ACCESSION NUMBER
91413

1967/10

IN THE PRIVY COUNCIL No. 34 of 1966

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

B E T W E E N:

FREIGHTLINES AND CONSTRUCTION HOLDING LIMITED Appellant (Plaintiff)

- and -

THE STATE OF NEW SOUTH WALES and THE COMMISSIONER FOR MOTOR TRANSPORT Respondents (Defendants)

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- and -

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
LEGAL STUDIES
15 MAR 1968
25 RUSSELL SQUARE
LONDON, W.C.1.

T.N.T. (SYDNEY) PROPRIETARY LIMITED

- and -

THE COMMONWEALTH OF AUSTRALIA

- and -

THE STATE OF SOUTH AUSTRALIA and ANOTHER

- and -

THE STATE OF VICTORIA and ANOTHER and the STATE OF TASMANIA and ANOTHER

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- and -

THE STATE OF QUEENSLAND and ANOTHER

- and -

THE STATE OF WESTERN AUSTRALIA Interveners

CASE FOR THE STATE OF SOUTH AUSTRALIA AND THE ATTORNEY-GENERAL FOR THE STATE OF SOUTH AUSTRALIA - INTERVENERS

RECORD

1. This is an appeal brought by special leave of Her Majesty in Council granted on the 20th July, 1966, from a judgment and order of the High Court of Australia (Taylor, Windeyer and Owen JJ.) made on the 2nd May, 1966, upholding a demurrer by the Respondents (Defendants) to the Statement of Claim of the Appellants (Plaintiffs)

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2. These Interveners (hereinafter called "South Australia") adopt the arguments adduced in the Case for the Respondents, and desire to emphasize, in the paragraphs following,

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certain aspects of that Case. (In this Case the Road Maintenance (Contribution) Act (New South Wales) 1958-1964 will be referred to as "the New South Wales Act", and the Road Maintenance (Contribution) Act (South Australia) 1963 will be referred to as "the South Australian Act").

3. The Government of the State of South Australia has, over the past four years, been obliged to spend from 4.8 to 5.1 million dollars a year merely on the maintenance of roads within the State (excluding sums spent on the reconstruction of stretches of road rendered necessary by wear and tear, as well as on the construction of new roads), and has received in revenue, under and pursuant to the South Australian Act, as part compensation therefor, annual sums of from 1.4 to 1.9 million dollars. South Australia respectfully submits, therefore, that this appeal is of great constitutional and practical importance not only to Australia generally, but also, in particular, to road users in this State.

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4. An examination of the High Court decisions from Hughes and Vale Pty.Ltd. v. The State of New South Wales (No. 2) (1955) 93 C.L.R. 127 to the present reveals, in South Australia's submission, that the two dissenting Justices (Kitto J. and Taylor J.), holding opinions contrary to the seven Justices who have supported the principles enunciated by the majority in the Hughes and Vale case (No. 2) (1955) supra, have adhered to the propositions originally stated by them in that case. It is important, therefore, in South Australia's submission, to extract and examine the assumptions on which those propositions are based.

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5. It is submitted that in the Hughes and Vale Case (No. 2) (1955), supra, Kitto J. demonstrates throughout his judgment (pages 215 to 225) and, in particular, in the passages cited hereunder, that he characterized the charge imposed by the Act under consideration (which is esssentially the same as the New South Wales Act and the South Australian Act) as being a charge for the use of the road - for the right of movement

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simpliciter. South Australia desires respectfully to submit and to emphasize that if such a characterization is to be supported it can be supported only by fastening on to certain of the features of the legislation, and failing to assess its nature and operation as a whole.

The passages in which (inter alia) Kitto J. expressed his views are as follows :

(a) 93 C.L.R. at page 219 -

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"To tell an individual that, though in a particular activity he observes all the restraints and takes all the steps which the fullest protection of the interests of his fellows is considered to require, the very fact of his performing that activity at all is to bring upon him a liability to contribute to the common purse is, as I think, to meet him outside the field of regulated conduct in an ordered society and, in effect, to deny flatly that he may enter it as of right. A law which does this is one which has a direct, adverse operation upon the activity, even considered as an activity regulated by law. If the activity is one of trade, commerce, or intercourse among the States, it seems to me that the operation of the law is a clear example of the kind from which s. 92 ordains that every individual shall be free."

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(b) 93 C.L.R. at page 220 -

"Neither a charge for a use of a particular piece of property considered as a subject of ownership nor a charge for personal services specifically availed of by the trader needs any reconciliation with s.92. But I am unable to see that a charge which is not of either of these kinds, and is imposed by reason of the very fact of proceeding on an inter-state journey, can be anything but an infringement of the freedom of inter-State travel."

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(c) 93 C.L.R. at page 222 -

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"If you can impose a money charge upon a trader because of his use of the roads and still say that trade is free, I am completely unable to see why you cannot impose a charge for all the benefits provided by the State and utilized by the trader, and say that even so trade remains free. Yet no one ventures to go so far, for to do so would be to say that despite s. 92 inter-State trade may be directly taxed, and it would require no little hardihood to assert that "free" does not at least mean free from taxes upon the very activities which are the subject of the freedom." 10

(d) 93 C.L.R. at page 225 -

"The whole matter seems to me to come down to this. A State law imposing a compulsory levy upon an individual by reference to his use of something belonging to or provided by the State must necessarily depend upon the existence in the State legislature of one of two powers: either a power to exclude that individual from that use, or a power to tax him upon that use. That s. 92 prevents the taxation of inter-State trade, commerce, and intercourse, is obvious. That it prevents the exclusion of individuals from the use of the public roads in the course of inter-State trade, commerce, or intercourse, except by a law which is regulatory in the relevent sense of that word, the Privy Council has conclusively laid down. That the notion of regulation extends to the imposition of a pecuniary charge upon a class of individuals for using something from the use of which the legislature concerned has no power to exclude that class is a proposition for which I find no support, either in anything the Privy Council has said or in the conception itself as I understand it." 20 30 40

6. It is submitted that Taylor J. in the Hughes and Vale Case (No. 2) (1955), supra, (pages 225

to 245) adopted the same characterization and, in the same way as Kitto J., failed to assess the nature and operation of the legislation as a whole. A passage (see 93 C.L.R. at page 236), in which Taylor J.'s views clearly appear, runs:

> "The contention that such charges [that is the charges imposed by the legislation] may be imposed by law as a condition of the use of public roads by vehicles engaged in inter-State trade and commerce, primarily, treats the public roads of the State as State-owned facilities which may be made available or withheld at pleasure and then proceeds to assert that, in these circumstances, the levying of a "reasonable charge" as a condition precedent to their use is quite consistent with the provisions of s. 92. There is, in my view, considerable confusion in this contention. If the public roads of the State should be regarded, exclusively, as State-owned and State-provided facilities which may be made available or withheld at will then it would, I should think, be within the competence of the State to make charges for their use and it might matter little whether the charges made for their use were reasonable or unreasonable. But such a conception in relation to the use of public roads by inter-State transport appears to me to be fundamentally opposed to the stipulation that "trade, commerce and intercourse among the States, whether by way of internal carriage or ocean navigation shall be absolutely free". The plain fact is that the public roads of the State are not facilities the use of which may be withheld at will - or except upon payment of a charge to be assessed at the discretion of a licensing authority - without impairing the freedom of inter-State trade of the character under consideration. If this be so then what virtue is achieved by limiting the charges which are sought to be levied to those which are said to be "reasonable"? By whatever name the charge is designated it remains in essence a tax payable for the

use of the roads and, by the legislation in question, it is imposed as a condition precedent to the use of the roads by vehicles engaged in inter-State trade and commerce."

7. It is South Australia's respectful submission that the distinction is both clear and wide between, on the one hand, a tax or impost which is an incident of mere movement along a public road in the course of an inter-State trade journey and, on the other hand, a charge as compensation for the damage or wear and tear caused by, but not an essential attribute or ingredient of, that movement. If the legislation, viewed as a whole, can be characterized as a real attempt to fix a reasonable compensation for the wear and tear which a vehicle in particular, a heavy vehicle - may be expected to cause, it is, in South Australia's submission, wrong to seize on certain limited features of the legislation and to seek to characterize it by those features only, disengaged from the whole. It is, of course, clear that the charge imposed by the New South Wales Act is arithmetically reckoned, in part, by reference to the number of miles travelled by the transport operator; but mere distance travelled is, as that Act read as a whole discloses, taken not as a factor in calculating a tax on movement, but as some indication of the wear and tear incidentally caused to the roads towards the repair of which the contributions recovered under the legislation are compulsorily applied (see in particular section 5 of the New South Wales Act).

8. A further part of Kitto J.'s reasoning in the Hughes and Vale case (No. 2) (1955), supra, warrants analysis. At 93 C.L.R. page 222, after stating that he could "see nothing significant for present purposes in conceding to a road or to any other physical thing the character of a facility" and developing the implications of that statement, he turned his attention to Hughes and Vale Pty. Ltd. v. State of New South Wales (No. 1) 1955 A.C. 241; (1954) 93 C.L.R. 1. From this case he deduced the proposition "that there

is no consideration which can reconcile with section 92 an attempt, otherwise than by way of true regulation, to exclude inter-State travellers either absolutely or conditional from the use of a public road". He then continued (at page 222):

> "The fact that a facility is provided by the roads was not overlooked by their Lordships. Reference was made in the judgment to the fact that the Chief Justice has not regarded the responsibility of the State for "the provision and maintenance of facilities for the carriage of goods and passengers by rail and road" as justifying the decisions in the Transport Cases in principle, but had regarded it as a distinguishing feature the recognition of which would confine the actual decision in McCarter v. Brodie /(1950) 80 C.L.R. 432/ within limits which enabled him to accept it without its wider implications in other fields; and their Lordships proceeded to reject even this view as being too limited. If the provision of the facility consisting of road surfaces will not sustain a simple closure of the roads to inter-State traffic, I do not understand how it can sustain a closure of them to inter-State traffic except upon terms of paying a sum of money."

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The conclusion to be derived from this discussion His Honour put in the form of a rhetorical question at 93 C.L.R. at page 223:

> "If the fact that the roads are a facility provided for travellers was not enough to distinguish the Transport Cases from other cases under section 92, how can it be enough to distinguish a charge for the use of roads from other exactions, made by law in aid of public funds, which are not payments for particular services rendered to individual persons?"

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9. The force and validity of His Honour's reasoning in this part of his judgment depends

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ultimately upon whether the "facilities for the carriage of goods and passengers by rail and road" (which includes "a facility provided by the roads") which formed an essential ingredient of that reasoning, are referable to the same things as the facilities or "specific physical service of which particular use is made" described by the majority in the Hughes and Vale Case (No. 2) (1955), supra.

10. In those portions of Kitto J.'s judgment just cited His Honour was alluding to a passage in the advice of the Privy Council in the Hughes and Vale Case (No. 1) (1954) which reads (93 C.L.R. at page 30 or /1955/ A.C. at page 304): 10

> "The learned Chief Justice /that is, Sir Owen Dixon/ then went on to give judgment against the appellant saying:- "I believe, however, that I would regard it as an imperative judicial necessity to overrule McCarter v. Brodie if it appeared inevitable that the consequences of the decision would extend beyond the subject of commercial transport by road and would make it necessary to hold that over the whole area of inter-State trade, commerce and intercourse a power existed in every legislature to impose a prohibition subject to a licence to be granted or refused at the discretion of the Executive. At first sight it may seem that these consequences ought logically to ensue, if the decision is allowed to stand. Neverthelesss, after a full re-examination of the Transport Cases in the light of the reasons of the majority of the Court in McCarter v. Brodie I have come to the conclusion that the application of these cases may be confined to the particular conditions or considerations which arise from the fact that the railways and the roads form facilities for the carriage of goods (and presumably of passengers) for the provision and maintenance of which the State is responsible." 20 30 40

It is clear from the foregoing that the Chief Justice did not regard the

responsibility of the State for the provision and maintenance of facilities for the carriage of goods and passengers by rail and road as justifying the decision in the Transport Cases in principle. He merely regarded it as a distinguishing feature in this particular field, the recognition of which would confine the actual decision in McCarter v. Brodie within limits which enabled him to accept it without its wider implications in other fields."

11. It is submitted that the Privy Council in speaking of "the responsibility of the State for the provision and maintenance of facilities for the carriage of goods and passengers by rail and road" were embracing a very much wider field of State responsibility than simply the repair of roads damaged by use. South Australia respectfully submits that by that phrase the Privy Council, and by similar phrases Dixon C.J. (in the Hughes and Vale Case (No. 1) (1953) 87 C.L.R. 49, 70-71), in passages to which the Privy Council alluded, were referring to the whole complex of State responsibility to build, maintain, co-ordinate and regulate transport services by rail as well as by road. That this was so, appears from the judgment of Dixon C.J. in the Hughes and Vale Case (No. 1) (1953) (supra) at pages 71 to 72 where he says :

> "If the Transport Cases have no future application except where the conditions or considerations exist that arise from the State providing facilities for the carriage of goods both in the form of railways and in the form of roads, the danger is removed of the decision operating generally over the whole area covered by s. 92 and on that footing I think that we ought not to reconsider it. I have been much encouraged to adopt such a view of the transport cases by the following passage in the reasons of Williams J. in McCarter v. Brodie. Referring to the Transport Cases His Honour says :- "In my opinion they ought not to be re-opened

in this Court without the greatest hesitation. The Acts do regulate competition between land transport by rail and road, both of passengers and goods, but only so far as such competition arises out of competing facilities provided by the States themselves. In this respect the Acts differ fundamentally from the legislation held to be invalid in the Australian National Airways Case /(1945 71 C.L.R. 29/ 10 and the Bank Case /(1950) A.C. 235; (1949) 79 C.L.R. 497/, for there the effect of the legislation was simply to prohibit competition with the government airlines in the one case and the government banks in the other. The Transport Regulations Acts do not prevent individuals carrying on the business of land transport among the States without a licence. But they do prevent individuals plying their vehicles on the 20 public roads of the States without a licence. They proceed on the broad principle that the interests of the State require the regulation of the whole service of land transport wherever it is conducted upon the public roads. I am of opinion that a State must have a wide power to regulate the use of the facilities which it provides for trade and commerce, so that the public funds invested in such facilities, in this 30 case the railways, shall not be jeopardised by undue competition brought about solely by the provision of another facility by the State. It is a question of fact whether such acts are, as they profess to be, regulatory or something more, and the solution of this question raises social and economic problems. The competition could be destroyed, as Evatt J. pointed out in Vizzard's Case /(1933) 50 C.L.R. 30, at p. 40 82/ by the State adopting the simple if drastic expedient of destroying the roads so as to compel all traders and travellers to use the railways. The same result could be achieved by allowing the roads to fall into a sufficient state of disrepair. Another way would be for a State to stop the roads short of the boundary and sell a strip of

land along its frontiers with other States to private individuals. It has not yet been suggested that the freedom guaranteed by s. 92 is violated if a private individual refuses to allow an inter-State trader or traveller to pass over his land. By building and maintaining State Highways States provide means of competition with their own railways, and I can find nothing in the judgment of the Privy Council which leads me to alter the opinion expressed in the Australian National Airways Case /No. 1/ /(1945) 71 C.L.R. at p. 109/, that 'it is simply an exercise of the sovereign rights of the States to co-ordinate traffic by rail or road, and to confine the use of roads to particular persons and vehicles. If the choice of these persons and vehicles has no relation to their passage across the border, but the legislation operates without discrimination with respect to all persons and vehicles desirous of using the roads, such legislation is not aimed or directed at inter-State commerce but at regulating, maintaining and co-ordinating a number of utilities for trade, commerce, and intercourse, State and inter-State, provided by the State'.""

12. It is submitted, therefore, that Kitto J. was in error in asserting in the Hughes and Vale Case (No. 2) 1955 (at 93 C.L.R. page 222) that the rejection, by the Privy Council in the Hughes and Vale Case (No. 1) 1955 A.C., of Dixon C.J.'s attempt to rationalize and circumscribe the operation of the Transport Cases precluded the High Court from reaching a conclusion (see Hughes and Vale Case (No. 2) (1955) 93 C.L.R. at pages 178-179) that -

"What is essential for the purpose of securing the freedom of inter-State transportation by road is that no pecuniary burden should be placed upon it which goes beyond a proper recompense to the State for the actual use made of the physical facilities provided in the shape of a highway. The difficulties are very great

in defining this conception. But the conception appears to be based on a real distinction between remuneration for the provision of a specific physical service of which particular use is made and a burden placed upon inter-State transportation in aid of the general expenditure of the State. It seems necessary to draw the distinction and ultimately to attempt to work out the conception so as to allow of a charge compatible with real freedom because it is no more than a fair recompense for a specific facility provided by the State and used for the purpose of his business by the inter-State trader." 10

In short, South Australia submits that what the Privy Council rejected in the Hughes and Vale Case (No. 1) (Supra) was an attempted justification of the Transport Cases on the grounds that a State is at liberty, consistently with section 92, to regulate and co-ordinate State transport services even though legislation effecting such regulation and co-ordination interferes with individual acts of inter-State trade or commerce. There is nothing in such a rejection contrary to the principles approved, ultimately by seven High Court Justices, in the series of judgments in the Hughes and Vale Case (No. 2) 93 C.L.R. 127, Armstrong's Case (No. 2) 99 C.L.R. 28; Commonwealth Freighters v. Sneddon 102 C.L.R. 280; Boardman v. Duddington 104 C.L.R. 456; Allwright's Transport Ltd. v. Ashley 107 C.L.R. 662 and Breen v. Sneddon 106 C.L.R. 406; or to the Banking Case /1950/ A.C. 235. 20 30

13. South Australia therefore respectfully submits that the judgment and order of the High Court of Australia should be upheld and the appeal dismissed for the reasons advanced by the Respondents and for the following among other 40

R E A S O N S

(1) BECAUSE the Acts of the various States being neither prohibitory nor discriminatory as between inter and intra state road users, do not restrict the freedom conferred by

section 92 of the Constitution.

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ALTERNATIVELY

(2) BECAUSE, if the said Acts restrict such freedom, they do not do so directly and immediately but indirectly or consequently, alternatively remotely or incidentally.

(3) BECAUSE, if the said Acts restrict such freedom, such restriction is by way of permissible regulation of trade commerce
10 and intercourse among the States.

(4) BECAUSE the decision of the High Court of Australia is right and ought to be affirmed.

GERALD DAVIES

Counsel for the Interveners the State of South Australia and the Attorney-General for the State of South Australia.

No. 34 of 1966

IN THE PRIVY COUNCIL

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