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Judgment 9, 1966

IN THE PRIVY COUNCIL No. 19 and 20 of 1965

ON APPEAL

FROM THE FULL COURT OF THE SUPREME COURT OF QUEENSLAND

BETWEEN:

COBB & CO. LIMITED, DOWNS TRANSPORT PTY. LTD.,
SOUTH QUEENSLAND TRANSPORT PTY. LTD.,
NORTHERN DOWNS TRANSPORT PTY. LTD.,
NORTHERN TRANSPORT PTY. LTD. and
COBB & CO. COACHES PTY. LTD.

Appellants
(Plaintiffs)

- and -

NORMAN EGGERT KROPP

Respondent
(Defendant)

AND BETWEEN:

COBB & CO. LIMITED, DOWNS TRANSPORT PTY. LTD.,
SOUTH QUEENSLAND TRANSPORT PTY. LTD.,
NORTHERN DOWNS TRANSPORT PTY. LTD. and
NORTHERN TRANSPORT PTY. LTD.

Appellants
(Plaintiffs)

- and -

THE HONOURABLE THOMAS ALFRED HILEY

- and -

NORMAN EGGERT KROPP

Respondents
(Defendants)

(CONSOLIDATED)

CASE FOR THE RESPONDENTS

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A. INTRODUCTORY:-

1. The Respondent Norman Eggert Kropp in the first of the above mentioned matters was sued in Supreme

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Court Action No. 380 of 1964 by the Appellants as the nominal defendant for and on behalf of the Government of the State of Queensland appointed pursuant to "The Claims Against Government Act of 1866" and as the Commissioner for Transport for the recovery of license and permit fees under "The State Transport Facilities Acts, 1946 to 1959" (hereinafter referred to as "the Facilities Acts"). In the second of the above mentioned matters in Supreme Court Action No. 87 of 1965 the Respondent the Honourable Thomas Alfred Hiley was sued by the Appellants as the nominal defendant for and on behalf of the State of Queensland pursuant to "The Claims Against Government Act of 1866", and the Respondent Norman Eggert Kropp was sued by the Appellants as the Commissioner for Transport, for the recovery of license and permit fees under "The State Transport Act of 1960" (hereinafter referred to as "the Act of 1960", and the Facilities Acts and this Act are hereinafter referred to as "the Transport Acts" or "the Transport Legislation").

Appeal No. 19 p.2

Appeal No. 20 p.2.

2. The appeals in these two matters, which have been consolidated, are brought by leave granted by the Full Court of the Supreme Court of Queensland on the 11th day of May 1965 and the 18th day of June 1965 respectively under the provisions of the Rules regulating Appeals from Queensland set out in the Imperial Order in Council of 18th October 1909. The Appeals are from the judgment of that Court pronounced on demurrer in each Action on the 14th day of April 1965 and the 18th day of June 1965 respectively. In each case, the demurrer of the Respondent (and in the second case Respondents) having been allowed, the Court adjudged that each respective Appellant (each of the Plaintiffs) recover nothing and that the Respondent (and in the second case the Respondents) recover against the Appellants their costs of the particular Action, to be taxed.

Appeal No. 19 p.28

Appeal No. 20 p.7

Appeal No. 19 p.5

Appeal No. 20 p.6.

3. The respective claims of the Appellants are set out in the Statement of Claim specially indorsed on each respective Writ of Summons. In the first Action (No. 380 of 1964) the Plaintiffs claimed the recovery of payments of sums had and received by the Defendant being moneys, so they alleged, levied by the Defendant upon the Plaintiffs as or in the guise of license and permit fees under the provisions of the Facilities Acts in respect of the carriage of goods and passengers

Appeal No. 19 p.2

on motor vehicles operated by the Plaintiffs in the State of Queensland. The Appellants claimed that such moneys were demanded of the Plaintiffs by the Defendant unlawfully under colour of office of the Commissioner for Transport in that the Facilities Acts had not at any time valid or lawful operation and that the said moneys were paid by the Plaintiffs involuntarily and under compulsion.

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Appeal No. 19 p.2 l.18

4. In the second Action (No. 87 of 1965) the Plaintiffs claimed the recovery of payments of sums had and received by the Defendants being moneys, so they alleged, levied by the Defendant Norman Eggert Kropp as the Commissioner for Transport upon the Plaintiffs as or in the guise of license and permit fees under the provisions of the Act of 1960. The Appellants claimed that such moneys were demanded of the Plaintiffs by the Defendant Norman Eggert Kropp unlawfully in that the Act of 1960 was not at any time a valid and effective Statute within the competence of the Legislature of Queensland and did not validly and lawfully authorise and empower his demands for the said moneys and such demands were made colore officii the Commissioner for Transport and the said moneys were paid by the Plaintiffs involuntarily and under protest. The Appellants pleaded, as particulars of the allegation that the Act of 1960 was not at any time a valid and effective Statute within the competence of the Legislature of Queensland, that -

Appeal No. 20 p.2

Appeal No. 20 p.2 l.22

Appeal No. 20 p.3.

"1. The said Statute, if valid,

Appeal No. 20 p.3 l.16

(1) would unlawfully and unconstitutionally delegate to the Commissioner for Transport the sovereign powers of the Legislature of Queensland -

(a) to impose and levy taxes (in the guise of license and permit fees) in his virtually unrestricted and unfettered discretion and in so doing would violate the principle that no tax may be imposed save with the full assent of Parliament and the assent of the Crown.

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(b) to repeal alter and amend the taxes imposed by him and to substitute other taxes therefor.

(c) to enact or determine as a self contained legislative body or organ matters of substantive law as between the citizen and the State in his unrestricted and unfettered discretion without the sanction or supervision of Parliament or the Governor-in-Council or the Courts of Justice of the State contrary to law and in particular contrary to the provisions of Section 3 of "The Consitituion Act Amendment Act of 1934"

(2) Would constitute an unlawful and unconstitutional transfer of sovereign power of the Legislature to the said Commissioner or an abdication of such power in his favour.

(3) would confer upon the said Commissioner a power of dispensing individuals from compliance with or observance of the law conditionally or unconditionally in his discretion and a power to differentiate between individuals.

(4) would give to each determination of the said Commissioner and of the Governor-in-Council of a monetary nature the legal effect of a "Money Bill" duly passed and assented to without compliance with the requirements of law and of Parliamentary usage in respect of such Bills and without the Royal assent.

(5) would confer upon the said Commissioner a power of regulating "supply" which is an exclusive power of Parliament and in dispensing with payment of fees a power of appropriating public moneys.

(6) would confer upon the Governor-in-Council and the Commissioner for Transport indirect power of repeal of the Act or some of the provisions thereof.

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2. The passage through Parliament of the said Statute, being a "Money Bill", was not attended by the procedure required by Parliamentary usage.

3. The said Statute so entrenches upon the Royal prerogative that it should have been reserved for the personal assent of the Sovereign."

5. The Respondents demurred to each of the Statements of Claim on the ground that it was bad in law and did not show any cause of action in that the particular Transport Acts or Act, alternatively those Acts or that Act so far as they or it were material in the circumstances were good and valid law and in operation at all material times and, in the second case, also that the Act of 1960 is and has been at all material times a valid and effective Statute within the competence of the Legislature of Queensland and does and did at all materials times validly and lawfully authorise and empower the Defendant Norman Eggert Kropp as the Commissioner for Transport to levy and demand the money referred to in the Statement of Claim as licensing and permit fees under the provisions of the said Act.

Appeal No. 19 p.4 l.20
Appeal No. 20 p.5
Appeal No. 20 p.5 l.19

6. As appears from letters exhibited and placed before the Full Court by the parties, the Appellants conceded that the allegations in their pleadings that the fees were paid involuntarily and under protest and that the demands therefor were made colore officii the Commissioner for Transport were pleaded solely as elements of the cause of action for money had and received, and were not designed to set up any independent cause of action. It has also been agreed between the Appellants and the Respondents that if the Appeals are successful, the Respondents may have leave to plead in the Actions.

Appeal No. 20 pp.8-14.
Appeal No. 20 p.12 l.14 and p.14 l.23

7. Before the Full Court of the Supreme Court of Queensland the Appellants contended -

(a) that the fees imposed under the Transport Acts as licensing fees or permit fees constitute taxation;

(b) that taxation and appropriation without the authority of Parliament are illegal and void;

(c) that insofar as the Commissioner for

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Transport imposes or remits taxes, such taxes are imposed or appropriated without the authority of Parliament; and

(d) that by the Transport Acts Parliament has purported to create a separate legislative body, the Commissioner for Transport.

The Respondents contended that the taxes imposed by the Commissioner for Transport were lawfully imposed under the grant or authority of Parliament, also that by the Acts Parliament has not purported to create any separate legislative body. The Full Court, in allowing the demurrers, accepted the Respondents' contentions, and held that the Appellants' attacks on the validity of the Acts failed.

B. THE POWERS OF THE QUEENSLAND LEGISLATURE.

8. The Queensland Parliament, it is contended, is a Parliament having plenary powers within Queensland but subject of course to any legislation of the Imperial Parliament made applicable to Queensland.

9. Those powers were conferred by the Order in Coumcil of 6th June, 1859 of Her Majesty Queen Victoria, the relevant provisions of which were later enacted by the "Constitution Act of 1867" (31 Vic. No. 38 Q.). Section 2 of that Act (now "The Constitution Acts 1867 to 1964") as amended by the Act 12 Geo. V. No. 32 of the State of Queensland, reads

> "2. Within the said Colony of Queensland Her Majesty shall have power by and with the advice and consent of the said Assembly to make laws for the peace welfare and good government of the colony in all cases whatsoever."

10. These or similar words have been the subject of judicial pronouncements of the highest authority, stressing the plenary and ample nature of the power conferred by them. Thus in McCawley v. The King 1920 A.C. 691 at p. 712, 28 C.L.R. 106 at p. 123, Lord Birkenhead L.C., delivering the opinion of the Judicial Committee, said of them,

> "It would be almost impossible to use wider or less restrictive language. The

colony may make laws for the peace, welfare and good government of the colony 'in all cases whatsoever'."

Hodge v. The Queen 1883 9 App. Cas. 117 concerned the powers of the Legislature of Ontario by the Liquor License Act of 1877 of the Province to entrust to a Board of Commissioners authority to enact regulations thereby creating offences and annexing penalties thereto. The Privy Council held the opinion that the Legislature could confer that power. Lord Fitzgerald, who delivered the judgment of the Judicial Committee said at p. 132,

> "It was argued at the bar that a legislature committing important regulations to agents or delegates effaces itself. That is not so. It retains its powers intact, and can, whenever it pleases, destroy the agency it has created and set up another, or take the matter directly into his own hands. How far it shall seek the aid of subordinate agencies, and how long it shall continue them, are matters for each legislature, and not for Courts of Law, to decide."

In Powell v. Apollo Candle Company Limited 1885 10 App. Cas. 282 the Privy Council dealt with the power of the legislature of the Colony of New South Wales to enact section 133 of the Customs Regulations Act of 1879 which authorized the Governor to levy a duty in certain circumstances. The opinion of their Lordships was that the section was within the plenary powers conferred upon the Legislature of New South Wales by its Constitution Act and that duties levied by an Order in Council issued under section 133 were validly levied. Sir Robert Collier, delivering the judgment of their Lordships, said at p. 291,

> "It is argued that the tax in question has been imposed by the Governor, and not by the Legislature, who alone had power to impose it. But the duties levied under the Order in Council are really levied by the authority of the Act under which the Order is issued. The Legislature has not parted with its perfect control over the Governor, and has the power, of course, at any moment, of withdrawing or altering the power which they have entrusted to him."

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In support of their case the Respondents also refer inter alia to The Queen v. Burah 1878 3 App. Cas. 889.

11. In the High Court of Australia the nature of the power of Commonwealth and of States (defined in similar terms to those in section 2 of the "Constitution Act of 1867," supra) has been considered from time to time. In Baxter v. Ah Way 1909 8 C.L.R. 626 that Court held that section 52(g) of the Customs Act 1901, which provided that all goods the importation of which should be prohibited by proclamation should be prohibited imports, effectively supported a proclamation prohibiting the importation into the Commonwealth of opium suitable for smoking. The first Chief Justice of the High Court, Sir Samuel Griffith, said at pp. 632 and 633,

> "It is of course obvious that every legislature does in one sense delegate some of its functions. It is too late in the day to say that the legislature cannot create, for instance, a municipal authority and give it power to make by-laws, or create a public authority with power to make regulations that shall have the force of law, or confer upon the Governor in Council power to make regulations having the force of law, or upon the Judges of the Court power to make Rules of Court having the force of law. Nor is it to the purpose to say that the legislature could have done the thing itself. Of course it could. in one sense this is a delegation of authority because it authorizes another body which it specifies to do something that it might have done itself. It is too late in the day to contend that such a delegation, if it is a delegation, is objectionable in any sense. The objection certainly cannot be supported by relying on the maxim delegatus non delegare potest, nor, in my opinion, on any other ground."

At pp. 633 and 634, Griffith C.J. quoted a passage from thejudgment of the Privy Council in Reg. v. Burah (supra, at p. 904) including the statement

> "Where plenary powers of legislation

exist as to particular subjects, whether in an imperial or in a provincial legislature, they may (in their Lordships' judgment) be well exercised, either absolutely or conditionally. Legislation, conditional on the use of particular powers, or on the exercise of a limited discretion, entrusted by the legislature to persons in whom it places confidence, is no uncommon thing; and, in many circumstances, it may be highly convenient. The British Statute Book abounds with examples of it: and it cannot be supposed that the Imperial Parliament did not, when constituting the Indian legislature, contemplate this kind of conditional legislation as within the scope of the legislative powers which it from time to time conferred."

He added

"The same observations apply exactly to a law of the Commonwealth or of a State under its Constitution."

Higgins J. expressed the matter (at p. 646) in this way,

"Analogies are dangerous; but if I may, for the present purpose, venture on one, I should say that within the ambit of the subjects committed to it, the Federal Parliament, and that within the ambit of the subjects committed to them, the State Parliaments, are like general agents, not like special agents; and that the Federal Parliament has, within its ambit, full power to frame its laws in any fashion, using any agent, any agency, any machinery that in its wisdom it thinks fit, for the peace, order, and good government of Australia."

12. Another authority of the High Court in which the nature of power conferred on a subordinate authority (in that instance to legislate with respect to employment), is Victorian Stevedoring and General Contracting Company Pty. Ltd. and Meakes v. Dignan 1931 46 C.L.R. 73. Dixon J. (as he then was) said at p. 102,

"In English law much weight has been given to the dependence of subordinate legislation for its efficacy, not only on

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the enactment, but upon the continuing operation of the statute by which it is so authorized. The statute is conceived to be the source of obligation and the expression of the continuing will of the Legislature. Minor consequences of such a doctrine are found in the rule that offences against subordinate regulation are offences against the statute (Willingale v. Norris) and the rule that upon the repeal of the statute, the regulation fails (Watson v. Winch). Major consequences are suggested by the emphasis laid in Powell's Case and in Hodge's Case upon the retention by the Legislature of the whole of its power of control and of its capacity to take the matter back into its own hands. After the long history of parliamentary delegation in Britain and the British colonies, it may be right to treat subordinate legislation which remains under parliamentary control as lacking the independent and unqualified authority which is an attribute of true legislative power, at any rate when there has been an attempt to confer any very general legislative capacity. But, whatever may be its rationale, we should now adhere to the interpretation which results from the decision of Roche v. Kronheimer."

The Respondents also refer to Ferrando v. Pearce 1918 25 C.L.R. 241, Roche v. Kronheimer 1921 29 C.L.R. 329, Crowe v. The Commonwealth 1935 54 C.L.R. 69, Radio Corporation Pty. Ltd. v. The Commonwealth, 1937-38 59 C.L.R. 170, Deputy Federal Commissioner of Taxation v. W.R. Moran Pty. Ltd. 1939 61 C.L.R. 735 at p.763, Peacock v. Newtown Marrickville and General Co-operative Building Society No. 4 Limited 1943 67 C.L.R. 25 at p. 44, Adelaide Company of Jehovah's Witnesses Incorporated v. The Commonwealth 1943 67 C.L.R. 116 at p. 136, and The Queen v. Kirby, Ex p. The Boilermakes Society of Australia 1955-6 94 C.L.R. 254 at pp. 280 and 309 to 310.

13. In Queensland the power of the Legislature to confer subordinate powers upon another body even including the power of amendment of an Act of Parliament under such authority was considered in The Grain Sorghum Marketing Board v. J. Jackson and Co. (Produce and Seeds) Pty. Ltd. (Attorney General of

Queensland intervening by leave) - 1962 Qd. R. 427. Two members of the Full Court of the Supreme Court of Queensland (the third having died after the hearing) decided that the Queensland Parliament had validly conferred such a power and that the conferment was not an abdication of power by that Legislature.

14. In the light of these authorities it is the Respondents' basic contention that the plenary power resident in such a Legislature as that of Queensland is sufficient to enable it to confer subordinate legislative power on any appropriate agency for the enactment of legislation conditional upon its own will, and that such a conferment of power may be of any subject within its own power even to the extent of powers which may affect the liberty of the subject or impose penalties or taxes upon him. The exercise of the power conferred may be dependent, too, on such discretion of the subordinate authority as the Legislature may care to allow.

C. THE POWERS OF THE COMMISSIONER FOR TRANSPORT.

15. The Respondents accept the proposition that fees imposed under the discretionary powers conferred by either of the Acts are taxes. They contend, however, that at all material times each was valid and effectively conferred on the Commissioner for Transport power to impose license or permit fees. The Respondents contend that this is so because of the nature of the powers of the Queensland Legislature discussed under heading B (supra).

The Legislation

16. The Facilities Acts are expressed to be for the improvement and extension of Transport facilities within the State of Queensland. By section 8 the Act is to be administered by the Minister, and subject to the Minister by the Commissioner for Transport. There was provision for his appointment by the Governor-in-Council (section 9), and he had a power of delegation (section 14). His decisions were subject to the confirmation of the Minister (section 16). By section 23 carriage of passengers and of goods had to be in

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accordance with a provision of Part III of the Act. By section 24 in that Part, transport was authorised in 28 sets of circumstances, including those defined by para. (25) (licensed services) as follows :

> "(25) Any vehicle approved for use in carrying on a licensed service at any time when such vehicle is carrying passengers, or goods, or both passengers and goods under and in accordance with the terms and conditions of the license for such service."

17. Section 32 of the Facilities Acts dealt with the terms and conditions of licenses, including

> "(ix) The licensing fee, stipulating whether to be wholly or partly a fixed amount and, if so, such amount, or whether to be calculated and paid wholly or partly upon any one or more of the bases prescribed in this Act, and, if so, such basis or bases, or whether to be wholly or partly a percentage of the gross revenue derived from the service and, if so, such percentage and in any event the time and manner of paying such fee or any part thereof or any instalment or instalments of such fee or any part thereof."

18. Section 35 of the Facilities Acts provided,

> "35. (1) A licensing fee of the amount or at the rate determined by the Commissioner shall be payable by every licensee.
>
> Such fee, and any instalment thereof, shall become due and payable, and shall be paid, to the Commissioner at the time and in the manner stated in the license, and any unpaid amount may be recovered by the Commissioner as a debt.
>
> If any amount of any licensing fee remains unpaid after the time when it becomes due and payable, additional licensing fee shall be due and payable at the rate of ten per centum of the amount unpaid:
>
> Provided that the Commissioner may in any case for reasons which he thinks

sufficient, remit the additional licensing fee or any part thereof.

(2) Such licensing fee shall, in the discretion of the Commissioner, be -

(i) an amount fixed by the Commissioner; or

(ii) An amount per centum as fixed by the Commissioner of the gross revenue derived from the licensed service; or

(iii) The sum of the amounts fixed by the Commissioner for each and every vehicle used for the purpose of carrying on the licensed service; or

(iv) An amount calculated on such of the following bases as can be applied, regard being had to the vehicles approved for use in carrying on the service, that is to say:-

(a) A rate (not exceeding one penny per passenger per road mile) for each and every vehicle approved for use in carrying on the service, such rate to be calculated by multiplying the maximum number of passengers each such vehicle may lawfully carry by the maximum number of miles it may lawfully travel;

(b) A rate (not exceeding the one of the following which is the greater - that is to say, three pence per ton per road mile or twenty per centum of the gross revenue derived from freights charged) for each and every vehicle approved for use in carrying on the service, such rate to be calculated by multiplying the maximum number of tons of goods each such vehicle may lawfully carry by the maximum number of miles it may lawfully travel;

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(c) in the case of vehicles approved for use for the carriage of both passengers and goods, subparagraph (a) of this paragraph may be applied as respects the carriage of passengers and subparagraph (b) of this paragraph may be applied as respects the carriage of goods; or

(v) An amount calculated on such of the following bases as can, having regard to the vehicles approved for use in carrying on the service, be applied, that is to say:-

(a) A rate (not exceeding one penny per passenger per road mile) for each and every passenger carried on any and every vehicle approved for use in carrying on the licensed service;

(b) A rate (not exceeding the one of the following which is the greater - that is to say, three pence per ton per road mile or twenty per centum of the gross revenue derived from freights charged) for each and every ton of goods carried on any and every vehicle approved for use in carrying on the licensed service: Provided that, subject to such maximum, different rates may be calculated on this basis in respect of different goods or classes of goods;

(c) In the case of vehicles approved for use for the carriage of both passengers and goods, subparagraph (a) of this paragraph may be applied as respects the carriage of passengers, and subparagraph (b) of this paragraph may be applied as respects the carriage of goods.

Where amounts respectively of a licensing fee under this Act and of a charge under 'The Roads (Contribution to Maintenance) Acts, 1957 to 1958', are payable in respect of any use on a road of any motor vehicle, the Commissioner may reduce that amount of licensing fee by not more than that amount of that charge.

(3) The Commissioner shall have power to determine that the fee payable by a licensee shall be in part a fixed amount determined in accordance with a provision of subsection two of this section and in part an amount calculated at any rate or rates specified in paragraph (iv) or paragraph (v) of the said subsection two but in so determining the Commissioner shall have regard to the maximum amount of licensing fee imposable under the provisions of the said paragraph (iv).

(4) (a) Where the Commissioner determines that a licensing fee shall be a fixed amount, or an amount per centum of the gross revenue derived from operating vehicles approved for use in carrying on the licensed service, or a fixed amount for each and every such vehicle, the Commissioner shall as near as may be determine such fee at a sum which would not exceed the maximum fee which would be payable if calculated at the maximum rate or rates specified in paragraph (iv) of subsection two of this section.

(b) The provisions of this subsection shall not apply so as to invalidate any determination by the Commissioner with respect to the fee payable by any licensee, but the amount of every such fee and every instalment thereof shall become due and payable and be paid under and in accordance with the terms and conditions of the license.

(5) The provisions of this section shall apply so as to authorise the Commissioner to determine differently the amounts or rates of the licensing fee payable by a licensee in respect of different parts as fixed by the Commissioner of one and the same licensed service.

In and for the purpose of so applying the provisions of this section different parts as fixed by the Commissioner of any one and the same licensed service shall each be deemed to be respectively a separate service licensed under this Act."

The amount of such fees was payable into and to form part of the Consolidated Revenue Fund (section 22).

19. The Act of 1960 sets up a somewhat different system. Under the Facilities Acts licenses for the carriage of either passengers or of goods or both could be the subject of sale and transfer (sections 42 and 43). A system of licenses still applied to passengers but the system relating to goods provided for permits only. Permits could also be obtained for the carriage of passengers. Permits are not capable of assignment.

20. The Commissioner for Transport holds his office under Part II of the Act of 1960. Section 6 requires him and other officers administering the Act to have regard to any directions of the Minister respecting policy. He holds office by virtue of section 7 and has a power of delegation under section 12. He controls the matter of licenses to hire (Part III), of road passenger services (Part IV) and of permits (Part V).

Relevant provisions of sections of Part V are as follow:

> "37. (1) Subject to this Act the Commissioner may issue permits with respect to the carrying on vehicles in or on any district or road of passengers or goods.
>
> .....
>
> (7) A permit may be issued -
>
> (a) in respect of a specified period of time; or
>
> (b) in respect of a specified occasion.
>
> .....
>
> (11) A permit under this Part shall not be transferable, assignable or renewable."

"41. (1) The Commissioner may issue any permit upon and subject to such terms

and conditions as he deems fit including, but without limit to the generality of his power to determine the terms and conditions of any permit, with respect to the documents to be carried on any and every vehicle in respect of which the permit is issued, the keeping of records and the making to the Commissioner of periodical returns by the permittee, the amount or rate of the fee to be paid in respect of the permit, and the periodical payment of amounts of such fee."

"44. (1) Where so determined by the Commissioner as a condition of, or condition precedent to the issue of, a permit under this part a permit fee of the amount or at the rate (not exceeding the prescribed maximum) determined by the Commissioner shall be payable by the permittee in respect of a permit under this Part.

Where payment of a fee is a condition of a permit such fee and any instalment thereof shall become due and payable, and shall be paid, to the Commissioner at the time and in the manner stated in the permit, and any unpaid amount may be recovered by the Commissioner as a debt.

Where payment of a fee is a condition precedent to the issue of a permit, the amount of such fee shall be paid in full to the Commissioner before the issue of the permit.

(2) In respect of a permit, the fee payable -

(a) with respect to the carriage of passengers, may, in the discretion of the Commissioner, be -

(i) a fixed amount;

(ii) the sum of the amounts fixed by the Commissioner for each and every vehicle in respect of which the permit is issued;

(iii) an amount per centum of the gross revenue derived from such carriage; or

(iv) an amount calculated at a rate per passenger per road mile for each and every passenger carried,

but shall not in any event exceed the rate of one penny per passenger per road mile;

(b) with respect to the carriage of goods, may in the discretion of the Commissioner, be -

(i) a fixed amount;

(ii) the sum of the amounts fixed by the Commissioner for each and every vehicle in respect of which the permit is issued; or

(iii) an amount calculated at a rate not exceeding the sum of the products obtained by multiplying, in respect of each and every vehicle in respect of which the permit is issued -

(a) three pence; by

(b) the load capacity of the vehicle expressed in tons (including fractions of tons to the nearest hundredweight); and by

(c) the number of road miles on which goods are carried on the vehicle pursuant to the permit,

but shall not in any event exceed an amount calculated as prescribed by subparagraph (iii) of this paragraph (b).

(3) The provisions of subsection two of this section limiting the amount of the fee in respect of a permit shall apply so as not to invalidate any determination by the Commissioner with respect to such fee

except as to any part of such fee which is in excess of -

(a) with respect to passengers, the rate of one penny per passenger per road mile; or

(b) with respect to goods, the amount calculated as prescribed by sub-paragraph (iii) of paragraph (b) of that subsection,

but otherwise the amount of such fee and any instalment thereof shall become due and payable and be paid under and in accordance with the terms and conditions of the permit."

21. Part VI deals with offences but by section 45 exempts from the operation of the Part vehicles the subject of a wide variety of use. The offence of using a vehicle, which has not been exempted under section 45, for the carriage of goods is defined by section 49 as follows :

"49. A person who at any time uses or causes or permits to be used on any road a vehicle for the carriage of goods shall, unless such goods are being at that time carried upon that vehicle under and in accordance with a permit under this Act issued in respect of such vehicle and in the name of such person, be guilty of an offence against this Act . . . . "

Section 51 provides for the exaction of fees in respect of illegal use of a vehicle as well as any fine imposed. By section 78 all fees are to be paid into and form part of the Consolidated Revenue Fund.

The Respondents' Contentions

22. The Respondents contend that by such provisions Parliament itself has authorised the license and permit fees. They are payable by virtue of the will of the legislature and remain under the complete control of that will. As part of the consolidated revenue such fees are the subject of appropriation according to the

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Constitution and Laws of Queensland. The Commissioner for Transport is not a separate legislative authority; but, by assessing the quantum of license and permit fees, is the instrument of that will.

23. There is nothing, it is contended, in any law or Act of Parliament which precludes the Queensland Legislature from legislating in the way it has done in the Transport Legislation; but in any event Queensland has a free Constitution and can legislate (within its admitted limits) freely in respect of taxation.

24. The same consideration arises in respect of the application of such historically significant measures as the Bill of Rights (1688) (1 William and Mary Sess. 2, c.2), made applicable to the Australian Colonies as part of the general law of England by the Statute of 1828 (9 Geo. IV c. 83 (Imp.)). (See also the "Supreme Court Act of 1867" (31 Vic. No. 23 Q) section 20). In any event there is nothing in the Bill of Rights repugnant to the Transport legislation. The Bill of Rights, inter alia, enacts.

> "That levying money for or to the use of the Crown by pretence of prerogative, without grant of Parliament, for longer time or in other manner than the same is or shall be granted, is illegal."

It is contended by the Respondents that the Bill of Rights requires parliamentary authorisation for a tax, but not necessarily direct parliamentary imposition of that tax. Admittedly the executive has no power to levy taxes or to impose a tax as a condition of a license without parliamentary sanction, but such in the present instance is not the case. Such authorities as Bowles v. Bank of England 1913 1 Ch. 57, Attorney-General v. Wilts United Dairies 1922 91 L.J.K.B. 897, Bristol Channel Steamers v. The King 1924 131 L.T. 608, Brocklebank v. The King 1925 1 K.B. 52 and Marshal Shipping Company (In Liquidation) v. The King 1925 41 T.L.R. 285 are clearly distinguishable.

25. In Commonwealth v. Colonial Combing Spinning and Weaving Co. Ltd. (The Wool Tops Case) 1922 31 C.L.R. 421 the rule was recognized that there could be no taxation without parliamentary sanction and for this and other reasons

the agreement entered into by the Commonwealth Government was held to be invalid. However the Judges of the High Court merely insisted on clear words showing such authority of Parliament, not upon any necessity for direct levying of the tax by Parliament (per Starke J. at pp. 459 to 460, and per Higgins J. at pp. 473 to 474); and it is submitted that similar considerations apply to Levene v. Commissioners of Inland Revenue 1928 A.C. 217 (q.v. at p. 228) and Ferrier v. The Scottish Milk Marketing Board 1937 A.C. 126 (q.v. at pp. 136 to 137).

26. In a number of cases fees such as are in question in the present appeal have been the subject of unsuccessful attacks, for example Hughes and Vale Pty. Ltd. v. New South Wales 1952-3 87 C.L.R. 49, Browns Transport Pty. Ltd. and Downs Transport Pty. Ltd. v. Kropp 1958 100 C.L.R. 117, and Bolton and Turner v. Madsen 1963 110 C.L.R. 264. However the present grounds of objection to them by the Appellants were not taken.

27. In Shannon v. Lower Mainland Dairy Products Board 1938 A.C. 708 their Lordships said, (at p. 722)

> "Within its appointed sphere the Provincial Legislature is as supreme as any other Parliament; and it is unnecessary to try to enumerate the innumerable occasions on which Legislatures, Provincial, Dominion and Imperial, have entrusted various persons and bodies with similar powers to those contained in this Act."

That case involved the vesting of power in Marketing Boards, inter alia, to fix and collect license fees. The Respondents contend that the present appeals are cases where the license and permit fees were normal exactions relating to the regulation of the transport trade within Queensland. The fees were payable as a condition of a right to carry on the business. Such a business is governed by the discretionary powers resident in the Commissioner for Transport, squarely placed upon him by the transport legislation as a part of such method of control. The fixing and collection of the fees has been sanctioned

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by Parliament and in so doing the Legislature has acted within the scope of its own powers.

Power of Amendments.

28. Further, in any event the Respondents contend that the requirements of the Bill of Rights are subject to modification by ordinary legislation. It is an enactment having the status of any other law.

29. Moreover the Constitution of Queensland is an uncontrolled Constitution. It is contained in "The Constitution Acts 1867 to 1964" of Queensland, which are subject to amendment by normal legislative process (with exceptions immaterial for present purposes, for example that of amendment by attempting directly to set up a second House of Parliament contrary to section 3 of "The Constitution Act Amendment Act of 1934"). The position in this regard was described by the Judicial Committee in Bribery Commissioner v. Ranasinghe 1965 A.C. 172 at pp. 196 and 197. When dealing with McCawley V. The King 1920 A.C. 691 their Lordships said,

> "In 1859 Queensland had been granted a Constitution in the terms of an Order in Council made on June 6 of that year under powers derived by Her Majesty from the Imperial Statute, 18 & 19 Vict. c. 54. The Order in Council had set up a legislature for the territory, consisting of the Queen, a Legislative Council and a Legislative Assembly, and the law-making power was vested in Her Majesty acting with the advice and consent of the Council and Assembly. Any laws could be made for the 'peace, welfare and good government of the Colony,' the phrase habitually employed to denote the plenitude of sovereign legislative power, even though that power be confined to certain subjects or within certain reservations. The Constitution thus established placed no restrictions on the manner in which or the extent to which the law-making power could be exercised, either generally or for particular purposes, except for the provisions then customary as to reservation

and disallowance of bills and a special provision as to the reservation of any bill which proposed the introduction of the elective principle into the make-up of the Legislative Council. Subject to this the legislature was expressly given full power and authority to alter or repeal the provisions of the Order in Council 'in the same manner as any other laws for the good government of the Colony.'

The legislature exercised this power in 1867 and passed what was called the Constitution Act of that year. By section 2 of the Act the legislative body, again the Queen acting with the advice and consent of the Council and Assembly, was given or declared to have power to make laws for the peace, welfare and good government of the Colony in all cases whatsoever. The only express restriction on this comprehensive power was contained in a later section, section 9, which required a two-thirds majority of the Council and of the Assembly as a condition precedent to the validity of legislation altering the constitution of the Council. As to this Lord Birkenhead L.C., delivering the Board's opinion, remarked: 'We observe, therefore, the legislature in this isolated instance carefully selecting one special and individual case in which limitations are imposed upon the power of the Parliament of Queensland to express and carry out its purpose in the ordinary way, by a bare majority.' This observation was coupled with the summary statement: 'The Legislature of Queensland is the master of its own household, except in so far as its powers have in special cases been restricted. No such restriction has been established, and none in fact exists, in such a case as is raised in the issues now under appeal.'".

The Judgments in the Present Cases.

30. The Respondents further contend that for the reasons expressed by the Judges of the Supreme Court (applicable to both appeals) the appeals should be dismissed. Stable J., in the course of his judgment, said,

Appeal No.19 p.7 l.43

"The size alone of this State of Queensland brings about problems. Conditions vary vastly from district to district, from shire to shire and even within shires. Apart from passengers, the products of the mines, the canefields, the graziers, the farmers, the factories and many other producers have to be moved from place to place within Queensland upon a scale not dreamed of even a generation ago."

Later he remarked,

Appeal No.19 p.10 l.10

"Obviously, Parliament cannot directly concern itself with all the multitudinous matters and considerations which necessarily arise for daily and hourly determination within the ramifications of a vast transport system in a great area in the fixing of and collection of licensing fees. So, as I see it on the face of the legislation, Parliament has lengthened its own arm by appointing a Commissioner to attend to all of these matters, including the fixing and gathering of the taxes which Parliament itself has seen fit to impose."

31. Gibbs J. after referring to the Wool Tops Case (supra) and Attorney-General v. Wilts United Dairies (supra) proceeded

Appeal No.19 p.16 l.33

"To understand these and like statements as meaning that Parliament must itself fix the rate of tax and completely define the liability to taxation is to mistake their significance and to ignore the context in which they appear. When it is said that a tax must be 'actually imposed by Act of Parliament', or imposed by 'plain and direct statutory means', or that Parliament must 'authorise the particular charge', what is meant is that there must be legislative authority for the exaction sought to be made (see Cam & Sons Pty. Ltd. v. Ramsay 1960 104 C.L.R. 247 at 258) and that if the authority is not expressed in clear enought terms the exaction will fail. These statements do not mean, and there is no case that decides, that Parliament cannot confer on its delegates the discretionary power of fixing the amount of a tax and determining the circumstances in

which it is to be levied. If the Legislature confers such a power on an executive body it does not abdicate its own powers, for the executive body is at all times subject to its control."

He also remarked,

"If the Bill of Rights did have the effect that a tax can only be imposed by an Act that itself fully and completely declares the conditions of liability and the rate of tax, and if the State Transport Facilities Acts were therefore inconsistent with the Bill of Rights, I can see no reason why the later statute, being inconsistent with the earlier, should not prevail over it to the extent of the inconsistency." Appeal No. 19 p.18 l.38

32. Hart J. applied Powell's case (supra) and Hodge's case (supra). He also stressed that the Queensland Constitution is uncontrolled within the principles discussed in McCawley v. The King, (supra). Appeal No.19 p.24 l.5 Appeal No. 19 p.23 l.13

33. Furthermore their Honours rejected the argument that the Transport Legislation attempted to set up another legislative body contrary to the requirements of section 3 of "The Constitution Act Amendment Act of 1934". Subsection (1) of that section reads,

"(1) The Parliament of Queensland (or, as sometimes called, the Legislature of Queensland), constituted by His Majesty the King and the Legislative Assembly of Queensland in Parliament assembled shall not be altered in the direction of providing for the restoration and/or constitution and/or establishment of another legislative body (whether called the 'Legislative Council', or by any other name or designation, in addition to the Legislative Assembly) except in the manner provided in this section."

Hart J. expressed his rejection of the argument in these terms,

"In my view this section in no way touches this case. It is concerned with the setting up of a Legislative body which shall be an integral part of the Legislature of Queensland; Appeal No.19 p.27 l.28

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a body which shall act in conjunction with the Legislative Assembly and Her Majesty the Queen in the making of laws. It does not refer to a merely subordinate law-making authority."

34. If it were required, there is a further ground, the Respondents contend, for supporting the validity of all the fees imposed under the Facilities Acts and under the Act of 1960 up to the passing of "The Transport Laws Validation Act of 1962", namely the 8th June 1962; for section 4 of that Act reads,

> "4. Without limiting or derogating from the provisions of section three of this Act, every act and thing done, or suffered or omitted to be done, under and pursuant to any provision of any of the Acts set out in the Schedule, other than any excepted section, are validated and declared and deemed to be and always to have been good and valid."

35. The Respondents contend that all other matters of which complaint is made against the Transport legislation by the Appellants in the actions the subject of the present appeals are effectively covered by the Constitutional powers of the Queensland Parliament, except to the extent to which such complaints may involve a construction of powers of the Commissioner for Transport wider than is justified by the Transport Acts. The Respondents justify the Transport Acts in their true sense, but not in any extended sense assumed in the particulars in Action No. 87 of 1965 set out in paragraph 4 of this Case.

D. CONCLUSIONS AND REASONS

36. The Respondents, therefore, respectfully submit that the appeals should be dismissed with costs and the judgments of the Supreme Court of Queensland confirmed for the following, amongst other,

R E A S O N S

(1) BECAUSE the license and permit fees the subject of the Appellants' claims

were properly and lawfully levied by the Respondent, the Commissioner for Transport on behalf of the Government of Queensland.

(2) BECAUSE the Facilities Acts and the Act of 1960 which authorised such fees were at all times valid and effective laws.

(3) BECAUSE the Transport Acts do not impose or levy taxes without Parliamentary sanction.

(4) BECAUSE, though the license and permit fees were taxes, the Commissioner for Transport exacted them under the Constitutional authority of the Parliament of Queensland.

(5) BECAUSE as a legislature having plenary power within its scope the Queensland Parliament validly could and did use the Commissioner for Transport as its instrument to fix and recover the license and permit fees.

(6) BECAUSE sections 32 and 35 of the Facilities Acts and sections 41 and 44 of the Act of 1960 do not bring about, or amount to, any abdication of power by the Queensland Parliament, but are Constitutional legislation by that Parliament.

(7) BECAUSE the Transport Acts as the sources of the obligations, the subject of complaint in these proceedings, are the expression of the continuing will of the Queensland Parliament.

(8) BECAUSE of the long history of legislative practice recognising the conferment of power by Parliament upon a subordinate authority.

(9) BECAUSE there is nothing in the Transport Acts inconsistent with either the Bill of Rights or "The Constitution Acts 1867 to 1964".

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(10) BECAUSE (if it were necessary so to argue) the Queensland Parliament by the Transport legislation could in material respects amend the Bill of Rights and "The Constitution Acts 1867 to 1964".

(11) BECAUSE (if it were necessary so to argue) "The Transport Laws Validation Act of 1962" ensured the validity of the exaction, receipt, and payment to Consolidated Revenue of all the fees up to the 8th June 1962.

(12) BECAUSE of the reasons in their judgments given by the learned judges who heard the demurrers the subject of the present appeals.

A.L. BENNETT, Q.C.

L.L. BYTH

R.A. GATEHOUSE

No. 19 and 20 of 1965

IN THE PRIVY COUNCIL

O N A P P E A L

FROM THE FULL COURT OF THE SUPREME COURT OF QUEENSLAND

B E T W E E N

COBB & CO. LIMITED, DOWNS TRANSPORT PTY. LTD., SOUTH QUEENSLAND TRANSPORT PTY. LTD., NORTHERN DOWNS TRANSPORT PTY. LTD., NORTHERN TRANSPORT PTY. LTD. and COBB & CO. COACHES PTY. LTD.

Appellants
(Plaintiffs)

- and -

NORMAN EGGERT KROPP

Respondent
(Defendant)

AND B E T W E E N

COBB & CO. LIMITED, DOWNS TRANSPORT PTY. LTD., SOUTH QUEENSLAND TRANSPORT PTY. LTD., NORTHERN DOWNS TRANSPORT PTY. LTD. and NORTHERN TRANSPORT PTY. LTD.

Appellants
(Plaintiffs)

- and -

THE HONOURABLE THOMAS ALRED HILEY

- and -

NORMAN EGGERT KROPP

Respondents
(Defendants)

(CONSOLIDATED)

CASE FOR THE RESPONDENTS

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