (Contribution) Act 1958 (N.S.W.) which imposes liability upon owners of commercial goods vehicles to pay a road charge of one-third of a penny per ton of the sum of the tare weight of the vehicle and forty per cent of its load capacity per mile of public streets along which it travels in New South Wales, validly applies in respect of vehicles travelling upon inter-State journeys. (at p298)

2. The way in which this question arises is that the appellant has been convicted under s. 10(1)(d) of the Act for failing to deliver to the Commissioner records of vehicle journeys which the Act requires to be kept for the purpose of the assessment of the charge imposed by the Act, and against this conviction by a court of petty sessions this appeal has been brought relying upon s. 92 of the Constitution. It is common ground that if the charges are not validly imposed upon the appellant the accessory provisions regarding the keeping and delivery of records can have no application to it. (at p298)

3. The Act corresponds with the Commercial Goods Vehicles Act 1955 (No. 5931) (Vict.), the validity of which and its application in respect of vehicles travelling in the course of inter-State trade was established in Armstrong v. State of Victoria (No. 2) [1957] HCA 55; (1957) 99 CLR 28 This decision is, in my judgment, indistinguishable from the present case. (at p299)

4. In Armstrong's Case (No. 2) [1957] HCA 55; (1957) 99 CLR 28 the Victorian Act was upheld because it was decided that the charge which it imposed had the character of compensation for wear and tear caused by vehicles using the State's roads. The principal reason for this decision was that in the Act there were found present all the indicia described in Hughes and Vale v. State of New South Wales (No. 2) [1955] HCA 28; (1955) 93 CLR 127, at pp 175, 176 as being sufficient to show prima facie that the charge was 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" (1955) 93 CLR, at p 175 As Fullagar J said: "Every one of the indicia mentioned is present here. The charge is based on ton-mileage, and is thus related on its face to the nature and extent of the use made of roads. Section 30 of the Act requires all moneys received by the Board to be paid into the Country Roads Board Fund (established under the Country Roads Act) to the credit of a special 'Roads Maintenance Account', and money to the credit of that special account is to be applied only to the maintenance of public highways. Inter-State transport bears no greater burden than the internal transport of the State. And the collection of the charge involves no interference with any inter-State journey" (1957) 99 CLR, at p 83 Furthermore, as his Honour said, there was no evidence to show that the charge was quantitatively unreasonable. Everything that his Honour said there with regard to the Victorian Act, is equally true with regard to the New South Wales Act. In Armstrong's Case (No. 2) [1957] HCA 55; (1957) 99 C.L.R. 28 there was, in addition, the evidence adduced by the State of Victoria which was regarded as supporting the conclusion that the Act was what it appeared to be. (at p299)

5. Here three grounds for distinguishing Armstrong's Case (No. 2) [1957] HCA 55; (1957) 99 CLR 28 were urged. The first was that there are material differences between the two Acts and, in particular, that in the New South Wales Act the more extensive definition of "public street" (s. 3) and the provisions of s. 9 which, instead of requiring payment of the charges collected into one fund for the maintenance of public streets as a whole, requires payment of one-fifth into the County of Cumberland Main Roads Fund, "Roads Maintenance Account", and four-fifths into the Country

Main Roads Fund, "Roads Maintenance Account", would permit charges to be used for the maintenance of public streets not used by commercial goods vehicles, and that these things, taken together, destroy the substantial identity that was found in the Victorian Act between the roads used and the roads to be maintained. I regard such differences as there are as immaterial and looking at the Act as a whole I think it is proper to accept it as being what it purports to be, i.e. one imposing a charge to meet wear and tear caused by commercial motor vehicles using the roads of the State. It is true that in the Victorian Act the phrase "public highway" was defined to mean "any street road lane bridge thoroughfare or place open to or used by the public for passage with vehicles" whereas in this Act the phrase "public street" means "any street, road, lane, bridge, thoroughfare, footpath or place open to or used by the public, and includes any place at the time open to or used by the public on the payment of money or otherwise"; but in a statute which is dealing with the journeys of vehicles along public streets and which requires the contributions to be paid into Main Roads Funds to the credit of Roads Maintenance Accounts to be used for the maintenance of public streets and for no other purpose, it would be unreal to regard the Act as authorizing the expenditure of the money on places not used by the public for passage with vehicles. So limited I think the definition in the New South Wales Act approximates to the definition in the Victorian Act and the words of addition "on the payment of money or otherwise" make no significant difference because the Victorian Act would apply to public roads used on the payment of money such, for instance, as a toll road. (at p300)

6. The second ground for distinguishing Armstrong's Case (No. 2) [1957] HCA 55; (1957) 99 CLR 28 was the assertion that because the formula for calculating the charge is the same as that in the Victorian Act and because the relevant circumstances in New South Wales in 1958 cannot be assumed to be the same as they were in Victoria in 1955, the application of the one formula in different circumstances must, or at least may, produce a different result and that as the result in Victoria was the conclusion that the charges were a contribution towards road maintenance, this cannot or, at least, may not be the case in New South Wales. So the somewhat paradoxical conclusion is reached that the New South Wales Act is or may be invalid because it is in the same terms as the Victorian Act which was held to be valid. I would not be prepared to accept this mode of reasoning if it were not otherwise objectionable but I reject it for a more fundamental reason than its doubtful logic. The decision in Armstrong's Case (No. 2) [1957] HCA 55; (1957) 99 CLR 28 was that a State Act did not contravene s. 92 and was valid; the question here is whether that decision applies to another State Act: when I find that the New South Wales Act is, apart from immaterial matters, the same as the Victorian Act, my task, it seems to me, is complete and subject to the matter to be dealt with next I must say that the New South Wales statute is valid. (at p301)

7. This brings me, however, to the third ground taken for distinguishing Armstrong's Case (No.2) [1957] HCA 55; (1957) 99 C.L.R. 28 which is that the decision depended upon the evidence adduced by the State of Victoria and in these cases there is no corresponding evidence. My principal reason for rejecting this as a distinguishing feature is the one that is implicit in what I have already said, but before elaborating it further I would say that the evidence in Armstrong's Case (No.2) [1957] HCA 55[1957] HCA 55; ; (1957) 99 CLR 28 did no more than reinforce the conclusion that was derived from an examination of the Act itself, namely, that it was a real attempt to fix compensation for wear and tear. However this may be, I am not ready to accept the notion that when this Court has decided that a statute is valid in a case where the decision was based upon or was influenced by a finding of fact anyone can contest the validity of the statute again on the footing that unless the same facts are proved in the subsequent proceedings the earlier decision is not to be treated as having binding authority in the later case. Any decision that a statute is constitutional or unconstitutional, however it may have been reached, is necessarily one of law and is, in the absence

of special circumstances, of binding authority. Where such a decision has been reached simply by process of construction and comparison no difficulty arises about the binding authority of the decision in subsequent cases. Where, however, the decision has depended in part upon findings of fact there is room for argument. Where the facts which have entered into the decision were ascertained by judicial notice there would seem to be no sound reason for not according the decision the same authority as if it had depended upon nothing more than a comparison between the challenged legislation and the constitution because the only matters of which judicial notice can be taken are those considered too notorious to require proof, that is, matters beyond controversy. Where, however, the facts which have entered into the decision have been ascertained from evidence there is more room for doubt whether the decision so reached has binding authority except in cases where precisely the same facts are established. This problem, like the more fundamental problem of the place of evidence in constitutional cases, is not a matter for unnecessary generalization, because it is possible to envisage cases where a decision based upon findings of fact could properly be called into question, but to deal with the case in hand I am not in doubt that if after taking evidence in an action the Court has decided that a State law leaves trade, commerce and intercourse among the States absolutely free and so does not contravene s.92, its decision on that point of law so long as it stands puts the matter at rest. Where a decision concerning validity has been reached upon findings of fact it would, of course, be open to the Court to consider the matter again upon the representation that the significant facts are no longer as they were, but this is another matter which need not be considered here. Applying the principles I have stated I do not regard the validity of the Victorian Act as an open question, notwithstanding that the evidence admitted in Armstrong's Case (No. 2) [1957] HCA 55; (1957) 99 CLR 28 may have contributed to the decision that that Act is valid. It follows by parity of reasoning that the absence of evidence in the present case is no ground for distinguishing Armstrong's Case (No.2) (1957) 99 CLR28 If, as I think, there is no material difference between the Victorian Act and the New South Wales Act then, at least in the absence of anything else, the question of the validity of the New South Wales Act is governed by Armstrong's Case (No.2) [1957] HCA 55; (1957) 99 C.L.R. 28. (at p302)

8. In this case evidence that might afford the basis for a conclusion that the Act is not what it appears to be because the charge is excessive or for some other reason was not tendered, and in these circumstances it is not necessary and I do not think it is desirable to consider what evidence might properly have been taken into consideration. (at p302)

9. Because on the authority of Armstrong's Case (No.2) (1957) 99 CLR28 the Act does validly apply to owners of vehicles used in inter-State trade the appeal must fail. (at p302)

WINDEYER J. In this case the appellant, the owner of a commercial goods vehicle, was charged with a breach of s.10 of the Road Maintenance (Contribution) Act 1958 (N.S.W.), in that he failed to deliver the record of journeys as required by the Act. The vehicle was, at the relevant time, engaged in inter-State trade. This case, therefore, squarely raises the question whether the Act is invalid so far as it purports to affect inter-State trade and commerce. I, of course, accept the judgments of the majority in Armstrong's Case (No.2) (1957) 99 C.L.R.28 and the pronouncements of the majority in Hughes and Vale Pty.Ltd. v. State of New South Wales (No.2) [1955] HCA 28 [1955] HCA 28; ; (1955) 93 CLR 127 as settled law. There are in those judgments some differences in the expression of the fundamental concept; but I read the statements as explanatory rather than definitive or formalised. The distinction taken between a valid road maintenance charge consistent with freedom of trade commerce and intercourse, and a tax upon road users which is an impediment to freedom, can, no doubt, be criticised as amorphous; but I accept it as real, although I appreciate that there are logical difficulties and evidentiary difficulties in applying it. I would add that I accept

the majority judgments the more readily because the distinction they make--however it should be precisely formulated--does seem to me to accord with some historic doctrines of English law and with old practices which can, I think, be regarded as in harmony with the freedom which s.92 assures. In Armstrong's Case (No.2) [1957] HCA 55; (1957) 99 C.L.R. 28 my brother Fullagar said: "What is, in my opinion, permissible in relation to public highways is not the making of a charge for the use of something which the State can at will allow or forbid to be used. What is permissible (whether you call it a 'compensation' or a 'recompense' or what you will) is the exaction of a contribution towards the maintenance of something that can be used as of right. The distinction is, to my mind, both real and important" (1957) 99 CLR,at p82 This statement I respectfully adopt. The attitude of the common law towards tolls upon the users of highways was that they might properly be authorized by Crown grant if they were for the maintenance of the highway or for the use of some facility provided for travellers on the highway such as a bridge; but if they were mere exactions from highway users they were inconsistent with the public right of way. Section 92, I think, really exists against the background of this ancient common law view of road charges. A highway is a way open to all the King's subjects; and bridges and ferries are "the continuation of a public highway across a river or other water for the purpose of public traffic from the termination of the highway on the one side to its recommencement on the other side": see Letton v. Goodden (1866) LR 2 Eq 123, at p 130 In mediaeval times repair of highways (which in essence are not formed roads but mere public rights of way) was undertaken by the parishes by enforced labour, a form of corvee. Later, by 2 & 3 Ph. & M. c. 8 and 18 Eliz. c. 10, parishioners were obliged to provide the labour and the carts required. Beyond that, money for roads was not needed; and road tolls for the repair of the highway were rare. Yet tolls - thorough - as the common law called them, in distinction from tolls - traverse - for the maintenance and repair of the highway where it passed through towns, as well as of its ferries and bridges, were not unknown. In the reign of Elizabeth I, the Queen's Bench decided that such a toll "ought to maintain a causeway or to repair a bridge or such like": Smith v. Shepherd (1599) Cro Eliz 771 (78 ER 945) per Popham C.J. But unless there were a consideration, such as the provision of a bridge or the maintenance of the highway, a toll was an unlawful imposition "for it is the inheritance of every man to pass on the King's highway": Mayor etc. of Nottingham v. Lambert (1738) Willes 111 (125 ER 1083) The author of Les Termes de la ley, speaking of a customary toll for the use of a highway, said it "seems to be not so unreasonable a prescription or custom as some have thought, though it be through the King's highway (as they call it) where every man may lawfully go, if there be one thing for another: As if there be a Bridge, or such like commodity, provided at the costs and charges of the Town, for the ease of travellers that drive that way, whereby their journey is either shortened or bettered, why then may not Toll be lawfully and with good reason demanded of them?" This was the view expressed in Rolle's Abridgment: "The King cannot charge his subjects by an imposition, unless it be for the benefit of the subjects charged and where they have a quid pro quo", cited in Brett v. Beales [1830] EngR 359; (1830) 10 B & C 508 (109 ER 539) An obligation to keep a road in repair was a sufficient consideration to support toll-thorough (Hammerton v. Dysart (Earl) (1916) 1 AC 57, at p 79) To an economic historian a striking feature of road tolls in England over the centuries, in contrast with many tolls levied on the continent, is that they were not mere taxes levied upon road users but were related to highway improvements and maintenance (see Heckscher, Mercantilism translated by Shapiro, 1, 46-56). But I do not think that references to the turnpike roads made in Armstrong's Case (No. 2) [1957] HCA 55; (1957) 99 CLR 28 and Hughes and Vales's Case (No. 2) [1955] HCA 28; (1955) 93 CLR 127 really throw much light on how far road tolls, considered in the abstract, are consistent or inconsistent with whatever doctrine of the freedom of trade s. 92 was intended to establish. The transformation which in the eighteenth and early nineteenth centuries the turnpike trusts made of the road system of England certainly is a striking illustration of the result of

a system of tolls authorized by Act of Parliament. New main roads were built. And instead of being muddy tracks for pack horses the roads of England became the macadamised carriage ways of the stage-coach era - which supplementing the canals enabled a revolution in trade, commerce and intercourse by internal carriage in England. But it was not only the insolvency of the turnpike trusts, after what Macadam called "the calamity of railways", which led to the removal of toll bars from roads. Their presence was a source of agitation and complaint, much of it more rational than were the Rebecca Riots. Toll bars were condemned as impediments to freedom of commerce and intercourse and there was persistent criticism of their multiplicity. (See generally Webb, The Story of the King's Highway; Wilkinson, From Track to By Pass; Searle, Turnpike & Tollbars). In Australia the toll bars which used to exist in New South Wales and Victoria had all been abolished well before 1900 (Australian Encyclopaedia, title Roads and Roadmaking). Tolls are, however, levied at some bridges and ferries in Australia to-day. In my view vehicles travelling inter-State are clearly liable to pay them. As the Chief Justice said in Armstrong's Case (No. 2) [1957] HCA 55[1957] HCA 55; ; (1957) 99 CLR 28 this is simply because "the payment is of such a kind that it is no impairment of the freedom of commerce or of movement if you are required to make it" (1957) 99 CLR, at p 43 (at p305)

2. Although s. 92 speaks in abstract terms, it speaks in relation to practical affairs - trade, commerce, carriage - activities which involve the use of physical things for communication, intercourse and transport. The things used - roads, railways, horse-drawn coaches, river-steamers, motor vehicles, aeroplanes - change in their relative importance as time goes on; and s. 92 speaks in the economic conditions prevailing from time to time. Whether in any case there is an impairment of the freedom which the Constitution assures is, in one sense, a question of fact. But it is, adopting the words of Starke J. (in Bank of N.S.W. v. The Commonwealth [1948] HCA 7 [1948] HCA 7; ; (1948) 76 CLR 1) " like some other matters of fact in the law, for the Court and not for the jury" (1948) 76 CLR, at p 309; and it must be decided in its own setting of time and place. In the judgments in Armstrong's Case (No. 2) [1957] HCA 55; (1957) 99 CLR 28 there are references to a "reasonable" recompense or contribution for wear and tear upon the roads as consistent with absolute freedom to use them. Here too the matter is one for the Court, for, as Coke said in a different context "reasonableness in these cases belongeth to the knowledge of the law, and therefore to be decided by the justices" (Co. Lit. 56b). The protection of s. 92 can be invoked by any individual; but it is not concerned with consequences affecting an individual because of some quality peculiar to him. The contention that some charge, otherwise lawful, might be unlawful in the case of a particular inter-State trader who could not afford to pay it, cannot, in my view, possibly be sustained. Section 92 assures to all an absolute freedom of trade, commerce and intercourse; but it offers no special immunities to impecunious individuals. (at p306)

3. In many countries to-day the cost of the construction and maintenance of highways suitable for the needs of modern motor traffic has by vehicle registration fees and petrol duties been placed, in part, directly or indirectly upon the traffic using the roads. As I read Armstrong's Case (No. 2) [1957] HCA 55; (1957) 99 CLR 28 it states three conditions which, in any direct impost upon road users travelling from State to State, are essential if it is not to contravene s. 92. Firstly, the levy must be proper in amount. Secondly, it must be uniform in respect of all traffic of the same class - that is to say, it must be imposed upon all vehicles of the same kind, without any discrimination dependent upon whether they be engaged in inter-State or intra-State traffic. Thirdly, the purpose of the impost must be the maintenance, in a broad sense, of highways; and the proceeds of the impost must be applicable only to that. (at p306)

4. Taking these matters in order. Firstly, is the charge, which is imposed by the Road Maintenance

(Contribution) A upon the owners of commercial vehicles travelling on the roads in New South Wales, a charge proper in amount? There must, it has been said, be "a reasonable relation between the charge and the purpose viz. a contribution to upkeep commensurate with the use made of the roads and the consequential wear and tear"; or, as it has also been put, "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". Such computations or estimates, difficult though they are, are not altogether new in highway history. The Report of the Select Committee on Steam Carriage on Highways of 1834 provides an early illustration. The committee heard some curious evidence which is printed with their report, and recommended that "in adopting a system of Toll, the proportion of 'wear and tear' of roads by Steam as compared with other Carriages should alone be taken into consideration". Calculations of damage caused by "extraordinary traffic" have also had to be made in England for the purpose of statutory provisions such as s. 54 of the Road Traffic Act 1930. See Pratt and Mackenzie's Law of Highways 19th ed. (1952), pp. 575-593, and Lord Aveland v. Lucas (1879) LR 5 CP 211, 351 These charges for wear and tear replaced earlier restrictions on the weight of loads, the width of wheels, the number of horses, which were incidents in a long controversy between those who demanded that traffic and commerce be constrained to suit the roads and those who thought that roads should be made suitable for the developing needs of traffic and of commerce. (at p307)

5. We do not have to assess damages to the roadway. We must, however, be satisfied that the charge imposed by the legislature can reasonably be said to be within the range of what is proper, for "It is the duty of the Court in every constitutional case to be satisfied of every fact the existence of which is necessary in law to provide a constitutional basis for the legislation" - a statement of Williams J. (1951) 83 CLR, at p 222 quoted in the majority judgment in Hughes and Vale's Case (No. 2) (1955) 93 C.L.R., at p. 165. Nice mathematical computation is impossible; and for the purposes of this case, the matter has, in my view, been concluded by Armstrong's Case (No. 2) (1957) 99 C.L.R. 28. The charge there was upon commercial vehicles, as there defined. It was one-third of a penny per ton per mile of highway travelled. The charge under the present Act is precisely the same and in respect of the same class of vehicles. It was argued that it must be improper; because it was said an amount proper for Victorian roads would be unlikely to be proper for New South Wales roads. I do not think so. The estimates and statistics given in evidence in Armstrong's Case (No. 2) [1957] HCA 55; (1957) 99 CLR 28 related to traffic and roads in Victoria certainly; but the conclusion was as to a reasonable charge, in the relevant sense, for the maintenance of roads. An amount found to be reasonable, in that sense, for the roads south of the River Murray in the south-eastern portion of Australia may, in the absence of evidence to the contrary, be taken as no less reasonable in respect of roads north of the River Murray in the central-eastern portion of Australia. In each part there are urban areas and rural districts and roads of different classes. That one part is Victoria and the other New South Wales does not alter the general similarity of the roads in each, considered as a whole; and the general wear and tear caused by a heavy vehicle upon a road must be much the same. Speaking generally, the roads of Australia are one road system. Section 92 keeps them so from the point of view of law and commerce; and, no doubt, contributions to their maintenance by those who use them can help to keep them so in a physical sense. The charges levied by the Act in respect of a particular journey of a particular vehicle are not related to the maintenance of the particular highway used, and at common law this would not have justified the grant of a toll: Brett v. Beales [1830] EngR 359; (1830) 10 B & C 508 (109 ER 539) But the matter must, I think, be viewed panoramically. Moreover the uniformity of the contribution is some assurance that the real effect of the statute is what on its face is said to be its purpose, and that it is not designed, as other parts of the New South Wales traffic legislation have been, to hamper road traffic in the interests of the State

railways. (at p308)

6. The next requisite for the validity of the charge is that it be imposed upon the journeys in New South Wales of all vehicles of the class to be charged, irrespective of whether they travel wholly within the State or to or from places outside the State. That requirement the Act meets. (at p308)

7. The third requisite is that the proceeds of the levy must be applied to the maintenance of roads. By the Act moneys received are to be applied as to one-fifth to the maintenance of "public streets" in the County of Cumberland and as to four-fifths to the maintenance of "public streets" outside the County of Cumberland. This division of the receipts is unobjectionable, for if the statute had not provided for this division, the Crown could have determined to what roads in the State the moneys should be applied. Furthermore some place within the County of Cumberland is the terminus a quo or the terminus ad quem of a considerable part of the commercial road traffic of the State; and much passes through the county on journeys between the southern and northern parts of the State. But the artificial meaning of the words "public streets" in the Act causes a difficulty. The definition section (s. 3) provides that in the Act, unless the context or subject matter otherwise indicates or requires, "'Public street' means any street, road, lane, bridge, thoroughfare, footpath, or place open to or used by the public on the payment of money or otherwise". This definition was lifted from another Act and put into this one, where it is inapt. The result is that moneys, which pursuant to s. 9 must be spent on the maintenance of "public streets", could, without any contravention of that requirement read literally, be devoted to all kinds of objects far removed from the maintenance of highways. In terms of the definition a municipal art gallery, a public park or recreation area, public baths and public houses, for examples, are all "public streets". It was however argued that the general content of the Act requires the width of the meaning which this definition so artificially and inartistically gives to public streets to be in some way limited. It was said that the title of the Act: "An Act to impose a charge on the owners of certain motor vehicles as a contribution to the maintenance of public streets . . ." restricted the meaning of s. 9 to road maintenance. Yet "street" is an unusual name for a highway running through open country; and as the long title is now taken as part of an Act the expression public street in the title has, prima facie, its defined meaning. If the New South Wales legislature had wished to be sure of having the benefit of the decision of this Court in Armstrong's Case (No. 2) (1957) 99 CLR 28 one would have expected it to frame its statute in the same words as the Victorian Act there held to be valid - and to have restricted the expenditure of the proceeds of the levy to the maintenance of highways, that is, of public roads. But it has departed from the Victorian Act, in a way which seems to me to involve a misuse of language if the intention be to restrict the proceeds of the levy to road maintenance. However other members of this Court think this, seemingly unnecessary, aberration does not render the charge invalid. Some restriction of the literal meaning of the strange definition was probably intended. And we were told by the Solicitor-General that the intention of the Crown is to use the moneys for public roads. I am content therefore to regard the charge as valid within the doctrine of Armstrong's Case (No. 2) [1957] HCA 55; (1957) 99 CLR 28, and I would dismiss the appeal Boland v. Sneddon. (at p309)

DIXON C.J. This appeal, like that in Commonwealth Freighters Pty. Ltd. v. Sneddon, is against a conviction under s. 10(1)(d) of the Road Maintenance (Contribution) Act 1958 (N.S.W.). Section 10(1)(d) provides that any person who fails to deliver any "such" record to the Commissioner for Motor Transport as required by this Act shall be guilty of an offence against this Act. The meaning of the word "such" appears from s. 6(1) of the Act which provides that the owner of a commercial goods vehicle shall keep in duplicate in or to the effect of the form in the second schedule an accurate daily record of all journeys of the vehicle along public streets in New South Wales. Sub-

section (2) of s. 6 provides that the owner of the vehicle shall retain for a period of six months after the completion of any journey, and on demand make available to the Commissioner or an authorized officer, a copy of each such record for inspection when so required. The information alleges that the appellant did fail to deliver to the Commissioner for Motor Transport as required by the Act the record he was required by the Act to keep, namely a record in respect of motor vehicle number AZP 022, a commercial goods vehicle, the said record being an accurate daily record of all journeys of such vehicle along public streets in New South Wales during the month of May 1958. The appellant's main case, like that of Commonwealth Freighters Pty. Ltd., is that upon any journey which he took in May 1958 he was engaged in inter-State trade and that the Road Maintenance (Contribution) Act 1958 could not validly apply to the journey. For the reasons given in the case of Commonwealth Freighters Pty. Ltd. v. Sneddon this defence cannot be sustained in law, on the assumption even that the journeys formed part of inter-State trade commerce and intercourse. In this view it is not material to examine the claim that any journey which the truck in question was proved to have made in May 1958 was made in the course of inter-State trade. But in view of the argument it is perhaps desirable to say that the facts do not appear to me to establish that the journey upon which the charge depends was anything but an intra-State journey. (at p310)

2. The appellant, however, put forward other defences. It will be seen from the nature of the charge that a basal requirement of the Act upon which the charge necessarily rested is expressed in the words of s. 6(1) which impose the duty of keeping an accurate record of all journeys of the vehicle along public streets in New South Wales. The appellant objects that no sufficient evidence was advanced that any such journey was taken. Proof was given that on Monday, 26th May 1958, bage of potatoes were taken off a semi-trailer some of which were put on a truck AZP 022. This was done at what is called Boland's Store at Dubbo, whence the truck moved off. Evidence was also given that on 26th May 1958 a truck so numbered, described as a Grant Table Top, was seen in Macquarie Street, Dubbo, at about 3.45 p.m. and that on the next day, 27th May 1958, the same truck was seen in a public lane at Orange, Macnamara's Lane, at 11.30 a.m. The distance between Dubbo and Orange is ninety miles. This appears to be clear evidence that the truck in question journeyed from Dubbo to Orange. (at p310)

3. A commercial goods vehicle is defined to mean any motor vehicle which is used or intended to be used for carrying goods for hire or reward or for any consideration or in the course of any trade or business whatsoever: s. 3. The Act does not apply in respect to any vehicle the loaded capacity of which is not more than four tons: s. 4. By s. 13 a certificate purporting to be signed by the officer for the time being in charge of the records kept under the Motor Traffic Act 1909 as amended of the load capacity of the motor vehicle or trailer or the maximum permissible gross weight of the motor vehicle or trailer together with the load which may be carried thereon or the aggregate weight of the motor vehicle or trailer, or the tare weight of the motor vehicle or trailer shall be prima facie evidence of the matters so stated. A certificate of this description was put in evidence showing that the aggregate weight of the vehicle was nine tons two cwt. and its tare weight three tons one cwt. This seems sufficient proof to bring both the journey and the vehicle within the statute. It was objected, however, that the word "journey" possessed a connotation requiring a terminus a quo and a terminus ad quem and that the proof failed to establish a journey in that sense. It was further objected that the journey must be upon public streets as defined. The proof showed that the vehicle covered ninety-two miles and a necessary presumption arises that it used public streets. If the proof did not indicate the destination, logic required the assumption that there was one. The point was made that at the hearing the informant tied himself down to a particular allegation concerning the journeys on which he relied. The allegation was that on 26th May at about 3.45 p.m. a vehicle AZP 022 travelled along Macquarie Street, Dubbo, and that on 27th May, at 11 a.m., it travelled along

Macnamara's Lane, a public street at Orange, and that between 26th May 1958 and 27th May 1958 the vehicle made a journey on public streets from Dubbo to Orange. It is difficult to see why it should be suggested that there was any departure from this allegation. In fact it was proved. The objection is quite untenable. (at p311)

4. It was then said that it was not shown that the appellant was the owner. There is in s. 3(1) an elaborate definition of "owner" which includes every person who is a joint owner. A certificate under s. 12 of the Motor Traffic Act 1909 was put in evidence showing the appellant as the registered owner. The expiration date of the registration was given as 27th July 1958. A partnership agreement was put in evidence from which it appeared that the appellant and certain of his children entered into partnership as from 10th June 1957. Evidence was given that the vehicle AZP 022 formed an asset of the partnership and became joint property. Even so the appellant remained an owner within the definition and under s. 10(1)(d) would be responsible for failure to deliver the record to the Commissioner. It was then objected that the proof was inadequate that such failure had taken place. The proof consisted of a certificate under s. 13(1)(a)(i) that up to 23rd June 1958 no record as prescribed by the Act had been received by the Commissioner for Motor Transport in respect of the vehicle AZP 022. It did appear, however, that an uncompleted form bearing date 19th June 1958, referring to the vehicle AZP 022 had been returned to the Commissioner. It was unsigned and contained no particulars of the journey. Apparently it had been handed or transmitted to the appellant and the inference is that it had been returned by him uncompleted. It seems clear enough that this did not amount to delivering a record to the Commissioner. All the objections therefore fail. The magistrate found the facts against the appellant and the conviction should stand. (at p312)

5. The appeal should be dismissed. (at p312)

McTIERNAN J. In this case I have had the advantage of reading the reasons for judgment of the Chief Justice and I concur in them. Accordingly I am of opinion that the appeal should be dismissed. (at p312)

DECISION

FULLAGAR J. I agree with the judgment of the Chief Justice, and I have nothing to add. (at p312)

KITTO J. I agree in the judgment of the Chief Justice. (at p312)

TAYLOR J. It is unnecessary in this case to repeat what I have already said in Commonwealth Freighters Pty. Ltd. v. Sneddon. (at p312)

2. The only additional matters which arise in the case are whether it was established that the appellant was the owner of the vehicle in question, whether the vehicle itself, between 26th and 27th May 1958, made a journey on public streets from Dubbo to Orange and, finally, whether there was adequate proof of failure on the part of the appellant to deliver the prescribed record of the journeys made by the vehicle on public streets. On these matters I agree entirely with the observations of the Chief Justice and have nothing to add. (at p312)

MENZIES J. I agree that the appeal should be dismissed. The appellant was not engaged in inter-State trade and as to the other objections to his conviction I agree that they are groundless for the reasons given by the Chief Justice. (at p312)

WINDEYER J. This is an appeal from a conviction by a magistrate for an offence against the Road Maintenance (Contribution) Act 1958 (N.S.W.). The appellant's contention was that that Act is, by reason of s. 92 of the Commonwealth Constitution, void so far as it affects inter-State trade and commerce and that he was engaged in inter-State trade and commerce in the transactions in respect of which he was convicted. He is in business in Dubbo as a wholesale greengrocer. In form at least, the business is carried on by a partnership of which he, his wife and children are members. In the course of this business the appellant bought a quantity of potatoes in sacks in Victoria and had them brought to Dubbo by a semi-trailer driven by one of his servants. This vehicle with its load of potatoes arrived at his store in Dubbo on Sunday 25th May 1958. The next day some of the sacks were taken from the semi-trailer and put on a truck for distribution to the appellant's customers. The truck left the appellant's premises in Dubbo; and next day, Tuesday, it was seen in Orange by a transport inspector of the Department of Motor Transport. The truck was a "commercial goods vehicle" within the meaning of the Road Maintenance (Contribution) Act; and the appellant was charged with a contravention of s. 7(1) of the Act in failing to deliver to the Commissioner for Motor Transport an accurate daily record of all journeys of his truck along public streets in New South Wales during the month of May. He was convicted by the magistrate, who found that the vehicle made a journey between Dubbo and Orange between 26th and 27th May 1958; that this was a wholly intra-State journey; and that the owner, the appellant, was required by the Act to keep a record of the said journey and deliver the same to the Commissioner and had failed to do so. (at p313)

2. The magistrate was right. Section 92, whatever its effect on the Road Maintenance (Contribution) Act, could not avail the appellant. The carriage of potatoes from Victoria to his store in Dubbo was inter-State commerce. But a merchant in Dubbo who distributes sacks of potatoes he bought in Victoria to his customers in the western part of New South Wales does not thereby engage in inter-State commerce. He is merely sending potatoes from Dubbo to other places in New South Wales. (at p313)

3. Mr. Holmes contended that if the Act were invalid in respect of inter-State traffic, it was invalid as a whole, and that it was irrelevant that the journey in relation to which the appellant was prosecuted was an intra-State journey with no inter-State complexion. His argument relied upon conclusions as to the policy of the Act, which he said were to be drawn from antecedent related legislation and decisions in the litigation to which it gave rise. But s. 3(2) provides an answer to this argument if it should otherwise have any foundation. (at p313)

4. Some of the other points taken can scarcely even be dignified as sophistry. However, I shall just say firstly: that the fact that a vehicle is in a public street in Dubbo one day, and next day in a public street in Orange - the two towns being about a hundred miles apart and connected by a public highway (which is by definition a public street) - is evidence that the vehicle made a journey along public streets in New South Wales. And secondly, any member of a partnership which owns a motor vehicle is an "owner" as defined in the Act; and if there be a failure to render the return or pay the charges required by the Act, any owner is liable to prosecution for an offence. But only one record and one payment are required for each vehicle, so that if these be rendered and made by one owner no offence is committed by any other owner of the vehicle. (at p314)

5. This appeal should, in my view, be dismissed with costs. (at p314)

ORDER

Order in each appeal:-
Appeal dismissed with costs.

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