Privy Council Appeals No. 19 and 20 of 1965

Cobb & Co. Limited and others – – – – – *Appellants*

v.

Norman Eggert Kropp – – – – – – *Respondent*

and

Cobb & Co. Limited and others – – – – – *Appellants*

v.

The Honourable Thomas Alfred Hiley and another – – *Respondents*

(Consolidated Appeals)

FROM

THE FULL COURT OF THE SUPREME COURT OF QUEENSLAND

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 24TH MAY 1966.

Present at the Hearing:

LORD MORRIS OF BORTH-Y-GEST
LORD GUEST
LORD DEVLIN
LORD UPJOHN
LORD WILBERFORCE

[*Delivered by* LORD MORRIS OF BORTH-Y-GEST]

These two appeals, which were consolidated pursuant to an Order of the Judicial Committee dated the 29th November 1965, are from two judgments of the Supreme Court of Queensland respectively dated the 14th April 1965 and the 18th June 1965 in two actions which were brought for the repayment and recovery of licence and permit fees.

The first action was commenced by Writ of Summons with Statement of Claim endorsed thereon dated the 28th April 1964. The six appellant companies joined as plaintiffs and brought their claims against the respondent Kropp as nominal defendant for the Government of Queensland appointed pursuant to "The Claims against Government Act" of 1866 and as the Commissioner for Transport. The claims were for the repayment of various amounts which the respective plaintiff companies had paid to the respondent and which had been levied by him "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". Shortly stated the basis of the claims (which were claims for money had and received to the use of the plaintiffs) was that the amounts had been demanded by the defendant unlawfully under colour of office of "The Commissioner for Transport in that the Transport Acts referred to 'had not at any time valid or lawful operation'".

The respondent on the 25th May 1964 demurred to the Statement of Claim on the grounds that it was bad in law and did not show any cause of action. It is sufficient for present purposes to refer to one of the grounds of the demurrer. It was that the State Transport Facilities Acts 1946 to 1959 were or alternatively so far as material were at all material times good and valid law and were at all material times in operation.

It should however be mentioned that another ground was that 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.

The demurrer was heard and argued on the 18th June 1964 and on the 23rd and 24th February 1965 before the Full Court of the Supreme Court of Queensland (Stable, Gibbs and Hart JJ.). By their judgment on the 14th April 1965 the demurrer was allowed and the respondent was awarded his costs of the demurrer and of the action. By their Order dated the 11th May leave to appeal to Her Majesty in Council was granted.

The second action, brought by five of the appellant companies as plaintiffs, was commenced, by Writ of Summons (with Statement of Claim specially indorsed) dated the 8th February 1965. The first defendant was sued as the nominal defendant for the Government of Queensland and the respondent Kropp was sued as the holder of the office of The Commissioner for Transport under the provisions of " The State Transport Act of 1960 ". The basis of the claims which were made (being claims for fees paid) was similar to that in the first action save that the impugned legislation, which was said not to be a valid and effective statute within the competence of the Legislature of Queensland, was " The State Transport Act of 1960 ".

Particulars were given of the grounds of the allegation that the Act of 1960 was not valid or effective. As these grounds (so far as now relevant) summarise the main submissions which have been presented by the appellants in these appeals it will be convenient to refer to them. They were:—

" The said Statute, if valid:—

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

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

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

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

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

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

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

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

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

The defendants demurred to the Statement of Claim on the grounds that it was bad in law and did not show any cause of action for the reason that The State Transport Act of 1960 was a good and valid and effective law within the competence of the Legislature of Queensland. The demurrer came on for hearing before the Full Court of the Supreme Court of Queensland (Hanger, Gibbs and Hart JJ.) on the 18th June 1965. In view of the decision in the first action the appellants did not and did not wish to submit further arguments to the Court. No separate or further judgment dealing with the Act of 1960 was sought. The demurrer was allowed with costs and leave to appeal to Her Majesty in Council was granted.

It will be seen that the first action relates to The State Transport Facilities Act 1946 (the amendments made in later acts from time to time up to 1959 do not call for special notice) while the second action relates to The State Transport Act of 1960. There are differences between the two Acts which were the subject of careful detailed analysis in the argument presented to their Lordships Board. In particular it was submitted that under the 1960 Act the Commissioner is subject to less control than under the earlier Act. The main question of principle that is raised is however common to the two actions. It was submitted by the appellants that both the 1946 Act and the 1960 Act were invalid and void for the reason that the Queensland Legislature had no power to legislate as they did.

It was submitted that the various Acts were invalid because they set up the Commissioner for Transport as a new legislative power with wide or sovereign authority to make decisions concerning the imposition of taxes (in the form of fees) and to make decisions as to the range and incidence of such taxes: and that the various Acts were invalid because they sought to impose taxes and levy them without parliamentary sanction and in so doing violated a long-established principle that no tax may be imposed save with the full assent of Parliament and of the Crown and that the Transport Laws Validation Act 1962 could not cure so fundamental an invalidity. In particular it was urged that the Legislature is endowed constitutionally with an exclusive power of taxation and that by the Acts in question the Legislature had purported to abrogate its power. As a variant or possibly as an extension of the main argument it was submitted that The Facilities Acts (meaning thereby The State Transport Facilities Acts 1946 to 1959) and the 1960 Act had not been enacted in accordance with section 3 of The Constitution Act Amendment Act 1934. Since the year 1922 the Parliament or Legislature of Queensland has been constituted by Her Majesty and the Legislative Assembly of Queensland in Parliament assembled. Prior to that time there had also been a Legislative Council. The Act of 1934 was an Act to amend the Constitution of Queensland by providing (*inter alia*) that a Legislative Council or other similar Legislative Body should not be restored or constituted or established unless or until a Referendum of the Electors should so approve. Section 3(1) of the Act provided that the Parliament (or Legislature) of Queensland should 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" which was provided for—which was by referendum. It was contended that the setting up of a Commissioner for Transport constituted the establishment of "another legislative body".

The State Transport Facilities Act of 1946 was an Act to provide for the improvement and extension of Transport Facilities within the State. As already mentioned there were various amending Acts. The State

Transport Act of 1960 was an Act to consolidate and amend the Law relating to Transport. It repealed The State Transport Facilities Acts 1946 to 1959. Following upon certain litigation the Transport Laws Validation Act was passed in 1962. The course of proceedings and of events concerning this latter Act was referred to in the judgment of their Lordships Board in *Western Transport Pty. Ltd. v. Kropp* [1965] A.C. 914.

It was provided by the Act of 1946 that the Act was to be administered by the Minister (usually the Minister for Transport) and subject to the Minister by the Commissioner for Transport (see section 8). The latter was to be appointed from time to time by the Governor in Council (see section 9). A determination or decision of the Commissioner was to be submitted to the Minister for his confirmation (see section 16 (2)). As Stable J. expressed it the Commissioner had " a Parliamentary hand on his shoulder ". The Commissioner had the duty of regulating and controlling carriage within the State with a view to ensuring that such transport facilities would be available as were reasonably adequate to meet the convenience and requirements of the public for the carriage of persons and goods (see section 18). He had certain powers to license services for the carriage of passengers and goods (see section 19 and section 27) and certain protection from proceedings in respect of his decisions concerning licences (see section 20). Section 24 laid down conditions under which it was lawful to use vehicles on roads. Under this section the Commissioner had certain powers of decision and was entrusted with the exercise of discretion (see sections 3, 4, 9, 21, 23). Sections 31 and 32 gave the Commissioner powers to decide as to the duration and the terms and conditions of licences. A licensing fee of the amount or at the rate determined by the Commissioner was payable by every licensee (see section 35 (1)). Other sub-sections of section 35 gave powers of determination to the Commissioner (see sections 2, 3, 4, 5). Other sections (such as sections 36, 37, 44, 56, 58) endowed the Commissioner with varying powers of decision.

Revenues (fees and moneys collected) derived under the Act were to be paid into and to form part of the Consolidated Revenue Fund and administration costs and expenses were to be paid out of moneys appropriated by Parliament from time to time (see section 22). Under section 70 the Commissioner was required to present an annual report setting out particulars of action taken under the Act and any general information regarding matters relating to State transport as he should think desirable.

It has been necessary to refer in general to the provisions of the Act for the purpose of giving consideration to the contentions of the appellants. There is no doubt that the fees imposed under the Act of 1946 (and under the 1960 Act) are to be regarded as constituting taxation. Accordingly it was submitted by the appellants that in legislating in the terms of the 1946 Act the Queensland Legislature had abrogated its exclusive power of levying taxation. The circumstance that within the terms of the Act the Commissioner had a discretion which enabled him to decide which transport operators would pay fees and which would not and the circumstance that the Commissioner could under certain conditions fix fees at rates which varied as between one operator and another showed it was submitted that the Legislature had abrogated a function which was exclusively its own. Additionally it was submitted that the provisions of section 70 would not enable the Legislature to possess such adequate information as would or could result in the exercise of effective control by the Legislature.

The argument submitted by the appellants recognised that under the 1946 Act (and The State Transport Facilities Acts 1946 to 1959) a determination or decision of the Commissioner had to be submitted to the Minister for his confirmation. It was contended however that an examination of The State Transport Act of 1960 (the 1960 Act) showed that the Commissioner was subject to less control than under the earlier Acts and in particular that the 1960 Act contained no provision

corresponding to section 16 (2) of the 1946 Act. The sections in the 1960 Act, under which there was a " permit " system, were examined in detail in the arguments submitted by the appellants with a view to showing that the Commissioner was given power to decide whether charges should be imposed or not and power to decide the amounts of charges imposed and power to decide as to which operators should pay and which should not and power to fix the rates which individual operators should pay. It was further contended that an examination of the provisions of the Act (the 1960 Act) showed that no effective day-to-day control of the Commissioner could be exercised either by the Minister or by the Legislature. For those reasons if they were established, it was contended that the Legislature had abrogated and indeed had transferred powers which were exclusive to itself and that legislation purporting so to do was void.

These contentions make it necessary for their Lordships to refer to the powers of the Queensland Legislature. As has already been mentioned prior to 1922 there was a Legislative Council as well as a Legislative Assembly. By clause 2 of the Order in Council of the 6th June 1859 (made pursuant to the Act 18 and 19 Vict. C. 54) it was provided that " within the said Colony of Queensland Her Majesty shall have power by and with the advice and consent of the said Council and Assembly to make laws for the peace welfare and good government of the Colony in all cases whatsoever ". There was however a proviso to the clause that " all Bills for appropriating any part of the public revenue for imposing any new rate tax or impost subject always to the limitations hereinafter provided " should originate in the Legislative Assembly. Section 2 of the Constitution Act 1867 was in similar terms to section 2 of the Order in Council. By The Constitution Act Amendment Act of 1922 the Legislative Council of Queensland was abolished and the Parliament of Queensland (or as sometimes called the Legislature of Queensland) was constituted " by His Majesty the King and the Legislative Assembly of Queensland in Parliament assembled ". The controversy which arose in 1885 concerning the question whether the Legislative Council had power to amend money Bills is of historical interest but has no substantial bearing upon the questions raised in these appeals. As related by Sir Samuel Griffith in his judgment in *Baxter v. Commissioner of Taxation* (N.S.W.) 4 C.L.R. p. 1087 at pp. 1106–7 an address was presented to Her Majesty praying that certain questions might be submitted for the opinion of the Privy Council. There was a report to Her Majesty which upheld the supremacy of the Legislative Assembly as regards Bills of aid and supply. The report negatived the claim of the Legislative Council to amend such Bills.

Inasmuch as Her Majesty has power by and with the advice and consent of the Legislative Assembly of Queensland to make laws for the peace welfare and good government of the State of Queensland it would seem surprising if the enactment of the various Transport Acts now being considered was not within such power.

The phrase " peace welfare and good government " is one that is " habitually employed to denote the plenitude of sovereign legislative power, even though that power be confined to certain subjects or within certain reservations " (see *McCawley v. The King* [1920] A.C. 691). Within certain limits which do not here call for full mention or consideration the power to legislate for the peace welfare and good government of the State of Queensland is full and plenary. As already stated the basis of the argument on behalf of the appellants was that the effect of the Acts was to create a new legislative authority and that this could not constitutionally be achieved.

In their Lordships' opinion the argument wholly fails. It cannot rationally be said that there was any abandonment or abdication of power in favour of a newly created legislative authority. In *The Queen v. Burah* in (1878) 3 A.C. 889 a question arose as to the powers of the Indian Legislature. In delivering the judgment of the Board Lord Selborne said (at p. 904) " The Indian Legislature has powers expressly limited by the

Act of the Imperial Parliament which created it and it can, of course, do nothing beyond the limits which circumscribe these powers. But, when acting within those limits, it is not in any sense an agent or delegate of the Imperial Parliament, but has, and was intended to have, plenary powers of legislation, as large, and of the same nature, as those of Parliament itself." Lord Selborne further said (at p. 905)—"Their Lordships agree that the Governor-General in Council could not, by any form of enactment, create in India, and arm with general legislative authority, a new legislative power, not created or authorised by the Councils' Act."

In their Lordships' view nothing comparable with "a new legislative power" armed with "general legislative authority" has been created by the passing by the Queensland Legislature of the various Transport Acts. The circumstance that the Commissioner was endowed with certain powers of decision and measures of discretion does not in any realistic sense support the contention that the Queensland Legislature exceeded its plenary and ample powers. It was pointed out in the judgment of the Board in *Hodge v. The Queen* 9 A.C. 117 that when the British North America Act enacted that there should be a legislature for Ontario and that its legislative assembly should have exclusive authority to make laws for the Province and for provincial purposes in relation to enumerated matters 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 prescribed limits as the Imperial Parliament in the plenitude of its power possessed and could bestow. Within those limits there was full authority "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. In the judgment of the Board it was said (at p. 132):—

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

In *Powell v. Apollo Candle Company Ltd.* (1885) 10 A.C. 282 questions were considered comparable to those raised in the present case. By a section of the New South Wales Customs Regulation Act 1879 it was provided that if in the opinion of the collector an article possessed properties which could be used for a purpose similar to that of a dutiable article the Governor was authorised in a manner prescribed to direct a levy of duty upon the article at a rate to be fixed in proportion to the degree in which the article approximated in its qualities or uses to such dutiable article. In pursuance of the section an Order in Council was issued imposing a duty on the importation of a certain article and the collector of customs required duty to be paid. It was contended that the section was invalid on the ground that the Legislature had exceeded its powers in enacting it. It was argued that the power given to the Legislature to impose duties was to be executed by themselves alone and could not be entrusted by them wholly or in part to the Governor or any other person or body. The contention failed. The cases of *Reg. v. Burah* (*supra*) and *Hodge v. The Queen* (*supra*) were referred to in the judgment of the Board where it was said—"These two cases have put an end to a doctrine which appears at one time to have had some currency, that a Colonial Legislature is a delegate of the Imperial Legislature. It is a Legislature restricted in

the area of its powers, but within that area unrestricted, and not acting as an agent or a delegate."

In the course of the judgment of their Lordships' Board it was further said (at p. 291)—" It is argued that the tax in question has been imposed by the Governor, and not by the Legislature, who alone had power to impose it. But the duties levied under the Order in Council are really levied by the authority of the Act under which the Order is issued. The Legislature has not parted with its perfect control over the Governor, and has the power, of course, at any moment, of withdrawing or altering the power which they have entrusted to him."

In their Lordships' view the Queensland Legislature were fully warranted in legislating in the terms of the Transport Acts now being considered. They preserved their own capacity intact and they retained perfect control over the Commissioner for Transport inasmuch as they could at any time repeal the legislation and withdraw such authority and discretion as they had vested in him. It cannot be asserted that there was a levying of money by pretence of prerogative without grant of Parliament or without parliamentary warrant.

As Stable J. said in his judgment in the first action—" 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 these matters, including the fixing and gathering of the taxes which Parliament itself has seen fit to impose. . . . 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 licences, and fix, assess, collect or refrain from collecting fees which are taxes."

The Legislature were entitled to use any agent or any subordinate agency or any machinery that they considered appropriate for carrying out the objects and purposes that they had in mind and which they designated. They were entitled to use the Commissioner for Transport as their instrument to fix and recover the licence and permit fees. They were not abrogating their power to levy taxes and were not transferring that power to the Commissioner. What they created by the passing of the Transport Acts could not reasonably be described as a new legislative power or separate legislative body armed with general legislative authority (see *The Queen v. Burah, supra*). Nor did the Queensland Legislature " create and endow with its own capacity a new legislative power not created by the Act to which it owes its own existence " (see *In re The Initiative and Referendum Act* [1919] A.C. 935, 945). In no sense did the Queensland Legislature assign or transfer or abrogate their powers or renounce or abdicate their responsibilities. They did not give away or relinquish their taxing powers. All that was done was done under and by reason of their authority. It was by virtue of their will that licence and permit fees became payable. Nor was there any alteration of the Legislature " 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) " (see section 3 of the Constitution Act Amendment Act of 1934).

Without referring further to " The Transport Laws Validation Act of 1962 " their Lordships consider that the attack upon the validity of the Transport Acts fails. Their Lordships are in agreement with the decisions of the Supreme Court and accordingly they will humbly advise Her Majesty that the appeals should be dismissed. The appellants must pay the respondents' costs.

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