~~P.C.~~
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No.10 of 1964
No.11 of 1964

Judgment 46 1964

IN THE PRIVY COUNCIL

ON APPEAL
FROM THE FULL COURT OF THE SUPREME COURT OF QUEENSLAND

BETWEEN

WESTERN TRANSPORT PTY. LTD. — Appellant (Plaintiff)

- and -

NORMAN EGGERT KROPP — Respondent (Defendant)

78682

AND BETWEEN

MARANOA TRANSPORT PTY. LTD. — Appellant (Plaintiff)

- and -

NORMAN EGGERT KROPP — Respondent (Defendant)

(Consolidated Appeals)

CASE of Appellants

RECORD

1. By Writ No. 890 of 1963, the Appellant Western Transport Pty. Ltd. sued the Respondent as Nominal Defendant duly appointed pursuant to the provisions of The Claims Against Government Act (Queensland) of 1866 to represent the Government of the State of Queensland. By Statement of Claim indorsed on the Writ, the said Appellant claimed the sum of £449,238.6.10 as being money had and received to its use, alleging that of such sum £138,236.15.2 represented payments made in respect of a licence purporting to have been issued to the Appellant under Part IV of The State Transport Facilities Acts 1946 to 1959, and £311,001.11.8 represented payments made in respect of goods permits purporting to have been issued under The State Transport Act of 1960.

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2. In Writ No. 891 of 1963, the Appellant Maranoa Transport Pty. Ltd. sued the Respondent as Nominal Defendant as aforesaid. By Statement of Claim indorsed on the said Writ, such Appellant claimed the sum of £138,579.14.6 as being money had and received to the use of such Appellant representing payments made in respect of a licence purporting to have been issued under Part IV of The State Transport Facilities Acts 1946 to 1959.

3. In each action in each Statement of Claim it was further alleged that the said The State Transport Facilities Acts 1946 to 1959 (hereinafter referred to as "The Facilities Acts") never had any lawful operation, and in the case of Writ No. 890, it was alleged that the said The State Transport Act of 1960 (hereinafter called "The Transport Act") never had any lawful operation.

4. In each Statement of Claim it was alleged that the payments made were not lawfully exigible and that all of the payments were made involuntarily and under compulsion.

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5. The Respondent in each action demurred to the whole of each Statement of Claim on the ground that it was bad in law and showed no cause of action to which effect could be given by the Court on the relevant grounds (in Writ No. 890):-

a. The Facilities Acts were at all material times validated and made operative (other than certain Sections irrelevant to these appeals) by The Transport Laws Validation Act of 1962 (hereinafter referred to as "The Validation Act"), and

b. The Transport Act was at all material times validated and made operative (other than certain Sections irrelevant to these appeals) by The Validation Act.

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6. In the demurrer to the Statement of Claim in Writ No. 891 the Respondent relied on the first of the said two grounds only.

7. The demurrers came on for hearing before

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the Full Court of the Supreme Court of the State of Queensland consisting of Their Honours The Chief Justice (Sir Alan Mansfield), Mr. Justice Jeffriess and Mr. Justice Lucas on the twenty-ninth day of November 1963. The two demurrers were heard together and Counsel appeared to represent all parties, the same Counsel representing both Appellants. Counsel for the Respondent submitted that in the present state of the law the Court was bound to allow the demurrer on Grounds 3 and 6 in Writ No. 890 and Ground 3 in the case of Writ No. 891. Such grounds are respectively set out in paragraph 5 of each Petition herein and are summarised in paragraphs 5 and 6 of this Case. Although there were other grounds stated in the notice of the respective demurrers delivered to the Appellants, no reliance was placed by Counsel for the Respondent on any other ground but those stated herein. Counsel for the Respondent referred the Court to the cases of Kropp v. Cobb & Co. Limited & Others (1962) (36 Australian Law Journal Reports 205) and Bolton and Turner v. Madsen (37 Australian Law Journal Reports 35). Counsel for the respective Appellants bearing in mind not only the two cases referred to but the decision of the Full Court itself in the case of MADSEN v WESTERN INTERSTATE PTY. LIMITED (/1963/ Qd. R.434) conceded that in the present state of the authorities the Full Court was bound to allow the demurrer. The Full Court thereupon without further argument ordered that judgment be entered in each action in favour of the Respondent with costs to be taxed.

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8. The Full Court constituted as aforesaid on the same day, the twenty-ninth day of November 1963, upon motion made by Counsel for each Appellant, granted leave to appeal to each Appellant from each such judgment.

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9. The business of each Appellant is that of a road transport contractor carrying goods for reward on motor vehicles used on roads, and the claims in the said

actions seek to recover moneys which each Appellant claims it was compelled to pay as a condition of being permitted to carry on its business. Such payments, it is alleged in each case, were unlawful exactions which it paid under compulsion. The unlawfulness of the exactions appears from a consideration of the statutes under which the payments purport to have been required.

10. The Facilities Acts purport to control and regulate various means of transport throughout the State of Queensland, and the Acts are conveniently divided into Parts relating to each form of transport. In section 23, contained in Part III, the use on any road at any time of a vehicle for the carriage of goods unless in accordance with a provision of the same Part is prohibited under penalty. In Section 24, contained in the same Part, it is provided that the use of a vehicle upon a road shall be lawful (inter alia) in the case of any vehicle approved for use in carrying on a licensed service when such vehicle is carrying goods in accordance with the terms and conditions of the licence. This provision appears in subsection (25) thereof.

11. Part IV of the Facilities Acts deals with the licensing of services for the carriage of goods and authorises the Commissioner for Transport appointed under the Act to grant licences upon conditions including under section 32 (ix) the power to fix the licence fee, stipulating whether it is 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. Under section 35 (2), the 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

(iv) (b) a rate (not exceeding the one of

the following which is the greater - 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 vehicle may lawfully carry by the maximum number of miles it may lawfully travel.

12. A substantial part of the Appellant Western Transport Pty. Ltd's claim, and the whole of the Appellant Maranoa Transport Pty. Ltd's claim relate to payments made to the Commissioner under the said licensing provisions of the Facilities Acts.

13. Part V of the Facilities Acts in Divisions I and III deals with Water Transport. The relevant Sections are 49, 50, 51 and 55.

14. The Merchant Shipping Act (Imperial) of 1894 provides by Sections 735 and 736 as follows:-

"POWERS OF COLONIAL LEGISLATURE

Power of colonial legislatures to alter provisions of Act.

735.-(1) The legislature of any British possession may by any Act or Ordinance, confirmed by Her Majesty in Council, repeal, wholly or in part, any provisions of this Act (other than those of the Third Part thereof which relate to emigrant ships), relating to ships registered in that possession; but any such Act or Ordinance shall not take effect until the approval of Her Majesty has been proclaimed in the possession, or until such time thereafter as may be fixed by the Act or Ordinance for the purpose.

(2) Where any Act or Ordinance of the legislature of a British possession has repealed in whole

or in part as respects that possession any provision of the Acts repealed by this Act, that Act or Ordinance shall have the same effect in relation to the corresponding provisions of this Act as it had in relation to the provision repealed by this Act.

Regulation of coasting trade by colonial legislature

736. The legislature of a British possession, may, by any Act or Ordinance, regulate the coasting trade of that British possession, subject in every case to the following conditions:-

(a) The Act or Ordinance shall contain a suspending clause providing that the Act or Ordinance shall not come into operation until Her Majesty's pleasure thereon has been publicly signified in the British possession in which it has been passed:

(b) The Act or Ordinance shall treat all British ships (including the ships of any other British possession) in exactly the same manner as ships of the British possession in which it is made:

(c) Where by treaty made before the passing of the Merchant Shipping (Colonial) Act, 1869 (that is to say, before the thirteenth day of May eighteen hundred and sixty-nine), Her Majesty has agreed to grant to any ships of any foreign state any rights or privileges in respect of the coasting trade of any British possession, those rights and privileges shall be enjoyed by those ships for so long as Her Majesty has already agreed or may hereafter agree to grant the same, anything in the Act or Ordinance to the contrary notwithstanding."

If this Act applies or applied at relevant times to the State of Queensland, it is clear that the provisions of sections 735 and 736 thereof have not been complied with by the State Legislature, and therefore the inclusion in the Facilities Acts of Sections 49, 50, 51 and 55 makes them Acts regulating the coasting trade of a British possession and since the Acts contained no suspending clause the whole of the provisions of such Acts including the provisions relating to carriage of goods by road were invalid.

15. The same position is reached in relation to the Transport Act which by section 4 (1) repealed the Facilities Acts. The Transport Act came into operation on the 27th February 1961, being the date fixed by Proclamation as provided in section 1 (2) thereof. This Act followed the general pattern of the Facilities Acts in dealing with various types of transport. In Part V, Sections 37 to 44 inclusive, power is given to the Commissioner to grant permits for the carriage of goods by road vehicles. Section 44 sets out the basis of calculation of fees payable for the issue of such permits. It is in relation to the payment of fees for permits purporting to have been issued under such Part that the second part of the claim of the Appellant, Western Transport Pty. Ltd. is founded.

16. Part VIII of the Transport Act (Sections 56, 57 and 60) deals with water transport, and the same criticism applicable to the Facilities Acts is available in this case, as the conditions of sections 735 and 736 of the said Merchant Shipping Act have not been complied with.

17. The Full Court of the Supreme Court of the State of Queensland has already held the Transport Act and by necessary implication the Facilities Acts invalid and inoperative because of the non-compliance with the conditions of the said two sections of the Merchant Shipping Act and the Full Court held that the Merchant Shipping Act continued to apply to Queensland after the establishment

of the Commonwealth of Australia. The case in which the said Full Court so held was THE QUEEN v. THE COMMISSIONER FOR TRANSPORT ex parte COBB & CO. LIMITED, DOWNS TRANSPORT PTY. LTD. AND OTHERS (/1963/ Qd.R.547) It is common ground between the parties that Her Majesty never publicly signified in Queensland her pleasure on the Facilities Acts or the Transport Act and has not as yet made any such signification consequent on the Validation Act, and further that since the Validation Act there has been no proclamation by the Governor in Council fixing the date when any of the Acts expressed to be validated are to come into operation.

18. The last-mentioned case (hereinafter referred to as "COBB & CO's CASE") concerned the return before the Full Court of an Order Nisi to Show Cause why a Writ of Prohibition should not issue restraining the Commissioner for Transport from proceeding further with seven notices served upon the prosecutors to show cause why permits issued under the Transport Act should not be suspended. The grounds on which the said Order Nisi were granted were that by reason of section 736 of the said Merchant Shipping Act the Transport Act was invalid or alternatively had not yet come into operation because it contained no suspending clause and Her Majesty had not yet publicly signified Her pleasure thereon and on other grounds sufficient in law. A writ of prohibition was directed by the Full Court to issue. This order was made on the 17th day of May 1962.

19. On 6th June 1962, the High Court of Australia granted the Respondent special leave to appeal from the Order of the said Full Court.

20. In the meantime, on 8th June 1962, the Validation Act was passed, and in the light of that the High Court consisting of Their Honours The Chief Justice Sir Owen Dixon, Mr. Justice Kitto, Mr. Justice Taylor, Mr. Justice Windeyer, and Mr. Justice Owen, rescinded special leave to appeal on 7th September 1962. The Court delivered jointly

its reasons for judgment which are not yet reported otherwise than in Volume 36 Australian Law Journal Reports at page 205 under the name of KROPP v. COBB & CO. LIMITED & OTHERS.

The Appellant there named is the present Respondent who was at relevant times The Commissioner for Transport.

21. A shorthand note of the argument before the High Court in such case was made and appended to this Case as Appendix "A" is the transcript of such argument. It appears quite clearly that no real argument as to the merits of the appeal was presented, and, in particular, Counsel for the Respondents to the appeal was not concerned one way or the other to put a view as to the validity of the Validation Act or its effect, which did not arise on the appeal. Nevertheless, in their reasons, Their Honours said: "Notwithstanding the decision of the Supreme Court from which special leave to appeal was granted, that Act (the Validation Act) validates the Act which the Supreme Court had thought was invalid, by reason of certain sections, and in that validation those sections are excepted. There can be no doubt that the validation was complete, is retrospective, and, apart from anything that can be obtained from section 8 of the Act, operates upon the rights of the parties in the present case". It is submitted that these remarks are merely obiter dicta, and in rescinding leave to appeal the High Court left undisturbed the judgment of the Full Court of the Supreme Court. No comments were passed on the correctness of the decision of such Full Court although that matter was in fact raised directly in the appeal, and was to some extent argued by Counsel for the present Respondent, but Counsel for the Respondents in KROPP v. COBB & CO. LTD. & OTHERS was not obliged to deal with it.

p.24 of Case.

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22. In KROPP v. COBB & CO.LTD & ORS. His Honour The Chief Justice of the High Court said: "I, speaking individually, would like to add for myself that, having read the judgments of the Supreme Court, I feel

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perhaps that more attention, if the point ever arose on a future occasion, should be given to the question whether section 736 of the Merchant Shipping Act 1894 was not designed simply to give a new power to colonies that did not enjoy such a power, and to fetter the new power with conditions which section 736 describes, and was not intended to operate as a substitutional power in derogation of existing powers enjoyed by colonies which had them. It appears to me that under the Letters Patent of 1859 which constituted the Colony of Queensland, and the Australian Colonies Act 1961 which confirmed that, the power already existed in Queensland to deal with the inland coastal waters concerned. But that is my own suggestion and has not been argued". It is significant that His Honour did not say that the Full Court of the Supreme Court was wrong in any way. His Honour was merely inviting argument on an aspect which he desired to be explored before coming to any firm view. Because the matter was not argued, it was not drawn to the attention of the Court, and particularly to His Honour The Chief Justice, that the High Court had itself considered the applicability of the Merchant Shipping Acts both to the States and the Commonwealth, and had held that they continued to apply to the States after federation as appears by the authorities cited hereafter.

37 A.L.J.R.35

23. In a case wherein two persons were convicted of offences respectively committed as alleged under section 49 of the Transport Act, the accused raised a constitutional issue under section 90 of the Commonwealth Constitution in the Court of first instance. The defence in substance was that the permit fees required to be paid under the said Act in respect of permits to carry goods by vehicles on the roads were duties of excise and beyond the power of the State legislature to legislate for, thus making the Transport Act invalid in such parts as could not be saved by severance. A second ground of defence was that the Validation Act had failed to validate the Transport Act, and that as such Act had already been held invalid, no offence was committed. The Court rejected both defences and convicted the

accused who thereupon appealed directly to the High Court against the convictions. This appeal under the name of BOLTON & TURNER v. MADSEN came on for hearing before the High Court consisting of His Honour The Chief Justice, and Their Honours Mr. Justice Kitto, Mr. Justice Taylor, Mr. Justice Menzies, Mr. Justice Windeyer and Mr. Justice Owen who dismissed the appeal, and on 6th June 1963 delivered a joint judgment which is reported in Volume 37 Australian Law Journal Reports at page 35. 37 A.L.J.R.35

24. It is noteworthy that the section 90 point was there in the forefront of the Appellants' case, and treating the judgment as indicative of the time devoted to the respective topics, the argument as to the ineffectiveness of the Validation Act must be regarded as a mere make-weight argument not seriously pressed. Certainly the High Court was not impressed by any such consideration. The Court said, "Although reference to (several sections of the Transport Act) and to sections 3 and 4 of the Transport Laws Validation Act of 1962 is necessary, it is not proposed to set them out in this judgment". It is rather surprising that at least section 7 of the Validation Act was not considered relevant, and the particular relevance of section 4 thereof is not easy to discern. In any event, the High Court does not seem to have devoted much consideration to the Validation Act, contenting itself with the observation "We can dispose shortly of the argument that The Transport Laws Validation Act of 1962 does not validate the Act by referring to KROPP v COBB & CO. (1962) 36 A.L.J.R. 205 in which it was decided that the Act had validating effect and by observing that nothing has emerged to require reconsideration of that decision". In our respectful submission, the COBB & CO. CASE certainly did not decide that the Validation Act had operative effect. Such an issue was not open and was not argued. 37 A.L.J.R.35 col.2 37 A.L.J.R.37 col.2

25. However, the Full Court of the Supreme Court of Queensland would be bound to give effect to the pronouncement of the High Court in BOLTON & TURNER v MADSEN even

if free to ignore the obiter dicta in COBB & CO'S CASE.

26. The issue of the effectiveness of the Validation Act came before the Full Court of the Supreme Court of Queensland in a case, MADSEN v WESTERN INTERSTATE PTY. LIMITED (/1963/ Qd.R.434) in which judgment was delivered on 9th July 1963. In this case, the appellant had been convicted of a breach of Section 23 of the Facilities Acts, and appealed by way of Order Nisi to Review to the Supreme Court on two grounds, the first of which was that the complaint disclosed no offence in that the Facilities Act was and is an invalid Act and that that Act had not been validated by the Validating Act. Mr. Justice Philp said, "It follows from the decision of this Court in The Queen v The Commissioner for Transport ex parte Cobb & Co. Limited and Others that the Facilities Act was invalid and we must accept that decision as good law. The question then arises whether the Validating Act gave to section 23 of the Facilities Act legal force so that it was part of the law of Queensland in operation as at 9th August 1960. If we accepted the arguments addressed to us for the appellant the result would be that the Validating Act achieved no effective validation. I do not propose to deal with those arguments because in KROPP v COBB & CO. LIMITED AND OTHERS (1962) 36. A.L.J.R. 205 the High Court recognised the effectiveness of the Validating Act. In that matter the Chief Justice expressed doubt as to the correctness of the Full Court's decision. In these circumstances I think that in this Court we should hold that section 23 of the Facilities Act was in force on 9th August 1960". Thus His Honour did not really deal with the argument on its merits but felt constrained to accept the authority of the obiter dicta above referred to. /1963/ Qd.R. 444

27. The argument for the appellant in Madsen's case is adequately summarised in the judgment of His Honour Mr. Justice Wanstall, and it will be seen that the attack on the Validation Act was within a very narrow compass within which the present /1963/ Qd.R. 449

Appellants are not bound. No argument seems to have been addressed to the Court as to the content of the Validating Act itself, and as will be developed in this Case the present Appellants here attack the Validation Act on more grounds than did the appellant in MADSEN'S CASE. In our respectful submission, His Honour Mr. Justice Wanstall, although upholding the validity of the Validation Act, placed the remarks of the High Court in COBB & CO'S CASE in proper perspective, as he said, "I prefer not to reject it (the appellant's first ground) on the basis that the High Court's decision in KROPP v COBB & CO. LTD. (1962-63) 36 A.L.J.R. 205 is conclusive against it; that decision is certainly inconsistent with the proposition but this point was not specifically raised in that case, and, whilst the learned justices are unlikely to have overlooked it, there is nothing to indicate whether or not they considered the question". [1963] Qd.R. 451

28. His Honour Mr. Justice Hart felt bound by the obiter dicta of the High Court in COBB & CO'S CASE, and he said, "Whatever view this Court takes of the matter I do not think it is at liberty to hold that the Act is invalid. For it is bound by the decision of the High Court in KROPP v COBB & CO. LIMITED. ..... I consider therefore that the question is not open to this Court and we must hold that the complaint did disclose an offence". [1963] Qd.R. 472

29. Because of the expressed views of the members of the Full Court of the Supreme Court of Queensland, the demurrers in the present cases were bound to succeed and Counsel for the present Appellants had no option but to concede this. However, the Full Court forthwith granted leave to appeal to Her Majesty in Council so that the matters in issue could be decisively dealt with.

30. The key section to the Validation Act is section 3. The first matter that calls for consideration is that the Acts set out in the Schedule other than the excepted

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sections are said to be validated as from their respective enactment "in so far as it may be necessary to ensure the validity and operation thereof". If the decision of the said Full Court in COBB & CO'S CASE is correct then the Acts referred to (including the excepted sections) were invalid ab initio, and therefore if it is desired to give them effectiveness, and assuming competence in the Queensland Parliament to do so, it does become necessary to "ensure the validity and operation thereof". On the other hand, if the said Full Court was in error, then the Facilities Acts and the Transport Act were at all times valid and operated in accordance with their own terms and did not require the Validation Act which thus would have no force.

/1963/ Qd.R. 434

31. It is the Appellants' contention as a starting point that the said Full Court was plainly right, and that, but for any effect the Validation Act might have, the Facilities Acts and the Transport Act were at all times inoperative. The Appellants adopt the reasoning of the Full Court in the separate judgments.

32. The pattern into which the Merchant Shipping Acts fit was discussed in UNION STEAMSHIP COMPANY OF NEW ZEALAND v THE COMMONWEALTH 36 Commonwealth Law Reports 130, and the judgments of Their Honours The Chief Justice Sir Adrian Knox and Mr. Justice Isaacs (as he then was) are of significance. The Acts in question were intended to cover the field, and Australian shipping is treated as a component part of Imperial shipping. In such case and that of THE COMMONWEALTH v KREGLINGER 37 Commonwealth Law Reports 393, the High Court held that both the Merchant Shipping Acts and the Colonial Laws Validity Act 1865 applied despite the Federal and State Constitutions, and it is submitted that these cases effectively answer the enquiry addressed by His Honour The Chief Justice of the High Court in KROPP v COBB & CO. LIMITED referred to in paragraph 22 above.

36 C.L.R.130

37 C.L.R.393

Case p.9.1.47.

33. In R. v MARAIS /1902/ A.C. 51 at page 54,

the Privy Council in reference to the Colonial Laws Validity Act said, "The obvious purpose and meaning of that statute was to preserve the right of the Imperial Legislature to legislate even for the colony, although a local legislature had been given, and to make it impossible when an Imperial statute had been passed expressly for the purpose of governing the colony, for the colonial legislature in that sense to enact anything repugnant to an express law applied to that colony by the Imperial legislature itself". 28 & 29 Vict.c63

34. Mr. Justice Isaacs in the UNION STEAMSHIP COMPANY CASE (supra) treated the Merchant Shipping Acts as within the ambit of the observations of the Privy Council in MARAIS' CASE. The learned Judge said "A colonial Parliament cannot repeal Imperial legislation, except where Imperial law so permits it, as in section 735 of the Merchant Shipping Act 1894, but the test of whether its legislation is inconsistent with Imperial legislation is the same as if it had the power of repeal". 36 C.L.R.130

35. Mr. Justice Taylor in ASIATIC STEAM NAVIGATION COMPANY LIMITED v THE COMMONWEALTH 96 Commonwealth Law Reports 397 at page 403 said of the sections of the Merchant Shipping Act with which these appeals are concerned "Accordingly, although section 503 may be said to be part of the local law in the sense that it operates within the Commonwealth, its local operation merely flows from the circumstance that it is contained in an Imperial statute which expressly extended the operation of that section to the Commonwealth. Indeed, it was so little a part of the local law in the true sense that, apart from the provisions of sections 735 and 736, its continued operation within the Commonwealth did not, and could not, depend upon the desires or intentions, however expressed, of any local legislature. The first of the sections to which I have referred did give a limited power of repeal, with the consent of Her Majesty in Council, to local legislatures, and the second authorised local legislatures, subject to the conditions expressed therein,

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to regulate the local coasting trade. Until the adoption, as from 3rd September 1939, of the Statute of Westminster the position, therefore, was that, apart from those sections, a local legislative provision which was repugnant to any provision of the Merchant Shipping Act 1894 was void. Nothing has occurred since the Statute of Westminster Adoption Act 1942 to effect or modify the operation in the Commonwealth of section 503 of the Merchant Shipping Act 1894, and the position at the present time, therefore, is that it still continues to operate as part of an Imperial statute which extends to this Country".

36. The Statute of Westminster does not affect the situation of the States. Even despite such Statute, it is significant that both Commonwealth and the respective States remain subject to the provisions of the Merchant Shipping Acts. In Queensland as recently as 1958, the Marine Act contained a suspending clause as required by section 736 of the Merchant Shipping Act, to the effect that the Act should not come into operation until after Her Majesty's pleasure had been publicly signified in Queensland. Similarly, the Navigation Act of the Commonwealth passed in 1912 was reserved for the King's pleasure under section 735. All the Justices of the High Court who sat on the appeal from the decision of His Honour Mr. Justice Taylor in ASIATIC STEAM NAVIGATION CO. CASE at pages 414 to 428 were agreed that, apart from the provisions of the Statute of Westminster, the Commonwealth Parliament could not affect the application of the Merchant Shipping Acts to Australia, [redacted] nor could such Parliament make a law inconsistent with such Acts - see pages 418 and 423. The learned Justices were The Chief Justice Sir Owen Dixon, and Justices McTiernan, Williams, Fullagar and Kitto. The Appellants adopt the reasons of the Full Court in COBB & CO'S CASE to show that the Queensland legislature is unaffected by the Statute of Westminster and has no plenary power to make laws inconsistent with the Imperial Acts referred to.

96 C.L.R.397

/1963/ Qd.R. 547

37. The validation sought to be effected by section 3 of the Validation Act is strictly limited by the concluding words of the section, because any amendment or repeal that might have taken place with respect to any of the Acts in the schedule to the Validation Act is still to be given effect. All of the Acts in the said schedule except the Transport Act had previously been repealed by the latter. Their repeal therefore is not to be affected by section 3. In the result, as a matter of construction, the section says of these repealed statutes:-

i) It is necessary to ensure their validity because otherwise they would be invalid ab initio;

ii) There was no power to enact them in the form in which they appeared on the statute book, but they are to be treated fictionally as though they were enacted in an unexceptionable form;

iii) They nevertheless remain repealed, so that even fictionally they are not being revived.

38. The Appellants contend therefore that all statutes prior to the Transport Act as listed in the schedule to the Validation Act are not validated ab initio or at all, either in a truncated form in which they never had any being or in any other form.

39. On the same line of reasoning, the Transport Act had not until the passage of the Validation Act ever existed in a truncated form. In the form in which it did have its being there was no power in the State legislature to so enact. Thus, to give any effect at all to section 3, the only possible view is that it purports to enact clumsily by reference the truncated form of the Transport Act. Treating it in this fashion, the first valid enactment of this truncated form of the Transport Act is with the passing of the Validation Act itself. In its truncated form, such an Act is within the power of the legislature to pass, and on this reading section 3

speaks prospectively and not retrospectively, so as to bring the truncated form of such Act into force as from the 8th June 1962.

40. Such a reading of the section accords with well-established canons of interpretation that retrospective effect is not to be given to the words of a statute which takes away or impairs vested rights acquired under existing laws unless the intention of the legislature is expressed in clear, plain and unambiguous language, because it is contrary to natural justice that an act legal at the time of doing it should be made unlawful by some new enactment - In re SCHOOL BOARD ELECTION FOR PARISH OF PULBOROUGH - BOURKE v NUTT /1894/ 1 Q.B. 725 at 737; WICKS v DIRECTOR OF PUBLIC PROSECUTIONS /1947/ A.C. 362; R. v VINE (1875) Law Reports 10 Q.B. 195 at 199; REID v REID (1886) 31 Ch. 402; INGLE v FARRAND /1927/ A.C. 417; SMITH v CALLANDER /1901/ A.C. 297 at 305.

41. As appears on reading section 7 of the Validation Act, this section attempts to make an innocent action criminal, and to take away from persons subject to its operation defences which might have been open to them at the time of the commission of the act, so that section 3 must be interpreted as seeking to validate retrospectively penal statutes.

42. Section 4 of the Validation Act cannot be interpreted more widely than section 3. It neither limits nor extends the ambit of the earlier section and therefore it is only insofar as section 3 breathes life and validity into any of the statutes in the schedule that section 4 can have any operation. On this basis, section 4 should be construed as speaking prospectively because the context is by no means unambiguous, and is certainly not so plain that a retrospective rendering is inescapable, bearing in mind that this is in essence a penal statute divesting acquired rights. In terms it is only a validation of such acts done or omitted to be done under the authority strictly conferred by the Acts in the schedule which owe their validity to section 3. Section 4 adds nothing to

Section 3 and is a mere particularisation of the generality referred to in the earlier section.

43. Section 5 is beyond power to enact. Where the Imperial Act states in clear terms that an Act of the State Parliament is not to operate except upon compliance with certain conditions, which have not been complied with, it is ineffective for the State Parliament, despite such non-compliance, to state that effect is to be given as though the conditions had been strictly complied with.

44. Section 6 is not relevant to this appeal, but is unusual in its terms and betrays an acknowledgment by the legislature that it may be harsh to subject one to imprisonment in respect of an action innocent when undertaken but made criminal ex post facto.

45. Section 7 again is contrary to natural justice. Not only is the accused man to be made liable ex post facto for actions innocent when undertaken but he is to be deprived of defences open to everyone charged with a criminal offence in the State. However, the opening words "subject to this Act", import the essential provisions of section 3, and it is only with respect to the statutes validated under that section, and as from the time of their operation validly, that section 7 can speak. On proper interpretation, in the Appellants' respectful submission, the only statute thus validated is the Transport Act and that only from the enactment of the Validation Act, so that there could not be any proceedings validly launched for any offence committed prior to the passing of the Validation Act to which section 7 could apply. Section 7 is not very happily drafted; for example, it seeks to remove defences under the Criminal Code so far as the same may apply "or be claimed to apply". The claim that Chapter V of the Criminal Code applies is of no relevance if, in law or in fact, it is unfounded. Similarly the words that follow "because of the invalidity or alleged invalidity or non-

operation or alleged non-operation" show a failure to appreciate the effect of the section. The words underlined have been emphasised to show that the allegation of invalidity or non-operation is of no significance if not justified. Again, there is no power in the State legislature to override the requirements of section 736 of the Merchant Shipping Act.

46. Section 8 is another example of inept legislation. The High Court dealt with this section in argument in KROPP v COBB & CO. LIMITED (Appendix "A" to this Case). This section has no relevance to the present appeals.

47. In addition to the foregoing the Appellants rely on the submissions of Counsel for the appellant in MADSEN v WESTERN INTERSTATE PTY. LIMITED conveniently summarised in the judgment of His Honour Mr. Justice Wanstall (1963 Qd. R.434 at p.449 et. seq) which they would respectfully ask to be treated as if here set out in full.

48. In the result, the Appellants submit that the Facilities Acts have gone beyond recall, and as to such part of the Appellant Western Transport Pty. Ltd.'s claim and the whole of Maranoa Transport Pty. Ltd.'s claim as are made in relation to such Acts the demurrer should have been overruled. As to the Transport Act, in the Appellants' submission, it operates for the first time as from the date of the passing of the Validation Act, so that with respect to the claim of the Appellant Western Transport Pty. Ltd., it remains unaffected by the Validation Act which should be read prospectively.

49. Further, and in the alternative, both the Facilities Acts and the Transport Act are invalid because they seek to impose a tax and to levy it without Parliamentary sanction, and in this they violate a long-established principle that no tax may be imposed save with the full assent of Parliament and the assent of the Crown. By reason of this fundamental invalidity the Validation Act cannot cure the defect and is beyond constitutional power.

50. In relevant respects, the entire road transportation system of the State, including the taxation of the operators, has been placed under the control of the Respondent without Parliamentary supervision or intervention. The action of the Respondent in fixing fees payable for either licences or permits under the said Acts is legislative in character.

51. The High Court considered the nature of the fee payable in respect of the issue of a licence under section 35 (2) (ii) of the Facilities Acts in BROWNS TRANSPORT PTY.LTD. v KROPP (1958) 100 Commonwealth Law Reports 117, and in a joint judgment Their Honours Dixon, Chief Justice, and McTiernan, Fullagar, Kitto, Taylor and Windeyer Justices said at page 129: "In the present case it is clear enough that the impost is a tax. 'It is a compulsory exaction of money by a public authority for public purposes, enforceable at law, and is not a payment for services rendered' - MATTHEWS v CHICORY MARKETING BOARD (1938) 60 Commonwealth Law Reports at page 276..... Here the exaction is imposed without mention of, and without regard to, any commodity or class of commodities. The person taxed is not taxed by reference to, or by reason of, any relation between himself and any commodity as producer, manufacturer, processor, seller or purchaser. The taxes which section 35 (2) authorises, calculated on one or more of a variety of bases, are payable whether the person taxed carries goods or passengers, and, if he carries goods, whatever may be the nature of the goods carried. The exaction is in truth, as it purports to be, simply a fee payable as a condition of a right to carry on a business".

52. A similar view was expressed by His Honour The Chief Justice in HUGHES AND VALE PTY.LTD. v NEW SOUTH WALES (1953) 87 Commonwealth Law Reports 49 at page 75 in respect of a similar licence fee payable under comparable legislation in New South Wales, "It is a tax on the carrier because he carries goods by motor vehicle".

53. The power given to the Respondent under the Facilities Acts - section 35 (2) (ii) (iv) and (v) - and under the Transport Act - section 44 (2) - includes the right to impose an income tax. The Respondent is not obliged by the said Acts to fix any fee, although he is empowered to do so within an extremely wide discretion, and he is likewise empowered to amend, alter, add to, vary or revoke the terms or conditions, including payment of fees, of any licence or permit - Facilities Acts section 36; Transport Act section 41 (3). Parliament has purported to abrogate its taxing power in respect of road transportation.

54. Every citizen is entitled to demand that no tax be imposed upon him except by Parliament with the Royal Assent. The original Constitution of Queensland is to be found in the Order in Council of the 6th day of June 1859 made in pursuance of the powers conferred by the Imperial Act 18 and 19 Victoria c.54 which contains the proviso in Paragraph II thereof that all bills for imposing any new tax or impost shall originate in the Legislative Assembly. The history of subsequent and relevant amendments to the Constitution of Queensland is set forth conveniently in COOPER v COMMISSIONER OF INCOME TAX (1907) 4 Commonwealth Law Reports 1304 at pages 1312, 1313; and although in 1922 the Legislative Council was abolished - The Constitution Act Amendment Act of 1922 (12 Geo. V No.32) - there has been no alteration in the situation which remains that the raising and expenditure of public moneys is made, under the Constitution, subject to the control of Parliament - sections 18,19,34,35,37, and 39 of the Constitution Act of 1867.

55. However, in exercise of the power committed to him under the said Facilities and Transport Acts, the Respondent may tax, alter tax, remit tax, tax one person at a higher rate than another in respect of the same operation, or even require no payment at all. He is acting as a legislature. But, it is submitted, there is no power in the elected legislature to abrogate its true functions by delegating this extensive power to impose taxes to the

Respondent, either by the original enactments or by the Validation Act which cannot accomplish the purpose of the statutes it purports to validate.

56. The fact that this submission is last referred to in no way diminishes the reliance placed upon it. It is submitted that as the whole of the Appellants' claims relates to payment of fees in respect of licences and permits issued as aforesaid, once it is shown that there was a constitutional bar to their exaction, it must follow in the circumstances that the Appellants have the right to their recovery in full.

57. It is therefore respectfully submitted that the appeals should be allowed and that the prayers of the Appellants in their respective petitions should be granted for the following (amongst other)

R E A S O N S

(1) Because the State Transport Facilities Acts 1946 to 1959 were not validated or made operative by the Transport Laws Validation Act of 1962.

(2) Because the State Transport Act of 1960 was not validated or made operative by the Transport Laws Validation Act of 1962.

(3) Because both "The Facilities Acts" and the "Transport Acts" are invalid.

(4) Because they seek to impose a tax and levy it without Parliamentary sanction and by reason thereof "The Validation Act" cannot operate to validate such Acts.

PHILIP. H.N. OPAS

FRANK WHITWORTH.

APPENDIX "A"

IN THE HIGH COURT OF AUSTRALIA

QUEENSLAND REGISTRY No.23 of 1962

ON APPEAL FROM THE FULL COURT OF THE SUPREME COURT OF QUEENSLAND

B E T W E E N :

NORMAN EGGERT KROPP
Appellant

- and -

COBB & CO.LIMITED, DOWNS TRANSPORT PTY. LIMITED, SOUTH QUEENSLAND TRANSPORT PTY. LIMITED, NORTHERN DOWNS TRANSPORT PTY. LIMITED, NORTHERN TRANSPORT PTY. LIMITED, N.S.W. TRANSPORT PTY. LIMITED, and COBB & CO.-REDMANS TRANSPORT PTY. LIMITED. Respondents

Coram: DIXON, C.J.
KITTO, J.
TAYLOR, J.
WINDEYER, J.
OWEN, J.

TRANSCRIPT OF PROCEEDINGS

AT BRISBANE ON FRIDAY 7TH SEPTEMBER 1962, AT 10.35 A.M.

MR. A.L. BENNETT, Q.C., with him MR. M.B. HOARE, Q.C., and MR. L. BYTH (instructed by the Crown Solicitor) appeared for the Appellant.

MR. R.H. MATTHEWS and MR. E.S. WILLIAMS (instructed by Hobbs, Bernays & McDonald) appeared for the Respondents.

RECORD

MR. BENNETT: May it please the Court, this is an appeal, pursuant to special leave, from a judgment of the Supreme Court of Queensland, sitting as a Full Court, given on 17th May 1962. The formal judgment appears in the record at page 60, and the order for special leave, which was made by this Court on 6th June 1962, appears at pages 63 and 64 of the record. The Notice of Appeal, given on 15th June 1962, pursuant to special leave, appears at pages 65 to 68 of the record and the reasons of the Judges of the Full Court, which were given later than the actual formal judgment, appear in the record at pages 13 to 59. See Case p.10. l.11.

The case concerned an attack on the State Transport Act 1960 on the ground of non-compliance with sec. 736 of the Merchant Shipping Act 1894. The facts leading to that attack were, briefly, that the respondents were the holders of permits under the provision of the State Transport Act, Part V, which part commences at sec. 37 in that Act.

On 23rd November 1961 the appellant, the Commissioner for Transport, called upon each of the respondents to show cause why the permit, in the case of each one of them, should not be suspended on the grounds of alleged breaches of the Act and non-compliance with the terms of the permit. These persons were called upon to appear to show cause, on 1st December 1961. However, they issued the writ in this case on 20th November, 1961, and on the morning of 1st December, the Supreme Court of Queensland, His Honour Mr. Justice Stanley, made an order nisi for prohibition against the respondent.

Our general reply to the decision, which was to the effect that section 736 applied and, not having been complied with, the Queensland Act as a whole was either not operative or was not enacted, really gets down to this in a nutshell: first I remind the Court that section 736 is a section in the Merchant Shipping Act which requires a certain formality in relation to a certain power. I just put it on that general basis at the moment, and it cannot be contended, nor is it contended, that the powers

generally of this Act come within the type of power there described. But the powers purported to be exercised in Part 8 of this Act, it is suggested and contended, come within the requirements of section 736.

Our short answer will be, and at the moment I am dealing with this in general terms, that section 736 does not apply to the State of Queensland or, for that matter, to any State since federation. Second, that part 8 is clearly severable.

We do wish to stress that ground particularly because of the repercussions of this decision on a number of other Acts if a reading down provision, to read an Act in power, is not to be taken into account, and so to avoid a clash with section 736 which, it is alleged, takes place in this case.

Without, perhaps, giving a list of Acts that could be attacked - and perhaps I should not even attempt to do that - there is one Act that does leap into the mind. It was constituted by the Act and Amendment Acts as the Harbours Act of the State of Queensland. The date of these Acts is 1955-1959.

In our submission, we will therefore be stressing very much the ground as to severance, and it is a position where we submit that part 8 of this Act can be severed, leaving the rest of the Act unimpaired.

DIXON, C.J.: Your first point, as I understand it, that you have just mentioned, is that the provisions of the Merchant Shipping Act would not apply to Queensland. Why?

MR. BENNETT: Because a British possession - - -

DIXON, C.J.: Because of the definition of a British possession in the Interpretation Act?

MR. BENNETT: And the Parliament of the British possession since federation is the Commonwealth Parliament. That would be our submission.

DIXON, C.J.: But there is the other possible reason, that it was a completely self-governing

colony before federation with complete power over the subject matter, and section 736 is a parallel power and not a substantial power.

MR. BENNETT: That will be the argument on that.

DIXON, C.J.: We have been furnished with Act No. 24 of 1962, and I have seen what section 8 says. But as far as substantive liability is concerned, this kills the whole question, does it not?

MR. BENNETT: I am sorry?

DIXON, C.J.: This Act No. 24 of 1962 sets at rest the whole substantive question, does it not?

MR. BENNETT: In relation to this particular legislation with, we submit, the important exceptions of the questions involved in the present litigation.

DIXON, C.J.: Because of section 8?

MR. BENNETT: Yes.

DIXON, C.J.: You had better look at section 8. Is it important?

MR. BENNETT: Yes. It is submitted that it is important in that there is £73,000 hanging on it.

DIXON, C.J.: It says, "Nothing in this Act shall prejudice or affect the rights inter se of the parties". Then it identifies the parties by reference to the proceedings. Then it goes on in relation to the sum of £73,000 paid into Court in respect of such proceedings.

MR. BENNETT: Yes.

DIXON, C.J.: That was done, and it seems to me on the first reading that it does not destroy the liability to pay money, assuming the fund is paid out to the prosecutors. They are still liable under the original Acts, are they not?

MR. BENNETT: Not because of a judgment of the Full Court of Queensland.

DIXON, C.J.: But that is undone by the whole of the Act and this exception in relation to the sum paid into Court (not heard) not the liabilities which are antecedent to it.

MR. BENNETT: The liability would be affected by the judgment of the Supreme Court of Queensland, and it is submitted that the effect of that Judgment is to destroy this liability, or to rid the respondents of the liability.

DIXON, C.J.: But the effect of the Act is to destroy the (not heard)

MR. BENNETT: Except in relation to this case, it is submitted, and that exception keeps alive that judgment, and all questions in relation to the Act are on the basis that it has not been validated and, the Act not being validated in relation to this question and this amount, it is submitted that this is a live question and that it is necessary to set aside the - - - - - -

DIXON, C.J.: When you say that this is a live question, to what do you refer? What is the "this" and what is "the question"?

MR. BENNETT: This appeal deals with what we submit is a live question on the judgment of the Full Court, and that judgment, it is submitted, rests entirely on the old Act without any validation because of the exception in section 8. If it so rests on the old Act, then the question, we submit - i.e. the question of the operation of the old Act - is a live one in regard to this litigation, including the amount involved and remaining in Court at the present time.

DIXON, C.J.: Take section 2 (b)

> "'Excepted sections' means the sections or parts of sections shown in the third column of the third schedule."

If you turn to the third column of the third schedule and skip the repealed Act of 2 George VI and 11 George VI and come down to 9 Elizabeth II, that is what we are dealing with. The excepted sections are sections 56 and 57 and, in so far as it relates to passengers or goods, section 60.

If you turn to these in Act No.48, those are the only sections on which the judgment turns, are they not? Then these are cut down notionally, so to speak, and then the whole Act is re-enacted less those sections, and the re-enactment, therefore, which is retrospective, is not subject to the attack on validity which was based on those sections.

MR. BENNETT: That is so.

DIXON, C.J.: And has full effect; it covers the whole ground. The only thing that is excepted is what is contained in 8, and as at present advised I do not see that liability is affected by 8. The destination of the fund considered as a lump sum of money may be.

MR. BENNETT: Our submission is that 8 goes further than merely dealing with a fund and it is submitted that it completely cuts out from the effect of the validation the rights of the parties to this action and that those rights rely and depend entirely upon the Act as not validated and as containing part 8 which is excepted in this validation.

DIXON, C.J.: Is it excepted? Go down to the words of 8. What is excepted is contained in those words. They do not seem to me to do anything except as to the proceeding; not the liability.

MR. BENNETT: "The rights inter se." "Nothing in this Act shall prejudice or affect the rights inter se of the parties in the proceedings." The it goes on, after naming the proceedings,"...including any right of appeal in respect of the judgment and such proceedings - - -"

DIXON, C.J.: You can go past that part and then it says "The rights inter se of the parties.....(reads).....in relation to such proceedings."

MR. BENNETT: Including any appeal, it is submitted.

DIXON, C.J.: Any right of appeal; not including any appeal. The State Legislature is not undertaking to regulate the appeal here; it is the right of appeal here in respect of the judgment - in respect of the judgment in such proceedings given on 17th May. That means that nothing shall prejudice or affect the rights inter se of the parties in the proceedings which are identified in relation to the sum of £73,000 paid into Court in respect of such proceedings." That language seems to me to identify a sum, not a liability.

MR. BENNETT: The word "and" may be the key to that situation. It is not the rights of the parties in relation to the sum of £73,000; it is the rights of the parties in the proceedings - and further down something additional, "...and in relation to the sum of £73,000 paid into Court in respect of such proceedings."

DIXON, C.J.: "Paid into Court" are the words identifying the money.

WINDEYER, J.: It is not the rights of the parties in the proceedings; it is the rights of the parties in relation to the proceedings.

MR. BENNETT: And the rights of the parties in the proceedings, I submit; at the top, "Nothing in this Act shall prejudice and effect the rights inter se of the parties in the proceedings in the order to show cause No. so and so - - - "

TAYLOR, J.: It does not touch the rights of the parties in relation to any other proceedings.

WINDEYER, J.: "In relation to such proceedings."

MR. BENNETT: It is submitted it is not in relation to the proceedings; it is the

rights of these parties - - -

WINDEYER, J.: In those proceedings in relation to the proceedings, is what it says.

DIXON, C.J.: "The parties in the proceedings" only means identifying the parties; the rights are in relation to the proceedings.

MR. BENNETT: Yes, including all rights to submit whether there should be judgment against one or the other, and including necessarily, it is submitted, a decision on those questions on the basis of the legislation prior to this Validation Act, because "Nothing in this Act shall prejudice the rights of the parties in these proceedings in relation to the proceedings, including appeal."

KITTO, J.: The contrast is between the rights which were the subject of discussion in the proceedings and the rights in relation to the proceedings themselves.

MR. BENNETT: I submit there is no real distinction in those rights, the rights in the proceedings or in relation to the proceedings, which are to be read apart from this Act, because "Nothing in this Act is to affect them" must be a saving provision, I submit, in relation to this particular group of respondents and the rights in the proceedings read apart from the Act must involve a decision on the basis whether the other Act which has never been repealed - that is the Act as it stood prior to validation - gives them any rights or wrongs.

TAYLOR, J.: If you were unsuccessful in these proceedings, the Commissioner could issue another notice to show cause, could'nt he? He could cancel the licence, and indeed could sue under section 35 (2) of the Act as validated?

MR. BENNETT: Yes, if the same situation still applies.

TAYLOR, J.: In relation to £73,000.

MR. BENNETT: Non-payment of fees and no returns.

TAYLOR, J.: Why not in relation to the sum of £73,000?

MR. BENNETT: I submit not. The rights in relation to that depend on the old law.

TAYLOR, J.: There is no saving provision in relation to the rights of the parties in relation to any other proceedings.

MR. BENNETT: No, but if the rights are in those proceedings determined - the rights between these parties - - -

TAYLOR, J.: But the rights of the parties were determined by the Supreme Court on the basis that the 1960 Act was invalid.

MR. BENNETT: Yes.

TAYLOR, J.: The relevant sections are now valid and always were valid. There has been no determination of that question and all that issaved under (viii) is the rights of the parties in relation to the existing proceedings. It does not touch the rights of the parties under the Act as validated.

MR. BENNETT: No; that is so.

OWEN, J.: Assume the £73,000 was under an order of the Supreme Court paid out to the applicants for the prohibition, Cobb & Co; that would be an end of those proceedings?

MR. BENNETT: Yes.

OWEN, J.: Well, would there be anything to stop the Commissioner from then instituting proceedings to recover £73,948.12.7. from Cobb & Co?

MR. BENNETT: Yes. I submit that may bring out very clearly what I am submitting to the Court. A payment out would involve a right as preserved by this section and I submit it could not be reopened between the same parties because those rights are expressly to be determined under section

(viii) on the basis of the old Act.

DIXON, C.J.: But that money was paid in under the last part of an order nisi for prohibition made by Mr. Justice - - -

MR. BENNETT: Yes, as a condition of the order nisi.

DIXON, C.J.: We had better look at the order nisi.

MR. BENNETT: The facts in relation to that are dealt with at some length by Mr. Justice Stanley because an application was made to have this money paid out.

OWEN, J.: At p.11.

MR. BENNETT: At pp.11 and 12; and at p.25 his Honour dealt with this subject of the application for payment out. As regards the actual terms of the order nisi, at p.25 he says: "In view of our announced decision and the consequent application.... (reads)....touching that application." He went on: "On 31st October 1961 the prosecutors asserted a claim in writing to the Commissioner for Transport.....", and he deals with the facts; then having set out the proceedings on the notice to show cause as to why the permit should not be suspended, at line 46 on p.26 he said:

> "It being obvious that very large sums of money were involved...(reads) .....at any future time."

MR. BENNETT: (Continuing) He mentions then at p.27 line 14 the matter of some discussion:

> "I certainly proceeded upon the basis that they referred to the final determination of whatever court might give the ultimate determination, dependent upon the exercise of either party's right of appeal."

I mention that because it is submitted that right from the making of

this order, the question of the destination of this money was dependent upon the judgment of this action.

DIXON, C.J.: Page 11 line 40 shows how the money came to be paid to the Court:

> "Upon reading the affidavit.... and the prosecutors by their counsel undertaking to pay into the Court all amounts that would be payable to this date by way of permit fees thereafter ..... by further .....fees.....to abide.....disposition of the sums."

Then, if you look at p.62, there is a further order of the Full Court that the application by prosecutors for all moneys paid into Court by them, "pursuant" .... first day of December .... be reserved."

It is still reserved, I presume.

MR. BENNETT: Yes, Your Honour.

DIXON, C.J.: It goes on, "until 29th May .... for further consideration." That has never been determined?

MR. BENNETT: No. But when the reasons were given - - -

DIXON, C.J.: Supposing we dismissed your appeal and an order was made out paying that sum of money out, under Act 24, you could immediately recover the sum of money as a debt, could you not?

MR. BENNETT: We would have thought not. As a matter of fact, I am sure my learned friend Mr. Matthews would be very disturbed - - - -

DIXON, C.J.: Mr. Matthews might be disturbed by deeper emotions.

MR. BENNETT: Our submission is that under the Validation Act rights were preserved in regard to these proceedings and the moneys deposited in relation to them; and that being so, it is a question of those rights one way or the other under the Act before validation. That being so, it is submitted

there is a live and contentious question of a serious and substantial nature.

WINDEYER, J.: I cannot follow why it was said to the Chief Justice that if the fund in Court was paid out to Mr. Matthew's client, why do you say there would be anything to prevent Mr. Matthews being called upon to pay a similar amount as a debt to the Crown?

MR. BENNETT: Our submission is that the similar amount would be the same debt, and that the judgment itself and the payment out involves a determination on the basis of the existing decision of the Full Court.

WINDEYER, J.: The Validating Act says that the old Act always was good.

MR. BENNETT: Yes, with this exception, we submit, as stated under s.8 - - - -

WINDEYER, J.: With the exception of any rights in relation to the fund in Court?

MR. BENNETT: It is hard, it is submitted, to see the distinction between the fund in Court and the right to the fund in Court.

OWEN, J.: There is no distinction.

WINDEYER, J.: It is no right, it is a liability to pay a debt to the Crown.

MR. BENNETT: A right to the fund in Court, we submit, is a matter which is completely determined by the rights inter se of the parties in the proceedings.

OWEN, J.: If a claim were made, another action for £73,000 in respect of licence fees, what would be the defence?

MR. BENNETT: If it were the same amount?

OWEN, J.: I am asking if the £73,948.12.7. being licence fees for the period A to B, what the defence be?

MR. BENNETT: The defence, I suggest, would be that if the period A to B identified it

as this money paid into this Court, then the rights can only be determined without reference to validation.

OWEN, J.: Not the rights in these proceedings but the rights in those proceedings.

TAYLOR, J.: The rights of parties in the other proceedings were concerned with the obligation, if any, of Cobb & Co. to pay these fees.

MR. BENNETT: Yes.

TAYLOR, J.: The Full Court said they had no liability to pay these fees, because the Act was invalid. Rights of the parties in those proceedings have no relation to the rights of parties in fresh proceedings where the question would be whether there would be determination upon Cobb & Co. to pay these fees under the Validating Act.

MR. BENNETT: Unless it could be argued - and we submit it could be very substantially argued - that the matter was res judicata.

TAYLOR, J.: If it had been meant to make the whole of Cobb & Co's liability to stand as it was before the Validating Act was passed, it would have been a very simple matter to say so. On the contrary, this very precise language has been used to indicate that was not so.

MR. BENNETT: It is submitted there are two ways of looking at this language.

TAYLOR, J.: There are probably several ways.

MR. BENNETT: The obvious intention is to preserve the rights in relation to this action, and the matter pertaining to it in relation to the £73,000.

TAYLOR, J.: I would not have thought it was obvious. If that is the intention it has been very well concealed.

MR. BENNETT; However, these are our submissions, but, of course, this is a matter that concerns, I submit, Mr. Matthews' client

equally with mine and his clients equally with mine; and it is put very respectfully to the Court that when the rights of the parties are preserved - as this section, we submit, does - then these rights are preserved in relation to the Act as not validated, and that there depends upon these rights into Court of a large sum of money, and that that Validation Act does not speak at all as to that money. Those are our submissions.

DIXON, C.J.: If we are to get this discussion, so to speak, within the lines that govern this jurisdiction, the first thing to realise in your favour on this subject is that we have determined a long time ago that under s.73 of the Constitution our jurisdiction is not the same as the Court of Appeal in England but is to be exercised to determine what order ought to have been made by the court below at the time of that court's decision. We would be governed by the state of the law at the time of the appeal. But if it were not for S.8. whatever we decided would be overruled by the Transport Laws Validation Act 1962 and it would not matter what we decided, the rights of the parties would be determined by that Act as a subsequent Act; and our decision of what their rights were at the time the Supreme Court gave its decision would not matter at all or carry or have any legal effect. That would be the situation if it were not for S.8.

If S.8 would give full effect to our decision, well and good: that is, our decision goes under special leave to appeal and there would not be much objection to hearing the appeal. You have no right of appeal except what the order for special leave gave you. It was given because there seemed to be a certain amount of doubt as to where the transport laws of this State stood. That doubt has been completely removed except as far as S.8. reserves this case, and unless S.8 takes this case completely out of the law of Queensland as it stands, it would be governed by the Act, whatever we say.

MR. BENNETT: Yes, your Honour.

DIXON, C.J.: That reduces it to this simple proposition. I myself should not have thought we should leave you with special leave to appeal, it being entirely special leave under that footing, unless S.8. would give effect to whatever we said was the law at the time of the decision in the Supreme Court. At the moment I cannot see that S.8. does that. It seems to me to except the parties to the proceedings, so as not to trespass on Federal jurisdiction. But I cannot see that it does except the parties from the general operation of the Transport Validation Act; and that is because, first af all, the earlier words seemed to speak for themselves, then, in relation to the sum of £73,000 paid into Court, it seems to identify the sum of money, and in effect, say, "As to that specific sum of money in the Supreme Court, all right, the Act does not touch that specific sum of money; but as to the obligations to discharge which it could be appropriated, does it touch that?" Because paying that sum of money into Court does not discharge the obligation of a debt, it is still a debt. The money was paid in because the judge thought the debt might not be paid unless the money was imprisoned.

MR. BENNETT: Your Honour has put that to me very clearly, and perhaps, I may be permitted to say a few further words in reply?

DIXON, C.J.: Yes.

MR. BENNETT: It gets back, we submit, to the words in the second line, "Nothing in this Act shall prejudice or affect" and the words in question "the rights inter se of the parties." Then in respect of two things: in relation to such proceedings and in relation to money. It is submitted that that does preserve the rights of these parties entirely as to those two things; and these rights being preserved, it is submitted, that there is at stake, firstly, the general question of rights in relation to prohibition, and, secondly, the general question of rights in relation to this

money, that these are matters on which the Full Court has pronounced judgment, a judgment which adversely affects the appellant, not only as to his rights in regard to these parties as at the due date on which this prohibition was passed, but also as to this money particularly specified.

That being the position, it is submitted they are live questions that they go to the whole rights of the parties in relation to money, among other things; and it is submitted therefore that the question is one that can, and, we submit, should be determined by this Court.

DIXON, C.J.: Thank you, Mr. Bennett.

DIXON, C.J.: Do you wish to say anything about this, Mr. Matthews?

MR. MATTHEWS: May it please your Honour, those of your Honours who sat in Sydney when special leave was given, will recall my plea that the application should not be heard until we saw the terms of the validating Act which was then proposed. So far as the construction of the Validating Act is concerned, I would, of course, abide the order of the Court, but if that construction is as indicated by your Honour, the Chief Justice, then my original submission to the Court in Sydney applies, that we have, on the face of it, an academic question which should not be litigated further in the Court, and that special leave should be rescinded.

DIXON, C.J.: I presume that your client or clients paid the sum of £73,948.12.7. into the Supreme Court in pursuance of the order nisi?

MR. MATTHEWS: Yes, your Honour.

DIXON, C.J.: It is true, is it not, that the reservation in the order absolute has not been acted upon - that is to say, the Supreme Court has given no decision?

MR. MATTHEWS: That is correct.

MR. BENNETT: If I may interpose, they gave a decision later, when they gave their reasons. It appears at the top of page 28. The decision there was to further reserve to the parties liberty to apply in the future, as they may be advised.

MR. MATTHEWS: The decision was to give a further decision.

WINDEYER, J.: But no decision has yet been given.

MR. MATTHEWS: No.

DIXON, C.J.: As I read sec. 8, there is a sum of money in Court, which is a fund - The Clerk of Courts Fund, and part of the appropriation account - and it would remain with the Supreme Court to make an order as to what is to happen to that fund. Under its present decision, if undisturbed, it would look probable that it would order that that sum be paid back to Cobb & Company.

As I construe sec. 8, it does not except out of the general validation effected by this Act, the liability of Cobb & Company to pay that sum of money to the Commissioner, Kropp, and it is on that footing that I have to say that any decision we gave would not affect that liability. It would, however, pay the actual money back into the hands of your client and, of course, no one knows what may happen to the actual fund. But that is the view that I am taking.

MR. MATTHEWS: Assuming that that is the view of the other members of the Court, then, in my submission, special leave should be rescinded.

DIXON, C.J.: Mr. Bennett, there is one minor matter which appears to me, but to which you have not adverted. Having regard to sec. 2B of the Act No. 24, did I take it correctly that the validating effect of this Act leaves secs. 56 and 57 out altogether, so that people actually

engaged in shipping services or the like, if there be any, are not affected by the validating Act? If we viewed the provisions or the decisions of the Supreme Court that the Act containing these sections cannot be valid, we would be really considering a matter which affects them, and they are not parties to the proceedings. It would be an isolated question, would it not? It is a very minor consideration which Mr. Justice Taylor mentioned to me, and I though I would mention it to you.

MR. BENNETT: In fact, no persons are so affected. The sections have never been operated. It is a discretion which has never been used. But the point we put is that they do affect the rights of parties in this matter.

TAYLOR, J.: I rather thought, from what you said, there were other provisions, such as the Harbours Act.

MR. BENNETT: There are other provisions.

TAYLOR, J.: If, in any way we said it had an effect on them that would be said in the absence of any argument by any party interested in the question.

MR. BENNETT: The present respondents are interested in the question.

TAYLOR, J.: Not in the Harbours Act.

MR. BENNETT: No, but they are in the general question.

TAYLOR, J.: What I had in mind was that sec. 8 of the 1962 Act had a meaning which the Chief Justice indicated, that is to say, that Cobb & Company's liabilities were created by the validating Act. Cobb & Company are therefore not interested to maintain that the provisions of the 1962 Act are valid or invalid or that any provision in the Harbours Act is invalid, so that that argument would proceed on an isolated question, in the absence of any interested party.

RECORD

MR. BENNETT: Of course, decisions always have indirect effects.

TAYLOR, J.: But the decision would be made without hearing any argument from any party interested.

MR. BENNETT: There are no parties now interested, so it is a completely general question.

TAYLOR, J.: That would make the question quite academic, if there are no other interested parties. 10

JUDGMENT DELIVERED AT 11.45 A.M. THE COURT PROCEEDED WITH ANOTHER MATTER

Nos. 10 & 11 of 1964

IN THE PRIVY COUNCIL

ON APPEAL FROM THE FULL COURT OF THE SUPREME COURT OF QUEENSLAND

B E T W E E N :-

WESTERN TRANSPORT PTY. LTD.	Appellant (Plaintiff)
- and -	
NORMAN EGGERT KROPP	Respondent (Defendant)
- and -	
MARANOA TRANSPORT PTY. LTD.	Appellant (Plaintiff)
- and -	
NORMAN EGGERT KROPP	Respondent (Defendant)

(Consolidated Appeals)

C A S E

- of -

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