~~P.C.~~
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Judgment
46, 1964

IN THE PRIVY COUNCIL No. 10 and 11 of 1964

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 B E T W E E N :

MARANOA TRANSPORT PTY. LTD. — Appellant (Plaintiff)

- and -

NORMAN EGGERT KROPP — Respondent (Defendant)

(CONSOLIDATED)

CASE FOR THE RESPONDENT

RECORD

A. INTRODUCTORY:

1. The Respondent is the nominal defendant for and on behalf of the Government of the State of Queensland in Actions brought by the Appellants for the recovery of license fees under "The State Transport Facilities Acts, 1946 to 1959" (hereinafter referred to as "the Facilities Acts") and permit fees under "The State Transport Act of 1960" (hereinafter referred to as "the Act

of 1960") and which Acts together are hereinafter referred to as "the Transport Acts" or "the Transport Legislation".

2. The appeals in these matters, which have been consolidated, are brought by leave granted by the
Appeal No.10 p.6 Full Court of the Supreme Court of Queensland on
Appeal No.11 p.5 the 29th November 1963 under the provisions of the Rules regulating Appeals from Queensland set out in the Imperial Order in Council of the 18th October 1909. The appeals are from the judgment of that Court pronounced on demurrer in each
Appeal No.10 p.5 action on the 29th November 1963. In each case,
Appeal No.11 p.4 the demurrer of the respondent (the defendant) having been allowed, the Court adjudged that each respective appellant (each of the plaintiffs) recover nothing against the respondent and that the respondent recover against each of the appellants his costs of the particular action, to be taxed.

3. The respective claims of the appellants are set out in the Statements of Claim specially endorsed on each respective Writ of Summons. In
Appeal No.10 p.1 action No. 890 of 1963 Western Transport Pty. Ltd. claimed the recovery of payments in respect of a license purporting to have been issued under Part IV of the Facilities Acts and of further payments in respect of goods permits purporting to have been issued under the Act of 1960. In
Appeal No.11 p.1 action No. 891 of 1963 Maranoa Transport Pty. Ltd. claimed the recovery of payments in respect of a license purporting to have been issued under the aforesaid Part IV. In each case the appellant claimed that the particular Transport Legislation has never had any lawful operation, that the payments were unlawfully demanded under colour of such Legislation, and were made by them involuntarily and under compulsion.

Appeal No.10 p.3 4. The respondent demurred to each of the
Appeal No.11 p.3 Statements of Claim on the ground that it was bad in law and did not show any cause of action in that the particular Transport Acts or Act, alternatively those Acts or that Act so far as they or it were material in the circumstances were good and valid enactments and in operation at the relevant times; alternatively that they were validated and made operative, other than sections 49, 50, 51 and, so far as it relates to carriage by water, section 55 of the Facilities Acts and other than Sections 56, 57, and, so far as it relates to carriage by water, section 60 of the

Act of 1960, by "The Transport Laws Validation Act of 1962"(hereinafter referred to as "the Validation Act").

5. As appears from the letters contained in Exhibit 1 placed before the Full Court by the parties, the appellants conceded that their pleadings raised no question other than that the Transport Acts have never had any lawful operation.

Appeal No.10 p.8
Appeal No.11 p.7

6. The Facilities Act as originally enacted was assented to by the Governor of the State of Queensland on behalf of His Majesty the King on the 24th December 1946, and was proclaimed to come into operation on the 8th April, 1947. The Act of 1960 was assented to on the 30th December 1960 by the Governor of the State of Queensland on behalf of Her Majesty the Queen, and was proclaimed to come into operation on the 27th February, 1961. Neither Act was reserved for the signification of His or Her Majesty's pleasure.

7. The questions of law in these appeals arise out of the presence in the Facilities Acts (in Part V) and in the Act of 1960 (in Part VIII) of the aforesaid groups of sections, respectively. The argument is that these provisions regulate the coasting trade and their presence vitiates the whole of the Act because of a failure to provide for reservation for Her Majesty's pleasure as required by Section 736 of The Merchant Shipping Act, 1894 (Imp.) (hereinafter referred to as "Section 736 (M.S.A.)"). Furthermore the argument proceeds, the Validation Act did not achieve its purpose and the Transport Acts remain either invalid or inoperative.

8. On the other hand, the respondent contends that the Transport Legislation was at all material times valid and operative (quite apart from validation); that in any case the provisions in each Act which are said to offend are severable, because (assuming that the conditions of section 736 (M.S.A.) apply) the condition in paragraph (a) of that section as to the inclusion in the Act concerned of a suspending clause is a condition of the exercise of one particular power (regulating "the coasting trade") and, on the assumption made for the purpose of the argument, its omission makes the attempted exercise of that power bad, but does not vitiate the whole legislative process on entirely different and permitted

subjects; that it appears that the legislation (containing such clause) is to operate as a legislative act by the fact that suspension is to take place by virtue of a provision of the Act itself.

Moreover, the respondent contends that the Validation Act has achieved its object, and that, whatever the previous position, by its enactment the Transport Legislation (inter alia) as at all material times became effective and operative (other than the exoepted sections mentioned in paragraph 4 of this Case).

HISTORY OF LITIGATION

9. The questions in issue have been raised in several Australian cases and the course that litigation has taken is shown by the following summary.

10. The first of these cases was The Queen v. The Commissioner for Transport Ex parte Cobb and Co. Limited 1963 Qd, R. 547 (hereinafter referred to as "the Cobb and Co. Case") in which judgment was given by the Full Court of The Supreme Court of Queensland on 29th May 1962. That case concerned the validity of the Act of 1960, which had replaced the Facilities Acts (though it gave continuity to certain effects of those Acts).

11. Both Acts were similar, the Facilities Acts in containing Part V and the Act of 1960 in containing Part VIII, which Parts included provisions pertaining to carriage upon any of the inland or coastal waters of Queensland, which were expressly stated to be inapplicable to any vessel navigated outside such waters.

The wording of Section 56 of the Act of 1960 is as follows -

> "(1) The Commissioner may from time to time prohibit the carriage of passengers, or goods, or both passengers and goods by water upon any of the inland or coastal waters of this State, or partly upon any such inland and partly upon any such coastal waters, except under and in accordance with the terms and conditions of a license under this Part.

"Notice of such prohibition shall be published in the Gazette and such notice shall specify the waters to which the prohibition relates, either by reference to places or in any other manner sufficiently identifying such waters.

As respects goods any such prohibition may relate to any class or classes of goods and, in that event the notice of the prohibition published in the Gazette shall also specify such class or classes of goods.

(2) The provisions of this Part shall not apply to or in respect of any vessel which while carrying passengers, or goods, or both passengers and goods from one place to another within this State is navigated outside the coastal waters of this State.

(3) Any prohibition imposed under the provisions of the repealed Acts corresponding to this section, and in force at the commencement of this Act, shall be deemed imposed under this section and shall continue in force accordingly. "

Section 49 of the Facilities Acts is similar except that it adds the words "of this Act" after the word "Part" where it appears and except that there is no subsection (3).

12. The Full Court, in the Cobb & Co. Case, held that the Act of 1960 was invalid by reason of its failure to comply with Section 736 (M.S.A.).

13. The respondent who was also the respondent in the Cobb and Co. Case, under his official title "The Commissioner For Transport" by motion on notice on the 6th June 1962 sought and obtained from the Full Bench of the High Court of Australia special leave to appeal against the judgment of the Full Court of the Supreme Court.

14. On the appeal coming on for hearing before five Justices of the High Court on the 7th September 1962 (reported sub. nom. Kropp v. Cobb and Co. Limited 36 A.L.J.R. 205), the Validation Act having been assented to on the 8th June 1962, members of the High Court raised the question whether the appeal had been rendered academic by the enactment of the Validation Act. After

hearing argument in which counsel for the then appellant (the present respondent) submitted that validation was effective and the Act of 1960 operative but that the Validation Act kept the litigation alive by preserving the rights of the parties, and in which counsel for the then respondent said his client was in the hands of the Court, the High Court rescinded the special leave to appeal.

In the course of his judgment delivered on behalf of the Court the Chief Justice of Australia (Sir Owen Dixon), among other things, said (36 A.L.J.R. at p.205) -

> " Act No. 24 of 1962, the validating Act, was assented to on 8th June 1962, after the granting of special leave. Notwithstanding the decision of the Supreme Court, from which special leave to appeal was granted, that 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 s. 8 of the Act, operates upon the rights of the parties in the present case."

He further remarked (at p. 206) -

> " I, speaking individually, would like to add for myself that, having read the judgments of the Supreme Court, I feel, perhaps, that more attention, if the point ever arose on a future occasion, should be given to the question whether s. 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 s. 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 1861 which confirmed that, the power already existed in Queensland to deal with the inland coastal waters concerned. But

"that it is my own suggestion and has not been argued. "

15. The next case in point was that of Madsen v. Western Interstate Pty. Limited Ex parte the latter (1963 Qd. R. 434) (hereinafter referred to as "the Western Interstate Case") which was heard by the Full Court of The Supreme Court of Queensland on the 21st and 22nd February 1963 but in which judgment was not given until the 9th July 1963. By that date another relevant case had been heard and determined by the High Court. The Queensland case came, on appeal to the Full Court, by Order to Review the conviction of the then appellant under the Act of 1960. The appeal, which was dismissed unanimously, raised the question of the effectiveness of the Validation Act. Counsel for the then respondent (the prosecutor before the Stipendiary Magistrate) formally submitted (conceding that that Court was bound by its own previous decision in the Cobb and Co. Case) that the Facilities Acts were valid and operative without validation, and submitted that in any case the Validation Act effectively validated and brought into operation retrospectively, the Facilities Acts (less the excepted sections). The Full Court decided that the Validation Act achieved this result.

16. Philp A.C.J. in the course of his judgment in the Western Interstate Case (1963 Qd. R. at pp. 444-5) said,

> " As to the first ground - It follows from the decision of this Court in The Queen v. The Commissioner for Transport, ex parte Cobb & Co. Limited and others (unreported) 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 s.23 of the Facilities Act legal force so that it was part of the law of Queensland in operation as at 9th August, 1950."

He added (at p.448) -

> " Since writing this judgment some time ago the High Court has adhered to its view expressed in Kropp v. Cobb & Co. Ltd. (supra) as to the effect of the Validating Act - see Bolton and another v. Madsen. Turner v. Madsen (1963 37 A.L.J.R. 35).

17. In the same case Wanstall J. said (at p.450) -

> " I will not set out in detail the respondent's counter submissions on this point, because I agree with his contention that the Validation Act did effectively validate and bring the Facilities Act into operation retrospectively. There is abundant evidence throughout the provisions of the Validation Act that it was Parliament's clear intention to make the scheduled Acts operate in truncated form, not only to validate their enactment. I think that this intention was effectuated by the words of s. 3, by which every Act set out in the Schedule, other than the excepted sections, is not only validated but 'declared and deemed to be and from (its) enactment to have been a good and valid law insofar as it may be necessary to ensure the . . . . . operation thereof'."

Hart J. agreed that validity had been given to the operation of the Act: (1963 Qd. R. at p.472).

18. The High Court appeals referred to by the members of the Full Court in the Western Interstate Case, which were heard after the hearing in that case but decided before the judgment of the Queensland Court was given, were the cases of Bolton v. Madsen and Turner v. Madsen 1963 37 A.L.J.R. 35 (hereinafter referred to as "Bolton's case") which were appeals (heard together) from convictions under the Act of 1960. Besides raising a question under the Constitution of the Commonwealth of Australia, Counsel for each appellant argued that the Validation Act was ineffective to bring about the operation of the Act of 1960. Counsel for the respondent in the appeals was not called upon on this point. In delivering the reasons of the six justices who heard the case, Dixon C.J. said, (1963 37 A.L.J.R. at pp.37-38) -

> " 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. "

THE RESPONDENT'S CONTENTION (in general terms)

19. The respondent respectfully contends that the comment of Dixon C.J. (in the appeal in the Cobb and Co. Case) concerning the decision of the Queensland Court in that case, is sound; that the Transport Acts were good and operative laws before the passing of the Validation Act; and that the nine judges who have declared (unanimously) in favour of effective validation and operation of the Act of 1960, or of the Facilities Acts which stand in every way at present material in the same position, are correct.

B. THE ORIGINAL VALIDITY OF THE TRANSPORT LEGISLATION.

20. The respondent contends that the Transport Acts are and were valid and operative, that is originally and quite apart from any effect of the Validation Act, for reasons summarised in paragraphs 21 and 22.

21. Section 736 (M.S.A.) provides as follows:-

"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."

22. The Transport Acts, it is contended, are valid and operative, on the following grounds :-

(a) That section 736 (M.S.A.) is an enabling and amplifying provision granting to a British possession a power or a wider power than it possessed as to the "coasting trade" (irrespective of mere territorial limit); that the section was not destructive of Queensland powers already granted to it by its Constitution and which extend to its own waters or at least to carriage wholly within those waters;

(b) That upon the establishment of the Commonwealth of Australia, each Australian colony ceased to be the "British possession" for the purpose of Section 736 (M.S.A.) and the Commonwealth alone satisfied the definition of "British possession" (Interpretation Act 1889 (Imp.), section 18); that sometimes a State authority may be described by reference to the British possession, Australia, e.g. a Court in a British possession, but section 736 (M.S.A.) speaks specifically of "The Legislature" of what by definition is Australia; that it follows that section 736 (M.S.A.) does not refer to the State legislatures, and, therefore, neither amplifies nor restricts the powers of Queensland over its own territorial waters;

(c) That, if section 736 (M.S.A.) is applicable, then it merely lays down conditions for the exercise of one power, namely to regulate the coasting trade and not any general legislative process; the Act itself is to provide for its

own suspension by its own force; that, on the hypothesis adopted, any attempt to exercise the particular power without complying with the conditions of section 736 (M.S.A.) is a bad exercise of that power, but the enactment stands as a legislative Act concerning other subject matters and the bad attempt is severable and should be ignored according to the declared intention of the Queensland Parliament (The Facilities Acts, section 3; the Act of 1960, Section 2; and the Acts Interpretation Act of 1954, Section 4);

(d) That paragraph (a) of section 736 (M.S.A.) requires the presence of a provision by which, for the effective exercise of the power as to the coasting trade, the Act suspends itself until Her Majesty's pleasure thereon has been publicly signified; and that such "double approval" for particular purposes is not uncommon in British colonial history. That if, on the other hand, Section 736 (M.S.A.) is to be read as a provision for the reservation of Bills for Her Majesty's assent (the respondent however contending otherwise) then its requirements have been superseded by the Australian States Constitution Act, 1907 (Imp.), which is a Code on the subject of the reservation of Bills passed by the legislature of any Australian State and which requires no reservation in the circumstances relating to the Transport Acts.

23. These contentions are expanded in the following paragraphs, 24 to 55 (inclusive).

GROUND (a): That section 736 (M.S.A.) is enabling and not destructive of Queensland territorial power.

24. The majority of the judges of the Full Court of the Supreme Court of Queensland appear to have given little, if any, attention to this ground (a fact to which Dixon C.J. refers, as mentioned in paragraph 14 of this Case). It was ground 1 in the respondent's argument (1963 Qd. R. 547 at pp. 551 and 557).

25. The respondent contends that Queensland power in territorial waters exists apart from section 736 (M.S.A.) and by virtue of the Constitution Act of 1867, Section 2 of which reads (as amended) -

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

26. The power so conferred is plenary power (Powell v. Apollo Candle Co. Ltd. 1885 10 App. Cas. 282 J.C. at pp.289-290, McCawley v. The King 1920 A.C. 691 J.C. at p.712) in matters pertaining to Queensland; and Queensland, it is contended, includes the territorial waters of that State.

27. In Croft v. Dunphy 1933 A.C. 156 J.C. the Privy Council dealt (irrespective of the Statute of Westminster) with the validity of hovering legislation (which extended its effect beyond the "three miles" limit) of the Canadian Parliament on which power had been conferred by the British North America Act, 1867 section 91 "to make laws for the Peace, Order and good Government of Canada". Lord Macmillan in giving the reasons of the Judicial Committee (at p. 163) said -

> "Once it is found that a particular topic of legislation is among those upon which the Dominion Parliament may competently legislate as being for the peace, order and good government of Canada or as being one of the specific subjects enumerated in s. 91 of the British North America Act, their Lordships see no reason to restrict the permitted scope of such legislation by any other consideration than is applicable to the legislation of a fully Sovereign State. "

28. The Transport Acts, by their respective Parts V and VIII do not attempt to go as far as this Canadian legislation but confine themselves strictly to possible operation in Queensland waters legislation, it is contended, falling distinctly within the grant of power in the Queensland Constitution (Constitution Act of 1867) which was enacted under the sanction of Imperial legislation (The New South Wales Constitution Act of 1855, 18 and 19 Vic. c. 54 section 7, Letters

Patent Constituting The Colony of Queensland 6th June 1859; the Order in Council of the 6th June 1859 and The Australian Colonies Act, 1861 all collected in Volume 2 of The Public Acts of Queensland Reprint 1828 - 1936.

29. It is not necessary for present purposes to prove the extent of Queensland waters, but that such exist is recognised by the Constitution of the Commonwealth (Section 51(x)). Reference also is made to the Queensland cases of Chapman and Co. Ltd. v. Rose 1914 St. R. Qd. 302 and D. v. Commissioner of Taxes 1941 St. R. Qd. 218 F.C., and to Secretary of State for India v. Chelipani 1916 L.R. 43 Ind. App. 192, and cases therein cited.

30. Section 736 (M.S.A.) is in the form of a grant not a derogation or detraction from power. It gave, it did not take away. The grant was not made by reference to territorial waters but in respect of regulating the coasting trade which may well operate beyond the three miles limit, while the Queensland provisions in question confine themselves to power otherwise granted by the Constitution, and subject themselves to overriding provisions which ensure that they shall be read down and operate only within permissible power of the Queensland Parliament.

GROUND (b): In any event since Federation Section 736 (M.S.A.) speaks not of the State but of the Commonwealth Parliament.

31. Section 18 of the Interpretation Act, 1889 (Imp.) contains the following applicable definitions (unless the contrary intention appears) -

"(2) The expression 'British possession' shall mean any part of Her Majesty's dominions exclusive of the United Kingdom, and where parts of such dominions are under both a central and a local legislature, all parts under the central legislature shall, for the purposes of this definition, be deemed to be one British possession"

and

"(7) The expression 'colonial legislature' and the expression 'legislature' when

> used with reference to a British possession, shall respectively mean the authority other than the Imperial Parliament or Her Majesty the Queen in Council, competent to make laws for a British possession."

32. It is contended that these definitions are applicable to section 736 (M.S.A.). Indeed, the Merchant Shipping Act, 1894 (Imp.) omitted any definition of these terms, (it is contended because of the passing of the Interpretation Act, 1889 (Imp.)) though the Merchant Shipping (Colonial) Act 1869 (Imp.) had contained a definition of the term "British possession" which included the provision

> ".....and all territories and places under one legislature as hereinafter defined are deemed to be one British possession for the purposes of this Act:"

and the further provision -

> "The term 'legislature' includes any person or persons who exercise legislative authority in the British possession, and where there are local legislatures as well as a central legislature, means the central legislature only."

33. Australia, it is contended, is the geographical unit referred to in section 736 (M.S.A.) and that section deals with the Parliament of the geographical unit competent to make laws for the whole unit and not with any legislature within the area. The Commonwealth Parliament, alone of the Australian legislatures, is competent to make laws for the whole geographical area. The section does not confer power on the legislature of a part (the State) to regulate the coasting trade of the whole (Australia). On the other hand the section does not speak at all in restriction of other existing powers of the State.

Federation in Australia led to a change of status of the colonies, and a loss of qualification in each of them to stand as the unit known as a British possession. The Interpretation Act "lies in wait, as it were" (cf. per Lord Robertson in Coster v. Headland 1906 A.C. 286 at p.289 cited by Isaacs J. in the case next

mentioned at p.432) and fits the facts as they arise.

34. The same question has arisen, in respect of a similar definition of "British possession", under the Fugitive Offenders Act, 1881 (Imp.) and, in respect of the definition in the Interpretation Act, under the Colonial Courts of Admiralty Act, 1890 (Imp.) and it is contended that the above propositions are borne out by Australian and New Zealand authorities, including John Sharp and Sons Ltd. v. The Katherine Mackall 1925 34 C.L.R. 420 q.v. at pp.425-6; McArthur v. Williams, 1936 55 C.L.R. 324 q.v. at pp.352-4, 358-361, Godwin v. Walker, 1938 N.Z.L.R. 712 C.A. q.v. at p.730, and McIlwraith McEacharn Ltd. v. The Shell Co. of Australia Ltd., 1945 70 C.L.R. 175 q.v. at pp.192, 202-5.

These cases show that any court in Australia may be a court in a British possession (Australia); indeed, that the law of Australia includes the law of all its component parts. But, it is contended, equally they show that the Governor of the possession is the Governor General of Australia and that the Legislature of the geographical unit is the Commonwealth Parliament.

35. In McArthur v. Williams (1936 55 C.L.R. 324) the High Court decided that, for the purposes of the Fugitive Offenders Act, 1881 (Imp.), Australia is one British possession. Dixon J. (as he then was), Evatt and McTiernan JJ. in a joint judgment (at p. 353) remarked, "There are particular functions assigned by the Fugitive Offenders Act to the Governor of the whole possession, a description which the Governor-General alone fulfils."

At pp.360-1 they said:-

> "The Constitution brought into existence a new unit of jurisdiction composed of old units and, according to the very terms in which the Fugitive Offenders Act 1881 is expressed, it applied to the new Unit, the Commonwealth. The Imperial statute was part of the law of a colony only because the colony was a British possession or single part of the King's dominions. When it ceased to be so, the Imperial statute

ceased to be part of the law of the State as such. Sec. 108 is expressed to be 'subject to this Constitution' and it is the Constitution which wrought the change in the unit of jurisdiction."

36. The same thought as that expressed in the joint judgment of Dixon, Evatt and McTiernan JJ. is stated by Sir Michael Myers C.J. in Godwin v. Walker (1938 N.Z.L.R. 712 at p.730) where he says that he would have thought, apart from authority, seeing that the Commonwealth Parliament would at once become the central legislature and the State Parliaments local legislatures, that the Commonwealth of Australia would automatically take the place of the separate colonies as a "British possession".

In the same case Kennedy J. at p.741, said:-

"As long as a legislature may be described as a central legislature, the territory under it is to be regarded as one British possession. There is nothing in the statute, so I think, which defines the powers which a central legislature must possess. There is no provision that the bulk of the legislative power, or that legislative power of a particular nature, shall be vested in the central legislature, if it is to be regarded as such. It may indeed be difficult to decide in some cases whether a legislature is central or not, but, if we look at the Commonwealth of Australia Constitution Act, 1900 (Imp.), I think there can be no doubt that, whatever meaning is given to the term, the parliament of the Commonwealth of Australia is a central legislature and that consequently the Commonwealth of Australia is one part of His Majesty's dominions for the purposes of the Fugitive Offenders Act, 1881 (Imp.). What is delimited is a geographical area, a territory or place and not a political entity: cf. Westralian Powell Wood Process Ltd. v. The Crown (1921 2 A.C. 133), at page 139. The terms 'British possession' and 'central legislature' are used in the Extradition Act, 1870 (Imp.) (s.26) which is a cognate statute and by virtue of the Interpretation Act, 1889 (Imp.) s.18(2) the expression 'British possession' has a

similar meaning in every Act passed after the commencement of this Act, unless the contrary intention appears. The High Court in John Sharp and Sons Ltd. v. The Katherine Mackall (1924 34 C.L.R. 420) implied no limitation in this definition of central legislature."

37. In McIlwraith McEacharn Ltd. v. The Shell Co. of Australia Ltd. 1945 70 C.L.R. 175 the High Court was concerned with whether the State of New South Wales or the Commonwealth was the British possession for the purposes of the Colonial Courts of Admiralty Act, 1890 (Imp.). The Court held it was the latter and not the former. Dixon J. (as he then was), whose reasons were adopted by McTiernan and Williams JJ., said (at p.203) that the whole matter appeared to him to depend upon the definition of the expression "British possession" in section 18 of the Imperial Interpretation Act 1889, that the definition in the Fugitive Offenders Act, 1881 (Imp.) was to the same effect, and that once the definition is applied without reservation no difficulty will be found to remain. He stated (at pp.204-5) -

"Australia is one of His Majesty's dominions, parts of which are under both a central and a local legislature. The definition in the Interpretation Act of 'British possession' says that in such a case all parts under the central legislature, that is, in our case, the Commonwealth Parliament, shall, for the purposes of the definition, be deemed to be one British possession. The Commonwealth of Australia is therefore the 'possession', that is the unit of jurisdiction, for the purposes of the Colonial Courts of Admiralty Act 1890. The High Court and the Supreme Courts alike fill the description of courts of law in the British possession, that is in the Commonwealth, having therein original unlimited civil jurisdiction, and there is no reason why they should not as a result all be Colonial Courts of Admiralty."

38. McKelvey v. Meagher 1906 4 C.L.R. might have been thought to be some authority against the propositions stated in this Case, but its reasoning has been "much weakened" and rejected (McArthur v. Williams 1936 55 C.L.R. at p.360; Godwin v. Walker 1938 N.Z.L.R. 712 C.A.; and McIlwraith McEacharn Ltd. v. The Shell Co. of

Australia Ltd. 1945 70 C.L.R. at pp.204 and 205.

39. The error which it is contended found its way into McKelvey v. Meagher was the thought that the legislature referred to in the Fugitive Offenders Act, 1881 (Imp.) must mean a legislature which has power to deal with the particular subject of the Act in question.

It was under the influence of this view that certain shipping cases were decided and which touch upon the question at present under discussion. It is contended that they are not contrary to the view put for the respondent, and, indeed, should be read as subject to the later decisions referred to in paragraphs 34 to 38 (inclusive) of this Case.

40. The earlier shipping cases in the High Court of Australia were concerned mainly with the territorial limits of the Commonwealth, and the effect of Section 5 of the Commonwealth of Australia Constitution Act. One of the principal cases on these questions, namely Merchant Service Guild of Australasia v. Commonwealth Steamship Owners' Association (No. 3) 1920 28 C.L.R. 495 has recently been over-ruled by the High Court itself in The Queen v. Foster, Ex parte Eastern & Australian Steamship Co. Ltd. 1959 103 C.L.R. 256. Again, the case of Newcastle and Hunter River Steamship Co. Ltd. v. The Attorney-General for the Commonwealth 1921 29 C.L.R. 357 contains no reference to the Merchant Shipping Act as a source of power. The Court held that the Navigation Act 1912-1920 of the Commonwealth, and Regulations made thereunder as to the manning of and accommodation of ships, are beyond the powers of the Commonwealth, to the extent that they purport to prescribe rules of conduct to be observed in respect of ships engaged solely in the domestic trade and commerce of a State, and are to that extent invalid.

41. In Spain v. The Union Steamship Co. of New Zealand Ltd. 1923 32 C.L.R. 138, and later proceedings 1923 33 C.L.R. 555, the decisions concerned appeals from a District Court of New South Wales. The minority (Isaacs and Rich JJ.) referred to Section 470 of the Merchant

Shipping Act 1894 (Imp.) as the source of the State's power (though Isaacs J. in a later case makes a critical analysis of the legislation with a different result).

42. In 1924 John Sharp & Sons Ltd. v. The Katherine Mackall (supra) was heard, but, while it decided that the Commonwealth was a British possession, it did not distinctly decide that Australia was the British possession. A similar attitude appears in Hume v. Palmer 1926 38 C.L.R. 441. There it was decided that New South Wales Regulations for Preventing Collisions at Sea, so far as they related to the offence charged, were inconsistent with the Navigation Act 1912-1920 of the Commonwealth. It was further held by Knox C.J., Isaacs, Gavan-Duffy and Starke JJ. that by reason of Section 735 of the Imperial Merchant Shipping Act 1894 and Section 2(2) of the Commonwealth Navigation Act 1912-1920 the Commonwealth legislation was not invalidated by the Colonial Laws Validity Act 1865 on the ground of repugnancy to the Imperial Merchant Shipping Act 1894. Knox C.J. at p.449 applied Section 735 saying "the Commonwealth is a British possession". Isaacs J. explains the position as follows (p.452):

> "Does that legislation conflict with the Merchant Shipping Act? Sec. 735 of that statute, in my opinion, authorized the Commonwealth legislation in question. It prescribes that 'the Legislature of any British possession' &c.; and the Commonwealth is a British possession within the meaning of that term (John Sharp & Sons Ltd. v. The Katherine Mackall (1924) 34 C.L.R. 420. The Imperial Interpretation Act 1889 (52 & 53 Vict. c. 63), by sec. 18, gives a definition of 'British possession' which shows that the term is a geographical expression. The words of sec. 735 of the Merchant Shipping Act referring to 'ships registered in that possession' mean, as applied to the Commonwealth, ships registered within the territory of the Commonwealth of Australia.
>
> Sec. 2 of the Navigation Act prevents the invalidity of the Act for excess of legislative power in one respect from affecting its operation in any other respect."

43. The King v. Turner, Ex parte Marine Board of Hobart 1927 39 C.L.R. 441 concerned a collision in the waters of the River Derwent a short distance outside the course ordinarily used by ships engaged in trade or commerce with other countries or among the States, between two vessels confined in their operations to the Port. It was held by a majority that a Commonwealth Court of Marine Enquiry established under the Navigation Act 1912-1925 had no jurisdiction to enquire into the collision. Knox C.J., Gavan-Duffy, Rich and Starke JJ. thought that the effect of Section 478 of the Merchant Shipping Act 1894 (Imp.) was merely to enable legislatures of British possessions to enlarge the territorial jurisdiction of their Courts, but not otherwise to alter the nature of their powers. They did not consider the question of what was a British possession for the purpose of that Section. Isaacs J., who dissented, considered the Section an independent grant of power, and he went on to consider the meaning of the term "British possession". At p. 432 he referred to Section 18 of the Imperial Interpretation Act 1889 and said -

> "It has most sedulously, as it seems to me, guarded against local confusion and inconsistency of colonial regulation by its definition of 'British Possession'. First, in the Merchant Shipping (Colonial) Act of 1869 (32 Vict. c.11) by sec. 2 'British Possession' is defined for that Act in the terms afterwards adopted in the Interpretation Act of 1889."

At p. 433 he continued -

> "I can see no room for hesitation in those clear words. The word 'part' means a portion of territory. 'Parts of a Dominion' are physical portions of territory comprised in that Dominion, such as the Provinces of Canada and the States of Australia. In each case those parts are under two legislatures, one being local and the other central. The selection of the central legislature is for the sake of simplicity and uniformity, because it represents an entire community for at least any important purposes. Those purposes are immaterial for the new Imperial purpose, which is to be entrusted for a single and complete inquiry and report

> to the single hand of one Dominion, where such exists, and which then forms a subject matter entirely new to whatever Possession it is entrusted."

Australia, he held, was but one Possession.

Higgins J., who also dissented because he held the Constitution Act of 1900 was amply sufficient to justify the enquiry, said he found it unnecessary to deal with the question raised by Isaacs J. (pp.450-1). Powers J., who was with the majority in the result, thought that section 478 authorised the British Dominion, the Commonwealth of Australia, to order, if it thought fit, enquiries into casualties to British ships registered in Australia, but that it had restricted its power by section 2(1) of the Navigation Act.

44. The respondent contends that the reasoning of Isaacs J., which appears more fully in the Reports, is sound; and applicable, also, to section 736 (M.S.A.), and that it is borne out by the later authority of McArthur v. Williams (supra) and McIlwraith McEacharn Ltd. v. The Shell Co. of Australia Ltd. (supra). It follows from an application of the definitions in section 18 of the Interpretation Act, 1889 (Imp.) and the reasoning of the cases referred to that the "British possession" mentioned in section 736 (M.S.A.) is Australia, and the legislature referred to is the central legislature, the Commonwealth Parliament. There is no longer, since federation, any reference to State Parliaments.

This view is not only supported by the words of section 736 (M.S.A.) according to their respective definitions but according to the requirements and probabilities of their context. Thus the subject matter is the coasting trade of "the British possession" and the appropriate legislature given the power to regulate the coasting trade of that possession is the Commonwealth Parliament.

45. The subsequent change by the Statute of Westminster 1931 (Imp.) (adopted as to sections 2, 3, 4, 5 and 6 as from the 3rd September, 1939, by the Statute of Westminster Adoption Act, 1942 (Commonwealth)) cannot and does not alter the construction suggested, though it

leaves Australian legislatures to work out their own authority in the light of their own Constitutional powers as enlarged in the case of the Commonwealth by the Statute.

GROUND (c): That Parts V and VIII of the respective Transport Acts are in any case severable, and the remainders of the Acts stand as valid enactments.

46. (a) It is not to the point to say that section 736 (M.S.A.) requires suspension of the whole Act; for suspension of the whole Act is a condition only of the exercise of one power. Non-compliance with the condition, though compliance with it would relate to the whole, merely strikes at the exercise of the power for which alone it is a condition.

(b) It is not correct to say that suspension is fundamental to the legislative process. Rather is the legislative process to take place and suspension occur by virtue of it.

(c) Hence (assuming the application of the section) the Act stands as an Act but bad as to the one power where the condition for its exercise has not been met.

(d) Again it is not pertinent to suggest that the Governor cannot assent to part of a Bill. The Governor assents to Bills subject to the overriding principle or express provision which eliminates that which is beyond power. Under a Constitution which limits powers, it is not infrequently that the Courts hold that portions of Acts passed by such a limited legislature are ultra vires and severable, though the Governor has in form assented to the whole.

(e) Then it is put that the Transport Acts in failing to comply with section 736 (M.S.A.) are repugnant to Imperial legislation and altogether void and inoperative under section 2 of the Colonial Laws Validity Act, 1865 (Imp.). The answer, it is contended, (on the present assumption) is that the repugnancy (if any) lies only in the attempt to legislate as to the coasting trade without compliance with the condition, and that section 2 of the Colonial Laws Validity Act only avoids the Queensland

legislation "to the extent of such repugnancy".

(f) A further argument against the respondent is that the regulation of the coasting trade is within Queensland power as provided by section 736 (M.S.A.) and that therefore there is no question of separating the bad from the good; but, on the assumption on which the respondent's present contention proceeds, the power under the section is sub modo. It does not exist unless the conditions are met. The attempt without meeting the conditions is ultra vires. The rest of the Act stands.

47. Attention is drawn to the relevant "reading down" sections, as follow :

The Facilities Acts, s.3:

"3. (1) This Act and every Proclamation, Order in Council, regulation, license, approval, authority, permit, direction, determination, prohibition, or other act of executive or administrative authority made, issued, granted, given or done under or pursuant to this Act by the Governor in Council, the Minister, the Commissioner, any delegate of the Commissioner, or any other person or authority shall be read and construed, and it is hereby declared always was to be read and construed, so as not to exceed the legislative power of the State to the intent that where any enactment contained in this Act, or provision contained in any such Proclamation, Order in Council or regulation, or any, or any term, provision, condition or limitation of any, such license, approval, authority or permit, or any such direction, determination, prohibition or other act of executive or administrative authority would but for this section have been construed as being in excess of that power it shall nevertheless be, and it is hereby declared always nevertheless was, a valid enactment, provision, license, approval, authority, permit, direction, determination, prohibition or, as the case may be, act of executive or administrative authority to the extent to which it is or was not in excess of that power.

(2) It is hereby declared to be and to have always been the intention of the Legislative Assembly -

(i) That if any enactment of this Act is inconsistent with the Commonwealth of Australia Constitution Act, or if any executive or administrative act done (whether before, on or after the passing of 'The State Transport Facilities Act Amendment Act of 1947') under or pursuant to this Act is in part so inconsistent, that enactment and all the other enactments in this Act, or, as the case may be, that part and all the other parts of the executive or administrative act in question shall nevertheless operate, and it is hereby declared shall be deemed to have always operated, to the full extent to which they can operate consistently with the Commonwealth of Australia Constitution Act; and

(ii) That the provisions of paragraph (i) of this subsection shall be in addition to, and not in substitution for, the provisions of subsection one of this section."

The Act of 1960, s.2:

"2. This Act and every Proclamation, Order in Council, regulation, license, permit, approval, authority, direction, determination, prohibition or other act of authority made, issued, granted, given or done under or pursuant to this Act by the Governor in Council, the Commissioner, any delegate of the Commissioner, or any other person or authority, shall be read and construed so as not to exceed the legislative power of the State to the intent that where any enactment contained in this Act, or provision contained in any such Proclamation, Order in Council or regulation, or any, or any term, provision, condition or limitation of any, such license, permit or authority, or any such direction, determination, prohibition or other act of authority would but for this section have been construed as being in excess of that power it shall nevertheless be a valid enactment, provision, license, permit, approval, authority, direction, determination,

prohibition or, as the case may be, act of authority to the extent to which it is or was not in excess of that power."

The Acts Interpretation Acts, 1954 to 1962, s.4:

"4. Every Act shall be read and construed so as not to exceed the legislative power of the State, to the intent that, where any enactment or provision thereof, but for this provision would be construed as being in excess of that power, it shall nevertheless be a valid enactment or, as the case may be, provision to the extent to which it is not in excess of that power."

48. It is contended that these provisions apply in the present circumstances and that the respective Part V or Part VIII is distinctly severable in each case. It is only the provisions relating to transport by water in these Parts that (on the assumption) are hit at by the condition as to inclusion of a suspending clause. The words of the High Court of Australia in Newcastle and Hunter River Steamship Co. Ltd. v. Attorney-General for the Commonwealth 1921 29 C.L.R. 357 at p.369 (per Knox C.J., Higgins, Gavan-Duffy, Powers, Rich and Starke JJ.) are appropriate -

"We think this provision is a legislative declaration of the intention of Parliament that, if valid and invalid provisions are found in the Act of Parliament, however interwoven together, no provision within the power of Parliament shall fail by reason of such conjunction, but the enactment shall operate on so much of its subject matter as Parliament might lawfully have dealt with."

See also Fraser Henleins Ltd. v. Cody 1945 70 C.L.R. 100 at pp.117 and 127; Bank of New South Wales v. The Commonwealth 1948 76 C.L.R. 1 at pp.370 to 371; Grannall v. Marrickville Margarine Pty. Ltd. 1954-1955 93 C.L.R. 55 at pp.71 and 75 to 76.

49. To sum up, the respondent contends, as to severability, that section 736 (M.S.A.) makes a clear distinction between the Acts passing and its suspension. The Act as passed is to contain

a provision for its own suspension as a condition of the exercise of the power as to the coasting trade, just as the condition in paragraph (b) must also be fulfilled for a valid exercise of the power.

The Transport legislation must be read subject to the appropriate "reading down" provisions set out in paragraph 47 of this Case. If so read, the question becomes one of construction, and there never was any "going beyond" power. It is just as if the Act had contained a section regulating the coasting trade and the next section had said it must be ignored and treated as not in the Act. The Act should be read as a whole to see what it means.

It is contended that the Transport Acts have been passed by normal legislative process, and read as a whole provide that if they contain anything in excess of power (as would be an attempt to make a law on a subject without complying with pertinent conditions) that is to be ignored, but that nevertheless the Act shall be a valid enactment as to the remainder.

GROUND (d): That, if section 736(a) (M.S.A.) is speaking of Bills as distinct from enacted legislation, it has been superseded by the Australian States Constitution Act, 1907 (Imp.)

50. It is contended that the Imperial Act cited in this heading is a code on the subject of reservation of Bills of the legislatures of Australian States. The following provisions are material -

> "1. (1) There shall be reserved, for the signification of His Majesty's pleasure thereon, every Bill passed by the Legislature of any State forming part of the Commonwealth of Australia which -
>
> (a) Alters the constitution of the Legislature of the State or of either House thereof; or
>
> (b) Affects the salary of the Governor of the State; or
>
> (c) Is, under any Act of the Legislature of the State passed after the passing

of this Act, or under any provision contained in the Bill itself, required to be reserved;

but, save as aforesaid, it shall not be necessary to so reserve any Bill passed by any such Legislature:

Provided that -

(a) Nothing in this Act shall affect the reservation of Bills in accordance with any instructions given to the Governor of the State by His Majesty; and

(b) It shall not be necessary to reserve a Bill for a temporary law which the Governor expressly declares necessary to be assented to forthwith by reason of some public and pressing emergency; and

(c) It shall not be necessary to reserve any Bill if the Governor declares that he withholds His Majesty's assent, or if he has previously received instructions from His Majesty to assent and does assent accordingly to the Bill.

. . . . . .

(4) So much of any Act of Parliament or Order in Council as requires any Bill passed by the Legislature of any such State to be reserved for the signification of His Majesty's pleasure thereon, or to be laid before the Houses of Parliament before His Majesty's pleasure is signified, and, in particular, the enactments mentioned in the Schedule to this Act, to the extent specified in the third column of that Schedule, shall be repealed both as originally enacted and as incorporated in or applied by any other Act of Parliament or any Order in Council or letters patent."

It is suggested that section 736 (M.S.A.) is not mentioned in the Schedule because that section applies also in other British possessions

besides Australia, or that section 736 (M.S.A.) no longer had any reference to Australian States.

51. The relative instructions given to the Governor of the State as referred to in proviso (a) set out in the last preceding paragraph are those of the 10th June, 1925 (printed in the Public Acts of Queensland Reprint (1825-1936) Vol. 2, p.599). These instructions contain the following relative matter, namely VII:

> "VII. The Governor shall not, except in the cases hereunder mentioned, assent in Our name to any Bill of any of the following classes:-
>
> 1. Any Bill for the divorce of persons joined together in holy matrimony.
>
> 2. Any Bill whereby any grant of land or money, or other donation or gratuity, may be made to himself.
>
> 3. Any Bill affecting the currency of the State.
>
> 4. Any Bill the provision of which shall appear inconsistent with obligations imposed upon Us by Treaty.
>
> 5. Any Bill of an extraordinary nature and importance, whereby Our prerogative or the rights and property of Our subjects not residing in the State, or the trade and shipping of the United Kingdom and its Dependencies, may be prejudiced.
>
> 6. Any Bill containing provisions to which Our Assent has been once refused, or which have been disallowed by Us;
>
> Unless he shall have previously obtained Our Instructions upon such Bill through one of Our Principal Secretaries of State, or unless such Bill shall contain a clause suspending the operation of such Bill until the signification in the State of Our pleasure thereupon, or unless the Governor shall have satisfied himself that an urgent necessity exists requiring that such Bill be brought into immediate

operation, in which case he is authorised to assent in Our name to such Bill, unless the same shall be repugnant to the law of England, or inconsistent with any obligations imposed upon Us by Treaty. But he is to transmit to Us by the earliest opportunity the Bill so assented to, together with his reasons for assenting thereto."

Then this instruction is subject to Section 4 of the Colonial Laws Validity Act, 1865 (Imp.). The result, it is contended, is that any failure to follow the instruction would not invalidate the legislation.

52. Stanley J. in the Cobb and Co. Case 1963 Qd. R. at p.570 found great difficulty and doubt in the question of the application of this section to s.736 (M.S.A.). "Presumably", he said, "s.736 would not be aiming at a dual assent - the first by the Governor on behalf of the Queen and the second by the Queen herself. But 'Act' means a Bill to which Royal assent has been given. It becomes an 'Act' by assent, and s. 736 speaks of suspending the operation of the Act, not of the Bill. Nevertheless the Bill is drawn in form of an Act, and the Act merely repeats the words of the Bill. Therefore the suspending clause would have to be in the Bill by virtue of s. 736. Therefore the language of s. 736 by its operation causes that section to fall within s. 1(4) and is to that extent repealed."

Stanley J., nevertheless, could not think that section 736 would not be thought worthy of the attention of specific words in the Schedule. In the circumstances he proposed to hold that the Act of 1960 was inoperative.

53. If Stanley J. is right in his view that "dual assent" is not the aim, but only the assent of Her Majesty, then it would be a case of reservation of the Bill, a matter now dealt with as to Australian States by the Imperial Act of 1907.

54. On the other hand s.736 (M.S.A.) itself requires the Act to contain a clause providing for suspension, until the signification of Her Majesty's pleasure. The Bill has become an Act, though it is to bring about its own non-operation. Such "dual assent" is not unusual (10 Halsbury, 1st Ed. pages 542-3, para. 924;

11 Halsbury 2nd Ed. page 184, para. 330; 5 Halsbury 3rd Ed. p. 587, para. 1257 and note "t").

55. It follows that State legislation, if section 736 (M.S.A.) has a bearing on it, must speak by its own force to suspend itself or it may speak so as to remove its own excesses (if any); alternatively that it is only a Bill governed by the Imperial Act of 1907, the result of which (with the Royal Instructions) is to leave the matter entirely to the Governor but not to invalidate the Act.

C. THE COBB AND CO. CASE 1963 Qd. R. 547.

56. It is contended that the decision of the Full Court of the Supreme Court of Queensland is wrong in law on the grounds and for the reasons already set out in this Case and, further, for the reasons following.

Further as to the reasons of Mansfield C.J.

57. Mansfield C.J. apparently considered that the only source of the State's power as to coastal shipping was section 736 (M.S.A.). He reasoned that the Queensland Parliament was a legislature of a British possession. He remarked (at p.558) -

> "I incline to the view that Australia is the British possession for the purpose of s. 736 of the Merchant Shipping Act, but for the reasons which hereinafter appear the result is the same whether the British possession for the purposes of s. 736 be Queensland or Australia."

His Honour arrived at his conclusion as to the Queensland Parliament being such a legislature on a consideration that the laws of the Commonwealth and States together form one system of jurisprudence (as discussed for other purposes in McArthur v. Williams (supra). He said (at p.559) -

> "The law of Australia includes the law of all its component parts and any authority which is competent to make laws for any of its component parts is a legislature competent to make laws for a British possession although they apply only in part of that possession and

the Queensland legislature being so competent is therefore a legislature of a British possession."

58. It is respectfully contended that this reasoning is erroneous, and does not meet the point raised under section 736 (M.S.A.). The Queensland Parliament may be a legislature of a British possession (Australia) in the sense that it is one of the legislatures in that possession, responsible for some of the law applicable to a part of that possession. But it is not competent to make laws for Australia. It is not "The Legislature of a British possession". That description so far as Australia is concerned applies only to the Commonwealth Parliament. The reasoning of the Justices of the High Court in McArthur v. Williams (supra) does not support the reasoning of Mansfield C.J. In that case the High Court was concerned with the meaning of the words, "an offence punishable by law in that possession", that is to say law, any law, in that possession. The words were satisfied by infringement of law, whether Commonwealth or State. It is a far step to say that "The Legislature of a British possession" equally can have a composite meaning embracing all legislative bodies in the geographical unit. "The Commonwealth has a legislative "body which exercises its authority over the "whole of Australia. There is one Parliament "for Australia, as there is 'one Parliament for "Canada'." (per Starke J. in McArthur v. Williams supra, at p.347). Moreover the word "Legislature" in section 736 (M.S.A.) does not involve any question of the method of distribution of powers. This is supported by the view of Dixon, Evatt and McTiernan JJ. in the same case at p. 352. At p.360, too, their Honours rejected the restrictive interpretation in McKelvey v. Meagher 1906 4 C.L.R. 265 of the expression "central legislature" which attempted to confine it to a legislature having power with respect to the particular subject matter. See also Godwin v. Walker 1938 N.Z.L.R. 712 C.A. The reasoning of the learned Chief Justice of Queensland runs counter to the definition of "legislature" in Section 18 of the Interpretation Act, 1889 (Imp.).

Further as to the reasons of Stanley J.

59. Stanley J. felt himself embarrassed by the existence of the Queensland Marine Act of 1958 (1963 Qd. R. at p.564). He said -

> " This Act, Section 2(1), contains a suspending clause that the Act shall not come into operation until after Her Majesty's pleasure had been publicly signified in Queensland."

He refers to this subject at p. 570, where he says that apparently in 1958 the legislature of Queensland did not take the view that section 735 (M.S.A.) and section 736 (M.S.A.) had been repealed.

60. The Queensland Legislation could not alter the meaning of the Imperial Statute, but in any case, an examination of the facts relating to the enactment of the Queensland Marine Act of 1958 shows that the procedure adopted was not that of section 736 (M.S.A.), but that of the Australian States Constitution Act, 1907 (Imp.). It is contended that the former procedure requires the dual assent and suspension by virtue of an operative enactment, whereas in the case of the Marine Act the Bill was reserved for Her Majesty's assent, and the suspensory provision operated as a reservation by virtue of section 1(1)(c) of the Australian States Constitution Act, 1907 (Imp.), which provides that there shall be reserved for the signification of Her Majesty's pleasure thereon every Bill passed by the Legislature of any Australian State which, (inter alia), is under any provision contained in the Bill itself, required to be reserved.

61. It is respectfully contended that Stanley J., though he decided against the respondent in the Cobb and Co. Case was conscious of difficulty and doubt. He endeavoured to find a distinct basis for the operation of the condition imposed by paragraph (b) of section 736 (M.S.A.), namely that requiring all British ships to be treated in exactly the same manner as ships of the British possession in which the Act or Ordinance is made; but, alternatively, said that it is a condition which might lead to repugnancy and a contest as to severability. It is contended for the respondent that both conditions (a) and (b) are parallel in the sense that they are conditions of the proper exercise of the one power, regulating the coasting trade, and the failure to observe the one - as the other - vitiates the attempt to exercise the particular

power. In both cases other unrelated or separable provisions may be held to be validly enacted.

62. Stanley J., moreover, appears to have thought that what goes to Her Majesty the Queen is a Bill. If so, that is a case of reservation. If not the instrument is an Act which may speak on lawful subjects but not as to the particular subject of the coasting trade, and which may itself bring about the destruction or deletion of any excess invalid matter it may contain.

Further as to the reasons of Wanstall J.

63. Wanstall J. seems to have approached the matter as if the question is whether Queensland is a legislature of the possession (1963 Qd. R. at p.573). It is contended that section 736 is very much more precise in its reference to "The Legislature" of the possession. He distinguished the different definition in section 39 of the Fugitive Offenders Act 1881, (Imp.) of the expression "Legislature", namely,

> " The expression 'legislature', where there are local legislatures as well as a central legislature, means the central legislature only."

He said, at p. 574, that there could be no doubt that upon Federation only the Commonwealth Parliament could exercise the powers under sections 30(4), 32 and 39 of the Fugitive Offenders Act because of this restriction of "legislature" to "the central legislature only". He also said, at p. 575, that it was plain that the learned Justices, in describing the effects of Sharp's Case (which dealt with the Colonial Courts of Admiralty Act, 1890) in McArthur v. Williams treated the Commonwealth Parliament as "the legislature of the possession". He went on -

> " The construction of s. 18 of the Interpretation Act, and of the cognate definition of 'colonial law' in s. 15 of the Colonial Courts of Admiralty Act, are necessarily involved in this view. To that extent it must be regarded as supporting the respondent's case, but it does not conclude the question as to the construction of s. 18 of the Interpretation

Act in its application to s. 736 of the Merchant Shipping Act."

In dealing with McIlwraith McEacharn Ltd. v. The Shell Co. of Australia Ltd., at p. 576, he observed that the Colonial Courts of Admiralty Act continued to operate as part of State law, for it authorised a legislative instrumentality of the State to function as such in the prescribing of rules of Court. The respondent contends with respect that this is clearly so because of the words of the particular Act. Similarly, other Imperial legislation operates as part of the State law, but the construction of these Acts has no bearing on the meaning of "the Legislature of a British possession" in section 736 (M.S.A.).

64. After pursuing certain subsidiary lines of reasoning, Wanstall J. said (at p. 581) -

> " The respondent's reliance on the undoubted authority of the line of cases in which the High Court has ruled that, since Federation, Australia is the 'British possession' as defined by the Imperial Interpretation Act, 1889, is in my view misplaced. It fails to yield to the differences in context between the Merchant Shipping Act and the other Acts to which those definitions were being applied in those cases, and treats them as being absolute definitions, and it ignores the crucial difference in the terms of the definition of 'legislature' in the Fugitive Offenders Act. I think that the change in the terminology of the relevant definition of 'legislature' as from 1894 for the purposes of the Merchant Shipping Act of that year is also significant. In the Merchant Shipping Act of 1869 that definition had been in the same terms as that of the Fugitive Offenders Act 1881, referring to 'the central legislature only'."

It is contended that the learned Judge erred in departing from the application of the definitions of the Imperial Interpretation Act, 1889. As Dixon J. (as he then was) said in another context, a complete and unqualified application of the definition of "British possession" is required and that from it no

difficulties arise which a proper understanding of our legal system will not remove (McArthur v. Williams 1936 55 C.L.R. at p.352, and McIlwraith McEacharn Ltd. v. Shell Co. of Australia Ltd. 1945 70 C.L.R. at pp.203-4). Moreover, it is contended that the definition of "legislature" in Section 18(7) of the Interpretation Act, 1889 (Imp.) worked no change from that contained in the Fugitive Offenders Act, 1881 (Imp.), and the Merchant Shipping Act of 1869. The legislature, under the definition of 1889, is that competent to make laws for a British possession, which, by definition, is the "one British possession".

65. The first of the subsidiary lines of reasoning of Wanstall J. is that section 107 of the Commonwealth Constitution preserves the existing power to the State. Relative sections of the Australian Constitution are as follows:-

> "107. Every power of the Parliament of a Colony which has become or becomes a State, shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be.
>
> 108. Every law in force in a Colony which has become or becomes a State, and relating to any matter within the powers of the Parliament of the Commonwealth, shall, subject to this Constitution, continue in force in the State: and, until provision is made in that behalf by the Parliament of the Commonwealth, the Parliament of the State shall have such powers of alteration and of repeal in respect of any such law as the Parliament of the Colony had until the Colony became a State. "

66. It is contended that these sections of the Constitution preserve the powers and the laws of the Colony where they survive the changed status wrought by the Commonwealth Constitution, but that where Imperial Legislation only applies because of a status and qualification it simply does not apply where that status and

qualification are lost. Such, it is submitted, is the position as to the application of Section 736 (M.S.A.). It is submitted that the words of Dixon J. (as he then was) are applicable to the operation of both of these Constitutional sections where in McArthur v. Williams (supra) at pp.360-361, he remarked -

> "The Constitution brought into existence a new unit of jurisdiction composed of old units and, according to the very terms in which the Fugitive Offenders Act 1881 is expressed, it applied to the new unit, the Commonwealth. The Imperial statute was part of the law of a colony only because the colony was a British possession or single part of the King's dominion. When it ceased to be so, the Imperial statute ceased to be part of the law of the State as such. Sec. 108 is expressed to be 'subject to this Constitution' and it is the Constitution which wrought the change in the unit of jurisdiction."

In short the State lost status as "the British possession", the Commonwealth alone satisfying that expression. This change of status was brought about by the Constitution, and thus the power under section 736 (M.S.A.) was withdrawn from the Parliament of the State by the Constitution of the Commonwealth.

67. The other subsidiary argument of Wanstall J. was based on his examination of the shipping cases, in which he found that only Isaacs J. denied to the legislature of a State the powers conferred by section 736 (M.S.A.).

The shipping cases have already been the subject of discussion in paragraphs 40 to 43 (inclusive) of this Case, and it is submitted that they should not be regarded as authority for the rejection of the construction of section 736 (M.S.A.) which is supported by an application of the Statutory definitions and such cases as McArthur v. Williams (supra) and McIlwraith McEacharn Ltd. v. The Shell Co. of Australia Ltd. (supra).

68. Wanstall J. also said (pp. 581-2) -

> "By virtue of its general grant of plenary power to pass laws under s. 2 of the

Constitution Act of 1867, the Parliament of Queensland would be competent to regulate some, but not all, of the aspects of the coasting trade contemplated by the grant of power in s. 736 of the Merchant Shipping Act, 1894. But whilst that Act applies to the State it must have the effect of derogating from the general grant under the earlier Constitution Act, so that any regulation of the coasting trade would be conditional on the observance of the restriction enacted by it in subclause (a). Once the State Parliament were freed from the operation of s. 736, its general power of legislation would support regulation of the coasting trade, at least within territorial limits, unfettered by the condition of Imperial oversight contained in s. 736 (a). "

At page 582 he said -

"I also agree that if the Merchant Shipping Act did not grant such powers there would remain under the State's general plenary powers a right to regulate the residue of the coasting trade on a territorial basis. This would include that section encompassed by the State Transport Act. "

It is contended that it was not the intention of the Imperial Parliament to take away power, and that there was no such derogation as is contemplated by the learned Judge. Queensland powers remained restricted to the territorial basis.

D. THE EFFECTIVENESS OF VALIDATION

69. Even if the Transport Legislation was unconstitutional for the reasons expressed by the Full Court of the Supreme Court of Queensland in the Cobb and Co. Case (1963 Qd. R. 547), such legislation has been validated and made operative by the Validation Act, as decided twice by the High Court and once by the Full Court of the Supreme Court; (see paragraphs 14 to 18 (inclusive) of this Case), and it is contended that the nine judges who have so declared are right.

70. The argument to the contrary proceeds on the lines that the Transport Acts require for

their operation a Proclamation fixing a respective date when each such Act should come into operation; that no fresh Proclamation was made in respect of either Act after validation; that the original Proclamations were of the whole Acts including the Parts said to offend against section 736 (M.S.A.); and that, therefore, such Proclamations were ineffective and remained so. It is contended that such argument is fallacious.

71. The Principal Act of the Facilities Acts was assented to by the Governor of Queensland on behalf of His Majesty the King on the 24th December 1946. It contained section 1(2) as follows:-

> "(2). Except as herein otherwise provided this Act shall come into operation on a date to be fixed by the Governor in Council by Proclamation published in the Gazette."

By Proclamation of the 27th March 1947 published in the Queensland Government Gazette of the 29th March 1947 the Governor in Council fixed the 8th April 1947 accordingly.

72. The Act of 1960 received the Governor's assent on behalf of the Queen's Most Excellent Majesty on the 30th December 1960. Section 1(2) is in the same words as section 1(2) of the earlier Act, save that the word "provided" is replaced by the word "prescribed". By Proclamation of the 23rd February 1961 published in the Queensland Government Gazette of that date the Governor in Council fixed the 27th February 1961 for the commencement of the Act.

73. The Validation Act contains the following principal provisions:

> "3. Subject to this Act, and in so far as it may be necessary to ensure the validity and operation thereof, every Act set out in the Schedule, other than the excepted sections, is validated as from its enactment and declared and deemed to be and from such enactment to have been a good and valid law, but subject to any amendment or repeal of any such Act by another such Act.

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

"5. Any provision of any Act set out in the Schedule, other than the excepted sections, which is inconsistent with the Constitution of the Commonwealth or with any Imperial Act extending to Queensland shall nevertheless operate and, in respect of any period of time before the passing of this Act, is hereby declared to have had validity and operation in accordance with this Act to the full extent to which such provision can operate or could have operated consistently with the Constitution of the Commonwealth or any such Imperial Act.

The provisions of this section are in addition to and not in substitution for the provisions of section four of 'The Acts Interpretation Acts, 1954 to 1960'. "

and the Schedule contains (inter alia) the Transport Legislation specifying the sections relating to carriage by water as "excepted sections".

74. The Validation Act goes on, by section 6, to abolish imprisonment and to make provisions in lieu thereof in respect of offences committed and sums of money due and payable, before the passing of the Validation Act and by section 7, to continue responsibility for offences and money due and payable but subject to such Act. Section 8 deals specifically with a certain Order to Show Cause.

75. It is pointed out that in each of the Transport Acts the provision for the coming into operation of each Act is prospective. Each Act "shall come into operation on a date to be fixed". There can be no retrospective proclamation after the Validation. The result is that, if the argument be correct, the Facilities Acts which have been repealed can never be proclaimed, and the Act of 1960 can

only be proclaimed for the future. Yet the clear object of the Validation Act is to reinstate the whole series of transport enactments and sustain the whole process of past administration, and expressly to validate their operation.

76. The result for which the appellants contend is obviated by the necessary intendment and the express provisions of the Validation Act.

77. Such necessary intendment is shown by,

(a) the Act's general contemplation of the effectiveness of actions and operations under the Transport Legislation;

(b) the manifest purpose "to ensure the validity and operation thereof";

(c) the modification of punishment for past offences (section 6);

(d) the elimination of certain defences defined in Chapter V of "The Criminal Code" of Queensland, concerning past offences (section 7).

78. The express provisions are threefold and are supported by other express references. They are -

(i) section 3, which "to ensure the validity and operation thereof", validates and declares and deems the legislation to have been a good and valid law;

(ii) section 4, which validates acts and things done; and this includes, it is contended, the Proclamation, the grant of licenses, issue of permits and the assessment and recovery of fees;

(iii) section 5, which declares for the operation of each Act (other than the excepted sections); and also, it is contended, by so doing declares for the operation of each Proclamation as included in the reference to "Act" under the provisions of section

5(2) of the Acts Interpretation Acts, 1954 to 1960.

79. It is, therefore, contended that validation of the Transport Acts (less the excepted sections) was complete and effective. The enactments themselves operated and all things done under them were valid. The applicable law must be taken to be as declared retrospectively by the Validation Act. The Proclamations made, the grant of road licenses, the issue of road permits, the assessment and recovery of fees in respect thereof and all things done under the Transport Acts must be judged as to their legality by that law. The operation of the Acts (less the excepted sections) and the legality of all relevant things done have been recognised and declared by the Validation Act.

E. CONCLUSIONS AND REASONS

80. The respondent, therefore, respectfully submits that the appeal should be dismissed with costs and the judgment of the Supreme Court of Queensland affirmed for the following, amongst other,

R E A S O N S

(1) BECAUSE of the original validity of the Transport legislation, apart altogether from the Validation Act; alternatively, the original validity of such legislation less the excepted sections dealing with certain transport by water.

(2) BECAUSE the Transport legislation, alternatively the Transport legislation less the excepted sections, falls within the powers of the State of Queensland conferred by the Constitution of that State.

(3) BECAUSE Parts V and VIII of the respective Transport Acts, so far as they deal with transport by water, deal only with transport by water in the territorial waters of Queensland, and are within the powers of the Queensland Parliament to make laws for the peace, welfare and good government of the territory of Queensland.

(4) BECAUSE in respect of such original validity the following grounds apply -

(a) That section 736 (M.S.A.) is enabling and amplifying and not destructive of Queensland territorial power;

(b) That upon Federation, Queensland lost and the Commonwealth of Australia gained the qualification and status of the British possession, and thenceforth section 736 (M.S.A.) spoke not of the State but of the Commonwealth Parliament; and the State territorial powers were left unimpaired;

(c) That the condition in section 736(a) (M.S.A.), though it requires the inclusion of a provision to bring about suspension, is nevertheless only a condition for the exercise of the one power, and the provisions relating to transport by water are distinct and severable;

(d) That if section 736(a) (M.S.A.) speaks of Bills as distinct from enacted legislation, it has been superseded by the Australian States Constitution Act, 1907 (Imp.).

(5) BECAUSE the decision of the Full Court of Queensland in the Cobb & Co. Case was wrong, in that -

(a) The learned Judges failed to take into account the amplifying and enabling nature of section 736 (M.S.A.), and wrongly regarded it as fettering State power.

(b) The learned Judges regarded the Parliament of Queensland as falling within the description of the Legislature of Australia.

(c) The learned Judges regarded the condition (a) of section 736 (M.S.A.) as a requirement of the legislative process rather than as a condition of particular legislation.

(d) Stanley J. leaned to the view that until the pleasure of Her Majesty the Queen was signified, there was no point under section 736 in obtaining the Governor's assent, and that the legislative document remained a Bill; it is contended that that becomes a case of reservation covered by the Australian States Constitution Act, 1907 (Imp.).

(e) The learned Chief Justice and Mr. Justice Wanstall held that the legislative document became an Act which should have contained a suspending provision; the result being, it is contended, that it should have provided by its own force to bring about its own suspension, as a condition of the exercise of one power; and lacking compliance (if the Act were subject to section 736), the one power was invalidly exercised.

(f) The learned Judges failed to perceive that the condition could only vitiate the one power, and that the Act was free to operate as to all other legitimate matters, including, by its own force, to reject the bad and sustain the good.

(6) BECAUSE, in any case, the Transport legislation, less the excepted sections, as to its operation has been effectively validated by the Validation Act.

(7) BECAUSE of the strong body of judicial opinion deciding the proposition set out in the last reason.

A.L. BENNETT

L.L. BYTH

R.A. GATEHOUSE

No. 10 and 11 of 1964

IN THE PRIVY COUNCIL

O N A P P E A L

FROM THE FULL COURT OF THE SUPREME COURT OF QUEENSLAND

B E T W E E N

WESTERN TRANSPORT PTY. LTD.

Appellant
(Plaintiff)

- and -

NORMAN EGGERT KROPP

Respondent
(Defendant)

AND B E T W E E N

MARANOA TRANSPORT PTY. LTD.

Appellant
(Plaintiff)

- and -

NORMAN EGGERT KROPP

Respondent
(Defendant)

(CONSOLIDATED)

CASE FOR THE RESPONDENTS

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