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Judgment 9, 1966

IN THE PRIVY COUNCIL | No.19 of 1965

ON APPEAL

FROM THE FULL COURT OF THE SUPREME COURT OF QUEENSLAND

B E T W E E N :

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

- and -

NORMAN EGGERT KROPP Defendant/Respondent

RECORD OF PROCEEDINGS

BLYTH, DUTTON, WRIGHT & BENNETT,
10, Norfolk Street, Strand,
London, W.C.2.
Solicitors for Appellants.

FRESHFIELDS,
1, Bank Buildings,
Princes Street,
London, E.C.2.
Solicitors for Respondent.

IN THE PRIVY COUNCIL | No.19 of 1965

ON APPEAL

FROM THE FULL COURT OF THE SUPREME COURT OF QUEENSLAND

B E T W E E N :

COBB & CO. LIMITED,
DOWNS TRANSPORT PTY. LTD.,
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NORTHERN DOWNS TRANSPORT PTY. LTD.,
NORTHERN TRANSPORT PTY. LTD. and
COBB & CO. COACHES PTY. LTD. Plaintiffs/Appellants

- and -

NORMAN EGGERT KROPP Defendant/Respondent

RECORD OF PROCEEDINGS

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1.	Writ of Summons (other than endorsement of claim)	28th April 1964
2	Entry of appearance by Defendant	8th May 1964
3	Entry of demurrer for argument	4th June 1964
4.	Notice of entry of demurrer for argument	4th June 1964
5	Copy of Pleadings	4th June 1964
6	Order adjourning argument on demurrer	18th June 1964
7	Notice of Motion to the Full Court of the Supreme Court of Queensland for leave to appeal to Her Majesty in Council	4th May 1965
8	Notice of payment into Court on 21 May 1965 of £500.0.0. by way of security for Appeal	27th May 1965
9	Draft Index to Record of Proceedings and List of documents omitted and appointment to settle	28th June 1965

DOCUMENT TRANSMITTED TO THE PRIVY COUNCIL BUT NOT REPRODUCED

Document	Date
Certificate of the Registrar of the Supreme Court of Queensland at Brisbane certifying transcript record of proceedings	22nd July 1965

UNIVERSITY OF L[illegible]
INSTITUTE OF A[illegible]
LEGAL ST[illegible]
25 APR 1967
25 RUSSELL SQUARE
LONDON, W.C.1.

87145

IN THE PRIVY COUNCIL No.19 of 1965

ON APPEAL

FROM THE FULL COURT OF THE SUPREME COURT OF QUEENSLAND

B E T W E E N :

COBB & CO. LIMITED
DOWNS TRANSPORT PTY. LTD.,
SOUTH QUEENSLAND TRANSPORT PTY LTD.,
NORTHERN DOWNS TRANSPORT PTY. LTD.,
10 NORTHERN TRANSPORT PTY. LTD. and
COBB & CO. COACHES PTY. LTD.
Plaintiffs/Appellants

- and -

NORMAN EGGERT KROPP
Defendant/Respondent

RECORD OF PROCEEDINGS

NO.1

In the Supreme Court

No. 1

Writ of Summons (endorsement of claim only)

28th April, 1964.

Writ of Summons (endorsement of claim only).

20

IN THE SUPREME COURT OF QUEENSLAND 1964 No.380.

Mr. Justice Stable
Mr. Justice Gibbs

BETWEEN 1. COBB & CO. LIMITED 2. DOWNS TRANSPORT PTY. LTD. 3. SOUTH QUEENSLAND TRANSPORT PTY. LTD. 4. NORTHERN DOWNS TRANSPORT PTY. LTD. 5. NORTHERN TRANSPORT PTY. LTD. and
30 6. COBB & CO. COACHES PTY. LTD.
Plaintiffs

- and -

NORMAN EGGERT KROPP Defendant

STATEMENT OF CLAIM
(Indorsed on Writ of Summons)

The Plaintiffs' claims are for the amounts set

In the Supreme Court

No. 1

Writ of Summons (endorsement of claim only) (continued)

28th April, 1964.

against their names respectively hereunder against the defendant as Nominal Defendant for the Government of Queensland appointed pursuant to "The Claims against Government Act" of 1866 and as The Commissioner for Transport for money payable to them by the Government of Queensland or by the Commissioner for Transport for money had and received by the defendant for the use of the plaintiffs being moneys or the balance of moneys levied by the defendant upon the plaintiffs on or in respect of the following dates or periods as or in the guise of licensing or permit fees under the provisions of "The State Transport Facilities Acts, 1946 to 1955" and "The State Transport Facilities Acts, 1946 to 1959" in respect of the carriage of goods and passengers on motor vehicles operated by the plaintiffs in the State of Queensland which moneys were demanded of the plaintiffs by the defendant unlawfully under colour of office of The Commissioner for Transport in that "The State Transport Facilities Acts, 1946 to 1959" had not at any time valid or lawful operation and the said moneys were paid by the plaintiffs involuntarily and under compulsion.

AND THE PLAINTIFFS respectively claim the following amounts, that is to say:-

	£.	s..	d..
Cobb & Co. Limited	8,477.	14 .	2
Downs Transport Pty. Ltd.	65,491.	4.	11
South Queensland Transport Pty. Ltd.	56,709.	1.	10
Northern Downs Transport Pty. Ltd.	83,282.	17.	10
Northern Transport Pty. Ltd.	48,009.	7.	11
Cobb & Co. Coaches Pty. Ltd.	94.	4.	1
	£262,064.	10.	9

The following are particulars:-

The claims of all the plaintiffs are for moneys paid by them respectively during or in

In the Supreme Court

No. 1

Writ of Summons (endorsement of claim only) (continued)

28th April, 1964.

respect of the periods set against their names hereunder for licensing or permit fees under "The State Transport Facilities Acts, 1946 to 1955" and "The State Transport Facilities Acts, 1946 to 1959" the amounts whereof are specified in column 1 hereunder, under the heading "Fees", less (save in the case of the plaintiff Cobb & Co. Coaches Pty. Ltd.) credits for charges payable under "The Roads (Contribution to Maintenance) Acts, 1957 to 1958" the amounts whereof are specified in column 2 hereunder, under the heading "Credits for Charges", and the balances claimed by the plaintiffs are specified in column 3 hereunder, under the heading "Balances due."

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Plaintiff	Column 1 Fees.	Column 2 Credits for Charges.	Column 3 Balances Due.
	£. s. d.	£. s. d.	£. s. d.
Cobb & Co. Limited Period 1959 December to 1961 April	11,411. 9. 8.	2,933.15. 6	8,477.14. 2
Downs Transport Pty. Ltd. Period 1958 April to 1961 April	78,026. 0. 6	12,534.14. 7	65,491. 5.11.
South Queensland Transport Pty.Ltd. Period 1958 April to 1961 April	79,455. 7. 8	22,746. 5.10	56,709. 1.10
Northern Downs Transport Pty. Ltd. Period 1958 April to 1961 April	103,121. 4. 0	19,838. 6. 2	83,282.17.10

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In the Supreme Court

No. 1

Writ of Summons (endorsement of claim only) (continund)

28th April, 1964.

Plaintiff	Column 1 Fees. £. s. d.	Column 2 Credits for Charges. £. s. d.	Column 3 Balances Due. £. s. d.
Northern Transport Pty. Ltd. Period 1958 April to 1961 April	60,691.19.10.	12,682.11.11	48,009.7.11
Cobb & Co. Coaches Pty. Ltd. Period 1958 April to 1961 April	94. 4. 1		94.4. 1

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No. 2

Demurrer to Plaintiff's Statement of Claim

25th May, 1964

No. 2

DEMURRER TO THE PLAINTIFF'S STATEMENT OF CLAIM

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Delivered the Twenty-fifth day of May 1964.

The Defendant demurs to the Plaintiffs' Statement of Claim on the grounds that it is bad in law and does not show any cause of action to which effect can be given by the Court against the Defendant in that:-

(a) "The State Transport Facilities Acts, 1946 to 1959" were at all material times good and valid law and were at all material times in operation. Alternatively "The State Transport Facilities Acts, 1946 to 1959" so far as are material to the present case were at all material times good and valid law and were at all material times in operation.

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(b) "The State Transport Facilities Acts, 1946 to 1959" were at all material times and apart from and prior to "The Transport Laws Validation Act of 1962" good and valid law and in operation, alternatively, good and valid law and in operation other

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than Part V so far as it relates to carriage by water, which part is severable.

(c) Alternatively "The State Transport Facilities Acts, 1946 to 1959" were as at all material times validated and made operative other than Sections 49, 50, 51 and, so far as it relates to carriage by water, Section 55, by "The Transport Laws Validation Act of 1962".

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(d) On other grounds sufficient in law.

J.P. O'CALLAGHAN

Crown Solicitor
Solicitor for the Defendant

No. 3

Judgment of the Full Court of the Supreme Court of Queensland on demurrer

FULL COURT

BEFORE THEIR HONOURS MR. JUSTICE STABLE
MR. JUSTICE GIBBS
MR. JUSTICE HART

20

The fourteenth day of April, 1965.

The Defendant having on the twenty-fifth day of May 1964 demurred to the Plaintiffs' Statement of Claim and the Demurrer having come on for hearing on the eighteenth day of June 1964 and the twenty-third and twenty-fourth days of February 1965 and the Court having ordered that the Demurrer stand for Judgment and the same standing for Judgment this day on the list of this Court in the presence of Counsel for all parties and the said Demurrer having been allowed by the Court THIS COURT DOTH ORDER AND ADJUDGE that the Plaintiffs recover nothing against the Defendant and that the Defendant recover against the Plaintiffs his costs of the Demurrer and of

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In the Supreme Court

No. 3

Judgment of the Full Court of the Supreme Court of Queensland on demurrer (continued)

14th April, 1965.

the action to be taxed AND THIS COURT DOTH FURTHER ORDER that there be no order in relation to the costs reserved.

By the Court,

(L.S.) J. Shannon

Registrar.

No. 4(a)

Reasons for Judgment of Stable, J.

14th April, 1965.

No. 4(a)

Reasons for Judgment of Stable, J.

Demurrer by the defendant Commissioner for Transport, appointed under the provisions of The State Transport Facilities Acts, 1946 to 1959, to the plaintiff's Statement of Claim for the return of moneys paid by them to the defendant for licensing or permit fees under the provisions of the above Acts. Such fees were paid in respect of the carriage of goods and passengers on motor vehicles operated by the plaintiffs in Queensland. The plaintiffs claim that the moneys were demanded of them unlawfully by the defendant under colour of office of The Commissioner for Transport in that the said Acts had not at any time valid or lawful operation, and that the moneys were paid by the plaintiffs involuntarily and under compulsion. The total of the sums claimed to have been paid from time to time by the six plaintiff companies is £262,064.10. 9d.

The defendant demurs to the statement of Claim on the ground that it is bad in law and does not show any cause of action to which effect can be given by the court against the defendant. The grounds set out are -

(a) The State Transport Facilities Acts, 1946 to 1959 were at all material times good and valid law and were at all material times in operation.

Alternatively The State Transport Facilities Acts, 1946 to 1959 so far as are material to the present case were at all material times good and valid law and were at all material times in operation.

(b) The State Transport Facilities Acts, 1946 to 1959 were at all material times and apart from and prior to The Transport Laws Validation Act of 1962 good and valid law and in operation, alternatively, good and valid law and in operation other than Part V so far as it relates to carriage by water, which Part is severable.

(c) Alternatively The State Transport Facilities Acts 1946 to 1959 were as at all material times validated and made operative other than Sections 49, 50, 51 and, so far as it relates to carriage by water, Section 55, by The Transport Laws Validation Act of 1962.

(d) On other grounds sufficient in law.

I do not find it necessary to proceed beyond ground (a).

The Acts were enacted to provide for the improvement and extension of transport facilities within the State of Queensland. Parliament provided for the appointment of a Commissioner for Transport under the Acts, and enacted in S.8 that the Acts shall be administered by the Minister for Transport or other Minister for the time being charged with their administration, and, subject to the Minister, by the Commissioner for Transport. Thus it appears at the very outset that the Commissioner has at all times, as it were, a Parliamentary hand on his shoulder.

A glance through the Acts shows that they are designed to cope from several angles with one of the complications of twentieth century life - a rapidly expanding and complex transport system which, without firm regulation in many ways, would become chaotic and even despotic. The size alone

In the Supreme Court

No.4(a)

Reasons for Judgment of Stable, J. (continued)

14th April, 1965.

of this State of Queensland brings about problems. Conditions vary vastly from district to district, from shire to shire and even within shires. Apart from passengers, the products of the mines, the canefields, the graziers, the farmers, the factories and many other producers have to be moved from place to place within Queensland upon a scale not dreamed of even a generation ago. Concerning the many problems thus raised several Acts have been enacted by the Sovereign by and with the advice and consent of the Legislative Assembly of Queensland in Parliament assembled, and by the authority of Parliament. The State Transport Facilities Acts and The State Transport Act of 1960 are two such statutes. We are not upon this demurrer immediately concerned with the latter statute; its validity falls to be determined in another matter before this Court as it is at present constituted. By agreement of the parties in the other matter the decision in the present case will determine the similiar points raised regarding permit fees under The State Transport Act.

The propositions raised on behalf of the plaintiffs are, as I noted them,

(1) The fees imposed under the Acts as licensing fees (or permit fees) constitute taxation;

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

(3) in so far as the Commissioner for Transport imposes or remits taxes such taxes are imposed or appropriated without the authority of Parliament;

(4) by these Acts Parliament has purported to create a separate legislative body - the defendant.

In my view this case is one in which a direct approach can cut through a mass of argument to what appears to be a simple truth.

As to proposition (1) it is not contested that the fees under consideration constitute

In the Supreme Court

No.4(a)

Reasons for Judgment of Stable, J. (continued)

14th April, 1965.

taxation. I accept that they do. Under s.22 of the Facilities Acts the amount of all fees and moneys collected under the Acts shall be paid into and form part of the Consolidated Revenue Fund. And see s.34 of The Constitution Acts, 1867 to 1961.

As to proposition (2) it is incontestable that taxation without the authority of Parliament would be illegal and void. I do not accept that in this case we are concerned with appropriation. 10 We are concerned with the imposition of taxation.

Propositions(3) and (4) can conveniently be taken together. The essence of the plaintiffs' argument is, as I understand it, that Parliament has given away its taxing power to the defendant who has been made in effect, a separate legislative body. This, it is said, is against the provision in the Bill of Rights (1 Will. & M. Sess. 2 c.2):- "That levying money for or to the use of the Crown, by pretence of prerogative, without grant 20 of Parliament, for longer time or in other manner than the same is or shall be granted, is illegal." (Stubbs Select Charters, 5th ed. p. 524).

I consider that the plaintiffs' propositions are based upon a misconception of the meaning of the word "grant" in the Bill of Rights. I accept that its meaning is as expounded by Parker J. in Bowles v. Bank of England (1913) 1 Ch. 57, 82 L.J. Ch. 124 at 130 -

> " By the statute 1 Will. & M., usually known 30 as the Bill of Rights, it was finally settled that there could be no taxation in this country except under authority of an Act of Parliament."

This statement was adopted by Isaacs J. (as he then was) in The Commonwealth v. Colonial Combing, Spinning and Weaving Co. Ltd. (1922) 31 C.L.R. 421 at 433-4. At 433 the learned justice refers to taxation of the individual "without parliamentary warrant" as being "forbidden ground." That, I consider, expresses the Law in Queensland, where the Bill of 40 Rights is a statute of this State by virtue of s.24 of the Australian Courts Act, 1828 and s.33 of the Constitution Acts, 1867 to 1961. It is not, in my view, necessary to enter upon a discussion of the power of our State Parliament to amend or repeal it. I consider that it is a statute imported into our law as a mere statute, which the Queensland Legislature may deal with for Queensland as though it were a statute of its own passing. Accepting the expressions of Parker J. and Isaacs J. as I respectfully do, can it be held that on the face of

In the Supreme Court

No.4(a)

Reasons for Judgment of Stable, J. (continued)

14th April, 1965.

the Acts with which we are concerned Parliament has divested itself of anything, be it taxing power or anything else? Queensland is a Sovereign State whose Parliament has power to impose taxation upon its subjects save in so far as it is directly or indirectly excluded from certain taxation fields which are under Commonwealth control. The Queensland Parliament is free to impose taxation within the field with which we are immediately concerned. Obviously, Parliament cannot directly concern itself with all the multitudinous matters and considerations which necessarily arise for daily and hourly determination within the ramifications of a vast transport system in a great area in the fixing of and collection of licensing fees. So, as I see it on the face of the legislation, Parliament has lengthened its own arm by appointing a Commissioner to attend to all of these matters, including the fixing and gathering of the taxes which Parliament itself has seen fit to impose. It has, as it were, lent him powers which are set out in the statute which brought his office into being. The plaintiffs would prefer a statement that Parliament has given away its power so that the Commissioner has become a second legislature to impose his own taxes, but this is not so as I read the Acts. The Commissioner has not been given any power to act outside the law as laid down by Parliament. Parliament has not abdicated from any of its own power. It has laid down a framework, a set of bounds, within which the person holding the office created by Parliament may grant, or refrain from granting, licenses, and fix, assess, collect or refrain from collecting fees which are taxes. I do not purport to give even a summary of the powers and duties delegated to the Commissioner under the Acts. In all of these matters he operates under the Minister. The taxes levied by him are levied under the authority of the Acts. As was said in <u>Powell v. The Apollo Candle Company</u> (1885) 10 App. Cas. 282, 54 L.J.P.C. 7 and 11, the Legislature has not parted with its perfect control over him, "and has the power, of course, at any moment, of withdrawing or altering the power which they have entrused to him." The result is, in my view, that the plaintiffs have failed to show that The State Transport Facilities Acts, 1946 to 1959 had not at any time valid or lawful operation.

I would allow the demurrer and order that there be judgment in the action for the defendant with costs to be taxed of the demurrer and of the action. I would make no order in relation to the costs reserved.

In the Supreme Court

No.4(b)

Reasons for Judgment of Gibbs J.

14th April 1965

NO. 4(b).

REASONS FOR JUDGMENT OF GIBBS J.

By a specially endorsed writ issued on the 28th April, 1964, the plaintiffs, six companies, claim to recover from the defendant, as nominal defendant for the Government of Queensland and as Commissioner for Transport, sums totalling £262,064.10.9. paid by the plaintiffs for licensing or permit fees under the State Transport Facilities Acts 1946 to 1955, and the State Transport Facilities Acts 1946 to 1959. There is, for present purposes, no material difference between the provisions of the Acts of 1946 to 1955 and those of 1946 to 1959, and it will not be necessary to refer to them separately hereafter. It is asserted in the Statement of Claim that these Acts had not at any time valid or lawful operation and that the monies were paid by the plaintiffs involuntarily and under compulsion. The defendant demurred to the Statement of Claim.

The main argument advanced before us on behalf of the plaintiffs was one which the appellants in Western Transport Pty Ltd. v. Kropp 1964 38 A.L.J.R. 237, sought to advance before the Judicial Committee but which their Lordships refused to be allowed to be raised because it had not been canvassed in this court, namely, an argument that the Acts "were invalid because they sought to impose taxes and levy them without parliamentary sanction: that in so doing they violated a long-established principle that no tax may be imposed save with the full assent of parliament and the assent of the Crown and that The Validation Act" (that is, The Transport Laws Validation Act of 1962) "could not cure so fundamental an invalidity."

The provisions of The State Transport Facilities Acts have often come before the courts but it is necessary to refer again to some of their provisions for the purposes of the present demurrer. The Acts provide for the appointment by the Governor in Council of a Commissioner for Transport (section 9) whose determinations and decisions must be submitted to the Minister for

In the Supreme Court

No.4(b)

Reasons for Judgment of Gibbs J. (Continued)

14th April 1965

his confirmation and, subject to the direction of the Minister with respect to determinations and decisions on matters of routine, shall have no effect unless or until they have been so confirmed (section 16). Section 23 prohibits the use of any vehicle for the carriage of goods or passengers except in accordance with the provisions of Part III of the Act. Section 24 (which is in Part III) provides that it shall be lawful to use a vehicle for the purposes specified in that section; inter alia it is lawful to use a vehicle approved for use in carrying on a licensed service when the vehicle is carrying passengers or goods or both under and in accordance with the terms and conditions of the licence (paragraph 25) and a vehicle which is being used under and in accordance with a permit granted under the Acts (paragraph 26). Paragraph 21 of Section 24 makes it lawful to use any vehicle carrying goods other than raw sugar for a distance not greater than 15 miles, but the Commissioner is given power, by notification in the Gazette, to vary this distance and thus in effect to render it lawful for any vehicle to carry goods other than raw sugar for any distance. The Governor in Council is also in effect given a general dispensing power (paragraph 27).

The licensing of vehicles is dealt with by Part IV. The Commissioner has a discretion to grant or refuse licences (section 27) and subject to such terms and conditions as may be prescribed to determine the terms and conditions of any licence (section 32) including the licence fee payable (section 32, paragraph (ix)) and has power to amend, alter, add to, vary or revoke any such terms and conditions (Section 36). Section 35(1) provides that "a licensing fee of the amount or at the rate determined by the Commissioner shall be payable by every Licensee." Section 35(2) provides as follows:

> "Such licensing fee shall, in the discretion of the Commissioner, be -
>
> (i) An amount fixed by the Commissioner; or

In the Supreme Court

No.4(b)

Reasons for Judgment of Gibbs J. (Continued)

14th April 1965

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

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

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(iv) An amount calculated on a passenger-mile basis (at a rate not exceeding one penny per road mile) or in the case of goods on a ton-mile basis (at a rate not exceeding 3d. per ton per road mile or 20 per centum of the gross revenue derived from freights charged, which ever is the greater) by reference to the maximum number of passengers or tons of goods the vehicle may lawfully carry and the maximum number of miles it may lawfully travel under its licence.

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(v) An amount calculated on a passenger-mile or ton-mile basis at rates not exceeding those mentioned in paragraph (iv) but charged on the passengers or tons of goods actually carried and in respect of the miles actually travelled.

By section 35(3) the Commissioner is given power to determine that the fee shall be in part a fixed amount and in part an amount calculated at the rates specified in paragraph (iv) or (v) of section 35(2). Section 35(4) provides as follows:

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

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In the Supreme Court

No.4(b)

Reasons for Judgment of Gibbs J. (Continued)

14th April 1965

maximum rate or rates specified in paragraph (iv) of subsection two of this section.

(b) The provisions of this subsection shall not apply so as to invalidate any determination by the Commissioner with respect to the fee payable by any licensee, but the amount of every such fee and every instalment thereof shall become due and payable and be paid under and in accordance with the terms and conditions of the licence." 10

It is not necessary for the purposes of this demurrer to express an opinion as to the meaning and effect of section 35(4)(b), construed, as it must be, to bring its provisions into harmony with those of section 35(4)(a). I am content to assume (although I do not intend to suggest that the assumption is necessarily correct) that the Acts themselves do not in 20 every case effectively prescribe the maximum fee that may be determined by the Commissioner. It is, of course, clear that in no case do the Acts prescribe a minimum.

Under Part VI of the Acts the Commissioner may permit the use of a vehicle for a specified purpose and may make the payment of a fee a condition of the permit. Section 59 provides that "the fee (if any) payable for the issue of a permit under this Part of this Act shall 30 be as prescribed or in so far as not prescribed, determined by the Commissioner", and goes on to state that the fee shall not exceed certain maxima. In fact the fees for permits are prescribed by regulation 22 of the State Transport Facilities Regulations 1947 and schedule 3 thereunder.

On behalf of the plaintiffs it was pointed out that the Commissioner (at least in the case of licence fees) is given the power, fettered 40 only by the necessity to obtain the confirmation of the Minister, to decide in any individual case whether a licence fee should be paid and if so whether it should be paid at a rate lower than the maximum where that is prescribed. The Commissioner may require a fee from one licensee

and not from another and may fix a higher rate for one than for the other. The contention on behalf of the plaintiffs was that these taxes (for it was not disputed that fees levied under the Acts are taxes - see Brown's Transport Pty. Ltd. v. Kropp 1958 100 C.L.R. 117 at 129) are not imposed by the Acts themselves but by the Commissioner and that this is illegal, being contrary to the fourth article of the Bill of Rights which, it was said, has the effect that no tax can validly be levied unless it is actually imposed by Parliament itself and forbids Parliament to delegate to some other authority the right to impose the tax. Further it was submitted that this provision of the Bill of Rights is a fundamental or organic provision which is beyond the power of the Queensland Legislature to repeal or amend.

Another submission was made which may be disposed of immediately. This was that the Commissioner may in the exercise of the power conferred by section 36 alter or revoke the conditions of a licence and thus in effect remit the payment of a licence fee and that to do this is to appropriate part of the revenue of the State contrary to section 19 of the Constitution Acts 1867 to 1961. It is true that when a fee is collected it is paid into and forms part of Consolidated Revenue (section 22 of the State Transport Facilities Acts) and that if the Commissioner revokes a condition the existence of which alone makes a licence fee payable the result may be that the revenue of the State is diminished, but in no sense can the revocation of such a condition be described as an appropriation, nor is revenue thereby "issued" within the meaning of section 19.

The fourth article of the Bill of Rights provides "That levying money for or to the use of the Crown by pretence of prerogative without grant of Parliament for longer time or in other manner than the same is or shall be granted is illegal." In support of his argument that this forbids Parliament to delegate the power to tax, counsel for the plaintiffs referred to certain expressions used by judges in discussing the principle that was finally established by the article. Most of the passages on which he relied are cited in Commonwealth v. Colonial Combing, Spinning and Weaving Co. Ltd. 1922 31 C.L.R. 421,

In the Supreme Court

No.4(b)

Reasons for Judgment of Gibbs J. (Continued)

14th April 1965

at 433-4, 444 and 474. In Bowles v. Bank of England 1913 1 Ch. 57 at 84-85 Parker J., after saying that by the Bill of Rights "it was finally settled that there could be no taxation in this country except under authority of an Act of Parliament," dealt with the effect of resolutions of the Committee of the House of Commons for Ways and Means, and of the House itself, and said that "it would be strange to find them relied on as justifying the Crown in levying a tax before such tax is actually imposed by Act of Parliament." In Attorney-General v. Wilts United Dairies Limited 1922 91 L.J.K.B. 897 at 900 Lord Buckmaster said:

> "However the character of this payment may be clothed by asking your Lordships to consider the necessity for its imposition, in the end it must remain a payment which certain classes of people were called upon to make for the purpose of exercising certain privileges, and the result is that the money so raised can only be described as a tax the levying of which can never be imposed upon subjects of this country by anything except plain and direct statutory means."

In the same case in the Court of Appeal Atkin L.J. said (1921 37 T.L.R. 884 at 886):

> "If an officer of the executive seeks to justify a charge upon the subject made for the use of the Crown ...... he must show, in clear terms, that Parliament has authorised the particular charge."

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

decides, that Parliament cannot confer on its delegates the discretionary power of fixing the amount of a tax and determining the circumstances in which it is to be levied. If the Legislature confers such a power on an executive body it does not abdicate its own powers, for the executive body is at all times subject to its control. (cf. Attorney-General for Australia v. The Queen, 1957 A.C. 288 at 315 and Grain Sorgham Marketing Board v. J. Jackson & Co. (Produce & Seeds) Pty. Ltd. Ex parte Grain Sorghum Marketing Board 1962 Qd. R 427). A tax is imposed by Parliament notwithstanding that the enactment which imposes it does not deal completely with the subject matter, rate and persons liable but leaves these matters to be prescribed. (See the discussion by Isaacs J. in Federal Commissioner of Taxation v. Munro 1926 38 C.L.R. 153 at 187-9, a case under Section 55 of the Commonwealth Constitution).

It is very well settled that a Legislature such as that of Queensland can delegate its powers to subordinate agencies and no distinction has been drawn between powers of taxation and other powers. Indeed this question arose, and one might have thought was finally settled, in Powell v. Apollo Candle Company 1885 10 App. Cas. 282, where it was argued that the power of the New South Wales Legislature to impose customs duties "was to be executed by themselves only, and could not be intrusted by them wholly or in part to the Governor or any other person or body" (See page 288). This argument was rejected by the Judicial Committee and at page 291 of the report their Lordships said:

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

In Shannon v. Lower Mainland Dairy Product Board

In the Supreme Court

No. 4(b)

Reasons for Judgment of Gibbs J. (Continued)

14th April 1965

1938 A.C. 708 the question again arose. In that case the validity of an Act of British Columbia, which enabled the Lieutenant-Governor-in-Council to set up a Marketing Board and vest in it a power to fix and collect licence fees, was challenged inter alia on the ground that it effected an unauthorised delegation of legislative power, and reliance was placed on a dictum in In re The Initiative and Referendum Act 1919 A.C. 935 at 945 where it was doubted whether a Provincial Legislature "can create and endow with its own capacity a new legislative power not created by the Act to which it owes its own existence." This argument was summarily rejected by the Judicial Committee. Lord Atkin said (at 722):

> "This objection appears to their Lordships subversive of the rights which the Provincial Legislature enjoys while dealing with matters falling within the classes of subjects in relation to which the constitution has granted legislative powers. Within its appointed sphere, the Provincial Legislature is as supreme as any other Parliament; and it is unnecessary to try to enumerate the innumerable occasions on which Legislatures, Provincial, Dominion and Imperial, have entrusted various persons and bodies with similar powers to those contained in this Act."

Those decisions appear fatal to the argument advanced on behalf of the plaintiffs in the present case. It is true that no reference was made to the Bill of Rights in either of these cases but it cannot be supposed that if there were any substance in the point it would have been overlooked by the distinguished Judges who constituted the Board.

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

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thought that the declaration in the Bill of Rights that it "shall stand remain and be the law of this realme for ever" made it immune from amendment, and no particular legislative procedure is prescribed for its repeal or alteration. In the view that I have taken, however, this question does not require further examination.

A further submission on behalf of the plaintiffs was that the State Transport Facilities Acts are invalid as being contrary to the Constitution Act Amendment Act of 1934, section 3 of which provides that the Parliament of Queensland constituted by the Queen and the Legislative Assembly in Parliament assembled "shall not be altered in the direction of providingfor the restoration and/or constitution and/or establishment of another legislative body (whether called the "Legislative Council", or by any other name or designation, in addition to the Legislative Assembly) except in the manner provided in this section," that is, by the approval of a Bill by a referendum. It was submitted that the State Transport Facilities Acts conferred legislative power on the Commissioner and thereby constituted or established him as a legislative body within section 3. It is quite clear from the preamble to the Constitution Act Amendment Act of 1934, as well as from the provisions of section 3 itself, that the object of section 3 is to prevent the restoration of the Legislative Council which was abolished in 1922, or the establishment of a similar legislative body additional to the Legislative Assembly by whatever name the body might be called. It is quite impossible to hold that the Commissioner has been established or constituted a legislative body within the meaning of this section. He is not endowed with any general legislative power. He plays no part in the enactment of statutes. He is simply the repository of power delegated to him by the Legislature which may at any time withdraw what it has conferred.

With all respect to the arguments submitted on behalf of the plaintiffs, the case is, in truth, a very clear one. The attack on the validity of the Acts cannot succeed and the demurrer should therefore be allowed.

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Reasons for Judgment of Gibbs J. (Continued)

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A minor question arose as to the costs of an adjournment of the hearing of the demurrer on the 18th June, 1964. When the matter then came before the Court the plaintiffs sought an adjournment on the ground that the matters raised by the demurrer were the subject of a pending appeal to the Privy Council. The defendant opposed the application but his opposition was unsuccessful. Costs, however, were reserved. In all the circumstances it appears to me just that there should be no order as to costs of that adjournment. 10

I would allow the demurrer and order that there be judgment in the action for the defendant with costs to be taxed of the demurrer and of the action. I would make no order in relation to the costs reserved.

No. 4(c)

Reasons for Judgment of Hart J.

14th April 1965

NO. 4(c)

REASONS FOR JUDGMENT OF HART, J.

The plaintiffs are carriers and the defendant is sued as the Nominal Defendant for the Government of Queensland and as the Commissioner for Transport. The plaintiffs in their Statement of Claim claimed the sum of £262,064.10.9. which they alleged were monies levied by the defendant in the guise of licensing or permit fees under the provisions of the State Transport Facilities Acts 1946 to 1955 and the State Transport Facilities Acts 1946 to 1959, in respect of the carriage of goods and passengers on motor vehicles operated by the plaintiffs in the State of Queensland. They further alleged that the monies were demanded of them by the defendant unlawfully under the cover of office of the Commissioner for Transport, in that the State Transport Facilities Acts 1946 to 1959 had not at any time valid or lawful operation and that the said monies were paid by them involuntarily and under compulsion. I shall refer to these Acts as the Facilities Acts. The defendant has demurred to this Statement of Claim and the question is had he under the Facilities Acts power to levy the plaintiffs in the manner in which he has done. 20 30 40

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No. 4(c)

Reasons for Judgment of Hart J. (Continued)

14th April 1965

It is not disputed that the Facilities Acts authorised the defendant to make the levies. What is said is that those Acts were beyond the powers of the State of Queensland. These Acts have been replaced by the State Transport Act of 1960 to which I will refer as the Transport Act. This Court decided in The Queen v. The Commissioner for Transport Ex parte Cobb & Co. Limited & Ors 1963 Q.R. 547 that the Transport Act as
10 originally enacted was invalid, by reason of non-compliance with the provisions of 736 of the Merchant Shipping Act 1894. Similar objections existed to the validity of the Facilities Acts. After that decision the Transport Laws Validation Act of 1962 was passed by the Queensland Legislature. This Act purported to validate both the Facilities Acts and the Transport Act with the exception in each case of the sections which it had been decided has
20 brought about the non-compliance with the Merchant Shipping Act. It was held by this Court in Madsen v. Western Interstate Pty. Limited Ex parte Western Interstate Pty. Limited 1963 Q.R. 434 that that Act had validated both Acts less the excepted sections. In Western Transport Limited v. Kropp and Maranoa Transport Pty. Limited v. Kropp 38 A.L.J.R. 237 the Privy Council approved this decision. There was a point which was taken before their Lordships which appears at
30 p.240 of the report that the Facilities Acts and the Transport Act were invalid because they sought to impose taxes and to levy them without parliamentary sanction. That in doing so they violated a long established principle that no tax may be imposed save with the full assent of Parliament and the assent of the Crown and that the Validation Act could not cure so fundamental an invalidity. Their Lordships in all the circumstances refused to allow this point to be raised as it had
40 not been raised before this Court and accordingly the point is still open to the plaintiffs. Although this case is only concerned with the Facilities Acts in Madsen v. Western Interstate Pty. Limited which followed it the same point arises with respect to the Transport Act. The suggestion of Counsel which the Court adopted was that it should deal with both Acts in this judgment and then incorporate it in Madsen's case.

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Reasons for Judgment of Hart J. (Continued)

14th April 1965

What both Acts do is to empower the defendant to fix the rates at which licenses and permit fees shall be paid. In all cases except one they fix an upward limit and give the defendant a discretion to levy fees from that amount down to nothing. The one case where there is no upward limit is the fixing of licence fees under the Transport Act.

Mr. Matthews Q.C. for the plaintiffs took four points. 10

1. The fees imposed under the Acts whether described as permit or licence fees constitute taxation.

2. Taxation and appropriation without authority of parliament are illegal and void.

3. In so far as the Commissioner for Transport imposes or remits taxes such taxes are imposed or appropriated without authority of Parliament.

4. By those Acts Parliament has purported to create a separate legislative body, i.e. Kropp, the defendant. 20

Mr. Bennett Q.C. for the Crown admitted that the fees were taxation. He also admitted Mr. Matthews's second proposition that taxation and appropriation without the authority of Parliament are illegal and void. He disputed Mr. Matthews's third proposition that the fees under the Acts are imposed or appropriated without the authority of Parliament. He also disputed Mr. Matthews's fourth point. 30

The plaintiffs' argument here was that Parliament in these Acts purported to create a separate legislative body; that it had somehow given away its powers to the defendant.

As it was not disputed that the defendant has acted within the powers which the Acts purport to give him the sole question is - Are the Acts within the legislative competence of the State of Queensland? In the first place it is said that somehow or other the Bill of Rights renders the Legislation invalid. Bowles v. The 40

Bank of England 1913 1 Ch. 57 was prayed in aid of this argument. What that case decides is that in accordance with the Bill of rights there can be no taxation "except under the authority of an Act of Parliament." As here it is admitted that what was done was done under the authority of an Act of Parliament it is difficult to see what Bowles' case has to do with this one.

10 The Bill of Rights is in force in Queensland but if by any chance the Facilities Acts or the Transport Act are in conflict with it then to the extent of the conflict it is repealed.

In McCawley v. The King 1920 A.C. 691 the Privy Council held that within the limits of its powers the Legislature of Queensland was uncontrolled. At p.704 Their Lordships stated the effect of a constitution being uncontrolled as follows:-

> "It is of the greatest importance to notice that where the constitution is uncontrolled
> 20 the consequences of its freedom admit of no qualification whatever. The doctrine is carried to every proper consequence with logical and inexorable precision. Thus when one of the learned judges in the Court below said that, according to the appellant, the constitution could be ignored as if it were a Dog Act, he was in effect merely expressing his opinion that the constitution was, in fact, controlled. If it were uncontrolled,
> 30 it would be an elementary common-place that in the eye of the law the legislative document or documents which defined it occupied precisely the same position as a Dog Act or any other Act, however humble its subject-matter."

From pages 705 and 706 of the report it clearly emerges that any Act of the Queensland Parliament whether it deals with the constitution or not can be altered in whole or in part merely by the
40 enactment of subsequent inconsistent legislation without its in any way being mentioned by name.

All that the legislature has done with these Acts is to delegate certain powers to the defendant and the levies which he makes are really

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levied by it. It has not parted with its perfect control over him and it has the power at any moment of withdrawing or altering the power which it has entrusted to him.

That this is within the power of the Legislature is clearly shown by Powell v. Apollo Candle Company Limited 10 A.C. 282 and Hodge v. The Queen 9 A.C. 117. In the first case the question was whether S.133 of the New South Wales Customs Regulations Act of 1897 was valid. That section so far as it is necessary to set it out was as follows:-

> "'Whenever any article of merchandise then unknown to the collector is imported, which, in the opinion of the collector or the commissioners, is apparently a substitute for any known dutiable article, or is apparently designed to evade duty, but possesses properties in the whole or in part which can be used or were intended to be applied for a similar purpose as such dutiable article, it shall be lawful for the Governor to direct that a duty be levied on such article at a rate to be fixed in proportion to the degree in which such unknown article approximates in its qualities or uses to such dutiable article;'".

In pursuance of this section, an Order-in-Council was issued imposing a duty on stearine. The Order followed the words of the Act and it appears from the judgment of their Lordships that the necessary requirements under the Act for its issue had been fulfilled. The Collector insisted on the respondents paying £92. 1. 9. on stearine imported by them. They paid it under protest and sued for its recovery. They were successful in New South Wales but failed before the Privy Council. Their Lordships held the duty was validly imposed. At p.291 they said:-

> "It is argued that the tax in question has been imposed by the Governor, and not by the Legislature, who alone had power to impose it. But the duties levied under the Order in Council are really levied by the authority of the Act under which the order is issued.

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The Legislature has not parted with its perfect control over the Governor, and has the power, of course, at any moment, of withdrawing or altering the power which they have entrusted to him. Under these circumstances their Lordships are of opinion that the judgment of the Supreme Court was wrong in declaring sect. 133 of the Customs Regulation Act of 1879 to be beyond the power of the Legislature."

10 In Hodges case 9 A.C. 117 it was held that the Legislature of Ontario had power to entrust in the manner in which it had done so, to a Board of Commissioners, authority to enact regulations for the good government of taverns and thereby to create offences and annex penalties thereto. At p.132 Their Lordships said:-

"When the British North America Act enacted that there should be a legislature for Ontario, and that its legislative assembly should have
20 exclusive authority to make laws for the Province and for provincial purposes in relation to the matters enumerated in sect. 92, it conferred powers not in any sense to be exercised by delegation from or as agents of the Imperial Parliament, but authority as plenary and as ample within the limits prescribed by sect. 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow. Within these
30 limits of subjects and area the local legislature is supreme, and has the same authority as the Imperial Parliament, or the Parliament of the Dominion, would have had under the circumstances to confide to a municipal institution or body of its own creation authority to make by-laws or resolutions as to subjects specified in the enactment, and with the object of carrying the enactment into operation and effect.

40 It is obvious that such an authority is ancillary to legislation, and without it an attempt to provide for varying details and machinery to carry them out might become oppressive, or absolutely fail. The very full and very elaborate judgment of the Court of Appeal contains abundance of precedents for this legislation, entrusting a limited discretionary authority to others, and has many illustrations of its necessity and convenience. It was

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14th April 1965

argued at the bar that a legislature committing important regulations to agents or delegates effaces itself. That is not so. It retains its powers intact, and can, whenever it pleases, destroy the agency it has created and set up another, or take the matter directly into his own hands. How far it shall seek the aid of subordinate agencies, and how long it shall continue them, are matters for each legislature, and not for Courts of Law, to decide." 1

The following passage occurs in the judgment of the Majority (Dixon C.J., McTiernan J., Fullagar J., and Kitto J.) in The Queen v. Kirby 94 C.L.R. 254 at p. 280 in citing a Judgment of Dixon J. as he then was in an earlier case (Meakes v. Dignan 46 C.L.R. 73 at 102):-

"In English law much weight has been given to the dependence of subordinate legislation for its efficacy, not only on the enactment, but upon the continuing operation of the statute by which it is so authorized. The statute is conceived to be the source of obligation and the expression of the continuing will of the Legislature. Minor consequences of such a doctrine are found in the rule that offences against subordinate regulation are offences against the statute (Willingale v. Norris (1909) 1 K.B. 57, at p.66) and the rule that upon the repeal of the statute, the regulation fails (Watson v. Winch (1916) 1 K.B. 688). Major consequences are suggested by the emphasis laid in Powell's Case (1885) 10 App. Cas. 282, at p.291 and in Hodge's Case (1883) 9 App. Cas. 117, at p. 132 upon the retention by the Legislature of the whole of its power of control and of its capacity to take the matter back into its own hands. After the long history of parliamentary delegation in Britain and the British colonies, it may be right to treat subordinate legislation which remains under parliamentary control as lacking the independent and unqualified authority which is an attribute of true legislative power, at any rate when there has been an attempt to confer any very general legislative capacity." 2 3 4

As I have stated this case is governed by Powell's

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Reasons for Judgment of Hart, J. (Continued)

14th April 1965

case 10 A.C. 282 and Hodge's Case 9 A.C. 117 which it cannot be said are not still good law and which make it clear that Parliament had the power to confer the powers which it did on the defendant.

Mr. Matthews also suggested that Parliament in the two Acts had attempted to create a separate Legislative body and that this was forbidden by S.3 of the Constitution Amendment Act of 1934, Queensland Statutes 1828-1962 Vol. 2 p.754, as
10 they had not been submitted to the electors as required by subsections 2 and 3 of that section. Subsection (1) of Section 3 is as follows:-

> "Parliament not to be altered in the direction of re-establishing the Legislative Council or other body except in accordance with this section.
> (1) The Parliament of Queensland (or, as sometimes called, the Legislature of Queensland), constituted by His Majesty the King and the
> 20 Legislative Assembly of Queensland in Parliament assembled shall not be altered in the direction of providing for the restoration and/or constitution and/or establishment of another legislative body (whether called the 'Legislative Council,' or by any other name or designation, in addition to the Legislative Assembly) except in the manner provided in this section."

In my view this section in no way touches this case. It is concerned with the setting up of a Legislative
30 body which shall be an integral part of the Legislature of Queensland; a body which shall act in conjunction with the Legislative Assembly and Her Majesty the Queen in the making of laws. It does not refer to a merely subordinate law-making authority.

For these reasons I think the demurrer should be upheld and I concur in the order proposed by Stable J.

In the Supreme Court

No. 5

Order of the Full Court of the Supreme Court of Queensland granting leave to appeal to Her Majesty in Council

11th May 1965

NO. 5

ORDER OF THE FULL COURT OF THE SUPREME COURT OF QUEENSLAND GRANTING LEAVE TO APPEAL TO HER MAJESTY IN COUNCIL.

FULL COURT

BEFORE THEIR HONOURS: MR. JUSTICE WANSTALL,
MR. JUSTICE STABLE,
MR. JUSTICE LUCAS.

THE ELEVENTH DAY OF MAY 1965.

UPON MOTION this day made unto the Court by Mr. Matthews, of Her Majesty's Counsel, of Counsel for the plaintiffs and UPON HEARING Mr. A.L. Bennett of Her Majesty's Counsel with him Mr. Byth of Counsel for the defendant, THIS COURT DOTH ORDER AND ADJUDGE that the plaintiffs do have leave to appeal to Her Majesty in Council from the judgment of this Honourable Court dated the fourteenth day of April 1965 whereby upon a demurrer having been allowed it was ordered and adjudged that the plaintiffs should recover nothing against the defendant and that the defendant should recover against the plaintiffs his costs of the demurrer and of the action to be taxed and that there be no order in relation to certain costs reserved UPON CONDITION that the plaintiffs not later than the eleventh day of June 1965 do enter into a good and sufficient security to the satisfaction of the Registrar of this Court in the sum of FIVE HUNDRED POUNDS (£500. 0. 0.) or at their option do pay that sum into Court as security for the due prosecution of the said appeal and the payment of all such costs as may become payable to the abovenamed defendant the said NORMAN EGGERT KROPP in the event of the appeal being dismissed for non-prosecution or if Her Majesty in Council should order the appellants to pay the respondent's costs of the appeal AND UPON CONDITION that the appellants take the necessary steps for the purpose of procuring the preparation of the Record and its despatch to England within three months from the date hereof AND THIS COURT DOTH FURTHER ORDER AND ADJUDGE that the costs of and incidental to the motion and this Order do abide the event unless Her Majesty in

In the Supreme Court

No..5

Order of the Full Court of the Supreme Court of Queensland granting leave to appeal to Her Majesty in Council (Continued) 11th May 1965

Council should otherwise order AND THIS COURT DOTH FURTHER ORDER AND ADJUDGE that the said costs be paid by the appellants in the event of the appeal not being proceeded with or being dismissed for non-prosecution.

BY THE COURT

(L.S.) J. Shannon

REGISTRAR

IN THE PRIVY COUNCIL | No.19 of 1965

ON APPEAL

FROM THE FULL COURT OF THE SUPREME COURT OF QUEENSLAND

B E T W E E N :

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

\- and -

NORMAN EGGERT KROPP Defendant/Respondent

RECORD OF PROCEEDINGS

BLYTH, DUTTON, WRIGHT & BENNETT,
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