~~C.D.C.C.~~ 39/1954

No. 40 of 1953

In the Privy Council.

ON APPEAL FROM THE FULL COURT OF THE HIGH COURT OF AUSTRALIA.

BETWEEN :

HUGHES & VALE PTY. LIMITED *Appellant,*

AND

THE STATE OF NEW SOUTH WALES, THE HONOURABLE WILLIAM FRANCIS SHEAHAN AND THE DIRECTOR OF TRANSPORT AND HIGHWAYS *Respondents,*

AND

THE COMMONWEALTH OF AUSTRALIA, THE STATE OF VICTORIA and THE STATE OF QUEENSLAND *Interveners.*

Case for the Intervener, The Commonwealth of Australia.

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INTRODUCTION.

RECORD.

1. This Appeal is brought by Special Leave of Her Majesty in Council by Order in Council dated 19th June 1953 from a Judgment and Order of the High Court of Australia overruling a demurrer by the Plaintiff (Appellant) to the Defence of the Defendants (Respondents). pp. 60–61. pp. 59–60.

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2. The Intervener, the Commonwealth of Australia, intervened by leave on the hearing before the High Court of Australia and was heard upon the application by the Appellant for Special Leave to appeal, and it was intimated by the Lord Chancellor that the Commonwealth of Australia would be heard as Intervener on the hearing of the Appeal in the event of special leave to appeal being granted.

3. The Plaintiff (Appellant), in its action in the High Court of Australia, sought declarations that the State Transport Co-ordination Act 1931–1950 (hereinafter referred to as "the New South Wales Transport Co-ordination Act") of the Parliament of New South Wales was invalid and that certain charges imposed under the provisions of the statute on the Plaintiff (Appellant) were invalid. It was recognised that the law was enacted upon a subject matter within the constitutional legislative powers of the Parliament of New South Wales but it was asserted by the Plaintiff that it was invalid as inconsistent with section 92 of the Constitution of the Commonwealth of Australia. The High Court held that the Act was valid and did not infringe section 92. That section applies to all the Legislatures in the Australian Federal System, and provides

> "On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free."

4. The New South Wales Transport Co-ordination Act provides for the licensing of motor vehicles engaged commercially in the transport of passengers and goods on the public highways of the State of New South Wales, and prohibits all unlicensed transportation. The Act is, therefore, confined to the territory of New South Wales and deals only with commercial transport journeys in New South Wales. It is not however specifically limited to journeys the termini of which are necessarily within the State, or journeys the whole routes of which are necessarily within the State. In consequence of the general character and scope of the Act, it applies equally and indifferently to all commercial carrying within the territory of New South Wales, whether or not such carrying in fact happens to be confined to the territory of New South Wales, and whether or not the journey in any particular case originates or terminates in some other State of the Commonwealth, or incidentally traverses in part the territory of some other State of the Commonwealth. In this

respect the Act may be said to embrace and operate upon both interstate and intra-state carrying operations in New South Wales. The Act also authorises the imposition of prescribed charges on transport operations.

5. The effect of the Act, in practical operation, may be to limit or prevent a motor carrier from carrying, either at all or upon some particular journey or journeys, by reason of the refusal of a licence or the grant of a licence in a particular limited form. If a carrier is unable to obtain a licence at all or only in some limited form, he may in consequence be prohibited in New South Wales from carrying on a journey in that State which might have originated outside the State or which might terminate outside the State. The Appellant contends that this consequence renders the Act invalid as contrary to section 92. This contention raises issues of great significance in the constitutional system of the Commonwealth, since section 92 of the Constitution, whatever be its true effect, applies equally to all Australian parliaments.

6. The Commonwealth of Australia is not at this date directly concerned, in the narrowest sense, as to the validity of the New South Wales Transport Co-ordination Act, since it would not be within the powers of the Commonwealth Parliament in peace time to pass a law dealing with commercial transport throughout the whole continent of Australia. It would, however, be within the interstate trade and commerce power of the Parliament to pass a law licensing commercial transportation of passengers and goods when carried on between the States of the Commonwealth whether by land, sea or air (Constitution section 51 (i)). In fact, Commonwealth legislation dealing with such transport has been enacted ; see, for example, Navigation Act 1912–1953, section 288. The true constitutional principles relating to such legislation are therefore of direct concern to the Commonwealth. Moreover, in time of war, in enacting laws for the defence of the Commonwealth (Constitution, section 51 (vi)) the Commonwealth Parliament may be compelled by national exigencies to enact a completely general control of land, sea and air transport throughout the whole continent, whether interstate or intra-state. In a period of national emergency the need has in the past arisen for nation wide legal transport control by the Commonwealth. It has been held that section 92 applies to the wartime " defence legislation " of the Commonwealth, along with all legislation by all other Australian parliaments. In consequence the actual issues involved in this appeal necessarily concern the Commonwealth.

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7. Further, the basic issues raised by the appeal extend beyond the subject matter of legislation upon commercial transport. The issues must ultimately affect legislation upon all trade and commerce carried on among the States. The power to make laws for the peace order and good government of the Commonwealth with respect to trade and commerce among the States is one of the most important entrusted to the Commonwealth Parliament (Constitution, section 51 (i)). Many other powers of the Commonwealth Parliament, including the defence power mentioned above, will also be affected by the issues which are raised in this appeal. Hereafter in this Case examples are given of Commonwealth legislation which is likely to be affected by the decision in this appeal.

(see paragraphs 18 and 20 infra.)

BASIC ISSUES IN THE APPEAL.

8. This appeal raises issues which for the purposes of discussion may be classified as general and particular respectively. The general issues are concerned with the extent of legislative powers in the Australian constitutional system. The particular issues are concerned with the application to the New South Wales Transport Co-ordination Act of the considerations involved in the general issues.

9. The general issues may be further analysed as primary and associated. The primary general issue raises questions as to the capacity of each of the Australian parliaments to enact laws limiting the persons who may carry on some particular interstate trade and commerce.

10. It has long been agreed that, under the Constitution, interstate trade and commerce is not extra legem. Various particular forms of controlling traders are available to Parliament conformably to the Constitution.

11. The case under appeal raises the question of the power to regulate interstate trade in a most significant form. The question to be determined is :—

> Where trade in any particular case is carried on across State borders, do the provisions of the Constitution preclude an Australian parliament from limiting, because of the nature of the trade or social or economic circumstances or the community needs, the number of fit and proper persons who may carry on that trade ?

This question states the primary general issue in the appeal.

12. It is contended by the Commonwealth that the Constitution does not prohibit such legislation, that the Judicial Committee of the Privy Council has definitely decided to this effect, that no decision of the High Court of Australia has ever construed the Constitution so as to prohibit such legislation and that dissenting judgments given by Justices of the High Court asserting that the Constitution has such an effect have remained as expressions of minority opinion and have not been accepted and are erroneous. More specifically, it is contended that the judgment of the Privy Council in the Bank Case, (*Commonwealth of Australia* v. *Bank of New South Wales*, (1950 A.C. 235), clearly indicates that the Constitution, and in particular section 92, has not the effect of prohibiting such legislation.

13. The associated general issue then arises. If, as the Commonwealth contends, appropriate circumstances justify the exclusion of certain traders from interstate trade, what legislative methods for implementing such exclusions are permissible and what particular forms may such legislation take ?

14. The Commonwealth of Australia as intervener is vitally concerned with the general issues both primary and associated, since these are of wide constitutional significance.

15. The particular issues (that is the issues regarding the validity of the New South Wales Transport Co-ordination Act) likewise have both primary and associated aspects. The primary aspect of the particular issues is whether, if it be true that legislation excluding some traders from interstate trading by reason of appropriate circumstances is not forbidden by the Constitution, the circumstances existing in relation to commercial land transport in Australia, and in particular in New South Wales, are such as to permit the State Parliament to enact a statute preventing carriers except under licence from carrying, including carrying interstate, as is the effect of the New South Wales Transport Co-ordination Act.

16. The associated aspect of the particular issue relates to the detailed provisions which the New South Wales Transport Co-ordination Act contains with regard to the discretion to grant or refuse transport licences, and with regard to a system of financial charges imposed upon transport operators.

17. The Commonwealth of Australia has, as will be more fully indicated below, only a limited interest in the particular issues.

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COMMONWEALTH'S INTEREST IN PRIMARY GENERAL ISSUE.

18. The vital concern of the Commonwealth of Australia with the primary general issue referred to in paragraph 11 is clearly shown by examples. The Commonwealth might in peace time desire to exclude, for example, certain companies or persons of foreign nationality from operating ships in Australian coastal shipping, that is, in interstate sea navigation, or from operating planes in interstate air navigation, because inter-national or national considerations rendered the presence of such companies or persons in those vital activities a grave danger to the national security or a grave threat to the integrity of Australian shipping or air-lines. Again, in wartime, the Commonwealth has in the past found it necessary, and in the event of a future war would again probably find it necessary, in order to protect the nation's economy, to acquire compulsorily essential food-stuffs, or itself to handle or control all sales thereof, including inter-state sales, to the exclusion of sales by private individuals. Instances of such Commonwealth wartime laws are :—

(i) the marketing Regulations made under the National Security Act during the 1939–1945 War ;

(ii) the Land Transport and Liquid Fuel Regulations made under the same Act and constituting a complete system of control of vehicles engaged, and liquid fuel carried, in land transport ;

(iii) the National Security (Shipping Co-ordination) Regulations;

(iv) Orders made in wartime under Regulation 59 of the National Security (General) Regulations prohibiting the carrying on of businesses except by licence.

19. The control of business activities in wartime by licensing was not, during the war of 1939–1945, challenged on the ground that it was obnoxious to section 92 as no case embracing facts involving interstate business activities came before the High Court of Australia. In consequence the holding valid of such statutory regulations (see *Stenhouse* v. *Coleman*, 69 C.L.R. 457) is not to be taken as a recognition by the High Court that such regulations would necessarily be valid if challenged by a plaintiff who was able to show that the general control or restriction of business activities affected him in relation to his activities traversing State borders. Any possibility of partial or total invalidation of such essential wartime controls is a matter of great importance to the Commonwealth.

20. The Commonwealth of Australia has enacted legislation over a considerable period of time upon the basis that laws can be shown to be valid notwithstanding that, in their operation, they do or may exclude individuals from carrying on some part of interstate trade and commerce, and may exclude such individuals upon grounds not dependent upon any personal deficiencies or incapacities.

See for example :—

(i) Australian Industries Preservation Act 1906–1950.

(ii) Banking Act 1945–1953, Part II, Division (1) and Part IV ;

(iii) Broadcasting Act 1942–1953 ss. 6 K and 44 ;

(iv) Commonwealth Bank Act 1945–1953, s. 51 ;

(v) Post and Telegraph Act 1901–1950 ;

(vi) Stevedoring Industry Act 1947–1949, ss. 33 and 34 ;

(vii) Whaling Act 1935–1948, ss. 6 to 10 ;

(viii) Wireless Telegraphy Act 1905–1950.

In particular, since the decision of the Privy Council in the Bank Case (1950 A.C. 235), the Commonwealth of Australia has enacted legislation upon the basis of this principle. In this respect attention is drawn to the Atomic Energy Act No. 31 of 1953, s. 40, and the Television Act No. 6 of 1953, ss. 4, 6 and 9.

PRIVY COUNCIL DECISIONS ON PRIMARY GENERAL ISSUE.

21. It is submitted on behalf of the Commonwealth that the decisions of the Privy Council on section 92 have emphatically laid it down that political, social or economic circumstances may justify the exclusion of individual traders from interstate trade. In the *Commonwealth of Australia* v. *Bank of New South Wales*, (1950 A.C. 235) (the Bank Case) it was held that regulation of trade, commerce and intercourse among the States is compatible with its absolute freedom (pp. 310 and 313). It was also held that, in determining whether an enactment is regulatory or something more, the problem to be solved will often be not so much legal as political, social or economic (p. 310). Their

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Lordships also agreed with the statement of Latham C.J. in *Australian National Airways Pty. Ltd.* v. *The Commonwealth* (71 C.L.R. p. 71), as follows :—

> " I venture to repeat what I said in the former case : ' One proposition which I regard as established is that simple legislative prohibition (Federal or State), as distinct from regulation, of inter-State trade and commerce is invalid. Further, a law which is " directed against " inter-State trade and commerce is invalid. Such a law does not regulate such trade, it merely prevents it. But a law prescribing rules as to the manner in which trade (including transport) is to be conducted is not a mere prohibition and may be valid in its application to inter-State trade, notwithstanding section 92 ' ".

It was also said by the Privy Council in the Bank Case :—

> " For their Lordships did not intend to lay it down that in no circumstances could the exclusion of competition so as to create a monopoly either in a State or Commonwealth agency or in some other body be justified. Every case must be judged on its own facts and its own setting of time and circumstance. . . . " (p. 311).

Again it was said :—

> " Their Lordships must therefore add, what, but for this argument so strenuously urged, they would have thought it unnecessary to add, that regulation of trade may clearly take the form of denying certain activities to persons by age or circumstances unfit to perform them, or of excluding from passage across the frontier of a State creatures or things calculated to injure its citizens. Here again a question of fact and degree is involved . . . . " (p. 312).

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*The considerations which Latham C.J. had in mind are explained in the sentences that immediately follow, namely :—

" In the present case the Act is directed against all competition with the inter-State services of the Commission. The exclusion of other services is based simply upon the fact that the competing services are themselves inter-State services. The Act is a prohibition, with a single exception, of such services, and that prohibition is quite independent of any considerations relating to safety, efficiency, air-worthiness, etc., which otherwise might have been relied upon as the basis of an argument that the statute regulated such services in the sense of introducing regular and orderly control into what otherwise might be unregulated, disorderly, possibly foolishly competitive, and therefore inefficient services."

In *James* v. *The Commonwealth* (1936 A.C. 578) at p. 623 the statement of Lord Atkin in *James* v. *Cowan* (1932 A.C. 542) at p. 558, as follows, was repeated—

> "It may be conceded that, even with powers granted in this form, if the Minister exercised them for a primary object which was not directed to trade or commerce, but to such matters as defence against the enemy, prevention of famine, disease and the like, he would not be open to attack because incidentally inter-State trade was affected."

COMMONWEALTH'S CONTENTIONS ON PRIMARY GENERAL ISSUE.

22. It is submitted on behalf of the Commonwealth that the effect of the decisions of the Judicial Committee on section 92 is as follows. Mere prohibition of a trader from carrying on interstate trade is forbidden by section 92. Examples of this were the legislation which was held to be invalid in the Bank Case (1950 A.C. 235); and in *Australian National Airways* v. *the Commonwealth* (71 C.L.R. 29). On the other hand, in many circumstances, legislation excluding some traders from interstate trade may be truly regulatory. In the case of a law which excludes some individuals from trading, the onus may often be on those defending the law to demonstrate the circumstances which make the law truly regulatory. In some cases these circumstances may be matters of which a Court can take judicial notice; in many others the facts will require to be brought to the knowledge of the Court in some appropriate way.

23. Further, the Commonwealth contends that the decision of the High Court and of the Privy Council holding the Banking Act 1947 (the Bank Nationalization Act) invalid was beyond question correct. It was of the essence of that law that it was not relative or conditional in its operation, but absolute and prohibitory. It was for this reason clearly invalid and for this reason pronounced to be invalid by the Judicial Committee. This decision is, however, in no way in conflict with the contentions herein put forward on behalf of the Commonwealth of Australia. On the contrary, the most authoritative exposition of the principles asserted by the Commonwealth in this case are to be found in the decision of the Privy Council holding the Bank Nationalization statute to be invalid.

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RELEVANT HIGH COURT DECISIONS.

24. The validity of legislation excluding traders from interstate trade is expressly asserted in the decisions of the Judicial Committee above referred to. It is submitted that the High Court has in a number of cases, apart from cases concerning road transport, held that legislation did not infringe section 92, although it excluded competent individuals from conducting interstate trade either in a particular form of interstate trade or in relation to particular transactions of interstate trade. See for example :—

(*a*) *New South Wales* v. *Commonwealth* (the Wheat Case) (20 C.L.R. 54) Compulsory acquisition of wheat by the Crown in wartime and invalidation of certain contracts, including interstate contracts for the sale of wheat, was held valid.

(*b*) *Roughley* v. *New South Wales* (42 C.L.R. 162). State law forbidding persons from carrying on business as farm produce agents except under licence was held not to infringe section 92.

(*c*) *Ex parte Nelson* (42 C.L.R. 209). State law authorising the Government to prohibit importation into the State of stock or fodder from any other State or country in which there was reason to believe any infectious or contagious disease in stock existed was held not to infringe section 92.

(*d*) *Milk Board* v. *Metropolitan Cream Pty. Ltd.* (62 C.L.R. 116). State law compulsorily acquiring milk for a metropolitan milk distributing district and empowering the Board to distribute the milk at fixed prices, supervise dairies, and devise and initiate methods in connection with production, distribution and sale of milk and excluding, *inter alia*, private interstate trade and commerce in milk in the distributing district was held not to infringe section 92 in its application to cream supplied by producers in another State.

(*e*) *Andrews* v. *Howell* (65 C.L.R. 255). Commonwealth Regulations under the defence power, establishing in time of war a marketing scheme for apples and pears providing for the compulsory vesting of all apples and pears in a Board and requiring delivery of them to the Board and excluding private interstate trade in or transportation of such apples, were held valid.

COMMONWEALTH'S CONTENTIONS ON ASSOCIATED GENERAL ISSUE.

25. The contention of the Commonwealth as set out above is that a law excluding certain traders from interstate trade may be valid

because of the particular and relevant circumstances. It follows that, because of the very nature of the validating circumstances contemplated, this situation is the particular rather than the general or ordinary situation. In the absence of such "political, social or economic" circumstances, the law would be an infringement of the constitutional guarantee.

26. It follows that the law, operating in a manner which would, but for the circumstances, be beyond power, must be limited to the particular requirements which it is designed to serve. If this were not so, the circumstances would produce a result more extensive than was justified. Thus, the circumstances may justify a law, which is confined to or is responsive to them, and the circumstances cannot be admitted to do more than this. The law must be limited to the circumstances which give it validity. This very general assertion must have many diverse applications in questions which arise as to the validity of laws challenged as inconcistent with section 92.

27. In some cases, a law may exclude some specified interstate trade and interstate traders in general terms, but the subject matter may yet be so limited as to be, of necessity, confined to particular circumstances and thereby to be valid. Thus, the Banking Act 1945–1953, Part IV, provides in effect that all persons shall deliver any gold in their possession to the Commonwealth Bank in return for fair compensation for the same, and shall not sell or otherwise dispose of gold. Thus the statutory provisions exclude, *inter alia*, interstate trade in gold. The exclusion of such trade is not limited to or by particular circumstances. But the limitation of the law to a unique commodity, in the existing social and economic circumstances of Australia and the whole world, ensures that this law in its operation is confined to the particular situation which gives validity to such a law and which, but for such circumstances, might be thought to infringe the constitutional freedom of interstate trade.

28. The Commonwealth further contends that a law excluding particular traders from trade of some particular class (including trade of that class among the States) may, in many cases, operate by means of a licensing system. If the discretion of the licensing authority is unlimited, the question arises whether the law will necessarily have that relation to the validating circumstances which, in the contention of the

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Commonwealth of Australia, is necessary to its validity. Notwithstanding that the discretion in the licensing system is not unlimited, nevertheless, if it is not appropriately limited by the terms of the statute it may, in the result, in some cases permit the exclusion of traders upon too general a basis. This conception is expressed by His Honour Mr. Justice Taylor in his dissenting judgment in the present case. His Honour said (87 C.L.R. p. 112):

p. 57, ll. 2–11.

> ". . . . legislation of this character must infringe Section 92 unless the discretion to refuse a licence is limited to or confined within the ambit constituted by those matters which should properly be regarded as regulatory of the trade or commerce concerned. For I can see no relevant distinction between an arbitrary discretion and one which though not capable of being exercised on any grounds at all, authorises the licensing authority to travel outside the field of regulation. This is the very activity which is denied to the legislature itself and that being so, any enactment purporting to authorise a subordinate authority to do so must be invalid."

COMMONWEALTH'S LIMITED INTEREST IN PARTICULAR ISSUES.

29. The Commonwealth is chiefly concerned with the decision of the general issues above indicated. The particular issues presented by the New South Wales Transport Co-ordination Act are the concern of the Respondent State. As to the primary aspect of the particular issues (referred to in paragraph 15 above), it is no doubt true that the law is one which contemplates the exclusion of transport operators from, *inter alia*, interstate operations. In consequence, the determination of the validity of the law may require consideration of social, economic and political circumstances affecting land transport operations in Australia and particularly New South Wales. The Commonwealth of Australia as intervener is concerned with the more general aspect of the extent of constitutional power rather than the application of power in this specific case.

30. As to the associated aspect of the particular issues (referred to in paragraph 16 above), the Commonwealth of Australia is not directly concerned to contend whether the application or operation of the New South Wales Transport Co-ordination Act is limited in such a way as to

be valid. This is a matter of detailed examination of the statute, falling to be performed by the Respondent State. However, the Commonwealth is concerned with some general considerations relating to this associated particular issue.

31. In the first place, it is submitted that, if a statute is so framed that the necessary limitations upon its operation are made clear by express terms or necessary implication, and if remedies exist by way of recourse to the courts, whether by way of appeal or prerogative writ, so that any individual who claims that he has been prejudiced may resort to the courts, the most complete safeguards exist that the statute is confined in its operation so as to conform to constitutional requirements. The Commonwealth contends, however, that the existence of such safeguards by way of recourse to judicial control is not essential to establish constitutional validity (in the situation here contemplated) though it is a useful means of ensuring the limitation of the operation of the statute in the way which is required.

32. It may be possible in relation to some impugned statute, by presupposing bad faith or improper motives or excess of power on the part of administrative authorities charged with duties such as the granting or withholding of licences under the powers contained in the statute, to demonstrate that the statute may operate to exceed the permissible limits of regulatory control of inter-state trade. But the Commonwealth contends that the possibility of such supposed results should not necessarily result in the invalidation of the statute, whether or not direct legal remedies for such administrative defects are available. The Parliament of the Commonwealth or a State which legislates in a form which is open to such theoretical criticism, is entitled to assume that constituted authorities will *bona fide* carry out limited purposes which it makes sufficiently clear by the statutory terms employed.

HIGH COURT JUDGMENTS IN THE PRESENT CASE.

33. It is submitted on behalf of the Commonwealth that the Justices of the High Court who constituted the majority, in the case now under appeal, acted correctly so far as they asserted the principle that conformably with section 92 Parliament may restrict those participating in interstate trade when particular social, economic or political circumstances require such restriction.

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(*a*) *Dixon C.J.* held the legislation valid because of the significance which had been placed by a number of judges in High Court cases on the fact that the State provided the highways and thereby was empowered to determine the extent to which such State-provided facilities should be permitted to be employed to provide direct competition with the State-owned railways (87 C.L.R. pp. 70–74). It is submitted that His Honour correctly had regard to this consideration as a political, social or economic circumstance directly relevant to the question whether the law was a permissible regulation of interstate trade. In so far, however, as His Honour was of the view that the kind of considerations applicable to the transport legislation could not *mutatis mutandis* be applied in appropriate conditions to other trades, it is submitted that His Honour took too narrow and restricted a view. His Honour would have been justified in asserting that the existence of circumstances justifying a law excluding particular traders from interstate trade must be unequivocally established and not merely asserted, and is not to be lightly assumed. It may be that His Honour did not intend to state more than this. If, however, His Honour is taken to deny that comparable facts could in other cases provide validating circumstances, it is respectfully submitted His Honour would be disregarding the principles laid down by the Privy Council in the Bank Case. In particular, the Commonwealth submits that the circumstances arising from a total war in which the nation may be engaged may unmistakably supply an analogous set of circumstances which, in the proper judgment of the High Court, might provide justification for similar legislation excluding traders from interstate trade. His Honour would, it is submitted, have expressed the correct view if he had asserted that the transport cases are examples of the general principle that political, social or economic circumstances may, in appropriate circumstances, render a law excluding individuals from interstate trade a truly regulatory law, and had then further insisted that this general principle is not to be contemplated as applying frequently or commonly.

pp. 24–27.

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(*b*) *McTiernan J.* adhered to the view which he and Latham C.J. had taken in *McCarter* v. *Brodie* (80 C.L.R. 432). This view was that the substance of the law was one for the co-ordination of road and rail transport. This view looked to relevant political, social and economic circumstances which in His Honour's opinion justified the law (80 C.L.R. pp. 468, 471 ; 87 C.L.R. pp. 76, 77–8 and 81–2).

pp. 28–32.

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It is respectfully submitted that Latham C.J. in *McCarter* v. *Brodie* and McTiernan J. in *McCarter* v. *Brodie* and the present case properly applied the tests as to the application of section 92 laid down by the Judicial Committee.

(*c*) *Williams J.*, after quoting from the Privy Council in *A.G. for Ontario* v. *A.G. for The Dominion* (1896 A.C. 348) at p. 363 (quoting Lord Davey in *Municipal Corporation of City of Toronto* v. *Virgo* (1896 A.C. 88) at p. 93 said (87 C.L.R. p. 84) :—

" There is no suggestion in this definition that the regulation of some form of trade and commerce cannot in appropriate circumstances restrict the number of persons authorised to engage in it. The thing which is to continue to exist is the trade itself and not the right of every individual to engage in it. p. 34, l. 38 to p. 35, l. 2.

I have never doubted that the freedom to engage in trade and commerce among the States guaranteed by section 92 attaches to the individual and not to the goods. But Their Lordships have said in the Banking Case that regulation of trade and commerce among the States is compatible with its absolute freedom and, if I understand them aright, that there may be instances in which such regulation will not infringe this freedom, although it extends to excluding some individuals from engaging in it."

It is respectfully submitted that His Honour in *McCarter* v. *Brodie* and the present case properly looked to political, social and economic circumstances in reaching his conclusion that the Act was truly regulatory. At 87 C.L.R. p. 86 His Honour said :—

" The purpose of the New South Wales Act is to improve and co-ordinate the means of, and facilities for, locomotion and transport, the official charged with its administration now being a corporation sole, the Director of Road Transport. The principal section is section 17. The discretion conferred upon him by this section is extremely wide but it is not unlimited. It must be exercised *bona fide* and so as to carry into effect the purposes of the Act. Otherwise the duty to exercise the discretion according to law could be enforced by mandamus." p. 36, ll. 6–13.

(*d*) It is submitted that *Webb J.* looked to appropriate political, social and economic circumstances in holding that the legislation was valid. His Honour said (87 C.L.R. p. 88) :

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p. 38, ll. 3–7.

"The banking situation and the road transport situation are constituted of entirely different sets of fact, and questions that arise under section 92 are always questions of fact, as has been pointed out by the Privy Council in *James* v. *Commonwealth* in a passage at p. 631 referred to in the Banking Case."

His Honour also said (87 C.L.R. p. 89) :—

p. 38, ll. 14–28.

"If Their Lordships reviewed the Australian road transport situation as it now exists I do not feel warranted in concluding from their observations in the *Banking Case* that they would necessarily hold invalid this New South Wales transport legislation, or any other State's transport legislation which has come under review in this Court. After all, in no case does such legislation go to the length of authorising a State or other monopoly ; and it may well be that in no case can it be shown that it is not called for by the factual situation with which it deals, apart from the necessity to obey section 92. I repeat here what I said in my reasons for judgment in *McCarter* v. *Brodie* : 'If economic activities at some stage of social development could justify legislation giving a monopoly as being essentially regulatory, legislation short of that might be essentially regulatory in circumstances not so exceptional, e.g., legislation to co-ordinate and nationalise motor transport to protect State railways against competition.'"

34. It is respectfully submitted that the minority Judges in the High Court—Fullagar, Kitto and Taylor JJ.—adopted the view that it is never permissible to exclude a trader from interstate trade, by reference to political, social or economic circumstances, and refused to consider such circumstances as relevant to the problem of determining the validity of the law. It is submitted that in so doing they failed to apply the principles laid down by the Judicial Committee.

(*a*) *Fullagar J.* (87 C.L.R. at p. 97) said that in *McCarter* v. *Brodie*, practically speaking two new grounds for deciding that the transport legislation was valid emerged. He went on—

p. 44, l. 43 to p. 45, l. 16.

"These were in substance (1) that the legislation in question was merely 'regulatory' and (2) that the States, because they provide facilities for transport, must have power to control the use of facilities for transport in any manner thought fit. The second ground had been foreshadowed in the judgment of Williams J. in the Airways Case (1945) 71 C.L.R. 29.

" With regard to the first ground, I simply refer to what I said in *McCarter* v. *Brodie*, adding a reference to the important case of *Melbourne Corporation* v. *Barry*. I gave a number of examples of ' regulation.' Section 92 protects individuals (like Mr. James), and any individual who finds himself prohibited from crossing a State border is entitled to invoke its protection.

" With regard to the second ground, I speak with all respect, but it is, to my mind, not really a ground at all. In the last resort I can find no real foundation for it except expediency. The question of expediency is itself one of a highly controversial character, and I am not able to regard the reference to political and economic problems in the judgment of Their Lordships in the Banking Case as an invitation to treat questions of expediency as decisive or even important in such a case as the present."

His Honour also said (87 C.L.R. at p. 100) :—

" If State legislation protective of State-owned railways falls outside section 92 why should State legislation protective of any other State-owned industry fall within it ? Or, for that matter, legislation protective of any other privately owned industry ? For it may be just as much in the interests of a State, considered as a separate body politic, to protect a privately owned industry within its borders. The argument can hardly stop short of saying that, wherever a real State interest is involved, there is immunity from section 92. I find it impossible to foresee where it will lead, and I would repeat what I said in *McCarter* v. *Brodie*. If it all comes back to ' co-ordination ', well and good. But that depends, as I have said, on the discredited ' volume ' theory."

p. 47, ll. 15–26.

It is respectfully submitted that His Honour failed to have regard to the relevant political social and economic considerations in determining whether the law was regulatory.

The addition by His Honour of the reference to the decision of the High Court in *Melbourne Corporation* v. *Barry* (31 C.L.R. 174) emphasizes the sense in which His Honour applied the conception of " regulation " to the question of validity under section 92. In the *Melbourne Corporation Case*, the Court was concerned to construe the extent of a by-law making power which authorised the Corporation of the City of Melbourne to make by-laws regulating processions in the city. It was held that the power did not authorise a by-law prohibiting a procession, applying the well-

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known doctrine of *Toronto* v. *Virgo*. His Honour Mr. Justice Fullagar has noted that the Privy Council in the Banking Case indicated that legislation " regulatory " of interstate trade would be valid and thereafter, erroneously it is submitted, adopted as necessarily binding in this context the interpretation of the word " regulation " in a local government statute wherein it derives particular significance from its context and from contrast with other words used in the section in which it occurs. His Honour failed to consider, as a more appropriate analogy, the interpretation placed, for example, on the power of Congress to regulate commerce among the States (U.S.A. Constitution, Art. 1 Sec. 8) as including the power to exclude or prohibit such commerce or individuals from such commerce.

(*b*) *Kitto J.* agreed with the judgment of Fullagar J. and with the reasons of Dixon and Fullagar JJ. in *McCarter* v. *Brodie*. At 87 C.L.R. p. 106 His Honour said :—

p. 51, l. 40 to p. 52, l. 3.

> " But since the Banking Case the proposition that simple prohibition is not regulation, long treated as unquestionable, is binding in law as well as in logic upon the Courts of this country in their deliberations upon section 92. I have looked in vain in the judgments on this matter for any ground upon which an acknowledgment that simple prohibition is not regulation can be reconciled with a decision that a simple prohibition subject to a discretionary power to grant exemptions can be regarded as regulation. And it is surely beyond argument that a prohibition is none the less simple because someone has a power, which he may exercise or refuse to exercise at discretion, to restore the freedom which that prohibition denies."

It is submitted that this statement is an incomplete statement of the law in so far as it does not acknowledge that relevant political social or economic circumstances may be looked at to determine whether a law is truly regulatory.

p. 57, ll. 12–16.

(*c*) *Taylor J.* said (at 87 C.L.R. p. 112)—

> " In my opinion section 17 of the Act under review in this case, even if it does not confer a complete and arbitrary authority to grant or refuse licences, does confer an arbitrary authority to refuse licences on grounds other than those which may properly be regarded as regulatory of the trade or commerce concerned."

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His Honour also said, after referring to the provisions of sub-section (3) and then sub-section (4) of section 17 of the New South Wales Transport Co-ordination Act—(87 C.L.R. p. 113) :

" But even if these latter provisions should be construed subject to the particular matters specified in sub-section (3) and some limitation of the discretion thereby ascertained, the conclusion could not be otherwise. An examination of these matters suggests to my mind that they were prescribed for consideration, primarily, in relation to the co-ordination of transport within the State and without regard to the provisions of section 92, and, clearly, they embrace matters which, on my view of the authorities, cannot form any basis for the regulation of interstate trade." p. 57, ll. 33–41.

It is respectfully submitted that in treating matters referred to in sub-section (3) of section 17 of the Act as being matters which cannot form the basis for the regulation of interstate trade, His Honour took too narrow and limited a view of the classes of considerations which the Judicial Committee indicated were directly in point in determining whether or not a law was regulatory.

OTHER VIEWS OF SECTION 92.

35. The Commonwealth of Australia asserts that section 92 of the Constitution must be interpreted as providing for freedom of interstate trade from legal restriction in all the manifestations which statutory forms or executive action may display, but subject to the qualifications which have been set out in this Case, particularly those arising from special circumstances. In three authoritative expositions the Privy Council has made clear that the restrictions, if exceeding the qualifications mentioned, are forbidden by the Constitution whether they operate by the imposition of customs duties or charges analogous thereto, or by means of a licensing system for traders which is not properly limited, or by means of direct statutory prohibition of the carrying on of a particular trade, or by any other means which may impede the passage of goods or the conduct of trade and commerce across the State borders. These decisions of the final appellate tribunal are conclusive, and have determined this aspect of the constitution for the last twenty years. The Commonwealth of Australia does not desire to challenge this established view or to assert that section 92 can be confined in its operation so as to forbid only customs duties and analogous financial burdens or explicit

prohibitions or quantitative limitations of the movement of goods across State borders. Section 92 guarantees freedom to carry on interstate trade, but freedom in an ordered community, and therefore freedom under the law. The right to trade may be qualified, but the constitutional provision cannot be written down to a mere immunity from financial burdens.

CONCLUSION.

36. The Intervener, the Commonwealth of Australia, therefore submits that this Appeal should be determined in the light of the principle that in appropriate political, social and economic circumstances a law excluding some persons from conducting interstate trade does not infringe section 92 of the Commonwealth Constitution.

P. D. PHILLIPS.

C. I. MENHENNITT.

No. 40 of 1953.

In the Privy Council.

ON APPEAL FROM THE FULL COURT OF THE HIGH COURT OF AUSTRALIA.

HUGHES & VALE PTY. LIMITED *Appellant,*

AND

THE STATE OF NEW SOUTH WALES, THE HONOURABLE WILLIAM FRANCIS SHEAHAN and THE DIRECTOR OF TRANSPORT AND HIGHWAYS *Respondents,*

AND

THE COMMONWEALTH OF AUSTRALIA, THE STATE OF VICTORIA and THE STATE OF QUEENSLAND *Interveners.*

Case for the Intervener, The Commonwealth of Australia.

COWARD, CHANCE & CO.,
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Agents for :—

THE CROWN SOLICITOR FOR THE COMMONWEALTH OF AUSTRALIA.

Solicitor for the Interveners The Commonwealth of Australia.

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