

[HIGH COURT OF AUSTRALIA.]

EDMUND T. LENNON PROPRIETARY }
LIMITED }

PLAINTIFF ;

AND

COMMISSIONER OF ROAD TRANSPORT DEFENDANT.

Pleading—Declaration for money had and received without stating facts by reason of which money alleged to have been had and received—Plea that claim barred by reason of particular statutory provision—Whether plea adequate to cover cause of action.

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Feb. 12, 13;SYDNEY,
July 11.Dixon C.J.,
McTiernan,
Webb,
Fullagar,
Kitto and
Taylor JJ.

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

In an action the declaration was simply for money had and received by the defendant for the use of the plaintiff and the defendant's plea was "that the alleged cause of action did not accrue within one year before action brought in accordance with the provisions of the *Transport (Division of Functions) Act 1932-1952* and in particular s. 27 thereof." The plaintiff demurred to the plea.

Held by Dixon C.J., McTiernan, Webb, Kitto and Taylor JJ., Fullagar J. dissenting, that the plea was inadequate to cover the cause of action and accordingly that the demurrer should be allowed.

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

In an action commenced in the Supreme Court of New South Wales in which Edmund T. Lennon Pty. Limited was plaintiff and the Commissioner for Road Transport was defendant the declaration filed by the plaintiff was in the following terms: "Edmund T.

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Lennon Pty. Limited a company duly incorporated and entitled to sue in and by its said corporate name and style by Lionel Dare its attorney sues the Commissioner for Motor Transport a body corporate and liable to be sued in and by its said corporate name and style for money payable by the defendant to the plaintiff for money had and received by the defendant for the use of the plaintiff and the plaintiff claims the sum of seventy-three thousand two hundred and seventy pounds three shillings and tenpence (£73,270 3s. 10d.).”

To this declaration the defendant pleaded : “ The defendant the Commissioner for Motor Transport by Finlay Patrick McRae its attorney says as to £73,095 6s. 4d. parcel of the money claimed that the sum of £73,095 6s. 4d. being part of the moneys sought to be recovered by the plaintiff in this action are moneys of the nature and character referred to in ss. 2, 3 and 4 of the *State Transport Co-ordination (Barring of Claims and Remedies) Act 1954* and that the said moneys were dealt with as in the said Act mentioned and the defendant further says that by virtue of the said Act the plaintiff’s cause of action is extinguished and its right to recover the said money is barred. 2. And for a second plea the defendant says as to £28,464 16s. 11d. parcel of the money claimed that the alleged cause of action did not accrue within one year before action brought in accordance with the provisions of the *Transport (Division of Functions) Act 1932-1952* and in particular s. 27 thereof.”

The plaintiff replied and demurred to such pleas as follows : “ The plaintiff joins issue with the defendant upon all his pleas herein. And the plaintiff says that the defendant’s first plea herein is bad in substance. On the argument of this demurrer it will be contended that the said plea is bad in substance for the following amongst other grounds. 1. That it discloses no defence to the claim of the plaintiff. 2. That in so far as it purports to extinguish the plaintiff’s cause of action or to bar its right to recover the money the subject of this action the *State Transport Co-ordination (Barring of Claims and Remedies) Act 1954* and the relevant sections thereof are and each of them is *ultra vires* the Parliament of the State of New South Wales. 3. That in an action in which the plaintiff herein was the plaintiff and the defendant herein was a defendant the High Court of Australia declared that s. 3 (a) of the *State Transport Co-ordination (Barring of Claims and Remedies) Act 1954* does not validly operate to extinguish any cause of action to which in consequence of the invalidity or inapplicability of the *State Transport (Co-ordination) Act 1931* (or that Act as amended) by reason of s. 92 of the Constitution the plaintiff was at the passing of the *State Transport Co-ordination (Barring of Claims and Remedies)*

Act 1954 entitled as against the defendant for the recovery of moneys demanded of the plaintiff in purported pursuance of s. 18 (5) or s. 37 of the said *State Transport (Co-ordination) Act* 1931 (or that Act as amended) or of a condition imposed upon a licence or permit or demanded upon the issue of such a licence or permit and the said Court further declared that s. 4 of the said *State Transport Co-ordination (Barring of Claims and Remedies) Act* 1954 does not validly operate to bar the remedy for the enforcement of the within or any such cause of action. And the plaintiff for a second demurrer further says that the defendant's second plea herein is bad in substance. On the argument of this demurrer it will be contended that the said plea is bad in substance for the following amongst other grounds:—1. That it discloses no defence to the claim of the plaintiff. 2. That s. 27 of the said *Transport (Division of Functions) Act* does not apply to the cause of action of the plaintiff herein. 3. That the action herein is not an action against the defendant for anything done or omitted under any valid Act of Parliament which conferred or imposed any power, authority, duty or function on the defendant or in the exercise or performance of any power authority duty or function lawfully conferred or imposed by any such Act."

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The defendant filed a joinder in demurrer alleging that the first and second pleas were good in substance, and the demurrer was then removed into the High Court under s. 40 of the *Judiciary Act* 1903-1955 for argument.

This matter was argued together with the cases of *Shepherd v. State of New South Wales* (1) and *Barton v. Commissioner for Motor Transport* (2) and the argument appears in the report of the latter case.

Sir *Garfield Barwick* Q.C. and *G. D. Needham*, for the plaintiff.

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

Cur. adv. vult.

The following written judgments were delivered:—

July 11.

DIXON C.J. The plaintiff demurs to two pleas in an action brought in the Supreme Court of New South Wales by writ of summons dated 14th January 1955. The demurrers were removed into this Court under s. 40 of the *Judiciary Act* 1903-1955 in order that it might be argued at the same time as *Barton v. Commissioner for Motor Transport* (2) and *Shepherd v. State of New South Wales* (1). A consideration of the pleadings suggests that perhaps, before

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

(2) (1957) 97 C.L.R. 633.

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making that order, the Court should have insisted that they be put in better shape.

To begin with, what may be supposed to be the intended defendant is misnamed. The declaration contains one count. It is for money payable by the defendant to the plaintiff for money had and received by the defendant for the use of the plaintiff. There is nothing in either plea and there are no particulars under the declaration which would show by reason of what facts the plaintiff alleges the money to have been received to the use of the plaintiff. The first plea, however, states facts designed to bring the cause of action under ss. 2, 3 and 4 of the *State Transport Co-ordination (Barring of Claims and Remedies) Act* 1954. It is agreed that this plea cannot be supported now, by reason of the decision in *Antill Ranger & Co. Pty. Ltd. v. Commissioner for Motor Transport* (1). It is the second plea which is in question. That plea is as follows: "And for a second plea the defendant says as to £28,464 16s. 11d. parcel of the money claimed that the alleged cause of action did not accrue within one year before action brought in accordance with the provisions of the *Transport (Division of Functions) Act* 1932-1952 and in particular s. 27 thereof." It is to be noticed that the Act is referred to in the plea as extending to 1952 not to 1956. That is because the plea was pleaded before Act No. 16 of 1956 came into force. In my reasons in *Barton v. Commissioner for Motor Transport* (2) I have expressed the view that so much of s. 27 as was added by the last-mentioned Act cannot validly apply to causes of action which accrued twelve months before its enactment, namely twelve months before 13th September 1956, in so far as such causes of action arise as a result of the operation of s. 92 of the Constitution on the provisions of the *State Transport (Co-ordination) Acts*.

As to so much of s. 27 as was enacted by Act No. 46 of 1940, the difficulty in this case is the inadequacy of the facts stated on the record. Everything must be spelt out of the expression used in the second plea "in accordance with the provisions of the *Transport (Division of Functions) Act* 1932-1952 and in particular s. 27 thereof." In my opinion enough is not stated in the plea to raise the question which it sought to litigate. It is, however, no doubt evident as a practical matter from the judgment prepared in *Barton v. Commissioner for Motor Transport* (2) what view I would take in the present case had the facts been adequately stated. As it is, I think that the demurrer must succeed against the second plea, simply because of the inadequacy of the plea to cover the cause of action.

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

(2) (1957) 97 C.L.R. 633.

Accordingly, in my opinion, there should be judgment in the demurrer for the plaintiff in the case of both the first and the second plea.

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

WEBB J. The plaintiff's demurrer to pleas in this action was removed from the Supreme Court into this Court under s. 40 of the *Judiciary Act* 1903-1955. The plaintiff's claim is for £73,270 3s. 10d., presumably being moneys paid for permits and licences to operate commercial goods vehicles in inter-State trade.

Assuming the material facts to be similar to those in *Barton's Case* (1) and *Shepherd's Case* (2), I think there should be judgment in the demurrer for the plaintiff and for the reasons already given in those cases.

FULLAGAR J. The writ of summons in this case was issued out of the Supreme Court of New South Wales on 14th January 1955. The plaintiff sued to recover from the defendant, a statutory corporation sole, a sum of £73,270 3s. 10d. as money had and received by the defendant to the use of the plaintiff. The moneys in question are moneys alleged to have been demanded by the defendant and received by it under the *State Transport (Co-ordination) Act* 1931 (N.S.W.) as amended from time to time. This Act (so far as material) was held by the Privy Council to be unconstitutional in *Hughes and Vale Pty. Ltd. v. State of New South Wales* [No. 1] (3). The defendant delivered two pleas on 17th January 1956. By its first plea it relied on the *State Transport Co-ordination (Barring of Claims and Remedies) Act* 1954 (N.S.W.). By its second plea it relied as to £28,464 16s. 11d., part of the money claimed, on s. 27 of the *Transport (Division of Functions) Act* 1932-1952 (N.S.W.). The plaintiff on 2nd March 1956 demurred to both pleas. Since both demurrers raised constitutional questions, they were removed into this Court by order made under s. 40 of the *Judiciary Act* of the Commonwealth.

Since the filing of the demurrers the *State Transport Co-ordination (Barring of Claims and Remedies) Act* 1954 has been held to be unconstitutional. It follows that the demurrer to the first plea must be allowed.

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(1) (1957) 97 C.L.R. 633.

(2) (1957) 97 C.L.R. 673.

(3) (1955) A.C. 241 ; (1954) 93 C.L.R.

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So far as the demurrer to the second plea is concerned, the case does not differ in any material respect from *Barton v. Commissioner for Motor Transport* (1). For the reasons which I have given in that case, I am of opinion that this demurrer should be overruled.

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

TAYLOR J. On the hearing of this matter it was conceded that the decision in *Antill Ranger & Co. Pty. Ltd. v. Commissioner for Motor Transport* (2) made it inevitable that the demurrer to the first plea should be allowed.

The second plea, however, invokes the protection of the limitation prescribed by s. 27 of the *Transport (Division of Functions) Act* 1932-1952 but there is nothing in the declaration or the plea to show that the plaintiff's action is of the general character described by that section. No doubt the parties intended to raise for consideration questions similar to those which were discussed in *Barton v. Commissioner for Road Transport* (1) and *Shepherd v. State of New South Wales* (3) but the pleadings are defective for this purpose. The result is, of course, that the demurrer should be allowed though it would follow from the views to which I subscribed in the last-mentioned cases that, if the pleadings were in an appropriate form, I would think the contrary result should follow. But it is not open to us to deal with the demurrer by assuming the existence of facts which are not alleged and, accordingly, the demurrer should be allowed.

*Judgment in demurrer upon the first and second
plea for the plaintiff with costs.*

Solicitors for the plaintiff, *Lionel Dare, Read & Martin*.

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

R. D. B.

(1) (1957) 97 C.L.R. 633.

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

(3) (1957) 97 C.L.R. 673.